Our reference: GW/HF/SFH/25491.0001

ICC Banking Commission
International Chamber of Commerce (ICC)
33-43 avenue du Président Wilson
75016 Paris
France

12 September 2016

Dear Sirs

Demand guarantees issued subject to ICC Uniform Rules for Demand Guarantees, 2010 revision (URDG 758)

1 Basis of instructions

We have been instructed by the ICC Banking Commission to provide this opinion in relation to demand guarantees issued subject to URDG 758, as further described in this opinion.

2 Documents reviewed

For the purposes of giving this opinion we have reviewed only URDG 758 and we have relied on the description of a Demand Guarantee set out in Schedule 1 (Description of a Demand Guarantee). We have not conducted any due diligence into any party.

3 Scope and purpose of opinion

3.1 This opinion is given on the basis that:

(a) it is limited to the laws of England and Wales, as applied and interpreted by the courts of England and Wales at the date of this opinion; and

(b) any dispute based on this opinion shall be governed by English law and subject to the exclusive jurisdiction of the English courts.

3.2 We express no opinion on the laws of any other jurisdiction. To the extent that foreign laws are relevant, this opinion is subject to the effect of such laws.
3.3 This opinion is provided by us for the benefit of the ICC Banking Commission and the financial institutions which are members of the ICC Banking Commission from time to time (together, the Opinion Beneficiaries) in connection with the Opinion Beneficiaries’ use of Demand Guarantees as a credit risk mitigation technique as referred to in Article 194 (Principles governing the eligibility of credit risk mitigation techniques) CRR (as defined below), including for the purposes of Article 194.1 CRR. It is not an opinion on any specific Demand Guarantee and we shall not have any liability to any Opinion Beneficiary in respect of an Opinion Beneficiary entering into any specific transaction in reliance on this opinion.

3.4 This opinion may be disclosed to third parties on the condition that such persons shall not be entitled to rely on the content of this opinion and we shall have no liability to any such recipient(s).

3.5 The fact that we have given this opinion for the benefit of the Opinion Beneficiaries shall not be deemed to cause us, now or in the future, any conflict of interest, whether in relation to the matters opined on in this opinion or otherwise, and by relying on this opinion each Opinion Beneficiary agrees and acknowledges this and, to the extent any conflict of interest exists now or arises in the future in relation to the matters opined on or otherwise, irrevocably waives that conflict of interest.

4 Interpretation

4.1 The headings in this opinion do not affect its interpretation. References to paragraphs and Schedules are (unless otherwise stated) references to paragraphs of, and schedules to, this opinion.

4.2 The annotations on the right-hand side of some of the pages of this opinion, indicating relevant Articles of the CRR, are for guidance only.

4.3 In this opinion:

CRR means Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms;

Demand Guarantee has the meaning given to it in Schedule 1 (Description of a Demand Guarantee);

IRB Approach has the meaning given to it in the CRR;

Standardised Approach has the meaning given to it in the CRR;

Underlying Obligor has the meaning given to it in Schedule 1 (Description of a Demand Guarantee);

Underlying Payment Obligation has the meaning given to it in Schedule 1 (Description of a Demand Guarantee); and

URDG 758 means ICC Uniform Rules for Demand Guarantees, 2010 revision, ICC Publication no. 758.

4.4 The terms “beneficiary”, “business day”, “complying demand”, “complying presentation”, “demand”, “guarantee”, “guarantor” and “presentation” have the meanings given to those terms in URDG 758.
4.5 The terms "approaches" and "methods" are used in the same manner as they are used in the relevant Articles of the CRR.

5 Opinion

Subject to the reasoning set out in paragraph 6 (Reasoning), the assumptions set out in paragraph 7 (Assumptions) and Schedule 2 (Further assumptions), and the qualifications set out in Schedule 3 (Qualifications):

Legal effectiveness and enforceability

5.1 We are of the opinion that the obligations expressed to be assumed by a guarantor under a Demand Guarantee would constitute legally effective and enforceable obligations of that party.

Credit risk mitigation

5.2 On the basis of the reasoning below, we are of the opinion that a Demand Guarantee would meet the criteria for credit risk mitigation set out in Articles 194 to 217 (inclusive) CRR.

6 Reasoning

In giving this opinion, we have considered the following points:

For a Demand Guarantee under all approaches and methods:

(a) the obligations expressed to be assumed by the guarantor under a Demand Guarantee are of a type and are in a form capable of being enforced by an English court applying English law, or an arbitration panel applying English law, although the legal effectiveness and enforceability of such obligations would be subject to principles which affect contractual obligations generally (and in this respect we refer to paragraph 1 of Schedule 3 (Qualifications));

(b) a demand guarantee is not expressly listed as an eligible protection agreement for unfunded credit protection. Under the terms of a Demand Guarantee, the guarantor undertakes to pay an amount to the beneficiary following presentation of a complying demand by the beneficiary (see Article 20(b) URDG 758). A complying demand would comprise a written demand by the beneficiary including a statement that the claimed amount was due but unpaid by the Underlying Obligor. As such, we are of the opinion that a Demand Guarantee effectively functions like a guarantee given by the guarantor in favour of the beneficiary and can be viewed as akin to a guarantee for the purposes of CRR. A Demand Guarantee is, therefore, capable of being an eligible protection agreement for the purposes of Articles 194.6(a) and 203 CRR, subject to meeting the applicable requirements for guarantees set out in Articles 194 to 217 (inclusive) CRR;

(c) under the terms of a Demand Guarantee the credit protection is direct in that it is expressed to be an obligation of the guarantor directly to the beneficiary;

(d) the extent of the credit protection is clearly defined and incontrovertible, in that the terms of a Demand Guarantee clearly define the amount of the guarantor's payment obligation and the
requirements to trigger payment of that obligation and the Demand Guarantee provides that it is irrevocable on issue (see Article 4(b) URDG 758);

(e) a Demand Guarantee does not contain any clause or provision, the fulfilment of which is outside the direct control of the beneficiary, that:

(i) would allow the guarantor to cancel the protection unilaterally (see Article 4(b) URDG 758, which states that the Demand Guarantee is irrevocable and Article 11(b) URDG 758, which provides that an amendment to the guarantee made without the beneficiary’s agreement is not binding on the beneficiary);

(ii) would increase the effective cost of protection as a result of a deterioration in the credit quality of the protected exposure;

(iii) could prevent the guarantor from being obliged to pay out in a timely manner in the event that the Underlying Obligor fails to make any payments due. In this respect we note that:

(A) Article 20(a) URDG 758 provides that the guarantor has a maximum of five business days following the day of presentation to determine if a presentation is complying. Although we are not aware of any applicable guidance on what time period might be “timely” for the purposes of Article 213.1(c)(iii) CRR, we are of the opinion that this time period, which we understand to reflect international market practice for examination of presentations, would be acceptable; and

(B) the terms of the Demand Guarantee might require that the unpaid amount being claimed must have been due but unpaid by the Underlying Obligor for a certain number of days before the beneficiary can make a demand. In our opinion, this would not prevent the requirements of Article 213.1(c)(iii) CRR being met so long as such period of time did not prevent the guarantor from being obliged to pay out in a timely manner following the relevant payment default. The beneficiary would need to determine whether such time period was “timely” for these purposes; or

(iv) could allow the maturity of the credit protection (being the expiry date of the Demand Guarantee) to be reduced by the guarantor (see Article 11(b) URDG 758, which provides that an amendment to the guarantee made without the beneficiary’s agreement is not binding on the beneficiary);

(f) under the terms of a Demand Guarantee, following a payment default by the Underlying Obligor, the beneficiary has the right to serve a demand on the guarantor for payment under the Demand Guarantee, meaning that the beneficiary has the right to pursue the guarantor in a timely manner for any monies due under the claim in respect of which the protection is provided and payment by the guarantor is not subject to the beneficiary first having to pursue the Underlying Obligor. In this respect, we note that:
(i) the form of demand under a Demand Guarantee might require the beneficiary to state that it has made a demand on the Underlying Obligor for payment of the unpaid amount being claimed. In our opinion, this would not prevent the requirements of Article 215.1(a) CRR being met, as such action is entirely within the beneficiary's control and the act of serving a demand is not the same as taking steps to pursue the Underlying Obligor; and

(ii) the terms of the Demand Guarantee might require that the unpaid amount being claimed must have been due but unpaid by the Underlying Obligor for a certain number of days before the beneficiary can make a demand. In our opinion, this would not prevent the requirements of Article 215.1(a) CRR being met so long as such period of time did not prevent the beneficiary from being able to make a demand under the Demand Guarantee in a timely manner following the relevant payment default. The beneficiary would need to determine whether such time period was "timely" for these purposes;

(g) a Demand Guarantee is an explicitly documented obligation assumed by the guarantor;  

(h) a Demand Guarantee will provide for the type of payments that the Underlying Obligor is expected to make in the underlying transaction which are covered by the Demand Guarantee. This is acceptable for the purposes of Article 215.1(c) CRR so long as, where certain types of payment are excluded from the coverage of the Demand Guarantee, the lending institution intending to rely on the coverage has adjusted the value of the "guarantee" to reflect the limited coverage;

Additionally for a Demand Guarantee under the IRB Approach:

(i) where the exception in Article 183.4 CRR does not apply (meaning that the relevant requirements of Articles 183.1 to 183.3 CRR apply):

(ii) the terms of a Demand Guarantee are evidenced in writing. In this respect, we are of the opinion that a Demand Guarantee issued electronically (for example, by authenticated SWIFT message) would satisfy this requirement; and

Additionally for a Demand Guarantee under the IRB Approach to qualify for the treatment set out in Article 133.3 CRR:

(j) under the terms of a Demand Guarantee, the beneficiary has the right to demand payment from the guarantor without having to take legal action in order to pursue the counterparty for payment; and
a Demand Guarantee sets out the written terms and conditions of that Demand Guarantee (including by incorporation of the terms and conditions of URDG 758), meaning that the terms and conditions of credit protection arrangements are legally confirmed in writing by both the protection provider and the institution. In the case of a Demand Guarantee where the terms of such Demand Guarantee are confirmed in writing by the guarantor, but such Demand Guarantee is not signed by the beneficiary, we are of the opinion that this requirement can be satisfied by the beneficiary evidencing, signifying or confirming, in each case in writing, its acceptance of, or reliance on, the terms of the Demand Guarantee.

7 Assumptions

In giving this opinion, we have assumed the following matters (in addition to the assumptions set out in Schedule 1 (Description of a Demand Guarantee), which the institution intending to benefit from the credit risk mitigation would need to confirm for the Demand Guarantee:

For a Demand Guarantee under all approaches and methods:

(a) that the lending institution as beneficiary has taken all appropriate steps to ensure the effectiveness of the credit protection arrangement and to address the risks related to that arrangement. We note that under the terms of URDG 758, where the Demand Guarantee is advised to the beneficiary through an advising party, the advising party signifies to the beneficiary that it has satisfied itself as to the apparent authenticity of such Demand Guarantee (Article 10(a) URDG 758). This step may be relevant in satisfying this requirement of CRR, although the “appropriate steps” to be taken for a particular Demand Guarantee for this purpose will depend on the circumstances;

(b) that the guarantor is an eligible provider of unfunded credit protection under Article 201 (Eligibility of protection providers under all approaches). For the purposes of this opinion, we have assumed that: (i) the Demand Guarantee is not a counter-guarantee nor is it being relied on as a counter-guarantee for the purposes of Article 214 CRR; and (ii) the Demand Guarantee has not been provided in the context of a mutual guarantee scheme;

(c) that the Demand Guarantee will be legally effective and enforceable in all relevant jurisdictions (other than England and Wales) including the jurisdiction of the guarantor (which for this purpose includes the jurisdiction of the issuing branch or office), so as to provide appropriate certainty as to the credit protection achieved having regard to the approach used to calculate risk-weighted exposure amounts and to the degree of recognition allowed;

(d) that the beneficiary has fulfilled any contractual and statutory requirements in respect of, and taken all steps necessary to ensure, the enforceability of the Demand Guarantee under all applicable laws. In this respect, we are not aware of any applicable statutory requirements that would apply under the laws of England and Wales;

(e) that the beneficiary has conducted sufficient legal review confirming the enforceability of the Demand Guarantee in all relevant jurisdictions (which for this purpose includes the jurisdiction of the issuing branch or...
office) and that it shall repeat such review as necessary to ensure continuing enforceability. For this purpose it is noted that this opinion could form part of such legal review in respect of the enforceability of the Demand Guarantee in England and Wales;

Additionally for a Demand Guarantee under the Standardised Approach:

(f) where the amount of the Demand Guarantee is less than the amount of the underlying exposure, that the protected and unprotected parts of the exposure are of equal seniority;  

Article 235.2 CRR

Additionally for a Demand Guarantee under the IRB Approach:

(g) unless the exception in Article 183.4 CRR applies:

(i) that the guarantor complies with the rules for obligors as set out in Articles 171, 172 and 173 CRR; and

Article 183.1(b) CRR

(ii) that the Demand Guarantee will be legally enforceable against the guarantor in a jurisdiction where it has assets to attach and enforce a judgment against. Where the guarantor has assets to attach in England and Wales, we refer to paragraph 5.1 (Legal effectiveness and enforceability) above;

Article 183.1(c) CRR

Additionally for a Demand Guarantee under the IRB Approach to qualify for the treatment set out in Article 153.3 CRR:

(h) that the guarantor is an eligible provider of unfunded credit protection under Article 202 (Eligibility of protection providers under the IRB Approach which qualify for the treatment set out in Article 153(3)) CRR. For the purposes of this opinion, we have assumed that: (i) the Demand Guarantee is not a counter-guarantee nor is it being relied on as a counter-guarantee for the purposes of Article 214 CRR; and (ii) the Demand Guarantee has not been provided in the context of a mutual guarantee scheme;

Articles 194.5, 194.6(c), 202, 214 and 215.2 CRR

(i) that: (i) the underlying exposure is to one of the exposures listed in Article 217.1(a) CRR; (ii) no Underlying Obligor is a member of the same group as the guarantor; and (iii) the underlying exposure is hedged by one of the instruments listed in Article 217.1(c) CRR (and the applicable requirements of Articles 217.2 and 217.3 are met);

Articles 217.1(a), 217.1(b), 217.1(c), 217.2 and 217.3 CRR

(j) that the risk weight that is associated with the exposure prior to the application of the treatment set out in Article 153.3 CRR, does not already factor in any aspect of the credit protection;

Article 217.1(e) CRR

(k) that, to the extent possible, the beneficiary has taken steps to satisfy itself that the guarantor is willing to pay promptly should a demand be made under the Demand Guarantee; and

Article 217.1(f) CRR

(l) that the requirements of Articles 217.1(g) and 217.1(l) CRR are met, to the extent applicable.

Articles 217.1(g) and 217.1(l) CRR
8 Other matters

In addition, an institution intending to benefit from the credit risk mitigation would need to satisfy itself of the following matters:

For a Demand Guarantee under all approaches and methods:

(a) that it can demonstrate to the satisfaction of the competent authorities that it has adequate risk management processes to control those risks to which it may be exposed as a result of carrying out credit risk mitigation practices;

(b) that, notwithstanding the fact that any credit risk mitigation is taken into account for the purposes of calculating risk-weighted exposure amounts and, where applicable, expected loss amounts, an institution is required to continue to undertake a full credit risk assessment of the underlying exposure and it must be in a position to demonstrate the fulfilment of this requirement to the satisfaction of the competent authorities;

(c) that it can demonstrate to the satisfaction of the competent authorities that it has in place systems to manage potential concentration of risk arising from its use of guarantees and credit derivatives, and how its strategy in respect of its use of credit derivatives and guarantees interacts with its management of its overall risk profile;

Additionally for a Demand Guarantee under the IRB Approach

(d) unless the exception in Article 183.4 CRR applies:

(i) that it has clearly specified criteria for the types of guarantors it recognises for the calculation of risk weighted exposure amounts; and

(ii) that it has clearly specified criteria for adjusting grades, pools or LGD estimates (as defined in the CRR) that comply with the requirements of Article 183.2 CRR; and

Additionally for a Demand Guarantee under the IRB Approach to qualify for the treatment set out in Article 153.3 CRR:

(e) that it has in place a process to detect excessive correlation between the creditworthiness of a protection provider and the obligor of the underlying exposure due to their performance being dependent on common factors beyond the systematic risk factor.

Yours faithfully

Sullivan & Worcester UK LLP

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Schedule 1 – Description of a Demand Guarantee

A demand guarantee is an independent payment undertaking issued to support performance of an underlying payment or other obligation. For the purposes of this opinion, **Demand Guarantee** means a demand guarantee which meets each of the criteria set out in this Schedule.

An institution intending to rely on a Demand Guarantee as a credit risk mitigation technique would be the beneficiary of the Demand Guarantee, having received the Demand Guarantee directly from a guarantor as credit protection for an underlying exposure.

Example wording for clauses in Demand Guarantees given in this Schedule are included for illustration purposes and are not intended to be prescriptive. In relation to paragraphs 1, 2, 3, 4, 6 and 8(c) below, we refer to the Model Form for a demand guarantee provided by ICC in relation to URDG 758:

**Criteria for a demand guarantee**

1. It is issued by a bank or any other entity which is listed as an eligible provider of unfunded credit protection under CRR in favour of a named beneficiary and is signed (as defined in URDG 758) by the party issuing it.

2. It is issued in respect of a payment obligation due by a named third party (the Underlying Obligor) to the beneficiary (the Underlying Payment Obligation).

3. It expressly incorporates the rules of URDG 758. For example:

   "This guarantee is subject to the Uniform Rules for Demand Guarantees (URDG) 2010 revision, ICC publication no. 758."

4. It clearly states:

   (a) the maximum amount of the guarantor’s payment obligation to the beneficiary; and

   (b) the extent to which the beneficiary is liable for any fees payable to the guarantor. The amount of such fees must not be connected to any changes in the credit quality of the Underlying Obligor or the Underlying Payment Obligation.

5. For the purposes of Article 13 (Variation of amount of guarantee) URDG 758, to the extent that the guarantee provides for the reduction of its amount on fixed and specified dates or on the occurrence of specified events or to reflect actual reductions in the amount of the Underlying Payment Obligation, this would not conflict with the requirements of CRR so long as the beneficiary adjusted the value of the credit protection in accordance with the provisions of CRR, and so long as such reductions were not connected to the credit quality of the Underlying Obligor or the Underlying Payment Obligation. In addition, equivalent provisions providing for the increase in the amount of the guarantee would not conflict with the requirements of CRR.

6. It clearly states the expiry date or expiry event for presentation. Where the guarantee provides for an expiry event, this event must be of a nature consistent with the provisions of CRR. For example, an event linked to the credit quality of the underlying exposure would not be acceptable. As the extent of the credit protection must be clearly defined and incontrovertible, the nature of the event (in terms of determining whether or not such event has occurred) must be clear. An example of an expiry event that
would be consistent with the requirements of CRR would be the satisfaction in full of the underlying exposure.

It provides that the guarantor will pay the beneficiary upon presentation of the beneficiary’s complying demand.

The terms of the guarantee are such that:

(a) the beneficiary will be able to present a demand following a default in any payment or a non-payment by the Underlying Obligor of the Underlying Payment Obligation. For example, by requiring that the beneficiary states that the amount claimed in the demand represents amounts due and owing but unpaid to the beneficiary by the Underlying Obligor in respect of the Underlying Payment Obligation;

(b) the beneficiary’s ability to make a demand is not conditional on any other event outside the direct control of the beneficiary having occurred (or on the beneficiary having to state or provide evidence that any other such event has occurred);

(c) it is clear from the terms of the guarantee what statements and information a demand must contain in order to constitute a complying presentation; and

(d) the beneficiary is not required to satisfy any conditions that are not entirely within its control in order to make a complying demand.

It is: (i) governed by English law and (ii) subject to the jurisdiction of the English courts or to arbitration under internationally recognised arbitration rules.

It does not contain any provisions which conflict with or alter the following Articles of URDG 758:

(a) Articles 4(a) and 4(b), which provide that the guarantee is irrevocable once issued;

(b) Articles 4(c), 14(a), 14(b) and 25(d) (together with the interpretive rules of Article 3(d)), which provide the rules for when the beneficiary may make a presentation in relation to the issue and expiry date of the guarantee, unless the terms of the guarantee are clear as to the deadline for making a presentation;

(c) Article 5 (Independence of guarantee and counter-guarantee) and Article 6 (Documents v. goods, services or performance), which confirm the independence of the guarantee from the underlying transaction;

(d) Article 7 (Non-documentary conditions), which provides that any non-documentary condition of the guarantee will be disregarded;

(e) Article 11(b), which provides that an amendment to the guarantee made without the beneficiary’s agreement is not binding on the beneficiary;

(f) Article 12 (Extent of guarantor’s liability under guarantee) which provides for the extent of the guarantor’s liability under the guarantee, unless the terms of the guarantee are clear as to the extent of the guarantor’s liability;

(g) Article 14 (Presentation), which provides for the rules of presentations under the guarantee, except to the extent the terms of the guarantee clearly provide for the time, place and in what format any presentation should be made;
(h) Article 15 *(Requirements for demand)*, which provides for the requirements for a
demand, except to the extent the terms of the guarantee clearly provide for the
requirements of a complying demand;

(i) Article 19(a), which provides that the guarantor shall determine, on the basis of
a presentation alone, whether it appears on its face to be complying;

(j) Article 20(a), which provides that the guarantor has a maximum of five business
days following the day of presentation to determine if a presentation is
complying. Any extension of the time period specified in this Article would need
to comply with the requirements of Article 213.1(c)(iii) CRR; and

(k) Article 20(b), which provides that when the guarantor determines that a demand
is complying, it shall pay the beneficiary. Examples of provisions which would
conflict with this Article include:

(i) any provision providing that the guarantor can unilaterally amend, reduce
the amount of or cancel the guarantee prior to its stated expiry date by
notice to the beneficiary; and

(ii) any sanctions clause that allows the guarantor any discretion not to make
a payment under the guarantee in circumstances other than where such
payment was legally prevented by statutory or regulatory requirements
applicable to that guarantor. For example, by reference to an internal
sanctions-related policy of that bank or by reference to the requirements
of the laws of another country not applicable to that bank.
Schedule 2 – Further assumptions

The opinions set out in this opinion letter are subject to the following assumptions:

1. The guarantor: (a) was, or will be (as applicable), at the time of issuing the Demand Guarantee, lawfully incorporated and existing in its jurisdiction of incorporation; (b) has, or will have (as applicable), the authority, power and capacity to enter into and perform its obligations under that Demand Guarantee; and (c) has, or will have (as applicable), duly executed and issued the Demand Guarantee, in each case in accordance with all applicable laws.

2. The obligations of the guarantor under the Demand Guarantee to which it is, or will be (as applicable), a party did or will, when entered into, constitute legal, valid, binding and enforceable obligations of the guarantor under all applicable laws (other than the English law obligations of the guarantor and any points of English law that are covered by this opinion).

3. The guarantor has not passed a resolution for its winding-up or dissolution and no proceedings have been commenced or steps taken for the winding-up of the guarantor or for the appointment of an administrator, receiver or manager in relation to the guarantor or any assets or revenue of the guarantor. No analogous procedure or step has been taken in any jurisdiction in relation to the guarantor, or any assets or revenue of the guarantor.

4. The guarantor has complied with, and will comply with, all applicable anti-terrorism, anti-corruption and anti-money laundering laws and regulations applicable to it, and there is nothing in the Demand Guarantee or the transactions contemplated by the Demand Guarantee that is inconsistent with any such laws and regulations.

5. The provisions of the Demand Guarantee do not breach any other agreement or instrument binding on the guarantor or its assets.

6. No foreign law affects this opinion or conflicts with the rights and obligations of the guarantor or the beneficiary under the Demand Guarantee. All consents, licences, approvals, notices, filing, publications and registrations required in any other jurisdiction for the legality, validity, binding nature or enforceability of the Demand Guarantee have or will be obtained.

7. The guarantor has not entered into, or will not enter into (as applicable), the Demand Guarantee in reliance on a misrepresentation, or in bad faith, or as a result of fraud, coercion or duress, or being aware of any limitation on any other party from entering into the Demand Guarantee.

8. The Demand Guarantee represents, or will represent (as applicable), the entire agreement between the parties to it in relation to the transactions contemplated by it.

9. If any party to the Demand Guarantee is or purports to carry out a regulated activity for the purposes of the Financial Services and Markets Act 2000 (FSMA) or equivalent legislation in its jurisdiction, that person is an authorised person who may carry out that activity under FSMA or such equivalent legislation, or is an exempt person under FSMA or such equivalent legislation and may carry out that activity. If a party to a Demand Guarantee is a financial institution, it has obtained all applicable consents, licences, approvals and authorisations of any relevant governmental, judicial or public body or other authority in any relevant jurisdiction to carry out its business as a financial institution in such jurisdiction.
10 No party to the Demand Guarantee: (a) has entered into, or will enter into (as applicable), the Demand Guarantee on the basis of anything said or done by a person carrying out a regulated activity unless that person is an authorised person who may carry out that activity under FSMA or is an exempt person under FSMA and may carry out that activity; or (b) has entered into, or will enter into (as applicable), the Demand Guarantee or has or will exercise any rights under the Demand Guarantee because of a communication made in breach of section 21(1) of FSMA, or, in each case, the equivalent legislation in its jurisdiction.
Schedule 3 – Qualifications

The opinions set out in this opinion letter are subject to the following qualifications:

1. The term "enforceable" as used in this opinion means that an obligation is of a type and form which the English courts generally enforce. This opinion is not to be taken to imply that any obligation would necessarily be capable of enforcement in all circumstances in accordance with its terms, as such obligations will be subject to certain principles of law, including but not limited to, time limitations, misrepresentation, mistake, fraud and frustration.

2. This opinion is subject to the effect of any bankruptcy, liquidation, receivership, moratorium, reorganisation or similar laws affecting the rights of secured and unsecured creditors generally.

3. Where a party to a Demand Guarantee has a discretion, or may determine a matter in its opinion, a court may impose limits on such determination or discretion, including but not limited to, requiring that any discretion is exercised in good faith, reasonably and for a proper purpose, and that any determination is made in good faith and based on reasonable grounds.

4. Any provision in a Demand Guarantee providing for a matter to be agreed in the future may be unenforceable or void for uncertainty.

5. A court may hold that the parties to a Demand Guarantee have amended or waived a provision of that Demand Guarantee orally, even though there is a provision requiring amendments or waivers to be in writing.

6. Any currency exchange obligation of a party which breaches exchange control regulations in the applicable countries of those currencies may not be enforceable in England and Wales.

7. We do not give any opinion in relation to taxation.

8. An undertaking or indemnity against non-payment of stamp duty may not be enforceable under English law.

9. Any provision in a Demand Guarantee for the payment of a specific amount (other than the amount itself required to be paid under that Demand Guarantee) or liquidated damages in the event of a breach or default of the Demand Guarantee may be unenforceable if it amounts to a penalty.

10. United Kingdom, United Nations and European Union sanctions prohibit certain dealings with specified countries and individuals, or dealings that involve specified countries. We have not conducted any searches or enquiries into whether there are rules, regulations or prohibitions under or in connection with any sanctions regime which would apply to any party or the transactions contemplated by any Demand Guarantee.

11. We do not give any opinion on matters of fact.

12. An English court may decline jurisdiction or stay an action before it where the procedural rules have not been followed, for example, valid service of proceedings.

13. The choice of English law to govern a Demand Guarantee would not be recognised or upheld by the English courts in all circumstances, for example, where it would be contrary to public policy or mandatory rules of English law.
Where the parties to a Demand Guarantee have agreed to the exclusive jurisdiction of the English courts and one party starts proceedings in relation to that agreement before another court (prior to proceedings being brought in the English courts), then, if that other court is:

(a) in another EU member state, Norway, Switzerland or Iceland, that other court must stay the proceedings before it until the English courts have determined whether they have jurisdiction over the claim (provided that the defendant has not submitted to the jurisdiction of that other court); or

(b) in a non-EU member state except for Norway, Switzerland or Iceland, the English courts have a discretion to stay proceedings before them (if a judgement of that other court would be recognised and enforced in England and a stay is necessary for the proper administration of justice); or continue proceedings before it (if proceedings in that other court are stayed or discontinued, or are unlikely to be concluded within a reasonable time and a continuation is necessary for the proper administration of justice); or dismiss proceedings before them (if the proceedings in that other court are concluded and have resulted in a judgment capable of recognition and enforcement in England).

Where an obligation is to be performed in a jurisdiction outside England and Wales, that obligation may not be enforceable in England and Wales to the extent that:

(a) its performance would be illegal under the laws, or contrary to overriding mandatory provisions (including but not limited to public policy and exchange control regulations) of the other jurisdiction or the laws applicable to that obligation; and

(b) the English courts take account of the law of that jurisdiction.

Where at least one party to an agreement is domiciled in the European Union, the decision of the French Supreme Court in *Ms X v Banque Privee Edmond de Rothschild* (No 11-26, 022) stating that unilateral jurisdiction clauses were ineffective as they breached Article 23 of the Brussels Regulation (44/2001/EC), may be relevant. A unilateral jurisdiction clause is a clause where one party to an agreement submits to the exclusive jurisdiction of the courts of a specified jurisdiction, but the other party retains the right to initiate proceedings in the courts of other jurisdictions. Although we do not believe that an English court would take the same approach as the French Supreme Court (as supported by obiter comments of the English courts in the case of *Mauritius Commercial Bank v Hestia Holdings Limited and another* [2013] EWHC 1328 (Comm)), if any question relating to unilateral jurisdiction clauses was referred to the European Court of Justice, the European Court of Justice may follow the French Supreme Court decision. If this happened, the decision by the European Court of Justice would be binding on English courts. The English courts would then have to decide the appropriate jurisdiction for the dispute based on the rules that apply where there is no agreed jurisdiction between the parties. We note that Article 35 URDG 758 provides that both the guarantor and the beneficiary submit to the exclusive jurisdiction of the competent court of the country of the location of the guarantor’s branch or office that issued the guarantee. As such, this qualification would not apply where that Article applies to the relevant Demand Guarantee.
Dear Sirs

Reimbursement undertakings issued subject to ICC Uniform Rules for Bank-to-Bank Reimbursements under Documentary Credits (URR 725)

1 Basis of instructions

We have been instructed by the ICC Banking Commission to provide this opinion in relation to reimbursement undertakings issued subject to URR 725, as further described in this opinion.

2 Documents reviewed

For the purposes of giving this opinion we have reviewed only URR 725 and we have relied on the description of an Undertaking set out in Schedule 1 (Description of an Undertaking). We have not conducted any due diligence into any party.

3 Scope and purpose of opinion

3.1 This opinion is given on the basis that:

(a) it is limited to the laws of England and Wales, as applied and interpreted by the courts of England and Wales at the date of this opinion; and

(b) any dispute based on this opinion shall be governed by English law and subject to the exclusive jurisdiction of the English courts.

3.2 We express no opinion on the laws of any other jurisdiction. To the extent that foreign laws are relevant, this opinion is subject to the effect of such laws.
3.3 This opinion is provided by us for the benefit of the ICC Banking Commission and the financial institutions which are members of the ICC Banking Commission from time to time (together, the Opinion Beneficiaries) in connection with the Opinion Beneficiaries' use of Undertakings as a credit risk mitigation technique as referred to in Article 194 (Principles governing the eligibility of credit risk mitigation techniques) CRR (as defined below), including for the purposes of Article 194.1 CRR. It is not an opinion on any specific Undertaking and we shall not have any liability to any Opinion Beneficiary in respect of an Opinion Beneficiary entering into any specific transaction in reliance on this opinion.

3.4 This opinion may be disclosed to third parties on the condition that such persons shall not be entitled to rely on the content of this opinion and we shall have no liability to any such recipient(s).

3.5 The fact that we have given this opinion for the benefit of the Opinion Beneficiaries shall not be deemed to cause us, now or in the future, any conflict of interest, whether in relation to the matters opined on in this opinion or otherwise, and by relying on this opinion each Opinion Beneficiary agrees and acknowledges this and, to the extent any conflict of interest exists now or arises in the future in relation to the matters opined on or otherwise, irrevocably waives that conflict of interest.

4 Interpretation

4.1 The headings in this opinion do not affect its interpretation. References to paragraphs and Schedules are (unless otherwise stated) references to paragraphs of, and schedules to, this opinion.

4.2 The annotations on the right-hand side of some of the pages of this opinion, indicating relevant Articles of the CRR, are for guidance only.

4.3 In this opinion:

CRR means Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms;

IRB Approach has the meaning given to it in the CRR;

Standardised Approach has the meaning given to it in the CRR;

UCP 600 means the Uniform Customs and Practice for Documentary Credits, 2007 Revision, ICC Publication no. 600;

Underlying Reimbursement Obligation has the meaning given to it in Schedule 1 (Description of an Undertaking);

Undertaking has the meaning given to it in Schedule 1 (Description of an Undertaking); and

URR 725 means the Uniform Rules for Bank-to-Bank Reimbursements under Documentary Credits, ICC publication no. 725.

4.4 The terms "claiming bank", "credit", "issuing bank", "reimbursement claim", "reimbursement undertaking" and "reimbursing bank" have the meanings given to those terms in URR 725.
4.5 The term "nominated bank" has the meaning given to it in UCP 600.

4.6 The terms "approaches" and "methods" are used in the same manner as they are used in the relevant Articles of the CRR.

5 **Opinion**

Subject to the reasoning set out in paragraph 6 (Reasoning), the assumptions set out in paragraph 7 (Assumptions) and Schedule 2 (Further Assumptions), and the qualifications set out in Schedule 3 (Qualifications):

**Legal effectiveness and enforceability**

5.1 We are of the opinion that the obligations expressed to be assumed by a reimbursing bank under an Undertaking would constitute legally effective and enforceable obligations of that reimbursing bank.

**Credit risk mitigation**

5.2 On the basis of the reasoning below, we are of the opinion that an Undertaking would meet the criteria for credit risk mitigation set out in Articles 194 to 217 (inclusive) CRR.

6 **Reasoning**

In giving this opinion, we have considered the following points:

**For an Undertaking under all approaches and methods:**

(a) the obligations expressed to be assumed by the reimbursing bank under an Undertaking are of a type and are in a form capable of being enforced by an English court applying English law, or an arbitration panel applying English law, although the legal effectiveness and enforceability of such obligations would be subject to principles which affect contractual obligations generally (and in this respect we refer to paragraph 1 of Schedule 3 (Qualifications));

(b) a reimbursement undertaking is not expressly listed as an eligible protection agreement for unfunded credit protection. Under the terms of an Undertaking, the reimbursing bank undertakes to pay an amount to the claiming bank following a complying reimbursement claim (see Article 9(g) and definition of "reimbursement undertaking" in Article 2 (Definitions) URR 725). A complying reimbursement claim would comprise a request for reimbursement in respect of an amount paid by the claiming bank, as nominated bank, under a credit. The amount claimed would reflect the amount due from the issuing bank to that claiming bank, as nominated bank, under the terms of such credit. As such, we are of the opinion that an Undertaking effectively functions like a guarantee given by the reimbursing bank in favour of the claiming bank, in respect of an issuing bank's payment obligation under a credit, and can be viewed as akin to a guarantee for the purposes of CRR. An Undertaking is, therefore, capable of being an eligible protection agreement for the purposes of Articles 194.6(a) and 203 CRR, subject to meeting the applicable requirements for guarantees set out in Articles 194 to 217 (inclusive) CRR;
(c) under the terms of an Undertaking the credit protection is direct in that it is expressed to be an obligation of the reimbursing bank directly to the claiming bank (see Article 2(g) URR 725, definition of "reimbursement undertaking");

(d) the extent of the credit protection is clearly defined and incontrovertible, in that the terms of an Undertaking clearly define the amount of the reimbursing bank's payment obligation and the requirements to trigger payment of that obligation and the Undertaking provides that the reimbursing bank is irrevocably bound to honour the Undertaking as of the time it issues the Undertaking (see Articles 9(e)(ii), 9(e)(iii) and 9(g) URR 725);

(e) an Undertaking does not contain any clause or provision, the fulfilment of which is outside the direct control of the claiming bank, that:

(i) would allow the reimbursing bank to cancel the protection unilaterally (see Article 9(g) URR 725 which states that an Undertaking is irrevocable and Article 9(i)(i) URR 725 which provides that an Undertaking cannot be cancelled without the agreement of the claiming bank);

(ii) would increase the effective cost of protection as a result of a deterioration in the credit quality of the protected exposure;

(iii) could prevent the reimbursing bank from being obliged to pay out in a timely manner in the event that the issuing bank (being the underlying obligor) fails to make any payments due. In this respect we note that:

(A) in practice, in accordance with the terms of an Undertaking, the claiming bank would usually make a reimbursement claim on the reimbursing bank before (and instead of) demanding reimbursement from the issuing bank under the terms of the credit. As such, a reimbursement claim is not subject to a prior payment default by the issuing bank. However, there is nothing in the terms of an Undertaking that would prevent the claiming bank demanding reimbursement from the issuing bank first and then subsequently making a reimbursement claim on the reimbursing bank if the issuing bank failed to pay (subject to complying with the terms of the Undertaking, including the latest date for presentation of a claim);

(B) Article 15 (Force Majeure) URR 725 provides that a reimbursing bank assumes no liability or responsibility for the consequences arising out of the interruption of its business by causes beyond its control. In our opinion, if Article 15 (Force Majeure) URR 725 is not amended, the effect of this Article is to excuse a reimbursing bank from performance in limited circumstances only where events have occurred which are outside the control of that reimbursing bank and which prevent that bank from performing its obligations under the Undertaking. We are of the opinion that this is similar to the English law doctrine of frustration which applies in limited
circumstances to discharge a party from performing its future obligations under a contract where it has become impossible to do so for reasons outside its control. As such, we are of the opinion that this provision of URR 725 is not incompatible with the requirements of Article 213.1(c)(iii) CRR; and

(C) Article 11(a)(i) URR 725 provides that the reimbursing bank has a maximum of three banking days following the day of receipt of a reimbursement claim to process the claim. Although we are not aware of any applicable guidance on what time period might be “timely” for the purposes of Article 213.1(c)(iii) CRR, we are of the opinion that this time period, which we understand to reflect international market practice for examination of claims, would be acceptable; or

(iv) could allow the maturity of the credit protection (being the latest date for presentation of a reimbursement claim) to be reduced by the reimbursing bank (see Article 9(i)(i) URR 725 which provides that an Undertaking cannot be amended without the agreement of the claiming bank);

(f) under the terms of an Undertaking, the claiming bank has the right to serve a reimbursement claim on the reimbursing bank for payment under the Undertaking in respect of an amount due from the issuing bank to the claiming bank under the credit, meaning that the claiming bank has the right to pursue the reimbursing bank in a timely manner for any monies due under the claim in respect of which the protection is provided and the payment by the reimbursing bank is not subject to the claiming bank first having to pursue the issuing bank (being the underlying obligor);

(g) an Undertaking is an explicitly documented obligation assumed by the reimbursing bank (as the “guarantor”);

(h) an Undertaking is given in respect of the reimbursement obligation of the issuing bank under a credit meaning that, for the purposes of Article 215.1(c) CRR, an Undertaking covers all types of payments that the issuing bank, as underlying obligor, is expected to make in respect of the claim;

Additionally for an Undertaking under the IRB Approach:

(i) where the exception in Article 183.4 CRR does not apply (meaning that the relevant requirements of Articles 183.1 to 183.3 CRR apply):

(i) the terms of an Undertaking are evidenced in writing. In this respect, we are of the opinion that an Undertaking issued by authenticated teletransmission would satisfy this requirement; and

(ii) an Undertaking is non-cancellable on the part of the reimbursing bank and, in accordance with its terms, remains in force until the Underlying Reimbursement Obligation is satisfied in full (to the extent of the amount and tenor of that Undertaking) (see Article 9(g) URR 725 which states that an
Undertaking is irrevocable and Article 9(i)(i) URR 725 which provides that an Undertaking cannot be cancelled without the agreement of the claiming bank);  

Additionally for an Undertaking under the IRB Approach to qualify for the treatment set out in Article 153.3 CRR:

(j) under the terms of an Undertaking, the claiming bank has the right to demand payment from the reimbursing bank without having to take legal action in order to pursue the counterparty for payment; and

(k) an Undertaking sets out the written terms and conditions of that Undertaking (including by incorporation of the terms and conditions of URR 725), meaning that the terms and conditions of credit protection arrangements are legally confirmed in writing by both the protection provider and the beneficiary institution. In the case of an Undertaking where the terms of such Undertaking are confirmed in writing by the protection provider, but such Undertaking is not signed by the claiming bank, we are of the opinion that this requirement can be satisfied by the claiming bank evidencing, signifying or confirming, in each case in writing, its acceptance of, or reliance on, the terms of the Undertaking.

7 Assumptions

In giving this opinion, we have assumed the following matters (in addition to the assumptions set out in Schedule 1 (Description of an Undertaking), which the institution intending to benefit from the credit risk mitigation would need to confirm for the Undertaking:

For an Undertaking under all approaches and methods:

(a) that the lending institution as beneficiary of the credit protection has taken all appropriate steps to ensure the effectiveness of the credit protection arrangement and to address the risks related to that arrangement;

(b) that the reimbursing bank is an eligible provider of unfunded credit protection under Article 201 (Eligibility of protection providers under all approaches). For the purposes of this opinion, we have assumed that: (i) the Undertaking is not nor is it being relied on as a counter-guarantee for the purposes of Article 214 CRR; and (ii) the Undertaking has not been provided in the context of a mutual guarantee scheme;

(c) that the Undertaking will be legally effective and enforceable in all relevant jurisdictions (other than England and Wales) including the jurisdiction of the reimbursing bank (which for this purpose is the jurisdiction of the issuing branch), so as to provide appropriate certainty as to the credit protection achieved having regard to the approach used to calculate risk-weighted exposure amounts and to the degree of recognition allowed;

(d) that the claiming bank, as beneficiary of the credit protection, has fulfilled any contractual and statutory requirements in respect of, and taken all steps necessary to ensure, the enforceability of the Undertaking under all applicable laws. In this respect, we are not aware of any applicable statutory requirements that would apply under the laws of England and Wales;
(e) that the claiming bank, as beneficiary of the credit protection, has conducted sufficient legal review confirming the enforceability of the Undertaking in all relevant jurisdictions (which for this purpose would be the jurisdiction of the issuing branch) and that it shall repeat such review as necessary to ensure continuing enforceability. For this purpose it is noted that this opinion could form part of such legal review in respect of the enforceability of the Undertaking in England and Wales;

Additionally for an Undertaking under the Standardised Approach:

(f) where the amount of the Undertaking is less than the amount of the underlying exposure, that the protected and unprotected parts of the exposure are of equal seniority;

Additionally for an Undertaking under the IRB Approach:

(g) unless the exception in Article 183.4 CRR applies:

(i) that the reimbursing bank complies with the rules for obligors as set out in Articles 171, 172 and 173 CRR; and

(ii) that the Undertaking will be legally enforceable against the reimbursing bank in a jurisdiction where it has assets to attach and enforce a judgment against. Where the reimbursing bank has assets to attach in England and Wales, we refer to paragraph 5.1 (Legal effectiveness and enforceability) above;

Additionally for an Undertaking under the IRB Approach to qualify for the treatment set out in Article 153.3 CRR:

(h) that the reimbursing bank is an eligible provider of unfunded credit protection under Article 202 (Eligibility of protection providers under the IRB Approach which qualify for the treatment set out in Article 153.3 CRR). For the purposes of this opinion, we have assumed that: (i) the Undertaking is not nor is it being relied on as a counter-guarantee for the purposes of Article 214 CRR; and (ii) the Undertaking has not been provided in the context of a mutual guarantee scheme;

(i) that: (i) the underlying exposure is to one of the exposures listed in Article 217.1(a) CRR; (ii) the issuing bank (being the underlying obligor) is not a member of the same group as the reimbursing bank; and (iii) the underlying exposure is hedged by one of the instruments listed in Article 217.1(c) CRR (and the applicable requirements of Articles 217.2 and 217.3 are met);

(j) that the risk weight that is associated with the exposure prior to the application of the treatment set out in Article 153.3 CRR, does not already factor in any aspect of the credit protection;

(k) that, to the extent possible, the claiming bank has taken steps to satisfy itself that the reimbursing bank is willing to pay promptly should a reimbursement claim be made under the Undertaking; and

(l) that the requirements of Articles 217.1(g) and 217.1(l) CRR are met, to the extent applicable.
8 Other matters

In addition, an institution intending to benefit from the credit risk mitigation would need to satisfy itself of the following matters:

For an Undertaking under all approaches and methods:

(a) that it can demonstrate to the satisfaction of the competent authorities that it has adequate risk management processes to control those risks to which it may be exposed as a result of carrying out credit risk mitigation practices;  

(b) that, notwithstanding the fact that any credit risk mitigation is taken into account for the purposes of calculating risk-weighted exposure amounts and, where applicable, expected loss amounts, an institution is required to continue to undertake a full credit risk assessment of the underlying exposure and it must be in a position to demonstrate the fulfilment of this requirement to the satisfaction of the competent authorities;

(c) that it can demonstrate to the satisfaction of the competent authorities that it has in place systems to manage potential concentration of risk arising from its use of guarantees and credit derivatives, and how its strategy in respect of its use of credit derivatives and guarantees interacts with its management of its overall risk profile;

Additionally for an Undertaking under the IRB Approach

(d) unless the exception in Article 183.4 CRR applies:

(i) that it has clearly specified criteria for the types of guarantors it recognises for the calculation of risk weighted exposure amounts; and

(ii) that it has clearly specified criteria for adjusting grades, pools or LGD estimates (as defined in the CRR) that comply with the requirements of Article 183.2 CRR; and

Additionally for an Undertaking under the IRB Approach to qualify for the treatment set out in Article 153.3 CRR:

(e) that it has in place a process to detect excessive correlation between the creditworthiness of a protection provider and the obligor of the underlying exposure due to their performance being dependent on common factors beyond the systematic risk factor.

Yours faithfully

Sullivan & Worcester UK LLP

{L0008818; 7}
Schedule 1 – Description of an Undertaking

A reimbursement undertaking is an independent payment undertaking issued by a bank to support the reimbursement obligation of an issuing bank to a nominated bank under a documentary credit. For the purposes of this opinion, **Undertaking** means a reimbursement undertaking which meets each of the criteria set out in this Schedule.

An institution intending to rely on an Undertaking as a credit risk mitigation technique would be the claiming bank under the Undertaking, having received the Undertaking directly from a reimbursing bank as credit protection for the reimbursement obligation of an issuing bank to that institution under a documentary credit.

Example wording for clauses in Undertakings given in this Schedule are included for illustration purposes and are not intended to be prescriptive.

**Criteria for an Undertaking**

1. It is issued by a bank in writing in favour of a named claiming bank or, if the underlying credit is available with any bank, it provides that claims can be made by any bank.

2. It states that it is a reimbursement undertaking.

3. It is issued in respect of the reimbursement obligation of a named issuing bank, pursuant to Article 7(c) UCP 600, to the claiming bank (as nominated bank) in relation to a specified documentary credit that has been issued subject to UCP 600 (the **Underlying Reimbursement Obligation**).

4. It expressly incorporates the rules of URR 725. For example:

   "This reimbursement undertaking is subject to the Uniform Rules for Bank-to-Bank Reimbursements under Documentary Credits, ICC publication no. 725."

5. It clearly states:
   (a) the amount of the reimbursement bank’s payment obligation to the claiming bank. For example:

   "This reimbursement obligation is for a maximum aggregate amount of [amount].";

   (b) the extent to which the claiming bank is liable for any fees payable to the reimbursing bank. The amount of such fees must not be connected to any changes in the credit quality of the issuing bank or the Underlying Reimbursement Obligation; and

   (c) the latest date for presentation of a reimbursement claim.

6. The terms of the reimbursement undertaking are such that:
   (a) the claiming bank will be able to present a reimbursement claim following any payment by the claiming bank, as nominated bank, under the underlying documentary credit;

   (b) the claiming bank’s ability to make a reimbursement claim is not conditional on any other event having occurred (or on the claiming bank having to certify or provide evidence that any other event has occurred);
it is clear from the terms of the reimbursement undertaking what statements and information a reimbursement claim must contain in order to constitute a complying reimbursement claim; and

the claiming bank is not required to satisfy any conditions that are not entirely within its control in order to make a complying reimbursement claim.

It is (i) governed by English law and (ii) subject to the jurisdiction of the English courts or to arbitration under internationally recognised arbitration rules.

It does not contain any provisions which conflict with or alter the following Articles of URR 725:

(a) Article 2(g), definition of "reimbursement undertaking", which provides that a reimbursement undertaking is a separate irrevocable undertaking to honour a reimbursement claim;

(b) Article 3 (Reimbursement Authorizations Versus Credits), which confirms the independence of a reimbursement authorization from the underlying credit;

(c) Article 9(e), which provides for the information (including the amount and tenor of the reimbursement undertaking) that must be contained within the terms and conditions of the reimbursement undertaking;

(d) Article 9(f), which provides the rules for when the claiming bank may make a reimbursement claim in relation to the latest day for presentation of a claim, unless the terms of the reimbursement undertaking are clear as to the deadline for making a presentation;

(e) Article 9(g), which provides that the reimbursing bank is irrevocably bound to honour a reimbursement claim at the time it issues the reimbursement undertaking. Examples of provisions which would conflict with this Article includes:

(i) any provision providing that the reimbursing bank can unilaterally amend, reduce the amount of or cancel the reimbursement undertaking prior to the stated latest date for presentation of a claim by notice to the claiming bank; and

(ii) any sanctions clause that allows the reimbursement bank any discretion not to make a payment under the reimbursement undertaking in circumstances other than where such payment was legally prevented by statutory or regulatory requirements applicable to that reimbursement bank. For example, by reference to an internal sanctions-related policy of that bank or by reference to the requirements of the laws of another country not applicable to that bank;

(f) Article 9(i)(i), which provides that the reimbursement undertaking cannot be amended or cancelled without the agreement of the claiming bank;

(g) Article 10(a), which provides the requirements for a reimbursement claim, including format and content, except to the extent the terms of the reimbursement undertaking clearly specify the requirements for a reimbursement claim; and

(h) Article 11(a)(i), which provides that the reimbursing bank has a maximum of three banking days following the day of receipt of a reimbursement claim to
process the claim. Any amendment to the time period specified in this Article would need to comply with the requirements of Article 213.1(c)(iii) CRR.
Schedule 2 – Further assumptions

The opinions set out in this opinion letter are subject to the following assumptions:

1. The reimbursing bank: (a) was, or will be (as applicable), at the time of issuing the Undertaking, lawfully incorporated and existing in its jurisdiction of incorporation; (b) has, or will have (as applicable), the authority, power and capacity to enter into and perform its obligations under that Undertaking; and (c) has, or will have (as applicable), duly executed and issued the Undertaking, in each case in accordance with all applicable laws.

2. The obligations of the reimbursing bank under the Undertaking to which it is, or will be (as applicable), a party did or will, when entered into, constitute legal, valid, binding and enforceable obligations of that reimbursing bank under all applicable laws (other than the English law obligations of that reimbursing bank and any points of English law that are covered by this opinion).

3. The reimbursing bank has not passed a resolution for its winding-up or dissolution and no proceedings have been commenced or steps taken for the winding-up of any such party or for the appointment of an administrator, receiver or manager in relation to any such party or any assets or revenue of any such party. No analogous procedure or step has been taken in any jurisdiction in relation to the reimbursing bank, or any assets or revenue of the reimbursing bank.

4. The reimbursing bank has complied with, and will comply with, all applicable anti-terrorism, anti-corruption and anti-money laundering laws and regulations applicable to it, and there is nothing in the Undertaking or the transactions contemplated by the Undertaking that is inconsistent with any such laws and regulations.

5. The provisions of the Undertaking do not breach any other agreement or instrument binding on the reimbursing bank or its assets.

6. No foreign law affects this opinion or conflicts with the rights and obligations of the reimbursing bank or the claiming bank under the Undertaking. All consents, licences, approvals, notices, filing, publications and registrations required in any other jurisdiction for the legality, validity, binding nature or enforceability of the Undertaking have or will be obtained.

7. The reimbursing bank has not entered into, or will not enter into (as applicable), the Undertaking in reliance on a misrepresentation, or in bad faith, or as a result of fraud, coercion or duress, or being aware of any limitation on any other party from entering into the Undertaking.

8. The Undertaking represents, or will represent (as applicable), the entire agreement between the reimbursing bank and the claiming bank to it in relation to the transactions contemplated by it.

9. If any party to the Undertaking is or purports to carry out a regulated activity for the purposes of the Financial Services and Markets Act 2000 (FSMA) or equivalent legislation in its jurisdiction, that person is an authorised person who may carry out that activity under FSMA or such equivalent legislation, or is an exempt person under FSMA or such equivalent legislation and may carry out that activity. If a party to an Undertaking is a financial institution, it has obtained all applicable consents, licences, approvals and authorisations of any relevant governmental, judicial or public body or other authority in any relevant jurisdiction to carry out its business as a financial institution in such jurisdiction.
No party to the Undertaking: (a) has entered into, or will enter into (as applicable), the Undertaking on the basis of anything said or done by a person carrying out a regulated activity unless that person is an authorised person who may carry out that activity under FSMA or is an exempt person under FSMA and may carry out that activity; or (b) has entered into, or will enter into (as applicable), the Undertaking or has or will exercise any rights under the Undertaking because of a communication made in breach of section 21(1) of FSMA, or, in each case, the equivalent legislation in its jurisdiction.
Schedule 3  – Qualifications

The opinions set out in this opinion letter are subject to the following qualifications:

1. The term "enforceable" as used in this opinion means that an obligation is of a type and form which the English courts generally enforce. This opinion is not to be taken to imply that any obligation would necessarily be capable of enforcement in all circumstances in accordance with its terms, as such obligations will be subject to certain principles of law, including but not limited to, time limitations, misrepresentation, mistake, fraud and frustration.

2. This opinion is subject to the effect of any bankruptcy, liquidation, receivership, moratorium, reorganisation or similar laws affecting the rights of secured and unsecured creditors generally.

3. Where a party to an Undertaking has a discretion, or may determine a matter in its opinion, a court may impose limits on such determination or discretion, including but not limited to, requiring that any discretion is exercised in good faith, reasonably and for a proper purpose, and that any determination is made in good faith and based on reasonable grounds.

4. Any provision in an Undertaking providing for a matter to be agreed in the future may be unenforceable or void for uncertainty.

5. A court may hold that the parties to an Undertaking have amended or waived a provision of that Undertaking orally, even though there is a provision requiring amendments or waivers to be in writing.

6. Any currency exchange obligation of a party which breaches exchange control regulations in the applicable countries of those currencies may not be enforceable in England and Wales.

7. We do not give any opinion in relation to taxation.

8. An undertaking or indemnity against non-payment of stamp duty may not be enforceable under English law.

9. Any provision in an Undertaking for the payment of a specific amount (other than the amount itself required to be paid under that Undertaking) or liquidated damages in the event of a breach or default of the Undertaking may be unenforceable if it amounts to a penalty.

10. United Kingdom, United Nations and European Union sanctions prohibit certain dealings with specified countries and individuals, or dealings that involve specified countries. We have not conducted any searches or enquiries into whether there are rules, regulations or prohibitions under or in connection with any sanctions regime which would apply to any party or the transactions contemplated by any Undertaking.

11. We do not give any opinion on matters of fact.

12. An English court may decline jurisdiction or stay an action before it where the procedural rules have not been followed, for example, valid service of proceedings.

13. The choice of English law to govern an Undertaking would not be recognised or upheld by the English courts in all circumstances, for example, where it would be contrary to public policy or mandatory rules of English law.
Where the parties to an Undertaking have agreed to the exclusive jurisdiction of the English courts and one party starts proceedings in relation to that agreement before another court (prior to proceedings being brought in the English courts), then, if that other court is:

(a) in another EU member state, Norway, Switzerland or Iceland, that other court must stay the proceedings before it until the English courts have determined whether they have jurisdiction over the claim (provided that the defendant has not submitted to the jurisdiction of that other court); or

(b) in a non-EU member state except for Norway, Switzerland or Iceland, the English courts have a discretion to stay proceedings before them (if a judgement of that other court would be recognised and enforced in England and a stay is necessary for the proper administration of justice); or continue proceedings before it (if proceedings in that other court are stayed or discontinued, or are unlikely to be concluded within a reasonable time and a continuation is necessary for the proper administration of justice); or dismiss proceedings before them (if the proceedings in that other court are concluded and have resulted in a judgment capable of recognition and enforcement in England).

Where an obligation is to be performed in a jurisdiction outside England and Wales, that obligation may not be enforceable in England and Wales to the extent that:

(a) its performance would be illegal under the laws, or contrary to overriding mandatory provisions (including but not limited to public policy and exchange control regulations) of the other jurisdiction or the laws applicable to that obligation; and

(b) the English courts take account of the law of that jurisdiction.

Where at least one party to an agreement is domiciled in the European Union, the decision of the French Supreme Court in *Ms X v Banque Privee Edmond de Rothschild* (No 11-26, 022) stating that unilateral jurisdiction clauses were ineffective as they breached Article 23 of the Brussels Regulation (44/2001/EC), may be relevant. A unilateral jurisdiction clause is a clause where one party to an agreement submits to the exclusive jurisdiction of the courts of a specified jurisdiction, but the other party retains the right to initiate proceedings in the courts of other jurisdictions. Although we do not believe that an English court would take the same approach as the French Supreme Court (as supported by obiter comments of the English courts in the case of *Mauritius Commercial Bank v Hestia Holdings Limited and another* [2013] EWHC 1328 (Comm)), if any question relating to unilateral jurisdiction clauses was referred to the European Court of Justice, the European Court of Justice may follow the French Supreme Court decision. If this happened, the decision by the European Court of Justice would be binding on English courts. The English courts would then have to decide the appropriate jurisdiction for the dispute based on the rules that apply where there is no agreed jurisdiction between the parties.
Our reference: GW/HF/SFH/25491.0001

ICC Banking Commission
International Chamber of Commerce (ICC)
33-43 avenue du Président Wilson
75016 Paris
France

12 September 2016

Dear Sirs

Standby letters of credit issued subject to ICC International Standby Practices 1998 (ISP98)

1 Basis of instructions

We have been instructed by the ICC Banking Commission to provide this opinion in relation to standby letters of credit issued subject to ISP98, as further described in this opinion.

2 Documents reviewed

For the purposes of giving this opinion we have reviewed only ISP98 and we have relied on the description of an SBLC set out in Schedule 1 (Description of an SBLC). We have not conducted any due diligence into any party.

3 Scope and purpose of opinion

3.1 This opinion is given on the basis that:

(a) it is limited to the laws of England and Wales, as applied and interpreted by the courts of England and Wales at the date of this opinion; and

(b) any dispute based on this opinion shall be governed by English law and subject to the exclusive jurisdiction of the English courts.

3.2 We express no opinion on the laws of any other jurisdiction. To the extent that foreign laws are relevant, this opinion is subject to the effect of such laws.
3.3 This opinion is provided by us for the benefit of the ICC Banking Commission and the financial institutions which are members of the ICC Banking Commission from time to time (together, the Opinion Beneficiaries) in connection with the Opinion Beneficiaries' use of SBLCs as a credit risk mitigation technique as referred to in Article 194 (Principles governing the eligibility of credit risk mitigation techniques) CRR (as defined below), including for the purposes of Article 194.1 CRR. It is not an opinion on any specific SBLC and we shall not have any liability to any Opinion Beneficiary in respect of an Opinion Beneficiary entering into any specific transaction in reliance on this opinion.

3.4 This opinion may be disclosed to third parties on the condition that such persons shall not be entitled to rely on the content of this opinion and we shall have no liability to any such recipient(s).

3.5 The fact that we have given this opinion for the benefit of the Opinion Beneficiaries shall not be deemed to cause us, now or in the future, any conflict of interest, whether in relation to the matters opined on in this opinion or otherwise, and by relying on this opinion each Opinion Beneficiary agrees and acknowledges this and, to the extent any conflict of interest exists now or arises in the future in relation to the matters opined on or otherwise, irrevocably waives that conflict of interest.

4 Interpretation

4.1 The headings in this opinion do not affect its interpretation. References to paragraphs and Schedules are (unless otherwise stated) references to paragraphs of, and schedules to, this opinion.

4.2 The annotations on the right-hand side of some of the pages of this opinion, indicating relevant Articles of the CRR, are for guidance only.

4.3 In this opinion:

CRR means Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms;

IRB Approach has the meaning given to it in the CRR;

ISP98 means the International Standby Practices 1998;

SBLC has the meaning given to it in Schedule 1 (Description of an SBLC);

Standardised Approach has the meaning given to it in the CRR;

Underlying Obligor has the meaning given to it in Schedule 1 (Description of an SBLC); and

Underlying Payment Obligation has the meaning given to it in Schedule 1 (Description of an SBLC).

4.4 The terms “beneficiary”, “business day”, “confirmor”, “demand”, “issuer” and “presentation” have the meanings given to those terms in ISP98 and, unless the context otherwise requires, references to “issuer” in this opinion shall include any “confirmor” of the SBLC.
4.5 The terms "approaches" and "methods" are used in the same manner as they are used in the relevant Articles of the CRR.

5 Opinion

Subject to the reasoning set out in paragraph 6 (Reasoning), the assumptions set out in paragraph 7 (Assumptions) and Schedule 2 (Further assumptions), and the qualifications set out in Schedule 3 (Qualifications):

Legal effectiveness and enforceability

5.1 We are of the opinion that the obligations expressed to be assumed by an issuer under an SBLC would constitute legally effective and enforceable obligations of that party. Article 194.1 CRR

Credit risk mitigation

5.2 On the basis of the reasoning below, we are of the opinion that an SBLC would meet the criteria for credit risk mitigation set out in Articles 194 to 217 (inclusive) CRR.

6 Reasoning

In giving this opinion, we have considered the following points:

For an SBLC under all approaches and methods:

(a) the obligations expressed to be assumed by the issuer under an SBLC are of a type and are in a form capable of being enforced by an English court applying English law, or an arbitration panel applying English law, although the legal effectiveness and enforceability of such obligations would be subject to principles which affect contractual obligations generally (and in this respect we refer to paragraph 1 of Schedule 3 (Qualifications)); Article 194.1 CRR

(b) a standby letter of credit is not expressly listed as an eligible protection agreement for unfunded credit protection. Under the terms of an SBLC, the issuer undertakes to pay an amount to the beneficiary following a complying presentation by the beneficiary (see Rules 2.01(a) and 2.01(b) ISP98). A complying presentation would comprise a written demand by the beneficiary including a statement that the claimed amount was due but unpaid by the Underlying Obligor. As such, we are of the opinion that an SBLC effectively functions like a guarantee given by the issuer in favour of the beneficiary and can be viewed as akin to a guarantee for the purposes of CRR. An SBLC is, therefore, capable of being an eligible protection agreement for the purposes of Articles 194.6(a) and 203 CRR, subject to meeting the applicable requirements for guarantees set out in Articles 194 to 217 (inclusive) CRR; Articles 194.6(a) and 203 CRR

(c) under the terms of an SBLC the credit protection is direct in that it is expressed to be an obligation of the issuer directly to the beneficiary (see Rule 2.01(a) ISP98); Article 213.1(a) CRR

(d) the extent of the credit protection is clearly defined and incontrovertible, in that the terms of an SBLC clearly define the amount of the issuer’s payment obligation and the requirements to Article 213.1(b) CRR
trigger payment of that obligation and the SBLC provides that the issuer is irrevocably bound to honour the SBLC as of the time it issues the SBLC (see Rules 1.06(a), 1.06(e) and 2.03 ISP98);

(e) an SBLC does not contain any clause or provision, the fulfilment of which is outside the direct control of the beneficiary, that:

(i) would allow the issuer to cancel the protection unilaterally (see Rule 1.06(a) ISP98 which states that the SBLC is irrevocable and Rules 1.06(b) and 7.01 ISP98 which provide that an SBLC cannot be cancelled without the consent of the beneficiary);

(ii) would increase the effective cost of protection as a result of a deterioration in the credit quality of the protected exposure;

(iii) could prevent the issuer from being obliged to pay out in a timely manner in the event that the Underlying Obligor fails to make any payments due. In this respect we note that:

(A) Rules 2.01(c) and 5.01(a)(i) ISP98 provide that an issuer acts in a “timely manner” if it honours a complying presentation within seven business days following the business day of presentation. Although we are not aware of any applicable guidance on what time period might be “timely” for the purposes of Article 213.1(c)(iii) CRR, we are of the opinion that this time period, which we understand to reflect international market practice for examination of presentations, would be acceptable; and

(B) the terms of the SBLC might require that the unpaid amount being claimed must have been due but unpaid by the Underlying Obligor for a certain number of days before the beneficiary can make a demand. In our opinion, this would not prevent the requirements of Article 213.1(c)(iii) CRR being met so long as such period of time did not prevent the issuer from being obliged to pay out in a timely manner following the relevant payment default. The beneficiary would need to determine whether such time period was “timely” for these purposes; or

(iv) could allow the maturity of the credit protection (being the expiry date of the SBLC) to be reduced by the issuer (see Rules 1.06(b), 2.06(c) and 7.01 ISP98 which provide that the SBLC cannot be amended without the consent of the beneficiary);

(f) under the terms of an SBLC, following a payment default by the Underlying Obligor, the beneficiary has the right to serve a demand on the issuer for payment under the SBLC, meaning that the beneficiary has the right to pursue the issuer in a timely manner for any monies due under the claim in respect of which the protection is provided and the payment by the issuer is not subject to the beneficiary first having to pursue the Underlying Obligor. In this respect, we note that:

(i) the form of demand under an SBLC might require the beneficiary to certify that it has made a demand on the Underlying Obligor for payment of the unpaid amount being claimed. In our opinion,
this would not prevent the requirements of Article 215.1(a) CRR being met, as such action is entirely within the beneficiary’s control and the act of serving a demand is not the same as taking steps to pursue the Underlying Obligor; and

(ii) the terms of the SBLC might require that the unpaid amount being claimed must have been due but unpaid by the Underlying Obligor for a certain number of days before the beneficiary can make a demand. In our opinion, this would not prevent the requirements of Article 215.1(a) CRR being met so long as such period of time did not prevent the beneficiary from being able to make a demand under the SBLC in a timely manner following the relevant payment default. The beneficiary would need to determine whether such time period was “timely” for these purposes;

(g) an SBLC is an explicitly documented obligation assumed by the issuer (in each case as the “guarantor”) (see Rule 2.01(a) ISP98);

(h) an SBLC will provide for the type of payments that the Underlying Obligor is expected to make in the underlying transaction which are covered by the SBLC. This is acceptable for the purposes of Article 215.1(c) CRR so long as, where certain types of payment are excluded from the coverage of the SBLC, the lending institution intending to rely on the coverage has adjusted the value of the “guarantee” to reflect the limited coverage;

Additionally for an SBLC under the IRB Approach:

(i) where the exception in Article 183.4 CRR does not apply (meaning that the relevant requirements of Articles 183.1 to 183.3 CRR apply);

(ii) the terms of an SBLC are evidenced in writing. In this respect, we are of the opinion that an SBLC issued electronically (for example, by authenticated SWIFT message) would satisfy this requirement; and

(ii) an SBLC is non-cancellable on the part of the issuer and, in accordance with its terms, remains in force until the Underlying Payment Obligation is satisfied in full (to the extent of the amount and tenor of that SBLC) (see Rule 1.06(a) ISP98, which states that the SBLC is irrevocable and Rules 1.06(b), 2.06(c) and 7.01 ISP98, which provide that an SBLC cannot be cancelled without the consent of the beneficiary);

Additionally for an SBLC under the IRB Approach to qualify for the treatment set out in Article 153.3 CRR:

(j) under the terms of an SBLC, the beneficiary has the right to demand payment from the issuer without having to take legal action in order to pursue the counterparty for payment; and

(k) an SBLC sets out the written terms and conditions of that SBLC (including by incorporation of the terms and conditions of ISP98), meaning that the terms and conditions of credit protection arrangements are legally confirmed in writing by both the protection
provider and the institution. In the case of an SBLC where the terms of such SBLC are confirmed in writing by the protection provider, but such SBLC is not signed by the beneficiary, we are of the opinion that this requirement can be satisfied by the beneficiary evidencing, signifying or confirming, in each case in writing, its acceptance of, or reliance on, the terms of the SBLC.

7 Assumptions

In giving this opinion, we have assumed the following matters (in addition to the assumptions set out in Schedule 1 (Description of an SBLC), which the institution intending to benefit from the credit risk mitigation would need to confirm for the SBLC:

For an SBLC under all approaches and methods:

(a) that the lending institution as beneficiary has taken all appropriate steps to ensure the effectiveness of the credit protection arrangement and to address the risks related to that arrangement. We note that under the terms of ISP98, where the SBLC is advised to the beneficiary through an advising party, the advising party signifies to the beneficiary that it has satisfied itself as to the apparent authenticity of such SBLC (Rule 2.05(a) ISP98). This step may be relevant in satisfying this requirement of CRR, although the "appropriate steps" to be taken for a particular SBLC for this purpose will depend on the circumstances;

(b) that the issuer is an eligible provider of unfunded credit protection under Article 201 (Eligibility of protection providers under all approaches). For the purposes of this opinion, we have assumed that: (i) the SBLC has not been provided nor is it being relied on as a counter-guarantee for the purposes of Article 214 CRR; and (ii) the SBLC has not been provided in the context of a mutual guarantee scheme;

(c) that the SBLC will be legally effective and enforceable in all relevant jurisdictions (other than England and Wales) including the jurisdiction of the issuer (which for this purpose is the jurisdiction of the issuing branch and, if applicable, the confirming branch), so as to provide appropriate certainty as to the credit protection achieved having regard to the approach used to calculate risk-weighted exposure amounts and to the degree of recognition allowed;

(d) that the beneficiary has fulfilled any contractual and statutory requirements in respect of, and taken all steps necessary to ensure, the enforceability of the SBLC under all applicable laws. In this respect, we are not aware of any applicable statutory requirements that would apply under the laws of England and Wales;

(e) that the beneficiary has conducted sufficient legal review confirming the enforceability of the SBLC in all relevant jurisdictions (which for this purpose would be the jurisdiction of the issuing branch and, if applicable, the confirming branch) and that it shall repeat such review as necessary to ensure continuing enforceability. For this purpose it is noted that this opinion could form part of such legal review in respect of the enforceability of the SBLC in England and Wales;
Additionally for an SBLC under the Standardised Approach:

(f) where the amount of the SBLC is less than the amount of the underlying exposure, that the protected and unprotected parts of the exposure are of equal seniority; | Article 235.2 CRR

Additionally for an SBLC under the IRB Approach:

(g) unless the exception in Article 183.4 CRR applies:

(i) that the issuer complies with the rules for obligors as set out in Articles 171, 172 and 173 CRR; and | Article 183.1(b) CRR

(ii) that the SBLC will be legally enforceable against the issuer in a jurisdiction where it has assets to attach and enforce a judgment against. Where the issuer has assets to attach in England and Wales, we refer to paragraph 5.1 (Legal effectiveness and enforceability) above; | Article 183.1(c) CRR

Additionally for an SBLC under the IRB Approach to qualify for the treatment set out in Article 153.3 CRR:

(h) that the issuer is an eligible provider of unfunded credit protection under Article 202 (Eligibility of protection providers under the IRB Approach which qualify for the treatment set out in Article 153(3)) CRR. For the purposes of this opinion, we have assumed that: (i) the SBLC has not been provided nor is it being relied on as a counter-guarantee for the purposes of Article 214 CRR; and (ii) the SBLC has not been provided in the context of a mutual guarantee scheme; | Articles 194.5, 194.6(c), 202, 214 and 215.2 CRR

(i) that: (i) the underlying exposure is to one of the exposures listed in Article 217.1(a) CRR; (ii) no Underlying Obligor is a member of the same group as the issuer; and (iii) the underlying exposure is hedged by one of the instruments listed in Article 217.1(c) CRR (and the applicable requirements of Articles 217.2 and 217.3 are met); | Articles 217.1(a), 217.1(b), 217.1(c), 217.2 and 217.3 CRR

(j) that the risk weight that is associated with the exposure prior to the application of the treatment set out in Article 153.3 CRR, does not already factor in any aspect of the credit protection; | Article 217.1(e) CRR

(k) that, to the extent possible, the beneficiary has taken steps to satisfy itself that the issuer is willing to pay promptly should a demand be made under the SBLC; and | Article 217.1(f) CRR

(l) that the requirements of Articles 217.1(g) and 217.1(l) CRR are met, to the extent applicable. | Articles 217.1(g) and 217.1(l) CRR

8 Other matters

In addition, an institution intending to benefit from the credit risk mitigation would need to satisfy itself of the following matters:

For an SBLC under all approaches and methods:

(a) that it can demonstrate to the satisfaction of the competent authorities that it has adequate risk management processes to control those risks | Article 194.6 CRR
to which it may be exposed as a result of carrying out credit risk mitigation practices;

(b) that, notwithstanding the fact that any credit risk mitigation is taken into account for the purposes of calculating risk-weighted exposure amounts and, where applicable, expected loss amounts, an institution is required to continue to undertake a full credit risk assessment of the underlying exposure and it must be in a position to demonstrate the fulfilment of this requirement to the satisfaction of the competent authorities;

(c) that it can demonstrate to the satisfaction of the competent authorities that it has in place systems to manage potential concentration of risk arising from its use of guarantees and credit derivatives, and how its strategy in respect of its use of credit derivatives and guarantees interacts with its management of its overall risk profile;

Additionally for an SBLC under the IRB Approach

(d) unless the exception in Article 183.4 CRR applies:

(i) that it has clearly specified criteria for the types of guarantors it recognises for the calculation of risk weighted exposure amounts; and

(ii) that it has clearly specified criteria for adjusting grades, pools or LGD estimates (as defined in the CRR) that comply with the requirements of Article 183.2 CRR; and

Additionally for an SBLC under the IRB Approach to qualify for the treatment set out in Article 153.3 CRR:

(e) that it has in place a process to detect excessive correlation between the creditworthiness of a protection provider and the obligor of the underlying exposure due to their performance being dependent on common factors beyond the systematic risk factor.

Yours faithfully

Sullivan & Worcester UK LLP
Schedule 1 – Description of an SBLC

A standby letter of credit is an independent payment undertaking issued to support performance of an underlying payment or other obligation. For the purposes of this opinion, SBLC means a standby letter of credit which meets each of the criteria set out in this Schedule.

An institution intending to rely on an SBLC as a credit risk mitigation technique would be the beneficiary of the SBLC, having received the SBLC directly from an issuer as credit protection for an underlying exposure.

Example wording for clauses in SBLCs given in this Schedule are included for illustration purposes and are not intended to be prescriptive.

Criteria for a standby letter of credit

1. It is issued by a bank in favour of a named beneficiary and it states that it is a standby letter of credit. For example:

   “We, [name of bank], hereby issue this irrevocable standby letter of credit number [***] in favour of [name of beneficiary].”

2. It is issued in respect of a payment obligation due by a named third party (the Underlying Obligor) to the beneficiary (the Underlying Payment Obligation).

3. It expressly incorporates the rules of ISP98. For example:

   “This standby letter of credit is subject to the International Standby Practices 1998.”

4. It may or may not be confirmed by another bank, but any confirmation must be added in accordance with ISP98 so that the relevant bank is a “confirmer” under ISP98, and so is treated as an “issuer” for the purposes of the Rules of ISP98 (see Rule 1.11(c)(i) ISP98).

5. It clearly states:

   (a) the maximum amount of the issuer’s payment obligation to the beneficiary. For example:

      “This standby letter of credit is for a maximum aggregate amount of [amount].”;

   and

   (b) the extent to which the beneficiary is liable for any fees payable to the issuer. The amount of such fees must not be connected to any changes in the credit quality of the Underlying Obligor or the Underlying Payment Obligation.

6. It is not subject to any “automatic amendment” provisions (for the purposes of Rule 2.06(a) ISP98) that would allow the issuer to unilaterally reduce the amount of, or the expiry date of, the standby letter of credit without the consent of the beneficiary. For this purpose, provisions that provide for the amount of the standby letter of credit to reduce at fixed times during the life of the standby letter of credit, or to reflect actual reductions in the amount of the Underlying Payment Obligation, would not conflict with the requirements of CRR so long as the beneficiary adjusted the value of the credit protection in accordance with the provisions of CRR, and so long as such reductions were not connected to the credit quality of the Underlying Obligor or the Underlying...
Payment Obligation. In addition, “automatic amendment” provisions providing for the increase in the amount of the standby letter of credit, or an extension of the expiry date, would not conflict with the requirements of CRR.

It clearly states the expiry date for presentation and, for the purposes of Rule 9.01(b) of ISP98, must not permit the issuer to terminate the standby letter of credit upon notice or payment. For example:

“This standby letter of credit will expire on [date].”

It provides that the issuer will pay the beneficiary upon presentation of the beneficiary’s first written demand.

For example:

“We hereby confirm that we will pay the beneficiary upon presentation of the beneficiary’s first written demand received by us before [time] on the expiry date.”

The terms of the standby letter of credit are such that:

(a) the beneficiary will be able to present a demand following a default in any payment or a non-payment by the Underlying Obligor of the Underlying Payment Obligation. For example, by requiring that the beneficiary states that the amount claimed in the demand represents amounts due and owing but unpaid to the beneficiary by the Underlying Obligor in respect of the Underlying Payment Obligation;

(b) the beneficiary’s ability to make a demand is not conditional on any other event having occurred (or on the beneficiary having to state or provide evidence that any other event has occurred);

(c) it is clear from the terms of the standby letter of credit what statements and information a demand must contain in order to constitute a complying presentation; and

(d) the beneficiary is not required to satisfy any conditions that are not entirely within its control in order to make a complying demand. In this respect:

(i) for the purposes of Rule 4.10 of ISP98, the standby letter of credit must not provide that any required document be issued, signed or counter-signed by the applicant (as defined in ISP98); and

(ii) any requirement in respect of formalities for the purposes of Rule 4.12 must be within the beneficiary’s control.

It is: (i) governed by English law and (ii) subject to the jurisdiction of the English courts or to arbitration under internationally recognised arbitration rules.

It does not contain any provisions which conflict with or alter the following Rules of ISP98:

(a) Rules 1.06(a), 1.06(e) and 2.03, which provide that the standby letter of credit is an irrevocable, independent, documentary and binding undertaking that is enforceable by the beneficiary once issued;
(b) Rules 1.06(b), 2.06(c) and 7.01, which provide that the issuer’s obligations to the beneficiary under the standby letter of credit cannot be amended or cancelled by the issuer without the consent of the beneficiary and the standby letter of credit does not provide for any circumstances where the issuer can amend or cancel the standby letter of credit without such consent, or for any “automatic amendment” for the purposes of Rule 2.06(a), except as provided in paragraph 6 above;

(c) Rules 1.06(c), 1.07 and 1.08, which confirm the independence of the standby letter of credit from the underlying transaction;

(d) Rules 1.06(d), 4.01(b), 4.02 and 4.03 which provide that the issuer’s obligations depend on the presentation of documents and an examination of required documents on their face;

(e) Rule 1.11(c)(i), which provides that references in the Rules to “issuer” include any “confirmer”;

(f) Rule 2.01, which establishes and confirms the undertaking of the issuer to honour the standby letter of credit following a complying presentation by paying the amount demanded to the beneficiary. Examples of provisions which would conflict with this Rule include:

(i) any provision providing that the issuer can unilaterally amend, reduce the amount of or cancel the standby letter of credit prior to its stated expiry date by notice to the beneficiary; and

(ii) any sanctions clause that allows the issuer any discretion not to make a payment under the standby letter of credit in circumstances other than where such payment was legally prevented by statutory or regulatory requirements applicable to that the issuer. For example, by reference to an internal sanctions-related policy of that bank or by reference to the requirements of the laws of another country not applicable to that bank;

(g) Rules 3.01, 3.02, 3.04, 3.06 and 3.07, which provide for the rules of presentations under the standby letter of credit, except to the extent the terms of the standby letter of credit clearly provide for the time, place and in what medium any presentation should be made;

(h) Rules 3.05, 3.13, 3.14, 9.03 and 9.04 which provide the rules for when the beneficiary may make a presentation in relation to the expiry date of the standby letter of credit, unless the terms of the standby letter of credit are clear as to the deadline for making a presentation;

(i) Rule 4.09, which provides for the rules for the wording of statements in a demand, except to the extent the terms of the standby letter of credit clearly provide for the requirements for any such statements;

(j) Rule 4.11, which provides that any non-documentary term or condition of the standby letter of credit must be disregarded; and

(k) Rule 5.01(a)(i), which provides, for the purposes of Rule 2.01(c), what is considered “timely”. Any amendment to the time period specified in this Rule would need to comply with the requirements of Article 213.1(c)(iii) CRR.
Schedule 2 – Further assumptions

The opinions set out in this opinion letter are subject to the following assumptions:

1. The issuer: (a) was, or will be (as applicable), at the time of issuing or confirming the SBLC (as applicable), lawfully incorporated and existing in its jurisdiction of incorporation; (b) has, or will have (as applicable), the authority, power and capacity to enter into and perform its obligations under that SBLC; and (c) has, or will have (as applicable), duly executed and issued or confirmed (as applicable) the SBLC, in each case in accordance with all applicable laws.

2. The obligations of the issuer under the SBLC to which it is, or will be (as applicable), a party did or will, when entered into, constitute legal, valid, binding and enforceable obligations of the issuer under all applicable laws (other than the English law obligations of the issuer and any points of English law that are covered by this opinion).

3. The issuer has not passed a resolution for its winding-up or dissolution and no proceedings have been commenced or steps taken for the winding-up of the issuer or for the appointment of an administrator, receiver or manager in relation to the issuer or any assets or revenue of the issuer. No analogous procedure or step has been taken in any jurisdiction in relation to the issuer, or any assets or revenue of the issuer.

4. The issuer has complied with, and will comply with, all applicable anti-terrorism, anti-corruption and anti-money laundering laws and regulations applicable to it, and there is nothing in the SBLC or the transactions contemplated by the SBLC that is inconsistent with any such laws and regulations.

5. The provisions of the SBLC do not breach any other agreement or instrument binding on the issuer or its assets.

6. To the extent ISP98 makes reference to mercantile usage, bank practices, standard standby practice, applicable standard practice and other such external sources of interpretation of the Rules of ISP98, that such external sources of interpretation do not affect this opinion.

7. No foreign law affects this opinion or conflicts with the rights and obligations of the issuer or the beneficiary under the SBLC. All consents, licences, approvals, notices, filing, publications and registrations required in any other jurisdiction for the legality, validity, binding nature or enforceability of the SBLC have or will be obtained.

8. The issuer has not entered into, or will not enter into (as applicable), the SBLC in reliance on a misrepresentation, or in bad faith, or as a result of fraud, coercion or duress, or being aware of any limitation on any other party from entering into the SBLC.

9. The SBLC represents, or will represent (as applicable), the entire agreement between the parties to it in relation to the transactions contemplated by it.

10. If any party to the SBLC is or purports to carry out a regulated activity for the purposes of the Financial Services and Markets Act 2000 (FSMA) or equivalent legislation in its jurisdiction, that person is an authorised person who may carry out that activity under FSMA or such equivalent legislation, or is an exempt person under FSMA or such equivalent legislation and may carry out that activity. If a party to an SBLC is a financial institution, it has obtained all applicable consents, licences, approvals and authorisations of any relevant governmental, judicial or public body or other authority.
in any relevant jurisdiction to carry out its business as a financial institution in such jurisdiction.

No party to the SBLC: (a) has entered into, or will enter into (as applicable), the SBLC on the basis of anything said or done by a person carrying out a regulated activity unless that person is an authorised person who may carry out that activity under FSMA or is an exempt person under FSMA and may carry out that activity; or (b) has entered into, or will enter into (as applicable), the SBLC or has or will exercise any rights under the SBLC because of a communication made in breach of section 21(1) of FSMA, or, in each case, the equivalent legislation in its jurisdiction.
Schedule 3 – Qualifications

The opinions set out in this opinion letter are subject to the following qualifications:

1. The term "enforceable" as used in this opinion means that an obligation is of a type and form which the English courts generally enforce. This opinion is not to be taken to imply that any obligation would necessarily be capable of enforcement in all circumstances in accordance with its terms, as such obligations will be subject to certain principles of law, including but not limited to, time limitations, misrepresentation, mistake, fraud and frustration.

2. This opinion is subject to the effect of any bankruptcy, liquidation, receivership, moratorium, reorganisation or similar laws affecting the rights of secured and unsecured creditors generally.

3. Where a party to an SBLC has a discretion, or may determine a matter in its opinion, a court may impose limits on such determination or discretion, including but not limited to, requiring that any discretion is exercised in good faith, reasonably and for a proper purpose, and that any determination is made in good faith and based on reasonable grounds.

4. Any provision in an SBLC providing for a matter to be agreed in the future may be unenforceable or void for uncertainty.

5. A court may hold that the parties to an SBLC have amended or waived a provision of that SBLC orally, even though there is a provision requiring amendments or waivers to be in writing.

6. Any currency exchange obligation of a party which breaches exchange control regulations in the applicable countries of those currencies may not be enforceable in England and Wales.

7. We do not give any opinion in relation to taxation.

8. An undertaking or indemnity against non-payment of stamp duty may not be enforceable under English law.

9. Any provision in an SBLC for the payment of a specific amount (other than the amount itself required to be paid under that SBLC) or liquidated damages in the event of a breach or default of the SBLC may be unenforceable if it amounts to a penalty.

10. United Kingdom, United Nations and European Union sanctions prohibit certain dealings with specified countries and individuals, or dealings that involve specified countries. We have not conducted any searches or enquiries into whether there are rules, regulations or prohibitions under or in connection with any sanctions regime which would apply to any party or the transactions contemplated by any SBLC.

11. We do not give any opinion on matters of fact.

12. An English court may decline jurisdiction or stay an action before it where the procedural rules have not been followed, for example, valid service of proceedings.

13. The choice of English law to govern an SBLC would not be recognised or upheld by the English courts in all circumstances, for example, where it would be contrary to public policy or mandatory rules of English law.
14. Where the parties to a SBLC have agreed to the exclusive jurisdiction of the English courts and one party starts proceedings in relation to that agreement before another court (prior to proceedings being brought in the English courts), then, if that other court is:

(a) in another EU member state, Norway, Switzerland or Iceland, that other court must stay the proceedings before it until the English courts have determined whether they have jurisdiction over the claim (provided that the defendant has not submitted to the jurisdiction of that other court); or

(b) in a non-EU member state except for Norway, Switzerland or Iceland, the English courts have a discretion to stay proceedings before them (if a judgement of that other court would be recognised and enforced in England and a stay is necessary for the proper administration of justice); or continue proceedings before it (if proceedings in that other court are stayed or discontinued, or are unlikely to be concluded within a reasonable time and a continuation is necessary for the proper administration of justice); or dismiss proceedings before them (if the proceedings in that other court are concluded and have resulted in a judgment capable of recognition and enforcement in England).

15. Where an obligation is to be performed in a jurisdiction outside England and Wales, that obligation may not be enforceable in England and Wales to the extent that:

(a) its performance would be illegal under the laws, or contrary to overriding mandatory provisions (including but not limited to public policy and exchange control regulations) of the other jurisdiction or the laws applicable to that obligation; and

(b) the English courts take account of the law of that jurisdiction.

16. Where at least one party to an agreement is domiciled in the European Union, the decision of the French Supreme Court in *Ms X v Banque Privee Edmond de Rothschild* (No 11-26, 022) stating that unilateral jurisdiction clauses were ineffective as they breached Article 23 of the Brussels Regulation (44/2001/EC), may be relevant. A unilateral jurisdiction clause is a clause where one party to an agreement submits to the exclusive jurisdiction of the courts of a specified jurisdiction, but the other party retains the right to initiate proceedings in the courts of other jurisdictions. Although we do not believe that an English court would take the same approach as the French Supreme Court (as supported by obiter comments of the English courts in the case of *Mauritius Commercial Bank v Hestia Holdings Limited and another* [2013] EWHC 1328 (Comm)), if any question relating to unilateral jurisdiction clauses was referred to the European Court of Justice, the European Court of Justice may follow the French Supreme Court decision. If this happened, the decision by the European Court of Justice would be binding on English courts. The English courts would then have to decide the appropriate jurisdiction for the dispute based on the rules that apply where there is no agreed jurisdiction between the parties.
Our reference: GW/HF/SFH/25491.0001

ICC Banking Commission
International Chamber of Commerce (ICC)
33-43 avenue du Président Wilson
75016 Paris
France

12 September 2016

Dear Sirs

Standby letters of credit issued subject to ICC Uniform Customs and Practice for Documentary Credits (UCP 600)

1 Basis of instructions

We have been instructed by the ICC Banking Commission to provide this opinion in relation to standby letters of credit issued subject to UCP 600, as further described in this opinion.

2 Documents reviewed

For the purposes of giving this opinion we have reviewed only UCP 600 and we have relied on the description of an SBLC set out in Schedule 1 (Description of an SBLC). We have not conducted any due diligence into any party.

3 Scope and purpose of opinion

3.1 This opinion is given on the basis that:

(a) it is limited to the laws of England and Wales, as applied and interpreted by the courts of England and Wales at the date of this opinion; and

(b) any dispute based on this opinion shall be governed by English law and subject to the exclusive jurisdiction of the English courts.

3.2 We express no opinion on the laws of any other jurisdiction. To the extent that foreign laws are relevant, this opinion is subject to the effect of such laws.
3.3 This opinion is provided by us for the benefit of the ICC Banking Commission and the financial institutions which are members of the ICC Banking Commission from time to time (together, the Opinion Beneficiaries) in connection with the Opinion Beneficiaries’ use of SBLCs as a credit risk mitigation technique as referred to in Article 194 (Principles governing the eligibility of credit risk mitigation techniques) CRR (as defined below), including for the purposes of Article 194.1 CRR. It is not an opinion on any specific SBLC and we shall not have any liability to any Opinion Beneficiary in respect of an Opinion Beneficiary entering into any specific transaction in reliance on this opinion.

3.4 This opinion may be disclosed to third parties on the condition that such persons shall not be entitled to rely on the content of this opinion and we shall have no liability to any such recipient(s).

3.5 The fact that we have given this opinion for the benefit of the Opinion Beneficiaries shall not be deemed to cause us, now or in the future, any conflict of interest, whether in relation to the matters opined on in this opinion or otherwise, and by relying on this opinion each Opinion Beneficiary agrees and acknowledges this and, to the extent any conflict of interest exists now or arises in the future in relation to the matters opined on or otherwise, irrevocably waives that conflict of interest.

4 Interpretation

4.1 The headings in this opinion do not affect its interpretation. References to paragraphs and Schedules are (unless otherwise stated) references to paragraphs of, and schedules to, this opinion.

4.2 The annotations on the right-hand side of some of the pages of this opinion, indicating relevant Articles of the CRR, are for guidance only.

4.3 In this opinion:

**CRR** means Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms;

**IRB Approach** has the meaning given to it in the CRR;

**SBLC** has the meaning given to it in Schedule 1 (Description of an SBLC);

**Standardised Approach** has the meaning given to it in the CRR;

**UCP 600** means the Uniform Customs and Practice for Documentary Credits, 2007 Revision, ICC Publication no. 600;

**Underlying Obligor** has the meaning given to it in Schedule 1 (Description of an SBLC); and

**Underlying Payment Obligation** has the meaning given to it in Schedule 1 (Description of an SBLC).

4.4 The terms “banking day”, “beneficiary”, “complying presentation”, “confirmation”, “confirming bank”, “honour”, “issuing bank” and “presentation” have the meanings given to those terms in UCP 600.
The terms “approaches” and “methods” are used in the same manner as they are used in the relevant Articles of the CRR.

5 **Opinion**

Subject to the reasoning set out in paragraph 6 (*Reasoning*), the assumptions set out in paragraph 7 (*Assumptions*) and Schedule 2 (*Further assumptions*), and the qualifications set out in Schedule 3 (*Qualifications*):

**Legal effectiveness and enforceability**

5.1 We are of the opinion that the obligations expressed to be assumed by an issuing bank and, if applicable, a confirming bank under an SBLC would, in each case, constitute legally effective and enforceable obligations of that party.

**Credit risk mitigation**

5.2 On the basis of the reasoning below, we are of the opinion that an SBLC would meet the criteria for credit risk mitigation set out in Articles 194 to 217 (inclusive) CRR.

6 **Reasoning**

In giving this opinion, we have considered the following points:

**For an SBLC under all approaches and methods:**

(a) the obligations expressed to be assumed by the issuing bank and, if applicable, the confirming bank under an SBLC are of a type and are in a form capable of being enforced by an English court applying English law, or an arbitration panel applying English law, although the legal effectiveness and enforceability of such obligations would be subject to principles which affect contractual obligations generally (and in this respect we refer to paragraph 1 of Schedule 3 (*Qualifications*));

(b) a standby letter of credit is not expressly listed as an eligible protection agreement for unfunded credit protection. Under the terms of an SBLC, each of the issuing bank and, if applicable, the confirming bank undertakes to pay an amount to the beneficiary following a complying presentation by the beneficiary (see Article 7 (*Issuing Bank Undertaking*) UCP 600 and Article 8 (*Confirming Bank Undertaking*) UCP 600). A complying presentation would comprise a written demand by the beneficiary including a statement that the claimed amount was due but unpaid by the Underlying Obligor. As such, we are of the opinion that an SBLC effectively functions like a guarantee given by the issuing bank and, if applicable, the confirming bank in favour of the beneficiary and can be viewed as akin to a guarantee for the purposes of CRR. An SBLC is, therefore, capable of being an eligible protection agreement for the purposes of Articles 194.6(a) and 203 CRR, subject to meeting the applicable requirements for guarantees set out in Articles 194 to 217 (inclusive) CRR;

(c) under the terms of an SBLC the credit protection is direct in that it is expressed to be an obligation of the issuing bank and, if applicable, the confirming bank directly to the beneficiary (see Articles 7a, 7b, 8a and 8b UCP 600);
the extent of the credit protection is clearly defined and incontrovertible, in that the terms of an SBLC clearly define the amount of the issuing bank’s and, if applicable, the confirming bank’s payment obligation and the requirements to trigger payment of that obligation and the SBLC provides that the issuing bank and, if applicable, the confirming bank is irrevocably bound to honour the SBLC as of the time it issues or adds its confirmation to (as applicable) the SBLC (see Articles 7b and 8b UCP 600); 

(e) an SBLC does not contain any clause or provision, the fulfilment of which is outside the direct control of the beneficiary, that:

(i) would allow the issuing bank or, if applicable, the confirming bank to cancel the protection unilaterally (see Articles 7b and 8b UCP 600 which state that the SBLC is irrevocable and Article 10a UCP 600 which provides that an SBLC cannot be cancelled without the consent of the beneficiary);  

(ii) would increase the effective cost of protection as a result of a deterioration in the credit quality of the protected exposure;  

(iii) could prevent the issuing bank or, if applicable, the confirming bank from being obliged to pay out in a timely manner in the event that the Underlying Obligor fails to make any payments due. In this respect we note that:

(A) Article 36 (Force Majeure) UCP 600 provides that, upon resumption of its business, an issuing bank or, if applicable, a confirming bank will not honour a credit that expired during an interruption of its business due to causes beyond its control. In our opinion, if Article 36 (Force Majeure) UCP 600 is not amended, the effect of this Article is to excuse an issuing bank or, if applicable, a confirming bank from performance in limited circumstances only where events have occurred which are outside the control of that issuing bank or, if applicable, that confirming bank and which prevent that bank from performing its obligations under the SBLC. We are of the opinion that this is similar to the English law doctrine of frustration which applies in limited circumstances to discharge a party from performing its future obligations under a contract where it has become impossible to do so for reasons outside its control. As such, we are of the opinion that this provision of UCP 600 is not incompatible with the requirements of Article 213.1(c)(iii) CRR;  

(B) Article 14b UCP 600 provides that the issuing bank or, if applicable, the confirming bank has a maximum of five banking days following the day of presentation to determine if a presentation is complying. Although we are not aware of any applicable guidance on what time period might be “timely” for the purposes of Article 213.1(c)(iii) CRR, we are of the opinion that this time period, which we understand to reflect international market practice for examination of presentations, would be acceptable; and
(C) the terms of an SBLC might require that the unpaid amount being claimed must have been due but unpaid by the Underlying Obligor for a certain number of days before the beneficiary can make a demand. In our opinion, this would not prevent the requirements of Article 213.1(c)(iii) CRR being met so long as such period of time did not prevent the issuing bank or, if applicable, the confirming bank from being obliged to pay out in a timely manner following the relevant payment default. The beneficiary would need to determine whether such time period was “timely” for these purposes; or

(iv) could allow the maturity of the credit protection (being the expiry date of the SBLC) to be reduced by the issuing bank or, if applicable, the confirming bank (see Article 10a UCP which provides that the SBLC cannot be amended without the consent of the beneficiary);

(f) under the terms of an SBLC, following a payment default by the Underlying Obligor, the beneficiary has the right to serve a demand on the issuing bank or, if applicable, the confirming bank for payment under the SBLC, meaning that the beneficiary has the right to pursue the issuing bank or, if applicable, the confirming bank in a timely manner for any monies due under the claim in respect of which the protection is provided and the payment by the issuing bank or, if applicable, the confirming bank is not subject to the beneficiary first having to pursue the Underlying Obligor. In this respect, we note that:

(i) the form of demand under an SBLC might require the beneficiary to certify that it has made a demand on the Underlying Obligor for payment of the unpaid amount being claimed. In our opinion, this would not prevent the requirements of Article 215.1(a) CRR being met, as such action is entirely within the beneficiary’s control and the act of serving a demand is not the same as taking steps to pursue the Underlying Obligor; and

(ii) the terms of an SBLC might require that the unpaid amount being claimed must have been due but unpaid by the Underlying Obligor for a certain number of days before the beneficiary can make a demand. In our opinion, this would not prevent the requirements of Article 215.1(a) CRR being met so long as such period of time did not prevent the beneficiary from being able to make a demand under the SBLC in a timely manner following the relevant payment default. The beneficiary would need to determine whether such time period was “timely” for these purposes;

(g) an SBLC is an explicitly documented obligation assumed by the issuing bank or, if applicable, the confirming bank (in each case as the "guarantor") (see Articles 7a, 7b, 8a and 8b UCP 600);

(h) an SBLC will provide for the type of payments that the Underlying Obligor is expected to make in the underlying transaction which are covered by the SBLC. This is acceptable for the purposes of Article 215.1(c) CRR so long as, where certain types of payment are excluded from the coverage of the SBLC, the lending institution intending to rely
on the coverage has adjusted the value of the “guarantee” to reflect the limited coverage;

Additionally for an SBLC under the IRB Approach:

(i) where the exception in Article 183.4 CRR does not apply (meaning that the relevant requirements of Articles 183.1 to 183.3 CRR apply):

   (i) the terms of an SBLC are evidenced in writing. In this respect, we are of the opinion that an SBLC issued by authenticated teletransmission in accordance with Article 11a UCP 600 would satisfy this requirement; and

   (ii) an SBLC is non-cancellable on the part of the issuing bank and, if applicable, the confirming bank and, in accordance with its terms, remains in force until the Underlying Payment Obligation is satisfied in full (to the extent of the amount and tenor of that SBLC) (see Articles 7b and 8b UCP 600 which state that the SBLC is irrevocable and Article 10a UCP 600 which provides that an SBLC cannot be cancelled without the consent of the beneficiary);

Additionally for an SBLC under the IRB Approach to qualify for the treatment set out in Article 153.3 CRR:

(j) under the terms of an SBLC, the beneficiary has the right to demand payment from the issuing bank or, if applicable, the confirming bank without having to take legal action in order to pursue the counterparty for payment; and

(k) an SBLC sets out the written terms and conditions of that SBLC (including by incorporation of the terms and conditions of UCP 600), meaning that the terms and conditions of credit protection arrangements are legally confirmed in writing by both the protection provider and the institution. In the case of an SBLC where the terms of such SBLC are confirmed in writing by the protection provider, but such SBLC is not signed by the beneficiary, we are of the opinion that this requirement can be satisfied by the beneficiary evidencing, signifying or confirming, in each case in writing, its acceptance of, or reliance on, the terms of the SBLC.

7 Assumptions

In giving this opinion, we have assumed the following matters (in addition to the assumptions set out in Schedule 1 (Description of an SBLC), which the institution intending to benefit from the credit risk mitigation would need to confirm for the SBLC:

For an SBLC under all approaches and methods:

(a) that the lending institution as beneficiary has taken all appropriate steps to ensure the effectiveness of the credit protection arrangement and to address the risks related to that arrangement. We note that under the terms of UCP 600, where the SBLC is advised to the beneficiary through an advising party directly (and not through a second advising party), the advising party signifies to the beneficiary that it has satisfied itself as to the apparent authenticity of such SBLC (Article 9b UCP 600). This step may be relevant in satisfying this requirement of
CRR, although the “appropriate steps” to be taken for a particular SBLC for this purpose will depend on the circumstances;

(b) that the issuing bank and, if applicable, the confirming bank is an eligible provider of unfunded credit protection under Article 201 (Eligibility of protection providers under all approaches). For the purposes of this opinion, we have assumed that: (i) the SBLC has not been provided nor is it being relied on as a counter-guarantee for the purposes of Article 214 CRR; and (ii) the SBLC has not been provided in the context of a mutual guarantee scheme;

(c) that the SBLC will be legally effective and enforceable in all relevant jurisdictions (other than England and Wales) including the jurisdiction of the issuing bank and, if applicable, the confirming bank (which for this purpose is the jurisdiction of the issuing branch and, if applicable, the confirming branch), so as to provide appropriate certainty as to the credit protection achieved having regard to the approach used to calculate risk-weighted exposure amounts and to the degree of recognition allowed;

(d) that the beneficiary has fulfilled any contractual and statutory requirements in respect of, and taken all steps necessary to ensure, the enforceability of the SBLC under all applicable laws. In this respect, we are not aware of any applicable statutory requirements that would apply under the laws of England and Wales;

(e) that the beneficiary has conducted sufficient legal review confirming the enforceability of the SBLC in all relevant jurisdictions (which for this purpose would be the jurisdiction of the issuing branch and, if applicable, the confirming branch) and that it shall repeat such review as necessary to ensure continuing enforceability. For this purpose it is noted that this opinion could form part of such legal review in respect of the enforceability of the SBLC in England and Wales;

Additionally for an SBLC under the Standardised Approach:

(f) where the amount of the SBLC is less than the amount of the underlying exposure, that the protected and unprotected parts of the exposure are of equal seniority;

Additionally for an SBLC under the IRB Approach:

(g) unless the exception in Article 183.4 CRR applies:

(i) that each of the issuing bank and, if applicable, the confirming bank complies with the rules for obligors as set out in Articles 171, 172 and 173 CRR; and

(ii) that the SBLC will be legally enforceable against the issuing bank and, if applicable, the confirming bank in a jurisdiction where it has assets to attach and enforce a judgment against. Where the issuing bank or, if applicable, the confirming bank has assets to attach in England and Wales, we refer to paragraph 5.1 (Legal effectiveness and enforceability) above;
Additionally for an SBLC under the IRB Approach to qualify for the treatment set out in Article 153.3 CRR:

(h) that the issuing bank and, if applicable, the confirming bank is an eligible provider of unfunded credit protection under Article 202 (Eligibility of protection providers under the IRB Approach which qualify for the treatment set out in Article 153(3)) CRR. For the purposes of this opinion, we have assumed that: (i) the SBLC has not been provided nor is it being relied on as a counter-guarantee for the purposes of Article 214 CRR; and (ii) the SBLC has not been provided in the context of a mutual guarantee scheme; Articles 194.5, 194.6(c), 202, 214 and 215.2 CRR

(i) that: (i) the underlying exposure is to one of the exposures listed in Article 217.1(a) CRR; (ii) no Underlying Obligor is a member of the same group as the issuing bank or, if applicable, the confirming bank; and (iii) the underlying exposure is hedged by one of the instruments listed in Article 217.1(c) CRR (and the applicable requirements of Articles 217.2 and 217.3 are met); Articles 217.1(a), 217.1(b), 217.1(c), 217.2 and 217.3 CRR

(j) that the risk weight that is associated with the exposure prior to the application of the treatment set out in Article 153.3 CRR, does not already factor in any aspect of the credit protection; Article 217.1(e) CRR

(k) that, to the extent possible, the beneficiary has taken steps to satisfy itself that each of the issuing bank and, if applicable, the confirming bank is willing to pay promptly should a demand be made under the SBLC; and Article 217.1(f) CRR

(l) that the requirements of Articles 217.1(g) and 217.1(l) CRR are met, to the extent applicable. Articles 217.1(g) and 217.1(l) CRR

8 Other matters

In addition, an institution intending to benefit from the credit risk mitigation would need to satisfy itself of the following matters:

For an SBLC under all approaches and methods:

(a) that it can demonstrate to the satisfaction of the competent authorities that it has adequate risk management processes to control those risks to which it may be exposed as a result of carrying out credit risk mitigation practices; Article 194.8 CRR

(b) that, notwithstanding the fact that any credit risk mitigation is taken into account for the purposes of calculating risk-weighted exposure amounts and, where applicable, expected loss amounts, an institution is required to continue to undertake a full credit risk assessment of the underlying exposure and it must be in a position to demonstrate the fulfilment of this requirement to the satisfaction of the competent authorities; Article 194.9 CRR

(c) that it can demonstrate to the satisfaction of the competent authorities that it has in place systems to manage potential concentration of risk arising from its use of guarantees and credit derivatives, and how its strategy in respect of its use of credit derivatives and guarantees interacts with its management of its overall risk profile; Article 213.2 CRR
Additionally for an SBL under the IRB Approach:

(d) unless the exception in Article 183.4 CRR applies:

(i) that it has clearly specified criteria for the types of guarantors it recognises for the calculation of risk weighted exposure amounts; and

(ii) that it has clearly specified criteria for adjusting grades, pools or LGD estimates (as defined in the CRR) that comply with the requirements of Article 183.2 CRR; and

Additionally for an SBL under the IRB Approach to qualify for the treatment set out in Article 153.3 CRR:

(e) that it has in place a process to detect excessive correlation between the creditworthiness of a protection provider and the obligor of the underlying exposure due to their performance being dependent on common factors beyond the systematic risk factor.

Yours faithfully,

[Signature]

Sullivan & Worcester UK LLP
Schedule 1 – Description of an SBLC

A standby letter of credit is an independent payment undertaking issued to support performance of an underlying payment or other obligation. For the purposes of this opinion, SBLC means a standby letter of credit which meets each of the criteria set out in this Schedule.

An institution intending to rely on an SBLC as a credit risk mitigation technique would be the beneficiary of the SBLC, having received the SBLC directly from an issuing bank and, if applicable, a confirming bank as credit protection for an underlying exposure.

Example wording for clauses in SBLCs given in this Schedule are included for illustration purposes and are not intended to be prescriptive.

Criteria for a standby letter of credit

1. It is issued by a bank in favour of a named beneficiary and it states that it is a standby letter of credit. For example:

   “We, [name of bank], hereby issue this irrevocable standby letter of credit number [***] in favour of [name of beneficiary].”

2. It is issued in respect of a payment obligation due by a named third party (the Underlying Obligor) to the beneficiary (the Underlying Payment Obligation).

3. It expressly incorporates the rules of UCP 600. For example:

   “This standby letter of credit is subject to the Uniform Customs and Practice for Documentary Credits, 2007 revision, ICC publication no. 600.”

4. It may or may not be confirmed by another bank, but any confirmation must be added in accordance with UCP 600 so that the relevant bank is a “confirming bank” under UCP 600.

5. It clearly states:

   (a) the maximum amount of the issuing bank’s and, if applicable, confirming bank’s payment obligation to the beneficiary. For example:

   “This standby letter of credit is for a maximum aggregate amount of [amount].”; and

   (b) the extent to which the beneficiary is liable for any fees payable to the issuing bank and, if applicable, the confirming bank. The amount of such fees must not be connected to any changes in the credit quality of the Underlying Obligor or the Underlying Payment Obligation.

6. It clearly states the expiry date for presentation. For example:

   “This standby letter of credit will expire on [date].”

7. It provides that the issuing bank or, if applicable, the confirming bank will pay the beneficiary upon presentation of the beneficiary’s first written demand.
For example:

“We hereby confirm that we will pay the beneficiary upon presentation of the beneficiary’s first written demand received by us before \[\text{time}\] on the expiry date.”

8 The terms of the standby letter of credit are such that:

(a) the beneficiary will be able to present a demand following a default in any payment or any non-payment by the Underlying Obligor of the Underlying Payment Obligation. For example, by requiring that the beneficiary states that the amount claimed in the demand represents amounts due and owing but unpaid to the beneficiary by the Underlying Obligor in respect of the Underlying Payment Obligation;

(b) the beneficiary’s ability to make a demand is not conditional on any other event having occurred (or on the beneficiary having to state or provide evidence that any other event has occurred);

(c) it is clear from the terms of the standby letter of credit in what format a demand must be made and what statements and information it must contain in order to constitute a complying presentation;

(d) the beneficiary is not required to satisfy any conditions that are not entirely within its control in order to make a complying demand; and

(e) either Article 32 (Instalment Drawings or Shipments) UCP 600 is expressly disapplied or, where demands under the SBLC must be made in instalments within given time periods, the SBLC provides that failure to make a demand within a given time period does not terminate the SBLC nor does it prevent any future demands being made in the subsequent given time periods.

9 It is: (i) governed by English law and (ii) subject to the jurisdiction of the English courts or to arbitration under internationally recognised arbitration rules.

10 It does not contain any provisions which conflict with or alter the following Articles of UCP 600:

(a) Article 4 (Credits v. Contracts) and Article 5 (Documents v. Goods, Services or Performance), which confirm the independence of the standby letter of credit from the underlying transaction;

(b) Article 6e, Article 29 (Extension of Expiry Date or Last Day for Presentation) and Article 33 (Hours of Presentation), which provide the rules for when the beneficiary may make a presentation in relation to the expiry date of the standby letter of credit, unless the terms of the standby letter of credit are clear as to the deadline for making a presentation;

(c) Article 6d(ii), which provides the rule for the place of presentation under the standby letter of credit, except to the extent the terms of the standby letter of credit clearly provide for the place that any presentation should be made;

(d) Article 7 (Issuing Bank Undertaking), Article 8 (Confirming Bank Undertaking) and Article 15 (Complying Presentation), which establish and confirm the irrevocable undertakings of the issuing bank and the confirming bank to honour the standby letter of credit on a complying presentation. Examples of provisions which would conflict with these Articles include:

{L0008644; 7}
(i) any provision providing that the issuing bank or, if applicable, confirming bank can unilaterally amend, reduce the amount of or cancel the standby letter of credit prior to its stated expiry date by notice to the beneficiary; and

(ii) any sanctions clause that allows the issuing bank or, if applicable, the confirming bank any discretion not to make a payment under the standby letter of credit in circumstances other than where such payment was legally prevented by statutory or regulatory requirements applicable to that issuing bank or confirming bank. For example, by reference to an internal sanctions-related policy of that bank or by reference to the requirements of the laws of another country not applicable to that bank;

(e) Article 10 (Amendments), which provides that the standby letter of credit cannot be amended or cancelled without the consent of the beneficiary;

(f) Article 14a, which confirms that the issuing bank or, if applicable, the confirming bank must examine a presentation on this basis of the documents alone; and

(g) Article 14b, which provides that the issuing bank or, if applicable, the confirming bank has a maximum of five banking days following the day of presentation to determine if a presentation is complying. Any amendment to the time period specified in this Article would need to comply with the requirements of Article 213.1(c)(iii) CRR.
Schedule 2 – Further assumptions

The opinions set out in this opinion letter are subject to the following assumptions:

1. This issuing bank and, if applicable, the confirming bank: (a) was, or will be (as applicable), at the time of issuing or confirming the SBLC (as applicable), lawfully incorporated and existing in its jurisdiction of incorporation; (b) has, or will have (as applicable), the authority, power and capacity to enter into and perform its obligations under that SBLC; and (c) has, or will have (as applicable), duly executed and issued or confirmed (as applicable) the SBLC, in each case in accordance with all applicable laws.

2. The obligations of the issuing bank and, if applicable, the confirming bank under the SBLC to which it is, or will be (as applicable), a party did or will, when entered into, constitute legal, valid, binding and enforceable obligations of that party under all applicable laws (other than the English law obligations of the issuing bank and, if applicable, the confirming bank and any points of English law that are covered by this opinion).

3. Neither the issuing bank nor, if applicable, the confirming bank has passed a resolution for its winding-up or dissolution and no proceedings have been commenced or steps taken for the winding-up of any such party or for the appointment of an administrator, receiver or manager in relation to any such party or any assets or revenue of any such party. No analogous procedure or step has been taken in any jurisdiction in relation to any such party, or any assets or revenue of any such party.

4. Each of the issuing bank and, if applicable, the confirming bank has complied with, and will comply with, all applicable anti-terrorism, anti-corruption and anti-money laundering laws and regulations applicable to it, and there is nothing in the SBLC or the transactions contemplated by the SBLC that is inconsistent with any such laws and regulations.

5. The provisions of the SBLC do not breach any other agreement or instrument binding on the issuing bank or, if applicable, the confirming bank or, in each case, that party’s assets.

6. No foreign law affects this opinion or conflicts with the rights and obligations of the issuing bank, the confirming bank (if applicable) or the beneficiary under the SBLC. All consents, licences, approvals, notices, filing, publications and registrations required in any other jurisdiction for the legality, validity, binding nature or enforceability of the SBLC have or will be obtained.

7. Neither the issuing bank nor, if applicable, the confirming bank entered into, or will enter into (as applicable), the SBLC in reliance on a misrepresentation, or in bad faith, or as a result of fraud, coercion or duress, or being aware of any limitation on any other party from entering into the SBLC.

8. The SBLC represents, or will represent (as applicable), the entire agreement between the parties to it in relation to the transactions contemplated by it.

9. If any party to the SBLC is or purports to carry out a regulated activity for the purposes of the Financial Services and Markets Act 2000 (FSMA) or equivalent legislation in its jurisdiction, that person is an authorised person who may carry out that activity under FSMA or such equivalent legislation, or is an exempt person under FSMA or such equivalent legislation and may carry out that activity. If a party to an SBLC is a financial institution, it has obtained all applicable consents, licences, approvals and authorisations of any relevant governmental, judicial or public body or other authority.
in any relevant jurisdiction to carry out its business as a financial institution in such jurisdiction.

10 No party to the SBLC: (a) has entered into, or will enter into (as applicable), the SBLC on the basis of anything said or done by a person carrying out a regulated activity unless that person is an authorised person who may carry out that activity under FSMA or is an exempt person under FSMA and may carry out that activity; or (b) has entered into, or will enter into (as applicable), the SBLC or has or will exercise any rights under the SBLC because of a communication made in breach of section 21(1) of FSMA, or, in each case, the equivalent legislation in its jurisdiction.
Schedule 3 – Qualifications

The opinions set out in this opinion letter are subject to the following qualifications:

1 The term “enforceable” as used in this opinion means that an obligation is of a type and form which the English courts generally enforce. This opinion is not to be taken to imply that any obligation would necessarily be capable of enforcement in all circumstances in accordance with its terms, as such obligations will be subject to certain principles of law, including but not limited to, time limitations, misrepresentation, mistake, fraud and frustration.

2 This opinion is subject to the effect of any bankruptcy, liquidation, receivership, moratorium, reorganisation or similar laws affecting the rights of secured and unsecured creditors generally.

3 Where a party to an SBLC has a discretion, or may determine a matter in its opinion, a court may impose limits on such determination or discretion, including but not limited to, requiring that any discretion is exercised in good faith, reasonably and for a proper purpose, and that any determination is made in good faith and based on reasonable grounds.

4 Any provision in an SBLC providing for a matter to be agreed in the future may be unenforceable or void for uncertainty.

5 A court may hold that the parties to an SBLC have amended or waived a provision of that SBLC orally, even though there is a provision requiring amendments or waivers to be in writing.

6 Any currency exchange obligation of a party which breaches exchange control regulations in the applicable countries of those currencies may not be enforceable in England and Wales.

7 We do not give any opinion in relation to taxation.

8 An undertaking or indemnity against non-payment of stamp duty may not be enforceable under English law.

9 Any provision in an SBLC for the payment of a specific amount (other than the amount itself required to be paid under that SBLC) or liquidated damages in the event of a breach or default of the SBLC may be unenforceable if it amounts to a penalty.

10 United Kingdom, United Nations and European Union sanctions prohibit certain dealings with specified countries and individuals, or dealings that involve specified countries. We have not conducted any searches or enquiries into whether there are rules, regulations or prohibitions under or in connection with any sanctions regime which would apply to any party or the transactions contemplated by any SBLC.

11 We do not give any opinion on matters of fact.

12 An English court may decline jurisdiction or stay an action before it where the procedural rules have not been followed, for example, valid service of proceedings.

13 The choice of English law to govern an SBLC would not be recognised or upheld by the English courts in all circumstances, for example, where it would be contrary to public policy or mandatory rules of English law.
14 Where the parties to an SBLC have agreed to the exclusive jurisdiction of the English courts and one party starts proceedings in relation to that agreement before another court (prior to proceedings being brought in the English courts), then, if that other court is:

(a) in another EU member state, Norway, Switzerland or Iceland, that other court must stay the proceedings before it until the English courts have determined whether they have jurisdiction over the claim (provided that the defendant has not submitted to the jurisdiction of that other court); or

(b) in a non-EU member state except for Norway, Switzerland or Iceland, the English courts have a discretion to stay proceedings before them (if a judgement of that other court would be recognised and enforced in England and a stay is necessary for the proper administration of justice); or continue proceedings before it (if proceedings in that other court are stayed or discontinued, or are unlikely to be concluded within a reasonable time and a continuation is necessary for the proper administration of justice); or dismiss proceedings before them (if the proceedings in that other court are concluded and have resulted in a judgment capable of recognition and enforcement in England).

15 Where an obligation is to be performed in a jurisdiction outside England and Wales, that obligation may not be enforceable in England and Wales to the extent that:

(a) its performance would be illegal under the laws, or contrary to overriding mandatory provisions (including but not limited to public policy and exchange control regulations) of the other jurisdiction or the laws applicable to that obligation; and

(b) the English courts take account of the law of that jurisdiction.

16 Where at least one party to an agreement is domiciled in the European Union, the decision of the French Supreme Court in Ms X v Banque Privee Edmond de Rothschild (No 11-26, 022) stating that unilateral jurisdiction clauses were ineffective as they breached Article 23 of the Brussels Regulation (44/2001/EC), may be relevant. A unilateral jurisdiction clause is a clause where one party to an agreement submits to the exclusive jurisdiction of the courts of a specified jurisdiction, but the other party retains the right to initiate proceedings in the courts of other jurisdictions. Although we do not believe that an English court would take the same approach as the French Supreme Court (as supported by obiter comments of the English courts in the case of Mauritius Commercial Bank v Hestia Holdings Limited and another [2013] EWHC 1328 (Comm)), if any question relating to unilateral jurisdiction clauses was referred to the European Court of Justice, the European Court of Justice may follow the French Supreme Court decision. If this happened, the decision by the European Court of Justice would be binding on English courts. The English courts would then have to decide the appropriate jurisdiction for the dispute based on the rules that apply where there is no agreed jurisdiction between the parties.