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Your reference

Our reference
MACC/LN78308

European Federation of Energy Traders
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The Netherlands

Attention: Lenka Hajnovicova

Dear Sirs

Legal opinion regarding the enforceability of close-out netting and the validity and enforceability of collateral arrangements under the EFET Master Netting Agreement and the TBMA Cross Product Master Agreement under English law

We refer to your letter of 2 September 2014 (the **Instruction Letter**), in which you requested our opinion as to matters of English law relating to the (i) enforceability of close-out netting provisions of the EFET Master Netting Agreement and the TBMA Cross Product Master Agreement and (ii) validity and enforceability of collateral provided under the EFET Cross Product Credit Support Annex to the TBMA Cross Product Master Agreement. This letter comprises our opinion on those matters.

In providing this opinion, we have considered the standard form agreements listed in Schedule 1 (the **Agreements**). We have examined no other documents and have undertaken no other enquiries.

This opinion is based on the assumptions detailed in the Instruction Letter (a copy of which appears at Annex 1 to this opinion) and the further assumptions contained in paragraph 3 below, and is subject to the qualifications set out in paragraph 5 below. It addresses the meaning and effect of the Agreements from a legal perspective and, except where those assumptions are relevant, is not concerned with questions of fact as to the circumstances relating to the agreement between, and the intentions of, the Parties in particular cases.

This opinion relates solely to matters of English law as in force at the date of this letter. Whilst it states circumstances in which the laws of other jurisdictions may be relevant, it does not purport to express a view as to the effect of those foreign laws, on which specific advice should be obtained.

This opinion is addressed to EFET and (i) is for the sole benefit of EFET and its legal committee members and any other subscribing entities; and (ii) may not be relied upon by, or disclosed to, any other person or legal entity without our prior written approval; but (iii) may be made available by EFET and its Legal Committee members and any other subscribing entities to the appropriate regulatory authorities, provided that we are notified in writing of all such authorities to whom the opinion is disclosed.

Capitalised terms used but not defined in this opinion bear the meanings given to them in the Agreements, as the context requires.

1 Executive summary

1.1 This executive summary is provided for convenience only and should be read in the context of the entire opinion.

1.2 Our conclusions as to the position under English law can be summarised as follows:

(a) the close-out netting provisions of the MNA and CPMA would be enforceable in accordance with their terms in the event of the commencement of insolvency proceedings in England;

(b) there are no special rules applicable in the event of insolvency in England for the relevant derivative contract types, being commodity forwards, commodity spots, commodity options and commodity swaps; in particular, there are generally no "safe harbours" available;

(c) it is not necessary for the parties to the MNA and CPMA to agree to automatic, rather than optional, termination of transactions;

(d) it may be the case, for the purposes of paying dividends or distributions in insolvency proceedings in England, that claims against an insolvent counterparty would be required to be converted into Sterling and that the dividend or distribution in respect of any final settlement amount would be paid (rateably with other claims, as applicable) in Sterling, notwithstanding contractual requirements for such amount to be calculated and paid in another currency;

(e) the provisions of the MNA and CPMA which allow for early termination for a Material Reason or on the occurrence of a close-out event other than due to insolvency, and subsequent close-out netting are enforceable in accordance with their terms;

(f) broadly, our conclusions are unchanged in the case of a counterparty which conducts business on a multibranch basis prior to insolvency, subject to applicable rules under EU insolvency legislation which (amongst other things) regulates jurisdictional questions regarding the opening of insolvency proceedings;

(g) in the event of separate insolvency proceedings in relation to the English branch of a multibranch party, the responsible insolvency office-holder would recognise the close-out netting provisions of the MNA and CPMA in accordance with their terms;

(h) each transfer of collateral advanced as credit support would likely take effect as an unconditional transfer of ownership of the assets concerned in accordance with its terms and is unlikely to be recharacterised as the creation of a security interest. No further action is required to enforce or continue such ownership interest;

(i) the other provisions of the MNA, CPMA and Credit Support Annexes would be legal, valid, binding and enforceable;

(j) an oral agreement as to the terms of a transaction will be enforceable provided that the necessary ingredients for the formation of a binding contract are present and its existence is not dependent on any subsequent written confirmation (with the exception of agreements on choice of jurisdiction, which are usually required to be made in writing);

(k) the subsequent submission of a written confirmation by one party after an oral agreement would not vary the terms of that contract without the consent of all parties;

(l) in the event of a dispute as to the terms of a transaction, certain direct and hearsay evidence of the agreed terms can be adduced in court in subsequent litigation;

(m) none of the elections contemplated by the Agreements would affect the substance of our conclusion as to the enforceability of the close-out netting provisions of the Agreements;

(n) in general: (i) the parties' choice of governing law would be upheld as a valid choice by the English courts; and (ii) the parties' submission to arbitration or jurisdiction would be respected by the English courts, in each case, under the MNA and CPMA (and, by reference, the relevant Credit Support Annexes);

(o) in the event that insolvency set-off were to take effect in England, it would result in a net amount payable between the parties which would also take account of any other mutual dealings between the parties; and

(p) our opinion as to the enforceability of close-out netting under the MNA and CPMA would not change by reason only of one or more parties to the relevant agreements (as applicable) being a partnership or limited liability partnership, a municipality or county, an association of local government or a quasi-governmental entity that is, or becomes, subject to insolvency proceedings.

2 Relevant entities

2.1 For the purposes of providing this opinion, we have proceeded primarily on the basis that the counterparty referred to as Party A in the Instruction Letter is an:

(a) English company; or

(b) foreign company,

as the context requires, including such persons (banks) which have permission to accept deposits by virtue of Part IV of the Financial Services and Markets Act 2000 (**FSMA**) and persons (insurance companies) which have permission to carry out contracts of insurance.

For these purposes, an "English company" is a company which is formed and registered under the Companies Act 1985, the Companies Act 2006 or the former Companies Acts (as defined in Sections 1(1) and 1171 of the Companies Act 2006); and a "foreign company" is a company which is incorporated or formed under the laws of another jurisdiction with a branch or branches established or located in this jurisdiction.

2.2 We have also been asked to opine in relation to counterparties which are other entities, namely, partnerships, municipalities or counties, associations of local government and quasi-governmental entities. Considerations specific to such entities are detailed in Schedule 2 and this opinion should be regarded as modified in light of, and to the extent required by, those considerations.

3 Further assumptions

3.1 In addition to the assumptions detailed in the Instruction Letter, we have assumed that:

(a) each Party has the capacity, power and authority, under all applicable laws, to enter into and to exercise its rights and to perform its obligations under the Agreements, all Netted Agreements, Principal Agreements and Uncovered Transactions and transactions entered into thereunder;

(b) each Party has duly authorised, executed and delivered the Agreements, all Netting Agreements, Principal Agreements and Uncovered Transactions and transactions entered into thereunder, as applicable;

(c) where an Agreement, a Netted Agreement, Principal Agreement and/or Uncovered Transaction or transactions entered into thereunder is expressed to be governed by a law other than English law, the relevant Agreement, Netted Agreement, Principal Agreement and/or Uncovered

Transaction or transaction entered into thereunder is legal, valid, binding and enforceable under the law by which it is expressed to be governed; and

(d) the Agreements, all Netting Agreements, Principal Agreements and Uncovered Transactions and transactions entered into thereunder are entered into between the Parties on commercial, arm's length terms.

3.2 We have also made further assumptions in relation to counterparties which are partnerships, municipalities or counties, associations of local government and quasi-governmental entities, as detailed in Schedule 2.

4 Opinions

4.1 The opinions contained in this paragraph 4 are presented as responses to the questions contained in Section C (*Issues and Additional Assumptions*) of the Instruction Letter, in the order in which they appear in the Instruction Letter. For ease of reference, those questions are reproduced in this letter in bold italics and have been divided into sub-questions, where appropriate; note, however, that we have not reproduced associated commentary or additional assumptions contained in your letter.

4.2 On the basis of the assumptions contained in the Instruction Letter and paragraph 3 above, and subject to the qualifications set out in paragraph 5 below, we are of the following opinion.

C.I. Enforceability of Close-out Netting

1. Winding-up, Insolvency or Attachment

General Overview (including Set-Off)

Please provide a short overview of the relevant insolvency proceedings, laws and terminology applicable to Party A and the contract types listed in Appendix C.

4.3 The only insolvency or reorganisation procedures to which a Party could be subject under English law, and which are relevant for the purposes of this opinion, are liquidation (including provisional liquidation), administration, bank insolvency, bank administration,[1] investment bank special administration, special administration (bank insolvency), special administration (bank administration),[2] administrative receivership, receivership, moratorium, voluntary arrangements and schemes of arrangement (together, **Insolvency Proceedings**).[3] The legislation applicable to Insolvency Proceedings is:

(a) in relation to all Insolvency Proceedings initiated after the date of this opinion letter except schemes of arrangement, the provisions of the Insolvency Act 1986 and the Insolvency Rules 1986; and

(b) in relation to schemes of arrangement, Section 895 - 901 of the Companies Act 2006; and

[1] Note that, in relation to a UK bank (an undertaking incorporated in, or formed under the law of any part of, the United Kingdom and having its head office in the United Kingdom, which has permission under Part IV of FSMA to accept deposits), the terms "liquidation" and "administration" when used in this opinion shall include bank insolvency and bank administration, respectively (and the terms "liquidator" and "administrator" shall be construed accordingly).

[2] Note that, in relation to a UK investment bank (an undertaking to which the Investment Bank Regulations apply, being an institution which is incorporated in the UK, authorised under FSMA to safeguard and administer investments or deal in investments as principal, and holds assets for clients), the terms "liquidation" and "administration" when used in this opinion shall include an investment bank special administration, a special administration (bank insolvency) and/or a special administration (bank administration) under the Investment Bank Regulations, as the context may require (and the terms "liquidator" and "administrator" shall be construed accordingly).

[3] Strictly, receivership and schemes of arrangement are not insolvency proceedings properly so-called; however, since each procedure is commonly invoked in the case of parties in financial difficulties and given the potential resulting implications for matters the subject of this opinion, both are included in the definition of "Insolvency Proceedings", for convenience.

(c) in relation to a UK bank, the Banking Act 2009 (the **Banking Act**), the Bank Insolvency (England and Wales) Rules 2009, the Bank Administration (England and Wales) Rules 2009, the Banking Act 2009 (Restrictions of Partial Property Transfers) Order 2009 and the Credit Institutions (Reorganisation and Winding Up) Regulations 2004 (the **Credit Institutions Regulations**), and in relation to a UK investment bank, the Investment Bank Special Administration Regulations 2011 (the **Investment Bank Regulations**), and in relation to a UK credit institution or an EEA credit institution,[4] the Credit Institutions Regulations;

(d) the Cross-Border Insolvency Regulations 2006 (**CBIR**); and

(e) in relation to insurers,[5] the Financial Services and Markets Act 2000, the Insurers (Winding Up) Rules 2001, the Financial Services and Markets Act 2000 (Administration Orders Relating to Insurers) Order 2002, the Insurers (Reorganisation and Winding Up) Regulations 2004 (in the case of insurance undertakings only) and the Prudential Sourcebook for Insurers (**INSPRU**).

In relation to an obligation which is a transfer order[6] as defined in the Financial Markets and Insolvency (Settlement Finality) Regulations 1999 (the **Settlement Finality Regulations**), the Settlement Finality Regulations will also be applicable. If any of the Agreements constitutes a "financial collateral arrangement" or an arrangement of which a "financial collateral arrangement" forms part, the Financial Collateral Arrangements (No. 2) Regulations 2003 (the **FCARs**) will also apply. Furthermore, the European Union Council Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (the **Insolvency Regulation**) has direct effect in this jurisdiction.

However:

(i) subject to Section 426 of the Insolvency Act 1986, a foreign company may not enter administration or make a voluntary arrangement unless it has its centre of main interests in England;

(ii) administrative receivership is not available in respect of a foreign company, with the possible exception of foreign companies who have registered particulars under the Overseas Companies Regulations 2009;

(iii) bank insolvency and bank administration are procedures only available in respect of a UK bank;

(iv) investment bank special administration is a procedure only available in respect of a UK investment bank which is not a deposit-taking bank with eligible depositors; special administration (bank administration) is a procedure only available in respect of a UK investment bank which is a deposit-taking bank; and special administration (bank insolvency) is a procedure only available in respect of a UK investment bank which is a deposit-taking bank with eligible depositors; for these purposes, "eligible depositors" has the meaning given in Section 93(3) of the Banking Act, being, broadly, depositors who are eligible for compensation under the Financial Services Compensation Scheme;

[4] As those terms are defined in the Credit Institutions Regulations.

[5] For the purposes of this opinion, a reference to an "insurer" has the meaning given to it in article 2 of the Financial Services and Markets Act 2000 (Insolvency) (Definition of "Insurer") Order 2001 but excludes any: (i) former or present underwriting member of the Society incorporated by the Lloyd's Act 1871; (ii) friendly society; (iii) exempt person in respect of that activity or a person who effects or carries out contracts of insurance of certain specified kinds only in the course of, or for the purposes of, a banking business and which is incorporated and registered under the laws of this jurisdiction or formed under the laws of another jurisdiction (other than Scotland) with a branch or branches established or located in this jurisdiction; and (iv) person who is a "reinsurance undertaking" within the meaning of Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance, or who conducts exclusively reinsurance business within the meaning of that Directive.

[6] In broad terms, a "transfer order" constitutes an unequivocal instruction by a participant (within the meaning of the Settlement Finality Regulations) authorising (i) a payment of money by reason of a book entry on the accounts of a credit institution, a central bank or a settlement agent, or an instruction which results in the discharge or a payment obligation as defined by the rules of a designated system or (ii) a transfer of securities by means of a book entry on a register or otherwise.

(v) in relation to an EEA credit institution, liquidation (including provisional liquidation), administration and voluntary arrangements cannot take effect. Furthermore, a scheme of arrangement in relation to an EEA credit institution which is, broadly, intended to enable it to survive, but affects creditors' rights, or to enable its assets to be realised and distributed to creditors, may not be sanctioned by the court unless the relevant insolvency officer or administrative or judicial authority (which would usually be the officer or authority of the EEA credit institution's home state) has been notified and has not objected.

Under Part XXIV of FSMA, the "appropriate regulator" (being the UK Prudential Regulation Authority (**PRA**) and/or the UK Financial Conduct Authority (**FCA**)) is given specific powers to petition to commence and otherwise to participate in Insolvency Proceedings relating to (i) any person that is (or has been) an authorised person under FSMA and (ii) any person carrying on (or who has carried on) a regulated activity without authorisation or exemption under FSMA. In relation to Insolvency Proceedings which are bank insolvency, bank administration, investment bank special administration, special administration (bank administration) and special administration (bank insolvency), the PRA and/or the FCA, as the case may be, are given similar powers to intervene and rights to participate under the Banking Act and the Investment Bank Regulations, respectively.

4.4 Instead of or in addition to Insolvency Proceedings, a UK bank may be subject to a "property transfer instrument" under Section 11 and 12 of the Banking Act if the PRA is satisfied that the UK bank is failing or likely to fail to satisfy the threshold conditions for authorisation under Section 55B of FSMA. In relation to netting the effects of a partial property transfer, and other powers exercisable under the Banking Act, are considered at paragraph 5.10 below.

4.5 In addition to the Insolvency Proceedings, there are a number of special insolvency procedures, measures and regimes in England for bodies operating in particular industries or sectors, particularly in areas in which there are public interest considerations which might not be adequately protected in Insolvency Proceedings. It is outside the scope of this opinion to seek to enumerate all such procedures, measures and regimes. By way of example, however, a Party which holds a licence under Section 6(1)(h) or (c) of the Electricity Act 1989 and/or under Section 7 of the Gas Act 1986 may be the subject of an Energy Administration Order (an **EAO**) under Section 154 of the Energy Act 2004. Whilst an EAO is in force, the affairs, business and property of the company are to be managed by a person appointed by the court. Whilst an EAO does not preclude an application for administration, a court may not grant such an order unless notice has been served on the Secretary of State and on the Gas and Electricity Markets Authority, a period of 14 days has elapsed since the last of those notices has been served and there is no application for an EAO that is outstanding. Similar restrictions apply to the application for a winding-up and for the enforcement of security.

Please discuss and advise on whether the contract types listed in Appendix C are governed by different rules and whether these rules would result in a splitting-up or segregation of the portfolios of transactions under the relevant Netted Agreements or Principal Agreements into multiple "netting pools" of disparate treatment or whether these rules would otherwise limit or render wholly or partially unenforceable the early termination and close-out netting rights provided for in the EFET Master Netting Agreement or TBMA Cross Product Master Agreement.

4.6 Under English law, there are no special rules applicable in the case of insolvency or Insolvency Proceedings for any of the contract types listed in Appendix C of the Instruction Letter (being commodity forwards, commodity spots, commodity options and commodity swaps). Such transactions are dealt with under the applicable Insolvency Proceedings in the same way and subject to the same procedures as set out in paragraph 4.3 above.

When rendering your opinion, please also advise on whether and how has 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) been reflected/implemented in the legislation of England, in particular the financial/capital markets and insolvency laws, or other laws relevant for purposes of rendering the present legal opinion.

4.7 EMIR is an EU Regulation and is directly applicable in EU member states. Certain amendments to English legislation have been necessary, however, in order to ensure compatibility of such legislation with the provisions of EMIR. The amendments relate in particular to the regulation of central counterparties, rules on the segregation and transfer of assets in the UK and amendments to the FCA's client asset rules. These amendments were made primarily by way of the Financial Services and Markets Act 2000 (Over the Counter Derivatives, Central Counterparties and Trade Repositories) Regulations 2013 and the Financial Services and Markets Act 2000 (Over the Counter Derivatives, Central Counterparties and Trade Repositories) (No. 2) Regulations 2013.

Please advise whether EMIR or relevant national legislation impact, or alter the legal qualification of any transactions under Netted Agreements or Principal Agreements as listed in Appendix C below.

4.8 Neither EMIR nor any of the legislation referred to in paragraph 4.7 above alters (i) the legal classification of any transactions under Netted Agreements or Principal Agreements or (ii) the analysis set out in this opinion.

When rendering your opinion on the enforceability of close-out netting in the context of an insolvency proceeding, you should discuss whether the termination of the Netted Agreements or Principal Agreements or transactions entered into thereunder, the calculation of the Settlement Amounts, the aggregation and offsetting of such Settlement Amounts and the determination of the Final Net Settlement Amount and/or its payment is voidable, challengeable or in any way capable of being invalidated, deleted, frozen, stayed or otherwise retroactively impacted by a liquidator, receiver, other third party or the court.

4.9 In our view, the close-out netting provisions of the MNA and CPMA would be enforceable in accordance with their terms in the event of the commencement of Insolvency Proceedings and would create an obligation on the part of one of the Parties to pay the other a Settlement Amount under each relevant Closed-Out Agreement in accordance with its terms. We are of this opinion because there is no rule of the laws of this jurisdiction which would, in our view, apply to prohibit the Parties from entering into a contract upon the terms of the MNA or CPMA netting provisions or which would render such terms ineffective. In addition, where the Agreement is a financial collateral arrangement, Regulation 12(1) of the FCARs provides that a close-out netting provision constituting a term of a financial collateral arrangement shall take effect in accordance with its terms, notwithstanding that the collateral-provider or collateral-taker under the arrangement is subject to winding-up proceedings or reorganisation measures (as such terms are defined in the FCARs).

4.10 In our view, a Party's right to terminate and to close-out a Netted Agreement, Principal Agreement or Uncovered Transaction or transactions entered into thereunder should not be voidable or challengeable on the opening of Insolvency Proceedings. However, if Insolvency Proceedings are commenced in relation to a Party, that Party would cease to be able to exercise any right to close-out under the MNA, CPMA, Netted Agreement, Principal Agreement, Uncovered Transaction or transactions entered into thereunder once the other Party has exercised its own right to close-out under the MNA, CPMA, Netted Agreement, Principal Agreement, Uncovered Transaction or transactions entered into thereunder or the close-out of the MNA, CPMA, Netted Agreement, Principal Agreement, Uncovered Transaction or transactions entered into thereunder has occurred automatically, though this would not affect the outcome of the close-out netting provisions of the MNA, CPMA, Netted Agreement, Principal Agreement, Uncovered Transaction or transactions entered into thereunder (as applicable) that the amount due in respect of the obligations of each Party would be a net sum.

4.11 We believe that the obligation to pay the Settlement Amount resulting from a close-out netting under a Netted Agreement, Principal Agreement or Uncovered Transaction or the obligation to pay a Final Net Settlement Amount under §8 of the MNA or a Net Set-Off Amount under Sections 3 and 4 of the CPMA, as applicable, as applicable, would be enforceable.

In particular, please clarify whether or not there is a distinction in time with respect to a creditor's rights between: (a) the filing of proceedings seeking a judgment of insolvency; (b) a bankruptcy

court recognizing the filing of proceedings seeking a judgment of insolvency; (c) the date on which a bankruptcy court determines a party first becomes insolvent; and (d) any other stage of the proceedings where a creditor's rights may be affected.

4.12 It is immaterial whether the Terminating Party or Closing-Out Party exercises its rights to close-out at any of the above times.

We are also interested in whether the insolvency law provides for a "safe harbor" for certain derivatives or other categories of transactions and whether the contract types listed in Appendix C would benefit from such provision(s).

4.13 We understand that the term "safe harbour" refers to provisions in jurisdictions such as the United States, in which there are wide-ranging moratoria in the event of the commencement of insolvency proceedings (which, for example, limit even the termination of contracts in accordance with their terms, and the acceleration of payment obligations thereunder), which provide relief from such restrictions. In general terms, under English law, protections for debtors in Insolvency Proceedings are not as wide-ranging (for example, the commencement of Insolvency Proceedings does not, without more, affect a counterparty's right to terminate a contract) and, accordingly, there are no equivalent safe harbour provisions.

4.14 However, in respect of a UK bank, article 3 of the Banking Act 2009 (Restriction of Partial Property Transfers) Order 2009 prohibits a partial property transfer of some, but not all, of the "protected rights and liabilities" between a particular person and a UK bank. Please refer to paragraphs 5.9 and 5.10 below for further details.

We would also like to know whether there is publicly available information that would confirm any of the procedural steps mentioned above under (a) through (d) or other solvency related facts (e.g., financial statements, corporate actions, etc).

4.15 In this jurisdiction a search may be carried out against a Party at Companies House in London or Cardiff and an enquiry may be made in respect of a Party at the Central Registry of Winding-Up Petitions by telephone or in person at the Companies Court General Office. In making such enquiry it should be asked whether or not: a winding-up order has been made; a petition for winding-up has been presented; an administration order has been made; a petition for an administration order has been presented; or documents have been filed at court with a view to the appointment of an administrator by the "out-of-court" route available under the Insolvency Act 1986.

4.16 However, searches and enquiries of the type described in paragraph 4.15 above are not conclusive about the status of a Party. For instance, Companies House and the Companies Court are reliant on third parties to provide them with information; and there will be a time-lag between the occurrence of an event (such as liquidation) and its notification to, and subsequent appearance at, Companies House. In addition, the searches and enquiries do not indicate whether insolvency proceedings have begun in another jurisdiction.

Do the laws of your jurisdiction consider early termination, set-off and close-out netting as legally distinct and separate rights, similar or related rights or do they make no such distinctions between them?

4.17 In this jurisdiction, a distinction is usually made between the concepts of early termination, set-off and close-out netting. Early termination is a contractual right which allows for the termination of an agreement (in accordance with the terms of the agreement) if the enforceability of such agreement is called into question or if a counterparty fails (or is at risk of failing) to perform its obligations, typically on the occurrence of an event of default, termination event or force majeure event. Set-off is a defence to a claim, which is dependent on the existence of cross-claims: where the defendant is owed a sum by the claimant, and a right of set-off exists, the defendant will escape liability on the claimant's claim by asserting a set-off of what he is owed against what is claimed against him. Close-out netting is a more extensive concept. It allows a party to accelerate or terminate all outstanding contracts in certain designated circumstances, to calculate the value of the obligations owing to and from the Parties and then to aggregate the obligations owing by it to the other Party against those owing from that other Party to it so as to produce a single net balance due either by or to it.

4.18 In short, a set-off acknowledges the existence of cross-claims between the parties and effects a discharge of them to the extent that the amounts are equivalent (with only the balance owing thereafter), whereas close-out netting involves just one monetary claim being owed by one Party to the transaction to the other Party. Nevertheless, the distinction between set-off and netting is often of little practical relevance, given the broad scope of set-off under English law.

Assuming the Parties have <u>not</u> specified that Automatic Termination (as defined in § 6.3 of the EFET Master Netting Agreement or Part II.B of the EFET/IECA Commodities Schedule to the Cross-Product Master Agreement) applies, are the provisions of the EFET Master Netting Agreement or TBMA Cross Product Master Agreement permitting the other Party (the "Terminating Party" or "Closing-Out Party") to terminate the Netted Agreements or Principal Agreements including all transactions upon the occurrence of a Close-Out Event enforceable under the laws of England or is there a risk that (i) the entering into the EFET Master Netting Agreement or TBMA Cross Product Master Agreement, (ii) the entering into Netted Agreements or Principal Agreements or transactions thereunder or (iii) the early termination by notice described in §5.I of the EFET Master Netting Agreement or Section 2.2 of the Cross-Product Master Agreement itself could be challenged by a liquidator, administrator, receiver or third party?

4.19 We believe that the provisions of the MNA or the CPMA permitting the Terminating Party or Close-Out Party to terminate the Netted Agreements, Principal Agreements or Uncovered Transactions (including all transactions) upon the occurrence of a Close-Out Event would be enforceable in this jurisdiction.

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

4.20 We believe that the provisions of the MNA or the CPMA providing for automatic termination of the Netted Agreements, Principal Agreements or Uncovered Transaction (including all transactions) upon the occurrence of a Close-Out Event would be enforceable in this jurisdiction. There is no reason why the Parties' intentions should not be upheld in this respect; in particular, if an express notice of termination clause is valid, there is no reason why the Parties should not be able to dispense with that notice.

4.21 The Early Termination rights which arise as a result of an insolvency based Close-Out Event under §3.1(C) of the MNA and/or Division 1, Part II, Section A of the Commodities Schedule would be enforceable under the laws of this jurisdiction, whether termination takes the form of Close-Out on the occurrence of a Close-Out Event under §3 of the MNA and/or Division 1, Part II, Section A of the Commodities Schedule or by Automatic Termination under §6 of the MNA or under Division 1, Part II, Section C of the Commodities Schedule. This applies to Early Termination of the MNA, CPMA and all Netted Agreements, Principal Agreements, Uncovered Transactions and transactions in existence at the time under the General Agreement.

Would you recommend to elect Automatic Termination to apply upon a Winding-up, Insolvency or Attachment (as defined in §3.1(C) of the EFET Master Netting Agreement) or similar event?

4.22 As a matter of English law, it is not necessary for the Parties to agree to automatic, rather than optional, termination of transactions.

If yes, please specify such event or events and indicate whether it would it 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.

4.23 Under the laws of this jurisdiction it is not necessary to specify, or refrain from specifying, a certain grace period.

Are the provisions in § 8 of the EFET Master Netting Agreement and Section 4 of the Cross-Product Master Agreement providing for the off-setting of all positive and negative Settlement Amounts in determining the Final Net Settlement Amount enforceable under the laws of this jurisdiction or is there a risk that such determination could be challenged by a liquidator, administrator, receiver or third party?

4.24 See paragraph 4.11 above, in which we stated our belief that the off-setting of all Settlement Amounts in determining the Final Net Settlement Amount §8 of the MNA and the Net Set-Off Amount under Section 4 of the CPMA would be enforceable.

4.25 However, it cannot be discounted that an insolvency office-holder appointed to Party A would seek to challenge such off-setting as amounting to a contractual set-off rather than a netting arrangement. If any such challenge were to be successful (which we consider to be unlikely), the contractual set-off would be valid only to the extent that the amount payable by Party A does not exceed that which would be payable by reason of Insolvency Set-off (as to which, see paragraphs 5.1 and 5.3 below).

Do the laws of England recognize that Close-Out applies to all transactions? Would we need the single agreement concept (as provided for in §2.3 of the EFET Master Netting Agreement and, if so selected in Section 10.6 of the EFET/IECA Commodities Schedule, in the Cross-Product Master Agreement) 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 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 or Principal 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 the General Agreement following a previous Partial Close-Out.

4.26 Under the laws of this jurisdiction it is not necessary that all transactions and the Netted Agreements or Principal Agreements, as applicable, be part of a single agreement for both the Early Termination rights and/or close-out netting provisions under the Netted Agreements or Principal Agreements to be effective.

4.27 Under the laws of this jurisdiction, it is possible for the Parties to agree to sever some transactions from the Netted Agreements or Principal Agreements, without undermining the enforceability of the Single Agreement clause in respect of the other Netted Agreements or Principal Agreements.

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 England or could the calculation or demand of such amount in a foreign currency be challenged by a liquidator, administrator, receiver or third party?

4.28 Outside of the context of Insolvency Proceedings, the English court can award judgment for a sum of money expressed in a foreign currency. This power may be exercised whether the applicable law of the contract is foreign law or English law. It is not restricted to claims for payment of debts but extends to claims for damages for breach of contract whether the claim is for liquidated or unliquidated damages. The judgment will be for payment of the amount of the foreign currency or the Sterling equivalent at the time of payment. The "time of payment" means that, if the defendant fails to deliver the foreign currency, the date for its conversion into Sterling should be as close as practicable to the date of payment, having regard to the realities of enforcement procedures. In other words, it is generally not possible to execute a judgment expressed in a foreign currency; it must first be converted into Sterling to allow those executing the judgment to know whether they have satisfied the judgment or not.

4.29 In addition, with respect to Insolvency Proceedings, English law may require that all claims or debts are converted into Sterling at an exchange rate determined by the court at a date related thereto, such as the date the company went into liquidation or bank insolvency (that is, the date of the winding up order or the date of the resolution to wind up) or, where an administrator proposes to make a distribution to creditors pursuant to Chapter 10, Section C of the Insolvency Rules 1986, the date the company entered administration.

Please specify, if and as applicable, the degree to which termination and close-out rights in insolvency in your jurisdiction are dependent upon, or otherwise effected by, the status of one or more of the concerned parties falling within a particular category of classification of entity. Specifically, do these rights differ as the result of a party being a financial institution, ordinary corporate entity or any other categorization or regulatory or legal status?

4.30 The termination and close-out rights in insolvency would not be dependent upon, or otherwise affected by the status of the insolvent Party (but see the comments in paragraph 4.28 above in relation to execution of a judgment).

2. Non-insolvency related Material Reasons

Please discuss and advise on the issues outlined above under d), e) and f) [(i.e. the questions to which paragraphs 4.24 to 4.29 above are responses)] in the context of non-insolvency related Material Reasons, as well as the following question:

Are the rights of the Terminating Party or Closing-Out Party to terminate and Close-Out the Netted Agreements or Principal Agreements including all transactions enforceable in accordance with the terms of the EFET Master Netting Agreement or TBMA Cross Product Master Agreement, irrespective of the insolvency of Party A?

4.31 The provisions of the MNA and the CPMA, which allow for Early Termination for a Material Reason or on the occurrence of a Close-Out Event (other than due to insolvency) and close-out netting of the Netted Agreements, Principal Agreements or Uncovered Transaction would be enforceable under the laws of this jurisdiction.

C.II. Multibranch Parties

1. English Multibranch Party

Would there be any change in your conclusions reached under C.I.1 or C.I.2 above based on the fact that Party A has conducted business under some or all of the Netted Agreements or Principal Agreements on a multibranch basis prior to its insolvency?

4.32 There would be no change to our conclusions, subject to the following observations as to insolvency jurisdiction of the English courts:

(a) The English courts have insolvency jurisdiction under the Credit Institutions Regulations in respect of all insolvency procedures of a UK credit institution incorporated in the UK, regardless of whether such UK credit institution has conducted business under the Netted Agreements, Principal Agreements and Uncovered Transaction on a multibranch basis.

(b) The English courts have insolvency jurisdiction under the Insurers Winding up Regulations in respect of all insolvency procedures of an insurer incorporated in the UK, regardless of whether such insurer has conducted business under the Netted Agreements, Principal Agreements and Uncovered Transaction on a multibranch basis.

(c) The Insolvency Regulation is applicable where a Party is not a credit institution, an insurance undertaking, an investment undertaking holding funds or securities for third parties, or a collective investment undertaking, and its "centre of main interests" (**COMI**) is in an EU member state other than Denmark. The Insolvency Regulation does not contain a definition of the term COMI. However, article 3(1) of the Insolvency Regulation states that, in the case of a company or legal person, the place of the registered office shall be presumed to be its COMI in the absence of proof to the contrary. Furthermore, recital (13) to the Insolvency Regulation states that the COMI should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.

(d) Where a Party is not a credit institution, an insurance undertaking, an investment undertaking holding funds or securities for third parties, or a collective investment undertaking, and its COMI is in the United Kingdom, the English courts have jurisdiction in respect of Insolvency Proceedings.

4.33 Where a Party does not fall within any of the categories set out in paragraph 4.32 above, the English courts would have jurisdiction in respect of winding-up proceedings, subject to the comments in paragraphs 4.34 to 4.38 below.

Would the EFET Master Netting Agreement and, if so selected in Section 10.6 of the EFET/IECA Commodities Schedule, the Cross-Product Master Agreement be treated as a single unified agreement by the English receiver under the laws of England, regardless of the treatment of the EFET Master Netting Agreement or Cross-Product Master Agreement or transactions thereunder by an insolvency official in a country where close-out netting may be unenforceable?

4.34 A liquidator or administrator is required to include obligations arising from all transactions governed by the MNA or the CPMA (regardless of whether these obligations originate from multiple branches of such party) in the calculation of amounts owed to and from the Defaulting Party.

4.35 A liquidator or administrator will not be able to undermine the "global" netting provisions of the MNA or the CPMA (whereby the Non-Defaulting Party may net obligations arising from (i) all transactions governed by the terms of the Netted Agreements and/or the MNA; or (ii) all transactions governed by the Principal Agreements, Uncovered Transactions and/or the CPMA, regardless of the type of transaction or from which office it was entered into) by treating the obligations in respect of transactions entered into from the office in this jurisdiction separately from other obligations arising under the Netted Agreement and/or the MNA or the Principal Agreements, Uncovered Transaction and/or the CPMA or other transactions governed by the terms of the Netted Agreement and/or the MNA, or the Principal Agreements, Uncovered Transaction and/or CPMA.

4.36 Under the Insolvency Regulation set-off is permitted in each of the two following situations:

(a) if it is permitted under the law of the jurisdiction in which insolvency proceedings have been opened in relation to the insolvent debtor (Article 4.2(d) of the Insolvency Regulation); or

(b) if it is permitted by the law applicable to the insolvent debtor's claim (Article 6.1 of the Insolvency Regulation).

In relation to (a), the laws of this jurisdiction would be applicable to the extent that set-off is relevant (as to which, see paragraphs 4.17 and 4.18 above), with the effect that set-off will be validated in the circumstances described in this opinion in the case of Insolvency Proceedings declared by a court in this jurisdiction. If the governing law of the MNA, the CPMA or the relevant Netted Agreement, Principal Agreement or Uncovered Transaction is not the law of this jurisdiction and the Insolvency Regulation applies, set-off will be allowed if it is permitted under the laws governing the MNA or the CPMA, Netted Agreement, Principal Agreement or Uncovered Transaction as applicable. In relation to (b) the law applicable may be the law expressed to be the governing law of the MNA or Netted Agreement; or the CPMA, Principal Agreement or Uncovered Transaction as applicable, or potentially the governing law of the transactions arsing under the Netted Agreement, Principal Agreement or Uncovered Transactions.

4.37 Note that the FCARs were introduced in the UK to implement Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements in the UK, the objective of which was to simplify the process of taking financial collateral across the EU by introducing a minimum uniform legal framework across member states. Where similar enacting measures have been implemented in other EU member states (on which specific advice should be obtained where appropriate), it is likely that close-out netting provisions contained in financial collateral arrangements will be effective in accordance with their terms (although note that such measures may remain largely untested in certain jurisdictions).

4.38 Under CBIR, a court may recognise a foreign insolvency proceeding, and in consequence of such recognition may limit the application of English insolvency law, or apply certain of such provisions at times, or in circumstances, where they would not otherwise be available. In these circumstances the opinions in relation to English law expressed in this opinion letter may not apply.

2. Foreign Multibranch party

Would there be separate proceedings in England with respect to the assets and liabilities of the English Branch upon the start of the insolvency proceeding for Party F in Country H [i.e. a corporation, a bank, an investment services provider, an insurance company, an investment fund management company or any other similar financial institution incorporated, organized or having its centre of main interest in a country other than England]? Or would the relevant authorities in England defer to the proceedings in Country H, so that the assets and liabilities of the English Branch would be handled as part of the proceedings for Party F in Country H? Could local creditors of the English Branch initiate separate proceedings in England even if the relevant authorities in England did not do so?

4.39 Subject to the observations at paragraphs 4.40 to 4.47 below, in principle it is possible for the courts of this jurisdiction to initiate certain Insolvency Proceedings in relation to a foreign company based on the mere presence of assets and liabilities in this jurisdiction. Such proceedings could be initiated by local creditors even if the relevant authorities did not do so.

4.40 In respect of an EEA credit institution incorporated in an EEA member state, the courts of this jurisdiction will have no jurisdiction to open winding-up proceedings and/or re-organisation measures.

4.41 Furthermore, where the Defaulting Party is an EEA credit institution, a liquidator or administrator may not be appointed in relation to proceedings.

4.42 Where an insolvent Party is an insurance undertaking whose permission for the purposes of FSMA arises by virtue of Schedule 3 of FSMA, the English courts have no jurisdiction in respect of certain Insolvency Proceedings.

4.43 Where a Party is not a credit institution, an insurance undertaking, an investment undertaking holding funds or securities for third parties, or a collective investment undertaking, and its COMI is in an EU member state other than the United Kingdom or Denmark, the Insolvency Regulation will apply. In such a case the English courts have no jurisdiction in respect of Insolvency Proceedings other than receivership, except in a case where the Party has an establishment (within the meaning in the Insolvency Regulation) in this jurisdiction, and then only to implement certain Insolvency Proceedings governed by English law in relation to the assets situated (or deemed under the Insolvency Regulation to be situated) in this jurisdiction. See paragraph 4.32(c) above in respect of COMI.

4.44 The courts of Scotland have exclusive jurisdiction in relation to liquidation of a Party incorporated under the laws of Scotland (a **Scottish Party**). Accordingly, the courts of this jurisdiction may defer to the courts of Scotland in relation to any question relating to the close-out netting provision in the General Agreement arising in the liquidation of a Scottish Party. In other Insolvency Proceedings there is a lower likelihood that the courts of this jurisdiction would be expected to defer to the courts of Scotland than in a case involving liquidation. No view is expressed in this opinion as to the effect of the laws of Scotland.

4.45 The courts having jurisdiction in relation to insolvency law in this jurisdiction are obliged to give assistance to courts in which concurrent insolvency proceedings have commenced under the laws of another jurisdiction. Such assistance may take the form of, for example, dealing with only those assets located in this jurisdiction or selectively applying provisions of foreign law in Insolvency Proceedings which are otherwise generally governed by English law. The courts of this jurisdiction may accordingly apply foreign systems of law rather than English law where the insolvent Party is subject to insolvency proceedings in another jurisdiction. Under Section 426 of the Insolvency Act 1986, a court with insolvency law jurisdiction in England has a discretion to apply the law of one of a list of certain specified (mainly Commonwealth) jurisdictions to the insolvency of an entity (including a company incorporated and registered in England and Wales) if so requested by the competent court of that other jurisdiction.[7] In exercising its discretion, the English court must have regard to the rules of private international law. (In any case where the Insolvency Regulation applies (as to which, see paragraph 4.32(c) above) and if the specified jurisdiction concerned is any of the Channel Islands, Isle of Man, or Ireland, the English court's powers under Section 426 of the Insolvency Act 1986 would be displaced insofar as inconsistent with the Insolvency Regulation.)

4.46 English courts may, in some circumstances, stay Insolvency Proceedings where they are of the opinion that proceedings in another forum would be more convenient or if concurrent proceedings are being brought elsewhere, but will take into account whether or not this will prejudice creditors whose claims have a close connection with this jurisdiction.

4.47 Under CBIR, a court may recognise a foreign insolvency proceeding, and in consequence of such recognition may limit the application of English insolvency law, or apply certain of such provisions at times, or in circumstances, where they would not otherwise be available.

If there were separate proceedings in England with respect to the assets and liabilities of the English Branch, would the receiver or liquidator in England and the English courts, based on the facts above, include Party F's position under the Netted Agreements or Principal Agreements, in whole or in part, among the assets of England and, if so, would the receiver or liquidator and the English courts recognize the close-out netting provisions of the EFET Master Netting Agreement or Cross-Product Master Agreement in accordance with their terms? The most significant problem arising would be if a[n] English receiver, liquidator or court considering a single EFET Master Netting Agreement were to require a counterparty of the English Branch of Party F to pay the mark-to-market value of transactions entered into with the English Branch to the liquidator or receiver of the English 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 EFET Master Netting Agreement or Cross-Product Master Agreement. In considering this issue, please assume that close-out netting under the EFET Master Netting Agreement or Cross-Product Master Agreement would be enforced in accordance with its terms in the proceedings for Party F in Country H.

[7] Those specified jurisdictions are currently the other parts of the United Kingdom, the Channel Islands, the Isle of Man, Anguilla, Australia, the Bahamas, Bermuda, Botswana, Brunei, Canada, Cayman Islands, Falkland Islands, Gibraltar, Hong Kong, Ireland, Malaysia, Montserrat, New Zealand, South Africa, St. Helena, Turks and Caicos Islands, Tuvalu and the Virgin Islands.

4.48 In our view, the administrator or liquidator in this jurisdiction would recognise the close-out netting provisions of the MNA and CPMA in accordance with their terms in such circumstances; in other words, we believe that he would take into account the whole of the Defaulting Party's positions under the Netting Agreements, Principal Agreements or Uncovered Transactions for close-out netting purposes.

4.49 However, if a recognition order is made under CBIR, or if the Insolvency Regulation applies, a liquidator or administrator may be required to defer to the jurisdiction of the insolvency officer appointed in another state, because particular transactions or the claims of the Defaulting Party against the Non-Defaulting Party arising under the MNA, CPMA, Netting Agreements, Principal Agreements or Uncovered Transactions may be deemed to be situated outside this jurisdiction.

Please consider your answer to your question assuming instead that Party F has no branch located in England, but has assets in England.

4.50 We repeat the answer set out at paragraph 4.48 above except that where a Party has no "establishment" in this jurisdiction and the Insolvency Regulation applies, only a very limited range of Insolvency Proceedings is available (see paragraph 4.43 above).

C.III. Collateral

Under the laws of England, what law governs the transfer of ownership in the various forms of Eligible Credit Support deliverable under the EFET Cross Product Credit Support Annex?

4.51 The choice of law provisions of the Credit Support Annexes (as set out in the MNA or CPMA as applicable) would be recognised in this jurisdiction, subject to the observations at paragraphs 4.94 to 4.96 below. However, under English rules of private international law, the relevant laws governing the proprietary aspects of a transfer of a movable asset are the laws of the jurisdiction in which the assets are situated. Therefore, in the case of such assets situated in a jurisdiction other than England, the laws of that other jurisdiction will become relevant and appropriate advice as to the position should be sought.

4.52 The position is less clear with respect to the location of certain other types of asset for the purposes of determining the applicable law. The better view, however, is that:

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

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

(c) in the case of a directly-held dematerialised debt security, the security is located in the jurisdiction establishing the statutory regime under which it is issued (or such other jurisdiction as is specified by that statutory regime); and

(d) in the case of an indirectly-held debt security, the location of the ultimate holder's or each intermediary's holding of the security is the location of the account, register or book-entry record of its interest maintained by the most immediate intermediary in the chain (as the case may be) (an approach known as the "place of the relevant intermediary approach", or "PRIMA").

4.53 Although there is little direct support for PRIMA in case law, it is the approach adopted in the FCARs, in the case of financial collateral arrangements with respect to book entry securities collateral. Regulation 19(2) of the FCARs provides that questions relating to a number of matters in respect of book entry securities collateral provided under a financial collateral arrangements, including their legal nature and proprietary effects, applicable perfection requirements and the steps required for their realisation following the occurrence of an enforcement event, are governed by the domestic law of the country in which the relevant account is maintained.

4.54 The law governing the transferee's obligations in respect of cash collateral would, in the absence of an agreement to the contrary, be the law of the place where the entity with which the cash is deposited is located. However, where the Insolvency Regulation, the Credit Institutions Regulations or the Insurers Winding-up Regulations apply, the effectiveness of a set-off is determined by reference to the law governing the insolvent Party's claim, so that if the cash collateral has been transferred to the insolvent Party, the law of the place where the solvent Party is due to repay the cash would typically govern the effectiveness of the set-off of the cash collateral against obligations of the insolvent Party.

4.55 In relation to letters of credit, we refer to our observations at paragraph 4.56 below.

Would the laws of England 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?

4.56 The following paragraphs consider the position where cash is given as Eligible Credit Support. With respect to letters of credit, we assume that there is no "transfer", but rather that the letter of credit is issued in favour of the Party seeking credit support. In considering the following questions, therefore, we express no view in relation to letters of credit since the questions assume a "transfer". For cash we assume that the credit support is paid to the Transferee and not to any third party.

4.57 §7 of the Credit Support Annexes provide that each Party agrees that all right, title and interest in and to any Eligible Credit Support or Interest Amount which it transfers to the other Party under the terms of the Credit Support Annexes will vest in the Transferee free and clear of any liens, claims, charges or encumbrances or any other interest of the Transferor or of any third person.

4.58 The English courts would look at the wording and the substance of the arrangements and would not re-characterise such transfers as creating security interest unless a court considers that the evidence shows that §7 of the Credit Support Annexes does not reflect the genuine intention and agreement of the Parties. The English courts would be concerned to ensure that the operation of the arrangement in practice is consistent with the Parties' characterisation of the arrangements but there is no particular bias on the part of the English courts for security arrangements as opposed to title transfer arrangements. Provided that the Parties reflect their true intentions in their contract, they are free to structure their transactions in whichever way they wish.

4.59 We are of the view that the laws of this jurisdiction would characterise each transfer of Eligible Credit Support, once payment is made to the Transferee, as effecting an unconditional transfer of ownership of the assets transferred, provided that the true intention of the Parties is the outright transfer of ownership. In those circumstances, we do not believe that there is a material risk that the English courts would re-characterise such transfer as intending to create or creating in favour of either Party any mortgage, charge, lien, pledge, encumbrance or other security interest in any Eligible Credit Support transferred from one party to the other, in the absence of express words added to the Credit Support Annexes to such effect.

4.60 However, if the Eligible Credit Support is located (i.e. repayable) in a jurisdiction other than this jurisdiction (e.g. the jurisdiction of the Transferee) the laws of that other jurisdiction should be checked to ensure that the transfer would not be re-characterised since there is no authority as to whether or not the courts of this jurisdiction would apply the law of the jurisdiction where the assets are situated to the question of the proper characterisation of a transfer of Eligible Credit Support. In any event, we consider it unlikely that an English court would re-characterise the Credit Support Annexes as a result of any re-characterisation under the laws of the jurisdiction in which the assets are situated.

4.61 Provided that the Transferee has possession or control of the Eligible Credit Support comprising cash, which would be the case where the transfer of the cash to the Transferee has been effected, the arrangements constituted by the Credit Support Annexes would, under the FCARs, be treated as a financial collateral arrangement in relation to such cash.

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 England 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?

4.62 No further action is required under the laws of this jurisdiction to enforce or continue such ownership interest.

4.63 However, where the Eligible Credit Support is located in another jurisdiction, the laws of that jurisdiction should be checked to confirm that there are no procedures that must be followed to enforce or continue such ownership interest.

What is the effect, if any, under the laws of England of the right to substitute collateral pursuant to §6 of the EFET Cross Product Credit Support Annex? Does the presence or absence of consent to substitution by Party B have any bearing on this question?

4.64 The right of the Transferor to exchange the Eligible Credit Support (for example, by swapping Euros for United States Dollars) pursuant to §6 of the Credit Support Annexes is a contractual right only. It does not affect our opinion expressed in paragraphs 4.51 to 4.60 above. Any substitution would simply amount to two outright transfers; one in which the Transferee returns Eligible Credit Support and a second where the Transferor provides substitute Eligible Credit Support. The presence of consent has no bearing on the question.

4.65 This opinion does not consider letters of credit which we assume cannot be "transferred" (please see paragraph 4.56 above).

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 Cross-Product Master Agreement together with §11 of the EFET Cross Product Credit Support Annex. Assuming that Section 4 of the Cross-Product Master Agreement is valid and enforceable in England insofar as it relates to the determination of a Final Net Settlement Amount payable by either Party on the termination of transactions, is §11 of the EFET Cross Product Credit Support Annex also valid to the extent that it provides for the value of the collateral provided and not yet transferred to be included in the calculation of the Final Net Settlement Amount under Section 4 of the Cross-Product Master Agreement?

4.66 §11 of the Cross Product Credit Support Annex would be valid to the extent that it provides that the Base Currency Equivalent of all Eligible Credit Support provided thereunder will be included in the calculation of the Final Net Settlement Amount as an amount payable by the Transferee.

Are the rights of Party B enforceable in accordance with the terms of the EFET Cross Product Master Agreement and the EFET Cross Product Credit Support Annex, irrespective of the insolvency of Party A?

4.67 The provisions of the MNA, CPMA and Credit Support Annexes would be enforceable under the laws of this jurisdiction irrespective of the insolvency of Party A, subject in particular to our comments at paragraph 5.17 below.

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 EFET Cross Product Credit Support Annex 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?

4.68 On the assumption that the exchanged assets are of no greater value that the assets which they are replacing, our view is that a substitution during any applicable "suspect period" for insolvency clawback actions available to an administrator or liquidator would not invalidate an otherwise valid transfer.

Is the EFET Credit Cross Product Support Annex 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 England in order to ensure validity of such transfer in each type of Eligible Credit Support created by Party A under the EFET Credit Cross Support Annex? For example, are there any other requirements such as those mentioned under o) above [i.e. the question to which paragraphs 4.56 et seq. are the response]?

4.69 Under the laws of this jurisdiction, the Credit Support Annexes are in an appropriate form to create the intended outright transfer of ownership in the collateral to Party B.

4.70 There are no other requirements under the laws of this jurisdiction necessary to ensure the validity of such transfer.

4.71 This opinion does not consider letters of credit which we assume cannot be "transferred" (please see paragraph 4.56 above).

Do you have other specific recommendations on the subject of collateral that you would like the EFET members to consider?

4.72 We do not have any such specific recommendations.

C.IV. General Enforceability

Are the EFET Master Netting Agreement and the Cross-Product Master Agreement and the EFET Cross-Product Credit Support Annex enforceable under the laws of England in accordance with its own terms? We are especially interested in provisions that you may believe infringe upon the ordre public in England and that may be challenged by the courts in England irrespective of the law that governs the Agreement.

4.73 In our opinion, the Agreements would be legal, valid and binding and enforceable under English law.

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

4.74 We do not have any such recommendations.

C.V. Confirmation Practices

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

4.75 For a transaction to be enforceable, and subject to contrary agreement, the following three elements must be present (i) offer and acceptance (ii) consideration, and (iii) intention to create legal relations.

4.76 Under the laws of this jurisdiction, transactions can be made without procedural formalities (that is, no writing or other form is necessary), unless prescribed by statute. In particular, there is no formal requirement for a signature, registration or notarisation in order to create a binding transaction under the laws of this jurisdiction. There is no statute of this jurisdiction which requires transactions as envisaged by the CPMA, MNA, Netted Agreement, Principal Agreement or the Uncovered Transaction to be in any prescribed form.

4.77 Consequently, an oral agreement (whether taped or not) will be enforceable if the three elements set out in paragraph 4.75 above are present and no factors are absent which would make the agreement incomplete or invalid for reasons of uncertainty (with the exception of agreements on choice of jurisdiction, which are usually required to be made in writing).

4.78 Under the laws of this jurisdiction an electronically transmitted confirmation of a transaction is acceptable. However, the method of transmission, whether it be by facsimile transmission, an exchange of telexes or an exchange of electronic messages on an electronic messaging system, must be in accordance with the terms of the contract.

4.79 Where, a Netted Agreement, Principal Agreement or Uncovered Transaction provides for confirmation of a transaction to be made "in writing", this would, in our opinion, include electronically transmitted confirmations.

4.80 It is necessary for a "title transfer financial collateral arrangement" to be evidenced in writing under the FCARs, but that requirement would be satisfied insofar as the Parties thereto have properly entered into the Credit Support Annexes.

At what point in time does a transaction agreed upon orally become legally enforceable?

4.81 In accordance with the principles set out in paragraph 4.75 above, a transaction entered into orally will be legally enforceable at the time of that oral agreement, and its existence is not dependent on its later confirmation in writing. Furthermore, the submission of a written confirmation by one Party after the oral agreement would not vary the terms of that contract without the consent of all Parties.

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

4.82 As stated in paragraph 4.81 above, the submission of a Confirmation after the formation of a contract will not vary the terms orally agreed between the Parties.

4.83 Subject to any agreement to the contrary, remaining silent and thereby failing to object to incorrect terms in a received confirmation will not amount to a variation of the existing contract as orally agreed between the Parties.

4.84 It may, however, be possible to argue that by failing to object to the incorrect term in the confirmation and by conducting themselves in a way that a reasonable person would believe that the Party assents to the terms as proposed by the other Party, the Party who has so conducted itself, whatever its real intention may have been, is bound by the terms in the Confirmation as if it had intended to agree to those terms when the contract was orally agreed. However, such a result (an estoppel) can only arise out of a "clear and unequivocal" representation. For this purpose mere inactivity is not generally sufficient. Therefore, for so long as a Party does not perform its obligations in respect of the transaction to which the incorrect Confirmation relates, failure to object by way of mere silence would not normally give rise to an estoppel.

Is the reference to a Netted Agreement or Principal Agreement sufficient for the inclusion of the transaction in the Agreement?

4.85 In our view, unless it can be shown that the Parties intend otherwise, a transaction concluded orally which the Parties reference as being included in the Netted Agreement, Principal Agreement or Uncovered Transaction would be so included (even where no reference is made to the Netted Agreement, Principal Agreement or Uncovered Transaction as applicable). Where transactions are matched electronically rather than manually entered into, such transactions will be treated as validly concluded as a matter of English law.

2. Means of Evidence

Assuming there is a dispute with respect to the existence [of] the terms or conditions of a 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) facsimile? Are there any local requirements or other considerations that are relevant to each form of evidence?

4.86 As set out at paragraph 4.75 above, the requirements for contract formation under English law include offer and acceptance; English law does not prescribe any formalities for the format of offer and acceptance in relation to the Netted Agreements, Principal Agreements, Uncovered Transaction or transactions thereunder.

4.87 In general (i) taped recordings; (ii) witness statements; (iii) e-mail or other electronic message or transaction entry systems; and/or (iv) facsimiles may be used for the purposes of evidencing the agreed terms of a transaction in the English courts, subject to the provisions of the Civil Evidence Act 1995 (**CEA**), the Civil Procedure Rules (**CPR**) and common law principles which apply to evidence generally.

4.88 In particular, but without limitation, while all relevant "hearsay" evidence is generally admissible, the distinction between direct evidence and hearsay evidence remains relevant in relation to the procedure for relying on hearsay evidence in civil proceedings and in assessing the weight a court may attach to such evidence. A party intending to rely on hearsay evidence at trial is required to serve notice of that intention on the other side in advance of the trial. Further, the court is required to have regard to any circumstances from which inferences can reasonably be drawn as to the reliability or otherwise of the hearsay evidence.

4.89 Under section 3(2)(c) of the Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000, all reasonable efforts must be made to inform participants that communications might be recorded. Under the Regulation of Investigatory Powers Act 2000, a person who records conversations without the requisite grounds can be liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine, or both.

4.90 Recordings obtained unlawfully are not automatically rendered inadmissible, although the recording may amount to a breach of Article 8 of the European Convention on Human Rights, and the courts in this jurisdiction will consider this in deciding whether or not to exclude the recording under its general discretion. Telephone recordings obtained lawfully will generally be admissible in evidence.

C.VI. Core Provisions

Would any of the elections contemplated by the EFET Master Netting Agreement or the Cross-Product Master Agreement or the EFET Cross-Product Credit Support Annex change the substance of your conclusions reached under Part C.I or C.II (Enforceability of Close-Out Netting)? As far as the EFET Cross-Product Credit Support Annex is concerned, you should in particular discuss the effect of electing to allow substitution with or without consent.

4.91 Under the laws of this jurisdiction none of the elections contemplated under the Agreements would change the substance of such conclusions.

4.92 As to substitution with or without consent, please see paragraphs 4.64 and 4.65 above.

Considering your conclusions reached under Part C.I or C.I1. (Enforceability of Close-Out Netting), what are the provisions of the EFET Master Netting Agreement or the Cross-Product Master Agreement that you regard as so essential that a material alteration thereof could affect the conclusions reached in that Part C.I or C.II (each such provision a "Core Provision")?

4.93 The following core provisions must not be amended in order to ensure the effectiveness of netting under the MNA and the CPMA:

(a) §§3, 4, 5, 6 and 7 of the MNA; and

(b) Sections 2, 3 and 4 of the CPMA.

C.VII. Governing Law, Arbitration and Jurisdiction

Would the Parties' agreement on the governing law, submission to arbitration or jurisdiction (§12 of the EFET Master Netting Agreement and Section 6 of the Cross-Product Master Agreement) be upheld in England, and what would be the consequence if it were not?

4.94 In this section, we have assumed the parties have chosen the domestic law of a country, or state law, in §12 of the MNA and in Section 6 of the CPMA, and that the Principal Agreement for the purposes of Section 6 of the CPMA is the MNA.

Governing law

4.95 If the matter were raised before the courts of this jurisdiction, for agreements entered into on or after 17 December 2009, the choice of law provisions concerning the governing law of the agreement set out in §12 of the MNA and Section 6 of the CPMA would generally be upheld as a valid choice by the English courts, subject to and in accordance with the provisions of Council Regulation No. 593/2008 of 17 June 2008 (the **Rome 1 Regulation**) on the law applicable to contractual obligations, provided that the relevant contractual obligation is within the scope of and the choice is permitted by the Rome 1 Regulation.

4.96 If the matter were raised before the courts of this jurisdiction, the choice of law provisions concerning the governing law of any non-contractual obligations arising out of or in connection with the agreement of §12 of the MNA would generally be upheld as a valid choice by the courts of England, subject to and in accordance with the provisions of Regulation No. 864/2007 of 11 July 2007 (the **Rome 2 Regulation**) on the law applicable to non-contractual obligations, provided that the relevant non-contractual obligation is within the scope of and the choice is permitted by the Rome 2 Regulation.

Jurisdiction

4.97 The English courts will generally respect the parties' contractual choice of jurisdiction, subject as provided below.

4.98 Disputes arising in connection with the MNA and/or the CPMA will generally fall within the scope of Regulation No. 44/2001 (the **Brussels Regulation**), provided that they concern civil and commercial matters and do not relate to certain matters, principally including:

(a) insolvency, winding-up or similar proceedings; or

(b) arbitration (including disputes relating to an arbitral award).

4.99 Where a dispute falls within the scope of the Brussels Regulations and §12 of the MNA and/or Section 6 of the CPMA provide for the exclusive jurisdiction of the English courts, this submission will be effective before the English courts, subject to the provisions of the Brussels Regulation.

4.100 The Brussels Regulation establishes certain exceptions and limitations on the parties' choice of jurisdiction, pursuant to which the courts of another EU member state may be required to exercise jurisdiction over certain claims (and the chosen courts to decline jurisdiction), notwithstanding any agreement to confer exclusive jurisdiction on the courts of a specified EU member state.

4.101 In addition, the chosen court may be obliged to decline jurisdiction where another member state's court is first seised of the matter, even if those proceedings are commenced in contravention of the parties' choice of jurisdiction in the MNA or the CPMA (as applicable).

4.102 Please note that amendments to the Brussels Regulation are due to come into effect in January 2015 (the Brussels Regulation as so amended, the **Brussels Regulation (As Amended)**). In particular, among other changes, any member state court first seised of proceedings in contravention of the parties' contractual choice of exclusive jurisdiction in favour of the courts of an EU member state will be required, subject to the provisions of the Brussels Regulation (As Amended), to stay those proceedings as soon as the court named in the jurisdiction clause has been seised. The Brussels Regulation (As Amended) is also due to introduce a discretionary rule allowing courts in EU member states in certain limited circumstances to stay proceedings where similar or related claims have first been commenced in a court outside the EU. We express no opinion on the impact of these or any other proposed amendments on the parties' choice of jurisdiction in the MNA or the CPMA (as applicable).

4.103 Where §12 of the MNA and/or Section 6 of the CPMA provide for the exclusive jurisdiction of courts other than the English courts, the English courts will generally respect that submission, subject to the provisions of the Brussels Regulation and, in circumstances where the Brussels Regulation does not apply, the English common law.

Insolvency

4.104 The courts having jurisdiction in relation to insolvency law in this jurisdiction are obliged to give assistance to courts in which concurrent Insolvency Proceedings have commenced under the laws of another jurisdiction. Such assistance may take the form of, for example, dealing with only those assets located in this jurisdiction.

4.105 English courts may, in some circumstances, stay Insolvency Proceedings where they are of the opinion that proceedings in another forum would be more convenient or if concurrent proceedings are being brought elsewhere, but will take into account whether or not this will prejudice creditors whose claims have a close connection with this jurisdiction.

4.106 See paragraph 4.44 above in respect of a Scottish Party.

Arbitration

4.107 If the Parties opt for arbitration in §12 of the MNA and proceedings were started in the English courts in breach of that election, the English courts will stay the proceedings before them in favour of arbitration as specified in §12 of the MNA provided that: §12 of the MNA is not null and void, inoperative or incapable of being performed; the party seeking a stay of the proceedings in the English courts had not taken any step in those proceedings to answer the substantive claim; and the subject matter of the claim is capable of being resolved by arbitration or is not otherwise non-arbitrable for reasons of public policy or otherwise

C.VIII. Other Provisions

If you have other recommendations that you would like EFET member companies to consider (for example to fully optimize the General 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 opinion letter.

4.108 We do not have any such recommendations.

5 Qualifications

Insolvency Set-Off

5.1 In a winding-up of a Party or an administration of a Party under the laws of this jurisdiction, the set-off of amounts representing terminated obligations may be effected under Rule 4.90 of the Insolvency

Rules 1986 (**Rule 4.90**) or (where the administrator appointed in respect of a Party gives notice pursuant to Rule 2.95 of the Insolvency Rules 1986 that he proposes to make a distribution to creditors) Rule 2.85 of the Insolvency Rules 1986 (**Rule 2.85**), or in relation to UK bank, Rule 72 of the Bank Insolvency (England and Wales) Rules 2009 (**Rule 72**) or, in relation to a UK investment bank, Rule 164 of the Investment Bank Special Administration (England and Wales) Rules 2011 (**Rule 164**) rather than under the specific provisions of the CPMA, MNA, Netted Agreement, Principal Agreement or the Uncovered Transaction (as applicable). Set-off pursuant to Rule 4.90, Rule 2.85, Rule 72 or Rule 164 (**Insolvency Set-Off**) would, in our view, result in a net amount payable between the Parties in respect of such amounts, assuming that there are "mutual dealings" between the parties,[8] subject to the inclusion in any Insolvency Set-Off of other mutual obligations between such Parties.

5.2 In a winding-up by the courts under the laws of this jurisdiction or a bank insolvency, any dispositions of the insolvent Party's property made after the commencement of winding-up or bank insolvency of such Party (which, in this context, means the time of presentation of the petition for winding-up; or, if earlier, the time of passing a resolution for voluntary winding-up; or, if the court makes a winding-up order on hearing an administration application, the making of the order) are void under Section 127 of the Insolvency Act 1986 unless the court otherwise orders or the FCARs prevent its application. Transactions entered into after compulsory winding-up or bank insolvency has commenced in relation to a Party might not be capable of inclusion in the set-off or netting under the CPMA, MNA, Netted Agreement, Principal Agreement or the Uncovered Transaction (as applicable) or a set-off pursuant to an Insolvency Set-Off, but this would not impair the effectiveness of the close-out netting provision or an Insolvency Set-Off in respect of transactions entered into before the commencement of such Insolvency Proceedings.

5.3 The provisions in the Insolvency Rules 1986 or, in relation to a UK bank, the Bank Insolvency (England and Wales) Rules 2009 or, in relation to a UK investment bank, the Investment Bank Special Administration (England and Wales) Rules 2011 relating to the set-off of mutual credits and debts do not apply to amounts which arise under transactions entered into at certain times, and accordingly an English court might not allow such amounts to be included in an aggregation or set-off pursuant to the close-out netting provision or an Insolvency Set-Off. The times referred to are, so far as relevant, as follows:

(a) after the insolvent Party had entered administration;

(b) at a time when the solvent Party had notice that an application for an administration order in respect of the insolvent Party was pending or any person had given notice of intention to appoint an administrator in respect of the insolvent Party;

(c) at a time when the solvent Party had notice that a meeting of creditors of the insolvent Party had been summoned under Section 98 of the Insolvency Act 1986 (which requires a company which goes into creditors' voluntary winding-up to cause a meeting of creditors to be summoned for a day not later than the fourteenth day after the day on which there is to be held a shareholders' meeting at which the resolution for voluntary winding-up is to be proposed) or that a petition for the winding-up or an application for a bank insolvency order of the insolvent Party was pending; or

(d) during a winding-up or bank administration of the insolvent Party,

and, where the court has made a recognition order in respect of a foreign main proceeding under CBIR in respect of the insolvent Party, it appears that an amount may also be excluded from an aggregation or set-off pursuant to the close-out netting provision or an Insolvency Set-Off if the transaction under which such amount arose was entered into after the making of the recognition order, or after the solvent Party had notice that a recognition application was pending.

[8] *In order for the claims to be mutual, each party must be personally liable on the claim it owes and beneficially entitled to the cross-claim it owes; the claim and cross-claim must be owed between the same legal persons in the same right (i.e. not in a representative capacity).*

Furthermore, any debt which has been acquired by the solvent Party by assignment or otherwise pursuant to an agreement between the solvent Party and any other person must be excluded from Insolvency Set-Off, and may not be included in an aggregation pursuant to the close-out netting provision, where such assignment or other agreement was entered into at any of the times mentioned above.

However, notwithstanding these limitations, if the Agreement constitutes a financial collateral arrangement, or an arrangement of which a financial collateral arrangement forms part, amounts which arise under transactions entered into at the times mentioned in sub-paragraphs (a) and sub-paragraph (d) may still be included in an aggregation or set-off unless at the time the relevant financial obligations came into existence the solvent Party was aware, or should have been aware, that winding up proceedings or reorganisation measures (as such terms are defined in the FCARs) had commenced in relation to the insolvent Party.

5.4 In respect of any transaction entered into before the commencement of the winding-up or bank insolvency of the insolvent Party, under which property is to be delivered after the time of such commencement and in respect of which the insolvent Party transfers ownership of the property to the solvent Party after the time of such commencement, it may not be possible for the price payable in respect of such property transferred to be included in the Final Net Settlement Amount. However, if such a transaction is terminated before ownership of the property to be delivered under such transaction is transferred, the gain or loss in respect of the transaction calculated in accordance with the close-out netting provision should be capable of being included in the Final Net Settlement Amount. Any action taken by the liquidator of the insolvent Party to recover the price from the solvent Party would not prejudice the effectiveness of the netting pursuant to the CPMA, MNA, Netted Agreement, Principal Agreement or the Uncovered Transaction (as applicable) of other, valid, obligations.

5.5 If an obligation which is owed by a Party is a contingent obligation, Rule 4.86 (in the case of liquidation) or Rule 2.81 (in the case of administration where the administrator has given notice of his intention to make a distribution to creditors) of the Insolvency Rules 1986 will operate to allow the liquidator or administrator to value that obligation. The valued amount would be included in the Insolvency Set-Off notwithstanding that the amount so included may differ from the other Party's assessment of the value of that obligation. A right of appeal to the court is available against the liquidator's or the administrator's valuation.

5.6 There are provisions in both the Companies Act 2006 and the Insolvency Act 1986 for schemes of arrangement or voluntary arrangements (where applicable) in respect of companies to be agreed by creditors or, in some cases, shareholders of the company. The courts will not sanction a scheme of arrangement under Section 895-901 of the Companies Act 2006 unless reasonable efforts were made to notify those creditors whose rights would be affected by the scheme of the meeting to approve that scheme. In relation to company voluntary arrangements under Part I of the Insolvency Act 1986, a creditor can be bound by the arrangement even if he did not have notice of the creditors' meeting to approve the arrangement. In the case of either a scheme of arrangement or a company voluntary arrangement, approval at the creditors' meeting of its terms does not require unanimity of the affected creditors, whether or not present at the meeting. Such arrangements could affect both set-off rights of creditors and the value of claims which the creditors may have against the company. If the netting provided for in the close-out netting provision has been effected before the approval of such an arrangement, any provision of such an arrangement which purports to unwind the application of the close-out netting provision would not bind the affected creditor if timely objection to the arrangement is made to the applicable court. An arrangement could, however, affect the value of any resulting net claim.

Banking Act 2009

5.7 The Banking Act contains various provisions which might affect the effectiveness of the close-out provision. In particular, Part I of the Banking Act provides for various remedies for a failing UK bank, which include the ability of the Treasury or the Bank of England to cause the transfer of securities issued by a UK bank, or property of a UK bank, to another person, by means of a "share transfer order", a "share transfer instrument", or a "property transfer instrument".

5.8 Section 75 of the Banking Act gives power to the Treasury to change the law (except the Banking Act itself) for the purpose of enabling the powers granted to the Bank of England, the Treasury, the PRA and the FCA under Part I of the Banking Act to be used effectively. Such changes might affect private law rights and might be used with retrospective effect. Furthermore, under Sections 23 and 40, a share transfer instrument or order, or a property transfer instrument, may include incidental, consequential or transitional provisions which might have impact on private law rights.

5.9 The CPMA and the MNA provide for the exercise of termination rights in circumstances which might include the making of a property transfer instrument, Under Section 38 of the Banking Act, a property transfer instrument may disapply a right to terminate the CPMA, MNA, related Netted Agreement, Principal Agreement, Uncovered Transaction or transactions thereunder which is exercisable by virtue of the existence or making of the property transfer instrument. However, rights to terminate based on the existence or occurrence of other circumstances should not be affected.

5.10 A property transfer instrument may apply to only part of a UK bank's assets and liabilities (such a transfer being referred to as a "partial property transfer"). This may be the case because the property transfer instrument concerned expressly applies to only part of the UK bank's business or because it is ineffective in relation to foreign property, which may include transactions, or obligations arising under transactions, which are governed by the laws of a non-UK jurisdiction. A partial property transfer could apply so as to cause the transfer of some, but not all, of the transactions (or obligations arising under transactions), with the result that the ability to net the amounts due in respect of different transactions against the amounts due in respect of others is impaired. However, in this regard, Article 3 of the Banking Act 2009 (Restriction of Partial Property Transfers) Order 2009 (the **Safeguards Order**) prohibits a partial property transfer which applies to some, but not all, of the "protected rights and liabilities" between a particular person and a UK bank. Article 3 of the Safeguards Order thus protects the Non-Defaulting Party against the adverse consequences of a partial property transfer affecting the Agreements or transactions, except that if any transaction is not a "relevant financial instrument" as defined in the Safeguards Order, Article 3 may not apply in relation to that transaction. For these purposes "relevant financial instrument" means: (a) an instrument listed in Section C of Annex I to the Markets in Financial Instruments Directive (2004/39/EC), read with Chapter VI of the Commission Regulation 1287/2006/EC, (b) any option, future, swap, forward, contract for differences or other derivative contract not falling within (a), and (c) any combination of the foregoing; a deposit; a loan; an instrument falling within article 77 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001; or any contract for the sale, purchase or delivery of transferable securities, the currency of the UK or any other country, territory or monetary union, any precious metal or any other commodity.

5.11 If a property transfer instrument is made, a "group company" of a UK bank must provide such services and facilities as are required to enable the transferee to operate the transferred business effectively. Furthermore, the Bank of England may cancel or modify the terms of a contract or other arrangement between the residual (post-transfer) UK bank and a group company or add or substitute a transferee as a party to such a contract or arrangement. It is theoretically possible that the termination or acceleration rights of a non-UK-bank Party under the Agreements may be disapplied or ineffective, or provisions of the Agreements could be modified or disapplied by the Bank of England, if a property transfer instrument is made in respect of a UK bank Party and continuation of the transactions is required to enable the transferee to operate a transferred business effectively. However, we would not expect this to be the outcome, as we understand that the purpose underlying the legislation is directed at continuation of non-financial "facilities".

Insurers

5.12 Where a UK insurer (as defined in the Insurers (Reorganisation and Winding Up) Regulations 2004 (the **Insurers Winding Up Regulations**) has been proved to be unable to pay its debts, a court in this jurisdiction, if it thinks fit, can reduce the value of one or more of the contracts of the insurer on such terms and subject to such conditions as it thinks just, in place of making a winding-up order pursuant to Section 377 of FSMA. The better view is that "contracts" for the purposes of Section 377 should be interpreted as referring to insurance policies only. However, we express no view as to the effect on the Insolvency Set-off provisions if a liability of a Party under the MNA, CPMA or Credit Support Annexes were able to be reduced under Section 377.

5.13 Rule 4.90 will apply on the winding up of a UK insurer subject to the following reservation. In respect of any case where the appointment of an administrator takes effect before 1 February 2011, Article 5 of the Financial Services and Markets Act 2000 (Administration Orders Relating to Insurers) Order 2002 (as amended) provides that where an administration order is made in respect of an insurer and it subsequently goes into liquidation, sums due from the insurer to another party are not to be included in the account of mutual dealings rendered under Rule 4.90 of the Insolvency Rules 1986 (mutual credit and set-off) if, at the time they became due:

(a) an administration application had been made under paragraph 12 of Schedule 131 to the Insolvency Act 1986 (**Schedule B1**) in relation to the insurer;

(b) in the case of appointment of an administrator by the holder of a floating charge, a notice of appointment has been filed with the court under paragraph 18 of Schedule B1 in relation to the insurer; or

(c) in the case of appointment of an administrator by the company or directors, a notice of intention to appoint has been filed with the court under paragraph 27 of Schedule B1 in relation to the insurer.

5.14 The Insurers Winding Up Regulations require that where a long term or a general insurer or a composite insurer (as defined in regulation 21(c)) is wound up, debts are paid out of the entire assets of the insurer in the following order of priority: preferential debts (after the expenses of the winding up); insurance debts (broadly policyholders debts); the debts of ordinary creditors (regulation 21). Paragraphs (3) and (4) of this regulation provide that where the assets of an insurer are insufficient to cover all preferential debts, the preferential debts abate in equal proportions and where the assets are insufficient to meet all insurance debts, those debts abate in equal proportions. Paragraph (5) makes provision as to the priority of preferential debts (but only those debts) over property comprised in a floating charge.

5.15 The Insurers Winding Up Regulations deal separately with the implementation of Directive 2001/17/EC on the re-organisation and winding up of insurance undertakings with respect to composite insurers (where there is no arrangement to transfer the long-term business) providing for the separate application of assets representing the fund or funds of the insurer maintained by the insurer in respect of its long term business and those assets representing the fund or funds maintained in respect of its general business. Accordingly, the long-term business assets are to be applied firstly in discharge of certain preferential liabilities (broadly preferential debts and insurance debts) attributable to the long-term business of the insurer, and the general business assets are to be applied in discharge of the same type of preferential liabilities but attributable to the general business. However, any excess in the assets attributable to the long-term business of a composite insurer once all of such preferential liabilities attributable to the long-term business have been met must be applied to meet any shortfall in assets of the general business and vice versa should the excess be in the general business fund and the shortfall in the long-term fund (paragraphs (3) to (8) of regulation 22). The order of priority specified in regulation 21 in relation to long term and general insurers is to be applied in the winding up of the separate types (i.e., general and long-term business) of a composite insurer's business (regulations 23 and 24).

5.16 An insurer carrying on long-term business is required under INSPRU to maintain a separate account in respect of the assets and liabilities attributable to its long-term business. Furthermore, pursuant to INSPRU and the FCA and the PRA's General Prudential Sourcebook, the long-term business assets must (subject to a few exceptions) not be applied other than for the purposes of its long-term business. Creditors who are not creditors of the long-term business do not have access to these assets unless and to the extent there is a surplus of assets in the fund.

General

5.17 The term "enforceable" as used in this opinion means that each obligation or document is of a type and form enforced by the English courts. The term does not address the extent to which a judgment obtained in a court outside England will be enforceable in England. Nor does it mean that each obligation will be enforced in accordance with its terms. Certain rights and obligations may be qualified by the nature of the remedies available in the English courts, the acceptance by such courts of jurisdiction, the power of such courts to stay proceedings, the provisions of the Limitation Act 1980, doctrines of good faith and fair conduct and laws based on those doctrines and other principles of law and equity of general application. In particular, the power of an English court to grant an equitable remedy such as an injunction or specific performance is discretionary, and accordingly an English court might make an award of damages where an equitable remedy is sought.

5.18 Liquidation, and, where an administrator is authorised to make a distribution, administration procedures under the Insolvency Rules 1986 are conducted in Sterling. Rule 2.86 and Rule 4.91 of the Insolvency Rules 1986 and Rule 166 of the Investment Bank Special Administration (England and Wales) Rules 2011 provide that, for the purposes of Insolvency Set-Off, a debt incurred in a currency other than sterling shall be converted into Sterling at the "official exchange-rate" (which is based on the market rate on the date the court makes the winding-up order, or the company concerned resolves to go into liquidation or enters administration). Therefore, the provisions in the Agreements, Netted Agreement, Principal Agreement, Uncovered Transaction and/or any transaction for the time and rate of conversion of one currency into another may, in the administration or liquidation of a Party under the laws of this jurisdiction, be superseded by a conversion, or conversions, at the time and rate specified by the administrator or liquidator, as set out above. Notwithstanding this, if the Agreements, Netted Agreement, Principal Agreement, Uncovered Transaction and/or transaction constitute a *financial collateral arrangement* or an *arrangement* of which a *financial collateral arrangement* forms part, Rule 2.86 and Rule 4.91 of the Insolvency Rules 1986 are disapplied in respect of that agreement unless the arrangement provides for an unreasonable exchange rate or the collateral-taker uses the mechanism provided under the arrangement to impose an unreasonable exchange rate.

5.19 Any provision of the CPMA, MNA, Netted Agreement, Principal Agreement, Uncovered Transaction and/or a transaction stating that a failure or delay on the part of any Party in exercising any right or remedy under the relevant CPMA, MNA, Netted Agreement, Principal Agreement, Uncovered Transaction and/or transaction shall not operate as a waiver of such right or remedy may not be effective.

Pending developments

5.20 The EU Bank Recovery and Resolution Directive (**BRRD**) has introduced a Europe-wide regime for the resolution of financial firms across borders within the European Union, the national implementation deadline for which is 1 January 2015. The BRRD contains provisions which empower resolution authorities to determine the value of liabilities following the close-out of derivatives subject to a netting arrangement on a net basis. The European Banking Authority, in consultation with the European Supervisory Authority (European Securities and Markets Authority), are required under the BRRD to submit to the European Commission draft regulatory technical standards specifying methodologies and the applicable principles on the valuation of liabilities arising on derivatives by 3 January 2016.

5.21 In the UK, the process for the transposition of the BRRD raises in particular the issue of how the UK's existing regime for the resolution and recovery of banks and investment firms ought to be amended to ensure compliance with the BRRD. HM Treasury, the PRA and the FCA are currently consulting on the implementation of the BRRD and intend to publish final versions of the legislation and regulations transposing the BRRD by 31 December 2014 (which is expected to include amendments to FSMA, the Banking Act, the Insolvency Act 1986 and the Insolvent Partnerships Order 1994).

Yours faithfully

Norton Rose Fulbright LLP

Norton Rose Fulbright LLP

Schedule 1
The Agreements

1. EFET Master Netting Agreement (Version 1.0, published June 2010)
2. EFET Master Netting Agreement Guidance Notes (Version 1.0, published 1 June 2010)
3. EFET CPMA Cross-Product Master Agreement published by The Bond Market Association (TBMA) (Version 1.0, published 16 February 2000)
4. EFET/IECA Commodities Schedule to the CPMA Cross-Product Master Agreement (Version 1.0, published 23 June 2003)
5. EFET Cross-Product Credit Support Annex to the CPMA Cross-Product Master Agreement (Version 1.0, published 23 June 2003)
6. EFET Cross-Product Credit Support Annex to the Master Netting Agreement (Version 1.0, published 1 February 2011)
7. EFET Cross Product Payment Netting Agreement (Version 1, published 20 October 2005)

Schedule 2
Counterparties that are entities other than companies

Our opinion is also given in respect of parties which are partnerships, municipalities or counties, associations of local government and quasi-governmental entities, and, in those cases, should be regarded as modified in light of, and to the extent required by, the considerations detailed in this schedule.

1 Partnerships and LLPs

1.1 For the purposes of our opinion, a reference to a "partnership" has the meaning given it in Section 1 of the Partnership Act 1890 and Section 4 of the Limited Partnerships Act 1907; and which is organised, established or formed under the laws of England.

1.2 A reference to a "limited liability partnership" or "LLP" is to a limited liability partnership within the meaning of Section 1 of the Limited Liability Partnerships Act 2000 which is registered under the laws of this jurisdiction.

Additional assumption

1.3 In relation to partnerships and LLPs, we have additionally assumed that where the Agreements, Netted Agreement, Principal Agreement, or Uncovered Transaction are entered into with a partnership, during the life of any transaction, the members of the partnership will remain unchanged.

In relation to this assumption, where there is a change in partnership, incoming partners may have no liability for the acts of their predecessor partner(s) unless they expressly undertake such liability. Section 17 of the Partnership Act 1890 provides that an incoming partner does not become liable to the creditors of the partnership for anything done before he became a partner. Under English law the introduction of a new partner will constitute a new partnership. Accordingly, it might be argued (a) that the relevant Agreement, Netted Agreement, Principal Agreement and / or Uncovered Transaction is not binding on the incoming partner(s), or (b) that transactions entered into by the former partners are not binding on incoming partner(s), with the consequence that not all obligations are subject to the Agreement, Netted Agreement, Principal Agreement, Uncovered Transaction or not all obligations are mutual, so that the relevant provisions of the §§3, 7 and 8 of the MNA and Sections 2, 3 and 4 of the CPMA (as applicable) would be ineffective to achieve (a) aggregation of values attributable to Netted Agreements, Principal Agreements, Uncovered Transactions or transactions entered into after the change in partners; or (b) aggregation of values attributable to Netted Agreements, Principal Agreements, Uncovered Transaction or transactions entered into before the change in partners against values attributable to Netted Agreements, Principal Agreements, Uncovered Transactions or transactions entered into after such change.

Additional opinion

1.4 Our opinion as to the enforceability of close-out netting under the MNA and CPMA would by reason only of one or more of the Parties to the Agreements or any Netted Agreement, Principal Agreement or Uncovered Transaction and transactions entered into thereunder being a partnership or LLP that is, or becomes, subject to Insolvency Proceedings.

1.5 The following additional legislation applies to partnerships and LLPs in insolvency:

(a) in relation to partnerships, the Insolvent Partnerships Order 1994;

(b) in respect of limited liability partnerships, Parts I, II of the Limited Liability Partnerships Regulations 2001;

1.6 The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which an LLP or partnership could be subject under the laws of this jurisdiction, and which are relevant for the purposes of the opinion, are as follows:

(a) Under the Insolvent Partnerships Order 1994, partnerships are subject to the following:

(i) Voluntary Arrangements:

(A) for insolvent partnerships (Article 4); and

(B) for members of insolvent partnerships (Article 5).

(ii) Administration (Article 6).

(iii) Winding up of an insolvent partnership as an unregistered company on petition of a creditor where there are:

(A) no concurrent petition(s) against partner(s) (Article 7); and

(B) concurrent petition(s) presented against one or more partner(s) (Article 8).

(iv) Winding up of an insolvent partnership as an unregistered company on petition of a partner where there are:

(A) no concurrent petition(s) presented against partner(s) (Article 9); and

(B) concurrent petition(s) presented against all partner(s) (Article 10).

(v) Bankruptcy by joint petition of partners without winding-up of partnership (Article 11).

(b) Under the Limited Liability Partnerships Regulations 2001, LLPs are subject to liquidation (including provisional liquidation), administration, administrative receivership, receivership, moratorium, voluntary arrangements and schemes of arrangement.

(c) Subject to section 426 of the Insolvency Act 1986:

(i) Where a partnership is established in an EEA member state, or has COMI in an EU member state (other than Denmark), the Insolvency Regulation curtails an English court's jurisdiction to implement Insolvency Proceedings. Where an LLP or partnership is established or registered in this jurisdiction, an English court may only implement certain Insolvency Proceedings governed by English law in relation to the assets situated (or deemed under the Insolvency Regulation to be situated) in this jurisdiction.

(ii) Where a partnership is an investment firm which provides services involving the holding or funds or securities for third parties or a collective investment scheme, and its COMI is in an EU member state (other than Denmark), the Insolvency Regulation will not apply. In such a case the Insolvency Regulation will not curtail the jurisdiction of the English courts.

Additional qualifications

1.7 It is not permissible to set off non-mutual debts or obligations under Rule 4.90 (in the case of liquidation), Rule 2.85 (in the case of administration), or Section 323 of the Insolvency Act 1986 (in the case of bankruptcy) (**Section 323**) or, in relation to a UK bank, Rule 72 or, in relation to a UK investment bank, Rule 164. A debt owed by a partner personally cannot, therefore, be set-off under an Insolvency Set-Off rule or Section 323 against a debt owed by the creditors of the partnership. Under the insolvency laws of this jurisdiction, the Insolvency Set-off rules and Section 323 are of mandatory application and will thus override any contractual provision to the extent that such provision is inconsistent with them. Debts owed by or to individual partners cannot be set-off against joint debts owed to or by the partnership because of absence of mutuality. Where mutuality exists, for example where there is a jointly owed claim against the partnership and jointly owed counterclaim by the partnership against the person claiming the debt, set-off may occur.

1.8 In a bankruptcy under Article 11 of the Insolvent Partnerships Order 1994, any dispositions of the insolvent Party's property made after the day of presentation of a bankruptcy petition in respect of such Party are void under Section 284 of the Insolvency Act 1986 unless the court otherwise orders.

1.9 There are provisions in the legislation applicable to LLPs for voluntary arrangements to be agreed by creditors of the LLP. A creditor can be bound by a voluntary arrangement even if he has not been given notice of the creditors' meeting to approve the arrangement. Approval at the creditors' meeting of its terms does not require unanimity of the affected creditors, whether or not present at the meeting.

1.10 Article 4(1) of the Insolvent Partnerships Order 1994 applies the provisions of Part I of, and Schedule A1 to, the Insolvency Act 1986 which govern company voluntary arrangements, with appropriate modifications, to insolvent partnerships so that an insolvent partnership is entitled to propose a partnership voluntary arrangement. Both corporate and individual members of a partnership may enter into voluntary arrangements. The courts may not sanction a partnership voluntary arrangement unless every creditor of the partnership of whose claim and address the person summoning the meeting is aware is invited to the meeting. The partnership voluntary arrangement binds every person who in accordance with the rules had notice of, and was entitled to vote at, the meeting. Approval at the creditors' meeting of its terms does not require unanimity of the affected creditors, whether or not present at the meeting. Furthermore, as a partnership may be wound up as an unregistered company, it may be possible for the court to sanction a scheme of arrangement in respect of its creditors or some of them. The court would not sanction a scheme of arrangement unless reasonable efforts were made to notify the creditors whose rights would be affected by the scheme of the meeting to approve that scheme.

1.11 Such arrangements could affect both set-off rights of creditors and the value of claims which the creditors may have against the insolvent Party. If the Liquidation Date has occurred before the approval of such an arrangement, any provision of such an arrangement which purports to unwind the application of the netting provisions would not bind the affected creditor if timely objection to the arrangement is made to the applicable court. An arrangement could, however, affect the value of any resulting net claim.

1.12 Insolvency proceedings in relation to an English partnership may only be opened in the EU Member State in which the partnership has its COMI when the proceedings are opened. Preamble 13 to the Insolvency Regulation provides that the COMI "should correspond to the place where the debtor conducts the administration of his interests on a regular basis". Therefore, in relation to a limited partnership, the place from which the general partner conducts the business of the limited partnership is likely to be significant in determining its COMI.

2 Municipalities or counties, associations of local government and quasi-governmental entities

2.1 Since there is no insolvency regime in England which is specific to these entities, we consider them together.

Additional opinion

2.2 Our opinion as to the enforceability of close-out netting under the MNA and CPMA would not change by reason only of one or more of the Parties to the Agreements or any Netted Agreement, Principal Agreement or Uncovered Transaction and transactions entered into thereunder being a municipality or county, an association of local government or a quasi-governmental entity that is, or becomes, subject to Insolvency Proceedings.

2.3 In our view, any of these entities may be wound up as an "unregistered company" under Section 221 of the Insolvency Act 1986. Section 221(1) provides that "all of the provisions of this Act about winding up apply to an unregistered company with the exceptions and additions mentioned in the following subsections". Section 221(4) provides that "[n]o unregistered company shall be wound up under this Act voluntarily, except in accordance with the EC Regulation". "EC Regulation" means the Insolvency

Regulation. Under the EC Insolvency Regulation a company incorporated in an EU member state with its COMI in England may be wound up in England under a creditors' voluntary winding up.

2.4 Insofar as these entities are engaged in governmental and administrative matters within the UK, it is likely that they will invariably have their COMI in England for purposes of the Insolvency Regulation. As England is part of the UK, which is an EU member state, any of these entities may be wound up voluntarily in England. If not wound up voluntarily, they will be wound up by the court (compulsory winding up). Whether the winding up of a Statutory Corporation is conducted on a voluntary or compulsory basis, the provisions of the Insolvency Rules 1986 relevant to a winding up will apply to the winding up of, including the insolvency set-off provision in Rule 4.90.

2.5 None of these entities may be made subject to a company voluntary arrangement or to administration proceedings under the Insolvency Act 1986 since those regimes are limited to English companies and certain foreign companies.

2.6 It appears likely, however, that these entities may be made subject to a scheme of arrangement under Part 26 of the Companies Act 2006 (sections 895 to 901). "Company" for purposes of Part 26 is defined in Section 895 of the Companies Act 2006 to include "any company liable to be wound up under the Insolvency Act 1986". In our view, this would include an unregistered company liable to be wound up under Section 221 of the Insolvency Act 1986. This view is supported by an analysis of the whole definition of "company" in Section 895:

> ""company" –
>
> (a) in section 900 (powers of court to facilitate reconstruction or amalgamation) means a company within the meaning of this Act, and
>
> (b) elsewhere in this Part means any company liable to be wound up under the Insolvency Act 1986 (c 45) or the Insolvency Northern Ireland Order 1989 (SI 1989/2405 (NI 19))."

2.7 Clause (a) includes all companies registered under the Companies Act 2006. If Part 26 were limited to such companies, then there would be no need for clause (b). That taken with the argument that an unregistered company is liable to be wound up under the Insolvency Act 1986, as noted above, is in our view sufficient to bring the entities under consideration within the scope of Part 26.

2.8 The fact that the English court still has discretion under Section 221 of the Insolvency Act 1986 to decide whether it has the power to assume jurisdiction and, where it does have the power, the discretion whether or not to exercise it in relation to an unregistered company does not, in our view, mean a Chartered Corporation is not "liable" to be wound up under the Insolvency Act 1986.

Additional qualifications

2.9 The court would not sanction a scheme of arrangement in relation to any of the entities under consideration unless reasonable efforts were made to notify the creditors whose rights would be affected by the scheme of the meeting to approve that scheme. Such arrangements could affect both set-off rights of creditors and the value of claims which the creditors may have against the insolvent Party. If the Liquidation Date has occurred before the approval of such an arrangement, any provision of such an arrangement which purports to unwind the application of the netting provisions would not bind the affected creditor if timely objection to the arrangement is made to the applicable court. An arrangement could, however, affect the value of any resulting net claim.

2.10 Any provision of the Agreements, Netted Agreement, Principal Agreement, Uncovered Transaction and/or transaction which constitutes, or purports to constitute, a restriction on the exercise of any statutory power by any Party or any other person may be ineffective.

Annex 1

Instruction Letter

EFET European Federation of Energy Traders

Mr. Nigel Dickinson
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United Kingdom

2 September 2014, Brussels

Instruction Letter : EFET CPMA/MNA Legal Opinion

Legal Opinion Regarding the Enforceability of Close-Out Netting and the Validity and Enforceability of Collateral Arrangements under the EFET Master Netting Agreement and the TBMA Cross Product Master Agreement under English Law

Dear Nigel,

We are seeking opinions from various jurisdictions on the enforceability of close-out netting provisions of the EFET Master Netting Agreement and the TBMA Cross Product Master Agreement. As far as the latter is concerned, we are also interested in the validity and enforceability of collateral provided under the EFET Cross Product Credit Support Annex to the TBMA Cross Product Master Agreement.

This process is in line with Directive 2006/48/EC of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (the "**Banking Directive**") and Directive 2006/49/EC on the capital adequacy of investment firms and credit institutions (the "**Capital Adequacy Directive**"), which, through implementation in all Member States of the European Union, apply to those of our members that are credit institutions or investment firms. Article 78(2) and Annex III, Part 7 of said Banking Directive require institutions to make available to the competent authorities written and reasoned legal opinions to the effect that, in the event of a legal challenge, the relevant courts and administrative authorities would uphold the netting agreement used by the institution ("**Enforceability of Close-out Netting**"). The Banking Directive specifically requires the opinions to address *the validity and enforceability of the cross-product netting agreement under its terms and* its impact on the material provisions of any included individual master agreement. In the case of a party which has entered into transactions under an EFET General Agreement as a multibranch party, i.e., where it operates for the purposes of the EFET General Agreement with two or more branches and in two or more jurisdictions ("**Multibranch Parties**"), it is necessary to obtain opinions on the enforceability of close-out netting from each jurisdiction where such a designated branch of that party is located. EFET has decided to commission such opinions and update them regularly. Additionally, EFET members which are not credit institutions or otherwise expressly subject to the Banking Directive and Capital Adequacy Directive require the advice provided in these jurisdiction opinions for reasons of maintaining sound and legally optimal commercial contracting practices.

In addition to the traditional netting opinion scope covering the enforceability of close-out netting in relevant jurisdictions, EFET is also interested in your opinions and recommendations addressing (i) the enforceability of rights in collateral provided under the EFET Cross Product Credit Support Annex to the TBMA Cross Product Master Agreement ("**Collateral**"), (ii) the validity and enforceability of other provisions of the EFET Master Netting Agreement and the TBMA Cross Product Master Agreement ("**General Enforceability**"), (iii) in general terms the conditions that have to be met for a transaction concluded under a Netted Agreement or Principal Agreement to fall within the scope of the netting provisions of the relevant EFET Master Netting Agreement or TBMA Cross Product Master Agreement and for a confirmation or other non-written documentation to be eligible for evidencing a legally binding transaction ("**Confirmation Practices**"), (iv) the validity and enforceability of the EFET Master Netting Agreement and the TBMA Cross Product Master Agreement and how this may be affected when certain provisions are modified by the parties ("**Core Provisions**"), and (v) the enforceability of the elections made with respect to governing law, arbitration and jurisdiction, especially if a foreign law has been chosen ("**Governing Law, Arbitration and Jurisdiction**").

We request that you provide us with a fixed quote for your fees and expenses for rendering a legal opinion in accordance with the specific content and form set forth in this letter. We will then decide as soon as possible whether to contact you again to request that you proceed. The detailed requirements for the opinion are as follows:

A. Documents to be Considered:

- EFET Master Netting Agreement (Version 1.0, published June 2010) (Enclosure 1)[1],
- EFET Master Netting Agreement Guidance Notes (Version 1.0, published 1 June 2010) (Enclosure 2),
- EFET CPMA Cross-Product Master Agreement published by The Bond Market Association (TBMA)[2] (Version 1.0, published 16 February 2000) (Enclosure 3)[3],

[1] The EFET Master Netting Agreement constitutes a bilateral cross-product netting agreement governing all transactions the Parties may enter into under certain master agreements (each a "Netted Agreement") falling within the scope of the Master Netting Agreement. The EFET Master Netting Agreement provides that the Master Netting Agreement, all Netted Agreements and all transactions entered into thereunder form a single agreement (§ 2.3 of the EFET Master Netting Agreement). Upon the occurrence of a Close-Out Event in respect of a Party, including a winding-up, insolvency or attachment, the other Party shall be entitled to terminate all transactions under all of its Netted Agreements (§ 4.1 of the EFET Master Netting Agreement). Settlement Amounts are determined for the terminated Netted Agreement (each a "Closed-Out Agreement") in accordance with their terms (§ 7.1 of the EFET Master Netting Agreement) and, to the extent necessary, converted into the Base Currency. If on the Early Termination Date both Parties owe one or more Settlement Amounts under two or more Closed-Out Agreements, such Settlement Amounts are aggregated and netted-off and only the difference, if any, between the two offsetting aggregate amounts (the "Final Net Settlement Amount") shall be owed by the Party with the larger aggregate obligation (§ 8.1 of the EFET Master Netting Agreement).

- EFET/IECA Commodities Schedule to the CPMA Cross-Product Master Agreement (Version 1.0, published 23 June 2003) (Enclosure 4),
- EFET Cross-Product Credit Support Annex to the CPMA Cross-Product Master agreement (Version 1.0, published 23 June 2003) (Enclosure 5)[4],
- EFET Cross-Product Credit Support Annex to the Master Netting Agreement (Version 1.0, published 1 February 2011) (Enclosure 6),
- EFET Cross Product Payment Netting Agreement (Version 1, published 20 October
2005) (Enclosure 7).

Copies of current versions of each of the Enclosures are also available on the EFET website: **www.efet.org/standardisation**. Please always verify on new versions upon instruction.

B. General Assumptions

- Two counterparties enter into the EFET Master Netting Agreement or the TBMA Cross Product Master Agreement and at least one of the counterparties is incorporated or organized or has its centre of main interest in England ("**Party A**").

- Party A is a corporation, financial institution or other entity as further described in Appendix A.

- The relevant EFET Master Netting Agreement or TBMA Cross Product Master Agreement is governed by the laws of England[5].

- Each EFET Master Netting Agreement or TBMA Cross Product Master Agreement and (in case of the TBMA Cross Product Master Agreement) the EFET Cross-Product

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[2] In 2006 The Bond Market Association (TBMA) and the Securities Industry Association (SIA) merged to form the new Securities Industry and Financial Markets Association (SIFMA).

[3] The Cross-Product Master Agreement constitutes a bilateral cross-product netting agreement governing all transactions the Parties may enter into under certain master agreements (each a "Principal Agreement") falling within the scope of the Cross-Product Master Agreement. If so selected by the Parties in Section 10.6 of the EFET/IECA Commodities Schedule, the Cross- Product Master Agreement provides that it forms together with all Principal Agreements and all transactions entered into thereunder a single agreement. Upon the occurrence of a Close-Out Event in respect of a Party, including a winding-up, insolvency or attachment, the other Party shall be entitled to terminate all of its Principal Agreements (Section 2.1 of the Cross- Product Master Agreement). Settlement Amounts are determined for the terminated Principal Agreement (each a "Closed-Out Agreement") in accordance with their terms (Section 3.1 of the Cross-Product Master Agreement) and, to the extent necessary, converted into the Base Currency. If after termination both Parties owe one or more Settlement Amounts under two or more Closed-Out Agreements, such Settlement Amounts are aggregated and netted-off and only the difference, if any, between the two offsetting aggregate amounts (the "Final Net Settlement Amount") shall be owed by the Party with the larger aggregate obligation (Section 4 of the Cross-Product Master Agreement).

[4] The EFET Cross-Product Credit Support Annex supplements the Cross Product Master Agreement. It provides for the transfer of full ownership in the collateral to the Transferee who acquires the right of complete and unrestricted use of the collateral (§ 7 of the EFET Cross-Product Credit Support Annex). Upon termination of the Cross Product Master Agreement, *any collateral provided but not yet re-transferred by the Parties is to be valued and included in the Final Net Settlement* Amount to be determined pursuant to Section 4 of the Cross Product Master Agreement (§ 11 of the EFET Cross-Product Credit Support Annex). One special feature of the EFET Cross-Product Credit Support Annex is the inclusion of Letter of Credits.

[5] Please note that, with respect to Part C.I.1 (Close-out Netting), Part C.II (Multibranch) and Part C.VII (Governing Law) the assumption is broader in order to also cover General Agreements governed by foreign law.

Credit Support Annex) is enforceable under the laws of any jurisdiction (other than the laws of England) and each counterparty has duly authorized, executed and delivered, and has the capacity to enter into, each document.

- The relevant EFET Master Netting Agreement or TBMA Cross Product Master Agreement provides for the inclusion of some or all of the master agreements described in Appendix B, each such master agreement being a Netted Agreement or Principal Agreement.

- On the basis of the terms and conditions of the EFET Master Netting Agreement or TBMA Cross Product Master Agreement and other relevant factors, and acting in a manner consistent with the intentions stated in the EFET Master Netting Agreement or TBMA Cross Product Master Agreement, the counterparties over time enter into a number of transactions which include some or all of the transactions described in Appendix C.

- 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.

You will find additional assumptions below.

C. Issues and Additional Assumptions

I. *Enforceability of Close-out Netting*

We would like you to distinguish between (1) a termination and close-out based on an event that constitutes a Winding-up, Insolvency or Attachment (as defined in § 3.1(C)(iii) of the EFET Master Netting Agreement) or a similar insolvency related Close-Out Event and (2) other non-insolvency related Close-Out Events.

1. Winding-up, Insolvency or Attachment

General Overview (including Set-Off):

Please provide a short overview of the relevant insolvency proceedings, laws and terminology applicable to Party A and the contract types listed in Appendix C. Please discuss and advise on whether the contract types listed in Appendix C are governed by different rules and whether these rules would result in a splitting-up or segregation of the portfolios of transactions under the relevant Netted Agreements or Principal Agreements into multiple "netting pools" of disparate treatment or whether these rules would otherwise limit or render wholly or partially unenforceable the early termination and close-out netting rights provided for in the EFET Master Netting Agreement or TBMA Cross Product Master Agreement.
When rendering your opinion, please also advise on whether and how has 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) been reflected/implemented in the legislation of England, in particular the financial/capital markets and insolvency laws, or other laws relevant for purposes of rendering the present legal opinion. Please advise whether EMIR or relevant national legislation impact, or alter the legal qualification of any transactions under Netted Agreements or Principal Agreements as listed in Appendix C below.

When rendering your opinion on the enforceability of close-out netting in the context of an insolvency proceeding, you should discuss whether the termination of the Netted Agreements or Principal Agreements or the transactions entered into thereunder, the calculation of the Settlements Amounts, the aggregation and offsetting of such Settlement Amounts and the determination of the Final Net Settlement Amount and/or its payment is voidable, challengeable or in any way capable of being invalidated, deleted, frozen, stayed or otherwise retroactively impacted by a liquidator, receiver, other third party or the court. In particular, please clarify whether or not there is a distinction in time with respect to a creditor's rights between: (a) the filing of proceedings seeking a judgment of insolvency; (b) a bankruptcy court recognizing the filing of proceedings seeking a judgment of insolvency; (c) the date on which a bankruptcy court determines a party first becomes insolvent; and (d) any other stage of the proceedings where a creditor's rights may be affected. We are also interested in whether the insolvency law provides for a "safe harbor" for certain derivatives or other categories of transactions and whether the contract types listed in Appendix C would benefit from such provision(s). We would also like to know whether there is publicly available information that would confirm any of the procedural steps mentioned above under (a) through (d) or other solvency related facts (e.g., financial statements, corporate actions, etc.). Do the laws of your jurisdiction consider early termination, set-off and close-out netting as legally distinct and separate rights, similar or related rights or do they make no such distinctions between them?

Please base your opinion on the following additional assumptions:

- The relevant EFET Master Netting Agreement or TBMA Cross Product Master Agreement is governed by any law (including English, German or New York law or the laws of England).

- 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 England 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.

Please discuss and advise on the following issues:

a) Assuming the Parties have <u>not</u> specified that Automatic Termination (as defined in § 6.3 of the EFET Master Netting Agreement or Part II.B of the EFET/IECA Commodities Schedule to the Cross-Product Master Agreement) applies, are the provisions of the EFET Master Netting Agreement or TBMA Cross Product Master Agreement permitting the other Party (the "Terminating Party" or "Closing-Out

Party") to terminate the Netted Agreements or Principal Agreements including all transactions upon the occurrence of a Close-Out Event enforceable under the laws of England or is there a risk that (i) the entering into the EFET Master Netting Agreement or TBMA Cross Product Master Agreement, (ii) the entering into Netted Agreements or Principal Agreements or transactions thereunder or (iii) the early termination by notice described in § 5.1 of the EFET Master Netting Agreement or Section 2.2 of the Cross-Product Master Agreement itself could be challenged by a liquidator, administrator, receiver or third party?

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

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 EFET Master Netting Agreement) 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.

d) Are the provisions in § 8 of the EFET Master Netting Agreement and Section 4 of the Cross-Product Master Agreement providing for the offsetting of all positive and negative Settlement Amounts in determining the Final Net Settlement Amount enforceable under the laws of England or is there a risk that such determination could be challenged by a liquidator, administrator, receiver or third party?

e) Do the laws of England recognize that the Close-Out applies to all transactions? Would we need the single agreement concept (as provided for in § 2.3 of the EFET Master Netting Agreement and, if so selected in Section 10.6 of the EFET/IECA Commodities Schedule, in the Cross-Product Master Agreement) 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 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 or Principal 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 the General Agreement following a previous Partial Close-Out.

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 England or could the calculation or demand of such amount in a foreign currency be challenged by a liquidator, administrator, receiver or third party?

g) Please specify, if and as applicable, the degree to which termination and close-out rights in insolvency in your jurisdiction are dependent upon, or otherwise effected by, the status of one or more of the concerned parties falling within a particular category of classification of entity. Specifically, do these rights differ as the result of a party being a financial institution, ordinary corporate entity or any other categorization or regulatory or legal status?

2. Non-insolvency related Material Reasons

Please discuss and advise on the issues outlined above under d), e) and f) in the context of non-insolvency related Material Reasons, as well as the following question:

h) Are the rights of the Terminating Party or Closing-Out Party to terminate and Close-Out the Netted Agreements or Principal Agreements including all transactions enforceable in accordance with the terms of the EFET Master Netting Agreement or TBMA Cross Product Master Agreement, irrespective of the insolvency of Party A?

II. Multibranch Parties

We would like you to distinguish between (1) a Multibranch Party incorporated, organized or having its centre of main interest in England and (2) a Multibranch Party incorporated, organized or having its centre of main interest <u>outside</u> England, but operating through one or more branches in England.

1. English Multibranch Party

Please base your opinion on the assumptions outlined under Part C.I and the following additional assumptions:

- Party A has entered into transactions under Netted Agreements or Principal Agreements through offices in England 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 England.

Please discuss and advise on the following issues:

i) Would there be any change in your conclusions reached under C.I.1 or C.I.2 above based upon the fact that Party A has conducted business under some or all of the Netted Agreements or Principal Agreements on a multibranch basis prior to its insolvency?

j) Would the EFET Master Netting Agreement and, if so selected in Section 10.6 of the EFET/IECA Commodities Schedule, the Cross-Product Master Agreement be treated as a single unified agreement by the English receiver under the laws of England, regardless of the treatment of the EFET Master Netting Agreement or Cross-Product Master Agreement or transactions thereunder by an insolvency official in a country where close-out netting may be unenforceable?

2. Foreign Multibranch Party

Please base your opinion 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 ("**Country H**") other than England has entered under some or all Netted Agreements or Principal 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 England (the "**English 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.

Please discuss and advise on the following issues:

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

l) If there were separate proceedings in England with respect to the assets and liabilities of the English Branch, would the receiver or liquidator in England and the English courts, based on the facts above, include Party F´s position under the Netted Agreements or Principal Agreements, in whole or in part, among the assets of England and, if so, would the receiver or liquidator and the English courts recognize the close-out netting provisions of the EFET Master Netting Agreement or Cross-Product Master Agreement in accordance with their terms? The most significant problem arising would be if a English receiver, liquidator or court considering a single EFET Master Netting Agreement or Cross-Product Master Agreement were to require a counterparty of the English Branch of Party F to pay the mark-to-market value of transactions entered into with the English Branch to the liquidator or receiver of the English 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 EFET Master Netting Agreement or Cross-Product Master Agreement. In considering this issue, please assume that close-out netting under the EFET Master Netting Agreement or Cross-Product Master Agreement would be enforced in accordance with its terms in the proceedings for Party F in Country H.

m) Please consider your answer to your question assuming instead that Party F has no branch located in England, but has assets in England.

III. Collateral

Please base your opinion on the following additional assumptions:

- Although it is a bilateral form in that it contemplates that each party may be required to post collateral to the other, we assume that (i) Party A is at all times Transferor under the EFET Cross Product Credit Support Annex and (ii) that the collateral is owned by Party A or that Party A is authorized and empowered to transfer ownership in the collateral.

- The counterparties agree that Eligible Credit Support will include cash and Letters of Credit. Cash is denominated in a freely convertible currency and is held in an account under the control of Party B maintained in the jurisdiction of the relevant currency.

Please discuss and advise on the following issues:

n) Under the laws of England, what law governs the transfer of ownership in the various forms of Eligible Credit Support deliverable under the EFET Cross Product Credit Support Annex?

o) Would the laws of England 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?

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 England 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?

q) What is the effect, if any, under the laws of England of the right to substitute collateral pursuant to § 6 of the EFET Cross Product Credit Support Annex? Does the presence or absence of consent to substitution by Party B have any bearing on this 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 Cross-Product Master Agreement together with §11 of the EFET Cross Product Credit Support Annex. Assuming that Section 4 of the Cross-Product Master Agreement is valid and enforceable in England insofar as it relates to the determination of a Final Net Settlement Amount payable by either Party on the termination of transactions, is § 11 of the EFET Cross Product Credit Support Annex also valid to the extent that it provides for the value of the collateral provided and not yet transferred to be included in the calculation of the Final Net Settlement Amount under Section 4 of the Cross-Product Master Agreement?

s) Are the rights of Party B enforceable in accordance with the terms of the Cross-Product Master Agreement and the EFET Cross Product Credit Support Annex, irrespective of the insolvency of Party A?

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 EFET Cross Product Credit Support Annex 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?

u) Is the EFET Cross Product Credit Support Annex 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 England in order to ensure validity of such transfer in each type of Eligible Credit Support created by Party A under the EFET Cross Product Credit Support Annex? For example, are there any other requirements such as those mentioned under o) above?

v) Do you have other specific recommendations on the subject of collateral that you would like the EFET members to consider?

IV. General Enforceability

Please discuss and advise on the following issues:

w) Are the EFET Master Netting Agreement and the Cross-Product Master Agreement and the EFET Cross-Product Credit Support Annex enforceable under the laws of England in accordance with its own terms? We are especially interested in provisions that you may believe infringe upon the *ordre public* in England and that may be challenged by the courts in England irrespective of the law that governs the Agreement.

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

V. Confirmation Practices

We would like you to distinguish between (1) the formal requirements and procedure in the formation of a legally binding and enforceable transaction and its inclusion in the Netted Agreement or Principal Agreement and the related EFET Master Netting Agreement or the Cross-Product Master Agreement and (2) the formal requirements a Confirmation should comply with under the procedural laws of England in order to be sufficient for all purposes to evidence a binding transaction and its inclusion in the agreements mentioned under (1). When doing so, please base your opinion on the following additional assumptions:

- As far as the confirmation practice is concerned, when entering into an transaction, the counterparties in each case (i) make oral reference to a Netted Agreement or Principal Agreement when concluding the relevant transaction over the phone or (ii) refer to a Netted Agreement or Principal 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).

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

1. Binding transaction

Please discuss and advise on the following issues:

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

z) At what point in time does an transaction agreed upon orally become legally binding or enforceable?

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?

bb) Is the reference to a Netted Agreement or Principal Agreement sufficient for the inclusion of the transaction in the Agreement?

2. Means of Evidence

Please discuss and advise on the following issues:

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) facsimile? Are there any local requirements or other considerations that are relevant to each form of evidence?

VI. Core Provisions

Please base your opinion on the additional assumptions outlined under Part C.I.1 and C.II and discuss the following issues:

dd) Would any of the elections contemplated by the EFET Master Netting Agreement or the Cross-Product Master Agreement or the EFET Cross-Product Credit Support Annex change the substance of your conclusions reached under Part C.I or C.II. (Enforceability of Close-out Netting)? As far as the EFET Cross-Product Credit Support Annex is concerned, you should in particular discuss the effect of electing to allow substitution with or without consent.

ee) Considering your conclusions reached under Part C.I or C.II. (Enforceability of Close-out Netting), what are the provisions of the EFET Master Netting Agreement or the Cross-Product Master Agreement that you regard as so essential that a material alteration thereof could affect the conclusions reached in that Part C.I or C.II (each such provision a "**Core Provision**")? We believe that the following provisions are Core Provisions: [ ].

VII. Governing Law, Arbitration and Jurisdiction

Please base your opinion on the following additional assumptions:

- The relevant EFET General Agreement is governed by the laws of a jurisdiction other than England (including English, German or New York law).

Please discuss and advise on the following issues:

ff) Would the Parties' agreement on the governing law, submission to arbitration or jurisdiction (§ 12 of the EFET Master Netting Agreement and Section 6 of the Cross-Product Master Agreement) be upheld in England, and what would be the consequence if it were not?

VIII. Other Provisions

gg) If you have other recommendations that you would like EFET member companies to consider (for example to fully optimize the General 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.

D. Addressees, Form and Tenor, Executive Summary and Other Issues

The opinion should be addressed to EFET and should provide that it: (i) is for the sole benefit of EFET and its Legal Committee members and any other subscribing entities; (ii) may not be relied upon by, or disclosed to, any other person or legal entity without EFET's or your prior written approval; but (iii) may be made available by EFET members to the appropriate regulatory authorities.

The opinion should discuss the issues outlined in Part C in substantially the same order as shown in this instruction letter. We expect a short introductory statement indicating a positive or negative answer, followed by an elaborated and reasoned discussion of the relevant legal aspects upon which your statement is based. We recognize that legal certainty or precedent is often lacking. However, we would like you to render a final conclusion even if it is based upon more generic concepts of laws or only reflects the "better view" or "more likely approach" you believe a court in England would take.

The opinion should be accompanied by an executive summary presenting the main conclusions and reservations reached in the opinion. You may clarify that the executive summary does not form part of the opinion and that it is given for the purposes of convenience only.

If you believe that your conclusions reached under Part C I. (Enforceability of Close-out Netting) above will be that the receiver or liquidator in England courts will not recognize the close-out netting provisions of the EFET General Agreements in accordance with their terms, please contact us immediately.

If you have any further questions or need some additional information, please do not hesitate to contact us.

Kind regards,

Dr. Jan Haizmann

Chairman, EFET Legal Committee

Appendices and Enclosures

Appendix A

Types of Counterparties

Corporations (e.g., a limited liability company, stock corporation or *Societas Europaea*)

Partnerships (e.g., a general or limited partnership)

Banks/Credit Institutions

Investment Services Provider/Investment Firms

Insurance Companies

Investment Fund Management Companies

Other Financial Institution (please specify)

Municipalities or Counties

Associations of Local Government

Publicly-owned Corporations

Quasi Governmental Entities (please specify)

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
- English Master Agreement for Over-The-Counter Derivative Instruments (version 2003), sponsored by the Schweizerische Bankiervereinigung
- English 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 Fédération Bancaire Française (FBF)
- French Convention-Cadre FBF Relative Aux Operations Sur Instruments Financiers à Terme (version August 2001), sponsored by the Fédération 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 (versión 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)

<u>Repurchase Master Agreements</u>

- 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)

Appendix C

Transactions under Netted Agreements or Principal Agreements

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

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

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

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

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

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

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

7. Cap Transaction. A transaction in which one party pays a single or periodic fixed amount and the other party pays periodic amounts of the same currency based on

the excess, if any, of a specified floating rate (in the case of an interest rate cap), rate or index (in the case of an economic statistic cap) or commodity price (in the case of a commodity cap) in each case that is reset periodically over a specified per annum rate (in the case of an interest rate cap), rate or index (in the case of an economic statistic cap) or commodity price (in the case of a commodity cap).

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

9. Commodity Forward. A transaction in which one party agrees to purchase a specified quantity of a commodity at a future date at an agreed price and the other party agrees to pay a price for the same quantity to be set on a specified date in the future. The payment calculation is based on the quantity of the commodity and is settled based, among other things, on the difference between the agreed forward price and the prevailing market price at the time of settlement.

10. Commodity Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified quantity of a commodity at a specified strike price. The option can be settled either by physically delivering the quantity of the commodity in exchange for the strike price or by cash settling the option, in which case the seller of the option would pay to the buyer the difference between the market price of that quantity of the commodity on the exercise date and the strike price.

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

12. Contingent Credit Default Swap. A Credit Default Swap Transaction in which the credit protection seller pays an amount determined by reference to the value of a hypothetical swap transaction.

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

14. Credit Default Swap. A transaction in which one party pays either a single fixed amount or periodic fixed amounts or floating amounts determined by reference to a specified notional amount, and the other party (the credit protection seller) pays either a fixed amount or an amount determined by reference to the value of one or more loans, debt securities or other financial instruments (each a "Reference Obligation") issued, guaranteed or otherwise entered into by a third party (the "Reference Entity") upon the occurrence of one or more specified credit events with respect to the Reference Entity (for example, bankruptcy or payment default). The amount payable by the credit protection seller is typically determined based upon the market value of one or more debt securities or other debt instruments issued,

guaranteed or otherwise entered into by the Reference Entity. A Credit Default Swap may also be physically settled by payment of a specified fixed amount by one party against delivery of specified obligations ("Deliverable Obligations") by the other party. A Credit Default Swap may also refer to a "basket" (typically ten or less) or a "portfolio" (eleven or more) or Reference Entities or may be an index transaction consisting of a series of component Credit Default Swaps.

15. Credit Derivative Transaction on Asset-Backed Securities. A Credit Default Swap for which the Reference Obligation is a cash or synthetic asset-backed security. Such a transaction may, but need not necessarily, include "pay as you go" settlements, meaning that the credit protection seller makes payments relating to interest shortfalls, principal shortfalls and write-downs arising on the Reference Obligation and the credit protection buyer makes additional fixed payments of reimbursements of such shortfalls or write-downs.

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

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

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

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

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

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

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

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

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

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

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

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

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

28. Forward Rate Transaction. A transaction in which one party agrees to pay a fixed rate for a defined period and the other party agrees to pay a rate to be set on a specified date in the future. The payment calculation is based on a notional

amount and is settled based, among other things, on the difference between the agreed forward rate and the prevailing market rate at the time of settlement.

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

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

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

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

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

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

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

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

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

38. Total Return Swap. A transaction in which one party pays either a single amount or periodic amounts based on the total return on one or more loans, debt securities or other financial instruments (each a "Reference Obligation") issued, guaranteed or otherwise entered into by a third party (the "Reference Entity"), calculated by reference to interest, dividend and fee payments and any appreciation in the market value of each Reference Obligation, and the other party pays either a single amount or periodic amounts determined by reference to a specified notional amount and any depreciation in the market value of each Reference Obligation. A total return swap may (but need not) provide for acceleration of its termination date upon the occurrence of one or more specified events with respect to a Reference Entity or a Reference Obligation with a termination payment made by one party to the other calculated by reference to the value of the Reference Obligation.

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