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Dodd-Frank Documentation Initiative

The ISDA Protocol and ISDA Amend Webinar series \ August 2, 2012



Agenda



Welcome and intro

Katherine Darras \ General Counsel, Americas, ISDA

Relevance, structure and key terms of the DF Protocol

Lary Stromfeld \ Partner, Cadwalader, Wickersham & Taft

ISDA Amend Overview

Eric Maldonado \ Managing Director, Markit

CADWALADER

Cadwalader, Wickersham & Taft LLP
New York London Charlotte Washington Beijing

International Swaps and Derivatives Association

Dodd-Frank Initiative:

Overview of ISDA's DF August 2012 Protocol and relevance to Buy-side Counterparties

August 2, 2012

Lary Stromfeld
Jeffrey L. Robins

Impact on Buy-side

- CFTC business conduct rules regulate the activities of swap dealers (and major swap participants) in transacting swaps with buy-side institutions.
 - Direct impact is on swap dealers and MSPs but counterparties are also affected.
- SDs and MSPs are required to obtain certain information and must conduct intrusive diligence on their counterparties, unless the counterparty provides adequate representations and certain safe harbors are used.
- Buy-side must be prepared to provide information and assess ability and willingness to give various representations.
- Parties should prepare now to ensure that trading can continue uninterrupted.

CFTC's External Business Conduct Rule

- **Know Your Counterparty.** SDs must collect “essential facts” about counterparties.
- **True Name and Owner.** SDs must collect specified name and address information from counterparties, guarantors and control persons.
- **Disclosures.** Relationship and transaction-specific.
- **Confidentiality.** New regulatory standards for treatment of customer confidential information.
- **Counterparty Eligibility.** SDs must verify ECP and Special Entity status.
- **Suitability.** Requirements apply when an SD makes a “recommendation” to a counterparty.
- **Special Entities.** SDs subject to burdensome rules when advising or transacting with SEs.

Issues that require active Buy-side Preparation to Trade

- **Know Your Counterparty.**
 - All information needed to comply with rules and regulations.
 - Authority of persons to act for CP.
- **True Name and Owner.**
- **Counterparty Eligibility.**
 - CPs will need to identify how they meet ECP status.
- **Suitability.**
 - In order to avoid burdensome and time-consuming regulations, CPs must provide certain representations to qualify for “institutional suitability.” This includes policies and procedures and qualified agent requirements.
- **Duties to Special Entities.**

Reliance on Representations and Standardized Disclosures

- **CP Representations**

- SDs may reasonably rely on the representations of CPs in lieu of diligence if the CP agrees to update representations.

- **Disclosures**

- SDs may provide CPs with standardized disclosures for certain swaps (e.g. for swaps that are commonly used), if CP agrees to receive disclosures in this manner.
- Disclosures must be provided prior to trading.
- Parties to a swap must agree upon the methods for disclosure.
- Disclosures are not generally required for anonymous exchange- or SEF-based transactions.

“Know Your Counterparty”

- **In General**

- General CP information must be obtained before trading commences.
- The KYC rule does not apply for anonymous exchange-based transactions.

- **“Essential Facts”**

- Broadly defined, all facts necessary to comply with regulation, for SD risk management, and authority of CP personnel.

- **Financial Entities**

- Extremely complicated definition; end-users should consider immediately whether they meet this status.

True Name and Owner

- Most information will already have been provided at the time the relationship was established
- Rule requires specific information that may not have been provided in all cases, or that may have become outdated, including:
 - “principal occupation or business”;
 - name and address of any guarantors; and
 - name and address of persons exercising control with respect to positions of the counterparty.

Eligibility to Trade

- **Eligible Contract Participants (ECPs)**

- Status is required for all non-exchange-based swaps.
- Detailed, extensive definition. CPs must identify how they meet it.
- Particularly complex for small funds/commodity pools; SDs will be required to inquire into assets and, in some cases, types of trading activities.

- **Special Entities**

- Generally includes: (1) governmental entities (federal/state/local); (2) ERISA plans; (3) government plans; (4) endowments; (4) employee benefit plans electing for SE status.

Continuing Eligibility as an ECP after December 31

- ECP Status Changes for certain entities after December 31.
- The change will affect:
 - Commodity Pools that currently meet the ECP definition exclusively through 1a(18)(v) (e.g., having total assets in excess of \$10 million).
 - Commodity Pools entering into Retail FX transactions (pass-through statutory amendments).

Institutional Suitability (General)

- In general, an SD that makes a “recommendation” to a CP is subject to suitability requirements.
 - Rules similar to current FINRA rules.
 - Require “reasonable diligence” and a “reasonable basis” to establish suitability.
 - Will require CPs to request detailed information from CP to comply.

Institutional Suitability (Safe Harbor)

- **Safe Harbor Requirements**

- SD must determine that the CP or its agent is capable of “independently” evaluating the risks of a swap and is exercising independent judgment.
- Can be established through representations of CP or its agent, BUT
- CP must represent that it has complied in good faith with written policies and procedures reasonably designed to ensure that the persons responsible for evaluating recommendations and making trading decisions are capable of doing so.

Duties to Special Entities

- **Swap Dealers** are subject to heightened duties when acting either as counterparties or as advisors to **Special Entities**.
- **As Counterparty:** SD must establish a reasonable basis to believe the SE has a “qualified independent representative” or a “fiduciary.”
- **As Advisor** (applies when SD “recommends” a “tailored swap” to an SE): unless safe harbor met, SD must determine that a swap/strategy is in the “best interests” of the SE.

Duties to Special Entities: Safe Harbors

- As Counterparties

- SD must conduct independent diligence unless both the SE and its designated representative make specified representations to the SD (and each requires representations as to the existence of relevant written policies and procedures in most cases).

- As Advisors

- SD must conduct intrusive diligence to satisfy the “best efforts” standard, unless both the SE and its designated representative make specified representations and the safe harbor is otherwise satisfied.
- ERISA SEs: have two available safe harbors.
- Other SEs: limited safe harbor only

Other Issues – Time is of the Essence

- **Dealers required to provide pre-trade marks to counterparties.**
 - Could result in material trading delays.
- **Rapid Timing in Reporting Obligations.**
 - Trade reporting obligations require extremely fast determinations. SDs will need CPs to act with speed in order to meet obligations.
- **Disclosures, Diligence Requirements.**
 - Trading will be materially slowed by these various requirements.
 - Safe harbors can alleviate the burdens; but delays may be inevitable for certain types of swaps and swap counterparties.

Rules Yet to Come ...

- Beyond focus on near term requirements, buy-side participants should be mindful of forthcoming rules that will require preparation, including:
 - Margin;
 - Swap documentation;
 - Portfolio reconciliation and compression;
 - Swap confirmations.

ISDA August 2012 DF Protocol

- **Designed to supplement all master agreements under which swaps are traded between a swap dealer and another party.**
 - Covers ISDA Master Agreements and other agreements governing swaps.
 - Parties can expand to cover swaps not governed by existing agreements, such as “prime brokered” swaps and swaps entered into for clearing.
- **Covers the CFTC External Business Conduct Rules and certain other final CFTC rules**
 - Addresses standardized provisions under the rules.
 - Parties may need to further amend documentation to meet specific needs.

ISDA August 2012 DF Protocol (cont'd)

- **Parties incorporate provisions of the DF Supplement by exchanging Questionnaires.**
 - Questionnaires are completed and exchanged through the “ISDA Amend” platform.
- **The DF Protocol will consist of:**
 - **(1) Protocol** (mechanism for amending documents);
 - **(2) Supplement** (material terms being added);
 - Contains general terms, and schedules covering safe harbors that parties may elect to enter into.
 - **(3) Questionnaire** (information about parties, elections).
 - **(4) Terms Agreement** (for Swaps not governed by an existing master agreement)



ISDA Amend Overview

Eric Maldonado/Managing Director, Markit



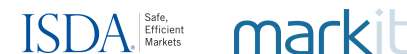
Overview



- The ISDA Dodd-Frank protocol provides an industry standard roadmap for updating swap documentation to comply with D-F rulemakings
- ISDA Amend will allow swap participants to amend multiple ISDA master agreements using a single online tool
- A joint ISDA Markit outreach program will provide guidance, education, and training to the industry regarding the D-F rulemakings, including the Business Conduct rules



Comply with Dodd-Frank and meet your deadlines



Amending your swap documentation is just a few clicks away

Background	Dodd-Frank rulemakings impose new obligations on swap dealers in a range of areas.
Requirement	Swap dealers must sign amendments to their ISDA documentation with impacted swap counterparties to become compliant with Dodd-Frank rules.
Summary	Rather than bilaterally agreeing to a set of amendments (the combination of which will be specific to the client), participants will adhere to an ISDA protocol, agreeing to contractual amendments published by ISDA and elected on the system. Markit will provide an online questionnaire that not only automates the matching of amendments to bilateral agreements but also maps that questionnaire back to other account data and documentation.
ISDA Markit Partnership	ISDA and Markit have developed a documentation-compliance tool to support market participants amend documentation covering over-the-counter derivatives. The move is intended to help counterparties comply with the Dodd-Frank Act, and will be used for amendments to documentation necessitated by other global regulatory changes.

ISDA mandate

- The ISDA D-F Protocol consists of multiple schedules which support original master agreements between Swap Dealers and their counterparties
- The ISDA Amend online questionnaire which accompanies the Protocol allows counterparties to revise their master agreements by applying the schedules once

General Questions

All participants answer Q1-5

Entity specific questions

ERISA
Answer Q7-9, 13

Swap Dealer
Answer Q10-12

Other (e.g. hedge fund)
Answer Q7-9

Special Entity
Answer Q7-9, 14-18



Amend ISDA master by accepting all or some of these schedules

Schedules
1, 2, 5, 6

Schedules
1-6

Schedules
1, 2, 3

Schedules
1, 2, 4



ISDA Amend Questionnaire

PCA PRINCIPAL TYPE

ERISA Special Entity ▾

REFERENCE NAME

Save Q

PCA Principal Type: ERISA Special Entity

Commodity Pool ?ELIGIBLE CONTRACT PARTICIPANT ?

i. Swap Dealer



ii. SBSD



iii. MSP



iv. SB-MSP



v. Financial Institution



vi. Insurance Company



vii. Investment Company



viii. Commodity Pool



ix. Large Entity



x. Hedge Entity ECP



xiii. Broker or Dealer is not a person



xiv. Broker or Dealer is a person



xv. AP of registered broker



xvi. Investment Bank Holding Co.



xvii. FCM is not a person



xviii. FCM is a person



xix. Floor Broker or Floor Trader



xx. Eligible Individual



xxi. Hedging Individual ECP



xxii. Other Eligible Person

Financial Entity ?SPECIAL ENTITY TYPE ?

i. Federal Agency



iv. Governmental Pla

ii. Municipal Agency



v. Endowment

iii. ERISA Special Entity



vi. Employee Benefit

ERISA SPECIAL ENTITY ELECTION ?

Agree to Schedule 5



Agree to Schedule 6

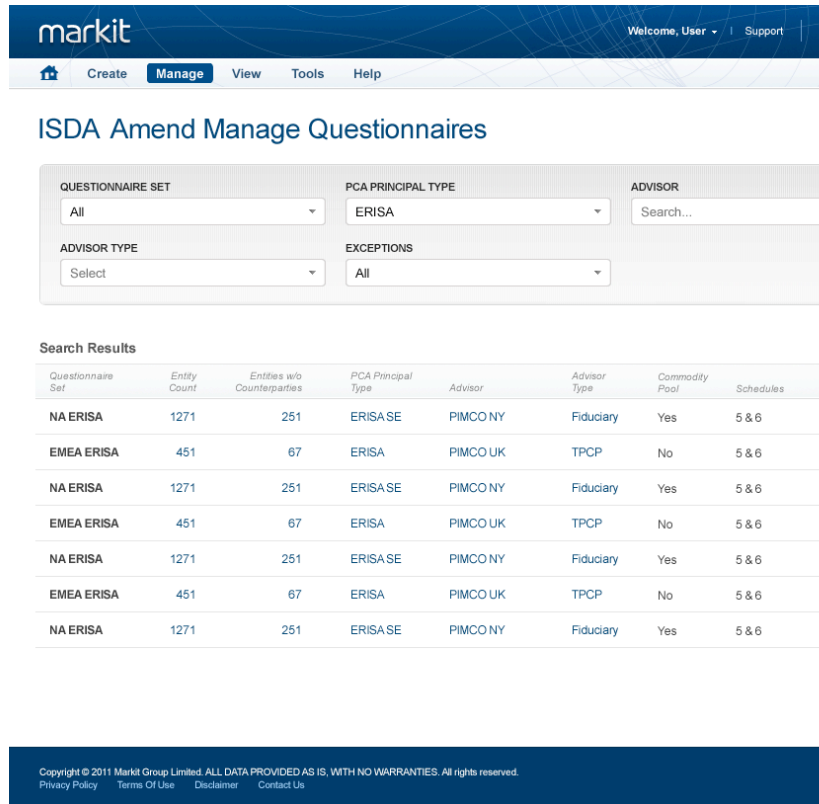
Fiduciary details are required if electing Schedule 5 or 6

Fiduciary Name

Address Line 1

Address Line 2

Answer questionnaire



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Create Manage View Tools Help

ISDA Amend Manage Questionnaires

QUESTIONNAIRE SET: All
PCA PRINCIPAL TYPE: ERISA
ADVISOR: Search...
ADVISOR TYPE: Select
EXCEPTIONS: All

Search Results

Questionnaire Set	Entity Count	Entities w/o Counterparties	PCA Principal Type	Advisor	Advisor Type	Commodity Pool	Schedules
NA ERISA	1271	251	ERISA SE	PIMCO NY	Fiduciary	Yes	5 & 6
EMEA ERISA	451	67	ERISA	PIMCO UK	TPCP	No	5 & 6
NA ERISA	1271	251	ERISA SE	PIMCO NY	Fiduciary	Yes	5 & 6
EMEA ERISA	451	67	ERISA	PIMCO UK	TPCP	No	5 & 6
NA ERISA	1271	251	ERISA SE	PIMCO NY	Fiduciary	Yes	5 & 6
EMEA ERISA	451	67	ERISA	PIMCO UK	TPCP	No	5 & 6
NA ERISA	1271	251	ERISA SE	PIMCO NY	Fiduciary	Yes	5 & 6

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The questionnaire is divided into three sections:

- Definitions
- Reference data information
- Principal Type selection, representations and schedules

Example of content layout

ISDA Amend

Select:

1. PCA Principle Type
2. Eligible Contract Participant
3. Conflict Flag will notify clients but will not avert selection
4. Special Entity Type
5. Schedules

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ISDA Amend Questionnaire [View DF Protocol](#)

PCA PRINCIPAL TYPE **1** REFERENCE NAME

ERISA Special Entity Enter Save Questionnaire

PCA Principal Type: ERISA Special Entity ☒

Commodity Pool ☐

2

ELIGIBLE CONTRACT PARTICIPANT **3**

I. Swap Dealer <input checked="" type="checkbox"/>	xiii. Broker or Dealer is not a person <input type="checkbox"/>
ii. SBSB <input type="checkbox"/>	xiv. Broker or Dealer is a person <input type="checkbox"/>
iii. MSP <input type="checkbox"/>	xv. AP of registered broker <input type="checkbox"/>
iv. SB-MSP <input type="checkbox"/>	xvi. Investment Bank Holding Co. <input type="checkbox"/>
v. Financial Institution <input type="checkbox"/>	xvii. FCM is not a person <input type="checkbox"/>
vi. Insurance Company <input type="checkbox"/>	xviii. FCM is a person <input type="checkbox"/>
vii. Investment Company <input type="checkbox"/>	xix. Floor Broker or Floor Trader <input type="checkbox"/>
viii. Commodity Pool <input type="checkbox"/>	xx. Eligible Individual <input type="checkbox"/>
ix. Large Entity <input type="checkbox"/>	xxi. Hedging Individual ECP <input type="checkbox"/>
x. Hedge Entity ECP <input type="checkbox"/>	xxii. Other Eligible Person <input type="checkbox"/>
xi. Employee Benefits Plan <input type="checkbox"/>	Enter Name
xii. Eligible Government Entity <input type="checkbox"/>	

Financial Entity **4** Select

SPECIAL ENTITY TYPE **4**

i. Federal Agency <input checked="" type="checkbox"/>	iv. Governmental Plan <input type="checkbox"/>
ii. Municipal Agency <input type="checkbox"/>	v. Endowment <input type="checkbox"/>
iii. ERISA Special Entity <input type="checkbox"/>	vi. Employee Benefit Plan <input type="checkbox"/>

ERISA SPECIAL ENTITY ELECTION **5**

Agree to Schedule 5 ☒ Agree to Schedule 6 ☐

Fiduciary details are required if electing Schedule 5 or 6

Fiduciary Name Enter

Address Line 1 Enter

Address Line 2 Enter

City Enter Phone Enter

State Select Fax Enter

Post Code/ZIP Enter Email Address Enter



Call to action

- Buy-side participants must be prepared to provide information to comply with Dodd-Frank rulemakings *OR* risk a halt to trading
- First steps include categorising accounts by PCA Principal type and preparing answers to Part 2 of the questionnaire for each account
- More rules to come
 - Participants should be mindful that beyond the focus of near-term requirements, more rules are on the way that will require preparation, including:
 - Margin for uncleared swaps
 - Swap documentation
 - Portfolio reconciliation, compression and dispute resolution



Benefits

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- Operational cost reduction
- Provides an easy to use technology-based solution
- Stores complete audit trail and reporting capabilities
- Leverages a secure and mature existing MDE infrastructure
- Extensible platform for wider utility moving forward
- No fee for buy-side users

Timeline of activity

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<i>July 17th</i>	<i>July 23rd</i>	<i>July 24th</i>	<i>July 24th– 25th</i>	Multiple Dates	August 13th	September 10th	October 15th
Target date to supply buy side names for distribution campaign	Bulk upload spreadsheet available for ISDA Amend questionnaire Part II Markit launches click-through ISDA Amend user sign-up	CFTC designating DTCC-SWIFT LEIs provider	ISDA Dodd Frank Event	E-mail Outreach	Markit Launches ISDA Amend questionnaire Part II ISDA August 2012 DF Protocol opens for adherence	Markit Launches ISDA Amend questionnaire Part III	Dodd-Frank business conduct rules compliance deadline

ISDA Amend Buy- Side Tool Kit

- The ISDA Dodd-Frank Protocol and ISDA Amend solution

ISDA Amend Process Flow

- Important ISDA, DTCC and ISDA Amend implementation dates through to the October 15th regulatory deadline
- ISDA Amend documentation upload process and platform functionality

ISDA Amend, Markit Built

- Dodd-Frank Compliance in 3 steps
- Step one: [Register](#)
- Step two: Onboard
- Step three: Match



Contact us

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For more information or for quick link access to ISDA Amend resources, contact:

Eric Maldonado

Managing Director
Markit

+1 212 205 1318

eric.maldonado@markit.com

Carmine Salute

Vice President
Markit

+1 212 488 4008

carmine.salute@markit.com

Stuart Billingham

Director
Markit

+65 6922 4227

stuart.billingham@markit.com

Chris Lynch

Associate Vice President
Markit

+44 207 064 6313

chris.lynch@markit.com



ISDA Amend Overview

Eric Maldonado/Managing Director, Markit

The ISDA-Markit Dodd-Frank Implementation page is on [isda.org](http://www.isda.org). In order to facilitate implementation of Dodd-Frank rulemakings, ISDA launched a page on their website to cover all presentations, documentation, audio playback related to this protocol.

Link: <http://www2.isda.org/dodd-frank-documentation-initiative/>

External Business Conduct Standards: Impact on Buy-Side and End-User Organizations

Webinar slide deck from June 27, 2012.

— [ISDA Dodd-Frank Documentation Initiative and August 2012 DF Protocol](#)

Common questions and a brief summary to assist in your consideration of the ISDA August 2012 Dodd-Frank (DF) Protocol

— [ISDA August 2012 DF Supplement \(DRAFT\)](#)

Cadwalader, Wickersham & Taft LLP DF Protocol - ISDA August 2012 Dodd-Frank Supplement

— [ISDA August 2012 DF Protocol Questionnaire \(DRAFT\)](#)

Cadwalader, Wickersham & Taft LLP DF Protocol - ISDA August 2012 Dodd-Frank Protocol Questionnaire.

— [ISDA August 2012 DF Protocol \(DRAFT\)](#)

Cadwalader, Wickersham & Taft LLP DF Protocol - ISDA August 2012 Dodd-Frank Protocol.

— [Dodd-Frank Documentation Compliance for Dealers](#)

Webinar slide deck from June 14, 2012.



Thank you.

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