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MEMORANDUM

As of September 1, 2016

TO: International Swaps and Derivatives Association, Inc.

RE: Collateral Taker Insolvency

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

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

(ii) the 2016 Phase One IM Credit Support Deed, governed by English law (the "IM Deed" and together with the IM NY Annex, the "IM Security Documents");

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

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

In this memorandum the term "Collateral Provider" means the Pledgor (under the IM NY Annex) or the Chargor (under the IM Deed), in relation to which "Collateral Taker" means the Secured Party. The term "Collateral", when used in this memorandum, is meant to refer, in the case of each IM Security Document, to any assets in which a security interest is created by the Collateral Provider in favor of the Collateral Taker as credit support for the obligations of the Collateral Provider under the relevant Master Agreement. For purposes of this memorandum, "Collateral Release Instruction" means an instruction to the Custodian to effect the Transfer specified in paragraph 8(d) of the relevant IM Security Document.

This memorandum incorporates and assumes familiarity with the Collateral Memorandum and our memorandum of law entitled "Collateral Provider Insolvency", prepared for ISDA and dated the date hereof (the "Collateral Provider Supplemental Memorandum"). The conclusions in this memorandum are subject to the assumptions, discussion and qualifications set out in the Collateral Memorandum, as modified and supplemented below. This memorandum does not address default or insolvency of a Custodian or the Collateral Provider.

I. Assumptions and Fact Patterns

A. Assumptions

We make the same assumptions as in Part 1, Section I.A of the Collateral Memorandum, as modified and supplemented below. For purposes of this memorandum, references in such assumptions of the Collateral Memorandum to a "Security Collateral Provider", "Security Document", "NY Annex" or "Deed" shall be deemed to refer, respectively, to a Collateral Provider, IM Security Document, IM NY Annex or IM Deed, as defined herein, and references to "Corporate Debt Securities" shall be deemed to include Corporate Equity Securities.[1]

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

b. Although under the IM Security Documents each of the parties may be required to post Collateral to the other (either under the same IM Security Document or under separate IM Security Documents) in an amount that depends on the IM calculation provisions, we assume, for the sake of simplicity, that references herein to the Collateral Provider or the Collateral Taker are to the same party acting in such capacity at all relevant times, and we consider in this memorandum certain rights and remedies of the party acting in the capacity of Collateral Provider in the event of an insolvency of the party acting in capacity of Collateral Taker. Issues relating to

[1] Please refer to section A.3.b of the Collateral Provider Supplemental Memorandum for certain qualifications and further discussion related to Corporate Equity Securities. For purposes of this memorandum, a "Corporate Equity Security" means a share or similar equity interest issued by a corporation, business trust, joint stock company or similar entity or by an entity that is registered as an "investment company" under the U.S. Investment Company Act of 1940, as amended; however, the term "Corporate Equity Security" does not include interests in partnerships, limited liability companies, cooperatives, commodity pools or similar enterprises.

the insolvency of the Collateral Provider are considered in the Collateral Provider Supplemental Memorandum;

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

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

e. the control agreement satisfies the "relatedness" criteria described in Section B.3.b of the Collateral Provider Supplemental Memorandum, and either the relevant IM Security Document or the control agreement sets forth an express, affirmative right of the Collateral Provider to give the Collateral Release Instruction, which right, if contained only in the control agreement, is not overridden by any provision of the IM Security Document;

f. for purposes of Section III, the Collateral Provider will satisfy its obligation to return Posted Credit Support (IM) prior to or concurrently with its giving of the Collateral Release Instruction, and any unsatisfied obligations to the Collateral Taker at that time in respect of interest or contingent tax liabilities are either concurrently satisfied or immaterial;

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

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

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

j. there is no provision of the control agreement or the custodial agreement, nor any fact or circumstance relating to the Custodian, the Collateral Provider or the Collateral Taker or the relationship between or among any of them that would be inconsistent with or materially affect the IM Security Document or the analysis herein;

k. for purposes of Section II: Custodian is a "securities intermediary" and "bank"; the Segregated Account is a "securities account" with respect to securities Collateral and a "deposit account" with respect to cash Collateral; cash Collateral is denominated in a freely convertible currency and is held in an account under the control of the Secured Party in New York if denominated in U.S. Dollars or otherwise in the jurisdiction of the relevant currency; the Collateral Provider is the "entitlement holder" of Custodian in its capacity as securities intermediary and "customer" of the Custodian in its capacity as bank; the "securities intermediary's jurisdiction" and "bank's jurisdiction" of the Custodian are New York (all within the meaning of the NYUCC);

l. the relevant IM Security Document has not been altered in any material respect (for purposes of this assumption, we do not view the elections expressly set forth in the published form of Paragraph 13 of either IM Security Document as material alterations);

m. the Collateral Taker does not have any option to purchase the Collateral (other than as part its remedies in respect of a Secured Party Rights Event);

n. the Collateral Taker does not contribute its own funds or securities to the Segregated Account, and the Collateral Taker had no interest in the Collateral at any time prior to the Transfer of Collateral by the Collateral Provider to the Segregated Account; and

o. for purposes of Section III.C, Section III.E and Section IV, if the Collateral Taker is a broker-dealer with SIPC-insured accounts, or a "stockbroker" or "commodity broker" as defined in the Code, the Segregated Account is not associated with any "customer" relationship with the Collateral Taker in a manner that could cause the Collateral to be deemed to be "customer property".

B. Fact Patterns

Our analysis herein contemplates three fact patterns.

1. The Location of the Collateral Taker is in New York state and the Location of the Collateral is outside New York state.

2. The Location of the Collateral Taker is in New York state and the Location of the Collateral is in New York state.

3. The Location of the Collateral Taker is outside New York state and the Location of the Collateral is in New York State.

For the foregoing purposes:

- the "Location" of the Collateral Taker is in New York state if it is incorporated or otherwise organized in New York state and/or if it has a branch or other place of business in New York state; and

- the "Location" of Collateral is the place where an asset of that type is located under the private international law rules of New York state.

"Located" when used below in relation to a Collateral Taker or any Collateral should be construed accordingly. Although we do not expressly refer to each fact pattern in our analysis relating to each

question, we have taken the fact patterns into consideration in developing our analysis. It should generally be apparent from the context which of the fact patterns is under discussion. In addition, it should generally be clear from the terms of each question whether the Collateral is to be considered as located in New York or in a foreign jurisdiction.

II. Enforcement of the Collateral Provider's Right to Recover Collateral in the Absence of a Collateral Taker Insolvency

A. Assumptions:

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

After entering into the Transactions and prior to the maturity thereof, a Pledgor Rights Event, in the case of the IM NY Annex, or a Chargor Rights Event, in the case of the IM Deed, has occurred and is continuing (however, an insolvency proceeding has not been instituted).

B. Issues

(1) Would the Collateral Provider be entitled to exercise its contractual rights under the IM Security Documents and the custodial arrangements described in assumption (c) to recover the Collateral held by the Custodian in the Segregated Account?

(2) Are there any requirements that the custodial arrangements described in assumption (c) must satisfy in order to permit the Collateral Provider to exercise such rights?

(3) In order for the Collateral Provider to exercise its rights under the IM Security Documents and the custodial arrangements described in assumption (c) to recover the Collateral, is there a requirement that the Collateral Provider have no outstanding obligations to the Collateral Taker?

C. Analysis

Pursuant to paragraph 2 of the IM NY Annex, the Collateral Provider grants the Collateral Taker a "security interest in, lien on and right of Set-off against each Segregated Account and all Posted Collateral (IM) Transferred" to the Collateral Taker under the IM NY Annex. If this ostensible grant of a security interest were recharacterized, due, for example, to the breadth of any other rights conveyed, as an outright transfer of ownership in the Posted Collateral (IM), then the Collateral Provider would not enjoy the statutory rights of a "debtor"[2] under the NYUCC or certain common law rights, as discussed in section II.C.2 below, nor would it have a property interest, as opposed to a creditors' claim, against the insolvency estate of the Collateral Taker in respect of the Collateral under the insolvency regimes considered in this memorandum. Section II.C.1 analyzes whether the Collateral Provider would be treated, under New York law, as having transferred outright ownership of the Collateral to the Collateral Taker, as opposed to granting only a security interest, under the IM NY Annex. Section II.C.2 discusses the enforceability under New York law, outside of insolvency, of the Collateral Taker's obligation to return the Collateral as well as certain statutory and common law rights of the Collateral Provider to obtain return of the Collateral. Because the legal characterization of a purported property interest under

[2] NYUCC § 9-102(28) defines "debtor", in relevant part, as a "person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor."

New York law is primarily a question of contract law, our analysis in this section is limited to the IM NY Annex.[3]

1. Collateral Provider's Property Interest in the Collateral under New York Law

Although we are not aware of directly pertinent case law examining the recharacterization of a purported security interest as transfer of absolute ownership, we believe that court decisions analyzing the distinction between ownership interests and security interests or contractual claims are relevant by analogy. In Granite Partners, L.P. v. Bear, Stearns & Co.,[4] a federal court applied New York law to determine whether a repurchase agreement was a sale or secured loan for purposes of Article 9 of the UCC. The court declined to treat the repurchase agreement as a loan, citing the parties' intent as the key inquiry[5] and noting in particular that the "unrestricted right to trade securities … represents an incident of ownership which does not pass to a secured lender in a collateralized transaction."[6] Cases analyzing whether an ownership interest exists in funds collected by an agent have focused on the absence of restrictions on the commingling and use of funds by the recipient and the recipient's agreement to pay interest as factors indicative of a debtor-creditor, rather than bailee-owner, relationship with respect to the funds.[7]

Applying these precedents, we believe that the parties' intent as expressed in the written agreements would be the principal factor considered, with economic attributes of the security arrangement also playing a significant role to elucidate and confirm the stated intent. The IM NY Annex refers to the parties as "Secured Party" and "Pledgor"; in paragraph 2, the Pledgor "pledges … as security" and grants a "security interest"; pursuant to paragraph 6(b), the Secured Party has no right to sell, pledge, rehypothecate, assign, invest, use , commingle, or otherwise use any Posted Collateral (IM) in its business; pursuant to paragraph 6(d), the Secured Party has no obligation to pay interest on Posted Collateral (IM); Pledgor bears losses stemming from its Custodian's default and risk from market fluctuations in the value of the Collateral; and paragraph 8(a) sets forth an acknowledgment and agreement that securities collateral "may decline speedily in value and is of any type customarily sold on a recognized market", a reference to conditions set out in NYUCC §9-611(d) under which certain notice requirements under the NYUCC do not apply. Based on the foregoing, we believe that the Collateral Provider should be treated as having transferred only a security interest, and not absolute ownership of the Collateral, to the Collateral Taker under the IM NY Annex. Although conditioning the Pledgor's right to substitute collateral on Secured Party consent (an election contemplated in paragraph 13(f)) would be a factor that tends to weigh against this conclusion, we do not believe that such a condition in and of itself should change the result.

2. Collateral Provider's Right to Return of Collateral

The Collateral Taker's obligation to give the Collateral Release Instruction pursuant to paragraph 8(d) of the IM NY Annex should be enforceable against the Collateral Taker as a matter of New York contract law, outside of insolvency proceedings, subject to general principles of equity. However, because the provision operates to terminate the Collateral Taker's security interest by reason of the Collateral Taker's default, its enforceability when the Collateral Provider's Obligations, or any

[3] See Part 1, Sections I.C.1 and IV.C.1(a) of the Collateral Memorandum for a discussion of conditions under which the contractually chosen law will be upheld.
[4] Granite Partners, L.P. v. Bear, Stearns & Co., 17 F. Supp. 2d 275 (S.D.N.Y. 1998).
[5] Id. at 302.
[6] Id. at 301 (quoting In re Bevill, Bresler & Schulman Asset Management Corp., 67 B.R. 557 (D.N.J. 1986)).
[7] See, e.g., In re Drexel Burnham Lambert Group Inc., 113 B.R. 830, 849 (Bankr. S.D. N.Y. 1990) (collecting factors considered in cited cases).

commitments of the Collateral Taker to give value, are still outstanding could be limited in certain circumstances by principles that disfavor penalties or forfeitures.

NYUCC § 9-208 imposes a statutory duty on a secured party to release control, within 10 days of the pledgor's demand, over deposit accounts and investment property if "there is no outstanding secured obligation and the secured party is not committed to make advances, incur obligations, or otherwise give value."[8] The provisions of NYUCC § 9-208 may be varied by agreement, except that obligations of good faith, diligence, reasonableness, and care prescribed by the NYUCC may not be disclaimed by agreement.[9]

NYUCC § 9-623 provides a statutory right to redeem collateral, which may not be waived except by an agreement entered into and authenticated after default.[10] The right to redeem provides the debtor with an opportunity after default to prevent its equity in the collateral from being cut off by the secured party's exercise of remedies. NYUCC § 9-623 does not specifically address the secured party's obligations to relinquish possession or control of collateral upon the pledgor's exercise of its redemption right.

Under New York common law, failure of a secured party to relinquish possession or control of collateral after the pledgor has discharged all secured obligations may constitute conversion (a common law tort for the unauthorized exercise of control over property owned by another).[11] Under New York law, to sustain a conversion claim, acts must be alleged that are unlawful or wrongful and not a mere violation of contractual rights.[12] When money is the object of a conversion claim, the funds must be specifically identifiable.[13] The statutory right of redemption and duty of a secured party to release control, under NYUCC §§ 9-623 and 9-208, discussed above, should establish failure to relinquish control as wrongful and distinguish such conduct from a mere breach of contract. Under the custodial arrangements of assumption (c) above, the requirement to specifically identify property will be met to the extent the Collateral has actually been maintained in the Segregated Account. Further, if New York law governs the assertion of adverse claims against the Segregated Account, any unauthorized encumbrance of the Segregated Account by the Collateral Taker (to which the Collateral Provider has not consented) should not cut off the Collateral Provider's conversion claim in respect of the Segregated Account under the adverse claim cutoff provisions of NYUCC § 8-510(a) because the Collateral Provider has remained

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[8] If these conditions are met, then within 10 days of receiving an authenticated demand from the pledgor the secured party must, in the case of a deposit account, send to the bank with which the deposit account is maintained an authenticated statement that releases the bank from any further obligation to comply with instructions originated by the secured party and, in the case of investment property, must send to the securities intermediary with which the security entitlement is maintained an authenticated record that releases the securities intermediary from any further obligation to comply with entitlement orders or directions originated by the secured party.

[9] NYUCC § 1-302. Although the policy of Article 9 is concerned primarily with protecting debtors from overreach by secured parties, we cannot rule out the possibility that NYUCC §9-208 might be asserted (for example, in conjunction with the forfeiture argument discussed in the text) as a limitation on the enforceability of the Collateral Provider's right to give the Collateral Release Instruction while the Collateral Provider's Obligations to the Collateral Taker are still outstanding.

[10] NYUCC § 9-624(c). To redeem its collateral, the pledgor must "tender fulfillment of all obligations secured by the collateral", as well as the secured party's reasonable expenses and attorney's fees, before the secured party has collected, disposed of, contracted for the disposition of, or accepted, the collateral.

[11] See NYUCC 9-208 comment 4; Clark v. Gen. Motors Acceptance Corp., 363 S.E.2d 813 (Ga. Ct. App. 1987); Mann v. United Mo. Bank of Kirkwood, 689 S.W.2d 830 (Mo. Ct. App. 1985). Section 45 of the RESTATEMENT (FIRST) OF SECURITY, however, states that if a pledgee who re-pledges collateral with the permission of the pledgor is unable to return pledged collateral due to its insolvency, the pledgee is not liable as a converter.

[12] Fraser v. Doubleday & Co., Inc., 587 F.Supp. 1284, 1288 (S.D.N.Y.1984).

[13] See In re Ames Dept. Stores, Inc., 274 B.R. 600, 629 (Bankr. S.D.N.Y. 2002).

the entitlement holder and the unauthorized transferee would not have acquired its interest "from the entitlement holder".[14]

III. Enforcement of the Collateral Provider's Right to Recover Collateral after Commencement of an Insolvency Proceeding in respect of the Collateral Taker

A. Assumptions

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

a. An Event of Default under Section 5(a)(vii) of the ISDA Master Agreement with respect to the Collateral Taker has occurred and a formal insolvency proceeding under the Code, FDIA, OLA, or NYBL has been instituted by or against the Collateral Taker.

b. A Pledgor Rights Event, in the case of the IM NY Annex, or a Chargor Rights Event, in the case of the IM Deed, has occurred and is continuing.

B. Issues

Would the Collateral Provider's ability to exercise its contractual rights to recover the Collateral held in the Segregated Account be subject to any to any stay or freeze or otherwise be affected by commencement of insolvency proceedings with respect to the Collateral Taker?

C. The Code

1. Summary of Conclusions

In general, the filing of a petition with the bankruptcy court operates as a stay of, *inter alia*, "any act to obtain possession of property of the [debtor's bankruptcy] estate or of property from the estate or to exercise control over property of the estate" and "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the [bankruptcy] case".[15] As discussed in Part 1, Section III.C.2(a) of the Collateral Memorandum, the Code provides exemptions from the automatic stay for the exercise of certain rights by protected parties with respect to swap agreements, master netting agreements and certain other financial contracts.

As a matter of statutory interpretation, we believe the Collateral Provider's right to give a Collateral Release Instruction should qualify as a "contractual right to cause the liquidation, termination or acceleration" of the IM Security Document, and therefore, subject to the discussion in Part 1, Section III.C.2(a) of the Collateral Memorandum, the exercise of this right should qualify for the protections from the automatic stay and from the invalidation of *ipso facto* rights discussed therein. This conclusion follows from established principles of statutory interpretation, is consistent with legislative history, and is compelled by the policy goals of the swap safe harbors. However, in the absence of specific indications in the legislative history or a pattern of decided cases on point, we cannot predict with certainty whether a court would agree with this conclusion. Given the consequences of a finding of a stay violation, which include voidability of the stayed action and possible sanctions, and the tendency of some courts to be unreceptive to a creditor's relying on "untested interpretations" (instead of applying to the court for relief from the stay), Collateral Providers should consult counsel in evaluating a course of action upon their

[14] NYUCC§ 8-510(a).

[15] Code section 362(a)(3), (6). For a discussion of the distinction between "property of the estate" and "property from the estate", see, e.g., In re St. Clair, 251 B.R. 660, 666-67 (D.N.J. 2000).

Collateral Takers' insolvency, including with regard to the advisability of seeking precautionary relief from the automatic stay. We anticipate that bankruptcy trustees and debtors-in-possession, as well as unsecured creditors committees, will have incentive to challenge the availability of an exception from the automatic stay for the Collateral Release Instruction in order to preserve collateralization of potential recoveries in respect of disputed close-out valuations.

If the Collateral Provider is prevented from giving, or elects not to give, the Collateral Release Instruction, its right to redeem the Collateral maintained in the Segregated Account should nevertheless be treated as an "interest in property" if the conditions set out in section III.C.2.b below are met and, therefore, should be entitled to the protections provided to such interests under the Code. Specifically, the Collateral Provider should have a right to "adequate protection" [16] as a condition for the trustee to use, sell or lease the Collateral[17] and, once the secured obligations have been satisfied and the Collateral Provider's non-contractual remedies for the return of the Collateral under applicable non-bankruptcy law have become presently enforceable, the Collateral Provider should have a strong basis on which to establish cause for the court to grant relief from the automatic stay to permit giving the Collateral Release Instruction, subject to equitable principles (including the equitable powers of the bankruptcy court and any equitable defenses available to the debtor under non-bankruptcy law), any prior authorized use or sale of the Collateral, and possibly to the debtor's concurrence in the close-out valuation used to establish that the secured obligations have been satisfied. However, considerable procedural strictures apply in a Code proceeding, and diligent monitoring of the progress of the case and diligent prosecution of its rights will be paramount for effectively protecting the Collateral Provider's right to redeem the Collateral.

Given the importance of ensuring prompt access to initial margin pools, market participants and regulators may wish to foster industry-wide measures to create increased certainty, such as developing forms of "first-day" orders that can be made part of institutions' resolution planning process, whereby an institution in default would request court authorization of specific procedures for the prompt release of initial margin collateral.

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[16] Code section 361 states that adequate protection of a non-debtor entity's interest in property may be provided by—
(1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362, use, sale, or lease under section 363, or any grant of a lien under section 364 results in a decrease in the value of such entity's interest in such property;
(2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or
(3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.
The process for granting adequate protection may require the Collateral Provider to request or appear at hearings, and the right to adequate protection may be lost if not pursued diligently.

[17] Subject to certain conditions, the trustee has the power under section 363 to use, sell, or lease property in which the estate and another entity have an interest, including the power to sell such property free and clear of such other entity's interest, and the power under section 364 to use such property for the purpose of obtaining credit. Use, sale or lease of property in the ordinary course of business may be undertaken without notice or a hearing, except that the trustee may not use, sell or lease "cash collateral" unless either (a) each entity with an interest in such cash collateral consents or (b) the court, after notice and a hearing, authorizes such use, sale or lease in accordance with section 363. Code section 363(c).

2. Analysis

a. Availability of Safe Harbors

Each IM Security Document, as a "security agreement, arrangement or other credit enhancement" related to the ISDA Master Agreement is itself a swap agreement, forward contract, securities contract or master netting agreement, to the extent of damages measured in accordance with section 562 and otherwise to the extent that transactions under the ISDA Master Agreement qualify as one or more of such protected agreements.

Section 560 of the Code protects the "exercise of any contractual right of any swap participant or financial participant to cause the liquidation, termination or acceleration of one or more swap agreements" (which includes security agreements or arrangements related to swap agreements) because of the commencement of a case under the Code or the occurrence of certain other *ipso facto* conditions specified in Code section 365(e)(1).[18] Applying the ordinary meaning of the term "liquidation" in the sense relevant to its context, we believe that "liquidation" of a security agreement or arrangement would likely mean the determination of the pledgor's and the secured party's respective entitlements to the collateral and its disposition in satisfaction of those entitlements.[19] The giving of the Collateral Release Instruction is consistent with this meaning because, pursuant to assumption (f) of Section I.A. above, it effects the final settlement of collateral returns after satisfaction of the obligations secured by the collateral. This ordinary meaning should be dispositive, unless it will "produce a result demonstrably at odds with the intention of [the statute's] drafters."[20] In this case, the legislative history of the 2005 amendments to the Code makes clear that the addition of "security agreements or arrangements …." to the definition of swap agreement (and parallel amendments to the other protected contract definitions) was intended to ensure that "any such agreement, arrangement or enhancement is itself deemed to be a swap, and therefore eligible for treatment as such for purposes of termination, liquidation, acceleration, offset and netting under the Bankruptcy Code [and] the FDIA …."[21] Neither is the ordinary meaning, in our view, at odds with the balance drawn by the drafters of the Code between the safe harbors and other policies of the Code, specifically preventing piecemeal depletion of the bankruptcy estate by unstayed creditors, because, pursuant to assumption (f) of Section I.A, the obligations secured by the Collateral will have been or will be concurrently satisfied. The potential for disputes regarding the Collateral Provider's close-out valuations are no greater here than in the converse case (expressly contemplated in the legislative history) of a secured party applying its close-out valuations as the basis for exercising its remedies against the collateral.

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[18] Parallel provisions for securities contracts, forward contracts and master netting agreements appear in Code sections 555, 556 and 561.

[19] See Ballentine's Law Dictionary (3d ed., 1969)(defining "liquidate", in relevant part, as "[t]o obtain by agreement or by action the ascertainment of the amount of a debt. To settle the affairs of a business by selling assets, making collections of accounts receivable, applying the proceeds thus obtained to the payment of the debts of the business, and, if there be a surplus after such debts are paid, dividing it among the owners of the business"); Merriam Webster's Dictionary (3d ed., 1961) (defining "liquidate" as "(1): to determine by agreement or by litigation the precise amount of (indebtedness, damages, or accounts); (2): to determine the liabilities and apportion assets toward discharging the indebtedness of"); Black's Law Dictionary (10th ed. 2014) (defining "liquidate," in relevant part as "(1) [t]o settle (an obligation) by payment or other adjustment; to extinguish (a debt); (2) [t]o ascertain the precise amount of (debt, damages, etc.) by litigation or agreement; (3) [t]o determine the liabilities and distribute the assets if (an entity), esp. in bankruptcy or dissolution."). See also Code sections 725, 726 (disposition and distribution of property in a "liquidation" proceeding under Chapter 7 of the Code).

[20] See United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989) ("the plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters") (internal citation omitted).

[21] H.R. Rep. No. 109-31 at 129 (2005).

Additionally, this interpretation is supported by a recent 'flip clause' case, in which the bankruptcy court held that the distribution of collateral proceeds, in which the debtor had a subordinated security interest, through a priority-of-payments waterfall to noteholders (who ranked higher in priority) was protected by the 'liquidation' prong of section 560.[22] The court reasoned that the distribution of proceeds to the noteholders completed the liquidation of the swap to which the debtor was party. Although the court's analysis was based on priority-of-payments provisions that were incorporated by reference into a swap, and the court did not explicitly characterize these provisions as a security agreement or arrangement, we believe that its analysis, particularly its application of the "ordinary, contemporary, common meaning" of the term "liquidate", should carry over to the present context.

Finally, interpreting the right to cause "liquidation" of a security arrangement as encompassing the Collateral Release Instruction finds further support in the stated policy goals underlying the swap safe harbors: guarding against volatility, market instability and systemic risk.[23] Although these concerns might be seen as limited to the price volatility of open swap positions, and therefore no longer implicated after termination amounts are fixed,[24] such a narrow reading would undermine the goals of the safe harbor because it neglects the deleterious systemic effects of immobilizing initial margin pools in the insolvency estate. International regulatory bodies have, in fact, remarked upon the increased demand for high quality collateral resulting from regulatory reform and the potential for supply-demand imbalances and increasing interconnectedness in the market for high quality collateral assets.[25] Moreover, exposures to price volatility remain after termination of swap positions with the bankrupt because active derivatives market participants who have traded with the bankrupt counterparty will need to post initial margin in order to re-establish positions and re-balance portfolios that have become unhedged as a result of terminating their positions with the bankrupt.[26]

The automatic stay exceptions discussed in Part 1, Section III.C.2.a of the Collateral Memorandum protect the "exercise by a swap participant or financial participant of any contractual right (as defined in section 560) under any security agreement or arrangement or other credit enhancement forming part of or related to any swap agreement."[27] Section 560 defines "contractual right" inclusively by reference to the source of the right (e.g., "arising … by reason of normal business practice"), but the

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[22] Lehman Bros. Special Fin. Inc. v. Bank of Am., N.A. (In re Lehman Brothers Holdings Inc.) No. 08-13555 (SCC) slip op. at 42-43 (Bankr. S.D.N.Y. June 28, 2016)("Distinguishing between a distribution made to LBSF [(the debtor)] pursuant to the Priority Provisions and a distribution to the Noteholders pursuant to the same Priority Provisions is inconsistent with … a plain-meaning interpretation of the statute and the Transaction Documents").

[23] See H.R. Rep. 101-484 at 2 (1990) ("Because financial markets can change significantly in a matter of days, or even hours, a non-bankrupt party to ongoing securities and other financial transactions could face heavy losses unless the transactions are resolved promptly and with finality."). See also 136 Cong. Rec. 10421, 10423 (1990) (statement of Rep. Charles Schumer) ("Instruments that are actively traded on the international capital markets fluctuate constantly in value. Counterparties to a bankrupt entity need immediate resolution of their claims in order to be able to hedge their positions in the increasingly volatile international capital markets.").

[24] See, e.g., A62 Equities LLC v. Chohan (In re Chohan), 532 B.R. 130, 138 (Bankr. C.D. Cal. 2015) (consulting legislative history of Code section 560 in determining that an assignee of interests in a terminated swap agreement does not qualify as a "swap participant"). In contrast to the claims assignee in Chohan, the Collateral Provider will have incurred a change to its market risk exposures by virtue of terminating its outstanding swap positions with the bankrupt Collateral Taker.

[25] Bank for International Settlements (May 2013), Committee on the Global Financial System (CGFS) Paper No. 49 - Asset encumbrance, financial reform and the demand for collateral assets; available at: http://www.bis.org/publ/cgfs49.pdf .

[26] The importance of market participants' need to re-establish hedges was remarked upon in Congressional colloquy at the time of the original adoption of the swap safe harbors. See the statement of Rep. Schumer cited in note 23, supra.

[27] Code section 362(b)(17). Parallel exceptions for forward contracts, securities contracts and master netting agreements appear in Code sections 362(b)(6) and (27).

definition itself does not limit the substantive content of the right. Section 362(b)(17) also does not specify a substantive content, and the legislative history offers only broad guidance.[28] Whatever the precise outer limits of the contractual rights referred to in section 362(b)(17) might be, we think it would be anomalous and inconsistent for "contractual right" in this context to be narrower than the rights to cause liquidation, etc. specified in section 560, which by its terms protects such rights from being "stayed" by operation of any provision of the Code. Pursuant to assumption (e) of Section I.A above, the Collateral Provider's right to give the Collateral Release Instruction is contained in a related security agreement or arrangement and therefore is a right "under" the security agreement or arrangement.

b. Interest in Property

The commencement of a case under the Code creates an estate comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case".[29] The nature of the debtor's interest in a particular item of property is generally determined by applicable non-bankruptcy law.[30] Limited or partial interests in property, such as liens held by the debtor on property owned by third parties, are included as property of the estate to the extent of the debtor's interest; however, unless the

[28] The reference to contractual rights was added in the 2006 amendments to the Code, and replaced a prior formulation of the stay exception that referred to setoff against transfers of property due from the debtor or against collateral pledged by the debtor. The legislative history describes the overall purpose of the amendments as making "technical changes … by strengthening and clarifying the enforceability of early termination and close-out netting provisions and related collateral arrangements in U.S. insolvency proceedings … [and] improv[ing] harmonization between U.S. insolvency laws and other jurisdictions." H.R. Rep. 109-648 at 2 (2006). With reference to the amendments to section 362(b), the legislative history states only that they "protect enforcement … of collateral, setoff or netting provisions in … security agreements or arrangements[, and] … conform the provisions of the Bankruptcy Code to the parallel provisions of the FDIA and FCUA to confirm that [the exceptions] protect … all rights previously protected…." *Id.* at 2, 7. In at least one instance, a bankruptcy court has seized on the legislative history's reference to "technical changes" to support a narrow reading of the effect of certain modifications to the automatic stay exceptions made by the 2006 amendments. In re Lehman Bros. Holdings Inc., 439 B.R. 811, 836 (Bankr. S.D.N.Y. 2010).

[29] Code section 541 (a) (1) (2016). Certain exceptions are specified in Code sections 541(b) and (c)(2).

[30] See Butner v. United States, 440 U.S. 48, 55 (1979) ("Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding"); Barnhill v. Johnson, 503 U.S. 393, 398 (1992) ("'Property' and 'interests in property' are creatures of state law").
The choice- of-law rules to determine the existence of an ownership or other equitable interest in property are not necessarily the same as those discussed in the Collateral Memorandum with regard to perfection and priority of security interests. See, e.g., In re Koreag, Controle et Revision S.A. v. Refco F/X Assocs., Inc., 961 F.2d 341, 350-51 (2d. Cir. 1992) (drawing an analogy to section 541 in a case under now-superseded section 304 and engaging in a "greatest interest" analysis to determine whether New York or Swiss law should govern the characterization of an interest in property, of which the foreign representative of a Swiss insolvency proceeding was seeking turnover).

bankruptcy trustee succeeds in avoiding interests of others in an item of property,[31] limitations on the debtor's interest apply equally in the hands of the estate.[32]

Bankruptcy courts have recognized trust, escrow, agency and bailment arrangements as ones where the debtor lacked an equitable interest in the subject property, and have generally allowed recovery of the property[33] if the claimant could adequately trace its interest to specific property. [34] The pledgor-

[31]Of particular relevance is Code section 544,which confers on the trustee the power to avoid transfers of property of the debtor and obligations incurred by the debtor that are avoidable by a hypothetical judicial lien creditor or certain other real or hypothetical creditors. Typical applications are the voiding of unperfected security interests and of constructively fraudulent transfers and obligations. Sections 546 (e) and (g) limit the trustee's avoidance powers (including those under section 544) with respect to certain transfers under or in connection with swap agreements, securities contracts and forward contracts. See Part 1, Section III.C.3(a) of the Collateral Memorandum. As it is difficult to anticipate all of the ways in which section 544 avoidance might be invoked based upon foreign law and analyze the coverage of the safe harbors in each case, we have assumed that, under applicable non-bankruptcy law (except as set forth in Section II.C above with respect to New York law), creditors of the Collateral Taker would not be able to obtain an interest in the Collateral that is superior to that of the Collateral Provider.

[32]See Pearlman v. Reliance Ins. Co., 371 U.S 132, 135-36 (1962) ("Property interests in a fund not owned by a bankrupt at the time of adjudication, whether complete or partial, legal or equitable, mortgages, liens, or simple priority of rights, are of course not a part of the bankrupt's property and do not vest in the trustee. The Bankruptcy Act simply does not authorize a trustee to distribute other people's property among a bankrupt's creditors"); In re Sanders, 969 F.2d 591, 593 (7th Cir. 1992) ("Filing a bankruptcy petition does not expand or change a debtor's interest in an asset; it merely changes the party who holds that interest"). See also, In re O.P.M. Leasing Servs., Inc., 46 B.R. 661, 667 (Bankr. S.D.N.Y. 1985) (citing legislative history); In re Bibo, Inc., 200 B.R. 348, 351 (9th Cir. 1996) (recognizing the distinction between the debtor's junior lien interest and a third-party's fee interest in real property, but holding that the junior lien interest was sufficient for the automatic stay to apply to a senior lienholder's foreclosure on the property), vacated as moot, 139 F.3d 659 (9th Cir.1998); In re March, 140 B.R. 387,389 (E.D. Va. 1992) (concluding that property of the debtor's estate was limited to the debtor's junior lien interests and did not include the real property that secured such junior lien interest), aff'd 988 F.2d 498 (4th Cir. 1993).

[33] See e.g., In re Columbia Gas Sys., Inc., 997 F.2d 1039, 1062 (3rd Cir. 1993) (holding that customer refunds received and to be received by the debtor pipeline owner were held pursuant to a federal common law trust and excluded from the bankruptcy estate under section 541(d)); In re Dameron, 155 F.3d 718, 723 (4th Cir. 1998) (holding that funds held by the debtor as depositary of an escrow were beyond the reach of the bankruptcy estate where claimants could trace their assets to the debtor's frozen bank account). See also, In re Ralph A. Veon, Inc., 12 B.R. 186, 188-89 (Bankr. W.D. Penn. 1981) (holding that bearer bonds contributed by the debtor's officers as security for the debtor's state mining permit and then returned by the state agency to debtor's counsel were held by the debtor as bailee under Pennsylvania law, and bailor officers could recover the bonds); In re Magna Entm't Corp., 438 B.R. 380, 387 (Bankr. Del. 2010) (holding on a motion to dismiss that complainants had stated claims for imposition of a trust and bailment on certain funds owed to winning bettors under a pari-mutuel wagering arrangement). See also In re Lehman Commercial Paper, Inc., No. 08-13900 (JMP) (Bankr. S.D.N.Y. Oct. 6, 2008), ECF No. 11 (order authorizing, inter alia, (i) debtor's continued transfers, consistent with pre-petition practice, to and from an agency account used in connection with its role as administrative agent for numerous commercial loans and (ii) elevation of participations in which debtor acted solely as intermediary); Debtor's Motion Pursuant to Sections 105(a), 363(b), 363(c) and 541(d) of the Bankruptcy Code and Bankruptcy Rule 6004 for Authority to (A) Continue to Utilize its Agency Bank Account, (B) Terminate Agency Relationships, and (C) Elevate Loan Participations, In re Lehman Commercial Paper Inc., No. 08-13900, (Bankr. S.D.N.Y. Oct. 6, 2008), ECF No. 3 (arguing, in part, that the debtor had no equitable interest in the agency account and that the elevation of participations was in the ordinary course of business and did not implicate a transfer of a property interest belonging to the debtor).

[34] Tracing of the interest to specific property, while it may be relevant to characterization of the interest under non-bankruptcy law, is an independent requirement of federal bankruptcy law that serves to uphold the policy of equal distribution among similarly situated creditors. See e.g., In re Bullion Reserve of N. Am., 836 F.2d 1214, 1218 (9th Cir. 1988); Callaway v. Memo Money Order Co., 381 B.R. 650, 655 (Bankr. E.D.N.C.2008) (summarizing cases on the federal tracing requirement).

pledgee relationship does not fit squarely into any of the above-mentioned categories (though analogies to a bailment suggest themselves) and has not been extensively analyzed by modern courts applying *Butner*.[35] In several more recent cases, the pledgor's attempt to recover collateral from a bankrupt pledgee was defeated by commingling or permitted rehypothecation of the collateral,[36] and consequently these cases provide relatively little guidance on how a court would apply non-bankruptcy law to determine whether the pledgor's right to redeem the collateral would constitute an interest in property, as opposed to a merely personal claim against the pledgee for the return of collateral.[37] However, based on the general principles delineated by the U.S. Supreme Court in the cases cited above, and in view of how they have been applied in the other contexts noted above, we believe that the presence of the following factors should establish that the Collateral Provider's right to redeem the Collateral maintained in the Segregated Account is an "interest in property" for purposes of the Code and, therefore, should be entitled to the protections described in Section III.C.1 (Summary of Conclusions) above:

- under applicable non-bankruptcy law, the interest transferred to the Collateral Taker constitutes only a security interest and not an absolute transfer of ownership;
- under applicable non-bankruptcy law, the Collateral Provider would have a non-contractual remedy, based on the legal relationships existing prior to the insolvency filing, to recover control of the Collateral;
- under applicable non-bankruptcy law, the Collateral Taker would not be able, consistently with the arrangements, to convey, nor would creditors of the Collateral Taker be able to obtain, an interest in the Collateral that is superior to that of the Collateral Provider.

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[35] A leading treatise cites cases decided under the since-repealed Bankruptcy Act of 1898 (ch. 541, 30 Stat. 544) for the proposition that pledged property can be reclaimed if it is traceable; but if property cannot be traced, the pledgor is relegated to the position of a general unsecured creditor. Alan N. Resnick & Henry J. Sommer, 5 Collier on Bankruptcy ¶ 541.05 [7] (16th ed. 2011). See In re Rosenbaum Grain Corp., 112 F.2d 315, 319 (7th Cir. 1940) (allowing reclamation of profits from the liquidation sale of commodity contracts pledged to a failed grain broker).

[36] See In re MJK Clearing, Inc., 371 F. 3d 397 (8th Cir. 2004) (holding that a pledgor merely held a general unsecured claim against the estate, in part because the tracing requirement was not met with respect to cash collateral pledged pursuant to a securities lending agreement, under which the debtor was permitted to use or invest, and was not required to segregate, the cash collateral); FirstBank P.R. v. Barclays Capital Inc., 526 B.R. 481, 492 (Bankr. S.D.N.Y. 2014) (holding that the pledgor lost its proprietary interest when the pledgee sold the collateral to an affiliate under the authority of the rehypothecation clause of the Credit Support Annex).

[37] One consequence of this lack of systematic, modern treatment is that passing commentary in certain decisions – to the effect that a pledgor's interest is a "claim" – might divert a court's analysis away from the centrality of examining property rights under applicable non-bankruptcy law. See, e.g., In re Bullion Reserve of N. Am., 836 at 1218 n.6; Lehman Bros. Holdings, Inc. v. Intel Corp., 502 B.R. 376, 381 n.2 (Bankr. S.D.N.Y. 2013) (citing FirstBank P.R. v. Barclays Capital, Inc., 492 B.R. 191, 200-201 (Bankr. S.D.N.Y. 2013) (in turn citing Hennequin v. Clews, 111 U.S. 676 (1884) for the proposition that a creditor who holds collateral is bound by its contract "to return it when its purpose as security is fulfilled; but it [it] fails to do so, it is only a breach of contract …"). We believe such commentary should be regarded as dicta, confined to the context where the claimant could not trace its interest to identifiable, segregated property. We note, however, occasional cases in which the broad definition of "claim" under the Code has been used to deny recognition to property rights derived from state-law constructive trust remedies imposed after the petition date. See, e.g., In re CRS Steam, 225 B.R. 833, 840-41 (Bankr. D. Mass. 1998). We believe that any extension of this approach to the pledgor-pledgee relationship, when collateral is segregated and identifiable, would be contrary to the vast weight of caselaw (see note 33 supra) and to the established principle that an owner with a traceable interest may elect to "treat the loss as a debt …. On the other hand, if the owner of property so elects, the owner may stand on the owner's rights as owner and demand the property's return." 5 Collier on Bankruptcy ¶ 547.03[3].

Our analysis of these conditions when the law of the State of New York is the applicable non-bankruptcy law appears in Section II.C above, in which we conclude, subject to the discussion of that section, that the Collateral Provider should be treated as having transferred only a security interest, and not absolute ownership of the Collateral, to the Collateral Taker under the IM NY Annex, and we discuss the statutory and common law rights of the Collateral Provider under New York law to recover control of the Segregated Account.

D. The FDIA

1. Additional Assumptions

We make the same assumptions as in Section I.A and Section III.A above, as modified by the following:

a. The FDIC has been appointed as the receiver or conservator of the Collateral Taker under the FDIA; and

b. the Collateral Provider's termination rights have become accessible (i.e., in the case of a receivership, the FDIC has not transferred the ISDA Master Agreement and associated collateral or other credit enhancements before 5:00 p.m. (eastern time) on the business day after its appointment as receiver, or in the case of a conservatorship, an event of default, other than an invalidated ispo facto default, has occurred),[38] and a Pledgor Rights Event has occurred.

2. Summary of Conclusions

In general, the FDIA prevents persons from exercising any right or power to "obtain possession of or exercise control over any property of … [,] or affect any contractual rights" of a depository institution for which the FDIC has been appointed as conservator or receiver without the consent of the FDIC for 45-days following its appointment as conservator and for 90-days following its appointment as receiver.[39] As discussed in Part 1, Section III.C.2(b) of the Collateral Memorandum, the FDIA provides exceptions from this consent requirement for the exercise of certain rights with respect to qualified financial contracts and related security agreements, arrangements or other credit enhancements.

As a matter of statutory interpretation, we believe the Collateral Provider's right to give a Collateral Release Instruction should qualify as a "right … to cause the termination, liquidation or acceleration" of a qualified financial contract for purposes of 12 U.S.C. § 1821(e)(8)(A) and (E) and therefore, subject to the discussion in Part 1, Section III.C.2(b) of the Collateral Memorandum, the exercise of this right should qualify for the protections discussed therein. However, in the absence of specific indications in the legislative history or a pattern of decided cases directly on point, we cannot predict with certainty whether the FDIC or the relevant court would agree with this conclusion.

If the Collateral Provider is prevented from giving, or elects not to give, the Collateral Release Instruction, its right to redeem the Collateral maintained in the Segregated Account, provided that the conditions set out in Section III.D.3.b below are met under applicable non-insolvency law, should remain intact notwithstanding the FDIC's appointment as receiver or conservator and, once the secured obligations have been satisfied and the Collateral Provider's non-contractual remedies for the return of the Collateral under applicable non-insolvency law have become presently enforceable, the FDIC, as receiver or conservator, should not have a legal basis under the FDIA to withhold release of the Collateral Taker's

[38] See Part 1, Section III.C.2(b) of the Collateral Memorandum.
[39] 12 USC § 1821(e)(13)(C).

control over the Segregated Account, subject to equitable principles (including the equitable powers of the federal courts and any equitable defenses available to the Collateral Taker under non-insolvency law). The FDIC administrative claims process, the availability of redress in the courts and other procedural aspects of recovering the Collateral in an FDIA proceeding are beyond the scope of this memorandum. If the return of Collateral is sought through the administrative claims process, we think it is likely that the FDIC would review the Collateral Provider's close-out valuation as part of its determination.

3. Analysis

a. Availability of Safe Harbors

To the extent the transactions under the ISDA Master Agreement are "qualified financial contracts", each IM Security Document, as a "security agreement or arrangement or other credit enhancement" related to such qualified financial contract, is itself, along with the ISDA Master Agreement, a "qualified financial contract".[40] In language substantially identical to the corresponding Code safe harbor, sections 21(e)(8)(A)(i) and (E)(i) of the FDIA protect the exercise of "any right … to cause the termination, liquidation, or acceleration of any qualified financial contract",[41] and the legislative history of the 2005 amendments, discussed in Section III.C.2.a above, makes clear that the addition of related "security agreements or arrangements" was intended to ensure that any such agreement would be "eligible for treatment as a [qualified financial contract] for purposes of termination, liquidation, acceleration, offset and netting under the … FDIA …."[42] Although we are not aware of cases interpreting the meaning of "liquidation" in this context under the FDIA, we can discern no reason for construing identical language with common legislative history differently than under the Code. Therefore, we believe that substantially the same analysis as set forth in Section III.C.2.a above with respect to the Code (based on the plain meaning of the statutory text, consistency with legislative history, and the policy goals of the qualified financial contract safe harbors) applies with respect to the FDIA to establish that the Collateral Provider's right to give the Collateral Release Instruction should qualify as a right to "cause the termination, liquidation or acceleration" of the IM Security Document for purposes of Sections 21(e)(8)(A)(i) and (E)(i) of the FDIA.[43]

b. Interest in Property

Upon its appointment as receiver or conservator, the FDIC, "by operation of law, succeed[s] to—all rights, titles, powers, and privileges of the insured depository institution…"[44] The U.S. Supreme Court

[40] The FDIA definitions of each type of "qualified financial contract" (i.e., securities contracts, commodity contracts, forward contracts, repurchase agreements and swap agreements) were amended by the 2005 and 2006 Acts to make them substantively identical to the revised Code definitions for the same type of transactions, including the reference to any "security agreement or arrangement or other credit enhancement related to" the relevant type of transaction (other than that the Code definitions specifically reference Code party and damages limits in certain respects). 12 U.S.C. § 1821(e)(8)(D); see also 12 U.S.C. § 1821(e)(3)(A), (C) (indicating how damages will be calculated under the FDIA).

[41] 12 U.S.C. § 1821(e)(8)(A)(i) and (E)(i).

[42] H.R. Rep. 109-31(I), at 129 (2005).

[43] Parallel protection for the exercise of "any right under a security agreement or arrangement or other credit enhancement related to" one or more qualified financial contracts is provided by 12 U.S.C. § 1821(e)(8)(A)(ii) and (E)(ii). The FDIA does not specify limitations on the types of right protected by these provisions, and we believe that, at a minimum, a right under a security agreement or arrangement to cause the liquidation of the agreement or arrangement would be included. These protections operate in tandem with those under Sections 21(e)(8)(A)(i) and (E)(i), and therefore any differences in scope between the two categories of protected rights does not appear to be significant under the FDIA.

[44] 12 U.S.C. § 1821(d)(2)(A)(i). Additionally, the FDIC succeeds to "all rights, titles, powers, and privileges of … any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the

has interpreted this provision as placing the FDIC "in the shoes of the insolvent [institution], to work out its claims under state law," except where a federal statute provides otherwise.[45] Courts and the FDIC staff have recognized that the FDIC, as receiver,[46] "takes title to the assets of a closed bank subject to all existing rights and equities and takes no greater rights in the property than the insolvent bank itself possessed."[47] This principle has been applied to the recovery of securities and cash collections held by a failed bank in a fiduciary or quasi-bailment capacity for others, provided that the claimant could specifically identify the property claimed.[48] Exceptions to the principle that the FDIC is limited by pre-existing rights and equities include: courts' refusal to recognize state laws that purport to redefine relationships upon insolvency;[49] the written agreement requirements of the FDIA;[50] the FDIC's repudiation powers;[51] and its ability to invoke powers conferred by "any other provision of law".[52]

Although these precedents address a narrower range of legal relationships than the precedents available under the Code and we have found no precedent closely akin to the pledgor-pledgee relationship considered herein, we believe, based on the principles of O'Melveny and the other authorities cited, that

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institution and the assets of the institution". Id. The reference to accountholders and depositors appears to empower the FDIC to assert remedies available to these classes of creditors.

[45] O'Melveny & Myers v. FDIC, 512 U.S. 79, 87 (1994)

[46] FDIC conservatorships have been relatively uncommon, and the available guidance has generally been in the receivership context. We see no reason why the principles discussed in this paragraph would apply differently to FDIC conservatorships.

[47] See Tobias v. College Towne Homes, Inc., 442 N.Y.S.2d 380, 385 (Sup. Ct. 1981) (citing People-Ticonic Nat. Bank v Stewart, 86 F.2d 359 (1st Cir. 1936) and Williams v. Green, 23 F.2d 796 (4th Cir. 1928)). See also FDIC Advisory Opinion 88-14 (Feb. 4, 1988), https://www.fdic.gov/regulations/laws/rules/4000-3030.html (citing Tobias and advising that FDIC as receiver will return securities held in custody by a failed bank if the beneficial owner can clearly establish that the bank held the security in a safekeeping or custodial capacity only – i.e. "[p]rovided that the bank has not carried the bills as an asset on its own balance sheet and the individual can provide the receiver with a safekeeping receipt documenting his unimpaired ownership rights").

[48] See note 47 supra. See also Merrill Lynch Mortg. Capital, Inc. v. FDIC, 293 F. Supp. 2d 98 (D.D.C. 2003) (applying New York law, the governing law of the parties' agreement, to determine whether an account was a "special" or a "general" deposit, and thus the priority of the related claim for return of amounts collected from borrowers that the failed savings and loan institution had agreed to segregate and hold in the account).
See also FDIC Advisory Opinion 03-01 (Jan. 3, 2003), https://www.fdic.gov/regulations/laws/rules/4000-10190.html (advising that "trust assets," which were securities held in an account with a failed institution's trust department, are recoverable under FDIC receivership if the trust customers (i) establish the existence of a "fiduciary relationship" between themselves and the failed bank and (ii) trace the assets into the hands of the FDIC, separate and apart from the failed bank's general assets). FDIC Advisory Opinion 03-01 cites court cases, many of them dating from the 1930's, which analyzed the "special" vs. "general" deposit distinction, i.e. whether a bailment, as opposed to a debtor-creditor, relationship existed between a bank and its depositor(s).

[49] See, e.g., Downriver Cmty. Fed. Credit Union v. Penn Square Bank, 879 F.2d 754, 760, (10th Cir. 1989).

[50] See Part 1, Section I.A.C.6 of the Collateral Memorandum.

[51] 12 U.S.C. § 1821(e)(1). The FDIA expressly states that no provisions of section 21(e) of the FDIA, which includes the FDIC's repudiation power, shall be construed as permitting the avoidance of "any legally enforceable or perfected security interest" in any assets of the failed institution except where such an interest is taken in contemplation of the institution's insolvency or if with intent to hinder, delay, or defraud the institution or its creditors. 12 U.S.C. § 1821(e)(12). (Further limitations on the avoidance of transfers in connection with qualified financial contracts are discussed in Part 1, Section III.C.2(b) of the Collateral Memorandum.) Although this provision refers to security interests rather ownership interests, it should follow *a fortiori* that a pledgor's right to redeem collateral that derives from a pre-existing ownership interest is equally protected from the FDIC's repudiation power.

[52] 12 U.S.C. § 1821(c)(2)(B). For example, under NYUCC § 9-317 a receiver, as a lien creditor, may take priority over unperfected security interests. Except as set forth in Section II.C above, we assume that the facts and circumstances surrounding the collateral arrangements do not give rise to any creditors' remedies or other legal powers under state or other applicable law that the FDIC would assert to interfere with the Collateral Provider's right to redeem the Collateral.

questions concerning relative or competing property interests of the FDIC and claimants with respect to collateral held by the depository institution in a FDIA proceeding should be determined under the applicable non-insolvency law, as determined by relevant choice-of-law principles. The FDIA and associated decisional law provide relatively little guidance on how to draw the distinction between a property interest and a claim based on a liability or obligation of the depository institution. However, abstracting from the legal relationships considered in the caselaw cited, we believe that the presence of the following factors should establish that the Collateral Provider's right to redeem the Collateral maintained in the Segregated Account is treated as a property interest and, therefore, should be preserved as described in Section III.D.2 (Summary of Conclusions) above:

- under applicable non-insolvency law, the interest transferred to the Collateral Taker constitutes only a security interest and not an absolute transfer of ownership;

- under applicable non-insolvency law, the Collateral Provider would have a non-contractual remedy, based on the legal relationship existing prior to the appointment of the FDIC as conservator or receiver, to recover control of the Collateral;

- under applicable non-bankruptcy law, the Collateral Taker would not be able to convey, consistently with the arrangements, nor would creditors of the Collateral Taker be able to obtain, an interest in the Collateral that is superior to that of the Collateral Provider.

Our analysis of these conditions when the law of the State of New York is the applicable non-bankruptcy law appears in Section II.C above, in which we conclude, subject to the discussion of that section, that the Collateral Provider should be treated as having transferred only a security interest, and not absolute ownership of the Collateral, to the Collateral Taker under the IM NY Annex, and we discuss the statutory and common law rights of the Collateral Provider under New York law to recover control of the Segregated Account.

E. The OLA

1. Additional Assumptions

We make the same assumptions as in Section I.A and Section III.A above, as modified by the following:

a. the FDIC has been appointed as the receiver of the Collateral Taker under the OLA; and

b. the Collateral Provider's termination rights have become accessible (i.e., the FDIC has not transferred the ISDA Master Agreement and associated collateral or other credit enhancements before 5:00 p.m. (eastern time) on the business day after its appointment as receiver),[53] and a Pledgor Rights Event has occurred.

2. Summary of Conclusions

The definition under the OLA of each type of qualified financial contract is substantially identical to the corresponding definition under the FDIA, including an express prong for "any security agreement or arrangements or other credit enhancement related to" each type of qualified financial contract.[54] In

[53] See Part 1, Section III.C.2(d) of the Collateral Memorandum.
[54] 12 U.S.C. § 5390(c)(8)(D)(i)–(vi), (viii).

identical language to that of the FDIA, the OLA safe harbors preserve "any right … to cause the termination, liquidation or acceleration" of any qualified financial contract and "any right under a security agreement or arrangement or other credit enhancement related to" one or more qualified financial contracts.[55] The provisions of the OLA that vest the FDIC as receiver with the rights, title, powers and privileges of the covered financial company are parallel to the corresponding provision of the FDIA, which was interpreted by the U.S. Supreme Court in O'Melveny.[56] Although the provisions of the OLA have not been construed by any court, we can discern no reason for interpreting these provisions differently in the current context than the corresponding FDIA provisions. Therefore, we think that the conclusions and the material elements of the analysis set out in Section II.D above should apply equally in the case of an OLA proceeding under the assumptions above. Specifically, subject to the discussion and caveats of that section, we believe that: (i) as a matter of statutory interpretation, the Collateral Provider's right to give the Collateral Release Instruction should be protected, as described in Part 1, Section III.C.2(d) of the Collateral Memorandum, as a "right to cause the termination, liquidation or acceleration" of the IM Security Document; and (ii) if the Collateral Provider is prevented from giving, or elects not to give, the Collateral Release Instruction, its right to redeem the Collateral maintained in the Segregated Account, provided that the conditions set out in Section III.D.3.b above are met under applicable non-insolvency law, should remain intact, as described in Section III.D.2 above, notwithstanding the designation of the Collateral Taker as a covered financial company and the FDIC's appointment as receiver.

F. The NYBL

1. Summary of Conclusions

In general, the Superintendent's taking of possession and liquidation of any banking organization operates as a stay of and injunction against, *inter alia*: any act to obtain possession of property of, or property from, the banking organization or to exercise control over property of the banking organization; and any act to collect, assess, or recover a claim against the banking organization that arose before the taking of possession.[57] As discussed in Part 1, Section III.C.2(c) of the Collateral Memorandum, the NYBL provides exemptions from the automatic stay and injunction for the exercise of certain rights with respect to qualified financial contracts, as defined in the NYBL.

As a matter of statutory interpretation, we believe the Collateral Provider's right to give the Collateral Release Instruction should qualify as a "right to cause the termination or liquidation of a qualified financial contract … in accordance with its terms" for purposes of Section 619(1)(d)(2)(i) of the NYBL and therefore, subject to the discussion in Part 1, Section III.C.2(c) of the Collateral Memorandum, the exercise of this right should be exempt from the automatic stay and injunction imposed by Section 619. However, in the absence of specific indications in the legislative history or a pattern of decided cases on point, we cannot predict with certainty whether the Superintendent or a court would agree with this conclusion.

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[55] 12 U.S.C. § 5390(c)(8)(A)(i), (ii).

[56] 12 U.S.C. § 5390(a)(1)(A) provides that the FDIC "shall, upon appointment as receiver for a covered financial company under this subchapter, succeed to …all rights, titles, powers, and privileges of the covered financial company and its assets, and of any stockholder, member, officer, or director of such company". In contrast to the corresponding FDIA provision, 12 U.S.C. § 1821(d)(2)(A), creditors such as accountholders or depositors are not expressly included. However, under 12 U.S.C. § 5390(a)(1)(K), the FDIC as receiver "may exercise all powers and authorities specifically granted to receivers under this title, and such incidental powers as shall be necessary to carry out such powers under this title."

[57] N.Y. Banking Law § 619.

If the Collateral Provider is prevented from giving, or elects[58] not to give, the Collateral Release Instruction, its right to redeem the Collateral maintained in the Segregated Account should nevertheless be treated as a property interest if the conditions set out in section III.F.2.b below are met and therefore, once the secured obligations have been satisfied and the Collateral Provider's non-contractual remedies for the return of the Collateral under applicable non-insolvency law have become presently enforceable, the Collateral Provider should have a strong basis on which to establish cause for the court to grant relief from the NYBL stay and injunction to permit giving the Collateral Release Instruction, subject to equitable principles (including the equitable powers of the court and any equitable defenses available to the banking organization under non-insolvency law), and possibly to the Superintendent's concurrence in the close-out valuation used to establish that the secured obligations have been satisfied. The procedural aspects of recovering the Collateral in a NYBL proceeding, including the claims process and the availability of redress against actions by the Superintendent, are beyond the scope of this memorandum.

2. Analysis

a. Availability of Safe Harbors

The NYBL defines "qualified financial contract" to mean "any securities contract, commodity contract, forward contract, … repurchase agreement, swap agreement, … and any master agreement for such agreements (such master agreement, *together with all supplements thereto*, shall be treated as one qualified financial contract)… [emphasis added]".[59]

To the extent that the transactions under the ISDA Master Agreement are qualified financial contracts, each IM Security Document should be considered as forming part of one qualified financial contract comprising the ISDA Master Agreement because each IM Security Document is a part of or at least is a "supplement" to the ISDA Master Agreement.[60] The IM NY Annex expressly provides in its preamble that it "supplements, forms part of, and is subject to, the above-referenced [Master] Agreement.…" The IM Deed does not explicitly use the word "supplement", but rather states that it is a "Credit Support Document with respect to both parties in relation to the ISDA Master Agreement referred to above.…" Although the recitals in the IM NY Annex would likely be dispositive, we base our analysis on the operative provisions and function of each IM Security Document. We believe that, substantively, each of the IM NY Annex and the IM Deed supplements the ISDA Master Agreement, since the provisions of each document inter-relate and depend on the provisions of the ISDA Master Agreement to

[58] N.Y. Banking Law § 619(5) provides for actual damages (including costs and attorney's fees) as well as potentially punitive damages for the "willful violation of a stay or injunction provided in this paragraph by any person or entity who has knowledge of the superintendent's taking of possession of the banking organization that is the subject of the stay or injunction".

[59] N.Y. Banking Law § 618-a2(e)(i).

[60] Further impetus for treating each IM Security Document as a "supplement" to the ISDA Master Agreement comes from the common terminology used under the NYBL and the FDIA for each type of qualified financial contract (i.e., swap agreement, forward contract, etc.) and, as discussed in Section III.D above, the FDIA's defining each such type of contract to include any related security agreement or arrangement or other credit enhancement. See, 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 noted that "both federal and state law had the same objective of excluding QFCs from the stay" 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).

such an extent that neither could operate as a freestanding agreement independently of the ISDA Master Agreement.[61]

Section 619(1)(d)(2)(i) of the NYBL protects from stay "any right to cause the termination or liquidation of any qualified financial contract … in accordance with the terms thereof." Applying the plain meaning of the term "liquidation" in the sense relevant to its context, we believe the giving of the Collateral Release Instruction is consistent with this meaning for the same reasons discussed in Section III.C.2.a above -- i.e., the Collateral Release Instruction effects the final settlement of collateral returns after satisfaction of the obligations secured by the collateral. New York State courts ultimately strive to implement the will of the legislature,[62] and will look to this plain meaning as the clearest and most compelling evidence of legislative intent.[63]

b. Interest in Property

New York courts have held that the Superintendent acquires no greater interest in the property of the failed banking organization than the banking organization itself had.[64] As stated by the U.S. Supreme Court in Scott v. Armstrong, a case that is widely cited in subsequent receivership caselaw,[65] a receiver

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[61] For example, Paragraph 7 (Events of Default) in each IM Security Document supplements Section 5(a) (Events of Default) under the ISDA Master Agreement by adding events of default; the definitions of "Chargor Rights Event" and "Pledgor Rights Event" and "Secured Party Rights Event" under the IM NY Annex and the IM Deed refer to the definition of "Early Termination Date" under the ISDA Master Agreement; the definition of "Obligations" in each of the IM NY Annex and the IM Deed refers to all obligations of a party under the relevant Master Agreement; and each of the IM NY Annex and the IM Deed provides additional legal rights and protections with regard to obligations existing under the Master Agreement.

[62] See People v. Smith, 79 N.Y.2d 309, 311(1992) ("our purpose is not to pass on the wisdom of a statute or any of its requirements, but rather to implement the will of the Legislature as expressed in its enactment."); Tompkins Cnty. Support Collection Unit ex rel. Chamberlin v. Chamberlin, 99 N.Y.2d 328, 335 (2003)("The primary goal of the court in interpreting a statute is to determine and implement the Legislature's intent.")

[63] See Raynor v. Landmark Chrysler , 18 N.Y.3d 48, 56 (2011)("As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation of a statute must always be the language itself, giving effect to the plain meaning thereof."); Tompkins Cnty. Support Collection Unit ex rel. Chamberlin v. Chamberlin, 99 N.Y.2d 328 (2003) (internal quotation marks omitted). ("To interpret a statute, [the Court of Appeals] first looks to its plain language, as that represents the most compelling evidence of the Legislature's intent. However, the legislative history of an enactment may also be relevant and is not to be ignored, even if words be clear"). We have found no evidence in legislative history contradicting our plain meaning interpretation of the term "liquidation".

[64] In re Int'l Milling, 259 N.Y. 77, 83 (1932) ("The Superintendent of Banks, when he took over the bank for the purpose of liquidation, acquired no greater interest in the fund than the bank possessed"); In re Bank of Cuba in N.Y., 191 N.Y.S. 88, 91 (App. Div. 1921) (holding that the relation between the parties is "that of bailee and bailor, and not of debtor and creditor" and "title to the draft… remained in the appellant", and therefore "the Superintendent of Banks, who is in effect a statutory receiver, acquired no title to the property in the custody of the bank, or which came into his custody, which it did not own; and the provisions of the Banking Law … confer upon the Superintendent of Banks no authority to withhold property to which the bank has no title and upon which it has no lien"); Van Wagoner v. Buckley, 133 N.Y.S. 599, 601 (App. Div. 1912) (holding that a special deposit never became property of the Superintendent of Banks when it took possession of the trust company because the trust company itself never held title, only a possessory interest as bailee, over said deposit).

[65] While Armstrong was a case decided under the National Banking Act, subsequent New York courts adjudicating insolvency proceedings under the NYBL have relied upon it. See Building & Engineering Co. v. Northern Bank of N.Y., 206 N.Y. 400, (1912) (citing Scott v. Armstrong to determine that an equitable right to setoff existed in the context of a NYBL insolvency proceeding because "the requirement as to ratable dividends, is to make them from what belongs to the bank, and that which at the time of the insolvency belongs of right to the [party asserting setoff] does not belong the bank"); Carnegie Trust Co. v. Kistler, 152 N.Y.S. 240 (1915) ("the rule in question laid down by the federal courts in construing the National Banking Act has therefore been followed by the courts of this state in construing the National Banking Act and in construing the New York State Banking Law").

takes possession subject to "all claims and defenses that might have been interposed" against the failed bank, which includes "liens, equities or rights arising by express agreement, or implied from the nature of the dealings between the parties, or by operation of law, prior to insolvency and not in contemplation thereof."[66] New York cases applying this principle often involved the distinction between general and special deposits or the finding of a bailment relationship under common law.

The possibility that the Superintendent might be in possession or control of property in which it does not hold equitable title is recognized in the plain text of the NYBL. Section 619(1)(e), which sets out the statute of limitations for actions against the Superintendent arising out of the administration or disposition of property, enumerates separate categories for "the estate of such banking organization" and "property in its possession or under its control … as bailee, pledgee, depository, agent or otherwise".[67] Further, Section 617 of the NYBL recognizes that the Superintendent may have taken possession or control of property held by the New York Bank as "bailee or depositary for hire or otherwise" and provides procedures for the return of such property to the owner.

Although the available precedents are dated and largely rely on the common law of special deposits and bailment (and therefore did not focus on sources of law or choice-of-law analysis), we believe, based on the authorities cited and indirect reference in the NYBL to the banking organization acting in a range of capacities with respect to property not within its "estate", that questions concerning relative or competing property interests of the Superintendent and claimants with respect to collateral held by the banking organization in a NYBL proceeding should be determined under the applicable non-insolvency law, as determined by relevant choice-of-law principles. Further, we believe that the presence of the following factors should establish that the Collateral Provider's right to redeem the Collateral maintained in the Segregated Account is treated as a property interest and, therefore, should be entitled to the protections described in Section III.F.1 (Summary of Conclusions) above:

- under applicable non-insolvency law, the interest transferred to the Collateral Taker constitutes only a security interest and not an absolute transfer of ownership;

- under applicable non-insolvency law, the Collateral Provider would have a non-contractual remedy, based on the legal relationship existing prior to the Superintendent taking possession of the Collateral Taker, to recover control of the Collateral;

- under applicable non-bankruptcy law, the Collateral Taker would not be able to convey, consistently with the arrangements, nor would creditors of the Collateral Taker be able to obtain, an interest in the Collateral that is superior to that of the Collateral Provider.

Our analysis of these conditions when the law of the State of New York is the applicable non-bankruptcy law appears in Section II.C above, in which we conclude, subject to the discussion of that section, that the Collateral Provider should be treated as having transferred only a security interest, and not absolute ownership of the Collateral, to the Collateral Taker under the IM NY Annex, and we discuss the statutory and common law rights of the Collateral Provider under New York law to recover control of the Segregated Account.

[66] 146 U.S. at 510. Notwithstanding this sweeping statement, the Superintendent enjoys certain express immunities under the NYBL. See, e.g., N.Y. Banking Law § 617(3) (holding the Superintendent harmless from liability to competing claimants if he distributes property in good faith to a claimant appearing on records in the Superintendent's office as being entitled to the property).

[67] N.Y. Banking Law § 619(1)(e).

IV. Alternative Custodial Arrangements

A. Assumptions

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

a. Collateral is held in the following form (and not pursuant to assumptions (g)(i), (ii), (iii) or (h) of Part 1, Section I.A of the Collateral Memorandum or assumption (c) of Section I.A. of this memorandum): (x) the Custodian is a central securities depository and holds the Collateral in the Custodian's name,[68] acting in its own name but for the account of the Collateral Taker (the account described in this clause (x), the "Custodial Account"); (y) instead of an IM Security Document, the parties have entered into securities documents and/or other agreements governing the pledge of the Collateral held by the central securities depository and movement of the Collateral into and out of Custodial Account (the "Alternative Security Documents"); and (z) such Alternative Security Documents are enforceable in accordance with their terms under applicable law (which may be different than the laws of the State of New York or the Federal laws of the United States);

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

c. instead of assumption (k) of Section I.A of this memorandum, we assume that the Custodial Account is a "securities account" with respect to securities Collateral and a "deposit account" with respect to cash Collateral, and neither Custodian's "securities intermediary's jurisdiction" nor its "bank's jurisdiction" (in each case, as defined in the NYUCC) in connection with the Custodial Account is New York;

d. the Custodial Account is used exclusively for Collateral provided by the Collateral Provider to the Collateral Taker;

e. assumptions (d), (f), (i), (m), (n) and (o) of Section I.A of this memorandum are satisfied, for which purposes references to the Segregated Account shall be deemed to refer to the Custodial Account, references to the IM Security Documents shall be deemed to refer to the Alternative Security Documents, and it is assumed that the Alternative Security Documents contain concepts that correspond to and are substantially identical to the Collateral Release Instruction, the Pledgor Rights Event, the Chargor Rights Event, and other defined terms used in such assumptions and definitions;

f. assumptions (e), (g), (h), (j) and (l) of Section I.A of this memorandum, which refer to the control agreement or the IM Security Documents, do not apply for purposes of this Section IV;

g. the Alternative Security Documents and any related documents governing the rights and duties of the Collateral Provider and Collateral Taker in respect of the Collateral satisfy the written agreement requirements described in assumption (k) of Part 1, Section I.A of the Collateral Memorandum, and were not entered into in contemplation of the insolvency of the

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

Collateral Provider or the Collateral Taker or with the intent to hinder, delay or defraud either party or the creditors of that party; and

h. there is no provision of the Alternative Security Documents or any other agreements relating to the custodial agreement (other than any provisions described in assumption (a) above), nor any fact or circumstance relating to the Custodian, the Collateral Provider or the Collateral Taker or the relationship between or among any of them that would be inconsistent with or materially affect the analysis herein.

B. Issues

How would the conclusions and analysis in response to the issues posed in Sections II and III above change if instead of entering into an IM Security Document and custodial arrangements described in assumption (c) of Section I.A, the parties enter into custodial arrangements described in the assumptions of this Section IV?

C. Analysis

Section II discusses the characterization of security interests granted under New York law as well as the Collateral Provider's rights and remedies under New York law for the return of Collateral. A New York court would apply the choice of law rules discussed in Part 1, Section I.C.1(b) of the Collateral Memorandum in deciding whether to give effect to the choice of non-US law to govern the security interest. Because the location of the Custodian should constitute a reasonable relation to the jurisdiction of the chosen governing law, the discussion of Section II would in all likelihood not be relevant under the assumptions of this Section IV (apart from the possibility that a conversion claim under New York law might be supported by a choice-of-law analysis that is independent of the contractually chosen law).

The availability of insolvency safe harbors to permit the Collateral Provider to give the Collateral Release Instruction is discussed in Sections III.C.2.a (Code), III.D.3.a (FDIA), III.E.2 (OLA), and III.F.2.a (NYBL). The legal principles discussed in these sections are generally applicable and will be relevant to any similar right of the Collateral Provider to unilaterally direct the final release of Collateral under the Alternative Security Documents. However, certain elements of the analysis depend on features of the IM Security Documents, such as: the IM Security Document being related to or forming part of a swap agreement or other protected contract; the effect of the Collateral Release Instruction as constituting a "liquidation" of a security agreement or Master Agreement; an affirmative right of the Collateral Provider to unilaterally give the Collateral Release Instruction being set forth in a security agreement related to a protected contract; and, in the case of the NYBL, the IM Security Document being a part of or a supplement to the Master Agreement. If these features can be established for the Alternative Security Documents, then the remainder of the analysis and conclusions of those sections should carry over to the Alternative Security Documents and custodial arrangements described in the assumptions of this Section IV.

The analysis of the Collateral Provider's right to redeem Collateral maintained in the Segregated Account as a property right in insolvency (see Sections III.C.2.b, III.D.3.b, III.E.2, and III.F.2.b) is not premised on any particular documentation structure; therefore, the same analysis is applicable to the question of whether the Collateral Provider's right to redeem Collateral maintained in the Custodial Account will be protected as a property interest in the event of a Collateral Taker insolvency under the insolvency regimes considered in those sections. Specifically, Collateral Providers should ascertain that under the applicable non-insolvency law (i) the interest transferred to the Collateral Taker under the Alternative Security Documents constitutes only a security interest and not an absolute transfer of ownership; (ii) the Collateral Provider would have a non-contractual remedy, based on the legal

relationship existing prior to the commencement of insolvency proceedings in respect of the Collateral Taker, to recover control of the Collateral; and (iii) the Collateral Taker would not be able to convey, consistently with the arrangements, nor would creditors of the Collateral Taker be able to obtain, an interest in the Collateral that is superior to that of the Collateral Provider. Because the Custodial Account appears to be an account of the Collateral Taker, the analysis of condition (iii) in particular may differ from the corresponding analysis under the custodial arrangements considered in Section III above.

V. IM NY Japanese Amendments

A. Assumptions

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

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

b. for purposes of Section II and with respect to Japanese Securities comprised in the Collateral: Custodian is a "securities intermediary"; the Segregated Account is a "securities account"; the Collateral Provider is the "entitlement holder" against Custodian in its capacity as securities intermediary; and the "securities intermediary's jurisdiction" of the Custodian is New York (all within the meaning of the NYUCC); [69]

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

d. the application of Japanese law to the rights and duties of the parties under the IM NY Annex (as amended by the IM NY Annex Japanese Amendments), the custodial arrangements or otherwise with respect to the Collateral does not produce a result that materially conflicts with New York law.

B. Issues

Please explain how your responses in Sections II and III above would change if instead of entering into an IM NY Annex and the custodial arrangements described in assumption (c) of Section I.A, the parties enter into an IM NY Annex, as amended by the IM NY Annex Japanese Amendments, and custodial arrangements described in the Japanese Amendments?

C. Analysis

Subject to the assumptions of this Section V, our responses in Sections II and III above would not be different in any material respect as a result of (a) the amendment of the IM NY Annex by the IM NY Annex Japanese Amendments or (b) the holding of the Collateral pursuant to the custodial arrangements described in the IM NY Annex Japanese Amendments, except as set out below.

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

The IM NY Annex Japanese Amendments supplement the granting clause of paragraph 2 of the IM NY Annex with a second, parallel grant by the Collateral Provider of a pledge under Japanese law over all its rights, title and interest in Posted Collateral (IM) that is Japanese Securities. To the extent that this pledge under Japanese law introduces other elements of the Japanese law of secured transactions, such as rights and duties with respect to enforcement of the security interest, these other elements might conflict with corresponding requirements of the NYUCC. While the NYUCC permits certain of its provisions to be varied by agreement, it imposes limitations on parties' ability to modify certain other provisions. If a conflict arises with respect to a variable provision of the NYUCC, and could be resolved by deeming the parties to have agreed to vary that NYUCC provision, we believe it is likely that a court would do so in order to give effect to each of the parallel granting clauses. If this were not possible, it is unclear whether the court would define rights and duties with respect to the security interest by creating a hybrid of New York and Japanese law (although we regard this possibility as unlikely), or engage in a choice-of-law analysis ab initio and determine that the security interest should be governed entirely by New York, Japanese or possibly third country law. We assume that the IM NY Annex Japanese Amendments present no such irreconcilable conflicts with New York law.

VI. Miscellaneous

Are there any other local law considerations that you would recommend the Collateral Provider to consider in connection with recovering the Collateral?

As the issues posed for consideration in this memorandum focus on the Collateral Provider's ultimate recovery of Collateral maintained in the Segregated Account (or Custodial Account in the case of Section IV), the rights and duties of the Collateral Provider prior to its giving the Collateral Release Instruction (or corresponding instruction, in the case of Section IV) under the assumptions set out herein are beyond this memorandum's scope. Important topics on which Collateral Providers should consult counsel include the Collateral Provider's duties to pay amounts owed to the Collateral Taker and turn over any property of the Collateral Taker to the insolvency administrator, the means of discharging the Collateral Provider's Obligations to the Collateral Taker, the consequences of any transfers of Collateral from the Segregated Account (or Custodial Account) such that it becomes commingled with assets of the Collateral Taker or other persons, and limitations on the Collateral Provider's ability to suspend or delay performance to the Collateral Taker following the commencement of insolvency proceedings by or against the Collateral Taker.

Are there any other circumstances you can foresee in your jurisdiction that might affect the Collateral Provider's ability to enforce its contractual rights to recover the Collateral?

The exercise of the Collateral Provider's remedies via a control agreement requires additional steps and actions of the Custodian, some of which are contemplated to occur following the commencement of insolvency proceedings in respect to the Collateral Taker. Due to the lack of precedents addressing how these insolvency regimes apply to custodial arrangements similar to those considered in this memorandum, Custodians with a desire for a greater degree of legal certainty could invoke protective provisions in custody or control agreements, commence interpleader actions, or take other measures to immunize themselves from liability, resulting in potential delays to the Collateral Provider's recovery of its Collateral.

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

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