
Reminder: Compliance Deadline Approaching for ISDA August 2012 Dodd-Frank Protocol

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As a reminder, swap market participants, including managers of hedge funds and other pooled investment vehicles as well as corporate end-users, may need to adhere to the ISDA August 2012 Dodd-Frank Protocol (the “Protocol”) in the next few weeks if they have not done so already.

Background

The Protocol is a mechanism designed by the International Swaps and Derivatives Association (“ISDA”) to amend existing swap documentation (such as ISDA Master Agreements) so that swap dealers can comply with Commodity Futures Trading Commission (“CFTC”) rules adopted in connection with the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Among other things, the “business conduct standards” included in these CFTC rules impose an obligation on swap dealers and major swap participants to obtain certain “know your counterparty” information and verify the “eligible contract participant status” of their counterparties. The effective date of these requirements is January 1, 2013. After that date, it is likely that swap dealers will not agree to enter into swap transactions with counterparties that have not adhered to the Protocol or otherwise bilaterally amended their swap documentation. Because the adherence process requires an exchange of information between each counterparty and its swap dealers, however, most swap dealers have urged their counterparties to complete the process well before year end.

Process for Adhering to the ISDA Protocol

In terms of process, each adhering party will need to:

- submit an adherence letter to ISDA;
- pay a US\$500 adherence fee to ISDA; and
- complete and deliver an ISDA August 2012 DF Protocol Questionnaire (the “Questionnaire”) to each specified counterparty.

The adherence letter and fee can be submitted through the ISDA website. The Questionnaire can be submitted manually or (more efficiently) through ISDA Amend, an online solution developed by ISDA and Markit. The Questionnaire is the means through which each pair of adhering parties (*e.g.*, the

swap dealer and its counterparty) will amend their existing swap documentation. Through the Questionnaire, each adhering party will make certain representations about its legal status, supply other “know your counterparty” information and elect which Schedules in the ISDA August 2012 DF Supplement (the “Supplement”) it wishes to incorporate into its existing documentation.

Some of the Schedules in the Supplement relate to safe harbors available to swap dealers that would otherwise be subject to certain suitability and/or fiduciary requirements under CFTC rules. It should be noted that by electing to incorporate certain Schedules (3, 4 or 5), the adhering party will be making representations that it has complied with certain written policies and procedures. For example, in Schedule 3 (applicable to entities other than federal or state agencies, employee benefit plans, governmental plans or endowments), the adhering party represents that it has complied in good faith with written policies and procedures reasonably designed to ensure that the persons responsible for evaluating swap recommendations by the swap dealer and making trading decisions are capable of doing so. Therefore, an adhering party may need to ensure it has such written policies and procedures before making such a representation.

For more information about the Protocol, please contact Partners [Dino Wu](#) or [Jeannette Boot](#) of the WilmerHale [Derivatives and Futures Practice](#).

Authors



Dino Wu
PARTNER

✉ dino.wu@wilmerhale.com

☎ +1 212 295 6436



Jeannette K. Boot
PARTNER

✉ jeannette.boot@wilmerhale.com

☎ +1 212 295 6507