Introduction

Keith Noyes, Regional Director, Asia Pacific, ISDA
ISDA Documentation Implications of Dodd-Frank Compliance

Katherine Darras, General Counsel, Americas, ISDA
The Business Conduct Standards are a new set of rules that basically work like a customer protection regime for the counterparties of Swap Dealers.

Some of the new rules do not impact documentation, and the DF Protocol does not address them.

- E.g., increased anti-fraud protection.

Other rules do impact documentation, and if documentation is not modified prior to the time that Swap Dealers are required to be in compliance, then Swap Dealers would be at potentially significant regulatory risk.

Dealers must comply with the EBC rules starting May 1, 2013.
How are the ISDA Dodd-Frank Protocols different from 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.

• The DF Protocol can also be used when a swap dealer and another party, including another swap dealer, have not previously executed an ISDA or other agreement but wish to apply the provisions of the DF Protocol to their trading relationship.

• 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.

• 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 August 2012 DF Protocol?

• The August 2012 DF Protocol has been designed to allow participants to comply with certain requirements of the following final CFTC rules (“Covered Rules”):
  – 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

• ISDA anticipates addressing future CFTC and SEC final rules in future protocols and/or other documentation initiatives.
The August Questionnaire

• Allows a participant to provide information required by the rules solely to the counterparties it chooses.

• Allows a participant to make certain elections, including
  – Incorporation of certain “suitability” safe harbor provisions of the DF Supplement.
  – Agreeing to receive pre-trade mid-market marks orally, and
  – Agreeing to incorporate the DF Terms Agreement.

• Under the Questionnaire, a participant is required to specify its legal status by identifying itself as a commodity pool, if applicable, and by specifying the manner in which it is an eligible contract participant.
How to participate in the August and March Protocols

• Get a CICI from DTCC [www.ciciutility.org](http://www.ciciutility.org) ($200 per fund; credit card required)

• To participate in the ISDA August 2012 D-F Protocol a party must:
  - Deliver a completed and executed Adherence Letter to ISDA through the ISDA Protocol Management page, [http://www2.isda.org/functional-areas/protocol-management/protocol/8](http://www2.isda.org/functional-areas/protocol-management/protocol/8)

• For most hedge funds, each fund will need to adhere separately ($500 per fund; credit card required)

• If a party does not deliver a Questionnaire to one or more of its counterparties, the Protocol will have no effect on its swap documentation with such counterparties.
Why a second Dodd-Frank Protocol?

• On Sept. 11, 2012, the CFTC adopted new rules relating to swap trading relationship documentation (“STRD”), portfolio reconciliation and confirmations.
  – These rules were originally intended to have rolling implementation dates beginning January 1, 2013. In December, these deadlines were (mostly) extended to July 1, 2013.
  – The rules include explicit requirements for documentation unrelated to the first Protocol.

• On December 13, 2012, the CFTC issued a mandatory clearing determination for certain classes of IRS and CDS.
  – Mandatory clearing is being implemented on rolling calendar with the second phase having begun on June 10, and the third phase scheduled for September 9.
  – Mandatory clearing necessitated further documentation to manage the implementation process.
  – Use of the “end-user clearing exception” also requires documentation.
Why a second Dodd-Frank Protocol? (Cont.)

The ISDA March 2013 DF Protocol (“March Protocol”) addresses documentation requirements of the following CFTC final rules (“March Protocol Rules”):


3. **Clearing Requirement Determination Under Section 2(h) of the CEA**, 77 Fed. Reg. 74284 (Dec. 13, 2012): adopts CFTC Regulations 50.1-50.6 & 50.10; see also CFTC Regulation 50.25 (rule on implementation of clearing determinations).
Why *This* Protocol?

The ISDA March 2013 DF Protocol addresses the following documentation needs arising from the March Protocol Rules:

- Provides standardized swap trading relationship documentation to comply with law in situations where the parties have not negotiated an ISDA Master Agreement or similar agreement.

- Provides a contractually agreed methodology for the daily valuation of all swaps (exclusively for internal risk management purposes of an SD or MSP) to satisfy STRD requirements. Fills gaps in this regard that may exist in negotiated documents (including an ISDA Credit Support Annex).

- Provides a basic agreement for conducting mandatory portfolio reconciliations in accordance with requirements set out in CFTC Rule 23.502.

- Provides legal agreements to establish that existing processes to match confirmations on an electronic platform comply with confirmation requirements in CFTC Rule 23.501.
Why *This* Protocol? (Cont.)

• Provides each participant an opportunity to communicate its status for purposes of implementation of mandatory clearing, and related representations and acknowledgements.

• Provides an opportunity for an end-user to make a one-time election to use the “end-user clearing exception” for IRS and CDS designated as subject to mandatory clearing, and to provide a SD or MSP required information in connection with such an election.

• Provides necessary notices and disclosures (including buy-side notices of status for purposes of “orderly liquidation authority.”)
## Rules Addressed in the March Protocol

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Future DF Protocols?

• SEC rulemakings

• Margin for uncleared swaps rulemakings upcoming
ISDA Documentation Implications of EMIR Compliance

David Geen, General Counsel, ISDA
Compliance with EMIR may merit amendments to ISDA documentation, such as:

- Additional representations to address counterparty status (NFC+/other NFCs)
- Allocation of obligations for providing confirmations
- Allocation of obligations for trade reporting
- Mechanisms for portfolio reconciliation and dispute resolution

Amendments could be standard wording for bilateral adoption or by Protocol.
NFC Representation Protocol

- Representation as to NFC status
- Representation that NFC is below clearing threshold
  - Can be switched off/on following change of status
- Published March 2013
Timely Confirmation Obligations

• Agreements to deliver and return confirmations within deadlines
• Negative affirmation
• Standard wording for bilateral agreement
• Published March 2013
Reporting Obligations

Currently under consideration

Key elements:

• Allocation of obligation for reporting Counterparty Data and Common Data
• Agreement of Common Data
• Confidentiality waiver
• Remedies for breach
Other Documentation Aspects

Currently Under Consideration:

• Portfolio reconciliation
• Dispute resolution

Protocol to be published shortly

Future Consideration:

• Collateral requirements
ISDA 2013 Reporting Protocol

Jacqueline Low, Senior Counsel, Asia, ISDA
Why the Reporting Protocol?

• As part of the G20 OTC derivatives commitments, many countries have or will be mandating that OTC derivative transactions be reported by one or both parties to a trade repository (TR).
  – E.g. Party A is required by the laws of Country A to report the trade to a TR in Country A. It deals with Party B from Country B. In some cases, for Party A to be able to report the trade with Party B to the TR in Country A, Party A will need to get Party B’s consent.

• The Reporting Protocol provides a form of written consent to disclosure of information by the other party to meet "Reporting Requirements".
But why in addition to the DF Protocols and EMIR Protocols?

• Though the Aug 2012 DF Protocol and the EMIR Protocol (when published) does/will include written consent to disclosure, such disclosure is/will be specific to trade reporting required under the DFA and EMIR respectively.

• The Reporting Protocol’s consent language attempts to cover any applicable trade reporting obligation to which a party may be subject. But as ISDA has not conducted any legal surveys on this, ISDA makes no representation on whether the language will suffice for the purposes of compliance with any country’s laws.
What agreements are covered by the Reporting Protocol?

• ISDA Master Agreements and any written agreement governing one or more “Derivatives” transaction can be amended by adhering to the Reporting Protocol.

• But where a third party is providing a guarantee or other support and consent or other action by the third party is required before the agreement can be amended, such agreement will not be covered by the Reporting Protocol until the third party has given its consent or taken such other action.
  – The party that is being guaranteed or supported undertakes that it has procured such consent or other action and will provide evidence to the other party upon demand.
Who can make use of the Reporting Protocol?

- Anyone who has entered into an agreement that is covered by the Reporting Protocol.
  - You do not need to be an ISDA member.

- You must adhere to the Reporting Protocol in the same capacity in which you have entered into the covered agreement.
  - If you have entered into the covered agreement as principal, you adhere to the Reporting Protocol as principal.
  - If you have entered into the covered agreement as agent, you adhere to the Reporting Protocol as agent.

- If you are an investment manager and have authority to adhere for all your clients in the covered agreements, you can adhere for all your clients without naming them.
- If you are an investment manager and have authority to adhere for some only of your clients in the covered agreements, you can adhere for these clients by naming the clients (by name or unique identifier known to your counterparties).
How do I adhere to the Reporting Protocol?

• You must complete and deliver the Adherence Letter electronically to ISDA via the ISDA website.

• You must pay (by credit card) an adherence fee of US$500 per Adherence Letter.
• “Notwithstanding anything to the contrary in a Protocol Covered Agreement or in any non-disclosure, confidentiality or other agreement between the parties, each party hereby consents to the disclosure of information:

(a) to the extent required or permitted by any applicable law, rule or regulation which mandates reporting and/or retention of transaction and similar information or to the extent required by any order or directive regarding reporting and/or retention of transaction and similar information issued by any authority or body or agency in accordance with which the other party is required or accustomed to act (“Reporting Requirements”); or

(b) to and between the other party’s head office, branches or affiliates, or any persons or entities who provide services to such other party or its head office, branches or affiliates, in each case, in connection with such Reporting Requirements.”
“Reporting Requirements”

- Consent to disclosure limited to compliance with “Reporting Requirements”.

- “permitted by” (in addition to “required by”) inserted to cater for situations where the law requires trade reporting but permits reporting to various TRs or permits reporting via reporting agents.

- “accustomed to act” (in addition to “required ... to act”) inserted to cater for situations where, although there may be technically speaking no legal requirement to comply, compliance is expected of members (e.g., directions or recommendations by SFEMC, FIMMDA or FEDAI).

- Banks may consolidate their reporting through one location or through one TR who then acts as a reporting agent (e.g. through DTCC as reporting agent to HKMA as TR).
What the rest of the clause does

• Informs the consenting party of:
  – Why trade reporting is being required.
  – What information may be reported.
  – To whom the information may be reported.
  – What could happen to the information.

• Expressly provides that it suffices as consent for purposes of any applicable law permitting disclosure with consent.

• Preserves any existing confidentiality agreement between the parties to the extent not inconsistent.

• Preserves any existing consent to disclosure agreement between the parties.

• Consenting party confirms that any third party to whom it owes a duty of confidence in respect of the information has consented to the disclosure.
  – Relevant for investment managers acting for clients.
Questions