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# ISDA 2021 SBS Protocol and ISDA 2021 SBS Top-Up Protocol

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**The ISDA SBS Protocols**

Parties are currently considering whether or not to adhere to the ISDA 2021 SBS Protocol ("SBS Full Protocol") or the ISDA 2021 SBS Top-Up Protocol ("SBS Top-Up Protocol", together, the "SBS Protocols"), in anticipation of relevant US Securities and Exchange Commission (SEC) rules governing security-based swaps coming into force on 1 November 2021.

Background

The International Swaps and Derivatives Association (ISDA) developed the SBS Full Protocol and the SBS Top-Up Protocol in response to new SEC rules affecting security-based swaps and related products. These rules follow those previously introduced by the US Commodity Futures Trading Commission (CFTC) in relation to other types of swaps.

The SBS Protocols follow a similar format to the two Dodd-Frank Protocols which were released during 2012 and 2013 (namely, the ISDA August 2012 DF Protocol and the ISDA March 2013 DF Protocol) – in that sense, similar protocols, for similar rules.

What are security-based swaps?

The dividing line between a "swap" subject to the CFTC regime and a security-based swap subject to the SEC regime is sometimes not obvious. Broadly, security-based swaps include certain credit derivatives based on a single security or loan or narrow-based security index (i.e., broadly, comprising nine or fewer component securities) or issuers of securities in a narrow-based security index, as well as certain equity derivatives, total return swaps, or contracts for differences on a single security, loan, or narrow-based security index.

Topping up the Dodd-Frank Protocols

As a result of commonalities between the CFTC requirements reflected in the Dodd-Frank Protocols from 2012/2013, and the SEC requirements reflected in the 2021 SBS Protocols, information already provided by adhering parties to the Dodd-Frank Protocols is also relevant to the SBS Protocols.

The SBS Top-Up Protocol was produced as a 'short form' version of the SBS Full Protocol, for use by parties which have already adhered to the Dodd-Frank Protocols, thus allowing adhering parties to use relevant information already submitted/exchanged in relation to the Dodd-Frank Protocols.

Consequently, adherence to the SBS Top-Up Protocol is appropriate only for parties which have already adhered to the Dodd-Frank Protocols. All others will need to adhere to the SBS Full Protocol and go through the full process, i.e., completion and delivery of completed questionnaires, in addition to the adherence letter.

How do the SBS Protocols work?

As with other ISDA protocols, the SBS Protocols act to amend bilateral agreements between adhering parties, thus removing the (usually greater) administrative burden to amend each bilateral agreement individually.

Again, as with other ISDA protocols, the SBS Protocols act to amend existing ISDA Master Agreements, but not ISDA Master Agreements to be entered into in the future (i.e., following the date of adherence). In which case, each 'future' agreement will need to include short form wording to confirm that the provisions of the relevant SBS Protocol apply to that future agreement.

Adherence process

Adhering to the SBS Top-Up Protocol is relatively straightforward, insofar as it requires an adherence letter to be completed, but does not require the completion and exchange of questionnaires. There is an adherence fee of US$500 for each adhering entity.

Adhering to the SBS Full Protocol is less straightforward, insofar as questionnaires must be completed and exchanged, in addition to completion of the adherence letter. Again, an adherence fee of US$500 applies for each adhering entity.

Is it necessary to adhere?

The relevant SEC rules governing security-based swaps apply to security-based swap dealers ("SBS Dealers") as well as major security-based swap participants ("Major SBS Participants").

Counterparties to SBS Dealers and Major SBS Participants will need to adhere to one of the two SBS Protocols if the SBS Dealers and Major SBS Participants require them to do so. In other words, it is for the SBS Dealers and Major SBS Participants to determine whether adherence by a certain type of counterparty is necessary for compliance by the SBS Dealers/Major SBS Participants themselves.

There may be differences in interpretation between SBS Dealers and Major SBS Participants as to which counterparties should be required to adhere. However, broadly-speaking, for most buy side entities, there will be little or no downside to adhering to the SBS Protocols. Adherence may well be a condition of being able to trade/do business with the relevant SBS Dealer/Major SBS Participant.

In what capacity should you adhere?

Broadly, if the fund entity has signed the relevant ISDA Master Agreement as counterparty (typically, that the fund entity is "Party B" under the ISDA Master Agreement), the fund entity will need to do a 'single entity adherence' to the relevant SBS Protocol, which means adhering as "PCA Principal". Only in circumstances where the fund entity's investment manager has itself signed the relevant ISDA Master Agreement as counterparty (typically, that the investment manager is itself "Party B" under the ISDA Master Agreement – albeit acting as agent – for example, under an 'umbrella' agreement) should an investment manager adhere as "PCA Agent". In other words, the style of adherence to the SBS Protocols must match the way in which the relevant ISDA Master Agreements have been executed.