



**AMENDMENT ADOPTING, INCORPORATING AND AMENDING THE ISDA® DF
PROTOCOL EXTENSION: EMIR PORTFOLIO RECONCILIATION, DISPUTE
RESOLUTION AND DISCLOSURE**

This Amendment Adopting, Incorporating and Amending the ISDA DF Protocol Extension: EMIR Portfolio Reconciliation, Dispute Resolution and Disclosure (the “IECA EMIR Amendment”) is entered into as of _____, 20__ (the “Effective Date”), by and between [_____] (“SD”) and [_____] (“CP”).¹

WHEREAS, reference is made to the ISDA March 2013 DF Supplement published by the International Swaps and Derivatives Association, Inc. (“ISDA®”) on March 22, 2013 (the “ISDA March DF Supplement”) and the ISDA DF Protocol Extension: EMIR Portfolio Reconciliation, Dispute Resolution and Disclosure also published by ISDA on September 10, 2013 (the “Extension Agreement”);

WHEREAS, the parties desire to amend the terms of Sections 1, 2 and 3 of the Extension Agreement [SELECT ONE AND DELETE THE OTHER (A):] [and apply it to that certain IECA Amendment Adopting, Incorporating and Amending the ISDA March 2013 DF Supplement, as agreed to by the parties dated as of _____, 20__ (the “IECA March 2013 DF Supplement Amendment” or the “Subject Agreement”), [OR (B)] [and apply it to the ISDA March DF Supplement as adopted between the parties (the “Subject Agreement”)]];

WHEREAS, SD is an entity that is established in the European Union (“EU”) and is subject to Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories dated July 4, 2012 (the “European Market Infrastructure Regulation” or “EMIR”) and, must, *inter alia*, comply with its requirements relating to Portfolio Reconciliation and Dispute Resolution (“EMIR Provisions”); and

WHEREAS, CP is an entity that is not established in the EU but desires to cooperate with SD in SD’s compliance with the EMIR Provisions.

¹ This IECA EMIR Amendment is intended to be used between a SD and a CP.

NOW, THEREFORE, in consideration of the mutual covenants set forth herein, the parties do hereby agree as follows:

Article 1:
Definitions and Conflict of Terms

1.1 Definitions. Capitalized terms used in this IECA EMIR Amendment and not otherwise defined herein shall have the meaning specified in the Subject Agreement. In the event of any inconsistency between a term defined in both the Subject Agreement and in this IECA EMIR Amendment, then such term defined in this IECA EMIR Amendment will control.

1.2 First Party. First Party, as defined in the Extension Agreement, will mean “SD.”

1.3 Counterparty. Counterparty, as defined in the Extension Agreement, will mean “CP.”

Article 2:
Incorporation of and Amendments to the Extension Agreement

2.1 Amendments. The parties agree to incorporate the Extension Agreement into the Subject Agreement along with the following amendments:

(i) Section 1(a)(ii) is amended by deleting “[and, where a PCA Agent executes this Extension Agreement in respect of one of the parties, in respect of which the PCA Agent acts];”

(ii) Section 1(a)(iii) is deleted and replaced with the following:

“(A) [the parties hereby agree that [on each Data Delivery Date, SD will deliver Portfolio Data to CP and CP will review such data]/[on each Data Delivery Date, SD and CP will deliver Portfolio Data to each other].]²

[INCORPORATE ONE OF PARAGRAPHS B-1, B-2 OR B-3, IF DESIRED]

(B-1) [CP is not established in the EU and so, as a third country entity (“TCE”), CP would not be classified as either a financial counterparty (“FC”) or a non-financial counterparty (“NFC”) under article 2(8) or 2(9) of EMIR. For the purpose of determining the content and applicability of the parties’ obligations set forth herein, having given due and proper consideration to its status as a TCE under EMIR, CP represents that (i) it is not a Major Swap Participant under Section 1a(33) of the US Commodity Exchange Act (“CEA”) and the regulations of the US Commodity Futures Trading Commission (“CFTC Rules”) thereunder, it is not a Swap Dealer under

² Include the relevant option if one party is a CFTC Swap Entity and the other is a CP. The first option applies one-way reconciliation, the second applies two-way reconciliation.

Section 1a(49) of the CEA and the CFTC Rules thereunder, and (ii) it is part of a group which also includes one or more affiliated NFCs established in the EU, identified as [_____ (insert name(s) of affiliated NFCs)], and its NFC+ or NFC- status should be assumed to be the same as that of such affiliated NFCs in the EU.]³

(B-2) [CP is not established in the EU and so, as a third country entity (“TCE”), CP would not be classified as either a financial counterparty (“FC”) or a non-financial counterparty (“NFC”) under article 2(8) or 2(9) of EMIR. For the purpose of determining the content and applicability of the parties’ obligations set forth herein, having given due and proper consideration to its status as a TCE under EMIR, CP represents that (i) it is not a Major Swap Participant under Section 1a(33) of the US Commodity Exchange Act (“CEA”) and the regulations of the US Commodity Futures Trading Commission (“CFTC Rules”) thereunder, and it is not a Swap Dealer under Section 1a(49) of the CEA and the CFTC Rules thereunder, and (ii) it is eligible for the exemption from clearing under Section 2(h)(7) of the CEA and the CFTC Rules thereunder for its OTC derivatives used for hedging. CP makes no representation or warranty with respect to any determination by SD that, as a result of the foregoing, SD may assume CP would be an NFC- pursuant to article 2(9) of EMIR were CP established in the EU.]⁴

(B-3) [CP is not established in the EU and so, as a third country entity (“TCE”), CP would not be classified as either a financial counterparty (“FC”) or a non-financial counterparty (“NFC”) under article 2(8) or 2(9) of EMIR. For the purpose of determining the content and applicability of the parties’ obligations set forth herein, having given due and proper consideration to its status as a TCE under EMIR, CP represents, to the best of its knowledge and belief, that (i) its positions in OTC derivatives do not exceed any of the relevant clearing thresholds (as determined in accordance with article 10 of EMIR and article 11 of the RTS⁵) and (ii) if CP were established in the EU, it would be classified as a NFC- pursuant to article 2(9) of EMIR. CP notes that in making its determination with respect to clearing thresholds under article 10 of EMIR and article 11 of the RTS, CP has not counted any positions in OTC derivatives that are objectively measurable as reducing risks directly relating to the

³ See OTC Question 13 “Status of Entities not established in the Union” and the first sentence of the first paragraph of OTC Answer 13(b) in Questions and Answers, Implementation of the Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR), published by the European Securities and Markets Authority (ESMA) and dated 11 November 2013 (ESMA/1633).

⁴ See OTC Question 13 “Status of Entities not established in the Union” and the second sentence of the first paragraph under OTC Answer 13(b) in Questions and Answers, Implementation of the Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR), published by the European Securities and Markets Authority (ESMA) and dated 11 November 2013 (ESMA/1633).

⁵ “RTS” means the Commission Delegated Regulation (EU) No. 149/2013 of 19 December 2012 and published on 23 February 2013 in the Official Journal of the European Union.

commercial activity or treasury financing activity of CP or its group according to the criteria set out in article 10 of the RTS and no representation or warranty is made by CP with respect to such determination.]⁶”

- (iii) Section 1(a)(x) is deleted in its entirety.
- (iv) [INCORPORATE AS APPLICABLE] Section 1(a)(xi) is incorporated as follows: [[First Party has appointed [●]] [and] [Counterparty has appointed [●]] as its agent in respect of portfolio reconciliation.] [The Parties have appointed [●] as a third-party service provider⁷ in respect of portfolio reconciliation.]
- (v) Subsection (x)(ii) under the Dispute Resolution provisions in Section 1(b), is replaced with the following: “To the extent the Dispute Resolution Risk Mitigation Techniques apply to each party, each party agrees that this Agreement, along with other applicable internal procedures a party may have in place (if any), shall serve as the procedures and processes in place to identify, record and monitor any Dispute for as long as the Dispute remains outstanding.”
- (vi) The definition of “Agreed Process” in Subsection (x)(v) under the Dispute Resolution provisions in Section 1(b) is amended to add “or contractual incorporation of the ISDA March 2013 DF Supplement by reference,” in the seventh line after the words “the ISDA March 2013 DF Protocol Agreement,” and before the words “as published by the International Swaps and Derivatives Association, Inc.”
- (vii) Section 1(c) is amended by:
 - (a) replacing it with the following: “Notwithstanding anything to the contrary in any 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 March 2013 DF Supplement Rules and]⁸ Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories dated 4 July 2012 (“**EMIR**”) and any applicable supporting law, rule or regulation (“**EMIR Information**”) which mandate reporting and/or retention of transaction and similar information (the “**Reporting Requirements**”). Each party acknowledges that disclosures made pursuant to this provision may include, without limitation, the disclosure of trade information including a party’s identity (by name,

⁶ See OTC Question 13 “Status of Entities not established in the Union” and the first and second sentences of the second paragraph under OTC Answer 13(b) in Questions and Answers, Implementation of the Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR), published by the European Securities and Markets Authority (ESMA) and dated 11 November 2013 (ESMA/1633).

⁷ Additional provisions may apply if electing the third-party service provider.

⁸ This optional provision extends the confidentiality waiver to cover disclosure required by the DF Supplement Rules, which parties to the IECA March 2013 DF Supplement Amendment may conclude is unnecessary.

identifier or otherwise) to any trade repository registered in accordance with Article 55 of EMIR or[, if no trade repository so registered can accept the information to be reported to it under the Reporting Requirements,] recognized in accordance with Article 77 of EMIR (each, a “**TR**”) and relevant regulators and that such disclosures could result in certain anonymous transaction and pricing data becoming available to the public. Each party further acknowledges that, for purposes of complying with regulatory reporting obligations, a TR 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 a TR. 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 Reporting Requirements 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. [Each party acknowledges that disclosures made pursuant hereto may be made to recipients in a jurisdiction other than that of the disclosing party or a jurisdiction that may not necessarily provide an equivalent or adequate level of protection for personal data as the disclosing party’s home jurisdiction].”; and

(b) adding: [EITHER (A):] [“The parties agree that the term Material Confidential Information as used in the IECA Amendment Adopting, Incorporating and Amending the ISDA August 2012 DF Supplement executed between the parties includes EMIR Information.”] [OR (B):] [“Notwithstanding the foregoing and without limiting any other agreement between the parties, the disclosing party will, to the extent feasible and if legally permitted to do so, notify the non-disclosing party of such request as soon as practicable after receipt thereof and shall not disclose such EMIR Information until the earlier of (a) the non-disclosing party notifying the disclosing party 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 the disclosing party has notified the non-disclosing party of such requirement, if in the disclosing party’s determination such notice is permitted by law and is consistent with the request of the regulatory authority) have passed following the non-disclosing party’s receipt of such notice without the non-disclosing party notifying the disclosing party that the non-disclosing party shall contest the disclosure of such EMIR Information to the requesting regulatory or self-regulatory organization, unless such notice to the non-disclosing party 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 the disclosing party.”]

(viii) Section 2 is amended to read:

[SELECT ALL THAT SHOULD APPLY:] “[Either party may terminate this IECA EMIR Amendment [, with at least 30 days’ written notice to the other party,

on the anniversary of the date written at the beginning of this IECA EMIR Amendment] OR [by giving at least 30 days' written notice to the other party].] AND/OR

[If the European Commission adopts an implementing act in respect of the United States of America pursuant to Article 13 of EMIR and makes the declarations stated in Article 13 of EMIR, at least in respect of the Portfolio Reconciliation Risk Mitigation Techniques and Dispute Resolution Risk Mitigation Techniques, this IECA EMIR Amendment will terminate automatically, without the need for action or notice by either party, 30 days following such implementing act becoming effective unless one party provides notice to the other pursuant to the parties' notice procedures.] AND/OR

[Termination of this IECA EMIR Amendment will disapply the amendments and construction imposed by this IECA EMIR Amendment from the date of termination [other than Section 1(c) which will continue in full force and effect]⁹.]"

- (ix) [SELECT ONE AND DELETE THE OTHER (A):¹⁰] [Section 3(c) is replaced with the following: "This IECA EMIR Amendment will be governed by and construed in accordance with the law specified in the IECA March 2013 DF Supplement Amendment."] [OR (B)¹¹] [Section 3(c) is incorporated as follows: This IECA EMIR Amendment and any non-contractual issues in respect thereof will be governed by and construed in accordance with [English law][the laws of the State of New York (without reference to choice of law doctrine)].]
- (x) The following sentence shall be added to the end of Section 3(c): "Notwithstanding anything to the contrary herein, nothing herein constitutes an agreement by either party that it is subject to, or submits to, the jurisdiction of EMIR or the EU."

IN WITNESS WHEREOF, the parties have executed this IECA EMIR Amendment as of the Effective Date.

SD

CP

By: _____
Name:
Title:

By: _____
Name:
Title:

⁹ Include this line in order to continue the confidentiality waiver.

¹⁰ Applicable if the parties have previously executed the IECA March 2013 DF Supplement Amendment.

¹¹ Applicable if the parties have not previously executed the IECA March 2013 DF Supplement Amendment.