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25 January 2006

**Prudential Policy Department
Monetary Authority of Singapore
10 Shenton Way, MAS Building
Singapore 079117**

Ladies and Gentlemen:

Re: Consultation Paper on Recognition of Bilateral Netting for Capital Adequacy Purposes

The International Swaps and Derivatives Association, Inc. ("ISDA") is pleased to have the opportunity to offer comments on the Consultation Paper (P015-2005) on Recognition of Bilateral Netting for Capital Adequacy Purposes, regarding a draft of MAS Notice 638 (the "Consultation Paper") of the Monetary Authority of Singapore ("MAS").

ISDA is an international financial trade association whose membership includes more than 670 of the world's largest commercial, merchant and investment banks, corporations, government entities and other institutions from 50 jurisdictions on six continents. Its members are the leading participants in the privately negotiated, or over-the-counter ("OTC"), derivatives industry. ISDA is committed to promoting the development of sound risk management practices. Its work includes efforts to ensure adequate legal and regulatory treatment of OTC derivatives transactions. In particular, ISDA has worked with regulators in jurisdictions around the world to promote the legal enforceability of the close-out netting mechanism in the ISDA Master Agreement, which is the leading standard form documentation for OTC derivatives transactions worldwide.

ISDA's work in this area is based on substantial experience. For example, since 1987, ISDA has been involved in collecting legal opinions on close-out netting in many jurisdictions. At present, ISDA has received advice from leading counsel in 48 countries on the enforceability of the early termination and close-out netting provisions of the ISDA Master Agreement for many types of insolvent counterparties. The jurisdictions covered by ISDA's Netting Opinions are set forth in Appendix A. Each ISDA Netting Opinion addresses netting with regard to specified types of counterparties across a broad range of transactions, as described in Appendix B. As MAS is authorized to use netalytics, the on-line subscription tool which analyzes key issues covered by ISDA's netting opinions, MAS will be aware of the scope of the netting opinions obtained by ISDA, the frequency with which they are updated and the high standards to which they adhere.

As MAS no doubt appreciates, close-out netting is a very important credit risk management tool that is at the heart of the ISDA Master Agreement. The Basel Committee on Banking Supervision (the "Basel Committee") recognized close-out netting for capital purposes for OTC derivatives transactions in the April 1995 Amendment to the 1988 Basel Capital Accord. In July 2005 the Basel Committee took the further step of recognizing cross-product netting across OTC derivatives transactions and securities financing transactions such as repurchase agreements, reverse repurchase agreements, securities lending and borrowing transactions and margin lending transactions. The cross-product netting rules are included in "The Application of Basel II to Trading Activities and the Treatment of Double Default Effects" published by the Basel Committee in July 2005. In each case banks may recognize close-out netting for capital purposes if they meet certain legal opinion and systems requirements. ISDA's netting opinions

have been prepared in order to satisfy the Basel Committee's legal opinion requirements. These legal opinions cover both OTC derivatives transactions and certain important types of securities financing transactions. While ISDA understands that MAS may wish to take its own approach to certain aspects of the recognition of close-out netting for capital purposes, ISDA hopes that MAS will follow the legal opinion and systems requirements established by the Basel Committee in 1995 and 2005 wherever it makes sense in the view of MAS.

Summary of Comments

We offer comments of several types. Certain of our comments are intended to assist MAS in publishing a Notice that preserves a simplicity and generality of requirements that will facilitate gathering opinions from many jurisdictions. Other comments focus on opinion requirements that may be inconsistent with typical counsel's responsibilities, inappropriate to generic opinions on form agreements or inconsistent with requirements of some other important regulatory capital regimes. Lastly, we have provided drafting comments intended to clarify particular points.

We hope our comments will be helpful in fashioning a Notice both protective of the regulatory interests of MAS and consistent with requirements imposed in other major commercial jurisdictions.

All capitalized terms which are not defined herein are to be defined as in the manner of and consistent with use of such terms in the Consultation Paper.

Comments

1. Paragraph 2.1

The list of transactions covered by the ISDA Netting Opinions, as set forth in Appendix B, is much longer than the list in paragraph 2.1 of the Consultation Paper. We believe a more expansive list of transactions is appropriate and would hope to see a revised paragraph 2.1 encompassing the full list of types of Transactions in Appendix B.

ISDA periodically updates the list of transactions covered by the ISDA Netting Opinions to reflect developments in derivatives activities. ISDA hopes that MAS anticipates similar flexibility in adding to the list of transactions specified in paragraph 2.1.

2. Paragraph 3.1

In paragraph 3.1(a) replace "contract" or "contracts" each time it appears with "transaction" or "transactions", as appropriate.

We suggest that the definition of "bilateral netting" contained in paragraph 3.1(b) be revised to read as follows:

"close-out netting, designed to apply where some or all of the outstanding transactions between the counterparties that are subject to the netting agreement are terminated due to the default of either counterparty or the occurrence of a termination event (however described), whereupon the values of such transactions are combined and reduced to a single payable sum."

The suggested changes reflect agreements that may use both "early termination" and "default" terminology and correspond more precisely to the way many master agreements function.

3. Paragraph 4.1(a)

We suggest including "under such netting agreement or other contract or other agreement" prior to the open parentheses in the last line thereof. This change makes it clear that the term "net creditor" is intended to refer to the relative position of the parties under the Netting Agreement only and not to either counterparty's financial status outside of the Netting Agreement.

4. Paragraph 4.1(b)

It would be helpful if MAS could more specifically describe what the term "independent" is meant to mean in this paragraph. Does this require that only outside counsel may provide these opinions? This is not a requirement of the Basel Committee.

While all of ISDA's netting opinions are prepared by outside counsel, the use of internal counsel may be appropriate when the legal function is independent of the business unit directly involved in the transactions. See also paragraph 5.6.

We suggest removing the requirement that a Singapore law opinion be provided unless Singapore is otherwise deemed a relevant jurisdiction pursuant to paragraph 4.1(b)(i), (ii), (iv) or (v). The ISDA netting opinions would not satisfy paragraph 4.1(b)(iii), and this is not a Basel Committee requirement.

We suggest combining 4.1(b)(iv) and (v) to read:

"the jurisdiction whose law governs the Netting Agreement or any other contract necessary to effect netting and, if different, the jurisdiction whose law governs any Transaction subject to the Netting Agreement."

5. Paragraph 4.2

Please see our comments on paragraph 5.6 below with respect to updates. In particular, the annual statement requirement in paragraph 4.2(a) seems unduly burdensome.

6. Paragraph 5.1

We suggest inserting "form of" before the word "Netting" in the second line of paragraphs 5.1(a) and (b).

7. Paragraph 5.2

"Transactions" at the end of the second line should be "Netting Agreement, including". The words "or the Reporting Bank" should be removed from the third and fourth lines of the paragraph. In our experience, capital rules generally are related to counterparty risk, not the Reporting Bank's risk of failure. The word "Transaction" in the fifth line should be plural.

8. Paragraph 5.3(a)

We would urge MAS to be less prescriptive in the details of legal opinions, especially with respect to generic opinions on forms of Netting Agreements. The salient details of an opinion will follow from the law of the opinion jurisdiction and from the opinion standards to which counsel is subject, once the fundamental inquiry is established (as described in earlier paragraphs of the Consultation Paper). More detailed requirements may lead to inefficient investigations of local law or to opinion counsel taking less initiative than appropriate as a result of relying on detailed requirements. We refer you to the

ISDA netting opinion questionnaire (attached as Appendix C), which has evoked information with respect to many of the issues referenced in paragraph 5.3 in jurisdictions where relevant, but which has allowed counsel discretion to raise issues in a jurisdictionally-appropriate way.

For example, we would regard paragraphs 5.3(a) and (b) as formalistic. Counsel to ISDA in various jurisdictions invariably review Netting Agreements as a whole and generally would point out any invalidity of the Netting Agreement that might jeopardize the overall enforcement of close-out netting. That said, it would be difficult for counsel to speak meaningfully to a broad concern that one, or an aggregation of several, hypothetical sub-enforceabilities might result in interference with the enforcement of netting (or of the Netting Agreement in other salient respects).

We would agree that paragraph 5.3(c) is a useful minimum statement with respect to breadth of coverage. Similarly, although we would regard paragraphs 5.3(f) and (i) as worthy subjects of consistent counsel attention, we would regard paragraphs 5.3(d), (e) and (g) as appropriately left to counsel's discretion in view of applicable law. We would think that paragraph 5.3(h) requires counsel to address matters beyond their competence. Paragraph 5.3(j) is broad and requires counsel to speculate as to relevant facts. Finally, paragraph 5.3(k) cannot be addressed by the writer of a generic opinion on a standard form agreement, unless specific additional clauses are presented for review.

9. Paragraph 5.4

Insert the words "of obvious purpose or" before "adequately" in the seventh line and before "adequately" in the eighth line thereof. There are a number of assumptions made in ISDA's netting opinions that do not merit explanation.

10. Paragraph 5.5

We question whether the reference to "conflict of laws" is appropriate, given the multiple jurisdiction analysis required pursuant to paragraph 4.1(b). Accordingly, we suggest deleting the phrase that starts with "considering the potential for conflicts of laws . . ." at the end of paragraph 5.5.

11. Paragraph 5.6

It should be noted that other capital adequacy regulatory regimes impose less rigid requirements with respect to updates. For example, the April 1995 Amendment to the 1988 Basel Capital Accord requires "procedures in place to ensure that the legal characteristics of netting arrangements are kept under review in the light of possible changes in relevant law". ISDA's netting opinions are in fact updated on an annual basis but the annual update of each opinion is not always completed within 12 months of the previous update. Consequently, we believe that a more flexible update requirement is appropriate.

12. Paragraph 5.8

Paragraph 5.8 creates a negative reporting responsibility that goes beyond both duties relevant to an affirmative netting position and the requirements of the Basel Accord. This requirement may be overly broad and unduly burdensome.

13. Paragraph 5.9

Paragraph 5.9 appears to be far reaching. ISDA believes that paragraph 5.9 should be limited to a counterparty's home or host supervisor. In the alternative, if there is a concern raised by the supervisor of one branch of a bank, the impact on netting for capital purposes should be limited to transactions entered into through that branch. This is what we understand to be the import of paragraph 5.7. If that is not correct, please clarify paragraph 5.7 also.

14. Paragraph 6.2

The requirements in paragraph 6.2 are overly detailed. For example, why does paragraph 6.2(a) require that certain transactions be "segregated"? A general requirement of adequate systems and controls should be sufficient.

In particular, we suggest deletion of "and the bases of the expertise" at the end of paragraph 6.2(d)(iii). Each Reporting Bank should not need to document separately the qualifications of ISDA's counsel in 48 jurisdictions.

15. Paragraph 7.1(b)

It would be helpful for MAS to include in the Notice any particular terms and conditions that MAS would apply if a Reporting Bank proposes to use an aggregate NGR rather than separate NGRs for each counterparty.

Thank you for the opportunity to comment. We would be pleased to provide any additional information you might require and answer any questions you might have. Please address any questions or requests to Ms Angela Papesch in Singapore on 6538 3879 or Ms Kimberly Summe in New York on +1 212 901 6030.

Yours faithfully

**For the International Swaps
and Derivatives Association, Inc.**



**Kimberly Summe
General Counsel, ISDA**



**Angela Papesch
Director of Policy and Head of Asia-Pacific Office**

APPENDIX A

Jurisdictions Covered by ISDA's Netting Opinions

1. Australia
2. Austria
3. Barbados
4. Bahamas
5. Belgium
6. Bermuda
7. Brazil
8. British Virgin Islands
9. Canada
10. Cayman Islands
11. Channel Islands (Guernsey)
12. Channel Islands (Jersey)
13. Czech Republic
14. Denmark
15. England
16. Finland
17. France
18. Germany
19. Greece
20. Hong Kong
21. Hungary
22. Iceland
23. India
24. Indonesia
25. Ireland
26. Italy
27. Japan
28. Luxembourg
29. Malaysia
30. Mexico
31. The Netherlands
32. Netherlands Antilles
33. New Zealand
34. Norway
35. Philippines
36. Poland
37. Portugal
38. Scotland
39. Singapore
40. South Africa
41. South Korea
42. Spain
43. Sweden
44. Switzerland
45. Taiwan
46. Thailand
47. Turkey
48. United States

APPENDIX BCertain Derivative Transactions Addressed By ISDA Netting Opinions

Basis Swap. A transaction in which one party pays periodic amounts of a given currency based on a floating rate and the other party pays periodic amounts of the same currency based on another floating rate, with both rates reset periodically; all calculations are based on a notional amount of the given currency.

Bond Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a bond of an issuer, such as Kingdom of Sweden or Unilever N.V., at a specified strike price. The bond option can be settled by physical delivery of the bonds in exchange for the strike price or may be cash settled based on the difference between the market price of the bonds on the exercise date and the strike price.

Bullion Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified number of ounces of Bullion at a specified strike price. The option may be settled by physical delivery of Bullion in exchange for the strike price or may be cash settled based on the difference between the market price of Bullion on the exercise date and the strike price.

Bullion Swap. A transaction in which one party pays periodic amounts of a given currency based on a fixed price or a fixed rate and the other party pays periodic amounts of the same currency or a different currency calculated by reference to a Bullion reference price (for example Gold-COMEX on the New York Commodity Exchange) or another method specified by the parties. Bullion swaps include cap, collar, or floor transactions in respect of Bullion.

Bullion Trade. A transaction in which one party agrees to buy from or sell to the other party a specified number of Ounces of Bullion at a specified price for settlement either on a "spot" or two-day basis or on a specified future date. A Bullion Trade may be settled by physical delivery of Bullion in exchange for a specified price or may be cash settled based on the difference between the market price of Bullion on the settlement date and the specified price.

For purposes of Bullion Trades, Bullion Options and Bullion Swaps, "Bullion" means gold, silver, platinum or palladium and "Ounce" means, in the case of gold, a fine troy ounce, and in the case of silver, platinum and palladium, a troy ounce.

Buy/Sell-Back Transaction. A transaction in which one party purchases a security (in consideration for a cash payment) and agrees to sell back that security to the other party (in consideration for the original cash payment plus a premium).

Cap Transaction. A transaction in which one party pays a single or periodic fixed amount and the other party pays periodic amounts of the same currency based on the excess, if any, of a specified floating rate (in the case of an interest rate cap) or commodity price (in the case of a commodity cap) in each case that is reset periodically over a specified per annum rate (in the case of an interest rate cap) or commodity price (in the case of a commodity cap).

Collar Transaction. A collar is a combination of a cap and a floor where one party is the floating rate or floating commodity price payer on the cap and the other party is the floating rate or floating commodity price payer on the floor.

Commodity Forward. A transaction in which one party agrees to purchase a specified quantity of a commodity at a future date at an agreed price and the other party agrees to pay a price for the same quantity to be set on a specified date in the future. The payment calculation is based on the quantity of the commodity and is settled based, among other things, on the difference between the agreed forward price and the prevailing market price at the time of settlement.

Commodity Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified quantity of a commodity at a specified strike price. The option can be settled either by physically delivering the quantity of the commodity in exchange for the strike price or by cash settling the option, in which case the seller of the option would pay to the buyer the difference between the market price of that quantity of the commodity on the exercise date and the strike price.

Commodity Swap. A transaction in which one party pays periodic amounts of a given currency based on a fixed price and the other party pays periodic amounts of the same currency based on the price of a commodity, such as natural gas or gold, or a futures contract on a commodity (e.g., Light Sweet Crude Oil on the New York Mercantile Exchange); all calculations are based on a notional quantity of the commodity.

Credit Protection Transaction.¹ A transaction in which one party pays either a single fixed amount or periodic fixed amounts or floating amounts determined by reference to a specified notional amount, and the other party (the credit protection seller) pays either a fixed amount or an amount determined by reference to the value of one or more loans, debt securities or other financial instruments (each a "Reference Obligation") issued, guaranteed or otherwise entered into by a third party (the "Reference Entity") upon the occurrence of one or more specified credit events with respect to the Reference Entity (e.g., bankruptcy or payment default). The amount payable by the credit protection seller is typically determined based upon the market value of one or more debt securities or other debt instruments issued, guaranteed or otherwise entered into by the Reference Entity. Credit protection transactions may also be physically settled by payment of a specified fixed amount by one party against delivery of specified Reference Obligations by the other party. A credit protection transaction may also refer to a "basket" of two or more Reference Entities.

Credit Spread Transaction. A transaction involving either a forward or an option where the value of the transaction is calculated based on the credit spread implicit in the price of the underlying instrument.

Cross-Currency Rate Swap. A transaction in which one party pays periodic amounts in one currency based on a specified fixed rate (or a floating rate that is reset periodically) and the other party pays periodic amounts in another currency based on a floating rate that is reset periodically. All calculations are determined on predetermined notional amounts of the two currencies; often such swaps will involve initial and or final exchanges of amounts corresponding to the notional amounts.

Currency Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified amount of a given currency at a specified strike price.

Currency Swap. A transaction in which one party pays fixed periodic amounts of one currency and the other party pays fixed periodic amounts of another currency. Payments are calculated on a notional amount. Such swaps may involve initial and or final payments that correspond to the notional amount.

Equity Forward. A transaction in which one party agrees to pay an agreed price for a specified quantity of shares of an issuer, a basket of shares of several issuers or an equity index at a future date and the other party agrees to pay a price for the same quantity of shares of an issuer to be set on a specified date in the

¹ Some market participants may refer to credit protection transactions as credit swaps, credit default swaps or credit default options.

future. The payment calculation is based on the number of shares and can be physically-settled (where delivery occurs in exchange for payment) or cash-settled (where settlement occurs based on the difference between the agreed forward price and the prevailing market price at the time of settlement).

Equity Index Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to receive a payment equal to the amount by which an equity index either exceeds (in the case of a call) or is less than (in the case of a put) a specified strike price.

Equity Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) shares of an issuer or a basket of shares of several issuers at a specified strike price. The share option may be settled by physical delivery of the shares in exchange for the strike price or may be cash settled based on the difference between the market price of the shares on the exercise date and the strike price.

Equity Swap. A transaction in which one party pays periodic amounts of a given currency based on a fixed price or a fixed rate and the other party pays periodic amounts of the same currency or a different currency based on the performance of a share of an issuer, a basket of shares of several issuers or an equity index, such as the Standard and Poor's 500 Index.

EU Emissions Allowance Transaction. A transaction in which one party agrees to purchase a specified quantity of emissions allowances at a future date at an agreed price and the other party agrees to deliver that quantity of emissions allowances for that agreed price.

Floor Transaction. A transaction in which one party pays a single or periodic amount and the other party pays periodic amounts of the same currency based on the excess, if any, of a specified per annum rate (in the case of an interest rate floor) or commodity price (in the case of a commodity floor) over a specified floating rate (in the case of an interest rate floor) or commodity price (in the case of a commodity floor).

Foreign Exchange Transaction. A transaction providing for the purchase of one currency with another currency providing for settlement either on a "spot" or two-day basis or a specified future date.

Forward Rate Transaction. A transaction in which one party agrees to pay a fixed rate for a defined period and the other party agrees to pay a rate to be set on a specified date in the future. The payment calculation is based on a notional amount and is settled based, among other things, on the difference between the agreed forward rate and the prevailing market rate at the time of settlement.

Freight Transaction. A transaction in which one party pays an amount or periodic amounts of a given currency based on a fixed price and the other party pays an amount or periodic amounts of the same currency based on the price of chartering a ship to transport wet or dry freight from one port to another; all calculations are based either on a notional quantity of freight or, in the case of time charter transactions, on a notional number of days.

Inflation Transaction. A transaction in which one party pays an amount or periodic amounts of a given currency by reference to interest rates or other factors and the other party pays an amount or periodic amounts of a currency based on a specified rate of inflation.

Interest Rate Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to receive a payment equal to the amount by which an interest rate either exceeds (in the case of a call option) or is less than (in the case of a put option) a specified strike rate.

Interest Rate Swap. A transaction in which one party pays periodic amounts of a given currency based on a specified fixed rate and the other party pays periodic amounts of the same currency based on a specified

floating rate that is reset periodically, such as the London inter-bank offered rate; all calculations are based on a notional amount of the given currency.

Physical Commodity Transaction. A transaction which provides for the purchase of an amount of a commodity, such as coal, electricity or gas, at a fixed or floating price for actual delivery on one or more dates.

Repurchase Transaction. A transaction in which one party agrees to sell securities to the other party and such party has the right to repurchase those securities from such other party at a future date.

Securities Lending Transaction. A transaction in which one party transfers securities to a party acting as the borrower in exchange for a payment or a series of payments from the borrower and the borrower's obligation to replace the securities at a defined date with identical securities.

Swap Option. A transaction in which one party grants to the other party the right (in consideration for a premium payment), but not the obligation, to enter into a swap with certain specified terms. In some cases the swap option may be settled with a cash payment equal to the market value of the underlying swap at the time of the exercise.

Total Return Swap. A transaction in which one party pays either a single amount or periodic amounts based on the total return on one or more loans, debt securities or other financial instruments (each a "Reference Obligation") issued, guaranteed or otherwise entered into by a third party (the "Reference Entity"), calculated by reference to interest, dividend and fee payments and any appreciation in the market value of each Reference Obligation, and the other party pays either a single amount or periodic amounts determined by reference to a specified notional amount and any depreciation in the market value of each Reference Obligation.

A total return swap may (but need not) provide for acceleration of its termination date upon the occurrence of one or more specified events with respect to a Reference Entity or a Reference Obligation with a termination payment made by one party to the other calculated by reference to the value of the Reference Obligation.

Weather Index Transaction. A transaction, structured in the form of a swap, cap, collar, floor, option or some combination thereof, between two parties in which the underlying value of the transaction is based on a rate or index pertaining to weather conditions, which may include measurements of heating, cooling, precipitation and wind.

APPENDIX C

[insert date]

THE ISDA MASTER AGREEMENTS**ENFORCEABILITY OF CLOSE-OUT NETTING
REQUEST FOR NEW ADVICE**

[insert counsel details]

Dear [insert name]:

On behalf of the International Swaps and Derivatives Association, Inc. (“ISDA”), I write this letter to request your advice on certain issues with respect to the enforceability of the termination, bilateral close-out netting and multibranch netting provisions of the 1992 and 2002 ISDA Master Agreements.

We would like you to provide a legal opinion to address the enforceability of the termination, bilateral close-out netting and multibranch netting provisions of the 1992 ISDA Master Agreements² and the 2002 ISDA Master Agreement (collectively, the “ISDA Master Agreements”). The 1992 ISDA Master Agreements are attached as Annex A and the 2002 ISDA Master Agreement is attached as Annex B. A copy of the 2002 ISDA Master Agreement, marked to show changes from the 1992 ISDA Master Agreement (Multicurrency – Cross Border), is attached as Annex C. We would not, however, expect that the substance of the your opinion on the 2002 ISDA Master Agreement would differ from your opinion relating to the 1992 ISDA Master Agreement.

We ask that you also provide an opinion on the 2001 ISDA Cross-Agreement Bridge (the “2001 Bridge”) attached as Annex D. The 2001 Bridge allows the close-out amounts under various industry master agreements to be taken into account in Section 6 of the 1992 ISDA Master Agreements as Unpaid Amounts. Although the 2001 Bridge was not prepared with the 2002 ISDA Master Agreement in mind, we do not expect your opinion to differ with respect to whether the 2001 Bridge is utilized with the 1992 ISDA Master Agreements or the 2002 ISDA Master Agreement. Lastly, we ask that you provide an opinion on the 2002 ISDA Energy Agreement Bridge (the “2002 Bridge”). The 2002 Bridge (attached at Annex E) was modeled on the 2001 Bridge. A blackline copy of the 2002 Bridge, marked to show changes from the 2001 Bridge, is also attached at Annex E. As with the 2001 Bridge, the 2002 Bridge was not prepared with the 2002 ISDA Master Agreement in mind, but we do not expect your opinion to differ with respect to whether the 2002 Bridge is utilized with the 1992 ISDA Master Agreements or the 2002 ISDA Master Agreement.

The 1992 ISDA Master Agreements and the 2002 ISDA Master Agreement – Enforceability of Close-out Netting of the following documents:

1. The 1992 ISDA Master Agreement (Multicurrency – Cross Border) (the “Cross Border Agreement”) and the 1992 ISDA Master Agreement (Local Currency - Single Jurisdiction) (the “Single Jurisdiction Agreement” and, together with the Cross Border Agreement, the “1992 ISDA Master Agreements”) published in June 1992 by ISDA.³

² There are two forms of 1992 ISDA Master Agreement: (i) Multicurrency-Cross Border; and (ii) Single Currency – Local Jurisdiction (see footnote 2).

³ The Single Jurisdiction Agreement is designed to be used for derivative transactions in a single currency between two parties organized or operating out of the same jurisdiction. The Cross Border Agreement is designed to be used for derivative transactions in any currency between two parties irrespective of their jurisdiction of organization. Both 1992 ISDA Master Agreements may be governed by either New York law or English law as the parties elect. Apart from differences relating to the multicurrency and cross border aspects of the Cross Border Agreement, the two 1992 ISDA Master Agreements are essentially the same in substance. Again, for purposes of the issues presented herein (other than Issue 4 of Part I.B), the relevant provisions of the 1992 ISDA Master Agreements are identical.

2. The ISDA 2002 Master Agreement, published in January 2003 by ISDA.

The enforceability of close-out netting is of interest to banks and corporations that have entered into Transactions governed by the 1992 ISDA Master Agreements and/or the 2002 ISDA Master Agreement as a matter of both credit risk assessment and considerations of capital adequacy.

On July 15, 1994, the Basle Committee on Banking Supervision of the Bank for International Settlements announced the adoption of an amendment to its Capital Accord of July 1988 that recognizes close-out netting for purposes of bank capital regulations in the Group of Ten (“G-10”) countries. This amendment to the Capital Accord requires banking regulators in each of the G-10 countries to recognize various aspects of close-out netting for capital purposes provided that a bank satisfied certain requirements, including the requirement that a bank obtain the following with respect to a master netting agreement to which that bank is a party:

“(2) written and reasoned legal opinions that, in the event of a legal challenge, the relevant courts and administrative authorities would find the bank’s exposure to be such a net amount under:

- The law of the jurisdiction in which the counterparty is chartered and, if the foreign branch of a counterparty is involved, then also under the law of the jurisdiction in which the branch is located;
- The law that governs the individual transactions; and
- The law governs any contract or agreement necessary to effect the netting.

The national supervisor, after consultation when necessary with other relevant supervisors, must be satisfied that the netting is enforceable under the laws of each of the relevant jurisdictions.”

In the case of a bank that has entered into transactions under a Cross Border Agreement or a 2002 ISDA Master Agreement as a multibranch party, it is now clearer that, to satisfy this opinion requirement, it is necessary to obtain enforceability opinions from each country where a branch of that bank is located that has entered into one or more transactions under the multibranch ISDA Master Agreement.

Only the Cross Border Agreement of the two 1992 Master Agreements has a multibranch provision. The Single Jurisdiction Agreement does not accommodate multibranch arrangements.⁴ Section 10(a) of the Cross Border Agreement provides that:

“If Section 10(a) is specified in the Schedule as applying, each party that enters into a Transaction through an Office other than its head or home office represents to the other party that, notwithstanding the place of booking office or jurisdiction of incorporation or organization of such party, the obligations of such party are the same as if it had entered into the Transaction through its head or home office. This representation will be deemed to be repeated by such party on each date on which a Transaction is entered into.”

Section 10(a) of the 2002 ISDA Master Agreement has been amended as compared to Section 10(a) of the Cross Border Agreement, as marked in italics below:

“If Section 10(a) is specified in the Schedule as applying, each party that enters into a Transaction through an Office other than its head or home office represents to *and agrees with* the other party that, notwithstanding the place of booking or *its* jurisdiction of incorporation or organization, *its* obligations are the same *in terms of recourse against it* as if it had entered into the Transaction

⁴ For this reason, all references below in Part I and Part II to the 1992 ISDA Master Agreement are to the Cross Border Agreement.

through its head or home office, *except that a party will not have recourse to the head or home office of the other party in respect of any payment or delivery deferred pursuant to Section 5(d) for so long as the payment or delivery is so deferred.* This representation and agreement will be deemed to be repeated by *each party* on each date on which *the parties enter into a Transaction.*”

Opinions about the enforceability of the bilateral close-out netting provisions of the ISDA Master Agreements have been obtained from counsel in forty-eight jurisdictions, covering an extensive range of derivative products. The existing ISDA opinions cover Australia, Austria, Barbados, the Bahamas, Belgium, Bermuda, Brazil, The British Virgin Islands, Canada, Cayman Islands, Channel Islands (Guernsey and Jersey), The Czech Republic, Denmark, England, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, India, Indonesia, Ireland, Italy, Japan, Luxembourg, Malaysia, Mexico, The Netherlands, Netherlands Antilles, New Zealand, Norway, Philippines, Poland, Portugal, Scotland, Singapore, South Africa, South Korea, Spain, Sweden, Switzerland, Taiwan, Thailand, Turkey and the United States. These opinions are updated on an annual basis.

Lastly, please consider that in recent years that transactions documented under the ISDA Master Agreements have expanded to include a broad range of new transactions. Annex F dated July 2005 contains a brief description of the various types of transactions that currently may be documented under the ISDA Master Agreements (the “Transactions”).

Accordingly, ISDA would like to ask your firm to prepare the opinion for [insert jurisdiction]. In connection with the preparation of the new netting opinion, we enclose the following:

- (1) The 1992 ISDA Master Agreements;
- (2) The User’s Guide to the 1992 ISDA Master Agreements, 1993 Edition;
- (3) The 2002 ISDA Master Agreement;
- (4) The User’s Guide to the 2002 ISDA Master Agreement, 2003 Edition; and
- (5) Copies of legal opinions, amended and restated legal opinions and updated legal opinions from counsel in Denmark, the United States and in the United Kingdom on the enforceability of the bilateral and multibranch close-out netting provisions of the 1992 ISDA Master Agreements and 2002 ISDA Master Agreement.

I. Close-out Netting Under the ISDA Master Agreements

A. Assumptions

1. Two institutions (either two derivatives dealers or a derivatives dealer and a sophisticated end-user of derivatives) have entered into an ISDA Master Agreement. The parties have selected either New York law or English law to govern, at least one of the institutions entering the ISDA Master Agreement is organized in [insert jurisdiction] and neither institution has specified that the provisions of Section 10(a) apply to it.

2. Provisions of the ISDA Master Agreement that you deem crucial to your opinion have not been altered in any material respect (please state, if accurate, that any selections contemplated by Sections 5 and 6 of the ISDA Master Agreement and made pursuant to a Schedule to the ISDA Master Agreement or in a Confirmation of a Transaction would not be considered material alterations)⁵.

3. On the basis of the terms and conditions of the ISDA Master Agreement and other relevant factors, and acting in a manner consistent with the intentions stated in the ISDA Master

⁵ This assumption is the result of concerns expressed by certain banking regulators regarding modifications made to standard ISDA Master Agreements.

Agreement, the parties over time enter into a number of Transactions that are intended to be governed by the ISDA Master Agreement. The transactions entered into include any or all of the Transactions described in Annex F.

4. Some of the Transactions provide for an exchange of cash by both parties and others provide for the physical delivery of shares, bonds or commodities in exchange for cash.

5. After entering into these Transactions and prior to the maturity thereof, one of the parties, which is organized in your jurisdiction, becomes the subject of a voluntary or involuntary case under the insolvency laws of your jurisdiction and, subsequent to the commencement of the insolvency, either that party or an insolvency official seeks to assume the Confirmations representing profitable Transactions for the insolvent party and reject the Confirmations representing unprofitable Transactions for the insolvent party.

You should also either assume that the parties have amended the 1992 ISDA Master Agreement so that they have adopted the approach of Full Two Way Payments for all Events of Default as well as Termination Events, or state that the choice between Full Two Way Payments and Limited Two Way Payments (called the First Method in the 1992 ISDA Master Agreement) does not affect your analysis. Therefore, the enforceability of Limited Two Way Payments should not be analyzed. Moreover, the selection of Market Quotation or Loss as a payment measure under the 1992 ISDA Master Agreement should only be addressed if the selection makes a difference under the laws of your country. Your analysis should be applicable to both banks and corporations organized in your jurisdiction. It should be noted that under the 2002 ISDA Master Agreement, First Method was eliminated, leaving only the Second Method in the 2002 ISDA Master Agreement (although it is not referred to as such).

B. Issues

1. Assuming the parties have not selected Automatic Early Termination upon certain insolvency events to apply to the insolvent counterparty organized in your jurisdiction, are the provisions of the ISDA Master Agreement permitting the Non-defaulting Party to terminate all the Transactions upon the insolvency of its counterparty enforceable under the law of your jurisdiction?

2. Assuming the parties have selected Automatic Early Termination upon certain insolvency events to apply to the insolvent counterparty organized in your jurisdiction, are the provisions of the ISDA Master Agreement automatically terminating all the Transactions upon the insolvency of a counterparty enforceable under the law of your jurisdiction?

3. Are the provisions of the ISDA Master Agreement providing for the netting of termination values in determining a single lump-sum termination amount upon the insolvency of a counterparty enforceable under the law of your jurisdiction?

4. Assuming the parties have entered into either a 1992 ISDA Master Agreement (Multicurrency-Cross Border) or a 2002 ISDA Master Agreement, one of the parties is insolvent and the parties have selected a Termination Currency other than the currency of the jurisdiction in which the insolvent party is organized, will the payment of the net termination amount in the Termination Currency be enforceable under the law of your jurisdiction?

II. Close-out Netting for Multibranch Parties

A. Assumptions

Please assume the same facts as set forth in Part I above (as applicable) with the following modifications:

1. When addressing Issue 1 set forth in Part II.B below, please assume that a bank organized in [insert jurisdiction] has entered into an ISDA Master Agreement on a multibranch basis. In the ISDA Master Agreement, the [insert jurisdiction] bank has specified that Section 10(a) applies to it. The [insert jurisdiction] bank then has entered into Transactions under ISDA Master Agreements through the bank in [insert jurisdiction] and also through one or more branches located in other countries that had been specified in the Schedules to [insert jurisdiction] bank's ISDA Master Agreements. After entering into these Transactions and prior to the maturity thereof, the [insert jurisdiction] bank becomes the subject of a voluntary or involuntary proceeding under the insolvency laws of [insert jurisdiction].

2. When addressing Issues 2 and 3 set forth in Part II.B. below, please assume that a bank ("Bank F") organized and with its headquarters in a country ("Country H") other than [insert jurisdiction] has entered into ISDA Master Agreements on a multibranch basis. Bank F has entered into Transactions under ISDA Master Agreements through Bank F and also through one or more branches located in other countries that Bank F had specified in the Schedules to Bank F's ISDA Master Agreements, including in each case a branch of Bank F located in and subject to the laws of [insert jurisdiction] (the "[insert jurisdiction] Branch"). After entering into these Transactions and prior to the maturity thereof, Bank F becomes the subject of a voluntary or involuntary proceeding under the insolvency laws of Country H.

B. Issues

1. Would there be any change in your conclusions concerning the enforceability of close-out netting under the ISDA Master Agreements based upon the fact that the [insert jurisdiction] bank has entered into ISDA Master Agreements on a multibranch basis and then conducted business in that fashion prior to its insolvency?

2. Would there be a separate proceeding in [insert jurisdiction] with respect to the assets and liabilities of the [insert jurisdiction] Branch at the start of the insolvency proceeding for Bank F in Country H? Or would the relevant authorities in [insert jurisdiction] defer to the proceedings in Country H so that the assets and liabilities of the [insert jurisdiction] Branch would be handled as part of the proceeding for Bank F in Country H? Could local creditors of the [insert jurisdiction] Branch initiate a separate proceeding in [insert jurisdiction] even if the relevant authorities in [insert jurisdiction] did not do so?

3. If there would be a separate proceeding in [insert jurisdiction] with respect to the assets and liabilities of the [insert jurisdiction] Branch, would the receiver or liquidator in [insert jurisdiction] and the [insert jurisdiction] courts, on the facts above, include Bank F's position under an ISDA Master Agreement, in whole or in part, among the assets of the [insert jurisdiction] Branch and, if so, would the receiver or liquidator and the [insert jurisdiction] courts recognize the close-out netting provisions of the ISDA Master Agreements in accordance with their terms? The most significant concern would arise if the [insert jurisdiction] receiver, liquidator or court considering a single ISDA Master Agreement would require a counterparty of the [insert jurisdiction] Branch of Bank F to pay the mark-to-market value of Transactions entered into with the [insert jurisdiction] Branch to the liquidator or receiver of the [insert jurisdiction] Branch while at the same time forcing the counterparty to claim in the proceedings in Country H for its net value from other Transactions with Bank F under the same ISDA Master Agreement. In considering this issue, please assume that close-out netting under all the relevant ISDA Master Agreements would be enforced in accordance with its terms in the proceedings for Bank F in Country H.

4. As indicated above thus far ISDA has obtained legal opinions indicating that bilateral and multibranch close-out netting would be enforceable in the following jurisdictions: Australia, Austria, Barbados, the Bahamas, Belgium, Bermuda, Brazil, The British Virgin Islands, Canada, Cayman Islands, Channel Islands (Guernsey and Jersey), The Czech Republic, Denmark, England, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, India, Indonesia, Ireland, Italy, Japan, Luxembourg,

Malaysia, Mexico, The Netherlands, Netherlands Antilles, New Zealand, Norway, Philippines, Poland, Portugal, Scotland, Singapore, South Africa, South Korea, Spain, Sweden, Switzerland, Taiwan, Thailand, Turkey and the United States (multibranch netting enforceable for branches of non-U.S. banks chartered in New York).

However, we would like you to confirm that your answers to Issues 1, 2 and 3 immediately above remain the same, notwithstanding possible actions that could be taken by an insolvency official or court in another jurisdiction where close-out netting may be unenforceable (the “Non-Netting Jurisdiction”). Such actions taken by an insolvency official of a Non-Netting Jurisdiction include the following scenarios:

(1) In the case of an insolvency proceeding for a [insert jurisdiction] Bank, the [insert jurisdiction] Bank, acting as a multibranch party, has booked Transactions through its home office and one or more branches located in Non-Netting Jurisdictions (the “Non-Netting Branches”)

(2) In the case of an insolvency proceeding for a [insert jurisdiction] Branch of Bank F, Bank F acting as a multibranch party, has booked Transactions through (i) its home office, (ii) its [insert jurisdiction] Branch and (iii) one or more Non-Netting Branches in other jurisdictions.

ISDA would like you to confirm that where courts in [insert jurisdiction] have jurisdiction over the assets of a [insert jurisdiction] Bank or a [insert jurisdiction] Branch, a multibranch master agreement such as the ISDA Master Agreement would be treated as a single, unified agreement by a [insert jurisdiction] receiver under the laws of [insert jurisdiction] regardless of the treatment of the ISDA Master Agreement or Transactions there under by an insolvency official in a country where close-out netting may be unenforceable.

If you believe that your answer to Issue 3 immediately above will be that the receiver or liquidator in [insert jurisdiction] or the [insert jurisdiction] courts will not recognize the close-out netting provisions of the ISDA Master Agreements in accordance with their terms, please contact me immediately because there may be additional questions that ISDA would like you to address.

We would ask that you set forth each question in Sections I.B and II.B of this letter in italics in your opinion, followed by your response to that question.

III. Key Differences between the 1992 ISDA Master Agreements and the 2002 ISDA Master Agreement

While a number of amendments were made in the 2002 ISDA Master Agreement, as compared to the 1992 ISDA Master Agreements, some of the key differences are the following: (i) amendments to Sections 5 and 6, including the tightening of grace or cure periods and the addition of new Section 5(b)(ii) – Force Majeure Termination Event; (ii) the introduction of a single measure of damages provision, Close-out Amount, which replaces Market Quotation and Loss in the 1992 ISDA Master Agreements; and (iii) the inclusion of a set-off provision in Section 6(f) in the 2002 ISDA Master Agreement.

First, Sections 5 and 6 of the 1992 ISDA Master Agreements have been amended in several ways. Grace periods in Sections 5(a)(i), 5(a)(v) and 5(a)(vii)(4) have been reduced in length. Second, Section 5(a)(v) has been amended so that cross-acceleration of a Specified Transaction is not sufficient to trigger an Event of Default; rather, there must be a determination that an acceleration has occurred under the documentation applicable to the relevant Specified Transactions. Thus, “mini close-outs”, where fewer than all transactions are terminated, are not sufficient in themselves to constitute an Event of Default.

A third amendment is the addition of a Termination Event set forth in Section 5(b)(ii) as the Force Majeure Termination Event. While some of the changes to the 1992 ISDA Master Agreements effected by the inclusion of a Force Majeure Termination Event relate to Sections 5 and 6, none of the changes relate to the focus of your opinion, namely close-out netting in the event of insolvency. Nevertheless, we ask that you confirm that the inclusion of the Force Majeure Termination Event would not affect your opinion. If the inclusion of such provisions would affect your opinion, please set forth the legal

implications. Please note that this is not a request for advice on force majeure and impossibility issues generally under the laws of your jurisdiction, but merely whether the inclusion of a Force Majeure Termination Event would affect your opinion on the enforceability of the termination, close-out netting and multi-branch netting provisions of the 2002 ISDA Master Agreement.

A fourth amendment is the inclusion of a single measure of damages provision, Close-out Amount, in the 2002 ISDA Master Agreement. Market Quotation and Loss in the 1992 ISDA Master Agreements have been eliminated. Please confirm that the inclusion of Close-out Amount will not affect your opinion on the enforceability of the termination, close-out netting and multi-branch netting provisions of the 2002 ISDA Master Agreement.

A fifth amendment is the inclusion of a set-off provision in Section 6(f) of the 2002 ISDA Master Agreement. We are not asking you to opine on the enforceability of Section 6(f), but to confirm that the inclusion of Section 6(f) would not affect your opinion on the enforceability of the close-out netting provisions of the 2002 ISDA Master Agreement.

2001 ISDA Cross-Agreement Bridge

As stated in the introduction, we request your advice on the 2001 Bridge. This advice should be included as a separate heading in your opinion to ISDA regarding the ISDA Master Agreements.

2002 ISDA Energy Agreement Bridge

Finally, we request your advice on the 2002 Bridge. This advice should be included as a separate heading in your opinion to ISDA regarding the ISDA Master Agreements. You will note that the 2002 Bridge is nearly identical in substance to the 2001 Bridge and thus it is anticipated that your advice will generally be the same as set forth for the 2001 Bridge.

Fees and Deadline

ISDA will pay for this work up to a maximum of US[insert amount] for all fees and expenses. Payment will be made upon completion of the project. We would like a first draft to be completed by [insert date]. If you are unable to meet this deadline, please notify me as soon as possible.

If you have any questions, please do not hesitate to contact Angela Papesch at 6538-3879, or Kimberly Summe at 1-212-901-6030 or by email at apapesch@isda.org or ksumme@isda.org.

Sincerely,



Kimberly Summe
General Counsel, ISDA



Angela Papesch
Director of Policy and Head of Asia-Pacific Office