



**International Swaps and Derivatives Association, Inc.**

**RELEVANCE OF ISDA PROTOCOLS/DOCUMENTS TO NON-US/EU MARKET PARTICIPANTS**

These charts address the relevance of ISDA protocols and other documentation for derivative transactions for market participants in non-US/EU jurisdictions.

**THESE CHARTS DO 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 ISDA PROTOCOLS AND OTHER DOCUMENTATION. PARTIES SHOULD CONSULT WITH THEIR LEGAL ADVISERS AND ANY OTHER ADVISER THEY DEEM APPROPRIATE IN CONSIDERING WHETHER TO USE THE ISDA PROTOCOLS AND OTHER DOCUMENTATION. ISDA ASSUMES NO RESPONSIBILITY FOR ANY USE TO WHICH ANY OF ITS DOCUMENTATION OR OTHER DOCUMENTATION MAY BE PUT.**

Please note the following assumptions made in the charts:

(1) These charts assume that the market participant is not (i) registered as a swap dealer or major swap participant, (ii) a US person, (iii) an affiliate conduit of a US person or (iv) guaranteed by a US person, or (v) a financial counterparty, (vi) a non-financial counterparty or (vii) a third country entity subject to the clearing and risk mitigation obligations under EMIR under Articles 4(1)(a)(v) or 11(12) EMIR (as used below, an **“Non-US/EU Market Participant”**).<sup>1</sup>

(2) Unless otherwise indicated, it is assumed that substituted compliance is not available for relevant Dodd-Frank requirements.<sup>2</sup> Unless otherwise indicated, it is assumed that relief under Article 13 EMIR is not available for relevant EMIR requirements.

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<sup>1</sup> See Annex I for further detail on “guarantees” and “affiliate conduit” status.

<sup>2</sup> In its guidance on the extraterritorial application of swap regulations, 78 Fed. Reg. 35292 (July 26, 2013) (“**Cross-Border Guidance**”), the CFTC provided that “substituted compliance” (*i.e.*, compliance with local requirements in lieu of compliance with relevant US requirements) would be allowed in certain circumstances and on a case-by-case basis pursuant to a CFTC determination.

Protocol / Document and Brief Description	Counterparty to Non-US/EU Market Participant						
	US SD (other than through Non-US Branch)	Non-US Branch of US Bank SD <sup>3</sup>	Non-US SD (other than through US Personnel) <sup>4</sup>	Non-US SD acting through US Personnel <sup>5</sup>	FC <sup>6</sup>	NFC+ <sup>7</sup>	NFC- <sup>8</sup>
<b>August 2012 DF Protocol</b> (Aug 13, 2012) <ul style="list-style-type: none"> <li>CFTC requirements applicable to swap dealers addressed include: external business conduct requirements (e.g., KYC, suitability), swap data recordkeeping and reporting requirements.</li> </ul>	Relevant.  All of the requirements addressed by the August Protocol apply to the US SD.	Relevant.  Absent substituted compliance, all of the requirements addressed by the August Protocol apply to the branch.	Some terms relevant.  Recordkeeping and reporting requirements that are addressed by the August Protocol apply to the Non-US SD. <sup>9</sup>	Relevant.  Under supplementary CFTC staff guidance, all of the requirements addressed by the August Protocol apply to the Non-US SD.	The August 2012 DF Protocol is primarily for use where one counterparty is an SD.  Assuming the counterparty is not registered with the CFTC as an SD or MSP, only provisions addressing certain reporting requirements may be relevant.		

<sup>3</sup> See Annex I for further detail on determining whether a trade is “with” a non-US branch of a US bank SD.

<sup>4</sup> See Annex I for further detail on determining when an SD is deemed to be acting through US personnel.

<sup>5</sup> See Annex I for further detail on determining when an SD is deemed to be acting through US personnel.

<sup>6</sup> The definition of “financial counterparty” can be found in Article 2(8) of EMIR: EU-authorized investment firms, credit institutions, insurance/reinsurance undertakings, UCITS/UCITS managers, pension schemes and alternative investment funds managed by alternative investment fund managers. It includes Non-EU Branches of the EU-established entity.

<sup>7</sup> A “non-financial counterparty” is an undertaking established in the EU (including its non-EU branches) other than a CCP or an FC (Article 2(9) of EMIR). An NFC+ is an NFC that exceeds one of the clearing thresholds. The thresholds are EUR 1 billion in gross notional amount (on a rolling average basis over 30 working days) where the asset class is credit or equity and EUR 3 billion for interest rate, FX or commodity and others combined. Once a threshold for any asset class is breached, all asset classes become subject to the clearing mandate (if any).

<sup>8</sup> An NFC- is an NFC that does not exceed any of the clearing thresholds.

<sup>9</sup> The ISDA 2013 DF Agreement for Non-US Transactions provides an alternate means to provide the relevant agreements, but cannot be implemented on ISDA Amend.

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<p><b>March 2013 DF Protocol</b> (Mar 22, 2013)<sup>10</sup></p> <ul style="list-style-type: none"> <li>Addresses swap trading relationship documentation, portfolio reconciliation and trade confirmation requirements.</li> <li>Also addresses status representations required in connection with mandatory clearing requirements and the end-user clearing exception.</li> </ul>	<p>Relevant.</p> <p>All of the requirements addressed by the March Protocol apply to the SD.</p>	<p>Relevant.</p> <p>Absent substituted compliance, all of the requirements addressed by the March Protocol apply to the branch.</p>	<p>Not relevant.</p> <p>A non-US SD will not be required to comply with the requirements addressed by the March Protocol.</p>	<p>Relevant.</p> <p>Under supplementary CFTC staff guidance, all of the requirements addressed by the March Protocol apply to the Non-US SD.</p>	<p>The March 2013 DF Protocol is only for use where one counterparty is or intends to become a US-registered SD or MSP.</p> <p>Assuming the counterparty is not registered with the CFTC as an SD or MSP, no provisions are likely to be relevant.</p>		
<p><b>2013 EMIR NFC Representation Protocol</b> (Mar 8, 2013) together with <b>Form of Change of Status Notice</b> (Sep 9, 2013)</p> <ul style="list-style-type: none"> <li>Allows a party (including third country entities) to provide its counterparties with representations as to whether it is an NFC+ or NFC-. A third country entity will make the representation on the basis that it would or would not have been an NFC+ or NFC- had it been established in the EU.</li> <li>A party that is an FC can also adhere without making the NFC representation so that it can benefit from the representations given by its adhering counterparties.</li> <li>Also includes a mechanism for adherents to notify subsequent changes in status.</li> </ul>	<p>Assuming the counterparty is not a financial counterparty or non-financial counterparty, this Protocol is not likely to be relevant.</p>				<p>Relevant.</p> <p>Applicability of clearing and risk mitigation requirements for uncleared trades depend on status of parties.</p>	<p>Relevant.</p> <p>Applicability of clearing and risk mitigation requirements for uncleared trades depend on status of parties.</p>	<p>Relevant.</p> <p>Applicability of clearing and risk mitigation requirements for uncleared trades depend on status of parties.</p>

<sup>10</sup> Pursuant to CFTC Letter No. 13-45, where the parties are subject to both EMIR and Dodd-Frank requirements, compliance with certain Dodd-Frank requirements addressed by the March Protocol (specifically, compliance relating to portfolio reconciliation, confirmations, and swap trading relationship documentation (save for valuations and OLA representations and disclosures)) may be achieved under Dodd-Frank by compliance with comparable EMIR requirements. The ISDA "Top-Up" Agreement (discussed below) allows participants in the March Protocol to convert the portfolio reconciliation agreement therein to one that is intended to be EMIR compliant.

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<p>2013 EMIR Portfolio Reconciliation, Dispute Resolution and Disclosure Protocol (Jul 19, 2013)</p> <ul style="list-style-type: none"> <li>Addresses portfolio reconciliation and dispute resolution requirements. Also includes a disclosure waiver to permit compliance with reporting and recordkeeping requirements without breaching confidentiality restrictions.</li> </ul>	Assuming the counterparty is not a financial counterparty or non-financial counterparty, this Protocol is not likely to be relevant.				Relevant – all of the requirements addressed in the Protocol apply to the FC.	Relevant – all of the requirements addressed in the Protocol apply to the NFC+.	Relevant – all of the requirements addressed in the Protocol apply to the NFC-.
<p>DF Disclosure Documents</p> <ul style="list-style-type: none"> <li>The transaction-level requirements include certain pre-trade disclosure requirements for SDs. These documents are standard form disclosure statements including both general and product-specific disclosures. Section 2.12 of Schedule 2 of the August 2012 DF Protocol specifies how such disclosures can be delivered to a counterparty.</li> </ul>	Relevant. Disclosures are responsive to applicable Dodd-Frank requirements.	Not specifically relevant. Disclosures are responsive to Dodd-Frank requirements that do not generally apply in this pairing, but may be informative or useful for other purposes.	Not specifically relevant. Disclosures are responsive to Dodd-Frank requirements that do not generally apply in this pairing, but may be informative or useful for other purposes.	Relevant. Disclosures are responsive to applicable Dodd-Frank requirements.	Assuming the counterparty is not registered with the CFTC as an SD or MSP, these disclosures need not be provided to an Non-US/EU Market Participant.		

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<p>Cross-Border Swaps Representation Letter (Aug 19, 2013)</p> <ul style="list-style-type: none"> <li>Allows a party to provide its counterparties with representations as to whether it is (i) a US or non-US person; (ii) in the case of a non-US person, whether it is an affiliate conduit or its swaps are guaranteed by a US person; and (iii) in the case where its swaps are guaranteed by a US person, whether the guarantor is a financial entity and whether it is affiliated with a SD.</li> <li>This letter may be both delivered and received by a Non-US/EU Market Participant.</li> <li>While an SD or MSP may need these representations to determine duties that apply to it, a Non-US/EU Market Participant may wish to receive the representations for determining whether swaps need to be counted for purposes of SD/MSP registration requirements.</li> </ul>	<p>Relevant.</p> <p>US swap dealers will generally be required to comply with all requirements for all counterparties; however, counterparty status may be needed for reporting or other purposes.</p>	<p>Relevant.</p> <p>Applicability of Transaction-Level Requirements and to a limited extent, Entity-Level Requirements, depends on status of counterparty.</p>	<p>Relevant.</p> <p>Applicability of Transaction-Level Requirements and to a limited extent, Entity-Level Requirements, depends on status of counterparty.</p>	<p>Relevant.</p> <p>SD will generally be required to comply with all requirements for all counterparties; however, counterparty status may be needed for reporting or other purposes.</p>	<p>Either party may wish to use this letter to determine the status of its counterparty for determining whether swaps need to be counted for purposes of SD/MSP registration requirements.</p>		
<p>Cross-Border Swaps Representation Letter for US Banks (Sep 16, 2013)</p> <ul style="list-style-type: none"> <li>Allows a US bank SD to provide representations to establish that swaps entered into with specified Non-US Branches satisfy conditions for such swaps to be, for purposes of the application of CFTC requirements, deemed to be with such Non-US Branches.</li> <li>Also allows a US bank SD to provide its counterparties with representations that the 5% exemption applies to swaps with its specified Non-US Branches.</li> </ul>	<p>Relevant, if a US bank.</p> <p>Counterparties to US Bank SDs may wish to know whether the swap can be deemed to be "with" the non-US branch.</p>	<p>Relevant.</p> <p>Counterparties to US Bank SDs may wish to know whether the swap can be deemed to be "with" the non-US branch.</p>	<p>Not relevant.</p> <p>The letter is relevant only if the counterparty is a US bank.</p>	<p>Not relevant.</p> <p>The letter is relevant only if the counterparty is a US bank.</p>	<p>The letter is relevant only if the counterparty is a US bank.</p>		

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ISDA DF Protocol Extension Agreement (Sep 10, 2013) (a.k.a. "Top-Up" Agreement) <sup>11</sup> <ul style="list-style-type: none"> <li>Where (a) both Dodd-Frank and EMIR portfolio reconciliation requirements apply and (b) both parties have adhered to the March 2013 DF Protocol but have not adhered to the 2013 EMIR Portfolio Reconciliation, Dispute Resolution and Disclosure Protocol, this document allows the parties to bilaterally amend Schedule 4 of the March 2013 DF Protocol Supplement to apply a slightly modified version of the portfolio reconciliation and dispute resolution provisions found in the 2013 EMIR Portfolio Reconciliation, Dispute Resolution and Disclosure Protocol.</li> </ul>	Not relevant where neither party is subject to EMIR requirements.	Not relevant where neither party is subject to EMIR requirements.	Possibly relevant. May be of use where the parties have (i) adhered to the March 2013 DF Protocol and (ii) SD is subject to EMIR requirements.	Possibly relevant. May be of use where the parties have (i) adhered to the March 2013 DF Protocol and (ii) SD is subject to EMIR requirements.			Possibly relevant. May be of use where the parties have (i) adhered to the March 2013 DF Protocol and (ii) the counterparty is subject to EMIR requirements.

<sup>11</sup> The Top-Up Agreement was published in response to CFTC Letter 13-45, which allows, *inter alia*, parties subject to both Dodd-Frank and EMIR portfolio reconciliation requirements to choose to comply only with the EMIR portfolio reconciliation requirements. Note that the Top-Up Agreement is an *alternative* to the 2013 EMIR Portfolio Reconciliation, Dispute Resolution and Disclosure Protocol; parties that have already adhered to that document will not need the Top-Up Agreement.

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<p>ISDA 2013 DF Agreement for Non-U.S. Transactions and Annexes (Nov 15, 2013)</p> <ul style="list-style-type: none"> <li>The agreement is intended for use in situations where one party is a non-US SD or a US bank SD acting through its Non-US Branches and the other party is a non-US person (including a guaranteed entity or affiliate conduit).</li> <li>Allows parties to bilaterally agree to the relevant provisions from the August 2012 March 2013 DF Protocols.</li> <li>The agreement operates independently and is not incorporated into other master agreements as does the August 2012 and March 2013 DF Protocols.</li> <li>Annex I addresses Entity-Level Requirements that apply to a non-US SD or a US bank SD acting through its Non-US Branches.</li> <li>Annex II addresses transaction-level requirements that apply to a non-US SD dealing with a guaranteed entity or affiliate conduit or to a US bank SD acting through its Non-US Branches.</li> </ul>	<p>Not relevant.</p> <p>Does not fully address applicable requirements, or substitute for, the August 2012 and March 2013 DF Protocols.</p>	<p>Relevant.</p> <p>Annex I and Annex II will be relevant to these Non-US Branches.</p>	<p>Relevant.</p> <p>Annex I addresses applicable reporting and recordkeeping requirements.</p>	<p>Not relevant.</p> <p>Does not fully address applicable requirements, or substitute for, the August 2012 and March 2013 DF Protocols.</p>	N.A.	N.A.	N.A.
<p>EMIR Timely Confirmation Amendment Agreement (Mar 8, 2013)</p> <ul style="list-style-type: none"> <li>Allows parties to bilaterally agree on the allocation of obligations relating to the timely delivery and return of confirmations.</li> </ul>	<p>Assuming the counterparty is not a financial counterparty or non-financial counterparty, this Amendment Agreement is not likely to be relevant.</p>				<p>Relevant – all of the requirements addressed in the Agreement apply to the FC.</p>	<p>Relevant – all of the requirements addressed in the Agreement apply to the NFC+.</p>	<p>Relevant – all of the requirements addressed in the Agreement apply to the NFC-.</p>

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EMIR Reporting Guidance Note (Jul 19, 2013) <ul style="list-style-type: none"> <li>Allows parties to bilaterally agree on their reporting roles and obligations and the extent of the confidentiality waiver.</li> </ul>	Assuming the counterparty is not a financial counterparty or non-financial counterparty, this Guidance Note is not likely to be relevant.				Relevant – all of the requirements addressed in the Note apply to the FC.	Relevant – all of the requirements addressed in the Note apply to the NFC+.	Relevant – all of the requirements addressed in the Note apply to the NFC-.
EMIR Portfolio Reconciliation Operational Guidance Note (Sep 10, 2013) <ul style="list-style-type: none"> <li>Provides guidance on the EMIR portfolio reconciliation and dispute resolution requirements.</li> </ul>	Assuming the counterparty is not a financial counterparty or non-financial counterparty, this Guidance Note is not likely to be relevant.				Relevant – all of the requirements addressed in the Note apply to the FC.	Relevant – all of the requirements addressed in the Note apply to the NFC+.	Relevant – all of the requirements addressed in the Note apply to the NFC-.



## ANNEX I: CERTAIN TERMS USED IN THE CHARTS

### Guarantees

Non-US persons should note that, under the Cross-Border Guidance, “**guarantee**” is treated broadly and may cover arrangements not typically thought of as a “guarantee,” *e.g.*, any arrangement under which a person commits to provide a financial backstop or funding against potential losses that may be incurred in connection with the swap.

### Affiliate Conduit

Factors that the CFTC will consider in determining whether a non-US person is an “**affiliate conduit**” include whether the non-US person is (i) a majority-owned affiliate of a US person; (ii) controlling, controlled by or under common control with a US person; (iii) its financial results are included with the consolidated financial statements of the US person; and (iv) in the regular course of its business, it engages in swaps with non-US counterparties for the purpose of hedging or mitigating risks faced by, or to take positions on behalf of, its US affiliate(s) and transfers the risks and benefits of such swaps to its US affiliates through offsetting swaps or other arrangements with them. Affiliates of SDs will generally not be considered to be affiliate conduits.

### Non-US Branch of a US Bank SD

Pursuant to the Cross-Border Guidance, in order for a swap to be deemed to be “with” a non-US branch of a US bank, the following conditions must be satisfied:

The non-US branch: (i) is subject to Regulation K of the FDIC International Banking Regulation, or otherwise designated as a “foreign branch” by the US bank’s primary regulator, (ii) maintains accounts independently of the home office and of the accounts of other non-US branches with the profit or loss accrued at each branch determined as a separate item for each non-US branch, and (iii) is subject to substantive regulation in banking or financing in the jurisdiction where it is located.

In addition, (i) the employees negotiating and agreeing to the terms of the swap (or, if the swap is executed electronically, managing the execution of the swap), other than employees with functions that are solely clerical or ministerial, are located in such non-US branch or in another non-US branch of the U.S. bank; (ii) the non-US branch or another non-US branch is the office through which the US bank makes and receives payments and deliveries under the swap on behalf of the Non-US Branch pursuant to a master netting or similar trading agreement, and the documentation of the swap specifies that the office for the U.S. bank is such non-US branch; (iii) the swap is entered into by such non-US branch in its normal course of business; and (iv) the swap is treated as a swap of the Non-US Branch for tax purposes; and (v) the swap is reflected in the local accounts of the non-US branch.

### US Personnel of a Non-US SD

Pursuant to a CFTC Advisory and CFTC Letter No. 13-71, when a non-US SD is regularly using personnel or agents located in the United States to arrange, negotiate, or execute swaps, the CFTC would generally expect compliance with transaction-level requirements. No-action relief has been provided from this interpretation through January 14, 2014; however, this document assumes that such relief is not in effect.