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# Dodd-Frank Business Conduct Rules

The ISDA Protocol and ISDA Amend Webinar series \ August 9, 2012

## Welcome and intro

Katherine Darras \ General Counsel, Americas, ISDA

## Relevance, structure and key terms of the DF Protocol

Jeffrey L. Robins \ Partner, Cadwalader, Wickersham & Taft

## ISDA Amend Overview

Eric Maldonado \ Managing Director, Markit

Lansing Gatrell \ Director, Markit

**International Swaps and Derivatives Association**

**Dodd-Frank Initiative:**

**Overview of ISDA's DF August 2012  
Protocol and relevance to Buy-side  
Counterparties**

**August 9, 2012**

Jeffrey L. Robins

# Impact on Buy-side

- CFTC business conduct rules regulate the activities of swap dealers (and major swap participants) in transacting swaps with buy-side institutions.
  - Direct impact is on swap dealers and MSPs but counterparties are also affected.
- SDs and MSPs are required to obtain certain information and must conduct intrusive diligence on their counterparties, unless the counterparty provides adequate representations and certain safe harbors are used.
- Buy-side must be prepared to provide information and assess ability and willingness to give various representations.
- Parties should prepare now to ensure that trading can continue uninterrupted.

# CFTC's External Business Conduct Rule

- **Know Your Counterparty.** SDs must collect “essential facts” about counterparties.
- **True Name and Owner.** SDs must collect specified name and address information from counterparties, guarantors and control persons.
- **Disclosures.** Relationship and transaction-specific.
- **Confidentiality.** New regulatory standards for treatment of customer confidential information.
- **Counterparty Eligibility.** SDs must verify ECP and Special Entity status.
- **Suitability.** Requirements apply when an SD makes a “recommendation” to a counterparty.
- **Special Entities.** SDs subject to burdensome rules when advising or transacting with SEs.

# Issues that require active Buy-side Preparation to Trade

- **Know Your Counterparty.**
  - All information needed to comply with rules and regulations.
  - Authority of persons to act for CP.
- **True Name and Owner.**
- **Counterparty Eligibility.**
  - CPs will need to identify how they meet ECP status.
- **Suitability.**
  - In order to avoid burdensome and time-consuming regulations, CPs must provide certain representations to qualify for “institutional suitability.” This includes policies and procedures and qualified agent requirements.
- **Duties to Special Entities.**

# Reliance on Representations and Standardized Disclosures

- **CP Representations**

- SDs may reasonably rely on the representations of CPs in lieu of diligence if the CP agrees to update representations.

- **Disclosures**

- SDs may provide CPs with standardized disclosures for certain swaps (e.g. for swaps that are commonly used), if CP agrees to receive disclosures in this manner.
- Disclosures must be provided prior to trading.
- Parties to a swap must agree upon the methods for disclosure.
- Disclosures are not generally required for anonymous exchange- or SEF-based transactions.

# “Know Your Counterparty”

- **In General**

- General CP information must be obtained before trading commences.
- The KYC rule does not apply for anonymous exchange-based transactions.

- **“Essential Facts”**

- Broadly defined, all facts necessary to comply with regulation, for SD risk management, and authority of CP personnel.

- **Financial Entities**

- Extremely complicated definition; end-users should consider immediately whether they meet this status.

# True Name and Owner

- Most information will already have been provided at the time the relationship was established
- Rule requires specific information that may not have been provided in all cases, or that may have become outdated, including:
  - “principal occupation or business”;
  - name and address of any guarantors; and
  - name and address of persons exercising control with respect to positions of the counterparty.

# Eligibility to Trade

- **Eligible Contract Participants (ECPs)**
  - Status is required for all non-exchange-based swaps.
  - Detailed, extensive definition. CPs must identify how they meet it.
  - Particularly complex for small funds/commodity pools; SDs will be required to inquire into assets and, in some cases, types of trading activities.
- **Special Entities**
  - Generally includes: (1) governmental entities (federal/state/local); (2) ERISA plans; (3) government plans; (4) endowments; (4) employee benefit plans electing for SE status.

# Continuing Eligibility as an ECP after December 31

- ECP Status Changes for certain entities after December 31.
- The change will affect:
  - Commodity Pools that currently meet the ECP definition exclusively through 1a(18)(v) (e.g., having total assets in excess of \$10 million).
  - Commodity Pools entering into Retail FX transactions (pass-through statutory amendments).

# Institutional Suitability (General)

- In general, an SD that makes a “recommendation” to a CP is subject to suitability requirements.
  - Rules similar to current FINRA rules.
  - Require “reasonable diligence” and a “reasonable basis” to establish suitability.
  - Will require CPs to request detailed information from CP to comply.

# Institutional Suitability (Safe Harbor)

- **Safe Harbor Requirements**

- SD must determine that the CP or its agent is capable of “independently” evaluating the risks of a swap and is exercising independent judgment.
- Can be established through representations of CP or its agent, BUT
- CP must represent that it has complied in good faith with written policies and procedures reasonably designed to ensure that the persons responsible for evaluating recommendations and making trading decisions are capable of doing so.

# Duties to Special Entities

- **Swap Dealers are subject to heightened duties when acting either as counterparties or as advisors to Special Entities.**
- **As Counterparty:** SD must establish a reasonable basis to believe the SE has a “qualified independent representative” or a “fiduciary.”
- **As Advisor** (applies when SD “recommends” a “tailored swap” to an SE): unless safe harbor met, SD must determine that a swap/strategy is in the “best interests” of the SE.

# Duties to Special Entities: Safe Harbors

- As Counterparties

- SD must conduct independent diligence unless both the SE and its designated representative make specified representations to the SD (and each requires representations as to the existence of relevant written policies and procedures in most cases).

- As Advisors

- SD must conduct intrusive diligence to satisfy the “best efforts” standard, unless both the SE and its designated representative make specified representations and the safe harbor is otherwise satisfied.
- ERISA SEs: have two available safe harbors.
- Other SEs: limited safe harbor only

# Other Issues – Time is of the Essence

- **Dealers required to provide pre-trade marks to counterparties.**
  - Could result in material trading delays.
- **Rapid Timing in Reporting Obligations.**
  - Trade reporting obligations require extremely fast determinations. SDs will need CPs to act with speed in order to meet obligations.
- **Disclosures, Diligence Requirements.**
  - Trading will be materially slowed by these various requirements.
  - Safe harbors can alleviate the burdens; but delays may be inevitable for certain types of swaps and swap counterparties.

# Rules Yet to Come ...

- **Beyond focus on near term requirements, buy-side participants should be mindful of forthcoming rules that will require preparation, including:**
  - Margin;
  - Swap documentation;
  - Portfolio reconciliation and compression;
  - Swap confirmations.

# ISDA August 2012 DF Protocol

- **Designed to supplement all master agreements under which swaps are traded between a swap dealer and another party.**
  - Covers ISDA Master Agreements and other agreements governing swaps.
  - Parties can expand to cover swaps not governed by existing agreements, such as “prime brokered” swaps and swaps entered into for clearing.
- **Covers the CFTC External Business Conduct Rules and certain other final CFTC rules**
  - Addresses standardized provisions under the rules.
  - Parties may need to further amend documentation to meet specific needs.

# ISDA August 2012 DF Protocol (cont'd)

- **Parties incorporate provisions of the DF Supplement by exchanging Questionnaires.**
  - Questionnaires are completed and exchanged through the “ISDA Amend” platform.
- **The DF Protocol will consist of:**
  - **(1) Protocol** (mechanism for amending documents);
  - **(2) Supplement** (material terms being added);
    - Contains general terms, and schedules covering safe harbors that parties may elect to enter into.
  - **(3) Questionnaire** (information about parties, elections).
  - **(4) Terms Agreement** (for Swaps not governed by an existing master agreement)

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## Compliance with Dodd-Frank business conduct rules made easy

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**ISDA Markit  
Partnership**

ISDA and Markit have developed a documentation-compliance tool to support market participants amend documentation covering over-the-counter derivatives. The move is intended to help counterparties comply with the Dodd-Frank Act, and will be used for amendments to documentation necessitated by other global regulatory changes.

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**Background**

Dodd-Frank business conduct rules impose new obligations on swap dealers in a range of areas.

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**Requirement**

Swap dealers must sign amendments to their ISDA documentation with impacted swap counterparties to become compliant with these Dodd-Frank rules.

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**Summary**

Rather than bilaterally agreeing to a set of amendments (the combination of which will be specific to the client), participants will adhere to an ISDA protocol, agreeing to contractual amendments published by ISDA and elected on the system. Markit will provide an online questionnaire that not only automates the matching of amendments to bilateral agreements but also maps that questionnaire back to other account data and documentation.

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## ISDA mandate: Sign up

- Online signup for Markit Document Exchange opened July 23<sup>rd</sup>  
Dealers and their clients can sign up now to upload KYC/AML documentation
- Buy-side users will control access by counterparty and account level

- ISDA Dodd-Frank Protocol Adherence: Opens August 13<sup>th</sup>  
Participants must self-identify by category under the Protocol
- ISDA Amend questionnaire, Part II: Opens August 13<sup>th</sup>  
Participants respond to questions 1-5 to identify participating accounts

**ISDA Amend onboard and match process**

	<b>General questions August 13<sup>th</sup></b>	<b>Entity specific questions September 10<sup>th</sup></b>	<b>Amend ISDA master, accept applicable schedules September 10<sup>th</sup></b>
<b>ERISA</b>	<b>Answer identity questions</b>	<b>Make representations</b>	<b>Schedules 1, 2, 5, 6</b>
<b>Swap Dealer</b>	<b>Answer Identity questions</b>	<b>Make representations</b>	<b>Schedules 1-6</b>

- 1 True Name
- 2 Principal business
- 3 LEI \ Entity ID
- 4 Guarantor name
- 5 Third party control person \ name

# ISDA Amend

The screenshot shows the 'ISDA Amend Questionnaire' interface. At the top, there is a navigation bar with 'markit' logo, 'Welcome, User', 'Support', and a search bar. Below the navigation bar, there are tabs for 'Create', 'Manage', 'View', 'Tools', and 'Help', along with a 'Document Exchange' button. The main title is 'ISDA Amend Questionnaire' with a 'View DF Protocol' link. The form is divided into several sections:

- Section 1:** 'PCA PRINCIPAL TYPE' dropdown menu set to 'ERISA Special Entity' and a 'REFERENCE NAME' text input field.
- Section 2:** 'Commodity Pool' checkbox.
- Section 3:** 'ELIGIBLE CONTRACT PARTICIPANT' section with a list of options (i-xii) and checkboxes.
- Section 4:** A sub-section within the eligible contract participant list.
- Section 5:** 'Financial Entity' dropdown menu.
- Section 6:** 'SPECIAL ENTITY TYPE' section with a list of options (i-vi) and checkboxes.
- Section 7:** 'ERISA SPECIAL ENTITY ELECTION' section with checkboxes for 'Agree to Schedule 5' and 'Agree to Schedule 6'.
- Section 8:** 'Fiduciary Name' text input field.

Below the 'Fiduciary Name' field, there are input fields for 'Address Line 1', 'Address Line 2', 'City', 'State', 'Post Code/ZIP', 'Phone', 'Fax', and 'Email Address'.

Select:

1. PCA Principle Type
2. Commodity Pool
3. Eligible Contract Participant
4. Conflict Flag will notify clients but will not avert selection
5. Financial Entity
6. Special Entity Type
7. Schedule Selection
8. Address Information

## Timeline of activity



<i>July 17<sup>th</sup></i>	<i>July 23<sup>rd</sup></i>	<i>July 24<sup>th</sup></i>	<i>July 24<sup>th</sup>– 25<sup>th</sup></i>	<i>August 13<sup>th</sup></i>	<i>August 23<sup>rd</sup> – September 6<sup>th</sup></i>	<i>September 10<sup>th</sup></i>	<i>October 15<sup>th</sup></i>
Target date to supply buy side names for distribution campaign	Bulk upload spreadsheet available for ISDA Amend questionnaire Part II, Q1-5  Markit launches click-through ISDA Amend user sign-up	CFTC designating DTCC-SWIFT LEIs provider	ISDA Dodd Frank Event	Markit Launches ISDA Amend questionnaire Part II, Q1-5  ISDA August 2012 DF Protocol opens for adherence	ISDA Amend service implementation webinars	Markit Launches ISDA Amend questionnaire Part II, Q6-11 and Part III	Dodd-Frank business conduct rules compliance deadline

## ISDA Amend Buy- Side Tool Kit

- The ISDA Dodd-Frank Protocol and ISDA Amend solution

## ISDA Amend Process Flow

- Important ISDA, DTCC and ISDA Amend implementation dates through to the October 15<sup>th</sup> regulatory deadline
- ISDA Amend documentation upload process and platform functionality

## ISDA Amend

- Dodd-Frank Compliance in 3 easy steps
- Step one: [Sign up](#)
- Step two: Onboard
- Step three: Match

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## Contact us

For more information or for quick link access to ISDA Amend resources, contact:

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Thank you.

The ISDA-Markit Dodd-Frank Implementation page is on [isda.org](http://www.isda.org). In order to facilitate implementation of Dodd-Frank rulemakings, ISDA launched a page on their website to cover all presentations, documentation, audio playback related to this protocol.

Link: <http://www2.isda.org/dodd-frank-documentation-initiative/>

External Business Conduct Standards: Impact on Buy-Side and End-User Organizations

Webinar slide deck from June 27, 2012.

### — ISDA Dodd-Frank Documentation Initiative and August 2012 DF Protocol

Common questions and a brief summary to assist in your consideration of the ISDA August 2012 Dodd-Frank (DF) Protocol

### — ISDA August 2012 DF Supplement (DRAFT)

Cadwalader, Wickersham & Taft LLP DF Protocol - ISDA August 2012 Dodd-Frank Supplement

### — ISDA August 2012 DF Protocol Questionnaire (DRAFT)

Cadwalader, Wickersham & Taft LLP DF Protocol - ISDA August 2012 Dodd-Frank Protocol Questionnaire.

### — ISDA August 2012 DF Protocol (DRAFT)

Cadwalader, Wickersham & Taft LLP DF Protocol - ISDA August 2012 Dodd-Frank Protocol.

### — Dodd-Frank Documentation Compliance for Dealers

Webinar slide deck from June 14, 2012.

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builds platforms  
provides access  
scales volume  
extends networks  
& transforms business.

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