



**USER GUIDE FOR
UTILITY SPECIAL ENTITY REPRESENTATION LETTER**

NOTE TO USERS:

This Utility Special Entity Representation Letter will generally be sought by an entity engaged in certain derivatives trading activity and documenting its due diligence in relation to Swap Dealer /Major Swap Participant registration requirements.

Solely for purposes of determining whether an entity’s Swap dealing activity with Special Entities has exceeded the \$25 million aggregate gross notional amount threshold for Swap Dealer registration set forth in CFTC Regulation 1.3(ggg)(4)(i)(A) for Swaps in which the counterparty is a Special Entity, CFTC Regulation 1.3(ggg)(4)(i)(B)(1) allows an entity to exclude “utility operations-related swaps” in which the Special Entity counterparty is a “utility special entity.”

In order to allow an entity to rely on the foregoing exclusion of “utility operations-related swaps” in which the Special Entity is a “utility special entity” under CFTC Regulation 1.3(ggg)(4)(i)(B)(1), the Special Entity can provide the representations set forth in the IECA’s Utility Special Entity Representation Letter (“Representation Letter”; see the form attached as Exhibit A.)

In the Representation Letter, the Special Entity is referred to as “Party A” and the recipient as “Party B.”

The second paragraph of the Representation Letter allows the parties to choose between two options with respect to the scope of the Representation Letter (i.e., there are two options for the definition of “Covered Agreement”). The first option applies the Representation Letter to all “Swaps” between the parties, whether they are yet in writing or are oral and whether subject to a master agreement, long-form confirmation or other agreement. The second option limits the applicability of the Representation Letter by specifically referencing the agreement(s) it amends.

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Section I of the Representation Letter allows the parties to choose between three options with respect to the effective “as of date” of Party A’s representations in the Representation Letter. The first option causes Party A’s representations to be effective “as of the date hereof” (i.e., as of the date of the Representation Letter). The second option causes Party A’s representations to be effective “as of October 27, 2014” (i.e., as of the effective date of the CFTC’s Final Rule on *Exclusion of Utility Operations-Related Swaps With Utility Special Entities From De Minimis Threshold for Swaps With Special Entities*, 79 F.R. 57767 (September 26, 2014)). The third option causes Party A’s representations to be effective as of any date designated by the parties.

With respect to “utility operations-related swaps” entered into with “utility special entities” prior to October 27, 2014 (i.e., the effective date of the CFTC’s Final Rule, as noted above), such Swaps may have been entered into in reliance on CFTC Staff Letter No. 14-34 (“Staff Letter 14-34”), issued on March 21, 2014, by the CFTC’s Division of Swap Dealer and Intermediary Oversight. We note that the CFTC’s Final Rule included the following further relief (See Final Rule, 79 F.R. 57767 at 57775): “In recognition of the fact that some persons may have entered into swaps in reliance on Staff Letter 14-34, the Commission is clarifying that such persons may continue to rely on such relief provided in Staff Letter 14-34 with respect to swaps entered into prior to the effective date of the Amendments [i.e., entered into prior to October 27, 2014].”

RECORDKEEPING REQUIREMENTS:

Pursuant to CFTC Regulation 1.3(ggg)(4)(i)(B)(4), an entity may rely on the representations provided by a Special Entity that it is a “utility special entity” and that the Swaps are “utility operations-related swaps;” provided, however, that “The person [Party B] must keep such representation in accordance with [CFTC Regulation] §1.31.” (Emphasis added.)

CFTC Regulation 1.31 requires records to be “available at all times for immediate examination [for the first two years],” while CFTC Regulation 45.2(e)(2) specifies that “Each record required by this section or any other section of the CEA to be kept by a non-SD/MSP counterparty shall be retrievable by that counterparty within five business days throughout the period during which it is to be kept.” (Emphasis added.)

Therefore, this Representation Letter is intended to be used as a stand-alone document that will be executed and retained as a record under CFTC Regulation 1.31, independently of the underlying trading or swap agreement, retained under CFTC Regulation Part 45, thereby keeping in strict compliance with the record retention requirements of CFTC Regulations 1.3(ggg)(4)(i)(B)(4) and 1.31. This Representation Letter is not a form suggesting representations to be incorporated into the underlying trading or swap agreement, since to do the latter could subject such trading or swap agreement to the more onerous recordkeeping requirements of CFTC Regulation §1.31.

We note, however, that a copy of this Representation Letter should also be kept with the underlying trading or swap agreement to which it refers.

CROSS-REFERENCE IN UNDERLYING TRADING OR SWAP AGREEMENT:

If the parties wish to reference the Representation Letter within their underlying trading or swap agreement(s), such agreement can include, or be amended to include, a representation such as the following:

“Representations made by Party [A] in favor of Party [B] in a Utility Special Entity Representation Letter, [delivered as of the date hereof,] [OR] [dated _____, 20__], are and remain true and correct as of the pertinent dates stated in such letter.”

Exhibit A to User Guide:
Form of Utility Special Entity Representation Letter

[Insert Date]

[Insert Name and Address of Recipient Counterparty]

Dear Sir/Madam:

This Utility Special Entity Representation Letter (this “Representation Letter”) is made as of _____, 201_ (the “Effective Date”) by _____ [*insert name of utility special entity*] (“Party A”) for the benefit of _____ [*insert name of recipient counterparty*] (“Party B”). Capitalized terms used and not otherwise defined herein are defined in the applicable Covered Agreement (as defined below).

Party A and Party B have entered into [SELECT ONE AND DELETE THE OTHER (A):] [any oral or written agreement between the parties that governs the terms and conditions of one or more transactions in Swaps that each such party has or may enter into as principal (each a “Covered Agreement”)] [OR (B):] [that certain _____[USERS TO INSERT NAME OF AGREEMENT(S) TO BE COVERED; MOST LIKELY AN ISDA MASTER AGREEMENT] dated _____ (the “Covered Agreement”)]. Party A is a Special Entity as that term is defined in Section 4s(h)(2)(C) of the CEA and CFTC Regulation 23.401(c) (for example, a state or local government, a government agency, or an instrumentality, department or corporation established by a state).

Solely for purposes of determining whether Party B’s Swaps dealing activity with Special Entities has exceeded the \$25 million aggregate gross notional amount threshold for Swap Dealer registration set forth in CFTC Regulation 1.3(ggg)(4)(i)(A) for Swaps in which the counterparty is a Special Entity, CFTC Regulation 1.3(ggg)(4)(i)(B)(1) allows Party B to exclude “utility operations-related swaps” in which the counterparty is a “utility special entity.” In order to allow Party B to rely on the foregoing exclusion, Party A provides the representations set forth in this Representation Letter for the benefit of Party B.

I. REPRESENTATIONS OF UTILITY SPECIAL ENTITY. Party A hereby represents to Party B as of [SELECT ONE AND DELETE THE OTHERS (A):] [the date hereof,] [OR (B):] [October 27, 2014,] [OR (C):] [_____, 20__, [USERS TO SPECIFY AN APPLICABLE DATE]] and such representations are deemed to have been repeated as of the time of entering into each Swap transaction under the Covered Agreement, on each day throughout the term of each Swap transaction, and as of the time of each Reportable Event (unless Party A otherwise specifically indicates in a written notice to Party B with respect to a particular Swap, delivered to Party B prior to the date Party A and Party B enter into such Swap or prior to the date of a Reportable Event with respect to such Swap), that with respect to any Swap entered into under the Covered Agreement:

(A) Party A is a “utility special entity” as such term is defined in CFTC Regulation 1.3(ggg)(4)(i)(B)(2), meaning that it is a Special Entity that:

- (i) owns or operates electric or natural gas facilities, electric or natural gas operations or anticipated electric or natural gas facilities or operations;
- (ii) supplies natural gas or electric energy to other utility special entities;
- (iii) has public service obligations or anticipated public service obligations under Federal, State or local law or regulation to deliver electric energy or natural gas service to utility customers; or
- (iv) is a Federal power marketing agency as defined in Section 3 of the Federal Power Act (16 U.S.C. 796(19)); and

(B) Any such Swap is a “utility operations-related swap” as such term is defined in CFTC Regulation 1.3(ggg)(4)(i)(B)(3), meaning that such Swap meets the following conditions:

- (i) a party to such Swap is a utility special entity;
- (ii) a utility special entity is using such Swap to hedge or mitigate commercial risk as defined in CFTC Regulation 50.50(c);
- (iii) such Swap is related to an exempt commodity, as that term is defined in Section 1a(20) of the CEA, or to an agricultural commodity insofar as such agricultural commodity is used for fuel for generation of electricity or is otherwise used in the normal operations of the utility special entity; and
- (iv) such Swap is an electric energy or natural gas Swap, or such Swap is associated with:
 - (a) the generation, production, purchase or sale of natural gas or electric energy, the supply of natural gas or electric energy to a utility special entity, or the delivery of natural gas or electric energy service to customers of a utility special entity;
 - (b) fuel supply for the facilities or operations of a utility special entity;
 - (c) compliance with an electric system reliability obligation; or
 - (d) compliance with an energy, energy efficiency, conservation, or renewable energy or environmental statute, regulation, or governmental order applicable to a utility special entity.

II. DEFINITIONS. For purposes of this Representation Letter, the following capitalized terms are defined as follows:

“*CFTC*” means the U.S. Commodity Futures Trading Commission.

“*CFTC Regulations*” means the rules, regulations, orders, supplementary information, guidance, questions and answers, staff letters and interpretations published or issued by the CFTC, in each applicable case as amended, modified, superseded, or otherwise supplemented from time to time, and when used herein may also include specific citations to Titles, Parts or Sections of Title 17 of the Code of Federal Regulations without otherwise limiting the applicability of other rules, regulations, orders, supplementary information, guidance, questions and answers, staff letters and interpretations.

“*Commodity Exchange Act*” or “*CEA*” means the U.S. Commodity Exchange Act, as amended, 7 USC Section 1, *et seq.*

“*Reportable Event*” means any event that results in a Swap under the Covered Agreement or in a change to the primary economic terms of a Swap under the Covered Agreement, including execution, termination, assignment, novation, exchange, transfer, amendment, conveyance, or extinguishing of rights or obligations of any such Swap.

“*Special Entity*” means a “special entity” as defined in Section 4s(h)(2)(C) of the CEA and CFTC Regulation 23.401(c).

“*Swap*” means a “swap” as defined in the Section 1a(47) of the CEA and CFTC Regulations thereunder.

“*Swap Dealer*” means a “swap dealer” as defined in the Section 1a(49) of the CEA and CFTC Regulations thereunder.

III. NOTICES AND CORRESPONDENCE. All notices and correspondence hereunder shall be addressed as follows:

If to Party A:

Phone: _____

Fax: _____

Email: _____

If to Party B:

Phone: _____

Fax: _____

Email: _____

IN WITNESS WHEREOF, this Representation Letter has been executed and delivered, as of the Effective Date, by Party A (as the “utility special entity”) for the benefit of Party B (as the “recipient counterparty”).

[_____] (Party A)

By: _____
Name:
Title:

[Acknowledgement of receipt, as of this __ day of _____, 20__, by:

[_____] (Party B)

By: _____
Name: _____
Title: _____]