

ISDA 2021 Security-based Swaps (SBS) Protocols

Schedule 2 - SBS Protocol

ISDA 2021 SBS Protocol Supplement I (SBS Supplement 1)

SBS Supplement 1 aligns broadly with the subject matter covered by the ISDA August 2012 DF Protocol Supplement (the "ISDA August DF Protocol Supplement")¹. Like the ISDA August DF Protocol Supplement, SBS Supplement 1 is divided into Schedules setting out standardised representations, acknowledgements, notifications, disclosures and agreements relating to the Covered Rules. The parties elect which Schedules will be incorporated into their Protocol Covered Agreements via the questionnaires. Schedules 1 and 2 apply automatically, but parties that are not themselves Covered SBS Entities must then choose one of Schedules 3-6 to apply, as each contains a safe harbour allowing Covered SBS Entities to transact SBS with them.

- **Schedule 1 – Defined terms**

- **Schedule 2 – Agreements between a Covered SBS Entity and any other party:**

- contains general representations and agreements between the parties regarding, amongst other things, the accuracy of information provided in the relevant questionnaires and consents to regulatory disclosure (which track the consents given in the SBS Top-up Protocol (see [Schedule 1](#)) rather than those in the ISDA August DF Protocol Supplement);
- specific representations are included for various entity types: non-Regulated Swap Entities², Eligible Contract Participants³ (ECP) (and which particular type of ECP); and
- notifications by a Covered SBS Entity are included with respect to daily marks, clearing and special entities⁴ (see [Schedule 1](#) in relation to the SBS Top-up Protocol).

- **Schedule 3 – Institutional suitability safe harbours for Institutional Counterparties:**

- contains representations and agreements to allow Covered SBS Entities and Institutional Counterparties⁵ to benefit from a general institutional safe harbour. A party may designate a Designated Evaluation Agent in its questionnaire who agrees to take responsibility for exercising independent judgment in evaluating recommendations made by the Covered SBS Entity in order to benefit from the safe harbour. Alternatively a party may choose not to designate a Designated Evaluation Agent, in which case more extensive representations are required, including that such party has complied in good faith with written policies and procedures designed to ensure that the person evaluating recommendations made by the Covered SBS Entity is capable of doing so and is exercising independent judgment. This Schedule will generally be applied by every adherent that is not a Special Entity (for which see below) and so will be the most common one applied.

- **Schedule 4 – Safe harbours for non-ERISA Special Entities:**

- this safe harbour may be used by Special Entities⁶ which are not employee benefit plans provided they have named one or more Designated Qualified Independent Representative (QIR) in their questionnaire. The Designated QIR(s) must countersign the questionnaire and agree to make the representations and perform the agreements applicable to it set out in Schedule 4.

- **Schedules 5 and 6 – Safe Harbours for ERISA Special Entities (Options 1 and 2):**

- Special Entities which are employee benefit plans may choose to incorporate the safe harbours set out in Schedule 5 or 6 or both; in order to do so, they must have one or more Designated Fiduciaries who have each countersigned the relevant questionnaire and agreed to give the representations in Schedule 5 and/or 6 and perform the agreements applicable to it. The delineation of responsibility between the ERISA Special Entity and the Designated Fiduciary is different between Schedules 5 and 6, with the Designated Fiduciary performing a more extensive role under Schedule 6.

¹ For more detail on the ISDA August 2012 DF Protocol, please see our [previous note](#).

² Counterparties that are not a SBS dealer, swap dealer major swap participant or major security-based swap participants.

³ As defined in Section 1a(18) of the commodity exchange act.

⁴ As defined in Section 15F(h)(2)(C) of the SEA and SEC Rule 15Fh-2(d).

⁵ A counterparty that is an ECP or has total assets of at least \$50m.

⁶ As defined in Section 15F(h)(2)(C) of the SEA and SEC Rule 15Fh-2(d). It includes ERISA plans, other US pension plans, US federal agencies, US States and other political subdivisions (e.g. municipalities and endowments).

ISDA 2021 SBS Protocol Supplement II (SBS II)

SBS Supplement 2 aligns broadly with the subject matter covered by the ISDA March 2013 DF Protocol Supplement (the ISDA March DF Protocol Supplement). Like the ISDA March DF Protocol Supplement, SBS Supplement II is divided into Schedules setting out standardised representations, acknowledgements, notifications, disclosures and agreements relating to the Covered Rules. The parties elect which Schedules will be incorporated into their Protocol Covered Agreements via the questionnaires. Schedules 1 and 2 will apply automatically, and Covered SBS Entities will generally require counterparties to apply Schedules 3 and 4 as a condition to continued trading.

- **Schedule 1 – Defined terms**

- **Schedule 2 – General terms:**

- contains general representations and agreements between the parties regarding, amongst other things, the accuracy of information provided in the relevant questionnaires and consents to regulatory disclosure (which track the consents given in the SBS Top-up Protocol (see [Schedule 1](#)) rather than those in the ISDA March DF Protocol Supplement);
- specific representations are included for non-Regulated Swap Entities⁷;
- if a party is a Non-Reporting Counterparty (the party that is not determined to be on the “reporting side” under the Covered Rules in respect of an SBS), 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;
- the parties agree that confirmations may be created by electronic delivery of written terms, subject to satisfaction of certain criteria;
- notifications are made with respect to the treatment of SBS by clearing agencies; and
- certain notifications and agreements are made in relation to parties who become, or cease to be, insured depository institutions⁸ or financial companies⁹ in the event that the FDIC is appointed as a receiver.

- **Schedule 3 – SBS risk valuation agreement:** broadly speaking:

- on each local business day following the occurrence of certain “transaction events”, the party who is the Covered SBS Entity must determine the risk exposure of each SBS. If the exposure is determined separately under a CSA, the CSA valuation may be used;
- the counterparty may request to see the risk valuations but otherwise the Covered SBS Entity is not obliged to disclose any proprietary models used for valuing SBS. Part II of Schedule 3 sets out a dispute resolution procedure in the event the counterparty disagrees with a risk valuation and there is no CSA in place. If there is a CSA in place, the CSA dispute resolution process will apply;
- the parties agree and acknowledge that risk valuation provisions in Schedule are purely to enable the Covered SBS Entity to comply with its risk management requirements under Section 15F(j) of the Securities Exchange Act and they have no bearing on any margining arrangements, or disputes in respect of such margining arrangements, separately in place between the parties; and
- failure by the counterparty to dispute a risk valuation does not constitute acceptance of such risk valuation.

- **Schedule 4 – Portfolio Reconciliation:** broadly speaking:

- the Covered SBS Entity may notify the counterparty that the parties need to perform a data reconciliation either daily, weekly, quarterly or annually in order for the Covered SBS Entity to comply with its portfolio reconciliation obligations under the Covered Rules;
- if the counterparty has elected for one-way delivery of portfolio data, the Covered SBS Entity will provide the portfolio data, counterparty will review it and either affirm it or identify a discrepancy which the parties must attempt to resolve in a timely fashion;
- if the counterparty has elected for exchange of portfolio data, the parties must agree on data delivery dates that comply with the requisite frequency of portfolio reconciliation, deliver portfolio data to each other on those data delivery dates and then perform a data reconciliation in respect of such portfolio data;

⁷ Counterparties that are not a SBS dealer, swap dealer major swap participant or major security-based swap participants.

⁸ As defined in 12 U.S.C. § 1813.

⁹ As defined in Section 201(a)(11) of the Dodd-Frank Act, 12 U.S.C. § 5381(a)(11).

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- dispute resolution mechanisms apply in the event of discrepancies and the time frames for resolving discrepancies varies depending on the nature of the discrepancy;
 - if the counterparty has elected to reconcile against SBS data repository data (SBSDR data) then each party must reconcile against SBSDR data to the extent it relates to material terms that would otherwise be delivered as portfolio data. This displaces the obligation to provide portfolio data to the extent such portfolio data consists of material terms data reported to an SBSDR. However, if a party is unable to access the relevant SBSDR data, it must notify the other party who must then deliver portfolio data as soon as reasonably practicable. Either party may terminate the obligation to reconcile against SBSDR data on two business days' notice;
 - the parties must use reasonable commercial efforts to coordinate timings of reconciliations with respect to swaps and SBS to the extent permitted under applicable law; and
 - the parties may agree bilateral procedures for the exchange, delivery and/or reconciliation of portfolio data and resolution of discrepancies either in addition to or instead of the procedures set out in Schedule 4.

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