

LCH Limited
Aldgate House
33 Aldgate High Street
London EC3N 1EA

1 December 2020

Dear Sirs

Opinion letter in respect of the LCH Limited EMIR-compliant model

You have asked us to provide advice in respect of the laws of England and Wales ("**this jurisdiction**") in response to certain specific questions raised by LCH Limited ("**LCH**") in relation to membership, insolvency, security, set-off & netting and client clearing for purposes including the application of LCH for "Recognised Central Counterparty" status, pursuant to Article 17 of EMIR(UK) (as defined below) and Section 288 of the Financial Services and Markets Act 2000 ("**FSMA**").

The relevant questions are set out in full in Section 3 of this opinion letter (the "**Opinion Letter**") together with the corresponding responses.

1. TERMS OF REFERENCE

1.1 This opinion is given in respect of Clearing Members which (as further specified in paragraph 2.14) are:

- 1.1.1 banks incorporated in this jurisdiction which have permission to accept deposits by virtue of Part 4A of FSMA but not including insurance companies which have such permission to carry out contracts of insurance. (Please note that certain other types of person, not covered by this opinion, may also have permission to accept deposits, including credit unions within the meaning of section 31 of the Credit Unions Act 1979);
- 1.1.2 banks incorporated in another jurisdiction but with a branch in this jurisdiction;
- 1.1.3 investment firms incorporated in this jurisdiction or incorporated in another jurisdiction but with a branch in this jurisdiction, and
- 1.1.4 Building Societies as defined in Annex 1 and subject to the modifications set out in Annex 1;

which, in each case, are either English companies, foreign companies or Royal Charter Corporations.

For these purposes, an "English company" is a company which is formed and registered under the Companies Act 2006 (the "CA 2006") or the former Companies Acts (as defined in section 1171 of the CA 2006), but does not include a company formed and registered under any of the former Companies Acts in what was then Ireland and following the expiry of the transition period (discussed further below), will include a "Societas UK", (being an entity established in the UK pursuant to EU Council Regulation No. 2157/2001 of 8 October 2001 company which has become a Societas UK by virtue of s12A of the European Public Limited-Liability Company Regulations 2004; a "foreign company" is a company which is incorporated or formed under the laws of another jurisdiction with a branch or branches established or located in this jurisdiction; and a "Royal Charter Corporation" is a company incorporated by royal charter under the laws of this jurisdiction. As to companies registered in Scotland, see paragraph 5.43 below.

- 1.2 The opinions contained in this Opinion Letter are not limited to any specific Services offered by LCH but do not apply to Services offered by FCM Clearing Members in respect of FCM Contracts.
- 1.3 Except where otherwise defined herein, terms defined in the Rulebook (as defined below) of LCH shall have the same meaning in this Opinion Letter.
- 1.4 In this Opinion Letter, unless otherwise indicated:
 - 1.4.1 "**Agreements**" means the Clearing Membership Agreement and the Deed of Charge;
 - 1.4.2 "**Arrangements**" means the Collateral Arrangements and the Default Arrangements;
 - 1.4.3 "**Charged Property**" has the meaning ascribed to such term in the Deed of Charge;
 - 1.4.4 "**Clearing Membership Agreement**" means a clearing membership agreement which is substantially in the form of the Clearing Membership Agreement set out in Schedule 1;
 - 1.4.5 "**Client Contracts**" means the Contracts entered into by a Clearing Member in respect of its Client Clearing Business;
 - 1.4.6 "**Collateral Arrangements**" means the security arrangements provided for in the Rulebook pursuant to which a Clearing Member provides Collateral to LCH;
 - 1.4.7 "**Deed of Charge**" means a deed of charge entered into between a Clearing Member and LCH which is substantially in the form of the Deed of Charge set out in Schedule 2;
 - 1.4.8 "**Default Arrangements**" means the default management procedures of LCH, provided for in the Rulebook, including, in particular, under the Default Rules and, in respect of Client Contracts, under the Client Clearing Annex to the Default Rules;

- 1.4.9 "**English Clearing Member**" means a Clearing Member which is an English company;
- 1.4.10 "**Insolvency Proceedings**" means the procedures described in paragraph 3.2.1;
- 1.4.11 "**Party**" means LCH or a particular Clearing Member, and "**Parties**" means both of them;
- 1.4.12 "**Rulebook**" means the version of the General Regulations, Procedures, Default Rules, Settlement Finality Regulations and the Product Specific Contract Terms and Eligibility Criteria Manual made available on LCH's website as at the date of this Opinion Letter;
- 1.4.13 "**Secured Obligations**" has the meaning ascribed to such term in the Deed of Charge;
- 1.4.14 "**Unregulated Entity**" means a UK entity which does not require authorisation under (and as provided for) in the UK SI 2001/544 (The Financial Services and Markets Act 2000 Regulated Activities Order 2001) to carry on House Clearing Business and which does not and will not provide Client Clearing Services;

the following principles of interpretation apply:

- 1.4.15 a reference to "**this opinion**" is to the opinion given in Section 3;
- 1.4.16 references to a "**designated system**" are to a designated system within the meaning of and for the purposes of the Settlement Finality Regulations 1999;
- 1.4.17 references to a "**recognised clearing house**" and to a "**recognised central counterparty**" are to a recognised clearing house and a recognised central counterparty, respectively, within the meaning of and for the purposes of Part 7 of the Companies Act 1989 ("**Part 7**");
- 1.4.18 a reference to the "**Cross-Border Insolvency Regulations**" means the Cross-Border Insolvency Regulations 2006;
- 1.4.19 a reference to "**CRR**" is to Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012; and a reference to "**CRR (UK)**" is a reference to CRR during the transition period, and following the end of the transition period, CRR as it is expected to form part of domestic law in the United Kingdom by virtue of section 3 of the European Union (Withdrawal) Act 2018 (and as amended pursuant to section 8 of the European Union (Withdrawal) Act 2018 or any regulations made thereunder).
- 1.4.20 a reference to "**EMIR**" is to Regulation (EU) No 648/2012 of the European Parliament and the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories; and a reference to "**EMIR (UK)**" is a reference to EMIR during the transition period, and following the end of the transition period, EMIR as it is expected to form part of domestic law in the United Kingdom by virtue of section 3 of the European Union (Withdrawal)

Act 2018 (and as amended pursuant to section 8 of the European Union (Withdrawal) Act 2018 or any regulations made thereunder)

- 1.4.21 a reference to the "**EUIR**" is to EU Council Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings;
- 1.4.22 a reference to a "**financial collateral arrangement**" is to an arrangement defined as such in the Financial Collateral Arrangements (No. 2) Regulations 2003 (the "**FCA Regulations**");
- 1.4.23 a reference to the "**Safeguards Order**" is to the Banking Act 2009 (Restriction of Partial Property Transfers) Order 2009;
- 1.4.24 a reference to the "**Settlement Finality Regulations 1999**" is to the Financial Markets and Insolvency (Settlement Finality) Regulations 1999;
- 1.4.25 a reference to the "**Special Bail-In Order**" is to the Banking Act 2009 (Restriction of Special Bail-in Provision, etc.) Order 2014;
- 1.4.26 a reference to a "**UK bank**" is to an undertaking incorporated in and as formed under the law of any part of the United Kingdom and having its head office in the United Kingdom, which has permission under Part 4A of FSMA to accept deposits; but for the purposes of this opinion does not include insurance companies or credit unions within the meaning of section 31 of the Credit Unions Act 1979;
- 1.4.27 a reference to a "**UK investment bank**" is to an undertaking to which the Investment Bank Regulations apply (being, broadly, an institution which is incorporated in the UK, authorised under FSMA to safeguard and administer investments or deal in investments as principal or agent, and holds assets for clients);
- 1.4.28 a reference to a "**UK investment firm**" is to an investment firm to which the Banking Act 2009 applies as defined in section 258A of that Act (being broadly, a UK institution which is an investment firm for the purposes of CRR(UK) but does not include a UK bank, a building society within the meaning of the Building Societies Act 1986 or credit union within the meaning of the Credit Unions Act 1979 or the Credit Unions (Northern Ireland) Order 1985);
- 1.4.29 in relation to a UK bank, the terms "**liquidator**" and "**administrator**" include a bank liquidator and bank administrator respectively; and, in relation to a UK investment bank, these terms include any individual(s) appointed as administrator pursuant to the investment bank special administration procedure, the special administration (bank insolvency) procedure or the special administration (bank administration) procedure under the Investment Bank Regulations;
- 1.4.30 in relation to a UK bank, the terms "**liquidation**" and "**administration**" include a bank insolvency and a bank administration respectively; and, in relation to a UK investment bank, these terms include an investment bank special administration, a special administration (bank insolvency) and/or a special

administration (bank administration) under the Investment Bank Regulations, as the context may require;

- 1.4.31 a reference to an "**EEA Credit Institution**" is to an EEA credit institution as defined in the Credit Institutions (Reorganisation and Winding Up) Regulations 2004 (the "**Credit Institutions Regulations**"), which means an EEA undertaking which qualifies as a credit institution under Directive 2000/12/EC but which is not a UK credit institution; a reference to the "**Investment Bank Regulations**" is to the Investment Bank Special Administration Regulations 2011;
 - 1.4.32 a reference to the "**UNCITRAL Model Law**" is to the Model Law on cross-border insolvency as adopted by the United Nations Commission on International Trade Law on 30th May 1997;
 - 1.4.33 any reference to any legislation (whether primary legislation or regulations or other subsidiary legislation made pursuant to primary legislation) shall be construed as a reference to such legislation as the same may have been amended or re-enacted on or before the date of this Opinion Letter;
 - 1.4.34 unless the context otherwise requires, a reference to a "**paragraph**" is a reference to a paragraph of this Opinion Letter, a reference to a "Section" is to a Section of this Opinion Letter and a reference to a "**Schedule**" is a reference to a Schedule to this Opinion Letter; and
 - 1.4.35 headings are for ease of reference only and shall not affect the interpretation of this Opinion Letter.
- 1.5 For the purposes of preparing this Opinion Letter we have only reviewed the following documents (the "Opinion Documents"):
- 1.5.1 the Rulebook;
 - 1.5.2 the Clearing Membership Agreement; and
 - 1.5.3 the Deed of Charge.
- 1.6 This Opinion Letter relates solely to matters of English law (as in force at the date hereof, subject to paragraph 1.9 below) and does not consider the impact of any laws (including insolvency laws) other than English law, even where, under English law, any foreign law falls to be applied. This Opinion Letter and the opinions given in it are governed by English law and relate only to English law as applied by the English courts or, where expressly stated, a duly constituted arbitral tribunal with its seat in England as at today's date, subject to paragraph 1.9 below. We express no opinion on the laws of any other jurisdiction.
- 1.7 On 31 January 2020, the UK ceased to be a member of the EU. Under the terms of the UK's withdrawal from the EU, a transition period came into effect on that date and is due to end on 31 December 2020. The terms of the transition period are set out in the withdrawal agreement agreed between the UK and the EU, which was ratified by the European Parliament, the Council of the EU and the UK Parliament and entered into effect on 31 January 2020 (the "**Withdrawal Agreement**"). The terms of the

Withdrawal Agreement were given effect in domestic law in the UK through the European Union (Withdrawal) Act 2018 as amended by the European Union (Withdrawal Agreement) Act 2020. During the transition period, the UK is treated as if it were still an EU Member State for the purposes of market access for goods and services (including financial services) and related EU law will continue to be applicable to and in the UK.

- 1.8 At the end of the transition period, the European Union (Withdrawal) Act 2018 as amended by the European Union (Withdrawal Agreement) Act 2020 provides that that EU laws will be “onshored” into UK domestic law as "retained EU law" and amended as necessary to correct any deficiencies in those onshored laws (principally by statutory instruments). There is, however, no certainty as to the precise status of UK law and regulations after the end of the transition period.
- 1.9 This Opinion Letter relates to matters of English law as in force at the date therefore, unless expressly stated otherwise, in which case, it relates to matters of English as it is expected to be in force following the end transition period in light of the European Union (Withdrawal) Act 2018 as amended by the European Union (Withdrawal Agreement) Act 2020, and any enacted or proposed regulations made thereunder. We have assumed for these purposes that the statutory instruments will be passed on substantially the same terms as the draft or enacted versions published by HM Treasury or other UK government departments.
- 1.10 We do not express any opinion as to any matters of fact, the liability of any Party to tax or accounting policy.
- 1.11 We do not opine on the enforceability of any net obligation resulting from any netting or set-off, including any net obligation certified as payable to LCH (as described at the end of our response in paragraph 3.2.6) and we do not express any view as to the effectiveness of the Default Arrangements in relation to any action which LCH may seek to take outside this jurisdiction.
- 1.12 We express no opinion as to any provisions of the Opinion Documents other than those to which express reference is made in this Opinion Letter except insofar as any such provisions directly relate to issues covered herein.
- 1.13 We have not been responsible for advising any party to the Opinion Documents other than LCH for the purposes of this Opinion Letter and the communication of this Opinion Letter to any person other than LCH does not evidence the existence of any relationship of client and adviser between us and such person.
- 1.14 We assume no duty to update this Opinion Letter or inform LCH or any other person to whom a copy of this Opinion Letter may be communicated of any change in English law (including, in particular, applicable case law), or the legal status of any party to the Services, or any other circumstance that occurs, or is disclosed to us, after the date on which this Opinion Letter is given, which might have an impact on the opinions given in this Opinion Letter.
- 1.15 The EUIR has been amended and replaced by Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) which entered into force on 26 June 2015 (the "**Recast EUIR**"). Where

relevant, the Recast EUIR applies to insolvency proceedings opened after 26 June 2017 during the transition period. The EUIR continues to apply to relevant insolvency proceedings opened before that date during the transition period. The scope and effect in this jurisdiction of the Recast EUIR will be different from the scope and effect of the EUIR. Those differences and their impact are not considered in this Opinion Letter.

- 1.16 The Opinions and provisions of this Opinion Letter that relate to authorised Clearing Members and Client Clearing do not apply to Unregulated Entities.
- 1.17 This Opinion Letter does not address the effectiveness of the custodial segregation provisions of the rulebook. These provisions are addressed in our opinion letters to you dated 9 June 2017.

2. **ASSUMPTIONS**

We assume the following:

- 2.1 That each Party has the capacity, power and authority under all applicable law(s) to enter into the Opinion Documents and Contracts and to perform its obligations under the Opinion Documents and Contracts.
- 2.2 That each Party has taken all necessary steps and obtained and maintained all authorisations, approvals, licences and consents necessary to execute, deliver and perform the Opinion Documents and the Contracts and to ensure the legality, validity, enforceability or admissibility in evidence of the Opinion Documents and the Contracts in this jurisdiction and any other jurisdiction.
- 2.3 The Opinion Documents and each of the Contracts accurately reflect the true intentions of the Parties and have been entered into and are carried out by the Parties in good faith, for the benefit of each of them respectively, on arms' length commercial terms and for the purpose of carrying on, and by way of, their respective businesses.
- 2.4 That the Agreements are entered into between the Parties prior to the formal commencement of any insolvency procedure under the laws of any jurisdiction in respect of the Clearing Member.
- 2.5 That LCH is at all relevant times able to meet its obligations in respect of the Contracts and not subject to any insolvency procedure under the laws of any jurisdiction.
- 2.6 Save in relation to any non-performance leading to the taking of action by LCH under the Default Rules, that each Party performs its obligations under the Opinion Documents and each Contract in accordance with their respective terms.
- 2.7 That no Clearing Member is entitled to claim in relation to itself or its assets immunity from suit, attachment, execution or other legal process.
- 2.8 That the Clearing Member is not a "bridge bank" as defined in section 12 of the Banking Act 2009.
- 2.9 That LCH is at all material times a recognised central counterparty within the meaning of section 285 FSMA and for the purposes of Part 7 and a designated system.

- 2.10 That neither Party is subject to Part 7 by reason of being a recognised investment exchange (as defined in section 285 of FSMA) or, in the case of the Clearing Member, by reason of being a recognised clearing house, EEA central counterparty or third country central counterparty (each as defined in FSMA).
- 2.11 That in all circumstances LCH will take action under its Default Rules in respect of a defaulting Clearing Member with the result that sections 166(2) and 167(3) of Part 7 will not apply. As to the effect of sections 166(2) and 167(3) of Part 7 please see paragraph 4.16 below.
- 2.12 That, apart from any circulars, notifications and equivalent measures published by LCH in accordance with the Rulebook, there are not any other agreements, instruments or arrangements between the Parties which modify or supersede the terms of the Opinion Documents.
- 2.13 That none of the Rules of the Clearing House or the other provisions of the Opinion Documents discussed and opined on in this Opinion Letter has been disallowed pursuant to section 300A of the FSMA.
- 2.14 That each Clearing Member is:
- 2.14.1 a UK credit institution or during the transition period, an EEA Credit Institution; or
 - 2.14.2 a bank incorporated in a jurisdiction other than the United Kingdom (or during the transition period, another member state of the EEA), with a branch in this jurisdiction; or
 - 2.14.3 a UK investment firm;
 - 2.14.4 a Building Society; or
 - 2.14.5 an Unregulated Entity (as defined in the Opinion Letter).
- and, otherwise than in respect of an Unregulated Entity, the term "**Backup Clearing Member**" shall be construed accordingly when used in this Opinion Letter.
- 2.15 That the Charged Property delivered pursuant to the Deed of Charge constitutes financial collateral (as defined in the FCA Regulations)¹.
- 2.16 That title to the Charged Property is evidenced by entries in a register or account maintained by or on behalf of an "intermediary" and that the "relevant account" (each as defined in the FCA Regulations) is located in England & Wales.
- 2.17 That the provision of Charged Property to LCH can be evidenced in writing or by electronic means and any other durable medium and that such evidencing permits the identification of the Charged Property (provided that, for this purpose, it is sufficient to

¹ In our view the Charged Property delivered by a Clearing Member should constitute "financial instruments" and, therefore, constitute "financial collateral" (as each such term is defined in the FCA Regulations). However, we cannot exclude the possibility that a Clearing Member might deliver (and LCH might accept) Charged Property in the form of other types of Collateral.

prove that the Charged Property taking the form of book-entry securities has been credited to, or forms a credit in, the relevant account).

- 2.18 That LCH at all times exercises its rights under the Opinion Documents and does not waive any requirement for it to consent to the withdrawal of any Charged Property.
- 2.19 That all Charged Property transferred is freely transferable and all acts or things required by the laws of this or any other jurisdiction to be done to ensure the validity of each transfer of Charged Property will have been effectively carried out.
- 2.20 That, pursuant to the European Union (Withdrawal) Act 2018 (as amended), English laws and regulations implementing EU law will be saved and will continue to have effect following end of the transition period (which is due to expire on 31 December 2020), and directly applicable EU legislation will be incorporated into and form part of domestic English law after the end of the transition period (together "**retained EU law**"). Further, this retained EU law will be amended after the end of the transition period by statutory instruments made pursuant the European Union (Withdrawal) Act 2018 (as amended) in order to remedy deficiencies in retained EU law arising as a result of the UK's exit from the European Union (including as a result of the end of the transition period). We have assumed that any such statutory instruments will be passed on substantially the same terms as the draft or enacted versions published by HM Treasury or other UK government departments. Please also see paragraph 1.9 above.

3. **OPINION**

On the basis of the foregoing terms of reference and assumptions and subject to the reservations and the qualifications set out in Section 5 below, we make the following statements of opinion. These statements of opinion are summary conclusions on specific questions which you have raised.

For the avoidance of doubt, in our view the protections provided by Part 7 amount to an Exempting Client Clearing Rule and consequently, in accordance with your instructions, we have not opined on the Security Deed.

3.1 Membership

3.1.1 *Will the rights and obligations of each of LCH and English Clearing Members under the LCH Agreements constitute legal, valid and binding and enforceable rights and obligations?*

On the basis of the foregoing assumptions and subject to the qualifications set out below, we are of the opinion that the rights and obligations of LCH and of an English Clearing Member under the Opinion Documents would constitute legal, valid, binding and enforceable rights and obligations at English law.

3.1.2 *Are there any statutory limitations on the capacity of, or specific regulatory requirements associated with, any English Clearing Member entering into the Agreements (including for the purpose of granting of security under the Deed of Charge)?*

We have assumed for the purpose of this opinion that an English Clearing Member has, where required, obtained the requisite regulatory licences and approvals (see paragraph

2.2 above). There are no specific statutory limitations or regulatory requirements which would limit the capacity of an appropriately authorised (to the extent that such authorisation is required) Clearing Member to enter into the Agreements. However, we note that no person may carry on a regulated activity unless he is authorised or exempt. Pursuant to section 26 FSMA an agreement made by an unauthorised non-exempt person in the course of carrying on a regulated activity is unenforceable against the other party. Therefore, an unauthorised and non-exempt English Clearing Member which should have been authorised would be unlikely to be able to enforce the terms of the Opinion Documents and/or Contracts against LCH.

The potential limitations imposed by the constitutional documents of an English Clearing Member and the restrictions limiting the capacity of directors of an English Clearing Member to enter into the Agreements on behalf of the English Clearing Member are discussed at paragraph 3.1.3 below.

3.1.3 *Would LCH be deemed to be domiciled, resident or carrying on business in this jurisdiction by virtue of providing clearing services to a Clearing Member? If so, would LCH be required to obtain a licence or be registered before providing clearing services to a Clearing Member or are there any special local arrangements for the recognition of overseas clearing houses in these circumstances?*

The question is not relevant to an English law analysis as LCH is domiciled, resident and carrying on business in England & Wales in any event.

3.1.4 *What type of documents should be obtained by LCH to evidence that an English Clearing Member and its officers have the capacity and authority to enter into the Agreements? Is LCH required to verify such evidence?*

Constitutional Documents

Prior to 1 October 2009, a company's capacity and powers were generally defined by and the objects of a company were set out in its memorandum of association. Transactions outside the scope of the company's capacity and powers could be *ultra vires*. After 1 October 2009 objects clauses contained in the memorandum of an existing company will be treated as provisions of the company's articles (section 28 CA 2006), unless and until the company chooses to remove them. As such "existing objects will thus just become limitations on directors' authority contained in the articles and amendable by special resolution", this renders the doctrine of *ultra vires* redundant². In addition, with respect to new and existing companies, section 31(1) CA 2006 provides that "unless a company's articles specifically restrict the objects of the company, its objects are unrestricted"³. Unless a company's objects are expressly restricted in its articles, its powers will be unlimited and will include the power to enter into the Agreements. It is important to note, however, that the directors will not be able to exercise these powers unchecked. Directors must exercise their powers in furtherance

² March 2009 Special Release addendum to Gore-Browne on Companies in Section SR7

³ For example, if the articles were to state that "the company **may ONLY** carry on the business of being a motor manufacturer", then the business of the company would be restricted to this activity. However, if the articles state that "the company **may** carry on the business of a motor manufacturer", this is a permissive statement, meaning that the company can carry on this activity and any other.

of the business of the company and for its benefit, in accordance with their statutory duty to act in good faith to promote the success of the company for the benefit of its members. Please note that we have assumed for the purpose of the opinion that the relevant directors are acting in accordance with the duty of good faith (see paragraph 2.3 above).

The cumulative effect of the 1 October 2009 changes is that it is no longer necessary to check that a transaction is within the capacity of the company but it is important to ensure that the directors have not breached their authority by exceeding their powers. If, on the other hand, the directors have abused their powers (thereby breaching their fiduciary duties) by entering into a transaction which is not in the interests of, and will confer no benefit on, the company, then this will amount to a breach of duty and the transaction may be set aside at the option of the company. Please note that we have assumed for the purpose of the opinion that the relevant directors are acting in accordance with their fiduciary duties (see paragraph 2.3 above).

Section 40 CA 2006 affords protection to third parties by providing that "in favour of a person dealing with a company in good faith, the power of the directors to bind the company or authorise others to do so, is deemed to be free of any limitation under the company's constitution". Section 40 is however unlikely to protect LCH where it has actual knowledge that the directors have abused their powers.

In view of the above, LCH should request a copy of the articles of association and memorandum of association (if any) of each English Clearing Member and check these documents for evidence of express restrictions on directors' powers (but not for evidence that those powers have been expressly conferred as was the case prior to 1 October 2009). If relevant restrictions are identified, it will be necessary to obtain a special members' resolution from the members of the English Clearing Member approving an amendment of the articles to remove these restrictions. As a practical matter, LCH will need to rely on the constitutional documents as actually provided by the English Clearing Member. LCH should therefore require each English Clearing Member to represent and certify that there have been no amendments to the versions of the constitutional documents delivered to LCH.

Corporate Approvals/Signing Authority

The authority to bind the company must be conferred either by the articles of association or by delegation under a power contained in them. In most cases, the general power to manage the company is vested in the board of directors. The articles describe how this power is to be exercised by setting out the internal procedures of the company and the limitations on the directors. A board meeting will usually be required for a company to authorise entering into an agreement. Alternatively, the board may delegate any of its powers to committees consisting of one or more directors. The directors act through resolutions passed at these committee meetings.

In addition to verifying that there are no limits on the directors' powers imposed by the constitutional documents of the English Clearing Member, it is also necessary to verify that the signatories signing the Agreements have been appropriately authorised to do so. Accordingly, each English Clearing Member should be required to provide a certified copy of the minutes of the quorate board meeting or committee meeting at which a resolution was passed authorising the execution of the Agreement(s),

specifying those persons who are authorised to execute them on the part of the English Clearing Member and providing their specimen signatures.

LCH should verify the documents provided and the names and signatories of the persons signing the Agreement(s). The directors and the secretary of a company constitute "authorised signatories" for the purpose of the CA 2006 (section 44(2)(a)). However, where the board resolution authorises the directors and/or the secretary to execute the Agreement(s) LCH should still require the relevant English Clearing Member to provide the relevant form of the Appointment of Directors and Appointment of Secretary forms submitted by the company to Companies House and to confirm that such forms have not been revoked/amended in order to verify that such person(s) is/are a director/secretary. A board resolution is insufficient to authorise a person who is not a director and/or the secretary (a "third party") to execute a deed (such as the Deed of Charge). A third party can only sign a deed on behalf of a company if he/she has been appointed to do so by a power of attorney. A power of attorney must itself be executed as a deed (section 47 CA 2006). Therefore, where the board resolution purports to authorise a third party to execute the Deed of Charge on behalf of the Clearing Member, LCH should require the relevant Clearing Member to provide a copy of the duly executed power of attorney deed (see "Due Execution" below for further detail in respect of the execution of deeds).

Due Execution

A contract (such as the Clearing Membership Agreement) may be executed by a company or on behalf of a company by a person acting under its authority (express or implied) (section 43 CA 2006). By contrast, a deed (such as the Deed of Charge) may only be executed by a company or on behalf of a company by a person who has been appointed as the company's attorney pursuant to a duly executed power of attorney deed (section 46 and 47 CA 2006).

A document (whether a contract or a deed) can be executed by a company:

- (a) by affixing its common seal (section 44(1)(a) CA 2006)⁴; or
- (b) by the document being signed on behalf of the company by either:
 - (i) two authorised signatories i.e. two directors or a director and the secretary; or
 - (ii) a director of the company in the presence of a witness who attests the signature (section 44(2) CA 2006).

The execution blocks on both the Deed of Charge and the Clearing Membership Agreement indicate that the Agreements are to be executed by the Company by two authorised signatories i.e. pursuant to the method of execution prescribed under section 44(2) CA 2006. However, if contrary to this indication a Deed of Charge is to be signed by an attorney who has been appointed by a English Clearing Member under a duly

⁴ In accordance with its articles of association, which may require the seal to be affixed in the presence of an authorised signatory.

executed power of attorney deed, it is important to note that the Deed of Charge will only be validly executed as a deed by such an attorney if, and only if it is signed:

- (a) by the attorney in the presence of a witness who attests his signature; or
- (b) at his direction and in his presence and the presence of two witnesses who each attest the signature (section 1(3)(a) Law of Property (Miscellaneous Provisions) Act 1989).

Delivery

In order to be effective a deed (such as the Deed of Charge) must be delivered. Pursuant to section 46(2) of the CA 2006 a deed executed by a company is presumed to be delivered on execution unless a contrary intention is proved. However, the deed can be delivered at a later date and should not be dated until the time of delivery.

Insolvency

There are various challenges which can be made where a disposition of property is made post-insolvency. As discussed below, Part 7, the Financial Collateral Regulations and the Settlement Finality Regulations 1999 provide certain protections from challenges under insolvency law (see paragraphs 3.2, 3.3 and 3.4).

However in our view and in light of the potential insolvency challenges it would be prudent for LCH to verify that a Clearing Member is not subject to Insolvency Proceedings at the time it enters into the Agreements. LCH should therefore require each Clearing Member to certify and represent that it is not subject to Insolvency Proceedings at the time of entering into the Agreements. Furthermore, LCH could conduct a winding-up search against the name of the Clearing Member with the Central Index of Winding up Petitions (held at the High Court) by telephoning the Central Index's telephone line and asking whether:

- (a) a petition for winding up has been presented; or
- (b) an application for an administration order, a notice of intention to appoint an administrator or a notice of appointment of an administrator has been presented.

A search at the Central Index of Company Winding-up Petitions at the Companies Court in London will reveal if a notice of appointment of an administrator by a qualifying floating charge holder, or notice of intention to appoint, and/or notice of appointment of, an administrator by a company or its directors has been filed with the Companies Court, London.

It is important to note that searches and enquiries only relate to insolvency proceedings commenced in England and are not conclusively capable of disclosing whether an interim or final administration order or winding up order has been made or resolution passed for the winding up of a company or whether notification of a moratorium has been given or a receiver, administrative receiver, administrator or liquidator has been appointed (or petition made for the winding up) of a company. In particular, notice of these matters may not yet have been filed with the Registrar of Companies (or if filed, may not yet be publicly available) and notice of a petition for winding up is not required

to be filed with the Registrar. In addition, details of a petition for winding up may not be entered on the Central Index of Winding-Up Petitions immediately and any response to an enquiry would only relate to the last six months prior to the enquiry.

Royal Charter Corporations

The analysis for Clearing Members that are Royal Charter Corporations is more complex and requires a review of the relevant Clearing Member's specific constitutional documents. Further advice should be sought in respect of such Clearing Members on a case-by-case basis.

3.1.5 *Are there any formalities to be complied with upon entry into of any of the Agreements and, if so, what is the effect of a failure to comply with these?*

In respect of the execution formalities to be complied with in respect of the entry into the Agreements please see paragraph 3.1.3 above.

There are no regulatory filings which need to be made upon the entry into the Clearing Membership Agreement.

Pursuant to section 859A CA 2006 a UK-registered company entering into a charge, or any person interested in a charge granted by a UK-registered company, may register the prescribed particulars relating to such charge with Companies House. For the purposes of the relevant provisions of CA 2006, charge is defined as "(a) a mortgage and (b) a standard security, assignment in security, and any other right in security constituted under the law of Scotland, including any heritable security, but not including a pledge" (section 859A(7) CA 2006). Accordingly, the Deed of Charge is likely to constitute a registrable charge for the purposes of the Act.

Failure to register within 21 days of the execution of the charge renders the charge "void" against the liquidator, administrator and any creditor of the company (section 859H CA 2006). However, Regulation 4(4) of the FCA Regulations disapplies the effects of section 859H CA 2006 where such charge constitutes a security financial collateral arrangement. A security financial collateral arrangement is defined as:

"an agreement or arrangement, evidenced in writing, where—

- (a) the purpose of the agreement or arrangement is to secure the relevant financial obligations owed to the collateral-taker;*
- (b) the collateral-provider creates or there arises a security interest⁵ in financial collateral to secure those obligations;*

⁵ A security interest means " means any legal or equitable interest or any right in security, other than a title transfer financial collateral arrangement, created or otherwise arising by way of security including - (a) a pledge; (b) a mortgage; (c) a fixed charge; (d) a charge created as a floating charge where the financial collateral charged is delivered, transferred, held, registered or otherwise designated so as to be in the possession or under the control of the collateral-taker or a person acting on its behalf; any right of the collateral-provider to substitute financial collateral of the same or greater value or withdraw excess financial collateral or to collect the proceeds of credit claims until further notice shall not prevent the financial collateral being in the possession or under the control of the collateral-taker; or (e) a lien" (Section 3(1) FCA Regulations).

(c) *the financial collateral is delivered, transferred, held, registered or otherwise designated so as to be in the possession or under the control of the collateral-taker or a person acting on its behalf; any right of the collateral-provider to substitute financial collateral of the same or greater value or withdraw excess financial collateral or to collect the proceeds of credit claims until further notice shall not prevent the financial collateral being in the possession or under the control of the collateral-taker; and*

(d) *the collateral-provider and the collateral-taker are both non-natural persons"* (Regulation 3(1) FCA Regulations).

For the reasons outlined at paragraph 3.2.2 below, in our view the Deed of Charge is likely to constitute a security financial collateral arrangement and accordingly it should not need to be registered. However, whether a particular arrangement constitutes a security financial collateral arrangement is a question of fact and cannot be opined on with certainty in any particular case. In particular, we would draw your attention to the assumption at paragraph 2.15 above and the qualifications at paragraphs 4.4 to 4.13 below.

The registration of companies charges provisions in sections 859A to 859H of the CA 2006 do not apply to Royal Charter Corporations.⁶

3.1.6 *Would the courts of this jurisdiction uphold the contractual choice of law and jurisdiction set out in Regulation 51?*

In any proceedings for the enforcement of the contractual obligations of the Clearing Members, the English courts or a duly constituted arbitral tribunal with its seat in England would give effect to the choice of English law as the governing law of the Opinion Documents subject to, and in accordance with, the provisions of Council Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (the "**Rome I Regulation**") during the transition period, and following the end of the transition period, Rome I Regulation as it is expected to form part of domestic law in the United Kingdom by virtue of section 3 of the European Union (Withdrawal) Act 2018 (and as amended pursuant to section 8 of the European Union (Withdrawal) Act 2018 or any regulations made thereunder) (the "**Rome I Regulation (UK)**"), if the Rome I Regulation (UK) does not apply to proceedings before an arbitral tribunal, the provisions of the Arbitration Act 1996 and the LCIA Arbitration Rules.

In any proceedings for the enforcement of any non-contractual obligations of the Clearing Members arising from or in connection with the Opinion Documents, the English courts or a duly constituted arbitral tribunal with its seat in England would give effect to the parties' agreement to submit to English law any non-contractual obligations arising from or in connection with the Opinion Documents subject to, and in

⁶ Royal Charter Corporations, as unregistered companies, are only subject to the provisions of the CA 2006 where those have been specifically extended to unregistered companies. Section 859A(6) of the CA 2006 provides that the registration of companies charges regime set out in Part 25 of the CA 2006 only applies to UK-registered companies (i.e. not to Royal Charter Corporations and other unregistered companies), and the Unregistered Companies Regulations 2009 do not seek to extend the relevant provisions to unregistered companies.

accordance with, Council Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (the "**Rome II Regulation**") during the transition period, and following the end of the transition period, Rome II Regulation as it is expected to form part of domestic law in the United Kingdom by virtue of section 3 of the European Union (Withdrawal) Act 2018 (and as amended pursuant to section 8 of the European Union (Withdrawal) Act 2018 or any regulations made thereunder) (the "**Rome II Regulation (UK)**") or, if the Rome II Regulation (UK) does not apply to proceedings before an arbitral tribunal, the provisions of the Arbitration Act 1996 and the LCIA Arbitration Rules, provided that (if the Rome II Regulation applies) the non-contractual obligation is within the scope of the Rome II Regulation, the provision of the Opinion Documents setting out the choice of English law was freely negotiated and all the parties to the Opinion Documents are pursuing a commercial activity.

3.1.7 *Will the courts uphold the judgement of the English courts or an English arbitration award?*

The first question (regarding the courts upholding the judgment of the English courts) is not relevant to an English law analysis.

The arbitration agreement contained in the Opinion Document is a valid and effective agreement to submit to arbitration.

The English courts will, on the application of a party to an arbitration agreement, stay proceedings in respect of a matter which under the Opinion Documents is referred to as an arbitration.

Under the Arbitration Act 1996, an arbitral award made by a duly constituted arbitral tribunal with its seat in England may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.

3.1.8 *Are there any "public policy" considerations that that the courts may take into account in determining matters related to choice of law and/or the enforcement of foreign judgements?*

An English law judgment would not constitute a foreign judgment. Therefore, we do not address this question in this Opinion Letter.

Matters relating to choice of law are considered in the response to 3.1.6 above.

3.2 Insolvency, Security, Set-off and Netting

3.2.1 *Please identify the different types of insolvency proceedings and reorganisation measures. Would any of these not be covered by those events entitling LCH to liquidate, transfer or otherwise deal with Contracts as provided for in Rule 5 of the Default Rules? Are any other events or procedures not envisaged in Rule 5 of the Default Rules relevant?*

The bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Clearing Member could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this Opinion Letter, are liquidation (including provisional liquidation), administration, bank insolvency, bank administration, investment bank special administration, special administration (bank

insolvency), special administration (bank administration), administrative receivership, receivership, voluntary arrangements and schemes of arrangement (together called "**Insolvency Proceedings**").

The legislation applicable to Insolvency Proceedings as at the date of this Opinion Letter is:

- (a) in relation to all Insolvency Proceedings initiated after the date of this opinion except schemes of arrangement, the provisions of the Insolvency Act 1986 and the Insolvency (England and Wales) Rules 2016;
- (b) in relation to schemes of arrangement, section 895 to section 901 of the CA 2006;
- (c) in relation to a Clearing Member which is a UK bank or a UK investment firm, the Banking Act 2009, the Banking Act 2009 (Restriction of Partial Property Transfers) Order 2009 and the Safeguards Order;
- (d) in relation to a Clearing Member which is a UK bank, the Bank Insolvency (England and Wales) Rules 2009, the Bank Administration (England and Wales) Rules 2009 and the Credit Institutions Regulations;
- (e) in relation to a Clearing Member which is a UK investment bank, the Investment Bank Regulations and the Investment Bank Special Administration (England and Wales) Rules 2011 and, during the transition period in relation to an EEA Credit Institution, the Credit Institutions Regulations;
- (f) Part 7; and
- (g) in relation to a Clearing Member which is a UK investment firm or a UK investment bank (other than a UK investment bank which is also a UK credit institution), the Cross-Border Insolvency Regulations.

In relation to (i) an obligation which is a transfer order (ii) an obligation which arises under the default arrangements of a designated system and (iii) collateral security delivered in connection with the participation in a designated system (as such terms are defined in the Settlement Finality Regulations 1999), the Settlement Finality Regulations 1999 will also be applicable. If the Opinion Documents constitute a financial collateral arrangement or an arrangement of which a financial collateral arrangement forms part, the FCA Regulations will also apply.

However, subject to section 426 of the Insolvency Act 1986:

- (a) a Clearing Member that is a foreign company may not enter administration or make a voluntary arrangement unless it is incorporated in an EEA member state, or has its centre of main interests in an EU member state (other than Denmark);
- (b) administrative receivership is not available in respect of a Clearing Member that is a foreign company, with the possible exception of

foreign companies who have registered particulars under the Overseas Companies Regulations 2009;

- (c) bank insolvency and bank administration are procedures only available in respect of a Clearing Member that is a UK bank;
- (d) investment bank special administration is a procedure only available in respect of a Clearing Member that is a UK investment bank which is not a deposit-taking bank with eligible depositors, special administration (bank administration) is a procedure only available in respect of a Clearing Member that is a UK investment bank which is a deposit-taking bank; and special administration (bank insolvency) is a procedure only available in respect of a Clearing Member that is a UK investment bank which is a deposit-taking bank with eligible depositors; for these purposes, "eligible depositors" has the meaning given in section 93(3) of the Banking Act 2009, being, broadly, depositors who are eligible for compensation under the Financial Services Compensation Scheme; and
- (e) during the transition period, in relation to a Clearing Member that is an EEA Credit Institution, liquidation (including provisional liquidation), administration and voluntary arrangements cannot take effect on or after 5 May 2004. Furthermore, during the transition period a scheme of arrangement in relation to an EEA Credit Institution which is, broadly, intended to enable it to survive, but affects creditors' rights, or to enable its assets to be realised and distributed to creditors, may not be sanctioned by the court unless the relevant insolvency officer or administrative or judicial authority (which would usually be the officer or authority of the EEA Credit Institution's home state) has been notified and has not objected.

Additionally, a Clearing Member that is a Royal Charter Corporation cannot be made subject to a company voluntary arrangement or to administration proceedings under the Insolvency Act 1986, but may potentially be wound up pursuant to the revocation of the royal charter under which it is established; the means of revoking the charter would be governed by the provisions of the individual Clearing Member's charter. References to "**Insolvency Proceedings**" in relation to a Clearing Member that is a Royal Charter Corporation should be read accordingly.

Under Part 24 of FSMA, the "appropriate regulator" (being the PRA and/or the FCA, as more particularly defined therein) is given specific powers to petition to commence and otherwise to participate in certain Insolvency Proceedings relating to (a) any person that is (or has been) an authorised person under FSMA and (b) any person carrying on (or who has carried on) a regulated activity without authorisation or exemption under FSMA. In relation to Insolvency Proceedings which are bank insolvency, bank administration, investment bank special administration, special administration (bank administration) and special administration (bank insolvency), the PRA and/or the FCA, as the case may be, are given similar powers to intervene and rights to participate under the Banking Act 2009 and the Investment Bank Regulations, respectively.

We confirm that the events specified in Rule 5 of the Default Rules adequately refer to all Insolvency Proceedings.

3.2.2 *Would the Deed of Charge be effective in the context of insolvency proceedings or reorganisation measures in respect of a Clearing Member? Is there anything that would prevent LCH from enforcing its rights under the Deed of Charge? Would LCH be required to take any particular steps or abide by any particular procedures for the purposes of enforcing against Collateral provided to it by a Clearing Member under the Deed of Charge?*

Pursuant to the Deed of Charge, the Clearing Member agrees to grant, with full title guarantee⁷, in favour of LCH a first fixed security over certain specified Charged Property. The Charged Property is rendered subject to the charge by submission of the appropriate details, as provided at section 4 of the LCH Procedures, by the Clearing Member to LCH, and by the delivery of securities matching the description to a designated securities account maintained in the name of LCH. Charged Property is released from the charge when the chargor submits a release instruction to LCH (as provided at section 4 of the LCH Procedures) to LCH and LCH discharges the charge under clause 4(1) of the Deed of Charge by redelivering the securities specified in the release instruction to the relevant Clearing Member.

The security interests under the Deed of Charge are validly created by a Clearing Member in favour of LCH as security for the payment or discharge of the Secured Obligations and would be effective in the context of Insolvency Proceedings in respect of a Clearing Member.

If a company enters into administration or an application is presented to the court for the making of an administration order in respect of a company or notice of intention to appoint an administrator to a company is filed with the court, the leave of the court (or, if an administrator has been appointed to the relevant company, the consent of that administrator) would be required under Paragraph 43 or 44 of Schedule B1 to the Insolvency Act 1986 in order for a secured party to enforce its rights under a security interest granted by the relevant company. Furthermore, under Paragraphs 70 and 71 of Schedule B1 to the Insolvency Act 1986, an administrator may seek leave of the court to realise property subject to security interest (other than a floating charge) as if it were not subject to that security. However, section 175(1) of Part 7 disapplies the provisions of the Insolvency Act 1986 referred to in this paragraph in respect of any market charge (which will include security arrangements provided for under the Deed of Charge).

Security Interest

Insofar as the Charged Property comprises "book entry securities collateral" (as defined in the FCA Regulations) and to the extent that the Charged Property is in the "possession" or "control" (as such terms are used in the FCA Regulations) of LCH, the security arrangements under the Deed of Charge should be regarded as a financial collateral arrangement. Consequently, any question relating to proprietary effects, requirements for perfecting such security arrangements and for rendering them effective against third parties, and the steps required for realisation of the Charged Property, would be governed by the domestic law of the country in which the "relevant

⁷ Subject to any other charge or lien arising in favour of a Custodian Bank or Clearance System (each as defined in the Deed of Charge).

account" (as defined in the FCA Regulations) is maintained, which we understand to be this jurisdiction.

Similarly, under Regulation 23 of the Settlement Finality Regulations 1999, the rights of a holder of collateral security in relation to securities shall be governed by the law of the EEA State where the account in which the legal entitlement of such holder is recorded. In our view, the Charged Property qualifies as "collateral security" for these purposes and the account in which the legal entitlement of LCH (as the holder of such collateral security) is recorded would be LCH's books and records, located in this jurisdiction.

Insofar as the "relevant account" for the purposes of the FCA Regulations, and since the account recording the entitlement of the holder of the relevant collateral security for the purposes of the FCA Regulations, is maintained in this jurisdiction, there would be, in our opinion, no acts and conditions needed to be done or fulfilled under the laws of this jurisdiction in order to ensure the recognition, effectiveness and perfection of LCH's security interest in the Charged Property and to enable LCH to enforce that security interest in accordance with the Deed of Charge.

3.2.3 *Would LCH have the right to take the actions provided for under the Default Rules (including exercising rights to deal with Contracts under Rule 6 and rights of set-off under Rule 8 but not at this stage considering those actions specifically provided for in the Client Clearing Annex to the Default Rules) in the event that a Clearing Member was subject to insolvency proceedings or reorganisation measures? Is it necessary or recommended that LCH should specify that certain insolvency proceedings and/or reorganisation measures will constitute an Automatic Early Termination Event in accordance with Rule 5 of the Default Rules? If the answer is affirmative, please identify those specific insolvency proceedings and/or reorganisation measures to which the answer applies and briefly explain your reasoning.*

If LCH takes action under Rules 6 and 8 of its Default Rules with respect to one or more Contracts to achieve a discharge of such Contracts, the laws of this jurisdiction will give effect to such action to achieve a discharge of the Parties' rights and obligations under each such Contract and to calculate a net sum payable in respect of all such Contracts so discharged. However we note that certain provisions under the Banking Act 2009 may impact LCH's ability to terminate such Contracts and the netting arrangements contemplated by the Default Rules may be impaired, depending on how certain resolution measures are carried out in practice and how certain provisions of the Banking Act 2009 (on which there is no authority) are interpreted.

Insolvency Proceedings

We are of this view due to the application of the provisions of Part 7. Section 159(1)(b) of Part 7 provides that the default rules of a recognised clearing house (including such a recognised clearing house which, as in the case of LCH, is a recognised central counterparty) are not to be regarded as to any extent invalid at law on the grounds of inconsistency with the law relating to the distribution of the assets of a person in insolvency. Similarly, section 159(2)(c) provides that an insolvency office-holder may not exercise its powers in any way so as to prevent or interfere with *inter alia*, the

settlement of a clearing member house contract⁸, in accordance with the default rules of a recognised central counterparty.

Accordingly, the enforceability or effectiveness of the Default Rules (including the rights to deal with Contracts under Rule 6 and rights of set-off under Rule 8 of the Default Rules) will not be affected by the commencement of Insolvency Proceedings in respect of the Clearing Member.

Resolution Measures under the Banking Act 2009

The Banking Act 2009 contains various provisions which might affect the effectiveness of the Arrangements. In particular, Part I of the Banking Act 2009 sets out the Special Resolution Regime which provides various remedies for a UK bank or UK investment firm that is failing or likely to fail. The stabilisation options available to the PRA or the Bank of England in respect of a UK bank or UK investment bank include the "bail-in option" or the transfer of securities issued by a UK bank, or property of a UK bank, to another person, by means of a "share transfer order", a "share transfer instrument", a "property transfer instrument" or in the case of "bail-in", a "resolution instrument".

Section 75 of the Banking Act 2009 gives power to the Treasury to change the law (except the Banking Act 2009 itself) for the purpose of enabling the powers granted to the PRA, the FCA, the Treasury and the Bank of England under Part I of the Banking Act 2009 to be used effectively. Such changes might affect private law rights and might be used with retrospective effect. Furthermore, under sections 23 and 40, a share transfer instrument or order, or a property transfer instrument, may include incidental, consequential or transitional provisions which might have an impact on private law rights.

A property transfer instrument may apply to only part of a UK bank's or UK investment firm's assets and liabilities (such a transfer being referred to as a "**partial property transfer**"). This may be the case because the property transfer instrument concerned expressly applies to only part of the UK bank or UK investment firm's business or because it is ineffective in relation to foreign property.

A partial property transfer could apply so as to cause the transfer of some, but not all, of the property, rights and/or liabilities of the relevant Clearing Member in relation to Contracts and/or the Charged Property associated with such Contracts, with the result that the netting arrangements under the Default Rules of LCH would be impaired. However, in this regard, article 7 of the Safeguards Order prohibits a partial property transfer which "would have the effect of modifying the operation of or rendering unenforceable (a) market contract; (b) the default rules of a recognised investment exchange or recognised clearing house; or (c) the rules of a recognised investment exchange or recognised clearing house as to the settlement of market contracts not dealt with under its default rules". Article 5 of the Safeguards Order addresses the risk that property transfer instrument may have the effect of disassociating secured obligations from security (e.g. transferring the one but not the other), by requiring that liabilities owed to or by the UK bank or UK investment firm and security related to them may not

⁸ The term "clearing member house contract" is defined in section 155(1)(b) to mean a "contract between a recognised central counterparty and clearing member recorded in the accounts of the recognised central counterparty as a position held for the account of a clearing member".

be separated pursuant to the transfer. However, the remedies for contravention are weak. Therefore, if a property transfer instrument is abused so as to affect the enforceability of the Charge granted to LCH under the Deed of Charge, LCH may not have adequate remedies on which to rely.

Under section 34 of the Banking Act 2009 encumbrances and trusts can be over reached or varied or the terms of a trust removed or altered (although in the case of partial property transfers the terms of a trust can only be removed or altered to the extent that it is necessary or expedient to transfer to the transferee: (i) the legal or beneficial title of the Clearing Member in the property held on trust, or (ii) any powers, rights or obligations of the Clearing Member in respect of the property held on trust) and provision may be made concerning how any powers, provisions and liabilities in respect of trust property are to be exercisable or have effect.

Section 12A of the Banking Act 2009 introduces a bail-in tool, allowing resolution authorities to write down and/or convert into equity, liabilities of a failing UK bank or UK investment firm in order to maintain the failing entity as a going concern and allow the issues that cause the failure to be addressed. The objective of the bail-in tool is to absorb the losses of that entity and recapitalise it using its own resources. A bail-in resolution instrument may cancel, modify or change the form of a liability owed by the bank or investment firm or provide that a contract under which the bank has a liability is to have effect as if a specified right had been exercised under it.

However, certain liabilities are exempt from bail-in under the Banking Act 2009. The Special Bail-in Order prohibits the application of the special bail-in provisions in respect of "protected liabilities". For the purposes of Article 4 of the Special Bail-in Order, liabilities of the relevant Clearing Member in relation to Contracts would be "protected liabilities".

Where the Special Bail-in Order applies to liabilities so as to preserve the effect of netting, any net sum produced by such netting would itself be at risk of being reduced or eliminated by a special bail-in provision.

In addition to the "protected liabilities" provisions of the Special Bail-in Order, Sections 48B(7A) and 48B(8) of the Banking Act 2009 exclude liabilities (with a remaining maturity of less than 7 days) arising from the participation in designated settlement systems and owed to such systems or to operators of, or participants in, such systems from the application of the special bail-in provisions. For the purposes of Sections 48B(7A) and 48B(8) of the Banking Act 2009, liabilities of the relevant Clearing Member in relation to the Contracts would be excluded liabilities.

Under section 48Z of the Banking Act 2009, the taking of certain measures by resolution authorities in relation to an affected entity, including a crisis prevention measure, crisis management measure or a recognised third-country resolution action (each as defined in section 48Z of the Banking Act 2009), may have the effect of disapplying the rights of a counterparty to terminate its agreement with an affected entity. There is no authority as to whether the provisions of the Default Rules which permit LCH to terminate Contracts with a Clearing Member would constitute a "default event provision" within the meaning of section 48Z. In the event that the Default Rules are deemed to fall within scope and a resolution authority decides to take action under

section 48Z, the netting arrangements under the Default Rules or the enforcement of security under the Deed of Charge would be impaired.

Automatic Early Termination

Under the laws of this jurisdiction, it is not necessary for the Parties to agree to an automatic, rather than an optional, termination of Contracts. Accordingly, it is not necessary to specify that certain Insolvency Proceedings and/or reorganisation measures constitute Automatic Early Termination Events.

3.2.4 ***Is there a "suspect period" prior to insolvency proceedings and/or reorganisation measures where Contracts with a Clearing Member could be avoided or challenged and, if so, what are the grounds? What are the risks for LCH in entering into Contracts and in taking Collateral in respect of those Contracts during such a period? Are any special protections or exemptions from the relevant arrangements for avoidance or challenge available in respect of contracts in financial markets?***

Transactions at an Undervalue

Under section 238 of the Insolvency Act 1986, a transaction entered into by a company at any time within a specified period ending with the onset of insolvency⁹ of the company with a person on terms that provide for the company to receive either no consideration, or a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by it, may be set aside as a transaction at an undervalue. In order to be set aside, at the time the transaction is entered into the company must have been unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986 or have become unable to pay its debts within the meaning of that section in consequence of the transaction. It should be noted that a court would not set aside such a transaction if it were satisfied that the company entered into the transaction in good faith and for the purpose of carrying on its business and that at the time it did so there were reasonable grounds for the belief that it would benefit the company. Transactions entered into on arm's length terms and at the then prevailing market rates are unlikely to constitute transactions at an undervalue. However, the matters referred to in the last two sentences are questions of fact in each case.

Under section 165(1) of Part 7, no order can be made by a court under section 238 of the Insolvency Act 1986 to set aside a market contract to which a recognised clearing house is a party or which has been entered into under the default rules of a recognised clearing house unless section 167(3) of Part 7 applies (as to the application of section 167(3) of Part 7 to this Opinion Letter, please refer to paragraph 3.2.5 below and the assumption set out in paragraph 2.10 above).

Preferences

⁹ In broad terms, the earliest of the date of the commencement of winding-up, the date of presentation of a petition for an administration order, the filing with the court of a notice of intention to appoint an administrator, or the company entering administration.

Under section 239 of the Insolvency Act 1986 anything done or suffered to be done by a company within a specified period ending with the onset of insolvency of that company may be set aside as a voidable preference. The thing done or suffered will be liable to be set aside if at the time it was done or suffered that company was unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986 or became unable to pay its debts within the meaning of that section in consequence of the thing done or suffered and that thing has the effect of putting any person in a better position, in the event of that company going into insolvent liquidation, than that person would have been in if the thing had not been done or suffered. However, the court would not make such an order if it was satisfied that the company which gave the preference was not influenced to give it by a desire to put that person in such better position.

Under section 165(1) of Part 7, no order can be made by a court under section 239 of the Insolvency Act 1986 in respect of a market contract to which a recognised clearing house is a party or which has been entered into under the default rules of a recognised clearing house unless section 167(3) of Part 7 applies (as to the application of section 167(3) of Part 7 to this Opinion Letter, please refer to paragraph 3.2.5 below and the assumption set out in paragraph 2.10 above).

We also note section 165(4) of Part 7 which extends section 165(1) to the provision of margin, a qualifying collateral arrangement, any contract effected by LCH for the purpose of realising property provided as margin and any disposition of property in accordance with the rules of LCH as to the application of property provided as margin. As per the paragraph immediately above this, no court can make an order under section 239 of the Insolvency Act 1986 to set aside such arrangements.

3.2.5 *Is there relevant netting legislation that, in the context of insolvency proceedings and/or reorganisation measures in respect of a Clearing Member, might apply as an alternative to the relevant arrangements set out in the Default Rules?*

In a winding-up or administration under the laws of this jurisdiction, set-off (a "**Statutory Insolvency Set-off**") of amounts may be implemented, respectively, subject to any contrary statutory rule such as Regulation 14 of the Settlement Finality Regulations 1999 or Regulation 12(1) of the FCA Regulations, under the mandatory rules of Rule 14.24 or 14.25 of the Insolvency (England and Wales) Rules 2016, or, in relation to a UK bank, Rule 72 of the Bank Insolvency (England and Wales) Rules 2009, or, in relation to a UK investment bank, Rule 164 of the Investment Bank Rules.

Statutory Insolvency Set-off would only be relevant in respect of the default of a Clearing Member where section 167(3) of Part 7 applied. Section 167(3) of Part 7 applies where LCH has not taken action under its default rules in respect of a Clearing Member which is subject to certain insolvency proceedings, and fails to take action (or to notify the Bank of England of its intention to take such action) within three business days from the date of receipt of a notice from the Bank of England. Statutory Insolvency Set-off would only apply to the extent the obligations assumed under the Opinion Documents and the Contracts are 'mutual' between the Parties, in the sense that each Party is personally and solely liable as regards obligations owed by it to the other Party and solely entitled to the benefit of obligations owed to it by the other Party. Circumstances in which the requisite mutuality will not be established include, without limitation, where a Party is acting as agent for another person, or is a trustee, or in

respect of which a Party has a joint interest or in respect of which a Party's rights or obligations or any interest therein have been assigned, charged or transferred (whether in whole or in part) whether unilaterally, by agreement or by operation of law or by order (including, without limitation, pursuant to section 111 of FSMA).

In addition, Regulation 12(1) of the FCA Regulations provides that a close-out netting provision constituting a term of a financial collateral arrangement, or an arrangement of which a financial collateral arrangement forms part, shall take effect in accordance with its terms, notwithstanding that the collateral-provider or collateral-taker under the arrangement is subject to winding-up proceedings or reorganisation measures (as such terms are defined in the FCA Regulations). Close-out netting in accordance with a close-out netting provision under Regulation 12(1) of the FCA Regulations would prevail over a Statutory Insolvency Set-off in the event of liquidation or administration proceedings relating to a Clearing Member.

In our view, the Default Rules (in particular, Rules 3, 6, 7 and 8) would qualify as a close-out netting provision constituting a term of an arrangement of which a financial collateral arrangement forms part under Regulation 12(1) of the FCA Regulations, the relevant "financial collateral arrangement" for these purposes being a "title transfer financial collateral arrangement" in respect of "financial collateral" in the form of "cash" (as each such term is defined in the FCA Regulations). The arrangements for the transfer of Collateral in the form of cash between (i) LCH and each Clearing Member in respect of their respective variation margin obligations and (ii) by each Clearing Member to LCH in respect of its initial margin obligations constitute the relevant title transfer financial collateral arrangement.

3.2.6 *Can a claim for a close-out amount be proved in insolvency proceedings without conversion into the local currency?*

The question does not seem to be relevant to an English law analysis where the close-out mechanics and net sum determined by LCH would be denominated in (or at least converted into) pounds sterling as would any Insolvency Proceedings conducted in respect of a Clearing Member and the claims proved therein.

3.3 Client Clearing

3.3.1 *Please opine on the availability and effectiveness of any law, regulation or statutory provision (having the force of law) in this jurisdiction which (if so designated by LCH) would be expected to qualify as an Exempting Client Clearing Rule. Please clarify whether the relevant Rule would be expected to apply to Clearing Members of all entity types or to only certain entity types.*

If, and to the extent that, you consider such an Exempting Client Clearing Rule to be available, please (i) assume for the purposes of answering the following Questions that LCH will rely upon the existence of the relevant Exempting Client Clearing Rule and will not require those Clearing Members to which that Rule applies to enter into a Security Deed; and (ii) ignore Questions 3.1.3 to 3.1.5.

In cases where you do not consider an Exempting Client Clearing Rule to be available, please: (i) assume for the purposes of answering the following

Questions that LCH will require Clearing Members to enter into a Security Deed; (ii) assume that the Security Deed is legal, valid, binding and enforceable under English law (as its governing law) and complies with all relevant perfection requirements under the law of any jurisdiction(s) other than this jurisdiction which you consider to be relevant to that matter; and (iii) provide a response to Questions 3.1.3 to 3.1.5.

For the avoidance of doubt, we are of the opinion that the protections provided by Part 7 amount to an Exempting Client Clearing Rule and have responded to the questions below accordingly.

3.3.2 If LCH were to: (i) declare a Clearing Member to be in Default in circumstances other than the commencement of insolvency proceedings or reorganisation measures in respect of that Clearing Member and (ii) seek to port the Client Contracts and Account Balance of a Clearing Client to a Backup Clearing Member as a result, could the Clearing Member or any other person successfully challenge the actions of LCH and claim for the amount of the Account Balance?

On the assumption that a Clearing Member has defaulted (whether as a result of the commencement of an Insolvency Proceeding or not):

- (a) LCH would be entitled to exercise its rights under the provisions of the Client Clearing Annex (which forms part of the Default Rules) providing for the porting of Client Contracts and the Account Balance of a Clearing Client; and
- (b) the terms of the provisions of the Client Clearing Annex would be valid and effective under the laws of this jurisdiction.

In our view, there is no rule of the laws of this jurisdiction which would apply to prohibit the Parties from entering into a contract upon the terms of the Clearing Membership Agreement or the Client Clearing Annex.

3.3.3 If LCH were to: (i) declare a Clearing Member to be in Default in circumstances other than the commencement of insolvency proceedings or reorganisation measures in respect of that Clearing Member; and (ii) seek to return the Client Clearing Entitlement to the relevant Clearing Client or to the Defaulter for the account of such client, could the Clearing Member or any other person successfully challenge the actions of LCH and claim for the amount of the Client Clearing Entitlement?

Our response in paragraph 3.3.2 above would apply equally in this scenario.

3.3.4 If (i) following the commencement of Insolvency Proceedings, a Clearing Member was designated a Defaulter (whether due to the delivery of a Default Notice or (if applicable) the occurrence of an Automatic Early Termination Event); and (ii) LCH were to seek to port the Client Contracts and Account Balance of a Clearing Client to a Backup Clearing Member as a result, could an insolvency officer appointed to the Defaulter or any other person

successfully challenge the actions of LCH and claim for the amount of the Account Balance?

If LCH takes action under its Default Rules with respect to one or more Client Contracts of a defaulting Clearing Member to achieve a porting of such Contracts, English law will give effect to such action to achieve the relevant porting. We are of this view because section 158 of Part 7 extends the insolvency protections provided by Part 7 to (i) action taken to transfer qualifying collateral arrangements in conjunction with a transfer (ie. port) of clearing member client contracts (which would include the Client Contracts) and (ii) qualifying property transfers.

For the purposes of Part 7, the definition of:

"qualifying collateral arrangement" includes (a) an arrangement by which property is provided as margin and is recorded in the accounts of a recognised central counterparty as an asset held for the account of a client and (b) an arrangement by which margin is provided to a client or clearing member for the purpose of providing cover for exposures arising out of present or future client trades (section 155A(2) of the Companies Act 1989); and

"qualifying property transfer" includes transfers of property to the extent that it involves transfers to a non-defaulting Clearing Member (ie. a Backup Clearing Member) in accordance with the default rules of the recognised central counterparty, either by way of transferring the contracts and associated collateral or terminating and closing the relevant client contracts and transferring the termination or close out value.

Accordingly, a liquidator or administrator appointed to a defaulting Clearing Member would be prevented from challenging the porting of Client Contracts and the Account Balance.

3.3.5 ***If (i) following the commencement of Insolvency Proceedings, a Clearing Member was designated a Defaulter (whether due to the delivery of a Default Notice or (if applicable) the occurrence of an Automatic Early Termination Event); and (ii) LCH were to seek to return the Client Clearing Entitlement to the relevant Clearing Client or to the Defaulter for the account of such client, could an insolvency officer appointed to the Defaulter or any other person successfully challenge the actions of LCH and claim for the amount of the Client Clearing Entitlement?***

3.3.6 As discussed above at paragraph 3.3.4, the insolvency protections provided by Part 7 apply to qualifying property transfers. The definition of qualifying property transfer includes transfers of property made in accordance with Article 48(7) of EMIR(UK). In accordance with Article 48(7) of EMIR(UK), LCH would be required to return Client Clearing Entitlements calculated as part of the Default Arrangements directly to the relevant Clearing Client(s) (where the clients are known to LCH) or (where the clients are not known to LCH) to the Clearing Member for the account of its clients. Accordingly, the insolvency officer of the Clearing Member would be prevented from challenging the return of the Client Clearing Entitlement to the relevant Clearing Client or to the Clearing Member on behalf of such client. ***If (i) following the implementation***

of reorganisation measures, a Clearing Member was designated a Defaulter (whether due to the delivery of a Default Notice or (if applicable) the occurrence of an Automatic Early Termination Event); and (ii) LCH were to seek to port the Client Contracts and Account Balance of a Clearing Client to a Backup Clearing Member as a result, could the representative appointed to reorganise/manage the Defaulter or any other person successfully challenge the actions of LCH and claim for the amount of the Account Balance?

Please refer to paragraph 3.2.3 above in relation to the relevant powers exercisable and the protections available under the Banking Act 2009 in relation to the default rules of a recognised clearing house in the circumstances of a partial property transfer.

As described more fully in that paragraph, article 7 of the Safeguards Order provides for protections in relation to (amongst other things) market contracts and the default rules of a recognised clearing house in the event of a partial property transfer. Hence, the arrangements in the Client Clearing Annex of the Default Rules of LCH for the porting of Client Contracts and the Account Balance of the relevant Clearing Client would remain intact and not be challengeable by the Special Resolution Unit of the Bank of England (or any of the other Authorities involved in implementing the powers under the Banking Act 2009) in the event of a partial property transfer under that Act.

3.3.7 If (i) following the commencement of reorganisation measures, a Clearing Member was designated a Defaulter (whether due to the delivery of a Default Notice or (if applicable) the occurrence of an Automatic Early Termination Event); and (ii) LCH were to seek to return the Client Clearing Entitlement to the relevant Clearing Client or to the Defaulter for the account of such client, could the representative appointed to reorganise/manage the Defaulter or any other person successfully challenge the actions of LCH and claim for the amount of the Client Clearing Entitlement?

Please see the response in paragraph 3.3.6. The protections available in the event of a partial property transfer under the Banking Act 2009 would apply equally to the return of the Client Clearing Entitlements to, or for the account of, the relevant Clearing Clients.

3.3.8 Would the Security Deed provide an effective security interest under the laws of this jurisdiction over the Account Balance or Client Clearing Entitlement in favour of the relevant Clearing Client?

We are of the opinion that the protections provided by Part 7 amount to an Exempting Client Clearing Rule and consequently, in accordance with your instructions, we have not provided an answer to this question.

3.3.9 Are there any perfection steps which would need to be taken under the laws of this jurisdiction in order for the Security Deed to be effective?

We are of the opinion that the protections provided by Part 7 amount to an Exempting Client Clearing Rule and consequently, in accordance with your instructions, we have not provided an answer to this question.

3.3.10 ***Is there any risk of a stay on the enforcement of the Security Deed in the event of insolvency proceedings or reorganisation measures being commenced in respect of a Clearing Member?***

We are of the opinion that the protections provided by Part 7 amount to an Exempting Client Clearing Rule and consequently, in accordance with your instructions, we have not provided an answer to this question.

3.3.11 ***Please provide brief details of any other significant legal or regulatory issues which might be expected to arise in connection with the provision by a Clearing Member of Client Clearing Services and which are not covered by the Questions above.***

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

3.4 Settlement Finality

3.4.1 ***Would the commencement of Insolvency Proceedings in respect of a Relevant Clearing Member affect finality of settlement of transfers of funds or securities (or both) from a Relevant Clearing Member to LCH? If so, please clarify from which point in time and in which circumstances finality protections in respect of such transfers would be lost.***

The Settlement Finality Regulations 1999 reduce the risks associated with participation in payment and securities settlement systems by minimising the disruption caused by insolvency proceedings brought against a participant in such a system. As soon as a payment transfer order or a securities transfer order (a "**transfer order**") has been entered into a "designated system" (as defined in the Settlement Finality Regulations 1999) it is protected against claims of a liquidator or administrator of a defaulting Clearing Member. The point of entry of a transfer order into the designated system is determined by the rules of the designated system.

The protections of the Settlement Finality Regulations 1999 referred to will not apply in relation to any transfer order entered into the designated system of LCH (which we take to mean registered with LCH in accordance with LCH's Settlement Finality Regulations made available on LCH's website as at the date of this Opinion Letter) after the court has made a winding-up or administration order in relation to the Clearing Member or the Clearing Member has passed a resolution for creditors' voluntary winding-up, unless the transfer order is carried out on the same business day as the order or resolution of the Clearing Member and LCH can show it did not have notice of the order or resolution.

Section 159 of Part 7 similarly provides that an insolvency office-holder may not exercise its powers in any way so as to prevent or interfere with *inter alia*, the settlement of a clearing member house contract¹⁰, in accordance with the default rules of a recognised central counterparty. However under section 164(5), if LCH has notice of

¹⁰ The term "clearing member house contract" is defined in section 155(1)(b) to mean a "contract between a recognised central counterparty and clearing member recorded in the accounts of the recognised central counterparty as a position held for the account of a clearing member".

winding-up proceedings of a Clearing Member, it may not retain the value of any default fund contribution or any margin in relation to a market contract with the relevant Clearing Member, unless such contract has been transferred in accordance with the Default Rules.

Further, under Regulation 13 of the FCA Regulations, financial collateral transferred pursuant to a financial collateral arrangement on the day of, but after the moment of commencement of winding-up proceedings or reorganisation measures are legally enforceable and binding on third parties, provided LCH (as collateral-taker) can show that it was not aware, nor should have been aware, of the commencement of such proceedings or measures with respect to the Clearing Member.

3.4.2 ***Are there any circumstances (such as the commencement of Reorganisation Measures) which might give rise to a loss of finality protections before the commencement of Insolvency Proceedings? If so, please clarify from which point in time and in which circumstances finality protections would be lost.***

Please see the response in paragraph 3.4.1. We are not aware of any other circumstances in this jurisdiction which would give rise to a loss of finality protections prior to the commencement of Insolvency Proceedings.

4. **FOREXCLEAR OPTIONS CLEARING SERVICE**

Overview

4.1 This section is concerned with the specific application and enforceability of the ForexClear Options clearing service rules.

General

4.1.1 ***Please confirm that the foregoing opinion would, if they formed part of the rulebook in the form attached as at the date of this opinion, apply to Regulations 90 to 106 (the FX Options Rules) as regards the application and enforceability of LCH's rights and the Relevant Clearing Member's obligations with particular reference to Regulation 100 (ForexClear Option Service – Settlement Limits, Settlement Trade-down and Settlement Events), Regulation 101 (ForexClear Option Service – Liquidity Event), Regulation 103 (Allocation of Mandatory ForexClear Swap Contracts and Mandatory Settlement ForexClear Swap Contracts) and Regulation 105 (ForexClear Option Service – Authority to Bind ForexClear Option Clearing Members).***

We can confirm that on the basis of the foregoing assumptions and subject to the qualifications set out below, the relevant Forexclear rules would, if enacted in the form attached, be of a kind which would constitute legal, valid, binding and enforceable rights and obligations at English law.

4.1.2 ***Are there specific legal or regulatory restrictions that would prevent a Relevant Clearing Member from performing its obligations under the FX Options rules?***

No.

4.1.3 ***Are there statutory or specific regulatory requirements associated with LCH entering into Mandatory ForexClear Swap Contracts or Mandatory Settlement ForexClear Swap Contracts, or utilizing the Liquidity Fund Contributions of a Relevant Clearing Member during a Liquidity Event?***

There are no specific statutory or regulatory requirements which would prohibit LCH from entering into these contracts or utilising the liquidity fund contributions.

5. **QUALIFICATIONS**

Effectiveness of Deed of Charge

5.1 We express no opinion as to:

- 5.1.1 whether a Clearing Member has good legal or other title to the assets or rights which are expressed to be subject to a security interest under the Deed of Charge, or as to the existence or value of any such assets or rights;
- 5.1.2 whether any security interest constitutes a legal or equitable security interest or a fixed or specific (rather than a floating) charge; or
- 5.1.3 whether the Deed of Charge breaches any other agreement or instrument.

5.2 Our opinions are subject to:

- 5.2.1 any asset being capable of forming the subject of a security interest and not otherwise being personal to a Clearing Member;
- 5.2.2 the creation of such security interest not requiring any authorisation, consent or fulfilment of any other pre-condition or formality which has not been satisfied, obtained or done; and
- 5.2.3 any relevant contract comprised in such security being capable of being set aside as a result of any fraud, misrepresentation or any bribe or corrupt conduct.

5.3 If a winding-up order has been made or a provisional liquidator appointed in respect of a Clearing Member and the liquidator or provisional liquidator is in possession of the Charged Property, in order to exercise any power of sale or appoint a receiver, LCH or its receivers will require leave of the court to take possession of the Charged Property to avoid the risk of being held in contempt of court as a consequence of interfering with the functions of the liquidator or provisional liquidator as court-appointed officers. However, it appears this leave will be given as of right where there is no dispute as to the validity of the security interest.

Financial Collateral Arrangements

5.4 As a consequence of the decision in *National Westminster Bank plc -v- Spectrum Plus Limited* [2005] UK HL 41, it is possible that fixed security interests expressed to be created by the Deed of Charge could be recharacterised as floating charges. The risk of recharacterisation of a security interest as a floating charge depends on whether LCH

has the requisite degree of control over the Charged Property. To the extent that the Chargor (as defined in the Deed of Charge) is able to deal with the Charged Property without LCH's substantive consent, the court is likely to hold that the security interest created under the Deed of Charge constitutes a floating charge. If the security interest created under the Deed of Charge is characterised as a floating charge then the risks set out below might apply:

- 5.4.1 the floating charge would, in certain circumstances, rank behind the preferential creditors and expenses of certain insolvency proceedings (in particular, under paragraph 99 of Schedule B1 to the Insolvency Act 1986, the expenses of an administration may rank ahead of a floating charge); and
- 5.4.2 the Chargor would be able to grant fixed charges and effect other dispositions of the relevant Charged Property which would rank higher than LCH's security interest.

Furthermore, if, contrary to our view stated in paragraphs 3.1.4 and 3.2.2 of this opinion the security interest created under the Deed of Charge was not a "financial collateral arrangement":

- 5.4.3 under section 859H of the CA 2006 a charge is void against a liquidator, an administrator and a creditor of the company unless registered within the relevant period allowed for delivery (which is ordinarily 21 days beginning on the day after creation of the charge);
- 5.4.4 under section 245 of the Insolvency Act 1986 a floating charge may be invalid if created within the period of 12 months before the onset of insolvency (as defined in paragraph 3.2.4 above);
- 5.4.5 under paragraphs 43 and 44 of Schedule B1 to the Insolvency Act 1986, a moratorium may apply which prevents enforcement of a charge without leave of the court or, where relevant, the consent of the administrator; and
- 5.4.6 under paragraphs 70 and 71 of Schedule B1 to the Insolvency Act 1986, an administrator may seek leave of the court to realise property subject to a charge.

However, as stated in paragraph 3.2.2, the powers of the administrator referred to in paragraphs 4.4.5 and 4.4.6 are disapplied under Part 7. Additionally, section 859H of the CA 2006 and Schedule B1 to the Insolvency Act 1986 do not apply to Royal Charter Corporations.

- 5.5 A security financial collateral arrangement requires that the relevant "financial collateral" (as defined in the FCA Regulations) is in the "possession or control" (as such terms are used in the FCA Regulations) of the collateral-taker, which in this case is LCH.
- 5.6 As a result of certain amendments to the FCA Regulations, a statutory definition of "possession" in respect of financial collateral for the purposes of the FCA Regulations has been introduced. This definition has clarified that the term "possession" covers (subject to certain provisos) "financial collateral in the form of cash or financial instruments [and] includes the case where financial collateral has been credited to an

account in the name of the collateral-taker or a person acting on his behalf (whether or not the collateral taker, or the person acting on his behalf, has credited the financial collateral to an account in the name of the collateral-provider on his, or that person's, books)". The FCA Regulations also state that the above applies "provided that any rights of the collateral-provider may have in relation to that financial collateral are limited to the right to substitute financial collateral of the same or greater value or to withdraw excess financial collateral", but do not clarify whether any other rights (in addition to withdrawal of excess collateral and substitution) would be acceptable for the purposes of establishing "possession" or whether the rights stated above are exclusive. Prior to the introduction of this definition of "possession", in *Gray v G-T-P Group Ltd, Re F2G Realisations Limited (in Liquidation)* [2010] EWHC 1772 (Ch) ("Gray"), Vos J had concluded that it was not possible to have "possession" of intangible assets such as book entry securities under English law. This definition of "possession" appears to have been introduced in response to that decision, although the drafting of the definition means that its precise meaning remains uncertain. In the decision in *Re Lehman Brothers International (Europe) (in administration)* [2012] EWHC 2997 (Ch) ("LBIE"), Briggs J took a slightly different view from that in Gray, concluding that it is possible to have "possession" of intangibles for the purpose of the FCA Regulations. Nevertheless, Briggs J did also conclude that such possession means more than mere custody of the assets. Rather, the collateral taker should also have rights to retain the collateral, thus making it difficult to separate the concept of possession from that of control.

- 5.7 The FCA Regulations, as amended, remain silent on the meaning of "control" in respect of which Briggs J in LBIE and Vos J in Gray took a conservative view. The court found that the collateral-taker must have, in addition to administrative control, a legal right to prevent the collateral provider from dealing with the collateral.
- 5.8 Similarly, in LBIE, to the extent that the collateral-provider was permitted to request a return of the collateral other than in respect of excess collateral without any ability of the collateral-taker to refuse such request, meant that the requirement of control was not satisfied. The decisions in Gray and LBIE are at present, the only jurisprudence available in this jurisdiction in relation to the issue of "possession" and "control" under the FCA Regulations of which we are aware.
- 5.9 In addition, it should be noted that on 10 November 2016 the Court of Justice of the European Union (the "CJEU") gave its first ruling on the scope of the Financial Collateral Directive following a referral on questions of EU law from the Supreme Court of Latvia (Case C-156/15). The judgment in respect of monies held in an ordinary bank account, in part addressed the issues of "possession" and "control". The court indicated that the collateral-taker may be regarded as having acquired 'possession or control' of the monies credited to the account only if the collateral-provider is prevented from disposing of them. The court further indicated that in order to meet this requirement a clause was required to the effect that the collateral provider was prevented from disposing of the monies after they had been deposited in the account. However, the decision does not consider in any detail what such a clause would have to provide, nor does the decision consider the criteria for what constitutes sufficient "possession" or "control", beyond the requirement that the collateral-provider be prevented from disposing of the monies in the account. At this stage we consider that

the position under the FCA Regulations in relation to the tests of "possession" or "control" remains unchanged from the Gray and LBIE cases.

- 5.10 As a result of the above, it is no longer possible to take a conclusive view as to whether an arrangement is a security financial collateral arrangement on the basis of either possession or control, unless such arrangement would clearly be a fixed charge under the laws of this jurisdiction or unless such arrangement is structured so as to ensure that the rights of the collateral provider are confined to substitution and the right to withdraw excess collateral; and it is possible, that an even more restrictive standard would apply. Moreover, it is possible that an arrangement could qualify as a security financial collateral arrangement under the laws of other EU jurisdictions, but not under the laws of this jurisdiction. Please note that whether or not a collateral arrangement constitutes a fixed or floating charge is a question of fact, and we express no opinion as to whether or not the Deed of Charge constitutes a fixed or floating charge.
- 5.11 There is no definition of excess collateral in the FCA Regulations. There is concern amongst commentators and practitioners that "excess" does not simply mean an excess over any level chosen by the parties. In part this stems from dicta in the judgment in LBIE (at paragraph 133) which could be taken to suggest that the excess must relate to "the state of account between [the collateral giver] and the collateral taker" and/or the "current indebtedness or...the collateral taker's reasonable estimate of its exposure". This has been taken to suggest that a level of collateral lower than the amount of the "account" or "indebtedness" or "exposure" would not constitute "excess" collateral for the purposes of the FCA Regulations. On this basis, if the parties agreed a collateral level of a percentage less than 100% of exposure, with mechanics to withdraw collateral above that agreed percentage, but potentially below the full amount of the actual exposure, then that would not be an "excess" for the purposes of the FCA Regulations. The secured obligations under the Deed of Charge are not restricted to trade exposures, but instead are defined to include all amounts (including fees, unfunded default fund contributions, indemnities etc) owing by a Clearing Member to LCH. Therefore the amount of Charged Property LCH may require the Clearing Member to maintain, and so any agreed level above which excess can be withdrawn, will likely be lower than the exposure of LCH to the Clearing Member under the Deed of Charge. On this construction it would be impossible to assess accurately the amount of such liabilities from time to time and therefore it would be impossible to determine the "excess amount" which would effectively (and somewhat surprisingly) prohibit any withdrawals. Accordingly, whilst we cannot, in the absence of jurisprudence on the point, give certainty, we believe that the better view is that this extension of the scope of secured obligations does not take the arrangements outside the protections afforded by the FCA Regulations.
- 5.12 Whilst there is no conclusive authority, for the purposes of this opinion we are of the view that in light of the fact that the Charged Property are held by LCH (either held by a Clearance System (as defined in the Deed of Charge) on behalf of, for the account of, to the order of or under the control or direction of LCH or under the control or direction of a Custodian Bank (as defined in the Deed of Charge) for the account of the Clearing House)) and that the Clearing Member is prohibited from charging or assigning (by way of security or otherwise) or creating any other proprietary interest over the Charged Property, the relevant conditions that have to be met in order to establish "possession" or "control" for the purposes of the FCA Regulations are present.

- 5.13 A "security financial collateral arrangement" can only arise over "financial collateral", as defined in the FCA Regulations. There is some debate as to whether this requirement is satisfied where a security interest is created over both property which constitutes financial collateral and property which does not constitute financial collateral. However, in our opinion, the better view is that this requirement is satisfied in these circumstances in respect of the financial collateral where any other assets over which security is taken (such as rights against a custodian) can be viewed as ancillary to the security over the "financial collateral" itself.
- 5.14 We note that the implications of the Gray and LBIE decisions are primarily relevant in cases where the collateral received is located in this jurisdiction. If the Collateral is posted to accounts maintained in another jurisdiction, there are arguments that "possession" and "control" will be determined pursuant to the laws of the lex situs jurisdiction.

Enforceability of claims

- 5.15 In this opinion letter "**enforceable**" means that an obligation is of a type which the English courts or, as the case may be, a duly constituted arbitral tribunal with its seat in England may enforce. It does not mean that those obligations will be enforced in all circumstances in accordance with the terms of the Opinion Documents.
- 5.16 In particular, the opinion set out in paragraph 3.1.1 (*Legal, valid, binding and enforceable obligations*) of this opinion letter is subject to any limitations arising from insolvency proceedings, measures for reorganisation, moratorium, reconstruction, administration or resolution, a scheme of arrangement under section 425 of the Companies Act 1985, a scheme within the meaning of Part VII of FSMA, a compromise or any similar proceedings generally affecting the rights of creditors and any direction issued to the Clearing House pursuant to Part XVIII of FSMA. Part 7 provides for certain protections in the context of insolvency proceedings in respect of a Clearing Member. The effects of Part 7 are discussed below.
- 5.17 Our opinions are subject to:
- 5.17.1 the power of an English court to order specific performance of an obligation or other equitable remedy is discretionary and, accordingly, an English court might make an award of damages where specific performance of an obligation or other equitable remedy is sought;
 - 5.17.2 where any party to the Opinion Documents is vested with a discretion or may determine a matter in its opinion, that party may be required to exercise its discretion in good faith, reasonably and for a proper purpose, and to form its opinion in good faith and on reasonable grounds;
 - 5.17.3 enforcement may be limited by the provisions of English law applicable to agreements held to have been frustrated by events happening after its execution;
 - 5.17.4 proceedings to enforce a claim or arbitral award may become barred under the Limitation Act 1980 or the Foreign Limitation Periods Act 1984 or may be or become subject to a defence of set-off or counterclaim;

- 5.17.5 in some circumstances an English court may, and in certain circumstances it must, terminate or suspend proceedings commenced before it, or decline to restrain proceedings commenced in another court, notwithstanding the provisions of the Opinion Documents providing that the courts of England have jurisdiction in relation to the subject matter of those proceedings;
- 5.17.6 a party to a contract may be able to avoid its obligations under that contract (and may have other remedies) where it has been induced to enter into that contract by a misrepresentation, or there has been any bribe or other corrupt conduct. The English courts will generally not enforce an obligation if there has been fraud; and
- 5.17.7 any provision providing that any calculation, determination or certification is to be conclusive and binding may not be effective if such calculation, determination or certification is fraudulent, arbitrary or manifestly incorrect and an English court may regard any certification, determination or calculation as no more than prima facie evidence.
- 5.17.8 by virtue of the International Monetary Fund Act 1979 and the Bretton Woods Agreements Order in Council (SI 1946/36), any obligation of a Clearing Member under the Opinion Documents which involves the currency of any member of the International Monetary Fund and which is contrary to the exchange control regulations of that member may not be enforceable in the English courts.

Market Contracts and Default Rules under Part 7

- 5.18 A recognised clearing house is not obliged to operate its default rules following the default of a member unless required to do so pursuant to directions given by the Bank of England under section 166 of Part 7. The Bank of England may direct LCH not to take action (or certain types of action) under its default rules in certain circumstances permitted by section 166.
- 5.19 Sections 166(2) of Part 7 applies if a recognised clearing house has not taken action under its default rules in respect of a clearing member or client (as applicable) which is subject to certain Insolvency Proceedings, and empowers the Bank of England to direct a recognised clearing house to take or refrain from taking actions under its default rules. Section 167(3) of Part 7 applies if a recognised clearing house has not taken action under its default rules in respect of a clearing member or client (as applicable) which is subject to certain Insolvency Proceedings, and fails to take action (or to notify the Bank of England, which is the agency designated for such purposes by the Secretary of State, of its intention to take such action forthwith) within three business days from the date of receipt of a notice from the Bank of England.
- 5.20 Whilst section 177 of Part 7 permits a clearing house to apply margin or a default contribution in relation to a market contract in accordance with its rules notwithstanding any prior equitable interest or right, or any right or remedy arising from a breach of fiduciary duty if the clearing house had notice of the interest, right or breach of duty at the time the property was provided as margin or a default contribution such property will be subject to the prior interest and/or right.

Settlement Finality Regulations

- 5.21 In relation to our opinions at paragraphs 3.2.2, 3.2.3 and 3.4.1, and our observations regarding the application of insolvency laws, the provisions of the Settlement Finality Regulations 1999 referred to will not apply in relation to any transfer order entered into by the designated system of LCH (which we take to mean registered with LCH) after the court has made a winding-up or administration order in relation to the Clearing Member or the Clearing Member has passed a resolution for creditors' voluntary winding-up, unless the transfer order is carried out on the same business day as the order or resolution, and LCH can show it did not have notice of the order or resolution. We express no view as to whether obligations between the Parties (in respect of Contracts or otherwise) which are, or arise from, transfer orders entered into after the commencement of the relevant Insolvency Proceedings may be included in the termination and liquidation under the Default Arrangements but the exclusion of any such obligation would not affect the effectiveness of the Default Arrangements in respect of any other obligations entered into before such time.
- 5.22 In relation to our opinion at paragraphs 3.2.2, 3.2.3 and 3.4.1, there is an argument that amounts due under Contracts which constitute derivatives do not constitute "transfer orders" for the purposes of the Settlement Finality Regulations 1999. A "transfer order" may be either a "payment transfer order" or a "securities transfer order" (as defined in the Settlement Finality Regulations 1999). While a cash sum due to be paid under a Contract ought to constitute, or give rise to, a "payment transfer order", it may be that the entirety of the Contract cannot properly be so regarded. Further, if under the terms of a Contract, title to, or an interest in, a commodity or other thing which is not a "security" (meaning an instrument referred to in Part 1 of Schedule 2 to the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001/544) is transferred, that Contract would not appear to constitute a "transfer order". If those arguments were to prevail, the additional protections provided by the Settlement Finality Regulations 1999 which are mentioned in paragraphs 3.2.2 and 3.4.1 may not be available in respect of those Contracts.
- 5.23 There is an argument that, in the case of a central counterparty such as LCH, which clears a number of different products in distinct product-specific clearing services, there would not be one single designated system for the purposes of the Settlement Finality Regulations 1999 (being the single centralised cross-product clearing system operated by the central counterparty) but, instead, the system in respect of each product cleared by the central counterparty should be treated as representing a separate designated system. If this were the case, then, notwithstanding our assumption at paragraph 2.9, and notwithstanding that the Bank of England (as the relevant "designating authority" under the Settlement Finality Regulations 1999) has, as at the date of this opinion, indicated on its website that LCH as a whole constitutes a single designated system, it may be that certain Services cleared by LCH constitute or contain a designated system, whilst others do not. A possible consequence of this might be that, for certain Services, and for the Contracts cleared on those Services, the Default Arrangements would not constitute "default arrangements" for the purposes of Regulation 14 of the Settlement Finality Regulations 1999 and therefore, the protections provided for under that statutory rule would not be available in respect of the close-out netting under the Default Arrangements of the relevant Contracts and in the relevant Services.

EUR

- 5.24 During the transition period, the EUIR has direct effect in England and Wales and introduces certain conflicts of law rules for insolvency proceedings concerning debtors based in the EU that have operations in more than one EU Member State and has specific rules ensuring, amongst other things, third parties' rights in rem, rights of set off, and the rights and obligations of the parties to a payment or settlement system or to a financial market are not changed by the rules on jurisdiction in the EUIR.
- 5.25 The EUIR does not apply to insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings since they are subject to special arrangements and, to some extent, national supervisory authorities have extremely wide ranging powers of intervention.
- 5.26 If, as a result of the application of the jurisdictional rules contained in the EUIR, insolvency proceedings are opened in an EU Member State (other than Denmark), the law of that Member State applies to those proceedings and determines the effects of those proceedings. If the English courts are required under the EUIR to give effect to the laws of that EU Member State or to recognise and enforce any judgment of a court of that EU Member State concerning those proceedings, the security interest created by the Deed of Charge may be held to be wholly or partly invalid, or otherwise be adversely affected.
- 5.27 However, under the EUIR, the jurisdiction of incorporation of each Clearing Member will be presumed to be the centre of main interest of each Clearing Member as the place of its registered office, in the absence of proof to the contrary. In addition, under the EUIR, the effects of any insolvency proceedings opened in another Member State in which a Clearing Member possesses an establishment shall be restricted to the assets of the Clearing Member situated in the territory of that other Member State, although these may include (amongst other things) for these purposes any claims of the Clearing Member on a person whose centre of main interests is within that territory.
- 5.28 Under the EUIR, if insolvency proceedings are opened against a Clearing Member in another Member State, the opening of those proceedings will not affect (amongst other things) the "rights in rem" of creditors or third parties over assets belonging to that Clearing Member which are situated for the purposes of the EUIR within this jurisdiction at the time those proceedings are opened. However, the laws of the other Member State in which insolvency proceedings are opened will determine (amongst other things) the voidness, voidability, or unenforceability of legal acts detrimental to all creditors of the Clearing Member.
- 5.29 For Clearing Members that are entities within the scope of the EUIR, have their centre of main interest in England and Wales and no establishment in any EU Member State, the EUIR will not impact our analysis.
- 5.30 Following the end of the transition period, it is expected there will be no reciprocal obligations between the UK and EU Member States under the EUIR as it is expected to form part of domestic law in the United Kingdom by virtue of section 3 of the European Union (Withdrawal) Act 2018 or any regulations made thereunder.

Other Insolvency Issues

- 5.31 Notwithstanding that this Opinion Letter is given in respect of obligations under the Agreements and Contracts which are legal, valid, binding and enforceable, we have nevertheless included in paragraphs 5.31 to 5.33 certain qualifications which address certain provisions of the insolvency law of this jurisdiction which could render the Agreements or one or more Contracts invalid and which we believe are of common interest.
- 5.32 In a winding-up of a Clearing Member by the courts of this jurisdiction, any dispositions by such Clearing Member of its property made on or after the commencement of the compulsory winding-up of such Clearing Member are void under section 127 of the Insolvency Act 1986 unless the court otherwise orders. However, pursuant to section 164(3) of Part 7, a market contract to which LCH is a party and any disposition of property pursuant to such market contract made by the relevant Clearing Member after the commencement of its compulsory winding-up will not be void under section 127 of the Insolvency Act 1986 and the value of such market contract can be included in the netting under LCH's Default Rules, unless section 164(3) is disapplied by section 167(3) of Part 7 (as to the (lack of) application of section 167(3) of Part 7 to this Opinion Letter, please refer to the assumption set out in paragraph 2.10 above).
- 5.33 In relation to paragraph 3.2.5 above, Regulation 12(1) of the FCA Regulations does not apply if at the time that (any of) the relevant financial obligations came into existence:
- (a) LCH was aware, or should have been aware, that winding up proceedings or reorganisation measures (as such terms are defined in the FCA Regulations) had commenced in relation to the Member;
 - (b) LCH had notice that a meeting of creditors of the Member had been summoned under section 98 of the Insolvency Act 1986 or that a petition for the winding-up of the Member was pending; or
 - (c) LCH had notice that an application for an administration order was pending, or that a person had given notice of intention to appoint an administrator, in respect of the Member.

Accordingly, in such circumstances, the protection granted under the FCA Regulations to a close-out netting provision may not be effective.

- 5.34 If any creditor of LCH were to attach, execute, levy execution or otherwise exercise a creditor's process (whether before or after judgment) over or against any claim owing by the Member to LCH, then the Member would be able to exercise its rights under a Netting Provision against the creditor of LCH in respect of claims which existed at the date of the attachment or other process, including the claim which is the subject of the attachment or other process. However, if the attaching creditor has become subject to Statutory Insolvency Set-Off before a Termination Date has occurred, it may be possible for the liquidator or administrator of the attaching creditor to claim the amounts subject to the attachment free of the Member's rights under the Netting Provision. This is because it may be argued that the Member seeks to exercise a set-off right in respect of an amount which is now owed by the Member to the attaching creditor rather than to LCH, and a contractual provision which purports to create a right of set-off between non-mutual claims may not be effective in Statutory Insolvency Set-Off when applied to the attaching creditor.

- 5.35 However, after the commencement of a winding-up of LCH any attachment will be ineffective unless the court otherwise orders, and in our view the court would not validate the attachment in order to defeat the rights of the Member under the Netting Provision. Further, the protections available under the Financial Collateral Regulations, the Settlement Finality Regulations 1999 and Part 7 may have effect to override the claim of the attaching creditor.
- 5.36 There is provision in both the CA 2006 and the Insolvency Act 1986 for schemes of arrangement, or voluntary arrangements in respect of companies, to be agreed by creditors or, in some cases, shareholders of the company. The courts will not sanction a scheme of arrangement under sections 895 to 901 of the CA 2006 unless reasonable efforts were made to notify those creditors, whose rights would be affected by the scheme, of the meeting to approve that scheme. In relation to company voluntary arrangements under Part I of the Insolvency Act 1986, a creditor can be bound by an arrangement even if he has not been given notice of the creditors' meeting to approve the arrangement. In the case of either a scheme of arrangement or a company voluntary arrangement, approval at the creditors' meeting of its terms does not require unanimity of the affected creditors, whether or not present at the meeting.

Such arrangements could affect both the set-off rights of creditors and the value of claims which the creditors may have against the company. The disapplication of certain aspects of the general law of insolvency by Part 7 may not be effective to disapply the consequences of a scheme of arrangement under the CA 2006, since this procedure does not appear to fall within the meaning of "insolvency law" under section 190(6) of Part 7.

If the default rules of a recognised clearing house have been operated to achieve a discharge of market contracts before the approval of such an arrangement, any provision of such an arrangement which purports to unwind the application of such default rules would not bind the affected creditor if timely objection to the arrangement is made to the applicable court. An arrangement could, however, affect the value of any resulting net claim.

- 5.37 Under section 423 of the Insolvency Act 1986, the court may, on the application of the liquidator or administrator of a company (or, with the leave of the court, on the application of a "victim of the transaction" even if the company is not in liquidation or administration), set aside a transaction entered into by the company "at an undervalue" if the company entered into the transaction for the purpose of putting assets beyond the reach of a person who is making, or may at some time make, a claim against it or of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make. It is not a condition of the making of such an order that the company was insolvent at the time of the transaction. A transaction at an undervalue is defined under section 423 of the Insolvency Act 1986 in substantially the same terms as under section 238 of the Insolvency Act 1986. In general arrangements entered into in the normal course of clearing would be extremely unlikely to fall within this provision. Furthermore, the power of the court is disapplied by section 165 of Part 7 and Regulation 17 of the Settlement Finality Regulations 1999.

Application of foreign law

- 5.38 If any obligation is or is to be performed in a jurisdiction outside England, it may not be enforceable in the English courts or in an arbitral tribunal to the extent that performance would be illegal or contrary to public policy under the laws of the other jurisdiction. An English court or an arbitral tribunal may give effect to any overriding mandatory provisions of the law of the place of performance insofar as they render the performance unlawful or otherwise take into account the law of the place of performance in relation to the manner of performance and to the steps to be taken in the event of defective performance.
- 5.39 An arbitral tribunal may, in practice, take account of mandatory rules or the public policy of a third country in which its award is to be enforced.
- 5.40 We express no opinion on the binding effect of the choice of law provisions in the Opinion Documents insofar as they relate to non-contractual obligations arising from or connected with the Opinion Documents.
- 5.41 We express no opinion as to whether a Clearing Member has created a valid security interest over any asset or right which is situated outside England (including those situated outside England and Wales within the meaning of Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings) or governed by a foreign law (notwithstanding, to the extent stated in the Deed of Charge, the choice of English law as the governing law of the Deed of Charge).
- 5.42 English courts may, in some circumstances, stay Insolvency Proceedings where they are of the opinion that proceedings in another forum would be more convenient or if concurrent proceedings are being brought elsewhere, but will take into account whether or not this will prejudice creditors whose claims have a close connection with this jurisdiction. Specifically, where the Chargor has no branch established or located in this jurisdiction, the English court's jurisdiction to wind up such a company may not be exercised at all if the court considers that there is not a sufficient connection with England or the court may exercise its discretion to apply foreign law to the winding-up in England.
- 5.43 The courts of Scotland have exclusive jurisdiction in relation to liquidation of a Party incorporated under the laws of Scotland (a "Scottish Party"). Accordingly, the courts of this jurisdiction may defer to the courts of Scotland in relation to any question arising in Insolvency Proceedings relating to a Scottish Party
- 5.44 The courts having jurisdiction in relation to insolvency law in this jurisdiction may give assistance to courts in which concurrent insolvency proceedings have commenced under the laws of another jurisdiction. Such assistance may take the form of, for example, dealing with only those assets located in this jurisdiction or selectively applying provisions of foreign law in Insolvency Proceedings which are otherwise generally governed by English law. The courts of this jurisdiction may accordingly apply foreign systems of law rather than English law where the Chargor is subject to insolvency proceedings in another jurisdiction. Under section 426 of the Insolvency Act 1986, a court with insolvency law jurisdiction in England has a discretion to apply the law of one of a list of specified jurisdictions to the insolvency of an entity (including a company incorporated and registered in England and Wales) if so requested by the competent court of that other jurisdiction. Those specified jurisdictions are currently the other parts of the United Kingdom, the Channel Islands, the Isle of Man, Anguilla,

Australia, the Bahamas, Bermuda, Botswana, Brunei, Canada, Cayman Islands, Falkland Islands, Gibraltar, Hong Kong, Ireland, Malaysia, Montserrat, New Zealand, South Africa, St. Helena, Turks and Caicos Islands, Tuvalu and the Virgin Islands. In exercising its discretion, the English court must have regard to the rules of private international law.

- 5.45 Furthermore, during the transition period, where the Clearing Member is an EEA Credit Institution, a liquidator or administrator may not be appointed in relation to proceedings initiated on or after 5 May 2004.
- 5.46 Under the Cross-Border Insolvency Regulations, a court may recognise a foreign insolvency proceeding, and in consequence of such recognition may limit the application of English insolvency law, or apply certain of such provisions at times, or in circumstances, where they would not otherwise be available.

However, Regulation 2 of the Cross-Border Insolvency Regulations provides that the UNCITRAL Model Law shall have the force of law in Great Britain and, under Regulation 4 of Article 1 of the UNCITRAL Model Law, an English court shall not grant any relief, or modify any relief already granted, or provide any co-operation or coordination, under or by virtue of any of the provisions of the UNCITRAL Model Law if and to the extent that such relief or modified relief or cooperation or coordination would be prohibited under or by virtue of Part 7.

Banking Act 2009

- 5.47 The UK Banking Act 2009 contains various provisions which might affect the effectiveness of the obligations of Clearing Members who are authorised as UK banks or investment banks ("UK Banks"). In particular, Part I of the Banking Act provides for various remedies for a failing UK Bank, which include the ability of the Treasury or the Bank of England to cause the transfer of securities issued by a UK Bank or building society, or property of a UK Bank or building society, to another person, by means of a "share transfer order", a "share transfer instrument", or a "property transfer instrument".
- 5.48 Section 75 of the Banking Act gives power to the Treasury to change the law (except the Banking Act itself) for the purpose of enabling the powers granted to the FCA, the Treasury and the Bank of England under Part I of the Banking Act to be used effectively. Such changes might affect private law rights and might be used with retrospective effect. Furthermore, under sections 23 and 40, a share transfer instrument or order, or a property transfer instrument, may include incidental, consequential or transitional provisions which might have an impact on private law rights.
- 5.49 A property transfer instrument may apply to only part of a UK Bank's assets and liabilities (such a transfer being referred to as a "partial property transfer"). This may be the case because the property transfer instrument concerned expressly applies to only part of the UK Bank's business or because it is ineffective in relation to foreign property. However, article 5 of the Banking Act 2009 (Restriction of Partial Property Transfers) Order 2009 addresses the risk that a property transfer instrument may have the effect of disassociating the Relevant Secured Obligations from the Security Interest granted in favour of the Clearing House (i.e. transferring one, but not the other) by requiring that the secured liabilities and the security relating to them may not be separated pursuant

to the transfer. However, the remedies for contravention are weak. Therefore, if a property transfer instrument is abused so as to affect the enforceability of the Clearing House's Security Interest, the Clearing House may not have adequate remedies on which to rely.

- 5.50 Pursuant to section 34(7) of the Banking Act, where a property transfer instrument makes provision in respect of property held on trust, it may also make provision about (a) the terms on which the property is to be held after the instrument takes effect and (b) how any powers, provisions and liabilities in respect of the property are to be exercisable or have direct effect after the instrument takes effect. In particular, where Client Collateral in the form of cash is also subject to a statutory trust pursuant to CASS, section 34(7) would give the Bank of England, Treasury or FCA (as the case may be) broad powers to alter the terms on which such assets are held, which may affect the enforceability of the Security Interest. Section 12A of the Banking Act 2009 introduces a bail-in tool allowing resolution authorities to write down and/or convert into equity, liabilities of a failing UK bank or UK investment firm in order to maintain the failing entity as a going concern and allow the issues that cause the failure to be address. The objective of the bail-in tool is to absorb the losses of that entity and recapitalise it using its own resources. A bail-in resolution instrument may cancel, modify or change the form of a liability owed by the bank or investment firm or provide that a contract under which the bank has a liability is to have effect as if a specified right had been exercised under it.
- 5.51 However, certain liabilities are exempt from bail-in under the Banking Act 2009. The Special Bail-in Order prohibits the application of the special bail-in provisions in respect of "protected liabilities". For the purposes of Article 4 of the Special Bail-in Order, liabilities of the relevant Client to the Clearing Member arising under the Relevant Clearing Agreement and/or the Collateral Arrangements would be "protected liabilities".
- 5.52 Under section 48Z of the Banking Act 2009, the taking of certain measures by resolution authorities in relation to an affected entity include a crisis prevention measure, crisis management measure or a recognised third-country resolution action (each as defined in section 48Z if the Banking Act 2009), may have the effect of disapplying the rights of a Clearing Member to terminate its agreement with an affected an entity. If the Relevant Clearing Agreement falls within scope and a resolution authority decides to take action under section 48Z the enforcement of security under the Collateral Arrangements would be impaired.

Arbitration

- 5.53 There remains a doubt as to whether, under English law, an agreement to arbitrate disputes may be validly combined with a clause giving one or more parties the right to elect for court proceedings. The current practice of the English courts is to uphold such provisions and in our view they will continue to do so. Moreover, and without prejudice to the foregoing, an English court may not allow election for arbitration proceedings where the party making the election participated in court proceedings or has otherwise conducted itself so as to lead another party to understand that the matters in dispute would be determined in court proceedings.

- 5.54 A party will lose the right to apply for a stay of English court proceedings in respect of a matter which under the Opinion Documents is to be referred to arbitration if he has taken any step in those proceedings to answer the substantive claim.
- 5.55 An arbitral tribunal may decline jurisdiction, and an English court may decline to stay English court proceedings if the subject matter is deemed incapable of being resolved by arbitration or is otherwise non-arbitrable for reasons of public policy (or otherwise) or where the court or arbitral tribunal is satisfied that the arbitration agreement has become inoperable or incapable of being performed.
- 5.56 An English court may be unable to restrain proceedings commenced in another court, notwithstanding the provisions of the Opinion Documents requiring that the subject matter of those proceedings is to be referred to arbitration.
- 5.57 Under certain circumstances, an English court may determine whether there is a valid arbitration agreement or whether an arbitral tribunal has jurisdiction to determine any question, notwithstanding any provision to the contrary in the Opinion Documents. Further, an English court may be required to recognise and give effect to a decision of a court of another Member State of the European Union or of Iceland, Norway or Switzerland that an arbitration agreement is not valid or not effective, given as a preliminary issue in proceedings before that court, notwithstanding the fact that the subject matter of those proceedings has been referred to arbitration with a seat in England in accordance with the arbitration provisions in the Opinion Documents.
- 5.58 Under English law, the parties may waive the right to appeal against an arbitral award on a question of law. An arbitral award may, however, be challenged on the grounds set out in sections 67 (substantive jurisdiction) and 68 (serious irregularity) of the Arbitration Act 1996 or on the ground of public policy.
- 5.59 Unless the parties have agreed otherwise, an arbitral tribunal has no power to order consolidation of separate arbitration proceedings, whether under the same arbitration agreement or different arbitration agreements.
- 5.60 An English court will not grant leave to enforce an award if it is shown that the arbitral tribunal lacked substantive jurisdiction to make the award or if the subject matter of the award is not capable of settlement by arbitration or if the award is contrary to English public policy. We express no opinion as to whether an arbitral award may be enforced otherwise than by leave of the court under the Arbitration Act 1996.
- 5.61 There is some doubt as to whether the Rome I Regulation (UK) and the Rome II Regulation (UK) would apply to arbitration proceedings.

Other Qualifications

- 5.62 Whilst section 177 of Part 7 permits a recognised clearing house to apply margin or a default contribution in relation to a market contract in accordance with its rules notwithstanding any prior equitable interest or right, or any right or remedy arising from a breach of fiduciary duty if the clearing house had notice of the interest, right or breach of duty at the time the property was provided as margin or a default contribution such property will be subject to the prior interest and/or right.

- 5.63 Under English law, interest imposed upon a Clearing Member under the Arrangements, an Agreement or a Contract might be held to be irrecoverable to the extent that it accrues on an unsecured debt after the making of a winding-up order or the passing of a winding-up resolution in respect of the Clearing Member, but the fact that it was held to be irrecoverable would not of itself prejudice the legality or validity of the netting arrangements under the Default Rules of LCH. If the Opinion Documents do not provide a contractual remedy for the late payment of any amount payable thereunder that is a substantial remedy within the meaning of the Late Payment of Commercial Debts (Interest) Act 1998, the Party entitled to that amount may have a right to statutory interest (and to payment of certain fixed sums) in respect of that late payment at the rate (and in the amount) from time to time prescribed pursuant to that Act. Any term of the Arrangements and/or the Agreements may be void to the extent that it excludes or varies the right to statutory interest, or purports to confer a contractual right to interest that is not a substantial remedy for late payment of that amount, within the meaning of that Act. We express no opinion as to whether any such provisions in the Opinion Documents do in fact constitute a "substantial remedy" in compliance with the conditions set out in section 9 of such Act.
- 5.64 There is some possibility that an English court or arbitral tribunal would hold that a judgment on an Opinion Document, whether given in an English court or elsewhere, would supersede the relevant Opinion Document so that any obligations relating to the payment of interest after judgment or any currency indemnities would not be held to survive the judgment.
- 5.65 An agreement requiring a party to pay the whole or part of the costs of arbitration in any event is valid only if made after the dispute in question has arisen. An English court or arbitral tribunal may in its discretion decline to give effect to any provision for the payment of legal costs incurred by a litigant.
- 5.66 Any undertaking or indemnity given by a Clearing Member in respect of stamp duty payable in the United Kingdom may be void.
- 5.67 An English court may in its discretion decline to give effect to any provision for the payment of legal costs incurred by a litigant.
- 5.68 If a Party is controlled by or otherwise connected with a person (or is itself) resident in, incorporated in or constituted under the laws of a country which is the subject of United Nations, European Community or UK sanctions implemented or effective in the United Kingdom under the United Nations Act 1946, the Emergency Laws (Re-enactments and Repeals) Act 1964, the Anti-terrorism, Crime and Security Act 2001 or the Counter-Terrorism Act 2008, or under the Treaty establishing the European Community or any successor agreement between the UK and the EU, or is otherwise the target of any such sanctions, then the obligations of the other Party to that Party under the Arrangements may be unenforceable or void.
- 5.69 The laws of this jurisdiction may have effect so that any discretion or determination to be exercised or made by a party under the Arrangements must be exercised or made reasonably. Any provision in the Opinion Documents providing that any calculation or certification is to be conclusive and binding will not be effective if such calculation or certification is fraudulent, incorrect, arbitrary or shown not to have been given or made in good faith and will not necessarily prevent judicial enquiry into the merits of any

claim by any Party thereto. An English court may regard any calculation, determination or certification as no more than prima facie evidence of the matter calculated, determined or certified.

- 5.70 Where the operation of the provisions of the Contracts (Rights of Third Parties) Act 1999 is expressly excluded in any document any person who is not a party to such agreement may be unable to enforce provisions of that agreement which are expressed to be for the benefit of that person. Such exclusion does not affect any right or remedy of any third party that exists or is available apart from pursuant to that Act.
- 5.71 The parties to the Agreements may be able to amend the Agreements or the Arrangements by oral agreement or by conduct despite any provision to the contrary.
- 5.72 Any provision of the Opinion Documents which constitutes, or purports to constitute, a restriction on the exercise of any statutory power by any party to the Agreements or any other person may be ineffective.
- 5.73 To the extent that any matter is expressly to be determined by future agreement or negotiation, the relevant provision may be unenforceable or void for uncertainty.
- 5.74 Any provision of the Opinion Documents stating that a failure or delay, on the part of any party, in exercising any right or remedy under the Opinion Document shall not operate as a waiver of such right or remedy may not be effective.
- 5.75 The effectiveness of any provision of the Opinion Documents which allows an invalid provision to be severed in order to save the remainder of the Opinion Document will be determined by the English courts or arbitral tribunal in their discretion having regard to all the circumstances of the case.
- 5.76 The opinions expressed in this opinion letter are subject to the effects of any United Nations, European Union or United Kingdom sanctions or other similar measures implemented or effective in the United Kingdom with respect to any party to the Opinion Documents which is, or is controlled by or otherwise connected with, a person resident in, incorporated in or constituted under the laws of, or carrying on business in a country to which any such sanctions or other similar measures apply, or is otherwise the target of any such sanctions or other similar measures.
- 5.77 In some circumstances an English court may, and in certain circumstances it must, terminate or suspend proceedings commenced before it, or decline to restrain proceedings commenced in another court, notwithstanding the provisions of the Opinion Documents providing that the courts of England have jurisdiction in relation to the subject matter of those proceedings.
- 5.78 There have been conflicting decisions of courts in other European Union jurisdictions as to whether jurisdiction clauses, similar in nature to the jurisdiction clause in the Opinion Documents, complied with the requirements of article 23 of the Brussels I Regulation (Council Regulation (EC) No 44/2001) (now article 25 of the Brussels I Regulation (recast) (Regulation (EU) No 1215/2012) (the "**Brussels I Regulation (recast)**") and, as a result, whether such clauses were effective to confer jurisdiction on the court identified in the clause. An English court, at first instance, has held that this type of clause is effective and complies with the requirements of the Brussels I

Regulation (recast). However, the issue might still be referred to the Court of Justice of the European Union in the future by a court in the European Union. It is possible that the Court of Justice of the European Union (whose decisions are binding on all courts within the European Union, which currently includes the English courts), would reach the conclusion that such clauses were ineffective. If so, the Opinion Documents may be ineffective to confer jurisdiction on the courts of England, in which case the jurisdiction of the English and other courts would be determined by reference to the general law applicable in those courts. Similar concerns arise where jurisdiction is determined on the basis of the 2007 Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

- 5.79 We express no opinion as to whether the execution or delivery of the Clearing Membership Agreement by the Clearing Members or the performance by Clearing Members of their obligations under the Opinion Documents contravenes any requirement imposed on Clearing Members by FSMA (as amended) or any applicable rules made under that Act (as amended).

This Opinion Letter is given for the exclusive benefit of the addressee. In this opinion we do not assume any obligation to notify or inform you of any developments subsequent to its date that might render its content untrue or inaccurate in whole or in part at such time. It may not, without prior written consent, be relied on by any other person. We consent to a copy of this Opinion Letter being made publicly available on its website and to it being shown to the relevant regulators and/or any counsel appointed by the addressee to advise on matters of the laws of other jurisdictions, for information purposes only and solely on the basis that we assume no responsibility to any such parties as a result or otherwise.

Yours faithfully

Simon Gleason

Clifford Chance LLP

ANNEX 1

BUILDING SOCIETIES

Subject to the modifications set out in this Annex 1 (*Building Societies*), the opinions, assumptions and qualifications set out in the opinion letter will also apply in respect of Clearing Members which are Building Societies. For the purposes of this Annex 1 (*Building Societies*), a "**Building Society**" means a building society formed and registered under the Building Societies Act 1989 (the "**Building Societies Act**") or formed under previous building societies legislation and deemed to be registered by the Building Societies Act.

1. TERMS OF REFERENCE

References to "liquidator" and "administrator" include a building society liquidator and building society special administrator respectively; and

References to "liquidation" and "administration" include building society insolvency and building society special administration respectively.

2. ASSUMPTIONS

2.1 The following additional paragraph shall be added to paragraph 2 (*Assumptions*) of the main body of this opinion letter:

2.1.1 That where the Agreements are entered into with a Clearing Member that is a Building Society, such Building Society is credit institution for the purposes of the Recast EUIR (meaning that the Recast EUIR will not apply in relation to the such Building Society).

3. OPINION

3.1 Insolvency, Security, Set-off and Netting: Building Societies

3.1.1 The response to Question 3.2.1 of the main body of this Opinion Letter shall be deemed deleted and replaced with the following:

The only bankruptcy, composition, rehabilitation (e.g. administration, receivership or voluntary arrangement) or other insolvency or reorganisation proceedings to which a Clearing Member that is a Building Society could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion letter, are liquidation (including provisional liquidation), administration, building society insolvency, building society special administration, administrative receivership¹¹, receivership¹² and

¹¹ This arises solely to the extent that the Treasury, the Bank of England and other central banks retain the power to appoint an administrative receiver over the whole of a building society's undertaking, where this is pursuant to a floating charge granted by the society to secure financial assistance under the Building Societies (Financial Assistance) Order 2010.

¹² Building societies were given the ability to create floating charges in March 2015 when parts of the Financial Services (Banking Reform) Act 2014 came into force. In June 2016, the Building Societies (Floating Charges

voluntary arrangements, and (if the Building Society qualifies as an "investment bank" under section 232 of the Banking Act) investment bank special administration (the above are together called "**Insolvency Proceedings**").

The legislation applicable to Insolvency Proceedings as at the date of this Opinion Letter is:

- (a) the Building Societies Act;
- (b) the provisions of the Insolvency Act 1986;
- (c) the Banking Act, the Bank Insolvency (England and Wales) Rules 2009, the Bank Administration (England and Wales) Rules 2009, the Banking Act 2009 (Restrictions of Partial Property Transfers) Order 2009 and, in relation to a UK investment bank, the Investment Bank Regulations and the Investment Bank Special Administration (England and Wales) Rules 2011;
- (d) the Building Societies (Insolvency and Special Administration) Order 2009;
- (e) the Building Society Insolvency (England and Wales) Rules 2010;
- (f) the Building Society Special Administration (England and Wales) Rules 2010;
- (g) the Building Societies (Financial Assistance) Order 2010;
- (h) the Building Societies (Floating Charges and Other Provisions) Order 2016;
- (i) the Credit Institutions Regulations; and
- (j) the Cross-Border Insolvency Regulations

In relation to (i) an obligation which is a transfer order (ii) an obligation which arises under the default arrangements of a designated system and (iii) collateral security delivered in connection with the participation in a designated system (as such terms are defined in the Settlement Finality Regulations 1999), the Settlement Finality Regulations 1999 will also be applicable. If the Opinion Documents constitute a financial collateral arrangement or an arrangement of which a financial collateral arrangement forms part, the FCA Regulations will also apply.

Under Part 24 of FSMA, the "appropriate regulator" (being the PRA and/or the FCA, as more particularly defined therein) is given specific powers to petition to commence and otherwise to participate in certain Insolvency Proceedings relating to (a) any person that is (or has been) an authorised person under FSMA

and Other Provisions) Order 2006 came into effect which allowed building societies to appoint a receiver (but not an administrative receiver) over a society's property that is subject to a floating charge.

and (b) any person carrying on (or who has carried on) a regulated activity without authorisation or exemption under FSMA. In relation to Insolvency Proceedings which are building society insolvency or building society special administration, the PRA and/or the FCA, as the case may be are given similar powers to intervene and rights to participate under the Banking Act, the Building Societies Act and the Building Societies (Insolvency and Special Administration) Order 2009, respectively.

We confirm that the events specified in Rule 5 of the Default Rules adequately refer to all Insolvency Proceedings.

- 3.1.2 In the response to Question 3.2.3 of the main body of the Opinion Letter, the references to "UK bank" should be read as references to a "Building Society".
- 3.1.3 The response to Question 3.2.5 of the main body of this Opinion Letter shall be deemed deleted and replaced with the following:

In the case of a company in liquidation, the aggregation of amounts representing terminated obligations may in a winding-up under the laws of this jurisdiction be implemented under Rule 14.25 of the Insolvency Rules 2016 ("**Rule 14.25**"). A Rule 14.25 set-off would in our view result in a net amount payable in respect of such amounts, subject to the other qualifications set out in this opinion. There is no equivalent to Rule 14.25 for a winding-up of a Building Society. In circumstances where the courts would apply Rule 14.25 but for the fact that the entity is a Building Society and not a company, the courts may aggregate the amounts representing the terminated obligations according to: (i) a ruling equivalent to Rule 14.25; (ii) the specific provisions of the Rulebook, or as the case may be, the Agreements; or (iii) another method. The better view is that the courts would apply the same treatment to a Building Society as it would to a company, and apply a treatment equivalent to Rule 14.25.

Furthermore, the aggregation or set-off amounts representing terminated obligations may be implemented by, in relation to a building society insolvency, Rule 73 of the Building Society Insolvency (England and Wales) Rules 2010 ("**Rule 73**") or, in relation to a building society special administration, Rule 2.85 of the Insolvency Rules 1986 ("**Rule 2.85**") as applied by Rule 63 of the Building Society Special Administration (England and Wales) Rules 2010, rather than under the specific provisions of the Rulebook or, as the case may be, the Agreements.

For the purposes of this opinion letter, "**Statutory Insolvency Set-Off**" means set-off pursuant to Rule 63 of the Building Society Special Administration Rules (which applies Rule 2.85) or Rule 73 and includes (in relation to a winding-up) any approach to set-off pursuant to or equivalent to Rule 14.25.

Statutory Insolvency Set-off would only be relevant in respect of the default of a Clearing Member where section 167(3) of Part 7 applied. Section 167(3) of Part 7 applies where LCH has not taken action under its default rules in respect of a Clearing Member which is subject to certain insolvency proceedings, and fails to take action (or to notify the Bank of England of its intention to take such action) within three business days from the date of receipt of a notice from the Bank of England. Statutory Insolvency

Set-off would only apply to the extent the obligations assumed under the Opinion Documents and the Contracts are 'mutual' between the Parties, in the sense that each Party is personally and solely liable as regards obligations owed by it to the other Party and solely entitled to the benefit of obligations owed to it by the other Party. Circumstances in which the requisite mutuality will not be established include, without limitation, where a Party is acting as agent for another person, or is a trustee, or in respect of which a Party has a joint interest or in respect of which a Party's rights or obligations or any interest therein have been assigned, charged or transferred (whether in whole or in part) whether unilaterally, by agreement or by operation of law or by order (including, without limitation, pursuant to section 111 of FSMA).

In addition, Regulation 12(1) of the FCA Regulations provides that a close-out netting provision constituting a term of a financial collateral arrangement, or an arrangement of which a financial collateral arrangement forms part, shall take effect in accordance with its terms, notwithstanding that the collateral-provider or collateral-taker under the arrangement is subject to winding-up proceedings or reorganisation measures (as such terms are defined in the FCA Regulations). Close-out netting in accordance with a close-out netting provision under Regulation 12(1) of the FCA Regulations would prevail over a Statutory Insolvency Set-off in the event of liquidation or administration proceedings relating to a Clearing Member.

In our view, the Default Rules (in particular, Rules 3, 6, 7 and 8) would qualify as a close-out netting provision constituting a term of an arrangement of which a financial collateral arrangement forms part under Regulation 12(1) of the FCA Regulations, the relevant "financial collateral arrangement" for these purposes being a "title transfer financial collateral arrangement" in respect of "financial collateral" in the form of "cash" (as each such term is defined in the FCA Regulations). The arrangements for the transfer of Collateral in the form of cash between (i) LCH and each Clearing Member in respect of their respective variation margin obligations and (ii) by each Clearing Member to LCH in respect of its initial margin obligations constitute the relevant title transfer financial collateral arrangement.

4. MODIFICATIONS TO QUALIFICATIONS

Furthermore, the qualifications at paragraph 5 are deemed modified as follows:

- 4.1 Paragraph 5 shall be construed such that references to a "*company*" (other than reference "*company*" incorporated into paragraph 5 by virtue of this Schedule) shall be read as "*Building Society*".
- 4.2 Paragraph 5.33 shall be deemed deleted and replaced with the following:

There is provision in the Insolvency Act 1986 (as applied by the Building Societies Act 1986) for voluntary arrangements in respect of Building Societies to be agreed by creditors. A creditor cannot be bound by a voluntary arrangement unless it has been given notice of the creditors' meeting to approve the arrangement. Approval at the creditors' meeting of its terms does not require unanimity of the affected creditors, whether or not present at the meeting. Such arrangements could affect both set-off rights of creditors and the value of claims which the creditors may have against the

Building Society. If the Liquidation Date occurs before the approval of such an arrangement, any provision of such an arrangement which purports to unwind the application of the netting arrangements contemplated by the Default Rules would not bind the affected creditor if timely objection to the arrangement is made to the applicable court. An arrangement could, however, affect the value of any resulting net claim.

If the default rules of a recognised clearing house have been operated to achieve a discharge of market contracts before the approval of such an arrangement, any provision of such an arrangement which purports to unwind the application of such default rules would not bind the affected creditor if timely objection to the arrangement is made to the applicable court. An arrangement could, however, affect the value of any resulting net claim.

- 4.3 In paragraphs 5.28 to 5.34 (inclusive) and 5.43 to 5.48 (inclusive) the following expressions shall be construed in relation to a Building Society, as follows:

"*bank insolvency*" shall be read as "*building society insolvency*" and "*company*" and "*UK bank*" shall be read as "*Building Society*"

SCHEDULE 1

Clearing Membership Agreement

CLEARING MEMBERSHIP AGREEMENT

DATED

LCH LIMITED

and
("the Firm")

Address of the Firm

THIS AGREEMENT is made on the date stated above

BETWEEN the Firm and LCH LIMITED ("the Clearing House"), whose registered office is at Aldgate House, 33 Aldgate High Street, London, EC3N 1EA.

WHEREAS:

- A The Clearing House is experienced in carrying on the business of a clearing house and undertakes with each Clearing Member the performance of contracts registered in its name in accordance with the Rulebook;
- B The Clearing House has been appointed by certain Exchanges to provide central counterparty and other services in accordance with the terms and conditions of the Rulebook and certain agreements entered into between the Clearing House and such Exchanges;
- C The Clearing House also provides central counterparty and other services to participants in certain over-the-counter ("OTC") markets in accordance with the terms of this Agreement and the Rulebook;
- D The Firm desires to be admitted as a Clearing Member of the Clearing House to clear certain categories of Contract agreed by The Clearing House with the Firm and, the Clearing House having determined on the basis inter alia of the information supplied to it by the Firm that the Firm satisfies for the time being the relevant Criteria for Admission, the Clearing House agrees to admit the Firm as a Clearing Member subject to the terms and conditions of this Agreement.

NOW IT IS HEREBY AGREED as follows:-

1 Interpretation and Scope of Agreement

1.1. Unless otherwise expressly stated, in this Agreement:

- (a) "Cash Cover" means cover for margin (within the meaning of that term in the "Definitions" section of the Rulebook) provided in the form of a cash deposit with the Clearing House;
- (b) "Clearing Member" means a Person who has been admitted to membership of the Clearing House and whose membership has not terminated;
- (c) "Contract" means a contract or transaction eligible for registration in the Firm's name by the Clearing House in accordance with the Rulebook;
- (d) "Contribution" and "Contribution to the Default Fund" mean the sums of cash deposited by the Firm as cover in respect of the Firm's obligation to indemnify the Clearing House as provided by clause 9 of this Agreement and the Default Rules;
- (e) "Criteria for Admission" means criteria set out in one or more documents published from time to time by the Clearing House, being criteria to be satisfied by an applicant for admission as a Clearing Member in respect of the Designated Contracts which the applicant wishes to clear with the Clearing House;
- (f) "Default Fund" means the fund established under the Default Rules of the Clearing House to which the Clearing Member is required to contribute by virtue of clause 9 of this Agreement;
- (g) [DELETED]

- (h) "Default Notice" means a notice issued by the Clearing House in accordance with the Default Rules in respect of a Clearing Member who is or is likely to become unable to meet its obligations in respect of one or more Contracts;
 - (i) "Default Rules" means that part of the Rulebook having effect in accordance with Part IV of the Financial Services and Market Act 2000 (Recognition Requirements for Investment Exchange and Clearing Houses) Regulations 2001 to provide for action to be taken in respect of a Clearing Member subject to a Default Notice;
 - (j) "Designated Contract" has the meaning given to it in clause 2.1;
 - (k) "Exchange" means an organisation responsible for administering a market with which the Clearing House has an agreement for the provision of central counterparty and other services to Clearing Members;
 - (l) "Exchange Contract" means any contract which an Exchange has adopted and authorised Exchange Members to trade in under its Exchange Rules and in respect of which the Clearing House has agreed to provide central counterparty and other services;
 - (m) "Exchange Member" means any person (by whatever name called) being a member of, or participant in, a Market pursuant to Exchange Rules;
 - (n) "Exchange Rules" means any of the regulations, rules and administrative procedures or contractual arrangements for the time being and from time to time governing the operation of a Market administered by an Exchange and includes, without prejudice to the generality of the foregoing, any regulations made by the directors of an Exchange or by any committee established under the Rules, and, save where the context otherwise requires, includes Exchange Contracts, and the Rulebook;
 - (o) "Rulebook" means the Clearing House's General Regulations, Default Rules, Settlement Finality Regulations and Procedures and such other rules of the Clearing House as published and amended from time to time;
 - (p) "Market" means a futures, options, forward, stock or other market, administered by an Exchange, or an OTC market, in respect of which the Clearing House has agreed with such Exchange or, in respect of an OTC market, with one or more participants in that market, to provide central counterparty and related services on the terms of the Rulebook and in the case of an Exchange, pursuant to the terms of any agreement entered into with the Exchange;
 - (q) "Person" includes any firm, company, corporation, body, association or partnership (whether or not having separate legal personality) or any combination of the foregoing;
 - (r) "Procedures" means that part of the Rulebook by that name;
 - (s) "Registered Contract" means a contract registered in the Firm's name by the Clearing House in accordance with the Rulebook;
- 1.2. (a) References to "the parties" are references to the parties hereto, and "party" shall be construed accordingly;
- (b) References herein to a clause are to a clause hereof and clause headings are for ease of reference only;
- (c) Unless the context otherwise requires, words (including defined terms) denoting the singular shall include the plural and vice versa;

(d) References to writing include typing, printing, lithography, photography, facsimile transmission and other modes of representing or reproducing words in a visible form; and

(e) References herein to statutes, statutory instruments, the Rulebook, or provisions thereof are to those statutes, statutory instruments, Rulebook or provisions thereof as amended, modified or replaced from time to time.

1.3 This Agreement, the terms of any other agreement to which the Clearing House and the Clearing Member are party which relates to the provision of central counterparty and other services by the Clearing House, the terms of, and applicable to, each and every Registered Contract, the Rulebook and all amendments to any of the foregoing shall together constitute a single agreement between the Clearing House and the Clearing Member and both parties acknowledge that all Registered Contracts are entered into in reliance upon the fact that all such items constitute a single agreement between the parties.

1.4 A person who is not a party to this Agreement shall have no rights under or in respect of this Agreement.

2 Clearing Membership

2.1. The Firm is hereby admitted as a Clearing Member on the terms set out in this Agreement. The Firm shall be eligible to clear such categories of Contract (each a "Designated Contract") as the Clearing House shall from time to time notify to the Firm.

2.2. The Firm warrants that the information supplied by the Firm to the Clearing House in connection with the enquiry conducted by the Clearing House to determine whether the Firm satisfies for the time being the Criteria for Admission was and is at the date of this Agreement true and accurate in all material respects.

2.3. The Firm will ensure that it will at all times satisfy the Criteria for Admission. If at any time it has reason to believe that it no longer satisfies or may cease to satisfy any of such criteria the Firm shall immediately notify the Clearing House of the circumstances.

2.4. The Firm shall give written notice forthwith to the Clearing House of the occurrence of any of the following of which it is aware:-

(a) the presentation of a petition or passing of any resolution for the bankruptcy or winding-up of, or for an administration order in respect of, the Firm or of a subsidiary or holding company of the Firm;

(b) the appointment of a receiver, administrative receiver, administrator or trustee of the estate of the Firm;

(c) the making of a composition or arrangement with creditors of the Firm or any order or proposal in connection therewith;

(d) where the Firm is a partnership, an application to dissolve the partnership, the presentation of a petition to wind up the partnership, or any other event which has the effect of dissolving the partnership;

(e) where the Firm is a registered company, the dissolution of the Firm or the striking-off of the Firm's name from the register of companies;

(f) any step analogous to those mentioned in paragraphs (a) to (e) of this clause 2.4 is taken in respect of such persons as are referred to in those respective paragraphs in any jurisdiction;

(g) the granting, withdrawal or refusal of an application for, or the revocation of any licence or authorisation to carry on investment, banking or insurance business in any country;

- (h) the granting, withdrawal or refusal of an application for, or the revocation of, a license or authorisation by the Financial Conduct Authority, the Prudential Regulation Authority or membership of any self-regulating organisation, recognised or overseas investment exchange or clearing house (other than the Clearing House) under the Financial Services and Markets Act 2000 or any other body or authority which exercises a regulatory or supervisory function under the laws of the United Kingdom or any other state;
- (i) the appointment of inspectors by a statutory or other regulatory authority to investigate the affairs of the Firm (other than an inspection of a purely routine and regular nature);
- (j) the imposition of any disciplinary measures or sanctions (or similar measures) on the Firm in relation to its investment or other business by any Exchange, regulatory or supervisory authority;
- (k) the entering of any judgment against the Firm under Section 150 of the Financial Services and Markets Act 2000;
- (l) the conviction of the Firm for any offence under legislation relating to banking or other financial services, building societies, companies, credit unions, consumer credit, friendly societies, insolvency, insurance and industrial and provident societies or for any offence involving fraud or other dishonesty;
- (m) the conviction of the Firm, or any subsidiary or holding company of the Firm for any offence relating to money laundering, or the entering of judgment or the making of any order against the Firm in any civil action or matter relating to money laundering;
- (n) any enforcement proceedings taken or order made in connection with any judgement (other than an arbitration award or judgement in respect of the same) against the Firm; and
- (o) any arrangement entered into by the Firm with any other Clearing Member relating to the provision of central counterparty and associated services by the Clearing House of Contracts or transactions entered into by the Firm after the effective date of termination of this Agreement.

2.5. The Firm shall give written notice forthwith to the Clearing House of any person becoming or ceasing to be a director of or a partner in the Firm or of the occurrence of any of the following in relation to a director of or a partner in the Firm, if aware of the same:-

- (a) the occurrence of any event specified in clause 2.4 (insofar as it is capable of materially affecting him); or
- (b) any disqualification order under the Company Directors Disqualification Act 1986 or equivalent order in overseas jurisdictions.

2.6. The Firm shall give written notice forthwith to the Clearing House of any change in its name, the address of its principal place of business, registered office or UK office.

2.7. The Firm shall give written notice to the Clearing House forthwith upon its becoming aware that any person is to become or cease to be, or has become or ceased to be, a controller of the Firm, and shall in relation to any person becoming a controller of the Firm state:-

- (a) the controller's name, principal business and address;
- (b) the date of the change or proposed change.

In this clause and in clause 2.9 "controller" means a person entitled to exercise or control the exercise of 20 per cent or more of the voting power in the Firm.

- 2.8. The Firm shall give written notice forthwith to the Clearing House of any change in its business which affects the Firm's ability to perform its obligations under this Agreement.
- 2.9. Where the Clearing House receives notification pursuant to any of clauses 2.3 to 2.8, or the Clearing House reasonably suspects that the Firm may no longer satisfy some or all of the Criteria for Admission or the criteria for clearing a Designated Contract, the Clearing House shall be entitled in its absolute discretion to call for information of whatsoever nature in order to determine whether the Firm continues to satisfy the Criteria for Admission or the criteria for clearing a Designated Contract. Without prejudice to the foregoing, the Clearing House may at any time call for information relating to the affairs (including the ownership) of any controller of the Firm or any person who is to become a controller of the Firm. The Firm shall forthwith on demand supply to the Clearing House information called for under this clause and shall ensure that such information is true and accurate in all respects.
- 2.10. The Firm undertakes to abide by the Rulebook and undertakes at all times to comply with other provisions of Exchange Rules so far as they apply to the Firm.
- 2.11. The Firm undertakes that at all times, to the extent the Firm is required under any applicable law to be authorised, licensed or approved in relation to activities undertaken by it, it shall be so authorised, licensed or approved.
- 2.12. The Firm agrees that in respect of any Contract for which central counterparty services are to be provided to the Firm by the Clearing House in accordance with the Rulebook, including, but not limited to, any contract made by the Firm under Exchange Rules on the floor of a Market (or through a Market's automated trading system) or otherwise, whether with a member of that Market or with a client or with any other person, and including any Contract entered into in an OTC market, the Firm shall contract as principal and not as agent.
- 2.13. The Firm shall furnish financial information to the Clearing House in accordance with the requirements of the Rulebook or such other requirements as the Clearing House may from time to time prescribe.
- 2.14. The Firm undertakes that, in its terms of business with its clients (being clients in respect of whom the Firm is subject to any regulations made pursuant to rules and/or legislation applicable to the Firm with respect to the safeguarding or segregation of clients' money):
- (a) where it is subject to Exchange Rules, it will at all times include a stipulation that contracts made under Exchange Rules with or for them shall be subject to Exchange Rules (including the Rulebook); and
 - (b) that money of such clients in the possession of the Clearing House may be dealt with by the Clearing House in accordance with the Rulebook without exception.
- 2.15. Without prejudice to clause 2.14 the Firm undertakes that its dealings with all its clients or counterparties shall be arranged so as to comply with the requirement that the Firm deals with the Clearing House as principal, and that all sums deposited with the Clearing House by way of Cash Cover (including the Firm's Contribution to the Default Fund) shall be deposited unencumbered and by the Firm acting as sole principal and as legal and beneficial owner.
- 2.16. The Firm undertakes not to assign, charge or subject to any other form of security, whether purporting to rank in priority over, *pari passu* with or subsequent to the rights of the Clearing House, any Cash Cover provided to the Clearing House, including its entitlement to repayment of its Contribution to the Default Fund or any part of it. Any purported charge, assignment or encumbrance (whether by way of security or otherwise) of Cash Cover provided to the Clearing House shall be void. The Firm shall not otherwise encumber (or seek to encumber) any Cash Cover provided to the Clearing House.

3 Remuneration

- 3.1. The Clearing House shall be entitled to charge the Firm such fees, charges, levies and other dues, on such events, and calculated in accordance with such scales and methods, as are for the time prescribed by the Clearing House and, where relevant, for Exchange Contracts, after consultation with the relevant Exchange.

- 3.2. The Clearing House shall give the Firm not less than fourteen days' notice of any increase in such fees, charges, levies or other dues.

4 Facilities Provided by the Clearing House

4.1. Provision of Central Counterparty Services

- (a) Details of all Contracts to be registered by the Clearing House in the name of the Firm and in respect of which central counterparty services are to be provided shall be provided to the Clearing House in accordance with the Rulebook and any other agreement entered into between the Clearing House and the Firm.
- (b) Provided that a Contract meets the criteria for registration of that Contract in the name of the Firm and is a Designated Contract, and subject to the Rulebook, the Clearing House shall enter into a Registered Contract with the Firm in respect thereof. Each such Contract shall be registered in accordance with the Rulebook and the Clearing House shall perform its obligations in respect of all Registered Contracts in accordance with this Agreement and the Rulebook.

4.2. Maintenance of Records

The Clearing House agrees that for a period of ten years after termination of a Registered Contract it shall maintain records thereof. The Clearing House may make a reasonable charge to the Firm for the production of any such records more than three months after registration.

4.3. Information

The Clearing House will provide to the Firm such information at such times as is provided for by the Rulebook.

4.4. Accounts

The Clearing House agrees to establish and maintain one or more accounts for the Firm in accordance with the Rulebook. Accounts will be opened and kept by the Clearing House in such manner as will not prevent the Firm from complying with requirements of any regulations made pursuant to rules and/or legislation applicable to the Firm with respect to the safeguarding or segregation of clients' money and the rules of such regulatory organisation as the Firm may be subject to in respect of their cleared business.

5 Default

In the event of the Firm appearing to the Clearing House to be unable, or to be likely to become unable, to meet any obligation in respect of one or more Registered Contracts, or failing to observe any other financial or contractual obligation under the Rulebook, the Clearing House shall be entitled to take all or any of the steps set out in that regard in the Rulebook, including (but not limited to) the liquidation of all or any of the Registered Contracts.

6 Disclosure of Information

The Firm agrees that the Clearing House shall have authority to disclose any information of whatsoever nature concerning the Firm to such persons as is provided for by the Rulebook.

7 Partnership

If the Firm is a partnership, the liability of each partner in the Firm hereunder and under any Registered Contract shall be joint and several and, notwithstanding an event which would by operation of law give rise to the dissolution of the partnership, or entitle a partner to seek an order to dissolve the partnership, including, but not limited to, the event of the death, bankruptcy, winding-up or dissolution of any such partner, the respective obligations of the Clearing House and all other partners shall remain in full force and effect. If the Firm is a partnership, the Firm undertakes that if any new partner joins the Firm, the Firm shall procure that such new partner becomes jointly and severally liable alongside existing partners in respect of obligations of the Firm to the Clearing House outstanding at the date of such new partner's accession to the Firm.

8 Term

- 8.1. Subject to clause 8.3 either party (provided, in the case of the Firm, that the Clearing House has not issued a Default Notice in respect of the Firm) may terminate this Agreement by giving to the other party notice in writing, such notice to specify the effective date of termination ("the termination date") which shall be a business day not less than three months after the date of the notice, and this Agreement shall, subject to clause 8.2(b), terminate on the termination date. By the close of business on the termination date the Firm shall ensure that all Registered Contracts in the Firm's name have been closed-out or transferred so that there are no open Registered Contracts to which the firm is party at the end of the termination date.
- 8.2. If, under clause 8.1, the Firm has not closed out or transferred all Registered Contracts by the set termination date the Clearing House shall, at its sole discretion, be entitled to:
- (a) liquidate any such Registered Contracts in accordance with the Rulebook; and
 - (b) require that the Firm remains a member of the Clearing House until such time as there are no Registered Contracts in existence to which the Firm is a party and the effective date of termination of this Agreement shall be postponed until such time.
- 8.3. If the Firm is in breach of or in default under any term of this Agreement or the Rulebook, or if the Clearing House has issued a Default Notice in respect of the Firm, or if the Clearing House reasonably determines that the Firm no longer satisfies the Criteria for Admission as a Clearing Member, the Clearing House may in its absolute discretion terminate this Agreement in writing either summarily or by notice as follows.

Any termination by notice under this clause 8.3 may take effect (subject as follows) on the expiry of 30 days or such longer period as may be specified in the notice. A notice given by the Clearing House under this clause may at the Clearing House's discretion allow the Firm a specified period in which to remedy the breach or default or to satisfy the Criteria for Admission as the case may be, and may specify what is to be done to that end, and may provide that if the same is done to the satisfaction of the Clearing House within that period the termination of this Agreement shall not take effect; and if this Agreement has terminated after the Clearing House has allowed the Firm such a period for remedy or satisfaction, the Clearing House shall then notify the Firm of the fact of termination. The Clearing House may, if the Clearing House has issued a Default Notice in respect of the Firm immediately, and in any other case after the effective date of termination, take such other action as it deems expedient in its absolute discretion to protect itself or any other Clearing Member including, without limitation, the liquidation of Registered Contracts but without prejudice to its own rights in respect of such contracts.

- 8.4. Upon the termination of this Agreement for whatever reason the Firm shall unless otherwise agreed cease to be a Clearing Member.

9 Default Fund

- 9.1. In this clause the term "Excess Loss" bears the meaning ascribed to it in the Rulebook.
- 9.2. The Firm, as primary obligor and not surety, hereby indemnifies the Clearing House in respect of any Excess Loss, and undertakes to deposit cash with the Clearing House as collateral for its obligations in respect of such indemnity, in accordance in each case with the Default Rules.

- 9.3. The Firm shall, in accordance with the Default Rules, continue to be liable to indemnify the Clearing House in respect of any Excess Loss arising upon any default occurring before the effective date of termination of this Agreement. Subject thereto, the indemnity hereby given shall cease to have effect on the effective date of termination of this Agreement, unless a Default Notice is issued by the Clearing House in respect of the Firm, in which case the indemnity hereby given shall cease to have effect after the date three months after the date of issue of such Default Notice.
- 9.4. Save as provided expressly by the Default Rules, the Firm shall not be entitled to exercise any right of subrogation in respect of any sum applied in satisfaction of its obligations to the Clearing House under this clause 9.

10 Force Majeure

Neither party shall be liable for any failure in performance of this Agreement if such failure arises out of causes beyond its control. Such causes may include, but are not limited to, acts of God or the public enemy, acts of civil or military authority, fire, flood, labour dispute (but excluding strikes, lock-outs and labour disputes involving the employees of the party intending to rely on this clause or its sub-contractors), unavailability or restriction of computer or data processing facilities or of energy supplies, communications systems failure, failure of a common depository, clearing system or settlement system, riot or war.

11 The Rulebook

In the event of conflict between the Rulebook and the provisions of this Agreement the Rulebook shall prevail.

12 Notices

- 12.1. Any notice or communication to be made under or in connection with this Agreement shall be made in writing addressed to the party to whom such notice or communication is to be given; save that a notice or communication of an urgent nature shall be given or made orally and as soon as reasonably practicable thereafter confirmed in writing in conformity hereto. A notice may be delivered personally or sent by post to the address of that party stated in this Agreement, or to such other address as may have been notified by that party in accordance herewith.
- 12.2. Where a notice is sent by the Clearing House by post it shall be deemed delivered 24 hours after being deposited in the post first-class postage prepaid in an envelope addressed to the party to whom it is to be given in conformity to clause 12.1, or in the case of international mail, on the fourth business day thereafter. In all other cases notices shall be deemed delivered when actually received.

13 Law

- 13.1. This Agreement shall be governed by and construed in accordance with the laws of England and Wales. The parties irrevocably agree that the courts of England and Wales shall have exclusive jurisdiction to hear and determine any action or dispute which may arise herefrom. The Clearing House and the Firm each irrevocably submits to such jurisdiction and to waive any objection which it might otherwise have to such courts being a convenient and appropriate forum.
- 13.2. The Firm irrevocably waives, with respect to itself and its revenues and assets all immunity on the grounds of sovereignty or other similar grounds from suit, jurisdiction of any court, relief by way of injunction, order for specific performance or for recovery of property, attachment of its assets (whether before or after judgement) and execution or enforcement of any judgement to which it or its revenues or assets might otherwise be entitled in any proceedings in the courts of any jurisdiction and irrevocably agrees that it will not claim any such immunity in any proceedings.

14 Service of Process

Without prejudice to any other mode of service, and subject to its right to change its agent for the purposes of this Clause on 30 days' written notice to the Clearing House, the Firm (other than where it is incorporated in England and Wales or otherwise has an office in England and Wales) appoints, as its agent for service of process relating to any proceedings

before the courts of England and Wales in connection with the Firm the person in London as notified to the Clearing House in writing with the application for admission.

IN WITNESS whereof the parties hereto have caused this Agreement to be signed by their duly authorised representatives the day and year first before written.

(Signature)

(Print Name and Title)

for THE FIRM

(Signature)

(Print Name and Title)

for THE FIRM

(Signature)

(Print Name and Title)

for **LCH LIMITED**

(Signature)

(Print Name and Title)

for **LCH LIMITED**

LCH LIMITED

Aldgate House 33 Aldgate High Street London EC3N 1EA

Tel: +44 (0)20 7426 7000 Fax: +44 (0)20 7426 7001

Internet: <http://www.lch.com>

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LCLTD/TRAIN/CMA-05/05(0.1)

SCHEDULE 2

Deed of Charge

A company whether incorporated in England and Wales or an overseas company.

CHARGE BY CLEARING MEMBER

CHARGE SECURING OWN OBLIGATIONS

Date of Execution:
(to be completed by LCH Limited) _____

Date of Delivery:
(to be completed by LCH Limited) _____

Name and Address of Chargor: _____

Clearing Membership Agreement Date: _____

Chargor's Account: _____

THIS DEED made on the date above-stated **BETWEEN THE ABOVE-NAMED CHARGOR** ("the Chargor") and **LCH LIMITED** ("the Clearing House")

WITNESSES as follows :

1. **Interpretation**

- (1) Any reference herein to:
 - (a) any statute or to any provisions of any statute shall be construed as a reference to any statutory modification or re-enactment thereof and to any regulations or orders made thereunder and from time to time in force; and
 - (b) an agreement or instrument shall be to that agreement or instrument as amended from time to time.
- (2) A reference herein to collateral or cash being "provided" includes the act of (i) transferring, (ii) delivering, or (iii) crediting to an account or effecting, directly or indirectly, any of the foregoing.
- (3) The Clause headings shall not affect the construction hereof.

1A. **The Secured Obligations**

- (1) The Chargor shall pay to the Clearing House all monies (including settlement costs, interest and other charges) which now are or at any time hereafter may be or become due or owing by the Chargor to the Clearing House on the account identified above (or, but only if no account is identified, on all accounts of the Chargor with the Clearing House) and discharge all other liabilities of the Chargor (whether actual or contingent, now existing or hereafter incurred) to the Clearing House on the said account (or, if no account is identified, on all accounts of the Chargor with the Clearing House) in each case when due in accordance with the Clearing Membership Agreement and the Clearing House's Rulebook referred to therein (the Clearing Membership Agreement and the Clearing House's Rulebook as from time to time amended, renewed or supplemented being hereinafter referred to as "**the Agreement**") or, if the Agreement does not specify a time for such payment or discharge, promptly following demand by the Clearing House.
- (2) In the event that the Chargor fails to comply with sub-paragraph (1) above, the Chargor shall pay interest accruing from the date of demand on the monies so demanded and on the amount of all other liabilities at the rate provided for in the Agreement or, in the event of no such rate having been agreed, at a rate determined by the Clearing House (the rate so agreed or determined to apply after as well as before any judgment), such interest to be paid upon demand of the Clearing House in accordance with its usual practices and to be compounded

with principal and accrued interest in the event of its not being duly and punctually paid.

- (3) The monies, other liabilities, interest and other charges referred to in sub-paragraph (1) of this Clause, the interest referred to in sub-paragraph (2) of this Clause and all other monies and liabilities payable or to be discharged by the Chargor under or pursuant to any other provision of this Deed are hereinafter collectively referred to as "**the Secured Obligations**".

1B. **Holding of Collateral**

- (1) The Chargor shall, in accordance with the Procedures, transfer collateral to the Clearing House. Where such collateral takes the form of Securities, the Clearing House shall hold such Securities for the Chargor, subject to the terms of (and including the security constituted by) this Deed.
- (2) From time to time, in accordance with the Procedures and in the context of a transfer of one or more contracts and related cover from one member of the Clearing House to the Chargor at the request of a client of that other member or the Chargor, the Clearing House shall designate that certain Securities which it previously held for a third party are instead held by the Clearing House for the Chargor and form part of the collateral provided by the Chargor in satisfaction of its requirements under the Procedures. Upon such designation, the Clearing House shall hold such Securities for the Chargor, subject to the terms of this Deed.
- (3) The Clearing House will identify in its own books that any Securities referred to in sub-paragraphs (1) or (2) above are held by it for the account of and (as between the Chargor and the Clearing House) belong to the Chargor (subject to the terms of this Deed) and shall be recorded in the Securities Account (as defined below) which shall be subject to the security constituted by this Deed. Where the Clearing House holds any such Securities in an account (including an omnibus account) at any Clearance System or with any Custodian Bank with any other Securities, the Clearing House will take all actions within its control to ensure that such Securities are recorded in accounts with the Clearance System or Custodian Bank (as applicable) in which the Clearing House's own assets are not recorded.
- (4) All Distributions in the form of cash received by the Clearing House on any Securities which are held by the Clearing House for the account of the Chargor in accordance with sub-paragraphs (1) or (2) above and any cash provided to the Clearing House in connection with transactions relating to Securities recorded in the Securities Account (excluding, for the avoidance of doubt, any cash provided directly by the Chargor to the Clearing House as collateral on a title transfer basis) shall be received by the Clearing House for its own account and paid into one or more accounts in the Clearing House's name, with a corresponding and equal

credit arising on and being recorded in the Cash Account (as defined below) whereupon such Distributions and other cash so provided to the Clearing House as recorded in the Cash Account shall be held by the Clearing House for the account of the Chargor and shall be subject to the security constituted by this Deed and designated as such in the Clearing House's books and records.

- (5) The Clearing House may hold any Securities pursuant to this Clause 1B (*Holding of Collateral*) in one or more omnibus accounts with a Custodian Bank or Clearance System, as the case may be, together with other Securities which it holds for other third parties which have granted a charge over such assets in favour of the Clearing House in a form substantially the same as this Deed but no other Securities. The Clearing House shall ensure that any such omnibus account with a Clearance System or Custodian Bank is clearly identified as an account relating to Securities held by the Clearing House on behalf of third parties.
- (6) The Clearing House undertakes to the Chargor that it will at all times ensure that, pursuant to the terms governing any account with any Clearance System or Custodian Bank in which any Securities are held for the Chargor, any claim or security interest which that Clearance System or Custodian Bank may have against or over such Securities shall be limited to any unpaid fees owed by the Clearing House to such Clearance System or Custodian Bank in respect of such account.

2. **Charge**

- (1) The Chargor acting in due capacity (as defined in sub-paragraph (3) below) (and to the intent that the security so constituted shall be a security in favour of the Clearing House extending to all beneficial interests in the assets hereby charged and to any proceeds of sale or other realisation thereof or of any part thereof including any redemption monies paid or payable in respect thereof) hereby separately assigns, charges and pledges by way of first fixed security and by way of continuing security to the Clearing House, until discharged by the Clearing House in accordance with this Deed, for the payment to the Clearing House and the discharge of all the Secured Obligations, the Charged Property.
- (2) It shall be implied in respect of sub-paragraph (1) above that the Chargor is charging the Charged Property free from all charges and encumbrances (whether monetary or not) and from all other rights exercisable by third parties (including liabilities imposed and rights conferred by or under any enactment) except for any charge or lien routinely arising in favour of a Custodian Bank or Clearance System and applying to assets held by the Clearing House with that Custodian Bank or Clearance System and any third party's beneficial interest in the Charged Property which ranks behind the rights of the Clearing House in respect of the Charged Property.

(3) In this Deed:

"acting in due capacity" in relation to the Chargor means that each of the dispositions of property hereby effected by the Chargor is made with full title guarantee in accordance with the Law of Property (Miscellaneous Provisions) Act 1994 except as expressly permitted or contemplated under this Deed;

"Cash Account" means any account maintained by the Clearing House on its books for the account of the Chargor in which an amount equal to any cash Distributions or cash provided to the Clearing House in connection with transactions relating to Securities recorded in the Securities Account (excluding, for the avoidance of doubt, any cash provided directly by the Chargor to the Clearing House as collateral on a title transfer basis) are recorded;

"Charged Property" means at any time all present and future rights, title and interest of the Chargor in and to:

- (i) all Securities from time to time recorded in and represented by the Securities Account and held by the Clearing House for the account of the Chargor in accordance with Clause 1B;
- (ii) all Distributions including without limitation Distributions in the form of cash;
- (iii) all cash provided to the Clearing House in connection with transactions relating to Securities recorded in the Securities Account (excluding, for the avoidance of doubt, any cash provided directly by the Chargor to the Clearing House as collateral on a title transfer basis);
- (iv) the Securities Account; and
- (v) the Cash Account;

"Chargor Custodian Bank" means a bank or custodian or any nominee company or trust company which is a subsidiary of such a bank or custodian with which the Chargor maintains any cash account or securities account;

"Clearance System" shall be construed as a reference to any system from time to time used or constituted for the clearing, collective safe custody or central deposit of securities, and any depository for any of the foregoing;

"Clearing Membership Agreement" means in relation to the Chargor the Clearing Membership Agreement between the Chargor and the Clearing House having the date specified on the first page of this Deed, as such agreement may be amended and or replaced from time to time;

"Custodian Bank" means a bank or custodian or any nominee company or trust company which is a subsidiary of such a bank or custodian with which the Clearing House maintains any cash account or securities account;

"Default Notice" has the meaning given to it in the Default Rules;

"Default Rules" has the meaning given to such term in the Clearing Membership Agreement;

"Deed" means this charge made between the Chargor and the Clearing House on the date above-stated, as the same may be amended, supplemented or restated from time to time;

"Distributions" means all rights, benefits and proceeds including, without limitation:

- (a) any dividends or interest, annual payments or other distributions; and
- (b) any proceeds of redemption, substitution, exchange, bonus or preference, under option rights or otherwise,

in each case attaching to or arising from or in respect of any Securities forming part of the Charged Property;

"Procedures" means the one or more documents containing the working practices and administrative requirements of the Clearing House for the purposes of implementing the Clearing House's Rulebook and Default Rules from time to time in force, or procedures for application for and regulation of clearing membership of the Clearing House;

"Receiver" means a receiver, receiver and manager or an administrative receiver as the Clearing House may specify at any time in the relevant appointment made under this Deed, which term will include any appointee made under a joint and/or several appointment by the Clearing House;

"Securities" shall be construed as a reference to bonds, debentures, notes, stock, shares, bills, certificates of deposit and other securities and instruments, including Distributions in the form of Securities (and without limitation, shall include any of the foregoing not constituted, evidenced or represented by a certificate or other document but by any entry in the books or other records of the issuer, a trustee or other fiduciary thereof, or a Clearance System); and

"Securities Account" means any account maintained by the Clearing House on its books for the account of the Chargor in which Securities are recorded.

3. **Release**

- (1) Upon the Clearing House being satisfied that the Secured Obligations have been irrevocably paid or discharged in full, the Clearing House shall, at the request and cost of the Chargor, release or discharge (as appropriate) all the Charged Property from the security created by this Deed provided that, without prejudice to any remedy which the Chargor may have if the Clearing House fails to comply with its obligations under this Clause, such actions shall be without recourse to, and without any representations or warranties by, the Clearing House or any of its nominees
- (2) The Chargor may, in the circumstances specified in sections 1.1.2 and 1.1.3 of the Procedures Section 4 (*Margin and Collateral*), request that part or all of the Charged Property, or the proceeds thereof, be returned or repaid to, or to the order of, the Chargor. Where, pursuant to such a request, the Clearing House returns or repays any of the Charged Property, or the proceeds thereof, pursuant to sections 1.1.2 or 1.1.3 of the Procedures Section 4 (*Margin and Collateral*), such Charged Property shall be released or discharged (as appropriate) from the security interest created over such Charged Property and the proceeds thereof pursuant to Clause 2(1) with effect from the time such Charged Property, or the proceeds thereof, are transferred by the Clearing House to, or to the order of, the Chargor in accordance with the Procedures.

4. **Income**

Prior to a Default (as defined in Clause 11(1) below), the Clearing House consents to the payment or transfer of any and all Distributions received by the Clearing House in respect of any Charged Property to the Chargor (and upon such payment or transfer, the Distributions shall be released from the security constituted by this Deed) provided that, in the Clearing House's reasonable view, the Clearing House would still have sufficient security, following such payment or transfer, to secure the Secured Obligations.

5. **Voting rights, calls and other obligations in respect of the Securities**

- (1) The Chargor must pay all calls and other payments due and payable in respect of any Securities and must comply with all requests (including requests for information by any listing or other authority), obligations and conditions relating to the Securities. In any case of default by the Chargor in this respect the Clearing House may if it thinks fit make any such payments on behalf of the Chargor (but shall be under no obligation to do so) in which event any sums so paid shall be reimbursed by the Chargor on demand by the Clearing House and until reimbursed shall bear interest in accordance with Clause 1A(2) above.
- (2) The Chargor shall not exercise or be entitled to exercise any voting rights, powers and other rights in respect of the Securities which are held by the Clearing House for the account of the Chargor pursuant to this Deed.

6. **Reinstatement**

If any discharge, release or arrangement is made by the Clearing House in whole or in part on the basis of any payment, security or other disposition which is avoided or must be restored in insolvency, liquidation, administration or otherwise, without limitation, then the liability of the Chargor and the security created by this Deed will continue or be reinstated as if the discharge, release or arrangement had not occurred.

7. **Warranties and Undertakings**

The Chargor hereby represents and warrants to the Clearing House and undertakes on an ongoing basis that:

- (i) the Chargor is duly incorporated or organised and validly existing under the laws of its jurisdiction of organisation or incorporation;
- (ii) the Chargor and each of its subsidiaries has the power to own its assets and carry on its business as it is being conducted;
- (iii) subject to any legal or equitable interest which any common depository, Clearance System or Custodian Bank may have in any Securities and to any third party's beneficial interest in the Charged Property which ranks behind the rights of the Clearing House in respect of the Charged Property, the Chargor is and will at all times during the subsistence of the security and security interest hereby constituted, be the sole and lawful owner of, and be entitled to the entire beneficial interest in, the Charged Property free from mortgages or charges (other than as a result of the security created under this Deed, any charge or lien arising in favour of any Clearance System or Custodian Bank and any charge in favour of the Chargor) or other encumbrances and no other person (save as aforesaid) has any rights or interests therein;
- (iv) save as contemplated by Clause 3(2), the Chargor has not sold or agreed to sell or otherwise disposed of or agreed to dispose of, and will not at any time during the subsistence of the security hereby constituted sell or agree to sell or otherwise dispose of or agree to dispose of, the benefit of all or any rights, titles and interest in and to the Charged Property or any part thereof;
- (v) the Chargor has and will at all material times have the necessary power to enable the Chargor to enter into and perform the obligations expressed to be assumed by the Chargor under this Deed;
- (vi) this Deed constitutes legal, valid, binding and enforceable obligations of the Chargor and is a security over, and confers a first security interest in, the Charged Property and every part thereof, effective in accordance with its terms (subject to applicable bankruptcy, resolution, reorganisation, insolvency, moratorium or

similar laws affecting creditors' rights generally and subject, as to enforceability, to equitable principles of general application (regardless of whether enforcement is sought in a proceeding in equity or at law));

- (vii) all necessary authorisations and filings to enable or entitle the Chargor to enter into this Deed have been obtained and are in full force and effect and will remain in such force and effect at all times during the subsistence of the security hereby constituted;
- (viii) the execution of this Deed does not violate any agreement to which the Chargor is a party or breach any obligation to which the Chargor is subject and does not conflict with any law or regulation applicable to it (if such conflict would adversely affect the Clearing House's rights under this Deed) or its constitutional documents;
- (ix) it has been and shall at all times remain expressly agreed between the Chargor and each of the Chargor's clients or other persons who are for the time being (or would be, but for the provisions of this Deed) entitled to the entire beneficial interest in all or any parts of the Charged Property that, in relation to any assets from time to time held by the Chargor or delivered to the Chargor for the account of any such client or other person which at any time form part of the Charged Property, the Chargor may, free of any interest of any such client or other person therein which is adverse to the Clearing House, charge or otherwise constitute security over such assets in favour of the Clearing House on such terms as the Clearing House may from time to time prescribe and, in particular but without limitation, on terms that the Clearing House may enforce and retain such charge or other security in satisfaction of or pending discharge of all or any obligations of the Chargor to the Clearing House;
- (x) in no case is the Chargor or the Chargor's client or other person who is for the time being the lawful owner of or person entitled to the entire beneficial interest in any part of the Charged Property, nor will the Chargor, client or other such person be, in breach of any trust or other fiduciary duty in placing or authorising the placing of any Charged Property (or rights, benefits or proceeds forming part of the Charged Property) under this Deed;
- (xi) no corporate actions, legal proceedings or other procedure or steps have been taken in relation to, or notice given in respect of, a composition, compromise, assignment or arrangement with any creditor of the Chargor or in relation to the suspension of payments or moratorium of any indebtedness, winding-up, dissolution, administration or reorganisation (by way of voluntary arrangement, scheme of arrangement or otherwise) of, or the appointment of an administrator to, the Chargor (other than any which will be dismissed, discharged, stayed or restrained within 15 days of their instigation) and no such step is intended by the Chargor (save for the purposes of any solvent re-organisation or reconstruction which has previously been approved by the Clearing House);

- (xii) the Chargor undertakes to abide by the Procedures as in effect from time to time.

8. **Negative Pledge**

- (1) The Chargor hereby undertakes with the Clearing House that at no time during the subsistence of the security hereby constituted will the Chargor, otherwise than:

- (i) in favour of the Clearing House; or

- (iii) with the prior written consent of the Clearing House and in accordance with and subject to any conditions which the Clearing House may attach to such consent,

create, grant, extend or, except in relation to any charge or lien in favour of any Clearance System or Custodian Bank, permit to subsist any mortgage or other fixed security or any floating charge or other security interest on, over or in the Charged Property or any part thereof. The foregoing prohibition shall apply not only to mortgages, other fixed securities, floating charges and security interests which rank or purport to rank in point of security in priority to the security hereby constituted but also to any mortgages, securities, floating charges or security interests which rank or purport to rank *pari passu* therewith or thereafter.

- (2) Sub-paragraph (1) above does not, during the subsistence of the security hereby constituted, operate to prevent the Chargor from continuing to hold a security interest in the Charged Property previously created in favour of the Chargor, *provided always* that the interest in favour of the Chargor shall rank after the security created by this Deed.

9. **Preservation of Charged Property**

- (1) Until the security hereby constituted shall have been discharged, the Chargor shall ensure, unless required by law or regulation to restrict any transfer (in which case the Chargor shall immediately notify the Clearing House of such restrictions), that all of the Charged Property is and at all times remains free from any restriction on transfer.

- (2) The Chargor shall not, to the extent that the same is within the control of the Chargor, permit or agree to any variation of the rights attaching to or conferred by the Charged Property or any part thereof without the prior consent of the Clearing House in writing.

- (3) The Clearing House shall not have any right of use or re-hypothecation right, in respect of the Charged Property, whether under Regulation 16 of the Financial

Collateral Arrangements (No.2) Regulations 2003, the New York Uniform Commercial Code or any applicable Federal law of the United States or otherwise, *provided that* this provision shall not affect the powers of the Clearing House under Clauses 12 (*Power of Sale*) and 13 (*Right of Appropriation*) or any other rights to enforce the security interest herein created against the Charged Property.

10. **Further Assurance**

- (1) In the case of any part of the Charged Property situated in the United States of America, it is acknowledged and agreed by the Chargor that this Deed shall also constitute a security agreement for the purpose of creating a security interest in the Charged Property under applicable provisions of the Uniform Commercial Code or other applicable laws or regulations of the State of New York. For purposes hereof, "**Charged Property situated in the United States of America**" means: (i) in the case of any securities account and/or securities entitlements or other rights or assets or investment property credited to a securities account as financial assets, a securities account maintained with a securities intermediary whose jurisdiction is New York or any other State of the United States for purposes of the NY UCC; (ii) in the case of any deposit account and/or any amounts credited to a deposit account, a deposit account maintained with a bank whose jurisdiction is New York or any other State of the United States for purposes of the NY UCC; and (iii) in the case of any commodity account or any commodity contract credited to a commodity account such commodity account is maintained with a commodity intermediary whose jurisdiction is New York or any other State of the United States for purposes of the NY UCC . In furtherance of the foregoing and without limiting the generality of Clause 2 (*Charge*) above, in order to secure the payment, performance and observance of the Secured Obligations, the Chargor hereby grants to the Clearing House a continuing security interest in, right of set-off against, and an assignment to the Clearing House of all of the Charged Property situated in the United States of America and all rights thereto, in each case whether now owned or existing or hereafter acquired or arising and which shall include, without limitation, all of the Chargor's interests in any deposit accounts, investment property and securities entitlements (as such terms are defined in the Uniform Commercial Code of the State of New York; the "**NY UCC**"), together with all proceeds (as defined in the NY UCC) and products of all or any of the property described above.
- (2) The Chargor undertakes promptly to execute and do (at the cost and expense of the Chargor) all such deeds, documents, acts and things as may be necessary or desirable in order for the Clearing House to enjoy a fully perfected security interest in the whole of the Charged Property, including without limitation the deposit of the Charged Property with a Clearance System or Custodian Bank (as applicable) and the perfection of pledges or transfers under such laws, of whatever nation or territory, as may govern the pledging or transfer of the Charged Property or part thereof or other mode of perfection of this Deed and the

security interest expressed to be created hereby. Without limiting the foregoing, the Chargor agrees with and covenants to the Clearing House that with respect to all Charged Property situated in the United States of America consisting of investment property, money, instruments, securities, securities entitlements, other financial assets and commodity contracts (as defined in the NY UCC), such Charged Property shall be held, maintained or deposited, as applicable, in a securities account or commodity account (in the case of commodity contracts) (such that, in each case, the Clearing House shall become the entitlement holder thereof, as defined in the NY UCC) or a deposit account (as defined in the NY UCC), in the case of Charged Property that may be credited to a Deposit Account, in the name of the Clearing House, or, if permitted by the Procedures, may be maintained and held in the Chargor's name at a Chargor Custodian Bank (whose jurisdiction is New York or any other State of the United States for purposes of the NY UCC) which shall have executed and delivered to the Clearing House an agreement whereby such Chargor Custodian Bank agrees that it will comply with entitlement orders of the Clearing House without further consent by the Chargor. Notwithstanding anything to the contrary herein, in respect of any Charged Property situated in the United States of America, the Clearing House shall comply with all non-waivable requirements of the NY UCC with respect to how the secured party must deal with collateral under its control or in its possession.

11. **Enforcement of Security**

(1) On and at any time:

- (i) if a Default Notice is served on the Chargor in accordance with Rule 3 of the Default Rules; or
- (ii) if the Chargor requests the Clearing House to exercise any of its powers under this Deed,

(each such event a "**Default**"), the security created by or pursuant to this Deed is immediately enforceable and the Clearing House may, without notice to the Chargor or prior authorisation from any court, in its absolute discretion:

- (a) enforce all or any part of the security created by this Deed (at the times, in the manner and on the terms it thinks fit) and take possession of (provided that the Clearing House will not be liable, by reason of entering into possession of any Charged Property, to account as mortgagee in possession or for any loss on realisation or for any default or omission for which a mortgagee in possession may be liable unless such loss, default or omission is caused by the Clearing House's gross negligence or wilful misconduct) and hold, sell, or otherwise dispose of all or any part of the Charged Property (at the time, in the manner and on the terms it thinks fit); and

- (b) whether or not it has appointed a Receiver, exercise all or any of the powers, authorisations and discretions conferred by the Law of Property Act 1925 (as varied or extended by this Deed) on chargees and by this Deed on any Receiver or otherwise conferred by law on chargees or Receivers.
- (2) The power of sale and other powers conferred by section 101 of the Law of Property Act 1925 on mortgagees, as varied and extended by this Deed, shall arise (and the Secured Obligations shall be deemed due and payable for that purpose) on the date of this Deed and shall be exercisable in accordance with Clause 11(1).

12. **Power of Sale**

- (1) If a Default has occurred, the Clearing House shall have and be entitled without prior notice to the Chargor to exercise the power to sell or otherwise dispose of, for any consideration (whether payable immediately or by instalments) as the Clearing House shall think fit, the whole or any part of the Charged Property and may (without prejudice to any right which it may have under any other provision hereof) treat such part of the Charged Property as consists of money as if it were the proceeds of such a sale or other disposal. The Clearing House shall be entitled to apply the proceeds of such sale or other disposal in paying the costs of such sale or other disposal and (subject to the rights or claims of any person entitled in priority to the Clearing House) in or towards the discharge of the Secured Obligations, the balance (if any) to be paid to the Chargor or other persons entitled thereto. Such power of sale or other disposal shall operate as a variation and extension of the statutory power of sale under section 101 of the Law of Property Act 1925.
- (2) The restriction contained in section 103 of the Law of Property Act 1925 on the exercise of the statutory power of sale shall not apply to any exercise by the Clearing House of its power of sale or other disposal. In favour of a purchaser a certificate in writing by an officer or agent of the Clearing House that either or both of such powers has arisen and is exercisable shall be conclusive evidence of that fact.
- (3) Upon any such default or failure as aforesaid the Clearing House shall also have with respect to any part of the Charged Property situated in the United States of America all of the rights and remedies of a secured party under the NY UCC or any other applicable law of the State of New York and all rights provided herein or in any other applicable security, loan or other agreement, all of which rights and remedies shall to the full extent permitted by law be cumulative.

13. **Right of Appropriation**

- (1) To the extent that any of the Charged Property constitutes "financial collateral" and this Deed and the obligations of the Chargor hereunder constitute a "security financial

collateral arrangement" (in each case as defined in, and for the purposes of, the Financial Collateral Arrangements (No. 2) Regulations 2003 (SI 2003 No. 3226), as amended, (the "**Regulations**") the Clearing House shall have the right (at any time following the occurrence of a Default) to appropriate all or any part of such financial collateral in or towards discharge of the Secured Obligations and may exercise such right to appropriate upon giving written notice to the Chargor. For this purpose, the parties agree that the value of such financial collateral so appropriated shall be determined as follows:

- (a) if the financial collateral is listed or traded on a recognised exchange or by reference to a public index, its value will be taken as the value at which it could have been sold on the exchange or which is given in the public index on the date of appropriation; and
 - (b) in any other case, the value of the financial collateral will be such amount as the Clearing House reasonably determines having taken into account advice obtained by it from an independent investment or accountancy firm of national standing selected by it.
- (2) The parties agree that the method of valuation provided for in this Deed shall constitute a commercially reasonable method of valuation for the purposes of the Regulations.

14. **Immediate Recourse**

The Chargor waives any right it may have of first requiring the Clearing House to proceed against or enforce any other rights or security or claim payment from any person before claiming from the Chargor under this Deed. This waiver applies irrespective of any law or any provision of this Deed to the contrary.

15. **Consolidation of Securities**

Subsection (1) of section 93 of the Law of Property Act 1925 shall not apply to this Deed.

16. **Effectiveness of Security**

- (1) This Deed shall be in addition to and shall be independent of every other security which the Clearing House may at any time hold for any of the Secured Obligations. No prior security held by the Clearing House over the whole or any part of the Charged Property shall merge into the security hereby constituted.
- (2) This Deed shall remain in full force and effect as a continuing security unless and until the Clearing House discharges it.
- (3) Nothing contained in this Deed is intended to, or shall operate so as to, prejudice or affect any bill, note, guarantee, mortgage, pledge, charge or other security of any kind whatsoever which the Clearing House may have for the Secured Obligations of any of them or any right, remedy or privilege of the Clearing House

thereunder.

17. **Avoidance of Payments**

If the Clearing House considers that any payment or discharge of the Secured Obligations is capable of being avoided or reduced by virtue of any bankruptcy, insolvency, liquidation or similar laws then such payment or discharge shall not be considered to have been made for the purposes of determining whether the Secured Obligations have been irrevocably paid or discharged in full.

18. **Power of Attorney**

The Chargor hereby irrevocably appoints the Clearing House to be the Chargor's attorney and in the Chargor's name and on the Chargor's behalf and as the act and deed of the Chargor to sign, seal, execute, deliver, perfect and do all deeds, instruments, mortgages, acts and things as may be, or as the Clearing House may consider to be, requisite for carrying out any obligation imposed on the Chargor under Clause 10 (*Further Assurance*) above, or for enabling the Clearing House to exercise its power of sale or other disposal referred to in Clause 12 (*Power of Sale*) above or for carrying out any such sale or other disposal made under such power into effect, or exercising any of the rights and powers referred to in Clause 9 (*Preservation of Charged Property*) above, including without limitation the appointment of any person as a proxy of the Chargor. The Chargor hereby undertakes to ratify and confirm all things done and documents executed by the Clearing House in the exercise of the power of attorney conferred by this Clause.

19. **Receivers and Administrators**

- (1) At any time after having been requested to do so by the Chargor or after this Deed becomes enforceable in accordance with Clause 11 (*Enforcement of Security*) above the Clearing House may by deed or otherwise (acting through an authorised officer of the Clearing House), without prior notice to the Chargor:
 - (a) appoint one or more persons to be a Receiver of the whole or any part of the Charged Property;
 - (b) appoint one or more Receivers of separate parts of the Charged Property respectively;
 - (c) remove (so far as it is lawfully able) any Receiver so appointed; and
 - (d) appoint another person(s) as an additional or replacement Receiver(s).
- (2) Each person appointed to be a Receiver pursuant to sub-paragraph (1) above will be:
 - (a) entitled to act individually or together with any other person appointed or

substituted as Receiver;

- (b) for all purposes deemed to be the agent of the Chargor which shall be solely responsible for his acts, defaults and liabilities and for the payment of his remuneration and no Receiver shall at any time act as agent for the Clearing House; and
 - (c) entitled to remuneration for his services at a rate to be fixed by the Clearing House from time to time (without being limited to the maximum rate specified by law including the Law of Property Act 1925).
- (3) The powers of appointment of a Receiver shall be in addition to all statutory and other powers of appointment of the Clearing House under the Law of Property Act 1925 (as extended by this Deed) or otherwise and such powers shall remain exercisable from time to time by the Clearing House in respect of any part of the Charged Property.
- (4) Every Receiver shall (subject to any restrictions in the instrument appointing him but notwithstanding any winding-up or dissolution of the Chargor) have and be entitled to exercise, in relation to the Charged Property in respect of which he was appointed, and as varied and extended by the provisions of this Deed (in the name of or on behalf of the Chargor or in his own name and, in each case, at the cost of the Chargor):
- (a) all the powers conferred by the Law of Property Act 1925 on mortgagors and on mortgagees in possession and on receivers appointed under that Act;
 - (b) all the powers of an administrative receiver set out in Schedule 1 to the Insolvency Act 1986 (whether or not the Receiver is an administrative receiver);
 - (c) all the powers and rights of an absolute owner and power to do or omit to do anything which the Chargor itself could do or omit to do;
 - (d) the power to delegate (either generally or specifically) the powers, authorities and discretions conferred on it by this Deed (including the power of attorney) on such terms and conditions as it shall see fit. Such delegation shall not preclude either the subsequent exercise or any subsequent delegation or any revocation of such power, authority or discretion by the Receiver itself; and
 - (e) the power to do all things (including bringing or defending proceedings in the name or on behalf of the Chargor) which seem to the Receiver to be incidental or conducive to:

- (i) any of the functions, powers, authorities or discretions conferred on or vested in him;
 - (ii) the exercise of any rights, powers and remedies of the Clearing House provided by or pursuant to this Deed or by law (including realisation of all or any part of the Charged Property); or
 - (iii) bringing to his hands any assets of the Chargor forming part of, or which when got in would be, Charged Property.
- (5) The receipt of the Clearing House or any Receiver shall be a conclusive discharge to a purchaser and, in making any sale or disposal of any of the Charged Property or making any acquisition, the Clearing House or any Receiver may do so for such consideration, in such manner and on such terms as it thinks fit.
- (6) No purchaser or other person dealing with the Clearing House or any Receiver shall be bound to inquire whether the right of the Clearing House or such Receiver to exercise any of its powers has arisen or become exercisable or be concerned with any propriety or regularity on the part of the Clearing House or such Receiver in such dealings.
- (7) Any liberty or power which may be exercised or any determination which may be made under this Deed by the Clearing House or any Receiver may be exercised or made in its absolute and unfettered discretion without any obligation to give reasons.

20. **No liability**

Neither the Clearing House nor any receiver appointed pursuant to this Deed shall be liable by reason of: (a) taking any action permitted by this Deed; or (b) any neglect or default in connection with the Charged Property; or (c) the taking possession or realisation of all or any part of the Charged Property, except in the case of gross negligence or wilful default upon its part.

21. **Remedies, Time or Indulgence**

- (1) The rights, powers and remedies provided by this Deed are cumulative and are not, nor are they to be construed as, exclusive of any right of set-off or other rights, powers and remedies provided by law.
- (2) The obligations of the Chargor under this Deed shall not be affected by any act, omission or circumstance which, but for this provision, might operate to release or otherwise exonerate the Chargor from its obligations under this Deed or affect

such obligations including (without limitation and whether or not known to the Chargor or the Clearing House):

- (a) any unenforceability, illegality, invalidity or non-provability of any obligation of the Chargor or any other person; or
 - (b) any incapacity or lack of power, authority or legal personality or dissolution or change in the members or status of the Chargor or any other person.
- (3) No failure on the part of the Clearing House to exercise, or delay on its part in exercising, any of the rights, powers and remedies provided by this Deed or by law (collectively "**the Clearing House's Rights**") shall operate as a waiver thereof, nor shall any single or partial waiver of any of the Clearing House's Rights preclude any further or other exercise of that or any other of the Clearing House's Rights.
- (4) The Clearing House may in its discretion grant time or other indulgence or make any other arrangement, variation or release with any person not party hereto (irrespective of whether such person is liable with the Chargor) in respect of the Secured Obligations or in any way affecting or concerning them or any of them or in respect of any security for the Secured Obligations or any of them, without in any such case prejudicing, affecting or impairing the security hereby constituted, or any of the Clearing House's Rights or the exercise of the same, or any indebtedness or other liability of the Chargor to the Clearing House.

22. **Costs, Charges and Expenses**

All costs, charges and expenses of the Clearing House incurred in the exercise of any of the Clearing House's Rights, or in connection with the execution of or otherwise in relation to this Deed or in connection with the perfection or enforcement of all security hereby constituted shall be reimbursed to the Clearing House by the Chargor on demand on a full indemnity basis together with interest from the date of the same having been incurred to the date of payment at the rate referred to in Clause 1A(2) above.

23. **Accounts**

All monies received, recovered or realised by the Clearing House under this Deed (including the proceeds of any conversion of currency) may in the discretion of the Clearing House be credited to any suspense or impersonal account and may be held in such account for so long as the Clearing House shall think fit (with interest accruing thereon at such rate, if any, as the Clearing House may deem fit) pending their application from time to time (as the Clearing House shall be entitled to do in its discretion) in or towards the discharge of any of the Secured Obligations.

24. **Currency**

- (1) For the purpose of or pending the discharge of any of the Secured Obligations the Clearing House may convert any monies received, recovered or realised or subject to application by the Clearing House under this Deed (including the proceeds of any previous conversion under this Clause) from their existing currency of denomination into such other currency of denomination as the Clearing House may think fit, and any such conversion shall be effected at such commercial spot selling rate of exchange then prevailing for such other currency against the existing currency as the Clearing House may in its discretion determine.
- (2) References herein to any currency extend to any funds of that currency and for the avoidance of doubt funds of one currency may be converted into different funds of the same currency.

25. **Notices**

- (1) Any notice or demand (including any Default Notice) requiring to be served on the Chargor by the Clearing House hereunder may be served on any of the officers of the Chargor personally, or by letter addressed to the Chargor or to any of its officers and left at its registered office or any one of its principal places of business, or by posting the same by letter addressed in any such manner as aforesaid to such registered office or any such principal place of business.
- (2) Any notice or demand (including any Default Notice) sent by post in accordance with sub-paragraph (1) of this Clause shall be deemed to have been served on the Chargor at 10 a.m. Greenwich Mean Time on the business day next following the date of posting. In proving such service by post it shall be sufficient to show that the letter containing the notice or demand (including any Default Notice) was properly addressed and posted and such proof of service shall be effective notwithstanding that the letter was in fact not delivered or was returned undelivered.

26. **Provisions Severable**

Each of the provisions contained in this Deed shall be severable and distinct from one another and if at any time any one or more of such provisions is or becomes invalid, illegal or unenforceable, the validity, legality and enforceability of each of the remaining provisions of this Deed shall not in any way be affected, prejudiced or impaired thereby.

27. **Clearing House's Discretions**

Any liberty or power which may be exercised or any determination which may be made hereunder by the Clearing House may (save where stated to the contrary) be exercised or made in the absolute and unfettered discretion of the Clearing House which shall not

be under any obligation to give reasons thereof.

28. **Third Party Rights**

A person who is not a party to this Deed has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce or to enjoy the benefit of any term of this Deed.

29. **Law and Jurisdiction**

This Deed, and any non-contractual obligations arising herefrom, shall be governed by and construed in accordance with English law, and the Chargor hereby irrevocably submits to the non-exclusive jurisdiction of the English courts; provided that with respect to issues arising as a result of the provisions of Clause 10(1) above or the use of this Deed as a security agreement as provided therein, this Deed shall be governed by and construed in accordance with applicable laws of the State of New York.

The Chargor

Executed as a **DEED** by

The Chargor

[CHARGOR NAME]

.....
Signature of Director

.....
Name of Director

.....
Date

.....
Signature of Director/Secretary

.....
Name of Director/Secretary

.....
Date

The Clearing House

LCH Limited

.....
Signature of Authorised Signatory

.....
Name of Authorised Signatory

.....
Title of Authorised Signatory

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Date

.....
Signature of Authorised Signatory

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Name of Authorised Signatory

.....
Title of Authorised Signatory

.....
Date

Dated _____

and

LCH LIMITED

**CHARGE BY CLEARING MEMBER
SECURING OWN OBLIGATIONS**
