

September 19, 2013

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

Re: CCP Opinion in relation to New York Portfolio Clearing, LLC

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 New York Portfolio Clearing, LLC (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 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 NYPCC 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; 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 that remains unstayed for a period of at least 90 days from the issue thereof, or the

¹ 11 U.S.C. §§ 101 *et seq.*

appointment of an administrator, provisional liquidator, conservator, receiver, trustee, custodian or other similar official for it or for all or substantially all of its assets, which if not sought by such person, remains unstayed for a period of at least 90 days from the issue thereof;²

- (d) **"CFTC Regulations"** means the rules promulgated by the CFTC under the Commodity Exchange Act;
- (e) **"Clearing Agreement"** means a Model Form Clearing Agreement or an Equivalent Clearing Agreement;
- (f) **"Clearing House Close-Out Event"** means a Bankruptcy Event in relation to the Clearing House or a Clearing House Payment Default, as applicable;
- (g) **"Clearing House Documentation"** means the Clearing Agreement and NYPCC Rules;³
- (h) **"Clearing House Payment Default"** means failure of the Clearing House to comply with an undisputed obligation to pay money or deliver property to a Member as set out under NYPCC Rule 506(b);⁴
- (i) **"Commodity Contract"** means a "commodity contract" (as such term is defined under the Bankruptcy Code);⁵

² For the purposes of this letter, the term **"Bankruptcy Event"** has the meaning set out under NYPCC Rule 506(a).

³ The terms **"NYPCC Rules"** and **"Clearing House Documentation"**, as used in this letter, do not include any materials that are not publically 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 NYPCC Rule 506(b), a Member may require the Clearing House to promptly close all of such Member's open proprietary and Customer positions if the Clearing House "fails to comply with an undisputed obligation to pay money or deliver property to a [Member] that is due and owing in connection with a transaction on [the Clearing House] or cleared by [the Clearing House], for a period of 30 days from the date that [the Clearing House] receives notice from the [Member] of the past due obligation."

⁵ 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

- (j) "**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 Regulation 40.3, for which the Clearing House acts as a DCO;
- (k) "**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;
- (l) "**Dodd-Frank**" means the Dodd-Frank Wall Street Reform and Consumer Protection Act;⁶
- (m) "**Equivalent Clearing Agreement**" means any agreement or other document entered into by or on behalf of a Member pursuant to which such Member agrees to be bound by the

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)."

⁶ Pub. L. No. 111-203.

NYPCC Rules as a Member but which contains no other provisions which may be relevant to the matters opined on in this letter;

- (n) "**Exchange**" means NYSE Liffe US and any other board of trade, exchange or market for which the Clearing House acts as a clearing organization, and their respective successors, by merger or otherwise;
- (o) "**Model Form Clearing Agreement**" means the clearing membership agreement entered into between each Member and the Clearing House in the form available on the website of the Clearing House on the date hereof;⁷
- (p) "**Netting Provision**" means NYPCC Rule 506(c);
- (q) "**NYPCC Rules**" means the rules of the Clearing House in force as at the date of this letter in force as at the date of this letter and publically available on the Clearing House's website as of the date hereof;⁸
- (r) "**Party**" means the Clearing House or the relevant Member;
- (s) "**Proprietary 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).

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 each Party under the governing law.

⁷ Available at <http://www.nypclear.com/sites/default/files/Clearing%20Member%20Agreement,%20Membership%20Application.pdf>.

⁸ The terms "**NYPCC Rules**" and "**Clearing House Documentation**", as used in this opinion, do not include any materials that are not publicly available on the website of the Clearing House at http://www.nypclear.com/sites/default/files/NYPC_Rules_Effective_February_14_2013.pdf as of the date hereof, including, without limitation, any manuals or other materials or provisions.

- 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 under the Clearing House Documentation and Contracts.
- 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 each Party has properly executed either the Model Form Clearing Agreement or an Equivalent Clearing Agreement.
- 2.7 That the relevant Member has complied with all conditions to admission to membership in connection with clearing Contracts under the Clearing House Documentation 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.
- 2.8 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.
- 2.9 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 a Member under the Netting Provision), each Party performs its obligations under the Clearing House Documentation and each Contract in accordance with their respective terms.
- 2.10 That, apart from any circulars, notifications and equivalent measures published by the Clearing House in accordance with the Clearing House Documentation, there are no other agreements, instruments or arrangements between the Parties which modify or supersede the terms of the Clearing House Documentation.

- 2.11 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 NYPCC Rules discussed herein, is at all relevant times solvent and not subject to insolvency proceedings under the laws of any jurisdiction.
- 2.12 That the obligations assumed under the Clearing House Documentation and Contracts are mutual between the Parties.⁹
- 2.13 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.
- 2.14 That the requirements of the law governing the transfers of securities and cash are complied with.
- 2.15 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.
- 2.16 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.

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**").¹⁰

⁹ See our discussion under paragraph 6.2.4.

- 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**"),¹¹ 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**");¹² or (C) a company predominantly engaged in activities that are financial in nature for purposes of

¹⁰ Pub. L. No. 111-203.

¹¹ 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).

¹² 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>.

the Bank Holding Company Act of 1956 (the "BHCA"), as determined by the Federal Reserve.¹³

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 default¹⁴; (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.

¹³ 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.

¹⁴ 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.

See Pub. L. No. 111-203, §§ 203(c)(4)(A)-(D).

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.¹⁵ 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.¹⁶

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 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 Clearing House Close-Out Event the relevant Member would be entitled to exercise its rights under the Netting Provision such that the 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 Proprietary Accounts, and
- (ii) the aggregate of all Customer Accounts.

¹⁵ Pub. L. No. 111-203, § 203.

¹⁶ 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.

In addition, if the Net Close-Out Amount with respect to the Proprietary 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 would also be permitted to net such Amount Receivable with any Net Close-Out Amount the Member is obligated to pay to the Clearing House ("**Amount Payable**") in respect of the Customer Accounts.

6 DISCUSSION

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

6.1 Terms of the Netting Provision

The Netting Provision contemplates that upon the occurrence of a Clearing House Close-Out Event, the Clearing House will close each Member's open positions and within 30 days of such close-out,

"the obligations of [the Clearing House] to such [Member] in respect of all of its proprietary positions, accounts, collateral and deposits to the Guaranty Fund shall be netted, in accordance with the Bankruptcy Code, the [Commodity Exchange Act] and the regulations adopted thereunder in each case, against the obligations of that [Member] in respect of its proprietary positions, accounts, collateral and its obligations to the Guaranty Fund to [the Clearing House and 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."¹⁷

6.2 Federal Deposit Insurance Corporation Improvement Act of 1991 ("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

¹⁷ NYPCC Rule 506(c).

term is defined under FDICIA ("**FDICIA Clearing Organization**")¹⁸ and any member of the FDICIA Clearing Organization with respect to the FDICIA Clearing Organization would be determined in accordance with the applicable "netting contract" (as defined under FDICIA, a "**Netting Contract**").¹⁹

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**")),²⁰ the "covered contractual payment obligations"²¹ and "covered

¹⁸ "**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).

¹⁹ 12 U.S.C. § 4404(a). 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).

²⁰ 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.

²¹ "**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 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

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);²²

- (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;²³ and
- (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

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).

²² 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)".

Furthermore, NYPCC 506(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.

²³ 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".

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").²⁴

The Clearing House, as a DCO registered under the Commodity Exchange Act, would qualify as a FDICIA Clearing Organization, and, therefore, NYPCC Rules (including the Netting Provision) would qualify as a Netting Contract.²⁵

We note, however, 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). As explained below, the 561 Limitation would not restrict the exercise of a Member's rights under the Netting Provision pursuant to Section 404(a) of FDICIA upon occurrence of a Clearing House Close-Out Event.

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

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

²⁴ 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".

²⁵ NYPCC Rule 506(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.

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]..."²⁶ In addition, 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"²⁷ of the Debtor DCO against any claim arising under, or in connection with, any 561(a) Instrument.

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.²⁸

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.

B. Effect of the 561 Limitation

The 561 Limitation would not restrict the exercise of a Member's rights under the Netting Provision pursuant to Section 404(a) of FDICIA upon occurrence of a Bankruptcy Event with respect to the Clearing House because the Exchange would qualify as a "contract market"²⁹ for

²⁶ See 11 U.S.C. § 561(b)(2)(A).

²⁷ 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).

²⁸ 11 U.S.C. § 561(b)(3)(A).

²⁹ Under the Bankruptcy Code, the term "contract market" is defined as a "registered entity", as such term is defined under the Commodity Exchange Act. See 11 U.S.C. § 761(7). In turn, under the Commodity Exchange Act, the term "registered entity" means "(A) a board of trade designated as a contract market under section 5 [of the Commodity Exchange Act]; (B) a derivatives clearing organization registered under section 5b [of the Commodity Exchange Act]; (C) a board of trade designated as a contract market under section 5f [of the Commodity Exchange Act]..." 7 U.S.C. § 1a(40).

the purposes of the 561 Limitation and, consequently, each Contract, by its terms, would qualify as a Siloed 561 Contract. As discussed above, the 561 Limitation, by its terms, potentially restricts netting and set-off among Siloed 561 Contracts and 561(a) Instruments, but would not impose any restrictions where all relevant instruments are Siloed 561 Contracts.

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.³⁰ 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.³¹ To the extent the FDICIA Netting Procedures are inconsistent with any provisions of state or federal law (other than the 561 Limitation and relevant provisions under FDIA, FCUA and SIPA, collectively ("**FDICIA Limiting Provisions**")), 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 portion of an amount due

³⁰ See our assumption under paragraph 2.15.

³¹ If, contrary to our assumption under paragraph 2.11, 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 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.

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.³²

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 this opinion 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 Clearing House Close-Out Event in accordance with the FDICIA Netting Procedures (subject to limitations and qualifications discussed in this letter) whether or not obligations between the Member and the Clearing House are mutual.³³

³² 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).

³³ In the event FDICIA Netting Procedures do not apply upon occurrence of a Clearing House Close-Out Event, 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

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 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.³⁴ 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

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.")

³⁴ 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)."

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.

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.³⁵ There is also authority for a presumption that amendatory acts do not change existing law further than is expressly declared.³⁶ 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.³⁷

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.³⁸

³⁵ See 73 Am. Jur. 2d *Statutes* § 89 (2012).

³⁶ 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.

³⁷ 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 derivatives contract with a Covered Financial Company would not be enforceable. Pub. L. No. 111-203, §§ 210(a)(8)(F)(i), (13)(C)(ii).

³⁸ 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.

7 NETTING AND SET-OFF: PROPRIETARY ACCOUNTS AND CUSTOMER ACCOUNTS

Where a Member has exercised its rights under the Netting Provision upon occurrence of a Clearing House Close-Out Event, an Amount Receivable on any Customer Account of a Member would not be aggregated with or netted against an Amount Payable by the Member on any Proprietary Account.

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 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).

NYPCC Rule 506(c) provides that after a Member closes open Contracts following a Clearing House Close-Out Event, all obligations of the Clearing House to a 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.

An offset of Amounts Payable in a Proprietary Account against any Amounts Receivable with respect to any Customer 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 Proprietary Account in a separate capacity from its Customer Accounts³⁹, (ii) accounts held by the Clearing House for a particular Member in separate capacities shall be treated as accounts of separate Customers,⁴⁰ and (iii) the "net equity" in any Customer Account may not be offset against the "net equity" in the account of any other Customer.⁴¹

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 Proprietary Account of the Member, and the final close-out amounts with respect to Customer Accounts and any Proprietary Account would not be offset.

8 MEMBERS' ASSESSMENT LIABILITIES

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

- 8.1 A Member is required to contribute to the Guaranty Fund in the amount calculated daily by the Clearing House in accordance with a formula that reflects certain components of risk and volume and shall be calculated by the Clearing House daily.⁴² The Clearing House shall determine the appropriate size of the Guaranty Fund.

³⁹ 11 U.S.C. § 763(b).

⁴⁰ 11 U.S.C. § 763(a).

⁴¹ 11 U.S.C. § 763(c).

⁴² If at any time a Member does not have a sufficient deposit in the Guaranty Fund, any such deficiency shall remain a liability of the Member to the Clearing House, which it may collect from any other assets of such

- 8.2 A Member may also be subject to the Clearing House Assessments, as discussed under paragraph 8.4.
- 8.3 A Member's failure to make a required contribution to the Guaranty Fund would be deemed a Default pursuant to NYPCC Rule 101.
- 8.4 If a Default occurs with respect to a Member (such Member, a "**Defaulting Clearing Member**"), including if a Member fails to deposit with, or pay to, the Clearing House in full any Original Margin or Variation Margin or other required amounts under or in connection with any Contract, then:
- (i) if and to the extent a Default relates to a Contract carried in any Customer Account carried by the Clearing House for a Defaulting Clearing Member, to pay the Obligations of the Member the Clearing House will apply (1) the Defaulting Clearing Member's Guaranty Fund deposit, (2) margin and other assets held by the Clearing House for all proprietary accounts of the Defaulting Clearing Member, and (3) any margin held by the Clearing House for all customer accounts of the Defaulting Clearing Member;
 - (ii) if and to the extent a Default relates to a Contract carried in any proprietary account carried by the Clearing House for a Defaulting Clearing Member or to a failure to contribute to the Guaranty Fund, to pay the Defaulted Obligation the Clearing House will apply the Defaulting Clearing Member's (1) Guaranty Fund deposit, (2) margin and such other assets as are held for the same or any other proprietary account of the Defaulting Clearing Member.
- 8.5 If, after the application of funds as set out in paragraph 8.4 above the Obligations to the Clearing House have not been satisfied in full, and if the Defaulting Clearing Member fails to pay the Clearing House the amount of the deficiency on demand, such Defaulting Clearing Member will continue to be liable therefor, but the amount of the deficiency, until

Member or by legal process. The amount required to be deposited by each Member shall be determined by a formula that reflects certain components of risk and volume and shall be calculated by the Clearing House daily. A Member whose requirement has increased relative to its current contribution shall be required to deposit cash, securities or other property acceptable to the Clearing House to remedy such deficiency, subject to certain thresholds established by the Clearing House from time to time. A Member whose Guaranty Fund requirement has decreased relative to its current contribution may withdraw its excess contribution upon request and at intervals established by the Clearing House from time to time. See NYPCC Rule 504(a).

collected from the Defaulting Clearing Member, will be met from the following sources of funds applied in the following order:

1. 25% of the Retained Earnings of the Clearing House;
2. the Guaranty Fund deposits of all Members (other than the Defaulting Clearing Member), in direct proportion to the total Guaranty Fund deposits of each Member (other than the Defaulting Clearing Member);⁴³
3. cash operating surplus of the Clearing House for the current year in excess of amounts necessary for normal operations remaining after the application of the Retained Earnings under sub-paragraph 1. above;
4. the NYSE Guaranty; and
5. assessments levied by the Clearing House upon all Members (other than the Defaulting Clearing Member) in the amount, determined by the Clearing House, that is proportional to such Member's Guaranty Fund requirement compared to the total Guaranty Fund requirement of all Members (excluding any Defaulting Clearing Member) (the "**Clearing House Assessments**"). A Clearing House Assessment with respect to any Member shall not exceed the greater of (i) 275 percent of the Member's Guaranty Fund requirement at the time of the Default and (ii) 550 percent of such Member's Guaranty Fund requirement at the commencement of a Cooling Off Period with respect to the Clearing House Loss attributed to all Defaulting Clearing Members during such Cooling Off Period.⁴⁴

If a Member has (i) made payment of all amounts assessed against it pursuant to NYPCC Rule 504 in connection with any single Default or multiple Defaults during a Cooling Off Period, (ii) has replenished any deficiency in its Guaranty Fund contribution in accordance with NYPCC Rule 504(b) and (c) and (iii) within five Business Days after making such payments, has satisfied the other conditions for withdrawal set forth in NYPCC Rule 311, it may notify the Clearing

⁴³ In the event any part of a Member's Guaranty Fund deposits are applied to meet obligations pursuant to the NYPCC Rules, Members are required to restore their Guaranty Fund contributions to the previously required level prior to the close of business on the next banking day. See NYPCC Rule 504(c).

⁴⁴ NYPCC Rule 504(b).

House in writing that it is terminating its status as a Member. Upon receipt of such notice, the withdrawing Member will not be subject to any residual assessment to cover any Clearing House Loss or Defaults occurring after the related Cooling Off Period. Furthermore, the Guaranty Fund contribution that such Member has restored will not be used or applied towards meeting any claim or obligation of the Clearing House that arises with respect to Defaults occurring after the related Cooling Off Period.⁴⁵

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 Clearing House Documentation as at the date of this letter. We express no opinion as any provisions of the NYPCC 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

⁴⁵ NYPCC Rule 504(e).

any responsibility to advise you of any future changes in law, regulations, Clearing House Documentation or fact that may affect this opinion.

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