

September 19, 2013

The Futures and Options Association
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CCP Opinion in relation to The Options Clearing Corporation

Dear Sirs:

You have asked us to give an opinion in respect of the federal laws of the United States and the laws of the State of New York ("**this jurisdiction**") as to the enforceability of the Netting Provision (as defined under paragraph 1.5) by a clearing member (a "**Member**") of The Options Clearing Corporation (the "**Clearing House**"). The Clearing House is registered as (i) a derivatives clearing organization (a "**DCO**") with the U.S. Commodity Futures Trading Commission (the "**CFTC**") under the U.S. Commodity Exchange Act of 1936, as amended (the "**Commodity Exchange Act**"), and (ii) a securities clearing agency ("**Securities Clearing Agency**") with the U.S. Securities and Exchange Commission (the "**SEC**") under the Securities Exchange Act of 1934, as amended ("**34 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 Clearing House Documentation have the same meaning in this letter.
- 1.2 Unless the context clearly indicates to the contrary, references to the plural include the singular and references to the singular include the plural.
- 1.3 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);

1.4 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 a Member or its own clients;
 - (iv) indemnification for any taxation liabilities;
 - (v) payment or delivery obligations under Contracts; or
 - (vi) any payment of damages awarded by a court or regulator for breach of contract, in respect of any tortious liability or for breach of statutory duty;
- (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) "**By-Laws**" means the by-laws of the Clearing House in force as at the date of this letter;
- (e) "**CFTC Futures Contract**" means a contract for future delivery within the meaning of the Commodity Exchange Act (a "**futures contract**"), an option on a futures contract or a commodity option, each listed for trading on 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, but does not include a Security Future;
- (f) "**CFTC Regulations**" means the rules promulgated by the CFTC under the Commodity Exchange Act;
- (g) "**Clearing House Documentation**" means the By-Laws and OCC Rules;
- (h) "**Commodity Contract**" means a "commodity contract" (as such term is defined under the Bankruptcy Code);²

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

- (i) "**Contract**" means a CFTC Futures Contract or an SEC Contract, as applicable;
- (j) "**Customer Account**" means Segregated Futures Account or Securities Customer Account, as applicable;
- (k) "**Customer**" means a Securities Customer or a Futures Customer, as applicable;
- (l) "**Dodd-Frank**" means the Dodd-Frank Wall Street Reform and Consumer Protection Act;³
- (m) "**Exchange**" means CBOE Futures Exchange, ELX Futures, L.P. The Nasdaq OMX Futures Exchange, NYSE Liffe, and any other national securities exchange or futures market which has been qualified for participation in the Clearing House and for which the Clearing House acts as a clearing organization, and their respective successors, by merger or otherwise;
- (n) "**Futures Customer**" has the same meaning as set out under the By-Laws;
- (o) "**House Account**" means an account with the Clearing House opened in the name of a Member that is not a Customer Account;
- (p) "**Netting Provision**" means Section 27, Article VI of the By-Laws;
- (q) "**OCC Rules**" means the rules of the Clearing House in force as at the date of this letter and publicly available on the Clearing House's website at <http://optionsclearing.com/about/publications/bylaws.jsp>;⁴
- (r) "**Party**" means the Clearing House or the relevant Member;
- (s) "**SEC Contract**" means a (i) Security Future or (ii) Security, each cleared on or subject to the rules of the Clearing House;

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).

³ Pub. L. No. 111-203.

⁴ The terms "**OCC Rules**" and "**Clearing House Documentation**", as used in this letter, do 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.

- (t) **"Securities Act"** means the Securities Act of 1933, as amended;
- (u) **"Securities Contract"** means a "securities contract" as such term is defined under Section 741(7) of the Bankruptcy Code;⁵

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

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

"(A) includes a (i) note; (ii) stock; (iii) treasury stock; (iv) bond; (v) debenture; (vi) collateral trust certificate; (vii) pre-organization certificate or subscription; (viii) transferable share; (ix) voting trust certificate; (x) certificate of deposit; (xi) certificate of deposit for security; (xii) investment contract or certificate of interest or participation in a profit-sharing agreement or in an oil, gas, or mineral royalty or lease, if such contract or interest is required to be the subject of a registration statement filed with the Securities and Exchange

- (v) "**Securities Customer**" has the same meaning as set out under the By-Laws;
- (w) "**Securities Customer Account**" means, in respect of a Member, an account of the Member on the records of the Clearing House which is confined to confirmed trades cleared and positions carried by the Member in SEC Contracts on behalf of its Securities Customers, other than those transactions of Market-Makers which are cleared through a Market-Maker's account;
- (x) "**Security**" means a "security" as such term is defined under Section 2(a)(1) of the Securities Act, or Section 3(a)(10) of the '34 Act;
- (y) "**Security Future**" means a "security future" as such term is defined under Section 1a(44)⁶ of the Commodity Exchange Act or any "security futures

Commission under the provisions of the Securities Act of 1933, or is exempt under Section 3(b) of such Act from the requirement to file such a statement; (xiii) interest of a limited partner in a limited partnership; (xiv) other claim or interest commonly known as "security," and (xv) certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase or sell, a security; but

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

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

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

product" as such term is defined under Section 1a(45) of the Commodity Exchange Act;⁷

- (z) "**Segregated Futures 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.
- 2.2 That each Party has the capacity, power and authority under all applicable law(s) to enter into the Clearing House Documentation and Contracts and perform its obligations thereunder.
- 2.3 That each Party has taken all necessary steps to execute and deliver and perform the Clearing House Documentation and Contracts.
- 2.4 That each Party has obtained, complied with the terms of and maintained all authorizations, approvals, licences 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.
- 2.5 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.

of the enactment of the Commodity Futures Modernization Act of 2000) or title IV of the Commodity Futures Modernization Act of 2000." 7 U.S.C. § 1a(44).

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

- 2.6 That each Party has entered into each relevant Contract for *bona fide* commercial reasons and at arm's length.
- 2.7 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.
- 2.8 That, apart from any circulars, notifications and equivalent measures published by the Clearing House in accordance with the Clearing House Documentation, there are not any other agreements, instruments or arrangements between the Parties which modify or supersede the terms of the Clearing House Documentation.
- 2.9 That, other than for the purposes of our discussions under section 8, the Member seeking to exercise its rights under the Netting Provision or other provisions of the Clearing House Documentation discussed herein 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 Clearing House Documentation and Contracts are mutual between the Parties.⁸
- 2.11 That the execution, delivery and performance of the Clearing House Documentation and Contracts by each of the Parties do not violate, or require any consent not obtained under any applicable law or regulation of any jurisdiction, or any order, writ, injunction or decree of any court or other governmental authority binding upon such Party.
- 2.12 That the 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 Clearing House Documentation with actual intent to

⁸ See our discussions under paragraph 6.2.4.

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 reorganisation 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:

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

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

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

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

⁹ Pub. L. No. 111-203.

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

¹¹ A "**non-bank financial company supervised by the Federal Reserve**" is a company that is predominantly engaged in financial activities and supervised by the Federal Reserve but does not include a bank holding

nature for purposes of the Bank Holding Company Act of 1956 (the "BHCA"), as determined by the Federal Reserve.¹²

If the Clearing House is determined to be a Financial Company, the procedure for determining whether it is a Covered Financial Company subject to OLA is as follows. The FDIC and the Federal Reserve must first both recommend an OLA proceeding with respect to the Clearing House. The U.S. Treasury Secretary (in consultation with the President of the United States) must then determine (a "Systemic Risk Determination") whether (1) the Clearing House is in default or danger of default;¹³ (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

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.

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

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

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

effect on the claims or interests of creditors, counterparties, and shareholders of the Clearing House and other market participants as a result of actions to be taken under OLA is appropriate, given the impact that any action taken under OLA would have on financial stability in the United States; (5) the remedial actions under OLA would avoid or mitigate such adverse effects, taking into consideration the effectiveness of the action in mitigating potential adverse effects on the financial system, the cost to the general fund of the U.S. Treasury, and the potential to increase excessive risk-taking on the part of creditors, counterparties, and shareholders in the Clearing House; and (6) a federal regulatory agency has ordered the Clearing House to convert all of its convertible debt instruments that are subject to the regulatory order.¹⁴ Once the Systemic Risk Determination is made with respect to the Clearing House, the U.S. Treasury Secretary is required to present all relevant findings and the recommendation to the United States District Court for the District of Columbia (the "**Court**") and provide notice to the Clearing House. After a hearing, in which the Clearing House may oppose the petition, absent the Court finding that the Systemic Risk Determination was arbitrary and capricious, the Court will issue an order authorizing the U.S. Treasury Secretary to appoint the FDIC as receiver.¹⁵

4. SPECIAL PROVISIONS OF LAW

- 4.1 A CFTC Futures Contract would be subject to the exclusive jurisdiction of the CFTC and regulation under the Commodity Exchange Act and the CFTC Regulations.
- 4.2 A Security Future would be subject to the joint jurisdiction of the SEC and the CFTC and regulation under (i) the Securities Act and '34 Act, and regulations promulgated by the SEC thereunder, and (ii) the Commodity Exchange Act and the CFTC Regulations, as applicable.
- 4.3 A Security would be subject to the exclusive jurisdiction of the SEC and regulation under the '33 Act and '34 Act and regulations promulgated by the SEC thereunder.

¹⁴ Pub. L. No. 111-203, § 203.

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

5. NETTING OPINION

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

- (i) the aggregate of all House Accounts,
- (ii) the aggregate of all Segregated Futures Accounts, and
- (iii) the aggregate of all Securities Customer Accounts.

In addition, as further explained under paragraph 6.2, if Federal Deposit Insurance Corporation Improvement Act of 1991 ("**FDICIA**") applies:

- (a) a Member would be permitted to net, in accordance with the Netting Provision, any Net Close-Out Amounts that a Member is entitled to receive from the Clearing House ("**Amount Receivable**") with respect to Contracts carried in the House Accounts (irrespective of Contract type) and Net Close-Out Amounts that a Member is entitled to pay to the Clearing House ("**Amount Payable**") with respect to CFTC Futures Contracts carried in Segregated Futures Accounts; and
- (b) a Member would be permitted to net, in accordance with the Netting Provision, any Amount Receivable with respect to Contracts carried in the House Accounts (irrespective of Contract type) and Amount Payable with respect to SEC Contracts carried in Customer Accounts to the extent the Member has "positive net equity" (within the meaning of the Bankruptcy Code) in the Member's "commodity accounts" (within the meaning of the Bankruptcy Code) at the Clearing House.

6. DISCUSSION

We are of this opinion set out under paragraph 5.1 above because:

6.1 Terms of the Netting Provision

The Netting Provision contemplates that upon the occurrence of a Bankruptcy Event with respect to the Clearing House, the Clearing House will net close-out amounts first within each individual account established or carried by a Member at the Clearing House¹⁶ and then separately across (i) House Accounts, (ii) Securities Customer Accounts and (iii) Segregated Futures Accounts,¹⁷ subject to certain limitations discussed below, such that "the result of all permitted netting shall be the total net asset position or total net liability position¹⁸ of the [Member] with respect to its positions in cleared contracts and stock loan and borrow positions with the [Clearing House] before application of margin assets."¹⁹ Further, under the Netting Provision, a "net asset position" in a House Account (other than a firm non-lien account or a proprietary X-M account) may be netted against a "net liability" in any other account or any other obligation of the Member to the Clearing House, including that in any Customer Account, while a "net liability" in a House Account may not be netted against a "net asset position" in any Customer Account.

¹⁶ In particular, paragraph (d) (*Netting Within Accounts*) of the Netting Provision provides that upon the occurrence of a Bankruptcy Event with respect to the Clearing House, the Clearing House shall net the close-out values of positions in each account of each Member to determine the net asset position or net liability position in each account by "(i) aggregate[ing] the close-out values of all asset positions (excluding segregated long option positions in a securities customers' account or firm non-lien account), (ii) aggregate[ing] the (negative) close-out values of all liability positions, and (iii) net[ting] the aggregate asset position against the aggregate liability position."

¹⁷ Paragraph (e) (*Netting Across Accounts*) of the Netting Provision provides that upon the occurrence of a Bankruptcy Event with respect to the Clearing House, the Clearing House shall determine the total net asset position or the total net liability of a particular Member by netting across the following accounts of the Member: (i) a net asset position in any of the Member's firm accounts and proprietary accounts (other than a firm non-lien account or a proprietary X-M account) against a net liability in any other Member's account or any other obligation of the Member to the Clearing House; (ii) a net liability in the Member's firm account and any proprietary account may be netted against a net asset position in any other proprietary account (other than a firm non-lien account or a proprietary X-M account) of the Member.

¹⁸ For purposes of the Netting Provision, a position having a positive close-out value shall be an "asset position" and a position having a negative close-out value shall be a "liability position."

¹⁹ Section 27(e), Article VI of the By-Laws.

In particular, paragraph (d) of the Netting Provision permits netting of assets and liabilities within accounts of a Member without limitation as to whether the assets and liabilities in the account arise from SEC Contracts or CFTC Futures Contracts. Pursuant to Section 3, Article VI of the By-Laws, the only type of an account in which both SEC Contracts and CFTC Futures Contracts may be carried is a "firm account." Consequently, although paragraph (d) of the Netting Provision does not impose any express prohibition on close-out netting among SEC Contracts and CFTC Futures Contracts, by the terms of the By-Laws, such cross-product netting may be possible only with respect to a Member's proprietary accounts.

In addition, paragraph (e) of the Netting Provision prescribes a mechanism for limited netting between various accounts of a Member, following the intra-account netting under paragraph (d) of the Netting Provision. In particular, paragraph (e) of the Netting Provision provides, among other things, that:

- (i) a net asset position in a "proprietary account"²⁰ may be netted against a net liability in any other account or any other obligation of the Member to the Clearing House ("**OCC Proprietary-Customer Netting Term**");
- (ii) a net liability in a "proprietary account" may be netted against a net asset position in any other proprietary account (other than a firm non-lien account or a proprietary X-M account) ("**OCC Proprietary Netting Term**"); and

a net asset position in a "non-proprietary Market-Maker's account" or "segregated futures account" (each as defined under the By-Laws) may not be netted against any net liability position in any other account and must be identified as the property of the "securities customers" or "futures customers" (as such terms are defined under the By-Laws) of the Member, respectively (the "**OCC Non-Proprietary Netting Limitations**").

²⁰ For purposes of the Proprietary Cross-Margining Interpretation, a "proprietary account" includes "(i) a firm account, (ii) a separate Market-Maker's account for which the Market-Maker is a [Member] or a proprietary Market-Maker trading for his own account, (iii) a combined Market-Maker's account confined to the confirmed trades of Market-Makers who are [Members] or proprietary Market-Makers trading for their own accounts, (iv) an OCC proprietary X-M account (together with the corresponding proprietary X-M account at a participating futures clearing organization), or (v) a proprietary futures professional account and any other account that does not contain positions or other property of any person who is a 'customer' within the meaning of the [Commodity Exchange Act] and regulations thereunder."

6.2 FDICIA

6.2.1 *FDICIA Netting Procedures*

FDICIA provides that, subject to certain limitations discussed below, notwithstanding any provision of federal or state law, the net obligations between a "clearing organization," as such term is defined under FDICIA ("**FDICIA Clearing Organization**")²¹ and any member of the FDICIA Clearing Organization upon occurrence of a Bankruptcy Event with respect to the FDICIA Clearing Organization would be determined in accordance with the applicable "netting contract" (as defined under FDICIA, a "**Netting Contract**").²²

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**")),²³ the "covered contractual payment obligations"²⁴ and "covered

²¹ Under FDICIA, the term "clearing organization" 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).

²² 12 U.S.C. § 4404(d), (e).

²³ 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.

²⁴ "**Covered contractual payment obligation**" means "(A) an obligation of a financial institution to make payment, subject to a [Netting Contract] to another financial institution; and (B) a covered clearing obligation". 12 U.S.C. § 4402(5). A "**covered clearing obligation**" means "an obligation of a member of a [FDICIA

contractual payment entitlements" of a member of a FDICIA Clearing Organization to and from all other members of a FDICIA Clearing Organization shall be netted in accordance with and subject to the conditions of the applicable Netting Contract (except as provided in Section 561(b)(2) of the Bankruptcy Code);²⁵

- (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;²⁶ 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

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

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

²⁵ 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)".

²⁶ 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**").²⁷

The Clearing House, as a DCO registered under the Commodity Exchange Act, would qualify as a FDICIA Clearing Organization, and, therefore, the Clearing House Documentation (including the Netting Provision) would qualify as a Netting Contract.²⁸

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

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

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

²⁷ 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".

²⁸ 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).

We note that Section 27(k), Article VI of the By-Laws 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.

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

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

The 561(b)(2)(A) Limitation provides that a party "may not net or offset an obligation" to a Commodity Broker, which is defined to include a DCO (such as the Clearing House), subject to the Code Proceedings ("**Debtor DCO**") arising under, or in connection with, a "[Commodity Contract] traded on or subject to the rules of a contract market designated under the Commodity Exchange Act or a derivatives transaction execution facility registered under the Commodity Exchange Act" (a "**Siloed 561 Contract**") against "any claim arising under, or in connection with, other [instruments identified under Section 561(a) of the Bankruptcy Code]" ("**561(a) Instruments**") except to the extent that the party has "positive net equity in the commodity accounts" at the Debtor DCO.²⁹ 561(a) Instruments include Commodity Contracts, Securities Contracts, "forward contracts", "repurchase agreements", "swap agreements", and "master netting agreements", each as defined under the Bankruptcy Code.

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

The 561(b)(2)(B) Limitation provides that another Commodity Broker may not net or offset an obligation to a Debtor DCO "arising under, or in connection with," a Siloed 561 Contract "entered into or held on behalf of a customer"³⁰ of the [Debtor DCO] against any claim arising under, or in connection with, any 561(a) Instrument.

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

The 561(b)(3)(A) Exception qualifies the 561 Limitation and provides that the 561 Limitation shall not prohibit the offset of claims and obligations that arise under a cross-margining agreement or similar arrangement that has been approved by or submitted to the CFTC and not abrogated or rendered ineffective by the CFTC.³¹

²⁹ See 11 U.S.C. § 561(b)(2)(A).

³⁰ 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).

³¹ 11 U.S.C. § 561(b)(3)(A).

B. 561(b)(3) Exception

Interpretation and Policy 02 to Section 3 of Article VI of the By-Laws (the "**Proprietary Cross-Margining Interpretation**") provides that the Clearing House Documentation constitutes "a cross-margining agreement or similar arrangement" for purposes of the 561(b)(3) Exception and "any netting performed between cleared contracts that are securities, on the one hand, and cleared contracts that are commodity futures, futures options or commodity options, on the other, including any close-out netting that is performed in accordance with [the Netting Provision], shall be deemed to occur pursuant to such cross-margining agreement or similar arrangement."

By its terms, the Proprietary Cross-Margining Interpretation is "a cross-margining agreement or similar arrangement." Furthermore, the Proprietary Cross-Margining Interpretation has been "approved by or submitted to the [CFTC] and not abrogated or rendered ineffective by the [CFTC]."³² Consequently, the 561(b)(2) Limitation would not restrict a Member's rights under the OCC Proprietary Netting Term to net "liability" in any House Account against a net asset position in any other House Account, irrespective of the Contract type.

We note, however, that the Proprietary Cross-Margining Interpretation by its terms does not extend to any Customer Accounts carried by a Member and would not restrict the operation of the 561(b)(2) Limitation for the purposes of FDICIA in connection with the OCC Proprietary-Customer Netting Term (discussed under sub-paragraphs (C) and (D) below).

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

As stated above, the Proprietary Cross-Margining Interpretation by its terms does not extend to any Customer Accounts carried by a Member and would not restrict the operation of the 561(b)(2)(A) Limitation in connection with the OCC Proprietary-Customer Netting Term.

³² The Proprietary Cross-Margining Interpretation became effective when the Clearing House registered as a DCO with the CFTC in 1988 and has not since been publicly abrogated or otherwise publicly declared ineffective. See Securities Exchange Act Release No. 26153 (October 3, 1988), 53 FR 39561 (October 3, 1988) (File No. SR-OCC-86-17) approving the first cross-margining program (limited to proprietary accounts of clearing members) between OCC and its commodity clearing affiliate, The Intermarket Clearing Corporation ("ICC"). CFTC approval of that cross-margining program was memorialized in a letter from Jean A. Webb, Secretary, to George S. Hender, President, ICC (June 1, 1988). See also Self-Regulatory Organizations; the Options Clearing Corporation; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Cleared Contracts Carried in a Proprietary Account, 72 Fed. Reg. 247, 73401, 73403 (December 27, 2007).

In the absence of any available 561(b)(3) Exception, the 561(b)(2)(A) Limitation would restrict the enforceability of netting under the OCC Proprietary-Customer Netting Term with respect to Contracts that do not qualify as Siloed 561 Contracts. For the purposes of the Bankruptcy Code, a Contract that is a CFTC Futures Contract, as defined herein, would qualify as a Siloed 561 Contract. However, as discussed below, it is uncertain whether a Security Futures Contract would also qualify as a Siloed 561 Contract.

In addition, none of the Bankruptcy Code, the Commodity Exchange Act or the CFTC Regulations provide direct guidance as to whether a House Account which contains both SEC Contracts and CFTC Futures Contracts (as contemplated under the Clearing House Documentation) would be deemed a "commodity account" for the purposes of the 561(b)(2)(A) Limitation, and, similarly, we are not aware of any relevant judicial guidance on this point. Consequently, there is risk that the 561(b)(2)(A) Limitation would restrict a Member's ability to net the aggregate Amounts Receivable arising under or in connection with Contracts carried in the House Accounts with any Amounts Payable arising under or in connection with SEC Contracts carried in Customer Accounts.

The legislative history of the 561(b)(2)(A) Limitation does not provide guidance with respect to a definition of a "commodity account," but does inform that the provision "limit[s] the exercise of contractual rights to net or to offset obligations where ... one leg of the obligations sought to be netted relates to [Commodity Contracts]. ... [The 561(b)(2)(A) Limitation] limit[s] the depletion of assets available for distribution to customers of Commodity Brokers."³³ Consistent with the legislative history, a better view would be that upon occurrence of a Bankruptcy Event with respect to the Clearing House, the OCC Proprietary-Customer Netting Term would be enforceable such that a Member is permitted to net, in accordance with the Netting Provision:

³³ H.R. Rep. No. 109-31, Part 1 at 132 (April 8, 2005).

Under the Bankruptcy Code, with respect to a futures commission merchant, such as a Member, the term "customer" means "(A)— (i) entity for or with whom such futures commission merchant deals and that holds a claim against such futures commission merchant on account of a commodity contract made, received, acquired, or held by or through such futures commission merchant in the ordinary course of such futures commission merchant's business as a futures commission merchant from or for a commodity contract account of such entity; or (ii) entity that holds a claim against such futures commission merchant arising out of— (I) the making, liquidation, or change in the value of a commodity contract of a kind specified in clause (i) of this subparagraph; (II) a deposit or payment of cash, a security, or other property with such futures commission merchant for the purpose of making or margining such a commodity contract; or (III) the making or taking of delivery on such a commodity contract..." See 11 U.S.C. § 761(9)(A).

- (i) any Amount Receivable with respect to Contracts carried in the House Accounts (irrespective of Contract type) and Amount Payable with respect to CFTC Futures Contracts carried in Segregated Futures Accounts, and
- (ii) any Amount Receivable with respect to Contracts carried in the House Accounts (irrespective of Contract type) and Amount Payable with respect to SEC Contracts carried in Customer Accounts to the extent the Member has "positive net equity" (within the meaning of the Bankruptcy Code) in the Member's "commodity accounts" (within the meaning of the Bankruptcy Code) at the Clearing House.

D. Section 561(b)(2)(B) of the Bankruptcy Code

As stated above, the 561(b)(2)(B) Limitation provides that if a debtor subject to the Code Proceedings is a Commodity Broker, "another commodity broker may not net or offset an obligation to the debtor arising under, or in connection with," a Siloed 561 Contract "entered into or held on behalf of a customer of the debtor" against any claim arising under, or in connection with, 561(a) Instruments. Under the Bankruptcy Code, a DCO is a Commodity Broker, and following on that, a "customer" of such DCO would, by virtue of the Bankruptcy Code definition, necessarily also be a member of such DCO.³⁴ Therefore, if the 561(b)(2)(B) Limitation is applied to the Clearing House insolvency, it would appear to merely restrict one Member's netting with respect to Contracts entered into or held by such Member on behalf of another Member of the Clearing House and only to the extent that the first Member has an obligation to the Clearing House arising under such Contract. In practice, this scenario appears unlikely. Both the SEC and the Clearing House have also previously taken the position that the 561(b)(2)(B) Limitation should not apply upon occurrence of a Bankruptcy Event with respect to the Clearing House.³⁵

³⁴ See fn. 30.

³⁵ In the notice of the proposed rule change to adopt the Netting Provision, the SEC stated that "Section 561(b)(2)(B) would appear to provide in effect that a [M]ember may not net an obligation to [the Clearing House] arising from a [C]ommodity [C]ontract entered into on behalf of a 'customer of the [Debtor DCO]' against amounts owed by [the Clearing House] to the [M]ember arising under a [S]ecurities [C]ontract or other contracts other than [C]ommodity [C]ontracts." See Self-Regulatory Organizations; the Options Clearing Corporation; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Cleared Contracts Carried in a Proprietary Account, 72 Fed. Reg. 247, 73401, 73403 (December 27, 2007).

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.³⁶ 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.³⁷ 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), 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 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.³⁸

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

³⁶ See our assumption under paragraph 2.13.

³⁷ If, contrary to our assumption under paragraph 2.9, 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.

³⁸ 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).

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 Bankruptcy Event with respect to the Clearing House 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.³⁹

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

³⁹ In the event FDICIA Netting Procedures do not apply upon occurrence of a Bankruptcy Event with respect to the Clearing House, in the context of the traditional CFTC Futures Contracts model, mutuality of debts between a clearing member and a DCO would likely exist under the laws of this jurisdiction, even with respect to transactions entered into by the clearing member on behalf of its customers. Our view in the preceding sentence is based on our understanding that funds deposited by the clearing member at the DCO as margin will serve as security to the DCO for the open CFTC Futures Contracts of all customers of the depositing clearing member and the DCO has authority to use such funds as security for such clearing member's collective customer obligations. Further, under the CFTC Futures Contracts model, a DCO does not generally possess any information regarding the ownership of any margin assets held in an omnibus customer account and does not otherwise identify the property of any individual customers, which reflects that generally the clearing member alone, and not its customers, is in contractual privity with the DCO. While a DCO typically requires its clearing members to deposit margin on behalf of their customers, the DCO would look only to such clearing members in assuring the financial integrity of cleared transactions. *See Mt. Morris Bank v. Twenty-Third Ward Bank*, 172 N.Y. 244 (1902); *Leist v. Simplot*, 638 F.2d 283, 287 (C.A.N.Y., 1980) ("The clearinghouse treats FCM's as principals in trading transactions.")

with the applicable Netting Contract upon commencement of an OLA Proceeding or a Code Proceeding with respect to such FDICIA Clearing Organization.

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

FDICIA was enacted in 1991 prior to the enactment of OLA and did not identify OLA as a FDICIA Limiting Provision. When enacting Dodd-Frank in 2010, Congress adopted certain amendments to FDICIA. In particular, under Dodd-Frank, Congress expressly amended Section 403(a) of FDICIA to include OLA among specifically identified statutory provisions limiting bilateral netting between two financial participants under that section.⁴⁰ However, Congress did not make a similar amendment to Section 404(a) of FDICIA with respect to netting among a FDICIA Clearing Organization and its members. In addition, while OLA expressly provides that a "walkaway" clause in a protected derivative contract with a Covered Financial Company would not be enforceable "notwithstanding the provisions of . . . sections 403 and 404 of [FDICIA]", it does not contain similar preemptive language with respect to any other OLA provision.

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.⁴¹ There is also authority for a presumption that amendatory acts do not change existing law further than

⁴⁰ 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)."

⁴¹ See 73 Am. Jur. 2d *Statutes* § 89 (2012).

is expressly declared.⁴² 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.⁴³

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 discussions 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.⁴⁴

⁴² 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.

⁴³ 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 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).

⁴⁴ In the event FDICIA Netting Procedures do not apply, the following are relevant provisions of the Bankruptcy Code that would apply upon commencement of a Code Proceeding with respect to the Clearing House.

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

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

Where a Member has exercised its rights under the Netting Provision upon occurrence of a Bankruptcy Event with respect to the Clearing House, a "net liability position" payable on any Customer Account of a Member would not be aggregated with or netted against a "net liability position" payable on any House Account of the Member.

Section 27(e), Article VI of the By-Laws provides that after a Member terminates open Contracts following the occurrence of a Bankruptcy Event with respect to the Clearing House, 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.⁴⁵

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).

⁴⁵ The By-Laws provide that "A net asset position in the segregated futures account may be netted against a net liability in a segregated futures professional account and vice versa, but a net asset position in such accounts

An offset of Amounts Payable in a House 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 House Account in a separate capacity from its Customer Accounts⁴⁶, (ii) accounts held by the Clearing House for a particular Member in separate capacities shall be treated as accounts of separate Customers,⁴⁷ and (iii) the "net equity" in any Customer Account may not be offset against the "net equity" in the account of any other Customer.⁴⁸ Similarly, CFTC Regulation 190.07(b)(3) provides that the "net equity" of one Customer of a Debtor DCO may not be offset against the "net equity" of any other Customer. Consequently, any termination claim amounts payable on any Segregated Futures 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 Segregated Futures Accounts and any House Account would not be offset.⁴⁹

8. MEMBERS' ASSESSMENT LIABILITIES

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

- (a) A Member is required to contribute to the Clearing Fund in the amount determined in accordance with Section 2, Article VIII of the By-Laws and OCC Rule 1001, which may be amended by the Board of Directors of the Clearing House at any time.

shall not be netted against a net liability in any other account and shall be segregated and identified as property of the futures customers of the Member and held for distribution to the persons entitled thereto in accordance with applicable law." Section 27(e), Article VI of the By-Laws.

⁴⁶ 11 U.S.C. § 763(b).

⁴⁷ 11 U.S.C. § 763(a).

⁴⁸ 11 U.S.C. § 763(c).

⁴⁹ As noted above, if the Clearing House is subject to an OLA Proceeding, the FDIC, as a receiver for the Clearing House, would be required, under the terms of OLA, to "apply the provisions of subchapter IV of Chapter 7 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).

(b) A Member may also be subject to the Clearing House Assessments, as discussed under paragraph 8.5.

8.2 Each Member is required to make the initial contribution to the Clearing Fund in the amount of \$150,000 or such greater amount as may be fixed by the Board of Directors. Not later than the end of the first three calendar months of a Member's admission to the Clearing House's membership, the Member's contribution to the Clearing Fund will be determined in accordance with the OCC Rules (but in no event may be less than \$150,000).

8.3 Following the initial contribution to the Clearing Fund, a required contribution of a Member to the Clearing Fund for each calendar month shall be the greater of (x) the minimum Clearing Fund contribution specified in OCC Rule 1001(c) or (y) such Member's proportionate share of the total amount of the Clearing Fund as determined by the Clearing House under OCC Rule 1001(a) (as discussed under paragraph (i) above). Because the OCC Rules do not expressly provide for a maximum size of the Clearing Fund,⁵⁰ a Member's required contribution to the Clearing Fund is not capped under the Clearing House Documentation.

8.4 A Member's failure to make a required contribution to the Clearing Fund may result in suspension of such Member ("**Member Suspension**").⁵¹ Upon a Member Suspension, whether due to a payment default ("**Monetary Default**") to the Clearing House or otherwise (such Member, a "**Defaulting Clearing Member**"), the Clearing House will liquidate all margins deposited with the Clearing House by such Defaulting Clearing Member in all accounts and all of such Member's contributions to the Clearing Fund, and apply the proceeds in the following order:

(a) if and to the extent a Member Suspension results from a payment default related to a Contract carried in any Customer Account, (1) any margin held by the Clearing House for all Customer Accounts of the Defaulting Clearing Member; (2) the Defaulting Clearing Member's Clearing Fund

⁵⁰ The total size of the Clearing Fund is determined in the Clearing House's sole discretion to be sufficient to protect the Clearing House against loss under simulated default scenarios, but in no event less than the greater of either (a) \$1 billion or (b) 110% of the size of the committed credit facilities of the Clearing House that are secured by the Clearing Fund on the date of the calculation. See OCC Rule 1001(a).

⁵¹ OCC Rule 1102.

deposit; and, (3) if the deficiency remains after (1) and (2), margin and other assets held by the Clearing House for all proprietary accounts of the Defaulting Clearing Member;⁵² and

- (b) if and to the extent a Monetary Default relates to a Contract carried in any House Account carried by the Clearing House for a Defaulting Clearing Member, to pay the Defaulted Obligation the Clearing House will apply the Defaulting Clearing Member's (1) Clearing Fund deposit and (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 paragraphs 8.4(a) and (b) above, the Defaulted Obligation has not been satisfied, 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 collected from the Defaulting Clearing Member, will be met (1) first, from the Member's Clearing Fund contribution (including any amounts obtained from the Member in satisfaction of its obligation to make good on any charges against its Clearing Fund contribution); and (2) second, from a *pro rata* charge against the Clearing Fund contributions of other Members in accordance with the Clearing House Documentation ("**Clearing House Assessments**").⁵³

8.6 Pursuant to Section 6, Article VIII of the By-Laws, whenever an amount is paid out of the Clearing Fund contribution of a Member, whether by proportionate charge or otherwise, such Member shall be liable promptly to make a payment in the amount of the resulting deficiency, **provided, however that** if the payment to the Clearing Fund is made as a result of a proportionate charge, a Member will not be liable for more than an additional 100% of the amount of its then-required contribution if (i) within five business days following such proportionate charge the Member notifies the Clearing House in writing that it is terminating its status as a Member, (ii) no opening purchase transaction or opening writing transaction is submitted for clearance through any of the Member's accounts at the Clearing House and no Stock Loan is initiated through any of the

⁵² OCC Rule 1104(a) provides that upon Member Suspension, any cash derived from liquidation of Margin held in Customer Accounts shall not be commingled with any other cash, and may be applied only to the obligations of such Customer Accounts.

⁵³ Section 27(f), Article VI of the By-Laws.

Member's accounts at the Clearing House after the giving of such notice, and (iii) the Member closes out or transfers all of its open positions with the Clearing House, in each case as promptly as practicable after the giving of such notice.⁵⁴ In the event a Member notifies the Clearing House of its intent to terminate its status as a Member, and such Member's computed contribution is less than its minimum required contribution, then the Member will be required to make a payment in the amount equal to its minimum required contribution less its computed contribution to the Clearing Fund.

9. QUALIFICATIONS

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

- 9.1 We are members of the bar of the State of New York and are not members of the bar of any other state, and this opinion is qualified by this fact.
- 9.2 The list of special provisions in paragraphs 4.1 through 4.3 is not an exhaustive list of all laws of this jurisdiction that may apply to Contracts, their interpretation and enforcement (which, among other things, shall be subject to general principles of New York contract law and laws particular to individual Members).
- 9.3 This letter relates only to the entities specified herein. We express no opinion with respect to the effect of the Trading with the Enemy Act, 50 U.S.C. app. § 1 *et seq.*, or the International Emergency Economic Powers Act, 50 U.S.C. § 1701 *et seq.*, on the rights or obligations of the Parties.
- 9.4 Our views are in all cases subject to equitable principles, whether applied in a proceeding at law or in equity.
- 9.5 The opinion given in paragraph 5.1 is in respect of a Member's powers under the Clearing House Documentation as at the date of this letter. We express no opinion as to any provisions of the Clearing House Documentation other than those on which we expressly opine.


⁵⁴ A Member which terminates its membership with the Clearing House will be ineligible to be readmitted to membership unless the Member agrees to reimbursement of other Members in the amount determined by the Board of Directors and deemed fair and equitable under the circumstances.

- 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, the Clearing House Documentation or fact that may affect the above opinion.
- 9.7 Where Contracts are governed by laws other than the laws of this jurisdiction, the opinion contained in paragraph 5.1 is given in respect of only those Contracts which are capable, under their governing laws, of being terminated and liquidated in accordance with the provisions of the Netting Provision.

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

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

Yours faithfully

A handwritten signature in cursive script that reads "Clifford Chance US LLP". The signature is written in dark ink and is positioned above a horizontal dotted line.