

REPORTING GUIDANCE NOTE published on 19 July 2013

ISDA has prepared this note to assist in your consideration of reporting issues. This document is intended to provide guidance around some of the issues raised in respect of the reporting obligations under Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (**EMIR**).

THIS GUIDANCE NOTE DOES NOT PURPORT TO BE AND SHOULD NOT BE CONSIDERED A GUIDE TO OR AN EXPLANATION OF ALL RELEVANT ISSUES OR CONSIDERATIONS IN CONNECTION WITH THE REPORTING OBLIGATIONS. PARTIES SHOULD CONSULT WITH THEIR LEGAL ADVISERS AND ANY OTHER ADVISER THEY DEEM APPROPRIATE PRIOR TO USING ANY LANGUAGE DISCUSSED IN THIS GUIDANCE NOTE. ISDA ASSUMES NO RESPONSIBILITY FOR ANY USE TO WHICH ANY OF ITS DOCUMENTATION OR OTHER DOCUMENTATION MAY BE PUT.

This guidance note and draft language included hereunder were developed by a working group of ISDA member institutions (including representatives from buy-side and sell-side institutions). Inevitably, due to the fact we are at the early stages of implementation of EMIR, the working group has had to form certain decisions on questions of interpretation of EMIR. Some of these are around reporting obligations as set out in Article 9 of EMIR, the Commission Delegated Regulation (EU) No 148/2013 of 19 December 2012 and published 23 February 2013 in the Official Journal of the European Union (the **Reporting RTS**) and the Commission Implementing Regulation (EU) No 1247/2012 of 19 December 2012 and published 21 December 2012 in the Official Journal of the European Union (the **Reporting ITS**).

This guidance note provides examples of language which might be useful to facilitate bilateral agreement between parties to an ISDA Master Agreement to reflect certain respective obligations in relation to reporting. It should be noted that it is not a full, or the only, means of complying with the EMIR obligations and we refer you to the footnotes in the guidance note in this regard. Parties can elect to use none, all or some only of the example provisions set out in this note and/or to amend them to meet any particular commercial agreement between parties. While the example language is written as amendments to an ISDA Master Agreement, parties may wish to amend it to work with one or more other forms of agreement.

Defined terms used in this guidance note and in the example language included hereunder are set out in Schedule 2 to this guidance note.

GENERAL SUMMARY

Article 9 of EMIR sets out the reporting obligation such that "counterparties" are required to ensure that the details of *any* derivative contract (which includes OTC derivative contracts and exchange-traded contracts) that they have concluded and any modification or termination of that derivative contract are reported to a trade repository registered in accordance with Article 55 of EMIR or a non-EU trade repository recognised in accordance with Article 77 of EMIR.

The information which must be reported to a trade repository is separated into two types in Article 1 and the Annex to the Reporting RTS and Article 1 and the Annex to the Reporting ITS, as follows:

- (a) details relating to each of the counterparties to the derivative contract (this being the Counterparty Data); and
- (b) details pertaining to the derivative contract concluded between the two counterparties (this being the Common Data).

The details of the data which must be reported, and the format in which and frequency with which such data must be reported, are contained in the Reporting Annexes to the Reporting RTS and Reporting ITS.

Article 9(1) of EMIR states that the reporting obligation applies to derivative contracts which:

- (a) were entered into before 16 August 2012 and remained outstanding on that date; or
- (b) are entered into on or after 16 August 2012.

The date by which information must be reported depends on the class of derivative contract, when it is entered into and for how long it remains outstanding, in accordance with Article 5 of the Reporting ITS which specifies set dates for this purpose (each such specified date, a **Reporting Start Date**).

Article 5 of the Reporting ITS states that where no trade repository is registered by the relevant dates in Article 5 of the Reporting ITS for a derivative class, reporting to a trade repository that is subsequently so registered will commence 90 days after its registration. If no trade repository has been registered by 1 July 2015, counterparties will be required to report to ESMA directly in accordance with Article 9(3) of EMIR.

1. REPORTING ROLES

The obligation to report as set out in Article 9 of EMIR is stated to apply to "counterparties" (and CCPs). EMIR provides in Article 9(1) that a counterparty may delegate the reporting of the details of the derivative contract but that counterparties must ensure details of their derivative contracts are reported without duplication.

Recital (1) of the Reporting RTS provides that a counterparty should be able to delegate to the other party or to a third party including a common third entity (which could include a CCP).

Draft language in respect of reporting roles¹

The language set out below provides for various options for delegation of either or both of the Common Data and the Counterparty Data, including where delegation is to the other party or to a third party or where there

¹ This drafting assumes that an EU entity transacting with a third country entity will not be required to report data in respect of such third country entity, in line with the interpretation currently attributed to the Article 9 requirement by ESMA as at the date of this guidance note.

is no delegation. The language also provides that the data to be reported will be reported to a trade repository within the timeframe set out in EMIR or the technical standards. The language covers reporting of transactions entered into after the Reporting Start Date but could be amended to cover the reporting obligations that apply to transactions entered into before the Reporting Start Date (see footnote 37).

(i)² Reporting Roles. Party A and/or Party B, as the case may be, will be required to report information in respect of Relevant Transactions pursuant to the Reporting Obligation and in accordance with this [Part 5[(x)]]. In respect of each Relevant Transaction, Party A and Party B agree that,

[Party A and Party B will each report the Counterparty Data in relation to it and each report the Common Data, in each case by the Reporting Deadline and to the Relevant Trade Repository [and for this purpose Party [A]/[B] [and Party B] [has/have] appointed a Reporting Delegate to comply with such obligation].]³

OR

[Party A and Party B will each report the Counterparty Data in relation to it [and for this purpose Party [A]/[B] [and Party B] [has/have] appointed a Reporting Delegate to comply with such obligation,] and only Party [A]/[B] will report the Common Data, in each case by the Reporting Deadline and to the Relevant Trade Repository. Party [B]/[A] hereby authorises Party [A]/[B] to report the Common Data to the Relevant Trade Repository on behalf of Party [B]/[A].]⁴

OR

[Party [A]/[B] will report (a) the Counterparty Data [(other than the Excluded Counterparty Data)]⁵ in relation to Party A and Party B and (b) the Common Data, in each case by the Reporting Deadline and to the Relevant Trade Repository [and for this purpose Party [A]/[B] [and Party B] [has/have] appointed a Reporting Delegate to comply with such obligation]. Party [B]/[A] hereby authorises Party [A]/[B] to report (a) the Counterparty Data [(other than the Excluded Counterparty Data)] in relation to Party [B]/[A] and (b) the Common Data to the Relevant Trade Repository on behalf of Party [B]/[A].]⁶

OR

[Party [A]/[B] will report (a) the Common Data on behalf of Party [B]/[A] and (b) the Counterparty Data in relation to itself , in each case by the Reporting Deadline and to the Relevant Trade Repository [and for this purpose Party [A]/[B] has appointed a Reporting Delegate to comply with such obligation].]⁷

For the purposes of this [Part 5], the "**Relevant Trade Repository**" in respect of a Relevant Transaction will be the Trade Repository [selected by [the Reporting Party]/[the Non-Reporting

² The numbering assumes the draft provisions are being added to Part 5 of an ISDA Master Agreement but can be amended as required.

³ This drafting provides that each party will report its own Counterparty Data and the Common Data. The language also allows for a Reporting Delegate to be appointed by one or both parties to carry out the reporting obligations.

⁴ This drafting provides that each party will report its own Counterparty Data. The language also allows for a Reporting Delegate to be appointed by one or both parties to carry out the reporting obligations in respect of such Counterparty Data. The language provides for the Common Data to be reported by one party only.

⁵ This drafting provides the flexibility to provide that, where reporting is delegated, the delegation will not include reporting of Excluded Counterparty Data on an ongoing basis (other than at day one). Such Excluded Counterparty Data includes the information in relation to mark-to-market valuation or mark-to-model valuation, as the case may be, and in relation to collateral. The parties could agree to include delegation of reporting of this information if they wish to do so or, if not delegated, the party required to report such Excluded Counterparty Data under EMIR will remain required to report it by the relevant deadline.

⁶ This drafting provides that one party will report both their own and their counterparty's Counterparty Data and the Common Data. The language also allows for a Reporting Delegate to be appointed by one or both parties to carry out the reporting obligations.

⁷ This drafting provides that a party will report its Counterparty Data and the Common Data. The language also allows for a Reporting Delegate to be appointed by the party to carry out the reporting obligations.

Party] [or, if applicable, a Reporting Delegate]]/[agreed between Party A and Party B] from time to time for such [type or class of] [Relevant Transaction] [or, where no Trade Repository is available to record the details of such Relevant Transaction, ESMA].

[[The Reporting Party]/[The Non-Reporting Party] will notify the other party of each Relevant Trade Repository which it selects for the purposes of this [Part 5]. Such notification shall be effective [on receipt].]⁸

[If a Reporting Delegate selects a Relevant Trade Repository (including, in the case of a CCP, pursuant to its Rule Set), the party which appointed such Reporting Delegate will notify the other party of such selection. Such notification shall be effective [on receipt].]⁹

2. REPORTING OBLIGATIONS

Article 9(1) of EMIR states that the details of any derivative contract that has been concluded or of any modification or termination of a derivative contract must be reported no later than the working day following the conclusion, modification or termination of the derivative contract and must be reported without duplication.

Article 9(2) of EMIR provides that counterparties should keep records of any derivative contract they have concluded and any modification for 5 years following termination of the derivative contract.¹⁰

Recital 2 to the Reporting RTS provides that counterparties should ensure that the Common Data reported is agreed between both parties to avoid inconsistencies in the Common Data tables.

Draft language in respect of the obligation to report

The language set out below provides for obligations to be imposed on each counterparty to the derivative contract to carry out the actions required in order to allow the reporting obligation to be met effectively and within the relevant timeframe, for instance where there is one Reporting Party.

(ii) Reporting Obligations

(1) In respect of each Relevant Transaction, Party A and Party B agree that they will act in good faith to agree the Common Data before it is reported to the Relevant Trade Repository.¹¹

(2) If, in respect of any Relevant Transaction(s), only one party (the "**Reporting Party**") agrees to report the Counterparty Data in relation to both parties and/or the Common Data, the other party (the "**Non-Reporting Party**"):

(A) agrees that it will deliver to the Reporting Party the information needed by the Reporting Party in time for the Reporting Party to comply with its obligation under [Part 5[(x)](i)]¹²; and

(B) represents to the Reporting Party that the information it delivers under [Part 5[(x)](ii)(2)(A)] above is, at the time of delivery, true, accurate and complete in every material respect.

⁸ Parties may wish to include this wording where one party selects the Relevant Trade Repository in accordance with the definition of that term.

⁹ Parties may wish to include this wording where the definition of Relevant Trade Repository contemplates that it might be selected by a Reporting Delegate.

¹⁰ Draft language has not been provided in respect of this obligation to retain records as the obligation falls on each counterparty individually and as such does not require contractual agreement between the parties.

¹¹ This provision corresponds with Recital 2 to the Reporting RTS and the answer to question 5 in the 8 February 2013 FAQ published by the European Commission that the counterparties should ensure that the Common Data reported is agreed between both parties to the trade. Parties should consider whether they need to include this wording or whether their existing processes and procedures will be sufficient in this regard.

¹² More specificity around the timeframe for providing this information could be agreed between the parties and included in the drafting.

3. CONFIDENTIALITY

Article 9(4) of EMIR states that the reporting of any details of any derivative contract in accordance with the reporting obligations under EMIR will not be considered a breach of any disclosure restriction imposed by that contract or by any legislative, regulatory or administrative provision.

Draft language in respect of confidentiality

Where a party is reporting data in respect of a derivative contract which pertains to details of its counterparty, it may wish to include a contractual provision that this report will not be a breach of any confidentiality obligation. This provision may be particularly useful where a party is reporting details in respect of a transaction with a third country entity which would not be covered by Article 9(4) of EMIR. ISDA working groups have carefully considered the question of confidentiality waivers and applicable wording is now included in each of the ISDA 2013 Reporting Protocol and the ISDA 2013 EMIR Portfolio Reconciliation, Dispute Resolution and Disclosure Protocol. The provisions set out below give parties the ability either to use one of those forms of wording or to cross refer to either such protocol.

(iii) Confidentiality Waiver¹³

¹⁴ [Notwithstanding anything to the contrary in this Agreement or in any non-disclosure, confidentiality or other agreement between the parties, each party hereby consents to the disclosure of information:

(a) to the extent required or permitted by any applicable law, rule or regulation which mandates reporting and/or retention of transaction and similar information or to the extent required by any order or directive regarding reporting and/or retention of transaction and similar information issued by any authority or body or agency in accordance with which the other party is required or accustomed to act ("**Reporting Requirements**"); or

(b) to and between the other party's head office, branches or affiliates, or any persons or entities who provide services to such other party or its head office, branches or affiliates, in each case, in connection with such Reporting Requirements.

Each party acknowledges that pursuant to global regulatory reform initiatives, regulators require reporting of trade data to increase market transparency and enable regulators to monitor systemic risk to ensure safeguards are implemented globally.

Each party further acknowledges that disclosures made pursuant hereto may include, without limitation, the disclosure of trade information including a party's identity (by name, address, corporate affiliation, identifier or otherwise) to any swap or trade data repository or one or more systems or services operated by any trade repository ("**TR**") and any relevant regulators (including without limitation, the U.S. Commodity Futures Trading Commission or other U.S. regulators in the case of trade reporting under applicable U.S. laws, and the European Securities and Markets Authority and national regulators in the E.U. under EMIR in the case of trade reporting under applicable E.U. laws) and that such disclosures could result in certain anonymous swap transaction and pricing data becoming available to the public. Each party further acknowledges that, for purposes of complying with regulatory reporting obligations, a party may use a third party service provider to transfer trade information into a TR and that a TR may engage the services of a global trade repository regulated by one or more governmental regulators. Each party also acknowledges

¹³ It is noted that some jurisdictions may not recognise or permit a waiver of confidentiality obligations and that as such this provision may not be sufficient for these jurisdictions. Counterparties will need to diligence the position in respect of any entity with which they intend to transact where they are considering utilising such language. Parties should consult with their legal advisers and any other adviser they deem appropriate prior to using this language and any other suggested language in this respect.

¹⁴ This language mirrors that used for the ISDA 2013 Reporting Protocol.

that disclosures made pursuant hereto may be made to recipients in a jurisdiction other than that of the disclosing party or a jurisdiction that may not necessarily provide an equivalent or adequate level of protection for personal data as the counterparty's home jurisdiction. For the avoidance of doubt, (i) to the extent that applicable non-disclosure, confidentiality, bank secrecy, data privacy or other law imposes non-disclosure requirements on transaction and similar information required or permitted to be disclosed as contemplated herein but permits a party to waive such requirements by consent, the consent and acknowledgements provided herein shall be a consent by each party for purposes of such law; (ii) any agreement between the parties to maintain confidentiality of information contained in the Agreement or in any non-disclosure, confidentiality or other agreement shall continue to apply to the extent that such agreement is not inconsistent with the disclosure of information in connection with the Reporting Requirements as set out herein; and (iii) nothing herein is intended to limit the scope of any other consent to disclosure separately given by each party to the other party.

The consenting party represents and warrants that any third party to whom it owes a duty of confidence in respect of the information disclosed has consented to the disclosure of that information.]

OR

¹⁵ [Notwithstanding anything to the contrary in this Agreement or in any non-disclosure, confidentiality or other agreement between the parties, each party hereby consents to the disclosure of information:

(1) to the extent required or permitted under, or made in accordance with, the provisions of EMIR and any applicable supporting law, rule or regulation ("**EMIR and Supporting Regulation**") which mandate reporting and/or retention of transaction and similar information or to the extent required or permitted under, or made in accordance with, any order or directive in relation to (and including) EMIR and Supporting Regulation regarding reporting and/or retention of transaction and similar information issued by any authority or body or agency in accordance with which the other party is required or accustomed to act ("**Reporting Requirements**"); or

(2) to and between the other party's head office, branches or Affiliates, or any persons or entities who provide services to such other party or its head office, branches or Affiliates, in each case, in connection with such Reporting Requirements.

Each party acknowledges that pursuant to EMIR and Supporting Regulation, regulators require reporting of trade data to increase market transparency and enable regulators to monitor systemic risk to ensure safeguards are implemented globally.

Each party further acknowledges that disclosures made pursuant hereto may include, without limitation, the disclosure of trade information including a party's identity (by name, address, corporate affiliation, identifier or otherwise) to any trade repository registered in accordance with Article 55 of EMIR or recognised in accordance with Article 77 of EMIR or one or more systems or services operated by any such trade repository ("**TR**") and any relevant regulators (including without limitation, the European Securities and Markets Authority and national regulators in the European Union) under EMIR and Supporting Regulation and that such disclosures could result in certain anonymous transaction and pricing data becoming available to the public. Each party further acknowledges that, for purposes of complying with regulatory reporting obligations, a party may use a third party service provider to transfer trade information into a TR and that a TR may engage the services of a global trade repository regulated by one or more governmental regulators. Each party also acknowledges that disclosures made pursuant hereto may be made to recipients in a jurisdiction

¹⁵ This language mirrors that used for the ISDA 2013 EMIR Portfolio Reconciliation, Dispute Resolution and Disclosure Protocol.

other than that of the disclosing party or a jurisdiction that may not necessarily provide an equivalent or adequate level of protection for personal data as the counterparty's home jurisdiction. For the avoidance of doubt, (i) to the extent that applicable non-disclosure, confidentiality, bank secrecy, data privacy or other law imposes non-disclosure requirements on transaction and similar information required or permitted to be disclosed as contemplated herein but permits a party to waive such requirements by consent, the consent and acknowledgements provided herein shall be a consent by each party for purposes of such law; (ii) any agreement between the parties to maintain confidentiality of information contained in this agreement or in any non-disclosure, confidentiality or other agreement shall continue to apply to the extent that such agreement is not inconsistent with the disclosure of information in connection with the Reporting Requirements as set out herein; and (iii) nothing herein is intended to limit the scope of any other consent to disclosure separately given by each party to the other party.

The consenting party represents and warrants that any third party to whom it owes a duty of confidence in respect of the information disclosed has consented to the disclosure of that information.]

OR

[[Part II (Confidentiality Waiver) of the attachment to the ISDA 2013 EMIR Portfolio Reconciliation, Dispute Resolution and Disclosure Protocol]/[The wording in the attachment to the ISDA 2013 Reporting Protocol], which provides for each party's consent to the disclosure by the other party of information pursuant to regulatory reporting requirements, is deemed to be incorporated into the Agreement.]

4. REMEDIES FOR BREACH

Article 12 of EMIR sets out the framework for penalties imposed as a consequence of breach or infringement of EMIR. These will be determined by the relevant national regulator of the relevant member state and are stated to include at least administrative fines. Note, however, that EMIR does not set out what any contractual agreement between the parties should incorporate to this effect.

Draft language in respect of remedies for breach

Parties may wish to incorporate into their ISDA Master Agreements the consequence of any breach of any reporting obligation. Without amendment or exclusion of breach, any breach of any reporting obligation inserted into the ISDA Master Agreement would constitute an event of default under the pre-printed terms of Section 5(a)(ii) (*Breach of Agreement*) and would also result in the non-satisfaction of the condition precedent in Section 2(a)(iii)(1). It is, of course, open to parties to agree otherwise. Some example wording to switch off the application of an Event of Default or Termination Event is included below, together with wording to address failure to agree the Common Data and failure to report for another party. Whether these alternatives are appropriate in any given circumstance will depend first on the contractual obligations agreed between the parties in relation to the reporting requirements under EMIR and second on their commercial agreement as to what should be the consequences of any breach of those contractual obligations. In addition, it is always open to the parties to agree other contractual consequences. Note finally that to the extent that a party reports for another, that relationship may be documented under a separate service agreement and the consequences of breach, amongst other things, will more likely be set out in such service agreement.

[(iv) Remedies for Breach

[(1) Without prejudice to the rights, powers, remedies and privileges provided by law, failure by a party to take any action required by this [Part 5[(x)]] will not constitute [an Event of Default] [or] [a Termination Event] under the Agreement.]

[(2) [Without prejudice to [Part 5[(x)](v)], if the parties fail to agree the Common Data in accordance with [Part 5[(x)](ii)(1)] above then each party is entitled to report the relevant Common Data to [a Trade Repository] OR [the Relevant Trade Repository] or to appoint a Reporting Delegate to make such report on its behalf.]¹⁶

[(3) If the Reporting Party fails to report the Common Data and/or the Counterparty Data by the Reporting Deadline in accordance with [Part 5[(x)](i)] above and the Non-Reporting Party is subject to the Reporting Obligation then, without prejudice to [Part 5[(x)](v)], the Non-Reporting Party is nonetheless entitled to report the relevant Common Data and/or the Counterparty Data in relation to it to [a Trade Repository] OR [the Relevant Trade Repository] or to appoint a Reporting Delegate to make such report on its behalf.

[Without prejudice to the rights, powers, remedies and privileges provided by law, failure by a party to take any action required by this [Part 5[(x)]] will not constitute an [Event of Default] [or a Termination Event] under the Agreement if it is caused by an error or omission of an administrative or operational nature which is outside of the Reporting Party's control] .]¹⁷

5. CORRECTION OF ERRORS

Parties may wish to include in their ISDA Master Agreements a mechanism for the correction of any errors in the information reported. EMIR does not set out what any contractual agreement between the parties should incorporate to this effect.

Potential Drafting in respect of correction of errors

(v) Correction of Errors

If either Party A or Party B identifies an error in any information previously provided to the other party which is material to the Reporting Obligation, such party will notify such other party as soon as reasonably practicable and both parties will use [all reasonable efforts in good faith and a commercially reasonable manner] to resolve such error.

Any information provided to [a Trade Repository] OR [the Relevant Trade Repository] for the purposes of complying with the Reporting Obligation is provided without prejudice to any present or future dispute between the parties in relation to the information provided. Any failure or delay in exercising any right, power or privilege in respect of this [Part 5[(x)](v)] will not be presumed to operate as a waiver in respect of any dispute between the parties and a single or partial exercise of any right, power or privilege will not be presumed to preclude any subsequent or further exercise of that right, power or privilege or the exercise of any other right, power or privilege in respect of any dispute between the parties.¹⁸

¹⁶ Recital 2 to the Reporting RTS provides that counterparties should ensure that the Common Data reported is agreed between both parties to the trade. This drafting allows for parties to report their own data or appoint a Reporting Delegate where such agreement is not reached.

¹⁷ Parties may wish to include a carve-out from a breach in a situation where either a failure to provide the information to the Reporting Party or the Reporting Delegate or the Reporting Party's failure to report is for reasons beyond such party's control. If included, this sub-paragraph should be conformed to the rest of the provision and the Agreement as a whole, particularly with respect to the inclusion of and/or elections made in respect of (1).

¹⁸ An obligation to report correction of errors could be included in the reporting roles provisions. The wording provides for this to be without prejudice to the parties' rights to dispute in relation to the information provided.

SCHEDULE 1

DRAFT LANGUAGE

(The draft language set out in the body of the guidance note above has been extracted and consolidated below for ease of reference.)

(i)¹⁹ Reporting Roles

Party A and/or Party B, as the case may be, will be required to report information in respect of Relevant Transactions pursuant to the Reporting Obligation and in accordance with this [Part 5[(x)]]. In respect of each Relevant Transaction, Party A and Party B agree that,

[Party A and Party B will each report the Counterparty Data in relation to it and each report the Common Data, in each case by the Reporting Deadline and to the Relevant Trade Repository [and for this purpose Party [A]/[B] [and Party B] [has/have] appointed a Reporting Delegate to comply with such obligation].]²⁰

OR

[Party A and Party B will each report the Counterparty Data in relation to it [and for this purpose Party [A]/[B] [and Party B] [has/have] appointed a Reporting Delegate to comply with such obligation,] and only Party [A]/[B] will report the Common Data, in each case by the Reporting Deadline and to the Relevant Trade Repository. Party [B]/[A] hereby authorises Party [A]/[B] to report the Common Data to the Relevant Trade Repository on behalf of Party [B]/[A].]²¹

OR

[Party [A]/[B] will report (a) the Counterparty Data [(other than the Excluded Counterparty Data)]²² in relation to Party A and Party B and (b) the Common Data, in each case by the Reporting Deadline and to the Relevant Trade Repository [and for this purpose Party [A]/[B] [and Party B] [has/have] appointed a Reporting Delegate to comply with such obligation]. Party [B]/[A] hereby authorises Party [A]/[B] to report (a) the Counterparty Data [(other than the Excluded Counterparty Data)] in relation to Party [B]/[A] and (b) the Common Data to the Relevant Trade Repository on behalf of Party [B]/[A].]²³

OR

[Party [A]/[B] will report (a) the Common Data on behalf of Party [B]/[A] and (b) the Counterparty Data in relation to itself, in each case by the Reporting Deadline and to the Relevant Trade Repository [and for this purpose Party [A]/[B] has appointed a Reporting Delegate to comply with such obligation].]²⁴

¹⁹ The numbering assumes the draft provisions are being added to Part 5 of an ISDA Master Agreement but can be amended as required.

²⁰ This drafting provides that each party will report its own Counterparty Data and the Common Data. The language also allows for a Reporting Delegate to be appointed by one or both parties to carry out the reporting obligations.

²¹ This drafting provides that each party will report its own Counterparty Data. The language also allows for a Reporting Delegate to be appointed by one or both parties to carry out the reporting obligations in respect of such Counterparty Data. The language provides for the Common Data to be reported by one party only.

²² This drafting provides the flexibility to provide that, where reporting is delegated, the delegation will not include reporting of Excluded Counterparty Data on an ongoing basis (other than at day one). Such Excluded Counterparty Data includes the information in relation to mark-to-market valuation or mark-to-model valuation, as the case may be, and in relation to collateral. The parties could agree to include delegation of reporting of this information if they wish to do so or, if not delegated, the party required to report such Excluded Counterparty Data under EMIR will remain required to report it by the relevant deadline.

²³ This drafting provides that one party will report both their own and their counterparty's Counterparty Data and the Common Data. The language also allows for a Reporting Delegate to be appointed by one or both parties to carry out the reporting obligations.

²⁴ This drafting provides that a party will report its Counterparty Data and the Common Data. The language also allows for a Reporting Delegate to be

For the purposes of this [Part 5], the "**Relevant Trade Repository**" in respect of a Relevant Transaction will be the Trade Repository [selected by [the Reporting Party]/[the Non-Reporting Party] [or, if applicable, a Reporting Delegate]]/[agreed between Party A and Party B] from time to time for such [type or class of] [Relevant Transaction] [or, where no Trade Repository is available to record the details of such Relevant Transaction, ESMA].

[[The Reporting Party]/[The Non-Reporting Party] will notify the other party of each Relevant Trade Repository which it selects for the purposes of this [Part 5]. Such notification shall be effective [on receipt].]²⁵

[If a Reporting Delegate selects a Relevant Trade Repository (including, in the case of a CCP, pursuant to its Rule Set), the party which appointed such Reporting Delegate will notify the other party of such selection. Such notification shall be effective [on receipt].]²⁶

(ii) **Reporting Obligations**

(1) In respect of each Relevant Transaction, Party A and Party B agree that they will act in good faith to agree the Common Data before it is reported to the Relevant Trade Repository.²⁷

(2) If, in respect of any Relevant Transaction(s), only one party (the "**Reporting Party**") agrees to report the Counterparty Data in relation to both parties and/or the Common Data, the other party (the "**Non-Reporting Party**"):

(A) agrees that it will deliver to the Reporting Party the information needed by the Reporting Party in time for the Reporting Party to comply with its obligation under [Part 5[(x)](i)]²⁸; and

(B) represents to the Reporting Party that the information it delivers under [Part 5[(x)](ii)(2)(A)] above is, at the time of delivery, true, accurate and complete in every material respect.

(iii) **Confidentiality Waiver**²⁹

³⁰ [Notwithstanding anything to the contrary in this Agreement or in any non-disclosure, confidentiality or other agreement between the parties, each party hereby consents to the disclosure of information:

(a) to the extent required or permitted by any applicable law, rule or regulation which mandates reporting and/or retention of transaction and similar information or to the extent required by any order or directive regarding reporting and/or retention of transaction and similar information issued by any authority or body or agency in accordance with which the other party is required or accustomed to act ("**Reporting Requirements**")]; or

appointed by the party to carry out the reporting obligations.

²⁵ Parties may wish to include this wording where one party selects the Relevant Trade Repository in accordance with the definition of that term.

²⁶ Parties may wish to include this wording where the definition of Relevant Trade Repository contemplates that it might be selected by a Reporting Delegate.

²⁷ This provision corresponds with Recital 2 to the Reporting RTS and the answer to question 5 in the 8 February 2013 FAQ published by the European Commission that the counterparties should ensure that the Common Data reported is agreed between both parties to the trade. Parties should consider whether they need to include this wording or whether their existing processes and procedures will be sufficient in this regard.

²⁸ More specificity around the timeframe for providing this information could be agreed between the parties and included in the drafting.

²⁹ It is noted that some jurisdictions may not recognise or permit a waiver of confidentiality obligations and that as such this provision may not be sufficient for these jurisdictions. Counterparties will need to diligence the position in respect of any entity with which they intend to transact where they are considering utilising such language. Parties should consult with their legal advisers and any other adviser they deem appropriate prior to using this language and any other suggested language in this respect.

³⁰ This language mirrors that used for the ISDA 2013 Reporting Protocol.

(b) to and between the other party's head office, branches or affiliates, or any persons or entities who provide services to such other party or its head office, branches or affiliates, in each case, in connection with such Reporting Requirements.

Each party acknowledges that pursuant to global regulatory reform initiatives, regulators require reporting of trade data to increase market transparency and enable regulators to monitor systemic risk to ensure safeguards are implemented globally.

Each party further acknowledges that disclosures made pursuant hereto may include, without limitation, the disclosure of trade information including a party's identity (by name, address, corporate affiliation, identifier or otherwise) to any swap or trade data repository or one or more systems or services operated by any trade repository ("**TR**") and any relevant regulators (including without limitation, the U.S. Commodity Futures Trading Commission or other U.S. regulators in the case of trade reporting under applicable U.S. laws, and the European Securities and Markets Authority and national regulators in the E.U. under EMIR in the case of trade reporting under applicable E.U. laws) and that such disclosures could result in certain anonymous swap transaction and pricing data becoming available to the public. Each party further acknowledges that, for purposes of complying with regulatory reporting obligations, a party may use a third party service provider to transfer trade information into a TR and that a TR may engage the services of a global trade repository regulated by one or more governmental regulators. Each party also acknowledges that disclosures made pursuant hereto may be made to recipients in a jurisdiction other than that of the disclosing party or a jurisdiction that may not necessarily provide an equivalent or adequate level of protection for personal data as the counterparty's home jurisdiction. For the avoidance of doubt, (i) to the extent that applicable non-disclosure, confidentiality, bank secrecy, data privacy or other law imposes non-disclosure requirements on transaction and similar information required or permitted to be disclosed as contemplated herein but permits a party to waive such requirements by consent, the consent and acknowledgements provided herein shall be a consent by each party for purposes of such law; (ii) any agreement between the parties to maintain confidentiality of information contained in the Agreement or in any non-disclosure, confidentiality or other agreement shall continue to apply to the extent that such agreement is not inconsistent with the disclosure of information in connection with the Reporting Requirements as set out herein; and (iii) nothing herein is intended to limit the scope of any other consent to disclosure separately given by each party to the other party.

The consenting party represents and warrants that any third party to whom it owes a duty of confidence in respect of the information disclosed has consented to the disclosure of that information.]

OR

³¹ [Notwithstanding anything to the contrary in this Agreement or in any non-disclosure, confidentiality or other agreement between the parties, each party hereby consents to the disclosure of information:

(1) to the extent required or permitted under, or made in accordance with, the provisions of EMIR and any applicable supporting law, rule or regulation ("**EMIR and Supporting Regulation**") which mandate reporting and/or retention of transaction and similar information or to the extent required or permitted under, or made in accordance with, any order or directive in relation to (and including) EMIR and Supporting Regulation regarding reporting and/or retention of transaction and similar information issued by any authority or body or agency in accordance with which the other party is required or accustomed to act ("**Reporting Requirements**"); or

³¹ This language mirrors that used for the ISDA 2013 EMIR Portfolio Reconciliation, Dispute Resolution and Disclosure Protocol.

(2) to and between the other party's head office, branches or Affiliates, or any persons or entities who provide services to such other party or its head office, branches or Affiliates, in each case, in connection with such Reporting Requirements.

Each party acknowledges that pursuant to EMIR and Supporting Regulation, regulators require reporting of trade data to increase market transparency and enable regulators to monitor systemic risk to ensure safeguards are implemented globally.

Each party further acknowledges that disclosures made pursuant hereto may include, without limitation, the disclosure of trade information including a party's identity (by name, address, corporate affiliation, identifier or otherwise) to any trade repository registered in accordance with Article 55 of EMIR or recognised in accordance with Article 77 of EMIR or one or more systems or services operated by any such trade repository ("**TR**") and any relevant regulators (including without limitation, the European Securities and Markets Authority and national regulators in the European Union) under EMIR and Supporting Regulation and that such disclosures could result in certain anonymous transaction and pricing data becoming available to the public. Each party further acknowledges that, for purposes of complying with regulatory reporting obligations, a party may use a third party service provider to transfer trade information into a TR and that a TR may engage the services of a global trade repository regulated by one or more governmental regulators. Each party also acknowledges that disclosures made pursuant hereto may be made to recipients in a jurisdiction other than that of the disclosing party or a jurisdiction that may not necessarily provide an equivalent or adequate level of protection for personal data as the counterparty's home jurisdiction. For the avoidance of doubt, (i) to the extent that applicable non-disclosure, confidentiality, bank secrecy, data privacy or other law imposes non-disclosure requirements on transaction and similar information required or permitted to be disclosed as contemplated herein but permits a party to waive such requirements by consent, the consent and acknowledgements provided herein shall be a consent by each party for purposes of such law; (ii) any agreement between the parties to maintain confidentiality of information contained in this agreement or in any non-disclosure, confidentiality or other agreement shall continue to apply to the extent that such agreement is not inconsistent with the disclosure of information in connection with the Reporting Requirements as set out herein; and (iii) nothing herein is intended to limit the scope of any other consent to disclosure separately given by each party to the other party.

The consenting party represents and warrants that any third party to whom it owes a duty of confidence in respect of the information disclosed has consented to the disclosure of that information.]

OR

[[Part II (Confidentiality Waiver) of the attachment to the ISDA 2013 EMIR Portfolio Reconciliation, Dispute Resolution and Disclosure Protocol]/[The wording in the attachment to the ISDA 2013 Reporting Protocol], which provides for each party's consent to the disclosure by the other party of information pursuant to regulatory reporting requirements, is deemed to be incorporated into the Agreement.]

[(iv) Remedies for Breach

(1) Without prejudice to the rights, powers, remedies and privileges provided by law, failure by a party to take any action required by this [Part 5[(x)]] will not constitute [an Event of Default] [or] [a Termination Event] under the Agreement.]

(2) [Without prejudice to [Part 5[(x)](v)], if the parties fail to agree the Common Data in accordance with [Part 5[(x)](ii)(1)] above then each party is entitled to report the relevant Common

Data to [a Trade Repository] OR [the Relevant Trade Repository] or to appoint a Reporting Delegate to make such report on its behalf.]³²

[(3) If the Reporting Party fails to report the Common Data and/or the Counterparty Data by the Reporting Deadline in accordance with [Part 5[(x)](i)] above and the Non-Reporting Party is subject to the Reporting Obligation then, without prejudice to [Part 5[(x)](v)], the Non-Reporting Party is nonetheless entitled to report the relevant Common Data and/or the Counterparty Data in relation to it to [a Trade Repository] OR [the Relevant Trade Repository] or to appoint a Reporting Delegate to make such report on its behalf.

[Without prejudice to the rights, powers, remedies and privileges provided by law, failure by a party to take any action required by this [Part 5[(x)]] will not constitute an [Event of Default] [or a Termination Event] under the Agreement if it is caused by an error or omission of an administrative or operational nature which is outside of the Reporting Party's control] .]³³

(v) Correction of Errors

If either Party A or Party B identifies an error in any information previously provided to the other party which is material to the Reporting Obligation, such party will notify such other party as soon as reasonably practicable and both parties will use [all reasonable efforts in good faith and a commercially reasonable manner] to resolve such error.

Any information provided to [a Trade Repository] OR [the Relevant Trade Repository] for the purposes of complying with the Reporting Obligation is provided without prejudice to any present or future dispute between the parties in relation to the information provided. Any failure or delay in exercising any right, power or privilege in respect of this [Part 5[(x)](v)] will not be presumed to operate as a waiver in respect of any dispute between the parties and a single or partial exercise of any right, power or privilege will not be presumed to preclude any subsequent or further exercise of that right, power or privilege or the exercise of any other right, power or privilege in respect of any dispute between the parties.³⁴

³² Recital 2 to the Reporting RTS provides that counterparties should ensure that the Common Data reported is agreed between both parties to the trade. This drafting allows for parties to report their own data or appoint a Reporting Delegate where such agreement is not reached.

³³ Parties may wish to include a carve-out from a breach in a situation where either a failure to provide the information to the Reporting Party or the Reporting Delegate or the Reporting Party's failure to report is for reasons beyond such party's control. If included, this sub-paragraph should be conformed to the rest of the provision and the Agreement as a whole, particularly with respect to the inclusion of and/or elections made in respect of (1).

³⁴ An obligation to report correction of errors could be included in the reporting roles provisions. The wording provides for this to be without prejudice to the parties' rights to dispute in relation to the information provided.

SCHEDULE 2

DEFINITIONS

For the purposes of this guidance note and the draft language set out in it the following definitions apply and can be utilised or amended accordingly:

"CCP" means any central clearing house authorised under Article 14 of EMIR or recognised under Article 25 of EMIR.

"Common Data" means, with respect to a Relevant Transaction, the information listed in Table 2 (*Common Data*) of the Reporting Annexes.

"Counterparty Data" means, with respect to a Relevant Transaction and a party, the information listed in Table 1 (*Counterparty Data*) of the Reporting Annexes.

"EMIR" means Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories dated 4 July 2012.

"ESMA" means the European Securities and Markets Authority established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council.

"European Union" means the economic and political union established in 1993 by the Maastricht Treaty, with the aim of achieving closer economic and political union between member states that are primarily located in Europe.

"Excluded Counterparty Data" means, with respect to a Relevant Transaction and a Non-Reporting Party, the information in relation to mark-to-market valuation or mark-to-model valuation, as the case may be, and in relation to collateral as listed in Table 1 (*Counterparty Data*) of the Reporting Annexes that is required to be reported on any day [other than the first day] on which such information is required to be reported in accordance with the Reporting Obligation.³⁵

"Non-Reporting Party" means the party, if any, specified as such in [Part 5[(x)](ii)] above.

"Relevant Trade Repository" has the meaning given to it in [Part 5(x)(i)].

"Relevant Transaction" means any Transaction that is subject to the Reporting Obligation³⁶ and that is entered into on or following the Reporting Start Date.³⁷

"Reporting Annexes" means (i) Table 2 of the Annex to the Commission Delegated Regulation (EU) No 148/2013 of 19 December 2012 and published 23 February 2013 in the Official Journal of the European Union, and (ii) Table 2 of the Annex to the Commission Implementing Regulation (EU) No 1247/2012 of 19 December 2012 and published 21 December 2012 in the Official Journal of the European Union.

³⁵ This drafting provides the flexibility to provide that, where reporting is delegated, the delegation will/will not include reporting of Excluded Counterparty Data on an ongoing basis (other than at day one). Such Excluded Counterparty Data includes the information in relation to mark-to-market valuation or mark-to-model valuation, as the case may be, and in relation to collateral. Parties could agree to include delegation of reporting this information if they wish to do so.

³⁶ The definition of "Relevant Transaction" could be used to separate out different classes of transaction if the parties wanted to assign reporting responsibility by class or other determinant.

³⁷ Parties should consider whether they want to cover the reporting of derivative contracts entered into before the Reporting Start Date. Such amendment could be incorporated into this definition should they wish to do so.

"Reporting Deadline" means the [end of the working day following the conclusion, modification or termination of the Relevant Transaction] OR [deadline for reporting the Relevant Transaction as specified in [Article 9 of] EMIR].

"Reporting Delegate" means a third party including, without limitation, a CCP, appointed by Party A and/or Party B to report the Counterparty Data in relation to one or both parties and/or the Common Data by the Reporting Deadline to the Relevant Trade Repository.³⁸

"Reporting Obligation" means the obligation to report details of derivative contracts that are concluded, modified or terminated to a trade repository or ESMA in accordance with Article 9 of EMIR.

"Reporting Party" means the party, if any, specified as such in [Part 5[(x)](ii)] above.

"Reporting Start Date" means, with respect to a Transaction, the first date on which details of such Transaction must be reported in accordance with Article 5 of Commission Implementing Regulation (EU) No 1247/2012 of 19 December 2012 and published 21 December 2012 in the Official Journal of the European Union.

"Rule Set" means, with respect to a CCP, the relevant rules, conditions, procedures, regulations, standard terms, membership agreements, collateral addenda, notices, guidance, policies or other such documents promulgated by the relevant CCP and amended and supplemented from time to time.

"Trade Repository" means any entity registered as a trade repository in accordance with Article 55 of EMIR or recognised as a trade repository in accordance with Article 77 of EMIR.

³⁸ The parties may wish to agree a mechanism for providing greater detail.