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European Federation of Energy Traders ("**EFET**")
Amstelveenseweg 998
1081 JS Amsterdam
The Netherlands

27 April 2021

Attention: EFET Legal Committee

Dear Sirs

LEGAL OPINION REGARDING THE ENFORCEABILITY OF CLOSE-OUT NETTING AND THE VALIDITY AND ENFORCEABILITY OF THE EFET GENERAL AGREEMENT CONCERNING THE DELIVERY AND ACCEPTANCE OF ELECTRICITY AND ITS COLLATERAL ARRANGEMENTS

We refer to your letter received on 20 October 2020 (the "**Instruction Letter**"), in which you requested our opinion as to matters of Singapore law relating to the (i) enforceability of close-out netting provisions of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (the "**EFET General Agreement**") and (ii) validity and enforceability of collateral provided under the EFET Credit Support Annex to the EFET General Agreement (the "**EFET Credit Support Annex**"). This letter sets out our Singapore law 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 4 below, and is subject to the qualifications set out in paragraph 6 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 Singapore 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 members; 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 members to the appropriate regulatory authorities, provided that we are notified in writing of all such authorities to whom the opinion is disclosed.

This document is confidential and may be privileged. If you are not the intended recipient, please notify us immediately; you are not authorised to copy it or use it for any purpose, or disclose its contents to any other person.

This opinion relates solely to matters of Singapore law as in force at the date of this letter. We do not purport to express a view on any foreign law, on which specific advice should be obtained. However, please note that pursuant to Section 3 of The Application of English Law Act, Chapter 7A of Singapore (the "**English Law Act**"), the common law of England and Wales, so far as it was part of the law of Singapore immediately before the coming into force of the English Law Act (that is, on 12th November, 1993), shall continue to be part of the law of Singapore. Prior to the passing of the English Law Act, Section 5(1) of the Civil Law Act, Chapter 43 of Singapore (which has been repealed by the English Law Act), provides that a Singapore court deciding issues with respect to mercantile law generally shall decide such issues in the same manner as a court of England and Wales, unless there are contrary provisions or case law in force in Singapore. While the law of contract in Singapore may tend to follow the law of contract in England and Wales, the law relating to insolvency in Singapore is primarily set out in the Insolvency, Restructuring and Dissolution Act 2018 (the "**IRDA**").

The Payment and Settlement Systems (Finality and Netting) Act (Chapter 231) (the "**Payment and Settlement Systems Act**") applies to transactions cleared or settled in a "designated system" as defined in the act. There are currently 3 such designated systems, namely, the CLS System (clearing of FX transactions), the MAS Electronic Payment and Book-Entry System (for transfer of funds, settlement of payment obligations and transfer of book entry securities and instruments) and the Banking Computer Services Private Limited System (for Singapore and US dollar cheque clearing and local inter-bank GIRO transfers). Therefore, the Payment and Settlement Systems Act would not be relevant in the context of the EFET General Agreement, as we understand Individual Contracts would not be cleared or settled using any of the designated systems.

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 Singapore law can be summarised as follows:

(a) the close-out netting provisions of the EFET General Agreement will be recognised, valid and enforceable, and in the event of a legal challenge will be upheld by the Singapore courts;

(b) for an Individual Contract 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;

(c) an electronically transmitted confirmation of an Individual Contract is acceptable to evidence a binding Individual Contract;

(d) upon commencement of insolvency proceedings, in the absence of any specific Singapore case-law, the better view, shared by us, is that the close-out netting provisions of the EFET General Agreement will be recognised, valid and enforceable;

(e) the status, intention and conduct of the Parties are important considerations for the recognition and enforcement of the close-out netting provisions;

(f) none of the elections contemplated by the EFET General Agreement would affect the substance of our conclusion as to the enforceability of the close-out netting provisions of the EFET General Agreement;

(g) there are no special rules applicable in the event of insolvency in Singapore for the relevant derivative contract types set out in Appendix B of the Instruction Letter, being commodity forwards, commodity options, commodity swaps and physical commodity transactions;

(h) persons who carry on business as a commodity broker or who act as a spot commodity broker are required to be licensed under the Commodity Trading Act (Chapter 48A) of Singapore ("**CTA**") (subject to certain exemptions). An agreement made by any person requiring such a license but who is not so licensed may be unenforceable against, or voidable at the instance of, the other contracting party on the ground of illegality and may be ineffective or in breach of the laws, or contrary to the public policy, of Singapore and may not be enforced by the Singapore courts;

(i) broadly, our conclusions are unchanged in the case of a counterparty which conducts business on a multibranch basis prior to insolvency;

(j) in the event of separate insolvency proceedings in relation to the Singapore branch of a multibranch Party, the responsible insolvency office-holder will recognise the close-out netting provisions of the EFET General Agreement in accordance with their terms;

(k) broadly, our opinion as to the enforceability of close-out netting under the EFET General Agreement will not change, by reason only of one or more Parties to the relevant agreements (as applicable) being a partnership, a 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;

(l) each transfer of collateral advanced as Eligible Credit Support under the EFET Credit Support Annex will likely take effect as an unconditional transfer of ownership of the assets concerned in accordance with its terms and is unlikely to be re-characterised as the creation of a security interest. No further action is required to enforce or continue such ownership interest;

(m) the *force majeure* provisions of the EFET General Agreement are legally valid and enforceable;

(n) the remedies for non-performance provisions of the EFET General Agreement will be enforceable unless the circumstances of the case were such that it would not be just for the Party suffering loss to have its remedies limited to damages, in which case, the Singapore courts may make an order for specific performance;

(o) the limitation of liability provisions of the EFET General Agreement are in standard terms and such provisions are generally enforceable, provided they are expressed clearly and without ambiguity. However, their enforceability is subject to a number of important exceptions the application of which is necessarily fact-specific and dependent upon the circumstances of the case;

(p) there are no exchange controls applicable in Singapore but exchange contracts which are contrary to the exchange control regulations of a member of the International Monetary Fund maintained in accordance with the Articles of Agreement of the International Monetary Fund are unenforceable in Singapore; and

(q) the Parties' choice of governing law will be upheld as a valid choice by the Singapore courts, and the Parties' submission to arbitration or jurisdiction will be recognised by the Singapore courts, in each case, under the EFET General Agreement (and, by reference, the EFET Credit Support Annex) provided that (1) it is not contrary to the public policy of the forum and (2) it is bona fide choice made in good faith and for legal purposes by each of the parties thereto.

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3. RELEVANT ENTITIES

3.1 This opinion is provided on the basis that the counterparty referred to as Party A in the Instruction Letter is a:

(a) Singapore company; or

(b) foreign company,

as the context requires, including banks which have permission to accept deposits by virtue of Part III of the Banking Act (Chapter 19) (the "**Banking Act**") and insurance companies which have permission to carry out contracts of insurance by virtue of the Insurance Act (Chapter 142) (the "**Insurance Act**"). A "Singapore company" is a company which is formed and registered under the Companies Act (Chapter 50) (the "**Companies Act**"), 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 Singapore.

3.2 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.

3.3 This opinion does not cover the situation where neither party is a Singapore company (as defined in paragraph 3.1 above), a foreign company (as defined in paragraph 3.1 above) or an entity set out in Schedule 2.

4. FURTHER ASSUMPTIONS

4.1 For the purposes of this opinion, 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 and each Individual Contract;

(b) each Party has duly authorised, executed and delivered the Agreements and each Individual Contract;

(c) where the EFET General Agreement, the Appendices, the EFET Credit Support Annex or each Individual Contract is expressed to be governed by a law other than Singapore law, the EFET General Agreement, the Appendices, the EFET Credit Support Annex and/or Individual Contract (as the case may be) are legal, valid, binding and enforceable under the law by which they are expressed to be governed;

(d) the EFET General Agreement, the Appendices, the EFET Credit Support Annex and each Individual Contract have been entered into between the Parties in good faith and on commercial, arm's length terms;

(e) the Parties to the EFET General Agreement, the Appendices, the EFET Credit Support Annex and each Individual Contract have not entered into any other agreement, document, arrangement or transaction which may in any way prohibit or restrict their right of entry into the EFET General Agreement, the Appendices, the EFET Credit Support Annex and each Individual Contract or which may vary their rights or obligations under the EFET General Agreement, the Appendices, the EFET Credit Support Annex and each Individual Contract, and the execution, observance or performance by any such party of the EFET General Agreement, the Appendices, the EFET Credit Support Annex and each Individual Contract is not contrary to or in breach of any contractual or other obligations binding on them;

(f) none of the Parties to the EFET General Agreement, the Appendices, the EFET Credit Support Annex and each Individual Contract were, at the time of entering into the EFET General Agreement, the Appendices, the EFET Credit Support Annex or each Individual Contract, insolvent or otherwise unable to pay their debts (for which purpose account is to be taken of their contingent and prospective liabilities) and have not become so insolvent or otherwise unable to pay their debts in consequence of their entry into or their performance of their obligations under the EFET General Agreement, the Appendices, the EFET Credit Support Annex and each Individual Contract;

(g) none of the Parties to the EFET General Agreement, the Appendices, the EFET Credit

Support Annex and each Individual Contract are or will be seeking to achieve any purpose not apparent from the EFET General Agreement, the Appendices, the EFET Credit Support Annex and each Individual Contract which might render the EFET General Agreement, the Appendices, the EFET Credit Support Annex and each Individual Contract illegal, void or voidable; and

(h) all authorisations, approvals, consents, licences, permits, orders, waivers and exemptions from, and all filings and registrations with, any governmental, regulatory, judicial or public authority or body outside Singapore and all stamping and other requirements under any applicable law (other than Singapore law), which are necessary or required in connection with the execution, delivery or performance of the EFET General Agreement, the Appendices, the EFET Credit Support Annex and each Individual Contract or for the legality, validity or enforceability of the EFET General Agreement, the Appendices, the EFET Credit Support Annex and each Individual Contract, will be duly obtained, effected and otherwise fulfilled within the time periods prescribed under such applicable laws and will be in full force and effect, and any conditions to which they are subject will be satisfied.

4.2 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.

5. OPINIONS

5.1 We have presented the opinions contained in this clause 5 as responses to the questions contained in Section C (Issues and Additional Assumptions) of the Instruction Letter and in the order in which the questions 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; however, please note that we have not reproduced associated commentary or additional assumptions contained in the Instruction Letter.

5.2 We have given the opinions contained in this clause 5 on the basis of the assumptions contained in the Instruction Letter, clause 4 above and the opinions below, and subject to the qualifications set out in clause 6 below.

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 B to the Instruction Letter.

5.3 The insolvency procedures to which a Party could be subject under Singapore law, and which are relevant for the purposes of this opinion, are winding-up, judicial management, receivership, schemes of arrangement and bank resolution (together, "**Insolvency Proceedings**")[1]. The legislation applicable to Insolvency Proceedings is:

(a) in relation to all Insolvency Proceedings initiated after the date of this opinion letter, the IRDA;

[1] Judicial management and schemes of arrangement are not strictly insolvency proceedings but have been included In the definition of "Insolvency Proceedings", as each procedure may be invoked where a Party is in financial difficulty.

(b) in relation to a licensed bank, the IRDA, the Banking Act, the Monetary Authority of Singapore Act (Chapter 186) (the "**MAS Act**") and the Monetary Authority of Singapore (Resolution of Financial Institutions) Regulations 2018 (the "**MAS Regulations**") and in relation to a licensed merchant bank, the MAS Act and the MAS Regulations;

(c) in relation to licensed insurers[2], the IRDA, the MAS Act, the Insurance Act and the MAS Regulations;

(d) in relation to an obligation which is a transfer order[3] as defined in the Payment and Settlement Systems Act, the Payment and Settlement Systems Act will also be applicable.

5.4 However, please note that:

(a) subject to Section 246(1)(d) of the IRDA, a foreign company may be wound up only if it has a substantial connection with Singapore;

(b) Under Part IVA of the MAS Act, the Monetary Authority of Singapore ("**MAS**") is given specific powers to participate in proceedings relating to schemes of arrangement, compromise or arrangement or transfer of property of a licensed bank, a licensed insurer or a licensed merchant bank. In relation to Insolvency Proceedings which is bank resolution, the MAS is given similar powers to intervene and rights to participate under Part IVB of the MAS Act and the MAS Regulations; and

(c) Instead of or in addition to Insolvency Proceedings, a licensed bank and licensed merchant bank may be subject to the "resolution regime" under the MAS Regulations, which is considered at clauses 6.4 to 6.11 below.

5.5 Besides the Insolvency Proceedings, there are a number of special insolvency procedures, measures and regimes in Singapore 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 the Electricity Act (Chapter 89A) (the "**Electricity Act**") and/or under the Gas Act (Chapter 116A) (the "**Gas Act**") may be the subject of a Special Administration Order (a "**SAO**") under Section 28 of the Electricity Act and/or Section 33 of the Gas Act respectively. Whilst an SAO is in force, the affairs, business and property of the company are to be managed by a person appointed by the Energy Market Authority of Singapore (the "**EMA**"). A gas or electricity licensee must not be wound up voluntarily without the consent of the EMA. No judicial management order under the IRDA can be made in relation to a gas or electricity licensee without the consent of the EMA. The EMA must be notified with 14 days written notice by any person seeking to take any step to enforce any security over a gas or electricity licensee's property or enforce a judgment obtained against a gas or electricity licensee. Whilst an SAO does not preclude an application for a scheme of arrangement, a court may not grant such an application unless 14 days written notice of the intention to make the application has been served on the EMA.

5.6 Under Singapore law, there are no special rules applicable in the case of insolvency or

[2] For the purposes of this opinion, a reference to a licensed insurer means an insurer licensed under section 8 of the Insurance Act

[3] In broad terms, a "transfer order" means, (a) an instruction by a participant, which may be carried out in or through one or more designated systems – (i) to place at the disposal of a recipient an amount of money by means of a book-entry on the accounts of a settlement institution for a designated systems; or (ii) that, when settled, results in the assumption or discharge of a payment obligation as defined by the rules of a designated system; or (b) an instruction by a participant to transfer book-entry securities.

Insolvency Proceedings for any of the contract types listed in Appendix B of the Instruction Letter (being commodity forwards, commodity options, commodity swaps and physical commodity transactions). Such transactions are dealt with under the applicable Insolvency Proceedings in the same way and subject to the same procedures as set out above.

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 EFET General Agreement, the calculation of the Termination 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.

5.7 We understand the close-out netting in the EFET General Agreement to be an accounting process or mechanism that is used to finally determine a single net balance owing one way or the other and which encompasses the following 3 main steps:

(a) termination of the incomplete or underperformed contracts or transactions;

(b) valuation (or calculation of each party's gains and losses from the terminated contracts or transactions); and

(c) determination (and payment) of a single net balance owing from one party to the other in respect of the terminated and valued contracts or transactions.

5.8 We are of the view that in the absence of insolvency proceedings, the close-out netting provisions of the EFET General Agreement (including the termination of the EFET General Agreement, the calculation of the Termination Amount and the payment of the Termination Amount) will be recognised, valid and enforceable in accordance with their terms, and in the event of a legal challenge will be upheld by the Singapore Courts.

5.9 However, upon commencement of insolvency proceedings or when a Party becomes subject to insolvency laws, there may be some doubts over the enforceability of close-out netting due to the operation of the following:

(a) Section 203 of the IRDA provides that the property of a company shall, on its winding up, be applied *pari passu* in satisfaction of its liabilities (apart from a security interest and an insolvency set-off). There is the concern that the close-out netting is an unlawful attempt to vary by contract the operation of Section 203 of the IRDA to achieve a result for the non-defaulting party without creating a security interest in favour of the non-defaulting party.

(b) Section 130 of the IRDA provides that any disposition of the property of a company made after the commencement of the winding up of the company shall be void unless otherwise ordered by the court. There is the concern that close-out netting comes within the ambit of Section 130 of the IRDA.

(c) The anti-deprivation rule, which is a principle of insolvency law, voids or invalidates contractual terms purporting to dispose property upon insolvency as being an evasion of the insolvency law. There is a concern that close-out netting infringes the anti-deprivation rule.

(d) Section 144(1) of the IRDA gives the liquidator the power to, after authorisation by either the court or the committee of inspection (which is a committee consisting of both creditors and contributories, appointed by the creditors of an insolvent company pursuant to Section 151(1) of the IRDA to work with the liquidator in carrying out his duties), make any compromise or arrangement with present or future creditors or compromise any call, debt, liability or claim by present or future creditors and give a complete discharge in respect of them. There is a concern that the liquidator may attempt to "cherry-pick" or disclaim only some of the contracts or transactions which were subject to close-out netting.

5.10 There is presently no specific Singapore case-law which clears the above doubts and concerns.

5.11 However, in the absence of legal certainty and precedent, the better view shared by us is that Singapore will recognise close-out netting as valid and enforceable even upon commencement of insolvency proceedings. We set out below the more salient reasonings and arguments:

(a) There is no express rule of the laws of Singapore which would apply to prohibit the Parties from entering into a close-out netting arrangement.

(b) The intention and effect of close-out netting is to determine the net balance owing without the use of set-off. Close-out netting can be viewed as merely an accounting process between the parties to arrive at a final outstanding amount. This interpretation finds support from the definitions of netting found in Singapore statutes. For example, the Payment and Settlement Systems Act defines "netting" to mean "the conversion into one net claim or one net obligation of claims and obligations resulting from transfer orders which a participant either issues to, or receives from, one or more other participants with the result that <u>only a net claim can be demanded or a net obligation be owed</u>." Both Section 61(1) of the IRDA and Section 126(6) of the MAS Act define a "netting arrangement" as "an arrangement under which 2 or more claims or obligations can be converted into <u>a net claim or obligation</u>, and <u>includes a close-out netting arrangement</u> (under which actual or theoretical debts are calculated during the course of a contract for the purpose of enabling them to be set off against each other or to be converted into a <u>net debt</u>)".

It can be reasonably argued that there is no relevant property (in a close-out netting where a debt does not become payable if the conditions precedent such as the occurrence of an Event of Default have not been satisfied) capable of being distributed to which the *pari passu* rule in Section 203 of the IRDA could apply.

It can be reasonably argued that close-out netting achieves the effect of determining a final outstanding amount upon the commencement of insolvency proceedings, and such close-out netting arrangements will then not come within the ambit of Section 130 of IRDA, which refers to payments made after the commencement of winding up, and thus should not nullify the rights of the non-defaulting party in a close-out netting scenario.

As we will expect the Parties who enter into the EFET General Agreement to do so in good faith and on commercial arm's length terms without deliberately intending to deprive the property of the other in an insolvency, we are of the view that the anti-deprivation rule will also then not apply. As close-out netting will involve an agreed valuation or calculation of the terminated contracts or transactions, there is also a defence to application of the anti-deprivation rule which is that the insolvent company has received fair value for the asset which is allegedly deprived.

Further, on the basis that the non-defaulting Party elects Automatic Termination and it is expressly stated in §1.1 of the EFET General Agreement that all Individual Contracts and the EFET General Agreement shall form a single agreement between the Parties, the Automatic Termination provisions should be valid and enforceable to terminate all Individual Contracts and transactions immediately prior to the insolvency of the defaulting Party, and the courts are unlikely to allow the liquidator pursuant to Section

144(3) of the IRDA to disclaim only some of the contracts or transactions and negating the intention of the close-out netting.

(c) There is also clear legislative intent that netting arrangements are exceptional contractual terms. For example, section 96(5)(a) of the IRDA provides that the exercise of any legal right under any arrangement (including a set-off arrangement or a netting arrangement) that may be prescribed by regulations will not affected when a company is in judicial management. Furthermore, Section 126 of the MAS Act prescribes that any set-off arrangement, netting arrangement or other type of arrangement should be exempted from the provisions relating to the resolution of financial institutions and that the Minister or the Authority must not exercise any power under the resolution of financial institutions in relation to any arrangement, transaction or action, or any matter for which any arrangement has been entered into.

(d) Singapore's central bank, Monetary Authority of Singapore, has issued several policy statements that it is not in their interest, in exercising resolution powers over financial institutions, to interfere with netting arrangements and the exercise of resolution powers should not defeat or otherwise affect the preservation of netting arrangements.

(e) Singapore regards itself as a good netting jurisdiction and it is the clear policy intention to preserve bilateral netting arrangements. For example, when concerns on the legislative impact on bilateral netting arrangements were raised in the Singapore Parliament in 2013, the then Deputy Prime Minister and Minister-in-charge of MAS, Mr Tharman Shanmugaratnam, stated that "*The approach we are taking is essentially similar to that being taken in the United Kingdom where they have adopted a Special Resolution Regime, and the carve-outs that the European Union has now directed its members to put in place when designing their resolution frameworks. It is a system where you put in place the basic provisions and the powers that a regulator needs, but you have carve-outs to ensure that contractual obligations and specifically, bilateral netting arrangements, are not defeated.*"

(f) We also understand that International Swaps and Derivatives Association has obtained legal opinions in respect of their ISDA Master Agreement (which close-out netting approach is similar to that of EFET General Agreement) which support that close-out netting is enforceable in several jurisdictions (including Singapore).

(g) The enforceability of close-out netting provisions on insolvency is also consistent with the UNIDROIT Principles on Close-out Netting Provisions, which although non-binding on jurisdictions, provide guidance to national legislators of implementing states seeking to revise or introduce national legislation relevant to the functioning of close-out netting designed to improve the enforceability of close-out netting agreements. ISDA's Model Netting Act and Guide released in 2018 generally requires that the provisions of a netting agreement will be enforceable in accordance with the terms of that agreement, including against an insolvent party. Taken together, the UNIDROIT Principles and the Model Netting Act and Guide provide the basis for nation states to recognise the enforceability of close-out netting provisions in support of the international framework for close-out netting provisions.

5.12 We are of the view that the status, intention and conduct of the Parties are important considerations for the recognition and enforcement of the close-out netting provisions. It is important that neither Party is insolvent at the time of entering into the EFET General Agreement (and the Individual Contracts) so that the anti-avoidance rules relating to transactions at an undervalue and unfair preferences do not apply (please see our further discussion on these rules in clauses 5.75 to 5.77). It is also important that there is no deliberate intention to evade insolvency laws. In *Belmont Park Investments PTY Limited v BNY Corporate*

Trustee Services Limited and Lehman Brothers Special Financing Inc [2011] UKSC 38, Lord Collins stated that in general the application of the anti-deprivation rule requires "a deliberate intention to evade insolvency laws" and that "a commercially sensible transaction entered into in good faith should not be held to infringe the anti-deprivation rule". It is also important that a Party acts in good faith and with reasonable care. In the case of *Tan Poh Leng Stanley v UBS AG* [2016] SGHC 17 in the context of a close-out of an ISDA Master Agreement, the Singapore court highlighted at paragraph 7 that the party exercising the close-out rights had "a duty of care … to conduct the close out exercise competently and with reasonable care".

5.13 Accordingly, we believe that the obligation to pay the Termination Amount resulting from a close-out netting under § 10.3(b) and § 10.4 of the EFET General Agreement and the calculation of that Termination Amount under § 11.1 of the EFET General Agreement, will 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.

5.14 There is no material distinction with respect to a creditor's rights between 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 B would benefit from such provision(s).

5.15 We understand that the term "safe harbour" refers to statutory relief provisions in certain jurisdictions such as the United States, where moratoria is imposed in the event of the commencement of insolvency proceedings which limits the termination of contracts in accordance with their terms, and the acceleration of payment obligations thereunder. Under Singapore law, Section 440(1) of the IRDA prohibits a party from terminating a contract with an insolvent company, or to take actions by reason of the commencement of Insolvency Proceedings. As a safeguard, Section 440(5)(a) of the IRDA provides for eligible contracts[4] to

[4] The following are prescribed financial contracts excluded from Section 440:

(a) the business rules of an approved exchange, a licensed trade repository or an approved clearing house;
(b) the business rules of a licensed foreign trade repository, recognised clearing house or recognised market operator which operate as a contract (i) between the licensed foreign trade repository and its participants, and between each participant and each other participant or (ii) between the recognised clearing house or recognised market operator and its members, and between each member and each other member;
(c) any contract between a recognised clearing house or recognised market operator and its members, or any contract between a licensed foreign trade repository and its participants, containing or incorporating by reference the business rules of the recognised clearing house, recognised market operator or licensed foreign trade repository, as the case may be;
(d) the depository rules (as may be amended from time to time) in relation to the operation of the Central Depository System;
(e) any contract containing or incorporating by reference the designated system operating rules of a designated system, that is entered into (i) between the operator of the designated system and a participant of the designated system, (ii) between the operator or a participant of the designated system and another party, or (iii) between such other party mentioned in sub-paragraph (ii) and a further party for the purpose of carrying out a contract mentioned in sub-paragraph (i) or (ii);
(f) any derivatives contract, margin lending agreement or securities contract;
(g) any master netting agreement, securities lending or repurchase agreement, commodities lending or repurchase contract, or spot contract, that contains a netting arrangement or set-off arrangement;
(h) any contract or agreement that is (i) a covered bond; or (ii) connected with a covered bond or the issuing of a covered bond;
(i) any contract or agreement that is, or that is directly connected with, a debenture;
(j) any agreement to clear or settle transactions relating to a derivatives contract;

be carved-out from the application of Section 440(1) of the IRDA under Regulation 3 of the Insolvency, Restructuring and Dissolution (Prescribed Contracts under Section 440) Regulations 2020. Generally, unless the specific facts of a transaction are to the contrary, the EFET General Agreement may be considered a derivatives contract[5], a master netting agreement[6] or as a contract for a guarantee, letter of credit, title transfer of assets, or other credit support arrangement in respect of an obligation under a financial contract, and carved out from the operation of Section 440 of the IRDA.

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).

5.16 In Singapore, a business profile search, which extracts basic information relating to a company from the electronic records maintained by the Accounting and Corporate Regulatory Authority of Singapore ("**ACRA**") and winding up and litigation searches of the electronic cause book maintained by Supreme Court of Singapore and the State Courts of Singapore through the relevant computerised search facilities of eLitigation provided by CrimsonLogic Pte Ltd may be carried out against a Party. The winding up and litigation searches would reveal whether a winding-up order has been made, a petition for winding-up has been presented, a judicial management order has been made; a petition for a judicial management order has been presented, or documents have been filed at court with a view to the appointment of a receiver or similar officer.

5.17 However, searches and enquiries of the type described in clause 5.16 above are not conclusive about the status of a Party. The information obtained from the searches may not be complete or up-to-date and may in fact contain errors or omissions, because the requisite notices, documents or resolutions may either not have been filed by the relevant persons with ACRA or the search facilities of eLitigation provided by CrimsonLogic Pte Ltd (the "**Services**") in a timely

(k) any contract between (i) an approved exchange, an approved clearing house, a recognised clearing house or a recognised market operator; and (ii) one or more of its members for the sale, purchase or transfer of any capital markets products, which is to be carried out pursuant to the business rules of the approved exchange, approved clearing house, recognised clearing house or recognised market operator (as the case may be) mentioned in paragraph (a) or (b);

(l) any contract for the offer of asset-backed securities by a securitisation special purpose vehicle, or any contract connected with such offer of asset-backed securities or the securitisation transaction pursuant to which the securities are issued;

(m) any contract that creates a mortgage, charge, pledge, lien or other type of security interest that is recognised by law, being a mortgage, charge, pledge, lien or other security interest that secures an obligation under a financial contract mentioned in paragraphs (a) to (l);

(n) any contract providing for a guarantee, letter of credit, title transfer of assets, or other credit support arrangement in respect of an obligation under a financial contract mentioned in paragraphs (a) to (l).

[5] Defined in regulation 2 of the Insolvency, Restructuring and Dissolution (Prescribed Arrangements and Proceedings) Regulations 2020 to mean any contract or arrangement under which-

(a) a party to the contract or arrangement is required to, or may be required to, discharge all or any of its obligations under the contract or arrangement at some future time; and

(b) the value of the contract or arrangement is determined (whether directly or indirectly, or whether wholly or in part) by reference to, is derived from, or varies by reference to, either of the following:

(i) the value or amount of one or more underlying things;

(ii) fluctuations in the values or amounts of one or more underlying things,

but does not include -

(c) securities;

(d) a deposit as defined in the Banking Act;

(e) a deposit as defined in the Finance Companies Act (Chapter 108) of Singapore; and

(f) a contract of insurance specified in the Insurance Act

[6] Defined in regulation 2 of the Insolvency, Restructuring and Dissolution (Prescribed Arrangements and Proceedings) Regulations 2020 to mean an agreement under which 2 or more claims or obligations under one or more of the following:

(a) securities contracts;

(b) derivatives contracts;

(c) securities lending or repurchase agreements;

(d) spot contracts,

can be converted into a net claim or obligation, and includes an agreement under which actual or theoretical debts arising under or in connection with a contract or an agreement mentioned in paragraph (a), (b), (c) or (d) are calculated and –

(e) set off against each other; or

(f) converted into a net debt

manner or, having been filed with ACRA or the Singapore courts, not have been processed (or been delayed in its processing) by the Services and will thus not appear on public record at the date on which the information was obtained, or errors and omissions in the information available from the Services may have occurred when data is processed by the Services or as a result of incomplete or inaccurate information contained in the filings made with the Services. As such, the information obtained from the searches and enquiries from the Services cannot be viewed as factually conclusive that no proceedings have been commenced by or against a party in Singapore, or that a party is not subject to winding up, judicial management or other types of orders or are validly existing. In addition, the searches and enquiries do not indicate whether insolvency proceedings have begun in another jurisdiction.

In addition, please provide a general description of limitations in your jurisdiction, if any, applicable to set-off (both in an insolvency related and non-insolvency related Early Termination scenario and otherwise):

(a) ***between Parties of claims arising <u>under</u> the EFET General Agreement;***

(b) ***between Parties of claims arising <u>outside</u> the EFET General Agreement if contractually provided for in an amendment to the EFET General Agreement; and***

(c) ***between Affiliates or Credit Support providers of Parties if contractually provided for in an amendment to the EFET General Agreement.***

5.18 The classes of set-off and netting available under the laws of Singapore which are relevant to this opinion are equitable set-off, contractual set-off and Insolvency Set-off (as described in <u>clause 6.1</u> below). With respect to equitable set-off and contractual set-off, there is no rule of the laws of Singapore which would, in our view, limit the application of set-off.

5.19 However, insolvency law does have restrictions on the general freedom to contract. For example, the case of *British Eagle International Airlines v Compagnie Nationale Air France* [1975] 1 WLR 758 which has been cited in the Singapore case of *Joo Yee Construction Pte Ltd (in liquidation) v Diethelm Industries Pte Ltd and Others* [1990] 1 SLR(R) 171, established the common law principle which enables courts to invalidate a contract or transaction if its effect is to deprive a company's creditors of property that, on the company's insolvency, would otherwise be realised for their benefit (also known as the *pari passu* rule of distribution in liquidation).

5.20 On the winding-up of a Party, Insolvency Set-off (further discussed in <u>clauses 6.1</u> *et seq.* below) is mandatory and operates as an exception to the *pari passu* rule in that it allows a creditor a payment in advance in full in priority to other unsecured creditors. The same is true in the judicial management of a Party where the judicial manager makes a payment to creditors under Section 99 of the IRDA. In the case of Insolvency Set-off, there is a requirement for "mutual dealings" between the parties, which means that a claim and cross and counterclaim must be made in the same right. Mutuality therefore requires the claims to be set off to be between the same persons and in the same capacity (please see <u>clause 6.1</u> below).

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?

5.21 In Singapore, a distinction is usually made between the concepts of early termination, set-off and close-out netting[7]. 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

[7] Singapore legislation, namely, the Payment and Systems Settlement Act, the IRDA and the MAS Act distinguishes between set-off and close-out netting.

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 the setting off of one money claim against another in or towards payment and is dependent on the existence of cross-claims. The Payment and Settlement Systems Act defines "netting" to mean "the conversion into one net claim or one net obligation of claims and obligations resulting from transfer orders which a participant either issues to, or receives from, one or more other participants with the result that only a net claim can be demanded or a net obligation be owed". Similarly, the IRDA and the MAS Act defines a "netting arrangement" to mean "an arrangement under which 2 or more claims or obligations can be converted into a net claim or obligation, and includes a close-out netting arrangement (under which actual or theoretical debts are calculated during the course of a contract for the purpose of enabling them to be set off against each other or to be converted into a net debt)".

5.22 Thus, close-out netting can be seen to be more extensive than set-off, and result in just one monetary claim being owed by one Party to the transaction to the other Party.

Assuming the Parties have <u>not</u> specified that Automatic Termination (as defined in § 10.4 of the EFET General Agreement) applies, are the provisions of the EFET General Agreement permitting the other Party (the "Terminating Party") to terminate the Agreement (including all Individual Contracts) upon the occurrence of a Material Reason described in § 10.5(c) of the EFET General Agreement enforceable under the laws of Singapore or is there a risk that (i) the entering Into the EFET General Agreement, (ii) the entering into Individual Contracts thereunder or (iii) the early termination by notice itself could be challenged by a liquidator, administrator, receiver or third party?

5.23 We are of the view that the provisions of the EFET General Agreement permitting the Terminating Party to terminate the EFET General Agreement upon the occurrence of a Material Reason would be enforceable in Singapore. We hold this view on the basis that these provisions constitute the terms of the EFET General Agreement which have been agreed between the parties and should be binding on the liquidator of the insolvent Party.

5.24 Where Automatic Termination is not selected, the right of the Terminating Party to designate an Early Termination Date and terminate the Individual Contracts with notice after the onset of insolvency may, however, be affected if the liquidator or judicial manager of the insolvent Party has already exercised his right to disclaim any of the Individual Contracts under Section 230 of the IRDA. Section 230 of the IRDA allows the liquidator or judicial manager of the insolvent Party to disclaim unprofitable contracts with the leave of the Singapore courts. Thus, a liquidator or judicial manager may attempt to "cherry pick" Individual Contracts if Automatic Termination is not selected and the Terminating Party chooses to exercise its right to terminate some time after the insolvency of the insolvent Party.

5.25 However, we also note from § 1.1 of the EFET General Agreement, that all Individual Contracts and the EFET General Agreement will form a single agreement between the Parties, which should be effective to prevent the liquidator from disclaiming selected Individual Contracts. Accordingly, even where Automatic Termination is not selected, the liquidator would not be able to disclaim only some of the Individual Contracts. The liquidator may (although we are of the view that this is unlikely) disclaim the entire EFET General Agreement after the Termination Amount has been determined by a close-out netting, in which case the non-defaulting Party can then prove as an unsecured creditor in respect of the losses suffered as a result of such a disclaimer by the liquidator.

Assuming that the Parties have elected Automatic Termination to apply, are the provisions of the EFET General Agreement terminating the Agreement (including all individual Contracts) upon the occurrence of a Material Reason described In § 10.5(c) of the EFET General Agreement enforceable under the laws of Singapore or is there a risk that the automatic termination could be challenged by a liquidator, administrator, receiver or third party?

5.26 We are of the view that the provisions of the EFET General Agreement providing for automatic termination of the EFET General Agreement upon the occurrence of a Material Reason would be enforceable in Singapore. We hold this view on the basis that the provisions constitute the terms of the EFET General Agreement which have been agreed between the Parties and should be binding on the liquidator of the insolvent Party.

5.27 The Early Termination rights which arise as a result of an insolvency-based Material Reason under § 10.5(c) of the EFET General Agreement would similarly be enforceable in Singapore.

Would you recommend to elect Automatic Termination to apply upon a Material Reason described in § 10.5(c) of the EFET General Agreement or upon other events not specified therein?

5.28 As a matter of Singapore law, it is not necessary for the Parties to agree to automatic, rather than optional, termination of transactions. However, as discussed in clauses 5.24 and 5.25 above, it will be preferable for the Parties to the EFET General Agreement to agree to automatic, rather than optional, termination of Individual Contracts to avoid any risk (which is however not high) that a liquidator may "cherry pick" unprofitable transactions where, in the event that Automatic Termination is not selected, the Terminating Party chooses to exercise its right to terminate some time after the insolvency of the insolvent Party.

Would it be necessary or recommendable to modify the scope of Automatic Termination (e.g. by (i) deleting or modifying some of the events listed in § 10.5(c) which would trigger the termination and/or (ii) by adding other Material Reasons upon the occurrence of which Automatic Termination should also apply and/or (iii) by limiting those insolvency events specified in § 10.5(c) which would trigger the Automatic Termination) or to specify, or to refrain from specifying, a certain grace period as contemplated in § 10.5(c)(iv) of the EFET General Agreement to provide for optimal timing of such termination under local law? If you are recommending that a grace period be made applicable in respect of § 10.5(c)(iv), 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 § 10.4 of the (EFET) General Agreement to Implement such optimal termination timing.

5.29 Under the laws of Singapore, it is not necessary, and we do not make recommendations, to modify the scope of the Automatic Termination or to specify, or refrain from specifying, a certain grace period.

Are the provisions in § 11 of the EFET General Agreement providing for the netting of all positive and negative Settlement Amounts in determining the Termination Amount enforceable under the laws of Singapore or is there a risk that such determination could be challenged by a liquidator, administrator, receiver or third party?

5.30 Please see clause 5.13 above, where we reached the view that the obligation to pay the Termination Amount resulting from a close-out netting under § 10.3(b) and § 10.4 of the EFET General Agreement, and the calculation of that Termination Amount under § 11.1 of the EFET General Agreement, would be enforceable.

5.31 We should mention that in the event (which is not likely) that the liquidator of Party A would be able to successfully challenge any off-setting under § 11.1 of the EFET General Agreement as amounting to a contractual set-off rather than a netting arrangement, 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 described in clause 6.1).

Do the laws of Singapore recognize that the close-out netting provisions in section §§ 10 to 11 of the EFET General Agreement apply to all Individual Contracts or could it be challenged by a liquidator, receiver or third party? Would we need the single agreement concept 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 elaborate in a detailed and circumstantiated manner on whether or not, and if so, the degree to which, provisions allowing or providing for the termination of some Individual Contracts but not all Individual Contracts under the EFET General Agreement might impact termination and close out rights generally, as well as subsequent rights to terminate Individual Contracts remaining under the EFET General Agreement following a previous Partial Close-Out.

5.32 We are of the view that the laws of Singapore recognising the close-out netting provisions in §§ 10 to 11 of the EFET General Agreement will apply also to all Individual Contracts. While the single agreement concept is useful to establish mutuality of claims and debts, it is not critically important in order to preserve the enforceability of the termination right and the ability to calculate a net amount.

5.33 Under the laws of Singapore, it is possible for the Parties to contractually agree to terminate some but not all the Individual Contracts from the EFET General Agreement, without impacting the enforceability of the termination and close-out rights.

Is the insolvent counterparty's obligation to pay the amount of any compensation claim in Euro, USD or GBP (as agreed between the parties in the Election Sheet) enforceable under the laws of Singapore or could the calculation or demand of such amount in a foreign currency be challenged by a liquidator, administrator, receiver or third party?

5.34 The Singapore court may in its discretion award judgment for a sum of money expressed in a foreign currency if they consider that it is the currency which most fairly expresses the plaintiff's loss, but such monetary amount may have to be converted into Singapore dollars for enforcement purposes. Regulation 49 of the Insolvency, Restructuring and Dissolution (Bankruptcy) Regulations 2020 provides that the amount of the debt shall be converted into Singapore dollars at the rate prevailing on the date of the bankruptcy order, such rate being determined as follows:

(a) the rate will be the rate of exchange made available by the MAS and prevailing on the date of the bankruptcy order in question; and

(b) in the absence of any such rate, it shall be such rate as may be determined by the administrator of the bankrupt's estate.

This power may be exercised whether the applicable law of the contract is foreign law or Singapore 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.

Please specify, if and as applicable, the degree to which termination and close-out rights in case of opening of insolvency against a party based in your jurisdiction are dependent upon, or otherwise affected 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?

5.35 The termination and close-out rights in insolvency would not be dependent upon, or otherwise affected by the status of the insolvent Party.

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 clauses 5.30 to 5.34 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 to terminate and close-out the EFET General Agreement enforceable in accordance with the terms of EFET General Agreement, irrespective of the insolvency of Party A?

5.36 On the basis of the assumptions, and subject to the qualifications, in this opinion, the rights of the Terminating Party to terminate and close-out the EFET General Agreement (in the context of non-insolvency related Material Reasons) are enforceable irrespective of the insolvency of Party A.

C.II Multibranch Parties

1. Singapore Multibranch Party

Would there be any change in your conclusions reached under C.I.1 above based on the fact that Party A has conducted business under the EFET General Agreement on a multibranch basis prior to its insolvency?

5.37 Pursuant to Section 140 of the IRDA, the liquidator of Party A shall take into his custody or under his control all the property and things in action to which Party A is or appears to be entitled. Accordingly, the liquidation proceeding of Party A would extend to all domestic and foreign assets of Party A, including the assets of any non-Singapore branches of Party A. The Singapore courts will apply the laws of Singapore in such proceedings and thus there would be no change to our conclusions, subject to the following observations as to the insolvency jurisdiction of the Singapore courts:

(a) The Singapore courts have insolvency jurisdiction under the IRDA in respect of all insolvency procedures of a Singapore financial institution incorporated in Singapore, regardless of whether such Singapore financial institution has conducted business under the EFET General Agreement on a multibranch basis.

(b) The Singapore courts have insolvency jurisdiction under the IRDA in respect of all insolvency procedures of a licensed insurer in Singapore, regardless of whether such licensed insurer has conducted business under the EFET General Agreement on a multibranch basis.

Would the EFET General Agreement be treated as a single unified agreement by the Singapore receiver under the laws of Singapore, regardless of the treatment of the EFET General Agreement or Individual Contracts by an insolvency official in a country, where close-out netting may be unenforceable?

5.38 A liquidator is required to include obligations arising from all Individual Contracts governed by the EFET General Agreement in respect of all amounts to be calculated in accordance with the EFET General Agreement (regardless of whether these obligations originate from multiple branches of such Party) in the calculation of amounts owed to and from the insolvent counterparty.

5.39 A liquidator will unlikely undermine the "global" netting provisions of the EFET General Agreement (whereby the Terminating Party may net obligations arising from all and any Individual Contracts governed by the terms of the EFET General Agreement, regardless of the type of Individual Contract or from which office it was entered into) by treating the obligations in respect of Individual Contracts entered into from the office in Singapore separately from other obligations arising under the EFET General Agreement or other Individual Contracts governed by the terms of the EFET General Agreement.

5.40 However, in the absence of specific case-law, in the event that under the governing law of the EFET General Agreement, close-out netting is unenforceable or a Singapore court recognises a foreign insolvency proceeding, we do not express a view as to the treatment of the EFET General Agreement by a Singapore liquidator under the laws of Singapore.

2. Foreign Multibranch party

Would there be separate proceedings in Singapore with respect to the assets and liabilities of the Singapore 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 county other than Singapore]? Or would the relevant authorities in Singapore defer to the proceedings in Country H, so that the assets and liabilities of the Singapore Branch would be handled as part of the proceedings for Party F in County H? Could local creditors of the Singapore Branch initiate separate proceedings in Singapore even if the relevant authorities in Singapore did not do so?

5.41 Section 250 of the IRDA provides that if a foreign company is liquidated or dissolved in its place of incorporation, the Singapore court may appoint a liquidator of the foreign company in Singapore. In addition, where the Singapore Branch is a bank licensed in Singapore under the Banking Act, the MAS Act provides that the foreign liquidator will not have the powers and functions of a liquidator for Singapore unless the liquidator has been approved by the MAS.

5.42 In short, the authority of the liquidator of Party F appointed under the laws of Country H would be recognised in Singapore subject to the limitation stated in clause 5.41 above. The question of whether there is any ring-fencing of assets depends on whether the Singapore Branch falls within certain categories of entities to which ring-fencing applies. Pursuant to Section 250(3)(c)(i) of the IRDA, ring-fencing applies to foreign companies which are or were prior to liquidation or dissolution carrying on business as "relevant companies"[8]. For such "relevant companies" the liquidator appointed for Singapore by the Singapore courts shall be concerned only with the recovery and the realisation of the assets of Party F located or deemed to be located in Singapore and shall pay the net amount so recovered to the liquidator of Party F after paying any debts and satisfying any liabilities of Party F in Singapore, as well as any preferential debts of Party F under Section 203 of the IRDA. The liquidator cannot pay out any creditor to the exclusion of any other creditor of Party F, save in relation to preferential debts under Section 203 of the IRDA or where the liquidator has obtained a Singapore court order.

5.43 In the case of a Singapore Branch that is a Singapore licensed bank, the Banking Act further provides that where the Singapore Branch becomes unable to meet its obligations or becomes

[8] "Relevant Company" means a licensed bank, a merchant bank or other financial institution approved under section 28 of the MAS Act, a finance company, a licensed insurer, a recognised market operator, a licensed foreign trade repository, a recognised clearing house, an approved holding company, a holder of a capital markets services licence that does not only carry on the business of providing credit rating services, a Registered Fund Management Company as defined under the Securities and Futures (Licensing and Conduct of Business) Regulations, a licensed financial adviser, a licensed trust company, an operator of a designated payment system, a person that has in force a payment services licence granted under Section 6 of the Payment Services Act 2019

insolvent, the assets of the Singapore Branch shall be available to meet certain liabilities in Singapore of the Singapore Branch (which generally relate to deposit liabilities and insured deposits under the deposit insurance scheme). These liabilities have priority over all unsecured liabilities of the Singapore Branch other than the preferential debts specified in the IRDA. The other provisions of the Banking Act as well as the mandatory insolvency laws of Singapore would also apply.

5.44 In the case of a Singapore Branch that is a licensed insurer, Section 49FR of the Insurance Act provides that the assets of the licensed insurer (subject to certain provisions on insurance funds) shall be available to meet specified liabilities in Singapore of the licensed insurer.

5.45 Where Party F is not a "relevant company", the ring-fencing rule under Section 250(3)(c) of the IRDA does not apply, though the sequence of priorities in respect of preferential debts under Section 203 of the IRDA would still apply to Party F which is wound up or dissolved pursuant to Section 250 of the IRDA. In addition, Section 250(5) of the IRDA requires that the liquidator in Singapore must, before paying any amount so recovered and realised in Singapore to the foreign liquidator, be satisfied that the interests of creditors in Singapore are adequately protected.

5.46 In this respect, it will not be entirely accurate to say that the relevant authorities in Singapore would defer to the liquidation proceedings in Country H such that the assets and liabilities of the Singapore Branch would be handled as part of the proceedings for Party F in Country H. Even in the case of the liquidator appointed under the laws of Country H, the liquidator will be acting generally in accordance with the laws of Singapore (and the mandatory provisions of the Banking Act, the MAS Act and the Insurance Act (if applicable) will prevail over foreign insolvency laws in the case of a Singapore Branch that is a licensed bank or licensed insurer) and moreover, the liquidator will pay the preferred creditors and, (if ring-fencing applies) other approved creditors of Party F in Singapore, prior to remitting the surplus assets to himself.

5.47 Section 246 of the IRDA provides for the rights of the creditors of the Singapore Branch to initiate a separate winding-up proceeding in Singapore. Under Section 246, an unregistered company may be wound-up on the following grounds:

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

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

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

5.48 The making of a winding-up order by the Singapore courts on any of the above three grounds is a matter of discretion; however, Section 246(1)(d) provides that a foreign company may be wound up only if it has a substantial connection with Singapore[9]. Section 246(4) of the IRDA

[9] For the purposes of determining whether a foreign company has a substantial connection with Singapore, the Singapore court may rely on the presence of one or more of the following:

(a) Singapore is the centre of main interests of the company;
(b) the company is carrying on business in Singapore or has a place of business in Singapore;
(c) the company is a foreign company that is registered under the Companies Act;
(d) the company has substantial assets in Singapore;
(e) the company has chosen Singapore law as the law governing a loan or other transaction, or the law governing the resolution of one or more disputes arising out of or in connection with a loan or other transaction;
(f) the company has submitted to the jurisdiction of the Singapore court for the resolution of one more disputes relating to a loan or other transaction.

further provides that a foreign company may be wound up not withstanding that it is simultaneously being wound-up under the laws of the place under which it was incorporated.

5.49 The liquidator appointed under Section 246 of the IRDA will assume the authority of the liquidator of the foreign company appointed under the laws of its place of incorporation and will have all the powers of a liquidator appointed in respect of a Singapore company. Accordingly, the Singapore Branch may be wound up notwithstanding that Party F is already the subject of a liquidation proceeding, whether voluntary or involuntary, under the insolvency laws of Country H. The winding up proceedings in Singapore in respect of the Singapore Branch will generally be limited in its scope or operation to assets located in Singapore.

5.50 We will highlight that there is a possibility that foreign insolvency proceedings may have an impact on the enforceability of the close-out netting provisions under Singapore law. Under Singapore law, there is the possibility of recognition under common law in Singapore of the appointment of the liquidator or other insolvency officer in the counterparty's home jurisdiction, and for the Singapore courts to assist, at common law, foreign insolvency proceedings. Such possibility has been made clear in the recent Singapore Court of Appeal decision of *Beluga Chartering GmBH (in liquidation) & Ors v Beluga Projects (Singapore) Pte Ltd (in liquidation) & Anor (deugro (Singapore) Pte Ltd, non party)* [2014] SGCA 14. However, the precise extent of recognition and assistance has yet to be worked out in Singapore.

5.51 In the absence of specific case-law, we do not express a view as to whether the Singapore courts will, in recognising and assisting a foreign insolvency, go as far as to give assistance in such a way that may limit the application of Singapore insolvency law.

5.52 In addition to the possibility of assistance and recognition at common law, there is the possibility of recognition and assistance being granted under the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency (the "**Model Law**"), incorporated under Section 252 of the IRDA. Situations in which the Model Law applies include (a) where assistance is sought in Singapore by a foreign court or a foreign representative in connection with a foreign proceeding, (b) where a foreign proceeding and a proceeding under Singapore insolvency law in respect of the same debtor are taking place concurrently. The Model Law does not apply to certain entities[10] such as a licensed bank, a licensed merchant bank and a licensed insurer.

5.53 Where the Model Law does apply, we are of the view that the Model Law provisions should not affect set-off and netting per se, as the reliefs that may be granted by a Singapore court are qualified in scope and effect as if the debtor had been made the subject of a winding up order under the IRDA and subject to the same powers of the Singapore court and the same prohibitions, limitations, exceptions and conditions as would apply under the law of Singapore.[11] Accordingly, we believe that the better view to be that courts would not grant relief under the Model Law that affects the enforceability of set-off and netting arrangements.

If there were separate proceedings in Singapore with respect to the assets and liabilities of the Singapore Branch, would the receiver or liquidator in Singapore and the Singapore courts, based on the facts above, include Party F's position under the EFET General

[10] The full list of entities is set out in the Insolvency, Restructuring and Dissolution (Prescribed Companies and Entities) Order 2020. These are licensed banks, merchant banks and other financial institutions approved under section 28 of the MAS Act, finance companies, a payment system operator, an authorised reinsurer, a licensed insurer, insurance brokers, recognised market operators, licensed foreign trade repository, recognised clearing houses, approved holding companies, capital markets services license holders, approved trustees, Registered Fund Management Companies, financial advisers, licensed trust companies, designated payment system operator and trustee managers of business trusts.

[11] See Article 20(2) and Article 1(3) which provides that the Singapore court must not grant any relief, or modify any relief already granted, or provide any cooperation or coordination, if such relief or modified relief or cooperation or coordination would, in the case of a proceeding under Singapore insolvency law, be prohibited by the IRDA, the Banking Act, the MAS Act or the Insurance Act or certain other written law.

Agreement, in whole or in part, among the assets of Singapore and, if so, would the receiver or liquidator and the Singapore courts recognize the close-out netting provisions of the EFET General Agreement in accordance with their terms? The most significant problem arising would be if a[n] Singapore receiver, liquidator or court considering a single EFET General Agreement were to require a counterparty of the Singapore Branch of Party F to pay the mark-to-market value of Individual Contracts entered into with the Singapore Branch to the liquidator or receiver of the Singapore Branch, while at the same time forcing the counterparty to claim in the proceedings in Country H for its net value from other Individual Contracts with Party F under the same EFET General Agreement in considering this issue, please assume that close-out netting under the EFET General Agreement would be enforced in accordance with its terms in the proceedings for Party F in Country H.

5.54 In the event of a separate liquidation proceeding in Singapore with respect to the assets and liabilities of the Singapore Branch, we are of the view that the liquidator in Singapore and the Singapore courts will include Party F's position under the EFET General Agreement among the assets of the Singapore Branch as the Individual Contracts documented by the EFET General Agreement constitute one single agreement. In such a situation, the counterparty will make its claims against the Singapore Branch in respect of debts arising under or in connection with all the transactions documented by the EFET General Agreement. There will not be a net calculation based only on the Individual Contracts booked through the Singapore Branch.

5.55 We are also of the view that the Singapore courts will recognise the netting provisions of the EFET General Agreement especially if this is the same legal position under the governing law of the EFET General Agreement, and the liquidator in Singapore will take into account the whole of Party F's positions under the EFET General Agreement for close-out netting purposes.

5.56 We therefore think that it is unlikely that the liquidator of Party F in Singapore considering a single EFET General Agreement would require the counterparty of the Singapore Branch to pay the mark-to-market value of the Individual Contracts entered into with the Singapore Branch to the liquidator of the Singapore Branch and at the same time forcing the counterparty to claim in the liquidation proceeding in Country H for the net termination value under the Individual Contracts with Party F under the same EFET General Agreement.

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

5.57 The Singapore courts may take into account the laws of Singapore as the law of the place where the asset or property is legally situated and the governing law of the asset or property (despite the choice of governing law of the EFET General Agreement) and where Party F has no "establishment" in Singapore and the IRDA applies, the assets of Party F would have to be recovered in accordance with Section 246 of the IRDA (see clauses 5.47 to 5.50 above).

C.III. Collateral

5.58 As defined in the Instruction Letter, "Collateral" refers to collateral provided under the EFET Credit Support Annex.

5.59 Additionally, we assume that transfers under the EFET Credit Support Annex would not be characterised as creating a form of security interest under English or German law (as the case may be).

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

5.60 In the case of Eligible Credit Support taking the form of Cash, the agreement to transfer ownership of the Cash is contained in the EFET Credit Support Annex and the choice of law provisions of the EFET Credit Support Annex (as set out in the EFET General Agreement) would be recognised in Singapore, subject to the observations at clause 5.115 below. However, on the assumption (as stated in the Instruction Letter) that and insofar as the Cash is held in an account under the control of Party B maintained in the jurisdiction of the relevant currency, the transfer of the Cash may be subject to the law of that jurisdiction and/or the governing law of Party B's account agreement with the bank at which the account is maintained.

5.61 In the case of Eligible Credit Support taking the form of a Letter of Credit, we refer to our observations at clause 5.62 below.

Would the laws of Singapore 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?

5.62 In the case of Eligible Credit Support taking the form of a Letter of Credit, we assume that there is no "transfer" or ownership, but rather that the Letter of Credit is issued directly by a commercial bank in favour of and delivered directly to Party B (such an assumption being consistent with the provisions of §1.2 and the definition of "Letter of Credit" under the EFET Credit Support Annex). We therefore express no view as to the "transfer" of Letters of Credits.

5.63 The following clauses consider the position in the case of Eligible Credit Support taking the form of Cash.

5.64 The Singapore courts would likely give effect to the express intent of the Parties as reflected by the wording and the substance of the arrangements set out under the EFET Credit Support Annex unless the court considers that there is evidence showing that the Parties' true intentions are otherwise.

5.65 We note that §7.1 of the EFET Credit Support Annex provides that each Party agrees that all right, title and interest in and to any Eligible Credit Support which, it transfers to the other Party under the terms of the EFET Credit Support Annex 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. §7.3 of the EFET Credit Support Annex further provides that nothing in the EFET Credit Support Annex is intended to create or does create in favour of either Party any mortgage, charge, lien, pledge, encumbrance or other security interest in any cash or other property transferred by one Party to the other Party under the EFET Credit Support Annex.

5.66 Based on the express provisions of the EFET Credit Support Annex above, we are of the view that the courts of Singapore would likely 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 of the Eligible Credit Support.

5.67 There may be a risk that the Singapore courts may re-characterise the transfer of Eligible Credit Support as creating a security interest in favour of the Transferee (notwithstanding such a transfer may not be characterised as creating a form of security interest under English or German law (as the case may be)) as the Singapore courts may construe the following arrangements as implying that the Parties' true intentions are for the Transferor to retain some form of ownership over the Eligible Credit Support:

(a) §7 of the EFET Credit Support Annex which provides that the Transferee shall pay the Transferor interest on Cash held and received by the Transferee as Eligible Credit Support; and

(b) §11 of the EFET Credit Support Annex provides that in the event of Early Termination of the Agreement, the Base Currency Equivalent of all Eligible Credit Support provided shall be included in the Termination Amount to be determined pursuant to §11 of the EFET General Agreement as part of "other amounts payable" by the Transferee.

We are of the view that the risk of the above is low given the express intention of the Parties as discussed in clauses 5.65 and 5.66 above, and assuming that Parties are acting in good faith and there is no other evidence (whether arising from the Parties' conduct or otherwise) that the Parties' intended to create a security interest over the Eligible Credit Support as opposed to an unconditional transfer of ownership.

5.68 If the Singapore courts re-characterises the transfer of Eligible Credit Support as creating a security interest taking the form of a charge over book debts of the Transferor or a floating charge over the Transferor's property (see clause 5.71 below), such charge will be required to be registered under the Companies Act and a failure to register such charge will render the charge void as against the liquidator or any creditor of the Transferor.

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 Singapore 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?

5.69 No further action is required under the laws of Singapore to enforce or continue such ownership interest.

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

5.70 Assuming that Party B receives absolute ownership of the Eligible Credit Support, the right of the Party A to substitute the Eligible Credit Support pursuant to §6 of the EFET Credit Support Annex will not have any effect and the presence of consent has no bearing on the question.

5.71 However, If the Singapore courts re-characterises the transfer of Eligible Credit Support as creating a security interest, the right of Party A to substitute the Eligible Credit Support without the consent of Party B may be construed by the court as evidence that a floating charge over Party A's property has been created. Such floating charge will be required to be registered under the Companies Act and a failure to register such charge will render the charge void as against the liquidator or any creditor of Party A.

5.72 This opinion does not consider Letters of Credit which we assume cannot be "transferred' (please see clause 5.62 above).

Party B's right in relation to the transferred collateral upon termination of the relevant master agreement will be governed by § 11 of the EFET General Agreement together with §11 of the EFET Credit Support Annex. Assuming that § 11 of the EFET General Agreement is valid and enforceable in Singapore insofar as it relates to the determination of a net amount payable by either Party on the termination of individual Contracts, is §11 of the EFET 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 a net amount payable under § 11 of the EFET General Agreement as "other amounts payable"?

5.73 §11 of the EFET 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 Termination Amount to be determined pursuant to §11 of the EFET General Agreement as part of "other amounts payable" by the Transferee.

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

5.74 We are of the view that the provisions of the EFET Credit Support Annex would be enforceable under the laws of Singapore irrespective of the insolvency of Party A, subject to the assumptions and qualifications set out in this opinion and the discussion in clauses 5.75 – 5.77 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 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?

5.75 A transfer of collateral provided by Party A to Party B before the date of Party A's insolvency (or other relevant insolvency proceeding) may be set aside in the following scenarios:

(a) Transactions at an undervalue

Under the IRDA, a judicial manager or liquidator of Party A may apply to court to set aside a transaction entered into at an undervalue at the relevant time.

The IRDA deems a transaction entered into by Party A with Party B to be at an undervalue if:

(i) Party A makes a gift to Party B or otherwise enters into a transaction with Party B on terms that provide for Party A to receive no consideration; or

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

The IRDA defines "relevant time" for the purpose of transactions at an undervalue as the period starting 3 years before the commencement of judicial management[12] or winding up[13] and ending on the date of the judicial management or winding up, and

[12] The commencement of the judicial management means (a) in a case where the judicial manager is appointed by the court under section 91 of the IRDA, the time when the application for the judicial management order was made; or (b) in a case where the judicial manager is appointed by the creditors of the company under section 94(11)(e), the time when the copy of the notice of appointment of the interim judicial manager is filed with the Registrar of Companies and the Official Receiver under section 94(5)(a).

[13] The commencement of winding up means: (a) in a case where the company is being wound up under an order of the court made at a time when the company was being wound up voluntarily, the time of the commencement of the voluntary winding up as determined in accordance with (d) or (e) below; (b) in a case where the company is being wound up under an order of the

subject that the time Party A entered into the transaction would not be considered a "relevant time" unless (i) Party A is unable to pay its debts at that time within the meaning of section 125(2) of the IRDA or (ii) Party A becomes unable to pay its debts within the meaning of section 125(2) of the IRDA in consequence of the transaction.

(b) Unfair preference

Under the IRDA, a judicial manager or liquidator of Party A may apply to court to set aside a transaction which constitutes an unfair preference and which was given at the relevant time.

The IRDA deems an unfair preference to be given by Party A to Party B if:

(i) Party B is one of Party A's creditors or a surety or guarantor for any of Party A's debts or other liabilities; and

(ii) Party A does anything or suffers anything to be done which (in either case) has the effect of putting Party B into a position which, in the event of Party A's winding up, will be better than the position Party B would have been in if that thing had not been done. In this respect, Party A must have been influenced, in deciding to do anything or suffer anything to be done, by a desire to produce in relation to Party B the effect mentioned above.

The IRDA defines "relevant time" for the purpose of unfair preferences as:

(A) in the case of an unfair preference which is not a transaction at an undervalue and is given to a person who is connected with Party A (otherwise than by reason only of being Party A's employee), the period of 2 years before the commencement of judicial management or winding up and ending on the date of the commencement of the judicial management or winding up; and

(B) in any other case of an unfair preference, the period starting 1 year before the commencement of judicial management or winding up and ending on the date of the commencement of the judicial management or winding up,

and subject that the time Party A entered into the transaction would not be considered a "relevant time" unless (i) Party A is unable to pay its debts at that time within the meaning of section 125(2) of the IRDA or (ii) Party A becomes unable to pay its debts within the meaning of section 125(2) of the IRDA in consequence of the transaction.

(c) Floating charges (Applicable only where the Singapore courts re-characterises the transfer of Eligible Credit Support as creating a security interest taking the form of a floating charge)

Under the IRDA, a floating charge on Party A's property created at a relevant time would be invalid except to the extent of the aggregate of:

(i) the value of so much of the consideration for the creation of the charge as consists of money paid, or goods or services supplied, to Party A at the same time as, or after, the creation of the charge;

court on an application made while the company was in judicial management, the time of the commencement of the judicial management; (c) in a case where a company is being wound up under an order of the court in any other case, the time of the making of the winding up application; () in a case where the company is being wound up voluntarily and a provisional liquidator has been appointed before the resolution for voluntarily winding up was passed, the time when the declaration mention in section 161(1) of the IRDA was lodged with the Registrar of Companies; or (e) in any other case where the company is wound up voluntarily, the time of the passing of the resolution for voluntary winding up.

(ii) the value of so much of that consideration as consists of the discharge or reduction, at the same time as, or after, the creation of the charge, of any debt of Party A; and

(iii) the amount of such interest (if any) as is payable on the amount falling within clauses (i) and (ii) above pursuant to any agreement under which the money was so paid, the goods or services were so supplied or the debt was so discharged or reduced.

The IRDA stipulates that the time at which a floating charge is created by Party A is a "relevant time" if the charge is created:

(A) in the case of a charge which is created in favour of Party B who is connected with Party A, at a time within the period of 2 years ending on the commencement of judicial management or winding up;

(B) in the case of a charge which is created in favour of Party B who is not connected with Party A, at a time within the period of 1 year ending on the commencement of judicial management or winding up, subject that the time at which the floating charge is created would not be considered a "relevant time" unless (i) Party A is unable to pay its debts at that time within the meaning of section 125(2) of the IRDA or (ii) Party A becomes unable to pay its debts within the meaning of section 125(2) of the IRDA in consequence of the transaction under which the charge was created; or

(C) at a time within the period starting on the commencement of judicial management and ending on the date Party A enters judicial management.

5.76 There does not appear to be any Singapore court decisions on the substitution of collateral during the suspect period. We take the view that, assuming the substitute assets are of no greater value than the assets they are replacing:

(a) it is arguable that such a substitution of collateral during the relevant suspect period will not constitute a transaction at an undervalue or an unfair preference and is unlikely to invalidate an otherwise valid transfer for that reason alone; and

(b) in the case where the Singapore courts have re-characterised the transfer of Eligible Credit Support as creating a security interest taking the form of a floating charge created during the suspect period, the floating charge over the substitute assets would be invalid except to the extent stated under clause 5.75(c) above.

5.77 With regards to a transfer of additional collateral during the suspect period made pursuant to mark-to-market provisions agreed between the parties under an existing EFET Credit Support Annex, and assuming that the existing EFET Credit Support Annex was entered into on an arms-length basis and that the existing EFET Credit Support Annex is not itself liable to be set aside due to the scenarios under clause 5.75 above, we take the view that such a transfer will not constitute a transaction at an undervalue or an unfair preference. If however, it is a case where the Singapore courts have re-characterised the transfer of Eligible Credit Support as creating a security interest taking the form of a floating charge created during the suspect period, the floating charge over the additional collateral would be invalid except to the extent stated under clause 5.75(c) above.

Is the EFET 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 Singapore in order to ensure validity of such transfer in each type of Eligible Credit Support created by Party A under the EFET Credit Support Annex? For example, are there any other requirements such as those mentioned under o) above [i.e. the question to which clauses 5.62 et seq. are the response]?

5.78 Under the laws of Singapore, the EFET Credit Support Annex is in an appropriate form to create the intended outright transfer of ownership in the collateral to Party B.

5.79 There are no other requirements under the laws of Singapore necessary to ensure the validity of such transfer.

5.80 This opinion does not consider letters of credit which we assume cannot be "transferred" (please see clause 5.62 above).

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

5.81 We do not have any such specific recommendations.

C.IV. General Enforceability

Is the EFET General Agreement and any of the above Annexes (including the EFET Credit Support Annex) enforceable under the laws of Singapore in accordance with its own terms?

5.82 On the basis of the assumptions and subject to the qualifications in this opinion, we are of the view that the EFET General Agreement (which, under § 1.1, includes its Annexes) would generally be legal, valid and binding and enforceable under Singapore law.

We would like you to specifically discuss the provisions on (i) non-performance due to Force Majeure (§7 of the EFET General Agreement), (ii) remedies for non-performance (§8 of the EFET General Agreement) and (iii) limitation of liability (§12 of the EFET General Agreement) and any other provisions which in your opinion need to be commented on according to the laws of Singapore, including whether these provisions could and/or need to be further expanded or strengthened under the laws of your jurisdiction. We are especially interested in provisions that you may believe infringe upon the ordre public in Singapore and that may be challenged by the courts in Singapore irrespective of the law that governs the EFET General Agreement.

5.83 The Non-Performance Due to Force Majeure clause at § 7 of the EFET General Agreement would be enforceable under Singapore law.

5.84 The Remedies for Failure to Deliver and Accept clause at § 8 of the EFET General Agreement would be enforceable under Singapore law unless the circumstances of the case were such that it would not be just for the Party suffering loss to have its remedies limited to damages. In those circumstances, the Singapore courts may make an order for specific performance.

5.85 Specific performance is an equitable remedy given at the discretion of the court by which a person is compelled to perform a contractual obligation where damages would not be an adequate remedy. The test on whether to grant specific performance has been reformulated in case law as the question "*is it just, in all the circumstances, for the [claimant] to be confined to his remedy in damages?*" (*Simgood Pte Ltd v MLC Shipbuilding Sdn Bhd and Ors* [2016] 1 SLR 1129). Damages would be considered an adequate remedy if the claimant could obtain what he had contracted for from another source (for example, if the contract concerned the sale of commodities or shares which were readily available in the market). Similarly, a contract to lend money cannot be specifically enforced by either party: the assumption being that damages can be assessed by reference to current rates of interest.

5.86 There is a general jurisdiction to deny specific performance if the court, on the particular facts, considers it just to do so. The most familiar specific grounds are as follows:

(a) legal incapacity of the defendant to bind himself by contract;

(b) the contract is illegal or oppressive;

(c) the conduct of the claimant (for example, where the claimant has failed to perform conditions of the contract or done acts amounting to a repudiation of the contract or been guilty of undue delay in performing his part of the contract);

(d) it has become impossible for the defendant to perform the contract;

(e) the contract has been rescinded or varied; or

(f) it is contrary to public policy to order performance.

5.87 Subject to this Part C.IV. (General Enforceability), exclusion of liability clauses are generally enforceable under the laws of Singapore, provided they are expressed clearly and without ambiguity.

5.88 No exclusion of liability clause can protect a Party from liability for his own fraud or require the other Party to assume what he knows to be false. Furthermore, under the laws of Singapore a Party cannot, by reference to a contract term or notice, exclude or restrict his liability for death or personal injury resulting from negligence. Any such exclusion or restriction of liability is wholly ineffective. In the case of other loss or damage resulting from negligence, a Party cannot exclude or restrict liability, pursuant to written standard terms of business, except insofar as the term satisfies the requirement of reasonableness.

5.89 "Standard terms" used in the course of a business which seek to exclude or restrict liability for breach of contract or obligations in tort are subject to regulation by the Unfair Contract Terms Act (Chapter 396) ("**UCTA**"). Section 3 of UCTA applies a test of reasonableness to any clause which seeks to exclude or restrict liability or which allows a business to render a contractual performance substantially different from that which was expected of it or, in respect of all or part of its obligations, to render no performance at all (see *Kay Lim Construction & Trading Pte Ltd v Soon Douglas (Pte) Ltd* [2013] 1 SLR 1).

5.90 There is a risk that the EFET General Agreement could be considered as the standard terms of business of one of the Parties. The test of reasonableness will depend on the wording of the EFET General Agreement and Individual Contract and the circumstances affecting the Parties. UCTA indicates some factors which may be taken into consideration when assessing the reasonableness of a provision including those set out in Schedule 2 to UCTA[14].

5.91 Particular rules apply to the construction of an exclusion clause, including, *inter alia*, that it is

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Schedule 2 of the UCTA provides that the matters to which regard is to be had in particular for the purposes of sections 6(3) and 7(3) and (4) of the UCTA are any of the following which appear to be relevant:

(a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met;

(b) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;

for the party seeking to rely on the exclusion clause to show that the clause, on its true construction, covers the obligation or liability which it purports to restrict or exclude. Any doubt or ambiguity in the construction of the clause will be resolved against that party. We express no view as to whether, in any particular circumstance, a Party would be able to enforce the exclusion of liability clause on the terms set out in § 12 of the EFET General Agreement.

5.92 Without prejudice to the above and subject to the observations of this Part C.IV. (*General Enforceability*), a clause which limits consequential damages and liability, such as § 12.3 of the EFET General Agreement is enforceable under Singapore law. Similarly, § 12.4 of the EFET General Agreement would also be enforceable under Singapore law.

5.93 The Duty to Mitigate Losses under § 12.5 of the EFET General Agreement would be enforceable under Singapore law.

5.94 The wording of the limitations and exclusions under § 12 of the EFET General Agreement is consistent with the wording of many such clauses in Singapore.

Please indicate any recommendations you have and which you are of the opinion EFET and its members need to be aware of regarding the general legal enforceability, from a legal standpoint, of the EFET General Agreement and its Credit Support Annex.

5.95 We do not have any such recommendations.

C.V. Confirmation Practices

1. Binding individual Contract

Does the formation of a legally binding and enforceable individual Contract require any formal act (e.g. execution in writing, signature, registration or notarization) under the laws of your jurisdiction?

5.96 For an Individual Contract 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.

5.97 Under the laws of Singapore, Individual Contracts 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 Singapore. There is no statute of Singapore which requires Individual Contracts as envisaged by the EFET General Agreement to be in any prescribed form.

5.98 Accordingly, an oral agreement (whether taped or not) will be enforceable if the three elements set out in clause 5.96 above are present and no factors are absent which would make the agreement incomplete or invalid for reasons of uncertainty.

5.99 Under Singapore laws, an electronically transmitted confirmation of an Individual Contract is acceptable. However, the method of transmission, i.e. by facsimile transmission, exchange of telexes or exchange of electronic messages on an electronic messaging system, must be in accordance with the terms of the contract.

(c) whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);
(d) where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;
(e) whether the goods were manufactured, processed or adapted to the special order of the customer.

5.100 § 3.2 of the EFET General Agreement contemplates the confirmation "in writing" by either Party of their understanding of the agreed terms of an Individual Contract. In our opinion, this would include electronically transmitted confirmations. In this regard, Part 2 of the Electronic Transactions Act (Chapter 88) of Singapore provides that an offer and the acceptance of an offer may be expressed by means of electronic communications and that were an electronic communication is used in the formation of a contract, that contract shall not be denied validity or enforceability solely on the ground that an electronic communication was used for that purpose.

At what point in time does an Individual Contract agreed upon orally become legally binding or enforceable under the laws of your jurisdiction?

5.101 In accordance with the principles set out in clause 5.96 above and §§ 3.1 and 3.2 of the EFET General Agreement, an Individual Contract 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 per the laws of your jurisdiction? If so, is there a relevant time period per the laws of your jurisdiction that could potentially override the governing law of the EFET General Agreement, and permit the parties to object still?

5.102 The submission of a Confirmation after the formation of a contract will not vary the terms orally agreed between the Parties (see clause 5.101 above).

5.103 Subject to any contrary agreement, remaining silent and 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.

5.104 However, it may be possible for a Party to argue that by failing to object to the incorrect term in the Confirmation and by the other Party conducting themselves in a way that a reasonable person would believe that the other Party assents to the terms as proposed by that Party, the other 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 Individual Contract 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 the relevant EFET General Agreement made in the relevant written confirmation sufficient for the inclusion of the Individual Contract in the Agreement?

5.105 In our view, unless it can be shown that the Parties intend otherwise, an Individual Contract concluded orally which the Parties reference as being included in the EFET General Agreement would be so included.

2. Means of Evidence

Assuming there is a dispute with respect to the existence [of] the terms or conditions of an Individual Contract, would any or all of the following be eligible for rendering or otherwise properly introducing evidence of the agreed terms of the Individual Contract in front of a court in your jurisdiction (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?

5.106 The requirements for contract formation under Singapore law include offer and acceptance (see clause 5.96 above); Singapore law does not prescribe any formalities for the format of offer and acceptance in relation to Individual Contracts.

5.107 Generally (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 an Individual Contract in the Singapore courts, subject to the provisions of the Evidence Act (Chapter 97), the Rules of Court and common law principles which apply to evidence generally.

5.108 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.

5.109 Recording telephone communications is a form of collecting personal data, in respect of which the provisions of the Personal Data Protection Act 2012 should be complied with.

C.VI. Core Provisions

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

5.110 Under Singapore law, none of the elections contemplated under the EFET General Agreement or the Annexes (including the EFET Credit Support Annex) would change the substance of such conclusions.

5.111 As to substitution with or without consent, please see clauses 5.70 and 5.72 above.

Considering your conclusions reached under Part C.I or C.II. (Enforceability of Close-Out Netting), what are the provisions of the EFET General 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: § 1, § 10.3(a), the second sentence of § 10.3(b), § 10.3(d), § 10.5(c)(iv), § 11 and the related definitions contained [in] Annex 1 to the EFET General Agreement.

5.112 We consider the following provisions to be Core Provisions:

(a) § 1;

(b) § 10.1;

(c) § 10.3(a);

(d) § 10.3(b);

(e) § 10.4; and

(f) § 11.

Would the inclusion of the [EFET] General Agreement in the EFET Cross Product Payment Netting Agreement, the Master Netting Agreement or in the CPMA Cross-Product Master Agreement (as amended by the EFET/IECA Commodities Schedule to the Cross-Product Master Agreement) (the "CPMA") change the substance of your conclusions reached under Part C.I or C.II?

5.113 The substance of our conclusions in Part C.I or C.II of this opinion would not change with the inclusion of the EFET General Agreement in the EFET Cross Product Payment Netting Agreement or in the CPMA. In particular, the EFET Cross Product Payment Netting Agreement is concerned with payment netting, rather than close-out netting, and § 3.1 of the CPMA provides that the Termination Amount under the EFET General Agreement (where it is designated as a "Principal Agreement" under the CPMA) shall be determined in accordance with the terms of the EFET General Agreement.

C.VII. Governing Law, Arbitration and Jurisdiction

Would the Parties' agreement on the governing law, submission to arbitration or jurisdiction (§ 22 of the EFET General Agreement) be upheld in Singapore, and what would be the consequence if it were not?

5.114 In this section, we have assumed the Parties have chosen the law of a country in § 22 of the EFET General Agreement, and that if the Parties opt for court jurisdiction instead of arbitration for the resolution of disputes, they provide for the exclusive jurisdiction of the courts of a country.

Governing law

5.115 If the matter were raised before the courts of Singapore, the choice of law provisions concerning the governing law of the agreement set out in § 22 of the EFET General Agreement would generally be upheld as a valid choice by the Singapore courts, provided that:

(a) such laws are proven to the satisfaction of the courts of Singapore (which satisfaction is within the discretion of the said courts);

(b) it is a bona fide choice made in good faith and not with a view to avoiding the provisions or effect of any other applicable law;

(c) such laws will be disregarded if their application would be illegal or contrary to public policy and any applicable mandatory rules of law in Singapore; and

(d) matters of procedure including questions of set-off and counter-claim, interest chargeable on judgement debts, priorities, measures of damages, limitation of actions and submissions to the jurisdiction of foreign courts are, as a general rule, governed by the laws of Singapore to the exclusion of the relevant expressed governing law.

Arbitration

5.116 The Singapore courts will recognise and give effect to the agreement to arbitrate and subject to and in accordance with the International Arbitration Act (Chapter 143A) of Singapore, a Singapore court would stay the proceedings before them in favour of arbitration as specified in § 22 of the EFET General Agreement provided that: § 22 of the EFET General Agreement is not null and void, inoperative or incapable of being performed; the Party seeking a stay of the proceedings in the Singapore 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.

Jurisdiction

5.117 § 22 of the EFET General Agreement does not expressly provide for the Parties to submit to the jurisdiction of any Courts, instead providing an arbitration clause. However, in the event that in the Election Sheet the parties instead agree that the courts of a country are to have exclusive jurisdiction to settle any disputes which arise under the EFET General Agreement the Singapore courts will generally respect the Parties' contractual choice of jurisdiction. However, the Singapore courts may, in appropriate circumstances exercise its residual jurisdiction to determine the matter.

5.118 Where § 22 of the EFET General Agreement provides for the exclusive jurisdiction of courts other than the Singapore courts, the Singapore courts will generally respect that submission, save that the Singapore courts may nonetheless exercise its residual jurisdiction to determine the matter in cases where the Singapore courts have jurisdiction over the matter, Singapore is a more appropriate forum for determination of the matter and the ends of justice will be better served by the matter being determined in the Singapore courts. Further, if the exclusive choice of jurisdiction of courts falls within the meaning of an "exclusive choice of court agreement" Choice of Courts Agreements Act 2016, a Singapore court must stay or dismiss any case or proceedings to which the exclusive choice of court agreement applies, subject to the stated exclusions in the Choice of Courts Agreements Act 2016.

C.VII. Regulatory Regime

Are there any exchange control laws or license requirements (under, e.g., any banking, securities trading or energy law) that may affect the enforceability of the relevant EFET General Agreement or of the Individual Contracts?

5.119 All persons are exempted from the provisions of the Exchange Control Act (Chapter 99) of Singapore (under which the MAS had powers to control a wide variety of transactions in currency, gold and security) by MAS Notice 754 (Exchange Control Liberalisation).

5.120 Under Article VIII, Section 2(b) (Avoidance of restrictions on current payments) of the Articles of Agreement of the International Monetary Fund (which has the force of law in Singapore by virtue of Section 11 of the Bretton Woods Agreements Act (Chapter 27) of Singapore, exchange contracts which involve the currency of any member of the International Monetary Fund and which are contrary to the exchange control regulations of that member maintained or imposed consistently with the Articles of Agreement of the International Monetary Fund are unenforceable in the territory of any member, which includes Singapore. "Exchange contract" is not defined in the Articles of Agreement of the International Monetary Fund or the Bretton Woods Agreements Act (Chapter 27) of Singapore. In the case of *Bank of India v Trans Continental Commodity Merchants Ltd* [1985-1986] SLR(R) 608, A Wahab Ghows J had this to say: "...It is clear from the authorities cited that the term "exchange contracts" in s 2(b) of Art VIII of the Bretton Woods Agreements should be interpreted narrowly and should be confined to contracts to exchange the currency of one country for that of another."

5.121 Under the CTA, a person who wishes to (a) carry on business as a commodity broker[15] or hold himself out as carrying on such a business; or (b) act or hold himself out as a spot commodity

[15] Defined to mean a person who (whether as principal or agent) carries on the business of soliciting, or accepting orders, for the purchase or sale of any commodity by way of or relating to any commodity contract, whether or not the business is part of, or is carried on in conjunction with, any other business.

broker[16], is required to be licensed under the CTA, subject to the exempted persons[17] in the Schedule to the CTA.

5.122 In addition, a person who contravenes the licence requirements under the CTA is guilty of a criminal offence and may face a fine not exceeding S$100,000 or to imprisonment for a term not exceeding 3 years or both (Section 12(2) CTA and Section 13A(3)(a) CTA). Although the CTA is silent on whether an agreement made by an unlicensed person in breach of the licensing requirement is unenforceable against the other contracting party such agreement may be unenforceable against, or voidable at the instance of, the other contracting party for illegality or may be ineffective or in breach of the laws, or contrary to the public policy, of Singapore and may not be enforced by the Singapore courts.

C.IX. Other Provisions

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

5.123 We do not have any such recommendations.

6. Qualifications

Insolvency Set-Off

6.1 In a winding up or a judicial management of a Party under the laws of Singapore, the set-off of amounts representing terminated obligations may be effected under Section 219 of the IRDA. Set-off pursuant to Section 219 of the IRDA ("**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"[18] between the Parties' subject to the inclusion in any insolvency set-off of other mutual obligations between such Parties. In order for Insolvency Set-Off to apply, the following conditions and requirements must be met:

[16] Defined to mean a person whether as principal or agent who carries on the business of soliciting or accepting orders, for the purchase or sale of any commodity by way of spot commodity trading, whether or not the business is part of, or is carried on in conjunction with, any other business but does not include a commodity broker.

[17] In respect of paragraph (a) above, the following persons are exempted: (i) a person who carries on the purchase or sale of commodities in a market that is not a commodity market, where such transaction is made with another person in the ordinary course of business and where it is not intended for resale other than in the ordinary course of business of wholesale or retail or where there is physical delivery of such commodities from seller to buyer, or a person who solicits or accepts orders for the purchase or sale of any commodity by way of or (ii) relating to any commodity contract for a customer in the following circumstances: (1) the person is not a party to the commodity contract, (2) the person does not carry the customer's position, margin or account in the person's own books, (3) the person does not accept money or assets from the customer as settlement of, or a margin for, or to guarantee or secure, any commodity contract, (4) there is physical delivery of the commodity from seller to buyer, (iii) a person who carries on the business of trading in commodity contracts only with accredited investors and not with any other person, (iv) a bank licensed under the Banking Act or a merchant bank approved under the MAS Act, (v) a person who is a Finance and Treasury Centre, an approved oil trading company or an approved international commodity trading company, within the meaning of the Income Tax Act (Chapter 134) of Singapore.
In respect of paragraph (b) above, the following persons are exempted, (i) a person who carries on spot commodity trading on his own account and does not solicit any funds from any member of the public or any section of the public in connection with the carrying out of any spot commodity trading, (ii) a person who solicits or accepts orders for the purchase or sale of any commodity by way of spot commodity trading for a customer in the following circumstances: (A) the person is not a party to any contract for the purchase or sale of the commodity, (B) the person does not carry the customer's position, margin or account in the person's own books; and (C) the person does not accept money or assets from the customer as settlement of, or a margin for, or to guarantee or secure any contract for any contract for the purchase or sale of any commodity.

[18] 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).

(a) there must be mutuality. Broadly speaking, mutuality requires each claimant to be liable on the debt to the other and each claimant must beneficially own the debt that is sought to be set off (for instance, where the Parties to the EFET General Agreement are acting as principals and own the beneficial interests in the debts);

(b) the mutual debts must be capable of maturing into monetary claims, and thereby establishing a liability on each side which is pecuniary in nature. In respect of transactions which involve physical delivery of commodities, this requirement is achieved in the EFET General Agreement by converting the delivery obligations into monetary obligations upon the occurrence or the designation of an Early Termination Date;

(c) set-off will not be available to the Terminating Party if it had notice, at the time the Parties entered into the EFET General Agreement and each Individual Contract, of the making of a winding up application against the insolvent counterparty, or the appointment of a provisional liquidator in respect of the insolvent counterparty, or a judicial management application against the insolvent counterparty. In contrast with conditions (a) and (b) above, the non-fulfilment of this condition (c) will affect only those Individual Contracts entered into after the Terminating Party had notice of the making of a winding up application against the insolvent counterparty, the appointment of the provisional liquidator or the judicial management application (with the result that set-off may not be available with respect to such Individual Contracts).

6.2 There are provisions in the IRDA for schemes of arrangement in respect of companies to be agreed by creditors or, in some cases, shareholders of the company.

6.3 The courts will not sanction a scheme of arrangement under Section 63 of the IRDA 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 the case of a scheme of 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.

Resolution powers of the MAS

6.4 The MAS Act was amended in 2013 to confer resolution powers on the MAS to deal with, inter alia, banks, insurance companies and other financial institutions in the event of their insolvency. These powers are broad and include the power to order a transfer of all or part of the business of a financial institution; they supplement existing powers of control conferred on MAS under the Banking Act and the Insurance Act[19].

6.5 These powers include the power to issue directions, power to issue moratoria, power to apply for court orders and the power to order a compulsory transfer of business[20].

[19] These allow the MAS to require the financial institution concerned to immediately take any action or to do or not to do any act or thing as the MAS may consider necessary, appoint one or more persons as statutory adviser, assume control of the institution or appoint one or more persons as statutory manager to do so.
[20] See Sections 51, 53(1), 53(2) and 57 of the MAS Act

6.6 In addition, the MAS has powers to reverse transfers of the whole or any part of the business back to the transferor, as well as order onward transfers of business (in whole or in part) to another transferee under Part 3 of the MAS Regulations.

6.7 We would note that these powers do not make any direct reference to netting or set-off arrangements. However, there is a new Section 126 in the MAS Act which makes specific provision for the enactment of regulations exempting set-off arrangements or netting arrangements from the provisions of Part IVB of the MAS Act (dealing with resolution of financial institutions).

6.8 The MAS has also made numerous policy statements[21][22] that it is not the MAS' intent, in exercising resolution powers over financial institutions, to interfere with set-off and netting arrangements, and that an exercise of resolution powers should not defeat or otherwise affect the preservation of set-off and netting arrangements.

6.9 The MAS has certain safeguards in connection with compulsory partial transfers of business such as the safeguard against partial transfers. Regulation 11 of the MAS Regulations provides that a partial transfer of the business of a transferor under Section 57 of the MAS Act must not provide for the transfer of some, but not all, of the protected rights and liabilities between a particular person and the transferor.

Rights and liabilities between the particular person and the transferor are protected if (i) they are rights and liabilities that arise from one or more financial contracts[23] between them, and (ii) they are rights and liabilities which either the particular person or the transferor is entitled to set-off or net under a set-off arrangement[24], netting arrangement[25] or title transfer arrangement[26].

This effectively means that rights and liabilities relating to a financial contract may only be transferred together as a whole to a transferee, or not at all. This prevents the cherry picking of specific Individual Contracts during a compulsory transfer of business by the MAS, provided the Individual Contract falls within the definition of a "financial contract", thereby protecting a compulsory transfer of business from disrupting close-out netting under netting arrangements such as the EFET General Agreement.

6.10 These safeguards address the concerns in relation to the partial transfers of business by the MAS for transactions that fall within the definition of "financial contracts", as well as secured liabilities and their security. No other safeguards have been promulgated to date concerning the other resolution powers of the MAS – for instance, the MAS' powers of reverse transfers of business and onward transfers of business do not have similar express safeguards. However,

[21] Proposed Legislative Amendments to Enhance the Resolution Regime for Financial Institutions in Singapore. In its response to feedback received in connection with the 2016 Consultation Paper, MAS stated that safeguards on protection of set-off and netting arrangements will be respected when MAS exercises its resolution powers, and that it is not MAS' intent, in the exercise of resolution powers over pertinent financial institutions, to defeat or otherwise affect the preservation of set-off and netting arrangements

[22] Available online at: https://www.mas.gov.sg/publications/monographs-or-information-paper/2017/mas-approach-to-resolution-of-financial-institutions-in-singapore. In paragraph 9.11 of the monograph, the MAS stated that the integrity of protected financial arrangements will be preserved when the MAS exercises its resolution powers under the MAS Act, in particular where there is a transfer of part but not the whole of the business (including assets and liabilities) of the non-viable financial institution during resolution

[23] Defined under the MAS Regulations to mean securities contracts, derivatives contracts, securities lending and repurchase agreements and spot contracts.

[24] Defined under the MAS Act to mean means an arrangement under which 2 or more debts, claims or obligations can be set-off against each other.

[25] Defined under the MAS Act to mean an arrangement under which 2 or more claims or obligations can be converted into a net claim or obligation, and includes a close-out netting arrangement (under which actual or theoretical debts are calculated during the course of a contract for the purpose of enabling them to be set-off against each other or to be converted into a net debt)

[26] Defined under the MAS Regulations to mean an arrangement under which a person transfers assets to another person on terms providing for the other person to transfer those assets back to the first person if the specified obligations are discharged

the other resolution powers do not make specific reference to netting or set-off arrangements and how these resolution powers are exercised is dependent on the MAS.

6.11 In summary, it is our view that the exercise by the MAS of the resolution powers in relation to a Singapore financial institution would not affect the validity and enforceability of the close-out netting provisions of the EFET General Agreement.

Bail In

6.12 In Singapore, the statutory bail-in powers of the MAS enshrined in the MAS Act[27] came into force on October 2018 with a view to ensuring Singapore's regime for the resolution of failing banks.[28] For non-bank financial institutions, the MAS will continue to monitor international developments on bail-in regimes. The MAS Act contains provisions which empower the MAS to cancel, modify or convert and/or change the form (i.e. convert from debt to equity) of an eligible instrument of a failing bank to facilitate orderly resolution.

6.13 The following eligible instruments within the scope of bail-in are:

(a) any equity instrument or other instrument that confers or represents a legal or beneficial ownership in the failing bank, except an ordinary share;
(b) any unsecured liability or other unsecured debt instrument that is subordinated to unsecured creditors' claims of the failing bank that are not so subordinated;
(c) any instrument that provides for a right for the instrument to be written down, cancelled, modified, changed in form or converted into shares or another instrument of ownership, when a specified event occurs.

The MAS has confirmed that derivatives contracts[29] will not be within the scope of bail-in.

Insurers

6.14 The Insurance Act requires that where a licensed insurer is wound up, debts are paid out of the assets of the licensed insurer in the following order of priority: (a) preferential debts specified in Section 203(1) of the IRDA, (b) any levy due and payable by the licensed insurer under the Deposit Insurance and Policy Owners' Protection Schemes Act 2011, (c) protected liabilities incurred by the licensed insurer, up to the amount paid or payable out of any of the PPF Funds by the PPF Agency under the Deposit Insurance and Policy Owners' Protection Schemes Act 2011 in respect of such protected liabilities and, if applicable, the amount paid or payable out of any of the PPF Funds by the PPF Agency under the Deposit Insurance and Policy Owners' Protection Schemes Act 2011 to fund any transfer or run-off of the business of the licensed insurer or the termination of insured policies issued by the licensed insurer, (d) any liabilities incurred by the licensed insurer in respect of direct policies which are not protected under the Deposit Insurance and Policy Owners' Protection Schemes Act 2011, (e) any liabilities incurred by the licensed insurer in respect of reinsurance policies and (f) any sum claimed by the trustee

[27] Division 4A of the MAS Act
[28] Currently, the bail-in regime only applies to (a) Singapore incorporated banks and (b) Singapore incorporated bank holding companies (at least one subsidiary of which is a Singapore incorporated bank)
[29] Defined to mean any contract or arrangement under which —
(a) a party to the contract or arrangement is required to, or may be required to, discharge all or any of its obligations under the contract or arrangement at some future time; and
(b) the value of the contract or arrangement is determined (whether directly or indirectly, or whether wholly or in part) by reference to, is derived from, or varies by reference to, either of the following:
(i) the value or amount of one or more underlying things;
(ii) fluctuations in the values or amounts of one or more underlying things,
but does not include -
(c) securities;
(d) a deposit as defined in the Banking Act;
(e) a deposit as defined in the Finance Companies Act (Chapter 108) of Singapore; and
(f) a contract of insurance specified in the Insurance Act

of a resolution fund.

General

6.15 The term "enforceable" as used in this opinion means that each obligation or document is of a type and form enforced by the Singapore courts. The term does not address the extent to which a judgment obtained in a court outside Singapore will be enforceable in Singapore. Nor does it mean that each obligation will be enforced in accordance with its terms. In particular:

(a) certain rights and obligations may be qualified by the nature of the remedies available in the Singapore courts, the acceptance by such courts of jurisdiction, the power of such courts to stay proceedings;

(b) claims may become barred under the provisions of the Limitation Act (Chapter 163) of Singapore or the State Immunity Act (Chapter 313) of Singapore;

(c) a Singapore court may refuse to enforce a provision thereof if such enforcement would be incompatible with any principle of Singapore public policy;

(d) enforcement may be limited by 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 a Singapore court to grant an equitable remedy such as an injunction or specific performance is discretionary, and accordingly a Singapore court might make an award of damages where an equitable remedy is sought;

(e) where obligations are to be performed in a jurisdiction outside Singapore, they may not be enforceable in Singapore to the extent that performance would be illegal or contrary to public policy under the laws of that jurisdiction.

6.16 Any provision of the EFET General Agreement and/or an Individual Contract stating that a failure or delay on the part of any Party in exercising any right or remedy under the relevant EFET General Agreement and/or Individual Contract shall not operate as a waiver of such right or remedy and may not be effective.

Yours faithfully

TAN PENG CHIN LLC

Schedule 1
The Agreements

1. EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1(a), published 21 September 2007)

2. EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1, published 20 December 2000)

3. EFET Credit Support Annex to the General Agreement (Version 2.0, published May, 2010)

4. EFET Allowances Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity

5. EFET Allowances Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 5.0, published February 28, 2018)

6. EFET VAT Annex for use with the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.0, published November 2005)

7. GTMA Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1, published 20 December 2000 and Version 2.1(a) published 21 September 2007) (Version 1.0, published 11 September 2009)

8. EFET EECS Certificates Master Agreement (Version 1.0, published 14 December 2013)

9. EFET EECS Certificates Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.0, published 14 December 2013)

10. Change Letter to amend § 14 (VAT and Taxes) of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.0, published 16 December 2013)

11. Change Letter to amend § 14 (VAT and Taxes) of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.0, published 1 October 2015)

For purposes of Part C.V (*Confirmation Practices*) only:

12. EFET Electronic Confirmation Agreement (published 28 June 2005)

13. Confirmation of Allowance Transactions (including AEUA, EUA, Eligible Kyoto Unit Transactions) (Fixed Price, Third Compliance Period (Phase 3) and Fixed Price, Second Compliance Period (Phase 2) to the Allowances Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.0, published 3 April 2012)

For purposes of Part C.VI (*Core Provision*) only:

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

15. EFET Master Netting Agreement (Version 1.0, published June 2010)

16. CPMA Cross-Product Master Agreement (Version February 2000) as amended by the EFET/IECA Commodities Schedule to the Cross-Product Master Agreement (Version 1.0, published 23 June 2003)

17. EFET Cross-Product Credit Support Annex to the CPMA Cross-Product Master Agreement (Version 1.0, published 23 June 2003)

18. EFET Credit Support Annex to the Master Netting Agreement (Version 1.0 published February 2011)

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 (Chapter 391) of Singapore ("**Partnership Act**") and Section 3 of the Limited Partnerships Act (Chapter 163B) of Singapore; and which is organised, established or formed under the laws of Singapore.

1.2 A reference to a "limited liability partnership" or "LLP" is to a limited liability partnership within the meaning of Section 4(1) of the Limited Liability Partnerships Act (Chapter 163A) of Singapore which is registered under the laws of Singapore.

Additional assumption

1.3 In relation to partnerships and LLPs, we have additionally assumed that where the EFET General Agreement is entered into with a partnership, during the life of any Individual Contract, 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 provides that an incoming partner does not become liable to the creditors of the partnership for anything done before he became a partner. Under Singapore law the introduction of a new partner will constitute a new partnership. Accordingly, it might be argued (a) that the EFET General Agreement is not binding on the incoming partner(s), or (b) that Individual Contracts entered into by the former partners are not binding on incoming partner(s), with the consequence that not all obligations are subject to the EFET General Agreement or not all obligations are mutual, so that the relevant provisions of §§ 10.3, 10.4 and 11 of the EFET General Agreement would be ineffective to achieve (a) aggregation of values attributable to Individual Contracts entered into after the change in partners; or (b) aggregation of values attributable to Individual Contracts entered into before the change in partners against values attributable to Individual Contracts entered into after such change.

Additional opinion

1.4 Our opinion as to the enforceability of close-out netting under the EFET General Agreement would not change by reason only of one or more of the Parties to the EFET General Agreement 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 IRDA; and

(b) in respect of limited liability partnerships, Limited Liability Partnerships Act (Chapter 163A) of Singapore ("**LLP Act**") and the Limited Liability Partnerships (Winding Up) Rules.

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 Singapore, and which are relevant for the purposes of the opinion, are as follows:

(a) under the IRDA, partnerships are subject to:

(i) voluntary arrangements under Part 14 of the IRDA;

(ii) winding up of an insolvent partnership as an unregistered company[30] under Parts 8 and 9 of the IRDA (Section 246 of the IRDA); or

(iii) bankruptcy as a partnership under Parts 16 and 17 of the IRDA; and

(b) under the Part VI of the LLP Act, LLPs are subject to winding up and receivership.

Additional qualifications

1.7 It is not permissible to set off non-mutual debts or obligations under Section 219 of the IRDA (in the case of winding up) or under Section 346(1) of the IRDA (in the case of bankruptcy). A debt owed by a partner personally cannot, therefore, be set-off under an Insolvency Set-Off rule or Section 346(1) of the IRDA against a debt owed by the creditors of the partnership. Under the insolvency laws of Singapore, the Insolvency Set-off rule and Section 346(1) of the IRDA 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 Parts 16 and 17 of the IRDA (or in a winding up as an unregistered company under Parts 8 and 9 of the IRDA), any dispositions of the insolvent Party's property made after commencement of the bankruptcy (or the winding up) by the court is, unless the court otherwise orders, void under Section 328(1) of the IRDA in the case of a bankruptcy (or Section 130 in the case of a winding up). A similar provision is found in Section 8 to the Fifth Schedule of the LLP Act for LLPs which are wound up by the court. Any disposition of the property of the LLP, and any assignment of a partner's interest or right to distributions from the LLP, or alteration in the status of the partners of the LLP made after the commencement of the winding up by the court shall (unless the Court otherwise orders) be void.

1.9 Part 14 of the IRDA governs bankruptcy voluntary arrangements which apply to insolvent partnerships for voluntary arrangements to be agreed by creditors of the partnership. Section 276(1) of the IRDA provides that any insolvent debtor may propose for a partnership voluntary arrangement. 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 creditors' 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.

1.10 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

[30] Section 245(1) of the IRDA defines "unregistered company" to include a foreign company and any partnership, association, club or company but does not include a company incorporated under the Companies Act or under any corresponding previous written law.

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

2.1 Since there is no insolvency regime in Singapore 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 EFET General Agreement would not change by reason only of one or more of the Parties to the EFET General Agreement and Individual Contracts 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 246 of the IRDA. Section 246(1) provides that *"any unregistered company may be wound up under Parts 8 and 9, which apply to an unregistered company with the following adaptations".*

2.4 None of these entities may be made subject to a company to judicial management proceedings under the IRDA since those regimes are limited to Singapore companies and certain foreign companies.

2.5 It appears likely, however, that these entities may be made subject to a scheme of arrangement under Part 5 of the IRDA. "Company" for purposes of Part 5 is defined in Section 63(3) of the IRDA to include *"any corporation liable to be wound up under this Act, but excludes such company or class of companies as the Minister may by order in the Gazette prescribe"*. In our view, this would include an unregistered company liable to be wound up under Section 246 of the IRDA. This view is supported by an analysis of the definitions of "company" in the IRDA against the definition of "company" in Section 63(3) of the IRDA:

Section 2(1): "company" has the meaning given by section 4(1) of the Companies Act

Section 63(3): "any corporation liable to be wound up under this Act, but excludes such company or class of companies as the Minister may by order in the Gazette prescribe"

2.6 The Section 2(1) definition includes all companies incorporated under the Companies Act (Chapter 50) of Singapore. If Part 5 were limited to such companies, then there would be no need for the definition in Section 63(3). That, taken with the argument that an unregistered company *is liable* to be *wound up under this Act*, as noted above, is in our view sufficient to bring the entities under consideration within the scope of Part 5.

Additional qualifications

2.7 Any provision of the EFET General Agreement and/or any Individual Contract 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
SO YOU CAN RELY ON THE MARKET

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Subject: EFET Close-Out Netting Legal Opinions – Instruction Letter

Date: 2 July 2018

Legal Opinion Regarding the Enforceability of Close-Out Netting and the Validity and Enforceability of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity and its Collateral Arrangements

Dear Counsel,

We are seeking opinions from various jurisdictions on the enforceability of close-out netting provisions of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (the "EFET General Agreement"), the validity and enforceability of collateral provided under the EFET Credit Support Annex to the EFET General Agreement (the "EFET Credit Support Annex") and other related issues as outlined below.

This process is in line with the 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 the 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 the 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"). In the case of a party which has entered into Individual Contracts under a 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 at least annually.

In addition to the usual netting opinions covering the enforceability of close-out netting in relevant jurisdictions, EFET is also interested in opinions addressing (i) the enforceability of collateral provided under the EFET Credit Support Annex ("Collateral"), (ii) the validity and enforceability of other provisions of the EFET General Agreement, like the Limitation of Liability or the consequences of a Force Majeure ("General Enforceability"), (iii) in general terms the conditions that have to be met for an Individual Contract to fall within the scope of the netting provisions of the relevant EFET General Agreement and for a Confirmation to be eligible for evidencing a binding Individual Contract ("Confirmation Practices"), (iv) the validity and enforceability of EFET General Agreement that have been modified by the parties ("Core Provisions"), (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"), and (vi) the existence of specific licensing requirement or currency or exchange control laws that might impact the enforceability of Individual Contracts entered into under the relevant EFET General Agreement ("Regulatory Regime").

For the avoidance of doubt, please note that most of the EFET members relying on this legal opinion are energy utilities (i.e. non-banking / credit institutions). Despite this, the level of detail expected from you when replying to the questions below, shall be such that it meets the requirements set in the Banking Directive and this legal opinion can be used for the purposes of said Banking Directive.

Please provide an executive summary of your main findings in the beginning of your opinion as well as a table of contents (referring to the relevant pages). Your main findings should summarise whether close-out netting, in particular in case of insolvency proceedings, is generally recognized and enforceable in your jurisdiction, and mention if there are any conditions or qualifications required for such recognition and enforcement in your legal system.

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 details of the opinions we are requiring are as follows:

A. Documents to be considered:

- EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1(a), published 21 September 2007) (**Enclosure 1**)[1],
- EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1, published 20 December 2000) (**Enclosure 2**),
- EFET Credit Support Annex to the General Agreement (Version 2.0, published May, 2010) (**Enclosure 3**)[2],

[1] The EFET General Agreement constitutes a bilateral master agreement governing all Individual Contracts the Parties may enter into for the purchase, sale and acceptance of electricity. The EFET General Agreement provides that all Individual Contracts and the General Agreement form a single Agreement (§ 1.1 of the General Agreement), which upon the occurrence of a Material Reason, including a winding-up, insolvency or attachment, may be terminated as a whole only (§ 10.3(a) of the EFET General Agreement). Except as specifically provided (e.g. in the case of clause 14.8(d) or in the case of termination of only the Individual Contracts for emissions trades under an EFET General Agreement supplemented by an Emissions Allowances Appendix without termination of the Individual Contracts under that same EFET General Agreement), the termination and close-out under the EFET General Agreement of only certain Individual Contracts, absent the termination of all outstanding Individual Contracts, is not permitted. Following the termination of the Agreement, a Termination Amount is to be calculated based on all positive and negative Settlement Amounts as determined in compliance with § 11 of the EFET General Agreement. The EFET General Agreement may be governed by any jurisdiction so agreed between the Parties in the Election Sheet (§ 22.1 of the EFET General Agreement) but is generally either subject to English or German law.

[2] The EFET Credit Support Annex provides for the transfer of full ownership in the collateral to the Secured Party that acquires the right of complete and unrestricted use of the collateral. Upon termination of the EFET General Agreement, any collateral provided

- EFET Allowances Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 4.0, published April 3, 2012) (**Enclosure 4**),

- EFET Allowances Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 5.0, published February 28, 2018) (**Enclosure 5**),

- EFET VAT Annex for use with the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.0, published November 2005) (**Enclosure 6**),

- EFET Italian Electricity Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1, published 20 December 2000) (**Enclosure 7**),

- GTMA Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1, published 20 December 2000 and Version 2.1(a) published 21 September 2007) (Version 1.0, published 11 September 2009) (**Enclosures 8 to 10**).

- EFET EECS Certificates Master Agreement (Version 1.0, published 14 December 2013) (**Enclosure 11**),

- EFET EECS Certificates Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.0, published 14 December 2013) (**Enclosure 12**),

- Change Letter to amend § 14 (VAT and Taxes) of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.0, published 16 December 2013) (**Enclosure 13**), and

- Change Letter to amend § 14 (VAT and Taxes) of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.0, published 1 October 2015) (**Enclosure 14**).

For purposes of Part C.V (Confirmation Practices) only:

- EFET Electronic Confirmation Agreement (published 28 June 2005) (**Enclosure 15**),

- Confirmation of Allowance Transactions (including AEUA, EUA, Eligible Kyoto Unit Transactions) (Fixed Price, Third Compliance Period (Phase 3) and Fixed Price, Second Compliance Period (Phase 2) to the Allowances Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.0, published 3 April 2012) (**Enclosure 16**), and

For purposes of Part C.VI (Core Provision) only:

- EFET Cross Product Payment Netting Agreement (Version 1, published 20 October 2005) (**Enclosure 17**), and

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but not yet re-transferred by the parties are to be valued and included into the close-out amount to be determined pursuant to § 11 of the EFET General Agreement (§ 11 of the EFET Credit Support Annex). One special feature of the EFET Credit Support Annex is the definition of "Exposure", which includes all sums due and payable, and the Value of all commodity delivered, but for which payment has not been received. Another particularity is the inclusion of Letter of Credits.

- EFET Master Netting Agreement (Version 1.0, published June 2010) (**Enclosure 18**),

- CPMA Cross-Product Master Agreement (Version February 2000) as amended by the EFET/IECA Commodities Schedule to the Cross-Product Master Agreement (Version 1.0, published 23 June 2003) (**Enclosures 19 and 20**),

- EFET Cross-Product Credit Support Annex to the CPMA Cross-Product Master Agreement (Version 1.0, published 23 June 2003) (**Enclosure 21**), and

- EFET Credit Support Annex to the Master Netting Agreement (Version 1.0 published February 2011) (**Enclosure 22**).

B. General Assumptions

- Two counterparties enter into the EFET General Agreement and at least one of the counterparties is incorporated or organized or has its centre of main interest in [jurisdiction] ("Party A").

- Party A is a corporation, financial institution or other entity as further described in Appendix A.[3]

- The relevant EFET General Agreement is governed by the laws of Germany or England and Wales[4].

- Each EFET General Agreement and any of the above Annexes (including the EFET Credit Support Annex) is enforceable under the laws of any jurisdiction for purposes of private international law (other than the laws of your jurisdiction, for which you are requested to opine on in this legal opinion) and each counterparty has duly authorized, executed and delivered, and has the capacity to enter into, each document.

- On the basis of the terms and conditions of the EFET General Agreement and other relevant factors, and acting in a manner consistent with the intentions stated in the EFET General Agreement, the counterparties over time enter into a number of Individual Contracts which include all of the Individual Contracts described in Appendix B.

- The Individual Contracts provide for the physical delivery of commodities, certificates or emission rights in exchange for cash, however, some of them may also provide for cash settlement.

You will find additional assumptions below.

C. Issues and Additional Assumptions

[3] Please include in your analysis if the netting regime is different depending on the status (e.g. regulated or non-regulated) of an entity.

[4] 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 cover also General Agreements governed by foreign law.

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 § 10.5(c) of the EFET General Agreement) and (2) other non-insolvency related Material Reasons.

1. Winding-up, Insolvency or Attachment

Please provide a short overview of the relevant insolvency proceedings, laws and terminology applicable to Party A and the contract types listed in Appendix B. This overview should be provided in a separate annex to your 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 Agreement, the calculation of the Termination Amount or its payment is voidable, challengeable or in any way deletable by a liquidator, receiver or 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 contract types and/or entities and whether the contract types listed in Appendix B and which of the entities listed in Appendix A would benefit from such provision. We would also like to know whether there is publicly available information that would confirm any of the procedural steps or other solvency related facts (e.g., financial statements, corporate actions, etc.). In addition, please provide a general description of limitations in your jurisdiction, if any, applicable to set-off (both in an insolvency related and non-insolvency related Early Termination scenario and otherwise): (a) between Parties of claims arising under the EFET General Agreement; (b) between Parties of claims arising outside the General Agreement if contractually provided for in an amendment to the EFET General Agreement; and (c) between Affiliates or Credit Support Providers of Parties if contractually provided for in an amendment to the EFET General Agreement. Please base your opinion on the following additional assumptions:

- The relevant EFET General Agreement is governed by any law (including English or German law or the laws of your jurisdiction).

- After entering into the Individual Contracts and prior to the maturity thereof, Party A becomes the subject of a voluntary or involuntary case under the insolvency laws of your jurisdiction and, subsequent to the commencement of the insolvency, either Party A or an insolvency official seeks to assume the confirmations representing profitable Individual Contracts for the insolvent counterparty.

Please discuss the following issues:

a) Automatic Termination:

aa) Would you recommend to elect Automatic Termination to apply upon a Material Reason described in § 10.5(c) of the EFET General Agreement or upon other events not specified therein? If yes, would it be necessary or recommendable to modify the scope of Automatic Termination (e.g., by (i) deleting or modifying some of the events listed in § 10.5(c) which would trigger the termination and/or (ii) adding other Material Reasons upon the occurrence of which Automatic Termination should also apply and/or (iii) by limiting those insolvency events specified in §10.5(c) which would trigger the Automatic Termination) or to specify, or to refrain from specifying, a certain grace period as contemplated in §10.5(c)(iv) of the EFET General Agreement?

- If you are recommending that a grace period be made applicable in respect of §10.5(c)(iv), 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?

Please supply specific language for purposes of customizing §10.4 of the EFET General Agreement to implement your recommendation and the optimal termination timing.

bb) Assuming you recommend Automatic Termination to apply, are the provisions of the EFET General Agreement terminating the EFET General Agreement (including all Individual Contracts) upon the occurrence of a Material Reason described in § 10.5(c) of the EFET General Agreement (adjusted as necessary pursuant to the laws of your jurisdiction) enforceable under the laws of [jurisdiction] or is there a risk that the automatic termination could be challenged by a liquidator, receiver or third party?

b) Assuming you recommend not to elect Automatic Termination (as defined in § 10.4 of the EFET General Agreement) upon the occurrence of an event described in § 10.5(c) of the EFET General Agreement:

aa) would it be necessary or recommendable to modify the scope of termination (e.g., by (i) deleting or modifying some of the events listed in § 10.5(c) which would permit the Terminating Party to terminate and/or (ii) adding other Material Reasons upon the occurrence of which it should be entitled to terminate)?

bb) are the provisions of the EFET General Agreement permitting the Terminating Party to terminate the Agreement (including all Individual Contracts) upon the occurrence of a Material Reason described in § 10.5(c) of the EFET General Agreement (adjusted as necessary pursuant to the laws of your jurisdiction) enforceable under the laws of [jurisdiction] or is there a risk that (i) the entering into the EFET General Agreement, (ii) the entering into Individual Contracts thereunder or (iii) the termination by notice itself could be challenged by a liquidator, receiver or third party?

c) Are the provisions in § 11 of the EFET General Agreement providing for the netting of all positive and negative Settlement Amounts in determining the Termination Amount enforceable under the laws of [jurisdiction] or is there a risk that such determination could be challenged by a liquidator, receiver or third party?

d) Do the laws of [jurisdiction] recognize that the close-out netting provisions in §§ 10 to 11 of the EFET General Agreement apply to all Individual Contracts or could it be challenged by a liquidator, receiver or third party? Would we need the single agreement concept 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 elaborate in a detailed and circumstantiated manner on whether or not, and if so, the degree to which, provisions allowing or providing for the termination of some Individual Contracts but not all Individual Contracts under the EFET General Agreement might impact termination and close out rights generally, as well as subsequent rights to terminate Individual Contracts remaining under the EFET General Agreement following a previous Partial Close-Out.

e) Is the insolvent counterparty obligation to pay the amount of any compensation claim in Euro, USD or GBP (as agreed between the parties in the Election Sheet) enforceable under the laws of [jurisdiction] or could the calculation in a foreign currency be challenged by a liquidator, receiver or third party?

f) Please specify, if and as applicable, the degree to which termination and close-out rights in case of opening of insolvency proceedings, against a party based in your jurisdiction are dependent upon, or otherwise affected 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 the issues outlined above under d), e) and f), as well as the following question:

g) Are the rights of the Terminating Party to terminate and close-out the EFET General Agreement enforceable in accordance with the terms of the EFET General 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 [jurisdiction] and (2) a Multibranch Party incorporated, organized or having its centre of main interest <u>outside</u> [jurisdiction], but operating through one or more branches in [jurisdiction].

1. [Jurisdiction] Multibranch Party

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

- Party A has entered into Individual Contracts under the EFET General Agreement through offices in [jurisdiction] as well as through one or more branches located abroad. After entering into these Individual Contracts and prior to the maturity thereof, Party A becomes the subject of a voluntary or involuntary proceeding under the insolvency laws of [jurisdiction].

Please discuss the following issues:

h) Would there be any change in your conclusions reached under I.1 above based upon the fact that Party A has conducted business under the EFET General Agreement on a multibranch basis prior to its insolvency?

i) Would the EFET General Agreement be treated as a single unified agreement by the [jurisdiction] receiver under the laws of [jurisdiction], regardless of the treatment of the EFET General Agreement or Individual Contracts 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 [jurisdiction] has entered under the EFET General Agreement into Individual Contracts 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 [jurisdiction] (the "[jurisdiction] Branch").

- After entering into these Individual Contracts 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 the following issues:

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

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

l) Please consider your answer to your question assuming instead that Party F has no branch located in [jurisdiction], but has assets in [jurisdiction].

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 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 the following issues:

m) Under the laws of [jurisdiction], what law governs the transfer of ownership in the various forms of Eligible Credit Support deliverable under the EFET Credit Support Annex?

n) Would the laws of [jurisdiction] 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?

o) 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 [jurisdiction] 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?

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

q) Party B's right in relation to the transferred collateral upon termination of the relevant master agreement will be governed by § 11 of the EFET General Agreement together with §11 of the EFET Credit Support Annex. Assuming that § 11 of the EFET General Agreement is valid and enforceable in [jurisdiction] insofar as it relates to the determination of a net amount payable by either Party on the termination of Individual Contracts, is § 11 of the EFET 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 a net amount payable under § 11 of the EFET General Agreement as "other amounts payable"?

r) Are the rights of Party B enforceable in accordance with the terms of the EFET General Agreement and the EFET Credit Support Annex, irrespective of the insolvency of Party A?

s) 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 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?

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

u) Do you have other specific recommendations on the subject of collateral that EFET and its members need to be aware of ? If yes, please provide detailed answer.

IV. General Enforceability

Please discuss the following issues:

v) Is the EFET General Agreement and any of the mentioned Annexes (including the EFET Credit Support Annex) enforceable under the laws of [jurisdiction] in accordance with its own terms? We would like you to specifically discuss, in a detailed and circumstantiated manner the provisions on (i) non-performance due to Force Majeure (§ 7 of the EFET General Agreement), (ii) remedies for non-performance (§ 8 of the EFET General Agreement) and (iii) limitation of liability (§ 12 of the EFET General Agreement) and any other provisions which in your opinion need to be commented on according to the law of [jurisdiction], including whether these provisions could and/or need to be further 'expanded' and/or 'strengthened' under the laws of your jurisdiction. We are especially interested in provisions that you may believe, for example infringe upon the *ordre public* in [jurisdiction] and that may be challenged by the courts in [jurisdiction] irrespective of the laws that governs the EFET General Agreement.

w) Please indicate any recommendations you have and which you are of the opinion EFET and its members need to be made aware of regarding the general enforceability, from a legal stand point, of the EFET General Agreement and its Credit Support Annex.

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 Individual Contract and its inclusion in the EFET General Agreement and (2) the formal requirements a Confirmation should comply with under the laws of [jurisdiction] in order to be sufficient for all purposes to evidence a binding Individual Contract and its inclusion in the EFET General Agreement. When doing so, please base your opinion on the following additional assumptions:

- As far as the Confirmation Practice is concerned, when entering into an Individual Contract, the counterparties in each case (i) make oral reference to the EFET General Agreement when concluding the relevant Individual Contract over the phone or (ii) refer to the EFET General Agreement when subsequently exchanging confirmations or similar electronic, written or non-verbal means of entering into or confirming Individual Contracts (in whichever form, including telex, fax, SWIFT or other means of electronic transmission).

- Parties may or may not (i) use the EFET Electronic Confirmation Matching System (EFET eCM) to electronically match and exchange Confirmations or (ii) enter into the EFET Electronic Confirmation Agreement

1. Binding Individual Contract

Please discuss in detail the following issues:

x) Does the formation of a legally binding and enforceable Individual Contract require any formal act (e.g., execution in writing, signature, registration or notarization) under the laws of your jurisdiction?

y) At what point in time does an Individual Contract agreed upon orally become legally binding or enforceable under the laws of your jurisdiction ?

z) Does failure to object to incorrect terms in a received Confirmation constitute "acceptance" of those terms per the laws of your jurisdiction ? If so, is there a relevant time period per the laws of your jurisdiction that could potentially override the governing law of the EFET General Agreement, and permit the parties to object still ?

aa) Is the reference to the relevant EFET General Agreement made in the relevant written confirmation exchanged (post trade) between the parties sufficient for the inclusion of the Individual Contract in the EFET General Agreement?

2. Means of Evidence

Please discuss in detail the following issues:

bb) Assumed there is a dispute with respect to the existence or the terms and conditions of an Individual Contract, would any or all of the following be eligible for rendering or otherwise properly introducing evidence of the agreed terms of the Individual Contract in front of a court in your jurisdiction: a (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 in detail the following:

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

dd) Considering your conclusions reached under Part C.I or C.II. (Enforceability of Close-out Netting) above, what are the provisions of the EFET General 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: § 1, § 10.3(a), the second sentence of § 10.3(b), § 10.3(d), § 10.5(c)(iv), § 11 and the related definitions contained Annex 1 to the EFET General Agreement.

ee) Would the inclusion of the General Agreement in the EFET Cross Product Payment Netting Agreement, the Master Netting Agreement or in the CPMA Cross-Product Master Agreement (as amended by the EFET/IECA Commodities Schedule to the Cross-Product Master Agreement) change the substance of your conclusions reached under Part C.I or C.II?

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 [jurisdiction] (including English or German law).

Please discuss in detail and advise on the following:

ff) Would the Parties' agreement on the governing law, submission to arbitration or jurisdiction (§ 22 of the EFET General Agreement) be upheld in [jurisdiction], and what would be the consequences if it were not?

VIII. Regulatory Regime

Please discuss the following issues:

gg) Are there any exchange control laws or license requirements (under, e.g., any banking, securities trading or energy law) that may affect the enforceability of the relevant EFET General Agreement or the Individual Contracts?

IX. Other Provisions

hh) If you have other recommendations that you would like EFET members to consider (for example to fully optimize the EFET 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. Addressee, Form and Tenor, Executive Summary and Other Issues

The opinion should be addressed to EFET. It should provide that it (i) is for the sole benefit of EFET and its members, (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 provided pdf version should be searchable.

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, a table of contents (referring to the relevant pages), followed by an elaborated and reasoned discussion of the relevant legal aspects upon which your statement is based upon. We recognize that legal certainty or precedent are often lacking. However, we would like you to render a final conclusion even if it based on more generic concepts of laws or only reflects the "better view" or "more likely approach" a court in [jurisdiction] 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 convenient purposes 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 [jurisdiction] courts will not recognize the close-out netting provisions of the EFET General Agreements in accordance with their terms, please contact us immediately.

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

Kind regards,

European Federation of Energy Traders

Appendices and Enclosures

Appendix A

Types of Counterparties

Corporations (e.g., limited liability companies or stock corporations)

Partnerships (e.g., general or limited partnerships)

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

Transactions under the EFET General Agreement

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.

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

Commodity Swap. A transaction in which one party pays periodic amounts of a given currency based on a fixed price and the other party pays periodic amounts of the same currency based on the price of a Commodity or an exchange-traded futures contract on a Commodity (e.g., the EEX EU Carbon Future); all calculations are based on a notional quantity of the commodity.

Physical Commodity Transaction. A transaction which provides for the purchase of an amount of a Commodity at a fixed or floating price for actual delivery on one or more dates.

"Commodity" means electricity, emissions allowances, certificates or capacity rights.