

MEMORANDUM

TO: File
FROM: Lindsay Kidwell
RE: Meeting with Representatives from the International Swaps and Derivatives
Association on Relationship Documentation
DATE: November 14, 2013

On November 7, 2013, representatives from the Securities and Exchange Commission (“SEC”) met with representatives from the International Swaps and Derivatives Association (“ISDA”). The SEC representatives present at the meeting were Lourdes Gonzalez, Joseph Furey, Joanne Rutkowski, Cindy Oh, Darren Vieira, Lindsay Kidwell, Sheila Swartz and Valentina Deng. The ISDA representatives present at the meeting were Katherine Darras and Chris Young.

The participants discussed ISDA’s relationship documentation designed to assist industry in complying with the Commodity Futures Trading Commission’s external business conduct standards for swap dealers and major swap participants, and ISDA’s process for developing this documentation. ISDA also distributed a summary of its 2013 account control agreement. The summary is attached.

ISDA 2013 Account Control Agreementⁱ

An ISDA working group has published a template tri-party account control agreement (the “ISDA ACA”) in order to facilitate market participant negotiation of contractual arrangements that provide for the segregation of Independent Amounts (“IA”) posted under an ISDA Master Agreement with a third-party custodian. The ISDA ACA is a three-way agreement between the party posting IA under the ISDA Master Agreement (the “Pledgor”), the party for whose benefit the IA is being posted (the “Secured Party”) and the custodian who will be holding the IA (the “Securities Intermediary”).

Structure: The ISDA ACA is structured in the traditional ISDA format of a base form ACA with an Annex made up of Parts 1-14 which address various optional provisions subject to negotiation.

ISDA ACA Publication Date: October 11, 2013

Summary of Key Collateral Movements:

1. **Segregation:** The Pledgor may direct the Securities Intermediary to segregate certain cash or other property for the benefit of the Secured Party. What is eligible to be posted as IA is governed by the ISDA Master Agreement and also must be received and accepted for credit by the Securities Intermediary. IA consisting of cash will be held in a separate deposit account in the name of the Pledgor for the benefit of the Secured Party. Depending on the election of the parties, IA consisting of securities will either be (a) held in a separate account in the name of the Pledgor for the benefit of the Secured Party or (b) segregated and identified on the Securities Intermediary’s books and records in the name of the Pledgor for the benefit of the Secured Party.
2. **Perfection by Control:** The Secured Party’s security interest in the IA is perfected pursuant to a provision of the ISDA ACA stating that the Securities Intermediary will comply with any written instructions originated by the Secured Party in accordance with the Notice of Exclusive Control (“NOEC”) provisions of the ISDA ACA *without consent of the Pledgor*. The parties may negotiate certain conditions to the Securities Intermediary’s obligation to act upon a NOEC (e.g., certain certifications by the Secured Party).
3. **Securities Intermediary’s Security Interest:** The parties may elect whether the Securities Intermediary has a lien on the IA. If the Securities Intermediary does have a lien, the parties may elect that the Securities Intermediary’s lien is (a) senior to the Secured Party’s lien; (b) subordinated to the Secured Party’s lien or (c) partially subordinated to the Secured Party’s lien.
4. **Collateral Returns in the “Ordinary Course”:** To effectuate returns of IA collateral to which the Pledgor is entitled pursuant to the ISDA Master Agreement in the ordinary course, the parties to the ISDA ACA may elect that the Securities Intermediary will comply only with (a) joint written instructions of the Pledgor and the Secured Party or (b) written instructions solely from the Secured Party.

5. Secured Party/Pledgor Access Outside the “Ordinary Course”:
- a. **Notices of Exclusive Control:** The Secured Party and the Pledgor will negotiate and specify a set of trigger events (e.g., a Pledgor bankruptcy event) upon which the Secured Party may send a NOEC to the Securities Intermediary. These trigger events will be reflected in an agreed template form of NOEC and the NOEC sent by the Secured Party must be substantially in the form agreed.
 - b. **Pledgor Access Notices:** Similar to above, the Secured Party and the Pledgor will negotiate and specify a set of trigger events (e.g., a Secured Party bankruptcy event) upon which the Pledgor may send a Pledgor Access Notice (“PAN”) to the Securities Intermediary. These trigger events will be reflected in an agreed template form of PAN and the Pledgor Access Notice sent by the Pledgor must be substantially in the form agreed.
 - c. **What Happens upon the Effectiveness of a NOEC/PAN:** The parties will agree at the time the ISDA ACA is entered into whether, upon the effectiveness of a PAN/NOEC, the Securities Intermediary will release all the IA in the account or only a portion of the IA in the account. If the parties decide that only a portion of the IA in the account will be released, then the parties will also elect whether that will happen in a one-stage process or a two-stage process. In the one-stage process, the Securities Intermediary will transfer the portion of IA required to be transferred to satisfy obligations owing under the ISDA Master Agreement as specified in the NOEC/PAN in accordance with a pre-agreed release time. The two-stage process is similar except that the NOEC or PAN will instead specify an estimate of the amount of IA that is required to be transferred to satisfy obligations owing under the ISDA Master Agreement and then a subsequent notice will specify the final determination of the amount of IA that should be transferred.
 - d. **Conflicting Instructions:** The parties may elect a “First in Time Prevails” approach whereby if a PAN is effective prior to a NOEC being effective, the Securities Intermediary will deem the NOEC ineffective and similarly, if a NOEC is effective prior to a PAN being effective, the Securities Intermediary will deem the PAN ineffective. Alternatively, the parties may agree that a NOEC will prevail over a PAN which will be disregarded by the Securities Intermediary.
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6. Proceeds and Income: The parties may elect whether interest, dividends, income and other amounts received in respect of the IA collateral will be credited to the account and be deemed collateral or whether they will be credited to the account and deemed collateral only upon the effectiveness of a NOEC.
7. Eligible Investments: In an exhibit to the ISDA ACA the parties may agree that IA consisting of cash will be invested in certain agreed “eligible investments” (e.g. money market funds).

ⁱ The ISDA ACA is subject to negotiation and includes many elective provisions with various options which are not reflected in this summary, the selection of which is left to the parties.