



# USER'S GUIDE TO THE IECA AMENDMENT TO THE ISDA® AUGUST 2012 DF SUPPLEMENT

This document illustrates the changes to the ISDA August 2012 DF Supplement to be made by the IECA's Amendment Adopting, Incorporating and Amending the ISDA August 2012 DF Supplement (the "Amendment") to be used by and between a Swap Dealer party and a non-Swap Dealer party. Note that the full text of the Amendment includes additional relevant changes, especially changes to the ISDA Protocol structure (for example, the Questionnaire is replaced), and therefore this redline should not be read as the complete set of changes made by the proposed Amendment. THIS DOCUMENT IS PROVIDED FOR YOUR CONVENIENCE ONLY, AND DOES NOT CONSTITUTE THE PROVISION OF LEGAL ADVICE BY THE IECA, ANY OF ITS MEMBERS, OR ANY OF ITS REPRESENTATIVES OR THEIR AGENTS.

**PROTOCOL MODIFICATIONS BY ISDA:** If the parties desire to incorporate other terms (for example, the Addendum I to the ISDA August 2012 DF Protocol Questionnaire, published by ISDA on November 9, 2012 (the "Addendum I"), they may do so by adding a statement to that effect at the end of Exhibit A to the IECA Amendment.

CHANGES made by the Amendment to the ISDA August 2012 DF Supplement are identified as follows:

[Insertions](#)

[Deletions](#)

[Commentary with respect to the change](#)

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## **ISDA AUGUST 2012 DF SUPPLEMENT<sup>1</sup>**

**published on August 13, 2012,  
by the International Swaps and Derivatives Association, Inc.**

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<sup>1</sup> This DF Supplement is intended to address requirements of the following final rules:

- (1) CFTC, Final Rule, *Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties*, 77 Fed. Reg. 9734 (Feb. 17, 2012);
- (2) CFTC, Final Rule, *Large Trader Reporting for Physical Commodity Swaps*, 76 Fed. Reg. 43851 (July 22, 2011);
- (3) CFTC, Final Rule, *Position Limits for Futures and Swaps*, 76 Fed. Reg. 71626 (Nov. 18, 2011);
- (4) CFTC, Final Rule, *Real-Time Public Reporting of Swap Transaction Data*, 77 Fed. Reg. 1182 (Jan. 9, 2012);
- (5) CFTC, Final Rule, *Swap Data Recordkeeping and Reporting Requirements*, 77 Fed. Reg. 2136 (Jan. 13, 2012);
- (6) CFTC, Final Rule, *Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants*, 77 Fed. Reg. 20128 (Apr. 3, 2012); and
- (7) CFTC, Final Rule, *Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps*, 77 Fed. Reg. 35200 (June 12, 2012).

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**[Article 1 of the Amendment contains important interpretive provisions:**

**1.1 Adherence to Protocol Agreement.**

*Section 1.1 allows the parties to execute the IECA Amendment as either a standalone document (Option 1) or in conjunction with signing the ISDA August 2012 Protocol (Option 2).*

SELECT ONE:

Option One: In lieu of using the procedures set forth in the Protocol Agreement, the parties desire to implement the terms of the ISDA August 2012 DF Supplement between them by incorporating it by reference and completing Exhibit A. The ISDA August 2012 DF Supplement, as amended hereby, is incorporated by reference into the Covered Agreement as though fully set forth therein and shall govern all Swap transactions, if any, under the Covered Agreement. The parties adopt between them the ISDA August 2012 DF Supplement into the Covered Agreement by execution of this Amendment, rather than pursuant to the procedure set forth in the ISDA August 2012 DF Protocol Agreement (the “Protocol Agreement”) or the Adherence Letter (as defined in the Protocol Agreement), the ISDA August 2012 DF Supplement or the ISDA August 2012 DF Questionnaire and its Addendum I (the “Questionnaire”). The phrase “this DF Supplement” as used in the ISDA August 2012 DF Supplement, as so adopted and incorporated hereby, means “this Amendment,” and the term “Covered Agreement” means “Covered Agreement” as defined in this Amendment. Exhibit A hereto shall be used in lieu of the Questionnaire contemplated by the Protocol Agreement for the Covered Agreement. “DF Supplement Information” is any information set forth in Exhibit A together with any other information that the parties agree shall be “DF Supplement Information.” The information contained in Exhibit A as well as any other information required to be delivered under the Agreement shall be automatically updated or provided and deemed delivered to SD by (a) any filings submitted by CP, from time to time, to the SEC as and when publicly posted on <http://www.sec.gov/edgar.shtml> (or any successor SEC webpage) and (b) any other written notices provided to SD under the Covered Agreement.

Option Two: The parties agree to use the procedures set forth in the Protocol Agreement and agree to implement and amend between them the terms of the ISDA August 2012 DF Supplement by adhering to the Protocol Agreement and exchanging the Questionnaire and entering into this Amendment. The Protocol Agreement, Questionnaire, DF Terms Agreement (if applicable) and ISDA August 2012 DF Supplement shall govern all Swap transactions, if any, under the Covered Agreement, provided that the ISDA August 2012 DF Supplement and Questionnaire shall govern as amended by this Amendment. The phrase “this DF Supplement” as used in the ISDA August 2012 DF Supplement, means the ISDA August 2012 DF Supplement as amended

by this Amendment, and the term “Covered Agreement” means “Covered Agreement” as defined in this Amendment. “DF Supplement Information” is any information set forth in the Questionnaire together with any other information that the parties agree shall be “DF Supplement Information.” The information contained in the Questionnaire as well as any other information required to be delivered under the Agreement shall be automatically updated or provided and deemed delivered to SD by (a) any filings submitted by CP, from time to time, to the SEC as and when publicly posted on <http://www.sec.gov/edgar.shtml> (or any successor SEC webpage) and (b) any other written notices provided to SD under the Covered Agreement.

*Regarding DF Supplemental Information, the IECA Amendment provides that the information update requirements contained in Section 2.3 of the ISDA August 2012 DF Supplement, may be met via SEC filings and notices given under the underlying contract. Note, however, this provision effects the delivery method of such update requirements, not the timing thereof. If delivery via an SEC filing would not be timely under the terms of the ISDA August 2012 DF Supplement (see, for example, Section 2.10 of the ISDA August 2012 DF Supplement), then the party would have to deliver via a more timely method.*

**1.2 Resolving Conflict of Terms.** Capitalized terms used herein and not otherwise defined shall have the meaning ascribed thereto in the ISDA August 2012 DF Supplement. However, in the event of any inconsistency between (a) a term defined in the Covered Agreement or in a Swap transaction confirmation and (b) a term defined in the ISDA August 2012 DF Supplement, then (i) the term defined in the ISDA August 2012 DF Supplement will control for purposes of interpreting this Amendment, and (ii) the term defined in the Covered Agreement or Swap transaction confirmation (with any inconsistency between the two documents determined in accordance with the Covered Agreement) will control for purposes of interpreting the Covered Agreement or Swap transaction confirmation.]

*Section 1.2 sets forth how a conflict in terms will be resolved between the IECA Amendment, the ISDA August 2012 Protocol, and the Covered Agreement.*

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International Swaps and Derivatives Association, Inc.

### **ISDA August 2012 DF Supplement** **(published on August 13, 2012)**

Any of the following schedules of this ISDA August 2012 DF Supplement (as published by the International Swaps and Derivatives Association, Inc. (“ISDA”)) (this “**DF Supplement**”) may be incorporated into an agreement (such agreement, a “**Covered Agreement**”) by written agreement of the relevant parties indicating which schedules of this DF Supplement (each such schedule, a “**DF Schedule**”) shall be incorporated into such Covered Agreement. All DF Schedules so incorporated in a Covered Agreement will be applicable to such Covered Agreement unless otherwise provided in such Covered Agreement, and any term defined in this DF Supplement and used in any DF Schedule that is incorporated by reference in a Covered Agreement will have the meaning set forth in this DF Supplement unless otherwise provided in such Covered Agreement. Any term used in a Covered Agreement will, when combined with the name of a party, have meaning with respect to the named party only. The headings and footnotes used in this DF Supplement are for informational purposes and convenience of reference only, and are not to affect the construction of or to be taken into consideration in interpreting this DF Supplement.

[FROM THE RECITALS: “WHEREAS, the parties desire to amend the terms of the ISDA August 2012 DF Supplement and apply it to [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] [OR (B)] [that certain \_\_\_\_\_] [users to insert name of agreement to be covered; most likely an ISDA Master Agreement] dated \_\_\_\_\_ ] (the “Covered Agreement”);”]

*The Recitals section allows the parties to choose between two options with respect to the scope of the ISDA August 2012 DF Supplement (i.e., there are two options for the definition of “Covered Agreement”): the first option applies the ISDA August 2012 DF Supplement 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 ISDA August 2012 DF Supplement by specifically referencing the agreements it amends. This is to address the concerns of some participants that not knowing which specific agreements are being amended by the ISDA August 2012 DF Supplement could lead to unintended consequences.*

## **Schedule 1 Defined Terms**

The following terms shall have the following meanings when used in this DF Supplement:

“**Agreement**,” as used in a provision of this DF Supplement that is incorporated into a Covered Agreement or any defined term used in such provision, means such Covered Agreement, as amended or supplemented from time to time.

“**Agricultural Commodity**” means any “agricultural commodity,” as defined in CFTC Regulation 1.3(zz).

“**Associated Person**” means, with respect to a Swap Dealer, any person acting for or on behalf of such Swap Dealer, including an associated person as defined in Section 1a(4) of the Commodity Exchange Act.

“**Applicable U.S. Law**” means all applicable laws of the United States and rules, regulations, orders and written interpretations of U.S. federal authorities, self-regulatory organizations, markets, exchanges, and clearing facilities.

“**Business Day**” means a day on which commercial banks are open for general business (including dealings in foreign exchange and foreign currency deposits).

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

“**CFTC Regulations**” means the rules, regulations, orders and interpretations published or issued by the CFTC.

“**Commodity Exchange Act**” means the Commodity Exchange Act, as amended.

“**Commodity Trade Option**” means a commodity option entered into pursuant to CFTC Regulation 32.3(a).

“**Counterparty**” or “**CP**” means a party that is the counterparty to a Swap Dealer in respect of the Agreement. For the avoidance of doubt, if two Swap Dealers are parties to the Agreement, each Swap Dealer is a Counterparty or CP for purposes of this DF Supplement.

“**DCM**” means a “designated contract market,” as such term is used in the CFTC Regulations.

“**DCO**” means a “derivatives clearing organization,” as such term is defined in Section 1a(15) of the Commodity Exchange Act and the CFTC Regulations.

“**Designated Evaluation Agent**” means, with respect to a party to the Agreement, a person (if any), other than an employee of such party, that such party has represented in writing to its counterparty is its “Designated Evaluation Agent.”

“**Designated Fiduciary**” means, with respect to a party to the Agreement, a person (if any) that such party has represented in writing to its counterparty is its “Designated Fiduciary.”

“**Designated QIR**” means, with respect to a party to the Agreement, a person (if any) that such party has represented in writing to its counterparty is its “Designated QIR.”

“**DF Schedule**” shall have the meaning given to such term in the introductory paragraph of this DF Supplement.

“**DF Supplement Rules**” means the CFTC Regulations adopted in the following Federal Register citations, as amended and supplemented from time to time: (1) *Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties*, 77 Fed. Reg. 9734 (Feb. 17, 2012); (2) *Large Trader Reporting for Physical Commodity Swaps*, 76 Fed. Reg. 43851 (July 22, 2011); (3) *Position Limits for Futures and Swaps*, 76 Fed. Reg. 71626 (Nov. 18, 2011); (4) *Real-Time Public Reporting of Swap Transaction Data*, 77 Fed. Reg. 1182 (Jan. 9, 2012); (5) *Swap Data Recordkeeping and Reporting Requirements*, 77 Fed. Reg. 2136 (Jan. 13, 2012); (6) *Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants*, 77 Fed. Reg. 20138 (Apr. 3, 2012); (7) *Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps*, 77 Fed. Reg. 35200 (June 12, 2012); and (8) solely for purposes of Sections 2.4, 2.5, 2.12 and 2.19 of this DF Supplement, any comparable non-U.S. regulation with which SD is permitted by the CFTC to comply in lieu of any of the foregoing CFTC Regulations.

“**DF Supplement Information**” means (i) any information or representation agreed in writing by the parties to be DF Supplement Information; and (ii) any information provided pursuant to Section 2.4 of this DF Supplement, in each case, as amended or supplemented from time to time in accordance with Section 2.3 of this DF Supplement or in another manner agreed by the parties.

“**ERISA**” means the Employee Retirement Income Security Act of 1974, as amended.

“**ERISA Special Entity**” means a party to the Agreement that has represented in writing to its counterparty that it is an employee benefit plan subject to Title I of ERISA.

“**Exempt Commodity**” means any “exempt commodity” under Section 1a(20) of the Commodity Exchange Act.

“**FCM**” means a futures commission merchant subject to regulation under the Commodity Exchange Act.

“**Hedging Entity ECP**” means a party to the Agreement that (i) has represented in writing to its counterparty that it is a corporation, partnership, proprietorship, organization, trust, or other entity that has a net worth exceeding \$1,000,000 and enters into Swaps in connection with the conduct of the party’s business or to manage the risk associated with an asset or liability owned or incurred or reasonably likely to be owned or incurred by the party in the conduct of the party’s business, but (ii) has not represented that it qualifies as an “eligible contract participant” as defined in Section 1a(18) of the Commodity Exchange Act other than as provided above.



“**Hedging Individual ECP**” means a party to the Agreement that (i) has represented in writing to its counterparty that it is an individual who has amounts invested on a discretionary basis, the aggregate of which is in excess of \$5,000,000 and who enters into Swaps in order to manage the risk associated with an asset owned or liability incurred, or reasonably likely to be owned or incurred, by the party, but (ii) has not represented that it qualifies as an “eligible contract participant” as defined in Section 1a(18) of the Commodity Exchange Act other than as provided above.

“**Local Business Day**” shall have the meaning specified in the Agreement; *provided, however*, in the event the Agreement does not specify the meaning of “Local Business Day,” the term shall mean, with respect to a party, a day on which commercial banks are open for business (including for dealings in foreign exchange and foreign currency deposits) in the city that is specified in the Agreement for receipt of notices by such party.

“**Major Security-Based Swap Participant**” means a party to the Agreement that has represented in writing to its counterparty that it is registered with the SEC as a “major security-based swap participant” as defined in Section 3a(67) of the Securities Exchange Act and Rule 3a67-1 thereunder.

“**Major Swap Participant**” means a party to the Agreement that has represented in writing to its counterparty that it is registered (fully or provisionally) with the CFTC as a “major swap participant” as defined in Section 1a(33) of the Commodity Exchange Act and CFTC Regulation 1.3(hhh) thereunder.

“**Material Confidential Information**” means “material confidential information” as such term is used in CFTC Regulation 23.410(c).

“**Non-Reporting Counterparty**” means, in respect of any Swap subject to the CFTC Regulations, the party to such Swap that is not the Reporting Counterparty.

“**Notice Effective Date**” means the Local Business Day following the date on which a notice would be effective pursuant to the Notice Procedures or such other date as the parties may specify in writing.

“**Notice Procedures**” means (1) the procedure specified in the Agreement regarding delivery of notices or information to a party and (2) such other means as may be agreed in writing between the parties from time to time.

“**Notifications**” means the notifications set forth in Part VII of DF Schedule 2.

“**Regulated Swap Entity**” means a Swap Dealer, Security-Based Swap Dealer, Major Swap Participant or Major Security-Based Swap Participant.

“**Reporting Counterparty**” means, in respect of any Swap subject to the CFTC Regulations, the party to such Swap that is determined to be the “reporting counterparty” in accordance with CFTC Regulation 45.8; *provided that*, in the event that CFTC Regulation 45.8 requires the parties to agree which party shall be the reporting Counterparty, the Reporting Counterparty in respect of a Swap shall be the party agreed by the parties.

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

“**SEC**” means the U.S. Securities and Exchange Commission.

“**Securities Exchange Act**” means the Securities Exchange Act of 1934, as amended.

“**Security-Based Swap Dealer**” means a party to the Agreement that has represented in writing to its counterparty that it is registered with the SEC as a “security-based swap dealer” as defined in Section 3(a)(71) of the Securities Exchange Act and Rule 3a71-1 thereunder.

“**SEF**” means a “swap execution facility” as defined in Section 1a(50) of the Commodity Exchange Act and the CFTC Regulations.

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

“**Swap**” means a “swap” as defined in the Section 1a(47) of the Commodity Exchange Act and CFTC Regulation 1.3(xxx) that is governed by or proposed to be governed by the Agreement. The term “Swap” also includes any foreign exchange swaps and foreign exchange forwards that may be exempted from regulation as “swaps” by the Secretary of the Treasury pursuant to authority granted by Section 1a(47)(E) of the Commodity Exchange Act.

“**Swap Communication Event**” means each (1) Swap Transaction Event, (2) offer to enter into a Swap under the Agreement or a Swap Transaction Event and (3) Swap Recommendation.

“**Swap Dealer**” or “**SD**” means a party to the Agreement that has represented in writing to a counterparty that it is registered (fully or provisionally) with the CFTC as a “swap dealer” as defined in Section 1a(49) of the Commodity Exchange Act and CFTC Regulation 1.3(ggg) thereunder, *provided that* the term “Swap Dealer” also includes, as appropriate, any Associated Person of such Swap Dealer.

“**Swap Recommendation**” means a “recommendation” (as such term is used in CFTC Regulations 23.434 and 23.440) with respect to a Swap or trading strategy involving a Swap that is governed by or proposed to be governed by the Agreement.

“**Swap Transaction Event**” means, with respect to any two parties, the execution of a new Swap between such parties under the Agreement or any material amendment, mutual unwind or novation of an existing Swap between such parties under the Agreement.<sup>1</sup>

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<sup>1</sup> See 77 Fed. Reg. 9734, 9741 (Feb. 17, 2012).

**Schedule 2**  
**Agreements Between a Swap Dealer and Any Other Party**

*This DF Schedule 2 may be incorporated into an agreement between a Swap Dealer and any other party, including another Swap Dealer. For the avoidance of doubt, if this DF Schedule 2 is incorporated into an agreement between two Swap Dealers, each such Swap Dealer will be both “SD” and “CP” for purposes of this DF Schedule 2.*

*If the parties to an agreement have specified that this DF Schedule 2 shall be incorporated into such agreement and any conditions to such incorporation set forth in such agreement have been satisfied, this DF Schedule 2 shall be deemed to be a part of such agreement to the same extent as if this DF Schedule 2 were restated therein in its entirety.*

**Part I. Representations and Agreements.**

- 2.1. Each party represents to the other party (which representation is deemed repeated as of the time of each Swap Transaction Event) that, as of the date of each Swap Transaction Event, (i) all DF Supplement Information (excluding financial information and representations) furnished by or on behalf of it to the other party is true, accurate and complete in every material respect, and (ii) no representation provided in the DF Supplement Information or in this DF Supplement is incorrect or misleading in any material respect, ~~and (iii) all DF Supplement Information that is financial information furnished by or on behalf of it to the other party has been prepared in accordance with applicable accounting standards, consistently applied.~~<sup>2</sup>

*Section 2.1(c)(i) of the Amendment is intended to limit Section 2.1 of the ISDA August 2012 DF Supplement which goes beyond what is required in the regulations. Instead, the parties should refer to the Covered Agreement for covenants respecting financial information. For example, parties typically already provide in their ISDA Schedule that financial information, such as quarterly reports, will be prepared according to GAAP.*

- 2.2. Each party acknowledges that the other party has agreed to incorporate one or more DF Schedules into the Agreement, and if the parties enter into any Swaps on or after the date of such incorporation the other party will do so, in reliance upon the DF Supplement Information and the representations provided by such party or its agent in the DF Supplement Information and this DF Supplement. Notwithstanding the foregoing, each party agrees that an event of default, termination event, grounds to vitiate, cancel or otherwise terminate a Swap, or other similar event shall not occur under the Agreement or any other contract between the parties solely on the basis of (i) a representation provided solely in DF Supplement Information or in this DF Supplement being incorrect or misleading in any material respect, or (ii) a breach of any covenant or agreement set forth solely in this DF Supplement; *provided, however*, that nothing in this

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<sup>2</sup> CFTC Regulation 23.402(d).

Section 2.2 shall prejudice any other right or remedy of a party at law or under the Agreement or any other contract in respect of any misrepresentation or breach hereunder or thereunder. For the avoidance of doubt, this Section 2.2 shall not alter a party's termination rights or remedies, if any, applicable to a breach of any representation, warranty, covenant, or agreement that is not provided or set forth solely in DF Supplement Information or in this DF Supplement, including any such breach relating to any event or condition that could also cause or constitute an event specified in (i) or (ii) above. [Provisions in the Agreement that in any manner limit the liability of one party to the other party are not amended or affected hereby.](#)

*Section 2.1(a)(i) of the Amendment is intended to limit the scope of liability that results if there is a breach of the Representations in the ISDA August 2012 DF Supplement, as amended by the Amendment. 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 the ISDA August 2012 DF Supplement (e.g., no consequential damages, etc.). This provision addresses the concerns of some end-users that a breach could be grounds to break a trade.*

- 2.3. Each party agrees to promptly notify the other party in writing in accordance with the Notice Procedures (i) of any material change to DF Supplement Information (other than representations) previously provided by such party or on behalf of such party and (ii) if any representations made in DF Supplement Information or this DF Supplement by or on behalf of such party become incorrect or misleading in any material respect. For any representation that would be incorrect or misleading in any material respect if repeated on any date following the date on which the representation was last repeated, the notifying party shall timely amend such representation by giving notice of such amendment to the other party in accordance with the Notice Procedures. Notwithstanding anything in the Agreement to the contrary, a notification pursuant to this Section 2.3 shall be effective on the Notice Effective Date and the relevant information or representation will be deemed amended as of such Notice Effective Date [and shall be deemed made when provided or given so that no misrepresentation by CP is deemed to occur due to the one day delay built into the definition of "Notice Effective Date"](#).<sup>3</sup>

*Section 2.1(c)(ii) of the Amendment is intended to clarify that Section 2.3 of the Protocol does not impact the date such notice is deemed to be given. This clarification ensures that no misrepresentation by CP is deemed to occur due to the one day delay built into the definition of "Notice Effective Date."*

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<sup>3</sup> CFTC Regulation 23.402(d).

- 2.4. Each party agrees to promptly provide the other party, in accordance with the Notice Procedures, any information reasonably requested by such other party to enable such other party to comply with Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act and the DF Supplement Rules in connection with any Swap outstanding between the parties under the Agreement.<sup>4</sup>
- 2.5. Notwithstanding anything to the contrary in the Agreement or in any non-disclosure, confidentiality or similar agreement between the parties, each party hereby consents to the disclosure of information to the extent required by the DF Supplement Rules which mandate reporting of transaction and similar information.<sup>5</sup> Each party acknowledges that disclosures made pursuant to this Section 2.5 may include, without limitation, the disclosure of trade information including a party's identity (by name, identifier or otherwise) to an SDR and relevant regulators and that such disclosures could result in certain anonymous Swap transaction and pricing data becoming available to the public. Each party further acknowledges that, for purposes of complying with regulatory reporting obligations, an SDR may engage the services of a global trade repository regulated by one or more governmental regulators, provided that such regulated global trade repository is subject to comparable confidentiality provisions as is an SDR registered with the CFTC. For the avoidance of doubt, to the extent that applicable non-disclosure, confidentiality, bank secrecy or other law imposes non-disclosure requirements on transaction and similar information required to be disclosed pursuant to the DF Supplement Rules but permits a party to waive such requirements by consent, the consent and acknowledgements provided herein shall be a consent by each party for purposes of such other applicable law.
- 2.6. To the fullest extent permitted by applicable law, each party consents to the recording of conversations of its trading, marketing, operations and other relevant personnel by the other party and its affiliates, with or without the use of a warning tone or similar warning, in connection with any Swap or proposed Swap. Each party further agrees to obtain the individual consents of its personnel should such consent be required by applicable law, [as determined necessary by the party employing or responsible for such personnel](#).<sup>6</sup>

*Certain States require the consent of both persons when recording a telephone conversation. Because Dodd-Frank requires Swap Dealers to keep a record of all negotiations leading to a Swap, Swap Dealers will record such telephone calls, and the ISDA August 2012 DF Supplement requires each party to get any consent "required" by law. Section 2.1(a)(ii) of the Amendment is intended to defer to the employer to determine whether such consent is "required" by law for recording its personnel,*

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<sup>4</sup> See, e.g., CFTC Regulations 20.5(a); 43.3-43.4; 45.2-45.4; 46.3.

<sup>5</sup> CFTC Regulations 20.4, 20.5, 23.204, 23.205, 43.3, 43.4, 45.3, 45.4, and 46.3. Please note that the consents and acknowledgements in this Section 2.5 may not be sufficient to meet all disclosure requirements for the disclosure of information as required under the laws of certain jurisdictions.

<sup>6</sup> CFTC Regulation 23.202.

*because the employer is generally the most familiar with the applicable law. In the past, many parties have recorded without requiring the language similar to that set forth in Section 2.6 from the ISDA August 2012 DF Supplement. This amendment is considered a compromise between prior practice and what is required in the ISDA August 2012 DF Supplement.*

- 2.7. As of each Swap Transaction Event with respect to a Commodity Trade Option to which CP is the offeree, CP represents to its counterparty that it is: (i) a producer, processor, commercial user of, or a merchant handling, the commodity that is the subject of the Commodity Trade Option, or the products or byproducts thereof, and (ii) entering into the Commodity Trade Option solely for purposes related to its business as such.<sup>7</sup>
- 2.8. As of each Swap Transaction Event with respect to a Commodity Trade Option, each party represents to the other party that the Commodity Trade Option, if exercised, contains a binding obligation that results in the sale of an Exempt Commodity or an Agricultural Commodity for immediate or deferred shipment or delivery.<sup>8</sup>

2.8.1 SD acknowledges that, unless specifically stated herein, CP does not waive any of its rights against SD, or excuse SD from any of its duties to CP, provided for in the DF Supplement Rules.

*Section 2.1(a)(iii) of the Amendment is intended to clarify that the CP does not waive any of its rights against SD or excuse SD from any of its duties to CP that are provided for in the "DF Supplement Rules" (as defined on page 7 of the ISDA August 2012 DF Supplement).*

## **Part II. Agreements of a Non-Reporting Counterparty.**

- 2.9. The parties agree that if the Non-Reporting Counterparty has reported a Swap under the Agreement as an "international swap" to a non-U.S. trade repository it shall notify the Reporting Counterparty as soon as practicable and in accordance with the Notice Procedures, of the (i) identity of each non-U.S. trade repository not registered with the CFTC to which the Non-Reporting Counterparty or its agent has reported the Swap; and (ii) swap identifier used by such non-U.S. trade repository to identify the Swap~~Each party agrees that if it is the Non-Reporting Counterparty with respect to a Swap under the Agreement that is an "international swap" (as that term is defined in CFTC Regulation 45.1), it shall notify the Reporting Counterparty to such international swap, as soon as practicable and in accordance with the Notice Procedures, of the (i) identity of each non-U.S. trade repository not registered with the CFTC to which the Non-Reporting~~

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<sup>7</sup> CFTC Regulation 32.3(a)(2).

<sup>8</sup> CFTC Regulation 32.3(a)(3).

~~Counterparty or its agent has reported the Swap, and (ii) swap identifier used by such non-U.S. trade repository to identify the swap.~~<sup>9</sup>

*Section 2.1(c)(iii) of the Amendment is intended to address the concerns of some end-users that the provision, as originally written, required the Non-Reporting Counterparty to make a legal determination of what is an “international swap.” The changes to this Section are intended to be clarifying only (it has been re-worded to be more “mechanical” in its operation: if you have reported a swap to a non-US trade repository, you have to tell the other party); there is no substantive change.*

- 2.10. Each party agrees that if it is the Non-Reporting Counterparty with respect to a Swap under the Agreement, then upon the occurrence of any corporate event (the meaning of “corporate event” as used in CFTC Regulation 45.1 to be reasonably determined by the Non-Reporting Counterparty unless and until the CFTC issues a specific definition of such term) with respect to the Non-Reporting Counterparty that is also a “life cycle event” (as that term is defined in CFTC Regulation 45.1) in respect of that Swap, it will, as soon as practicable, but in no event later than 10 a.m. on the second “business day” (as that term is defined in CFTC Regulation 45.1) following the day on which such life cycle event occurs, notify the Reporting Counterparty with respect to the Swap of the occurrence of such life cycle event, with sufficient detail regarding such life cycle event to allow the Reporting Counterparty to comply with any reporting requirements imposed by the DF Supplement Rules relevant to such other party’s compliance with the DF Supplement Rules reporting requirements (see CFTC Regulation 45.4(c)).~~Each party agrees that if it is the Non-Reporting Counterparty with respect to a Swap under the Agreement, upon the occurrence of any “life cycle event” (as that term is defined in CFTC Regulation 45.1) relating to a corporate event in respect of such Non-Reporting Counterparty and such Swap, it will, as soon as practicable, but in no event later than 10 a.m. on the second “business day” (as that term is defined in CFTC Regulation 45.1) following the day on which such life cycle event occurs, notify the Reporting Counterparty to the Swap of the occurrence of such life cycle event, with sufficient detail regarding such life cycle event to allow such other party to comply with any reporting requirements imposed by the DF Supplement Rules.~~<sup>10</sup>

*Section 2.10 of the ISDA August 2012 DF Supplement applies to a limited type and number of Swaps: those in which (1) a “life cycle event” has occurred; (2) which relates to a “corporate event” of the Non-Reporting Counterparty and (3) the corporate event also relates to the Swap.*

*Note that, per CFTC Regulations, “Life cycle event means any event that would result in either a change to a primary economic term of a swap or to any primary economic terms data previously reported to a swap data repository in connection with a swap.”*

<sup>9</sup> CFTC Regulation 45.3(h).

<sup>10</sup> CFTC Regulation 45.4(c).

*The current list of the minimum primary economic terms can be found in Appendix 1 to Part 45 (consisting of Exhibits A – D).*

*A “corporate event” is likely to be interpreted to mean corporate action affecting a security or securities on which the Swap is based (e.g., a merger, dividend, stock split, or bankruptcy).*

*Section 2.1(c)(iv) of the Amendment is intended to address the concern of some end-users that the language, as originally drafted, went beyond the requirement of the regulation and required the end-user to report ALL corporate events, not just those that related to a Swap between the parties. It also addresses the concern of some end-users that the meaning of “corporate event” should not be subject to an after-the-fact determination of the Reporting Party.*

### **Part III. Representations and Agreements of a Counterparty that is not a Swap Dealer.**

If CP is not a Swap Dealer, it represents and agrees as follows:

- 2.11. CP has received, reviewed, and understood the Notifications in Part VII of DF Schedule 2 that are applicable to CP.<sup>11</sup>
- 2.12. CP agrees that SD may effect delivery to CP of any notifications and informational disclosures required by the DF Supplement Rules, including standardized notifications and disclosures applicable to multiple Swaps, through any of the following means, each of which CP agrees is reliable: (i) means specified for the delivery of notices in the Notice Procedures or (ii) by posting on a web page at, or accessible through, a URL designated in a written notice given to CP pursuant to the Notice Procedures and notifying CP of such posting in a written notice given pursuant to the Notice Procedures, *provided that* SD need not provide written notice of posting on such web page with respect to the provision of daily marks pursuant to CFTC Regulation 23.431(d). CP further agrees that, if it has so specified in writing to SD, SD may provide oral disclosures of any (i) pre-trade mid-market marks required pursuant to CFTC Regulation 23.431(a)(3)(i) and (ii) basic material economic terms, including price, notional amount and termination date, pursuant to CFTC Regulation 23.431(a)(2), *provided* such disclosures are confirmed by SD in a written notice (which confirmation may be provided post-trade) by a means specified in the preceding sentence.
- 2.13. Subject to any conditions on the disclosure of Material Confidential Information to governmental authorities, regulatory authorities or self-regulatory organizations previously agreed by the parties, CP agrees that SD is authorized to disclose Material Confidential Information provided to SD by (or on behalf of) CP to comply with a request of any regulatory authority or self-regulatory organization

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<sup>11</sup> CFTC Regulations 23.402(f) and 23.431(d)(3)(ii).



with jurisdiction over SD or of which SD is a member or as otherwise required by applicable law (whether by statute, law, rule, regulation, court order, subpoena, deposition, civil investigative demand or otherwise) with respect to DF Supplement Rules; provided however, that SD will, to the extent feasible and if legally permitted to do so, notify CP of such request as soon as practicable after receipt thereof and shall not disclose such Material Confidential Information until the earlier of (a) CP notifying SD that it will not contest such disclosure or (b) five (5) Business Days (or shorter if such shorter period is requested by the regulator and SD has notified CP of such requirement, if in SD's determination such notice is permitted by law and is consistent with the request of the regulatory authority) have passed following CP's receipt of such notice without CP notifying SD that CP shall contest the disclosure of such Material Confidential Information to the requesting regulatory or self-regulatory organization, unless such notice to CP or such restriction on disclosure is otherwise not permitted by applicable law or by the requesting regulating authority or self-regulatory organization; provided further, that the foregoing proviso shall not be applicable to routine filings by SD.<sup>12</sup>

*Section 2.1(b)(i) of the Amendment is intended to preserve the non-disclosing party's confidentiality rights by providing that it shall be notified (to the extent feasible and permitted by law) so that the non-disclosing party can contest the information request, if necessary. It was a compromise between the need of Swap Dealers to cooperate with regulatory agencies and the concerns of some end-users that, where permitted by law and where consistent with the request of the regulatory agency, they be given an opportunity to contest such disclosure.*

- 2.14. If, ~~on or prior to the date on which this DF Schedule 2 is incorporated into the Agreement,~~ CP and SD have entered or enter into a written agreement relating to the non-disclosure of information regarding CP or its activities, CP and SD agree that all information that is subject to that agreement that constitutes Material Confidential Information and is provided by (or on behalf of) CP to SD may be used or disclosed by SD in any manner that is not prohibited by the terms of such agreement, irrespective of any limitations set forth in CFTC Regulation 23.410(c)(1); provided however, CP does not waive any of its rights or excuse SD from any of its duties to CP under such written agreement relating to the non-disclosure of information.

*Section 2.1(b)(ii) of the Amendment provides that both existing and new, rather than just pre-existing, confidentiality agreements govern, so parties can continue to enter into confidentiality agreements knowing that those agreements will control.*

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<sup>12</sup> CFTC Regulation 23.410(c)(2).

~~2.15.~~ If any Material Confidential Information provided by (or on behalf of) CP to SD is not subject to an agreement of the type described in Section 2.14 above, CP agrees that SD is authorized to use or disclose such Material Confidential Information on a need-to-know basis to (i) any of its affiliates, third-party service providers (*provided* such affiliates and third-party service providers are subject to limitations on use or disclosure that are no less restrictive than the limitations applicable to SD under the DF Supplement Rules, as agreed by the parties in this DF Supplement) and (ii) Associated Persons, solely for purposes of complying with the internal legal risk, compliance, accounting, operational risk, market risk, liquidity risk or credit risk policies of SD or its affiliates (in each case, consistently applied) or as otherwise permitted by the DF Supplement Rules; *provided however, the persons to whom such disclosure is made will be informed of the confidential nature of such information and instructed to keep such information confidential. Subject to the foregoing, Material Confidential Information may be disclosed to any person acting in a structuring, sales or trading capacity for SD or any affiliate of SD as permitted by CFTC Regulation 23.410(c)(2); provided that nothing in the foregoing shall waive any violation of CFTC Regulation 23.410(a); and provided further that for purposes of the foregoing, CP and SD agree that:* ~~Notwithstanding the foregoing, no such Material Confidential Information will be disclosed to any person acting in a structuring, sales or trading capacity for SD or any affiliate of SD except as permitted by CFTC Regulation 23.410(c)(2); provided that for purposes of the foregoing, CP and SD agree that:~~

*Section 2.1(b)(iii) of the Amendment clarifies that Material Confidential Information can only be shared internally on a need-to-know basis and that such persons are still subject to the parties' confidentiality agreement. This section also clarifies that Regulation 23.410 is designed to protect, rather than serve as a mechanism to permit release of, Material Confidential Information.*

- a. “the effective execution of any swap for or with counterparty,” as such language is used in CFTC Regulation 23.410(c)(2)(i), may require, without limitation, the delivery of Material Confidential Information to persons acting in a structuring, sales or trading capacity for SD or any affiliate of SD for the purpose of structuring a Swap or for the purpose of, but solely to the extent necessary for, establishing the price of a Swap or proposed Swap or adjusting the terms of an existing Swap; and
- b. the disclosure or use of Material Confidential Information to “hedge or mitigate any exposure,” as such language is used in CFTC Rule 23.410(c)(2)(ii), includes, without limitation, its disclosure or use, for the purpose of, but solely to the extent necessary for, establishing or adjusting one or more anticipatory hedges or other positions intended to hedge against the market risk, liquidity risk or counterparty credit exposure to CP that is generated by a Swap or proposed Swap.

- 2.16. CP agrees that the following information is not Material Confidential Information: information that, at or prior to the time of its use or disclosure by SD, is generally available publicly other than as a result of (i) a breach by SD of its obligations to CP under Applicable U.S. Law or a written agreement relating to the non-disclosure of information regarding CP or its activities or (ii) a breach by (a) any of SD's affiliates or third-party service providers that receive such information from SD or (b) any of SD's affiliates that receive such information in connection with the trading relationship between SD and CP, in either case, of corresponding restrictions on the use or disclosure of such information that are applicable to it.<sup>13</sup>

**Part IV. Agreements and Acknowledgements of a Counterparty that is not a Regulated Swap Entity.**

If CP is not a Regulated Swap Entity, it agrees and acknowledges as follows:

- 2.17. CP agrees that, with respect to each cleared Swap originally executed between CP and SD, CP will obtain any daily marks it wishes to receive for such cleared Swap from the FCM through which CP clears such cleared Swap or the relevant DCO or another third party.<sup>14</sup>
- 2.18. CP agrees that, unless otherwise agreed with SD in writing, with respect to each uncleared Swap between CP and SD, any daily marks required to be provided by SD to CP pursuant to CFTC Regulation 23.431(d) will be calculated by SD as of the close of business on the prior Business Day in the locality specified by SD in its notice of such daily mark to CP, such locality to be consistently specified with regard to a class or type of Swaps.<sup>15</sup>
- 2.19. CP acknowledges that, with respect to each Swap between CP and SD that is not "available for trading" (as that phrase is used in the CFTC Regulations), unless CP makes a request of SD prior to a Swap Transaction Event for a specific scenario analysis to which it is entitled pursuant to DF Supplement Rules or other Applicable U.S. Law (which request, if made orally, will be confirmed in writing, [which may include an electronic communication](#)), CP shall not be entitled to any scenario analysis unless SD otherwise agrees.<sup>16</sup>

*Section 2.1(d)(i) of the Amendment is intended to clarify that end- users can request scenario analyses by email; to avoid it having been "waived" on account of not having been requested "in writing."*

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<sup>13</sup> CFTC Regulation 23.410(c).

<sup>14</sup> CFTC Regulation 23.431(d).

<sup>15</sup> CFTC Regulation 23.431(d).

<sup>16</sup> CFTC Regulation 23.431(b).

**Part V. Representation of a Hedging Entity ECP.**

- 2.20. If CP is a Hedging Entity ECP, CP represents to SD (which representation is deemed repeated as of the time of each Swap Transaction Event) that for so long as CP remains a Hedging Entity ECP, each Swap entered into by it under the Agreement will be entered into in connection with the conduct of CP's business or to manage the risk associated with an asset or liability owned or incurred or reasonably likely to be owned or incurred by CP in the conduct of CP's business. If a party has represented to the other party that it is an "eligible contract participant" as defined in Section 1a(18) of the Commodity Exchange Act, then such party is not a Hedging Entity ECP and therefore does not make the representation in this Section 2.20.<sup>17</sup>

*Some end-users expressed the concern that, if a party did not appreciate the importance of the last line of the definition of "Hedging Entity ECP," Section 2.20 of the ISDA August 2012 DF Supplement appeared to require ALL persons to make the representation, not just those that are Hedging Entity ECPs. Section 2.1(d)(ii) of the Amendment is intended to simply remind the reader that if a party has represented in the Questionnaire or elsewhere that it is an ECP, this provision does not apply.*

**Part VI. Representation of a Hedging Individual ECP.**

- 2.21. If CP is a Hedging Individual ECP, CP represents to SD (which representation is deemed repeated as of the time of each Swap Transaction Event) that for so long as CP remains a Hedging Individual ECP, each Swap entered into by it under the Agreement, will be entered into in order to manage the risk associated with an asset owned or liability incurred, or reasonably likely to be owned or incurred, by CP.<sup>18</sup>

**Part VII. Notifications by a Swap Dealer.**

If applicable, SD hereby notifies CP that:

- 2.22. Scenario Analysis<sup>19</sup>
- a. If CP is not a Regulated Swap Entity, prior to any Swap Transaction Event with respect to any Swap that is not "available for trading" (as such term is defined in the CFTC Regulations) on a DCM or SEF, CP can request, and consult on the design of, a scenario analysis in accordance with the requirements of the DF Supplement Rules (CFTC Regulation 23.431(b)(1)

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<sup>17</sup> See Commodity Exchange Act Section 1a(18)(A)(v)(III) and related CFTC Regulations.

<sup>18</sup> See Commodity Exchange Act Section 1a(18)(A)(vi)(II) and related CFTC Regulations.

<sup>19</sup> CFTC Regulation 23.431(b).

~~– (4) to allow CP to assess its potential exposure in connection with such Swap.~~

*Section 2.1(d)(iii) of the Amendment clarifies that there is no implied waiver of CP rights under Regulation 23.431(b)(2), (3), or (4).*

#### 2.23. Daily Mark

- a. If CP is not a Regulated Swap Entity, CP has the right to receive the daily mark for cleared Swaps originally executed by CP with SD from the relevant DCO.<sup>20</sup>
- b. If CP is not a Regulated Swap Entity, SD hereby discloses to CP, in respect of a daily mark for any uncleared Swap provided to CP by SD pursuant to CFTC Regulation 23.431(d)(3)(ii), that:
  1. the daily mark may not necessarily be a price at which either CP or SD would agree to replace or terminate the Swap;
  2. unless otherwise expressly agreed by the parties, calls for margin may be based on considerations other than the daily mark provided to CP; and<sup>21</sup>
  3. the daily mark may not necessarily be the value of the Swap that is marked on the books of SD.<sup>22</sup>

#### 2.24. Clearing

- a. If CP is a not a Regulated Swap Entity, with respect to any Swap entered into between CP and SD under the Agreement that is subject to the mandatory clearing requirements under Section 2(h) of the Commodity Exchange Act, CP has the sole right to select the DCO at which the Swap will be cleared.<sup>23</sup>
- b. If CP is not a Regulated Swap Entity, with respect to any Swap entered into between CP and SD under the Agreement that is not subject to the mandatory clearing requirements under Section 2(h) of the Commodity

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<sup>20</sup> CFTC Regulation 23.431(d)(1).

<sup>21</sup> CFTC Regulation 23.431(d)(3).

<sup>22</sup> CFTC Regulation 23.431(d)(3).

<sup>23</sup> CFTC Regulation 23.432(a).

Exchange Act, CP may elect to clear such Swap and has the sole right to select the DCO at which the Swap will be cleared.<sup>24</sup>

#### 2.25. Special Entities

- a. If CP is an employee benefit plan defined in Section 3 of ERISA that is not subject to Title I of ERISA, SD hereby notifies CP of its right to elect to be treated as a special entity pursuant to CFTC Regulation 23.430(c).<sup>25</sup>

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<sup>24</sup> CFTC Regulation 23.432(b).

<sup>25</sup> CFTC Regulation 23.430(c)

**Schedule 3**  
**Institutional Suitability Safe Harbors for Non-Special Entities**

*This DF Schedule 3 may be incorporated into an agreement between a Swap Dealer and any other party that is not a Regulated Swap Entity or a Special Entity.*

*If the parties to an agreement have specified that this DF Schedule 3 shall be incorporated into such agreement and any conditions to such incorporation set forth in such agreement have been satisfied, this DF Schedule 3 shall be deemed to be a part of such agreement to the same extent as if this DF Schedule 3 were restated therein in its entirety. If the party that is not a Regulated Swap Entity or Special Entity has one or more Designated Evaluation Agents, this DF Schedule 3 will only be incorporated into an agreement if such party and each such Designated Evaluation Agent have agreed to make the representations and agreements in this DF Schedule 3 that are applicable to it.*

**Part I. Representations and Agreements Applicable if Counterparty Has One or More Designated Evaluation Agents.**

- 3.1. If (i) CP has designated one or more agents as Designated Evaluation Agents and (ii) each such Designated Evaluation Agent has agreed in writing to make the representations and agreements in Sections 3.1(b) and 3.1(c):
- a. CP represents to SD (which representation is deemed repeated by CP as of the occurrence of each Swap Communication Event) that CP has complied in good faith with written policies and procedures that are reasonably designed to ensure that each of its Designated Evaluation Agents is capable of evaluating Swap Recommendations (if any) of SD and making trading decisions on behalf of CP;<sup>26</sup>
  - b. Each Designated Evaluation Agent represents to SD (which representation is deemed repeated by such Designated Evaluation Agent as of the occurrence of each Swap Communication Event involving such Designated Evaluation Agent) that such Designated Evaluation Agent is exercising independent judgment in evaluating all Swap Recommendations (if any) of SD that are presented to it;<sup>27</sup> and
  - c. Each Designated Evaluation Agent agrees to promptly notify SD in writing in accordance with the Notice Procedures if any representations made by such Designated Evaluation Agent in this DF Supplement become incorrect or misleading in any material respect. For any representation that would be incorrect or misleading in any material respect if repeated on any date following the date on which the representation was last repeated, the Designated Evaluation Agent shall timely amend such representation by giving notice of such amendment to

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<sup>26</sup> CFTC Regulation 23.434(c)(1).

<sup>27</sup> CFTC Regulation 23.434(b)(2).

SD in accordance with the Notice Procedures. Notwithstanding anything in the Agreement to the contrary, a notification pursuant to this Section 3.1(c) shall be effective on the Notice Effective Date and the relevant information or representation will be deemed amended as of such Notice Effective Date.<sup>28</sup>

- d. CP represents (which representations are deemed repeated by CP as of the occurrence of each Swap Communication Event) that it will exercise independent judgment in consultation with a Designated Evaluation Agent, in evaluating all Swap Recommendations (if any) of SD that are presented to CP with respect to Swaps to be executed by CP on its own behalf.

**Part II. Representations Applicable if Counterparty Does Not Have a Designated Evaluation Agent.**

- 3.2. If CP has not designated a Designated Evaluation Agent, CP represents to SD (which representations are deemed repeated by CP as of the occurrence of each Swap Communication Event) that:
  - a. CP has complied in good faith with written policies and procedures that are reasonably designed to ensure that the persons responsible for evaluating all Swap Recommendations (if any) regarding a Swap and making trading decisions on behalf of CP are capable of doing so; and<sup>29</sup>
  - b. CP is exercising independent judgment in evaluating all Swap Recommendations (if any).<sup>30</sup>

**Part III. Disclosures of a Swap Dealer.**

- 3.3. SD hereby discloses to CP (which disclosure is deemed repeated by SD as of the occurrence of each Swap Communication Event) that SD is acting in its capacity as a counterparty and is not undertaking to assess the suitability of any Swap or trading strategy involving a Swap for CP.<sup>31</sup>

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<sup>28</sup> CFTC Regulation 23.402(d).

<sup>29</sup> CFTC Regulation 23.434(c)(1).

<sup>30</sup> CFTC Regulation 23.434(b)(2).

<sup>31</sup> CFTC Regulation 23.434(b)(3).



**Schedule 4**  
**Safe Harbors for Non-ERISA Special Entities**

*This DF Schedule 4 may be incorporated into an agreement between a Swap Dealer and any Special Entity that is not an ERISA Special Entity; provided that the Special Entity has one or more Designated QIRs, each of whom agrees to the provisions of Part III of this DF Schedule 4 that are applicable to it.*

*If the parties to an agreement have specified that this DF Schedule 4 shall be incorporated into such agreement and any conditions to such incorporation set forth in such agreement have been satisfied, this DF Schedule 4 shall be deemed to be a part of such agreement to the same extent as if this DF Schedule 4 were restated therein in its entirety. This DF Schedule 4 will only be incorporated into an agreement if the Special Entity and each Designated QIR have agreed to make the representations and agreements in this DF Schedule 4 that are applicable to it.*

**Part I. Representations of a Counterparty.**

- 4.1. CP represents to SD (which representations are deemed repeated by CP as of the occurrence of each Swap Communication Event) that:
- a. CP will not rely on Swap Recommendations (if any) provided by SD;<sup>32</sup>
  - b. CP will rely on advice from a Designated QIR,<sup>33</sup>
  - c. CP has complied in good faith with written policies and procedures reasonably designed to ensure that each Designated QIR selected by CP satisfies the applicable requirements of CFTC Regulation 23.450(b)(1), and that such policies and procedures provide for ongoing monitoring of the performance of such representative consistent with the requirements of CFTC Regulation 23.450(b)(1),<sup>34</sup> and
  - d. CP will exercise independent judgment in consultation with a Designated QIR, in evaluating all Swap Recommendations (if any) of SD that are presented to CP with respect to Swaps to be executed by CP on its own behalf.

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<sup>32</sup> CFTC Regulation 23.440(b)(2)(ii)(A).

<sup>33</sup> CFTC Regulation 23.440(b)(2)(ii)(B).

<sup>34</sup> CFTC Regulation 23.450(d)(1)(i); 23.434(c)(ii).

**Part II. Disclosures of a Swap Dealer.**

- 4.2. SD discloses to CP (which disclosures are deemed repeated by SD as of the occurrence of each Swap Communication Event) that:
- a. SD is not undertaking to act in the best interests of CP;<sup>35</sup> and
  - b. SD is acting in its capacity as a counterparty and is not undertaking to assess the suitability of any Swap or trading strategy involving a Swap for CP.<sup>36</sup>

**Part III. Representations and Agreements of a Designated QIR.**

- 4.3. Each Designated QIR represents to SD and CP (which representations are deemed repeated by such Designated QIR as of the occurrence of each Swap Communication Event involving such Designated QIR) that:
- a. Such Designated QIR has written policies and procedures reasonably designed to ensure that the Designated QIR satisfies the applicable requirements of CFTC Regulation 23.450(b)(1);<sup>37</sup>
  - b. Such Designated QIR is exercising independent judgment in evaluating all Swap Recommendations (if any) of SD that are presented to it;<sup>38</sup>
  - c. Unless such Designated QIR otherwise notifies SD in writing in accordance with the Notice Procedures, which notification shall become effective on the Notice Effective Date:
    1. Such Designated QIR is not and, within one year of representing CP in connection with the Swap has not been, an “associated person,” as such term is defined in Section 1a(4) of the Commodity Exchange Act, of SD;<sup>39</sup>
    2. There is no “principal relationship” (as that term is defined in CFTC Regulation 23.450(a)(1)) between the Designated QIR and SD;<sup>40</sup>

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<sup>35</sup> CFTC Regulation 23.440(b)(2)(iii).

<sup>36</sup> CFTC Regulation 23.434(b)(3).

<sup>37</sup> CFTC Regulation 23.450(d)(1)(ii)(A).

<sup>38</sup> CFTC Regulation 23.434(b)(2).

<sup>39</sup> CFTC Regulation 23.450(c)(1).

<sup>40</sup> CFTC Regulation 23.450(c)(2).

3. Such Designated QIR (i) provides timely and effective disclosures to CP of all material conflicts of interest that could reasonably affect the judgment or decision making of such Designated QIR with respect to its obligations to CP and (ii) complies with policies and procedures reasonably designed to manage and mitigate such material conflicts of interest;<sup>41</sup>
  4. Such Designated QIR is not directly or indirectly, through one or more persons, controlled by, in control of, or under common control with SD;<sup>42</sup> and
  5. To the best of such Designated QIR's knowledge, SD did not refer, recommend, or introduce such Designated QIR to CP within one year of such Designated QIR's representation of CP in connection with the Swap; and<sup>43</sup>
- d. Such Designated QIR is legally obligated to comply with the applicable requirements of CFTC Regulation 23.450(b)(1) by agreement, condition of employment, law, rule, regulation, or other enforceable duty.<sup>44</sup>
- 4.4. Each Designated QIR agrees to promptly notify SD in writing in accordance with the Notice Procedures if any representations made by such Designated QIR in this DF Supplement become incorrect or misleading in any material respect. For any representation that would be incorrect or misleading in any material respect if repeated on any date following the date on which the representation was last repeated, the Designated QIR shall timely amend such representation by giving notice of such amendment to SD in accordance with the Notice Procedures. Notwithstanding anything in the Agreement to the contrary, a notification pursuant to this Section 4.4 shall be effective on the Notice Effective Date and the relevant information or representation will be deemed amended as of such Notice Effective Date.<sup>45</sup>

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<sup>41</sup> CFTC Regulation 23.450(c)(3).

<sup>42</sup> CFTC Regulation 23.450(c)(4).

<sup>43</sup> CFTC Regulation 23.450(c)(5).

<sup>44</sup> CFTC Regulation 23.450(d)(1)(ii)(C).

<sup>45</sup> CFTC Regulation 23.402(d).

**Schedule 5**  
**Safe Harbors for ERISA Special Entities (Option 1)**

*This DF Schedule 5 may be incorporated into an agreement between a Swap Dealer and an ERISA Special Entity; provided that the ERISA Special Entity has one or more Designated Fiduciaries, each of whom agrees to the provisions of Part III of this DF Schedule 5 that are applicable to it. If the relevant Swap Dealer and ERISA Special Entity so agree, both DF Schedule 5 and DF Schedule 6 may be incorporated into an agreement.*

*If the parties to an agreement have specified that this DF Schedule 5 shall be incorporated into such agreement and any conditions to such incorporation set forth in such agreement have been satisfied, this DF Schedule 5 shall be deemed to be a part of such agreement to the same extent as if this DF Schedule 5 were restated therein in its entirety. This DF Schedule 5 will only be incorporated into an agreement if the ERISA Special Entity and each Designated Fiduciary have agreed to make the representations and agreements in this DF Schedule 5 that are applicable to it.*

**Part I. Representations of a Counterparty.**

- 5.1. CP represents to SD (which representations are deemed repeated by CP as of the occurrence of each Swap Communication Event) that:
- a. Each of its Designated Fiduciaries is a “fiduciary” as defined in Section 3 of ERISA and a Designated Fiduciary is responsible for representing CP in connection with each Swap or trading strategy involving a Swap,<sup>46</sup>
  - b. Either:
    - 1. CP will comply in good faith with written policies and procedures reasonably designed to ensure that any recommendation CP receives from SD materially affecting a Swap transaction is evaluated by a Designated Fiduciary before the transaction occurs; or<sup>47</sup>
    - 2. Any recommendation CP receives from SD materially affecting a Swap transaction will be evaluated by a Designated Fiduciary before the transaction occurs;<sup>48</sup> and
  - c. CP will exercise independent judgment in consultation with a Designated Fiduciary, in evaluating all Swap Recommendations (if any) of SD that are presented to CP with respect to Swaps to be executed by CP on its own behalf.

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<sup>46</sup> CFTC Regulations 23.440(b)(1)(i) and 23.450(d)(2).

<sup>47</sup> CFTC Regulation 23.440(b)(1)(iii)(A).

<sup>48</sup> CFTC Regulation 23.440(b)(1)(iii)(B).

**Part II. Disclosures of a Swap Dealer.**

- 5.2. SD discloses to CP (which disclosures are deemed repeated by SD as of the occurrence of each Swap Communication Event) that:
- a. SD is not undertaking to act in the best interests of CP;<sup>49</sup> and
  - b. SD is acting in its capacity as a counterparty and is not undertaking to assess the suitability of any Swap or trading strategy involving a Swap for CP.<sup>50</sup>

**Part III. Representations and Agreements of a Designated Fiduciary.**

- 5.3. Each Designated Fiduciary represents to SD and CP (which representations are deemed repeated by such Designated Fiduciary as of the occurrence of each Swap Communication Event involving such Designated Fiduciary) that:
- a. Such Designated Fiduciary is not relying on Swap Recommendations (if any) provided by SD; and<sup>51</sup>
  - b. Such Designated Fiduciary is exercising independent judgment in evaluating all Swap Recommendations (if any) of SD that are presented to it.<sup>52</sup>
- 5.4. Each Designated Fiduciary agrees to promptly notify SD in writing in accordance with the Notice Procedures if any representations made by such Designated Fiduciary in this DF Supplement become incorrect or misleading in any material respect. For any representation that would be incorrect or misleading in any material respect if repeated on any date following the date on which the representation was last repeated, the Designated Fiduciary shall timely amend such representation by giving notice of such amendment to SD in accordance with the Notice Procedures. Notwithstanding anything in the Agreement to the contrary, a notification pursuant to this Section 5.4 shall be effective on the Notice Effective Date and the relevant information or representation will be deemed amended as of such Notice Effective Date.<sup>53</sup>

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<sup>49</sup> CFTC Regulation 23.440(b)(2)(iii).

<sup>50</sup> CFTC Regulation 23.434(b)(3).

<sup>51</sup> CFTC Regulation 23.440(b)(1)(ii).

<sup>52</sup> CFTC Regulation 23.434(b)(2).

<sup>53</sup> CFTC Regulation 23.402(d).



**Schedule 6**  
**Safe Harbors for ERISA Special Entities (Option 2)**

*This DF Schedule 6 may be incorporated into an agreement between a Swap Dealer and an ERISA Special Entity; provided that the ERISA Special Entity has one or more Designated Fiduciaries, each of whom agrees to the provisions of Part III of this DF Schedule 6 that are applicable to it. If the relevant Swap Dealer and ERISA Special Entity so agree, both DF Schedule 5 and DF Schedule 6 may be incorporated into an agreement.*

*If the parties to an agreement have specified that this DF Schedule 6 shall be incorporated into such agreement and any conditions to such incorporation set forth in such agreement have been satisfied, this DF Schedule 6 shall be deemed to be a part of such agreement to the same extent as if this DF Schedule 6 were restated therein in its entirety. This DF Schedule 6 will only be incorporated into an agreement if the ERISA Special Entity and each Designated Fiduciary have agreed to make the representations and agreements in this DF Schedule 6 that are applicable to it.*

**Part I. Representations of a Counterparty.**

- 6.1. CP represents to SD (which representations are deemed repeated by CP as of the occurrence of each Swap Communication Event) that:
- a. Each of its Designated Fiduciaries is a “fiduciary” as defined in Section 3 of ERISA;<sup>54</sup>
  - b. CP will not rely on recommendations (if any) provided by SD;<sup>55</sup>
  - c. CP will rely on advice from a Designated Fiduciary;<sup>56</sup> and
  - d. CP will exercise independent judgment in consultation with a Designated Fiduciary, in evaluating all Swap Recommendations (if any) of SD that are presented to CP with respect to Swaps to be executed by CP on its own behalf.

**Part II. Disclosures of a Swap Dealer.**

- 6.2. SD discloses to CP (which disclosures are deemed repeated by SD as of the occurrence of each Swap Communication Event) that:
- a. SD is not undertaking to act in the best interests of CP;<sup>57</sup> and

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<sup>54</sup> CFTC Regulation 23.450(d)(2).

<sup>55</sup> CFTC Regulation 23.440(b)(2)(ii)(A).

<sup>56</sup> CFTC Regulation 23.440(b)(2)(ii)(B).

<sup>57</sup> CFTC Regulation 23.440(b)(2)(iii).

- b. SD is acting in its capacity as a counterparty and is not undertaking to assess the suitability of any Swap or trading strategy involving a Swap for CP.<sup>58</sup>

**Part III. Representations and Agreements of a Designated Fiduciary.**

- 6.3. Each Designated Fiduciary represents to SD and CP (which representations are deemed repeated by such Designated Fiduciary as of the occurrence of each Swap Communication Event involving such Designated Fiduciary) that such Designated Fiduciary is exercising independent judgment in evaluating all Swap Recommendations (if any) of SD presented to it.<sup>59</sup>
- 6.4. Each Designated Fiduciary agrees to promptly notify SD in writing in accordance with the Notice Procedures if any representations made by such Designated Fiduciary in this DF Supplement have become incorrect or misleading in any material respect. For any representation that would be incorrect or misleading in any material respect if repeated on any date following the date on which the representation was last repeated, the Designated Fiduciary shall timely amend such representation by giving notice of such amendment to SD in accordance with the Notice Procedures. Notwithstanding anything in the Agreement to the contrary, a notification pursuant to this Section 6.4 shall be effective on the Notice Effective Date and the relevant information or representation will be deemed amended as of such Notice Effective Date.<sup>60</sup>

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<sup>58</sup> CFTC Regulation 23.434(b)(3).

<sup>59</sup> CFTC Regulation 23.434(b)(2).

<sup>60</sup> CFTC Regulation 23.402(d).