MEMORANDUM FOR THE INTERNATIONAL SWAPS AND DERIVATIVES ASSOCIATION, INC.

Enforceability of the Termination,
Close-Out and Multibranch Netting Provisions of the
1987, 1992 and 2002 Editions of ISDA Master Agreements

As of December 1, ~~2014~~2015

MAYER • BROWN

TABLE OF CONTENTS

Page

I. BACKGROUND AND ASSUMPTIONS 6

A. BACKGROUND 6

1. Calculation of the Lump-Sum Amount under the 2002 ISDA Master Agreement 7

2. Calculation of the Lump-Sum Amount under the 1992 ISDA Master Agreements 8

3. Calculation of the Lump-Sum Amount under the 1987 ISDA Master Agreements 8

B. ASSUMPTIONS 9

II. QUESTIONS PRESENTED 11

III. SUMMARY OF CONCLUSIONS 13

A. "SWAP AGREEMENT" UNDER THE CODE, THE FDIA, THE NYBL AND THE OLA 13

B. FDICIA 14

C. NON-ENUMERATED TRANSACTIONS AND MASTER NETTING AGREEMENTS UNDER THE CODE, THE FDIA, THE NYBL, THE OLA AND FDICIA 14

D. TERMINATION CURRENCY 14

E. MULTIBRANCH ISDA MASTER AGREEMENTS 15

F. ENGLISH-LAW ISDA MASTER AGREEMENTS 15

G. NEW YORK-LAW ISDA MASTER AGREEMENTS 15

H. PENDING DEVELOPMENTS 16

IV. "SWAP AGREEMENT" UNDER THE CODE, THE FDIA, THE NYBL, THE OLA AND FDICIA 16

A. CODE 16

1. Background; Definitions 16

(a) Code Insolvency Proceedings 16

(b) Definitions 17

2. Automatic Stay 19

3. Right to Terminate and Exercise Netting Provisions 19

TABLE OF CONTENTS
(continued)

Page

4. Limitation on Avoiding Powers 20

B. THE FDIA ..... ~~20~~21

1. Background; Definitions ..... ~~20~~21

(a) FDIA Insolvency Proceedings ..... ~~20~~21
(b) Definitions ..... ~~21~~22

2. Right to Terminate ..... ~~22~~23

3. Netting 23

4. No Selective Transfer or Repudiation ..... ~~23~~24

5. Pre-insolvency Payments ..... ~~23~~24

6. No Walkaway Clause 24

C. THE NYBL ..... ~~24~~25

1. NYBL Insolvency Proceedings ..... ~~24~~25

2. Right to Terminate 26

3. Netting 26

4. Selective Repudiation ..... ~~26~~27

5. No Forfeiture ..... ~~26~~27

D. THE OLA 27

1. Background; Definitions 27

(a) OLA Insolvency Proceedings 27
(b) Qualified Financial Contract Overview 29

2. Right to Terminate 30

3. Netting 30

4. No Selective Transfer or Repudiation ..... ~~30~~31

5. Pre-insolvency Payments 31

6. No Walkaway Clause 31

V. FDICIA ..... ~~31~~32

A. BACKGROUND; DEFINITIONS ..... ~~31~~32

1. Qualitative Test ..... ~~32~~33

2. Quantitative Test ..... ~~32~~33

TABLE OF CONTENTS
(continued)

Page

B. TREATMENT OF TRANSACTIONS 33

C. ENFORCEABILITY OF TERMINATION PROVISIONS OF AN ISDA MASTER AGREEMENT UNDER FDICIA .... ~~33~~34

D. PRE-INSOLVENCY PAYMENTS 34

VI. NON-ENUMERATED TRANSACTIONS AND MASTER NETTING AGREEMENTS UNDER THE CODE, THE FDIA, THE NYBL, THE OLA AND FDICIA 34

A. CLASSIFICATION OF TRANSACTIONS 34

1. Introduction 34
2. Non-Enumerated Transactions that are “swap agreements” 35
   (a) Physically-settled commodity swaps and options on commodity swaps 35
   (b) Economic Statistic Transactions 35
   (c) Property Index Derivatives 36
   (d) Freight Transactions 36
3. Non-Enumerated Transactions that are not “swap agreements” or master netting agreements 37
   (a) Non-Enumerated Transactions as “securities contracts” 37
   (b) Non-Enumerated Transactions as “forward contracts” 38
   (c) Non-Enumerated Transactions that are not “securities contracts” or “forward contracts” 39

B. CODE 39

1. Treatment of Forward Contracts, Securities Contracts and Master Netting Agreements .... ~~39~~40
   (a) Automatic Stay 40
   (b) Limitation on Avoiding Powers 42
   (c) Liquidation 43

C. THE FDIA AND THE OLA 44

1. Treatment of Forward Contracts, Securities Contracts and Master Agreements 44
2. Right to terminate generally .... ~~44~~45
3. Netting .... ~~44~~45
4. No Selective Transfer or Repudiation 45

D. THE NYBL 45

TABLE OF CONTENTS
(continued)

Page

1. Treatment of Master Agreements 45

2. Right to terminate .... ~~45~~46

3. Netting .... ~~45~~46

4. Selective Repudiation .... ~~45~~46

E. FDICIA 46

VII. TERMINATION CURRENCY 46

VIII. MULTIBRANCH ISSUES 46

1. Enforceability of multibranch close-out netting provisions in an ISDA Master Agreement for U.S. Bank with foreign branches 46

(a) FDIC-insured National Bank 46
(b) FDIC-insured New York-chartered state bank .... ~~47~~48
(c) Exceptions .... ~~47~~48

2. Commencement of a separate proceeding to administer the assets of (a) the insolvent Federal Branch of Bank F or (b) the insolvent New York Branch of Bank F 48

(a) Federal Branch 48
(b) New York Branch 49

3. Treatment of multibranch close-out netting provisions in an insolvency proceeding conducted for the New York Branch or the Federal Branch of Bank F 50

(a) New York Branch 50
(b) Federal Branch 51

4. Bad Branch Issues 52

(a) Insolvency Proceeding for a U.S. Bank 52
(b) Insolvency Proceeding for a New York Branch of Bank F 53
(c) Insolvency Proceeding for a Federal Branch of Bank F 53

IX. APPLICABILITY OF CONCLUSIONS REGARDING NEW YORK-LAW ISDA MASTER AGREEMENT TO ENGLISH-LAW ISDA MASTER AGREEMENT .... ~~53~~54

X. ENFORCEABILITY OF TERMINATION, CLOSE-OUT NETTING AND MULTIBRANCH PROVISIONS OF NEW YORK-LAW ISDA MASTER AGREEMENT UNDER NEW YORK STATE LAW .... ~~54~~55

XI. PENDING DEVELOPMENTS 55

XII. BRIDGES .... ~~55~~56

TABLE OF CONTENTS
(continued)

Page

XIII. ADDENDUM– FEDERAL HOME LOAN BANKS 56

APPENDIX A: CERTAIN TRANSACTIONS UNDER THE ISDA MASTER AGREEMENTS A-1

APPENDIX B: CERTAIN COUNTERPARTY TYPES B-1

MEMORANDUM FOR THE INTERNATIONAL SWAPS AND DERIVATIVES ASSOCIATION, INC.

PRIVATELY NEGOTIATED DERIVATIVES TRANSACTIONS: NETTING UNDER THE CODE, THE FDIA, THE NYBL, THE OLA AND FDICIA

As of December 1, ~~2014~~2015

This memorandum of law examines the treatment under the United States Bankruptcy Code (the "Code"),[1] the Federal Deposit Insurance Act (the "FDIA"),[2] the New York Banking Law (the "NYBL")[3], the Orderly Liquidation Authority statute (the "OLA")[4] and the Federal Deposit Insurance Corporation Improvement Act of 1991 ("FDICIA")[5] of privately negotiated derivatives transactions that are documented under an ISDA Master Agreement (as defined and discussed below). These privately negotiated derivatives transactions may include any and all transactions described in the attached Appendix A (each, a "Transaction"). Some of these Transactions may provide for payments of cash by both parties, such as interest rate swaps, currency swaps and options and foreign exchange transactions, while others, such as equity, bond and commodity options, may require one party to deliver cash and the other party to deliver shares, bonds or commodities.

Attached to this memorandum is Appendix B, as provided by the International Swaps and Derivatives Association, Inc. ("ISDA"). We discuss below with greater particularity and in more jurisdictionally pertinent terms the entity-type coverage of this memorandum. Referring generally to Appendix B, however, we note that this memorandum covers many kinds of banks (U.S. federally-insured depositories, New York State chartered banks, federally-insured or not, and Federal Home Loan Banks), corporations, hedge funds and proprietary traders, investment firms/broker-dealers, and partnerships, all to the extent subject to U.S. Bankruptcy Code proceedings. This memorandum does not cover the Federal Reserve Banks, insurance companies, international organizations, local authorities, pension funds, sovereigns or their "wealth funds", sovereign-owned entities, or U.S. states. "Investment Funds" may be covered if organized as corporations, partnerships or business trusts.

With that as background, this memorandum of law is given in respect of the following derivative counterparties organized under the laws of the United States or its constituent jurisdictions (each a "U.S. Party"):

(1) Certain U.S. entities subject to the Code

For purposes of this memorandum, U.S. entities subject to the Code ("Code Entities") include:

[1] 11 U.S.C. § 101 et seq. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which was signed into law in April, 2005 (the "2005 Act"), amended the Code, the FDIA, FDICIA and related statutes as of October 17, 2005. The provisions of the 2005 Act that are relied upon in this memorandum apply only to proceedings commenced under the Code, the FDIA, or related statutes on or after October 17, 2005. The Financial Netting Improvements Act of 2006, which was signed into law on December 12, 2006 (the "2006 Act"), builds on the 2005 Act to further improve and clarify the netting process for certain financial contracts through amendments to the Code, the FDIA, FDICIA and related statutes. The provisions of the 2006 Act that are relied upon in this memorandum will apply only to proceedings commenced under the Code, the FDIA, or related statutes on or after the date of its enactment. References in this memorandum to the Code, the FDIA and FDICIA will be references to such laws as amended by the 2005 Act and/or the 2006 Act.

[2] 12 U.S.C. § 1811 et seq.

[3] N.Y. Banking Law § 1 et seq.

[4] 12 U.S.C. § 5381 et seq.

[5] Pub. L. No. 102-242, 105 Stat. 2236 (1991).

(i) corporations that are incorporated under the laws of any of the fifty states of the United States, the District of Columbia or Puerto Rico[6];

(ii) partnerships[7] that are organized under the laws of any of the fifty states of the United States, the District of Columbia or Puerto Rico; [8] and

(iii) business trusts (as referred to in Section 101(9)(A)(v) of the Code) that are organized under the laws of any of the fifty states of the United States, the District of Columbia or Puerto Rico. Business trusts are vehicles for the conduct of business and sharing of gains, and unlike ordinary trusts, are not for holding and conserving particular property. Although the Code does not define the term "business trust", the courts have adopted several different interpretations of the term, all of which could include a trust entering into derivatives transactions, depending on its structure.[9]

Excluded from the scope of this memorandum are certain other entities, some of which are covered by the Code, in particular:

(i) municipalities;[10]

[6] Investment firms/broker-dealers are typically organized as corporations or partnerships. ~~See 15 U.S.C. § 78aaa et seq. In addition to the general provisions of the Code,~~Liquidation proceedings for broker-dealers with insured accounts are ~~subject to the special provisions of~~typically conducted under the Securities Investor Protection Act ~~of 1970 ("SIPA"), to the extent that liquidation proceedings are carried out under the SIPA, and to the provisions of Subchapter III~~("SIPA"), 15 U.S.C. § 78aaa et seq.SIPA itself specifically provides for the application of Chapters 1, 3 and 5 and Subchapters I and II of Chapter 7 of the Code~~, to the extent that the SIPA does not govern. Affiliates of registered broker-dealers that are not themselves so registered are also covered by this memorandum, to the extent they are otherwise within its scope. As~~ to the extent such provisions are not inconsistent with SIPA. § 78fff(b). As SIPA was amended by the 2005 Act, neither the stay applicable upon the filing with the court of an application for a protective decree nor any order or decree obtained by the Securities Investor Protection Corporation shall operate as a stay of a creditor's "contractual right" (broadly defined) to liquidate, terminate, accelerate or net obligations arising under or in connection with, a securities contract, commodity contract, forward contract, repurchase agreement, swap agreement, or master netting agreement, each as defined in the Code, or to foreclose on cash collateral pledged by the debtor. 15 U.S.C. § 78eee(b)(2)(C)(i). Special ~~rules apply to~~stay and disposition ~~of "securities collateral" in the SIPA context. Id~~rules apply in the SIPA context to securities pledged as collateral, or sold or lent under a repurchase or securities lending agreement, by the failed broker-dealer. 15 U.S.C. § 78eee(b)(2)(C)(ii). Affiliates of registered broker-dealers that are not themselves so registered are also covered by this memorandum, to the extent they are otherwise within its scope.

[7] Partnerships include general partnerships and limited partnerships.

[8] Hedge funds and mutual funds domiciled in the U.S. are typically organized as corporations, partnerships or trusts (that are potentially "business trusts", see infra note 9 and accompanying text) and to that extent are covered by this memorandum.

[9] See, e.g., In re Kenneth Allen Knight Trust, 303 F.3d 671, 679 (6th Cir. 2002) (concluding that "the definition of business trust properly belongs to federal, rather than state, law", and holding that the standard is whether the trust is created with the primary purpose of carrying on business or commercial activity for the benefit of investors, and that the determination is highly fact-specific); In re Heritage N. Dunlap Trust, 120 B.R. 252, 254 (Bankr. D. Mass. 1990) (concluding that whether a trust is a "business trust" is determined by looking to applicable state law (including filing and registration requirements)); In re Mich. Real Estate Ins. Trust, 87 B.R. 447, 449 (E.D. Mich. 1988) (stating that "a business trust is 'an unincorporated business organization . . . by which property is to be held and managed by trustees for the benefit and profit of such persons as may be or may become the holders of transferable certificates evidencing the beneficial interests in the trust's estate'") (citing 13 Am. Jur. 2d Business Trusts § 1); In re Universal Clearing House Co., 60 B.R. 985, 992 (D. Utah 1986) (finding a business trust because although it never engaged in a profit making business, its express purpose was principally making profit rather than protecting the trust assets); In re Mosby, 61 B.R. 636, 638 (E.D. Mo. 1985) (relying on cases with respect to business trusts in the Federal tax context), aff'd, 791 F.2d 628 (8th Cir. 1986).

In addition, when defining a "corporation" the drafters of the Code inserted the term "business trust" in place of the following language used in the Bankruptcy Act of 1898: "any business conducted by a trustee or trustees wherein beneficial interest or ownership is evidenced by a certificate or other written instrument." As at least one court has noted that this change was intended by Congress to broaden the variety of trusts eligible to obtain relief in the bankruptcy courts, it is quite possible that a trust entering into derivatives transactions would be considered a "business trust". See In re Tru Block Concrete Prods., Inc., 27 B.R. 486, 488 (Bankr. S.D. Cal. 1983); see also Hecht v. Malley, 265 U.S. 144, 159–62 (1924); W. Fletcher, 16A Fletcher's Cyclopedia of the Law of Private Corporations § 8267 (D. Nelson & M. Wasiunec rev. ed., 1988). See also 11 U.S.C. § 101(9)(A)(v). But see In re The Estate of the Assignment for the Benefit of Creditors of May, 405 B.R. 443 (Bankr. E.D. Mich. 2008), which declined to follow Tru Block because the Tru Block court applied California state law to define "business trust", 405 B.R. at 455; instead, the May court reasoned that Congress appeared to incorporate federal tax law concepts to the meaning of "business trust", "including the concept that a liquidating trust is not a business trust", id. at 455–56.

[10] Under 11 U.S.C. § 101(40) "municipality" means political subdivision or public agency or instrumentality of any of the fifty states of the United States, but not of the District of Columbia or Puerto Rico. As a result of the 2005 Act, proceedings regarding municipalities under Chapter 9 now have the benefit of Code Sections 555, 556, 559, 560, 561 and 562, some of which are discussed in this memorandum with respect to other Code entities.

(ii) pension funds that are subject to a special insolvency regime administered by the Pension Benefit Guaranty Corporation;[11]

(iii) ordinary private trusts that are not eligible for insolvency under the Code; and

(iv) commodity brokers.[12]

(2) Certain U.S. banking institutions

For purposes of this memorandum, U.S. banking institutions ("U.S. Banking Institutions") include nationally chartered banking institutions that take ~~Federally~~federally-insured deposits, New York State chartered banking institutions whether or not they take ~~Federally~~federally-insured deposits and Federal savings associations that take ~~Federally~~federally-insured deposits. We refer to any of the foregoing U.S. Banking Institutions that take ~~Federally~~federally-insured deposits as "Insured Institutions", and to New York State chartered banking institutions that do not take ~~Federally~~federally-insured deposits as "Uninsured N.Y. Institutions."

(3) Certain U.S. systemically significant financial companies

For purposes of this memorandum, we refer to a Code Entity or Uninsured N.Y. Institution for which the FDIC is appointed as receiver pursuant to the OLA, as described in Section IV.D, as a "Covered Financial Company."

(4) Certain U.S. branches of non-U.S. banking institutions

For purposes of this memorandum, U.S. branches of non-U.S. banking institutions ("Branches") include branches and agencies of banks incorporated or organized outside the United States that are (i) ~~Federally~~federally-licensed[13] branches or agencies whether or not they take ~~Federally~~federally-insured deposits ("Federal Branches") or (ii) New York State licensed branches[14] or agencies whether or not they take ~~Federally~~federally-insured deposits ("New York Branches").

(5) Non-U.S. banks

For purposes of this memorandum, we refer to banks incorporated or organized outside the United States (each with its branches or agencies as a single entity) or only the non-U.S. bank parent of a branch or agency, as appropriate and relevant to the context.

(6) Entities not covered by this memorandum

Excluded from the scope of this memorandum (in addition to those described in (1) above) are certain other categories of U.S. entities, in particular:

(i) insurance companies;[15]

(ii) credit unions; [16]

(iii) governmental entities, such as the Federal Reserve Banks, government-sponsored agencies (other than Federal Home Loan Banks, [17] which are discussed in Section XIII), such as the Federal National Mortgage Association ("Fannie Mae"),[18] the Federal Home Loan Mortgage Corporation ("Freddie

[11] See Subchapter III on Plan Termination Insurance of the Employee Retirement Income Security Act ("ERISA") of 1974 (29 U.S.C. § 1301 et seq.).

[12] "Commodity broker" is defined in Section 101(6) of the Code to include a range of intermediaries in commodity contracts. Commodity brokers in insolvency may be subject to special provisions of the Code and certain Commodity Futures Trading Commission rules. See 17 CFR § 190. Section 561(b)(2)–(3) of the Code limits, in certain respects, the application of netting to commodity brokers.

[13] Under the International Banking Act of 1978, a Federal Branch must be licensed to take deposits and do banking business in the United States (12 U.S.C. § 3102).

[14] A New York Branch of a non-U.S. banking institution must be licensed to take deposits or do business in New York (N.Y. Banking Law § 200).

[15] U.S. insurance companies are subject to various insolvency laws at the state level. Parties should consider carefully entering into a 2002 ISDA Master Agreement with U.S. insurance companies because the enforceability of the termination and close-out netting provisions of the 2002 ISDA Master Agreement may be uncertain under some state insurance company insolvency laws.

[16] Credit unions are subject to a special insolvency regime governed by the Federal Credit Union Act (12 U.S.C. §§ 1751–1795k). This regime is not treated in this memorandum.

[17] See Federal Home Loan Bank Act of 1932 (12 U.S.C. §§ 1421–1449).

[18] See National Housing Act of 1934 (12 U.S.C. § 1716 et seq.).

Mac"),[19] the Financing Corporation,[20] the Resolution Funding Corporation,[21] the Banks for Cooperatives,[22] the Farm Credit System Banks,[23] and the Government National Mortgage Association ("Ginnie Mae")[24];[25]

(iv) international organizations; and

(v) sovereigns and states of federal sovereigns.

In addition, this memorandum of law covers FDICIA, which supplements the Code and the FDIA and provides for the enforceability of netting provisions contained in a "netting contract" between two or more "financial institutions" notwithstanding any other provision of law.[26]

This memorandum of law is confined to matters of the Federal laws of the United States and the laws of the State of New York.

Parties entering into an ISDA Master Agreement that documents Transactions previously would have faced an element of uncertainty in assessing the bankruptcy or insolvency risks involved in dealing with a counterparty organized in the United States and subject to the Code, the FDIA or the NYBL. These risks would have varied depending upon the type of counterparty (i.e., bank, savings institution or corporation). Generally, this uncertainty has been removed and legal certainty provided as a result of amended provisions of the Code, the FDIA, the NYBL and FDICIA, and the incorporation into the OLA of provisions patterned closely after the amended provisions of the FDIA, each as discussed below.

This memorandum of law is structured as follows: Section I. sets forth some background information and certain assumptions; Section II. sets forth the questions presented; Section III. sets forth a summary of conclusions; Section IV. analyzes the treatment of a "swap agreement" under the Code, the FDIA, the NYBL and the OLA; Section V. analyzes the provisions of FDICIA relevant to the ISDA Master Agreement; Section VI. analyzes the treatment of Non-Enumerated Transactions (as defined below) under the Code, the FDIA, the NYBL, the OLA and FDICIA; Section VII. briefly discusses the current status of obtaining judgments in non-U.S. currencies from U.S. courts; Section VIII. discusses various issues arising with the multibranch provisions of the ISDA Master Agreement in an insolvency of a U.S. Bank (as defined in assumption q. below) or a Federal or New York Branch of a foreign bank; Section IX. discusses the applicability of the conclusions reached for a New York-law governed ISDA Master Agreement to an ISDA Master Agreement that is governed by English law; Section X. discusses the enforceability of the termination, close-out netting and multibranch provisions of the ISDA Master Agreement under New York law; Section XI. discusses whether any developments are pending as a result of which the current regulatory or legal environment under U.S. law or New York State law concerning the enforceability of close-out netting may be expected to change in the foreseeable future; and Section XII discusses the enforceability of the termination and close-out netting provisions of (a) the 2001 ISDA Cross-Agreement Bridge and (b) the 2002 ISDA Energy Agreement Bridge (each, a "Bridge"). Section XIII discusses the applicability of the conclusions of this memorandum to Federal Home Loan Banks. Capitalized terms not otherwise defined herein have the meanings assigned to them in the ISDA Master Agreement.

[19] See the Federal Home Loan Mortgage Corporation Act (12 U.S.C. §§ 1451–1459).

[20] See Federal Savings and Loan Insurance Corporation Recapitalization Act of 1987 (12 U.S.C. § 1441).

[21] See The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (Pub. L. 101-73, 103 Stat. 183).

[22] See The Farm Credit Act of 1971 (12 U.S.C. § 2121).

[23] See The Farm Credit Act of 1971 (12 U.S.C. § 2011).

[24] Ginnie Mae was created on September 1, 1968, as one of two corporations resulting from the partition of the former Federal National Mortgage Association. Ginnie Mae is a tax-exempt corporate instrumentality of the United States, chartered under 12 U.S.C. §§ 1716b–1723i.

[25] The Government-sponsored enterprises are subject to a variety of insolvency regimes. Some of these insolvency regimes are contained in the acts establishing those government-sponsored entities; however, for some enterprises, such as Ginnie Mae, there are no specific statutory provisions addressing liquidation, reorganization, conservatorship or receivership. The Federal Housing Finance Agency ("FHFA") has certain powers as conservator or receiver for Fannie Mae, Freddie Mac and the Federal Home Loan Banks under the Housing and Economic Recovery Act of 2008 ("HERA"), Public Law 110-289, 122 Stat. 2654. The qualified financial contract provisions of HERA (not within the scope of this memorandum) share many features with the FDIA. Note that Freddie Mac and Fannie Mae were placed into conservatorship by the FHFA on September 7, 2008. Note also that on December 29, 2004, the Student Loan Marketing Association, a former government-sponsored enterprise, was dissolved in connection with its privatization as SLM Corporation.

[26] See in particular the discussion under Section V.

I.

BACKGROUND AND ASSUMPTIONS

A. Background

The International Swaps and Derivatives Association, Inc. (formerly known as the International Swap Dealers Association, Inc., "ISDA") published the Interest Rate and Currency Exchange Agreement (the "Interest Rate and Currency Exchange Agreement") and the Interest Rate Swap Agreement (the "Interest Rate Swap Agreement") (collectively referred to as the "1987 ISDA Master Agreements", and each a "1987 ISDA Master Agreement") in March 1987.[27] ISDA published the ISDA Master Agreement (Multicurrency–Cross Border) (the "Cross Border Agreement") and the ISDA Master Agreement (Local Currency–Single Jurisdiction) (the "Single Jurisdiction Agreement" and, together with the Cross Border Agreement, the "1992 ISDA Master Agreements" and each a "1992 ISDA Master Agreement"), both in June 1992.[28] ISDA published the 2002 ISDA Master Agreement (the "2002 ISDA Master Agreement" and, together with the 1987 ISDA Master Agreements and the 1992 ISDA Master Agreements, the "ISDA Master Agreements" and each an "ISDA Master Agreement") in January 2003.

Set forth below is a general description of how the relevant provisions of the ISDA Master Agreements operate. Any capitalized terms used but not defined herein are taken from the ISDA Master Agreements.

The ISDA Master Agreements state that the parties have entered or will enter into one or more Transactions with each other from time to time and will execute and exchange a document or other confirming evidence (each, a "Confirmation") setting forth the particular terms of each Transaction.

The ISDA Master Agreements also state that the parties enter into Transactions in reliance on the fact that each ISDA Master Agreement and Confirmations relating thereto form a single agreement between the parties and the parties would not otherwise enter into any Transactions.[29] The ISDA Master Agreements provide that each Confirmation is a binding supplement to the relevant ISDA Master Agreement.

The ISDA Master Agreements provide that on each payment date all amounts otherwise owing in the same currency under the same Transaction are netted so that only a single amount is owed in that currency. The ISDA Master Agreements also provide, if the parties so elect, for such netting of amounts in the same currency among all Transactions identified as being subject to such election that have common payment dates and booking offices.[30] The obligation of each party to make scheduled payments or deliveries with respect to the Transactions is subject to the conditions that: (i) no Event of Default or Potential Event of Default with respect to the other party (including, without limitation, a payment or delivery default) has occurred and continues and (ii) under the 1992 ISDA Master Agreements and the 2002 ISDA Master Agreement, no Early Termination Date has occurred or been designated with respect to any Affected Transaction.[31] The failure by a party to make a payment or delivery with respect to any Transaction or the insolvency of that party constitutes an Event of Default under the ISDA Master Agreements as it relates to all Transactions.[32] Finally, the default-based termination of any other specified derivatives transactions

[27] The Interest Rate Swap Agreement is designed for U.S. dollar-denominated interest rate swaps. The Interest Rate and Currency Exchange Agreement is designed for both single currency and multicurrency interest rate swaps and currency swaps (including U.S. dollar-denominated interest rate swaps). The Interest Rate and Currency Exchange Agreement 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 Interest Rate and Currency Exchange Agreement, the two 1987 ISDA Master Agreements are essentially the same in substance. ISDA published standard form addenda to the 1987 ISDA Master Agreements in 1989 to facilitate their use for interest rate caps and floors and again in 1990 to facilitate their use for swaptions.

[28] The Single Jurisdiction Agreement is designed for Transactions in a single currency between two parties organized or operating out of the same jurisdiction. The Cross Border Agreement is designed for Transactions in any currency between two parties irrespective of their jurisdiction of organization or operation. The Cross Border Agreement 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.

[29] See the Preamble of a 1987 ISDA Master Agreement and Section 1(c) of the 1992 ISDA Master Agreement and the 2002 ISDA Master Agreement.

[30] See Section 2 of the ISDA Master Agreements.

[31] Although not a Section 2(a)(iii) condition precedent, we note that under the 2002 ISDA Master Agreement, payment and delivery obligations are deferred if an Illegality or Force Majeure Event has occurred and continues during the applicable Waiting Period, as defined in the 2002 ISDA Master Agreement. See Section 5(d). See Section 2(a)(iii) of the ISDA Master Agreements.

[32] See Section 5(a)(i), (vii) of the ISDA Master Agreements.

between the parties (other than, under the 2002 ISDA Master Agreement, single transaction close-outs for delivery failure under multiple transaction agreements) constitutes an Event of Default under the ISDA Master Agreements.[33]

The ISDA Master Agreements permit, in most cases, the designation of an Early Termination Date following the occurrence of an Event of Default or Termination Event specified in the ISDA Master Agreements. The ISDA Master Agreements provide that, in such case, no further scheduled payments and deliveries in respect of the Transactions will be required to be made. In addition, the ISDA Master Agreements provide that, in the case of a default-based termination, the designated Early Termination Date will be the Early Termination Date for all Transactions.[34] In addition, the 1992 and 2002 ISDA Master Agreements allow parties to elect, at the time they enter into a 1992 or 2002 ISDA Master Agreement, for all the outstanding Transactions under the 1992 or 2002 ISDA Master Agreement to terminate automatically upon certain insolvency events, instead of requiring the Non-defaulting Party to designate an Early Termination Date. Under a 1987 ISDA Master Agreement, however, all the outstanding Transactions will terminate automatically and an Early Termination Date will be deemed to have occurred immediately upon the occurrence of certain insolvency events.

In the event of a default-based termination, the ISDA Master Agreements provide for a lump-sum amount (reflecting the positive or negative values of all Transactions) to be calculated on the Early Termination Date (commonly referred to as "close-out netting").[35] The 2002, 1992 and 1987 Master Agreements differ from one another in terms of calculating payments owed upon a default-based termination. Nevertheless, the differences among them do not affect the issues discussed in this memorandum of law.

1. <u>Calculation of the Lump-Sum Amount under the 2002 ISDA Master Agreement</u>. The 2002 ISDA Master Agreement contains a single method for calculating the lump-sum amount upon early termination, which is based in part on the determination of a Close-out Amount. When determining a Close-out Amount, a Determining Party calculates the amount of its losses that are or would be incurred or its gains that are or would be realized in replacing, or in providing for the Determining Party the economic equivalent of (i) the material terms, including the payments and deliveries by the parties under Section 2(a)(i), in respect of a Terminated Transaction or group of Terminated Transactions, and (ii) the option rights of the parties in respect of a Terminated Transaction or group of Terminated Transactions. A Close-out Amount is to be determined by the Determining Party in good faith, using commercially reasonable procedures in order to produce a commercially reasonable result. The definition of Close-out Amount is permissive with respect to the kind of information that a Determining Party may consider, though it emphasizes consideration of certain information in certain contexts. Following the determination of any Close-out Amount, Section 6(e) of the 2002 ISDA Master Agreement sets out how a lump sum termination payment is to be calculated on early termination. The termination payment amount may be paid by the Non-defaulting or non-Affected Party or by the Defaulting or Affected Party, as the case may be, depending on which the calculation favors.

2. <u>Calculation of the Lump-Sum Amount under the 1992 ISDA Master Agreements</u>. The 1992 ISDA Master Agreements contain alternatives for calculating the lump-sum amount upon early termination, which the parties may elect at the time they enter into a 1992 ISDA Master Agreement.

First, the 1992 ISDA Master Agreements allow the parties to elect a payment measure based upon Market Quotation (market values of the Transactions based upon the parties' future scheduled payment or delivery obligations) or Loss (a general indemnity). If the parties elect Market Quotation, the lump-sum amount includes (i) all Unpaid Amounts (amounts which were or would have been due prior to termination) relating to the Transactions and (ii) an amount that reflects the netting of positive (<u>i.e.</u>, each amount that would be payable by the Non-defaulting Party to replace Transactions under then current market conditions) and negative (<u>i.e.</u>, each amount that would be received by the Non-defaulting Party to replace Transactions under then current market conditions) Market Quotations. As a result of such netting, the Defaulting Party is given credit for the negative market value of any

[33] <u>See</u> Section 5(a)(v) of the ISDA Master Agreements.

[34] If an Early Termination Date is designated as the result of the occurrence of an Event of Default or a decline in the credit quality of a party following the occurrence of certain merger-related events, all Transactions under the ISDA Master Agreements terminate. In the unlikely event, however, that an Early Termination Date is designated as a result of the occurrence of certain events relating to the imposition of withholding taxes or a change in law as a result of which a party's performance becomes illegal (or, under the 2002 ISDA Master Agreement, a Force Majeure Event), only the Transactions affected by such events (or, under the 2002 ISDA Master Agreement, in the case of an Illegality or a Force Majeure Event and at the election in certain cases of either party, some of the Affected Transactions) terminate. <u>See</u> Section 6 of the ISDA Master Agreements.

[35] <u>See</u> Section 6 of the ISDA Master Agreements.

Transactions under which it then would (absent the existence of an Event of Default or Potential Event of Default under the 1992 ISDA Master Agreements) have been entitled to receive payments from the Non-defaulting Party, even though the Non-defaulting Party would not, by virtue of the conditional payment obligation provisions set forth in the 1992 ISDA Master Agreements, otherwise have been obligated to make such payments. If the parties elect Loss, then any payment upon termination will be equal to the Non-defaulting Party's total net losses and costs (or gain, in which case expressed as a negative number) under the 1992 ISDA Master Agreements as a result of the termination of the Transactions.

Second, the 1992 ISDA Master Agreements also require the parties to elect between the "First Method" of calculating termination payments and the "Second Method". Under the First Method, in the case of an Event of Default, if the lump-sum termination amount is positive, it is paid by the Defaulting Party to the Non-defaulting Party, but, if it is negative, no payment is due: The Non-defaulting Party is not required to make a termination payment to the defaulting party after an Event of Default. Under the Second Method, if the lump-sum termination amount is a positive number, the Defaulting Party will pay it to the Non-Defaulting Party; if that amount is a negative number, the Non-defaulting party will pay the absolute value of that number to the Defaulting Party.

3. Calculation of the Lump-Sum Amount under the 1987 ISDA Master Agreements. The 1987 ISDA Master Agreements presume the selection of Market Quotation as the applicable payment measure with Loss used as the measure of damages with respect to the future value of a Transaction where a Market Quotation cannot be determined. Also, under the 1987 ISDA Master Agreements, either Market Quotation or Loss is determined in respect of single terminated Transactions only. In addition, the 1987 ISDA Master Agreements only provide for the First Method (limited two-way payments) upon an Event of Default.

On November 9, 1992, in the case of Drexel Burnham Lambert Products Corp. v. Midland Bank PLC, Case No. 92-3098, 1992 WL 12633422 (S.D.N.Y. Nov. 10, 1992), Judge Pollack of the U.S. District Court for the Southern District of New York held that "[t]he so-called 'Limited Two-Way Payments Clause' . . . is . . . enforceable".[36] This memorandum of law, however, does not address the enforceability of the First Method (also referred to as limited two-way payments) or the Second Method (also referred to as full two-way payments), because, as a matter of the assumptions below, resolution of this issue would have no impact upon the conclusions reached herein. The 2005 Act has amended the FDIA such that the limited two-way payment method, which would likely fall within the definition of "walkaway clause", would no longer be enforceable under the FDIA and FDICIA against an institution in default that takes ~~Federally~~federally-insured deposits.[37] The OLA contains a substantively identical denial of enforceability of walkaway clauses against Covered Financial Companies.[38] As noted in Section VIII.3(a) below, limited two-way payments may be challenged under the NYBL as well.

B. Assumptions

For purposes of this memorandum, we have made the following assumptions:

(a) Two institutions, either (i) a corporation or another Code entity or (ii) a bank or other similar financial institution, have entered into an ISDA Master Agreement. The parties have selected either the laws of the State of New York or the laws of England to govern the ISDA Master Agreement, at least one of the institutions is a U.S. Party and neither institution has specified, in the case of a 1987 ISDA Master Agreement, that it is a "Multibranch Party" or, in the case of a 1992 or 2002 ISDA Master Agreement, that the provisions of Section 10(a) apply to it.

[36] 1992 WL 12633422, at *2; see also Brookfield Asset Mgmt., Inc. v. AIG Fin. Prods. Corp., Case No. 09-8285, 2010 WL 3910590 (S.D.N.Y. Sept. 29, 2010) (nonbankruptcy court holding on motion to dismiss that defendants failed to demonstrate that Section 6(e)(i) of the 1987 ISDA Master Agreement is an unenforceable penalty clause).

[37] A "walkaway clause", as most recently defined in the 2006 Act, is defined as follows: "any provision in a qualified financial contract that suspends, conditions, or extinguishes a payment obligation of a party, in whole or in part, or does not create a payment obligation of a party that would otherwise exist, solely because of such party's status as a nondefaulting party in connection with the insolvency of an insured depository institution that is a party to the contract or the appointment of or the exercise of rights or powers by a conservator or receiver of such depository institution, and not as a result of a party's exercise of any right to offset, setoff, or net obligations that exist under the contract, any other contract between those parties, or applicable law." 12 U.S.C. § 1821(e)(8)(G)(iii). The OLA contains a substantively identical definition of "walkaway clause". 12 U.S.C. § 5390(c)(8)(F)(iii).

[38] 12 U.S.C. § 5390(c)(8)(F).

(b) The provisions of the Preamble of the ISDA Master Agreements and Section 1(c) of the 1992 ISDA Master Agreements and 2002 ISDA Master Agreement, as well as Sections 1(a), 2(a), 5, 6 and 13(a) of the ISDA Master Agreements and the related definitions contained in the Preamble and Section 14 have not been altered in any material respect from the printed terms of the ISDA Master Agreements.[39]

(c) 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 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 Appendix A.

(d) 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.

(e) After entering into these Transactions and prior to the maturity thereof, the U.S. Party becomes the subject of a voluntary or involuntary case in New York under the Code, the FDIA, the NYBL or the OLA, as the case may be, and, subsequent to the commencement of the insolvency, the U.S. 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.

(f) The parties have amended the 1987 ISDA Master Agreements and the 1992 ISDA Master Agreement so that they have adopted the approach of Full Two Way Payments for all Events of Default (called the Second Method in the 1992 ISDA Master Agreement) as well as Termination Events.

(g) Upon the occurrence of an Event of Default or a Termination Event under Section 5 of the ISDA Master Agreement in respect of the Defaulting Party, the Non-defaulting Party will act in good faith and in a commercially reasonable manner in the exercise of its rights granted to it under Sections 5 and 6 of the ISDA Master Agreement.

(h) With respect to an Insured Institution subject to the FDIA, the written agreement requirements of Sections 11(d)(9), 11(n)(4)(I) and 13(e) of the FDIA, as interpreted in the Policy Statement Regarding Qualified Financial Contracts issued by the Board of Directors of the FDIC on December 12, 1989 (the "FDIC Policy Statement"), are met; [40] (ii) with respect to a U.S. Banking Institution or a New York Branch subject to the NYBL, for purposes of the definition of Qualified Financial Contracts under the NYBL,[41] the Transactions entered into by such Party are reflected in the books, accounts or records of such

[39] We believe the following alterations to be consistent with this assumption: any selections contemplated by Sections 5 and 6 of the ISDA Master Agreements and made pursuant to a Schedule to an ISDA Master Agreement or in a Confirmation for a Transaction; an amendment of a 1987 ISDA Master Agreement to replace the First Method with the Second Method; an amendment of a 1992 ISDA Master Agreement, in the form set out in the ISDA Close-out Amount Protocol, to replace Market Quotation and (if elected) Loss with Close-out Amount; or an amendment in the form published by ISDA in June 2014 for use in relation to Section 2(a)(iii) of the 1992 ISDA Master Agreement or the 2002 ISDA Master Agreement.

[40] The FDIC Policy Statement provides a safe harbor under these sections of the FDIA where (i) the Transaction entered into under the ISDA Master Agreement is evidenced by a written confirmation issued by one of the parties "reasonably contemporaneously" with the Transaction, (ii) the Non-defaulting Party has relied on a representation or a resolution as to the corporate authority of the Insured Institution and (iii) the Non-defaulting Party has maintained a copy of the confirmation and evidence of authority. We believe that the confirmations required under Section 9 of the ISDA Master Agreement and the representations given under Section 3 of the ISDA Master Agreement should meet the requirements set forth in the FDIC Policy Statement. Subsections (d)(9) and (n)(4)(I) of Section 11, each of which relates to agreements generally, refer to Section 13(e) to define aspects of the written agreement requirement. Section 13(e) has been amended by the 2005 Act to eliminate the contemporaneous requirement, but, as written, only with respect to security arrangements for qualified financial contracts. We think subsections (d)(9) and (n)(4)(I) of Section 11 should be interpreted to be equally subject to the amended language of Section 13(e). However, in the absence of precedent, whether or not a court would decide that there remained any contemporaneous requirement in respect of an ISDA Master Agreement remains unclear.

[41] N.Y. Banking Law § 618-a2(e).

Party; and (iii) with respect to a Covered Financial Company subject to the OLA, the written agreement requirements of 12 U.S.C. § 5390(a)(6) are met.[42]

(i) For purposes of Questions 1–8 and Question 10, it is assumed that the ISDA Master Agreement is governed by the laws of the State of New York.

(j) Each Party has corporate power and authority to enter into the ISDA Master Agreement, including all the Transactions thereunder, and is a sophisticated user of derivatives, and all Transactions are enforceable in accordance with their terms.

(k) The execution and delivery of the ISDA Master Agreement, including the documents and other confirming evidence exchanged between the Parties confirming the Transactions, have been duly authorized by all necessary actions on the part of either Party.

(l) Any payments made by or any security interest granted to one Party in any of the assets of the other Party were not taken by the Party in contemplation of the latter Party's insolvency or with the intent to hinder, delay, or defraud that Party or the creditors of that Party.

(m) Neither Party to the relevant ISDA Master Agreement will be an "insider" of the other Party as defined in Section 101(31) of the Code, an "affiliate" of the other Party as defined in either Section 101(2) of the Code or Section 23A of the Federal Reserve Act, or an "institution affiliated party" of the other Party as defined in Section 3(u) of the FDIA.

(n) The United Nations Convention on Contracts for the International Sale of Goods will not apply to the ISDA Master Agreement or Transactions entered into thereunder.

(o) The ISDA Master Agreement and all Transactions carried out under the ISDA Master Agreement are entered into prior to the formal commencement of insolvency proceedings against either Party.

(p) At the time at which a Transaction is entered into under the ISDA Master Agreement, neither Party has actual notice of the insolvency of the other Party.

(q) For the purposes of Questions 6 and 8 below, it is assumed that a ~~Federally~~federally chartered national bank or a New York-chartered state bank that takes ~~Federally~~federally-insured deposits (the "U.S. Bank") has entered into an ISDA Master Agreement on a multibranch basis. In the 1992 and 2002 ISDA Master Agreements, the U.S. Bank has specified that Section 10(a) applies to it and, in the 1987 ISDA Master Agreements, that it is a "Multibranch Party". The U.S. Bank then has entered into Transactions under the ISDA Master Agreement through its head office and also through one or more branches of the U.S. Bank located in other countries that had been specified in the Schedule to the U.S. Bank's ISDA Master Agreement. After entering into these Transactions and prior to the maturity thereof, the U.S. Bank becomes the subject of a voluntary or involuntary proceeding under the banking insolvency laws of the United States.

(r) For the purposes of Questions 7 and 8 below, it is assumed that a bank ("Bank F") organized and with its headquarters in a country ("Country H") other than the United States has entered into an ISDA Master Agreement on a multibranch basis. In the 1992 and 2002 ISDA Master Agreements, Bank F has specified that Section 10(a) applies to it and, in the 1987 ISDA Master Agreements, that it is a "Multibranch Party". Bank F then has entered into Transactions under the ISDA Master Agreement

[42] 12 U.S.C. § 5390(a)(6) provides that "[n]o agreement that tends to diminish or defeat the interest of the Corporation as receiver in any asset ac quired by the receiver under this section shall be valid against the receiver, unless such agreement—(A) is in writing; (B) was executed by an authorized officer or representative of the covered financial company, or confirmed in the ordinary course of business by the covered financial company; and (C) has been, since the time of its execution, an official record of the company or the party claiming under the agreement provides documentation, acceptable to the receiver, of such agreement and its authorized execution or confirmation by the covered financial company."

through Bank F and also through one or more branches of Bank F located in other countries that had been specified in the Schedule to Bank F's ISDA Master Agreement, including in each case a branch of Bank F located in New York State and organized under the laws of New York State that does not take ~~Federally~~federally-insured deposits (the "New York Branch") or a branch of Bank F located in and organized under Federal law (the "Federal Branch"). After entering into these Transactions and prior to the maturity thereof, Bank F becomes the subject of a voluntary or involuntary insolvency proceeding in Country H.

(s) For purposes of Question 9 below, the Parties enter into an ISDA Master Agreement in which Part 4(h) or, in the case of the 1987 ISDA Master Agreements, Part 4(l), of the Schedule reads as follows: "Governing Law. This Agreement will be governed by and construed in accordance with English law" (each an "English-law ISDA Master Agreement"). In addition, all the Transactions entered into under the English-law ISDA Master Agreement will be governed by English law. The English-law ISDA Master Agreement, in particular the termination, the close-out netting and the multibranch provisions thereof, the Schedule and all the Transactions entered into thereunder are valid, binding and enforceable in accordance with their terms under English law.

(t) All Bridged Agreements (as defined in Section XII) relate to transactions eligible for one or more of the safe harbors for securities contracts, forward contracts or swap agreements under the Code and, as qualified financial contracts, for purposes of the FDIA, the NYBL and the OLA; all Bridged Agreements (including the transactions thereunder) are themselves enforceable under their governing laws and the laws of the State of New York, if applied thereto, and satisfy assumptions (j) through (p) above (as if references therein to the ISDA Master Agreement and Transactions were, respectively, to the relevant Bridged Agreement and the transactions thereunder); the Bridge satisfies assumptions (i) through (p) above (as if references to the ISDA Master Agreement and were to the Bridge, with references to Transactions being disregarded); all Bridged Agreements provide for simultaneous termination of all transactions thereunder and calculation of a single net termination amount and the relevant Bridge, as written, would successfully trigger those termination and netting provisions; the termination and netting provisions under the Bridged Agreements are themselves enforceable under the Code, the FDIA, the NYBL and the OLA to the same extent as are like provisions of the ISDA Master Agreements; and any notices deemed given shall be given or adequately substituted for, to the extent necessary to support the enforceability of the Bridged Agreements as described above.

II.

QUESTIONS PRESENTED

This memorandum of law addresses the following questions:

1. For purposes of the 1992 ISDA Master Agreements and 2002 ISDA Master Agreement, assuming the parties have not selected Automatic Early Termination upon certain insolvency events to apply to the U.S. Party, are the provisions of the relevant ISDA Master Agreement permitting the Non-defaulting Party to terminate all the Transactions (i) upon the insolvency of a Code Entity, enforceable under the Code, the OLA or FDICIA, and (ii) upon the insolvency of a U.S. Banking Institution, enforceable under the FDIA, the NYBL, the OLA (in the case of an Uninsured N.Y. Institution) or FDICIA?

2. Assuming, in the case of the 1992 ISDA Master Agreements and 2002 ISDA Master Agreement, that the parties have selected Automatic Early Termination upon certain insolvency events to apply to the U.S. Party or that the 1987 ISDA Master Agreement applies, are the provisions of the ISDA Master Agreement automatically terminating all the Transactions (i) upon the insolvency of a Code Entity, enforceable under the Code, the OLA or FDICIA, and (ii) upon the insolvency of a U.S. Banking Institution, enforceable under the FDIA, the NYBL, the OLA (in the case of an Uninsured N.Y. Institution) or FDICIA?

3. Are the provisions of the ISDA Master Agreement providing for the netting of termination values in determining a single lump-sum termination amount (i) upon the insolvency of a Code Entity, enforceable under the

Code, the OLA or FDICIA, and (ii) upon the insolvency of a U.S. Banking Institution, enforceable under the FDIA, the NYBL, the OLA (in the case of an Uninsured N.Y. Institution) or FDICIA?

4. Assuming (i) the parties have entered into an ISDA Master Agreement, (ii) one of the parties is insolvent and (iii) the parties have selected a Termination Currency other than U.S. dollars, is it possible to "prove" (that is, file) a claim in a local insolvency proceeding in a foreign currency?

5. Is it possible to obtain or execute a judgment in a foreign currency under the laws of the U.S. or the State of New York?

6. Would there be any change in the conclusions reached for Questions 1–5 above if a U.S. Bank entered into an ISDA Master Agreement on a multibranch basis and then conducted business in that fashion prior to its insolvency?

7. In relation to Bank F as a multibranch party with a New York Branch or a Federal Branch:

(a) Would there be a separate proceeding under New York law or Federal law with respect to the assets and liabilities of a New York Branch or Federal Branch at the start of an insolvency proceeding for Bank F in Country H? Or would the Superintendent or the OCC defer to the proceedings in Country H so that the assets and liabilities of the New York Branch or Federal Branch would be handled as part of the proceeding for Bank F in Country H? Could local creditors of a New York Branch or Federal Branch initiate a separate proceeding even if the Superintendent or the OCC did not do so?

(b) If there would be a separate proceeding with respect to the assets and liabilities of a New York Branch or Federal Branch, would the Superintendent or the OCC and the New York or Federal 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 New York Branch or Federal Branch and, if so, would the Superintendent or the OCC and the New York or Federal courts recognize the close-out netting provisions of the ISDA Master Agreement in accordance with their terms? We assume that close-out netting under the ISDA Master Agreement would be enforced in accordance with its terms in the proceedings for Bank F in Country H.

8. Would the conclusions reached for Questions 6 and 7 above change as a result of the inclusion of a non-netting branch in an ISDA Master Agreement, notwithstanding the 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 Jurisdictions")?

In particular, we will consider whether the conclusions reached for Questions 6 and 7 above would not be materially altered based on the following scenarios:

(a) In the case of an insolvency proceeding for a U.S. Bank, the U.S. 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").

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

9. Would the conclusions reached for Questions 1–8 above change as a result of the choice of English law as the law governing the ISDA Master Agreements?

10. Are the termination, close-out netting and multibranch provisions contained in the ISDA Master Agreement enforceable under the laws of the State of New York?

11. Are there any developments pending as a result of which the current regulatory or legal environment under U.S. law or New York State law concerning the enforceability of close-out netting may be expected to change in the foreseeable future?

III.

SUMMARY OF CONCLUSIONS[43]

The applicable provisions of the Code, the FDIA, the NYBL and the OLA clarify, to a significant extent, the status of Transactions documented under an ISDA Master Agreement in both a Code Insolvency Proceeding,[44] an FDIA Insolvency Proceeding,[45] an NYBL Insolvency Proceeding[46] and an OLA Insolvency Proceeding.[47] These laws expressly provide that, with respect to a master agreement that documents "swap agreement[s]" or a master agreement that documents a combination of swap agreements, "securities contracts", and/or "forward contracts", close-out netting provisions will be upheld to permit broad forms of netting arrangements, thereby providing a firm legal foundation for calculating exposures on a net basis. In addition, where FDICIA applies (<u>i.e.</u>, each counterparty is a "financial institution" and the agreement is a type of "netting contract"), close-out netting provisions will be upheld irrespective of the types of Transactions entered into under the "netting contract".

A. <u>"Swap Agreement" under the Code, the FDIA, the NYBL and the OLA</u>

In a proceeding under the Code, the right to terminate by reason of and upon bankruptcy is expressly recognized in the amendments to the Code, entitling Parties to an ISDA Master Agreement that is a "swap agreement" to liquidate, terminate or accelerate the ISDA Master Agreement immediately upon the filing of a bankruptcy petition by their counterparty and to calculate damages on a net basis (in addition to utilizing any collateral they are holding to satisfy any secured claim under the ISDA Master Agreement). In an FDIC-administered proceeding (whether under the FDIA or the OLA), a party's right to terminate based solely on the appointment of the FDIC as receiver (under the FDIA or the OLA) or conservator (under the FDIA), or the insolvency or financial condition of the institution for which the FDIC has been appointed, (but not any right to terminate based on other grounds) will be (i) in the case of a receivership, suspended until 5:00 p.m. (eastern time) on the business day following appointment or (ii) in the case of a conservatorship, inaccessible. However, upon any transfer or repudiation by the FDIC, and upon lapse of the one-business-day suspension period in the case of a receivership, the close-out netting provisions of an ISDA Master Agreement that is a "swap agreement" will be preserved and enforced (in the case of a transferred agreement, upon default of the transferee). A "walkaway" clause, however, will not be enforced. A similar result will occur in an insolvency proceeding under the NYBL which is administered by the Superintendent as would occur under the FDIA. Termination rights based solely on insolvency or financial condition of an *affiliate* of the counterparty subject to the Code, FDIA, NYBL or OLA proceeding could be limited by the OLA in certain circumstances if that affiliate is a Covered Financial Company.[48]

B. <u>FDICIA</u>

Where FDICIA is applicable[49] (<u>i.e.</u>, both parties are "financial institution[s]" and the agreement is a "netting contract"), then, regardless of the types of Transactions documented under the ISDA Master Agreement and "notwithstanding any other provision of law" (except as described below), the terms of such ISDA Master Agreement should govern, enabling the parties to enforce the close-out netting provisions of the ISDA Master Agreement. The enforceability of the termination provisions of an ISDA Master Agreement under FDICIA, however, is limited by the rights of a receiver or conservator of an insolvent ~~Federally~~<u>federally</u>-insured depository under the FDIA and the rights of a receiver of an insolvent Covered Financial Company under the OLA.[50] These

[43] The conclusions reached in A–C below apply regardless of whether or not the parties have selected Automatic Early Termination to apply or its analogous provision in Section 6(a) of the 1987 ISDA Master Agreements applies.

[44] <u>See</u> Section IV.A.1(a).

[45] <u>See</u> Section IV.B.1(a).

[46] <u>See</u> Section IV.C.1.

[47] <u>See</u> Section IV.D.1(a).

[48] 12 U.S.C. § 5390(c)(16). <u>See</u> Section IV.D.1(a).

[49] <u>See</u> Section V.

[50] The right to enforce close-out netting under FDICIA is subject to Section 11(e) of the FDIA (12 U.S.C. § 1821(e)), Section 210(c) of the OLA (12 U.S.C. § 5390(c)), certain sections of the Federal Credit Union Act and any order authorized under Section 5(b)(2) of the Securities Investor Protection Act of 1970. Termination rights based solely on insolvency or financial condition of an *affiliate* of a party to a netting contract could be limited by the OLA in certain circumstances if that affiliate is a Covered Financial Company. 12 U.S.C. § 5390(c)(16). <u>See</u> Section IV.D.1(a).

rights include the prohibition against enforcement of a "walkaway clause" in a netting agreement against a ~~Federally~~federally-insured depository or a Covered Financial Company in default.[51]

C. Non-Enumerated Transactions and Master Netting Agreements under the Code, the FDIA, the NYBL, the OLA and FDICIA

Where FDICIA does not apply and with respect to an ISDA Master Agreement that documents Transactions listed by name within the definition of "swap agreement" along with transactions that are not so enumerated in the Code, the FDIA, the NYBL and the OLA ("Non-Enumerated Transactions"), a court should find, under the circumstances described in this memorandum, that certain Non-Enumerated Transactions deserve the same treatment as "swap agreement[s]" under the Code, the FDIA, the NYBL and the OLA, thereby enabling a derivatives market participant to achieve one net amount owed by or to it.

Under the Code, if such Non-Enumerated Transactions are not treated as "swap agreement[s]" but rather as any combination of one or more of "forward contract[s]" and/or "securities contract[s]", and if the derivatives market participant qualifies as a "master netting agreement participant", then the ISDA Master Agreement will be treated as a "master netting agreement" and the derivatives market participant may preserve and enforce close-out netting with respect to such Non-Enumerated Transactions.[52]

Similarly, under the FDIA, the NYBL and the OLA, if such Non-Enumerated Transactions are not treated as "swap agreement[s]" but rather as any combination of one or more of "forward contract[s]" and/or "securities contract[s]", then such ISDA Master Agreement would be treated as a single agreement and a single "qualified financial contract", and such party should be able to enforce the close-out netting provisions of the ISDA Master Agreement to reach one net amount, to the extent the underlying transactions are themselves qualified financial contracts.

FDICIA does not impose any restrictions based on type of Transaction.

D. Termination Currency

The selection of a Termination Currency other than U.S. dollars should not violate the public policy of the United States or the State of New York. Nevertheless, for purposes of any insolvency proceeding under the Code, the FDIA, the NYBL or the OLA, any claim of the Non-defaulting Party or any judgment in favor of the Non-defaulting Party that is denominated in a currency other than U.S. dollars must be converted into U.S. dollars.

E. Multibranch ISDA Master Agreements

U.S. Bank with Foreign Branches. The conclusions reached under A–D above with regard to the enforceability of the termination and close-out netting provisions in an ISDA Master Agreement would be applicable to ISDA Master Agreements executed and conducted by a U.S. Bank on a multibranch basis.

Insolvency Proceedings Applicable to a New York Branch or a Federal Branch. There would be a separate insolvency proceeding under New York or Federal law to administer the disposition of the assets and liabilities of a New York Branch or Federal Branch; the New York proceedings would be administered by the Superintendent, assuming the Superintendent did not defer to the FDIC or the FDIC did not otherwise take control of the assets of the New York Branch. The Federal Branch proceeding would be administered by the FDIC after appointment by the Office of the Comptroller of the Currency ("OCC") or by the OCC. Individual creditors of the New York Branch could not initiate a separate insolvency proceeding against the New York Branch if the Superintendent chose not to initiate such a proceeding. Individual creditors of the Federal Branch may force the commencement of an insolvency proceeding for the Federal Branch by obtaining a judgment against the Federal Branch in a U.S. court and certifying to the OCC that such judgment has remained unpaid for 30 days.

Multibranch Netting with a New York Branch or a Federal Branch. Based on amendments to the NYBL, in a separate insolvency proceeding for a New York Branch, the Superintendent would recognize and enforce the multibranch close-out netting provisions of the ISDA Master Agreement entered into by the New York Branch, with certain limitations. If the assets of the New York Branch were within the control of the FDIC, the insolvency

[51] 12 U.S.C. § 1821(e)(8)(G); 12 U.S.C. § 5390(c)(8)(F).

[52] Of course, an agreement solely for one of the protected categories of transactions other than swap agreements should also be protected under the Code provisions relevant to that category of transaction.

proceeding may be governed by the amended NYBL or the FDIA. In an insolvency proceeding for a Federal Branch administered under either the FDIA or the National Bank Act ("NBA") and the International Banking Act ("IBA"), the multibranch close-out netting provisions might not be enforceable; however, a reasonable argument exists that to the extent the FDIA would be applicable to the insolvency proceedings, the FDIC should enforce the multibranch close-out netting provisions in accordance with the intention of the parties and the provisions of the FDIA.

U.S. Bank with a Foreign Branch in a Non-Netting Jurisdiction. The conclusions reached above with respect to the treatment of the multibranch netting provisions of the ISDA Master Agreement would remain the same notwithstanding the fact that the U.S. Bank, acting on a multibranch basis, booked some Transactions through Non-Netting Branches.

Foreign Bank with a U.S. Branch and Non-Netting Branches. The conclusions reached above with respect to the treatment of the multibranch netting provisions of the ISDA Master Agreement would be applicable to branches or agencies of Bank F if Bank F, acting on a multibranch basis, booked Transactions through its home office, a Federal Branch or a New York Branch and one or more Non-Netting Branches in other jurisdictions.

F. English-Law ISDA Master Agreements

The conclusions reached under A, B, C, D and E above with respect to the enforceability of the termination, close-out netting and multibranch provisions of New York-law ISDA Master Agreements would be applicable to English-law ISDA Master Agreements under the Code, the FDIA, the NYBL and FDICIA.

G. New York-Law ISDA Master Agreements

We believe that the termination,[53] close-out netting and multibranch provisions contained in the ISDA Master Agreement would be enforceable under the laws of the State of New York against the Defaulting Party in accordance with their terms, subject to general principles of equity (including, without limitation, concepts of materiality, reasonableness, good faith and fair dealing), regardless of whether considered in a proceeding in equity or at law.

H. Pending Developments

The OLA provisions of the Dodd-Frank Act mandated certain studies on the resolution of financial companies.[54] One of these studies, to be produced by the Board of Governors in consultation with the Administrative Office of the United States Courts and the results of which are to be reported to Congressional committees annually until the fifth year after the date of enactment of the Dodd-Frank Act, encompasses the question of whether amendments should be made to the Code, the FDIA and other insolvency laws to address the manner in which qualified financial contracts of financial companies are treated in insolvency. Another of the required studies examined the treatment of fully secured creditors under the Code, the FDIA and the OLA and the question of how a haircut (of various degrees) on secured creditors could improve market discipline and protect taxpayers. The reports produced to date included summaries of the arguments of proponents and opponents of the financial contract safe harbors.[55] Neither report contained recommendations for the modification of the safe harbors.

Despite the effectiveness of many Dodd-Frank provisions regulating the OTC market, controversy continues to attach to swaps and other aspects of financial reform. One manifestation of this is a movement, so far ineffective, to reduce or eliminate the special insolvency protections available to swaps and certain other financial contracts. This movement may be expected to continue in coming years. Whether or not it becomes an imminent threat to the protections described in this memorandum remains to be seen. Bills have been introduced in Congress (and one such bill was ~~recently~~ approved by the House of Representatives in 2014) to amend the U.S. Bankruptcy Code to provide new mechanisms, including a temporary stay on the termination of safe-harbored financial contracts (and ability to set off against collateral), for resolving financial institutions without resort to the OLA. U.S. prudential regulators have indicated that they may require regulated financial firms to employ contractual stays on

[53] Termination rights based solely on insolvency or financial condition of an *affiliate* of the Defaulting Party could be limited by the OLA in certain circumstances if that affiliate is a Covered Financial Company. 12 U.S.C. § 5390(c)(16). See Section IV.D.1(a).

[54] Sections 215, 216 and 217 of the OLA. The topics for the studies are: secured creditor haircuts; the bankruptcy process for financial companies and nonbank financial institutions; and international coordination relating to the bankruptcy process for nonbank financial institutions.

[55] Study on the Resolution of Financial Companies under the Bankruptcy Code, Board of Governors of the Federal Reserve System (July 2011), pages 15–18; Report to Congress on Secured Creditor Haircuts, Financial Stability Oversight Council (July 2011), pages 15–16.

termination rights in their derivatives contracts with counterparties. The ISDA ~~2014~~2015 Universal Resolution Stay Protocol (which replaces an earlier 2014 protocol for parties that adhere to the 2015 protocol) enables adhering parties to amend covered ISDA Master Agreements ~~and~~, covered securities finance master agreements and related covered credit enhancements to incorporate certain limitations on the exercise of default rights and various other modifications. The ~~protocol was~~2014 and 2015 protocols were developed in consultation with a global body of regulators with the objectives of supporting recognition of the cross-border application of special resolution regimes applicable to certain financial companies and supporting the resolution of certain financial companies under the Code.

New case law developments may threaten certain of the anti-avoidance protections available under the U.S. Bankruptcy Code by allowing creditors to pursue state law causes of action with substantially similar effect as avoidance actions that would be barred were they brought under the U.S. Bankruptcy Code. See footnote 223. Courts have split on the issue and appeals are pending. We believe that an analysis that makes observance of the anti-avoidance safe harbors a function of purely elective procedural decisions of the debtor should not prevail. However, we must await further decisions bearing this out.

IV.

"SWAP AGREEMENT" UNDER THE CODE, THE FDIA, THE NYBL, THE OLA AND FDICIA

A. Code[56]

1. Background; Definitions

(a) Code Insolvency Proceedings. Under the Code, cases may be commenced either voluntarily by the debtor, or involuntarily by the debtor's creditors. A voluntary case commences when a Code Entity files with the bankruptcy court a petition under the relevant chapter of the Code. An involuntary case may be commenced under the Code by the filing with the bankruptcy court of a petition by one of the persons or groups of persons indicated in the Code. As a general rule, the Code offers two types of insolvency proceedings, one under Chapter 7 (liquidation) and one under Chapter 11 (reorganization).

(b) Definitions. The Code provides:

(i) an express exemption from the automatic stay contained in Section 362 to exercise any contractual right "under any security agreement or arrangement or other credit enhancement forming a part of or related to any swap agreement" or to "offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such [swap] agreements, including any master agreement for such agreements";[57]

(ii) express recognition that parties will be entitled to exercise contractual rights to liquidate, terminate or accelerate one or more "swap agreements" and net or offset termination values and payment amounts under such "swap agreements";[58] and

[56] Throughout this Section IV.A, we assume that the insolvent U.S. Party is a Code Entity.

[57] 11 U.S.C. § 362(b)(17) as amended by the 2006 Act.

[58] 11 U.S.C. § 560. ~~Limited~~Section 560 focuses on protecting rights triggered by contractual "financial condition" or "ipso facto" clauses. The effect of Section 560 was limited by Lehman Bros. Special Fin. Inc. v. BNY Corp. Tr. Servs. Ltd. (In re Lehman Bros. Holdings Inc.), 422 B.R. 407 (Bankr. S.D.N.Y. 2010), which held that an ipso facto clause must be specifically set forth in the "swap documents" to fall within the safe harbor, and a flip clause in the transaction documents for credit-linked notes did not meet this test. This decision may also support the proposition that the flip clause would not be viewed as within the safe harbors even if it had been within the swap agreement itself. See infra note 66.

(iii) express protection for transfers in good faith under or in connection with a “swap agreement” against a trustee’s power to avoid payments and other transfers made within 90 days (or in some cases one year) prior to a bankruptcy filing.[59]

Under Section 101(53C) of the Code, a “swap participant” is defined as “an entity that, at any time before the filing of the petition, has an outstanding swap agreement with the debtor.” Under Section 101(22A) of the Code, a “financial participant” is defined, in relevant part, as “an entity that, at the time it enters into a securities contract, commodity contract, swap agreement, repurchase agreement, or forward contract, or at the time of the date of the filing of the petition, has one or more agreements or transactions [of the foregoing type or one or more master netting agreements] with the debtor or any other entity (other than an affiliate) of a total gross dollar value of not less than $1,000,000,000 in notional or actual principal amount outstanding (aggregated across counterparties) at such time or on any day during the 15-month period preceding the date of filing the petition, or has gross mark-to-market positions of not less than $100,000,000 (aggregated across counterparties) in one or more such agreements or transactions with the debtor or any other entity (other than an affiliate) at such time or on any day during the 15-month period preceding the date of filing the petition”.

As amended by the 2006 Act, Section 101(53B) of the Code defines “swap agreement” as:

(i) any agreement, including the terms and conditions incorporated by reference in such agreement, which is — (I) an interest rate swap, option, future, or forward agreement, including a rate floor, rate cap, rate collar, cross-currency rate swap, and basis swap; (II) a spot, same day-tomorrow, tomorrow-next, forward, or other foreign exchange, precious metals, or other commodity agreement; (III) a currency swap, option, future, or forward agreement; (IV) an equity index or equity swap, option, future, or forward agreement; (V) a debt index or debt swap, option, future, or forward agreement; (VI) a total return, credit spread or credit swap, option, future, or forward agreement; (VII) a commodity index or a commodity swap, option, future, or forward agreement; (VIII) a weather swap, option, future, or forward agreement; (IX) an emissions swap, option, future, or forward agreement; or (X) an inflation swap, option, future, or forward agreement;

(ii) any agreement or transaction that is similar to any other agreement or transaction referred to in this paragraph and that — (I) is of a type that has been, is presently, or in the future becomes, the subject of recurrent dealings in the swap or other derivatives markets (including terms and conditions incorporated by reference therein); and (II) is a forward, swap, future, option, or spot transaction on one or more rates, currencies, commodities, equity securities, or other equity instruments, debt securities or other debt instruments, quantitative measures associated with an occurrence, extent of an occurrence, or contingency associated with a financial, commercial, or economic consequence, or economic or financial indices or measures of economic or financial risk or value;

(iii) any combination of agreements or transactions referred to in this subparagraph;

(iv) any option to enter into an agreement or transaction referred to in this subparagraph;

(v) a master agreement that provides for an agreement or transaction referred to in clause (i), (ii), (iii), or (iv), together with all supplements to any such master agreement, and without regard to whether the master agreement contains an agreement or transaction that is not a swap agreement under this paragraph, except that the master agreement shall be considered to be a swap agreement under this paragraph only with respect to each agreement or transaction under the master agreement that is referred to in clause (i), (ii), (iii), or (iv); or

(vi) any security agreement or arrangement or other credit enhancement related to any agreements or transactions referred to in clause (i) through (v), including any guarantee or reimbursement obligation by or to a swap participant or financial participant in connection with any

[59] 11 U.S.C. §§ 546(g), 548(c), 548(d)(2).

agreement or transaction referred to in any such clause, but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562.[60]

As part of the Bankruptcy Reform Act of 1994, the definition of "swap agreement" was amended to expressly include "spot foreign exchange agreements". The 2005 and 2006 Acts, further amended the definition to expressly include, among others, various types of equity, credit,[61] commodity, weather, inflation and emissions derivatives, as well as spot transactions on all of the foregoing underlyings.[62]

The reference in subparagraph (ii) above to "any agreement or transaction that is similar" was expanded substantially in the 2005 and 2006 Acts to explicitly articulate types of transactions and underlyings intended to be covered. The expanded reference appears open to spot transactions generally and to newer privately negotiated derivatives transactions that have common fundamental characteristics with those Transactions specified, such as economic statistic derivatives. When amending the Code in 1990, 2005 and 2006, Congress was aware that the derivatives markets were rapidly growing and evolving, and it was sensible to include additional language designed to accommodate this growth and evolution. The legislative history underscores in particular the expansive intent of the new reference to "derivatives" markets (stating on page 6 of the House Report that "the proposed amendments would change the reference to swap markets to 'swap or other derivatives markets' in order to avoid any suggestion that new developments are limited to transactions that are technically swaps as opposed to other types of derivatives, such as options").[63]

The definition of "swap agreement" also contemplates that more than one "swap agreement" may be effected under a master agreement such as an ISDA Master Agreement, and clarifies that in such a case, all such agreements taken together will constitute a single "swap agreement" (regardless, but to the exclusion, of any agreements under the master agreement that are not themselves swap agreements).[64] This provision, together with Section 560 of the Code, discussed below, should bar any efforts by a trustee to "cherry-pick" among Transactions advantageous to the trustee that fall within the definition of "swap agreement" and that are documented under an ISDA Master Agreement.

[60] 11 U.S.C. § 101(53B)(B). Section 101(53B)(B) also states that the definition "is applicable for purposes of this title only, and shall not be construed or applied so as to challenge or affect the characterization, definition, or treatment of any swap agreement under any other statute, regulation, or rule, including the Gramm-Leach-Bliley Act, the Legal Certainty for Bank Products Act of 2000, the securities laws (as such term is defined in section 3(a)(47) of the Securities Exchange Act of 1934) and the Commodity Exchange Act".

[61] Appendix A contains references to "Contingent Credit Default Swaps" and "Swap Deliverable Contingent Credit Default Swaps". We regard these transactions fundamentally as "Credit Default Swaps" for purposes of this memorandum, despite their idiosyncrasies of valuation and settlement. See, e.g., Fed. R. Bankr. P. 3001(e). We note that variations exist in approaches to these transactions (especially the latter), but we are not aware of variations that challenge our assessment.

[62] The report of the House Committee on Financial Services stated that "the reference . . . to spot transactions in commodities is not intended to e ncompass ordinary sales of goods contracts, but rather financial market transactions in commodities." H.R. No. 109-648, at 6 (2006). Presumably both the nature of the parties and the nature of the "goods" would figure in determining the scope of this aspect of the definition.

[63] ~~See In re Nat'l Gas Distribs.~~The bankruptcy court in *In re National Gas Distributors, LLC* took a more restrictive view of the definition of "swap agreement" (in its 2005 version) than that seemingly intended by Congress by holding that a "commodity forward agreement," an enumerated "swap" under Section 101(53)(B), had to be traded in a financial market and could not have involved physical delivery of the commodity to an end user. 369 B.R. 884 (Bankr. E.D.N.C. 2007). The U.S. Court of Appeals for the Fourth Circuit, *In re National Gas Distributors*, *LLC*, 556 F.3d 247 (C.A.4~~th Cir. 2009),~~ (N.C.) 2009) reversed this decision, noting Congress's expansive intent and held that Congress did not preclude physical delivery in connection with a "commodity forward agreement."⊥
National Gas did, however, elucidate four elements, arguably in *dicta*, which further restrict the definition of "commodity forward agreement": for ~~a limited, though still supportive, view of the nature and breadth of markets and transactions reached. See infra note 180.~~example, that price, quantity and timing are fixed at the time of contracting. Hence, on remand, the lower bankruptcy court thereby held on summary judgment that contracts without fixed quantity terms could not be "commodity forward agreements." It is not clear whether this limiting view will have ramifications beyond the case. *See Lightfoot v. MXEnergy Electric, Inc. (In re MBS Mgmt. Servs., Inc.)*, 430 B.R. 750, 756 (Bankr. E.D. La. 2010), and 432 B.R. 570, 576 (Bankr. E.D. La. 2010), *aff'd*, 2011 WL 1899764 (E.D. La. May 19, 2011), *aff'd*, 690 F.3d 352 (5th Cir. 2012) (describing *dicta* of *National Gas* as "intentionally open-ended . . . and evocative rather than prescriptive" and stating that *In re Olympic Natural Gas Co.*, discussed infra at note 180, did not limit the definition of "forward contract" to require exact quan tities and delivery dates and that *Olympic* rejected several arguments designed to narrow the scope of the definition of "forward contract"). *But see Conti v. Perdue BioEnergy, LLC (In re Clean Burn Fuels, LLC), 2015 Bankr. LEXIS 3300* (Bankr. M.D.N.C.) which followed the con trolling 4th Circuit *National Gas* precedent and held that, by its logic, *National Gas*'s four elements not only apply to "commodity forward agreements" as "swap agreements" under Section 546(g), but also extend to "forward contracts" under 546(e). See infra note 180.

[64] 11 U.S.C. § 101(53B)(A)(v). Under 11 U.S.C. § 101(53B)(A)(v), a master agreement comprising both transactions that are swap agreements and transactions that are not swap agreements will be considered a swap agreement only with respect to the transactions that are themselves swap agreements or other protected agreements.

2. Automatic Stay. Section 362(b)(17) of the Code creates an exception to the scope of the automatic stay set forth in Section 362(a) of the Code. This exception permits a swap participant or a financial participant to exercise any contractual rights under any security agreement or arrangement or other credit enhancement forming a part of or related to any swap agreement or exercise any contractual right[65] to offset or net out any termination value, payment amount or other transfer obligation arising under or in connection with one or more such agreements, including any master agreement for such agreements. This permits netting of payment (or other property transfer) obligations at any time, including obligations arising after the filing of the bankruptcy petition. This provision also allows parties holding collateral or margin, or entitled to the benefits of a guarantee, to utilize such credit support, notwithstanding the bankruptcy filing.

In addition, Section 553(b)(1) of the Code protects the right of a swap participant to exercise rights of setoff by exempting them from a trustee's power to readjust any setoff that takes place during the 90-day period prior to the filing of a petition.

3. Right to Terminate and Exercise Netting Provisions. Section 560 of the Code preserves the contractual right of a swap participant or financial participant to liquidate, terminate or accelerate one or more "swap agreement[s]" and offset or net out any termination or payment amounts owed under it in the event that the other party to the agreement files a bankruptcy petition or becomes insolvent, or in the event that a trustee or custodian is appointed for the party. A contractual right is defined to include a right set forth under a rule or bylaw of various types of clearing facilities, exchanges or transaction execution facilities, or in a resolution of a governing board of any thereof, or a right arising under common law, under law merchant, or by reason of normal business practice, whether or not the right is evidenced in writing.[66]

One principal effect of this provision is to override Section 365(e) of the Code, which otherwise generally would prevent a nonbankrupt party from using the bankruptcy filing as a basis for exercising a typical bankruptcy default provision in order to terminate a "swap agreement". Equally important, by permitting a party to "net out any termination values", Section 560 of the Code makes clear that the provisions contained in an ISDA Master Agreement for closeout netting will be enforceable upon termination of a "swap agreement".[67]

Section 562 of the Code, introduced as part of the 2005 Act, sets forth the timing of damage measurement in connection with the termination of swap agreements, securities contracts, forward contracts, commodity contracts, repurchase agreements and master netting agreements. In general, damages will be measured as of the earlier of the date of rejection by the trustee of such agreement or the date or dates of the liquidation, termination, or acceleration

[65] Please see note 211, discussing the very broad definition of "contractual right" that applies in several places in the Bankruptcy Code, including Section 362(b)(17) (referencing Sections 555 and 556). However~~,~~ in Bank of America v. Lehman Brothers Holdings Inc. (In re Lehman Brothers Holdings, Inc.), 439 B.R. 811 (Bankr. S.D.N.Y. 2010), (the court held that the exception under Section 362(b)(17) for the exercise of "contractual" rights does not extend to common-law setoff rights against a "special purpose" deposit account pledged by the debtor exclusively to secure overdrafts arising in its bank accounts).

[66] See 11 U.S.C. § 560. This provision does not preempt the statute of frauds or any other provision of law, except for the provisions of the Code, and does not validate any particular method of calculating termination values or damages. See H.R. Rep. No. 101-484, at 5–7 (1990). One bankruptcy court has read the scope of Section 560 protection as confined to contractual rights within the swap master agreement itself, as opposed to related "flip clause" subordination rights within a related indenture. See Lehman Bros. Special Fin. Inc. v. BNY Corp. Tr. Servs. Ltd. (In re Lehman Bros. Holdings Inc.), 422 B.R. 407 (Bankr. S.D.N.Y. 2010); see also Lehman Bros. Special Fin. Inc. v. Ballyrock ABS CDO 2007-1 Ltd., 452 B.R. 31, 40 (Bankr. S.D.N.Y. 2011) (holding, on motion to dismiss, that an indenture provision assigning a lower distribution priority to termination payments due to defaulting swap counterparty is not within the scope of Section 560, which is "limited exclusively to preserving the right to liquidate, terminate and accelerate a qualifying financial contract"), leave to appeal denied, 2011 WL 9375423 (Bankr. S.D.N.Y. Nov. 3, 2011); but see Michigan State Housing Development Authority v. Lehman Bros. Derivatives Products, Inc. (In re Lehman Bros. Holdings Inc.), 502 B.R. 383, (Bankr. S.D. N.Y. Dec. 19, 2013) (holding that a provision shifting the methodology for calculating termination amounts upon the debtor counterparty's bankruptcy is within the protective scope of Section 560).

[67] In Calpine Energy Servs., L.P. v. Reliant Energy Elec. Solutions, L.L.C. (In re Calpine Corp.), Case No. 05-60200, Adv. No. 08-1251, 2009 WL 1578282 (Bankr. S.D.N.Y. May 7, 2009), the court held that analogous language of Section 556 protects only the right to terminate based upon a condition of the kind specified in Section 365(e)(1). Accordingly, a provision requiring the debtor to give timely notice that it disputes the non-defaulting party's calculation of a termination payment was not enforceable against the debtor. See also In re Lehman Brothers Holdings, Inc., 2009 WL 6057286 (No. 08--13555 (JMP), Bankr. S.D.N.Y. Sept. 17, 2009) and Transcript of Proceedings dated September 15, 2009 at 107-112(filed as Dkt. No. 5261) (bench opinion holding that failure to terminate for an extended period of time following an insolvency filing constitutes a waiver of that right and that a contractual provision suspending the non-debtor's performance was not protected by the safe harbors). See also supra note 66.

of the agreement by the other party in the transaction or agreement.[68] If there are not any commercially reasonable determinants of value as of the relevant date, damages shall be measured as of the earliest subsequent date or dates on which there are such determinants.[69] The proponent of a subsequent date has the burden of proving that there were no commercially reasonable determinants of value as of the relevant earlier date.[70]

4. Limitation on Avoiding Powers. Section 546(g) of the Code limits certain powers of a bankruptcy trustee to reclaim property previously transferred by the debtor. For example, a trustee can ordinarily reclaim property transferred within the 90 days[71] prior to the bankruptcy filing if such transfer constituted a "preference" (i.e., if it enabled a creditor to receive more than it would have been entitled to receive in a liquidation proceeding). Section 546(g) of the Code provides that a transfer before the commencement of the case "made by or to (or for the benefit of) a swap participant or financial participant, under or in connection with any swap agreement",[72] cannot be reclaimed by a bankruptcy trustee, unless such transfer is made with actual intent to hinder or defraud creditors.[73]

Section 548(d)(2) of the Code additionally protects transfers of property made in connection with a "swap agreement" (subject to the appropriateness of the underlying individual contracts in the case of a master agreement that is a swap agreement) from avoidance by the bankruptcy trustee as fraudulent transfers. The Section provides that such transfers are deemed to be transfers "for value". As long as such transfers also are made "in good faith", as provided in Section 548(c) of the Code, they will be exempt from challenge as fraudulent transfers.

B. The FDIA[74]

1. Background; Definitions

(a) FDIA Insolvency Proceedings. Insured Institutions are subject to insolvency proceedings under the FDIA. The conservatorship and receivership provisions of the FDIA permit the FDIC to act as receiver or conservator for any Insured Institution.

If an Insured Institution is a national banking association, it is also subject to certain provisions of the NBA. The NBA[75] provides a full-fledged legal regime for national banks, including provisions for voluntary dissolution[76] and receivership.[77] Section 191 of the NBA empowers the OCC to appoint a receiver or conservator to take over a national bank, in a number of circumstances, including whenever the OCC becomes satisfied that the national bank is insolvent. Whenever the OCC is to appoint a receiver for any Federal depository institution, such as a national bank, that takes ~~Federally~~federally-insured deposits, it must appoint the FDIC as receiver[78] and the insolvency proceedings would be carried out under the FDIA. In addition, it is within the OCC's discretion to appoint the FDIC as

[68] If the insolvent Code Entity is a stockbroker, SIPA or possibly Code provisions for determining a customer's net equity claim may take precedence over Section 562 in certain circumstances. See SIPC v. Lehman Bros. Inc., 433 B.R. 127 (Bankr. S.D.N.Y. 2010) (holding that the SIPA definition of "net equity" under 15 U.S.C. § 78*lll*(11), rather than Section 562 of the Code, governed the applicable measurement date for a claim relating to the close-out of short securities positions in a prime brokerage account).

[69] In Crédit Agricole Corp. and Inv. Bank N.Y. Branch v. Am. Home Mortg. Holdings, Inc. (In re Am. Home Mortg. Holdings, Inc.), 637 F.3d 246 (3d Cir. 2011), the court held that the non-debtor party to a repurchase agreement had not met its burden of proving that application of a discounted cash flow model was not a commercially reasonable determinant of value as of the acceleration date, a date on which markets for the underlying instruments were "dysfunctional".

[70] 11 U.S.C. § 562(c).

[71] Such period can be extended to up to one year in the case of transfers to an insider. 11 U.S.C. § 547(b)(4)(B).

[72] The 2006 Act added "or for the benefit of" throughout Section 546, which should clarify that transfers to third parties who are acting on behalf of or at the direction of swap or financial participants should not be voided. This change reflects the realities of complex financial arrangements found in evolving markets. The 2005 reformulation of Section 546(g) to include "under or in connection" language overcomes the difficulty with prior language documented in Interbulk, Ltd. v. Louis Dreyfus Corp. (In re Interbulk, Ltd.), 240 B.R. 195, 202–03 (Bankr. S.D.N.Y. 1999). This amendment was discussed, and the legislative overrule of Interbulk noted, in Casa de Cambio Majapara S.A. de C.V. v. Wachovia Bank, N.A. (In re Casa de Cambio Majapara S.A. de C.V.), 390 B.R. 595, 598 (Bankr. N.D. Ill. 2008).

[73] See note 223, infra, with respect to a potential exception to this statement and caveats based on certain decisions ~~currently under appeal~~that upheld state law causes of action that could have substantive results similar to Code avoidance actions.

[74] Throughout this Section IV.B, we assume that the insolvent U.S. Party will be an Insured Institution.

[75] 12 U.S.C. §§ 91, 191.

[76] 12 U.S.C. §§ 181–182.

[77] 12 U.S.C. §§ 191–194, 196–203.

[78] Under 12 U.S.C. § 1821(c)(2)(A)(ii), "the [FDIC] shall be appointed receiver, and shall accept such appointment, whenever a receiver is appointed for the purpose of liquidation or winding up the affairs of an insured Federal depository institution by the appropriate Federal banking agency, notwithstanding any other provision of Federal law."

conservator for any Federal depository institution,[79] such as a national bank, that takes ~~Federally~~federally-insured deposits. We assume, for the purposes of this memorandum, that the OCC would appoint the FDIC as conservator for a national bank, in which case the insolvency proceedings would be carried out under the FDIA as well.[80]

If the FDIC is appointed as a conservator or receiver of a national bank, the FDIC will have both the powers granted to it by the FDIA and, to the extent not inconsistent with the FDIA, the powers granted to conservators or receivers of national banks.[81] For the reasons discussed in Section IV.B.5 below, we do not believe that additional powers arising under the NBA will affect the treatment of qualified financial contracts under the relevant provisions of the FDIA. Therefore, our discussion in this Section IV.B would also apply to an Insured Institution that is subject to the NBA. FDICIA would also apply to the extent the contract at issue was a "netting contract" between "financial institution[s]".

The FDIA would not apply in the case of a bank or savings institution that is neither ~~Federally~~federally-chartered nor ~~Federally~~federally-insured. The FDIA also would not apply to a proceeding involving the insolvency of a non-U.S. bank's U.S. branch or agency that did not have ~~Federally~~federally-insured deposits.

(b) Definitions. The FDIA provides that, in the case of a *receivership*, subject to certain limitations, a party to a qualified financial contract will be entitled to:

> (i) exercise any contractual right to terminate, liquidate or accelerate a qualified financial contract as a result of the appointment of the FDIC as receiver or the insolvency or financial condition of the depository institution for which the receiver was appointed after 5:00 p.m. (eastern time) on the business day following the appointment of the receiver;
>
> (ii) exercise any rights under any security agreement or arrangement or other credit enhancement related to one or more qualified financial contracts; and
>
> (iii) exercise any right to "offset or net out any termination value, payment amount or other transfer obligation arising under or in connection with [one] or more [qualified financial contracts]".[82]

In the case of a *conservatorship*, the above applies except that a party to a qualified financial contract will be able to exercise any contractual right to terminate *other than* one based *solely* on the appointment of or the exercise of rights or powers by the conservator or the insolvency underlying the existence of such powers (i.e., a "bankruptcy" default provision).[83]

Another important feature of the FDIA with respect to qualified financial contracts, is that, in the case of both receivership and conservatorship, ~~is that~~ it expressly provides that neither payments made nor collateral transferred by a depository institution prior to its insolvency, nor any legally enforceable or perfected security interest in any of the assets of the institution, may be avoided by the FDIC (subject to certain exceptions), except where the transferee intended to "hinder, delay, or defraud" the creditors or the receiver or conservator of the institution.[84]

The FDIA distinguishes between the FDIC's power as a receiver and as a conservator. As receiver, the FDIC has the power to liquidate and wind up the affairs of an institution, while as a conservator, the FDIC has the power to operate the insolvent institution as a going concern. When acting in either capacity, the FDIC generally will have many of the powers of a bankruptcy trustee under the Code, including the right to repudiate burdensome

[79] Under 12 U.S.C. § 1813(c)(4), the term "Federal depository institution" means any national bank, any Federal savings association, and any Federal branch.

[80] Under 12 U.S.C. § 1821(c)(2)(A)(i), the FDIC may, at the discretion of the supervisory authority, be appointed conservator of any insured Federal depository institution and the FDIC may accept such appointment. As a practical matter we believe that the OCC would appoint the FDIC as conservator for a national bank.

[81] 12 U.S.C. § 203(d), 1821(c)(2)(B).

[82] 12 U.S.C. § 1821(e)(8)(A), (e)(10)(B)(i).

[83] 12 U.S.C. § 1821(e)(8)(E), (e)(10)(B)(ii). If there exists a contractual right to terminate based on the appointment of a conservator *and* some other event of default, then a party would be able to terminate a qualified financial contract upon the occurrence of such other event notwithstanding the appointment of the conservator.

[84] 12 U.S.C. § 1821(e)(8)(C)(ii).

contracts, to enforce contracts and to assign contracts to another party. The FDIA, however, contains significant limitations on the FDIC's powers with respect to financial contracts meeting the definition of "qualified financial contract".

"Qualified financial contract" is defined to include securities contracts, commodity contracts, forward contracts, repurchase agreements and swap agreements.[85] In the 2005 and 2006 Acts, each of the definitions of these types of protected transactions was amended to make it substantively identical to the revised Code definition for the same transaction (other than that the Code definitions specifically reference Code party and damages limits in certain respects).[86]

In a manner identical to the definition of "swap agreement" under the Code, the definition of "swap agreement" under the FDIA includes "any agreement or transaction that is similar", indicating that it is intended to cover both current and newly developed Transactions that, while not specifically enumerated, share fundamental characteristics with those specified.

The FDIA also specifies that a master agreement such as an ISDA Master Agreement (i) that documents Transactions falling within the definition of "swap agreement", together with its supplements, will be treated as one "swap agreement", and (ii) that documents Transactions that are qualified financial contracts will be treated as one qualified financial contract (but only with respect to those underlying agreements that are qualified financial contracts).[87]

2. Right to Terminate. In the case of receivership, the FDIA provides that a party to a qualified financial contract will be entitled to enforce any contractual right to terminate, liquidate or net such a contract as a result of the appointment of the receiver or the insolvency or financial condition of the depository institution for which the receiver has been appointed after 5:00 p.m. on the business day after such appointment.[88]

In addition, in the case of a conservatorship, a party to a qualified financial contract may enforce any contractual right to terminate, liquidate or accelerate, other than one based *solely* on the appointment of the conservator or the insolvency or financial condition of the depository institution for which the conservator has been appointed (i.e., a "bankruptcy" default provision).[89]

Where the FDIC is acting as the conservator for a bank or savings institution, the qualified financial contract will continue in effect in accordance with its terms. The FDIC will succeed to the rights and obligations of the bank or savings institution. A party to a qualified financial contract will not be able to terminate the contract as a result of the appointment of the FDIC as conservator, but any default subsequent to this succession, such as failure to make a payment, may result in termination of the contract.

The limitations described above on the ability of a party to utilize a bankruptcy or insolvency default provision in the case of a conservatorship do not affect the rights of parties to enforce contractual rights to net out or set off payment values or termination amounts upon any termination of an ISDA Master Agreement. Therefore, these limitations on the right to terminate under the FDIA should not affect the basic evaluation of the credit exposure that exists under a swap agreement or other qualified financial contract. When termination rights are accessible (in a receivership or a conservatorship), the FDIA further provides that a person that is a party to a qualified financial contract will be entitled to enforce any right under any security agreement or arrangement or other credit enhancement related to one or more qualified financial contracts.[90]

3. Netting. A key provision of the FDIA protects the rights of parties to swap agreements and other qualified financial contracts to "offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with [one] or more [qualified financial contracts]".[91] This provision, together with the

[85] 12 U.S.C. § 1821(e)(8)(D)(i)–(vi). The term also extends to any "similar agreement" that the FDIC determines by regulation, resolution or order to be a qualified financial contract.

[86] 12 U.S.C. § 1821(e)(8)(D). See id. § 1821(e)(3)(A), (C), described in Section IV.B1(b)3 below, which indicates how damages will be calculated under the FDIA.

[87] 12 U.S.C. § 1821(e)(8)(D)(vi)–(vii).

[88] 12 U.S.C. § 1821(e)(10)(B)(i). 12 U.S.C. § 1821(e)(8)(A) refers to the right to "accelerate" in lieu of the right to "net".

[89] 12 U.S.C. § 1821(e)(8)(A), (e)(12). 12 U.S.C. § 1821(e)(10)(B)(ii) refers to the right to "net" in lieu of the right to "accelerate".

[90] 12 U.S.C. § 1821(e)(8)(A), (E). The 2006 Act included expanded Section 1821(e)(8)(D) in order to define those "person[s]" who may enforce such rights. New Section 1821(e)(8)(D)(ix) defines a person as "any governmental entity in addition to any entity included in the definition of such term in section 1 of Title 1" of the United States Code.

[91] 12 U.S.C. § 1821(e)(8)(A)(iii).

anti-cherry-picking provisions described below, should ensure that credit exposures to an insolvent institution can be calculated on a net basis pursuant to the terms of an ISDA Master Agreement.

Under the FDIA, the liability of the FDIC in respect of a repudiated contract is generally limited to "actual direct compensatory damages" of the parties to the contract as of the date on which the FDIC took possession of the institution.[92] With respect to qualified financial contracts, however, the "actual direct compensatory damages" arising in respect of the FDIC's repudiation of such a contract are deemed to include normal and reasonable costs of cover or other reasonable measures of damages utilized in the industries for such contract and agreement claims, calculated as of the date of the disaffirmance or repudiation of such contract or agreement.[93]

4. No Selective Transfer or Repudiation. The FDIA provides that, in any transfer of assets of an insolvent institution, the receiver or conservator may not "cherry-pick" among qualified financial contracts between the insolvent institution and any particular counterparty.[94] Instead, if any qualified financial contract with a given counterparty is transferred, all qualified financial contracts with that counterparty must be transferred to the same party (together with all claims relating thereto).[95] Likewise, as made clear by the 2005 Act, the receiver or conservator may not "cherry-pick" among qualified financial contracts between the insolvent institution and any particular counterparty for purposes of repudiating or disaffirming any qualified financial contracts.[96]

5. Pre-insolvency Payments. ~~The~~With respect to qualified financial contracts, the FDIA expressly provides that neither payments made nor collateral transferred by an institution prior to its insolvency, nor any legally enforceable or perfected security interest in any of the assets of the institution, may be avoided by the FDIC, except where the FDIC determines that "the transferee had actual intent to hinder, delay, or defraud such institution".[97] These provisions ensure that qualified financial contracts receive parallel treatment under the FDIA and the Code with respect to any "preference" payments.

If the FDIC is appointed as a conservator or receiver of a national bank, the FDIC will have both the powers granted to it by the FDIA and, to the extent not inconsistent with the FDIA, the powers granted to conservators or receivers of national banks. Therefore, pre-insolvency payments made by an insolvent national bank may also be reviewed under Section 91 of the NBA.[98] Pursuant to Section 91 of the NBA, all transfers by a national bank, including "payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to . . . preference of one creditor to another . . . shall be utterly null and void . . . ." The FDIA provision described above was amended in the 2005 Act to clarify that it supersedes Section 91 of the NBA. As amended, the FDIA provision applies "[n]otwithstanding . . . [Section 91 of the NBA or] any other Federal or State law relating to the avoidance of preferential or fraudulent transfers".[99] Accordingly, we believe that ~~a~~the FDIC (whether acting as conservator or receiver) should not be able to invoke the preference provisions of the NBA to avoid a preinsolvency transfer made under a qualified financial contract (if such transfer was made without the intent to hinder, defraud, or delay). Furthermore, if FDICIA applies, a court should not void a transfer made pursuant to a security arrangement relating to a "netting contract", if it is to give effect to the broad preemptive language of the new Section 403(f) of FDICIA.[100]

6. No Walkaway Clause. The FDIA has been amended by the 2005 Act to deny enforcement against a ~~Federally~~federally-insured depository institution in default of "walkaway" clauses in qualified financial contracts. Pursuant to a 2006 Act amendment, a walkaway clause is defined as follows: "any provision in a qualified financial contract that suspends, conditions or extinguishes a payment obligation of a party, in whole or in part, or does not create a payment obligation of a party that would otherwise exist, solely because of such party's status as a

[92] Actual direct compensatory damages do not include punitive or exemplary damages, damages for lost profits or opportunity or damages for pain and suffering.

[93] 12 U.S.C. § 1821(e)(3)(A), (C).

[94] 12 U.S.C. § 1821(e)(9). In addition, a receiver or conservator has express right to transfer to certain foreign institutions. 12 U.S.C. § 1821(e)(9)(B).

[95] Qualified financial contracts, and related claims, security and credit enhancements, of the counterparty's affiliates must also be included in such transfer. Id.

[96] 12 U.S.C. § 1821(e)(11). Qualifed financial contracts of the counterparty's affiliates must be disaffirmed or repudiated together with the conterparty's qualified financial contracts.

[97] 12 U.S.C. § 1821(e)(8)(C).

[98] 12 U.S.C. § 91.

[99] 12 U.S.C. § 1821(e)(8)(C)(i).

[100] 12 U.S.C. § 4403(f) and Section IV.D below.

nondefaulting party in connection with the insolvency of an insured depository institution that is a party to the contract or the appointment of or the exercise of rights or powers by a conservator or receiver of such depository institution, and not as a result of a party's exercise of any right to offset, setoff, or net obligations that exist under the contract, any other contract between those parties, or applicable law."[101]

This FDIA restriction on enforcement of walkaway clauses applies also to FDICIA, discussed below.[102] There is a comparable provision in the NYBL, discussed below, but no comparable provision in the Code.

C. The NYBL[103]

1. NYBL Insolvency Proceedings. There are several different circumstances under which the FDIC or another qualified Federal receiver may be appointed or appoint itself as conservator or receiver for an insolvent New York State chartered banking institution. First of all, the New York Superintendent of Financial Services (the "Superintendent") is authorized to tender the receivership of an insolvent New York State chartered banking institution that accepts ~~Federally~~federally-insured deposits to the FDIC or to another qualified Federal receiver.[104]

In addition, in certain cases, the appropriate ~~Federal~~federal banking agency may appoint the FDIC as sole receiver or conservator for an insured state institution after consultation with the Superintendent.[105] Such appointment may occur where the appropriate ~~Federal~~federal banking agency (as defined in Section 3(q) of the FDIA) has determined that (i) the institution is undercapitalized and has no reasonable prospect of becoming adequately capitalized or fails to satisfy certain conditions specified in the FDIA, or the institution is critically undercapitalized or otherwise has substantially insufficient capital, and (ii) the appointment is necessary to carry out the purposes of the "prompt corrective action" provisions of Section 38 of the FDIA. However, a ~~Federal~~federal banking agency may not appoint a conservator on these grounds without prior notice to the FDIC or the FDIC's prior consent.[106] The "appropriate ~~Federal~~federal banking agency" with respect to an insured state member bank is the Board of Governors of the Federal Reserve System (the "Board").[107]

The FDIC may appoint itself as conservator or receiver for an insured New York state-chartered bank if it determines that (i) a conservator, receiver or other legal custodian has been appointed for such institution, such institution has been subject to the appointment of any such conservator, receiver or custodian for a period of at least 15 consecutive days, and one or more of the depositors in such institution is unable to withdraw any amount of any insured deposit, or that such institution has been closed by or under the laws of any state; and (ii) one or more of the grounds specified in Section 11(c)(5)[108] of the FDIA existed with respect to such institution at the time the conservator, receiver, or other legal custodian was appointed or such institution was closed, or any such grounds exist at any time during the appointment of the conservator, receiver or other legal custodian or while such institution is closed.[109]

Furthermore, the Board of Directors of the FDIC may appoint the FDIC as sole receiver or conservator for an insured state-chartered depository institution, after consultation with the appropriate ~~Federal~~federal and state supervisory authorities, where the Board of Directors has made a determination (a) that grounds for such appointment exist and (b) that the appointment is necessary to reduce (i) the risk of loss to the FDIC's deposit insurance fund with respect to the institution or (ii) any loss that the deposit insurance fund is expected to incur with respect to the institution.[110]

If the FDIC appoints itself as conservator or receiver for an insured state bank, or is appointed as conservator or receiver by the appropriate ~~Federal~~federal bank regulatory agency, the conservatorship and

[101] 12 U.S.C. § 1821(e)(8)(G).
[102] 12 U.S.C. § 1821(e)(8)(G)(i). The FDIC has been especially concerned to protect its insurance fund and its mandate to manage bank insolvencies in the public interest.
[103] Throughout this Section IV.C, we assume that the Superintendent has not tendered the receivership of an insolvent New York State chartered banking institution that accepts ~~Federally~~federally-insured deposits to the FDIC.
~~[104] N.Y. Banking Law § 634.~~[104] N.Y. Banking Law § 634.
[105] 12 U.S.C. § 1821(c)(9)(A).
[106] 12 U.S.C. § 1821(c)(11).
[107] 12 U.S.C. § 1813(q)(2)(A).
[108] 12 U.S.C. § 1821(c)(5).
[109] 12 U.S.C. § 1821(c)(4).
[110] 12 U.S.C. § 1821(c)(10).

receivership provisions of the FDIA apply to such appointment in the same manner as they would apply to a Federal depository institution, except that the FDIC is required to give effect to state depositor preference statutes.[111] If the FDIC is appointed to such capacity by the applicable state banking supervisor, the FDIC may exercise both the powers given to conservators and receivers by the applicable state law and the powers conferred upon it by Section 11 of the FDIA.[112]

In all other cases an insolvency proceeding for that New York State chartered banking institution would be conducted solely under the NYBL.[113] As a rule, the insolvency proceedings under the NYBL, which are administered by the Superintendent, are fairly similar to those applicable under the FDIA. A proceeding under the NYBL is commenced when the Superintendent takes possession of the business and property of such banking institution.[114] If the Superintendent does so, he may conduct proceedings to liquidate the institution or may appoint the FDIC as receiver or liquidator of such institution. The Superintendent has many of the powers of a bankruptcy trustee under the Code, including the right to repudiate burdensome contracts. The commencement of an insolvency proceeding is at the discretion of the Superintendent and may not be initiated by individual creditors.[115]

2. Right to Terminate. Section 619(1)(d)(2)(i) of the NYBL provides that the Superintendent's taking possession of a New York banking organization does not operate as a stay or as an injunction against the termination of a "qualified financial contract" in accordance with its terms. That Section also provides that a party to a qualified financial contract may exercise any of its rights under a security arrangement relating to any qualified financial contract free from any stay. The definition of qualified financial contracts under the NYBL enumerates certain categories of financial contracts.[116] Those categories include, among others, swap agreements. The NYBL does not describe in detail which financial contracts would be encompassed by this category. Nevertheless, we believe that generally the Superintendent should interpret each category to include the same range of financial contracts that are covered by the corresponding definitions under the FDIA.[117]

3. Netting. Section 619(d)(2) of the NYBL provides that the Superintendent's taking possession of a New York banking organization shall not act as an injunction against "any right to offset or net out any termination value, payment amount, or other transfer obligation arising under . . . qualified financial contracts". Under Section 618-a of the NYBL, once the Superintendent has taken possession of an institution, the Superintendent may "repudiate" any contract to which the institution is a party if the performance of that contract is burdensome and the repudiation of that contract would promote the orderly administration of the institution's affairs.

As under the FDIA, the liability of the Superintendent in respect of a repudiated contract is generally limited to "actual direct compensatory damages" of the parties to the contract as of the date on which the Superintendent took possession of the institution.[118] With respect to qualified financial contracts, however, the "actual direct compensatory damages" arising ~~in respect of~~from the Superintendent's repudiation of such a contract, or from the termination or liquidation of such contract in accordance with its terms, is "deemed to include normal and reasonable costs of cover or other reasonable measures of damages utilized among participants in the market for qualified financial contract claims".[119] These damages are determined as of the date of ~~the appointment of the~~

[111] 12 U.S.C. § 1821(c)(13).
[112] 12 U.S.C. § 1821(c)(3)(B).
[113] The applicable laws are found in Article XIII of the NYBL.
[114] There is no provision in the NYBL that permits a creditor of the bank or a person other than the Superintendent to commence such a proceeding.
[115] N.Y. Banking Law § 606(1).
[116] N.Y. Banking Law § 618-a2(e). Under § 618-a2(e)(i) of the NYBL, "qualified financial contract" means any securities contract, commodity contract, forward contract (including spot and forward foreign exchange), repurchase agreement, swap agreement, and any similar agreement, any option to enter into any such agreement, including any combination of the foregoing, and any master agreement for such agreements, as well as other agreements determined by the Superintendent to be qualified financial contracts, provided that such agreements satisfy certain documentary requirements.
[117] See supra Section IV.B. See also, e.g., Bank of Tokyo, State of New York Dept. of Banking, Staff Interpretive Letter (May 20, 2003), in which the staff of the State Banking Department referenced both the FDIA and the Code definitions and parallel purposes in determining a securities lending transaction to be within the Section 618-a2(e) definition of qualified financial contract. Although precedent is not clear on the point, we believe the Superintendent would look to the FDIA and Code as then in effect, rather than as those statutes were at the time of the enactment of the relevant NYBL provisions. See id. (no reference to looking back to earlier versions of FDIA and Code).
[118] 12 U.S.C. § 1821(e)(3)(A)(i); see also N.Y. Banking Law § 618-a2(a).
[119] N.Y. Banking Law § 618-a2(b).

~~conservator or receiver or the date of the disaffirmance or~~ repudiation ~~of the~~or date of termination of such qualified financial contract in accordance with its terms.[120]

4. Selective Repudiation. The NYBL also specifies that any master agreement for qualified financial contracts, together with all supplements thereto, "shall be treated as one qualified financial contract".[121] Accordingly, if the Superintendent repudiates any of the Transactions under an ISDA Master Agreement, the Superintendent would be required to repudiate all of them, and we believe that the amount payable by the parties to the ISDA Master Agreement in respect of such repudiation would be calculated as provided under the ISDA Master Agreement.

5. No Forfeiture. Subsections (b) and (c) of Section 618-a2 of the NYBL direct the Superintendent to disregard contractual provisions of qualified financial contracts that purport to "effect a forfeiture" of amounts due to the Superintendent upon termination or liquidation of the contract.

D. The OLA[122]

1. Background; Definitions

(a) OLA Insolvency Proceedings. Title II of the Dodd-Frank Act establishes the Orderly Liquidation Authority (the "OLA"),[123] which authorizes the Secretary of the Treasury to appoint the FDIC as receiver of certain systemically significant financial companies that are not federally-insured depositories[124] following a recommendation, determination and judicial review process set forth in the OLA.[125] The purpose of the OLA is "to provide the necessary authority to liquidate failing financial companies that pose a significant risk to the financial stability of the United States in a manner that mitigates such risk and minimizes moral hazard."[126] The OLA has not yet been used. No attempt has been made to apply the OLA to a failing entity.

As receiver, the FDIC is directed to liquidate and wind up the affairs of a covered financial company in such manner as the FDIC deems appropriate, subject to all legally enforceable and perfected security interests and all legally enforceable security entitlements in respect of assets of the covered financial company.[127] The FDIC's actions under the OLA are subject to certain mandatory terms and conditions, including that the FDIC shall (i) determine that any such action is necessary for purposes of the financial stability of the United States, and not for the purpose of preserving the covered financial company, and (ii) ensure that unsecured creditors bear losses in accordance with the priority of claims provisions of the OLA.[128]

The powers of the FDIC as receiver under the OLA are closely patterned after those under the FDIA. In addition, the OLA provides that the FDIC may avoid preferential and fraudulent transfers[129] and preferential setoffs,[130] in each case under provisions patterned after (but not identical to) the corresponding provisions of the

[120] Id.
[121] N.Y. Banking Law § 618-a2(e).
[122] Throughout this Section IV.D, we assume that the insolvent U.S. Party will be a Covered Financial Company.
[123] 12 U.S.C. §§ 5381–5394.
[124] Note that insurance company procedures may be precipitated by the OLA, but applicable state law will apply. 12 U.S.C. § 5383(e).
[125] The requisite determinations, which are to be made by the Secretary of the Treasury in consultation with the President, include findings that the financial company is in default or danger of default, its failure and resolution under otherwise applicable law would have serious adverse effects on the financial stability of the United States, and no viable private sector alternative is available to prevent the default of the financial company. 12 U.S.C. § 5383(b). If the covered financial company's board of directors (or equivalent body) does not acquiesce to the appointment of the FDIC as receiver, the Secretary's determinations will be subject to judicial review under an "arbitrary and capricious" standard. 12 U.S.C. § 5382(a)–(b).
[126] 12 U.S.C. § 5384.
[127] 12 U.S.C. § 5390(a)(1)(D).
[128] 12 U.S.C. § 5386.
[129] 12 U.S.C. § 5390(a)(11).
[130] 12 U.S.C. § 5390(a)(11).

Code,[131] and may deviate from the equal treatment of similarly situated creditors in certain circumstances.[132] Further, the FDIC has the power to enforce contracts of subsidiaries and affiliates of the covered financial company, notwithstanding any *ipso facto* contractual rights based solely on the insolvency, financial condition or receivership of the covered financial company, if the obligations of the affiliate or subsidiary under the contract are guaranteed or otherwise supported by or linked to the covered financial company and either: (i) the guarantee or other support and all related assets and liabilities are transferred to a bridge financial company or solvent third party during the time period allowed for the transfer of QFCs or (ii) the FDIC provides "adequate protection" for the supported obligations.[133]

In regulations implementing this provision of the OLA,[134] the FDIC defines a contract of a subsidiary or affiliate to be "linked" to a covered financial company if the contract contains a "specified financial condition clause" that specifies the covered financial company. A "specified financial condition clause" is one that permits a counterparty to terminate, accelerate, liquidate or exercise any other remedy under a contract with, or obtain possession or exercise control over any property or affect any contractual rights of, the subsidiary or affiliate, directly or indirectly by reason of specified types of actions or circumstances relating to the covered financial company or one of its direct or indirect transferees, such as a bridge financial company or the bridge company's successor.

No action is required by the FDIC as receiver to exercise its power to enforce subsidiary or affiliate contracts. The implementing regulation by its terms nullifies the counterparty's entitlement to terminate, accelerate, liquidate, or exercise any other remedy arising solely by reason of a specified financial condition clause.[135] The preamble accompanying the regulation states that the regulation does not prohibit termination or exercise of remedies based on breach or default by a subsidiary or affiliate of a covered financial company, such as failure to make a payment; however, the subsidiary's or affiliate's failure to comply with a remedy for an "asserted violation of an unenforceable specified financial condition clause" would not be permissible grounds for terminating a contract or exercising remedies.[136]

The regulation interprets the statutory condition, noted above, requiring either the transfer of support or the furnishing of adequate protection as being applicable only to obligations that are "supported" by, rather than merely linked to, the covered financial company.[137] The term "support" means an undertaking to guarantee, indemnify, or make loans, advances or capital contributions or be contractually obligated to provide any other financial assistance to the subsidiary or affiliate for the purpose of supporting the its contractual obligations for the benefit of a counterparty to a linked contract.

Like the FDIA, the OLA contains significant limitations on the FDIC's powers with respect to financial contracts meeting the definition of "qualified financial contract".

The OLA applies to "financial companies" for which the Secretary of the Treasury has made a systemic risk determination under Section 203(b) of the OLA and that are not insured depository institutions ("covered financial companies"). A "financial company" is defined as any "company" incorporated or organized under U.S. Federal or State law that is one of the following:

(i) a bank holding company;

[131] See 11 U.S.C. §§ 547–548, 553. The FDIC has issued regulations to conform its avoidance powers under the OLA with respect to fraudulent and preferential transfers to the corresponding Code provisions. 12 C.F.R. § 380.9.

[132] See 12 U.S.C. § 5390(b)(4), (d)(4), (h)(5)(E). Upon appropriate determinations, the FDIC may make additional payments or credit additional amounts to some but not other creditors of the Covered Financial Company with equally ranking claims. Of relevance to derivatives counterparties, such additional amounts may take the form of payments or credits to third-party institutions in order to induce such institutions to accept liability for the creditors' claims. 12 U.S.C. § 5890(d)(4)(C). Such additional payments or credits may be clawed back by the FDIC if necessary to repay obligations issued by the FDIC to the Secretary of the Treasury under the OLA. 12 U.S.C. § 5890(o)(1)(D)(i).

[133] 12 U.S.C. § 5390(c)(16).

[134] 12 C.F.R.§ 380.12.

[135] 12 C.F.R. § 380.12(a)(1)

[136] 77 Fed. Reg. 63205, 63207 (October 16, 2012).

[137] 12 C.F.R. § 380.12(a)(2). See also 77 Fed. Reg. 63205, 63208. We note the possibility of rights stemming from a specified financial condition clause becoming accessible with respect to supported contracts (if the FDIC does not transfer the support and related assets and liabilities, or provide adequate protection, within the allotted time period) while remaining inaccessible for contracts that are merely linked to the covered financial company. Parties contemplating the exercise of rights in such circumstances should consider the ramifications, which are beyond the scope of this memorandum, with respect to netting, setoff and access to collateral. The terms "support" and "related assets and liabilities" are defined in 12 C.F.R. § 380.12(b)(3) and (4), respectively.

(ii) a nonbank financial company supervised by the Board of Governors of the Federal Reserve (the "FRB");

(iii) any company that is predominantly engaged in activities the FRB has determined are financial in nature or incidental thereto for purposes of Section 4(k) of the Bank Holding Company Act; and

(iv) any subsidiary (other than an insured depository institution or an insurance company) of one of the aforementioned companies that is predominantly engaged in activities the FRB has determined are financial in nature or incidental thereto for purposes of Section 4(k) of the Bank Holding Company Act.[138]

In order to be considered to be "predominantly engaged" in the activities described in clauses (iii) or (iv), a company's consolidated revenues from such activities must constitute at least 85% of its total consolidated revenues, as established in regulations to be promulgated by the FDIC in consultation with the Secretary of the Treasury.[139] The OLA does not apply to federally chartered Farm Credit System Institutions, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, any Federal Home Loan Bank or certain other governmental or regulated entities.

In any case where the FDIC is appointed as receiver of a "covered financial company" under the OLA, it may also appoint itself as receiver of any "covered subsidiary" of the covered financial company if the FDIC and the Secretary of the Treasury jointly determine that the subsidiary is in default or danger of default, the appointment of the FDIC as receiver would avoid or mitigate serious adverse effects on the financial stability or economic conditions of the United States and such action would facilitate the orderly liquidation of the covered financial company.[140] A subsidiary of a covered financial company other than (i) an insured depository institution, (ii) an insurance company or (iii) a covered broker or dealer is eligible to be treated as a covered subsidiary.[141] If the FDIC is appointed as receiver, the covered subsidiary is treated as a covered financial company under the OLA.[142]

(b) Qualified Financial Contract Overview. The OLA provides that, subject to certain limitations, a party to a qualified financial contract will be entitled to:

(i) exercise any right to cause the termination, liquidation or acceleration of a qualified financial contract as a result of the appointment of the FDIC as receiver or the insolvency or financial condition of the covered financial company for which the receiver was appointed after 5:00 p.m. (eastern time) on the business day following the appointment of the receiver;

(ii) exercise any rights under any security agreement or arrangement or other credit enhancement related to one or more qualified financial contracts; and

(iii) exercise any right to "offset or net out any termination value, payment amount or other transfer obligation arising under or in connection with [one] or more [qualified financial contracts]".[143]

Another important feature of the OLA is that it expressly provides that neither payments made nor collateral transferred by a covered financial company in connection with a qualified financial contract may be avoided by the FDIC, except where the transferee intended to "hinder, delay, or defraud" the creditors or the receiver of the covered financial company.[144]

[138] 12 U.S.C. § 5381(a)(11). If the OLA proceeding is for a covered broker or dealer, the FDIC must appoint SIPC as trustee. 12 U.S.C. § 5385(a). SIPC must apply SIPA generally but not to assets and liabilities transferred by the FDIC to a bridge financial company. 12 U.S.C. § 5385(b)(1). The effect of SIPA on qualified financial contracts is highly limited. See 12 U.S.C. § 5385(b)(4). If the OLA proceeding is for a "stockbroker" that is not a member of SIPC, the FDIC must generally apply the provisions of subchapter III of Chapter 7 of the Bankruptcy Code in respect of the distribution to customers of customer name securities, customer property and member property. 12 U.S.C. § 5390(m)(1)(A).
[139] 12 U.S.C. § 5381(b). The FDIC's regulations are codified at 12 C.F.R.§ 380.8. See also 78 Fed. Reg. 34712 (June 10, 2013).
[140] 12 U.S.C. § 5390(a)(1)(E).
[141] 12 U.S.C. § 5381(a)(9).
[142] 12 U.S.C. § 5390(a)(1)(E)(ii).
[143] 12 U.S.C. § 5390(c)(8)(A), (c)(10)(B)(i).
[144] 12 U.S.C. § 5390(c)(8)(C).

"Qualified financial contract" is defined to include securities contracts, commodity contracts, forward contracts, repurchase agreements and swap agreements.[145] The definition of each of these types of protected transactions is substantially identical to the corresponding definition under the FDIA.[146]

In a manner identical to the definition of "swap agreement" under the Code and the FDIA, the definition of "swap agreement" under the OLA includes "any agreement or transaction that is similar", indicating that it is intended to cover both current and newly developed Transactions that, while not specifically enumerated, share fundamental characteristics with those specified.

The OLA also specifies that a master agreement such as an ISDA Master Agreement (i) that documents Transactions falling within the definition of "swap agreement", together with its supplements, will be treated as one "swap agreement", and (ii) that documents Transactions that are qualified financial contracts will be treated as one qualified financial contract (but only with respect to those underlying agreements that are qualified financial contracts).[147]

2. Right to Terminate. The OLA provides that a person that is a party to a qualified financial contract will be entitled to enforce any right to cause the termination, liquidation or acceleration of such a contract which arises upon the date of the FDIC's appointment as receiver of a covered financial company or at any time after such appointment,[148] except that any such right that arises solely as a result of or incidental to the appointment of the receiver (or the insolvency or financial condition of the covered financial company for which the receiver has been appointed) may not be exercised until 5:00 p.m. (eastern time) on the business day after such appointment.[149] When termination rights are accessible, the OLA further provides that a person that is a party to a qualified financial contract will be entitled to enforce any right under any security agreement or arrangement or other credit enhancement related to one or more qualified financial contracts.[150]

3. Netting. A key provision of the OLA protects the rights of parties to swap agreements and other qualified financial contracts to "offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with [one] or more [qualified financial contracts]".[151] This provision, together with the anti-cherry-picking provisions described below, should ensure that credit exposures to an insolvent covered financial company can be calculated on a net basis pursuant to the terms of an ISDA Master Agreement.

Under the OLA, the liability of the FDIC in respect of a repudiated contract is generally limited to "actual direct compensatory damages" of the parties to the contract as of the date on which the FDIC was appointed as receiver.[152] With respect to qualified financial contracts, however, the compensatory damages arising in respect of the FDIC's repudiation of such a contract are deemed to include normal and reasonable costs of cover or other reasonable measures of damages utilized in the industries for such contract and agreement claims, calculated as of the date of the disaffirmance or repudiation of such contract or agreement.[153]

4. No Selective Transfer or Repudiation. The OLA provides that, in any transfer of assets of a covered financial company, the FDIC may not "cherry-pick" among qualified financial contracts between the covered financial company and any particular counterparty. Instead, if any qualified financial contract with a given counterparty is transferred, all qualified financial contracts with that counterparty or its affiliates must be transferred

[145] 12 U.S.C. § 5390(c)(8)(D)(i)–(vi). The term also extends to any "similar agreement" that the FDIC determines by regulation, resolution or order to be a qualified financial contract.
[146] See 12 U.S.C. § 1821(e)(8)(D)(i)–(vi).
[147] 12 U.S.C. § 5390(c)(8)(D)(viii).
[148] 12 U.S.C. § 5390(c)(8)(A), 10(B).
[149] 12 U.S.C. § 5390(c)(10)(B)(i). 12 U.S.C. § 1821(e)(8)(A) refers to the right to "accelerate", whereas the limitation in 12 U.S.C. § 5390(c)(10)(B)(i) refers to the right to "net".
[150] 12 U.S.C. § 5390(c)(8)(A). 12 U.S.C. § 5390(c)(8)(D)(x) defines a person to include "any governmental entity in addition to any entity included in the definition of such term in section 1 of Title 1" of the United States Code.
[151] 12 U.S.C. § 5390(c)(8)(A)(iii).
[152] Actual direct compensatory damages do not include punitive or exemplary damages, damages for lost profits or opportunity or damages for pain and suffering. 12 U.S.C. § 5390(c)(3)(B).
[153] 12 U.S.C. § 5390(c)(3)(A), (C).

to the same party (together with all claims, security and credit enhancements relating thereto). [154] Likewise, FDIC may not "cherry-pick" among qualified financial contracts between the insolvent covered financial company and any particular counterparty or that counterparty's affiliates for purposes of repudiating or disaffirming any qualified financial contracts.[155]

5. Pre-insolvency Payments. The OLA expressly provides that the FDIC, whether acting in its corporate capacity or as receiver for a covered financial company, may not avoid any transfer of money or other property in connection with any qualified financial contract with a covered financial company, except where "the transferee had actual intent to hinder, delay, or defraud" such company, its creditors or the FDIC as receiver for such company.[156] Similarly to the corresponding provision of the FDIA, this provision applies "[n]otwithstanding . . . [Section 91 of the NBA or] any other Federal or State law relating to the avoidance of preferential or fraudulent transfers".[157]

6. No Walkaway Clause. Like the FDIA, the OLA denies enforcement against a covered financial company in default of "walkaway" clauses in qualified financial contracts. A walkaway clause is defined in a substantively identical manner to the corresponding definition under the FDIA.[158] As under the FDIA, this restriction on enforcement of walkaway clauses applies notwithstanding Section 403 and 404 of FDICIA, discussed below.[159]

V.

FDICIA

A. Background; Definitions

In the event a court for some reason did not treat an ISDA Master Agreement as one agreement or did not (or could not) apply the analysis concerning the Code, FDIA, the NYBL and the OLA set forth in Section IV above, the close-out netting provisions in an ISDA Master Agreement with certain entities may still be enforced based on FDICIA. As amended by the 2006 Act, FDICIA recognizes the enforceability of the termination, liquidation, acceleration and netting of payment obligations between two "financial institution[s]" under a "netting contract", "notwithstanding any other provision of law" (other than certain provisions of the FDIA, the OLA and other Federal statutes)[160] and notwithstanding any "stay, injunction, avoidance, moratorium or similar proceeding or order, whether issued or granted by a court, administrative agency, or otherwise".[161]

Section 402(14) of FDICIA defines "netting contract" to mean, in pertinent part, a contract or agreement between two or more financial institutions that: "provides for netting present or future payment obligations or

[154] 12 U.S.C. § 5390(c)(9)(A). Qualified financial contracts, and related claims, security and credit enhancements, of the counterparty's affiliates must also be included in such transfer. Id. Certain subordinated claims against the covered financial company need not be transferred. 12 U.S.C. § 5390(c)(9)(A)(i)(II). In addition, a receiver or conservator has the express right to transfer to certain foreign institutions. 12 U.S.C. § 5390(c)(9)(B).

[155] 12 U.S.C. § 5390(c)(11). Qualifed financial contracts of the counterparty's affiliates must be disaffirmed or repudiated together with the conterparty's qualified financial contracts.

[156] 12 U.S.C. § 5390(c)(8)(C). Unlike the corresponding provision of the FDIA, the exception refers only to the transferee's actual intent, not to the FDIC's determination of such actual intent. See 12 U.S.C. § 1821(e)(8)(C).

[157] 12 U.S.C. § 5390(c)(8)(C).

[158] 12 U.S.C. § 5390(c)(8)(F).

[159] 12 U.S.C. § 5390(c)(8)(F)(i).

[160] Carved out from this sweeping statement and pertinent to this memorandum is FDIA Section 1821(e) (powers of conservators and receivers with respect to contracts entered into before appointment of a conservator or receiver), 12 U.S.C. § 5390(c) (corresponding provision of the OLA) or any order authorized under Section 5(b)(2) of the Securities Investor Protection Act of 1970. Please see note 175 below. Although not relevant to the Code Entities we consider in this memorandum, also carved out is Section 561(b)(2) of the Code, which imposes certain limits on netting rights when the debtor is a commodity broker.

[161] See generally 12 U.S.C. §§ 4401–4407. A plain reading of this broad language in FDICIA appears to preempt all contrary Federal and state laws and actions with respect to those laws. The Board of Governors of the Federal Reserve System has recognized that "[n]etting contracts between financial institutions in the United States generally are valid under the netting provisions of . . . FDICIA". 57 Fed. Reg. 31974 (July 20, 1992). That the 2005 and 2006 Acts specifically carved out particular statutes from this provision argues strongly that courts should give this pre-emptive directive full effect as to all other statutes.

payment entitlements (including liquidation or close-out values relating to the obligations or entitlements) among the parties to the agreement . . . ."[162]

In a striking change, the 2005 Act deleted the requirement that the netting contract be governed by the laws of the United States or a constituent jurisdiction. As before, however, the contract must be valid under, and not precluded by, Federal law to be a "netting contract" for purposes of FDICIA.[163] We believe that the ISDA Master Agreement qualifies as a "netting contract" under FDICIA.

In addition, in order for FDICIA to apply, both parties must be "financial institutions". Section 402(9) of FDICIA defines "financial institution" to mean a registered or licensed broker or dealer (and certain affiliates as determined by the Board), a depository institution (i.e., national and state banks, irrespective of their eligibility for deposit insurance, credit unions, thrift institutions, U.S. branches or agencies of foreign banks, foreign banks (with or without their U.S. branches or agencies (if any) as single entities), or Edge Act corporations), a registered or licensed futures commission merchant or any other institution determined by the Board.[164]

The original terms of FDICIA delegated rule-making authority to the Board to expand the definition of financial institutions beyond the original enumerated entities.[165] Under Regulation EE adopted by the Board in 1994, the expanded definition of financial institution extended the protections of FDICIA to a significant number of new entities that met both prongs of a two-prong test (qualitative and quantitative) included in the new definition of "financial institution".[166] Regulation EE is available to both domestic and foreign "persons" that meet the two-prong test.

1. Qualitative Test. The qualitative test requires that a "person" "represents, orally or in writing, that it will engage in financial contracts as a counterparty on both sides in one or more financial markets".[167] In a letter addressed to ISDA dated March 3, 1994, the Associate General Counsel of the Board explained that the word "represents" does not require written contractual representations. The letter also states that there should be many ways to meet this requirement. For example, representations can be made in noncontractual writings or orally. Finally, the letter explains that representations do not have to be made to a particular counterparty.

2. Quantitative Test. An entity also must satisfy a quantitative test before it will be deemed a financial institution under the new definition. This quantitative test requires that the entity meet either of two minimum thresholds with respect to "financial contracts". This test is not relevant to entities that qualify under the statute, such as state-chartered branches; it is only relevant to entities that seek to qualify under the rule.

The definition of "financial contract" in the rule adopts the definition of "qualified financial contract" that appears in Section 11(e)(8)(D)(i) of the FDIA, as amended.[168]

The first minimum threshold test requires an entity to have outstanding financial contracts of at least $1 billion in notional principal amount with counterparties that are not affiliates. The alternative minimum threshold test requires that an entity have financial contracts with a total gross mark-to-market position of at least $100 million.[169] Again, these two quantitative thresholds are alternatives, and satisfaction of either will satisfy the quantitative prong of the two-prong test. Both of the alternative quantitative tests can be met by an entity that exceeds either of the thresholds on any single day during the prior 15-month period. If a person qualifies as a

162 12 U.S.C. § 4402(14)(A)(i).
163 12 U.S.C. § 4402(14)(B).
164 12 U.S.C. § 4402(9). Although we believe the reference to "foreign banks" is intended to address a foreign bank as a single institution encompassing all its branches and agencies (including its U.S. branches and agencies), this is not clear on the face of the statute.
165 Id. This authority remains in the amended statute. The Board has exercised its authority in a variety of specific instances, frequently with respect to GSEs. See, e.g., Letter of Jennifer J. Johnson, Secretary of the Board, to Paul Friend, Federal Home Loan Bank of New York, 1998 Fed. Res. Interp. Ltr. LEXIS 70, July 7, 1998, and Letter of William W. Wiles, Secretary of the Board to Maud Mater, Esq., Federal Home Loan Mortgage Corporation, January 21, 1997.
166 Netting Eligibility for Financial Institutions, Regulation EE, 12 C.F.R. § 231.3.
167 Netting Eligibility for Financial Institutions, Regulation EE, 12 C.F.R. § 231.3(a).
168 The sole difference from the FDIA definition is that Regulation EE defines a "forward contract" to include a contract with a maturity date two days or less after the date the contract is entered into (i.e., a "spot" contract). 12 C.F.R. § 231.2(c). Under the FDIA, spot, same day-tomorrow, tomorrow-next, forward, or other foreign exchange, precious metals and commodity agreements are "swap agreements". 12 U.S.C. § 18212(e)(8)(D)(vi)(I).
169 The gross mark-to-market position is based on the sum of the absolute mark-to-market value of each financial contract (without regard to the in-the-money or out-of-the-money status of the entity), calculated in accordance with the methods normally used by the parties to value each contract. Netting Eligibility for Financial Institutions Regulation EE, 12 C.F.R. § 231.2(e).

financial institution under the two-prong test, that person will be considered a financial institution for the purposes of any contract entered into during the period it qualifies, even if the person subsequently fails to qualify.[170]

B. Treatment of Transactions

Assuming that each of the parties to an ISDA Master Agreement is a "financial institution", the netting provisions in FDICIA would apply to that contract.[171] After a review of the applicable statutory language and legislative history, we have not found anything to suggest that different types of Transactions would fail to qualify under the applicable provisions of FDICIA. In fact, because Congress intended to reduce systemic risk in enacting Sections 401–407 of FDICIA,[172] it appears that the correct view would be to construe broadly the application of FDICIA so as to include Transactions that may not fall within the definition of "swap agreement". In the event that certain Non-Enumerated Transactions are not treated as "swap agreements" or as part of a "master agreement" (as discussed below in Section VI.), a party may be able to rely on FDICIA to obtain close-out netting of an ISDA Master Agreement upon the insolvency of a financial institution subject to FDICIA. The netting provisions of an ISDA Master Agreement should be enforceable if both parties are "financial institutions", regardless of whether all of the Transactions entered under the ISDA Master Agreement are found to be "swap agreements" or "qualified financial contracts", or to fall within a "master agreement".

C. Enforceability of termination provisions of an ISDA Master Agreement under FDICIA

FDICIA protects the enforceability of "netting contracts" between "financial institutions", "notwithstanding any other provision of law" or any "stay, injunction, avoidance, moratorium or similar proceeding or order, whether issued or granted by a court, administrative agency, or otherwise", other than certain provisions of the FDIA, discussed below, the OLA or any order authorized under Section 5(b)(2) of the Securities Investor Protection Act of 1970.[173]

The 2006 Act amendments make it clear that FDICIA protects a financial institution's ability to terminate, liquidate, accelerate and net pursuant to the close-out netting provisions of an ISDA Master Agreement entered into with an insolvent financial institution.[174]

D. Pre-insolvency payments.

FDICIA would apply to an ISDA Master Agreement between two "financial institution[s]" where the ISDA Master Agreement is a "netting contract", as discussed above. FDICIA neither provides for any insolvency proceeding nor empowers any authority to void transfers. FDICIA as amended by the 2005 Act expressly provides that the provisions of any security agreement or arrangement or other credit enhancement related to one or more netting contract shall not be stayed, avoided or otherwise limited by any State or Federal law, other than certain provisions not directly relevant to avoidance of transfers.[175] Recovery under other statutes of a transfer made pursuant to such a security arrangement would seem to constitute a limitation of a security arrangement that is expressly prohibited by FDICIA.[176]

[170] Netting Eligibility for Financial Institutions, Regulation EE, 12 C.F.R. § 231.3(b).

[171] In the case of a physically settled transaction, such contract may, but need not allow for conversion of the value of the physically settled transaction to a cash payment, because although Section 402(14) of FDICIA limits the definition of "netting contract" to a contract that "prov ides for netting present or future *payment obligations or payment entitlements*" (emphasis added), "payment" is defined as "a payment of United States dollars, another currency, or a composite currency, and a noncash delivery, including a payment or delivery to liquidate an unmatured obligation." 12 U.S.C. § 4402(15).

[172] See 12 U.S.C. § 4401 (setting forth Congressional findings).

[173] 12 U.S.C. §§ 4403(a), 4405.

[174] The 2006 Act specifically inserted the words "terminated, liquidated, accelerated and" before "netted" in Sections 403 and 404 of FDICIA, making it expressly clear that the relevant terms of an ISDA Master Agreement with an insolvent financial institution are to be enforced without delay, subject to note 160 above. 12 U.S.C. §§ 4403–4404.

[175] See supra note 160 (referring to provisions of the FDIA, the OLA, SIPA and the Code). FDIC staff have informally expressed the view that the intent of the cross-reference to the FDIA in FDICIA was to protect the stay and transfer provisions of the FDIA and not Section 1821(e) in full, and that the cross-reference to the OLA added by the Dodd-Frank Act should be interpreted similarly.

[176] Despite this sweeping language, in certain instances (e.g., actual fraud) a court might nonetheless have the incentive and the means to facilitate recovery of a transfer. For example, under Section 402(14)(B) of FDICIA, a "netting contract" does not include a contract that is "invalid or precluded by Federal law." Under Section 548(a)(1)(A) of the Code, a trustee may avoid certain obligations incurred with actual intent to defraud.

Under the 2006 Act, however, FDICIA was amended to expressly permit certain provisions of the FDIA to override the netting provisions of a netting contract under FDICIA. The entirety of Section 1821(e) (powers of conservators and receivers with respect to contracts entered into before appointment of a conservator or receiver) overrides the FDICIA provision. Section 1821(e) importantly includes FDIA limits upon exercising termination and netting rights against a receiver or conservator, see Section IV.B.2 above, and the unenforceability of walkaway clauses under the FDIA against insured depository institutions in default.[177]

VI.

NON-ENUMERATED TRANSACTIONS AND MASTER NETTING AGREEMENTS UNDER THE CODE, THE FDIA, THE NYBL, THE OLA AND FDICIA

A. Classification of Transactions

1. Introduction. Derivatives market participants increasingly are documenting a wider variety of Transactions under agreements such as the ISDA Master Agreement. Appendix A sets forth a current list of such Transactions. Some of these Transactions are expressly enumerated under the definition of "swap agreement" in the Code, the FDIA, the NYBL or the OLA, and some are Non-Enumerated Transactions, such as economic statistic transactions and freight derivatives. Where FDICIA applies, a derivatives market participant should be able to exercise its netting rights under FDICIA, irrespective of whether the Transactions documented under the ISDA Master Agreement fall within the definition of "swap agreement" or not. Where the Code, the FDIA, the NYBL or the OLA applies but FDICIA does not apply, the analysis is more complicated. In such a case, a court has to decide whether Transactions should be treated as either "swap agreement[s]" and thus deserving of the treatment set forth in Section IV. above, or as other kinds of transactions entitled to parallel treatment.[178] If so, a derivatives market participant would be able to exercise its netting rights by treating an ISDA Master Agreement governing multiple kinds of protected transactions as a "master netting agreement" as defined in the Code, or a "master agreement" as referenced in the FDIA, the NYBL and the OLA, with respect to such Non-Enumerated Transactions and Transactions in the enumerated list.

The broadening of the definition of "swap agreement" accomplished in the 2005 Act and the 2006 Act has added to the enumerated list many previously Non-Enumerated Transactions, such as bullion trades, commodity forwards, equity derivatives, credit derivatives, weather derivatives, inflation derivatives and emissions derivatives.[179] As a result, it has become easier in many cases to rely on the "any agreement or transaction that is similar" language in the Code and FDIA definitions of "swap agreement". The OLA incorporates a substantively identical definition.

2. Non-Enumerated Transactions that are "swap agreements"

(a) Physically-settled commodity swaps and options on commodity swaps. We believe that a Transaction that is specifically enumerated in the definition of "swap agreement" in the Code, the FDIA, the NYBL or the OLA deserves the treatment provided to a "swap agreement" therein, irrespective of whether the Transaction

[177] 12 U.S.C. § 1821(e)(8)(G). These specific limitations existed under the 2005 Act as well. The expansion of the Section 1821(e) carve-out in the 2006 Act may be viewed more as the establishment of consistency in relevant cases, rather than the imposition of significant additional constraints on the party seeking the close-out. We believe the cross-reference to OLA Section 5390(c) should be interpreted in a similar manner but note that the OLA contains additional limitations on the exercise of termination rights not present in the FDIA. See 12 U.S.C. § 5390(c)(16).

[178] Other safe-harbored transactions include securities contracts, forward agreements, commodity contracts (11 U.S.C. § 761(4)) and repurchase agreements (11 U.S.C. § 101(47)).

[179] For a description of these transactions, see Appendix A.

is cash-settled or physically-settled.[180] Thus, a physically-settled commodity swap,[181] including a bullion swap,[182] or an option on a physically-settled swap,[183] including a bullion option,[184] should be treated as a "swap agreement" since "commodity swap[s]" and "option[s]" on "commodity swaps" are specifically enumerated under the definition of "swap agreement" in the Code, the FDIA, the NYBL and the OLA.[185] Aside from references to foreign exchange and precious metals, in the Code, the FDIA and the OLA there is no specific definition of commodities in respect of which swap agreements may be entered into. We believe that the term "commodity" should be interpreted broadly in this context.[186]

(b) Economic Statistic Transactions. Economic statistic transactions are not specifically enumerated within the definition of "swap agreement". Economic statistic transactions are financial contracts, the value of which is determined by reference to the value of a rate or index pertaining to particular economic statistics, e.g., inflation, unemployment or gross domestic product. Economic statistic transactions may include transactions in the form of a swap, option, cap, collar or floor. While none of the Code, the FDIA, the NYBL or the OLA mentions economic statistic transactions as such, the definition of "swap agreement" under the Code, the FDIA and the OLA does include a common subtype of economic statistic transactions, "inflation swap[s], option[s], future[s] and forward agreement[s]".[187] Accordingly, swaps, options, forwards and combinations thereof based on other economic statistics should be viewed as within the definition of "swap agreement" under the Code, the FDIA, the NYBL and the OLA based upon their similarity to inflation derivatives.[188] In addition, economic statistic transactions should qualify as swap agreements because they are based upon "quantitative measures associated with an occurrence, extent of an occurrence, or contingency associated with . . . economic or financial indices", as described within clause (A)(ii)(II) of the Code definition and clause (II) of the FDIA and the OLA definitions of "swap agreement".

(c) Property Index Derivatives. Property index derivatives, although not specifically enumerated within the definition of swap agreement in the relevant statutes, should be considered as such for the same reasons that economic statistic transactions should be so considered.

(d) Freight Transactions. Freight derivatives are swaps, the value of which is determined by reference to the value of a freight rate index, however they are not specifically enumerated within the definition of "swap agreement". Even so, they would appear to be of a type, commodity derivatives, that is specifically enumerated within the definition of "swap agreement". Cash-settled freight derivatives should be treated as commodity index swaps, commodity swaps, and commodity options, futures and forwards which are enumerated in the definition of "swap agreement", provided that the freight rate index pertaining would be deemed a commodity. While none of the

[180] See Williams v. Morgan Stanley Grp., Inc. (In re Olympic Natural Gas Co.), 294 F.3d 737, 742 (5th Cir. 2002) (finding no distinction between "financial" and physically settled forward contracts for purposes of the forward contract anti-avoidance provision of the Code). This view was maintained with respect to commodity forward agreements, an enumerated type of swap agreement, in In re National Gas Distributors, 556 F.3d 247 (4th Cir. 2009)~~. The U.S. Court of Appeals for the Fourth Circuit, however, in dicta, took a narrow view of what might be a "forward agreement" for purposes of the definition of swap agreement. On remand, the bankruptcy court seized on this dicta to hold on summary judgment that contracts without fixed quantity terms could not be forward agreements. It is not clear whether this limiting view will have ramifications beyond the case. See Lightfoot v. MXEnergy Electric, Inc. (In re MBS Mgmt. Servs., Inc.), 430 B.R. 750, 756 (Bankr. E.D. La. 2010), and 432 B.R. 570, 576 (Bankr. E.D. La. 2010), aff'd, 2011 WL 1899764 (E.D. La. May 19, 2011) (criticizing the National Gas court's reliance on the presence of price and quantity elements in cited Wall Street Journal references to "forward agreements" as failing to~~. *See supra* note ~~the distinction between exchange-traded contracts and forwards), aff'd, 690 F.3d 352 (5th Cir. 2012) (describing dicta of National Gas as "intentionally open-ended . . . and evocative rather than prescriptive" and stating that Olympic did not limit the definition of "forward contract" to require exact quantities and delivery dates and that Olympic rejected several arguments designed to narrow the scope of the definition of "forward contract").~~63.

[181] A physically settled commodity swap can be viewed as a series of contracts providing for the physical delivery of a variable amount of a commodity at future dates in exchange for some fixed payment.

[182] For a description of this transaction, see Appendix A.

[183] An option on a physically-settled swap is an option in consideration for a premium payment to purchase or sell a commodity at a future date in exchange for an established price in which a party would take a physical delivery.

[184] For a description of this transaction, see Appendix A.

[185] The definitions of "swap agreement" set forth in the Code, the FDIA and the OLA specifically include a "commodity swap" and "any option to enter into" any such agreement. 11 U.S.C. § 101(53B), 12 U.S.C. § 1821(e)(8)(D)(vi), 12 U.S.C. § 5390(c)(8)(D)(vi). Note also that the references to spot transactions in the definition of swap agreement, first with respect to foreign exchange and precious metals and then generally in the "similar agreements" provision are specific references to transactions that are physically settled.

[186] This interpretation follows the broad scope of transactions described in the definition of "forward contract". See infra notes 192–194 and accompanying text.

[187] 11 U.S.C. § 101(53B)(A)(i)(X), 12 U.S.C. § 1821(e)(8)(D)(vi)(I) and 12 U.S.C. § 5390(c)(8)(D)(vi)(I).

[188] We assume "recurrent dealing" to the extent required by the statutes.

Code, the FDIA, the NYBL or the OLA defines these types of transactions,[189] a "commodity" is defined under the Code just as it is under the Commodity Exchange Act (the "CEA").[190] The FDIA and the OLA use similar wording to the Code for the definitions of "commodity contract" and "forward contract".[191] Accordingly, we think it appropriate to look to the CEA definition of commodity in determining what commodity swaps, options, caps, collars and floors under the FDIA and the OLA are. We believe the same to be the case with respect to the NYBL.

The CEA defines a commodity in relevant part as "all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in."[192] The term "future delivery" is not defined other than as "'future delivery' does not include any sale of any cash commodity for deferred shipment or delivery."[193] However, the term "contract for future delivery" is used in the CEA interchangeably with "futures contract".[194] For example, Section 15b(c)(1) of the CEA states, "The term 'cotton futures contract' means any contract of sale of cotton for future delivery made at, on, or in any exchange, board of trade, or similar institution or place of business . . . ."

For example, we believe that futures contracts on indices of freight rates are offered on designated contract markets such as the New York Mercantile Exchange, Inc. Accordingly, a freight derivative should be viewed as a "commodity" for purposes of the CEA.[195]

In addition, the definition of "excluded commodity" includes "any economic or commercial index based on prices, rates, values, or levels that are not within the control of any party to the relevant contract, agreement, or transaction".[196] An index based on freight rates is facially within the definition and therefore should be seen as a commodity for purposes of the CEA. Accordingly, freight transactions should be viewed as commodity swaps.[197]

3. Non-Enumerated Transactions that are not "swap agreements" or master netting agreements

Although the broadened definition of "swap agreement" may favorably resolve the situation with respect to many previously Non-Enumerated Transactions, it is worth mentioning alternative transaction categories that are bases for statutory relief that also have been broadened in some cases and are potentially available to transactions that fall outside the definition of swap agreement (such transactions, "Eligible Transactions"). If transactions fall within these other definitions, certain of which are discussed below, protections largely parallel to those available to a "swap agreement" would apply to such transactions.

(a) Non-Enumerated Transactions as "securities contracts". Under the Code (11 U.S.C. § 741(7)) "securities contract" means:

> "(i) a contract for the purchase, sale, or loan of a security [as defined in 11 U.S.C. § 101(49)], a certificate of deposit, a mortgage loan, any interest in a mortgage loan, a group or index of securities, certificates of deposit, or mortgage loans or interests therein (including an interest therein or based on the value thereof), or option on any of the foregoing, including an option to purchase or sell any such security,

189 Commodity option is defined in the Code as any agreement or transaction regulated by a certain CEA provision. 11 U.S.C. § 761(5). According to that CEA provision, commodity option is defined as "any transaction involving any commodity regulated under [the CEA] which is of the character of, or is commonly known to the trade as, an 'option', 'privilege', 'indemnity', 'bid', 'offer', 'put', 'call', 'advance guaranty', or 'decline guaranty.'" 7 U.S.C. § 6c(b). This definition effectively refers directly back to the CEA for a definition of "commodity".

190 11 U.S.C. § 761(8).

191 12 U.S.C. § 1821(e)(8)(D)(iii)–(iv); 12 U.S.C. § 5390(c)(8)(D)(iii)–(iv).

192 7 U.S.C. § 1a(9).

193 7 U.S.C. § 1a(27).

194 The term "contract for future delivery" is used interchangeably with "futures contract" in the 2005 ISDA Commodity Definitions ("2005 Definitions") as well. The 2005 Definitions says "'Futures Contract' means, in respect of a Commodity Reference Price, the contract for future delivery of a contract size in respect of the relevant Delivery Date relating to the Commodity referred to in that Commodity Reference Price."

195 See, e.g., NYMEX Rule 945 (Panamax Timecharter Average (Baltic) Swap Futures). We have not conducted an exhaustive survey of freight rate indexes that may be offered on other exchanges. Although it is arguable that the existence of these futures contracts is relevant only to OTC transactions using the same indices, we think the better view is the existence of these futures contracts is supportive of a positive treatment of freight indices and rates generally.

196 7 U.S.C. § 1a(19). An "excluded commodity" is one of a class of commodities deemed suitable for certain exclusions from aspects of the CEA.

197 In Interbulk, Ltd., discussed in note 72 above, which was decided prior to both the enactment of the 2005 Act and the 2000 adoption of the definition of "excluded commodity" referenced above, the court decided that the forward freight agreements at issue in that case conformed to the definition of swap agreement within the meaning of the Code. The court was nonspecific in its treatment of the definition of "swap agreement", and the categorization of the agreements in question within the definition was apparently not an issue. See supra note 72.

certificate of deposit, mortgage loan, interest, group or index, or option, and including any repurchase or reverse repurchase transaction on any such security, certificate of deposit, mortgage loan, interest, group or index, or option (whether or not such repurchase or reverse repurchase transaction is a 'repurchase agreement', as defined in section 101);

(ii) any option entered into on a national securities exchange relating to foreign currencies;

(iii) the guarantee (including by novation) by or to any securities clearing agency of a settlement of cash, securities, certificates of deposit, mortgage loans or interests therein, group or index of securities, or mortgage loans or interests therein (including any interest therein or based on the value thereof), or option on any of the foregoing, including an option to purchase or sell any such security, certificate of deposit, mortgage loan, interest, group or index, or option (whether or not such settlement is in connection with any agreement or transaction referred to in clauses (i) through (xi));

(iv) any margin loan;

(v) any extension of credit for the clearance or settlement of securities transactions;

(vi) any loan transaction coupled with a securities collar transaction, any prepaid forward securities transaction, or any total return swap transaction coupled with a securities sale transaction;

(vii) any other agreement or transaction that is similar to an agreement or transaction referred to in this subparagraph;

(viii) any combination of the agreements or transactions referred to in this subparagraph;

(ix) any option to enter into any agreement or transaction referred to in this subparagraph;

(x) a master agreement that provides for an agreement or transaction referred to in clause (i), (ii), (iii), (iv), (v), (vi), (vii), (viii), or (ix), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a securities contract under this subparagraph, except that such master agreement shall be considered to be a securities contract under this subparagraph only with respect to each agreement or transaction under such master agreement that is referred to in clause (i), (ii), (iii), (iv), (v), (vi), (vii), (viii), or (ix); or

(xi) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this subparagraph, including any guarantee or reimbursement obligation by or to a stockbroker, securities clearing agency, financial institution, or financial participant in connection with any agreement or transaction referred to in this subparagraph, but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562"

and explicitly excludes "any purchase, sale, or repurchase obligation under a participation in a commercial mortgage loan".

The 2006 Act amended the definition to include, most prominently, extensions of credit for the clearance or settlement of securities transactions, loan transactions coupled with securities collars or prepaid forwards and total return swaps coupled with securities sales. The definition of "securities contract" in the FDIA is similar to the definition in the Code described above,[198] and the definition in the OLA is substantively identical to the definition in the FDIA. Although the NYBL does not describe in detail which financial contracts would be encompassed by the category "securities contract", we believe that the Superintendent should interpret this category to include the same range of financial contracts that are covered by the definition in the Code described above. Securities contracts under the Code, and like-kind transactions which are considered qualified financial contracts under the FDIA, the

[198] 12 U.S.C. § 1821(e)(8)(D)(ii). The differences between the two definitions are the reference to Code parties and Section 562 damages limits in the Code, and, under the FDIA, the right of the FDIC to include any purchase, sale or repurchase obligation under a participation in a commercial mortgage loan through regulation, resolution or order.

NYBL and the OLA, are accorded statutory protections much like those described above with respect to swap agreements. These protections are described below.

(b) Non-Enumerated Transactions as "forward contracts". The Code definition of "forward contract", as amended by the 2006 Act, is:

> "(A) a contract (other than a commodity contract, as defined in section 761)[199] for the purchase, sale, or transfer of a commodity, as defined in section 761(8) of this title, or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade, or product or byproduct thereof, with a maturity date more than two days after the date the contract is entered into, including, but not limited to, a repurchase or reverse repurchase transaction (whether or not such repurchase or reverse repurchase transaction is a 'repurchase agreement', as defined in this section) consignment, lease, swap, hedge transaction, deposit, loan, option, allocated transaction, unallocated transaction, or any other similar agreement;
>
> (B) any combination of agreements or transactions referred to in subparagraphs (A) and (C);
>
> (C) any option to enter into an agreement or transaction referred to in subparagraph (A) or (B);
>
> (D) a master agreement that provides for an agreement or transaction referred to in subparagraph (A), (B), or (C), together with all supplements to any such master agreement, without regard to whether such master agreement provides for an agreement or transaction that is not a forward contract under this paragraph, except that such master agreement shall be considered to be a forward contract under this paragraph only with respect to each agreement or transaction under such master agreement that is referred to in subparagraph (A), (B), or (C); or
>
> (E) any security agreement or arrangement, or other credit enhancement related to any agreement or transaction referred to in subparagraph (A), (B), (C), or (D), including any guarantee or reimbursement obligation by or to a forward contract merchant or financial participant in connection with any agreement or transaction referred to in any such subparagraph, but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562."[200]

It may be difficult to conceptualize a forward contract that is not also now a swap agreement for purposes of the Code, the FDIA and the OLA. Nonetheless, forward contract status may prove useful and is noted here accordingly. (Typical "spot trades", of course, are settled within two days after the date the contract is entered into and would not be forward contracts.) As in the case of security contracts, transactions that qualify as forward contracts under the Code and as qualified financial contracts under the FDIA and the OLA may have access to statutory protections much like those available to swap agreements, including, for example, the Section 362(b)(6) exemption from the automatic stay, as described below.

(c) Non-Enumerated Transactions that are not "securities contracts" or "forward contracts". Transactions that may not qualify as "swap agreements" under the Code, the FDIA, the NYBL and the OLA and that do not qualify as "securities contracts" or "forward contracts" under the Code, the FDIA, the NYBL and the OLA ("Ineligible Transactions") may not be eligible for special treatment under the Code (see sub B.), the FDIA (see sub C.), the NYBL (see sub D.) and the OLA (discussed together with the FDIA in sub C.).[201]

---

[199] A "commodity contract" is, in pertinent part, "(A) with respect to a futures commission merchant, contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade; (B) with respect to a foreign futures commission merchant, foreign future; (C) with respect to a leverage transaction merchant, leverage transaction; (D) with respect to a clearing organization, contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization, or commodity option traded on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization; (E) with respect to a commodity options dealer, commodity option"; or similar agreements, combinations of such agreements, related master agreements and related security arrangements. 11 U.S.C. § 761(4).

[200] 11 U.S.C. § 101(25).

~~[201] Protective provisions similar to those for swap agreements, securities contracts and forward contracts exist for "commodity contracts" and "re purchase agreements". These provisions are beyond the scope of this memorandum.~~[201] Protective provisions similar to those for swap agreements, securities contracts and forward contracts exist for "commodity contracts" and "repurchase agreements". These provisions are beyond the scope of this memorandum.

B. Code[202]

If the Non-Enumerated Transactions are not all afforded "swap agreement" treatment, then a derivatives market participant may be faced with an ISDA Master Agreement under which "swap agreement[s]", "forward contract[s]" and/or "securities contract[s]" are documented. Such an ISDA Master Agreement, as a "master netting agreement", would still receive substantially the same protection as a "swap agreement" would.[203] Section 101(38A) of the Code defines a "master netting agreement" as, in relevant part, "an agreement providing for the exercise of rights, including rights of netting, setoff, liquidation, termination, acceleration, or close out, under or in connection with one or more contracts that are described in any one or more of paragraphs (1) through (5) of section 561(a) [the "Section 561(a) Transactions"], or any security agreement or arrangement or other credit enhancement related to one or more of the foregoing, including any guarantee or reimbursement obligation related to 1 or more of the foregoing". The definition clarifies that to the extent the agreement contains agreements or transactions that are not Section 561(a) Transactions, the agreement shall be deemed to be a master netting agreement only with respect to the Section 561(a) Transactions.[204] Protective provisions relevant to master netting agreements are described below.

1. Treatment of Forward Contracts, Securities Contracts and Master Netting Agreements

(a) Automatic Stay. The Code grants special treatment to forward contracts and securities contracts in a manner analogous to swap agreements. Specifically, the Code provides an express exemption from the automatic stay contained in Section 362 of the Code[205] to permit, in pertinent part, the following: a "forward contract merchant",[206] a "stockbroker",[207]

[202] Throughout this Section VI.B, we assume that the insolvent U.S. Party is a Code Entity. The situations under FDIA, the OLA and the NYBL are described in Sections VI.C and VI.D below.

[203] A swap master agreement that governs swap agreements and non-safe harbored transactions will still be respected as a master agreement with respect to those swap agreements. See 11 U.S.C. § 101(53B)(A)(v).

[204] 11 U.S.C. § 101(38A)(B). Parties contemplating having such mixed masters should consider the ramifications with respect to termination, netting and access to collateral.

[205] 11 U.S.C. § 362(b)(6).

[206] Under 11 U.S.C. § 101(26), "forward contract merchant" means "a Federal reserve bank, or an entity the business of which consists in whole or in part of entering into forward contracts as or with merchants in a commodity (as defined in section 761) or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade."

[207] Under 11 U.S.C. § 101(53A), "stockbroker" means a person⊥
(A) with respect to which there is a customer, as defined in Section 741 of this title; and⊥
(B) that is engaged in the business of effecting transactions in securities (i) for the account of others; or (ii) with members of the general public, from or for such person's own account.⊥
To qualify as a stockbroker, a person (a) must be engaged in the business of effecting transactions in securities, as agent and/or with members of the general public and (b) must in the ordinary course of its business receive, acquire or hold securities and/or cash for customers in connection with securities transactions. Thus, the term "stockbroker" applies only to persons that are generally understood to be securities brokers or dealers. The critical aspect of the definition of stockbroker is the requirement that the securities dealer have customers; absent customers, the securities dealers cannot qualify as a stockbroker. See Kaiser Steel Corp. v. Pearl Brewing Co. (In re Kaiser Steel Corp.), 952 F.2d 1230, 1240 n.11 (10th Cir. 1991) ("Kaiser"), cert. denied, 112 S. Ct. 3015 (1992); Wider v. Wootton, 907 F.2d 570, 572 (5th Cir. 1990); In re ESM Gov't Sec., Inc., 52 B.R. 372 (S.D. Fla. 1985). To our knowledge, there is no case law as to whether the term "stockbroker" would include non-U.S. stockbrokers. As a rule, the Code does not distinguish between claimants on the basis of nationality or domicile. Therefore, we believe that the better view is that non-U.S. stockbrokers would qualify under this provision.⊥
Under 11 U.S.C. § 741(2), "customer" includes⊥
(A) an entity with whom a person deals as principal or agent and that has a claim against such person on account of a security received, acquired, or held by such person in the ordinary course of such person's business as a stockbroker, from or for the securities account or accounts of such entity (i) for safe keeping; (ii) with a view to sale; (iii) to cover a consummated sale; (iv) pursuant to a purchase; (v) as collateral under a security agreement; or (vi) for the purpose of effecting registration of transfer; and⊥
(B) an entity that has a claim against a person arising out of (i) a sale or conversion of a security received, acquired, or held as specified in subparagraph (A) of this paragraph; or (ii) a deposit of cash, a security, or other property with such person for the purpose of purchasing or selling a security.⊥
To our knowledge, there is no case law as to whether the term "customer" would include non-U.S. customers. As a rule, the Code does not distinguish between claimants on the basis of nationality or domicile. Therefore, we believe that the better view is that non-U.S. customers would qualify under this provision.

a "financial institution",[208] a "financial participant"[209] or a "securities clearing agency"[210] to exercise any contractual right (as defined in Section 555 or 556) , under any security agreement or arrangement or other credit enhancement forming a part of or related to any forward contract or securities contract, or of any contractual right (as defined in Section 555 or 556[211]) to offset or net out any termination value, payment amount or other transfer obligation arising under or in connection with one or more such contracts, including any master agreement for such contracts. In addition, Section 553 of the Code, 11 U.S.C. § 553, which restricts setoff under certain circumstances, expressly allows setoff of a kind referred to in Section 362(b)(6) of the Code.

In order to utilize the provisions of Section 362(b)(6), a derivatives market participant must be a "forward contract merchant", a "stockbroker", a "financial institution", a "financial participant" or a "securities clearing agency", as applicable, within the meaning of the Code. It is worth noting that the definition of "financial participant", which was added in the 2005 Act, significantly broadens the scope of eligible counterparties. The vast majority of derivatives dealers in the marketplace should fall within one of these categories for purposes of the Code. The 2006 Act has removed the requirement that eligible setoff involve a "settlement payment"[212] or "margin payment"[213], as was previously required.[214] This change clarifies the breadth of the protection intended.[215] The definition of "contractual right[s] to liquidate, terminate or accelerate" under Sections 555 and 556 are also

[208] Under 11 U.S.C. § 101(22) "financial institution" means "(A) a Federal reserve bank or entity that is a commercial or savings bank, industrial savings bank, savings and loan association, trust company, federally-insured credit union, or receiver, liquidating agent, or conservator for such entity and, when any Federal reserve bank, receiver, liquidating agent, conservator or entity is acting as agent or custodian for a customer (whether or not a 'customer', as defined in section 741) in connection with a securities contract (as defined in section 741) such customer; or (B) in connection with a securities contract (as defined in section 741) an investment company registered under the Investment Company Act of 1940." To our knowledge, there is no case law as to whether the term "financial institution" would inc lude non-U.S. banks. As a rule, the Code does not distinguish between claimants on the basis of nationality or domicile. Additionally, the 2005 Act specifically removed the FDICIA requirement that a "financial institution" be a domestic institution, see Section V.A., infra. Therefore, we believe that the better view by far is that non-U.S. banks would qualify under this provision.

[209] 11 U.S.C. § 101(22A).

[210] Under 11 U.S.C. § 101(48) "securities clearing agency" means a "person that is registered as a clearing agency under section 17A of the Securities Exchange Act of 1934 or exempt from such registration under such section pursuant to an order of the Securities and Exchange Commission, or whose business is confined to the performance of functions of a clearing agency with respect to exempted securities, as defined in section 3(a)(12) of such Act for the purposes of such section 17A."⊥
The inclusion of securities clearing agencies within the ambit of protection is important to enable such agencies to realize against collateral pledged by the debtor under their rules and bylaws and to assure timely settlement of the debtor's securities contracts that clear through such agencies.

[211] Sections 555 and 556 define the contractual rights to liquidate, terminate or accelerate securities and forward contracts. They define such rights as "a right set forth in a rule or bylaw of a derivatives clearing organization (as defined in the Commodity Exchange Act), a multilateral clearing organization (as defined in the Federal Deposit Insurance Corporation Improvement Act of 1991), a national securities exchange, a national securities association, a securities clearing agency, a contract market designated under the Commodity Exchange Act, a derivatives transaction execution facility registered under the Commodity Exchange Act, or a board of trade (as defined in the Commodity Exchange Act), or in a resolution of the governing board thereof, and a right, whether or not in writing, arising under common law, under law merchant, or by reason of normal business practice." 11 U.S.C. § 555. But see supra notes 65–67.

[212] For purposes of the forward contract provisions of the Code, "settlement payment" is defined in section 101(51A), 11 U.S.C. § 101(51A). For purposes of the securities contract provisions of the Code, "settlement payment" is defined in section 741(8), 11 U.S.C. § 741(8).

[213] For purposes of the forward contract provisions of the Code, "margin payment" is defined in section 101(38), 11 U.S.C. § 101(38). For purposes of the securities contract provisions of the Code, "margin payment" is defined in section 741(5), 11 U.S.C. § 741(5).

[214] We emphasize that this memorandum is not intended to analyze repurchase agreements or commodity contracts, or to describe instances, such as section 362(b)(6), where commodity broker status may be useful.

[215] The changes to Section 362(b)(6), (7), (17) and (27) eliminated the requirement that the setoff be of "any mutual debt and claim". Section 553, however, dealing expressly with setoff, declares the protected (from other provisions of the Code) status of the setoff of a "mutual debt" only. It is unclear what other provisions of the Code might have an impact upon a setoff not protected by Section 553, but able to be implemented free of the stay under Section 362(b). Nonetheless, in the absence of legislative history indicating that Congress intended to delete the mutuality requirement applicable to protected setoff, the revised provisions of Section 362 establish only a basis for arguing that a mutuality requirement is not required, but arguments exist to the contrary. The legislative history observes that the relevant changes confirm the protection of "all rights previously protected by Sections 362(b)(6), (7) and (17) . . . ." H.R. No. 109-648, at 7 (2006). A recent series of cases holds that the mutuality requirement continues to apply to setoff under safe-harbored contracts. See Swedbank AB (PUBL) v. Lehman Bros. Holdings Inc. (In re Lehman Bros. Holdings Inc.), 445 B.R. 130, 137 (S.D.N.Y. 2011) (lack of mutuality between pre-petition claim and post-petition deposits by debtor; "no evidence in the legislative history that the Safe Harbor Provisions were intended to eliminate the mutuality requirement"), aff'g 433 B.R. 101 (Bankr. S.D.N.Y. 2010); In re Lehman Bros. Inc., 458 B.R. 134 (Bankr. S.D.N.Y. 2011) (lack of mutuality under triangular setoff provision); Sass v. Barclays Bank PLC (In re Am. Home Mortg., Holdings, Inc.), 501 B.R. 44 (Bankr. D. Del. Nov. 8, 2013) (following In re Lehman Bros. Inc., 458 B.R. 134 (Bankr. S.D.N.Y. 2011), and stating that "nothing in section 561 of the Bankruptcy Code can preserve or protect a right that that [sic] does not exist, inclusive of the mutuality requirement demanded in section 553").

quite broad (and parallel to that in Section 362(b)(17) discussed above).[216] Accordingly, the exemption in Section 362(b)(6) of the Code from the automatic stay should apply to forward contracts or securities contracts documented under an ISDA Master Agreement.[217] This would permit a derivatives market participant within one of the above-enumerated categories of protected persons to net cash amounts or other property, if any, that it owes to the debtor under forward contracts or securities contracts against payments or deliveries owed to that derivatives market participant by the bankrupt with respect to other forward contracts or securities contracts under that ISDA Master Agreement. Therefore, Section 362(b)(6) would allow a qualifying derivatives market participant to achieve one net amount for all securities contracts and one net amount for all forward contracts documented under an ISDA Master Agreement.

Furthermore, Section 362(b)(6) does not specifically link the setoff of amounts owed under a forward contract against other amounts under that type of contract. Rather, the statute can be read to permit the setoff of amounts owing under a forward contract (and its related credit and security arrangements and master netting agreements) against amounts owing under a securities contract (and its related credit and security arrangements and master netting agreements).[218] We have not found any direct support for this analysis apart from the language of the statute and certain legislative history which in each case does not preclude such a conclusion.[219] More importantly, Section 362(b)(27), as introduced in the 2005 Act and amended in the 2006 Act, clarifies that, when an agreement is classified as a master netting agreement, all contractual rights under securities contracts, forward contracts and swap agreements "under any security agreement or arrangement or other credit enhancement forming a part of or related to any master netting agreement" or contractual rights arising from securities contracts, forward contracts and swap agreements "to offset or net out any termination value, payment amount or other transfer obligation arising under or in connection with 1 or more such master netting agreements" may be exercised "to the extent such participant is eligible to exercise such rights under [Section 362(b)(6)] . . . or (17) for each individual contract covered by the master netting agreement".[220]

(b) Limitation on Avoiding Powers. Sections 546(e) and 548(d)(2) of the Code also provide express protection for, in pertinent part, transfers in good faith that are "settlement payment[s]" or "margin payment[s]" made by or to (or for the benefit of) a "forward contract merchant", "stockbroker", "securities clearing agency", "financial institution" or "financial participant" within 90 days (or in some cases two years) prior to a bankruptcy filing.[221] The 2006 Act amendments have further expanded this protection to include a "transfer" made by or to (or for the benefit of) a forward contract merchant", "stockbroker", "securities clearing agency", "financial institution" or "financial participant" in connection with a securities contract or forward contract. Therefore any amounts payable during the term of an ISDA Master Agreement and at termination in connection with Transactions that are found to be forward contracts or securities contracts should qualify as "settlement payment[s]"[222], "margin payment[s]" and/or "transfer[s]" and a derivatives dealer is likely to be a "forward contract merchant", "stockbroker", "securities clearing agency", "financial institution" or "financial participant". Thus, the protection set forth in the Code in all likelihood covers payments made under Transactions that are found to be forward contracts

[216] See note 211 and discussion of Section 362(b)(17) above.

[217] See 128 Cong. Rec. S8132 (daily ed. July 13, 1982) (statement of Sen. Dole) ("In the case of forward contracts, the net amount due to or owing from the debtor would be the sum of the net amounts, if any, due or owing with respect to each such contract of the debtor [after operation of the statute].").

[218] 11 U.S.C. § 362(b)(6).

[219] See 128 Cong. Rec. S8133 (daily ed. July 13, 1982) (statements of Sen. Dole and Sen. Mathias) (legislative history consistent with statute, implying that setoff of amounts owed under securities contract against forward contract is consistent with statute).

[220] 11 U.S.C. § 362(b)(27).

[221] 11 U.S.C. §§ 546(e), 548(d)(2). Importantly, these sections are limited by Section 548(a)(1)(A), which allows the trustee to avoid any transfer or obligation made or incurred within two years before the date of the filing if such transfer or obligation was made with the intent to hinder, delay or defraud. 11 U.S.C. § 548(a)(1)(A).

[222] See Kaiser Steel Corp. v. Pearl Brewing Co. (In re Kaiser Steel Corp.), 952 F.2d 1230, 1237 (10th Cir. 1991) ("Kaiser"), cert. denied, 112 S. Ct. 3015 (1992); Kaiser Steel Corp. v. Charles Schwab & Co., Inc., 913 F.2d 846, 848 (10th Cir. 1990); Bevill Bresler & Schulman Asset Mgmt. Corp. v. Spencer Sav. & Loan Ass'n, 878 F.2d 742, 752 (3d Cir. 1989). The Kaiser court stated that, of the five different types of contracts granted special treatment under the Code (i.e., swap agreements, securities contracts, commodity contracts, forward contracts and repurchase agreements), all involve settlement payments of one form or another except for swap agreements. Kaiser, 952 F.2d at 1239. This statement either could well be wrong, since swap agreements probably involve settlement payments (see, e.g., Section 14 of the ISDA Master Agreements (definition of "Close-out Amount")), or is irrelevant, since once you conclude a Transaction is not covered by the Code definition of "swap agreement" such Transaction must be another type likely falling within one of the remaining categories of contracts that, according to the Kaiser court, provides for settlement payments.

or securities contracts documented under that ISDA Master Agreement.[223]

As amended by the 2006 Act, Section 546(j) of the Code quite simply stipulates that the trustee may not avoid transfers (under appropriate individual contracts) by or to, or for the benefit of, a "master netting agreement participant"[224] under or in connection with a master netting agreement (but subject to a trustee's other rights to avoid a transfer under an individual contract within the master netting agreement).[225] In addition, Section 548(d)(2) of the Code protects transfers of property made in connection with a "master netting agreement" (subject to the appropriateness of the underlying individual contracts) from avoidance as fraudulent transfers by providing that such transfers are deemed to be transfers "for value".[226] As long as such transfers also are made "in good faith", as provided in Section 548(c) of the Code,[227] they should be exempt from challenge as fraudulent transfers.

(c) Liquidation. The Code further recognizes, in pertinent part, that a derivatives market participant that is a "stockbroker", "securities clearing agency", "financial institution" or "financial participant" will be entitled to exercise its contractual right (as broadly defined) to liquidate, terminate or accelerate a securities contract upon

[223] 11 U.S.C. §§ 546(e), 548(d)(2). A number of courts dealing with securities contracts have read both the term "settlement payment" and "transfer" as limited by the courts' view that Congress intended Section 546(e) to protect only the public securities markets and clearing and settlement systems and therefore have refused to apply the safe harbors in "private" transactions. Other courts have simply applied a "plain meaning" reading of the statute. See, e.g., Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V., 651 F.3d 329 (2d Cir. 2011); In re Quebecor World (USA) Inc., 719 F.3d 94, 99–100 (2d Cir. 2013) (noting the split of authority, applying a "plain meaning" reading of the statute, and holding that "a transfer may qualify for the section 546(e) safe harbor even if the financial intermediary is merely a conduit"). Courts also will not apply Section 546(e) to protect a transfer in a transaction void (as opposed to potentially voidable) under state law. See Enron Corp. v. Bear, Stearns Int'l Ltd. (In re Enron Corp.), 323 B.R. 857, 870 (Bankr. S.D.N.Y. 2005), appeal denied, 2006 WL 1222035 (S.D.N.Y. May 3, 2006).

A number of courts have addressed whether Sections 546(e) and Section 546(g) preempt state law causes of action that would provide essentially the same relief as avoidance actions barred by the Code. In Whyte v. Barclays Bank PLC, 494 B.R. 196 (S.D.N.Y. 2013) ("Whyte"), for example, the court held that Section 546(g) impliedly preempted state law fraudulent conveyance claims asserted by a litigation trust that was assignee of both creditor claims and avoidance claims under Chapter 5 of the Code. The court reasoned that permitting the litigation trustee, which the court characterized as "the creature of a Chapter 11 plan", to invoke state law fraudulent conveyance actions would "stand as a major obstacle to the purposes and objectives of Congress" in passing Section 546(g). Id. at 200. In contrast, the recent decision In re Tribune Co. Fraudulent Conveyance Litig., 499 B.R. 310 (S.D.N.Y. 2013) ("Tribune"), which considered state law constructive fraudulent conveyance claims brought by individual creditors, reached a different conclusion in its preemption analysis. The Tribune court distinguished Whyte and other cases on the basis that the committee or trust pursuing the state law claims held to be preempted in those cases was a successor in interest to the bankruptcy trustee. Id. at 318-19. Notwithstanding its conclusion that the individual creditors' claims were not preempted, the Tribune court held that the Code's automatic stay deprived the individual creditors of standing to pursue those claims when an official creditors committee, representing the bankruptcy estate, was simultaneously asserting different claims to avoid the same transactions. Id. at 324-25. The court suggested that this bar to standing would not apply if the committee had completely abandoned such claims. Id. at 325 . The Tribune court's reasoning, we believe, erroneously fails to give sufficient weight to the dominant logic of the Whyte decision, that allowing state fraudulent conveyance claims to trump Sections 546(e) and (g) will effectively defeat the purpose of those provisions. Both the Whyte and Tribune decisions have been appealed to the Second Circuit Court of Appeals. ISDA, among others, has filed amicus briefs in the Tribune and Whyte cases. The reasoning in Tribune was followed by another bankruptcy court in the Southern District of New York. See In re: Lyondell Chemical Company, 503 B.R. 348, 374-379 (Bankr. S.D.N.Y., 2014) ("Lyondell") (concurring, in a Section 546(e) case, with the Tribune court's method of distinguishing the facts in Whyte while criticizing the Whyte court for overemphasizing the protection of financial markets and failing to consider all of Congress's purposes in enacting the Code). Other courts have held that Section 546(e) does not preempt state law causes of action that are premised on facts distinct from those that would be protected by Section 546(e)'s safe harbor. In re Lehman Bros. Holdings Inc., 469 B.R. 415, 451 (Bankr. S.D.N.Y. 2012) (constructive trust, unjust enrichment and conversion claims not preempted because they "have more in common with claims grounded in actual fraudulent intent"); In re Hellas Telecommunications (Luxembourg) II, 526 B.R. 499, 514 (Bankr. S.D.N.Y. 2015) (same reasoning applied in a Chapter 15 case to an unjust enrichment claim).

[224] 11 U.S.C. § 101(38B) (master netting agreement participant defined as "an entity that, at any time before the date of the filing of the petition, is a party to an outstanding master netting agreement with the debtor").

[225] As discussed in note 72, the 2006 Act added the term "or for the benefit of" in key subsections of Section 546, including subsection (j).

[226] 11 U.S.C. § 548(d)(2).

[227] 11 U.S.C. § 548(c).

the occurrence of an insolvency, subject to certain exceptions.[228] The exercise of the close-out netting provisions under an ISDA Master Agreement by a derivatives market participant with respect to Transactions that fall within the definition of "securities contract" should be viewed as amounting to the liquidation, termination or acceleration of a "securities contract" and thus within the scope of Section 555 of the Code.[229]

The Code also recognizes, in pertinent part, the right of a "financial participant" or "forward contract merchant" to exercise its contractual right to cause the liquidation, termination or acceleration of a forward contract upon the occurrence of an insolvency.[230] If the relevant Transaction is classified as a "forward contract" within the meaning of the Code, a derivatives dealer should fall within the definition of "forward contract merchant" because a part of its business then will, by definition, consist of entering into forward contracts. Accordingly, exercise of the close-out netting provisions under an ISDA Master Agreement by a derivatives dealer or other qualifying market participant with respect to Transactions that are "forward contracts" should be viewed as amounting to the liquidation, termination or acceleration of a "forward contract" and thus within the scope of Section 556 of the Code.[231]

Finally, the Code recognizes, in pertinent part, the right under a master netting agreement of any master netting participant to exercise its contractual right to cause the "termination, liquidation or acceleration of or to offset or net termination values, payment amounts, or other transfer obligations arising under or in connection with one or more" securities contracts, forward contracts, swap agreements or master netting agreements, upon the occurrence of an insolvency (to the same extent as would be the case with respect to a swap agreement, securities contract or forward contract).[232]

C. The FDIA and the OLA[233]

Again, in a manner analogous to the Code analysis immediately above, if the relevant Transactions do not fall within the definition of "swap agreement" under the FDIA or the OLA, as applicable, and these Transactions were documented under an ISDA Master Agreement along with "swap agreement[s]", a derivatives market participant would be faced with an ISDA Master Agreement under which "swap agreement[s]" and other types of Transactions are documented. Again, these Non-Enumerated Transactions are likely to fall within the definition of "forward contract"[234] or "securities contract"[235] under the FDIA and the OLA, each of which is a type of qualified financial contract thereunder.[236]

1. Treatment of Forward Contracts, Securities Contracts and Master Agreements. A "forward contract" and a "securities contract" are each included in the definition of "qualified financial contract".[237] Therefore, they are entitled to the treatment afforded to qualified financial contracts under the FDIA and the OLA (as

[228] 11 U.S.C. § 555. The exceptions to the protection from stay or avoidance referred to in Section 555 of the Code are court stays or orders authorized under the provisions of SIPA or any statute administered by the SEC barring the liquidation of securities contracts of broker-dealers. Although Section 555 defers to a SIPA stay, a new provision in SIPA added by the 2005 Act in turn defers to the Code, and states that any "contractual rights of a creditor to liquidate, terminate, or accelerate" a safe-harbored transaction will not be stayed by an order under SIPA (although it does not expressly refer to Section 555 of the Code, but does refer expressly to Section 362). 15 U.S.C. § 78eee(b)(2)(C). We believe that the intent of this new provision was to give effect to ~~Section 555 of the Code~~the protection provided under Section 555 for contractual rights to liquidate, terminate or accelerate a securities contract without regard to a SIPA stay. Special stay and disposition rules under SIPA apply, however, to securities pledged as collateral, or sold or lent under a repurchase or securities lending agreement, by the failed broker-dealer. 15 U.S.C. § 78eee(b)(2)(C)(ii). With respect to any injunctive relief or other stay gained by the SEC, the exception to Section 555 ~~exception~~ would continue to apply. The exception to the operation of Section 555 for SEC stays, however, may be of little moment if FDICIA is applicable, given that FDICIA defers to certain provisions of the FDIA and SIPA, but is silent (except for its broad pre-emptive provision) with respect to SEC stays.
The sections of the Code concerning the liquidation of a "forward contract", 11 U.S.C. § 556, and a "swap agreement", 11 U.S.C. § 560, are not subject to the same exceptions.

[229] 11 U.S.C. § 555. Our research did not reveal anything to suggest that the termination provisions under an ISDA Master Agreement would not be viewed as a liquidation within the meaning of Section 555 of the Code or within the meaning of Section 556 of the Code, 11 U.S.C. § 556, discussed immediately below.

[230] 11 U.S.C. § 556.

[231] Id.

[232] 11 U.S.C. § 561.

[233] Throughout this Section VI.C, we have assumed in our discussion of the FDIA that the insolvent U.S. Party will be an Insured Institution and in our discussion of the OLA that the insolvent U.S. Party will be a Covered Financial Company.

[234] As defined in 12 U.S.C. § 1821(e)(8)(D)(iv); 12 U.S.C. § 5390(c)(8)(D)(iv).

[235] As defined in 12 U.S.C. § 1821(e)(8)(D)(ii); 12 U.S.C. § 5390(c)(8)(D)(ii).

[236] See Section IV.B and IV.D above.

[237] 12 U.S.C. § 1821(e)(8)(D)(i); 12 U.S.C. § 5390(c)(8)(D)(i).

swap agreements are so entitled). The FDIA as amended by the 2005 Act states that a master agreement for one or more forward contracts and securities contracts will be treated as a single qualified financial contract (but only to the extent the underlying agreements are themselves qualified financial contracts).[238] The OLA contains a substantively identical provision. This ensures that cross-product netting will be effective.

2. Right to terminate generally. As discussed in Sections IV.B.2 and IV.D.2 above with respect to an ISDA Master Agreement that documents only "swap agreement[s]", the FDIA and the OLA provide that a party to a qualified financial contract will be entitled to enforce any right to terminate or liquidate such a contract as a result of the appointment of a receiver after 5:00 p.m. (eastern time) the business day after such appointment.[239] Again, however, in the case of a conservatorship under the FDIA, a party to a qualified financial contract may enforce any contractual right to terminate or liquidate *other than* one based *solely* on the appointment of the conservator (or the insolvency or financial condition of the depository institution for which the conservator has been appointed), i.e., a "bankruptcy" default provision.[240] Therefore, if another default under an ISDA Master Agreement is triggered in addition to the "bankruptcy" default provision, a party could enforce its contractual right to terminate.

3. Netting. As discussed in Sections IV.B.3 and IV.D.3 above, netting provisions should be enforced under the FDIA or the OLA with respect to forward contracts, securities contracts and master agreements comprising any combination of the foregoing and/or swap agreements.

4. No Selective Transfer or Repudiation. In any transfer of assets of an insolvent institution, the FDIA and the OLA provide that the receiver (or conservator in the case of the FDIA) may not "cherry-pick" among qualified financial contracts between the insolvent institution and any particular counterparty.[241] Instead, if any qualified financial contract with a single counterparty is transferred, all qualified financial contracts with that counterparty must be transferred to the same party (together with all claims, security and credit enhancements relating thereto).[242] Therefore, there is no risk of selective repudiation with a transfer. Furthermore, the FDIA and the OLA provide that the receiver (or conservator in the case of the FDIA) may not "cherry-pick" among qualified financial contracts between the insolvent institution and any particular counterparty in exercising its authority to disaffirm or repudiate.[243] Therefore, there is no risk of selective disaffirmance or repudiation.

D. The NYBL

1. Treatment of Master Agreements. Again, in a manner analogous to the Code and the FDIA analysis immediately above, if the relevant Transactions do not fall within the definition of "swap agreement" under the NYBL and these Transactions were documented under an ISDA Master Agreement along with "swap agreement[s]", a derivatives market participant would be faced with an ISDA Master Agreement under which "swap agreement[s]" and other types of Transactions are documented. The definition of qualified financial contracts under Section 618-a(2)(e)(1) of the NYBL enumerates certain categories of financial contracts.[244] Those categories include, among others, securities contracts, forward contracts, swap agreements and master agreements for such agreements. The NYBL does not describe in detail which financial contracts would be encompassed by these categories. However, we believe that generally the Superintendent should interpret these categories to include the

[238] 12 U.S.C. § 1821(e)(8)(D)(vii); 12 U.S.C. § 5390(c)(8)(D)(vii).
[239] 12 U.S.C. § 1821(e)(8)(A), (e)(10); FDIC Statement of Policy 5113 (Dec. 12, 1989); 12 U.S.C. § 5390(c)(8(A), (e)(10).
[240] 12 U.S.C. § 1821(e)(8)(E), (e)(12).
[241] 12 U.S.C. § 1821(e)(9); 12 U.S.C. § 5390(c)(9).
[242] Qualified financial contracts, and related claims, security and credit enhancements, of the counterparty's affiliates must also be included in such transfer. Id.
[243] 12 U.S.C. § 1821(e)(11); 12 U.S.C. § 5390(c)(11). Qualified financial contracts of the counterparty's affiliates must be disaffirmed or repudiated together with the counterparty's qualified financial contracts.
[244] Under § 618-a2(e)(i) of the NYBL, "qualified financial contract" means any securities contract, commodity contract, forward contract (including spot and forward foreign exchange), repurchase agreement, swap agreement, and any similar agreement, any option to enter into any such agreement, including any combination of the foregoing, and any master agreement for such agreements, as well as other agreements determined by the Superintendent to be qualified financial contracts, provided that such agreements satisfy certain documentary requirements.

same range of financial contracts that are covered by the corresponding definitions under the FDIA.[245] Nevertheless, we understand that independent inquiries made with the Banking Division of the New York Department of Financial Services for more unusual transactions may be helpful.

2. Right to terminate. As discussed under Section IV.C.2, Section 619(1)(d)(2)(i) of the NYBL provides that the Superintendent's taking possession of a New York banking organization does not operate as a stay or as an injunction against the termination of a "qualified financial contract" in accordance with its terms.

3. Netting. As discussed under Section IV.C.3, netting among qualified financial contracts is enforceable under the NYBL.

4. Selective Repudiation. As discussed under Section IV.C.4, the NYBL also specifies that any master agreement for qualified financial contracts, together with all supplements thereto, "shall be treated as one qualified financial contract." Accordingly, if the Superintendent repudiates any of the Transactions under the ISDA Master Agreement, the Superintendent would be required to repudiate all of them, and we believe that the amount payable by the parties to the ISDA Master Agreement in respect of such repudiation would be calculated as provided under the ISDA Master Agreement.

E. FDICIA

As discussed in Section V.B. above, the applicability of FDICIA is not restricted by the type of Transaction involved.

VII.

TERMINATION CURRENCY

Under the ISDA Master Agreement, the parties may elect a Termination Currency for payment of the termination amount other than U.S. dollars; accordingly, the single obligation to pay a net amount under the ISDA Master Agreement would be converted into the Termination Currency.

This provision should not violate the public policy of the United States or the State of New York, given that both Section 823 of the Restatement (Third) of The Foreign Relations Law of the United States and Section 27(b) of the New York Judiciary Law permit the issuance of judgments denominated in foreign currencies.[246]

For purposes of any insolvency proceeding under the Code, the FDIA and the NYBL, any claim of the Non-defaulting Party or any judgment in favor of the Non-defaulting Party that is denominated in a currency other than U.S. dollars must be converted into U.S. dollars.[247]

VIII.

MULTIBRANCH ISSUES

1. Enforceability of multibranch close-out netting provisions in an ISDA Master Agreement for U.S. Bank with foreign branches

[245] See above under Section VI.C. We assume in this discussion that the Superintendent would refer to the FDIA as in effect at the time of an insolvency proceeding. Although there are good policy reasons why the Superintendent may interpret these definitions in accordance with the FDIA as amended to date, there are countervailing reasons why the Superintendent might refer to the FDIA as it was at the time of enactment of the relevant provisions of the NYBL.

[246] Under Section 27(b) of the New York Judiciary Law, in any case in which the cause of action is based upon an obligation denominated in a currency other than currency of the United States, a court shall render or enter a judgment or decree in the foreign currency of the underlying obligation. However, as a matter of New York law, such judgment or decree will be converted into currency of the United States at the rate of exchange prevailing on the date of entry of the judgment or decree if it is to be enforced in the State of New York.

[247] With respect to the Code, see In re Good Hope Chemical Corp., 31 B.R. 887, 891–92 (Bank. D. Mass. 1983). See also Official Form 10 (Proof of Claim) (indicating U.S. dollars in front of the space where the creditor must insert the total amount of its claim at the time the bankruptcy case was filed); 11 U.S.C. § 502(b) (requiring the bankruptcy court to determine the amount of a claim "in lawful currency of the United States as of the date of the filing of the petition" if an interested party objects to such claim).

(a) FDIC-insured National Bank. As discussed under Sections IV., V. and VI. above, specific provisions of the FDIA and FDICIA ensure the enforceability of the bilateral close-out netting provisions of the ISDA Master Agreement in cases of an FDIC-administered bank insolvency. These conclusions would not change based on the assumption that the ISDA Master Agreement is executed and conducted on a multibranch basis.

Any national banking association may establish (with the permission of the Board of Governors of the Federal Reserve) bank branches in foreign countries.[248] These foreign branches are not considered to be independent entities. The leading view on the relationship between a U.S. Bank and its foreign branches is expressed in Sokoloff v. National City Bank of New York, 224 N.Y.S. 102 (N.Y. Sup. Ct. 1927): "when considered with relation to the parent bank, [foreign branches] are not independent agencies; they are . . . merely branches, and are subject to the supervision and control of the parent bank . . . , and their property and assets belong to the parent bank, although nominally held in the names of the particular branches. Ultimate liability for a debt of a branch would rest upon the parent bank."[249]

Although foreign branches of national banks are required to keep independent financial records separate from the records of the parent bank,[250] this requirement is intended to simplify the oversight of foreign branches by U.S. banking regulators, and should not be interpreted to grant the foreign branches "separate entity" status.[251] The "single entity" treatment of a U.S. Bank and its branches expressed in Sokoloff has been repeatedly reaffirmed by ~~Federal~~federal and state courts.[252]

Furthermore, in an Interpretive Letter, the FDIC affirmed that the "single entity" theory would be applied in the case of a receivership of an insolvent multinational bank chartered within the United States.[253] Therefore, in such an insolvency proceeding, as a general matter, all creditors of the bank and its branches should be entitled to obtain payment from the proceeds of all the international and domestic assets of the U.S. Bank and its branches, regardless of the location of those assets.[254]

We believe, therefore, that the conclusions reached under Section III.A–D above would not change with respect to an ISDA Master Agreement executed and conducted on a multibranch basis with a national bank because the intent of the multibranch provisions (to net out payments across the entire bank, without regard to the place of booking) is in harmony with the policies behind the FDIC's "single entity" theory of receivership (to treat all bank assets as a whole, without regard to the location of assets).

The enforcement of multibranch close-out netting also would be consistent with the language of the FDIA and FDICIA discussed under Sections IV., V. and VI. above. Under the FDIA, a counterparty to a multibranch ISDA Master Agreement that is a "qualified financial contract" is permitted to "offset or net out any termination value, payment amount or other transfer obligation arising under or in connection with" one or more qualified financial contracts.[255] Nothing in this language would indicate a limitation on the ability to enforce multibranch netting in an otherwise valid qualified financial contract. More explicitly, FDICIA would permit a counterparty that is a "financial institution" to net out payment entitlements with the insolvent U.S. Bank "in accordance with" any applicable netting contract.[256]

Based on the "single entity" approach to bank insolvency proceedings adopted by the U.S. courts and the FDIC, and the language of the operative statutes that would apply in the case of a U.S. national bank insolvency, we believe that the conclusions reached under Section III.A–D above would not change with respect to an ISDA Master Agreement executed and conducted on a multibranch basis by a national bank.

[248] 12 U.S.C. § 601.
[249] Sokoloff v. Nat'l City Bank of N.Y., 224 N.Y.S. 102, 114 (N.Y. Sup. Ct. 1927) (citations omitted).
[250] 12 U.S.C. § 604.
[251] First Nat'l City Bank of N.Y. v. IRS, 271 F.2d 616, 618–19 (2d Cir. 1959).
[252] See, e.g., Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854, 863–64 (2d Cir. 1981) (holding U.S. bank liable for the deposit liabilities of its nationalized Vietnam branch); First Nat'l Bank of Boston (Int'l) v. Banco Nacional de Cuba, 658 F.2d 895, 900 (2d Cir. 1981) (holding that Cuban branches of national bank were not a separate entity under 12 U.S.C. § 601); United States v. BCCI Holdings (Lux.), S.A., 833 F. Supp. 32, 38 (D.D.C. 1993) (holding that all the foreign branches and the parent bank of the BCCI conglomerate were a single entity).
[253] FDIC Interpretive Letter 941 (Feb. 28, 1994). Informal conversations with FDIC staff revealed no deviations from this policy. See the FDIC press release PR-201-2009 11/6/2009 regarding United Commercial Bank.
[254] Id.
[255] 12 U.S.C. § 1821(e)(8)(A)(iii).
[256] 12 U.S.C. § 4403(a).

(b) FDIC-insured New York-chartered state bank. If the Superintendent would tender the receivership of an insolvent New York State-chartered banking institution that accepts ~~Federally~~federally-insured deposits to the FDIC or to another qualified Federal receiver, the same result as set forth under (a) above would occur. In all other cases, an insolvency proceeding for that New York State chartered banking institution would be conducted under the NYBL.[257] Under the NYBL, the New York bank and its branches would be treated as a single entity. Specifically, Section 138 of the NYBL states that any New York bank with a branch office in a foreign country "shall be liable for contracts to be performed at such branch office".[258]

(c) Exceptions. Certain statutes provide that deposit obligations of a foreign branch of a ~~Federally~~federally or New York-chartered state bank that cannot be paid by that foreign branch because of the imposition of exchange controls or similar circumstances are not required to be paid by any other office of such bank unless the bank and the depositor have otherwise explicitly agreed.[259] However, we believe that the obligations of a Party under the Transactions will not constitute deposits subject to these statutory provisions.

With respect to a foreign branch of a National Bank, however, it must be noted that the OCC has objected to the decisions of the courts in the First National Bank of Boston (International), Vishipco and other cases and has taken the position that, in appropriate circumstances, a foreign branch of a National Bank should be treated as a separate entity from its U.S. parent following a sovereign risk event.[260]

With respect to a foreign branch of an FDIC-insured New York State-chartered state bank subject to the provisions of the NYBL, Section 138 also provides that (i) a New York bank is liable on the contracts of its foreign branch only to the extent that a bank organized under the laws of the foreign country would be liable under the same contract, and (ii) if an unrecognized government of a foreign country seizes assets of a foreign bank, the obligations of that bank in respect of any contract made by it through any branch in that country are reduced pro tanto by the proportion that the value of the assets seized bears to the aggregate of all the liabilities of the branch offices of the bank in that country.[261]

2. Commencement of a separate proceeding to administer the assets of (a) the insolvent Federal Branch of Bank F or (b) the insolvent New York Branch of Bank F.

Unlike the provisions of Federal and New York law discussed above, in which the courts and the FDIC have promoted a "single entity" treatment of U.S. banks and their foreign branches, relevant provisions of the NYBL and the IBA follow a "separate entity" theory for dealing with insolvent U.S.-based branches of foreign banks.

(a) Federal Branch. Section 4 of the IBA governs the establishment and operation of Federal Branches. Under the IBA, the rules and regulations applicable to Federal Branches generally are the same as those governing a national bank and, as for a national bank, the OCC is in charge of applying them to Federal Branches.[262] Under the IBA, the receiver for the Federal Branch exercises the same rights, privileges, powers, and authority as are exercised by a receiver appointed by the OCC under the NBA. In an insolvency of a Federal Branch, Section 4(j) of the IBA empowers the OCC to appoint a receiver to take possession of all the property and assets of the Federal Branch, without regard to the proceedings in the bank's home country and to apply assets to satisfy the claims of creditors arising out of transactions conducted with the Federal Branch.[263]

Only after such claims are satisfied may the receiver turn over any remaining assets to the head office of the foreign bank. Individual creditors of the Federal Branch may force the commencement of an insolvency proceeding

[257] The applicable laws are found in Article XIII of the NYBL.
[258] N.Y. Banking Law § 138(1).
[259] See 12 U.S.C. § 633(a)(2) (applicable to all insured depository institutions); N.Y. Banking Law § 138(2-d) (applicable to New York State-chartered banks).
[260] See 1-3 O.C.C. Q.J. 36 (Aug. 1982) (letter from OCC to U.S. Department of Justice).
[261] A New York bank is not required to repay any deposit made at a foreign branch if that branch cannot repay the deposit due to (i) an act of war, insurrection, or civil strife; or (ii) an action by a foreign government or instrumentality, whether de jure or de facto, in the country in which the branch is located preventing such repayment, unless such bank has expressly agreed in writing to repay the deposit under such circumstances. See N.Y. Banking Law § 138(2-a).
[262] 12 U.S.C. § 3102(b).
[263] 12 U.S.C. § 3102(j).

for the Federal Branch by obtaining a judgment against the Federal Branch in a U.S. court and certifying to the OCC that such judgment has remained unpaid for 30 days.[264]

If the Federal Branch accepts ~~Federally~~federally-insured deposits, the liquidation of such insolvent Federal Branch is also subject to the FDIA. Whenever the OCC is to appoint a receiver for any such Federal Branch, it must appoint the FDIC as receiver. In addition, it is in the OCC's discretion to appoint the FDIC as conservator for any Federal depository institution, such as a Federal Branch,[265] that takes ~~Federally~~federally-insured deposits. In these situations, the insolvency proceedings for such Federal Branch would be carried out under the FDIA.[266] If the Federal Branch does not accept ~~Federally~~federally-insured deposits or if the OCC does not exercise its right to tender the conservatorship of a Federal Branch that takes ~~Federally~~federally-insured deposits to the FDIC or to another qualified Federal receiver, the administration of an uninsured Federal Branch would be governed by the NBA and the IBA, as applicable.[267]

(b) New York Branch. If the New York Branch accepts ~~Federally~~federally-insured deposits, the NYBL gives the Superintendent the discretion to tender the receivership of that insolvent New York Branch to the FDIC or to another qualified Federal receiver.[268] In such an instance, it is not clear whether the multibranch close-out netting provisions of the NYBL, as discussed under Section VIII.3 below, would apply or whether the insolvency proceeding with respect to the insured New York Branch would be conducted under the FDIA or the NYBL, even if there is no insolvent Federal Branch of Bank F.

If the New York Branch does not accept ~~Federally~~federally-insured deposits or if the Superintendent does not exercise his right to tender the receivership of a New York Branch that takes ~~Federally~~federally-insured deposits to the FDIC or to another qualified Federal receiver, then the NYBL would be applicable to that New York Branch. Under New York law, the New York Branch of Bank F must be licensed to take deposits or do business in New York.[269] The Superintendent is authorized to take possession of the New York Branch if Bank F becomes the subject of insolvency proceedings in Country H.[270] After taking possession, the Superintendent is authorized to commence an insolvency proceeding for the New York Branch, without regard to the proceedings in Country H.[271] The commencement of an insolvency proceeding is at the discretion of the Superintendent and may not be initiated by individual creditors.[272]

If a foreign bank has both a New York Branch and a Federal Branch, the broad authority contained in the IBA creates a jurisdictional overlap between a proceeding for a Federal Branch and a proceeding for a New York Branch (insured or uninsured) of that bank. Because the OCC authority encompasses all assets of the foreign bank in the United States, the assets of the New York Branch may be subject to an insolvency proceeding commenced under the IBA with respect to the Federal Branch. This distinction is important, because as described below, New York law will enforce multibranch close-out netting provisions while Federal law might not.

There have been~~ recent~~ decisions under the now repealed Section 304 of the Code that in combination suggested that counterparties of the New York Branch of Bank F may experience some delay in enforcing early termination and multibranch close-out netting provisions in insolvency proceedings brought by the Superintendent under the NYBL. These cases suggested that the Superintendent's proceedings might be interrupted by a Section

[264] Id.

[265] Under 12 U.S.C. § 1813(c)(4), the term "Federal depository institution" means "any national bank, any Federal savings association, and any Federal Branch."

[266] Under 12 U.S.C. § 1821(c)(2)(A)(ii), the FDIC shall be appointed receiver, and shall accept such appointment, whenever a receiver is appointed for the purpose of liquidation or winding up the affairs of an insured Federal depository institution by the appropriate Federal banking agency, notwithstanding any other provision of Federal law (other than, pertinently, Section 21A of the Federal Home Loan Bank Act, see 12 U.S.C. § 1441(a)).

[267] We think that the provision of the 2005 Act extending FDICIA to foreign banks as well as their U.S. branches should be applied to overcome any potential for an adverse result under the NBA and the IBA in those instances where FDICIA would be applicable. 12 U.S.C. § 4402. See supra note 164 and accompanying text. In the absence of precedent, however, the extent of FDICIA's influence is unclear.

[268] N.Y. Banking Law § 634.

[269] N.Y. Banking Law § 200.

[270] N.Y. Banking Law § 606(4)(a).

[271] See In re Liquidation of N.Y. Agency of B.C.C.I., 587 N.Y.S.2d 524, 526–27 (N.Y. Sup. Ct. 1992) (holding NYBL insolvency regime was a "rational and balanced" system to protect the local interests of creditors of a New York branch of a foreign bank).

[272] N.Y. Banking Law § 606(1).

304 proceeding,[273] and that the termination and netting provisions of the Code might not apply in a Section 304 proceeding.[274] The 2005 Act, however, has amended the Code to make it clear both that the protective provisions of the Code would apply in proceedings under the ~~new~~ successor provision to Section 304, Chapter 15 of the Code, and that branches and agencies of foreign banks with branches or agencies in the U.S. may not be the subject of Chapter 15 proceedings.[275]

3. Treatment of multibranch close-out netting provisions in an insolvency proceeding conducted for the New York Branch or the Federal Branch of Bank F.

(a) New York Branch. If the Superintendent takes possession of the New York Branch and the NYBL applies, the NYBL directs the Superintendent to segregate the assets of Bank F that are located in New York, and use those assets to satisfy only the claims of creditors that arise out of transactions with the New York branch.[276] The segregation, or "ring-fencing", of the New York Branch's assets and liabilities treats the New York Branch as a separate entity, distinct from the assets and liabilities of Bank F.

In the absence of special provisions, this "separate entity" treatment dictated by the NYBL might be interpreted to require the Superintendent to ignore the multibranch netting terms of an ISDA Master Agreement, and to treat transactions booked through the New York Branch without regard to other transactions booked through Bank F.

This outcome is avoided, however, by amendments to the NYBL adopted in 1993 that specifically address the treatment of multibranch netting agreements in an insolvency proceeding for a New York Branch.[277] These amendments enumerate swap agreements and other derivatives as "qualified financial contracts". The definition in the NYBL is consistent with the definition of qualified financial contract in the FDIA. ISDA Master Agreements executed on a multibranch basis would be within this definition to the extent that each transaction documented thereunder is a qualified financial contract. As discussed under Sections IV. and VI. above, the definition of qualified financial contract is expansive, and should encompass most derivatives transactions commonly documented under ISDA Master Agreements, or transactions "similar to" such common transactions.[278] However, it may be useful to make independent inquiries with the Office of the Superintendent for more unusual transactions that may not be within the definition of "qualified financial contract" contained in the NYBL.

The 1993 amendments limit the Superintendent's power to terminate or repudiate qualified financial contracts. Specifically, the Superintendent may not take any action with respect to multibranch qualified financial contracts; these contracts must either be terminated by the non-insolvent counterparty in accordance with their terms, or terminated by the banking regulators in Country H.[279]

Under the 1993 amendments, after the termination of the New York Branch's multibranch ISDA Master Agreement, netting of amounts due under the terminated ISDA Master Agreement are calculated on both a global

[273] In re Agency for Deposit Ins., Rehab., Bankr. and Liquidations of Banks, 310 B.R. 793 (S.D.N.Y. 2004). In Agency, the Yugoslav receiver of two failed Yugoslavian banks with New York agencies commenced U.S. bankruptcy proceedings under Section 304 of the Code to prevent the Superintendent from giving preferences to certain creditors with respect to the New York assets of each bank's New York agency, in accordance with Section 606(4) of the NYBL. The Superintendent had already taken possession of each bank's New York operations and initiated liquidation proceedings pursuant to the NYBL by the time the Yugoslav receiver filed its Section 304 proceeding. This case did not seem to involve any Transaction or close-out netting issues.
In response, the Superintendent brought a motion to dismiss the Section 304 petitions, which the Bankruptcy Court granted on the basis that Section 109 of the Code expressly excludes foreign banks from the definition of who may be a "debtor" under the Code. The District Court reversed the Bankruptcy Court's decision and held that "[t]he fact that, under § 109, a foreign bank cannot avail itself of the full benefits of Chapter 7 liquidation in the United States in no way implies that its estate may not obtain the benefits of a foreign bankruptcy by invoking the remedies afforded by § 304." Id. at 795. The District Court noted that the Yugoslav receiver's entitlement to file a Section 304 petition in the Bankruptcy Court is not dispositive of his entitlement to relief under Section 304 and remanded the case to the Bankruptcy Court to make a determination as to whether the Yugoslav receiver has met the burden set out in Section 304. The District Court denied the Superintendent's motion for reconsideration of the order or, alternatively, for certification of the order immediate appeal. 313 B.R. 561 (S.D.N.Y. 2004). The Second Circuit affirmed the decision. 482 F.3d 612 (2d Cir. 2007).
[274] In re Petition of the Bd. of Directors of Compañía General de Combustibles S.A., 269 B.R.104, 111–12 (Bankr. S.D.N.Y. 2001).
[275] 11 U.S.C. §§ 561(d), 1501(c), 1519(f), 1521(f). Similarly, foreign banks with branches in the United States may not be Code debtors in plenary cases (for example, under Chapter 7 or Chapter 11). 11 U.S.C. § 109(b)(3)(B).
[276] N.Y. Banking Law § 606(4)(a).
[277] N.Y. Banking Law §§ 618-a to 620.
[278] N.Y. Banking Law § 618-a2(e)(i).
[279] N.Y. Banking Law § 618-a1.

and New York only basis. The global net amount is the amount owed by or to Bank F as a whole if all transactions across all branches subject to the multibranch netting agreement are considered (the "Global Net Payment Obligation" or "Global Net Payment Entitlement"). The New York or local net amount is the amount owed by or to the New York Branch after netting only the transactions entered into by the New York Branch (the "Branch/Agency Net Payment Obligation" or "Branch/Agency Net Payment Entitlement"). The Superintendent shall only be liable to pay a counterparty the lesser of the Global Net Payment Obligation and the Branch/Agency Net Payment Obligation. Likewise, when a counterparty owes a net amount pursuant to a repudiated or terminated qualified financial contract, the Superintendent of the insolvent New York Branch may demand from the counterparty a payment of the lesser of the Global Net Payment Entitlement or the Branch/Agency Net Payment Entitlement. The right of the Superintendent to receive this payment from a Non-defaulting Party exists regardless of the inclusion of a limited two-way payments clause in the terminated qualified financial contract.[280]

Based on these provisions, the Superintendent would enforce the close-out netting provisions of an ISDA Master Agreement executed on a multibranch basis by the New York Branch, subject to the limitations described above.[281]

If the New York Branch of Bank F accepts ~~Federally~~federally-insured deposits, the NYBL gives the Superintendent the discretion to tender receivership of that insolvent New York Branch to the FDIC or to another qualified Federal receiver.[282] Where the Superintendent does tender receivership of the insolvent New York Branch to the FDIC, the insolvency proceeding would be conducted under the FDIA or the NYBL. In this situation, we believe that the risk of delay under the FDIA would be the same as under the NYBL.

(b) Federal Branch. A different result would occur if a separate proceeding was conducted for a Federal Branch. In an FDIC-administered insolvency proceeding for a Federal Branch that takes ~~Federally~~federally-insured deposits, the FDIC will "ring-fence" the U.S.-based assets and apply those assets to satisfy the claims of creditors arising out of transactions conducted with the Federal Branch.[283] Only after such claims are satisfied may the FDIC turn over any remaining assets to the head office of the foreign bank.[284] This "ring-fencing" approach could be used to avoid enforcement of the multibranch close-out netting provisions, because the FDIC could argue that payments due to the Federal Branch (i.e., U.S.-based assets) should not be netted or set off against payment obligations of the head office of Bank F or its branches in other jurisdictions.

These "ring-fencing" provisions may be in conflict with the provisions of the FDIA that protect a counterparty's right to "offset or net out any termination value…arising under or in connection with 1 or more [qualified financial contracts]" (emphasis added).[285] There is a strong argument that these provisions of the FDIA are sufficiently broad to encompass multibranch netting, and that these provisions should apply in the case of an FDIC-proceeding for a Federal Branch. It is worth noting that the FDIC's authority in carrying out a receivership of an insolvent Federal Branch under the IBA extends to the "same rights, privileges, powers and authority with respect thereto as are now exercised by receivers of national banks".[286] Therefore, it may reasonably be argued that the provisions of the FDIA should be applied in an FDIC insolvency proceeding for a Federal Branch in the same way the FDIC would apply those provisions in an insolvency proceeding for a national bank.

Furthermore, there is some evidence indicating that the OCC would defer to a contractual agreement between sophisticated parties in which one party "waives" the protection provided by the ring-fencing provisions of the IBA. In an interpretive letter from 1988, the OCC stated that although the IBA grants a preference to creditors whose claims arise out of transactions with a Federal Branch, there is no indication in the IBA that sophisticated investors "may not agree to surrender or alter their priority rights".[287] The multibranch netting provisions of an ISDA Master Agreement could be deemed to be a "surrender" of a counterparty's priority rights because, depending on the values of the transactions booked through the designated branches, a Non-defaulting Party might be better off

[280] N.Y. Banking Law § 618-a2(c).
[281] In the absence of precedent, it is not possible to determine if application of FDICIA might impel some more literal application of the ISDA Master Agreement than that required by the terms of the NYBL.
[282] N.Y. Banking Law § 634.
[283] 12 U.S.C. § 3102(j)(2).
[284] Id.
[285] 12 U.S.C. § 1821(e)(8)(A)(iii).
[286] 12 U.S.C. § 3102(j)(1).
[287] OCC Interpretive Letter, 1988 WL 282300 (Sept. 2, 1988) (permitting investors of Notes issued by Federal Branch to agree to be subordinated to all other creditors of the foreign bank, even those with claims against other branches of the foreign bank).

only netting transactions booked through the Federal Branch instead of netting transactions booked through all branches and the head office. Therefore, it may be argued that if the OCC chose to enforce multibranch netting in one situation (i.e., when it is deemed to be a waiver), it may choose consistently to enforce multibranch netting in all situations, which would also be consistent with the FDIA.

However, without clarifying legislation or OCC regulations, it is unclear if the FDIC would enforce the multibranch close-out netting provisions in accordance with the terms of the FDIA or, alternatively, permit close-out netting only for transactions booked through the Federal Branch (or only for transactions booked through any branches in the United States). We note that prior to the passage of the 2005 Act, ISDA had proposed that the OCC exercise its rule-making authority under Section 3102(b) of the IBA and adopt clarifying regulations that would ensure the enforceability of multibranch close-out netting provisions in an insolvency proceeding for a Federal Branch. As of the date of this memorandum, however, the OCC had not taken any action in response to this proposal.[288]

In an insolvency proceeding for a Federal Branch that does not take ~~Federally~~federally-insured deposits, the receivership would be governed by the NBA and the IBA, as applicable. While the FDIA receivership provisions provide special treatment for qualified financial contracts, the NBA does not contain comparably specific provisions. We believe, however, that similar results should be obtained under the NBA and the FDIA.[289] There can be no assurance, however, that such arguments would prevail. Therefore, without clarifying legislation or OCC regulations, it is unclear if the OCC would enforce the multibranch close-out netting provisions under the NBA and the IBA or, alternatively, permit close-out netting only for transactions booked through the Federal Branch (or only for transactions booked through any branches in the United States).[290]

4. Bad Branch Issues

(a) Insolvency Proceeding for a U.S. Bank. As described under Section VIII.l above, in the case of an insolvency proceeding for a U.S. Bank, the U.S. Bank and all of its branches will be deemed to be a "single entity", and all assets and liabilities of the insolvent U.S. Bank will be dealt with in a single insolvency proceeding in the United States. Based on this "single entity" treatment, the fact that some Transactions under an ISDA Master Agreement may be booked through one or more Non-Netting Branches of the U.S. Bank should not affect the enforceability of the multibranch close-out netting provisions of an ISDA Master Agreement in the insolvency proceeding for the U.S. Bank.

Notwithstanding the "single entity" treatment of a U.S. Bank, an insolvency official in a Non-Netting Jurisdiction could attempt to sever or otherwise "ring-fence" the Transactions booked through the Non-Netting Branch of the U.S. Bank. We do not believe that the FDIC, acting as either a conservator or a receiver for the insolvent U.S. Bank, should or would recognize the validity of such actions.

There may be, however, narrow factual scenarios that might lead to an alternate conclusion. Although we believe that the FDIC would enforce the multibranch close-out netting provisions of the ISDA Master Agreement in almost all situations, we recognize the theoretical possibility that the FDIC could defer to an insolvency official in a Non-Netting Jurisdiction in a way that might undermine the enforceability of the multibranch close-out netting provisions. We believe that such a possibility would arise only in circumstances in which the insolvency official in a Non-Netting Jurisdiction manages to "cherry-pick" Transactions and realize substantial assets for the benefit of local creditors.

Even in these circumstances, we believe that under U.S. law the FDIC should be required to act in a manner consistent with the conclusions described above. Therefore, the assets and liabilities of the entire U.S. Bank (including those arising under a multibranch ISDA Master Agreement) should be dealt with on a net basis in a unified proceeding, in accordance with U.S. law, notwithstanding the actions taken outside the U.S. We believe that the FDIC would not recognize, and a U.S. court would not declare enforceable, an order issued in an insolvency

[288] We think that the provision of the 2005 Act extending FDICIA to foreign banks as well as their U.S. branches should be applied to overcome any potential for an adverse result under the IBA in those instances where FDICIA would be applicable. 12 U.S.C. § 4402. See supra note 164 and accompanying text. In the absence of precedent, however, the extent of FDICIA's influence is unclear.

[289] See OCC Interpretive Letter No. 768 (Oct. 4, 1995).

[290] Again, in cases where FDICIA would be applicable, we think that its strong mandate to give effect to its provisions should pre-empt a narrow application of close-out netting, although to what extent that will actually occur is unclear. See supra note 161.

proceeding in a Non-Netting Jurisdiction against a Non-Netting Branch of the U.S. bank as a result of which the close-out netting provisions of the multibranch ISDA Master Agreement would be unraveled.

(b) Insolvency Proceeding for a New York Branch of Bank F. As described under Section VIII.2 above, in a New York Branch insolvency proceeding, under the provisions dealing with multibranch qualified financial contracts, the New York Banking Superintendent will be obligated to pay the lesser of the Global Net Payment Obligation and the Branch/Agency Net Payment Obligation under any terminated ISDA Master Agreement documenting Transactions that are qualified financial contracts. The New York Banking Superintendent would calculate the Global Net Payment Obligation for all Transactions under the multibranch ISDA Master Agreement, notwithstanding actions taken by insolvency officials in Non-Netting Jurisdictions. Therefore, the conclusions reached under Section VIII.2 above with respect to the treatment of multibranch ISDA Master Agreements should not be altered if Bank F booked Transactions both through the New York Branch and through a Non-Netting Branch.

There are certain scenarios where the provisions of the NYBL dealing with multibranch qualified financial contracts would not apply. One such scenario would be that Bank F has operated in the U.S. both through a New York Branch and a Federal Branch and the OCC would carry out the insolvency proceedings for both the Federal Branch and the New York Branch and therefore encompass the assets of the New York Branch as well as the Federal Branch. The New York Branch regime described above also would not apply in the unlikely scenario that the Superintendent would tender the receivership of an insolvent New York Branch to the FDIC or to another qualified Federal receiver.[291]

(c) Insolvency Proceeding for a Federal Branch of Bank F. As described under Section VIII.3 above, the enforceability of multibranch close-out netting in an insolvency proceeding for a Federal Branch of Bank F is uncertain. Therefore, we cannot rule out that the booking of Transactions through a Non-Netting Branch of Bank F could affect the enforceability of multibranch close-out netting in an insolvency proceeding for a Federal Branch of Bank F.

As described under Section VIII.3 above, in an insolvency proceeding for a Federal Branch of Bank F, the receiver appointed by the OCC under the IBA would "ring-fence" the U.S.-based assets of such branch and apply those assets to satisfy the claims of creditors arising out of Transactions conducted with the Federal Branch. Only after such claims are satisfied may the receiver turn over any remaining assets to the head office of the foreign bank. This "ring-fencing" approach could be used to avoid enforcement of the close-out netting provisions on a multibranch basis, because the receiver could argue that payments due to the Federal Branch (i.e., U.S.-based assets) should not be netted or setoff against payment obligations of the head office of a foreign bank or its branches in other jurisdictions.[292]

IX.

APPLICABILITY OF CONCLUSIONS REGARDING NEW YORK-LAW ISDA MASTER AGREEMENT TO ENGLISH-LAW ISDA MASTER AGREEMENT

The conclusions reached under Sections I.–VIII. above with respect to the enforceability of the termination, close-out netting and multibranch provisions of the ISDA Master Agreement is subject to the assumption that the ISDA Master Agreement is governed by the laws of the State of New York (each a "New York-law ISDA Master Agreement"). The ISDA Master Agreement also permits the parties thereto to choose English law as the law governing the ISDA Master Agreement.

If in connection with an insolvency of a U.S. Party a Federal district court or a Federal bankruptcy court were to adjudicate a claim under an English-law ISDA Master Agreement, the court would first determine whether the choice of English law to govern the English-law ISDA Master Agreement would comply with the applicable U.S. choice of law rules. If the choice of English law is recognized under the applicable U.S. choice of law rules, then

[291] See supra note 104 and accompanying text.

[292] It should be noted, however, that these "ring-fencing" provisions may be in conflict with the provisions of the FDIA that protect a counterparty's right to "offset or net out any termination value . . . arising under or in connection with 1 or more (qualified financial contracts)." See supra Section VIII.3(b). Similarly, if FDICIA is applicable, they may conflict with the broad, pre-emptive FDICIA mandate to net "in accordance with . . . the terms of any applicable netting contract". 12 U.S.C. § 4403(a).

U.S. insolvency officials would next determine whether the termination and close-out netting provisions of such English-law ISDA Master Agreement are enforceable under applicable U.S. insolvency laws.

Federal district courts sitting in diversity jurisdiction are bound to apply the choice of law rules of the state in which the court sits.[293] Federal courts in New York adjudicating in bankruptcy would also apply New York choice of law rules in determining matters that do not raise important concerns implicating national bankruptcy policy.[294] Under the choice of law rules of the State of New York, choice of law clauses are recognized unless there is no reasonable basis for the parties' choice or the law chosen by the parties would violate a "fundamental policy" of an otherwise applicable law of the State of New York.[295] Therefore, Federal district courts and Federal bankruptcy courts that sit in the State of New York would be bound to apply English law to an English-law ISDA Master Agreement, insofar as English law does not violate a fundamental policy of New York laws.[296]

Since the termination, close-out netting and multibranch provisions of an English-law ISDA Master Agreement are the same as those contained in a New York-law ISDA Master Agreement, we believe that a court in the State of New York would conclude that the termination and close-out netting provisions of an English-law ISDA Master Agreement do not violate a fundamental policy of New York laws.

However, this analysis presumes that there is no applicable U.S. insolvency statute that deals with choice of law issues and provides to the contrary. Under the FDIA, FDICIA, the Code and the NYBL, the choice of English law would not affect our conclusion set forth above.

X.

ENFORCEABILITY OF TERMINATION, CLOSE-OUT NETTING AND MULTIBRANCH PROVISIONS OF NEW YORK-LAW ISDA MASTER AGREEMENT UNDER NEW YORK STATE LAW

We believe that the termination, close-out netting and multibranch provisions contained in the ISDA Master Agreement would be enforceable under the laws of the State of New York against the Defaulting Party in accordance with their terms, subject to general principles of equity (including, without limitation, concepts of materiality, reasonableness, good faith and fair dealing), regardless of whether considered in a proceeding in equity or at law.[297]

XI.

PENDING DEVELOPMENTS

The OLA provisions of the Dodd-Frank Act mandated certain studies on the resolution of financial companies.[298] One of these studies, to be produced by the Board of Governors in consultation with the Administrative Office of the United States Courts and the results of which are to be reported to Congressional committees annually until the fifth year after the date of enactment of the Dodd-Frank Act, encompasses the question of whether amendments should be made to the Code, the FDIA and other insolvency laws to address the manner in which qualified financial contracts of financial companies are treated in insolvency. Another of the required studies examined the treatment of fully secured creditors under the Code, the FDIA and the OLA and the question of how a

[293] See Klaxon Co. v Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941).

[294] See In re Gaston, 243 F.3d 599, 606-7 (2d Cir. 2001); see also In re Koreag, Controle et Revision S.A. v. Refco F/X Assocs., Inc. (In re Koreag, Controle et Revision S.A.), 961 F.2d 341, 350 (2d Cir. 1992). See also In re Merritt Dredging Co., Inc., 839 F.2d 203, 206 (4th Cir. 1988) (holding that, absent a compelling federal interest which dictates otherwise, the *Klaxon* rule should prevail where a federal bankruptcy court seeks to determine the extent of a debtor's property interest). In those select instances where state substantive law raises "important concerns implicating national bankruptcy policy", bankruptcy courts in New York may follow federal choice of law rules, which in certain contexts may be quite similar to New York law. See ~~id~~961 F.2d at 350.

[295] See In re Johns-Manville Corp., 129 B.R. 710, 885 (E.D.N.Y. and S.D.N.Y. 1991), vacated on other grounds, 982 F.2d 721 (2d Cir. 1992); see also N.Y. Gen. Ob. L. §§ 5-1401 to -1402.

[296] There are some precedents that do not follow the rule stated herein, but rather apply the law of a jurisdiction that has the most "significant contacts" with the matter in dispute. However, the New York Uniform Commercial Code, the New York General Obligations Law and the vast weight of the case law support the argument that the parties' intentions and not "significant contacts" should be the dispositive factor in determining choice of law. See Bank Itec N.V. v. J. Henry Schroder Bank & Trust Co., 612 F. Supp 134, 140–41 (S.D.N.Y. 1985).

[297] If the Defaulting Party is an affiliate of a Covered Financial Company, termination rights based solely on insolvency or financial condition of the affiliated Covered Financial Company could be limited by the OLA in certain circumstances. See Section IV.D.1(a).

[298] Sections 215, 216 and 217 of the OLA. The topics for the studies are: secured creditor haircuts; the bankruptcy process for financial companies and nonbank financial institutions; and international coordination relating to the bankruptcy process for nonbank financial institutions.

haircut (of various degrees) on secured creditors could improve market discipline and protect taxpayers. The reports produced to date included summaries of the arguments of proponents and opponents of the financial contract safe harbors.[299] Neither report contained recommendations for the modification of the safe harbors.

Despite the effectiveness of many Dodd-Frank provisions regulating the OTC market, controversy continues to attach to swaps and other aspects of financial reform. One manifestation of this is a movement, so far ineffective, to reduce or eliminate the special insolvency protections available to swaps and certain other financial contracts. This movement may be expected to continue in coming years. Whether or not it becomes an imminent threat to the protections described in this memorandum remains to be seen. Bills have been introduced in Congress (and one such bill was ~~recently~~ approved by the House of Representatives in 2014) to amend the U.S. Bankruptcy Code to provide new mechanisms, including a temporary stay on the termination of safe-harbored financial contracts (and ability to set off against collateral), for resolving financial institutions without resort to the OLA. U.S. prudential regulators have indicated that they may require regulated financial firms to employ contractual stays on termination rights in their derivatives contracts with counterparties. The ISDA ~~2014~~2015 Universal Resolution Stay Protocol (which replaces an earlier 2014 protocol for parties that adhere to the 2015 protocol) enables adhering parties to amend covered ISDA Master Agreements ~~and~~, covered securities finance master agreements and related covered credit enhancements to incorporate certain limitations on the exercise of default rights and various other modifications. The ~~protocol was~~2014 and 2015 protocols were developed in consultation with a global body of regulators with the objectives of supporting recognition of the cross-border application of special resolution regimes applicable to certain financial companies and supporting the resolution of certain financial companies under the Code.

New case law developments may threaten certain of the anti-avoidance protections available under the U.S. Bankruptcy Code by allowing creditors to pursue state law causes of action with substantially similar effect as avoidance actions that would be barred were they brought under the U.S. Bankruptcy Code. See footnote 223. Courts have split on the issue and appeals are pending. We believe that an analysis that makes observance of the anti-avoidance safe harbors a function of purely elective procedural decisions of the debtor should not prevail. However, we must await further decisions bearing this out.

XII.

BRIDGES

Each Bridge allows parties to an ISDA Master Agreement to agree that certain other master agreements between them ("Bridged Agreements") will upon the happening of certain specified events ("Bridging Events") be defaulted, or cross-defaulted, to each other and the ISDA Master Agreement. Each Bridge further provides that a separate net termination amount will be calculated under and in accordance with the terms of each Bridged Agreement with respect to all transactions thereunder. All net termination amounts will then be combined within the calculation of Loss or Unpaid Amounts, as the case may be, under the ISDA Master Agreement, so as to produce ultimately a single net termination amount with respect to the ISDA Master Agreement and all Bridged Agreements.

Subject to the foregoing and all qualifications in this memorandum, we believe that the simultaneous termination and close out netting provisions of each Bridge should be enforceable to the extent described in this memorandum with respect to the ISDA Master Agreements, and that each Bridge should be viewed as a master agreement or master netting agreement, as facts may dictate.

XIII.

ADDENDUM– FEDERAL HOME LOAN BANKS

This addendum, as more particularly set forth below, confirms that the material conclusions reached in Parts IV.B, IX and X of this memorandum of law concerning the exercise of termination and netting rights under an ISDA Master Agreement would apply equally when one of the Parties to the ISDA Master Agreement is a Federal Home Loan Bank, as if the Federal Home Loan Bank were an Insured Institution and references in this memorandum to the

[299] Study on the Resolution of Financial Companies under the Bankruptcy Code, Board of Governors of the Federal Reserve System (July 2011), pages 15–18; Report to Congress on Secured Creditor Haircuts, Financial Stability Oversight Council (July 2011), pages 15–16.

FDIA and FDIC were, respectively, references to the conservatorship and receivership provisions[300] of the Housing and Economic Recovery Act of 2008 ("HERA") and to the Federal Housing Finance Agency (the "Agency").

The conclusions of this addendum are subject to the assumptions and qualifications set out in this memorandum, as supplemented and modified by the following. We assume that: (i) all Transactions carried out under the ISDA Master Agreement are "swap agreements" of a type enumerated in 12 U.S.C. § 4617(d)(8)(D)(vi)(I);[301] (ii) the written agreement requirements of 12 U.S.C. § 4617(b)(9)(B) are met;[302] and (iii) neither Party to the relevant ISDA Master Agreement will be an "entity-affiliated party" of the other Party as defined in 12 U.S.C. § 4502(11).

We do not comment on the process for the appointment of the Agency as conservator or receiver or the procedures by which it may exercise its rights as such. Reform of Federal housing finance continues to be an active topic of legislative proposals and Administration study. It is entirely possible that new legislation could significantly amend or replace entirely the conservatorship and receivership provisions of HERA. We note that the OLA does not apply to a Federal Home Loan Bank.[303]

We observe, with regard to Section IV.B.6 of this memorandum, that a "walkaway" clause is defined for purposes of HERA as "a provision in a qualified financial contract that, after calculation of a value of a party's position or an amount due to or from 1 of the parties in accordance with its terms upon termination, liquidation, or acceleration of the qualified financial contract, either does not create a payment obligation of a party or extinguishes a payment obligation of a party in whole or in part solely because of the status of such party as a nondefaulting party."[304]

We note also that the class of transferees to which the Agency may transfer qualified financial contracts under HERA is significantly broader than under the FDIA. Under the FDIA, the transferee must be a non-bankrupt financial institution (including a foreign financial institution if under applicable law the contractual rights of the parties are enforceable to substantially the same extent as permitted under the FDIA), whereas the corresponding provision under HERA merely refers to a transfer of all contracts to one "person."[305,306]

We do not address the applicability of FDICIA to Federal Home Loan Banks in this memorandum. The provisions of HERA and FDICIA addressing the interaction of the two statutes are not drafted identically to the corresponding provisions addressing the interaction between FDICIA and the FDIA, and the effect, if any, of these differences is not entirely clear.

This memorandum of law is rendered solely to ISDA for the benefit and use of its members. This memorandum of law may not be relied upon by any other person or used, circulated, quoted or otherwise referred to

---

300 12 U.S.C. § 4617.

301 12 U.S.C. § 4617(d)(8)(D)(vi)(I) lists the following as types of swap agreements: "any agreement, including the terms and conditions incorporated by reference in any such agreement, which is an interest rate swap, option, future, or forward agreement, including a rate floor, rate cap, rate collar, cross-currency rate swap, and basis swap; a spot, same day-tomorrow, tomorrow-next, forward, or other foreign exchange or precious metals agreement; a currency swap, option, future, or forward agreement; an equity index or equity swap, option, future, or forward agreement; a debt index or debt swap, option, future, or forward agreement; a total return, credit spread or credit swap, option, future, or forward agreement; a commodity index or commodity swap, option, future, or forward agreement; or a weather swap, weather derivative, or weather option[.]"

302 12 U.S.C. § 4617(b)(9)(B) provides: "No agreement that tends to diminish or defeat the interest of the Agency in any asset acquired by the A gency as receiver under this section shall be valid against the Agency unless such agreement is in writing and executed by an authorized officer or representative of the regulated entity." The written agreement requirement under HERA does not include a contemporaneous execution requirement, such as that under Section 13(e) of the FDIA.

303 See 12 U.S.C. § 5381(a)(11)(C) (excluding Federal Home Loan Banks from the definition of "financial company").

304 12 U.S.C. § 4617(d)(8)(G)(ii).

305 Compare 12 U.S.C. § 1821(e)(9)(A)-(B) with 12 U.S.C. § 4617(d)(9). Potential transferees under HERA may include a limited-life regulated entity, which the Agency, as receiver, may choose to organize under a temporary charter with certain powers and attributes of the Federal Home Loan Bank in receivership. 12 U.S.C. § 4617(i)(1) and (7). In certain circumstances, the Director of the Agency may authorize a limited-life regulated entity to obtain credit or issue debt that is secured by a senior or equal lien on property that is subject to a prior lien, provided that there is "adequate protection" of the interest of the affected lienholder. 12 U.S.C. § 4617(i)(11); 12 C.F.R. § 1237.11.

306 Another drafting dissimilarity between HERA and the FDIA exists regarding transfers but appears to be without consequence. 12 U.S.C. § 4617(i)(7)—which authorizes the Agency, as receiver, to transfer the assets and liabilities of a regulated entity, such as a Federal Home Loan Bank, to a newly established "limited-life regulated entity"— refers to transfers from a regulated entity "in default, or in danger of default". However, the prohibition against selective transfers in 12 U.S.C. § 4617(d)(9) refers only to a "regulated entity in default" and thus reads as being potentially narrower than the authority to transfer under 12 U.S.C. § 4617(i)(7). This divergence in language appears to be without consequence, however, because organization of a limited-life regulated entity, under 12 U.S.C. § 4617(i)(1), presupposes receivership, which results in "default" under the definition of such term in 12 U.S.C. § 4502(8).

or relied upon for any other purpose without our prior written consent; provided that this memorandum may be shared with ISDA's advisors, ISDA's member advisors and ISDA's members' supervisors and regulators provided that they may not rely on this memorandum.

MAYER BROWN LLP

As of December 1, ~~2014~~2015

APPENDIX A

APPENDIX A
AUGUST 2015~~307~~

CERTAIN TRANSACTIONS UNDER THE ISDA MASTER AGREEMENTS

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 Forward. A transaction in which one party agrees to pay an agreed price for a specified amount of a bond of an issuer or a basket of bonds of several issuers at a future date and the other party agrees to pay a price for the same amount of the same bond to be set on a specified date in the future. The payment calculation is based on the amount of the bond 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).

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 specified amount of 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 COMEX Division of the New York Mercantile 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.

~~307 This version of Appendix A replaces a prior version that was appended to this memorandum of law when issued. The "as of" date of this memorandum of law remains December 1, 2014, although references in it to "Appendix A" may be construed to refer to this later-dated version of the appendix.~~

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 (or in the case of reference prices not expressed in Ounces, the relevant Units of gold, silver, platinum or palladium).

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 (or in some cases an equivalent 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), rate or index (in the case of an economic statistic 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), rate or index (in the case of an economic statistic 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, floating index or floating commodity price payer on the cap and the other party is the floating rate, floating index 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[~~308~~307] for the same quantity to be set on a specified date in the future. A Commodity Forward may be settled by the physical delivery of the commodity in exchange for the specified price or may be cash settled based on the difference between the agreed forward price and the prevailing market price at the time of settlement.

Commodity 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 based on the price of one or more commodities.

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., West Texas Intermediate Light Sweet Crude Oil on the New York Mercantile Exchange); all calculations are based on a notional quantity of the commodity.

Contingent Credit Default Swap. A Credit Default Swap Transaction under which the calculation amounts applicable to one or both parties may vary over time by reference to the mark-to-market value of a hypothetical swap transaction.

Credit Default Swap 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 enter into a Credit Default Swap.

[~~308~~307] We assume that this price (i.e., the amount that will be paid in lieu of delivery) is the prevailing market price of the commodity at the time of settlement.

Credit Default Swap. 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 (for example, 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. A Credit Default Swap may also be physically settled by payment of a specified fixed amount by one party against delivery of specified obligations ("Deliverable Obligations") by the other party. A Credit Default Swap may also refer to a "basket" (typically ten or less) or a "portfolio" (eleven or more) of Reference Entities or may be an index transaction consisting of a series of component Credit Default Swaps.

Credit Derivative Transaction on Asset-Backed Securities. A Credit Default Swap for which the Reference Obligation is a cash or synthetic asset-backed security. Such a transaction may, but need not necessarily, include "pay as you go" settlements, meaning that the credit protection seller makes payments relating to interest shortfalls, principal shortfalls and write-downs arising on the Reference Obligation and the credit protection buyer makes additional fixed payments of reimbursements of such shortfalls or write-downs.

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.

Economic Statistic 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 or may pay an amount or periodic amounts of a currency based on a specified rate or index pertaining to statistical data on economic conditions, which may include economic growth, retail sales, inflation, consumer prices, consumer sentiment, unemployment and housing.

Emissions Allowance Transaction. A transaction in which one party agrees to buy from or sell to the other party a specified quantity of emissions allowances or reductions at a specified price for settlement either on a "spot" basis or on a specified future date. An Emissions Allowance Transaction may also constitute a swap of emissions allowances or reductions or an option whereby 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 the specified quantity of emissions allowances or reductions exceeds or is less than a specified strike. An Emissions Allowance Transaction may be physically settled by delivery of emissions allowances or reductions in exchange for a specified price, differing vintage years or differing emissions products or may be cash settled based on the difference between the market price of emissions allowances or reductions on the settlement date and the specified price.

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 and shares to be set on a specified date in the 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) a specified number of 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 or floating 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.

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), rate or index level (in the case of an economic statistic floor) or commodity price (in the case of a commodity floor) over a specified floating rate (in the case of an interest rate floor), rate or index level (in the case of an economic statistic floor) or commodity price (in the case of a commodity floor).

Foreign Exchange Transaction. A deliverable or non-deliverable 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.

Fund Option Transaction: A transaction in which one party grants to the other party (for an agreed payment or other consideration) the right, but not the obligation, to receive a payment based on the redemption value of a specified amount of an interest issued to or held by an investor in a fund, pooled investment vehicle or any other interest identified as such in the relevant Confirmation (a "Fund Interest"), whether i) a single class of Fund Interest of a Single Reference Fund or ii) a basket of Fund Interests in relation to a specified strike price. The Fund Option Transactions will generally be cash settled (where settlement occurs based on the excess of such redemption value over such specified strike price (in the case of a call) or the excess of such specified strike price over such redemption value (in the case of a put) as measured on the valuation date or dates relating to the exercise date).

Fund Forward Transaction: A transaction in which one party agrees to pay an agreed price for the redemption value of a specified amount of i) a single class of Fund Interest of a Single Reference Fund or ii) a basket of Fund Interests at a future date and the other party agrees to pay a price for the redemption value of the same amount of the same Fund Interests to be set on a specified date in the future. The payment calculation is based on the amount of the redemption value relating to such Fund Interest and generally cash-settled (where settlement occurs based on the difference between the agreed forward price and the redemption value measured as of the applicable valuation date or dates).

Fund Swap Transaction: A transaction 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 based on the redemption value of i) a single class of Fund Interest of a Single Reference Fund or ii) a basket of Fund Interests.

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.

Longevity/Mortality Transaction. (a) A transaction employing a derivative instrument, such as a forward, a swap or an option, that is valued according to expected variation in a reference index of observed demographic trends, as exhibited by a specified population, relating to aging, morbidity, and mortality/longevity, or (b) A transaction that references the payment profile underlying a specific portfolio of longevity- or mortality- contingent obligations, e.g. a pool of pension liabilities or life insurance policies (either the actual claims payments or a synthetic basket referencing the profile of claims payments).

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

Property Index Derivative Transaction. A transaction, often structured in the form of a forward, option or total return swap, between two parties in which the underlying value of the transaction is based on a rate or index based on residential or commercial property prices for a specified local, regional or national area.

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 (or in some cases equivalent 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 Deliverable Contingent Credit Default Swap. A Contingent Credit Default Swap under which one of the Deliverable Obligations is a claim against the Reference Entity under an ISDA Master Agreement with respect to which an Early Termination Date (as defined therein) has occurred.

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 B
SEPTEMBER 2009

CERTAIN COUNTERPARTY TYPES[1]

Bank/Credit Institution. A legal entity, which may be organized as a corporation, partnership or in some other form, that conducts commercial banking activities, that is, whose core business typically involves (a) taking deposits from private individuals and/or corporate entities and (b) making loans to private individual and/or corporate borrowers. This type of entity is sometimes referred to as a "commercial bank" or, if its business also includes investment banking and trading activities, a "universal bank". (If the entity only conducts investment banking and trading activities, then it falls within the "Investment Firm/Broker Dealer" category below.) This type of entity is referred to as a "credit institution" in European Community (**EC**) legislation. This category may include specialised types of bank, such as a mortgage savings bank (provided that the relevant entity accepts deposits and makes loans), or such an entity may be considered in the local jurisdiction to constitute a separate category of legal entity (as in the case of a building society in the United Kingdom (**UK**)).

Central Bank. A legal entity that performs the function of a central bank for a Sovereign or for an area of monetary union (as in the case of the European Central Bank in respect of the euro zone).

Corporation. A legal entity that is organized as a corporation or company rather than a partnership, is engaged in industrial and/or commercial activities and does not fall within one of the other categories in this Appendix B.

Hedge Fund/Proprietary Trader. A legal entity, which may be organized as a corporation, partnership or in some other legal form, the principal business of which is to deal in and/or manage securities and/or other financial instruments and/or otherwise to carry on an investment business predominantly or exclusively as principal for its own account.

Insurance Company. A legal entity, which may be organised as a corporation, partnership or in some other legal form (for example, a friendly society or industrial & provident society in the UK), that is licensed to carry on insurance business, and is typically subject to a special regulatory regime and a special insolvency regime in order to protect the interests of policyholders.

International Organization. An organization of Sovereigns established by treaty entered into between the Sovereigns, including the International Bank for Reconstruction and Development (the World Bank), regional development banks and similar organizations established by treaty.

Investment Firm/Broker Dealer. A legal entity, which may be organized as a corporation, partnership or in some other form, that does not conduct commercial banking activities but deals in and/or manages securities and/or other financial instruments as an agent for third parties. It may also conduct such activities as principal (but if it does so exclusively as principal, then it most likely falls within the "Hedge Fund/Proprietary Trader" category above.) Its business normally includes holding securities and/or other financial instruments for third parties and operating related cash accounts. This type of entity is referred to as a "broker-dealer" in US legislation and as an "investment firm" in EC legislation.

Investment Fund. A legal entity or an arrangement without legal personality (for example, a common law trust) established to provide investors with a share in profits or income arising from property acquired, held, managed or disposed of by the manager(s) of the legal entity or arrangement or a right to payment determined by reference to such profits or income. This type of entity or arrangement is referred to as a "collective investment scheme" in EC legislation. It may be regulated or unregulated. It is typically administered by one or more persons (who may be private individuals and/or corporate entities) who have various rights and obligations governed by general law and/or, typically in the case of regulated Investment Funds, financial services legislation. Where the arrangement

1 In these definitions, the term "legal entity" means an entity with legal personality other than a private individual.

does not have separate legal personality, one or more representatives of the Investment Fund (for example, a trustee of a unit trust) contract on behalf of the Investment Fund, are owed the rights and owe the obligations provided for in the contract and are entitled to be indemnified out of the assets comprised in the arrangement.

Local Authority. A legal entity established to administer the functions of local government in a particular region within a Sovereign or State of a Federal Sovereign, for example, a city, county, borough or similar area.

Partnership. A legal entity or form of arrangement without legal personality that is (a) organised as a general, limited or some other form of partnership and (b) does not fall within one of the other categories in this Appendix B. If it does not have legal personality, it may nonetheless be treated as though it were a legal person for certain purposes (for example, for insolvency purposes) and not for other purposes (for example, tax or personal liability).

Pension Fund. A legal entity or an arrangement without legal personality (for example, a common law trust) established to provide pension benefits to a specific class of beneficiaries, normally sponsored by an employer or group of employers. It is typically administered by one or more persons (who may be private individuals and/or corporate entities) who have various rights and obligations governed by pensions legislation. Where the arrangement does not have separate legal personality, one or more representatives of the Pension Fund (for example, a trustee of a pension scheme in the form of a common law trust) contract on behalf of the Pension Fund and are owed the rights and owe the obligations provided for in the contract and are entitled to be indemnified out of the assets comprised in the arrangement.

Sovereign. A sovereign nation state recognized internationally as such, typically acting through a direct agency or instrumentality of the central government without separate legal personality, for example, the ministry of finance, treasury or national debt office. This category does not include a State of a Federal Sovereign or other political sub-division of a sovereign nation state if the sub-division has separate legal personality (for example, a Local Authority) and it does not include any legal entity owned by a sovereign nation state (see "Sovereign-owned Entity").

Sovereign Wealth Fund. A legal entity, often created by a special statute and normally wholly owned by a Sovereign, established to manage assets of or on behalf of the Sovereign, which may or may not hold those assets in its own name. Such an entity is often referred to as an "investment authority". For certain Sovereigns, this function is performed by the Central Bank, however for purposes of this Appendix B the term "Sovereign Wealth Fund" excludes a Central Bank.

Sovereign-Owned Entity. A legal entity wholly or majority-owned by a Sovereign, other than a Central Bank, or by a State of a Federal Sovereign, which may or may not benefit from any immunity enjoyed by the Sovereign or State of a Federal Sovereign from legal proceedings or execution against its assets. This category may include entities active entirely in the private sector without any specific public duties or public sector mission as well as statutory bodies with public duties (for example, a statutory body charged with regulatory responsibility over a sector of the domestic economy). This category does not include local governmental authorities (see "Local Authority").

State of a Federal Sovereign. The principal political sub-division of a federal Sovereign, such as Australia (for example, Queensland), Canada (for example, Ontario), Germany (for example, Nordrhein-Westfalen) or the United States of America (for example, Pennsylvania). This category does not include a Local Authority.

INDEX

1987 ISDA Master Agreement.......6
1987 ISDA Master Agreements.......6
1992 ISDA Master Agreement.......6
1992 ISDA Master Agreements.......6

2002 ISDA Master Agreement 6
Bank F 11
Board 25
Branch/Agency Net Payment Entitlement 51
Branch/Agency Net Payment Obligation 51
Branches 4
Bridge 5
Bridged Agreements 56
CEA 36
close-out netting 7
Code 2
Code Entities 2
Confirmation 6
Country H 11
Covered Financial Company 4
Cross Border Agreement 6
Eligible Transactions 37
English-law ISDA Master Agreement 11
FDIA 2
FDIC Policy Statement 10
FDICIA 2
Federal Branch 11
Federal Branches 4
Freddie Mac 5
Ginnie Mae 5
Global Net Payment Entitlement 51
Global Net Payment Obligation 51
IBA 15
Ineligible Transactions 39
Insured Institutions 4
Interest Rate and Currency Exchange Agreement 6
Interest Rate Swap Agreement 6
ISDA 6
ISDA Master Agreement 6
ISDA Master Agreements 6
NBA 15
New York Branch 11
New York Branches 4
New York-law ISDA Master Agreement 54
Non-Enumerated Transactions 14
Non-Netting Branches 12
Non-Netting Jurisdictions 12
NYBL 2
OCC 15
Single Jurisdiction Agreement 6
Superintendent ~~24~~25
Transaction 2
U.S. Bank 10
U.S. Banking Institutions 4
U.S. Party 2
Uninsured N.Y. Institutions 4

Document comparison by Workshare Compare on Tuesday, April 05, 2016 7:17:56 PM

Input:	
Document 1 ID	interwovenSite://AMEDMS/AMECURRENT/719046319/1
Description	#719046319v1<AMECURRENT> - ISDA Netting Memo-2014 Update
Document 2 ID	interwovenSite://AMEDMS/AMECURRENT/719046319/5
Description	#719046319v5<AMECURRENT> - ISDA Netting Memo-2015 Update
Rendering set	Standard

Legend:	
Insertion	
~~Deletion~~	
~~Moved from~~	
Moved to	
Style change	
Format change	
~~Moved deletion~~	
Inserted cell	
Deleted cell	
Moved cell	
Split/Merged cell	
Padding cell	

Statistics:	
	Count
Insertions	125
Deletions	116
Moved from	2
Moved to	2
Style change	0
Format changed	0
Total changes	245