

Economic Sanctions Programs & Derivatives

Guidance Note for Addressing Sanctions Issues in ISDA Documentation

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1. INTRODUCTION

1.1 Background

Since 2014, lawmakers in the United States, the European Union, the United Kingdom and elsewhere have expanded the use of targeted economic sanctions to achieve foreign policy objectives and have introduced new breeds of sanctions programs affecting some entities that are highly integrated into the global economy due to their participation in international trade and their networks of affiliated entities. The imposition of these sanctions by governments, either unilaterally or on a coordinated basis across jurisdictions, may cause uncertainty and potential economic harm for non-sanctioned entities that are participants and service providers in derivatives markets, and potentially reduce the efficacy of risk-reducing regulatory mechanisms.

In December 2019, ISDA published a white paper¹ exploring these issues in detail. The white paper proposed principles to ensure the continued safe operation of derivatives markets and minimize market disruption and economic consequences for non-sanctioned entities, while neither compromising foreign policy or national security goals, nor conferring any benefit on sanctioned entities or otherwise harming the objectives of any sanctions program.

The white paper examined issues for derivatives in sanctions regulations. While the focus of that work was to minimize consequences for non-sanctioned entities, it is recognized that sanctions will always present some consequences for parties that trade with entities that become sanctions targets. The question therefore arises how the parties allocate the risk of sanctions in their trading agreements.

While ISDA's standard form agreements, definitional booklets and confirmation templates include provisions that might be activated by sanctions², these documents have not specifically addressed the potential unique consequences of novel economic sanctions programs on derivatives counterparties or transactions, as further outlined in the white paper.

This guidance note considers when parties may wish to include specific provisions addressing sanctions issues in ISDA documentation, explains the purpose of these provisions and provides example provisions that can be adapted by parties for use in their negotiated agreements.

¹ Economic Sanctions Programs & Derivatives: Issues for Derivatives Transactions and Principles for Minimizing Impact on Non-sanctioned Entities and Avoiding Market Disruption (available at <https://www.isda.org/2019/12/18/economic-sanctions-programs-derivatives/>)

² For example, the no violation or conflict and consents representations in section 3(a) of the ISDA Master Agreements, the agreement to maintain authorizations and comply with laws in section 4 of the ISDA Master Agreements and the illegality termination event in section 6(b)(i) of the ISDA Master Agreements (and the associated early termination provisions of section 6).

This document is intended as an information resource only; it does not contain legal advice and should not be considered a guide to or explanation of all relevant issues or considerations in connection with the potential impact of sanctions on derivatives transactions. You should consult your legal advisors and any other advisor you deem appropriate in considering the issues discussed herein. ISDA assumes no responsibility for any use to which any of these materials may be put.

1.2 Purpose and Considerations

The terms of any additional provisions or amendments relating to sanctions, and the desirability or appropriateness of including them in ISDA documentation between counterparties, will depend on the facts and circumstances of the trading relationship, and are subject to the parties' bilateral negotiation.

This guidance note is not a recommendation that specific sanctions provisions be included as standard in all ISDA documentation. However, parties may wish to include such provisions to facilitate an orderly unwinding or divestment of transactions where they determine that (a) there is an appreciable risk that those transactions may be impacted by sanctions and (b) other standard or negotiated provisions in their trading documentation do not adequately address that risk.

Examples of factors which a party might take into account in determining whether such provisions may be appropriate include:

- The possibility of future sanctions applying to its counterparty and/or transactions (e.g., owing to the counterparty's jurisdiction or industry). Derivatives trading documentation (such as an ISDA Master Agreement) is typically entered into at the commencement of the relationship and governs for its entire duration (which may be many years, or even decades).
- The possibility of the trading relationship being impacted by the sanctions authorities of one or more jurisdictions, owing to factors including the places of business³ of the parties and their affiliated entities, the governing law of the contract, the places of business of any entities referenced in derivatives transactions or that support the parties' obligations under the relationship or the classes or types of asset to which their trading will reference.
- The possibility of payments or transfers under derivatives transactions or collateral arrangements being used by the receiving party for purposes that may contravene prohibitions or limitations on the use of funds or other assets under sanctions programs, e.g., if there is a jurisdictional or other nexus between the counterparty and sanctions targets.
- The possibility that derivatives transactions may be used to facilitate activities that may become prohibited by sanctions programs such as the issuance of new debt or new equity obligations by the counterparty or its affiliates.

1.3 Scope

This guidance note is intended to highlight how existing provisions of certain ISDA documentation may be utilized to address sanctions risks, and where amendments to such provisions may be considered appropriate in the context of a particular relationship or transaction. This guidance note is limited to considerations in respect of the following standard

³ In this respect, places of business may include where those entities are domiciled or registered or where they have physical offices or otherwise conduct business activities. Parties should also consider if their businesses could be affected by sanctions authorities that have the power to restrict their access to markets, trading venues or clearing services that are used in their businesses.

form ISDA master agreements and credit support documentation (“**Relevant Documents**”) only⁴, although such considerations may be similarly applicable in respect of other iterations of these documents:

ISDA Master Agreements

- 1992 ISDA Master Agreement (Multicurrency – Cross border) (the “**1992 MA**”)
- ISDA 2002 Master Agreement (the “**2002 MA**”, and together with the 1992 MA, the “**ISDA Master Agreements**”)

Credit Support Documentation

- 1994 ISDA Credit Support Annex (Security Interest –New York Law) and 2016 ISDA Credit Support Annex for Variation Margin (VM) (Security Interest –New York Law) (the “**NY CSAs**”)
- 1995 ISDA Credit Support Annex (Title Transfer –English law) and 2016 ISDA Credit Support Annex for Variation Margin (VM) (Title Transfer –English law) (the “**English CSAs**”)
- 1995 ISDA Credit Support Deed (Security Interest –English law) (the “**CSD**”, and together with the NY CSAs and English CSAs, the “**Credit Support Documents**”)

This guidance note specifically addresses circumstances where a counterparty or credit support provider (or relevant affiliates) becomes the target of a sanctions program. In these cases it is likely that the measures would impact the entire trading relationship or a specific sub-set of transactions identified by the relevant sanctions program, and not just a single transaction. Therefore, this guidance note is focused on terms that might be included in relationship-level agreements, such as the Relevant Documents listed above. These provisions would then apply to all the transactions (or, to the extent provided, to the specific sub-set of transactions affected by the sanctions).

Most derivatives transactions are subject to standardized terms that may be adjusted by the parties (but in most cases are not); other transactions are highly bespoke. This guidance note does not attempt to address non-standardized terms that parties might include for individual transactions or specific asset classes or product types.

1.4 **Reference Transactions**

In some circumstances a sanctions program may have an impact on transactions that are between non-sanctioned entities but which reference a sanctioned entity (or certain obligations or instruments of that sanctioned entity). These ‘reference transactions’, which are discussed in detail in the white paper, may include credit derivatives (such as credit default swaps), which are linked to debt obligations of a sanctioned entity and equity derivatives (such as equity

⁴ Including where such Relevant Documents may be incorporated by reference in a 'long-form' confirmation. In certain cases, counterparties may determine that the sanctions risks are elevated in respect of a specific transaction and elect to document that transaction pursuant to a long-form confirmation including specific amendments to the deemed ISDA Master Agreement and/or deemed Credit Support Document(s) to address those sanctions-related risks.

swaps, equity options and equity forwards), which are linked to shares of the sanctioned entity or share indices which include a sanctioned entity as a component.

Generally it is important for the terms of reference transactions to be the same with all counterparties rather than to attempt to include negotiated terms with an individual counterparty to address a sanctions issue. This avoids creating mismatches in trades that are intended to be fungible or to provide effective hedge positions. Instead, where sanctions programs may impact a substantial portion of a particular type of reference transaction, the adoption of a market-wide solution to ensure compliance may be preferable⁵. For these reasons, consideration of reference transactions is outside of the scope of this note. However, parties may wish to consider adapting the sanctions provisions outlined in this guidance note to include the relevant underlying issuers or obligors in such reference transactions in certain non-standard transactions (e.g., if the contemplated ‘reference transactions’ are bespoke arrangements involving underlying issuers closely connected to the counterparty). Parties should seek advice from their legal advisors and any other advisor they deem appropriate to ensure any such provisions address their specific concerns.

1.5 Limitations and Conflicts of Laws Issues

Sanctions issues in the context of derivatives transactions are complex and involve an interplay between different laws and regulations in different jurisdictions. The impact of any sanctions program on any relationship or transaction is highly fact-specific and requires careful consideration. While in some circumstances contractual provisions may be helpful in evidencing a party’s intention to comply (or to facilitate compliance) with certain aspects of a sanctions regime (such as due diligence), they do not override the requirements to comply with any applicable sanctions programs.

In addition, local law considerations may affect the extent to which parties can avail themselves of contractual provisions that permit them to take certain actions as a consequence of the imposition of extraterritorial sanctions. For example, Article 5 of the EU Blocking Regulation⁶ prohibits EU persons from complying (directly or indirectly) with any requirement or prohibition based on or resulting (directly or indirectly) from certain US sanctions targeting Iran and Cuba. Section 7 of the German Foreign Trade Ordinance (*Außenwirtschaftsverordnung* - “AWV”) prohibits German entities and nationals from complying with sanctions imposed by jurisdictions other than the UN, the EU and Germany where the UN, EU and Germany have not themselves imposed sanctions against the same target. Where parties believe that such laws may apply to their derivatives trading relationship and/or any transactions they enter into, such parties may wish to consider limiting the scope of particular sanctions provisions solely to the extent that those provisions would be permissible under those relevant laws. In all cases, advice should be sought on the impact and effectiveness of any sanctions-related provisions in particular circumstances.

This guidance note (and the information contained within it) is not intended to be exhaustive or comprehensive. It does not constitute legal or other advice, and must not be relied upon, whether as legal advice or otherwise. Example provisions are included for illustrative purposes only and do not take into account any facts or circumstances that may be relevant for any

⁵ E.g., the 2017 ISDA Venezuela Additional Provisions Protocol, which excluded certain sanctioned debt instruments from credit default swaps written on Venezuela and PDVSA.

⁶ Council Regulation (EC) No. 2271/96

particular party or trading relationship. For convenience, the example provisions are drafted on the basis that one party to a Relevant Document (referred to as “Party A”) is concerned with the impact of sanctions affecting its trading relationship with its counterparty (referred to as “Party B”). If using the examples, parties will be required to adapt them to suit their particular circumstances, including if they wish to make any of the provisions apply on a mutual basis.

1.6 Terminology

In this guidance note the imposition of sanctions is referred to as a “**sanctions program**” and any legal or regulatory body that imposes or administers a sanctions program as a “**sanctions authority**”. Any entity that becomes the target of a sanctions program is referred to as a “**sanctioned entity**” and any other entity that is required to comply with a sanctions program as a “**non-sanctioned entity**”. Capitalized terms used, but not defined, in this guidance note have the meanings ascribed to them in the Relevant Documents.

2. DEFINITIONS

If parties elect to insert additional provisions in Relevant Documents to address sanctions issues, they should consider including definitions of key concepts that clarify the scope of sanctions measures that may be, or become, relevant in the context of the trading relationship. These definitions may then be used throughout the applicable sanctions provisions, streamlining drafting, minimizing inconsistencies and aiding negotiation.

Additional definitions may be included in Part 5 of the Schedule to either of the ISDA Master Agreements, either along with the relevant sanctions provisions or in a separate definitions section.

In particular parties may consider including the following defined terms:

2.1 “Sanctions Authority”

This should include the sanctions authorities that have the power to enact or administer sanctions programs that may affect the trading relationship or for which the trading relationship may have adverse consequences for the non-sanctioned entity. In making such a determination, a party may wish to consider not just the authorities which have direct jurisdiction over it but also authorities in respect of which non-compliance with sanctions could breach that party’s regulatory obligations or otherwise have a material impact on that party’s business or reputation (e.g., access to its markets or infrastructure) by means of so-called ‘secondary sanctions’ measures.

The term could be defined either (a) generally, by reference to governmental authorities responsible for the administration and/or enforcement of sanctions, or (b) specifically, by specifying the applicable authorities or jurisdictions (or by a combination of these approaches). If a broader non-exhaustive definition is used, then the parties may consider qualifying the operative sanctions provisions by reference to the impact that the relevant action may have.

Example provision (1992 MA or 2002 MA):

*“**Sanctions Authority**” means [any authority responsible for the imposition, administration and/or enforcement of sanctions, including without limitation]: [(a) the United Nations Security Council; (b) the United States (including the US Department of Treasury Office of Foreign Assets Control and the US State Department); (c) the United Kingdom (including HM Treasury Office of Financial Sanctions Implementation); (d) the European Union and the Member States of the European Union; [and (e) the sanctions authorities of the place of incorporation or establishment of Party A and Party B]⁸, and, in each case, any successor to, or replacement for, any such authority.”*

⁷ Insertion of square bracketed language provides a broad non-exhaustive list of sanctions authorities.

⁸ Insertion of square-bracketed language addresses circumstances where parties are subject to sanctions authorities not listed by virtue of their place of incorporation or establishment.

2.2 “Sanctions”

As sanctions programs vary widely across different sanctions authorities and may be novel, it is important that the definition of sanctions is drafted with sufficient breadth to ensure that any sanctions program would be within its scope. The operative sanctions provisions can then be drafted to further limit the scope if desired.

Example provision (1992 MA or 2002 MA):

*“**Sanctions**” means any economic or financial sanctions, trade embargoes or other similar prohibitions or restrictions on activity pursuant to any laws, regulations, orders or licenses imposed, administered or enforced from time to time by a Sanctions Authority.”*

2.3 “Sanctions Target”

The concept of a “sanctions target” is commonly used to address the fact that sanctions programs may be introduced to restrict dealings with specific named entities or dealings with any entity within a certain class (e.g., a country or industrial sector within that country). In addition, an existing sanctions program may be extended to include new entities from time to time. Any of these approaches has the potential to impact the trading relationship with a counterparty so it is important that any sanctions provisions contemplate each scenario.

The definition should include any existing sanctions programs and/or designations that could impair the party’s ability to trade derivatives with its counterparty, as well as future programs enacted by any relevant sanctions authority (either directly targeting the entity or by virtue of the jurisdiction in which the entity is located). Existing programs (such as the relevant sanctions lists maintained in the US and the European Union) can be specifically listed in the definition or instead the provision can simply cross-refer to the defined sanctions authorities.

The scope of sanctions programs targeted at a particular entity or individual may extend to other individuals or entities connected with that person. Therefore, a trading relationship may be affected even if the counterparty is not specifically identified by the relevant sanctions authority, e.g., if the counterparty is owned or controlled by a sanctions target. The connected persons to which a sanctions programs may extend may differ between sanctions authorities and so advice should be sought to ensure that the definition encapsulates those entities or persons that would be within the scope.

Example provision (1992 MA or 2002 MA):

*“**Sanctions Target**” means any entity or person: (a) listed in any Sanctions-related list maintained by any Sanctions Authority; (b) located, organized or resident in a country or territory that is the subject or target of comprehensive Sanctions⁹; or (c) which otherwise is the target of any Sanctions, including, without limitation, any entity or person controlled (howsoever such control or any equivalent concept is determined in accordance with the relevant Sanctions) or 50 percent or more owned in the aggregate, directly or indirectly, by*

⁹ If desired, parties may wish to consider including a separate definition of "Sanctioned Jurisdiction" which includes a list of those jurisdictions that are known to be subject to relevant sanctions programs at the time of entry into the Relevant Document and provides for the extension to new jurisdictions from time to time.

any target or targets of Sanctions (irrespective of whether or not any such entity is an Affiliate of the target of such Sanctions).”

3. ADDITIONAL REPRESENTATIONS

Section 3 of the ISDA Master Agreements contain certain basic mutual representations. Although these include a representation that the execution and delivery of the agreement by a party and performance of that party's obligations "do not violate or conflict with any law applicable to it", this representation would not generally serve to confirm that such execution, delivery or performance would comply with any sanctions program because typically such sanctions laws would apply to the other party and not the party making the representation. Therefore, parties may wish to consider whether to include additional representations to address sanctions issues where appropriate in light of their assessment of the factors set out in Paragraph 1.2 (*Purpose and Considerations*) above.

Additional representations may be included, either by including them as "Additional Representations" in Part 4 of the Schedule to the 2002 MA or by including a separate provision in Part 5 of the Schedule to the 1992 MA. Parties may wish to consider whether any representation should only be made when the agreement is entered into or should also be deemed to be repeated, either on the entry into new transactions or at all times. For example, if the agreement specifies that representations as to the sanctions status of a counterparty are deemed to be made on a repeating basis then they may be breached if sanctions are introduced or broadened after the ISDA Master Agreement has been entered into and during the life of the trading relationship.

Under the standard language of Section 5(a)(iv) of an ISDA Master Agreement, any representation that proves to be incorrect or misleading in any material respect when made or repeated or deemed to be made or repeated constitutes an event of default. Parties should consider whether this is the appropriate consequence in the context of sanctions representations in all cases. Parties may opt to carve-out representations relating to potential future actions of sanctions authorities from the misrepresentation event of default and instead choose to rely on the sanctions termination event provisions discussed below.

As noted above, whether the inclusion of representations could evidence a party's intention to comply with sanctions or mitigate any potential liability for alleged non-compliance with sanctions will depend on the approach of the relevant sanctions authority and the specific facts and circumstances. Parties should therefore carefully consider such representations as part of their overall risk-based approach and legal advice should be taken to understand the consequences under any applicable regime and under particular circumstances.

3.1 Sanctions status of counterparty

Although market participants will be expected to have conducted due diligence and 'know-your-counterparty' checks in respect of any potential counterparty to ensure that it is not a target of any applicable sanctions, they may also consider including a representation to that effect.

The inclusion of an appropriately considered representation may serve to: (a) encourage the counterparty to disclose any relevant issues that may not have been found by the due diligence process; (b) provide an ongoing obligation to confirm the position; and (c) provide contractual remedies if the representation later proves to be incorrect. A sanctions representation which if breached leads to an event of default or termination event in accordance with the agreement may facilitate the orderly unwind of transactions with minimal disruption to the market.

Although the exact wording of any such representation will depend on the circumstances of both parties, a suitable representation may make reference to the applicable definitions discussed in Paragraph 2 (*Definitions*) above (i.e., Sanctions Authorities, Sanctions and Sanctions Target).

Example provision (1992 MA):

“**([●]) Additional Representation.** [Party B] represents to [Party A] [(which representation will be deemed to be repeated by Party B [on each date on which a Transaction is entered into][at all times when any obligations (actual or contingent) are owed under this Agreement)], that (a) neither it nor any director, officer, agent, employee, or any person acting on behalf of it is a Sanctions Target; (b) it is entering into this Agreement as principal and not on behalf of any other person or entity that is a Sanctions Target.”

Example provision (2002 MA):

“**([●]) Additional Representation.** For the purpose of Section 3 of this Agreement, the following will constitute an Additional Representation in respect of [Party B]:-

[Party B] represents to [Party A] [(which representation will be deemed to be repeated by Party B [on each date on which a Transaction is entered into][at all times when any obligations (actual or contingent) are owed under this Agreement)], that (a) neither it nor any director, officer, agent, employee, or any person acting on behalf of it is a Sanctions Target; (b) it is entering into this Agreement as principal and not on behalf of any other person or entity that is a Sanctions Target.”

3.2 Use of transaction or proceeds

A representation can be used to provide a party with comfort that any payments or deliveries it makes to its counterparty under transactions (or any collateral it provides pursuant to a Credit Support Document) or the transactions themselves will not be used to finance or otherwise facilitate any business of any sanctions target, or in any way which would violate (or cause the party to violate) applicable sanctions.

Example provision (1992 MA):

“**([●]) Additional Representation.** . [Party B] represents to [Party A] [(which representation will be deemed to be repeated by Party B [on each date on which a Transaction is entered into][at all times when any obligations (actual or contingent) are owed under this Agreement)], that it shall not directly or indirectly (a) use (or agree to use) any Transaction or any cash, securities or other deliveries received by it pursuant to this Agreement (including under any Credit Support Document), or (b) lend, contribute or otherwise make available such cash, securities or other deliveries received by it pursuant to this Agreement to or for the benefit of [any Sanctions Target or] any [other] person or entity, to finance or facilitate activities or business of or with any Sanctions Target or in any other manner which would violate Sanctions”

Example provision (2002 MA):

“**([●]) Additional Representation.** For the purpose of Section 3 of this Agreement, the following will constitute an Additional Representation in respect of [Party B]:-

[Party B] represents to [Party A] [(which representation will be deemed to be repeated by Party B [on each date on which a Transaction is entered into][at all times when any obligations (actual or contingent) are owed under this Agreement)], that it shall not directly or indirectly (a) use (or agree to use) any Transaction or any cash, securities or other deliveries received by it pursuant to this Agreement (including under any Credit Support Document), or (b) lend, contribute or otherwise make available such cash, securities or other deliveries received by it pursuant to this Agreement to or for the benefit of [any Sanctions Target or] any [other] person or entity, to finance or facilitate activities or business of or with any Sanctions Target or in any other manner which would violate Sanctions”

3.3 Ancillary activities

Some sanctions programs prohibiting dealings in certain debt or equity instruments have also included prohibitions on the provision of services in support, assistance in issuance or other similarly described facilitation activities in respect of those instruments. Although the scope of such prohibitions in the context of derivatives trading relationships is not always clear, a party may be concerned that a derivative transaction could be entered into by its counterparty in connection with debt or equity financing (e.g., to hedge interest rate risk or exchange the proceeds into another currency).

A representation can be used to provide a party with comfort that any transactions entered into under the Agreement will not be used to facilitate activities that are the subject of sanctions. Such a representation may be particularly appropriate where the counterparty is already the subject of limited sanctions in connection with dealings in its debt or equity, in which case it could be tailored to the particular restrictions of the relevant sanctions program¹⁰.

Example provision (1992 MA):

*“([●]) **Additional Representation.** [Party B] represents to [Party A] on each date on which a Transaction is entered into [and at all times when any obligations (actual or contingent) are owed with respect to that Transaction], that such Transaction is not connected to the issuance or incurrence of, or performance of any obligations under, any debt or equity obligation which is the target of any restrictions on dealings by any Sanctions Authority.”*

Example provision (2002 MA):

*“([●]) **Additional Representation.** For the purpose of Section 3 of this Agreement, the following will constitute an Additional Representation in respect of [Party B]:-*

[Party B] represents to [Party A] on each date on which a Transaction is entered into [and at all times when any obligations (actual or contingent) are owed with respect to that Transaction], that such Transaction is not connected to the issuance or incurrence of, or performance of any obligations under, any debt or equity obligation which the target of any restrictions on dealings by any Sanctions Authority.”

¹⁰ We note that there may be some overlap of the scope of this 'ancillary activities' representation and limb (b) of the 'use of transaction or proceeds' representation in the preceding section. However, in light of the recent focus of sanctions programs on debt and equity instruments, parties may wish to also include this 'ancillary representation' to provide specific comfort that transactions are not linked to any such instruments that are or become the target of sanctions.

4. TERMINATION EVENTS

The terms of the ISDA Master Agreement provide that some or all transactions may be terminated (or closed out) in certain circumstances. At the time of close out, each of those transactions will have a value to one party or the other, depending on the present value of future expected payments or deliveries under those transactions at that time. Upon any such close out: (i) the current value of the terminated transactions must be assessed by reference to the cost or benefit to the terminating party of replacing those transactions in the market, and (ii) a single net payment is calculated which reflects the net market value of all terminated transactions, (the close out amount) and any amounts that fell due before the close out but were unpaid. Any posted collateral may be applied to satisfy that payment and any remainder becomes due from one of the parties to the other.

Both the 1992 MA and the 2002 MA include an Illegality Termination Event which, subject to certain conditions, permits parties to terminate some or all of the transactions under the relevant agreement if it becomes illegal for one or both of the parties to perform their obligations¹¹.

In some cases, the Illegality Termination Event may operate to permit parties to close out their transactions in an orderly manner in such a scenario. However, parties may wish to consider the inclusion of a specific Additional Termination Event to specifically address sanctions issues, including for the following reasons:

- A sanctions program may not make performance of obligations strictly illegal but continuing with the trading relationship may be impractical or undesirable, e.g., if:
 - the party is prohibited from using market infrastructure or its employees are prohibited from performing their functions;
 - the party would be subject to secondary sanctions impacting other parts of its business; or
 - continued performance would conflict with other legal, regulatory or contractual obligations
- A sanctions program may allow for a wind-down period during which performance of obligations remains lawful but the trading documentation does not provide a party with the unilateral ability to terminate the transactions prior to the end of that wind-down period;
- It may not be practical or appropriate to comply with contractual preconditions to termination for Illegality contained in the ISDA Master Agreements, such as notice

¹¹ The 2002 MA (but not the 1992 MA) also includes a Termination Event for a Force Majeure Event which applies where, after giving effect to any other applicable provision, fallback or remedy in the agreement, a party (or its credit support provider) is prevented from making or receiving payments or deliveries or complying with other material obligations (or it is impossible or impracticable to do so) "by reason of force majeure or act of state" that is beyond the control of the party and cannot be overcome using all reasonable efforts. The requirements for a Force Majeure Event are fact-specific and relatively untested, therefore it is difficult to know in the abstract if a Force Majeure Event would be applicable with respect to any specific sanctions scenario.

requirements, obligations to attempt to transfer obligations to another office or affiliate or waiting periods.

- The standard Illegality termination event is drafted to balance the interests of the parties if there is a change in law on the basis that neither party is responsible for that event. These provisions permit either party to terminate the relevant transactions if one party's obligations have become unlawful to perform and the other party whose obligations are unaffected by the change in law determines the relevant termination payment at its side of the market. This allocation of risk may not be considered appropriate in the context of sanctions-related events.
- A sanctions Additional Termination Event may provide for termination where other sanctions-related undertakings provided for in the agreement have been breached

Therefore, a specific Additional Termination Event may provide a party with greater certainty over the management of its trading relationship in circumstances where sanctions become relevant.

An Additional Termination Event can be inserted into Part 1(h) of the Schedule to the 1992 MA or Part 1(g) of the Schedule to the 2002 MA. However, parties may prefer to express this provision as an additional Event of Default, rather than as an Additional Termination Event, or to bifurcate the provision between events which constitute an Additional Termination Event and those which would constitute an Event of Default. This is a matter of negotiation between the parties and outside of the scope of this guidance note.

Example provision (1992 MA or 2002 MA):

"([h/g]¹²) Additional Termination Event will apply. Each of the following will constitute an Additional Termination Event:-:

- [(i) [Party B] or any director, officer, agent, employee, or any person acting on behalf of [Party B]:*
 - (A) is or becomes a Sanctions Target; or*
 - (B) acts directly or indirectly on behalf of, a Sanctions Target.*
- (ii) Any cash, securities or other deliveries received by [Party B] pursuant to the Agreement (including under any Credit Support Document) is made available by [Party B], directly or indirectly, to or for the benefit of a Sanctions Target or otherwise is, directly or indirectly, applied by Party B or any Transaction is used by Party B, to finance or facilitate any activity or transaction of or with a Sanctions Target or otherwise in a manner or for a purpose prohibited by any Sanctions.]¹³*
- (iii) As a result of any Sanctions it becomes impossible, impracticable or unlawful under any applicable law, on any day, or it would be impossible, impracticable or unlawful if*

¹² This will typically be paragraph (h) under Part 1 of the 1992 MA or paragraph (g) under Part 1 of the 1992 MA but should be integrated with any other Additional Termination Events in the relevant agreement.

¹³ If appropriate repeating sanctions representations are included, parties may consider deleting limbs (i) and (ii) and instead relying on the breach of the relevant representation giving rise to a Sanctions Termination Event and/or an event of default.

the relevant payment, delivery or compliance were required on that day, for [Party A] or any Credit Support Provider of [Party A] to perform any absolute or contingent obligation to make a payment or delivery in respect of this Agreement or any Credit Support Document, to receive a payment or delivery in respect of this Agreement or to comply with any other provisions of this Agreement or any Credit Support Document, Document as determined by [Party A] in its reasonable judgment.

- (iv) Any announcement is made by, or on behalf of, any Sanctions Authority that it intends to implement any Sanctions that would, once implemented, give rise to any of the circumstances described in (i), (ii) or (iii) above.*
- (v) [Any representation under Part 5([●])¹⁴ of this Agreement made or repeated or deemed to have been made or repeated by [Party B] proves to have been incorrect or misleading in any [material]¹⁵ respect when made or repeated or deemed to have been made or repeated.]¹⁶*

*(any such event a “**Sanctions Termination Event**”)*

For the purpose of the foregoing Additional Termination Events, [Party B]¹⁷ shall be the sole Affected Party and [all Transactions]¹⁸ shall be Affected Transactions.”

¹⁴ Insert relevant cross-reference to additional sanctions representations

¹⁵ Although the misrepresentation event of default includes this materiality threshold, parties may consider omitting it in the context of Sanctions Termination Events if sanctions policies require a stricter approach.

¹⁶ Consider including where sanctions representations are carved out of the misrepresentation event of default

¹⁷ If parties wish to permit either party to terminate following a Sanctions Termination Event, then this language may be modified to make both parties "Affected Parties" for the purposes of Section 6(b) of the Master Agreement only.

¹⁸ Although the expectation is that a Sanctions Termination Event would impact the whole trading relationship such that the Non-affected Party would want to close out all transactions, it is possible that sanctions may be limited to certain types of transaction and/or asset class so parties may wish to consider including the possibility of the "Affected Transactions" being only those transactions that the Non-affected Party determines would be impacted by the Sanctions.

5. DEFERRAL OF PAYMENTS AND DELIVERIES

The parties may wish to consider if it is appropriate to include the non-occurrence of a Sanctions Termination Event as an additional condition precedent to applicable payment and delivery obligations under an ISDA Master Agreement. This may serve to (a) prevent the non-sanctioned party from having to make a payment to a sanctioned entity where it is either not permitted to do so by the relevant sanctions or would not wish to do so as from a credit risk perspective and (b) prevent the non-sanctioned entity from triggering a failure to pay Event of Default in circumstances where it is not permitted to make a payment or delivery by the relevant sanctions.

This additional provision may be included in Part 5 of the Schedule to either of the ISDA Master Agreements, either along with the other relevant sanctions provisions or in a separate section. In addition, in respect of the NY CSAs and the CSD, if all Additional Termination Events are not already included as a “Specified Condition” in the document, parties may wish to consider including the Sanctions Termination Event as a “Specified Condition” so that the equivalent condition precedent found in the NY CSA or the CSD (as applicable) would also apply to a party’s obligations to post collateral under these documents. This is not required under the English CSAs, where the posting obligations are already subject to the condition precedent in the relevant ISDA Master Agreement.

Example provision (1992 or 2002 MA):

“([●]) For the purpose of Section 2(a)(iii)(3) of this Agreement, each obligation of [Party A] under Section 2(a)(i) is subject to the further condition precedent that no Sanctions Termination Event has occurred and is continuing.”

6. DETERMINATION AND PAYMENT OF TERMINATION PAYMENTS

The ability to close out transactions and determine the net settlement amount if the relevant event or circumstance arises is a vital tool for the reduction of credit risk and the availability of credit in the financial markets. Derivatives transfer risk by providing for future payment or delivery obligations, the size and direction of which will depend on the future price or rate of the underlying asset or variable. The actual future obligations under derivatives transactions are therefore uncertain by design.

The current value of derivatives transactions is based on the present value of the *expected* size and direction of those future obligations, and both those expectations of size and direction and the calculation of the present value of those expectations may fluctuate as market prices and rates change. Because of this uncertainty, if a non-sanctioned entity were not able to require performance or close out a transaction with a party that becomes a sanctions target (or to collect margin), it could have an open-ended, unquantifiable exposure on its balance sheet. The close-out process allows the non-sanctioned entity to manage this risk, by converting the current value of the outstanding transactions into a single, definite cash amount. If it wishes, the non-sanctioned entity could also consider replacing the risk position by entering into new transactions with one or more other non-sanctioned entities. On the other hand, closing out the transactions promptly deprives the sanctioned party of its desired risk exposure at a time when it is likely to have limited opportunity to replace the position. In addition, if any net payment owed to the sanctioned entity following the close-out process must be placed into a blocked account, the sanctioned entity would be prevented from realizing the value of its positions for the duration of the time it is the subject of sanctions.

However, under some sanctions programs, the ability of a non-sanctioned entity to close out transactions under ISDA Master Agreements in this way (including the application and/or return of any collateral posted to the non-sanctioned entity) may require the non-sanctioned entity to obtain a license from the relevant sanctions authority (or there may at least be uncertainty as to the non-sanctioned entity's ability to do so absent such a license). Obtaining a license may take some time, during which the non-sanctioned entity would be subject to the additional exposure to the sanctions target arising from the transactions remaining in place (including in respect of any collateral posted to the sanctioned entity).

In light of this, a party may wish to include provisions to address the risk that sanctions make it unlawful or impractical to continue performance of a contract while at the same time prevent it from being able to avail itself of the close-out mechanisms. Although the condition precedent discussed in Paragraph 5 (*Deferral of Payments and Deliveries*) above protects against having to continue to perform the contract while the sanctions remain in place, it does not eliminate the risk exposure as those obligations are only suspended for a period of time during which market movements may increase that exposure. Including additional provisions that give the non-sanctioned entity the ability to at least crystallize the value of any termination payment upon the imposition of sanctions (even if the sanctions prevent the settlement of that payment) could serve to reduce this open-ended liability of the non-sanctioned entity.

These additional provisions may be included in Part 5 of the Schedule to either of the ISDA Master Agreements, either along with the other relevant sanctions provisions or in a separate section.

Example provision (1992 MA):

“([●]) Early Termination following a Sanctions Termination Event. If a Sanctions Termination Event occurs¹⁹:

- (i) the Non-affected Party shall not be required to give the notice contemplated by Section 6(b)(i) of this Agreement if and for so long as (in the Non-affected Party’s reasonable judgment) the relevant Sanctions do not permit such notice to be given;*
- (ii) if the Sanctions Termination Event Suspension Condition (as defined below) is not satisfied, the Non-affected Party may designate an Early Termination Date in respect of the Affected Transactions in accordance with Section 6 of the Agreement;*
- (iii) if the Sanctions Termination Event Suspension Condition (as defined below) is satisfied:*
 - (A) the Non-affected Party may give written notice to the other party specifying the Crystallization Date; provided that the Non-affected Party shall not be obliged to give such notice if and for so long as (in the Non-affected Party’s reasonable judgment) the relevant Sanctions do not permit such notice to be given;*
 - (B) on or as soon as reasonably practicable following the Crystallization Date (as defined below), the Non-affected Party shall:*
 - (I) make the calculations contemplated by Section 6(e) of this Agreement that it would be required to make as if (x) an Early Termination Date in respect of all Affected Transactions had have resulted from the Sanctions Termination Event, and (y) all references to “Early Termination Date” (including in the associated definitions) in Section 6(e) of this Agreement were deemed to be references to “Crystallization Date”, and*
 - (II) prepare a statement containing the information set forth in 6(d)(i)(1) of this Agreement and provide that statement to the Affected Party; provided that the Non-affected Party shall not be obliged to provide such statement to the Affected Party if and for so long as (in the Non-affected Party’s reasonable judgment) the relevant Sanctions do not permit such statement to be given;*
 - (C) upon the occurrence of the Sanctions Termination Event Release Condition (as defined below), the Non-affected Party may designate an Early Termination Date in respect of the Affected Transactions in accordance with Section 6 of the Agreement; and*
 - (D) notwithstanding Section 6(e) of this Agreement, the amount due in respect of the Early Termination Date designated in respect of the Affected Transactions under (C) above shall be the amount determined by the Non-affected Party in respect of the Crystallization Date under (B) above, as adjusted for any*

¹⁹ Note that this example assumes that the Sanctions Termination Event provisions have been included in the agreement. Where parties wish to use these provisions without including the Sanctions Termination Event (or wish the provisions to apply in circumstances that would not constitute a Sanctions Termination Event) then an alternative formulation will be necessary to import the relevant concepts, and references to the "Non-affected Party" in these provisions would need to be amended to reflect the relevant party that is entitled to take the specified action under the agreement.

payments made between the parties or placed into blocked accounts during the period from (but excluding) the Crystallization Date to (and including) the Early Termination Date [plus (if, and to the extent, permitted by the relevant Sanctions) interest accrued on such amount from (and including) the date of the occurrence of the Crystallization Date to (but excluding) the date on which it is paid at [●]²⁰]²¹;

Defined terms used in this section but not otherwise defined herein shall have the following meanings:

“Crystallization Date” *means any Local Business Day designated by the Non-affected Party during the period from and including the date of the occurrence of the Sanctions Termination Event; provided that if (in the Non-affected Party’s reasonable judgment) the relevant Sanctions do not permit the Non-affected Party to designate a Crystallization Date, then the Crystallization Date will occur [immediately upon the occurrence of the Sanctions Termination Event and as of the time immediately preceding the time as of which the relevant Sanctions that gave rise to the Sanctions Termination Event took effect]²²[as determined by the Non-affected Party, acting in a commercially reasonable manner, following the Non-affected Party’s determination that the Sanctions Termination Event has occurred]²³.*

“Sanctions Termination Event Release Condition” *means (in the Non-affected Party’s reasonable judgment) that either (x) permission is granted by the relevant Sanctions Authority to designate an Early Termination Date in respect of the Affected Transactions in accordance with Section 6 of this Agreement or (y) the relevant Sanctions no longer prohibit the Non-affected Party from designating an Early Termination Date in respect of the of the Affected Transactions in accordance with Section 6 of this Agreement,*

“Sanctions Termination Event Suspension Condition” *means (in the Non-affected Party’s reasonable judgment) that at any time following the occurrence of a Sanctions Termination Event the relevant Sanctions would not permit the Non-affected Party to designate an Early Termination Date in respect of the Affected Transactions in accordance with Section 6 of this Agreement.*

([●]) Payments on Early Termination following a Sanctions Termination Event. *If a Sanctions Termination Event occurs and the Sanctions Termination Event Suspension Condition is not satisfied but the relevant Sanctions do not permit payment of any amount calculated as being payable by the Non-affected Party to the Affected Party in respect of any Early Termination Date, then such amount may, at the option of the Non-affected Party, be placed into a blocked account to the extent permitted by the relevant Sanctions or not paid at all until such time as (in the Non-affected Party’s reasonable judgment) either (a) permission is granted by the relevant Sanctions Authority to make or release such payment or (b) the Sanctions no longer prohibit payments of such amount or require such payments to be held in a blocked account [, provided that any such amount not paid to the Affected Party shall (if, and*

²⁰ Include an appropriate interest rate.

²¹ Include if parties agree that amount should accrue interest.

²² Include if parties wish to crystallize the amount automatically as of the time immediately prior to the imposition of the relevant sanctions.

²³ Include if parties do not wish the amount to crystallize automatically in these circumstances.

to the extent, permitted by the relevant Sanctions) accrue interest at [●]²⁴ from (and including) the Early Termination Date to (but excluding) the date paid²⁵. For the avoidance of doubt, nothing herein shall be understood or construed to create any obligation on the Non-affected Party that the Non-affected Party otherwise would not have.

([●]) Credit Support following a Sanctions Termination Event. To the extent any Credit Support Document provides for credit support, such credit support shall be maintained in accordance with the terms of such Credit Support Document (to the extent permitted by the relevant Sanctions and through the facility of blocked accounts to the extent necessary and permitted) until such time as the Affected Transactions are terminated, whereupon such credit support, whether held by or for one party or the other, shall be accounted for, reconciled with the calculation of the amount calculated in respect of any Early Termination Date under Section 6(e), and transferred or retained, consistently with such calculation.”

Example provision (2002 MA):

“([●]) Early Termination following a Sanctions Termination Event. If a Sanctions Termination Event occurs²⁶:

- (i) the Non-affected Party shall not be required to give the notice contemplated by Section 6(b)(i) of this Agreement if and for so long as (in the Non-affected Party’s reasonable judgment) the relevant Sanctions do not permit such notice to be given;
- (ii) if the Sanctions Termination Event Suspension Condition (as defined below) is not satisfied, the Non-affected Party may designate an Early Termination Date in respect of the Affected Transactions in accordance with Section 6 of the Agreement;
- (iii) if the Sanctions Termination Event Suspension Condition (as defined below) is satisfied:
 - (A) the Non-affected Party may give written notice to the other party specifying the Crystallization Date; provided that the Non-affected Party shall not be obliged to give such notice if and for so long as (in the Non-affected Party’s reasonable judgment) the relevant Sanctions do not permit such notice to be given;
 - (B) on or as soon as reasonably practicable following the Crystallization Date (as defined below), the Non-affected Party shall:
 - (I) make the calculations contemplated by Section 6(e) of this Agreement that it would be required to make as if (x) an Early Termination Date in respect of all Affected Transactions had have resulted from the Sanctions Termination Event, and (y) all references to “Early Termination Date”

²⁴ Include an appropriate interest rate.

²⁵ Include if parties agree that amount should accrue interest.

²⁶ Note that this example assumes that the Sanctions Termination Event provisions have been included in the agreement. Where parties wish to use these provisions without including the Sanctions Termination Event (or wish the provisions to apply in circumstances that would not constitute a Sanctions Termination Event) then an alternative formulation will be necessary to import the relevant concepts, and references to the “Non-affected Party” in these provisions would need to be amended to reflect the relevant party that is entitled to take the specified action under the agreement.

(including in the associated definitions) in Section 6(e) of this Agreement were deemed to be references to “Crystallization Date”, and

- (II) prepare a statement containing the information set forth in 6(d)(i)(1) of this Agreement and provide that statement to the Affected Party; provided that the Non-affected Party shall not be obliged to provide such statement to the Affected Party if and for so long as (in the Non-affected Party’s reasonable judgment) the relevant Sanctions do not permit such statement to be given;*
- (C) upon the occurrence of the Sanctions Termination Event Release Condition (as defined below), the Non-affected Party may designate an Early Termination Date in respect of the Affected Transactions in accordance with Section 6 of the Agreement;*
- (D) notwithstanding Section 6(e) of this Agreement, the Early Termination Amount due in respect of the Early Termination Date designated in respect of the Affected Transactions under (C) above shall be the amount determined by the Non-affected Party in respect of the Crystallization Date under (B) above, as adjusted for any payments made between the parties or placed into blocked accounts during the period from (but excluding) the Crystallization Date to (and including) the Early Termination Date [plus (if, and to the extent, permitted by the relevant Sanctions) interest accrued on such amount from (and including) the date of the occurrence of the Crystallization Date to (but excluding) the date on which it is paid at the rate specified in clause (a) of the definition of “Applicable Deferral Rate”]²⁷;*

Defined terms used in this section but not otherwise defined herein shall have the following meanings:

*“**Crystallization Date**” means any Local Business Day designated by the Non-affected Party during the period from and including the date of the occurrence of the Sanctions Termination Event; provided that if (in the Non-affected Party’s reasonable judgment) the relevant Sanctions do not permit the Non-affected Party to designate a Crystallization Date, then the Crystallization Date will occur [immediately upon the occurrence of the Sanctions Termination Event and as of the time immediately preceding the time as of which the relevant Sanctions that gave rise to the Sanctions Termination Event took effect]²⁸[as determined by the Non-affected Party, acting in a commercially reasonable manner, following the Non-affected Party’s determination that the Sanctions Termination Event has occurred]²⁹.*

*“**Sanctions Termination Event Release Condition**” means (in the Non-affected Party’s reasonable judgment) that either (x) permission is granted by the relevant Sanctions Authority to designate an Early Termination Date in respect of the Affected Transactions in accordance with Section 6 of this Agreement or (y) the relevant Sanctions no longer prohibit the Non-*

²⁷ Include if parties agree that amount should accrue interest.

²⁸ Include if parties wish to crystallize the amount automatically as of the time immediately prior to the imposition of the relevant sanctions.

²⁹ Include if parties do not wish the amount to crystallize automatically in these circumstances.

affected Party from designating an Early Termination Date in respect of the of the Affected Transactions in accordance with Section 6 of this Agreement,

“Sanctions Termination Event Suspension Condition” means (in the Non-affected Party’s reasonable judgment) that at any time following the occurrence of a Sanctions Termination Event the relevant Sanctions would not permit the Non-affected Party to designate an Early Termination Date in respect of the Affected Transactions in accordance with Section 6 of this Agreement.

([●]) Payments on Early Termination following a Sanctions Termination Event. If a Sanctions Termination Event occurs and the Sanctions Termination Event Suspension Condition is not satisfied but the relevant Sanctions do not permit payment of any Early Termination Amount calculated as being payable by the Non-affected Party to the Affected Party in respect of any Early Termination Date, then such amount may, at the option of the Non-affected Party, be placed into a blocked account to the extent permitted by the relevant Sanctions or not paid at all until such time as (in the Non-affected Party’s reasonable judgment) either (a) permission is granted by the relevant Sanctions Authority to make or release such payment or (b) the Sanctions no longer prohibit payments of such amount or require such payments to be held in a blocked account [, provided that any such amount not paid to the Affected Party shall (if, and to the extent, permitted by the relevant Sanctions) accrue interest at the rate specified in clause (a) of the definition of “Applicable Deferral Rate” from (and including) the Early Termination Date to (but excluding) the date paid]³⁰. For the avoidance of doubt, nothing herein shall be understood or construed to create any obligation on the Non-affected Party that the Non-affected Party otherwise would not have.

([●]) Credit Support following a Sanctions Termination Event. To the extent any Credit Support Document provides for credit support, such credit support shall be maintained in accordance with the terms of such Credit Support Document (to the extent permitted by the relevant Sanctions and through the facility of blocked accounts to the extent necessary and permitted) until such time as the Affected Transactions are terminated, whereupon such credit support, whether held by or for one party or the other, shall be accounted for, reconciled with the calculation of the Early Termination Amount calculated in respect of any Early Termination Date under Section 6(e), and transferred or retained, consistently with such calculation.”

³⁰ Include if parties agree that amount should accrue interest.

7. TRANSFERS FOLLOWING SANCTIONS EVENT

The parties may also wish to consider if it is appropriate to include a right to transfer or novate transactions upon the occurrence of a Sanctions Termination Event. This may allow a party to divest itself of its transactions in circumstances in which the relevant sanctions authority has permitted a wind-down period in the applicable sanctions program.

This additional provision may be included in Part 5 of the Schedule to either of the ISDA Master Agreements, either along with the other relevant sanctions provisions or in a separate section.

Example provision (1992 MA or 2002 MA):

“([●]) Section 7 of the Agreement shall be amended by the insertion of the following immediately prior to the full stop in paragraph (b) thereof:

; and

(c) [Party A] may make such a transfer of this Agreement or all or any part of its rights and obligations under this Agreement (including, without limitation, in respect of any Transaction) following the occurrence of a Sanctions Termination Event and [Party B] hereby agrees to such transfer.”