



MAY 13, 2019

*In accordance with the provisions of Article 5(1) of the Indirect Clearing RTS,<sup>1</sup> this Direct Client Disclosure Statement is being made available to our clients that may be entitled to the protections of the Indirect Clearing RTS.*

**MERRILL LYNCH PROFESSIONAL CLEARING CORP.  
DIRECT CLIENT DISCLOSURE STATEMENT<sup>2</sup>  
INDIRECT CLEARING**

**I. Introduction**

**A. The purpose of this document.<sup>3</sup>**

We are providing this Direct Client Disclosure Statement (**Statement**) to you because you have elected to enter into derivatives transactions that may be cleared by a clearing organization that is authorized as a central counterparty in accordance with EMIR (CCP).<sup>4</sup>

To enable us to comply with our obligations as a direct client under the Indirect Clearing RTS, which require that, where we are providing indirect clearing services to you that involve us clearing derivatives through a clearing member on a CCP, we must:

- (i) offer you a choice of a basic omnibus indirect client account or a gross omnibus indirect client account (as described in further detail in Annex I);
- (ii) publicly disclose the levels of protection and costs associated with different levels of segregation;
- (iii) publicly disclose the general terms and conditions under which we provide services to you (as described in further detail in Annex II ); and
- (iv) describe the main legal implications of different levels of segregation.

We have entered into relationships with one or more clearing members of one or more CCPs located in the European Union (EU) that are authorized by EMIR and which may also be registered with the

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<sup>1</sup> Commission Delegated Regulation (EU) No 2017/2154 supplementing Regulation (EU) No 600/2014 with regard to regulatory technical standards on indirect clearing arrangements.

<sup>2</sup> Although care has been taken to assure that the information herein is accurate, this Statement is not intended to constitute legal advice. Recipients of this Statement should not act, or refrain from acting, on the basis of the analysis herein without seeking appropriate advice from their own counsel.

<sup>3</sup> As used throughout this Statement, the terms “we”, “our” and “us” refer to the direct client; the terms “you” and “your” refer to the indirect client.

<sup>4</sup> The terms “CCP” and “DCO” will be used interchangeably throughout this Statement.

Commodity Futures Trading Commission (CFTC) as a derivatives clearing organization (DCO) in order to provide clearing services in connection with certain derivatives to US persons.<sup>5</sup> Because we are registered with the CFTC as a futures commission merchant (FCM), we must comply with the provisions of the US Commodity Exchange Act (CEA) and the CFTC's rules governing the protection of customer assets and positions, as well as EMIR, MiFIR<sup>6</sup> and the Indirect Clearing RTS. Where we provide clearing services in respect of non-US equity options, we are also registered with the Securities and Exchange Commission (SEC) as a broker-dealer (BD) and we must comply with the provisions of the US Securities Exchange Act of 1934, as amended (Exchange Act) and the SEC's rules governing the protection of customer assets and positions in respect of such services (the Exchange Act and SEC's rules together with the CEA and the CFTC's rules, the **US Customer Protection Regime**).

Article 30 of MiFIR and the Indirect Clearing RTS set out specific compliance requirements for entities that participate in indirect clearing arrangements in connection with exchange-traded derivatives (ETDs).<sup>7</sup> In particular, Article 30(1) of MiFIR requires that indirect clearing arrangements should not increase counterparty risk and ensure protections that are of "equivalent effect" to that provided for under EMIR. The term "indirect clearing arrangement" refers to a set of relationships – also called a "chain" – where at least two intermediaries are interposed between an end-client and the relevant CCP. The most basic indirect clearing chain therefore involves the following four entities: the CCP; a clearing member of the CCP; a direct client, *i.e.*, the client of the clearing member that is itself an intermediary; and an indirect client, *i.e.*, the client of the direct client. Longer chains are permitted in certain circumstances.

As a direct client, we may not be able to provide you with the forms of indirect client segregated accounts that comply with the Indirect Clearing RTS in certain circumstances. **Specifically, if the clearing member is also an FCM (or, in respect of Non-US Listed Equity Options, is also a BD), the US Customer Protection Regime applicable to us and to the clearing member will preclude us from providing you with a form of client segregation required under the Indirect Clearing RTS in the event of our or their insolvency. In these circumstances, you will therefore receive client segregation in compliance with the US Customer Protection Regime.**

By contrast, if the clearing member is not an FCM (or, in respect of Non-US Listed Equity Options, is not a BD), we may determine, based on an assessment of the relevant facts and circumstances, that we are able to facilitate the opening of a form of segregated accounts that comply with the Indirect Clearing RTS at the clearing member level. Basic details regarding these forms of segregated accounts are provided in Annex I. **Please note that the forms of protection associated with these segregated accounts will not be available in the event of our insolvency, where the US Customer Protection Regime shall apply.** You will only receive the protections associated with these forms of account in the event of the clearing member's insolvency.

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<sup>5</sup> The terms "CCP" and "DCO" will be used interchangeably throughout this Statement.

<sup>6</sup> Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012.

<sup>7</sup> "Exchange-traded derivative" is defined in Article 2(1)(32) of MiFIR to include any derivative traded on an EU regulated market or on any third-country trading venue determined to be "equivalent" to an EU regulated market for purposes of discharging MiFIR's mandatory trade execution obligations. No such equivalence determinations have yet been made. Where applicable, when used herein this term also includes equity options listed for trading on an EU regulated market (**Non-US Listed Equity Options**).

This Statement describes at a high level the US Customer Protection Regime with respect to exchange-traded derivatives. In respect of the treatment of margin and collateral at the CCP level, you should refer to the CCP disclosures that the CCPs are required to prepare.

**B. Organization of this Statement**

This Statement is set out as follows:

- Part II highlights certain significant differences between EMIR and the Indirect Clearing RTS, on the one hand, and the US Customer Protection Regime on the other.
- Part III describes the US Customer Protection Regime.
- Part IV summarizes the rights of a customer to transfer, or port, assets or positions in a business-as-usual context and in the event we default in our obligations to a CCP.
- Part V considers factors to consider in the event of the insolvency of a CCP or other third party.

**C. What you are required to do.**

You are required to review the information provided in this Statement and, as applicable, the separate clearing member disclosure statement<sup>8</sup> and the disclosure statement provided by the CCP through which you may clear ETDs. Where we offer to facilitate the opening of segregated accounts at the clearing member level that comply with the Indirect Clearing RTS, you will also need to confirm to us your choice of indirect client accounts in accordance with our instructions.

**D. Important**

Although this Statement will be helpful to you, this Statement does not constitute legal or any other form of advice and must not be relied on as such. This Statement provides a high level analysis of several complex and/or new areas of law, whose effect will vary depending on the specific facts of any particular case, some of which have not been tested in the courts. It does not provide all the information you may need to make your decision on which account type or level of segregation is suitable. It is your responsibility to review and conduct your own due diligence on the relevant rules, legal documentation and any other information provided to you on each of our client account offerings and those of the various clearing members and CCPs on which we clear derivatives for you. You may wish to appoint your own professional advisors to assist you with this.

We will not in any circumstances be liable, whether in contract, tort, breach of statutory duty or otherwise for any losses or damages that may be suffered as a result of using this Statement. Such losses or damages include (a) any loss of profit or revenue, damage to reputation or loss of any contract or other business opportunity or goodwill, and (b) any indirect loss or consequential loss. No responsibility or liability is accepted for any differences of interpretation of legislative provisions and related guidance on which it is based. This paragraph does not extend to an exclusion of liability for, or remedy in respect of, fraudulent misrepresentation.

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<sup>8</sup> Related disclosures for Merrill Lynch Professional Clearing Corp.'s ("ML Pro") affiliate, BofA Securities, Inc. ("BofAS"), will be made available via the following link: [www.bofaml.com/en-us/content/futures-options-otc-clearing.html](http://www.bofaml.com/en-us/content/futures-options-otc-clearing.html).

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Please note that this disclosure has been prepared on the basis of US law except as otherwise stated. However, issues under other laws may be relevant to your due diligence, including for example, the law governing the CCP rules or related agreements; the law governing the clearing arrangement between the clearing member and us; the law governing our insolvency; the law of the jurisdiction of incorporation of the CCP and of the clearing member; and the law of the location of any assets.

## II. Significant Differences Between EU Rules and the US Customer Protection Regime

As noted above, the primary focus of this Statement is the US Customer Protection Regime. Nonetheless, throughout this Statement, we identify certain differences and similarities between the manner in which derivatives transactions generally are cleared in the EU, including as required by EMIR and the Indirect Clearing RTS, and in which they are cleared under the US Customer Protection Regime.

Before turning to a discussion of the US Customer Protection Regime for exchange-traded futures and the separate US Customer Protection Regime for equity options, we highlight the following key differences between EU rules and the US Customer Protection Regime applicable to exchange-traded futures:

- In the EU, cleared derivatives transactions are generally entered into using the “principal model.” That is, the clearing member enters into two separate but related transactions: (i) a principal transaction with its client; and (ii) an equal and opposite principal transaction with the CCP; and the direct client also enters into two separate but related transactions: (i) a principal transaction with the clearing member; and (ii) an equal and opposite principal transaction with its indirect client. Under the US Customer Protection Regime applicable to exchange-traded futures, transactions are entered into using the “agency model.” That is, the direct client FCM, as agent for its customer, enters into one transaction with the clearing member. The direct client FCM does not enter into a separate transaction with its customer.
- In the EU, customer assets may be transferred to a clearing member on either a title transfer basis or a security interest basis. Under the US Customer Protection Regime applicable to exchange-traded futures regulatory regime, customer assets may only be transferred on a security interest basis.
- Under the Indirect Clearing RTS, clearing members and direct clients must offer indirect clients a choice between a basic omnibus indirect client account and a gross omnibus indirect client account (as described in further detail in Annex I). Under the US Customer Protection Regime applicable to exchange-traded futures, direct client FCMs may provide only US omnibus client segregation to their indirect clients. The forms of omnibus client segregation permitted under the US Customer Protection Regime applicable to exchange-traded futures differ in certain respects from the forms of indirect client segregation that comply with the Indirect Client RTS. The US Customer Protection Regime applicable to exchange-traded futures may not necessarily preclude a direct client FCM from facilitating the opening of segregated accounts at the clearing member level in accordance with the Indirect Client RTS, provided that such clearing member is not also an FCM. **However the protections associated with these forms of segregated accounts will only be given effect in the event of the default of the non-FCM clearing member.**
- Under EMIR and the Indirect Clearing RTS, affiliates are treated as customers and may be part of the same omnibus client account as all other customers. Under the US Customer Protection Regime applicable to exchange-traded futures, the accounts of FCMs and their affiliates must be treated as proprietary accounts and may not be commingled with customer accounts. This reflects the CFTC’s view that accounts that are subject to common control with the FCM may pose the same risk to customer funds as an FCM’s own accounts.

### III. US Customer Protection Regime

#### A. Exchange-Traded Futures

We may receive assets from you to margin: (i) exchange-traded derivatives executed on a designated contract market (**DCM**) registered with the CFTC;<sup>9</sup> or (ii) exchange-traded derivatives executed on a regulated market.<sup>10</sup> We are required to post assets with the clearing member as margin to support your open positions within the time prescribed by the clearing member and/or CCP.<sup>11</sup>

Under CFTC rules, customer collateral received to margin exchange-traded derivatives executed on a DCM may not be commingled with funds received to margin exchange-traded derivatives on a regulated market.<sup>12</sup> As discussed below under *Transfer, or porting, of customer assets and positions*, the prohibition on commingling assures that customer assets are better protected in the event of an FCM clearing member bankruptcy.

**1. US Derivatives Exchanges.** The provisions of the CEA that provide for the segregation of customer funds held to margin, guarantee or secure futures and options on futures contracts traded on or subject to the rules of a US derivatives exchange require an FCM to “treat and deal with all money, securities and property received by such [FCM] to margin, guarantee or secure the trades or contracts of any customer of such [FCM] or accruing to such customer as a result of such trades, as belonging to such customer.”<sup>13</sup> Exchange-traded derivatives customer funds: (i) must be separately accounted for and may not be commingled with our funds or be used to margin, guarantee, or secure any trades or contracts of any other customer or person; and (ii) may be commingled in an omnibus account with a bank or trust company or with the DCO that clears exchange-traded derivatives on our behalf.

In addition, FCMs are required to create and maintain books and records concerning: (i) the identity of their customers; (ii) the positions held on behalf of each such customer; and (iii) the collateral deposited by each customer to margin such positions.

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<sup>9</sup> Certain CCPs also clear futures and options on futures contracts listed for trading on US designated contract markets. For example, ICE Clear Europe clears futures and options on futures contracts listed for trading on ICE Futures US. LCH Limited is permitted by the scope of its DCO registration to – but does not currently – clear futures and options on futures contracts listed for trading on DCMs.

<sup>10</sup> Each of Eurex Clearing AG, ICE Clear Europe, LCH Limited and LCH SA clears futures and options on futures contracts listed for trading on one or more regulated markets.

<sup>11</sup> In practice, such margin is generally required to be paid early in the morning, although additional margin may be called during any trading day. Consequently, we will frequently meet a margin requirement using our own funds and then call you for margin. In the ordinary course, we will expect you to meet any call for margin by the end of the day on which the call is made. If you provide margin in a form that is not accepted by the clearing member and/or CCP, we may transform it. The arrangements between you and us relating to how margin calls will be funded will be set out in our customer agreement with you.

<sup>12</sup> In addition, any customer collateral we receive to margin cleared swaps may not be commingled with funds received to margin exchange-traded derivatives executed on either a DCM or a regulated market.

<sup>13</sup> The obligation to treat customer collateral as belonging to the customer requires that all such collateral be received on a security interest basis. Customer collateral may not be received on a title-transfer basis.

At the clearing member level, however, the direct client FCM is not required to provide the clearing member with information to identify the positions of, and the market value of the collateral posted by, each customer, and the clearing member is not required to create and maintain such books and records. Rather, the clearing member is entitled to treat the omnibus account as a single customer.

As discussed below under *Transfer, or porting, of customer assets and positions*, because the clearing member is entitled to treat the omnibus account as a single customer, a customer's ability to transfer the customer's positions and related margin upon the default of a direct client FCM may be limited. Moreover, in the event a direct client FCM defaults in its obligations to a clearing member and there is a shortfall in the customer funds required to be held in the customer omnibus account, the clearing member may, but is not required to, liquidate all positions held in the omnibus account and apply the proceeds thereof to meet the FCM's obligations to the clearing member with respect to the customer omnibus account.<sup>14</sup>

**2. Non-US Derivatives Exchanges.** We may have established a relationship with a clearing member of a CCP for the purpose of clearing transactions executed on a non-US derivatives exchange. The CEA does not specifically provide for the segregation of customer funds held to margin, guarantee or secure futures and options on futures contracts traded on or subject to the rules of a non-US derivatives exchange. Nonetheless, at the FCM level, the CFTC's rules establish a regulatory regime that is comparable to the provisions governing US exchange-traded derivatives customer funds. Customer funds held for the purpose of trading non-US exchange-traded derivatives: (i) must be separately accounted for and may not be commingled with our funds or be used to margin, guarantee, or secure any trades or contracts of any other customer or person; and (ii) may be commingled in an omnibus account with a bank or trust company or with the CCP that clears exchange-traded derivatives on our behalf. In addition, we are required to maintain books and records concerning: (i) the identity of our customers; (ii) the positions held on behalf of each such customer; and (iii) the collateral deposited by each customer to margin such positions.

At the clearing member and CCP level, however, the rules of the jurisdiction otherwise governing the treatment of customer funds would ordinarily apply. Specifically, in the case of an EMIR-authorized CCP and a non-FCM clearing member, indirect client funds would ordinarily be held by the CCP and the clearing member in accordance with the Indirect Clearing RTS.

**3. Excess Customer Funds.** CFTC rules do not expressly authorize a CCP to adopt (or prohibit a CCP from adopting) rules permitting an FCM to maintain its excess customer funds with the clearing member or the CCP. If a CCP were to adopt such rules, the clearing member or the CCP would not be required to identify such funds to particular customers within the customer omnibus account. In the event a direct client FCM defaults in its obligations to the clearing member and there is a shortfall in the customer funds required to be held in the customer omnibus account, the clearing member may apply the excess customer funds that it is holding to meet the FCM's obligations to the clearing member with respect to the customer omnibus account.

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<sup>14</sup> As further discussed below, the assets held in the customer omnibus account may not be used to meet any other obligations of the FCM to the clearing member.

## B. Non-US Listed Equity Options

We may have established a relationship with a clearing member of a CCP for the purpose of clearing transactions in Non-US Listed Equity Options.<sup>15</sup> The US Customer Protection Regime for Non-US Listed Equity Options is set out in the Exchange Act and SEC rules and is summarized below.

**1. Customer Protection Rule.** Under the SEC’s customer protection rule, a BD is required to promptly obtain and maintain physical possession and control of all “fully paid”<sup>16</sup> securities and “excess margin securities”<sup>17</sup> carried for customers, which may not be used by the BD and must be segregated a lien-free environment. In addition, a credit balance in a customer’s account (*i.e.*, the BD’s liabilities to customers) is considered a “free credit balance” subject to immediate cash payment to customers on demand. Any amount of such free credit balances not used to finance customer-related debits must be deposited in the Reserve Account described below.

**2. Reserve Account.** A BD is required to add a number of different credits (*e.g.*, cash balances in customer accounts and funds obtained through the use of customer securities) as well as corresponding debits (*e.g.*, monies owed by customers from margin loans, securities borrowed-in by the BD to cover customer short sales, and margin posted to cover customer clearing activities) across the BD’s entire set of customers. If aggregate customer credits exceed aggregate customer debits, the BD must maintain cash or qualifying securities in the amount of the excess in a special Reserve Account, which must be segregated from the BD’s other bank accounts. Although these calculations are performed in the aggregate, a BD is required to prepare and maintain current ledger accounts that itemise separately each cash and margin account of every customer as well as a stock record that reflects the positions of each customer.

**3. Hypothecation Rules.** SEC rules prohibit a BD from commingling customer securities with its own proprietary securities. They further require a BD to obtain each customer’s written consent in order to hypothecate securities under circumstances that would permit the commingling of that customer’s securities with those of the BD. In addition, the BD must give written notice to a pledgee that, among other things, a security pledged is carried for the account of its customer.

## C. Indirect Clearing

If we facilitate clearing of derivatives at an EU CCP through a clearing member that is also an FCM (or, in respect of Non-US Listed Equity Options, that is also a BD), then the US Customer Protection Regime described in the remainder of this section III shall apply in all cases to the clearing services we offer you.

Where we do so through a clearing member that is not an FCM (or, in respect of Non-US Listed Equity Options, that is not a BD), then we may determine that we are able to open and maintain segregated

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<sup>15</sup> BofAS is a Clearing Member on ICE Clear Europe Limited (UK), which clears Equity Options.

<sup>16</sup> “Fully-paid” securities are securities that a customer has fully paid for and that are held in “cash accounts” as defined in US Federal Reserve Regulation T.

<sup>17</sup> “Margin securities” are those securities carried for a customer in a margin account, with market value equal to (or less than) 140% of the account’s debit balance; the BD has access to these securities to finance the debit balance and for use as collateral for bank loans or stock loans or repurchase agreements. “Excess” margin securities are those securities that have a market value in excess of 140% of the aggregate debit balance in that customer’s account.



accounts for you at the clearing member level in a form that complies with the Indirect Clearing RTS. A basic description of the indirect client account structures under the Indirect Clearing RTS is provided in Annex I. Any such accounts may give you additional protections in the event of the clearing member's insolvency.

**However, in the event of our insolvency, the mandatory liquidation provisions of: (i) the US Bankruptcy Code; (ii) the CFTC's rules (in respect of exchange-traded futures); and/or (iii) the US Securities Investor Protection Act (SIPA) (in respect of Non-US Listed Equity Options), described in section IV below will apply. In other words, in the event of our insolvency, the positions in any accounts that we may open at the clearing member level that comply with the Indirect Clearing RTS, and the related assets, will be ported or liquidated pursuant to the requirements of the US Bankruptcy Code and the CFTC's rules and/or SIPA rather than in accordance with the Indirect Clearing RTS.**

#### **IV. Transfer, or porting, of customer assets and positions**

##### **A. Transfers to another FCM in a business-as-usual context**

The rights and obligations of FCMs and their customers with respect to the transfer of customer assets and positions to another FCM in a business-as-usual context are the same whether the customer is trading (i) exchange-traded derivatives executed on a DCM, or (ii) exchange-traded derivatives executed on a regulated market. In particular, CFTC rules prohibit us from transferring your assets and positions to another FCM without your consent.

In a business-as-usual context, *i.e.*, we are not in default, you may request at any time that all or a portion of your assets and positions be transferred to another FCM clearing member that has agreed to accept your account. National Futures Association (NFA) Compliance Rule 2-27 provides that, within two business days after receiving a customer's request to transfer the customer's account, or within such further time as may be necessary in the exercise of due diligence, the FCM clearing member carrying the account must confirm to the FCM clearing member receiving the account all balances in the account and all open positions. Within three business days of the day such confirmation is due, or within such further time as may be necessary in the exercise of due diligence, the FCM clearing member carrying the account must effect the transfer of the balances and positions to the receiving FCM clearing member.

NFA Compliance Rule 2-27 is applicable to all FCMs and each type of customer account.

##### **B. Treatment of exchange-traded derivatives customer assets and positions when an FCM is placed in bankruptcy**

**1. In general.** If an FCM is placed in bankruptcy, the FCM is liquidated in accordance with the commodity broker liquidation provisions of the US Bankruptcy Code and the CFTC's rules.

**2. Transfer of customer assets and positions.** Once a direct client FCM has filed for, or is otherwise placed in bankruptcy, a clearing member may not transfer, or port, the positions and assets of non-defaulting customers to another FCM except as directed by the trustee and confirmed by the Bankruptcy Court. In addition, the trustee in bankruptcy, in coordination with the clearing member, will attempt to effectuate the transfer of all customer positions together with the money, securities, or other property held to margin the commodity contracts.

In the event customer accounts cannot be transferred, however, or only a partial transfer is accomplished, the trustee is further instructed to liquidate all remaining open positions. The Bankruptcy Code requires that losses arising in any account class of a defaulting FCM must be shared ratably among the members of that account class. Therefore, in the event that losses in the customer omnibus account are so great that the direct client FCM is unable to meet the shortfall with its own assets and consequently defaults to the clearing member, a customer may be exposed to losses of other customers.<sup>18</sup>

**3. Authority of the clearing member in the event of a shortfall in the exchange-traded derivatives customer omnibus account.** If, upon the bankruptcy of a direct client FCM, there is a

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<sup>18</sup> Consequently, even if an FCM were able to provide its customers segregated accounts in a form that complied with the Indirect Clearing RTS, such accounts would not provide any additional protection to customers in the event of the bankruptcy of the FCM.

shortfall in the exchange-traded derivatives customer omnibus account caused by the default of one or more customers, CFTC rules permit, but do not require, the clearing member to net and liquidate the positions held in the customer omnibus account and to use the proceeds of such liquidation to meet the defaulting direct client FCM's obligations to the clearing member with respect to the omnibus account.<sup>19</sup> The proceeds from the liquidation of the exchange-traded derivatives customer omnibus account may not be used to meet any other obligations of the direct client FCM to the clearing member.

### **C. Treatment of customer assets and positions when a BD is placed in bankruptcy**

Upon the insolvency of a BD a bankruptcy trustee will be appointed, or the Securities Investor Protection Corporation (SIPC) may file an application and complaint under SIPA, which will automatically halt any pending bankruptcy proceeding and the BD will be liquidated pursuant to SIPA at the direction of a SIPA trustee who is subject to oversight by SIPC. A SIPA proceeding is conducted in accordance with Chapter 7 of the US Bankruptcy Code except to the extent any such provisions are inconsistent with the provisions of SIPA. It is the SIPA trustee, rather than the clearing member, who has the authority to port the positions of such insolvent BD's customers (including, as relevant here, indirect clients). In particular, a SIPA trustee has the authority, subject to the prior approval of SIPC, to sell or otherwise transfer to another member of SIPC, without consent of any customer, all or any part of the account of a customer of the debtor.<sup>20</sup> In the context of a liquidation in bankruptcy, as opposed to under SIPA, the bankruptcy trustee is required to promptly liquidate securities held by the bankruptcy estate except for securities registered in a customer's name and that is not in a form transferable by delivery on the date of the BD's insolvency.

Where the trustee is not able to effect or otherwise elects not to effect the transfer of all customer positions, the trustee distributes property to customers to satisfy their claims against the BD. "Customer property" is viewed as fungible under SIPA and the US Bankruptcy Code and as such, all customers share ratably in the BD's pool of such property according to the customer's net equity claim.<sup>21</sup> Generally, "customer property" is defined as cash, securities, or other property received by or acquired from the securities account of a customer that is being held by or for the account of the BD. For example, shares held on behalf of a customer in street name and customer cash constitute customer property. If the customer property fund is insufficient to cover the customers' claims, customers receive distributions from other property of the estate on a *pari passu* basis with general creditors.

### **D. Rights and Obligations of CCPs and Clearing Members Under EMIR and the Indirect Clearing RTS**

The clearing member disclosure statement, referenced above, describes in greater detail the rights and obligations of clearing members, their clients and CCPs under EMIR and the Indirect Clearing RTS in the event of a clearing member default. These rights and obligations differ in certain respects from the

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<sup>19</sup> The clearing member is authorized to net and liquidate such positions even if the Bankruptcy Court has appointed a trustee in bankruptcy.

<sup>20</sup> In the event the insolvent BD is also a registered FCM, the SIPA trustee will, in respect of the insolvent firm's FCM business, be subject to the same duties and requirements as a trustee under the commodity broker liquidation provisions of the Code as would apply to an insolvent FCM that is not also a registered BD.

<sup>21</sup> In a SIPA proceeding, customer property is first allocated to SIPC in repayment of certain expenses incurred in freeing customer securities from liens and security interests before ratable distribution to customers.

rights and obligations available under the US Customer Protection Regime. We note immediately below three significant differences.

1. Where porting is available under EMIR and the Indirect Clearing RTS, it is generally required for the client of a defaulting clearing member or the indirect client of a defaulting direct client to have designated a replacement clearing member or direct client, and for such replacement to consent to the transfer. Under the US Customer Protection Regime, the CCP or the clearing member, in coordination with the CFTC, would identify one or more non-defaulting FCMs that would be willing to accept the omnibus account. In a SIPA proceeding, the SIPA trustee would attempt to transfer the insolvent BD's customer account to a non-defaulting BD. Once the relevant accounts are transferred, each customer would be able to request that the customer's account be transferred to an FCM or BD that the customer selects.

2. Under EMIR Article 48(5), a CCP or clearing member must commit to transfer the assets and positions held by a defaulting clearing member in an omnibus client segregated account or a gross omnibus indirect client account for a predefined period of time after the clearing member or direct client becomes insolvent. Under the US Bankruptcy Code, once an FCM or BD has filed for bankruptcy, no transfers of client assets and positions may occur without the consent of the bankruptcy trustee or, in the event of a SIPA proceeding, without the consent of SIPC and the SIPA trustee.

3. EMIR Article 48(7) provides that, where a balance is owed by the CCP in respect of a client segregated account of a defaulting clearing member, such amount must be readily returned directly to the relevant client, where such client's identity is known to the CCP, or otherwise to the defaulting clearing member for the account of its clients. These "leapfrog" payment provisions also apply to the return of proceeds in respect of an indirect client segregated account by the CCP to the direct client for the account of its indirect clients, where the identity of the relevant client is known. Finally, the Indirect Clearing RTS establish an obligation on a clearing member to return liquidation assets directly to the indirect client of a defaulting direct client, where the indirect client has opted for a gross omnibus indirect client account. By contrast, under the US Customer Protection Regime and the US Bankruptcy Code, the bankruptcy trustee (or, in a SIPA proceeding, the SIPA trustee) is responsible for liquidating the positions of non-porting customers of an insolvent FCM or BD and distributing the liquidation proceeds ratably to customers.

## V. Insolvency of CCPs and others

Except as set out in this section, this Statement deals only with our insolvency. You may also not receive all of your assets back or retain the benefit of your positions, if other parties in the clearing structure default – *e.g.*, the CCP itself, a custodian or a settlement agent.

In relation to CCP insolvency, broadly speaking our (and therefore your) rights will depend on the law of the country in which the CCP is incorporated and the specific protections that the CCP has put in place.<sup>22</sup> You should review the relevant CCP disclosures carefully in this respect and take legal advice to fully understand the risks in this scenario.

In addition, please note the following:

- We expect that an insolvency official will be appointed to manage the CCP. Our rights against the CCP will depend on the relevant insolvency law and/or that official.
- It will be difficult or impossible to port positions and related margin, so it would be reasonable to expect that they will be terminated at CCP level. The steps, timing, level of control and risks relating to that process will depend on the CCP, its rules and the relevant insolvency law. However, it is likely that there will be material delay and uncertainty around when and how much assets or cash we will receive back from the CCP. Subject to the bullet points below, it is likely that we will only receive back only a percentage of assets available depending on the overall assets and liabilities of the CCP.
- It is unlikely that you will have a direct claim against the CCP.
- Under the terms of our customer agreement, we are not liable to you in the event of the default of a CCP or other third party not under our control.
- If recovery of margin in this scenario is important, then you should explore “bankruptcy remote” or “physical segregation” structures offered by some CCPs. However, these tend to be offered only in relation to accounts subject to individual client segregation.

It is beyond the scope of this disclosure to analyse such options but your due diligence on them should include analysis of matters such as whether other creditors will have priority claims to margin; whether margin or positions on one account could be applied against margin or positions on another account (notwithstanding the contractual agreement in the CCP’s rules); the likely time needed to recover margin; whether the margin will be recovered as assets or cash equivalent; and any likely challenges to the legal effectiveness of the structure (especially as a result of the CCP’s insolvency).

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<sup>22</sup> BofAS is a Clearing Member of ICE Clear Europe Limited (UK). The CCPs with respect to which we provide indirect clearing services and the clearing members that we use may change over time. Current information with respect to such CCPs and clearing members may be found in ML Pro’s CFTC Rule 1.55(i), (k) and (o) Disclosure, located here: <https://www.bofaml.com/en-us/content/futures-options-otc-clearing.html>.

**ANNEX I****Forms of Indirect Client Segregated Account**

Under the Indirect Clearing RTS, there are two basic types of indirect client accounts available at the CCP level: the Basic Omnibus Indirect Client Accounts and Gross Omnibus Indirect Client Accounts. Clearing members then open and maintain accounts corresponding to the relevant indirect clearing accounts at the CCP level as described in more detail below.

Please see Part Two of the clearing member disclosure statement<sup>23</sup> for an overview of the risks in relation to a Basic Omnibus Indirect Client Account and a Gross Omnibus Indirect Client Accounts. We also refer you to the CCP disclosures which CCPs are required to prepare and which set out the treatment of margin and collateral at the CCP level.

**1. Basic Omnibus Indirect Client Account<sup>24</sup>**

Under this account type, at the level of the clearing member, your transactions (including corresponding assets in the clearing member's accounts) are segregated from:

- the clearing member's proprietary transactions and any of its assets;
- any transactions (including corresponding assets in the clearing member's accounts) relating to our own account or that of one of the clearing member's other clients;
- any transactions (including corresponding assets in the clearing member's accounts) relating to any clients of the clearing member's other clients that have also opted for a Basic Omnibus Indirect Client Account and which are recorded in a different Basic Omnibus Indirect Client Account; and
- any transactions (including corresponding assets in the clearing member's accounts) relating to any of our clients or any clients of the clearing member's other clients that have opted for a Gross Omnibus Indirect Client Account.

However, your transactions (including corresponding assets in the clearing member's accounts) will be commingled with the transactions (including corresponding assets in the clearing member's accounts) relating to any of our other clients that have also opted for a Basic Omnibus Indirect Client Account and which are recorded in the same Basic Omnibus Indirect Client Account.

Can your transactions and related collateral be netted with the clearing member's proprietary transactions and assets?	No
Can your transactions and related assets be netted with those relating to us or the clearing member's other clients?	No

<sup>23</sup> Related disclosures for ML Pro's affiliate, BofAS, will be made available via the following link: [www.bofaml.com/en-us/content/futures-options-otc-clearing.html](http://www.bofaml.com/en-us/content/futures-options-otc-clearing.html).

<sup>24</sup> This description is based on Articles 4(2)(a) and 4(4)(a) of the Indirect Clearing RTS. Please note that we have based our analysis on the minimum requirements as set out in the Indirect Clearing RTS. Therefore, we have assumed that positions in a Basic Omnibus Indirect Client Account would be held on a net basis and margin would also be collected on a net basis.

Can your transactions and related collateral be netted with those relating to our other clients?	Yes (provided the transactions and assets of our other clients are recorded in the same Basic Omnibus Indirect Client Account)
Can your transactions and related collateral be netted with those relating to the clearing member's other clients?	No

The clearing member will not net your transactions with its proprietary transactions or any transactions not recorded in the same Basic Omnibus Indirect Client Account, nor use the assets relating to such transactions with respect to any of its proprietary transactions or transaction recorded in any other client account.

However, the clearing member may net the transactions that are recorded in the same Basic Omnibus Indirect Client Account. The assets provided in relation to the transaction credited to that Basic Omnibus Indirect Client Account can be used in relation to any transaction credited to that Account. In addition, upon the default of a non-FCM clearing member (or, in relation to Non-US Listed Equity Options, the default of a non-BD clearing member), the rules of the CCP may permit some netting of transactions and use of assets between the Basic Omnibus Indirect Client Account and the other client omnibus accounts maintained by that non-FCM clearing member.

## 2. **Gross Omnibus Indirect Client Account**<sup>25</sup>

Under this account type, at the level of the clearing member, your transactions (including the corresponding assets in our accounts) are segregated from:

- the clearing member's proprietary transactions and any of its assets;
- any transactions (including corresponding assets in the clearing member's accounts) relating to our own account or that of one of the clearing member's other clients;
- any transactions (including corresponding assets in the clearing member's accounts) relating to any of our clients or any clients of the clearing member's other clients that have also opted for a Basic Omnibus Indirect Client Account; and
- any transactions (including corresponding assets in the clearing member's accounts) relating to any clients of the clearing member's other clients that have opted for a Gross Omnibus Indirect Client Account and which are recorded in a different Gross Omnibus Indirect Client Account.

However, your transactions (including corresponding assets in the clearing member's accounts) will be commingled with the transactions (including corresponding assets in our accounts) relating to any of our other clients that have also opted for a Gross Omnibus Indirect Client Account and which are recorded in the same Gross Omnibus Indirect Client Account.

Can your transactions and related collateral be netted with the clearing member's proprietary transactions and assets?	No
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<sup>25</sup> This description is based on Articles 4(2)(b) and 4(4)(b) of the Indirect Clearing RTS.

Can your transactions and related assets be netted with those relating to us or the clearing member's other clients?	No
Can your transactions and related collateral be netted with those relating to our other clients?	Your transactions will not be netted with the transactions relating to any of our other clients.  However, the collateral relating to you may be used to cover transactions of our other clients to the extent it is recorded in the same Gross Omnibus Indirect Client Account.
Can your transactions and related collateral be netted with those relating to clients of the clearing member's other clients?	No

The clearing member will not net your transactions with its proprietary transactions, our transactions, the transactions relating to the clearing member's other clients, the client of the clearing members' other clients, or any transactions relating to our other clients (regardless of whether they are recorded in the same Gross Omnibus Indirect Client Account).

The clearing member will also agree not to use the assets relating to your transactions with respect to any of its proprietary transactions or client transactions recorded to any other account. However, the clearing member may use the assets provided in relation to your transactions in relation to any transaction relating to our other clients which are credited to the same Gross Omnibus Indirect Client Account. In addition, upon the default of a non-FCM clearing member (or, in relation to Non-US Listed Equity Options, the default of a non-BD clearing member), the rules of the CCP may permit some netting of transactions and use of assets between the Gross Omnibus Indirect Client Account and the other client omnibus accounts maintained by that non-FCM clearing member.



## ANNEX II

### Terms and Conditions Indirect Clearing Arrangements

In accordance with the provisions of the Regulatory Technical Standards on Indirect Clearing Arrangements under MiFIR<sup>26</sup> and EMIR<sup>27</sup>, we are required to disclose the general terms and conditions pursuant to which we provide our clients indirect clearing services with respect to exchange-traded derivatives contracts that are cleared by a central counterparty authorized in the European Union (“**EU CCP**”).<sup>28</sup> Such terms and conditions are set out in detail in the agreement, including all schedules and appendices thereto, that we enter into with you (the “**Agreement**”).

The term “**indirect clearing services**,” for purposes of this Statement, refers to the circumstances where we access an EU CCP through a clearing member of that EU CCP.

In significant part, the terms and conditions identified below are required in order for us to comply with relevant provisions of the Commodity Exchange Act and the rules of the Commodity Futures Trading Commission (“**CFTC**”) and the self-regulatory organizations with jurisdiction over our futures-related activities. If we facilitate clearing in respect of Non-US Listed Equity Options at an EU CCP, we must also comply with relevant provisions of the Securities Exchange Act of 1934 and the rules of the Securities and Exchange Commission (“**SEC**”) and the self-regulatory organizations with jurisdiction over our securities-related activities. (All such laws and rules, as applicable, are collectively referred to herein as the “**rules**”.) For example, the rules require that we must:

- take reasonable steps to know our clients in accordance with applicable law, including Anti-Money Laundering and “know your customer” rules;
- establish risk-based limits on each client’s orders;
- conduct business only with or through an intermediary that is registered with the CFTC or SEC, as applicable (or not required to be registered);
- obtain a first priority security interest in all exchange-traded derivatives contracts and all cash and securities deposited to margin such contracts; and
- confirm that our clients have received and understood certain prescribed disclosures.

A general description of the principal terms and conditions governing our relationship with our clients is set out below. The actual provisions of the Agreement are more detailed. Moreover, please note that the

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<sup>26</sup> Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012.

<sup>27</sup> Regulation (EU) No. 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives central counterparties and trade repositories.

<sup>28</sup> “**Exchange-traded derivative**” is defined in Article 2(1)(32) of MiFIR to include any derivative traded on an EU regulated market or on any third-country trading venue determined to be “equivalent” to an EU regulated market for purposes of discharging MiFIR’s mandatory trade execution obligations. No such equivalence determinations have yet been made. Where applicable, when used herein this term also includes equity options listed for trading on an EU regulated market (“**Non-US Listed Equity Options**”).

specific terms and conditions of the Agreement that we enter into with any client may differ depending on our analysis of the risks that such client's trading activities may present.

Before providing indirect client services to you, we will generally require, subject to the terms and conditions contained in the Agreement, that you:

- provide us with such information that we may request in order to verify your identity as required by law or as we may otherwise require for account opening purposes.
- confirm to our satisfaction that you meet our minimum financial and operational requirements appropriate for your business, experience and the nature of the trading in which you intend to engage; you must agree to provide us with such financial information, including a current financial statement, as we may request from time to time and to notify us promptly of any material change in your financial condition.
- confirm to our satisfaction that you have full power and authority to enter into the Agreement and to enter into the transactions contemplated thereby for your account or on your behalf.
- confirm to our satisfaction that you have obtained all registrations or licenses, if any, that you may require to conduct business and that you remain in good standing with all relevant regulatory and self-regulatory authorities.
- acknowledge that you have read and understood all disclosure statements with respect to your trading activities that we have provided you, including the appropriate Disclosure Statement on Indirect Clearing.
- acknowledge that all exchange-traded derivatives transactions effected for your account or on your behalf are subject to "**Applicable Law**", including exchange and clearing organization rules that require your consent to be subject to the jurisdiction of the markets on which you trade, and that you will conduct all activities subject to the Agreement in accordance with such Applicable Law.
- agree that we may, in our sole discretion, limit the size of your positions, refuse to accept any order or transaction, or require you to transfer your account to another firm.
- agree to meet all margin calls with respect to exchange-traded derivatives contracts that we clear for your account or on your behalf in such form and amounts and within such time as we may determine, consistent with Applicable Law.
- grant us a lien and first priority security interest and right of set-off in all exchange-traded derivatives contracts and all cash, securities and other property ("**collateral**") that you deposit with us to margin, guarantee or secure all exchange-traded derivatives contracts that we clear for your account or on your behalf. You must grant us the right to borrow, pledge, repledge, hypothecate, rehypothecate, loan or invest any such collateral.
- acknowledge that, upon an event of default, as that term is defined in the Agreement, we will have certain rights as set out in the Agreement, including the right, in addition to any remedy otherwise available in law or equity, to liquidate any or all exchange-traded derivatives contracts held in your name or on your behalf by any lawful means and to apply any collateral to meet any amounts you owe us.

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- acknowledge that we will not be liable to you for any losses that may be incurred except insofar as such losses are a direct result of our negligence, willful misconduct or fraud and, further, that in no event will we be liable for any consequential, indirect or punitive damages.
- agree that the Agreement will be interpreted in accordance with the laws of the State of New York and submit to the jurisdiction of the courts in the State of New York and the federal courts in the Southern District of New York. You must waive any right to a jury trial.