THE ANNOTATIONS AND INSTRUCTIONS IN THIS DOCUMENT DO NOT PURPORT TO BE AND SHOULD NOT BE CONSIDERED A GUIDE TO OR AN EXPLANATION OF ALL RELEVANT ISSUES IN CONNECTION WITH YOUR CONSIDERATION OF THE ISDA AUGUST 2012 DF PROTOCOL OR THE RELATED DOCUMENTS. PARTIES SHOULD CONSULT WITH THEIR LEGAL ADVISERS AND ANY OTHER ADVISERS THEY DEEM APPROPRIATE AS PART OF THEIR CONSIDERATION OF THE PROTOCOL PRIOR TO ADHERING TO THE PROTOCOL. ISDA ASSUMES NO RESPONSIBILITY FOR ANY USE TO WHICH ANY OF ITS DOCUMENTATION OR OTHER DOCUMENTATION MAY BE PUT.

1  This DF Supplement is intended to address requirements of the following final rules:

(1) CFTC, Final Rule, Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties, 77 Fed. Reg. 9734 (Feb. 17, 2012);

(2) CFTC, Final Rule, Large Trader Reporting for Physical Commodity Swaps, 76 Fed. Reg. 43851 (July 22, 2011);

(3) CFTC, Final Rule, Position Limits for Futures and Swaps, 76 Fed. Reg. 71626 (Nov. 18, 2011);

(4) CFTC, Final Rule, Real-Time Public Reporting of Swap Transaction Data, 77 Fed. Reg. 1182 (Jan. 9, 2012);

(5) CFTC, Final Rule, Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. 2136 (Jan. 13, 2012);

(6) CFTC, Final Rule, Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants, 77 Fed. Reg. 20128 (Apr. 3, 2012); and

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Any of the following schedules of this ISDA August 2012 DF Supplement (as published by the International Swaps and Derivatives Association, Inc. ("ISDA")) (this "DF Supplement") may be incorporated into an agreement (such agreement, a “Covered Agreement”) by written agreement of the relevant parties indicating which schedules of this DF Supplement (each such schedule, a “DF Schedule”) shall be incorporated into such Covered Agreement. All DF Schedules so incorporated in a Covered Agreement will be applicable to such Covered Agreement unless otherwise provided in such Covered Agreement, and any term defined in this DF Supplement and used in any DF Schedule that is incorporated by reference in a Covered Agreement will have the meaning set forth in this DF Supplement unless otherwise provided in such Covered Agreement. Any term used in a Covered Agreement will, when combined with the name of a party, have meaning with respect to the named party only. The headings and footnotes used in this DF Supplement are for informational purposes and convenience of reference only, and are not to affect the construction of or to be taken into consideration in interpreting this DF Supplement.

2 This Supplement is designed to be used by (i) a swap dealer (referred to herein as the “Swap Dealer” or “SD”) and (ii) another counterparty (referred to herein as the “Counterparty” or “CP”) who may also be a swap dealer. Where both parties are swap dealers, each is considered to be the “Swap Dealer” (or “SD”) and the “Counterparty” (or “CP”) for purposes of this Supplement.

3 The “written agreement of the relevant parties” may include any written agreement by which the parties agree to incorporate the provisions of this Supplement. Such an agreement will be established if both parties have adhered to the August 2012 DF Protocol and exchanged Questionnaires in accordance with the terms thereof. Parties may also incorporate such provisions through any other bilateral agreement. In either case, the relevant provisions of this Supplement would be incorporated into “Covered Agreements.”

Under the Protocol Agreement, a “Covered Agreement” refers to an agreement between the parties that (1) governs the terms and conditions of one or more transactions in Swaps and (2) is in existence at the time the parties have (i) adhered to the Protocol and (ii) matched Questionnaires. The DF Terms Agreement would qualify as a Covered Agreement under the Protocol Agreement. See DF Terms Agreement and annotations thereto.
Schedule 1
Defined Terms

The following terms shall have the following meanings when used in this DF Supplement:

"Agreement," as used in a provision of this DF Supplement that is incorporated into a Covered Agreement or any defined term used in such provision, means such Covered Agreement, as amended or supplemented from time to time.4

"Agricultural Commodity" means any "agricultural commodity," as defined in CFTC Regulation 1.3(zz).5

"Associated Person" means, with respect to a Swap Dealer, any person acting for or on behalf of such Swap Dealer, including an associated person as defined in Section 1a(4) of the Commodity Exchange Act.6

"Applicable U.S. Law" means all applicable laws of the United States and rules, regulations, orders and written interpretations of U.S. federal authorities, self-regulatory organizations, markets, exchanges, and clearing facilities.

"Business Day" means a day on which commercial banks are open for general business (including dealings in foreign exchange and foreign currency deposits).

"CFTC" means the U.S. Commodity Futures Trading Commission.

"CFTC Regulations" means the rules, regulations, orders and interpretations published or issued by the CFTC.

"Commodity Exchange Act" means the Commodity Exchange Act, as amended.

"Commodity Trade Option" means a commodity option entered into pursuant to CFTC Regulation 32.3(a).7

"Counterparty" or "CP" means a party that is the counterparty to a Swap Dealer in respect of the Agreement. For the avoidance of doubt, if two Swap Dealers are parties to the Agreement, each Swap Dealer is a Counterparty or CP for purposes of this DF Supplement.

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4 Because “Covered Agreement” means any agreement that the parties may amend or supplement with the terms provided in this DF Supplement, the term “Agreement” is used to identify the specific agreement that is supplemented when these terms are incorporated into that agreement. An “Agreement” can be a master agreement governing the terms and conditions of swaps or general terms of business such as the DF Terms Agreement.

5 This term is used in Section 2.8. See discussion of “Commodity Trade Options” below.

6 The CFTC External Business Conduct Rules, adopted at 77 Fed. Reg. 9734 (Feb. 17, 2012) ("EBCR"), provide that the term “swap dealer,” when used in those rules, includes any person acting for or on behalf of a swap dealer, including associated persons (as defined in Section 1(a)(49) of the Commodity Exchange Act), “as appropriate.”

7 This term is used in Sections 2.7 and 2.8 of the Supplement.
“DCM” means a “designated contract market,” as such term is used in the CFTC Regulations.

“DCO” means a “derivatives clearing organization,” as such term is defined in Section 1a(15) of the Commodity Exchange Act and the CFTC Regulations.

“Designated Evaluation Agent” means, with respect to a party to the Agreement, a person (if any), other than an employee of such party, that such party has represented in writing to its counterparty is its “Designated Evaluation Agent.”

“Designated Fiduciary” means, with respect to a party to the Agreement, a person (if any) that such party has represented in writing to its counterparty is its “Designated Fiduciary.”

“Designated QIR” means, with respect to a party to the Agreement, a person (if any) that such party has represented in writing to its counterparty is its “Designated QIR.”

“DF Schedule” shall have the meaning given to such term in the introductory paragraph of this DF Supplement.

“DF Supplement Rules” means the CFTC Regulations adopted in the following Federal Register citations, as amended and supplemented from time to time: (1) Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties, 77 Fed. Reg. 9734 (Feb. 17, 2012); (2) Large Trader Reporting for Physical Commodity Swaps, 76 Fed. Reg. 43851 (July 22, 2011); (3) Position Limits for Futures and Swaps, 76 Fed. Reg. 71626 (Nov. 18, 2011); (4) Real-Time Public Reporting of Swap Transaction Data, 77 Fed. Reg. 1182 (Jan. 9, 2012); (5) Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. 2136 (Jan. 13, 2012); (6) Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants, 77 Fed. Reg. 20138 (Apr. 3, 2012); (7) Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps, 77 Fed. Reg. 35200 (June 12, 2012); and (8) solely for purposes of Sections 2.4, 2.5, 2.12 and 2.19 of this DF Supplement, any comparable non-U.S. regulation with which SD is permitted by the CFTC to comply in lieu of any of the foregoing CFTC Regulations.11

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8 This definition is used exclusively in DF Schedule 3. It is therefore only applicable to a counterparty who is eligible for (i.e., not a Special Entity), and elects to enter into, that DF Schedule.

9 This definition is used exclusively in DF Schedules 5 and 6. It is therefore only applicable to a counterparty who is an ERISA Special Entity that is eligible for, and elects to enter into, either or both of those DF Schedules.

10 This definition is used exclusively in DF Schedule 4. It is therefore only applicable to a CP who is a Special Entity that is eligible for, and elects to enter into, that DF Schedule.

11 Part 8 of this definition is intended to cover, to a limited extent, non-U.S. regulatory requirements that a non-U.S. swap dealer would be allowed by the CFTC to comply with in lieu of compliance with applicable CFTC regulations. Note that this Supplement is not intended to cover rules governing swaps beyond those listed in this definition (for example, non-U.S. reporting rules). See Final Exemptive Order Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 858 (Jan. 7, 2013).
“DF Supplement Information” means (i) any information or representation agreed in writing by the parties to be DF Supplement Information; and (ii) any information provided pursuant to Section 2.4 of this DF Supplement, in each case, as amended or supplemented from time to time in accordance with Section 2.3 of this DF Supplement or in another manner agreed by the parties.\textsuperscript{12}


“ERISA Special Entity” means a party to the Agreement that has represented in writing to its counterparty that it is an employee benefit plan subject to Title I of ERISA.

“Exempt Commodity” means any “exempt commodity” under Section 1a(20) of the Commodity Exchange Act.\textsuperscript{13}

“FCM” means a futures commission merchant subject to regulation under the Commodity Exchange Act.

“Hedging Entity ECP” means a party to the Agreement that (i) has represented in writing to its counterparty that it is a corporation, partnership, proprietorship, organization, trust, or other entity that has a net worth exceeding $1,000,000 and enters into Swaps in connection with the conduct of the party’s business or to manage the risk associated with an asset or liability owned or incurred or reasonably likely to be owned or incurred by the party in the conduct of the party’s business, but (ii) has not represented that it qualifies as an “eligible contract participant” as defined in Section 1a(18) of the Commodity Exchange Act other than as provided above.\textsuperscript{14}

“Hedging Individual ECP” means a party to the Agreement that (i) has represented in writing to its counterparty that it is an individual who has amounts invested on a discretionary basis, the aggregate of which is in excess of $5,000,000 and who enters into Swaps in order to manage the risk associated with an asset owned or liability incurred, or reasonably likely to be owned or incurred, by the party, but (ii) has not represented that it qualifies as an “eligible contract participant” as defined in Section 1a(18) of the Commodity Exchange Act other than as provided above.\textsuperscript{15}

“Local Business Day” shall have the meaning specified in the Agreement; provided, however, in the event the Agreement does not specify the meaning of “Local Business Day,” the term shall

\textsuperscript{12} See Sections 2.1-2.3. “DF Supplement Information” includes information and representations provided in a counterparty’s Questionnaire or equivalent bilateral documentation, as well as updates of that information and other information provided to the dealer counterparty so that it can satisfy regulatory requirements under the DF Supplement Rules.

\textsuperscript{13} This term is used in Section 2.8.

\textsuperscript{14} This term is used in Section 2.20. It describes a type of counterparty that can only lawfully enter into swaps in connection with the conduct of its business. \textit{See Commodity Exchange Act § 1a(18)(A)(v)(III) and CFTC Regulation 1.3(m)(7).}

\textsuperscript{15} This term is used in Section 2.21. It describes a type of counterparty that is a natural person and can only lawfully enter into swaps to manage certain risks. \textit{See Commodity Exchange Act § 1a(18)(A)(xi)(III) and CFTC Regulation 1.3(m)(7).}
mean, with respect to a party, a day on which commercial banks are open for business (including for dealings in foreign exchange and foreign currency deposits) in the city that is specified in the Agreement for receipt of notices by such party.

“Major Security-Based Swap Participant” means a party to the Agreement that has represented in writing to its counterparty that it is registered with the SEC as a “major security-based swap participant” as defined in Section 3a(67) of the Securities Exchange Act and Rule 3a67-1 thereunder.

“Major Swap Participant” means a party to the Agreement that has represented in writing to its counterparty that it is registered (fully or provisionally) with the CFTC as a “major swap participant” as defined in Section 1a(33) of the Commodity Exchange Act and CFTC Regulation 1.3(hhh) thereunder.

“Material Confidential Information” means “material confidential information” as such term is used in CFTC Regulation 23.410(c).\(^\text{16}\)

“Non-Reporting Counterparty” means, in respect of any Swap subject to the CFTC Regulations, the party to such Swap that is not the Reporting Counterparty.

“Notice Effective Date” means the Local Business Day following the date on which a notice would be effective pursuant to the Notice Procedures or such other date as the parties may specify in writing.\(^\text{17}\)

“Notice Procedures” means (1) the procedure specified in the Agreement regarding delivery of notices or information to a party and (2) such other means as may be agreed in writing between the parties from time to time.\(^\text{18}\)

“Notifications” means the notifications set forth in Part VII of DF Schedule 2.

\(^\text{16}\) See Sections 2.13-2.16 of the Supplement. The EBCR do not define this term, although it is used extensively therein. It is likely that CFTC interpretations will emerge over time. For this reason, this definition is tied to the meaning of the term in the EBCR as it evolves.

\(^\text{17}\) Certain types of notices from a CP may require the SD counterparty to change its policies and procedures to remain in compliance with DF Supplement Rules (e.g., an eligible counterparty notifies its dealer counterparty that it elects to be treated as a “special entity” or that it will cease making a representation needed to satisfy a safe harbor that it has previously elected). This term provides that such notices are deemed effective one Local Business Day after notices are generally effective to give the dealer counterparty time to update its internal systems and procedures with the new information in order to be in compliance. Note that this delayed effective date only applies to the specific types of notices that a counterparty may give under Sections 2.3, 3.1(c), 4.3(c), 4.4, 5.4, and 6.4 of the Supplement. It does not change the effective date of counterparty notices in other situations.

\(^\text{18}\) Provides that notice hereunder may be provided in the manner agreed upon in the original agreement, unless otherwise agreed. Note that in addition to a general notice address, that would likely have been provided in the underlying agreement, a counterparty is asked in Part II, Section 10 of the Questionnaire to provide an email address to which certain types of trading information and risk disclosure can be delivered. Pursuant to Section 6(c)(iv) of the Protocol Agreement, “Notice Procedures” includes written notice by email to the address specified in the Questionnaire or to any substitute e-mail address provided pursuant to Section 2.3 of the DF Supplement.
“Regulated Swap Entity” means a Swap Dealer, Security-Based Swap Dealer, Major Swap Participant or Major Security-Based Swap Participant.

“Reporting Counterparty” means, in respect of any Swap subject to the CFTC Regulations, the party to such Swap that is determined to be the “reporting counterparty” in accordance with CFTC Regulation 45.8; provided that, in the event that CFTC Regulation 45.8 requires the parties to agree which party shall be the reporting Counterparty, the Reporting Counterparty in respect of a Swap shall be the party agreed by the parties.19

“SDR” means a “swap data repository” as defined in Section 1a(48) of the Commodity Exchange Act and the CFTC Regulations.

“SEC” means the U.S. Securities and Exchange Commission.


“Security-Based Swap Dealer” means a party to the Agreement that has represented in writing to its counterparty that it is registered with the SEC as a “security-based swap dealer” as defined in Section 3(a)(71) of the Securities Exchange Act and Rule 3a71-1 thereunder.

“SEF” means a “swap execution facility” as defined in Section 1a(50) of the Commodity Exchange Act and the CFTC Regulations.

“Special Entity” means a “special entity” as defined in Section 4s(h)(2)(C) of the Commodity Exchange Act and CFTC Regulation 23.401(c) thereunder.

“Swap” means a “swap” as defined in the Section 1a(47) of the Commodity Exchange Act and CFTC Regulation 1.3(xxx) that is governed by or proposed to be governed by the Agreement. The term “Swap” also includes any foreign exchange swaps and foreign exchange forwards that may be exempted from regulation as “swaps” by the Secretary of the Treasury pursuant to authority granted by Section 1a(47)(E) of the Commodity Exchange Act.20

“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.21

19 The Supplement is drafted on the basis that at least one CP will be an SD. If the other CP is not an SD, then the SD will always be the “Reporting Counterparty” under CFTC rules regarding the reporting of swap data with respect to swaps between the parties. If both CPs are SDs, they must enter into additional agreements to establish which party will be the Reporting Counterparty, which may include industry standards for determining which swap dealer is the Reporting Counterparty.

20 While the Secretary of the Treasury has the authority to exempt certain types of FX transactions from the definition of “swap” under the Commodity Exchange Act (which authority has been exercised, see 77 Fed. Reg. 69694 (Nov. 20, 2012)), the EBCR and reporting rules still apply to any exempted transactions. Commodity Exchange Act § 1a(47)(E).

21 Under the EBCR, certain so-called “suitability” obligations are triggered when a swap dealer makes a “recommendation” regarding a swap or a trading strategy or an offer to enter into a swap. Such obligations may be satisfied through safe harbors available under the EBCR, which depend upon representations being made at the appropriate times. The term “Swap Communication Event” defines these times and is used in DF Schedules 3, 4, 5, and 6. Representations in DF Schedule 2, on the other hand, are tied to Swap Transaction Events.
“Swap Dealer” or “SD” means a party to the Agreement that has represented in writing to a counterparty that it is registered (fully or provisionally) with the CFTC as a “swap dealer” as defined in Section 1a(49) of the Commodity Exchange Act and CFTC Regulation 1.3(ggg) thereunder, provided that the term “Swap Dealer” also includes, as appropriate, any Associated Person of such Swap Dealer.

“Swap Recommendation” means a “recommendation” (as such term is used in CFTC Regulations 23.434 and 23.440) with respect to a Swap or trading strategy involving a Swap that is governed by or proposed to be governed by the Agreement.22

“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.23

22 This term is defined by reference to its use in the EBCR due to the facts-and-circumstances nature of the determination. For further detail on what constitutes a “recommendation” under the EBCR, see 77 Fed. Reg. 9734, 9828 (Feb. 17, 2012).

23 See 77 Fed. Reg. 9734, 9741 (Feb. 17, 2012). The EBCR treat the events identified in this definition as new swaps for purposes of a swap dealer’s duties under those rules. The term “Swap Transaction Event” defines these events and is used in DF Schedule 2 to establish when certain representations are repeated. It is also embedded in the definition of “Swap Communication Event,” discussed above.
Schedule 2
Agreements Between a Swap Dealer and Any Other Party

This DF Schedule 2 may be incorporated into an agreement between a Swap Dealer and any other party, including another Swap Dealer. For the avoidance of doubt, if this DF Schedule 2 is incorporated into an agreement between two Swap Dealers, each such Swap Dealer will be both “SD” and “CP” for purposes of this DF Schedule 2.

If the parties to an agreement have specified that this DF Schedule 2 shall be incorporated into such agreement and any conditions to such incorporation set forth in such agreement have been satisfied, this DF Schedule 2 shall be deemed to be a part of such agreement to the same extent as if this DF Schedule 2 were restated therein in its entirety.24

Part I. Representations and Agreements.

2.1. Each party represents to the other party (which representation is deemed repeated as of the time of each Swap Transaction Event) that, as of the date of each Swap Transaction Event, (i) all DF Supplement Information (excluding financial information and representations) furnished by or on behalf of it to the other party is true, accurate and complete in every material respect, (ii) no representation provided in the DF Supplement Information or in this DF Supplement is incorrect or misleading in any material respect, and (iii) all DF Supplement Information that is financial information furnished by or on behalf of it to the other party has been prepared in accordance with applicable accounting standards, consistently applied.25

2.2. Each party acknowledges that the other party has agreed to incorporate one or more DF Schedules into the Agreement, and if the parties enter into any Swaps on or after the date of such incorporation the other party will do so, in reliance upon the DF Supplement Information and the representations provided by such party or its agent in the DF Supplement Information and this DF Supplement. Notwithstanding the foregoing, each party agrees that an event of default, termination event, or other similar event shall not occur under the Agreement or any other contract between the parties solely on the basis of (i) a representation provided solely in DF Supplement Information or in this DF Supplement being incorrect or misleading in any material respect, or (ii) a breach of any covenant or agreement set forth solely in this DF Supplement; provided, however, that nothing in this Section 2.2 shall prejudice any other right or remedy of a party at law or under the Agreement or any other contract in respect of any misrepresentation or

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24 If the parties have adhered to the August 2012 DF Protocol and exchanged Questionnaires in accordance with its terms, this Schedule 2 will be automatically incorporated into the agreements between the parties that are covered by the Protocol.

25 CFTC Regulation 23.402(d). Under the EBCR, a swap dealer is required to obtain certain information and representations from its counterparties. Such information and representations are provided via the Protocol in the Questionnaire. The purpose of this Section is to provide representations from the counterparty in support of the information and representations it has provided. See also Section 2.3 below regarding the update of such representations and information.
breach hereunder or thereunder. For the avoidance of doubt, this Section 2.2 shall not alter a party’s termination rights or remedies, if any, applicable to a breach of any representation, warranty, covenant, or agreement that is not provided or set forth solely in DF Supplement Information or in this DF Supplement, including any such breach relating to any event or condition that could also cause or constitute an event specified in (i) or (ii) above.  

2.3. Each party agrees to promptly notify the other party in writing in accordance with the Notice Procedures (i) of any material change to DF Supplement Information (other than representations) previously provided by such party or on behalf of such party and (ii) if any representations made in DF Supplement Information or this DF Supplement by or on behalf of such party become incorrect or misleading in any material respect. For any representation that would be incorrect or misleading in any material respect if repeated on any date following the date on which the representation was last repeated, the notifying party shall timely amend such representation by giving notice of such amendment to the other party in accordance with the Notice Procedures. Notwithstanding anything in the Agreement to the contrary, a notification pursuant to this Section 2.3 shall be effective on the Notice Effective Date and the relevant information or representation will be deemed amended as of such Notice Effective Date.  

2.4. Each party agrees to promptly provide the other party, in accordance with the Notice Procedures, any information reasonably requested by such other party to enable such other party to comply with Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act and the DF Supplement Rules in connection with any Swap outstanding between the parties under the Agreement.  

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26 As described above, parties are allowed to incorporate the representations and agreements of this Supplement into their agreements, including existing agreements. Parties may use the August 2012 DF Protocol as an efficient means of incorporating the Supplement into existing agreements. Because the Protocol does not afford parties the opportunity to modify the terms of the Supplement, Section 2.2 provides that an event of default or similar event will not occur due to a misrepresentation or breach arising solely from the provisions of the Supplement incorporated into their agreement and will not be a cross-default under other agreements between the parties. On the other hand, if (for example) a CP provides a representation in both the Questionnaire and in an underlying ISDA agreement (such as an ECP representation), Section 2.2 does not alter any remedies the dealer counterparty may have under that ISDA agreement as a result of the inaccuracy of the representation in the ISDA agreement, even though a breach of that representation would also likely be a breach of a representation made in the Questionnaire and incorporated into that same ISDA agreement.  

27 CFTC Regulation 23.402(d). Under the EBCR, a swap dealer is permitted to rely on CP representations that are made in relationship documentation (rather than in connection with specific trades) in order to satisfy certain obligations, provided that the counterparty undertakes to “timely” update the representations. Section 2.3 is designed to satisfy this requirement. This Section works in conjunction with Section 2.1 (which updates CP representations as of each trade date). The last sentence delays the effectiveness of such updates to avoid compliance problems that could arise if a counterparty were to provide a last minute notice immediately prior to trading.  

28 See, e.g., CFTC Regulations 20.5(a); 43.3-43.4; 45.2-45.4; 46.3. Various provisions of Title VII and the DF Supplement Rules require swap dealers to obtain information from CPs. This information includes, but is not limited to, the requirements of the DF Supplement Rules (i) to satisfy swap reporting requirements (which
2.5. Notwithstanding anything to the contrary in the 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 DF Supplement Rules which mandate reporting of transaction and similar information. Each party acknowledges that disclosures made pursuant to this Section 2.5 may include, without limitation, the disclosure of trade information including a party’s identity (by name, identifier or otherwise) to an SDR and relevant regulators and that such disclosures could result in certain anonymous Swap transaction and pricing data becoming available to the public. Each party further acknowledges that, for purposes of complying with regulatory reporting obligations, an SDR 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 an SDR registered with the CFTC. For the avoidance of doubt, 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 DF Supplement Rules 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.29

2.6. To the fullest extent permitted by applicable law, each party consents to the recording of conversations of its trading, marketing, operations and other relevant personnel by the other party and its affiliates, with or without the use of a warning tone or similar warning, in connection with any Swap or proposed Swap. Each

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29 CFTC Regulations 20.4, 20.5, 23.204, 23.205, 43.3, 43.4, 45.3, 45.4, and 46.3. Swap dealers are required to report data regarding counterparties and swaps entered into with those counterparties to swap data repositories or “SDRs” regulated by the CFTC. Because a CP may previously have negotiated a confidentiality or non-disclosure agreement with a dealer counterparty that would not otherwise permit such reporting, Section 2.5 provides a consent intended to override any such agreement. While this agreement overrides previous agreements, its scope is limited to information that the dealer counterparty is obligated to report under the Commodity Exchange Act. The last sentence of this Section is merely to clarify that the consent given is a consent for purposes of all applicable law. The Section also contains an acknowledgment that an SDR may use the services of a “global trade repository” such as DTCC to facilitate reporting, which is not regulated by the CFTC.
party further agrees to obtain the individual consents of its personnel should such consent be required by applicable law.\textsuperscript{30}

2.7. As of each Swap Transaction Event with respect to a Commodity Trade Option to which CP is the offeree, CP represents to its counterparty that it is: (i) a producer, processor, commercial user of, or a merchant handling, the commodity that is the subject of the Commodity Trade Option, or the products or byproducts thereof, and (ii) entering into the Commodity Trade Option solely for purposes related to its business as such.\textsuperscript{31}

2.8. As of each Swap Transaction Event with respect to a Commodity Trade Option, each party represents to the other party that the Commodity Trade Option, if exercised, contains a binding obligation that results in the sale of an Exempt Commodity or an Agricultural Commodity for immediate or deferred shipment or delivery.\textsuperscript{32}

Part II. Agreements of a Non-Reporting Counterparty.

2.9. Each party agrees that if it is the Non-Reporting Counterparty with respect to a Swap under the Agreement that is an “international swap” (as that term is defined in CFTC Regulation 45.1), it shall notify the Reporting Counterparty to such international swap, as soon as practicable and in accordance with the Notice Procedures, of the (i) identity of each non-U.S. trade repository not registered with the CFTC to which the Non-Reporting Counterparty or its agent has reported the Swap, and (ii) swap identifier used by such non-U.S. trade repository to identify the swap.\textsuperscript{33}

\textsuperscript{30} CFTC Regulation 23.202. CFTC rules regarding books and records require the creation of records permitting the recreation of a complete “audit trail” involving negotiations that lead to the execution of a swap. Accordingly, this Section is designed to enable the dealer counterparty to record phone lines to establish adequate records. Parties should be aware, however, that this Section 2.6 may not be sufficient for the purposes of complying with the voice recording laws of certain U.S. states and non-U.S. jurisdictions. For example, in certain jurisdictions, the consent of the actual individual whose voice is being recorded may be required and a warning beep may or may not be sufficient to establish knowledge and consent to recording. CPs are required to agree to obtain consents from the employees as needed to satisfy local law for this reason.

\textsuperscript{31} CFTC Regulation 32.3(a)(2). Under CFTC rules, only certain types of persons are eligible to purchase long options on tangible commodities that are intended to be physically settled. Sections 2.7 and 2.8 provide assurances as to a counterparty’s eligibility.

\textsuperscript{32} CFTC Regulation 32.3(a)(3).

\textsuperscript{33} CFTC Regulation 45.3(h). The CFTC monitors swap data on a market-wide basis. In order to avoid “double counting” of swaps in its statistics, the CFTC requires the dealer counterparty to report whether a swap is reported to a non-U.S. data repository that may be consolidating information with the CFTC. For this reason, when the dealer counterparty reports a swap to an SDR, it needs to know whether the CP will be reporting the swap to a non-U.S. data repository. Section 2.6 requires the CP to notify the dealer counterparty in such instances. Note that Section 2.6 only requires the CP to notify the dealer counterparty if the CP or its agent reports the swap to a non-U.S. data repository and does not impose other obligations. Therefore, this DF Supplement does not address what is an “international swap” or specify the circumstances under which such reporting may be required. It is up to the CP to determine its own reporting obligations and to let the dealer counterparty know when it is reporting in another jurisdiction.
2.10. Each party agrees that if it is the Non-Reporting Counterparty with respect to a Swap under the Agreement, upon the occurrence of any “life cycle event” (as that term is defined in CFTC Regulation 45.1) relating to a corporate event in respect of such Non-Reporting Counterparty and such Swap, it will, as soon as practicable, but in no event later than 10 a.m. on the second “business day” (as that term is defined in CFTC Regulation 45.1) following the day on which such life cycle event occurs, notify the Reporting Counterparty to the Swap of the occurrence of such life cycle event, with sufficient detail regarding such life cycle event to allow such other party to comply with any reporting requirements imposed by the DF Supplement Rules.  

Part III. Representations and Agreements of a Counterparty that is not a Swap Dealer.

If CP is not a Swap Dealer, it represents and agrees as follows:

2.11. CP has received, reviewed, and understood the Notifications in Part VII of DF Schedule 2 that are applicable to CP.  

2.12. CP agrees that SD may effect delivery to CP of any notifications and informational disclosures required by the DF Supplement Rules, including standardized notifications and disclosures applicable to multiple Swaps, through any of the following means, each of which CP agrees is reliable: (i) means specified for the delivery of notices in the Notice Procedures or (ii) by posting on a web page at, or accessible through, a URL designated in a written notice given to CP pursuant to the Notice Procedures and notifying CP of such posting in a written notice given pursuant to the Notice Procedures, provided that SD need not provide written notice of posting on such web page with respect to the provision of daily marks pursuant to CFTC Regulation 23.431(d). CP further agrees that, if it has so specified in writing to SD, SD may provide oral disclosures of any (i) pre-trade mid-market marks required pursuant to CFTC Regulation 23.431(a)(3)(i) and (ii) basic material economic terms, including price, notional amount and termination date, pursuant to CFTC Regulation 23.431(a)(2), provided such disclosures are confirmed by SD in a written notice (which confirmation may be provided post-trade) by a means specified in the preceding sentence.

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34 CFTC Regulation 45.4(c). In certain limited circumstances (e.g., a self-referencing swap), the parties may enter into a swap under which a corporate event with respect to the counterparty triggers a change to the swap that would be considered a “life cycle event” under CFTC reporting rules. In such cases, the SD is obligated to report the life-cycle event within two business days of the event. In order to satisfy this requirement in circumstances where the relevant event is not public or otherwise known to the SD, Section 2.6 requires the CP to report the event to the SD prior to noon on the second business day.

35 CFTC Regulations 23.402(f) and 23.431(d)(3)(ii). This Section merely acknowledges that the CP has read and understood the notices provided in Part VII. It does not require the CP to agree to the adequacy of those notices or waive any rights to receive further notices.

36 The EBCR provide that an SD may provide notices and disclosures in any “reliable means agreed to in writing by the counterparty.” Disclosures and notices applicable to multiples swaps can be provided in counterparty
2.13. Subject to any conditions on the disclosure of Material Confidential Information to governmental authorities, regulatory authorities or self-regulatory organizations previously agreed by the parties, CP agrees that SD is authorized to disclose Material Confidential Information provided to SD by (or on behalf of) CP to comply with a request of any regulatory authority or self-regulatory organization with jurisdiction over SD or of which SD is a member or as otherwise required by applicable law (whether by statute, law, rule, regulation, court order, subpoena, deposition, civil investigative demand or otherwise).\(^{37}\)

2.14. If, on or prior to the date on which this DF Schedule 2 is incorporated into the Agreement, CP and SD have entered into a written agreement relating to the non-disclosure of information regarding CP or its activities, CP and SD agree that all information that is subject to that agreement that constitutes Material Confidential Information and is provided by (or on behalf of) CP to SD may be used or disclosed by SD in any manner that is not prohibited by the terms of such agreement, irrespective of any limitations set forth in CFTC Regulation 23.410(c)(1).\(^{38}\)

2.15. If any Material Confidential Information provided by (or on behalf of) CP to SD is not subject to an agreement of the type described in Section 2.14 above, CP relationship documentation provided they meet this standard. Section 2.12 provides an agreement as to the means of delivery of various disclosures and notices and includes a counterparty agreement that such means are reliable. See also Section 6(c)(iv) of the Protocol Agreement regarding the use of e-mail for delivery.

Note that Section 2.12 provides that the SD may provide notices and disclosures by placing the relevant information on the SD’s website but must notify the CP by another means (such as email) that it has done so. The Questionnaire provides an opportunity for the CP to provide an email address for such purposes. See Questionnaire Part II, Section 10 and annotations thereto. Daily post-trade regulatory marks to market required under CFTC Regulation 23.431(d) may be posted on a website without daily emails. Note also that if the CP has agreed, pre-trade marks-to-market and other pre-trade transaction information can be provided orally so long as oral notice is followed by a subsequent written confirmation. See Questionnaire Part II, Section 11 and annotations thereto.

\(^{37}\) CFTC Regulation 23.410(c)(2). This Section is required to overcome what is likely an unintended consequence of CFTC Regulations. CFTC confidentiality requirements prohibit swap dealers from disclosing any “material confidential information” about a CP or its trades except as agreed with the CP or as permitted by a regulatory safe-harbor. While the EBCR include a safe harbor for reporting to the CFTC, the DOJ, SROs that report to the CFTC and bank regulators, the EBCR safe harbor does not include other regulators (e.g., the SEC). This provision is included to allow SDs to satisfy information requests made by any of their applicable governmental authorities and regulators. Note that Section 2.13 only permits reporting subject to the conditions of any existing non-disclosure agreement between the parties.

\(^{38}\) For a CP who has an existing non-disclosure agreement with the SD, Section 2.14 provides that information within the scope of that agreement remains subject to the same rules that applied when that agreement was negotiated notwithstanding new confidentiality obligations imposed under the EBCR. The purpose is to preserve the balance that was struck when such agreement was originally negotiated, as the parties have already structured their relationship by contract in those circumstances and the new rules could upset the balance that was intended.

Note that the scope of Section 2.14 is limited to information that is within the scope of an existing agreement between the parties. Where the parties have an agreement that only covers limited types of counterparty information, information that is outside of the scope of that agreement is subject to the CFTC’s new confidentiality requirements and Section 2.15.
agrees that SD is authorized to use or disclose such Material Confidential Information to (i) any of its affiliates, third-party service providers (provided such affiliates and third-party service providers are subject to limitations on use or disclosure that are no less restrictive than the limitations applicable to SD under the DF Supplement Rules, as agreed by the parties in this DF Supplement) and (ii) Associated Persons, solely for purposes of complying with the internal legal risk, compliance, accounting, operational risk, market risk, liquidity risk or credit risk policies of SD or its affiliates (in each case, consistently applied) or as otherwise permitted by the DF Supplement Rules. Notwithstanding the foregoing, no such Material Confidential Information will be disclosed to any person acting in a structuring, sales or trading capacity for SD or any affiliate of SD except as permitted by CFTC Regulation 23.410(c)(2); provided that for purposes of the foregoing, CP and SD agree that:

a. “the effective execution of any swap for or with counterparty,” as such language is used in CFTC Regulation 23.410(c)(2)(i), may require, without limitation, the delivery of Material Confidential Information to persons acting in a structuring, sales or trading capacity for SD or any affiliate of SD for the purpose of structuring a Swap or for the purpose of, but solely to the extent necessary for, establishing the price of a Swap or proposed Swap or adjusting the terms of an existing Swap; and

b. the disclosure or use of Material Confidential Information to “hedge or mitigate any exposure,” as such language is used in CFTC Rule 23.410(c)(2)(ii), includes, without limitation, its disclosure or use, for the purpose of, but solely to the extent necessary for, establishing or adjusting one or more anticipatory hedges or other positions intended to hedge against the market risk, liquidity risk or counterparty credit exposure to CP that is generated by a Swap or proposed Swap.39

2.16. CP agrees that the following information is not Material Confidential Information: information that, at or prior to the time of its use or disclosure by SD, is generally available publicly other than as a result of (i) a breach by SD of its obligations to CP under Applicable U.S. Law or a written agreement relating to the non-disclosure of information regarding CP or its activities or (ii) a breach by (a) any of SD’s affiliates or third-party service providers that receive such information

39 The EBCR prohibits swap dealers from using counterparty material confidential information in a manner that “would tend to be materially adverse to the interests of the counterparty” and from disclosing any such information absent (i) authorization from the CP or (ii) a safe harbor. The EBCR provides safe harbors for “effective execution” of a swap for or with the relevant CP and to hedge or mitigate exposure created by the relevant swap. To help apply the language of the EBCR safe harbors, Section 2.15 represents an agreement of the parties on practical guidelines for use of counterparty material confidential information with regard to, among other things, anticipatory hedging and market making activities.

In particular, 2.15(a) is designed to ensure that conversations with structurers are permitted and that information can be shared between swap dealer personnel and desks to the extent needed to establish a price for a swap. Because the extent of disclosure that is required for structuring may be uncertain, 2.15(a) permits disclosure “for the purpose of” such structuring, but “solely to the extent necessary” to price a swap or effect a hedge.
Part IV. Agreements and Acknowledgements of a Counterparty that is not a Regulated Swap Entity.

If CP is not a Regulated Swap Entity, it agrees and acknowledges as follows:

2.17. CP agrees that, with respect to each cleared Swap originally executed between CP and SD, CP will obtain any daily marks it wishes to receive for such cleared Swap from the FCM through which CP clears such cleared Swap or the relevant DCO or another third party.41

2.18. CP agrees that, unless otherwise agreed with SD in writing, with respect to each uncleared Swap between CP and SD, any daily marks required to be provided by SD to CP pursuant to CFTC Regulation 23.431(d) will be calculated by SD as of the close of business on the prior Business Day in the locality specified by SD in its notice of such daily mark to CP, such locality to be consistently specified with regard to a class or type of Swaps.42

2.19. CP acknowledges that, with respect to each Swap between CP and SD that is not “available for trading” (as that phrase is used in the CFTC Regulations), unless CP makes a request of SD prior to a Swap Transaction Event for a specific scenario analysis to which it is entitled pursuant to DF Supplement Rules or other Applicable U.S. Law (which request, if made orally, will be confirmed in writing), CP shall not be entitled to any scenario analysis unless SD otherwise agrees.43

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40 CFTC Regulation 23.410(c). The EBCR do not define the term “material confidential information” but permits the parties to agree to the treatment of such information. Section 2.16 creates a basic agreement as to when information will be deemed public that is generally consistent with market practice.

41 CFTC Regulation 23.431(d). The EBCR require SDs to disclose to CPs that they have the right to receive daily marks to market with respect to cleared swaps from the relevant DCO. The relevant rules leave some ambiguity as to whether an SD might be required to forward those marks to CPs who clear their swaps at a different FCM if requested by the CP to do so. Because the SD would not have contractual privity or obligations to the CP once the CP clears the transactions at an FCM, the CP agrees in Section 2.17 that it will get marks from its FCM or DCO and not from the SD in such circumstances.

42 CFTC Regulation 23.431(d). The EBCR provide that daily “mid-market” marks must be provided as of the close of business or such other time as the parties agree, but does not provide further guidance. Section 2.18 provides a clear baseline rule by establishing that “close of business” means close of business on the previous business day in the SD’s jurisdiction (as notified to the CP). The provision allows the parties to agree otherwise in writing.

43 CFTC Regulation 23.431(b). The EBCR provides CPs with the right to obtain scenario analyses with respect to swaps that are not traded on a DCM or SEF prior to entering into those swaps. Section 2.19 is intended to clarify that this is a pre-trade right only and that CP must specifically ask for a scenario analysis to avoid confusion. This provision applies only to the pre-trade scenario analysis to which the CP is entitled under applicable law. It does not affect any other scenario analysis that the SD provides, or agrees to provide, to the CP.
Part V. Representation of a Hedging Entity ECP.

2.20. If CP is a Hedging Entity ECP, CP represents to SD (which representation is deemed repeated as of the time of each Swap Transaction Event) that for so long as CP remains a Hedging Entity ECP, each Swap entered into by it under the Agreement will be entered into in connection with the conduct of CP’s business or to manage the risk associated with an asset or liability owned or incurred or reasonably likely to be owned or incurred by CP in the conduct of CP’s business.\(^{44}\)

Part VI. Representation of a Hedging Individual ECP.

2.21. If CP is a Hedging Individual ECP, CP represents to SD (which representation is deemed repeated as of the time of each Swap Transaction Event) that for so long as CP remains a Hedging Individual ECP, each Swap entered into by it under the Agreement, will be entered into in order to manage the risk associated with an asset owned or liability incurred, or reasonably likely to be owned or incurred, by CP.\(^{45}\)

Part VII. Notifications by a Swap Dealer.

If applicable, SD hereby notifies CP that:

2.22. Scenario Analysis

a. If CP is not a Regulated Swap Entity, prior to any Swap Transaction Event with respect to any Swap that is not “available for trading” (as such term is defined in the CFTC Regulations) on a DCM or SEF, CP can request, and consult on the design of, a scenario analysis to allow CP to assess its potential exposure in connection with such Swap.\(^{46}\)

2.23. Daily Mark

a. If CP is not a Regulated Swap Entity, CP has the right to receive the daily mark for cleared Swaps originally executed by CP with SD from the relevant DCO.\(^{47}\)

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\(^{44}\) See Commodity Exchange Act Section 1a(18)(A)(v)(III) and related CFTC Regulations. For a CP that qualifies as an ECP solely as a Hedging Entity ECP, this representation establishes that each swap it enters into with the SD satisfies the conditions of its limited ECP status. See further explanation in the definition of “Hedging Entity ECP.”

\(^{45}\) See Commodity Exchange Act Section 1a(18)(A)(xi)(II) and related CFTC Regulations. For a natural person who qualifies as an ECP solely as a Hedging Individual ECP, this representation establishes that each swap he/she enters into with the SD satisfies the conditions of his/her limited ECP status. See further explanation in the definition of “Hedging Individual ECP.”

\(^{46}\) CFTC Regulation 23.431(b). This is a required notification under CFTC Regulation 23.431(b)(1)-(2).

\(^{47}\) CFTC Regulation 23.431(d)(1). This is a required notification under CFTC Regulation 23.431(d)(1).
b. If CP is not a Regulated Swap Entity, SD hereby discloses to CP, in respect of a daily mark for any uncleared Swap provided to CP by SD pursuant to CFTC Regulation 23.431(d)(3)(ii), that:

1. the daily mark may not necessarily be a price at which either CP or SD would agree to replace or terminate the Swap;

2. unless otherwise expressly agreed by the parties, calls for margin may be based on considerations other than the daily mark provided to CP; and

3. the daily mark may not necessarily be the value of the Swap that is marked on the books of SD.  

2.24. Clearing

a. If CP is not a Regulated Swap Entity, with respect to any Swap entered into between CP and SD under the Agreement that is subject to the mandatory clearing requirements under Section 2(h) of the Commodity Exchange Act, CP has the sole right to select the DCO at which the Swap will be cleared.  

b. If CP is not a Regulated Swap Entity, with respect to any Swap entered into between CP and SD under the Agreement that is not subject to the mandatory clearing requirements under Section 2(h) of the Commodity Exchange Act, CP may elect to clear such Swap and has the sole right to select the DCO at which the Swap will be cleared.  

2.25. Special Entities

a. If CP is an employee benefit plan defined in Section 3 of ERISA that is not subject to Title I of ERISA, SD hereby notifies CP of its right to elect to be treated as a special entity pursuant to CFTC Regulation 23.430(c).
Schedule 3  
Institutional Suitability Safe Harbors for Non-Special Entities

This DF Schedule 3 may be incorporated into an agreement between a Swap Dealer and any other party that is not a Regulated Swap Entity or a Special Entity.

If the parties to an agreement have specified that this DF Schedule 3 shall be incorporated into such agreement and any conditions to such incorporation set forth in such agreement have been satisfied, this DF Schedule 3 shall be deemed to be a part of such agreement to the same extent as if this DF Schedule 3 were restated therein in its entirety. If the party that is not a Regulated Swap Entity or Special Entity has one or more Designated Evaluation Agents, this DF Schedule 3 will only be incorporated into an agreement if such party and each such Designated Evaluation Agent have agreed to make the representations and agreements in this DF Schedule 3 that are applicable to it.

Part I. Representations and Agreements Applicable if Counterparty Has One or More Designated Evaluation Agents.

3.1. If (i) CP has designated one or more agents as Designated Evaluation Agents and (ii) each such Designated Evaluation Agent has agreed in writing to make the representations and agreements in Sections 3.1(b) and 3.1(c):

52 Under the EBCR, certain so-called “suitability” obligations are triggered when an SD makes a “recommendation” regarding a swap or a trading strategy or an offer to enter into a swap. Such obligations may be satisfied through safe harbors available under the EBCR. DF Schedule 3 provides the representations and agreements necessary to satisfy the safe harbor available for CPs who are not “special entities.” DF Schedule 3 is not relevant to an agreement between an SD and another SD or a major swap participant, because SDs are not subject to suitability requirements when transacting with such counterparties.

53 For a pair of counterparties who have adhered to the August 2012 DF Protocol and exchanged Questionnaires, this DF Schedule 3 will be incorporated into the agreements that are covered by the Protocol if both parties have elected to do so and are eligible to do so (i.e., this DF Schedule is optional under the Protocol).

54 A CP that has one or more investment managers that have discretion to trade for the CP’s account may satisfy the safe harbor by (i) representing that the CP has complied with policies and procedures designed to ensure that each investment manager is capable of evaluating swaps, and (ii) having the investment manager represent that it will exercise independent judgment in evaluation any swaps recommended by the SD. These representations are provided in Part I of this DF Schedule 3. A CP accomplishes this by simply representing to the SD that each investment manager is a “Designated Evaluation Agent” (which may be accomplished through the Protocol in the Questionnaire). To satisfy the safe harbor, this DF Schedule then provides that each Designated Evaluation Agent must make the representations and agreements set forth in this Part I.

Please note that CP is not required to designate a “Designated Evaluation Agent” to enter into Schedule 3, provided that CP can make the representations about itself in Part II of DF Schedule 3. In addition, please note that the term “Designated Evaluation Agent” is defined to exclude an employee of the CP.
a. CP represents to SD (which representation is deemed repeated by CP as of the occurrence of each Swap Communication Event) that CP has complied in good faith with written policies and procedures that are reasonably designed to ensure that each of its Designated Evaluation Agents is capable of evaluating Swap Recommendations (if any) of SD and making trading decisions on behalf of CP;\textsuperscript{55}

b. Each Designated Evaluation Agent represents to SD (which representation is deemed repeated by such Designated Evaluation Agent as of the occurrence of each Swap Communication Event involving such Designated Evaluation Agent) that such Designated Evaluation Agent is exercising independent judgment in evaluating all Swap Recommendations (if any) of SD that are presented to it;\textsuperscript{56} and

c. Each Designated Evaluation Agent agrees to promptly notify SD in writing in accordance with the Notice Procedures if any representations made by such Designated Evaluation Agent in this DF Supplement become incorrect or misleading in any material respect. For any representation that would be incorrect or misleading in any material respect if repeated on any date following the date on which the representation was last repeated, the Designated Evaluation Agent shall timely amend such representation by giving notice of such amendment to SD in accordance with the Notice Procedures. Notwithstanding anything in the Agreement to the contrary, a notification pursuant to this Section 3.1(c) shall be effective on the Notice Effective Date and the relevant information or representation will be deemed amended as of such Notice Effective Date.\textsuperscript{57}

d. CP represents (which representations are deemed repeated by CP as of the occurrence of each Swap Communication Event) that it will exercise independent judgment in consultation with a Designated Evaluation Agent, in evaluating all Swap Recommendations (if any) of SD that are presented to CP with respect to Swaps to be executed by CP on its own behalf.

\textsuperscript{55} CFTC Regulation 23.434(c)(1).

\textsuperscript{56} CFTC Regulation 23.434(b)(2). Note that Designated Evaluation Agents are only asked to represent that they evaluate swap recommendations presented to them and not to other persons or the underlying account. This is to accommodate counterparties who may have multiple Designated Evaluation Agents who would not want to make representations relating to swaps for which they are not responsible.

\textsuperscript{57} CFTC Regulation 23.402(d). This provision matches the language in Section 2.3 and is necessary to ensure that the SD may continue to “reasonably” rely upon the representations of the Designated Evaluation Agent for each new trade.
Part II. Representations Applicable if Counterparty Does Not Have a Designated Evaluation Agent.\(^{58}\)

3.2. If CP has not designated a Designated Evaluation Agent, CP represents to SD (which representations are deemed repeated by CP as of the occurrence of each Swap Communication Event) that:

a. CP has complied in good faith with written policies and procedures that are reasonably designed to ensure that the persons responsible for evaluating all Swap Recommendations (if any) regarding a Swap and making trading decisions on behalf of CP are capable of doing so; and\(^{59}\)

b. CP is exercising independent judgment in evaluating all Swap Recommendations (if any).\(^{60}\)

Part III. Disclosures of a Swap Dealer.

3.3. SD hereby discloses to CP (which disclosure is deemed repeated by SD as of the occurrence of each Swap Communication Event) that SD is acting in its capacity as a counterparty and is not undertaking to assess the suitability of any Swap or trading strategy involving a Swap for CP.\(^{61}\)

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\(^{58}\) This Part II is primarily for use by CPs who will be making trading decisions in-house or who do not wish to designate their investment managers as “Designated Evaluation Agents.” This option has the benefit of permitting the SD to discuss swaps directly with the CP.

\(^{59}\) CFTC Regulation 23.434(c)(1).

\(^{60}\) CFTC Regulation 23.434(b)(2).

\(^{61}\) CFTC Regulation 23.434(b)(3).
Schedule 4
Safe Harbors for Non-ERISA Special Entities

This DF Schedule 4 may be incorporated into an agreement between a Swap Dealer and any Special Entity that is not an ERISA Special Entity; provided that the Special Entity has one or more Designated QIRs, each of whom agrees to the provisions of Part III of this DF Schedule 4 that are applicable to it.

If the parties to an agreement have specified that this DF Schedule 4 shall be incorporated into such agreement and any conditions to such incorporation set forth in such agreement have been satisfied, this DF Schedule 4 shall be deemed to be a part of such agreement to the same extent as if this DF Schedule 4 were restated therein in its entirety. This DF Schedule 4 will only be incorporated into an agreement if the Special Entity and each Designated QIR have agreed to make the representations and agreements in this DF Schedule 4 that are applicable to it.

Part I. Representations of a Counterparty.

4.1. CP represents to SD (which representations are deemed repeated by CP as of the occurrence of each Swap Communication Event) that:

a. CP will not rely on Swap Recommendations (if any) provided by SD;

b. CP will rely on advice from a Designated QIR;

Under the EBCR, certain so-called “suitability” obligations are triggered when an SD makes a “recommendation” regarding a swap or a trading strategy or an offer to enter into a swap. Such obligations may be satisfied through safe harbors available under the EBCR. DF Schedule 4 provides the representations and agreements necessary to satisfy the safe harbor available for CPs who are “Non-ERISA special entities” (i.e., special entities that are not subject to ERISA, such as federal agencies; states; municipalities; agencies, instrumentalities and corporations of a state or municipality; government benefit plans, endowments and other employment benefit plans that are not subject to ERISA).

In the absence of a safe harbor, a dealer would need to conduct extensive due diligence in order to meet its regulatory obligations to understand the CP’s investment profile, trading objectives, ability to absorb potential losses, etc. These enhanced diligence and compliance obligations for the SD could cause the parties to incur increased time and costs prior to trading. Under CFTC Regulation 23.450, an SD is obligated to make a reasonable determination that a non-ERISA special entity has a “qualified independent representative” or “QIR” meeting specified standards before trading with that counterparty. This DF Schedule provides representations and agreements on which the SD may rely to satisfy that obligation.

It should be noted that a recommendation to a special entity that involves a bespoke swap (i.e., one that has been structured or “tailored” for the special entity) imposes upon the SD the duty to act “in the best interest” of the special entity. This DF Schedule provides representations that create a safe harbor from those duties, provided that the dealer counterparty and its personnel do not express an “opinion” about the advisability of entering into the bespoke swap.

For a pair of counterparties who have adhered to the August 2012 DF Protocol and exchanged Questionnaires, this DF Schedule 4 will be incorporated into the agreements that are covered by the Protocol if both parties have elected to do so and are eligible to do so (i.e., this DF Schedule is optional under the Protocol), and each Designated QIR has agreed to make the representations and agreements applicable to it.

c. CP has complied in good faith with written policies and procedures reasonably designed to ensure that each Designated QIR selected by CP satisfies the applicable requirements of CFTC Regulation 23.450(b)(1), and that such policies and procedures provide for ongoing monitoring of the performance of such representative consistent with the requirements of CFTC Regulation 23.450(b)(1);\(^66\) and

d. CP will exercise independent judgment in consultation with a Designated QIR, in evaluating all Swap Recommendations (if any) of SD that are presented to CP with respect to Swaps to be executed by CP on its own behalf.

Part II. Disclosures of a Swap Dealer.

4.2. SD discloses to CP (which disclosures are deemed repeated by SD as of the occurrence of each Swap Communication Event) that:

a. SD is not undertaking to act in the best interests of CP;\(^67\) and

b. SD is acting in its capacity as a counterparty and is not undertaking to assess the suitability of any Swap or trading strategy involving a Swap for CP.\(^68\)

Part III. Representations and Agreements of a Designated QIR.\(^69\)

4.3. Each Designated QIR represents to SD and CP (which representations are deemed repeated by such Designated QIR as of the occurrence of each Swap Communication Event involving such Designated QIR) that:

a. Such Designated QIR has written policies and procedures reasonably designed to ensure that the Designated QIR satisfies the applicable requirements of CFTC Regulation 23.450(b)(1);\(^70\)

b. Such Designated QIR is exercising independent judgment in evaluating all Swap Recommendations (if any) of SD that are presented to it;\(^71\)

\(^{66}\) CFTC Regulation 23.450(d)(1)(i); 23.434(c)(ii).

\(^{67}\) CFTC Regulation 23.440(b)(2)(iii).

\(^{68}\) CFTC Regulation 23.434(b)(3).

\(^{69}\) Note that this Schedule permits the special entity to designate multiple QIRs.

\(^{70}\) CFTC Regulation 23.450(d)(1)(ii)(A).

\(^{71}\) CFTC Regulation 23.434(b)(2).
c. Unless such Designated QIR otherwise notifies SD in writing in accordance with the Notice Procedures, which notification shall become effective on the Notice Effective Date:

1. Such Designated QIR is not and, within one year of representing CP in connection with the Swap has not been, an “associated person,” as such term is defined in Section 1a(4) of the Commodity Exchange Act, of SD;

2. There is no “principal relationship” (as that term is defined in CFTC Regulation 23.450(a)(1)) between the Designated QIR and SD;

3. Such Designated QIR (i) provides timely and effective disclosures to CP of all material conflicts of interest that could reasonably affect the judgment or decision making of such Designated QIR with respect to its obligations to CP and (ii) complies with policies and procedures reasonably designed to manage and mitigate such material conflicts of interest;

4. Such Designated QIR is not directly or indirectly, through one or more persons, controlled by, in control of, or under common control with SD; and

5. To the best of such Designated QIR’s knowledge, SD did not refer, recommend, or introduce such Designated QIR to CP within one year of such Designated QIR’s representation of CP in connection with the Swap; and

d. Such Designated QIR is legally obligated to comply with the applicable requirements of CFTC Regulation 23.450(b)(1) by agreement, condition of employment, law, rule, regulation, or other enforceable duty.

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72 CFTC Regulation 23.450(c). The following representations are intended to establish that the special entity’s representative satisfies independence standards necessary to qualify as a QIR.

73 CFTC Regulation 23.450(c)(1).

74 CFTC Regulation 23.450(c)(2). Regulation 23.450(a)(1) provides that a “principal relationship” means “where a swap dealer . . . is a principal of the representative of a Special Entity or the representative of a Special Entity is a principal of the swap dealer.” Under CFTC Regulation 3.1, a “principal” generally means executive officers, persons in charge of business units, board members, and persons/entities with ownership relationships to the relevant entity.

75 CFTC Regulation 23.450(c)(3).

76 CFTC Regulation 23.450(c)(4).

77 CFTC Regulation 23.450(c)(5). Note that, to facilitate a QIR making these representations, clause (5) has been qualified by a “knowledge” standard, even though the regulatory standard is not so qualified.

78 CFTC Regulation 23.450(d)(1)(ii)(C).
4.4. Each Designated QIR agrees to promptly notify SD in writing in accordance with the Notice Procedures if any representations made by such Designated QIR in this DF Supplement become incorrect or misleading in any material respect. For any representation that would be incorrect or misleading in any material respect if repeated on any date following the date on which the representation was last repeated, the Designated QIR shall timely amend such representation by giving notice of such amendment to SD in accordance with the Notice Procedures. Notwithstanding anything in the Agreement to the contrary, a notification pursuant to this Section 4.4 shall be effective on the Notice Effective Date and the relevant information or representation will be deemed amended as of such Notice Effective Date.\textsuperscript{79}

\textsuperscript{79} CFTC Regulation 23.402(d). This provision matches the language in Section 2.3 and is necessary to ensure that the SD may continue to “reasonably” rely upon the representations of the Designated QIR for each new trade.
Schedule 5
Safe Harbors for ERISA Special Entities (Option 1)

This DF Schedule 5 may be incorporated into an agreement between a Swap Dealer and an ERISA Special Entity; provided that the ERISA Special Entity has one or more Designated Fiduciaries, each of whom agrees to the provisions of Part III of this DF Schedule 5 that are applicable to it. If the relevant Swap Dealer and ERISA Special Entity so agree, both DF Schedule 5 and DF Schedule 6 may be incorporated into an agreement.

If the parties to an agreement have specified that this DF Schedule 5 shall be incorporated into such agreement and any conditions to such incorporation set forth in such agreement have been satisfied, this DF Schedule 5 shall be deemed to be a part of such agreement to the same extent as if this DF Schedule 5 were restated therein in its entirety. This DF Schedule 5 will only be incorporated into an agreement if the ERISA Special Entity and each Designated Fiduciary have agreed to make the representations and agreements in this DF Schedule 5 that are applicable to it.

Part I. Representations of a Counterparty.

5.1. CP represents to SD (which representations are deemed repeated by CP as of the occurrence of each Swap Communication Event) that:

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80 Under the EBCR, certain so-called “suitability” obligations are triggered when an SD makes a “recommendation” regarding a swap or a trading strategy or an offer to enter into a swap. Such obligations may be satisfied through safe harbors available under the EBCR. DF Schedule 5 provides the representations and agreements necessary to satisfy the safe harbor available for counterparties who are “special entities” that are subject to ERISA. DF Schedule 6 provides an alternative set of representations and agreements for such counterparties.

It should be noted that under CFTC Regulation 23.440, a recommendation to a special entity that involves a bespoke swap (i.e., one that has been structured or “tailored” for the special entity) imposes upon the SD the duty to act “in the best interests” of the special entity. The EBCR provide two safe harbors for special entities subject to ERISA. DF Schedule 6 provides representations that satisfy the conditions of the safe harbor that is available so long as the SD and its personnel do not express an “opinion” about the advisability of entering into the bespoke swap. This DF Schedule 5, on the other hand, provides representations that satisfy the conditions of the safe harbor that does not prohibit the expression of an opinion.

In the absence of a safe harbor, a dealer would need to conduct extensive due diligence in order to meet its regulatory obligations to understand the CP’s investment profile, trading objectives, ability to absorb potential losses, etc. The obligations on the SD are further heightened in the case of recommendations of bespoke swaps. These enhanced diligence and compliance obligations for the SD could cause the parties to incur increased time and costs prior to trading.

Under CFTC Regulation 23.450, an SD is obligated to make a reasonable determination that an ERISA special entity has an ERISA fiduciary before trading with that counterparty. This DF Schedule provides representations and agreements on which the swap dealer may rely to satisfy that obligation.

81 For a pair of counterparties who have adhered to the August 2012 DF Protocol and exchanged Questionnaires, this DF Schedule 5 will be incorporated into the agreements that are covered by the Protocol if both parties have elected to do so and are eligible to do so (i.e., this DF Schedule is optional under the Protocol), and each Designated Fiduciary has agreed to make the representations and agreements applicable to it.
a. Each of its Designated Fiduciaries is a “fiduciary” as defined in Section 3 of ERISA and a Designated Fiduciary is responsible for representing CP in connection with each Swap or trading strategy involving a Swap;\textsuperscript{82}

b. Either:\textsuperscript{83}

1. CP will comply in good faith with written policies and procedures reasonably designed to ensure that any recommendation CP receives from SD materially affecting a Swap transaction is evaluated by a Designated Fiduciary before the transaction occurs; or\textsuperscript{84}

2. Any recommendation CP receives from SD materially affecting a Swap transaction will be evaluated by a Designated Fiduciary before the transaction occurs; and\textsuperscript{85}

c. CP will exercise independent judgment in consultation with a Designated Fiduciary, in evaluating all Swap Recommendations (if any) of SD that are presented to CP with respect to Swaps to be executed by CP on its own behalf.\textsuperscript{86}

Part II. Disclosures of a Swap Dealer.

5.2. SD discloses to CP (which disclosures are deemed repeated by SD as of the occurrence of each Swap Communication Event) that:

a. SD is not undertaking to act in the best interests of CP;\textsuperscript{87} and

b. SD is acting in its capacity as a counterparty and is not undertaking to assess the suitability of any Swap or trading strategy involving a Swap for CP.\textsuperscript{88}

\textsuperscript{82} CFTC Regulations 23.440(b)(1)(i) and 23.450(d)(2). Note that this Schedule permits the special entity to designate multiple fiduciaries.

\textsuperscript{83} This provision, which comes directly from CFTC Regulation 23.440(b)(1)(iii), gives ERISA special entities the option to satisfy the safe harbor requirements without having written policies and procedures.

\textsuperscript{84} CFTC Regulation 23.440(b)(1)(iii)(A).

\textsuperscript{85} CFTC Regulation 23.440(b)(1)(iii)(B).

\textsuperscript{86} This representation is not explicitly required in the safe harbor, but is included to cover situations in which the SD may be communicating about potential trades directly with a special entity rather than its fiduciary.

\textsuperscript{87} CFTC Regulation 23.440(b)(2)(iii).

\textsuperscript{88} CFTC Regulation 23.434(b)(3).
Part III. Representations and Agreements of a Designated Fiduciary.

5.3. Each Designated Fiduciary represents to SD and CP (which representations are deemed repeated by such Designated Fiduciary as of the occurrence of each Swap Communication Event involving such Designated Fiduciary) that:

a. Such Designated Fiduciary is not relying on Swap Recommendations (if any) provided by SD; and

b. Such Designated Fiduciary is exercising independent judgment in evaluating all Swap Recommendations (if any) of SD that are presented to it.

5.4. Each Designated Fiduciary agrees to promptly notify SD in writing in accordance with the Notice Procedures if any representations made by such Designated Fiduciary in this DF Supplement become incorrect or misleading in any material respect. For any representation that would be incorrect or misleading in any material respect if repeated on any date following the date on which the representation was last repeated, the Designated Fiduciary shall timely amend such representation by giving notice of such amendment to SD in accordance with the Notice Procedures. Notwithstanding anything in the Agreement to the contrary, a notification pursuant to this Section 5.4 shall be effective on the Notice Effective Date and the relevant information or representation will be deemed amended as of such Notice Effective Date.

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89 CFTC Regulation 23.440(b)(1)(ii). Note that the safe harbor for ERISA special entities expressly requires that this representation must come from the fiduciary rather than the special entity.

90 CFTC Regulation 23.434(b)(2).

91 CFTC Regulation 23.402(d). This provision matches the language in Section 2.3 and is necessary to ensure that the dealer counterparty may continue to “reasonably” rely upon the representations of the Designated Fiduciary for each new trade.
Schedule 6
Safe Harbors for ERISA Special Entities (Option 2)

This DF Schedule 6 may be incorporated into an agreement between a Swap Dealer and an ERISA Special Entity; provided that the ERISA Special Entity has one or more Designated Fiduciaries, each of whom agrees to the provisions of Part III of this DF Schedule 6 that are applicable to it. If the relevant Swap Dealer and ERISA Special Entity so agree, both DF Schedule 5 and DF Schedule 6 may be incorporated into an agreement.

If the parties to an agreement have specified that this DF Schedule 6 shall be incorporated into such agreement and any conditions to such incorporation set forth in such agreement have been satisfied, this DF Schedule 6 shall be deemed to be a part of such agreement to the same extent as if this DF Schedule 6 were restated therein in its entirety. This DF Schedule 6 will only be incorporated into an agreement if the ERISA Special Entity and each Designated Fiduciary have agreed to make the representations and agreements in this DF Schedule 6 that are applicable to it.

Part I. Representations of a Counterparty.

6.1. CP represents to SD (which representations are deemed repeated by CP as of the occurrence of each Swap Communication Event) that:

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92 Under the EBCR, certain so-called “suitability” obligations are triggered when an SD makes a “recommendation” regarding a swap or a trading strategy or an offer to enter into a swap. Such obligations may be satisfied through safe harbors available under the EBCR. DF Schedule 6 provides the representations and agreements necessary to satisfy the safe harbor available for counterparties who are “special entities” that are subject to ERISA. DF Schedule 5 provides an alternative set of representations and agreements for such counterparties. It should be noted that under CFTC Regulation 23.440, a recommendation to a special entity that involves a bespoke swap (i.e., one that has been structured or “tailored” for the special entity) imposes upon the SD the duty to act “in the best interests” of the special entity. The EBCR provide two safe harbors for special entities subject to ERISA. This DF Schedule 6 provides representations that satisfy the conditions of the safe harbor that is available so long as the SD and its personnel do not express an “opinion” about the advisability of entering into the bespoke swap. DF Schedule 5, on the other hand, provides representations that satisfy the conditions of the safe harbor that does not prohibit the expression of an opinion.

In the absence of a safe harbor, a dealer would need to conduct extensive due diligence in order to meet its regulatory obligations to understand the CP’s investment profile, trading objectives, ability to absorb potential losses, etc. The obligations on the SD are further heightened in the case of recommendations of bespoke swaps. These enhanced diligence and compliance obligations for the SD could cause the parties to incur increased time and costs prior to trading.

Under CFTC Regulation 23.450, an SD is obligated to make a reasonable determination that an ERISA special entity has an ERISA fiduciary before trading with that counterparty. This DF Schedule provides representations and agreements on which the swap dealer may rely to satisfy that obligation.

93 For a pair of counterparties who have adhered to the August 2012 DF Protocol and exchanged Questionnaires, this DF Schedule 6 will be incorporated into the agreements that are covered by the Protocol if both parties have elected to do so and are eligible to do so (i.e., this DF Schedule is optional under the Protocol), and each Designated Fiduciary has agreed to make the representations and agreements applicable to it.
a. Each of its Designated Fiduciaries is a “fiduciary” as defined in Section 3 of ERISA;\textsuperscript{94}

b. CP will not rely on recommendations (if any) provided by SD;\textsuperscript{95}

c. CP will rely on advice from a Designated Fiduciary; and\textsuperscript{96}

d. CP will exercise independent judgment in consultation with a Designated Fiduciary, in evaluating all Swap Recommendations (if any) of SD that are presented to CP with respect to Swaps to be executed by CP on its own behalf.

Part II. Disclosures of a Swap Dealer.

6.2. SD discloses to CP (which disclosures are deemed repeated by SD as of the occurrence of each Swap Communication Event) that:

a. SD is not undertaking to act in the best interests of CP; and \textsuperscript{97}

b. SD is acting in its capacity as a counterparty and is not undertaking to assess the suitability of any Swap or trading strategy involving a Swap for CP. \textsuperscript{98}

Part III. Representations and Agreements of a Designated Fiduciary.

6.3. Each Designated Fiduciary represents to SD and CP (which representations are deemed repeated by such Designated Fiduciary as of the occurrence of each Swap Communication Event involving such Designated Fiduciary) that such Designated Fiduciary is exercising independent judgment in evaluating all Swap Recommendations (if any) of SD presented to it.\textsuperscript{99}

6.4. Each Designated Fiduciary agrees to promptly notify SD in writing in accordance with the Notice Procedures if any representations made by such Designated Fiduciary in this DF Supplement have become incorrect or misleading in any material respect. For any representation that would be incorrect or misleading in any material respect if repeated on any date following the date on which the representation was last repeated, the Designated Fiduciary shall timely amend such representation by giving notice of such amendment to SD in accordance with

\textsuperscript{94} CFTC Regulation 23.450(d)(2). Note that this Schedule permits the special entity to designate multiple fiduciaries.

\textsuperscript{95} CFTC Regulation 23.440(b)(2)(ii)(A).

\textsuperscript{96} CFTC Regulation 23.440(b)(2)(ii)(B).

\textsuperscript{97} CFTC Regulation 23.440(b)(2)(iii).

\textsuperscript{98} CFTC Regulation 23.434(b)(3).

\textsuperscript{99} CFTC Regulation 23.434(b)(2).
the Notice Procedures. Notwithstanding anything in the Agreement to the contrary, a notification pursuant to this Section 6.4 shall be effective on the Notice Effective Date and the relevant information or representation will be deemed amended as of such Notice Effective Date.\textsuperscript{100}

\textsuperscript{100} CFTC Regulation 23.402(d). This provision matches the language in Section 2.3 and is necessary to ensure that the SD may continue to “reasonably” rely upon the representations of the Designated Fiduciary for each new trade.