As of February 2, 2017

International Swaps and Derivatives Association, Inc.
360 Madison Avenue, 16th Floor
New York, New York 10017
U.S.A.

ISDA Resolution Stay Jurisdictional Modular Protocol

Ladies and Gentlemen:

We have acted as your counsel as to matters of laws of the State of New York for purposes of this opinion in connection with the ISDA Resolution Stay Jurisdictional Modular Protocol (the “Protocol”) that you (ISDA) have published. The Protocol is intended for use with modules, each relating to the legal requirements of a particular jurisdiction, that ISDA has published or may in the future publish (each such module, a “Jurisdictional Module”). A separate adherence process will apply to each Jurisdictional Module. Capitalized terms used in this letter without definition have the meanings given to those terms in the Protocol.

The purpose of the Protocol is to enable adhering parties to amend the terms of Protocol Covered Agreements as set forth in the applicable Jurisdictional Module. As used herein, a “Protocol Covered ISDA Agreement” is a Protocol Covered Agreement that is a 1992 ISDA Master Agreement, 2002 ISDA Master Agreement, 1994 ISDA Credit Support Annex governed by New York law, 2016 ISDA Credit Support Annex for Variation Margin (VM) governed by New York law, 2016 ISDA Phase One Credit Support Annex for Initial Margin (IM) governed by New York law, 1995 ISDA Credit Support Deed governed by English law, 1995 ISDA Credit Support Annex governed by English law, 2016 ISDA Credit Support Annex for Variation Margin (VM) governed by English law, or 2016 ISDA Phase One IM Credit Support Deed governed by English law, and a “Protocol Covered NY ISDA Agreement” is a 1992 or 2002 ISDA Master Agreement, 1994 ISDA Credit Support Annex, 2016 ISDA Credit Support Annex for Variation Margin (VM) or 2016 ISDA Phase One Credit Support Annex for Initial Margin (IM), in each case governed by New York law.

This opinion relates only to matters governed by the laws of the State of New York and is confined to such matters.

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1. The Protocol

The Protocol provides an agreed mechanism whereby parties may amend certain agreements in accordance with the terms and conditions set out in the applicable Jurisdictional Module.

Through the execution, followed by online delivery to ISDA, of an Adherence Letter for a Jurisdictional Module on or before the Cut-off Date, a party may adhere to the Protocol in respect of that module. The Adherence Letter must be substantially in the form attached as an exhibit to the Protocol, and it appoints ISDA as the relevant Adhering Party’s agent for the limited purposes of the Protocol. In each Adherence Letter, a party must specify whether it is adhering in the capacity of a Module Adhering Party, a Regulated Entity, or in both capacities. A Module Adhering Party must identify those Regulated Entities that it wishes to designate as Regulated Entity Counterparties with respect to it for purposes of the Module by electing in its Adherence Letter among the following options: (i) all current and future Regulated Entities, (ii) each current and future Regulated Entity that is a member of a G-SIB, or (iii) one or more specific Regulated Entities to whom the Module Adhering Party will deliver a Module Adherence Notice. A Module Adhering Party that has selected option (ii) may additionally elect to specify other Regulated Entities on an entity-by-entity basis pursuant to option (iii). A Module Adherence Notice will only be effective if the Module Adhering Party has previously, or simultaneously, adhered to the Protocol. An Adhering Party may not specify additional provisions, conditions or limitations in its Adherence Letter. ISDA, as agent, may determine in good faith that a purported adherence that is not in compliance with the Protocol is void.

In order to adhere to the Protocol, an Adhering Party is required to access the “Protocol Management” section of the ISDA website to enter information online that is required to generate its form of Adherence Letter and to submit payment of any applicable fee. Each Adhering Party will print, sign and upload the signed Adherence Letter as a PDF attachment into the Protocol Management system. Once ISDA has approved and accepted the signed Adherence Letter, it will provide e-mail confirmation to the Adhering Party of the Adhering Party’s adherence to the Protocol with respect to the Jurisdictional Module identified in the Adherence Letter. ISDA intends to display electronically on its website a record of each Adherence Letter it accepts. Adherence to the Protocol is open until the Cut-off Date. ISDA will have the right, in its sole and absolute discretion, to designate the Cut-off Date.

A party’s adherence, once effective, is expressed in paragraph 1(g) of the Protocol to be irrevocable except that, by subsequently delivering a Revocation Notice during the Annual Revocation Period, a party may designate the next Annual Revocation Date as the last date on which any other party may adhere to the Protocol in respect of any Protocol Covered Agreement between them.
2. Analysis

The Protocol selects English law to govern the Protocol and each Adherence Letter, and further provides that the amendments to each Protocol Covered Agreement will be governed by the law specified in that agreement and otherwise in accordance with applicable choice of law doctrine. Generally, courts in New York will give effect to the parties' contractual choice of another jurisdiction's law unless there is no reasonable basis for the parties' choice or the chosen law would violate a fundamental policy of an otherwise applicable law of the State of New York. Further, precedents applying a choice-of-law doctrine known as depecage provide support for a New York court to recognize a choice of different laws to govern distinct aspects of a contractual relationship. Accordingly, assuming the choice of English law is upheld and the Protocol is effective as a matter of English law to amend the Protocol Covered ISDA Agreements, then the Protocol Covered NY ISDA Agreements will also be deemed amended as a matter of New York law. If the choice of English law is not respected, a New York court would engage in a “most significant contacts” analysis to determine the governing law, and would likely give considerable weight in its analysis to the parties’ contractual choice of New York law to govern the Protocol Covered NY ISDA Agreements. We turn now to analyzing the effectiveness of the Protocol mechanism if New York law were applied to govern the Protocol and Adherence Letters.

The procedure for entry into the Protocol contemplated by the Protocol is clearly founded, in our view, on the traditional doctrine of offer and acceptance. With respect to those Module Adhering Parties that specify Regulated Entity Counterparties pursuant to option (i) or (ii), as described in section 1 above, the delivery by a party adhering in a specific capacity (i.e., Module Adhering Party or Regulated Entity) of an Adherence Letter to ISDA is both an effective offer to each market participant adhering in the complementary capacity (i.e., a Regulated Entity of the specified type, or a Module Adhering Party) who has yet to adhere to the Protocol and an effective acceptance of the offer made by each other market participant (if any) who has already adhered in such complementary capacity at that time, in each case on the terms and subject to the conditions of the Protocol. With respect to those Module Adhering Parties that elect entity-by-entity specification of Regulated Entity Counterparties pursuant to option (iii), the Protocol may be viewed as creating an offer by each Regulated Entity to enter into the Module amendments with each Module Adhering Party, which offer a Module Adhering Party may accept by delivery of a Module Adherence Notice through one of the means specified by such Regulated Entity in its Adherence Letter. The fact that offer and acceptance occur in the context of a reasonably elaborate multilateral mechanism does not, in our view, affect the validity of the offer or acceptance as between each pair of Adhering Parties. With respect to “deemed” Protocol Covered ISDA Agreements created in confirmations executed after the Implementation Date, we believe the Protocol is best

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1 Please refer to the legal opinion of Mayer Brown International LLP, dated the date hereof, regarding the effectiveness of the Protocol under English law.
construed as creating a standing agreement to amend such deemed master agreements, which if not modified by subsequent agreement or conduct should be effective to amend those deemed agreements, subject to the discussion in paragraphs 5 and 8 of “Assumptions and Qualifications” below.

In the case of ISDA 2002 and 1992 edition master agreements entered into on or prior to the Implementation Date ("Master Agreements"), helpful support for the mechanism contemplated by the Protocol for entering into the Protocol and for amending Protocol Covered ISDA Agreements is provided by the Master Agreements themselves, since they expressly contemplate that they may be amended and modified from time to time. Their modular architecture provides an open-ended framework to facilitate the ongoing trading relationship of the parties. Section 9(b) of the Master Agreements provides that an amendment to, or modification of, the agreement will be effective if it is in writing and executed by each of the parties, and Section 9(e) contemplates amendments and modifications that are executed and delivered in counterparts. In addition, we note the stipulation of facsimile transmission as being included as an acceptable means of evidencing an amendment or modification in writing under Section 9(b). We are therefore of the view that the signature by each of a pair of Protocol participants of their respective Adherence Letters and the uploading of them as PDF attachments into the Protocol Management system should be viewed as sufficiently parallel to facsimile transmission to satisfy Section 9(b).

3. **Opinion**

On the basis of the foregoing, having regard to such legal considerations as we deem relevant and subject to the analysis, assumptions and qualifications set out herein, we are of the opinion that, under the laws of the State of New York, the delivery to ISDA of an Adherence Letter before the Cut-off Date (and before any applicable Annual Revocation Date) by each of two parties, in each case on the terms set out in the Protocol (including, if applicable, the delivery of a Module Adherence Notice by the Module Adhering Party to the Regulated Entity Counterparty), (i) will be sufficient to effect an amendment of each Protocol Covered ISDA Agreement entered into between them (or, in the case of a Protocol Covered ISDA Agreement that is a deed, executed and provided by one of them in favor of the other) on or prior to the Implementation Date and (ii) should be sufficient to effect an amendment of “deemed” Protocol Covered ISDA Agreements created in confirmations executed after the Implementation Date, as discussed in paragraphs 5 and 8 under “Assumptions and Qualifications”, in each case in accordance with the terms and conditions of the applicable Jurisdictional Module.

4. **Assumptions and Qualifications**

This opinion is given subject to the following assumptions and qualifications:
(1) Each relevant Protocol Covered ISDA Agreement is, or contains provisions regarding amendments and modifications substantially identical to, those found in a Master Agreement;

(2) Under each applicable law, each Adhering Party is and was at all relevant times able lawfully to enter into each relevant Protocol Covered ISDA Agreement, its entry into each relevant Protocol Covered ISDA Agreement was duly authorized and each relevant Protocol Covered ISDA Agreement constitutes the legal, valid and binding obligations of each relevant Adhering Party;

(3) Under each applicable law, each Adhering Party is and was at all relevant times able lawfully to adhere to the Protocol on the terms set out in the Protocol, its adherence to the Protocol is duly authorized and each Adherence Letter has been properly completed, executed and delivered to ISDA in accordance with the terms of the Protocol and substantially in the form attached as an exhibit to the Protocol;

(4) The Protocol reflects correctly the commercial intentions of each Adhering Party and there is no fact or circumstance relating to any Adhering Party or pair of Adhering Parties which would affect this opinion;

(5) None of the provisions of the Jurisdictional Module, or any substantive requirements or interpretive principles of the relevant jurisdiction’s laws or regulations that may be incorporated therein, modify, conflict with or create ambiguity in respect of Protocol provisions in any manner that is material to this opinion.2

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2 Each of the UK (PRA Rule) Jurisdictional Module, the German Jurisdictional Module and the Japanese Jurisdictional Module contains, in paragraph 2(a), an operative provision whereby the parties agree that the amendments specified in the Jurisdictional Module will be deemed made to “Covered Agreements” (as defined in the Jurisdictional Module), while paragraph 1(b) of the Protocol sets forth an agreement that the terms of each “Protocol Covered Agreement” will be amended in accordance with the terms and conditions set forth in the Jurisdictional Module. A question therefore arises whether the operative amending provision in each of these Jurisdictional Modules is intended to supplant or modify paragraph 1(b) of the Protocol, such that amendments will be made to “Covered Agreements” (as defined in the Jurisdictional Module) rather than to Protocol Covered Agreements.

The Protocol defines “Protocol Covered Agreement” by reference to the term “Covered Agreement” (as defined in the Protocol), which is defined in turn by reference to ‘Covered Agreement’ (as defined in the Jurisdictional Module). The definition of “Covered Agreement” in the Protocol expressly includes post-Implementation Date “deemed” ISDA Master Agreements, and excludes any agreement if third-party consents are required to amend the agreement or to avoid adverse effects of an amendment. As defined in the UK, German and Japanese Jurisdictional Modules, ‘Covered Agreement’ lacks these elements of specificity.

We believe that the UK, German and Japanese Jurisdictional Modules would likely be construed under New York law as intended to amend “Protocol Covered Agreements”, as this approach would reconcile paragraph 1(b) of the
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(6) As between any two Adhering Parties, the later of them to adhere does so (and any Module Adherence Notice is delivered and any “deemed” ISDA Master Agreement is entered into) prior to the formal commencement of insolvency or reorganization proceedings against either of them and this opinion is not otherwise affected by the insolvency laws applicable to any Adhering Party;

(7) Insofar as performance in or subject to the laws of any jurisdiction outside of the State of New York is contemplated, such performance will not be illegal or invalid by virtue of the laws of that jurisdiction;

(8) The Protocol, which allows parties to opt in to aspects of certain resolution regimes and to override certain contractual rights, applies prospectively through clause (b) of the definition of Covered Agreements to ISDA Master Agreements deemed to have been entered into after the Implementation Date by a confirmation “deeming process”. Unless the confirmation that effects the deeming process appropriately amends Section 9(a), the “Entire Agreement” provision, of the relevant standard ISDA Master Agreement, that provision, which declares the ISDA Master Agreement to be the entire agreement between the parties, could threaten the effectiveness of the Protocol with respect to such post-Implementation Date “deemed” ISDA Master Agreements.

New York courts tend to enforce provisions like the Entire Agreement provisions (which differ slightly in the 1992 and 2002 versions of the ISDA Master Agreements), though there are a number of potential exceptions. See, e.g., Chimart Assocs. v. Paul, 66 N.Y.S.2d 344, 347, 489 N.E.2d 231, 234 (1986) (parole evidence admissible to establish the existence of a mutual mistake) and General Motors Corp. v. Fiat S.p.A., 678 F. Supp. 2d 141, 148 (S.D.N.Y. 2009) (effect of merger clause limited so as to preserve some operative scope for a prior agreement to arbitrate). A court applying New York law should hold that the Entire Agreement provision – incorporated into a confirmation as a matter of form, without alteration or other evidence of specific negotiation, the effect of which would nullify ab initio an express written term of the publicly adhered to and recorded Protocol – does not preclude effectiveness of the Protocol amendments of deemed ISDA Master Agreements during the period before an actual ISDA Master Agreement is executed, absent other extrinsic evidence that...
would controvert a mutual intent to amend the deemed ISDA Master Agreements. However, again noting the judicial bias towards enforcement of provisions like the Entire Agreement provisions, our conclusion is not certain.

The effect of an Annual Revocation Date on future (i.e., post-Annual Revocation Date) deemed ISDA Master Agreements between parties that had adhered on or before the applicable Annual Revocation Date may be interpreted in various ways. Under one reading, which finds its most direct textual support in the clause “regardless of the date …” in paragraph 1(g)(i), Protocol amendments continue to take effect after the applicable Annual Revocation Date. The contrary reading, however, can also be reconciled to the text as a whole and arguably is in greater accord with the premise of the Protocol as a mechanism for obviating the need for separate, numerous bilateral actions with every other Adhering Party. Parties revoking their adherence, as well as those who will continue to transact with them via long-form confirmations, may wish to expressly address the consequences of revocation in their confirmations or in separate, bilateral agreements; and

(9) We express no opinion as to the enforceability of the amendments effected by the Protocol, the effectiveness of paragraph 3(d) of the Protocol to cause any particular agreement to meet the definition of Protocol Covered Agreement or, except as set forth in our opinion stated in section 3 above, the enforceability of any provisions of the Protocol.

This opinion is rendered solely to ISDA for distribution to its members and each other party adhering to the Protocol. This opinion may not be distributed to any other person without our prior written consent, except that we consent to ISDA including a copy of this opinion on the “ISDA Resolution Stay Jurisdictional Modular Protocol” section of its website for information purposes only. This opinion may also be shown by an ISDA member or another party adhering to the Protocol to a competent regulatory authority for such person for information purposes only, on the basis that we assume no responsibility to such authority or any other person as a result or otherwise.

Yours faithfully,

Mayer Brown LLP

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