

## THOMSON REUTERS PRACTICAL LAW

## US Derivatives Regulation: Swap Documentation Checklist

by Practical Law Finance

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*A Checklist of provisions, documents, and protocols needed to facilitate compliance with Dodd-Frank swaps rules.*

The following is a Checklist of provisions, documents, and protocols that the parties to a swap transaction need to facilitate compliance with swaps rules under the [Dodd-Frank Act](#) and related regulations. Further detail follows the table below.

Provisions, Documents, and Protocols to Consider	Further Details
<b>The ISDA-FIA Cleared Derivatives Addenda</b> and dealer futures/futures and options form account agreements, for cleared swap transactions	For details, see <a href="#">Clearing Documentation and the ISDA-FIA Cleared Derivatives Addenda</a> .
<b>ISDA Credit Support Annexes (CSAs)</b> and related documentation, for US and global margin compliance for uncleared swaps.	For details, see <a href="#">ISDA Global Margin Compliance Documentation for Uncleared Swaps</a> .
<b>Optional Initial Margin Collateral Segregation Documentation</b> , for swap dealer counterparties	For details, see <a href="#">Documentation Related to Uncleared Swap Optional Margin Segregation Rules</a> .
<b>The August 2012 ISDA Dodd-Frank Protocol</b> and <b>ISDA Representation Letters</b> , for compliance with final Title VII EBC rules for swap dealers and MSPs	For details, see <a href="#">Dodd-Frank External Business Conduct Standards (EBCS) and the August 2012 ISDA Dodd-Frank Protocol</a> .
<b>Standardized ISDA Swap Disclosure Documentation</b> , for swap dealers	For details, see <a href="#">ISDA Standard Disclosure Documentation for Swap Dealers and MSPs</a> .
<b>The March 2013 ISDA Dodd-Frank Protocol</b> , for compliance with final Title VII IBC rules for swap dealers and MSPs	For details, see <a href="#">Dodd-Frank Internal Business Conduct (IBC) Rules and the March 2013 ISDA Dodd-Frank Protocol</a> .
<b>Sample Dodd-Frank Swaps Representations</b>	For details, see <a href="#">Sample EBCS and Other Dodd-Frank Swap Representations</a> .
<b>Daily Mark Disclaimer</b>	For details, see <a href="#">Daily Mark Disclaimer Language</a> .
<b>FDIC resolution authority</b> language and protocols	For details, see <a href="#">The FDIC's Resolution and Liquidation Authority</a> .
<b>Exempt Commercial End-User Representation</b> , where applicable	For details, see <a href="#">Exempt Commercial End-User Representation</a> .
<b>ISDA Cross-Border Representation Letters</b> , used to comply with Dodd-Frank cross-border swaps rules	For details, see <a href="#">ISDA Cross-Border Representation Letters</a> .
<b>Delegation of Applicable Swap Data Reporting Obligations</b> for the	For details, see <a href="#">Swap Data Reporting Obligations</a> .

transaction	
<b>ISDA Reporting Data Delegation Agreement</b> , for appointing third parties to report transaction data to trade	For details, see <a href="#">Swap Data Reporting Obligations</a> .
<b>ISDA 2013 Swap Data Reporting Disclosure Protocol</b> , addressing certain confidential swap data disclosure issues	For details, see <a href="#">ISDA Data Reporting Resources</a> .
<b>Dodd-Frank ISDA amendment</b> , to amend ISDA Master Agreements for non-dealer/end-user swap compliance	For details, see <a href="#">Counterparty Compliance with Final Rules</a> .

## Documenting Dodd-Frank Swap Margin Collateral Matters

Swap counterparties need to account for certain margin collateral matters addressed by rulemaking under Title VII of the Dodd-Frank Act in their swap documentation, including swap documentation published by the [International Swaps and Derivatives Association, Inc.](#) (ISDA®), [prime brokerage](#) agreements, or other trading documents.

### Clearing Documentation and the ISDA-FIA Cleared Derivatives Addenda

Banks and dealers must be [futures commission merchants](#) (FCMs) in order to enter into a cleared swap with a customer on a registered exchange. FCMs are "gatekeeper" counterparties for large derivatives exchanges – that is, each large financial institution is typically:

- A member of one or more registered derivatives exchanges.
- A [clearing member](#) of the affiliated clearinghouse to each exchange of which the FCM is a member.

FCMs therefore typically use their standard futures account or futures and options account agreements (in-house futures agreements) to govern cleared swaps arrangements with their buy-side customers. These in-house futures agreements must be supplemented to accommodate cleared swaps trading.

### Standard Futures Account or Futures and Options Account Agreements

Standard in-house bank/dealer futures agreements:

- Are not heavily negotiated, as the customer has little negotiating leverage if it wishes to enter into the cleared transaction;
- Typically contain extensive margining provisions for the customer but not for the dealer;
- Cover futures and other cleared and exchange-traded derivatives transactions, but not swaps, and must therefore be supplemented for use in a cleared swap transaction.

Note that the terms relating to margin collateral, as well as certain administrative matters, for a cleared derivatives transaction are largely prescribed by applicable clearinghouse rules (which are subject to Dodd-Frank or other applicable [Commodity Futures Trading Commission](#) (CFTC) regulations.

### ISDA-FIA Cleared Derivatives Addendum

The [ISDA-FIA Cleared Derivatives Addendum](#) (clearing addendum) is a standardized clearing addendum published by ISDA and the Futures Industry Association (FIA) in 2012. The clearing addendum is:

- Used to supplement in-house futures agreements in the US to govern cleared [over-the-counter](#) (OTC) swap transactions.
- An optional template that can be used by FCMs/clearing members and their buy-side customers for documenting their cleared-swaps trading relationship.
- Includes representations for each party on certain clearing-related matters.
- Sets out the close-out methodology for cleared swaps, the triggers for liquidation, and provisions for valuing terminated trades.
- Includes provisions governing tax issues for cleared swap transactions.

The clearing addendum may be, and often is, customized by the parties and includes a schedule that parties can use to make additional representations or otherwise modify the terms of the addendum.

## ISDA-FIA Alternative Cleared Derivatives Addendum

ISDA and FIA later published the [2018 Alternative Cleared Derivatives Addendum](#) (alternative clearing addendum). The alternative clearing addendum does not replace or supersede the 2012 clearing addendum. Like the 2012 clearing addendum, the alternative clearing addendum is:

- An optional standard template for FCMs and their customers for documenting cleared OTC swap transactions;
- Used to supplement in-house futures agreements in the US to govern cleared swaps transactions.
- May be customized by the parties using an attached schedule.

The alternative clearing addendum differs from the 2012 clearing addendum in several key respects, including:

- Additional provisions relating to the close-out and liquidation of derivatives transactions after a close-out event or tax liquidation event; and
- A specification that the alternative clearing addendum and related contracts form a single **master netting agreement**.

For more information on the alternative clearing addendum, see [Legal Update, ISDA and FIA Publish 2018 Alternative Cleared Derivatives Addendum](#).

## ISDA Global Margin Compliance Documentation for Uncleared Swaps

Final margin rules for uncleared derivatives have taken effect in the US, the EU, Canada, and Japan covering both [initial margin](#) (IM) and [variation margin](#) (VM) posted and collected in connection with these transactions. These rules now set the parameters for negotiation of many key elements of the [ISDA Credit Support Annex](#) (CSA) for OTC derivatives.

- Parties to multiple uncleared swap transactions may be subject to the margin requirements of more than one jurisdiction, depending on the particular counterparty relationships. If more than one set of rules apply to a party, the party should comply with the strictest rules requiring the greatest amount of credit support to be posted.
- New trades entered into after the compliance dates for the applicable uncleared swap margin rules compliance dates (regulatory trades) are subject to rules for IM and VM (absent an exemption) and require new CSA terms.
- For more information on margin requirements for uncleared swaps, generally, see Practice Notes:
  - [Global Margin Compliance for Uncleared Swaps](#).
  - [US Derivatives Regulation: Margin Collection and Exchange Requirements for Uncleared Swaps](#).
  - [EMIR: risk mitigation requirements for uncleared OTC derivatives](#).
- For details the last remaining compliance phase-in dates for margin rules, see [Practice Note, Global Margin Compliance for Uncleared Swaps: Applicable Rules and Phase-In Dates](#).

## ISDA Credit Support/Margin Documentation

ISDA has published new CSAs and other documentation to support compliance with global margin requirements for uncleared swaps:

- **ISDA Regulatory Margin Self-Disclosure Letter (SDL)**, a standard form letter in which a party makes certain elections and representations to aid compliance with global margin rules and includes information necessary to determine which margin rules among multiple jurisdictions apply to that party (see [Legal Update, ISDA Publishes Self-Disclosure Letter to Help Market Participants Comply with Margin Rules for Uncleared Swaps](#)).
- **ISDA 2018 Credit Support Annex for Initial Margin** (2018 IM CSA), governing IM for regulatory trades subject to Phase Four and Phase Five IM requirements as of September 1, 2019 and September 1, 2020, respectively (see [Legal Update, ISDA Publishes 2018 Credit Support Annex for Initial Margin](#)).
- **ISDA 2016 Phase One Credit Support Annex for Initial Margin** (Security Interest - New York Law) (2016 IM CSA), governing IM for regulatory trades subject to Phase One IM requirements as of September 1, 2016 (see [Legal Update, ISDA Publishes 2016 Phase One Credit Support Annex for Initial Margin](#)).
- **ISDA 2016 Variation Margin Protocol** (VM Protocol), designed to help market participants comply with global rules on variation margin for uncleared swaps by allowing the parties to make standardized amendments to existing CSAs or to enter into new CSAs (see [Legal Update, ISDA Publishes 2016 Variation Margin Protocol to Help Parties Comply with Margin Rules for Uncleared Swaps](#)).

- **ISDA 2016 Credit Support Annex for Variation Margin** (2016 VM CSA), governing VM for regulatory trades (see [Legal Update, ISDA Publishes 2016 Credit Support Annex for Variation Margin \(New York Law\)](#)), and an updated template for Paragraph 13 of the New York 2016 VM CSA (see [The ISDA Master Agreement: 2016 Variation Margin Credit Support Annex \(New York Law\) Paragraph 13 "Fallback" Checklist](#)).

For further information on these and additional ISDA margin compliance tools and documentation, see [Practice Note, Global Margin Compliance for Uncleared Swaps](#).

## Documentation Related to Uncleared Swap Margin Segregation Rules

### Optional Margin Segregation Rules: One Party Is a Swap Dealer or Major Swap Participant

Under Sections 724(c) and 863(d) of the Dodd-Frank Act, if a swap is not cleared and one party to the swap is a [swap dealer](#) (SD), [major swap participant](#) (MSP), [security-based swap dealer](#) (SBSD), or [major security-based swap participant](#) (MSBSP), that party must notify its counterparty that the counterparty has the right to require segregation with an independent third-party custodian of any IM that the counterparty posts in connection with the swap (7 U.S.C. § 6s(l); 15 U.S.C. § 78c-5(f); 17 C.F.R. §§ 23.701 and 240.15c3-3(p)(4)(i); and see [Practice Note, US Derivatives Regulation: Margin Collateral Rules: Optional Segregation of Uncleared Swaps Initial Margin](#)).

If the customer counterparty opts for this segregation, the custodial arrangement should be accounted for in the applicable swap and prime brokerage agreements. Note that:

- The applicable CSA may need to be amended to include, and new CSAs may need to reflect, this arrangement, naming the custodian and incorporating by reference the terms of the applicable custodian agreement; and
- A tri-party custodial agreement is also required under these circumstances.

The end user must make a commercial determination as to whether the benefits of margin segregation outweigh the costs.

### Mandatory Margin Segregation Rules: Swaps Between Swap Dealers and Major Swap Participants

CFTC and prudential banking rules issued pursuant to Dodd-Frank also require IM posted by covered swap entities (CSE) (which include SDs, MSPs, SBSDs, and SBMSPs), and including margin posted to another CSE, under an uncleared swap to be segregated with an independent third-party custodian (12 C.F.R. § 45.7; 17 C.F.R. § 23.157; and see [Practice Note, US Derivatives Regulation: Margin Collateral Rules: Segregation of Uncleared Swap IM Posted by SDs and MSPs to One Another](#)).

Under these rules the third-party custodian is contractually prohibited from:

- [Rehypothecating](#) or otherwise transferring any of the IM it holds; and
- Reinvesting any initial margin held by it in any asset that would not qualify as eligible collateral for initial margin under the proposed rules (immediately available cash and high-quality, highly liquid US government and agency obligations).

For more information on these rules, see [Practice Note, US Derivatives Regulation: Margin Collection and Exchange Rules for Uncleared Swaps: Collateral Segregation Under the Final Prudential Margin Rules](#) and [Collateral Segregation Under the Final CFTC Margin Rules](#).

### ISDA Resources for Margin Collateral Segregation

In connection with these margin segregation rules, ISDA has published:

- A sample IM segregation-rights notice that may be used to satisfy notice requirements in connection with these rules under CFTC Regulation 23.701 (see [Legal Update, ISDA Releases Sample Initial Margin Segregation-Rights Notice and FAQs](#)).
- A tri-party account control agreement template designed to accommodate independent third-party custodial IM segregation, as required under the rules (see [Legal Update, ISDA Publishes Account Control Agreement Template for Initial Margin Segregation](#)). ISDA has also published an [annotated version](#) of this document.

These documents may be used by parties to new or existing uncleared OTC derivatives transactions entered into under an [ISDA Master Agreement](#) and New York law CSA:

- Where a non-SD/MSP counterparty to an SD or MSP elects custodial segregation of the IM it posts in relation to the transactions entered into under that ISDA Master.
- For mandatory segregation.

## Dodd-Frank External Business Conduct Standards (EBCS) and the August 2012 ISDA Dodd-Frank Protocol

Regulators have issued a framework of rules under Title VII of the Dodd-Frank Act directed at entities that enter into large [notional](#) volumes of derivatives transactions. These entities are designated as SDs and MSPs under Title VII. Among these are the Dodd-Frank external business conduct (EBC) rules (also referred to as external business conduct standards or "EBCS") for SDs and MSPs. The EBCS specify:

- Detailed requirements for SDs and MSPs, including know-your-customer rules, so-called "institutional suitability" rules, and rules on swaps with "special entities," which are US sovereigns or government-controlled entities such as public utilities.
- Safe harbors under which swap documentation can be used to comply with the rules, often using representations and warranties.

An SD or MSP may rely on the written representations of a swap counterparty to satisfy its due diligence requirements under the EBCS unless it has information that would cause a reasonable person to question the accuracy of the representation ([17 C.F.R. § 23.402\(d\)](#)):

- SDs and MSPs may therefore satisfy certain of their obligations under a number of the EBCS by making representations to, and relying on representations from, their swap counterparties.
- The parties may use master documentation, such as an ISDA Master, for making these representations.
- Representations made in a master agreement are deemed renewed with each swap entered into under that master agreement.

For all newly executed swaps, SDs and MSPs must therefore receive documentation from their counterparties which includes representations that address the SD/MSP obligations under the EBCS (see [Practice Note, US Derivatives Regulation: External Business Conduct \(EBC\) Rules for Swap Dealers and MSPs](#)). In many cases this may be achieved through either:

- Counterparty adherence to the ISDA Dodd-Frank August 2012 Protocol (see [Practice Note, Practical Law Guide to the ISDA Dodd-Frank Protocols and ISDA Amend: The August 2012 Protocol: Compliance with Final EBC Rules for Swap Dealers and MSPs](#); or
- Standard ISDA form letters to facilitate compliance with the EBCS and its safe harbors (see [Legal Updates, Safe Harbor 'ERISA Special Entity' and 'Non-Special Entity' Letters Published by ISDA](#) and [ISDA Publishes Sample 'Special Entities' Letter for Swap Dealers](#)). These representation letters are useful where a counterparty is not a protocol adherent; certain pre-trade EBC obligations of the SD or MSP can be satisfied through a counterparty's execution of the applicable ISDA Dodd-Frank safe harbor representation letter.

Many SDs include a provision in their draft ISDA Schedules under which both parties acknowledge that they have adhered to the ISDA August 2012 Protocol (August Protocol) and which incorporate the August Protocol and August Protocol elections by reference into their ISDA Master Agreements.

### ISDA Standard Disclosure Documentation for Swap Dealers and MSPs

SDs and MSPs also have obligations under the EBCS to provide certain disclosures to the non-SD/MSP counterparties with which they enter into swaps. In connection with this, ISDA has prepared, and publishes from time to time, certain standard disclosure documents to help market participants comply with these rules.

For details on these rules and documents, see [Practice Notes, Practical Law Guide to the ISDA Dodd-Frank Protocols and ISDA Amend: ISDA Swap Disclosure Documentation Templates for Compliance with Final EBC Rules for Swap Dealers and MSPs](#) and [US Derivatives Regulation: External Business Conduct \(EBC\) Rules for Swap Dealers and MSPs: Swap Disclosure Documentation Requirements Under Final EBC Rules](#).

### Sample EBCS Swap Representations

As noted, an SD or MSP may rely on the written representations of a swap counterparty to satisfy its due diligence requirements under the EBCS unless it has information that would cause a reasonable person to question the accuracy of the representation ([17 C.F.R. § 23.402\(d\)](#)).

For an example of these representations, see [Standard Clause, The ISDA Master Agreement: Sample ISDA Schedule Part 5 Representations](#).

It may be useful, out of an abundance of caution, to include these representations in SD or MSP swap documentation as a matter of course, regardless of whether the counterparty has adhered to the August Protocol, even though some of the representations may be arguably duplicative.

### Daily Mark Disclaimer Language

SDs and MSPs should consider including in their swap documentation the following disclaimers from CFTC Regulation 23.431(d)(3)(ii):

- The daily mark may not necessarily be a price at which either the counterparty or the SD or MSP would agree to replace or terminate the swap.
- Calls for margin may be based on considerations other than the daily mark provided to the counterparty.
- The daily mark may not necessarily be the value of the swap that is marked on the books of the SD or MSP.

(17 C.F.R. § 23.431(d)(3)(ii).)

## Dodd-Frank Internal Business Conduct (IBC) Rules and the March 2013 ISDA Dodd-Frank Protocol

The CFTC has also adopted internal business conduct (IBC) rules on swap documentation and other procedures for SDs and MSPs. The IBC rules address, among other things:

- Swap trading relationship documentation.
- Transaction confirmations.
- Transaction acknowledgement.

(17 C.F.R. §§ 23.501 and 23.504.)

The IBC rules also address recordkeeping, swap portfolio reconciliation, and swap portfolio compression, though these rules are not relevant for documentation purposes (see, generally, [US Derivatives Regulation: Internal Business Conduct \(IBC\) Rules for Swap Dealers and MSPs](#)).

The IBC rules require SDs and MSPs to implement written policies and procedures reasonably designed to ensure that the SD or MSP:

- executes written swap trading relationship documentation with its swap counterparty; and
- sets out the details of certain transaction terms that must be reflected in swap transaction documentation.

For details on specific provisions that must be included in SD and MSP swap documents under the IBC rules, as well as information on other swap documentation requirements including transaction confirmation and acknowledgement requirements for SD/MSP swaps under the final IBC rules, see [Practice Note, US Derivatives Regulation: Internal Business Conduct \(IBC\) Rules for Swap Dealers and MSPs](#).

For information on how the March 2013 Protocol may be used to facilitate compliance with the IBC rules, see [Practice Note, Practical Law Guide to the ISDA Dodd-Frank Protocols and ISDA Amend: The March 2013 Protocol: Compliance with Final IBC Rules for Swap Dealers and MSPs](#).

## IBC Documentation Requirements Relating to FDIC Resolution and Liquidation Authority Under Title II of the Dodd-Frank Act

Under the final IBC rules, parties to a swap involving an SD or MSP must include in their uncleared swap documentation:

- A statement of whether the SD or MSP, its counterparty, or both are insured [depository institutions](#) (IDIs) or financial companies; and
- An acknowledgement that certain limitations apply to the non-covered party's right to terminate, liquidate, or net any swap by reason of the appointment of the [Federal Deposit Insurance Corporation](#) (FDIC) as receiver of the covered party, either under its bank resolution authority under the [Federal Deposit Insurance Act](#) (FDIA) or the FDIC's nonbank orderly liquidation authority (OLA) under Title II of the Dodd-Frank Act.

(17 C.F.R. § 23.504(b)(5).)

The FDIC imposes a stay of up to one business day on these rights when acting as receiver of an institution under the FDIA or the OLA.

Note that this acknowledgement may be made by the parties to a swap by the parties' adherence to the ISDA March 2013 Dodd-Frank Protocol (see [Practice Note, Practical Law Guide to the ISDA Dodd-Frank Protocols and ISDA Amend: The March 2013 Protocol: Compliance with Final IBC Rules for Swap Dealers and MSPs](#)).

## FDIC Resolution and ISDA G-SIB Stay Protocols

Under Section 165 of the Dodd-Frank Act, the [Federal Reserve](#) (Fed) imposes temporary stay requirements on termination rights in certain financial contracts of US [global systemically important banking institutions](#) (G-SIBs).

Parties to these contracts may need to amend their legacy documentation and incorporate provisions in their new documentation that provide for these temporary stay requirements in the event of counterparty bankruptcy or FDIC receivership. These amendments may be made using ISDA



protocols (see [Legal Update, Fed Limits Termination Rights Under Financial Contracts of US G-SIBs](#)).

Note that while compliance with the IBC rules can be facilitated through adherence to the ISDA March 2013 Dodd-Frank Protocol, compliance with the Fed's G-SIB financial contract limitations may only be achieved through adherence to the ISDA 2015 Universal Resolution Stay Protocol (RSP) or the ISDA 2018 US Resolution Stay Protocol. Parties would presumably need to comply with both the IBC rules and the Fed G-SIB rule separately.

For more information, see:

- [Practice Note, The ISDA Master Agreement: Early Termination: Stays on Early Termination](#).
- [Legal Update, ISDA Expands Resolution Stay Protocol to Include Securities Lending and Repo Transactions](#).
- [Legal Update, ISDA Launches Resolution Stay Jurisdictional Modular Protocol](#).
- [Practice Note, Overview: US Resolution Stay Rules and the ISDA 2018 US Resolution Stay Protocol](#).

For more information on the application of the FDIC's OLA and FDIC bank resolution authority to swaps, see [Practice Notes, Summary of the Dodd-Frank Act: Swaps and Derivatives: The FDIC's Orderly Liquidation Authority Under Title II](#) and [The Role of the FDIC in a Bank Failure](#).

## Exempt Commercial End-User Representation

SDs and MSPs may also consider incorporating a provision into their swap documentation stating that its counterparty is eligible for the end-user exception from the mandatory swap-clearing requirement:

- SDs and MSPs must obtain certain documentation from any swap counterparty seeking to take advantage of the end-user exception to the mandatory Title VII swap-clearing requirement (7 U.S.C. § 2(h); 17 C.F.R. § 50.50; and see [Practice Note, US Derivatives Regulation: The Commercial End-User Exception to the Mandatory Swap Clearing Requirement](#)).
- The documentation should be sufficient to provide a reasonable basis upon which to believe that the counterparty is eligible for the exception, including:
  - the identity of the counterparty electing the end-user exception;
  - that the counterparty has elected not to clear a particular swap under the end-user exception;
  - that the counterparty is not a financial entity, as that term is defined in Section 2h(7)(C) of the Commodity Exchange Act (CEA) (7 U.S.C. § 2(h)(7)(C));
  - that the counterparty is using the swap to hedge or mitigate a commercial risk; and
  - that the counterparty generally meets its financial obligations associated with its uncleared swaps and how it generally does so.
- While these requirements can generally be satisfied with representations from the commercial end user, the SD or MSP must conduct necessary diligence into these representations and the documentation provided by the end user to support them.
- The last three items listed above are not required if the SD or MSP obtains documentation specifying that its counterparty has reported the information required to qualify for the end-user exception to the CFTC in an annual report filed in anticipation of electing the exception for one or more swaps (17 C.F.R. § 50.50(b)(2)).
- An exempt end-user representation may be obtained through counterparty adherence to the ISDA August 2012 Dodd-Frank Protocol and completing the Protocol Questionnaire (see [Practice Note, Practical Law Guide to the ISDA Dodd-Frank Protocols and ISDA Amend: The August 2012 Protocol: Compliance with Final EBC Rules for Swap Dealers and MSPs](#)).

## ISDA Cross-Border Representation Letters

- In order to facilitate compliance with the CFTC's final Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations (final guidance) on application of Dodd-Frank swaps rules to cross-border swaps (78 Fed. Reg. 45292 (July 26, 2013); see [Practice Note, US Derivatives Regulation: Cross-Border Application of Swaps Rules](#)), ISDA has published two cross-border swaps representation letters, one for US banks (see [Legal Update, Cross-Border Swaps Representation Letter for US Banks Published by ISDA](#)) and another for all market participants (see [Legal Update, ISDA Publishes Cross-Border Swaps Representation Letter and Methodology](#)).

- The letters are intended to help parties provide their swap counterparties with status representations to determine, among other things, whether a transaction:
  - is considered to be entered into with an international branch of a US bank (international transaction); or
  - qualifies for the safe harbor to comply with the local law of the international branch instead of the CFTC's transaction-level requirements (see [Practice Note, US Derivatives Regulation: Cross-Border Application of Swaps Rules: Entity-Level Requirements and Transaction-Level Requirements](#) and [Substituted Compliance for Transaction-Level Requirements](#)).
- The bank letter permits a bank to identify itself as a US bank that is registered with the CFTC as an SD or MSP and to represent that:
  - a particular foreign branch is the relevant office of the bank for purposes of the swap in question; and
  - it has satisfied the requirements under the final guidance for the swap in question to be deemed a swap entered into by that foreign branch for purposes of substituted compliance with the laws of its local jurisdiction in lieu of CFTC regulations.

## ISDA Data Reporting Resources

Under ISDA's Reporting Delegation Agreement, market participants may meet their transaction data reporting obligations under applicable regulations by appointing third parties to report transaction data to trade repositories on their behalf (see [Legal Update, ISDA Publishes Trade Data Reporting Delegation Agreement](#)). The ISDA Reporting Delegation Agreement, along with jurisdiction-specific annexes (schedules) for Australia and Singapore that can be attached to the delegation agreement, are available from the [ISDA bookstore](#). A separate ISDA/FIA EMIR Reporting Delegation Agreement is also available from the [ISDA bookstore](#).

ISDA's [2013 Swap Data Reporting Disclosure Protocol](#) and related documents allow parties to amend the terms of their ISDA Master Agreements (or any other agreement governing the terms of their derivative transactions) to address restrictions on a party's ability to comply with swap data reporting requirements under the Dodd-Frank Act and the European Market Infrastructure Regulation (EMIR).

The ISDA reporting protocol aims to assist parties in overcoming statutory, regulatory, or contractual limitations on disclosure of certain non-public information relating to their derivative contracts required under Dodd-Frank and EMIR swap data reporting rules. The ISDA reporting protocol provides for counterparty consent to disclosure of restricted information by the reporting party (see [Legal Update, Swap Data Reporting Disclosure Protocol Launched by ISDA](#)).

## Provisions for End Users

### Swap Data Reporting Obligations

- Dodd-Frank swap data reporting rules specify which party to a swap transaction is the designated reporting party for purposes of making the required report (see [Practice Note, US Derivatives Regulation: Practical Guide to Over-the-Counter \(OTC\) Swap Data Reporting: Box, Which Is the Reporting Party?](#)).
- End users, such as funds and businesses entering into swaps with SDs and MSPs, may want to obtain a representation from their SD or MSP counterparties that the SD or MSP party, as the designated reporting party under the rules, is undertaking all data reporting obligations relating to the swap under all required Dodd-Frank swap data reporting.
- For an amendment to the ISDA Master Agreement that helps parties facilitate compliance with these obligations, see [Standard Document, The ISDA Master Agreement: Dodd-Frank Amendment for End-User Swaps](#).

### Counterparty Compliance with Final Rules

- End users may find it useful to obtain a representation from their SD or MSP swap counterparties that the SD or MSP is in material compliance with all of its obligations under the Dodd-Frank Act to the extent applicable to the agreement between the parties. This provision may be further negotiated with knowledge and materiality qualifiers.
- The end user may also consider requesting that its SD or MSP swap counterparty include a representation that it has implemented and complied in good faith with policies and procedures reasonably designed to comply with the final EBCS and IBC rules, as well as any other rules applicable to it under the Dodd-Frank Act.



- These representations are important for end users because the rules are specifically designed to protect end users in their swap-related dealing with large swaps entities. For more information on these rules and other related documentary issues, see [Practice Note, US Derivatives Regulation: External Business Conduct \(EBC\) Rules for Swap Dealers and MSPs](#).
- When an end-user counterparty enters into a swap with a registered SD, the SD will require the end-user counterparty adhere to the ISDA Dodd-Frank Protocols in order for the SD to comply with the EBC and IBC rules. For details, see [Dodd-Frank External Business Conduct Standards \(EBCS\) and the August 2012 ISDA Dodd-Frank Protocol](#) and [Dodd-Frank Internal Business Conduct \(IBC\) Rules and the March 2013 ISDA Dodd-Frank Protocol](#).
- In the alternative, the SD party may require the end-user counterparty to sign certain standard ISDA representation letters (see [ISDA Standard Disclosure Documentation for Swap Dealers and MSPs](#)).

## Dodd-Frank Amendment for Non-Dealer Swaps

Practical Law has published a Standard Document designed to facilitate Dodd-Frank regulatory compliance for end-user swaps to which there is no swap dealer or MSP counterparty (see [Standard Document, The ISDA Master Agreement: Dodd-Frank Amendment for End-User Swaps](#)).

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