ISDA DF PROTOCOL EXTENSION:

EMIR PORTFOLIO RECONCILIATION, DISPUTE RESOLUTION AND DISCLOSURE

ISDA has prepared this explanatory memorandum to assist in your consideration of the form of the extension agreement (the **Extension Agreement**) to the ISDA March 2013 DF Protocol (**ISDA March DF Protocol**) relating to certain requirements 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 SUMMARY 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 EXTENSION AGREEMENT. PARTIES SHOULD CONSULT WITH THEIR LEGAL ADVISERS AND ANY OTHER ADVISER THEY DEEM APPROPRIATE PRIOR TO USING THE EXTENSION AGREEMENT. ISDA ASSUMES NO RESPONSIBILITY FOR ANY USE TO WHICH ANY OF ITS DOCUMENTATION OR OTHER DOCUMENTATION MAY BE PUT.

Terms used in this memorandum and not otherwise defined have the meanings ascribed to them in the ISDA March DF Protocol and the ISDA July EMIR Protocol (as defined below).

BACKGROUND

On 22 March 2013, ISDA published the ISDA March DF Protocol and related Supplements to help market participants, through a process of adherence and exchange of questionnaires, comply with certain rules promulgated by the U.S. Commodity Futures Trading Commission (**CFTC**) in respect of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the **DF Act**), including in respect of portfolio reconciliation and dispute resolution.

On 19 July 2013, ISDA published the ISDA 2013 EMIR Portfolio Reconciliation, Dispute Resolution and Disclosure Protocol (**ISDA July EMIR Protocol**) to help market participants comply with the portfolio reconciliation and dispute resolution requirements under EMIR and to provide confidentiality waiver language in respect of EMIR.

On 11 July 2013, the CFTC issued a No-Action Relief Letter (the **No Action Letter**) allowing certain market participants to satisfy certain requirements promulgated by the CFTC under the DF Act by complying instead with the corresponding requirements under EMIR.

On the basis of the above regulatory requirements and the No Action Letter, market participants were keen to have available a documentation solution that would allow parties who have already adhered to the ISDA March DF Protocol agreeing changes to the ISDA March DF Protocol to facilitate compliance with the portfolio reconciliation and dispute resolution requirements under EMIR without adhering to the ISDA July EMIR Protocol. The Extension Agreement was developed by a working group of ISDA member institutions (including representatives from buy-side and sell-side institutions) as this documentation solution.

GENERAL SUMMARY

The aim of the Extension Agreement is to allow two parties to agree bilaterally to use their existing arrangements under the ISDA March 2013 DF Protocol to help them meet their portfolio reconciliation and dispute resolution requirements under EMIR, without adhering to the ISDA July EMIR Protocol.

The Extension Agreement does not and is not intended to:

1. Achieve "super-compliance" - that is to include provisions that are strict enough to meet all the relevant CFTC requirements under the DF Act and all the relevant EMIR requirements in relation to portfolio reconciliation and dispute resolution. Market participants may want to achieve this in circumstances where there is uncertainty as to whether the relevant CFTC requirements under the DF Act or the relevant EMIR requirements apply or where market participants want to adopt a cautious approach to compliance. However, the view of the working group was not to delay publication of the Extension Agreement in order to produce a "super-compliant" version.

2. Operate in circumstances where parties have not adhered to the ISDA March DF Protocol at all (although it can operate in circumstances where parties have adhered to the ISDA March DF Protocol but not elected for DF Schedule 4 to apply (see further paragraph 1 in Summary of Extension Agreement below)). In such circumstances, parties could consider simply adhering to the ISDA July EMIR Protocol.

3. Allow parties to elect which of the ISDA March DF Protocol and the ISDA July EMIR Protocol will apply in circumstances where parties have adhered to both protocols. Consistent with the aim of the Extension Agreement, the assumption is that parties wanting to use the Extension Agreement will not have adhered to the ISDA July EMIR Protocol.

SUMMARY OF EXTENSION AGREEMENT

The Extension Agreement is intended to facilitate bilateral agreement between parties and covers three main areas:

1. The ISDA July EMIR Protocol
2. Optional termination
3. Miscellaneous provisions

Taking each of these in turn:

1. **ISDA July EMIR Protocol**

(a) Portfolio Reconciliation

Portfolio reconciliation is dealt with in the ISDA March DF Protocol in March 2013 DF Schedule 4. The approach taken in the Extension Agreement is to use March 2013 DF Schedule 4 and amend it, as necessary, to tailor it more closely to the portfolio reconciliation requirements under EMIR.

The amendments are expressed to take effect from 15 September 2013 as that is the date that the portfolio reconciliation requirements under EMIR will take effect.

Broadly, the amendments to March 2013 DF Schedule 4 are as follows:

(i) to apply March 2013 DF Schedule 4 to ensure that it will apply even in circumstances where a party has not elected for it to apply through original adherence to the ISDA March DF Protocol and exchange of questionnaires;

(ii) to apply March 2013 DF Schedule 4 to OTC derivative transactions between the parties which are subject to the portfolio reconciliation requirements under EMIR, so aligning the scope of transaction coverage with EMIR;

(iii) to establish which party is a CFTC Swap Entity or CP and whether one way or two-way reconciliation applies for the purposes of the arrangements set out in March 2013 DF Schedule 4 (as amended by the Extension Agreement);

(iv) to reference the portfolio reconciliation requirements under EMIR rather than the corresponding CFTC requirements under the DF Act that are otherwise referenced in March 2013 DF Schedule 4;

(v) to establish that "Material Terms" as referenced in March 2013 Schedule 4 should be construed to mean the information required by the portfolio reconciliation requirements under EMIR;

(vi) to delete part V of March 2013 DF Schedule 4 that allows for reconciliation against swap data repository data, as this process is not part of the portfolio reconciliation requirements under EMIR;

(vii) to make it clear that any valuation used as part of the portfolio reconciliation requirement under EMIR is without prejudice to any other process that valuation may be used for;

(viii) to make it clear that failure to comply with the portfolio reconciliation arrangements in the Extension Agreement will not constitute an event of default, termination or other similar event;

(ix) to change the timing requirement to resolve discrepancies under the portfolio reconciliation arrangements to reflect the less prescriptive EMIR requirement on this point. This wording is optional;

(x) to include a provision that allows parties to agree to use agents or third party service providers. This wording is optional.

(b) Dispute Resolution

The dispute resolution requirements under EMIR are not clearly dealt with in the ISDA March 2013 DF Protocol. As a result, unlike with portfolio reconciliation, the approach taken in the Extension Agreement is to include almost in its entirety the dispute resolution provision from the ISDA July EMIR Protocol rather than amending provisions of the ISDA March 2013 DF Protocol.

The amendments are expressed to take effect from 15 September 2013 as that is the date that the dispute resolution requirements under EMIR will take effect.

For further information on the dispute resolution provision in the Extension Agreement, please see the FAQs on the ISDA July EMIR Protocol at http://www.isda.org/functional-areas/protocol-management/faq/15.

(c) *Confidentiality Waiver*

The ISDA July EMIR Protocol includes a confidentiality waiver provision. For further information on the confidentiality waiver provision in the ISDA July EMIR Protocol, please see the FAQs at http://www.isda.org/functional-areas/protocol-management/faq/15. As a result, an optional confidentiality waiver provision is included in the Extension Agreement. The confidentiality waiver provision included in the Extension Agreement is based on the one included in the ISDA July EMIR Protocol but is narrower in general scope. The wording gives the parties the option to extend the scope of the confidentiality waiver provision so that it covers the March 2013 DF Supplement Rules as well.

2. **Optional Termination**

As stated above, the aim of the Extension Agreement is to allow parties to extend the ISDA March DF Protocol to facilitate compliance with the portfolio and dispute resolution requirements of EMIR. Given continuing uncertainties in relation to recognition of equivalent regimes, it may be that at some point parties would be able to and would prefer to comply with the corresponding rules promulgated by the CFTC under the DF Act. In that case, parties would want to terminate the Extension Agreement and use the ISDA March DF Protocol again unamended. Section 2 of the Extension Agreement provides an optional termination provision with a number of suggested alternatives that could be used to achieve that.

3. **Miscellaneous**

The Extension Agreement includes a minimum number of boiler plate provisions. Parties may wish to include adding representation and/or other applicable standard boiler plate provisions.

EXECUTION

The Extension Agreement facilitates execution by agents on behalf of principals and multi-party execution by a number of principals. Square bracketed wording and additional text together with accompanying footnotes is included throughout the Extension Agreement to accommodate this.