~~Enforceability under New Zealand law of the liquidation, set-off, netting and credit support provisions of certain futures account agreements and a cleared derivatives addendum upon a customer's default or insolvency~~ Enforceability upon a Customer's insolvency or other default of the Position Liquidation, Margin Liquidation and Determination of Account Provisions of a Customer Agreement pursuant to which a US Futures Commission Merchant clears Futures and/or Cleared Swaps for the Customer

New Zealand law opinion for the
International Swaps and
Derivatives Association, Inc. and the Futures Industry Association

~~24 November 2015~~

20 June 2022

BELL GULLY
WELLINGTON ANZ CENTRE, 171 FEATHERSTON STREET
P O BOX 1291, WELLINGTON 6140, DX SX11164, NEW ZEALAND
Tel 64 4 915 6800 **Fax** 64 4 915 6810

Table of contents

BELL GULLY

International Swaps and Derivatives Association, Inc. (**ISDA**)
~~360 Madison Avenue~~
~~16th Floor~~
10 East 53rd Street
New York, NY ~~10017~~10022
United States of America

FROM **David Craig / Zac Kedgley-Foot**
DDI +64 4 915 6839 / +64 4 915 6820
MOBILE +64 21 674 851 / +64 21 535 253
EMAIL ~~david.craig~~david.craig@bellgully.com / zac.kedgley-foot@bellgully.com
MATTER NO. ~~400-1922~~404-8658
DATE ~~24 November 2015~~20 June 2022

Futures Industry Association (**FIA**)
2001 ~~Pennsylvania Avenue N.W.~~K Street, NW
Suite ~~600~~725, North Tower
Washington, D.C. ~~20001~~20006
United States of America

Enforceability ~~under New Zealand law of the liquidation, set-off, netting and credit support provisions of certain futures account agreements and a cleared derivatives addendum upon a customer's default or insolvency~~upon a Customer's insolvency or other default of the Position Liquidation, Margin Liquidation and Determination of Account Provisions of a Customer Agreement pursuant to which a US Futures Commission Merchant clears Futures and/or Cleared Swaps for the Customer

PART A: BACKGROUND

1. Introduction

~~1.1~~ *Instructions*

This opinion considers the ~~validity and~~ enforceability under the laws of New Zealand ~~law~~ of the ~~liquidation, set-off, netting and credit support provisions of:~~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 New Zealand (the **Covered Customer**).

~~(a) certain Covered Base Agreements (as defined in paragraph 2.1(a) below) entered into by an entity that is registered with the United States Commodity Futures Trading Commission (**CFTC**) as a futures commission merchant (**FCM**) and is a member of one or more CFTC-registered derivatives clearing organisations (each such FCM, a **Clearing Member**) and such Clearing Member's Covered Customer (as defined in paragraph 2.1(a) below), setting forth the right of such Clearing Member, upon the occurrence of an event giving rise to any right of such Clearing Member to liquidate all Futures Transactions (as defined in paragraph 2.1(a) below), to liquidate such transactions and to determine amounts owing with respect to those transactions, to exercise remedies in respect of Futures Payment Rights (as defined in paragraph 2.1(c)(ii) below) and rights of netting and set-off with respect to obligations arising from Futures Transactions and to apply Futures Credit Support (as defined in paragraph 2.1(c)(i) below) transferred by a Covered Customer in connection with them; and~~

~~(b) an addendum for Cleared Derivatives Transactions (a **CDA**) entered into by a Clearing Member and such Clearing Member's Covered Customer, setting forth the right of such Clearing Member, upon the occurrence of an event giving rise to any right of such Clearing Member to liquidate either (i) all Cleared Derivatives Transactions (as defined in paragraph 2.2(a) below) or (ii) any Cleared Derivatives Transactions affected by a Tax Liquidation Event (as defined in the form of Cleared Derivatives Addendum published by the FIA and ISDA), under a Covered Base Agreement, to liquidate such transactions and to determine amounts owing with respect to those transactions, to exercise remedies in respect of Cleared Derivatives Payment Rights (as defined in paragraph 2.2(c)(ii) below) and rights of netting and set-off with respect to obligations arising from Cleared Derivatives Transactions, to apply Cleared Derivatives Credit Support (as defined in paragraph 2.2(c)(i) below) transferred by a Covered Customer in connection with them and to offset obligations arising from Cleared Derivatives Transactions against Cleared Derivatives Credit Support transferred to the Covered Customer.~~

As requested, we have addressed the issues raised by ISDA in its instruction letter sent to us ~~dated August 26, 2013~~on 5 November 2021 (**Instruction Letter**) on the basis of the assumptions that we have been asked to make. We ~~have also~~ set out in Schedule 1 of this opinion both those requested assumptions and certain other assumptions that we consider necessary in order for us to answer the questions posed.

For the purposes of this opinion, we have read the memorandum prepared by Sullivan & Cromwell LLP entitled *Memorandum to the Futures Industry Association and the International Swaps and Derivatives Association, Inc. Regarding Futures and Options Transactions, Cleared Swaps and Foreign Futures Transactions Executed and Carried by Futures Commission Merchants for Their Customers* dated November 17, 2021 (the **S&C Memo**), as well as a summary annex that provides a high-level overview and summary of the main concepts covered, conclusions reached and certain factual assumptions in the S&C Memo (the **Summary Annex**).

~~1.2~~ ***Scope***

This opinion is subject to the following:

(a) The advice in this opinion is only in relation to New Zealand law as it stands at the date of this opinion, and we ~~have assumed~~assume that no law of a jurisdiction other than New Zealand adversely affects the conclusions in this opinion.

~~(b) This opinion incorporates all the assumptions contained in the Instruction Letter (which, for convenience, are repeated in Schedule 1 of this opinion).~~

(b) 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**).

(c) We assume in this opinion that the Covered Customer (the **New Zealand Party**) is an ~~ordinary company, insurance company or bank incorporated, or re-registered, under the Companies Act 1993 (an **NZ Company**)~~entity of the type identified in the Appendix to this opinion as covered by this opinion.[1] ~~NZ Company does not include foreign companies or entities.~~

~~We set out in Appendix B (dated September 2009) further information on whether entities meeting particular descriptions would, or could, be NZ Companies.~~

[1] Accordingly, with the exception of insurance companies ~~and~~, banks/credit institutions, local authorities, and the Reserve Bank of New Zealand (the **Reserve Bank**), this opinion does not deal with bodies corporate~~, such as local authorities or other statutory corporations,~~ that are governed by special legislation or rules in addition to or other than the Companies Act 1993. ~~Also, this opinion does not deal with trusts.~~

~~Also, we note that, under New Zealand law, superannuation funds, managed investment schemes and other trusts are not legal entities. The relevant entity is the trustee acting in its capacity as trustee of the relevant fund, scheme or trust.~~

~~(d) You have asked that we consider the list of Covered Transactions in Appendix A dated September 2012.~~

(d) ~~(e)~~ You have asked us, when responding to each question, to distinguish between the following three fact patterns:

(i) The ~~Location~~location of the Covered Customer is *in* New Zealand and the ~~Location~~location of the Covered Collateral is *outside* New Zealand.

(ii) The ~~Location~~location of the Covered Customer is *in* New Zealand and the ~~Location~~location of the Covered Collateral is *in* New Zealand.

(iii) The ~~Location~~location of the Covered Customer is *outside* New Zealand and the ~~Location~~location of the Covered Collateral is *in* New Zealand.

For these purposes:

(i) The "~~Location~~location" of the Covered Customer is *in* New Zealand if it is incorporated in New Zealand.

(ii) The "~~Location~~location" of Covered Collateral is determined by reference to the rules in the Personal Property Securities Act 1999 (the **PPSA**) and the related conflict of laws rules~~, which are described in Part C.II.1 of this opinion~~.

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

We consider the enforceability under New Zealand law ~~of each~~ of the ~~Covered Base Agreement and a CDA~~remedial provisions against a Covered Customer that is ~~an NZ Company or (to the extent that the PPSA applies to it) a company organised in a foreign jurisdiction~~a New Zealand Party. Where the location of the Covered Collateral ~~or the jurisdiction in which a company is organised or its status~~ affects our analysis, it is generally clear from the wording of our opinion.

(e) ~~(f)~~ We do not consider in this opinion the insolvency of any entity other than ~~an NZ Company~~a New Zealand Party.

(f) ~~(g)~~ This opinion is given for the sole benefit of ISDA and the FIA, and each of their members, and may not be relied upon by any other person unless we otherwise specifically agree with that person in writing. This opinion may, however, be shown by the FIA, ISDA, an FIA member or an ISDA member to a competent regulatory or supervisory authority or professional advisors for such member, the FIA or ISDA for the purposes of information only, on the basis that we assume no responsibility to such authority or any other person as a result, or otherwise.

2. ~~**Covered Base Agreements and CDAs**~~**Additional defined terms**

~~In accordance with the Instruction Letter, we assume the following:~~

~~2.1 **Covered Base Agreements**~~

Schedule 1 of this opinion contains a number of defined terms used in this opinion. In addition, in this opinion:

Account Class is defined in the definition of Customer Account;

~~(a) Pursuant to a futures customer account agreement (a **Covered Base Agreement**) entered into between a Clearing Member and an NZ Company (a **Covered Customer**), the Clearing Member agrees to carry one or more accounts on behalf of that Covered Customer (each, an **Account**) and to execute, carry and clear transactions for the purchase or sale of commodities for future delivery on, or subject to the rules of, a derivatives clearing organization (a **DCO**) registered as such under the United States Commodity Exchange Act (the **CEA**) or traded on, or subject to the rules of, a board of trade outside the United States (such contracts executed on a contract market designated pursuant to Section 5 of the CEA and cleared by a U.S.-registered DCO, **U.S. Futures**, such contracts traded on, or subject to the rules of, a board of trade outside the United States, and options on those contracts, **Foreign Futures** and, collectively, **Futures**) and/or options on U.S. Futures subject to Part 33 of the rules of the CFTC (such contracts, **Options** and, collectively with Futures, **Futures Transactions**). With respect to Foreign Futures, the Clearing Member acts for the Covered Customer by carrying Foreign Futures on the Covered Customer's behalf with, and guaranteeing the Covered Customer's performance to, clearing members (**Foreign Clearing Members**) of the relevant foreign clearinghouses, which Foreign Clearing Members may frequently be affiliates of the Clearing Member, and the Foreign Clearing Members will, in turn, enter into back-to-back futures transactions cleared by foreign clearinghouses.~~ **Base Account Agreement** means a customer account agreement;

CDA means a cleared derivatives addendum in the forms published by FIA and ISDA in 2012 or 2018;

CEA means the US Commodity Exchange Act of 1936;

CFTC means the Commodity Futures Trading Commission;

Cleared Swaps means swap contracts cleared by an FCM for a customer through a DCO;

Cleared Swaps Account means a Covered Customer's account with an FCM relating to the Covered Customer's Customer Funds for Cleared Swaps;

Covered Agreement means, with respect to a Covered Customer:

(a) a Base Account Agreement, if the Covered Customer clears only Futures; or

(b) a Base Account Agreement and CDA if the Covered Customer clears only Cleared Swaps or both Futures and Cleared Swaps;

Covered Collateral is defined in Schedule 1;

~~(b) Each Covered Base Agreement is governed by New York law.~~

~~(c) Pursuant to~~

Customer Account is defined in Schedule 1, and **Account Class** means the relevant class of Customer Account;

Customer Funds means cash, securities and other property received by an FCM to margin customer contracts, or accruing to customers as a result of their contracts;

Customer Property Rules means the CEA segregation and separate account rules that apply in respect of Customer Funds of US Futures customers, Cleared Swap customers, and Foreign Futures customers;

DCO means a derivatives clearing organisation registered as such with the CFTC under the CEA;

Determination of Account means the determination by an FCM of a single cash balance in respect of a Customer Account based on:

(a) upon a Position Liquidation, increases or decreases to that cash balance due to the net cumulative gain (or loss) realised with respect to each position in the Covered Customer's Covered Contracts, and any related payments to or from the Customer Account;

(b) upon a Margin Liquidation, increases to that cash balance due to proceeds resulting from:

(i) the liquidation of the Covered Customer's securities and other non-cash assets; or

(ii) the determination of the value of such non-cash assets credited to the Customer Account; or

(c) other applicable credits and debits, including credits in respect of close-out amounts paid to the FCM's house account and other amounts due to the Covered Customer and debits in respect of amounts payable to the FCM, including chargeable costs consisting of reimbursements to the FCM for close-out amounts paid by the FCM with its own funds to third parties and other costs and expenses incurred in connection with the FCM's exercise of remedies;

Foreign Futures means futures contracts or options on futures contracts made on or subject to the rules of a foreign (i.e., non-US) board of trade and cleared by the FCM for a customer through a Foreign Futures Broker;

Foreign Futures Account means a Covered Customer's account with an FCM relating to the Covered Customer's Customer Funds for Foreign Futures;

Foreign Futures Broker means a person that is a member of a foreign (i.e., non-US) board of trade and foreign clearing organisation;

Futures means US Futures and/or Foreign Futures, as the context may require;

Margin Liquidation means the right of an FCM under a ~~Covered~~ Base Account Agreement, ~~the Covered Customer agrees to transfer, as applicable, initial margin and variation margin payments as the Clearing Member may require in respect of~~upon the occurrence of an event of default, to sell, liquidate or otherwise dispose of the Covered Customer's Covered Collateral consisting of securities and other non-cash assets and apply the proceeds to, or net or set off the value of the proceeds with or against, any amounts due from the Covered Customer~~'s Futures Transactions. Also, pursuant to the Covered~~ to the FCM;

Position Liquidation means the right of the FCM under a Base Account Agreement, upon the ~~Covered Customer grants a security interest to the Clearing Member in all of the Covered Customer's rights in the following property, whether existing at the time of the grant or subsequently:~~

~~(i) **Futures Credit Support**, meaning:[2]~~

~~(A) with respect to U.S. Futures and Options, its Account and all assets credited to its Account, including assets held by a DCO, as well as other property of the Covered Customer held in respect of Futures Transactions by or for the Clearing Member, the DCO or any agent acting for the Clearing Member, the DCO or the Covered Customer; and~~

~~[2] The Instruction Letter uses the word "including" for this definition. To ensure the scope of this defined term is certain, we have used "meaning" in the definition used in this opinion.~~

~~(B) with respect to Foreign Futures, its Account and all assets credited to its Account, including assets held by a Foreign Clearing Member or foreign clearinghouse, as well as other property of the Covered Customer held in respect of Futures Transactions by or for, or for the Account and due from, the Clearing Member, any Foreign Clearing Member, any foreign clearinghouse or others, or any agent acting for the Clearing Member, any Foreign Clearing Member, any foreign clearinghouse or others; and~~

~~(ii) **Futures Payment Rights**, meaning:[3]~~

~~(A) with respect to U.S. Futures and Options, its Futures Transactions and all rights to payment under its Futures Transactions (whether constituting obligations of the Clearing Member or a DCO); and~~

~~(B) with respect to Foreign Futures, its Futures Transactions and all rights to payment under its Futures Transactions (whether constituting obligations of the Clearing Member, a Foreign Clearing Member or a foreign clearinghouse).~~

~~(d) The security interest secures all obligations of the Covered Customer to the Clearing Member under the Covered Base Agreement.~~

~~(e) A Covered Base Agreement contains one or more events of default (whether or not described in it as "events of default") (each, an **Event of Default**) the effect of which is to give the Clearing Member the right to liquidate the Futures Transactions held in the Covered Customer's Account (**Futures Liquidation Rights**). Among such Events of Default are defaults predicated on:~~

~~(i) a Covered Customer's filing under applicable bankruptcy or similar insolvency laws;~~

~~(ii) the filing of a petition for the commencement of involuntary proceedings in respect of the Covered Customer under applicable bankruptcy or similar insolvency laws, which filing results in a judgment of insolvency or bankruptcy or an order for relief; and~~

~~(iii) the appointment in respect of the Covered Customer or substantially all of its assets of an administrator, conservator, receiver or similar official, including the possession and control of the property of the Covered Customer by such an official pursuant to seizure orders.~~

~~The terms of the Covered Base Agreement provide the Clearing Member with the right as a secured party to exercise remedies in respect of Futures Payment Rights and to net and set off amounts owing under Futures Transactions on account of their liquidation and termination.[4]~~

~~(f) The Covered Base Agreement includes a provision the effect of which is to permit the Clearing Member, upon the occurrence of an Event of Default in respect of a Covered Customer, to dispose of or realize on all Futures Credit Support posted by the Covered Customer to the Clearing Member in respect of Futures Transactions and net or apply the foregoing or the liquidation value of the foregoing to any obligations the Covered Customer owes to the Clearing Member under the Covered Base Agreement (collectively, **Futures Credit Support Rights**).~~

~~[3] The Instruction Letter uses the word "including" for this definition. To ensure the scope of this defined term is certain, we have used "meaning" in the definition used in this opinion.~~

~~[4] The template uses the defined term "Futures Netting Rights" to describe these rights. As this term is not otherwise used in the template, we have not referred to it in this opinion.~~

~~(g) A futures account agreement that does not alone satisfy the above requirements is nevertheless a "Covered Base Agreement" to the extent it is paired with a CDA that supplies any of the otherwise unsatisfied requirements.~~

~~2.2 **The CDA**~~

~~(a) In addition to entering into a Covered Base Agreement with the Covered Customer, the Clearing Member and the Covered Customer execute the CDA. The CDA supplements a Covered Base Agreement with respect to, among other things, the liquidation and netting of "Cleared Derivatives Transactions" carried in the Covered Customer's account holding Cleared Derivatives Transactions (the **Cleared Derivatives Account**), as well as the application of collateral related to those Cleared Derivatives Transactions. **Cleared Derivatives Transactions** are swaps, forwards, options, or similar transactions (but excluding Futures Transactions executed on or subject to the rules of a U.S. designated contract market or on a foreign board of trade and subject to regulation in that jurisdiction) that are (a) entered into by a Covered Customer in the over-the-counter market, or (b) executed or traded by such Covered Customer on or subject to the rules or protocols of any multilateral or other trading facility, system or platform, including any communication network or auction facility permitted under applicable law or any designated contract market and, in either case, subsequently submitted to and accepted for clearing by a DCO and subject to the CFTC's Part 22 rules. To the extent that a security-based swap is, in accordance with applicable law, carried by an FCM in a cleared swaps customer account (as defined in the CFTC's Part 22 rules), such security-based swap constitutes a Cleared Derivatives Transaction. A list of example types of Cleared Derivatives Transactions appears in Annex A. In this opinion, Cleared Derivatives Transactions and Futures Transactions are together referred to as **Covered Transactions**.~~

~~(b) Each CDA is governed by~~occurrence of an event of default, to close out or otherwise liquidate the Covered Customer's open positions in its Covered Contracts, and hedge risk incurred by the FCM in connection with such event of default, by any reasonable method, including by means of entering into offsetting transactions, risk-reducing transactions or hedging transactions, causing book-entry transfers, and by valuing any transactions entered into by the FCM;

Segregated Funds means funds credited to a segregated account of an FCM to satisfy its customer property obligations to US Futures or Cleared Swaps customers, including proprietary funds contributed by the FCM with respect to that Account Class;

Separate Account Funds means the funds credited to a separate account of an FCM to satisfy its customer property obligations to Foreign Futures customers;

Statutory Trust means each separate statutory trust established over Customer Funds held by an FCM for the benefit of its customers in each applicable Account Class as described in the S&C Memo and Summary Annex;

US Futures means futures contracts or options on futures contracts cleared by an FCM for a customer through a DCO; and

US Futures Account means a Covered Customer's account with an FCM relating to the Covered Customer's Customer Funds for US Futures.

3. Personal Property Securities Act

A number of the issues addressed in this opinion involve a consideration of the PPSA, which is the principal legislation in New Zealand governing security interests in personal property. By way of background to the discussion of PPSA-related matters in this opinion, we set out in Schedule 2 of this opinion an overview of the relevant PPSA concepts.

PART B: POSITION LIQUIDATION, MARGIN LIQUIDATION AND DETERMINATION OF ACCOUNT

1. Governing law and submission to jurisdiction

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 New Zealand, and what would be the consequences if they were not?

Governing law

The parties' agreement on the governing law of each Base Account Agreement and CDA would be recognised in New Zealand if:

(a) the choice of law is legal and is freely and genuinely made in good faith;

(b) there is no reason for avoiding the choice of law on the ground of New Zealand public policy; and

(c) the relevant matter to which it is sought to apply the foreign law is substantive and not procedural.

In general, each of these elements should be present where the parties enter into a Base Account Agreement or CDA.

Submission to jurisdiction

The parties' submission in each Base Account Agreement and CDA to the non-exclusive jurisdiction of the relevant stated courts would be recognised in New Zealand. In these circumstances, a New Zealand court will stay proceedings instituted in New Zealand unless the claimant establishes that New Zealand is clearly or distinctly the more appropriate forum.[2]

If the parties' agreement on the governing law and their submission to jurisdiction were not upheld (and we believe it *would* be), the Base Account Agreement and CDA would be examined on the basis of the law determined to be most applicable by a New Zealand court.

2. Recognition of exercise of Position Liquidation provisions

Would the Position Liquidation provisions of each of the Base Account Agreement and the CDA be enforceable under the laws of New Zealand 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 recognised and upheld by a court in New Zealand? If a particular method would either not be upheld or may be challenged, please provide further detail and explain the reason for this.

Yes, the Position Liquidation provisions of each of the Base Account Agreement and the CDA would be enforceable under the laws of New Zealand, and each of the Position Liquidation methods set out in paragraph 2.4 of the Summary Annex and Section XI of the S&C Memo would be recognised and upheld by New Zealand courts, provided that those provisions and methods would be enforceable under New York law as the governing law of the Covered Agreement. In reaching this conclusion, we have taken into consideration the fact that the FCM's exercise of the Position Liquidation provisions is *not* undertaken as the agent of the Covered Customer. Rather, the FCM is

[2] *Spiliada Maritime Corporation* v *Cansulex Ltd* [1987] AC 460 (HL).

acting in its own interest, albeit pursuant to the same contract (the Covered Agreement) that establishes the agency relationship.[3]

3. Recognition of FCM's agent-trustee role

Would the FCM's holding of the Covered Contracts as an "agent-trustee" be recognized by a court in New Zealand 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, New Zealand law would recognise the FCM's holding of the Covered Contracts as an "agent-trustee" as creating a valid trust over the Covered Contracts. This trust satisfies the general requirements for a trust under New Zealand law — i.e., the control of property, by one person on behalf of another or for the accomplishment of a particular purpose, with a split of ownership.[4] The fact that the FCM may, in relation to this trust, perform certain roles not typically associated with that of a trustee (e.g., an agency-type role) does not detract from our conclusion.

If, as a matter of New York law~~.~~

~~(c) Pursuant to the CDA, Cleared Derivatives Transactions become incorporated into~~, a Covered Customer's beneficial interest is in the ~~related~~FCM's Covered ~~Base Agreement, which incorporation is accomplished by considering references to "Contracts," "Futures," "Futures Contracts" and similar terms in such Covered Base Agreement to include references to the Cleared Derivatives Transactions. Through this incorporation~~Contracts as a whole (i.e., the Covered Customer ~~grants a security~~'s beneficial interest ~~to the Clearing Member in~~is an interest in a proportionate share of all ~~of~~ the Covered ~~Customer's rights in the following property, whether existing at the time of the grant or subsequently:~~

~~(i) (1) its Cleared Derivatives Account and all assets credited to that Account, including assets held by a DCO, and (2) other property of the Covered Customer held in respect of Cleared Derivatives Transactions by or for the Clearing Member, the DCO~~Contracts credited to the FCM's omnibus customer positions account for the relevant Account Class), and not in any ~~agent acting for the Clearing Member, the DCO or the Covered Customer (collectively, **Cleared Derivatives Credit Support**); and~~

~~(ii) its Cleared Derivatives Transactions and all rights to payment under those Transactions (whether constituting obligations of the Clearing Member or a DCO) (collectively, **Cleared Derivatives Payment Rights**).~~

~~(d) Pursuant to the CDA, following the occurrence of an Event of Default, the Clearing Member is entitled to set off or apply any margin transferred to the Covered Customer under Cleared Derivatives Transactions (**Customer Received Margin**) against obligations to the Covered Customer~~specific Covered Contract, this will be recognised under New Zealand law, which would not treat the Covered Customer as having an outright ownership interest in any specific Covered Contract. Furthermore, New Zealand law recognises that the assets constituting trust property may change from time to time.

[3] The significance of this consideration is that it would avoid the argument that, in exercising the Position Liquidation provisions, the FCM was purporting to rely on its status as the Covered Customer's agent at a time when its agency had terminated.

[4] In Butler, *Equity and Trusts in New Zealand* (2nd ed., 2009), the authors, having suggested there has never been a wholly satisfactory definition of a trust, nonetheless proceed to quote (at ¶ 3.1.2) the definition offered in Underhill and Hayton, *Law Relating to Trusts and Trustees* (14th ed., 1987) p.1:

> an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called the beneficiaries or *cestuis que trust*), of whom he may himself be one, and any one of whom may enforce the obligation.

(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?

Yes, assuming this would be the case under New York law as the ~~CDA.~~

~~(e) The Clearing Member is entitled, upon the occurrence of an Event of Default, to designate a date on which it can cause the liquidation of a Covered Customer's Cleared Derivatives Transactions (such rights, the **Cleared Derivatives Liquidation Rights**). The Clearing Member is entitled to exercise its remedies as a secured party in respect of Cleared Derivatives Payment Rights and to net amounts owing in respect of liquidated Cleared Derivatives Transactions.~~

~~(f) Upon the liquidation of a Covered Customer's Cleared Derivatives Transactions, the CDA provides the Clearing Member with rights to (a) dispose of or realize on all Cleared Derivatives Credit Support posted by the Covered Customer to the Clearing Member in respect of Cleared Derivatives Transactions and net or apply the foregoing or the liquidation value of the foregoing to any obligations the Covered Customer owes to the Clearing Member under the CDA and (b) net or apply the value of any Customer Received Margin against any obligations owed to the Covered Customer under the CDA (such rights, the **Cleared Derivatives Credit Support Rights**).~~

~~(g) We have been instructed that the "FIA-ISDA Cleared Derivatives Addendum" in the form published jointly by the FIA and ISDA satisfies the above requirements.~~

~~(h) A CDA that does not alone satisfy the above requirements is nevertheless a **CDA** to the extent it is paired with a Covered Base Agreement that supplies any of the otherwise unsatisfied requirements. In addition, a single document that satisfies the above requirements for a Covered Base Agreement and a CDA is both a "Covered Base Agreement" and a "CDA."~~

~~2.3 Covered Base Agreement and CDA~~

~~We assume that the Covered Base Agreement and the CDA form a single agreement under their governing law.~~

~~2.4 Assumptions~~

~~Additional assumptions that we have been asked to make, together with certain other assumptions that we consider necessary in order for us to answer the questions posed, are set out in Schedule 1.~~

~~**PART B: NETTING UNDER A COVERED BASE AGREEMENT AND CDA**~~

~~2.5 **Insolvency Proceedings**~~

~~The reorganisation, liquidation or other insolvency proceedings to which an NZ Company can be subjected are the following:~~

~~(a) liquidation;~~

~~(b) voluntary administration;~~

~~(c) statutory management;~~

~~(d) receivership; and~~

~~(e) compromise,~~

~~(together **Insolvency Proceedings**). These are summarised in Schedule 2.~~

~~The issues addressed in this opinion are considered principally in the context of the liquidation, administration and statutory management regimes. These are the regimes that, in our experience, are likely to be of greatest concern to a counterparty that deals with an NZ Company because they are the most frequently used regimes in the financial sector. These are also the regimes that have been amended by New Zealand's netting legislation.~~

~~2.6 **Netting Acts**~~

~~New Zealand's netting legislation is summarised in Schedule 3.~~

~~We express no opinion on the enforceability of any action taken by the Clearing Member or any other person on behalf~~governing law of the Covered Agreement.

(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 New Zealand?

No, the FCM's holding of the Covered Customer's Covered Contracts should not be characterised as some alternative arrangement, such as a commission agency or as a collateral security arrangement, assuming it would not be characterised in that manner by a New York court applying New York law.

4. Recognition of Statutory Trust

Would a court in New Zealand 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)?

Yes, New Zealand law would recognise the Statutory Trust with respect to the Segregated Funds or Separate Account Funds of each Account Class as creating a valid trust over those funds. The Statutory Trust satisfies the general requirements for a trust under New Zealand law, as mentioned in the response to question 3.

If, as a matter of U.S. Federal law, a beneficiary's interest is in the Segregated Funds or the Separate Account Funds as a whole (*pro rata* according to its "net liquidating equity"), and not in any specific asset subject to the Statutory Trust, this will be recognised under New Zealand law, which would not treat the Covered Customer as having an outright ownership interest in any such specific asset. Furthermore, New Zealand law recognises that the assets constituting trust property may change from time to time.

The Statutory Trust should not be characterised as some alternative arrangement (e.g., as a collateral security arrangement).

(a) Would the Margin Liquidation provisions of each of the Base Account Agreement and CDA be enforceable under the laws of New Zealand and the FCM's Margin Liquidation in respect of each Account Class be recognized and upheld by a court in New Zealand?

Yes, assuming:

(i) this would be the case under New York law as the governing law of the Covered Agreement and under the Customer Property Rules; and

(ii) in exercising Margin Liquidation, ~~including~~ the ~~creation of offsetting transactions~~FCM is relying on its Permitted Uses Rights (as to which, see below) rather than its security interest in the Covered Customer's ~~Account held at the Clearing Member. However, we note that, where the~~ Covered Collateral.[5]

Could such Margin Liquidation be capable of exercise based on the FCM's exercise of its right under the applicable Customer ~~is insolvent or subject to certain types of Insolvency Proceedings, the authority of the Clearing Member or other person may be revoked with the result that~~***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*** ~~taking~~***enforcement of*** ~~action on behalf of~~***its security interest in the Covered Customer*** ~~may not be enforceable against the Covered Customer.~~

~~2.7 Termination of Covered Transactions on the insolvency of the Covered Customer~~

~~Are the~~'s Collateral consisting of securities?

Yes, Margin Liquidation could be exercised based on the FCM's Permitted Uses Rights, rather than by the enforcement of its security interest in the Covered Customer's Covered Collateral consisting of securities, assuming this would be the case under New York law as the governing law of the Covered Agreement and under the Customer Property Rules. In this regard, we understand that, under the Customer Property Rules, the FCM may effect Margin Liquidation pursuant to an authority granted to it under those rules to withdraw and apply Customer Funds to, among other things, margin or settle Covered Contracts or resulting market positions.

(b) Would the Determination of Account provisions of each of the ~~Covered~~ Base Account Agreement and CDA ~~permitting the Clearing Member to terminate all the Covered Transactions upon the insolvency of the Covered Customer~~be enforceable under the laws of New Zealand ~~law?~~

[5] If that were *not* the case (i.e., if the FCM was in fact relying on its security interest in the Covered Customer's Covered Collateral), the various prohibitions and restrictions we discuss in Part C of this opinion could apply.

We consider below the issue of whether optional termination is enforceable in the liquidation, administration or statutory management of an NZ Company.

(1) Liquidation

A termination clause that permits a non-defaulting party to terminate all outstanding transactions on the insolvency of its New Zealand counterparty would be enforceable.[5]

Where the non-defaulting party purports to terminate (and, therefore, to set off) transactions *after* its counterparty is put into liquidation, this action is arguably contrary to the principle that insolvency set-off is a "mandatory and self-executing"[6] rule that operates automatically on the commencement of the liquidation (the **Insolvency Date**). In other words, it is arguable that the optional termination (and set off) occurs too late because, as a matter of law, it has already taken place on the Insolvency Date. However, we believe the better view is that optional termination *would* be effective in these circumstances in the sense that the value attributed to the transactions to be mandatorily set off on the Insolvency Date will be determined by reference to the (later) termination of those transactions. Put another way, we do not believe that, for the purposes of insolvency set-off, those transactions would be given their value as at the Insolvency Date. The scheme of the Netting Acts (as defined in Schedule 3), which broadly favours giving effect to netting agreements in accordance with their terms, supports this view.

Accordingly, since New Zealand law would give effect to optional early termination, that early termination, when carried out pursuant to rights under a Covered Base Agreement and CDA governed by New York law, will be given effect to in New Zealand both prior to and upon liquidation.

This view is supported by the amendments to the Companies Act made by the Companies Amendment Act 1999. While those amendments do not *expressly* confirm the enforceability of optional termination clauses in "netting agreements" (such as the Covered Base Agreement and CDA), they do, in two provisions, lend support *implicitly* to the enforceability of those clauses.

(a) The first provision is the definition of "bilateral netting agreement" in section 310A of the Companies Act. "Bilateral netting agreement" is defined to include an agreement that provides:

> That on the occurrence of an event specified in the agreement, all or any of [the transactions to which the agreement applies] must *(or may, at the option of a party) be terminated*...(our emphasis)

Therefore, for the purposes of determining whether an agreement is a "bilateral netting agreement", either automatic or optional termination is acceptable. It would be an odd conclusion if, in the light of this provision, optional termination clauses were invalidated elsewhere in the Companies Act.

(b) The second provision is section 310H of the Companies Act. Section 310H(a) provides that nothing in section 248(1)[7] affects:

> The termination, in accordance with the netting agreement, of all or any transactions that are subject to the netting agreement by reason of the occurrence of an event specified in the netting agreement, being an event (including the appointment of a liquidator) occurring not later than the commencement of the liquidation;

[5] See, for example, *Shipton, Anderson & Co. (1927), Ltd v Micks, Lambert & Co.* [1936] 2 All ER 1032 (CA).

[6] *Stein v Blake* [1995] 2 All ER 961 at 969 (HL).

[7] Section 248(1) provides for a stay on the exercise of certain creditor rights as from the Insolvency Date.

~~Once again, this provision expressly contemplates the exercise of rights of termination on or after the Insolvency Date.~~

~~(2) Administration~~

~~The administration regime generally prohibits a "transaction or dealing" by a company in administration that affects the company's property".[8] It is not clear whether this prohibition would apply to the purported termination of an existing contract. However, we believe the better view is that it would not.[9] That being the case, the administration of an NZ Company should not prevent the Clearing Member from terminating all Covered Transactions.~~

~~Optional termination would be enforceable in the administration of an NZ Company for the same reasons that it would be enforceable in a liquidation. That is:~~

- ~~the New Zealand courts accept the general principle of optional termination;~~
- ~~Part XVA of the Companies Act (administration) adopts the same definition of "netting agreement" used in Part XVI (liquidation), which contemplates both optional and automatic termination; and~~
- ~~section 239AEN(a) of the Companies Act (administration) is drafted in the same way as section 310H(a) (liquidation), which, on its face, permits both optional and automatic termination to occur despite a potential impediment elsewhere in the legislation.~~

~~(3) Statutory management~~

~~The statutory management regimes do not prevent a party from terminating a contract (provided it does not also seek to do something that is subject to the statutory management moratorium). Accordingly, regardless of any conflict of laws issue, the onset of statutory management does not prevent the Clearing Member from terminating all Covered Transactions.~~

~~Optional termination would be enforceable in the statutory management of an NZ Company for the same reasons that it would be enforceable in a liquidation. That is:~~

- ~~the New Zealand courts accept the general principle of optional termination;~~
- ~~section 42(7) of the Corporations (Investigation and Management) Act 1989 (the **CIM Act**)[10] adopts the definition of "netting agreement" used in the Companies Act (which contemplates both optional and automatic termination); and~~
- ~~section 42(7)(b)(i) of the CIM Act[11] is drafted in the same way as section 310H(a) of the Companies Act (which, on its face, permits both optional and automatic termination to occur despite a potential impediment elsewhere in the legislation).~~

~~[8] Section 239Z of the Companies Act.~~

~~[9] Our reasons for this view are, first, that the purported termination is not "by [the] company in administration". It is by the non-defaulting party. Secondly, section 239Z(4)(a) suggests that the "transaction or dealing" must be something that the company can "enter into" – that is, a *new* contractual arrangement, as opposed to the mere exercise of rights under an *existing* contractual arrangement. Thirdly, the purported termination does not (arguably at least) affect the company's property, as that property (i.e., the contractual rights embodied in the relevant agreement) was, from the outset, subject to the right to terminate. In other words, the right to terminate has always been a feature of, and therefore has always qualified, the company's "property". In effect, this third point is a restatement of the "flawed asset" analysis.~~

~~[10] The equivalent provision in the Reserve Bank of New Zealand Act 1989 (the **Reserve Bank Act**) is section 122(7).~~

~~[11] The equivalent provision in the Reserve Bank Act is section 122(7)(b)(i).~~

~~2.8 Netting of termination values on the insolvency of the Covered Customer~~

~~***Are the provisions of the Covered Base Agreement and CDA providing for the netting of termination values and cash collateral that is viewed as a title transfer (see discussion in assumption (e) in section 1, Part B of Schedule 1 to this opinion) in determining a single lump-sum termination amount upon the insolvency of a Covered Customer enforceable under New Zealand law?***~~

~~**(1) Liquidation**~~

~~We conclude in Schedule 3 that, as a matter of New Zealand law, the Covered Base Agreement and CDA is a "netting agreement" (i.e.,~~***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 New Zealand 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)?***

The Determination of Account provisions of each of the Base Account Agreement and CDA would be enforceable under the laws of New Zealand and the FCM's Determination of Account in respect of (i) each Account Class and (ii) all Account Classes on a combined basis would be recognised and upheld by a court in New Zealand.

We understand that, under New York law, a Determination of Account could be characterised as an accounting procedure to determine the single indivisible debt claim owing by one party to the other in respect of a Customer Account. That debt claim is a running balance, which is arrived at by applying the debits and credits made to the Customer Account as a mutual open account. Put another way, that debt claim does *not*, under New York law, represent a net amount arrived at by the set off of independent obligations. That being the case, our view is a New Zealand court would recognise that characterisation under the governing law of the Covered Agreement and so would treat Determination of Account as a contractual accounting.

If our conclusion above were incorrect, and a Determination of Account were held *not* to be an accounting procedure of the kind we mention above, we believe the position would be as follows:

(i) outside of the insolvency of the Covered Customer, the individual debits and credits that are taken into consideration in the Determination of Account would be regarded as separately-owed balances that are subject to a contractual right of set-off; and

(ii) in the liquidation, administration or statutory management of the Covered Customer:

(A) the Covered Agreement would likely be considered to be a "bilateral netting agreement"~~) under~~ for the ~~Companies Act. Section~~purposes of sections 310~~C~~A-O of the Companies Act ~~provides that:~~;

~~If a company that is a party to a netting agreement is in liquidation,~~

~~(a) Any netted balance payable by or to the company must be calculated in accordance with the netting agreement; and~~

~~(b) That netted balance constitutes the amount that may be claimed in the liquidation or is payable to the company, as the case may be, in respect of the transactions that are included in the calculation.~~

~~"Netted balance" is defined in section 310A to mean:~~

~~any amount calculated under a netting agreement as the net debit payable by or on behalf of a party to the agreement to or on behalf of another party to the agreement~~

(B) the individual debits and credits that are taken into consideration in the Determination of Account would be regarded as separately-owed balances payable "in respect of all or any transactions to which the netting agreement applies~~.~~

~~The term "net debit" is not defined in~~ " (the ~~Companies Act. However,~~phrase used in ~~our view,~~ the "~~net debit", in the context of the Covered Base Agreement~~netted balance" definition); and ~~CDA~~

(C) consequently, ~~is~~ the net ~~termination~~ amount ~~payable~~determined by the ~~out-of-the-money party. Accordingly, the close-out netting provisions in the Covered Base Agreement and CDA~~aggregation of those separately-owed balances would be ~~enforceable in~~the "netted balance" for the ~~liquidation~~purposes of ~~a~~the Companies Act. That netted balance, if owed by the Covered Customer~~.~~

~~**(2) Administration**~~

~~Section 239AEI of the Companies Act is the equivalent, in the context of the administration regime, to section 310C (outlined in (1) above in the context of liquidation). Section 239AEI provides as follows:~~

~~(a) any netted balance payable by or to the company must be calculated in accordance with the netting agreement; and~~

~~(b) that netted balance constitutes, in respect of the transactions that are included in the calculation,~~

~~(i) the debt that is owed to the creditor and that may be~~, is the amount that could be claimed in its liquidation, admitted under ~~the~~its deed of company arrangement~~; or~~ (if it is in administration), or claimed from the statutory manager (if it is in statutory management).

~~(ii) the amount that is payable to the company,~~

~~as the case may be.~~

~~Accordingly, consistent with the view we express in (1) above in the context of liquidation, we believe the close-out netting provisions in the Covered Base Agreement and CDA would also be enforceable in the administration of a Covered Customer.~~

~~**(3) Statutory management**~~

~~If the close-out netting provisions in the Covered Base Agreement and CDA are to be enforceable on and after the date on which a statutory manager of an NZ Company is appointed, then, irrespective of the position under New York law, those provisions must not contravene the statutory moratorium[12] including, in particular, the moratorium on exercising a right of set-off.~~

~~Schedule 3 outlines the moratorium provisions in the statutory management regimes. Prior to the Netting Acts coming into force, the most problematic of the moratorium provisions, in the context of the close-out netting provisions in the Covered Base Agreement and CDA, was that preventing the exercise of a right of set-off.[13] However, in the case of a "netting~~

~~[12] Section 42 of the CIM Act; section 122 of the Reserve Bank Act.~~

~~[13] Section 42(1)(h) of the CIM Act; section 122(1)(h) of the Reserve Bank Act.~~

~~agreement" to which the Companies Act applies, nothing in the set-off moratorium provision applies to any right of set-off provided for in the netting agreement.[14]~~

~~In addition, the statutory moratorium provisions are expressed not to limit or prevent:~~

> ~~The taking of an account, in accordance with the netting agreement, of all money due between the parties to the netting agreement in respect of transactions affected by the [close-out] termination;[15]~~

~~Accordingly, the statutory moratorium provisions should not prevent the operation of the close-out netting provisions in the Covered Base Agreement and CDA.~~

5. Restraints on the exercise of Position Liquidation, Margin Liquidation or a Determination of Account

Are there any other circumstances in New Zealand, 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)?

Potentially, yes.

If:

(a) in exercising Margin Liquidation, the FCM is relying on its security interest in the Covered Customer's Covered Collateral, rather than its Permitted Uses Rights; or

(b) in exercising Determination of Account, the FCM is relying on its security interest in the credits made to the Customer Account to satisfy the Covered Customer's obligations in respect of the debits made to that account,

the various prohibitions and restrictions we discuss in Part C of this opinion (and, in particular, the stays we discuss in the response to question 14 of Part C) could apply.

6. Claims of competing creditors of a Covered Customer

Under the laws of New Zealand, 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)?

No.

If, as a matter of U.S. Federal law, a Covered Customer has a beneficial interest in the Segregated Funds or the Separate Account Funds as a whole, and not in any specific asset subject to the Statutory Trust, this will be recognised under New Zealand law, which would not recognise the Covered Customer as having an outright ownership interest in any such specific asset. As a result, a creditor of a Covered Customer will only be entitled to claim against the final cash balance or

~~[14] Section 42(7)(a) of the CIM Act; section 122(7)(a) of the Reserve Bank Act.~~

~~[15] Section 42(7)(b)(ii) of the CIM Act; section 122(7)(b)(ii) of the Reserve Bank Act.~~

single net termination amount that constitutes the Determination of Account for the relevant Account Class or the overall Customer Account (comprising the three Account Classes), and not any specific asset subject to the Statutory Trust.

7. ~~2.9~~ **Claiming a net termination amount in a foreign currency**

Assuming the parties have entered into ~~a~~the Covered ~~Base~~ Agreement ~~and CDA~~, the Covered Customer is insolvent and the ~~Clearing Member~~FCM has determined a lump-sum cash balance or net termination amount in a currency other than New Zealand dollars:

(1) ***~~(1)~~ would a New Zealand court enforce a claim for the cash balance or net termination amount in the currency in which it was determined?***

Where a judgment of a New York court has been entered in a foreign currency, a New Zealand court should enter judgment in New Zealand in that currency. There would need to be exceptional reasons for a court to decline to do so.[~~16~~]

However, where the judgment creditor comes to execute (or enforce) the judgment, the judgment debt generally needs to be converted into New Zealand currency. The relevant date for conversion is the date when the court authorises enforcement of the judgment.[~~17~~] Conversion may not be necessary where the judgment debtor owns assets denominated in the judgment currency (e.g., a foreign currency bank account with a New Zealand bank).

(2) ***can a claim for the cash balance or net termination amount be proved in insolvency proceedings in New Zealand without conversion into New Zealand dollars?***

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

The answer to this question depends on the type of insolvency proceedings to which the Covered Customer is subject.

(i) ***~~(1)~~ Liquidation***

The currency in which a claim is valued in a liquidation in New Zealand is New Zealand dollars. Section 306(2) of the Companies Act provides that:

> The amount of a claim based on a debt or liability denominated in a currency other than New Zealand currency must be converted into New Zealand currency at the rate of exchange on the date of commencement of the liquidation, or, if there is more than one rate of exchange on that date, at the average of those rates.

This is so even though the amount of the claim may have to be ascertained later. While this rule applies to a claim *against* ~~an NZ Company~~a Covered Customer in liquidation, it is not settled how a claim *by* ~~an NZ Company~~a Covered Customer against the ~~Clearing Member~~FCM should be valued. In principle, that claim should also be converted at the rate of exchange prevailing on the ~~Insolvency Date~~date of commencement of the liquidation.

~~Accordingly, while the Companies Amendment Act 1999 provisions give considerable freedom to parties to determine the method of calculation of the "netted balance" in their "bilateral netting agreement", the claim represented by that netted balance, once~~

~~16 Goddard and McLachlan, *Private International Law* (2012), 69.~~

~~17 *Miliangos v George Frank (Textiles) Ltd* [1975] 3 All ER 801 (HL), *American Express Europe Ltd v Bishop* (1987) 1 PRNZ 635 and *Marinkovich v the proceeds of sale of the ship "Gold Coast"* (unreported, 17 March 1997, High Court, Whangarei M4/92 and M122/94).~~

~~determined, becomes subject to the same rules that apply to all other claims. This includes the requirements of section 306(2).[18]~~

~~(2)~~

(ii) *Administration*

In the administration of a company, creditors advise the administrator of their claim for the purpose of having that claim included in the deed of company arrangement to be adopted by the company and its creditors. The Companies (Voluntary Administration) Regulations 2007 set out the provisions that are deemed to be included in a deed of company arrangement if they are not expressly excluded. Paragraph 8(1) of Schedule 1 of those Regulations incorporates section 306 of the Companies Act (discussed in (~~1~~i) above). Accordingly, the analysis ~~set out~~ above in relation to liquidation applies equally to administration.

(iii) ~~(3)~~ *Statutory management*

A payment of the cash balance or net termination amount by ~~an NZ Company~~a Covered Customer made subject to statutory management may be made in a termination currency other than New Zealand dollars. However, this is on the unlikely assumption that the statutory manager chooses to make the payment in the first place. ~~As we state in Schedule 2, the~~The statutory manager may suspend the payment of the net termination amount. Alternatively, the statutory manager may choose not to pay the cash balance or net termination amount and rely on the statutory moratorium preventing the counterparty from bringing proceedings to recover that amount.

~~[18] In reaching this conclusion, we have read down a literal interpretation of section 310C(b) of the Companies Act. That provision states that the "netted balance constitutes the amount that may be claimed in the liquidation". For the reasons given in this section 2.9(2)(1), it is *the New Zealand dollar equivalent* (calculated in accordance with section 306(2)) of the netted balance that may be claimed.~~

~~**PART C: COLLATERAL UNDER A COVERED BASE AGREEMENT AND CDA**~~

~~**I. THE PERSONAL PROPERTY SECURITIES ACT**~~

~~We outline in Schedule 4 certain parts of the PPSA that are relevant to the responses in this Part C. A number of the terms and concepts used below are defined and explained in Schedule 4.~~

~~**II. VALIDITY**~~

8. **Other local law considerations relating to exercise of Position Liquidation, Margin Liquidation or a Determination of Account**

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.

However, if a Covered Customer defaults, we recommend that the FCM rely on and exercise Position Liquidation in preference to Margin Liquidation where the FCM is relying on its security interest in the Covered Customer's Covered Collateral (rather than its Permitted Uses Rights). This is because, while there is no general prohibition on a creditor enforcing its security over the assets of a company in a liquidation under the Companies Act:

(a) in an administration of a company, there is a stay (subject to certain exceptions) preventing a person from enforcing a "charge"[6] over the property of the company; and

(b) in the statutory management of a company, there is a stay on, among other things, exercising any power or rights under "any mortgage, charge, debenture, instrument or other security" over the property of the company.

Importantly though, each of these prohibitions is subject to an exception inserted by the Financial Markets (Derivatives Margin and Benchmarking) Reform Amendment Act 2019 (the **Derivatives Margin Act**). That exception applies to security interests over collateral that secure obligations under "qualifying derivatives" entered into with "qualifying counterparties" where, before enforcement, the collateral is transferred or otherwise dealt with so as to be in the possession or under the control of the enforcing counterparty or another person on its behalf. The Derivatives Margin Act is discussed in more detail in Part C of this opinion (and, in particular, in the response to question 14 in Part C).

There is no similar restriction that would apply in respect of Position Liquidation.

[6] In this context, "charge" is defined to include:

> a right or interest in relation to property owned by a company, by virtue of which a creditor of the company is entitled to claim payment in priority to [non-preferential unsecured creditors] …

PART C: CREATION, PERFECTION AND ENFORCEMENT OF FCM'S SECURITY ~~INTERESTS~~INTEREST IN COVERED COLLATERAL

~~We set out below our analysis of the issues raised under the heading "Validity of Security Interests" in Part III of the Instruction Letter.~~

~~1. Law governing contractual and validity aspects~~Creation and perfection of the security interest

~~Under the laws of New Zealand, what law governs the contractual aspects of a security interest in the various forms of Eligible Collateral under the Covered Base Agreement and CDA? Would the courts of New Zealand recognise the validity of a security interest created under each Covered Base Agreement and CDA, assuming it is valid under the governing law of such Covered Base Agreement and CDA?~~

1. Law governing contractual aspects of security interest

Under the laws of New Zealand, what law governs the contractual aspects of the security interest in the various forms of Covered Collateral?

Under New Zealand law, the governing law of a security agreement (such as ~~the~~a Covered ~~Base~~ Agreement ~~and CDA~~) determines issues relating to the contractual aspects of a security interest under that agreement.

~~Recognition of validity of security interest~~

2. Law governing perfection of security interest

Under the laws of New Zealand, 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 New Zealand with respect to the different types of Covered Collateral. If relevant, please describe how the laws of New Zealand apply to each form in which securities Covered Collateral may be held as described in the assumption in Part C(c) of section 1 of Schedule 1 of this opinion.

The PPSA contains conflict of laws rules that specify the circumstances in which New Zealand law governs the ~~validity~~perfection of a "security interest". These rules apply despite any governing law clause in a security agreement that specifies that the laws of another jurisdiction are to determine these issues.

These rules are different for ~~"investment securities", on the one hand, and cash and other~~different types of collateral. Given our conclusion in the overview of the PPSA in Schedule 2 of this opinion that each category of Covered Collateral would constitute an "intangible" for the purposes of the PPSA, we set out below the PPSA's conflict of laws rules for "intangibles" ~~(such as intangible securities), on the other hand~~.

Conflict of laws rules for ~~"investment securities"~~

~~Section 26(1) of the PPSA states that:~~

~~[e]xcept as otherwise provided in this Act, the validity, perfection, and the effect of perfection or non-perfection of…a possessory security interest in…an investment security…is governed by the law of New Zealand if,~~

~~(a) At the time the security interest attaches to the collateral, the collateral is situated in New Zealand; or~~
~~…~~

~~[*The remaining circumstances should not be relevant for the purposes of this opinion*.]~~

~~On this basis, given our conclusion in Schedule 4 that, in respect of any "investment securities", the Covered Base Agreement and CDA create a "possessory security interest" in those "investment securities", New Zealand law will govern the validity of that security interest if those securities are situated in New Zealand at the time of attachment. The common law conflict of laws rules for determining the *situs* of securities are as follows:~~

~~(a) if the securities are directly held bearer debt securities, they are situated in the jurisdiction where the instrument constituting those securities is located;[19]~~

~~(b) if the securities are directly held registered debt securities, they are situated in the jurisdiction where the register is located;[20]~~

~~(c) if the securities are directly held dematerialised debt securities, they are situated where the records of the clearing house or securities depository are kept;[21] and~~

~~(d) if the securities are intermediated debt securities, the best view (although the issue is far from settled) is that they are situated where the relevant intermediary's records are kept.[22]~~

~~The conflict of laws rules for "investment securities" in circumstances where section 26(1) does *not* apply is unclear. This is because, unlike in the case of the rule in section 30 (discussed below), section 26 only sets out the circumstances in which New Zealand law applies. It does not go further (as section 30 does) and state, in those circumstances where New Zealand law does *not* apply, which jurisdiction's laws *do* apply. However, our view is that, in those circumstances, a New Zealand court would apply common law rules and~~

~~[19] Dicey, Morris & Collins, *The Conflict of Laws* (15th ed., 2012) para. 22-040.~~

~~[20] Dicey, Morris & Collins, para. 22-044. But see the discussion in para. 22-045 relating to the overriding of this *situs* where it is not the jurisdiction of incorporation of the issuer. This approach may best reconcile the divergent views expressed by the English Court of Appeal in *Macmillan Inc.* v *Bishopsgate Trust (No.3)* [1996] 1 WLR 387. In that case, Staughton and Aldous LJJ adopted the jurisdiction of incorporation of the issuer approach (at pages 405 and 423, respectively) and Auld LJ adopted the jurisdiction of location of the register approach (at page 411).~~

~~[21] Section 26(2) of the PPSA.~~

~~[22] Dicey, Morris & Collins, para. 22-043. We believe this represents the best view on the *situs* of intermediated debt securities. This view has overwhelming academic support: see, for example, *Oxford Colloquium on Collateral and Conflict of Laws*, Special Supplement to Butterworths Journal of International Banking and Financial Law (September 1998); Benjamin, *Interests in Securities* (2000); Austen-Peters, *Custody of Investments: Law and Practice* (2000). This view has also been accepted (albeit in a modified form) in private international law: see, for example, *The Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary*, concluded on 5 July 2006.~~

~~This approach, now widely-known as the "place of the relevant intermediary approach" (or PRIMA), has the logical appeal of determining that proprietary issues in relation to interests in intermediated debt securities should be governed by the law of the place where the record of title is maintained and where, therefore, orders in respect of those securities can be enforced. PRIMA overcomes the practical difficulty, commercial inefficiency and uncertainty surrounding the alternative "look through approach" (under which the *lex situs* of intermediated debt securities is the jurisdiction where the underlying securities are located). Also, PRIMA is consistent with the statutory *situs* rule applying to directly held dematerialised debt securities (described above). It is unlikely that a New Zealand court considering the *situs* of intermediated debt securities would adopt a (common law) approach that is different to the (statutory) approach prescribed for directly held dematerialised debt securities.~~

~~Despite our views, there is no authority on this issue in New Zealand.~~

~~conclude that the *lex situs* (determined in the manner outlined above) should govern the validity of the security interest. We stress, however, that there is no directly-applicable judicial support for that view.~~

~~*Conflict of laws rules for cash and other*~~ ***"intangibles"***

Section 30 of the PPSA states that:

> The validity, perfection, and the effect of perfection or non-perfection of a security interest is governed by the law, including the conflict of laws rules, of the jurisdiction where the debtor is located when the security interest attaches, if the security interest is –
>
> (a) A security interest in an intangible:

~~We conclude in Schedule 4 that the Covered Base Agreement and CDA~~On this basis, to the extent that ~~it applies to cash, intangible securities, or general intangibles,~~a Covered Agreement creates a "security interest" in the Covered Collateral (as "intangibles"~~. Therefore~~), the law of the jurisdiction where the debtor (~~which we assume is~~i.e., the Covered Customer) is located governs validity issues in respect of ~~that collateral~~the Covered Collateral.

Section 29(a) states that, for the purposes of section 30, a debtor that is a body corporate is located in the country of its incorporation. Therefore, despite the parties' choice of governing law in the Covered ~~Base~~ Agreement ~~and CDA~~, New Zealand law will govern ~~validity~~perfection issues in respect of ~~cash, intangible securities, and general intangibles~~the Covered Collateral if, as we assume, the Covered Customer is incorporated in New Zealand.

However, the law applicable in this case is New Zealand law "including [its] conflict of laws rules".~~23~~ The New Zealand conflict of laws rules for each category of Covered Collateral is as follows:

~~The conflict of laws rule in New Zealand for cash is that issues of validity are governed by the law of the location of the branch at which the relevant account is kept (which is the *situs* of the account).~~[24] ~~Accordingly, New Zealand law will govern issues of validity if the Covered Customer's collateral account is held at a New Zealand branch of its bank.~~

~~The conflict of laws rule in New Zealand for intangible securities is that issues of validity are governed by the *lex situs*. Accordingly, New Zealand law governs issues of validity if those securities are situated in New Zealand (as to which, see above).~~

~~The conflict of laws rule in New Zealand~~

(a) *Customer Account and cash credited to Customer Account*: Issues of perfection for general intangibles that constitute debts ~~is that issues of validity~~ are governed by the law of the jurisdiction where the debtor[7] resides. Residence, in the case of a corporation, means the jurisdiction of incorporation, or a where the corporation carries on business. Where there is more than one place of residence, and there is no promise to pay at any particular one of

~~23 By contrast, there is no reference to the conflict of laws rules in section 26 (discussed above). This suggests that, in the circumstances set out in section 26(1), New Zealand *domestic* law applies: Dicey, Morris & Collins, para.s 4-005 and 4-023. However, in the circumstances set out in section 30, a *renvoi* is possible. Under a *renvoi* (or reference-back), the conflict of laws rules of, say, New Zealand refers an issue to the "law" of a foreign jurisdiction, but the conflict of laws rules of that jurisdiction would have referred the issue to the "law" of New Zealand or of a third jurisdiction.~~

~~24 Dicey, Morris & Collins, para. 22-029.~~

[7] Note that the "debtor" in this instance is the person that owes the debt over which the security interest is created (i.e., the FCM), as opposed to the "debtor" in section 30 above (where that term means the person granting the security interest, i.e., the Covered Customer).

them, residence is the place where the debt would be paid in the ordinary course of business.~~25~~[8]

~~If the debtor relocates to another jurisdiction, section 31 sets out the circumstances in which a security interest may continue to be perfected in New Zealand.~~

~~*Position if New Zealand law governs validity*~~

~~If~~On the assumption that the Customer Account is held in New York, ~~under either of these conflict of laws provisions,~~ New ~~Zealand~~York law ~~governs~~would determine issues of ~~validity~~perfection.

(b) *Securities credited to Customer Account*: Similarly, issues of perfection for general intangibles that constitute credits to an account are governed by the law of the jurisdiction where the account provider resides (as to which, see (a) above).

Consequently, we would not expect ~~a~~ New Zealand ~~court~~law to govern issues of perfection in respect of Covered Collateral.

3. **Recognition of validity of security interest**

Would the courts of New Zealand recognise the validity of a security interest ~~created under~~in the different types of Covered ~~Base Agreement and CDA~~Collateral, assuming it is valid under ~~its governing~~New York law~~.~~? ~~This reflects the common law conflict of laws rule that a New Zealand court recognises the validity of a contract that is both materially valid and formally valid under its governing 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 in Part C(c) of section 1 of Schedule 1 of this opinion. 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.~~26~~

~~***Summary***~~

~~Under New Zealand's conflict of laws rules, the jurisdiction whose laws would govern the validity of a security interest in Eligible Collateral is:~~

~~(a) in the case of directly held bearer debt securities, directly held registered debt securities, directly held dematerialised debt securities, and intermediated debt securities (whether classified as "investment securities" or "intangible securities" for the purposes of the PPSA), the *lex situs* (determined in the manner outlined above under the heading "*Conflict of laws rules for "investment securities"*");~~

~~(b) in the case of cash, the law of the location of the branch at which the relevant account is kept; and~~

~~(c) in the case of general intangibles that constitute debts, the law of the jurisdiction where the debtor resides.~~

~~2. **Law governing perfection of security interest**~~

~~***Under the laws of New Zealand, what law governs the proprietary aspects of a security interest (that is, the formalities required to protect a security interest in Eligible Collateral against competing claims) granted by the Covered Customer under each Covered Base Agreement and CDA (for example, the law of the jurisdiction of***~~

~~25~~[8] Dicey, Morris & Collins, ~~para.s~~*The Conflict of Laws* (15th ed., 2012), ¶ 22-026 – 22-029.

~~26 Dicey, Morris & Collins, para.s 32-121 and 32-128.~~

~~incorporation or organisation of the Covered Customer, the jurisdiction where the Eligible Collateral is located, or the jurisdiction of the location of the Clearing Member or DCO's Intermediary in relation to Eligible Collateral in the form of indirectly held securities)? What factors would be relevant to this question? Where the location (or deemed location) of the Eligible Collateral is the determining factor, please briefly describe the principles governing such determination under New Zealand law with respect to the different types of Eligible Collateral. In particular, please describe how the laws of New Zealand apply to each form in which securities Eligible Collateral may be held as described in assumption (b) in section 1, Part B of Schedule 1 of this opinion.~~

Under New Zealand law, the laws of the same jurisdiction govern both the perfection of a security interest and the validity of that security interest, where those two matters are to be determined as at the same time. Therefore, the analysis in our response to question ~~1~~2 also applies to this question. ~~In summary, the rules governing the perfection of a security interest are determined by applying the conflict of laws rules set out in sections 26 (in the case of "investment securities") and 30 (in the case of cash, intangible securities, or general intangibles) of the PPSA.~~

~~However, there is a qualification to this analysis where the Collateral is an account receivable that is payable in New Zealand (such as cash Collateral held at a New Zealand branch of the Covered Customer's bank) and the law governing perfection determined in accordance with section 30 does not provide for public registration of the security interest. In that case, section 32 requires the Clearing Member to perfect its security interest, or otherwise obtain priority, *under the PPSA*.~~

~~3. Recognition of security interest~~

~~Would the courts of New Zealand recognise a security interest in each type of Eligible Collateral created under each Covered Base Agreement and CDA? In answering this question, please bear in mind the different forms in which securities Collateral may be held, as described in assumption (b) in section 1, Part B of Schedule 1 to this opinion. Please indicate, in relation to cash Collateral, if your answer depends on the location of the account in which the relevant obligations are recorded and/or upon the currency of those obligations.~~

~~A New Zealand court would recognise a security interest in each type of Eligible Collateral created under each Covered Base Agreement and CDA, provided~~

Consequently, given the conclusion in our response to question 2 (i.e., that New York law would govern the issue of the perfection of a security interest in Covered Collateral), if that ~~the~~ security interest is valid under ~~its~~New York law as the governing law of the Covered Agreement, we would expect a New Zealand court to recognise the validity of that security interest.

~~Following the decision of Millett J in *Re Charge Card Services Limited*,[27] there was considerable uncertainty in New Zealand whether a person may take a security interest in respect of their own indebtedness. In particular, there was concern that a security interest taken by a bank over a deposit made with it by one of its customers would be invalid.~~

~~However, that decision was overruled by the House of Lords in *Re Bank of Credit and Commerce International SA (No. 8)*.[28] Also, the PPSA clarifies the issue by stating that a person obligated under an account receivable (such as a bank in respect of a deposit) may take a security interest in that account receivable.[29]~~

~~[27] [1986] 3 All ER 289 (Ch D).~~

~~[28] [1997] 4 All ER 568.~~

~~[29] Section 17(2) of the PPSA.~~

1. **Effect of fluctuating exposures or Covered Collateral**

What is the effect, if any, under the laws of New Zealand of the fact that the amount secured or the amount of ~~Eligible~~any cash or securities Covered Collateral subject to the security interest will fluctuate under the Covered ~~Base~~ Agreement ~~and CDA~~ (including as a result of entering into additional Covered Transactions from time to time)?

As a matter of New Zealand law, there are no adverse consequences arising from the fact that the amount secured or the amount of ~~Eligible~~any cash or securities Covered Collateral subject to the security interest will fluctuate under the Covered ~~Base~~ Agreement ~~and CDA~~, provided it does so in accordance with the terms agreed between the parties.

In particular:

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

Yes.

~~Section 71 of the PPSA provides that a security agreement (such as the Covered Base Agreement and CDA) "may provide for future advances". Furthermore, section 72 provides that "a security interest has the same priority in respect of all advances, including future advances".~~

~~Section 16(1) of the PPSA defines "future advance" to include "the giving of value secured by a security interest, occurring after the security agreement has been signed, or assented to". In our view, the Clearing Member's entry into Covered Transactions with the Covered Customer after the Covered Base Agreement and CDA has been entered into constitutes the giving of value by the Clearing Member and, therefore, constitutes "future advances".~~

~~(b)~~ ***~~would~~(b) Would the security interest be valid in relation to future Covered Collateral (that is, ~~Eligible~~Covered Collateral not yet delivered to the ~~Clearing Member~~FCM at the time of entry into the ~~relevant~~ Covered ~~Base~~ Agreement ~~and CDA~~)?***

Yes.

~~Section 43 of the PPSA provides that a security agreement (such as the Covered Base Agreement and CDA) may provide for security interests in "after-acquired property". "After-acquired property" is defined to mean "personal property that is acquired by a debtor after the security agreement is made". Also, a security interest will be valid in relation to Collateral owned by the Covered Customer at the outset but not delivered to the Clearing Member until after entry into the Covered Base Agreement and CDA.~~

~~However, in either case, attachment will not occur until the Collateral is delivered to the Clearing Member.~~

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

No.

However, the pool of assets must be described in the Covered ~~Base~~ Agreement ~~and CDA~~ in such a way that the Covered Collateral is identifiable at any given time. Identification need not be specific, and may be operational. For example, it is sufficient to identify Covered

Collateral generally in ~~the~~a Covered ~~Base~~ Agreement ~~and CDA~~ by referring to Covered Collateral ~~transferred~~deposited by the Covered Customer with the FCM. In this regard, a description of Covered Collateral similar to ~~a designated margin account at the Clearing Member or its custodian~~the one set out in paragraph 1.36 of the Summary Annex would suffice for this purpose.

~~(d) is~~***(d) Is it necessary under the laws of New Zealand for the amount secured by ~~each Covered Base Agreement and CDA~~the security interest to be a fixed amount or subject to a fixed maximum amount?***

No.

~~(e) is~~***(e) Is it permissible under the laws of New Zealand for the ~~Clearing Member~~FCM to hold Customer Collateral in excess of its actual exposure to the Covered Customer under the ~~related~~ Covered ~~Base~~ Agreement ~~and CDA~~?***

Yes, assuming this reflects the agreement between the parties.

~~*In relation to (a), it is understood that the security interest in any specific 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 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 Collateral to be delivered at some point in the future after the time of entry into the relevant Covered Base Agreement and CDA would not take effect in relation to such Collateral until the Collateral had been delivered to the Clearing Member in accordance with the Covered Base Agreement and CDA. 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 Collateral or whether the security interest would take effect in relation to such Collateral without further action (other than the delivery) by either party.*~~

~~*In relation to (c), you may assume that each specific delivery to the Clearing Member and return by the Clearing Member of Collateral under the Covered Base Agreement and CDA from time to time would be properly recorded by the Clearing Member, 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 Clearing Member.*~~

2. **Action required to perfect security interest**

Assuming that the courts of New Zealand would ~~recognise~~recognize the security interest in each type of ~~Eligible~~Covered Collateral ~~created under each Covered Base Agreement and CDA~~, 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 New Zealand 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.

No action (such as a filing, registration, notification, stamping, notarisation or any other action or the obtaining of any governmental, judicial, regulatory or other order, consent or approval) is required in New Zealand to perfect ~~*that*~~the security interest~~*? If so, please indicate what actions must be taken and how such actions may differ depending on the type of Eligible Collateral*~~ in ~~*question.*~~

~~In addressing~~ this ~~issue, we assume that, applying the conflict of laws rules described in our response to question 1, New Zealand law determines matters of perfection~~case.

~~Under the PPSA, there are three methods of perfecting a security interest that has attached: "possession" of the Collateral, registration of a financing statement and automatic, but temporary, perfection. We discuss each of these below. However, there are methods other than perfection that allow a secured party to obtain priority over all other secured parties.[30] These are discussed in our response to question 15.~~

~~***Possession***~~

~~We discuss the concept of "possession" in Schedule 4 and conclude that the Clearing Member has "possession" of "investment securities" transferred to it under the Covered Base Agreement and CDA. However, it will not have "possession" of cash, intangible securities, or general intangibles,[31] which (being intangibles) are incapable of *actual* possession and are not covered by any *deemed* possession rules.~~

~~***Registration***~~

~~Whereas possession only perfects security interests in certain types of Collateral, registration perfects security interests in *all* types of Collateral (including intangibles).~~

~~The registration of a financing statement is carried out electronically. Certain specified information must be contained in the financing statement (in particular, the name and address of the debtor and the secured party, the debtor's company number and a description of the Collateral).[32] The fee payable on registration of a financing statement is nominal (N.Z.$10 or $20).[33]~~

~~A financing statement may be registered either before or after the Covered Base Agreement and CDA has been entered into or a security interest has attached.[34] Also, a single financing statement could cover all transfers of Collateral under the Covered Base Agreement and CDA. Therefore, the Clearing Member would only need to register once for each Covered Customer.~~

~~It is possible to perfect a security interest both by taking possession of the Collateral (assuming it can be possessed) and by registering a financing statement. However, for the reasons given in our response to question 15, the Clearing Member should not, in the case of "investment securities" or cash, need to perfect its security interest under *either* of these methods to obtain priority over all other secured parties. Perfecting under *both* methods should, therefore, also be unnecessary.~~

~~However, if the literal interpretation we outline in Schedule 4 is correct, a Clearing Member that is a third- (or lower-) tier holder should register a financing statement to perfect its security interest in its intangible securities. We believe that, until the correct interpretation is judicially or statutorily confirmed, this is the prudent approach for a Clearing Member in this position to adopt. However, our experience to date is that few secured parties are registering financing statements in these circumstances.~~

~~[30] These methods allow a secured party to obtain priority in respect of original collateral, but not in respect of "proceeds" of that original collateral. Therefore, the discussion below under the heading "Temporary perfection" (which deals with the perfection of a security interest in proceeds) is of particular relevance to secured parties.~~

~~[31] Cash, intangible securities, and general intangibles are discussed in Schedule 4.~~

~~[32] Section 142 of the PPSA.~~

~~[33] Regulation 21(1)(a) of the Personal Property Securities Regulations 2001 (the **PPS Regulations**).~~

~~[34] Section 146 of the PPSA.~~

~~A Clearing Member should also register a financing statement to perfect its security interest in any general intangibles (specifically, in the context of the types of Collateral considered in this opinion, Covered Customer Rights).~~

~~***Temporary perfection***~~

~~In certain circumstances, the PPSA provides for the temporary perfection of a security interest. During the period of temporary perfection, the secured party has the opportunity to re-perfect by one of the other two methods described above. If it fails to do so, it may lose priority at the end of that period.~~

~~In the context of the Covered Base Agreement and CDA, the most relevant application of the temporary perfection rule concerns "proceeds".[35] Section 45(1)(b) of the PPSA provides that a security interest in Collateral that gives rise to "proceeds" extends to those "proceeds". Pursuant to section 47, a security interest in proceeds remains temporarily perfected for 10 working days[36] after attachment if the security interest in the original Collateral were perfected.~~

~~*Original Collateral is "investment securities"*~~

~~If the original Collateral were "investment securities", on the basis of our conclusion that the Clearing Member has a perfected security interest in those securities (through possession), it would also have a temporarily perfected security interest in any proceeds. To maintain a perfected security interest in proceeds, the Clearing Member must, within the 10-working day period, register a financing statement for the proceeds (on the assumption that they will be intangibles (such as cash)).~~

~~*Original Collateral is cash, intangible securities, or general intangibles*~~

~~If the original Collateral were cash, intangible securities, or general intangibles, section 47 would not apply and the Clearing Member would not have a temporarily perfected security interest in any proceeds. However, it may obtain a *continuously* perfected security interest in proceeds if the security interest in the original cash, intangible securities, or general intangibles Collateral were perfected by registration.[37]~~

3. **Other requirements for validity or perfection**

If there are any other requirements to ensure the validity or perfection of ~~a~~the security interest in each type of ~~Eligible~~Covered Collateral ~~created by the Covered Customer under each Covered Base Agreement and CDA~~, please indicate the nature of such requirements. ~~For example, is it necessary as a matter of formal validity that the Covered Base Agreement and CDA be expressly governed by the law of New Zealand or translated into any other language or for the Covered Base Agreement and CDA to include any specific wording?~~ Are there any other documentary formalities that must be observed in order for ~~a~~the security interest ~~created under each~~in any type of Covered ~~Base Agreement and CDA~~Collateral to be ~~recognised~~recognized as valid and perfected in New Zealand?

There are no such requirements or documentary formalities.

~~[35] We discuss "proceeds" in Schedule 4. In the discussion that follows, we assume that the Clearing Member wishes to perfect its security interest in all proceeds. However, we recognise that, in practice, this may not always be the case. For example, this may not be the case where the Collateral held by the Clearing Member is only likely to give rise to income-type proceeds, as opposed to principal-type proceeds. If the Clearing Member is required to pass on income-type proceeds to the Covered Customer, the Clearing Member may not be concerned with perfecting its security interest in them.~~

~~[36] In this context, a "working day" is a day other than Saturday, Sunday, certain New Zealand public holidays or a day in the period from 25 December in any year to 2 January in the following year.~~

~~[37] Section 46(b)(i) or (ii) of the PPSA. This assumes, as seems reasonable, that cash collateral will only give rise to cash proceeds.~~

~~However, under section 148 of the PPSA, if the Clearing Member registers a financing statement in respect of Collateral, it must give the Covered Customer a copy of the verification statement (which confirms the registration) within 15 working days of it being received by the Clearing Member. The Covered Customer can waive this right in writing. We set out in our response to question 11 suggested wording for this waiver. There is no suggestion in the PPSA that failure to comply with section 148 affects the validity or perfection of a security interest. However, see the discussion of section 176(1) in our response to question 11.~~

4. **Action required to update or continue security interest**

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

~~Except in relation to proceeds,[38] there are no ongoing requirements to ensure that the Clearing Member's security interest in the Eligible Collateral remains perfected (or otherwise has the protection of section 95 or 97 of the PPSA).[39]~~

~~Section 153(1) of the PPSA specifies that the registration of a financing statement is effective for a maximum of five years. Pursuant to section 154(1), a registration may be renewed (for up to another five years from the date of renewal) by registering a financing change statement at any time during the period that the registration is effective. There is no limit on the number of times a registration may be renewed.~~

~~Also, section 90 of the PPSA provides that, where a security interest is perfected by registration and the debtor (i.e., the Covered Customer) changes its name, the secured party (the Clearing Member) must register a financing change statement disclosing the debtor's new name within 15 calendar days of the secured party obtaining knowledge[40] of that new name. If the secured party fails to do so, it may lose priority to certain security and other interests. However, the secured party should *not* lose priority to the extent that priority derives from section 95 or 97 and not from registration.~~

~~8. **Requirements where New Zealand law is not the governing law for validity and perfection**~~

~~Assuming that (a) pursuant to the laws of New Zealand, the laws of another jurisdiction govern the creation and/or perfection of a security interest in the Eligible Collateral transferred by way of security pursuant to each Covered Base Agreement and CDA (for example, because such Collateral is located or deemed to be located outside New Zealand) and (b) the Clearing Member has obtained a valid and perfected security interest in the Eligible Collateral under the laws of such other jurisdiction, will the Clearing Member have a valid security interest in the Collateral so far as the laws of New Zealand are concerned? Is any action (filing, registration, notification, stamping or notarisation or any other action or the obtaining of any governmental, judicial, regulatory or other order, consent or approval) required under the laws of New Zealand to establish, perfect, continue or enforce this security interest? Are there any other requirements of the type referred to in question 6 above?~~

~~[38] Discussed in our response to question 5.~~

~~[39] Sections 95 and 97 of the PPSA are discussed in our response to question 15.~~

~~[40] The PPSA's concept of knowledge is discussed in our response to question 15.~~

~~If, pursuant to the laws of New Zealand, the laws of another jurisdiction govern the creation, validity and perfection of a security interest in the Eligible Collateral, and the Clearing Member has obtained a valid and perfected security interest under the laws of that jurisdiction, subject to what we say below concerning section 32 of the PPSA, a New Zealand court would recognise the Clearing Member as having a valid and perfected security interest.~~

~~No action is required under the laws of New Zealand to establish, perfect, continue or enforce this security interest. There are no other requirements of the type referred to in question 6.~~

~~Section 32 of the PPSA provides that, if the relevant (foreign) governing law does not provide for public registration or recording of the security interest or a notice relating to it, and the collateral is not in the possession of the secured party, the security interest is subordinate to:~~

~~(a) an interest in an account receivable (such as cash) that is payable in New Zealand; or~~

~~(b) an interest in an investment security acquired when the collateral was situated in New Zealand,~~

~~*unless* that security interest is perfected under the PPSA before the interest in paragraph (a) or (b) arises.~~

In these circumstances, neither the FCM nor the Covered Customer would need to take any action to ensure that the security interest continues to be and/or remains perfected (including with respect to additional cash or securities Covered Collateral transferred from time to time when required pursuant to the Covered Agreement).

5. ~~9. Clearing Member~~FCM duties

Are there any particular duties, obligations or limitations imposed on the ~~Clearing Member~~FCM in relation to the care of the ~~Eligible~~Covered Collateral held by it pursuant to ~~each Covered Base Agreement and CDA~~the security interest?

Under New Zealand's conflict of laws rules, the extent of the ~~Clearing Member~~FCM's duties in relation to the care of the ~~Eligible~~Covered Collateral held by it would be determined by the governing law of the relevant Covered ~~Base~~ Agreement ~~and CDA. Therefore, New York law should determine this issue~~. However, we consider this issue below on the assumption that New Zealand law governs.

~~The PPSA does not impose any duties on secured parties in relation to the care of collateral except in the context of the exercise of its enforcement rights.[41] Therefore, it is likely that the existing common law rules (such as the duties of a mortgagee in possession) will continue.~~

Most of the common law rules imposing duties on secured parties in possession are relevant only to tangible non-documentary property (e.g., the duty to keep collateral in repair). The only residual duty that may be relevant in the context of the Covered ~~Base Agreement and CDA~~Agreements is a duty to take reasonable steps to ensure the safe custody of collateral held by the secured party. However, there is no general duty owed by a mortgagee to use reasonable care in dealing with collateral.[~~42~~9]

~~[41] We discuss these duties in our response to question 11. We also discuss in that response the general duty in the PPSA to act in good faith and in accordance with reasonable standards of commercial practice.~~

[~~42~~9] *Downsview Nominees Ltd* v *First City Corporation Ltd* [1993] 1 NZLR 513 (PC).

6. ~~10.~~ Dealings with Covered Collateral

~~A Covered Base Agreement and CDA may grant the Clearing Member broad rights with respect to the use of Collateral. Additionally, the Covered Base Agreement and CDA are subject to the rules of DCOs, which may also grant DCOs similar rights with respect to the use of Collateral that has been on-posted from a Clearing Member to a DCO. Such use might include pledging or rehypothecating the securities, disposing of the securities under a securities repurchase (repo) agreement or simply selling the securities.~~ Do the laws of New Zealand recognise the right of the ~~Clearing Member or DCO so~~FCM to use ~~such~~cash or securities Covered Collateral (as described in the assumption in Part C(f) of section 1 of Schedule 1 of this opinion) 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 ~~a~~the security interest otherwise validly created and perfected prior to such use? Are there any other obligations, duties or limitations imposed on the ~~Clearing Member or DCO~~FCM with respect to its use of ~~the~~such Covered Collateral under the laws of New Zealand? ~~In considering the above question in relation to a DCO, please limit your response to the extent that rights or duties applicable to the DCO under the laws of New Zealand are relevant to the validity, continuity, perfection or priority of Clearing Member's security interest.~~

Under New Zealand's conflict of laws rules, the validity of the ~~Clearing Member~~FCM's use of Covered Collateral[10] in ~~the~~this manner ~~contemplated by this question~~ would be governed by New York law (and, perhaps, by the *lex situs* of the Covered Collateral). However, in the hypothetical situation where New Zealand law governed the matter, it is unlikely that the ~~Clearing Member~~FCM would be entitled to deal with Covered Collateral in ~~this~~that manner. This is despite ~~the Covered Customer's~~any agreement by the Covered Customer to allow such ~~dealing~~use.[43] ~~Such dealing may extinguish the Covered Customer's equity of redemption, which is protected under section 132(1) of the PPSA.[44] Such dealing could also constitute conversion by the Clearing Member.~~

> ~~If the Clearing Member dealt with securities Collateral in this manner, the property the Clearing Member received in return for the dealing (say, cash) would be "proceeds" for the purposes of the PPSA if the Covered Customer "acquires an interest" in that property. The validity, continuity, perfection and priority of the Clearing Member's security interest in those proceeds would be determined in accordance with the principles outlined in our response to question 5.~~

There are no other obligations, duties or limitations imposed by New Zealand law on the ~~Clearing Member~~FCM with respect to its use of the Covered Collateral.

~~III. ENFORCEMENT OF FUTURES CREDIT SUPPORT RIGHTS AND CLEARED DERIVATIVES CREDIT SUPPORT RIGHTS UNDER THE COVERED BASE AGREEMENT AND CDA BY THE CLEARING MEMBER IN THE ABSENCE OF AN INSOLVENCY PROCEEDING~~

~~We set out below our analysis of the issues raised under the heading "~~

Enforcement of ~~Futures Credit Support Rights and Cleared Derivatives Credit Support Rights under~~ ***the security interest in Covered*** ~~Base Agreement and CDA by the Clearing~~

[10] We should note that the cash or securities to which this question relates (and, accordingly, to which our response relates) is the cash/securities that constitutes Covered Collateral. That is, it is cash/securities credited to the Customer Account. It is *not* the cash/securities deposited with the FCM by a Covered Customer that gives rise to the credit to the Customer Account.

~~[43] Nevertheless, we are aware of one common law case that holds that a mortgagor of shares may, by agreement, forgo the right to the return of the *identical* shares mortgaged (and accept instead *equivalent* shares): *Crerar* v *The Bank of Scotland* [1921] SC 736. Also, more recently, courts in overseas jurisdictions seem to have become more prepared to uphold rehypothecation clauses – at least where there is no unconscionability on the part of the secured party. See, for example, *Lift Capital Partners Pty Limited* v *Merrill Lynch International* [2009] NSWSC 7.~~

~~[44] Discussed in our response to question 11.~~

~~Member~~***Collateral in the absence of an insolvency proceeding***~~" in Part III of the Instruction Letter.~~

7. ~~11.~~ **Formalities in exercising enforcement rights**

Assuming that the ~~Clearing Member~~FCM has obtained a valid and perfected security interest ~~in the Eligible Collateral~~ under the laws of New Zealand, 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 ~~Clearing Member~~FCM must observe or undertake in enforcing its security interest ~~in the Eligible Collateral and exercising its Futures Credit Support Rights and Cleared Derivatives Credit Support Rights (Credit Support Rights) as a Clearing Member~~as an FCM under ~~each~~the Covered ~~Base~~ Agreement ~~and CDA, such as the right to liquidate Eligible Collateral~~? For example, is it free to sell the ~~Eligible~~Covered Collateral (including to itself) and apply the proceeds to satisfy the Covered Customer's outstanding obligations under the Covered ~~Base~~ Agreement ~~and CDA~~? Do such formalities or procedures differ depending on the type of ~~Eligible~~Covered Collateral involved?

There are two parts of the PPSA that are *potentially* relevant in this context: section 25 (which requires rights arising under a security agreement to be exercised in a certain manner) and Part 9 (which governs the enforcement of security interests). However, as the PPSA's conflict of laws rules do not apply to enforcement issues,[~~45~~11] it is unclear in what circumstances section 25 or Part 9 will apply.

~~It is~~There are three possible ~~that~~approaches a New Zealand court ~~would~~could take when considering this issue:

(a) it could hold that issues relating to enforcement should be determined by the governing law of the Covered ~~Base~~ Agreement ~~and CDA. Alternatively (and, in our view, more likely), a New Zealand court may~~;

(b) it could hold that~~, if~~ the ~~PPSA governs~~same jurisdictions laws that govern validity and perfection issues~~, it~~ should also govern enforcement issues~~.~~; or ~~A New Zealand court~~

(c) it could ~~also~~ hold that enforcement issues are procedural, and not substantive, and that the PPSA's enforcement rules should therefore apply as part of the *lex fori*. ~~In either of the latter two cases,~~

Only if a New Zealand court adopted approach (c) would section 25 and Part 9 apply~~. The following discussion assumes that section 25 and Part 9~~ in enforcing a security interest in Covered Collateral. However, our view is a New Zealand court would adopt approach (a) or, more likely, (b), with the result in either case being that the court would hold New York law should apply to issues of enforcement.

~~***Exercise of rights arising under security agreement***~~

~~Section 25(1) provides that:~~

> ~~All rights, duties, or obligations that arise under a security agreement or this Act must be exercised or discharged in good faith and in accordance with reasonable standards of commercial practice.~~

[~~45~~11] As mentioned in our response to question ~~1~~2, the PPSA's conflict of laws rules only apply to issues of "validity, perfection, and the effect of perfection or non-perfection".

There are two standards that a secured party must satisfy: good faith and the reasonable standard of commercial practice. "Good faith" is not defined in the PPSA, although section 25(2) provides that a person does not act in bad faith merely because they act with knowledge of the interest of another person. There are no guidelines in the PPSA as to what are "reasonable standards of commercial practice".

Enforcement

The relevant provisions of Part 9 are outlined below. We discuss first the three enforcement options available to a secured party (sale, application and retention), then the rights of redemption and reinstatement and, finally, the scope to contract out of Part 9.

Sale of collateral

Section 109(1)(a) allows a secured party to take possession of (if it has not already) and sell collateral when the debtor is in "default" under the security agreement. "Default" means:

> (a) The failure to pay or otherwise perform the obligation secured when due; or
>
> (b) The occurrence of an event that, under the security agreement, gives the secured party the right to enforce the security:

If a secured party elects to sell collateral, it owes a duty to the debtor and to other secured parties to obtain the best price reasonably obtainable as at the time of sale.[46] The sale may be by auction, public tender, private sale or another method.[47]

The secured party must give at least 10 working days' notice of the sale to the debtor and to other secured creditors.[48] However, the notice requirement does not apply in certain circumstances - in particular, where the collateral is foreign currency or where the secured party believes on reasonable grounds that the collateral will decline substantially in value if it is not disposed of immediately.[49]

Within 15 working days of the sale, the secured party must give a written statement of account, specifying certain details, to the debtor and to each other secured creditor.[50] The secured party must pay any surplus, first, to the other secured parties according to their respective priorities, then to the debtor.[51]

Application of collateral

As an alternative to selling collateral, a secured party with priority over all other secured parties may, if the debtor is in default, apply an account receivable (which, we conclude in Schedule 4, includes cash under the Covered Base Agreement and CDA) or an investment

---

[46] Section 110 of the PPSA.

[47] Section 113 of the PPSA.

[48] A form of notice is prescribed in Form 1 of Schedule 2 of the PPS Regulations.

Generally, where the enforcement provisions in the PPSA require a secured party to give a notice to other secured creditors, notice need only be given to:

(a) a person who has registered a financing statement in respect of the collateral that is effective at the time the secured party took possession; and

(b) a person that has given the secured party notice that it claims an interest in the collateral.

[49] Section 114(2) of the PPSA.

[50] Section 116 of the PPSA.

[51] Sections 116A and 117 of the PPSA.

security taken as collateral to the satisfaction of the secured obligation.[52] This alternative is not available in respect of intangible securities.

Retention of collateral

As a further alternative to selling collateral, a secured party with priority over all other secured parties may, after a default by the debtor, propose to take the collateral in satisfaction of the secured obligation.[53] It appears that the principal distinction between this alternative and the application of collateral alternative referred to above is that the latter contemplates the collateral being held by a third party, whereas the former does not.[54] Arguably, this alternative requires the secured party to foreclose on the collateral in satisfaction of the *entire* secured obligation, rather than that part of the secured obligation representing the value of the collateral being retained.

The secured party must give notice to the debtor and to all other secured parties of its proposal to retain the collateral.[55] The secured party must sell, rather than retain, the collateral under the procedure outlined above if a recipient of the notice objects in writing within 10 working days of receipt of the notice.[56] If no such objection is received within that 10-working day period, the secured party is deemed to have irrevocably elected to take the collateral in satisfaction of the secured obligation.[57]

Right of redemption and reinstatement

At any time before the secured party takes one of the above three steps:

(a) the debtor or any other secured party may redeem the collateral by paying the secured amount plus the secured party's reasonable expenses;[58] or

(b) the debtor may, unless it has otherwise agreed in writing after default, reinstate the security agreement by paying the sum in arrears (exclusive of acceleration), remedying any other default and paying the secured party's reasonable expenses in enforcing the security agreement.[59] The debtor may only reinstate a security agreement twice if the term of that agreement is no more than 12 months, and twice in each year if the term is more than 12 months.[60]

It is not clear how these reinstatement provisions would operate in the context of the Covered Base Agreement and CDA. Those provisions were drafted in contemplation of a security agreement securing obligations under a financing-type facility. They do not fit well with an agreement securing obligations arising out of Covered Transactions. In particular, the requirement to ignore "the operation of an acceleration clause in the security agreement" is a potential concern.[61]

[52] Section 108 of the PPSA.

[53] Section 120 of the PPSA.

[54] One further difference is that the secured party is required to give notice of its intention to exercise its right to *retain* collateral, but is not required to give notice if it elects to *apply* collateral.

[55] A form of notice is prescribed in Form 2 of Schedule 2 of the PPS Regulations.

[56] Section 121 of the PPSA.

[57] Section 123(1) of the PPSA.

[58] Section 132(1) of the PPSA.

[59] Section 133 of the PPSA.

[60] Section 134 of the PPSA.

[61] Consider the following example. The Covered Customer, which is net out-of-the-money, defaults under the Covered Base Agreement and CDA (whether in payment or otherwise). The Clearing Member closes out. Before the Clearing

~~*Contracting out*~~

~~Section 107 of the PPSA allows the parties to a security agreement to contract out of certain provisions of Part 9. The parties may contract out of, among others:~~

~~(a) section 108 (secured party's right to apply collateral);~~

~~(b) section 109 (secured party's right to sell collateral);~~

~~(c) section 114(1)(a) (secured party's obligation to give notice of sale to debtor);~~

~~(d) section 120(1) (secured party's right to retain collateral); and~~

~~(e) sections 133 and 134 (debtor's right of reinstatement).~~

~~Essentially, these are provisions that do not affect the rights of third parties.~~

~~The parties may also contract out of, among others, the debtor's right to:~~

~~(a) receive a statement of account under section 116;~~

~~(b) receive notice of a secured party's proposal to retain collateral under section 120(2); and~~

~~(c) object to a secured party's proposal to retain collateral under section 121.~~

~~We recommend that Clearing Members take advantage of this ability to contract out to the fullest extent permitted by the PPSA. To the extent that the provision being contracted out of confers a right on the *Covered Customer*, enforcement by the Clearing Member will be a simpler procedure. To the extent that the provision being contracted out of confers a right on the *Clearing Member*, an equivalent right is generally conferred under the Covered Base Agreement and CDA. We therefore recommend that the following wording be included in the Covered Base Agreement and CDA:~~[62]

~~[ ] **Certain provisions of PPSA excluded.**~~

~~(i) To the extent applicable, none of the sections referred to in section 107(1), and none of the rights referred to in section 107(2), of the Personal Property Securities Act 1999 (New Zealand) (**PPSA**) applies to this [Agreement]. For the avoidance of doubt, nothing in this [clause/section [ ]] is to affect the rights of either party under this [Agreement].~~

~~(ii) Each party waives its right under section 148 of the PPSA to receive a copy of any verification statement relating to a financing statement or financing change statement registered in respect of it by the other party.~~

~~Member sells or applies the Collateral it is holding, the Covered Customer remedies the original (payment or other) default. The Covered Customer could then argue that, under section 133, the Clearing Member must reinstate matters by, effectively, unwinding the close-out. The Covered Customer could also argue that the Clearing Member's expenses in doing so are not reimbursable under section 133(c) as they do not relate to the enforcement of the security agreement.~~

~~Until a New Zealand court considers circumstances such as these, we cannot rule out this interpretation. For that reason, the contracting out provisions discussed below are important.~~

~~62 Paragraph (i) of the recommended amendment contracts out of some of the PPSA's enforcement provisions. Paragraph (ii) contains a waiver of the Covered Customer's right to receive a copy of a verification statement (as discussed in our response to question 6).~~

~~We emphasise, however, that, even if this amendment were adopted, the Clearing Member may still have residual obligations under Part 9 of the PPSA. For example, the Clearing Member may still be required to give notice to other secured parties of any proposed sale of Collateral (subject to the exceptions in section 114(2)).~~

~~***Entitlement to damages for breach of PPSA's obligations***~~

~~Section 176(1) of the PPSA provides that, if a person fails to discharge any duty or obligation imposed on that person by that Act, the person to whom the duty or obligation is owed and any other person who can reasonably be expected to rely on performance of the duty or obligation has a right to recover damages for any loss or damage that was reasonably foreseeable as likely to result from the failure.~~

~~12. **Formalities where New Zealand law is not the law governing the validity and perfection**~~

~~***Assuming that (a) pursuant to the laws of New Zealand, the laws of another jurisdiction govern the creation and/or perfection of a security interest in the Eligible Collateral transferred by way of security pursuant to each Covered Base Agreement and CDA (for example, because such Collateral is located or deemed to be located outside New Zealand) and (b) the Clearing Member has obtained a valid and perfected security interest in the Eligible Collateral under the laws of such other jurisdiction, are there any formalities, notification requirements or other procedures, if any, that the Clearing Member must observe or undertake in New Zealand in exercising its Credit Support Rights as a Clearing Member under each Covered Base Agreement and CDA?***~~

~~No.~~

~~However, we assume, for the reasons stated in our response to question 11, that New Zealand conflict of laws rules determine that the laws of the other jurisdiction govern not just *creation* and *perfection* issues, but also *enforcement* issues.~~

8. ~~13.~~ **Special limitations on enforcement**

Are there any laws or regulations in New Zealand that would limit or distinguish a creditor's enforcement rights with respect to ~~Eligible~~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 ~~Eligible~~ 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 ~~creditor's~~ security interest ~~in the Eligible Collateral~~?

Subject to what we say below, there are no such laws or regulations of general application. ~~However, the rules of an Intermediary (as defined in Schedule 1) may purport to confer a prior-ranking security interest over securities.~~

Section 169 of the Tax Administration Act 1994 creates a statutory charge over all of an employer's property for any sum payable but not paid to the Commissioner of Inland Revenue (the **Commissioner**) under the PAYE (Pay As You Earn) rules. Pursuant to section 169(2), that charge is:

> subject to all mortgages, charges, or encumbrances existing at the time of creation of the charge, but, subject to this section, shall have priority over all other mortgages, charges or encumbrances.

Where the statutory charge is over personal property, the Commissioner may register a financing statement under the PPSA. In that case, section 169(4) states that the registration operates and takes priority according to the provisions of the PPSA.

Reconciling subsections (2) and (4) is not entirely straightforward. However, our view~~[63]~~[12] is that the Commissioner's charge is created immediately upon default by the taxpayer, but that charge only has priority over subsequently-created security interests in accordance with the PPSA's rules. ~~In other words, subject to what we say in the following paragraph, the PPSA's priority rules that we outline in our response to question 15 below should also apply to this statutory charge.~~

Section 169(4B) is more problematic. It provides that~~,~~ if a "mortgage" over the same property is registered before the statutory charge, and money secured by that mortgage is advanced after registration of the charge, the charge has priority. ~~Assuming that the~~If a Covered ~~Base~~ Agreement ~~and CDA~~ creates a "mortgage", the issue is, therefore, whether the sums secured by that document should be regarded as being "advanced". Clearly, the legislation is principally aimed at borrower/lender situations involving real property. That is not to say, however, that a court might not take a broad, purposive, interpretation of this provision and conclude that it applies in these circumstances. Until the issue is clarified by case law or amending legislation, this uncertainty remains.

Where the taxpayer is in liquidation, section 167 of the Tax Administration Act applies. The effect of that provision is summarised in our response to question ~~15~~13 below, under the heading "Tax payable to the Commissioner".

9. ~~14. Clearing Member~~**Effect of FCM being in default**

How would your ~~responses~~response to questions 10 and 11 ~~to 13 above~~ change, if at all, assuming that an insolvency proceeding ~~described in assumption (g) in section 1, Part B of Schedule 1 of this opinion~~above has occurred with respect to the ~~Clearing Member~~FCM (notwithstanding that the Covered ~~Base~~ Agreement ~~and CDA~~ may not provide for any events of default in respect of the ~~Clearing Member~~FCM) rather than or in addition to the Covered Customer (for example, would this affect ~~the~~this ability of the ~~Clearing Member~~FCM to ~~exercise~~enforce its ~~enforcement rights with respect to the Eligible~~security interest in Covered Collateral)?

Our response would not change in these circumstances.

~~**IV. ENFORCEMENT OF CREDIT SUPPORT RIGHTS UNDER THE COVERED BASE AGREEMENT AND CDA BY THE CLEARING MEMBER AFTER COMMENCEMENT OF AN INSOLVENCY PROCEEDING**~~

~~We set out below our analysis of the issues raised under the heading "~~

Enforcement of ~~Credit Support Rights Under~~ the security in Covered ~~Base Agreement and CDA by the Clearing Member~~Collateral after the commencement of an insolvency proceeding~~" in Part III of the Instruction Letter.~~

~~The different types of insolvency proceedings possible under New Zealand law are described in Schedule 2.~~

~~The following analysis applies to all the types of insolvency proceedings possible under New Zealand law in respect of ordinary NZ Companies. This analysis proceeds on the assumption that the Covered Customer's assets are located in New Zealand. If any of its assets are located outside New Zealand, then the analysis will need to be supplemented by advice on the cross-border insolvency regime that operates in the country in which the assets are located (i.e., there might be similar types of proceedings in that other country to the proceedings that can apply in New Zealand).~~

~~63~~12 In reaching this view, we place particular emphasis on the "subject to this section" wording in subsection (2).

~~15. Competing claims~~

10. Determination of competing priorities

How are competing priorities between creditors determined in New Zealand? What conditions must be satisfied if the ~~Clearing Member~~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 ~~Eligible~~Covered Collateral~~, other than claims of a DCO~~?

Conflict of laws

As discussed in our response to question ~~1~~2, the PPSA's conflict of laws rules specify the circumstances in which New Zealand law governs the "validity, perfection, and the effect of perfection or non-perfection" of a security interest. Accordingly, in matters of priority, these rules would apply to the extent that priority depends upon perfection.

~~However, as discussed below, there are methods aside from perfection that allow the Clearing Member to obtain priority over all other security interests. It is arguable that, in these circumstances, priority matters concern "the effect of…non-perfection" of a security interest (and are, therefore, covered by the PPSA's conflict of laws rules). However, it is unclear whether a court would uphold this view. If it did not, the common law conflict of laws rules applying to priorities would prevail. These are the same rules as apply to transfers (and, therefore, to the reconciliation of *competing* transfers)[64] of the underlying collateral.~~

~~Broadly, these common law conflict of laws rules provide that:~~

~~(a) transfers of directly held bearer debt securities are governed by the law of the jurisdiction where the securities certificate was when it was delivered;[65]~~

~~(b) transfers of directly held registered debt securities, directly held dematerialised debt securities[66] and general debts (such as cash) are governed by the law governing the creation of those securities or that debt (i.e., the relevant proper law);[67] and~~

~~(c) transfers of intermediated debt securities should be governed by the law of the jurisdiction where the transferor's account with its intermediary is maintained, however the issue is by no means settled.[68]~~

~~If the conflict of laws rules of either the PPSA or the common law provide that New Zealand law governs priority issues in respect of Eligible Collateral, the position is as described below.~~

~~***General rules***~~

~~The basic principles in New Zealand for resolving competing priorities between creditors are that:[69]~~

~~(a) secured creditors have priority over unsecured creditors;~~

~~[64] Dicey, Morris & Collins, para. 24-063.~~

~~[65] Dicey, Morris & Collins, para.s 24-066.~~

~~[66] While Dicey, Morris & Collins do not consider expressly transfers of directly held dematerialised debt securities, the analysis should, in principle, be the same as for directly held registered debt securities. That is, where securities are directly held, the focus should be on the method of transfer of the securities, rather than whether the securities are certificated or uncertificated. In the case of both directly held registered debt securities and directly held dematerialised debt securities, the method of transfer is by entry in the records of the issuer or of the registrar.~~

~~[67] Dicey, Morris & Collins, para. 24-062.~~

~~[68] See Dicey, Morris & Collins, para. 24-071 *et seq.* for a discussion of the current state of the relevant law.~~

~~[69] Sections 36 and 66 of the PPSA.~~

(b) a perfected security interest has priority over an unperfected security interest;

(c) priority between perfected security interests is determined by the order of the first to occur of registration of a financing statement or possession of the collateral; and

(d) priority between unperfected security interests is determined by the order of attachment.

Where the collateral that is the subject of the competing priorities is "proceeds",[70] the time of registration or possession in respect of the original collateral is also the time of registration or possession in respect of those proceeds.[71] Therefore, if the Clearing Member registers a financing statement for cash proceeds of "investment securities" within the temporary perfection period (i.e., within 10 working days of attachment), the relevant date for determining the Clearing Member's priority will be the date on which it took possession of the original Collateral. Therefore, given the conclusion in our response to question 2 (i.e., that New York law would govern the issue of the perfection of a security interest in Covered Collateral), New York law would also govern issues of priority to the extent that priority depends upon perfection. In other words, the rules in the PPSA for resolving competing priorities between creditors would not apply in the context of the Covered Collateral.

Exceptions to the general rules

There are methods aside from perfection that allow the Clearing Member to obtain priority over all other security interests.[72] These methods differ depending on the type of Eligible Collateral involved. We discuss below the position for both "investment securities" and cash. However, there are no such exceptions applicable to intangible securities or general intangibles, in respect of which priority issues are determined solely under the general rules outlined above.

We also discuss the position of preferential creditors under the Companies Act, tax payable to the Commissioner, designated settlement systems, and life insurers.

"Investment securities"

Section 97 of the PPSA states that:

(1) The interest of a purchaser of an investment security has priority over a perfected security interest in the investment security if the purchaser –

(a) Gave value for the investment security; and

(b) Acquired the investment security without knowledge of the security interest; and

(c) Took possession of the investment security.

(2) For the purposes of subsection (1), the purchaser of an investment security who acquired it under a transaction entered into in the ordinary course of the transferor's business has knowledge only if the purchaser acquired the interest with knowledge that the transaction is a breach of the security agreement to which the security interest relates.

[70] Discussed in our response to question 5.

[71] Section 68 of the PPSA.

[72] On its face, section 95 (which relates to cash and confers priority over *any* security interest) gives broader protection than section 97 (which relates to securities and confers priority over *any perfected* security interest). However, in order to avoid circularity of priority, section 97 must be read as also conferring priority over *unperfected* security interests.

~~A "purchaser" is defined as a person who "purchases" personal property. "Purchase" means:~~

> ~~taking by sale, lease, discount, assignment, negotiation, mortgage, pledge, lien, issue, reissue, gift, or any other consensual transaction that creates an interest in personal property:~~

~~The Clearing Member is a purchaser in the context of "investment securities" transferred to it under the Covered Base Agreement and CDA.~~

~~To qualify for section 97(1) priority, the Clearing Member must satisfy each of the conditions set out in paragraphs (a), (b) and (c). The first and third conditions ("value" and "possession") are discussed in Schedule 4 (in which we conclude that the Clearing Member gives "value" for, and takes "possession" of, the "investment securities"). We discuss below the second condition – knowledge.~~

~~Section 19(1)(b) sets out what constitutes knowledge in the context of an organisation:[73]~~

> ~~An organisation knows or has knowledge of a fact in relation to a particular transaction when –~~
>
> ~~(i) The person within the organisation with responsibility for matters to which the transaction relates has actual knowledge of the fact; or~~
>
> ~~(ii) The organisation receives a notice stating the fact; or~~
>
> ~~(iii) The fact is communicated to the organisation in such a way that it would have been brought to the attention of the person with responsibility for matters to which the transaction relates if the organisation had exercised reasonable care.~~

~~Section 19(2) specifies what constitutes "reasonable care". In addition, section 20 makes it clear that registration of a financing statement is not constructive knowledge of its existence or contents to any person. In short, therefore, "knowledge" means actual knowledge.~~

~~The level of knowledge that will prevent the Clearing Member from being able to rely on section 97 depends on the circumstances of the underlying transfer of Collateral. If:~~

~~(a) the "investment securities" are transferred in the ordinary course of the Covered Customer's business, section 97 can be relied on unless the Clearing Member knows that the transfer is a breach of the security agreement creating the competing security interest; or~~

~~(b) the "investment securities" are transferred in any other circumstances, section 97 can be relied on unless the Clearing Member knows of that competing security interest.~~

~~In other words, section 97 can be relied on in a wider range of circumstances where the underlying transfer of Collateral is made in the ordinary course of the Covered Customer's business. In this opinion, we assume an absence of knowledge by the Clearing Member of any perfected security interest in the Collateral.~~

~~[73] Section 16(1) of the PPSA defines an "organisation" to mean "any body or organisation, whether incorporated or unincorporated". But section 19(3) specifies that "organisation" does not include a government department (in respect of which, there are special knowledge rules).~~

Cash

Section 95(1) of the PPSA states that:

> A creditor who receives payment of a debt owing by a debtor through a debtor-initiated payment has priority over a security interest in –
>
> (a) The funds paid:
>
> (b) The intangible that was the source of the payment:
>
> (c) A negotiable instrument used to effect the payment.

Paragraph (b) is the most relevant in this context. The "intangible" to which paragraph (b) refers is the contractual deposit arrangement that the Covered Customer has entered into with its bank.[74]

The principal requirements of section 95(1) are that a "debtor" uses a "debtor-initiated payment" to pay a "debt". We discuss each of these three requirements in turn. We also discuss the relevance of the Clearing Member's knowledge of any competing security interest.

(a) *"Debtor"*

"Debtor" is defined in section 16 to include "[a] person who owes payment or performance of an obligation secured". In the context of the Covered Base Agreement and CDA, the principal "obligation secured" is the obligation to comply with the terms of the relevant Covered Transactions. The Covered Customer is the person that "owes payment or performance" of that "obligation secured". Therefore, the Covered Customer is a "debtor".

(b) *"Debtor-initiated payment"*

"Debtor-initiated payment" is defined in section 95(3) to mean:

> a payment made by the debtor through the use of –
>
> (a) A negotiable instrument; or
>
> (b) An electronic funds transfer; or
>
> (c) A debit, a transfer order, an authorisation, or a similar written payment mechanism executed by the debtor when the payment was made.

A payment made by the Covered Customer through the use of its bank or Intermediary should be a "debtor-initiated payment" under paragraph (b) or (c) of that definition. However, where the Clearing Member is a deposit-taking institution (such as a bank) and receives payment through a debit, transfer order or authorisation, there will only be a "debtor-initiated payment" if the Covered Customer executes the debit, transfer order or authorisation *when the payment is made*. That is, any standing payment authorisation given by the Covered Customer to the Clearing Member will not give rise to a "debtor-initiated payment".[75]

[74] This is distinct from the intangible that arises, or that increases in value, as a result of that payment (i.e., the contractual deposit arrangement that *the Clearing Member* has entered into with its bank). See *R v Preddy* [1996] AC 815 (HL) for a discussion of the distinction between these two intangibles. *Preddy* was applied by the New Zealand Court of Appeal in *R v Wilkinson* [1999] 1 NZLR 403.

[75] For a further discussion of the term "debtor-initiated payment", see the decision of the Court of Appeal in *Commissioner of Inland Revenue* v *Stiassny* [2012] NZCA 93.

~~(c) *Debt*~~

~~"Debt" is not defined in the PPSA. The governing law of the Covered Base Agreement and CDA should determine whether an obligation to post cash Collateral in a foreign currency constitutes a debt. However, if New Zealand law determines this issue, a court would likely first consider the relative merits of the "traditional" view and the "modern" view of the role of foreign currency in these circumstances.~~

~~The traditional view is that foreign currency is *money* (and, therefore, gives rise to a debt) when it serves the classic economic function of a medium of exchange and performs the other secondary functions fulfilled by domestic currency. It is a *commodity* if it is itself the subject of commercial exchange.[76]~~

~~The modern view is that all foreign currency is "money".[77]~~

~~A review of the analysis supporting each of these views is beyond the scope of this opinion. However, in our view, a New Zealand court would *either* adopt the modern view *or* would regard the foreign currency as functioning as money (in terms of the traditional view). In either case, the court should conclude that an obligation to post cash Collateral in a foreign currency constitutes a debt.~~

~~(d) Knowledge~~

~~Section 95(2) states that "[s]ubsection (1) applies whether or not the creditor had knowledge of the security interest at the time of the payment". Therefore, unlike in the case of "investment securities" under section 97, in the case of cash, the Clearing Member's position is not compromised by any knowledge it has of a competing security interest. However, knowledge of a *breach* of the terms of a competing security interest *would* affect the ability of the Clearing Member to rely on section 95.[78]~~

However, aside from the PPSA, there are other New Zealand legislative regimes that might affect competing priorities. We discuss these below.

Preferential creditors

Section 312(1) of the Companies Act requires the liquidator of a company to pay out of the assets of the company, in the order of priority specified, the claims set out in Schedule 7 of that Act.~~[79]~~

The principal claims set out in Schedule 7 relate to the liquidator's fees and expenses and certain amounts owed to employees or to the Inland Revenue Department. Clause 2(1)(b)(i) of Schedule 7 states that these preferential claims have priority over the claims of any person under a security interest over "all or any part of the company's accounts receivable and inventory".~~[80]~~[13] The intention

~~*Commissioner of Inland Revenue* v *Stiassny* [2012] NZCA 93.~~

~~[76] See, for example, Derham, *Set-off* (3rd ed., 2003) para.s 9.14-9.16.~~

~~[77] See, for example, Wood, *English and International Set-off* (1989) p.656 and Wood, *Set-off and Netting, Derivatives, Clearing Systems* (2nd ed., 2007), para. 1-036:~~

> ~~There must now be very few, if any, legally developed jurisdictions which treat a foreign currency obligation as an obligation to deliver goods as opposed to money.~~

~~[78] *Stiassny* v *Commissioner of Inland Revenue* [2013] 1 NZLR 453 (SC).~~

~~[79] There is a similar provision in the statutory management legislation (see section 51 of the CIM Act and section 134 of the Reserve Bank Act).~~

~~[80]~~[13] The terms "security interest", "accounts receivable" and "inventory" have the meanings given to them in the PPSA. There are exceptions to this priority position. However, they are not relevant for the circumstances that we are considering.

of this provision is to preserve the position under the pre-PPSA law, where claims in respect of assets subject to a floating charge[~~81~~14] ranked after preferential creditors.

~~We conclude in Schedule 4 that cash~~Cash is an "account receivable" for the purposes of the PPSA~~. However~~, and the FCM has a "security interest" over cash ~~is an account receivable of the Clearing Member, not the~~ Covered ~~Customer~~Collateral.[~~82~~15] ~~Therefore, cash is not subject to clause 2(1)(b)(i) of~~Accordingly, Schedule 7 ~~and the Clearing Member's claim in respect of cash would not~~would seem to apply in these circumstances.

If Schedule 7 *does* apply, the FCM may be ~~subject~~able to ~~the prior claim of~~rely on an amendment to that schedule made in the Derivatives Margin Act to avoid losing priority to preferential creditors. Clause 2(3A) of Schedule 7 provides that the preferential creditors do *not* have priority over the holder of:

> a security interest over accounts receivable, inventory, or both to the extent that that security interest secures payment or performance of an obligation under or in relation to a qualifying derivative and—
>
> (a) the counterparties to the derivative are—
>
> (i) 2 qualifying counterparties; or
>
> (ii) a qualifying counterparty and an overseas person; and
>
> (b) before enforcement of the interest, the collateral is transferred or otherwise dealt with so as to be in the possession or under the control of—
>
> (i) the enforcing counterparty; or
>
> (ii) another person (who is not the company that granted the security interest) on behalf of the enforcing counterparty, under the terms of an arrangement evidenced in writing.

The key terms in this provision, which define its scope, are "collateral", "qualifying derivative", "qualifying counterparty", "overseas person", "possession", and "control". These terms are discussed in detail in the response to question 14.

Tax payable to the Commissioner

Section 167(1) of the Tax Administration Act provides that PAYE withheld by an employer shall be held in trust for the Crown and, in the liquidation of the employer, shall not form part of the estate in liquidation. By contrast, subsection (2) provides that, if an employer has not dealt with the PAYE as required by subsection (1) or the PAYE rules, the amount of tax owing ranks, in a liquidation, in the ordinary way in accordance with Schedule 7 of the Companies Act (as outlined above).

On their face, these two subsections appear inconsistent. If withheld PAYE is indeed held on trust by the employer for the Crown and does not form part of the employer's estate in a liquidation (as subsection (1) states), why would the Commissioner have a claim for the amount of the tax in a liquidation (as subsection (2) states)? The Supreme Court has reconciled this inconsistency in favour of the more specific subsection (2) overriding the more general subsection (1).[~~83~~16] Accordingly, the priority of the Commissioner's claim would be determined in accordance with the "preferential creditors" rules outlined above.

~~*Designated settlement systems*~~

[~~81~~14] Inventory and book debts (or accounts receivable) are the principal assets that were traditionally subject to a floating charge. The concept of the floating charge became redundant once the PPSA came into force. This is because the PPSA allows what is essentially a fixed security interest to be granted over present and after-acquired property, even where that property is to be sold in the ordinary course of the debtor's business.

[~~82~~15] See ~~footnote 74~~Schedule 2.

[~~83~~16] *Jennings Roadfreight Limited (in liq)* v *Commissioner of Inland Revenue* [2014] NZSC 160.

~~Section 103A of the PPSA provides that the interest of an operator of a designated settlement system (**DSS**) has priority over any security interest in personal property if a participant in the DSS has, in accordance with the rules of that DSS:~~

~~(a) either~~

~~(i) granted a security interest in that personal property in favour of the operator; or~~

~~(ii) transferred that personal property, or the operator's interest in that personal property, to the operator; and~~

~~(b) taken that action for the purpose of, or in connection with, either~~

~~(i) effecting a settlement in accordance with the rules of that designated settlement system; or~~

~~(ii) mitigating a loss that may be incurred by the operator if the participant defaults.~~

~~Therefore, the interest of the Clearing Member in Collateral could be subordinated to the interest of a DSS operator if the Covered Customer is a participant in a DSS and has provided that same Collateral to the operator in accordance with the rules of the DSS.~~

Life insurers

Section 116 of the Insurance (Prudential Supervision) Act 2010 (the **IPS Act**) specifies the order of priority for the assets of a statutory fund of a life insurer in liquidation.

Section 116(4) gives policy holders priority over "other liabilities that are referable to the business of [the statutory fund]". Given that section 116 applies despite anything to the contrary in the Companies Act,~~[84]~~[17] it is unclear whether this provision is intended to give policy holders priority over both secured and unsecured general creditors of the statutory fund, or only the latter. However, this is likely to be an academic issue given the general prohibition on life insurers mortgaging or charging statutory fund assets.~~[85]~~

11. ~~16.~~ Stay on enforcement rights

Would the ~~Clearing Member's right to enforce~~FCM's enforcement of its security interest in ~~the Eligible Collateral and exercise its Credit Support Rights under each Covered Base Agreement and CDA, such as the right to liquidate the Eligible~~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 ~~responses~~response to ~~questions 11 and 12~~question 10 above, if at all)?

Yes, in certain circumstances.

The effect (if any) on the ~~Clearing Member~~FCM's rights under the Covered ~~Base~~ Agreement ~~and CDA~~ depends on the nature of the insolvency proceedings to which the Covered Customer is subject. There are five insolvency regimes in New Zealand that could apply to the Covered Customer.[18] These are:

~~[84]~~[17] Section 116(12) of the IPS Act.

~~[85] See footnote 105.~~

[18] These insolvency regimes could apply in the insolvency of a company that acts as trustee of a trust fund, as well as in the more typical scenario where the company is simply acting in its own right. However, where there is an insolvent trustee, the application of these insolvency regimes will necessarily be different in some instances to what is described below. Most notably, in a liquidation of a company that acts as trustee, the trust assets held by

(a) the liquidation regime set out in Part 16 of the Companies Act, which applies to companies incorporated in New Zealand, bodies corporate incorporated outside New Zealand, and "associations"[19] (discussed in (1) below);

(b) the voluntary administration regime set out in Part 15A of the Companies Act, which applies to companies incorporated in New Zealand and bodies corporate incorporated outside New Zealand (discussed in (2) below);

(c) the statutory management regimes set out in:

(i) the Corporations (Investigation and Management) Act 1989 (the **CIM Act**), which applies to any body of persons, whether incorporated or not, and whether incorporated or established in New Zealand or elsewhere;[20]

(ii) the Reserve Bank of New Zealand Act 1989 (the Reserve Bank Act), which applies to banks registered in New Zealand;[21]

(iii) the IPS Act, which applies to "licensed insurers";[22] and

(iv) the Financial Market Infrastructures Act 2021 (the **FMI Act**),[23] which applies to the operator of a "systemically important" designated financial market infrastructure (**FMI**),[24]

---

the company will generally fall outside the scope of the liquidation provisions in the Companies Act.

By contrast, if the underlying *trust fund* (rather than the *trustee*) is insolvent, the insolvency regimes outlined below would not apply. In that case, the insolvency of the trust fund would most likely be dealt with by way of discretionary court orders. See, further, section 6.1 of our opinion to ISDA on close-out netting dated 30 August 2021 (as updated, the **Netting Opinion**).

19 Section 240B of the Companies Act gives the High Court jurisdiction to appoint a liquidator to an "association". Section 2 defines "association" as including:

> a body corporate (other than a company, an overseas company, or a body corporate that may be put into liquidation under or in accordance with the Act under which it is incorporated or registered);

The liquidation regime set out in Part 16 of the Companies Act applies in relation to the liquidation of an "association", subject to the modifications and exclusions set out in Schedule 11 of that Act.

In the context of the types of entity covered by this opinion, the Reserve Bank and a local authority would each be an "association".

20 Section 2(4) of the CIM Act provides that, where a body corporate incorporated outside New Zealand carries on business or has assets in New Zealand, the statutory management rules apply in respect of that business or those assets as if the business were carried on, or the assets were held, by a separate person.

21 Section 117(3) of the Reserve Bank Act provides that, where a registered bank that is declared to be subject to statutory management is incorporated outside New Zealand, the statutory management rules apply to the property, rights, assets, and liabilities relating to its New Zealand business.

22 Generally speaking, the IPS Act does not set out a bespoke comprehensive statutory regime for licensed insurers. Rather, the IPS Act applies the provisions of the CIM Act to the statutory management of a licensed insurer. Section 171 of the IPS Act provides that, where a licensed insurer that is declared to be subject to statutory management is an overseas person, the statutory management rules apply to the property, rights, assets, and liabilities relating to its New Zealand business.

23 The FMI Act received Royal assent on 10 May 2021. While parts of that Act are already in force, most of the provisions discussed in this opinion are not. It is expected that the FMI Act will be in full force by the end of 2022 or early 2023.

The FMI Act will replace the existing regime in Part 5C of the Reserve Bank Act that regulates DSSs.

24 The FMI Act provides that "FMI":

> (a) means a multilateral system for the clearing, settling, or recording of any of the following:
>
> (i) payments:
>
> (ii) personal property, or transactions involving personal property, within the financial system:

(discussed in (3) below);

(d) the receivership regime set out in the Receiverships Act 1993 (discussed in (4) below); and

(e) the compromises regime set out in Parts 14 and 15 of the Companies Act, which applies to compromises in respect of companies incorporated in New Zealand, or overseas companies registered under the Companies Act (or, in the case of Part 15, "associations"), and their creditors (discussed in (5) below).

An outline of the three most important insolvency regimes (liquidation, administration and statutory management) is set out in section 6 of the Netting Opinion. We assume, in the discussion below, that the rules of each insolvency regime would apply irrespective of the (foreign) governing law of the Covered Agreement. This is on the basis that insolvency laws are mandatory laws of the forum.

(1) ***Liquidation***

Liquidation is a distributive, rather than a rehabilitative, regime. The general scheme of the liquidation provisions in the Companies Act is that secured creditors should be able to exercise their rights independently of the liquidation of the insolvent company. The ~~Clearing Member~~FCM's rights under the Covered ~~Base~~ Agreement ~~and CDA~~ should not be subject to any stay or freeze or, except as outlined in our response to question ~~17~~15, otherwise be affected by the liquidation of the Covered Customer.

(2) ***Administration***

Administration is a more rehabilitative regime than liquidation. The administration regime is intended to freeze a company's financial position while the administrator and the creditors negotiate the company's future. In particular, section 239ABC of the Companies Act provides that:

> Subject to subpart 10, a person must not, during the administration of a company, enforce[25] a charge over the property of the company, except-
>
> (a) with the administrator's written consent; or
>
> (b) with the permission of the Court.

In this context, "charge" is defined to include:

(iii) other transactions within the financial system; and

(b) includes (without limitation) a system that is commonly regarded, within the financial system in New Zealand or elsewhere, as a financial market infrastructure, including a financial market infrastructure of any of the following types:

(i) a payment system:

(ii) a central securities depository:

(iii) a securities settlement system:

(iv) a central counterparty:

(v) a trade repository:

(vi) a combination of 2 or more of the types of financial market infrastructure listed in subparagraphs (i) to (v)

Section 92 of the FMI Act provides that, if the home jurisdiction of an operator under statutory management is not New Zealand, that Act's statutory management regime applies only to the operator's property, rights, assets, and liabilities relating to its New Zealand business or, if the operator has business undertakings unrelated to the FMI, that part of its New Zealand business that relates to the FMI.

[25] The term "enforce" is defined broadly in section 239ABK of the Companies Act to include assuming control of, or exercising a right as secured creditor in relation to, the charged property.

> a right or interest in relation to property owned by a company, by virtue of which a creditor of the company is entitled to claim payment in priority to [non-preferential unsecured creditors] …

Section 239ABC will, therefore, apply if the Covered ~~Base~~ Agreement ~~and CDA~~ creates a "charge" under its governing law or if a court decides that the issue involves mandatory New Zealand law and that, under New Zealand law, a "charge" is created.[26]

Generic exception for secured creditors

However, the moratorium in this provision is expressed to be subject to subpart 10. Subpart 10 (more specifically, sections 239ABL and 239ABM) allows the enforcement of a charge over the property of a company in administration where:

- a secured creditor having a charge over all, or substantially all, of the company's property begins enforcing[~~86~~] the charge no later than the 10th working day after the commencement of the administration; or

- *any* secured creditor has begun enforcing its charge prior to the commencement of the administration. However, in this case, the administrator may apply to the court for an order restraining the secured creditor's actions. Any such order granted must adequately protect the secured creditor's interests.

Accordingly, where this moratorium applies, the ~~Clearing Member~~FCM will be unable to exercise its secured creditor rights unless it qualifies under one of the two exemptions. In practice, it is unlikely that the ~~Clearing Member~~FCM would have a charge over all- (or substantially all-) assets ~~security over~~of the Covered Customer. Assuming it does not, the ~~Clearing Member~~FCM's only protection would be if it were able to begin enforcement prior to the commencement of administration. Obtaining prompt notice of an impending administration would, of course, then be crucial.

Exception for secured creditors in respect of qualifying derivatives

The Derivatives Margin Act inserted a new section 239ABMA into the Companies Act. The effect of this new provision is to provide an exception to the moratorium in section 239ABC where collateral secures "qualifying derivatives", and certain other conditions are met. Section 239ABMA provides that:

> (1) Nothing in sections 239ABC, 239ABD, 239ABE, and 239ABG limits or prevents any person referred to in subsection (2) from enforcing a security interest over collateral to the extent that the security interest secures payment or performance of an obligation under or in relation to a qualifying derivative if—
>
> (a) the counterparties to the derivative are—
>
> (i) 2 qualifying counterparties; or
>
> (ii) a qualifying counterparty and an overseas person; and

[26] The concept of a "charge" under the Companies Act is to be interpreted in the light of the "security interest" definition in the PPSA: *Dunphy* v *Sleepyhead Manufacturing Co Ltd* [2007] NZCA 241, ¶ 37.

[~~86~~] ~~"Enforce" is broadly defined in section 239ABK to include the exercise of any secured creditor right arising under contract.~~

(b) before enforcement, the collateral is transferred or otherwise dealt with[27] so as to be in the possession or under the control of—

(i) the secured creditor; or

(ii) another person (who is not the company that granted the security interest) on behalf of the secured creditor, under the terms of an arrangement evidenced in writing.

(2) The persons are—

(a) the secured creditor:

(b) a receiver or person appointed as mentioned in paragraph (a), (b), or (d) of the definition of enforce in section 239ABK as that definition applies in relation to the security interest, or any of the security interests (even if appointed after the decision period).

The scope of this exception derives from the following key terms it uses: "collateral", "qualifying derivative", "qualifying counterparty", "overseas person", "possession", and "control". These terms take their meaning from section 122A of the Reserve Bank Act. We consider each of these defined terms in turn below.

- *"Collateral"*

collateral means any 1 or more of the following:

(a) a financial product:

(b) gold, silver, or platinum:

(c) a document of title, a chattel paper, an investment security, money, a negotiable instrument, or an intangible (with terms and expressions used in this paragraph having the same meanings as in section 16(1) of the [PPSA]):

(d) if a person (an **intermediary**) maintains an account to which interests in property, or rights to payment or delivery of property, of a kind specified in any of paragraphs (a) to (c) may be credited or debited, the rights of a person in whose name the intermediary maintains the account, to the extent that those rights relate to the interests in that property or the rights to payment or delivery of that property;[28]

(e) the proceeds of property of a kind specified in any of paragraphs (a) to (d)

Covered Collateral would be "collateral" for the purposes of this definition.

- *"Qualifying derivative"*

qualifying derivative, in relation to enforcing a security interest over collateral,

[27] The requirement for collateral to be "transferred or otherwise dealt with" so as to confer possession or control (which is borrowed from section 14A(1)(b) of the Payment Systems and Netting Act 1998 (Cth) (the **PSNA**)) is, at best, unnecessary and, at worst, problematic.

It remains to be seen how the New Zealand courts will interpret the words "transferred or otherwise dealt with". It is possible that the courts may take a pragmatic view and read down those words so that, in effect, this requirement is satisfied simply by virtue of the secured creditor having possession or control of the collateral.

[28] Collateral of this kind is referred to as **intermediated collateral**.

means a derivative[29] to which both of the following apply:

(a) the derivative is subject to—

(i) a netting agreement to which sections 310A to 310O of the Companies Act 1993 or sections 255 to 263 of the Insolvency Act 2006 apply; or

(ii) netting under the rules of a designated settlement system; and

(b) the enforcing counterparty's interest in the collateral is evidenced in writing

A derivative entered into under a Covered Agreement would be a "qualifying derivative" for the purposes of this definition if the Covered Agreement is a "netting agreement" to which sections 310A-O of the Companies Act applies.[30] The Companies Act's definition of "netting agreement" is discussed in section 7 of the Netting Opinion. As we have not reviewed any particular Covered Agreement, we cannot express a definitive view on whether it might constitute a "netting agreement" for this purpose. However, based on our understanding of the form and substance of a typical Covered Agreement, we expect it is likely such an agreement *would* constitute a "netting agreement".

At one stage, the Derivatives Margin Bill proposed that its amendments would only apply to "qualifying derivatives" entered into on or after the commencement date of the Act.[31] However, the position changed in response to strong opposition to the dual regime this would have created. Consequently, the Derivatives Margin Act states that its amendments apply to:

(a) a qualifying derivative entered into before the commencement of this clause if, on that commencement, any obligations remain under or in relation to the derivative (whether the obligations are contingent or otherwise); and

(b) a qualifying derivative entered into on or after the commencement of this clause.

The effect of this change is to prevent a distinction being drawn between the treatment of pre- and post-commencement date Covered Contracts.

29 A "derivative" for this purpose means a derivative within the meaning of section 8(4) of the Financial Markets Conduct Act 2013 (the **FMC Act**) (but disregarding any declaration referred to in section 8(5)(b) of that Act). The effect of those words in parentheses is that designations, such as that made under the Financial Markets Conduct (Forward Foreign Exchange Contracts) Designation Notice 2017, are to be ignored in construing the term "derivative".

The issue of whether each type of Covered Contract falls within the FMC Act's definition of "derivative" is beyond the scope of this opinion. However, where Covered Collateral secures Covered Contracts some of which are "qualifying derivatives" and others of which are not, the FCM should be able to rely on this exception to the administration moratorium and exercise its secured creditor rights in order to recover the amount owing in relation to those "qualifying derivatives" (but no more). That is, the FCM's position is not tainted by the fact that Covered Contracts that are not "qualifying derivatives" may be secured by the same Covered Collateral. The use of the words "to the extent that" in section 239ABMA(1) supports that conclusion.

30 The Companies Act's definition of "netting agreement" is discussed in section 7 of the Netting Opinion. As we have not reviewed any particular Covered Agreement, we cannot express a definitive view on whether it might constitute a "netting agreement" for this purpose.

31 The commencement date of Part 1 of the Derivatives Margin Act was 31 August 2019.

- *"Qualifying counterparty"*

qualifying counterparty means—

(a) a registered bank; or

(b) the Accident Compensation Corporation (as continued by section 259 of the Accident Compensation Act 2001); or

(c) the Guardians of New Zealand Superannuation established under section 48 of the New Zealand Superannuation and Retirement Income Act 2001; or

(d) a specified operator [of a DSS]; or

(e) any prescribed entity; or

(f) any other entity of a prescribed class[32]

- *"Overseas person"*

overseas person means—

(a) a natural person who is not ordinarily resident in New Zealand; or

(b) an entity (within the meaning of section 6(1) of the [FMC Act])[33] that is incorporated or established outside New Zealand

An FCM would likely be an "overseas person" for this purpose.

- *"Possession"*

possession includes possession within the meaning of section 18 of the [PPSA] (subject to section 122B and regulations made under section 173(1)(fc) and (fd))[34]

- *"Control"*

[32] There are no prescribed entities or prescribed classes as at the date of this opinion.

[33] "Entity" is defined in the FMC Act as meaning any of the following:

(a) company or other body corporate;

(b) a corporation sole;

(c) in the case of a trust that has:

(i) only one trustee, the trustee acting in his, her, or its capacity as trustee; and

(ii) more than one trustee, the trustees acting jointly in their capacity as trustees; and

(d) an unincorporated body (including a partnership).

[34] Section 122B is summarised below in the discussion of "control". There are no regulations made under section 173(1)(fc) or (fd) of the Reserve Bank Act as at the date of this opinion.

Section 122B of the Reserve Bank Act provides an extensive list of circumstances that do, and those that do not, constitute "possession" or "control".[35] A summary of that provision is as follows:

(a) Collateral must be taken *not* to be in the possession or under the control of the enforcing counterparty if, under the security interest, the grantor is free to deal with the collateral in the ordinary course of business until the enforcing counterparty's interest in the collateral becomes fixed and enforceable. This applies even if the enforcing counterparty's interest in the collateral becomes fixed and enforceable before the enforcement of the security interest over that collateral.

(b) Intermediated collateral must be taken to be in the possession of the enforcing counterparty if that counterparty is the person in whose name the intermediary maintains the account.

(c) Intermediated collateral must be taken to be under the control of the enforcing counterparty if:

(i) the intermediary is not the grantor (but may be the enforcing counterparty or another person);

(ii) there is an agreement in force between the intermediary and one or more other persons, one of which is the enforcing counterparty or the grantor; and

(iii) the agreement has one or more of the following effects:

(A) the person in whose name the intermediary maintains the account is not able to transfer or otherwise deal with the collateral;

(B) the intermediary must not comply with instructions given by the grantor in relation to the collateral without seeking the consent of the enforcing counterparty (or a person who has agreed to act on the instructions of the enforcing counterparty); or

(C) the intermediary must comply, or must comply in one or more specified circumstances, with instructions (including instructions to debit the account) given by the enforcing counterparty in relation to the collateral without seeking the consent of the grantor (or any person who has agreed to act on the instructions of the grantor).

(d) The fact that a grantor retains a right of one or more of the following kinds does not mean there is no "possession" or "control":

(i) a right to receive and withdraw income in relation to the collateral;

(ii) a right to receive notices in relation to the collateral;

(iii) a right to vote in relation to the collateral;

(iv) a right to substitute other collateral that the parties agree is of equivalent value for the collateral;

[35] It is likely that, in considering the interpretation of section 122B, a New Zealand court would have regard to the approach taken in similar provisions in the FCD, The Financial Collateral Arrangements (No. 2) Regulations 2003 (UK), and the PSNA (including its Explanatory Memorandum – see, in particular, ¶ 1.142 - 1.157). See also Yeowart and Parsons, *The Law of Financial Collateral* (2016), chapter 8, and the Financial Markets Law Committee paper entitled *Issue 1: Collateral Directive — Analysis of uncertainty regarding the meaning of 'possession or ... control' and 'excess financial collateral' under the Financial Collateral Arrangements (No. 2) Regulations 2003*, dated December 2012.

(v) a right to withdraw excess collateral; or

(vi) a right to determine the value of collateral.

Under section 239ABMA(1)(b), *either* "possession" *or* "control" is required. Given that Covered Collateral is not capable of "possession" within the PPSA meaning of the term, the rules in the Reserve Bank Act relating to the possession[36] and control of collateral (see (b) and (c) above) are crucial in that case. Whether an FCM has such possession or control in relation to Covered Collateral would depend on the terms of the particular Covered Agreement and the practice of the parties.

Effect of deed of company arrangement

Section 239ACT(2) provides that, where a deed of company arrangement has been entered into in relation to a company in administration, this does not prevent a secured creditor from enforcing its charge, except so far as:

~~(a)~~ (a) the deed provides otherwise in relation to a secured creditor who voted in favour of the resolution to execute that deed; or

~~(b)~~ (b) the Court orders otherwise under section 239ACV(1)(a).

(3) ***Statutory management***

Like administration, statutory management is a more rehabilitative regime. In broad terms, making a party subject to statutory management in New Zealand creates a moratorium in relation to that party's affairs.~~87~~[37] The statutory management moratorium provides that no person may, among other things:

…

(d) Enter into possession, sell, or appoint a receiver of the property of that corporation, or property in respect of which the corporation has an equity of redemption: [or]

(e) Exercise or continue any power or rights under, or in pursuance of, any mortgage, charge, debenture, instrument or other security over the property of the corporation:

Accordingly, if, under the governing law of ~~the~~a Covered ~~Base~~ Agreement ~~and CDA~~, the Covered Collateral remains "the property of" the Covered Customer,~~88~~ the statutory moratorium prohibits the exercise by the ~~Clearing Member~~FCM of its secured creditor rights. However, there are ~~two~~four points to note here.

- First, and most importantly, the Derivatives Margin Act created a new exception to this moratorium.[38] As with the exception to the *administration* moratorium discussed above, the exception to the *statutory management* moratorium applies where collateral secures "qualifying derivatives" and certain other conditions are met. Section 42(10) of the CIM Act provides that:

[36] These rules build on the PPSA definition of "possession" by providing that, *for the specific purposes of these provisions in the Reserve Bank Act*, a person may have possession of cash Covered Collateral.

~~87~~[37] Section 42 of the CIM Act. The equivalent provision in the Reserve Bank Act is section 122.

~~88 This would be the case if New Zealand law determined this issue. (The same issue arises in the context of the moratorium under the administration regime.)~~

[38] Section 42(10) of the CIM Act. The equivalent provision in the Reserve Bank Act is section 122(9A).

Nothing in subsection (1) limits or prevents the exercise of any rights to enforce a security interest over collateral to the extent that the security interest secures payment or performance of an obligation under or in relation to a qualifying derivative if—

(a) the counterparties to the derivative are—

(i) 2 qualifying counterparties; or

(ii) a qualifying counterparty and an overseas person; and

(b) before the exercise of the rights, the collateral is transferred or otherwise dealt with so as to be in the possession or under the control of—

(i) the enforcing counterparty; or

(ii) another person (who is not the corporation that granted the security interest) on behalf of the enforcing counterparty, under the terms of an arrangement evidenced in writing.

The key defined terms used in section 42(10) have the same meaning as set out above in the discussion of the exception to the administration moratorium.

The equivalent exception in the Reserve Bank Act (section 122(9A)) is almost identical to section 42(10) of the CIM Act, other than in one significant respect. The Reserve Bank Act exception is more limited in its scope; it only permits enforcement rights to be exercised after the "specified time". The "specified time" is the close of the day after the date on which the statutory management commenced (the **default time**), or any earlier or later time specified by the Reserve Bank in a notice issued before the default time. The Reserve Bank may only specify a *later* time (i.e., extend the temporary moratorium) where it is satisfied of certain matters. These matters include that the registered bank in statutory management can meet, when they become due and payable, its liabilities under its netting agreements and its liabilities in respect of security interests securing "qualifying derivatives".

- Secondly, if the Covered Customer is the operator of a "systemically important" designated FMI and is in statutory management under the FMI Act, section 125(2) of that Act provides that the resulting moratorium does not limit or prevent the exercise of a right to which section 42(1)(d) or (e) applies (as to which, see above) if the right is triggered by the statutory management and is exercised after the default time or an earlier or later time specified by the relevant regulator in a notice issued before the default time.[39]

Accordingly, in those circumstances, and in the absence of a contrary notice from the regulator, the FCM would be able to exercise its secured creditor rights on the second day after the commencement of the Covered Customer's statutory management.[40]

[39] Section 126 of the FMI Act sets out the matters in respect of which the regulator must be satisfied before it can specify a time that is *later* than the default time. These matters are that:

(a) [the operator (**A**)] is able to meet all of its liabilities under the rules of the FMI; and

(b) either—

(i) A complies with the minimum capital requirements (if any) set by a standard issued under section 31; or

(ii) there are satisfactory arrangements in place to ensure that A meets all of its liabilities referred to in paragraph (a) as and when those liabilities become due and payable and those arrangements will remain in place until A complies with the requirements referred to in subparagraph (i) or the statutory management is terminated, whichever occurs first.

[40] In this respect, the FCM might be in a slightly worse position if a Covered Customer that is an operator of a designated FMI were put into statutory management *under the FMI Act* (as discussed in this second point) than if it were put into statutory management *under the CIM Act* (as discussed in the first point above). That letter scenario is possible, but unlikely. The Financial Markets Authority is required to obtain the consent of the Reserve Bank before making a recommendation that would lead to an operator of a designated FMI being subject to statutory management: section 38(6) of the FMI Act.

- Thirdly, while the statutory moratorium also generally prohibits the exercise of rights of set-off against the corporation in statutory management, there is an exception for rights of set-off provided for in a "netting agreement" (~~such as the~~which a Covered ~~Base~~ Agreement ~~and CDA~~may be, although see footnote 30).[41] Furthermore, section 42(7)(b)(ii) of the CIM Act[~~89~~42] provides that the moratorium referred to above does not prevent:

> The taking of an account, in accordance with the netting agreement, of all money due between the parties to the netting agreement in respect of transactions affected by the termination;

  The ~~Clearing Member~~FCM could argue that this allows it to exercise its contractual right to set off the value of the Covered Collateral against the Covered Customer's indebtedness (assuming the Covered Agreement confers such a right).

- ~~Secondly~~Fourthly, it may be difficult for the statutory manager (or an administrator) of the Covered Customer, *in practice*, to enforce a moratorium where the collateral is located offshore and where (as here) the security agreement is governed by foreign (i.e., non-New Zealand) law.

(4) ***Receivership***

A receiver, manager or receiver and manager of a New Zealand company's affairs may be appointed either by the terms of a contract (typically, a contract granting a security interest) or by a court. In either case, the Receiverships Act applies. A receiver is generally appointed to manage all or substantially all of the company's affairs.

The options available to a receiver include:

(a) selling the assets of the company in respect of which the receiver is appointed; or

(b) continuing to run the business of the company as a going concern; or

(c) putting the company into liquidation.

(5) ***Compromises***

The Companies Act contains a statutory procedure by which a company may enter into a compromise with its creditors. A "compromise" is defined in section 227 of the Companies Act to include:

> a compromise –
>
> (a) Cancelling all or part of a debt of the company; or
>
> (b) Varying the rights of its creditors or the terms of a debt; or
>
> (c) Relating to an alteration of a company's constitution that affects the likelihood of the company being able to pay a debt:

A compromise proposal may be initiated by the board of directors of the company, a receiver, a liquidator or, with the leave of the court, any creditor or shareholder of the company where any of those persons has reason to believe that the company is or will be unable to pay its debts.[43] Also, the court may, under section 236 of the Companies Act, on the application of the company or any

[41] New Zealand's netting legislation, and its effect on the liquidation, administration and statutory management regimes, is discussed in detail in the Netting Opinion.

[~~89~~42] The equivalent provision in the Reserve Bank Act is section 122(7)(b)(ii).

[43] Section 228(1) of the Companies Act.

shareholder or creditor of the company, order that a compromise is binding on the company and on such other persons as the court specifies.

Except in the case of a compromise ordered by the court, the party proposing the compromise must give to each known "creditor" of the company, the company itself, any receiver or liquidator and deliver to the Registrar of Companies for registration, the following documents:

(a) notice in accordance with the requirements in the Companies Act stating that a meeting of creditors is to be held;

(b) a statement setting out, among other things, the terms of the proposed compromise and explaining that the proposed compromise and any amendment to it at a meeting of creditors will be binding on all creditors if approved in accordance with the Companies Act; and

(c) a list of creditors known to the proponent who would be affected by the proposed compromise, together with amounts owing or estimated to be owing to each of them and their voting rights at the meeting of creditors.

A compromise only becomes binding if a majority in number representing at least 75% in value of the creditors, or a class of creditors, voting on the matter votes in favour of the compromise. A compromise is binding on the company and on all creditors to whom notice of the proposal is given.

In our experience, compromises are rarely entered into in respect of counterparties that are significant participants in the derivatives markets. And, even if a Covered Customer *were* to enter into a compromise with its creditors, it is likely the FCM would be able to enforce its rights in respect of the Covered Collateral before becoming bound by that compromise (although this might not be the case if the compromise were court-ordered).

12. ~~17.~~ **Clawback**

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 ~~Clearing Member~~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 favour of the ~~Clearing Member~~FCM or on any other basis? If so, how long before the insolvency does this suspect period begin? ~~If such a period exists, would the substitution of Collateral by the Covered Customer during this period invalidate an otherwise valid security interest if the substitute Collateral is of no greater value than the assets it is replacing?~~ Would the posting of additional ~~"~~variation margin~~"~~ (~~an amount that reflects a change in the mark-to-market value~~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?

Of the ~~three~~five insolvency regimes considered in our response to question ~~16~~14, the only one that provides for transactions to be challenged during "suspect periods" is the liquidation regime.[~~90~~44] However, there is a provision in the statutory management legislation that has a similar effect, although it is not linked to a "suspect period". In addition, the Property Law Act ~~2007~~ sets out rules that enable a court to order that property acquired or received under or through certain 'prejudicial dispositions' made by a debtor be restored for the benefit of creditors.

[~~90~~44] However, three of the provisions referred to below from the Companies Act liquidation regime (sections 292, 293 and 297) also apply to a corporation that is subject to statutory management: section 55(1) of the CIM Act (applied to the statutory management of an operator of a systemically important FMI by virtue of section 122(l) of the FMI Act) and section 139(1) of the Reserve Bank Act.

We discuss each of these below.

If the liquidator or statutory manager of the Covered Customer is successful in challenging a transaction, he or she may still face the practical difficulty of enforcing the relevant court order if the Covered Collateral is located outside New Zealand.

(1) ***Liquidation***

There are two provisions in the Companies Act under which a liquidator could challenge the ~~creation of a security interest over~~transfer of securities or cash Covered Collateral under ~~the~~a Covered ~~Base~~ Agreement ~~and CDA~~. These are section 292 (insolvent transaction voidable) and section 297 (transactions at undervalue). A third provision could be added if ~~transfers under the~~a Covered ~~Base~~ Agreement ~~and CDA create~~creates a "charge" under its governing law: section 293 (voidable charges). Where a "charge" *is* created, section 305 prescribes the rights and duties of the secured party. Each of these provisions is considered below.

Section 292 (insolvent transactions voidable)

Section 292(1) provides that a transaction by a company is voidable by its liquidator if the transaction is an "insolvent transaction" that is entered into within the "~~specified~~restricted period" (~~two years~~six months prior to the commencement of the liquidation).

"Insolvent transaction" is defined to mean:

> a transaction[~~91~~45] by a company that –
>
> (a) is entered into at a time when the company is unable to pay its due debts; and
>
> (b) enables another person to receive more towards satisfaction of a debt owed by the company than the person would receive, or would be likely to receive, in the company's liquidation.

There is a reversed onus provision in section 292(4A), which states that, unless the contrary is proved, a transaction that took place within the restricted period ~~of six months prior to the liquidation~~ is presumed to have been made at a time when the company was unable to pay its debts.

Section 292(4B) sets out the so-called "running account" exception, which provides that:

> Where –
>
> (a) ~~(a)~~ a transaction is, for commercial purposes, an integral part of a continuing business relationship (for example, a running account) between a company and a creditor of the company (including a relationship to which other persons are parties); and
>
> (b) ~~(b)~~ in the course of the relationship, the level of the company's net indebtedness to the creditor is increased and reduced from time to time as the result of a series of transactions forming part of the relationship;
>
> then –
>
> (c) subsections (~~c~~1) ~~subsection~~ and (1A) ~~applies~~(as relevant) apply in relation to all the transactions forming part of the relationship as if they together constituted a single transaction; and
>
> (d) ~~(d)~~ the transaction referred to in paragraph (a) may only be taken to be an insolvent transaction voidable by the liquidator if the effect of applying subsection (1) or (1A) in accordance with paragraph (c) is that the single transaction referred to in paragraph (c) is taken to be an insolvent transaction voidable by the liquidator.

[~~91~~45] A "transaction" is defined to include a conveyance or transfer of property by the company in liquidation or the creation of a charge over that property.

The effect of this exception is to treat all transactions that make up a continuing business relationship as one single transaction. A transaction within that business relationship may only be set aside under section 292 if the deemed single transaction (i.e., the overall position) is itself an insolvent transaction.

Assuming that the requirements of the following provisions were met:

- section 292(1)(b) (Collateral transferred within ~~two years~~six months of the liquidation); and
- section 292(2)(a) (Collateral transferred at a time when the company was unable to pay its due debts),

then the ~~Clearing Member~~FCM would need either:

- to negate section 292(2)(b) (~~Clearing Member~~FCM must receive more towards satisfaction of a debt than in the liquidation);~~92~~[46] or
- to rely on the "running account" exception.

In our view, it is unlikely that the ~~Clearing Member~~FCM could successfully negate section 292(2)(b). This is because the effect (in economic terms) of a transfer of securities or cash Covered Collateral under ~~the~~a Covered ~~Base~~ Agreement ~~and CDA~~ is to convert the ~~Clearing Member~~FCM from an unsecured creditor to a secured creditor, thereby increasing its recovery.~~93~~[47]

Whether the "running account" exception is available is a question of fact in each case.

Even if all the requirements of section 292(1) were satisfied, the ~~Clearing Member~~FCM could still avoid a transfer of securities or cash Covered Collateral being set aside by the liquidator of the Covered Customer. Section 296(3) of the Companies Act states that:

> A court must not order the recovery of property of a company (or its equivalent value) by a liquidator, whether under this Act, any other enactment, or in law or in equity, if the person from whom recovery is sought (**A**) proves that when A received the property –
>
> (a) A acted in good faith; and
>
> (b) a reasonable person in A's position would not have suspected, and A did not have reasonable grounds for suspecting, that the company was, or would become, insolvent; and
>
> (c) A gave value for the property or altered A's position in the reasonably held belief that the transfer of the property to A was valid and would not be set aside.

The ~~Clearing Member~~FCM has the onus of proof to establish that all the elements of section 296(3) are satisfied.~~94~~[48] In this regard:

(a) the good faith element is likely to be established if the ~~Clearing Member~~FCM had no knowledge of the financial position of the Covered Customer at the time the transfer of cash or securities Covered Collateral was made and, consequently, honestly believed that it was not gaining a preference;

~~92~~[46] The extent of any preference is to be measured against what creditors would receive in the *actual* liquidation, not what they would have received in a *hypothetical* liquidation occurring at the time of the transaction. In addition, it is not necessary for a liquidator to prove that the general body of creditors of the company had been disadvantaged by the impugned transaction: *Levin v Market Square Trust* [2007] 3 NZLR 391 (CA).

~~93~~ [47] See, for example, *Reynolds* v *James* [2012] NZHC 2132.

~~94~~[48] *In re Holm (a bankrupt)* [1974] 2 NZLR 455 (SC). For a discussion of the section 296(3) defence, and its equivalent provision in the Property Law Act – section 349(1) (outlined in (3) below), see *McIntosh* v *Fisk* [2017] NZSC 78.

(b) whether there were reasonable grounds to suspect the Covered Customer's insolvency is likely to be purely a question of fact; and

(c) in the context of the two alternatives in paragraph (c), the ~~Clearing Member~~FCM should be regarded as giving value for the transfer (see the discussion on this point below in the context of section 297).~~95~~[49]

The principles outlined above should apply not only to an initial transfer of cash or securities Covered Collateral but also to~~:~~

~~(a) improvements in the value of Eligible Collateral for existing Covered Transactions pursuant to a substitution (that is, where the substituted Collateral is more valuable than the Collateral it replaces); and(b)~~ the provision of additional ~~"variation margin"~~cash or securities Covered Collateral to maintain the required ~~credit support amount in respect of Covered Transactions~~ net liquidating equity (that ~~were~~is, in ~~existence before the provision of the additional variation margin~~commercial parlance, "top-up collateral").

Section 297 (transactions at undervalue)

Section 297 of the Companies Act provides that:

(1) Under subsection (2) the liquidator may recover from a person (**X**) the amount **C** in the formula A – B = C, where –

(a) **A** is the value that X received from a company under a transaction to which the company was or is a party; and

(b) **B** is the value (if any) that the company received from X under the transaction.

(2) The liquidator may recover the difference in value (that is, C in the formula in subsection (1)) from X if –

(a) the company entered into the transaction within the [period of two years prior to the commencement of the liquidation]; and

(b) either –

(i) the company was unable to pay its due debts when it entered into the transaction; or

(ii) the company became unable to pay its due debts as a result of entering into the transaction.

"Transaction" has the same meaning as in section 292(3) and, therefore, includes a conveyance or transfer of property by the company in liquidation or the creation of a charge over that property. Each transfer of cash or securities Covered Collateral would, therefore, be a "transaction".

Section 297(1) is difficult to construe in the context of a transfer of cash or securities Covered Collateral under ~~the~~a Covered ~~Base~~ Agreement ~~and CDA~~. This is because, in terms of paragraph (b), there is no explicit consideration received by the Covered Customer in return for that transfer. There are two possible interpretations.

The first interpretation is that consideration, in the context of ~~the~~a Covered ~~Base~~ Agreement ~~and CDA~~, should be looked at on a transfer-by-transfer basis. There must be separate and identifiable

~~95~~[49] In *Allied Concrete Limited* v *Meltzer* [2015] NZSC 7, the Supreme Court held that original value given by a creditor, prior to the impugned transaction, would be sufficient provided that the value was real and substantial.

consideration provided to the Covered Customer at the time of each transfer of Covered Collateral. This interpretation makes transfers of Covered Collateral under ~~the~~a Covered ~~Base~~ Agreement ~~and CDA~~ vulnerable to challenge under section 297(1) (assuming that the other requirements of section 297 are met). In particular, the fact that transfers of Covered Collateral typically occur *after* the underlying Covered ~~Transactions~~Contracts are entered into makes it easier to argue that the Covered Customer is receiving little benefit in return. A liquidator taking this interpretation to its extreme could argue that the ~~Clearing Member~~FCM had not in fact provided *any* consideration for a transfer of Covered Collateral. Therefore, the liquidator should be entitled to recover the full value of the Covered Collateral.

The second interpretation is that consideration, in the context of ~~the~~a Covered ~~Base~~ Agreement ~~and CDA~~, should be viewed not on a transfer-by-transfer basis but on the basis of the entire set of related transactions. These related transactions would include the initial entry into the Covered ~~Base~~ Agreement ~~and CDA~~, as well as the underlying Covered ~~Transactions~~Contracts secured by the Covered Collateral transferred. Under this interpretation, consideration *is* provided by the ~~Clearing Member~~FCM for transfers of Covered Collateral (but prior to the transfer and not simultaneously with it). The consideration is the ~~Clearing Member~~FCM's contractual promises embodied in the documentation for these related transactions.

The second interpretation is, in our view, the better approach. It is consistent with the principal aim of section 297, which is to avoid the assets of a company being depleted through its entry into transactions other than on commercial terms. That is, the assets of the Covered Customer cannot be depleted by a transfer of Covered Collateral if the Covered Collateral can only be applied to the extent of the Covered Customer's obligations to the FCM, and excess Covered Collateral must be returned.~~96~~[50]

Section 293 (voidable charges)

Section 293 of the Companies Act provides that:

> (1) A charge over any property or undertaking of a company is voidable by the liquidator if –
>
> (a) the charge was given within the ~~[~~restricted period [i.e., the period of ~~two years~~six months prior to the commencement of the liquidation]; and
>
> (b) immediately after the charge was given, the company was unable to pay its due debts.
>
> …
>
> (1A) [Subsection (1) does not apply ~~if~~] to a charge that –
>
> (a) ~~the charge~~ secures money actually advanced or paid, or the actual price or value of property sold or supplied to the company, or any other valuable consideration given in good faith by the grantee of the charge at the time of, or at any time after, the giving of the charge; or
>
> (b) ~~the charge~~ is in substitution for a charge that … was given before the ~~specified~~restricted period~~.~~:

Section 293 will only apply if the Covered ~~Base~~ Agreement ~~and CDA~~ creates a "charge" under its governing law. The definition of the term "charge" is set out in our response to question ~~16~~14, under the heading "Administration".

There is a reversed onus provision in section 293(2), similar to that in section 292(4A) (discussed above). Section 293(2) states that, unless the contrary is proved, a company giving a charge within the restricted period ~~of six months before the commencement of its liquidation~~ is presumed to have been unable to pay its due debts immediately after giving the charge.

~~96~~[50] *Re M C Bacon Limited* [1990] BCLC 324 (Ch D).

If section 293 were applicable, the ~~Clearing Member~~FCM would most likely seek to rely on the exception in section 293(1A)(a) to avoid the charge being set aside. In our view, the ~~Clearing Member~~FCM would have a good case to the extent that the Collateral secures indebtedness to the FCM under the Covered ~~Transactions entered into~~Agreement incurred on or after the date on which the Covered ~~Base~~ Agreement ~~and CDA~~ was entered into. Its argument would be that the charge "secures...other valuable consideration given in good faith by the grantee of the charge at the time of, or at any time after, the giving of the charge". The "valuable consideration" in this case would be the contractual rights embodied in the ~~Transactions~~Covered Customer's Covered Contracts.

However, the Covered ~~Base~~ Agreement ~~and CDA~~ could be set aside to the extent it purports to secure ~~Covered Transactions entered into prior~~indebtedness to the ~~Covered Base~~FCM under the Covered Agreement ~~and CDA being executed~~incurred prior to date of its execution.[~~97~~51] In that case, the ~~Clearing Member~~FCM could still avoid the Covered ~~Base~~ Agreement ~~and CDA~~ being set aside by proving to the court that section 296(3) is applicable.[~~98~~52]

> ~~The substitution of Collateral by the Covered Customer during the suspect period should not render the Covered Base Agreement and CDA voidable provided that the value of the substitute Collateral is no greater than the value of the Collateral it replaces.~~[~~99~~]

Section 305 (rights and duties of secured creditors)

If ~~the~~a Covered ~~Base~~ Agreement ~~and CDA~~ creates a "charge" under its governing law, the ~~Clearing Member~~FCM will be a "secured creditor" for the purposes of the Companies Act. Section 305 permits a secured creditor to realise the property of the company in liquidation and apply the sale proceeds in reduction of the indebtedness due to it. Section 305 also allows a secured creditor to value the property subject to the security interest, as opposed to selling it, and to claim in the liquidation as an unsecured creditor for the balance due. This second procedure is subject to a number of additional requirements (for example, the valuation may be rejected by the liquidator). For that reason, the second procedure is less likely to be used by a person in the ~~Clearing Member~~FCM's position than the first.

(2) ***Statutory management***

Section 54(1) of the CIM Act[~~100~~53] provides that:

> In any case where, whether before or after the passing of this Act, -
>
> (a) Any property has been acquired by a person in circumstances which cause it to be *just and equitable* that that person should hold it upon trust for any corporation that has been declared to be subject to statutory management; or
>
> (b) Any property has been *improperly disposed of*, whether or not the property has become subject to a trust, -
>
> the Court may, if it thinks fit, make an order –
>
> (c) That the property be transferred or delivered to the statutory manager:
>
> (d) That any person who acquired or received the property, or his or her administrator, shall pay to the statutory manager a sum not exceeding the value of that property.

[~~97~~51] See *Re C & D Webster Ltd (in liquidation)* [1995] 3 NZLR 590 (HC). That said, the New Zealand courts have typically adopted a liberal interpretation of the phrase "at the time of". Charges granted a number of weeks after consideration was given by the grantee have been held to be granted "at the time of" the giving of that consideration. What is important is that, at the outset (i.e., when the ~~Covered~~ Transaction is entered into), there is a promise to grant security.

[~~98~~52] Section 296(3) is discussed above in the context of section 292 (insolvent transaction voidable).

~~99 Section 293(1A)(b) and (3).~~

[~~100~~53] The equivalent provision in the Reserve Bank Act is section 138(1).

(our emphasis)

There is no definition of "property" in the CIM Act. However, it has been held that "property" in this context includes both money and bank deposits.[~~101~~54] On that basis, "property" could apply to both cash and securities Covered Collateral.

It is a question of fact in each case whether the "just and equitable" test in paragraph (a), or the "improperly disposed of" test in paragraph (b), has been satisfied. A lack of judicial authority on point makes it difficult to identify any guidelines as to when section 54(1) may be applicable. Those cases that *have* considered section 54 tend to involve clear cut situations where it would be difficult to argue against the court making an order. However, if section 54(1) *did* apply in the circumstances we are considering, it is likely that the exception set out in section 54(3) would be available to the ~~Clearing Member~~FCM. That provision states that:

> No order made pursuant to this section shall deprive any other person of any estate or interest in the property if the estate or interest was acquired in good faith and for valuable consideration.[~~102~~55]

(3) ***Property Law Act***

Section 346 of the Property Law Act states that subpart 6 of Part 6 of that Act applies to dispositions[~~103~~56] of property made:

- by a debtor who:
  - was insolvent at the time, or became insolvent as a result, of making the disposition; or
  - was engaged, or was about to engage, in a business or transaction for which its remaining assets were, given the nature of the business or transaction, unreasonably small; or
  - intended to incur, or believed, or reasonably should have believed, that it would incur, debts beyond its ability to pay; and
- with intent to prejudice a creditor, or by way of gift, or without receiving reasonably equivalent value in exchange.

A liquidator or a creditor that has been prejudiced by such a disposition can apply to the court for an order that either vests the relevant property in, or requires the recipient of the property to pay reasonable compensation to, the debtor (or other specified person).

Section 349 protects certain recipients of property that could otherwise be the subject of such a court order. In particular, section 349(1) provides that an order may not be made in relation to a person who acquired the property for valuable consideration and in good faith without knowledge of the fact that the property had been the subject of a disposition to which subpart 6 applies, or an acquirer from such person.

[~~101~~54] *Equiticorp Industries Group Limited (in statutory management)* v *The Crown* (judgment no. 47) [1998] 2 NZLR 481, 706-7 (HC).

[~~102~~55] The exception is stated to apply if "any *other* person" (our emphasis) is deprived of an interest in the property. This suggests that the exception cannot protect the person to which section 54(1) refers (i.e., the person that acquires an interest in property directly from the corporation (in this case, the ~~Clearing Member~~FCM)). However, we expect that, in practice, both *direct* and *indirect* acquirers of an interest in the property of a corporation subject to statutory management would have the benefit of the exception in section 54(3). That is, if a *direct* acquirer acquires its interest "in good faith and for valuable consideration", it should not fall within the scope of section 54(1)(a) or (b). This seems to be the approach taken in the *Equiticorp* case.

[~~103~~56] The term "disposition" is defined broadly to include a transfer, assignment, delivery or payment, and the grant or creation of a mortgage or charge.

~~V. MISCELLANEOUS~~

~~We set out below our analysis of the issues raised under the heading "Miscellaneous" in Part III of the Instruction Letter.~~

~~18. Governing law of Covered Base Agreement and CDA~~

~~***Would the parties' agreement on the***~~

13. Requirements where New Zealand law is not governing law ~~*of each Covered Base Agreement and CDA and submission to jurisdiction be upheld in New Zealand, and what would be the consequences if they were not?*~~

~~***Governing law***~~

~~The parties' agreement on the governing law of the Covered Base Agreement and CDA will be recognised in New Zealand if:~~

~~· the choice of law is legal and is freely and genuinely made in good faith;~~

~~· there is no reason for avoiding the choice of law on the ground of New Zealand public policy; and~~

~~· the relevant matter to which it is sought to apply the foreign law is substantive and not procedural.~~

~~Subject to the various discussions above on the statutory (PPSA) and common law conflict of laws rules, in general, each of these elements should be present where the Covered Customer and the Clearing Member enter into the Covered Base Agreement and CDA. Accordingly, except where those conflict of laws rules apply or unusual circumstances exist, a New Zealand court would give effect to the choice of New York or English law, as the case may be, to govern the Covered Base Agreement and CDA.~~

~~***Submission to jurisdiction***~~

~~The parties' submission to the jurisdiction of the New York courts should be recognised in New Zealand.~~

~~***Consequence of agreement not being upheld***~~

~~If the parties' agreement on governing law and submission to jurisdiction were not upheld in New Zealand, the Covered Base Agreement and CDA would be examined by the New Zealand courts on the basis of New Zealand law (including its conflict of laws rules).~~ **for validity and perfection**

Assuming that (a) pursuant to the laws of New Zealand, 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 New Zealand) 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 New Zealand in enforcing its security interest in Covered Collateral?

If, pursuant to the laws of New Zealand, the laws of another jurisdiction govern the creation, validity and perfection of a security interest in the Covered Collateral and the FCM has obtained a valid and perfected security interest under the laws of that jurisdiction, a New Zealand court would recognise the FCM as having a valid and perfected security interest and the FCM would not need to observe or undertake any formalities, notification requirements or other procedures in New Zealand in enforcing its security interest in Covered Collateral.

Additional considerations

14. ~~19.~~ Other ~~issues~~considerations

Are there any other local law considerations that you would recommend the ~~Clearing Member~~FCM to consider in connection with ~~taking and realising upon the Eligible~~enforcing its security interest in Covered Collateral ~~from the Covered Customer~~?

No.

15. ~~20.~~ **Other circumstances ~~that might affect~~affecting enforcement**

Are there any other circumstances you can foresee that might affect the ~~Clearing Member~~FCM's ability to enforce its security interest in the Covered Collateral in New Zealand?

No.

Yours faithfully

SCHEDULE 1

Assumptions and qualifications

1. **Assumptions**

Following are the assumptions set out in the Instruction Letter that we have been instructed to assume in preparing this opinion.

Part ~~A~~B

(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 authorises 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) ~~(a)~~ On the basis of the terms and conditions of ~~a~~the Covered ~~Base~~ Agreement ~~and CDA~~ and other relevant factors~~,~~ and acting in a manner consistent with the intentions stated in the Covered ~~Base~~ Agreement ~~and CDA, the parties~~, over time ~~enter into~~, the Covered Customer trades a number of Covered ~~Transactions~~Contracts that are ~~intended to be governed by the Covered Base Agreement and CDA. The Covered Transactions entered into include any~~cleared and carried in or ~~all of~~credited to the ~~transactions described in Appendix A~~Customer Account.

(d) ~~(b)~~ Some of the Covered ~~Transactions~~Contracts provide for an exchange of cash ~~by both parties~~ and others provide for the physical delivery of shares, bonds or commodities in exchange for cash.

(e) ~~(c)~~ After ~~entering into these Covered Transactions and prior to their maturity,~~commencing trading and while the Covered Customer has open positions in Covered Contracts, the Covered Customer, which is organised in New Zealand, becomes the subject of a ~~voluntary or involuntary case~~formal bankruptcy, insolvency, liquidation, reorganisation, administration or comparable proceeding (collectively, the **insolvency**) under the insolvency laws of New Zealand and~~, subsequent~~ 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 ~~assume~~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 ~~reject the~~rejecting its unprofitable Covered Transactions ~~for the Covered Customer or otherwise prevent the exercise of close-out rights by the Clearing Member~~).

(g) The statements contained in the Instruction Letter, the S&C Memo and the Summary Annex are true and correct.

Part ~~B~~C

As for Part ~~A~~B (as applicable), with the following modifications:

(a) ~~Pursuant to the relevant~~ **Covered** ~~Base Agreement and CDA, the counterparties agree that~~ **Collateral** ~~will include~~ means the Covered Customer's Collateral consisting of:

(i) its rights under or in respect of its Customer Account;

(ii) its rights under or in respect of its Covered Contracts;

(iii) cash credited to ~~an account~~its Customer Account (as opposed to physical notes and coins)[104]~~;~~ and ~~certain~~

(iv) the types of securities ~~(as further described~~that are identified below~~)~~ and that are located or deemed located either ~~(i)~~ in New Zealand~~,~~ or ~~(ii)~~ outside New Zealand (~~**Eligible Collateral**~~). ~~Eligible Collateral also includes the Covered Customer's right, title and interest in (i) its contractual rights under its Futures Transactions and Cleared Derivatives Transactions, (ii) its right to payment from DCOs in respect of those Futures Transactions and Cleared Derivatives Transactions and (iii)~~.[57]

(b) Covered Collateral in the ~~proceeds~~form of ~~such rights (together,~~ 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 ~~**Covered Customer Rights**~~)**UCC**), as described in paragraph 1.40 of the Summary Annex.

~~(b) Please assume that any~~

(c) Any securities provided as ~~Eligible~~Covered Collateral are denominated in either New Zealand dollars or any freely convertible currency and consist of (i) corporate debt securities whether or not the issuer is ~~organized~~organised or located in New Zealand; (ii) debt securities issued by the government of New Zealand; 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 ~~a Clearing Member or a DCO~~the FCM as Collateral under ~~a~~the Covered ~~Base~~ Agreement ~~and CDA~~, held directly in this form by the ~~Clearing Member or a DCO~~FCM (that is, not held by the ~~Clearing Member or DCO~~FCM indirectly ~~with~~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 ~~a Clearing Member or DCO~~the FCM as Collateral under ~~a~~the Covered ~~Base~~ Agreement ~~and CDA~~, held directly in this form by the ~~Clearing Member or DCO~~FCM so that the ~~Clearing Member or DCO~~FCM is shown as the relevant holder in the register for such securities (that is, not held by the ~~Clearing Member or DCO~~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 ~~a Clearing Member or DCO~~the FCM as Collateral under ~~a~~the Covered ~~Base~~ Agreement ~~and CDA~~, held directly in this form by the ~~Clearing Member or DCO~~FCM so that the ~~Clearing Member or DCO~~FCM is shown as the relevant holder in the electronic register for such securities (that is, not held by the ~~Clearing Member or DCO~~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 ~~Clearing Member or DCO~~FCM where such interest has been credited to the account of the ~~Clearing Member or DCO~~FCM in connection with a ~~transfer~~deposit

---

[104] ~~Therefore, for the purposes of this opinion, **cash** refers not to currency but to the debt owed to the Clearing Member by the relevant financial institution with which it holds its collateral account.~~

[57] Such securities are included as "Covered Collateral" to the extent that they are credited to the Covered Customer's Customer Account.

of Collateral by the Covered Customer ~~to~~with the ~~Clearing Member~~FCM under ~~a~~the Covered ~~Base~~ Agreement ~~and CDA~~.

~~The precise nature of the rights of the Clearing Member in relation to its interest in intermediated debt securities and as against its Intermediary will be determined, among other things, by the law of the agreement between the Clearing Member and its Intermediary relating to its account with the Intermediary, as well as the law generally applicable to the Intermediary, and possibly by other considerations arising under the general law or the rules of private international law of New Zealand. The Clearing Member's Intermediary may itself hold its interest in the relevant debt securities indirectly with another Intermediary or directly in one of the three forms mentioned in (i), (ii) and (iii). In practice, there is likely to be a number of tiers of Intermediaries between the Clearing Member and the issuer of such securities, at least one of which will be an Intermediary that is a national or international CSD.~~

~~Our expectation is that the Clearing Member 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).~~

~~(c) Due to regulatory requirements, Collateral posted will be held by intermediaries in a way that identifies the Collateral as belonging to customers of the Clearing Member. For example, if the Collateral is held by the Clearing Member or an intermediary of the Clearing Member, that account will show that it is held for customers generally and the Clearing Member's books will show that the collateral is held for the individual customer. If the Collateral is held by the DCO or an intermediary of the DCO, that account will show that it is held for customers generally and the DCO's books will show that the Collateral is held for the individual customer.~~

~~(d) Please assume that cash Collateral is denominated in a freely convertible currency and is held in an account under the control of the Clearing Member or DCO.~~

~~(e) In the case of cash Collateral that is transferred to a Clearing Member as margin, such cash Collateral can be viewed either as a transfer of title in that cash to the Clearing Member, or as collateral in which the Clearing Member can take a security interest. Under the first alternative, the Clearing Member can be viewed as receiving such cash Collateral as a principal and therefore having a right to net that cash margin against amounts owing from the Covered Customer to the Clearing Member. A supporting fact for this view is if the Clearing Member is paying the Covered Customer interest on such cash Collateral. Alternatively, if the Clearing Member holds such cash Collateral as agent, it would need to perfect its security interest in such cash Collateral. In applying these concepts to US cash Collateral, US counsel views the cash as a set-off right. If the treatment of cash Collateral is subject to similar alternate analyses in New Zealand, please advise as to the proper treatment under each alternative.~~

(d) ~~(f)~~ In the case of questions ~~11~~10 to ~~14~~12, ~~please~~if relevant, we also assume that, after ~~entering into~~ the Covered ~~Transactions and prior to their maturity~~Customer commences clearing under the Covered Agreement and while it has open positions in Covered Contracts, an ~~event~~Event of ~~default exists and is continuing~~Default occurs with respect to the Covered Customer, and/or, if applicable, the ~~Clearing Member~~FCM has designated a date to begin ~~exercising its Futures Liquidation Rights or Cleared Derivatives Liquidation Rights (a **Liquidation Date**)~~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 (~~g~~e) and questions ~~15~~13 to ~~17~~15).

(e) ~~(g) In the case of questions 15 to 17, please assume that a formal bankruptcy, insolvency, liquidation, reorganization, administration or comparable proceeding (collectively, the **insolvency**) has been instituted by or against the Covered Customer and an event of default has accordingly occurred under the Covered Base Agreement and CDA. If there are different types of insolvency proceedings under the laws of your jurisdiction (for example, bankruptcy or liquidation proceedings where an entity does not emerge as a going concern,~~

~~on the one hand, and a reorganization or administration proceeding where an entity is restructured and does continue as a going concern, on the other hand), please briefly describe the different types of proceedings and answer each question with respect to each such proceeding.~~In the case of questions 13 to 15, if relevant, we assume that the Covered Customer has become subject to insolvency proceedings in New Zealand.

(f) We note the following point 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, an 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 endeavour 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 an 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 have also assumed that:

(g) ~~(a)~~ each party to the Covered ~~Base~~ Agreement ~~and CDA~~ is validly incorporated under the laws of its place of incorporation;

(h) ~~(b)~~ each Covered ~~Base~~ Agreement ~~and CDA~~ is a legal, valid, binding and enforceable obligation of each party under all applicable laws (however, this assumption does not limit the views that we express in this opinion);

(i) ~~(c)~~ each party has the capacity to enter into and perform its obligations under, and has duly authorised, executed and delivered, each Covered ~~Base~~ Agreement ~~and CDA~~;[~~105~~]

~~(d) each Covered Base Agreement and Futures Transactions under it, and each CDA and Cleared Derivatives Transactions under it, form a single agreement between the Covered Customer and Clearing Member under all applicable laws;~~

~~(e) each party enters into each Covered Transaction in the same capacity and in the same right (i.e., there is mutuality[106] between the parties for the purposes of insolvency set-off under New Zealand law);[107]~~

~~[105] In this context, note that section 94(3) of the IPS Act states that a life insurer may not mortgage or charge any of the assets of a statutory fund except to secure a bank overdraft for the purposes of the business of the statutory fund.~~

~~[106] Mutuality is a prerequisite for New Zealand's netting legislation to apply, as a result of section 310D of the Companies Act. Under New Zealand's conflict of laws rules, the governing law of a contract should determine whether such mutuality exists. In that regard, we understand that, as a matter of New York law, whether "mutuality" exists in the context of the US model of clearing requires an assessment of the degree to which an FCM, in its role as intermediary, acts as an agent for the customer or as a principal facing both the customer and the DCO, an assessment that may be fact and situation dependent. If, under New York law, the circumstances were such that mutuality *did not* exist, the relevant contract would not be a "bilateral netting agreement" to which New Zealand's netting legislation applies. In that case, the FCM would need to assess its rights in the context of its status as a secured creditor of the customer rather than through an assessment of the availability of insolvency set-off rights.~~

~~[107] In accordance with the Instruction Letter, we understand that, under the FCM clearing model, the ultimate counterparties to a Covered Transaction that has been novated through the clearing process are (i) the FCM's~~

~~(f) no party has assigned, declared any trust over or given any security interest over any of its rights to receive a payment that would be taken into account in determining the net termination amount owing under the Covered Base Agreement or CDA;[108]~~

(j) ~~(g)~~ each Covered ~~Transaction~~Contract is entered into for value on commercially reasonable terms and on an arm's length basis;

(k) ~~(h)~~ no party is, or would be, seeking to conduct any relevant transaction or any associated activity under the Covered ~~Base~~ Agreement ~~or CDA~~ in a manner or for a purpose not evident on the face of the document; and

(l) ~~(i)~~ the Covered ~~Base~~ Agreement ~~and CDA~~ and each Covered ~~Transaction~~Contract is entered into, and ~~Futures Credit Support and Cleared Derivatives Credit Support~~Covered Collateral is transferred:

(i) before a liquidator, statutory manager or administrator of the Covered Customer is appointed; and

(ii) at a time when the Covered Customer is solvent and able to pay its debts as they become due.

2. Qualifications

Our opinion is subject to the following qualifications:

(a) our opinion on the enforceability of the Covered ~~Base~~ Agreement ~~and CDA~~ means that the obligations assumed by the respective parties to those documents are of a type that a New Zealand court enforces or recognises. It does not mean that those obligations will be enforced or recognised in all circumstances or that a particular remedy will be available;

(b) enforcement of the Covered ~~Base~~ Agreement ~~and CDA~~ may, in each case, be limited by general principles of equity; for example, equitable remedies are discretionary, subject to equitable defences and are not available where damages are considered to be an adequate remedy, nor will specific performance normally be ordered in respect of a monetary obligation;

(c) claims may be or become:

(i) time barred under the Limitation Act 2010; and

(ii) subject to the defences of set-off, abatement or counterclaim;

(d) enforcement of the Covered ~~Base~~ Agreement ~~and CDA~~ is, in each case, subject to the doctrine of estoppel in relation to representations, acts or omissions of any party to an agreement or document that may preclude, limit or affect the ability of that party to enforce against another party the obligations of that other party under that agreement or document;

~~counterparties to a Covered Transaction that has been novated through the clearing process are (i) the FCM's customer and (ii) each DCO that has accepted the customer's Covered Transactions for clearing. We assume that, despite this, the entry into Covered Transactions still gives rise to rights and obligations between the Covered Customer and the Clearing Member governed by the Covered Base Agreement and the CDA. We also assume that the Futures Liquidation Rights and Cleared Derivatives Liquidation Rights apply to these obligations (even if those rights and obligations between the Covered Customer and the Clearing Member arise from transactions entered into by the Clearing Member on behalf of the Covered Customer).~~

~~[108] The effect of this assumption is that, to the extent that the Covered Customer grants a security interest to the Clearing Member over such payment right, mutuality would be destroyed for close-out netting purposes. Accordingly, the Clearing Member would need to rely on its security rights rather than its netting rights in these circumstances.~~

(e) an obligation to pay an amount (for example, default interest) may not be enforceable if the amount is held by a New Zealand court to constitute a penalty and not a genuine and reasonable pre-estimate of the loss likely to be suffered in the relevant circumstances;

(f) a provision of the Covered ~~Base~~ Agreement ~~and CDA~~ relating to the binding or conclusive effect of a calculation, determination, certification or opinion may not be enforceable because a New Zealand court may review the grounds on which it is made or given;

(g) the laws of New Zealand may require that:

(i) discretions are exercised reasonably; and

(ii) opinions are based on reasonable grounds;

(h) a New Zealand court may not enforce a provision of the Covered ~~Base~~ Agreement ~~or CDA~~ relating to the severability of an illegal, invalid or unenforceable provision because it may reserve to itself the decision whether that provision is severable;

(i) a New Zealand court may not enforce a provision of the Covered ~~Base~~ Agreement ~~or CDA~~ that may be or become illegal under the laws of another jurisdiction in which it is to be performed or that is contrary to the exchange control regulations of another jurisdiction;

(j) a New Zealand court may not enforce a provision of the Covered ~~Base~~ Agreement ~~or CDA~~ limiting, restricting or otherwise relating to amendments or waivers if it determines the intentions of the parties to be contrary in any case;

(k) a New Zealand court may not enforce a provision of the Covered ~~Base~~ Agreement ~~or CDA~~ relating to the payment of costs or expenses of unsuccessful litigation brought before it or where it has itself made an order for costs;

(l) proceedings brought before a New Zealand court may be stayed if:

(i) the subject matter of the proceedings has previously been considered by or is concurrently before another court in another jurisdiction; or

(ii) another forum, having competent jurisdiction, is the more appropriate forum for those proceedings; and

(m) we express no opinion on ~~:(i)~~ the title of any person to any property ~~; or~~

~~(ii) the application of the Gambling Act 2003 to any Covered Transaction; or~~

~~(iii) the regulatory capital treatment of any Covered Transaction; or~~

~~(iv) the validity of the methodology used to determine the various termination values and cash collateral amounts to be netted under the Covered Base Agreement and CDA~~.

SCHEDULE 2
~~Insolvency proceedings under the laws of New Zealand~~

~~There are five insolvency regimes in New Zealand that could apply to a Covered Customer. These are:~~

~~(a) the liquidation regime set out in the Companies Act, which applies to companies incorporated in New Zealand and bodies corporate incorporated outside New Zealand;~~

~~(b) the voluntary administration regime set out in the Companies Act, which applies to companies incorporated in New Zealand and bodies corporate incorporated outside New Zealand;~~

~~(c) the statutory management regimes set out in:~~

~~(i) the CIM Act, which applies to any body of persons, whether incorporated or not, and whether incorporated or established in New Zealand or elsewhere;[109]~~

~~(ii) the Reserve Bank Act, which applies to banks registered in New Zealand; and~~

~~(ii) the IPS Act, which applies to "licensed insurers";[110]~~

~~(d) the receivership regime set out in the Receiverships Act 1993; and~~

~~(e) the compromises regime set out in the Companies Act, which applies to compromises between companies incorporated in New Zealand, or overseas companies registered under the Companies Act, and their creditors.~~

~~We briefly outline each of these regimes below. The issues addressed in this opinion are considered principally in the context of the liquidation, administration and statutory management regimes. These are, by far, the more likely regimes to apply in the insolvency of a Covered Customer in New Zealand.~~

~~*Liquidation*~~

~~Liquidation is a distributive, rather than a rehabilitative, process. The Companies Act contains a set of liquidation rules that is intended to realise the assets of the company, to distribute the proceeds to the company's creditors and shareholders and, ultimately, to dissolve the company.~~

~~A company is put into liquidation by the appointment of a liquidator. Pursuant to section 241(2) of the Companies Act, a liquidator may be appointed by:~~

~~(a) special resolution of those shareholders entitled to vote and voting on the question; or~~

~~(b) the board of the company on the occurrence of an event specified in the constitution; or~~

~~(c) the Court, on the application of the company, a director, a shareholder or other entitled person, a creditor of the company (including any contingent or prospective creditor), an administrator, the Financial Markets Authority (**FMA**) (if the company is a financial markets participant), the Registrar [of Companies] or the Reserve Bank of New Zealand (**Reserve Bank**) (if the company is a licensed insurer); or~~

~~(d) a resolution of the creditors passed at the watershed meeting (if the company is in administration).~~

~~[109] Section 2(4) of the CIM Act.~~

~~[110] Generally speaking, the IPS Act does not set out a bespoke comprehensive statutory regime for licensed insurers. Rather, the IPS Act applies the provisions of the CIM Act to the statutory management of a licensed insurer.~~

~~Administration~~

~~Prior to the Companies Amendment Act 2006 coming into force on 1 November 2007, the only rehabilitative insolvency regime in New Zealand for viable companies was the compromises regime (see below). For a number of reasons (including, in particular, the need to obtain creditor consent), this had proved to be a difficult regime to apply in practice. Therefore, Parliament enacted an alternative regime to encourage business rehabilitation, based on the voluntary administration model adopted by Australia in 1992.~~

~~The administration of a company begins when an administrator is appointed by:~~

~~(a) board resolution; or~~

~~(b) a liquidator; or~~

~~(c) a secured creditor holding a charge over all, or substantially all, of the company's property where that charge has become enforceable; or~~

~~(d) the High Court, on the application of a creditor, a liquidator, the FMA (if the company is a financial markets participant) or the Registrar of Companies.[111]~~

~~The appointment of an administrator has three main consequences. First, it vests control of the company's business in the administrator. Secondly, it triggers obligations on the administrator to hold various creditors' meetings to try to seek a consensus on the future of the company. Thirdly, it imposes a stay on certain creditor actions (similar to the moratorium imposed in a statutory management, as discussed below). For example, while a company remains in administration, in the absence of administrator consent or a court order:~~

~~(a) a transaction or dealing that affects the company's property is void;~~

~~(b) a person may not enforce a charge over the company's property, except for:~~

~~(i) a chargeholder having a charge over all, or substantially all, of the company's property who begins enforcing the charge no later than the 10th working day after the commencement of the administration; or~~

~~(ii) *any* chargeholder who begins enforcing its charge prior to the commencement of the administration;~~

~~(c) the owner or lessor of property occupied or used by the company may not repossess that property (unless repossession began prior to the commencement of the administration); and~~

~~(d) court proceedings or any enforcement process against the company or any of its property may not begin or continue.~~

~~Administration is intended to be a relatively short-term measure that (by and large) freezes the company's financial position while the administrator and the creditors negotiate the company's future. The administration of a company ends either when the negotiations have been successful (in which case, a "deed of company arrangement" is entered into)[112] or when the statutory timeframe expires without resolution. Other steps, such as the appointment of a liquidator, can also end an administration.~~

~~Statutory management~~

~~[111] Section 239H(1) of the Companies Act.~~

~~[112] A deed of company arrangement must be approved by a majority in number representing 75% in value of creditors voting.~~

~~By contrast, statutory management is a more rehabilitative process. In broad terms, making a party subject to statutory management in New Zealand creates a moratorium in relation to that party's affairs.[113] The effect of that moratorium is outlined below.~~

~~A party is made subject to statutory management by way of a declaration to that effect in the form of an Order-in-Council signed by the Governor-General:~~

~~(a) in the case of the CIM Act, on the advice of the Minister of Justice given in accordance with a recommendation of the FMA; or~~

~~(b) in the case of the Reserve Bank Act and the IPS Act, on the advice of the responsible Minister given in accordance with a recommendation of Reserve Bank.~~

~~The statutory management moratorium provides that no person may, among other things:~~

~~(a) take any action or other proceedings against the party made subject to statutory management; or~~

~~(b) apply or resolve to put that party into liquidation; or~~

~~(c) enforce any security interest it may have over that party's property (for example, margin); or~~

~~(d) exercise any right of set-off against that party.~~

~~In addition, the statutory manager is able, "notwithstanding the terms of any contract, [to] suspend in whole or in part, ...the payment of any debt, or the discharge of any obligation".[114] This suspension expressly does not constitute a breach or repudiation of the relevant contract with the result that the other party cannot cancel it for breach or repudiation.[115]~~

~~Receivership~~

~~A receiver, manager or receiver and manager of a New Zealand company's affairs may be appointed either by the terms of a contract (typically, a contract granting a security interest) or by a court under the Receiverships Act. A receiver is generally appointed to manage all or substantially all of the company's affairs.~~

~~The options available to a receiver include:~~

~~(a) selling the assets of the company in respect of which the receiver is appointed; or~~

~~(b) continuing to run the business of the company as a going concern; or~~

~~(c) putting the company into liquidation.~~

~~Compromises~~

~~The Companies Act contains a statutory procedure by which a company may enter into a compromise with its creditors. For this purpose, a "compromise" is defined in section 227 of the Companies Act to include:~~

~~a compromise –~~

~~(a) Cancelling all or part of a debt of the company; or~~

~~[113] Section 42 of the CIM Act. The equivalent provision in the Reserve Bank Act is section 122.~~

~~[114] Section 44(1) of the CIM Act; section 127(1) of the Reserve Bank Act.~~

~~[115] Section 44(2) of the CIM Act; section 127(2) of the Reserve Bank Act.~~

(b) Varying the rights of its creditors or the terms of a debt; or

(c) Relating to an alteration of a company's constitution that affects the likelihood of the company being able to pay a debt:

A compromise proposal may be initiated by the board of directors of the company, a receiver, a liquidator or, with the leave of the court, any creditor or shareholder of the company where any of those persons has reason to believe that the company is or will be unable to pay its debts.[116] Also, the court may, under section 236 of the Companies Act, on the application of a company or any shareholder or creditor of the company, order that a compromise is binding on the company and on such other persons as the court specifies.

Except in the case of a compromise ordered by the court, the party proposing the compromise must give to each known "creditor" of the company, the company itself, any receiver or liquidator and deliver to the Registrar of Companies for registration, the following documents:

(a) notice in accordance with the requirements in the Companies Act stating that a meeting of creditors is to be held;

(b) a statement setting out, among other things, the terms of the proposed compromise and explaining that the proposed compromise and any amendment to it at a meeting of creditors will be binding on all creditors if approved in accordance with the Companies Act; and

(c) a list of creditors known to the proponent who would be affected by the proposed compromise, together with amounts owing or estimated to be owing to each of them and their voting rights at the meeting of creditors.

A compromise only becomes binding if a majority in number representing at least 75% in value of the creditors, or a class of creditors, voting on the matter votes in favour of the compromise. A compromise is binding on the company and on all creditors to whom notice of the proposal is given.

[116] Section 228(1) of the Companies Act.

SCHEDULE 3
Summary of the Netting Acts

On 26 April 1999, specific netting legislation came into force in New Zealand. The legislation is split into four statutes: the Companies Amendment Act 1999, the Corporations (Investigation and Management) Amendment Act 1999, the Reserve Bank of New Zealand Amendment Act 1999 and the Insolvency Amendment Act 1999. The first three of these four statutes, together with the Companies Amendment Act 2006,[117] (the **Netting Acts**) are relevant for the purposes of this opinion. The fourth statute deals with netting agreements entered into by individuals. It is, therefore, not relevant for the purposes of this opinion.

Each Netting Act amends its underlying principal Act to provide expressly for the enforceability of "netting agreements" in the context of the relevant insolvency regime.

"Netting agreements"

"Netting agreements" are of two types: "bilateral netting agreements" and "recognised multilateral netting agreements". Only the first type is relevant for the purposes of this opinion.

A "bilateral netting agreement" is defined in section 310A of the Companies Act as:

> an agreement that provides, in respect of transactions between 2 persons to which the agreement applies,
>
> (a) That on the occurrence of an event specified in the agreement, all or any of those transactions must (or may, at the option of a party) be terminated and
>
> (i) An account taken of all money due between the parties in respect of the terminated transactions; and
>
> (ii) All obligations in respect of that money satisfied by payment of the net amount due from or on behalf of the party having a net debit to or on behalf of the party having a net credit; or
>
> (b) That each transaction is to be debited or credited to an account with the effect that the rights and obligations of each party that existed in respect of the relevant account prior to the transaction are extinguished and replaced by rights and obligations in respect of the net debit due on the relevant account after taking into account that transaction; or
>
> (c) That amounts payable by each party to the other party are to be paid or satisfied by payment of the net amount of those obligations by the party having a net debit to the party having a net credit;
>
> but does not include any bilateral netting agreement that is part of a multilateral netting agreement.

In broad terms, a "bilateral netting agreement" is an agreement between two persons that provides for any of three different types of netting: close-out netting, netting by novation or payments netting. In contrast to the equivalent legislation in a number of other jurisdictions, a "netting agreement" does not need to be entered into between particular types of counterparties or to relate to particular types of transactions in order to qualify for protection under the Netting Acts.

In principle, whether an agreement constitutes a "bilateral netting agreement" should, under New Zealand's conflict of laws rules, be determined by its governing law. We assume in this opinion

[117] The Companies Amendment Act 2006 introduced the administration regime outlined in Schedule 2 above. At the same time, that Act also adopted netting rules (consistent with those adopted in 1999) to apply to a company in administration.

~~that, under New York law, the Covered Base Agreement and CDA is a "bilateral netting agreement" in terms of section 310A of the Companies Act. However, it is also possible that a New Zealand court could conclude that the Netting Acts contain mandatory insolvency rules that should be interpreted in accordance with New Zealand law. In that regard, the Covered Base Agreement and CDA is, as a matter of New Zealand law, a "bilateral netting agreement". That is, the Covered Base Agreement and CDA satisfies the requirements for a "bilateral netting agreement" (specifically, through qualifying under either paragraph (a) and/or paragraph (b) of the definition of that term).~~

~~*Consequences of an agreement being a "netting agreement"*~~

~~The effect of the Netting Acts is that the contractual rights of netting or set-off contained in a "netting agreement" operate in accordance with their terms in the insolvency of an NZ Company. To this extent, those rights override the general insolvency rules that otherwise apply mandatorily in these circumstances.~~

~~**SCHEDULE 4**~~

Personal Property Securities Act overview

1. Introduction

The PPSA came into force on 1 May 2002. The PPSA replaced a number of English law-based regimes that previously governed security interests in personal property.

2. Application of PPSA to Covered ~~Base Agreement and CDA~~Agreements

The PPSA applies to "security interests". A "security interest" is a type of proprietary interest in "personal property". Accordingly, the definitions of "personal property" and "security interest" are the key to determining whether ~~the~~a Covered ~~Base~~ Agreement ~~and CDA~~ is subject to the PPSA.

"Personal property"

The PPSA defines "personal property" to include "chattel paper, documents of title, goods, intangibles, investment securities, money, and negotiable instruments". For the purposes of this opinion, the ~~two categories~~category of most relevance ~~are "investment securities" and~~is "intangibles". ~~To these we add a third category – "proceeds" – which is a derivative of the first two categories. We discuss each in turn.~~

~~***"Investment securities"***~~

~~In the context of the Covered Base Agreement and CDA, the discussion below on "investment securities" is relevant to:~~

- ~~securities provided as Eligible Collateral in one of the forms outlined in Part B(b) of the Assumptions in Schedule 1; and~~
- ~~potentially, Covered Customer Rights consisting of the Covered Customer's right, title and interest in its contractual rights under its Futures Transactions and Cleared Derivatives Transactions.~~

~~An "investment security":~~

~~(a) means –~~

~~(i) a writing (whether or not in the form of a security certificate) that is recognised in the place in which it is issued or dealt with as evidencing a… share, right to participate, or other interest in property or an enterprise, or that evidences an obligation of the issuer, and that, in the ordinary course of business, is transferred or withdrawn by –~~

~~(A) delivery with any necessary endorsement, assignment, or registration in the records of the issuer or agent of the issuer …; or~~

~~(B) an entry in the records of a clearing house or securities depository; or~~

~~(C) an entry in the records maintained for that purpose by or on behalf of the issuer; or~~

~~(D) an entry in the records maintained for that purpose by or on behalf of the nominee:~~

~~(ii) an emissions unit; but~~

(b) does not include a writing that evidences a monetary obligation that is secured by an interest in land:

The terms "issuer", "clearing house", "securities depository" and "nominee" are not defined in the PPSA. The term "writing" includes the electronic recording or display of words.

One interpretation of the definition of "investment security" is that only the *direct* holder (such as a CSD or its nominee) has an interest in an "investment security".[118] If this interpretation were correct, any *indirect* holder merely has an "intangible", the nature of which is principally determined by the contractual arrangement it has entered into with the direct holder.

We do not support this interpretation. In our view, both paragraph (a)(i)(B) – (D) of the definition of "investment security" and other provisions of the PPSA (including, in particular, section 18 (which defines "possession" and is discussed below)) indicate that a second-tier holder[119] has an interest in an "investment security".

However, our view is that the position is considerably less clear in the case of lower- (say, third- or fourth-) tier holders.

On the one hand, there is the robust interpretation. This emphasises the definition's recognition of the widespread commercial practice of using systems of multi-tiered holdings and suggests that it cannot have been Parliament's intention to distinguish between second- and third- (or lower-) tier holders.

On the other hand, there is the literal interpretation. This suggests that the definition's inclusion of indirect interests is limited to those deriving their interest directly through the first-tier holder. Paragraph (a)(i)(B) – (D) only applies where the records of the clearing house, securities depository, registrar or nominee relate to the property in the introductory wording in paragraph (a)(i) (i.e., the underlying security itself). Paragraph (a)(i)(B) – (D) does *not* apply where those records relate to an indirect interest. If that interpretation were correct, these third- (and lower-) tier holders merely have an interest in an "intangible",[120] not an "investment security".

Until this position is clarified by legislation or by case law, it is advisable for Clearing Members at this lower-tier level to analyse their position under the PPSA on the basis that either classification could be correct. The most likely practical consequence of this approach is that the Clearing Member would *both* register a financing statement in respect of the Collateral (which is the only method for perfecting a security interest in an intangible) *and* take "possession" of the Collateral (which is a method for perfecting a security interest in an investment security). This opinion considers the consequences of both interpretations.

"Intangibles"

In the context of the Covered Base Agreement and CDA, the discussion below on "intangibles" is relevant to:

- cash and intangible securities; and

[118] The basis of this argument is that only the *underlying security* can be a "writing" of the type identified in the introductory wording in paragraph (a)(i) of the definition (i.e., something that is recognised as evidencing as share, other interest, etc. in the property of the issuer).

[119] In this opinion, we use the term **first-tier holder** to mean the direct holder of a security (such as the registered holder of registered debt securities) and the term **second-tier holder** to mean a person who derives its interest in securities directly from a first-tier holder (and so on for third- (and lower-) tier holders).

[120] In this opinion, we refer to the property held by these lower-tier holders as **intangible securities**. Footnote 129 discusses a further issue relating to such lower-tier holders (in the context of the "possession" of investment securities).

- ~~Covered Customer Rights consisting of the Covered Customer's right, title and interest in (i) its contractual rights under its Futures Transactions and Cleared Derivatives Transactions, (ii) its right to payment from DCOs in respect of those Futures Transactions and Cleared Derivatives Transactions.~~[121]

"Intangibles" are a residual category of "personal property". "Intangible" is defined in section 16 of the PPSA to mean:

> personal property other than chattel paper, a document of title, goods, an investment security, money, or a negotiable instrument:

~~Cash paid to~~None of the ~~Clearing Member under a~~categories of Covered ~~Base Agreement and CDA does not fall~~Collateral identified in Schedule 1 of this opinion falls within any of the specified types of "personal property" that are excluded in this definition. In particular, cash (in the sense that that term is used in this opinion~~, – see footnote 104~~) is not "money" (which is defined to mean currency (e.g., bank notes)). Cash is a receivable and, therefore, for the purposes of the PPSA, an "intangible". Specifically, cash falls within the subset of "intangibles" labelled "accounts receivable".~~12258~~ Section 16 defines "account receivable" to mean:

> a monetary obligation that is not evidenced by chattel paper, an investment security, or by a negotiable instrument, whether or not that obligation has been earned by performance:

~~**"*Proceeds*"**~~

~~In the context of the Covered Base Agreement and CDA, the discussion below on "proceeds" is relevant to:~~

- ~~returns on cash and securities Collateral; and~~
- ~~Covered Customer Rights consisting of the proceeds described in Part B(a)(iii) of the Assumptions in Schedule 1.~~

~~"Proceeds":~~

> ~~(a) Means identifiable or traceable personal property –~~
>
> ~~(i) That is derived directly or indirectly from a dealing with collateral or the proceeds of collateral; and~~
>
> ~~(ii) In which the debtor acquires an interest; and~~
>
> ~~(b) Includes –~~
>
> ~~…~~
>
> ~~(ii) A payment made in total or partial discharge or redemption of…an intangible or investment security…~~

~~In the context of the Covered Base Agreement and CDA, the most likely "proceeds" are (i) in the case of securities Collateral, cash or securities distributions, (ii) in the case of cash Collateral, interest, and (iii) in the case of Covered Customer Rights, cash (together,~~

~~121 The third component of "Covered Customer Rights", as defined in Part B(a) of the Assumptions in Schedule 1, (i.e., proceeds of the rights identified in (i) and (ii)) is considered in the section immediately below headed "Proceeds".~~

~~12258~~ See *Burns* v *The Commissioner of Inland Revenue* (2011) 25 NZTC 25, 594. Cf. *The Commissioner of Inland Revenue* v *Northshore Taverns Ltd (in liq.)* (2008) 23 NZTC 22,074. See also *Strategic Finance Ltd (in rec and in liq)* v *Bridgman* [2013] 3 NZLR 650, 671.

~~**Collateral returns**).~~[123] ~~However, the definition of "proceeds" requires the Covered Customer to acquire a proprietary interest in Collateral returns before they constitute "proceeds". Whether this requirement is satisfied is, we believe, a matter for the *lex situs* to determine.~~[124] ~~If the *lex situs* were New Zealand, this requirement *would* be satisfied in the case of Collateral returns subject to a traditional security interest arrangement but *would not* be satisfied in the case of Collateral returns subject to an outright transfer arrangement.~~[125]

~~Proceeds will typically be cash, which the Clearing Member will likely deposit into an account containing other funds. In that case, the property may cease to be identifiable but may, under the common law tracing rules, be traceable (and, therefore, constitute "proceeds").~~

"Security interest"

"Security interest" is defined in section 17(1)(a) of the PPSA to mean:

> an interest in personal property created or provided for by a transaction that in substance secures payment or performance of an obligation, without regard to –
>
> (i) The form of the transaction; and
>
> (ii) The identity of the person who has title to the collateral;

In addition, and for the avoidance of doubt, section 17(3) lists a number of types of transactions to which the PPSA applies. Most importantly in the context of the Covered ~~Base Agreement and CDA~~Agreements, the list includes "a fixed charge,…pledge,…[or] an assignment…that secures payment or performance of an obligation". This reinforces the central concept in the section 17(1)(a) definition that it is the *substance* of the transaction that is critical. ~~It is immaterial that the form of a transaction is, say, an absolute assignment if, in substance, it secures payment or performance of an obligation.~~[126]

Returning to the section 17(1)(a) definition, does ~~the~~a Covered ~~Base~~ Agreement ~~and CDA~~ create a "security interest"?

There are three parts to the "security interest" definition:

[123] ~~While distributions arising as a result of the redemption of securities are clearly "proceeds", it is less clear whether other types of Collateral returns fall within this definition. For example, it is arguable that a coupon payment may not be "derived directly or indirectly from a *dealing*" (our emphasis) with the underlying security. While the issue is not beyond doubt, we would expect a New Zealand court to adopt a broad meaning of "dealing" and conclude that property such as this constitutes "proceeds".~~

[124] ~~Dicey, Morris & Collins, para. 24-006. The concept of the *situs* of Collateral is discussed further in Part C.II.1.~~

[125] ~~This is because, under New Zealand law, the Covered Customer retains an equitable interest in Collateral subject to a security interest under a traditional security interest arrangement. That equitable interest extends to Collateral returns. By contrast, under New Zealand law, the Covered Customer does *not* retain an equitable interest in Collateral transferred under an outright transfer arrangement. Therefore, the Covered Customer does not have an equitable interest in Collateral returns arising under an outright transfer arrangement. See the discussion in *New Zealand Bloodstock Limited v Waller and Agnew* [2006] 3 NZLR 629 (CA).~~

[126] ~~Section 24 restates this principle by providing that the application of the PPSA is not affected by the fact that title to collateral may be in the secured party rather than the debtor (which will be the case in an absolute assignment).~~

~~We should point out that there are those who take a contrary view and, therefore, by extension, believe that an outright transfer arrangement should *not* constitute a "security interest". See, for example, Allan, *Guidebook to New Zealand Personal Property Securities Law* (2002), para. 2.12:~~

> ~~Where there is an absolute assignment no security interest is involved. When there is an assignment with an agreement to retransfer upon completion of some obligation or payment of money, then that is the type of assignment which will in substance be a security interest.~~

~~We do not share this view. There is nothing in the PPSA that suggests that a debtor must retain some proprietary interest in the collateral (akin to an equity of redemption) in order for a "security interest" to arise.~~

(a) ~~(c)~~ the property that is the subject of the transaction must be classified as "personal property";

(b) ~~(d)~~ the transaction must create an "interest in" that personal property (i.e., a proprietary interest in the property as opposed to a mere contractual right against the debtor); and

(c) ~~(e)~~ the transaction must "in substance [secure] payment or performance of an obligation".

The first and second parts of the definition are matters to be determined in accordance with the *lex situs* of the collateral (as these concern, in the case of the first part, the nature of the collateral and, in the case of the second part, the proprietary rights created by a transfer).~~127~~59

The third part of the definition is a matter to be determined in accordance with the governing law of the Covered ~~Base~~ Agreement ~~and CDA~~ (as this is a matter of contractual interpretation).

Therefore, New Zealand law does not govern the third part of the definition (as the Covered ~~Base~~ Agreement ~~and CDA~~ is not governed by New Zealand law). New Zealand law also does not govern the first and second parts of the definition if the *lex situs* of the Covered Collateral is not New Zealand.60 However, for the purposes of this opinion, we assume that all parts of the definition would be satisfied ~~(which would be the case if New Zealand law determined these three issues)~~. On that basis, ~~the~~each Covered ~~Base~~ Agreement ~~and CDA~~ creates a "security interest".

~~3. Other relevant concepts~~

~~The PPSA contains other concepts that are relevant to a number of issues discussed in this opinion. We outline three of these other concepts below: possession, value and attachment.~~

~~*Possession*~~

~~In a number of instances, the PPSA analysis for investment securities depends on whether the secured party's security interest in those investment securities is possessory or non-possessory.~~

~~*General rules for possession of investment securities*~~

~~Section 18(1) of the PPSA states that:~~

> ~~For the purposes of this Act, a person takes possession of an investment security … if,~~
>
> ~~(a) In the case of an investment security that is evidenced by a security certificate, the person takes physical possession of that certificate; or~~
>
> ~~(b) In the case of an investment security that is traded or settled through a clearing house or securities depository, the clearing house or securities depository, as the case may be, records the interest of the person in the investment security; or~~
>
> ~~(c) In the case of an investment security that is not evidenced by a security certificate and that is not traded or settled through a clearing house or securities depository, the records maintained by the issuer, or on behalf of the issuer, record the interest of the person in the investment security; or~~

~~127~~59 See Dicey, Morris & Collins, ~~Rule 128 and footnote 124~~¶ 22-002 – 22-010.

60 For this purpose, the *lex situs* of the Covered Collateral is the same as the jurisdiction determined in accordance with the conflict of laws rules outlined in paragraphs (a) and (b) of the response to question 2 in Part C.

(d) In the case of an investment security that is held by a nominee, the records of the nominee record the interest of the person in the investment security.

The PPSA does not define "security certificate", "clearing house", "securities depository" or "nominee".

In our view, subject to the discussion below on section 18(3):

(a) once the Clearing Member takes physical possession of certificates for directly held bearer debt securities or directly held registered debt securities, the Clearing Member will have "possession" of those securities;

(b) once the interest of the Clearing Member in directly held dematerialised debt securities is recorded in the records maintained by, or on behalf of, the issuer, the Clearing Member will have "possession" of those securities; and

(c) once the interest of the Clearing Member in intermediated debt securities is recorded in the Intermediary's records, the Clearing Member will have "possession" of those securities.[128]

Exception to general rules for possession of investment securities

Section 18(3) of the PPSA contains an exception to the general rule for possession of investment securities, providing that:

> a secured party is not in possession of collateral that is in the actual or apparent possession or control of the debtor or the debtor's agent.

Therefore, it is arguable that the Clearing Member does not have "possession" of securities transferred to it under the Covered Base Agreement and CDA where either:

(a) the Collateral is in the actual or apparent possession of the debtor's agent and:

(i) the Covered Customer and the Clearing Member use a common Intermediary to hold securities; and

(ii) under the terms of that Intermediary's agreement with the Covered Customer, that Intermediary acts as the Covered Customer's agent; or

(b) the Collateral is in the control of the debtor (the Covered Customer) and the Covered Customer has the right to substitute securities without the Clearing Member's consent.

We doubt that the first argument would succeed because, in our view:

[128] This assumes that these securities are "investment securities" for the purposes of the PPSA. If the alternative interpretation outlined in section 2 of this Schedule 4 were correct (and, therefore, these securities were classified as "intangibles"), the concept of possession would be irrelevant.

However, if intermediated debt securities held by a third- (or lower-) tier holder *are* "investment securities", a further issue arises. This is because section 18 deems a person to have possession of an investment security if the clearing house, securities depository, registrar or nominee "records the interest of *[that] person*" (our emphasis) in that investment security. Where the Clearing Member holds an interest in investment securities as a third- (or lower-) tier holder, the clearing house, securities depository, registrar or nominee to which section 18 refers will not record the interest of that person. Rather, it will record the interest of the Intermediary (or the Intermediary's intermediary). Therefore, one interpretation of section 18 is that that person would not have "possession" of the investment securities.

That said, our view is that, if a court considered that intermediated debt securities held at the third- (or lower-) tier level were "investment securities", the court would also likely conclude that the holder has "possession" of those "investment securities" in these circumstances. To give effect to this view, a court could regard the Intermediary as itself being a "securities depository" or "clearing house" for the purposes of section 18(1). The entry made in the records of that "securities depository" or "clearing house" would then give the indirect holder possession of the relevant investment security.

(a) the specific possession rules relating to investment securities in section 18(1) should override the general exclusion in section 18(3);[129]

(b) it is sensible to interpret section 18(3) as negating possession by the secured party only where the agent has possession in its capacity as the debtor's agent. That would not be the case in the circumstances we are considering; and

(c) the policy behind section 18(3) is to prevent third parties being misled into believing (wrongly) that property of a debtor is unencumbered (because no financing statement has been registered and the property is in the possession or control of the debtor or its agent). By contrast, in the circumstances we are considering, a third party could not reasonably be misled into believing that investment securities were unencumbered merely because the Intermediary through which they are held is an agent of the debtor.

We also doubt that the second argument would succeed. In our view, the Covered Customer does not have "control" of securities transferred to the Clearing Member under a Covered Base Agreement and CDA merely because it retains an absolute right of substitution. The better analysis is that the Covered Customer may *gain* control of securities Collateral by exercising its right of substitution. But, until it exercises that right, control rests with the Clearing Member (who can deal with the securities as it sees fit in accordance with the Covered Base Agreement and CDA).

Conclusion

In our view, section 18(3) should not apply in these circumstances. Therefore, the Clearing Member has "possession" of "investment securities" once the steps set out in section 18(1) are taken. In this opinion, we assume that the relevant steps have been taken in respect of all "investment securities" subject to a Covered Base Agreement and CDA. In that case, the Clearing Member has a possessory security interest in those securities.

Value

The giving of "value" by the secured party is a precondition to attachment (discussed below). It is also a precondition to a method that allows a secured party to obtain priority over all other secured parties.[130]

"Value":

(a) Means consideration that is sufficient to support a simple contract; and

(b) Includes an antecedent debt or liability.

The "value" given by the Clearing Member is its contractual promise under each Covered Transaction to which the Collateral relates.

Attachment

The time of attachment of a security interest is critical to resolving a number of conflict of laws issues. Section 40(1) of the PPSA provides that a security interest attaches to collateral when:

(a) value is given by the secured party;

[129] For a discussion, and an application, of the rule *generalia specialibus non derogant* (the general does not derogate from the specific), see *McDonald v Australian Guarantee Corporation (NZ) Ltd* [1990] 1 NZLR 227 (HC).

[130] See the discussion of section 97 of the PPSA (which gives priority to a secured party taking possession of investment securities) in Part C.IV.15.

~~(b) the debtor has rights in the collateral; and~~

~~(c) either:~~

~~(i) the secured party has possession of the collateral; or~~

~~(ii) the debtor has signed, or assented to, a security agreement adequately describing the collateral.~~

~~Given our conclusion above that the Clearing Member *does* give value for the Collateral, and on the (necessary) assumption that the Covered Customer has rights in the Collateral at the outset, attachment occurs under the Covered Base Agreement and CDA when the Collateral is transferred to the Clearing Member or its custodian. That transfer will either give the Clearing Member "possession" of the Collateral or it will, through the description in the security agreement (i.e., the Covered Base Agreement and CDA), identify the Collateral as being subject to that agreement.~~[131]

~~131 If the transfer does not result in the Clearing Member having "possession" of the Collateral, the Covered Customer must have signed, or assented to (through written or electronic means), the security agreement.~~

APPENDIX ~~A~~

~~SEPTEMBER 2012~~
~~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 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
CERTAIN COUNTERPARTY TYPES~~13~~[2]61

Description	Covered by opinion	Legal form(s)
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**)).	Yes, to the extent that each such entity is a company incorporated or re-registered under the Companies Act.	The registered name of a company incorporated or re-registered under the Companies Act will usually, but not always, end with the word "Limited" or the words "Tapui (Limited)". The word "Limited" is sometimes abbreviated to "Ltd".
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.~~ Yes.	The Reserve Bank of New Zealand is a statutory corporation governed by the Reserve Bank of New Zealand Act 1989.

~~13~~[2]61 In these definitions, the term "legal entity" means an entity with legal personality other than a private individual.

Description	Covered by opinion	Legal form(s)
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, to the extent that each such entity is a company incorporated or re-registered under the Companies Act.	The registered name of a company incorporated or re-registered under the Companies Act will usually, but not always, end with the word "Limited" or the words "Tapui (Limited)". The word "Limited" is sometimes abbreviated to "Ltd".
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 an investment business predominantly or exclusively as principal for its own account.	Yes, to the extent that each such entity is a company incorporated or re-registered under the Companies Act.	The registered name of a company incorporated or re-registered under the Companies Act will usually, but not always, end with the word "Limited" or the words "Tapui (Limited)". The word "Limited" is sometimes abbreviated to "Ltd".
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, to the extent that each such entity is a company incorporated or re-registered under the Companies Act.	The registered name of a company incorporated or re-registered under the Companies Act will usually, but not always, end with the word "Limited" or the words "Tapui (Limited)". The word "Limited" is sometimes abbreviated to "Ltd".
International Organization. An organization		

Description	Covered by opinion	Legal form(s)
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.[62]	
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, to the extent that each such entity is a company incorporated or re-registered under the Companies Act.	The registered name of a company incorporated or re-registered under the Companies Act will usually, but not always, end with the word "Limited" or the words "Tapui (Limited)". The word "Limited" is sometimes abbreviated to "Ltd".
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	~~No.~~Yes, to the extent that each such fund is established as a trust governed by New Zealand law and the trustee is a company incorporated or re-registered under the Companies Act.	An investment fund does not have separate legal personality. It is established under a trust deed, pursuant to which a trustee holds the fund's assets and contracts with third parties on behalf of the fund.

[62] Consideration of the position with regard to this counterparty type requires further legal analysis and is thus outside the scope of the current opinion.

Description	Covered by opinion	Legal form(s)
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 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.~~Yes.	Each district council, city council or regional council (each, a "local authority") is a statutory corporation constituted by Order in Council or, in the case of Auckland Council, by the Local Government (Auckland Council) Act 2009. The Local Government Act 2002 applies generally to local authorities.
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, to the extent that each partner is a company incorporated or re-registered under the Companies Act.	The registered name of a company incorporated or re-registered under the Companies Act will usually, but not always, end with the word "Limited" or the words "Tapui (Limited)". The word "Limited" is sometimes abbreviated to "Ltd".

Description	Covered by opinion	Legal form(s)
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.~~ Yes, to the extent that each such fund is established as a trust governed by New Zealand law and the trustee is a company incorporated or re-registered under the Companies Act.	A pension fund does not have separate legal personality. It is established under a trust deed, pursuant to which a trustee holds the fund's assets and contracts with third parties on behalf of the fund.
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.[63]	

[63] Consideration of the position with regard to this counterparty type requires further legal analysis and is thus outside the scope of the current opinion.

Description	Covered by opinion	Legal form(s)
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.[64]	
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").	Yes, to the extent that each such entity is a company incorporated or re-registered under the Companies Act, and is not governed by special legislation or rules in addition to or other than the Companies Act.	The registered name of a company incorporated or re-registered under the Companies Act will usually, but not always, end with the word "Limited" or the words "Tapui (Limited)". The word "Limited" is sometimes abbreviated to "Ltd".

[64] Consideration of the position with regard to this counterparty type requires further legal analysis and is thus outside the scope of the current opinion.

Description	Covered by opinion	Legal form(s)
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.[65]	

[65] Consideration of the position with regard to this counterparty type requires further legal analysis and is thus outside the scope of the current opinion.

Document comparison by Workshare Compare on Monday, 20 June 2022 10:07:54 AM

Input:	
Document 1 ID	file://C:\Users\DC\Desktop\Letter to ISDA and FIA(15509938.14).docx
Description	Letter to ISDA and FIA(15509938.14)
Document 2 ID	iManage://work10.bellgully.com/BELLGULLY/28738163/7
Description	#28738163v7<work10.bellgully.com> - ISDA/FIA FCM opinion (2022)
Rendering set	Standard

Legend:	
Insertion	
~~Deletion~~	
~~Moved from~~	
Moved to	
Style change	
Format change	
~~Moved deletion~~	
Inserted cell	
Deleted cell	
Moved cell	
Split/Merged cell	
Padding cell	

Statistics:	
	Count
Insertions	1154
Deletions	1709
Moved from	58
Moved to	58
Style changes	0
Format changes	0
Total changes	2979