



**Dated**

**ICE Clear Europe ltd.**

**- and -**

**(Clearing Member)**

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**GOLD SUPPLEMENT**

**To**

**CLEARING MEMBERSHIP AGREEMENT**

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This Gold Supplement ("**Agreement**") dated \_\_\_\_\_, is entered into as by and between [*Clearing Member*], whose registered office is at [*ADDRESS*] (the "**Company**"), organised and existing under the laws of [*JURISDICTION*], and ICE Clear Europe Limited (the "**Clearing House**"), incorporated under the laws of England and Wales, with its registered office at Milton Gate, 60 Chiswell Street, London EC1Y 4SA, United Kingdom.

## PURPOSE OF THE AGREEMENT

- A. The Clearing House and the Company are party to the Original Clearing Membership Agreement (as defined below), pursuant to which the Company agreed, on becoming a member of the Clearing House, inter alia, to be subject to the terms and conditions set out in the Original Clearing Membership Agreement.
- B. The Clearing House has agreed to accept the delivery of Gold as Permitted Cover, subject to and in accordance with the Rules and the Finance Procedures.
- C. The Clearing House and the Company are party to this Agreement for the purpose of supplementing the provisions of the Clearing Membership Agreement to provide for the delivery of Gold as Permitted Cover and to provide for certain limitations on the liability of the Clearing House in respect of such Gold.

## 1. INTERPRETATION

1.1 In this Agreement, the following expressions shall have the following meanings:

- (i) The term "**Allocated Account**" means an account of the Clearing House with the Custodian for recording the custody of Gold in whole bars.
- (ii) The terms "**Custodian**" and "**Bank**", respectively, mean, in relation to any set of Gold accounts of the Clearing House with a financial institution or its group companies, that financial institution or those of its affiliates which provide custody services for allocated Gold, reflected in the Allocated Account, and deposit account services for unallocated Gold, reflected in the Unallocated Account, respectively.
- (iii) The term "**Equivalent Agreement**" means, in relation to a Clearing Member other than the Company, an agreement between the Clearing House and such Clearing Member in or substantially in the form of this Agreement, *mutatis mutandis*.
- (iv) The term "**Finance Procedures**" means that part of the procedures (forming part of the Rules of the Clearing House) so titled.
- (v) The term "**Gold**" means gold bullion as a commodity that may be traded or held as an investment, being, for the purposes of this Agreement, gold bullion in the form of identified or "allocated" gold in whole bars and in the form of "unallocated" gold (not in whole bars).
- (vi) The term "**Gold Bank**" means the Custodian, in respect of allocated Gold, and the Bank, in the case of unallocated Gold.
- (vii) The term "**Gold Shortfall**" has the meaning given in Clause 2.4.
- (viii) The term "**Gold Shortfall Claim**" means any claim of the Clearing House against the Gold Bank in respect of all or part of a Gold Shortfall.

- (ix) The term "**Gold Shortfall CM**" means a Clearing Member to which all or part of a Gold Shortfall has been allocated by the Clearing House pursuant to this Agreement (in the case of the Company) and pursuant to an Equivalent Agreement (in the case of another Clearing Member).
  - (x) The term "**GSCM Group**" means all the Gold Shortfall CMs who are represented by the GSCM Representative.
  - (xi) The term, "**GSCM Majority**" means Persons being or representing no fewer than two Gold Shortfall CMs who have been allocated not less than 75% of the Gold Shortfall, or a person being or representing the sole Gold Shortfall CM. The Gold Shortfall CMs constituting the GSCM Majority may change from time to time.
  - (xii) The term "**GSCM Representative**" means the person or firm chosen by Gold Shortfall CMs (or some of them) to be their representative in consulting with and giving instructions to and receiving information from the Clearing House in relation to Gold Shortfall Claims.
  - (xiii) The term "**Independent Accountants**" means a firm of accountants of international repute which is independent of the Clearing House.
  - (xiv) The term "**Net Recovery**" has the meaning given in Clause 3.11.
  - (xv) The term "**Original Clearing Membership Agreement**" means the Clearing Membership Agreement dated **2 September 2008** between the Clearing House and the Company as the same has been amended or supplemented from time to time up to but not including the date hereof.
  - (xvi) The term "**Relevant Proportion**" has the meaning set out in Clause 2.4.
  - (xvii) The term "**Unallocated Account**" means an account of the Clearing House with the Bank for the deposit and withdrawal of Gold other than in whole bars.
- 1.2 All the provisions of Clause 1 of the Original Clearing Member Agreement apply to this Agreement unless the context clearly requires otherwise.
2. **SUPPLEMENT TO CLAUSE 4 OF THE ORIGINAL CLEARING MEMBERSHIP AGREEMENT**
- 2.1 To the extent that the Clearing Member is to satisfy the requirement for Collateral by the delivery of Gold, the following provisions of this Clause 2 will supplement the provisions of Clause 4 of the Original Clearing Membership Agreement.
- 2.2 Delivery of Gold will be in a manner complying with the Finance Procedures and will take effect as a transfer of all right, title and interest in the relevant Gold to or to the order of the Clearing House.
- 2.3 Where, subject to Clause 2.4, the Clearing House has any obligation to re-transfer or re-deliver to the Company any Gold, the obligation of the Clearing House will be to transfer or deliver equivalent Gold from the Clearing House's Unallocated Gold Account (being Gold of the same minimum fineness, description and amount as the Gold originally delivered or transferred by the Clearing Member to the Clearing House) and, accordingly, the Clearing House shall have the right to deal with any Gold transferred or delivered to it as referred to in this Clause 2 in any manner.

- 2.4 The Clearing House will not be liable to account to the Company for the Relevant Proportion of any Gold or for the Relevant Proportion of the value of any Gold delivered or transferred by the Company to the Clearing House and credited to an account of the Clearing Member with the Clearing House (and not previously re-delivered or re-transferred to the Clearing Member) if, in relation to the Clearing House's Allocated Account or Unallocated Account, the relevant Gold Bank under the Allocated Account or the Unallocated Account fails to transfer or deliver or to procure to be transferred or delivered to or to the order of the Clearing House all the Gold which was, respectively, deposited in the Allocated Account or standing to the credit of the Unallocated Account. For these purposes, the "**Relevant Proportion**" shall be equal to (a) the amount of Gold not so transferred or delivered to or to the order of the Clearing House by such Gold Bank (the "**Gold Shortfall**") divided by (b) the sum of all the Gold in respect of which the Clearing House would, in the absence of this Clause (and equivalent provisions in any Equivalent Agreements with other Clearing Members), be obliged to account to the Company and all such Clearing Members, expressed as a percentage. Accordingly, the Company shall bear a proportionate loss in relation to such Gold Shortfall.
- 2.5 Each of the Clearing House and the Company represents to the other (which representation shall be deemed to be repeated as of each date on which it transfers, re-transfers, delivers or re-delivers any Gold to the other as referred to in this Clause 2) that it is the sole owner of or otherwise has the right to transfer all such Gold to the other party, free and clear of any Encumbrances of the transferor or of any third Person (other than, in the case of the Clearing House, any deduction or withholding for or an account of tax required by Applicable Laws). All right, title and interest in and to any Gold transferred, re-transferred, delivered or re-delivered as referred to in this Clause 2 shall vest in the recipient free and clear of any rights or Encumbrances of the transferor or of any third Person accordingly.
- 2.6 This Clause 2 is intended to create an ownership right in relation to any Gold transferred by the Company to the Clearing House pursuant to this Clause 2. Nothing in this Clause 2 is intended to create or does create in favour of the Clearing House or any other person any Encumbrance in relation to any Gold transferred by the Company to the Clearing House pursuant to this Clause 2.

### 3. **GOLD SHORTFALLS**

- 3.1 Where any Gold Shortfall arises which is allocated in whole or in part to the Company, the Clearing House and the Company will be bound by the following provisions:
- 3.2 The Clearing House will hold any Gold Shortfall Claim it may have against the Gold Bank for itself alone and not as agent or trustee or in any other capacity on behalf of the Company, one or more Gold Shortfall CMs or Clearing Members generally, whether in whole or in part.
- 3.3 The Clearing House will, as soon as reasonably practicable after the identification of a Gold Shortfall, notify each Gold Shortfall CM of the identity of all Gold Shortfall CMs.
- 3.4 The Clearing House will, if requested by Gold Shortfall CMs to which have been allocated not less than a simple majority of the Gold Shortfall, appoint Independent Accountants (at the cost of the requesting Gold Shortfall CMs) for the limited purpose of assisting the Gold Shortfall CMs as follows:
- (i) the Clearing House will notify the Independent Accountants, on a confidential basis, of the proportion of the Gold Shortfall allocated to each Gold Shortfall CM; and
  - (ii) where the Gold Shortfall CMs wish to ascertain whether, on holding a vote in respect of any matter, the vote in favour of or against the relevant motion has achieved a

relevant percentage (or not, as the case may be), the Independent Accountants, on being given by the Gold Shortfall CMs all the requisite information of the votes cast and the percentage required, will determine whether such vote is passed or not and shall notify the Gold Shortfall CMs in these circumstances accordingly.

For the avoidance of doubt, there is no obligation on the Company (or any Gold Shortfall CMs) to make any use of the Independent Accountants (if required to be appointed) for this purpose.

- 3.5 Subject to the following sentence, the Clearing House will, in relation to any Gold Shortfall Claim, consult only with the GSCM Representative and will take instructions only from the GSCM Representative where those instructions come from a GSCM Majority. The Clearing House will not be obliged to reveal any information about any Gold Shortfall Claim to the GSCM Representative unless and until the GSCM Representative enters into a confidentiality undertaking in favour of the Clearing House under which it confirms (i) that it will keep all such information confidential (subject to usual exceptions) and (ii) that it will only pass on such information to any Gold Shortfall CMs who have entered into equivalent confidentiality undertakings with it which protect the Clearing House rights of confidentiality in respect of such information.
- 3.6 The Clearing House may make a Gold Shortfall Claim against the Gold Bank and, subject to being indemnified and secured to its satisfaction in respect of all costs and expenses arising out of or in connection with a Gold Shortfall Claim against the Gold Bank, including in respect of any losses which may arise out of any counterclaim by the Gold Bank or any order for costs by any party, and subject also to Clause 3.7, shall make a Gold Shortfall Claim against the Gold Bank on the instructions of a GSCM Majority.
- 3.7 The Clearing House will not be obliged to pursue any Gold Shortfall Claim against the Gold Bank:
- (i) if it has been advised by leading counsel that there are no realistic prospects of success;
  - (ii) if it considers that making such a claim might be materially damaging to its reputation; or
  - (iii) if, in all the circumstances, it considers that it would be in the best interests of the Clearing House and the continuation of its business of providing clearing services to Clearing Members not to make or pursue such a Gold Shortfall Claim.

The Clearing House will consult the GSCM Group, through the GSCM Representative, in relation to the instructions to counsel and the advice received from counsel, where (i) applies.

- 3.8 The Company, if it is a Gold Shortfall CM, will be bound by any instructions to the Clearing House given by a GSCM Majority through the GSCM Representative.
- 3.9 Subject to the receipt of the confidentiality undertaking referred to in Clause 3.5, where the Clearing House makes a Gold Shortfall Claim against the Gold Bank on the instructions of a GSCM Majority, the Clearing House will keep the GSCM Representative informed generally of the progress of the claim on a regular basis.
- 3.10 Where the Clearing House has made a Gold Shortfall Claim against the Gold Bank in respect of a Gold Shortfall other than on the instructions of a GSCM Majority, the Clearing House will be entitled, without the consent of any Gold Shortfall CMs, to settle the Gold Shortfall Claim on any terms that seem to the Clearing House to be appropriate.

- 3.11 If the Clearing House obtains any recoveries from a Gold Shortfall Claim (including any recoveries by way of set-off against an amount otherwise owed by the Clearing House to the Gold Bank), it shall be entitled to deduct its own costs and expenses (to the extent not otherwise reimbursed by Gold Shortfall CMs) and to deduct amounts equal to any amounts owed to it (for its own account) in respect of Gold Shortfalls and any amounts owed to it on any other account by the Gold Bank. The recoveries from a Gold Shortfall Claim, after all such deductions, are the "**Net Recovery**".
- 3.12 The Clearing House will account to all the Gold Shortfall CMs, whether or not any Gold Shortfall CM was part of the GSCM Group, for any Net Recovery by making payment to them in the following order, to the extent that the Net Recovery is sufficient to do so, and the Clearing House will hold the Net Recovery on Trust for the Gold Shortfall CMs for this purpose:
- (i) first in reimbursing Gold Shortfall CMs for any indemnity payments previously made to the Clearing House in connection with the Gold Shortfall Claim (pro rata to such payments); and
  - (ii) thereafter in distributing the remainder of the Net Recovery (if any) to the Gold Shortfall CMs (pro rata to the amount of the Gold Shortfall allocated to each).
- 3.13 The Clearing House will not be liable to any Gold Shortfall CM or to the Company for any action or inaction taken in accordance with the instructions of a GSCM Majority. The Clearing House will not be liable for any inaction where any monies are outstanding to it under the indemnity referred to in Clause 3.6.

#### 4. **REPRESENTATIONS AND WARRANTIES**

- 4.1 The Company represents and warrants that:
- (i) neither the execution nor performance of this Agreement by or on behalf of the Company or the Clearing House will breach or conflict with any provision of the memorandum of incorporation, articles of association, by-laws, partnership agreement, limited liability company agreement or any other organisational document of the Company, or with any agreement or Applicable Law which is binding upon or affects the Company;
  - (ii) the Company and signatories to this Agreement each have full power and all necessary authority to execute this Agreement and perform any act that may be required pursuant to this Agreement and the Rules;
  - (iii) the Company is duly organised and validly existing under Applicable Laws of the jurisdiction of its incorporation and is in good standing under such Applicable Laws; and
  - (iv) after having had the opportunity to ask questions and receive answers from the Clearing House regarding the Rules and the operation of the Clearing House, it has received all the information it considers necessary and appropriate for deciding whether to enter into this Agreement and has consulted its own independent advisers, or otherwise satisfied itself concerning, without limitation, the tax, legal and other considerations relevant to this Agreement.

5. **ARBITRATION**

- 5.1 The provisions of Clause 8 of the Original Clearing Membership Agreement shall apply, mutatis mutandis, as though set out in full herein.
- 5.2 The parties agree that any arbitration under this Clause 4 may be consolidated into a single arbitration with any other arbitration between the parties under the Clearing Membership Agreement.

6. **MISCELLANEOUS**

- 6.1 The provisions of Clauses 9.1 to 9.5 inclusive, 9.7 to 9.9 inclusive, 9.11 and 9.13 of the Original Clearing Membership Agreement shall apply, mutatis mutandis, as though set out in full herein.
- 6.2 Nothing in this Agreement is intended to, or shall be deemed to, establish any partnership or joint venture between any of the parties. Nothing in this Agreement is intended to, or shall be deemed to, constitute any party the agent or principal of another party, nor authorise any party to make or enter into any commitments for or on behalf of any other party.
- 6.3 Each party agrees that the other party has complied with all terms of the Original Clearing Membership Agreement in respect of the amendments or supplements thereto set out herein.
- 6.4 This Agreement shall be governed by and construed in accordance with English law.

ICE CLEAR EUROPE LIMITED

By: \_\_\_\_\_

Authorised Signatory

Name: \_\_\_\_\_

(Clearing Member)

By: \_\_\_\_\_

Authorised Signatory

Name: \_\_\_\_\_

By: \_\_\_\_\_

Authorised Signatory

Name: \_\_\_\_\_