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Guidance Notes

to the

EFET Master Netting Agreement **(version 1.0 / June 2010)**

I. Introduction: EFET's form of Master Netting Agreement (the **"MNA"**) was developed over several years by a working group comprised of EFET member company representatives and EFET's counsel, with a first version approved by the full EFET Legal Committee for publishing on the EFET web page in June of 2010.

The MNA was developed to offer an intuitive, user-friendly and linear documentary tool, to meet the challenges of netting trading exposures arising within and across multiple books of "over-the-counter" bilateral trading. The MNA has a clear focus on the commodities and derivative products traded in European energy markets, as well as related markets like emissions, pipeline, freight and wires capacity and weather derivatives (but is not structured to impose this scope as a limitation on users wishing a broader application of the document).

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PLEASE NOTE that the legal enforceability of rights of early termination, trade liquidation, close-out netting and/or set-off (regardless of their having been provided for within the general terms of the MNA), are generally subject to numerous restrictions and limitations imposed by the laws of differing legal jurisdictions, particularly when enforcement of these contractual rights is attempted within the context of a party's insolvency. For this reason, users of the MNA are strongly encouraged to consult legal opinions made available from time to time by EFET as well as their own legal counsel to ensure that their MNAs are properly customized in order to render the greatest level of enforceability of these concepts permitted under the prevailing circumstances and given the applicable legal regimes having jurisdiction over the parties involved and their assets.

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II. Scope & Purpose: The MNA is designed to facilitate and support, where permitted under applicable law, the early termination and close-out netting of unsettled trades of one or more commodities, derivatives and/or related products transacted under multiple bilateral trading agreements and, if applicable, other forms of transactional documentation. It is ***not*** designed to facilitate or support cross-affiliate (sometimes called "triangular" or "cross-entity") netting or any other form of netting involving more than a single legal entity on each side of the trading relationship. Such expanded netting rights, even when legally enforceable, generally involve a level of documentary customization clearly beyond the scope of a standardized document like the MNA, with its very broad intended scope of use by parties potentially subject to a host of different insolvency regimes.

The MNA also offers users the option to implement payment netting across multiple agreements in order to reduce periodically scheduled and coinciding billing and payment obligations under multiple designated agreements (defined as **"Concerned Agreements"**). The result is a single[1] obligation to either:

(i) ***pay*** the "net" amount due to one's counter-party (if any); ***or***

(ii) ***receive*** the "net" amount due from one's counter-party (if any).

Concerned Agreements may, at the users' election, be defined as the same agreements to which close-out netting applies, a subset of those agreements, an expansion of those agreements, or even a wholly different set of agreements.

III. Notes on Selected MNA Provisions & Sections of the Election Sheet:

§ 2. Scope of Early Termination and Close-Out Netting Rights

- **§ 2.1 of the MNA and Election Sheet: (*Designation of Agreements Which May Be Terminated, Closed-Out and Netted*).**

Specifying agreements in respect of § 2.1 of the MNA by filling in the grid in the corresponding section of the Election Sheet will include those specified agreements within the scope of the MNA's close-out netting provisions and its early termination triggering provisions. Agreements so identified are defined for the purposes of the MNA as **"Netted Agreements."** Netted Agreements will not only be included within the scope of the MNA's close-out netting processes but in addition, and subject to the customizations made in respect of § 3 of the MNA, may also serve to define those events (i.e. **"Close-Out Events"**) giving rise to the right to initiate an early termination under the MNA.

[1] There is obviously also the statistically remote chance of a completely "obligation-free net" where the respective obligations match evenly resulting in neither party owing anything to the other.

The Netted Agreement grid in the Election Sheet contains a box for each standard form master trading agreement[2] employed, circa June 2010, in the European energy markets, as well as two more generally descriptive, catch-all boxes which parties may use to add to their list of defined Netted Agreements either or both of: (i) all other agreements conforming to the definition of master trading agreement cited in footnote number 1, and/or (ii) all long form transaction confirmations which by their own terms incorporate by reference some or all of the terms of any of the other master trading agreements identified by the parties in their Netted Agreement grid. Finally, as noted above in the Introduction to these Guidance Notes, parties are free to add to their grid of Netted Agreements any other master trading agreement, category or group of transactions, one-off trade, or any other form of trade or transaction which they wish to have included within the scope of the MNA's early termination and close-out netting provisions and mechanisms.

Please note that electing to include within your specified list of Netted Agreements one or more documents falling into a non-standardized or bespoke documentary structure[3] may create and elevate a risk inherent in the nature of a broadly scoped netting agreement like the MNA. Specifically, and dependent upon the definition of Close-Out Events selected by the Parties in respect of § 3 of the MNA, the inclusion of these types of documents within the definition of Netted Agreements can run the risk of permitting the termination of all Netted Agreements upon the occurrence of a highly deal-specific event of default originally intended to permit only the termination of either the bespoke transaction itself, or at most, a far more narrowly defined scope of trades than the parties are intending to place under the far broader scope of their MNA.

If the defined events of default contained in such unique transaction documents are (i) desired to be retained at all[4] but (ii) not desired or intended to be empowered by the MNA to initiate a larger, MNA-level scale of Close-Out, such agreements and trades may instead be classified for MNA purposes as **"Additional Netted Agreements,"** a topic described in more detail below.

- **§2.1 of the Election Sheet: The (*Additional Netted Agreements*) Election.**

Immediately following the Netted Agreement Grid in § 2.1 of the Election Sheet is a box permitting the parties to make operative in their MNA the concept of Additional Netted Agreements. Checking of this box will incorporate within the MNA's Election Sheet its Part III (the **Additional Netted Agreement Rider**), which must then be customized by the parties. Notes on the customization of the Rider are provided below. If the parties do not wish to include any Additional Netted Agreements within the scope of their MNA, there is no

[2] In this context, "master trading agreement" meaning an agreement (generally adopting to one degree or another the "single agreement concept") which provides within its own terms and conditions for the entry into, early termination and uniform close-out netting, of, multiple underlying trading transactions.

[3] e.g. highly customized, one-off or non-standardized trades or transactions, particularly those with very specifically negotiated default event definitions relating primarily or only to the trades themselves rather then to the overall trading relationship between the parties.

[4] e.g. they are not intended to be overridden and replaced by a set of Harmonised Default Events pursuant to § 3(C) of the MNA, but rather are wished to be retained but only in respect of the transaction in the terms of which they are defined.

need to check this box, and the Additional Netted Agreement Rider may be discarded from the Election Sheet in its entirety.

- **§ 2.2 of the MNA and Election Sheet: The (*Excluded Agreements*) Election.**

Parties wishing to exclude from the scope of their MNA certain agreements, trades, transactions or categories of one or more of the same may do so by identifying them as Excluded Agreements in the grid found at § 2.2 of the Election Sheet. The effect of designating an agreement as an Excluded Agreement is to ring fence it from the operation of the MNA, such that it may neither be terminated due to the occurrence of an MNA Close-Out Event nor any amounts due in respect of it included within the Close-Out Netting processes of the MNA. Obviously, the relevance of the Excluded Agreement concept is proportional to the level of generality (as opposed to specificity) used by the parties in defining their Netted Agreements.

- **§ 2.3 of the MNA: the (*Single Agreement*) language.**

This language clearly states the intention of the parties to contractually define everything falling within the designated scope of their MNA as, for legal purposes, a single, fully integrated and hopefully inseparable agreement. The purpose of this language is to discourage and frustrate operation of a common approach of many bankruptcy regimes to permit the disassembly and segregation of unperformed (trades) agreements into two different categories, followed by the selective enforcement of one category of trades while the other is rejected, leaving damages due thereunder subject to only a percentage distribution, if any. The intent of the single agreement language is to force an all-or-nothing application of these concepts such that the amount of damages claimed against the insolvent entity and therefore subject to a percentage distribution, would apply only after a full one-to-one set off or netting of all unperformed and (presumably) terminated in-the-money trades and agreements against all out-of-the-money ones.

§ 3. Close-Out Events

- **§ 3.1 of the MNA and Election Sheet: (*Definition of "Close-Out Event"*).**

§ 3.1 of the MNA permits parties to identify and customize those events, the occurrence of which they wish to give rise to the right to initiate an MNA level Close-Out.[5] The provision defines three primary categories of Close-Out Event: Master Netting Agreement Close-Out Events, Netted Agreement Default Events and Harmonised Default Events. The parties may elect to apply or not apply one or more of the specified Master Netting Agreement Close-Out Events. They then must choose between applying either the Netted Agreement Default Events or the Harmonised Default Events, but may not apply both. Each of these categories of Close-Out Event, and the ways in which they may be further customised, are described in the following paragraphs of these Guidance Notes.

[5] The default nature of such a Close-Out (i.e. absent an express opting out of this approach under § 4.2 {***Global Nature of Close-Out***}) of the MNA results in the termination of every Netted Agreement linked together by the MNA, along with each of their respective underlying transactions.

- **§3.1(A) of the MNA and Election Sheet: (*Master Netting Agreement Default Events*).**

Section 3.1(A) of the MNA defines three categories of events, each relating to the MNA itself, the occurrence of which may be defined as a Close-Out Event. Category I is concerned with breach of those Representations and Warranties given in accordance with §12.1 of the MNA. Category II is concerned with breach of any of the few specific covenants provided for in the MNA itself. And category III is concerned with failures to perform in accordance with the terms of a Credit Support Annex appended to and made a part of the MNA itself (as opposed to CSAs[6] supplementing individual underlying Netted Agreements). **Please note** that parties should only apply this third category in the event that they have added, or intend to add, a Credit Support Annex to their MNA.

- **§3.1(B) of the MNA and Election Sheet: (*Netted Agreement Default Events*).**

The election to apply §3.1(B) of the MNA redefines as a "**Close-Out Event**", for MNA purposes, each event defined in each underlying Netted Agreement the occurrence of which would permit the early termination and Close-Out of that Netted Agreement and all of its underlying trades and transactions. Unless an MNA user has been extremely careful to define events of default (a/k/a Material Reasons for termination), in a highly consistent manner across all of its underlying Netted Agreements – elevation of such events to the status of MNA Close-Out Events will pose certain risks. The most significant risk in applying the §3.1(B) election is potentially permitting termination of one's entire trading portfolio upon the occurrence of an event which may have been perfectly well suited to justify the termination of only a specific Netted Agreement,[7] but which might not justify (from the parties' perspective) the termination of their entire trading portfolio.

- **§3.1(C) of the MNA and Election Sheet: (*Harmonised Default Events*).**

Section 3.1(C) of the MNA, and the related sections of the Election Sheet, permit the parties to hand select and customize a list of bespoke, harmonised[8] Close-Out Events which they wish to apply to all of their Netted Agreements and upon the occurrence of which the MNA and all of its underlying Netted Agreements may be terminated. The sample list provided in §3.1(C) of the MNA's Election Sheet is drawn from a combination of the Material Reason and Material Adverse Change definitional provisions of the EFET Master Trading Agreement forms for electricity and natural gas.[9] As is the case with the use of these provisions within the documents from which they were drawn, they are intended to be specified and customized in respect of the often unique characteristics of each party to the MNA.

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[6] Credit Support or Collateral Annexes.

[7] Recall that while most of the MNA Election Sheet's default list of Netted Agreements are fully fleshed out master trading agreements, each with extensive provisions addressing defaults, early termination and close-out, parties are free to supplement this list as they see fit with bespoke trading agreements and even agreements documenting only a single trade or transaction.

[8] One of the three previously mentioned categories of Close-Out Event.

[9] Some minor revisions to the source document language were made to adjust them for use in respect of a master netting agreement as opposed to a master trading agreement, but in all key conceptual points they are wholly consistent.

Once the parties have selected and defined the Close-Out Events they wish to apply in respect of each other, they have the option of either superimposing them over and in replacement of the default events found in the underlying Netted Agreement, or, in the alternative, having them added to those events already defined in the terms of their Netted Agreements.[10] **Please note** that in each case these decisions are not merely terms of their MNA but also result in the actual amendment of the terms of each and every one of their underlying Netted Agreements.[11] Whether or not the parties wish to retain such amendments, or return the Netted Agreements to their original terms, should be considered, and provided for in related documentation if at some later stage the parties elect to terminate or replace their MNA.

The election of which of these two approaches to define Close-Out Events will be employed in their MNA is taken by the parties not by selecting an option in respect of § 3.1(C) but instead by selecting an option in their Election Sheet on the subject of the Global vs. Non-Global scope of MNA Close-Out. This election is implemented through §4.2 (***Global Nature of Close-Out***) of the Election Sheet. Parties having chosen to apply the Harmonised Default Event option and who have also elected to allow the MNA's default[12] position of Global Close-Out to prevail will thereby also be applying the "delete and replace" option with respect to the events of default originally set forth in their underlying Netted Agreements. Those who instead elect to opt out of the Global Close-Out default will by so doing also implement the "additive" approach of layering the Harmonised Close-Out Events selected by the parties in respect of each of them for their MNA, on top of whatever default events are already contained in the Netted Agreements themselves.[13]

The decision was ultimately taken that in order to simplify the structure of the MNA, the primary approach utilised by the MNA is to structure the Harmonised Default Event option, where the parties have not opted-out of the Global scope of Close-Out, as deleting in their entirety all (rather than merely some or even only the inconsistent) default events specified in the underlying Netted Agreements and then replacing them uniformly across the board with only the elected list of Harmonised Default Event definitions.

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[10] Other variations were considered by the MNA's working group but ultimately rejected as too problematic in implementation – e.g. providing for the Harmonised Events to only delete and replace default events defined in the underlying agreements that were addressed at the same topics or related to the same or similar events or scenarios. This decision was taken in respect of the practical difficulty in drawing bright line definitional distinctions in respect of such terms as "the same," "similar" and "not already covered by" within the contexts of often broadly drafted or conceptually overlapping events and scenarios as the same might be defined within an almost infinite number of potentially concerned agreements.

[11] This could be quite important in the event that the MNA itself was for some reason and at some later stage terminated, with the parties returning to performance under their now amended underlying Netted Agreements alone. If the parties wished to reinstate the original, non-harmonised default events found in these documents, they would need to provide that any amendments made to them in the MNA would not survive its termination.

[12] In this particular context, we are using the term "default" to signify the standard approach of the MNA, as drafted, which applies absent some affirmative election to apply an alternative approach. This is sometimes referred to as the "fallback" or "preferred" option. EFET documents typically apply a default in respect of any provision offering alternative options in order to avoid any confusion in the event that parties for some reason fail to designate a preference from among the options provided.

[13] Please note the implications of opting out of the MNA's default to Global Close-Out in respect of both the Automatic Early Termination and Additional Netted Agreement provisions of the MNA, as discussed further in respect of the MNA's §§ 4 and 6, as well as the Additional Netted Agreement Rider to the Election Sheet.

The one exception to this "delete and replace" approach would be the option of combining the Harmonised Default Event election with the election to opt-out in respect of the default position of Global Close-Out under § 4.2 (***Global Nature of Close-Out***). This combination would have the effect of preserving all underlying Netted Agreement default events and adding to them the further event definitions selected in respect of each party from the Harmonised list. This second option would present at least two primary points worthy of note. First, it would at least arguably permit, via the non-global election, cherry-picking at the underlying Netted Agreement level.[14] Second, with the additive nature of overlaying the Harmonised event definitions over existing default event definitions, the resulting amendments of the Netted Agreements could quite likely result in them having more than a single default event addressing a particular default scenario (e.g. insolvency, payment failures, etc).

- **§3.2 of the Election Sheet: (*Excluded Default Events*).**

This portion of the Election Sheet offers a means by which parties who have elected to utilize an approach to defining Close-Out Events which incorporates by reference a potentially broad list of events to narrow that list. The Election Sheet offers three pre-defined categories of events which parties may not want to form part of the applicable definition of Close-Out Event: (a) tax and change of law provisions which likely apply only to a single Netted Agreement; (b) default events which relate to scenarios defined as Force Majeure; and (c) defaults premised upon nomination, scheduling, notification and similar procedural defects; as well as a final box which may be used to incorporate any additional, bespoke carve outs from the Close-Out Event definition.

§ 4. <u>The Right to Close-Out, Its Effect and Applicable Limitations</u>

- **§4.2 of the MNA and Election Sheet: (*Global Nature of Close-Out*).**

§ 4.2 of the MNA sets forth the general default position of the MNA – if a party is entitled and wishes to terminate any Netted Agreement under its MNA, it may only do so by terminating all of its Netted Agreements under its MNA.[15] § 4.2 further provides that under this default election all Netted Agreements are deemed amended such that any attempt to terminate any one in accordance with its own terms will result in termination of them all by virtue of such amendment by the MNA to their original terms. Finally, § 4.2 provides that absent a termination of all Netted Agreements, no single Netted Agreement originally containing its own automatic early termination provision will continue to be capable of self-termination. This "Global" approach to MNA termination and Close-Out effectively mandates an "all or nothing" scope of termination in respect of the MNA and each of its underlying Netted Agreements which overrides any contrary rights set forth in the terms of any individual Netted Agreement.

[14] We note that while this would appear to be the contractual objective achieved by this combination of options within the MNA, the legal enforceability of such an objective would likely be uncertain under a number of insolvency regimes which disfavour such rights when employed against an insolvent entity.

[15] Please note that this default represents a 180 degree shift from the fallback approach embodied by the EFET/IECA Schedule to the BMA CPMA, where one had to opt into a Global approach to Close-Out, absent which the document provided for the right to terminate some, but not necessarily all of its underlying Principal Agreements as its default position.

Consequently, unless parties actively opt-out of Global Close-Out in their Election Sheet, both automatic and voluntary termination rights contained in the underlying Netted Agreements will cease and termination will be possible only under the terms of their MNA, and only in respect of all Netted Agreements. The final sentence of § 4.2 merely clarifies that "cherry-picking" of individual Netted Agreements (by closing them out in accordance with their own terms) will not be possible. This is regardless of whether parties elected to apply "Netted Agreement Default Events" in accordance with § 3.1 (B) or "Harmonised Default Events" in accordance with § 3.2 (C). Any right to terminate a Netted Agreement individually (without also terminating all other Netted Agreements) must be positively implemented via election in the Election Sheet.

The alternative to §4.2's default Global termination approach is really the parties' selected choice from among a series of three sub-options. The first two elections allow each Netted Agreement to be terminated according to its own terms, whether such termination is voluntarily or automatic (i.e. depending upon whether the relevant events of default in the Netted Agreement provide for merely the right to initiate a voluntary termination or instead call for the automatic early termination of such Netted Agreement). Selection of either of these first two elections render inoperative the sentence commencing with "For the avoidance of doubt" at the end of § 4.2. The third election permits termination of individual Netted Agreements in accordance with the terms of the MNA.

The initial step to utilizing one of these three variations to the MNA's Global approach to Close-Out is to disapply §4.2 in the MNA's Election Sheet. Once the parties have reserved the right to terminate something less than all of its Netted Agreements, they must go on to define which one or more of three alternative approaches to non-Global Close-Out they wish to make applicable. This application is made by selecting one or more options from among the three variations set forth under § 4.2 of the Election Sheet.

The first sub-election – ***Voluntary Termination of Individual Netted Agreements based upon Their Own Close-Out Terms*** – permits (again, assuming this may be done under the relevant principles of the applicable law) the voluntary termination of one or more Netted Agreements in accordance with their own original terms (i.e. their original default provisions not amended by the selected Close-Out Event definition of the MNA). The effect of making this variation operative is to permit a "Global" MNA level Close-Out based upon the occurrence of an event listed in the expanded §3 definition of Close-Out Event, but the early termination of any individual Netted Agreement will require the occurrence of an event specified as a termination event within its own original terms.

The second sub-election – ***Automatic Termination of Individual Netted Agreements based upon Their Own Close-Out Terms*** – permits individual Netted Agreements to self-terminate via the operation of their own automatic early termination provisions, even if not all such Netted Agreements contain such clauses or if the triggers contained therein which initiate an automatic termination are different from each other. The presumption here is that some parties may have a rationale for some of their Netted Agreements to automatically terminate that would not necessarily extend to the automatic termination of all of their Netted Agreements. Consequently, upon the automatic termination of any one or more Netted Agreements pursuant to their own terms, the MNA would not serve to automatically terminate any other Netted Agreement(s) for parties who had elected to make this sub-election operative. **Please note** that it is very important when applying this sub-election to consider issues of consistency with respect to elections made in §6 (***Customization of Automatic Termination Rights***).

The third and final sub-election – ***Voluntary Termination of Individual Netted Agreements based upon the Close-Out Terms of the MNA*** – permits a party to voluntarily terminate individual Netted Agreements (without having to terminate all of its Netted Agreements) upon the occurrence of an event defined as a Close-Out Event in the MNA. **Please note** that such triggering events may, depending upon the elections made in respect of the approach of § 3.1 to defining Close-Out Events, be either: (i) any one of those specific events originally defined as an event of default in any one of the Netted Agreements themselves (based upon an application of §3.1(B) of the MNA); or (ii) any one of those underlying Netted Agreement default events as added to and supplemented by the list of Harmonised Close-Out Events imposed under § 3.1(C) of the MNA; and may also, if applicable, be any Master Netting Agreement Default Event made applicable pursuant to §3.1(A) of the MNA. This third sub-election is far and away the most sweeping in scope, arguably permitting, for example the termination of a Netted Agreement upon the occurrence of an event not even designated a termination event in the original terms of that Netted Agreement, but rather set forth as a default event in another Netted Agreement. Any attempt to implement such potentially creative options at selectively terminating specific Netted Agreements, even though arguably contractually permitted under this sub-election, should, however, be evaluated for legal enforceability under the laws of the applicable legal system, particularly in the event of an insolvency-based termination.

As one last point on this section of the MNA, we direct your attention to the final sentence of the paragraph following the three sub-elections in respect of §4.2 in the MNA's Election Sheet which clarifies that a party who has reserved to itself the right to implement a Non-Global Close-Out of only one or more Netted Agreements must, in order to terminate a Netted Agreement, fully comply with any notice and other applicable procedural requirements as set forth in the relevant Netting Agreement's own terms, and will have to do so without the benefits of the simplified and harmonised termination mechanics provided for in the MNA in respect of Global Close-Outs.

§ 5. <u>Voluntary Commencement of Close-Out</u>

- **§ 5.1 of the MNA: (*Termination Notice*).**

Section 5.1 of the MNA specifies the mechanical process required to initiate a voluntary (as opposed to an automatic) Close-Out of Netted Agreements under the MNA. Its terms are largely modelled on the provisions of the same purpose found in the EFET Master Trading Agreements for power and natural gas. A key concept included in this provision is the necessity for a terminating party to designate an "**Early Termination Date**" in one's Termination Notice. The designated Early Termination Date's significance is that it is the date, absent some alternative controlling principal of the relevant jurisdiction's insolvency law mandating a different date or time, on which the liquidated value of terminated trades is marked to market.

One very important procedural aspect of the MNA to note is that once a Close-Out Event has occurred and an Early Termination Date has been designated, all Netted Agreements will simultaneously terminate and Close-Out as of the designated Early Termination Date, regardless of any contrary or additional notice requirements, cure periods

or other similar provisions which may have applied to that process under the original terms of any Netted Agreement.[16]

- **§ 5.2 of the MNA: (*Effect of Attempting to Initiate Close-Out of Less Than All Netted Agreements*).**

Section 5.2 of the MNA sets forth the important proposition that any party which has not affirmatively opted out of the MNA's default Global approach to Close-Out but which attempts to voluntarily initiate the early termination of any single Netted Agreement will be deemed in so doing to be initiating a Close-Out of all Netted Agreements. Consequently, any party applying the Global approach to Close-Out in their MNA will terminate and Close-Out all of their Netted Agreements if they attempt to terminate any one of those Netted Agreements in accordance with its own terms and procedures.

§ 6. Customization of Automatic Termination Rights

- **§ 6.1 of the MNA: (*Automatic Termination and Global Close-Out*).**

This provision is primarily explanatory in character. It clarifies the MNA's approach to the subject of Automatic Termination provisions for parties that applied the MNA's default election to Global Close-Out ***and also*** defined Close-Out Event via §3.1(B)'s MNA-level elevation of default events defined in the underlying Netted Agreements. In this scenario, if any one of the Netted Agreements terminates automatically pursuant to its own terms, all other Netted Agreements will self-terminate at the same time, even if they originally contained no automatic termination clauses under their own terms. The provision elevates (absent an express election to the contrary) the triggering of an automatic-termination provision in a single Netted Agreement to a trigger for the Global Close-Out of all Netted Agreements. Parties wishing to apply a more narrow approach to Automatic Termination under their MNA may do so via § 6.2 **(*Optional Uniform Election of Automatic Termination and Close-Out*)**.

An important distinction to note between §§ 6.1 and 6.2 is that the former takes the Automatic Termination clause in the form in which it is found in the Netted Agreement and merely extends its applicability to the other Netted Agreements while the latter provides a

[16] This is a different approach to the Close-Out process under the terms of the EFET/IECA Schedule to the BMA CPMA, which applied a rolling Close-Out of Netted Agreements (which it called "Principal Agreements") in accordance with the terms of each underlying agreement, such that these agreements could terminate and liquidate at different times, with payments due thereunder held in abeyance, subject to the accrual of interest, until the final agreement terminated and was factored into the rolling set-off process, resulting in a final sum due between the parties. Whilst acknowledging the conceptual elegance of the other approach, the MNA working group elected for a simultaneous Close-Out as one means of attempting to simplify what is generally an otherwise already quite complicated process. This was particularly the case in respect of the potential for procedural complications resulting from actions within an insolvency case occurring at some stage after the rolling Close-Out process had begun but before it had been completed.

mechanism for the parties to customize a standard Automatic Termination clause[17] at the MNA level and then apply it uniformly to all their Netted Agreements.[18]

- **§ 6.2 of the MNA and Election Sheet: (*Optional Uniform Election of Automatic Termination and Close-Out*).**

As noted above, § 6.2 of the MNA permits parties wishing to do so to define in their Election Sheet and then apply across all of their Netted Agreements a single, uniform Automatic Termination clause in respect of each party that would override and replace any inconsistent Automatic Termination provisions applicable to such party in the Netted Agreements' respective original terms. This provision is really intended as a means of cleaning up the Automatic Termination provisions (or the lack thereof) which may have been negotiated into Netted Agreements at a stage of market development where the parties were perhaps not yet familiar with the purpose, necessity, legal enforceability or intended operation of such clauses.

Parties electing to apply § 6.2 in their Election Sheets must also in their Election Sheet define the triggering conditions for the Automatic Termination to occur and also specify the applicable timing for the Close-Out. Such triggering events are generally a subset of the Close-Out Events otherwise defined in respect of the MNA and therefore the Election Sheet is designed to offer parties a quick means of scaling-back and only applying for these purposes the desired subset of the events defined as Close-Out Events.

In theory, § 6.2 could even be used to wholly disapply the concept of Automatic Termination in respect of a party who would have been subject to Automatic Termination conditions under the terms of one or more of the underlying Netted Agreements. **Please note** that one means of investigating and evaluating the feasibility and desirability of applying Automatic Termination in respect of a party is to review the relevant portions of the Netting Opinion for the jurisdiction of that party's incorporation or organisation procured from time to time by EFET on behalf of its Legal Committee members.

This provision allows parties to limit the scope of a Global automatic Close-Out to those triggering events specified for that purpose in respect to this § 6.2. The election serves the purpose for those parties who have opted-out on § 4.2 (***Global Nature of Close-Out***) but actually only want Non-Global Close-Out to apply in the case of voluntary Close-Outs, whilst preferring Global Close-out to apply for certain automatic (insolvency related) termination events. If those parties want their Netted Agreements to terminate automatically but individually (i.e. not global) according to their terms, they have to disapply § 4.2 and opt-in on the second election in the Election Sheet ***(Automatic Individual Termination of Netted Agreements)***.

[17] This being the case regardless of whether any one or more of the Netted Agreements contains no Automatic Termination provision, the same Automatic Termination provision, or wholly contrary or inconsistent Automatic Termination provisions.

[18] One effect of which would be to override any contrary Automatic Termination provision or provisions found in the original termsof those Netted Agreements.

- **§ 6.4 of the MNA and Election Sheet: (*Automatic Early Termination and Adjustment for Bankruptcy*).**

Section 6.4 of the MNA is an optional provision which parties must opt-into via the Election Sheet. It is designed to address a technical problem often encountered in the case of the Automatic Termination of trading agreements. This problem arises due to the fact that the triggering events for an Automatic Termination may at times go unnoticed by one or both parties to an agreement for some period of time, during which it is not uncommon for deliveries, receipts and normally occurring settlement payments to continue in the ordinary course of the companies' business relationship for some period of time following the (automatic) self-termination of the underlying contract and/or its applicable transaction(s).

The intended operation of this provision is to permit the parties to effectively unwind such post-termination performance and factor the economic values attributable to the same into adjustments to the Final Net Settlement Amount payment which would otherwise be due between the parties, as calculated at the time of the actual automatic termination of the agreement. The reason we say "intended" in the previous sentence is that the operation of this sort of clause requires that it be legally enforceable under the applicable law/jurisdiction, something that in some insolvency regimes may be either problematic or wholly impossible. Consequently, users opting to apply this clause are urged to take advice from local counsel regarding the likelihood of legal enforcement in the relevant jurisdiction.

§ 8. Netting-Off of Settlement Amounts; Accrual of Interest

- **§ 8.3(C) of the MNA and Election Sheet: (*Place of Payment and Base Currency*).**

Parties in this section of their Election Sheet must specify the applicable payment instructions for their receipt of a Final Net Settlement Amount under the MNA, as well as the Base Currency used for the purposes of conversions of amounts due under the MNA.

- **§ 8.4 of the MNA and Election Sheet: (*Accrual of Interest on the Final Net Settlement Amount*).**

Parties in this section of their Election Sheet must specify the applicable rate of interest they wish to accrue on Final Net Settlement Amounts due but unpaid under the MNA. **Please note** that notwithstanding what is agreed by the parties in their MNA, in various insolvency regimes such interest will either be excluded or at an applicable mandatory interest rate specified by statute.

§ 9. Credit Support / Performance Assurance

- **§ 9.1 of the MNA and Election Sheet: (*Benefit of Credit Support*).**

Section 9.1 of the MNA is an optional provision which must be affirmatively applied via the Election Sheet. It is designed to address the application of collateral held by a party in the calculation of Settlement Amounts applicable to any Closed-Out Agreements. Rather than apply such collateral in accordance with the provisions of any specific Netted Agreement (or its own Collateral Annex), this provision allows the Terminating Party to hold such sums separate from the process and apply them only as a final adjustment to the Final Net Settlement Amount.

- **§ 9.2 of the MNA and Election Sheet: (*Fungible Use of Credit Support*).**

Section 9.2 of the MNA is an optional provision which must be affirmatively applied via the Election Sheet. It is designed to negate any express or implied limitations on the use of collateral in an optimal manner with respect to the MNA. For obvious reasons, this provision will likely have greater application to collateral in the form of cash than in the case of Instrument Collateral.[19] Application of this provision's stated aim to forms of Instrument Collateral will likely require more than this simple provision alone can accomplish. This is due to the issuer or guarantor of the particular instrument being a third party and in most cases not a signatory to, or bound by, the terms of the MNA. To achieve the application of this provision's intent to LCs and Guarantees would likely require the inclusion of similar language in the terms of the Instrument Collateral itself, or some other form of ratification of the concept by its issuer.

§ 10. Additional Optional Provisions Relating to Close-Out

Section 10 of the MNA contains two standardized optional provisions, § 10.1(A) **(*Set-Off of Final Net Settlement Amount*)** and § 10.1(B) **(*Suspension*)**. Each of these provisions must be affirmatively applied via the Election Sheet in order to become provisions of the MNA.

- **§ 10.1(A) of the MNA: (*Set-Off of Final Net Settlement Amount*).**

This provision, if made operative via the Election Sheet, permits the set-off, against amounts otherwise owed between the parties to the MNA due to agreements or contracts not within the scope of the MNA, of the Final Net Settlement Amount owed as the result of a Close-Out of the MNA and its underlying Netted Agreements.

[19] i.e. collateral in forms other than freely transferrable cash, such as Letters of Credit, Guarantees, etc.

- **§ 10.1(B) of the MNA: (*Suspension*).**

This provision permits a party faced with a counterparty experiencing either a Close-Out Event or a potential Close-Out Event to cease otherwise applicable deliveries, receipts, scheduling, notification and nomination activities under all[20] of its Netted Agreements. Parties electing to make this provision operative must designate in their Election Sheet the minimum number of hours of notice required prior to both the cessation of such activities and also prior to any recommencement of any previously suspended performance. In addition to ceasing operational activities, a party entitled to invoke rights under §10.1(B) may also withhold payments owed by it to the other party. A party wrongfully purporting to make use of §10.1(B) remedies under circumstances later determined to not justify such actions, must indemnify the other party for any harm it sustains as a result thereof. A party may only implement suspension rights for so long as the triggering Close-Out Event is continuing, but not for any longer period of time. However, use of suspension rights under §10.1(B) will not prevent a party from eventually initiating a Close-Out of the MNA and all of its underlying Netted Agreements.

§ 11. Payment Netting

- **§ 11.1 of the MNA and Election Sheet: (*Payment Netting Election*).**

The MNA's §11.1 permits parties wishing to use their MNA to implement Payment Netting[21] across multiple underlying master trading agreements to make the initial election necessary for doing so. The MNA's Payment Netting provisions are designed as a series of opt-ins, each of which will further amend or revise the initial general election to simply apply Payment Netting. Obviously, and unlike the more core Close-Out Netting provisions that make up the central purpose of the MNA, there is no obligation to make use of the Payment Netting provisions of the MNA if not desired by the parties.

Applying §11.1 will, itself, only extend Payment Netting to amounts due and owing between the parties on the same date and in the same currency. If the parties wish to further refine and/or expand the applicability of their Payment Netting regime, they may do so by applying and customizing other provisions within the MNA's § 11 (*Payment Netting*).

- **§ 11.2 of the MNA and Election Sheet: (*Designation of Concerned Agreements*).**

Parties may specify the contract to which they wish Payment Netting to extend by designating them as "**Concerned Agreements**" in § 11.2 of their Election Sheet. A review of the Election Sheet will confirm that Concerned Agreements may be defined in respect of Netted Agreements, as wholly different agreements between the parties, or with one as a subset of the other. There is no requirement that the agreements to which Payment Netting applies (Concerned Agreements) be the same as the ones to which Close-Out Netting applies.

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[20] The party invoking suspension rights may not cease these activities in respect of anything less than all of its Netted Agreements.

[21] In this context, Payment Netting, which must not be confused with Close-Out Netting, is merely the contractual agreement to amend the payment terms otherwise set forth in the terms of individual Netted Agreements in order that regularly scheduled payments due and owing between the parties, and in the absence of a Close-Out, may be settled by means of offsetting gross payment obligations under the multiple Netted Agreements in to a single, net amount, owed by one party to the other.

- **§ 11.3 of the MNA and Election Sheet: (*Harmonised Due Date*).**

Section 11.3 of the MNA provides two additional options which parties may apply to shape their initial election in §11.1 to implement Payment Netting. The first such election is whether, notwithstanding differing payment Due Dates provided for in their Concerned Agreements, they wish to impose over them a uniform due date (thus expanding the scope of permissible payments to net). The option under §11.3 is which of the two Harmonised Due Dates (set forth as options (A) and (B)) the parties would like to apply.

- **§ 11.6 of the MNA and Election Sheet: (*Payment*).**

Section 11.6 of the MNA's Election Sheet provides a place where the parties may designate bank account details, if different from those specified in their Concerned Agreements, into which net payments owed under the MNA may be made.

- **§ 11.7 of the MNA and Election Sheet: (*Default Interest*).**

Section 11.6 of the MNA's Election Sheet provides a place where the parties may designate an interest rate they wish to accrue in respect of payments not made on the relevant Due Date in accordance with the requirements of § 11 (*Payment Netting*) of the MNA.

Part III of the Election Sheet (the ADDITIONAL NETTED AGREEMENT RIDER)

Parties having checked the **Additional Netted Agreement** box under the grid of standardized Netted Agreement options in § 2.1 of the Election Sheet, must then employ Part III of the Election Sheet to define both the nature of Additional Netted Agreements they wish to bring within the scope of their MNA, and the context in which they wish these Additional Netted Agreements to interact with the general provisions of the MNA. The key concept to remember in respect of Additional Netted Agreements under the MNA is that while these contracts will be terminated and liquidated, and their economic values factored into the Close-Out Netting process along with the other Netted Agreements, Additional Netted Agreements may not themselves trigger or initiate the commencement of a Close-Out under the MNA.

Please note the very important proviso immediately below the first paragraph of § 1 of the Rider. This language clarifies that Additional Netted Agreements may not form the basis for either a voluntary or automatic Close-Out of the MNA. Consequently, a party intending that a breach of one of their trading agreements should enable an MNA-level Close-Out should list that agreement as a Netted Agreement under § 2.1 of the Election Sheet rather than as an Additional Netted Agreement under § 1.1 of the Rider.

- **§ 1 of the Additional Netted Agreement Rider to the MNA's Election Sheet: (*Specific "Additional Netted Agreements & Transactions*).**

Section 1 of the Rider provides two means of defining Additional Netted Agreements. §1.1 of the Rider provides a grid in which specific existing Additional Netted Agreements may be listed. Parties wishing to identify their Additional Netted Agreements more generally, by subject matter or type of underlying product may do so by selecting from a list of standardized options provided for in §1.2 of the Rider. These are not necessarily alternative approaches and parties are free to define their Additional Netted Agreements using both §1.1 to identify specific, existing contracts and also §1.2's more general approach.

The first series of standardized, check-the-box options for generally defining Additional Netted Agreements lists all of the trading documents commonly used in the European energy markets which, unlike those agreements listed in the § 2.1 grid of Netted Agreement options, were felt by the MNA Working Group to not technically meet the standards of being called a master trading agreement.[22] These include the NBP '97 Terms, the Beach 2000 terms, early releases of the ZBT trading terms, the globalCoal SCoTA, and several categories of "one-off" or transaction specific Commodity forwards and financial derivatives. Those who elected to check the box for "**Commodity**" forwards and derivatives will then need to use the following set of standardized optional descriptions to define what they mean by Commodities. These options are divided into a few general categories: traditional energy products; agricultural/soft commodities, metals and paper products; transportation, transmission, freight and storage capacity products; emissions credits and products; green energy products and tradable certificates; and weather derivatives. And of course, as with all similar provisions in the MNA, the parties are free to add their own customized additions to the standard list provided.

- **§ 2 of the Additional Netted Agreement Rider to the MNA's Election Sheet: (*Additional Netted Agreement Settlement Amounts*).**

§ 2 of the Rider is an optional provision allowing the parties to add a clause providing for the calculation of, and duty to pay, a Settlement Amount to Additional Netted Agreements which do not already contain such a provision. This provision was added at the request of MNA Working Group members who felt that many of what they intended to classify as Additional Netted Agreements in their own MNAs would be short form transaction documents which in their own terms would contain no equivalent provision calling for the payment of a Settlement Amount upon a default based early termination.

- **§ 3 of the Additional Netted Agreement Rider to the MNA's Election Sheet: (*Additional Netted Agreements and Payment Netting*).**

§ 3 of the Rider provides an optional mechanism for parties wishing to apply Payment Netting to some or all of their Additional Netted Agreements to do so by defining them as Concerned Agreements for the purposes of § 11 (*Payment Netting*) of their MNA.

- **§ 4 of the Additional Netted Agreement Rider to the MNA's Election Sheet: (*Supplemental Liquidation Mechanics*).**

Section 4 of the Rider is an optional provision allowing the parties to add a mechanism providing for the calculation of a Settlement Amount to Additional Netted Agreements which do not already contain such a provision. The mechanism provided is modelled upon § 11 of the EFET Master Trading Agreements for Electric Power and Natural Gas.

[22] Key elements of this qualification include: a thorough implementation of the "single agreement concept," provisions dealing with early termination, transaction liquidation and close-out netting, a form of written document executed and delivered by both parties, etc.

IV. Comparisons of the EFET MNA with the BMA CPMA (as modified by the EFET/IECA Schedule):

Realizing that many potential users of the EFET MNA were familiar with, or had previously used the Bond Market Association's Cross Product Master Agreement, as supplemented by the EFET/IECA European Energy Commodity Schedule, and given that both agreements, as well as most master netting agreements in general, tend to address similar concepts, apply similar methodologies and sometimes use overlapping terminology, we thought it might be helpful to provide some comparisons between the two documents.

Key Terminology Differences:

CPMA	**EFET MNA**
1. "Principal Agreements"	1. "Netted Agreements"
2. "Uncovered Transactions"	2. "Additional Netted Agreements"
3. "Uncovered Transaction Default"	3. Not applicable
4. "Close-Out"	4. Both "Close-Out" and "Net-Off"
5. "Section 2 Notice"	5. "Termination Notice"

Key Conceptual Differences

CPMA	**EFET MNA**
1. Takes your underlying agreements "as it finds them"	1. Provides many options to fix and harmonize underling agreements
2. Only provides for Close-Out Netting	2. Provides for both Close-Out and (optional) Payment Netting
3. "Non-Global" Close-Out is the default	3. "Global" Close-Out is now the default
4. Uncovered Transactions feature prominently throughout body of document	4. The Additional Netted Agreement concept is now largely segregated in a Rider to the Election Sheet
5. Uncovered Transaction Defaults can trigger Close-Out (an option)	5. Additional Netted Agreements are included in Close-Out but **can't themselves trigger** a Close-Out
6. Rolling Close-Out process with accrual of interest	6. Simultaneous Close-Out of all Netted Agreements
7. Representations given only once (when CPMA is executed)	7. Representations deemed to be repeated based on underlying trading activity