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# MEMORANDUM

As of September 1, 2016

**TO:** International Swaps and Derivatives Association, Inc.

**RE:** Collateral Provider Insolvency (including 2016 Credit Support Documents)

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This memorandum supplements our memorandum of law entitled "Validity and Enforceability of Collateral Arrangements under the ISDA Credit Support Documents" prepared for the International Swaps and Derivatives Association, Inc. ("**ISDA**") and dated as of December 1, 2015 (the "**Collateral Memorandum**") with responses to certain questions under the Federal laws of the United States of America and the laws of the State of New York with regard to collateral arrangements documented under:

(i) the 1994 Credit Support Annex governed by New York law (the "**1994 NY Annex**");

(ii) the 2016 Credit Support Annex for Variation Margin (VM) governed by New York law (the "**VM NY Annex**");

(iii) the 2016 Phase One Credit Support Annex for Initial Margin (IM) governed by New York law (the "**IM NY Annex**") and the Recommended Amendment Provisions for the ISDA New York Law 2016 Phase One Credit Support Annex for Initial Margin (IM) with respect to Japanese Securities (the "**IM NY Annex Japanese Amendments**");

(iv) the 1995 Credit Support Deed governed by English law (the "**1995 Deed**");

(v) the 2016 Phase One IM Credit Support Deed, governed by English law (the "**IM Deed**");

(vi) the 1995 Credit Support Annex governed by English law (the "**1995 Transfer Annex**"); or

(vii) the 2016 VM Credit Support Annex governed by English law (the "**VM Transfer Annex**");

in each case, when entered into to provide credit support for transactions ("**Transactions**") entered into pursuant to an ISDA master agreement (the "**Master Agreement**").

For the purposes of this memorandum:

(i) "**Annex**" means each of the 1994 NY Annex, the VM NY Annex and the IM NY Annex;

(ii) "**Deed**" means each of the 1995 Deed and the IM Deed;

(iii) "**Security Documents**" means the Annexes and the Deeds;

(iv) "**IM Security Documents**" means the IM NY Annex and the IM Deed;

(v) "**Non-IM Security Documents**" means the 1994 NY Annex, the VM NY Annex and the 1995 Deed.

(vi) "**Transfer Annex**" means each of the 1995 Transfer Annex and the VM Transfer Annex; and

(vii) "**Credit Support Documents**" means the Security Documents and the Transfer Annexes.

Capitalized terms used but not defined herein have the meanings given to them in the Master Agreement or the relevant Credit Support Document, as applicable. Capitalized terms herein referring to statutes have the meanings given to them in the Collateral Memorandum.

In this memorandum:

(a) in relation to the Security Documents, the term "**Security Collateral Provider**" means the Pledgor (under an Annex) or the Chargor (under a Deed), as context requires; and

(b) "**Collateral Provider**" means the Security Collateral Provider under a Security Document or the Transferor under a Transfer Annex, according to context, in relation to which "**Collateral Taker**" means the Secured Party or the Transferee, as the case may be.

The term "**Collateral**", when used in this letter, is meant to refer, in the case of each Security Document, to any assets in which a security interest is created by the Security Collateral Provider in favor of the Secured Party and, in the case of each Transfer Annex, to any securities transferred as credit support or cash deposited, in either case, by the Transferor to or with the Transferee, as credit support for the obligations of the Collateral Provider under the relevant Master Agreement.

This memorandum incorporates and assumes familiarity with the Collateral Memorandum, and the conclusions in this memorandum are subject to the assumptions, discussion and qualifications set out in the Collateral Memorandum, as modified and supplemented herein.[1] This memorandum does not address default or insolvency of a Custodian. Our responses refer to questions addressed in the Collateral Memorandum using a different numbering scheme than is used therein. For convenience, those questions, numbered as we refer to them herein, are set out in the Appendix.

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[1] Assumption (d) of Part 1, Section I.A of the Collateral Memorandum is replaced with the following: "Each ISDA Master Agreement and each Security Document is enforceable under the laws of New York (except as expressly addressed in this memorandum) or England, as appropriate, and each party has duly authorized, executed and delivered, and has the capacity to enter into, each document."

## A. Non-IM Security Documents

1. Issues. For Non-IM Security Documents, would any of the responses to questions 1 through 21 be different from those provided in the Collateral Memorandum as a result of (a) any changes in the laws of the State of New York or the Federal laws of the United States, (b) the inclusion of Security Documents in this memorandum that were not included in the Collateral Memorandum, or (c) the inclusion of equity securities as Eligible Collateral described in assumption (g) of Part 1, Section I.A of the Collateral Memorandum? If so, please comment specifically on any such changes.

2. Assumptions.

We make the same assumptions as in the Collateral Memorandum (as applicable therein to each of questions 1 through 21), for which purpose references in the Collateral Memorandum to the "NY Annex" or the "Deed" shall be deemed to refer, respectively, to an Annex or a Deed, as defined herein, and references to "Corporate Debt Securities" shall be deemed to include Corporate Equity Securities. Additionally, we assume for purposes of question 9, that any negative rate of interest charged on Cash collateral is not manifestly unreasonable as a measure of the Secured Party's carrying costs for that Cash collateral. (See footnote 80 of the Collateral Memorandum.)

3. Analysis.

With respect to the Non-IM Security Documents, and subject to the assumptions of this Section A and the discussion below, our responses to questions 1 through 21 would not be different in any material respect from those provided in the Collateral Memorandum as a result of (a) any changes in the laws of the State of New York or the Federal laws of the United States between December 1, 2015 and the date of this memorandum, (b) the inclusion of the VM NY Annex as a Security Document, or (c) the inclusion of Corporate Equity Securities (as defined below) as Eligible Collateral (as though references to "Corporate Debt Securities" were to Corporate Equity Securities).

a. Recent Court Decisions

Footnote 157 of the Collateral Memorandum is supplemented as follows: In In re Tribune Co. Fraudulent Conveyance Litigation, 818 F.3d 98 (2d. Cir. March 29, 2016), the Second Circuit held, on implied preemption grounds, that section 546(e) bars constructive fraudulent conveyance proceedings seeking to avoid transfers by a debtor that fall within the terms of section 546(e), whether or not brought by the bankruptcy trustee. In a contemporaneous summary order, the Second Circuit affirmed the lower court's decision in Whyte for substantially the reasons stated in its Tribune decision. Whyte v. Barclays Bank PLC, 2016 WL 1138642 (2d. Cir March 24, 2016).

b. Corporate Equity Securities

Because Corporate Equity Securities, like Corporate Debt Securities, are "securities" under the NYUCC[2] and therefore also are "financial assets"[3] with respect to which a person can have a "security entitlement"[4], each of our responses to questions 1 to 21 would be equally applicable if references to Corporate Debt Securities were construed to include Corporate Equity Securities. For purposes of this memorandum, a "Corporate Equity Security" means a share or similar equity interest issued by a corporation, business trust, joint stock company or similar entity or by an entity that is

[2] NYUCC §8-102(a)(15) and §8-103.
[3] NYUCC §8-102(9).
[4] NYUCC §8-102(17).

registered as an "investment company" under the U.S. Investment Company Act of 1940, as amended;[5] however, the term "Corporate Equity Security" does not include interests in partnerships, limited liability companies, cooperatives, commodity pools or similar enterprises.[6]

**B. IM Security Documents – Custodial Account in Name of Collateral Provider**

1. Issues. (i) For the IM Security Documents, would any of your responses to questions 1 through 21 with respect to Collateral held pursuant to the custodial arrangement described in assumption (a) below be different than the responses to such questions in the Collateral Memorandum as a result of (a) any changes in the laws of the State of New York or the Federal laws of the United States, (b) the inclusion of the IM Security Documents in this memorandum, (c) the inclusion of equity securities as Eligible Collateral described in assumption (g) of Part 1, Section I.A. of the Collateral Memorandum, or (d) the holding of the Collateral pursuant to the custodial arrangements described in assumption (a) below? If so, please comment specifically on any such changes.

(ii) Please describe any requirements that the custodial arrangements described in assumption (a) below must meet to permit the Collateral Taker to exercise the same rights as if no such custodial arrangements were in place.

2. Assumptions. We make the same assumptions as in Section A, above, as modified below:

a. Each IM Security Document is entered into in connection with either a New York law or English law governed ISDA Master Agreement and may be subject to a different governing law than the relevant ISDA Master Agreement (depending on whether the parties choose to align the governing law of the IM Security Document to (i) the Location of the relevant Custodial Account; or (ii) the governing law of the ISDA Master Agreement). In respect of an IM NY Annex entered into in connection with an English law governed ISDA Master Agreement, the parties will provide in paragraph 13 of the IM NY Annex that the Annex is governed by and construed in accordance with New York law. (The IM NY Annex forms a part of the relevant ISDA Master Agreement and therefore, unless this provision for New York governing law is made, the parties' election of English law to govern the relevant ISDA Master Agreement would apply to the IM NY Annex as well.) The parties may enter into more than one IM Security Document and may enter into security arrangements with respect to the transactions in addition to the IM Security Documents. If more than one IM Security Document or an IM Security Document and one or more other security arrangements are entered into in connection with the same ISDA Master Agreement, no such IM Security Document or other security arrangement is inconsistent or conflicts with, or modifies, any other IM Security Document or other security arrangement in a manner that is material to the analysis in this memorandum.

b. Although under the IM Security Documents each of the parties may be required to post Collateral to the other (either under the same IM Security Document or under separate IM Security

[5] NYUCC §8-103. Official Comment 2 states that § 8-103(a) "establishes an unconditional rule that ordinary corporate stock is a security." Notwithstanding this, courts on occasion have declined to treat as securities shares that are not of a type traded on securities exchanges or securities markets. See, e.g., In re U.S. Physicians, Inc., 236 B.R. 593 (Bankr. E.D. Pa. 1999)(applying Pennsylvania UCC and failing to consider § 8-103(a)).

[6] Equity interests excluded from the definition of Corporate Equity Security might still qualify as "securities" under the general criteria of NYUCC §8-102. Such determination would require an analysis of the particular characteristics of the equity interest in question, and is beyond the scope of this memorandum. This memorandum, like the Collateral Memorandum generally, does not explore the unusual case where the Security Collateral Provider or Transferor is an issuer or affiliate of an issuer of securities provided as credit support.

Documents) in an amount that depends on the IM calculation provisions, we assume, for the sake of simplicity, that references herein to the Collateral Provider or the Collateral Taker are to the same party acting in such capacity at all relevant times, and we consider in this memorandum certain rights and remedies of the party acting in the capacity of Collateral Taker in the event of an insolvency of the party acting in capacity of Collateral Provider. Issues relating to the insolvency of the Collateral Taker are considered in a companion memorandum, dated the date hereof.

c. Collateral is held in a Segregated Account maintained with a third-party custodian ("Custodian") in the following form (and not pursuant to assumptions (g) and (h) of Part 1, Section I.A of the Collateral Memorandum): (x) the Custodian holds the Collateral in the Collateral Provider's name pursuant to a custodial agreement between the Collateral Provider and Custodian; (y) the Segregated Account is used exclusively for the Collateral provided by the Collateral Provider to the Collateral Taker; and (z) the Collateral Provider, the Collateral Taker and the Custodian have entered into an agreement (which may be a separate control agreement or may be part of the custodial agreement) under which the Collateral Taker can take control of the Collateral under certain circumstances;

d. the Segregated Account is held apart from the assets of the Custodian or other assets of the Collateral Provider; the Custodian has agreed to subordinate any lien it has on the Segregated Account to that of the Collateral Taker under the IM Security Documents (other than possibly with respect to incidental items, such as fees and costs of the Custodian); the scope of Obligations has not been expanded in Paragraph 13; there are no consensual liens on the Segregated Account other than the security interest granted under the IM Security Document, any lien of the Custodian (as described in this assumption), or any liens routinely imposed on all securities in a relevant clearing system;[7]

e. any transfer of Collateral from Custodian to the Secured Party preserves control and perfection; the control agreement provides rights to the Secured Party to deliver a notice of exclusive control and to give entitlement orders instructing the Custodian to transfer Collateral to, or as directed by, the Secured Party; the Secured Party will exercise such rights under the control agreement for the sole purpose of effectuating its remedies against the Collateral, and its disposition of the Collateral will take place within a commercially reasonable timeframe of giving the relevant instruction to the Custodian;

f. the control agreement is enforceable under the laws chosen by the parties, or found by a court, to govern rights and duties thereunder, and each party has duly authorized, executed and delivered, and has the capacity to enter into, the control agreement;

g. the control agreement satisfies the written agreement requirements described in assumption (k) of Part 1, Section I.A of the Collateral Memorandum, and was not entered into in contemplation of the insolvency of the Collateral Provider or the Secured Party or with the intent to hinder, delay or defraud either party or the creditors of that party;

h. the Custodian will not be an "insider" of the Secured Party or the Collateral Provider as defined in Section 101(31) of the Code, an "affiliate" of either party as defined in Section 101(2) of the Code or Section 23A of the Federal Reserve Act, or an "institution affiliated party" of either party as defined in Section 3(u) of the FDIA;

[7] Additional liens on the Segregated Account could be relevant as facts and circumstances to be taken into account in the "relatedness" analysis described in Section B.3.b. Secured Parties, of course, will have an interest in understanding the relative priority of any other liens to the security interest granted under the IM Security Documents.

i. there is no provision of the control agreement or the custodial agreement, nor any fact or circumstance relating to the Custodian, the Collateral Provider or the Secured Party or the relationship between or among any of them that would be inconsistent with or materially affect the IM Security Document or the analysis set out below; and

j. for purposes of Section B.3.a and insofar as any of the responses set out in the Collateral Memorandum rely on the NYUCC or relate to adverse claims against cash collateral: Custodian is a "securities intermediary" and "bank"; the Segregated Account is a "securities account" with respect to securities Collateral and a "deposit account" with respect to cash Collateral; cash Collateral is denominated in a freely convertible currency and is held in an account under the control of the Secured Party in New York if denominated in U.S. Dollars or otherwise in the jurisdiction of the relevant currency; the Collateral Taker is the "entitlement holder" against Custodian in its capacity as securities intermediary and "customer" of the Custodian in its capacity as bank; and, insofar as any of the responses relate to the substantive (as opposed to the choice-of-law) provisions of the NYUCC, the "securities intermediary's jurisdiction" and "bank's jurisdiction" of the Custodian are New York (all within the meaning of the NYUCC).

3. Analysis.

In order to exercise its remedies against Collateral held pursuant to the custodial arrangement, the Collateral Taker will need to avail itself of rights under the control agreement to deliver a notice of exclusive control and to give entitlement orders instructing the Custodian to transfer Collateral to, or as directed by, the Collateral Taker. If such provisions are included as part of the custodial agreement, rather than being contained in a separate control agreement, then references to a control agreement in discussion below should be taken to refer to the provisions of the custodial agreement that effect similar functions. In such case, parties should review the custodial agreement carefully to ensure that the interaction of such provisions with other provisions of custodial agreement does not affect the analysis and conclusions in this section.

With respect to the IM Security Documents and the custodial arrangements described in assumption (a) above for the holding of Collateral, and subject to the assumptions of this Section B, our responses to questions 1 through 21 would not be different in any material respect from those provided in the Collateral Memorandum as a result of (a) any changes in the laws New York State or Federal laws of the United States between December 1, 2015 and the date of this memorandum, (b) the inclusion of the IM Security Documents as Security Documents, (c) subject to the discussion in Section A above, the inclusion of Corporate Equity Securities as Eligible Collateral (as though references to "Corporate Debt Securities" were to Corporate Equity Securities), or (d) the holding of Collateral pursuant to the custodial arrangements described in assumption (a) above, except as set out below in this Section B. Furthermore, the discussion and conclusions in the Collateral Memorandum should be equally applicable to the Collateral Taker's exercise of remedies against the Collateral in its capacity as the Secured Party, subject to the discussion and qualifications below.

a. NYUCC

Under section 9-314 of the NYUCC, a security interest in deposit accounts or security entitlements (as defined in the NYUCC) may be perfected by "control,"[8] which may be achieved through a properly constructed account control agreement, among other methods as discussed in the Collateral Memorandum. A secured party has control of a deposit account if the debtor, secured party, and bank

[8] The only method of perfecting a security interest in a deposit account as original collateral is by control. NYUCC §9-312(b)(1)

have agreed in an authenticated record that the bank will comply with instructions originated by the secured party directing disposition of the funds in the deposit account without further consent by the debtor.[9] Similarly, a secured party has control of a security entitlement if the securities intermediary has agreed that it will comply with entitlement orders originated by the secured party without further consent by the entitlement holder.[10]

A secured party that has satisfied that requirements for establishing control under NYUCC §9-104(a)(2) or §8-106(d)(2) has control even if the pledgor retains the right to direct the disposition of funds from the deposit account,[11] or retains the right to make substitutions for a security entitlement, to originate entitlement orders, or otherwise deal with the security entitlement.[12] Furthermore, a secured party has control under such sections of the NYUCC even if the duty of the bank to comply with instructions originated by the secured party directing the disposition of funds, or the duty of the securities intermediary to comply with entitlement orders originated by the secured party, is subject to conditions (other than further consent by the debtor).[13] However, conditions within the pledgor's control or other provisions of the control agreement that allow the pledgor to block the secured party's entitlement orders could vitiate control, and secured parties should therefore review control agreements carefully in consultation with counsel so as to ensure that the conditions to perfection by control are met.

A security interest held by the bank with which the deposit account is maintained, or by a securities intermediary in a security entitlement or securities account maintained with the securities intermediary, has priority over a conflicting security interest held by another secured party, unless the secured party has obtained control of the deposit account under NYUCC § 9-104(a)(3) by becoming the bank's customer.[14] However, Article 9 does not preclude the bank or securities intermediary from subordinating its claim by agreement.[15]

Because the Secured Party does not become the entitlement holder with respect to Collateral held under the custodial arrangements described an assumption (a) above, the assertion of an adverse claim to security entitlements is governed by section 8-510 rather than section 8-502 of the NYUCC. See footnote 118 in the Collateral Memorandum. Because the elements of giving value and not having notice of any adverse claims are common to sections 8-502 and 8-510, the substance of the discussion of adverse claims to security entitlements in the Collateral Memorandum is unaffected by this distinction so long as the Secured Party has control of the security entitlements.

b. Bankruptcy Code

The control agreement itself will be a "swap agreement" or "master netting agreement" (to the extent of damages measured in accordance with section 562 of the Code) if it is a "*security agreement or arrangement or other credit enhancement related to*" agreements, transactions or contracts referred to in the swap agreement or the master netting agreement definition, respectively. The NYUCC

[9] NYUCC §9-104(a)(2).
[10] NYUCC §8-106(d)(2). A securities intermediary may not enter into an agreement of this kind without the consent of the entitlement holder. NYUCC §8-106(g).
[11] NYUCC §9-104(b).
[12] NYUCC §8-106(f).
[13] NYUCC §9-104(d); §8-106(i). Official Comment 7 to section 8-106 observes that, unless conditions relating to the entitlement holder are formulated so as to be effective only as between the secured party and the entitlement holder, there is a "risk that the securities intermediary will be caught between conflicting assertions as to whether the conditions have been met." Nonetheless, the Official Comment continues, "the existence of unfulfilled conditions effective against the securities intermediary would not preclude the [secured party] from having control."
[14] NYUCC §9-327(c) and (d); §9-328(c).
[15] NYUCC §9-339.

defines a "security agreement" as an agreement that creates or provides for a security interest. Although a control agreement might not meet this definition (which is not directly apposite for Code purposes in any event) because attachment of the security interest is separately provided for in the IM NY Annex, it is significant that the NYUCC recognizes control as an alternative mechanism (in lieu of an authenticated security agreement) by which a security interest may attach.[16] Moreover, the control agreement provides the means of perfecting the security interest, assuring the Secured Party as to the maintenance of the Collateral, and allowing the Secured Party to exercise its remedies against the Collateral. Further support for treating a control agreement as a form of security arrangement is found in the pre-2006 formulation of the automatic stay exceptions in Code sections 362(b)(17) and (27), which referred to setoff against cash, securities or other property "*under the control of*" a swap participant or financial participant, or a master netting participant, respectively.[17] Accordingly, we believe that a control agreement that operates consistently with the discussion and assumptions above should qualify as a "security agreement or arrangement or other credit enhancement."

Bankruptcy courts have considered the degree of "relatedness" to a safe-harbored agreement needed for a security arrangement to qualify for the Code safe harbors in various contexts. In analyzing the availability of the exception under Code section 362(b)(17) from the automatic stay, one court characterized the inquiry as one that "calls for a review of the facts and circumstances of each transaction or series of transactions and, of necessity, must be decided on a case by case basis by market participants or, in the event of a dispute, by the Court." In re Lehman Bros. Holdings Inc., 439 B.R. 811, 835 (Bankr. S.D.N.Y. 2010). Another court considered the relatedness needed for security arrangements to qualify as securities contracts under clause (xi) of Code section 741(7)(A). In re Lehman Bros. Holdings Inc., 469 B.R. 415, 439 (Bankr. S.D.N.Y. 2012) (taking notice of references to a clearance agreement, a type of securities contract, in the recitals to, and coverage by the substantively operative provisions of, certain security documents, and holding that "there is no required language to connect agreements so that they will be deemed related"). Separately, the court held that the "in connection with" requirement of the safe harbor from avoidance provided under section 546(e) "does not contain any temporal or existential requirement that a transfer must be 'in connection with' then-outstanding legal exposure", and that "it is proper to construe the words 'in connection with' broadly to mean 'related to'". Id. at 442.

We believe there is strong support for the requisite degree of relatedness to the ISDA Master Agreement in the manner in which the control agreement and the Segregated Account relate to the IM Security Documents, including, among other provisions, that the Segregated Account is referred to in the granting/charging clause of Paragraph 2 and is the designated destination for transfers of Collateral to the Secured Party. Of course, the provisions of the control agreement itself will be an important part of the relatedness analysis, and secured parties should ensure that its provisions and the attendant facts and circumstances are consistent with the foregoing grounds for relatedness. Assuming this to be the case, the rights under the control agreement to deliver a notice of exclusive control and to give entitlement orders should be considered contractual rights under a security agreement or arrangement or other credit enhancement forming part of or related to a swap agreement or master netting agreement, and the control agreement should be considered a swap agreement and a master netting agreement insofar as it provides

[16] NYUCC §9-203(b)(3)(D).

[17] The legislative history to the 2006 amendments states that the changes to the automatic stay exemptions "conform the provisions of the Bankruptcy Code to the parallel provisions of the FDIA and FCUA to confirm that [the exceptions] protect … all rights previously protected….". H.R. Rep. 109-648 at 7 (2006). Bankruptcy courts have employed the pre-2006 versions of the Code safe harbors as interpretive aids in construing post-2006 statutory provisions. See 439 B.R. 811, 836 (citing the legislative history of the Financial Netting Improvements Act of 2006 for the proposition that "the amended language was intended to merely make 'technical changes to the netting and financial contract provisions' of the Bankruptcy Code").

for those rights, in each case to the extent the ISDA Master Agreement is a swap agreement or master netting agreement. Therefore, the discussion and conclusions in Part I, Section III.C.2(a) and .3(a) of the Collateral Memorandum should be equally applicable to the Collateral Taker's exercise of remedies in its capacity as the Secured Party under the IM Security Documents under the assumptions of this Section B.

The Collateral Memorandum addresses primarily the fact pattern where the Secured Party holds the Collateral directly (i.e., is the entitlement holder and depository bank's customer). In contrast to that case, the exercise of remedies via the control agreement requires additional steps and actions of the Custodian, some of which may occur after the commencement of a Code proceeding. This fact may implicate certain provisions of the Code whose applicability and interaction with the swap safe harbors will present novel issues, such as the turnover provisions of sections 542 and 543 and the possible existence of "transfers" subject to avoidance under section 549 unless authorized under the appropriate sections of the Code or by the court. For this reason, and due to the lack of precedents applying the safe harbors to custodial arrangements similar to those discussed in this Section B, Custodians with a desire for a greater degree of legal certainty could invoke protective provisions in custody or control agreements, commence interpleader actions, or take other measures to immunize themselves from liability, resulting in potential delays to the exercise of a secured party's remedies. Generally, we believe that a proper interpretation of the Code should resolve these issues so as to give effect to the safe harbors based, among other reasons, upon the mandate of sections 560 and 561 that the contractual rights specified therein[18]

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[18] Although the meaning of the protected liquidation and offset rights, as applied to security arrangements, has not to our knowledge been interpreted by any court, we believe that such rights should be construed to include realization on the collateral and the application of its proceeds or value, as permitted under applicable commercial law and agreements, in satisfaction of termination values, payment amounts, or other transfer obligations owed by the pledgor. See Michigan State Housing Development Authority v. Lehman Bros. Derivatives Products, Inc. (In re Lehman Bros. Holdings Inc.), 502 B.R. 383, 393 (Bankr. S.D.N.Y. Dec. 19, 2013) (citing, in its analysis of an *ipso facto* shift of the methodology for calculating termination amounts, the Black's Law Dictionary definition of liquidation: "1. The act of determining by agreement or by litigation the exact amount of something (as a debt or damages) that before was uncertain. 2. The act of settling a debt by payment or other satisfaction. 3. The act or process of converting assets into cash, esp. to settle debts"). See also Lehman Bros. Special Fin. Inc. v. Bank of Am., N.A. (In re Lehman Brothers Holdings Inc.) No. 08-13555 (SCC) slip op. at 42-43 (Bankr. S.D.N.Y. June 28, 2016) (holding that a distribution of collateral proceeds, in which the debtor had a subordinated security interest, through a priority-of-payments waterfall to noteholders (who ranked higher in priority) was protected by the 'liquidation' prong of section 560). Furthermore, the legislative history of the 2005 amendments, in describing amendments to the automatic stay exceptions for financial contracts, states:

> This provision parallels the other provisions of the Bankruptcy Code that protect netting provisions of securities contracts, commodity contracts, forward contracts, and repurchase agreements. Because the relevant definitions include related security agreements, the references to "setoff" in these provisions, as well as in section 362(b)(6) and (7) of the Bankruptcy Code, are intended to refer also to rights to foreclose on, and to set off against obligations to return, collateral securing swap agreements, master netting agreements, repurchase agreements, securities contracts, commodity contracts, or forward contracts. H.R. Rep. No. 109-31, at 132 (2005).

This passage indicates that the automatic stay exceptions are intended to parallel the netting protections for safe-harbored financial contracts (including related security agreements) and provides further support for interpreting the references to "offset" and "netting" in Sections 560 and 561 to encompass the right to foreclose on and apply collateral against termination values, payment amounts or other transfer obligations arising under or in connection with safe-harbored contracts.

The rights to deliver a notice of exclusive control and to give entitlement orders instructing the Custodian to transfer Collateral to, or as directed by, the Secured Party are necessary steps in exercising the safe-harbored remedies against the Collateral and should therefore be encompassed within the rights to liquidate, net and offset. Cf.

"shall not be stayed, avoided, or otherwise limited by operation of any provision of [the Code] or by any order of a court or administrative agency in any proceeding under [the Code]."[19] However, in the absence of decided cases or legislative history closely on point, this conclusion is not certain.

*Recent Court Decisions*

Footnote 157 of the Collateral Memorandum is supplemented as follows: In In re Tribune Co. Fraudulent Conveyance Litigation, 818 F.3d 98 (2d. Cir. March 29, 2016), the Second Circuit held, on implied preemption grounds, that section 546(e) bars constructive fraudulent conveyance proceedings seeking to avoid transfers by a debtor that fall within the terms of section 546(e), whether or not brought by the bankruptcy trustee. In a contemporaneous summary order, the Second Circuit affirmed the lower court's decision in Whyte for substantially the reasons stated in its Tribune decision. Whyte v. Barclays Bank PLC, 2016 WL 1138642 (2d. Cir March 24, 2016).

c. FDIA, OLA and FDICIA

The FDIA definitions of each type of "qualified financial contract" (i.e., securities contracts, commodity contracts, forward contracts, repurchase agreements and swap agreements) were amended by the 2005 and 2006 Acts to make them substantively identical to the revised Code definitions for the same type of transactions, including the reference to any "*security agreement or arrangement or other credit enhancement related to*" the relevant type of transaction (other than that the Code definitions specifically reference Code party and damages limits in certain respects).[20] Sections 21(e)(8)(A)(ii) and (E)(ii) of the FDIA protects the exercise of "any right under any security agreement or arrangement or other credit enhancement related to one or more qualified financial contracts."[21] The corresponding OLA provisions are identical.[22]

Although we are not aware of cases interpreting the "security arrangement" provisions of the FDIA, and the OLA has not been used, we can discern no reason for construing identical language differently than under the Code. Therefore, we think the discussion and conclusions in Part I, Section III.C.2(b) and (d) and .3(b)and (e) of the Collateral Memorandum should be equally applicable to the Collateral Taker's exercise of remedies in its capacity as the secured party under the IM Security Documents under the assumptions of this Section B.

Based on the same principle that identical language should be given the same meaning in statutes dealing with related subject matter,[23] we believe the control agreement should be a "security agreement or arrangement or other credit enhancement related to one or more netting contracts" within the meaning of section 403(f) of FDICIA, and that the protections of section 403(f) should be available for the exercise of rights under the control agreement to effectuate remedies under the IM Security

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502 B.R. at 395 ("These concepts (liquidation and liquidation methodology) are so closely connected to one another that they flow together and become virtually inseparable").

[19] We regard the court's attempt in In re Lehman Bros. Holdings Inc., 433 B.R. 101, 110 (Bankr. S.D.N.Y. 2010) to read this phrase to be narrower than the commonly-used phrase "notwithstanding any other provision of law" as not in accord with plain meaning and in any event not necessary to the court's holding in that case. The line of cases finding mutuality to be a requirement for setoff under the safe harbors is, we believe, best regarded as adopting a restricted reading of the term "contractual right" based on the pre-2006 formulation of the safe harbors.

[20] 12 U.S.C. § 1821(e)(8)(D); see also 12 U.S.C. § 1821(e)(3)(A), (C) (indicating how damages will be calculated under the FDIA).

[21] 12 U.S.C. § 1821(e)(8)(A)(ii).

[22] 12 U.S.C. § 5390(c)(8)(D), (c)(8)(A)(ii).

[23] See, e.g., Ratzlaf v. United States, 510 U.S. 135, 143 (1994)(a "term appearing in several places in a statutory text is generally read the same way each time it appears").

Documents against the Collateral, assuming the other requirements of FDICIA are met. See Part 1, Sections III.C.2(e) and .3(f) of the Collateral Memorandum.

d. NYBL

Section 615(2) of the NYBL provides that any demand by the Superintendant for the turnover of assets of the banking organization "shall not affect the right of a secured creditor with a perfected security interest, or other valid lien or security interest enforceable against third parties, to retain collateral, including any right of such secured creditor under any security arrangement related to a qualified financial contract … to retain collateral and apply such collateral" in accordance with Section 618-a(2)(d) of the NYBL.

Section 619(l)(d)(2)(i) of the NYBL excepts from the automatic stay the right of a secured creditor with a perfected security interest or other valid lien or security interest enforceable against third parties under "any security arrangement related to a qualified financial contract" to retain and apply such collateral in accordance with Section 618-a(2)(d) of the NYBL.

Although we are not aware of cases construing the provisions of the NYBL concerning security arrangements related to qualified financial contracts, we believe that, subject to its meeting assumptions of this Section B, the control agreement should be a security arrangement related to a qualified financial contract for purposes of the NYBL. Therefore, the discussion and conclusions in Part I, Section III.C.2(c) and .3(d) of the Collateral Memorandum should be equally applicable to the Collateral Taker's exercise of remedies in its capacity as the Secured Party under the IM Security Documents under the assumptions of this Section B.

e. Custodian's Role

As noted in Section B.b above, the custodial arrangements of assumption (a) differ from the manner of holding Collateral considered in the Collateral Memorandum in that remedies against the Collateral must be exercised via the control agreement, which requires additional steps and actions of the Custodian. Precedents and guidance with regard to such arrangements are also sparse or lacking under the FDIA, OLA, FDICIA and NYBL. Therefore the timing and procedural considerations with regard to the Custodian's role, as discussed in Section B.b, apply also in the non-Code insolvency proceedings discussed in the Collateral Memorandum.

## C. Alternative Security Documents – Custodial Account at Central Securities Depository Acting for the Account of the Collateral Taker

1. Issues. (i) Would any of the responses to questions 1 through 9 and 12 through 21with respect to Collateral held pursuant the custodial arrangement described in assumption (a) below be different than the responses provided in the Collateral Memorandum as a result of the holding of the Collateral pursuant to the custodial arrangements described in assumption (a) below? If so, please comment specifically on any such changes.

(ii) Please describe any requirements that the custodial arrangements described in assumption (a) below must meet to permit the Collateral Taker to exercise the same rights as if no such custodial arrangements were in place.

2. Assumptions. We make the same assumptions as in Section A, above, as modified below:

a. Collateral is held in the following form (and not pursuant to assumptions (g)(i), (ii), (iii) or (h) of Part 1, Section I.A of the Collateral Memorandum): (x) the Custodian is a central securities depository and holds the Collateral in the Custodian's name,[24] acting in its own name but for the account of the Collateral Taker (the account described in this clause (x), the "Custodial Account"); (y) instead of an IM Security Document, the parties have entered into securities documents and/or other agreements governing the pledge of the Collateral held by the central securities depository and movement of the Collateral into and out of Custodial Account (the "Alternative Security Documents"); and (z) such Alternative Security Documents are enforceable in accordance with their terms under applicable law (which may be different than the laws of the State of New York or the Federal laws of the United States);

b. the Alternative Security Documents provide for the grant of a security interest in the Collateral under the laws of a jurisdiction outside the United States and are effective to create a security interest in the Collateral under such laws;

c. the relevant provisions of the Alternative Security Documents are sufficiently parallel to those of the IM Security Documents so as to be consistent with the premises of the relevant discussions in the Collateral Memorandum and herein;

d. the Alternative Security Documents and any related documents governing the rights and duties of the Collateral Provider and Collateral Taker in respect of the Collateral satisfy the written agreement requirements described in assumption (k) of Part 1, Section I.A of the Collateral Memorandum, and were not entered into in contemplation of the insolvency of the Collateral Provider or the Collateral Taker or with the intent to hinder, delay or defraud either party or the creditors of that party;

e. the Custodian will not be an "insider" of the Collateral Taker or the Collateral Provider as defined in Section 101(31) of the Code, an "affiliate" of either party as defined in Section 101(2) of the Code or Section 23A of the Federal Reserve Act, or an "institution affiliated party" of either party as defined in Section 3(u) of the FDIA; and

f. insofar as any of the responses set out in the Collateral Memorandum rely on the NYUCC or relate to adverse claims against cash collateral: Custodian is a "securities intermediary" and "bank"; the Segregated Account is a "securities account" with respect to securities Collateral and a "deposit account" with respect to cash Collateral; cash Collateral is denominated in a freely convertible currency and is held in an account under the control of the Secured Party in New York if denominated in U.S. Dollars or otherwise in the jurisdiction of the relevant currency; the Collateral Taker is the "entitlement holder" against Custodian in its capacity as securities intermediary and "customer" of the Custodian in its capacity as bank; and, insofar as any of the responses relate to the substantive (as opposed to the choice-of-law) provisions of the NYUCC, the "securities intermediary's jurisdiction" and "bank's jurisdiction" of the Custodian are New York (all within the meaning of the NYUCC).

3. Analysis.

Subject to the assumptions of this Section C, our responses in the Collateral Memorandum to questions 1 through 9 and 12 through 21 would not be different in any material respect as a result of holding the Collateral pursuant to the custodial arrangements described in assumption (a) above, except as set out below.

[24] We assume this to mean that the financial assets corresponding to those security entitlements comprised in the Custodial Account are registered in the name of the Custodian.

A New York court would apply the choice of law rules discussed in Part 1, Section I.C.1(b) of the Collateral Memorandum in deciding whether to give effect to the choice of non-US law specified in the Alternative Security Documents as governing the attachment of the security interest in the Collateral. If the chosen law is not respected, and the court determines that the application of New York law is appropriate, we think the court would attempt to apply the principles discussed in Part 1, Section I.C.5 of the Collateral Memorandum to the Alternative Security Documents in order to determine whether the security interest provided therein has validly attached.

The description of the custodial arrangements in assumption (a) above, under which the Custodian "holds the Collateral in the Custodian's name, acting in its own name but for the account of the Collateral Taker", does not readily translate into the nomenclature of the NYUCC. We assume that the Custodian is acting in the capacity of a "securities intermediary" and the Collateral Taker is the "entitlement holder", in each case within the meaning of the NYUCC, with respect to the Custodial Account. If this assumption does not hold, and the relationship between the Collateral Taker and Custodian is characterized as giving rise to interests other than security entitlements, then, among other matters, choice-of-law rules and methods of perfection different than those discussed in the Collateral Memorandum could apply.

Our discussion in Part 1, Section III.C.2 of the Collateral Memorandum of the consequences of an insolvency proceeding with respect to the Collateral Provider relies for certain conclusions on the relevant Security Document qualifying as a "security agreement or arrangement or other credit enhancement … *related to or forming part of*" a swap agreement or other protected contract or, in the case of the NYBL, a "security arrangement *related to*" a qualified financial contract. We assume that the Alternative Security Documents would so qualify. As discussed in Section B.3.b above, "relatedness" is a facts-and-circumstances determination, which can only be made based on a detailed analysis of particular arrangements and documentation. Nevertheless, we expect that the authorities cited in Section B.3.b on this topic to be relevant as guidance.

The discussion of this Section C is intended to be generic, and we express no views on any particular custodial arrangements or Alternative Security Documents.

## D. IM NY Annex Japanese Amendments

1. Issues. Would any of your responses to questions 1 through 21 below with respect to Collateral held pursuant the custodial arrangement described in the IM NY Annex Japanese Amendments be different than the responses to such questions that you provided as of the last date such responses were provided with respect to your jurisdiction as a result of (a) the amendment of the IM NY Annex by the IM NY Annex Japanese Amendments or (b) the holding of the Collateral pursuant to the custodial arrangements described in the IM NY Annex Japanese Amendments? If so, please comment specifically on any such changes.

2. Assumptions. We make the same assumptions as in Section A, above, as modified below:

a. the IM NY Annex is amended by the IM NY Annex Japanese Amendments, and Collateral is held pursuant to the custodial arrangements described in the IM NY Annex Japanese Amendments;

b. insofar as any of the responses set out in the Collateral Memorandum rely on the NYUCC, with respect to Japanese Securities comprised in the Collateral: Custodian is a "securities intermediary"; the Segregated Account is a "securities account"; one of the Collateral Provider or the

Collateral Taker is the "entitlement holder" against Custodian in its capacity as securities intermediary; and, insofar as any of the responses relate to the substantive (as opposed to the choice-of-law) provisions of the NYUCC, the "securities intermediary's jurisdiction" of the Custodian is New York (all within the meaning of the NYUCC);[25] and

c. the duties of Custodian as an Account Management Institution under Japanese law, and any substantive or interpretative principles of Japanese law that may be incorporated into the IM NY Annex due to the IM NY Annex Japanese Amendments do not materially affect the analysis set out herein or in the Collateral Memorandum.

3. Analysis.

Subject to the assumptions of this Section D, our responses in the Collateral Memorandum to questions 1 through 21 would not be different in any material respect as a result of (a) the amendment of the IM NY Annex by the IM NY Annex Japanese Amendments or (b) the holding of the Collateral pursuant to the custodial arrangements described in the IM NY Annex Japanese Amendments, except as set out below.

The IM NY Annex Japanese Amendments supplement the granting clause of paragraph 2 of the IM NY Annex with a second, parallel grant by the Collateral Provider of a pledge under Japanese law over all its rights, title and interest in Posted Collateral (IM) that is Japanese Securities. To the extent that this pledge under Japanese law introduces other elements of the Japanese law of secured transactions, such as rights and duties with respect to enforcement of the security interest, these other elements might conflict with corresponding requirements of the NYUCC. While the NYUCC permits certain of its provisions to be varied by agreement, it imposes limitations on parties' ability to modify certain other provisions. If a conflict arises with respect to a variable provision of the NYUCC, and could be resolved by deeming the parties to have agreed to vary that NYUCC provision, we believe it is likely that a court would do so in order to give effect to each of the parallel granting clauses. If this were not possible, it is unclear whether the court would define rights and duties with respect to the security interest by creating a hybrid of New York and Japanese law (although we regard this possibility as unlikely), or engage in a choice-of-law analysis ab initio and determine that the security interest should be governed entirely by New York, Japanese or possibly third country law.

The IM NY Annex Japanese Amendments contemplate that Japanese Securities transferred as Posted Credit Support (IM) will be maintained in accordance with the Book-entry Transfer Act with a Custodian that is an Account Management Institution in a Segregated Account in the name of the Collateral Taker, with the Custodian making a record in the "pledge ledger" of the Segregated Account. A footnote in the IM NY Annex Japanese Amendments states that, from a Japanese law perspective, the Custodian is not prevented from agreeing with the Collateral Provider and the Collateral Taker that the Collateral Provider may exercise certain rights with respect to Japanese Securities so maintained. This description of the custodial arrangements does not provide sufficient information to determine their characterization under the NYUCC. We assume that the Custodian is acting in the capacity of a "securities intermediary" with respect to the Japanese Securities maintained in the Segregated Account. If this assumption does not hold, then, among other matters, choice-of-law rules and methods of perfection different than those discussed in the Collateral Memorandum could apply. The description also does not provide sufficient information to determine if the Collateral Provider or the Collateral Taker is the "entitlement holder" with respect to the Japanese Securities maintained in the

[25] We have not reviewed any particular custodial arrangements or made any investigation of the possible effects of Japanese law on these characterizations, and therefore we express no views regarding to what extent the foregoing assumptions may be satisfied.

Segregated Account. If the Collateral Provider is the entitlement holder, then the analysis of Section B above, subject to the assumptions thereof, would be applicable. If, on the other hand, the Collateral Taker is the entitlement holder, then the custodial arrangements appear to be substantially the same as those described in assumption (g)(iv) of Part 1, Section I.A.1 of the Collateral Memorandum for intermediated debt securities, and the analysis set out in the Collateral Memorandum would be applicable.

## E. Transfer Annexes

1. Issues. For Transfer Annexes, would any of the responses to questions 22 through 29 provided in the Collateral Memorandum be different as a result of (a) any changes in the laws of the State of New York or the Federal laws of the United States, (b) the inclusion of the VM Transfer Annex in this memorandum, or (c), the inclusion of equity securities as Eligible Collateral described in assumption (g) of Part 1, Section I.A of the Collateral Memorandum?

2. Assumptions.

We make the same assumptions as in Section A above, but assuming that the parties have entered into a Transfer Annex in connection with an ISDA Master Agreement[26] rather than a Security Document. For this purpose, the relevant assumptions should be read as modified by the following: references to the "Security Document(s)" should be deemed to be references to the "Transfer Annex"; references to the "Security Collateral Provider" and "Secured Party" should be deemed to be references to "Transferor" and "Transferee", respectively; and references to "Eligible Collateral" should be deemed to be references to "Eligible Credit Support".

In addition, we make the following additional assumptions:

a. The Transferor has entered into an ISDA Master Agreement governed by English law and a Transfer Annex with the Transferee. Pursuant to the terms of the Transfer Annex, and as a matter of English law, transfers of Eligible Credit Support involve an outright transfer of title, free and clear of any liens, claims, charges or encumbrances or any other interest of the transferring party or of any third person (other than a lien routinely imposed on all securities in a relevant clearance system). If an Event of Default exists with respect to either party, an amount equal to the Value of the Credit Support Balance is deemed to be an Unpaid Amount under the ISDA Master Agreement and therefore is taken into account for purposes of determining the amount due upon close-out of the Transactions pursuant to Section 6(e) of the ISDA Master Agreement. Although such arrangement has an economic effect similar to the Collateral arrangements evidenced by the Security Documents, the Transfer Annex is not intended to create any form of security interest.

b. Transfers under the Transfer Annex would not be recharacterized as creating a form of security interest by an English court, provided that the Transfer Annex was not amended in any material way and provided further that the parties by their conduct did not otherwise clearly evidence an intention to create a security interest in the transferred Collateral.

3. Analysis. With respect to the Transfer Annexes and subject to the assumptions of this Section E, our response to questions 22 through 29 would not be different in any material respect as a result of (a) any changes in the laws the State of New York or the Federal laws of the United States between December 1, 2015 and the date of this memorandum, (b) the inclusion of the VM Transfer Annex as a Security Document, or (c), subject to the discussion in Section A above, the inclusion of

[26] For purposes of Part 2 of the Collateral Memorandum, the term "ISDA Master Agreement" does not include either of the 1987 versions of the ISDA Master Agreement.

Corporate Equity Securities as Eligible Collateral (as though references to "Corporate Debt Securities" were to Corporate Equity Securities), except as set out below with respect to recent court decisions under the Code.

Footnote 157 of the Collateral Memorandum is supplemented as follows: In In re Tribune Co. Fraudulent Conveyance Litigation, 818 F.3d 98 (2d. Cir. March 29, 2016), the Second Circuit held, on implied preemption grounds, that section 546(e) bars constructive fraudulent conveyance proceedings seeking to avoid transfers by a debtor that fall within the terms of section 546(e), whether or not brought by the bankruptcy trustee. In a contemporaneous summary order, the Second Circuit affirmed the lower court's decision in Whyte for substantially the reasons stated in its Tribune decision. Whyte v. Barclays Bank PLC, 2016 WL 1138642 (2d. Cir March 24, 2016).

**F. Close-out Amount Protocol and Negative Interest Protocol**

The 2009 ISDA Close-out Amount Protocol and the 2014 ISDA Collateral Agreement Negative Interest Protocol are addressed in the Collateral Memorandum.

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This memorandum is based solely on the laws of the State of New York and those Federal laws of the United States governing an insolvency proceeding of the Collateral Provider, as at the date hereof, and does not express any views with respect to the laws or regulation of any other jurisdiction or subject matter. In particular, we express no view with regard to any regulatory requirements to collect, post or segregate margin or the effect of such requirements on the conclusions reached herein. We undertake no duty to update this memorandum of law. This memorandum of law is rendered solely to ISDA for the benefit and use of its members. The memorandum of law may not be used by any other person or used, circulated or quoted or otherwise referred to or relied upon for any other purpose without our prior written consent.

Mayer Brown LLP

## APPENDIX

*Validity of Security Interests*

1. Under the laws of the State of New York, what law governs the creation and attachment[27] of a security interest in the various forms of Eligible Collateral deliverable under the Security Documents?

2. Under the laws of the State of New York, what law governs the perfection of a security interest (that is, the formalities required to protect a security interest in Collateral against competing claims) granted by the Security Collateral Provider under each Security Document (for example, the law of the jurisdiction of incorporation or organization of the Security Collateral Provider, the jurisdiction where the Collateral is located, or the jurisdiction of location of the Secured Party's securities intermediary in relation to Collateral in the form of indirectly held securities)? What factors would be relevant to this question? Where the location (or deemed location) of the Collateral is the determining factor, please briefly describe the principles governing such determination under New York law with respect to the different types of Collateral. In particular, please describe how the laws of the State of New York apply to each form in which securities Collateral may be held as described in assumption (g) of Part 1, Section I.A of the Collateral Memorandum.

3. Would the courts of New York recognize a security interest in each type of Eligible Collateral created under each Security Document? In relation to cash Collateral delivered by the Security Collateral Provider under the Deed, please assume that the security interest contemplated by Paragraph 2 of the Deed is valid under English law in relation to cash Collateral deposited with the Secured Party.

4. What is the effect, if any, under the laws of the State of New York of the fact that the amount secured or the amount of Eligible Collateral subject to the security interest will fluctuate under the ISDA Master Agreement and the relevant Security Document (including as a result of entering into additional Transactions under the ISDA Master Agreement from time to time)? In particular:

   (a) would the security interest be valid in relation to future obligations of the Security Collateral Provider (at the time such obligations might arise and in relation only to Collateral held at that time)?

   (b) would the security interest be valid without further action other than delivery in relation to future Collateral (that is, Eligible Collateral not yet delivered to the Secured Party at the time of entry into the relevant Security Document)?

   (c) is there any difficulty with the concept of creating a security interest over a fluctuating pool of assets (which, although fluctuating, is composed of clearly identifiable assets at any specific time), for example, by reason of the impossibility of identifying in the Security Documents the specific assets pledged?

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[27] Some may refer to these as the "contractual aspects" of a security interest. However, we note that these aspects are not exclusively contractual, nor are other aspects devoid of contractual elements. Accordingly, we use customary New York language of creation and, below, perfection.

(d) is it necessary under the laws of the State of New York for the amount secured by each Security Document to be a fixed amount or subject to a fixed maximum amount?

(e) is it permissible under the laws of the State of New York for the Secured Party to hold Collateral in excess of its actual exposure to the Security Collateral Provider under the related ISDA Master Agreement?

5. Assuming that the courts of New York would recognize the security interest in each type of Eligible Collateral created under each Security Document, is any action (filing, registration, notification, stamping, notarization or any other action or the obtaining of any governmental, judicial, regulatory or other order, consent or approval) required in New York to perfect that security interest? If so, please indicate what actions must be taken and how such actions may differ depending on the type of Eligible Collateral in question.

6. If there are any other requirements to ensure the validity or perfection of a security interest in each type of Eligible Collateral created by the Security Collateral Provider under each Security Document, please indicate the nature of such requirements. For example, is it necessary as a matter of formal validity that the Security Documents be expressly governed by the law of New York or translated into any other language or for them to include any specific wording? Are there any other documentary formalities that must be observed in order for a security interest created under each Security Document to be recognized as valid and perfected in New York?

7. Assuming that the Secured Party has obtained a valid and perfected security interest in the Eligible Collateral under the laws of the State of New York, to the extent such laws apply, by complying with the requirements set forth in our responses to Questions 1–6 above, as applicable, will the Secured Party or the Security Collateral Provider need to take any action thereafter to ensure that the security interest in the Eligible Collateral continues and/or remains perfected, particularly with respect to additional Collateral pledged from time to time whenever the Credit Support Amount exceeds the Value of the Collateral held by the Secured Party?

8. Assuming that (a) pursuant to the laws of the State of New York, the laws of another jurisdiction govern the creation and/or perfection of a security interest in the Eligible Collateral pledged pursuant to each Security Document (for example, because such Collateral is located or deemed to be located outside New York) and (b) the Secured Party has obtained a valid and perfected security interest in the Eligible Collateral under the laws of such other jurisdiction, will the Secured Party have a valid security interest in the Collateral so far as the laws of the State of New York are concerned? Is any action (filing, registration, notification, stamping or notarization or any other action or the obtaining of any governmental, judicial, regulatory or other order, consent or approval) required under the laws of the State of New York to establish, perfect, continue or enforce this security interest? Are there any other requirements of the type referred to in Question 6 above?

9. Are there any particular duties, obligations or limitations imposed on the Secured Party in relation to the care of the Eligible Collateral held by it pursuant to each Security Document?

10. Please note that pursuant to the terms of the Deed, the Secured Party is not permitted to use any Collateral securities it holds. This is because it is thought, as a matter of English law, that any such use is or may be incompatible with the limited nature of the interest which the Secured Party has in the Collateral. On the other hand, unless otherwise agreed to by the parties, Paragraph 6(c) of the NY Annex grants the Secured Party broad rights with respect to the use of Collateral, provided that the Secured Party returns equivalent Collateral when the Pledgor is entitled to the

return of Collateral pursuant to the terms of the NY Annex. Such use might include pledging or rehypothecating the securities, transferring the securities under a securities repurchase (repo) agreement or simply selling the securities. Do the laws of the State of New York recognize the right of the Secured Party to so use such Collateral pursuant to an agreement with the Pledgor? In particular, how does such use of the Collateral affect, if at all, the validity, continuity, perfection or priority of a security interest otherwise validly created and perfected prior to such use? Are there any other obligations, duties or limitations imposed on the Secured Party with respect to its use of the Collateral under the laws of the State of New York?

11. What is the effect, if any, under the laws of the State of New York on the validity, continuity, perfection or priority of a security interest in Eligible Collateral under each Security Document of the right of the Pledgor to substitute Collateral pursuant to Paragraph 4(d) of the NY Annex and the Deed? How does the presence or absence of consent to substitution by the Secured Party affect our response to this question?

*Enforcement of Rights under the Security Documents by the Secured Party in the Absence of an Insolvency Proceeding*

12. Assuming that the Secured Party has obtained a valid and perfected security interest in the Eligible Collateral under the laws of the State of New York, to the extent such laws apply, by complying with the requirements set forth in our responses to Questions 1–6 above, as applicable, what are the formalities (including the necessity to obtain a court order or conduct an auction), notification requirements (to the Security Collateral Provider or any other person) or other procedures if any, that the Secured Party must observe or undertake in exercising its rights as a Secured Party under each Security Document, such as the right to liquidate the Collateral? For example, is it free to sell the Collateral (including to itself) and apply the proceeds to satisfy the Security Collateral Provider's outstanding obligations under the ISDA Master Agreement? Do such formalities or procedures differ depending on the type of Collateral involved?

13. Assuming that (a) pursuant to the laws of the State of New York, the laws of another jurisdiction govern the creation and/or perfection of a security interest in the Eligible Collateral pledged pursuant to each Security Document (for example, because such Collateral is located or deemed to be located outside New York) and (b) the Secured Party has obtained a valid and perfected security interest in the Eligible Collateral under the laws of such other jurisdiction, are there any formalities, notification requirements or other procedures, if any, that the Secured Party must observe or undertake in New York in exercising its rights as a Secured Party under each Security Document?

14. Are there any laws or regulations in New York that would limit or distinguish a creditor's enforcement rights with respect to Collateral depending on (a) the type of transaction underlying the creditor's exposure, (b) the type of Collateral or (c) the nature of the creditor or the debtor? For example, are there any types of "statutory liens" that would be deemed to take precedence over a creditor's security interest in Collateral?

15. How would our responses to Questions 12 to 14 above change, if at all, assuming that an Event of Default, Relevant Event or Specified Condition, as the case may be, exists with respect to the Secured Party rather than or in addition to the Security Collateral Provider (for example, would this affect the ability of the Secured Party to exercise its enforcement rights with respect to the Collateral)?

*Enforcement of Rights under the Security Documents by the Secured Party after the Commencement of an Insolvency Proceeding*

16. How are competing priorities between creditors determined in New York? What conditions must be satisfied if the Secured Party's security interest is to have priority over all other claims (secured or unsecured) of an interest in the Eligible Collateral?

17. Would the Secured Party's rights under each Security Document, such as the right to liquidate the Collateral, be subject to any stay or freeze or otherwise be affected by commencement of the insolvency (that is, how does the institution of an insolvency proceeding change our responses to Questions 12 and 13 above, if at all)?

18. Will the Security Collateral Provider (or its administrator, provisional liquidator, conservator, receiver, trustee, custodian or other similar official) be able to recover any transfers of Collateral made to the Secured Party during a certain "suspect period" preceding the date of the insolvency as a result of such a transfer constituting a "preference" (however called and whether or not fraudulent) in favor of the Secured Party or on any other basis? If so, how long before the insolvency does this suspect period begin? If such a period exists, would the substitution of Collateral by a counterparty during this period invalidate an otherwise valid pledge if the substitute Collateral is of no greater value than the assets it is replacing? Would the posting of additional Collateral pursuant to the mark-to-market provisions of the Security Documents during the suspect period be subject to avoidance, either because the Collateral was considered to relate to an antecedent or pre-existing obligation or for some other reason?

*Miscellaneous*

19. Would the parties' agreement on the governing law of each Security Document and submission to jurisdiction be upheld in New York, and what would be the consequences if it were not?

20. Are there any other local law considerations that you would recommend the Secured Party to consider in connection with taking and realizing upon the Eligible Collateral from the Security Collateral Provider?

21. Are there any other circumstances we can foresee that might affect the Secured Party's ability to enforce its security interest in New York?

*Title Transfer Approach pursuant to Each Transfer Annex*

22. Would the laws of the State of New York characterize each transfer of Eligible Credit Support as effecting an unconditional transfer of ownership in the assets transferred? Is there any risk that any such transfer would be recharacterized as creating a security interest? If so, is there any way to minimize such risk? What would be the consequences of such a recharacterization?

23. Assuming that the Transferee receives an absolute ownership interest in the Eligible Credit Support, will it need to take any action thereafter to ensure that its title therein continues? Are there any filing or perfection requirements necessary or advisable, including taking any of the actions referred to in Part 1, Section I.C5 of the Collateral Memorandum? Are there any other procedures that must be followed or consents or other governmental or regulatory approvals that must be obtained to establish, enforce, or continue such ownership interest?

24. What is the effect, if any, under the laws of the State of New York of the right of the Transferor to substitute Eligible Credit Support pursuant to Paragraph 3(c) of the Transfer Annex? Does the presence or absence of consent to substitution by the Transferee have any bearing on this question?

25. The Transferee's rights in relation to the transferred Eligible Credit Support upon the occurrence of an Event of Default will be governed by Section 6 of the ISDA Master Agreement. Would Paragraph 6 of the Transfer Annex also be valid to the extent that it provides for the Value of the Credit Support Balance to be included in the calculation of the net amount payable under Section 6(e) of the ISDA Master Agreement?

26. Would the rights of the Transferee be enforceable in accordance with the terms of the ISDA Master Agreement and the Transfer Annex, irrespective of the insolvency of the Transferor?

27. Will the Transferor (or its administrator, provisional liquidator, conservator, receiver, trustee, custodian or other similar official) be able to recover any transfers of Eligible Credit Support made to the Transferee during a certain "suspect period" preceding the date of the insolvency? If so, how long before the insolvency does the suspect period begin? If such a period exists, would the substitution of Eligible Credit Support by a counterparty during this period invalidate an otherwise valid transfer, assuming the substitute assets are of no greater value than the assets they are replacing? Would the transfer of additional Eligible Credit Support pursuant to the mark-to-market provisions of the Transfer Annex during the suspect period be subject to avoidance, either because it was considered to relate to an antecedent or pre-existing obligation or for some other reason?

28. Would the parties' agreement on governing law of the Transfer Annex and submission to jurisdiction be upheld in New York, and what would be the consequences if it were not?

29. Is the Transfer Annex in an appropriate form to create the intended outright transfer of ownership in the Eligible Credit Support to the Transferee? If there are any other requirements to ensure the validity of such transfer in each type of Eligible Credit Support created by the Transferor under the Transfer Annex, please indicate the nature of such requirements. For example, are there any other requirements of the type referred to in Part 1, Section I.C.6 of the Collateral Memorandum?