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Markets

ISDA Documentation Initiatives
July 25, 2012
Hong Kong

ISDA/Markit Collaboration on Dodd-Frank Protocol and Relevance to Asia

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Implementation of Dodd-Frank:

- Based on the current regulatory schedule in the U.S., the rules and regulations related to Dodd-Frank are being finalized, and compliance therewith will be required, in phases.
- The documentation and compliance will require implementation multiple times in corresponding phases.
 - The 1st phase is scheduled to occur 4th quarter of this year.
 - The 2nd phase is scheduled to occur 1st/ 2nd quarters of 2013.
 - The 3rd phase is scheduled to occur 3rd/ 4th quarters of 2013.

Impact of Dodd-Frank:

Swap dealers and Major Swap Participants: Must have compliant policies and documentation in order to offer or effect new swaps or modify/unwind existing swaps with counterparties.

All Counterparties (including SDs and MSPs): Must update documentation, including representations regarding legal status under Dodd-Frank, in order to trade with swap dealers and MSPs.

Extraterritoriality: Applicability to specific parties in cross-border and offshore transactions is currently uncertain given the absence of regulatory guidance.

Addressing the impact of Dodd-Frank:

- The documentation impact of the 1st phase of Dodd-Frank may be addressed by using the Dodd-Frank Protocol. The Dodd-Frank Protocol is an industry effort to standardize the supplements required to agreements governing swaps, so that such supplements may be agreed in an efficient manner on a multilateral basis.
- Alternatively, a party may address the documentation impact of the 1st phase of Dodd-Frank on a bilateral basis with each of its CPs, but such an approach will be time consuming, expensive and could prevent parties from continuing to trade until they have agreed on the required supplements to their agreements governing swaps.
- The documentation impact of future phases of Dodd-Frank will be addressed in future ISDA protocols and/or other documentation initiatives.
- The compliance impact of each phase of Dodd-Frank must be addressed on an institution-by-institution basis and will represent a significant change in the compliance procedures of institutions in the swaps markets.

Application of Dodd-Frank:

- To determine whether and how Dodd-Frank applies to your swap trading relationship, you will need to consider the legal “status” of you and your counterparty, and the application of the U.S.’s new jurisdictional rules.
 - ❖ You and your counterparty must both be **eligible contract participants**.
 - ❖ Are you or your counterparty a **swap dealer (“SD”)**?
 - ❖ Are you or your counterparty a **security-based swap dealer**?
 - ❖ Are you or your counterparty a **major swap participant (“MSP”)**?
 - ❖ Are you or your counterparty a **major security-based swap participant**?
 - ❖ Are you or your counterparty a **special entity**?
 - ❖ Are you or your counterparty a **financial entity**?
 - ❖ Are you or your counterparty a **U.S. person**?

Key considerations for Asia:

- U.S. Persons
- Non-U.S. Based SDs
- Non-U.S. Based MSPs
- Other Non-U.S. Based Market Participants

U.S. Persons:

- Definition in Cross-Border Guidance:
 - ❖ A U.S. resident.
 - ❖ A corporation, partnership or other legal entity either: (1) organized or incorporated under U.S. laws, or (2) in which direct or indirect owners thereof are responsible for the liabilities of such entity and one or more of such owners is a U.S. person.
 - ❖ An individual account where the beneficial owner is a U.S. person.
 - ❖ Any commodity pool or collective investment vehicle of which a majority ownership is held, directly or indirectly, by a U.S. person.
 - ❖ Any commodity pool or collective investment vehicle the operator of which is required to register under the CEA.
 - ❖ A pension plan for the employees, officers or principals of a legal entity with its principal place of business in the U.S..
 - ❖ An estate or trust subject to U.S. income tax.

Non-U.S. based SDs:

- Primarily any large non-U.S. based bank or financial institution (“FI”) who would be deemed an SD, i.e.:
 - ❖ (together with non-U.S. affiliates) having aggregate \$8 billion in notional principal amount over 12 months
 - ❖ counting from the effective date of the final products definitions
 - ❖ of dealing swaps (as opposed to hedging or trading swaps) as part of “a regular business”
 - ❖ with U.S. persons (excluding foreign branches of registered U.S. swap dealers)
 - ❖ or which are guaranteed by any U.S. person.

Non-U.S. based SDs:

- Timetable:
 - ❖ Registration: Mandatory registration starts 60 days after publication of the final product definitions in the Federal Register. A non-U.S. based SD is required to register within two months after the month in which it exceeds the de minimis threshold.
 - ❖ Compliance: Earlier of (i) the date that the non-U.S. bank or FI first applies (or would be required to apply) for registration and (ii) the effective date of the relevant rule – assuming they all post-date the effective date of the final product definitions, unless a particular requirement is delayed pursuant to the Exemptive Order.
 - ❖ Protocol: Targeted publication in mid-August 2012. The Protocol sets up a process for adding supplemental terms to existing documentation, with Supplement becoming effective when the parties exchange Questionnaires.

Non-U.S. based SDs:

- Entity-level requirements:
 - ❖ Swaps with U.S. counterparties (CPs): Exemptive Order requires compliance with swap data repository (SDR) and large trader reporting (LTR) requirements upon the relevant compliance date.
 - ❖ Swaps with non-U.S. CPs: Exemptive Order provides relief on compliance with SDR and LTR requirements until 12 months after the final product definitions publication date.
 - ❖ Swaps with all CPs (for affiliates / subsidiaries of U.S. based SDs): Exemptive Order requires compliance with SDR and LTR requirements upon the relevant compliance date, but permitting substituted compliance.
 - ❖ Protocol addresses CFTC final rules relevant to SDR and LTR requirements.

Non-U.S. based SDs:

- Transaction-level requirements:
 - ❖ Swaps with U.S. CPs: All transaction-level requirements apply, without permitting substituted compliance.
 - ❖ Swaps with non-U.S. CPs: All transaction-level requirements apply (except for external business conduct standards), but substituted compliance permitted.
 - ❖ Protocol addresses transaction-level requirements (including external business conduct standards) with U.S. CPs.
 - ❖ Protocol provisions would be largely inapplicable to swaps between non-U.S. based SDs and non-U.S. CPs (who are not non-U.S. based SDs), but may be useful for addressing reporting requirements.

Non-U.S. based MSPs:

- A large non-U.S. bank or FI, who is not deemed to be an SD, might be deemed an MSP if it holds a substantial position in swaps with U.S. persons, i.e., if it held current and future exposures in certain threshold amounts by calculating:
 - ❖ all of its swap positions where its CP is a U.S. person (including a foreign branch of a U.S. based SD or MSP);
 - ❖ all of its swap positions where the non-U.S. bank or FI guarantees the obligations of another non-U.S. person's swap with a U.S. person;

but not:

 - ❖ any swap position where its counterparty is a non-U.S. person (that is not guaranteed); or
 - ❖ any swap position where the non-U.S. bank's or FI's obligations are guaranteed (unless the non-U.S. bank or FI is itself subject to capital regulation by the CFTC or SEC).

Non-U.S. based MSPs:

- The CFTC proposes to regulate non-U.S. based MSPs largely in the same manner as non-U.S. based SDs.
- However, the Protocol is not designed for MSPs (other than as customers of SDs).
- Non-U.S. based MSPs could use the provisions of the Questionnaire and Supplement in revising their own documentation.

Other Non-U.S. based Market Participants:

- Pursuant to the Cross-Border Guidance, for swaps between non-U.S. based market participants:
 - ❖ with U.S. CPs – the Dodd-Frank requirements relating to clearing, trade execution, real time public reporting and LTR would apply (not permitting substituted compliance) and relating to SDR and swap data recordkeeping would apply (permitting substituted compliance);
 - ❖ with non-U.S. CPs who are not SDs or MSPs – no Dodd-Frank requirements would apply; and
 - ❖ with non-U.S. CPs who are SDs or MSPs – at least the CPs on their side would be required to comply with entity-level and transaction-level requirements.

Other Non-U.S. based Market Participants:

- The Protocol would be relevant to a non-U.S. based market participant where its CP is an SD (whether U.S. based or non-U.S. based).
- The Protocol would not be relevant to a non-U.S. based market participant in other situations, although some of the provisions in the Supplement could be adopted in the non-U.S. based market participant's swap documentation.

Other Non-U.S. based Market Participants:

- The Protocol (at Schedules 4, 5 and 6 of the Supplement) would be relevant and presumably beneficial to a non-U.S. based market participant who:
 - ❖ is a Special Entity (e.g., a non-U.S. government) or
 - ❖ is an ERISA Special Entity (e.g., a non-U.S. employee benefit plan)

and the non-U.S. based market participant is entering into a swap transaction with an SD (whether U.S. based or non-U.S. based).

Summary of key considerations for Asia:

- The Protocol would be directly relevant and useful for swap transactions of all non-U.S. based SDs.
- The Protocol may be relevant and useful for non-U.S. based MSPs and other non-U.S. based market participants:
 - ❖ where they are entering into swap transactions with SDs (whether U.S. based or non-U.S. based); or
 - ❖ where they would like to adopt relevant provisions in the Supplement for use in their own swap documentation, especially with U.S. CPs.

What is a Protocol?

A protocol is a multilateral contractual amendment mechanism that allows for various standardized amendments to be deemed to be made to the relevant agreements between any two adhering parties. It builds on the principle that parties may agree with one or more other parties that certain terms and provisions will apply to their respective relationships (unless and until they specifically agree otherwise).

How is the ISDA August 2012 Dodd-Frank Protocol (“DF Protocol”) different from other ISDA protocols?

Unlike other ISDA protocols:

- The DF Protocol may be utilized to amend all agreements (“Protocol Covered Agreements” or “PCAs”), not just ISDA Master Agreements, governing swaps between a swap dealer and any other party, including another swap dealer.
- Delivery of an adherence letter is not the only action required by a party that wishes to participate in the DF Protocol, instead, in order for a party to participate in the DF Protocol, such party must deliver an Adherence Letter and a Questionnaire.
- Parties participating in the DF Protocol must provide certain detailed information about themselves (in the Questionnaire) to counterparties with whom they wish to utilize the DF Protocol to supplement PCAs.
- The DF Protocol is customizable in certain respects based on the information provided, or the elections made, by a participating party.
- Parties participating in the DF Protocol may select each counterparty, via selective delivery of their Questionnaire, with whom they are willing to utilize the DF Protocol to supplement PCAs.

What is the scope of the DF Protocol?

- The DF Protocol has been designed to allow participants to comply with certain requirements of the following final CFTC rules (“Covered Rules”):
 - ❖ CFTC, Final Rule, Business Conduct Standards for Swap Dealers and Major Swap Participants, 77 Fed. Reg. 9734 (Feb. 17, 2012),
 - ❖ CFTC, Final Rule, Large Trader Reporting for Physical Commodity Swaps, 76 Fed. Reg. 43851 (July 22, 2011),
 - ❖ CFTC, Final Rule, Position Limits for Futures and Swaps, 76 Fed. Reg. 71626 (Nov. 18, 2011),
 - ❖ CFTC, Final Rule, Real-Time Public Reporting of Swap Transaction Data, 77 Fed. Reg. 1182 (Jan. 9, 2012),
 - ❖ CFTC, Final Rule, Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. 2136 (Jan. 13, 2012),
 - ❖ CFTC, Final Rule, Swap Dealer and Major Swap Participant Recordkeeping and Reporting, Duties, and Conflicts of Interest Policies and Procedures; Futures Commission Merchant and Introducing Broker Conflicts of Interest Policies and Procedures; Swap Dealer, Major Swap Participant, and Futures Commission Merchant Chief Compliance Officer, 77 Fed. Reg. 20128 (Apr. 3, 2012), and
 - ❖ CFTC, Final Rule, Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps, 77 Fed. Reg. 35200 (June 12, 2012).
- ISDA anticipates addressing future CFTC and SEC final rules in future protocols and/or other documentation initiatives.

Architecture of the DF Protocol:

- The informational requirements and “one size does not fit all” nature of the Covered Rules requires the architecture of the DF Protocol to be more complex than that of other ISDA protocols. The architecture of the DF Protocol has been structured to provide:
 - ❖ participants with the ability to exchange information, some of which may be sensitive, in a controlled non-public manner (*i.e.*, information will only be shared at the direction of the party providing such information),
 - ❖ that the application of certain provisions will be based on the information provided by a participant, and
 - ❖ participants with the right to elect to agree to certain provisions (either because of the status of the participant or because the provisions are optional) on a counterparty by counterparty basis (*i.e.*, a participant can agree to supplement its Protocol Covered Agreements with two different counterparties differently by delivering different Questionnaires to each such counterparty).

Architecture of the DF Protocol:

The DF Protocol consists of the following four main components:

- Protocol Agreement: Sets forth the agreement of participants as to the mechanism by which such participants may supplement existing Protocol Covered Agreements.
- Adherence Letter: Evidences a party's agreement to be bound by the Protocol.
- Questionnaire: Allows a party to provide information about itself, make certain elections regarding the scope of the amendments it is willing to agree to and identify, through delivery, which of its counterparties with whom it is willing to utilize the DF Protocol to supplement PCAs.
- DF Supplement: Contains standardized representations, covenants, disclosure, acknowledgements and notifications related to the Covered Rules that may be implemented into Protocol Covered Agreements via the DF Protocol.

Who can participate in the DF Protocol?

- Any party that (i) is a swap dealer, or (ii) has entered into a Protocol Covered Agreement with a swap dealer may participate in the DF Protocol.
- A participant can be a principal or an agent acting on behalf of one or more principal(s).
- A participant may only supplement Protocol Covered Agreements that it has directly executed (as principal or agent) via the DF Protocol. For example:
 - ❖ a principal may only supplement Protocol Covered Agreements that it has executed as principal via the DF Protocol (*i.e.*, it cannot supplement a Protocol Covered Agreement that an agent has executed on its behalf), and
 - ❖ an agent may only supplement Protocol Covered Agreements that it has executed as agent via the DF Protocol (*i.e.*, an agent cannot supplement a Protocol Covered Agreement that a principal has executed).

How to participate in the DF Protocol:

- To participate in the DF Protocol a party must:
 - ❖ Deliver a completed and executed Adherence Letter to ISDA.
 - ❖ Deliver a completed and executed Questionnaire to one or more of its Protocol Covered Agreement counterparties. Questionnaires must be delivered in the manner specified in the receiving party's Adherence Letter.
- If a party fails to deliver a completed and executed Adherence Letter to ISDA, the DF Protocol will not be effective in respect of its Protocol Covered Agreements.
- If a party does not deliver a Questionnaire to one or more of its Protocol Covered Agreement counterparties, the DF Protocol will have no effect on its Protocol Covered Agreements with such counterparties.

How to determine if your PCAs have been supplemented via the DF Protocol:

- Have you received a Questionnaire from one or more of your Protocol Covered Agreement counterparties to whom you delivered a Questionnaire?
 - ❖ If you have not, your Protocol Covered Agreements have not been supplemented via the DF Protocol.
 - ❖ If you have, your Protocol Covered Agreements with the parties with whom you have exchanged Questionnaires have been supplemented via the DF Protocol.

How to determine the extent to which your PCAs have been supplemented via the DF Protocol:

- The Protocol Covered Agreements between any two parties who have exchanged Questionnaires and each delivered a completed and executed Adherence Letter to ISDA will be supplemented:
 - ❖ by incorporation of Schedules 1 & 2 of the DF Supplement therein , and
 - ❖ by incorporation of any other Schedule of the DF Supplement that each of the parties have elected, in their respective Questionnaires, to agree to incorporate. If only one of the two such parties elects to agree to incorporate any particular Schedule of the DF Supplement, such Schedule will not be incorporated.

Summary of the Protocol Agreement:

- The Protocol Agreement establishes the mechanics by which parties may supplement their Protocol Covered Agreements on a multilateral basis.
- Allows a party to select:
 - ❖ by election in its Questionnaire, whether it wishes to incorporate certain provisions of the DF Supplement into its Protocol Covered Agreements, and
 - ❖ through delivery of its Questionnaire, with whom, and the extent to which, it wishes to supplement its Protocol Covered Agreement via the DF Protocol.
- Contains certain provisions designed to work with the DF Supplement to establish agreement thereunder regarding “DF Supplement Information” and “Notice Procedures” as each such term is used in the DF Supplement.

Summary of the Adherence Letter:

- Delivery of an executed Adherence Letter to ISDA binds a party to the Protocol Agreement. A party may only submit one Adherence Letter to ISDA.
- An Adherence Letter may be executed by a principal or an agent acting on behalf of one or more principal(s).
- A party will specify the address (electronic or otherwise) and the means by which it will receive Questionnaires from other participants in its Adherence Letter.
- Adherence Letters delivered to ISDA will be uploaded and available for public view on ISDA's website, like prior ISDA protocol adherence letters.

Summary of the Questionnaire:

- The Questionnaire serves two main purposes. First, it allows a participant to provide information required by the Covered Rules. Second, it allows a participant to (i) identify its legal status, and (ii) elect to agree to incorporate certain provisions (based on legal status) of the DF Supplement.
- A Questionnaire may be executed by a principal or an agent acting on behalf of one or more principal(s). A Questionnaire is also required to be executed by an evaluation agent, qualified independent representative, or fiduciary, if any, in its individual capacity.
- A participant may deliver different Questionnaires to different counterparties, but may only deliver one Questionnaire to any single counterparty.

Summary of the Questionnaire:

- A participant is required to provide the following information under the Questionnaire:
 - ❖ Name and contact information,
 - ❖ Legal Entity Identifier,
 - ❖ Principal occupation or business,
 - ❖ Guarantor name and contact information, and
 - ❖ Agent (third party control persons, evaluation agents, qualified independent representatives and/or fiduciaries) name and contact information.

Summary of the Questionnaire:

- Under the Questionnaire, a participant is required to specify its legal status by identifying itself as each of the following that are applicable:
 - ❖ a commodity pool,
 - ❖ an eligible contract participant,
 - ❖ a swap dealer,
 - ❖ a security based-swap dealer,
 - ❖ a major swap participant,
 - ❖ a major security-based swap participant,
 - ❖ a financial entity, and
 - ❖ a special entity (ERISA or Non-ERISA).

Summary of the Questionnaire:

- Under the Questionnaire, a participant, based on its legal status, is required to make the following elections:
 - ❖ swap dealers are required to elect to agree, or not agree, to the incorporation of provisions of the DF Supplement related to institutional suitability and special entity safe harbors,
 - ❖ non-ERISA special entities are required to elect to agree, or not agree, to the incorporation of provisions of the DF Supplement related to non-ERISA special entity safe harbors,
 - ❖ ERISA special entities are required to elect to agree, or not agree, to the incorporation of provisions of the DF Supplement related to ERISA special entity safe harbors, and
 - ❖ participants that are not swap dealers, security-based swap dealers, major swap participants, major security-based swap participants or special entities are required to elect to agree, or not agree, to the incorporation of provisions of the DF Supplement related to institutional suitability safe harbors.

Summary of the DF Supplement:

- The DF Supplement will be published by ISDA simultaneously with but separate from, and may be utilized outside of, the DF Protocol. The DF Supplement may be incorporated into Protocol Covered Agreements via the DF Protocol or into an agreement bilaterally by the parties to such agreement.
- The DF Supplement sets forth certain standardized representations, covenants, disclosure, acknowledgements and notifications relating to the Covered Rules in various “Schedules.”
- The DF Supplement contains the following Schedules:
 - ❖ Schedule 1 – Defined Terms,
 - ❖ Schedule 2 – Agreements between a Swap Dealer and any other party,
 - ❖ Schedule 3 – Institutional Suitability Safe Harbors for Non-Special Entities,
 - ❖ Schedule 4 – Safe Harbors for Non-ERISA Special Entities,
 - ❖ Schedule 5 – Safe Harbors for ERISA Special Entities (Option 1), and
 - ❖ Schedule 6 – Safe Harbors for ERISA Special Entities (Option 2)

Summary of Schedule 1:

- Schedule 1 (Defined Terms) contains the defined terms used throughout the DF Supplement.
- “Swap Communication Event” and “Swap Transaction Event” are each defined in Schedule 1 and many of the provisions of the DF Supplement are keyed off of the occurrence of either such event.
- “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 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.

Summary of Schedule 2:

- Schedule 2 (Agreements between a Swap Dealer and any other party) sets forth standardized representations, covenants, disclosures, acknowledgements and notifications that will allow parties to comply with certain requirements of the Covered Rules.
- Schedule 2 may be incorporated into an agreement between any pair of parties where one such party is a swap dealer and the other party is of any legal status, including another swap dealer.
- The provisions of Schedule 2 address:
 - ❖ the accuracy of information provided and representations made,
 - ❖ an agreement to update information previously provided and representations made to maintain the accuracy thereof,
 - ❖ an agreement to provide new information,
 - ❖ the effect of a breach or misrepresentation,
 - ❖ material confidential information and the disclosure thereof,
 - ❖ the delivery of notifications and disclosures,
 - ❖ the delivery of daily marks, and
 - ❖ the right to receive a scenario analysis.

Summary of Schedule 2:

- Highlights of Schedule 2:
 - ❖ Contractual Remedies (Section 2.2.). A breach or misrepresentation solely under the provisions of the DF Supplement will not constitute an event of default, termination event or other similar event under the relevant Protocol Covered Agreement.
 - ❖ Material Confidential Information (Sections 2.5, 2.12 & 2.13).
 - ❑ Parties agree to the disclosures required by the Covered Rules.
 - ❑ If parties have an existing non-disclosure agreement, such agreement will continue to govern the disclosure of material confidential information.
 - ❑ If parties do not have an existing non-disclosure agreement, material confidential information may be disclosed in accordance with the Covered Rules and the parties expressly agree that such information may be disclosed to (i) certain other parties to comply with the risk management policies of the parties, and (ii) “front office” employees for pricing and hedging purposes.

Summary of Schedule 2:

- Highlights of Schedule 2 continued:
 - ❖ Daily Marks (Section 2.16). Parties agree that any daily marks provided by a swap dealer to its counterparty will be calculated by the swap dealer as of the close of business on the prior business day in the locality specified by the swap dealer in its notice of such daily mark to such counterparty.
 - ❖ Scenario Analysis (Section 2.18). A counterparty to a swap dealer acknowledges that it must request a scenario analysis from the swap dealer prior to the occurrence of a Swap Transaction Event in order to be entitled to receive such scenario analysis (unless otherwise agreed by the swap dealer).

Summary of Schedule 3:

- Schedule 3 (Institutional Suitability Safe Harbors for Non-Special Entities) sets forth the representations, covenants and disclosures that will allow parties to take advantage of the institutional suitability safe harbors available for non-special entities under the CFTC's external business conduct rules.
- Schedule 3 may be incorporated into an agreement between any pair of parties where one such party is a swap dealer and the other party is not a swap dealer, security-based swap dealer, major swap participant, major security-based swap participant, or special entity ("Other Party").
- The Other Party may, but is not required to, have an evaluation agent make certain representations and covenants under Schedule 3.
- If the Other Party has an evaluation agent that has agreed to make certain representations and covenants under Schedule 3, Schedule 3 provides that:
 - ❖ the Other Party represents that it has complied with written policies and procedures regarding the selection of an evaluation agent responsible for evaluating swap recommendations,
 - ❖ evaluation agent represents that it is exercising independent judgment in evaluating swap recommendations, and
 - ❖ evaluation agent covenants to update information previously provided and representations made to maintain the accuracy thereof.

Summary of Schedule 3:

- If the Other Party does not have an evaluation agent that has agreed to make certain representations and covenants under Schedule 3, Schedule 3 provides that the Other Party represents :
 - ❖ that it has complied with written policies and procedures regarding the selection of the person responsible for evaluating swap recommendations, and
 - ❖ that it is exercising independent judgment in evaluating swap recommendations.
- In all cases, Schedule 3 provides that the swap dealer discloses to the Other Party that it is acting in its capacity as a counterparty and is not undertaking to assess the suitability of any swap for the Other Party.

Summary of Schedule 4:

- Schedule 4 (Safe Harbors for Non-ERISA Special Entities) sets forth the representations, covenants, disclosures, acknowledgements and notifications that will allow parties to take advantage of the safe harbors available for non-ERISA special entities under the CFTC's external business conduct rules.
- Schedule 4 may be incorporated into an agreement between any pair of parties where one such party is a swap dealer and the other party is a non-ERISA special entity.
- The non-ERISA special entity is required to have a qualified independent representative.
- Schedule 4 provides that the non-ERISA special entity:
 - ❖ represents that it will (i) not rely on swap recommendations provided by the swap dealer, and (ii) rely on advice from its qualified independent representative,
 - ❖ represents that it has complied with written policy and procedures regarding the selection of the qualified independent representative, and
 - ❖ acknowledges that the swap dealer has not expressed an opinion.

Summary of Schedule 4:

- Schedule 4 provides that the swap dealer:
 - ❖ represents that it has not expressed an opinion,
 - ❖ notifies the non-ERISA special entity that it should obtain the advice of a qualified independent representative,
 - ❖ discloses to the non-ERISA special entity that it is not undertaking to act in its best interest, and
 - ❖ discloses to the non-ERISA special entity that it is acting in its capacity as a counterparty and is not undertaking to assess the suitability of any swap for non-ERISA special entity.
- Schedule 4 provides that the qualified independent representative:
 - ❖ represents that it has written policy and procedures that are designed to ensure satisfaction of the applicable requirements of the CFTC's external business conduct rules,
 - ❖ represents that it is exercising independent judgment in evaluating swap recommendations,
 - ❖ represents that it is independent of the swap dealer as required by the CFTC's external business conduct rules, and
 - ❖ covenants to update information previously provided and representations made to maintain the accuracy thereof.

Summary of Schedule 5:

- Schedule 5 (Safe Harbors for ERISA Special Entities (Option 1)) sets forth the representations, covenants and disclosures that will allow parties to take advantage of the safe harbors available for ERISA special entities under the CFTC's external business conduct rules.
- Schedule 5 may be incorporated into an agreement between any pair of parties where one such party is a swap dealer and the other party is an ERISA special entity.
- The ERISA special entity is required to have a fiduciary.
- Schedule 5 provides that the ERISA special entity represents that:
 - ❖ its fiduciary is a “fiduciary” as defined in Section 3 of ERISA, and
 - ❖ (i) it has complied with written policies and procedures designed to ensure that any recommendation affecting a swap will be evaluated by a fiduciary, or (ii) any recommendation affecting a swap will be evaluated by a fiduciary.

Summary of Schedule 5:

- Schedule 5 provides that the swap dealer discloses to the ERISA special entity that:
 - ❖ it is not undertaking to act in its best interest, and
 - ❖ it is acting in its capacity as a counterparty and is not undertaking to assess the suitability of any swap for ERISA special entity.
- Schedule 5 provides that the fiduciary:
 - ❖ represents that it is not relying on swap recommendations,
 - ❖ represents that it is exercising independent judgment in evaluating swap recommendations, and
 - ❖ covenants to update information previously provided and representations made to maintain the accuracy thereof.

Summary of Schedule 6:

- Schedule 6 (Safe Harbors for ERISA Special Entities (Option 2)) sets forth the representations, covenants and disclosures that will allow parties to take advantage of the safe harbors available for ERISA special entities under the CFTC's external business conduct rules.
- Schedule 6 may be incorporated into an agreement between any pair of parties where one such party is a swap dealer and the other party is an ERISA special entity.
- The ERISA special entity is required to have a fiduciary.
- Schedule 6 provides that the ERISA special entity:
 - ❖ represents that its fiduciary is a “fiduciary” as defined in Section 3 of ERISA,
 - ❖ represents that it will (i) not rely on swap recommendations provided by the swap dealer, and (ii) rely on advice from its qualified independent representative, and
 - ❖ acknowledges that the swap dealer has not expressed an opinion.

Summary of Schedule 6:

- Schedule 6 provides that the swap dealer discloses to the ERISA special entity that:
 - ❖ represents that it has not expressed an opinion,
 - ❖ notifies the ERISA special entity that it should obtain the advice of a qualified independent representative,
 - ❖ discloses to the ERISA special entity that it is not undertaking to act in its best interest, and
 - ❖ discloses to the ERISA special entity that it is acting in its capacity as a counterparty and is not undertaking to assess the suitability of any swap for ERISA special entity.
- Schedule 6 provides that the fiduciary:
 - ❖ represents that it is exercising independent judgment in evaluating swap recommendations, and
 - ❖ covenants to update information previously provided and representations made to maintain the accuracy thereof.

Schedule 5 vs. Schedule 6:

- Schedules 5 and 6 set forth two different manners in which parties may take advantage of the safe harbors available for ERISA special entities under the the CFTC's external business conduct rules.
- Schedule 5 allows swap dealers and ERISA special entities to take advantage of the special safe harbor provided exclusively for ERISA special entities.
- Schedule 6 allows swap dealers and ERISA special entities to take advantage of the general safe harbor for all special entities.
- Both Schedules 5 and 6 may be incorporated into an agreement between any pair of parties where one such party is a swap dealer and the other party is an ERISA special entity.
- The Schedule 6 general safe harbor does not cover situations in which a swap dealer has communicated an “opinion” to the ERISA special entity. As a consequence, communications between a swap dealer and an ERISA special entity will likely be more restricted if such parties are relying on the Schedule 6 general safe harbor.

Schedules 4, 5, and 6: Key Term Summary

	Representative	Opinions
Schedule 4: Non-ERISA	QIR	Not permitted
Schedule 5: ERISA	ERISA Fiduciary	Permitted if evaluated by the Fiduciary
Schedule 6: ERISA	ERISA Fiduciary	Not permitted

- Opinions -- CFTC Rule 23.440(b)(2)(i):
 - ❖ “The swap dealer does not express an opinion as to whether the Special Entity should enter into a recommended swap or trading strategy involving a swap that is tailored to the particular needs or characteristics of the Special Entity”

Questions & Answers:

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Jeff Chen is a capital markets, structured finance and derivatives lawyer with pan-Asian experience. His practice is focused on limited recourse and cross-border financing structures of all types, including asset-backed securities and asset backed loans. Jeff is versed with local law peculiarities in many Asian jurisdictions and coordinates regional local law compliance on issues such as netting and collateral. He is also familiar with structured notes and derivatives. Jeff is a pioneer on limited recourse receivables financings in mainland China under PRC law.

Jeff has advised clients on the U.S. and New York law aspects of offerings into the U.S. of conventional and structured securities. He also advises on compliance with Regulation AB and other rules applicable to asset-backed securities in the U.S., as well as regulatory changes relating to swaps and derivatives which are being implemented by the U.S. CFTC and SEC pursuant to the Dodd-Frank Act.

Jeff has worked on many high-profile transactions in Asia over the past decade, including the first wrapped cross-border RMBS offerings out of Korea and Taiwan.

Jeff is listed as a leading lawyer in the *Chambers & Partners Global Guide* and in *Chambers Asia* (2008-2010), and in *IFLR's Guide to the World's Leading Structured Finance and Securitization Lawyers*. He is listed by Asia Legal Business as one of 19 lawyers in "The Experts" category in the ALB Hot 100 Lawyers of 2011.

Jeff received his J.D. from The George Washington University Law School and his M.A. and B.A. degrees from the University of Michigan. He is admitted to practice in New York and the District of Columbia and is a registered foreign lawyer in Hong Kong.

Jeffrey L. Robins

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Jeff Robins is a partner in the Financial Services Department. He represents broker-dealers, securities exchanges, industry associations and buy-side institutions in regulatory and transactional matters. Recognized by Legal 500 as "remarkably strong" in the regulatory field and a leader in equity derivatives, his regulatory practice is concentrated in the area of securities regulation of broker-dealers and the structuring of financing and derivatives transactions for multi-entity financial organizations subject to a variety of regulatory regimes; his transactional work focuses on prime-brokerage and over-the-counter derivatives.

Jeff has substantial experience providing counsel on margin, capital, custody and record keeping requirements, cross-border transactions, cash market sales and trading, and development of compliance and supervisory procedures. Jeff also advises a variety of financial institutions on credit aspects of financing and derivatives transactions, particularly risks to counterparties in the event of insolvency, the rights of creditors to close out financial contracts and exercise netting and collateral rights, and the risks and benefits of central clearing.

He received his J.D. from Harvard Law School, magna cum laude, an M.A. in Russian and East European Studies and a B.A., with distinction, in Political Science, from Stanford. Jeff was a clerk for the Honorable Cynthia Holcomb Hall of the United States Court of Appeals for the Ninth Circuit.

Lary Stromfeld

Partner



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Lary Stromfeld has a diverse practice based upon more than 30 years of experience in the capital markets. He represents global financial institutions and other leading market participants in transactions and advisory matters involving a wide variety of financial products and complex financings.

Lary is ranked among the top derivatives attorneys in the world. He has been called an "expert of the highest caliber" with a "derivatives practice that is truly versatile, spanning advisory and transactional matters" (Chambers Global 2011). He has "a true gift... which allows him to stay calm and unrattled.... He never says 'no,' but rather suggests how to get around limitations and exploit opportunities." (Chambers U.S.A 2012).

Lary has served as counsel to the International Swaps and Derivatives Association (ISDA) on documentation projects and amicus briefs. He is currently advising numerous market participants on the impact of the Dodd-Frank Act.

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Markets

ISDA Documentation Initiatives
July 25, 2012
Hong Kong

ISDA/Markit Collaboration on Dodd-Frank Protocol and Relevance to Asia

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