

## **ISDA Dodd-Frank Documentation Initiative and August 2012 Dodd-Frank Protocol FAQ**

ISDA has prepared this brief summary to assist in your consideration of the ISDA August 2012 Dodd-Frank (DF) Protocol. Capitalized terms not otherwise defined herein have the meanings ascribed to them in the ISDA August 2012 DF Protocol documents.

**THIS SUMMARY DOES NOT PURPORT TO BE AND SHOULD NOT BE CONSIDERED A GUIDE TO OR AN EXPLANATION OF ALL RELEVANT ISSUES IN CONNECTION WITH YOUR CONSIDERATION OF THE ISDA AUGUST 2012 DF PROTOCOL OR THE RELATED DOCUMENTS. PARTIES SHOULD CONSULT WITH THEIR LEGAL ADVISERS AND ANY OTHER ADVISERS THEY DEEM APPROPRIATE AS PART OF THEIR CONSIDERATION OF THE PROTOCOL PRIOR TO ADHERING TO THE PROTOCOL. ISDA ASSUMES NO RESPONSIBILITY FOR ANY USE TO WHICH ANY OF ITS DOCUMENTATION OR OTHER DOCUMENTATION MAY BE PUT.**

### **1.Q What is the ISDA DF Documentation Initiative?**

The ISDA DF Documentation Initiative is a core element in ISDA's broader mission to assist the industry in implementing and complying with regulatory requirements. The ISDA DF Documentation Initiative provides an industry solution to the need for amending existing swap relationship documentation for the purpose of facilitating compliance with regulatory requirements in a manner that minimizes the need for bilateral negotiations and disruptions to trading.

To this end, the ISDA DF Documentation Initiative will, among other things, provide a standard set of amendments to facilitate updating of existing swap relationship documentation for Dodd-Frank compliance purposes as well as other standard industry documentation, such as general and product specific risk disclosures, to assist regulated swap entities in satisfying their on-going regulatory requirements and to allow other entities to continue trading with regulated swap entities.

ISDA envisions the possibility for multiple protocols to the extent necessary for future final rules requiring documentation amendments on compliance dates beyond those covered by the initial August Protocol. ISDA will work with our members to develop a coordinated and efficient process to amend documentation in a timely manner. ISDA also expects to conduct similar reviews for documentation changes mandated by legislative developments in other countries and regions as these develop.

## **2.Q What is a “protocol” and how does the ISDA August 2012 DF Protocol differ from previous ISDA protocols?**

An ISDA protocol is a multilateral contractual amendment mechanism that allows for various standardized amendments to be deemed to be made to the relevant Protocol Covered Agreements between any two adhering parties. It builds on the principle that parties may agree with one or more other parties that certain terms and provisions will apply to their respective relationships (unless and until they specifically agree otherwise).

Market participants indicate their participation in the protocol arrangement by following the adherence instructions posted on the ISDA website ([www.isda.org](http://www.isda.org)), which includes submission of a letter (an “Adherence Letter”) and payment of an adherence fee of US \$500.00. Each party submitting a letter and paying the adherence fee is a “Protocol Participant.” Additionally, Protocol Participants will be required to specify how they will receive Questionnaires from other Protocol Participants in the Adherence Letter.

Unlike previous ISDA protocols, where amendments or supplements were effected solely through delivery of an adherence letter by each party to the underlying document to be amended (*i.e.*, a master agreement), this protocol includes additional bilateral delivery requirements in order to effectuate the addition of supplemental terms (see 5.Q below for more information related to the delivery requirements). Each party that submits an Adherence Letter must also deliver a completed Questionnaire to another Protocol Participant for the addition of supplemental terms to be effective with respect to that Protocol Participant. As a result of these additional bilateral delivery requirements, ISDA together with Markit have developed a technology-based solution (“ISDA Amend”) to automate the information-gathering process and provide sharing of submitted data and documents to permissioned counterparties (see 6.Q below for more information). ISDA Amend is available at <http://www.markit.com/en/products/distribution/document-exchange/registration.page>.

The ISDA August 2012 DF Protocol is designed to provide an efficient means for swap dealers and counterparties to supplement Protocol Covered Agreements through the exchange of Questionnaires. So that a counterparty will know when it is completing its Questionnaire whether a particular dealer is participating in the Protocol (and by what means it may deliver the Questionnaire to the dealer), it is recommended that swap dealers submit their Adherence Letters early in the adherence period.

## **3.Q What is the ISDA August 2012 DF Protocol?**

The ISDA August 2012 DF Protocol is intended to address the requirements of the following final rules (“Covered Rules”):

- CFTC, Final Rule, *Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties*, 77 Fed. Reg. 9734 (Feb. 17, 2012);
- CFTC, Final Rule, *Large Trader Reporting for Physical Commodity Swaps*, 76 Fed. Reg. 43851 (July 22, 2011);

- CFTC, Final Rule, *Position Limits for Futures and Swaps*, 76 Fed. Reg. 71626 (Nov. 18, 2011);
- CFTC, Final Rule, *Real-Time Public Reporting of Swap Transaction Data*, 77 Fed. Reg. 1182 (Jan. 9, 2012);
- CFTC, Final Rule, *Swap Data Recordkeeping and Reporting Requirements*, 77 Fed. Reg. 2136 (Jan. 13, 2012);
- CFTC, Final Rule, *Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants*, 77 Fed. Reg. 20128 (Apr. 3, 2012); and
- CFTC, Final Rule, *Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps*, 77 Fed. Reg. 35200 (June 12, 2012).

#### **4.Q What agreements does the ISDA August 2012 DF Protocol cover?**

The Protocol is designed to supplement existing written agreements governing the terms and conditions of one or more transactions in swaps. The Protocol adds notices, representations and covenants responsive to Dodd-Frank Title VII requirements that must be satisfied at or prior to the time that swap transactions are offered and executed. The Protocol is not limited to ISDA Master Agreements, and may be used to amend all agreements between a pair of parties pursuant to which they enter into swaps. See below regarding the process required for any pair of parties to amend their existing master agreement through use of the Protocol.

Agreements that may be supplemented through the Protocol are called “Protocol Covered Agreements” in the Protocol Agreement (described further in 5.Q below). Other documents within the suite of documents provided as part of the Protocol use more generic terms (“Covered Agreement” or “Agreement”), to facilitate their use in other contexts. However, the Protocol process may only be used to supplement agreements that are Protocol Covered Agreements.

#### **5.Q How is the ISDA August 2012 DF Protocol structured? What is the purpose of the different Protocol documents?**

In order to comply with rules adopted by the CFTC under Title VII of Dodd-Frank, swap dealers must obtain certain “know your counterparty” information from counterparties and also verify that counterparties qualify as “eligible contract participants” (which requires the counterparty to identify the particular prong of the eligible contract participant definition that applies when the swap dealer is relying on a representation from the counterparty). In addition, the particular notices and supplemental terms that are required for a swap dealer to establish compliance depend on the legal status of the counterparty (*e.g.*, eligible contract participant, swap dealer, major swap participant, special entity, etc.) and the “know your counterparty” rules require swap dealers to be aware of these legal statuses. Therefore, a protocol intended to establish documentation compliance needs to include delivery of the relevant information by both swap dealers and their counterparties in order to satisfy these requirements and establish that the parties are entering into the proper supplemental terms.

Concerns arose, however, that some of the data required for delivery may be considered sensitive. Therefore, market participants may be deterred from adhering to a protocol that required dissemination of this information to parties other than their counterparties. Additionally, some provisions would be required to be elective, and in some cases, parties (particularly special entities) may need to differentiate elections for different counterparties.

Accordingly, ISDA developed an approach to architecture and process designed to accommodate two fundamental objectives: Selective access to information (*i.e.*, who is given permission to see certain information) and variation in the document provisions to which a party is bound (either because of the type of counterparty or because the provisions are optional). The process as developed is necessarily more complex than multilateral amendments that have been accomplished via past ISDA protocols. However, we believe it will reduce the need to amend documents outside of the protocol process and also provides sufficient flexibility to accommodate additional information delivery and variation in the document provisions to which a party is bound that may arise as additional rules are finalized.

The basic architecture consists of four documents, each as described below: (I) an Adherence Letter, (II) the Questionnaire, (III) the Protocol Agreement, and (IV) the DF Supplement. In addition, a fifth document, the DF Terms Agreement extends the basic architecture of the Protocol to situations in which parties may wish to transact in swaps without the benefit of having a pre-executed master agreement between them. The DF Terms Agreement is discussed in detail in Questions 16-20 below.

## **I. Adherence Letter**

a. Must be signed and submitted by each party agreeing to the terms of the Protocol Agreement in order to participate in the Protocol.

i. Adhering parties must include name, address, and other non-sensitive information.

ii. Each adhering party must specify the address (electronic or otherwise) and means by which the adhering party will receive Questionnaires as a Protocol Participant from other Protocol Participants.

b. Will be uploaded and available for public view, like prior ISDA protocol adherence letters.

## **II. Protocol Agreement**

a. Establishes an agreed process for amending agreements that govern the terms and conditions of one or more transactions in swaps and/or entering into a “DF Terms Agreement” (described in detail below). Each such agreement is defined as a “Protocol Covered Agreement.”

b. Defines a “PCA Principal” as a party who is or may become a principal to one or more swaps under a Protocol Covered Agreement, and a “PCA Agent” as a party who has executed a Protocol Covered Agreement as an agent on behalf of a one or more PCA Agents.

- c. Specifies that a person may participate in the ISDA August 2012 DF Protocol as a PCA Principal or PCA Agent (or both), but that only a party that executed an existing Protocol Covered Agreement (as PCA Principal or PCA Agent on behalf of a PCA Principal) may use the Protocol to supplement that Protocol Covered Agreement.
- d. Each PCA Principal and PCA Agent directly participating in the Protocol through execution of an Adherence Letter is provided the ability to supplement Protocol Covered Agreements by completing one or more Questionnaires and delivering them in the manner described below.
- e. Provides that Protocol Participants that exchange Questionnaires in the manner proscribed supplement the Protocol Covered Agreements for swaps between PCA Principals named in such Questionnaires by incorporating Schedules 1 and 2 from the DF Supplement. Additional schedules of the DF Supplement are incorporated only if both of the relevant PCA Principals have elected in their Questionnaires to do so.
- f. The Protocol Agreement also includes provisions designed to work with the DF Supplement by establishing that information delivered by a Questionnaire is considered “DF Supplement Information” for purposes of the DF Supplement.

### **III. Questionnaire**

- a. The basic document used by Protocol Participants to supplement Protocol Covered Agreements. Protocol Participants may complete and exchange Questionnaires to supplement their mutual Protocol Covered Agreements.
- b. Provides for the delivery of required information about a Protocol Participant (or in the case of a Questionnaire delivered by PCA Agent, its PCA Principals) to relevant counterparties.
- i. The Questionnaire includes representations as to the legal status of the relevant PCA Principal(s) (*e.g.*, eligible contract participant, swap dealer, major swap participant, special entity, etc.).
- ii. A PCA Agent (*e.g.*, an investment advisor or ERISA fiduciary) who has an existing “umbrella” agreement with a swap dealer for multiple underlying clients may complete and deliver a Questionnaire on behalf of all or some of such clients.
- c. The Questionnaire allows a PCA Principal to make various elections under the DF Supplement, including the particular DF Schedules that will supplement its Protocol Covered Agreements.
- d. A Protocol Participant is permitted to complete more than one Questionnaire so that it may deliver different Questionnaires to different counterparties under the Protocol.

e. A Protocol Participant completing the Questionnaire online through ISDA Amend will have the ability to deliver the Questionnaire through ISDA Amend exclusively to other Protocol Participants that it has specifically approved.

#### **IV. DF Supplement**

a. The DF Supplement sets forth certain standardized representations, acknowledgments, notifications and agreements relating to the Covered Rules.

i. Representations and covenants are set forth in various “DF Schedules.”

ii. DF Schedules 1 and 2 are automatically incorporated into Protocol Covered Agreements through the exchange of Questionnaires. However, certain sections of Schedule 2 are only applicable to certain types of counterparty pairs based on representations they have made to each other in their Questionnaires.

iii. DF Schedules 3-6 are optional and applicable only if both PCA Principals with respect to a pair of exchanged Questionnaires have elected to apply them.

As noted above, the DF Terms Agreement is discussed in detail below.

#### **6.Q What is ISDA Amend?**

Markit is working with ISDA to develop an online Questionnaire for all counterparties in the over-the-counter (OTC) swaps market. The purpose of the service is to centralize counterparty categorization under Dodd-Frank and permit Protocol Covered Agreements to be supplemented electronically in accordance with the Covered Rules by the October deadline. ISDA Amend is available at: <http://www.markit.com/en/products/distribution/document-exchange/registration.page>.

ISDA Amend will be rolled out in two phases. Phase 1, which will allow parties to complete Part II, Sections 1 through 5 of the Questionnaire, will be available on August 13, 2012. Phase 2, which will allow parties to complete the remainder of the Questionnaire, is scheduled to be available on September 10, 2012. Therefore, parties can begin inputting their information into ISDA Amend on August 13, 2012 and can complete and begin delivering their Questionnaires via ISDA Amend on September 10, 2012.

#### **7.Q Will adherence to the ISDA August 2012 DF Protocol satisfy all regulatory requirements/obligations in connection with the Covered Rules?**

The CFTC regulations addressed by this Protocol have far-ranging implications for the derivatives market, including the terms under which counterparties are required or wish to transact in OTC derivatives. While certain of the regulations (and the statutory requirements that they implement) impose specific documentation requirements, others impose compliance requirements for swap dealers that can be met through various combinations of documentation

and internal policies, and still others are not susceptible to being addressed through a protocol. The Protocol is designed to provide basic standardized provisions to enable market participants to amend their existing documentation with swap dealers. While provision of such standardized terms is designed to provide an efficient manner for a large number of counterparties to amend their bilateral contracts to address basic requirements of the relevant CFTC regulations, it cannot address all situations, products or types of counterparties. Counterparties should obtain legal advice as to whether the provisions of the Protocol address their particular situation.

**8.Q What is the purpose of, and rationale for, Question 11 in Part II of the Questionnaire?**

The external business conduct rules require swap dealers to provide certain pre-trade “mid-market” marks and disclosures about the basic material terms of a swap before entering into that swap with certain counterparties. Generally, such disclosures are expected to be in writing. However, in certain fast-moving markets, a requirement to provide all such disclosures in writing could interfere with the ability to execute trades on a timely basis. For this reason, the Questionnaire provides the counterparty to a swap dealer with the opportunity to indicate that it will accept oral disclosure of pre-trade marks and of basic swap terms, provided that written confirmations of all such information are subsequently provided.

**9.Q What is the purpose of, and rationale for, Question 1 in Part III of the Questionnaire?**

CFTC definitional regulations that go into effect on December 31, 2012 will alter terms on which “commodity pools,” as defined under the Commodities Exchange Act, may qualify as “eligible contract participants” for purposes of transacting in swaps in the over the counter markets and also for purposes of transacting in retail foreign exchange products. Because the external business conduct rules require (i) a swap dealer to verify that its counterparties are eligible contract participants, and (ii) counterparties to represent how they qualify as eligible contract participants in order for a swap dealer to satisfy this obligation, counterparties to swap dealers that are commodity pools may need to update the eligible contract participant information they provide by December 31. The purpose of this question (which is voluntary), is to assist swap dealers and their counterparties to identify persons that may need to update their representations.

**10.Q What is the purpose of, and rationale for, DF Supplement Section 2.2?**

Under the Protocol, parties provide information and make representations to satisfy new regulatory requirements applicable to swap dealers. The focus of the Protocol is on giving parties an efficient and standardized manner to satisfy new compliance requirements, not on creating additional (and potentially unanticipated) contractual remedies under existing bilateral contracts. Further, in some cases, the information provided under the Protocol is similar in kind to information currently provided by customers as part of a dealer’s “on-boarding” process, which typically does not give rise to termination rights under a master agreement. Section 2.2 therefore provides that parties do not have expanded termination rights due to information or representations provided exclusively through the Protocol. However, a party providing representations and information under the Protocol should note that the other party will rely upon

them and may have other remedies available to it under law or contract (including their master agreement to the extent covered by provisions outside of the Protocol).

**11.Q Is DF Supplement Section 2.5 consent language sufficient to establish a valid consent to the disclosure of confidential information in all jurisdictions?**

Under the Covered Rules, swap dealers will be required to report certain information about swaps directly to regulators or into swap data repositories (for regulatory access and/or dissemination to the public). Information required to be reported to regulators or swap data repositories includes, but is not limited to, the identity of each party to a swap, although a party's identity information is not subject to public dissemination. Swap data repositories may engage the services of a global trade repository (that is regulated by one or more governmental authorities and subject to confidentiality provisions that are comparable although not necessarily identical to those of swap data repositories) for the purposes of data reporting. While reporting parties, such as swap dealers, will have reporting obligations under the Covered Rules, on the one hand, they may also be subject to contractual, statutory, regulatory or other legal limitations (under non-disclosure, confidentiality, bank secrecy or other laws), on the other hand, which could prohibit the disclosure of the relevant information. To facilitate compliance with reporting obligations under the Covered Rules while addressing these disclosure limitations, DF Supplement Section 2.6 contains a party's consent to the disclosure of information as described. The consent language in Section 2.6 may not be sufficient to fully address restrictions as they may apply for the disclosure of information under applicable law (in certain jurisdictions) or otherwise. Satisfaction of additional disclosure requirements, if any, will have to be met on a bilateral basis, through additional industry protocols or otherwise.

**12.Q How do DF Supplement Sections 2.14 and 2.15 address use and disclosure of "material confidential information"?**

The external business conduct rules establish a new regulatory standard governing the use and disclosure of "material confidential information" provided by a counterparty to a swap dealer, subject to a qualification explicitly permitting parties to establish an alternative standard by agreement. Prior to the establishment of this regulatory standard, swap counterparties often addressed similar issues through non-disclosure agreements. Accordingly, where the parties have agreed upon the restrictions and permitted uses of such information by a prior agreement, the Protocol defers to such an agreement. As past agreements were not drafted to satisfy the external business conduct rules' requirements for establishing permissible uses of material confidential information, Section 2.14 "brings down" those agreements into the new regulatory environment by providing that information that is within the scope of the original agreement remains subject to the terms of that agreement as read in the legal context in which it was negotiated.

To the extent that any material confidential information is not within the scope of a pre-existing agreement between the parties (or if no such agreement exists), Section 2.15 establishes an agreement of the parties regarding the restrictions and permitted uses of such information within the context of the new regulatory standard. Whether or not parties have an existing agreement



(and are therefore covered by either Section 2.14 or 2.15), they may agree on a bilateral basis to any other terms governing material confidential information that they choose.

### **13.Q What do DF Supplement DF Schedules 3–6 cover?**

The external business conduct rules impose upon swap dealers a duty to reasonably determine the suitability of any swap “recommended” to a counterparty. The rules also impose heightened suitability or “best interest” duties when a swap dealer recommends a tailored swap to a “special entity.” However, the rules provide safe harbors from these requirements where the counterparty is adequately advised and will exercise independent judgment in assessing swap recommendations. These safe harbors can be satisfied in whole or part through representations of the counterparty and relevant advisers. Each swap dealer and counterparty must determine for itself whether it wishes to use a safe harbor and how it may satisfy applicable criteria.

The Protocol provides a standardized approach to the safe harbors designed to allow counterparties that are able to make a full set of representations required to establish the applicability of a safe harbor to do so. Application of the safe harbors is entirely elective and both counterparties to a Protocol Covered Agreement must agree to a safe harbor in their Questionnaire in order for the relevant DF Schedule to be integrated into their agreements. Partial solutions to safe harbors are not provided in the Protocol because such partial solutions would not eliminate the need for bilateral agreement outside of the Protocol as to whether and how to apply a safe harbor.

The general safe harbor for institutional suitability (DF Schedule 3) is available to swap dealers and all counterparties that are not themselves swap dealers or major swap participants, other than special entities. The DF Schedule 4 safe harbor is for use by swap dealers and counterparties that are “special entities” other than certain employee benefit plans. This DF Schedule is designed to establish both that the special entity has a “qualified independent representative” (necessary for trading with such a special entity in general) and that the relevant swap dealer will not be treated as the special entity’s advisor for purposes of the external business conduct rules as long as communications are limited to those permitted within the safe harbor (*i.e.*, the swap dealer does not provide an “opinion” with respect to a tailored swap or a trading strategy involving such a swap). Use of this DF Schedule by a special entity requires a qualified independent representative for the special entity to make specified representations and covenants.

In the case of special entities that are employee benefit plans subject to Title I of ERISA, two alternative safe harbors (DF Schedules 5 and 6) are available. ERISA special entities may elect one or both safe harbors (provided the corresponding swap dealer has also agreed to apply either or both safe harbors). The first safe harbor (DF Schedule 5) provides representations designed to satisfy the terms of the special safe harbor provided exclusively for ERISA special entities. The second safe harbor (DF Schedule 6) is a version of the general safe harbor for special entities with certain terms modified for ERISA plans. Both require a fiduciary of the ERISA plan to agree to certain representations and covenants. ERISA special entities should note that the second safe harbor is more limited than the first safe harbor in that it does not cover situations in which a swap dealer has communicated an “opinion” to the special entity regarding the

advisability of entering into a swap transaction. As a consequence, communications with a swap dealer are likely to be more restricted for ERISA special entities that elect the second safe harbor. Protocol participants wishing to use one or more of the available safe harbor DF Schedules should note that the representations in the DF Schedules (other than DF Schedule 5) require the counterparty to a swap dealer to represent that it is complying with certain written policies and procedures. *As the requirement for these policies and procedures is new, many potential participants may need to create new written policies and procedures before entering into the DF Protocol in order to be able to use the safe harbors.*

**14.Q DF Schedules 3-6 include representations from certain agents of swap dealer counterparties (e.g., a “Designated Evaluation Agent,” “Designated QIR” or “Designated Fiduciary”) in order to satisfy the terms of the corresponding safe harbors. If a protocol participant has more than one of such persons, can it indicate that?**

Yes. The Questionnaire permits a respondent to name one or more persons as its Designated Evaluation Agent, Designated QIR or Designated Fiduciary. Each person designated in a Questionnaire is required to countersign the Questionnaire in order to make representations applicable to it in the relevant DF Schedule. For example, each Designated Evaluation Agent, Designated QIR or Designated Fiduciary is required to represent that it will exercise independent judgment in evaluating all swap “recommendations” of the relevant swap dealer that are presented to it with respect to swaps under the relevant Protocol Covered Agreement.

In addition, in appropriate circumstances counterparties to swap dealers that are not special entities may elect to enter into DF Schedule 3 without designating any agent as its Designated Evaluation Agent for purposes of that Schedule. Unlike the terms, “Designated QIR” and “Designated Fiduciary,” Designated Evaluation Agent is limited to third-party agents with trading authority and is defined to exclude employees of a PCA Principal.

Protocol Participants should also note that the external business conduct rules require counterparties to swap dealers to provide information about agents and control persons for various regulatory purposes. The Questionnaire and DF Supplement are designed to directly address each of these regulatory requirements. This may lead to some apparent redundancy in answering questions. For example a respondent’s “Third Party Control Person” may be an investment manager that will also be designated its “Designated Evaluation Agent.” In such cases, the Questionnaire permits the respondent to indicate that fact. In the case of multiple “Third Party Control Persons,” respondents should identify each such Third Party Control Person in the Questionnaire (and use additional schedules to do so if additional space is necessary).

**15.Q What is DF Supplement Information?**

Due to the nature of the architecture of the Protocol, the DF Supplement does not include language directly referring to the Questionnaire. Instead, “DF Supplement Information” is defined generically in the DF Supplement as “(i) any information or representation agreed in writing by the parties to be DF Supplement Information; and (ii) any information provided pursuant to Section 2.4 of this DF Supplement, in each case, as amended or supplemented from

time to time in accordance with Section 2.3 of this DF Supplement or in another manner agreed by the parties.”

To integrate this generic definition with the information and representations provided in the Questionnaire, the Protocol Agreement provides that parties that exchange Questionnaires agree that any information or representation provided on behalf of one PCA Principal to another in a Questionnaire is “DF Supplement Information.”

#### **16.Q What is the ISDA August 2012 DF Terms Agreement?**

The ISDA August 2012 DF Terms Agreement (the “**DF Terms Agreement**”) serves the limited purpose of allowing parties to apply selected provisions of the DF Supplement to their trading relationship in respect of swaps, irrespective of whether or not such relationship is governed by an existing written agreement. Like the DF Supplement, the DF Terms Agreement is designed to be used by any pair of parties, provided that at least one of the parties is a swap dealer.

The DF Terms Agreement is a “bare-bones” agreement that (i) sets forth its intended scope, (ii) provides that the parties thereto automatically agree to incorporate DF Schedules 1 and 2 into such agreement, (iii) allows the parties thereto to elect to incorporate DF Schedules 3 through 6, and (iv) includes basic representations, governing law, address for notices and other basic contract provisions.

#### **17.Q What is the purpose of the DF Terms Agreement?**

The DF Terms Agreement is designed to be used by parties who would like to apply selected provisions of the DF Supplement to their trading relationship in respect of swaps. Parties should consider entering into a DF Terms Agreement if at least one of them is a swap dealer and either of the following circumstances apply:

- (a) the parties may execute swaps that are not governed by an existing ISDA Master Agreement, an execution agreement (such as the FIA Swaps Execution Agreement) or other written agreement between the parties (such swaps, “Undocumented Swaps”), including swaps that are executed by a party to be cleared or swaps that are executed to be “given up” to a third-party derivatives dealer or “prime broker,” or
- (b) the parties may not have yet entered into an ISDA Master Agreement or other written agreement, but would like to begin offering or entering into swaps, including swaps to be documented on “long-form confirmations.”

#### **18.Q How do parties enter into the DF Terms Agreement by participating in the DF Protocol?**

Parties may enter into the DF Terms Agreement, and select the provisions of the DF Supplement they wish to incorporate therein, by participating in the ISDA August 2012 DF Protocol. A party wishing to use the DF Protocol to enter into the DF Terms Agreement may do so in the same

manner that it uses the DF Protocol to supplement its existing written agreements, *i.e.*, by exchanging Questionnaires with another protocol participant who wishes to enter into a DF Terms Agreement.

The parties may enter into a DF Terms Agreement via the DF Protocol even if they are not using the DF Protocol to supplement existing written agreements governing swaps. The DF Terms Agreement would constitute a “Protocol Covered Agreement” if entered into via the DF Protocol.

#### **19.Q Who should execute the DF Terms Agreement?**

Like the other components of the DF Protocol, the DF Terms Agreement differentiates between the parties that make the representations and agreements provided in the DF Supplement (such parties are called “DF Terms Principals” in the DF Terms Agreement), and parties that may execute the DF Terms Agreement as agents for those parties. The DF Terms Agreement is drafted according to the principle that the party that executes the DF Terms Agreement (whether through the DF Protocol or on a bilateral basis) is the party that may execute swaps covered by its terms. To address situations where an investment manager or other third party agent will execute swaps on behalf of a client, the relevant agent should execute the DF Terms Agreement as agent for the relevant party. To address situations where a party will execute swaps on its own behalf, that party should execute the DF Terms Agreement.

#### **20.Q If I am participating in the DF Protocol to supplement my existing written agreements by incorporating the provisions of the DF Supplement, is there any reason I would also elect to enter into the DF Terms Agreement via the DF Protocol?**

Yes. The scope of the DF Protocol is limited to existing written agreements between the relevant parties, so it will not apply to Undocumented Swaps unless the parties have elected to enter into a DF Terms Agreement. Therefore, even if a party has incorporated the provisions of the DF Supplement into its existing written agreements, it should consider entering into the DF Terms Agreement so that the provisions of the DF Supplement that it has elected to incorporate into such existing written agreements would also be applicable to any swap that it executes or may execute that is an Undocumented Swap.

Protocol Participants may elect to enter into the DF Terms Agreement by indicating that election in Question 10 of Part III of the Questionnaire.