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Zurich, dated as of December 15, 2020
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MEMORANDUM OF LAW ON THE VALIDITY AND ENFORCEABILITY UNDER THE LAWS OF SWITZERLAND OF CLOSE-OUT NETTING PROVISIONS AND COLLATERAL ARRANGEMENTS UNDER THE EFET MASTER NETTING AGREEMENT AND THE CREDIT SUPPORT ANNEX THERETO AND THE TBMA CROSS PRODUCT MASTER AGREEMENT AND THE CROSS PRODUCT CREDIT SUPPORT ANNEX THERETO

I. Terms of Reference

You have asked us to render certain opinions as per the instruction letter of EFET dated 2 July 2020 ("**Instruction Letter**") as to Swiss law aspects in respect of the following documents submitted to us as copies. 1

A. Documents Considered

(i) The Cross Product Master Agreement published in February 2000 by the Bond Market Association ("**CPMA Form**") as further modified by Version 1.0 of the European Commodities Schedule published on 23 June 2003 by EFET/ International Energy Credit Association ("**IECA**") (the "**Schedule**") collectively, the CPMA Form as modified by the Schedule is referred to as the Cross Product Master Agreement ("**CPMA**"); 2

(ii) the Cross-Product Credit Support Annex ("**CPMA CSA**") to the CPMA published by EFET on 23 June 2003; 3

(iii) the Master Netting Agreement published by EFET in June 2010 ("**MNA**") (collectively, the CPMA and the MNA are referred to as the "**Master Agreements**"); and 4

(iv) the Credit Support Annex to the MNA published by EFET in February 2011 ("MNA CSA") (collectively the CPMA CSA and the MNA are referred to as the Credit Support Annexes ("**CSAs**"). 5

The Master Agreements and the CSAs are together referred to herein as the "**Agreements**". 6

B. Counterparties

In this memorandum of law we consider the validity and enforceability under the laws of Switzerland of netting provisions and collateral arrangements under the Agreements entered into with a party (each a "**Swiss Counterparty**") organized as: 7

(i) a corporation incorporated under the Swiss Code of Obligations ("**CO**")[1]. For the purposes of this memorandum of law, corporations include (i) joint stock corporations (*Aktiengesellschaft*) subject to Articles 620 et seq. CO, (ii) companies with unlimited partners (*Kommanditaktiengesellschaft*) subject to Articles 764 et seq. CO, (iii) cooperatives (*Genossenschaft*) subject to Articles 828 et seq. CO and (iv) limited 8

[1] Schweizerisches Obligationenrecht (OR), SR 220.

liability companies (*Gesellschaft mit beschränkter Haftung*) subject to Articles 772 et seq. CO;

(ii) a banking institution licensed under the Swiss Federal Act on Banks and Savings Banks ("**Banking Act**")[2], organized in the form of a corporation, in each case having its registered seat in Switzerland (a "**Bank**"); 9

(iii) a securities firm licensed under the Swiss Federal Act on Financial Institutions ("**FinIA**")[3] organized in the form of a joint stock corporation having its registered seat in Switzerland (a "**Securities Firm**")[4] (each of the entities listed under 2. and 3. above is referred to as a "**Special Insolvency Regime Swiss Entity**"; 10

(iv) a Swiss branch (*Zweigniederlassung*) of a foreign corporation established in Switzerland (a "**Swiss Branch**"); or 11

(v) a Swiss branch of a foreign bank or of a foreign securities dealer established and duly licensed in Switzerland under the Banking Act or, as the case may be, the SESTA (a "**Special Insolvency Regime Swiss Branch**"). 12

C. Definitions and Rules of Interpretation

1. Definitions

For the purposes of this memorandum of law, unless otherwise specified: 13

Capitalized terms used and not otherwise defined herein shall have the meanings ascribed to them in the Agreements. 14

"**Eligible Credit Support**" means Cash or Letters of Credit. 15

"**Insolvency**" and "**Insolvency Proceedings**" shall be a reference to either a bankruptcy (*Konkurs*) and the adjudication thereof (*Konkurseröffnung*) under the Swiss Federal Act on Debt Enforcement and Bankruptcy ("**SDEBA**")[5], the grant of a moratorium (*Nachlassstundung*) and composition proceedings leading up to a composition agreement with assignment of assets (*Nachlassvertrag mit Vermögensabtretung*), or the special liquidation proceedings in respect of Special Insolvency Regime Swiss Entities or Special Insolvency Swiss Branches (all as discussed in further detail under n. 64-73, 74-83, 102-154 and 161 16

2 Bundesgesetz über die Banken und Sparkassen (BankG), SR 952.0.
3 Bundesgesetz über die Finanzinstitute (FINIG), SR 954.1.
4 This includes securities dealers (*Effektenhändler*) that were until December 31, 2019 licensed under the Swiss Federal Act on Stock Exchanges and Securities Trading ("**SESTA**"). The SESTA has been abolished concurrently with the entering into force of the FinIA. Such securities dealers are not required to obtain new licenses under the FinIA. Rather, their licenses granted under the SESTA will continue to be valid under the FinIA.
5 Bundesgesetz über Schuldbetreibung und Konkurs (SchKG), SR 281.1.

below). The term "**Insolvent**" shall be understood accordingly.

"**Close-out Netting Provisions**" means the set-off, net-off and netting provisions of § 5- 8 of the MNA, § 2-4 of the CPMA, § 12 of the CSA and §11 of the CPMA-CSA. 17

"**Party**" means a party to the Agreements. 18

"**Transaction**" means any or all of the transactions described in Appendix A to the Instruction Letter when entered into under an Underlying Agreement (n. 20). 19

"**Underlying Agreement**" means each or any of the agreements set out in Annex 2 that the Parties may selected pursuant to the CPMA: Division 1, Part I, Section A / MNA: Section 2.1, Part I of the Election Sheet. the GTMA, EFET Power Agreement (Version 2.1(a)/September 21, 2007), EFET Gas Agreement (Version 2.0(a), May 11, 2007), EECS Certificate Master Agreement (Version 1.0/14 December 2013), ISDA Master Agreement (either the 1992 or the 2002 versions). Each of the Underlying Agreements is governed by either English or German law save in respect of the ISDA Master Agreement which is governed by either English, New York, Irish or French law. 20

"**Uncovered Transactions**"/"**Additional Netted Agreements**" will be long form confirmations incorporating, insubstantially their original form, the terms and conditions of one of the Underlying Agreements as defined herein save that an Uncovered Transaction /Additional Netted Agreement shall also include confirmations incorporating the short term flat NBP 2015 trading terms and conditions which have not been amended and are therefore not subject to an NBP Master. In respect of the CPMA, the Parties have elected that close-out netting applies to Uncovered Transactions. 21

2. Rules of Interpretation

References to a "Section" or a "Paragraph" are to a section or a paragraph of the Agreements. 22

II. Assumptions and Limitations

For the purposes of this memorandum of law, we have made the following general assumptions. 23

(i) The Parties enter into an Agreement, one Party being a Swiss Counterparty ("**Party A**") and the other Party being a counterparty incorporated and having its registered seat outside Switzerland ("**Party B**"). 24

(ii) The relevant Agreement is governed by the laws of England or Germany. 25

(iii) Each Agreement and each Underlying Agreement and each Uncovered Transaction/Additional Netted Agreement is valid, binding and enforceable in accordance with its respective terms and conditions and each Party has duly authorized, executed and delivered, and has the legal capacity and power to enter into, 26 each document and has received all consents, approvals, permits and resolutions (corporate and otherwise) necessary in order to duly authorize the entering into, execution and delivery of, and performance under each Agreement and each Underlying Agreement and each Uncovered Transaction/Additional Netted Agreement.

(iv) The entering into each Agreement, each Underlying Agreement and Uncovered 27
Transaction/Additional Netted Agreement and each Transaction, and the execution and delivery of, and performance thereunder, does not violate any Party's constitutive documents.

(v) Each Agreement provides for the inclusion of some or all of the Underlying 28
Agreements and elects for the inclusion of Uncovered Transactions/Netted Agreements into the close-out netting under such Agreement.

(vi) On the basis of the terms and conditions of an Agreement, the relevant Underlying 29
Agreements (if applicable) and other relevant factors, and acting in a manner consistent with the intentions stated in the relevant Agreement and the relevant Underlying Agreement (if applicable) the Parties over time may enter into a number of transactions that are intended to be governed by the Agreement either as transactions entered into under the relevant Underlying Agreement or as Uncovered Transactions/Additional Netted Agreements (where such Uncovered Transactions/Additional Netted Agreements will only include long form confirmations incorporating, in substantially their original form, the terms and conditions of the Underlying Agreements in either Division 1, Part 1, Section A of the Template Default Elections of the CPMA or in the Additional Netted Agreement Rider at Part III of the MNA Election Sheet).

(vii) Each Agreement is used with the elections set forth in this memorandum of law and 30
in particular Annex 2 (EFET/IECA Schedule Template Default Elections) without changes that are material to the opinions expressed herein, and for purposes of this memorandum of law we deem any changes to the Close-out Netting Provisions and the insolvency related Close-out Events – and with respect to the latter, the elections ascertaining of automatic early termination and the rewrite with respect to the CPMA (as set out in Annex 2 (EFET/IECA Schedule Template Default Elections 5. Automatic Close-out of Underlying Agreements) – as material.

(viii) The transactions entered into will include any or all of the Transactions. 31

(ix) Each Close-Out Event specified as applicable pursuant to: (i) in respect of the CPMA, 32
the Election for Division 1, Part II, Section A of the model Schedule; or (ii) in respect of the MNA, the Election for Section 3.1, Part I of the Election Sheet 4 is an effective and valid Event of Default under the applicable Underlying Agreement.

(x) Each Party has obtained, complied with the terms of and maintained all authorizations, 33
approvals, licenses and consents required under all laws of any applicable jurisdictions (including Switzerland) to enable it to lawfully enter into and perform its obligations under the relevant Agreement, Underlying Agreements and Uncovered Transactions/Additional Netted Agreements (as applicable) and each Transaction and to ensure the legality, validity and admissibility in evidence or enforceability thereof.

(xi) Each Party is duly incorporated or, as the case may be, has been duly organized under 34
the laws of its jurisdiction or the jurisdiction of its place of business, and each Party when entering into the relevant Agreement, Underlying Agreements and Uncovered Transactions/Additional Netted Agreements (as applicable) initially and as of the date of the conclusion of a Transaction or providing Eligible Credit Support under a CSA is neither insolvent (*zahlungsunfähig*) nor overindebted (*überschuldet*) within the meaning of Swiss law or any other law applicable to such Party.

(xii) The terms of the relevant Agreement, Underlying Agreements and Uncovered 35
Transactions/Additional Netted Agreements (as applicable) and each Transaction are agreed on arm's length by the Parties so that no element of gift or undervalue from one party to the other is involved.

(xiii) The Transactions, under their governing laws, are capable of being terminated and 36
liquidated in accordance with the Close-out Netting Provisions.

(xiv) No provision of the relevant Agreement, Underlying Agreements and Uncovered 37
Transactions/Additional Netted Agreements (as applicable) or a document of which such documents form part, or any other arrangement between the Parties, invalidates the effectiveness of the Close-out Netting Provisions under applicable law.

(xv) There is no other agreement, instrument or other arrangement between the Parties 38
which modifies or supersedes the Agreements in such a way as to affect the operation of the Close-out Netting Provisions.

(xvi) Without derogation to the specific limitations and qualifications set forth herein, this 39
memorandum of law is subject to the following general limitations:

- This memorandum of law is limited to Swiss law as in force and interpreted at the 40
date hereof.

- The meaning and sense of certain concepts of Swiss law and expressions which 41
are used herein and on which this memorandum of law is based do not necessarily equal the meaning and sense of concepts and expressions in the reader's jurisdiction. It is assumed by us that all words and expressions in the Agreement

are to be understood in accordance with their plain meaning and without regard of any import they may have under any other applicable laws.

- This memorandum of law is limited to matters of law and does neither address any factual circumstances or statements of the Parties to the Agreements, whether contained in representations or warranties of the Parties thereunder or otherwise, nor any tax matters, including without limitation any tax, regulatory or accounting consequences of the entering into, execution and delivery of, and performance under the Agreements. 42

- We have not reviewed the terms of any Transaction and consequently no views whatsoever are expressed in relation thereto. 43

- We have not reviewed the terms of any Underlying Agreement or Additional Netted Agreement/Uncovered Transaction and consequently no views whatsoever are expressed in relation thereto. 44

- This memorandum of law assumes that no law other than Swiss law would affect or qualify the views expressed herein. 45

III. Opinions and legal analyses

A. Netting / Set-off Absent an Insolvency

CPMA/MNA

1. Issues covered

Question 1: Would a transaction entered into under an Underlying Agreement or an Uncovered Transaction / Additional Netted Agreement be validly included in each model Master Agreement, assuming either a choice of English or German law as governing such documents (save of the trading terms and conditions of the 2015 NBP Master which is governed by English law)? Please elaborate if your analysis depends on whether or not the relevant transaction: (i) was concluded before or after the execution of each Master Agreement; or (ii) makes explicit reference to a Master Agreement or the relevant Underlying Agreement.

2. Inclusion of Underlying Agreements or Uncovered Transactions/Additional Netted Agreements

The Master Agreement is governed by English or German law respectively and the question whether the Underlying Agreements or and Uncovered Transaction/Additional Netted Agreement has been validly included is a question that is governed by the Master Agreement 46 and the respective law applicable to such Master Agreement. For the recognition of such choice of law see under paragraph F (*General Validity of each CPMA and each CSA and the Choice of Law and Jurisdiction*) n. 247 et seq.).

Question 3: An analysis regarding the necessity or efficacy of performing any due diligence (i.e., lien searches, filings etc.) prior to a party entering into each model Master Agreement.

Under Swiss substantive law no registries are available that would allow for a meaningful lien search, search for filings etc. in the context of a Master Agreement. 47

Question 2: Legality, validity and enforceability of each model Master Agreement (absent an insolvency of either party) of the netting and set-off of obligations due between the parties: a. under one or more physically settling transactions involving the same commodity or product, b. under one or more physically settling energy transactions involving two or more different classes or types of commodity or product, and c. under a combination of physically and financially settling transactions (transacted under two or more Underlying Agreements).

Question 4: General discussion of, and your opinion regarding, your jurisdiction's laws relevant to the concepts of close-out netting and set-off of claims between parties, combinations of accounts or such other terminology as is employed in this jurisdiction to address such issues.

3. Netting / Set-off under Swiss substantive law

Close-out netting is neither a clear-cut concept nor specifically addressed in Swiss substantive law. It can, in particular, not be clearly distinguished from a contractual set-off arrangement. Subject to limitations of general principles of law, parties are free, however, to determine the conditions for and the effects of any termination of their contracts. 48

Under Swiss substantive law, the termination of an agreement and the determination of one single lump-sum termination amount in lieu of all amounts otherwise owed under various transactions entered into thereunder (which are the characteristic elements of what is generally referred to as close-out netting) would in our view be treated as a pre-agreed contractual liquidation of all such transactions in certain circumstances agreed upon by the parties. Under Swiss substantive law, the procedure of liquidating contractual claims can be agreed upon in advance and a close-out netting provision would, hence, be recognized under Swiss law. 49

As a matter of Swiss substantive law, the parties may also by contract stipulate a set-off of mutual claims and thereby deviate from the requirements that would otherwise apply to a unilateral right of set-off under Swiss substantive law. Such requirements that would, in the absence of a contractual agreement to the contrary, apply to a unilateral right of set-off are: 50

(i) the parties have to be each others' mutual creditor and debtor (mutuality requirement); 51

(ii) the mutual claims must be of the same kind (e.g. monetary claims)[6]; 52

[6] Monetary claims expressed in different currencies are treated as being of the same kind if the currencies are freely convertible and unless the parties specifically agreed or it is customary that an obligation must be

(iii) the party invoking the set-off must be entitled to discharge its obligation (e.g. debt must be due or may be pre-paid); and 53

(iv) the counterclaim must be due. 54

4. Netting / Set-off under Swiss conflict of laws rules

Art. 148 of the PILA deals with set-off in an international context and addresses both the unilateral right of set-off and the contractual set-off. 55

In respect of the unilateral right of set-off, it is first to be noted that the PILA regards such right as a substantive right as opposed to a mere procedural right. Hence, it is not the *lex fori* that applies, but pursuant to Art. 148 para. 2 PILA the law applicable to the claim owed by the party having first declared the set-off. Such claim is referred to as the main claim (*Hauptforderung*), whereas the other claim is referred to as the set-off claim (*Verrechnungsforderung*) and the law applicable to the unilateral set-off pursuant to Art. 148 PILA is referred to as the set-off statute (*Verrechnungsstatut*). 56

Pursuant to Art. 148 para. 2 PILA, the set-off statute determines, *inter alia*, (i) the requirements of a unilateral right of set-off (e.g. whether reciprocity/mutuality is required and what constitutes reciprocity/mutuality), (ii) how the right of set-off is exercised, and (iii) its effects. 57

Still, it is the law that governs the main claim and the set-off claim respectively (the contract statute) which determines whether the claim satisfies such requirements (e.g. whether a claim is due if that is required and it is also the contract statute that determines who is the creditor/debtor of the respective claims). We are further of the view that the question whether a claim may be subject to set-off at all is also governed by the contract statutes of the respective claims and not the set-off statute. 58

There is some controversy in Swiss legal doctrine as to whether the set-off statute governs the effects of the set-off on the main claim only or whether it also governs the effects on the set-off claim, i.e. whether it is also applicable as to the question of extinction of the latter. The prevailing view seems to be that it applies to both, unless the law applicable to the set-off claim does not know the concept of set-off at all. 59

Art. 148 para. 3 PILA, by reference to Art. 116 PILA, provides that a contractual right of set-off is governed by the law chosen by the parties in the set-off agreement. In the absence of a choice of law, a Swiss court would need to determine and apply the law of such jurisdiction that is most closely related to such agreement. Again, such law would determine the requirements for set-off, but also the extent to which such requirements may be freely agreed 60

effectively discharged in the agreed currency (effective clause). Even if there is such an effective clause, the parties may agree that different currencies may be set-off and this latter agreement would for the purposes of set-off prevail over the effective clause (BGE 130 II 318).

between the parties and the effects on the respective claims.

The choice of any of English or German law to govern the Agreements is a valid choice of law for purposes of Swiss law and a Swiss court would accordingly have to apply such laws. 61
A Swiss court would, hence, look to such chosen law to determine the requirements for set-off. However, once the Swiss court has established such requirements, it may then well have to look to another law that may be applicable to the question as to whether a particular claim satisfies such requirements. It is important to note that such other laws would again be determined by the Swiss conflict of laws rules and not any conflict rules of the chosen law as the set-off statute may further direct.

We note that while Section 3 of the CPMA and § 7 of the MNA may in certain respects amend 62
the relevant provisions dealing with the calculation of a Settlement Amount under an Underlying Agreement, it otherwise constitutes a mere reference to such provisions and does, hence, in our view not incorporate such provisions into the relevant Master Agreement. As a result, such provisions and the Settlement Amount resulting therefrom remain subject to the law governing the respective Underlying Agreement.

In respect of an Uncovered Transaction, the terms thereof and the laws applicable thereto will 63
determine whether such Uncovered Transaction can be terminated and a Settlement Amount calculated.

The application of the chosen law would, however, be subject to Swiss public policy (*ordre* 64
public) pursuant to Art. 17 and 18 PILA. We have not on the face of the Agreements identified any provisions that we would view as contrary to the general principles of Swiss public policy (*ordre public*).

While Section 4.1 of the CPMA and § 8 of the MNA refer to a *set-off* or *netting-off* respectively 65
of various Settlement Amounts resulting from the close-out pursuant to the terms of a Closed-out Agreement (as modified by the respective Master Agreement) and Section 4.2 of the CPMA and § 8.2 of the MNA stipulate that the respective Settlement Amounts shall to the extent of such set-off be deemed to be discharged for purposes of the relevant Closed-Out Agreement, we understand, that no Net Settlement Amount resulting therefrom is to be actually settled pending the eventual close-out netting of all Settlement Amounts pursuant to Section 4.4 of the CPMA and § 8.3 of the MNA.

In our view the Set-off provisions of Section 4.1 of the CPMA and § 8 of the MNA are best 66
analyzed not as a mere modification of a unilateral set-off right, but as a comprehensive contractual set-off arrangement. Such provisions are in addition not to be read in isolation, but together with the netting provisions of Section 4.4 of the CPMA and § 8.3 of the MNA.

Hence, in our view, Section 4 of the CPMA and § 8 of the MNA as a whole should under 67
Swiss law be treated as a close-out netting agreement in respect of all Settlement Amounts, which allows for a staggered netting, taking into account the timing provided for such close-out netting under the various Closed-Out Agreements.

5. Netting / Set-off under the Agreements – Conclusions

Whether an Underlying Agreement or an Uncovered Transaction / Additional Netted Agreement has been validly included under the Agreements is a question governed by the laws governing such Agreements and the Underlying Agreement or an Uncovered Transaction / Additional Netted Agreement, which as per the assumptions set out in this memorandum of law, is English or German law. The choice of any of English or German law to govern the Agreements is pursuant to Art. 116 PILA a valid choice of law for purposes of Swiss law and a Swiss court would accordingly have to apply such laws. To the extent that under applicable English or German law such Underlying Agreement or an Uncovered Transaction / Additional Netted Agreement have been validly included under the Agreements such inclusion would be recognized as a matter of Swiss law. 68

We note that at the level of the Master Agreements, it is our understanding and we have for purposes of this opinion assumed that all amounts to be set-off or netted pursuant to Section 4 of the CPMA or § 8 of the MNA are expressed as monetary claims. We further assume that in order to arrive to a Settlement Amount, the respective Netted Agreement, or as the case may be the relevant Uncovered Transaction, provides for the conversion of any non monetary claim into a monetary claim at such time as a Settlement Amount is to be calculated. To the extent such conversion is provided for and valid and binding under the laws governing such Netted Agreement or Uncovered Transaction, such conversion into a monetary claim would be recognized under Swiss law. 69

Based on the above, we are of the view, that the netting and set-off referred to and provided in Section 3 and 4 of the CPMA and the § 7 and 8 of the MNA would be recognized and enforceable against a Swiss Counterparty prior to Insolvency. 70

This holds true irrespective of whether the terms of a Transaction provided for cash or physical settlement and irrespective of whether the terms of various Transactions to be included in such netting and set-off provided for in Section 4 of the CPMA and § 8 of the MNA provided for different categories of underlying assets (*cross-category netting/set-off*). 71

We note that no lien search which would be meaningful in the context of the Agreements is available under Swiss law. 72

CPMA CSA / MNA CSA

1. Issues covered

Question 5: Would the laws of this jurisdiction characterize each transfer of Eligible Credit Support as effecting an unconditional transfer of ownership in the assets transferred and is there any risk that such transfer would be re-characterized as intending to create or creating in favour of either party any mortgage, charge, lien, pledge, encumbrance or other security interest in any Eligible Credit Support transferred from one party to the other under each CSA. If so, please opine on whether there is any way *to minimize such risk and the consequences of such a recharacterization to ensure the valid transfer of each type of Eligible Credit Support created by the providing party under each CSA.*

Question 6: Assuming the transferee receives absolute ownership interest in the Eligible Credit Support, your opinion on whether it will need to take any subsequent action to ensure that its title in the Eligible Credit Support continues. Your opinion should include whether there are any requirements in your jurisdiction necessary or advisable, including any filing registration, notification, stamping, notarization or any other action or the obtaining of any governmental judicial, regulatory or other order, consent or approval together with any procedures that must be followed or consents or other governmental or regulatory approvals that must be obtained or established, to enforce or continue such ownership interest.

Question 7: What is the effect, if any, under the laws of this jurisdiction of the right of a Swiss Counterparty to exchange Eligible Credit Support (for example, by swapping cash for a letter of credit) pursuant to Section 6 of each CSA. Does the presence of consent to substitution by the receiving party have any bearing on this question.

Question 8: Would the governing law of each CSA and their submission to jurisdiction be upheld in this jurisdiction, and what would be the consequences if they were not.

Question 9: Does under local law of this jurisdiction, each CSA comply with any mandatory margining requirements applicable under the laws of this jurisdiction.

Question 10: Are there any other local law considerations that a recipient of Eligible Credit Support should consider in connection with taking and realizing upon the Eligible Credit Support from a Swiss Counterparty.

2. Additional Assumptions

Our memorandum of law is based on the following additional assumptions:

(i) Although it is a bilateral form in that it contemplates that each party may be required to post Eligible Credit Support to the other, we assume that (i) Party A is at all times the Transferor under the CSAs and (ii) that the Eligible Credit Support is owned by the Party A or that Party A is authorized and empowered to transfer ownership in the Eligible Credit Support. A Transferee holding Eligible Credit Support and applying and using that Eligible Credit Support in a close-out netting event, is a Party to the Agreements and is an entity incorporated or organized under the laws of another jurisdiction than Switzerland. 73

(ii) The Parties agree that Eligible Credit Support will consist solely of Cash (which we assume to mean a bank transfer between accounts) and/or Letters of Credit. Cash is denominated in a freely convertible currency and is held in an account of or under the control of Party B which is not an account of Party A. Eligible Credit Support in the form of Cash will not be remitted physically and any disposition of Cash will be conducted by way of wire-transfer. 74

(iii) Eligible Credit Support in the form of Letters of Credit will be provided by having a duly licensed bank ("Issuing Bank") issue such Letter of Credit directly in favor of the 75

Transferee, but that Party B is not a party to the agreement between Party A and the Issuing Bank based on which the Issuing Bank issues the Letter of Credit to Party B. The Issuing Bank issues the Letter of Credit a as part of its ordinary banking business and on customary terms and conditions. In the context of close-out-netting, the Letter of Credit is accounted for with the full nominal value of the un-drawn amount of the Letter of Credit.

(iv) The CPMA CSA is part of the CPMA the CSA is part of the MNA. 76

3. Choice of Law

The undertaking in the Agreements to provide Eligible Credit Support in the form of Cash or a Letter of Credit is a valid undertaking under Swiss law and the choice of any of German, or English law to govern the CSAs and the undertaking by Party A to provide Cash or a Letter of Credit to Party B as Transferee is a valid choice of law in accordance with Art. 116 PILA and would have to be applied to any claim under the CSAs by a Swiss court, subject to Swiss public policy pursuant to Art. 17 and 18 PILA. On the face of the CSAs we have not identified any provisions that would be contrary to Swiss public policy. 77

3.1 Cash

Based on the assumption that Cash will not be remitted physically, but that any disposition of Cash will be conducted by way of wire-transfer, neither a transfer of a movable asset nor an assignment of a claim will take place. Therefore, the act of disposition under the relevant Credit Support Document does not consist of assigning or pledging a claim that the counterparty holds as against its bank, but rather of a wire-transfer resulting in a debit on the counterparty's bank account, i.e. in the discharge of the counterparty's bank from paying the respective amount, and in a credit on the bank account of the other counterparty. Thus, according to our view, the act of disposition consists of a chain of payments, i.e. wire-transfers that have to comply with the law(s) applicable to such wire-transfers. In the relationship between the parties, only a claim that is governed by the Credit Support Document remains and the Secured Party's rights to claim the transfer of cash and to use the Cash as collateral will be governed by the law chosen to apply to the CSAs (subject to any failed wire-transfer that would trigger any claims for restitution under the law(s) applicable to such wire-transfer). 78

3.2 Letters of Credit

Based on the assumption that a Letter of Credit is issued directly to Party B and while the Letter of Credit is by agreement of the parties to the relevant Credit Support Document treated as Eligible Credit Support and is to be provided when and as required by the relevant Credit Support Document, notwithstanding any terminology used in the CSAs to the contrary, Party B is legally speaking not a mere transferee of the Letter of Credit as otherwise contemplated by the relevant Credit Support Document, but the sole and original beneficiary of the Letter of 79

Credit.

It is our view, that the Parties may as a matter of Swiss law subject a Letter of Credit to the provision of close-out-netting as provided for under the Master Agreements in connection with the CSAs and that Party B may as part of such close-out-netting and in terms of realizing the Letter of Credit for purposes of the Agreements and the relevant Credit Support Document account for the full nominal amount of the un-drawn amount under the Letter of Credit as part of "other amounts payable" owed by the Transferee and draw such amount under the Letter of Credit on its own, subject only to such Letter of Credit's terms and conditions, prior to and following the occurrence of an Insolvency Event. 80

In our view, there is no reasonable basis in Swiss law either for a receiver in bankruptcy of, or a liquidator in a composition procedure against Party A to request that any amount having been paid to the Secured Party under the Letter of Credit be paid over by the Secured Party to the receiver in bankruptcy or liquidator so as to be shared with Party A's other creditors. 81

4. Submission to Jurisdiction

The submission by the Parties pursuant to Division 1, Part IV of the Schedule or § 12.4 of the Election Sheet to the MNA to the exclusive jurisdiction of (i) the English courts in case English law applies to the Master Agreements and the respective Security Documents or (ii) the courts of Frankfurt am Main in case German law applies to the Master Agreements and the respective Security Document, for any dispute arising out or in connection with the Agreements, is legal, valid and binding upon the Parties. 82

Such exclusive jurisdiction would not, however, bar any Swiss court to assume jurisdiction in respect of provisional measures (*vorsorgliche Massnahmen*) or in the context of any attachment of assets in Switzerland prior to Insolvency. 83

5. Recharacterization of transfer of Eligible Credit Support

5.1 Cash

Under Swiss substantive law, the transfer of cash to a bank account of the Transferee to provide collateral is not specifically regulated. The purpose to provide collateral is, however, a sufficient legal basis for such transfer and results in the Transferee becoming the holder of such cash albeit with an obligation to account for any application of such cash against any secured claims as provided for in the relevant security agreement or to retransfer such cash upon full satisfaction of all secured obligations. 84

We note that while the CSAs state that it is not intended to create a security, a Swiss court may conclude to the contrary. This would, however, not affect our opinion as to a potential recharacterization for Swiss law purposes. Because the transfer of Cash as Eligible Credit Support under the CSAs (where transferred directly to an account of the Transferee) would 85 under Swiss substantive law lead to "full" or "absolute" "ownership" to such cash being transferred to the Transferee the transfer would not be recharacterized as a mere grant of a regular pledge (*reguläres Pfandrecht*) in favor of the Transferee.

Hence, we are of the view that a Swiss court would recognize the full transfer of title as provided for in § 7 in either of the Security Documents, and this irrespective of the purpose of such transfer to provide collateral. 86

5.2 Letters of Credit

We have assumed that a Letter of Credit which is to be used as Eligible Credit Support would be issued directly to the Transferee as opposed to being issued to the Transferor and then transferred or pledged to the Transferee. In the absence of a transfer there is no need to address a "transfer" of a Letter of Credit and there is no room for any recharacterization into a mere regular pledge (*reguläres Pfandrecht*). 87

6. Perfection Requirements

Assuming that Party B receives absolute ownership in the Eligible Credit Support in the form of Cash, there is no need for any further action to perfect the security interest of Party B. There are in particular no requirements in Switzerland necessary or advisable, including any filing, registration, notification, stamping, notarization or any other action or the obtaining of any governmental, judicial, regulatory or other order governmental or regulatory approvals that must be obtained or established, to enforce or continue such ownership interest. 88

7. Substitutions of Eligible Credit Support

The right of Party A to substitute Eligible Credit Support pursuant to § 6 of either of the CSAs, subject to the Transferee's consent as provided for in § 6 of either of the CSAs, would, if valid and legally binding and enforceable in accordance with its terms under the laws governing such CSA, be recognized as a matter of Swiss law. Based on the assumptions made with respect to Cash and Letters of Credit, the effect of such substitution right, if any, would be governed by the laws governing the respective CSA. 89

8. Regulatory Requirements

The Financial Market Infrastructure Act[7] ("**FMIA**") provides for margining requirements (variation margin and initial margin) as part of the risk mitigation obligations for un-cleared derivative transactions in line with the G20 principles. The FMIA requirements are largely in line with EMIR requirements. Whether such margining requirements apply will, hence, 90

[7] Bundesgesetz über Finanzmarktinfrastrukturen (FINFRAG), SR 958.1.

depend on various factors such as inter alia the qualification of the Parties under the FMIA and the qualification of the Transactions and will need to be determined on a case by case basis. We note that where the FMIA requirements would apply, Cash but not Letters of Credit would, in principle, qualify for purposes of such FMIA requirements.

9. Other Local Law Considerations

There are no other local law considerations that Party B should consider in connection with taking and realizing upon the Eligible Credit Support from Party A. 91

CPMA combined with the CPMA CSA / MNA combined with the CSA

1. Issues covered

Question 11: The transferee's right in relation to the transferred Eligible Credit Support upon the occurrence of a Close-Out Event will be governed by: (i) in the case of the CPMA, Section 4 of the CPMA (see Section 11 of the CPMA CSA); and (ii) in the case of the MNA, Section 8 of the MNA (see Section 12 of the MNA CSA). Assuming that Section 4 of the CPMA / Section 8 of the MNA is valid and enforceable in this jurisdiction insofar as it relates to the determination of a Final Net Settlement Amount by either party on the termination of Underlying Agreements, would Section 11 of the CPMA CSA / Section 12 of the MNA CSA also be valid to the extent that it provides for the Base Currency Equivalent of all the Eligible Credit Support provided under each CSA on the Determination Date to be included in the calculation of the Final Net Settlement Amount. In other words whether, contractually, the right of a party to apply collateral to a Settlement Amount is enforceable.

Question 12: Would the opinions have expressed on: (i) the CPMA and the CPMA CSA; and (ii) the MNA and MNA CSA change in the event that the parties agree to place the Eligible Credit Support with an independent third party collateral agent rather than a party to each Master Agreement and relevant CSA.

2. Inclusion of Eligible Credit Support in Final Net Settlement Amount

Each of § 11 of the CPMA CSA and § 12 of the CSA, to the extent valid and legally binding under German or English law as the law governing the respective CSA, would be recognized and be enforceable as a matter of Swiss law to the extent that it provides for the Base Currency Value of the Eligible Credit Support provided under the respective Credit Support Document on the Determination Date to be included in the calculation of the Final Net Settlement Amount as set forth in Section 4.4 of the CPMA and § 8.3 of the MNA respectively, provided that the Transferee has acquired full right in such Eligible Credit Support, i.e. has become the creditor of the Cash balance based on its transfer and credit to its account with the account bank or the creditor of the Letter of Credit. 92

3. Eligible Credit Support held by an Independent Collateral Agent

The opinions expressed in respect of Eligible Credit Support in the form of Letters of Credit would not change, provided that the assumptions in respect of Letters of Credit remain unchanged, in particular that the Transferee remains the beneficiary and creditor of such Letters of Credit. 93

In respect of Eligible Credit Support in the form of Cash, the transfer of Cash to an account which is not the account of the Transferee would indeed require a further analysis of the respective agreement(s) of the Parties with the independent collateral agent and the account structure and set-up of the security arrangement under the laws applicable to such security arrangement. The key question would be, whether the security arrangement would need to be qualified as granting a *limited in rem right* only to the Secured Party which may then need to be qualified as a *regular pledge* for Swiss law purposes. Prior to an Insolvency of Party B a private realization that is the basis for including such Cash in the computation of the Final Net Settlement Amount as discussed above (see n. 92) is permissible. Following an Insolvency Event, though, such private realization would not as a rule be permitted any longer, unless Party B is a Special Insolvency Regime Entity or a Special Insolvency Regime Swiss Branch for which Art. 18 BIO-FINMA provides for certain safeguards of a private realization (see paragraph B (*Netting / Set-off in the Context of an Insolvency*) n. 119 et seq.). 94

B. Netting / Set-off in the Context of an Insolvency

CPMA/MNA

1. Issues Covered

Question 1: Assuming the parties have not selected Automatic Close-Out of each Underlying Agreement (Division 1, Part II, Section C of the Schedule to the CPMA / Section 6.1 of the MNA Election Sheet) and/or none of the Underlying Agreements provide for automatic early termination upon certain insolvency events to apply to the entity incorporated in your jurisdiction, your opinion on whether the provisions of each model Master Agreement permitting the non-defaulting party to terminate all the Underlying Agreements (including Uncovered Transactions / Additional Netted Agreements, if applicable) and all the transactions done under them upon the insolvency of its counterparty would be enforceable under the laws of this jurisdiction.

Question 2: Assuming the parties have selected Automatic Close-Out of each Underlying Agreement (Division 1, Part II, Section C of the Schedule / Section 6.1 of the MNA Election Sheet6) and/or all of the Underlying Agreements provide for automatic early termination upon certain insolvency events to apply to the entity incorporated in your jurisdiction, your opinion on whether the provisions of each model Master Agreement permitting the non-defaulting party to terminate all the Underlying Agreements (including Uncovered Transactions / Additional Netted 6 In the case of the MNA, Automatic Close-Out applies if the parties leave Section 6.1 blank. 12 Agreements, if applicable) and all transactions done under them upon the insolvency of its counterparty would be enforceable under the laws of this jurisdiction.

Question 3:Would the provisions of each model Master Agreement that provide for the calculation of a single Final Net Settlement Amount (see Sections 3 and 4 of the CPMA / Section 7 and 8 of the MNA) upon the insolvency of a counterparty would be enforceable in an insolvency of a party that is organized under the laws of this jurisdiction.

Question 4:Would the early termination, close-out netting or the calculation and payment of a Final Net Settlement Amount under the provisions of each model Master Agreement are voidable, challengeable or in any way vulnerable to deletion by a liquidator or any third party if insolvency procedures are later opened against a party that is organized under the laws of this jurisdiction.

Question 5: Cross Category Netting – since the Master Agreements contemplates the inclusion of various types of master agreements and other trading documentation covering both physical and financial trading, discussion of this jurisdiction's insolvency laws as they would apply to the close-out and netting via each model Master Agreement of obligations under different categories or types of traded products, and a. if any distinctions are applicable based on whether these products are traded under one or more Underlying Agreements, b. if any distinctions are applicable when attempting to use a model Master Agreement to net / set-off physically settled transactions when these involve the purchase, sale and/or optioning of different commodity types or categories (e.g. the netting obligations related to gas, power and coal trading) ("Cross Product Netting"), and c. if any distinctions are applicable based on whether both financially settled swaps, swaptions and derivative transactions and physically settled forwards and options are traded under one or more Underlying Agreements with respect to each Master Agreement.

Question 6: Assuming that the parties have selected a Base Currency (Division 1, Part VI of the CPMA Schedule and section 8.3(C) of the MNA Election Sheet) other than the legal currency of this jurisdiction in which the insolvent party is organized, would payment of the Final Net Settlement Amount in that currency be enforceable under the laws of this jurisdiction.

Question 7: Are the rights of a party are enforceable in accordance with the terms of each model Master Agreement, irrespective of the insolvency of the entity incorporated in this jurisdiction.

Question 8: Would the parties' agreement on governing law of each model Master Agreement and submission to jurisdiction be upheld in this jurisdiction, and the consequences if it were not.

Question 10: Would the mere institution of proceedings seeking a judgment of insolvency and/or the opening of the proceedings in this jurisdiction have any implication on the enforceability or operation of the model Master Agreement

2. Additional Assumption

Our memorandum of law is based on the following additional assumption:

(i) after entering into a transaction and prior to its maturity, Party A becomes the subject of Insolvency Proceedings and, subsequent to the commencement of the Insolvency Proceedings, either Party A or an insolvency official seeks to assume the confirmations representing profitable transactions for the insolvent party and reject the confirmations representing unprofitable transactions for the insolvent party. 95

3. General Overview - Swiss Insolvency Laws

Enforcement of contractual obligations is generally subject to limitations in case of insolvency proceedings being instituted against a Swiss Counterparty under applicable Swiss law. 96

In a nutshell, the various insolvency proceedings against a Swiss Counterparty and their main impact on the Swiss Counterparty's ability to abide by its obligations under the Agreements can be summarized as follows. 97

3.1 Bankruptcy

The legal framework as regards the enforcement of claims and the questions relating to insolvency and bankruptcy is as a rule set by the SDEBA. By way of exception, the insolvency and bankruptcy of Special Insolvency Regime Swiss Entities and Special Insolvency Regime Swiss Branches will not primarily be governed by the SDEBA, but by the specific laws which apply in these cases. Swiss Branches are also subject to the SDEBA, but on the liability side only with respect to debts and obligations incurred and entered into by the Swiss Branch and on the assets side only with respect to assets located in Switzerland or to which Swiss authorities have access (see the discussion under n. 155 et seq. below). 98

The enforcement of claims follows different proceedings depending on the status of the debtor. As a rule, claims against Swiss Counterparties (other than Special Insolvency Regime Swiss Entities) have to be pursued in enforcement proceedings leading to the declaration of bankruptcy (*Konkurs*) and, hence, a general liquidation of all assets and liabilities of the debtor, except that, unless a bankruptcy has been declared, creditors who are secured by a pledge must follow a special enforcement proceeding limited to the liquidation of the relevant collateral (*Betreibung auf Pfandverwertung*). 99

However, if a bankruptcy is declared while such a proceeding is pending, the proceeding is ceased and the creditor participates with the other creditors in the bankruptcy proceedings. 100

A bankruptcy (other than for Special Insolvency Regime Entities) is declared by the court either on the initiative of a creditor or on the debtor's request. It is declared with effect as of a specific date and time of the day. All assets of the bankrupt entity at the time of declaration of bankruptcy, and all assets acquired or received subsequently, form together the bankruptcy estate, which after deduction of costs and certain other expenses, is to satisfy the creditors in accordance with the statutory ranking order. 101

As a rule, the declaration of bankruptcy by the competent court upon motion of a creditor needs to be preceded by a prior debt enforcement procedure (*Konkurs mit vorgängiger Betreibung*). Any creditor or purported creditor may apply for the commencement of debt enforcement proceedings against a debtor. Upon a creditor's request, in which the creditor need not evidence its claim, the competent debt enforcement authority (*Betreibungsamt*) will issue a payment summons (*Zahlungsbefehl*). The debtor may object to the payment summons by simple declaration (*Rechtsvorschlag*). If the debtor does so object, the creditor needs to lift 102 such objection by a court procedure.

If the creditor has a written debt acknowledgment of the debtor, it can start a special summary procedure (*provisorische Rechtsöffnung*). Otherwise, full fledged litigation on the merits may need to be commenced. If the creditor prevails in the special summary procedure, but the debtor still wants to contest the claim, it is up to the debtor to commence full fledged litigation on the merits. If the creditor prevails, the payment summons comes into legal effect and the creditor may request the continuation of enforcement proceedings and the competent debt enforcement authority (*Betreibungsamt*) would then notify the debtor that bankruptcy proceedings will be opened by the court upon a respective request of the creditor unless payment of the debt will be performed within 20 days. After the lapse of such deadline without payment of the debt, the creditor may request that the competent court open bankruptcy proceedings. 103

The competent court may declare a debtor bankrupt without prior enforcement proceedings (*Konkurs ohne vorgängige Betreibung*) under the following circumstances: at the request of the debtor if (i) the debtor's board of directors declares that the debtor is overindebted (*überschuldet*) within the meaning of Art. 725 para. 2 CO or (ii) if the debtor declares to be insolvent (*zahlungsunfähig*), and at the request of a creditor if (i) the debtor commits certain acts to the detriment of its creditors or (ii) ceases to make payments (*Zahlungseinstellung*) or if certain events happen during composition proceedings. 104

The bankruptcy proceedings are carried out and the bankruptcy estate is managed by the receiver in bankruptcy. 105

For the final distribution there is a ranking of creditors in three classes. For corporate entities, the first and the second class, which are privileged, comprise claims under areas including employment contracts, social security (old-age and survivors insurance, accident insurance, invalidity insurance, income compensation and unemployment insurance) and pension plans. All other creditors are treated equally in the third class. 106

The declaration of bankruptcy (*Konkurseröffnung*) has, *inter alia*, the following effects with respect to the bankrupt party: 107

– *Loss of capacity to dispose of assets*: With the declaration of bankruptcy the bankrupt party loses its capacity to dispose of its assets. 108

– *Revocation of powers and instructions*: With the declaration of bankruptcy any powers, instructions and similar arrangements given or made by the bankrupt party prior to its bankruptcy authorising or directing a third party to legally represent it or to dispose of its assets would automatically expire. 109

– *Currency of filing*: Claims in a foreign currency against a bankrupt party initially remain unaffected by the declaration of bankruptcy. Foreign currency claims must, however, be converted into Swiss Francs in order to participate in the distribution of the liquidation 110 proceeds, if any. While a creditor is free to choose a currency rate provider (such as the Swiss National Bank), the bankruptcy liquidator may decide to apply a uniform rate of exchange to ensure equal treatment of creditors or to reduce a claim in case the rate applied by the creditor differs from the rates published by other market currency rate providers.

- *Interest*: Unless a claim is secured by collateral, interest stops to accrue following the declaration of bankruptcy. In case of secured claims, only an excess of the realization of the credit support over the principal amount may be applied against interest and any uncovered interest amount would be disregarded. 111

- *Performance of Obligations*: With the declaration of bankruptcy all obligations of the bankrupt party become due and payable and non-monetary obligations of the bankrupt party would, as a rule, have to be converted into monetary claims. 112

- *Date of calculation of a claim*: Calculations to be made with respect to a claim may have to be made as of the date of the declaration of bankruptcy in order to ascertain equal treatment of all creditors of the bankrupt party. 113

- *Set-off/netting*: A set-off in a bankruptcy is, pursuant to Art. 213 SDEBA, limited to situations where a debtor of the bankrupt party seeking to set-off a claim has become the creditor of the bankrupt party in respect of such claim prior to the declaration of bankruptcy or where a creditor of the bankrupt party seeking to set-off a claim has become the debtor of the bankrupt party prior to the declaration of bankruptcy and even in such situations a set-off may be subject to challenge pursuant to Art. 214 SDEBA by any other creditor establishing that (i) a claim has been acquired by a debtor of the bankrupt party prior to the declaration of bankruptcy, but upon knowledge of the bankrupt party 's insolvency and (ii) with the purpose of gaining an advantage by virtue of such set-off to the detriment of other creditors. In other words, Art. 213 SDEBA mirrors the Swiss substantive law requirements of a unilateral right of set-off, i.e. the claims to be set-off must have existed prior to the bankruptcy and must be mutual as between the bankrupt party and the counterparty, such mutuality existed prior to the declaration of bankruptcy and the claims must be of the same kind. Art. 214 SDEBA provides for the possibility to challenge the set-off of claims for which the mutuality has existed prior to the declaration of bankruptcy, but where such mutuality has been created under the particular circumstances set out in Art. 214 SDEBA. The analysis is to be made on the basis of each claim that is to be set-off. These provisions are supplemented by the general avoidance actions provided for in the SDEBA (n. 134 et seq.). 114

- *Disposal of and security interest in future rights*: The undertaking to grant a security interest in collateral to be delivered in the future would be recognized under Swiss law. However, as set out above, the transfer, assignment or the creation of the security interest constitutes a disposal with respect to such collateral and, hence, requires the collateral 115 provider's ability to dispose of such collateral at such time. Such ability is, however, lost upon a party being declared bankrupt and, therefore, the transfer or assignment of collateral could no longer be validly made and a security interest no longer be validly created by such bankrupt party.

Where Collateral that has been posted (irrespective of whether this has been done under a title transfer or assignment or through the grant of a security interest in the form of a pledge or equivalent security interest) also comprises future rights and claims, the Federal Supreme Court holds that such future rights and claims that only arise after the declaration of bankruptcy will not be validly transferred, assigned or subjected to the security interest and will remain part of the bankrupt party's bankruptcy estate. 116

- *Realization of credit support*: With respect to the realization of a security interest in a bankruptcy, it is key to determine whether the asset being subject to a security interest is due to the nature of such security interest still to be regarded as an asset being part of the bankruptcy estate of the credit support provider: 117

- *Security interest without transfer of property*: Assets over which the credit support provider granted a regular pledge remain its property and would in case of its bankruptcy be part of its bankruptcy estate. As a rule, a secured party is under an obligation to remit the pledged assets to the bankruptcy estate. Such credit support is, hence, liquidated by the receiver in bankruptcy in the same manner as the other assets of the bankruptcy estate, but the secured party retains its privilege to be satisfied from the proceeds of the liquidation of such credit support with priority over unsecured creditors. 118

- *General rule*: As a rule, a secured party is under an obligation to remit the pledged assets to the bankruptcy estate. Such credit support is, hence, liquidated by the receiver in bankruptcy in the same manner as the other assets of the bankruptcy estate, but the secured party retains its privilege to be satisfied from the proceeds of the liquidation of such credit support with priority over unsecured creditors. 119

- *Particular rules for Banks and Securities Firms*: Where the insolvent party having provided collateral is a Bank or a Securities Firm (see n. 153 et seq. below), and where the parties have agreed on a private realization in the context of a security interest that would be treated as a regular pledge, such right to a private realization may pursuant to Art. 27 para. 1 lit. b Banking Act and Art. 18 of the Ordinance of the Swiss Financial Market Supervisory Authority ("**FINMA**") on the Insolvency of Banks ("**BIO-FINMA**")[8] still be exercised by the secured party where the collateral consists of securities and other financial instruments the value of which can be objectively determined (*objektiv bestimmbar*). The secured party has to inform the receiver in 120

[8] Verordnung der Eidgenössischen Finanzmarktaufsicht über die Insolvenz von Banken und Effektenhändlern BIV-FINMA), SR 952.05.

bankruptcy that it holds collateral under a regular pledge, though, and must evidence its right to a private sale, which typically will be done by providing a copy of the respective security arrangement providing for such right. It is held in Swiss doctrine that such safeguards also apply to collateral in the form of cash provided by means of a pledge of a cash account of a Bank or a Securities Firm.

– *Security interest with transfer of property*: Assets over which the credit support provider granted an irregular pledge or which the credit support provider transferred under a transfer of title or assignment for security purposes, however, are not any longer deemed to be the property of the credit support provider who merely retains contractual rights for the return of such assets, and based thereon, would in case of its bankruptcy not be part of the bankruptcy estate. The realization of such credit support would not be effected through the receiver in bankruptcy. The secured party would, hence, realize the credit support outside official realization proceedings, i.e. through private realization (*Privatverwertung*) but needs to account for the sales proceeds and remit any excess sales proceeds to the receiver in bankruptcy (*Abrechnungspflicht*). 121

3.2 Reorganization – Composition Agreement

As an alternative to bankruptcy, and for a party other than a Special Insolvency Regime Swiss Entity, the SDEBA also provides for reorganization procedures by composition with a party's creditors. Reorganization is initiated by a party lodging a request with the competent court for a moratorium (*Nachlassstundung*) pending negotiation of the composition agreement with the creditors (majority vote) and confirmation of such agreement by the competent court. The debtor may also attempt to restructure consensually with the creditors during the composition moratorium in which case no composition agreement would be concluded. 122

A distinction is made between a composition agreement providing for the assignment of assets (*Nachlassvertrag mit Vermögensabtretung*) which leads to a private liquidation and in many instances has analogous effects as a bankruptcy, and a dividend composition (*Dividenden-Vergleich*) providing for the payment of a certain percentage on the creditors' claims and the continuation of the debtor. Further, there is the possibility of a composition in the form of a mere payment term extension (*Stundungsvergleich*). 123

The grant of a moratorium has, *inter alia*, the following effects on the insolvent party: 124

- *Stay of Debt Collection Proceedings*: No debt collection proceedings, including debt collection proceedings aimed at a realization of collateral (other than real estate collateral) (*Betreibung auf Pfandverwertung*) can be initiated for the duration of the moratorium and pending proceedings are stayed. Furthermore, it is held in Swiss legal doctrine (albeit with as we believe valid dissenting views) that a private realization of collateral granted under a *regular pledge* is also stayed for the term of such moratorium, where the security agreement allows such private realization. Furthermore, we note that there are some authors that based on the wording of Art. 324 SDEBA hold that the terms of a composition 125 agreement with assignment of assets (*Nachlassvertrag mit Vermögensabtretung*) could provide for a further stay.[9] Procedural steps taken before the moratorium, however, remain in effect until a decision is taken on a composition agreement, except for (a) collection proceedings for claims of employees arising in the course of the preceding six months and certain claims based on social security laws and family law (so-called first class claims), (b) collection proceedings for debt secured by real property, and (c) collection proceedings for new debt arising out of the permitted continuation of the debtor's business. Further permitted are sequestration and other measures of securing assets for creditors. The moratorium does not preclude initiating lawsuits and continuing pending litigations.

- *Power to dispose*: During the moratorium, the insolvent party's power to dispose of its 126
assets and to manage its affairs is restricted. While the insolvent party may - under the supervision of the administrator - effect the necessary transactions for its daily business as long as any instruction of the administrator is observed, the debtor is barred from performing certain acts. Acts may be prohibited by law, by order of the court, or by instruction of the administrator. Without approval, the debtor is prohibited by law from (a) disposing of or pledging any fixed assets (such as holdings in other companies or real property), (b) creating new security interests, (c) issuing guarantees, and (d) entering into transactions which are not at arm's length. Such acts performed without court approval are invalid. The counterparty's claims for rescission of the contract must be recorded, and treated just like any other creditors' claim. Such counterparty will therefore only be entitled to receive a dividend from or a share in the liquidation proceeds of the insolvent party.

- *Realization of Credit Support*: In case of a security interest without title transfer, such as 127
a regular pledge, the secured party is, furthermore, not entitled to proceed with a private liquidation until the competent court has approved the composition agreement. The private liquidation may also be stayed for a further period. In case of a security interest with title transfer, such as an irregular pledge, however, the sale of the pledged assets may take place without delay. A Secured Party would participate in the settlement only for the amount of its claim not covered by proceeds from the sale of the collateral or, if the collateral is appropriated, the amount by which its claim exceeds the value ascribed to the collateral.

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[9] This is, in our view rightfully, contested by other authors on the basis that secured creditors are not parties to such composition agreement. If contrary to such view, one were to contemplate such a stay, then it would need to be based on the interest of the security provider to postpone such realization clearly outweighing the security takers interest to realize such collateral, which we do not see as a realistic scenario for the type of the Collateral provided in the context of contracts.

- *Interest*: Unsecured debts become non-interest bearing as of the date the moratorium is granted. If the moratorium is withdrawn at a later time, the interest period will be deemed to have run during the moratorium.

- *Conversion*: The administrator may request the conversion of non-monetary claims into monetary claims of equal value.

- *Assignment of future claims*: The assignment of claims which has been agreed prior to the grant of a moratorium with respect to claims which come into existence thereafter is no longer effective in relation to such future claims. 129

- *Due Dates*: The moratorium does not affect the agreed due dates of debts (contrary to bankruptcy, in which case all debts become immediately due upon adjudication). Should the moratorium proceedings end in a composition agreement with assignment of assets (*Nachlassvertrag mit Vermögensabtretung*) for the benefit of creditors, then all debt will fall due to allow a general liquidation. 130

- *Set-off*: Set-off is allowed, subject to the same limitations as in a bankruptcy (see n. 114 above), whereby the date of the publication of the grant of the moratorium is relevant for determining which claims qualify for set-off. 131

The moratorium aims at facilitating the consensual restructuring or the conclusion of one of the above composition agreements. As mentioned, the composition agreement needs to be approved by the creditors and confirmed by the competent court. With the judicial confirmation, the composition agreement becomes binding on all creditors, whereby secured claims are only subject to the composition agreement to the extent that the collateral proves to be insufficient to cover the secured claims. 132

3.3 Emergency Moratorium

The SDEBA further confers the right to the cantonal governments to stay certain procedures under the SDEBA, including the declaration of bankruptcy, at the debtor's request if the debtor's inability to pay its debts is temporary and due to extraordinary circumstances of general implication (e.g. a general economic crisis). The basic principle under the emergency moratorium regime is that the respective debtor is to abstain from any transactions that are to the detriment of its creditors generally and from any transactions that prefer certain of its creditors to the detriment of other creditors. The competent court can also provide for more specific measures such as that payment of existing debt or the granting of security interests is subject to its prior approval. The emergency moratorium has been applied rarely only in the past. 133

3.4 Clawback/Avoidance of Transactions

The receiver in bankruptcy, the liquidator under a composition agreement with assignment of assets or creditors to which the relevant right has been assigned may, by means of an 134 appropriate lawsuit (*actio pauliana*) or by way of objection or otherwise, challenge certain arrangements or dispositions made by the insolvent party during a period (suspect or look-back period) preceding the declaration of bankruptcy or, in case of a composition agreement with assignment of assets (*Nachlassvertrag mit Vermögensabtretung*), the grant of the moratorium. This possible challenge relates to (i) gifts and other gratuitous transactions (*Schenkungspauliana*), (ii) certain acts of a debtor (described in more detail below), undertaken at such time as the debtor was overindebted (*Überschuldungspauliana*), and/or (iii) dispositions made by the debtor with the intention to disadvantage its creditors or to give a preference to certain creditors to the detriment of other creditors (*Absichtspauliana*) (all as described below).

For all avoidance actions it is required that the challenged transaction has caused damages to other creditors of the insolvent party which is presumed by law but may be overcome by counterproof of the defendant in an avoidance action.[10] Court precedents suggest that this requirement is to be interpreted extensively and is met if (i) the act to be set aside caused actual damages to the creditors by reducing the assets available for distribution or the quota of a specific creditor or (ii) if the position of the creditors in the insolvency proceeding has otherwise been affected negatively.[11] The targeted acts may be summarised as follows: 135

(a) Avoidance of Gifts and Gratuitous Transactions

Art. 286 SDEBA allows the avoidance of gifts and other gratuitous transactions (as well as some further specifically mentioned transactions, which are, however, of no relevance in the context of this Opinion), which the insolvent party made within a suspect period of 12 months prior to being declared bankrupt or the grant of a moratorium. Not only outright gratuitous transactions, but also transactions where the obligations of the parties measured in economic terms are disproportionate to the detriment of the insolvent party, are to the extent of such disproportion and for purposes of Art. 286 SDEBA treated as gratuitous transactions. 136

Any such gratuitous transaction can be challenged based on the objective elements of (i) the gratuitous nature of such transaction and (ii) the established damages resulting therefrom for other creditors of the insolvent party. Where the gratuitous transaction is concluded among related parties (which includes, among other, entities of the same corporate group), the counterparty of the insolvent party bears the burden of proof that the transaction was not disproportionate in nature. 137

(b) Avoidance due to Over-Indebtedness

Contrary to Art. 286 SDEBA, Art. 287 SDEBA targets specific acts of the insolvent debtor within the suspect period of 12 months prior to the debtor being declared bankrupt or the grant of a moratorium, where the insolvent party, as an additional objective prerequisite, was already 138

[10] BGE 99 III 27, 33, recently confirmed in BGE 137 III 268, 283.
[11] BGE 137 III 268, 283, confirmed in 5A_95/2019, c.3.1.

overindebted (*überschuldet*) at the time the relevant act was undertaken by the insolvent party. The term "overindebted" refers to the fact that the insolvent party 's assets do not cover its liabilities. The existence of such over-indebtedness at the time of the relevant transaction or act is, as a rule, to be proven by whoever challenges the transaction or act based on the existence thereof.

The targeted acts include (i) the posting of collateral for an existing but unsecured obligation with no pre-existing undertaking to post collateral for such obligation, (ii) settlement of monetary claims other than in cash or commonly used payment means and (iii) the settlement of claims prior to their stated maturity. 139

Art. 287 SDEBA, following the BESA coming into force, has been amended by the addition of a new para. 3 specifying that no challenge is possible if: (1) the collateral consists of securities, Book-entry Securities or other financial instruments traded on a representative market (*repräsentativer Markt*)[12]; and (2) the collateral provider had previously (i) agreed to provide additional collateral in case of a diminution of the collateral value or an increase in the value of the obligation to be secured and/or (ii) had reserved the right to substitute other collateral. 1

There is a subjective element also, in that the insolvent's counterparty to the challenged transaction or act may avoid a challenge of the transaction or act if it can prove that it did not and, being diligent, could not know about debtor's over-indebtedness (such knowledge or deemed knowledge being one of the subjective tests). While, as mentioned above, the over-indebtedness as such needs to be proven by the challenging party, once established, the counterparty to the transaction or act is, subject to the proof of the contrary, presumed to have been aware thereof. This proof will certainly fail if the over-indebtedness was reflected in financial statements made available to such counterparty. It would in our view also fail, if the counterparty did not specifically ask for financial statements despite that due diligence warranted to ask for financial statements in the light of the nature and the magnitude of the transaction contemplated, and if the financial statements would indeed have revealed the over-indebtedness. 140

(c) Avoidance for Intent

Art. 288 SDEBA subjects any act of an insolvent party within the suspect period of 5 years prior to the declaration of bankruptcy or the granting of a moratorium in respect of such insolvent party, to challenge to the extent that (i) such act was taken by the insolvent party with the intention of preferring certain creditors over others or disadvantaging certain of its creditors and (ii) this intention was, or exercising the requisite due diligence, must have been known to the counterparty. 141

[12] While Art. 287 SDEBA has not been amended in the context of the changes of Art. 31 BESA and Art. 27 para. 1 Banking Act we think that representative market should also be interpreted as having an objectively determinable value in the context of Art. 287 SDEBA.

The term "act" must be read in a very broad sense. It is not limited to the conclusion of contracts, but includes any act of the insolvent party, in particular also any act which the SDEBA specifically targets in one of the other two avoidance actions, if such act meets the further requirements of the particular avoidance for intent pursuant to Art. 288 SDEBA. 142

The subjective tests for an 'avoidance for intent' are (i) the actual or presumed presence of an intention of the insolvent party to prefer or to disadvantage creditors and (ii) such intention having been recognizable to the counterparty of the relevant act. 143

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The insolvent party is presumed to have such an intention where such insolvent party recognized or using the diligence required in the circumstances should have recognized that the challenged act would prefer or disadvantage creditors. It is sufficient if the insolvent party, even while not directly aiming for such preference or disadvantage to occur as a result of its act, merely accepted such preference or disadvantage was a possible consequence of its act.[13] 145

Jurisprudence holds that such intent is recognizable to a counterparty, if the counterparty, using the diligence warranted under the specific circumstances, should have foreseen a disadvantage to the other creditors as the consequence of the act of the party. The counterparty may have to make the necessary inquiries although recent court precedents hold that such duty to make inquiries requires clear signs for creditor preference or creditor disadvantage.[14] 146

In respect of counterparties that are banks, Swiss legal doctrine holds that the suspicion of the bank that the party when transacting with the bank may accept that such act disadvantages its creditors generally, is sufficient to deem such bank having recognized the party's intent. Furthermore, pursuant to such scholarly opinions, the intent is deemed recognizable not only if a bank knows about the distressed financial situation of the party but also if there are indications of a distressed financial situation. 147

While these subjective elements have to be proven by the challenging creditor, who obviously would need to gather the requisite information, one should not in our view underestimate the impact of the presumptions which work into the hands of such creditors as discussed above and it is, hence, important to focus on the objective elements. Moreover, where the act occurred among related parties, the counterparty of the insolvent party bears the burden of proof that the intent of the insolvent party to prefer or disadvantage creditors was not recognizable to it. 148

Neither Art. 286 SDEBA nor Art. 288 SDEBA (unlike Art. 287 SDEBA) require over-indebtedness of the insolvent party at the moment when the challenged act is undertaken. However, as the acts which can potentially be challenged under Art. 288 SDEBA are only 149

13 BGE 137 III 268, 283 et seq.
14 BGE 138 III 497, 510.

very generically addressed by the finality of such acts, one nevertheless in our view needs to distinguish two different scenarios:

(a) Under the first scenario, there is insufficient indication of financial difficulties when 150
the insolvent party acts. In such scenario, the act must be such that its very nature is targeted to achieve an undue preference of, or a disadvantage to certain creditors if and when the debtor should be declared bankrupt or granted a moratorium (e.g. posting of collateral only concurrently or immediately preceding the declaration of bankruptcy or the grant of a moratorium, so that in fact the intention is that the counterparty should only be granted a preferential right over an asset if and when the party is declared insolvent, but with no intent to treat the counterparty as a secured party other than in insolvency or an artificial creation of an overstated claim upon such declaration of insolvency in order to achieve a higher basis for a dividend or the like).

(b) The second scenario is where the insolvent party is in financial difficulties at the time 151
the act occurs. The scope of acts that can be challenged under such circumstances is significantly broader and, in respect of a party on the verge of an insolvency at the time such act occurs, eventually would include the payment of a matured claim or providing collateral, if the counterparty must have recognized that the party would have had to file for bankruptcy or the grant of a moratorium and, by making such payment outside the insolvency or by providing collateral, prefers or is deemed to have preferred such counterparty over other creditors (as insolvency proceedings require proportional satisfaction of claims of the same class) who will end up with a dividend that will not cover their full claims and who thereby are not getting the same *pro rata* share as the counterparty[15].

[15] In its decision 5A_892/2010 of August 22, 2011 c.4, the Federal Supreme Court first confirmed that an avoidance action under Art. 288 SDEBA was independent of the other avoidance actions and, hence, could also, if the further qualified conditions are met, affect acts that could not be challenged under such other avoidance actions. It then held in the context of a collateralized total return swap documented under a 1992 ISDA Master Agreement and presumably an English law CSA-Transfer, that in the case at hand collateral was transferred for existing obligations and without pre-existing obligation to do so and, hence, caused damages for the other creditors and was thereby subject to avoidance. The decision is in our view not properly reasoned, in particular as it denies the existence of a pre-existing obligation to transfer collateral on the basis of a perceived lack of predictability of the amount that would need to be collateralized when the parties entered into the agreement. At the same time it held that periodic balancing payments that the parties had agreed in longer intervals than the ones for the transfer of collateral with the last such payment having been made after the last transfer of collateral were part of the exchange of payments agreed by the parties at the outset and, hence, not subject to avoidance. As both the balancing payments and the transfer of collateral aim at the same reduction of exposure, are to be calculated on the same basis and were agreed at the outset, the different treatment seems inconsistent. So what in essence seems to be the immediate conclusion from this decision for derivative transactions (with secured amounts that necessarily will fluctuate), is that the risk perceived in our opinion that collateral posted under an existing security undertaking could be clawed back under Art. 288 SDEBA notwithstanding the existence of a security undertaking providing for additional collateral calls during the life of transaction(s) is confirmed by the decision, albeit with a less than convincing reasoning.

3.5 Jurisdiction Clauses and Insolvency Actions

It should be noted that under Swiss law jurisdiction clauses have no effect on actions brought under the SDEBA, i.e. to issues that relate to Swiss bankruptcy or insolvency law rather than to contractual law. These actions must be brought before the court at the place of the Insolvency Proceeding. Accordingly, the jurisdiction clause provided for in the Agreements in favour of the English courts would not be effective in case of actions relating to Insolvency Proceedings. With respect to avoidance actions (see n. 134 et seq. above), it seems noteworthy in this context that, contrary to earlier precedents, recent precedents hold that the forum provided for in Art. 289 SDEBA (place of defendant) may be disposed of, but only after the adjudication of Insolvency by an agreement entered into by the non-defaulting party with either the administrator or the creditors. 152

3.6 Rules applicable to Banks and Securities Firms

The Banking Act and the BIO-FINMA set forth a detailed regime governing bankruptcy and Insolvency proceedings against Banks. Pursuant to Art. 67 FinIA, the same rules apply *mutatis mutandis* also to Securities Firms.[16] A reference to a Bank shall in this para. 3.6, hence, include Securities Firms. 153

In relation to Banks, the SDEBA only applies to the extent that there are no applicable special rules pursuant to the Banking Act and/or the BIO-FINMA. The SDEBA rules regarding composition proceedings (*Nachlassstundung*) within the meaning of Art. 293 et seq. SDEBA are disapplied altogether with respect to Banks. In addition, the FINMA may deviate from the rules of the SDEBA where it deems it appropriate. 154

Yet, according to the explanatory message accompanying the 2004 amendment of the Banking Act[17] and gathering from the BIO-FINMA, such derogation is mostly of a formal nature. 155

The Banking Act grants broad powers to the FINMA which is entitled to handle the insolvency proceedings against Banks, Securities Firms and Fund Management Companies. In particular, the FINMA has the authority to implement (i) protective measures (*Schutzmassnahmen*) in case of justified concern of insolvency, (ii) reorganization proceedings (*Sanierungsmassnahmen*), or (iii) solvent or insolvent liquidation proceedings relating to Banks (*Bankenkonkurse*). 156

Pursuant to the Banking Act, bankruptcy is declared and made public by the FINMA if there is no prospect of restructuring the Bank (*Aussicht auf Sanierung*) or where the attempt to restructure the Bank have failed. The bankruptcy proceedings are carried out and the 157

[16] Securities Firms (*Wertpapierhäuser*) regulated under the FinIA correspond to securities dealers (*Effektenhändler*) that were regulated under the former Stock Exchange Act (SESTA) and to which the bankruptcy, rehabilitation or other insolvency or reorganisation procedures of the Banking Act also applied mutatis mutandis.

[17] Botschaft zur Änderung des Bundesgesetzes über die Banken und Sparkassen vom 20. November 2002.

bankruptcy estate is managed by one or more special liquidators which are to be appointed by the FINMA (*Konkursliquidatoren*).

Protective measures may include a broad variety of measures such as, in particular, a bank moratorium (*Stundung*) or a maturity postponement (*Fälligkeitsaufschub*) and may be ordered by the FINMA either on a stand-alone basis or in connection with reorganization or liquidation proceedings. Such measures are largely handled by the FINMA. 158

Pursuant to Art. 30 Banking Act, the FINMA also has the power, by ordering reorganization proceedings (*Sanierungsmassnahmen*), to order that selected banking services be continued, regardless of the continued existence of the reorganized Bank. In particular, the FINMA may order the transfer of all or part of the business with assets, liabilities and contracts to another existing entity or a newly established bridge bank, with such transfer becoming effective upon the ratification of the reorganization plan by FINMA. 159

The reorganization plan can also provide for a debt for equity swap. Where a reorganization plan affects creditors' rights, the FINMA has to set a deadline within which creditors can reject the reorganization plan, and if third class creditors (unsecured unprivileged creditors) that represent in excess of 50% of the amounts of third class claims in the books of the bank reject such plan, then the reorganization plan has failed and FINMA has to order the bankruptcy[18]. 160

Art. 27 para. 1 Banking Act provides for the safeguard of netting arrangements (lit. a), private collateral realization arrangements (lit. b) and in addition porting arrangements (lit. c) in case of protective measures (*Schutzmassnahmen*), reorganization proceedings (*Sanierungsverfahren*) or an insolvent liquidation (*Konkursliquidation*) being taken in respect of a Bank. 161

Art. 27 para. 1 lit. a not only safeguards contractual netting arrangements as such, but also the methodology for such netting and the valuation thereunder. 162

The same holds true for the right to privately realize collateral in the form of securities and financial instruments even though collateral has been provided outside a title transfer collateral arrangement. Art. 27 para. 1 lit. b, however, replaces the controversial requirement of a "representative market" by a concept of an "objectively determinable value" for such collateral as a prerequisite for such private realization in case of any of the afore stated measures or proceedings being taken against a Bank. 163

The safeguard of porting in Art. 27 para. 1 lit. c is new and thereby expands the protection previously offered with a view to the particular needs of cleared derivatives transactions. 164

In sum, the provisions of Art. 27 para. 1 Banking Act further strengthen the enforceability of netting arrangements, including the private realization of collateral and now also protect 165

[18] Pursuant to an amendment of the Banking Act in 2012 (Art. 31a para. 3 Banking Act), the reorganization plan cannot be rejected by the creditors with respect to a systemic bank.

portability of transactions with Banks.

At the same time, though, para. 2 of Art. 27 Banking Act provides for one exception to this overarching safeguard, in that it expressly reserves the temporary stay (*Aufschub*) of a termination (*automatic termination*) or of the exercise of termination rights (*optional termination*) or of the exercise of netting, private realization of collateral or porting rights provided for in a new Art. 30a Banking Act (which came into force on January 1, 2016). 166

The stay provided for in the new Art. 30a Banking Act replaces the stay right stipulated in former Art. 57 BIO-FINMA and, as set out above, clearly takes precedence over the safeguard of the arrangements contemplated by Art. 27 para. 1 Banking Act. 167

Such stay can be ordered in conjunction with any protective measure (*Schutzmassnahmen*), or more likely any measure taken in reorganization proceedings (*Sanierungsverfahren*) (e.g. a transfer of bank services or bail-in measures such as capital reduction or capital conversion) and would take precedence over the safeguard of netting, private realization of collateral and porting rights that otherwise protects such arrangements against protective measures or reorganization proceedings. It cannot be ordered in conjunction with an outright order for the insolvent liquidation of a Bank (*Konkursliquidation*). However, where certain bank services should be transferred, FINMA would first order such transfer of banking services and then only order the insolvent liquidation of the reorganizing Bank. 168

It is further to be noted that the stay of a termination or of the exercise of termination rights has a significantly broader scope in that it is no longer limited to financial contracts and transactions, but applies to all contracts that provide for termination or for the exercise of termination rights predicated upon protective or reorganization measures ordered by FINMA. The effects of the stay of a termination or of the exercise of termination rights are also more stringent. The maximum duration of such stay is 2 business days. The stay becomes permanent with respect to the particular measure for which it was ordered, where FINMA confirms within the 2 business days stay that the protective or reorganization measure was successful in reinstating the orderly state of a Bank's business and the satisfaction of the legal requirements by such Bank in respect of which such measures have been ordered. Where the reorganization measure consists of a transfer of all or part of the Bank's business, it is sufficient that the Bank's business as transferred to another Bank and to which the agreements subject to the stay of a termination or of the exercise of termination rights have been transferred satisfy such orderly state or other legal requirements. 169

Finally, in this context it is to be noted that Art. 31 Banking Act remains unchanged and requires that any reorganization plan and reorganization measures contemplated therein (transfer of banking services or bail in measures such as capital reduction or conversion) adequately take into account and preserve the legal and economic connections between assets, liabilities and contractual relationships that are to be subjected to such measures. In the same vein, the safeguards of Art. 49 lit. b and Art. 50 BIO-FINMA exclude claims that are subject to set-off/netting rights or collateral arrangements from bail-in measures (capital reduction or 170 conversion) to the extent of such set-off/netting and collateralization. A net excess claim or an unsecured excess claim against the reorganizing Bank, though, would then be subject to such measures. In the case of a transfer of a banking business, the principle of Art. 31 Banking Act translates into an obligation to see to it that claims that are subject to a set-off/netting arrangement or collateral arrangement or have other legal or economic ties only be transferred as a whole pursuant to Art. 51 lit. h no. 1 BIO-FINMA. The requirements of Art. 31 Banking Act may therefore be viewed as an additional and general safeguard for set-off rights and collateral arrangements.

It seems noteworthy that the prerequisites for actions for the avoidance of transactions are somewhat different from the ones in the SDEBA in that such actions can also be brought in case of a reorganization of Banks, Securities Firms and Fund Management Companies. Further, in the first instance, the Bank itself is competent to challenge these arrangements or dispositions once the reorganization plan has been approved by the FINMA. If the reorganization plan does not provide for the challenge of these actions by the Bank itself, the creditors of the Bank may initiate these actions. 171

Finally, the FINMA has the competence to recognize foreign insolvency decisions (whether rendered in the country of such bank's legal seat or the country of its effective seat) and to put assets located in Switzerland at the disposition of a foreign insolvency estate without having to open a separate Swiss insolvency proceeding pursuant to Art. 166 et seq. PILA, subject to the foreign insolvency proceeding (i) ascertaining equal treatment to Swiss secured or privileged creditors, and (ii) providing for adequate consideration of other claims of Swiss creditors. 172

4. Netting / Set-off in the Context of an Insolvency

4.1 Availability of set-off

Pursuant to the SDEBA, the exercise of a set-off right remains possible post-insolvency. However, post-insolvency set-off is subject to the limitations of Art. 213 and 214 SDEBA (see n. 114 et seq. and n. 132 above). As a result, set-off is permissible only to the extent that the claims to be set-off have existed prior to the occurrence of an Insolvency Event or the grant of a moratorium (*Bewilligung Nachlassstundung*) are mutual between the Insolvent and the counterparty, that such mutuality existed prior to occurrence of an Insolvency Event or the grant of a moratorium (*Bewilligung Nachlassstundung*) and that the claims are of the same kind. 173

4.2 Termination in case of Insolvency

(a) Termination and Step-in Right in general

Insolvency does not as a rule *per se* result in a termination of all insolvent party's contracts unless the applicable substantive law governing a specific contract provides otherwise. Subject 174 to the Step-in Right (as defined and discussed below), though, all non-monetary claims against the insolvent party are converted into monetary claims in case of a declaration of bankruptcy (*Konkurseröffnung*) or a ratification of a composition agreement with assignment of assets (*Bestätigung des Nachlassvertrages mit Vermögensabtretung*) or, in case of a moratorium (*Nachlasstundung*) upon notification of such conversion by the administrator to the counterparty pursuant to Art. 297 para. 9 SDEBA. In turn, parties are pursuant to the almost unanimous view among legal scholars free to stipulate in their contract that an Insolvency shall give rise to a termination of such contract, be it automatically or, subject to certain limitations discussed below, by notice[19].

In a bankruptcy, the receiver in bankruptcy may pursuant to Art. 211 para. 2 SDEBA request the fulfilment of any undischarged obligations resulting from bilateral contracts by the other contractual party provided that the bankruptcy estate also fully fulfils its obligations under the relevant contract (the "**Step-in Right**"). The Step-in Right is by analogy available to the liquidator in case of a composition agreement with assignment of assets (*Nachlassvertrag mit Vermögensabtretung*). Any obligation resulting from a contract for which the relevant Insolvency Representative exercised the Step-in Right becomes a direct and own obligation of the relevant Insolvency estate (*Massaverbindlichkeit*) and must be satisfied from such Insolvency estate ahead of other creditors. This is *inter alia* the reason why an Insolvency Representative will only exercise the Step-in Right with respect to obligations that it views as critical or beneficial for an orderly and favorable liquidation of an insolvent person and thereby as benefitting all creditors. Insofar as long term agreements (*Dauerschuldverhältnisse*) are concerned, though, the consequence of obligations becoming obligations of the Insolvency estate only applies to obligations which come into existence after the occurrence of the Insolvency Event and for as long as the receiver in bankruptcy exercises the Step-in Right (Art. 211a para. 2 SDEBA; the "**Partial Step-in**"). It is not further specified in the SDEBA what types of agreement would qualify as long term agreement. Typical examples include rental contracts, employment contracts, license agreements and similar. It is noteworthy that some authors take the view that swap contracts may also qualify as long term agreements in the broader sense and there is one author that seems to suggest that swaps may therefore fall under Art. 211a SDEBA unless the relevant swap contracts do meet the definition of Qualifying Contracts (as defined and discussed under n. 182 below) where the Step-in Right is excluded. 175

[19] There is one recent dissenting view in Swiss legal doctrine that holds that any contractual termination right, whether optional or automatic, would be void and the same consequence is also proposed as a rule for contractual liquidation provisions due to an alleged violation of the principle of equal treatment of creditors. On this basis, the author further states that close-out netting would not be enforceable in a bankruptcy, unless protected by a particular netting safeguard provision, including where transactions qualify as Qualified Transactions within the meaning of Art. 211 para. 2^{bis} SDEBA (see below n. 182). It is a singular view with which we disagree, in that we deem it to be contrary to the legislative intention and history and contrary to the predominant view in Swiss legal doctrine.

Exercising the Step-in Right, though, presupposes that the relevant contract has not been terminated as confirmed by a recent precedent of the Swiss Federal Supreme Court.[20] 176

(b) Step-in Right and contractual termination arrangements

There are no court precedents to date as to whether the statutory Step-in Right could interfere with or preclude contractual termination arrangements of the parties. 177

According to the predominant view in Swiss legal doctrine, and supported by decisions of the Swiss Federal Supreme Court[21], the Step-in Right is held to constitute a mere procedural provision rather than a substantive law rule. As per the legislative history, the introduction of the Statutory Close-out (as defined and discussed under n. 182 below) of Art. 211 para. 2^{bis} SDEBA did not aim at altering the qualification of Art. 211 para. 2 SDEBA as a procedural provision. 178

The foregoing view is expressed in connection with both automatic and optional termination rights. We note, though, that one statement in doctrine could be read to imply that unless an optional termination right has been exercised before the occurrence of an Insolvency Event such exercise would not be possible any longer due to the Step-in Right. The statement is not entirely clear, though and would be a singular view whereas the clear majority of scholars accepts that optional termination rights may be exercised also after the occurrence of an Insolvency Event. That said, certain additional requirements are being discussed in doctrine for the exercise of the relevant optional termination to be admissible. On the one hand, it is proposed by some authors that such termination rights should be exercised shortly after the occurrence of the relevant termination event. While some scholars argue this on the basis of Swiss substantive contract law and the principle of good faith, others appear to draw this conclusion directly on the basis of the SDEBA (in which case it would apply irrespective of the law governing the relevant contract). Other authors suggest that, under optional termination, notice will have to be given with (retroactive) effect as per the occurrence of the Insolvency Event (and not with effect as of a date thereafter). We note in this respect that the Master Agreements may not accept the concept of a retroactive termination. Finally, one author appears to suggest that an optional termination right cannot be invoked any longer where the Insolvency Representative has exercised its Step-in Right in the interim. The statement lacks clarity and is not widely discussed in doctrine but we are aware of at least two statements which come to the opposite result.[22] 179

[20] The Swiss Federal Supreme Court has ruled on November 5, 2018 (4A_203/2018) that the Step-in Right cannot be exercised for contracts that are already terminated due to bankruptcy. Although the precedent was about a mandate agreement that terminated by operation of law in the event of bankruptcy, we are of the view that the same logic should apply to a contractual termination.

[21] BGE 104 III 84 S. 94 of October 26, 1978, confirmed by 5A_823/2015 of September 7, 2015.

[22] If this author were correct, a further question would arise as to whether the Step-in Right could be validly exercised for some (but not all) transactions (cherry picking) which are covered by a Master Agreement (which does not appear to be discussed in doctrine). Where a single agreement clause as contemplated in the

Based on such qualification as a procedural provision and the reference in Art. 211 para. 3 SDEBA which reserves termination provisions under substantive law, the almost unanimous view in Swiss legal doctrine holds that the Step-in Right does not preclude a termination arrangement validly agreed by the parties prior to the commencement of an Insolvency Procedure. Many authors when discussing the Step-in Right highlight the fact that Art. 211 para. 2 SDEBA only grants the Insolvency Representative a Step-in Right into contractual obligations as the same were agreed between the Parties and as they stand as per the occurrence of an Insolvency Event, i.e. the Insolvency Representative cannot claim any more rights than the Insolvent party could have claimed, or disregard any rights that the non-defaulting party has under the respective contract.

On the basis of the foregoing, it is our view, that the Step-in Right does not preclude a contractual termination arrangement and that the Step-in Right could not any longer be exercised upon the effectiveness of any such termination. The calculation of one single amount pursuant to a close-out netting provision under such circumstances is in our view also generally valid and binding (subject to the discussion as outlined in more detail below under III.B.4.3). 180

We note, though, that no court precedents are available on this very point and we further refer to the controversial discussion on certain additional requirements which are being discussed in doctrine on the timing to give a termination notice and the proposed effective date of the termination and the further discussion on whether an intermediate exercise of the Step-in Right may overrule or limit the effectiveness of an optional termination. Also, we note that at least one author may suggest that the Step-in Right trumps optional termination which, however, is a singular view and has not been articulated very clearly. 181

(c) Statutory Close-out

Art. 211 para. 2^{bis} SDEBA excludes the Step-in Right in respect of certain types of agreements, i.e. (i) fixed term agreements (*Fixgeschäfte*) within the meaning of Art. 108 ciph. 3 CO[23], and 182

Master Agreements is agreed or would otherwise be deemed to apply as a matter of the applicable substantive law governing the relevant Master Agreement, any such intermediate exercise of the Step-in Right by the bankruptcy administration would in our view have to cover all (rather than selected) transactions concluded under a Master Agreement on the basis that the bankruptcy administration would have to accept the scope of the agreement as agreed by the parties. Where individual transactions were held to qualify as long term agreements within the meaning of Art. 211a SDEBA and would not meet the definition of Qualifying Contracts so as to be exempted from the Step-in Right (see n. 182 below), such cherry picking may be possible irrespective of a contractual arrangement or substantive law to the contrary. The reason for this is that, unlike Art. 211 para. 2 SDEBA, Art. 211a para. 2 SDEBA specifically allows the Partial Step-in for long term agreements which may not only allow the performance of the underlying long term agreements for a limited period of time but also for a limited scope.

23 Any agreement in which the parties agree that specific performance should only be permissible on or up to a certain date or at least would only be permitted if the other side were to specifically agree to it, qualifies as such fixed term agreement (*Fixgeschäft)*. Furthermore, the predominant view is that the exclusion of the Step-in Right pursuant to Art. 211 para. 2^{bis} SDEBA applies to all fixed term agreements rather than to financial agreements only.

(ii) certain financial derivative transactions, including financial swaps, forward agreements and options (each, a "**Qualifying Contract**") and in turn provides for statutory liquidation of such contracts in case of bankruptcy and the abstract calculation of a liquidation amount based on market or exchange quoted prices as compared to the contractual value (the "**Statutory Close-out**"). Such calculation does not as per its wording and as supported by the majority view in legal doctrine, however, take into account any further damages or costs of either party.

The Statutory Close-out as per its terms applies to individual Qualifying Contracts. The calculation examples given in the legislative materials appear to suggest, though, that in case of multiple Qualifying Contracts between the same parties the liquidation amounts with respect to each liquidated Qualifying Contracts will be subject to a statutory netting (i.e. not dependent on a specific declaration of set-off by either party or a set-off or netting agreement). We note, though, that the statutory netting is not really discussed as such in the legislative materials and that the wording of Art. 211 para. 2^{bis} SDEBA does not mention such netting. There is no further guidance available in court precedents or legal doctrine on the topic. If the Statutory Close-out does not result in a statutory netting of liquidation amounts under multiple Qualifying Contracts, it is our view that set-off would generally be available (subject to the discussion under n. 184 et seq. below) 183

(d) Statutory Close-out and contractual termination arrangements

There are no court precedents to date as to whether the Statutory Close-out could interfere with or preclude contractual termination arrangements of the parties. 184

Art. 211 para. 2^{bis} SDEBA was introduced in the light of close-out netting agreements that had become customary in the financial community and primarily aimed at backing the viability of close-out netting in Insolvency Proceedings. This, in our view, needs to be borne in mind when interpreting Art. 211 para. 2^{bis} SDEBA which, as outlined above, does not limit itself to excluding the Step-in Right of Art. 211 para. 2 SDEBA, but establishes a Statutory Close-out in that it provides that the relevant contracts are automatically terminated and lays down an abstract calculation of a liquidation amount, which is similar but not identical to typical close-out netting provisions and may be more restrictive as to, for instance, further costs and damages. It was also stated in the report of the expert commission addressed to the Federal Office of Justice that the entire Art. 211 SDEBA is procedural (rather than substantive law in nature). 185

This raises the question whether Art. 211 para. 2^{bis} SDEBA may be modified, most noteworthy as to the automatic character of a termination / liquidation of underlying contracts, and the calculation method of the amount to be paid following such termination. While there are various nuances among the growing number of legal scholars discussing this point, it is our view that the prevailing view accepts (within certain limitations as discussed under III.B.4.3) contractually agreed deviations from the abstract calculation of a liquidation amount as set out in Art. 211 para. 2^{bis} SDEBA whereas termination provisions are accepted by a majority view, 186 provided that they are triggered by an event which occurs not later than the occurrence of an Insolvency Event. Accordingly, Art. 211 para. 2^{bis} SDEBA is not generally viewed as mandatory law in its entirety. That said, there is more controversy as to whether an optional termination taking place after the occurrence of an Insolvency Event should be effective or replaced by the automatic termination upon the opening of bankruptcy in the light of Art. 211 para. 2^{bis} SDEBA than as to the dispositive nature of the calculation method.

Insofar as the validity of a contractual termination as such is concerned, this is predominantly 187
discussed in the context of optional early termination but does not typically give rise to much debate where automatic early termination is agreed. An important number of scholarly opinions holds that in the absence of a termination by (or, as proposed by some authors, with effect as per) the occurrence of an Insolvency Event, the liquidation of contracts ordered under the Statutory Close-out becomes mandatory. This is sometimes (but not always) argued on the basis of the alleged substantive law nature of Art. 211 para. 2^{bis} SDEBA. That said, a qualification as a substantive rather than as a procedural rule does not in our view *eo ipso* exclude its modification by contract, which view is also supported by scholarly opinions. A number of authors, thus, concludes that an optional early termination would trump the Statutory Close-out. The enforceability of optional termination for Qualifying Contracts is further challenged by some authors based on concerns of a violation of the equal treatment of creditors in Insolvency Proceedings. While discussed in the context of the Step-in Right, the argument is made on the basis that optional termination may allow a counterparty to speculate against the Insolvency estate and to the detriment of other creditors of the Insolvent debtor. In the absence of a pre-agreed short notice period, it should, therefore, be disregarded according to some scholars. It is further held in this respect that if the termination notice provides for an effective date which is later than the date of the occurrence of an Insolvency Event, then notwithstanding any designation of another date, all calculations may need to be made as of such date. To address this concern, some authors hold that the optional termination must be declared with retroactive effect as of the occurrence of the Insolvency Event. It is unclear, though, whether this truly means that the termination as such would need to have a retroactive effect as of such date, which seems a somewhat fictitious concept, or whether this is not rather meant to require a calculation of the single net amount as of such date, which would be sufficient to satisfy the rationale of equal treatment of creditors. We note in this respect that the Master Agreements may not accept the concept of a retroactive termination.

Certain authors further suggest that the calculation method set out by Art. 211 para. 2^{bis} 188
SDEBA is mandatory. Some authors consider that the calculation rules under the Statutory Close-out are applicable to contracts that provide for automatic early termination, but do not provide for close-out netting provisions. The mandatory nature of the statutory calculation method is more prominently discussed for optional early termination, but we consider it the majority view that the contractual calculation method should prevail subject to the limitations discussed under III.B.4.3 below. Some scholars come to this view even if they challenge the effectiveness of the optional termination as such because the relevant termination right has not

been exercised by (or with effect as per) the occurrence of an Insolvency Event.

(e) Optional Early Termination and Automatic Early Termination – Conclusions and recommendation to apply Automatic Early Termination

While optional early termination ("**Optional Early Termination**") is valid and binding on the Parties prior to an Insolvency, the effectiveness of Optional Early Termination is more questionable in case of the occurrence of an Insolvency Event. 189

In connection with the Step-in Right, we refer to the controversial discussion in legal doctrine on certain additional requirements in relation to the timing to give a termination notice and the proposed effective date of the termination and the further discussion on whether an intermediate exercise of the Step-in Right may overrule or limit the effectiveness of an optional termination. Also, we note that at least one author may suggest that the Step-in Right trumps optional termination which, however, is a singular view and has not been articulated very clearly (see the discussion under 180 et seq. and 186 et seq. above). 190

Further, the Statutory Close-out for Qualifying Contracts, if and to the extent viewed as mandatory for contract termination, could overrule the optional termination chosen by the Parties pursuant to their close-out netting provisions if such optional termination has not been exercised at the latest on (or with effect as per) the occurrence of the Insolvency Event. 191

Art. 27 para. 1 of the Banking Act gives in our view a strong argument to allow Optional Early Termination for Banks and Securities Firms, but there is to date no precedent or authoritative guidance that would support this view. 192

By contrast, it is largely uncontested, that Automatic Early Termination (as provided for in the Master Agreement) ("**Automatic Early Termination**") is valid and binding under Swiss law and would be upheld in an Insolvency. 193

In the light of the uncertainties discussed with respect to Optional Early Termination upon the occurrence of an Insolvency Events we strongly recommend to elect Automatic Early Termination rather than to provide for a short term period within which Optional Early Termination would need to be declared.[24] 194

The insolvency related Close-out Events contemplated by § 3.1(C) (III) of the MNA, for which the parties have as assumed for purposes of this memorandum of law (and as strongly recommended) elected Automatic Early Termination to apply, are in our view sufficiently broad to ascertain that the Automatic Early Termination applies prior to the declaration of a bankruptcy or the confirmation of a composition agreement with assignment of assets. We refer to our recommendation to clarify such provisions for Swiss law purposes as per Annex 195

[24] As mentioned above (see n. Footnote 19 there is one author that holds that close-out netting would be null and void where it violates equal treatment of creditors and under such circumstances also views a termination, be it optional or automatic, that facilitates such close-out netting, as null and void.

1.

In order to ascertain, that this is the case for all Underlying Agreements and Additional Netted Agreements/Uncovered Transactions, we recommend to add a Close-Out Event in the Agreements for both the MNA and the CPMA (as Insolvency Event) which is as broad as the respective provisions mentioned above and to apply Automatic Early Termination to such Insolvency Events. 196

(f) Applicability to Banks, Securities Firms and Special Insolvency Regime Swiss Branches

Although the Banking Act does not contain any specific rules regarding close-out netting in insolvency procedures and thus in this respect the general rules of the SDEBA should also be applicable to Banks, Securities Firms and Special Insolvency Regime Swiss Branches, Art. 27 para. 1 of the Banking Act clearly states that netting arrangements shall not be affected by protective measures, reorganization measures or a bankruptcy and consequently the Message clarifies in an even broader context that close-out netting arrangements are generally accepted and to be upheld (see paragraph III.B.3.6 above). In turn a termination and thereby the exercise of netting, private realization of collateral and porting rights could be subject to a stay ordered by FINMA pursuant to Art. 30a of the Banking Act and would take precedence (Art. 27 para. 2 of the Banking Act and in respect thereof see n.166 et seq.. With respect to a transfer of services and assets in the context of restructuring measures ordered against a Bank or a Securities Firm, Article 51 para. 1 lit. h BIO-FINMA requires that said transfer does not separate claims that are subject to netting arrangements. 197

4.3 Determination of Settlement Amounts, Net Set-off Amount and Final Net Settlement Amount

As outlined above, the close-out netting by means of calculating one Settlement Amount under each Closed-Out Agreements (as contemplated by Section 3 CPMA and § 8 of the MNA) constitutes a valid pre-agreed contractual liquidation of all Transactions under such Closed-Out Agreements. Such close-out netting would generally be upheld in an Insolvency. We refer, though, to the discussion of termination and close-out netting under paragraph III.B.4.1 above and the views expressed in legal doctrine as to the potential mandatory nature of the calculation of the liquidation amount under the rules on Statutory Close-out namely where termination of Qualifying Contracts does not otherwise occur at the latest on (or with effect as per) the date on which an Insolvency Event is being declared. 198

As mentioned above (see n. 66) the Close-out Netting Provisions are best analyzed as a comprehensive contractual set-off arrangement and, hence, as a close-out netting mechanism. This question, which eventually would have to be decided under English or German law as the law governing the Agreement, has, however, no impact in our view that the determination of a single lump-sum termination amount is generally enforceable following the occurrence of an Insolvency Event against the background of the discussion under paragraph III.B.4.1 above. 199

We further note in this respect that, pursuant to the SDEBA, the exercise of a set-off right remains possible post-insolvency. However, post-insolvency set-off is subject to the limitations of Art. 213 and 214 SDEBA (see n. 114 and n. 131 above). As a result, set-off is permissible only to the extent that the claims to be set-off have existed prior to the Insolvency and were mutual between the bankrupt party and the counterparty prior to the occurrence of an Insolvency Event or the grant of a moratorium (*Nachlassstundung*) and are of the same kind (as to the latter see n. 50 et seq. above). We have, for purposes of this memorandum of law, assumed the satisfaction of the above requirements and, in particular, that the claims are mutual (i.e. no intermediate assignment nor inclusion of affiliate claims) under applicable law. As a matter of Swiss substantive law, precedents of the Swiss Federal Supreme Court state that claims resulting from a contract termination are pre-existing claims and where contract termination is triggered by an event of Insolvency, Art. 213 and 214 SDEBA would not prevent set-off of claims resulting from such contract termination[25].

Moreover, any calculation and valuation to be made in the context of the close-out netting, which pursuant to the relevant terms has been made as of a date *after* the adjudication of bankruptcy or the confirmation of a composition agreement with assignment of assets is likely to be disregarded in case it proves to be to the detriment of the bankruptcy estate and adjusted for a calculation of such more favorable amount as of the date of the Insolvency Event. Other grounds for a (partial) rejection of the calculation contemplated under a close-out netting would be a unilateral waiver of claims deemed to apply to the claims of the bankruptcy estate resulting from close-out netting, the extension of indemnity or similar obligations to costs of representation in the Swiss Insolvency (which would be contrary to Art. 27 SDEBA) or the pre-agreed inflation of claims in Insolvency (see n. 150 above for similar concerns in this respect under applicable Swiss avoidance rules). 200

The Underlying Agreements and Additional Netted Agreements/Uncovered Transactions may provide for both physical and financial Transactions being entered into thereunder. 201

There are no specific rules on physically settled commodities transactions in the SDEBA. Hence, the general principles governing insolvency apply: With the declaration of bankruptcy, as a rule, all claims against the bankrupt become immediately due and payable (*fällig*). Claims which are not claims for a sum of money are converted into a claim for money of a corresponding value and translated into CHF at the exchange rate prevailing on the date of the adjudication of bankruptcy or the confirmation of a composition agreement with assignment of assets. We understand and have assumed, that under the Close-out Netting Provisions, all obligations that are not monetary obligations are replaced by monetary obligations with a view of liquidating all Transactions. 202

With respect to the Step-in Right and the Statutory Close-out we refer to the discussion under n. 174 et seq. above. Based thereon, we are of the view, that cross-category netting would be 203

[25] BGE 107 III 28.

recognized before and after an Insolvency (n. 71 and 174 et seq.). As discussed above under n. 184 et seq. we thereby assume that the Underlying Agreements and the Additional Netted Agreements/Uncovered Transactions all provide for a conversion of any non monetary claim into a monetary claim upon termination of the Underlying Agreements or the Additional Netted Agreements/Uncovered Transactions.

4.4 Currency of filing

Claims in a foreign currency against an insolvent party initially remain unaffected by the institution of Insolvency Proceedings. Foreign currency claims must, however, be converted into Swiss Francs in order to participate in the distribution of the liquidation proceeds, if any. A claim of the solvent party under a Master Agreement for a single lump-sum termination amount denominated in a currency other than Swiss Francs would thus only be enforceable in an Insolvency Proceeding if converted as of the date of the adjudication of bankruptcy (in case of a bankruptcy) or as of the confirmation of the composition agreement (in case of a composition agreement with assignment of assets). While a creditor is free to choose a currency rate provider (such as the Swiss National Bank), the bankruptcy liquidator may decide to apply a uniform rate of exchange to ensure equal treatment of creditors or to reduce a claim in case the rate applied by the creditor differs from the rates published by other market currency rate providers. 204

One could, therefore, argue, that for purposes of the calculation pursuant to Section 4 of the CPMA and § 8 of the MNA all amounts owed by the Insolvent would need to be converted into Swiss Francs as opposed to any other Base Currency, while the claims of the Insolvent estate would remain in the Base Currency. This notwithstanding, set-off would remain possible as claims denominated in different currencies are still viewed as being claims of the same kind if the currencies are fully convertible and, in case the agreement otherwise provides for effective payment in one currency, the parties have agreed that set-off should be possible irrespective of the currencies. We are of the view that Section 4 of the CPMA and § 8 of the MNA suffice to allow cross-currency set-off and would also remain binding upon an Insolvency. 205

We are, however, of the view that the agreed upon conversion provision would remain binding post Insolvency, and that only a net amount owed by the Insolvent as a Final Net Settlement Amount would eventually be subject to conversion into Swiss Francs. 206

4.5 Date

The calculations to be made under Section 3 of the CPMA and § 7 of the MNA may have to be made as of the date of the adjudication of bankruptcy or the confirmation of a composition agreement with assignment of assets in order to ascertain equal treatment of all creditors of the Insolvent. 207

4.6 Accrual of Interest

Unless a claim is secured by collateral, interest stops to accrue following the adjudication of bankruptcy or the grant of a moratorium. 208

Any interest element would, hence, under such premises be disallowed for purposes of calculating the Settlement Amounts, Net Set-off Amounts and Final Net Settlement Amount. 209

In case of secured claims, only an excess of the realization of the collateral over the principal amount may be applied against interest and any uncovered interest amount would be disregarded. 210

4.7 Close-out Netting after Insolvency – Conclusions

Close-out netting as referred to, or provided for under §2-4 of the CPMA as well as under § 5-8 of the MNA, is available after the adjudication of bankruptcy or the confirmation of a composition agreement with assignment of assets, provided that the calculation of the Settlement Amounts, the Net Set-off Amounts and the Final Net Settlement Amount may need to be made as of the date of the adjudication of bankruptcy or the confirmation of a composition agreement with assignment of assets and any fluctuation of amounts owed based on market or currency fluctuations to the detriment of the Insolvent would be disregarded as would any interest amount, which is not calculated in respect of a collateralized obligation or in excess of what is so secured by collateral. 211

In view of the uncertainties discussed with respect to Optional Early Termination and potential mandatory effects of the Statutory Close-out, we strongly recommend to elect Automatic Early Termination or not to disapply Automatic Early Termination as is assumed for purposes of this memorandum of law. 212

In the case of Banks and Securities Firms, the safeguards of Art. 27 Banking Act further support the enforceability of the Close-out Netting Provisions, subject only to the exception of a stay of termination rights ordered by FINMA under Art. 30a Banking Act. 213

A claim of the solvent party for a Final Net Settlement Amount denominated in a currency other than Swiss Frances would need to be converted into Swiss Francs as of the date of the adjudication of bankruptcy or the confirmation of the composition agreement with assignment of assets in an Insolvency Proceeding. 214

CPMA CSA / MNA CSA

1. Issues covered

Question 12: Would Party A (or its administrator, provisional liquidator, receiver, trustee or other similar official) be able to recover any transfer of Eligible Credit Support made to the transferee during a certain "suspect period" preceding the date of the insolvency that makes the recovery vulnerable to being treated as preferential or otherwise suspect (or other similar treatment) by such official and *therefore subject to avoidance. If such a "suspect period" exists, please give your opinion on whether the substitution of Eligible Credit Support by a counterparty during this period would invalidate an otherwise valid transfer, assuming that the exchanged assets are of no greater value than the assets that they are replacing. Please also include an analysis of the relevant time-period(s) surrounding the insolvency.*

Question 13 Would the transfer of additional Eligible Credit Support pursuant to the mark-to-market provisions of each CSA during any applicable "suspect period" described above be subject to avoidance, either because it will be considered to relate to an antecedent or pre-existing obligation or for some other reason.

Question 14: A general discussion of, and opinion regarding, whether or not the mere institution of proceedings seeking a judgment of insolvency and/or the opening of the proceedings has any implication on the enforceability or operation of each CSA.

Question 15: An analysis of local law issues surrounding the insolvency of a recipient of Eligible Credit Support, when the recipient of the Eligible Credit Support is an entity based in this jurisdiction, with the provider of the Eligible Credit Support being an entity based outside this jurisdiction. If title vests in the recipient because of an outright transfer of Eligible Credit Support, is there any way that a bankruptcy court in your jurisdiction can bolster or recharacterize the nature of the providing party's rights to that Eligible Credit Support. a. What rights does the providing party have against such an asset located in your local jurisdiction upon the insolvency of the recipient party? b. Are there other steps that the providing party should be taking to minimize its risk and best protect such an asset?

Question 16: An analysis of the rights and obligations of an insolvent party organized in your jurisdiction with respect to Eligible Credit Support held by a recipient party organized outside your jurisdiction. If title vests in the recipient because of an outright transfer of Eligible Credit Support, is there any way that a bankruptcy court in your jurisdiction can undermine or re-characterize the nature of the recipient's rights to that Eligible Credit Support?

2. CSAs after Insolvency

2.1 Transfer of Eligible Credit Support, Exchange of Eligible Credit Support

Following the adjudication of bankruptcy the debtor looses its right to dispose of its assets. 215
Hence, no Eligible Credit Support can be validly transferred by the Insolvent following such adjudication of a bankruptcy. The same holds true in case of the grant of a moratorium, unless specific consent is given for such grant of collateral and in both instances irrespective of any pre-existing obligation to grant or increase such collateral.

Hence, a Swiss Counterparty could not any longer transfer Eligible Credit Support under a 216
Credit Support Document, which as a result would also render an exchange of Eligible Credit Support impracticable.

While a Credit Support Document, assuming it and any Transaction for which collateralization 217
is sought has been entered into prior to the Swiss Counterparty being over-indebted and at arm's length condition, in our view constitutes a valid and pre-agreed undertaking to provide Eligible Credit Support could, hence, not be avoided on the basis of either avoidance of gifts and gratuitous transactions (Art. 286) or avoidance due to over-indebtedness (Art. 287), such transfer of Eligible Credit Support could under the qualified circumstances outlined above (see

n. 141 et seq.) become subject to avoidance for intent; though[26].

A substitution of Eligible Credit Support does not invalidate an otherwise valid transfer. However, a transfer originally made outside the suspect period could be deemed to be made at the moment of a substitution within the suspect period. If it of the same value as the substituted Eligible Credit Support, though, such substitution would not, however, in our view lead to damages to the other creditors. 218

The transfer of additional Eligible Credit Support pursuant to the mark-to-market provisions of the CSAs during the suspect period would not be subject to avoidance on the basis that it would be considered to relate to an antecedent or preexisting unsecured obligation in accordance with Art. 287 SDEBA (see n. 138 et seq.) as has been specifically stipulated in Art. 287 para. 3 sec. 2 SDEBA in respect of securities or financial instruments traded on a representative market. However, under the qualified circumstances discussed in respect of Art. 288 SDEBA (see n. 141 et seq.), such additional Eligible Credit Support could indeed become subject to avoidance in accordance with this provision[27]. 219

Collateral provided in the form of Cash by Party A to Party B would become the property of Party B and would not any longer be part of Party A's Insolvency estate. Party B would, hence, be free to allocate such Cash Collateral to its secured obligations, but would need to account for and remit any excess Collateral to the Insolvency estate of Party A. For the inclusion of Collateral in the form of Cash into the Close-out Netting, see below n. 222 et seq. 220

2.2 Rights of Party B where Party A is the transferee of Collateral transferred by Party B following Party A's Insolvency

Collateral in the form of Cash provided to Party A under a title transfer approach becomes the property of Party A and would be part of its Insolvency estate. Party B would have a claim for the return of any excess Cash collateral, provided that such claim constitutes an unsecured claim ranking pari passu with all other unsecured creditors of Party A in the third class. 221

CPMA combined with the CPMA CSA / MNA combined with the MNA CSA

3. Issues covered

Question 17: Would the rights of the transferee Party B of Eligible Credit Support be enforceable in accordance with the terms of: (i) the CPMA and the CPMA CSA; and (ii) the MNA and the MNA CSA, irrespective of the insolvency of the providing Party A.

[26] See also reference to the Federal Supreme Court decision 5A_892/2010 of August 22, 2011 c.4.4, in Footnote 15.

[27] See also reference to the Federal Supreme Court decision 5A_892/2010 of August 22, 2011 c.4.4, in Footnote 15.

4. Realization of Eligible Credit Support provided by Party A in case of its Insolvency – Inclusion of Eligible Credit Support in Final Net Settlement Amount

4.1 Cash

Inclusion of Eligible Credit Support in the close-out netting as provided for in § 11 of the 222
CPMA CSA, Sections 3 and 4 of the CPMA and § 12 of the CSA and § 7 and 8 of the MNA respectively (as discussed above in paragraph III.B.4 (*Netting / Set-off in the Context of an Insolvency*)) amounts to a private realization of such Eligible Credit Support.

Assuming that the transfer of Eligible Credit Support is not subject to avoidance as discussed 223
above (see n. 215-219 and by reference therein n. 134-151, and based on the assumptions made in respect of Cash, i.e. that such Cash is transferred by Party A to an account of Party B as Transferee and Party B thereby becoming the legal creditor of such Cash with its account bank, such Posted Credit Support could be realized by including it in the close-out netting as provided for in § 11 of the CPMA CSA, Sections 3 and 4 of the CPMA and § 12 of the CSA and § 7 and 8 of the MNA respectively as discussed above n. 174-214.

With respect to a requalification of Eligible Credit Support see above n. 84-86. As set-out 224
therein a likely qualification of the transfer as having been made for security purposes would not result in the requalification of the transfer of Cash into a mere limited in rem right under Swiss law. Hence the fact that the transfer has been made for security purposes would not alter the above analysis.

4.2 Letters of Credit

Also a drawing under a Letter of Credit would, subject to such Letter of Credit's terms and 225
conditions, be possible after an Insolvency Proceeding has been commenced against Party A.

4.3 Close-out Netting including Posted Credit Support - Conclusions

As discussed in paragraph III.B.4 (*Netting / Set-off in the Context of an Insolvency*) above the 226
close-out netting referred to and provided for under Sections 3 and 4 of the CPMA and § 7 and 8 of the MNA and the inclusion of Posted Credit Support in the form of Cash as provided for in § 11 of the CPMA CSA and § 12 of the CSA would in our view remain enforceable following an Insolvency of Party A.

C. Cross Affiliate Netting and Set-off

Cross-affiliate netting and set-off may constitute undertakings of one affiliate in favor of other 227
affiliates which prior to Insolvency Proceedings and would in the case of a Swiss Counterparty be subject to corporate law limitations. Cross-affiliate netting and set-off furthermore constitutes a waiver of the mutuality requirement for set-off. While such waiver is permissible prior to Insolvency Proceedings having commenced, such waiver would in our view and in line with what we see as the prevailing view in Swiss legal doctrine not be enforceable in case

of Insolvency Proceedings based on the mutuality requirements of Art. 213 and 214 SDEBA. Finally, in the absence of arm's length consideration the netting and set-off against assets of an Insolvent Swiss Counterparty may also be challenged by way of an avoidance action as a gratuitous act. In sum, we do not recommend including cross-affiliate netting and set-off arrangements into the Agreements.

D. Multibranch Parties

1. Questions covered

Question 1: Would there be any change in the conclusions expressed in paragraph III.B above concerning the enforceability of close-out netting under each Master Agreement and each Master Agreement combined with the relevant CSA (given the assumption in paragraph D.2 (i) below).

Question 2: Could separate proceedings be brought in this jurisdiction with respect to assets and liabilities of Swiss Branch or Swiss Special Insolvency Regime Branch in this jurisdiction of a counterparty organized or incorporated outside this jurisdiction upon the commencement of insolvency proceedings against the counterparty in that outside jurisdiction. How would the relevant authorities in this jurisdiction treat the proceedings in an outside jurisdiction by, for example, deferring to them so that the assets and liabilities of the branch would be treated as part of the proceedings against the counterparty. Please also include whether or not local creditors of the Swiss Branch or Swiss Special Insolvency Regime Branch would be able to initiate separate proceedings in this jurisdiction even if the relevant authorities did not do so.

Question 3: in the event that proceedings are brought in this jurisdiction with respect to the assets and liabilities of the Swiss Branch or Swiss Special Insolvency Regime Branch located in your jurisdiction, would the administrator, provisional liquidator, receiver, trustee or other similar official and/or the courts in your jurisdiction include the counterparty's position under its Underlying Agreements or underlying transactions among the assets of its branch and, if so, recognize their respective close-out and netting provisions in accordance with their terms (you may assume that the close-out netting provisions under the relevant Underlying Agreements or underlying transactions would be enforceable in the proceedings against the counterparty brought outside this jurisdiction.

2. Additional Assumption

Our memorandum of law is based on the following additional assumptions:

(i) For the purposes of addressing the multi-branch issues at paragraph III.D Question 1 above, we assume that a Swiss Counterparty may have one or more Underlying Agreements or Additional Netting Agreements/Uncovered Transactions that have been entered into by branches outside Switzerland ("**Foreign Branch**"); and 228

(ii) for the purposes of addressing the multi-branch issues at paragraph III.D Question 2 and III.D Question 3 above, we assume that a Swiss Branch or a Special Insolvency Regime Swiss Branch may have one or more Underlying Agreements or Additional Netting Agreements/Uncovered Transactions that have been entered into by a Swiss Branch or a Special Insolvency Regime Swiss Branch of a foreign Party ("**Party F**"). 229

3. Foreign Branch of Swiss Counterparty

Under Swiss substantive law, a branch of a Swiss Counterparty has no separate legal 230
personality, but is legally part of such Swiss Counterparty. The Swiss Counterparty is fully liable for all obligations of its branch and for purposes of set-off and netting, the obligations of the Swiss Counterparty and its branch are viewed as obligations of one and the same party (in particular for purposes of mutuality).

Assuming that this is the case also under the laws of the jurisdiction in which a Swiss 231
Counterparty has established a branch office through which it enters into Underlying Agreements or Additional Netting Agreements/Uncovered Transactions or a Transaction thereunder, our conclusions expressed herein in respect of the enforceability of close-out netting under the Master Agreements combined with the relevant CSAs remain unchanged.

A different question is whether the laws of such foreign jurisdiction recognize 232
multibranch close-out netting for purposes of insolvency proceedings in such foreign jurisdiction. This question is answered under Swiss conflict of laws rules by the applicable foreign law to which the PILA refers.

4. Swiss Branch/ Special Insolvency Regime Swiss Branch of foreign multibranch Party

4.1 Insolvency rules applicable to Swiss Branches and Swiss Special Insolvency Regime

Three proceedings are to be distinguished in connection with insolvency proceedings against Swiss Branches: (i) the branch insolvency (*Zweigniederlassungskonkurs*) pursuant to Art. 50 para. 1 SDEBA (see n. 156 below), (ii) the ancillary insolvency proceeding (*Hilfskonkurs*) pursuant to Art. 166 et seq. PILA (see n. 157 et seq. below) and (iii) the special Insolvency Proceedings applicable to Special Insolvency Regime Swiss Branches (see n. 161 below).

If a foreign debtor has a branch (*Zweigniederlassung*) in Switzerland, claims against this 233
debtor can, to the extent they are derived from the operations of such branch, be enforced directly at the place where the branch is located in a branch insolvency (*Zweigniederlassungskonkurs*) (Art. 50 para. 1 SDEBA). Note that Swiss substantive law determines whether an office established in Switzerland qualifies as a branch (*Zweigniederlassung*) within the meaning of Swiss law. Under Swiss substantive law, a branch is a commercial operation which pursues activities similar to those of the principal office on its own premises. It enjoys a certain degree of autonomy from, but is not a separate legal entity to, the principal office. Accordingly, under Swiss substantive law, branch employees with signatory rights also bind the principal office and, in turn, agreements entered into by the principal office in accordance with applicable law are binding also on the branch.

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Art. 166 et seq. PILA[28], on the other hand, provide for the so-called ancillary insolvency proceeding (*Hilfskonkurs*) pursuant to which a foreign bankruptcy decree is recognized in Switzerland, if (i) the decree has been issued in the state of incorporation of the debtor or in the state of debtor's main interest (COMI) provided that the debtor was not incorporated in Switzerland at the time of the opening of the foreign insolvency proceeding, (ii) it is enforceable in the state where it was rendered, and (iii) there is no ground to deny recognition based on formal and material principles of Swiss public policy (*ordre public*). The same conditions apply to the recognition of a foreign composition agreement (Art. 175 PILA).

If the above requirements are met, on application of the foreign receiver in bankruptcy or any creditor, the courts recognize the decree and subsequently the competent Swiss authorities open (based on the court's decision) ancillary bankruptcy proceedings regarding all assets located in Switzerland. Such ancillary insolvency proceedings are then governed by Swiss insolvency law (Art. 170 PILA), including the provisions on avoidance actions (Art. 285 et seq. SDEBA) or limitations on abusive set-off (Art. 213 and 214 SDEBA) as discussed herein (see n.72 above). 235

While any creditor can request the recognition of a foreign insolvency and the opening of an ancillary insolvency proceeding, once opened, only (i) secured creditors (foreign and Swiss) and only to the extent that the collateral forming part of the ancillary insolvency estate covers such claims, (ii) Swiss privileged creditors (claims ranking first and second pursuant to Art. 219 SDEBA), (iii) regular creditors with claims arising from liabilities entered into for the account of a branch of the debtor entered in the commercial register and (iv) the foreign receiver in bankruptcy may directly file claims in such ancillary insolvency proceeding (Art. 172 para. 1 and 2 PILA). If there is an excess, then such excess would be made available to the foreign receiver or the creditor having requested the recognition. The Swiss excess assets can, however, only be remitted if the plan establishing the recognition of filed claims in the foreign insolvency proceeding has been recognized by the competent Swiss court and such recognition can be denied if the Swiss court finds that the unprivileged Swiss creditors are not appropriately recognized. In such case, or if the plan is not timely submitted, the excess is used to satisfy the unprivileged Swiss creditors. As of January 1, 2019, the foreign receiver in bankruptcy may request not to open an ancillary insolvency proceeding if there are no creditors in Switzerland the claims of which are privileged or secured by a pledge and the claims of non-privileged and unsecured creditors in Switzerland are adequately taken into account in the foreign proceedings and such creditors were granted an opportunity to be heard. In such a case, the foreign receiver in bankruptcy may carry out all actions in Switzerland to which it is authorized pursuant to the applicable foreign law and which are in compliance with Swiss law, including e.g. the transfer of assets of a foreign debtor located in Switzerland to the foreign insolvency estate (Art. 174a PILA). 236

A branch insolvency can be opened after an ancillary insolvency proceeding has been declared, but only until the publication of the recognition of the foreign bankruptcy decree pursuant to Art. 169 PILA. If a branch insolvency has been opened before the ancillary insolvency proceeding and the 20-day deadline pursuant to Art. 250 SDEBA for filing a claim against the ranking of the creditors in a collocation plan (*Kollokationsplan*) after its publication has not yet expired, the branch insolvency would be closed and all the claims of the colocation plan (*Kollokationsplan*) transferred into the ancillary insolvency proceeding pursuant to Art. 172 PILA, but only in respect of the Swiss branch assets, while the other assets located in Switzerland would remain in the ancillary insolvency proceeding 237

If the Swiss branch is a Special Insolvency Regime Swiss Branch, the special rules discussed under n. 153 et seq. above are applicable. In this case, FINMA has supervisory authority over such Special Insolvency Regime Swiss Branches, has the power to appoint a liquidator to liquidate the assets attributable to the Swiss Branch and to supervise that liquidation proceeding. In this context, all assets of a Swiss branch are considered to form part of the assets attributable to the Swiss Branch. The Insolvency of the Swiss Branch does, hence, not, only include assets located in Switzerland, but also assets located abroad. Furthermore, Art. 37g of the Banking Act expressly provides that the FINMA is the competent authority for the recognition of foreign insolvency orders, or measures, which have been rendered abroad against foreign banks. In this context, the FINMA may be authorized to transfer assets attributable to the Swiss Branch to the foreign insolvency receiver, without implementing Swiss insolvency proceedings (see n. 172 above), provided that (a) claims which are privileged or covered by a pledge pursuant to Art. 219 SDEBA of creditors having their domiciles in Switzerland are equally treated in the context of the foreign bankruptcy proceedings and (b) the other claims of other creditors, who are resident in Switzerland, are duly considered in the context of those foreign insolvency proceedings. In case Insolvency Proceedings are conducted by FINMA over the assets of the Swiss Branch, then non Swiss resident and unpriviledged creditors are also accepted in the context of the collocation of the claims relating to the assets of the Swiss Branch. 238

4.2 Close-out Netting/Sett-of against Swiss Branch/Special Insolvency Regime Swiss Branch

Pursuant to Art. 160 PILA, Swiss substantive law determines whether a foreign party's establishment in Switzerland qualifies as a branch. 239

A branch constitutes a commercial operation, which while it has certain autonomy is legally part of the principal office. Any obligation subscribed for a Swiss branch by a signatory of such branch, hence, binds the principal office. 240

In turn the principal office is generally liable with the assets of its Swiss branch for all of its obligations. 241

Swiss law provides for three types of proceedings relevant in the context of insolvency proceedings against a Swiss branch (which under applicable Swiss law forms legally part of 242

Party F): (i) the branch insolvency (*Zweigniederlassungskonkurs*), (ii) the ancillary insolvency proceeding (*Hilfskonkurs*) and (iii) the special Insolvency Proceedings applicable to Special Insolvency Regime Swiss Branches (as more fully discussed above). In all scenarios, a Swiss receiver (respectively FINMA in case of a Special Insolvency Regime Swiss Branch) would be bound by the set-off and netting rights of the counterparty of the Swiss branch under the relevant Master Agreement, whether entered into on a multibranch basis or not. The ability of the counterparty to set-off its claims against the claim of the Swiss Branch or Special Insolvency Regime Swiss Branch would thus extinguish the latter's claim, provided the counterparty's claim exceeds such claim. Accordingly, there would be no asset of the Swiss branch available to the Swiss receiver after close-out netting under the Agreements entered into on a multibranch basis.

Furthermore, a Swiss court, or a Swiss receiver or liquidator (respectively FINMA in case of 243
a Special Insolvency Regime Swiss Branch), would be bound by the principles on which the Master Agreements are based as a matter of substantive law, including the "single agreement concept". We are thus of the opinion that a Swiss court would give effect to such "single agreement concept". We also note that this recognition would be in line with the principle of the universality which applies in the context of any Insolvency in Switzerland as well as based on the principle that, to the extent Art. 211 para. 2 SDEBA is of a mere procedural nature, a Swiss court or a liquidator or Swiss receiver (or FINMA in case of a Special Insolvency Regime Swiss Branch) would be bound by the contractual arrangements entered into by the parties prior to bankruptcy. In summary, separate Insolvency Proceedings with respect to the Swiss Branch or Swiss Bank Insolvency Regime Branch would not in our view adversely affect the multibranch close-out netting. We note, though, that there are to our knowledge no Swiss court precedents with respect to this very question.

E. Permutations CSAs

1. Issues covered and assumptions

In relation to each of the questions in paragraph III.D above, the assumption is that the providing party is a counterparty incorporated or otherwise organised in this jurisdiction. Would the answer be different, if at all, assuming instead that:

(i) The providing party is a Special Insolvency Regime Swiss Branch (Party A) of a bank organized outside this jurisdiction;

(ii) The providing party is neither incorporated nor otherwise organised in nor has a branch located in this jurisdiction, but has assets in this jurisdiction ("**Swiss Assets**");

(iii) None of the above applies to the providing party (that is, it has no connection with this jurisdiction), but the margin comprises cash in the lawful currency of this jurisdiction.

2. Party providing Eligible Credit Support is a Special Insolvency Regime Swiss Branch

Our responses under paragraph III.D remain unchanged where Party A is a Special Insolvency Regime Swiss Branch. 244

3. Swiss Insolvency based on Assets located in Switzerland

To the extent that the Swiss Assets would become subject to a Swiss Insolvency by means of an ancillary bankruptcy (*Hilfskonkurs*) (see n. 234 et seq.) our conclusions as to the effect of such Insolvency on the Agreements, to the extent relevant in case of Swiss Assets, would remain the same. 245

4. Cash provided as Eligible Credit Support is legal currency of this jurisdiction

Our responses under paragraph III.D remain unchanged where Eligible Credit Support in the form of Cash is denominated in the legal currency of Switzerland. 246

F. General Validity of each CPMA and each CSA and the Choice of Law and Jurisdiction

1. Issues Covered

Question 1: Given the above stated assumptions, are the: (i) CPMA and the CPMA CSA; and (ii) MNA and the MNA CSA legal, valid and binding under the laws of your jurisdiction?

Question 2. Are there any applicable limitations on the courts in your country with regard to upholding a choice of law and submission to jurisdiction

The Agreements are, as per the choice of law therein, governed by English or German law. 247
Such choice of law is a valid choice of law in accordance with Art. 116 PILA (see also n. 55 et seq. with respect to netting and n. 77 et seq. with respect to the CSAs and such laws would have to be applied by Swiss courts in respect of the Agreements. The application of the chosen law would be subject to Swiss public policy (*ordre public*) pursuant to Art. 17 and 18 PILA. We have not, however, identified any provisions on the face of the Agreements which we would view as contrary to Swiss public policy. To the extent that the Agreements are legal, valid, binding and enforceable under all laws applicable to such Agreements (other than Swiss law) and in particular English or German law as the law governing such Agreements, such Agreements would also be enforceable as a matter of Swiss law, as set out above subject to Swiss public policy.

The submission to the jurisdiction of the English courts or the courts of Frankfurt in the 248
Agreements when governed by German law if legal, valid, binding and enforceable under English and German law, respectively, would be recognized as a matter of Swiss law, subject to the discussion of jurisdiction for insolvency related proceedings (see n. 152).

G. Other Provisions

1. Questions covered

Question 1: Are there any other provisions of either the Master Agreement or either CSA that (a) need to be revised in order to be enforceable in this jurisdiction; or (b) the legal efficacy of which could be materially improved upon or optimized with different wording (given such provision's apparent intent)

No further provisions of the Agreements call for particular mention. 249

IV. Recent and Pending Developments

There are currently no pending developments in Swiss law that would be relevant to this memorandum of law. 250

V. Executive Summary

This executive summary highlights those issues identified in this memorandum of law which we, in our discretion, consider to be material in the context of the Agreements. It does not purport to be exhaustive and reading this executive summary is not a substitute for reading this memorandum of law in its entirety. The executive summary is in all respects subject to the in-depth discussion and the limitations as set out in this memorandum of law. 251

1. Insolvency and Early Termination

The insolvency proceedings to which a Swiss Counterparty would be subject in Switzerland are the debt enforcement and bankruptcy proceedings under the SDEBA and, in respect of Special Insolvency Regime Swiss Entities and Special Insolvency Regime Swiss Branches, the special proceedings which apply in these cases. 252

In our view a termination upon the occurrence of a Close-out Event is valid and binding notwithstanding the opening of insolvency procedures. We strongly recommend, however, to elect *Automatic Termination* in the Master Agreements (i.e. for the MNA we recommend not to elect to disapply Automatic Termination of § 6.1 in the Election Sheet) rather than to provide for a short term period within which an optional termination would need to be declared and to provide for a Close-out Event in the relevant Master Agreement which follows the broad insolvency triggers as contained in the Netted Agreements in order to ascertain an effective date no later than the adjudication of bankruptcy or the confirmation of a composition agreement with assignment of assets. For the MNA, and assuming that the Netted Agreements provide for automatic termination upon a broadly defined insolvency related Close-out Event, the election of the alternative § 3.1 (B) would meet this recommendation. Still in order to ascertain consistency and clarity we strongly recommend to elect alternative § 3.1 (C) and to 253 provide for automatic termination to apply to a Close-out Event pursuant to §3.1 (C)(III)[29].

The insolvency related Close-out Events are in our view broad enough to cover the Insolvency Proceedings as defined herein. Still we recommend to clarify the provisions by specifically making reference to certain Swiss insolvency proceedings (see recommendation in Annex 1). 254

2. Close-out Netting

We are of the view that as a matter of Swiss law, including Swiss bankruptcy and insolvency law, the Set-off and Close-out Netting Provisions in the Master Agreements in combination with § 11 of the CPMA CSA or § 12 of the CSA in respect of Eligible Credit Support are valid and binding and would be recognized before as well as after the commencement of Insolvency Proceedings against a Swiss Counterparty. 255

The netting of termination amounts in determining the Termination Amount and payment thereof by the defaulting party or by the non-defaulting party under the Close-out Netting Provisions is enforceable under Swiss law, irrespective of whether the terms of a Transaction provided for cash or physical settlement and irrespective of whether the terms of a Transaction provide for different categories of underlying assets (cross-category netting/set-off) prior to and after an Insolvency of the Swiss Counterparty, subject to the following limitations: 256

(a) A claim of the solvent party under the Agreement for a Termination Amount denominated in a currency other than Swiss Francs would need to be converted into Swiss Francs as of the date of the adjudication of bankruptcy (in case of bankruptcy) or as of the date of confirmation of the composition agreement (in case of a composition agreement with assignment of assets). 257

(b) The calculation of the Termination Amount may need to be made as of the date of the adjudication of bankruptcy or the confirmation of a composition agreement with assignment of assets and any fluctuation of amounts owed based on market or currency fluctuations to the detriment of the Insolvent thereafter would be disregarded as would any interest amount, which is not calculated in respect of a collateralized obligation or in excess of what is so secured by collateral. 258

(c) With respect to a Special Insolvency Regime Swiss Entity or a Swiss Special Insolvency Regime Swiss Branch, FINMA may pursuant to Art. 30 Banking Act order a stay of termination and thereby of netting and private realization of collateral or porting rights. 259

[29] There is no particular legal restriction on the deadline under 3C(III)(d), in line with other Master Agreements, a 30 days deadline would seem reasonable.

any other person, entity or corporation whatsoever and may not be disclosed to any other persons without EFET's and our prior written approval.

Yours sincerely

LENZ & STAEHELIN

Patrick Hünerwadel

Annex 1 - Certain drafting suggestions

Governing Law Clause for the CSAs:

"The Agreement, the creation and perfection of any security interest thereunder will be governed by and construed in accordance with [specify] law."

Clarification of insolvency related Close-out Events of §3.1(C)(III) of the MNA having regard to Swiss Insolvency Proceedings

"or in respect of an insolvency proceeding governed by Swiss law, (i) the filing for a request for a stay (Gesuch um Nachlassstundung and (ii) the filing by the respective entity of a request to be declared bankrupt (Antrag auf Konkurseröffnung), (iii) the grant of a stay (Gewährung der Nachlassstundung), (iv) the formal declaration of bankruptcy (Konkurseröffnung) or (v) where applicable, the withdrawal of its license and liquidation under (i) Article 66 of the Financial Institutions Act (SR 954.1) or Article 23quinquies of the Banking Act (SR 952.0) or (ii) Article 33 of the Banking Act (SR 952.0) (as such laws may be amended or re-enacted from time to time)."

Additional Close-out Event for Banks, Securities Firms and Special Insolvency Regime Swiss Branches:

*"in respect of a Swiss bank or a Swiss branch of a bank licensed under the Swiss Federal Act on Banks and Savings Banks (Bundesgesetz über die Banken und Sparkassen) (the "**Banking Act**") or a Swiss securities firm or Swiss branch of a securities firm licensed under the Financial Institution Act, it has imposed on it or with respect to it, by the Swiss Financial Market Supervisory Authority, (i) protective measures (Schutzmassnahmen) under Article 26 para. 1 lit. e, f, g or h of or other protective measures establishing a payment moratorium of general applicability or ordering the termination of its business operations or, (ii) restructuring procedures (Sanierungsverfahren) under Articles 28-32 of the Banking Act."*

Annex 2 ***EFET/IECA Schedule Template Default Elections:***

The model Master Agreements, upon which this memorandum of law has been based, will have the following characteristics:

1. Underlying Agreements:

CPMA: Division 1, Part I, Section A / MNA: Section 2.1, Part I of the Election Sheet – The Underlying Agreements selected shall be the GTMA, EFET Power Agreement (Version 2.1(a)/September 21, 2007), EFET Gas Agreement (Version 2.0(a), May 11, 2007), EECS Certificate Master Agreement (Version 1.0/14 December 2013), ISDA Master Agreement (either the 1992 or the 2002 versions). Each of the Underlying Agreements is governed by either English or German law save in respect of the ISDA Master Agreement which is governed by either English, New York, Irish or French law.

2. Uncovered Transactions / Additional Netted Agreements

CPMA: Division 1, Part I, Section C / MNA: Part III of the Election Sheet - Uncovered Transactions / Additional Netted Agreements are included but all such transactions will be long form confirmations incorporating, in substantially their original form, the terms and conditions of one of the Underlying Agreements identified above save that an Uncovered Transaction / Additional Netted Agreement shall also include confirmations incorporating the short term flat NBP 2015 trading terms and conditions which have not been amended and are therefore not subject to an NBP Master.

3. Close-Out Events

CPMA: Division 1, Part II, Section A / MNA: Section 3.1, Part 1 of the Election Sheet: - 'Close-Out Event' means any events that entitle close-out under the Underlying Agreements.

In respect of the CPMA all boxes shall be checked.

4. Excluded Events

CPMA: Division 1, Part II, Section B / MNA: Section 3.2, Part 1 of the Election Sheet: - 'Excluded Events' – the first three boxes will be checked.

5. Automatic Close-Out of Underlying Agreements

CPMA: Division 1, Part II, Section C / MNA: Section 3.2, Part 1 of the Election Sheet: – In respect of the CPMA, assume the box is checked and that the rewrite of this provision contained in the Schedule is operative. In respect of the MNA, assume the box is unchecked.

6. Additional Representations

CPMA: Division 1, Part III / MNA: Section12.1, Part 1 of the Election Sheet: - Additional Acknowledgements and Representations – none.

7. Governing Law

CPMA: Division 1, Part IV / MNA: Section 12.2, Part 1 of the Election Sheet: - Governing Law - English and German law applies, in the alternative.

8. Assignments

CPMA: Division 1, Part VII / MNA: Section 12.2, Part 1 of the Election Sheet: - Assignment. In respect of the CPMA, no election, Section 7 applies but is amended as set out at (a) and (b) of the Election Sheet.

9. Election MNA Section 12.5(A)

In respect of the MNA, Section12.5(A) shall be operative in respect of Party A and Party B.

10. Further Elections

	CPMA: Division 1,Part VIII	MNA: Election Sheet
Set-off of Final Net Settlement Amount	10.1	Section 10.1(A)
No Waiver	10.2	Automatically included (see Section 10.8 of the MNA)
Suspension	10.4	Section 10.1(B)
Automatic Early Termination &	10.5	Section 6.4
Adjustment for Bankruptcy		
Benefit of Credit Support	10.7	Section 9.1
Withholding Final Net Settlement Amount	10.8	No equivalent

11. CPMA: Division 1, Part X / MNA: Part II of the Election Sheet - no additional terms.