

ISDA Dodd-Frank Documentation Initiative and August 2012 Dodd-Frank Protocol

June 26, 2012

ISDA has prepared this brief summary to assist in your consideration of the ISDA August 2012 Dodd-Frank (DF) Protocol. Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the ISDA August 2012 DF Protocol (or Protocol) documents.

THIS SUMMARY DOES NOT PURPORT TO BE AND SHOULD NOT BE CONSIDERED A GUIDE TO OR AN EXPLANATION OF ALL RELEVANT ISSUES OR CONSIDERATIONS IN CONNECTION WITH YOUR CONSIDERATION OF THE ISDA AUGUST 2012 DF PROTOCOL OR THE RELATED DOCUMENTS. PARTIES SHOULD CONSULT WITH THEIR LEGAL ADVISERS AND ANY OTHER ADVISER THEY DEEM APPROPRIATE AS PART OF THEIR CONSIDERATION OF THE PROTOCOL AND PRIOR TO ADHERING TO THE PROTOCOL. ISDA ASSUMES NO RESPONSIBILITY FOR ANY USE TO WHICH ANY OF ITS DOCUMENTATION OR OTHER DOCUMENTATION MAY BE PUT.

1.Q What is the ISDA DF Documentation Initiative?

The ISDA DF Documentation Initiative is a core element in ISDA's broader mission to assist the industry in implementing and complying with regulatory requirements. The ISDA DF Documentation Initiative provides an industry solution to the need for amending existing swap relationship documentation for the purpose of facilitating compliance with regulatory requirements in a manner that minimizes the need for bilateral negotiations and disruptions to trading.

To this end, the ISDA DF Documentation Initiative will, among other things, provide a standard set of amendments to facilitate updating of existing swap relationship documentation for Dodd-Frank compliance purposes and other standard industry documentation, such as general and product specific risk disclosures, to assist regulated swap entities in satisfying their on-going regulatory requirements and to allow other entities to continue trading with regulated swap entities.

ISDA envisions the possibility for multiple protocols to the extent future final rules requiring documentation amendments are subject to inconsistent compliance dates. ISDA will work with our members to develop a coordinated and efficient process to amend documentation in a timely manner. ISDA also expects to conduct similar reviews for documentation changes mandated by legislative developments in other countries and regions as these develop.

2.Q What is a "protocol" and how does the ISDA August 2012 DF Protocol differ from previous ISDA protocols?

The protocol is a multilateral contractual amendment mechanism that allows for various standardized amendments to be deemed to be made to the relevant Protocol Covered Agreements between any two adhering parties. It builds on the principle that parties may agree with one or more other parties that certain terms and provisions will apply to their respective relationships (unless and until they specifically agree otherwise).

Market participants indicate their participation in the protocol arrangement by following the adherence instructions posted on the ISDA website (www.isda.org), which includes submission of a letter (an "Adherence Letter") and payment of an adherence fee of US \$500.00. Each party submitting a letter and paying the adherence fee is an "Adhering Party." Additionally, Adhering Parties will be required to specify how they will receive Protocol Questionnaires from other Adhering Parties in the Adherence Letter.

Unlike with previous ISDA protocols where amendments were effected solely with delivery of an adherence letter by each party to the underlying document to be amended (i.e., a master agreement), this protocol will include additional bilateral delivery requirements in order to effectuate the amendments (see 5.Q below for more information related to the delivery requirements). Each party that submits an Adherence Letter must also deliver a completed Protocol Questionnaire to each relevant counterparty for the amendments to be effective. As a result of these additional bilateral delivery requirements, ISDA together with Markit have developed a technology-based solution ("ISDA/Markit platform") to automate the information-gathering process and provide sharing of submitted data and documents to permissioned counterparties (see 6.Q below for more information).

The ISDA August 2012 DF Protocol is designed to provide an efficient means for swap dealers and counterparties to amend Protocol Covered Agreements through the exchange of Protocol Questionnaires. So that a counterparty will know when it is completing its Protocol Questionnaire whether a particular dealer is participating in the Protocol (and by what means it may deliver the Protocol Questionnaire to the dealer), it is recommended that swap dealers submit their Adherence Letters early in the adherence period.

3.Q What is the ISDA August 2012 DF Protocol?

The ISDA August 2012 DF Protocol is intended to address the requirements of the following final rules ("Covered Rules"):

- CFTC, Final Rule, Business Conduct Standards for Swap Dealers and Major Swap Participants, 77 Fed. Reg. 9734 (Feb. 17, 2012);
- CFTC, Final Rule, Large Trader Reporting for Physical Commodity Swaps, 76 Fed. Reg. 43851 (July 22, 2011);
- CFTC, Final Rule, Position Limits for Futures and Swaps, 76 Fed. Reg. 71626 (Nov. 18, 2011);
- CFTC, Final Rule, Real-Time Public Reporting of Swap Transaction Data, 77 Fed. Reg. 1182 (Jan. 9, 2012);
- CFTC, Final Rule, Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. 2136 (Jan. 13, 2012); and

- CFTC, Final Rule, Swap Dealer and Major Swap Participant Recordkeeping and Reporting, Duties, and Conflicts of Interest Policies and Procedures; Futures Commission Merchant and Introducing Broker Conflicts of Interest Policies and Procedures; Swap Dealer, Major Swap Participant, and Futures Commission Merchant Chief Compliance Officer, 77 Fed. Reg. 20128 (Apr. 3, 2012).

4.Q What agreements will the ISDA August 2012 DF Protocol cover?

The Protocol is designed to supplement existing master agreements under which parties may execute “swaps.” The Protocol adds notices, representations and covenants responsive to Dodd-Frank Title VII requirements that must be satisfied at or prior to the time that swap transactions are offered and executed. The Protocol is not limited to ISDA Master Agreements, and may be used to amend all agreements between a pair of parties pursuant to which they enter into swaps. See below regarding the process required for any pair of parties to amend their existing master agreement through use of the Protocol.

5.Q How is the ISDA August 2012 DF Protocol structured? What is the purpose of the different Protocol documents?

In order to comply with rules adopted by the CFTC under Title VII of Dodd-Frank, swap dealers must obtain certain “know your counterparty” information from counterparties and also verify that counterparties qualify as “eligible contract participants” (which requires the counterparty to identify the particular prong of the ECP definition that applies when the swap dealer is relying on a representation from the counterparty). In addition, the particular notices and supplemental terms that are required to establish compliance depend on the legal status of the counterparty (e.g., Swap Dealer, MSP, special entity, etc.) and the “know your counterparty” rules require swap dealers to be aware of these legal statuses. Therefore, a protocol intended to establish documentation compliance needs to include delivery of the relevant information by both swap dealers and their counterparties in order to satisfy these requirements and establish that the parties are entering into the proper supplemental terms.

Concerns arose, however, that some of the data required for delivery may be considered sensitive. Therefore, market participants may be deterred from adhering to a protocol that required dissemination of this information to parties other than their counterparties. Additionally, some provisions would be required to be elective, and in some cases, parties (particularly special entities) may need to differentiate elections for different counterparties.

Accordingly, ISDA developed an approach to architecture and process designed to accommodate two fundamental objectives: Selective access to information (i.e., who is given permission to see certain information) and variation in the document provisions to which a party is bound (either because of the type of counterparty or because the provisions are optional). The process as developed is necessarily more complex than multilateral amendments that have been accomplished via past ISDA protocols. However, we believe it will reduce the need to amend documents outside of the protocol process and also provides sufficient flexibility to accommodate additional information delivery and variation in the document provisions to which a party is bound that may arise as additional rules are finalized.

The architecture consists of four documents, each as described below: (I) the DF Supplement, (II) the Protocol, (III) an Adherence Letter, and (IV) the Protocol Questionnaire.

I. DF Supplement

- a. The DF Supplement sets forth certain standardized representations and covenants relating to the Covered Rules.
 - i. Representations and covenants are set forth in various “Schedules.”
 - ii. All Adhering Parties will be deemed to incorporate Schedule 2. However, certain sections of Schedule 2 are only applicable to certain types of counterparty pairs based on representations they have made to each other regarding their legal status.
 - iii. Schedules 3-6 are optional and applicable only if both parties in a pair elect to apply them.
 - iv. Counterparties may agree to incorporate specific elective Schedules of the DF Supplement into Protocol Covered Agreements by adhering to the Protocol as described below.

II. Protocol

- a. Under the ISDA August 2012 DF Protocol, each PCA Principal participating in the Protocol directly or through a PCA Agent who has executed an Adherence Letter and delivered Protocol Questionnaires on its behalf agrees that the particular Schedules of the DF Supplement to which it and a “Matched PCA Principal” (as defined below) have mutually agreed will operate as a supplement to all Protocol Covered Agreements governing swaps between them.
- b. The particular Schedules of the DF Supplement to which a PCA Principal agrees will be specified in its Protocol Questionnaire.
- c. Each PCA Principal and PCA Agent directly participating in the Protocol through execution of an Adherence Letter is provided the ability to amend Protocol Covered Agreements by completing one or more Protocol Questionnaires and delivering them in the manner described below.
- d. The Protocol also includes provisions designed to work with the DF Supplement by establishing that information delivered by Protocol Questionnaire is considered “DF Supplement Information” for purposes of the DF Supplement.
- e. A PCA Principal or PCA Agent will bind itself (and in the case of a PCA Agent, its PCA Principals) to the Protocol by delivery of an Adherence Letter.

III. Adherence Letter

- a. Signed and submitted by each party agreeing to the terms of the Protocol (an “Adhering Party”).
 - i. Will include name, address, and other non-sensitive information.
 - ii. Will specify the address (electronic or otherwise) and means by which the Adhering Party will receive Protocol Questionnaires from other Adhering Parties.
- b. Will be uploaded and available for public view, like prior ISDA protocol adherence letters.

IV. Protocol Questionnaire

- a. Pursuant to the Protocol, each Adhering Party will complete and deliver a Protocol Questionnaire with information about itself (and in the case of a PCA Agent, its PCA Principals).
 - i. The Protocol Questionnaire will include representations as to the legal status of the relevant PCA Principal(s) (ECP, Swap Dealer, MSP, Special Entity, etc.).
 - ii. A PCA Agent (e.g., an investment advisor or ERISA fiduciary) who has an existing “umbrella” agreement with a swap dealer for multiple underlying clients may complete and deliver a Protocol Questionnaire on behalf of all or some of such clients.
- b. The Protocol Questionnaire will allow a PCA Principal to identify its relevant regulatory statuses and make various elections under the DF Supplement, including the particular Schedules of the DF Supplement that will supplement its Protocol Covered Agreements.
- c. The party completing the Protocol Questionnaire (the “Delivering Party”) will have the ability to deliver or give permission via the ISDA/Markit platform for the Protocol Questionnaire to be delivered to, and only to, Adhering Parties specifically approved by the Delivering Party (each, a “Receiving Party”).
 - i. To enable the same Protocol Questionnaire to be delivered to multiple counterparties, and not allow those counterparties to know the identity of each other, the ISDA/Markit platform will provide for the automated designation of approved Receiving Parties.
- d. To establish an agreement to amend existing Protocol Covered Agreements, each PCA Principal (acting directly or, in the case of Protocol Covered Agreements originally executed by a PCA Agent, through the relevant PCA Agent) must be a “Matched PCA Principal.” To be a Matched PCA Principal, a Protocol Questionnaire with respect to the PCA Principal must be delivered to the relevant Receiving Party and a Protocol Questionnaire from such Receiving Party must also be delivered to the PCA Principal or its PCA Agent (as relevant).
- e. An Adhering Party will be able to complete more than one Protocol Questionnaire, so that it may deliver different Protocol Questionnaires to different counterparties under the Protocol.
- f. Pursuant to the Protocol, if a Receiving Party agrees to the same Schedules as a Delivering Party, by each completing its own Protocol Questionnaire and delivering it the other party by any mechanism specified by the Receiving Party (by the ISDA/Markit platform or otherwise) in its Adherence Letter, then the provisions of the Schedules to which they both agree will operate as a supplement to all Protocol Covered Agreements governing swaps between Delivering Party and Receiving Party.

6.Q What is the ISDA/Markit platform?

Markit is working with ISDA to develop an online questionnaire for all counterparties in the over the counter (OTC) swaps market. The purpose of the service is to centralize counterparty categorization under Dodd-Frank and electronically amend all Protocol Covered Agreements in accordance with the Covered Rules by the October deadline.

7.Q Will adherence to the ISDA August 2012 DF Protocol satisfy all regulatory requirements/obligations in connection with the Covered Rules?

The CFTC regulations addressed by this Protocol have far-ranging implications for the derivatives market, including the terms under which counterparties are required or wish to transact in OTC derivatives. While certain of the regulations (and the statutory requirements that they implement) impose specific documentation requirements, others impose compliance requirements for swap dealers that can be met through various combinations of documentation and internal policies, and still others are not susceptible to being addressed through a protocol. The Protocol is designed to provide basic standardized provisions to enable market participants to amend their existing documentation with swap dealers. While provision of such standardized terms is designed to provide an efficient manner for a large number of counterparties to amend their bilateral contracts to address basic requirements of the relevant CFTC regulations, it cannot address all situations, products or types of counterparties. Counterparties should obtain legal advice as to whether the provisions of the Protocol address their particular situation.

8.Q What is the purpose of, and rationale for, DF Supplement Section 2.2?

Under the Protocol, parties may agree to make representations, agree to covenants and provide information to establish compliance with various provisions of the Covered Rules and apply elective safe harbors. The focus of the Protocol is on giving parties an efficient and standardized manner to satisfy new compliance requirements, not on creating additional (and potentially unanticipated) contractual remedies under existing bilateral contracts. Further, in some cases, the information provided under the Protocol is similar in kind to information currently provided by customers as part of a dealer's "on-boarding" process, which typically does not give rise to termination rights under a master agreement. However, a party providing representations and information under the Protocol should note that the other party will rely upon them and may have other remedies available to it under law or contract (including their master agreement to the extent covered by provisions outside of the Protocol).

9.Q Is DF Supplement Section 2.6 consent language sufficient to establish a valid consent to the disclosure of confidential information in all jurisdictions?

Under the Covered Rules, swap dealers will be required to report certain information about swaps to swap data repositories, who may disseminate that information publicly. Because the swap dealer may be subject to contractual limits on such disclosure, the Protocol contains a provision whereby the non-reporting counterparty consents to such disclosure. However, this consent may not be sufficient to establish a valid consent to the disclosure of confidential information in certain jurisdictions. On a case-by-case basis, parties will need to determine whether or not the jurisdiction of either party has a heightened consent requirement that would not be satisfied by the consent set forth in the Protocol. Satisfaction of any such heightened consent requirement will have to be documented on a bilateral basis.

10.Q How do DF Supplement Sections 2.13 and 2.14 address use and disclosure of "material confidential information?"

The external business conduct rules establish a new regulatory standard governing the use and disclosure of "material confidential information" provided by a counterparty to a swap dealer, subject to a

qualification explicitly permitting parties to establish an alternative standard by agreement. Prior to the establishment of this regulatory standard, swap counterparties often addressed similar issues through non-disclosure agreements. Accordingly, where the parties have agreed upon the restrictions and permitted uses of such information by a prior agreement, the Protocol defers to such an agreement. As past agreements were not drafted to satisfy the external business conduct rules' requirements for establishing permissible uses of material confidential information, Section 2.13 "brings down" those agreements into the new regulatory environment by providing that information that is within the scope of the original agreement remains subject to the terms of the that agreement as read in the legal context in which it was negotiated.

To the extent that any material confidential information is not within the scope of a pre-existing agreement between the parties (or if no such agreement exists), Section 2.14 establishes an agreement of the parties regarding the restrictions and permitted uses of such information within the context of the new regulatory standard.

11.Q What do DF Supplement Schedules 3 – 6 cover?

The external business conduct rules impose upon swap dealers a duty to reasonably determine the suitability of any swap "recommended" to a counterparty and impose heightened suitability or "best interest" duties when a swap dealer recommends a tailored swap to a "special entity." However, the rules provide safe harbors from this requirement where the counterparty is adequately advised and will exercise independent judgment in assessing swap recommendations. These safe harbors can be satisfied in whole or part through representations of the counterparty and relevant advisers. Each swap dealer and counterparty must determine for itself whether, and how, it wishes to satisfy the criteria of the safe harbors.

The Protocol provides a standardized approach to the safe harbors designed to allow counterparties that are able to make a full set of representations required to establish the applicability of a safe harbor to do so. Application of the safe harbors is entirely elective and both counterparties to a covered agreement must agree to a safe harbor in their Protocol Questionnaire in order for the relevant Schedule to be integrated into their agreements. Partial solutions to safe harbors are not provided, because such partial solutions would not eliminate the need of the parties to agree on a bilateral basis as to whether they will transact within a safe harbor and how its applicability will be established.

The general safe harbor for institutional suitability (Schedule 3) is available to swap dealers and all counterparties that are not regulated swap entities, other than special entities. The Schedule 4 safe harbor is for use by swap dealers and counterparties that are governmental special entities. This Schedule is designed to establish both that the governmental special entity has a "qualified independent representative" (necessary for trading with such a special entity in general) and to establish that the parties may transact within the limited safe harbor that is available for such special entities. Use of this Schedule by a governmental special entity requires a qualified independent representative for the governmental special entity make specified representations and covenants.

In the case of ERISA special entities, two alternative safe harbors (Schedules 5 and 6) are available. ERISA special entities may elect one or both safe harbors (provided the corresponding swap dealer has

also agreed to apply either or both safe harbors). The first safe harbor (Schedule 5) provides representations designed to satisfy the terms of the special safe harbor provided exclusively for ERISA special entities. The second safe harbor (Schedule 6) is a version of the general safe harbor for special entities with certain terms modified for ERISA plans. Both require a fiduciary of the ERISA plan to agree to certain representations and covenants. ERISA special entities should note that the second safe harbor is more limited than the first safe harbor in that it does not cover situations in which a swap dealer has communicated an “opinion” to the special entity regarding the advisability of entering into a swap transaction. As a consequence, communications with a swap dealer are likely to be more restricted for ERISA special entities that elect the second safe harbor.

DF Protocol participants wishing to use one or more of the available safe harbor Schedules should note that the representations in the Schedules (other than Schedule 5) require the counterparty to a swap dealer to represent that it is complying with certain written policies and procedures. As the requirement for these policies and procedures is new, many potential participants may need to create new written policies and procedures before entering into the DF Protocol in order to be able to use the safe harbors.

12.Q The Protocol Questionnaire requires a Protocol participant to provide information about certain advisory agents and persons who exercise control over the respondent’s swap trading. Some of these persons (e.g., a “Designated Evaluation Agent,” “Designated QIR” or “Designated Fiduciary”) are required to make representations in the elective Schedules of the Protocol. If a participant has more than one such person, can it indicate that?

The external business conduct rules require counterparties to swap dealers to provide information about agents and control persons for various regulatory purposes. The Protocol Questionnaire and DF Supplement are designed to directly address each of these regulatory requirements. This may lead to some apparent redundancy in answering questions. For example a respondent’s “Third Party Control Person” may also be its “Evaluation Agent.” In such cases, the Protocol Questionnaire permits the respondent to indicate that fact.

At the same time, respondents may have multiple agents or control persons who fit a category described in the Questionnaire. In the case of multiple “Third Party Control Persons,” respondents should identify each such Third Party Control Person in the Protocol Questionnaire (and use additional schedules to do so if additional space is necessary). This information is needed to satisfy a swap dealer’s counterparty information requirements.

With respect to “Designated Evaluation Agents,” “Designated QIRs,” and “Designated Fiduciaries,” these are persons who are identified for purposes of making representations in Schedules 3-6 of the DF Supplement relating to voluntary safe harbors. While it is possible that a counterparty to a swap dealer could have several agents or advisors that assist it in evaluating swaps under a single master agreement, in such cases, application of the safe harbors would require trade-by-trade selection of the appropriate agent to make the necessary representations. For this reason, these situations require bilateral treatment outside of the Protocol. Schedules 3-6 can only be used for situations where a swap dealer’s counterparty has a single “Designated Evaluation Agent,” “Designated QIR” or “Designated Fiduciary” that can make the required representations with respect to all swaps under Matched Protocol Covered Agreements between the parties.