

CLIENT MEMORANDUM

July Adherence Deadline For ISDA March 2013 Dodd-Frank Protocol

May 29, 2013

AUTHORS

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Since the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act¹ in 2010, the CFTC has adopted several final rules² that will alter trading in over-the-counter derivatives. In order to assist dealers and counterparties in complying with the newly adopted final rules, the International Swaps and Derivatives Association (“ISDA”) has developed and recently released a new protocol. The new ISDA March 2013 DF Protocol³ initiative (the “DF Protocol”) is intended to enable swap dealers and their counterparties that elect to adhere to the DF Protocol to comply with the new regulatory requirements without significant disruptions to their swap trading.

¹ Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”), H.R. 4173, *available at* <http://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf>.

² The DF Protocol (defined above) is intended to facilitate compliance with certain final adopted CFTC rules (the “DF Rules”): (i) CFTC, Final Rule, *Confirmation, Portfolio Reconciliation, Portfolio Compression, and Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants*, 77 Fed. Reg. 55904 (Sept. 11, 2012); (ii) CFTC, Final Rule, *End-User Exception to the Clearing Requirement for Swaps*, 77 Fed. Reg. 42559 (July 19, 2012); and (iii) CFTC, Final Rule, *Clearing Requirement Determination Under Section 2(h) of the CEA*, 77 Fed. Reg. 74284 (Dec. 13, 2012).

³ Please refer to our discussion of the ISDA August 2012 Dodd-Frank Protocol for a summary of the previous protocol released by ISDA, *available at* http://www.willkie.com/files/tbl_s29Publications%5CFileUpload5686%5C4169%5CISDA_August_2012_Dodd_Frank_Protocol.pdf.

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Adherence to the DF Protocol is required by July 1, 2013 for parties that execute swap transactions on a regular basis. Parties that anticipate executing a swap transaction in the future may adhere to the DF Protocol at such time.

This Memorandum aims to outline the steps that certain end-users will need to take in order to adhere.

I. Execution of the Adherence Letter

In order to adhere to the DF Protocol, a party will need to execute and deliver online (through the ISDA website) an adherence letter (the "Adherence Letter"). The Adherence Letter will serve as confirmation of a party's adherence to the DF Protocol, and will be made public on the ISDA website, so that a party will be able to confirm whether its counterparty agreed to adhere to the DF Protocol. In addition, the Adherence Letter will set out a party's contact information and the manner by which such party will accept delivery of a counterparty's DF Protocol Questionnaire (see Section II below).⁴ ISDA has indicated that it has the right, upon 30 days' prior notice on its website, to set a closing date for the adherence period for the DF Protocol; however, ISDA has indicated that it has no intent to do so at this time.

II. DF Protocol Questionnaire

Following the execution and submission of an Adherence Letter, a party to a protocol covered agreement (the "Protocol Covered Agreement")⁵ will need to execute a DF Protocol questionnaire (the "DF Protocol Questionnaire").

Through the DF Protocol Questionnaire, a party will make certain representations with respect to the party's legal status (*i.e.*, *financial entity* or *financial company*), provide its legal entity identifier and make various elections, including the election of specific schedules of the DF supplement (the "DF Supplement"). The execution and delivery of a completed DF Protocol Questionnaire (and election of applicable schedules in the DF Supplement) by each party to a Protocol Covered Agreement will supplement such agreement. There are a total of four schedules that contain specific legal and factual representations and covenants designed to facilitate compliance with the DF Rules. Schedule 1 contains the defined terms. Schedule 2, among other provisions, contains general representations and acknowledgements regarding the creation of a transaction confirmation, status for purposes of complying with mandatory clearing (June 10, 2013 for all

⁴ According to ISDA, delivery may be made via the ISDA website, in writing delivered in person or by courier, or via facsimile transmission.

⁵ A Protocol Covered Agreement is an existing written agreement, such as an ISDA Master Agreement, between two parties that governs the terms and conditions of one or more transactions in swaps that each such party has entered into or may enter into as a principal. The ISDA March 2013 DF Protocol Master Agreement will generally serve the limited purpose of allowing parties to apply selected provisions of the DF Supplement (defined above) to their trading relationship where such relationship is not already governed by a master trading agreement. The ISDA March 2013 DF Protocol Master Agreement is outside the scope of this Memorandum, and as a result is not covered in any further detail.

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private funds),⁶ and the end-user exception from mandatory clearing.⁷ Schedule 3 contains provisions regarding risk valuation procedures and dispute mechanics for swaps, to the extent that parties do not otherwise have a written agreement in place (such as an ISDA Credit Support Annex). Schedule 4 contains portfolio reconciliation procedures for parties that choose to perform, or are required (such as swap dealers) to perform, swap data and valuation reconciliation.

Finally, a party that completes a DF Protocol Questionnaire will be able to deliver or give permission, via the ISDA website, for its DF Protocol Questionnaire to be delivered to, and only to, a party that also has executed and delivered an Adherence Letter. Once the DF Protocol Questionnaire has been executed and delivered to ISDA, ISDA, through its website, will be able to provide automated notification to all parties that have been approved by the delivering party. Unlike the Adherence Letter, the DF Protocol Questionnaire will not be made public on the ISDA website; only a party that has been granted permission by a delivering party will be able to access the delivering party's DF Protocol Questionnaire.

If you have any questions concerning the matters described in this Memorandum, please contact Jack I. Habert (212-728-8952, jhabert@willkie.com), Alessandro Turina (212-728-8737, aturina@willkie.com), Vadim Avdeychik (212-728-8421, vavdeychik@willkie.com) or the Willkie attorney with whom you regularly work.

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⁶ All Category 2 entities, which category includes commodity pools, private funds and entities engaged in business that is financial in nature, will be required to begin clearing all swaps, to the extent that such swaps are subject to the recent CFTC mandatory clearing determination by June 10, 2013. Such entities will need to appoint a futures commission merchant to act as their clearing member prior to such date.

⁷ The end-user exception is generally available to nonfinancial entities that execute swaps for the purpose of hedging or mitigating commercial risk related to their business.