

September 19, 2013

The Futures and Options Association
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CCP Opinion in relation to Chicago Mercantile Exchange, Inc.

Dear Sirs,

You have asked us to give an opinion in respect of the federal laws of the United States and the laws of the State of New York ("**this jurisdiction**") as to the enforceability of the Netting Provision (as defined under paragraph 1.5) by a clearing member (a "**Member**") of the Chicago Mercantile Exchange, Inc. (the "**Clearing House**"). The Clearing House is (i) registered as a derivatives clearing organization (a "**DCO**") with the U.S. Commodity Futures Trading Commission (the "**CFTC**") under the U.S. Commodity Exchange Act of 1936, as amended (the "**Commodity Exchange Act**") and (ii) "deemed registered" as a securities clearing agency (a "**Securities Clearing Agency**") with the U.S. Securities and Exchange Commission (the "**SEC**") by operation of law pursuant to Section 763 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("**Dodd-Frank**") for the limited purpose of clearing over-the-counter Security-Based Swaps (as defined under paragraph 1.5).

We understand that your requirement is for the enforceability and validity of such provisions to be substantiated by a written and reasoned opinion letter.

References herein to "**this opinion**" are to the opinion given in paragraph 5.1.

1 TERMS OF REFERENCE

1.1 Except where otherwise defined herein, terms defined in the Clearing House Documentation have the same meaning in this letter.

- 1.2 References to a "**section**" or to a "**paragraph**" are (except where the context otherwise requires) to a section or paragraph of this letter (as the case may be).
- 1.3 Unless the context clearly indicates to the contrary, references to the plural include the singular and references to the singular include the plural.
- 1.4 References to the word "**enforceable**" and cognate terms are used to refer to the ability of a Party to exercise its contractual rights in accordance with their terms and without risk of successful legal challenge. We do not opine on the availability of any judicial remedy.

1.5 **Definitions**

In this letter, unless otherwise indicated:

- (a) "**34 Act**" means Securities Exchange Act of 1934, as amended;
- (b) "**Assessment Liability**" means a liability of a Member to pay an amount to the Clearing House (including a contribution to the assets or capital of the Clearing House, or to any default or similar fund maintained by the Clearing House), but excluding:
- (i) any obligations to provide margin or collateral to the Clearing House, where calculated at any time by reference to Contracts open at that time;
 - (ii) membership fees, fines and charges;
 - (iii) reimbursement of costs incurred directly or indirectly on behalf of or for a Member or its own clients;
 - (iv) indemnification for any taxation liabilities;
 - (v) payment or delivery obligations under Contracts; or
 - (vi) any payment of damages awarded by a court or regulator for breach of contract, in respect of any tortious liability or for breach of statutory duty;
- (c) "**Bankruptcy Code**" means the United States Bankruptcy Code;¹

¹ 11 U.S.C. §§ 101 *et seq.*

- (d) "**Bankruptcy Event**" means with respect to any person, institution by or against such person of a proceeding seeking a judgment of insolvency or bankruptcy or any other relief under any bankruptcy or insolvency law or other similar law affecting creditors' rights, or presentation of a petition for such person's winding up or liquidation, and, in the case of any such proceeding or petition presented against such person, where such proceeding or petition results in a judgment of insolvency or bankruptcy or the entry of an order for relief or the making of an order for such person's winding-up or liquidation;
- (e) "**By-Laws**" means the by-laws of the Clearing House in force as at the date of this letter;
- (f) "**CFTC CDS Contract**" means a CDS Product that is a Swap;
- (g) "**CFTC Futures Contract**" means a contract for future delivery within the meaning of the Commodity Exchange Act (a "**futures contract**"), an option on a futures contract or a commodity option, each listed for trading on the Exchange under Section 5c(c) of the Commodity Exchange Act, CFTC Regulation 38.4(a) and CFTC Regulation 40.3, for which the Clearing House acts as a DCO, but does not include a Security Future.
- (h) "**CFTC Regulations**" means the rules promulgated by the CFTC under the Commodity Exchange Act;
- (i) "**Cleared Swaps Contracts**" means CFTC CDS Contracts, Interest Rate Swaps, and Swap FX OTC Cleared Transactions;
- (j) "**Cleared Swaps Customer Account**" has the same meaning as set out under CME Rule 973;²
- (k) "**Clearing House Documentation**" means the By-Laws and CME Rules;
- (l) "**Client Account**" means Customer Segregated Account or Cleared Swaps Customer Account, as applicable;
- (m) "**CME Rules**" means the rules of the Clearing House in force as at the date of this letter and publicly available on the Clearing House's website at <http://www.cmegroup.com/rulebook/CME/>;³

² We note that the CME Rules also reference a "Cleared OTC Derivatives Sequestered Account", which appears to qualify as a Cleared Swaps Customer Account for the purposes of the CME Rules.

- (n) "**Commodity Contract**" means a "commodity contract" (as such term is defined under the Bankruptcy Code);⁴
- (o) "**Contract**" means a CFTC Futures Contract, a CFTC CDS Contract, an Interest Rate Swap, Swap FX OTC Cleared Transaction, or a Security Futures Contract, as applicable;
- (p) "**Customer Segregated Account**" has the same meaning as set out under CME Rule 973;
- (q) "**Exchange**" means Chicago Mercantile Exchange Inc.;
- (r) "**House Account**" means an account of a Member or "proprietary account" as defined under CFTC Regulation 1.3(y) maintained at the Clearing House;
- (s) "**Member**" means a clearing member of the Clearing House;

³ The term "**CME Rules**", as used in this letter, does not include any materials that are not publicly available on the website of the Clearing House as of the date hereof, including, without limitation, any manuals or other materials or provisions.

⁴ Under the Bankruptcy Code, the term "**commodity contract**" means "(A) with respect to a futures commission merchant, contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade; (B) with respect to a foreign futures commission merchant, foreign future; (C) with respect to a leverage transaction merchant, leverage transaction; (D) with respect to a clearing organization, contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization, or commodity option traded on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization; (E) with respect to a commodity options dealer, commodity option; (F)(i) any other contract, option, agreement, or transaction that is similar to a contract, option, agreement, or transaction referred to in this paragraph; and (ii) with respect to a futures commission merchant or a clearing organization, any other contract, option, agreement, or transaction, in each case, that is cleared by a clearing organization; (G) any combination of the agreements or transactions referred to in this paragraph; (H) any option to enter into an agreement or transaction referred to in this paragraph; (I) a master agreement that provides for an agreement or transaction referred to in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H), together with all supplements to such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a commodity contract under this paragraph, except that the master agreement shall be considered to be a commodity contract under this paragraph only with respect to each agreement or transaction under the master agreement that is referred to in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H); or (J) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this paragraph, including any guarantee or reimbursement obligation by or to a commodity broker or financial participant in connection with any agreement or transaction referred to in this paragraph, but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562". See 11 U.S.C. § 761(4).

- (t) "**Netting Provision**" means CME Rules 818.A., 818.C. and 818.E., as may be qualified by CME Rule 8H802.B.;
- (u) "**Party**" means the Clearing House or the relevant Member;
- (v) "**Securities Contract**" means a "securities contract" as such term is defined under Section 741(7) of the Bankruptcy Code;⁵

⁵ Under the Bankruptcy Code, the term "**securities contract**" means (A)(i) a contract for the purchase, sale, or loan of a security, a certificate of deposit, a mortgage loan, any interest in a mortgage loan, a group or index of securities, certificates of deposit, or mortgage loans or interests therein (including an interest therein or based on the value thereof), or option on any of the foregoing, including an option to purchase or sell any such security, certificate of deposit, mortgage loan, interest, group or index, or option, and including any repurchase or reverse repurchase transaction on any such security, certificate of deposit, mortgage loan, interest, group or index, or option ...; (ii) any option entered into on a national securities exchange relating to foreign currencies; (iii) the guarantee (including by novation) by or to any securities clearing agency of a settlement of cash, securities, certificates of deposit, mortgage loans or interests therein, group or index of securities, or mortgage loans or interests therein (including any interest therein or based on the value thereof), or option on any of the foregoing, including an option to purchase or sell any such security, certificate of deposit, mortgage loan, interest, group or index, or option (whether or not such settlement is in connection with any agreement or transaction referred to in clauses (i) through (xi)); (iv) any margin loan; (v) any extension of credit for the clearance or settlement of securities transactions; (vi) any loan transaction coupled with a securities collar transaction, any prepaid forward securities transaction or any total return swap transaction coupled with a securities sale transaction; (vii) any other agreement or transaction that is similar to an agreement or transaction referred to in this subparagraph; (viii) any combination of the agreements or transactions referred to in this subparagraph; (ix) any option to enter into any agreement or transaction referred to in this subparagraph; (x) a master agreement that provides for an agreement or transaction referred to in clause (i), (ii), (iii), (iv), (v), (vi), (vii), (viii), or (ix) together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a securities contract under this subparagraph, except that such master agreement shall be considered to be a securities contract under this subparagraph only with respect to each agreement or transaction under such master agreement that is referred to in clause (i), (ii), (iii), (iv), (v), (vi), (vii), (viii), or (ix); or (xi) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this subparagraph, including any guarantee or reimbursement obligation by or to a stockbroker, securities clearing agency, financial institution, or financial participant in connection with any agreement or transaction referred to in this subparagraph, but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562 of the Bankruptcy Code; and (B) does not include any purchase, sale, or repurchase obligation under a participation in a commercial mortgage loan." See 11 U.S.C. § 741(7).

Under 11 U.S.C. § 101(49), a "**security**":

"(A) includes a (i) note; (ii) stock; (iii) treasury stock; (iv) bond; (v) debenture; (vi) collateral trust certificate; (vii) pre-organization certificate or subscription; (viii) transferable share; (ix) voting trust certificate; (x)

- (w) "**Security-Based Swap**" means a "security-based swap" as such term is defined under Section 3(a) of the '34 Act;
- (x) "**Security Future**" means a "security future" as such term is defined under Section 1a(44) of the Commodity Exchange Act;⁶
- (y) "**Security Futures Contract**" means a Security Future or any "security futures product", as such term is defined under Section 1a(45) of the Commodity Exchange Act, cleared through the Clearing House or subject to the CME Rules;⁷

certificate of deposit; (xi) certificate of deposit for security; (xii) investment contract or certificate of interest or participation in a profit-sharing agreement or in an oil, gas, or mineral royalty or lease, if such contract or interest is required to be the subject of a registration statement filed with the Securities and Exchange Commission under the provisions of the Securities Act of 1933, or is exempt under Section 3(b) of such Act from the requirement to file such a statement; (xiii) interest of a limited partner in a limited partnership; (xiv) other claim or interest commonly known as "security," and (xv) certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase or sell, a security; but

(B) does not include a (i) currency, check, draft, bill of exchange, or bank letter of credit; (ii) leverage transaction, as defined in Section 761 of the Bankruptcy Code; (iii) commodity futures contract or forward contract; (iv) option, warrant, or right to subscribe to or purchase or sell a commodity futures contract; (v) option to purchase or sell a commodity; (vi) contract or certificate of a kind specified in subparagraph A(xii) of this paragraph that is not required to be the subject of a registration statement filed with the Securities and Exchange Commission and is not exempt under Section 3(b) of the Securities Act of 1933 from the requirement to file such a statement; or (vii) debt or evidence of indebtedness for goods sold and delivered or services rendered".

In addition, Section 3B(a) of the Securities Exchange Act of 1934, as amended provides that "any agreement, contract, or transaction (or class thereof) that is exempted by the [CFTC] pursuant to Section 4(c)(1) of the [Commodity Exchange Act] with the condition that the [CFTC] exercise concurrent jurisdiction over such agreement, contract, or transaction (or class thereof) shall be deemed a security for purposes of the securities laws."

⁶ The term "**security future**" means "a contract of sale for future delivery of a single security or of a narrow-based security index, including any interest therein or based on the value thereof, except an exempted security under section 3(a)(12) of the Securities Exchange Act of 1934 as in effect on the date of the enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in section 3(a)(29) of the Securities Exchange Act of 1934 as in effect on the date of the enactment of the Futures Trading Act of 1982). The term "security future" does not include any agreement, contract, or transaction excluded from [the Commodity Exchange Act] under section 2(c), 2(d), 2(f), or 2(g) of [the Commodity Exchange Act] (as in effect on the date of the enactment of the Commodity Futures Modernization Act of 2000) or title IV of the Commodity Futures Modernization Act of 2000". 7 U.S.C. § 1a(44).

- (z) "Swap" means a "swap" as such term is defined under Section 1a(47) of the Commodity Exchange Act and the relevant CFTC Regulations.

2 ASSUMPTIONS

We assume the following:

- 2.1 That, except with regards to the provisions discussed and opined on in this letter, the Clearing House Documentation and Contracts are legally binding and enforceable against both Parties under the governing law.
- 2.2 That each Party has the capacity, power and authority under all applicable law(s) to enter into the Clearing House Documentation and Contracts and perform its obligations thereunder.
- 2.3 That each Party has taken all necessary steps to execute and deliver and perform the Clearing House Documentation and Contracts.
- 2.4 That each Party has entered into each relevant Contract for *bona fide* commercial reasons and at arm's length.
- 2.5 That each Party has obtained, complied with the terms of and maintained all authorizations, approvals, licenses and consents required to enable it lawfully to enter into and perform its obligations under the Clearing House Documentation and Contracts and to ensure the legality, validity, enforceability or admissibility in evidence of the Clearing House Documentation in this jurisdiction.
- 2.6 That the relevant Member has complied with all conditions to admission to membership in connection with clearing Contracts under the Clearing House Documentation.
- 2.7 That the Clearing House Documentation has been entered into prior to the commencement of any insolvency procedure under the laws of any jurisdiction in respect of either Party.
- 2.8 That each Party acts in accordance with the powers conferred by the Clearing House Documentation and Contracts; and that (save in relation to any non-performance leading to the taking of action by the relevant Member under the Netting Provision), each Party

⁷ The term "security futures product" means "a security future or any put, call, straddle, option, or privilege on any security future." 7 U.S.C. § 1a(45).

performs its obligations under the Clearing House Documentation and each Contract in accordance with their respective terms.

- 2.9 That, apart from any circulars, notifications and equivalent measures published by the Clearing House in accordance with the Clearing House Documentation, there are not any other agreements, instruments or arrangements between the Parties which modify or supersede the terms of the Clearing House Documentation.
- 2.10 That, other than for the purposes of our discussion under section 8, the Member seeking to exercise its rights under the Netting Provision or other provisions of the CME Rules discussed herein is at all relevant times solvent and not subject to insolvency proceedings under the laws of any jurisdiction.
- 2.11 That the execution, delivery and performance of the Clearing House Documentation and Contracts by each of the Parties do not violate, or require any consent not obtained under, any applicable law or regulation of any jurisdiction or any order, writ, injunction or decree of any court or other governmental authority binding upon such Party.
- 2.12 That the obligations assumed under the Clearing House Documentation and Contracts are mutual between the Parties.⁸
- 2.13 That the requirements of the law governing the transfers of securities and cash are complied with.
- 2.14 That the Clearing House is not (i) a banking institution or a branch thereof which takes deposits insured by the Federal Deposit Insurance Corporation ("FDIC"), (ii) a broker-dealer or (iii) a federally chartered credit union.
- 2.15 That a Member did not make transfers or incur obligations in connection with any Contracts or otherwise under the Clearing House Documentation with actual intent to hinder, delay, or defraud any entity to which the Member was or became, on or after the date that such transfer was made or such obligation was incurred, indebted.

⁸ See our discussion under paragraph 6.2.4.

3 INSOLVENCY PROCEEDINGS

3.1 The only bankruptcy, composition, rehabilitation or other insolvency or reorganization procedures to which the Clearing House could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion, are:

- (a) proceedings under the Bankruptcy Code (the "**Code Proceedings**"); or
- (b) proceedings under the Orderly Liquidation Authority ("**OLA**") set out in Title II of Dodd-Frank (the "**OLA Proceedings**" and together with the Code Proceedings, the "**Insolvency Proceedings**").⁹

3.2 The Code Proceedings applicable to the Clearing House in its capacity as a DCO would be the liquidation proceedings under Subchapter IV of Chapter 7 of the Bankruptcy Code applicable to "commodity brokers," as defined in the Bankruptcy Code (a "**Commodity Broker**"),¹⁰ as supplemented by Part 190 of the CFTC Regulations.

3.3 The OLA Proceedings may be commenced with respect to the Clearing House if (a) the Clearing House is determined to be a "financial company" for the purposes of OLA (a "**Financial Company**"), (b) the Systemic Risk Determination (as defined below) is made with respect to the Clearing House such that it becomes a "covered financial company" (a "**Covered Financial Company**"), and (c) a court does not determine that the Systemic Risk Determination with respect to the Clearing House was arbitrary and capricious.

A "**Financial Company**" is a company that (i) is organized under U.S. state or federal law and (ii) is (A) a bank holding company; (B) a non-bank financial company supervised by the Board of Governors of the Federal Reserve System (the "**Federal Reserve**");¹¹ or (C) a

⁹ Pub. L. No. 111-203.

¹⁰ Under the Bankruptcy Code, the term "**commodity broker**" means "futures commission merchant, foreign futures commission merchant, clearing organization, leverage transaction merchant, or commodity options dealer with respect to which there is a customer". See 11 U.S.C. § 101(6).

¹¹ A "non-bank financial company supervised by the Federal Reserve" is a company that is predominantly engaged in financial activities and supervised by the Federal Reserve but does not include a bank holding company, a Farm Credit System institution chartered and subject to the provisions of the Farm Credit Act of 1971, a national securities exchange (or parent thereof), a clearing agency (or parent thereof, unless the parent is a bank holding company), a security-based swap execution facility, or a security-based swap data repository registered with the Securities Exchange Commission, a board of trade designated as a contract market (or parent thereof), a derivatives clearing organization (or parent thereof, unless the parent is a bank holding company), swap

company predominantly engaged in activities that are financial in nature for purposes of the Bank Holding Company Act of 1956 (the "BHCA"), as determined by the Federal Reserve.¹²

If the Clearing House is determined to be a Financial Company, the procedure for determining whether it is a Covered Financial Company subject to OLA is as follows. The FDIC and the Federal Reserve must first both recommend an OLA proceeding with respect to the Clearing House. The U.S. Treasury Secretary (in consultation with the President of the United States) must then determine (a "Systemic Risk Determination") whether

execution facility or a swap data repository registered with the Commodity Futures Trading Commission. Pub. L. No. 111-203, § 102(a)(4)(C), (D). As a result, the Clearing House, a DCO, will not be a "non-bank financial company supervised by the Federal Reserve" for the purposes of OLA.

We note that the Clearing House, in its letter to the FDIC, dated November 18, 2010, has taken the position that it would not be deemed a Financial Company because it is not a bank holding company and, as a DCO, is excluded from the definition of a "non-bank financial company supervised by the Federal Reserve". Similarly, the Clearing House expressed a view that it would not be a company predominantly engaged in activities that are financial in nature for purposes of the BHCA because it does not derive at least 85% of its consolidated revenues from the revenue generated from such financial activities. However, we are not aware of the FDIC expressly adopting the Clearing House's position. <http://www.fdic.gov/regulations/laws/federal/2010/10c22Orderliq.PDF>.

¹² Pub. L. No. 111-203, § 201(a)(11). A company is not "predominantly engaged" in financial activities if "the consolidated revenues of such company from such activities constitute less than 85 percent of the total consolidated revenues of such company, as [the FDIC], in consultation with [the Treasury Secretary] shall establish by regulation". In determining whether a company is a financial company, the consolidated revenues derived from the ownership or control of a depository institution shall be included. *Id.* at § 201(b).

Under Section 4(k) of the BHCA, activities deemed to be "financial in nature" include, among others, (i) lending, exchanging, transferring, investing for others, or safeguarding money or securities, (ii) insuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability, or death, (iii) providing financial, investment, or economic advisory services, (iv) underwriting, dealing in, or making a market in securities, and (v) engaging in any activity that is determined to be so closely related to banking or managing or controlling banks as to be a proper incident thereto (subject to the same terms and conditions contained in such order or regulation, unless modified by the Board). 12 U.S.C. § 1843k.

(1) the Clearing House is in default or danger of default¹³; (2) the failure of the Clearing House and its resolution under otherwise applicable Federal or state law would have serious adverse effects on financial stability in the United States; (3) no viable private sector alternative is available to prevent the default of the Clearing House; (4) any effect on the claims or interests of creditors, counterparties, and shareholders of the Clearing House and other market participants as a result of actions to be taken under OLA is appropriate, given the impact that any action taken under OLA would have on financial stability in the United States; (5) the remedial actions under OLA would avoid or mitigate such adverse effects, taking into consideration the effectiveness of the action in mitigating potential adverse effects on the financial system, the cost to the general fund of the U.S. Treasury, and the potential to increase excessive risk-taking on the part of creditors, counterparties, and shareholders in the Clearing House; and (6) a federal regulatory agency has ordered the Clearing House to convert all of its convertible debt instruments that are subject to the regulatory order.¹⁴ Once the Systemic Risk Determination is made with respect to the Clearing House, the U.S. Treasury Secretary is required to present all relevant findings and the recommendation to the United States District Court for the District of Columbia (the "**Court**") and provide notice to the Clearing House. After a hearing, in which the Clearing House may oppose the petition, absent the Court finding that the Systemic Risk Determination was arbitrary and capricious, the Court will issue an order authorizing the U.S. Treasury Secretary to appoint the FDIC as receiver.¹⁵

¹³ A Financial Company would be deemed to be in default or danger of default if: (i) a bankruptcy case has been, or likely will be, commenced with respect to a Financial Company; (ii) the Financial Company has incurred, or is likely to incur, losses that will deplete all or substantially all of the Financial Company's capital with no reasonable prospect to avoid such depletion; (iii) the obligations of the Financial Company to creditors and others exceed, or are likely to exceed, its assets; or (iv) the Financial Company is, or is likely to be, unable to pay its obligations in the normal course of business. Pub. L. No. 111-203, § § 203(c)(4)(A)-(D).

¹⁴ Pub. L. No. 111-203, § 203.

¹⁵ Pub. L. No. 111-203, § 202(a)(1). If the Court does not make a determination within 24 hours of receipt of the petition (I) the petition shall be granted by operation of law; (II) the U.S. Treasury Secretary shall appoint the FDIC as receiver; and (III) liquidation under OLA shall automatically and without further notice or action be commenced and the FDIC may immediately take all actions authorized under OLA.

4 SPECIAL PROVISIONS OF LAW

- 4.1 The CFTC Futures Contracts and Cleared Swaps Contracts would be subject to the exclusive jurisdiction of the CFTC and regulation under the Commodity Exchange Act and the CFTC Regulations.
- 4.2 The Security Futures Contracts would be subject to the joint jurisdiction of the CFTC and the SEC and regulation under (i) the Securities Act of 1933, as amended, and '34 Act, and regulations promulgated by the SEC thereunder, and (ii) the Commodity Exchange Act and the CFTC Regulations, as applicable.

5 NETTING OPINION

5.1 Subject to the limitations and qualifications set out under section 6, the Netting Provision would be enforceable in accordance with its terms and without fulfillment of any further conditions so that, upon the occurrence of a Bankruptcy Event in relation to the Clearing House the relevant Member would be entitled to exercise its rights under the Netting Provision, such that the relevant Member would be obliged to pay to the Clearing House or entitled to receive from the Clearing House only a single amount in respect of all individual Contracts, together with other losses or gains referable to the relevant Contracts (the "**Net Close-Out Amount**"), *provided, however* that the Net-Close-Out Amount would be calculated separately with respect to each of:

- (i) the aggregate of all House Accounts (subject to calculations of a separate Net Close-Out Amount with respect to CFTC CDS Contracts carried in the House Account upon the occurrence of a CDS Termination Event (as defined below));
- (ii) the aggregate of all Customer Segregated Accounts; and
- (iii) the aggregate of all Cleared Swaps Customer Accounts (except that upon occurrence of a CDS Termination Event (as defined below) a separate Net Close-Out Amount will be calculated with respect to CFTC CDS Contracts carried in any Cleared Swaps Customer Account).

In addition, as further explained under section 6:

- (a) if Federal Deposit Insurance Corporation Improvement Act of 1991 ("**FDICIA**") applies, a Member would be permitted to net, in

accordance with the Netting Provision, any Net Close-Out Amounts that a Member is entitled to receive from the Clearing House ("**Amount Receivable**") and Net Close-Out Amounts that a Member is entitled to pay to the Clearing House ("**Amount Payable**") arising under or in connection with all Contracts "without regard to product category" entered into or held on behalf of Client Accounts, except that such netting between CFTC Futures Contracts and Security Futures Contracts or Cleared Swaps Contracts may be permitted only to the extent that the relevant Member has "positive net equity in the commodity accounts" (within the meaning of the Bankruptcy Code) at the Clearing House;

- (b) notwithstanding sub-paragraph (a) above, upon occurrence of a CDS Termination Event (as defined below), the Net Close-Out Amount would be calculated separately with respect to CFTC CDS Contracts in accordance with CME Rule 8H802.B.3. and CDS Priority of Payments shall be distributed in accordance with such rule, notwithstanding any other provision in the CME Rules.

6 DISCUSSION

We are of the opinion set out under paragraph 5.1 because:

6.1 Terms of the Netting Provision

- 6.1.1 The Netting Provision contemplates that upon the occurrence of a Bankruptcy Event with respect to the Clearing House, the Clearing House will net close-out amounts separately in respect of (i) a Member's all "proprietary positions, accounts, collateral, [Member's] obligations as guarantor of the performance of its customers and its then matured obligations to the [Guaranty Fund] to the Clearing House and to the Exchange" ("**CME Proprietary Netting Term**") and (ii) a Member's "customer positions, accounts, and collateral shall be separately netted against the positions, accounts and collateral of its customers without regard to product category in accordance with the requirements of the Bankruptcy Code, the [Commodity Exchange Act] and [CFTC Regulations]" ("**CME Non-Proprietary Netting Term**"). Further, the Netting Provision provides that all of the property in a Member's House Accounts on deposit with the Clearing House "shall be deemed to be subject to a single master netting agreement with the result that any excess which is on deposit with respect to any product category shall be applied to reduce any

deficiency of the [Member] in any other product category" (the "**Cross-Margining Provision**").¹⁶

6.1.2 With respect to CFTC CDS Contracts, the CME Proprietary Netting Term and CME Non-Proprietary Netting Term would be qualified by the terms of CME Rule 8H802.B,¹⁷ which provides that if at any time following a default of any CDS Member, a Bankruptcy Event occurs with respect to the Exchange (a "**CDS Termination Event**"),¹⁸ then all CFTC CDS Contracts shall be terminated and the CDS Margin shall be distributed in accordance with CME Rule 8H802.B.3. rather than the CME Proprietary Netting Term and CME Non-Proprietary Netting Term. Pursuant to CME Rule 8H802.B., following a CDS Termination Event, the amount to be paid to or collected from each non-defaulted CDS Member would be determined by the Clearing House as follows:

- (a) The Net Close-Out Amount in respect of the obligations of a non-defaulted CDS Member to the Clearing House shall be determined separately for (a) its proprietary positions in CDS Contracts and (b) the positions of each of its customers in CDS Contracts (determined on the individual basis) using the CDS Close-Out Value for CDS Contracts. The sum of all Amounts Receivable with respect to House Accounts and individual Cleared Swaps Customers shall be the "**Aggregate CDS Collects**". The sum of all Amounts Payable with respect to House Accounts and individual Cleared Swaps Customers shall be the "**Aggregate CDS Pays**."
- (b) The Clearing House shall determine the amount of each non-defaulted CDS Member's remaining payment obligations, if any, in respect of CDS

¹⁶ CME Rule 818.C.

¹⁷ We note that although Part 8G of the CME Rules contains a limited recourse provision applicable to Interest Rate Swaps, it does not set forth a qualification to the Netting Provision similar to CME Rule 8H802.B.3 that would be relevant upon occurrence of a Bankruptcy Event with respect to the Exchange. Although this discrepancy may be due to a drafting error, the Clearing House has not publicly abrogated or amended Part 8G and this opinion is based on the provisions of the CME Rules as in effect on the date of this letter.

¹⁸ By the plain terms of CME Rule 8H802.B, a default of at least one CDS Member must occur prior to the occurrence of a Bankruptcy Event with respect to the Exchange for a CDS Termination Event to occur. This CME Rule has not, to our knowledge, been interpreted or applied, but there is reason to believe that if viewed in context, it may be interpreted to provide that a CDS Termination Event would occur immediately upon occurrence of a Bankruptcy Event with respect to the Exchange rather than that a CDS Member default must occur as a condition for a CDS Termination Event.

Assessments (which, together with the CME CDS Corporate Contribution and any remaining CDS Guaranty Fund amounts and any CDS Assessments previously funded, constitute the "**Remaining CDS Priority of Payments**").

- (c) The Clearing House shall add any remaining CDS Collateral, CDS Customer Collateral and Remaining CDS Priority of Payments to the Aggregate CDS Pays, and deduct the amount of any uncovered CDS Loss (the sum of such amount, the "**Aggregate CDS Available Funds**").
- (d) The Clearing House shall then notify each CDS Member of the amount of its remaining CDS Assessments, Proprietary CDS Pays and Individual Customer CDS Pays.
- (e) If the Aggregate CDS Collects exceed the amount of Aggregate CDS Available Funds received, the Clearing House shall "haircut the amount of each Proprietary CDS Collect (such haircut amount, the "**Allocated Proprietary CDS Collect**") and Individual Customer CDS Collect (such haircut amount, the "**Allocated Individual Customer CDS Collect**") on a pro rata basis based on the amount of Aggregate CDS Available Funds received relative to the amount of the Initial Proprietary CDS Collect and Initial Individual Customer CDS Collect."
- (f) For non-defaulted CDS Members, the Clearing House shall pay the Proprietary CDS Collect or Allocated Proprietary CDS Collect, as applicable, and Individual Customer CDS Collect or Allocated Individual Customer CDS Collects, as applicable, as soon as practicable after receipt of the Aggregate CDS Available Funds. For non-defaulted customers of a defaulted CDS Member, the Clearing House will make arrangements to pay directly to such non-defaulted customers.

Upon the completion of payments, CDS Members, their Affiliates and their customers shall have no claim against any other guaranty fund established by the Exchange, CME Group Inc. or any of its affiliates with respect to losses suffered as a result of the application of CME Rule 8H802.B, nor shall any beneficial holder of a CDS Contract have any claim against its non-defaulting CDS Member as a result of the application of CME Rule 8H802.B.

6.2 FDICIA

6.2.1 FDICIA Netting Procedures

FDICIA provides that, subject to certain limitations discussed below, notwithstanding any provision of federal or state law, the net obligations between a "clearing organization," as such term is defined under FDICIA ("**FDICIA Clearing Organization**")¹⁹ and any member of the FDICIA Clearing Organization upon occurrence of a Bankruptcy Event with respect to the FDICIA Clearing Organization would be determined in accordance with the applicable "netting contract" (as defined under FDICIA, a "**Netting Contract**").²⁰

In particular, FDICIA provides that, with certain limited exceptions discussed below:

- (a) notwithstanding any other provision of Federal or state law (other than Section 1(e) of the Federal Deposit Insurance Act ("**FDIA**"), Section 207(c) of the Federal Credit Union Act ("**FCUA**"), and any order authorized under section 5(b)(2) of the Securities Investor Protection Act of 1970 ("**SIPA**")),²¹ the "covered contractual payment obligations"²² and "covered

¹⁹ "**Clearing organization**" for purposes of FDICIA means "a clearinghouse, clearing association, clearing corporation, or similar organization (A) that provides clearing, netting, or settlement services for its members and (i) in which all members other than the clearing organization itself are financial institutions or other clearing organizations; or (ii) which is registered as a clearing agency under the Securities Exchange Act of 1934, or is exempt from such registration by order of the [SEC]; or (B) that is registered as a derivatives clearing organization under section 5b of the Commodity Exchange Act, that has been granted an exemption under section 4(c)(1) of the Commodity Exchange Act, or that is a multilateral clearing organization (as defined in section 408 of [FDICIA])." 12 U.S.C. § 4402(2).

²⁰ 12 U.S.C. § 4404(d), (e).

²¹ Insolvency proceedings under FDIA apply to a banking institution (including savings associations), established under the laws of any state of the United States, any territory of the United States, the District of Columbia, Puerto Rico, the Virgin Islands (or any other governmental unit defined as a "state" in the FDIA, as amended) or under the federal laws of the United States, and which take deposits insured by the FDIC. Insolvency proceedings under SIPA apply to a broker-dealer established under the laws of any state of the United States, the District of Columbia, Puerto Rico, or any territory or possession of the United States, regardless of whether it is a member of the Securities Investor Protection Corporation. Insolvency proceedings under FCUA will apply to a federally chartered credit union.

²² "**Covered contractual payment obligation**" means "(A) an obligation of a financial institution to make payment, subject to a [Netting Contract] to another financial institution; and (B) a covered clearing obligation". 12 U.S.C. § 4402(5). A "**covered clearing obligation**" means "an obligation of a member of a [FDICIA

contractual payment entitlements" of a member of a FDICIA Clearing Organization to and from all other members of a FDICIA Clearing Organization shall be netted in accordance with and subject to the conditions of the applicable Netting Contract (except as provided in Section 561(b)(2) of the Bankruptcy Code);²³

- (b) the only obligation, if any, of a member of a FDICIA Clearing Organization to make payment with respect to a "covered contractual payment obligation" arising under a single Netting Contract to any other member of a FDICIA Clearing Organization shall be equal to its net obligation arising under that Netting Contract, and no such obligation shall exist if there is no net obligation;²⁴ and

Clearing Organization] to make payment to another member of a [FDICIA Clearing Organization, subject to a Netting Contract]". 12 U.S.C. § 4402(3).

"**Covered contractual payment entitlement**" means "(A) an entitlement of a financial institution to receive a payment, subject to a [Netting Contract] from another financial institution; and (B) an entitlement of a member of a [Clearing Organization] to receive payment, subject to a [Netting Contract], from another member of a [Clearing Organization] of a covered clearing obligation". 12 U.S.C. § 4402(4).

²³ 12 U.S.C. § 4404(a), which provides as follows:

"Notwithstanding any other provisions of State or federal law (other than section 1(e) of the Federal Deposit Insurance Act, section 207(c) of the Federal Credit Union Act, and any order authorized under section 5(b)(2) of the Securities Investor Protection Act of 1970), the covered contractual payment obligations and the covered contractual payment entitlements of a member of a [FDICIA Clearing Organization] to and from all other members of a [FDICIA Clearing Organization] shall be terminated, liquidated, accelerated, and netted in accordance with and subject to the conditions of any applicable [Netting Contract] (except as provided in Section 561(b)(2) of title 11, United States Code)".

Further, CME Rule 818.E. expressly provides that the Clearing House intends that an obligation to make a payment by either the Clearing House or a Member in accordance with the Netting Provisions would be a "covered contractual obligation" and an entitlement to receive a payment would be a "covered contractual payment entitlement" for the purposes of the FDICIA Netting Procedures.

²⁴ 12 U.S.C. § 4404(b), which provides as follows:

"**LIMITATION OF OBLIGATION TO MAKE PAYMENT.**- The only obligation, if any, of a member of a clearing organization to make payment with respect to covered contractual payment obligations arising under a single netting contract to any other member of a clearing organization shall be equal to its net obligation arising under that netting contract, and no such obligation shall exist if there is no net obligation".

- (c) the only right, if any, of a member of a FDICIA Clearing Organization to receive payment with respect to a "covered contractual payment entitlement" arising under a single Netting Contract from other members of a FDICIA Clearing Organization shall be equal to its net entitlement arising under that Netting Contract, and no such right shall exist if there is no net entitlement (provisions in sub-paragraphs (a) through (c) above, "**FDICIA Netting Procedures**").²⁵

The Clearing House, as a DCO registered under the Commodity Exchange Act, would qualify as a FDICIA Clearing Organization, and, therefore, CME Rules (including the Netting Provision) would qualify as a Netting Contract.²⁶

We note that we are not aware of any instance where the application of the FDICIA Netting Procedures has been tested.

6.2.2 Limitations on FDICIA Netting Procedures: Section 561(b)(2) of the Bankruptcy Code

As stated above, netting between a FDICIA Clearing Organization and its members pursuant to Section 404(a) of FDICIA is generally governed by the terms of the applicable Netting Contract, except as provided in Sections 561(b)(2)(A) (the "**561(b)(2)(A) Limitation**") and 561(b)(2)(B) (the "**561(b)(2)(B) Limitation**") and together with the 561(b)(2)(A) Limitation, the "**561 Limitation**") of the Bankruptcy Code (unless an exception under Section 561(b)(3)(A) of the Bankruptcy Code (the "**561(b)(3) Exception**") applies).

²⁵ 12 U.S.C. § 4404(c), which provides as follows:

"LIMITATION ON RIGHT TO RECEIVE PAYMENT -The only right, if any, of a member of a [FDICIA Clearing Organization] to receive payment with respect to a covered contractual payment entitlement arising under a single [Netting Contract] from other members of a [FDICIA Clearing Organization] shall be equal to its net entitlement arising under that netting contract, and no such right shall exist if there is no net entitlement".

²⁶ Under FDICIA, the term "**netting contract**" "(i) means a contract or agreement between 2 or more financial institutions, clearing organizations, or members that provides for netting present or future payment obligations or payment entitlements (including liquidation or close out values relating to such obligations or entitlements) among the parties to the agreement; and (ii) includes the rules of a clearing organization." See 12 U.S.C. § 4402(14).

A. Terms of the 561 Limitation and the 561(b)(3) Exception

(i) *561(b)(2)(A) Limitation.*

The 561(b)(2)(A) Limitation provides that a party "may not net or offset an obligation" to a Commodity Broker, which is defined to include a DCO (such as the Clearing House), subject to the Code Proceedings ("**Debtor DCO**") arising under, or in connection with, a "[Commodity Contract] traded on or subject to the rules of a contract market designated under the Commodity Exchange Act or a derivatives transaction execution facility registered under the Commodity Exchange Act" (a "**Siloed 561 Contract**") against "any claim arising under, or in connection with, other [instruments identified under Section 561(a) of the Bankruptcy Code]" ("**561(a) Instruments**") except to the extent that the party has "positive net equity in the commodity accounts" at the Debtor DCO.²⁷ 561(a) Instruments include Commodity Contracts, Securities Contracts, "forward contracts", "repurchase agreements", "swap agreements", and "master netting agreements", each as defined under the Bankruptcy Code.

(ii) *561(b)(2)(B) Limitation.*

The 561(b)(2)(B) Limitation provides that another Commodity Broker may not net or offset an obligation to a Debtor DCO "arising under, or in connection with," a Siloed 561 Contract "entered into or held on behalf of a customer"²⁸ of the [Debtor DCO] against any claim arising under, or in connection with, any 561(a) Instrument.

(iii) *561(b)(3)(A) Exception.*

The 561(b)(3)(A) Exception qualifies the 561 Limitation and provides that the 561 Limitation shall not prohibit the offset of claims and obligations that arise under a cross-margining agreement or similar arrangement that has been approved by or submitted to the CFTC and not abrogated or rendered ineffective by the CFTC.²⁹

²⁷ See 11 U.S.C. § 561(b)(2)(A).

²⁸ Under the Bankruptcy Code, with respect to a "clearing organization," such as the Clearing House, the term "**customer**" means, a "clearing member of such clearing organization with whom such clearing organization deals and that holds a claim against such clearing organization on account of cash, a security, or other property received by such clearing organization to margin, guarantee, or secure a commodity contract in such clearing member's proprietary account or customer account." See 11 U.S.C. § 761(9)(D).

²⁹ 11 U.S.C. § 561(b)(3)(A).

B. 561(b)(3) Exception

By its terms, the Cross-Margining Provision³⁰ is "a cross-margining agreement or similar arrangement." Further, this provision has been "approved by or submitted to the [CFTC] and not abrogated or rendered ineffective by the [CFTC]."³¹ Consequently, the 561(b)(2) Limitation would not restrict a Member's right under the Netting Provision to net close-out amounts in respect of the Member's all proprietary positions, House Accounts and collateral in accordance with the CME Proprietary Netting Term upon occurrence of a Bankruptcy Event with respect to the Clearing House.

We note, however, that the Cross-Margining Provision by its terms does not extend to any Client Accounts carried by a Member and would not restrict the operation of the 561 Limitation with respect to the CME Non-Proprietary Netting Term (discussed under sub-paragraphs (C) and (D) below).

C. 561(b)(2)(A) Limitation

In the absence of any available 561(b)(3) Exception, the 561(b)(2)(A) Limitation would restrict the enforceability of netting in connection with Contracts that do not qualify as Siloed 561 Contracts. For the purposes of the Bankruptcy Code, a Contract that is (i) a Security Futures Contract, as defined herein, would qualify as a Securities Contract, and (ii) a CFTC Futures Contract and a Cleared Swaps Contract, as defined herein, would each qualify as a Commodity Contract with respect to the Clearing House and a Member. However, as discussed under sub-paragraphs (i) and (ii) below, it is uncertain whether a Cleared Swaps Contract or a Security Futures Contract would also qualify as a Siloed 561 Contract.

In the event Cleared Swaps Contracts or Security Futures Contracts do not qualify as Siloed 561 Contracts, a Member would be permitted to exercise its rights under the CME Non-Proprietary Netting Term upon occurrence of a Bankruptcy Event with respect to the Clearing House, except that such Member may be permitted to net Net Close-out Amounts with respect to CFTC Futures Contracts with Net Close-out Amounts with respect to Cleared Swaps Contracts or Security

³⁰ See paragraph 6.1.1.

³¹ The Clearing House submitted the CME Proprietary Netting Term to the CFTC on February 6, 2009 in accordance with CFTC Regulation 40.5, and since then the CME Proprietary Netting Term has not been publicly abrogated or otherwise publicly declared ineffective.. The submission is publicly available at <http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/rul020609cme001.pdf>.

Futures Contracts, only to the extent that the Member has positive net equity in the "commodity accounts" (within the meaning of the Bankruptcy Code) at the Clearing House.

We note that none of the Bankruptcy Code, the Commodity Exchange Act or the CFTC Regulations define the term "commodity account" for the purposes of the 561 Limitation, but there is reason to doubt that any Cleared Swaps Customer Accounts will be included because the term "commodity account" predates the existence of Cleared Swaps Customer Accounts and we are unaware of any congressional or CFTC intent to treat Cleared Swaps Customer Accounts as "commodity accounts" for purposes of the 561 Limitation.

(i) *Cleared Swaps Contracts*

The 561(b)(2) Limitation restricts netting between Siloed 561 Contracts and 561(a) Instruments. To qualify as a Siloed 561 Contract, a contract must be a Commodity Contract that is "traded on or subject to the rules of a contract market designated under the Commodity Exchange Act or a derivatives transaction execution facility registered under the Commodity Exchange Act." On the face of the 561(b)(2) Limitation, a Cleared Swaps Contract would satisfy that requirement because the Clearing House (a DCO), as a "registered entity" (as defined under the Commodity Exchange Act), would qualify as a "contract market," and, accordingly, a Cleared Swaps Contract would be "subject to the rules" of such "contract market" within the plain meaning of the statute.³²

Nevertheless, because the statute does not merely reference any Commodity Contract (which is individually defined under the Bankruptcy Code), but rather a Commodity Contract that is "traded on or subject to the rules of" a contract market "designated" under the Commodity Exchange Act, there remains risk that a court may interpret the 561(b)(2) Limitation as restricting netting and set-off between exchange-executed CFTC Futures Contracts and over-the-counter Cleared Swaps Contracts.

We understand that the words "traded on or subject to the rules of a contract market" have long been used in the commodities industry to describe commodity contracts executed through a

³² Under the Bankruptcy Code, the term "contract market" is defined as a "registered entity", which, in turn, means, among other things, (a) a board of trade designated as a contract market under Section 5 of the Commodity Exchange Act, (b) a DCO registered under section 5b of the Commodity Exchange Act, or (c) a board of trade designated as a contract market under section 5f of the Commodity Exchange Act.³² Therefore, on the face of Section 561(b)(2) of the Bankruptcy Code, the Clearing House would be a "contract market" for the purposes of the Bankruptcy Code. See 7 U.S.C. § 1a(40).

contract market's public auction or in alternative manner prescribed by contract market rules, neither of which will necessarily be present for Cleared Swaps Contracts, for which CME Rules do not prescribe any standards for execution. In addition, "*designated*" is a term of art under the Commodity Exchange Act that is frequently used in connection with an exchange rather than a DCO (which is *registered* rather than *designated* under the relevant section of the Commodity Exchange Act).

The uncertainty is further highlighted by the fact that when Congress enacted Dodd-Frank, it expressly amended the definition of the Commodity Contract to include, with respect to an FCM or a "clearing organization", any "contract, option, agreement, or transaction, ... that is cleared by a clearing organization", but did not strike the qualification of "traded on or subject to the rules of a contract market designated under the Commodity Exchange Act or a derivatives transaction execution facility registered under the Commodity Exchange Act" from the 561(b)(2) Limitation. We further note that we are not aware of any relevant guidance as to whether a Swap entered into in the over-the-counter market and subsequently cleared through a DCO would qualify as a Siloed 561 Contract.

In the event Cleared Swaps Contracts do not qualify as Siloed 561 Contracts, a Member would be permitted to exercise its rights under the Netting Provision and calculate a single Net Close-out Amount with respect to both Cleared Swaps Contracts and CFTC Futures Contracts only to the extent that the Member has positive net equity in the "commodity accounts" (within the meaning of the Bankruptcy Code) at the Clearing House upon commencement of an Insolvency Proceeding with respect to the Clearing House.

(ii) *Securities Contracts*

We understand that the 561(b)(2)(A) Limitation would, on its face, apply to any Contracts that are Securities Contracts (such as Security Futures Contracts), such that a party may not net or offset obligations to a Debtor DCO arising under, or in connection with, a Siloed 561 Contract against any claim arising under a Securities Contract "except to the extent that the non-defaulting party has positive net equity in the commodity accounts at the [Debtor DCO]".

Under the CME Rules, the Securities Contracts cleared through the Clearing House are limited to Security Futures Contracts.³³ Further, under the CME Rules, any Security Futures Contracts

³³ As of the date of this letter, the Clearing House does not clear any over-the-counter Security-Based Swaps. We further note that on October 18, 2012, the Clearing House has filed with the SEC a proposed change to its CME

cleared for a Member's customer are carried in a "futures account" (as such term is used in the CME Rules) and are subject to the segregation requirements applicable to CFTC Futures Contracts pursuant to Section 4d of the Commodity Exchange Act.³⁴ None of the Bankruptcy Code, the Commodity Exchange Act or the CFTC Regulations provide direct guidance as to whether a Security Futures Contract carried in a "futures account" and subject to the segregation requirements under Section 4d of the Commodity Exchange Act (such as Security Futures Contracts cleared through the Clearing House) would be deemed a Siloed 561 Contract. Further, none of the Bankruptcy Code, the Commodity Exchange Act or the CFTC Regulations define the term "commodity account" for the purposes of the 561(b)(2)(A) Limitation. Similarly, we are not aware of any relevant judicial guidance on this point.

In the absence of statutory, regulatory or judicial guidance, we believe there is uncertainty as to whether (i) a Security Futures Contract subject to CME Rules would qualify as a Siloed 561 Contract, and (ii) a House Account or a Customer Segregated Account where both CFTC Futures Contracts and Security Futures Contracts are carried would constitute a "commodity account" for the purposes of the 561(b)(2)(A) Limitation.

In the event Security Futures Contracts do not qualify as Siloed 561 Contracts, a Member would be permitted to exercise its rights under the CME Non-Proprietary Netting Term and calculate a single Net Close-out Amount with respect to both Security Futures Contracts and CFTC Futures Contracts only to the extent that the Member has positive net equity in the "commodity accounts" (within the meaning of the Bankruptcy Code) at the Clearing House upon commencement of an Insolvency Proceeding with respect to the Clearing House.

D. 561(b)(2)(B) Limitation

As stated above, the 561(b)(2)(B) Limitation provides that if a debtor subject to the Code Proceedings is a Commodity Broker, "another commodity broker may not net or offset an obligation to the debtor arising under, or in connection with," a Siloed 561 Contract "entered into or held on behalf of a customer of the debtor" against any claim arising under, or in connection with, 561(a) Instruments. Under the Bankruptcy Code, a DCO is a Commodity Broker, and following on that, a "customer" of such DCO would by virtue of the Bankruptcy Code definition,

Rules to initiate clearing of certain security-based swaps for House Accounts of its Members. As of the date of this letter, the proposed rule has not yet been approved by the SEC.

³⁴ CFTC Regulation 41.41 requires a CFTC-registered FCM that is also a notice-registered broker-dealer to hold a Customer's Security Futures Contracts in a "futures account." See CFTC Regulation 41.41(a).

necessarily also be a member of such DCO.³⁵ Therefore, if the 561(b)(2)(B) Limitation is applied to the Clearing House insolvency, it would appear to merely restrict one Member's netting with respect to Contracts entered into or held by such Member on behalf of another Member of the Clearing House and only to the extent that the first Member has an obligation to the Clearing House arising under such Contract. In practice, this scenario appears unlikely.

Although we are not aware of any instance when the CFTC or the SEC has expressed its position on the effect of the 561(b)(2)(B) Limitation on the enforceability of the Netting Provision, we are aware of at least one instance when the SEC interpreted the 561(b)(2)(B) Limitation as inapplicable in the context of a Securities Clearing Agency insolvency based on the above reasoning.³⁶ Consistent with the SEC's view, the 561(b)(2)(B) Limitation should not be interpreted as restricting the enforceability of the Netting Provision.

6.2.3 *Limitations on FDICIA Netting Procedures: FDIA, FCUA and SIPA*

If the Clearing House is not (i) a banking institution or a branch thereof which takes deposits insured by the FDIC, (ii) a broker-dealer or (iii) a federally chartered credit union, the Clearing House would not be subject to an insolvency proceeding under FDIA, FCUA or SIPA.³⁷ Consequently, the exercise of a Member's rights under the Netting Provision pursuant to Section 404(a) of FDICIA would not be limited by any relevant provisions set out under FDIA, FCUA or SIPA.³⁸ To the extent the FDICIA Netting Procedures are inconsistent with any provisions of

³⁵ See fn. 28.

³⁶ Securities Exchange Act Release No. 26153 (October 3, 1988), 53 FR 39561 (October 3, 1988) (File No. SR-OCC-86-17) approving the first cross-margining program (limited to proprietary accounts of clearing members) between the Options Clearing Corporation and its commodity clearing affiliate, The Intermarket Clearing Corporation ("ICC"). CFTC approval of that cross-margining program was memorialized in a letter from Jean A. Webb, Secretary, to George S. Hender, President, ICC (June 1, 1988). See also Self-Regulatory Organizations; the Options Clearing Corporation; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Cleared Contracts Carried in a Proprietary Account, 72 Fed. Reg. 247, 73401, 73403 (December 27, 2007).

³⁷ See our assumption under paragraph 2.12.

³⁸ If, contrary to our assumption under paragraph 2.8, the relevant Member was subject to an insolvency proceeding under FDIA, FCUA or SIPA, certain limitations to the FDICIA Netting Procedure may apply. Insolvency proceedings under FDIA will apply to a Member that is a banking institution (including savings associations), established under the laws of any state of the United States, any territory of the United States, the District of Columbia, Puerto Rico, the Virgin Islands (or any other governmental unit defined as a "state" in the FDIA, as amended) or under the federal laws of the United States, and which take deposits insured by the FDIC. Insolvency proceeding under SIPA will apply to a Member that is a broker-dealer established under the laws of

state or federal law (other than the 561 Limitation and relevant provisions under FDIA, FCUA and SIPA), FDICIA, by its terms, would override such provisions.

6.2.4 Mutuality of Debts

A right of set-off is a common law remedy developed by courts based on principles of equity and often supplemented by a statute to allow a debtor to settle or otherwise eliminate all or a portion of an amount due to a creditor by applying against that amount all or a portion of an amount due from the creditor. Under most circumstances, the law in this jurisdiction generally requires that there be mutuality of debts for the operation of set-off.³⁹

Unlike set-off, the concept of netting has been developed by statute and involves the termination or cancellation of obligations, the valuation of terminated obligations and their replacement by a single payment obligation. Close-out netting is usually applied in the event of default or other termination of transactions outside the normal course of business. If one party becomes insolvent or otherwise defaults on its obligations, close-out netting provisions normally permit the non-defaulting party to accelerate and terminate all outstanding transactions and net the transactions' marked-to-market values so that a single sum will be owed by, or owed to, the non-defaulting party.

There is generally no requirement of mutuality of debts for the operation of statutorily permitted netting. In particular, the terms of the FDICIA Netting Procedures do not require mutuality of debts among the relevant FDICIA Clearing Organization and its members as a condition to operation of netting. Therefore, while we have with your permission assumed that mutuality of debts exists between the relevant Member and the Clearing House, and the opinion in paragraph 5.1 is rendered on that basis, please be aware that while not opining on this point, we observe that the Netting Provision should be enforceable by a Member upon occurrence of a Bankruptcy Event with respect to the Clearing House in accordance with the FDICIA Netting Procedures

any state of the United States, the District of Columbia, Puerto Rico, or any territory or possession of the United States, regardless of whether it is a member of the Securities Investor Protection Corporation. Insolvency proceeding under FCUA will apply to a federally chartered credit union.

³⁹ Under New York law, the three elements needed for mutuality of debts are: (1) the debts are in the same right (i.e., all pre-petition debt); (2) debts must be between the same parties; and (3) the parties must stand in the same capacity in relation to each other (i.e., no fiduciary relationship).

(subject to limitations and qualifications discussed in this letter) whether or not obligations between the Member and the Clearing House are mutual.⁴⁰

⁴⁰ In the event FDICIA Netting Procedures do not apply upon occurrence of a Bankruptcy Event with respect to the Clearing House, in the context of the traditional CFTC Futures Contracts model, mutuality of debts between a clearing member and a DCO would likely exist under the laws of this jurisdiction, even with respect to transactions entered into by the clearing member on behalf of its customers. Our view in the preceding sentence is based on our understanding that funds deposited by the clearing member at the DCO as margin will serve as security to the DCO for the open CFTC Futures Contracts of all customers of the depositing clearing member and the DCO has authority to use such funds as security for such clearing member's collective customer obligations. Furthermore, under the CFTC Futures Contracts model, a DCO does not generally possess any information regarding the ownership of any margin assets held in an omnibus customer account and does not otherwise identify the property of any individual customers, which reflects that generally the clearing member alone, and not its customers, is in contractual privity with the DCO. While a DCO typically requires its clearing members to deposit margin on behalf of their customers, the DCO would look only to such clearing members in assuring the financial integrity of cleared transactions. *See Mt. Morris Bank v. Twenty-Third Ward Bank*, 172 N.Y. 244 (1902); *Leist v. Simplot*, 638 F.2d 283, 287 (C.A.N.Y., 1980) ("The clearinghouse treats FCM's as principals in trading transactions.")

We note, however, that it may be more uncertain whether mutuality of debts exists with respect to any Cleared Swaps Contracts, because pursuant to the "legally segregated operationally commingled" model ("LSOC") promulgated by the CFTC with respect to Cleared Swaps Contracts, a DCO must identify the value of margin assets received from a clearing member to such member's individual customers and, in the event of the clearing member's default, may not use the assets of a non-defaulting customer to satisfy any payment obligations of the defaulting customers to the clearing house. *See generally* Part 22 of the CFTC Regulations. In particular, CFTC Regulation 22.15 requires each DCO "to treat the value of collateral required with respect to the portfolio of rights and obligations arising out of the [Cleared Swaps Contract] intermediated for each Cleared Swaps Customer, and collected from the FCM, as belonging to such Cleared Swaps Customer, and such amount shall not be used to margin, guarantee, or secure the Cleared Swaps or other obligations of the FCM, or of any other Cleared Swaps Customer, or Futures Customer."

LSOC represents a departure from the default waterfall applicable under the CFTC Regulations with respect to CFTC Futures Contracts. Under the traditional "futures contracts" model, an FCM does not identify its customers to the clearing house (thus acting as an agent for unidentified principals) and, in the event of an FCM's payment default to a DCO, the assets in the FCM's futures omnibus customer account, such as a Customer Segregated Account, may be used by the DCO to meet the obligations of any customer of the FCM. As a result, in the event that a futures contract customer's loss exceeds its available collateral, other customers of the FCM may suffer losses. In contrast, under the LSOC model, an FCM customer's collateral value at the DCO can be used only to cover losses relating to that customer's own portfolio. In addition, unlike the U.S. futures contracts model, LSOC requires a DCO to maintain books and records identifying the property of individual Swap customers.

6.3 OLA and Bankruptcy Code

To the extent OLA or Bankruptcy Code may be inconsistent with or contrary to the FDICIA Netting Procedures, Section 404(a) of FDICIA, by its terms, would preempt any OLA provisions or Bankruptcy Code provisions (other than Section 561(b)(2) of the Bankruptcy Code) limiting the enforceability of netting among members of a FDICIA Clearing Organization in accordance with the applicable Netting Contract upon commencement of an OLA Proceeding or a Code Proceeding with respect to such FDICIA Clearing Organization.

As discussed above, Section 404(a) of FDICIA provides that netting of "covered contractual payment obligations" and "covered contractual payment entitlements" of a member of a FDICIA Clearing Organization to and from all other members of a FDICIA Clearing Organization would be effected in accordance with the relevant Netting Contract "notwithstanding any other provision of Federal or state law" except for specifically identified provisions of the FDIA, SIPA, FCUA and the Bankruptcy Code ("**FDICIA Limiting Provisions**").

FDICIA was enacted in 1991 prior to the enactment of OLA and did not identify OLA as a FDICIA Limiting Provision. When enacting Dodd-Frank in 2010, Congress adopted certain amendments to FDICIA. In particular, under Dodd-Frank, Congress expressly amended Section 403(a) of FDICIA to include OLA among specifically identified statutory provisions limiting bilateral netting between two financial participants under that section.⁴¹ However, Congress did not make a similar amendment to Section 404(a) of FDICIA with respect to netting among a FDICIA Clearing Organization and its members. In addition, while OLA expressly provides that a "walkaway" clause in a protected derivative contract with a Covered Financial Company would not be enforceable "notwithstanding the provisions of . . . sections 403 and 404 of [FDICIA]", it does not contain similar preemptive language with respect to any other OLA provision.

⁴¹ Similarly to Section 404(a) of FDICIA on netting among members of a FDICIA Clearing Organization, Section 403(a) of FDICIA prior to the enactment of Dodd-Frank provided that "notwithstanding any other provision of State or Federal law (other than section 11(e) of the Federal Deposit Insurance Act, section 210(c) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, section 1367 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4617(d)), section 207(c) of the Federal Credit Union Act, or any order authorized under section 5(b)(2) of the Securities Investor Protection Act of 1970), the covered contractual payment obligations and the covered contractual payment entitlements between any 2 financial institutions shall be terminated, liquidated, accelerated, and netted in accordance with, and subject that to the conditions of, the terms of any applicable netting contract (except as provided in section 561(b)(2) of title 11, United States Code)."

Generally, where the legislative body has expressly legislated in respect to a given matter, that express legislation must control in the absence of subsequent legislation equally express.⁴² There is also authority for a presumption that amendatory acts do not change existing law further than is expressly declared.⁴³ Accordingly, the better view would be that OLA would not be interpreted to be among the FDICIA Limiting Provisions with respect to Section 404(a) of FDICIA and, as such, a Member would be permitted to exercise its rights under the Netting Provision in accordance with the FDICIA Netting Procedures as discussed above notwithstanding any provision under OLA to the contrary. We note, however, that there has not yet been an OLA Proceeding in this jurisdiction and application of the relevant OLA provisions has not been tested.⁴⁴

We also note that Dodd-Frank has not provided for any further amendments of the FDICIA Netting Procedures related to the Bankruptcy Code limitations, and our discussion under paragraph 6.2 would apply upon commencement of a Code Proceeding with respect to the Clearing House. We note, however, that there has not yet been a Code Proceeding with respect to a DCO, and the preemption effect of the FDICIA Netting Procedures in this context has not been tested.⁴⁵

⁴² See 73 Am. Jur. 2d *Statutes* § 89 (2012).

⁴³ See 1A Singer, *Sutherland Statutory Construction* § 22:30, at 368 (6th ed. 2002). Furthermore, there is a presumption against the implied repeal or amendment of any existing statutory provision. *Id.* at 369.

⁴⁴ We note that OLA provides that with respect to any Covered Financial Company that is a Commodity Broker, the FDIC, as a receiver for such Covered Financial Company, would be required to "apply the provisions of subchapter IV of Chapter 7 of the Bankruptcy Code, in respect of the distribution to any customer of all customer property and member property, as if such [C]overed [F]inancial [C]ompany ... were a debtor for purposes of such subchapter". Pub. L. No. 111-203, § 210(m)(1)(B). We also note that OLA expressly acknowledges the FDICIA Netting Procedures and provides that the rights of a party to a Netting Contract to terminate any right or power to terminate, accelerate, or declare a default under any contract to which the Covered Financial Company is a party shall not be stayed under OLA, but states that notwithstanding the FDICIA Netting Procedures, "walkaway" clauses in a derivative contract with a Covered Financial Company would not be enforceable. Pub. L. No. 111-203, §§ 210(a)(8)(F)(i), (13)(C)(ii).

⁴⁵ In the event FDICIA Netting Procedures do not apply, the following are relevant provisions of the Bankruptcy Code that would apply upon commencement of a Code Proceeding with respect to the Clearing House.

Sections 555 and 556 of the Bankruptcy Code provide that the "contractual right" (as such term is defined in the Bankruptcy Code) of a Commodity Broker or a "stockbroker" (as defined under the Bankruptcy Code), such as a Member, to cause the liquidation, termination or acceleration of a Commodity Contract or Securities Contract, as applicable, because of the bankruptcy or financial condition of the debtor, and the right to a variation or

7 NETTING AND SET-OFF: HOUSE ACCOUNTS AND CLIENT ACCOUNTS

Where a Member has exercised its rights under the Netting Provision, a Net Close-Out Amount payable by the Member on any Client Account would not be aggregated with or netted against an Amount Payable in connection with any House Account.

CME Rule 818.C. provides that after a Member closes open Contracts following the occurrence of a Bankruptcy Event with respect to the Clearing House, all obligations of the Clearing House to such Member in respect of its customer positions, accounts, and collateral shall be separately netted against the positions, accounts and collateral of its customers in accordance with the requirements of the Bankruptcy Code, the Commodity Exchange Act and the regulations adopted thereunder in each case.

maintenance margin payment received from a trustee with respect to open Commodity Contracts, is not to be stayed, avoided, or otherwise limited by operation of any provision of the Bankruptcy Code or by the order of a court in any proceeding under the Bankruptcy Code. A "contractual right" includes, among other things, a right set forth in a rule or bylaw of a DCO and would include the Netting Provision. In addition, Section 362(b)(6) of the Bankruptcy Code excepts from the automatic stay the exercise by a Commodity Broker, Financial Institution or Financial Participant of any "contractual right" to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with one or more Commodity Contracts. Section 546(e) of the Bankruptcy Code also protects a pre-petition transfer that is a margin payment or settlement payment from avoidance as a preference or constructive fraudulent transfer if the transfer is made by or to (or for the benefit of) a Commodity Broker or a Financial Participant in connection with a Commodity Contract. The foregoing provision does not protect from avoidance a fraudulent transfer made with actual intent to hinder, delay, or defraud creditors.

Furthermore, in the event of commencement of the Code Proceedings with respect to the Clearing House, debts (including, without limitation, amounts payable under Commodity Contracts in accordance with their terms including, where applicable, termination amounts) owed by the Clearing House to a Member would be set off against mutual debts (including, without limitation, amounts payable under Commodity Contracts in accordance with their terms including, where applicable, termination amounts) owed by the Member to the Clearing House, in a liquidation of the Clearing House under Section 766 of the Bankruptcy Code. Pursuant to Section 766(i) of the Bankruptcy Code, the bankruptcy trustee of the Debtor DCO shall distribute any "customer property" (as such term is defined under Section 761(10) of the Bankruptcy Code) other than Member property, ratably to DCO Customers on the basis and to the extent of such DCO Customers' allowed "net equity" claim (which is a total claim of a Customer against the estate of the insolvent Clearing House based on the Commodity Contracts held by the Clearing House for or on behalf of such Customer less any indebtedness of the Customer to the insolvent Clearing House), based on such DCO Customers' accounts (other than Members' proprietary accounts). The bankruptcy trustee of the Clearing House will also be required to distribute Member property ratably to all Members, in their capacity as DCO Customers, on the basis and to the extent of such Members' allowed net equity claims based on their proprietary accounts. See CFTC Regulation 190.07(b).

An offset of Amounts Payable in a House Account against any Amounts Receivable with respect to any Client Account is also not permitted under the Bankruptcy Code and the relevant CFTC Regulations. In particular, the Bankruptcy Code provides that (i) for the purposes of calculating "net equity" claims, a Member will be deemed to hold its House Account in a separate capacity from its Client Accounts⁴⁶, (ii) accounts held by the Clearing House for a particular Member in separate capacities shall be treated as accounts of separate Customers,⁴⁷ and (iii) the "net equity" in any Client Account may not be offset against the "net equity" in the account of any other Customer.⁴⁸ Similarly, CFTC Regulation 190.07(b)(3) provides that the "net equity" of one Customer of a Debtor DCO may not be offset against the "net equity" of any other Customer. Consequently, any termination claim amounts payable on any Customer Segregated Account of the Member would not be aggregated with or netted against a termination claim amount payable on any House Account of the Member, and the final close-out amounts with respect to Customer Segregated Accounts and any House Account would not be offset.⁴⁹

8 MEMBERS' ASSESSMENT LIABILITIES

8.1 Pursuant to the CME Rules, a Member's Assessment Liability is as follows:

- (a) A Member is required to contribute to the Base Guaranty Fund a proportionate share of the Aggregate Guaranty Fund Deposit determined in accordance with CME Rule 816, which may be amended by the Clearing House Risk Committee at any time.⁵⁰
 - (i) The CME Rules do not expressly provide for the maximum amount of a Member's contribution to the Base Guaranty Fund which may be set by the Clearing House Risk Committee.

⁴⁶ 11 U.S.C. § 763(b).

⁴⁷ 11 U.S.C. § 763(a).

⁴⁸ 11 U.S.C. § 763(c).

⁴⁹ As noted above, if the Clearing House is subject to an OLA Proceeding, the FDIC, as a receiver for the Clearing House, would be required, under the terms of OLA, to "apply the provisions of subchapter IV of Chapter 7 the Bankruptcy Code, in respect of the distribution to any customer of all customer property and member property, as if such [C]overed [F]inancial [C]ompany ... were a debtor for purposes of such subchapter". Pub. L. No. 111-203, § 210(m)(1)(B).

⁵⁰ See CME Rule 816.

- (ii) A Member's proportionate share of the Aggregate Guaranty Fund Deposit shall consist of: (1) a specified percentage of the Aggregate Guaranty Fund Deposit multiplied by the Member's proportionate share (including the total risk performance bond requirement in respect of positions in its cross-margin accounts and any applicable short option value) of the average aggregate risk performance bond requirement (including the risk performance bond requirement in respect of positions in all cross-margin accounts and any applicable short option value) for the preceding three months; *plus* (2) a specified percentage of the Aggregate Guaranty Fund Deposit multiplied by the Member's proportionate share of the total number of contracts executed on the Exchange and any applicable exchange or market during the preceding three months; *plus* (3) a specified percentage of the Aggregate Guaranty Fund Deposit multiplied by the Member's proportionate share of foreign currency settlements for the preceding three months.
- (b) If a Member is a CDS Clearing Member, such Member may be required to also contribute to the CDS Guaranty Fund and make deposits of CDS Assessments.⁵¹
- (i) The size of the CDS Guaranty Fund is determined by the Clearing House using stress test methodology, calculated on a net exposure basis within each of the proprietary account and the customer account, equal to the largest theoretical aggregate losses caused by the default of any two CDS Clearing Members produced by such stress test or such other methodology, also on such a net exposure basis, determined by the CDS Risk Committee ("**Largest Two Losses**").
- (ii) A CDS Clearing Member's required contribution to the CDS Guaranty Fund shall be the greater of: (1) such CDS Clearing Member's proportionate share of the Largest Two Losses, each CDS Clearing Member's proportionate share being based on the 30-day trailing average of its potential residual loss ("PRL") and the 30-day trailing average gross notional open interest outstanding at the Clearing House (or, in either case, such other shorter time interval determined by the CDS Risk Committee); and (2) \$50,000,000.
- (iii) The amount of the CDS Assessments (the "**Aggregate Assessment Amount**") is determined by the Clearing House using stress test methodology, calculated

⁵¹ See CME Rule 8H07.

on a net exposure basis within each of the proprietary account and the customer account, equal to the largest theoretical aggregate losses caused by the default of any two CDS Clearing Members (other than the two CDS Clearing Members selected for calculating the Two Largest losses) produced by such stress test or such other methodology (and assuming for purposes of the model that already-defaulted CDS Clearing Members will fail to contribute) or such other methodology approved by the CDS Risk Committee. Upon a default, after application of the CDS Guaranty Fund, each CDS Clearing Member (other than an insolvent or defaulted CDS Clearing Member) shall be subject to assessment of its proportionate share of the Aggregate Assessment Amount, each CDS Clearing Member's proportionate share bearing the same ratio to the Aggregate Assessment Amount as such CDS Clearing Member's required CDS Guaranty Fund deposit.

- (iv) The Clearing House may require a CDS Clearing Member to make an additional deposit to the CDS Guaranty Fund or increase a CDS Clearing Member's maximum CDS Assessment if the Clearing House determines that there has been a material change in the business of such CDS Clearing Member.

- 8.2 A Member's failure to make a required contribution to the Base Guaranty Fund would be deemed an Event of Default pursuant to CME Rule 802.A. and may result in suspension of such Member.
- 8.3 If a Member (i) fails promptly to discharge any obligation to the Clearing House or (ii) becomes subject to any bankruptcy, reorganization, arrangement, insolvency, moratorium, or liquidation proceedings (such Member, a "**Defaulting Member**"), then its performance bonds on deposit with the Clearing House relating to the Base Guaranty Fund Product Classes, the proceeds of the sale of any membership assigned to it for clearing qualification, and any of its other assets held by, pledged to or otherwise available to the Clearing House, shall be applied by the Clearing House to discharge the Defaulting Member's obligation to the Clearing House.
- 8.4 If the Base Guaranty Fund contribution, performance bond relating to Base Fund Products and other assets of a Defaulting Member available to the Clearing House are insufficient to satisfy all of its obligations to the Clearing House, including all claims against the Clearing House by reason of its substitution for that Defaulting Member, the Clearing House shall nonetheless pay all such claims, which payments by the Clearing House shall be deemed a Loss to it and which shall be a liability of the Defaulting Member to the Clearing House,

which the Clearing House may collect from any other assets of such Defaulting Member or by process of law.

8.5 According to the relevant CME Rules, the Clearing House will apply payments as follows:

- (a) if and to the extent a default relates to a Contract carried in any Client Account carried by the Clearing House for a Defaulting Member, to pay the Defaulted Obligation the Clearing House will apply (1) the Defaulting Member's Guaranty Fund deposit, (2) margin and other assets held by the Clearing House for all House Accounts of the Defaulting Member, and (3) any margin held by the Clearing House for all customer accounts of the Defaulting Member; and
- (b) if and to the extent a Monetary Default relates to a Contract carried in any proprietary account carried by the Clearing House for a Defaulting Member, to pay the Defaulted Obligation the Clearing House will apply the Defaulting Member's (1) Guaranty Fund deposit, (2) margin and (3) such other assets as are held for the same or any other proprietary account of the Defaulting Member;

8.6 If, after the application of the processes set forth above, any Losses remain, the Clearing House may impose an assessment against all Members (excluding any Defaulting Members) in an amount that does not exceed (i) a total of 275 percent of such Member's Base Guaranty Fund requirements attributable to all Base Guaranty Fund Product Classes at the time of the default with respect to Losses attributed to a single defaulted Member and (ii) a total of 550 percent of such Member's Base Guaranty Fund requirements attributable to all Base Guaranty Fund Product Classes at the time of the default with respect to Losses attributed to all defaulted Members during a Base Cooling Off Period ("**Clearing House Assessments**"). Assessed amounts shall be divided among Members *pro rata* in proportion to the size of the Clearing House's assessment authority with respect to each Member, without regard to the Base Guaranty Fund Product Classes cleared by such Member or the proportion to which such Base Guaranty Fund Product Classes contribute to such Member's maximum assessment exposure.⁵²

⁵² In the event it shall become necessary to apply all or part of the Base Guaranty Fund contributions to meet obligations to the Clearing House, Members will be required to restore their contribution to the Base Guaranty Fund to the previously required level prior to the close of business on the next banking day. See CME Rule 802.F.

9 QUALIFICATIONS

This opinion and other matters set forth in this letter are subject to the following qualifications:

- 9.1 We are members of the bar of the State of New York and are not members of the bar of any other state, and this opinion is qualified by this fact.
- 9.2 The list of special provisions in paragraphs 4.1 and 4.2 is not an exhaustive list of all laws of this jurisdiction that may apply to Contracts, their interpretation and enforcement (which, among other things, shall be subject to general principles of New York contract law and laws particular to individual Members).
- 9.3 This letter relates only to the entities specified herein. We express no opinion with respect to the effect of the Trading with the Enemy Act, 50 U.S.C. app. §1 *et seq.*, or the International Emergency Economic Powers Act, 50 U.S.C. §1701 *et seq.*, on the rights or obligations of the Parties.
- 9.4 Our views are in all cases subject to equitable principles, whether applied in a proceeding at law or in equity.
- 9.5 The opinion given in paragraph 5.1 is in respect of a Member's powers under the Clearing House Documentation as at the date of this letter. We express no opinion as to any provisions of the Clearing House Documentation other than those on which we expressly opine.
- 9.6 This letter is effective as of the date hereof. No expansion of this opinion may be made by implication or otherwise, and we provide no opinions other than the opinion herein expressly set forth in paragraph 5.1. We do not undertake to advise you of any matter within the scope of this letter that comes to our attention after the date hereof and disclaim any responsibility to advise you of any future changes in law, regulations, Clearing House Documentation or facts that may affect the above opinion.
- 9.7 Where Contracts are governed by laws other than the laws of this jurisdiction, the opinion contained in paragraph 5.1 is given in respect of only those Contracts which are capable, under their governing laws, of being terminated and liquidated in accordance with the provisions of the Netting Provision.

There are no other material issues relevant to the issues addressed in this opinion which we wish to draw to your attention.

This letter is given for the sole benefit of the Futures and Options Association and such of its members (excluding associate members) as subscribe to the Futures and Options Association's opinions library (and whose terms of subscription give them access to this letter). This letter may not be relied upon by any other person unless we otherwise specifically agree with that person in writing, although we consent to it being shown to such Futures and Options Association members' affiliates (being members of such persons' groups, as defined by the UK Financial Services and Markets Act 2000) and to any competent authority supervising such member firms and their affiliates in connection with their compliance with their obligations under prudential regulation.

Yours faithfully,

Clifford Chance US LLP