International Swaps and Derivatives Association, Inc.

2019 Narrowly Tailored Credit Event Supplement to the 2014 ISDA Credit Derivatives Definitions

(published on July 15, 2019)

Any or all of the following definitions and provisions may be incorporated into a document by wording in the document indicating that, or the extent to which, the document is subject to the 2014 ISDA Credit Derivatives Definitions (as published by the International Swaps and Derivatives Association, Inc.) ("**ISDA**") (the "**2014 Definitions**") as supplemented by this 2019 Narrowly Tailored Credit Event Supplement to the 2014 Definitions (this "**2019 NTCE Supplement**"). All definitions and provisions so incorporated in a document will be applicable to that document unless otherwise provided in that document and any term defined in the 2014 Definitions as supplemented by this 2019 NTCE Supplement and used in any definition or provision that is incorporated by reference in a document will have the meaning set forth in the 2014 Definitions as supplemented by this 2019 NTCE Supplement unless otherwise provided in that document.

If the parties have specified that this 2019 NTCE Supplement is applicable, the following provisions shall apply for the purpose of the related Credit Derivative Transaction.

1. OUTSTANDING PRINCIPAL BALANCE

Section 3.8 of the 2014 Definitions is hereby deleted in its entirety and replaced with the following:

"**Section 3.8. Outstanding Principal Balance**

(a) The "Outstanding Principal Balance" of an obligation will be calculated as follows:

(i) first, by determining, in respect of the obligation, the amount of the Reference Entity's principal payment obligations and, where applicable in accordance with Section 3.12 (*Accrued Interest*), the Reference Entity's accrued but unpaid interest payment obligations (which, in the case of a Guarantee will be the lower of (A) the Outstanding Principal Balance (including accrued but unpaid interest, where applicable) of the Underlying Obligation (determined as if references to the Reference Entity were references to the Underlying Obligor) and (B) the amount of the Fixed Cap, if any);

(ii) second, by subtracting all or any portion of such amount which, pursuant to the terms of the obligation, (A) is subject to any Prohibited Action, or (B) may otherwise be reduced as a result of the effluxion of time or the occurrence or non-occurrence of an event or circumstance (other than by way of (I) payment or (II) a Permitted Contingency) (the amount determined in Section 3.8(a)(i) less any amounts subtracted in accordance with Section 3.8(a)(ii), the "Non-Contingent Amount"); and

(iii) third, by determining the Quantum of the Claim, which shall then constitute the Outstanding Principal Balance,

in each case, determined:

(A) unless otherwise specified, in accordance with the terms of the obligation in effect on either (I) the NOPS Effective Date (or if the terms of the obligation are amended after such date but on or prior to the Delivery Date, the Delivery Date), or (II) the Valuation Date, as applicable; and

(B) with respect to the Quantum of the Claim only, in accordance with any applicable laws (insofar as such laws reduce or discount the size of the claim to reflect the original issue price or accrued value of the obligation).

For the purposes of Section 3.8(a)(iii)(B), "applicable laws" shall include any bankruptcy or insolvency law or other law affecting creditors' rights to which the relevant obligation is, or may become, subject.

If "Fallback Discounting" is specified as applicable in the related Confirmation, then notwithstanding the above, if (i) the Outstanding Principal Balance of an obligation is not reduced or discounted under Section 3.8(a)(iii)(B) above, (ii) that obligation is either a Bond that has an issue price less than ninety-five per cent of the principal redemption amount or a Loan where the amount advanced is less than ninety-five per cent of the principal repayment amount, and (iii) such Bond or Loan does not include provisions relating to the accretion over time of the amount which would be payable on an early redemption or repayment of such Bond or Loan that are customary for the applicable type of Bond or Loan as the case may be, then the Outstanding Principal Balance of such Bond or Loan shall be the lesser of (a) the Non-Contingent Amount; and (b) an amount determined by straight line interpolation between the issue price of the Bond or the amount advanced under the Loan and the principal redemption amount or principal repayment amount, as applicable.

For the purposes of determining whether the issue price of a Bond or the amount advanced under a Loan is less than ninety-five per cent of the principal redemption amount or principal repayment amount (as applicable) or, where applicable, for applying straight line interpolation:

(x) where such Bond or Loan was issued as a result of an exchange offer, the issue price or amount advanced of the new Bond or Loan resulting from the exchange shall be deemed to be equal to the aggregate Outstanding Principal Balance of the original obligation(s) that were tendered or exchanged (the "Original Obligation(s)") at the time of such exchange (determined without regard to market or trading value of the Original Obligation(s)); and

(y) in the case of a Bond or Loan that is fungible with a prior debt obligation previously issued by the Reference Entity, such Bond or Loan shall be treated as having the same issue price or amount advanced as the prior debt obligation.

In circumstances where a holder would have received more than one obligation in exchange for the Original Obligation(s), the Calculation Agent will determine the allocation of the aggregate Outstanding Principal Balance of the Original Obligation(s) amongst each of the resulting obligations for the purpose of determining the issue price or amount advanced of the relevant Bond or Loan. Such allocation will take into account the interest rate, maturity, level of subordination and other terms of the obligations that resulted from the exchange and shall be made by the Calculation Agent in accordance with the methodology (if any) determined by the relevant Credit Derivatives Determinations Committee.

(b) "Quantum of the Claim" means the lowest amount of the claim which could be validly asserted against the Reference Entity in respect of the Non-Contingent Amount if the obligation had become redeemable, been accelerated, terminated or had otherwise become due and payable at the time of the relevant determination, provided that the Quantum of the Claim cannot exceed the Non-Contingent Amount."

2. FAILURE TO PAY

Section 4.5 of the 2014 Definitions is hereby deleted in its entirety and replaced with the following:

"**Section 4.5. Failure to Pay**. "Failure to Pay" means, after the expiration of any applicable Grace Period (after the satisfaction of any conditions precedent to the commencement of such Grace Period), the failure by the Reference Entity to make, when and where due, any payments in an aggregate amount of not less than the Payment Requirement under one or more Obligations, in accordance with the terms of such Obligations at the time of such failure. If "Credit Deterioration Requirement" is specified as applicable in the related Confirmation, then, notwithstanding the foregoing, it shall not constitute a Failure to Pay if such failure does not directly or indirectly either result from, or result in, a deterioration in the creditworthiness or financial condition of the Reference Entity.

Guidance on the interpretation of "Failure to Pay" is set forth in Exhibit F."

3. INTERPRETIVE GUIDANCE

The following guidance note shall be inserted as Exhibit F of the 2014 Definitions.

"EXHIBIT F to 2014 ISDA Credit Derivatives Definitions

Guidance on the interpretation of the definition of "Failure to Pay"

Summary

1.1 This note (the "**Guidance Note**") provides guidance on the interpretation of the definition of "Failure to Pay" in the 2014 ISDA Credit Derivatives Definitions (the "**2014 Definitions**"), as amended by the 2019 Narrowly Tailored Credit Event Supplement to the 2014 Definitions (as published on July 15, 2019) where "Credit Deterioration Requirement" is specified as applicable. This Guidance Note is only intended to assist in the determination of whether an event constitutes a Failure to Pay and is not an aid to interpreting the 2014 Definitions more broadly. Capitalized terms used but not defined have the meaning given to them in the 2014 Definitions.

Intention behind amendment to the definition of Failure to Pay

1.2 In April 2018, ISDA published a statement from its Board of Directors noting "press reports of instances of credit default swap (CDS) market participants entering into arrangements with corporations that are narrowly tailored to trigger a credit event for CDS contracts while minimizing the impact on the corporation, in order to increase payment to the buyers of CDS protection." The ISDA Board of Directors was of the view that "narrowly tailored defaults […] could negatively impact the efficiency, reliability and fairness of the overall CDS market."

1.3 The U.S. Commodity Futures Trading Commission Divisions of Clearing and Risk, Market Oversight, and Swap Dealer and Intermediary Oversight also published a statement that the "CDS market functions based on the premise that firms referenced in CDS contracts seek to avoid defaults, and as a result, the instruments are priced based on the financial health of the reference entity. However, recent arrangements appear to involve intentional, or 'manufactured,' credit events that could call that premise into question”.[1] Similarly, the UK Financial Conduct Authority published a statement that “‘manufactured’, events […] can severely harm confidence and trust in the credit derivatives market”.[2]

1.4 The Credit Deterioration Requirement related to Failure to Pay was introduced with the intention that a narrowly tailored payment default should not constitute a Failure to Pay Credit Event. It is not possible to devise an exhaustive definition of narrowly tailored payment defaults, but a common feature is that narrowly tailored payment defaults do not, directly or indirectly, result primarily from, or result in, a deterioration in the creditworthiness or financial condition of the Reference Entity. Accordingly, the Credit Deterioration Requirement excludes from the Failure to Pay definition any non-payments that do not directly or indirectly either result from, or result in, a deterioration in the creditworthiness or financial condition of the Reference Entity. This approach has the additional consequence of potentially excluding from the Failure to Pay definition non-payments that are not arranged for the purpose of triggering a Credit Event under a Credit Derivative Transaction, but that are caused by something other than a deterioration in the creditworthiness or financial condition of the Reference Entity.

1.5 For simplicity, this Guidance Note assumes that the relevant Credit Derivatives Determinations Committee (the "**Determinations Committee**") would be responsible for making the determination of whether or not an event constitutes a Failure to Pay. To the extent a question is referred to External Review, the references below to the Determinations Committee should be read as references to the External Review Panel. Furthermore, the principles set out in this Guidance Note should also apply if the question of interpretation is a purely bilateral matter and the relevant determination is not being made by the Determinations Committee or the External Review Panel.

Eligible Information

1.6 The Determinations Committee may take into account such Eligible Information as is available to it at the time of its determination, and the Determinations Committee is not obliged to conduct any investigation or solicit additional Eligible Information prior to making a determination when it is assessing (i) whether a Reference Entity experienced a deterioration in its creditworthiness or financial condition and (ii) whether the non-payment directly or indirectly resulted from, or resulted in, such deterioration. Eligible Information may include statements made by the Reference Entity but such statements will not necessarily be determinative.

1.7 The Determinations Committee may presume that the Credit Deterioration Requirement is satisfied in the absence of any Eligible Information to suggest the contrary.

Assessment of the Credit Deterioration Requirement

1.8 The Credit Deterioration Requirement, when specified as applicable, requires that a non-payment must directly or indirectly result from, or result in, a deterioration in the creditworthiness or financial condition of the Reference Entity in order to qualify as a Failure to Pay Credit Event. It should be noted that the financial condition of the Reference Entity at the time it fails to pay is not conclusive as to whether or not such non-payment resulted from, or resulted in, a deterioration in the creditworthiness or financial condition of the Reference Entity. Rather, there must be a causal link between the non-payment and the deterioration in the creditworthiness or financial condition of the Reference Entity. While the expectation is that the Credit Deterioration Requirement would generally be met by way of a non-payment resulting from such deterioration, the Credit Deterioration Requirement may also be met by a non-payment that results in such deterioration. This is intended to permit a Failure to Pay to occur where a technical, administrative or operational non-

[1] Statement on Manufactured Credit Events by U.S. Commodity Futures Trading Commission Divisions of Clearing and Risk, Market Oversight, and Swap Dealer and Intermediary Oversight of April 24, 2018, available at https://www.cftc.gov/PressRoom/SpeechesTestimony/divisionsstatement042418.

[2] Market Watch December 2018, available at https://www.fca.org.uk/publication/newsletters/market-watch-58.pdf

payment occurs that does not itself result from a deterioration in creditworthiness or financial condition, but the consequences of such non-payment result in a deterioration in the creditworthiness or financial condition of the Reference Entity.

1.9 Paragraphs 1.10 and 1.11 below respectively set out indicators that the Credit Deterioration Requirement may or may not be satisfied. However, the Determinations Committee will have regard to the broader context in which the non-payment occurred: the factors set out are not exhaustive and no single factor is necessarily conclusive. In circumstances where indicators listed in each of paragraph 1.10 and 1.11 are present, the Determinations Committee will need to assess the various indicators, taking into account the purpose of the Credit Deterioration Requirement and the wider context in which such non-payment occurred.

1.10 Eligible Information that is indicative that the Credit Deterioration Requirement is not satisfied may, without limitation, include the following:

(a) Subject to paragraphs 1.13 and 1.14 below, the non-payment arises directly from an arrangement or understanding (whether or not evidenced in writing) between the Reference Entity and one or more entities where an essential purpose of the arrangement or understanding is to create a benefit under a Credit Derivative Transaction referencing such Reference Entity to either a buyer or seller in such capacity by virtue of triggering a Credit Event due to such non-payment.

(b) An arrangement or understanding within the scope of sub-paragraph (a) above is entered into and, as part of such arrangement or understanding, the Reference Entity agrees to issue or incur either: (i) a new debt obligation which is likely to be the cheapest-to-deliver Deliverable Obligation in any Auction resulting from the Credit Event triggered by such non-payment (i.e. the new debt obligation would trade at a lower value compared to the other debt obligations that could be delivered into the relevant Auction); or (ii) a material amount of additional debt obligations that would constitute Deliverable Obligations in such an Auction.

(c) The non-payment did not result in the Reference Entity's other debt obligations generally being accelerated or becoming capable of being accelerated.[3]

(d) The Reference Entity had access to sufficient liquidity to meet its debt obligations as they were scheduled to fall due and there is no Eligible Information that such non-payment had a technical, administrative or operational cause.

(e) The non-payment was promptly cured following the expiry of the relevant grace period, including a Grace Period deemed under the 2014 Definitions.

(f) Subject to paragraph 1.13 below, the non-payment related only to debt obligations held by affiliates or other persons not likely to accelerate or take enforcement action.

1.11 Eligible Information that is indicative that the Credit Deterioration Requirement is satisfied may, without limitation, include the following:

(a) The Reference Entity previously announced that it was in financial distress and/or seeking to restructure its debt obligations prior to the non-payment occurring, or other Eligible Information indicates that this is the case (such as the entry into the sort of forbearance, standstill or other similar arrangement with creditors described at paragraph 1.13 below).

[3] This is relevant because the consequences of non-payment to the Reference Entity may be an indicator that a payment default was narrowly tailored and that the Credit Deterioration Requirement is not satisfied. However, a non-payment could also occur as a result of a deterioration in the creditworthiness or financial condition of the Reference Entity in circumstances where the non-payment does not exceed the threshold for cross-default. Accordingly, as with each of the other factors, this is only one of the factors to be considered.

(b) The Reference Entity previously appointed professional financial advisors that specialize in restructuring and/or insolvency situations.

(c) The non-payment occurs pursuant to the terms of a creditor process that is overseen by or approved by a court or independent insolvency official.

(d) The non-payment related to debt obligations that were, at the time of the non-payment, held by a number of parties.

(e) The non-payment occurred because the Reference Entity was not able to refinance (including as a result of general market conditions or external factors) in order to meet its debt obligations when due.

(f) The payment date on which the non-payment occurred was a scheduled payment date under the terms of the debt obligation at the time such debt obligation was originally incurred; or if such payment date was amended, it was amended well before the date such non-payment occurred.

(g) Regarding whether the non-payment directly or indirectly resulted in a deterioration in the creditworthiness or financial condition of the Reference Entity, following or as a result of the non-payment, any of the following occurs: (i) other debt obligations of the Reference Entity are generally accelerated or capable of acceleration; (ii) the Reference Entity fails to pay in respect of its other debt obligations; and/or (iii) a Bankruptcy occurs in respect of the Reference Entity.

1.12 If a non-payment occurs which arises directly or indirectly from, or is subject to a defence based upon, the matters set out in (a), (b), (c) and (d) of the second sentence of Section 4.1 of the 2014 Definitions (the "**Section 4.1 Factors**"), even in the absence of the indicators in paragraph 1.11 above, the Determinations Committee may presume the existence of such Section 4.1 Factors to have been a product of a deterioration in the creditworthiness or financial condition of the Reference Entity, absent Eligible Information (such as those indicators listed in paragraph 1.10 above) to the contrary.

Forbearance, standstill and other bona fide arrangements

1.13 If a Reference Entity enters into a forbearance, standstill or other similar arrangement with its creditors for *bona fide* commercial reasons related to a deterioration in its creditworthiness or financial condition, this would rarely result in a determination that the relevant non-payment by the Reference Entity did not directly or indirectly result from a deterioration in the creditworthiness or financial condition of the Reference Entity. Eligible Information that (i) a Reference Entity has entered into such arrangement with its creditors other than on arm's length terms, (ii) no written and binding agreement setting out the terms of such arrangement exists and/or (iii) such arrangement is not entered into between the Reference Entity and a significant portion of its creditors by value, may indicate that such forbearance, standstill or other similar arrangement has not been entered into for *bona fide* commercial reasons related to the credit deterioration of the Reference Entity.

1.14 Creditors who have hedged their exposure to a Reference Entity using Credit Derivative Transactions may be likely to reject any restructuring of the Reference Entity's debt obligations if the terms of such restructuring would impair the value of such Credit Derivatives Transactions. Accordingly, within the context of a *bona fide* debt restructuring, if the Reference Entity enters into an arrangement or understanding with such creditors that includes a failure to make a payment with the purpose of causing settlement of such Credit Derivative Transactions so as to increase the likelihood of success of such *bona fide* restructuring, and in circumstances where without such restructuring the Reference Entity would be likely to enter into bankruptcy or similar proceedings, such arrangement or understanding should generally be considered to have the essential purpose of facilitating such restructuring rather than creating a benefit under a Credit Derivative Transaction as described in paragraph 1.10(a) above."