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September 19, 2013

The Futures and Options Association
2nd Floor
36-38 Botolph Lane
London
EC3R 8DE

Re: CCP Opinion in relation to Minneapolis Grain 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 effect of certain netting and set-off rights of a clearing member (a "**Member**") of the Minneapolis Grain Exchange, Inc. (the "**Clearing House**"). The Clearing House is 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**").

We understand that your requirement is for the enforceability and validity of such netting and set-off rights 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 MGEX Rules 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 challenge. We do not opine on the availability of any judicial remedy.

1.5 **Definitions**

In this letter, unless otherwise indicated:

(a) "**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 the 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;

(b) "**Bankruptcy Code**" means the United States Bankruptcy Code;[1]

(c) "**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

[1] 11 U.S.C. §§ 101 *et seq.*

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;

(d) "**CFTC Regulations**" means the rules promulgated by the CFTC under the Commodity Exchange Act;

(e) "**Commodity Contract**" means a "commodity contract" (as such term is defined under the Bankruptcy Code);[2]

(f) "**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 an Exchange under Section 5c(c) of the Commodity Exchange Act, CFTC Regulation 38.4(a) and CFTC

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[2] 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). In addition, Section 4d(f)(5) of the Commodity Exchange Act provides that "a swap cleared by or through a derivatives clearing organization shall be considered to be a commodity contract as such term is defined in section 761 of [the Bankruptcy Code], with regard to all money, securities, and property of any swaps customer received by a futures commission merchant or a derivatives clearing organization to margin, guarantee, or secure the swap (including money, securities, or property accruing to the customer as the result of the swap)."

Regulation 40.3, for which the Clearing House acts as a DCO, but does not include a "security future" as such term is defined under Section 1a(44) of the Commodity Exchange Act;

(g) "**Customer Account**" means an account established by a Member with the Clearing House in which the Member maintains trades, positions and related margin solely for "customers", as such term is defined in CFTC Regulation 1.3(k), of the Member;

(h) "**Exchange**" means Minneapolis Grain Exchange, Inc. for which the Clearing House acts as a DCO, and its respective successors, by merger or otherwise;

(i) "**House Account**" means an account with the Clearing House opened in the name of a Member that is not a Customer Account and which qualifies as a "proprietary account" as defined under CFTC Regulation 1.3(y);

(j) "**MGEX Rules**" means the rules of the Clearing House in force as at the date of this letter and publically available at http://www.mgex.com/documents/Rulebook_024.pdf;"**Party**" means the Clearing House or the relevant Member;[3]

(k) "**Party**" means the Clearing House or the relevant Member.

2. ASSUMPTIONS

We assume the following:

2.1 That, except with regards to the provisions discussed and opined on in this letter, the MGEX Rules and Contracts are legally binding and enforceable against each Party under governing law.

2.2 That each Party has the capacity, power and authority under all applicable law(s) to be bound by the MGEX Rules and enter into Contracts and perform its obligations thereunder; and that each Party has taken all necessary steps to execute and deliver all documents and agreements necessary for a Member to obtain recognition as a Member in accordance with the MGEX Rules.

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[3] The term "**MGEX 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.

2.3 That each Party has the capacity, power and authority under all applicable law(s) to enter into each relevant Contract and perform under such 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 authorisations, approvals, licences and consents required to enable it lawfully to enter into and perform its obligations under the MGEX Rules and Contracts and to ensure the legality, validity, enforceability or admissibility in evidence of the MGEX Rules 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 MGEX Rules and has become a clearing member of the Clearing House prior to the commencement of any insolvency procedure under the laws of any jurisdiction in respect of either Party.

2.7 That each Party acts in accordance with the powers conferred by the MGEX Rules and Contracts and performs its obligations under the MGEX Rules and each Contract in accordance with their respective terms.

2.8 That, apart from any circulars, notifications and equivalent measures published by the Clearing House in accordance with the MGEX Rules, there are no any other agreements, instruments or arrangements between the Parties which modify or supersede the terms of the MGEX Rules.

2.9 That, other than for the purposes of our discussions under section 8, the Member seeking to exercise any rights with respect to the Clearing House is at all relevant times solvent and not subject to insolvency proceedings under the laws of any jurisdiction.

2.10 That the obligations assumed under the MGEX Rules and Contracts are mutual between the Parties.[4]

2.11 That the execution, delivery and performance of by each of the Parties under the Contracts and the relevant MGEX Rules do not violate, or require any consent not obtained under, any applicable law or regulation of any jurisdiction or any order, writ,

[4] See our discussions under paragraph 6.3.

injunction or decree of any court or other governmental authority binding upon such Party.

2.12 That the requirements of the law governing the transfers of securities and cash are complied with.

2.13 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.

2.14 That a Member did not make transfers or incur obligations in connection with any Contracts or otherwise under the MGEX Rules 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.

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**").[5]

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**"),[6] as supplemented by Part 190 of the CFTC Regulations.

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[5] Pub. L. No. 111-203.

[6] 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).

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**");[7] or (C) a 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.[8]

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[7] 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 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.

[8] 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,

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 (1) the Clearing House is in default or danger of default[9]; (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.[10] 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

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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.

9 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).

10 Pub. L. No. 111-203, § 203.

capricious, the Court will issue an order authorizing the U.S. Treasury Secretary to appoint the FDIC as receiver.[11]

4. SPECIAL PROVISIONS OF LAW

4.1 Contracts would be subject to the exclusive jurisdiction of the CFTC and regulation under the Commodity Exchange Act and the CFTC Regulations.

5. OPINION

5.1 In the event of commencement of an Insolvency Proceeding with respect to the Clearing House, debts (including, without limitation, amounts payable under Commodity Contracts[12] in accordance with their terms including, where applicable, termination amounts) owed by the Clearing House to a Member should be permitted to 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 accordance with Section 766 of the Bankruptcy Code and Part 190 of the CFTC Regulations, such that the Member is 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 a Net-Close-Out Amount will be calculated separately with respect to each of:

(i) the aggregate of all House Accounts, and

(ii) the aggregate of all Customer Accounts.[13]

In addition, if the Net Close-Out Amount with respect to the House Accounts is a positive number such that a Member is entitled to receive, and the Clearing House has an obligation to pay to the Member, the Net Close-Out Amount ("**Amount Receivable**"), a Member should also be permitted to net such Amount Receivable with any Net Close-

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[11] 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.

[12] A Contract, as defined herein, would qualify as a Commodity Contract for the purposes of the Bankruptcy Code.

[13] Pub. L. No. 111-203, § 210(m)(1)(B).

Out Amount the Member is obligated to pay to the Clearing House ("**Amount Payable**") in its capacity as a guarantor of the performance of its customers in respect of the Customer Accounts.

6. DISCUSSION

6.1 Netting and Set-Off under the Bankruptcy Code

The MGEX Rules do not contain any provision expressly allowing a Member to apply close-out netting or debt set-off in respect of its positions with, and obligations owed to or by, the Clearing House upon occurrence of a Bankruptcy Event with respect to the Clearing House.[14]

Nevertheless, pursuant to the Bankruptcy Code and the CFTC Regulations, in the event of commencement of Code Proceedings with respect to the Clearing House, any debts (including, without limitation, amounts payable under Contracts in accordance with their terms including, where applicable, termination amounts) owed by the Clearing House to a Member shall be set off against any mutual debt (including, without limitation, amounts payable under Contracts in accordance with their terms including, where applicable, termination amounts) owed by the Member to the Clearing House by virtue of prescribed calculation of claim amounts under the Bankruptcy Code. Section 766(h) of the Bankruptcy Code and CFTC Regulation 190.07 provide that the bankruptcy trustee of the insolvent Clearing House subject to a Code Proceeding shall distribute any property held by the Clearing House ratably to Members, in their capacity as "customers" of the Clearing House (as such term is defined under Section 761(9)(D) of the Bankruptcy Code) (each, a "**Customer**"),[15] on the basis and to the extent of such Members' allowed

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[14] The Federal Deposit Insurance Corporation Improvement Act of 1991 ("**FDICIA**") provides that, subject to certain limitations, notwithstanding any provision of federal or state law, in the event of a DCO insolvency, the members of such insolvent DCO would not be stayed from netting all payment obligations with respect to the DCO if the rules of the DCO provide for such netting ("**FDICIA Netting Rule**"). See 12 U.S.C. §4404. However, the MGEX Rules do not set out a provision that would allow a Member to apply close-out netting or debt set-off in respect of its positions with, and obligations owed to or by, the insolvent Clearing House, and, consequently, we do not believe that FDICIA Netting Rule would apply in the event of the Clearing House insolvency.

[15] Under the Bankruptcy Code, a "**customer**" means "with respect to a clearing organization, 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

"net equity", which is a total claim of a Customer against the estate of the insolvent Clearing House based on the Contracts held by the Clearing House for or on behalf of such Customer less any indebtedness of the Customer to the insolvent Clearing House.[16]

For purposes of the Bankruptcy Code, "**net equity**" means with respect to the aggregate of all of a Member's accounts (calculated separately for Customer Accounts and House Accounts):

A. the balance remaining in such Member's accounts with the Clearing House immediately after (i) all Contracts of such Member have been transferred, liquidated or become identified for delivery; and (ii) all obligations of such Member to the Clearing House have been offset; ***plus***

B. the value of any specifically identifiable property actually returned to such Member; ***plus***

C. the value, as of the date of the transfer, of (i) any Contract to which such Member is entitled that is transferred to another clearing house and (ii) any cash, security, or other property of such Member transferred to another clearing house to margin or secure such transferred Contract.

In addition, pursuant to CFTC Regulation 190.07(b)(3), any obligation which is not required to be included in computing the "net equity" of a Customer as set out in sub-paragraphs (A) through (C) above, but which is owed by such Customer to the insolvent clearing organization, must be deducted from any obligation not required to be included in computing the equity of a Customer which is owed by such clearing organization to the Customer. If the former amount exceeds the latter, the excess must be deducted from the equity balance of the Customer obtained after performing the preceding calculations of "net equity".

6.2 Netting and Set-Off under OLA

In the event of commencement of an OLA Proceeding with respect to the Clearing House, the FDIC, as a receiver for the Clearing House would be required, by the terms of OLA,

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margin, guarantee, or secure a commodity contract in such clearing member's proprietary account or customer account." See 11 U.S.C. §766(9)(D).

[16] CFTC Regulation 190.07(b).

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". Consequently, our discussions regarding netting and set-off pursuant to the Bankruptcy Code and CFTC Regulations in paragraph 6.1 above would also apply if the Clearing House becomes subject to an OLA Proceeding. We note, however, that there has not yet been an OLA Proceeding in this jurisdiction, and its application remains untested.

6.3 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 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.[17]

We note, however, that the terms of CFTC Regulation 190.07 and Section 766 of the Bankruptcy Code relating to the calculation of "net equity" (discussed above) do not expressly require mutuality of debts for the operation of set-off and expressly permit netting of termination amounts in respect of a Commodity Broker's "customer" positions in the event of a Code Proceeding.[18] Therefore, while we have with your permission

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[17] 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).

[18] In addition, in the context of the traditional futures 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 primarily because to the extent that funds deposited by the clearing member at the DCO as margin serve as security to the DCO for the open 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. Further, under the futures model, a DCO does not 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.")

assumed that mutuality of debts exists between the relevant Member and the Clearing House for the purposes of the operation of set-off under the Bankruptcy Code and the relevant CFTC Regulations discussed above,[19] and this opinion is rendered on that basis, please be aware that while not opining on this point, we separately note in principle that the a Member should be permitted to set-off termination amounts in respect of Customer Accounts as discussed above upon occurrence of a Bankruptcy Event with respect to the Clearing House whether or not obligations between the Member and the Clearing House are mutual.

7. NETTING AND SET-OFF: HOUSE ACCOUNTS AND CUSTOMER ACCOUNTS

An offset of Amounts Payable in a House Account against any Amounts Receivable with respect to any Customer Account is 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 Customer Accounts,[20] (ii) accounts held by the Clearing House for a particular Member in separate capacities shall be treated as accounts of separate Customers,[21] and (iii) the "net equity" in any Customer Account may not be offset against the "net equity" in the account of any other Customer.[22]

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 Account of a 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 Accounts and any House Account would not be offset.

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19 See paragraph 2.10.

20 11 U.S.C. § 763(b).

21 11 U.S.C. § 763(a).

22 11 U.S.C. § 763(c).

8. MEMBERS' ASSESSMENT LIABILITIES

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

(i) A Member is required to deposit with the Clearing House as security for its obligations thereto such amount as determined by the Exchange in sole discretion ("**Security Deposit**"). The form of such deposit is also determined by the Exchange.[23]

(ii) A Member may also be subject to the Clearing House Assessments, as discussed under section 8.3.

8.2 If a Member fails promptly to discharge any obligation to the Exchange (such Member, a "**Defaulting Clearing Member**"), the Exchange will apply such Defaulting Member's Security Deposits, margins and performance bonds on deposit with the Exchange (but not those belonging to a non-defaulting customer of the Defaulting Clearing Member), to discharge the obligation to the Exchange. Further, the Exchange may make immediate demand upon any Guarantor of the Defaulting Clearing Member.

8.3 In the event the Exchange bears a loss resulting from the actions of a Defaulting Clearing Member, including due to the insufficiency of the Security Deposit, margins, bonds and other assets of the Defaulting Member to fully meet its obligations to the Exchange, such loss will be made from the following sources applied in the order of priority, with each source of funds to be completely exhausted, to the extent practical, before the next following source is applied:

(i) Security Deposits of the Defaulting Clearing Member;

(ii) Margins and performance bonds of the Defaulting Clearing Member on deposit with MGEX;

(iii) payments made by a guarantor of the Defaulting Clearing Member, and any other assets of the Defaulting Clearing Member;

(iv) assets of the MGEX Clearing House Reserve Fund;

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[23] MGEX Rule 2104.00.

(v) Security Deposits of non-defaulting Members applied proportionately to the total Security Deposit requirement of each Member;

(vi) surplus funds of the Exchange as may be in excess of funds necessary for normal business operations (as approved by the Finance Committee, Executive Committee or the Board); and

(vii) assessment amounts against Members (excluding any Defaulting Clearing Member) in direct proportion to the Members' total security deposit requirement, but in no event in excess of 200 percent of such Member's total Security Deposit requirement ("**Clearing House Assessments**").[24]

8.4 In the event it shall become necessary as provided above to apply all or part of the Member's Security Deposits to meet obligations to the Clearing House, the Defaulting Member will be required to immediately make good on any such deficiency in Security Deposits, by wire or other acceptable method, by established deadlines for current end of day variation cycle or sooner as may be required by the Exchange.[25] If the Security Deposits, margins, performance bonds, guarantees and other assets of a Defaulting Member (excluding funds belonging to the Defaulting Member's customers and margins unless directly involved in a liability) are insufficient to satisfy all of its obligations to the Exchange, the Exchange shall nonetheless pay all such claims, which shall be deemed a loss to it and which shall be a liability of the Defaulting Member to the Exchange, which the Exchange may collect from the assets of such Member available to it or by process of law.[26]

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[24] A Member may withdraw from Membership by giving written notice to the Exchange; however, such Member shall continue to be liable for any assessments made pursuant to this rule to cover any default occurring prior to resignation. MGEX Rule 2105.01.

[25] MGEX Rule 2105.03.

[26] MGEX Rule 2105.02.

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 paragraph 4.1 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 opinion 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 MGEX Rules as at the date of this letter. We express no opinion as to any provisions of the MGEX Rules 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, MGEX Rules or fact that may affect the above opinions.

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 under applicable law.

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

This opinion 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