



**DODD-FRANK ACT REPRESENTATIONS AND REPORTING AMENDING AGREEMENT**

*[The Dodd-Frank Act Representations and Reporting Amending Agreement was prepared to assist two non-Swap Dealer/Major Swap Participants (commonly referred to as “end-users” whether or not the party files for the end-user exception from clearing under CFTC Regulations) in complying with CFTC Regulation 45.8(d)(2) under the Dodd-Frank Act.]*

This Dodd-Frank Act Representations and Reporting Amending Agreement (this “Agreement”) is made as of \_\_\_\_\_, 201\_, by and between \_\_\_\_\_ (“Party A”) and \_\_\_\_\_ (“Party B”) with respect to Swap Transactions (as defined below) entered into under [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 Swap Transactions that each such party has or may enter into as principal] [OR (B)] [that certain \_\_\_\_\_ [users to insert name of agreement(s) to be covered] dated \_\_\_\_\_] (each a “Covered Agreement” and collectively with every additional contract or agreement the parties may from time to time hereinafter agree in writing to make subject hereto, the “Covered Agreements”), and amends each Covered Agreement to the extent provided herein.

*[The Recitals section allows the parties to choose between two options with respect to the scope of this Agreement (i.e., there are two options for the definition of “Covered Agreement”): the first option applies this Agreement 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. This second option limits the applicability of this Agreement by specifically referencing the agreements it amends.]*

WHEREAS, CFTC Regulation 45.8(d)(2) provides in pertinent part that “the counterparties shall agree as one term of their swap which counterparty shall be the reporting counterparty”;

In consideration of the mutual covenants set forth herein, the parties hereto agree as follows:

**Article 1:  
Amendment of each Covered Agreement**

**1.1** The parties hereby amend each Covered Agreement as set forth herein. In the event of any inconsistency between the provisions of this Agreement and a Covered Agreement, this Agreement shall prevail for the purpose of the relevant Swap Transaction. In the event of any inconsistency between the

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provisions of any confirmation entered into after the date hereof and this Agreement, such confirmation shall prevail for the purpose of the relevant Swap Transaction.

**Article 2:**  
**Definitions; Rules of Construction**

**2.1** Capitalized terms used in this Agreement and not otherwise defined herein are defined below.

“*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, 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. [“*CFTC Regulations*” is generally defined very broadly. However, this agreement specifies a particular regulation when the agreement means a particular regulation.]

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

“*Commodity Option*” means a “commodity option” within the meaning of CFTC Regulations.

“*Eligible Contract Participant*” is defined in Section 1a(18) in the Commodity Exchange Act.

“*Historical Swap*” means a “pre-enactment swap” within the meaning of CFTC Regulation 46.1 or a “transition swap” within the meaning of CFTC Regulation 46.1, in either case entered into under a Covered Agreement.

“*Notice Procedures*” means (i) the procedure specified in a Covered Agreement regarding delivery of notices or information to a party; and (ii) such other means for the delivery of notices or information to a party as may be agreed in writing between the parties from time to time.

“*Reporting Counterparty*” means the party designated as such for those categories of Swaps so identified in Exhibit A, or as otherwise agreed to by the parties in a Swap Transaction.

“*Reportable Event*” means any event that results in a Swap under a Covered Agreement or in a change to the primary economic terms of such a Swap, including execution, termination, assignment, novation, exchange, transfer, amendment, conveyance, or extinguishing of rights or obligations of a Swap. [“*Reportable Event*” includes the large range of events that CFTC regulations require be reported, which go beyond execution of the Swap and includes novation, etc.]

“*SDR*” means a registered “swap data repository” as defined in Section 1a(48) of the Commodity Exchange Act and CFTC Regulations.

“*Swap*” means a “swap” as defined in the Section 1a(47) of the Commodity Exchange Act and CFTC Regulations. [This Agreement’s definition of “Swap” uses “CFTC Regulations” so that requirements, clarifications and guidance provided beyond the CFTC’s regulations are also captured.]

“*Swap Transaction*” means a transaction between the parties under a Covered Agreement involving a Swap.

“Trade Option” means a Commodity Option between the parties under a Covered Agreement that meets the conditions contained in CFTC Regulation 32.3(a).

**2.2** As used in this Agreement, (i) “or” is not necessarily exclusive; (ii) “hereof,” “herein,” “hereunder,” and similar words refer to this Agreement in its entirety; (iii) “Articles,” “Sections” and “Exhibits” refer to Articles, Sections and Exhibits hereof unless otherwise stated or indicated; (iv) “including” is not limiting and means “including without limitation”; (v) all references to a particular entity include a reference to such entity’s successors and (if applicable) permitted assigns; and (vi) all references to a Covered Agreement or any other agreement include such Covered Agreement or other agreement as amended.

### **Article 3: Representations**

**3.1** Each party represents to the other as of the date hereof that: *[Representations to be made only as of the date of this Agreement.]*

- (a) it is duly organized or incorporated and in good standing under the laws of the jurisdiction of its organization or incorporation;
- (b) it has all requisite power and authority and, if applicable, third party and regulator consents, necessary to execute and perform this Agreement; and
- (c) the information concerning it set forth on Exhibit A is true, correct and complete.

**3.2** Without limiting the representations of the parties to each other under the applicable Covered Agreement, but amending such representations to the extent inconsistent herewith, each party represents to the other as of the date hereof, and as of the time of each Reportable Event, unless otherwise stated on Exhibit A or in a subsequent notice delivered to the other party, that it is, and any guarantor, credit support provider or pledgor of assets in support of its obligations are each, an Eligible Contract Participant. *[The parties make this representation as of each Reportable Event (as defined herein in Section 2.1) and as of the date of this Agreement. Under the Commodity Exchange Act § 2(e) it is unlawful (except in a few limited instances) to enter into a Swap unless both parties are ECPs. While a number of parties will rep in their Covered Agreements that each party is an ECP, the ECP rep here is expanded to address the CFTC’s regulatory conclusions that a guaranty of a Swap is an integral part of the Swap and the CFTC’s Office of General Counsel’s Letter No. 12-17, dated October 12, 2012, which concluded that a guarantor of a Swap must be an ECP.]*

**3.3** No event of default, termination event, grounds to vitiate, rescind, cancel or otherwise terminate a Swap, or other similar event shall be deemed to occur under a Covered Agreement or any other contract between the parties solely on the basis of a breach of any covenant or agreement set forth solely in Section 3.4 or Article 4 of this Agreement; provided, however, that nothing in this Section 3.3 shall prejudice any other right or remedy of a party at law or under such Covered Agreement or any other contract in respect of any misrepresentation or breach hereunder or thereunder. This Section 3.3 shall not limit or alter a party’s termination rights or remedies, if any, applicable to a breach of any representation, warranty, covenant, or agreement that is not set forth solely in Section 3.4 or Article 4. Any provisions in a Covered Agreement that limit the liability of one party to the other party are not amended or affected by this Agreement. *[This Section 3.3 is intended to limit the scope of liability that results if there is a breach of the Representations in this Agreement. The intent is to preserve the original transaction and Covered Agreement. The intent is also to preserve the limitations on damages]*

set forth in the Covered Agreement, and have those limitations also apply to a breach of Representations in this Agreement (e.g., no consequential damages, etc.). The limit on the scope of liability provided by Section 3.3 does not apply to Article 5 (Trade Options), so that if a party breaches a representation related to a Trade Option (which would otherwise qualify for abridged recordkeeping and reporting requirements), a party can seek to break a trade. If the Covered Agreement has the same representations that are made here, this is not a release from misrepresentation remedies under those provisions. It does not remove any waivers of consequential damages that may be in the Covered Agreements. Furthermore, neither party provides the other an "indemnity." Common law remedies, and for gas and possibly electricity UCC remedies, would still apply.]

**3.4** Each party will promptly notify the other party, before any Reportable Event in accordance with the Notice Procedures, if any representation made by such party in Exhibit A or this Agreement becomes incorrect or misleading in any material respect, and will update such representation in accordance with the Notice Procedures. [This Section requires the parties to notify each other of any material changes to their respective representations under this Agreement. For example, if one party has to file as a Swap Dealer, that party would automatically become the Reporting Counterparty as outlined in CFTC Regulation Part 45.8 and therefore the other party should be notified before the next Reportable Event.]

#### **Article 4: Reporting**

**4.1** The parties hereby agree as one term of each Swap Transaction that the Reporting Counterparty designated in Exhibit A for such Swap Transaction shall be the reporting counterparty. For each Reportable Event, the Reporting Counterparty designated in Exhibit A will report to an SDR everything that is required to be reported by the "reporting counterparty" or "reporting party" under CFTC Regulations 43.3(a), 45.8, and 46.5, and to the extent CFTC Regulations provide that the party other than the Reporting Counterparty is to be the "reporting counterparty" or "reporting party," the Reporting Counterparty is appointed as its "third party service provider" under CFTC Regulations 45.9 and 46.6. [This Section allows the parties to agree which party will be the Reporting Counterparty and incorporates such agreement as one of the terms of each Swap Transaction as required by CFTC Regulation 45.8(d)(2). To the extent that one of the parties is, for example, a non-US person, which would mean that the US person would have to report, and the non-US person wants to report, or the parties have made a mistake and deviated from the reporting hierarchy set forth in the regulations, this provision appoints the "wrong" party as the third party service provider as permitted under Regulations 45.9 and 46.6.]

**4.2** With respect to Swap Transactions that are Trade Options, each party will report everything that is required to be reported by it under CFTC Regulation Part 32. [Each party agrees to notify the other party prior to or contemporaneous with entering into any Trade Option if such party has become obligated to comply with the reporting requirements of CFTC Regulation Part 45 as a "reporting counterparty" during the preceding 12-month period in connection with any Swap Transaction that is not a Trade Option.]<sup>1</sup> [This notifies the non-Part 45 reporting party that such transaction should not be included in its Form TO. Although the CFTC provided No-Action relief related to Non-Swap Dealers/Major Swap Participants and their Part 45 reporting obligations for Trade Options, this

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<sup>1</sup> Remove bracketed text if either party is or intends to be a CFTC Regulation Part 45 Reporting Counterparty.

provision is still relevant for instances where such parties do not use the No-Action relief. See CFTC Letter No. 13-08].

**4.3** The Reporting Counterparty will provide to an SDR, or if no SDR is available to receive the information of the Reporting Counterparty, to the CFTC, everything that is required to be provided under CFTC Regulation 50.50<sup>2</sup>(b) regarding the election (if any) of the exception to the clearing requirement under Section 2(h)(7)(A) of the Commodity Exchange Act. If a party elects the exception to the clearing requirement under Section 2(h)(7)(A) of the Commodity Exchange Act, [(i) it represents as of the date of each Swap Transaction for which such election is made that it has provided the annual filing described in CFTC Regulation 50.50(b)(2) less than one year before the date of such Swap Transaction and the information therein remains true, correct and complete; [or (ii) if it has not provided the annual filing described in CFTC Regulation 50.50(b)(2) less than one year before the date of such Swap Transaction, it will provide the Reporting Counterparty with the information set forth in CFTC Regulation 50.50(b)(1)(iii) and represents as of the date of such Swap Transaction that the information is true, correct and complete]<sup>3</sup>. Upon request, a party electing the end-user exception for any Swap Transaction will provide the other party with a copy of its current annual filing described in CFTC Regulation 50.50(b)(2). [These provisions require the non-Reporting Counterparty to provide the Reporting Counterparty the material that the Reporting Counterparty needs from the non-Reporting Counterparty in order to report.]

**4.4** Each party will provide to the other party any information reasonably requested by such other party to enable such other party to comply with CFTC Regulations in connection with any Swap Transaction. [This Section provides for the flow of information as reasonably needed by the other party to comply with CFTC Regulations.]

**4.5** The party that is not the Reporting Counterparty with respect to a Swap Transaction will promptly notify the Reporting Counterparty of the occurrence of a “life cycle event” (as defined in CFTC Regulation 45.1) in respect of such Swap Transaction, that is related to a corporate event (the meaning of “corporate event” as used in CFTC Regulation 45.1 to be reasonably determined by such party that is not the Reporting Counterparty unless and until the CFTC issues a specific definition of such term) in respect of the non-Reporting Counterparty, no later than noon Central U.S. Time on the applicable “business day” (as that term is defined in CFTC Regulation 45.1) with sufficient detail regarding such life cycle event to allow the Reporting Counterparty to comply with CFTC Regulation 45.4(c), provided, however that nothing herein requires a party to provide material non-public information respecting its securities to the Reporting Counterparty.<sup>4</sup> [This Section is intended to document an agreement that the reportable corporate events are only those that relate to a Swap between the parties. This Section also documents an agreement that the meaning of “corporate event” should not be subject to an after-the-fact determination of the Reporting Counterparty and provides timing requirements to better enable the Reporting Counterparty to report current information as required by CFTC Regulations. This Section includes a savings clause that neither party is required to violate securities laws, by, for example, providing a tipoff of a merger.]

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<sup>2</sup> Formerly 39.6.

<sup>3</sup> Parties that are not requiring their non-Reporting Counterparty to make the annual filing will need to obtain the information in this clause. The parties may also prefer to address this matter on a confirmation-by-confirmation basis. Parties may also wish to require representations concerning whether a Swap Transaction is entered into in accordance with the end-user exception to mandatory clearing, including whether the transaction hedges or mitigates commercial risk, on a confirmation-by-confirmation basis.

<sup>4</sup> See footnote 39 to Part 45 Reporting Final Rule, 77 Federal Register 2154 (January 13, 2012).

**4.6** The parties shall seek to agree at the time a transaction is executed whether the transaction is a Swap, a Trade Option or a contract excluded from the defined term “Swap” or otherwise exempt from reporting. If the parties fail to so agree, the Reporting Counterparty shall determine and advise the other party prior to or concurrently with the execution of such transaction that it will report the transaction as a Swap Transaction or a Trade Option; provided however, a determination made solely by the Reporting Counterparty shall not preclude the other party from making its own determination, and shall not constitute an agreement by the parties, as to whether the transaction is a Swap, a Trade Option, or a contract excluded from the defined term “Swap” or otherwise exempt from reporting. *[This Section sets out an expectation that the parties will seek to agree on a classification of the transaction for Dodd-Frank compliance purposes at the point of execution. To account for the fact that the parties may not always agree on whether or not a transaction is characterized a certain way, this Section provides that the Reporting Counterparty is the ultimate decision maker for the purposes of reporting, but such determination is not otherwise binding on the other party for other compliance purposes.]*

**4.7** Notwithstanding any restrictions on disclosure to the contrary in any Covered Agreement or in any non-disclosure, confidentiality or similar agreement between the parties, each party consents to the disclosure of information only to the extent required by CFTC Regulations and only to the persons or entities contemplated by those CFTC Regulations. *[This Section overrides any confidentiality disclosure restrictions previously agreed to by the parties to the extent required to comply with CFTC Regulations.]*

## **Article 5: Trade Options**

**5.1** As of the time of each offer to enter into a Swap Transaction that is or may be a Commodity Option, and each Reportable Event in respect of such Swap Transaction, each party represents to the other, for each Commodity Option that by its terms can be exercised for physical settlement or that the parties have agreed pursuant to Section 4.6 hereof is a Trade Option, that it (i) is a producer, processor, or commercial user of, or a merchant handling the commodity that is the subject of the Commodity Option or the products or by-products thereof; (ii) is entering into the Commodity Option solely for purposes related to its business as such; and <sup>5</sup> (iii) intends to physically settle the Commodity Option, so that if exercised, the Commodity Option will result in the sale of an “exempt commodity” (as defined in Section 1a(20) of the Commodity Exchange Act) or an “agricultural commodity” (as defined in CFTC Regulation 1.3(zz)) for immediate or deferred shipment or delivery. *[This Section provides the representations that are applicable to qualifying for the Trade Option exemption. Including these qualifications as representations allows the parties to break deals when such representations are breached. Even if the parties have not agreed on whether a transaction is a Trade Option, the parties still make the representations in this Section if the transaction could be a Trade Option, due to the consequences for entering into a Commodity Option that is not a Trade Option. These consequences include the full panoply of CFTC Regulations, and being illegal as a swap entered into between persons other than Eligible Contract Participants.]*

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<sup>5</sup> CFTC Regulation 32.3(a)(2) only requires the representations in Section 5.1(i) and (ii) hereof be made by the offeree of the option, since the offeror of the option may instead rely on the Eligible Contract Participant representation made in Section 3.2 hereof (see CFTC Regulation 32.3(a)(1)(i)). If the offeror of the option, as an ECP, is unable to make the representations in Section 5.1(1)(i) and (ii) for a particular transaction, the parties may limit such representations so that they are being made solely by the offeree of the option.

**Article 6:**  
**Miscellaneous**

**6.1** This Agreement (i) is governed by the law specified to govern the applicable Covered Agreement for the applicable Swap Transaction; (ii) may be executed and delivered in counterparts (including by facsimile transmission or PDF files), all of which taken together shall constitute one and the same instrument; and (iii) does not create a partnership or joint venture between the parties.

**6.2** Each party, upon the reasonable request of the other, will perform such further acts and execute such further documents as may be necessary to carry out the essential intent and purpose hereof.

**6.3** Any part hereof that is or becomes invalid, illegal, or unenforceable may be severed from the remainder hereof, and to the extent possible, the parties will use reasonable efforts to replace any such part with provisions that preserve their original intent.

**6.4** This Agreement does not create any third-party beneficiaries that are in addition to those provided under a Covered Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first above written.

**PARTY A**

**PARTY B**

\_\_\_\_\_  
By:  
Name:  
Title:

\_\_\_\_\_  
By:  
Name:  
Title:

**EXHIBIT A**

*[Some parties may elect to just exchange this Exhibit A as a “know your counterparty” questionnaire.]*

<b>Party A:</b> _____		<b>Party B:</b> _____	
CICI/Legal Entity Identifier:		CICI/Legal Entity Identifier:	
Principal Address:		Principal Address:	
Phone:		Phone:	
Fax:		Fax:	
Email:		Email:	
<b>Guarantor, if applicable:</b>		<b>Guarantor, if applicable:</b>	
Address:		Address:	
Phone:		Phone:	
Fax:		Fax:	
Email:		Email:	
<b>Reporting Counterparty: (select only one)</b>			
<input type="checkbox"/> Party A	<input type="checkbox"/> Party B	<input type="checkbox"/> Other [specify] <i>[Options include but are not limited to: Seller, Seller or Floating Price Payor, Buyer or Fixed Price Payor. However, these options may create confusion as in certain circumstances there may not be a clear “Seller” or only one Floating/Fixed Price Payor.]</i>	
<b>Swap Data Repository(ies) selected by the Reporting Counterparty(ies):</b>			
SDR if Party A is a/the Reporting Counterparty:			
SDR if Party B is a/the Reporting Counterparty:			
<b>Reportable Events to be reported by Reporting Counterparty:</b>			
<input type="checkbox"/> Historical Swaps entered into prior to the date hereof <input type="checkbox"/> Reportable Events on or after the date hereof including in respect of Historical Swaps <input type="checkbox"/> Reportable Events on or after the date hereof excluding in respect of Historical Swaps <input type="checkbox"/> Historical Swaps as used in this election excludes cleared Historical Swaps <i>[Multiple options provided to allow the parties to identify exactly which trades will be reported. This Section can be edited by the parties if a further break-out of delegation is required.]</i>			
<b>Swap Dealer within the meaning of Section 1a(49) of the Commodity Exchange Act and CFTC Regulations:</b> <i>[Neither party should be making this election when entering into this Agreement. This was provided to make sure the parties had a clear representation from the other party with respect to its Swap Dealer status and to create a representation that would need to be updated when this status changes.]</i>			
Party A:		Party B:	
<input type="checkbox"/> Yes		<input type="checkbox"/> Yes	
<input type="checkbox"/> No		<input type="checkbox"/> No	
<b>Major Swap Participant within the meaning of Section 1a(33) of the Commodity Exchange Act and CFTC Regulations:</b> <i>[Neither party should be making this election when entering into this Agreement. This was provided to make sure the parties had a clear representation from the other party with respect to its Major Swap Participant status and to create a representation that would</i>			



<i>need to be updated when this status changes.]</i>	
Party A: <input type="checkbox"/> Yes <input type="checkbox"/> No	Party B: <input type="checkbox"/> Yes <input type="checkbox"/> No
<b>Eligible Contract Participant:</b>	
Party A: <input type="checkbox"/> Yes <input type="checkbox"/> No	Party B: <input type="checkbox"/> Yes <input type="checkbox"/> No
<b>U.S. person within the meaning of CFTC Regulations:</b>	
Party A: <input type="checkbox"/> Yes <input type="checkbox"/> No	Party B: <input type="checkbox"/> Yes <input type="checkbox"/> No
<b>Financial Entity within the meaning of CFTC Regulations:</b> <i>[If one party is a Financial Entity, that party must be the Reporting Counterparty, unless otherwise delegated as provided herein.]</i>	
Party A: <input type="checkbox"/> Yes <input type="checkbox"/> No	Party B: <input type="checkbox"/> Yes <input type="checkbox"/> No
<b>Special Entity within the meaning of CFTC Regulations:</b> <i>[Included to help parties identify their counterparty and track Swaps done with Special Entities as they track their exposure in relation to the de minimis threshold.]</i>	
Party A: <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> If Yes, check if the following applies: “owns or operates electric or natural gas facilities or electric or natural gas operations (or anticipated facilities or operations), supplies natural gas and/or electric energy to other utility special entities, has public service obligations (or anticipated public service obligations) under Federal, State or local law or regulation to deliver electric energy and/or natural gas service to utility customers, or is a Federal power marketing agency as defined in Section 3 of the Federal Power Act (16 U.S.C. 796(19))” <sup>6</sup> <i>[Used to identify Utility Special Entities which have a separate de minimis threshold.]</i>	Party B: <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> If Yes, check if the following applies: “owns or operates electric or natural gas facilities or electric or natural gas operations (or anticipated facilities or operations), supplies natural gas and/or electric energy to other utility special entities, has public service obligations (or anticipated public service obligations) under Federal, State or local law or regulation to deliver electric energy and/or natural gas service to utility customers, or is a Federal power marketing agency as defined in Section 3 of the Federal Power Act (16 U.S.C. 796(19))”

<sup>6</sup> Users are strongly recommended to read CFTC No-Action Letter 12-18 in full if either party checks this box. There are several additional conditions to reliance on the No-Action Letter. The consequences of not meeting such additional conditions are significant. The no-action position taken therein is not binding on the CFTC as a whole. IECA is not providing legal advice to any entity in respect of the consequences of transacting with a Utility Special Entity in reliance on the No-Action Letter.

**Other information if requested:**

<b>Ultimate Parent (legal entity name of the company that owns or controls the counterparty, and that itself has no parent entity):</b> _____	<b>Ultimate Parent (legal entity name of the company that owns or controls the counterparty, and that itself has no parent entity):</b> _____
<input type="checkbox"/> Check if 100% owned by above entity	<input type="checkbox"/> Check if 100% owned by above entity

*[Additional information as required by some SDRs may be included here.]*