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MEMORANDUM OF LAW ON THE ENFORCEABILITY UNDER SINGAPORE LAW OF THE LIQUIDATION, SET-OFF, NETTING AND CREDIT SUPPORT PROVISIONS OF CERTAIN FUTURES ACCOUNT AGREEMENTS AND A CLEARED DERIVATIVES ADDENDUM

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Memorandum of Law on the Enforceability under Singapore Law of the Liquidation, Set-off, Netting and Credit Support Provisions of Certain Futures Account Agreements and a Cleared Derivatives Addendum

I. Introduction

This memorandum addresses the questions (set out in bold print and italics below) raised by the International Swaps and Derivatives Association, Inc. ("**ISDA**") and the Futures Industry Association ("**FIA**") in a letter to us dated 1 October 2013 relating to the enforceability under Singapore law of the liquidation, set-off, netting and credit support provisions of:

(a) certain Covered Base Agreements (as defined below) entered into between an entity that is organised under the laws of the United States and registered with the United States Commodity Futures Trading Commission (the "**CFTC**") as a futures commission merchant ("**FCM**") (each such FCM, a "**Clearing Member**") and such Clearing Member's Covered Customer (as defined 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 below), to liquidate such transactions and to determine amounts owing with respect thereto, to exercise remedies in respect of Futures Payment Rights (as defined below) and rights of netting and set-off with respect to obligations arising from Futures Transactions and to apply Futures Credit Support (as defined below) transferred by a Covered Customer in connection therewith; 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 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 thereto, to exercise remedies in respect of Cleared Derivatives Payment Rights (as defined 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 below) transferred by a Covered Customer in connection therewith and to offset obligations transferred from Cleared Derivatives Transactions against Cleared Derivatives Credit Support transferred to the Covered Customer.

For the purposes of this opinion:

"**Covered Base Agreement**" means a futures customer account agreement.

"**Covered Customer**" means a customer located in Singapore, which is of a type set out in Appendix B as being covered by this opinion.

The opinions expressed in this memorandum are confined to the laws of Singapore as of the date of this memorandum.

We should mention from the outset that pursuant to section 3 of The Application of English Law Act, Chapter 7A of Singapore (the "**English Law Act**"), the common law of England, so far as it was part of the law of Singapore immediately before the coming into force of the English Law Act (that is, on 12 November 1993), shall continue to be part of the law of Singapore so far as it is applicable to the circumstances of Singapore and its inhabitants and subject to such modifications as those circumstances may require. Prior to the passing of the English Law Act, Section 5(1) of the Civil Law Act, Chapter 43 of Singapore (the "**Civil Law Act**") (which has been repealed by the English Law Act), provided that a Singapore court deciding issues with respect to mercantile law would generally decide such issues in the same manner as an English court, unless there are contrary provisions or case law in force in Singapore.

On this basis, we would advise that the law of contract in Singapore tends generally to follow the English law of contract. On the other hand, the law relating to insolvency in Singapore is primarily set out in the Companies Act, Chapter 50 of Singapore (the "**Companies Act**") (and the Companies Act makes applicable to some extent provisions of the Bankruptcy Act, Chapter 20 of Singapore (the "**Bankruptcy Act**"), to insolvent winding up and also judicial management) although English case law may still be relevant in interpreting certain provisions of the Companies Act or the Bankruptcy Act for which equivalent or similar provisions exist in England or in setting out principles of English common law relating to insolvency which are not codified in the Companies Act or the Bankruptcy Act and there is still residual scope for certain aspects of the common law relating to insolvency to apply.

FACT PATTERNS

The discussions under this memorandum are based on the following facts.

(a) *Covered Base Agreements*

(i) Pursuant to a Covered Base Agreement entered into between a Clearing Member and 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 organisation (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 thereon, "**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.

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

(iii) Pursuant to a Covered Base Agreement, the Covered Customer agrees to transfer, as applicable, initial margin and variation margin payments as the Clearing Member may require in respect of the Covered Customer's Futures Transactions. Also, pursuant to the Covered Base Agreement, the Covered Customer grants a security interest to the Clearing Member in all of the Covered Customer's rights in the following property, whether at the time of the grant or thereafter existing:

(A) "**Futures Credit Support**," including:

(1) with respect to U.S. Futures and Options, its Account and all assets credited thereto, 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;

(2) with respect to Foreign Futures, its Account and all assets credited thereto, 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

(B) "**Futures Payment Rights**", including:

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

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

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

(iv) A Covered Base Agreement contains one or more events of default (whether or not described therein 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 (A) a Covered Customer's filing under applicable bankruptcy or similar insolvency laws, (B) 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 (C) 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 (collectively, "**Futures Netting Rights**").

(v) 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 thereof to any obligations the Covered Customer owes to the Clearing Member under the Covered Base Agreement. We refer to the foregoing collectively as "**Futures Credit Support Rights**".

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.

(b) The CDA

(i) 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 is set out in in Appendix A.

(ii) Each CDA is governed by New York law.

(iii) Pursuant to the CDA, Cleared Derivatives Transactions become incorporated into the related 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, the Covered Customer grants a security interest to the Clearing Member in all of the Covered Customer's rights in the following property, whether at the time of the grant or thereafter existing:

(A) (1) its Cleared Derivatives Account and all assets credited thereto, 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 and any agent acting for the Clearing Member, the DCO or the Covered Customer (collectively, "**Cleared Derivatives Credit Support**"); and

(B) its Cleared Derivatives Transactions and all rights to payment thereunder (whether constituting obligations of the Clearing Member or a DCO) (collectively, "**Cleared Derivatives Payment Rights**").

(iv) 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 under the CDA.

(v) The Clearing Member is entitled, upon the occurrence of an Event of Default, to designate a date and thereupon 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.

(vi) Upon the liquidation of a Covered Customer's Cleared Derivatives Transactions, the CDA provides the Clearing Member with rights to (a) dispose of or realise 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 thereof to any obligations the Covered Customer owes to 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**").

The "FIA-ISDA Cleared Derivatives Addendum" in the form published jointly by the FIA and ISDA satisfies the above requirements.

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".

II. Netting under a Covered Base Agreement and CDA

A. Assumptions

Unless otherwise indicated, and in addition to any other assumptions and qualifications specifically stated elsewhere in this memorandum, our responses in this part II are subject to the following assumptions:

1. On the basis of the terms and conditions of a 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 a number of Covered Transactions that are intended to be governed by the Covered Base Agreement and CDA. The Covered Transactions entered into include any or all of the transactions described in Appendix A.

2. Some of the Covered Transactions 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.

3. After entering into these Covered Transactions and prior to the maturity thereof, the Covered Customer becomes the subject of a voluntary or involuntary case under the insolvency laws of Singapore and, subsequent to the commencement of the insolvency, either the Covered Customer or an insolvency official seeks to assume the profitable Covered Transactions for the Covered Customer and reject the unprofitable Covered Transactions for theCovered Customer or otherwise prevent the exercise of close-out rights by the Clearing Member.

4. The net amounts derived amount to a proper and valid assessment and valuation of the net amounts outstanding.

5. That the Covered Base Agreement and CDA is legal, valid, binding and enforceable under New York law to which it is expressed to be governed and that each party has duly authorised, executed and delivered, and has the capacity to enter into, each document. We will further assume that the choice of laws of New York to govern the Covered Base Agreement and CDA is made in good faith and does not violate any applicable law or public policy which the parties cannot derogate from.

6. Each of the parties are entitled legally and beneficially to the rights, entitlements and benefits of each of the Covered Transactions and none of the respective parties' rights are encumbered in favour of any third party.

7. That the Covered Base Agreement and CDA and the Covered Transactions are entered into by the parties bona fide, on an arms' length and commercial basis, and are properly entered into and executed.

Save where expressly mentioned below, we shall make no distinction in this memorandum between banks and corporations incorporated under the Companies Act in considering the impact of the insolvency of the Covered Client on the enforceability of the close-out netting provisions. There is no special set of rules applicable to banks in the event of insolvency (save for section 62A of the Banking Act, Chapter 19 of Singapore (the "**Banking Act**") which should not affect our analysis in this part II of this memorandum[1]) and our

[1] Section 62A of the Banking Act ("**Section 62A**") deals with the set-off of a depositor's liabilities to a bank in Singapore against the deposits of the depositor placed with the bank, in the event of the winding-up of the bank. The issue here is whether "depositor's liabilities" in the context of Section 62A refers to the liabilities of the depositor before the application of liquidation, set-off and netting provisions under a Covered Base Agreement and CDA, or after. In our view, "liabilities"

conclusions in this memorandum therefore apply to both banks and corporations incorporated under the Companies Act.

B. Issues

1. Are the provisions of the Covered Base Agreement and CDA permitting the Clearing Member to terminate all the Covered Transactions upon the insolvency of the Covered Customer enforceable under the law of Singapore?

1.1 We understand that under the FCM clearing model, the ultimate counterparties to a Covered Transaction that has been novated through the clearing process are (a) the FCM's customer and (b) each DCO that has accepted the customer's Covered Transactions for clearing. In the context of a Covered Base Agreement and CDA, the Covered Customer will interact with the DCOs via its clearing FCM (the Clearing Member), and the Clearing Member will be exposed to the Covered Customer: under applicable DCO rules, the Clearing Member must meet the Covered Customer's obligations to the DCOs under the Futures Transactions and Cleared Derivatives Transactions it clears regardless of whether the Covered Customer itself performs. Thus, the DCOs will have two potential sources of payment under a Covered Transaction - the Covered Customer itself and the Clearing Member. The Clearing Member, however, does not guarantee the obligations of the DCOs to the Covered Customer.

1.2 On the understanding that the Covered Base Agreement and CDA confer upon the Clearing Member the contractual right to liquidate (whether before or after novation to the DCO) all Covered Transactions upon the insolvency of the Covered Customer[2] as described under the fact patterns, we are of the view that these contractual provisions should generally be enforceable under the laws of Singapore. We hold this view on the basis that these provisions constitute the terms of the Covered Base Agreement or CDA which are binding on the liquidator of the Covered Customer.

1.3 The right of the Clearing Member to terminate the Covered Transactions after the onset of insolvency may, however, be affected if the liquidator (or possibly if so ordered by the court under section 227X of the Companies Act, in each case then in this part II of the memorandum also the judicial manager) of the Covered Customer has already exercised his right to disclaim any of the Covered Transactions under section 332 of the Companies Act. Section 332 of the Companies Act allows the liquidator of the Covered Customer to disclaim unprofitable contracts with the leave of the courts of Singapore. The other party

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should refer to the net liabilities of the depositor after the application of the liquidation, set-off and netting provisions, and accordingly Section 62A would not affect our analysis in respect of the enforceability of these provisions under the Covered Base Agreement and CDA as set out in this memorandum.

[2] There are three types of insolvency proceedings that a Singapore-incorporated company may be subject to. These are (i) a winding up under Part X of the Companies Act, (ii) judicial management under Part VIIIA of the Companies Act and (iii) a compromise or arrangement under sections 210, 211, 212 and 309 of the Companies Act, whereby proposals between the company and its creditors (or a class of them) for a composition in satisfaction of its debts can, if resolved upon the requisite number of creditors (and, in the case of section 210, if approved by the court), bind all its creditors (or the relevant class) (an "**Arrangement**"). In the event of an Arrangement, the ability of the Clearing Member to terminate the outstanding Covered Transactions may be affected by the Arrangement, but an Arrangement is only implemented after certain procedural steps have been taken (including the convening of meetings of creditors and/or shareholders of the company as the Covered Customer). As long as the Covered Transactions have been terminated and closed-out pursuant to the provisions of the Covered Base Agreement and CDA prior to the Arrangement taking effect, the Arrangement should not retrospectively overturn the recognition of the effectiveness of the termination and netting provisions of the Covered Base Agreement and CDA under Singapore law.

to a disclaimed contract will then need to prove as an unsecured creditor in respect of any damages payable for any loss in respect of the non-performance of the disclaimed contract.

1.4 Accordingly, there is a risk that the liquidator of the Covered Customer may attempt to "cherry pick" if the Clearing Member exercises its right to terminate the Covered Transactions some time after the insolvency of the Covered Customer. In such a case, the damages which may be claimed by the Clearing Member arising out of the disclaimer will be set-off against the amounts due to the Covered Customer under the Covered Transactions which have neither been disclaimed by the liquidator nor terminated by the Clearing Member (but please note our comments on netting in question II(2) below).

1.5 It is difficult to state with certainty the particular timeframe that the liquidator will seek to exercise his right of disclaimer; however, broadly speaking, we normally would not expect such right to be exercised before at least two or three months from the date of appointment of the liquidator. This is because it would take some time for the liquidator or judicial manager, as the case may be, to make an assessment as to whether to exercise his right to disclaim any of the Covered Transactions. In the case of judicial management, the judicial manager additionally has to apply to the court for the power to exercise disclaimer rights. If, prior to the liquidator's (or judicial manager's) exercise of his right to disclaim any of the Covered Transactions, the Clearing Member exercises its rights to close-out the Covered Transactions, note that the liquidator (or judicial manager) may nevertheless choose to exercise his right of disclaimer over the entire agreement (assuming all Covered Transactions constitute a single agreement) after a termination amount has been determined following the closing-out of the Covered Transactions, in which case, the Clearing Member will have the right to prove as an unsecured creditor in respect of its loss or damage as a consequence of such disclaimer.

1.6 We understand that the CDA confers upon the Clearing Member the right to liquidate any Cleared Derivatives Transactions affected by a Tax Liquidation Event; in other words, the Clearing Member has the right, in the case of a Tax Liquidation Event, to terminate some but not all of the Covered Transactions. Based on our review of the form of the Cleared Derivatives Addendum published by FIA and ISDA, we would advise that, in the insolvency of a Covered Customer, such right of the Clearing Member to selectively terminate Covered Transactions may incrementally increase the risk of the liquidator having a right to disclaim selected Covered Transactions. If, however, each party has entered into the CDA in good faith, for proper purpose and for its own commercial benefit, and both parties were solvent at the time of entering into the CDA and the relevant Covered Transactions, our expectation is that generally, the existence of such a provision in the CDA conferring on the Clearing Member the right to selectively terminate Covered Transactions in the case of a Tax Liquidation Event should not in itself materially increase the risk of the liquidator successfully "cherry picking". However, it is difficult to state the position with certainty in the absence of Singapore case law.

1.7 As a separate point, we have been asked to advise on whether the Clearing Member has the authority to enter into offsetting transactions on behalf of the Covered Customer upon the insolvency of the Covered Customer. The general position under Singapore law is that a power of attorney may be revoked upon, among others, insolvency of the donor of the power. However, in the case of a Singapore-incorporated company in respect of a power

of attorney to be used in Singapore, this is subject to two exceptions. First, under section 44 of the Conveyancing and Law of Property Act, Chapter 61 of Singapore, if a power of attorney is in the instrument creating the power expressed to be irrevocable for a fixed time therein specified, then in favour of a purchaser:[3]

(a) the power shall not be revoked for and during that fixed time by (among others) the bankruptcy of the donor of the power;

(b) any act done within that fixed time by the donee of the power in pursuance of the power shall be as valid as if anything done by the donor of the power as if the bankruptcy of the donor of the power had not happened; and

(c) neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice either during or after that fixed time of (among others) the bankruptcy of the donor of the power within that fixed time.

1.8 The second exception is a power of attorney that is coupled with an interest.

1.9 In the case of the power of attorney granted by the Covered Customer to the Clearing Member under Section 7(a)(iii) of the CDA (which is not expressed to be irrevocable), there is a risk that it will be regarded as revoked upon the Covered Customer's insolvency. However, given that the power of attorney is coupled with the security interest granted to the Clearing Member under the CDA, we believe that the power of attorney should be recognised and effective upon the Covered Customer's insolvency provided that: (a) the security interest is validly existing at that time; (b) the exercise of the power of attorney is in relation to, and to the extent of, the valid security interest; and (c) the power of attorney, as properly construed, is not revocable.

1.10 We should also add that apart from the power of attorney, any agency relationship may also be revoked upon insolvency of the principal. However, this may not, by itself, affect the enforcement of security rights within the confines of the security interest, provided that in general it will not add to the amount of provable debts or liabilities of the insolvent principal.

1.11 We are not able to fully comment on the effects of insolvency on foreign companies as that would partly depend on the laws of the incorporation or establishment of that company.

2. Are the provisions of the Covered Base Agreement and CDA providing for the netting of termination values and any cash collateral that is viewed as a title transfer (see discussion in Section IV.A(f) below), in determining a single lump-sum termination amount upon the insolvency of a Covered Customer enforceable under the law of Singapore?

2.1 Whether the provisions of the Covered Base Agreement and CDA providing for netting of termination values in determining a single lump-sum termination amount upon the insolvency of the Covered Customer are enforceable under the law of Singapore where the derivatives contract is novated under the FCM Clearing Model as described in question II(1) above, and the ultimate counterparties to the Covered Transaction are the

[3] The term "purchaser" is widely defined to include a lessee or mortgagee and an intending purchaser, lessee or mortgagee or other person who for valuable consideration takes or deals for any property. The term "mortgage" includes any charge on any property for securing money or money's worth.

DCO and Covered Customer, would depend on whether they are consistent with the mandatory insolvency set-off rules described in paragraph 2.4 below.

Netting of termination values where the transaction is novated to the DCO

2.2 It is provided in section 300 of the Companies Act that the property of a company shall, on its winding-up, be applied *pari passu* in satisfaction of its liabilities (apart from secured liabilities, statutorily preferred debts such as employees' salary and the costs and expenses of the liquidation). Separately, in the case of an insolvent winding-up or possibly judicial management (where the Singapore High Court (or the Court of Appeal, as the case may be) exercises the power under section 227X of the Companies Act to order for the application of section 327(2) and section 88 of the Bankruptcy Act in the case of a judicial management) the mandatory insolvency set-off provisions under Section 88 of the Bankruptcy Act which may be made applicable under section 327(2) of the Companies Act could apply. The question accordingly arises as to whether the netting provisions represent an attempt by the parties to vary by contract the provisions of section 300 of the Companies Act or the mandatory insolvency set-off provisions and consequently confer upon the Clearing Member a result which cannot be effectively achieved in the absence of the creation of a security interest in favour of the Clearing Member.

2.3 Section 300 of the Companies Act applies in a voluntary winding up. Case law has also made clear that the *pari passu* rule applies also to compulsory winding up.

2.4 The mandatory insolvency set-off provisions under Singapore law essentially provide that where there have been mutual credits, mutual debts and other mutual dealings between an insolvent company and one of its creditors, then the total sum due from one party must be set-off against the total sum due from the other party such that only the balance is payable by or to the liquidator. In order for set-off to apply under the mandatory insolvency set-off rules, the following conditions and requirements for mutuality must be met:

(a) debts must be owing to and from a person in the same capacity (this means that the parties to the Covered Base Agreement and CDA must be acting as principals and not through an agent and must own the beneficial interests in the debts);

(b) the mutual debts must be capable of maturing into monetary claims, and thereby establishing a liability on each side which is pecuniary in nature. In respect of transactions which involve physical delivery of shares, bonds or commodities, this requirement could be achieved in the Covered Base Agreement and CDA by converting the delivery obligations into monetary obligations upon liquidation of the Covered Transactions; and

(c) set-off will not be available to the Clearing Member if it had notice, at the time the parties entered into the Covered Base Agreement and CDA and each Covered Transaction, of the making of a winding-up application against the Covered Customer, or the appointment of a provisional liquidator in respect of the Covered Customer, or a judicial management application against the Covered Customer. In contrast with conditions (a) and (b) above, the non-fulfilment of this condition (c) will affect only those Covered Transactions entered into after the Clearing Member Party had notice of the making of a winding-up application against the Covered Customer, the appointment of the provisional liquidator or the judicial

management application (with the result that set-off may not be available with respect to such Covered Transactions).

2.5 We do not undertake in this memorandum to evaluate whether Clearing Members act as agents for their customers or in a principal role in respect of obligations to customers or the potential implications that the legal characterisation of the Clearing Members' roles may have for netting under the traditional doctrine of setoff. In particular, we express no opinion on whether the condition for mutuality as described under paragraph 2.4(a) above would be met. Rather, we analyse a Clearing Member's right to net contractual payment obligations by focusing on its status as a secured party. While we focus on a Clearing Member's rights in respect of contractual payment obligations as rights of a secured party, we note that it is possible, depending on the facts and circumstances, that a Clearing Member's rights in respect of related assets (such as margin) may be viewed as netting or setoff rights, rights of a secured party or both.

2.6 If the Clearing Member has a right of subrogation after paying the DCO under applicable DCO rules (pursuant to which the Clearing Member must meet the Covered Customer's obligations to the DCO under the Futures Transactions and Cleared Derivatives Transactions it clears regardless of whether the Covered Customer itself performs), or if the Clearing Member has some other right of indemnity against the Covered Customer, this could establish a claim by the Clearing Member against the Covered Customer which the Clearing Member would be able to set-off against any obligations that the Clearing Member owes to the Covered Customer (provided that the conditions for mutuality in paragraph 2.4(b) and (c) are fulfilled). As regards the question of whether the Clearing Member needs to have paid the DCO before it can rely on its right of subrogation to establish a claim for the purposes of set-off, this would be a matter to be determined under the governing law of the Covered Base Agreement and CDA (i.e. New York law).

2.7 Regardless of whether traditional netting would be available, the Clearing Member would be able to achieve a similar result through the grant and perfection of a security interest in, and the exercise of remedies against collateral, including in particular a security interest in the Covered Customer's right, title and interest in (a) its contractual rights under its Futures Transactions and Cleared Derivatives Transactions, (b) its right to payment from DCOs in respect of those Futures Transactions and Cleared Derivatives Transactions and (iii) the proceeds of such rights (which are typically in the form of variation margin payments made by the DCOs to the FCM on a frequent basis), which the Covered Customer grants to the Clearing Member under the Covered Base Agreement and CDA. Such security interest would have to secure obligations owed by the Covered Customer to the Clearing Member, and in this regard, the Clearing Member should ensure that it has a right of reimbursement by the Covered Customer to the Clearing Member for any funds paid by the Clearing Member to the DCOs under the guarantees, possibly by way of a contractual indemnity in the Covered Base Agreement and CDA.

2.8 Subject to our response to question II(1) above and to the issues concerning creation, perfection, enforcement and priority of security interests in part IV below, the Clearing Member would be able to liquidate the Covered Transactions and enforce its security interest and to collect amounts owed by DCOs to the Covered Customer. The Clearing Member may then apply the amounts against any obligations owed by the Covered Customer to the Clearing Member. Although this does not involve set-off and netting *per*

se, assuming that the security interest is valid and enforceable, this should allow the Clearing Member to achieve the same economic effect as though the Clearing Member were to set-off obligations owed by the DCO to the Customer against the Clearing Member's obligations to the DCO under the guarantee. We would, however, highlight that enforcement of security interests, unlike set-off and netting rights, may be subject to stays or delays in enforcement where the Covered Customer is insolvent (as further elaborated in our response to question IV(17) below). Briefly, if the Covered Customer is subject to judicial management proceedings, there is a stay on the enforcement of security and therefore the Clearing Member would have to obtain the leave of the High Court of Singapore or the consent of the judicial manager in order to enforce its security interest.

2.9 In addition, we would highlight that the Monetary Authority of Singapore (the "**Authority**") has powers of resolution in respect of Singapore licensed financial institutions, including banks and insurance companies in the event of their insolvency. These powers are broad and include the power to order a transfer of all or part of the business of a financial institution and to apply to the Singapore High Court for an order that, *inter alia,* no execution, distress or other legal process shall be commenced, levied or continued against any property of the financial institution, no steps shall be taken to enforce any security over any property of the financial institution and/or no steps shall be taken by any person, other than a person specified in the order, to sell, transfer, assign or otherwise dispose of any property of the financial institution.

(a) Before these resolution powers were introduced, the Authority conducted a public consultation, and received feedback that these powers were too broadly worded and could affect bilateral netting arrangements that parties had legitimately entered into. In response to this feedback, provisions were inserted into the relevant legislation to allow the Minister of Finance to enact regulations exempting set-off arrangements or netting arrangements from the resolution provisions. Although no regulations relating to bilateral netting arrangements have yet been made, it is clear from the parliamentary debates that the legislative intention is to uphold proper bilateral netting arrangements across all financial institutions, including banks and insurance companies. Accordingly, we are of the view these resolution powers are not intended to affect bilateral netting arrangements.

(b) However, they may affect the enforceability of security interests. Broadly, the Authority has the general power to require the financial institution immediately to take any action or to do or not to do any act or thing whatsoever in relation to its business as the Authority may consider necessary, and the Authority may impose a moratorium on proceedings or on the enforcement of security. Such moratoriums do not automatically take effect upon the insolvency of the financial institution. Generally, there would be a moratorium only if the Authority, if it considers it to be in the interests of certain affected persons (e.g. in the case of a bank, the depositors, or in the case of an insurer, the policy owners), makes an application to the Singapore High Court and the Singapore High Court makes an order imposing such a moratorium; however, we would note that we are not aware of any instance where the Authority made such application to the Singapore High Court. Under certain circumstances (for instance, where the financial institution is directed by the Authority to make a compulsory transfer of the whole or any part of its business), the moratorium would only apply from the date on which the Minister

publishes a notice of intention to approve the transfer, or in the absence thereof, the date on which the Authority publishes the certificate of transfer.

Clawbacks

2.10 We would highlight that there are clawbacks under Singapore law for transactions that are entered into during certain suspect periods.

Unfair Preference

2.11 Pursuant to section 227T and section 329 of the Companies Act, unfair preferences granted within a certain period prior to the commencement of certain insolvency proceedings, if the Covered Customer was insolvent or became insolvent as a result of the preference may be set aside or varied by the Singapore courts. An unfair preference would be regarded as having been given by the company to a person:

(a) where that person is one of the Covered Customer's creditors or a surety or guarantor for any of its debts or other liabilities; and

(b) the Covered Customer does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the liquidation, will be better than the position he would have been in if that thing had not been done.

2.12 The test for unfair preference is whether the Covered Customer which gave the potential unfair preference was influenced in deciding to give such preference by a desire to put the recipient into a position which, in the event of liquidation, will be better than the position he would have been in if that thing had not been done. In relation to certain specified classes of connected persons, the company will be presumed, unless the contrary is shown, to have been influenced by the desire to produce the effect stated above. The relevant period, in the case of preferences given to such "connected persons", is the period of two years ending with the date of commencement of winding-up or judicial management; in the case of preferences given to other persons, the relevant period is the period of six months ending with that date. For this purpose, winding up should in principle have commenced on the earliest of:

(a) the filing of the winding up application;

(b) the passing of the winding up resolution; and

(c) where a provisional liquidator has been appointed before the resolution for winding up had been passed, at the time when the declaration of the inability by reason of its liabilities of the company to continue its business is lodged with the Registrar of Companies.

In the case of judicial management, judicial management should for this purpose be regarded as having been commenced on the making of the judicial management application.

2.13 We are of the view that a payment effected in accordance with the terms of the Covered Base Agreement and CDA prior to the insolvency of the Covered Customer should, generally speaking, not be considered by the Singapore courts as a payment made with a view to giving the Clearing Member (or the DCO) a preference over the other creditors of

the Covered Customer where the parties entered into the Covered Base Agreement and CDA on an arm's-length basis. However, if the Covered Customer was influenced in entering into transactions during the unfair preference period by the desire to prefer the Clearing Member (or the DCO), this may justify the application of section 329 of the Companies Act.

Transactions at an Undervalue

2.14 Pursuant to section 227T and section 329 of the Companies Act, transactions entered into at an undervalue within a certain period prior to the insolvency proceedings in respect of a Singapore company may be set aside or varied by the Singapore courts, if the relevant company was insolvent or became insolvent as a result of the preference. A transaction is essentially entered into at an undervalue if the insolvent company makes a gift or otherwise enters into a transaction where no consideration or inadequate consideration is received. In determining whether a transaction is at an undervalue, the High Court of Singapore, in the case of *Show Theatres Pte Ltd (in liquidation) v Shaw Theatres Pte Ltd*, held, following an Australian case, that the relevant guideline is whether there was a bargain of such magnitude that it could not be explained by normal commercial practice. On appeal, this decision was reversed on another point but the holding above relating to transactions at an undervalue should still apply. Separately, under regulation 6 of the Companies (Application of Bankruptcy Act Provisions) Regulations, a transaction is not at an undervalue if the company which entered into the transaction did so in good faith and for the purpose of carrying on its business; and at the time it did so there were reasonable grounds for believing that the transaction would benefit the company. The relevant period is the period of five years ending on the date of commencement of winding-up or judicial management, as described under paragraph 2.12 above.

2.15 In the present context, if the parties deal on arms' length terms, there should be minimal risk of the Covered Transactions being characterised as transactions at an undervalue.

3. Assuming the parties have entered into a Covered Base Agreement and CDA, the Covered Customer is insolvent and the Clearing Member has determined a lump-sum termination amount in a currency other than the currency of the jurisdiction in which the insolvent party is organised:

(1) would a court in Singapore enforce a claim for the net termination amount in the currency in which it was determined?

Payments to creditors made in the course of administering the insolvency will be made in Singapore dollars pursuant to rule 181 of the Bankruptcy Rules (which would apply to insolvent winding up via section 327(2) of the Companies Act and which may apply in turn to judicial management via section 227X of the Companies Act). This rule provides that the amount of the debt in foreign currency shall be converted into Singapore dollars at the rate prevailing on the date of the bankruptcy order, such rate being determined as follows:

(a) the rate will be the average of the buying and selling rates as published in a local newspaper on the date in question; and

(b) in the absence of any such published rate, it shall be such rate as may be determined by the Official Assignee or the trustee in bankruptcy.

(2) can a claim for the net termination amount be proved in insolvency proceedings in Singapore without conversion into the local currency?

Yes -- it is possible to file a proof of debt in liquidation proceedings in Singapore for a debt payable in a currency other than Singapore dollars. However, when payments to creditors are made in the course of administering the insolvency, such payments will be made in Singapore dollars pursuant to rule 181 of the Bankruptcy Rules, as described above.

III. Netting for Multibranch Parties

A. Assumptions

Unless otherwise indicated, and in addition to any other assumptions and qualifications specifically stated elsewhere in this memorandum, our responses in this part III are subject to all of the assumptions set out in respect of part II and the following assumptions:

1. In respect of Issue 1 below, a Covered Customer that is a bank organised in Singapore has entered into a Covered Base Agreement and CDA that permit it to enter into Covered Transactions acting through branches in multiple jurisdictions (referred to herein as a "**multibranch basis**"). The local bank then has entered into Covered Transactions under a Covered Base Agreement and CDA through the bank in Singapore and also through one or more branches located in other countries (as permitted by the bank's Covered Base Agreement and CDA). After entering into these Covered Transactions and prior to the maturity thereof, the local bank becomes the subject of a voluntary or involuntary proceeding under the insolvency laws of Singapore.
2. In respect of Issues 2 and 3 set forth below, a Covered Customer that is a bank ("**Bank F**") organised and with its headquarters in a country ("**Country H**") other than Singapore has entered into a Covered Base Agreement and CDA on a multibranch basis. Bank F has entered into Covered Transactions under the Covered Base Agreement and CDA through Bank F and also through one or more branches located in other countries (as permitted by the bank's Covered Base Agreement and CDA), including in each case a branch of Bank F located in and subject to the laws of Singapore (the "**Local Branch**"). After entering into these Covered Transactions and prior to the maturity thereof, Bank F becomes the subject of a voluntary or involuntary proceeding under the insolvency laws of Country H.

B. Issues

1. *Would there be any change in your conclusions concerning the enforceability of netting under the Covered Base Agreement and CDA based upon the fact that the local bank has entered into a Covered Base Agreement and CDA on a multibranch basis and then entered into Covered Transactions under that Covered Base Agreement and CDA through the bank in Singapore and also through one or more branches located in other countries prior to its insolvency?*

Pursuant to section 269(1), read with section 305, of the Companies Act, the liquidator of the Singapore bank (whether appointed under a voluntary or involuntary proceeding) shall take into his custody or under his control all the property or choses in action to which the Singapore bank is or appears to be entitled. Accordingly, in principle, the liquidation proceeding of the Singapore bank should extend to all domestic and foreign assets of the Singapore bank, including the assets of any non-Singapore branches of the bank. The Singapore courts will apply the laws of Singapore in such proceedings and accordingly,

our conclusions concerning the enforceability of close-out netting under the Covered Base Agreement and CDA as set out under part II above should remain the same notwithstanding that the Singapore bank has entered into the Covered Base Agreement and CDA on a multibranch basis.

2. Would there be a separate proceeding in Singapore with respect to the assets and liabilities of the Local Branch at the start of the insolvency proceeding for Bank F in Country H? Or would the relevant authorities in Singapore defer to the proceedings in Country H so that the assets and liabilities of the Local Branch would be handled as part of the proceeding for Bank F in Country H? Could local creditors of the Local Branch initiate a separate proceeding in Singapore even if the relevant authorities in Singapore did not do so?

2.1 Section 377(2) of the Companies Act provides that if a foreign company is liquidated or is dissolved in its place of incorporation, the agent of such foreign company* shall, within one month after the commencement of the liquidation or the dissolution or within such other time as the Registrar of Companies of Singapore (the "**Registrar**") in special circumstances may allow, lodge, or cause to be lodged, with the Registrar notice of that fact and when the liquidator is appointed, notice of such appointment. Section 377(2)(b) of the Companies Act provides that the liquidator of such foreign company shall, until a Singapore liquidator of such foreign company is duly appointed by the Singapore courts, have the powers and functions of a liquidator for Singapore. Case law in Singapore has, however, interpreted section 377(2)(b) of the Companies Act to mean that the powers and functions of the foreign liquidator contemplated under section 377(2)(b) are solely to enable the foreign liquidator to collect and recover the assets of the foreign company in Singapore. Section 377(2)(b) does not confer on the foreign liquidator all the powers and the functions of a liquidator appointed under the Companies Act (as discussed in paragraph 2.6 below) and in particular, it has been decided in the Singapore courts that the Singapore courts do not have the jurisdiction to summon and examine on oath persons allegedly connected with the affairs or property of foreign companies which are not wound up under the Companies Act. In addition, where the Local Branch is a "specified financial institution" (as such term is defined in the Monetary Authority of Singapore Act, Chapter 186 of Singapore (the "**MAS Act**"), which includes a bank licensed in Singapore under the Banking Act), the MAS Act provides that the foreign liquidator shall not have or exercise any power or function of a liquidator in Singapore unless the liquidator has been approved by the Authority.

2.2 In short, this means that the authority of the liquidator of Bank F appointed under the laws of Country H will generally be recognised in Singapore subject to the limitations stated in paragraph 2.1 above. Pursuant to section 377(3) of the Companies Act, the liquidator of Bank F appointed for Singapore by the Singapore courts or a person exercising the powers and functions of such a liquidator shall be concerned only with the recovery and the realisation of the assets of the foreign company located or deemed to be located in Singapore and shall, subject to certain conditions, pay the net amount so recovered to the liquidator of Bank F in Country H after paying any debts and satisfying all preferential debts of the foreign company as well as any other payments approved by a Singapore

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* *A foreign company with a registered branch office in Singapore is required under the Companies Act to appoint two agents in Singapore.*

court and any liabilities incurred in Singapore by the foreign company. In the case of a Local Branch that is a Singapore licensed bank, the Banking Act further provides that where the Local Branch becomes unable to meet its obligations or becomes insolvent or suspends payment, the assets of the Local Branch shall be available to meet certain liabilities in Singapore of the Local Branch (which generally relate to deposit liabilities and insured deposits under the deposit insurance scheme). These liabilities have priority over all unsecured liabilities of the Local Branch other than the preferential debts specified in the Companies Act. The other provisions of the Banking Act as well as the mandatory insolvency laws of Singapore would also apply.

2.3 In this respect, it is not entirely accurate to say that the relevant authorities in Singapore would defer to the liquidation proceeding in Country H such that the assets and liabilities of the Local Branch would be handled as part of the proceeding for Bank F in Country H. This is because even in the case of the liquidator appointed under the laws of Country H (we shall describe the procedure whereby the liquidator for Singapore is appointed below), the liquidator will be acting generally in accordance with the laws of Singapore (and the mandatory provisions of the Banking Act and the MAS Act, to the extent applicable, will prevail over foreign insolvency laws in the case of a Local Branch that is a Singapore licensed bank) and moreover, the liquidator will pay the preferred and other approved creditors of Bank F in Singapore prior to remitting the surplus assets to himself as the foreign liquidator.

2.4 As for the rights of the creditors of the Local Branch to initiate a separate winding-up proceeding in Singapore, this is provided for in section 351 of the Companies Act. Section 351 basically provides that a foreign company may be wound-up:

(a) if the company is dissolved or has ceased to carry on business in Singapore or has a place of business in Singapore only for the purpose of winding-up its affairs or has ceased to carry on business in Singapore;

(b) if the company is unable to pay its debts; and

(c) if the Singapore court is of the opinion that it is just and equitable that the foreign company should be wound-up.

2.5 The making of a winding-up order by the Singapore courts on any of the above three grounds is a matter of discretion. Section 351(3) of the Companies Act further provides that a foreign company may be wound-up notwithstanding that it is simultaneously being wound-up under the laws of the place under which it was incorporated.

2.6 The liquidator for the foreign company appointed under section 351 of the Companies Act will, upon his appointment, generally have the powers and functions of a liquidator appointed in respect of a Singapore company (cf. the more limited powers of a foreign liquidator as described in paragraph 2.1 above). Accordingly, the Local Branch may be wound-up notwithstanding that Bank F is already the subject of a liquidation proceeding, whether voluntary or involuntary, under the insolvency laws of Country H. The winding-up proceeding in Singapore in respect of the Local Branch is usually referred to as an ancillary proceeding and, as stated above, will generally be limited in its scope or operation to assets located or deemed to be located in Singapore.

2.7 We would also highlight that where the winding-up proceeding is initiated under section 351 of the Companies Act, the mandatory insolvency set-off provisions would be triggered - this is in contrast to a situation where there is no Singapore court winding up, in which case the mandatory insolvency set-off provisions would not automatically be imported.

2.8 We would, however, note that there is a possibility that foreign insolvency proceedings may have an impact on the enforceability of the close-out netting provisions under Singapore law. Under Singapore law, there is the possibility of recognition under common law in Singapore of the appointment of the liquidator or other insolvency officer in Bank F's home jurisdiction, and for the Singapore courts to assist, at common law, foreign insolvency proceedings. Such possibility has been made clear in a recent Singapore Court of Appeal decision. However, the precise extent of recognition and assistance has yet to be worked out in Singapore.

2.9 Nonetheless, it is our opinion that it seems unlikely that the Singapore courts will, in recognising and assisting a foreign insolvency, go as far as to give assistance in such a way that undermines the enforceability of valid close-out netting provisions. However, in the absence of case law on this specific point, it is not possible to state the position with absolute certainty.

3. If there would be a separate proceeding in Singapore with respect to the assets and liabilities of the Local Branch, would the receiver or liquidator in Singapore and the courts of Singapore, on the facts above, include Bank F's position under a Covered Base Agreement and CDA, in whole or in part, among the assets of the Local Branch and, if so, would the receiver or liquidator and the courts of Singapore recognize the netting provisions of the Covered Base Agreement and CDA in accordance with their terms? The most significant concern would arise if the receiver, liquidator or court in Singapore considering a single Covered Base Agreement and CDA would require a counterparty of the Local Branch of Bank F to pay the mark-to-market value of Covered Transactions entered into with the Local Branch to the liquidator or receiver of the Local Branch while at the same time forcing the counterparty to claim in the proceedings in Country H for its net value from other Covered Transactions with Bank F under the same Covered Base Agreement and CDA. In considering this issue, please assume that netting under the Covered Base Agreement and CDA would be enforced in accordance with its terms in the proceedings for Bank F in Country H.

3.1 In the event of a separate liquidation proceeding in Singapore with respect to the assets and liabilities of the Local Branch, we would advise that the liquidator in Singapore and the Singapore courts will include Bank F's position under the Covered Base Agreement and CDA among the assets of the Local Branch if the transactions documented by the Covered Base Agreement and CDA constitute one agreement. Whether these transactions constitute a single agreement would ultimately be determined under the governing law of the Covered Base Agreement and CDA (i.e. New York law), but generally this would depend on whether the Covered Base Agreement and CDA expressly provide for these transactions to constitute a single agreement and even if they so provide, whether there are any other factors supporting a contrary conclusion. In such a situation, the Clearing Member will make its claims against the Local Branch in respect of debts arising under or in connection with all the Covered Transactions documented under the

Covered Base Agreement and CDA. There will not be a net calculation based on only the Covered Transactions booked through the Local Branch.

3.2 The Singapore courts, in determining the amount which may be paid to the Clearing Member against the assets of the Local Branch will have regard to the laws of Singapore (although New York law will be relevant in determining whether the Covered Transactions are valid) with the result that the discussions relating to close-out and close-out netting under part II above are equally applicable here. If close-out netting is available, it is unlikely that the liquidator of Bank F in Singapore considering a single Covered Base Agreement and CDA would require the counterparty of the Local Branch to pay the mark-to-market value of Covered Transactions entered into with the Local Branch to the liquidator of the Local Branch and at the same time forcing the counterparty to claim in the liquidation proceeding in Country H for the net termination value under Transactions with Bank F documented under the same Covered Base Agreement and CDA.

4. We would like you to confirm that your answers to Issues 1, 2 and 3 immediately above remain the same, notwithstanding possible actions that could be taken by an insolvency official or court in another jurisdiction where netting may be unenforceable (the "Non-Netting Jurisdiction"). Such actions taken by an insolvency official of a Non-Netting Jurisdiction include the following scenarios:

(1) In the case of an insolvency proceeding for a local bank (a bank organised under the laws of Singapore), the local bank, acting on a multibranch basis, has booked Covered Transactions through its home office and one or more branches located in Non-Netting Jurisdictions (the "Non-Netting Branches").

(2) In the case of an insolvency proceeding for a Local Branch of Bank F, Bank F acting on a multibranch basis, has booked Covered Transactions through (i) its home office, (ii) its Local Branch and (iii) one or more Non-Netting Branches in other jurisdictions.

Please note our comments under paragraphs 2.8 and 2.9 of this part II above on the possible impact of foreign insolvency proceedings. However, as mentioned, in our view, it is unlikely that the Singapore courts will, in recognising and assisting a foreign insolvency, go as far as to give assistance in such a way that undermines the enforceability of valid close-out netting provisions. Accordingly, our answers to Issues 1 to 3 would generally remain the same.

However, where there are ongoing insolvency proceedings in Non-Netting Jurisdictions, this may give rise to conflicts with the Singapore insolvency proceedings, as the Non-Netting Jurisdictions may not recognise the set-off effected by the Singapore courts.

5. ISDA would like you to confirm that where courts in your country have jurisdiction over the assets of a local bank or a Local Branch, a Covered Base Agreement and CDA that allows a Covered Customer to enter into Covered Transactions on a multibranch basis would be treated as a single, unified agreement by a receiver under the laws of your jurisdiction regardless of the treatment of the Covered Base Agreement and CDA or Covered Transactions thereunder by an insolvency official in a country where netting may be unenforceable.

We confirm that where courts in Singapore have jurisdiction over the assets of a local bank or a Local Branch, a Covered Base Agreement and CDA that allows a Covered Customer to enter into Covered Transactions on a multibranch basis would be treated as a single, unified agreement by a receiver under the laws of Singapore (assuming that this is contractually provided for and is the effect of the Covered Base Agreement and CDA under New York law) regardless of the treatment of the Covered Base Agreement and CDA or Covered Transactions thereunder by an insolvency official in a country where netting may be unenforceable.

IV. Collateral Under a Covered Base Agreement and CDA

FACT PATTERNS

The three principal fact patterns concern (a) whether or not the Location (as defined below) of the Covered Customer is in Singapore and (b) whether or not the Location of the Futures Credit Support or Cleared Derivatives Credit Support ("**Collateral**") is in Singapore.

In particular, when responding to each question, we distinguish between the following three fact patterns:

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

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

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

For the foregoing purposes:

(a) the "Location" of the Covered Customer is in Singapore if it is incorporated or otherwise organised in Singapore and/or if it has a branch or other place of business in Singapore; and

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

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

We have not expressly referred to each fact pattern in answering each question below, but we have taken the fact patterns into account in preparing our advice and, unless otherwise stated in our advice (or the relevant question), our advice generally applies to all three fact patterns.

A. Assumptions

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

(a) Pursuant to the relevant Covered Base Agreement and CDA, the counterparties agree that Collateral will include cash credited to an account (as opposed to physical notes and coins) and certain types of securities (as further described below) that are located or deemed located either (i) in Singapore, or (ii) outside Singapore ("**Eligible Collateral**"). We further assume that Eligible Collateral will include the security interest held by the Clearing

Member in the Covered Customer's right, title and interest in (1) its contractual rights under its Futures Transactions and Cleared Derivatives Transactions, (2) its right to payment from DCOs in respect of those Futures Transactions and Cleared Derivatives Transactions and (3) the proceeds of such rights.

(b) We assume that the Clearing Member is either (i) a corporation or (ii) a bank or other similar financial institution.

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

(d) 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.

(e) We 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.

(f) 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 setoff right. If the treatment of cash Collateral is subject to similar alternate analyses in Singapore, we have been asked to advise as to the proper treatment under each alternative.

Whether the cash Collateral is viewed as a title transfer or a security interest depends on the construction of the Covered Base Agreement and the CDA under its governing law. If the cash Collateral is viewed as a title transfer, the Clearing Member may, assuming that the relevant Covered Base Agreement and CDA confers on the Clearing Member a contractual right of set-off, immediately set off the amount of cash against the Covered Customer's outstanding obligations under the Covered Base Agreement and CDA. Accordingly, in such cases, there is no issue as to the validity of a security interest over the cash Collateral. Therefore our responses to the questions below on security interests relate to the case where the cash Collateral is viewed as collateral over which the Clearing Member has a security interest.

(g) In the case of questions 12 to 15 below, we also assume that after entering into the Covered Transactions and prior to the maturity thereof, an event of default exists and is continuing with respect to the Covered Customer, and/or the Clearing Member has designated a date to begin exercising its Futures Liquidation Rights or Cleared Derivatives Liquidation Rights (a "**Liquidation Date**") as a result thereof (however, an insolvency

proceeding has not been instituted, which is addressed separately in assumption (h) and questions 16 to 18 below).

(h) In the case of questions 16 to 18 below, we assume that a formal bankruptcy, insolvency, liquidation, reorganisation, 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.

B. Issues

Validity of Security Interests

1. Under the laws of Singapore, 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 Singapore recognize 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?

Under Singapore conflicts of laws rules, the law governing the contractual aspects of a security interest in the various forms of Eligible Collateral deliverable under the Covered Base Agreement and CDA is the proper law (i.e. the governing law) of the Covered Base Agreement and CDA.

The courts of Singapore would recognise the validity of a security interest created under the Covered Base Agreement and CDA, assuming it is valid under the governing law of such Covered Base Agreement and CDA, and assuming further that the proprietary aspects of the security interest are valid under the laws of the relevant jurisdiction (as described in our response to the following question).

2. Under the laws of Singapore, 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 incorporation or organisation of the Covered Customer, the jurisdiction where the Eligible Collateral is located, or the jurisdiction of 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 the law of Singapore with respect to the different types of Eligible Collateral. In particular, please describe how the laws of Singapore apply to each form in which securities Eligible Collateral may be held as described in assumption (c) above.

Under the conflict of law rules of Singapore, the law which governs the proprietary aspects of a security interest in Eligible Collateral (other than Eligible Collateral in the form of cash and contractual rights) is the law of the jurisdiction where the Eligible Collateral is situate (the *lex situs*). For the different types of such Eligible Collateral, while there is some uncertainty in the relevant caselaw as to how their location should be determined, our views on this issue are as follows:

(a) Directly held bearer debt securities are located in the jurisdiction where the relevant certificate are located.

(b) Directly held registered debt securities are located in the jurisdiction where the relevant register is located.

(c) Directly held dematerialised debt securities are located in the jurisdiction where the relevant electronic register is located.

(d) In the case of indirectly held debt securities, the conflicts of laws rules are especially unclear; but in our view, a Singapore court is likely to hold that the rights against the custodian or intermediary to such securities are located in the jurisdiction in which the account with the relevant custodian or other intermediary is maintained.

In the case of Eligible Collateral in the form of cash, we assume that such Eligible Collateral takes the form of a debt claim against the bank with whom the relevant account is maintained. On this basis, a Singapore court would take the view that the proprietary aspects of a security interest over such Eligible Collateral is governed by the governing law of the account agreement with the bank.

In respect of Eligible Collateral which consists of contractual rights, a Singapore court would take the view that the proprietary aspects of a security interest over such Eligible Collateral are governed by the governing law of the contract under which the rights are conferred – i.e. in the case of the Covered Customer's contractual rights under Futures Transactions and Cleared Derivatives Transactions, its right to payment from DCOs in respect of those Futures Transactions and Cleared Derivatives Transactions and the proceeds of such rights, this would be the governing law of the agreements governing Futures Transactions and Cleared Derivatives Transactions in the first case, and the governing law of the agreement between the Covered Customer and the respective DCO in the second case.

3. Would the courts of Singapore 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 (c) above. 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.

Subject to the discussion below regarding Singapore government securities, Singapore courts would recognise a security interest in each type of Eligible Collateral created under each Covered Base Agreement and CDA, provided the security interest is valid under the governing law of the Covered Base Agreement and CDA, the law governing the proprietary aspects of the security interest (as described in our response to question IV(2) above), and any applicable perfection requirements under Singapore law have been complied with (as described in our response to question IV(5) below).

The foregoing applies in the case of cash Collateral, regardless of the location of the account where the relevant deposit obligations are recorded or the currency of those obligations.

In the case of Singapore government securities, there is a statutory method of taking security over such securities as set out under the Government Securities Acts (as defined

below). Before we discuss this, it may be useful to explain briefly the form which Singapore government securities may take.

The issue, transfer and pledge of securities issued by the Government of Singapore are governed by the Government Securities Act, Chapter 121A of Singapore, the Local Treasury Bills Act, Chapter 167 of Singapore, the Development Loan Act, Chapter 81 of Singapore and the Development Loan (1987) Act, Chapter 81A of Singapore (together, the "**Government Securities Acts**"). Under the Government Securities Acts, Singapore government securities may be issued in registered, bearer or book-entry form. In the case of registered Singapore government securities, the Authority will maintain a register of all such securities, and legal title in the securities will be vested in the individual or corporation whose name is entered on the register in respect of the securities. In the case of bearer Singapore government securities, the holder of the certificates evidencing the securities will be deemed to be the legal owner of the securities. Singapore government securities may also be issued by the Authority in a dematerialised form by means of book-entries in its records which include the name of the depositor and the amount and description of the securities. The Authority will, in respect of such book-entry securities, maintain accounts for, *inter alia*, any depositor for the book-entry securities which such depositor holds for its own account, or where the depositor is a depository institution, for the account of its customers.

Under the Government Securities Acts, pledges of book-entry Singapore government securities (hereinafter referred to as "**statutory pledges**") to any pledgee (who must be eligible to maintain an appropriate account in its name with the Authority[4]) shall be effected by the execution by the parties of an instrument of transfer and the making of an appropriate entry by the Authority in its records of the securities pledged. The making of such an entry in the records of the Authority will constitute the pledgee as the holder of the securities and will have the effect of vesting a security interest over the securities in favour of the pledgee. Further, pledges effected by this method will have priority over any pledge effected or created in any other manner and whether created prior to, on or after the date of creation of the pledge. Accordingly, if it is desired to take a statutory pledge over Singapore government securities, it would be necessary to comply with the steps prescribed under the Government Securities Acts in addition to executing the Covered Base Agreement and CDA (or other instrument of transfer).

However, to the best of our knowledge, a statutory pledge has rarely been resorted to. In practice, the usual method of taking security interest over the Singapore government securities would be for the Covered Customer to create a common law security interest over the Covered Customer's interest to the securities[5].

4. What is the effect, if any, under the laws of Singapore of the fact that the amount secured or the amount of Eligible 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)? In particular:

[4] While there is no guideline as to the types of persons which are eligible to maintain such an account in its own name with the Authority, it is presently the policy of the Authority for only banks licensed in Singapore to establish such an account.

[5] In addition to a statutory pledge, it is also possible for the Covered Customer to create a common law security interest over its rights against a depository institution in favour of the Clearing Member if the Covered Customer holds the government securities through a depository institution.

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

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

(c) ***is there any difficulty with the concept of creating a 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?***

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

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

In relation to (c), we 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.

We advise that, generally, the fact that the amount secured or the amount of Eligible 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) will not create any difficulty under Singapore law provided that the Covered Base Agreement and/or CDA permits or contemplates such fluctuation. We advise as follows on the specific queries above:

(a) the security interest over the Eligible Collateral would be valid in relation to obligations incurred after the date such Eligible Collateral was given to the Clearing Member if the Covered Base Agreement and/or CDA expressly provides for this;

(b) it is possible to provide in the Covered Base Agreement and/or CDA that the Clearing Member's security interest will also extend to any future Eligible Collateral not yet delivered to the Clearing Member at the time of entry into the Covered Base Agreement and/or CDA. Accordingly, if the Covered Base Agreement and/or CDA provides for this, the security interest would extend to future Collateral as well. Please note, however, that the provision of such additional Eligible Collateral as security may be set aside as an unfair preference upon the bankruptcy or winding-up of the Covered Customer (please refer to the answer to question IV(18) below for a full discussion on unfair preferences);

(c) there is no difficulty, under Singapore law, with the concept of creating a security interest over a fluctuating pool of assets. However, there is the risk that if the Covered Customer has the right to use or substitute Eligible Collateral without the consent of the Clearing Member, the Clearing Member's security interest will be deemed under Singapore law to be a floating charge and will require registration

pursuant to section 131 of the Companies Act (please see the answer to question IV(5) below with respect to registration requirements for certain types of security interests);

(d) it is not necessary under the laws of Singapore for the amount secured by each Covered Base Agreement or CDA to be a fixed amount or subject to a fixed maximum amount and the Covered Base Agreement or CDA may secure any amount as stated in that Covered Base Agreement or CDA; and

(e) it is permissible under the laws of Singapore for the Clearing Member to hold collateral in excess of its actual exposure to the Covered Customer under the related Covered Base Agreement and CDA.

5. Assuming that the courts of Singapore would recognise the security interest in each type of Eligible Collateral created under each Covered Base Agreement and CDA, is any action (filing, registration, notification, stamping, notarisation or any other action or the obtaining of any governmental, judicial, regulatory or other order, consent or approval) required in Singapore to perfect that security interest? If so, please indicate what actions must be taken and how such actions may differ depending upon the type of Eligible Collateral in question.

Although the term “perfection” in the context of a security interest is not a term of art under Singapore law, it would generally be construed to refer to all the steps required to be taken in order to render the security interest effective and valid as against all third parties and we shall adopt this construction in advising on the perfection procedures of a statutory security interest and other security interests (as opposed to the *creation* of the security interest) which renders the security interest valid as against the Covered Customer.

Under Singapore law, the applicable law to determine questions relating to the perfection of a security interest over Collateral located in a particular jurisdiction is the law of such jurisdiction or the *lex situs*. In the case of cash in a bank account, this will be considered to be “located” in the jurisdiction of the deposit bank.

We shall first discuss the perfection requirements where the *lex situs* of the Eligible Collateral is Singapore (in which case the applicable law to determine the issue of perfection is Singapore law) before the registration requirements under the Companies Act (which is an overriding provision of Singapore law requiring the registration of certain security interests) and the payment of stamp duty.

If the *lex situs* of the Eligible Collateral is Singapore, it would be necessary to give a notice of assignment or charge to the sub-custodian in Singapore (in the case of Eligible Collateral in the form of dematerialised or immobilised securities), to the bank with which the Security Collateral Provider has deposited its cash (in the case of cash Collateral) and to the contractual counterparty (in the case of contractual rights). This is pursuant to the rule in the English case of *Dearle v Hall* which states that the priority of legal and equitable assignees of choses in action is governed by the order in which notice is given to the debtor. This is considered a perfection requirement as the failure to give the relevant notice will have the effect of postponing the priority of the Clearing Member's security interest over the chose in action. This requirement applies regardless of the location of the Covered Customer. Written notice to the debtor is also needed for an assignment to take effect as a legal

assignment (rather than only as an equitable assignment) under section 4(8) of the Civil Law Act.

The security interest created under the Covered Base Agreement and CDA may also need to be registered under the Companies Act. Under section 131 of the Companies Act, a charge created by a Singapore incorporated company over certain assets is required to be registered with the Registrar of Companies in Singapore within 30 days of the creation of the charge (if the documents creating the charge are executed by the company in Singapore) or within 37 days after the creation of the charge (if the documents creating the charge are executed by the company outside Singapore). A failure to register the charge, if registration is required, will render the charge void as against the liquidator and any creditor of the company.

As for a charge created by a foreign company over certain assets, which, if such a charge is created by a Singapore company is required to be registered with the Registrar of Companies, the registration requirement will apply but only if the foreign company has a registered Singapore branch and those assets are located in Singapore (for example, in the case of cash, if the cash is maintained with a bank account in Singapore). A foreign company which does not have a Singapore branch registered with the Singapore Registrar of Companies does not have to comply with any such requirement.

The following charges are among those to which the registration requirements of the Companies Act apply:

(a) a charge over cash will have to be registered with the Registrar of Companies, if the cash constitutes a "book debt" of the Covered Customer; and

(b) a floating charge over the undertaking or property of the Covered Customer, and this will include securities and cash (whether or not such cash constitutes a book debt of the Covered Customer).

If a security interest extends to the dividends or interest payable on any securities, or to other rights or entitlements attaching to the securities, such security interest should be registered with the Registrar of Companies on the basis that it may constitute a charge over the book debts of the Collateral Provider. Debt securities, rights to payment and other debt claims may also constitute book debts. It should be noted that a charge over Singapore government securities is not a charge over book debts for the purposes of the registration requirements under section 131 of the Companies Act and is not therefore required to be registered.

Under the Stamp Duties Act, Chapter 312 of Singapore, each Covered Base Agreement and CDA (where the Eligible Collateral comprises stock or shares, and the Covered Base Agreement and CDA are not executed under hand only (for instance, if they are executed as a deed)) will attract stamp duty of up to S$500. Such stamping must be effected within 14 days of execution of the Covered Base Agreement and CDA if it was executed in Singapore, or within 30 days of the Covered Base Agreement and CDA being first brought into Singapore, if the Covered Base Agreement and CDA was executed outside Singapore. A document that is not stamped within the prescribed period(s) may still be stamped but would be subject to the payment of a penalty of up to four times the amount stampable. Failure to pay such stamp duty does not affect the validity or enforceability of the Covered Base

Agreement and CDA, but it will render the Covered Base Agreement and CDA inadmissible as evidence before a Singapore court and other tribunals.

Apart from the foregoing, there is no other action required under Singapore law in order to perfect the security interest under a Covered Base Agreement and CDA.

6. If there are any other requirements to ensure the validity or perfection of a security interest in each type of Eligible 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 Singapore 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 security interest created under each Covered Base Agreement and CDA to be recognised as valid and perfected in Singapore?

Save as stated in the answer to question IV(5) above, there is no other requirement under Singapore law to ensure the validity or perfection of a security interest in each type of Eligible Collateral created by the Covered Customer under each Covered Base Agreement and CDA. In particular, it is not necessary as a matter of formal validity under Singapore law that the Covered Base Agreement and CDA be expressly governed by the law of Singapore or translated into any other language or for them to include any specific wording, assuming, of course, that the Covered Base Agreement and CDA is adequate under its governing law to create the security interest over the Eligible Collateral. Save as stated in our response to question IV(5) above, there is no other documentary formality for a security interest created under each Covered Base Agreement and CDA to be recognised as valid and perfected in Singapore.

7. Assuming that the Clearing Member has obtained a valid and perfected security interest in the Eligible Collateral under the laws of Singapore, 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 or the Covered Customer need to take any action thereafter to ensure that the security interest in the Eligible Collateral continues and/or remains perfected, particularly with respect to additional Collateral transferred by way of security from time to time when required pursuant to the Covered Base Agreement and CDA?

Where additional Eligible Collateral is pledged pursuant to the Covered Base Agreement or CDA, if the forms lodged with the Registrar of Companies for registration of any charge, and if the notice of assignment or charge given to the bank, CSD, Intermediary or contractual counterparty, as the case may be, make it clear that the security extends to additional Eligible Collateral pledged, it will not be necessary to repeat the formalities described in the answer to question IV(5) above again to ensure that the security interest in the Eligible Collateral continues and/or remains perfected. This is on the assumption that the Covered Base Agreement and CDA expressly provide for the pledging of additional Eligible Collateral and no additional documentation is executed to create the security over the additional Eligible Collateral (otherwise, it will be necessary to register the document with the Registrar of Companies in Singapore as described in the answer to question IV(5) above).

8. ***Assuming that (a) pursuant to the laws of Singapore, 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 Singapore) 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 Singapore are concerned? Is any action (filing, registration, notification, stamping or notarization or any other action or the obtaining of any governmental, judicial, regulatory or other order, consent or approval) required under the laws of Singapore to establish, perfect, continue or enforce this security interest? Are there any other requirements of the type referred to in question 6 above?***

If, pursuant to the laws of Singapore, the laws of another jurisdiction govern the creation and/or perfection of a security interest in the Eligible Collateral pledged pursuant to each Covered Base Agreement and CDA and the Clearing Member has obtained a valid, enforceable and perfected security interest in the Eligible Collateral under the laws of such other jurisdiction, we advise that the Clearing Member will have a security interest in the Collateral so far as the laws of Singapore are concerned. However, if the Covered Customer is a company incorporated in Singapore, or is a foreign company with a registered Singapore branch and the relevant assets are located in Singapore, it will be necessary to register the Covered Base Agreement and CDA with the Registrar of Companies of Singapore as described in the answer to question IV(5) (if the Covered Base Agreement and CDA creates a charge which requires registration under the Companies Act). Apart from this, there is no other action required under the laws of Singapore to establish, perfect or continue this security interest (we shall deal with the enforcement of the security interest in questions IV(12) to (15) below).

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

Under Singapore law, the Clearing Member is required to exercise reasonable care in relation to the Eligible Collateral held by it pursuant to each Covered Base Agreement and CDA. In the case of certificated securities, this would mean that the Clearing Member is required to keep the certificates in safe custody while in the case of dematerialised securities and indirectly held securities, the Clearing Member should not deal with the securities in a manner inconsistent with the provisions of the Covered Base Agreement and CDAs.

10. ***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 Singapore recognise the right of the Clearing Member or DCO so to use such Collateral pursuant to an***

agreement with the Covered Customer? In particular, how does such use of the Collateral affect, if at all, the validity, continuity, perfection or priority of a 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 with respect to its use of the Collateral under the laws of Singapore? 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 Singapore are relevant to the validity, continuity, perfection or priority of Clearing Member's security interest.

There is no express provision of Singapore law which states that the Clearing Member cannot use or otherwise deal with the Eligible Collateral freely for its own benefit. The better view is that the Clearing Member is able to do so, if the relevant Covered Base Agreement and CDA gives the Clearing Member such rights, and if such rights are valid and enforceable under the governing law of the Covered Base Agreement and CDA and the law governing the proprietary aspects of the security interest. The legal basis for this view is that Singapore law generally recognises the freedom of contract and the parties are free to agree that the Clearing Member may deal with the Eligible Collateral, provided it agrees to return equivalent Eligible Collateral to the Covered Customer when the obligations secured by such Eligible Collateral have been fully discharged. In such a case, the use of the Eligible Collateral would not affect the validity, continuity, perfection or priority of the security interest validly created and perfected under all applicable laws prior to such use. Apart from the obligations imposed on the Covered Customer as described in question IV(9) above, there are no other obligations, duties or limitations imposed on the Clearing Member with respect to its use of the Collateral under the laws of Singapore.

Separately, we understand that as a matter of market practice, Clearing Members often offer their customers the ability to manage the Eligible Collateral posted by the customer, for example by allowing the customer to post 10-year treasuries and returning 5-year treasuries to the customer. As long as the parties agree to this arrangement (whether such agreement is expressly provided for in the Covered Base Agreement/CDA or is implied by virtue of the market practice), we would not expect this to affect the Clearing Member's rights to use the Eligible Collateral.

Our response above equally applies to the rights of a DCO to use Eligible Collateral that has been on-posted from a Clearing Member to a DCO, if the applicable DCO rules confer such rights on the DCO, and if such rights are valid and enforceable under the governing law of the applicable DCO rules and the law governing the proprietary aspects of the security interest.

11. What is the effect, if any, under the laws of Singapore on the validity, continuity, perfection or priority of a security interest in Eligible Collateral under each Covered Base Agreement and CDA of the ability of the Covered Customer to substitute Collateral by transferring additional Collateral to an Account or Cleared Derivatives Account and withdrawing excess Collateral from that Account or Cleared Derivatives Account? Please comment specifically on whether the Covered Customer and the Clearing Member are able validly to agree in the Covered Base Agreement and CDA that the Covered Customer may substitute Collateral without specific consent of the Clearing Member and whether and, if so, how this may affect

the nature of the security interest or otherwise affect your conclusions regarding the validity or enforceability of the security interest.

Under the laws of Singapore, there is a risk that if the Covered Customer has the right to deal with or substitute Collateral without the consent of the Clearing Member, the Clearing Member's security interest will be deemed under Singapore law to be a floating charge and will require registration pursuant to section 131 of the Companies Act (please see the answer to question IV(5) above). A floating charge will generally rank behind a fixed charge over the Collateral whether created before or after the floating charge and behind certain preferential debts, and a floating charge is generally more vulnerable in the event of the winding-up of the Covered Customer. In order to create a first fixed charge over the Collateral, the Clearing Member must have some control over the Collateral pledged, and the right of the Covered Customer to deal with or substitute the Collateral must be made subject to the consent of the Clearing Member, and such consent to use or substitute security should not be readily given.

We confirm that the Clearing Member and the Covered Customer are able validly to agree on such substitution of Collateral. This will (as stated above) result in there being a risk that the security interest may then be characterised as a floating charge instead of a fixed charge.

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

Note the additional assumption in IV.A.(g) above which applies to questions IV(12) to (15) below.

12. Assuming that the Clearing Member has obtained a valid and perfected security interest in the Eligible Collateral under the laws of Singapore, 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 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 under each Covered Base Agreement and CDA, such as the right to liquidate Eligible Collateral? For example, is it free to sell the Eligible 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 Collateral involved?

Under Singapore law, the Clearing Member may immediately exercise its rights to seize and/or sell the Eligible Collateral upon the default by the Covered Customer of any or all of its obligations under the relevant Covered Base Agreement and CDA (whether the default is a payment default or otherwise) and apply the proceeds to satisfy the Covered Customer's outstanding obligations under the Covered Base Agreement and CDA as long as the relevant Covered Base Agreement and CDA grants the Clearing Member such rights. In addition, the Clearing Member may also proceed to enforce its security over the Eligible

Collateral without the requirement to give any notice to the Covered Customer as long as the Covered Base Agreement and CDA so provide (although it would be advisable to do so notwithstanding that it is not a requirement, in order to persuade the court to hold that the Clearing Member has acted reasonably). This is subject to the duty imposed on the Clearing Member under Singapore law to use reasonable efforts to obtain the best available price for the Eligible Collateral which it or its agent is selling and to follow professional advice as to the best method of sale, pursuant to enforcement of such Eligible Collateral.

The position is different if the Clearing Member wishes to sell the Eligible Collateral to itself. Quite apart from the fact that the Clearing Member may be in the position of conflict of interest if it wishes to transfer title to itself and hold the Eligible Collateral in a proprietary position instead of selling the Eligible Collateral, the sale of the Eligible Collateral by the Clearing Member to itself would be akin to a foreclosure on the Eligible Collateral, and under Singapore law, the Clearing Member may not transfer title to itself without a foreclosure order and without following the proper procedures. The remedy of foreclosure is discretionary and since it is seen as confiscatory, will only be ordered by the court if the amount of debt outstanding exceeds the value of the security. The Covered Customer will usually be given six months to redeem the Eligible Collateral before a foreclosure order nisi is made absolute and the foreclosure becomes effective.

In the case of Eligible Collateral in the form of cash deposited by the Covered Customer with the Clearing Member, the Clearing Member may, assuming that the relevant Covered Base Agreement and CDA confers on the Clearing Member a contractual right of set-off, immediately set off the amount of cash against the Covered Customer's outstanding obligations under the Covered Base Agreement and CDA.

Save as stated above, there are no other special 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 that the Clearing Member must observe or undertake in exercising its Credit Support Rights.

13. Assuming that (a) pursuant to the laws of Singapore, 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 Eligible Collateral is located or deemed located outside Singapore) 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 Singapore in exercising its Credit Support Rights as a Clearing Member under each Covered Base Agreement and CDA?

The Clearing Member would need to comply with the formalities and procedures described in our response to question IV(12) above in the event it enforces its security interest under the Covered Base Agreement and CDA in Singapore. However, if the Eligible Collateral is located outside Singapore, it is likely that any enforcement will take place in the jurisdiction where it is located, with the result that the laws of such jurisdiction will be relevant in defining the duties and obligations of the Clearing Member in the enforcement of the security interest. The foregoing statements must, however, be qualified in that they are concerned with the exercise by the Clearing Member of its enforcement rights under each

Covered Base Agreement and CDA. The Clearing Member is at all times free to exercise its other contractual rights under the Covered Base Agreement and CDA, which would be governed by the law chosen to govern the Covered Base Agreement and CDA.

14. Are there any laws or regulations in Singapore that would limit or distinguish a creditor's enforcement rights with respect to Eligible 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?

Assuming that the security interest in the Eligible Collateral has been properly created and perfected under all applicable laws with the appropriate priority and in the absence of any insolvency proceedings with respect to the Covered Customer, there is no law or regulation in Singapore that would limit or distinguish a creditor's enforcement rights with respect to the Eligible 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.

In general, there are no statutory or preferential liens under Singapore law that would take precedence over the Clearing Member's security interest in the Eligible Collateral, if the security interest takes the form of a fixed charge. We would, however, highlight section 33 of the Employment Act, Chapter 91 of Singapore, which accords priority to the salary of certain employees to other debts in certain limited situations. Section 33 provides that when, on the application of a person holding a mortgage, charge or lien, the property of an employer is sold, or any money due to the employer is garnished, the court ordering the sale or garnishment shall not distribute the proceeds unless it has ascertained and paid the salary due to all the employees (who are workmen who receive a salary not exceeding S$4,500 a month, or who are employees other than workmen whose salary does not exceed S$2,000 a month) employed by that employer or engaged by a contractor and working for that employer. This priority only applies, however, to (a) property on which those employees were working, (b) property which is the produce of the employees' work, or (c) movable property used by those employees in the course of their work, or (d) money due to the employer in respect of work done by those employees. The amount payable to each employee is capped at 5 months' salary.

Certain preferred claims do take priority over a floating charge, and it is therefore advisable to ensure that the security interest takes the form of a fixed charge (as described in our response to question IV(11) above).

15. How would your response to questions 12 to 14 change, if at all, assuming that an insolvency proceeding described in assumption (h) above has occurred with respect to the Clearing Member (notwithstanding that the Covered Base Agreement and CDA may not provide for any events of default in respect of the Clearing Member) rather than or in addition to the Covered Customer (for example, would this affect this ability of the Clearing Member to exercise its enforcement rights with respect to the Eligible Collateral)?

Our responses to questions IV(12) to (14) would not change in such scenario.

Enforcement of Credit Support Rights Under the Covered Base Agreement and CDA by the Clearing Member after the Commencement of an Insolvency Proceeding

Note the additional assumption in IV.A.(h) above which applies to questions 16 to 18 below.

Before addressing questions IV(16) to (18), we describe generally the different types of insolvency proceedings under Singapore law.

In general, the types of insolvency proceedings to which a Covered Customer that is a Singapore incorporated company may be subject in Singapore are the following:

(a) Winding-up: A winding-up under Part X of the Companies Act. This may be (i) an involuntary winding-up effected by the court, (ii) a voluntary winding-up approved by a special resolution of its members or (iii) a voluntary winding-up at the end of the fixed term or upon the occurrence of some other event specified in the Covered Customer's articles of association and approved by an ordinary resolution of its members. A "members' voluntary winding-up" or solvent voluntary liquidation requires the directors of the Covered Customer to make a statutory declaration to the effect that they believe that the Covered Customer will be able to pay its debts in full within 12 months of the date of the declaration; a voluntary winding-up in which such a declaration cannot be given is a "creditors' voluntary winding-up" or insolvent liquidation. A provisional liquidator may be appointed by the court at any time after the making of a winding-up application and before the making of a winding-up order.

(b) Judicial Management: Judicial management under Part VIIIA of the Companies Act (which does not apply to a company which has gone into liquidation, banks, finance companies and insurance companies licensed in Singapore, unless the public interest so requires). The Covered Customer, its directors or any of its creditors may make an application to court applying for a judicial management order and the court may make the order if it is satisfied that the Covered Customer is or will be unable to pay its debts and it considers that to do so would be likely to result in, *inter alia*, the survival of the Covered Customer, or the whole or part of its undertaking as a going concern or in a more advantageous realisation of the Covered Customer's assets than would be achieved upon a winding-up. The Companies Act expressly allows the court to apply any provisions on winding-up within Part X of the Companies Act to judicial management (and certain provisions of Part X of the Companies Act apply automatically under section 227X(b) of the Companies Act).

(c) Arrangement: A compromise or arrangement under sections 210, 211, 212 and 309 of the Companies Act (an "**arrangement**") whereby proposals between the Covered Customer and its creditors (or a class of them) for a composition in satisfaction of its debts can, if resolved upon by the requisite number of creditors (and, in the case of section 210, if sanctioned by the court), bind all its creditors (or the relevant class).

In the case of a Covered Customer that is not a Singapore company, it will not be subject to judicial management proceedings. However, winding up proceedings and arrangement proceedings may take place under the Companies Act in respect of a foreign company (even if it does not have a registered branch in Singapore).

16. How are competing priorities between creditors determined in Singapore? What conditions must be satisfied if the Clearing Member's security interest is to have priority over all other claims (secured or unsecured) of an interest in the Eligible Collateral, other than claims of a DCO?

We shall discuss the priorities position between creditors in the event that an insolvency proceeding as described above has been instituted by or against the Covered Customer as it is usually in such event that the priorities position becomes critical.

In general, in the event of the winding-up of the Covered Customer, the secured creditors of the Covered Customer will first be paid out of assets which have been charged or mortgaged in their favour while the remainder of the assets will generally be distributed among the other creditors as follows:-

(a) the cost and expenses of the winding-up;

(b) the wages and salary of employees;

(c) retrenchment benefits or ex gratia payment;

(d) workers' compensation due in respect of injury compensation under the Work Injury Compensation Act, Chapter 354 of Singapore;

(e) contributions to provident funds;

(f) remuneration in respect of vacation leave;

(g) taxes (including taxes payable under section 24 of the Singapore Tourism (Cess Collection) Act and section 24 of the Skills Development Levy Act);

(h) retirement and retrenchment benefits under section 47 of the Employment Act;

(i) liabilities in Singapore of a bank specified in section 62(1) of the Banking Act; and

(i) the remainder will be paid to the unsecured creditors.

The debts referred to in paragraphs (a) to (g) above and sometimes (h) and (i) as well are usually referred to as preferred debts as they rank ahead of unsecured debts. If the assets of the company are inadequate to pay a particular class of preferred debts in full, the debts ranking in the subsequent class will not be paid and the unsecured creditors will obviously get nothing at all. Although we have stated that the secured creditors will be paid ahead of the preferred debts, this is subject to the proviso that the preferred debts referred to in (a), (b), (c), (e) and (f) above will be paid ahead of the debts secured by a floating charge. Accordingly, this should be borne in mind when the parties consider permitting substitution of collateral without permission as this may result in the creation of a floating charge. Parties should also note that (1) net amounts due in respect of contracts of insurance previously taken out in respect of third parties are to be paid to the relevant third parties, (2) all debts due and claims owing from time to time to the Government ("**Government Debts**") would have in our view priority over any non-preferential unsecured debts, incurred subsequent to the time the Government Debts were contracted or incurred under section 10 of the Government Proceedings Act, and (3) before a Singapore liquidator of a registered foreign company remits the net assets recovered and realised by him to the foreign liquidator appointed in the place of incorporation, he has to pay off the statutory preferential debts under section 328 of the Companies Act as well as all debts and liabilities incurred by the registered foreign company in Singapore under section 377(3)(c) of the Companies Act.

We should also add that the proper costs and expenses of judicial management also prevail over the claims secured by a floating charge.

Accordingly, the Clearing Member as a secured party will, subject as stated above, have priority over the unsecured creditors of the Covered Customer with respect to the Eligible Collateral in the winding-up of the Covered Customer. However, as far as the priority of the Clearing Member with respect to the Eligible Collateral over the other secured creditors of the Covered Customer with an interest in the Eligible Collateral is concerned, this will depend on whether the Clearing Member's security interest is a first ranking security interest.

In order to ensure that the Clearing Member's security interest has priority over all other security interests other than claims of a DCO, the Covered Base Agreement and CDA should provide for the security over the Eligible Collateral to be the senior or first claim over the Eligible Collateral apart from the claims of a DCO. Apart from this, the Clearing Member should also observe the following:

(i) the position with respect to the priorities of competing security interests under Singapore law is fairly complex and we would not propose to discuss it in detail. As a practical matter, the Clearing Member should first ascertain whether anyone else already has an interest in the Eligible Collateral by checking the register of charges maintained by the Registrar of Companies of Singapore as to whether any charge over the Eligible Collateral has been created. Unfortunately, under Singapore law, even where the security interests are registrable under section 131 of the Companies Act, priorities are not determined by the order of registration. Thus, even if the Clearing Member manages to register its security interest first, it will not automatically obtain priority as long as another creditor with a prior charge registers its security interest within the prescribed period of its creation. As between two properly registered interests, it will be necessary to look at the instruments creating the security, and the normal rules of priority will apply. This generally means that as between two security interests of the same nature, *i.e.*, both legal or both equitable, the first in time will have priority. Otherwise, as between a legal security interest and an equitable security interest, the legal security interest will prevail unless at the time of the creation of the legal security interest, the creditor had notice (either actual or constructive) of the equitable security interest. However, once the Clearing Member's security interest is properly registered, all subsequent creditors of the Covered Customer will be deemed to have notice of the Clearing Member's prior claim to the Eligible Collateral concerned;

(ii) insofar as cash deposited by the Covered Customer with a bank in Singapore is concerned, the Covered Customer can assign in favour of the Clearing Member all of its rights, title and interest to the cash and create a charge in favour of the Clearing Member over the account in which the cash is deposited. In the event of a default by the Covered Customer, the Clearing Member may enforce the charge created in its favour and apply the cash in satisfaction of the amounts owing by the Covered Customer to the Clearing Member under the Covered Base Agreement and CDA (assuming that no application for the judicial management of the Covered Customer has been made (please see the answer to question IV(17) below)).

The risk in such an arrangement is that the bank with which the cash is deposited may set off such deposit against amounts owing by the Covered Customer to the bank. There is also a risk that the Covered Customer may create a security interest

over the cash in favour of other persons. To reduce such a risk, an acknowledgement should be obtained from the bank that it will not exercise any right of set-off and that it has not received notice of any other assignment or charge in respect of such cash;

(iii) with respect to physical securities under Singapore law, the most effective means of ensuring that the Clearing Member has a first priority claim would be for the Covered Customer to create a legal mortgage over such securities in favour of the Clearing Member and for such securities to be delivered to the Clearing Member or its custodian and (if they are registered securities) to be registered in the name of the Clearing Member or its custodian. If registration in the name of the Clearing Member or its custodian is not feasible, the Clearing Member should still ensure that it or its custodian has possession of the certificates evidencing the securities and transfer forms duly executed in its or its custodian's favour;

(iv) in the case of physical Singapore government securities which are in registered form (please see the answer to question IV(3) above), the Clearing Member should obtain a legal mortgage of such securities by the delivery of the securities to the Clearing Member or its custodian and registration in the name of the Clearing Member or its custodian. Where book-entry Singapore government securities are concerned, the Government Securities Acts provide that pledges of such securities can be made by the Authority making an appropriate entry in its records, and pledges made by such entry will take priority over transfer or pledges effected by any other means; and

(v) in the case of contractual rights such as Futures Transactions and Cleared Derivatives Transactions and rights against DCOs for payments in respect of such transactions, the Clearing Member should procure that the Covered Customer charges and assigns absolutely to the Clearing Member all such rights, including all of the Covered Customer's right, title and interest in any payment owed by a DCO to the Covered Customer. We would highlight that this is still subject to the risk that such contractual rights may be set-off against obligations owed by the Covered Customer to the contractual counterparty (for instance the DCO) and the Covered Customer may create a security interest over these contractual rights in favour of other persons. To reduce such a risk, notice should be provided to the contractual counterparty of the Clearing Member's security interest, and if possible, an acknowledgement should be obtained from such counterparty that it will not exercise its rights of set-off – although we expect that counterparties are not likely to provide such an acknowledgement in practice.

We should mention that even if the appropriate steps have been taken under Singapore law to ensure that the Clearing Member has a first ranking security interest, the position with respect to the priority of the Clearing Member's security interest in the event of a judicial management or an arrangement would be affected by the stay on the enforcement of the Covered Base Agreement and CDA as more particularly described in our answer to question IV(17) below.

17. Would the Clearing Member's right to enforce 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 Collateral, be subject

to any stay or freeze or otherwise be affected by commencement of the insolvency (that is, how does the institution of an insolvency proceeding change your responses to questions 12 and 13 above, if at all)?

(a) Winding-up: Pursuant to section 258 of the Companies Act, in the case where a winding-up proceeding has been commenced against the Covered Customer, a stay of proceedings may be obtained by the Covered Customer or any creditor or member of the Covered Customer at any time after the making of the winding-up application and before the winding-up order is made by application to the court, and the court may stay or restrain the proceedings accordingly on such terms as it thinks fit. In addition, pursuant to section 262(3) of the Companies Act, once the winding-up order is made, no action or proceeding may be commenced against the Covered Customer or proceeded with except with the leave of the court and upon such terms as the court may impose. The leave of the court must be sought by any person who wishes to commence or continue proceedings against a company in liquidation. Where the Covered Customer has a creditors' voluntary liquidation commenced against it, under section 299 of the Companies Act, any attachment, sequestration, distress or execution put in force against the estate or effects of the company shall be void, and no action or proceeding shall be proceeded with or commenced against the Covered Customer except by leave of the Court and subject to such terms as the Court imposes.

In deciding whether to stay any proceeding pursuant to section 258 of the Companies Act or to give leave pursuant to section 262(3) or section 299(2) of the Companies Act, the court will consider whether, according to the balance of convenience and the demands of justice, it is necessary that the action be continued or whether the claim of the plaintiff is one that could just as easily be dealt with in the winding-up. Thus, leave may be given where a secured creditor wishes to enforce his security, as long as it cannot be shown that there is some advantage in requiring it to do so within the scope of the winding-up.

Accordingly, if the Clearing Member was compelled to commence an action or counterclaim to defend its security interest in the Singapore courts, the effect of the making of the winding-up application or the commencement of a creditors voluntary liquidation in respect of the Covered Customer is that there may be some delay before the Clearing Member is able to enforce its security interest over the Eligible Collateral. However, if the Clearing Member is seeking to enforce its security by means of out-of-court self-help remedies, there is no requirement for the Clearing Member to obtain any judicial consent or approval prior to enforcing its security (assuming the security interest in favour of the Clearing Member has been properly created).There is a possibility that a Clearing Member may have to realise its security within six months of the making of the winding up order or the passing of the resolution for winding up, where the Covered Customer is insolvent, failing which the Clearing Member may not be able to claim post winding up interest unless the six months period is extended by the Official Receiver. This possibility arises if section 76(4) of the Bankruptcy Act is made applicable to insolvent winding up by Section 327(2) of the Companies Act. Such a possibility may also apply to judicial management if the court so orders under section 227X of the Companies Act.

(b) Judicial Management: If the Covered Customer is subject to judicial management proceedings, there may be the following delays in the enforcement of the Clearing Member's security interest:

(i) During the period commencing on the making of an application for a judicial management order and ending on the making of such an order or the dismissal of the application, pursuant to section 227C(b) of the Companies Act, the Clearing Member may not take any step to enforce a charge or security against the Covered Customer’s property and may not commence or continue actions and proceedings against the Covered Customer except with the leave of the High Court of Singapore.

(ii) During the period when the judicial management order is in force, pursuant to the provisions of section 227D(4) of the Companies Act, the Clearing Member may not take any step to enforce a charge or security against the Covered Customer’s property and may not commence or continue actions and proceedings against the Covered Customer except with the leave of the High Court of Singapore or with the consent of the judicial manager.

(iii) If the Clearing Member wishes to seek the leave of the High Court of Singapore to enforce its security in the abovementioned circumstances, an application to the High Court by way of originating summons must be made. The length of time required for such a process depends on the circumstances of the application, including whether the application is opposed by the judicial manager. In the ordinary course, a period of approximately two to three months would generally be required. However, if the Clearing Member is able to convince the High Court of the urgency of the application, it may be able to obtain a hearing for the application within approximately one to two weeks.

We would point out that the exercise by the Clearing Member of a right of proper set-off is not subject to the abovementioned delays. Further, such delays in the ability of the Clearing Member to enforce its security do not mean that the Clearing Member ceases to have a valid security interest in the Eligible Collateral. The Clearing Member would continue to have such a security interest, which is valid as against the judicial manager or, as the case may be, the liquidator of the Covered Customer and which the judicial manager or, as the case may be, the liquidator would have to recognise.

Further, if for any reason the High Court declines to grant leave for the enforcement of the Clearing Member's security in the circumstances referred to in paragraphs (a) and (b) above and the Eligible Collateral is subsequently sold by the judicial manager or, as the case may be, the liquidator, the Clearing Member will have the same priority in respect of the proceeds of such sale as the Clearing Member would have had in respect of the Eligible Collateral. Accordingly, the Clearing Member will have the same priority over all other creditors of the Covered Customer in relation to the Eligible Collateral (assuming that its security interest has been properly and validly created and ranks ahead of any other security created over the same Eligible Collateral), including any preferential debtors of the Covered Customer. That said, it is open to the court to make an order under section 227X of the Companies Act to confer the same priority that applies by reason of section 328 of the Companies Act in an

insolvent winding up to certain preferential creditors, such as to prevail over a floating charge. These preferential claims are those discussed in our response to question IV(16) above.

If the proceeds of the sale of the Eligible Collateral are insufficient to satisfy the amounts owing by the Covered Customer to the Clearing Member under the Covered Base Agreement and CDA, the Clearing Member may claim the balance of such amounts as an unsecured creditor of the Covered Customer.

(c) Arrangement: The effect of an arrangement is less certain as under Singapore law, the scheme of arrangement is theoretically capable of having an unlimited effect on the rights of creditors (subject to approval of the terms of the arrangement by the appropriate majority of the creditors). Accordingly, depending on the terms of the arrangement, the rights of a secured creditor to enforce its security or indeed, the rights of the Clearing Member to the Eligible Collateral itself, may be compromised. However, as any arrangement is only implemented after certain procedural steps have been taken (such as the convening of meetings of creditors) the Clearing Member should have sufficient time to enforce its rights under the relevant Covered Base Agreement and CDA before the Clearing Member is bound by the arrangement. In addition, there will be a stay of proceedings if the court so orders but this should not, in principle, affect the Clearing Member's ability to enforce its security interest by means of out-of-court self-help remedies.

18. Will the Covered Customer (or its administrator, provisional liquidator, conservator, receiver, trustee, custodian or other similar official) be able to recover any transfers of Collateral made to the Clearing Member during a certain "suspect period" preceding the date of the insolvency as a result of such a transfer constituting a "preference" (however called and whether or not fraudulent) in favour of the Clearing Member 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 of one or more Covered Transactions) during the suspect period be subject to avoidance, either because the Collateral was considered to relate to an antecedent or pre-existing obligation or for some other reason?

In the event of the winding-up or the judicial management of the Covered Customer, the following transactions (which will include transfers of collateral and posting of additional variation margin by the Covered Customer) may potentially be set aside:

(a) Transactions at an undervalue

Under the Bankruptcy Act (which is applied to companies pursuant to the Companies Act), transactions entered at an undervalue at the relevant time may be set aside or varied by the court. A transaction is entered into at an undervalue if the Covered Customer:

(i) makes a gift or otherwise enters into a transaction where no consideration is received; or

(ii) enters into a transaction for a consideration the value of which, in money's worth, is significantly less than the value of the consideration provided.

The "**relevant time**" is defined as any time within a period of five years ending with the day of commencement of winding-up or judicial management. For this purpose, winding up should in principle have commenced on the earliest of:

(a) the filing of the winding up application;

(b) the passing of the winding up resolution; and

(c) where a provisional liquidator has been appointed before the resolution for winding up had been passed, at the time when the declaration of the inability by reason of its liabilities of the company to continue its business is lodged with the Registrar of Companies.

In the case of judicial management, judicial management should for this purpose be regarded as having been commenced on the making of the judicial management application.

In addition, the Covered Customer must, at the time the transaction was entered into, be insolvent, or become insolvent immediately after the transaction.

(b) Unfair preference

Under the Bankruptcy Act (which is applied to companies pursuant to the Companies Act), unfair preferences given at the relevant time may be set aside or otherwise altered by the court with a view to restoring the position of parties. An unfair preference is given by the Covered Customer to a person:

(i) where that person is one of the Covered Customer's creditors or a surety or guarantor for any of its debts or other liabilities; and

(ii) the Covered Customer does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the winding-up or judicial management of the Covered Customer, will be better than the position it would have been in if that thing had not been done.

The test for unfair preference is the requirement "that the bankrupt who gave the preference was influenced in deciding to give it by a desire to produce in relation to that person the effect" mentioned in paragraph (ii) above.

The "**relevant time**" for the purpose of unfair preference is:

(aa) in the case of an unfair preference which is not a transaction at an undervalue and is given to a person who is connected to the Covered Customer, the period of two years ending with the day of commencement of winding-up or judicial management ("**that day**"); and

(bb) in any other case of an unfair preference which is not a transaction at an undervalue, the period of six months ending with that day.

The relevant time is subject to one further qualification, i.e., the Covered Customer must when entering into the transaction be insolvent or become insolvent immediately after the transaction.

We are of the view that in general the substitution of collateral by the counterparty during the suspect period is unlikely to invalidate an otherwise valid security interest if the substitute Collateral is of no greater value than the assets it is replacing. First, it is unlikely to be a transaction at an undervalue as the consideration received by the Covered Customer for the provision of the substituted Collateral is the returned Collateral. Secondly, there is unlikely to be any unfair preference as it can be argued that the Covered Customer is not preferring the Clearing Member by providing it with substituted Collateral, as it is being provided in exchange for Collateral released to the Covered Customer by the Clearing Member (however, this is a question of fact to be determined by the Singapore courts).

With regards to the posting of additional variation margin during the suspect period pursuant to the mark-to-market provisions of the Covered Base Agreement and CDA, we are of the view that the Singapore courts would consider such topping-up to be made on an arms'-length basis (assuming that the pre-existing Covered Base Agreement and CDA were entered into on an arms'-length basis) and therefore, not exercise its rights to avoid such posting of additional variation margin as an undervalue transaction or an unfair preference.

(c) Floating charges

If a floating charge was created by a company within six months of the commencement of its winding up, section 330 of the Companies Act provides that the floating charge will be invalid, unless it can be shown that:

(i) the chargor was solvent at the time the floating charge was created; or

(ii) the chargee advanced cash to the chargor when the charge was created or subsequently, in which case the charge will be valid to cover the amount of the cash advanced together with interest thereon at five per cent. per annum.

MISCELLANEOUS

19. Would the parties' agreement on governing law of each Covered Base Agreement and CDA and submission to jurisdiction be upheld in Singapore, and what would be the consequences if they were not?

We advise that a Singapore court would recognise and uphold the validity of the governing law clause of each Covered Base Agreement and CDA, provided that the choice of law in the governing law clause has been made in good faith and is not intended to evade the provisions of Singapore law or another legal system with which the Covered Base Agreement and CDA may have a closer connection and that none of the terms of the Covered Base Agreement and CDA nor any provision of the chosen law applicable to the Covered Base Agreement and CDA is contrary to Singapore public policy. We do not have any reason to believe that the choice of New York law in the Covered Base Agreement and CDA is intended to evade any provision of Singapore law or is otherwise contrary to Singapore public policy.

We also advise that a Singapore court would recognise and uphold an express submission to jurisdiction by the Covered Customer in each Covered Base Agreement and CDA.

20. Are there any other local law considerations that you would recommend the Clearing Member to consider in connection with taking and realising upon the Eligible Collateral from the Covered Customer?

There are no other Singapore law considerations that we would recommend the Clearing Member to consider in connection with taking and realising upon the Eligible Collateral from the Covered Customer.

21. Are there any other circumstances you can foresee that might affect the Clearing Member's ability to enforce its security interest in Singapore?

We would bring to your attention the following pending development or change in the laws of Singapore. In October 2002, several proposals for changes to the laws of Singapore were published by a committee known as the Company Legislation and Regulatory Framework Committee (the "**CLRFC**"). These proposals have been accepted by the Singapore government and will therefore be implemented in due course. One change recommended by the CLRFC, and accepted by the government, was the consolidation and refinement of Singapore's insolvency legislation, which at present is set out in discrete portions of the Companies Act and in the Bankruptcy Act. There is therefore a possibility that, when this consolidation and refinement takes place, the insolvency laws could be amended in a way which affects the conclusions reached in this memorandum. Following the proposals of the CLRFC, the Minister for Law set up the Insolvency Law Review Committee (the "**ILRC**") to review the existing personal and corporate insolvency regimes. The ILRC has come up with key recommendations and the Ministry of Law has conducted a public consultation, from 7 October 2013 to 2 December 2013, on the key recommendations made in a final report by the ILRC in relation to Singapore's personal and corporate insolvency regimes -- this can be accessed at the following link: http://www.mlaw.gov.sg/news/public-consultations/public-consultation-on-ILRC-report.html. To-date, there has been no announcement on any developments following the public consultation.

Save as stated above, there are no other foreseeable circumstances that might affect the Clearing Member's ability to enforce its security interest in Singapore.

This Memorandum is addressed to ISDA and FIA solely for the benefit of their members. No other person may rely on this Memorandum for any purpose without our prior written consent.

ALLEN & GLEDHILL LLP
24 March 2014

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[6]

Description	**Covered by opinion**	**Legal form(s)**
Bank/Credit Institution. A legal entity, which may be organised 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, provided it takes the form of a Company or a Branch	A company incorporated in Singapore under the Companies Act, Chapter 50 (a "**Company**") or a foreign corporation registered in Singapore as a branch under the Companies Act, Chapter 50 (a **Branch**")
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[7]	

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

[7] Consideration of the position with regard to this counterparty type requires further legal analysis and is thus outside the scope of this memorandum.

Description	Covered by opinion	Legal form(s)
Corporation. A separate legal entity that is organised 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, provided it takes the form of a Company or a Branch	
Hedge Fund/Proprietary Trader. A legal entity, which may be organised 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, provided it takes the form of a Company or a Branch	
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, provided it takes the form of a Company or a Branch, and provided that all transactions entered into under the Covered Base Agreement and CDA by the insurer are attributable to the same insurance fund maintained by the insurer under the Insurance Act,	

Description	Covered by opinion	Legal form(s)
	Chapter 142 of Singapore[8]	
International Organisation. An organisation 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 organisations established by treaty.	No[9]	

[8] Pursuant to section 17(1) of the Insurance Act, every licensed insurer is required to maintain a separate insurance fund for each class of insurance business carried on by the insurer. Section 17(4) further provides that there shall be paid into an insurance fund all receipts of the insurer properly attributable to the business to which the fund relates (including the income of the fund), and the assets comprised in the fund shall be applicable only to meet such part of the insurer's liabilities and expenses as is properly so attributable. Accordingly, if transactions under a Covered Based Agreement and CDA have been entered into for the account of different insurance funds, there is doubt as to whether netting or set-off can take place across such transactions, as the setting off of liabilities attributable to one fund against assets attributable to another fund would appear to breach section 17(4). These concerns also arise in connection with the use of margin under the Covered Base Agreement and CDA. If the insurer has provided cash or assets by way of margin from one insurance fund, and has entered into transactions for the account of another insurance fund, it may be argued that this is unenforceable, as this would appear to contravene the provisions of section 17(4) of the Insurance Act (although we would highlight that this provision has not been tested in the Singapore courts). Section 17 would appear to prohibit the operation of the netting provisions if they will involve setting off the Clearing Member's obligations to repay or redeliver the margin against the insurer's obligations to pay the Clearing Member any amounts owed under the transactions. The insurer is effectively unable to provide, as margin, assets from one insurance fund for the purpose of securing liabilities attributable to another insurance fund.

To prevent these issues from arising, all transactions entered into under the Covered Base Agreement and CDA have to relate to one particular insurance fund maintained by the insurer. Similarly, all margin provided by the insurer under the Covered Base Agreement and CDA must be assets of that same insurance fund. We would therefore recommend providing, in the Covered Base Agreement and CDA, a representation from the insurer to the effect that all transactions relate to one particular insurance fund and all margin provided thereunder also relate to that fund. Where it is contemplated that the Clearing Member will enter into transactions with the insurer for the account of more than one insurance fund, we would recommend that it be made clear in the Covered Base Agreement and CDA that they take effect as separate agreements, each entered into between the Clearing Member and the insurer for the account of one single insurance fund established under section 17 of the Insurance Act.

[9] Consideration of the position with regard to this counterparty type requires further legal analysis and is thus outside the scope of this memorandum.

Description	Covered by opinion	Legal form(s)
Investment Firm/Broker Dealer. A legal entity, which may be organised 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, provided it takes the form of a Company or a Branch and (in either case it is transacting as principal and not as trustee, agent or in some other capacity.	
Investment Fund. A legal entity or an arrangement without legal personality (for example, a common law trust) established to provide investors with a share in profits or income arising from property acquired, held, managed or disposed of by the manager(s) of the legal entity or arrangement or a right to payment determined by reference to such profits or income. This type of entity or arrangement is referred to as a "collective investment scheme" in EC legislation. It may be regulated or unregulated. It is typically administered by one or more persons (who may be private individuals and/or corporate entities) who have various rights and obligations governed by general law and/or, typically in the case of regulated Investment Funds, financial services legislation. Where the arrangement does not have separate legal personality, one or more representatives of the Investment Fund (for example, a trustee of a unit trust) contract on behalf of the Investment Fund, are owed the rights and owe the obligations provided for in the contract and are entitled to be indemnified out of the assets comprised in the arrangement.	Yes, provided it takes the form of a Company or a Branch and (in either case) it is transacting as principal and not as trustee or agent, or in some other capacity	

Description	Covered by opinion	Legal form(s)
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[10]	
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).	No[11]	
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.	Yes, provided it takes the form of a Company or a Branch and (in either case) it is transacting as principal and not as trustee or agent	
Sovereign. A sovereign nation state recognized internationally as such, typically acting through a	No[12]	

[10] Consideration of the position with regard to this counterparty type requires further legal analysis and is thus outside the scope of this memorandum.

[11] Consideration of the position with regard to this counterparty type requires further legal analysis and is thus outside the scope of this memorandum.

[12] Consideration of the position with regard to this counterparty type requires further legal analysis and is thus outside the scope of this memorandum.

Description	Covered by opinion	Legal form(s)
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”).		
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.	Yes, provided it takes the form of a Company or a Branch	
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, provided it takes the form of a Company or a Branch	

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[13]	

[13] Consideration of the position with regard to this counterparty type requires further legal analysis and is thus outside the scope of this memorandum.