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M2.4374143_1

MEMORANDUM OF LAW ON THE VALIDITY AND ENFORCEABILITY UNDER THE LAWS OF SWITZERLAND OF CLOSE-OUT NETTING PROVISIONS AND COLLATERAL ARRANGEMENTS UNDER THE EFET MASTER NETTING AGREEMENT AND THE CREDIT SUPPORT ANNEX THERETO AND THE TBMA CROSS PRODUCT MASTER AGREEMENT AND THE CROSS PRODUCT CREDIT SUPPORT ANNEX THERETO

DATED AS OF OCTOBER 6, 2014

A. INTRODUCTION

You have asked us to render certain opinions as per the instruction letter of the EFET Legal Committee dated 19 August 2014 ("**Instruction Letter**") as to Swiss law aspects in respect of the following documents submitted to us as copies. 1

I. Documents Considered

1. The EFET Master Netting Agreement (Version 1.0, published June 2010) ("**MNA 2010**"); 2

2. The EFET Master Netting Agreement Guidance Notes (Version 1.0, published 1 June 2010); 3

3. the EFET CPMA Cross Product Master Agreement published by the Bond Market Association ("**TBMA**") (Version 1.0, published 16 February 2000) (the "**CPMA**") as further modified by Version 1.0 of the European Commodities Schedule published on 23 June 2003 by EFET/ International Energy Credit Association ("**IECA**") (the "Schedule") collectively, the CPMA as modified by the Schedule is referred to as the Master Netting Agreement (the "**MNA 2003**") (and each of the MNA 2010 and the MNA 2010 a "**Master Agreement**"); 4

4. the EFET Cross-Product Credit Support Annex (the "**CPCSA**") to the MNA 2003 published by EFET on 23 June 2003; 5

5. the EFET Credit Support Annex (the "**CSA**") to the MNA 2010 published by EFET in February 2011 (each of the CPCSA and the CSA a "**Credit Support Document**"); and 6

6. the EFET Cross Product Payment Netting Agreement (Version 1, published 20 October 2005). 7

The Master Agreements and the Credit Support Documents are together referred to herein as the "**Agreements**". 8

II. Counterparties

In this memorandum of law we consider the validity and enforceability under the laws of 9
Switzerland of netting provisions and collateral arrangements under the Agreements entered into with a party organized as:

1. a corporation incorporated under the Swiss Code of Obligations ("**CO**")[1]. For the 10
purposes of this memorandum of law, corporations include (i) joint stock corporations (*Aktiengesellschaft*) subject to Articles 620 et seq. CO, (ii) companies with unlimited partners (*Kommanditaktiengesellschaft*) subject to Articles 764 et seq. CO, (iii) cooperatives (*Genossenschaft*) subject to Articles 828 et seq. CO and (iv) limited liability companies (*Gesellschaft mit beschränkter Haftung*) subject to Articles 772 et seq. CO;

2. a partnership organized under the CO. For the purposes of this memorandum of law, 11
partnerships include (i) general partnerships (*Kollektivgesellschaft*) subject to Articles 552 et seq. CO and (ii) limited partnerships (*Kommanditgesellschaft*) subject to Articles 594 CO;

3. a banking institution licensed under the Swiss Federal Act on Banks and Savings 12
Banks ("**Banking Act**")[2], organized in the form of a corporation or a partnership, in each case having its registered seat in Switzerland (a "**Bank**");

4. a securities dealer licensed under the Swiss Federal Act on Stock Exchanges and 13
Securities Trading ("**SESTA**")[3], organized in the form of a corporation or a partnership, in each case having its registered seat in Switzerland (a "**Securities Dealer**");

5. an insurance company licensed under the Swiss Federal Law on Insurance 14
Supervision ("**ISA**")[4], organized in the form of a joint stock corporation or a cooperative, in each case having its registered seat in Switzerland (an "**Insurance Company**");[5]

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1 Schweizerisches Obligationenrecht (OR), SR 220.
2 Bundesgesetz über die Banken und Sparkassen (BankG), SR 952.0.
3 Bundesgesetz über die Börsen und den Effektenhandel (BEHG), SR 954.1.
4 Bundesgesetz betreffend die Aufsicht über Versicherungsunternehmen (VAG), SR 961.01.
5 Note that the analysis and conclusions contained in this memorandum of law do not necessarily apply to other types of insurance companies and in particular not to insurance companies established under Swiss Federal or Cantonal public law.

6. a collective investment scheme licensed under the Swiss Collective Investment 15
Scheme Act ("**CISA**")[6] and organized in the form of a contractual fund pursuant to Articles 25 et seq. CISA ("**Contractual Fund**");

7. a collective investment scheme licensed under the CISA and organized in the form of 16
an investment company with variable capital (SICAV) pursuant to Articles 36 et seq. CISA ("**SICAV**");

(each of the entities listed under n. 12-16 above are referred to as a "**Special Insolvency** 17
Regime Swiss Entity")

8. a Swiss branch (*Zweigniederlassung*) of a foreign corporation established in 18
Switzerland (a "**Swiss Branch**"); or

9. a Swiss branch of a foreign bank or of a foreign securities dealer established and 19
duly licensed in Switzerland under the Banking Act or, as the case may be, the SESTA (a "**Special Insolvency Regime Swiss Branch**")

(each entity or branch under n. 10-19 above, a "**Swiss Counterparty**"). 20

III. Definitions

1. Definitions

For the purposes of this memorandum of law, unless otherwise specified: 21

Capitalized terms used and not otherwise defined herein shall have the meanings ascribed 22
to them in the Agreements.

1. "**Eligible Credit Support**" means Cash or Letters of Credit. 23

2. "**Counterparty**" means any kind of party as described under n.10-19 above. 24

3. "**Insolvency**" and "**Insolvency Proceedings**" shall be a reference to either a 25
bankruptcy (*Konkurs*) and the adjudication thereof (*Konkurseröffnung*) under the Swiss Federal Act on Debt Enforcement and Bankruptcy ("**SDEBA**")[7], the grant of a moratorium (*Nachlassstundung*) with the view of entering into a composition

6 Bundesgesetz über die kollektiven Kapitalanlagen (KAG), SR 951.31.

agreement with assignment of assets (*Nachlassvertrag mit Vermögensabtretung*), or the special liquidation proceedings in respect of Banks, Securities Dealers, Insurances Companies, a Contractual Fund, a SICAV or Special Insolvency Swiss Branches (all as discussed in further detail under n. 64-73, 74-83, 102-154 and 161 below). The term "**Insolvent**" shall be understood accordingly.

4. "**Netted Agreements**" means any and all agreements listed in Annex 2 when entered into as contemplated herein (see n. 32). 26

5. "**Close-out Netting Provisions**" means the set-off, net-off and netting provisions of § 8 of the MNA 2010 or § 4 of the MNA 2003 and the respective provision providing for set-off/netting under a Netted Agreement or an Uncovered Transaction. 27

6. "**Party**" means a party to the Agreements. 28

7. "**Transaction**" means any or all of the transactions described in Appendix B to the Instruction Letter when entered into under a Netted Agreement or an Uncovered Transaction as contemplated below (n. 37). 29

2. Rules of Interpretation

References to a "Section" or a "Paragraph" are to a section or a paragraph of the Agreements; 30

B. ASSUMPTIONS AND LIMITATIONS

For the purposes of this memorandum of law, we have made the following assumptions. 31

(i) Two Counterparties enter into a Master Agreement and at least one of the Counterparties is incorporated or organized or has its center of main interest in Switzerland ("**Party A**"). 32

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[7] Bundesgesetz über Schuldbetreibung und Konkurs (SchKG), SR 281.1.

(ii) The relevant Master Agreement is governed by the laws of Switzerland.[8] 33

(iii) Each Agreement is enforceable under the laws of any jurisdiction (other than the laws of Switzerland) and each Counterparty has duly authorized, executed and delivered, and has the legal capacity and power to enter into, each document and has received all consents, approvals, permits and resolutions (corporate and otherwise) necessary in order to duly authorize the entering into, execution and delivery of, and performance under the Agreements. 34

(iv) The entering into the Agreements and each Transaction, and the execution and delivery of, and performance thereunder, does not violate any Party's constitutive documents. 35

(v) The Master Agreements provide for the inclusion of some or all of the master agreements described in Appendix B, each such master agreement being a Netted Agreement. 36

(vi) On the basis of the terms and conditions of the Master Agreements and other relevant factors, and acting in a manner consistent with the intentions stated in the Master Agreements the Counterparties over time enter into a number of Transactions which include some or all of the transactions described in Appendix B to the Instruction Letter. 37

(vii) Some of the Transactions provide for an exchange of cash by both counterparties and others provide for the physical delivery of shares, bonds or commodities (including emission rights) in exchange for cash. 38

(viii) Each of the Netted Agreements and each Uncovered Transaction is valid, legal, binding and enforceable in accordance with its respective terms. 39

(ix) Each Close-Out Event specified as applicable pursuant to the Election for Division 1, Part II, Section A of the model Schedule to the MNA 2003 and each Close-Out 40

8 Please note that, with respect to Part D.I.2 (Close-out Netting Provisions) (Close-out Netting), D.II (Multibranch Parties) and D.VII (Governing Law, Arbitration and Jurisdiction) the assumption is broader in order to also cover General Agreements governed by either of German, English, New York or Swiss law (see n. 162).

Event as specified as applicable in the Election Sheet to the MNA 2010 is an effective and valid Event of Default under the applicable Netted Agreement or by reference each Uncovered Transaction.

(x) Each Party has obtained, complied with the terms of and maintained all authorizations, approvals, licenses and consents required under all laws of any applicable jurisdictions (including Switzerland) to enable it to lawfully enter into and perform its obligations under the Agreements and each Transaction and to ensure the legality, validity and admissibility in evidence or enforceability thereof. 41

(xi) Each Party is duly incorporated or, as the case may be, has been duly organized under the laws of its jurisdiction or the jurisdiction of its place of business, and each Party when entering into the Agreements initially and as of the date of the conclusion of a Transaction or providing Eligible Credit Support under a Credit Support Document is neither insolvent (*zahlungsunfähig*) nor overindebted (*überschuldet*) within the meaning of Swiss law or any other law applicable to such Party. 42

(xii) The terms of the Agreements and each Transaction are agreed on arm's length by the Parties so that no element of gift or undervalue from one party to the other is involved. 43

(xiii) The Agreements constitute legal, valid and binding obligations enforceable against each Party under all applicable laws (other than Swiss law). 44

(xiv) The Transactions, under their governing laws, are capable of being terminated and liquidated in accordance with the Close-out Netting Provisions. 45

(xv) No provision of the Agreements, or a document of which an Agreement forms part, or any other arrangement between the Parties, invalidates the effectiveness of the Close-out Netting Provisions or the Credit Support Documents under applicable law. 46

(xvi) There is no other agreement, instrument or other arrangement between the Parties which modifies or supersedes the Agreements in such a way as to affect the operation of the Close-out Netting Provisions. 47

(xvii) No provision of the Agreements has been altered in any material respect other than 48 for our recommendations herein.

(xviii) Without derogation to the specific limitations and qualifications set forth herein, this memorandum of law is subject to the following general limitations: 49

- This memorandum of law is limited to Swiss law as in force and interpreted at the date hereof. 50

- The meaning and sense of certain concepts of Swiss law and expressions which are used herein and on which this memorandum of law is based do not necessarily equal the meaning and sense of concepts and expressions in the reader's jurisdiction. It is assumed by us that all words and expressions in the Agreement are to be understood in accordance with their plain meaning and without regard of any import they may have under any other applicable laws. 51

- This memorandum of law is limited to matters of law and does neither address any factual circumstances or statements of the Parties to the Agreements, whether contained in representations or warranties of the Parties thereunder or otherwise, nor any tax matters, including without limitation any tax, regulatory or accounting consequences of the entering into, execution and delivery of, and performance under the Agreements. 52

- We have not reviewed the terms of any Transaction and consequently no views whatsoever are expressed in relation thereto. 53

- We have not reviewed the terms of any Netted Agreement or Uncovered Transaction and consequently no views whatsoever are expressed in relation thereto. 54

- This memorandum of law assumes that no law other than Swiss law would affect or qualify the views expressed herein. 55

C. EXECUTIVE SUMMARY

This executive summary highlights those issues identified in this memorandum of law which we, in our discretion, consider to be material in the context of the Agreements. It 56 does not purport to be exhaustive and reading this executive summary is not a substitute for reading this memorandum of law in its entirety. The executive summary is in all respects subject to the in-depth discussion and the limitations as set out in this memorandum of law.

1. Insolvency and Early Termination

The insolvency proceedings to which a Swiss Counterparty would be subject in Switzerland are the debt enforcement and bankruptcy proceedings under the SDEBA and, in respect of Special Insolvency Regime Swiss Entities and Special Insolvency Regime Swiss Branches, the special proceedings which apply in these cases. 57

In our view a termination upon the occurrence of a Close-out Event is valid and binding notwithstanding the opening of insolvency procedures. We recommend, however, to elect *Automatic Termination* in the Master Agreements (i.e. for the MNA 2010 we recommend not to elect to disapply Automatic Termination of § 6.1 in the Election Sheet) rather than to provide for a short term period within which an optional termination would need to be declared and to provide for a Close-out Event in the relevant Master Agreement which follows the broad insolvency triggers as contained in the Netted Agreements in order to ascertain an effective date no later than the adjudication of bankruptcy or the confirmation of a composition agreement with assignment of assets. For the MNA 2010, and assuming that the Netted Agreements provide for automatic termination upon a broadly defined insolvency related Close-out Event, the election of the alternative § 3.1 (B) would meet this recommendation. Still in order to ascertain consistency and clarity we recommend to elect alternative § 3.1 (C) and to provide for automatic termination to apply to a Close-out Event pursuant to §3.1 (C)(III)[9]. 58

The insolvency related Close-out Events are in our view broad enough to cover the Insolvency Proceedings as defined herein. Still we recommend to clarify the provisions by specifically making reference to certain Swiss insolvency proceedings (see recommendation in Annex 1). 59

2. Close-out Netting

We are of the view that as a matter of Swiss law, including Swiss bankruptcy and insolvency law, the Set-off and Close-out Netting Provisions in the Master Agreements in combination with § 11 of the CPCSA or § 12 of the CSA in respect of Eligible Credit 60

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9 There is no particular legal restriction on the deadline under 3C(III)(d), in line with other Master Agreements, a 30 days deadline would seem reasonable.

Support are valid and binding and would be recognized before as well as after the commencement of Insolvency Proceedings against a Swiss Counterparty.

The netting of termination amounts in determining the Termination Amount and payment thereof by the defaulting party or by the non-defaulting party under the Close-out Netting Provisions is enforceable under Swiss law, irrespective of whether the terms of a Transaction provide for cash or physical settlement and irrespective of whether the terms of a Transaction provide for different categories of underlying assets (cross-category netting/set-off) prior to and after an Insolvency of the Swiss Counterparty. 61

A claim of the solvent party under the Agreement for a Termination Amount denominated in a currency other than Swiss Francs would need to be converted into Swiss Francs as of the date of the adjudication of bankruptcy (in case of bankruptcy) or as of the date of confirmation of the composition agreement (in case of a composition agreement with assignment of assets). 62

The calculation of the Termination Amount may need to be made as of the date of the adjudication of bankruptcy or the confirmation of a composition agreement with assignment of assets and any fluctuation of amounts owed based on market or currency fluctuations to the detriment of the Insolvent thereafter would be disregarded as would any interest amount, which is not calculated in respect of a collateralized obligation or in excess of what is so secured by collateral. 63

D. ISSUES AND ADDITIONAL ASSUMPTIONS

I. Enforceability of Close-out Netting

1. General Overview - Swiss Insolvency Laws

Enforcement of contractual obligations is generally subject to limitations in case of insolvency proceedings being instituted against a Swiss Counterparty under applicable Swiss law. 64

In a nutshell, the various insolvency proceedings against a Swiss Counterparty and their main impact on the Swiss Counterparty's ability to abide by its obligations under the Credit Support Documents can be summarized as follows. 65

1.1 Bankruptcy

1.1.1 Proceedings

The legal framework as regards the enforcement of claims and the questions relating to insolvency and bankruptcy is as a rule set by the SDEBA. By way of exception, the insolvency and bankruptcy of Special Insolvency Regime Swiss Entities and Special Insolvency Regime Swiss Branches will not primarily be governed by the SDEBA, but by the specific laws which apply in these cases. Swiss Branches are also subject to the SDEBA, but on the liability side only with respect to debts and obligations incurred and entered into by the Swiss Branch and on the assets side only with respect to assets located in Switzerland or to which Swiss authorities have access (see the discussion under n. 155 et seq. below). 66

The enforcement of claims follows different proceedings depending on the status of the debtor. As a rule, claims against Swiss Counterparties (other than Special Insolvency Regime Swiss Entities and Special Insolvency Regime Swiss Branches) have to be pursued in enforcement proceedings leading to the declaration of bankruptcy (*Konkurs*) and, hence, a general liquidation of all assets and liabilities of the debtor, except that, unless a bankruptcy has been declared, creditors who are secured by a pledge must follow a special enforcement proceeding limited to the liquidation of the relevant collateral (*Betreibung auf Pfandverwertung*). However, if a bankruptcy is declared while such a proceeding is pending, the proceeding is ceased and the creditor participates with the other creditors in the bankruptcy proceedings. 67

Bankruptcy is declared by the court either on the initiative of a creditor or at the debtor's request. It is declared with effect as of a specific date and time of the day. All assets of the bankrupt entity at the time of declaration of bankruptcy, and all assets acquired or received subsequently, form together the bankruptcy estate, which after deduction of costs and certain other expenses, is to satisfy proportionally the creditors. The bankruptcy proceedings are carried out and the bankruptcy estate is managed by the receiver in bankruptcy. The bankrupt party loses its capacity to dispose of its assets and any mandate or power of attorney by the bankrupt party is automatically deemed revoked with the declaration of bankruptcy. 68

As a rule, the declaration of bankruptcy by the competent court needs to be preceded by a prior debt enforcement procedure (*Konkurs mit vorgängiger Betreibung*). Any creditor or purported creditor may apply for the commencement of debt enforcement proceedings against a debtor. Upon a creditor's request, in which the creditor need not evidence its 69 claim, the competent debt enforcement authority (*Betreibungsamt*) will issue a payment summons (*Zahlungsbefehl*). The debtor may object to the payment summons by simple declaration (*Rechtsvorschlag*). If the debtor does so object, the creditor needs to lift such objection by a court procedure.

If the creditor has a written debt acknowledgment of the debtor, it can start a special summary procedure (*provisorische Rechtsöffnung*). Otherwise, full fledged litigation on the merits may need to be commenced. If the creditor prevails in the special summary procedure, but the debtor still wants to contest the claim, it is up to the debtor to commence full fledged litigation on the merits. If the creditor prevails, the payment summons comes into legal effect and the creditor may request the continuation of enforcement proceedings and the competent debt enforcement authority (*Betreibungsamt*) would then notify the debtor that bankruptcy proceedings will be opened by the court upon a respective request of the creditor unless payment of the debt will be performed within 20 days. After the lapse of such deadline without payment of the debtor, the creditor may request that the competent court open bankruptcy proceedings. 70

The competent court may declare a debtor bankrupt without prior enforcement proceedings (*Konkurs ohne vorgängige Betreibung*) under the following circumstances: at the request of the debtor if (i) the debtor's board of directors declares that the debtor is overindebted (*überschuldet*) within the meaning of Art. 725 para. 2 CO or (ii) if the debtor declares to be insolvent (*zahlungsunfähig*), and at the request of a creditor if (i) the debtor commits certain acts to the detriment of its creditors or (ii) ceases to make payments (*Zahlungseinstellung*) or if certain events happen during composition proceedings. 71

A set-off in a bankruptcy is, pursuant to Art. 213 SDEBA, limited to situations where the debtor of the bankrupt party willing to set-off a claim has become the creditor of the bankrupt entity prior to the declaration of bankruptcy and even in such situations a set-off may be subject to challenge pursuant to Art. 214 SDEBA by any other creditor establishing that (i) a claim has been acquired prior to the declaration of bankruptcy, but upon knowledge of the bankrupt party's insolvency and (ii) with the purpose of gaining an advantage by virtue of such set-off to the detriment of other creditors. These provisions are supplemented by the general avoidance actions provided for in the SDEBA (n. 85 et seq. below). 72

For the final distribution there is a ranking of creditors in three classes. The first and the second class, which are privileged, comprise claims under e.g. employment contracts, 73 accident insurance, pension plans and family law. Certain privileges can further result for the government and its subdivisions based on specific provisions of federal law. All other creditors are treated equally in the third class.

1.2 Reorganization

The SDEBA also provides for reorganization procedures by composition with the debtor's creditors. Reorganization is initiated by a request with the competent court for a stay (*Nachlassstundung*) pending negotiation of the composition agreement with the creditors and confirmation of such agreement by the competent court. 74

A distinction is made between a composition agreement providing for the assignment of assets (*Nachlassvertrag mit Vermögensabtretung*) which leads to a private liquidation and in many instances has analogous effects as a bankruptcy, and a dividend composition (*Dividenden-Vergleich*) providing for the payment of a certain percentage on the creditors' claims and the continuation of the debtor. Further, there is the possibility of a composition in the form of a mere payment term extension (*Stundungsvergleich*). 75

The grant of a moratorium has, *inter alia*, the following effects: 76

- *Stay of Debt Collection Proceedings*: No debt collection proceedings can be initiated for the duration of the moratorium and pending proceedings are stayed. Procedural steps taken before the moratorium, however, remain in effect until a decision is taken on a composition agreement, except for (a) collection proceedings for claims of employees arisen in the course of the last six months and certain claims based on social security laws and family law (so-called first class claims), (b) collection proceedings for debt secured by real property, and (c) collection proceedings for new debt arising out of the permitted continuation of the debtor's business. Further permitted are sequestration and other measures of securing assets for creditors. The moratorium does not preclude initiating lawsuits and continuing pending litigations. 77

- *Capacity of Acting*: During the moratorium, the debtor's power to dispose of its assets and to manage its affairs is restricted. While the debtor may - under the supervision of the administrator - effect the necessary transactions for its daily business as long as any instruction of the administrator is observed, the debtor is barred from performing certain acts. Acts may be prohibited by law, by order of the court, or by instruction of the administrator. Without approval, the debtor is prohibited by law to (a) dispose of or pledge any fixed assets (such as holdings in 78 other companies or real property), (b) create new security interests, (c) issue guarantees, and (d) enter into transactions which are not at arm's length. Such acts performed without court approval are invalid. If the debtor has entered into such a transaction, the counterparty is not entitled to any dividend or liquidation proceeds resulting for the creditors. The third party's claims for rescission of the contract must be recorded, and will be treated just like any other creditors' claims, thus receive a dividend or a share in the liquidation proceeds only.

- In case of a regular pledge, the security taker is, furthermore, not entitled to proceed with a private liquidation until the confirmation of the settlement by the competent court. The private liquidation may also be stayed for a further period. A secured creditor participates in the settlement only for the amount of its claim not covered by the collateral. 79

- *Interest*: Unsecured debts become non-interest bearing as of the date the moratorium is granted. If the moratorium is withdrawn at a later time, the interest period will be deemed to have run during the moratorium. 80

- *Due Dates*: The moratorium does not affect the agreed due dates of debts (contrary to bankruptcy, in which case all debts become immediately due upon adjudication). Should the moratorium proceedings end in a composition agreement with assignment of assets (*Nachlassvertrag mit Vermögensabtretung*) for the benefit of creditors, then all debt will fall due to allow a general liquidation. 81

- *Set-off*: Set-off is allowed, subject to the same limitations as in a bankruptcy (see n. 72 above), whereby the date of the publication of the grant of the moratorium is relevant for determining which claims qualify for set-off. 82

The moratorium aims at facilitating the conclusion of one of the above composition agreements. As mentioned, the composition agreement needs to be approved by the creditors and confirmed by the competent court. With the judicial confirmation, the composition agreement becomes binding on all creditors, whereby secured claims are only subject to the composition agreement to the extent that the collateral proves to be insufficient to cover the secured claims. 83

1.3 Emergency Moratorium

The SDEBA further confers the right to the cantonal governments to stay certain procedures under the SDEBA, including the declaration of bankruptcy, at the debtor's 84 request if the debtor's inability to pay its debts is temporary and due to extraordinary circumstances of general implication (e.g. a general economic crisis). The basic principle under the emergency moratorium regime is that the respective debtor is to abstain from any transactions that are to the detriment of its creditors generally and from any transactions that prefer certain of its creditors to the detriment of other creditors. The competent court can also provide for more specific measures such as that payment of existing debt or the granting of security interests is subject to its prior approval. The emergency moratorium has been applied rarely only in the past and with respect to which scarce practical experience exists only.

1.4 Clawback/Avoidance of Transactions

The receiver in bankruptcy and certain creditors may, by means of an appropriate lawsuit, challenge certain arrangements or dispositions made by the insolvent during a period (the suspect period) preceding the declaration of bankruptcy or, in case of a composition agreement with assignment of assets (*Nachlassvertrag mit Vermögensabtretung*), the grant of the moratorium. This possible challenge relates to (i) gifts and other gratuitous transactions (*Schenkungspauliana*), (ii) certain acts of a debtor, undertaken at such time as the debtor was overindebted (*Überschuldungspauliana*), and (iii) dispositions made by the debtor with the intent to disadvantage its creditors or to prefer certain of its creditors to the detriment of other creditors (*Absichtspauliana*) (all as discussed in more detail below). 85

1.4.1 Avoidance of Gifts and Gratuitous Transactions

Art. 286 SDEBA allows the avoidance of gifts and other gratuitous transactions (as well as some further specifically mentioned transactions, which are, however, of no relevance in the context of this memorandum of law), which the debtor made within a suspect period of 12 months prior to being declared bankrupt or the grant of a moratorium. Not only outright gratuitous transactions, but also transactions where the obligations of the parties measured in economic terms are disproportionate to the detriment of the bankrupt debtor are to the extent of such disproportion and for purposes of Art. 286 SDEBA treated as gratuitous transactions. 86

Any such gratuitous transaction can be challenged based on the objective elements of the gratuitous nature of such transaction and established damages resulting therefrom for other creditors of the debtor. 87

1.4.2 Avoidance due to Over-Indebtedness

Contrary to Art. 286 SDEBA, Art. 287 SDEBA targets specific acts of the insolvent debtor within the suspect period of 12 months prior to the debtor being declared bankrupt or the grant of a moratorium, where the debtor, as an additional objective prerequisite, was already overindebted (*überschuldet*) at the time the relevant act was undertaken by the debtor. The term "overindebted" refers to the fact that the debtor's assets do not cover its liabilities. The existence of such over-indebtedness at the time of the relevant transaction or act is, as a rule, to be proven by whoever challenges the transaction or act based on the existence thereof. 88

The targeted acts are specifically acts that prefer one creditor over the others in the light of such over-indebtedness. Such acts include (i) the posting of collateral for an existing but unsecured obligation with no pre-existing undertaking to post collateral for such obligation, (ii) settlement of monetary claims other than in cash or commonly used payment means and (iii) the settlement of claims prior to their stated maturity. 89

These acts must result in damages to the creditors. Such damages are presumed in the context of avoidance where the creditors have suffered final losses (*Verlustscheingläubiger*) in a debt collection procedure or if the bankruptcy estate challenges an act. It is then up to the defendant to prove that the challenged act did not lead to such damages. 90

There is a subjective element also, in that the debtor's counterparty to the challenged transaction or act may avoid a challenge of the transaction or act if it can prove that it did not and, being diligent, could not know about the debtor's over-indebtedness. While, as mentioned above, the over-indebtedness as such needs to be proven by the challenging party, once established, the counterparty to the transaction or act is, subject to the proof of the contrary, presumed to have been aware thereof. This proof will certainly fail if the over-indebtedness was reflected in financial statements made available to such counterparty. It would in our view also fail, if the counterparty did not specifically ask for financial statements despite that due diligence warranted to ask for financial statements in the light of the nature and the magnitude of the transaction contemplated, and if the financial statements would indeed have revealed the over-indebtedness. 91

1.4.3 Avoidance for Intent

Art. 288 SDEBA subjects any act of a debtor within the suspect period of five years prior to its being declared bankrupt or being granted a moratorium to challenge to the extent that such act was made with the bankrupt debtor's intent to prefer certain creditors over others or to disadvantage certain of its creditors and if this intention was, or exercising the requisite due diligence, must have been known to the counterparty. 92

As for the other avoidance actions, in terms of objective prerequisites, the act of the debtor must have led to damages to creditors. While the SDEBA does not specifically mention this prerequisite, it nevertheless follows from the nature and aim of an avoidance action. Pursuant to Swiss jurisprudence, such damages are presumed in the context of the avoidance for intent, where the challenging creditor has suffered final losses (*Verlustscheingläubiger*) in a debt collection procedure or if the bankruptcy estate challenges the act. It is then up to the defendant to prove that the challenged act did not in the case at hand lead to such damages, i.e. the burden of proof is shifted to the defendant in such cases. The term "act" must be read in a very broad sense. It is not limited to the conclusion of contracts, but includes any act of the debtor, in particular also any act which the SDEBA specifically targets in one of the other two avoidance actions, if such act meets the further requirements of the particular avoidance for intent pursuant to Art. 288 SDEBA. 93

In terms of subjective elements, avoidance for intent calls for intent to prefer or to disadvantage creditors on the debtor's side and such intent must have been recognizable to the counterparty of the relevant act. The intent on the debtor's side is presumed where the debtor could and must have recognized that the challenged act would prefer or disadvantage creditors. It is sufficient, though, that the debtor, while not directly aiming at such preference or disadvantage by its act, merely accepts such preference or disadvantage as a possible consequence of its act. 94

Jurisprudence holds that such intent is recognizable to a counterparty, if the counterparty, using the diligence warranted under the specific circumstances, should have foreseen a disadvantage to the other creditors as the consequence of the act of the debtor. If there are signs of a potential disadvantage to other creditors, then the counterparty has to interrogate the debtor and make the necessary further inquiries. 95

As far as banks are concerned, Swiss legal doctrine holds, that the suspicion of a bank that the debtor when transacting with the bank may accept that such act disadvantages its creditors generally, is sufficient to deem such bank having recognized the debtor's intent. Furthermore, pursuant to such scholarly opinions, the intent is deemed recognizable not 96 only if a bank knows about the distressed financial situation of the debtor, but also if there are indications of a distressed financial situation.

While these subjective elements have to be proven by the challenging creditor, who obviously would need to gather the requisite information, one should not in our view underestimate the impact of the presumptions which work into the hands of such creditors as discussed above and it is, hence, important to focus on the objective elements. 97

It is to be noted that (as is the case for Art. 286 SDEBA, but contrary to Art. 287 SDEBA) an actual over-indebtedness at the very moment when the act is undertaken, does not generally constitute a prerequisite for a challenge of the relevant act. However, as the acts which can potentially be challenged under Art. 288 SDEBA are only very generically addressed by the finality of such acts, one nevertheless in our view needs to distinguish two different scenarios: 98

Under the first scenario, there is no sufficient indication of financial difficulties when the debtor acts. In such scenario, the act must be such that its very nature is targeted to achieve an undue preference of, or a disadvantage to certain creditors if and when the debtor should be declared bankrupt or granted a moratorium (e.g. posting of collateral only concurrently or immediately preceding the declaration of bankruptcy, so that in fact the intention is, that the counterparty should only be granted a preferential right over an asset if and when the debtor is declared bankrupt, but with no intent to treat the counterparty as a Security taker other than in bankruptcy or an artificial creation of an overstated claim upon such declaration of bankruptcy in order to achieve a higher basis for a bankruptcy dividend or the like). 99

In the second scenario, though, where the debtor is in financial difficulties, the scope of acts that can be challenged becomes significantly broader and on the verge of a bankruptcy eventually would also include the payment of a matured claim, if the counterparty must have recognized that the debtor would have had to file for bankruptcy and by making such payment outside the bankruptcy (which ensures proportional satisfaction of claims of the same class) prefers such counterparty over other creditors who will end up with a dividend that will not cover their full claims and who thereby are not getting the same *pro rata* share as the counterparty.[10] 100

[10] In its decision NR. 5A.892/2010 of August 22, 2011 c.4., the Federal Supreme Court first confirmed that an avoidance action under Art. 288 SDEBA was independent of the other avoidance actions and, hence, could also, if the further qualified conditions are met, affect acts that could not be challenged under such other avoidance actions. It then held in the context of a collateralized total return swap documented under a 1992 ISDA Master Agreement and presumably an English law CSA-Transfer, that in the case at hand

1.5 Jurisdiction Clauses and Insolvency Actions

It should be noted that under Swiss law jurisdiction clauses have no effect on actions brought under the SDEBA, i.e. to issues that relate to Swiss bankruptcy or insolvency law rather than to contractual law. These actions must be brought before the court at the place of the Insolvency Proceeding. Accordingly, the jurisdiction clause provided for in the Agreement in favour of the English courts would not be effective in case of actions relating to Insolvency Proceedings. With respect to avoidance actions (see n. 85-100 above), it seems noteworthy in this context that, contrary to earlier precedents, recent precedents hold that the forum provided for in Art. 289 SDEBA (place of defendant) may be disposed of, but only after the adjudication of Insolvency by an agreement entered into by the non-defaulting party with either the administrator or the creditors. 101

1.6 Special rules applicable to Banks and Securities Dealers

The Banking Act and the Ordinance of the Swiss Financial Market Supervisory Authority on the Insolvency of Banks and Securities Dealers ("**BIO-FINMA**")[11] set forth a detailed regime governing bankruptcy and insolvency proceedings against Banks. Pursuant to Art. 36a SESTA, the same rules apply to Securities Dealers established in Switzerland. 102

In relation to Banks and Securities Dealers, the SDEBA only applies to the extent that there are no applicable special rules pursuant to the Banking Act and/or the BIO-FINMA. The 103

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collateral was transferred for *existing obligations* and without *pre-existing obligation* to do so and, hence, caused damages for the other creditors and thereby subject to avoidance. The decision is in our view not properly reasoned, in particular as it denies the existence of a pre-existing obligation to transfer collateral on the basis of a perceived lack of predictability of the amount that would need to be collateralized when the parties entered into the agreement. At the same time it held that periodic balancing payments that the parties had agreed in longer intervals than the ones for the transfer of collateral with the last such payment having been made after the last transfer of collateral were part of the exchange of payments agreed by the parties at the outset and, hence, not subject to avoidance. As both the balancing payments and the transfer of collateral aim at the same reduction of exposure, are to be calculated on the same basis and were agreed at the outset, the different treatment seems inconsistent. So what in essence seems to be the immediate conclusion from this decision for derivative transactions (with secured amounts that necessarily will fluctuate), is the risk that collateral posted under an existing security undertaking could be clawed back under Art. 288 SDEBA notwithstanding the existence of a security undertaking providing for additional collateral calls during the life of transaction(s).

11 Verordnung der Eidgenössischen Finanzmarktaufsicht über die Insolvenz von Banken und Effektenhändlern (Bankeninsolvenzverordnung-FINMA, BIV-FINMA) / Ordonnance de l'Autorité fédérale de surveillance des marchés financiers sur l'insolvabilité des banques et des négociants en valeurs mobilières (Ordonnance de la FINMA sur l'insolvabilité bancaire, OIB-FINMA), SR 952.05.

SDEBA rules regarding reorganization (*Nachlassstundung*) within the meaning of Articles 293 et seq. SDEBA are disapplied altogether with respect to Banks and Securities Dealers.

It should be noted further that the Swiss Financial Market Supervisory Authority ("**FINMA**")[12] may deviate from the rules of the SDEBA where it deems it appropriate. Yet, according to the explanatory message accompanying the 2004 amendment of the Banking Act (the "**2004 Message**")[13] and gathering from the BIO-FINMA, such derogation is mostly of a formal nature. 104

The Banking Act grants broad powers to the FINMA which is entitled to handle the insolvency proceedings against Banks and Securities Dealers. In particular, the FINMA has the authority to implement (i) protective measures (*Schutzmassnahmen*) in case of justified concern of insolvency, (ii) reorganization proceedings (*Sanierungsmassnahmen*), (iii) solvent or insolvent liquidation proceedings relating to banks (*Bankenkonkurse*). 105

Protective measures may include a broad variety of measures such as, in particular, a bank moratorium (*Stundung*) or a maturity postponement (*Fälligkeitsaufschub*), and may be ordered by the FINMA either on a stand-alone basis or in connection with reorganization or liquidation proceedings. Such measures are largely handled by the FINMA. 106

Under the 2011 amendment of the Banking Act, the FINMA has the additional power, by ordering reorganization proceedings, to order the transfer of all or part of the business with assets, liabilities and contracts to another existing bank or a newly established bridge bank, with such transfer becoming effective upon the ratification of the reorganization plan by FINMA. Pursuant to Article 57 of the BIO-FINMA, this transfer could be coupled with a temporary stay of any contractual termination right of a counterparty with respect to finance contracts[14] (*Finanzverträge*) for up to 48 hours if such contractual termination right 107

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[12] With effect from January 1, 2009, the former Swiss Federal Banking Commission (*Eidgenössische Bankenkommission, EBK*) has been merged into the Swiss Financial Market Supervisory Authority (*Eidgenössische Finanzmarktaufsicht, FINMA*) in accordance with the Federal Act on the Swiss Financial Market Supervisory Authority (FINMASA) (Bundesgesetz über die Eidgenössische Finanzmarktaufsicht, FINMAG, SR 956.1).

[13] Botschaft zur Änderung des Bundesgesetzes über die Banken und Sparkassen vom 20. November 2002.

[14] Are considered finance contracts under the BIO-FINMA: (a) contracts for buying, selling, repurchasing, and lending securities and book-entry securities and trading with options on securities and book-entry securities irrespective of whether it is done individually, in groups or as indices; (b) contracts for buying and selling commodities with future delivery and for options trading on commodities or commodity deliveries; (c) contracts for buying, selling or transferring goods, services, rights or interest yields at a certain price set in advance and at a future date; (d) contracts for foreign exchange, currency, precious

would otherwise be triggered by officially ordered restructuring or protective measures.

We note that under present law such power granted to the FINMA pursuant to the BIO-FINMA may contradict and, being a mere implementing ordinance that is subordinate to the Banking Act, violate Article 27 para. 3 of the Banking Act as the temporary stay could affect netting under the netting arrangements while said Article 27 para. 3 of the Banking Act provides that netting arrangements shall not be affected by protective measures, reorganization measures and liquidation procedures. 108

Article 57 provides that the temporary stay: 109

- may only be ordered by the FINMA for finance contracts which provide for early termination rights in case of reorganisation proceedings (Sanierungsmassnahmen) or protective measures (*Schutzmassnahmen*) ordered by an official authority; 110

- is limited to a maximum of 48 hours; and that 111

- the rights of the counterparty to terminate the relevant finance contracts remains unaffected if the acting of the Insolvent triggers another Close-out Event before, during or after the transfer, or if the transferee bank triggers an independent Close-out Event after such transfer which is not linked to the protective measures or the reorganisation proceedings ordered by FINMA. 112

The termination rights affected by a temporary stay ordered by the FINMA can in our reading of Article 57 BIO-FINMA be exercised immediately upon the expiration of the relevant 48 hours period (or, if the Agreement is not transferred, as soon as the counterparty becomes aware that the Agreement remains with the Insolvent). 113

For completeness sake, we note that no precedents are available as of the date hereof with respect to the application of Art. 57 para. 2 of the BIO-FINMA[15]. 114

A reorganization plan can also provide for a debt for equity swap. Where a reorganization plan affects creditors' rights, the FINMA has to set a deadline within which creditors can reject the reorganization plan, and if third class creditors (unsecured unprivileged creditors) 115

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metals, credit as well as securities and book-entry securities, commodities and their indices; and (e) all other contracts with an effect equivalent to those specified under letters a-d.

15 We further note that it is proposed to replace this provision by a new provision in the Banking Act.

that represent more than 50 per cent of the amounts of third class claims in the books of the bank reject such plan, then the reorganization plan has failed and the FINMA has to order the bankruptcy[16].

According to the 2004 Message, the rules regarding the insolvency proceedings of banks are not meant to affect netting arrangements and, in particular, in a liquidation proceeding ordered by the FINMA, the relevant provisions of the SDEBA governing netting arrangements shall remain applicable. Article 27 para. 3 of the Banking Act provides that netting arrangements shall not be affected by protective measures, reorganization measures and liquidation procedures. For completeness sake, we note that no precedents are available as of the date hereof. 116

It seems noteworthy that the prerequisites for actions for the avoidance of transactions are somewhat different from the ones in the SDEBA in that such actions can also be brought in case of a reorganization of a Bank or a Securities Dealer. Further, in the first instance, the Bank or the Securities Dealer itself is competent to challenge these arrangements or dispositions once the reorganization plan has been approved by the FINMA. If the reorganization plan does not provide for the challenge of these actions by the Bank or the Securities Dealer itself, the creditors of the Bank or the Securities Dealer may initiate these actions. 117

Finally, under the 2011 amendment of the Banking Act, the FINMA has the competence to recognize foreign insolvency decisions (whether rendered in the country of such bank's legal or the country of its effective seat) and to put assets located in Switzerland at the disposition of a foreign insolvency estate without having to open separate Swiss Insolvency Proceedings pursuant to Articles 166 et seq. of the Swiss Federal Act on Private International Law ("**PILA**")[17], subject to the foreign insolvency proceedings (i) ascertaining equal treatment to Swiss creditors who are secured or would be privileged creditors under Swiss law, and (ii) providing for adequate consideration of other claims of Swiss creditors. 118

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16 Pursuant to an amendment of the Banking Act in 2012, the reorganization plan cannot be rejected by the creditors with respect to a systemic bank.

17 Bundesgesetz über das Internationale Privatrecht (IPRG) / Loi fédérale sur le droit international privé (LDIP), SR 291.

1.7 Special rules applicable to Insurance Companies

As from January 1, 2006, the regulatory legal framework for Insurance Companies, which used to consist of several separate acts and ordinances, has been merged into the ISA and the implementing ordinance thereto ("**ISO**")[18]. The regulatory treatment of the various business lines of Insurance Companies has thereby been largely harmonized. 119

The ISA and the new Ordinance of the Swiss Financial Market Supervisory Authority on the Bankruptcy of Insurance Companies[19] ("**IBO-FINMA**") that came into force on January 1, 2013 provide for a special bankruptcy and insolvency regime applicable to Insurance Companies. 120

In relation to Insurance Companies, the SDEBA only applies to the extent that there are no applicable special rules pursuant to the ISA and/or IBO-FINMA. The SDEBA rules regarding composition proceedings (*Nachlassstundung*) within the meaning of Art. 293 et seq. SDEBA are disapplied altogether with respect to Insurance Companies. 121

Pursuant to the ISA, bankruptcy is declared and made public by the FINMA if it has reasonable grounds of concern that an Insurance Company is over-indebted (*Begründete Besorgnis der Überschuldung*) and there is no prospect of restructuring the Insurance Company (*Aussicht auf Sanierung*). The bankruptcy proceedings are carried out and the bankruptcy estate is managed by a special liquidator which is to be appointed by the FINMA (*Konkursliquidator*). 122

In addition, the FINMA is granted the competence to deviate from the SDEBA rules where it deems it appropriate. 123

We note in particular that the IBO-FINMA grants a liquidator appointed by the FINMA (*Konkursliquidator*) the power to challenge certain arrangements or dispositions made by the insolvent Insurance Company. The liquidator has to examine *ex officio* whether certain arrangements or dispositions made by the insolvent Insurance Company may be subject to challenge. In calculating the lapse of the suspect period, the duration of a preceding reorganization (*Sanierung*) or of preceding reorganization measures (*Sanierungsmassnahmen*) as per Art. 51 ISA are not counted. If the liquidator concludes that certain arrangements or dispositions may be subject to challenge, the liquidator requires the approval of the FINMA in order to initiate the respective court proceedings. If 124

[18] Verordnung über die Beaufsichtigung von privaten Versicherungsunternehmen (AVO), SR 961.011.
[19] Verordnung der Eidgenössischen Finanzmarktaufsicht über den Konkurs von Versicherungsunternehmen (Versicherungskonkursverordnung-FINMA, VKV-FINMA), SR 961.015.2.

FINMA refuses to approve, or the liquidator declines to initiate, such proceedings, the respective claims are to be offered to the creditors for assignment, all in accordance with Art. 260 SDEBA.

The ISA further provides for comprehensive rights of the FINMA to order or take precautionary measures in case an Insurance Company does not comply with the solvency requirements or if it seems otherwise warranted in the circumstances to safeguard the interests of the insured persons. 125

Pursuant to Art. 51 ISA, the FINMA can, *inter alia*, take the following protective measures, which are of interest in the context discussed herein: 126

- limit the right of an Insurance Company to dispose of its assets; 127
- order a freezing of assets or order that such assets be deposited with a third party (freezing); 128
- transfer the powers of corporate bodies of an Insurance Company to third parties; 129
- order that an insurance portfolio be transferred to another insurance company together with the pertaining Allocated Assets (transfer of assets); 130
- order the liquidation of a pool of Allocated Assets (liquidation of allocated assets); 131
- allocate free assets to a pool of Allocated Assets; 132
- in the case of a threatening insolvency order a moratorium and payment deferral. 133

Finally, with regard to the recognition of foreign insolvency decisions, Art. 54d ISA refers to the relevant provision of the Banking Act (see n. 118 above). 134

Such measures could affect the Insurance Company's ability to provide collateral, irrespective of whether the underlying security agreement is to be qualified as an unconditional transfer of title in the assets or as an irregular or regular pledge. 135

An Insurance Company must at all times allocate qualifying assets to a segregated pool of assets in order to cover insurance claims (Art. 17 ISA). While in the past the rules on the security fund of a Swiss life insurance and on the allocated assets (*gebundenes Vermögen*) 136 of a Swiss casualty insurance were not totally identical, the rules applicable to, and the designation as allocated assets (*gebundenes Vermögen*) (the "**Allocated Assets**") have now in respect of the issues relevant in this context, been harmonized for all insurance categories. An Insurance Company has to form separate pools of Allocated Assets in respect of certain business lines (Art. 77 ISO) and we understand from the regulator (prior to January 2009, the Swiss Federal Office of Private Insurance, merged into the FINMA with effect as from January 2009), that an Insurance Company is also free to voluntarily further sub-divide its insurance portfolio and create separate pools of Allocated Assets for each such sub-divided insurance portfolio. Hence, an Insurance Company may have several pools of Allocated Assets. Any assets, which are not so segregated in a particular pool of Allocated Assets, are referred to herein as "**Free Assets**".

Due to the particular function of the Allocated Assets as security for insurance claims, only assets which are unencumbered and which are not subject to any right of set-off may as a rule be part of the Allocated Assets (Art. 84 para. 2 ISO)[20]. However, Art. 91 para. 3 ISO explicitly reserves netting in respect of financial derivatives, which form part of one and the same pool of Allocated Assets. While the ISO is not very clear on the point, it was the aim throughout the preparatory work on the ISO that collateral required to secure financial derivatives under a master agreement may also be provided out of the particular pool of Allocated Assets without need to replace such encumbered assets in the Allocated Assets. Pursuant to the FINMA, the above netting exception is, hence, to be read in a broader sense and also allows for collateral for such financial derivatives to be provided from the respective Allocated Assets. The FINMA has confirmed this view in its investment guidelines for Allocated Assets, as last amended June 26, 2013 ("**IGA**")[21]. IGA note 506 et seq. permit the use of Allocated Assets as collateral for derivative transactions forming part of the same pool of Allocated Assets entered into under a qualifying master documentation. A series of documentation requirements have to be met, though.[22] 137

20 Art. 84 para. 2 ISO literally stipulates that liabilities which do not form part of Allocated Assets may not be set-off against assets of the Allocated Assets. There are some doubts, though, that such a prohibition to set-off in a mere ordinance is a sufficient legal basis. So it is more likely to be interpreted as a prerequisite for an asset to qualify for the Allocated Assets that it indeed is not exposed to a right of set-off. The FINMA, therefore, also requests that the parties to a Master Agreement clearly exclude a set-off of claims under a Master Agreement for Allocated Assets with claims outside such Master Agreement and that this waiver is meant to be applicable prior and after insolvency of a party (IGA note 495).

21 FINMA Rundschreiben 2008/18 (*Anlagerichtlinien Versicherer*).

22 Thresholds and minimal transfer amounts need to be kept low and need to take into account the counterparty's rating (IGA note 508-510). Collateral needs to be deposited either in Switzerland or in a foreign jurisdiction that the FINMA has approved for such purposes on the basis of such jurisdiction respecting the particular allocation of Allocated Assets in case of an insolvency of an Insurance Company (for the time being Luxembourg, Liechtenstein and Belgium) (IGA note 133). Collateral

Furthermore, IGA note 506 provides that if the parties agree on collateral, care be taken that such arrangement be bilateral. Finally, IGA note 499 stipulates that in case of a foreign counterparty, an Insurance Company has to request that such foreign counterparty provide collateral for derivative transactions, if such derivative transactions are to be part of a pool of Allocated Assets. 138

To the extent that the pools of Allocated Assets are not being transferred to another insurance company together with the respective insurance portfolio, but rather liquidated, the proceeds of such liquidation are to be utilized in first priority to discharge the insurance claims secured by such pools of Allocated Assets. As for a bankruptcy (see below), we are of the view, that the claim of a counterparty of an Insurance Company resulting from a financial derivative entered into under a qualifying master agreement for the purposes of the particular pool of Allocated Assets, is also to be satisfied from such Allocated Assets and not from its Free Assets only. 139

The Allocated Assets are also liquidated in the context of the bankruptcy. As mentioned above, though, the proceeds from the liquidation of the Allocated Assets are first to be used to cover the insurance claims secured by the particular Allocated Assets and only the excess becomes part of the bankruptcy estate (Art. 54a and 17 ISA). 140

By allowing that financial derivatives directly form part of a certain pool of Allocated Assets, the new regulatory framework implicitly also allows that there are claims derived from such financial derivatives against the Allocated Assets. This is in particular recognized in Art. 91 para. 3 ISO dealing with netting of derivatives in that it requires that any negative amount be deducted from the value of the Allocated Assets. Hence, in our view the claim of a counterparty of an Insurance Company resulting from a financial derivative entered into under a qualifying master agreement for the purposes of the particular pool of Allocated Assets, is also to be satisfied from such pool's Allocated Assets and recovery therefore is in our view possible from both the specific Allocated Assets on a *pari passu* basis with the respective policyholders and if insufficient from the Free Assets 141

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posted by an Insurance Company from its Allocated Assets is still accounted for as part of the Allocated Assets and the Credit Support Document needs to specifically address the fact that the claim for a return of collateral which is part of a pool of Allocated Assets belongs to such pool of Allocated Assets (IGA note 495). Collateral posted by the counterparty is legally attributed to the Allocated Assets and IGA note 513 requires that this be made evident for third parties, but no value may be allocated to it as it constitutes a mere security. Finally, there is a need to keep the various Allocated Assets separate. Hence, the collateral needs to be put up for and from a clearly identified pool of Allocated Assets under a separate Master Agreement and Addendum which is specific to such Allocated Assets.

which form part of the bankruptcy estate *pari passu* with all other unsecured and unprivileged creditors of the Insurance Company.

1.8 Special rules applicable to Contractual Funds and to SICAVs

Pursuant to the 2011 amendment to the CISA, and in particular Art. 137 CISA, the FINMA 142
shall declare the bankruptcy of any person licensed under Art. 13 CISA (which, *inter alios*, includes Contractual Funds and SICAVs as discussed below) if there are reasonable concerns (*begründete Besorgnis*) that such person is over-indebted (*überschuldet*) or has serious liquidity problems (*ernsthafte Liquiditätsprobleme*) and if a mere reorganization (*Sanierung*) is not viable or has failed. As for the Insolvency Proceedings, the respective rules applicable pursuant to Art. 33 to 37g Banking Act apply by analogy (Art. 137 para. 3 CISA), and the SDEBA rules regarding composition proceedings (*Nachlassstundung*) pursuant to Art. 293-336 SDEBA are expressly disapplied altogether (Art. 137 para. 2 CISA).

The Ordinance of the Swiss Financial Market Supervisory Authority on the Bankruptcy of 143
Collective Investment Vehicles (**"CISBO-FINMA"**) came into force on January 1, 2013[23] and provides for a more detailed legal framework in respect of insolvency proceedings of Contractual Funds and SICAVs. Having said this, the CISBO-FINMA adapts the general insolvency regime set by the SDEBA to the particularities of Swiss collective investment vehicles.

SICAVs are, following the 2011 amendment of the CISA, subject to the particular 144
insolvency regime of the CISA.

A Contractual Fund is not a separate legal entity but merely a separate asset pool. As such, 145
it does not have legal capacity to act and is represented by a Swiss fund management company (the **"Fund Management Company"**) in accordance with Art. 28 et seq. CISA. A Fund Management Company must be organized as a joint stock corporation (*Aktiengesellschaft*) and is, following the 2011 amendment of the CISA, subject to the particular insolvency regime of the CISA. A Contractual Fund's assets are held on a fiduciary basis by the applicable Fund Management Company on behalf of such Contractual Fund's investors. Art. 35 CISA accordingly provides that, in case of a bankruptcy of the Fund Management Company, the Contractual Fund's assets are segregated from the Fund Management Company's bankruptcy estate, whereas the

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23 Verordnung der Eidgenössischen Finanzmarktaufsicht über den Konkurs von kollektiven Kapitalanlagen (Kollektivanlagen-Konkursverordnung-FINMA, KAKV-FINMA), SR 951.315.2.

bankruptcy estate of the fund management company may withhold assets required to cover any claim that the fund management company has acquired in the due performance of its duties.[24] Whether or not Insolvency proceedings can be initiated against the Contractual Fund itself (as opposed to Insolvency proceedings against the Fund Management Company) is not discussed in Swiss legal doctrine and we are not aware of any precedents. As a general rule under Swiss law, Insolvency proceedings with respect to entities lacking the legal capacity to act are to be sought against the legal entity representing the entity. An exception is made for certain of those entities, however, and Insolvency proceedings can be instituted directly against them notwithstanding they lack legal capacity to act. It is common to all those exceptions though that the law explicitly provides that such entities are (deemed to be) vested with legal capacity to act. This is not the case for a Contractual Fund. We, therefore, believe that Insolvency proceedings sought against a Contractual Fund directly would have to be rejected. We note that this question is of no relevance if, and we recommend that, the documentation for transactions with such counterparties is drafted such that an event of default is triggered if the relevant event arises with respect to either the Contractual Fund itself or with respect to the applicable Fund Management Company.

The CISA provides for an array of supervisory instruments that seem noteworthy in the 146
context of Transactions entered into with Collective Investment Vehicles.

The FINMA, as the supervisory authority, has the general right to provide measures 147
necessary to address any irregularities of Collective Investment Vehicles with a view to restore the proper state of affairs. While the law does not provide for a catalogue of possible measures it does provide that the FINMA can, in the sense of an *ultima ratio* measure, withdraw authorizations and approvals and can order the dissolution (e.g. if the minimum assets fall below the required amount).

We further note that according to the CISO[25], the FINMA may, in case of a dissolution of a 148
Contractual Fund or of a SICAV respectively (e.g. as a result of a withdrawal of approval), order the transfer of the assets and in the case of a Contractual Fund the fund contract to a suitable new Fund Management Company or custodian bank.

While, as mentioned above, no precedents are available as of the date hereof with respect 149
to the supervisory instruments available under the CISA, we believe that the FINMA will

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[24] The CISBO-FINMA provides for the possibility to transfer a contractual investment vehicle to a solvent fund management company.

[25] Verordnung über die kollektiven Kapitalanlagen (KKV), SR 951.311.

largely continue the practice developed under the predecessor law. In particular, the general administrative law principles (e.g. principle of proportionality) must be adhered to and, most importantly, we do not believe that the CISA provides for a legal basis that would warrant the authorities' ignoring agreements otherwise valid and enforceable.

Umbrella fund structures are possible under the CISA, with each sub-fund only being liable 150
for its own liabilities under such structure, although such limitation is disregarded in respect of a SICAV, if its limited liability was not disclosed when entering into the applicable transaction. In such circumstances, the SICAV is liable with its entire assets.[26]

The CISA delegates the power to set rules on the granting of collateral by a Collective 151
Investment Vehicle to the Federal Council, who set out in the CISO the quantitative limitations listed below to control the amount of collateral that a fund may provide.

Collective Investment Vehicles qualifying (i) as securities funds (*Effektenfonds*) may 152
provide collateral up to 25% of their net assets (Art. 77 para. 1 (b) CISO); (ii) as other funds for traditional investments (*Übrige Fonds für traditionelle Anlagen*) up to 60% of their net assets (Art. 100 para. 1 (b) CISO); and (iii) as other funds for alternative investments (*Übrige Fonds für alternative Anlagen*) up to 100% of their net assets (Art. 100 para. 2 (b) CISO). These provisions contemplate both a security interest in the form of a pledge or a transfer of title. For umbrella fund structures, i.e a subdivision in several sub-funds, these rules apply to each sub-fund and the collateral must be provided out of the respective sub-fund's assets. More generally, we note, in relation to umbrella fund structures, that a Master Agreement and the pertaining addendum would need to be concluded in respect of each particular sub-fund.

These limitations are accompanied by limitations applicable to each of the above funds on 153
short term borrowings that such funds can take up. Collective Investment Vehicles qualifying: (i) as securities funds (*Effektenfonds*) may borrow up to 10% of their net assets (Art. 77 para. 2 CISO); (ii) as other funds for traditional investments (*Übrige Fonds für traditionelle Anlagen*) may borrow up to 25% of their net assets (Art. 100 para. 1 (a) CISO); and (iii) as other funds for alternative investments (*Übrige Fonds für alternative Anlagen*) may borrow up to 50% of their net assets (Art. 100 para. 2 (a) CISO).

The provisions on collateral do not, however, specifically address collateralization of a 154

[26] We note that no precedents and doctrine is available yet as of the date hereof with respect to the effects negative net assets of one sub-fund have on other sub-fund and on the Collective Investment Vehicle as such, in particular with respect to insolvency law issues.

Collective Investment Fund's obligations under financial derivatives. To the extent that such obligations are permitted under the applicable legal framework, though, it must in our view also be permissible to collateralize such obligations. This view has been confirmed in an informal discussion with the FINMA provided that any such posted collateral is within the overall collateral limits referred to under n. 152 above.

1.9 Special rules applicable to Swiss Branches

Three proceedings are to be distinguished in connection with insolvency proceedings against Swiss Branches: (i) the branch insolvency (*Zweigniederlassungskonkurs*) pursuant to Art. 50 para. 1 SDEBA (see n. 156 below), (ii) the ancillary insolvency proceeding (*Hilfskonkurs*) pursuant to Art. 166 et seq. PILA (see n. 157 et seq. below) and (iii) the special Insolvency Proceedings applicable to Special Insolvency Regime Swiss Branches (see n. 161 below). 155

If a foreign debtor has a branch (*Zweigniederlassung*) in Switzerland, claims against this debtor can, to the extent they are derived from the operations of such branch, be enforced directly at the place where the branch is located in a branch insolvency (*Zweigniederlassungskonkurs*) (Art. 50 para. 1 SDEBA). Note that Swiss substantive law determines whether an office established in Switzerland qualifies as a branch (*Zweigniederlassung*) within the meaning of Swiss law. Under Swiss substantive law, a branch is a commercial operation which pursues activities similar to those of the principal office on its own premises. It enjoys a certain degree of autonomy from, but is not a separate legal entity to, the principal office. Accordingly, under Swiss substantive law, branch employees with signatory rights also bind the principal office and, in turn, agreements entered into by the principal office in accordance with applicable law are binding also on the branch. 156

Art. 166 et seq. PILA, on the other hand, provide for the ancillary insolvency (*Hilfskonkurs*) pursuant to which a foreign bankruptcy decree is recognized in Switzerland, if (i) the decree has been issued in the state of incorporation of the debtor, (ii) it is enforceable in the state where it was rendered, (iii) there is no ground to deny recognition based on formal and material principles of Swiss public policy (*ordre public*), and (iv) if the state where the decision was rendered grants reciprocity. The same conditions apply to the recognition of a foreign composition agreement (Art. 175 PILA). 157

If the above requirements are met, on application of the foreign receiver in bankruptcy or any creditor, the courts recognize the decree and subsequently the competent Swiss authorities open (based on the court's decision) ancillary bankruptcy proceedings regarding 158 all assets located in Switzerland. Such ancillary insolvency proceedings are then governed by Swiss insolvency law (Art. 170 PILA), including the provisions on avoidance actions (Art. 285 et seq. SDEBA) or limitations on abusive set-off (Art. 213 and 214 SDEBA) as discussed herein (see n.72 above).

While any creditor can request the recognition of a foreign insolvency and the opening of an ancillary insolvency, once opened, only (i) secured creditors (foreign and Swiss) and only to the extent that the collateral forming part of the ancillary insolvency estate covers such claims, and (ii) Swiss privileged creditors (claims ranking first and second pursuant to Art. 219 SDEBA) may directly file claims in such ancillary insolvency. If there is an excess, then such excess would be made available to the foreign receiver or the creditor having requested the recognition. The Swiss excess assets can, however, only be remitted if the plan establishing the recognition of filed claims in the foreign insolvency proceeding has been recognized by the competent Swiss court and such recognition can be denied if the Swiss court finds that the unprivileged Swiss creditors are not appropriately recognized. In such case, or if the plan is not timely submitted, the excess is used to satisfy the unprivileged Swiss creditors. 159

A branch insolvency can be opened after an ancillary insolvency has been declared, but only until the ancillary insolvency reaches the state in which the ranking of the creditors is ascertained and listed in a collocation plan (*Kollokationsplan*), and if opened would then take precedent over the ancillary insolvency, but only in respect of the Swiss branch assets, while the other assets located in Switzerland would remain in the ancillary insolvency proceeding. 160

If the Swiss branch is a Special Insolvency Regime Swiss Branch, the special rules discussed under n. 102 et seq. above are applicable. In this case, FINMA has supervisory authority over such Special Insolvency Regime Swiss Branches, has the power to appoint a liquidator to liquidate the assets attributable to the Swiss Branch and to supervise that liquidation proceeding. In this context, all assets of a Swiss branch are considered to form part of the assets attributable to the Swiss Branch. The Insolvency of the Swiss Branch does, hence, not, only include assets located in Switzerland, but also assets located abroad. Furthermore, Art. 37g of the Banking Act expressly provides that the FINMA is the competent authority for the recognition of foreign insolvency orders, or measures, which have been rendered abroad against foreign banks. In this context, the FINMA may be authorized to transfer assets attributable to the Swiss Branch to the foreign insolvency receiver, without implementing Swiss insolvency proceedings (see n. 118 above). In case Insolvency Proceedings are conducted by FINMA over the assets of the Swiss Branch, then 161 non Swiss resident and unpriviledged creditors are also accepted in the context of the collocation of the claims relating to the assets of the Swiss Branch.

2. Close-out Netting Provisions

2.1 Additional Assumption

Our memorandum of law is based on the following additional assumption:

- The relevant Master Agreement is governed by either English or German law or the laws of the State of New York law or the laws of Switzerland. 162

2.2 Netting / Set-off pursuant to the Master Agreements absent Insolvency

Question A: Assuming the Parties have not specified that Automatic Termination (as defined in § 6.3 of the MNA 2010 or Part II.B of the EFET/IECA Commodities Schedule to the MNA 2003) applies, are the provisions of the relevant Master Agreement permitting the other Party (the "Terminating Party" or "Closing-Out Party") to terminate the Netted Agreements including all transactions upon the occurrence of a Close-Out Event enforceable under the laws of Switzerland or is there a risk that (i) the entering into a Master Agreement, (ii) the entering into Netted Agreements or transactions thereunder or (iii) the early termination by notice described in § 5.1 of the MNA 2010 or Section 2.2 of the MNA 2003 itself could be challenged by a liquidator, administrator, receiver or third party?

2.2.1 Netting / Set-off under Swiss substantive law

Close-out netting is neither a clear-cut concept nor specifically addressed in Swiss 163
substantive law. It can, in particular, not be clearly distinguished from a contractual set-off arrangement. Subject to limitations of general principles of law, parties are free, however, to determine the conditions for and the effects of any termination of their contracts.

Under Swiss substantive law, the termination of an agreement and the determination of one 164
single lump-sum termination amount in lieu of all amounts otherwise owed under various transactions entered into thereunder (which are the characteristic elements of what is generally referred to as close-out netting) would in our view be treated as a pre-agreed contractual liquidation of all such transactions in certain circumstances agreed upon by the parties. Under Swiss substantive law, the procedure of liquidating contractual claims can be agreed upon in advance and a close-out netting provision would, hence, be recognized under Swiss law.

As a matter of Swiss substantive law, the parties may also by contract stipulate a set-off of 165
mutual claims and thereby deviate from the requirements that would otherwise apply to a

unilateral right of set-off under Swiss substantive law. Such requirements that would, in the absence of a contractual agreement to the contrary, apply to a unilateral right of set-off are:

(i) the parties have to be each others' mutual creditor and debtor (mutuality requirement); 166

(ii) the mutual claims must be of the same kind (e.g. monetary claims)[27]; 167

(iii) the party invoking the set-off must be entitled to discharge its obligation (e.g. debt must be due or may be pre-paid); and 168

(iv) the counterclaim must be due. 169

2.2.2 Netting / Set-off under Swiss conflict of laws rules

Art. 148 of the PILA deals with set-off in an international context and addresses both the unilateral right of set-off and the contractual set-off. 170

In respect of the unilateral right of set-off, it is first to be noted that the PILA regards such right as a substantive right as opposed to a mere procedural right. Hence, it is not the *lex fori* that applies, but pursuant to Art. 148 para. 2 PILA the law applicable to the claim owed by the party having first declared the set-off. Such claim is referred to as the main claim (*Hauptforderung*), whereas the other claim is referred to as the set-off claim (*Verrechnungsforderung*) and the law applicable to the unilateral set-off pursuant to Art. 148 PILA is referred to as the set-off statute (*Verrechnungsstatut*). 171

Pursuant to Art. 148 para. 2 PILA, the set-off statute determines, *inter alia*, (i) the requirements of a unilateral right of set-off (e.g. whether reciprocity/mutuality is required and what constitutes reciprocity/mutuality), (ii) how the right of set-off is exercised, and (iii) its effects. 172

Still, it is the law that governs the main claim and the set-off claim respectively (the contract statute) which determines whether the claim satisfies such requirements (e.g. 173

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27 Monetary claims expressed in different currencies are treated as being of the same kind if the currencies are freely convertible and unless the parties specifically agreed or it is customary that an obligation must be effectively discharged in the agreed currency (effective clause). Even if there is such an effective clause, the parties may agree that different currencies may be set-off and this latter agreement would for the purposes of set-off prevail over the effective clause (BGE 130 II 318).

whether a claim is due if that is required and it is also the contract statute that determines who is the creditor/debtor of the respective claims). We are further of the view that the question whether a claim may be subject to set-off at all is also governed by the contract statutes of the respective claims and not the set-off statute.

There is some controversy in Swiss legal doctrine as to whether the set-off statute governs 174 the effects of the set-off on the main claim only or whether it also governs the effects on the set-off claim, i.e. whether it is also applicable as to the question of extinction of the latter. The prevailing view seems to be that it applies to both, unless the law applicable to the set-off claim does not know the concept of set-off at all.

Art. 148 para. 3 PILA, by reference to Art. 116 PILA, provides that a contractual right of 175 set-off is governed by the law chosen by the parties in the set-off agreement. In the absence of a choice of law, a Swiss court would need to determine and apply the law of such jurisdiction that is most closely related to such agreement. Again, such law would determine the requirements for set-off, but also the extent to which such requirements may be freely agreed between the parties and the effects on the respective claims.

The choice of any of English, German, New York or Swiss law to govern the Agreement is 176 a valid choice of law for purposes of Swiss law and a Swiss court would accordingly have to apply such laws.

A Swiss court would, hence, look to such chosen law to determine the requirements for set- 177 off. However, once the Swiss court has established such requirements, it may then well have to look to another law that may be applicable to the question as to whether a particular claim satisfies such requirements. It is important to note that such other laws would again be determined by the Swiss conflict of laws rules and not any conflict rules of the chosen law as the set-off statute may further direct.

We note that while Section 3 of the MNA 2003 and § 7 of the MNA 2010 may in certain 178 respects amend the relevant provisions dealing with the calculation of a Settlement Amount under a Netted Agreement, it otherwise constitutes a mere reference to such provisions and does, hence, in our view not incorporate such provisions into the relevant Master Agreement. As a result, such provisions and the Settlement Amount resulting therefrom remain subject to the law governing the respective Netted Agreement.

In respect of an Uncovered Transaction, the terms thereof and the laws applicable thereto 179 will determine whether such Uncovered Transaction can be terminated and a Settlement Amount calculated.

180 The application of the chosen law would, however, be subject to Swiss public policy (*ordre public*) pursuant to Art. 17 and 18 PILA. We have not on the face of the Agreement identified any provisions that we would view as contrary to the general principles of Swiss public policy (*ordre public*).

181 While Section 4.1 of the MNA 2003 and § 8 of the MNA 2010 refer to a *set-off* or *netting-off* respectively of various Settlement Amounts resulting from the close-out pursuant to the terms of a Closed-out Agreement (as modified by the respective Master Agreement) and Section 4.2 of the MNA 2003 and § 8.2 of the MNA 2010 stipulate that the respective Settlement Amounts shall to the extent of such set-off be deemed to be discharged for purposes of the relevant Closed-Out Agreement, we understand, that no Net Settlement Amount resulting therefrom is to be actually settled pending the eventual close-out netting of all Settlement Amounts pursuant to Section 4.4 of the MNA 2003 and § 8.3 of the MNA 2010.

182 In our view the Set-off provisions of Section 4.1 of the MNA 2003 and § 8 of the MNA 2010 are best analyzed not as a mere modification of a unilateral set-off right, but as a comprehensive contractual set-off arrangement. Such provisions are in addition not to be read in isolation, but together with the netting provisions of Section 4.4 of the MNA 2003 and § 8.3 of the MNA 2010.

183 Hence, in our view, Section 4 of the MNA 2003 and § 8 of the MNA 2010 as a whole should under Swiss law be treated as a close-out netting agreement in respect of all Settlement Amounts, which allows for a staggered netting, taking into account the timing provided for such close-out netting under the various Closed-Out Agreements.

2.2.3 Netting / Set-off under the Agreements – Conclusions

184 We note that at the level of the Master Agreements, it is our understanding and we have for purposes of this opinion assumed that all amounts to be set-off or netted pursuant to Section 4 of the MNA 2003 or § 8 of the MNA 2010 are expressed as monetary claims. We further assume that in order to arrive to a Settlement Amount, the respective Netted Agreement, or as the case may be the relevant Uncovered Transaction, provides for the conversion of any non monetary claim into a monetary claim at such time as a Settlement Amount is to be calculated. To the extent such conversion is provided for and valid and binding under the laws governing such Netted Agreement or Uncovered Transaction, such conversion into a monetary claim would be recognized under Swiss law.

Based on the above, we are of the view, that the netting and set-off referred to and provided in Section 3 and 4 of the MNA 2003 and the § 7 and 8 of the MNA 2010 would be recognized and enforceable against a Swiss Counterparty or a Swiss Branch of a Swiss Counterparty prior to Insolvency. 185

This holds true irrespective of whether the terms of a Transaction provided for cash or physical settlement and irrespective of whether the terms of various Transactions to be included in such netting and set-off provided for in Section 4 of the MNA 2003 and § 8 of the MNA 2010 provided for different categories of underlying assets (*cross-category netting/set-off*). 186

2.3 Netting / Set-off following Insolvency

2.3.1 Additional Assumption

Our memorandum of law is based on the following additional assumption:

- After entering into transactions and prior to the maturity thereof, Party A becomes the subject of voluntary or involuntary proceedings under the insolvency laws of Switzerland and, subsequent to the commencement of the insolvency, either Party A or an insolvency official seeks to assume the confirmations representing profitable ("in the money") transactions for the insolvent counterparty. 187

2.3.2 Termination in case of Insolvency

Question B: Assuming the Parties have elected Automatic Termination to apply, are the provisions of the Master Agreements terminating the Netted Agreements including all transactions upon the occurrence of a Close-Out Event described in § 6.3 of the MNA 2010 or Part II.B of the EFET/IECA Commodities Schedule to the MNA 2003 enforceable under the laws of Switzerland or is there a risk that the automatic termination could be challenged by a liquidator, administrator, receiver or third party?

Question H: Are the rights of the Terminating Party or Closing-Out Party to terminate and Close-Out the Netted Agreements including all transactions enforceable in accordance with the terms of the relevant Master Agreement, irrespective of the insolvency of Party A?

Step-in Right (Art. 211 para. 2 SDEBA)

Insolvency does not as a rule *per se* result in a termination of the Insolvent's contracts. Subject to the Step-in Right (as defined and discussed below), though, all non-monetary claims against the Insolvent are converted into monetary claims in case of a declaration of bankruptcy (*Konkurseröffnung*) or a ratification of a composition agreement with assignment of claims (*Genehmigung Nachlassvertrag mit Vermögensabtretung*). In turn, 188 parties are free to stipulate in their contract that an Insolvency shall give rise to a termination of such contract, be it automatically or by notice.

In a bankruptcy, the receiver in bankruptcy may pursuant to Art. 211 para. 2 SDEBA request the fulfillment of any undischarged obligations resulting from bilateral contracts by the other contractual party provided that the bankruptcy estate also fully fulfills its obligations under the relevant contract (the "**Step-in Right**"). The Step-in Right is by analogy available to the liquidator in case of a composition agreement with assignment of assets. 189

Waiver of Step-in Right

The Step-in Right is held by the prevailing doctrine to constitute a mere procedural provision, which based on such qualification, may be validly excluded by the parties in an agreement entered into prior to the commencement of an Insolvency Procedure. The calculation of a single lump-sum termination amount pursuant to a close-out netting provision under such circumstances is also valid and binding as discussed below. 190

As per the legislative history, the introduction of the Statutory Close-out (as defined and discussed under n. 193 and 194 below) of Art. 211 para. 2^{bis} SDEBA did neither aim at altering the qualification of Art. 211 para. 2 SDEBA as a procedural provision nor limit close-out netting to contracts specifically addressed in Art. 211 para. 2^{bis} SDEBA. 191

Hence, it is our view, that the Step-in Right of Art. 211 para. 2 SDEBA may be validly waived by the parties for agreements which are not Qualifying Contracts (as defined and discussed under n. 193 and 194 below) within the meaning of Art. 211 para. 2^{bis} SDEBA. Note, however, that no precedents are available to the very point of the non-mandatory character of Art. 211 para. 2 SDEBA. 192

Statutory Close-out

Art. 211 para. 2^{bis} SDEBA excludes the Step-in Right in respect of certain types of agreements, i.e. (i) fixed term agreements (*Fixgeschäfte*) within the meaning of Art. 108 CO[28], and (ii) certain financial derivative transactions, including financial swaps, forward agreements and options (each, a "**Qualifying Contract**") and in turn provides for 193

[28] Any agreement in which the parties agree that specific performance should only be permissible on or up to a certain date or at least would only be permitted if the other party were to specifically agree to it, qualifies as such fixed term agreement (*Fixgeschäft*). Furthermore, the predominant view is that the exclusion of the Step-in Right pursuant to Art. 211 para. 2^{bis} SDEBA applies to all fixed term agreements rather than to financial agreements only.

automatic termination of such contracts in case of bankruptcy[29] and the abstract calculation of a liquidation amount based on market or exchange quoted prices as compared to the contractual value (the "**Statutory Close-out**"). Such calculation does not as per its wording, however, take into account any further damages or costs of either party.

In the context of an Insolvency Proceeding, a contractual termination right and a close-out netting provision amount to an exclusion of the Step-in Right, and in case of Qualifying Contracts, the Statutory Close-out, the validity of which need to be analyzed pursuant to Art. 211 para. 2 SDEBA and Art. 211 para. 2[bis] SDEBA, respectively. 194

Waiver or Modification of Statutory Close-out

Art. 211 para. 2[bis] SDEBA was introduced in the light of close-out netting agreements that had become customary in the financial community and primarily aimed at backing the viability of close-out netting in an Insolvency Proceeding. This, in our view, needs to be borne in mind when interpreting Art. 211 para. 2[bis] SDEBA which, as outlined above, does not limit itself to excluding the Step-in Right of Art. 211 para. 2 SDEBA, but provides for a Statutory Close-out in that it stipulates that the relevant contracts are automatically terminated and lays down an abstract calculation of a liquidation amount, which is similar but not identical to typical close-out netting provisions and may, therefore, be more restrictive as to e.g. further costs and damages. 195

This raises the question whether Art. 211 para. 2[bis] SDEBA may be modified, most noteworthy as to the automatic character of a termination and the calculation method of the amount to be paid following such termination. What we view as the prevailing opinion (in the albeit scarce doctrine), is that like Art. 211 para. 2 SDEBA the more recent Art. 211 para. 2[bis] SDEBA does not constitute mandatory law either and may, hence, be modified by advance agreement. There is one dissenting scholarly opinion, which holds that Art. 211 para. 2[bis] SDEBA in its entirety constitutes substantive law rather than a procedural rule and as such substantive rule is mandatory. In its report to the revision of the Step-in Right in the SDEBA, though, the Federal Office of Justice specifically stated that the proposed provisions aimed at procedural aspects only and not at aspects of substantive law. 196

In addition, a qualification as a substantive rather than as a procedural rule does not in our view *eo ipso* exclude its modification by contract, which view is also supported by a recent scholarly opinion. Other qualifying opinions hold, that while a different contractual calculation method is permissible, the automatic character of the termination is to be 197

[29] And again by analogy in case of a confirmation of a composition agreement with assignment of assets (*Nachlassvertrag mit Vermögensabtretung*).

viewed as mandatory or at least to limit optional termination to a termination with effect prior to the declaration of bankruptcy. One scholarly opinion holds that in the absence of a termination by the opening of bankruptcy, the Statutory Close-out becomes mandatory. Consequently, there seems to be more controversy as to whether an optional termination taking place after the opening of bankruptcy should be effective or replaced by the automatic termination upon the opening of bankruptcy in the light of Art. 211 para. 2bis SDEBA than as to the dispositive nature of the calculation method. Note in this context that already in respect of Art. 211 para. 2 SDEBA an optional termination is fraught with uncertainties (see n. 199 and 200 below).

Applicability to Banks, Securities Dealers and Special Insolvency Regime Swiss Branches

Although the Banking Act does not contain any specific rules regarding close-out netting in insolvency procedures and thus in this respect the general rules of the SDEBA should also be applicable to Banks, Securities Dealers and Special Insolvency Regime Swiss Branches, Art. 27 para. 3 of the Banking Act clearly states that netting arrangements shall not be affected by protective measures and consequently the Message clarifies in an even broader context that close-out netting arrangements are generally accepted and to be upheld (see n. 102 et seq. and 161 above). 198

Optional Termination

While optional termination is valid and binding on the Parties prior to an Insolvency, the effectiveness of optional termination is more questionable in case of an Insolvency. Doctrine holds that optional termination would allow a counterparty to speculate to the detriment of other creditors of the insolvent debtor in the absence of a pre-agreed short notice period and should, therefore, be disregarded. It is also held that if the termination notice provides for an effective date which is later than the date of the opening of bankruptcy or the confirmation of a composition agreement with assignment of assets, then notwithstanding any designation of another date, all calculations may need to be made as of such date. 199

As mentioned above, the Statutory Close-out for Qualifying Contracts, if viewed as mandatory, could overrule the optional termination and the calculation of the amount owed by the Parties pursuant to their close-out netting provisions. 200

Recommendation Automatic Termination

Question C: Would you recommend to elect Automatic Termination to apply upon a Winding-up, Insolvency or Attachment (as defined in § 3.1(C)(iii) of the MNA 2010) or similar event? If yes, please specify such event or events and indicate whether it would be necessary or advisable to specify, or to refrain from specifying, a certain grace period to provide for optimal timing of such termination under local law? If you are recommending that a grace period be made applicable, what, in your best estimation is the minimum reasonable period of time required by a party whose creditor(s) have instituted an unsubstantiable or otherwise clearly frivolous involuntary bankruptcy proceeding against it in the insolvency courts of your jurisdiction to *have that proceeding dismissed or otherwise terminated? If you are recommending that Automatic Termination be made applicable in respect of parties subject to the insolvency laws of your jurisdiction, what is the optimal timing for that Automatic Termination to take effect? In this event, please supply specific recommended language for purposes of customizing the Automatic Termination provisions to implement such optimal termination timing.*

In the light of the above uncertainties we, therefore, recommend to elect Automatic Termination rather than to provide for a short term period within which an optional termination would need to be declared. 201

As for an optional termination, the Automatic Termination would, pursuant to its terms need to designate a date prior to the adjudication of bankruptcy or the confirmation of a composition agreement with assignment of assets as the effective date of such termination. 202

The insolvency related Close-out Events contemplated by § 3.1(C) (III) of the 2010 MNA, assuming the parties have elected to apply Automatic Termination therefore, are in our view sufficiently broad to ascertain that the Automatic Termination applies prior to the declaration of a bankruptcy or the confirmation of a composition agreement with assignment of assets. 203

In order to ascertain, that this is the case for all Netted Agreements and Uncovered Transactions, we recommend to add a Close-Out Event in the Agreements (as Insolvency Event) which is as broad as the respective provisions mentioned above. 204

We note that a stay of the termination rights ordered in respect of a Bank or a Securities Dealer would take precedence over the contractual termination rights (see n. 108 et seq. above). With respect to a transfer of services and assets in the context of restructuring measures ordered against a Bank or a Securities Dealer, Article 51 para. 1 lit. h BIO-FINMA requires that said transfer does not separate claims that are subject to netting arrangements. 205

2.3.3 Determination of Settlement Amounts, Net Set-off Amount and Final Net Settlement Amount Determination of Termination Amount

<u>Question D</u>: Are the provisions in § 8 of the MNA 2010 and Section 4 of the MNA 2003 providing for the offsetting of all positive and negative Settlement Amounts in determining the Final Net Settlement Amount enforceable under the laws of Switzerland or is there a risk that such determination could be challenged by a liquidator, administrator, receiver or third party?

As outlined above, the close-out netting by means of calculating one Settlement Amount under each Closed-Out Agreements (as contemplated by Section 3 MNA 2003 and § 8 of the MNA 2010) constitutes a valid pre-agreed contractual liquidation of all Transactions 206 under such Closed-Out Agreements. Such close-out netting would be upheld in an Insolvency, subject to the discussion of termination and close-out netting under n. 188 et seq. above.

In particular, any calculation and valuation to be made in the context of the close-out netting, which pursuant to the relevant terms has been made as of a date after the adjudication of bankruptcy or the confirmation of a composition agreement with assignment of assets is likely to be disregarded in case it proves to be to the detriment of the bankruptcy estate and adjusted for a calculation of such more favorable amount as of the date of the adjudication of bankruptcy or the confirmation of a composition agreement with assignment of assets. 207

Pursuant to the SDEBA, the exercise of a set-off right remains possible post-insolvency. However, post-insolvency set-off is subject to the limitations of Art. 213 and 214 SDEBA (see n. 72 above). As a result, set-off is permissible only to the extent that the claims to be set-off have existed prior to the Insolvency and were mutual between the Insolvent and the counterparty prior to the Insolvency and are of the same kind (as to the latter see n. 163 et seq. above). We have, for purposes of this memorandum of law, assumed the satisfaction of the above requirements and, in particular, that the claims are mutual (i.e. no intermediate assignment or inclusion of affiliate claims). 208

As mentioned above (see n. 182), the Close-out Netting Provisions are best analyzed as a comprehensive contractual set-off arrangement and, hence, as a close-out netting mechanism. This question, which eventually would have to be decided under English law as the law governing the Agreement, has, however, no impact in our view that the determination of a Termination Amount is enforceable following an adjudication of bankruptcy or the confirmation of a composition agreement with assignment of assets in an Insolvency Proceeding against the background of the discussion under n. 188 et seq. above. 209

Determination of Net Set-Off Amount and Final Net Settlement Amount

The Set-off contemplated by Section 4.1 and 4.2 of the MNA 2003 and the § 8.1 and § 8.2 of the MNA 2010 to arrive at a Net Set-Off Amount is compatible with the unilateral right of set-off as provided for under Swiss substantive law (see above n. 165 et seq). 210

Pursuant to the SDEBA, the exercise of a set-off right remains possible following an Insolvency Event. Set-off after an Insolvency Proceeding has been commenced is, 211 however, subject to the limitations of Art. 213 and 214 SDEBA (see n. 72).[30]

As a result, set-off is permissible only to the extent, that the claims to be set-off have existed prior to the Insolvency and were mutual between the Insolvent and the counterparty prior to the Insolvency and are of the same kind (as to the latter see n. 218 et seq.). 212

We have for purposes of this opinion assumed the satisfaction of the above pre-requisites and in particular that the claims are mutual (i.e. no intermediate assignment nor inclusion of affiliate claims). 213

As mentioned above (see n. 182 et seq.), we are of the view, that Sections 3 and Sections 4.1 through to 4.4 of the MNA 2003 and § 8.1 through to 8.3 of the MNA 2010 should be best analyzed as part of one close-out netting provision. This question, which eventually would have to be decided under the law governing the Agreements, has, however, no impact on our view that the determination of a Net Set-off Amount is enforceable, irrespective of whether it is qualified as a modification of a set-off right or a netting arrangement, and our view that the determination of a Final Net Settlement Amount in accordance with Section 4.4 of the MNA 2003 or § 8.3 of the MNA 2010 is enforceable following an adjudication of bankruptcy or the confirmation of a composition agreement with assignment of assets against the background of the discussion under n. 188 et seq. 214

Netted Agreements and Uncovered Transactions may provide for both physical and financial Transactions being entered into thereunder. 215

There are no specific rules on physically settled commodities transactions in the SDEBA. Hence, the general principles governing insolvency apply: With the declaration of bankruptcy, as a rule, all claims against the bankrupt become immediately due and payable (*fällig*). Claims which are not claims for a sum of money are converted into a claim for money of a corresponding value and translated into CHF at the exchange rate prevailing on the date of the adjudication of bankruptcy or the confirmation of a composition agreement with assignment of assets. 216

With respect to the Step-in Right and the Statutory Close-out we refer to the discussion under n. 188 et seq. above. Based thereon, we are of the view, that cross-category netting would be recognized before and after an Insolvency (n. 186 and 188 et seq.). As discussed 217

[30] Absent any assignments, these limitations, which in our view would also apply to the extent one would include any claim affected by Art. 213 or 214 SDEBA in a netting provision, seem of little practical importance as far as the set-off and netting as per the Agreements and Netted Agreements are concerned to the extent all Transactions have been entered into prior to an Insolvency.

above under n. 184 et seq. we thereby assume that the Netted Agreements and Uncovered Transactions all provide for a conversion of any non monetary claim into a monetary claim upon termination of the Netted Agreements. We further note, that the money equivalent may need to be calculated as of the date of the adjudication of bankruptcy or the confirmation of a composition agreement with assignment of assets.

Currency of filing

Question F: Is the insolvent counterparty's obligation to pay the Final Net Settlement Amount in Euro, USD or GBP (as agreed between the Parties in the Election Sheet or EFET/IECA Commodities Schedule) enforceable under the laws of Switzerland or could the calculation or demand of such amount in a foreign currency be challenged by a liquidator, administrator, receiver or third party?

Claims in a foreign currency against an insolvent party initially remain unaffected by the institution of Insolvency Proceedings. Foreign currency claims must, however, be converted into Swiss Francs in order to participate in the distribution of the liquidation proceeds, if any. A claim of the solvent party under an Agreement for a Termination Amount denominated in a currency other than Swiss Francs would thus only be enforceable in an Insolvency Proceeding if converted into Swiss Francs as of the date of the adjudication of bankruptcy (in case of a bankruptcy) or as of the confirmation of the composition agreement (in case of a composition agreement with assignment of assets). 218

One could, therefore, argue, that for purposes of the calculation pursuant to Section 4 of the MNA 2003 and § 8 of the MNA 2010 all amounts owed by the Insolvent would need to be converted into Swiss Francs as opposed to any other Base Currency, while the claims of the Insolvent estate would remain in the Base Currency. This notwithstanding, set-off would remain possible as claims denominated in different currencies are still viewed as being claims of the same kind if the currencies are fully convertible and, in case the agreement otherwise provides for effective payment in one currency, the parties have agreed that set-off should be possible irrespective of the currencies. We are of the view that Section 4 of the MNA 2003 and § 8 of the MNA 2010 suffice to allow cross-currency set-off and would also remain binding upon an Insolvency. 219

We are, however, of the view that the agreed upon conversion provision would remain binding post Insolvency, and that only a net amount owed by the Insolvent as a Final Net Settlement Amount would eventually be subject to conversion into Swiss Francs. 220

Date

The calculations to be made under Section 3 of the MNA 2003 and § 7 of the MNA 2010 may have to be made as of the date of the adjudication of bankruptcy or the confirmation of 221 a composition agreement with assignment of assets in order to ascertain equal treatment of all creditors of the Insolvent.

Accrual of Interest

Unless a claim is secured by collateral, interest stops to accrue following the adjudication of bankruptcy or the grant of a moratorium. 222

Any interest element would, hence, under such premises be disallowed for purposes of calculating the Settlement Amounts, Net Set-off Amounts and Final Net Settlement Amount. 223

In case of secured claims, only an excess of the realization of the collateral over the principal amount may be applied against interest and any uncovered interest amount would be disregarded. 224

2.3.4 Close-out Netting after Insolvency – Conclusions

Close-out netting as referred to, or provided for under Sections 3 and 4 of the MNA 2003 as well as under § 7 and 8 of the MNA 2010, is available after the adjudication of bankruptcy or the confirmation of a composition agreement with assignment of assets, provided that the calculation of the Settlement Amounts, the Net Set-off Amounts and the Final Net Settlement Amount may need to be made as of the date of the adjudication of bankruptcy or the confirmation of a composition agreement with assignment of assets and any fluctuation of amounts owed based on market or currency fluctuations to the detriment of the Insolvent would be disregarded as would any interest amount, which is not calculated in respect of a collateralized obligation or in excess of what is so secured by collateral. 225

A claim of the solvent party for a Final Net Settlement Amount denominated in a currency other than Swiss Frances would need to be converted into Swiss Francs as of the date of the adjudication of bankruptcy or the confirmation of the composition agreement with assignment of assets in an Insolvency Proceeding. 226

II. Multibranch Parties

<u>Question I</u>: Would there be any change in your conclusions reached above (see Part D) based upon the fact that Party A has conducted business under some or all of the Netted Agreements on a multibranch basis prior to its insolvency?

1. Swiss Multibranch Party

1.1 Additional Assumption

Our memorandum of law is based on the following additional assumptions:

- Party A has entered into transactions under Netted Agreements through offices in Switzerland as well as through one or more branches located abroad. After entering into these transactions and prior to the maturity thereof, Party A becomes the subject of a voluntary or involuntary proceeding under the insolvency laws of Switzerland. 227

1.2 Discussion

Under Swiss substantive law, a branch of a Swiss Counterparty has no separate legal personality, but is legally part of such Swiss Counterparty. The Swiss Counterparty is fully liable for all obligations of its branch and for purposes of set-off and netting, the obligations of the Swiss Counterparty and its branch are viewed as obligations of one and the same party (in particular for purposes of mutuality). 228

Assuming that this is the case also under the laws of the jurisdiction in which a Swiss Counterparty has established a branch office through which it enters into an Netted Agreement or a Transaction thereunder, our conclusions expressed herein in respect of the enforceability of close-out netting under the Master Agreements combined with the relevant Security Document remain unchanged. 229

This assumes, though, that multibranch close-out netting as provided for in the Master Agreements and the Netted Agreements are enforceable in the jurisdictions in which such branches have been established by the Swiss Counterparty. 230

2. Foreign Multibranch Party

2.1 Additional Assumptions

Our memorandum of law is based on the following additional assumptions:

- A corporation, a bank, an investment services provider, an insurance company, an investment fund management company or any other similar financial institution ("Party F") incorporated, organized or having its centre of main interest in a country 231

("Country H") other than Switzerland has entered under some or all Netted Agreements into Transactions both through its home office and through one or more branches located in other countries including in each case a branch of Party F located in and subject to the laws of Switzerland (a "Swiss Branch" or "Swiss Special Insolvency Regime Swiss Branch").

- After entering into these transactions and prior to the maturity thereof, Party F becomes the subject of voluntary or involuntary proceedings under the insolvency laws of Country H. 232

2.2 Discussion

Question K: Would there be separate proceedings in Switzerland with respect to the assets and liabilities of the Swiss Branch upon the start of the insolvency proceeding for Party F in Country H? Or would the relevant authorities in Switzerland defer to the proceedings in Country H, so that the assets and liabilities of the Swiss Branch would be handled as part of the proceedings for Party F in Country H? Could local creditors of the Swiss Branch initiate separate proceedings in Switzerland even if the relevant authorities in Switzerland did not do so?

Question L: If there were separate proceedings in Switzerland with respect to the assets and liabilities of the Swiss Branch, would the receiver or liquidator in Switzerland and the Swiss courts, based on the facts above, include Party F's position under the Netted Agreements, in whole or in part, among the assets of Switzerland and, if so, would the receiver or liquidator and the Switzerland courts recognize the close-out netting provisions of the Master Agreements in accordance with their terms? The most significant problem arising would be if a Swiss receiver, liquidator or court considering a single Master Agreement were to require a counterparty of the Swiss Branch of Party F to pay the mark-to-market value of transactions entered into with the Swiss Branch to the liquidator or receiver of the Swiss Branch, while at the same time forcing the counterparty to claim in the proceedings in Country H for its net value from other transactions with Party F under the same Master Agreement. In considering this issue, please assume that close-out netting under the Master Agreements would be enforced in accordance with its terms in the proceedings for Party F in Country H.

Pursuant to Art. 160 PILA, Swiss substantive law determines whether a foreign party's establishment in Switzerland qualifies as a branch. 233

A branch constitutes a commercial operation, which while it has certain autonomy is legally part of the principal office. Any obligation subscribed for a Swiss branch by a signatory of such branch, hence, binds the principal office. 234

In turn the principal office is generally liable with the assets of its Swiss branch for all of its obligations. 235

Swiss law provides for three types of proceedings relevant in the context of insolvency proceedings against a Swiss branch (which under applicable Swiss law forms legally part of Party F): (i) the branch insolvency (*Zweigniederlassungskonkurs*), (ii) the ancillary 236 insolvency proceeding (*Hilfskonkurs*) and (iii) the special Insolvency Proceedings applicable to Special Insolvency Regime Swiss Branches (as more fully discussed above). In all scenarios, a Swiss receiver (respectively FINMA in case of a Special Insolvency Regime Swiss Branch) would be bound by the set-off and netting rights of the counterparty of the Swiss branch under the relevant Master Agreement, whether entered into on a multibranch basis or not. The ability of the counterparty to set-off its claims against the claim of the Swiss branch would thus extinguish the latter's claim, provided the counterparty's claim exceeds such claim. Accordingly, there would be no asset of the Swiss branch available to the Swiss receiver after close-out netting under the Agreements entered into on a multibranch basis.

Furthermore, a Swiss court, or a Swiss receiver or liquidator (respectively FINMA in case 237
of a Special Insolvency Regime Swiss Branch), would be bound by the principles on which the Master Agreements are based as a matter of substantive law, including the "single agreement concept". We are thus of the opinion that a Swiss court would give effect to such "single agreement concept". We also note that this recognition would be in line with the principle of the universality which applies in the context of any Insolvency in Switzerland as well as based on the principle that, to the extent Art. 211 para. 2 SDEBA is of a mere procedural nature, a Swiss court or a liquidator or Swiss receiver (or FINMA in case of a Special Insolvency Regime Swiss Branch) would be bound by the contractual arrangements entered into by the parties prior to bankruptcy. In summary, separate insolvency proceedings with respect to the Swiss Branch or Swiss Bank Insolvency Regime Branch would not in our view adversely affect the multibranch close-out netting.

3. Swiss Insolvency based on Assets located in Switzerland

3.1 Additional Assumptions

Our memorandum of law is based on the following additional assumptions:

- Party F has no branch located in Switzerland, but has assets in Switzerland ("**Swiss** 238
  Assets").

<u>Question M</u>: Please consider your answer to the aforementioned questions assuming instead that Party F has no branch located in Switzerland, but has assets in Switzerland.

To the extent that the Swiss Assets would become subject to a Swiss Insolvency by means 239
of an ancillary bankruptcy (*Hilfskonkurs*) (see n. 157 et seq.) our conclusions as to the

effect of such Insolvency on the Agreements, to the extent relevant in case of Swiss Assets, would remain the same.

III. Eligible Credit Support

1. Additional Assumptions

Our memorandum of law is based on the following additional assumptions:

- Although it is a bilateral form in that it contemplates that each party may be required to post Eligible Credit Support to the other, we assume that (i) Party A is at all times the Transferor under the Credit Support Documents and (ii) that the Eligible Credit Support is owned by the Party A or that Party A is authorized and empowered to transfer ownership in the Eligible Credit Support. A Transferee holding Eligible Credit Support and applying and using that Eligible Credit Support in a close-out netting event, is a Party to the Agreements and is an entity incorporated or organized under the laws of another jurisdiction than Switzerland. 240

- The Parties agree that Eligible Credit Support will consist solely of Cash (which we assume to mean a bank transfer between accounts) and/or Letters of Credit. Cash is denominated in a freely convertible currency and is held in an account under the control of Party B. Eligible Credit Support in the form of Cash will not be remitted physically and any disposition of Cash will be conducted by way of wire-transfer. 241

- Eligible Credit Support in the form of Letters of Credit will be provided by having a duly licensed bank ("Issuing Bank") issue such Letter of Credit directly in favor of the Transferee, but that Party B is not a party to the agreement between Party A and the Issuing Bank based on which the Issuing Bank issues the Letter of Credit to Party B. The Issuing Bank issues the Letter of Credit a as part of its ordinary banking business and on customary terms and conditions. In the context of close-out-netting, the Letter of Credit is accounted for with the full nominal value of the un-drawn amount of the Letter of Credit. 242

- The CPCSA is part of the MNA 2003in the form of the MNA 2003; the CSA is part of the MNA 2010. 243

1. Credit Support Documents prior to Insolvency

Question N: Under the laws of Switzerland, what law governs the transfer of ownership in the various forms of Eligible Credit Support deliverable under the Security Documents?

1.1 Choice of Law

The undertaking in the Agreements to provide Eligible Credit Support in the form of Cash or a Letter of Credit is a valid undertaking under Swiss law and the choice of any of German, English, New York or Swiss law to govern the Credit Support Documents and the undertaking by Party A to provide Cash or a Letter of Credit to Party B as Transferee is a valid choice of law in accordance with Art. 116 PILA and would have to be applied to any claim under the Credit Support Documents by a Swiss court. 244

1.1.1 Cash

Based on the assumption that Cash will not be remitted physically, but that any disposition of Cash will be conducted by way of wire-transfer, neither a transfer of a movable asset nor an assignment of a claim will take place. Therefore, the act of disposition under the relevant Credit Support Document does not consist of assigning or pledging a claim that the counterparty holds as against its bank, but rather of a wire-transfer resulting in a debit on the counterparty's bank account, i.e. in the discharge of the counterparty's bank from paying the respective amount, and in a credit on the bank account of the other counterparty. Thus, according to our view, the act of disposition consists of a chain of payments, i.e. wire-transfers that have to comply with the law(s) applicable to such wire-transfers. In the relationship between the parties, only a claim that is governed by the Credit Support Document remains and the Secured Party's rights to claim the transfer of cash and to use the Cash as collateral will be governed by the law chosen to apply to the Credit Support Documents (subject to any failed wire-transfer that would trigger any claims for restitution under the law(s) applicable to such wire-transfer). 245

1.1.2 Letters of Credit

Based on the assumption that a Letter of Credit is issued directly to Party B and while the Letter of Credit is by agreement of the parties to the relevant Credit Support Document treated as Eligible Credit Support and is to be provided when and as required by the relevant Credit Support Document, notwithstanding any terminology used in the Credit Support Documents to the contrary, Party B is legally speaking not a mere transferee of the Letter of Credit as otherwise contemplated by the relevant Credit Support Document, but the sole and original beneficiary of the Letter of Credit. 246

It is our view, that the Parties may as a matter of Swiss law subject a Letter of Credit to the provision of close-out-netting as provided for under the Master Agreements in connection with the Credit Support Documents and that Party B may as part of such close-out-netting and in terms of realizing the Letter of Credit for purposes of the Agreements and the relevant Credit Support Document account for the full nominal amount of the un-drawn amount under the Letter of Credit as part of "other amounts payable" owed by the Transferee and draw such amount under the Letter of Credit on its own, subject only to such Letter of Credit's terms and conditions, prior to and following the occurrence of an Insolvency Event. 247

In our view, there is no reasonable basis in Swiss law either for a receiver in bankruptcy of, or a liquidator in a composition procedure against Party A to request that any amount having been paid to the Secured Party under the Letter of Credit be paid over by the Secured Party to the receiver in bankruptcy or liquidator so as to be shared with Party A's other creditors. 248

1.2 Submission to Jurisdiction

The submission by the Parties pursuant to Division 1, Part IV of the Schedule or § 12.4 of the Election Sheet to the MNA 2010 to the exclusive jurisdiction of (i) the English courts in case English law applies to the Master Agreements and the respective Security Documents or (ii) the courts of Frankfurt am Main in case German law applies to the Master Agreements and the respective Security Document, for any dispute arising out or in connection with the Agreements, is legal, valid and binding upon the Parties. 249

Such exclusive jurisdiction would not, however, bar any Swiss court to assume jurisdiction in respect of provisional measures (*vorsorgliche Massnahmen*) or in the context of any attachment of assets in Switzerland prior to Insolvency. 250

1.3 Recharacterization of transfer of Eligible Credit Support

Question O: Would the laws of Switzerland characterize each transfer of collateral as effecting an unconditional transfer of ownership in the assets transferred? Is there any risk that any such transfer would be re-characterized as creating a security interest? If so, is there any way to minimize such risk? What would be the consequences of such a re-characterization?

1.3.1 Cash

Under Swiss substantive law, the transfer of cash to a bank account of the Secured Party to provide collateral is not specifically regulated. The purpose to provide collateral is, 251 however, a sufficient legal basis for such transfer and results in the Transferee becoming the holder of such cash albeit with an obligation to account for any application of such cash against any secured claims as provided for in the relevant security agreement or to retransfer such cash upon full satisfaction of all secured obligations.

We note that while the Credit Support Documents state that it is not intended to create a security, a Swiss court may conclude to the contrary. This would, however, not affect our opinion as to a potential recharacterization for Swiss law purposes. Because the transfer of Cash as Eligible Credit Support under the Credit Support Documents (where transferred directly to an account of the Transferee) would under Swiss substantive law lead to "full" or "absolute" "ownership" to such cash being transferred to the Transferee the transfer would not be recharacterized as a mere grant of a regular pledge (*reguläres Pfandrecht*) in favor of the Transferee. 252

Hence, we are of the view that a Swiss court would recognize the full transfer of title as provided for in § 7 in either of the Security Documents, and this irrespective of the purpose of such transfer to provide collateral. 253

1.3.2 Letters of Credit

We have assumed that a Letter of Credit which is to be used as Eligible Credit Support would be issued directly to the Transferee as opposed to being issued to the Transferor and then transferred or pledged to the Transferee. In the absence of a transfer there is no need to address a "transfer" of a Letter of Credit and there is no room for any recharacterization into a mere regular pledge (*reguläres Pfandrecht*). 254

1.4 Perfection Requirements

Question P: Assuming that Party B receives absolute ownership in the collateral, will it need to take any action thereafter to ensure that its title therein continues? Are there any requirements in Switzerland necessary or advisable, including any filing, registration, notification, stamping, notarisation or any other action or the obtaining of any governmental, judicial, regulatory or other order, consent or approval? Are there any other procedures that must be followed or consents or other governmental or regulatory approvals that must be obtained or established, to enforce, or continue such ownership interest?

Question U: Are the Credit Support Documents in an appropriate form to create the intended outright transfer of ownership in the collateral to Party B? Are there any other requirements to be observed in Switzerland in order to ensure validity of such transfer in each type of Eligible Credit Support created by Party A under a Credit Support Document?

Assuming that Party B receives absolute ownership in the Eligible Credit Support in the form of Cash, there is no need for any further action to perfect the security interest of Party 255

B. There are in particular no requirements in Switzerland necessary or advisable, including any filing, registration, notification, stamping, notarization or any other action or the obtaining of any governmental, judicial, regulatory or other order governmental or regulatory approvals that must be obtained or established, to enforce or continue such ownership interest.

1.5 Exchange of Eligible Credit Support

Question Q: What is the effect, if any, under the laws of Switzerland of the right to substitute collateral pursuant to § 6 of the relevant Security Document? Does the presence or absence of consent to substitution by Party B have any bearing on this question?

The right of Party A to substitute Eligible Credit Support pursuant to § 6 of either of the Security Documents is valid and legally binding and enforceable in accordance with its terms, but subject to the Transferee's consent as provided for in § 6 of either of the Security Documents. 256

1.6 Inclusion of Eligible Credit Support in Final Net Settlement Amount

Question R: Party B's right in relation to the transferred collateral upon termination of the relevant master agreement will be governed by Section 4 of the MNA 2003 together with §11 of the CPCSA or § 8 of the MNA 2010 together with § 12 of the CSA . Assuming that Section 4 of the MNA 2003 is valid and enforceable in Switzerland insofar as it relates to the determination of a Final Net Settlement Amount payable by either Party on the termination of transactions, are § 11 of the CPCSA and § 12 of the CSA also valid to the extent that it provides for the value of the collateral provided and not yet returned to be included in the calculation of the Final Net Settlement Amount under Section 4 of the MNA 2003 and § 8 of the MNA 2010?

Each of § 11 of the CPCSA and § 12 of the CSA is valid and legally binding to the extent that it provides for the Base Currency Value of the Eligible Credit Support provided under the respective Credit Support Document on the Determination Date to be included in the calculation of the Final Net Settlement Amount as set forth in Section 4.4 of the MNA 2003 and § 8.3 of the MNA 2010 respectively, provided that the Transferee has acquired an absolute right in such Eligible Credit Support. 257

2. Credit Support Documents after Insolvency

2.1 Transfer of Eligible Credit Support, Exchange of Eligible Credit Support

Question Q: What is the effect, if any, under the laws of Switzerland of the right to substitute collateral pursuant to § 6 of the relevant Security Document? Does the presence or absence of consent to substitution by Party B have any bearing on this question?

Question T: Will Party A (or its receiver or other similar official) be able to recover any transfer of collateral provided to Party B during a certain "suspect period" preceding the date of the insolvency? If so, how long before the insolvency does the suspect period begin? If such a period exists, does the substitution of collateral *by a Counterparty during this period invalidate an otherwise valid transfer, assuming the substitute assets are of no greater value than the assets they are replacing? Is the transfer of additional collateral pursuant to the mark-to-market provisions of the respective Security Document during the suspect period subject to avoidance, either because it was considered to relate to an antecedent or pre-existing obligation or for some other reason?*

Following the adjudication of bankruptcy the debtor looses its right to dispose of its assets. 258
Hence, no Eligible Credit Support can be validly transferred by the Insolvent following such adjudication of a bankruptcy. The same holds true in case of the grant of a moratorium, unless specific consent is given for such grant of collateral and in both instances irrespective of any pre-existing obligation to grant or increase such collateral.

Hence, a Swiss Counterparty could not any longer transfer Eligible Credit Support under a 259
Credit Support Document, which as a result would also render an exchange of Eligible Credit Support impracticable.

While a Credit Support Document, assuming it and any Transaction for which 260
collateralization is sought has been entered into prior to the Swiss Counterparty being over-indebted and at arm's length condition, in our view constitutes a valid and pre-agreed undertaking to provide Eligible Credit Support could, hence, not be avoided on the basis of either avoidance of gifts and gratuitous transactions (Art. 286) or avoidance due to over-indebtedness (Art. 287), such transfer of Eligible Credit Support could under the qualified circumstances outlined above (see n. 92 et seq.) become subject to avoidance for intent.

A substitution of Eligible Credit Support does not invalidate an otherwise valid transfer. 261
However, a transfer originally made outside the suspect period could be deemed to be made at the moment of a substitution within the suspect period.

The transfer of additional Eligible Credit Support pursuant to the mark-to-market 262
provisions of the Credit Support Documents during the suspect period would not be subject to avoidance on the basis that it would be considered to relate to an antecedent or preexisting unsecured obligation in accordance with Art. 287 SDEBA (see n. 88 et seq.) as has been specifically stipulated in Art. 287 para. 3 sec. 2 in respect of securities or financial instruments traded on a representative market. However, under the qualified circumstances discussed in respect of Art. 288 SDEBA (see n. 92 et seq.), such additional Eligible Credit Support could indeed become subject to avoidance in accordance with this provision.

2.2 Realization of Posted Credit Support – Inclusion of Eligible Credit Support in Final Net Settlement Amount

<u>Question S</u>: Are the rights of Party B enforceable in accordance with the terms of the Master Agreements and the respective Security Documents, irrespective of the insolvency of Party A?

<u>Question R</u>: Party B's right in relation to the transferred collateral upon termination of the relevant master agreement will be governed by Section 4 of the MNA 2003 together with §11 of the CPCSA or § 8 of the MNA 2010 together with § 12 of the CSA . Assuming that Section 4 of the MNA 2003 is valid and enforceable in Switzerland insofar as it relates to the determination of a Final Net Settlement Amount payable by either Party on the termination of transactions, are § 11 of the CPCSA and § 12 of the CSA also valid to the extent that it provides for the value of the collateral provided and not yet returned to be included in the calculation of the Final Net Settlement Amount under Section 4 of the MNA 2003 and § 8 of the MNA 2010?

Assuming that its transfer is not subject to avoidance as discussed above, and based on the assumptions made in respect of Posted Credit Support in form of cash, such Posted Credit Support could be realized by including it in the close-out netting as provided for in § 11 of the CPCSA, Sections 3 and 4 of the MNA 2003, § 12 of the CSA and § 7 and 8 of the MNA 2010 as discussed above n. 206-224. 263

Under Swiss substantive law a qualification of the absolute transfer as a transfer for security purposes would not alter the above analysis. 264

Also a drawing under a Letter of Credit would, subject to such Letter of Credit's terms and conditions, be possible after an Insolvency Proceeding has been commenced. 265

3. Close-out Netting including Posted Credit Support - Conclusions

As discussed in n. 206-224 and n. 258-263 above the close-out netting referred to and provided for under Sections 3 and 4 of the MNA 2003 and § 7 and 8 of the MNA 2010 and the inclusion of Posted Credit Support in the form of Cash as provided for in § 11 of the CPCSA and § 12 of the CSA would in our view remain enforceable following an Insolvency. 266

4. Other local law considerations

<u>Question V</u>: Do you have other specific recommendations on the subject of collateral that you would like the EFET members to consider?

There are no other Swiss law considerations that a Transferee of Eligible Credit Support should consider in connection with taking and realizing upon the Eligible Credit Support from a Transferor who is a Swiss Counterparty. 267

IV. General Enforceability

Question W: Are the Agreements enforceable under the laws of Switzerland in accordance with its own terms? We are especially interested in provisions that you may believe infringe upon the ordre public in Switzerland and that may be challenged by the courts in Switzerland irrespective of the law that governs the Agreement.

Question X: Do you have other recommendations going to the topic of general legal enforceability that you would like EFET members to consider?

The Agreements are, to the extent legal, valid, binding and enforceable under all laws applicable to such Agreements (other than Swiss law) and in particular English or German law as the law governing such Agreements as per their terms, are generally legal, valid, binding and enforceable under Swiss law and the choice of law and the submission to jurisdiction would be upheld, subject to the discussion in n. 170 et seq. 268

V. Confirmation Practices

1. Additional Assumptions

Our memorandum of law is based on the following additional assumptions:

- As far as the confirmation practice is concerned, when entering into a transaction, the counterparties in each case (i) make oral reference to a Netted Agreement when concluding the relevant transaction over the phone or (ii) refer to a Netted Agreement when subsequently exchanging confirmations or similar electronic, written or non-verbal means of entering into or confirming transactions (in whichever form, including telex, fax, SWIFT, electronic confirmation or position matching service or other means of electronic transmission). 269

- Parties may or may not use matching systems (like EFET eCM, MarkitWire or DTTC DS Match) to electronically match and exchange confirmations. 270

2. Binding Transaction

Question Y: Does the formation of a legally binding and enforceable transaction require any formal act (e.g., execution in writing, signature, registration or notarization)?

An Agreement regarding the netting of Transactions such as the contract contemplated by the Master Agreements is as a matter of Swiss substantive law valid and binding if 271 concluded as verbal agreement.

Question Z: At what point in time does a transaction agreed upon orally become legally binding or enforceable?

A Transaction becomes legally enforceable at the moment the two duly authorized representatives reached an agreement on all essential terms of the transaction orally. 272
Please note that in that context while a Transaction is validly concluded when the essential terms are agreed upon orally, the specific terms agreed may be difficult to prove.

Question AA: Does failure to object to incorrect terms in a received confirmation constitute "acceptance" of those terms? If so, is there a relevant time period?

Notwithstanding the oral conclusion of a transaction, any terms of a written confirmation 273
which are inconsistent with the oral understanding, but have not been timely rejected, the addressee of the confirmation would override the terms of the previous oral agreement, provided that the inconsistency is not such, that the confirming party could not (by objective measure) legitimately expect the addressee thereof to agree with the inconsistent part. In turn, due fulfillment of a transaction in strict compliance with an inconsistent confirmation by the addressee thereof would constitute irrevocable acceptance of the terms laid down in such confirmation.

Question BB: Is the reference to a Netted Agreement sufficient for the inclusion of the transaction in the relevant Master Agreement?

In accordance with the terms of the Master Agreements, but subject to any terms to the 274
contrary in any Transaction, a Transaction entered into under a Netted Agreement or an Uncovered Transaction is for Swiss law purposes validly subjected to the relevant Master Agreement, irrespective of whether (i) such Transaction was concluded prior to or after entering into the respective Master Agreement or (ii) such Transaction contains an explicit reference to the relevant Master Agreement.

Please note, though, that we cannot conclusively opine as to whether all definitions of 275
Uncovered Transactions are sufficiently specific in all circumstances to distinguish Uncovered Transactions from similar transactions that should not fall under such defined term. It is, therefore, recommended to make a specific reference to the relevant Master Agreement.

3. Means of Evidence

Question CC: Assuming there is a dispute with respect to the existence or the terms or conditions of an transaction, would any or all of the following be eligible for rendering or otherwise properly introducing evidence of the agreed terms of the transaction in court: (i) taped recording; (ii) witness` statement; (iii) e-mail or other electronic message or transaction entry system; and/or (iv) facsimilie? Are there any local requirements or other considerations that are relevant to each form of evidence?

Taped recording, witness` statement, e-mail or other electronic message or transaction entry system and/or facsimilie would be eligible for rendering or otherwise properly introducing evidence of the agreed terms of the transaction in court. However, the court would be free in his consideration of evidence according to the Swiss procedural rules. 276

With regard to the tape recording of conversations held, please note that in order to be effective under Swiss law, the consent to the recording of telephone conversation not only needs to be given by the parties, but by the physical acting on behalf of the parties. It is, however, sufficient that the respective persons are made aware of such recording, be it when initiating a telephone call or be it by having the persons acting for a party generally agreeing to such recording. 277

VI. Core Provisions

Question DD: Would any of the elections contemplated by the Agreements change the substance of your conclusions reached under Part D (Enforceability of Close-out Netting)? As far as the Security Documents are concerned, you should in particular discuss the effect of electing to allow substitution with or without consent.

The elections contemplated by the Agreements do not change the substance of our conclusions reached under Part D, except for our recommendation to elect Automatic Termination or not to disapply Automatic Termination for insolvency related Close-out Events. The right to substitute Eligible Credit Support does not either change our conclusions reached under Part D, provided that the exercise of such right is limited by the commencement of Insolvency Proceedings (see n. 258 et seq). 278

Question EE: Considering your conclusions reached under Part D (Enforceability of Close-out Netting), what are the provisions of the Master Agreements that you regard as so essential that a material alteration thereof could affect the conclusions reached in that Part D (each such provision a "Core Provision")?

We believe that the Close-out Netting Provisions and the insolvency related Close-out Events are such core provisions. We also emphasize our recommendation to have Automatic Termination apply to insolvency related Close-out Events. 279

VII. Governing Law, Arbitration and Jurisdiction

1. Additional Assumption

Our memorandum of law is based on the following additional assumptions:

- The relevant Master Agreement is governed by the laws of a jurisdiction other than Switzerland (i.e. English or German law or the laws of the State of New York). 280

Question FF: Would the Parties' agreement on the governing law, submission to arbitration or jurisdiction (§ 12 of the MNA 2010 and Section 6 of the MNA 2003) be upheld in Switzerland, and what would be the consequence if it were not?

Please refer to n. 176 regarding Master Agreements and n. 244 et seq. regarding the Credit Support Documents. 281

VIII. Other Provisions

Question GG: If you have other recommendations that you would like EFET member companies to consider (for example to fully optimize the Master Agreement for a specific purpose such as to support limited trading between two entities both organized and doing business solely in your jurisdiction), then these types of suggestions may, but need not, be appended as an Annex to the end of your final opinion letter.

Should the Security Documents be used for other collateral than the Eligible Credit Support addressed herein and thereby also lead to a transfer of *in rem rights*, we would recommend to insert a specific governing law clause that specifies that the choice of law also applies to the creation and transfer of any interest in the Eligible Credit Support or Posted Credit Support.[31] 282

No further provisions of the Agreements call for particular mention. 283

IX. Single Agreement

Question E: Do the laws of Switzerland recognize that the Close-Out applies to all transactions? Would we need the single agreement concept (as provided for in § 2.3 of the MNA 2010 and, if so selected in Section 10.6 of the EFET/IECA Commodities Schedule, in the MNA 2003) in order to preserve the enforceability of the termination right and the ability to calculate a net amount? If the single agreement concept is particularly

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31 Please note, though, that this Opinion does not and does not purport to address any particular conflict of law issues which may arise in connection with collateral other than Eligible Credit Support as defined herein.

important in your jurisdiction, please give us your opinion on whether or not, and if so, the degree to which, provisions allowing or providing for the termination of some but not all Netted Agreements and some and not all transactions thereunder might impact termination and close out rights generally, as well as subsequent rights to terminate transactions remaining under a Netted Agreement following a previous Partial Close-Out.

The Schedule (Part VIII, Section 10.6) as well as the MNA 2010 (§ 2.3) provide for a single agreement concept. We note, though, that in our view the insertion of the provision as-is may create some uncertainties as to the applicable law to the various Netted Agreements, where such Netted Agreements are governed by laws different than the Agreements. 284

While the single agreement concept, i.e. the linking of various agreements in respect of multiple transactions so as to be treated as one agreement for purposes of termination, close-out netting calculation of one Termination Amount etc., is not specifically regulated under Swiss substantive law, such linking is, within the general limits of applicable Swiss law, valid and the particular aspects of such treatment as one agreement do not, as discussed below, violate Swiss substantive law or the Swiss ordre public. 285

Under the laws of Switzerland it is not necessary that the obligations to be netted form part of a single agreement in order for the netting and close out provisions to be effective. It is sufficient that the different obligations are covered by the respective netting and close out provisions contractually agreed among the parties (even if such netting and close out provisions form part of a separate agreement). 286

Question J: Would the MNA 2010 and, if so selected in Section 10.6 of the EFET/ICEA Commodities Schedule, the MNA 2003 be treated as a single unified agreement by the Swiss receiver under the laws of Switzerland, regardless of the treatment of the relevant Master Agreement or transactions thereunder by an insolvency official in a country where close-out netting may be unenforceable?

As stated above (see n. 286) it is not necessary under the laws of Switzerland that the obligations to be netted form part of a single agreement in order for the netting and close out provisions to be effective. As a result the netting mechanism agreed between the parties would also be applied in Switzerland for all Transactions which are subject to the Swiss jurisdiction regardless of the treatment of the MNA 2010, the MNA 2003 or transactions thereunder by an insolvency official of a jurisdiction where close-out netting may be unenforceable. 287

X. Pending Developments

A Swiss Financial Market Infrastructure Act ("**FMIA**") is currently being proposed, which is legislation similar to and mainly drafted along the lines of the Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories ("**EMIR**"). The FMIA has, however, yet to go into parliamentary debate, and its entry into force is expected to occur something during the second half of 2015. We note that in connection with the FMIA there are further amendments to the Banking Act being proposed. One is an amendment of Article 27 Banking Act (see n. 116 above) that should further strengthen netting, private realization of collateral and portability of transaction with Banks and Securities Dealers as counterparties, and the application of which is to be extended to central counterparties as well under the FMIA. The other is the introduction of a new provision into the Banking Act with respect to the FINMA's power to order a stay of termination rights as part of its ordering protective or restructuring measures against a Bank or a Securities Dealer, which then would replace Article 57 BIO-FINMA (see n. 114). Such power to stay would thereby have a clear legal basis, it would also provide that such stay of termination rights would prevail over Article 27 Banking Act and finally, such stay would become final, where the FINMA confirms within the 48h stay that the protective measure or restructuring way successful to reinstate the orderly state of and the satisfaction of the legal requirements by the Bank or the Securities Dealer in respect of which such measures have been ordered. These amendments are expected to come into force at the same time as the FMIA. 288

This memorandum of law is governed by and construed in accordance with Swiss law and shall be subject to the exclusive jurisdiction of the courts of Zurich, Switzerland.

This memorandum of law is solely addressed to you and solely for the benefit of your members. It may not be relied upon by any other person, entity or corporation whatsoever and may, save as set forth hereinafter, not be disclosed to any other person, entity or corporation whatsoever without our prior written consent. This memorandum of law may be disclosed professional advisors of your members and to the appropriate bank regulatory and supervisory authorities for informational purposes, on the basis that we assume no responsibility to such professional advisors, authorities or any other person as a result.

Yours sincerely

LENZ & STAEHELIN

Patrick Hünerwadel

Annex 1 - Certain drafting suggestions

Governing Law Clause:

"The Agreement, the creation and perfection of any security interest thereunder will be governed by and construed in accordance with [specify] law."

Clarification of insolvency related Close-out Events of §3.1(C)(III) of the 2010 MNA having regard to Swiss Insolvency Proceedings

"or in respect of an insolvency proceeding governed by Swiss law, (i) the filing for a request for stay (Gesuch um Nachlassstundung), whether provisional or definitive and (ii) the filing by the respective entity of a request to be declared bankrupt (Antrag auf Konkurseröffnung), (iii) the grant of a stay (Gewährung der Nachlassstundung), (iv) the formal declaration of bankruptcy (Konkurseröffnung) or (v) where applicable, an order for liquidation and the formal declaration of a bank insolvency (Bankkonkurs) under the Swiss Federal Act on Banks and Savings Banks (Bundesgesetz über die Banken und Sparkassen) or the withdrawal of its license."

Additional close-out Event for Banks, Securities Dealers and Special Insolvency Regime Swiss Branches:

*"in respect of a Swiss bank or Swiss branch of a bank licensed under the Swiss Federal Act on Banks and Savings Banks (Bundesgesetz über die Banken und Sparkassen) (the "**Banking Act**") or a Swiss securities dealer or Swiss branch of a securities dealer licensed under the Swiss Federal Act on Stock Exchanges and Securities Trading, it has imposed on it or with respect to it, by the Swiss Financial Market Supervisory Authority, (i) protective measures (Schutzmassnahmen) under Article 26 para. 1 lit. e, f, g or h of or other protective measures establishing a payment moratorium of general applicability or ordering the termination of its business operations or, (ii) restructuring procedures (Sanierungsverfahren) under Articles 28-32 of the Banking Act."*

Additional close-out Event for Insurance Companies:

*"in respect of a Swiss insurance company licensed under the Swiss Federal Law on Insurance Supervision ("**ISA**"), it has imposed on it or with respect to it, by the Swiss Financial Market Supervisory Authority, the protective measures under Article 51 para. 2 lit. a, b, d, e, or i of the Swiss Federal Act on the Supervision of Insurance Companies. "*

Appendix B

Master Agreements covered by the EFET Master Netting Agreement or the TBMA Cross Product Master Agreement

Energy Trading Master Agreements

- European General Agreement Concerning the Delivery and Acceptance of Electricity (version 2007), sponsored by the European Federation of Energy Traders (EFET)
- European General Agreement Concerning the Delivery and Acceptance of Electricity (version 2000), sponsored by the European Federation of Energy Traders (EFET)
- European General Agreement Concerning the Delivery and Acceptance of Natural Gas (version 2007), sponsored by the European Federation of Energy Traders (EFET)
- European General Agreement Concerning the Delivery and Acceptance of Natural Gas (version 2003), sponsored by the European Federation of Energy Traders (EFET)
- UK Grid Trade Master Agreement (version June 2004), sponsored by the Futures and Options Association (FOA)
- NBP Amendment Agreement for natural gas settled through the National Balancing Point (NBP) based on the Short Term Flat NBP Trading Terms and Conditions 1997
- ZBT Amendment Agreement for natural gas settled through the Belgian Zeebruegge hub based on the Zeebruegge Terms and Conditions 2004
- ZBT Amendment Agreement for natural gas settled through the Belgian Zeebruegge hub based on the Zeebruegge Terms and Conditions 2001
- International Emissions Trading Master Agreement (version 2010/2011), sponsored by the International Emissions Trading Association (IETA)
- Emissions Trading Master Agreement for the EU Scheme (version 2008), sponsored by the International Emissions Trading Association (IETA)
- Emissions Trading Master Agreement for the EU Scheme (version 2005), sponsored by the International Emissions Trading Association (IETA)
- Emissions Trading Master Agreement for the EU Scheme (version 2002), sponsored by the International Emissions Trading Association (IETA)
- US Master Power Purchase & Sale Agreement (version 2000), sponsored by the Edison Electric Institute
- US General Terms and Conditions Base Contract for Sale and Purchase of Natural Gas (version 2002), sponsored by the North American Energy Standards Board, Inc (NAESB)
- US General Terms and Conditions Base Contract for Sale and Purchase of Natural Gas (version 2006), sponsored by the North American Energy Standards Board, Inc (NAESB)
- Canadian Base Contract for Short-term Sale and Purchase of Natural Gas (version 2005), sponsored by GasEDI

- Canadian Base Contract for Short-term Sale and Purchase of Natural Gas (version 2000), sponsored by GasEDI

Derivatives Master Agreements

- Financial Energy Master Agreement (version 2000), sponsored by the Nordic Association of Energy Traders (NAET)
- ISDA 2002 Master Agreement, sponsored by the International Swaps and Derivatives Association, Inc.
- 1992 ISDA Master Agreement (Multicurrency – Cross Border), sponsored by the International Swaps and Derivatives Association, Inc.
- 1992 ISDA Master Agreement (Local Currency – Single Jurisdiction), sponsored by the International Swaps and Derivatives Association, Inc.
- 1987 Interest Rate and Currency Exchange Agreement, sponsored by the International Swaps and Derivatives Association, Inc.
- Australian version of the 1992 ISDA Master Agreement (Multicurrency – Cross Border), sponsored by the Australian Financial Markets Association (AFMA)
- New Zealand version of the 1992 ISDA Master Agreement (Multicurrency – Cross Border)
- German Rahmenvertrag für Finanztermingeschäfte (version 2001), sponsored by the German Banker's Association
- German Rahmenvertrag für Finanztermingeschäfte (version 1994), sponsored by the German Banker's Association
- Swiss Master Agreement for Over-The-Counter Derivative Instruments (version 2003), sponsored by the Schweizerische Bankiervereinigung
- Swiss Master Agreement for Over-The-Counter Derivative Instruments (version 1994), sponsored by the Schweizerische Bankiervereinigung
- French Convention-Cadre FBF Relative Aux Operations Sur Instruments Financiers à Terme (version July 2007), sponsored by the Fédèration Bancaire Française (FBF)
- French Convention-Cadre FBF Relative Aux Operations Sur Instruments Financiers à Terme (version August 2001), sponsored by the Fédèration Bancaire Française (FBF)
- French Convention-Cadre AFB Relative Aux Operations Sur Instruments Financiers à Terme (version), sponsored by the Association Française des Banques (AFB)
- Spanish Contrato Marco De Operaciones Financieras (versi6n 1997), sponsored by the Asociación Española de Banca Privada (AEB)
- Dutch Raamovereenkomst voor Financiële Derivaten (RFD), sponsored by the Nederlandse Vereniging van Banken (NVB)
- Japanese Bond Option Agreement, sponsored by the Japan Securities Dealers Association (JSDA)
- Mexican Contrato Marco para Operaciones Financieras Derividas
- Mexican Contrato Normativo para la realización de las operaciones de Intercambio

- Mexican Master Agreement for Entering into Dollar against Mexican Peso Forward Transactions
- US Master Securities Forward Agreement (version 1996), sponsored by The Bond Market Association (TBMA)
- US Master OTC Options Agreement (version 2000), sponsored by The Bond Market Association (TBMA)
- US OTC Option Transactions – U.S. Treasury Securities Master Dealer Agreement (version August 1989), sponsored by the Public Securities Association (PSA)
- UK International Currency Options Market Agreement (ICOM) sponsored by the British Bankers' Association (BBA)
- UK Foreign Exchange and Options Master Agreement (FEOMA), sponsored by the British Bankers' Association (BBA)
- UK International Foreign Exchange Master Agreement (IFEMA), sponsored by the British Bankers' Association (BBA)
- The 1994 International Bullion Master Agreement (IBMA) (version June 1994), sponsored by the London Bullion Market Association and the Foreign Exchange Committee
- European Master Agreement for Financial Transactions (EMA) (edition January 2004), sponsored by the Banking Federation of the European Union (FBE)
- European Master Agreement for Financial Transactions (EMA) (edition January 2001), sponsored by the Banking Federation of the European Union (FBE)

<u>Securities Lending Master Agreements</u>

- Global Master Securities Lending Agreement (GMSLA) (version 2010), sponsored by the International Securities Lending Association (ISLA)
- Global Master Securities Lending Agreement (GMSLA) (version 2000), sponsored by the International Securities Lending Association (ISLA)
- Master Equity & Fixed Interest Stock Lending Agreement (MEFISLA) (version 1996), sponsored by the International Securities Lending Association (ISLA)
- Master Gilt Edged Stock Lending Agreement (GESLA) (version 1996), sponsored by the International Securities Lending Association (ISLA)
- Overseas Securities Lender's Agreement (OSLA) (version 1995), sponsored by the International Securities Lending Association (ISLA)
- Overseas Securities Lender's Agreement (OSLA) (version October 1994), sponsored by the International Securities Lending Association (ISLA)
- Overseas Securities Lender's Agreement (OSLA) (version February 1994), sponsored by the International Securities Lending Association (ISLA)
- US Master Securities Loan Agreement (version 2000), sponsored by The Bond Market Association (TBMA)
- US Master Securities Loan Agreement (version May 1993), sponsored by the Public Securities Association (PSA)

- Canadian Securities Loan Agreement, sponsored by the Investment Dealers Association of Canada (IDAC)
- German Rahmenvertrag für Wertpapierleihgeschäfte
- German Rahmenvertrag für Wertpapierdarlehen (version 1999)
- French Contract Cadre de Prêts des Titres (version 2007), sponsored by the Association Francaise des Professionnels des Titres (AFTI)
- French Contract Cadre de Prêts des Titres (version), sponsored by the Association Francaise des Professionnels des Titres (AFTI)
- Australian Master Securities Lending Agreement (version November 2003), sponsored by Australian Securities Lending Association Ltd. (ASLA)
- Australian Master Securities Lending Agreement (version December 2002), sponsored by Australian Securities Lending Association Ltd. (ASLA)
- Australian Master Securities Lending Agreement (version April 1997), sponsored by Australian Securities Lending Association Ltd. (ASLA)
- New Zealand Master Repurchase Securities Lending Agreement
- Japanese Basis Agreement Concerning Stock Lending Transactions, sponsored by the Japan Securities Dealers Association (JSDA)

Repurchase Master Agreements

- Global Master Repurchase Agreement (GMRA) (version October 2000), sponsored by The Bond Market Association (TBMA) and the International Securities Market Association (ISMA)
- Global Master Repurchase Agreement (GMRA) (version 1995), sponsored by the Public Securities Association (PSA) and the International Securities Market Association (ISMA)
- Global Master Repurchase Agreement (GMRA), sponsored by the Public Securities Association (PSA) and the International Securities Market Association (ISMA) (version November 1992)
- US Master Repurchase Agreement (MRA) (version September 1996), sponsored by The Bond Market Association (TBMA)
- US Master Repurchase Agreement (MRA) (version 1987)
- Canadian Repurchase/Reverse Repurchase Transaction Agreement
- Australian version of the Global Master Repurchase Agreement (GMRA) (version 1995), sponsored by the Australian Financial Markets Association (AFMA)
- New Zealand version of Global Master Repurchase Agreement (GMRA) (version 1995)
- German Rahmenvertrag für Wertpapierpensionsgeschäfte (version 2005)
- German Rahmenvertrag für Wertpapierpensionsgeschäfte (version 2002)
- German Rahmenvertrag für echte Pensionsgeschäfte (version 1997)

- French Convention-cadre FBF Relative Aux Opérations de Pensions Livriée (version 2007), sponsored by the Fédération bancaire française (FBF) [FBF07 REPO]
- French Convention-cadre FBF Relative Aux Opérations de Pensions Livriée (version 2003), sponsored by the Fédération bancaire française (FBF)
- French Convention-cadre Relative Aux Opérations de Pensions Livriée, sponsored by the Association du Forex et des Trésoriers de Banque (AFTB
- Japanese Bond Lending Agreement, sponsored by the Japan Securities Dealers Association (JSDA)
- Japanese Basic Agreement Concerning Gensaki Transactions of Bonds, Japan Securities Dealers Association (JSDA)