Understanding the ISDA® Master Agreement and Schedule International, USA (National/Federal) Related Content

A comprehensive guide to navigating and understanding the ISDA Master Agreement and negotiating and drafting the Schedule to the ISDA Master Agreement. It may be read in conjunction with either the 2002 ISDA Master Agreement and Schedule or the 1992 ISDA Master Agreement and Schedule.

Most **over-the-counter (OTC) derivatives** transactions are documented using standardized documentation published by the **International Swaps and Derivatives Association, Inc.** (ISDA®). This almost always includes the **ISDA Master Agreement** (ISDA Master) and the **Schedule to the ISDA Master Agreement** (ISDA Schedule). The ISDA Schedule supplements and forms part of the ISDA Master.

There are two versions of the ISDA Master (though they are substantially similar in most respects):

- 1992 ISDA Master Agreement (Multicurrency - Cross-Border) (the 1992 Master); or
- 2002 ISDA Master Agreement (the 2002 Master).

These documents are referred to collectively in this Note as the ISDA Master. Distinctions are made between the 1992 Master and the 2002 Master where applicable.

The 2002 Master is a modified version of the 1992 Master. Both are pre-printed form documents designed for use on all types of OTC derivative transactions. Despite omission of an analogous parenthetical designation in the title of the document, the 2002 Master may also be used for multicurrency and cross-border transactions.

The ISDA Master is a **bilateral** framework agreement between two parties under which individual derivatives transactions may be entered into. The agreement is divided into two parts:

- The first part is a standard set of non-commercial terms and conditions (including representations, undertakings, events of default, termination events, and close-out provisions). On the ISDA Master itself, only the preamble and the signature block are filled out by the parties.
- The second part is the ISDA Schedule, which allows the parties to:
  - make certain elections under the ISDA Master;
  - specify which provisions of the ISDA Master apply to which parties;
  - modify the provisions of the ISDA Master as needed; and
  - add **bespoke** provisions that are not included in the pre-printed portion of the ISDA Master.

The ISDA Schedule memorializes the choices that the parties to the agreement make regarding whether certain provisions of the ISDA Master should apply to both parties, to one party or to neither. As noted above, the ISDA Schedule also allows parties to modify and add provisions to the ISDA Master.

The commercial terms of each individual derivatives transaction are then documented using a **transaction confirmation**. The transaction confirmation is read with reference to the ISDA Master and forms part of the ISDA Master. A new transaction confirmation is entered into between the parties each time a new transaction is entered into under the ISDA Master. Accordingly, each derivatives transaction entered into between the parties to the ISDA Master will be governed by the terms of the relevant transaction confirmation, as supplemented by the ISDA Master. For information on document hierarchy (which of these ISDA documents controls), see Section 1(b): Inconsistency.

This Note provides guidance on understanding the ISDA Master and negotiating and drafting the ISDA Schedule.

Copies of the 1992 Master and the 2002 Master may be obtained by ISDA members only from the ISDA website.

Preamble to the ISDA Master

The following details must be completed in the preamble to the ISDA Master:

- The names of the parties to the ISDA Master.
- The date the ISDA Master is to take effect. If there are existing swap transactions between the parties on the date of signing that are not already governed by an ISDA Master or other agreement, the ISDA Master should be dated the date of the first of such transactions, thereby enabling the terms of the ISDA Master to cover all such prior transactions. The words "dated as of" make it clear that the date is an effective date of the agreement and not the actual date of the signing of the ISDA Master. The actual date of signing is reflected in the Signature Block to the ISDA Master and the Signature Block to the ISDA Schedule.

The details included in the preamble to the ISDA Master must reflect the corresponding details in the Preamble to the ISDA Schedule, otherwise there will be inconsistency in the agreement.

Section 1: Interpretation

Section 1(a): Definitions

This section of the ISDA Master confirms that terms defined in the ISDA Master (including in Section 14: Definitions and in the ISDA Schedule) have those meanings when used in the ISDA Master and the ISDA Schedule.

Section 1(b): Inconsistency

The section of the ISDA Master confirms that if there is a conflict between the ISDA Master, the ISDA Schedule, and/or a transaction confirmation:

- The transaction confirmation prevails over the ISDA Schedule and the ISDA Master.
- The ISDA Schedule prevails over the (pre-printed portion of the) ISDA Master.

This makes sense when one considers that:

- The ISDA Schedule annotates the pre-printed terms of the ISDA Master.
- The transaction confirmation dictates commercial terms applicable to a particular transaction.

Section 1(c): Single Agreement

This section of the ISDA Master clarifies that the transaction confirmations and the ISDA Master (including the Schedule) form a single agreement. This section attempts to protect these documents from being "cherry-picked" by a **bankruptcy trustee** (or analogous liquidator in a non-US jurisdiction). Bankruptcy trustees may accept or reject **executory contracts** depending on the benefit to the bankruptcy estate. This section attempts to ensure that the ISDA Master is not rejected where a transaction confirmation is accepted. The provision is designed to ensure that a transaction confirmation is not read independently of the terms in the ISDA Master and Schedule.

The parties should check that Section 1(c) is effective under the governing law of the ISDA Master and any laws likely to govern the insolvency of the counterparty.

Legal opinions on the effectiveness of Section 1(c) and the **netting** of the terminated transactions are available to ISDA members on the ISDA website.

Section 2: Obligations

Section 2(a): General Conditions

Under this section of the ISDA Master, the parties agree to comply with their obligations under the ISDA Master:

Section 2(a)(i): Payments and deliveries will be made
Under this section of the ISDA Master, the parties each agree to make the payments and deliveries that are required to be made by it under each transaction confirmation. A breach of this section is addressed under Section 5(a)(i): Failure to Pay or Deliver. For details on how and when a failure to pay or deliver under Section 2(a)(i) becomes an event of default under Section 5(a)(i), see The ISDA Master Agreement: Timeline of Action Points Upon Counterparty Failure to Perform.

Section 2(a)(ii): Payments and deliveries will be made on due date
Under this section of the ISDA Master, the parties agree, among other things, that payments and deliveries under a transaction will be made on the due date and payments will be made in the required currency. A breach of this section is addressed under Breach of Agreement: Section 5(a)(ii) of 1992 Master/Section 5(a)(ii)(1) of 2002 Master.

Section 2(a)(iii): Obligations of party subject to conditions precedent
Under this section, the parties agree that the only conditions precedent to making a payment or physical delivery under a transaction entered into under the agreement are that no Event of Default, Potential Event of Default or Early Termination Date for the relevant transaction has occurred.

The parties can (and often do) agree to additional conditions precedent in the Schedule or in a transaction confirmation.

As a consequence of this section, if an Event of Default (EOD) or Potential Event of Default (PEOD) occur and are continuing, a non-defaulting party can suspend payments and deliveries owed to the defaulting party for as long as the default continues, or until the non-defaulting party elects to terminate the transaction. Payment obligations are not extinguished by the maturity of the transaction (that is last date fixed for contractual performance), and amounts continue to accrue for so long as this condition is unfulfilled. This section permits a party to suspend performance under the agreement pending the continuation of the other party's suspended performance, as litigated in the Metavante matter in the Lehman bankruptcy cases (*In re Lehman Bros. Holdings Inc.*, No. 08-13555 (JMP), 2009 WL 6057286 (Bankr. S.D.N.Y. Sept. 17, 2009)).

The Metavante ruling. Section 2(a)(iii) of the ISDA Master essentially provides an open-ended option on the agreement for the non-defaulting party for the duration of the EOD or PEOD. Certain non-defaulting counterparties have held debtor counterparties in limbo under this provision while awaiting the transaction to move in their favor. This provision was litigated in both the US and the UK in the wake of the financial crisis. Most notably, in the US, this provision was the subject of the Metavante decision in the Lehman Brothers bankruptcy case (see Practice Note, The ISDA Master Agreement: Early Termination: Early Termination and the Metavante Ruling and Article, The Bankruptcy Court Ruling in the Lehman Metavante Matter).

In Metavante, the SDNY Bankruptcy Court (Lehman court) ruled that the provision operated as a prohibited **ipso facto clause** because it deprived the debtor of its right to payments under the contract as a result of its bankruptcy filing (which is a default under Section 5(a)(vii): Bankruptcy).The Lehman court ruled the provision was unenforceable in a US bankruptcy proceeding, holding that the non-defaulting party must either:

- Elect to terminate the transaction(s) under the ISDA Master; or
- Resume making payments under the transaction(s) "promptly";

otherwise the party may be deemed to have waived its right to terminate the agreement.

Section 2(a)(iii) optional amendment. To address the issue litigated in Metavante, ISDA has published an optional amendment to Section 2(a)(iii) of the ISDA Master that may be used by parties to an ISDA Master to address the controversial open-ended payment-withholding option during the continuation of a counterparty default under Section 2(a)(iii). The amendment gives parties the option integrating a time limit (defined by using a Condition End Date) on this provision into their ISDA Master Agreements. For details, see Legal Update, ISDA Publishes Optional Amendment to Controversial Section 2(a)(iii) of ISDA Master Agreement.

Section 2(b): Change of Account

Under this section of the ISDA Master:

- A party can change its account for receiving payment or delivery under a transaction by giving the other party notice (for details on the giving of notice under the ISDA Master, see Section 12: Notices). The relevant account is normally specified in the transaction confirmation (occasionally it may be included in the Schedule).
- The other party may object to the change of account if its grounds for rejection are reasonable.

The ability to reject a change of account is important. For example, if the change of account is to an overseas office, it could give rise to a withholding tax charge (for an overview on withholding tax, see Section 2(d): Deduction or Withholding for Tax).

Section 2(c): Netting of Payments

Under this section of the ISDA Master, if payments under a single transaction are due on the same date and in the same currency by both parties, those payments can be **netted** for the purposes of that transaction. After all such amounts have been netted, only the party that is **out of the money** need make a payment of the net amount to the other party. This is primarily for administrative convenience. Note that in many jurisdictions, including the US, "mutuality" is required for netting under an agreement such as the ISDA Master to be upheld in a bankruptcy proceeding. For details, see Legal Updates:

- Lehman-Swedbank Decision Holds that Mutuality Must Exist to Exercise Right of Setoff Under Swap.
- Lehman Court Holds Triangular Setoff Provisions Unenforceable in Bankruptcy.
- In re American Home Mortgage: Triangular Setoff Again Disallowed Under Bankruptcy Code.

Multiple Transaction Payment Netting

The 2002 Master permits parties to choose "Multiple Transaction Payment Netting'" in Part 4(i) of the Schedule: Multiple Transaction Payment Netting or in a transaction confirmation. If "Multiple Transaction Payment Netting" is selected:

- The netting will take effect across more than one transaction with respect to all amounts payable on the same date in the same currency.
- The election may be made separately for different groups of transactions.
- The election applies separately to each pairing of offices (for an overview on the offices where transactions are booked, see Section 10: Offices; Multibranch Parties).

The parties should check that Multiple Transaction Payment Netting will work from a practical perspective (that is, their systems can operate in a manner consistent with Multiple Transaction Payment Netting) before agreeing to its inclusion. A similar effect may be achieved under a 1992 Master by specifying in the Schedule that Section 2(c)(ii) does not apply.

Note that in many jurisdictions, including the US, "mutuality" is required for netting under an agreement such as the ISDA Master to be upheld in a bankruptcy proceeding (see Section 2(c): Netting of Payments).

Section 2(d): Deduction or Withholding for Tax

This section of the ISDA Master addresses withholding for tax purposes. Withholding may be necessary to account for a tax on the payee that gives rise to a deduction from the payment being made by the payer, resulting in the payee receiving less than what it would otherwise receive.

Under this section of the ISDA Master, if a tax is required to be levied and the tax is an Indemnifiable Tax (as defined in Section 14: Definitions), the payer must promptly:

- Notify the payee of such requirement.
- Pay the tax to the appropriate tax authorities.
- Forward to the payee the documentation evidencing such payment.
- Pay an additional amount to the payee so that the payee receives the amount it anticipated to receive had no such withholding been made. This is commonly referred to as a "**gross up**." A gross up is not required if:
  - The withholding obligation has arisen as a result of the payee failing to comply with any of the following provisions of the ISDA Master:
    - Section 4(a)(i): Furnish specified tax information;

        - Section 4(a)(iii): Furnish withholding tax information; or
        - Section 4(d): Tax Agreement.
    - The payee representation in Section 3(f): Payee Tax Representations is incorrect, other than as a result of the circumstances contemplated by the Termination Event under Section 5(b)(ii) 1992 Master/Section 5(b)(iii) 2002 Master: Tax Event.

If the payer and payee elect to make the tax representations included in Section 3(e): Payer Tax Representation (specified under Part 2(a) of the Schedule: Payer Tax Representations) and Section 3(f): Payee Tax Representations (specified under Part 2(b) of the Schedule: Payee Tax Representations) and those representations are true and correct, withholding should not be necessary under Section 2(d) of the ISDA Master. For more information, see Section 3(e): Payer Tax Representation and Section 3(f): Payee Tax Representations.

The following provisions should be carefully considered regarding withholding tax when negotiating the ISDA Master:

- Section 3(e): Payer Tax Representation.
- Section 3(f): Payee Tax Representations.
- Section 4(a)(iii): Furnish withholding tax information.
- Section 10(a): Recourse to party's head office or home office.
- Section 10(b): Booking and making payments and deliveries to nominated office.
- Section 10(c): Effect of specifying office in confirmation.

Section 2(e): Default Interest; Other Amounts (1992 Master)

This section of the ISDA Master specifies that interest is due on overdue amounts under the 1992 Master from the date due until paid, at the Default Rate, compounded daily based on actual number of days elapsed. The 2002 Master omits Section 2(e) but the 2002 Master includes a more comprehensive and detailed interest rate provision, Section 9(h): Interest and Compensation.

For details on the interest rate provisions under the 1992 Master, including a table providing a comparison between the expanded interest rate provisions included in the 2002 Master and those included in the 1992 Master, see Practice Note, Comparison of 1992 and 2002 ISDA Master Agreements: Expanded Interest Rate Provisions: Interest on Deferred and Defaulted Payments.

Section 3: Representations

This section of the ISDA Master sets out the parties' representations under the agreement. If a representation given under Section 3 of the ISDA Master is misleading in any material respect, an EOD under Section 5(a)(iv): Misrepresentation occurs. (For an overview on the consequences of an EOD, see Section 6: Early Termination (1992 Master)/Early Termination; Close-out Netting (2002 Master).)

Misrepresentation under Section 3(e): Payer Tax Representation or Section 3(f): Payee Tax Representations is also addressed by the withholding provisions in Section 2(d): Deduction or Withholding for Tax.

The representations in Section 3 (other than Section 3(f): Payee Tax Representations) are deemed to be made on the date each transaction is entered into. The representation in Section 3(f): Payee Tax Representations is deemed made whenever a payment is made under a transaction (which may be at any time during the term of a transaction) and is therefore repeated at all times throughout the life of the ISDA Master.

Section 3(a): Basic Representations

The representations included in this section of the ISDA Master are basic, standard representations, similar to those found in many types of agreements, relating to a party's constitution and its capacity to enter into the derivatives transactions to be entered into under the ISDA Master. These are:

- Section 3(a)(i): Status.
- Section 3(a)(ii): Powers.
- Section 3(a)(iii): No Violation or Conflict.
- Section 3(a)(iv): Consents.

- Section 3(a)(v): Obligations Binding.

If a representation given under this section of the ISDA Master is misleading in any material respect, an EOD occurs under Section 5(a)(iv): Misrepresentation.

Section 3(b): Absence of Certain Events

The representation in this section of the ISDA Master confirms that no Event of Default, Potential Event of Default or Termination Event has occurred with respect to the party giving the representation. This representation includes a standard knowledge qualifier ("to its knowledge," which implies no diligence obligations) that is rarely modified by the parties.

If a representation given under this section of the ISDA Master is misleading in any material respect, an EOD occurs under Section 5(a)(iv): Misrepresentation.

Section 3(c): Absence of Litigation

The representation in this section of the ISDA Master confirms that there is no actual or threatened litigation against the party giving the representation or any of its Credit Support Providers that is likely to affect the legality, validity, or enforceability of the ISDA Master or any Credit Support Document. This representation includes a standard knowledge qualifier ("to its knowledge," which implies no diligence obligations) that is rarely modified by the parties.

If elected under Part 4(k) of Schedule to the 2002 Master: Absence of Litigation, the representation also applies to any entity that is named as a "Specified Entity" under Part 4(k) (for more information, see Part 4(k) of Schedule to 2002 Master: Absence of Litigation). Note that "Specified Entity " for the purposes of this provision is different from any Specified Entity named in Part 1(a) of the Schedule: Specified Entity.

If a representation given under this section of the ISDA Master is misleading in any material respect, an EOD occurs under Section 5(a)(iv): Misrepresentation.

Section 3(d): Accuracy of Specified Information

This section of the ISDA Master confirms the accuracy of any information that is identified under Part 3 of the Schedule: Agreement to Deliver Documents as information to which Section 3(d) applies. The information covered by this representation normally includes materials such as constitutional documents, authorizing resolutions, and signing authorities but may be extended to other information (such as tax information). For more on the provision of information, see Section 4(a): Furnish Specified Information. This representation includes a standard materiality qualifier.

If a representation given under this section of the ISDA Master is misleading in any material respect, an EOD occurs under Section 5(a)(iv): Misrepresentation.

Section 3(e): Payer Tax Representation

Under this section of the ISDA Master, each party may elect to represent, as specified under Part 2(a) of the Schedule: Payer Tax Representations, that, when it makes a payment under the ISDA Master, no tax gross up will occur, provided the payee tax representations in Section 3(f): Payee Tax Representations made under Part 2(b) of the Schedule: Payee Tax Representations are true and correct. For an explanation of the tax gross-up provisions, see Section 2(d): Deduction or Withholding for Tax.

If a representation given under this section of the ISDA Master is misleading in any material respect, an EOD occurs under Section 5(a)(iv): Misrepresentation.

The ISDA FATCA Protocol
In August 2012, ISDA published a protocol to address the effects of the US Foreign Account Tax Compliance Act (FATCA) on derivatives transactions (see Legal Update, ISDA Publishes 2012 FATCA Protocol for Amending Swap Documents). The ISDA FATCA protocol:

- Removed the FATCA tax from the tax representations made by the parties under Section 3(e) of the ISDA Master.
- Placed the burden of FATCA withholding on the recipient of payments under the agreement by removing FATCA taxes from the definition of "Indemnifiable Tax."

To adhere to the ISDA FATCA protocol, parties must send a signed adherence letter along with a payment to the ISDA protocol management system. The parties will then receive an email confirmation from ISDA after approval and acceptance.

Section 3(f): Payee Tax Representations

Under this section of the ISDA Master, each party may elect to represent that any tax representations provided by it in Part 2(b) of the Schedule: Payee Tax Representations are true and correct. This representation confirms the tax position of a party with respect to payments received by that party under the agreement and is required to support the Section 3(e): Payer Tax Representation made by its counterparty. Provided these representations are true and correct, no withholding should be required when the parties to the ISDA Master make payments to one another under the agreement.

This representation is deemed to be made at all times until the termination of the ISDA Master (see Section 3: Representations). This is because payments need to be made periodically throughout the life of each transaction and therefore it is important that the representation (which supports the Section 3(e): Payer Tax Representation) is continually true and correct.

If a representation given under this section of the ISDA Master is misleading in any material respect, an EOD occurs under Section 5(a)(iv): Misrepresentation.

Section 3(g): No Agency (2002 Master)

This section is only found in the 2002 Master - there is no Section 3(g) in the 1992 Master. This representation is only activated with respect to a party if it is selected for that party in Part 4(l) of the 2002 Schedule: No Agency (there is also no corresponding Part 4(l) of the 1992 Schedule). The representation confirms that each party is entering into the 2002 Master on its own account and not as agent for a third party.

This representation is important for the effectiveness of the 2002 Master's close-out netting provisions in Section 6: Early Termination (1992 Master)/Early Termination; Close-out Netting (2002 Master). In certain jurisdictions, including the US, netting is only honored in a bankruptcy proceeding where the obligations owed by each party are mutual (see Legal Update, Lehman Court Holds Triangular Setoff Provisions Unenforceable in Bankruptcy). By making this representation, the parties state their intention that the transactions entered into under the agreement are entered into in the same capacity (that is, on a principal-to-principal basis) thereby providing support for a one element of a mutuality determination.

Section 3(g) is not included in the 1992 Master.

If a representation given under this section of the ISDA Master is misleading in any material respect, an EOD occurs under Section 5(a)(iv): Misrepresentation.

Section 4: Undertakings

This section of the ISDA Master sets out the covenants that each party agrees to undertake under the agreement for so long as it has obligations outstanding under the agreement.

If an undertaking under Section 4 of the ISDA Master (other than the undertakings relating to tax under Section 4(a)(i): Furnish Specified Tax Information, Section 4(a)(iii): Furnish Specified Withholding Information or Section 4(d): Tax Agreement) is not complied with by a party and continues not to be complied with for 30 days after notice of the failure to comply has been given (see Section 12: Notices) an EOD under Section 5(a)(ii): Breach of Agreement (1992 Master)/Breach of Agreement; Repudiation of Agreement (2002 Master) occurs.

The consequence of an undertaking given under:

- Section 4(a)(i): Furnish Specified Tax Information;
- Section 4(a)(iii): Furnish Specified Withholding Information; or
- Section 4(d): Tax Agreement;

not being complied with are addressed in the withholding provisions of Section 2(d): Deduction or Withholding for Tax. Gross up is not required by a party if withholding obligation has arisen as a result of failure of the other party to comply with any of these.

Section 4(a): Furnish Specified Information

Under this section of the ISDA Master, each party agrees to supply to one another certain information (including information specified in Part 3 of the Schedule: Agreement to Deliver Documents) to the other party, or in certain cases, as noted, to a relevant authority (such as a governmental or tax authority) on the date specified in the Schedule or transaction confirmation, or if none is specified, as soon as reasonably practicable.

The sections below provide further information on the subsections of Section 4(a) of the ISDA Master.

Section 4(a)(i): Furnish specified tax information

This section of the ISDA Master directs the parties to deliver to one another tax-related forms to the extent specified in Part 3 of the Schedule: Agreement to Deliver Documents or in a transaction confirmation.

The consequence of an undertaking given under this section of the ISDA Master not being complied with are addressed in the withholding provisions of Section 2(d): Deduction or Withholding for Tax (gross up not required by a party if withholding obligation has arisen as a result of failure of the other party to comply with any of these).

Section 4(a)(ii): Furnish specified non-tax information

This section of the ISDA Master directs the parties to deliver to one another financial statements, board resolutions, legal opinions, and signatory lists to the extent specified in Part 3 of the Schedule: Agreement to Deliver Documents or in a transaction confirmation.

If a breach of this section continues for 30 days after notice of the failure to comply has been given (see Section 12: Notices) an EOD under Section 5(a)(ii): Breach of Agreement (1992 Master)/Breach of Agreement; Repudiation of Agreement (2002 Master) occurs.

Section 4(a)(iii): Furnish withholding tax information

This section of the ISDA Master directs the delivery of necessary documents by the parties to one another or to a relevant government or tax authority to enable payments to be made to the other party with no withholding for tax, or for withholding at a lower rate. For an explanation of withholding under the ISDA Master, see Section 2(d): Deduction or Withholding for Tax.

The consequence of an undertaking given under this section not being complied with are addressed in the withholding provisions of Section 2(d): Deduction or Withholding for Tax (gross up not required by a party if withholding obligation has arisen as a result of failure of the other party to comply with any of these).

Section 4(b): Maintain Authorisations

Under this section of the ISDA Master, each party undertakes to maintain in effect any consents and governmental authorizations required to be obtained by it with respect to the ISDA Master or any Credit Support Document.

If a breach of this section continues for 30 days after notice of the failure to comply has been given (see Section 12: Notices) an EOD under Section 5(a)(ii): Breach of Agreement (1992 Master)/Breach of Agreement; Repudiation of Agreement (2002 Master) occurs.

Section 4(c): Comply With Laws

Under this section of the ISDA Master, each party undertakes to comply with any laws which, if breached, would materially impair its ability to perform its obligations under the ISDA Master or any Credit Support Document.

If a breach of this section continues for 30 days after notice of the failure to comply has been given (see Section 12: Notices) an EOD under Section 5(a)(ii): Breach of Agreement (1992 Master)/Breach of Agreement; Repudiation of Agreement (2002 Master) occurs.

Section 4(d): Tax Agreement

Under this section of the ISDA Master, each party undertakes to notify the other party of any failure of a representation made under Section 3(f): Payee Tax Representations.

The consequence of an undertaking given under this section not being complied with are addressed in the withholding provisions of Section 2(d): Deduction or Withholding for Tax (gross up not required by a party if withholding obligation has arisen as a result of failure of the other party to comply with any of these).

Section 4(e): Payment of Stamp Tax

Under this section of the ISDA Master, each party undertakes:

- To pay any relevant stamp taxes that are payable by it in its jurisdiction of organization or jurisdiction of the office through which it is entering into the ISDA Master.

- To indemnify the other party for any failure of it to do so, if the parties are transacting on a cross-border basis and the other party is not organized under the laws of or entering into the agreement from that same jurisdiction.

If a breach of this section continues for 30 days after notice of the failure to comply has been given (see Section 12: Notices) an EOD under Section 5(a)(ii): Breach of Agreement (1992 Master)/Breach of Agreement; Repudiation of Agreement (2002 Master) occurs.

Section 5: Events of Default and Termination Events

This section of the ISDA Master specifies the Events of Default (EODs) and Termination Events (TEs) under the ISDA Master.

- The EODs are specified in Section 5(a): Events of Default.
- The TEs are specified in Section 5(b): Termination Events.

EODs and TEs both give rise to the ability to terminate transactions under the ISDA Master. For an overview on the consequences of the occurrence of an EOD or TE, see Section 6: Early Termination (1992 Master)/Early Termination; Close-out Netting (2002 Master) and for a detailed explanation, see Practice Note, The ISDA Master Agreement: Early Termination.

For a summary of conditions precedent to the occurrence of all EODs and TEs under the ISDA Master, including all required notice and grace periods, see The ISDA Master Agreement: Early Termination Checklist: Notice Requirements, Cure Periods, and Conditions Precedent to Early Termination Under the ISDA Master.

Section 5(a) Events of Default

Section 5(a) of the ISDA Master sets out the events that give rise to Events of Default (EODs) under the ISDA Master. The sections below provide more detail on each EOD included in Section 5(a) of the ISDA Master.

The following resources provide additional detail relating to this section:

- For an overview of the consequences of the occurrence of an EOD under the ISDA Master, see Section 6: Early Termination (1992 Master)/Early Termination; Close-out Netting (2002 Master) and for a detailed explanation, see Practice Note, The ISDA Master Agreement: Early Termination.
- For a summary of conditions precedent to the occurrence of all EODs (and TEs) under the ISDA Master, including all required notice and grace periods, see The ISDA Master Agreement: Early Termination Checklist: Notice Requirements, Cure Periods, and Conditions Precedent to Early Termination Under the ISDA Master.
- For a detailed explanation of the differences between Section 5(a) Events of Default under the 1992 Master and the 2002 Master, see Practice Note, Comparison of 1992 and 2002 ISDA Master Agreements: Changes to Event of Default Provisions.
- For a sample notice of default and early termination that may be used in connection with an EOD under this section of the ISDA Master, see Standard Document, The ISDA Master Agreement: Sample Notice of Default and Early Termination.

Section 5(a)(i): Failure to Pay or Deliver

Under this section of the ISDA Master, an EOD occurs under the ISDA Master if, subject to notice and certain grace periods, there is a failure to make any payment or delivery when due under:

- Section 2(a)(i): Payments and deliveries will be made.
- Section 2(e): Default Interest; Other Amounts (1992 Master).
- Section 9(h)(i)(2): Compensation for Defaulted Deliveries (2002 Master).
- Section 9(h)(i)(4): Compensation for Deferred Deliveries Prior to Early Termination Date (2002 Master).

In order to avoid default under this section, payment or delivery is due:

- On or before the third Local Business Day after notice is given to the counterparty under the 1992 Master.
- On or before the first Local Business Day (for payment) and the first Local Delivery Day (for deliveries) after notice is given to the counterparty under the 2002 Master.

For information on the giving of notice under the ISDA Master, see Section 12: Notices.

This section is subject to the provisions of:

- Section 5(c): Hierarchy of Events.
- Section 5(e): Inability of Head or Home Office to Perform Obligations of Branch (2002 Master).

For an overview of the occurrence of the consequences of this EOD, see Section 6: Early Termination (1992 Master)/Early Termination; Close-out Netting (2002 Master) and for a detailed explanation, see Practice Note, The ISDA Master Agreement: Early Termination.

For a helpful timeline on actions that must be taken to effect an EOD and applicable remedies in the event of a counterparty failure to pay or deliver under Section 2(a)(i) and 5(a)(i) of the ISDA Master, see The ISDA Master Agreement: Timeline of Action Points Upon Counterparty Failure to Perform.

For a sample notice that may be used by a counterparty to a nonperforming party under this section, see Standard Document, The ISDA Master Agreement: Sample Counterparty Failure Notice.

Section 5(a)(ii): Breach of Agreement (1992 Master)/Breach of Agreement; Repudiation of Agreement (2002 Master)

Under the 2002 Master, this section is composed of two parts, each of which provides for a separate default:

- Section 5(a)(ii)(1): Breach of Agreement.
- Section 5(a)(ii)(2): Repudiation of Agreement.

The 1992 Master includes only Breach of Agreement.

Under the 2002 Master, this section is subject to the provisions of Section 5(c): Hierarchy of Events.

For an overview of the consequences of the occurrence of this EOD, see Section 6: Early Termination (1992 Master)/Early Termination; Close-out Netting (2002 Master) and for a detailed explanation, see Practice Note, The ISDA Master Agreement: Early Termination.

The following sections provide more detail on Section 5(a)(ii).

Breach of Agreement: Section 5(a)(ii) of 1992 Master/Section 5(a)(ii)(1) of 2002 Master

Under this section of the ISDA Master, an EOD occurs under the ISDA Master if there is a failure by a party to comply with the ISDA Master (subject to a 30 day grace period) excluding:

- A failure to pay or deliver under any of the following sections of the ISDA Master:
  - Section 2(a)(i): Payments and deliveries will be made;
  - Section 9(h)(i)(2): Compensation for Defaulted Deliveries Prior to Early Termination Date (2002 Master);
  - Section 9(h)(i)(4): Compensation for Deferred Deliveries Prior to Early Termination Date (2002 Master); or
  - Section 2(e): Default Interest; Other Amounts (1992 Master).
- A failure to give notice of a Termination Event.
- A failure to comply with Section 4(a)(i): Furnish specified tax information.
- A failure to comply with Section 4(a)(iii): Furnish withholding tax information.
- A failure to comply with Section 4(d): Tax Agreement.

This section is subject to the provisions of Section 5(c): Hierarchy of Events.

For an overview of the consequences of the occurrence of this EOD, see Section 6: Early Termination (1992 Master)/Early Termination; Close-out Netting (2002 Master) and Practice Note, The ISDA Master Agreement: Early Termination.

Section 5(a)(ii)(2): Repudiation of Agreement (2002 Master)

Under this section of the ISDA Master, an EOD occurs under the 2002 Master if a party rejects or challenges the validity of the 2002 Master or any transaction confirmation.

This section is subject to the provisions of Section 5(c): Hierarchy of Events.

This section is not included in the 1992 Master.

For an overview of the consequences of the occurrence of this EOD, see Section 6: Early Termination (1992 Master)/Early Termination; Close-out Netting (2002 Master) and for a detailed explanation, see Practice Note, The ISDA Master Agreement: Early Termination.

Section 5(a)(iii): Credit Support Default

Under this section of the ISDA Master, an EOD occurs under the ISDA Master if there is a breach of any of:

- Section 5(a)(iii)(1): Breach of Credit Support;
- Section 5(a)(iii)(2): Expiration or termination of Credit Support; or
- Section 5(a)(iii)(3): Repudiation of Credit Support.

This section is subject to the provisions of:

- Section 5(c): Hierarchy of Events.
- Section 5(e): Inability of Head or Home Office to Perform Obligations of Branch (2002 Master only).

For an overview of the consequences of the occurrence of this EOD, see Section 6: Early Termination (1992 Master)/Early Termination; Close-out Netting (2002 Master) and for a detailed explanation, see Practice Note, The ISDA Master Agreement: Early Termination.

The following sections provide more detail on Section 5(a)(iii).

Section 5(a)(iii)(1): Breach of Credit Support

Under this section of the ISDA Master, an EOD occurs under the ISDA Master if there is a breach by a party or its Credit Support Provider of a Credit Support Document and the breach continues after the expiry of any applicable grace period.

This section is subject to the provisions of:

- Section 5(c): Hierarchy of Events.
- Section 5(e): Inability of Head or Home Office to Perform Obligations of Branch (2002 Master only).

For an overview of the consequences of the occurrence of this EOD, see Section 6: Early Termination (1992 Master)/Early Termination; Close-out Netting (2002 Master) and for a detailed explanation, see Practice Note, The ISDA Master Agreement: Early Termination.

Section 5(a)(iii)(2): Expiration or termination of Credit Support

Under this section of the ISDA Master, an EOD occurs under the ISDA Master if a Credit Support Document (or, under the 2002 Master only, if any security interest granted under such document) becomes ineffective other than in accordance with its terms.

This section is subject to the provisions of:

- Section 5(c): Hierarchy of Events.
- Section 5(e): Inability of Head or Home Office to Perform Obligations of Branch (2002 Master only).

For an overview of the consequences of the occurrence of this EOD, see Section 6: Early Termination (1992 Master)/Early Termination; Close-out Netting (2002 Master) and Practice Note, The ISDA Master Agreement: Early Termination.

Section 5(a)(iii)(3): Repudiation of Credit Support

Under this section of the ISDA Master, an EOD occurs under the ISDA Master if a party or its Credit Support Provider rejects or challenges the validity of any Credit Support Document.

This section is subject to the provisions of:

- Section 5(c): Hierarchy of Events.
- Section 5(e): Inability of Head or Home Office to Perform Obligations of Branch (2002 Master only).

For an overview of the consequences of the occurrence of this EOD, see Section 6: Early Termination (1992 Master)/Early Termination; Close-out Netting (2002 Master) and for a detailed explanation, see Practice Note, The ISDA Master Agreement: Early Termination.

Section 5(a)(iv): Misrepresentation

Under this section of the ISDA Master, an EOD occurs under the ISDA Master if either:

- Any representation in the ISDA Master other than a representation made under Section 3(e): Payer Tax Representation or Section 3(f): Payee Tax Representations is misleading in any material respect; or
- Any representation in any Credit Support Document is misleading in any material respect.

For an overview of the consequences of the occurrence of this EOD, see Section 6: Early Termination (1992 Master)/Early Termination; Close-out Netting (2002 Master) and for a detailed explanation, see Practice Note, The ISDA Master Agreement: Early Termination.

Section 5(a)(v): Default Under Specified Transaction

The term Specified Transaction is defined under Section 14: Definitions of the ISDA Master and may be modified under Part 1(b) of the Schedule: Specified Transaction.

Under this section of the ISDA Master, an EOD occurs under the ISDA Master if any:

- Party to the ISDA Master;
- Credit Support Provider of any party to the ISDA Master; or
- Specified Entity of a party to the ISDA Master listed in Part 1(a) of the Schedule: Specified Entity as being subject to Section 5(a)(v);

either:

- Defaults under a Specified Transaction or any credit support arrangement relating to the Specified Transaction and such default results in the liquidation, acceleration or termination of the Specified Transaction.
- Fails to make a payment or a delivery under a Specified Transaction, after the expiry of any applicable notice or grace periods, provided that, if there is no applicable notice requirement or grace period, then the failure continues for at least three Local Business Days under a 1992 Master or at least one Local Business Day under a 2002 Master.
- Disaffirms or rejects a Specified Transaction (or under the 2002 Master, a credit support arrangement relating to such Specified Transaction). Under the 2002 Master, evidence is required of such action by the counterparty.

The definition of Specified Transaction is detailed in its description of the types of events that give rise to an EOD under this section and should be read carefully to determine its applicability in any given circumstance. The list of transactions included in the definition of Specified Transaction in the 2002 Master is greatly expanded over the definition in the 1992 Master, but functionally the effect is the same. For an explanation of the differences, see Practice Note, Comparison of 1992 and 2002 ISDA Master Agreements: Changes to Default Under Specified Transaction. The 2002 Master also reduces the cure period for a Default under Specified Transaction where the Specified Transaction is not subject to notice or a cure period from three Local Business Days under the 1992 Master to one Local Business Day under the 2002 Master.

For an overview of the consequences of the occurrence of this EOD, see Section 6: Early Termination (1992 Master)/Early Termination; Close-out Netting (2002 Master) and for a detailed explanation, see Practice Note, The ISDA Master Agreement: Early Termination.

Section 5(a)(vi): Cross-Default

Under this section of the ISDA Master, an EOD occurs under the ISDA Master if this section 5(a)(vi): Cross-Default, is specified as applying to a party to the ISDA Master under Part 1(c) of the Schedule: Cross-Default, Specified Indebtedness, and Threshold Amount and either:

- Under subsection 5(a)(vi)(1), any default occurs under any agreement relating to Specified Indebtedness that causes or is capable of causing such Specified Indebtedness to become due and payable by:

    - that party;
    - any Credit Support Provider of that party; or
    - if Part 1(a) of the Schedule: Specified Entity specifies that Section 5(a)(vi) applies to a Specified Entity of that party, that Specified Entity; or
- Under subsection 5(a)(vi)(2), there is a default in making a payment or payments under any agreement relating to Specified Indebtedness by:
    - that party;
    - any Credit Support Provider of that party; or
    - if Part 1(a) of the Schedule (Specified Entity) specifies that Section 5(a)(vi) applies to a Specified Entity of that party, that Specified Entity.

This EOD only occurs if a certain Threshold Amount of Specified Indebtedness is exceeded (for more information, see Part 1(c) of the Schedule: Cross-Default, Specified Indebtedness, and Threshold Amount). Generally, the Threshold Amount aligns with a materiality threshold for each of the parties.

It is important to note that for an EOD to occur under this subsection (1), the Specified Indebtedness need only be "capable" of being accelerated as a result of the cross-default. In other words, there is no need for the agreement evidencing the Specified Indebtedness to have been terminated and accelerated as a result of the default to trigger application of this section. Subsection (2) only requires that one or more payments in equal to or exceeding the Threshold Amount have been missed, not that the default has resulted in the termination and acceleration of the agreement such that all amounts due under the agreement have become immediately due and payable.

However, this section can be, and often is, amended by the parties to the ISDA Master under Part 1(c) of the Schedule: Cross-Default, Specified Indebtedness, and Threshold Amount to apply only when cross-acceleration occurs with respect to the Specified Indebtedness (subject to any Threshold Amount). Electing cross-acceleration imposes a higher threshold for default under this section of the ISDA Master. Cross-acceleration occurs when a default on Specified Indebtedness (subject to any Threshold Amount) results in the termination and acceleration of the agreement under which the Specified Indebtedness arises, such that all amounts due under the agreement have become immediately due and payable. For more details on cross-default and cross-acceleration, see Practice Note, Finance Fundamentals: Cross-Default v. Cross-Acceleration.

For information on negotiation of this provision under the ISDA Master, which is often heavily negotiated by the parties, see Part 1(c) of the Schedule: Cross-Default, Specified Indebtedness, and Threshold Amount.

For an overview of the consequences of the occurrence of this EOD, see Section 6: Early Termination (1992 Master)/Early Termination; Close-out Netting (2002 Master) and for a detailed explanation, see Practice Note, The ISDA Master Agreement: Early Termination.

Section 5(a)(vii): Bankruptcy

Under this section of the ISDA Master, an EOD occurs under the ISDA Master if certain insolvency events arise with respect to:

- A party to the ISDA Master;
- Any Credit Support Provider of a party to the ISDA Master; or
- If Part 1(a) of the Schedule: Specified Entity specifies that Section 5(a)(vii) applies to a Specified Entity of a party, that Specified Entity.

The insolvency events enumerated in the section include:

- A bankruptcy filing.
- Dissolution.
- Being unable to pay debts as they fall due or written admission of such.
- Passing of a winding-up resolution.
- Becoming subject to or seeking an administrator, receiver or similar regulator, or official.
- A secured party taking possession of substantially all of the entity's assets.

Amendments to the section can be made in Part 5 of the Schedule: Bespoke Provisions.

Note that the 2002 Master reduces the 30-day cure period under the 1992 Master to 15 days if the bankruptcy is initiated by a third party (other than a principal regulator of the counterparty). As in the 1992 Master, there is no cure period for a counterparty's voluntary bankruptcy filing under the 2002 Master. The 2002 Master adds that there is also no cure period if bankruptcy proceedings are initiated by a principal regulator of the counterparty.

For an overview of the consequences of the occurrence of this EOD, see Section 6: Early Termination (1992 Master)/Early Termination; Close-out Netting (2002 Master) and for a detailed explanation, see Practice Note, The ISDA Master Agreement: Early Termination.

Section 5(a)(viii): Merger Without Assumption

Under this section of the ISDA Master, an EOD occurs under the ISDA Master if:

- A party to the ISDA Master;
- Any Credit Support Provider of a party to the ISDA Master; or
- If Part 1(a) of the Schedule: Specified Entity specifies that Section 5(a)(viii) applies to a Specified Entity of a party, that Specified Entity;

merges with, or transfers all or most of its assets to another entity (or, under a 2002 Master, reorganizes or reconstitutes itself as another entity) and:

- That other entity fails to assume:
  - the party's obligations under the ISDA Master; or
  - the Credit Support Provider's obligations under the relevant Credit Support Document; or
- The Credit Support Document fails to extend to the performance of that other entity.

For an overview of the consequences of the occurrence of this EOD, see Section 6: Early Termination (1992 Master)/Early Termination; Close-out Netting (2002 Master) and for a detailed explanation, see Practice Note, The ISDA Master Agreement: Early Termination.

Section 5(b): Termination Events

Section 5(b) of the ISDA Master sets out the events that give rise to Termination Events (TEs) under the ISDA Master. Where an EOD has occurred, a party has defaulted, however, when a TE occurs, it is considered to be an event beyond the control of the parties. When a TE occurs, only Affected Transactions may be terminated.

The sections below provide more detail on each TE included in Section 5(b) of the ISDA Master.

The following resources provide additional detail relating to this section:

- For a summary of conditions precedent to the occurrence of all TEs (and EODs) under the ISDA Master, including all required notice and grace periods, see The ISDA Master Agreement: Early Termination Checklist: Notice Requirements, Cure Periods, and Conditions Precedent to Early Termination Under the ISDA Master.
- For a detailed explanation of the differences between Section 5(b) Termination Events under the 1992 Master and the 2002 Master, see Practice Note, Comparison of 1992 and 2002 ISDA Master Agreements: Changes to Termination Events.
- For an overview of the consequences of the occurrence of a TE under the ISDA Master, see Section 6: Early Termination (1992 Master)/Early Termination; Close-out Netting (2002 Master) and for a detailed explanation, see Practice Note, The ISDA Master Agreement: Early Termination.

Section 5(b)(i): Illegality

Under this section of the ISDA Master, a TE occurs under the ISDA Master if an "Illegality" occurs. An Illegality arises if, after a transaction has been entered into (and, under the 2002 Master, after giving effect to any relevant provision of the ISDA Master, the ISDA Schedule or any transaction confirmation relating to such event), it becomes unlawful for:

- A party to the ISDA Master (the Affected Party); or
- A Credit Support Provider of a party to the ISDA Master (the Affected Party);

to make or receive payments or deliveries under the agreement (including contingent obligations) or perform any of its other material obligations under:

- The ISDA Master (Section 5(b)(i)(1)); or
- A Credit Support Document (Section 5(b)(i)(2)).

An example of the occurrence of an Illegality TE would be where a law is passed that makes it unlawful for a party to the ISDA Master to be a party to a derivatives transaction (however the section would only apply if the law were passed after the party had entered into an existing transaction and the law was applied to that transaction).

Upon the occurrence of this TE under the ISDA Master, only Affected Transactions may be terminated.

A TE does not occur under this section if the Illegality arises because of:

- An action taken by a party to the ISDA Master or its Credit Support Provider.
- A breach by a party to the ISDA Master of its obligation to maintain authorizations as required under Section 4(b): Maintain Authorisations.

See Section 5(c): Hierarchy of Events for an explanation of how to treat events that give rise to both an Illegality TE and either:

- Another TE under the ISDA Master.
- An EOD under the ISDA Master.

Note specifically the waiting period provisions applicable to this TE under a 2002 Master (see Section 5(d): Deferral of Payments and Deliveries During Waiting Period (2002 Master) and related interest accrual provisions under Section 9(h)(i)(3): Interest on Deferred Payments Prior to Early Termination Date (2002 Master) and Section 9(h)(i)(4): Compensation for Deferred Deliveries Prior to Early Termination Date (2002 Master)). For further details, see Practice Note, Comparison of 1992 and 2002 ISDA Master Agreements: Waiting Periods for Illegality and Force Majeure.

The following Illegality-specific provisions need to be considered if an Illegality occurs under this section:

- Section 2(e): Default Interest; Other Amounts (1992 Master).
- Section 5(c): Hierarchy of Events.
- Section 5(d): Deferral of Payments and Deliveries During Waiting Period (2002 Master).
- Section 5(e): Inability of Head or Home Office to Perform Obligations of Branch (2002 Master).
- Section 6(b)(iv): Right to Terminate Following Termination Event, Right to Terminate.
- Section 6(e)(ii): Payments on Early Termination, Termination Events.
- Section 6(e)(iv): Adjustments of Payments for Illegality or Force Majeure Event (2002 Master).
- Section 6(f): Set-Off (2002 Master).
- Section 9(h)(i)(3): Interest on Deferred Payments Prior to Early Termination Date (2002 Master).
- Section 9(h)(i)(4): Compensation for Deferred Deliveries Prior to Early Termination Date (2002 Master).
- Section 10(a): Recourse to party's head office or home office.

For an overview of the consequences of the occurrence of this TE, see Section 6: Early Termination (1992 Master)/Early Termination; Close-out Netting (2002 Master) and for a detailed explanation, see Practice Note, The ISDA Master Agreement: Early Termination.

For a detailed explanation of the differences between the Illegality TE under Section 5(b)(i) of the 1992 and 2002 Masters, see Practice Note, Comparison of 1992 and 2002 ISDA Master Agreements: Changes to Illegality Termination Event.

ISDA Illegality/Force Majeure Protocol
In July 2012, ISDA published an Illegality/Force Majeure Protocol and related documents, as part of ISDA's Eurozone contingency planning activity, to address issues that could arise should a Eurozone member leave the Eurozone. This protocol allows parties to amend their 1992 Masters to reflect the Illegality and Force Majeure provisions of the 2002 Master (see Legal Update, Eurozone Crisis: ISDA Illegality/Force Majeure Protocol).

Section 5(b)(ii): Force Majeure Event (2002 Master)

Under this section of the ISDA Master, a TE occurs under the 2002 Master if a "Force Majeure Event" occurs. There is no analogous section of the 1992 Master.

A Force Majeure Event arises if, after a transaction has been entered into (and after giving effect to any relevant provision of the 2002 Master, the ISDA Schedule or any transaction confirmation relating to such event), there occurs an event or an act of state which prevents:

- A party to the ISDA Master (the Affected Party); or
- A Credit Support Provider of a party to the ISDA Master (the Affected Party);

from making or receiving payments or deliveries under the agreement or performing any of its other material obligations under the 2002 Master or a Credit Support Document.

A Force Majeure Event only arises if the event is beyond the control of the party that is subject to the Force Majeure Event and the event could not be overcome after using all reasonable efforts (other than efforts that would give rise to a loss on behalf of that party).

Upon the occurrence of this TE under the ISDA Master, only Affected Transactions may be terminated.

Each party, upon becoming aware of a Force Majeure Event, is under an obligation to notify the other party of the event in accordance with Section 12: Notices.

If an event constitutes both a Force Majeure Event under this section of the 2002 Master and an Illegality, it is treated as an Illegality and the provisions under Section 5(b)(i): Illegality apply (see Section 5(c): Hierarchy of Events).

The following Force Majeure-specific provisions need to be considered if a Force Majeure Event occurs under this section:

- Section 2(e): Default Interest; Other Amounts (1992 Master).
- Section 5(c): Hierarchy of Events.
- Section 5(d): Deferral of Payments and Deliveries During Waiting Period (2002 Master).
- Section 5(e): Inability of Head or Home Office to Perform Obligations of Branch (2002 Master).
- Section 6(b)(i): Right to Terminate Following Termination Event, Notice.
- Section 6(b)(iv): Right to Terminate Following Termination Event, Right to Terminate.
- Section 6(e)(ii): Payments on Early Termination, Termination Events.
- Section 6(e)(iv): Adjustments of Payments for Illegality or Force Majeure Event (2002 Master).
- Section 6(f): Set-Off (2002 Master).
- Section 9(h)(i)(3): Interest on Deferred Payments Prior to Early Termination Date (2002 Master).
- Section 9(h)(i)(4): Compensation for Deferred Deliveries Prior to the Early Termination Date (2002 Master).
- Section 10(a): Recourse to party's head office or home office.

Note specifically the waiting period provisions applicable to this TE under a 2002 Master Section 5(d): Deferral of Payments and Deliveries During Waiting Period (2002 Master) (and related interest accrual provisions under Section 9(h)(i)(3): Interest on Deferred Payments Prior to Early Termination Date (2002 Master) and Section 9(h)(i)(4): Compensation for Deferred Deliveries Prior to Early Termination Date (2002 Master)). For details, see Practice Note, Comparison of 1992 and 2002 ISDA Master Agreements: Waiting Periods for Illegality and Force Majeure.

For an overview of the consequences of the occurrence of this TE, see Section 6: Early Termination (1992 Master)/Early Termination; Close-out Netting (2002 Master) and for a detailed explanation, see Practice Note, The ISDA Master Agreement: Early Termination.

For further details on the Force Majeure Termination Event under the 2002 Master, see Practice Note, Comparison of 1992 and 2002 ISDA Master Agreements: Addition of Force Majeure Termination Event.

ISDA Illegality/Force Majeure Protocol

In July 2012, ISDA published an Illegality/Force Majeure Protocol and related documents, as part of ISDA's Eurozone contingency planning activity, to address issues that could arise should a Eurozone member leave the Eurozone. This protocol allows parties to amend their 1992 Masters to reflect the Illegality and Force Majeure provisions of the 2002 Master (see Legal Update, Eurozone Crisis: ISDA Illegality/Force Majeure Protocol). The 1992 Master Agreement does not include a Force Majeure Termination Event, so incorporating the Force Majeure provisions of the 2002 Master into the 1992 Master allows a Termination Event to occur under a 1992 Master if an "act of state" prevents payments or deliveries being made or obligations being performed under the agreement.

Section 5(b)(ii) 1992 Master/Section 5(b)(iii) 2002 Master: Tax Event

Under this section of the ISDA Master, a TE occurs under the ISDA Master if, as a result of certain tax-related events that occur after a transaction has been entered into under the ISDA Master (and which are beyond the control of a party to the ISDA Master - for example, a change in tax law), a party (the Affected Party) is obligated to withhold for tax purposes under Section 2(d): Deduction or Withholding for Tax and as a result:

- The payer must gross up for such tax under Section 2(d): Deduction or Withholding for Tax; or
- The payee does not receive a gross up for such tax under Section 2(d): Deduction or Withholding for Tax, other than by reason of:
  - The payee failing to comply with:
    - Section 4(a)(i): Furnish specified tax information (for an overview on the consequence of a breach of Section 4(a)(i): Furnish specified tax information, see Section 2(d): Deduction or Withholding for Tax);
    - Section 4(a)(iii): Furnish withholding tax information (for an overview on the consequence of a breach of Section 4(a)(iii): Furnish withholding tax information, see Section 2(d): Deduction or Withholding for Tax); or
    - Section 4(d): Tax Agreement (for an overview on the consequence of a breach of Section 4(d): Tax Agreement, see Section 2(d): Deduction or Withholding for Tax); or
  - The payee representation in Section 3(f): Payee Tax Representations being incorrect, unless the only reason it is incorrect is because of:
    - a change in law;
    - a change in the interpretation of the law; or
    - an action taken by a tax authority after the relevant transaction is entered into.

A TE does not occur under this section if the gross up only relates to interest payable due to a late payment as contemplated under:

- Section 9(h): Interest and Compensation (2002 Master), if under a 2002 Master.
- Section 2(e): Default Interest; Other Amounts (1992 Master), Section 6(d): Calculations (1992 Master)/Calculations; Payment Date (2002 Master) and/or Section 6(e): Payments on Early Termination, if under a 1992 Master.

For an overview on withholding and "gross up," see Section 2(d): Deduction or Withholding for Tax.

The following Tax Event-specific provisions need to be considered if a Tax Event occurs under this section:

- Section 6(b)(ii): Right to Terminate Following Termination Event, Transfer to Avoid Termination Event.
- Section 6(b)(iii): Right to Terminate Following Termination Event, Two Affected Parties.
- Section 6(b)(iv): Right to Terminate Following Termination Event, Right to Terminate.

For an overview of the consequences of the occurrence of this TE, see Section 6: Early Termination and for a detailed explanation, see Practice Note, The ISDA Master Agreement: Early Termination.

Section 5(b)(iii) 1992 Master/Section 5(b)(iv) 2002 Master: Tax Event Upon Merger

Under this section of the ISDA Master, a TE occurs under the ISDA Master if an amount payable under the ISDA Master will become subject to a withholding for tax as a result of a party:

- Merging with, or transferring all or most of its assets to, another entity; or
- Under the 2002 Master, reorganizing or reconstituting itself as another entity;

and, as a result, the other party:

- Is required to gross up for such tax under Section 2(d): Deduction or Withholding for Tax; or
- Does not receive a gross up for such tax under Section 2(d): Deduction or Withholding for Tax, other than by reason of:
  - The payee failing to comply with:
    - Section 4(a)(i): Furnish specified tax information;
    - Section 4(a)(iii): Furnish withholding tax information; or
    - Section 4(d): Tax Agreement.
  - The payee representation in Section 3(f): Payee Tax Representations being incorrect unless the only reason it is incorrect is because of:
    - a change in law;
    - a change in the interpretation of the law; or
    - an action taken by a tax authority after the relevant transaction is entered into.

Note that the surviving entity is the Affected Party.

A TE does not occur under this section if the gross up only relates to interest payable due to a late payment as contemplated under:

- Section 9(h): Interest and Compensation (2002 Master), if under a 2002 Master.
- Section 2(e): Default Interest; Other Amounts (1992 Master), Section 6(d): Calculations (1992 Master)/Calculations; Payment Date (2002 Master) and/or Section 6(e): Payments on Early Termination, if under a 1992 Master.

A TE also does not occur under this section if the events giving rise to this TE also constitute a default under Section 5(a)(viii): Merger Without Assumption.

For an overview on withholding and "gross up," see Section 2(d): Deduction or Withholding for Tax.

The following Tax Event Upon Merger-specific provisions need to be considered if a Tax Event Upon Merger occurs under this section:

- Section 6(b)(ii): Right to Terminate Following Termination Event, Transfer to Avoid Termination Event.
- Section 6(b)(iv): Right to Terminate Following Termination Event, Right to Terminate.

For an overview of the consequences of the occurrence of this TE, see Section 6: Early Termination (1992 Master)/Early Termination; Close-out Netting (2002 Master) and for a detailed explanation, see Practice Note, The ISDA Master Agreement: Early Termination.

Section 5(b)(iv) 1992 Master/Section 5(b)(v) 2002 Master: Credit Event Upon Merger

Under this section of the ISDA Master, a TE occurs under the ISDA Master if Section 5(b)(v) of a 2002 Master or Section 5(b)(iv) of a 1992 Master is specified under Part 1(d) of the Schedule: Credit Event Upon Merger as applying to a party to the agreement and

- Any of:
  - that party,
  - a Credit Support Provider of that party; or
  - if Part 1(a) of the Schedule: Specified Entity specifies that Section 5(b)(v) of a 2002 Master or Section 5(b)(iv) of a 1992 Master applies to a Specified Entity of that party, that Specified Entity;

  merges with, or transfers all or most of its assets to another entity (or, under a 2002 Master reorganizes or reconstitutes itself as another entity), which results in a material reduction in that entity's or the surviving entity's creditworthiness; or
- Any person or related group of persons acquires directly or indirectly the beneficial ownership of equity securities having the power to control:
  - that party;
  - the Credit Support Provider of that party; or

    - if Part 1(a) of the Schedule: Specified Entity specifies that this section applies to a Specified Entity of that party, that Specified Entity; or
- Any person or related group of persons acquires directly or indirectly the beneficial ownership of equity securities having the power to elect the majority of the directors (or equivalent) of:
    - that party;
    - the Credit Support Provider of that party; or
    - if Part 1(a) of the Schedule: Specified Entity specifies that this section applies to a Specified Entity of that party, that Specified Entity; or
- If there are certain changes to the capital structure of:
    - that party;
    - the Credit Support Provider of that party; or
    - if Part 1(a) of the Schedule: Specified Entity specifies that this section applies to a Specified Entity of that party, that Specified Entity;

  that result in a material reduction in the creditworthiness of that entity or its successor.

The Affected Party is that party or its successor.

Note that if events occur that give rise to both a TE under this section and an EOD under Section 5(a)(viii): Merger Without Assumption, the provisions of Section 5(a)(viii): Merger Without Assumption apply and this section is inapplicable.

For an overview of the consequences of the occurrence of this TE, see Section 6: Early Termination (1992 Master)/Early Termination; Close-out Netting (2002 Master) and for a detailed explanation, see Practice Note, The ISDA Master Agreement: Early Termination.

Section 5(b)(v) 1992 Master/Section 5(b)(vi) 2002 Master: Additional Termination Event

Under this section of the ISDA Master, a TE occurs under the ISDA Master if events specified by the parties in Part 1(g) of the 2002 Schedule/Part 1(h) of the 1992 Schedule: Additional Termination Event occur with respect to one or both of the parties.

This section provides the parties with the option of specifying events as TEs under the ISDA Master that are not otherwise included. For more detail, see Part 1(g) of the 2002 Schedule/Part 1(h) of the 1992 Schedule: Additional Termination Event.

For an overview of the consequences of the occurrence of this TE, see Section 6: Early Termination (1992 Master)/Early Termination; Close-out Netting (2002 Master) and for a detailed explanation, see Practice Note, The ISDA Master Agreement: Early Termination.

Section 5(c): Hierarchy of Events

1992 Master. Under Section 5(c) of the 1992 Master, if events or circumstances that would otherwise constitute an EOD also constitute an Illegality, they are treated as an Illegality and not as an EOD.

2002 Master. Under this section of the 2002 Master, if an EOD under either:

- Section 5(a)(i): Failure to Pay or Deliver;
- Section 5(a)(ii)(1): Breach of Agreement; or
- Section 5(a)(ii)(2): Repudiation of Agreement;

occurs and the default is due to:

- An Illegality; or
- A Force Majeure Event;

the event is to be treated as an Illegality or, where relevant, a Force Majeure Event.

Under the 2002 Master, if an event constitutes both an Illegality and a Force Majeure Event, it is to be considered an Illegality and the provisions of Section 5(b)(i): Illegality apply.

For an overview of:

- Illegality and its consequences, see Section 5(b)(i): Illegality.

- Force Majeure Event and its consequences, see Section 5(b)(ii): Force Majeure Event (2002 Master).

Section 5(d): Deferral of Payments and Deliveries During Waiting Period (2002 Master)

This section of the ISDA Master confirms that a payment or delivery under the ISDA Master will be due if an Illegality or a Force Majeure Event occurs on the first Local Business Day or local delivery day after the end of any applicable waiting period.

Section 5(e): Inability of Head or Home Office to Perform Obligations of Branch (2002 Master)

This section applies under a 2002 Master where:

- An Illegality or Force Majeure Event affects the ability of an office which is a branch office of a party to the ISDA Master to make or receive a payment or delivery under the agreement; and

- As a result, the counterparty attempts to apply Section 10(a): Recourse to party's head office or home office; and

- The head office or home office is also unable to comply with the relevant obligation due to an event which, if the head office or home office were the branch office, would give rise to an Illegality or Force Majeure Event; then

such failure on the part of the head office or home office does not constitute an EOD under Section 5(a)(i): Failure to Pay or Deliver or Section 5(a)(iii): Credit Support Default.

Section 6: Early Termination (1992 Master)/Early Termination; Close-out Netting (2002 Master)

Section 6 is a critical provision in the ISDA Master. It describes the right to terminate certain transactions under the agreement and the liability of each party if an Event of Default or a Termination Event has occurred. Section 6 should be read carefully as the right to terminate may only arise if certain preconditions have been satisfied. The procedures and consequences are different depending upon whether an EOD or TE occurs.

In the case of an EOD, all transactions entered into under the ISDA Master may be terminated by the Non-defaulting Party. See Section 6(a): Right to Terminate Following Event of Default for more detail on a termination following an EOD. If a TE occurs, less than all transactions – only Affected Transactions – may be terminated.

The definition of "Affected Transactions" in Section 14: Definitions combined with the terms of Section 6(b): Right to Terminate Following Termination Event determines which transactions can be terminated in the event of a Termination Event: Only the transactions affected by the TE (Affected Transactions) may be terminated, except that all transactions entered into under the ISDA Master may be terminated in the case of a TE under Section 5(b)(iv) 1992 Master/Section 5(b)(v) 2002 Master: Credit Event Upon Merger or Section 5(b)(v) 1992 Master/Section 5(b)(vi) 2002 Master: Additional Termination Event. See Section 6(b): Right to Terminate Following Termination Event for more detail on early termination following a TE.

The Early Termination Date is the date on which the termination of the transactions becomes effective. Note that, upon the exercise of early termination rights under the ISDA Master, it is not the ISDA Master and supporting documentation between the parties that is terminated, but rather all or certain transactions entered into by the parties under the ISDA Master (as discussed below).

- **Conditions precedent to early termination.** For a quick reference table of applicable conditions precedent to the Events of Default and Termination Events under the ISDA Master, including, in some cases, notice and a cure period, see The ISDA Master Agreement: Early Termination Checklist: Notice Requirements, Cure Periods, and Conditions Precedent to Early Termination Under the ISDA Master. Note that these conditions are also covered below, as applicable.

- **Consequences of early termination.** For a discussion of economic and other considerations relevant to a decision to exercise early termination rights under the ISDA Master, see Practice Note, The ISDA Master Agreement: Early Termination: Consequences of Early Termination: Is Early Termination the Best Course of Action?

- **The Metavante case.** Note that early termination rights exercised by a party as a result of its counterparty becoming subject to US bankruptcy proceedings must be exercised "promptly" or may be deemed to be waived. For details, see Practice Note, The ISDA Master Agreement: Early Termination: Early Termination and the Metavante Ruling and Article, The Bankruptcy Court Ruling in the Lehman Metavante Matter.

Stays on Early Termination

ISDA Resolution Stays. Uncleared swaps entered into by certain large global banking institutions and their counterparties may also be subject to a stay of early termination rights lasting up to 48 hours, depending on whether the parties to the swap have adhered to one of ISDA's Resolution Stay Protocols.

In an effort to address global too-big-to-fail issues, global banks have agreed to adhere to one of these protocols to stay early termination rights under their swaps contracts in the event the bank enters into receivership or similar proceedings. In 2014, ISDA announced the 2014 Resolution Stay Protocol (2014 RSP), to which 18 global banks originally agreed to adhere to at launch. ISDA expanded the 2014 RSP with the launch of the 2015 Universal Resolution Stay Protocol (2015 RSP), which includes securities lending and repo transactions. ISDA further modified the Resolution Stay Protocol in 2016 with the launch of the ISDA Resolution Stay Jurisdictional Modular Protocol (RSJMP), which permits market participants to comply across different jurisdictions.

For further details on the protocols, see Legal Updates, ISDA Expands Resolution Stay Protocol to Include Securities Lending and Repo Transactions and ISDA Launches Resolution Stay Jurisdictional Modular Protocol.

FDIC liquidation and resolution authority. A non-defaulting counterparty to an uncleared swap may be subject to a stay lasting up to one business day on its ability to terminate, liquidate, or net its swaps with its counterparty if its counterparty enter into Federal Deposit Insurance Corporation (FDIC) receivership and is:

- A nonbank covered financial company (CFC) subject to the FDIC's orderly liquidation authority (OLA) under Title II of the Dodd-Frank Act (see Practice Note, Summary of the Dodd-Frank Act: Resolution of Failing Financial Institutions and Legal Update, FDIC Clarifies Scope of Orderly Liquidation Authority).
- An insured depository institution (IDI) subject to the FDIC's bank resolution authority under the Federal Deposit Insurance Act (FDIA) (see Practice Note, The Role of the FDIC in a Bank Failure).

The protocols and FDIC stays would run concurrently to the extent more than one is applicable.

Section 6(a): Right to Terminate Following Event of Default

This section of the ISDA Master sets out the procedures that must be followed to give effect to early termination under the ISDA Master following the occurrence of an Event of Default under Section 5(a) of the ISDA Master. Under this section, where an EOD occurs and is continuing, provided that Automatic Early Termination is not selected (or "turned on") with respect to the Defaulting Party under Part 1(e) of the Schedule: Automatic Early Termination, the Non-defaulting Party has the right to terminate all outstanding transactions under the ISDA Master by giving not more than 20 days notice to the Defaulting Party.

Under Section 12: Notices, notice under this section of the ISDA Master may not be given:

- Under a 2002 ISDA Master, by electronic messaging system or email.
- Under a 1992 ISDA Master, by facsimile transmission or electronic messaging system.

For more information on the giving of notices under the ISDA Master, see Section 12: Notices.

For a sample form of notice that may be used in connection with this section of the ISDA Master, see Standard Document, The ISDA Master Agreement: Sample Notice of Default and Early Termination Under ISDA Master Agreement.

For a quick reference table of applicable conditions precedent to the Events of Default under the ISDA Master, including, in some cases, notice and a cure period, see The ISDA Master Agreement: Early Termination Checklist: Conditions Precedent to Events of Default Under the ISDA Master. Note that these conditions are also covered below, as applicable.

Automatic Early Termination. If Automatic Early Termination is turned on with respect to a party to the agreement under Part 1(e) of the Schedule: Automatic Early Termination, the occurrence of the following events in relation to that party under Section 5(a)(vii): Bankruptcy automatically terminate all transactions under the ISDA Master:

- A dissolution of that party.
- That party enters into an arrangement, assignment, or composition with its creditors.
- That party passes a winding-up resolution.
- An administrator or similar insolvency practitioner is appointed with respect to that party.

The advantage of Automatic Early Termination is that the termination of the transactions (and the resulting netting of amounts owed under the transactions) occurs before a bankruptcy trustee, receiver, or other insolvency practitioner can attempt to reject or disclaim any transaction (see Section 1(c): Single Agreement). Note, however, that in many jurisdictions, including the US, "mutuality" is required for netting under an agreement such as the ISDA Master to be upheld in a bankruptcy proceeding (see Article, Lehman-Swedbank Decision Holds that Mutuality Must Exist to Exercise Right of Setoff Under Swap).

The disadvantages of Automatic Early Termination include the following:

- The Non-defaulting Party may not be aware that the automatic termination and consequential netting has occurred.
- The automatic termination and consequential netting of the transactions may be detrimental to the Non-defaulting Party if, due to the timing of the termination and as a result of the netting, an amount becomes payable by the Non-defaulting Party to the Defaulting Party. If, as a result of Automatic Early Termination, an amount becomes payable by the Non-defaulting Party to the Defaulting Party, interest accrues against the Non-defaulting Party under Section 9(h): Interest and Compensation of a 2002 Master or under Section 2(e): Default Interest; Other Amounts of a 1992 Master.

Legal opinions on the effectiveness of close-out netting and Automatic Early Termination are available to ISDA members on the ISDA website.

Setoff and close-out netting. The implications of **setoff** under the ISDA Master should be considered if there is an early termination as a result of an EOD. The right of setoff of the Early Termination Amount is set out in Section 6(f): Set-Off under a 2002 Master. While there is no corresponding Section 6(f) under the 1992 Master, similar (but less limited) early termination set-off rights are contemplated under the last sentence of Section 6(e): Payments on Early Termination of the 1992 Master.

Termination and close-out netting give rise to important legal issues under the ISDA Master. To understand these issues, the effect of Section 6(e): Payments on Early Termination must be examined.

Section 6(b): Right to Terminate Following Termination Event

This section of the ISDA Master sets out the procedures that must be followed to give effect to early termination under the ISDA Master following the occurrence of a Termination Event under Section 5(b) of the ISDA Master. Only Affected Transactions may be terminated, except that all transactions may be terminated in the case of a TE under Section 5(b)(iv) 1992 Master/Section 5(b)(v) 2002 Master: Credit Event Upon Merger or Section 5(b)(v) 1992 Master/Section 5(b)(vi) 2002 Master: Additional Termination Event.

For a quick reference table of applicable conditions precedent to the Termination Events under the ISDA Master, including, in some cases, notice and a cure period, see The ISDA Master Agreement: Early Termination Checklist: Conditions Precedent to Termination Events Under the ISDA Master. Note that these conditions are also covered below, as applicable.

The implications of setoff under the 2002 Master should be considered if there is an early termination as a result of the following Termination Events:

- A Credit Event Upon Merger; or
- A Termination Event where only one party is entitled to terminate the Affected Transactions.

While there is no corresponding Section 6(f) under the 1992 Master, similar (but less limited) early termination set-off rights are contemplated under the last sentence of Section 6(e): Payments on Early Termination of the 1992 Master.

The sections below provide more detail on the provisions that comprise Section 6(b) of the ISDA Master.

Section 6(b)(i): Notice

This section of the ISDA Master confirms that an Affected Party must promptly notify the other party as soon as it becomes aware of the occurrence of a Termination Event (other than a Force Majeure Event). The notice must also include details of the transactions affected by the TE.

If a Force Majeure Event occurs under a 2002 Master, each party, upon becoming aware of the event, is under an obligation to "promptly" notify the other party of the existence of the event.

Under Section 12: Notices, notice under this section of the ISDA Master may not be given:

- Under a 2002 ISDA Master, by electronic messaging system or email.
- Under a 1992 ISDA Master, by facsimile transmission or electronic messaging system.

For more information on the giving of notices under the ISDA Master, see Section 12: Notices.

Section 6(b)(ii): Transfer to Avoid Termination Event

This section of the ISDA Master requires that an attempt must be made to transfer transactions affected by the occurrence of a TE under the following sections of the ISDA Master to another office or affiliate of the Affected Party before an Early Termination Date can be designated under Section 6(b)(iv): Right to Terminate:

- Section 5(b)(ii) 1992 Master/Section 5(b)(iii) 2002 Master: Tax Event if there is only one Affected Party; or
- Section 5(b)(iii) 1992 Master/Section 5(b)(iv) 2002 Master: Tax Event Upon Merger, provided the Burdened Party is the Affected Party; or
- Under a 1992 Master only, Section 5(b)(i)(1): Illegality (relating to failure to make a payment or delivery under the ISDA Master) if there is only one Affected Party;

If the transfer is successful within 20 days after notice is given under Section 6(b)(i): Notice, early termination as a result of these Termination Events is avoided. If such transfer is not successful, the Affected Party must notify the other party and the other party then has ten additional days to effect a transfer before early termination may be effected. Any such transfer under this section is subject to the written consent of the other party.

Section 6(b)(iii): Two Affected Parties

This section of the ISDA Master sets out the steps that must be taken where there are two Affected Parties before an Early Termination Date can be designated under Section 6(b)(iv): Right to Terminate as a result of:

- A TE under Section 5(b)(ii) 1992 Master/Section 5(b)(iii) 2002 Master: Tax Event; or
- Under a 1992 Master only, Section 5(b)(i)(1): Illegality (relating to failure to make a payment or delivery under the ISDA Master).

Under this section, the parties must use reasonable efforts to reach agreement to avoid the TE within 30 days of notice of the TE being given under Section 6(b)(i): Notice.

Section 6(b)(iv): Right to Terminate

Section 6(b)(iv) of the ISDA Master sets out the rights of the parties to designate, and the mechanics for designating, an Early Termination Date under the ISDA Master if a TE occurs and is continuing. The Early Termination Date is the date on which the termination of the transactions becomes effective.

Note that the notice referred to under this section of the ISDA Master may not be given:

- Under a 2002 ISDA Master, by electronic messaging system or email.
- Under a 1992 ISDA Master, by facsimile transmission or electronic messaging system.

For more information on the giving of notices under the ISDA Master, see Section 12: Notices.

2002 Master

Under this section of the 2002 Master:

- **Illegality.** If a TE under Section 5(b)(i): Illegality occurs, after three Local Business Days (or days that otherwise would have been Local Business Days), by giving not more than 20 days notice to the other party, either party may:
  - Designate an Early Termination Date for all Affected Transactions.
  - Designate an Early Termination Date for fewer than all Affected Transactions that is two Local Business Days after the date on which notice specified above is effective. Within this time, the other party may, by notice to its counterparty, designate the same Early Termination Date for all or some of the remaining Affected Transactions.

  If the Illegality prevents compliance by either the Affected Party or any of its Credit Support Providers with any other material provision of the relevant Credit Support Document, an Affected Party only has the right to designate an Early Termination Date following the prior designation by the other party of such a date for less than all of Affected Transactions.

- **Force Majeure.** If a TE under Section 5(b)(ii): Force Majeure Event occurs, after eight Local Business Days (or days that otherwise would have been Local Business Days) by giving not more than 20 days notice to the other party:
  - Either party may designate an Early Termination Date for all Affected Transactions.

- Designate an Early Termination Date for fewer than all Affected Transactions that is two Local Business Days after the date on which notice specified above is effective. Within this time, the other party may, by notice to its counterparty, designate the same Early Termination Date for all or some of the remaining Affected Transactions.

  If the Force Majeure Event prevents compliance by either the Affected Party or any of its Credit Support Providers with any other material provision of the relevant Credit Support Document, an Affected Party only has the right to designate an Early Termination Date following the prior designation by the other party of such a date for less than all of Affected Transactions.

- **Tax Event.** Subject to Section 6(b)(iii): Two Affected Parties, if a TE under Section 5(b)(iii): Tax Event occurs, provided Section 6(b)(ii): Transfer to Avoid Termination Event has been complied with, the following parties are entitled to designate an Early Termination Date for all Affected Transactions by giving not more than 20 days notice to the other party:
  - Any party that would have to make a gross up under Section 2(d): Deduction or Withholding for Tax as a result of the Tax Event if a payment were made under the 2002 Master.
  - Any party that would not be entitled to a gross up under Section 2(d): Deduction or Withholding for Tax if a withholding is made as a result of the Tax Event.
- **Tax Event Upon Merger.** If a TE under Section 5(b)(iv): Tax Event Upon Merger occurs, provided Section 6(b)(ii): Transfer to Avoid Termination Event has been complied with, the following parties are entitled to designate an Early Termination Date for all Affected Transactions by giving not more than 20 days notice to the other party:
  - The party that would have to make a gross up under Section 2(d): Deduction or Withholding for Tax as a result of the other party's Tax Event Upon Merger if a payment were made under the 2002 Master.
  - The party that would not be entitled to a gross up under Section 2(d): Deduction or Withholding for Tax if a withholding is made as a result of the other party's Tax Event Upon Merger.
- **Credit Event Upon Merger.** If a TE under Section 5(b)(v): Credit Event Upon Merger occurs, the following parties are entitled to designate an Early Termination Date for all, but not less than all, transactions under the ISDA Master (all transactions are Affected Transactions) by giving not more than 20 days notice to the other party:
  - The counterparty to the party that has merged or transferred its assets in the manner contemplated under Section 5(b)(v): Credit Event Upon Merger.
  - The counterparty to the party whose Credit Support Provider has merged or transferred its assets in the manner contemplated under Section 5(b)(v): Credit Event Upon Merger.
  - If Part 1(a) of the Schedule: Specified Entity specifies that Section 5(b)(v): Credit Event Upon Merger applies to a Specified Entity, the counterparty to the party that lists the Specified Entity that has merged or transferred its assets in the manner contemplated under Section 5(b)(v): Credit Event Upon Merger.
- **Additional Termination Event (ATE).** If an ATE under Section 5(b)(vi) 2002 Master: Additional Termination Event occurs, the following parties are entitled to designate an Early Termination Date for all, but not less than all, transactions under the ISDA Master (all transactions are Affected Transactions) by giving not more than 20 days notice to the other party:
  - Any party if there are two Affected Parties (as that term is defined for the relevant Termination Event under Part 1(g) of the 2002 Schedule).
  - The Non-affected Party if there is only one Affected Party, as that term is defined for the relevant Termination Event under Part 1(g) of the 2002 Schedule. (Note that the 1992 Master does not use the defined term "Non-affected Party," however, the effect is the same).

1992 Master

Under this section of the 1992 Master, if the relevant TE is continuing, the following parties are entitled to designate an Early Termination Date for all Affected Transactions by giving not more than 20 days notice to the other party:

- **Illegality.** Subject to Section 6(b)(iii): Two Affected Parties, and provided Section 6(b)(ii): Transfer to Avoid Termination Event has been complied with (in each case, no earlier than 30 days after notice under Section 6(b)(i): Notice has been provided), either party.
- **Tax Event.** Subject to Section 6(b)(iii): Two Affected Parties, and provided Section 6(b)(ii): Transfer to Avoid Termination Event has been complied with (in each case, no earlier than 30 days after notice under Section 6(b)(i): Notice has been provided), any Affected Party.

- **Tax Event Upon Merger.** Provided Section 6(b)(ii): Transfer to Avoid Termination Event has been complied with, the Burdened Party if the Burdened Party is not the Affected Party.
- **Credit Event Upon Merger.** The party that is not the Affected Party, or, if Part 1(a) of the Schedule: Specified Entity specifies that Section 5(b)(iv): Credit Event Upon Merger applies to a Specified Entity, the counterparty to the party that lists the Specified Entity that has merged or transferred its assets in the manner contemplated under Section 5(b)(iv): Credit Event Upon Merger.
- **ATE.** Any Affected Party if there is more than one Affected Party and the party that is not the Affected Party where there is only one Affected Party.

Sections 6(c): Effect of Designation

This section of the ISDA Master confirms that once notice is given designating an Early Termination Date under Section 6(a): Right to Terminate Following Event of Default or Section 6(b): Right to Terminate Following Termination Event:

- The Early Termination Date occurs whether or not the EOD or TE is continuing.
- No further payments or deliveries are to be made under the terminated transactions and a net amount is calculated for the terminated transactions. This amount becomes payable by the party that is **out of the money** in the aggregate in accordance with Section 6(e): Payments on Early Termination.

Section 6(d): Calculations (1992 Master)/Calculations; Payment Date (2002 Master)

This section of the ISDA Master sets out each party's obligation to send a calculation statement/calculation notice to the other party reflecting amounts due and owing under Section 6(e): Payments on Early Termination. The calculation statement must specify in detail the amounts owed by the parties to one another under Section 6(e) of the ISDA Master, with a net payment amount specified. It should include the details of any relevant account(s) into which payment may be made. The calculation statement should be delivered as soon as reasonably practicable on or after the Early Termination Date.

Under both the 2002 Master and the 1992 Master, the early termination payment under Section 6(e): Payments on Early Termination is due:

- The day that the calculation notice is "effective" if the early termination is the result of an Event of Default under the ISDA Master.
- Two Local Business Days after the calculation notice is "effective" if the early termination is the result of a Termination Event under the ISDA Master.

The ISDA Master does not specify what or how the notice becomes "effective," but it is assumed in practice that it becomes effective upon delivery. The notice requirements of Section 12: Notices, of course, apply to the calculation statement delivered under this section. Therefore, the calculation statement may not be delivered:

- Under a 2002 ISDA Master, by electronic messaging system or email.
- Under a 1992 ISDA Master, by facsimile transmission or electronic messaging system.

For more information on the giving of notices under the ISDA Master, see Section 12: Notices.

For a sample calculation notice that may be used under this section of the ISDA Master, see Standard Document, The ISDA Master Agreement: Sample Notice of Early Termination Amount (Calculation Statement).

For further information on the calculation statement, see Practice Note, The ISDA Master Agreement: Early Termination: Delivery of Calculation Statement.

Section 6(e): Payments on Early Termination

This section of the ISDA Master details the manner in which the early termination payment is to be calculated for transactions terminated as a result of an Event of Default or Termination Event under the ISDA Master. Under this section of the ISDA Master, the terminated transactions are given a replacement value, with any unpaid amounts already due and owing under the agreement also accounted for. Each of these amounts are then set off against each other to produce an overall net amount owed by the party that is out of the money in the aggregate to the party that is in the money in the aggregate. This is achieved through the following calculation mechanics under the ISDA Master:

- **1992 Master:** First Method or Second Method and Market Quotation or Loss (as elected by the parties under Part 1(f) of the 1992 Schedule) are used to determine the Settlement Amount, which is the early termination payment under a 1992 Master.

- **2002 Master:** The Close-out Amount is added to the Unpaid Amounts to determine the Early Termination Amount, which is the early termination payment under a 2002 Master.

For a detailed explanation of the early termination payment calculation mechanics under both the 1992 Master and the 2002 Master, including calculation of the Settlement Amount under a 1992 Master and the Close-out Amount under the 2002 Master, see Practice Note, The ISDA Master Agreement: Early Termination: Early Termination Payment Methodologies Under Section 6(e) of the ISDA Master.

Early termination payment may be subject to interest accrual. The Section 6(e) early termination payment may be subject to interest accrual, if it is not paid promptly, under:

- Section 2(e): Default Interest; Other Amounts (1992 Master).

- Section 9(h)(ii): Early Termination (2002 Master).

For a detailed explanation of the interest rate provisions applicable to these amounts, and a helpful comparison table of how interest is calculated under each of the 1992 and 2002 Masters, see Practice Note, Comparison of 1992 and 2002 ISDA Master Agreements: Interest Rate Accrual Comparison Table.

Termination currency. The parties to the ISDA Master usually agree on a currency under Part 1(f) of the 2002 Schedule/Part 1(g) of the 1992 Schedule: Termination Currency (referred to as the Termination Currency) into which the early termination payment is to be converted and paid. The method of conversion is set out in the definition of "Termination Currency" in Section 14: Definitions.

Setoff of early termination payments against other amounts owed between the parties. The early termination payment may be subject to a right of setoff against other amounts owed between the parties. Section 6(e) of the 1992 Master specifies that payments made under this section are subject to "any" right of setoff, whether under the ISDA Master or any other agreements between the parties. Setoff of the Early Termination Amount under a 2002 Master is addressed in Section 6(f): Set-Off.

Important US cases on Section 6(e) of the ISDA Master:

- For information on an important case on the enforceability of the settlement calculation methodology of the ISDA Master in US bankruptcy proceedings, see Legal Update, In re Lehman: ISDA Swaps Liquidation Methodology Protected by Section 560 Safe Harbor.

- For details on an informative "battle of the experts" case on the early termination payment under Section 6(e) of a 1992 Master Agreement, see Legal Update, Solstice II: SDNY Determines Early Termination Payment for ABS Swap Under ISDA Master Agreement.

- For details on a landmark case in the SDNY Bankruptcy Court on the calculation of “Loss” under the 1992 Master, see Legal Update, Lehman v. Intel: SDNY Gives Non-Defaulting Party Broad Discretion in Calculating Loss Under 1992 ISDA Master.

Section 6(e)(i): Events of Default

This section of the ISDA Master details how the early termination payment is to be calculated if early termination occurs as the result of an Event of Default.

This section of the ISDA Master specifies that, if an Event of Default occurs, the early termination payment is calculated by the Non-defaulting Party in accordance with the terms of this section. The calculation must:

- Be made in good faith.

- Use commercially reasonable procedures to produce a commercially reasonable result.

Under this section of the ISDA Master, the terminated transactions are given a replacement value with any Unpaid Amounts already due and owing under the agreement also accounted for. Each of these amounts are then set off against each other (netted) to determine an overall net amount owed. This is achieved through the following mechanics under the ISDA Master:

1992 Master: Under the 1992 Master, the Section 6(e) early termination payment is equal to the Settlement Amount. The Settlement Amount under a 1992 Master is determined by using one of two metrics selected by the parties in Part 1(f) of the 1992 Schedule and adding the results for all terminated transactions:

- Market Quotation.

- Loss.

If Market Quotation has been selected by the parties but is not available or would not yield a commercially reasonable result for a particular terminated transaction, the Loss calculation is used for that transaction.

Note that the 1992 Master also includes the following options for payment of the Settlement Amount, as selected by the parties in Part 1(f) of the 1992 Schedule:

- First Method. Under First Method, only the non-defaulting party is entitled to a termination payment. This provision is viewed as draconian and is rarely used.

- Second Method. Under the Second Method, the party that is owed the early termination payment receives the payment regardless of whether it is the defaulting or non-defaulting party under the agreement. Use of Second Method has been and continues to be the prevailing market practice since use of the 1992 Master began.

For a detailed explanation of the early termination payment calculation mechanics under the 1992 Master, including details of the Market Quotation and Loss metrics and how the Settlement Amount is determined, see Practice Note, The ISDA Master Agreement: Early Termination: 1992 Master: Settlement Amount.

Note that the early termination payment under the 2002 Master may be subject to:

- Rights of setoff against other amounts owed between the parties, whether under the ISDA Master or any other agreements between the parties.

- Interest accrual.

For more information on these, see Section 6(e): Payments on Early Termination.

2002 Master: Under the 2002 Master, the Close-out Amount is added to the Unpaid Amounts to determine the Early Termination Amount, which is the Section 6(e) early termination payment. The 2002 Master omits the First Method/Second Method option from the 1992 Master. Under the 2002 Master, the party that is owed the early termination payment receives the payment regardless of whether it is the defaulting or non-defaulting party under the agreement. The 2002 Master also omits the Market Quotation/Loss distinction. Under the 2002 Master, the Close-out Amount is somewhat of an amalgamation of these two methodologies.

For a detailed explanation of these early termination payment calculation mechanics under the 2002 Master, including details of how the Close-out Amount is calculated, see Practice Note, The ISDA Master Agreement: Early Termination: 2002 Master: Close-out Amount.

Note that the Early Termination Amount under the 2002 Master may be subject to:

- Rights of setoff against other amounts owed between the parties, whether under the ISDA Master or any other agreements between the parties.

- Interest accrual.

For more information on these, see Section 6(e): Payments on Early Termination.

Termination and Close-out Netting Under the ISDA Master

Section 6(e): Payments on Early Termination provides for the calculation of a net amount owing by one party to the other upon an early termination of all or any of the transactions under the ISDA Master. This is the same under both the 1992 Master and the 2002 Master.

For example, if Party A owes $1,500,000 under one transaction and Party B owes $500,000 under another transaction, the net amount is $1,000,000 owed by Party A to Party B. This net amount is defined:

- In the 2002 Master as the Early Termination Amount.

- In the 1992 Master as the "Settlement Amount."

The effectiveness of the provision may depend upon:

- Whether the terminated transactions are mutual. For an overview on mutuality, see below, Termination and Close-out Netting Under the ISDA Master.

- If one of the parties is subject to bankruptcy proceedings, whether the bankruptcy trustee can cherry-pick the transactions. For an overview on cherry-picking, see Section 1(c): Single Agreement.

Legal opinions on the effectiveness of the netting of terminated transactions in different jurisdictions are available to ISDA members on the ISDA website.

Note that in many jurisdictions, including the US, "mutuality" is required to effect netting under an agreement such as the ISDA Master in a bankruptcy proceeding. For details, see Legal Updates:

- Lehman-Swedbank Decision Holds that Mutuality Must Exist to Exercise Right of Setoff Under Swap.
- Lehman Court Holds Triangular Setoff Provisions Unenforceable in Bankruptcy.
- In re American Home Mortgage: Triangular Setoff Again Disallowed Under Bankruptcy Code.

Netting under the ISDA Master is important because there is a significant reduction of credit risk under a transaction if a party can net obligations against its counterparty. For example, if Party A owes $500,000 to its counterparty, Party B, and Party B owes $2,000,000 to Party A, then:

- If the obligations cannot be netted and Party B becomes insolvent, to the extent it is unsecured (that is, to the extent margin collateral has not been posted to it by Party B to cover **exposure** under the transaction), Party A is exposed for the full $2,000,000 it is owed by Party B, while still owing $500,00 to Party B.
- If the obligations can be netted, the amount owed by Party B to Party A would be reduced by the amount Party A owes to Party B. As a result, Party A discharges the debt it owes to Party B and would have a claim against Party B for $1,500,000 (the original debt owed by Party B of $2,000,000 less the debt owed by Party A of $500,000).

The legal issues that are relevant to netting are:

- Whether termination netting is enforceable under both the governing law of the 2002 Master and any law likely to govern the insolvency of the counterparty.
- Whether the transactions under the 2002 Master can be cherry-picked. For information on cherry-picking, see Section 1(c): Single Agreement.

In terms of the question of enforceability, under US law the concept of "mutuality" is the key to understanding whether netting (otherwise known as "set-off") is enforceable.

Mutuality occurs where each of the obligations being netted is owed between the same principal parties, for example:

- Obligations under two contracts entered into between party A (as principal) with party B (as principal) will be mutual as both contracts are between the same principal parties (party A and party B).
- Obligations under a contract entered into between party A (in the capacity as an agent for party C) with party B (as principal) would not be mutual with obligations under a contract entered into between party A (as principal) and party B (as principal). This is because the two contracts are between different principal parties (the first contract is between Party B and Party C and the second contract is between Party A and Party B).
- Obligations under two contracts entered into between party A (in the capacity as an agent for party C) with party B (as principal) would be mutual as both contracts are between the same principal parties (party C and party A).

Legal opinions on the effectiveness of the netting of terminated transactions in different jurisdictions are available to ISDA members on the ISDA website.

Section 6(e)(ii): Termination Events

This section of the ISDA Master details how the early termination payment is to be calculated if early termination occurs as the result of a Termination Event.

This section of the ISDA Master specifies that, if a Termination Event occurs:

- Where there is only one Affected Party, the early termination payment is calculated by the Non-affected Party (or, under a 1992 Master, the party that is not the Affected Party) in accordance with Section 6(e)(i): Events of Default. (Note that the 1992 Master does not use the defined term "Non-affected Party," however, the party that is not the Affected Party is charged with making the calculation).
- Where there are two Affected Parties (other than, under a 2002 Master only, in the case of an Illegality or a Force Majeure Event), both parties calculate the net early termination payment for the affected transactions in the same manner as if there were only one Affected Party and the early termination payment is equal to half of the difference between the two calculations.

- If the Termination Event is an Illegality or a Force Majeure Event under a 2002 Master, the Early Termination Amount is calculated in accordance with the above provisions. However, when calculating the Close-out Amount prong of the Early Termination Amount, if obtaining quotations from third parties:
  - the third parties must be instructed not to account for the creditworthiness of the party determining the Close-out Amount (the Determining Party) or the existence of any Credit Support Document in support of that party's obligations under the ISDA Master when getting quotations.
  - "mid-market" quotations are to be used.

Under this section of the ISDA Master, in accordance with Section 6(e)(i): Events of Default, the terminated transactions are given a replacement value, with any Unpaid Amounts already due and owing under the agreement also accounted for. Each of these amounts are then set off against each other (netted) to produce an overall net amount owed by the party that is out of the money in the aggregate to the party that is in the money in the aggregate.

This is achieved through the following mechanics under the ISDA Master:

- **1992 Master:** First Method or Second Method and Market Quotation or Loss (elected by the parties under Part 1(f) of the 1992 Schedule) are used to determine the Settlement Amount, which is the early termination payment under a 1992 Master.
- **2002 Master:** The Close-out Amount is added to the Unpaid Amounts to determine the Early Termination Amount, which is the early termination payment under a 2002 Master.

For a detailed explanation of these early termination payment calculation mechanics and metrics under both the 1992 Master and the 2002 Master, see Practice Note, The ISDA Master Agreement: Early Termination: Early Termination Payment Methodologies Under Section 6(e) of the ISDA Master.

Note that the early termination payment under the ISDA Master may be subject to:

- Rights of setoff against other amounts owed between the parties, whether under the ISDA Master or any other agreements between the parties.
- Interest accrual.

For more information on these, see Section 6(e): Payments on Early Termination.

Section 6(e)(iii): Adjustment for Bankruptcy

Under this section of the ISDA Master, the early termination payment may be adjusted to account for payments or deliveries made by a party under the agreement between the occurrence of the Early Termination Date and the date the early termination payment is to be made in accordance with Section 6(d)(ii) where Automatic Early Termination has occurred.

Automatic Early Termination only applies where a party has become insolvent or subject to certain bankruptcy or insolvency proceedings, provided Automatic Early Termination has been elected under Part 1(e) of the Schedule: Automatic Early Termination. The section appears designed to address a situation where Automatic Early Termination has occurred without a party's knowledge that the agreement has been terminated.

For an overview of Automatic Early Termination and its application, see Part 1(e): Automatic Early Termination and Section 6(a): Right to Terminate Following Event of Default.

Section 6(e)(iv): Adjustment for Illegality or Force Majeure Event (2002 Master)

The section of the 2002 Master confirms that, where there is a failure to pay an Early Termination Amount that is due as a result of an Illegality or a Force Majeure Event:

- This does not give rise to an Event of Default under:
  - Section 5(a)(i): Failure to Pay or Deliver; or
  - Section 5(a)(iii)(1): Breach of Credit Support.
- Interest accrues on the amount in accordance with Section 9(h)(ii)(2): Interest on Early Termination Amounts, which specifies that interest accrues on such amounts at the "Applicable Close-out Rate." For an explanation of how the Applicable Close-out Rate is determined under these circumstances, see Practice Note, Comparison of 1992 and 2002 ISDA Master Agreements: Expanded Interest Rate Provisions: Interest on Deferred and Defaulted Payments.

The section also confirms that if all transactions entered into under the ISDA Master are subsequently terminated as a result of:

- An Event of Default;
- A Credit Event Upon Merger; or
- An Additional Termination Event;

then the amount owing accrues interest in accordance with Section 9(h)(ii)(1): Unpaid Amounts and is otherwise treated as an "Unpaid Amount," as that term is defined in Section 14: Definitions.

The 1992 Master does not include a comparably elaborate interest rate provision. It is assumed interest amounts under the circumstances discussed in this section, if occurring under a 1992 Master, would be governed by Section 2(e): Default Interest; Other Amounts.

For further details on the expanded interest rate provisions of the 2002 Master, as well as details on the interest rate provisions under the 1992 Master, including a table providing a comparison between the two, see Practice Note, Comparison of 1992 and 2002 ISDA Master Agreements: Expanded Interest Rate Provisions: Interest on Deferred and Defaulted Payments.

Section 6(e)(iv) 1992 Master/Section 6(e)(v) 2002 Master: Pre-Estimate

This section of the ISDA Master specifies that the early termination payment calculated in accordance with Section 6(e): Payments on Early Termination is the only amount owed as a result of early termination of transactions under Section 6: Early Termination (1992 Master)/Early Termination; Close-out Netting (2002 Master), except as otherwise provided in the 2002 Master (see, for example, Section 11: Expenses). This amount is therefore expected to cover a party's future loss of bargain in having to terminate the transaction(s).

Section 6(f): Set-Off (2002 Master)

This section of the 2002 Master allows for amounts owing between the parties, whether arising under the ISDA Master or otherwise, to be set off against one another if there is an early termination of all transactions under the ISDA Master under Section 6: Early Termination (1992 Master)/Early Termination; Close-out Netting (2002 Master) as a result of:

- An Event of Default;
- A Credit Event Upon Merger; or
- A Termination Event where only one party is entitled to terminate the transactions. For an overview on the termination of transactions as a result of the occurrence of a Termination Event, see Section 6(b): Right to Terminate Following Termination Event.

The party able to exercise this set-off right is:

- The Non-defaulting Party, in the case of an Event of Default.
- The party terminating the transactions in the case of a Credit Event Upon Merger or a Tax Event Upon Merger.
- The counterparty to the party terminating the transactions in the case of an Illegality, a Force Majeure Event or a Tax Event.
- The Non-affected Party in the case of an Additional Termination Event.

The effectiveness of the provision (especially in an insolvency situation) may depend upon whether the obligations being set-off are mutual. For an overview of mutuality, see Section 2(c): Netting of Payments and Termination and Close-out Netting Under the ISDA Master.

Rights of setoff of the early termination payment under the 1992 Master are specified under Section 6(e): Payments on Early Termination.

For additional information on this section of the 2002 Master, see Practice Note, Comparison of 1992 and 2002 ISDA Master Agreements: Addition of Set-off Provision.

Section 7: Transfer

This section of the ISDA Master prohibits a party from transferring any rights or obligations under the ISDA Master (including the grant of a security interest) to any third party without the written consent of the other party. There are three exceptions to this prohibition:

- If the transfer is made to avoid a Tax Event or a Tax Event Upon Merger in accordance with Section 6(b)(ii): Transfer to Avoid Termination Event.

- If the transfer arises from:
  - A consolidation or amalgamation with or merger into another entity; or
  - A transfer of all or substantially all of a party's assets.
- The transfer is of a party's interest in any amounts payable to it by a Defaulting Party under Section 6(e): Payments on Early Termination.

The following Sections of the ISDA Master also need to be considered if a party to the ISDA Master intends to consolidate, amalgamate or merge with or into another entity or if a party intends to transfer all or most of its assets:

- Section 5(a)(viii): Merger Without Assumption.
- Section 5(b)(iii) 1992 Master/Section 5(b)(iv) 2002 Master: Tax Event Upon Merger.
- Section 5(b)(iv) 1992 Master/Section 5(b)(v) 2002 Master: Credit Event Upon Merger.

Section 8: Contractual Currency

Under this section of the ISDA Master, the parties agree to indemnify one another for any exchange-rate loss incurred as a result of a payment being made in a currency other than the currency agreed by the parties.

Section 9: Miscellaneous

Section 9(a): Entire agreement

This section of the ISDA Master, commonly known as a "merger clause" or "integration clause," is a boilerplate provision that the ISDA Master constitutes the entire agreement between the parties with respect to the matters it covers.

Section 9(b): Amendments

This section of the ISDA Master specifies that any amendments to the ISDA Master are only effective if:

- In writing (including writing evidenced by fax) executed by both parties; or
- They are executed by an exchange of electronic messages on an electronic messaging system (or an exchange of telexes). Note that under a 2002 Master, an electronic messaging system does not include email (see definition of electronic messages and electronic messaging system in Section 14: Definitions). These terms or not defined in the 1992 Master so it is presumed, though not expressly specified, that email is acceptable for amendments under a 1992 Master.

Out of an abundance of caution, most ISDA amendments are executed by the parties on a standard ISDA form that is executed by both parties in hard copy.

For additional information on the execution and effectiveness of amendments to the ISDA Master, see Section 9(e): Counterparts and Confirmations.

Section 9(c): Survival of Obligations

This section confirms that the ISDA Master will survive the termination of a transaction entered into under the ISDA Master.

Section 9(d): Remedies Cumulative

This section of the ISDA Master is a boilerplate provision confirming that the remedies provided for in the ISDA Master are not exclusive of any remedies provided by law (for example, the contractual remedy of specific performance).

Section 9(e): Counterparts and Confirmations

This section of the ISDA Master confirms that:

- That the ISDA Master and any amendment to it may be signed in counterpart. This means that the ISDA Master and any amendment can be signed by each party signing a different copy of the same standard document and that those copies together will constitute one agreement signed by all parties. This provides for ease of execution of the document where it is inconvenient for all the parties to sign one document (for example, if the parties are located in different jurisdictions).

- That the transactions are binding on the parties as soon as they are entered into, whether orally or otherwise.
- That a confirmation of each transaction is to be entered into as soon as practicable and that a confirmation may be executed and delivered in counterpart (including by facsimile) or be created by an exchange of telexes, electronic messages on an electronic messaging system or, expressly under a 2002 Master, by an exchange of emails. Though the 1992 Master does not expressly specify that a transaction confirmation may be delivered by email, the list of media acceptable for confirmation delivery under a 1992 Master is non-exclusive. Email therefore appears to be an acceptable form of delivery of a transaction confirmation under a 1992 Master, as well.

For further information on transaction confirmations under the ISDA Master, see Practice Note, ISDA Documents: Overview (US): Transaction Confirmation.

Section 9(f): No Waiver of Rights

This section of the ISDA Master is a boilerplate provision specifying that any failure or delay in exercising any right under the ISDA Master is not presumed to be a waiver of that right.

However, note the Metavante case, which reaches the opposite result in the context of a US bankruptcy case (see Practice Note, The ISDA Master Agreement: Early Termination: Early Termination and the Metavante Ruling and Article, The Bankruptcy Court Ruling in the Lehman Metavante Matter).

Section 9(g): Headings

This section of the ISDA Master is a boilerplate provision confirming that headings used in the ISDA Master should not affect the interpretation of the agreement.

Section 9(h): Interest and Compensation (2002 Master)

This section of the 2002 Master details how interest and compensation for late payments and deliveries is to be determined.

The 1992 Master includes a much less detailed interest rate provision, Section 2(e): Default Interest; Other Amounts.

The sections below provide more detail on the provisions that comprise Section 9(h) of the ISDA Master. For further explanation of these provisions, see Practice Note, Comparison of 1992 and 2002 ISDA Master Agreements: Expanded Interest Rate Provisions: Interest on Deferred and Defaulted Payments.

Section 9(h)(i): Prior to Early Termination (2002 Master)

This section of the 2002 Master details how interest and compensation are calculated on late payments and deliveries prior to the occurrence or effective designation of an Early Termination Date. The sections below provide more detail on the provisions that comprise Section 9(h)(i) of the 2002 Master. For further information on this section of the 2002 Master, see Practice Note, Comparison of 1992 and 2002 ISDA Master Agreements: Expanded Interest Rate Provisions: Interest on Deferred and Defaulted Payments.

Section 9(h)(i)(1): Interest on Defaulted Payments Prior to Early Termination Date (2002 Master)

Under this section of the 2002 Master, the parties agree to pay interest at the Default Rate for defaulted payments made prior to the occurrence or effective designation of an Early Termination Date, except:

- If the defaulted payment is due to an Illegality or Force Majeure Event.
- During any waiting period under Section 5(d): Deferral of Payments and Deliveries During Waiting Period (2002 Master).

For further information on this section of the 2002 Master, see Practice Note, Comparison of 1992 and 2002 ISDA Master Agreements: Expanded Interest Rate Provisions: Interest on Deferred and Defaulted Payments.

Section 9(h)(i)(2): Compensation for Defaulted Deliveries Prior to Early Termination Date (2002 Master)

Under this section of the 2002 Master, subject to certain limited exceptions, the amount due on defaulted deliveries prior to the occurrence or effective designation of an Early Termination Date is equal to the fair market value of such deliveries plus interest at the Default Rate.

For further information on this section of the 2002 Master, see Practice Note, Comparison of 1992 and 2002 ISDA Master Agreements: Expanded Interest Rate Provisions: Interest on Deferred and Defaulted Payments.

Section 9(h)(i)(3): Interest on Deferred Payments Prior to Early Termination Date (2002 Master)
Under this section of the 2002 Master, the parties agree to pay interest at the Applicable Deferral Rate for deferred payments made prior to the occurrence or effective designation of an Early Termination Date under the following circumstances:

- Where a payment has not been made due to a condition precedent not being satisfied under Section 2(a)(iii): Obligations of party subject to conditions precedent being satisfied.
- Where a payment has been deferred due to an Illegality or a Force Majeure Event.

For further information on this section of the 2002 Master, including how the Applicable Deferral Rate is determined under these circumstances, see Practice Note, Comparison of 1992 and 2002 ISDA Master Agreements: Expanded Interest Rate Provisions: Interest on Deferred and Defaulted Payments.

Section 9(h)(i)(4): Compensation for Deferred Deliveries Prior to Early Termination Date (2002 Master)
Under this section of the 2002 Master, the parties agree to pay compensation for and interest on deferred deliveries prior to the occurrence or effective designation of an Early Termination Date if, and in the manner, provided for in the applicable transaction confirmation or elsewhere in the 2002 Master.

Deferred deliveries occur where a delivery:

- Has not been made due to a condition precedent not being satisfied under Section 2(a)(iii): Obligations of party subject to conditions precedent.
- Has been deferred due to an Illegality or a Force Majeure Event.

For further information on how interest in calculated on these amounts, see Practice Note, Comparison of 1992 and 2002 ISDA Master Agreements: Expanded Interest Rate Provisions: Interest on Deferred and Defaulted Payments.

Section 9(h)(ii): Early Termination (2002 Master)
This section of the 2002 Master specifies how interest is calculated for a late payment or delivery once an Early Termination Date has occurred or been effectively designated. The sections below provide more detail on the provisions that comprise Section 9(h)(ii) of the 2002 Master. For further information on this section of the 2002 Master, see Practice Note, Comparison of 1992 and 2002 ISDA Master Agreements: Expanded Interest Rate Provisions: Interest on Deferred and Defaulted Payments.

Section 9(h)(ii)(1): Unpaid Amounts After Early Termination (2002 Master)
Under this section of the 2002 Master, the parties agree to pay interest on any Unpaid Amounts owed by a party under a terminated transaction at the Applicable Close-out Rate. For an explanation of how the Applicable Close-out Rate is determined under these circumstances, see Practice Note, Comparison of 1992 and 2002 ISDA Master Agreements: Expanded Interest Rate Provisions: Interest on Deferred and Defaulted Payments.

Section 9(h)(ii)(2): Interest on Early Termination Amounts (2002 Master)
Under this section of the 2002 Master, the parties agree to pay interest on Early Termination Amount during the period beginning on the Early Termination Date and ending on the date it is paid at the Applicable Close-out Rate. For an explanation of how the Applicable Close-out Rate is determined under these circumstances, see Practice Note, Comparison of 1992 and 2002 ISDA Master Agreements: Expanded Interest Rate Provisions: Interest on Deferred and Defaulted Payments.

Section 9(h)(iii): Interest calculation (2002 Master)
This section of the 2002 Master specifies that interest payable under Section 9(h): Interest and Compensation is to be compounded on a daily basis.

Section 10: Offices; Multibranch Parties

Section 10(a): Recourse to party's head office or home office

Under this section of the ISDA Master, if:

- Section 10(a) is specified as applying to a party under Part 4(c) of the Schedule: Offices; and

- A transaction is entered into by that party other than through its head or home office;

then its counterparty may have recourse to the head office or home office of that party irrespective of:

- Where the transaction is booked.
- The jurisdiction of incorporation or organization of that party.

Under a 2002 Master, this section does not apply to any payment that is deferred because of an Illegality or Force Majeure Event.

Implications for the following sections should be carefully considered when deciding whether to apply or disapply this section of the ISDA Master:

- Section 2(d): Deduction or Withholding for Tax.
- Section 6(e): Payments on Early Termination.

Section 10(b): Booking and making payments and deliveries to nominated office

1992 Master. Under this section of the 1992 Master, a party may not change the office through which it makes and receives payments or deliveries without the prior written consent of the other party. Under the 2002 Master, this obligation is specified in Section 10(c).

2002 Master. Under this section of the 2002 Master, if a party is specified as a Multibranch Party within Part 4(d) of the Schedule: Multibranch Party, that party may only enter into, book, and make payments and deliveries for transactions through the offices specified by it in Part 4(d) of the Schedule: Multibranch Party. The relevant office is to be specified in the relevant transaction confirmation.

Implications for the following sections should be carefully considered when deciding whether to apply or disapply this section 10(b) of the ISDA Master:

Section 2(d): Deduction or Withholding for Tax.

Section 6(e): Payments on Early Termination.

Section 10(c) Effect of specifying office in confirmation

1992 Master. Under this section of the 1992 Master, if a party is specified as a Multibranch Party within Part 4(d) of the Schedule: Multibranch Party, that party may only enter into, book and make payments and deliveries for transactions through the offices specified by it in Part 4(d) of the Schedule: Multibranch Party. The relevant office is to be specified in the relevant transaction confirmation.

2002 Master. Under this section of the 2002 Master:

- The office through which a party:
  - enters into a transaction and to which the transaction is booked;
  - receives payments and deliveries;

  is the office specified in the relevant transaction confirmation or as otherwise agreed between the parties, and if no office is agreed then the party's head office or home office is deemed the applicable office for these purposes.
- A party cannot change the office through which it makes payments or deliveries without the other party's written consent unless the transfer is in accordance with Section 6(b)(ii): Transfer to Avoid Termination Event.

Section 11: Expenses

Under this section of the ISDA Master, the Defaulting Party agrees to indemnify the Non-defaulting Party against reasonable expenses incurred in:

- Enforcing and protecting its rights under the ISDA Master; and
- Enforcing and protecting its rights under any Credit Support Document against the Defaulting Party. This section does not cover expenses incurred in enforcing a Credit Support Document against a third party, such as a Credit Support Provider, including a guarantor or indemnifier of the obligations of a party under the ISDA Master.

Section 12: Notices

Section 12(a). This section of the ISDA Master specifies the methods by which notices and communications under the ISDA Master may be given, as well as the deemed delivery times of such notices (if delivery is made or attempted after the close of business on a Local Business Day (LBD) or on a day that is not a LBD, the notice is deemed given on the next LBD). The Local Business Day definition under the ISDA Master is a boilerplate local business day definition.

The ISDA Master specifies that notice is "given" but, otherwise specifies only the methods by which notice may be delivered under the ISDA Master. This section confirms that notices under the ISDA Master may be given in writing:

- By telex.
- By facsimile.
- By certified or registered mail.
- By electronic messaging system, subject to an exception for notices under Section 5: Events of Default and Termination Events and Section 6: Early Termination (see below).
- Under the 2002 Master only, by email, subject to an exception for notices under Section 5: Events of Default and Termination Events and Section 6: Early Termination (1992 Master)/Early Termination; Close-out Netting (2002 Master) (see below). There is no provision for notice to be given by email under the 1992 Master.

Restrictions on notices under Sections 5 and 6 of the ISDA Master: notices given under Section 5: Events of Default and Termination Events and Section 6: Early Termination (1992 Master)/Early Termination; Close-out Netting (2002 Master) of the ISDA Master may not be given:

- Under a 2002 ISDA Master, by electronic messaging system or email.
- Under a 1992 ISDA Master, by facsimile transmission or electronic messaging system.

Though the term "electronic messaging system" is not defined in the 1992 ISDA Master, this provision could be interpreted to prohibit email notice under these sections of the 1992 ISDA Master. It is therefore recommended that notices sent under Section 5: Events of Default and Termination Events and Section 6: Early Termination (1992 Master)/Early Termination; Close-out Netting (2002 Master) of a 1992 Master not be sent by email, as a counterparty could contend that notice was improper and of no effect. Under the 2002 Master, electronic messaging system does not include email. (Under the 2002 Master, electronic messaging system, by virtue of Section 14: Definitions, includes documents expressed in markup languages.)

It is generally recommended out of an abundance of caution that notice under the ISDA Master be given by at least two permissible methods of delivery, including hand delivery to the address provided for the receiving party in Part 4(a) of the Schedule: Address for Notices or otherwise specified in the relevant transaction confirmation. Remember, under Section 1(b): Inconsistency, any transaction confirmation trumps the other ISDA transaction documents so if an address for notices is specified in a transaction confirmation that is different from the address specified in the ISDA Schedule, the address specified in the confirmation should be used for correspondence with respect to the transaction governed by that transaction confirmation.

For more information on the delivery and effectiveness of notices under the ISDA Master, see Practice Note, The ISDA Master Agreement: Early Termination: Delivery and Effectiveness of Notices Under the ISDA Master.

Section 12(b). Under Section 12(b) of the ISDA Master, a party to the agreement may change its contact details by notice to the other party.

Section 13: Governing Law and Jurisdiction

- **Section 13(a): Governing Law.** This section of the ISDA Master confirms that the ISDA Master is governed by the law specified in Part 4(h) of the Schedule: Governing Law. The two options provided are:
  - New York law.
  - English law.

  Parties may specify an alternative governing law jurisdiction to these two in Part 4(h) of the Schedule: Governing Law, however, this is extremely rare.
- **Section 13(b): Jurisdiction.** Under this section of the ISDA Master, the parties agree to the jurisdiction of either the New York courts or the English courts, depending on whether the agreement is governed by New York law or English law (see Part 4(h) of the Schedule: Governing Law).

- **Section 13(c): Service of Process.** This section of the ISDA Master confirms that if a process agent is appointed for a particular party in Part 4(b) of the Schedule: Process Agent, that agent acts as agent for the relevant party to accept service of legal documents. The appointment of a process agent is normally only necessary for a particular party to a contract if that party does not have a registered office in the governing law jurisdiction.
- **Section 13(d): Waiver of Immunities.** Under this section of the ISDA Master, the parties waive immunity on the grounds of sovereignty.

Arbitration

Following an extensive consultation with ISDA members on the use of arbitration to settle disputes arising under the ISDA Master Agreement, ISDA published the 2013 ISDA Arbitration Guide. The guide describes the key features of arbitration, and sets out a wide range of model arbitration clauses that include the most popular seats of arbitration and arbitral rules, including (among others) the International Chamber of Commerce (ICC) arbitration rules, the London Court of International Arbitration (LCIA) arbitration rules and the PRIME Finance (Panel of Recognised International Market Experts in Finance) Arbitration Rules.

For more information on the ISDA Arbitration Guide, see Legal Update, 2013 ISDA Arbitration Guide is published.

Section 14: Definitions

This section defines certain key terms used in the ISDA Master, including (but not limited to) the following terms referenced in this Note:

Affected Party

Section 14 confirms that "Affected Party" is defined within the relevant Termination Event in Section 5(b): Termination Events.

For the purposes of the Termination Event under Section 5(b)(v) 1992 Master/Section 5(b)(vi) 2002 Master: Additional Termination Event, the definition of "Affected Party" is to be set out in Part 1(g) of the 2002 Schedule/Part 1(h) of the 1992 Schedule: Additional Termination Event.

This definition specifies the roles that each party plays under the complex termination provisions in Section 6(b): Right to Terminate Following Termination Event and Section 6(e): Payments on Early Termination, which apply when a Termination Event occurs.

Affected Transactions

This definition identifies which transactions may be terminated due to the occurrence of a Termination Event. The definition is to be read in conjunction with Section 6(b): Right to Terminate Following Termination Event, but basically specifies that the term refers to transactions that are affected by the termination event.

Affiliate

Section 14 of the ISDA Master provides a broad definition of "Affiliate." Part 4(j) of the Schedule: Affiliate contemplates that this definition may be amended by the parties to the ISDA Master.

Although the term "Affiliate" may be used in the bespoke provisions of the ISDA Master (the Schedule and transaction confirmation), the term is only used in the following standard provisions of the ISDA Master:

- Section 6(b)(ii): Transfer to Avoid Termination Event.
- Section 6(e)(ii): Payments on Termination Events.
- The definition of Close-out Amount (2002 Master) under Section 14 of the 2002 Master.
- Section 3(c): Absence of Litigation under the 1992 Master only. The term "Affiliates" is replaced by the term "applicable Specified Entities" in this provision of the 2002 Master. Note that "Specified Entity " for the purposes of this provision is different from any Specified Entity named in Part 1(a) of the Schedule: "Specified Entity."

Applicable Deferral Rate (2002 Master)

This definition provides for a different interest rate depending upon whether it is used for a particular provision within Section 9(h)(i)(3): Interest on Deferred Payments Prior to Early Termination Date (2002 Master) or for the definition of "Applicable Close-out Rate" (separately defined in Section 14 of the 2002 Master). For further information on this section of the 2002 Master, including how the Applicable Deferral Rate and the Applicable Close-out Rate are determined under the 2002 Master, see Practice Note, Comparison of 1992 and 2002 ISDA Master Agreements: Expanded Interest Rate Provisions: Interest on Deferred and Defaulted Payments.

Condition End Date

This definition may be inserted at the option of the parties if they choose to execute an amendment to Section 2(a)(iii) under which the parties agree on a time limit on the condition precedent in Section 2(a)(iii) of the ISDA Master (see Section 2(a)(iii): Obligations of party subject to conditions precedent), which permits a party to suspend performance under the agreement pending the continuation of the other party's suspended performance.

Close-out Amount (2002 Master)

The definition of "Close-out Amount" describes in detail how this component of the Early Termination Amount is calculated under Section 6(e): Payments on Early Termination of the 2002 Master. For a detailed explanation of how the Close-out Amount is determined, see Practice Note, The ISDA Master Agreement: Early Termination: 2002 Master: Close-out Amount.

Default Rate

This definition confirms that the Default Rate is 1% above the relevant payee's cost of funds per annum (certified by the payee) if it were to fund or is funding the relevant amount.

Defaulting Party

This definition confirms that the term "Defaulting Party" is defined within Section 6(a): Right to Terminate Following Event of Default. The Defaulting Party is the party that is responsible for the occurrence of an Event of Default.

Early Termination Amount (2002 Master)

This definition confirms that the term "Early Termination Amount" under the 2002 Master is defined within Section 6(e): Payments on Early Termination of the 2002 Master. For more detail, see Section 6(e): Payments on Early Termination.

Early Termination Date

This definition confirms that the Early Termination Date is the date the relevant transactions terminate in accordance with either:

- Section 6(a): Right to Terminate Following Event of Default; or
- Section 6(b)(iv): Right to Terminate, which details the parties' rights to terminate following the occurrence of a Termination Event.

Electronic Messages and Electronic Messaging System (2002 Master)

This definition confirms that, under the 2002 Master, the terms "electronic messages" and "electronic messaging system":

- Do not include email.
- Do include documents expressed in markup languages.

The 1992 Master is silent on notice by email, as email was not widely used as a means of communication at the time it was published. But the 1992 Master does permit notice by "electronic messaging system" other than for notices under Sections 5 and 6. However, the phrases "electronic messages" and "electronic messaging system" should be ascribed the same meaning under the 1992 Master as under the 2002 Master. That is, they do not encompass notice by email.

Regardless, email notice is not an acceptable method of delivery of notices under Sections 5 and 6 of both the 1992 Master and the 2002 Master.

For more detailed information on notices under the ISDA Master, see Section 12: Notices.

Indemnifiable Tax

This definition confirms that the term "Indemnifiable Tax" refers to any tax except a tax that is imposed because of a connection between the jurisdiction of the taxing authority and the recipient of a payment under the ISDA Master.

For example, if a US incorporated payee received an amount through its French office and the amount was paid by a payer incorporated in Germany through the payer's London office:

- Withholding tax imposed by the US or French tax authorities because the payee is incorporated in the US or has a French office would not be an Indemnifiable Tax. In this situation, there is a voluntary connection between the payee and the tax jurisdiction.

- If the withholding tax is imposed by the German or UK taxing authorities due only to the payer's connection to the taxing jurisdiction, the tax would be an Indemnifiable Tax. In this situation, there is no voluntary connection between the payee and the German and UK jurisdictions.

The term "Indemnifiable Tax" is relevant to the provisions of Section 2(d): Deduction or Withholding for Tax, as that section requires the payer to gross up payments for any Indemnifiable Tax unless the recipient of a payment breaches its tax representations or tax-form delivery requirements under the ISDA Master.

In August 2012, ISDA published a protocol to address the effects of the US Foreign Account Tax Compliance Act (FATCA) on derivatives transactions (see Legal Update, ISDA Publishes 2012 FATCA Protocol for Amending Swap Documents). The ISDA FATCA protocol:

- Removed the FATCA tax from the tax representations made by the parties under Section 3(e) of the ISDA Master.

- Placed the burden of FATCA withholding on the recipient of payments under the agreement by removing FATCA taxes from the definition of "Indemnifiable Tax."

To adhere to the ISDA FATCA protocol, parties must send a signed adherence letter along with a payment to the ISDA protocol management system and will then receive an email confirmation from ISDA after approval and acceptance.

Local Business Day

The ISDA Master provides an intuitive, boilerplate local business day definition.

Non-affected Party (2002 Master)

This definition confirms that, so long as there is only one Affected Party, the Non-affected Party is the other party. The 1992 Master does not include this defined term. Under the 1992 Master, the Non-affected Party is generally referred to as "the party which is not the Affected Party."

Non-Defaulting Party

This definition confirms that this term is defined in Section 6(a): Right to Terminate Following Event of Default. Essentially, the Non-defaulting Party is the counterparty to the party in default as a result of the occurrence of an Event of Default.

Potential Event of Default

This definition confirms that a Potential Event of Default is any event that would constitute an Event of Default provided all applicable conditions precedent, including the lapse of applicable grace periods and the giving of any required notice, have been satisfied (for a list of these, see The ISDA Master Agreement: Early Termination Checklist: Notice Requirements, Cure Periods, and Conditions Precedent to Early Termination Under the ISDA Master).

Settlement Amount (1992 Master)

This definition specifies that under the 1992 Master, the Settlement Amount, which comprises the early termination payment under Section 6(e): Payments on Early Termination of a 1992 Master, is equal to the sum of:

- The Market Quotation amount for all terminated transactions for which Market Quotation is determined and would produce a commercially reasonable result; and

- The amount determined under the Loss calculation for all other transactions.

The use of either Market Quotation or Loss is elected by the parties under Part 1(f) of the 1992 Schedule. If Market Quotation is elected by the parties but not available for a particular terminated transaction then Loss applies for that transaction.

For a detailed explanation of these calculations, see Practice Note, The ISDA Master Agreement: Early Termination: 1992 Master: Settlement Amount.

Specified Indebtedness

This definition specifies that Specified Indebtedness means an obligation for borrowed money or any obligation relating to borrowed money. However, Part 1(c) of the Schedule: Cross-Default, Specified Indebtedness, and Threshold Amount contemplates that this definition may be amended by the parties. This term is used only in Section 5(a)(vi): Cross-Default of the ISDA Master, though it may be used by the parties elsewhere in the ISDA Schedule or transaction confirmation.

Specified Transaction

This definition specifies that "Specified Transaction" covers any OTC derivatives transaction that is not governed by that particular ISDA Master, which is entered into between:

- On the first part:
  - A party (Party A);
  - Any Specified Entity named by Party A under Section 5(a)(v): Default Under Specified Transaction; or
  - A Credit Support Provider of Party A; and
- On the second part:
  - The other party (Party B);
  - Any Specified Entity named by Party B under Section 5(a)(v): Default Under Specified Transaction; or
  - A Credit Support Provider of Party B.

The Specified Transaction definition included in the 2002 Master is more broadly inclusive of a variety of transaction types than the definition under 1992 Master. However, they are both designed to be broad and inclusive of a variety of transaction types. For an explanation of the differences, see Practice Note, Comparison of 1992 and 2002 ISDA Master Agreements: Changes to Default Under Specified Transaction.

The "Specified Transaction" definition may also be modified by the parties under Part 1(b) of the Schedule: Specified Transaction.

The term is used only in the following section of the ISDA Master:

- Section 5(a)(v): Default Under Specified Transaction.
- The definition of Local Business Day in Section 14: Definitions.

However, the term may be used by the parties elsewhere in the ISDA Schedule or transaction confirmation.

Termination Currency

This definition confirms that the term "Termination Currency," when used in the ISDA Master, refers to the currency specified under Part 1(f) of the 2002 Schedule/Part 1(g) of the 1992 Schedule: Termination Currency. The Termination Currency is the currency into which the early termination payment under Section 6(e): Payments on Early Termination is to be converted and paid.

Under the 2002 Master only, if the parties have failed to select a Termination Currency or if the Termination Currency is not freely available, the termination currency is:

- US dollars, if the 2002 Master is governed by New York law.
- Euro, if the 2002 Master is governed by English law.

Unpaid Amounts

A component of the early termination payment under Section 6(e): Payments on Early Termination that is equal to amounts due and owing under Section 2(a)(i): Payments and deliveries will be made, together with applicable interest, excluding amounts not due as a result of the application of

Section 2(a)(iii): Obligations of party subject to conditions precedent or, under a 2002 Master, Section 5(d): Deferral of Payments and Deliveries During Waiting Period.

For details on how interest is calculated on Unpaid Amounts under both the 1992 Master and the 2002 Master, see Practice Note, Comparison of 1992 and 2002 ISDA Master Agreements: Expanded Interest Rate Provisions: Interest on Deferred and Defaulted Payments.

Signature Block to the ISDA Master

The signature block to the ISDA Master requires the following details to be completed:

- The name of each party to the agreement.
- The name and title of the signatory for each party to the agreement.
- The date of signing by each signatory. This date may be different from the effective date of the ISDA Master and Schedule. For an overview on the difference between the date of signing and the effective date, see Preamble to the ISDA Master.

The details included in the signature block to the ISDA Master must match the details in the signature block to the schedule (see Signature Block to the ISDA Schedule), otherwise there will be an inconsistency in the agreement.

Schedule to the ISDA Master

The ISDA Schedule allows the parties to:

- Make certain elections under the ISDA Master.
- Specify which provisions of the ISDA Master apply to which parties.
- Modify the provisions of the ISDA Master as needed.
- Add bespoke (negotiated) provisions that are not included in the pre-printed portion of the ISDA Master.

Preamble to the ISDA Schedule

The following details must be completed in the preamble to the ISDA Schedule:

- The date the ISDA Master is to take effect. If there are existing transactions between the parties on the date of signing, the ISDA Master will normally be dated the date of the first of such transactions thereby enabling the terms of the ISDA Master to cover all such prior transactions. The words "dated as of" make it clear that the date is an effective date of the agreement and not the actual date of the signing of the ISDA Master. The actual date of signing is reflected in the Signature Block to the ISDA Master and the Signature Block to the ISDA Schedule.
- The name of each party to the ISDA Master.
- Each party's entity type (2002 Master only).
- The "company number" of each party (2002 Master only).
- Each party's jurisdiction of organization (2002 Master only).
- If applicable, the branch each party is acting through (2002 Master only).

The information included here must reflect the information provided by the parties in the Preamble to the ISDA Master, otherwise there will be an inconsistency in the agreement.

Part 1: Termination Provisions

Part 1(a): Specified Entity

This part of the ISDA Schedule allows the parties to specify entities that are Specified Entities for the purposes of one or more of the following sections of the ISDA Master:

- Section 5(a)(v): Default Under Specified Transaction.
- Section 5(a)(vi): Cross-Default.
- Section 5(a)(vii): Bankruptcy.
- Section 5(b)(iv) 1992 Master/5(b)(v) 2002 Master: Credit Event Upon Merger.

The inclusion of a Specified Entity under any of the above Events of Default or Termination Events broadens that Event of Default or Termination Event to include that Specified Entity. Parties that are named as Specified Entities under Part 1(a) of the ISDA Schedule are typically parent or affiliate entities of one of the parties to the agreement.

For example, if:

- For the purposes of Section 5(a)(vii): Bankruptcy, Party X, the parent entity of a party (Party A), is specified under this part of the ISDA Schedule as a Specified Entity of Party A; and
- Party X becomes subject to any of the events referred to in Section 5(a)(vii): Bankruptcy;

Party A is a Defaulting Party under the ISDA Master.

Note that "Specified Entity" for the purposes of this provision is different from the Specified Entity named in Part 4(k) of Schedule to 2002 Master: Absence of Litigation, which names a Specified Entity for purposes of Section 3(c): Absence of Litigation.

Part 1(b): Specified Transaction

This part of the ISDA Schedule contemplates that the definition of "Specified Transaction" under Section 14: Definitions may be expanded by the parties. The Section 14 definition is limited to certain OTC derivative transactions between the parties not already governed by the ISDA Master. Default under a Specified Transaction by a party to the ISDA Master or any Specified Entity of a party named under Part 1(a) of the Schedule: "Specified Entity" triggers a default under Section 5(a)(v): Default Under Specified Transaction.

Under this part, the definition could, for example, be extended by the parties to cover lending arrangements, **repo agreements** or **securities lending** transactions between the parties or between affiliates of the parties to the agreement if named as Specified Entities under Part 1(a) of the Schedule: Specified Entity.

Though it may be used by the parties elsewhere in the ISDA Schedule or transaction confirmation, the term "Specified Transaction" is only used in the following standard provisions of the ISDA Master:

- Section 5(a)(v): Default Under Specified Transaction.
- The definition of Local Business Day in Section 14: Definitions.

For information on Default under Specified Transaction under Section 5(a)(v), see Section 5(a)(v): Default Under Specified Transaction.

Part 1(c): Cross-Default, Specified Indebtedness, and Threshold Amount

This part of the ISDA Schedule allows the parties to elect whether the EOD under Section 5(a)(vi): Cross-Default applies to either or both of the parties.

If Section 5(a)(vi): Cross-Default applies, the parties need to:

- Consider whether they agree that the definition of Specified Indebtedness under Section 14: Definitions should apply under the ISDA Master or whether they prefer a different definition for the purposes of Section 5(a)(vi): Cross-Default. The definition of Specified Indebtedness under Section 14: Definitions covers obligations for borrowed money. Under this part of the ISDA Master, the parties may broaden this definition to include other agreements, for example other derivatives contracts and/or repo agreements.
- Agree on a Threshold Amount, which sets a minimum amount of Specified Indebtedness that must to be in default before a default under Section 5(a)(vi): Cross-Default occurs. The parties may specify a different applicable Threshold Amount for each party. If the parties agree that any level of defaulted Specified Indebtedness causes a default under Section 5(a)(vi): Cross-Default for a particular party, then the parties should specify in this part that a Threshold Amount of zero applies to that party. The Threshold Amount may also be specified, for example, where one of the parties to the ISDA Master is a fund, as a percentage (for example, 3%) of that party's **net asset value** (NAV), or the lesser (or greater) of a party's NAV and a hard figure ($1,500,000, for example).

- Consider whether they would like to amend Section 5(a)(vi): Cross-Default here in Part 1(c) of the Schedule to apply a cross-acceleration requirement in place of the cross-default language specified in Section 5(a)(vi). For more details on cross-default and cross-acceleration, see Practice Note, Finance Fundamentals: Cross-Default v. Cross-Acceleration.

Note that parties also often add a **carve-out** from Section 5(a)(vi): Cross-Default for administrative or ministerial defaults on Specified Indebtedness. These carve-outs usually require that a showing be made that the funds were available, and that the amount be paid within one or two business days of notice of the default. Parties also sometimes negotiate a good-faith qualifier under which a party agrees not to call a cross-default under Section 5(a)(vi): Cross-Default unless the Non-defaulting Party determines in good faith that it has reasonable grounds to conclude that the Defaulting Party's ability to perform its financial obligations under the ISDA Master is materially impaired as a result of the default.

The parties may effect these modifications by specifying in this part of the ISDA Schedule that, for example: "The provisions of Section 5(a)(vi) will apply to [Party A and/or Party B]; Section 5(a)(vi) is hereby amended by adding the following at the end thereof:" (the parties may then add language specifying any of the above modifications to this Event of Default).

In order to effect cross-acceleration instead of cross-default under Section 5(a)(vi): Cross-Default, the parties should specify in this part of the Schedule that "the following language is hereby deleted from clause (1) of Section 5(a)(vi): 'or becoming capable at such time of being declared.'" This effects cross-acceleration under the ISDA Master because the obligation for Specified Indebtedness at or in excess of the Threshold Amount must not only be capable of being declared due and payable, but must actually have become due and payable.

For more information on Cross-Default under Section 5(a)(vi), see Section 5(a)(vi): Cross-Default.

Part 1(d): Credit Event Upon Merger

This part allows the parties to determine whether the Termination Event under Section 5(b)(iv) 1992 Master/Section 5(b)(v) 2002 Master: Credit Event Upon Merger applies to either or both of the parties. The parties may also specify a bespoke (negotiated) definition of "Credit Event Upon Merger" for purposes of Section 5(b)(iv) 1992 Master/Section 5(b)(v) 2002 Master: Credit Event Upon Merger, which they may specify in this part of the ISDA Schedule.

For an overview of the Credit Event Upon Merger, see Section 5(b)(iv) 1992 Master/Section 5(b)(v) 2002 Master: Credit Event Upon Merger.

Part 1(e): Automatic Early Termination

This part of the ISDA Schedule allows the parties to specify whether Automatic Early Termination under Section 6(a): Right to Terminate Following Event of Default applies to either or both of the parties. For an overview on the advantages and disadvantages of Automatic Early Termination, see Section 6(a): Right to Terminate Following Event of Default.

Part 1(f) of the 1992 Schedule: Payments on Early Termination

This part of the 1992 Schedule allows the parties to elect default mechanics for determining the Settlement Amount under Section 6(e): Payments on Early Termination of a 1992 Master.

The two options for determining the Settlement Amount are Market Quotation or Loss. Note that, unless another mechanic is specified in this part of the ISDA Schedule by the parties, where Market Quotation is elected by the parties but not available for a particular terminated transaction, Loss applies for that transaction.

The two options for "method" of determining the Settlement Amount under the 1992 Master are First Method and Second Method. First Method is rarely used. For a detailed explanation of these mechanics of determining the Settlement Amount under Section 6(e) of a 1992 Master, see Practice Note, The ISDA Master Agreement: Early Termination: 1992 Master: Settlement Amount.

Under this part of the ISDA Master, the parties may:

- Include bespoke Market Quotation or Loss provisions, or bespoke definitions of Settlement Amount.
- Specify that Market Quotation is to apply under certain circumstances and Loss is to apply under other specified circumstances.
- Specify a list of institutions from which an acceptable Market Quotation may be obtained.

Part 1(f) of the 2002 Schedule/Part 1(g) of the 1992 Schedule: Termination Currency

This part of the ISDA Schedule allows the parties to select a Termination Currency for the purposes of Section 6(e): Payments on Early Termination. In particular, a Termination Currency (and a fallback Termination Currency if the selected Termination Currency is not freely available) should be provided by the parties under this part of the Schedule if neither New York law or English law governs this ISDA Master (see Termination Currency and Part 4(h): Governing Law for further information on selecting a Termination Currency).

Part 1(g) of the 2002 Schedule/Part 1(h) of the 1992 Schedule: Additional Termination Event

This part of the ISDA Schedule allows the parties to adopt additional Termination Events (ATEs) for the purposes of Section 5(b)(v) 1992 Master/Section 5(b)(vi) 2002 Master: Additional Termination Event.

If an additional Termination Event is included, this part needs to identify the Affected Party or Affected Parties for each ATE. The nomination of the Affected Party(s) is important as it determines which party may:

- Terminate as a result of a Termination Event under Section 5(b)(v) 1992 Master/Section 5(b)(vi) 2002 Master: Additional Termination Event.
- Exercise setoff rights under Section 6(f): Set-Off.

ATEs commonly included this part of the ISDA Schedule include:

- **Credit rating ATE**, under which a party may terminate the ISDA Master (see Section 6(b): Right to Terminate Following Termination Event) if its counterparty's credit rating falls below a certain threshold level. For details on credit-ratings-related ATEs typically included in swaps related to **asset-backed securities** (ABS) transactions, see ABS Rating Agency Condition (RAC) Provisions.
- **NAV ATE**, under which a party may terminate the ISDA Master (see Section 6(b): Right to Terminate Following Termination Event) if its counterparty's NAV falls below a certain threshold level (these are popular among ISDA counterparties to hedge funds). This ATE is also typically triggered if the fund fails to calculate or disclose its NAV. This ATE may be measured in absolute terms (NAV falls below a hard floor) or may be required to fall a specified percentage to trigger the ATE, for example, from one month end to the prior month end, from a month end to the month end three months prior, and/or from a month end to the month end 12 months prior (these percentages often vary, for example, 25%, 35% and 40%, respectively). Sometimes parties negotiate a "seed capital" carve-out from NAV triggers so that removals of "Seed Capital," as defined in by the parties this part of the ISDA Schedule, do not count toward NAV calculations for the purposes of this ATE.
- **Key party ATE**, under which the ATE is triggered by the departure of a key person, such as the removal of an investment manager, either from one of the parties to the ISDA Master or from a Specified Entity.
- **Amendment ATE**, under which the ATE is triggered by the termination or material modification or amendment of an important agreement, for example an investment advisory agreement to which a fund counterparty is a party.
- **Rating agency condition (RAC) ATE.** These are typically used in ABS transactions. For details, see ABS Rating Agency Condition (RAC) Provisions.

For an overview on who can initiate a Termination Event under Section 5(b)(v) 1992 Master/Section 5(b)(vi) 2002 Master: Additional Termination Event, see Section 6(b): Right to Terminate Following Termination Event.

Part 2: Tax Representations

If the payer and payee elect, under Section 3(e): Payer Tax Representation and Section 3(f): Payee Tax Representations, to make the tax representations included in this part of the ISDA Schedule applicable and these representations are true and correct, withholding by the parties under the ISDA Master should not be necessary. For further details, see Section 2(d): Deduction or Withholding for Tax.

Note that parties often replace the boilerplate language included in this part of the ISDA Master with a simple statement of their form and jurisdiction of organization for the purposes of either or both the payer representation under Part 2(a) of the Schedule (as represented under Section 3(e): Payer Tax Representation) and/or the payee representation under Part 2(b) of the Schedule (as represented under Section 3(f): Payee Tax Representations) (for example, "Part 2 Tax Representation. Party A is a Cayman Islands exempted company and a 'check the box' partnership for U.S. tax purposes"). Any representations provided under this part of the ISDA Schedule should be sufficient to ensure that no withholding is required under Section 2(d): Deduction or Withholding for Tax of the ISDA Master.

Part 2(a): Payer Tax Representations

The language of the payer tax representation to be given by the parties for the purposes of Section 3(e): Payer Tax Representation is included in this part of the ISDA Schedule. If this representation is true and correct, withholding by the parties under the ISDA Master should not be necessary. Tax counsel should carefully review the representation and the information provided by the parties in this part of the ISDA Schedule.

Parties often replace the boilerplate language included in this part of the ISDA Master with a simple statement of their form and jurisdiction of organization (for example, "Part 2 Tax Representation. Party A is a Cayman Islands exempted company and a 'check the box' partnership for U.S. tax purposes") or a bespoke representation (for example, "It is not required by any applicable law, as modified by the practice of any relevant governmental revenue authority, of any relevant jurisdiction to make any deduction or withholding for or on account of any tax from any payment (other than interest under Section 2(e), 6(d)(ii), or 6(e) of this Agreement) to be made by it to the other party under this Agreement") for the purposes of this part of the ISDA Schedule and Section 3(e): Payer Tax Representation. Any representations provided under this part of the ISDA Schedule should be sufficient to ensure that no withholding is required under Section 2(d): Deduction or Withholding for Tax of the ISDA Master.

Part 2(b): Payee Tax Representations

The language of the payee tax representation to be given by the parties for the purposes of Section 3(f): Payee Tax Representations is to be included in this part of the ISDA Schedule. For information on this representation, see Section 3(f): Payee Tax Representations. Any representations provided under this part of the ISDA Schedule should be sufficient to ensure that no withholding is required under Section 2(d): Deduction or Withholding for Tax. Tax counsel should carefully review the representation and the information provided by the parties in this part of the ISDA Schedule.

Part 3: Agreement to Deliver Documents

Under this part of the ISDA Schedule, the parties list:

- The documents to be delivered in accordance with:
  - Section 4(a)(i): Furnish specified tax information; and
  - Section 4(a)(ii): Furnish specified non-tax information.
- The timing for the delivery of these documents. When a time frame is not specified, Section 4(a): Furnish Specified Information provides that these documents must be delivered as soon as reasonably practicable.
- Whether any document to be delivered under this part should be covered by the Section 3(d): Accuracy of Specified Information representation.

Documents typically listed under this part of the ISDA Schedule (which is often presented in this part of the Schedule as a table listing the documents to be delivered and dates for delivery for each document) include:

- Each party's tax form and the tax forms of any Credit Support Provider of any party to the ISDA Master (usually to be delivered upon execution of the ISDA Master or promptly thereafter).
- Any form or document that may be required or reasonably requested in order to allow the other party to make a payment under the ISDA Master without any deduction or withholding for or on account of any tax (usually to be delivered upon counterparty request).
- Opinions of counsel, including enforceability opinions, in form and substance satisfactory to the counterparty to which the opinion is addressed (usually to be delivered upon execution of the ISDA Master or promptly thereafter).
- Audited annual financial statements of the counterparty and any Credit Support Provider of any party to the ISDA Master (usually to be delivered within 120 days of year end).
- Certificates and other documents evidencing the authority of the party entering into the ISDA Master; copies of the party's (and any Specified Entity's or other relevant party's) organizational documents and by-laws; copies of any board resolutions and appropriate certificates of incumbency as to the officers executing such documents (usually to be delivered upon execution of the ISDA Master or promptly thereafter).
- Monthly calculation of NAV of any party to the ISDA Master that is subject to an NAV ATE (see Part 1(g) of the 2002 Schedule/Part 1(h) of the 1992 Schedule: Additional Termination Event) (usually to be delivered monthly).
- Any relevant offering memoranda, investment management agreements, organizational documents (or other applicable constituent documents), and any amendments thereto or restatements thereof (usually to be delivered upon counterparty request).

Part 4: Miscellaneous

Part 4(a): Address for Notices

The part of the ISDA Schedule allows each of the parties to specify addresses for notice for the purposes of Section 12: Notices.

Part 4(b): Process Agent

This part of the ISDA Schedule allows each of the parties to specify a process agent, if any, for the purposes of Section 13: Governing Law and Jurisdiction.

A process agent acts as an agent for a contracting party to accept service of legal documents in the jurisdiction of the law governing the underlying contract. An appointment of a process agent is normally only necessary if the relevant party does not have a registered office in the governing law jurisdiction.

If a process agent is not appointed and a party does not have a registered office in the relevant jurisdiction, it may be difficult to serve legal proceedings on the party.

Part 4(c): Offices

This part of the ISDA Schedule allows the parties to elect whether Section 10(a): Recourse to party's head office or home office applies to either or both of the parties to the agreement.

Part 4(d): Multibranch Party

This part of the ISDA Schedule allows each of the parties to elect whether it is a Multibranch Party for the purposes of Section 10(b): Booking and making payments and deliveries to nominated offices.

Part 4(e): Calculation Agent

This part of the ISDA Schedule allows the parties to nominate a **calculation agent** for the transactions entered into under the ISDA Master. The calculation agent's role is normally specified on a transaction-by-transaction basis under the transaction confirmation.

The calculation agent provision typically requires that the calculation agent obtain rates and prices from independent third-party sources in order to make calculations integral to the transactions under the ISDA Master. As a result, the calculation agent is often the bank or dealer counterparty to the ISDA Master, unless an Event of Default or Potential Event of Default has occurred with respect to that party, in which case the calculation agent switches to the non-defaulting or non-affected party.

The parties also often specify that calculation agent shall undertake its duties under the ISDA Master in good faith and in a commercially reasonable manner.

Sometimes the calculation agent provision under this section of the ISDA Schedule is complex and heavily negotiated. For example, this part of the ISDA Schedule may include calculation agent language similar to the following:

- "If the parties are unable to agree on a particular calculation, then the Calculation Agent will seek four actual quotations from leading dealers (that are not affiliates of either party) in the relevant market (Party A and Party B shall each select two of the four leading dealers), taking the arithmetic average of those quotations obtained; provided that if four quotations are not available for a particular Transaction, then fewer than four quotations may be used for that Transaction. If no quotations are available for a particular Transaction, or in the case where the parties are unable to agree on a particular determination made by the Calculation Agent, the parties shall appoint another mutually acceptable leading dealer in the relevant market (the 'Mutually Acceptable Calculation Agent') to make such calculation or determination in dispute. If the parties cannot agree on a mutually acceptable leading dealer, the parties will each appoint a leading dealer (that is not an affiliate of either party) who shall together appoint a third leading dealer (that is not an affiliate of either party) (also a 'Mutually Acceptable Calculation Agent'). The Mutually Acceptable Calculation Agent's determination or calculation (as applicable) will be binding on Party A and Party B. The fees and expenses of the leading dealers or Mutually Acceptable Calculation Agent shall be borne by the parties equally."
- "If an Event of Default has occurred and is continuing with respect to Party A, at the request of Party B, the Calculation Agent shall be a leading, independent dealer in derivatives selected by agreement between the parties (the 'Substitute Calculation Agent') within one Local Business Day of Party B's request to appoint a Substitute Calculation Agent. If the parties are unable to agree on a Substitute Calculation Agent, each of the parties shall select an independent dealer in derivatives who, together, will agree on a third party leading, independent dealer in derivatives to act

as the Substitute Calculation Agent. All determinations by the Calculation Agent and any Substitute Calculation Agent shall be made in good faith and in a commercially reasonable manner. The fees and expenses of the Substitute Calculation Agent shall be met equally by both parties."

Note that the term "Calculation Agent" is not used in the 2002 Master, although it is used in the 2006 ISDA Definitions, which govern most interest rate swaps, and is also used in certain of the other ISDA definitions, including the 2014 ISDA Credit Derivatives Definitions.

Part 4(f): Credit Support Document

Under this part of the ISDA Schedule, the parties provide the details of any Credit Support Document that is being provided as security for its obligations under the ISDA Master. This credit support may take the form of a guarantee, security interest over collateral and/or a combination of both. Where credit support (under a Credit Support Document) has been provided in support of the obligations of a party to the ISDA Master by a Credit Support Provider, a breach of that Credit Support Document may give rise to an Event of Default under Section 5(a)(iii): Credit Support Default of the ISDA Master.

Part 4(g): Credit Support Provider

Where a third party provides a Credit Support Document in support of the obligations of a party to the ISDA Master (as a guarantor or indemnifier), that third party must be listed under this part of the ISDA Schedule as a Credit Support Provider for that party.

Throughout the ISDA Master (most importantly in the representations under Section 3: Representations, Section 5: Events of Default and Termination Events) there are references to certain actions or events relating to the Credit Support Provider.

For an overview of the sections of the ISDA Master that apply to any Credit Support Provider or under which a Credit Support Provider may have obligations or could cause an Event of Default or Termination Event under the ISDA Master, see:

- Section 3: Representations.
- Section 5(a)(iii): Credit Support Default.
- Section 5(a)(iv): Misrepresentation.
- Section 5(a)(v): Default Under Specified Transaction.
- Section 5(a)(vi): Cross-Default.
- Section 5(a)(vii): Bankruptcy.
- Section 5(a)(viii): Merger Without Assumption.
- Section 5(b)(i)(1): Illegality.
- Section 5(b)(ii): Force Majeure Event (2002 Master).
- Section 5(b)(iv) 1992 Master/Section 5(b)(v) 2002 Master: Credit Event Upon Merger.

If a party to the 2002 Master has the benefit of a Credit Support Document given by a Credit Support Provider, that party should note that it is not indemnified by its counterparty under Section 11: Expenses for expenses incurred by reason of the enforcement and protection of the party's rights against the Credit Support Provider. For more detail, see Section 11: Expenses. If the party requires such an indemnity, this would usually be provided in Part 5: Bespoke Provisions.

Part 4(h): Governing Law

This part of the ISDA Schedule allows the parties to select governing law for the ISDA Master. New York State law and English law are provided as options under this part and one of these options is commonly selected.

Other laws may be nominated as the governing law of the 2002 master agreement, however:

- Any alternative law should only be adopted if legal advice has been obtained that the overall agreement will be enforceable under the proposed law and on the appropriate drafting of Section 13(b) (the jurisdiction clause).
- The parties should ensure they nominate a Termination Currency under Part 1(f) of the 2002 Schedule/Part 1(g) of the 1992 Schedule: Termination Currency as well as a fallback Termination Currency if the selected Termination Currency is not freely available. This is because the

definition of "Termination Currency" under Section 14: Definitions only has a fall back definition for Termination Currency (where a Termination Currency is not selected under Part 1(f) of the 2002 Schedule/Part 1(g) of the 1992 Schedule: Termination Currency or the selected Termination Currency is not freely available) if New York or English law applies. For more information on the significance of "Termination Currency," see Section 6(e): Payments on Early Termination.

Part 4(i): Multiple Transaction Payment Netting

This part of the ISDA Schedule allows the parties to nominate whether "Multiple Transaction Payment Netting" applies under Section 2(c): Netting of payments and from what date it applies.

For an overview of "Multiple Transaction Payment Netting," see Section 2(c): Netting of payments.

Part 4(j): Affiliate

This part of the ISDA Schedule contemplates that the definition of "Affiliate" used in Section 14: Definitions may be amended.

Although the term "Affiliate" may be used in the bespoke provisions of the 2002 Master, the term is only used in the following standard provisions of the 2002 Master:

- Section 6(b)(ii): Transfer to Avoid Termination Event.
- Section 6(e)(ii): Payments on Termination Events.
- The definition of "Close-out Amount" under Section 14: Definitions.

Part 4(k) (2002 Master): Absence of Litigation

This part of the Schedule to the 2002 Master (there is no analogous Part to the Schedule to the 1992 Master) permits a party to elect a Specified Entity for the purposes of Section 3(c): Absence of Litigation. A party may wish to nominate a Specified Entity under this part of the ISDA Schedule where, for example, there is a likelihood that litigation with respect to a particular entity (for example a parent company of the counterparty) may jeopardize the counterparty's ability to perform its obligations under the 2002 Master.

Note that Specified Entity for the purposes of this provision is different from any Specified Entity named in Part 1(a) of the Schedule: Specified Entity.

For an overview of the significance of a "Specified Entity" under Section 3(c): Absence of litigation, see Section 3(c): Absence of Litigation.

Part 4(l) (2002 Master): No Agency

This part of the Schedule to the 2002 Master allows the parties to elect whether Section 3(g): No Agency applies.

Section 3(g): No Agency should always apply where both parties are entering into the 2002 Master on their own behalf and not as an agent for a third party.

For an overview on the significance of Section 3(g): No Agency, see Section 3(g): No Agency.

Part 4(m) (2002 Master): Additional Representations

This part of the ISDA Schedule allows the parties to include additional representations under Section 3: Representations in respect of either or both of the parties. Examples of possible additional representations are included in part 4(m), however these examples are by no means exclusive.

If additional representations are included, the parties need to specify, within part 4(m), when the representations are to be made. For example, are they to be:

- Made on the date the ISDA Master is first entered into.
- Repeated each time a transaction is entered into.
- Repeated throughout the life of the ISDA Master.

In determining this question the parties should consider at what stage(s) during the term of the ISDA Master they need to have the comfort of the representation.

For an overview on the significance of representations, see Section 3: Representations.

Part 4(n) (2002 Master): Recording of Conversations

This part of the ISDA Schedule allows the parties to agree to the recording of telephone conversations between their respective traders and other personnel with respect to matters in connection with the ISDA Master.

Part 5: Bespoke Provisions

This part of the ISDA Schedule allows the parties to incorporate additional, customized provisions within the ISDA Master. Such provisions typically include:

- **Non-reliance.** A non-reliance provision under which the parties acknowledge that they are making their own independent decision and not relying on the advice or any statements of the other party in entering into the ISDA Master or transactions under it.
- **Understanding.** Each party is capable of assessing the merits of and understanding (on its own behalf or through independent professional advice), and understands and accepts the terms and conditions and risks of each transaction entered into under the ISDA Master.
- **Eligible contract participant.** Parties often require one another to represent that they are an **eligible contract participant** (ECP) as defined in Section 1a(18) of the Commodity Exchange Act (CEA) (7 U.S.C. § 1a(18)), as amended by Title VII of the Dodd-Frank Act (formerly CEA Section 1a(12)). Certain Dodd-Frank business conduct rules for **swap dealers** (SDs) require that SDs verify that their uncleared swap counterparties are ECPs (see Practice Note, US Derivatives Regulation: External Business Conduct (EBC) Rules for Swap Dealers and MSPs: Verification of Counterparty Eligibility).

However, these provisions are sometimes included in Part 4 of the ISDA Schedule, as there are no restrictions on where in the ISDA Schedule bespoke, or customized, provisions may be included.

The parties may include in Part 5 of the ISDA Schedule any other commercially reasonable provisions they may agree upon, and any other modifications to any of the provisions of the ISDA Master, as agreed.

ABS Rating Agency Condition (RAC) Provisions

Elaborate "rating agency condition" (RAC) provisions are common in swap agreements relating to ABS transactions, in which a solvent and reliable swap provider is essential to the transaction. These provisions are usually specified in Part 5 of the ISDA Schedule.

Typically, under these provisions, an ATE under Part 1(g) of the 2002 Schedule/Part 1(h) of the 1992 Schedule: Additional Termination Event is averted if a counterparty that has experienced a credit ratings downgrade (usually Party A, the swap provider) is able, within a specified period such as ten Local Business Days, to satisfy the applicable RAC specified in Part 5 by:

- Posting a certain level of collateral to cover a potential default;
- Replacing itself with another party that is acceptable to the counterparty and otherwise meets certain criteria with a credit rating equal to or greater than that of the Affected Party prior to the downgrade; or
- Obtaining a guarantee of its obligations under the ISDA Master by a third party that is acceptable to the counterparty and otherwise meets certain criteria with a credit rating equal to or greater than that of the Affected Party.

Failure to effect any of the above (satisfy the RAC) results in the occurrence of an ATE under Part 1(g) of the 2002 Schedule/Part 1(h) of the 1992 Schedule: Additional Termination Event, with the swap provider as the Affected Party. The major credit rating agencies each use different remedies out of the above list for a first downgrade (usually collateral posting) and a second further downgrade (usually replacement or guarantor) of the swap provider counterparty to the swap.

These provisions are referred to as "de-linking" provisions because they attempt to de-link the creditworthiness of the swap provider counterparty to the swap from the credit rating of the ABS. For further details, see Legal Update, Revised S&P Criteria for Swap Counterparties in Structured Finance Transactions Take Effect.

For an explanation of the role of the swap provider in an ABS transaction, see Practice Notes, Securitization: US Overview: Use of Derivatives in Securitization and Securitization: US Transaction Parties and Documents: The Swap Provider.

Signature Block to the ISDA Schedule

The signature block to the schedule requires the following details to be completed:

- The name of each party.
- The name and title of the signatory for each party.
- The date of signing by each signatory. This date may be different from the effective date of the ISDA Master and the schedule (for an overview on the difference between the date of signing and the effective date, see Preamble to the ISDA Schedule).

The details included here must reflect the details in the signature block to the ISDA Master (see Signature Block to the ISDA Master) otherwise there will be an inconsistency in the agreement.

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