

ISDA 2021 Security-based Swaps (SBS) Protocols

Schedule 1 - SBS Top-Up Protocol

What changes does the SBS Top-Up Protocol make to the Dodd-Frank Protocols?

As mentioned previously, the SBS Top-Up Protocol is the most suitable route where parties have previously adhered to the Dodd-Frank Protocols. Broadly, the SBS Top-Up Protocol adopts a “clone and tweak” approach which involves replicating the relevant Dodd-Frank Protocol elections (as per the questionnaires exchanged when the parties adhered to the Dodd-Frank Protocols), amending them to reflect the fact that compliance is now with the SEC regime and not the CFTC regime, and finally including certain additional agreements in order to reflect the requirements of the SEC regime.

The SBS Top-Up Protocol is divided between two appendices: “SBS Appendix 1” relating to the ISDA August 2012 Dodd-Frank Protocol (the ISDA August DF Protocol) and “SBS Appendix 2” relating to the ISDA March 2013 Dodd-Frank Protocol (the ISDA March DF Protocol).

SBS Appendix 1

Where parties have adhered to the ISDA August DF Protocol, the amendments set out in SBS Appendix 1 will be incorporated into the relevant Protocol Covered Agreements. SBS Appendix 1 amends each Schedule to the ISDA August DF Protocol Supplement as follows.

1. **Schedule 1 – Defined terms:** consequential changes are made to reflect the SEC rules – for example “Swap” is replaced with “SBS” and “DF Supplement” is replaced with “SBS Appendix 1”.
2. **Schedule 2 – Agreements between a swap dealer and any other party:** selected sections are replicated and additional agreements are added as follows.
 - SEC statement: the parties agree to rely on representations previously provided in connection with swap transactions in order to satisfy requirements under equivalent SEC requirements.
 - Regulatory disclosures:
 - bespoke regulatory disclosure provisions apply whereby the parties consent to the disclosure of information about themselves or their activities to the extent required by the relevant SEC rules notwithstanding any contractual non-disclosure arrangements that may be in place;

- further acknowledgements are made with respect to the disclosure of trade information to certain security-based swap data repositories, execution facilities and other third party service providers in connection with a party fulfilling its regulatory reporting obligations under the SEC rules;
- where a transaction is subject to non-disclosure requirements imposed by law and the parties are permitted to waive such requirements by consent, the parties are deemed to give such consent by virtue of the consents and acknowledgments in SBS Appendix 1; and
- if a party is a Non-Reporting Counterparty (as defined in the ISDA August DF Protocol Supplement), it agrees to notify the Reporting Counterparty of certain life-cycle events (defined in the Covered Rules) so as to allow the Reporting Party to fulfil its reporting requirements under the Covered Rules.
- Notifications: various notifications are made between the parties with respect to:
 - daily marks provided to a non-regulated counterparty by the relevant Covered SBS Entity;
 - the treatment of SBS by clearing agencies;
 - the ability of non-regulated swap entities to select which clearing agencies to be used to clear SBS where clearing is mandated under Dodd-Frank, and to require clearing of SBS (and select the relevant clearing agency) where clearing is not mandated¹; and
 - the ability of a counterparty to elect to be treated as a special entity for purposes of transacting in SBS pursuant to SEC Rule 15Fh-3(a) where the counterparty meets certain criteria under ERISA.
- **Schedules 3-6 – Safe harbours:** where any of Schedules 3-6 of the ISDA August DF Protocol Supplement were previously incorporated and a counterparty that is not a Covered SBS Entity has not already identified itself as an Institutional Counterparty ECP, a general representation is added that such counterparty has total assets of at least \$50m unless counterparty notifies the Covered SBS Entity to the contrary. Relevant sections from Schedules 3-6 are duplicated and consequential changes made in order to allow the parties to advantage of the relevant safe harbours if applicable.

¹ The right to select the clearing agency is limited to clearing agencies through which the Covered SBS Entity is authorised or permitted (directly or through a designated clearing member) to clear SBS.

SBS Appendix 2

Where parties have adhered to the ISDA March DF Protocol, the amendments set out in SBS Appendix 2 will be incorporated into the relevant Protocol Covered Agreements. Similar to SBS Appendix 1, SBS Appendix 2 goes through each Schedule to the ISDA March DF Protocol Supplement and amends them as follows:

- **Schedule 2 – General terms:** selected sections are duplicated and the Regulatory Disclosures section of SBS Appendix 1 is added (where the parties have not already entered into SBS Appendix 1). Certain consequential amendments are made to ISDA Master Agreements entered into pursuant to the ISDA March DF Protocol Agreement to extend their scope to cover SBS as well as swaps.
- **Schedule 3 – Calculation of risk valuations and dispute resolution:** Schedule 3 is duplicated in its entirety with certain definitions updated.
- **Schedule 4 – Portfolio reconciliation:** Schedule 4 is duplicated in its entirety with certain definitions updated. An additional provision is added obliging the parties to use reasonable commercial efforts to coordinate the timing of reconciliations with respect to swaps and SBS to the extent permitted under applicable law, so as to minimise operational burdens.
- **Elections:** certain elections² made under the ISDA March DF Protocol Questionnaire are carried over to SBS Appendix 2 as relevant.

² The relevant items of the ISDA DF Protocol Questionnaire are: Part II, questions 6, 7 and 8; and Part III, questions 1, 3(b) and 3(c).

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