

SULLIVAN & CROMWELL LLP

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Via E-mail

MEMORANDUM TO: Scott Alvarez
(Board of Governors of the Federal Reserve System)

Amy Friend
(Office of the Comptroller of the Currency)

Richard Osterman
(Federal Deposit Insurance Corporation)

FROM: Michael M. Wiseman
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RE: Trade Finance Participations under Dodd-Frank Title VII

I. Introduction

On behalf of The Bankers Association for Finance and Trade (“BAFT”),¹ we are requesting the views of the staffs of the Board of Governors of the Federal Reserve System (the “*Federal Reserve*”), the Office of the Comptroller of the Currency (the “*OCC*”) and the Federal Deposit Insurance Corporation (the “*FDIC*”) and, together with the Federal Reserve and the OCC, the “*Banking Regulators*”)

¹ BAFT, which was formed by the merger of The Bankers Association for Finance and Trade and the International Financial Services Associates, is an international financial services trade association whose membership includes a broad range of financial institutions throughout the global community. As a worldwide forum for analysis, discussion and advocacy in international financial services, BAFT and its member banks provide leadership to build consensus in preserving the safe and efficient conduct of the financial system worldwide.

regarding interpretation of the statutory term “identified banking product” (or “*IBP*”).² Interpretation of this term could materially impact the extent to which the provisions of Title VII (“*Title VII*”) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“*Dodd-Frank*”) apply to participations (“*Participations*”) by commercial banks and other sophisticated market participants in a range of routine extensions of credit traditionally extended by banks to finance trade (“*Trade Finance Products*”).³

Specifically, we are concerned that broad implementation of Title VII may have the unintended effect of disrupting a stable, long-established bank trade finance participation market which bears little or no resemblance to the over-the-counter (“*OTC*”) derivatives market for which the Title VII regulatory regime was designed. Activities in the potentially affected market include transfers by customary participation arrangements of credit risks that are substantively similar to those associated with the sale of loan participations but which, because they involve specialized trade finance bank products that are “labeled” as something other than “loans”, do not fit neatly into the common analytical framework.

Dodd-Frank provides an exclusion (the “*IBP Exclusion*”) for IBPs from coverage under Title VII, which generally applies to swaps and security-based swaps (“*Title VII instruments*”).⁴ The fifth clause of the IBP definition includes “a participation

² Section 402(b) of the Legal Certainty for Bank Products Act of 2000 (the “*Bank Products Act*”) provides the relevant definition of “identified banking product.” This definition, and definitions of certain of its included terms are attached hereto as [Annex 1](#).

³ A list of Trade Finance Products is attached hereto as [Annex 2](#).

⁴ Dodd-Frank Section 725(g)(2) amended Section 403 of the Bank Products Act to exclude qualifying IBPs from coverage under the Commodity Exchange Act (the “*CEA*”), inclusion in the “security-based swap” and related definitions under the CEA and the Securities Exchange Act of 1934 (the “*Exchange Act*”), and regulation by the Commodity Futures Trading Commission (the “*CFTC*”) and the Securities and Exchange Commission (the “*SEC*”) under the CEA and the Exchange Act, respectively.

in a loan which the bank or an affiliate of the bank (other than a broker or dealer) funds, participates in, or owns,” and that is sold to a purchaser meeting specified criteria.

We have previously consulted with members of the staffs of the SEC and the CFTC with respect to Title VII instruments.⁵ Insofar as the scope of Title VII instruments is informed by the IBP definition, we believe that is an issue for determination by the Banking Regulators. Fundamentally, the market for Participations is an interbank market; we understand that the vast majority (estimated at 90-95%) of market participants are commercial banks.⁶ Furthermore, although we recognize that the fifth clause of the IBP definition allows for the sale of participations by banks and their affiliates to banks and a restricted set of highly sophisticated non-bank parties, the scope of our request is limited to transactions between banks.⁷ We therefore request confirmation that, for purposes of the fifth clause of the IBP definition, where both

Notwithstanding the foregoing, an IBP that would otherwise satisfy those definitions will not qualify for the IBP Exclusion if: (i) an appropriate Federal banking agency determines (in consultation with the CFTC and SEC) that the product has become “known to the trade as a swap or security-based swap” or was structured as an identified banking product for purposes of evading the CEO, the Exchange Act or the Securities Act of 1933 (the “*Securities Act*”); or (ii) if it is a product of a bank that is not under the regulatory jurisdiction of an appropriate Federal banking agency and either has become known in the trade as a swap or security-based swap or was structured as an identified banking product for purposes of evading the CEA, the Exchange Act or the Securities Act. Bank Products Act Sections 403(b), (c).

⁵ In August 2012, the SEC and CFTC issued a joint final rule release which, among other things, addressed the criteria for excluding certain types of customary commercial agreements and transactions, including qualifying loan participations, from treatment as Title VII instruments. 77 Fed. Reg. 48208 (Aug. 13, 2012) (the “*Joint Release*”), 48250-48252. During a November 19, 2013 teleconference, staff members of the CFTC and the SEC provided us and BAFT with informal guidance regarding the application of this portion of the Joint Release to Participations in Trade Finance Products.

⁶ Our understanding of the market in trade finance participations is based on feedback we have received from BAFT members, unless otherwise specified.

⁷ We have assumed for this purpose that there would be no different treatment of Participations executed with export credit agencies and multilateral development organizations (such as the Export-Import Bank of the United States, the International Finance Corporation, the Inter-American Development Bank, the Asian Development Bank and the European Bank for Reconstruction and Development) that have as their aim the promotion of international trade finance. Although these agencies and organizations may not possess traditional banking charters *per se*, they support their common missions through the conduct of customary banking activities.

parties are banks: (i) Participations in Trade Finance Products may be treated as participations in “loans”, and (ii) Unfunded Participations (defined below) in funded Trade Finance Products may be treated as “participations.” Not only do the Banking Regulators have the authority to provide this guidance, but the Banking Regulators are best positioned to evaluate the nature of the extensions of credit involved, their impact on bank safety and soundness, systemic impacts as well as the potential impact of the issues under Title VII identified in this memorandum on a segment of traditional bank lending activities which they have historically supervised.

II. MPA Participations as Traditional Bank Products

Trade Finance Products participated under BAFT’s forms of Master Participation Agreements (the “MPAs”)⁸ include conventional loans used for trade finance, but more often consist of bank credit extended in the form of documentary letters of credit, standby letters of credit, demand guarantees, bankers acceptances and the other Trade Finance Products identified on Annex 2, each arising out of or in connection with imports, exports, sales of goods or services, or similar trade-related transactions. Extensions of credit in the form of Participations in Trade Finance Products are substantially identical to those in the form of participations in traditional revolving loans (or commitments).

Like conventional revolving credit and term commitments and loans, Trade Finance Products involve: (i) advances of funds, or commitments to make such

⁸ BAFT has developed two forms of MPA: one governed by New York law (the “*New York MPA*,” attached hereto as Annex 3) and one governed by English law (the “*English MPA*,” attached hereto as Annex 4). Unless stated otherwise, a reference to the “MPA” refers to both the New York MPA and the English MPA. The primary substantive difference between the two MPAs is that the New York MPA supports true sale accounting treatment. The English MPA, which reflects market practice in England and other parts of the world, does not support true sale accounting treatment for Participations documented thereon.

advances, by a bank, (ii) to or for the benefit of a customer or third party (the “*Recourse Party*”) against which the originating bank has a right to reimbursement for the amount advanced, (iii) such reimbursement to include interest (or the economic equivalent of interest resulting from discounting of the credit), (iv) on demand or at a stated maturity or expiration “date certain.”⁹

In transactions documented under an MPA, the “Participant” acquires a participating interest in the claim of the Seller¹⁰ against the Recourse Party. The claim must generally be made by the Participant through the Seller.¹¹ The amount and timing of the Participant’s recovery is determined and limited by the amounts recovered and timing of recovery from the Recourse Party after the Seller funds the underlying Trade Finance Product. Under the MPAs, both parties to a Participation have not only the opportunity but the obligation to inform themselves of the range of credit risks posed by the underlying Trade Finance Product.¹² Furthermore, in the case of a Participation in a

⁹ There is variation among the types of and terms of Trade Finance Products for which Participations may be documented under the MPAs and the ways such products are treated by market participants. Our discussion in this Section II is intended to be sufficiently general to cover the attributes of the various products.

¹⁰ The nomenclature describing this party varies between the New York MPA and the English MPA. This memorandum uses “Seller” to reference the entity that sells or grants a Participation in an underlying Trade Finance Product.

¹¹ In limited circumstances, the MPAs provide a mechanism and limited right to assignment of the relevant percentage interest in the underlying credit or claim to the Participant, in which case the Participant obtains a claim directly against the Recourse Party.

¹² Each of the Seller and the Participant represents and warrants that “it will at all times make its own independent investigation and assessment of the financial condition, creditworthiness, status and affairs of the Recourse Parties and of other relevant factors for the assessment of the credit risk and that it has not relied on the other Party for the making of such assessment.” The Participant further represents and warrants that “it will have undertaken its own assessment of the [participated Trade Finance Product] (including as to its type and nature) and will have received sufficient information from the Seller in order to undertake such assessment.” *See* New York MPA Sections 18.2(a) and 18.4, English MPA Sections 19.2(a) and 19.4.

secured Trade Finance Product, each party would customarily conduct an assessment of the underlying collateral.

One type of Participation often sold under the MPAs is an unfunded participation in a funded Trade Finance Product (an “*Unfunded Participation*”).¹³ Although the underlying Trade Finance Product may be funded on one or more occasions by the Seller, an Unfunded Participation remains unfunded by the Participant unless or until a default by the Recourse Party occurs. Unfunded Participations are appropriately analyzed as the trade finance version of unfunded participations in syndicated loans.¹⁴ Unfunded Participations in Trade Finance Products and unfunded participations in syndicated loans, like their funded counterparts are both techniques for parties to manage capacity and credit exposure with respect to an underlying instrument, and allow the originating bank to share the risk of the underlying instrument with another bank.

The term “loan” is not defined for purposes of the IBP definition, and we are not aware of any relevant legislative history or interpretive guidance from the Banking Regulators regarding the scope of the term. Various types of Trade Finance Products traditionally offered by banks are referred to by labels that do not include the

¹³ We refer to Participations which are funded by the Participant as and when the Seller funds the underlying Trade Finance Product as “Funded Participations.”

¹⁴ Although an Unfunded Participation does not transfer a beneficial interest in the underlying Trade Finance Product to the Participant, the same is true, absent exercise of an elevation right, of common loan participations offered under the industry standard Loan Market Association (“*LMA*”) documentation (one of two major types of mainstream loan participations).

As discussed above at note 5, the Joint Release excludes certain loan participations, including “*LMA*-style participations” from treatment as Title VII instruments. In the Joint Release, the CFTC and SEC addressed commenters’ position that a loan participation “should not be required to be a ‘true participation’” to qualify for the exclusion “because *LMA*-style participations do not represent a beneficial ownership in the underlying loan or commitment such that they would be considered a true participation.” The CFTC and SEC stated that they “agree that a loan participation does not have to be a true participation in order for the loan participation to fall outside the swap and security-based swap definitions.” Joint Release at 48252.

word “loan.” However, mere “labels” should not trump substance. For example the Banking Regulators, the CFTC and the SEC collectively defined the term “loan” broadly, for purposes of implementing the Volcker Rule, as “any loan, lease, extension of credit, or secured or unsecured receivable that is not a security or derivative.”¹⁵ The term “participation” in the fifth clause of the IBP definition is likewise undefined, and the requirements of that clause do not specify whether, or to what extent, such participations must be funded.

Where a bank undertakes an assessment of a customer’s credit risk, determines to extend credit to that customer, and subsequently shares the credit exposure through banking industry standardized participation arrangements with other banks, the regulatory regime applicable to these common credit transactions should not differ depending on whether, for example, that credit is extended in the form of a short-term loan secured by a receivable or through a bankers acceptance facility. We urge the Banking Regulators to confirm that the fifth clause of the IBP definition includes

¹⁵ See Section __.2(s) of the final rule promulgated under Dodd-Frank Section 619 (the “*Volcker Rule*”). 79 Fed. Reg. 5536 (Jan. 31, 2014) (the “*Volcker Release*”), 5780. The Volcker Release definition of “loan” (as excluded from the “financial instruments” in which proprietary trading is prohibited, and in connection with loan securitization activities) reflects the legislative imperative in Section (g)(2) of the Volcker Rule. That language protected traditional bank loan activities, stating: “Nothing in this section shall be construed to limit or restrict to the ability of a banking entity...to sell or securitize loans in a manner otherwise permitted by law.”

We recognize that the Volcker Release definition of “loan” is not dispositive of the construction of the term “loan” for the IBP definition. We believe, however, that it is indicative of how the term should be interpreted in the context of customary banking activities. In discussing the rationale for the “loan” definition, the Volcker Release states that the prohibitions of the Volcker Rule “are not intended to interfere with traditional lending practices” and that the “loan” definition “encompasses the financial instruments that result from lending money to customers.” *Id.* at 5689. The preservation of traditional lending activities of commercial banks would also appropriately be applied to Trade Finance Products.

We also note that the carve-out of securities and derivatives from the “loan” definition in the Volcker Release would not impact our Trade Finance Product extensions of credit. Trade Finance Products are not securities, and the Volcker Release definition of “derivative” excludes IBPs. See Section __.2(h) of the final rule in the Volcker Release, *Id.* at 5780.

Participations (both Funded and Unfunded), sold by a bank to a bank, and bearing the characteristics described above.

III. Banking Regulators' Action Requested

Interpretive action from the Banking Regulators is requested to prevent uncertainty and, potentially, resulting interruption of current banking services caused by concern about the possible regulation of Participations in loan-like Trade Finance Products as Title VII instruments. Such a result would be bizarre; even the risk of such a result, however, could have a chilling effect on an important element of the trade finance market. The trade finance participation market considerably predates both Dodd-Frank and the growth of the OTC credit derivatives market, and the extent of the trade finance liquidity at stake is sizeable. For example, the International Trade and Forfaiting Association has advised us that 25 institutional members surveyed reported having executed 2,145 MPAs and, in the last full year alone, having participated \$137.3 billion (of which \$52.5 billion were Unfunded Participations) in volume.

Moreover, as noted below, Participations in loan-like Trade Finance Products that are negotiated, evaluated and approved by customary bank credit review and approval procedures and under guidelines that are administered by different personnel, and that involve different credit considerations, from those relevant to Title VII instruments do not implicate the policy concerns that were the intended focus of Title VII. In the absence of clarification, banks' efforts to comply with the requirements of Title VII will increase costs to trade credit providers, reduce risk diversification opportunities, create unnecessary impediments to effective oversight of banks' trade

finance exposures, and generate economic and operational inefficiencies, and could restrict the global availability of liquidity supporting trade finance.

A. Background and Administration of the Trade Finance Participation Market

Transactions in trade finance participations have been conducted for 20 to 30 years within an established, traditional bank product market (like the commercial loan participation market). The characteristics of the underlying trade credit transactions (generally short-term, efficient sources of financing for identifiable commercial transactions utilizing conventional transaction structures) have driven the development of relevant market practice.

Parties to participations in these trade credits have historically used correspondingly simple transaction documentation. Trade finance participations originally stemmed from participations in syndicated loans, and early trade finance participation documentation was often partially based on familiar loan participation documentation, adjusted to reflect trade finance-specific terminology and the nature of relevant trade flows (*i.e.*, short tenor, small transaction size and high volume). Certain market participants subsequently developed their own master documentation to streamline repeat transaction negotiations. This practice culminated in the development by BAFT, in concert with market participants, of the standardized MPAs.¹⁶ BAFT believes that the development of uniform agreement templates has and will continue to

¹⁶ To maximize the utility of the MPAs, their drafting allows for adaptation by parties, and are today likely used as a starting point for negotiation of most new master agreements (although individual transactions are still completed under non-uniform forms of master agreements that predated the release of the MPAs).

simplify the exchange of documentation, reduce legal costs, increase efficiency, drive market standards, improve transactional certainty and promote trade.

Although the market for and mechanics of Participation transactions are straightforward in certain respects, both buy-side and sell-side participants are highly sophisticated in all cases. As noted above, the market is nearly entirely composed of banks (estimated at 90-95% of market participants), and our request for interpretive guidance from the Banking Regulators is limited to transactions in which both Sellers and Participants are banks.¹⁷ Trade finance-related activities (including the origination of Trade Finance Products, the offer, sale and purchase of Participations, and the ongoing management of exposures) are usually confined to commercial banks' trade finance departments. The trade finance participations market concentrates on marketing bank risk or trade risk (where the Seller owns the underlying credit). Involvement in the trade finance market generally requires assessment by multiple parties of a broad array of trade finance-related risks.

Trade finance department personnel necessarily become specialists in the range of relevant transaction and product types, industries, assets, counterparties and standardized documentation. These specialists do not operate as traders, do not analyze or market Participations in a manner similar to swap trading, do not quote prices for Participations, and do not organize their operations like the operations of swap traders. At commercial banks, the mechanics of trade finance participation activities, and the approach to corresponding controls and recordkeeping, are far more similar to the

¹⁷ We note that even the small number of non-bank market participants are large, non-bank financial institutions of the kind that would typically invest in the bank loan market, and are knowledgeable regarding trade finance practices and risks.

practices of commercial loan desks than to those of derivatives operations.

Unsurprisingly, commercial banks' trade finance departments are often located within the same areas as commercial loan desks.

B. Prudential Considerations

The manner in which the above-described market for Trade Finance Products and Participations is conducted, according to long-established, logic-driven commercial practices, demonstrates why such operations have traditionally fallen within the ambit of the Banking Regulators' prudential oversight. Furthermore, the policy concerns that fueled the formulation of the Title VII regime—speculation, leverage, lack of market transparency, settlement risk and system risk—are not present, not present to a comparable degree, or are inapplicable to the trade finance market.¹⁸ Thus, there is no reason why the Banking Regulators, accustomed to oversight of traditional banking activities, should not continue to protect the integrity of this market.

The sale of Participations is not speculative in nature, but is rather a critical component of the business (and ability) of banks to extend credit based on the judicious application of underwriting criteria to circumstances presented. Each participated Trade Finance Product is unique and, as discussed above, both the Seller and Participant evaluate its attendant risks and the quality of any collateral, in the same way that that an originating bank and a potential syndicate member would evaluate any

¹⁸ Measures to encourage market uniformity and protect unsophisticated investors were also embedded in Title VII. As discussed in the previous section, these issues also have limited relevance to the market for Participations: the trade finance industry itself has prioritized documentary uniformity, and the market is *de facto* inaccessible to all but the most sophisticated parties.

commercial loan.¹⁹ Participations do not trade freely on a secondary market.

Additionally, because the tenor of a Participation matches the maturity of its underlying Trade Finance Product, Participations are essentially self-liquidating. Generally, Funded Participations are repaid, or contingent exposures under Unfunded Participations are terminated, upon the completion of the underlying trade transaction.

A Participation, by its terms, also limits leverage by preventing multiplication (via the Participation) of gains or losses on the underlying Trade Finance Product. Participations must be tied to actual underlying trade transactions, not “notional” or hypothetical products. The Seller must own the underlying asset and may not sell Participations under the MPA that exceed the face value of the underlying Trade Finance Product. The sale of a Participation does not provide additional financing exceeding the credit extended in the underlying credit. Participation transactions thus share the financing risk among the originating bank or Seller and one or more Participants, but do not allow for leverage.²⁰

Parties are not transacting in Participations for speculative purposes. Sellers and Participants are not trading in and out of their positions in Participations to benefit from changes in market prices or interest rates, or to hedge trading positions. Rather, Participations provide a crucial means of prudential risk distribution for

¹⁹ The MPAs also provide certain protections for both Sellers and Participants. For example, the MPAs limit the Seller’s ability to vary the terms of a participated Trade Finance Product, generally require the Seller to consult with the Participant in the event of a Recourse Party’s default, and provide that a Participant may require the Seller to assign to the Participant its *pro rata* interest in the underlying transaction under certain circumstances. *See* Sections 13.1, 7.2 and 7.4 of the MPAs.

²⁰ This remains true in the case of Unfunded Participations, in which the originating bank’s total credit exposure remains the same, even though the originating bank must evaluate its repayment risk as against both the Recourse Party and the Participant.

originating banks in managing a range of exposure types. Likewise, Participants benefit from opportunities for diversification.

Market participants should not be discouraged from engaging in such loan portfolio management in a market that is not unduly risky. Recent empirical data gathered and evaluated by the International Chamber of Commerce Banking Commission (the “ICC”) supports the position that trade and export finance “clearly demonstrate a low risk profile...as compared to other asset classes,”²¹ notwithstanding the range of risks inherent in the trade finance market.²² The ICC observes, with respect to short-term trade finance products as a class,²³ a “low default rate across all products”²⁴ and that “losses in the case of a default are relatively low.”²⁵

The market for Trade Finance Products and Participations does not require a market transparency model designed for the OTC derivatives market. In line with the commercial loan market generally, and as described above, parties document these transactions through one-off, bilateral contractual arrangements. In the case of OTC derivatives, market transparency supports the market pricing function, but Participations

²¹ International Chamber of Commerce Banking Commission, “The ICC Trade Register” (Report Summary, June 2014) (the “ICC Report Summary”), p. 36, available at: <http://www.iccwbo.org/Products-and-Services/Trade-facilitation/ICC-Trade-Register/>. The results highlighted in the ICC Report Summary “mainly focus on the year of 2012 and across the past five years.”

²² *Id.* at p. 17.

²³ The ICC Report Summary defines short-term products as “all instruments facilitating trade transactions with a maturity of typically less than one year and with a clear link to a specific trade transaction.” *Id.* at p. 18. The ICC also notes that the tenor of “most” short-term products is less than 180 days, while the maturities of standby letters of credit and guarantees may exceed one year. *Id.* at pp. 11, 18.

²⁴ The ICC stresses that this applied “both at the customer and transactional level, in fact only reaching one tenth of comparable Moody’s default rates, with the customer default rate being higher than the transaction default rates.” The ICC cites the latter point as “strongly reinforcing” its hypothesis of a “relatively low likelihood of default” for trade finance products specifically. *Id.* at p. 11 (emphasis added).

²⁵ *Id.* at p. 36.

do not trade primarily based on fluctuations of market prices. Additionally, the trade finance market (despite the presence of repeat market players) does not comprise a web of interdependent relationships. Because of the various characteristics of Participation transactions described above, a default under a Participation or an underlying Trade Finance Product would be unlikely to trigger further failures across the market.

Based on all of the factors discussed above, continued operation of the trade finance market, according to established principles and under the established supervision of the Banking Regulators, does not raise the specter of systemic risk to any significant degree. By contrast, however, the prospect of preventable disruptions to the efficient operation of the existing bank trade finance market could present unnecessary risks for both individual banks and for the market.

If the Banking Regulators do not provide the interpretive guidance requested in this memorandum, certain Participations may be inadvertently captured by the Title VII regulatory regime "because of a lack of clarity as to the structures captured by Title VII and the scope of the IBP Exclusion."²⁶ The result would be that, due to characteristics of such Participations which should not alter their eligibility for treatment as traditional banking products, they would nevertheless be subject to a variety of requirements intended for application to derivatives transactions, unlike other Participation structures serving a comparable purpose.²⁷ The market will be disrupted needlessly if commercial banks are required to implement divergent compliance

²⁶ Examples include if the term "loan" is not specified in the name of the Trade Finance Product being participated or if funding of the related Participation is not required until after an obligor default).

²⁷ For example, certain Participations would qualify for the IBP Exclusion as expressly defined, without the need for interpretive guidance requested in this memorandum. Other structures have been excluded from treatment as Title VII instruments under the provisions of the Joint Release.

infrastructure requirements for different artificial categories of what is essentially the same product.

As a practical matter, trade finance departments' technological infrastructure is not compatible with the platforms used to support global markets businesses such as swaps trading. There exists no operational or transactional justification to force the wholesale migration of straightforward trade finance activities to such platforms, and the build-out of such capabilities in banks' trade finance departments solely to support certain Participations is entirely unnecessary.

In the alternative, transferring the administrative and compliance responsibilities for affected Participations to existing derivatives trading divisions equipped with the relevant technology, with or without corresponding redeployment of trade finance personnel, would also be illogical. The distinctive knowledge base of trade finance specialists is not present in regular trading personnel and is critical to maintaining customer and counterparty confidence and preserving transaction efficiency in a high volume environment. With or without trade finance expertise, carving the administration of certain Participations out of trade finance operations would be ill-advised. Banks do not engage in Participation transactions for proprietary trading purposes, but rather as a crucial risk distribution mechanism supporting the origination flows of Trade Finance Products. Participations are embedded in the prudent oversight of banks' trade finance-related exposures. Isolating and relocating the administration of affected Participations would require a complex segmentation of complementary components of a currently well-functioning, integrated business, and would be antithetical to a comprehensive approach to trade finance risk management.

C. Feasibility of Market in the Absence of Banking Regulator Action

The trade finance market, like the syndicated loan market, is critical to facilitating global commerce, providing vital support to international import/export activities and ensuring that bank customers have sufficient liquidity to support their global operations. For both the prudential reasons described above in Section III.B and the practical considerations discussed below in this section, the potential for treatment of certain Participations as Title VII instruments could result in a contraction of the breadth and depth of the Participation market. This would necessarily reduce originating banks' appetites for risk that they cannot distribute, thus restricting the ability of banks to provide trade finance solutions to their customers and negatively impacting international trade flows.

As a result of factors including the generally short tenor, self-liquidating nature and attractive risk profile of Trade Finance Products,²⁸ trade finance transactions tend to be thinly priced. Given the narrow margins on which the trade finance market operates, it is improbable that market participants will be able to pass substantially increased compliance costs along to either customers for Trade Finance Products or purchasers of Participations.

Potential approaches to providing Title VII-compliant infrastructure for affected Participations could require entirely re-engineering trade finance departments' booking platforms, maintaining multiple sets of divergent compliance policies, developing trade finance expertise *de novo* in existing trading divisions and supporting redundant specialized trade risk distribution teams in multiple areas of a bank. As a

²⁸ See, e.g., the discussion in Section III.B above.

general matter, every one of these options imposes additional overhead costs on banks with no meaningful benefit to the vitality of the trade finance market or to the safety and soundness of its operations. More specifically, the limited returns realized by banks in the course of their routine trade finance operations would render such substantial expenditures disproportionate and increasingly difficult to justify. For some banks, there is a significant possibility that the most rational course would be to narrow or abandon the sale of any Participations that could implicate the Title VII regulatory regime, with the knock-on effect of either diminishing the availability of the Trade Finance Products underlying those Participations or leaving the originating banks with less diversified, larger exposures to the credit risks thereof.

IV. Conclusion

We are requesting clarification of the scope of the IBP definition in this memorandum to avoid the risk that at least some Participations currently distributed or purchased as a routine part of the trade finance activities of and between commercial banks could be captured by the Title VII regulatory regime. Affected Participations would need to be administered differently and separately from other bank products, despite their common resemblance to traditional loan products. This result will disrupt an existing, efficient, low-risk bank financing market, and with resulting adverse impacts on global trade finance liquidity.

The costs associated with implementing trade finance department technology or sustaining a redundant layer of administration to handle swap-oriented compliance obligations for affected Participations may also incentivize banks to push the risk management of trade finance that grows out of traditional commercial banking

relationships into their trading areas because those areas already have the expertise and systems required for Title VII-type compliance and reporting. However, this is an entirely counter-intuitive approach to the prudential oversight of trade finance, removing the management of exposures to credit and specialized assets from the bank departments best qualified and positioned to undertake these responsibilities.

Ultimately, the largely unrelated OTC derivatives market should not impose any additional cost, inefficiency or contraction, whatever the scale, on the trade finance market, because there will be no offsetting useful benefit in transparency or protection of banks participating in the market.

In this memorandum, we have described the loan-like characteristics of Participations, the similarities between banks' trade finance and commercial loan activities, the different extent to which the policy objectives underlying Title VII apply to the trade finance participation market, and the potential consequences of allowing an over-broad application of Title VII to interfere with a crucial source of global liquidity. In the interest of preserving the ability of banks to conduct an important segment of their credit function, we request confirmation from the Banking Regulators that, for purposes of the fifth clause of the IBP definition, where both parties are banks: (i) Participations in Trade Finance Products may be treated as participations in "loans"; and (ii) Unfunded Participations in funded Trade Finance Products may be treated as "participations."

* * *

We hope that the information provided herein is useful, and we look forward to discussing this memorandum with you at your convenience.

M.M.W.
E.D.L.
J.P.W.

(Annexes)

Definition of “identified banking product,” “bank” and “qualified investor”

Section 402(b) of the Bank Products Act defines “identified banking product” by reference to Section 206(a)(1)-(5) of the Gramm-Leach-Bliley Act as:

- (1) a deposit account, savings account, certificate of deposit, or other deposit instrument issued by a bank;
- (2) a banker’s acceptance;
- (3) a letter of credit issued or loan made by a bank;
- (4) a debit account at a bank arising from a credit card or similar arrangement;
- (5) a participation in a loan which the bank or an affiliate of the bank (other than a broker or dealer) funds, participates in, or owns that is sold—
 - (A) to qualified investors; or
 - (B) to other persons that—
 - (i) have the opportunity to review and assess any material information, including information regarding the borrower’s credit worthiness; and
 - (ii) based on such factors as financial sophistication, net worth, and knowledge and experience in financial matters, have the capability to evaluate the information available, as determined under generally applicable banking standards or guidelines.

Section 402(a) of the Bank Products Act defines “bank,” excluding internal cross references, as:

- (1) any depository institution;²⁹
- (2) any foreign bank³⁰ or branch or agency of a foreign bank;
- (3) any Federal or State credit union;
- (4) any corporation organized under section 25A of the Federal Reserve Act;
- (5) any corporation operating under section 25 of the Federal Reserve Act;

²⁹ “Depository institution” is defined to mean, in part, any national bank and state bank, and any federal branch and insured branch (including any former savings associations). 12 U.S.C. Section 1813(c).

³⁰ “Foreign bank” is defined as “any company organized under the laws of a foreign country... which engages in the business of banking, or any subsidiary or affiliate, organized under such laws, of any such company,” and explicitly includes, among others, foreign commercial banks. 12 U.S.C. Section 3101(7).

- (6) any trust company; or
- (7) any subsidiary of any entity described in paragraph (1) through (6) above, if the subsidiary is regulated as if the subsidiary were part of the entity and is not a broker or dealer or a futures commission merchant.

Section 402(b)(2) of the Bank Products Act provides that the term “qualified investor,” as used above, has the same meaning as “eligible contract participant” (as defined in Section 1a(12) of the CEA as in effect on December 21, 2000).

Trade Finance Products

1. letters of credit issued or confirmed by the participation seller, drafts accepted and deferred payment or negotiation obligations incurred by the participation seller under letters of credit;
2. confirmations or guarantees of letters of credit given at the request of the letter of credit beneficiaries;
3. purchases of claims by the participation seller under letters of credit, drafts accepted and deferred payment or negotiation obligations incurred by the participation seller under letters of credit;
4. refinancing of sight payments under letters of credit made by the participation seller;
5. discounts of drafts accepted and deferred payment or negotiation obligations under letters of credit or under bankers acceptances made by the participation seller;
6. bankers acceptances created by the participation seller;
7. bills of exchange and promissory notes purchased, avalised or accepted by the participation seller;
8. irrevocable reimbursement undertakings, letters of indemnity, guarantees or similar instruments issued by the participation seller;
9. advance payment guarantees issued by the participation seller;
10. performance and bid bonds issued by the participation seller;
11. letters of indemnity, guarantees or similar instruments issued by a recourse party in favor of the participation seller;
12. trade-related loans made by and trade-related accounts receivable purchased by the participation seller; and
13. any other transaction which involves (i) advances of funds, or commitments to make such advances, by a bank, (ii) to or for the benefit of a recourse party, (iii) with interest (or its economic equivalent resulting from discounting of the credit), (iv) on demand or at a stated maturity or expiration “date certain,” and (v) is otherwise substantively consistent with the characteristics discussed in Section II above.

Form of BAFT Master Participation Agreement Governed by New York Law

**MASTER PARTICIPATION AGREEMENT
FOR TRADE TRANSACTIONS**

Dated [Date]

Between

[Party A]

And

[Party B]

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This Master Participation Agreement for Trade Transactions (the “**Agreement**”) is made the [Day] day of [Month], [Year]

between:

- I. [Party A], a bank incorporated in [♦], [Head Office][Registered Office] at [♦]
and
- II. [Party B], a bank incorporated in [♦], [Head Office][Registered Office] at [♦]

Whereas:

If one Party (including any branch or affiliate thereof wherever located that signs an Offer under Clause 3), offers to the other Party a participation (on a funded or unfunded basis) in respect of a Transaction under Clause 3 and the other Party (including any branch or affiliate thereof wherever located that signs an acceptance under Clause 4) accepts such Offer under Clause 4, the provisions of this Agreement shall apply to the Parties with respect to any Participation Agreement on and after the date each Participation Agreement is concluded as provided in Clause 4, and such participation will represent the irrevocable transfer, sale and conveyance of an undivided 100% participation interest in and to the Settlement Portion of the Participated Transaction conveyed under the relevant Participation Agreement with effect, for each Settlement Portion conveyed, on and after the Settlement Date for such Settlement Portion (a “**Participation**”). The Party offering the Participation will be called the “**Seller**” and the Party taking the Participation will be called the “**Participant**”.

Now it is hereby agreed as follows:

1 DEFINITIONS

For the purpose of this Agreement and any Participation Agreement, the following words and expressions shall have the following meanings:

“**Acceptance**” means acceptance by the Participant of an Offer in accordance with Clause 4;

“**Additional Default Rate**” has the meaning given to it in Clause 9;

“**Applicable Interest Rate**” means the Federal Funds Rate or LIBOR or other interest rate that is specified in the relevant Offer;

“**Beneficiary**” means the person entitled to payment from the Seller under a Participated Transaction;

“**Business Day**” means a day (not being a Saturday or a Sunday) (a) on which the dealings in deposits in the Relevant Currency are carried on in the New York market or London Interbank Market or such other jurisdiction specified in the relevant Offer; and (b) on which banks are open for interbank transactions: (i) in [Place of Seller] and [Place of Participant]; and (ii) in the financial center of the Relevant Currency;

“**Chosen Courts**” has the meaning given to it in Clause 22.1[(b)/(f)];

“Clause” means any clause of this Agreement;

“Credit Amount” means, in relation to a Participated Transaction, the aggregate principal amount of the Seller’s exposure to the Recourse Parties, as specified in the relevant Participation Agreement;

“Default” means:

- (a) any non-receipt of monies due to the Seller by the Recourse Parties at the Due Date under a Participated Transaction; and
- (b) the Seller receiving monies from the Recourse Parties under a Participated Transaction which it is subsequently required to return to a Recourse Party or any third party by operation of mandatory rules of law;

“Defaulted Amount” means:

- (a) a sum due to the Seller by the Recourse Parties under a Participated Transaction which has not been received by the Seller; and
- (b) a sum received by the Seller from the Recourse Parties under a Participated Transaction which the Seller is subsequently required to return to a Recourse Party or any third party by operation of mandatory rules of law together with all interest payable by the Seller to a Recourse Party or any third party in connection therewith;

“Demand Waiting Period” has the meaning given to it in Clause 6.1.2.

“Domestic Participant”, if Clause 10.1 is applicable, shall have the meaning given to it in Clause 1 of Appendix IV;

[**“Disputing Party”** has the meaning given to it in Clause 22.1(b);]

“Due Date” means any date on which payment to the Seller by the Recourse Parties is due under a Participated Transaction;

“Federal Funds Rate” means, for any date, the weighted average (rounded upwards, if necessary, to the next 1/100 of 1%) of the rates set by the Federal Reserve Bank of New York on overnight federal funds transactions with members of the Federal Reserve System arranged by federal funds brokers, as published on the next succeeding Business Day in The Wall Street Journal (Eastern Edition), or, if such rate is not so published for any day that is a Business Day, the average (rounded upwards, if necessary, to the next 1/100 of 1%) of the quotations for such day for such transactions received by the Parties from three federal funds brokers of recognized standing selected by the Parties. For a day that is not a Business Day, the Federal Funds Rate shall be the rate applicable to federal funds transactions on the immediately preceding day for which such rate is reported;

“Foreign Participant”, if Clause 10.1 is applicable, shall have the meaning given to it in Clause 1 of Appendix IV;

“Funded Participation” means a Participation that is either fully funded by the Participant when the Participation Agreement is entered into or that, due to the nature of the Participated Transaction, may be fully or partially funded at a later date pursuant to Clause 6.2.2, and in all cases under which the Seller may make one or more demands for payment upon the Participant pursuant to Clause 10.5;

“Interim Measures” has the meaning given it in Clause 22.1(b);]

“ISP” means International Standby Practices, ICC Publication No 590 and any subsequent revisions thereof;

“LIBOR” means, in relation to any period for which an interest rate is to be determined, the British Bankers' Association Interest Settlement Rate (where such is available for the Relevant Currency and period) appearing at or about 11:00 hours a.m. London time on the relevant Reuters screen page(s), or if the service ceases to be available, the Party claiming interest may specify another determination of the appropriate rate (acting reasonably after consultation with the other Party);

“Offer” means an offer made by the Seller to the Participant in accordance with Clause 3;

“Participation” has the meaning given it in the recital.

“Participated Transaction” means the Transaction in which the Participant accepted a participation in accordance with Clause 4;

“Participation Agreement” means the agreement between the Seller and the Participant on the terms of the Offer, Acceptance and this Agreement (together with any amendments which the Seller and Participant may agree in writing from time to time) in respect of a Participated Transaction;

“Participation Amount” means, in relation to a Participated Transaction, the aggregate principal amount assumed by the Participant in respect of such Participated Transaction as specified in the relevant Participation Agreement (but, for the avoidance of doubt, not including any costs or expenses for which the Participant is expressly liable under the terms of this Agreement);

“Participation Percentage” means, in respect of a Participated Transaction, the proportion that the Participation Amount bears to the Credit Amount (expressed as a percentage figure);

“Participation Portion” means:

- (a) in relation to an Unfunded Participation, the amount equal to the Participation Percentage of the Defaulted Amount;
- (b) in relation to a Funded Participation, in aggregate, the amount equal to the Participation Percentage of the Credit Amount, less any amounts previously repaid by the Seller to the Participant pursuant to Clauses 6.2.1 and 8.4 (but not

less any commissions or fees paid by the Seller to the Participant pursuant to Clauses 8.1 and 8.3);

“**Party**” means a party to this Agreement;

“**Recourse Parties**” means the persons to whom the Seller has recourse in respect of a Participated Transaction, as specified in the relevant Offer;

“**Relevant Currency**” means the currency in which the relevant Transaction is denominated, as specified in the relevant Offer;

“**Request**” has the meaning given to it in Clause 6.2.2;

“**Requested Amount**” has the meaning given to it in Clause 6.2.2;

“**Retention Share**” means the percentage of the Credit Amount of the Participated Transaction retained by the Seller at its own risk;

[“**Servicing Fee**” shall be a fee payable by the Participant to the Seller for administration of the relevant Participated Transaction, as specified in the relevant Offer; provided, that for the avoidance of doubt, such Servicing Fee shall rank *pari passu* in all respects with other payments to be made hereunder;]

“**Settlement Date**” shall mean, (i) with respect to a Funded Participation that has been fully funded by the Participant on the date upon which the Participation Agreement is concluded, the date upon which the Participation Agreement is concluded, (ii) with respect to a Funded Participation that has not been fully funded by the Participant when the Participation Agreement is entered into due to the nature of the Participated Transaction, but which is thereafter partially or fully funded by the Participant pursuant to Clauses 6.2.2 and 6.2.3, each date upon which a Requested Amount is received by the Seller, and (iii) with respect to an Unfunded Participation, each date upon which Seller receives payment from the Participant pursuant to Clauses 6.1.1 and 6.1.2 upon a Default.

“**Settlement Portion**” shall mean, (i) with respect to a Funded Participation that has been fully funded by the Participant on the date upon which the Participation Agreement is concluded, 100% of the portion of the Participated Transaction conveyed to the Participant under the relevant Participation Agreement, (ii) with respect to a Funded Participation that has not been fully funded by the Participant when the Participation Agreement is entered into due to the nature of the Participated Transaction, but which is later partially or fully funded by the Participant pursuant to Clauses 6.2.2 and 6.2.3, the portion of the Participated Transaction that is equal to the relevant Requested Amount divided by the Credit Amount, and (iii) with respect to an Unfunded Participation, the relevant Participation Portion.

“**Transaction**” means any of the transactions specified in Clause 2;

“**Transaction Documents**” means the documents which set out the material terms of the relevant Transaction;

“**UCP**” means the Uniform Customs and Practice for Documentary Credits published by the International Chamber of Commerce currently in effect or to which a specific documentary credit is made subject; and

“**Unfunded Participation**” means a Participation that remains unfunded by the Participant until the Seller makes one or more demands for payment upon the Participant pursuant to Clause 6.1.2 or Clause 10.5.

2 TRANSACTIONS

Each Party may from time to time desire to offer and the other Party to this Agreement may desire to accept and adopt Unfunded Participations and/or Funded Participations in the following Transactions:

- 2.1 letters of credit issued or confirmed by the Seller, drafts accepted and deferred payment or negotiation obligations incurred by the Seller under letters of credit;
- 2.2 confirmations or guarantees of letters of credit given at the request of the Beneficiary;
- 2.3 purchases of claims by the Seller under letters of credit, drafts accepted and deferred payment or negotiation obligations incurred by the Seller under letters of credit;
- 2.4 refinancing of sight payments under letters of credit made by the Seller;
- 2.5 discounts of drafts accepted and deferred payment or negotiation obligations under letters of credit or under banker’s acceptances made by the Seller;
- 2.6 bankers acceptances created by the Seller;
- 2.7 bills of exchange and promissory notes purchased, avalised or accepted by the Seller;
- 2.8 irrevocable reimbursement undertakings, letters of indemnity, guarantees or similar instruments issued by the Seller;
- 2.9 advance payment guarantees issued by the Seller;
- 2.10 performance and bid bonds issued by the Seller;
- 2.11 letters of indemnity, guarantees or similar instruments issued by a Recourse Party in favor of the Seller;
- 2.12 trade-related loans made by the Seller; and
- 2.13 any other transaction the Seller and the Participant may agree upon.

3 OFFER

- 3.1 If the Seller wishes to offer the Participant a participation in a Transaction it shall send to the Participant an Offer in accordance with Clause 19 and substantially in the form specified in Appendix I.
- 3.2 Subject to Clause 14.3, if the Participant so requests, the Seller will use reasonable efforts to promptly provide to the Participant a copy of the Transaction Documents prior to the expiry date set out in the Offer.
- 3.3 If either the Seller or Participant is acting through one of its branches, that branch will be identified in the Offer or the Acceptance, as applicable.

4 ACCEPTANCE

- 4.1 Subject to Clauses 4.3 and 4.4, a Participation Agreement shall be concluded upon the Seller receiving the Participant's Acceptance to the Offer in accordance with Clause 19 and substantially in the form set out in Appendix I.
- 4.2 Upon conclusion of a Participation Agreement, the terms of the Offer (together with such amendments as may have been agreed in writing by each Party) shall, together with the terms of this Agreement, constitute the Participation Agreement.
- 4.3 Any purported modifications to the terms of the Offer by the Participant, including, without limitation, the substitution of a branch or affiliate of the recipient of the Offer as the "Participant" if such branch or affiliate was not initially named by the Seller as the intended Participant, shall not constitute an Acceptance unless accepted in writing by the Seller within two Business Days of receipt of such proposed modifications (and the expiry date set out in the Offer shall be disregarded in this respect). If the Seller has not expressly accepted the suggested modifications within such period, the Offer shall become void and no Participation Agreement will be concluded.
- 4.4 If the Participant has not accepted an Offer before the expiry date set out in the Offer, the Offer shall lapse and no purported Acceptance by the Participant of such Offer after such date will be effective.
- 4.5 The Participant is under no obligation to accept any Offer.

5 CONFLICT OF TERMS

In the event of discrepancy or inconsistency between the agreed terms of the Offer and Acceptance and the terms of this Agreement, the terms of the Offer and Acceptance will prevail.

6 PARTICIPATIONS AND FUNDING

- 6.1 In relation to Unfunded Participations:

- 6.1.1 Following a Default of the type specified in clause (a) of the definition thereof, the Participant irrevocably and unconditionally undertakes to pay to the Seller, irrespective of any objections or exceptions, within [two] Business Days of the Seller's first written demand (as specified in Clause 6.1.2), which shall be sent by the Seller promptly following such Default, an amount equal to the relevant Participation Portion, including default interest (at the rate specified in Clause 9 or the rate payable by the relevant Recourse Party to the Seller, if higher) from the date of the Default until payment is received from the Participant.
 - 6.1.2 Each demand for payment to be delivered by the Seller to the Participant under Clause 6.1.1 must be in the form specified in Appendix II hereto, which may be delivered either immediately following the relevant Default or following such waiting period as may be specified in the relevant Offer (the "**Demand Waiting Period**").
 - 6.1.3 Subject to Clause 10.6, payment by the Participant of the Participation Portion shall be in the Relevant Currency.
 - 6.1.4 In the event that the Credit Amount under a Participated Transaction is reduced, the Participation Amount in respect of such Participated Transaction shall decrease by the Participation Percentage of such reduction and the Seller shall promptly inform the Participant of any such reduction.
- 6.2 In relation to Funded Participations:
- 6.2.1 Provided that the Participant has funded the relevant Funded Participation to the extent required pursuant to this Agreement, whenever the Seller applies an amount received under such Funded Participation towards a payment of principal or interest (including default interest) that relates to the relevant Participated Transaction, the Seller shall promptly pay to the Participant the relevant Participation Percentage of that amount [less the Servicing Fee, if any]; provided that the Participant's Participation Percentage of interest payments received will be appropriately adjusted to reflect the period of time during which the Participation has been outstanding; and provided further that if the Participant's Participation in a Participated Transaction does not cover all extensions of credit in the Participated Transaction, the Seller may use its sole discretion (except as may be contemplated in the Transaction Documents) in funding, applying payments or otherwise dealing with the Participated Transaction as compared to such other extensions of credit in the Participated Transaction.
 - 6.2.2 If a Funded Participation has not been fully funded by the Participant when the Participation Agreement is entered into due to the nature of the Participated Transaction (including, without limitation, where the relevant Participated Transaction was not fully funded by the Seller upon its inception) and a request or demand for payment is duly made

by the Beneficiary upon the Seller under the relevant Participated Transaction (a “**Request**”, with the sum demanded from the Seller being the “**Requested Amount**”), the Seller shall thereupon be entitled to demand that the Participant pay to the Seller the relevant Participation Percentage of the Requested Amount. The Participant irrevocably and unconditionally undertakes to pay such sum to the Seller, irrespective of any objections or exceptions and without regard to the existence of any event or occurrence that might entitle the Seller to decline to pay or honor any such demand for payment, within [two] Business Days of the Seller’s first written demand.

6.2.3 Each demand for payment by the Seller under Clause 6.2.2 must be in the form specified in Appendix III.

6.2.4 Subject to Clause 10.6, payment by the Participant to the Seller of its Participation Percentage of any Requested Amount shall be in the Relevant Currency.

6.3 Subject to Clause 14.3, following the Seller’s demand for payment under Clause 6.1.2 or Clause 6.2.2, at the Participant’s reasonable request the Seller will use reasonable efforts to promptly provide to the Participant certified copies of the Transaction Documents (other than those (if any) already supplied by the Seller to the Participant) and any relevant demand for payment served by the Seller upon a Recourse Party. For the avoidance of doubt, failure by the Seller to provide such documentation will not affect the Participant’s obligations under the relevant Participation Agreement.

7 DEFAULT UNDER THE PARTICIPATED TRANSACTION

7.1 Subject to the other provisions of this Clause 7 and to Clause 13.1, the Seller may take or refrain from taking any steps the Seller sees fit (subject to the requirements of Clause 17.1) in enforcing the obligations relating to a Participated Transaction and/or recovering all sums due to the Seller from the Recourse Parties under a Participated Transaction and may rely on the professional advice provided by counsel, independent public accountants and experts as provided in Clause 17.1.

7.2 Following a Default and provided that the Participant is in compliance with its payment obligations under this Agreement, prior to taking or refraining from taking any steps contemplated by Clause 7.1 the Seller shall consult in good faith with the Participant for a reasonable period to reach agreement with the Participant as to what steps (if any) to take or refrain from taking to obtain repayment or reimbursement of a Defaulted Amount from the Recourse Parties under the Participated Transaction. Subject to Clause 7.4, the obligation of the Seller to consult with the Participant under this paragraph shall not apply if the Seller determines that its interests or the interests of the Participant under the Participated Transaction would be prejudiced or adversely affected by the time taken to conduct such consultation.

- 7.3 The Participant agrees to indemnify the Seller on demand for the relevant Participation Percentage of all expenses (including all legal expenses), costs, losses and claims incurred in connection with the exercise or enforcement of any rights in connection with a Participated Transaction or the protection or preservation of any security therefor which have not been reimbursed by the Recourse Parties[, except to the extent such expenses result from the Seller's gross negligence or wilful misconduct. Such reimbursable expenses may include without limitation court costs, collection charges, outside attorneys' and accountants' fees and disbursements, expenses of special examinations and audits, and other out-of-pocket expenses. If any Recourse Party or any stockholder or partner thereof or any receiver, trustee in bankruptcy or other party threatens or commences any action or makes any claim against or demand on the Seller at any time, because of any alleged usurious, ultra vires or invalid transaction or any alleged voidable preferential or fraudulent transfer or asserts any other action, claim or demand in connection with the Participated Transaction or Transaction Documents or any security therefor, then any monies paid in satisfaction or compromise of such action, claim or demand (including but not limited to interest or damages) and any outside attorneys' fees and disbursements and other out-of-pocket expenses incurred or sustained in connection therewith shall also be reimbursable expenses under this Clause 7.3 and shall be shared pro rata in accordance with Participant's Participation Percentage as of the date that any such expenses are incurred or sustained].
- 7.4 If agreement cannot be reached as to what steps (if any) are to be taken or refrained from being taken following a Default in accordance with Clause 7.2 and the Seller desires to take steps that would include one or more of the actions listed in Clause 13.1, the Seller will, if so requested by the Participant and provided that the Participant has complied with its payment obligations under this Agreement, use reasonable efforts to assign to the Participant at the Participant's cost, the Participation Percentage of:
- 7.4.1 the Seller's claims, titles, rights and interests against the Recourse Parties in respect of the relevant Defaulted Amount under the relevant Participated Transaction to the extent that the same is capable of assignment; or (at the Participant's option)
- 7.4.2 the Seller's claims, titles, rights and interests related to the Participated Transaction (with the exception of any security), to the extent that the same is capable of assignment.
- 7.5 If the Participant does not opt for assignment under Clause 7.4 or the Seller is unable to effect the assignment in accordance with Clause 7.4 the Seller shall administer and continue to collect at the expense of the Participant the portion of reimbursement that corresponds with the Participation Percentage of the Defaulted Amount, at all times acting as the Seller sees fit, provided, that if the Participant has opted for assignment under Clause 7.4 but the Seller is unable to effect the assignment in accordance with Clause 7.4, the Seller will act in accordance with the Participant's instructions with respect to the Participant's participated amounts, to the extent permitted by law, as though none of the

actions listed in Clause 13.1 had been taken, as long as the Seller has received reasonably satisfactory indemnification from the Participant for following such instructions (subject, in all cases under this Clause 7.5, to the requirements of Clause 17.1).

- 7.6 In any case and if for any reason the Participant receives direct payment from any Recourse Party in relation to the Participated Transaction, the Participant shall be entitled to retain the Participation Percentage thereof and shall pay to the Seller the balance of such amount within five Business Days after such receipt [plus the Servicing Fee, if any, that would otherwise have been retained by the Seller with respect to such Participation Percentage].

8 COMMISSION, FEES AND RECOVERIES

- 8.1 Subject to Clause 8.5 and to the Participant complying with its payment obligations under this Agreement, the Seller undertakes to pay to the Participant commission and fees as set out in the relevant Offer on a per annum basis on the Participation Percentage of the relevant Participated Transaction from time to time for the period from the start date of the relevant Participation Agreement until the earlier of (a) the final Due Date, (b) the date the relevant Participation Agreement is terminated or (c) the date the relevant Participated Transaction is terminated, in each case adjusted to reflect the duration and quantum of the Participant's exposure.
- 8.2 Payments of commissions pursuant to Clause 8.1 shall be made on the day that is [three] Business Days following:
- 8.2.1 each Due Date; and
 - 8.2.2 the earlier of (a) the date the relevant Participation Agreement is terminated and (b) the date the relevant Participated Transaction is terminated.
- 8.3 If so stated in the Offer and subject to the Participant complying with its payment obligations in respect of Participations, the Seller undertakes to pay to the Participant an up-front fee, in the amount stated in the Offer, payable promptly following the conclusion of the relevant Participation Agreement[; for the avoidance of doubt, such payments include the payment by the Seller to the Participant of its of its Participation Percentage of any upfront fee paid by any Beneficiary or Recourse Party, if specified in the relevant Offer].
- 8.4 Subject to Clause 8.5 and to the Participant complying with its payment obligations under this Agreement, the Seller shall promptly pay the Participant the relevant Participation Percentage of all sums recovered (including, without limitation, through payment by or on behalf of a Recourse Party, a Recourse Party's receiver, liquidator or other insolvency officer, or through the exercise of any rights of set-off) [less the Servicing Fee, if any].
- 8.5 For the avoidance of doubt:

- 8.5.1 The Seller shall not be obligated to pay to the Participant its Participation Percentage [(less the Servicing Fee, if any)] of any payment expected to be received from a Beneficiary or a Recourse Party (or other person described under Clause 8.4) pursuant to the relevant Participated Transaction unless and until such payment is received by the Seller;
- 8.5.2 [The Seller shall not be obligated to pay to the Participant commission and fees pursuant to Clauses 8.1 and 8.2 on any date specified in Clause 8.2 to the extent such commission and fees correspond to any Defaulted Amount with respect to such date (provided that any commission and fees not paid pursuant to this Clause 8.5.2 shall be paid by the Seller to the Participant promptly upon actual recovery of such Defaulted Amount by the Seller); and
- 8.5.3 The Seller shall not be obligated to pay to the Participant commission and fees pursuant to Clauses 8.1 and 8.2 on a date specified in Clause 8.2.2(a) to the extent such commission and fees correspond to any amount not yet due from a Recourse Party (provided that any commission and fees not paid pursuant to this Clause 8.5.3 shall be paid by the Seller to the Participant promptly upon the receipt by the Seller of such amount from such Recourse Party).]

9 DEFAULT INTEREST

In the event that either Party defaults on the payment of any sum due hereunder, interest shall accrue on the amount in respect of which such default has been made from the date of the default until payment (after as well as before judgment) at the Applicable Interest Rate plus any “**Additional Default Rate**”, if any is specified in the relevant Offer, per annum calculated on a day-to-day basis from the due date for payment until payment is received from the relevant Party.

10 TAX AND PAYMENTS

- 10.1 In the event that the Participated Transaction involves payment of fees or interest to a Participant that is sourced from the United States, the provisions of Appendix IV shall apply in addition to any other applicable provisions of Clause 10.
- 10.2 All payments by the Seller under this Agreement shall be made net of any deduction or withholding required to be made from such payments by any law or regulation (including pursuant to Appendix IV, if applicable). If any such deduction or withholding is made, the Participant shall bear the risk of such deduction or withholding and shall for the purposes of this Agreement be deemed to have received the amount that it would have received if such deduction or withholding had not been made.
- 10.3 All payments by the Participant under this Agreement shall be made free and clear of any deduction or withholding unless such deduction or withholding is required to be made by any law, regulation or practice. If any such deduction or withholding is made or is required to be made the Participant shall increase the

amount to be paid to the Seller to ensure that the Seller receives and retains a sum equal to the sum which it would have received and so retained had no such deduction or withholding been made or required to be made.

- 10.4 The Seller and the Participant shall each use their reasonable efforts to avoid any such deduction or withholding as is referred to in Clauses 10.2 and 10.3 [(without obligation to incur costs unless the other Party has agreed to reimburse such costs)].
- 10.5 If at any time the Seller pays an amount to the Participant [(including commission and fees pursuant to Clauses 8.1 and 8.2)] and (a) the Seller had not actually received the related amount under the Participated Transaction or (b) the Seller is required to return such related amount to a Recourse Party or any third party by operation of mandatory rules of law, then the Participant shall on demand refund the same to the Seller together with interest on that amount from the date of payment to the date of receipt by the Seller, calculated at the Applicable Interest Rate, or the rate payable by the Seller to the relevant Recourse Party, if higher.
- 10.6 Certain Payments:
- 10.6.1 Each payment under this Agreement will be made in the Relevant Currency. To the extent permitted by applicable law, any obligation to make payment under this Agreement in the Relevant Currency will not be discharged or satisfied by any tender in any currency other than the Relevant Currency, except to the extent such tender results in the actual receipt by the Party to which payment is owed, acting in good faith and using [commercially reasonable] procedures in converting the currency so tendered into the Relevant Currency, of the full amount in the Relevant Currency of all amounts payable in respect of this Agreement. If for any reason the amount in the Relevant Currency so received falls short of the amount in the Relevant Currency payable in respect of this Agreement, the Party required to make the payment will, to the extent permitted by applicable law, immediately pay such additional amount in the Relevant Currency as may be necessary to compensate for the shortfall. If for any reason the amount in the Relevant Currency so received exceeds the amount in the Relevant Currency payable in respect of this Agreement, the Party receiving the payment will refund promptly the amount of such excess.
- 10.6.2 To the extent permitted by applicable law, if any judgment or order expressed in a currency other than the Relevant Currency is rendered (a) for the payment of any amount owing in respect of this Agreement, (b) for the payment of any amount relating to any early termination in respect of this Agreement or (iii) in respect of a judgment or order of another court or tribunal for the payment of any amount described in sub-clause (a) or (b) above, the Party seeking recovery, after recovery in full of the aggregate amount to which such Party is entitled pursuant to the judgment or order, will be entitled to receive immediately from the

other Party the amount of any shortfall of the Relevant Currency received by such Party as a consequence of sums paid in such other currency and will refund promptly to the other Party any excess of the Relevant Currency received by such Party as a consequence of sums paid in such other currency if such shortfall or such excess arises or results from any variation between the rate of exchange at which the Relevant Currency is converted into the currency of the judgment or order for the purpose of such judgment or order and the rate of exchange at which such Party is able, acting in good faith and using [commercially reasonable] procedures in converting the currency received into the Relevant Currency, to purchase the Relevant Currency with the amount of the currency of the judgment or order actually received by such Party.

- 10.6.3 To the extent permitted by applicable law, the amounts payable in this Clause 10.6 constitute separate and independent obligations from the other obligations in this Agreement, will be enforceable as separate and independent causes of action, will apply notwithstanding any indulgence granted by the Party to which any payment is owed and will not be affected by judgment being obtained or claim or proof being made for any other sums payable in respect of this Agreement.
- 10.6.4 For the purpose of this Clause 10.6, it will be sufficient for a Party to demonstrate that it would have suffered a loss had an actual exchange or purchase been made.

11 FRAUD RISK

If it is determined that any Recourse Parties had no obligation to reimburse the Seller due to the occurrence of fraud in the underlying transaction or related documentation (including, without limitation, any documentation examined in accordance with Clause 14.1) then the Participant shall continue to be liable for the relevant Participation Portion (in the case of a Participated Transaction not fully funded by the Seller upon its inception, to the extent such Participated Transaction was subsequently funded by the Seller) notwithstanding that that Recourse Party had no such obligation.

12 INFORMATION

- 12.1 The Seller shall, within a reasonable timeframe, notify the Participant of any Default or dispute under the Participated Transaction, which in the reasonable opinion of the Seller has had or may have a material adverse effect on the likelihood of the Recourse Parties paying any amounts due under the relevant Participated Transaction.
- 12.2 The Seller shall, within a reasonable timeframe, notify the Participant of the expiry, fulfilment or non-fulfilment of each material liability or obligation relating to the Participated Transaction (including, without limitation, in the case of letters of credit: presentations of documents, due dates for payment and dates of drawings).

- 12.3 Any failure by the Seller to comply with the terms of this Clause 12 will not affect the Participant's obligations under the relevant Participation Agreement.
- 12.4 Except for information expressly required to be furnished to the Participant hereunder, the Seller shall not have any duty or responsibility to provide the Participant with any credit or other information concerning the affairs, financial condition or business of any Recourse Party or any other information regarding any Participated Transaction or any matter related thereto which may come into the possession of the Seller or any of its affiliates.

13 VARIATION OF TRANSACTION

13.1 The Seller shall not without the prior written consent of the Participant (without prejudice to the rights of the Participant under Clause 7), take any action that would result in:

- (a) any extension of the date for payment by a Recourse Party in respect of any Participated Transaction;
- (b) any reduction in the liability of any Recourse Party or in the release of any security in respect of any Participated Transaction;
- (c) any material change in the goods or change of country of any named port(s) in respect of any Participated Transaction;
- (d) any change in the currency in respect of any Participated Transaction;
- (e) any reduction of any amount in respect of interest or commission related to a Participated Transaction, which would affect the amount of interest or commission due to the Participant from the Seller.

13.2 The Seller may without the prior consent of the Participant (without prejudice to the rights of the Participant under Clause 7), take any action that would result in:

- (a) any increase in the Credit Amount; or
- (b) any extension in the date of validity or extension of the expiry date (but not an extension of the date for payment by a Recourse Party in respect of any Participated Transaction),

provided that (i) such action does not affect the rights or obligations of the Participant under the Participation Agreement; and (ii) the Participation Amount in respect of the relevant Participation Agreement shall not change and the Participant shall have no liability in respect of any payment made or liability incurred by the Seller after the original date of validity or expiry date.

13.3 In cases where the Participant does not agree to any such action where its consent is required, the Seller will, if so requested by the Participant and provided that the Participant has complied with its payment obligations under this Agreement, use efforts consistent with the standard set forth in the second

sentence of Clause 17.1 to assign to the Participant at the Participant's cost, the Participation Percentage of:

- (a) The Seller's claims, titles, rights and interests against the Recourse Parties under the relevant Participated Transaction to the extent that the same is capable of assignment; or (at the Participant's option)
- (b) The Seller's claims, titles, rights and interests related to the Participated Transaction (with the exception of any security), to the extent that the same is capable of assignment.

13.4 If the Participant does not opt for assignment under Clause 13.3 or the Seller is unable to effect the assignment in accordance with Clause 13.3 the Seller shall administer and continue to collect at the expense of the Participant the portion of reimbursement that corresponds with the Participation Percentage of the Defaulted Amount, at all times acting as the Seller sees fit, provided, that if the Participant has opted for assignment under Clause 13.3 but the Seller is unable to effect the assignment in accordance with Clause 13.3, the Seller will act in accordance with the Participant's instructions with respect to the Participant's participated amounts, to the extent permitted by law, as though none of the actions listed in Clause 13.1 had been taken, as long as the Seller has received reasonably satisfactory indemnification from the Participant for following such instructions (subject, in all cases under this Clause 13.4, to the requirements of Clause 17.1).

14 DOCUMENTARY EXAMINATIONS

- 14.1 The examination of any documents submitted by the Beneficiary or a Recourse Party in respect of a Participated Transaction is the sole and full responsibility of the Seller and shall not be affected by any delegation by the Seller.
- 14.2 In respect of Participated Transactions, the Seller shall exercise such care and attention in relation to the presentation and form of documents with respect to a Participated Transaction as would a bank acting in accordance with UCP or ISP (if applicable) or otherwise as is in accordance with established market practice in the relevant financial center for Transactions of a similar nature.
- 14.3 The Participant shall have no right to examine drawing documents presented under any letter of credit. If a dispute arises as to the Seller's performance under a letter of credit (including without limitation a dispute as to whether drawing documents complied with the terms and conditions of the letter of credit), and the Beneficiary or Recourse Party does not reimburse the Seller in full for a drawing thereunder, the Seller shall not be obligated to repay to the Participant any amounts funded by the Participant in connection with such drawing unless and until a court of competent jurisdiction renders a final determination that, as a result of such failure to perform, the Seller is not entitled to be reimbursed by the Beneficiary or Recourse Party, in which case the Seller shall return to the Participant the amounts so funded, together with interest thereon at the Applicable Interest Rate [plus one per cent per annum calculated on a day-to-day

basis] accruing from the date such amounts were funded until the date of actual reimbursement.

15 CONFIDENTIALITY

15.1 Subject to Clause 15.2 and unless otherwise agreed in writing by the Parties: (a) the Participant shall not without prior written consent of the Seller, disclose the Participated Transaction (unless the Participated Transaction is expressly undertaken on a “disclosed” basis) or any offered Participation or any other information relating thereto or to the Participated Transaction to any Recourse Party or to any third party; and (b) the Seller and the Participant agree that they will treat this Agreement and any information supplied in connection herewith as being confidential (but, for the avoidance of doubt, each Party is permitted to disclose such information to its affiliates, directors, officers, employees and professional advisers who have a need to know the information and who are made aware of the obligations of confidentiality under this Clause 15). The duty of confidentiality arising from this Agreement continues to apply in full even after the relevant Participation Agreement has been terminated but will expire two years following such termination.

15.2 The provisions of Clause 15.1 do not apply to any information which:

- (a) is or comes into the public domain otherwise than by breach of this Agreement;
- (b) is required to be disclosed in compliance with any applicable law, rule, regulation or order from a court of competent jurisdiction;
- (c) is required or requested to be disclosed to any public authority or governmental body or regulatory body having jurisdiction over the conduct of (as applicable) the Seller’s or Participant’s business and/or affairs;
- (d) is disclosed by any Party to its legal advisers or auditors (but in that capacity only) provided that such persons are bound by professional obligations of confidentiality; and
- (e) is disclosed to any potential assignee, transferee or sub-participant provided that the Party intending to disclose any such information to any person shall only disclose such information to the extent necessary for the relevant person to decide whether or not to enter into the assignment, transfer or sub-participation and otherwise to effect the assignment, transfer or sub-participation and upon the terms that all information so disclosed shall be kept confidential by that recipient.

16 ASSIGNABILITY

16.1 The Participant may not assign or transfer any of its rights or obligations under this Agreement or under any Participation Agreement without the prior written consent of the Seller. Such consent may not be unreasonably withheld or delayed.

- 16.2 Unless expressly stated to the contrary in the Participation Agreement, the Participant may enter into sub-participations with third parties in respect of Participation Agreements without the consent of, and without giving notice to, the Seller; provided, however, that (a) such sub-participation shall comply with any applicable requirements in the Transaction Documents and shall not violate any applicable laws, rules or regulation, including any applicable securities laws, rules or regulations, (b) notwithstanding any such sub-participation, unless the Seller otherwise consents in writing [(which consent the Seller shall not unreasonably withhold or delay)], (i) the Participant's obligations to the Seller under this Agreement or any relevant Participation Agreement shall remain in full force and effect until fully paid, performed, and satisfied, and (ii) the Seller shall continue to deal solely and directly with the Participant in connection with the Participant's obligations under this Agreement and any Participation Agreement hereunder.
- 16.3 The Seller may not assign or transfer any of its rights or obligations under this Agreement or under any Participation Agreement without the prior written consent of the Participant. Such consent may not be unreasonably withheld or delayed.
- 16.4 The Seller may not enter into any transaction that purports to pledge, exchange or otherwise dispose of the Seller's claims, titles, rights or interest in the portion of the Participated Transaction subject to the relevant Participation Agreement without the prior written consent of the Participant.

17 ADDITIONAL DUTIES OF THE SELLER

- 17.1 The Seller (i) shall have no duties or liabilities except those expressly set forth in this Agreement and shall have no fiduciary obligations to the Participant; (ii) may consult with counsel, independent public accountants and experts selected by it (including counsel for any Beneficiary or Recourse Party) and any advice or opinion of such professional shall be full and complete authorization and protection in respect of any action taken, suffered or omitted by the Seller hereunder in good faith and in accordance with such advice or opinion; and (iii) may employ agents, attorneys-in-fact and correspondent banks and shall not be responsible for the negligence or misconduct of any such persons selected by it in good faith. Subject to the foregoing and except as otherwise specifically provided in this Agreement, the Seller shall administer and manage the Participated Transaction, the Transaction Documents and its conduct pursuant to any provision of Clause 7 in the ordinary course of its business and with the same degree of care which the Seller normally exercises in administering and managing assets with respect to which no participations are sold, and the Seller shall not, in the absence of gross negligence or willful misconduct by it, be under any liability to the Participant with respect to anything which it may do or refrain from doing which the Seller determines is necessary or desirable.
- 17.2 Subject to Clause 16.4, the Seller may enter into assignments or other participations with third parties in respect of Participated Transactions provided that the Seller retains the Retention Share stipulated in the relevant Offer (if any) and the Seller's claims, titles, rights or interest in the portion of the Participated

Transaction subject to the relevant Participation Agreement. If no Retention Share is stipulated in the relevant Offer, then the Seller shall not be obliged to retain any Retention Share in that Participated Transaction.

- 17.3 The Seller may rely upon, and will incur no liability in taking or omitting to take action upon, any notification, instruction, consent or other communication from the Participant which the Seller believes to be genuine and correct or to have been signed, sent or made by a proper person or persons, and the Seller will have no further obligation to verify or inquire into any matters pertaining thereto.
- 17.4 The Seller may accept deposits from, make loans or otherwise extend credit to, and generally engage in any kind of banking or trust business with, the Recourse Parties and receive payments on such loans or extensions of credit and otherwise act with respect thereto freely and without accountability to the Participant in the same manner as if this Participation Agreement and the transactions contemplated herein were not in effect. The Participant shall have no interest in any other credit or any security for any Recourse Party's obligations other than any security specifically granted to the Seller in connection with the Participated Transaction.

18 REPRESENTATIONS AND WARRANTIES

- 18.1 Each Participation purchased by the Participant hereunder will be without recourse to the Seller and for the Participant's own account and risk. Without prejudice to the Seller's duties under Clause 14 [and Clause 17.1], the Seller makes no representation or warranty as to, and shall have no responsibility for: the due authorization, execution or delivery by any Recourse Party, Beneficiary or other person or entity of any Transaction Documents; the legality, validity, genuineness, effectiveness, value, sufficiency, enforceability or collectability of the relevant Transaction or of any document related thereto; the title to, the value of, or the validity, perfection or priority of any security interest in, any collateral or other support for any Participated Transaction or any drafts or other documents presented in connection with drawings under any letter of credit; any recital, statement, representation, certification or warranty made by, or any information provided by, any Recourse Party, Beneficiary or other person or entity; the performance or observance by any Recourse Party, Beneficiary or other person or entity of the provisions of any Transaction Documents; any failure by any Recourse Party, Beneficiary or other person or entity to obtain any required governmental approvals; the financial condition of any Recourse Party, Beneficiary or other person or entity; or (except as otherwise expressly provided herein) any other matter relating to any Recourse Party, Beneficiary or other person or entity, any Participated Transaction, the related Transaction Documents, or any collateral or other support therefor.
- 18.2 Each Party represents and warrants to the other that:
- (a) it will at all times make its own independent investigation and assessment of the financial condition, creditworthiness, status and affairs of the Recourse Parties and of other relevant factors for the assessment of the

credit risk and that it has not relied on the other Party for the making of such assessment; and;

- (b) this Agreement and any Participation Agreement concluded hereunder constitute and will constitute its legally valid and binding obligations enforceable against it in accordance with their respective terms

The representations and warranties set out in Clauses 18.1 and 18.2 shall be deemed repeated as at the date each Participation Agreement is concluded.

- 18.3 In respect of each Participation, the Seller represents and warrants to the Participant that, to the best of its knowledge as at the date the relevant Participation Agreement is concluded, it will be the sole legal and beneficial owner of and have good title to the Seller's claims, titles, rights or interest in the portion of the Participated Transaction subject to the relevant Participation Agreement, free from any lien, security interest or other encumbrance, any purchase or option agreement or arrangement, or any agreement to create or effect any of the same. The representations and warranties set out in this Clause 18.3 shall be deemed repeated as at the date the relevant Participation Agreement is concluded, and as at each Settlement Date thereunder.
- 18.4 In respect of each Participation, the Participant represents and warrants to the Seller that as at the date the relevant Participation Agreement is concluded, it will have undertaken its own assessment of the Participated Transaction (including as to its type and nature) and will have received sufficient information from the Seller in order to undertake such assessment. The representations and warranties set out in this Clause 18.4 shall be deemed repeated as at the date the relevant Participation Agreement is concluded.

19 COMMUNICATION

- 19.1 The Parties agree that the Seller may send information related to a Transaction via e-mail prior to sending the final Offer to the Participant. The Participant is entitled to assume that all the information received by the Seller via e-mail is from an authorised individual. However, regarding the conclusion of a Participation Agreement, Clause 4 shall apply.
- 19.2 The Parties confirm that they are aware of the fact that information by way of electronic exchange such as e-mail or facsimile is transmitted unencrypted over a publicly accessible network, and each acknowledges all associated risks.
- 19.3 Except as otherwise provided herein, notices under this Agreement shall be in writing and must be sent by courier, prepaid registered mail, signed facsimile or by authenticated SWIFT message to the address specified by the Parties below. Each Party shall provide written notice to the other Party of a change of address, which shall become effective five calendar days after such notice is received.

Notice details for [Party A] :

[Address]
Attention: [◆]
Telephone: [◆]
Attention:
Telephone:
Fax:
Swift:
eMail:

Notice details for [Party B]:

[Address]
Attention: [◆]
Telephone: [◆]
Fax: [◆]
Swift: [◆]
eMail:

- 19.4 Unless the contrary shall be proved, each such notice shall be deemed to have been given or made and delivered, if by letter or signed facsimile message upon receipt by the addressee, if by delivery when left at the relevant address or if by authenticated SWIFT message when transmitted. However, a notice given in accordance with this Clause that is received on a non-Business Day or after business hours in the place of receipt will only be deemed to be given on the next Business Day in that place.
- 19.5 Where an Acceptance has been sent by the Participant to the Seller by facsimile, the Participant agrees to promptly provide the Seller with a hard copy of the original Acceptance.
- 19.6 Where an Offer has been sent by the Seller to the Participant by facsimile, the Seller agrees to promptly provide the Participant with a hard copy of the original Offer.

20 TERMINATION

Either Party may terminate this Agreement by giving 30 calendar days' notice in writing to the other Party. Notwithstanding any such termination: (a) this Agreement shall continue to govern any Participation Agreement concluded before the termination of the Agreement, (b) such termination will be without prejudice to any rights or obligations accrued prior to the date such termination takes effect, and (c) such rights and duties as survive such termination in accordance with the express terms of this Agreement shall so survive.

21 MISCELLANEOUS

- 21.1 The relationship between the Seller and the Participant is that of seller and buyer with the right of the Participant to receive amounts from the Seller restricted to the relevant Participation Percentage of any amount received and applied by the

Seller from any Recourse Party [(less the Servicing Fee, if any)] and the Participants' rights against the Seller under this Agreement.

- 21.2 This Agreement shall not constitute any kind of agency, fiduciary or trust relationship between the Seller and the Participant and the Seller shall not have any other duties or responsibilities other than those expressly specified in this Agreement.
- 21.3 If, at any time, any provision of this Agreement is or becomes invalid, illegal or unenforceable in any respect, the validity, legality or enforceable character of the remaining provisions will not in any way be affected or impaired.
- 21.4 Nothing express or implied in this Agreement or any Participation Agreement hereunder is intended to confer any rights, remedies, obligations or liabilities upon any person other than the Parties and their respective heirs, executors, administrators, successors, legal representatives and permitted assigns.
- 21.5 This Agreement and any Participation Agreement hereunder represents the entire agreement between the Parties with respect to its subject matter and supersedes all prior agreements or communications pertaining thereto. This Agreement shall not affect any participation concluded between the Parties before the date of this Agreement in respect of any Transaction.
- 21.6 Subject to Clause 21.4, this Agreement may be rescinded or varied at any time by the Parties without the consent of any third party.
- 21.7 No amendment or waiver of any provision of this Agreement or of any Participation Agreement shall be effective unless made in writing by both Parties. Any amendment or waiver shall be effective only in the specific instance and for the specific purpose for which given.
- 21.8 This Agreement does not contain any obligation for and commitment of either Party to issue an Offer or an Acceptance or to agree to an Acceptance towards the other Party.
- 21.9 Any Participation is made without recourse to the Seller [and, for the avoidance of doubt, any other participant in the Participated Transaction]. The Seller shall not have any liability or obligation to the Participant relating to the Participated Transaction or a Participation Agreement except as specifically set out in this Agreement.
- 21.10 Nothing in this Agreement shall oblige the Seller to carry out any "know your customer" or other checks in relation to any person on behalf of the Participant and the Participant confirms to the Seller that it is solely responsible for any such checks it is required to carry out and that it shall not rely on any statement in relation to such checks made by the Seller.
- 21.11 This Agreement and any Participation Agreement may be executed in counterparts, both of which taken together shall constitute one and the same Agreement or Participation Agreement.

21.12 With respect to all Settlement Portions of the Participated Transaction conveyed by the Seller:

21.12.1 The Parties agree to account for each conveyance of a Settlement Portion of the Participated Transaction as an asset sale from the Seller to the Participant, representing the irrevocable transfer, sale and conveyance of an undivided 100% participation interest in and to each such Settlement Portion as of the relevant Settlement Date;

21.12.2 [In construing this Agreement, the Parties agree that it is their intention that the conveyance of a Settlement Portion is intended to place the legal ownership interest represented by Settlement Portion of the Participated Transaction beyond the reach of the Seller's creditors in any bankruptcy, insolvency or reorganization proceeding, and the provisions of this Agreement should be interpreted accordingly.]

22 APPLICABLE LAW AND JURISDICTION

22.1 (a) WAIVER OF JURY TRIAL. EACH OF THE PARTICIPANT AND THE SELLER IRREVOCABLY WAIVES ANY RIGHT TO TRIAL BY JURY IN ANY ACTION OR PROCEEDING (WHETHER BASED ON CONTRACT, TORT OR OTHERWISE) ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY PARTICIPATION AGREEMENT HEREUNDER OR THE PARTICIPANT'S OR THE SELLER'S ACTIONS IN THE NEGOTIATION, ADMINISTRATION OR ENFORCEMENT HEREOF.

[(b)This Agreement shall be governed by and construed in accordance with the law of the State of New York without regard to principles of conflicts of laws thereof. Each Party agrees that it shall bring any action or legal proceeding in respect of any claim arising out of or related to this Agreement and each Participation Agreement hereunder exclusively in any New York State or Federal court sitting in New York City (the "**Chosen Courts**"), and solely in connection with any claims arising out of or related to this Agreement and any Participation Agreement hereunder (i) irrevocably appoints _____ (in the case of Party A) and _____ (in the case of Party B) as its agent for service of process in New York in connection with any such action or proceeding, (ii) irrevocably submits to the [non]-exclusive jurisdiction of the Chosen Courts, (iii) irrevocably waives objection to venue in connection with any such action or proceeding in the Chosen Courts, (iv) irrevocably waives any claim that any such action or proceeding brought in the Chosen Courts has been brought in an inconvenient forum and (v) agrees that service of process upon such Party in any such action or legal proceeding shall be effective if notice is given to the agent for service of process specified in this Clause 22.1 and that failure by such agent to notify it of the process will not invalidate the proceedings concerned. Each party irrevocably waives any immunity, on the ground of sovereignty or otherwise, from jurisdiction, attachment prior to judgment, other attachment, execution or other legal process in connection with its obligations hereunder. Without prejudice to any other mode of service allowed under any relevant law, each Party agrees that service of any process, summons, notice or

document by any means permitted for notices under this Agreement shall be effective service of process for any such action, suit, proceeding or judgment.]

OR

[(b) If the Parties (each, a “**Disputing Party**”) cannot resolve any dispute arising out of or in connection with this Agreement and each Participation Agreement hereunder, or the breach hereof or thereof, within [30] calendar days after written notice of the dispute specifying in reasonable detail the nature of the dispute is first given, such dispute will be decided through arbitration administered by the International Chamber of Commerce in accordance with its Rules of Arbitration then in effect. For the avoidance of doubt, a Disputing Party may also seek a temporary restraining order, preliminary injunction or an order directing specific performance, maintenance of the status quo or other relief to prevent irreparable harm pending resolution of the dispute (such remedies being “**Interim Measures**”) through court proceedings in accordance with Clause 22.1(f).

(c) The place of arbitration shall be New York City, New York and the language to be used in the arbitral proceedings shall be English. The number of arbitrators shall be [one]/[three. Each Disputing Party shall appoint one arbitrator in a time to be set by the International Chamber of Commerce. The two arbitrators so appointed shall mutually appoint the third arbitrator (who shall act as the chairman), if possible. If the two arbitrators have not so appointed the third arbitrator within [30] calendar days of the appointment of the second arbitrator, the International Chamber of Commerce shall appoint the third arbitrator].

(d) The arbitrators will base their decision on the terms and conditions of this Agreement or the relevant Participation Agreement, as the case may be. Judgment upon any interim or final award rendered by the arbitrators may be entered in any court having jurisdiction thereof. The arbitrators shall have no authority to award punitive, special or exemplary damages or any other form of non-compensatory damages. The arbitrators shall have the power to award specific performance and/or injunctive or other equitable relief in order to enforce or prevent any breach or violation of any provision of this Agreement or any Participation Agreement hereunder.

(e) The Disputing Parties shall keep any arbitration confidential and shall not disclose to any person, other than those necessary to the proceedings, the existence of the arbitration, any information, testimony or documents submitted during the arbitration or received from the other party, a witness of the arbitrator(s) in connection with the arbitration, and any award, unless and to the extent that disclosure is required by law or is necessary for permitted court proceedings, such as proceedings to recognize or enforce an award.

(f) THIS AGREEMENT AND ANY PARTICIPATION AGREEMENT HEREUNDER SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK, WITHOUT

REGARD TO THE CHOICE OF LAW RULES THEREOF, APPLICABLE TO CONTRACTS TO BE PERFORMED ENTIRELY WITHIN SUCH STATE. IN THE CASE OF ANY PERMITTED COURT PROCEEDINGS, INCLUDING ANY REQUEST FOR INTERIM MEASURES, EACH OF THE PARTIES AGREES (I) TO SUBMIT TO THE [NON]-EXCLUSIVE PERSONAL JURISDICTION OF ANY NEW YORK STATE OR FEDERAL COURT SITTING IN NEW YORK CITY (THE "**CHOSEN COURTS**"), (II) THAT [NON]-EXCLUSIVE JURISDICTION AND VENUE SHALL LIE IN THE CHOSEN COURTS, AND (III) THAT NOTICE UPON SUCH PARTY IN ANY SUCH ACTION OR LEGAL PROCEEDING SHALL BE EFFECTIVE IF NOTICE IS GIVEN TO THE AGENT FOR SERVICE OF PROCESS SPECIFIED BY SUCH PARTY IN CLAUSE 22.1(G). THE PARTIES MAY SEEK TO ENFORCE AN ARBITRAL AWARD IN ANY COURT IN WHICH JURISDICTION MAY BE HAD. WITHOUT PREJUDICE TO ANY OTHER MODE OF SERVICE ALLOWED UNDER ANY RELEVANT LAW, EACH PARTY AGREES THAT SERVICE OF ANY PROCESS, SUMMONS, NOTICE OR DOCUMENT BY ANY MEANS PERMITTED FOR NOTICES UNDER THIS AGREEMENT SHALL BE EFFECTIVE SERVICE OF PROCESS FOR ANY SUCH ACTION, SUIT, PROCEEDING OR JUDGMENT.

(g) Each Party agrees that, solely in connection with any claims arising out of or related to this Agreement and any Participation Agreement hereunder, it irrevocably appoints _____ (in the case of Party A) and _____ (in the case of party B) as its agent for service of process in New York and that failure by such agent to notify it of the process will not invalidate the proceedings concerned.]

This Agreement is made in two originals, the Parties taking one original each.

Date:

For [Party A]

Signature:

Name:

Title:

Signature:

Name:

Title:

Date:

For [Party B]

Signature:

Name:

Title:

Signature:

Name:

Title:

APPENDIX I – OFFER AND ACCEPTANCE

OFFER AND ACCEPTANCE

From: [Seller]
To: [Participant]
Date: [Date]

OFFER

Pursuant to the terms of our Master Participation Agreement, dated [Date] (“the **Agreement**”), the Seller (including any branch or affiliate wherever located that signs the Offer) hereby offers to the Participant (including any branch or affiliate wherever located that signs the Acceptance) a Participation in the following Transaction.

| | |
|--|--|
| Type of Transaction: | [Insert detailed description of transaction] |
| Type of Participation: | [Unfunded/Funded] [disclosed/undisclosed] |
| [LC Number: | [...]] |
| Seller’s Reference No.: | [...] |
| Recourse Party(ies): | [Name, City, Country] |
| Recourse Party(ies)’s Reference No.: | [...] |
| Relevant Currency and Credit Amount: | [Currency and Amount] |
| [Alternative Business Day Jurisdiction] | [if not New York market or London Interbank] |
| Applicable Interest Rate (Federal Funds Rate, LIBOR or other) | [Rate and definition] |
| [Additional Default Rate] | [Rate, if any] |
| Participation Amount: | [Currency and Amount] |
| Participation Percentage: | [Percentage] |
| Exporter: | [Name, City, Country] |
| Importer: | [Name, City, Country] |
| Goods: | [Description of Goods] |
| Shipment: | from [Country] to [Country] |
| Start Date of Transaction: | [Date] |
| Start Date of Participation Agreement: | [Date] |
| Validity Date of Transaction: | [Date] |
| Maturity Date or Dates of Transaction: | [Date/Dates] |
| Payment Terms of Transaction: | [at sight / deferred payment details] |
| Latest Date for Shipment in Transaction: | [Date] |
| Latest possible Due Date of Transaction: | [Date] |
| Applicable Rules | [e.g. UCP600, ISP98 etc] |
| Funding Details (if any): | [...] |
| Demand Waiting Period (if any): | [None]/[days following the date of the relevant Default] |
| Special conditions or comments (if any): | [more detailed information about the Transaction if necessary] |
| [Our Servicing Fee: | [Details of servicing fee]] |

Your commission for above Participation: [... % p.a., calculated on the basis of a year of 360 days and actual number of days elapsed]

Your up-front fee for above Participation: []/[Nil]

Retention Share: []%

Transaction Documents provided: [Yes][No]

Please let us know at your earliest convenience - but in no case later than close of business (cob) on [Date] when this Offer will expire - whether you accept the above Offer of Participation. Your Acceptance shall be given to us by countersigning this Offer and notifying us of your acceptance in accordance with Clause 19 of the Agreement. All provisions of the Agreement, including Clause 22 (Applicable Law and Jurisdiction) are applicable to this Offer. [We agree to be bound as "Seller" by all of the terms and conditions of the Participation Agreement.]

[Name of the Seller]

[Seller's signatures]

ACCEPTANCE

Pursuant to the terms of our Master Participation Agreement, dated [Date] (the "**Agreement**"), and your above-mentioned Offer, we hereby inform you that we accept the terms of your Offer as outlined.

Kindly remit any sums due to us in relation to this Participation Agreement to:

Participant's account No.:

[account no.]

Participant's correspondent bank:

[Name, City, Country, Swift Code]

Participant's Reference No.:

[reference no.]

All provisions of the Agreement, including Clause 22 (Applicable Law and Jurisdiction) are applicable to this Acceptance. [We agree to be bound as "Participant" by all of the terms and conditions of the Participation Agreement]

For the Participant:

Place and Date:

[Place and Date]

[Signatures of the Participant]

APPENDIX II – UNFUNDED PARTICIPATIONS – DEFAULT NOTICE

DEMAND FOR PAYMENT AS REQUIRED UNDER CLAUSES 6.1.1 AND 6.1.2.

Pursuant to the terms of our Master Participation Agreement, dated [Date] (the “**Agreement**”), and your Acceptance, dated [Date], we hereby inform you that a Default has occurred under the following Transaction:

| | |
|---|----------------------------------|
| Type of Transaction: | [Description] |
| Type of Participation: | Unfunded [disclosed/undisclosed] |
| Seller’s Reference No.: | [...] |
| Participant’s Reference No.: | [...] |
| Recourse Party(ies): | [Name, City, Country] |
| Defaulted Amount: | [Currency and Amount] |
| Participation Portion: | [...] |
| Date of Default: | [...] |
| Interest Rate Payable from Date of Default: | [...] |

We confirm that:

- (i) the Defaulted Amount has been claimed from the Recourse Party(ies);
- (ii) payment is due and has not reached us as of today; and
- (iii) we have acted in all [material] respects in accordance with the Participation Agreement applicable to the Transaction.

[Please note: statements (i), (ii) and (iii) above must not be amended when making a demand]

[A copy of the claim sent to the relevant Recourse Party is enclosed with this Request for Payment].

We kindly ask you to remit the Participation Portion together with the Interest Rate Payable on such Participation Portion from the date of Default to the date upon which we will receive your payment within [two] Business Days to our account:

| | |
|--------------------|-----------------------------------|
| Account No.: | [...] |
| With Bank: | [Name, City, Country, Swift Code] |
| Our Reference No.: | [...] |

Capitalised terms not otherwise defined in this notice shall have the meaning set out in the Agreement, unless the context otherwise requires. All provisions of the Agreement, including Clause 22 (Applicable Law and Jurisdiction) are applicable to this demand.

[Name of the Seller] [Seller’s signatures]

APPENDIX III – FUNDED PARTICIPATIONS — DEMAND NOTICE

DEMAND FOR PAYMENT AS REQUIRED UNDER CLAUSES 6.2.2 AND 6.2.3.

Pursuant to the terms of our Master Participation Agreement, dated [Date] (the “**Agreement**”), and your Acceptance, dated [Date], we hereby inform you that a Request has been made under the following Transaction:

| | |
|------------------------------|--------------------------------|
| Type of Transaction: | [Description] |
| Type of Participation: | Funded [disclosed/undisclosed] |
| Seller’s Reference No.: | [...] |
| Participant’s Reference No.: | [...] |
| Recourse Party(ies): | [Name, City, Country] |
| Requested Amount: | [Currency and Amount] |

We confirm that:

- (i) the Requested Amount has been demanded by the Beneficiary; and
- (ii) we have acted in all [material] respects with the Participation Agreement applicable to the Transaction.

[Please note: statements (i) and (ii) above must not be amended when making a demand]

[A copy of the Request received from the Beneficiary is attached].

We kindly ask you to remit the amount of [Currency and Amount] within [two] Business Days to our account:

| | |
|--------------------|-----------------------------------|
| Account No.: | [...] |
| With Bank: | [Name, City, Country, Swift Code] |
| Our Reference No.: | [...] |

Capitalised terms not otherwise defined in this notice shall have the meaning set out in the Agreement, unless the context otherwise requires. All provisions of the Agreement, including Clause 22 (Applicable Law and Jurisdiction) are applicable to this demand.

[Name of the Seller]

[Seller’s signatures]

APPENDIX IV– CERTAIN U.S. TAX MATTERS

1. In the event that the Participated Transaction involves payment of fees or interest to a Participant that is sourced from the United States due to the location of the Recourse Party, the Seller will, as required by law, withhold any applicable US withholding taxes from such payment unless: (i) in respect of any Participant organized under the laws of a jurisdiction outside of the United States (a “**Foreign Participant**”) it shall have received satisfactory evidence of exemption from US withholding or (ii) in respect of any Participant organized under the laws of the United States (a “**Domestic Participant**”), it has received a properly completed IRS Form W-9 (with a U.S. taxpayer identification number) or the Domestic Participant has otherwise established an exemption from withholding.
2. Foreign Participants are generally subject to US withholding on payments of interest (and certain fees) unless (a) they are entitled to the benefits of an income tax treaty with the United States which eliminates U.S. federal withholding income tax on such fees or interest, (b) they are engaged in a U.S. trade or business to which such fees or interest are effectively connected, (c) they are entitled to an exemption from withholding by reason of being an “international organization” or a non-US government, or (d) the interest qualifies as portfolio interest under U.S. tax law and they are either (i) not a bank (or a conduit for a banking entity) or (ii) are a bank that has not entered into the Participation in the ordinary course of its trade or business, and in each case (clauses (a) – (d)) has provided the Seller with a properly completed IRS Form W-8 (as described below).
3. Before receipt of any fees or interest from the Seller, a Foreign Participant must have provided to the Seller one of the following tax forms, as applicable:
 - (a) In the case of a non-ban (or a bank not acting in the ordinary course of its trade or business), a properly completed IRS Form W-8BEN (with a U.S. taxpayer identification number);
 - (b) A properly completed IRS Form W-8BEN (with a U.S. taxpayer identification number) that indicates that the investor is entitled to the benefits of an income tax treaty with the United States and the applicable rate of withholding on such fees or interest;
 - (c) A properly completed IRS Form W-8ECI (with a U.S. taxpayer identification number) that indicates that such fees or interest are effectively connected with the investor’s U.S. trade or business;
 - (d) A properly completed IRS Form W-8EXP that indicates the investor is entitled to an exemption from withholding by reason of being an “international organization” or a non-US government; or
 - (e) In the case of a Foreign Participant that is a non-U.S partnership or other flow-through entity for U.S. federal income tax purposes, or an intermediary, a properly completed IRS Form W-8IMY with a withholding (allocation) statement and one of the

forms described in (a) through (c) above or Form W-9 attached for each beneficial owner, if and as required.

4. The Participant shall promptly deliver to the Seller a newly completed tax form (i) after the occurrence of any event requiring a change in the most recent form delivered to the Seller, (ii) upon learning that any previously delivered form has become obsolete or incorrect, and (iii) upon the reasonable request of the Seller.

Form of BAFT Master Participation Agreement Governed by English Law

**MASTER PARTICIPATION AGREEMENT
FOR TRADE TRANSACTIONS**

Dated [Date]

Between

[Party A]

And

[Party B]

NB: This template represents a recommended form only, which parties are free to amend as necessary.
Each party must satisfy itself as to the legal, commercial and regulatory implications of its use.

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This Agreement (the "**Agreement**") is made the [Day] day of [Month], [Year]

between:

- I. [Party A] a bank incorporated in [♦], [Head Office][Registered Office] at [♦]

and

- II. [Party B] a bank incorporated in [♦], [Head Office][Registered Office] at [♦]¹

Whereas:

If one Party offers to the other Party a participation (on a funded or unfunded basis) in respect of a Trade Transaction under Clause 3 and the other Party accepts such Offer under Clause 4, the provisions of this Agreement shall apply to such participation (a "**Participation**"). The Party offering the Participation will be called the "**Grantor**" and the Party taking the Participation will be called the "**Participant**".

Now it is hereby agreed as follows:

1 DEFINITIONS

For the purpose of this Agreement and any Participation Agreement, the following words and expressions shall have the following meanings:

"Acceptance" means acceptance by the Participant of an Offer in accordance with Clause 4;

"Beneficiary" means the person entitled to payment from the Grantor under a Participated Transaction;

"Business Day" means a day (not being a Saturday or a Sunday) (a) on which the dealings in deposits in the Relevant Currency are carried on in the London Interbank Market; and (b) on which banks are open for interbank transactions: (i) in [♦] and [♦]; and (ii) in the financial centre of the Relevant Currency;

"Clause" means any clause of this Agreement;

"Credit Amount" means in relation to a Participated Transaction, the aggregate principal amount of the Grantor's exposure to the Recourse Parties, as specified in the relevant Participation Agreement;

"Default" means:

- (a) any non-receipt of monies due to the Grantor by the Recourse Parties at the Due Date under a Participated Transaction; and
- (b) the Grantor receiving monies from the Recourse Parties under a Participated Transaction which it is subsequently required to return to a Recourse Party or any third party by operation of mandatory rules of law.

¹ If a Bank is contracting with a branch, the need for "multibranch" provisions be considered on an incremental basis and parent company guarantees sought as necessary.

"Defaulted Amount" means:

- (a) a sum due to the Grantor by the Recourse Parties under a Participated Transaction which has not been received by the Grantor; and
- (b) a sum received by the Grantor from the Recourse Parties under a Participated Transaction which the Grantor is subsequently required to return to a Recourse Party or any third party by operation of mandatory rules of law.

"Due Date" means any date on which payment to the Grantor by the Recourse Parties is due under a Participated Transaction;

"Funded Participation" means a Participation on a funded basis;

"General Debt Restructuring" means any rescheduling or reorganisation of the indebtedness (or any class of the indebtedness) of a Recourse Party, including (without limitation) by way of novation, release payment, refinancing or assumption of obligations by third parties which satisfies the following test:

- (a) the holders of more than half of the indebtedness (or of any class of the indebtedness, if applicable) participate in or agree to the same; and
- (b) the same arises in relation to any actual or purported insolvency, payments difficulty, moratorium (unilaterally declared or otherwise), exchange control or transfer restrictions, withholding of foreign currency payments or similar circumstance.

"ISP" means International Standby Practices, ICC Publication No 590 and any subsequent revisions thereof;

"LIBOR" means, in relation to any period for which an interest rate is to be determined, the British Bankers' Association Interest Settlement Rate (where such is available for the Relevant Currency and period) appearing at or about 11:00 hours a.m. London time on the relevant Reuters screen page(s), or if the service ceases to be available, the Party claiming interest may specify another determination of the appropriate rate (acting reasonably after consultation with the other Party);

"Offer" means an offer made by the Grantor to the Participant in accordance with Clause 3;

"Participated Transaction" means the Transaction in which the Participant accepted a participation in accordance with Clause 4;

"Participation Agreement" means the agreement between the Grantor and the Participant on the terms of the Offer, Acceptance and this Agreement (together with any amendments which the Grantor and Participant may agree in writing from time to time) in respect of a Participated Transaction;

"Participation Amount" means, in relation to a Participated Transaction, the aggregate principal liability assumed by the Participant in respect of such Participated Transaction as specified in the relevant Participation Agreement (but, for the avoidance of doubt, not including any costs or expenses for which the Participant is expressly liable under the terms of this Agreement);

"Participation Percentage" means, in respect of a Participated Transaction, the proportion that the Participation Amount bears to the Credit Amount (expressed as a percentage figure);

"Participation Portion" means:

- (a) in relation to an Unfunded Participation, the amount equal to the Participation Percentage of the Defaulted Amount;
- (b) in relation to a Funded Participation, the amount equal to the Participation Percentage of the Requested Amount;

"Party" means a party to this Agreement;

"Recourse Parties" means the persons to whom the Grantor has recourse in respect of a Participated Transaction, as specified in the relevant Offer;

"Reference Interest Rate" which will be applicable to Relevant Currencies other than those quoted by reference to LIBOR, means in relation to any period for which an interest rate is to be determined, the rate per annum determined by leading banks in the financial centre of the Relevant Currency appearing at or about 12:00 noon in that financial centre on the relevant Reuters screen page(s) (or other applicable page customarily used for such purposes in that financial centre as determined by the party claiming interest), for deposits in such currency for a duration comparable to that of the relevant period;

"Relevant Currency" means the currency in which the relevant Transaction is denominated, as specified in the relevant Offer;

"Relevant Dispute" has the meaning given to it in Clause 14.3;

"Request" has the meaning given to it in Clause 6.2.2;

"Request Notice Period" has the meaning given to it in Clause 6.2.3;

"Requested Amount" has the meaning given to it in Clause 6.2.2;

"Retention Share" means the percentage of the Credit Amount of the Participated Transaction retained by the Grantor at its own risk;

"Termination Date" means, in relation to a Participated Transaction, the earlier to occur of:

- (a) 30 calendar days following the final Due Date;
- (b) the date the relevant Participation is terminated in accordance with its terms; or
- (c) the date on which the Grantor's liability (both current and contingent) under that Participated Transaction is reduced to zero.

"Transaction" means any of the transactions specified in Clause 2;

"Transaction Documents" means the documents which set out the material terms of the relevant Transaction;

"UCP" means UCP 500, UCP 600 and any subsequent revisions thereof;

"UCP 500" means the Uniform Customs and Practice for Documentary Credits, ICC Publication No. 500;

"UCP 600" means the Uniform Customs and Practice for Documentary Credits, ICC Publication No. 600; and

"Unfunded Participation" means a Participation on an unfunded basis.

2 TRANSACTIONS

Each Party may from time to time desire to offer and the other Party to this Agreement may desire to accept and adopt Unfunded Participations and/or Funded Participations in the following Transactions:

- 2.1 letters of credit issued or confirmed by the Grantor, drafts accepted and deferred payment or negotiation obligations incurred by the Grantor under letters of credit;
- 2.2 confirmations or guarantees of letters of credit given at the request of the Beneficiary;
- 2.3 purchases of claims by the Grantor under letters of credit, drafts accepted and deferred payment or negotiation obligations incurred by the Grantor under letters of credit;
- 2.4 refinancings of sight payments under letters of credit made by the Grantor;
- 2.5 discounts of drafts accepted and deferred payment or negotiation obligations under letters of credit or under banker's acceptances made by the Grantor;
- 2.6 bankers acceptances created by the Grantor;
- 2.7 bills of exchange and promissory notes purchased, avalised or accepted by the Grantor;
- 2.8 irrevocable reimbursement undertakings, letters of indemnity, guarantees or similar instruments issued by the Grantor;
- 2.9 advance payment guarantees issued by the Grantor;
- 2.10 performance and bid bonds issued by the Grantor;
- 2.11 letters of indemnity, guarantees or similar instruments issued by a Recourse Party in favour of the Grantor; and
- 2.12 any other transaction the Grantor and the Participant may agree upon.

3 OFFER

- 3.1 If the Grantor wishes to offer the Participant a participation in a Transaction it shall send to the Participant an Offer in accordance with Clause 20 and substantially in the form specified in Appendix I.

- 3.2 If the Participant so requests, the Grantor will use reasonable endeavours to promptly provide to the Participant a copy of the Transaction Documents prior to the expiry date set out in the Offer.

4 ACCEPTANCE

- 4.1 Subject to Clause 4.4, a Participation Agreement shall be concluded upon the Grantor receiving the Participant's Acceptance to the Offer in accordance with Clause 20 and substantially in the form set out in Appendix I.
- 4.2 Upon conclusion of a Participation Agreement, the terms of the Offer (together with such amendments as may have been agreed in writing by each Party) shall, together with the terms of this Agreement, constitute the Participation Agreement.
- 4.3 Any purported modifications to the terms of the Offer by the Participant shall not constitute an Acceptance unless accepted in writing by the Grantor within two Business Days of receipt of such proposed modifications (and the expiry date set out in the Offer shall be disregarded in this respect). If the Grantor has not expressly accepted the suggested modifications within such period, the Offer shall become void and no Participation Agreement will be concluded.
- 4.4 If the Participant has not accepted an Offer before the expiry date set out in the Offer, the Offer shall lapse and no purported Acceptance by the Participant of such Offer after such date will be effective.
- 4.5 The Participant is under no obligation to accept any Offer.

5 CONFLICT OF TERMS

In the event of discrepancy or inconsistency between the agreed terms of the Offer and Acceptance and the terms of this Agreement, the terms of the Offer and Acceptance will prevail.

6 PARTICIPATIONS AND FUNDING

- 6.1 In relation to Unfunded Participations:
- 6.1.1 Following a Default, the Participant irrevocably and unconditionally undertakes to pay to the Grantor[, irrespective of any objections or exceptions,] within [four] Business Days of the Grantor's first written demand (as specified in Clause 6.1.2), an amount equal to the relevant Participation Portion.
- 6.1.2 Each demand for payment to be delivered by the Grantor to the Participant under Clause 6.1.1 must be in the form specified in Appendix II hereto, [no earlier than 10 calendar days from the date of the relevant Default but] within 30 calendar days of the relevant Default (such 30 day period being the "**Default Notice Period**"). The Grantor's right to demand payment in respect of a specific Default shall lapse at the end of the relevant Default Notice Period.

- 6.1.3 The Grantor may not make any demand for payment under this Clause 6.1 after the Termination Date (other than as referred to in Clause 10.5).
- 6.1.4 Payment by the Participant of the Participation Portion shall be in the Relevant Currency.
- 6.1.5 In the event that the Credit Amount under a Participated Transaction is reduced, the Participation Amount in respect of such Participated Transaction shall decrease by the Participation Percentage of such reduction and the Grantor shall promptly inform the Participant of any such reduction.
- 6.2 In relation to Funded Participations:
- 6.2.1 Provided that the Participant is in compliance with its payment obligations under this Agreement, whenever the Grantor applies an amount received under a Funded Participation towards a payment of principal or interest (including default interest) that relates to the relevant Participated Transaction, the Grantor shall promptly pay to the Participant the relevant Participation Percentage of that amount.
- 6.2.2 If a demand for payment is made by the Beneficiary upon the Grantor under the relevant Participated Transaction (a "**Request**", with the sum demanded from the Grantor being the "**Requested Amount**"), the Grantor shall be entitled to demand that the Participant pays to the Grantor the relevant Participation Portion. The Participant irrevocably and unconditionally undertakes to pay such sum to the Grantor[, irrespective of any objections or exceptions,] within [four] Business Days of the Grantor's first written demand.
- 6.2.3 Each demand for payment by the Grantor under Clause 6.2.2 must be in the form specified in Appendix III and be made by the Grantor within thirty (30) calendar days (or such other period as may be agreed between the Parties in writing) of the date of Request (such period being the "**Request Notice Period**"). The Grantor's right to demand payment in respect of a Requested Amount shall lapse at the end of the relevant Request Notice Period.
- 6.2.4 The Grantor may not make any demand for payment under this Clause 6.2 after the Termination Date (other than as referred to in Clause 10.5).
- 6.2.5 Payment by the Participant of the Participation Portion of the Requested Amount shall be in the Relevant Currency.
- 6.3 Following the Grantor's demand for payment under Clause 6.1.2 or Clause 6.2.3, at the Participant's reasonable request the Grantor will use reasonable endeavours to promptly provide to the Participant certified copies of the Transaction Documents (other than those (if any) already supplied by the Grantor to the Participant) and any relevant demand for payment served by the Grantor upon a Recourse Party. For the avoidance of doubt, failure by the Grantor to provide such documentation will not affect the Participant's obligations under the relevant Participation Agreement.

7 DEFAULT UNDER THE PARTICIPATED TRANSACTION

- 7.1 Subject to the other provisions of this Clause 7, the Grantor may take or refrain from taking any steps the Grantor sees fit (acting reasonably and relying on such professional opinions as the Grantor thinks appropriate) in recovering all sums due to the Grantor from the Recourse Parties under a Participated Transaction.
- 7.2 Following a Default and provided that the Participant is in compliance with its payment obligations under this Agreement, prior to taking or refraining from taking any steps contemplated by Clause 7.1 the Grantor shall consult in good faith with the Participant for a reasonable period and shall use all reasonable endeavours to reach agreement with the Participant as to what steps (if any) to take or refrain from taking to obtain repayment or reimbursement of a Defaulted Amount from the Recourse Parties under the Participated Transaction. The obligation of the Grantor to consult with the Participant under this paragraph shall not apply if the Grantor, acting reasonably, determines that its interests or the interests of the Participant under the Participated Transaction would be prejudiced or adversely affected by the time taken to conduct such consultation.
- 7.3 The Participant agrees to indemnify the Grantor on demand for the relevant Participation Percentage of all expenses (including all legal expenses), costs and losses reasonably incurred and claims incurred in connection with the exercise or enforcement of any rights in connection with a Participated Transaction which have not been reimbursed by the Recourse Parties.
- 7.4 If agreement cannot be reached as to what steps (if any) are to be taken or refrained from being taken following a Default in accordance with Clause 7.2, the Grantor will, if so requested by the Participant and provided that the Participant has complied with its payment obligations under this Agreement, use reasonable endeavours to assign to the Participant at the [Participant's][Grantor's] cost, the Participation Percentage of:
- 7.4.1 the Grantor's claims, titles, rights and interests against the Recourse Parties in respect of the relevant Defaulted Amount under the relevant Participated Transaction to the extent that the same is capable of assignment]; or (at the Participant's option)
- 7.4.2 the Grantor's claims, titles, rights and interests related to the Participated Transaction (with the exception of any security), to the extent that the same is capable of assignment].
- 7.5 [If agreement cannot be reached as to what steps (if any) are to be taken or refrained from being taken following a Default in accordance with Clause 7.2 and the Participant has not exercised its rights under Clause 7.4, the Grantor may assign to the Participant at the Grantor's cost, the Participation Percentage of:
- 7.5.1 the Grantor's claims, titles, rights and interests against the Recourse Party in respect of the relevant Defaulted Amount under the relevant Participated Trade Transaction to the extent that the same is capable of assignment; or (at the Grantor's option)

7.5.2 the Grantor's claims, titles, rights and interests related to the Participated Trade Transaction (with the exception of any security), to the extent that the same is capable of assignment.]²

- 7.6 If [neither] the Participant [does not] [nor the Grantor] opt for assignment under Clause 7.4 [or 7.5 (as applicable)] or the Grantor is unable to effect the assignment in accordance with Clause 7.4 [or 7.5 (as applicable)], the Grantor shall administer and continue to collect at the expense of the Participant the portion of reimbursement that corresponds with the Participation Percentage of the Defaulted Amount, at all times acting as the Grantor sees fit (subject to the requirements of Clause 18.2).
- 7.7 In any case and if for any reason the Participant receives direct payment from any Recourse Party in relation to the Participated Transaction, the Participant shall be entitled to retain the Participation Percentage thereof and shall pay to the Grantor the balance of such amount within five Business Days after such receipt.
- 7.8 This Clause 7 shall not apply to any Relevant Dispute. Relevant Disputes shall instead be administered in accordance with Clause 14.

8 COMMISSION, FEES AND RECOVERIES³

- 8.1 [Subject to the Participant complying with its payment obligations under this Agreement, the Grantor undertakes to pay to the Participant commission and fees as set out in the relevant Offer on a per annum basis on the Participation Percentage of the relevant Participated Transaction from time to time for the period from the start date of the relevant Participation Agreement until the earlier of (a) the final Due Date, (b) the date the relevant Participation Agreement is terminated or (c) the date the relevant Participated Transaction is terminated, in each case adjusted to reflect the duration and quantum of the Participant's exposure.]
- 8.2 Payments of commission shall be made on:
- 8.2.1 [subject to Clause 8.3,]each Due Date; and
- 8.2.2 the earlier of (a) the date the relevant Participation Agreement is terminated and (b) the date the relevant Participated Transaction is terminated.
- 8.3 [Unless otherwise agreed in the relevant Participation Agreement, commission shall only be payable to the Participant on the dates specified in Clause 8.2.1 following receipt by the Grantor of the corresponding commission or fees payable to the Grantor by the relevant Recourse Party in respect of the relevant Participated Transaction].
- 8.4 If so stated in the Offer and subject to the Participant complying with its payment obligations in respect of Participations, the Grantor undertakes to pay to the Participant an up-front fee, in the amount stated in the Offer, payable promptly following the conclusion of the relevant Participation Agreement.

² Banks to agree on a case-by-case basis whether this provision should be included.

³ Banks to agree on a case-by-case basis as to which rules should govern commission payments.

- 8.5 The Grantor shall promptly pay the Participant the relevant Participation Percentage of all sums recovered (including, without limitation, through payment by or on behalf of a Recourse Party, a Recourse Party's receiver, liquidator or other insolvency officer, or through the exercise of any rights of set-off).

9 DEFAULT INTEREST

In the event that either Party defaults on the payment of any sum due hereunder, interest shall accrue on the amount in respect of which such default has been made from the date of the default until payment (after as well as before judgment) at the overnight rate of LIBOR or the Reference Interest Rate (as applicable) plus one per cent per annum calculated on a day-to-day basis from the due date for payment until payment is received from the relevant Party.

10 TAX AND PAYMENTS

- 10.1 All payments by the Grantor under this Agreement shall be made net of any deduction or withholding required to be made from such payments by any law or regulation. If any such deduction or withholding is made, the Participant shall bear the risk of such deduction or withholding and shall for the purposes of this Agreement be deemed to have received the amount that it would have received if such deduction or withholding had not been made.
- 10.2 All payments by the Participant under this Agreement shall be made free and clear of any deduction or withholding unless such deduction or withholding is required to be made by any law, regulation or practice. If any such deduction or withholding is made or is required to be made the Participant shall increase the amount to be paid to the Grantor to ensure that the Grantor receives and retains a sum equal to the sum which it would have received and so retained had no such deduction or withholding been made or required to be made.
- 10.3 The Grantor and the Participant shall each use their reasonable endeavours to avoid any such deduction or withholding as is referred to in Clauses 10.1 and 10.2.
- 10.4 All payments under this Agreement shall be made in immediately available funds in the Relevant Currency to the credit of the account specified by the Party to whom such payments are due without set-off or counterclaim.
- 10.5 If at any time (including after the relevant Termination Date) the Grantor pays an amount to the Participant and (a) the Grantor had not actually received the related amount under the Participated Transaction or (b) the Grantor is required to return such amount to a Recourse Party or any third party by operation of mandatory rules of law, then the Participant shall on demand refund the same to the Grantor together with the overnight rate of interest on that amount from the date of payment to the date of receipt by the Grantor, calculated at the overnight rate of LIBOR or the Reference Interest Rate (as applicable), or the rate payable by the Grantor to the relevant Recourse Party, if higher.
- 10.6 If any sum due from either Party under this Agreement to the other or any order or judgment given or made in relation hereto or thereto has to be converted from the currency (the "**first currency**") in which the same is

payable hereunder or under such order or judgment into another currency (the "**second currency**") for the purpose of (a) making or filing a claim or proof against the Participant or a Recourse Party, (b) obtaining an order or judgment given in any court or other tribunal or (c) enforcing any order or judgment given or made in relation hereto or thereto, the paying Party shall indemnify and hold harmless the recipient Party from and against any loss suffered as a result of any discrepancy between (i) the rate of exchange used to convert the sum in question from the first currency into the second currency and (ii) the rate or rates of exchange at which the receiving Party may in the ordinary course of business purchase the first currency with the second currency upon receipt of a sum paid to it in satisfaction, in whole or in part, of any such order or judgment, claim or proof.

11 FRAUD RISK

[Notwithstanding any other Clause in this Agreement, if it is finally, non-appealably legally determined that the Recourse Parties had no obligation to reimburse the Grantor due to the occurrence of fraud in the underlying transaction or related documentation (including, without limitation, any documentation examined by the Grantor in accordance with Clause 14.1) then:

- (a) the Participant shall not be liable to make payment to the Grantor in respect of such (if it has not already made such payment); and
- (b) the Grantor shall reimburse the Participant any monies paid by the Participant under Clause 6.1 or Clause 6.2 (and which have not otherwise been reimbursed by the Grantor in accordance with the terms of the Participation Agreement) in respect of such[, together with interest calculated at the overnight rate of LIBOR or the Reference Interest Rate (as appropriate) accruing from the date such payment was made by the Participant under Clause 6.1 or Clause 6.2, until the date of actual reimbursement].]

[If it is determined that any Recourse Parties had no obligation to reimburse the Grantor due to the occurrence of fraud in the underlying transaction or related documentation (including, without limitation, any documentation examined in accordance with Clause 14.1) then the Participant shall continue to be liable for the relevant Participation Portion notwithstanding that that Recourse Party had no such obligation, provided that the provisions of Clause 14.3 shall continue to apply in respect of the examination of documents.]⁴

12 INFORMATION

12.1 The Grantor shall, within a reasonable timeframe, notify the Participant of (a) any dispute under the Participated Transaction, which in the reasonable opinion of the Grantor has had or may have a material adverse effect on the likelihood of the Recourse Parties paying any amounts due under the relevant Participated Transaction; and (b) in the case of a Funded Participation, any Default.

12.2 The Grantor shall, within a reasonable timeframe, notify the Participant of the expiry, fulfilment or non-fulfilment of each material liability or obligation relating to the Participated Transaction (including, without limitation, in the case of

⁴ Parties to agree appropriate option (i.e. whether Participant participates in the risk of fraud).

letters of credit: presentations of documents, due dates for payment and dates of drawings).

- 12.3 Any failure by the Grantor to comply with the terms of this Clause 12 will not affect the Participant's obligations under the relevant Participation Agreement.

13 VARIATION OF TRANSACTION

- 13.1 The Grantor shall not without the prior written consent of the Participant (without prejudice to the rights of the Participant under Clause 7), take such action that would result in:

- (a) any extension of the date for payment by a Recourse Party in respect of any Participated Transaction;
- (b) any reduction in the liability of any Recourse Party or in the release of any security in respect of any Participated Transaction;
- (c) any material change in the goods or change of country of any named port(s) in respect of any Participated Transaction;
- (d) any change in the currency in respect of any Participated Transaction;
- (e) any reduction of any amount in respect of interest or commission related to a Participated Transaction, which would affect the amount of interest or commission due to the Participant from the Grantor.

- 13.2 The Grantor may without the prior consent of the Participant (without prejudice to the rights of the Participant under Clause 7), take such action that would result in:

- (a) any increase in the Credit Amount; or
- (b) any extension in the date of validity or extension of the expiry date (but not an extension of the date for payment by a Recourse Party in respect of any Participated Transaction),

provided that (i) such action does not affect the rights or obligations of the Participant under the Participation Agreement; and (ii) the Participation Amount in respect of the relevant Participation Agreement shall not change and the Participant shall have no liability in respect of any payment made or liability incurred by the Grantor after the original date of validity or expiry date.

- 13.3 In cases where the Participant does not agree to any such action where its consent is required, the Grantor shall have the option immediately to terminate the Participation Agreement by giving written notice to the Participant. All commission and interest payable to the Participant under the Participation Agreement shall be calculated on a pro rata basis and the principal amount paid by the Participant to the Grantor (in the case of a Funded Participation) shall be reimbursed.

14 DOCUMENTARY DISCREPANCIES

- 14.1 The examination of any documents submitted by the Beneficiary in respect of a Participated Transaction is the sole and full responsibility of the Grantor and shall not be affected by any delegation by the Grantor.
- 14.2 In respect of Participated Transactions the Grantor shall exercise such care and attention in relation to the presentation and form of documents with respect to a Participated Transaction as would a bank acting in accordance with UCP or ISP (if applicable) or otherwise as is in accordance with established market practice in the relevant financial centre for Transactions of a similar nature.
- 14.3 If a dispute arises between a Recourse Party and the Grantor under a Participated Transaction as to whether documents examined by the Grantor complied with the documentary requirements of that Participated Transaction and the Grantor is of the reasonable opinion that the Recourse Party is unjustified in its refusal to repay to the Grantor any sums paid by the Grantor to the Beneficiary (a "**Relevant Dispute**"), the Grantor shall (without prejudice to its obligations under Clause 18.2) use its reasonable endeavours to obtain a final non-appealable legally binding decision, whether obtained in a court of competent jurisdiction, through arbitration or DOCDEX decision (a "**Relevant Decision**") as soon as is reasonably possible.
- 14.4 Should a Relevant Decision not be in favour of the Grantor, the Grantor shall reimburse to the Participant the relevant Participation Portion [including default interest (at the rate specified in Clause 9)][including interest calculated at the overnight rate of LIBOR or the Reference Interest Rate (as appropriate)]⁵ accruing from the date such payment was made by the Participant under either Clause 6.1 or Clause 6.2 (as the case may be) until the date of actual reimbursement. Such reimbursement obligation will continue notwithstanding the expiry or assignment of the relevant Participation Agreement or Participated Transaction.
- 14.5 Where a Relevant Decision holds that the Recourse Party should reimburse the Grantor, the Participant shall promptly pay to the Grantor an amount equal to its Participation Percentage of the costs incurred by the Grantor in relation to obtaining the Relevant Decision (including without limitation all associated legal fees and costs) ("**Relevant Costs**"). The Grantor shall enclose with any such claim a certificate setting out in reasonable detail the calculation of amounts demanded thereunder. In all other cases, all Relevant Costs incurred by the Grantor shall be exclusively borne by the Grantor and the Participant shall have no liability in respect of the same.
- 14.6 Save as expressly set out in this Clause 14, the existence of a Relevant Dispute will not affect the rights and obligations of each Party under Clause 6 in respect of the relevant Participated Transaction.
- 14.7 If the Grantor does not use reasonable endeavours to obtain a Relevant Decision as soon as is reasonably possible following the commencement of a Relevant Dispute, the Participant may exercise its rights under Clause 7.4. For the avoidance of doubt, the Grantor's obligation to reimburse the Participant in accordance with Clause 14.3 will survive any termination or

⁵ Delete as applicable.

expiry of the Participated Transaction, Participation Agreement, this Agreement or any assignment made in accordance with Clause 7.4 [or 7.5].

15 GENERAL DEBT RESTRUCTURING

- 15.1 Subject to Clause 15.7, it is the intent that the Participant will bear the risk of any General Debt Restructuring in relation to a Participated Transaction.
- 15.2 The Grantor shall not be obliged to make payment to the Participant under a Participation Agreement in respect of:
- (a) any sum which is paid into a blocked account or is paid in non-transferable and/or non-convertible currency until that impediment is removed; or
 - (b) any financial or other instrument issued to the Grantor in either case paid or issued in satisfaction or purported satisfaction of the obligation of a Recourse Party to make any payment with respect to a Participated Transaction unless and until such instrument is disposed of, redeemed or otherwise realised for cash and where the proceeds of realisation are themselves not subject to Clause 15.2.
- 15.3 The Grantor will endeavour (at the expense of the Participant) to assign to the Participant the pro rata benefit of any sum referred to in Clause 15.2(a) to the extent that the Grantor is able to do so and to the extent that the same is, in the Grantor's reasonable opinion, attributable to the Participant's interest in relation to the relevant Participated Transaction.
- 15.4 The Grantor may, in connection with any General Debt Restructuring, apply for or accept any note, debenture or other instrument issued or proposed to be issued by the relevant Recourse Party or any other person in respect of any Participated Transaction or any part thereof, or any interest or fees payable in respect of any Participated Transaction or any part thereof.
- 15.5 [The Grantor may participate in any agreement in connection with a General Debt Restructuring and which relates to any principal or interest on or fees in respect of any Participated Transaction. If the Grantor does so, the Grantor shall not be obliged to account to the Participant in respect of that principal or interest or fees. However, the Grantor will endeavour to give the Participant the benefit of the agreement on the same terms as this Agreement to the extent that payments received and applied by the Grantor under the agreement are in the Grantor's reasonable opinion attributable to the Participant's interest in the relevant Participated Transaction.]
- 15.6 [If, in connection with any General Debt Restructuring, the Grantor agrees to increase its exposure, the Grantor shall not be obliged to account to the Participant under this Agreement until that increased exposure has been paid and satisfied unless the Participant agrees to modify this Agreement in form and substance reasonably satisfactory to the Grantor to the effect that the Participant participates in the increased exposure on the terms of this Agreement. The provisions of this Clause 15.6 shall only apply if the Grantor has first offered the Participant the opportunity to modify this Agreement in form and substance reasonably satisfactory to the Grantor to the effect that the Participant participates in the increased exposure on the terms of this Agreement and the Participant has either refused to so participate or fails to

accept the Grantor's offer within [five] Business Days of such offer being made.]

[The Grantor may join any General Debt Restructuring which affects the Grantor's payment claim against a Recourse Party arising from any Participated Transaction without the Participant's prior consent and shall notify the Participant thereof. The Participant shall then, upon the Grantor's first demand, adapt the Participant's undertaking or perform its duties and enjoy its rights under the relevant Participation Agreement irrespective thereof.]⁶

- 15.7 Notwithstanding any other provision of this Agreement, the Participant shall have no obligation to participate in any such increased exposure whether in connection with any General Debt Restructuring or otherwise.

16 CONFIDENTIALITY

- 16.1 Subject to Clause 16.2 and unless otherwise agreed in writing by the Parties: (a) the Participant shall not without prior written consent of the Grantor, disclose the Participated Transaction (unless the Participated Transaction is expressly undertaken on a "disclosed" basis) or any offered Participation or any other information relating thereto or to the Participated Transaction to any Recourse Party or to any third party; and (b) the Grantor and the Participant agree that they will treat this Agreement and any information supplied in connection herewith as being confidential (but, for the avoidance of doubt, each Party is permitted to disclose such information to its affiliates, directors, officers, employees and professional advisers who have a need to know the information and who are made aware of the obligations of confidentiality under this Clause 16). The duty of confidentiality arising from this Agreement continues to apply in full even after the relevant Participation Agreement has been terminated [but will expire two years following such termination].

- 16.2 The provisions of Clause 16.1 do not apply to any information which:

- (a) is or comes into the public domain otherwise than by breach of this Agreement;
- (b) is required to be disclosed in compliance with any applicable law, rule, regulation or order from a court of competent jurisdiction;
- (c) is required or requested to be disclosed to any public authority or governmental body or regulatory body having jurisdiction over the conduct of (as applicable) the Grantor's or Participant's business and/or affairs;
- (d) is disclosed by any Party to its legal advisers or auditors (but in that capacity only) provided that such persons are bound by professional obligations of confidentiality; and
- (e) is disclosed to any potential assignee, transferee or sub-participant provided that the Party intending to disclose any such information to any person shall only disclose such information to the extent necessary for the relevant person to decide whether or not to enter into the

⁶ Parties to decide whether to use 'Frankfurt'-style wording.

assignment, transfer or sub-participation and otherwise to effect the assignment, transfer or sub-participation and upon the terms that all information so disclosed shall be kept confidential by that recipient.

17 ASSIGNABILITY

- 17.1 The Participant may not assign or transfer any of its rights or obligations under this Agreement or under any Participation Agreement without the prior written consent of the Grantor. The Grantor may give or refuse such consent in its absolute discretion.
- 17.2 Unless expressly stated to the contrary in the Participation Agreement, the Participant may enter into sub-participations with third parties in respect of Participation Agreements without the consent of, and without giving notice to, the Grantor.
- 17.3 The Grantor may not assign or transfer any of its rights or obligations under this Agreement or under any Participation Agreement without the prior written consent of the Participant. Such consent may not be unreasonably withheld or delayed.

18 ADDITIONAL DUTIES OF THE GRANTOR

- 18.1 The Grantor may enter into other participations with third parties in respect of Participated Transactions provided that the Grantor retains the Retention Share stipulated in the relevant Offer (if any). If no Retention Share is stipulated in the relevant Offer, then the Grantor shall not be obliged to retain any Retention Share in that Participated Transaction.
- 18.2 The Grantor shall administer the Participated Transaction with the same degree of care which the Grantor normally exercises in administering Transactions in which no participation has been granted.

19 REPRESENTATIONS AND WARRANTIES

- 19.1 Without prejudice to the Grantor's duties under Clause 14, the Grantor does not make any representation or warranty and does not assume any responsibility with respect to the due execution, legality, validity, adequacy or enforceability of the relevant Transaction or of any document related thereto.
- 19.2 Each Party represents and warrants to the other that:
 - (a) it will at all times make its own independent investigation and assessment of the financial condition, creditworthiness, status and affairs of the Recourse Parties and of other relevant factors for the assessment of the credit risk and that it has not relied on the other Party for the making of such assessment; and
 - (b) this Agreement and any Participation Agreement concluded hereunder constitute and will constitute its legally valid and binding obligations enforceable in accordance with their respective terms.
 - (c) [others?]

The representations and warranties set out in Clauses 19.1 and 19.2 shall be deemed repeated as at the date each Participation Agreement is concluded.

- 19.3 In respect of each Participation, the Grantor represents and warrants to the Participant that, to the best of its knowledge as at the date the relevant Participation Agreement begins, it will own beneficially the obligations under the Transaction in which the Participation is granted free from any lien, security interest or other encumbrance, any purchase or option agreement or arrangement, or any agreement to create or effect any of the same.
- 19.4 In respect of each Participation, the Participant represents and warrants to the Grantor that it has undertaken its own assessment of the Participated Transaction (including as to its type and nature) and has received sufficient information from the Grantor in order to undertake such assessment.

20 COMMUNICATION

- 20.1 The Parties agree that the Grantor may send information related to a Transaction via e-mail prior to sending the final Offer to the Participant. The Participant is entitled to assume that all the information received by the Grantor via e-mail is from an authorised individual. However, regarding the conclusion of a Participation Agreement, Clause 4 shall apply.
- 20.2 The Parties confirm that they are aware of the fact that information by way of electronic exchange is transmitted unencrypted over a publicly accessible network, and each acknowledges all associated risks.
- 20.3 Except as otherwise provided herein, notices under this Agreement shall be in writing and must be sent by courier, prepaid registered mail, signed facsimile or by authenticated SWIFT message to the address specified by the Parties below. Each Party shall provide written notice to the other Party of a change of address, which shall become effective five calendar days after such notice is received.

Notice details for [Party A]:

[Address]
Attention: [◆]
Telephone: [◆]
Fax: [◆]
Swift: [◆]

Notice details for [Party B]:

[Address]
Attention: [◆]
Telephone: [◆]
Fax: [◆]
Swift: [◆]

- 20.4 Unless the contrary shall be proved, each such notice shall be deemed to have been given or made and delivered, if by letter or signed facsimile message upon receipt by the addressee, if by delivery when left at the relevant address or if by authenticated SWIFT message when transmitted. However, a notice given in accordance with this Clause that is received on a

non-Business Day or after business hours in the place of receipt will only be deemed to be given on the next Business Day in that place.

- 20.5 [Where an Acceptance has been sent by the Participant to the Grantor by facsimile, the Participant agrees to promptly provide the Grantor with a hard copy of the original Acceptance.]⁷
- 20.6 Where an Offer has been sent by the Grantor to the Participant by facsimile, the Grantor agrees to promptly provide the Participant with a hard copy of the original Offer.]⁸

21 TERMINATION

Each Party may terminate this Agreement by giving 30 calendar days' notice in writing to the other Party. Notwithstanding any such termination: (a) this Agreement shall continue to govern any Participation Agreement concluded before the termination of the Agreement, and (b) such termination will be without prejudice to any rights or obligations accrued prior to the date such termination takes effect.

22 MISCELLANEOUS

- 22.1 [The Grantor does not transfer or assign any rights or obligations under the Transaction Documents and the Participant will have no proprietary interest in the benefit of the Transaction Documents or in any amount received by the Grantor under or in relation to the Transaction Documents.
- 22.2 The relationship between the Grantor and the Participant is that of debtor and creditor with the right of the Participant to receive amounts from the Grantor restricted to the relevant Participation Percentage of any amount received and applied by the Grantor from any Recourse Party and the Participants' rights against the Grantor under this Agreement.
- 22.3 The Participant shall not be subrogated to or substituted in respect of the Grantor's claims by virtue of any payment under this Agreement and the Participant shall have no contractual relationship with or rights against any Recourse Party.]
- 22.4 This Agreement shall not constitute any kind of agency, fiduciary or trust relationship between the Grantor and the Participant and the Grantor shall not have any other duties or responsibilities other than those expressly specified in this Agreement.
- 22.5 If, at any time, any provision of this Agreement is or becomes invalid, illegal or unenforceable in any respect, the validity, legality or enforceable character of the remaining provisions will not in any way be affected or impaired.
- 22.6 A person who is not a Party has no rights under the Contracts (Rights of Third Parties) Act 1999 to enforce or to enjoy the benefit of any term of any Participation Agreement or this Agreement.

⁷ To be included if required by the Parties.

⁸ To be included if required by the Parties.

- 22.7 This Agreement and any Participation Agreement thereunder represents the entire agreement between the Parties with respect to its subject matter and supersedes all prior agreements or communications pertaining thereto. [This Agreement shall not affect any participation concluded between the Parties before the date of this Agreement in respect of any Transaction.]
- 22.8 Subject to Clause 22.6, this Agreement may be rescinded or varied at any time by the Parties without the consent of any third party.
- 22.9 No amendment or waiver of any provision of this Agreement or of any Participation Agreement shall be effective unless made in writing by both Parties. Any amendment or waiver shall be effective only in the specific instance and for the specific purpose for which given.
- 22.10 This Agreement does not contain any obligation for and commitment of either Party to issue an Offer or an Acceptance or to agree to an Acceptance towards the other Party.
- 22.11 Save as expressly set out in this Agreement, any Participation is made without recourse to the Grantor. The Grantor shall not have any liability or obligation to the Participant relating to the Participated Transaction or a Participation Agreement except as specifically set out in this Agreement.
- 22.12 Nothing in this Agreement shall oblige the Grantor to carry out any "know your customer" or other checks in relation to any person on behalf of the Participant and the Participant confirms to the Grantor that it is solely responsible for any such checks it is required to carry out and that it shall not rely on any statement in relation to such checks made by the Grantor.
- 22.13 This Agreement and any Participation Agreement may be executed in counterparts, both of which taken together shall constitute one and the same Agreement or Participation Agreement.

23 APPLICABLE LAW AND JURISDICTION

- 23.1 This Agreement and each Participation Agreement hereunder shall be governed by and construed in accordance with English law without reference to conflicts of laws rules.
- 23.2 [Each Party agrees that the courts of England have exclusive jurisdiction to settle any disputes in connection with this Agreement and/or any Participation Agreement and accordingly submits to the jurisdiction of the English courts.]
- 23.2 [Any dispute in connection with this Agreement and/or any Participation Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the arbitration rules of the London Court of International Arbitration, which rules are deemed to be incorporated by reference into this Clause.
- 23.3 The number of arbitrators shall be [one/three], the seat, or legal place of arbitration shall be London and the language to be used in the arbitral proceedings shall be English.]
- 23.4 Each Party:

- (a) waives objection to the English courts on grounds of inconvenient forum or otherwise as regards proceedings in connection with this Agreement and/or any Participation Agreement; and
- (b) agrees that a judgment or order of an English court in connection with this Agreement and/or any Participation Agreement is conclusive and binding on it and may be enforced against it in the courts of any other jurisdiction.

23.5 Without prejudice to any other mode of service allowed under any relevant law, [Party A][Party B]⁹:

- (a) irrevocably appoints [♦] as its agent for service of process in relation to any proceedings before the English courts in connection with this Agreement and any Participation Agreement; and
- (b) agrees that failure by a process agent to notify [Party A][Party B] of the process will not invalidate the proceedings concerned.]

This Agreement is made in two originals, the Parties taking one original each.

| | |
|---------------|---------------|
| Date: | Date: |
| For [Party A] | For [Party B] |
| Signature: | Signature: |
| Name: | Name: |
| Title: | Title: |
| Signature: | Signature: |
| Name: | Name: |
| Title: | Title: |

⁹ Use for either/neither/both party/ies as necessary.

APPENDIX I – OFFER AND ACCEPTANCE

OFFER AND ACCEPTANCE

From: [Grantor]
To: [Participant]
Date: [Date]

OFFER

Pursuant to the terms of our Master Participation Agreement, dated [Date] ("the **Agreement**"), the Grantor hereby offers to the Participant a Participation in the following Transaction.

| | |
|--|---|
| Type of Transaction: | [Insert detailed description of transaction] |
| Type of Participation: | [Unfunded/Funded] [disclosed/undisclosed] |
| [LC Number: | [...]] |
| Grantor's Reference No.: | [...] |
| Recourse Party(ies): | [Name, City, Country] |
| Recourse Party(ies)'s Reference No.: | [...] |
| Relevant Currency and Credit Amount: | [Currency and Amount] |
| Participation Amount: | [Currency and Amount] |
| Participation Percentage: | [Percentage] |
| Exporter: | [Name, City, Country] |
| Importer: | [Name, City, Country] |
| Goods: | [Description of Goods] |
| Shipment: | from [Country] to [Country] |
| Start Date of Transaction: | [Date] |
| Start Date of Participation Agreement: | [Date] |
| Validity Date of Transaction: | [Date] |
| Payment Terms of Transaction: | [at sight / deferred payment details] |
| Latest Date for Shipment in Transaction: | [Date] |
| Latest possible Due Date of Transaction: | [Date] |
| Applicable Rules | [e.g. UCP600, ISP98 etc] |
| Funding Details (if any): | [...] |
| Special conditions or comments (if any): | [more detailed information about the Transaction if necessary] |
| Your commission for above Participation: | [... % p.a., calculated on the basis of a year of 360 days and actual number of days elapsed] |
| Your up-front fee for above Participation: | []/[Nil] |
| Retention Share: | []% |
| Transaction Documents provided: | [Yes][No] |

Please let us know at your earliest convenience - but in no case later than close of business (cob) on [Date] when this Offer will expire - whether you accept the above Offer of Participation. Your Acceptance shall be given to us by countersigning this Offer and notifying us of your acceptance in accordance with Clause 20 of the Agreement. All provisions of the

Agreement, including Clause 23 (Applicable Law and Jurisdiction) are applicable to this Offer.

[Name of the Grantor]

[Grantor's signatures]

ACCEPTANCE

Pursuant to the terms of our Master Participation Agreement, dated [Date] (the "**Agreement**"), and your above-mentioned Offer, we hereby inform you that we will be pleased to participate on the terms of your Offer as outlined.

Kindly remit any sums due to us in relation to this Participation Agreement to:

Participant's account No.:

[account no.]

Participant's correspondent bank:

[Name, City, Country, Swift Code]

Participant's Reference No.:

[reference no.]

All provisions of the Agreement, including Clause 23 (Applicable Law and Jurisdiction) are applicable to this Acceptance.

For the Participant:

Place and Date:

[Place and Date]

[Signatures of the Participant]

APPENDIX II – UNFUNDED PARTICIPATIONS

DEMAND FOR PAYMENT AS REQUIRED UNDER CLAUSES 6.1.1 AND 6.1.2.

Pursuant to the terms of our Master Participation Agreement, dated [Date] (the "**Agreement**"), and your Acceptance, dated [Date], we hereby inform you that a Default has occurred under the following Transaction:

| | |
|------------------------------|----------------------------------|
| Type of Transaction: | [Description] |
| Type of Participation: | Unfunded [disclosed/undisclosed] |
| Grantor's Reference No.: | [...] |
| Participant's Reference No.: | [...] |
| Recourse Party(ies): | [Name, City, Country] |
| Defaulted Amount: | [Currency and Amount] |

We confirm that:

- (i) the Defaulted Amount has been claimed from the Recourse Party(ies);
- (ii) payment is due and has not reached us as of today; and
- (iii) we have acted in all [material] respects with the Participation Agreement applicable to the Transaction.

[Please note: statements (i), (ii) and (iii) above must not be amended when making a demand]

[A copy of the claim sent to the relevant Recourse Party is enclosed with this Request for Payment].

We kindly ask you to remit the amount of [Currency and Amount] within [four] Business Days to our account:

| | |
|--------------------|-----------------------------------|
| Account No.: | [...] |
| With Bank: | [Name, City, Country, Swift Code] |
| Our Reference No.: | [...] |

Capitalised terms not otherwise defined in this notice shall have the meaning set out in the Agreement, unless the context otherwise requires. All provisions of the Agreement, including Clause 23 (Applicable Law and Jurisdiction) are applicable to this demand.

[Name of the Grantor] [Grantor's signatures]

APPENDIX III – FUNDED PARTICIPATIONS

DEMAND FOR PAYMENT AS REQUIRED UNDER CLAUSES 6.2.2 AND 6.2.3

Pursuant to the terms of our Master Participation Agreement, dated [Date] (the "**Agreement**"), and your Acceptance, dated [Date], we hereby inform you that a Request has been made under the following Transaction:

| | |
|------------------------------|--------------------------------|
| Type of Transaction: | [Description] |
| Type of Participation: | Funded [disclosed/undisclosed] |
| Grantor's Reference No.: | [...] |
| Participant's Reference No.: | [...] |
| Recourse Party(ies): | [Name, City, Country] |
| Requested Amount: | [Currency and Amount] |

We confirm that:

- (i) the Requested Amount has been demanded by the Beneficiary; and
- (ii) we have acted in all [material] respects with the Participation Agreement applicable to the Transaction.

[Please note: statements (i) and (ii) above must not be amended when making a demand]

[A copy of the Request received from the Beneficiary is attached].

We kindly ask you to remit the amount of [Currency and Amount] within [two] Business Days to our account:

| | |
|--------------------|-----------------------------------|
| Account No.: | [...] |
| With Bank: | [Name, City, Country, Swift Code] |
| Our Reference No.: | [...] |

Capitalised terms not otherwise defined in this notice shall have the meaning set out in the Agreement, unless the context otherwise requires. All provisions of the Agreement, including Clause 23 (Applicable Law and Jurisdiction) are applicable to this demand.

[Name of the Grantor]

[Grantor's signatures]