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ISDA Documentation Initiatives
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Addendum II to the August 2012 Dodd-Frank Protocol Questionnaire

Cadwalader, Wickersham & Taft LLP

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Role of the Questionnaire

- To participate in the DF Protocol a party must:
 - ❖ Deliver a completed and executed Adherence Letter to ISDA.
 - ❖ Deliver a completed and executed Questionnaire to one or more of its Protocol Covered Agreement counterparties. Questionnaires may be delivered through ISDA Amend or another means specified in the receiving party's Adherence Letter.
- Questionnaire provides for delivery of required information and elections.
- Questionnaire “matching” completes the contractual process of supplementing covered agreements with a relevant counterparty.

Questionnaire Addendums

- There are two addendums to the Questionnaire.
 - ❖ Addendum I was last updated on December 13, 2012.
 - ❖ Addendum II was published on February 22, 2013.
- Each addendum is a method for parties to provide matched counterparties with certain additional information, representations and elections.
- The information and representations are considered “DF Supplement Information” for purposes of the Protocol.
- While completion of each addendum is strongly encouraged, they are not required for parties to establish a “match” of Questionnaires for purposes of establishing effective agreement supplements.

Addendum I

- Addendum I addresses (i) CFTC rules regarding eligible contract participant (“**ECP**”) status for “commodity pools” and (ii) “active fund” status for purposes of the implementation schedule for mandatory clearing of interest rate swaps and CDS.
 - ❖ Provides additional representations to establish ECP status for funds that can not represent they were originally formed by a qualifying commodity pool operator.
 - ❖ Provides special ECP representations for foreign exchange products otherwise subject to retail FX rules and statutory “look through” requirements.

Addendum I (cont.)

- In addition, Addendum I addresses the need for parties to prepare for the first phase of mandatory clearing by providing an elective notice to SDs as to whether a counterparty is an “active fund”.
- “Active funds” are private funds that: (i) are not “third-party subaccounts” and (ii) executed 200 or more swaps per month on average over the 12 months ending November 1, 2012. Mandatory clearing between “active funds” and other “Category 1 Entities” begins **March 11, 2013**.
- For purposes of the active fund definition, FX forwards and swaps exempted by the U.S. Treasury may be excluded.
- Using the addendum is a non-exclusive means of notifying SDs as to whether clearing of specified swaps will be required in phase I.

Addendum II Overview

- Addendum II provides a mechanic to make elections and provide information to address the following additional regulatory issues:
 - ❖ Elections to forego delivery of pre-trade marks to market in permitted situations
 - ❖ Identification of “U.S. person” status for purposes of interim CFTC guidance
 - ❖ Status for purposes of the second phase of mandatory clearing for interest rate swaps and CDS.
- Addendum II information and elections is relevant to rules with compliance dates generally aligned with Protocol 1.0 and prior to dates for Protocol 2.0.

Pre-Trade Marks

- Section 2: CFTC No-Action Letters 12-42 and 12-58 provide conditional relief from the requirement to provide mid-market marks to a counterparty (generally in writing) prior to trading. The relief is provided in circumstances where pre-trade market levels can be ascertained through accessing market data that is widely available.
- One condition to the relief is that the counterparty consent.
- Section 2 of Addendum II would allow a counterparty to provide such consents for:
 - ❖ specified foreign exchange forwards, swaps and options
 - ❖ specified classes of IRS and CDS.
- To reduce the need for additional elections in the futures Section 2 also provides an opportunity to consent for any additional types of swaps for which the CFTC issues similar relief in the future.

U.S. Person

- Section 3: On December 21, the CFTC published an exemptive order defining the term “U.S. person” on an interim basis. The interim definition may be used through (at least) July 12, 2013 to determine compliance obligations for non-U.S. swap dealers, among other purposes.
- Section 3 of Addendum II asks parties to identify their status for purposes of the interim definition only.
- Because the interim U.S. person definition expands (effective April 1, 2013), to include non-U.S. corporates that have headquarters in the U.S., Section three permits parties to answer “Yes,” “No” or “No until April 1, 2013 and Yes thereafter.”

Mandatory Clearing Second Phase

- Section 4: Pursuant to the CFTC's mandatory clearing determination for certain interest rate and credit default swaps, relevant trades between "Category 1 Entities" (e.g., swap dealers) and "Category 2 Entities" must be submitted for clearing beginning **June 10, 2013**.
- Section 4 of Addendum II asks parties to identify their status as "Category 2 Entities."
- Category 2 Entities include (1) "private funds," (2) "commodity pools," and (3) persons predominately engaged in the business of banking or activities "financial in nature."

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Jeff Robins is a partner in the Financial Services Department. He represents broker-dealers, securities exchanges, industry associations and buy-side institutions in regulatory and transactional matters. Recognized by Legal 500 as "remarkably strong" in the regulatory field and a leader in equity derivatives, his regulatory practice is concentrated in the area of securities regulation of broker-dealers and the structuring of financing and derivatives transactions for multi-entity financial organizations subject to a variety of regulatory regimes; his transactional work focuses on prime-brokerage and over-the-counter derivatives.

Jeff has substantial experience providing counsel on margin, capital, custody and record keeping requirements, cross-border transactions, cash market sales and trading, and development of compliance and supervisory procedures. Jeff also advises a variety of financial institutions on credit aspects of financing and derivatives transactions, particularly risks to counterparties in the event of insolvency, the rights of creditors to close out financial contracts and exercise netting and collateral rights, and the risks and benefits of central clearing.

He received his J.D. from Harvard Law School, magna cum laude, an M.A. in Russian and East European Studies and a B.A., with distinction, in Political Science, from Stanford. Jeff was a clerk for the Honorable Cynthia Holcomb Hall of the United States Court of Appeals for the Ninth Circuit.

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