



## **ISDA Cross-Border Swaps Representation Letter Fact**

**Sheet<sup>1</sup> October 8, 2013 (Updated April 2015)**

### **1. What is the ISDA Cross-Border Swaps Representation Letter (“Letter”)?**

- Industry-developed solution to assist Swap Dealers in client categorization of:
  - o expanded universe of “U.S. Persons”
  - o newly created categories of “guaranteed affiliates” and “affiliate conduits”
- These categories are used to determine the application of the Commodity Futures Trading Commission (“CFTC”) Swap Regulations.

### **2. Why is Deutsche Bank asking clients (including non-U.S. clients) to sign the Letter?**

- The CFTC’s Interpretive Guidance published on July 26, 2013 expanded the scope of U.S. Person and added two categories of non-U.S. Persons (“guaranteed affiliates” and “affiliate conduits”) for the purpose of determining the application of the CFTC Swap Regulations.
- Clients are being asked to complete the Letter as they are best positioned to know and represent their status. You only need to take action on any entity which you have not already represented as a U.S. Person under prior ISDA Dodd-Frank Protocols.
- Third-Parties, such as Deutsche Bank, are not able to classify clients under new definitions because some of the information, as described below, may not be public information:
  - o Expanded U.S. Person definition includes “principal place of business” and beneficial ownership tests for collective investment vehicles.
  - o “Affiliate conduit” definition requires a determination if client is engaging in swap transactions for purposes of hedging the risks of a U.S. affiliate.

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<sup>1</sup> Capitalized terms used in this Fact Sheet are defined in the Appendix.



- Deutsche Bank needs clients to provide representations to determine whether they are a U.S. Person, affiliate conduit, or an entity whose swap transactions are supported by a “U.S. Person Guarantee” for the following purpose:
  - o U.S. Persons – Deutsche Bank must satisfy:
    - regulatory reporting obligations;
    - external business conduct standards;
    - mandatory clearing (currently effective for certain credit and rates products);
    - swap execution facility (“SEF”) execution (currently effective for certain credit and rates products);
    - swap processing;
    - swap trading relationship documentation;
    - portfolio reconciliation and compression;
    - real-time public reporting;
    - trade confirmation; and
    - daily trading records requirements
  - o Affiliate conduits or entities whose swap transactions are supported by a “U.S. Person Guarantee” – Deutsche Bank must satisfy all rules above except those related to external business conduct.

**3. If I have already adhered and delivered questionnaires to Deutsche Bank in connection with both ISDA August 2012 Dodd-Frank Protocol (“Protocol 1.0”) and ISDA March 2013 Dodd-Frank Protocol (“Protocol 2.0”), is there anything that I need to do in connection with the Letter?**

Yes. Deutsche Bank is subject to the European Market Infrastructure Regulation (“EMIR”). Consequently, you will need to execute the ISDA “Top-up” Agreement with us to bridge the portfolio reconciliation and dispute resolution provisions of Dodd-Frank and the requirements of the EMIR. In addition, please note that if you intend to trade interest rate and credit swaps with Deutsche Bank, they may be subject to mandatory clearing, and you may wish to enter into the Deutsche Bank form of the FIA-ISDA Cleared Derivatives Execution Agreement (“CDEA”).



**4. If I adhered to the EMIR Portfolio Reconciliation, Dispute Resolution and Disclosure Protocol and/or the Non Financial Representation Protocol do I still need to complete the Letter?**

Yes. Although there are similar obligations under Dodd-Frank and EMIR, they are separate regulatory regimes requiring separate documentation until otherwise notified.

**5. Where can I complete the Letter and obtain additional information?**

- To view the Letter, please click [here](#).
- Unless you have already adhered to the ISDA Dodd-Frank Protocols as a U.S. Person, you will be able to complete the Letter on ISDA Amend at: <http://www.markit.com/en/products/distribution/counterparty-manager/isda-amend.page>
- Deutsche Bank is requesting clients to submit the Letter via ISDA Amend, which is a scaled industry solution permitting clients to simultaneously provide representations to multiple dealers.
- The ISDA Amend Took Kit for the Letter is attached [here](#).
- An ISDA Webinar on the Letter and using ISDA Amend to complete the Letter is at: <http://www2.isda.org/dodd-frank-documentation-initiative/>

**6. How are the terms “U.S. Person,” “affiliate conduit” and “guaranteed affiliate” defined?**

“U.S. Person,” “affiliate conduit” and “guaranteed affiliate” are not defined terms and instead the definitions “U.S. Person Categories”, “Affiliate Conduit Factors” and “Guarantee” are provided to help make these determinations. These definitions are in the Letter and attached in the Appendix of this Fact Sheet.



**7. What are the implications of my firm representing that it is a U.S. Person?**

- The CFTC Dodd-Frank rules applicable to swap trading, reporting and other matters will apply. See question 2.
- U.S. Person clients must adhere to:
  - o Protocol 1.0 (designating Deutsche Bank to receive information as a swap dealer)
  - o Protocol 2.0 (designating Deutsche Bank to receive information as a swap dealer)

Deutsche Bank does not require you, or any of its customers, to enter into a FIA-ISDA Cleared Derivatives Execution Agreement (“CDEA”) with it in order to execute intended to be cleared swaps (“ITBC swaps”). However, if you would like to enter into a CDEA with Deutsche Bank, Deutsche Bank is happy to negotiate and enter into a CDEA with you. Parties to ITBC swaps may find CDEAs beneficial, particularly with respect to ITBC swaps executed off of a SEF, as CDEAs explicitly address the trade submission process and include fallback procedures for ITBC swaps that fail to clear. If you do not have a CDEA in place with Deutsche Bank and would like to put one in place, please send an email to Deutsche Bank’s execution group (DB.ExecutionAgreement@db.com) requesting a CDEA.

For more information on the ISDA Protocols and to adhere to the Protocols, please visit the ISDA site [here](#). Failure to adhere to the Protocols may cause a disruption in swap trading activity.



**8. What are the implications of my firm representing that it is a guaranteed affiliate or affiliate conduit?**

- The CFTC Dodd Frank rules applicable to swap trading, reporting and other matters will apply. See question 2.
- Guaranteed affiliate or affiliate conduit clients must enter into Protocol 2.0 and either the ISDA Reporting Protocol or Protocol 1.0.

**9. If I only trade spot FX or other products not in scope, do I need to submit the Letter and adhere to the Dodd-Frank Protocols? Are only certain OTC products covered?**

Spot FX (normal settlement) is not considered to be a “swap” for the purposes of CFTC rules under Dodd-Frank. As a result, if you only trade spot FX with us, you may not fall within the scope of the regulations that require us to seek your adherence to the Protocols. The CFTC has also defined circumstances under which “securities conversion transactions”— short-dated FX entered into expressly tied to buying/selling a security— may be deemed to be spot FX. You should consult with your legal and compliance teams regarding the scope of covered contracts subject to Dodd-Frank legislation, which may change over time.



**10. Is there a fee for submitting the Letter on ISDA Amend or adhering to the Dodd-Frank Protocols?**

- Markit does not require buy-side market participants to pay a fee to submit the Letter on ISDA Amend.
- There is a \$500 fee payable to ISDA for adherence to each of Protocol 1.0 and Protocol 2.0.

**THIS PUBLICATION, WHICH WE BELIEVE MAY BE OF INTEREST TO OUR CLIENTS, IS FOR GENERAL INFORMATION ONLY AND IS NOT A FULL ANALYSIS OF THE MATTERS PRESENTED. THIS PUBLICATION MAY NOT BE RELIED UPON AS LEGAL ADVICE. YOU SHOULD CONSULT WITH YOUR LEGAL, COMPLIANCE AND REGULATORY ADVISORS IN EVALUATING THE MATTERS PRESENTED HEREIN.**



## Definitions Appendix<sup>2</sup>

“*Affiliate Conduit Factors*” means the four factors identified in the Interpretive Guidance as relevant to considering whether a non-U.S. person is an “affiliate conduit.”<sup>3</sup> For informational purposes only, the text of the factors (but not the related interpretive material) is reproduced below:

- (i) the non-U.S. person is a majority-owned affiliate of a U.S. person;<sup>4</sup>
- (ii) the non-U.S. person is controlling, controlled by or under common control with the U.S. person;<sup>5</sup>
- (iii) the financial results of the non-U.S. person are included in the consolidated financial statements of the U.S. person; and
- (iv) the non-U.S. person, in the regular course of business, engages in swaps with non-U.S. third-party(ies) for the purpose of hedging or mitigating risks faced by, or to take positions on behalf of, its U.S. affiliate(s) and enters into offsetting swaps or other arrangements with its U.S. affiliate(s) in order to transfer the risks and benefits of such swaps with third-party(ies) to its U.S. affiliates.

“*CEA*” means the U.S. Commodity Exchange Act, as amended.

“*CFTC*” means the U.S. Commodity Futures Trading Commission.

“*CFTC Swap Regulations*” means the rules, regulations, orders and interpretations adopted or issued by the CFTC, as in effect from time to time, that apply to Swaps and that are promulgated under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act or that are otherwise designated by the CFTC as being subject to the Interpretive Guidance.<sup>6</sup>

“*Guarantee*” means an agreement or arrangement under which a person commits to provide a financial backstop or funding against potential losses that may be incurred by another person in connection with a Swap.<sup>7</sup>

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<sup>2</sup> The definitions set forth herein are extracted from the ISDA Cross-Border Swaps Representation Letter published on August 19, 2013 by the International Swaps and Derivatives Association, Inc.

<sup>3</sup> For the full discussion of how the CFTC interprets the term “affiliate conduit” (or alternately “conduit affiliate”), see the Interpretive Guidance at pp. 45358-59. Note that the discussion indicates that the term “affiliate conduit” is not intended to include affiliates of swap dealers.

<sup>4</sup> The concept of a majority-owned affiliate for these purposes is discussed in fn. 591 of the Interpretive Guidance.

<sup>5</sup> The concept of “control” for these purposes is discussed in fn. 592 of the Interpretive Guidance.

<sup>6</sup> The application of the “U.S. person” concept to swap regulation is discussed at p. 45316 of the Interpretive Guidance and the related concept of “swaps activities” is discussed at p. 45297 & fn. 38.

<sup>7</sup> For a full discussion of how the CFTC interprets the term “guarantee,” see the Interpretive Guidance at p. 45320



“**Interpretive Guidance**” means the *Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations*, 78 Fed. Reg. 45292 (July 26, 2013), as amended or supplemented by the CFTC from time to time.<sup>8</sup>

“**Swap**” means a “swap” as defined in the Section 1a(47) of the CEA and CFTC Regulation 1.3(xxx). 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.

“**Swap Dealer**” means a “swap dealer” as defined in Section 1a(49) of the CEA and CFTC Regulation 1.3(ggg) thereunder.

“**Swap Transaction**” means any transaction that results in the creation of new Swap between two or more parties or in a change to the terms of an existing Swap between parties, including execution, termination, assignment, novation, exchange, transfer, amendment, conveyance, or extinguishing of rights or obligations of a Swap.

“**United States**” or “**U.S.**” means the United States, its states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and any other territories or possessions of the United States government, or enclave of the United States government, its agencies or instrumentalities.

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& fn. 267 and also at p. 45355.

<sup>8</sup> Available at: <http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2013-17958a.pdf>.





“*U.S. Person Categories*” means the enumerated categories of “U.S. persons” that are provided in the Interpretive Guidance.<sup>9</sup> For informational purposes only, the text of the categories (but not the related interpretive materials) is reproduced below:

- (i) any natural person who is a resident of the United States;
- (ii) any estate of a decedent who was a resident of the United States at the time of death;
- (iii) any corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund or any form of enterprise similar to any of the foregoing (other than an entity described in prongs (iv) or (v), below) (a “**legal entity**”),<sup>10</sup> in each case that is organized or incorporated under the laws of a state or other jurisdiction in the United States or having its principal place of business in the United States;<sup>11</sup>
- (iv) any pension plan for the employees, officers or principals of a legal entity described in prong (iii), unless the pension plan is primarily for foreign employees of such entity;
- (v) any trust governed by the laws of a state or other jurisdiction in the United States, if a court within the United States is able to exercise primary supervision over the administration of the trust;

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<sup>9</sup> Interpretive Guidance at pp. 45316-17.

<sup>10</sup> See the Interpretive Guidance at p. 45309 regarding the inclusion of legal entities that engage in non-profit activities, U.S. state, county and local governments and their agencies and instrumentalities. The treatment of international financial institutions such as the World Bank is discussed at p. 45353 & fn. 531.

<sup>11</sup> The CFTC indicates that the concept of “principal place of business” as applied to collective investment vehicles requires special consideration due to the nature of such vehicles. In particular, the location of senior personnel responsible for implementing the vehicle’s investment strategy and for forming and/or promoting the vehicle is discussed. For discussion of the relevant considerations, see the Interpretive Guidance at pp. 45309-12.



- (vi) any commodity pool, pooled account, investment fund, or other collective investment vehicle that is not described in prong (iii) and that is majority-owned by one or more persons described in prong (i), (ii), (iii), (iv), or (v),<sup>12</sup> except any commodity pool, pooled account, investment fund, or other collective investment vehicle that is publicly offered only to non-U.S. persons and not offered to U.S. persons;<sup>13</sup>
- (vii) any legal entity (other than a limited liability company, limited liability partnership or similar entity where all of the owners of the entity have limited liability) that is directly or indirectly majority-owned by one or more persons described in prong (i), (ii), (iii), (iv), or (v) and in which such person(s) bears unlimited responsibility for the obligations and liabilities of the legal entity;<sup>14</sup> and
- (viii) any individual account or joint account (discretionary or not) where the beneficial owner (or one of the beneficial owners in the case of a joint account) is a person described in prong (i), (ii), (iii), (iv), (v), (vi), or (vii).

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<sup>12</sup> For purposes of making this determination, the CFTC indicates that collective investment vehicles should “look through” direct investors in certain circumstances. See the Interpretive Guidance at pp. 45313-14 for discussion of when a look-through is required. In addition, the Interpretive Guidance indicates that majority ownership for this purpose is “the beneficial ownership of more than 50 percent of the equity or voting interests.”

<sup>13</sup> See the Interpretive Guidance at p. 45314 regarding exclusion of collective investment vehicles that are publicly offered only to non-U.S. persons and not offered to U.S. persons from the U.S. Person Categories.

<sup>14</sup> Regarding the circumstances in which a majority of the owners of an entity are considered to be U.S. persons with unlimited responsibility for the obligations and liabilities of the legal entity, see the Interpretive Guidance at pp. 45312-13.