User's Guide to the ISDA 2002 Master Agreement

2003 EDITION

ISDA®

INTERNATIONAL SWAPS AND DERIVATIVES ASSOCIATION, INC.

360 Madison Avenue, 16th Floor
New York, N.Y. 10017

TABLE OF CONTENTS

INTRODUCTION i

A NOTE ON COPYRIGHT ii

I. ISDA DOCUMENTATION ARCHITECTURE 1
A. The 2002 Architecture 1
1. Form of Master Agreement 1
2. Completing the 2002 Agreement 1
3. Confirmations and Definitional Booklets 1
a. Interest Rate and Currency Transactions 2
b. FX Transactions and Currency Options 2
c. Commodity Derivatives 2
d. Credit Derivatives 3
e. Equity Derivatives 3
4. 2001 ISDA Cross-Agreement Bridge and 2002 ISDA Energy Agreement Bridge 3
5. 2002 Master Agreement Protocol and Bilateral Forms of Amendment 3
6. Implementation and Use of the 2002 Architecture 4
B. The Pre-2002 Architecture 4
1. 1992 Agreements 4
2. 1987 Agreements 4
II. DESCRIPTION OF THE 2002 AGREEMENT—A SECTION-BY-SECTION GUIDE 5
A. Heading 5
1. Identifying Information 5
2. Text of Heading 5
B. Section 1—Interpretation 6
C. Section 2—Obligations 6
1. General Conditions 6
2. Change of Account 6
3. Netting of Payments 7
4. Default Interest; Other Amounts 7
D. Section 3—Representations 7
1. General 7
2. Absence of Litigation 7
3. Accuracy of Specified Information 7
4. No Agency 7
5. Additional Representation in the Schedule 8
E. Section 4—Agreements 8
1. General 8
2. Furnish Specified Information 8
F. Section 5—Events of Default and Termination Events 9
1. General—Specified Entities and Credit Support Providers 9
2. Events of Default 9
a. Failure to Pay or Deliver 9
b. Breach of Agreement; Repudiation of Agreement 10
c. Credit Support Default 10
d. Misrepresentation 11
e. Default Under Specified Transaction 11

f. Cross-Default 13
g. Bankruptcy 14
h. Merger Without Assumption 15
3. Termination Events. 15
a. Illegality 15
b. Force Majeure Event 16
i. Deferral Provisions 17
(A) Deferral of Payments and Deliveries During Waiting Period 18
(B) Deferral of Rights to Terminate Affected Transactions 18
ii. Inability of Head or Home Office to Perform Obligations of Branch 18
c. Credit Event Upon Merger 18
d. Additional Termination Event 19
e. Hierarchy of Events 19
G. Section 6—Early Termination; Close-out Netting 20
1. Who May Designate an Early Termination Date 20
a. Events of Default; Automatic Early Termination 20
b. Termination Events 21
2. What Transactions May Be Terminated 22
3. Effect of Designation of an Early Termination Date 23
4. Calculations; Payment Date 23
5. Payments on Early Termination 24
a. Close-out Amount 24
b. Calculation of Early Termination Amounts 27
i. Early Termination Amount and Events of Default 27
ii. Early Termination Amount and Termination Events (One Affected Party) 27
iii. Early Termination Amount and Termination Events (Two Affected Parties) 27
c. Currency of Termination Payment 28
d. Mid-market Events 28
e. Adjustment for Bankruptcy 29
f. Adjustment for Illegality or Force Majeure Event 29
g. Pre-Estimate 29
h. Set-Off 29
H. Section 7—Transfer 30
I. Section 8—Contractual Currency 30
1. Payment in the Contractual Currency 30
2. Judgments 31
3. Separate Indemnities 31
4. Evidence of Loss 31
J. Section 9—Miscellaneous 31
1. Entire Agreement 31
2. Amendments 31
3. Survival of Obligations 31
4. Remedies Cumulative 31
5. Counterparts and Confirmations 32
6. No Waiver of Rights 32
7. Headings 32
8. Interest and Compensation 32

a. Prior to Early Termination 32
i. Interest on Defaulted Payments 32
ii. Compensation for Defaulted Deliveries 33
iii. Interest on Deferred Payments 33
(A) Section 2(a)(iii) 33
(B) Section 5(d) 34
(C) Continuing Illegality or Force Majeure Event 34
iv. Compensation for Deferred Deliveries 34
b. Early Termination 34
i. Unpaid Amounts 35
ii. Early Termination Amounts 35
K. Section 10—Offices; Multibranch Parties 36
L. Section 11—Expenses 37
M. Section 12—Notices 37
N. Section 13—Governing Law and Jurisdiction 38
1. Governing Law 38
2. Jurisdiction 38
3. Service of Process 39
4. Waiver of Immunities 39
O. Section 14—Definitions 39
P. Signature Block 40
III. CONFIRMATIONS PRIOR TO EXECUTION OF A 2002 AGREEMENT 40
IV. TAX PROVISIONS 40
A. Introduction 40
B. Withholding Taxes 41
1. General Approach to Withholding Taxes 41
2. Changes from the 1992 Agreement 43
3. Establishing Absence of Withholding Tax. 43
a. Payer Tax Representation 43
b. Payee Tax Representation 44
i. Treaty 45
ii. Effectively Connected 46
c. Agreement to Deliver Tax Forms 46
4. Multiple Relevant Jurisdictions; Multibranch Parties 47
5. Allocation of Financial Burden of Withholding Tax 48
a. Definition of "Indemnifiable Tax" 48
b. Gross-up Provisions 49
i. Initial Expectations Incorrect 50
ii. Change in Facts 52
iii. Change in Tax Law or Similar Legal Development 52
iv. Impact of new "No Agency" Representation 53
C. Tax-Related Termination Events 54
1. General 54
a. Tax Event 54
b. Tax Event Upon Merger 54
2. Changes from the 1992 Agreement 55
3. Analysis 55
D. Stamp Taxes 56
1. General Approach 56
2. Changes from the 1992 Agreement 57
3. Analysis 57

E. Early Termination 57
F. Tax Considerations Relating to Physical Delivery 57
G. Tax Issues Relating to Transfers 58
1. General Approach 58
2. Changes from the 1992 Agreement 58
3. Analysis 58
H. U.S. Tax Representations 59
1. General 59
2. Information Reporting 60
a. IRS Form 1042-S Reporting 60
b. IRS Form 1099 Reporting and Backup Withholding 60
c. Payments to Foreign Partnerships and Trusts 61
3. Treatment of Payments as Interest 61
a. Effectively Connected Income 61
b. Portfolio Interest 62
c. Treaty Exemption 62
4. Sample Representations for Inclusion in Part 2(b) of the Schedule to the 2002 Agreement. 63
5. Explanation of U.S. Payee Tax Representations 64
a. Representation A (Payee is a U.S. Person) 64
b. Representation B (Payee May Not Act Through a U.S. Office) 64
c. Representation C (Payee is a Multi-Branch Party That May Act Through a U.S. Office) 64
d. Representation D (Payee is a Non-U.S. Person Acting Only Through a U.S. Office) 64
I. U.S. Confidential Tax Shelter Legislation 64
J. U.K. Deductibility of Payments Made Pursuant to the 2002 Agreement 65
1. General 65
2. Sample Representation 67
V. ADEQUATE ASSURANCES PROVISION 67
VI. EXPANDING THE SCOPE OF SET-OFF 68
A. Guarantee and Assignment Provision 68
B. Other Approaches 70
1. Withholding/Conditionality Approach 70
2. Flawed Asset Approach 71
VII. GLOBAL DOCUMENTATION STEERING COMMITTEE RECOMMENDATIONS 72
VIII. ADDITIONAL MODIFICATIONS TO THE 2002 AGREEMENT REGARDING PHYSICALLY-SETTLED TRANSACTIONS 72
IX. FINANCIAL PRODUCTS MARK-UP LANGUAGE 74

APPENDIX A	ISDA AGREEMENT STRUCTURE (2003)
APPENDIX B	BILATERAL FORM OF AMENDMENT FOR CLOSE-OUT AMOUNT
APPENDIX C	BILATERAL FORM OF AMENDMENT FOR CREDIT SUPPORT DOCUMENTS
APPENDIX D	GROSS-UP/TAX EVENT PROVISIONS FLOWCHART

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INTRODUCTION

In 1999, the International Swaps and Derivatives Association, Inc. ("ISDA"), initiated a strategic documentation review (the "Strategic Documentation Review" or "SDR") of the 1992 ISDA Master Agreement (Multicurrency – Cross Border) (the "1992 Agreement") and the ISDA Credit Support Documents. Three ISDA working groups were formed to address specific areas of the 1992 Agreement. One group addressed the termination, valuation and close-out provisions of the 1992 Agreement. Another group addressed the proposal to prepare standard force majeure and impossibility provisions for inclusion in a 1992 Agreement. The third group addressed certain structural issues, including consideration of how to make use of the 1992 Agreement to achieve cross-product netting, ultimately resulting in ISDA's publication of the 2001 ISDA Cross-Agreement Bridge. A fourth working group focused on the Credit Support Documents, resulting in the publication of the 2001 ISDA Margin Provisions and User's Guide.

The SDR and the subsequent development of a new Master Agreement (the "2002 Agreement") grew out of member experiences during periods of market turmoil in the late 1990s, including the Asian currency crises, the Russian debt default and issues surrounding Long-Term Capital Management. The operation of several key provisions of the 1992 Agreement, particularly Sections 5 and 6, needed to be adjusted to reflect the lessons learned from those experiences and to incorporate some of the changes that occurred in market practice after 1992. In revising the 1992 Agreement, the main objectives were to incorporate modifications and clarifications deemed important based on experience gained since 1992 and to form a consensus of the ISDA membership on such modifications and clarifications.

This User's Guide is designed to explain the 2002 Agreement and to highlight significant changes from the 1992 Agreement. The User's Guide also identifies and discusses certain issues that merit additional consideration by market participants. Section I of the User's Guide focuses on the architecture of and the product coverage contemplated by the 2002 Agreement. Section II provides a section-by-section guide to the 2002 Agreement. Section III discusses what can be done if parties enter into a confirmation with respect to a particular derivative transaction prior to execution of a 2002 Agreement. Section IV explains the tax provisions and related tax considerations with respect to the 2002 Agreement. Section V discusses adequate assurances. Section VI sets forth a model guarantee and assignment provision, which expands the set-off provision in the 2002 Agreement. Section VII describes the Global Documentation Steering Committee's efforts to harmonise documentation approaches across industry master agreements. Section VIII offers additional modifications to the 2002 Agreement relating to physically-settled transactions. Lastly, Section IX discusses Financial products Markup Language and its implications for the 2002 Agreement. The publication date of this User's Guide is July 23, 2003.

THIS USER'S GUIDE DOES NOT PURPORT AND SHOULD NOT BE CONSIDERED TO BE A GUIDE TO OR EXPLANATION OF ALL RELEVANT ISSUES OR CONSIDERATIONS IN A PARTICULAR TRANSACTION OR CONTRACTUAL RELATIONSHIP. PARTIES SHOULD THEREFORE CONSULT WITH THEIR LEGAL ADVISERS AND ANY OTHER ADVISER

THEY DEEM APPROPRIATE PRIOR TO USING ANY ISDA STANDARD DOCUMENTATION. ISDA ASSUMES NO RESPONSIBILITY FOR ANY USE TO WHICH ANY OF ITS DOCUMENTATION OR ANY DEFINITION OR PROVISION CONTAINED THEREIN MAY BE PUT.

Unless otherwise indicated, capitalised terms used in this User's Guide and not defined have the meanings given such terms in the 2002 Agreement and Section references in this User's Guide are to Sections of the 2002 Agreement.

Copies of any of the published ISDA standard documentation may be obtained from ISDA's website, www.isda.org, under "ISDA Bookstore".

USER'S GUIDE TO THE ISDA 2002 MASTER AGREEMENT

I. ISDA DOCUMENTATION ARCHITECTURE

This Section explains the ISDA documentation architecture and its development. Particular focus is given to the architecture of the 2002 Agreement.

A. The 2002 Architecture

This Section I.A. explains the choices parties will typically consider in using ISDA standard documentation to document derivative transactions and assumes that the parties are initially entering into a 2002 Agreement to be followed by one or more confirmations containing the economic terms of particular derivative transactions. ISDA recognises that, in practice, parties often enter into a confirmation for a particular derivative transaction first and then enter into a 2002 Agreement *(see* Section III below). A chart set forth as Appendix A to this User's Guide illustrates the 2002 ISDA documentation architecture.

1. ***Form of Master Agreement.*** The 2002 Agreement is intended to be used as a Multicurrency – Cross Border Master Agreement. Unlike ISDA's 1992 forms of Master Agreement, which involved two forms (Local Currency – Single Jurisdiction and Multicurrency – Cross Border), the 2002 Agreement is offered only as a Multicurrency – Cross Border form, although it is not designated as such.

2. ***Completing the 2002 Agreement*****.** The advantage to market participants using the printed forms is to reduce the time and expense involved in reviewing documentation prepared by another party. This benefit is lost if the forms are prepared by one party without regard to the printed forms. It is also advantageous to use the printed forms even if market participants wish to make additions or deletions, for this enables them to focus on the actual changes being made to a 2002 Agreement. Parties need only provide identifying information in the main text of a 2002 Agreement and complete the schedule (the "Schedule") attached to a 2002 Agreement. It may be more practical to retype the Schedule where significant additions to a 2002 Agreement are made. In the Schedule parties choose whether and how certain optional provisions in a 2002 Agreement will apply. For example, in Part 1(a) of the Schedule parties may choose to specify Specified Entities (*see* Section II.F.1. below) for purposes of expanding the scope of certain Events of Default and one of the Termination Events (i.e., the Events of Default specified in Sections 5(a)(v), 5(a)(vi) and 5(a)(vii) and the Credit Event Upon Merger Termination Event). Also, in the Schedule parties may alter or amend the provisions of a 2002 Agreement as they wish through specification of additional or alternative provisions. For example, parties may decide to amend a 2002 Agreement by including one or more Additional Termination Events in Part 1(g) of their Schedule. (*See* Section II.F.3.d. below). Amendments or deletions to the form 2002 Agreement can be made with an appropriate statement in the Schedule. Please note that a Schedule to the 2002 Agreement is available in an electronic format on ISDA's website, www.isda.org, under "ISDA Bookstore".

3. ***Confirmations and Definitional Booklets.*** Once the parties have provided the necessary identifying information in a 2002 Agreement and negotiated the Schedule, the parties must then select the appropriate confirmation for documenting the economic terms of a contemplated derivative transaction under a 2002 Agreement. The 2002 Agreement can cover a broad range of derivative transactions, including basis swaps, bond options, bullion options, bullion swaps, bullion trades, buy-sellback transactions, cap transactions, collar transactions, commodity forwards, commodity options, commodity swaps, credit default swaps, credit spread transactions, cross-currency rate swaps, currency options, currency swaps, equity forwards, equity index options, equity options, equity index swaps, equity swaps, floor transactions, foreign exchange transactions, forward rate transactions, interest rate options, interest rate swaps, physical commodity transactions, repurchase transactions, securities lending transactions, total return swaps and weather derivatives. Many of these transaction types are specifically addressed in various ISDA definitional booklets, although, as discussed further in Section I.A.5. below, parties should note that definitional booklets published before 2002 were not drafted with the 2002 Agreement in mind and certain references or concepts contained in them refer to or rely on the 1992 Agreement. Some of the more common transactions are discussed below.

a. ***Interest Rate and Currency Transactions.*** If the relevant transaction is a basis swap or other form of interest rate swap, a currency swap, cross-currency rate swap transaction, forward rate transaction, interest rate cap transaction, interest rate collar transaction, interest rate floor transaction, or any other similar transaction (including any option with respect to any of these transactions), parties should consider using the 2000 ISDA Definitions (the "2000 Definitions"), which include the Annex to the 2000 ISDA Definitions (updated electronically from time to time on ISDA's website) and the related forms of confirmations. In these forms of confirmations, parties will incorporate the 2000 Definitions, will specify the economic terms of the relevant transaction and may provide any individual modifications to a 2002 Agreement beyond those contained in the Schedule.

b. ***FX Transactions and Currency Options.*** If the relevant transaction is a foreign exchange transaction or currency option, parties should consider using the 1998 FX and Currency Option Definitions (the "FX and Currency Option Definitions") and Annex A to the 1998 FX and Currency Option Definitions (updated electronically from time to time on ISDA's website) and the related forms of confirmations. In these forms of confirmations parties will incorporate the FX and Currency Option Definitions, will specify the economic terms of the relevant transaction and may provide any individual modifications to a 2002 Agreement beyond those contained in the Schedule.

c. ***Commodity Derivatives.*** If the relevant transaction is a commodity forward, commodity option or commodity swap or any other similar transaction, parties should consider using the 1993 ISDA Commodity Derivative Definitions as supplemented by the 2000 Supplement (the "Commodity Derivative Definitions") and the related forms of confirmations. In these forms of confirmations, parties will incorporate the Commodity Derivative Definitions, will specify the economic terms of the relevant transaction and may provide any individual modifications to a 2002 Agreement beyond those contained in the

Schedule.

d. ***Credit Derivatives.*** If the relevant transaction is a credit default swap (sometimes referred to as a credit protection transaction), parties should consider using the 2003 ISDA Credit Derivatives Definitions and the May 2003 Supplement to the 2003 ISDA Credit Derivatives Definitions (together, the "Credit Derivatives Definitions") and the related form of confirmation. In this form of confirmation, parties will incorporate the Credit Derivatives Definitions, will specify the economic terms of the relevant transaction and may provide any individual modifications to a 2002 Agreement beyond those contained in the Schedule.

e. ***Equity Derivatives.*** If the relevant transaction is an equity forward, equity index option, equity option, equity index swap or equity swap, parties should consider using the 2002 ISDA Equity Derivatives Definitions (the "Equity Derivatives Definitions") and the forms of confirmations published on ISDA's website. In these forms of confirmations, parties will incorporate the Equity Derivatives Definitions, will specify the economic terms of the relevant transaction and can provide any individual modifications to a 2002 Agreement beyond those contained in the Schedule. ISDA members may wish to consider also incorporating provisions from the 2000 Definitions if one leg of the Equity Derivative Transaction involves payments of Floating Amounts linked to interest rates or currency exchange rates.

4. ***2001 ISDA Cross-Agreement Bridge and 2002 ISDA Energy Agreement Bridge.*** The 2001 ISDA Cross-Agreement Bridge (the "2001 Bridge") and the 2002 ISDA Energy Agreement Bridge (the "2002 Bridge") were developed in order to provide parties to an ISDA Master Agreement with a means of using that agreement to achieve a form of cross-product netting. Upon the occurrence of certain circumstances, transactions documented under other industry-standard master agreements may be closed-out and the net close-out amounts calculated in respect of those transactions in accordance with the provisions of the agreement under which those transactions are documented may be incorporated within the close-out provisions of their ISDA Master Agreement. The 2001 Bridge and the 2002 Bridge may be incorporated into Part 5 of the Schedule to an ISDA Master Agreement.

5. ***2002 Master Agreement Protocol and Bilateral Forms of Amendment.*** ISDA made available a Protocol on 15 July 2003 to enable parties who have entered and/or anticipate in the future entering into a 2002 Agreement to address, in an efficient way, various issues that arise when certain documents published by ISDA before 2002 are used with a 2002 Agreement. These issues arise because documents published before 2002 were not drafted with the 2002 Agreement in mind. Many of those documents therefore contain references to the 1992 Agreement and references to certain terms and concepts contained in the 1992 Agreement that are not included in the 2002 Agreement (such as Market Quotation and Loss).

Parties that adhere to the Protocol, whether or not they have yet entered into a 2002 Agreement, agree that if and when certain ISDA definitional booklets and credit support documents are used with a 2002 Agreement between them and any other adherent, certain standardised amendments to those documents will be deemed to be made. The possible amendments are contained in the Protocol's eighteen Annexes, each one of which concerns a different ISDA publication. Both members and non-members of ISDA who have entered and/or anticipate entering into a 2002 Agreement in the future have until 1 March 2004 to take advantage of the significant time and cost benefits offered by the multilateral nature of the Protocol. The Protocol, including details of how to adhere, and a list of its adherents are available on ISDA's website.

In addition, ISDA published a bilateral form of Amendment Agreement that enables parties to amend a 1992 Agreement to include the 2002 Agreement's single measure of damages standard, Close-out Amount. The Amendment Agreement is set forth as Appendix B to this User's Guide. Although this replacement or amendment process may consume some time in the short-term, it should significantly reduce long-term documentation basis risk. ISDA also published a bilateral form of Amendment Agreement for amendments to the 1994 ISDA Credit Support Annex (New York law) and the 1995 ISDA Credit Support Annex (English law) in order to take account of changes reflected in the 2002 Agreement, including the introduction of Close-out Amount. This Amendment Agreement is set forth as Appendix C to this User's Guide.

6. ***Implementation and Use of the 2002 Architecture.*** ISDA recommends the use of its 2002 standard documentation for new contractual relationships between parties. ISDA also recommends that, where feasible, parties consider implementing the 2002 documentation architecture into existing contractual relationships.

B. The Pre-2002 Architecture

This Section I.B. describes pre-2002 ISDA documentation architecture.

1. ***1992 Agreements.*** In the pre-2002 Agreement context, parties contemplating a contractual relationship would first decide whether to use the Local Currency – Single Jurisdiction ("Local Currency Master") or the Multicurrency - Cross Border ("Multicurrency Master") form of the 1992 ISDA Master Agreements (together, "the 1992 Agreements"). The Local Currency Master and the Multicurrency Master are each master agreements which can govern multiple derivative transactions, the economic terms of which are documented in separate confirmations which each form a part of the relevant 1992 Agreement. The Local Currency Master and the Multicurrency Master are structured as complete contracts containing payment provisions, representations, agreements, events of default, termination events, provisions for early termination, methods for calculating payments on early termination and other provisions. A party may choose the Local Currency Master when dealing with a counterparty located in the same jurisdiction as such party in transactions involving only one currency (generally the local currency of such jurisdiction).

2. ***1987 Agreements.*** Before the 1992 Agreements were published, parties contemplating a contractual relationship used the 1987 ISDA Interest Rate Swap Agreement or the 1987 ISDA Interest Rate and Currency Exchange Agreement (together, the "1987 Agreements"). The 1987 Agreements were structured as a complete contract containing payment provisions, representations, agreements, events of default, termination events, provisions for early termination, methods for calculating payments on early termination and other provisions. Parties would then provide identifying information in the main text of the 1987 Agreements and complete the schedule, in which the parties would modify the 1987 Agreements and choose whether and how certain optional provisions in the 1987 Agreements would apply.

II. DESCRIPTION OF THE 2002 AGREEMENT—A SECTION-BY-SECTION GUIDE

This Section II explains the provisions of the 2002 Agreement and sets forth certain considerations, including potential modifications, which parties may wish to consider. Section II also explains the changes made in the 2002 Agreement from the 1992 Agreement. Copies of the 2002 Agreement marked to show all changes from the 1992 Agreement are available from ISDA's legal department.

An explanation of the tax provisions in the 2002 Agreement (including tax representations and tax-related Termination Events) may be found in Section IV below. The definitions contained in Section 14 of the 2002 Agreement and the provisions contained in the Schedule are integrated into the discussion below.

A. Heading

1. *Identifying Information.* The name of each party and, if desired, the form and jurisdiction of its organization must be specified on the first page of the main text as well as in the heading of the Schedule. The date from which the agreement of the parties has effect must be specified on the first page of the 2002 Agreement and in the heading to the Schedule. This allows parties to apply the terms of the 2002 Agreement to transactions between the parties already existing at the time the 2002 Agreement is signed.

2. *Text of Heading.* The heading to the 2002 Agreement sets forth the master agreement architecture contemplated by the parties by specifically indicating that the contractual relationship of the parties will be governed by both the Master Agreement (which includes the Schedule) and, in the case of any Transaction, any "documents and other confirming evidence exchanged between the parties or otherwise effective for the purpose of confirming or evidencing" that Transaction. The heading has been amended from the 1992 Agreement by adding the phrase "or otherwise effective for the purpose of confirming" Transactions in order to recognise that parties may confirm Transactions in ways other than through the *exchange* of documents or other confirming evidence. For example, in instances where only one party sends a Confirmation[1], documents or confirming evidence would not be "exchanged" between the parties, as required in the 1992 Agreement.

Parties entering into a Confirmation through "confirming evidence" in a form other than written and signed documents that have been exchanged should carefully

[1] Under a 1994 amendment to the New York State Statute of Frauds, it is legally effective for only one party to send a Confirmation or for neither party to send a Confirmation if there is an oral contract. In addition, many jurisdictions have enacted electronic signature legislation that would not strictly require that the Confirmation be "exchanged" between the parties.

consider whether the use of such "confirming evidence" complies with any applicable statute of frauds or other legal requirements in their particular jurisdiction.

B. Section 1—Interpretation

Section 1 sets forth certain rules of interpretation. Section 1(b) establishes a priority for reconciling any inconsistencies between the Schedule and the remainder of the 2002 Agreement and inconsistencies between provisions of any Confirmation and the 2002 Agreement. Section 1(c) states that the parties intend that the 2002 Agreement and all Confirmations form a single agreement between the parties. This is a fundamental provision that is the basis for close-out netting. In other words, each Confirmation does not represent a separate agreement between the parties.

C. Section 2—Obligations

1. ***General Conditions.*** Section 2(a) indicates that each Confirmation will set forth the economic terms for a particular Transaction and when and how payments or deliveries will be made. Section 2(a)(i) provides that each party will make the payments and deliveries specified in each Confirmation to be made by it, subject to other provisions of the 2002 Agreement. Section 2(a)(ii) states that the payments required under the 2002 Agreement will be made on the required due date "in freely transferable funds and in a manner customary for payments in the required currency". If delivery is required under the 2002 Agreement, such delivery will be made on the required due date "in the manner customary for the relevant obligation", unless otherwise specified in the relevant Confirmation or in the 2002 Agreement.

Section 2(a)(iii) provides that the obligations of parties to make payments or deliveries are subject to various conditions precedent, including that no Event of Default or Potential Event of Default has occurred and is continuing and that no Early Termination Date has occurred or been effectively designated. Thus, the existence of an Event of Default or a Potential Event of Default is a sufficient basis to withhold a payment or delivery while a Termination Event must have led to the declaration of an Early Termination Date for a relevant Transaction before a payment or delivery may be withheld for that Transaction. Section 2(a)(iii) of the 2002 Agreement has been modified from the 1992 Agreement to provide that if the parties wish additional conditions to serve as conditions precedent for the purpose of Section 2(a)(iii), they must clearly specify them as such in the 2002 Agreement.

2. ***Change of Account.*** The 2002 Agreement contemplates that parties will specify their respective accounts for receiving payments or deliveries under each Transaction in the relevant Confirmation. Of course, parties may also specify their respective accounts in the Schedule. Section 2(b) provides that a party may change its account upon giving prior notice of at least five Local Business Days prior to the next scheduled payment or delivery date unless the other party provides timely notice of a reasonable objection to such change. Section 2(b) states that the time for notice is calculated in the place where the relevant new account is to be located and permits the other party to assert reasonable grounds for objecting to a change of account. The other party has been granted the ability to object because, for example, in some jurisdictions changes in account location could result in adverse tax consequences.

3. ***Netting of Payments***. Section 2(c) provides that payments due on the same date and in the same currency in respect of the same Transaction will be netted. Under the 1992 Agreement, the parties could elect in their Schedule that a single net amount would be determined for all amounts payable on the same date and in the same currency regardless of whether those amounts were payable in respect of the same Transaction. In the 2002 Agreement, this election now has a name: “Multiple Transaction Payment Netting”. Under the 2002 Agreement, the parties can elect in Part 4(i) of their Schedule or in their Confirmation that “Multiple Transaction Payment Netting” applies, which means that the parties will pay on a net basis obligations owed by them to each other in the same currency and on the same date with respect to two or more Transactions. As in the 1992 Agreement, there is a space in the Schedule for the parties to specify a start date from which Multiple Transaction Payment Netting will apply. Under Section 2(c) of the 2002 Agreement, any such election made will only apply where the relevant Transactions are between the same Offices of the parties.

4. ***Default Interest; Other Amounts.*** Section 2(e) of the 1992 Agreement has been consolidated with other interest and compensation provisions in Section 9(h) of the 2002 Agreement. The default interest provision is now Section 9(h)(i)(1), discussed below in Section II.J.8.

D. Section 3—Representations

1. ***General.*** Section 3 contains the representations of the parties (apart from the representation, if applicable, contained in Section 10(a) and any tax representations, which tax representations, if any, are referred to in Sections 3(e) and (f) and discussed in Section IV below). Each representation is repeated by each party on each date on which the parties enter into a Transaction (other than the tax representations given by a party under the Agreement in its capacity as a payee, which are made at all times as discussed in Section IV.B.2.b. below). The representations contained in Sections 3(a) (Basic Representations) and (b) (Absence of Certain Events) are self-explanatory and have not changed in the 2002 Agreement.

2. ***Absence of Litigation***. The representation in Section 3(c) applies to each party, any of a party’s Credit Support Providers or any applicable Specified Entities of a party. In the 1992 Agreement, the representation in Section 3(c) applied to each party and its Affiliates, but based on market practice the Section has been narrowed in the 2002 Agreement to apply only to Credit Support Providers and any Specified Entities designated for the purpose in the Schedule.

3. ***Accuracy of Specified Information.*** The representation in Section 3(d) applies only to information specified as being covered by such representation in the Schedule. Accordingly, parties should specify in the Schedule those documents or other information to which this representation applies.

4. ***No Agency.*** A new elective representation has been added in the 2002 Agreement as Section 3(g), so that the parties may represent that they are entering into the Agreement and each Transaction as principal and not as an agent of any person or entity. This elective representation should only be specified if it reflects the relationship between the parties.

5. ***Additional Representation in the Schedule.*** An additional representation may be specified as applicable in Part 4(m) of the Schedule. One additional representation that parties may consider including is the representation entitled "Relationship Between Parties" that is set forth in Part 4(m) of the Schedule. The "Relationship Between Parties" representation permits parties to represent to one another that they are acting for their own accounts and have made their own independent decisions to enter into the Transaction. Each party represents that it has not relied on the other party for investment advice or for a recommendation to enter into a Transaction and that no communication, written or oral, received from the other party is a guarantee. Each party also represents that it is capable of assessing the merits of, and understands and accepts the terms, conditions and risks of the Transaction and that it is capable of assuming those risks. It should be noted that the "Additional Representation" framework is broader than the "Relationship Between Parties" representation and allows the parties to specify any additional representation to which they may agree.

E. Section 4—Agreements

1. ***General.*** Section 4 contains certain agreements of the parties. The agreements contained in Sections 4(d) and (e) of the 2002 Agreement, which concern tax-related matters, are explained in Section IV below. The agreements contained in Sections 4(b) (Maintain Authorisations) and (c) (Comply with Laws) are self-explanatory and have not changed since the 1992 Agreement.

2. ***Furnish Specified Information***. Section 4(a) sets forth the agreement of the parties to furnish certain specified information. In order for Sections 4(a)(i) and (ii) of the 2002 Agreement to have practical effect, parties must specify in the Schedule or in a Confirmation any forms, documents or certificates which are required to be delivered and when delivery is required. In addition to requiring, pursuant to Section 4(a)(i) of the 2002 Agreement, delivery of any forms, documents or certificates relating to taxation, parties may wish to require, pursuant to Section 4(a)(ii) of the 2002 Agreement, delivery of financial statements, authorising resolutions, legal opinions, director's or officer's certificates or incumbency certificates and such other documents as the parties may deem appropriate for their particular contractual relationship. The delivery of Credit Support Documents such as letters of credit, keepwell agreements, pledge agreements, security agreements or guarantee agreements should also be specified where delivery is to occur after execution of a 2002 Agreement.[2] Section 4(a)(iii) provides that a party may be required to deliver to the other party certain forms or documents in order to allow such other party or its Credit Support Provider to make a payment under a 2002 Agreement or any applicable Credit Support Document without deduction or withholding for or on account of any Tax or with such deduction or withholding at a reduced rate. However, a party need not complete, execute or submit such a form or document if doing so would "materially prejudice" its "legal or commercial position". Unlike Sections 4(a)(i) and

[2] Any such document should also be identified as a "Credit Support Document" so that the provisions in the 2002 Agreement concerning Credit Support Documents apply.

4(a)(ii), Section 4(a)(iii) has effect without the need for the parties to specify particular forms or documents in the Schedule or in a Confirmation.

F. Section 5—Events of Default and Termination Events

1. ***General—Specified Entities and Credit Support Providers.*** Section 5 contains the Events of Default and Termination Events in the 2002 Agreement (*n.b.*, the different treatment of Events of Default, as compared with Termination Events, following termination is explained in Section II.G. below). The Events of Default and the Termination Events are reciprocal, in that they potentially may be triggered by either party. In some cases, an Event of Default or a Termination Event may be triggered by a condition or event involving a third party. For example, market participants should note that the term "Specified Entity" is used in the Events of Default set forth in Sections 5(a)(v), (vi) and (vii) and the Termination Event set forth in Section 5(b)(v). The meaning of the term "Specified Entity" for each such Event of Default and Termination Event should be specified in Part 1(a) of the Schedule in each case where the parties to a 2002 Agreement intend the term to be applicable. Market participants could, for example, use the term "Affiliate" (which is defined in Section 14) to define "Specified Entity". Narrower definitions may also be used. In addition, market participants should note that the term "Credit Support Provider" is used in the Events of Default in Sections 5(a)(iii), (iv), (v), (vi), (vii) and (viii) and the Termination Events contained in Sections 5(b)(i), (ii) and (v). The identity of each "Credit Support Provider" should be provided in Part 4(g) of the Schedule if the obligations of a party to a 2002 Agreement are to be supported by a Credit Support Document issued by such a third party. The meaning of "Credit Support Provider" is expected to remain consistent throughout a 2002 Agreement and should apply to any person or entity (other than either party) providing, or a party to, a Credit Support Document delivered on behalf of a particular party. Where it was thought that parties might list entities in addition to each relevant Credit Support Provider for a particular provision, the option to set forth a Specified Entity along with any Credit Support Provider remains. Market participants should also note that the meaning of the term "Credit Support Document" must be specified in Part 4(f) of the Schedule. The meaning of Credit Support Document is important for many provisions of the 2002 Agreement, including the Events of Default in Sections 5(a)(iii), (iv) and (viii) and the Termination Events in Sections 5(b)(i), (ii) and (v).

2. *Events of Default*

a. ***Failure to Pay or Deliver.*** Section 5(a)(i) applies to the failure by a party to make when due any payment under the 2002 Agreement or any delivery under Section 2(a)(i) or 9(h)(i)(2) or (4) after passage of a grace period of one Local Business Day after notice has been given in the case of a payment and one Local Delivery Day after notice has been given in the case of a delivery. It should be noted that, like the 1992 Agreement, the 2002 Agreement does not require that the notice needs to indicate the consequences of not curing the failure by a certain specified time. Under the 1992 Agreement, there was a grace period of three Local Business Days for both a failure to pay and a failure to deliver. Members generally considered that three Local Business Days following notice is too lengthy a timeframe, especially during periods of market stress. Local Delivery Day is a new term in the 2002 Agreement, defined in Section 14 as a day on which the settlement systems necessary to accomplish delivery are open for business.

b. ***Breach of Agreement; Repudiation of Agreement*.** Section 5(a)(ii)(1) applies to a failure to comply with any agreement or obligation under a 2002 Agreement after passage of a grace period of 30 days after notice. However, exempted from this provision are any obligations to make any payment under the 2002 Agreement or any delivery under Section 2(a)(i) or 9(h)(i)(2) or (4), to give notice of a Termination Event or any agreement or obligation contained in Section 4(a)(i), 4(a)(iii) or 4(d). Since such events are subject to different treatment elsewhere, it was thought that such events should not, in and of themselves, give rise to a right of early termination under Section 5(a)(ii)(1). This Section has not been altered from the 1992 Agreement.

A new clause is added in the 2002 Agreement. It is now also an Event of Default under Section 5(a)(ii)(2) if a party repudiates or challenges the validity of the 2002 Agreement, any Confirmation or any Transaction evidenced by that Confirmation. The effect is that a party may have a right of early termination even if the other party has not actually failed to perform, but if it has clearly indicated an intention not to perform. Under the 1992 Agreement, a party has a right to terminate Transactions if there is a repudiation with respect to a "Specified Transaction" (*see* Section 5(a)(v)(3) of the 1992 Agreement) or a Credit Support Document (*see* Section 5(a)(iii)(3) of the 1992 Agreement), but there is no other express right to terminate based on repudiation in the 1992 Agreement. ISDA members supported including more general repudiation protection in the 2002 Agreement.

c. ***Credit Support Default.*** Section 5(a)(iii) only applies to a party if a Credit Support Document is provided by or on behalf of that party and is identified as such in the Schedule (or appropriately identified in other relevant documentation between the parties) or that Credit Support Document. The parties should specify in the Schedule any Credit Support Document (such as a letter of credit, keepwell agreement, security agreement, pledge agreement or guarantee agreement) and the party whose obligations are supported by that Credit Support Document. In addition, if the Credit Support Document constitutes an obligation of an entity other than a party to a 2002 Agreement (such as a third-party guarantee), parties should specify in the Schedule that such entity is a "Credit Support Provider" since this Event of Default also applies to any Credit Support Provider of a party.

This Event of Default is triggered if: (i) a party or any Credit Support Provider of a party breaches a Credit Support Document and the breach is continuing after passage of any applicable grace period; (ii) the Credit Support Document or any security interest granted therein expires or fails prior to the satisfaction of all obligations under related Transactions without the written consent of the other party (the security interest portion of the clause is new in the 2002 Agreement); or (iii) a party or a Credit Support Provider, among other things, repudiates, a Credit Support Document (or such action is taken by someone who has the power to do so on its behalf). In the 2002 Agreement the trigger for a Credit Support Default in Section 5(a)(iii)(2) has been amended to include the expiration or termination of the relevant Credit Support Document or the failing or ceasing of such Credit Support Document or any security interest granted by the party or such Credit Support Provider. Section 5(a)(iii)(3) has also been amended to the effect that not only is this event triggered if a party or its Credit Support Provider repudiates or challenges the validity of the Credit Support Document, but also if any person or entity appointed or empowered to operate it or act on behalf of the party or its Credit Support Provider repudiates or challenges the Credit Support Document.

d. ***Misrepresentation.*** Section 5(a)(iv) applies to certain breaches of representations (other than tax representations) made in a 2002 Agreement or in a Credit Support Document by a party or any applicable Credit Support Provider. This provision has not been changed from the 1992 Agreement.

e. ***Default Under Specified Transaction.*** Section 5(a)(v), which is sometimes described as a limited cross-default provision, applies to certain events which would indicate that there has been an event of default or other unexcused failure to perform in respect of a "Specified Transaction". It applies to each party, any Credit Support Provider of a particular party or any applicable Specified Entity of a particular party. The definition of "Specified Transaction" has been expanded substantially from the 1992 Agreement and includes a broad range of financial transactions between one party (or any Credit Support Provider or Specified Entity of such party) and the other party (or any Credit Support Provider or Specified Entity of such party), but note that the definition specifically excludes Transactions under the parties' 2002 Agreement. It is important to note that the definition does not include transactions between a party (or its Credit Support Provider or Specified Entity) and any other third party.

The definition of "Specified Transaction" in Section 14 of the 2002 Agreement specifically lists, in addition to the transactions listed in the definition of that term in the 1992 Agreement, the following types of transactions: swap option, credit protection transaction, credit swap, credit default swap, credit default option, total return swap, credit spread transaction, repurchase transaction, reverse repurchase transaction, buy/sell-back transaction, securities lending transaction, weather index transaction or forward purchase or sale of a security, commodity or other financial instrument or interest (including any option with respect to any of these transactions). The definition also covers any transaction that is similar to any transaction referred to in clause (i) of the definition that is currently, or in the future becomes, recurrently entered into in the financial markets.

The 1992 Agreement included three types of default in Section 5(a)(v): (1) a default leading to the acceleration or early termination of a Specified Transaction; (2) a default in making a payment or delivery due on the final payment date of a Specified Transaction or in making any payments on early termination of a Specified Transaction; and (3) a repudiation of a Specified Transaction by the party itself or a third party empowered to act on its behalf. The 2002 Agreement amends these defaults as follows.

First, in clause (2) of Section 5(a)(v) in the 2002 Agreement, the grace period that is deemed to apply in respect of a payment failure at the maturity or on early termination of a Specified Transaction where no grace period is specified in the documentation applicable to the Specified Transaction has been reduced from three Local Business Days to one Local Business Day. Second, defaults constituted by failures to deliver are addressed separately in a new clause (3). The new clause (3) of this Event of Default provides that in the case of a delivery failure and the expiration of any accompanying grace period under a Specified Transaction, the delivery failure must result in the acceleration or early termination of all transactions outstanding under the documentation applicable to that Specified Transaction. Examples of where clause (3) would apply are delivery failures under master agreements for repurchase transactions or securities lending transactions. Only once all transactions outstanding under the documentation governing the Specified Transaction have been accelerated or terminated will that constitute an Event of Default under Section 5(a)(v)(3) of the 2002 Agreement. For example, if the Specified Transaction at issue is a repurchase transaction and a party to the repurchase transaction fails to deliver the relevant obligation on the due date as specified in the documentation governing the repurchase transaction, that delivery default under one transaction must lead to the termination of all repurchase transactions under a master agreement for repurchase transactions between the relevant parties before it constitutes an Event of Default under the 2002 Agreement. As the definition of Specified Transaction has been expanded, it was important to ensure that a mini close-out, where only one or a few transactions are terminated under the non-ISDA master agreement, is not sufficient to constitute an Event of Default under the 2002 Agreement. It is the experience of members that, as a practical matter, delivery failures may occur for repurchase and securities lending transactions due to administrative errors, settlement system problems or scarcity of the underlying security. Accordingly, the 2002 Agreement requires that *all* transactions outstanding under the documentation applicable to that Specified Transaction must be accelerated or terminated before an Event of Default for a delivery failure occurs under Section 5(a)(v)(3). In light of the expanded scope of Section 5(a)(v), parties may wish to review thoroughly their other industry standard master agreements to ensure they understand the nature and scope of the events of defaults in, as well as the possible consequences of default under, those industry standard master agreements.

Third, clause (3) in the 1992 Agreement has become clause (4) in the 2002 Agreement. Clause (4) addresses situations in which a party, a Credit Support Provider of a party or a Specified Entity of a party repudiates or challenges a Specified Transaction. Lastly, note that clauses (1), (3) and (4) have been amended to add reference to "any credit support arrangement relating to a Specified Transaction". The effect is that a Default Under Specified Transaction may be triggered by not only a default under a Specified Transaction but also by a default under any credit support arrangement relating to a Specified Transaction.

Parties should note that they may broaden or narrow the application of this

Event of Default by modifying the definition of "Specified Transaction"[3] and by the respective meanings, if any, given to "Specified Entity" and "Credit Support Provider".

f. ***Cross-Default.*** Section 5(a)(vi) only applies to a party (and its applicable Specified Entities and Credit Support Providers) if so specified in the Schedule (*see* Part 1(c) of the Schedule). The election should include a "Threshold Amount". In a change from the 1992 Agreement, Section 5(a)(vi) provides for aggregation between its two limbs in determining whether the Threshold Amount has been reached. In the 1992 Agreement, clause (1) of the elective provision, addressing cross-acceleration of the obligations under an agreement relating to Specified Indebtedness, and clause (2) of the elective provision, addressing a default in making one or more payments on the due date under an agreement relating to Specified Indebtedness, were viewed by some as separate and independent tests. This has been modified to provide that the two limbs of the Section are aggregated and thus a party can add the defaults under clauses (1) and (2) to determine if the Threshold Amount has been reached.

To avoid ambiguity, a party that wants Cross-Default to apply without regard to the amount involved should specify that the Threshold Amount is zero. In specifying a Threshold Amount, parties should make clear that the amount specified includes the equivalent amount in the specified currency of any obligations stated in any other currency, currency unit or combination thereof. For example, if the Threshold Amount is $10,000,000, an indication should be made that the Threshold Amount as of any date includes the U.S. dollar equivalent of any obligations stated in any other currency, currency unit or combination thereof, as reasonably determined by the other party as of that date. Unless otherwise agreed, this Event of Default will automatically also be determined by reference to the Credit Support Provider of any party subject to Cross-Default but, if it is to be determined by reference to any other Specified Entity, that entity must be expressly included. If this Event of Default applies, it is triggered by the following defaults or similar events under one or more agreements or instruments relating to Specified Indebtedness (individually or collectively) in an amount not less than the applicable Threshold Amount:

(i) a default or similar event under such agreements or instruments that has resulted in the Specified Indebtedness becoming, or becoming capable at such time of being declared, due and payable; or

(ii) a failure to make any payments on their due date under such agreements or instruments after giving effect to any applicable notice or grace period.

The scope of this Event of Default may be regulated by the parties in several ways. First, parties may regulate the scope through the manner in which they specify a Threshold Amount in the Schedule (*i.e.*, the lower the Threshold

[3] For example, the parties may delete the references in the definition to "repurchase transaction", "reverse repurchase transaction", "buy/sell-back transaction" and "securities lending transaction".

Amount the broader the scope of the Event of Default). Second, parties may modify the definition of "Specified Indebtedness" by, for example, expanding the definition to address other types of indebtedness or obligations (*e.g.*, capital lease obligations, bankers' acceptances or derivative transactions with third parties) in addition to obligations for borrowed money or, alternatively, narrowing the definition to exclude, for example, obligations in respect of deposits received in the ordinary course of a party's banking business. Third, parties may narrow or broaden the scope of this Event of Default by how "Specified Entity" is defined or by failing to add meaning to "Credit Support Provider" in Part 4(g) of the Schedule. However, parties should consider that while this Event of Default offers significant default protection to a party, the provision may also be used against the same party. Finally, this Event of Default may be changed from a cross-default to a cross-acceleration provision by deleting the phrase "or becoming capable at such time of being declared" in the third line from the end of clause (1).

g. ***Bankruptcy.*** Section 5(a)(vii) applies to each party, any Credit Support Provider of a party and any applicable Specified Entity of a party. It is drafted so as to be triggered by a variety of events associated with bankruptcy or insolvency proceedings under United States or English law but recognises that market participants will be located in and organised under the laws of different countries around the world. Accordingly, the Bankruptcy Event of Default has been drafted with the intention that it be broad enough to be triggered by analogous proceedings or events under any bankruptcy or insolvency laws pertaining to a particular party.

Where an insolvency proceeding is instituted or a petition presented against a party (or its Credit Support Provider or Specified Entity) by a third party, the 1992 Agreement provided for a 30-day period during which the party (or Credit Support Provider or Specified Entity) could attempt to have the bankruptcy petition dismissed or stayed before an Event of Default would be triggered. The 2002 Agreement amends this provision by distinguishing between proceedings initiated by the principal regulator or other primary insolvency official of a party (or its Credit Support Provider or Specified Entity) and proceedings initiated by other third parties. Proceedings started by a principal regulator or other primary insolvency official now trigger an Event of Default *immediately* while proceedings initiated by any other third party (such as a creditor) are subject to a 15-day grace period, rather than a 30-day grace period, before an Event of Default is triggered. The same amendment for a 15-day grace period has been made in clause (7). This change was motivated by member comments that a 30-day grace period was too long for those who would like to designate an Early Termination Date after this event and a 15-day grace period, while perhaps not sufficient to dismiss or stay a bankruptcy filing or proceeding, will be sufficient for a party to communicate with its counterparty to determine whether the filing was frivolous or whether there are serious credit problems.

With respect to a party that agrees to have Automatic Early Termination apply to itself, such party should note that unless it agrees with its counterparty that Automatic Early Termination will not apply when a third party (other than its principal regulator or other primary insolvency official) files a bankruptcy petition against it, it will need to obtain a waiver from its counterparty if it would like to have communications continue with its counterparty after the 15-day grace period has expired.

Where a party is organised in a jurisdiction other than the United States or England, market participants may, in certain cases, wish to modify this Event of Default to refer to specific insolvency concepts relevant in other jurisdictions. Market participants should note that the scope of this Section will be affected by the meanings given to "Specified Entity" and "Credit Support Provider".

h. ***Merger Without Assumption.*** Section 5(a)(viii) of the 2002 Agreement applies to situations where a party or any Credit Support Provider of a party (but not a Specified Entity) consolidates or amalgamates with, or merges with or into, or transfers all or substantially all its assets to, or reorganises, reincorporates or reconstitutes into or as another entity and (i) such entity fails to assume the obligations of a party under any 2002 Agreement or the obligations of a party or a Credit Support Provider under a Credit Support Document or (ii) the benefits of any Credit Support Document are no longer available after consummation of the relevant transaction (unless the other party consents to such a result). There is no requirement in connection with this Event of Default that the new entity be incorporated or organised in the same country as the party engaging in the merger or other strategic transaction covered by the Event of Default.

This Event of Default has been modified from the 1992 Agreement to include the phrase "reorganises, reincorporates or reconstitutes" to elaborate on different ways a party or its Credit Support Provider might undergo significant change in corporate identity. This takes account of different corporate procedures in different jurisdictions. In addition, clause (viii)(1) of the 1992 Agreement provided that the resulting entity after the merger must fail to assume all the obligations of such party or such Credit Support Provider under the Agreement or any Credit Support Document to which it or its predecessor was a party "by operation of law or pursuant to an agreement reasonably satisfactory to the other party". The language "by operation of law or pursuant to an agreement reasonably satisfactory to the other party" was removed in clause (viii)(1) of the 2002 Agreement as the requirement that the assumption of obligations has to be pursuant to an agreement reasonably satisfactory to the other party is inconsistent with the merger exception in Section 7(a), under which no consent of the other party is required.

3. Termination Events.[4]

a. ***Illegality.*** Section 5(b)(i) provides that a Termination Event will occur if (after a Transaction is entered into and other than due to any action taken by a party or, if applicable, its Credit Support Provider or a breach by the party of its obligations under Section 4(b)) it becomes unlawful under any applicable law (i) for the Office through which a party makes and receives payments or deliveries with respect to such Transaction to make or receive a payment or

4 The two Tax-related Termination Events are addressed in Section IV below.

delivery under such Transaction or to comply with any material provision of the 2002 Agreement with respect to such Transaction; or (ii) for a party or its Credit Support Provider to perform under a Credit Support Document (whether to make or receive a payment or delivery or to comply with any other material provision of such Credit Support Document). Illegality, like Force Majeure Event (*see* Section II.F.3.b.below) but unlike other Termination Events, is anticipatory in that it may be triggered if it *would* be unlawful to make a payment or delivery or to comply on a day if the relevant payment, delivery or compliance were required on that day, even if no such payment, delivery or compliance is in fact required on that day. The party in respect of which the Illegality has occurred will be the Affected Party (although both parties could be Affected Parties depending on the circumstances).

Where performance under a Transaction is concerned, note that, by focusing on the ability of a party's Office through which it makes and receives payments or deliveries with respect to such Transaction to perform, an Illegality could still occur despite the fact that the party may be able to satisfy its obligations by making or receiving a payment or delivery through another of its Offices. In the 1992 Agreement, Illegality focused simply on the ability of "a party" to perform.

It is important to note that an Illegality, like a Force Majeure Event, may only be triggered after giving effect to any applicable provision, disruption fallback or remedy specified in a Confirmation or elsewhere in the 2002 Agreement. For example, if the parties have incorporated the 1998 FX and Currency Option Definitions or the 2002 ISDA Equity Derivatives Definitions in the relevant Confirmation, any applicable disruption events and related fallbacks in these definitional booklets will be given effect and there may be no role for the Illegality (or Force Majeure Event) Termination Event. If, however, the applicable fallbacks, if any, do not resolve the problem, Illegality (or Force Majeure Event) may come into play. In view of the anticipatory nature of Illegality (and Force Majeure Event), these types of fallbacks may not, under the terms of the Confirmation for the Transaction, in fact apply at the time a party believes an Illegality (or a Force Majeure Event) has occurred.

The obligation of the Affected Party under the 1992 Agreement to use all reasonable efforts to transfer Affected Transactions in order to avoid the occurrence of the Termination Event is not included in the 2002 Agreement.

Deferral of payments and deliveries after an Illegality occurs is discussed in Section II.F.3.b.1. below.

b. ***Force Majeure Event.*** Section 5(b)(ii) of the 2002 Agreement introduces a new Termination Event called Force Majeure Event. The 1992 Agreement did not include a force majeure or impossibility provision, primarily because at that time, members were not able to reach a consensus on whether such a provision should be included and if so, what it should provide. As an alternative, the User's Guide to the 1992 Agreement provided a standardised impossibility provision. A Force Majeure Event differs from an Illegality in that it covers events that fall outside of the definition of Illegality, but which still hinder or prevent performance under the 2002 Agreement. Some examples of Force Majeure Events under New York or English law would include occurrences such as natural or man-made disasters, labor disruptions or acts of terrorism. "Acts of state" are also included in Section 5(b)(ii) and this is intended to address actions by sovereign states, such as a foreign invasion, that may not fall within the scope of Illegality.

Section 5(b)(ii) provides that a Force Majeure Event occurs if, by reason of force majeure or act of state occurring after a Transaction is entered into (i) the Office through which a party makes and receives payments or deliveries with respect to such Transaction is prevented from making or receiving a payment or delivery in respect of such Transaction or from complying with any other material provision of the 2002 Agreement relating to such Transaction, or it becomes impossible or impracticable for such Office to so perform or comply; or (ii) a party or its Credit Support Provider is prevented from making or receiving a payment or delivery under a Credit Support Document relating to such Transaction or from complying with any other material provision of such Credit Support Document, or it becomes impossible or impracticable for such party or Credit Support Provider to so perform or comply.

To constitute a Force Majeure Event, the force majeure or act of state must be beyond the control of the Office, party or Credit Support Provider, as appropriate, and it must also be the case that the Office, party or Credit Support Provider could not, after using all reasonable efforts (not requiring the incurrence of a material loss) overcome the relevant problem.

As discussed in more detail in the context of Illegality in Section II.F.3.a. above, Force Majeure Event is, like Illegality, anticipatory in nature. It also, like Illegality, may only be triggered after giving effect to any applicable provision, disruption fallback or remedy specified in a Confirmation or elsewhere in the 2002 Agreement.

i. ***Deferral Provisions.***

Upon the occurrence of an Illegality or a Force Majeure Event, a temporary standstill generally applies in respect of Affected Transactions for the duration of a "Waiting Period", assuming the problematic event or circumstance persists. In the case of Illegality, the Waiting Period is three Local Business Days (or days that would have been Local Business Days but for the occurrence of the relevant event or circumstance) following the occurrence of the event or circumstance. In the case of Force Majeure Event, the Waiting Period is eight Local Business Days (or days that would have been Local Business Days but for the occurrence of the relevant event or circumstance) following the occurrence of the event or circumstance.

However, in the case of both Illegality and Force Majeure Event, no Waiting Period applies where the problematic event or circumstance affects a payment or delivery under, or compliance with, a Credit Support Document that is actually due on the relevant day.

A shorter Waiting Period applies in the case of Illegality because it can be expected that the implications of a change in law would be known in a fairly short period of time and it can be expected that the effects of a new law would not quickly be reversed. In contrast, a longer Waiting Period applies in the case of Force Majeure Event because it may take several days to assess the impact of the relevant event or circumstance and it can be expected that many such events or circumstances may be overcome within a relatively short period of time.

(A) ***Deferral of Payments and Deliveries During Waiting Period.*** Section 5(d) addresses the deferral of payments and deliveries under Affected Transactions during the Waiting Period. If an Illegality or a Force Majeure Event occurs, payments and deliveries under Affected Transactions will be deferred and will not become due until: (i) the first Local Business Day or Local Delivery Day (as appropriate) following the end of any applicable Waiting Period; or (ii) if earlier, the date on which the Illegality or Force Majeure Event ceases to exist.

(B) ***Deferral of Rights to Terminate Affected Transactions.*** Pursuant to Section 6(b)(iv)(2), rights to terminate Affected Transactions by reason of the occurrence of an Illegality or a Force Majeure Event only mature if the Illegality or Force Majeure Event is continuing at the end of any applicable Waiting Period.

ii. ***Inability of Head or Home Office to Perform Obligations of Branch.*** Section 5(e) provides that if Section 10(a) applies (*see* Section II.K. below) and an Illegality or Force Majeure Event occurs and the relevant Office is not the Affected Party's head or home office, but such Affected Party's head or home office fails to perform after the end of the applicable Waiting Period when requested by the Non-affected Party due to the occurrence of an event which would constitute an Illegality or Force Majeure Event, such non-performance will not be considered an Event of Default for so long as the relevant event or circumstance continues to exist with respect to both the Office and the Affected Party's head or home office.

c. ***Credit Event Upon Merger.*** Section 5(b)(v) of the 2002 Agreement only applies to a party if so specified in the Schedule *(see* Part 1(d) of the Schedule). It addresses the situation where a Designated Event occurs with respect to a party, its Credit Support Provider or any applicable Specified Entity. Designated Event is a new concept in the 2002 Agreement which, compared with Section 5(b)(iv) of the 1992 Agreement, expands the types of events that may trigger a Credit Event Upon Merger. A Designated Event includes a wide range of change of control events, including: (i) mergers, asset transfers, reorganisations, reincorporations or reconstitutions; (ii) direct or indirect changes in beneficial ownership of (a) equity securities having the power to elect a majority of the board of directors or (b) any other ownership interest enabling a person to exercise control; or (iii) any substantial change in a party's capital structure through the issuance, incurrence or guarantee of debt or the issuance of preferred stock or convertible securities.

A Termination Event will occur under this Section if such a transaction does not result in an Event of Default under Section 5(a)(viii) (Merger Without Assumption) and the creditworthiness of the surviving entity becomes "materially weaker" than that of such party, such Credit Support Provider or such Specified Entity, as the case may be. The timing at which the assessment of creditworthiness is made has been clarified in the 2002 Agreement. In Section 5(b)(iv) of the 1992 Agreement, the creditworthiness of the resulting or surviving entity had to be materially weaker compared to what it was immediately prior to the event. The 2002 Agreement clarifies the timing of such comparison by providing that the creditworthiness of the resulting or surviving entity *immediately after the event* must be materially weaker than it was immediately before the event. If this Termination Event occurs, the party who has entered into, or whose Credit Support Provider or Specified Entity has entered into, such a transaction is the Affected Party.

After consultation with their appropriate credit advisers, some market participants may elect to modify this Termination Event to define "materially weaker" in terms of, for example, situations in which one or more specified rating agencies downgrades the ratings of any outstanding long-term debt securities of a party below a specified rating or any such debt securities fail or cease to be rated by such rating agency.

d. ***Additional Termination Event.*** Section 5(b)(vi) of the 2002 Agreement is designed so that parties may specify an Additional Termination Event in Part 1(g) of the Schedule or in any Confirmation and any Affected Party or Affected Parties for such an Additional Termination Event. It is presumed that, in the case of an Additional Termination Event, all Transactions will be Affected Transactions and the Non-affected Party will be the party entitled to terminate. These presumptions, which were first included in the 1992 Master Agreement and have not been changed in the 2002 Agreement can be modified by the parties. They were included in the 1992 Agreement based upon a belief that most additional Termination Events included by market participants in their contractual relationships are credit-related (*e.g.,* some market participants, after consultation with their credit advisers, add a Termination Event which is implicated if one or more specified rating agencies downgrades the rating of any outstanding long-term debt securities of a party below a specified rating or any such debt securities fail or cease to be rated by such rating agency) and therefore were intended to affect the entire contractual relationship between the parties and not any particular group of Transactions. However, the Additional Termination Events included by the parties may not always be credit-related.

e. ***Hierarchy of Events.*** Section 5(c) of the 2002 Agreement has been expanded from the 1992 Agreement to provide a more detailed approach to the "hierarchy" of Events of Default and Termination Events where there may be potential overlap. Section 5(c)(i) states that an event or circumstance that constitutes or gives rise to an Illegality or a Force Majeure Event will not, for so long as that is the case, also constitute or give rise to an Event of Default under Section 5(a)(i), 5(a)(ii)(1) or 5(a)(iii)(1) insofar as it relates to the failure to make a payment or delivery or a failure to comply with any other material provision of the 2002 Agreement or a Credit Support Document. Section 5(c)(ii) then makes clear that, except as contemplated by Section 5(c)(i), if an event or circumstance which would otherwise constitute or give rise to an Illegality or a Force Majeure Event also constitutes an Event of Default or any other Termination Event, it will be treated as an Event of Default or such other Termination Event. This reflects a modification from Section 5(c) of the 1992 Agreement, which provided that, in all cases, if an event or circumstances which would otherwise constitute or give rise to an Event of Default also constitutes an Illegality, it will be treated as an Illegality and will not constitute an Event of Default. The modification was motivated by the experiences of market participants at the time of the Russian debt default, where it was argued that what could have been a Bankruptcy Event of Default had to be treated instead as an Illegality Termination Event.

Lastly, Section 5(c)(iii) states that if an event or circumstance which would otherwise constitute or give rise to a Force Majeure Event also constitutes an Illegality, it will be treated as an Illegality, except as described in Section 5(c)(ii).

G. Section 6—Early Termination; Close-out Netting

1. *Who May Designate an Early Termination Date*

a. ***Events of Default; Automatic Early Termination.*** Under Section 6(a), the Non-defaulting Party has the right to designate an Early Termination Date for all outstanding Transactions upon the occurrence and continuance of an Event of Default. Section 6(a) also affords parties the opportunity to elect in Part 1(e) of the Schedule that "Automatic Early Termination" will apply to a party upon the occurrence of certain bankruptcy or insolvency events. If parties fail to make an election in Part 1(e), Automatic Early Termination will not apply. If Automatic Early Termination applies and certain insolvency events in Section 5(a)(vii) occur, an Early Termination Date will occur automatically for all outstanding Transactions, so that no notice is required. Section 6(a) has been not been modified from the 1992 Agreement.

Market participants should carefully balance the advantages and disadvantages of electing Automatic Early Termination as well as considering the enforceability of such a provision in an insolvency proceeding. The primary advantage of Automatic Early Termination may be that, by providing that an Early Termination Date in respect of a 2002 Agreement will occur prior to, for example, the filing of an insolvency petition with respect to a counterparty (*see* Section 5(a)(vii)(4) of the 2002 Agreement), it may be more likely in some jurisdictions that a Non-defaulting Party may exercise its termination rights outside of an insolvency proceeding. It is also conceivable that, in certain jurisdictions, the choice of Automatic Early Termination would be favorably received by an independent third party (*e.g.,* judicial body) because of the relative certainty and objectivity of the timing provided by Automatic Early Termination.

The primary disadvantage of Automatic Early Termination is that an Early Termination Date could occur without the knowledge of the Non-defaulting Party and, prior to the discovery by the Non-defaulting Party of the occurrence of such a termination, the relevant market could have moved significantly from its position on the Early Termination Date. In such circumstances, however, it would be commercially reasonable for the Non-defaulting Party to determine Close-out Amounts on a date or dates following the Early Termination Date pursuant to the definition of "Close-out Amount".

THE ISSUES POSED BY AUTOMATIC EARLY TERMINATION ARE COMPLEX AND WILL VARY DEPENDING ON THE JURISDICTION OF ORGANISATION OF EACH COUNTERPARTY TO A 2002 AGREEMENT. ACCORDINGLY, PARTIES SHOULD CAREFULLY CONSIDER WITH THEIR LEGAL AND CREDIT ADVISERS THE PRACTICAL AND LEGAL ADVANTAGES AND DISADVANTAGES OF ELECTING AUTOMATIC EARLY TERMINATION AND THE ENFORCEABILITY OF AUTOMATIC EARLY TERMINATION.

b. ***Termination Events.*** Under Section 6(b)(i), if a Termination Event other than a Force Majeure Event occurs, an Affected Party must inform the other party of the particular Termination Event. If a Force Majeure Event occurs, each party will use all reasonable efforts to notify the other party specifying the nature of the Force Majeure Event and each Affected Transaction and provide such other information as the other party may reasonably require. The reason that a Force Majeure Event requires only "reasonable efforts" to notify as to this kind of event is that the type of events or circumstances contemplated by a Force Majeure Event, such as an earthquake, may make notification impossible.

The party who is entitled to designate an Early Termination Date in response to a Termination Event varies in the case of each Termination Event as set forth in Section 6(b)(iv) of the 2002 Agreement. Also, in certain cases the right to designate an Early Termination Date is conditioned upon compliance with certain conditions set forth in Section 6(b) based on the assumption that it is generally preferable to continue a Transaction where possible.

In the case of an Illegality or a Force Majeure Event, special rules apply. The general position under Section 6(b)(iv)(2) is that either party (whether an Affected Party or not) has rights of termination (subject to the expiration of any applicable Waiting Period). However, where the Illegality or Force Majeure Event relates to performance by a party or its Credit Support Provider of an obligation to make (not receive) a payment or delivery under, or to compliance with any other material provision of, a Credit Support Document, an Affected Party only obtains rights of termination if the other party first chooses to exercise some of its own rights of termination. Members did not believe that an Affected Party which cannot deliver collateral required under the terms of a Credit Support

Document should thereby earn unilateral rights to terminate Affected Transactions. (*See* Section II.G.2. below).

Section 6(b)(ii) of the 2002 Agreement requires a party with respect to which a Tax Event or Tax Event Upon Merger has occurred first to use all reasonable efforts to transfer all Affected Transactions to another Office or Affiliate to avoid the termination of the relevant Affected Transactions. This Section also grants the Non-affected Party the ability to effect such a transfer if the Affected Party has not been able to make such a transfer after passage of a specified period of time. As discussed above, it should be noted that this Section has been modified from the 1992 Agreement to remove the requirement of attempted transfer in the case of an Illegality. The experiences of market participants suggested that such a transfer is generally difficult to implement in practice when an Illegality has occurred and thus it was considered beneficial to be able to terminate Affected Transactions at the earliest possible point in time (subject to the expiration of any applicable Waiting Period).

In the case of a Tax Event under Section 5(b)(ii) where there are two Affected Parties, Section 6(b)(iii) of the 2002 Agreement provides that parties must use all reasonable efforts to agree on action within 30 days of notice to avoid the relevant Termination Event. If the parties are unable to agree, transfer or otherwise avoid the relevant Termination Event within the 30-day period, an Early Termination Date may be designated in accordance with Section 6(b)(iv) of the 2002 Agreement.

2. ***What Transactions May Be Terminated.*** Section 6(b)(iv) addresses the rights of termination that one or both parties may have with respect to any or all of the Affected Transactions (or all Transactions in the case of Credit Event Upon Merger and (presumptively) Additional Termination Event). The general rule is that, so long as the relevant Termination Event is continuing, an Early Termination Date may be designated by not more than 20 days' notice to the other party.

With respect to an Illegality or a Force Majeure Event that is continuing at the end of any applicable Waiting Period, Section 6(b)(iv)(2) provides that either all or less than all the Affected Transactions may be terminated. This approach is intended to provide some flexibility for parties where it may not be in their mutual best interest to terminate all Affected Transactions. As discussed above, generally either party (whether an Affected Party or not) has rights of termination. If a party chooses to designate an Early Termination Date in respect of all outstanding Transaction, it may designate an Early Termination Date not earlier than the day on which the notice becomes effective. If, however, a party chooses to designate an Early Termination Date in respect of less than all outstanding Transactions, it cannot designate a day earlier than two Local Business Days following the day on which the notice becomes effective as an Early Termination Date. This minimum period of two Local Business Days gives the other party the opportunity to deliver a notice designating the same day as an Early Termination Date in respect of any or all other remaining Affected Transactions. Giving the other party this opportunity discourages a party from electing to terminate only those Affected Transactions that are valuable to it at the time it decides to designate an Early Termination Date.

As indicated above, where an Illegality or a Force Majeure Event relates to performance by a party or its Credit Support Provider of an obligation to make (not receive) a payment or delivery under, or to compliance with any other material provision of, a Credit Support Document, an Affected Party only obtains rights of termination if the other party first chooses to designate an Early Termination Date in respect of less than all Affected Transactions.

3. ***Effect of Designation of an Early Termination Date.*** Once a notice designating an Early Termination Date is provided under Section 6(a) or 6(b), the Early Termination Date will occur on such designated date, whether or not the relevant Event of Default or Termination Event is continuing. If an Event of Default or a Credit Event Upon Merger has occurred and an Early Termination Date has been designated in relation thereto, all Transactions are Terminated Transactions. If an Illegality, a Force Majeure Event, a Tax Event or a Tax Event Upon Merger has occurred and an Early Termination Date has been designated in relation thereto, only Affected Transactions may be Terminated Transactions. As discussed above in Section II.F.3.d., the 2002 Agreement contains a presumption (which can be modified) that all Transactions will be Terminated Transactions by the occurrence of an Additional Termination Event.

When a Transaction becomes a Terminated Transaction, as set forth in Section 6(c)(ii) of the 2002 Agreement, each party is no longer required to make payments or deliveries pursuant to Section 2(a)(i) or 9(h)(i) of a 2002 Agreement with respect to payment or delivery dates scheduled to occur after the Early Termination Date. These obligations are replaced by the single Early Termination Amount calculated pursuant to Section 6(e) (*see* Section II.G.5.b. below). The obligations that would have been due on dates occurring after the effectiveness of the notice of termination but on or prior to the Early Termination Date (as well as any obligations that did not become payable or deliverable because of the failure to satisfy all conditions precedent) are included in the definition of "Unpaid Amounts" and are thereby included in the calculation of the amount, if any, payable as a result of the early termination.

4. ***Calculations; Payment Date.*** Section 6(d) requires that on or as soon as reasonably practicable after the occurrence of an Early Termination Date, each party will make the calculations, if any, contemplated in Section 6(e). Each party is required to provide to the other party a reasonably detailed statement which shows the calculations used in determining the specified Early Termination Amount and to provide details of the relevant account to which the Early Termination Amount should be paid. "Early Termination Amount" is a new term in the 2002 Agreement and was intended to provide a shorthand reference to amounts payable under Section 6(e).

Early Termination Amounts for Events of Default are payable on the day that notice of the amount payable is effective according to Section 6(d)(ii)(1). Early Termination Amounts for Termination Events are payable two Local Business Days after the day that notice of the amount payable is effective. If there are two Affected Parties, the Early Termination Amount is payable on the day following the provision of the statement in Section 6(d)(i). In each case, interest will accrue according to the provisions of Section 9(h)(ii)(2). This Section has not been significantly amended, with the exception of changed cross-references and the inclusion of references to the new measure of damages provision in the 2002 Agreement.

5. ***Payments on Early Termination.*** The 2002 Agreement has been modified significantly from the 1992 Agreement in terms of calculating payments owed if an Early Termination Date occurs. First, the 2002 Agreement includes only one payment measure, Close-out Amount. The 1992 Agreement offered two options, Market Quotation and Loss. Previously, Section 6(e) of the 1992 Agreement stated that if the parties failed to select a payment measure in Part 1(f) of the Schedule, they were deemed to have selected Market Quotation. Loss was the fallback provision in the event a Market Quotation could not be determined or (in the reasonable belief of the party making the determination) would not produce a commercially reasonable result. In addition, Loss could be the primary choice as a payment measure.

The addition of Close-out Amount, and the deletion of Market Quotation and Loss as payment measures, was made in response to member comments that a single measure of damages in the 2002 Agreement was desirable as was a single method of payment. The 1992 Agreement included two payment methods, the First Method and the Second Method. First Method under the 1992 Agreement was sometimes referred to as "limited two-way payments" or a "walk away clause". Under the First Method, if a single net amount ran in favour of the Defaulting Party, it would not receive that amount from the Non-defaulting Party. The First Method has been deleted from the 2002 Agreement leaving Second Method as the sole payment method, in response to member comments that First Method was no longer used, most likely due to rules adopted by bank regulators that conditioned the recognition of netting for capital purposes on use of the Second Method.

a. ***Close-out Amount.*** One of the more significant amendments in the 2002 Agreement is the inclusion of a single measure of damages provision, Close-out Amount, as defined in Section 14. This Section will: (i) explain the definition of "Close-out Amount" and illustrate differences between this definition and the 1992 Agreement's definitions of "Market Quotation" and "Loss"; (ii) explain the mechanics and results on the application of Close-out Amount if an Event of Default or a Termination Event occurs (and, if a Termination Event occurs, the result if there is one Affected Party or two Affected Parties); and (iii) discuss Termination Currency, adjustments for bankruptcy and interest on certain amounts owed.

Close-out Amount is a payment measure developed to offer greater flexibility to the party making the determination of the amount due upon the designation and occurrence of an Early Termination Date and to address some of the potential weaknesses of Market Quotation that became apparent during periods of market stress in the late 1990s. The need for increased flexibility was highlighted during the market crises in 1998 and 1999 when many determining parties encountered difficulty in trying to obtain quotations from Reference Market-makers as required by the definition of Market Quotation in the 1992 Agreement. In addition, even in instances where four quotations could be obtained, in an illiquid market those quotations could be widely divergent. Balanced by the interest of increased flexibility was the need to ensure that the new provision incorporated certain objectivity and transparency requirements that were felt to be lacking, particularly in the definition of Loss in the 1992 Agreement.

The first paragraph of the definition of Close-out Amount provides that the Determining Party will determine the amount of the losses or costs incurred or the gains realised in replacing or providing the economic equivalent of the material terms of the Terminated Transaction or Terminated Transactions. This calculation includes the payments and deliveries owed under Section 2(a)(i) in respect of that Terminated Transaction or group of Terminated Transactions that would have, but for the occurrence of the Early Termination Date, been required. The calculation of Close-out Amount also includes option rights in respect of the Terminated Transaction or group of Terminated Transactions that would have existed but for the occurrence of the Early Termination Date. The language related to preserving the economic equivalent of payments and deliveries owed under Section 2(a)(i) is similar to the "Market Quotation" definition in the 1992 Agreement, but the paragraph clarifies that it is the "material terms" of the Terminated Transaction or Terminated Transactions that are considered. The addition of the phrase "material terms" was intended to refer to direct payment flows and other items that impact pricing. The reference to option rights is also new in the 2002 Agreement as a matter of clarification.

The second paragraph of the Close-out Amount definition instructs the Determining Party to act in good faith and to use commercially reasonable procedures when determining a Close-out Amount in order to produce a commercially reasonable result. This is an overarching principle that applies to all Determining Party actions in its determination of a Close-out Amount. In addition this paragraph provides that a Close-out Amount will be determined for an individual Terminated Transaction or for a group of Terminated Transactions, but not a subset of the Terminated Transactions (*i.e.*, not less than all (in aggregate)). This allows the Determining Party to make its determination based on the features of the individual transaction or transactions. For example, a quotation may be obtained for an entire portfolio of Terminated Transactions, a group of Terminated Transactions or one Terminated Transaction.

The timing as of which the Close-out Amount is determined is also set forth in the definition. The second paragraph indicates that such determination will occur as of the Early Termination Date, unless such a determination would not be commercially reasonable, in which case such determination will occur as of the date or dates following the Early Termination Date, provided that date is commercially reasonable. In calculating the Close-out Amount, Unpaid Amounts (defined in Section 14) and legal fees and out-of-pocket expenses referred to in Section 11 are excluded.

The next three paragraphs in the definition of Close-out Amount address the information that a Determining Party may consider in calculating a Close-out Amount. With respect to information that a Determining Party may consider, the definition provides, without limitation, for consideration of *one or more* of three categories of information set forth in clauses (i) through (iii) in paragraph four. Clause (i) allows for quotations, either firm or indicative, from third parties for the replacement transactions to be used in determining a Close-out Amount. This approach moves away from the strict procedural formality of the Market Quotation definition as it does not require that four quotations be obtained from "Reference Market-makers" or that an arithmetic average be obtained. This flexibility was incorporated in the definition as a response to experiences during times of market turmoil. The third parties providing quotations may include dealers in the relevant market, end-users of the relevant product, information vendors, brokers and other sources of information. This broadens the sources of quotations from only "Reference Market-makers" in the "Market Quotation" definition in the 1992 Agreement to a much wider variety of sources. Clause (ii) includes relevant market data in the relevant market and is meant to capture information such as yields, yield curves, volatilities, spreads and correlations. Clause (iii) provides that information from internal sources of the type described in the first two clauses can be utilised. However, the internal information has to be of the same type used by the Determining Party in the regular course of its business for the valuation of similar transactions.

When using the types of information described above, a Determining Party will consider quotations or relevant market data from third parties unless the Determining Party reasonably believes in good faith that such quotations or relevant market data are not readily available or would produce a result that would not satisfy the standards set forth in the definition. When markets are functioning in a normal manner and quotations and data are readily available, that information should be considered as a source of information in calculating a Close-out Amount. However, if market conditions create an environment in which quotations or data are not available or, if available, would produce a commercially unreasonable result, then the Determining Party is not required to spend time trying to obtain such information from third parties.

A Determining Party may include costs of funding in its Close-out Amount calculation provided that those costs are not included elsewhere. The definition of "Loss" in the 1992 Agreement referred to costs of funding, but it is now clarified in the 2002 Agreement that such costs cannot be counted twice in the Determining Party's calculation. In addition there may be situations in which it is commercially reasonable for the Determining Party to consider hedging costs in calculating a Close-out Amount but those costs cannot duplicate amounts included elsewhere. The cost of liquidating hedges may be a more appropriate basis for determining a Close-out Amount for certain types of Transactions, such as credit and equity derivatives. However, the hedging costs must be related to the Terminated Transaction or group of Terminated Transactions. In most cases, the Determining Party will use either the types of information described above or hedging costs to determine a Close-out Amount. In unusual cases (such as an interest rate swap with an equity option knock out feature) both the types of information described above and hedging costs may be used.

The final paragraph of the Close-out Amount definition includes examples of commercially reasonable procedures, including the application of pricing or other valuation models to relevant market data and internal models, provided that those models are used by the Determining Party in the regular course of its business in pricing or valuing similar transactions between the Determining Party and unrelated third parties. The definition also recognises that the calculation of the Close-out Amount may be impacted by the type, complexity, size or number of the Terminated Transactions.

b. ***Calculation of Early Termination Amounts.*** Under the 2002 Agreement a payment on early termination can be viewed as consisting of the following three components: (i) payments for obligations which became payable or deliverable but which were not paid or delivered prior to the Early Termination Date; (ii) payments for obligations which would have been payable or deliverable prior to the Early Termination Date if all conditions to payment or delivery (such as the absence of any Event of Default) had been satisfied or if the Early Termination Date had not been designated; and (iii) payments for the future value of the Terminated Transactions . The amounts referred to in clauses (i) and (ii) above are included in the definition of "Unpaid Amounts". The amounts referred to in clause (iii) above are included in the definition of "Close-out Amount". Calculations of payments on early termination will be made as follows:

i. ***Early Termination Amount and Events of Default.*** Close-out Amount and Unpaid Amounts are the components of the Early Termination Amount under Section 6(e) of the 2002 Agreement. To calculate the Early Termination Amount where an Event of Default has occurred, Section 6(e)(i) provides that the Close-out Amount for each Terminated Transaction or group of Terminated Transactions, whether positive or negative numbers, are added together. The net amount, whether a positive or negative number, is then added to the Unpaid Amounts owed to the Non-defaulting Party. The Unpaid Amounts owed to the Defaulting Party are then subtracted from this total. The net amount, if a positive number, is paid by the Defaulting Party to the Non-defaulting Party. If the net amount is a negative number, the absolute value of that amount is paid by the Non-defaulting Party to the Defaulting Party.

ii. ***Early Termination Amount and Termination Events (One Affected Party)***. Section 6(e)(ii)(1) provides that if there is one Affected Party, subject to Section 6(e)(ii)(3), the Early Termination Amount is determined on the same basis as for Events of Default, except that it is the Non-affected Party that makes the determination rather than the Non-defaulting Party.

iii. ***Early Termination Amount and Termination Events (Two Affected Parties)***. Section 6(e)(ii)(2) provides that if there are two Affected Parties, subject to Section 6(e)(ii)(3), each party will determine the Close-out Amount for each Terminated Transaction or group of Terminated Transactions, whether positive or negative numbers, so that two net amounts are determined. The parties then determine an amount equal to one-half of the difference between the higher net amount and the lower net amount. This amount is then added to the Unpaid Amounts payable to the party with the higher net amount. Unpaid Amounts due to the other party are then subtracted from this total. If the amount is a positive number, the party with the lower net amount pays that amount to the other party. If the amount is a negative number, the party with the higher net amount pays the absolute value of that amount to the other party.

The following are two examples of how the calculations might look in a hypothetical situation:

Example One

Close-out Amount determined by X:	90
Close-out Amount determined by Y:	-100
Unpaid Amounts:	0
Difference between Close-out Amounts:	190
One-half of the difference of the total of Close-out Amounts:	95
Result that Y pays X:	95.

Example Two

Close-out Amount determined by X:	90
Close-out Amount determined by Y:	-100
Unpaid Amounts owed to X:	50
Unpaid Amounts owed to Y:	25
Difference between Close-out Amounts:	190
One-half of the difference of the total of Close-out Amounts:	95
Plus Unpaid Amounts owed to X:	50
Less Unpaid Amounts owed to Y:	25
Result that Y pays X:	120

c. ***Currency of Termination Payment.*** Under the 2002 Agreement, a payment on early termination will be made in the Termination Currency. The "Termination Currency" must be specified in Part 1(f) of the Schedule to the 2002 Agreement and, if not specified or the currency specified is not freely available, the fallback will be U.S. dollar for a 2002 Agreement governed by New York law, and the euro if a 2002 Agreement is governed by English law. The 1992 Agreement had a U.S. dollar fallback regardless of the governing law of the 1992 Agreement. In calculating amounts payable, any Close-out Amount or Unpaid Amount is converted to a "Termination Currency Equivalent" on the basis of an exchange rate determined in accordance with the 2002 Agreement by a foreign exchange agent.

d. ***Mid-market Events.*** Section 6(e)(ii)(3) is new in the 2002 Agreement and is relevant if the Early Termination Date results from an Illegality or a Force Majeure Event. It provides, firstly, that if the Determining Party is soliciting quotations to determine a Close-out Amount, the Determining Party will ask each third party or Affiliate not to take account of the current creditworthiness of the Determining Party or any existing Credit Support Document and to provide mid-market quotations. Secondly, it provides that in any other case, the Determining Party will use mid-market values without regard to its creditworthiness. This approach emphasises the strong non-fault nature of these two Termination Events and it was felt to be inappropriate to have the valuation calculated at one party's side of the market or, in the case of two Affected Parties, the average of the calculations at each party's side of the market.

e. ***Adjustment for Bankruptcy.*** Section 6(e)(iii) provides that the Early Termination Amount will be adjusted if the Early Termination Date is deemed to have occurred as a result of the operation of Automatic Early Termination.

f. ***Adjustment for Illegality or Force Majeure Event.*** Section 6(e)(iv) is new and states that the failure to pay an Early Termination Amount due to an event that would constitute or give rise to an Illegality or a Force Majeure Event if it occurred with respect to performance under a Transaction does not constitute an Event of Default under Section 5(a)(i) or 5(a)(iii)(1). If all outstanding Transactions are subsequently terminated as a result of an Event of Default, a Credit Event Upon Merger or an Additional Termination Event, this amount will accrue interest and otherwise be treated as an Unpaid Amount. Otherwise, this amount will accrue interest in accordance with Section 9(h)(ii)(2).

g. ***Pre-Estimate.*** Section 6(e)(v) states that the Early Termination Amount is considered a reasonable pre-estimate of loss and is not a penalty. Consequential damages are excluded.

h. ***Set-Off.*** Section 6(f) is a new provision. The 1992 Agreement did not include a set-off provision, but a model provision was included in the User's Guide to the 1992 Agreement that addressed claims between a pair of contracting parties. This model formed the basis for Section 6(f). A party's ability to set off may be of particular importance because, without such an ability, the Non-defaulting Party might be required to make payment to the Defaulting Party upon termination while, at the same time, the Non-defaulting Party may not have any realistic expectation of receiving payments owed to it by the Defaulting Party (and its Affiliates) under other agreements or instruments. Section 6(f) provides that when there is an Event of Default or there is one Affected Party (after either a Credit Event Upon Merger or any other Termination Event in respect of which all outstanding Transactions are Affected Transactions), any Early Termination Amount payable to the Payee by the Payer will, at the Non-defaulting/Non-affected Party's option (without notice) be reduced by setting-off against any Other Amount payable by the Payee to the Payer, whether or not those Other Amounts arose under the 2002 Agreement and whether or not those Other Amounts are matured, are contingent and irrespective of the currency and place of the payment or booking. Section 6(f) does not create a charge or security interest and the provision requires mutuality.

In considering Section 6(f), it should also be noted that the new "No Agency" representation in Section 3(g) of the 2002 Agreement may assist a party in establishing, among other things, that there is mutuality between the parties for purposes of any set-off that may be contemplated under a 2002 Agreement. Mutuality between parties is one necessary prerequisite to the enforceability of a right of set-off in certain jurisdictions and in certain situations. Mutuality arguably might not exist if parties are acting in different capacities. In some jurisdictions, mutuality between parties may also be necessary for the enforceability of close-out netting.

SET-OFF RAISES ISSUES THAT MAY BE SUBJECT TO DIFFERING TREATMENT IN DIFFERENT JURISDICTIONS AND SHOULD BE REVIEWED BY A PARTY'S LEGAL ADVISERS. THE ANNUAL NETTING OPINION UPDATES OBTAINED BY ISDA ON BEHALF OF ITS MEMBERS DO NOT ADDRESS THE ENFORCEABILITY OF THE SET-OFF PROVISION IN THE USER'S GUIDE TO THE 1992 AGREEMENT OR IN SECTION 6(f) OF THE 2002 AGREEMENT.

H. Section 7—Transfer

Section 7 contains a general prohibition on the transfer of a 2002 Agreement and any interest or obligation in or under a 2002 Agreement without prior written consent, subject to Section 6(b)(ii) (the requirement that in the event of a Tax Event or Tax Event Upon Merger, the relevant party must use all reasonable efforts to transfer the Affected Transactions – *see* Section II.G.1.b. above). Section 7 provides two exceptions to this general prohibition. First, a transfer is permitted if it results from a consolidation or amalgamation with, or merger with or into, or transfer of all or substantially all of a party's assets to, another entity. Second, a Non-defaulting Party may transfer all or any part of its interest in any Early Termination Amount payable to it by a Defaulting Party. Section 7 in the 2002 Agreement was not significantly changed from the 1992 Agreement. However, Section 7 now makes clear that the restrictions on transfer provided for only apply "to the extent permitted by applicable law". This amendment recognises that applicable law may provide that contractual restrictions on transfer are ineffective (*see, e.g.*, revised New York Uniform Commercial Code §9-406). Also, Section 7 now makes clear that a Non-defaulting Party may transfer, together with its interest in any Early Termination Amount payable by a Defaulting Party, any amounts payable with respect to that interest pursuant to Sections 8, 9(h) and 11. As in the 1992 Agreement, Section 7 of the 2002 Agreement makes clear that granting a security interest in respect of a 2002 Agreement constitutes a transfer for purposes of Section 7.

PARTIES ASKED TO CONSENT TO A TRANSFER OR AN AMENDMENT TO SECTION 7 TO ALLOW A TRANSFER, SHOULD CAREFULLY CONSIDER WITHHOLDING AND OTHER TAX IMPLICATIONS, INCLUDING THE POSSIBLE NEED UPON A TRANSFER FOR REVISIONS IN THE TAX REPRESENTATIONS MADE IN PART 2 OF THE SCHEDULE TO THE 2002 AGREEMENT. (*SEE* SECTION IV BELOW).

I. Section 8—Contractual Currency

1. ***Payment in the Contractual Currency.*** Section 8(a) of the 2002 Agreement provides that all payments will be made in the currency specified by the parties for that payment (the "Contractual Currency"). Payment made in a non-Contractual Currency will not discharge any payment obligation unless payment in the non-Contractual Currency allows a payee to convert the payment into the full amount payable in the Contractual Currency. The party required to make a payment must compensate for any shortfall existing after the currency conversion and the party receiving payment will refund any excess received after currency conversion.

2. ***Judgments.*** Section 8(b) of the 2002 Agreement states that any amounts recovered as a result of a judicial proceeding in a non-Contractual Currency with respect to certain matters relating to a 2002 Agreement may be converted into the Contractual Currency by the party seeking recovery. The party seeking recovery will be entitled to any shortfall existing after the currency conversion and will be required to refund any excess received after currency conversion.

3. ***Separate Indemnities.*** Section 8(c) of the 2002 Agreement describes the provisions in Section 8(a) and (b) as separate and independent indemnities that are separately enforceable. This provision seeks to avoid the risk that a judicial body would treat a claim based on either indemnity as part of, or in combination with, claims for other amounts owing under the 2002 Agreement.

4. ***Evidence of Loss.*** Section 8(d) of the 2002 Agreement states that if a party can show that it would have experienced a loss had an actual exchange or purchase of currency been made, this showing will be sufficient for purposes of Section 8.

J. Section 9—Miscellaneous

1. ***Entire Agreement.*** Section 9(a) provides that the 2002 Agreement is the entire agreement of the parties with respect to its subject matter. This Section has been amended from the 1992 Agreement to provide that in entering into the 2002 Agreement, neither party has relied on any oral or written representation, warranty or other assurance except as otherwise provided in the 2002 Agreement. Section 9(a) also now states that nothing in the 2002 Agreement will limit or exclude any liability of a party for fraud.

2. ***Amendments.*** Section 9(b) provides that amendments, modifications or waivers are only effective if in writing and executed by both parties. The writing may be evidenced by facsimile transmission and the parties may confirm such amendments, modifications or waivers by an exchange of telexes or an exchange of electronic messages. The 2002 Agreement has added a new definition of "electronic messages" in Section 14 to indicate that e-mails are not covered by this term, but documents expressed in Financial products Mark-up Language are included. (*See* Section IX below).

3. ***Survival of Obligations.*** Section 9(c) provides that the parties' obligation survive the termination of any Transaction under the 2002 Agreement, but Transactions subject to early termination are excluded.

4. ***Remedies Cumulative.*** Section 9(d) states that the rights under the 2002 Agreement are not exclusive of other rights available to the parties by law. Therefore the parties can, for example, seek specific performance if monetary compensation as provided for under the 2002 Agreement is not sufficient. This provision has not been amended in the 2002 Agreement.

5. ***Counterparts and Confirmations.*** Section 9(e)(i) recognises that the parties may execute and deliver the 2002 Agreement and any amendment or modification thereof in counterparts, including by facsimile and by electronic messaging system (which does not include e-mail). The ability to execute and deliver by electronic messaging system is new in the 2002 Agreement.

Section 9(e)(ii) acknowledges that parties often first agree to the terms of a Transaction orally and provides that the parties intend to be legally bound from the moment they agree on the terms of a Transaction. It provides that a Confirmation will be entered into as soon as practicable and may be executed and delivered in counterparts, including by facsimile transmission, exchange of telexes, exchange of electronic messages or by an exchange of e-mails. The 2002 Agreement adds e-mail as an acceptable form of communication for the exchange of Confirmations. Parties relying on this provision should consider the relevance of any applicable statute of frauds or other similar laws as this provision does not supersede the requirements of any such statute or law.

6. ***No Waiver of Rights.*** Section 9(f) provides that any failure or delay of a party to exercise a right in respect of the 2002 Agreement will not be presumed to operate as a waiver of such right, nor will a partial exercise of any right be presumed to preclude any subsequent or further exercise of that right. Section 9(f) has not been amended in the 2002 Agreement.

7. ***Headings.*** Section 9(g) states that headings of Sections in the 2002 Agreement are for convenience of reference only and are not to affect the interpretation of such Sections. Section 9(g) has not been amended in the 2002 Agreement.

8. ***Interest and Compensation.*** Section 9(h) is a new Section in the 2002 Agreement that consolidates and updates all provisions regarding interest and compensation which were found in Sections 2(e) and 6(d)(ii) of the 1992 Agreement and adds provisions to deal with certain consequences of an Illegality or a Force Majeure Event. All interest pursuant to Section 9(h) is calculated on the basis of daily compounding and the actual number of days elapsed.

Section 9(h) includes provisions relevant prior to the occurrence or effective designation of an Early Termination Date as well as provisions relevant following the occurrence or effective designation of an Early Termination Date.

a. ***Prior to Early Termination.***

i. ***Interest on Defaulted Payments.*** Section 9(h)(i)(1) provides that a party that defaults on any payment obligation will on demand pay interest on the overdue amount for the period from (and including) the original due date for that payment to (but excluding) the date of actual payment. The interest is assessed at the Default Rate. This provision was contained in Section 2(e) of the 1992 Agreement. Default

Rate is defined in Section 14 of the 2002 Agreement as the payee's cost of funding plus one percent per annum and has not been amended from the 1992 Agreement.

ii. ***Compensation for Defaulted Deliveries.*** Section 9(h)(i)(2) states that a party that defaults in making a required delivery will on demand (i) compensate the other party to the extent provided for in the relevant Confirmation or elsewhere in the 2002 Agreement and (ii) unless otherwise provided in the relevant Confirmation or elsewhere in the 2002 Agreement, pay interest on the fair market value of the asset which was to be delivered. The interest will be paid for the period from (and including) the originally scheduled delivery date to (but excluding) the date of actual delivery (and excluding any period in respect of which interest or compensation is due as described in Section II.J.8.a.iv. below). The interest is assessed at the Default Rate. The fair market value of an asset will be determined as of the originally scheduled date for delivery, in good faith and using commercially reasonable procedures, by the party entitled to take delivery.

Section 2(e) of the 1992 Agreement provided that compensation for defaulted deliveries had to be made to the extent provided for in the relevant Confirmation or elsewhere in the 1992 Agreement. The 2002 Agreement goes further by providing that where no provision is made in the relevant Confirmation or elsewhere in the 2002 Agreement, the Defaulting Party must pay interest on the fair market value of the relevant asset at the Default Rate. Where relevant, parties are, however, encouraged to address this issue in their Confirmation.

iii. ***Interest on Deferred Payments.*** Section 9(h)(i)(3) addresses payments that are deferred under the 2002 Agreement for one of three reasons. First, payments may be deferred because a Section 2(a)(iii) condition precedent has not been met. Second, payments may be deferred during an Illegality or a Force Majeure Event Waiting Period. Third, payments may be deferred because of the occurrence of an Illegality or a Force Majeure Event, the expiration of the applicable Waiting Period and the continuance of such Illegality or Force Majeure Event at the end of the Waiting Period. Section 9(h)(i)(3) provides that, in each situation, interest be paid at the Applicable Deferral Rate, a new term defined in Section 14. Applicable Deferral Rate is divided into three sub-clauses to address each of the three deferral situations discussed in the preceding sentences.

(A) ***Section 2(a)(iii).*** In the case of payments deferred because a Section 2(a)(iii) condition precedent has not been met, the deferring party must, subject to the other provisions of Section 9(h)(i)(3), pay interest from (and including) the date that the payment would, but for Section 2(a)(iii), have been payable to (but excluding) the date of actual payment, at the Applicable Deferral Rate. Clause (a) of the definition of Applicable Deferral Rate indicates that interest will be assessed at a rate equal to the rate offered to the payer by a major bank in the interbank market for overnight deposits in the applicable currency.

(B) ***Section 5(d).*** In the case of payments deferred during a Waiting Period associated with an Illegality or a Force Majeure Event, the deferring party must, for so long as no Event of Default or Potential Event of Default with respect to that party has occurred and is continuing, pay interest for the period from (and including) the date the amount would, but for Section 5(d), have been payable to (but excluding) the earlier of (i) the date the payment is no longer deferred pursuant to Section 5(d) and (ii) the date during the deferral period upon which an Event of Default or Potential Event of Default with respect to that party occurs, at the Applicable Default Rate. Clause (b) of the definition of Applicable Deferral Rate indicates that interest will be assessed at a rate equal to the rate offered to prime banks by a major bank in a relevant interbank market for overnight deposits in the applicable currency.

(C) ***Continuing Illegality or Force Majeure Event.*** In the case of payments deferred because an Illegality or a Force Majeure Event has continued to exist after any applicable Waiting Period has ended, the deferring party must, for so long as the event or circumstance giving rise to the Illegality or Force Majeure Event continues and no Event of Default or Potential Event of Default with respect to that party has occurred and is continuing, pay interest on the overdue amount for the period from (and including) the date the party fails to make the payment due to the occurrence of the relevant Illegality or Force Majeure Event (or, if later, the date the payment is no longer deferred pursuant to Section 5(d)) to (but excluding) the earlier of (i) the date the Illegality or Force Majeure Event ceases to exist and (ii) the date during the period on which an Event of Default or Potential Event of Default with respect to that party occurs (and excluding any period in respect of which interest is due as described in Section II.J.8.a.iii.B. above), at the Applicable Deferral Rate. Clause (c) of the definition of Applicable Deferral Rate indicates that interest is assessed at a rate equal to the arithmetic mean of (i) the rate offered to the payer by a major bank in a relevant interbank market for overnight deposits in the applicable currency and (ii) a rate per annum equal to the cost to the payee if it were to fund or of funding the relevant amount.

iv. ***Compensation for Deferred Deliveries.*** Section 9(h)(i)(4) provides that if a delivery has been deferred because (i) a Section 2(a)(iii) condition precedent has not been satisfied; (ii) a Waiting Period for an Illegality or a Force Majeure Event exists; or (iii) an Illegality or a Force Majeure Event continues to exist after the applicable Waiting Period has elapsed, the party required (or that would otherwise have been required) to make the delivery will compensate and pay interest to the other party if and to the extent provided for in the relevant Confirmation or elsewhere in the 2002 Agreement.

b. ***Early Termination.*** Section 9(h)(ii) addresses (i) how interest is taken into account in the determination of an Unpaid Amount and (ii) how interest is calculated for Early Termination Amounts, in each case following the occurrence or effective designation of an Early Termination Date.

i. ***Unpaid Amounts.*** Section 9(h)(ii)(1) provides that for purposes of determining an "Unpaid Amount" interest will accrue on the amount of any payment obligation or the amount equal to the fair market value of any obligation required to be settled by delivery for the period from (and including) the date the relevant obligation was (or would have been but for Section 2(a)(iii) or Section 5(d)) required to have been performed to (but excluding) the relevant Early Termination Date. Interest is assessed at the Applicable Close-out Rate. Applicable Close-out Rate is a new definition in Section 14 of the 2002 Agreement, but part of the definition is modeled on the definition of Applicable Rate in the 1992 Agreement. Broadly, the Applicable Close-out Rate for Unpaid Amounts is determined based on whether there is a Defaulting Party or a Non-defaulting Party or one of more Affected Parties at the time of the early termination. In other words, what generally matters is how the non-paying or non-delivering party is characterised at the time of the termination only, subject to clause (a)(iii) of the definition discussed below.

Clause (a)(i) of the definition of Applicable Close-out Rate indicates that, in respect of obligations payable or deliverable by a Defaulting Party, the rate of interest is the Default Rate. Clause (a)(ii) states that, in respect of obligations payable or deliverable by a Non-defaulting Party, the rate of interest is the Non-default Rate. The definition of "Non-default Rate" has been amended in the 2002 Agreement to be the rate offered to the Non-defaulting Party by a major bank in the interbank market for overnight deposits in the applicable currency. Clause (a)(iii) provides that, in respect of obligations deferred pursuant to Section 5(d), if there is no Defaulting Party and for so long as the deferral period continues, then the rate of interest is the Applicable Deferral Rate (*i.e.*, a rate equal to the rate offered to prime banks by a major bank in a relevant interbank market for overnight deposits in the applicable currency). Lastly, clause (a)(iv) states that in all other cases following the occurrence of a Termination Event, the rate of interest is the Applicable Deferral Rate (*i.e.*, a rate equal to the arithmetic mean of (i) the rate offered to the payer by a major bank in a relevant interbank market for overnight deposits in the applicable currency and (ii) a rate per annum equal to the cost to the payee if it were to fund or of funding the relevant amount).

ii. ***Early Termination Amounts.*** Section 9(h)(ii)(2), formerly Section 6(d)(ii) in the 1992 Agreement, provides that interest will be paid on an Early Termination Amount for the period from (and including) the Early Termination Date to (but excluding) the date the amount is paid, at the Applicable Close-out Rate. Clause (b) of the definition of Applicable Close-out Rate provides for two possible timeframes. The first timeframe is from (and including) the Early Termination Date to (but excluding) the date on which the Early Termination Amount is payable. If a Defaulting

Party owes the Early Termination Amount, the interest rate is the Default Rate. If a Non-defaulting Party owes the Early Termination Amount, the interest rate is the Non-default Rate. If an Affected Party or a Non-affected Party owes the Early Termination Amount, the interest rate is the Applicable Deferral Rate (*i.e.*, a rate equal to the arithmetic mean of (i) the rate offered to the payer by a major bank in a relevant interbank market for overnight deposits in the applicable currency and (ii) a rate per annum equal to the cost to the payee if it were to fund or of funding the relevant amount). The second timeframe is from (and including) the date on which the Early Termination Amount is payable to (but excluding) the date of actual payment. If the Early Termination Amount is not paid because an event or circumstance in the nature of an Illegality or a Force Majeure Event exists on the payment date, then for so long as the Early Termination Amount remains unpaid due to the continuing existence of such event or circumstance, interest is assessed at the Applicable Deferral Rate (*i.e.*, a rate equal to the arithmetic mean of (i) the rate offered to the payer by a major bank in a relevant interbank market for overnight deposits in the applicable currency and (ii) a rate per annum equal to the cost to the payee if it were to fund or of funding the relevant amount). If the Early Termination Amount is owed by a Defaulting Party, the Default Rate applies and if the Early Termination Amount is owed by a Non-defaulting Party, the Non-default Rate applies, but, in either case, excluding any period where the Applicable Deferral Rate applies. In all other cases, the interest rate is the Termination Rate (*i.e.*, a rate equal to the arithmetic mean of the cost to each party if it were to fund or of funding the relevant amount).

K. Section 10—Offices; Multibranch Parties

An optional representation and agreement is included in Section 10(a) of the 2002 Agreement that provides that a party entering into a Transaction through an Office other than its head or home office is obligated in terms of recourse against it to the same extent as if it had entered into the Transaction through its head or home office. However, a party will not have recourse to the head or home office of the other party if a Waiting Period under Section 5(d) is in effect. This exception for a Waiting Period was not included in the 1992 Agreement, since the 1992 Agreement did not include a concept of a Waiting Period. In order for Section 10(a) to have effect, it must be specified in Part 4(c) of the Schedule as applicable. The representation and agreement in Section 10(a) is separate from the representation concerning Multibranch Parties in Section 10(b).

Section 10(b) states that if a party is specified as a Multibranch Party in Part 4(d) of the Schedule, that party may enter into, book and make and receive payments and deliveries with respect to, a Transaction through any Office listed for that party in Part 4(d). Section 10(b) is the equivalent of Section 10(c) in the 1992 Agreement.

Section 10(c) is the equivalent of Section 10(b) in the 1992 Agreement, but the clause has been amended to provide for more detailed treatment of branches. Section 10(c) provides that the Office through which a party enters into a Transaction will be the

Office specified for that party in the relevant Confirmation or as otherwise agreed by the parties in writing, and, if an Office for that party is not specified in the Confirmation or otherwise agreed by the parties in writing, its head or home office. In addition, the Office in which a party enters into a Transaction is considered to be the Office in which the party books a Transaction and the Office through which the party makes and receives payments and deliveries. Neither party can change the Office in which it books the Transaction or the Office through which it makes and receives payments or deliveries with respect to a Transaction without the prior written consent of the other party (subject to Section 6(b)(ii), *i.e.*, the obligation to attempt a transfer if a Tax Event or Tax Event Upon Merger occurs).

L. Section 11—Expenses

Section 11 requires a Defaulting Party to pay on demand reasonable out-of-pocket expenses incurred by the other party in connection with enforcement and protection of its rights under a 2002 Agreement or any Credit Support Document to which the Defaulting Party is a party if there has been an early termination. Out-of-pocket expenses may include legal fees, execution fees and Stamp Taxes. The inclusion of expenses relating to execution fees is a modification from the 1992 Agreement. Section 11 of the 2002 Agreement, however, does not specifically provide for the payment of expenses arising from the enforcement and protection of rights under any Credit Support Document to which the Defaulting Party is not a party, so market participants should therefore ensure that, if desired, any such Credit Support Document includes an appropriate indemnity for expenses.

M. Section 12—Notices

Section 12(a) provides that notices or communications in respect of the 2002 Agreement may be given in six different forms: (i) in writing, which is effective on the date it is delivered; (ii) by telex, which is effective on the date the recipient's answerback is received; (iii) by facsimile, which is effective on the date it is received by a responsible employee of the recipient in a legible form; (iv) by certified or registered mail or airmail or the equivalent, which is effective on the date it is delivered or attempted to be delivered; (v) by electronic messaging system, which is effective on the date it is received; and (vi) by e-mail, which is effective on the date it is delivered. The delivery date is only an effective date if it is a Local Business Day. Notices or communications that are delivered, attempted to be delivered or received after the close of business on a Local Business Day are deemed effective on the next Local Business Day.

Section 12(a) has been modified from the 1992 Agreement to permit e-mail delivery, but it should be noted that Section 5 or 6 notices may not be given by e-mail or by electronic messaging system. Section 5 or 6 notices, however, may now be given by facsimile. If appropriate, parties should ensure that any communication between their respective back offices does not constitute a notice for purposes of Sections 5 and 6.

Lastly, Section 12(b) provides that each party may change its contact details in any of the prescribed forms in clause (a).

It should be noted that the parties may include "Specific Instructions" in Part 4(a) of the Schedule if they require notices (such as notices under Section 5 or 6) to be delivered to a particular person or in a particular form. When relevant, parties should consider including in Section 5 or 6 notices language to the effect that the failure to remedy a Potential Event of Default or Termination Event will or may result in the termination of Transactions under the 2002 Agreement if such failure is not cured within the specified time-frame set forth in the relevant provision of the 2002 Agreement.

N. Section 13—Governing Law and Jurisdiction

1. ***Governing Law.*** Section 13(a) requires that the parties select a governing law for the 2002 Agreement in Part 4(h) of the Schedule. The governing law may be English law or the laws of the State of New York. Parties that wish to elect a governing law for the 2002 Agreement other than English law or the laws of the State of New York should carefully consider such an election with their legal advisers.

2. ***Jurisdiction.*** Section 13(b) addresses jurisdiction. If the 2002 Agreement is governed by English law, the parties submit to the non-exclusive jurisdiction of the English courts, except where the Proceedings involve a Convention Court. "Proceedings" is defined in Section 14 and means any suit, action or proceeding relating to any dispute arising out of or in connection with the 2002 Agreement. "Convention Court" is defined in Section 14 and means any court which is bound to apply to the Proceedings either Article 17 of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the "Brussels Convention") or Article 17 of the 1988 Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the "Lugano Convention"). If the Proceedings involve a Convention Court, then the parties submit to the exclusive jurisdiction of the English courts. Under the 1992 Agreement, submission to the jurisdiction of the English courts was exclusive unless Proceedings were brought within a jurisdiction which was not bound by the Brussels Convention or the Lugano Convention, in which case jurisdiction was non-exclusive in favour of the English courts. Section 13(b) of the 1992 Agreement recognised that Article 17 of the Brussels Convention and Article 17 of the Lugano Convention (which deal with jurisdiction agreements) do not explicitly acknowledge the validity of non-exclusive jurisdiction agreements. The Council of the European Union's Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Council Regulation No. 44/2001 of 22 December 2000) (the "Brussels Regulation"), which amends and replaces the Brussels Convention, explicitly acknowledges the validity of non-exclusive jurisdiction agreements. However, not all signatories to the Brussels Convention are subject to the Brussels Regulation. At the time of this writing, Denmark remains bound by the Brussels Convention. Also, the position of those States which are signatories to the Lugano Convention remains unchanged. Therefore, Section 13(b) of the 2002 Agreement still provides for exclusive jurisdiction in favour of the English courts where a court involved in any Proceeding is required to apply Article 17 of the Brussels Convention or Article 17 of the Lugano Convention.

If the 2002 Agreement is governed by the laws of the State of New York, the parties submit to the non-exclusive jurisdiction of the courts of the State of New York and the United States District Court located in the borough of Manhattan, New York

City.

3. ***Service of Process.*** Section 13(c) states that each party may appoint a Process Agent in Part 4(b) of the Schedule. Substitute Process Agents may be appointed, subject to acceptance of such substitute Process Agent by the other party. Section 13(c) also provides that the parties irrevocably consent to service of process given in the manner provided for notices in Section 12(a)(i), (iii) or (iv) of the 2002 Agreement. These are methods for service of process which are contractually agreed between the parties. However, they do not affect the right of either party to serve process in any other manner permitted by applicable law. It should not be assumed that the methods of service set out in the 2002 Agreement will be effective methods of service within every jurisdiction. Parties should always consult with local counsel where they are uncertain about the effectiveness of these methods for service of process within a particular jurisdiction.

4. ***Waiver of Immunities.*** Section 13(d) provides for a waiver of immunities by the parties to the extent permitted by applicable law. Section 13(d) has not been amended in the 2002 Agreement.

O. Section 14—Definitions

Section 14 has introduced the following new definitions in the 2002 Agreement:

Additional Representation (Section 3)
Applicable Close-out Rate (Section 9(h))
Applicable Deferral Rate (Section 9(h))
Close-out Amount (Section 6)
Convention Court (Section 13)
Determining Party (Section 6(e)(ii)(3))
Early Termination Amount (Section 6(e))
electronic messages (Sections 9(b) and 12)
Force Majeure Event (Section 5(b))
General Business Day (Section 14)
Local Delivery Day (Section 5(a)(i))
Merger Without Assumption (Section 5(a)(viii))
Non-affected Party (Section 5(b))
rate of exchange (Section 6(f))
Waiting Period (Section 5(b)(i), (ii))

Some of these definitions, such as Early Termination Amount, have been added as a short-hand for use in various related Sections. Others, such as Close-out Amount and Convention Court, are new to the 2002 Agreement.

Section 14 of the 2002 Agreement has eliminated six definitions that were included in the 1992 Agreement:

Applicable Rate
Loss
Market Quotation
Reference Market-makers
Set-Off
Settlement Amount

The definition of Applicable Rate has been folded into the new definition of Applicable Close-out Rate. The definition of Set-Off has been replaced by the new set-off clause in Section 6(f) of the 2002 Agreement. Loss, Market Quotation, Reference Market-makers and Settlement Amount were associated with the measures of damages in the 1992 Agreement and have been eliminated as a new measure of damages provision, Close-out Amount, has been introduced in the 2002 Agreement.

P. Signature Block

The name of each party and the names and titles of signatories must be completed on the signature page along with the dates of signing by each party. Additional signatures may be added to the signature block as necessary. It should be noted that the parties sign the 2002 Agreement on a particular date with effect from the date specified on the first page of the 2002 Agreement to make clear both the date a 2002 Agreement was signed and the date the parties intend that 2002 Agreement to be effective, which dates may be different.

A signature block has also been added at the end of the printed form of the Schedule. While it is not mandatory that the parties include a signature block in their Schedule (since the Schedule forms part of the 2002 Agreement, which itself is signed), if parties do choose to include a signature block in their Schedule, they should sign it where indicated.

III. CONFIRMATIONS PRIOR TO EXECUTION OF A 2002 AGREEMENT

The forms of confirmations provided in the ISDA definitional booklets are designed to be used where the parties have already entered into a 1992 Agreement or a 2002 Agreement (although, as already discussed, parties should note that definitional booklets, including the forms of confirmations published in them, published before 2002 were not drafted with the 2002 Agreement in mind and may include, for example, references to the 1992 Agreement). These forms of confirmations may also be used, with some revisions, where the parties have not yet entered into a 2002 Agreement.

PARTIES SHOULD CONSULT WITH THEIR LEGAL ADVISERS ABOUT THE NECESSARY REVISIONS TO THESE FORMS OF CONFIRMATIONS IF THEY ARE USED BEFORE A 2002 AGREEMENT HAS BEEN ENTERED INTO.

IV. TAX PROVISIONS

A. Introduction

Prior to publishing the 2002 Agreement, ISDA solicited comments from its members regarding what amendments should be made to the 1992 Agreement. Although all comments were considered, several suggested tax amendments were not made, some because it was believed that they reflected the practice of only a minority of the members, and others because, while widely accepted as market practice, they related solely to Transactions involving parties from a specific jurisdiction (typically, the U.S.) and, thus, were not of sufficiently general applicability to be incorporated in a document meant to accommodate transactions globally. Some of the proposed amendments, however, may be appropriate in certain cases and thus are described below. In any event, no accepted changes in law or market practice have warranted making significant amendments to the tax provisions of the 1992 Agreement. Thus, with minor exceptions, ISDA has not amended such provisions in the 2002 Agreement.

B. Withholding Taxes

1. *General Approach to Withholding Taxes*. The tax provisions in the 2002 Agreement serve three general functions. First, utilising Payer and Payee Tax Representations in Sections 3(e) and (f) of the 2002 Agreement and Parts 2(a) and 2(b) of the Schedule, the parties represent that no withholding taxes will apply to any future payments made in a Transaction under a 2002 Agreement under the laws in effect on the date the parties enter into the 2002 Agreement. It should be noted that the typical Payer Tax Representation does not apply to payments under Section 9(h), which, in general, governs default or deferred payment interest and interest on early termination payments. Each party makes the Payer Tax Representation that, in reliance on the accuracy of the Payee Tax Representations and the tax forms, documents or certificates furnished under Section 4(a)(i) or (iii) of the 2002 Agreement that are provided by the payee, that are thought necessary to support the legal conclusion that no withholding is required, it is not required by any Relevant Jurisdiction to withhold tax from the payments it makes.[5]

Second, if any withholding tax does apply to a payment required under the 2002 Agreement, the financial burden of that withholding tax is allocated through the gross-up provision in Section 2(d)(i)(4) and the definition of "Indemnifiable Tax" (generally speaking, any tax other than a tax imposed by reason of a present or former connection between the payee and the taxing authority) in Section 14. Subject to two exceptions described below, the payer is allocated the burden when the withholding tax is an Indemnifiable Tax. When, however, the tax is a non-Indemnifiable Tax, the payee is generally allocated the burden.[6]

There are two exceptions to the payer's obligation to gross-up for an Indemnifiable Tax. First, no gross-up is required if the payee has made a Payee Tax Representation that was false when made or later becomes false (unless it becomes false as a result of a Change in Tax Law or similar legal development). Second, no gross-up is required if the payee has failed to comply with certain tax provisions (such as the requirement to provide certain identification and certification forms or to notify the Payer that a Payee Tax Representation has become inaccurate). Note that a payee that would otherwise have been entitled to a gross-up by virtue of a Change in Tax Law can lose that entitlement by failing to provide notice under Section 4(d) of the 2002 Agreement.

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5 *See* footnote 7 below, for a discussion of the function served by the Payer Tax Representation.

6 For example, if a French payee acting through its London Office receives a payment from a Japanese payer acting through its New York Office, the French payee generally would be grossed-up by the Japanese payer for a tax imposed on that payment by Japan or the U.S. (because that tax *is not* imposed because of a connection between the French payee and the taxing jurisdiction and, thus, is an Indemnifiable Tax). If, however, the French payee engaged in certain other activities in the U.S. and the U.S. imposed a tax on payments made under the 2002 Agreement *because of those activities* (in other words, the tax would not have been imposed but for such activities), such tax imposed by the payer's jurisdiction generally would not be grossed-up because the tax is not an Indemnifiable Tax.

Third, a party may be permitted to terminate certain Transactions under the 2002 Agreement (specifically, the "Affected Transactions") upon the occurrence of a Termination Event. Two tax-related Termination Events are included: a Tax Event (a Change in Tax Law or other similar legal development that results in an actual or potential withholding tax liability) and a Tax Event Upon Merger (a merger or similar transaction that results in a withholding tax liability). (*See* Section IV.C. below).

Upon the occurrence of a Tax Event, any Affected Party (any party bearing, or substantially likely to bear, the burden of a withholding tax either as payer, being required to make gross-up payments or, as payee, receiving net payments) may terminate the Affected Transactions: (i) in the case of one Affected Party, only if such party uses reasonable effort, but fails, within 20 days after proper notice is given, to eliminate the tax burden by transferring its rights and obligations under the 2002 Agreement to another one of its Offices or Affiliates and (ii) in the case of two Affected Parties, only if it uses reasonable efforts, but fails to reach agreement with the other party (who is also required to use reasonable effort to reach an agreement) to eliminate the burden of the tax within 30 days after notice is given. Any transfer by an Affected Party must be conditioned upon the prior written consent of the other party, but such other party cannot withhold its consent if its policies in effect at such time would permit it to enter into Transactions with the transferee on the terms proposed. In the event the Affected Party is unable to make such a transfer, it must give notice to that effect to the other party prior to the expiration of the 20-day period (which commences after the Affected Party gives notice of the Tax Event). The other party then has the right, within 30 days after the *initial giving of notice* that there was a Tax Event, to effect such a transfer. In the event that the other party is unable to effectuate such a transfer within such period (which will be a maximum of 30 days and a minimum of 10 days), the Affected Party may declare all Affected Transactions terminated as of a designated date that is not more than 20 days after the date of such declaration. Consequently, upon the occurrence of a Tax Event, an Affected Party will be unable to unilaterally terminate the Affected Transactions prior to 30 days from the time it first gives the other party notice of such Tax Event. Thus, an Affected Party may be unable to eliminate its burden (paying a gross-up or receiving a payment net of withholding) with respect to any payments that are due to be made within the requisite 30-day period.

Upon the occurrence of a Tax Event Upon Merger, the Burdened Party (the party bearing the burden of a withholding tax) may terminate the Affected Transactions under the 2002 Agreement: (i) when it is the Affected Party (defined for this purpose, in contrast to its definition for purposes of "Tax Event," as a party to the merger or similar transaction), only if it uses reasonable effort, but fails, within 20 days after proper notice is given, to eliminate the tax burden by transferring its rights and obligations under the 2002 Agreement in respect of the Affected Transactions to another one of its Offices or Affiliates and (ii) when it is not the Affected Party, merely upon proper notice. Any transfer by an Affected Party must be conditioned upon the prior written consent of the other party, but such other party cannot withhold its consent if its policies in effect at such time would permit it to enter into Transactions with the transferee on the terms proposed. In the event the Burdened Party is the Affected Party and such Affected Party is not able to make such a transfer, it must give notice to that effect to the other party prior to the expiration of the 20-day period (which commenced after the Affected Party gave notice of the Tax Event Upon Merger). The other party then has the right, within 30 days after the *initial giving of notice* that there was a Tax Event Upon Merger, to effect such a transfer. In the event that the other party is unable to effectuate such a transfer within such period (which will be a maximum of 30 days and a minimum of 10 days), the Affected Party may declare all Affected Transactions terminated as of a designated date that is not more than 20 days after the date of such declaration. Consequently, upon the occurrence of a Tax Event Upon Merger, a Burdened Party that is also the Affected Party will be unable to unilaterally terminate the Affected Transactions prior to 30 days from the time it first gives the other party notice of such Tax Event Upon Merger. Thus, as in a Tax Event, an Affected Party that is also the Burdened Party may be unable to eliminate its burden (paying a gross-up or receiving a payment net of withholding) with respect to any payments that are due to be made within the requisite 30-day period. In contrast, in the event that the Burdened Party is not the Affected Party (*i.e.*, not the party engaging in the merger or other similar transaction), it can elect to terminate the Affected Transactions immediately upon the occurrence of a Tax Event Upon Merger.

The tax provisions of the 2002 Agreement summarised above are discussed in more detail below. In addition, a flow-chart set forth as Appendix D to this User's Guide illustrates the application of the gross-up and the tax-related termination provisions of the 2002 Agreement.

2. *Changes from the 1992 Agreement*. With minor exceptions, the tax provisions in the 1992 Agreement have not been amended.

3. *Establishing Absence of Withholding Tax.*

a. *Payer Tax Representation*. Parties generally enter Transactions with the expectation that no withholding tax will be imposed by any jurisdiction on payments made under the Transactions. That expectation is expressed in the Payer Tax Representation in Section 3(e) of the 2002 Agreement and Part 2(a) of the Schedule. Each party normally makes the Payer Tax representation, stating that it will not be required to withhold "Taxes" on behalf of any Relevant Jurisdiction from payments it makes pursuant to a Transaction. Relevant Jurisdictions are the payer's "home" jurisdiction, the jurisdiction in which the Office through which the payer is acting in the Transaction is located, the jurisdiction in which the payer executes the relevant Agreement, and the jurisdiction from or through which the payer makes payments. (*See* the definition of "Relevant Jurisdiction" in Section 14 of the 2002 Agreement). In view of the payer's voluntary association with those jurisdictions, the payer is assigned the responsibility to ascertain that such jurisdictions will not require the payer to withhold taxes from payments it makes.[7]

[7] That responsibility is reinforced by generally requiring the payer to gross-up for any Indemnifiable Tax imposed on payments by a Relevant Jurisdiction. (*See* Section 2(d)(i)(4) of the 2002 Agreement and Section IV.B.5. below). It should be noted that the Payer Tax Representation does not have any specific operational effect under the 2002 Agreement. Absent an express deletion of the gross-up provision (or any

Many jurisdictions do not require taxes to be withheld from payments made under the types of Transactions documented under the 2002 Agreement. Certain jurisdictions, however, do impose withholding taxes unless the payee qualifies for an exemption from such taxes (*e.g.*, pursuant to a tax treaty). A payer in the latter type of jurisdiction can therefore properly make the Payer Tax Representation only if the payer can ascertain that the payee qualifies for such an exemption. Such a payer should request from the payee evidence of the payee's qualification for exemption. The required evidence will depend on the law of the jurisdiction imposing the tax, but will most often consist of: (i) a representation made by the payee as to its tax status (a Payee Tax Representation) and/or (ii) a particular governmental form completed by the payee (a tax form).

In making the Payer Tax Representation, the payer is entitled to rely on Payee Tax Representations and tax-related agreements of the payee, including an agreement to deliver tax forms, and the accuracy and effectiveness of any document provided by the payee pursuant to a tax-related agreement.[8]

If either party cannot give the Payer Tax Representation because it believes withholding taxes will be imposed on payments it will make under a Transaction, the parties should consider restructuring the Transaction to avoid that built-in tax inefficiency.

b. ***Payee Tax Representation*.** As noted above, certain jurisdictions may impose withholding tax on payments made under a Transaction unless the payee is eligible for an exemption from that tax. A payer in such a jurisdiction will normally require the payee to provide Payee Tax Representations pursuant to Section 3(f) that will allow the payer to determine that the payee is eligible for such an exemption and, thus, that the payer may give its Payer Tax

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portion thereof), failure of a payer to give a representation does not remove its obligation to gross-up the payee for an Indemnifiable Tax. If the payer does give such representation, the fact that the representation is, or later becomes, false, does not entitle either the payer or payee to terminate a Transaction under the 2002 Agreement. (*See* Section 5(a)(iv) (incorrect or misleading representations under Section 3(e) or (f) of the 2002 Agreement do not constitute a Misrepresentation) which would constitute an Event of Default). Furthermore, although the typical Payer Tax Representation provides that no withholding shall be imposed by any *Relevant Jurisdiction*, a payer's gross-up obligation is not, by any means, limited to withholding tax imposed by a Relevant Jurisdiction. The significant effect of the Payer Tax Representation is to serve as a reminder to the payer to diligence its withholding obligations arising from the Transaction. By making (and focusing on) the representation, each payer is reminded to make sure that it has asked for (and will receive) all necessary forms or representations from the payee in order to ensure that it, the payer, will not have to withhold on its payments to the payee. The reasons the representation focuses on withholding imposed by Relevant Jurisdictions (and no other jurisdictions) are because (i) it is generally assumed that no jurisdiction other than a Relevant Jurisdiction would be able to impose a withholding tax (because other jurisdictions likely would lack any justifiable nexus to do so) and (ii) it would be impractical for payers to diligence the tax laws of every possible jurisdiction.

[8] Because the Payer Tax Representation is repeated for every Transaction entered into under the 2002 Agreement, parties should consider at the time of entering into a 2002 Agreement all possible types of Transactions reasonably expected to be documented under the 2002 Agreement. Different tax representations and forms may be required for different Transactions.

Representation. Any Payee Tax Representation should be set forth in Part 2(b) of the Schedule or in a Confirmation. (*See also* Section IV.B.5.b.iv. below, discussing the incorporation of the "No Agency" representation as a Payee Tax Representation).

Payee Tax Representations are made continuously until the termination of a 2002 Agreement. (*See* introductory clause to Section 3 of the 2002 Agreement). Under Section 4(d), a payee is required to notify a payer *upon learning* that any of the Payee Tax Representations are no longer accurate or true.

Part 2(b) of the Schedule contains several standard form representations that a payer may find useful to establish that the payee is eligible for an exemption from withholding tax imposed by a Relevant Jurisdiction of the payer. Care in selecting suggested representations is required because only some of these representations may apply in a particular situation and some of the representations are mutually inconsistent. (*See* Section IV.H. below, for a detailed discussion of U.S. Payee Tax Representations).

The standard Payee Tax Representations are as follows:

i. ***Treaty.*** If a Relevant Jurisdiction of the payer provides an exemption from its withholding tax if the payee is eligible for the benefits of a tax treaty and the payer is not acting through a branch in the Relevant Jurisdiction, the payer should request from the payee the representation in Part 2(b)(i) of the Schedule, which states that the payee is eligible for the benefits of an income tax treaty (the "Specified Treaty") between the jurisdiction potentially imposing the tax (the "Specified Jurisdiction") and another jurisdiction. In general, the representation attests to the payee's status as a "resident" of the second jurisdiction.[9] In addition, the representation states that the payee is not acting through a permanent establishment in the jurisdiction potentially imposing the tax, as most treaties do not provide protection to income attributable to such a permanent establishment. Such income may be subject to a net income tax rather than a withholding tax.

It should be noted that treaty benefits apply only if both: (i) the income in question is of a type for which the treaty provides benefits and (ii) the recipient of the income is eligible for the protection of the treaty. The representation in Part 2(b)(i) of the Schedule addresses only the eligibility of the payee for protection under the Specified Treaty. The representation made by the payee does not address whether payments made under a Transaction in fact constitute "business profits", "interest" or any other type of treaty-favored income. As a result, it is the

[9] Where the payee is acting through an Office located outside its home jurisdiction (*i.e.*, the jurisdiction in which it is organised or has its principal place of business), residence for this purpose will typically be in the home jurisdiction rather than where such Office is located. (*See* Section IV.B.4. below).

responsibility of the payer to determine whether the type of income to be realised in the Transaction is or is not eligible under the Specified Treaty for an exemption from an otherwise applicable tax imposed by a Relevant Jurisdiction or to a reduced rate of tax. In addition, it is the responsibility of the payer to request any necessary forms from the payee so that the payer will be relieved of any obligation to withhold.

ii. ***Effectively Connected.*** Under U.S. law, where income received by a non-U.S. party is "effectively connected" with the conduct of a trade or business in the U.S. by that party (*e.g.*, where income is attributable to the assets or activities of a U.S. branch of that party), that income is subject to regular U.S. net income tax, but generally is exempt from U.S. withholding tax.[10] A similar rule applies in many other countries as well. Thus, a payee organised outside such a country (the "Specified Jurisdiction") but acting through an Office in the Specified Jurisdiction may be requested to give the "effectively connected" representation to allow a payer resident in, or acting through an Office in, the Specified Jurisdiction to determine that the Specified Jurisdiction will not require the payer to withhold taxes from payments it makes to the payee. As in the case with the treaty representation, it is the responsibility of the payer to request any necessary forms from the payee so that the payer will be relieved of any obligation to withhold.

It should be noted that any net income tax imposed by the Specified Jurisdiction on "effectively connected" income of a payee would not be an Indemnifiable Tax because it is imposed by reason of a connection between the Specified Jurisdiction and the payee and, thus, would not be grossed-up. (*See* the definition of Indemnifiable Tax in Section 14 of the 2002 Agreement and Section IV.B.5.a. below).

c. ***Agreement to Deliver Tax Forms.*** Under the laws of a payer's jurisdiction, a withholding tax exemption may be available if the payee submits certain tax-related forms to either the payer or the relevant taxing authority. Section 4(a)(i) and (iii) require the payee to supply such forms in certain cases.

A payer in a jurisdiction known to require tax forms as a condition to providing a withholding tax exemption should specify under Section 4(a)(i) of the 2002 Agreement and in Part 3(a) of the Schedule or in a Confirmation each tax form required under law and practice in effect on the date the parties enter into each Transaction to be delivered by the payee and the date by which each such tax form must be delivered.

[10] As indicated in Section IV.H.1. below, the U.S. generally imposes no withholding taxes on payments made by a U.S. payer to a non-U.S. payee on contracts that are characterised as notional principal contracts, whether or not such payments are effectively connected with a U.S. trade or business of the payee.

Because changes in law or administrative practice may require the delivery of tax forms that are not known at the time a Transaction is entered into, the 2002 Agreement incorporates in Section 4(a)(iii) an ongoing agreement by each party to deliver unspecified tax forms to allow the other party to make payments free of, or subject to a reduced rate of, withholding tax.

Section 4(a)(iii) provides that a party must provide any form or document reasonably requested or required by the other party to permit the other party to make a payment free of withholding tax, provided that "the completion, execution or submission of such form or document would not materially prejudice the legal or commercial position of the party in receipt of such demand ...". Some firms believe that this proviso should be omitted because one party's determination of what constitutes "materially prejudice" is inherently subjective and, thus, should not trigger the imposition of a gross-up obligation or a right effectively to compel the termination of Affected Transactions (by forcing the payer to terminate the Affected Transaction rather than succumb to a gross-up obligation). Although this position was not adopted in the 2002 Agreement, parties to a 2002 Agreement may wish to consider doing so. Retaining this exception may, in some circumstances, (*e.g.*, when the request under Section 4(a)(iii) is not precipitated by what would otherwise constitute a Termination Event) place the payer at risk of being unable to terminate Transactions that produce a gross-up obligation based purely on the payee's position that it will be prejudiced by providing a form, delivery of which was not required under Section 4(a)(i). In any event, parties to a Transaction should determine early in their negotiations what forms and documents will be required, in order to reduce the risk that a dispute will later arise over whether a party's position is materially prejudiced. If the "materially prejudiced" exception is omitted, the final clause of the Payer Tax Representation in Part 2(a) of the Schedule should be deleted.

4. ***Multiple Relevant Jurisdictions; Multibranch Parties.*** Where the payer or the payee has a connection to more than one jurisdiction with respect to a 2002 Agreement, the issues involved in determining at the outset that no withholding tax applies do not change, but do become more complex to administer. Each party, as payer, must determine whether any of its Relevant Jurisdictions impose withholding tax on payments under any type of Transaction that may be effected under a 2002 Agreement and, if so, determine whether the payee is eligible for an exemption from that withholding tax (which may depend on the Office through which the payee is acting for purposes of a particular Transaction under a 2002 Agreement). Provided an exemption is available, a payer must request from the payee the Payee Tax Representations or tax forms necessary to establish the availability of the exemption. The payer must perform this analysis for each combination of a Relevant Jurisdiction of the payer and an Office through which a payee may act in order to be satisfied that it is unlikely that it will have to withhold on and, therefore, gross-up, any of its payments.[11]

[11] As indicated in footnote 7 above, if a jurisdiction other than a Relevant Jurisdiction imposes a tax on a payer's payment, the fact that a non-Relevant Jurisdiction imposed such tax will not preclude such tax

For example, if a Country W payer is acting through its Country X office and a Country Y payee may act through either its home (Country Y) or Country Z office, the Country W payer needs to ensure that Country X will not impose any withholding tax on its payments to either the Country Y or Country Z office. If the Country W payer needs to rely on a treaty to prevent any withholding obligation when it makes a payment to the Country Y payee that is acting through its Country Z office, it will normally have to rely on the Country X-Country Y treaty, because the treaty that provides an exemption from withholding is normally the treaty between the jurisdiction that would otherwise impose the withholding tax (Country X) and the jurisdiction in which the payee is a tax resident, which is usually the jurisdiction in which it is organised or in which its head office is located (Country Y), not the jurisdiction in which the Office through which it is acting is located (Country Z).

5. ***Allocation of Financial Burden of Withholding Tax*****.** Although the parties to a Transaction normally expect that no withholding tax will apply to payments made under the Transaction, it is possible that a withholding tax nevertheless may apply. The burden of such a withholding tax is allocated to either the payer or the payee through the definition of "Indemnifiable Tax" in Section 14 of the 2002 Agreement and through the gross-up provisions of Section 2(d)(i)(4).

> **a.** ***Definition of "Indemnifiable Tax*****".** Section 14 generally defines an Indemnifiable Tax as any Tax[12] imposed on a payment *except* a tax imposed because of a connection between the taxing jurisdiction and the recipient of the payment (or a related person). For this purpose, such a connection does not include the mere execution or delivery of a 2002 Agreement, the performance of obligations or receipt of payments under a 2002 Agreement or the enforcement of a 2002 Agreement.
>
> The definition of "Indemnifiable Tax" is a key feature of the 2002 Agreement because Section 2(d)(i)(4) generally requires the payer to gross-up for an Indemnifiable Tax, but not for any other tax. As a consequence, a tax withheld without regard to whether the payee has any connection to the taxing jurisdiction

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from being an Indemnifiable Tax. Thus, although the analysis below suggests that a payer must analyse all possible permutations of Relevant Jurisdictions and relevant payee Offices (because payers generally assume that no jurisdiction other than a Relevant Jurisdiction will have a justifiable nexus to impose a withholding tax on their payments), payers should note that they should extend this analysis to any non-Relevant Jurisdiction that they believe may impose a tax on a Transaction.

12 "Tax" is defined in Section 14 as any tax, charge or other similar listed items, except a stamp, registration, documentation or similar tax (*i.e.*, a "Stamp Tax", as defined in Section 14 of the 2002 Agreement). It is worth noting that the definition of "Tax" and, thus, the definition of "Indemnifiable Tax" includes any taxes imposed "in respect of any payment under this Agreement ...," which include withholding taxes on payments of interest on defaulted or deferred payments and compensation for defaulted and deferred deliveries. Although not specifically stated in the 2002 Agreement, it is understood that where payments under a 2002 Agreement are netted but withholding taxes are imposed on gross payments, the obligation to indemnify applies to the gross payment and applies even if no net payment is made. Similarly, a tax otherwise meeting the definition of "Indemnifiable Tax" does not fail to be treated as such on account of the tax applying to payments made by delivery of property rather than in cash.

(such as a conventional gross income withholding tax) generally would be borne by the payer through the gross- up provisions in Section 2(d)(i)(4), while a tax withheld because the payee has a connection with the taxing jurisdiction generally would be borne by the payee through the receipt of a net payment. **IT IS THEREFORE ADVISABLE FOR EACH PARTY TO BE AWARE OF WHETHER ANY TAX MIGHT BE IMPOSED ON PAYMENTS IT RECEIVES UNDER THE TAX LAWS OF ANY JURISDICTION WITH WHICH IT HAS A CONNECTION, AS THAT PARTY WILL GENERALLY BEAR THE BURDEN OF ANY TAX IMPOSED BY SUCH A JURISDICTION ON SUCH PAYMENTS.**

In 1988, ISDA published an addition to the definition of Indemnifiable Tax that parties were free to use if they so chose. That addition to the definition has not been incorporated into the 2002 Agreement because it has not been commonly adopted by parties and ISDA members did not support including it in the 2002 Agreement, but it continues to be available for parties to use. The addition to the definition is as follows:

> "Notwithstanding the foregoing, "Indemnifiable Tax" also means any Tax imposed in respect of a payment under this Agreement by reason of a Change in Tax Law by a government or taxing authority of a Relevant Jurisdiction of the party making such payment, unless the other party is incorporated, organised, managed and controlled or considered to have its seat in such jurisdiction, or is acting for purposes of this Agreement through a branch or office located in such jurisdiction."

In essence, the addition to the definition treats as an Indemnifiable Tax a tax attributable to a connection between the payee and the taxing jurisdiction if: (i) the tax is imposed by reason of a Change in Tax Law and (ii) the taxing jurisdiction is not the payee's home jurisdiction or the jurisdiction through which the payee is acting under the 2002 Agreement. It thus eliminates the payee's risk of bearing new taxes imposed by the payer's jurisdiction, even if the payee's activities in such jurisdiction are the basis for such taxes (so long as (ii) above is satisfied). The expansion of the definition of Indemnifiable Tax slightly increases the portion of the universe of taxes for which the payer may be required to gross-up. The expanded definition may be useful for parties who wish to allocate to the payer the burden of a withholding tax imposed by a jurisdiction to which both parties are connected. The proper party to bear such burden is not uniform in all Transactions and may depend on the type and degree of activities carried on by the payee in the taxing jurisdiction. It should be noted, however, that even if the parties incorporate an expanded definition of Indemnifiable Tax, the Change in Tax Law precipitating the indemnification would constitute a Termination Event and the payer could (subject to certain conditions) terminate the Transaction. (*See* Section IV.C. below).

b. ***Gross-up Provisions.*** As discussed above, in the event that an Indemnifiable Tax is required to be withheld from a payment, the payer is, subject to certain exceptions, required to gross-up the payee for that Indemnifiable Tax under Section 2(d)(i)(4). Although parties entering into a Transaction normally expect that no Indemnifiable Taxes will be required to be withheld from payments made under that Transaction, such withholding may nevertheless apply for one of three reasons:

(i) the initial expectation of no withholding was incorrect at the outset;

(ii) a withholding requirement is triggered after the date the parties enter into a Transaction by a change of facts concerning either the payee or the payer; or

(iii) a withholding requirement is triggered after the date the parties enter into a Transaction by a Change in Tax Law or similar legal development.

Section 2(d)(i)(4) is drafted to allocate the financial burden of a withholding tax to the payer or the payee depending on the reason why the unexpected withholding obligation is triggered.

Some firms suggested that a payer should not have to gross-up a payee for any withholding imposed on a payment to the payee if the payee knows that it will receive a refund of the tax or a credit against its tax liability (since the payee will, in these events, not actually bear the economic burden of the tax and will receive an economic windfall if it is in fact grossed-up for such withholding). Although this position was not adopted in the 2002 Agreement, parties to a 2002 Agreement may wish to consider doing so. A simple way to adopt this provision would be to compel a payer to rely on a payee's good faith determination by the payee as to the extent, if any, a tax refund or credit is or will be attributable to a tax for which it received a gross-up payment. If parties adopt this provision, they will need to make conforming changes to the definition of Tax Event (to preclude a Tax Event when a payee will receive a payment net of withholding if the payee will not suffer the effect of such withholding).

i. ***Initial Expectations Incorrect.*** The initial expectation that neither party will be required to withhold an Indemnifiable Tax from any payments made under a Transaction is established through the willingness of each party to make the Payer Tax Representation in Section 3(e) of the 2002 Agreement and Part 2(a) of the Schedule. If the laws of a Relevant Jurisdiction of a party generally require withholding, but provide an exemption for certain payees, that party (as payer) will normally request the other party (as payee) to provide certain representations and/or tax forms or other documentation on which the payer can rely to establish that the payee is exempt from withholding tax and that the payer therefore can make the Payer Tax Representation and refrain from withholding.

If the payer's initial expectation is incorrect and withholding of an Indemnifiable Tax is required, the general rule of Section 2(d)(i)(4) is that the payer must bear the burden of the Indemnifiable Tax through its obligation to gross-up the payee. The assignment of this financial responsibility to the payer is consistent with the fact that the payer incorrectly represented that, under the law in effect as of the date the parties entered into a Transaction, no such withholding was required.[13]

There are two exceptions to this general rule, both of which shift the responsibility for such withholding to the payee where the payee is considered to be "at fault". Under the first exception, if: (i) the payee makes a Payee Tax Representation to enable the payer to determine whether any taxes apply; (ii) that representation, which is made continuously (*see* introductory clause to Section 3 of the 2002 Agreement), fails to be accurate and true, other than by reason of a Change in Tax Law or similar legal development; and (iii) an Indemnifiable Tax is required to be withheld as a result of that failure, then the payee bears the burden of the Indemnifiable Tax by receiving payments net of withholding with no gross-up right (Section 2(d)(i)(4)(B)). Under the second exception, the payee bears the burden if an Indemnifiable Tax is required to be withheld because of the payee's failure to comply with its obligation to deliver tax forms or to give timely notice upon its learning of its breach of a Payee Tax Representation (Section 2(d)(i)(4)(A)).

It should be noted that the payer is required to gross-up under Section 2(d)(i)(4) for an Indemnifiable Tax imposed by reason of the payee's refusal to deliver a requested tax form in reliance on the "material prejudice" exception in Section 4(a)(iii). (*See* Section IV.B.3.c. above). So long as the payer has specified under Section 4(a)(i) of the 2002 Agreement and Part 3(a) of the Schedule or the Confirmation all tax forms required by the payer's Relevant Jurisdictions under the laws and practice in effect on the date the parties enter into a Transaction, the payer's request for an additional tax form under Section 4(a)(iii) generally would arise from a Change in Tax Law or similar legal development and as a result the payer's gross-up requirement would qualify as a Tax Event, giving the payer a termination right under Sections 5(b)(iii) and 6(b). (*See* Section IV.C. below). Nevertheless, if the required tax form was required under the law and practice in effect on the date the parties entered into the Transaction and the payer failed to request at the outset that the form be provided under Section 4(a)(i), the payer's gross-up requirement would not give rise to a Tax Event and to termination rights. **EACH PARTY SHOULD THEREFORE CAREFULLY ASSESS ITS NEED FOR TAX FORMS AT THE OUTSET OF A TRANSACTION AND REQUEST THE OTHER PARTY TO DELIVER THOSE FORMS**

13 See footnote 7 above for a discussion of the function served by the Payer Tax Representation.

UNDER SECTION 4(a)(i), WHICH HAS NO "MATERIAL PREJUDICE" EXCEPTION.[14]

ii. ***Change in Facts*****.** Even if there is no requirement to withhold any Indemnifiable Tax at the outset of a Transaction, such a requirement might arise as a result of a change in facts concerning the payer or payee. Such withholding will not, however, necessitate a gross-up if such tax results from the breach of a Payee Tax Representation (which, pursuant to the introductory clause to Section 3 of the 2002 Agreement, is made continuously) or the failure of a payee to provide an agreed tax form; in either of those circumstances, the exceptions to the payer's gross-up obligations apply (*see* Section 2(d)(i)(4)(A) and (B) of the 2002 Agreement) and the change in facts concerning the payee will thus result in the payee bearing the burden of the resulting withholding tax. In general, if there is a change in facts concerning the payer, the payer will not be excused from its obligation under Section 2(d)(i)(4) to gross-up for any resulting Indemnifiable Tax (unless, the payee fails to provide a form reasonably requested under Section 4(a)(iii)). However, although unlikely (especially when a payee utilises one of the standard Payee Tax Representations), it is possible that a change in facts concerning the payer could result in both a withholding obligation on payments made from the payer to the payee and a breach of a Payee Tax Representation. This result would not only compel a payee to accept payments net of withholding, but also would preclude a payee from terminating the Affected Transaction since the withholding would not have been precipitated by a Change in Tax Law or other similar legal development. In the event a payee gives a non-standard tax representation, it should consider amending the 2002 Agreement to provide that it will be entitled to a gross-up if a Payee Tax Representation would not fail to be true but for change in facts of the payer. Alternatively (or in addition), the parties may wish to amend the definition of Tax Event in the 2002 Agreement to encompass this situation.

iii. ***Change in Tax Law or Similar Legal Development*****.** If a jurisdiction imposes a requirement on the payer to withhold an Indemnifiable Tax as a result of: (i) an action taken by a taxing authority or brought in a court of competent jurisdiction, on or after the date the parties entered into a Transaction or (ii) a Change in Tax Law (as defined in Section 14 of the 2002 Agreement) then the payer will be required to gross-up for that Indemnifiable Tax. This is true even if the Change in Tax Law or similar legal development causes a Payee Tax Representation to become untrue, as the gross-up exception in Section 2(d)(i)(4)(B) has a

14 The other party may, of course, refuse to agree at the outset to provide a particular tax form by reason of "material prejudice" (or any other reason, for that matter). In that case, the request for tax forms under Section 4(a)(i) will have uncovered a potentially difficult tax issue before the Transaction has commenced, at a time that it can most easily be dealt with by the parties.

carve-out for a breach of a Payee Tax Representation arising from such events.

Sections 5(b)(iii) and 6(b) provide that a determination that there is, due to a change in tax law or similar legal development, a substantial likelihood that a party will be required to either make gross-up payments or receive payments net of withholding, will permit such party to terminate the 2002 Agreement (assuming it satisfies certain procedural requirements discussed in Section IV.C. below). Some firms believe that such determination should be permitted only if substantiated by a written legal opinion. Although ISDA did not adopt this position in the 2002 Agreement, parties to a 2002 Agreement should consider doing so. (For a more detailed discussion of this concern, *see* Section IV.C.3. below).

iv. ***Impact of new "No Agency" Representation.*** The 2002 Agreement has been expanded to include an optional "No Agency" representation. In Section 3(g), each party to a 2002 Agreement represents that it is entering into the Agreement as principal and not as agent. Among other reasons for using such a representation is that the particular tax form or representation a payer should request from a foreign counterparty in order to avoid withholding may depend, in part, on whether the counterparty is acting as principal or agent. For example, in the case of a payment (or a portion thereof) characterized as interest that is made by a U.S. payer, a non-U.S. payee receiving payments as principal typically would provide an IRS Form W-8BEN, whereas a counterparty acting as agent would provide an IRS Form W-8IMY and any required accompanying documentation.

As indicated above, Section 2(d)(i) requires all payments made under a 2002 Agreement to be made without deduction for withholding. In the event withholding is required, the payer is obligated to "gross-up" the payment (*i.e.*, pay additional amounts to compensate for the withholding imposed on the original payment). Under Section 2(d)(i)(4)(B), however, if the withholding is imposed as a result of the inaccuracy or falsity of a Payee Tax Representation made pursuant to Section 3(f), then no gross-up obligation is imposed (other than as a result of a Change in Tax Law or similar legal development).

Because the "No Agency" representation is found in Section 3(g), rather than Section 3(f), a party breaching the Section 3(g) "No Agency" representation would literally still be entitled to a gross-up even if that breach caused the payer to request an inappropriate tax form and, thus, a withholding tax to apply.[15] In order to avoid this result, parties to a 2002

[15] Under U.S. law, if the payee provided an IRS tax form (*i.e.*, an IRS Form W-8BEN or W-8ECI) indicating that it was the beneficial owner of payments received in a Transaction, the payer would be entitled to rely on that representation and no withholding would be required even if in fact the payee was

Agreement should consider providing that the reference in Section 2(d)(i)(4)(B) to Section 3(f) also includes Section 3(g).

C. Tax-Related Termination Events

1. ***General.*** A right to terminate in Section 6(b)(iv) may arise upon the occurrence of a "Tax Event," defined in Section 5(b)(iii), or a "Tax Event Upon Merger," defined in Section 5(b)(iv).

a. ***Tax Event.*** Generally, a Tax Event occurs if a party is (or there is a substantial likelihood that it will be) burdened by a withholding tax (*i.e.*, the payer is required to gross-up or the payee receives a payment net of withholding with no gross-up) *if* the withholding tax risk is due to a Change in Tax Law or similar legal development. A termination right arises in such cases because neither party is considered to be sufficiently "at fault" so as to require it to be burdened by an unanticipated tax through the scheduled maturity of the Transaction.

If a withholding tax applies and is *not* due to a Change in Tax Law or similar legal development, it either: (i) applied at the outset of the Transaction or (ii) is due to a change in facts since the outset of the Transaction. As discussed in Sections IV.B.5.b.(i). and 5.b.(ii). above, in those cases the gross-up provisions of Section 2(d)(i)(4) allocate the financial burden of such a withholding tax to the "responsible" party. The widespread (but not universally accepted) view, adopted in the 2002 Agreement is that a termination right should not arise in such cases, in order to reinforce each party's duty of care and diligence in determining and applying the withholding tax rules of its Relevant Jurisdictions and also to prevent a party from creating a "call" right through its own actions.

A Tax Event does not occur with respect to a party that will receive a payment net of withholding tax (with no obligation on the payer to gross-up for such withholding tax) if the tax would not have occurred but for: (i) the failure of the payee to comply with its obligations under Section 4(a)(i), 4(a)(iii) or 4(d) (generally, the obligation to give and update tax forms to the payer and to notify the payer upon learning of a breach of its own tax representation) or (ii) the failure of a Payee Tax Representation to be accurate and true (unless such failure would not have occurred but for a Change in Tax Law or similar legal development). A Tax Event also does not occur with respect to gross-up obligations (or lack thereof) with respect to interest under Section 9(h).

b. ***Tax Event Upon Merger.*** Under Section 5(b)(iv), a Tax Event Upon Merger occurs if a party pays a gross-up or receives payments subject to withholding tax without a gross-up, if the withholding tax arises because either party consolidates or amalgamates with, merges with or into, or transfers all or

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acting as an agent for a third party (unless the payer had actual knowledge or reason to know that the representation was false).

substantially all its assets (or any substantial part of the assets comprising the business conducted by it as of the date of the 2002 Agreement) to another entity. Such a transaction could result in the application of withholding tax, for example, if the transferee entity's jurisdiction of incorporation differs from the transferor's jurisdiction.

As in the definition of "Tax Event", certain exceptions apply. If a payee is not entitled to a gross-up because it has made a false tax representation (other than by reason of a Change in Tax Law or other similar legal development) or has failed to deliver an agreed tax form, then a Tax Event Upon Merger will not arise in favor of the payee. In addition, a withholding tax with respect to interest under Section 9(h) will not result in a Tax Event Upon Merger with respect to a payer that has to gross-up for such tax. However, in contrast to the exceptions to Tax Event discussed above, with respect to a payee, there is no exception to a Tax Event Upon Merger if the only payments that the payee receives net of a withholding tax are those constituting interest under Section 9(h).

Finally, if a Tax Event Upon Merger arises from a merger or other similar transaction that also qualifies as a Merger Without Assumption, the latter provisions will apply and the merger or other similar transaction will not constitute a Tax Event Upon Merger.

2. ***Changes from the 1992 Agreement.*** The definition of Tax Event has not been amended. The definition of Tax Event Upon Merger, however, has been expanded to include the transfer of any substantial part of the assets comprising the business conducted by a party as of the date of the Agreement.

3. ***Analysis.*** Under Section 6(b)(iv), the payer and payee, respectively, may terminate an Affected Transaction if, pursuant to Section 5(b)(iii) as a result of any Change in Tax Law or similar legal development:

(i) the payer will be required, or there is a "substantial likelihood" that it will be required, to gross-up its payment to the other party; or

(ii) the payee will be required, or there is a "substantial likelihood" that it will be required, to receive a payment without a gross-up (either (i) or (ii) a "Tax Event").

While the likelihood that a payment will or will not be subject to a gross-up is a legal determination, this provision would seem to afford broad discretion to the Affected Party to determine whether a "substantial likelihood" exists that it will be adversely affected by a Change in Tax Law or similar legal development, without requiring that it provide any support for its determination. Accordingly, parties to a 2002 Agreement may wish to amend the definition of Tax Event in Section 5(b)(iii) to require that a party attempting to terminate a Transaction on "substantial likelihood" grounds provide the other party with a written legal opinion from independent counsel substantiating that determination. If parties adopt this provision, they should also make it clear that the providing of a legal opinion does not curtail or preclude (in any manner) the other party from challenging that opinion. In other words, if the opinion turns out to be wrong, the party relying on it would be in breach of the 2002 Agreement.

Some firms suggested amending the definition of Tax Event to incorporate a change in circumstances of a payee. Thus, upon a change in circumstances with respect to the payee (which typically will be voluntarily caused by the payee) that caused the payee to receive a payment net of withholding, the payee could terminate the Transaction. Although this position was not adopted in the 2002 Agreement, parties to a 2002 Agreement may wish to consider doing so.

In contrast, some firms objected to a Tax Event Upon Merger being a Termination Event, because a merger is generally in the control of the *merging* party, whereas a termination may have adverse effects (such as adverse tax and accounting effects) on the *non-merging* party that are not adequately compensated by the payment of a Close-out Amount. For example, the potentially adverse consequences to the non-merging party of a premature termination include the possibility that (i) it will not be able to enter into a replacement Transaction, (ii) it will have to currently recognise taxable gain and (iii) the termination will have an undesirable effect on its earnings.

Although ISDA did not adopt this position in the 2002 Agreement, parties to a 2002 Agreement may consider doing so. If the Tax Event Upon Merger provision under Section 5(b)(iv) is omitted, conforming amendments should be made to, among others, the following Sections: first, Section 2(d)(i)(4) should be amended to except from a party's gross-up obligation, any withholding tax triggered by a merger of the other party (which should be defined in Section 14 to include, among other things, a transfer of assets). Another way this may be accomplished is by excluding from the definition of Indemnifiable Tax in Section 14, taxes that would not have occurred but for the payee's merger or other similar combination. Second, the definition of Tax Event under Section 5(b)(iii) should be amended to clarify that a Tax Event does not arise if the Tax Event would not have occurred but for the merger. Third, the definition of Indemnifiable Tax should be amended to provide that a payer will have to gross-up the payments made to a payee if withholding on such payments would not have been incurred but for a merger of the payer, notwithstanding that the payee may have a nexus with the payer's jurisdiction.

D. Stamp Taxes

1. ***General Approach.*** Under Section 4(e), each party generally agrees to pay Stamp Taxes imposed on it because it is a resident of a Stamp Tax Jurisdiction and to indemnify the other party against such Stamp Taxes imposed by any Stamp Tax Jurisdiction to which the other party is not a resident. Where both parties are residents of a Stamp Tax Jurisdiction, there is no indemnification right and the financial burden of any Stamp Tax generally will be borne by the party primarily liable for such tax. Note that, in certain jurisdictions a provision, such as the one in Section 4(e), indemnifying against Stamp Taxes may be void.

2. ***Changes from the 1992 Agreement.*** The Stamp Tax provisions in the 1992 Agreement have not been amended.

3. ***Analysis.*** Stamp Taxes are not Indemnifiable Taxes. (*See* the definition of Indemnifiable Tax in Section 14 of the 2002 Agreement that references the definition of Tax, which excludes Stamp Taxes). Instead, the obligation to pay them (and to indemnify the other party for them) is found in Section 4(e), rather than in Section 2(d) (the general gross-up provision). With respect to Stamp Taxes, no Payee Tax Representation is made, no right to terminate will arise if such tax is imposed and no right to request forms or documents (in order to reduce or eliminate any Stamp Taxes) under Section 4(a)(iii) of the 2002 Agreement exists. Some members pointed out that certain taxes on payments, such as the excise tax on certain insurance and reinsurance contracts under Sections 4371-74 of the U.S. Internal Revenue Code, while primarily imposed on the payer, may be levied upon the payee of the premium if the tax is not paid by the payer of the premium. These taxes, which would not be imposed unless the 2002 Agreement was recharacterised by the U.S. Internal Revenue Service as either an insurance or reinsurance contract, could constitute Stamp Taxes and, thus, be excluded from the definition of Indemnifiable Tax. Although this recharacterisation risk is very small, it is somewhat greater when the payment is being made to a foreign insurance or reinsurance company. These members suggested that including such a tax in the definition of Taxes (and thus, Indemnifiable Taxes) under Section 14 might be appropriate. Although ISDA did not adopt this position in the 2002 Agreement, parties to a 2002 Agreement may consider doing so. If parties adopted this provision, they would need to clarify (in order to effectuate the gross-up provision in Section 2(d)(i) of the 2002 Agreement) that any such tax imposed on a party not primarily liable for such tax is deemed to be deducted from a payment made to such party from its counterparty.

E. Early Termination

Where an early termination occurs pursuant to Section 6, payment may be made between the parties in accordance with Section 6(e) in respect of such early termination. It should be noted that other secondary tax issues may be raised by such termination payments that are not addressed in the 2002 Agreement.

F. Tax Considerations Relating to Physical Delivery

Like the 1992 Agreement, the 2002 Agreement does not address the treatment of every tax that might result from Transactions that settle by physical delivery. Parties should take great care in considering Transactions that settle by physical delivery because a Stamp Tax may apply in certain jurisdictions to either the documents related to the conveyance of physical assets or to the 2002 Agreement itself. In addition, Transactions that settle by physical delivery may raise issues as to the applicability of value-added taxes. Further, income on assets accepted for physical delivery may be subject to withholding taxes (such as, in certain instances, interest paid to a non-U.S. person on a bearer obligation issued by a U.S. person) that will not fall within the definition of Taxes or Indemnifiable Taxes in Section 14.

G. Tax Issues Relating to Transfers

1. ***General Approach.*** Under Section 7 of the 2002 Agreement, transfer of an obligation (or any portion thereof) generally is permitted only with consent of the counterparty. However, a party may make such a transfer pursuant to a consolidation or amalgamation with, or merger with or into, or a transfer of all or substantially all its assets to, another entity. In addition, a party may transfer its interest (or any portion thereof) in an Early Termination Amount receivable from a Defaulting Party.

2. ***Changes from the 1992 Agreement.*** No significant changes were made to Section 7 of the 1992 Agreement.

3. ***Analysis.*** Parties to a 2002 Agreement should consider whether the right to transfer the rights and obligations under the 2002 Agreement is appropriate. Under U.S. federal income tax regulations, a transfer by one party of its rights and obligations under a notional principal contract may be a taxable event for the other party. In contrast, the transfer of a notional principal contract by a dealer will, in certain cases, not be a taxable event for the other party, provided that the Transaction documents specifically permit such transfer. In other jurisdictions, a mere right to transfer, however, may lead to adverse consequences.

If it is determined that a right to transfer is appropriate, a provision should be included in the 2002 Agreement or Schedule providing that a Termination Event does not include a transfer by a party to an Affiliate, provided that: (i) taking into account any Credit Support Documents and the obligations of any Credit Support Provider, the creditworthiness of the Affiliate is not materially weaker than that of the transferring party immediately prior to the transfer; (ii) the transfer will not be treated as a taxable exchange for U.S. federal income tax purposes; and (iii) on the next succeeding Scheduled Payment Date, the non-transferring party will neither: (i) be required to pay, nor is there a substantial likelihood that it would be required to pay, an additional amount in respect of an Indemnifiable Tax under Section 2(d)(i)(4) (except in respect of interest under Section 9(h)) nor (ii) receive a payment, nor is there a substantial likelihood that it would receive a payment, from which an amount has been deducted or withheld for or on account of any Indemnifiable Tax in respect of which the other party is not required to pay an additional amount (other than by reason of Section 2(d)(i)(4)(A) or (B)), in either case as a result of such transfer.

Under U.S. tax law, payments made to a non-U.S. counterparty that represents it is a "foreign person" are not subject to withholding. This rule, however, applies only if the payments are characterised as notional principal contract payments. It does not apply to any payment, or portion thereof that, under U.S. federal income tax law, is characterised as interest. A payment, or portion thereof, may be characterised as interest if, for example, the payer had previously received a large up-front payment in connection with the Transaction. In such cases, the payment, or portion thereof, characterised as interest will be subject to withholding unless either (i) the payee is entitled to the protection of a tax treaty that eliminates such withholding or (ii) the interest qualifies for the portfolio interest exception to withholding. (*See* Section IV.H.3.b. below for a discussion of portfolio interest).

For a payment to qualify for the portfolio interest exception, the instrument giving rise to such payment must be in “registered form”. In very general terms, an instrument is in registered form if the issuer (or an agent thereof) is required to record a transfer of such instrument on its books and records. Most tax practitioners believe that a typical Transaction documented under the 2002 Agreement (and its predecessor, the 1992 Agreement) is in registered form because in the classic Transaction, neither party can transfer its interest in the Transaction without the consent of the other party (and consent is typically given only in connection with a current proposed transfer to a specified transferee). However, the U.S. Internal Revenue Service has not provided any guidance on this point and it is also possible that consent may be given in a manner in which it would be less clear that the registration requirements are satisfied (*e.g.*, the giving of blanket consent for future transfers to a class of transferees in which the identity of the specific transferee is not specified). Parties should consider the requirement that a Transaction be in registered form where a Transaction can be recharacterised as a debt obligation of a U.S. person held by a non-U.S. person and consent is being sought other than in connection with a current transfer to an identified transferee.

H. U.S. Tax Representations

1. *General.*

Section IV.B.3. above provides an in-depth description of the general theory behind the utilisation of Payer and Payee Tax Representations, as well as a detailed description of the mechanics of the gross-up provisions. Because a significant number of ISDA Master Agreements are entered into between parties at least one of which is a U.S. person or otherwise subject to U.S. information or backup withholding rules, this Section focuses exclusively on the Payee Tax Representations that should be used when a payer is a U.S. person or otherwise subject to U.S. information or backup withholding rules.

The Payee Tax Representations provided in Part 2(b)(i) and (ii) of the Schedule are generic representations that are not specific for any country. In October 2001, ISDA published on its website new Payee Tax Representations in sample form, for inclusion in the Schedule for contracts where the payer is a U.S. person (or otherwise is subject to U.S. information reporting and backup withholding rules). These new representations were added to help parties comply with new complex U.S. withholding and reporting rules (which generally became effective as of 1 January 2001). The new representations are set out in Part 2(b)(iii) through (vi) of the Schedule and are repeated for your convenience in paragraphs (A) through (D) of Section IV.H.4. below. In general, the Payee Tax Representations outlined below are utilised to reduce or eliminate any reporting or withholding obligations. Payers that are U.S. persons should consider obtaining one of the new representations. Which one of these representations should be provided depends on the payee’s U.S. tax status, as explained below. Tax laws change periodically and caution should be used to determine whether any representation requested remains appropriate under the tax laws in effect at the time of each Transaction. Further, special rules may apply to Transactions that are characterised, for

U.S. federal income tax purposes, as other than notional principal contracts. *Although ISDA is providing these sample representations, each party to a Transaction should consult with U.S. tax counsel to determine what, if any, representation is appropriate in its case.*

For a more detailed explanation of these representations, including citations to the relevant U.S. federal income tax regulations, readers are referred to "New U.S. Tax Representations for Schedule to ISDA Master Agreement" available at www.isda.org under the Tax Committee page.

In general, payments attributable to notional principal contracts are not subject to U.S. withholding tax, but may be subject to U.S. information reporting and backup withholding. The general "no withholding" rule does not, however, apply to payments treated as interest for U.S. tax purposes, even though paid in a Transaction documented as a swap.

2. *Information Reporting.*

a. *IRS Form 1042-S Reporting.* Notional principal contract payments generally must be reported on IRS Form 1042-S if treated under U.S. Internal Revenue Service regulations as effectively connected with the conduct of a trade or business in the United States. A safe harbor provides, however, that payments need not be reported if the payee represents in the Schedule that it is a U.S. person or a non-U.S. branch of a foreign person.

ISDA has provided sample alternative Payee Tax Representations for this purpose that may be added in Part 2(b)(iv) of the Schedule: paragraph (A) (for U.S. persons); paragraph (B) (for foreign persons that cannot act through a U.S. branch); and paragraph (C) (for foreign persons that are multibranch parties able to act through a U.S. branch). Before making the representation in paragraph (C), payees should carefully consider whether they will in fact be acting through a non-U.S. branch in all Transactions in which payments are to be made to an address or an account outside the U.S. For example, a payee that directs payments to an account or address outside the U.S. with respect to all its Transactions, including those in which it is acting through its U.S. branch, could not make this representation. Further, a payer cannot rely on either paragraph (B) or paragraph (C) to avoid IRS Form 1042-S reporting if it knows, or has reason to know, that the payment is in fact effectively connected with the conduct of a trade or business within the United States.

b. *IRS Form 1099 Reporting and Backup Withholding.* Notional principal contract payments must be reported on IRS Form 1099 unless the payee is a corporation or otherwise eligible for an exemption. U.S. Internal Revenue Service rules set forth indicia of corporate status on which a payer generally may rely to avoid reporting, including an IRS Form W-9 with an employer identification number and a statement that the payee is a domestic corporation. Payments also need not be reported if the payee represents that it is a foreign person in the Schedule. Thus, foreign payees providing the new representations in paragraphs (B) and (C) of Section IV.H.4. below to avoid IRS Form 1042-S reporting also will be exempt from IRS Form 1099 reporting. Other foreign payees may make the sample representation in paragraph (D) to avoid IRS Form 1099 reporting.

A swap payment that is not exempt from IRS Form 1099 reporting is subject to a backup withholding tax unless the payee provides a valid U.S. Internal Revenue Service taxpayer identification number. (*See also* Section IV.H.2.c. below for a brief discussion of backup withholding).

c. ***Payments to Foreign Partnerships and Trusts.*** The sample representations in the Schedule may be used by a foreign partnership or trust that qualifies as a "withholding foreign partnership" or "withholding foreign trust" (as evidenced by an IRS Form W-8IMY certifying its status). Persons making payments to non-withholding foreign partnerships and trusts should consult tax counsel as to the representations and forms needed to avoid information reporting and backup withholding.

3. *Treatment of Payments as Interest.*

Swap agreements providing for up-front yield adjustment or other non-periodic payments from a non-U.S. party to a U.S. party may be treated by the U.S. Internal Revenue Service as loans to the U.S. person if those payments are "significant". If so, a portion of the payments from the U.S. to the non-U.S. party will be U.S.-source interest potentially subject to a 30-percent withholding tax.

Because there is no bright-line test whether a payment is "significant", Transactions with up-front (or other non-periodic) payments *to* a U.S. party *from* a non-U.S. party should be reviewed by tax counsel to determine whether they could be loans for U.S. tax purposes. If the only up-front payment is *by* a U.S. party, however, no review is necessary because interest paid *to* a U.S. person is not subject to withholding. U.S. Internal Revenue Service regulations permit reliance on a representation on IRS Form W-9 that a party is a U.S. person.

Even if swap payments to a non-U.S. party are treated as interest, no withholding is required if: (i) the interest is effectively connected with the conduct of a trade or business in the U.S.; (ii) the interest qualifies as "portfolio interest"; or (iii) the payee qualifies for the benefits of a treaty providing a full exemption.

a. ***Effectively Connected Income.*** U.S.-source interest is effectively connected income exempt from withholding if, prior to payment, the foreign beneficial owner of the payment provides a valid IRS Form W-8ECI with which the payment reliably can be associated that includes both: (i) the owner's taxpayer identifying number and (ii) a representation, under penalties of perjury, that the amounts for which the certificate is furnished are effectively connected with the conduct of a trade or business in the U.S. and are includable in the owner's gross income for the taxable year.

Even if a U.S. payer relies on the effectively connected exemption in not withholding on payments that are treated as interest, the payer may be required to report payments under the agreement on IRS Form 1042-S.

b. ***Portfolio Interest.*** To qualify for the portfolio interest exemption, the payee must certify on IRS Form W-8BEN that it is a foreign person and is the beneficial owner of the payment. The exemption is not available, however, unless the obligation on which the interest is paid is in registered form. (*See* Section IV.G. above).

The portfolio interest exemption is denied to: (i) a bank receiving interest on an extension of credit made pursuant to a loan agreement entered into in the ordinary course of its trade or business and (ii) a payee related to the payer in specified ways. Thus, U.S. persons making swap payments potentially treated as interest may consider requesting a representation in the Schedule that the payee is neither a bank nor related to the payer. U.S. Internal Revenue Service rules do not expressly authorise reliance on such representations and ISDA has not provided sample language.

Alternatively, U.S. persons entering into a 2002 Agreement with a non-U.S. bank should consider an income tax treaty as a fallback position in the event that the portfolio interest exemption turns out to be unavailable. (*See* Section IV.H.3.c. below).

Further, special rules not discussed here may limit availability of the portfolio interest exemption for payments to foreign entities treated for U.S. tax purposes as conduits for extensions of credit by non-U.S. persons.

c. ***Treaty Exemption.*** A payer may treat a payment of U.S.-source interest as qualifying for relief from withholding if, prior to payment, the payment can be reliably associated with a withholding certificate on IRS Form W-8BEN with all the representations and other information necessary to support the payee's claim of treaty benefits (including the completion of Part II thereof and the provision of a U.S. tax identification number).

Not all tax treaties provide complete exemption from tax for U.S.-source interest payments; some provide only a reduced rate. A payer must examine the provisions of the applicable treaty before determining that payments treated as interest for U.S. tax purposes will be exempt from withholding.

Special rules not discussed here apply in determining the availability of treaty benefits in the case of payments of U.S.-source interest to foreign partnerships and other fiscally transparent entities.

4. *Sample Representations for Inclusion in Part 2(b) of the Schedule to the 2002 Agreement*.

If payee is	*then request representation in . . .*
a U.S. person	paragraph (A)
a non-U.S. person with no U.S. office	paragraph (B)
a multibranch non-U.S. person with both a foreign office and a U.S. office	paragraph (C)
a non-U.S. person acting only through a U.S. office	paragraph (D)

Insert in Part 2(b)(iii):

(A) The following representation [will] [will not] apply to Party A and [will] [will not] apply to Party B:

It is a "U.S. person" (as that term is used in Section 1.1441-4(a)(3)(ii) of the United States Treasury Regulations) for U.S. federal income tax purposes.

OR

(B) The following representation [will] [will not] apply to Party A and [will] [will not] apply to Party B:

It is a "non-U.S. branch of a foreign person" (as that term is used in Section 1.1441-4(a)(3)(ii) of the United States Treasury Regulations) for U.S. federal income tax purposes.

OR

(C) The following representation [will] [will not] apply to Party A and [will] [will not] apply to Party B:

With respect to payments made to an address outside the U.S. or made by a transfer of funds to an account outside the U.S., it is a "non-U.S. branch of a foreign person" (as that term is used in Section 1.1441-4(a)(3)(ii) of the United States Treasury Regulations) for U.S. federal income tax purposes.

OR

(D) The following representation [will] [will not] apply to Party A and [will] [will not] apply to Party B:

It is a "foreign person" (as that term is used in Section 1.6041-4(a)(4) of the United States Treasury Regulations) for U.S. federal income tax purposes.

5. *Explanation of U.S. Payee Tax Representations.*

The following provides a brief explanation of the four representations outlined in (A) through (D) in Section IV.H.4. above.

a. ***Representation A (Payee is a U.S. Person).*** If the payee is a U.S. person, it should provide the representation in paragraph (A). If the payee provides the representation in paragraph (A), the payer will not be required to report payments on IRS Form 1042-S. The payer, nevertheless, may be required to report on IRS Form 1099 unless the payee is a corporation (or other "exempt recipient"). If reporting is required, backup withholding also will be required if the payee fails to provide a valid U.S. Internal Revenue Service taxpayer identification number to the payer.

b. ***Representation B (Payee May Not Act Through a U.S. Office).*** If the payee provides this representation, the payer generally will not be required to report payments on either IRS Form 1042-S or IRS Form 1099.

c. ***Representation C (Payee is a Multi-Branch Party That May Act Through a U.S. Office).*** This representation differs from the second representation in that it applies to a non-U.S. person with multiple branches, at least one of which is in the U.S. (while the second representation applies to a non-U.S. person that does not have U.S. branches). If the payee provides this representation, the payer will not be required to report payments on IRS Form 1099. In addition, the payer will not be required to report on IRS Form 1042-S payments to an address outside the U.S. or to a bank account outside the U.S., because the payee will have represented that it is a non-U.S. branch of a foreign person with respect to such payments. A non-U.S. party that enters into swaps through both U.S. and non-U.S. branches under a single Schedule, but directs that payments under all swaps be made to an address outside the United States, could not give this representation. The rules for determining whether income of a foreign person is effectively connected are complicated and parties entering into Transactions with a foreign person that operates through U.S. and non-U.S. branches should consult their tax advisors regarding the appropriate representations to be made.

d. ***Representation D (Payee is a Non-U.S. Person Acting Only Through a U.S. Office).*** If the payee provides this representation, the payer will not be required to report any payments on IRS Form 1099. Reporting on IRS Form 1042-S may be required.

I. U.S. Confidential Tax Shelter Legislation

In February 2003 the U.S. Internal Revenue Service finalised U.S. Treasury regulations regarding the disclosure, registration and list-keeping requirements related to abusive tax shelters. U.S. Internal Revenue Service regulations may treat a transaction (not otherwise thought of as a tax shelter) as an abusive tax shelter if certain information regarding the tax treatment and tax structure of the transaction is required to be kept confidential. Such treatment would require a participant otherwise required to file a U.S. tax return to disclose the transaction to the U.S. Internal Revenue Service on its tax return and, in certain circumstances, subject that person or other persons connected with the transaction (whether or not required to file a tax return) to certain other requirements, such as registering the transaction with, or maintaining a list of participants for, the U.S. Internal Revenue Service. Participants in Transactions should consider whether, in light of those regulations, a provision should be added to the Schedule that provides that the tax treatment and tax structure of the transaction need not be kept confidential. The final regulations provide a safe-harbor, in which a transaction will be presumed not to be confidential under these regulations if every person making or providing statements about the potential tax consequences that may result from the transaction provides express written authorisation to the taxpayer in substantially the following form: "the taxpayer (and each employee, representative, or other agent of the taxpayer) may disclose to any and all persons, without limitation of any kind, the tax treatment and tax structure of the transaction and all materials of any kind (including opinions or other tax analyses) that are provided to the taxpayer relating to such tax treatment and tax structure." Such written authorisations generally must be effective from the commencement of discussions related to such transaction. Although standardised industry-wide language to preclude confidentiality has not yet been developed, ISDA may consider publishing such language in the future. In the interim, participants in Transactions that have a U.S. nexus may wish to incorporate in the Schedule the language from the final regulations (or other appropriate language).

J. U.K. Deductibility of Payments Made Pursuant to the 2002 Agreement

1. ***General.*** Special issues exist with respect to the deductibility (for U.K. tax purposes) of payments made by certain U.K. residents (and U.K. branches of non-residents) to non-U.K. residents. **These special rules do not apply, however, if the U.K. resident enters into the 2002 Agreement in the course of its trade or business and is either a bank, building society, financial trader or a recognised clearing house**. In very general terms, if a U.K. payer (other than one of the U.K. payers listed above for which this rule does not apply) makes a "notional interest" payment under a derivative entered into with a non-U.K. resident company, the U.K. payer could lose its tax deduction for that payment. For purposes of this rule, a "notional interest" payment is defined as any payment that is determined by applying an interest rate to a notional amount. Thus, without limitation, a notional interest payment would include payments made under a traditional interest rate swap as well as a LIBOR leg on a total return swap.

Specifically, in limited circumstances, paragraph 31 of Schedule 26 FA 2002 (which is in effect for accounting periods for U.K. purposes beginning *on or after* 1 October 2002), may deny a U.K. resident (other than the U.K. residents exempt from this rule (*see* above)) a deduction for payments made pursuant to a 2002 Agreement (as well as for other payments) unless certain conditions are met.[16] Typically, the deductions will

[16] For accounting periods beginning prior to 1 October 2002, the applicable statutory provision that may deny the deduction is Section 168 of the Finance Act 1994. Further, with respect to such accounting

be permitted if the payee either is a U.K. resident (or a U.K. branch of a non-U.K. resident) or satisfies certain safe harbors.

One safe harbor provides that the deduction will be permitted if the payee (x) is entering into the transaction solely for purposes of a trade carried on by it in the U.K. and (y) is not entering into the transaction as agent or nominee for any other person. (*See* Section 168(4) of the Finance Act 1994 and its successor provision, Paragraph 31(6) of Schedule 26 Finance Act 2002). This rule effectively permits the deduction when the payment is being made to a payee that is entering into the transaction through a UK. branch or agency, which might be a slightly lesser standard than a permanent establishment. Legislation pending as of the publication of this User's Guide would, however, require the payee to have a permanent establishment in the U.K. in order for the payer to avail itself of the safe harbor in (x) above.

Another safe harbor provides that the deduction will be permitted if the payee is a resident in a territory that has concluded a double taxation treaty (that contains an interest article) with the United Kingdom. (*See* Section 168(5) of the Finance Act 1994 and its successor provision, Paragraph 31(7) of Schedule 26 Finance Act 2002).

Accordingly, a U.K. payer (other than those exempt from these rules (see above)) may wish to incorporate the following representation into the Schedule in order to avail itself of the safe harbors. If added, it should not be classified as a Payee Tax Representation under Section 3(f) of the 2002 Agreement because those representations relate to whether *withholding* will be imposed on payments made under the 2002 Agreement. This suggested representation relates, however, merely to whether the payment will be deductible for U.K. purposes. Thus, consideration should be given as to whether it should be labeled as an Additional Representation (as defined under Section 3 of the 2002 Agreement) and whether it should be deemed to be repeated (just like Payee Tax Representations (*see* introductory clause to Section 3 of the 2002 Agreement)) at all times until the termination of the 2002 Agreement. If so, the failure of such representation to be true (at any point in time) will constitute an Event of Default under Section 5(a)(iv) of the 2002 Agreement and will permit the U.K. payer (in accordance with the standard termination provisions of the 2002 Agreement) to terminate the Transaction. A U.K. payer should consider, however, whether it wants to add an indemnity to (or otherwise alter) the standard termination provisions to compensate such payer for the lack of a deduction should the Additional Representation turn out to be false. In addition, the payee should consider (i) whether it wants to permit a breach of the Additional Representation to be labeled a "default" under the 2002 Agreement because such a default could trigger other adverse consequences as a result of cross-default provisions in other transactions (including ones not documented under a 2002 Agreement) and (ii) whether it wants to specify that termination is the sole remedy for breach.

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periods, the category of payments that may be affected by this rule is not limited to "notional interest" payments; currency and debt contracts would be impacted as well.

2. ***Sample Representation*.** The following representation is merely a sampling of possible representations and may not be sufficient for all U.K. payers. **Accordingly, all U.K. payers should consult their own U.K. tax counsel to ensure that their payments will be deductible to the extent anticipated**.

The following representation [will] [will not] apply to Party A and [will] [will not] apply to Party B:

Either:

(i) it is resident in the United Kingdom for United Kingdom tax purposes, or

(ii) in relation to accounting periods of [Party B] [Party A] [*i.e.*, the person relying on the representation] beginning on or after 1 October 2002, the conditions of Paragraph 31(6) or Paragraph 31(7) of Schedule 26 of the Finance Act 2002 (in each case as amended or re-enacted from time to time) are satisfied with respect to the Transaction.[17]

V. ADEQUATE ASSURANCES PROVISION

Under certain circumstances, parties to a 2002 Agreement may wish to consider the incorporation of an adequate assurances provision. The doctrine of adequate assurances has its origins in United States common law, where it developed as an outgrowth of the concept of anticipatory repudiation. The doctrine of adequate assurances is currently codified in Article 2 (Sale of Goods) of the Uniform Commercial Code as adopted by 49 states in the United States and has been included as an optional provision in other industry master agreements, such as the International Currency Options Market Master Agreement and the International Foreign Exchange Master Agreement.

Under an adequate assurances provision, when reasonable grounds for insecurity of performance are present, the insecure party may demand adequate assurances of performance from its counterparty. The form of assurance that may be provided in response to such a request and the determination of adequacy of any such assurance will depend on the relevant facts and circumstances. A letter certified by an appropriate officer of the counterparty may, in some circumstances, constitute adequate assurances of the counterparty's ability and intention to perform its obligations under the 2002 Agreement. In other circumstances, an insecure party may request financial statements, additional collateral or other sources of assurance. If assurances are not timely provided, or the provided assurances are not adequate (in the good faith and commercially reasonable opinion of the demanding party), the insecure party may invoke the early termination and close-out netting provisions of the relevant agreement. Thus, an adequate assurances provision can provide a party with a means of protecting itself

[17] For accounting periods beginning before 1 October 2002, reference should also be made to "the conditions of Section 168(4) or Section 168(5) of the Finance Act 1994," which are the predecessor provisions of the conditions of Paragraph 31(6) or Paragraph 31(7) of Schedule 26 of the Finance Act 2002.

against uncertainties that do not, by themselves, otherwise constitute an enumerated Termination Event or Event of Default under the 2002 Agreement.

While some parties may view an adequate assurances provision as undesirable because it is less objective than most Events of Default and Termination Events, an adequate assurances provision may be considered beneficial in a variety of situations, including, for example, where a party wishes to reserve the right to obtain additional assurances of performance upon the occurrence of unanticipated economic, political or other events affecting its counterparty. In addition, an adequate assurances provision may be used where the parties' trading relationship is not collateralised (although adequate assurances provisions are not limited to whether collateral arrangements have or have not been made). Further, an adequate assurances provision may be considered a market convention in certain sectors such as energy.

Under a typical adequate assurances provision, a demand for adequate assurances is based on "reasonable grounds for insecurity". This means that the party making a demand for adequate assurances must have a foundation for the demand based on what would be deemed reasonable under similar circumstances. Parties may wish to consider specifying what constitutes "reasonable grounds for insecurity".

Although general trends in an industry may be relevant to a consideration of whether to request adequate assurances, a demand for adequate assurances should not be based solely on such industry information that does not impact or affect a counterparty's ability to perform its obligations under the 2002 Agreement. Rather, the demand for adequate assurances should be based on information that is specific to the counterparty to which the demand is made. Parties should, of course, consider (in consultation with counsel) the desirability of making a demand for adequate assurances. The request for adequate assurances must be reasonable given the relevant facts and circumstances.

VI. EXPANDING THE SCOPE OF SET-OFF

A. Guarantee and Assignment Provision

Parties may wish to consider replacing Section 6(f) in the standard form 2002 Agreement with a Guarantee and Assignment provision in order to expand the reach of the set-off provided for by Section 6(f). The Guarantee and Assignment provision set forth below operates through the use of assignments to the Non-defaulting Party by its Affiliates and guarantees by the Defaulting Party of obligations of its Affiliates. The provision may be written to apply to the Affiliates of one party and not the other. Parties may wish to consider the following Guarantee and Assignment provision:

> "(f) *Set-off*. Any Early Termination Amount payable to one party (the 'Payee') by the other party (the 'Payer') under Section 6(e), in circumstances where there is a Defaulting Party or one Affected Party in the case where a Termination Event under Section 5(b)(v)[18] has occurred, will, at the option of the party ('X') other

[18] The reference to this Termination Event may be deleted or expanded to include other Termination Events and also may be expanded to address a situation involving two Affected Parties.

than the Defaulting Party or the Affected Party (and without prior notice to the Defaulting Party or the Affected Party),[19] be reduced by its set-off against any amount(s) (the 'Other Amounts') payable (whether at such time or in the future or upon the occurrence of a contingency) by the Payee or any Affiliate of the Payee to the Payer or any Affiliate of the Payer, including under (i) or (ii) below and irrespective of the currency, place of payment or booking office of the obligation. To the extent any Other Amounts are so set-off, those Other Amounts will be discharged promptly and in all respects. X will give notice to the other party of any set-off effected under this Section 6(f).

(i) ***Guarantee.*** Each party ('B') hereby unconditionally and irrevocably guarantees (but only to the extent of any Early Termination Amount payable to it), each as a primary obligor and not merely as a surety, the due and punctual payment and performance of all the obligations of B's Affiliates to the other party ('A') (or any of A's Affiliates), and B agrees that such guarantee is a guarantee of payment when due and not of collection and is a continuing guarantee, waives any and all rights of contribution, reimbursement or subrogation (except as provided below in this Section 6(f)) which may arise as a result of such guarantee and waives any and all defenses to payment that it or any of its Affiliates may have.

(ii) ***Assignment.*** If either party ('C') has reasonable grounds for insecurity regarding a potential default under this Agreement by the other party ('D'), then any right of an Affiliate of C to receive payment from D or any Affiliate of D may be assigned to C, in which case D hereby consents to any such assignment of the benefit of its obligations and agrees to use its best efforts to obtain any required consents from its relevant Affiliate to any such assignment of the benefit of an obligation of that Affiliate. C shall give prompt written notice to D of any assignments of rights to C by Affiliates of C pursuant to this provision.

If the Early Termination Amount has been reduced or eliminated through its set-off against amounts payable under (A) above or assigned pursuant to (B) above, the obligations guaranteed pursuant to (A) above and the obligations in respect of which rights were assigned pursuant to (B) above shall be discharged promptly in all respects to the extent utilised to so reduce or eliminate the Early Termination Amount.

Following the payment to the Payer or Payer's Affiliates of all amounts owed to them by the Payee's Affiliates and the expiration of any applicable legal period relating to bankruptcy, insolvency, administration or liquidation or other similar event, the Payee shall become subrogated to the rights of the Payer or the Payer's Affiliates, as the case may be, under the obligations guaranteed pursuant to (A) above.

[19] This clause may be modified so that it applies automatically on the date the Early Termination Amount becomes payable.

For this purpose, either the Early Termination Amount or any Other Amounts (or the relevant portion of such amounts) may be converted by X into the currency in which the other is denominated at the rate of exchange at which such party is able, acting in a reasonable manner and in good faith, to purchase the relevant amount of such currency.

If an obligation is unascertained, X may in good faith estimate that obligation and set-off in respect of the estimate, subject to the relevant party accounting to the other when the obligation is ascertained.

Nothing in this Section 6(f) shall be effective to create a charge or other security interest. This Section 6(f) shall be without prejudice and in addition to any right of set-off, combination of accounts, lien or other right to which any party is at any time otherwise entitled (whether by operation of law, contract or otherwise)."

B. Other Approaches

1. ***Withholding/Conditionality Approach.*** Some market participants have suggested an approach to issues relating to set-off in which payments on termination would be withheld until the occurrence of certain events or conditioned based upon the occurrence of certain events (the "Withholding/Conditionality Approach"). Under the Withholding/Conditionality Approach, a termination payment owed from a Non-defaulting Party to a Defaulting Party either (i) would be withheld until certain specified obligations of the Defaulting Party and its Affiliates to the Non-defaulting Party and its Affiliates have been satisfied or (ii) would be conditioned upon the satisfaction of certain obligations of the Defaulting Party and its Affiliates to the Non-defaulting Party and its Affiliates. This approach may be designed to reach only the obligations of the parties to a 2002 Agreement or may be written to apply to the Affiliates of one party and not the other depending on which party is the Defaulting Party. The Withholding/Conditionality Approach could also be structured to apply to a Termination Event resulting from a Credit Event Upon Merger or other Termination Events. This approach may be added in lieu of or in combination with the set-off provision contained in Section 6(f) of the 2002 Agreement. The intended economic effect of such an approach encompassing Affiliates of a Defaulting Party is not substantively different from the result sought under a 2002 Agreement containing the Guarantee and Assignment Provision.

The following is a provision favored by a few ISDA members that attempts to implement the Withholding/Conditionality Approach with respect to the occurrence of an Event of Default:[20]

"(f) ***Conditions to Certain Payments.*** Notwithstanding the provisions of Section 6(e)(i) if the amount referred to therein is a positive number, the Defaulting Party will pay such amount to the Non-defaulting Party, and if the

[20] The provision could be modified to include one or more Termination Events, in which case references to the Affected Party and the Non-affected Party would need to be included, as appropriate, where references to the Defaulting Party and Non-defaulting Party, respectively, are currently set forth.

amount referred to therein is a negative number, the Non-defaulting Party shall have no obligation to pay any amount thereunder to the Defaulting Party unless and until the conditions set forth in (A) and (B) below have been satisfied[21] at which time there shall arise an obligation of the Non-defaulting Party to pay to the Defaulting Party an amount equal to the absolute value of such negative number less any and all amounts which the Defaulting Party may be obligated to pay under Section 11:

(A) the Non-defaulting Party shall have received confirmation satisfactory to it in its sole discretion (which may include an unqualified opinion of its counsel) that (x) no further payments or deliveries under Section 2(a)(i) or Section 9(h) in respect of Terminated Transactions will be required to be made in accordance with Section 6(c)(ii) and (y) each Specified Transaction shall have terminated pursuant to its specified termination date or through the exercise by a party of a right to terminate and all obligations owing under each such Specified Transaction shall have been fully and finally performed; and

(B) all obligations (contingent or absolute, matured or unmatured) of the Defaulting Party and any Affiliate of the Defaulting Party to make any payment or delivery to the Non-defaulting Party or any Affiliate of the Non-defaulting Party shall have been fully and finally performed."

2. ***Flawed Asset Approach.*** Other market participants have suggested that a 2002 Agreement could be amended to provide that a termination payment owed to a Defaulting Party would be calculated by subtracting from the amounts otherwise owed to the Defaulting Party any amounts owed by the Defaulting Party or its Affiliates to the Non-defaulting Party and its Affiliates under other agreements (the "Flawed Asset Approach"). Under this approach the Defaulting Party would only have a limited right to receive a termination payment, with the "flawed asset" thus being the "impaired" right to the termination payment. This approach may be designed to reach only the obligations of the parties to a 2002 Agreement or may be written to apply to the Affiliates of one party and not the other depending on which party is the Defaulting Party. The Flawed Asset Approach could also be structured to apply to a Termination Event resulting from a Credit Event Upon Merger or other Termination Events. This approach may be added in lieu of or in combination with Section 6(f). The intended economic effect of the Flawed Asset Approach encompassing Affiliates of a Defaulting Party is not substantively different from the result sought under a 2002 Agreement containing the Guarantee and Assignment provision if the Flawed Asset Approach is implemented in combination with Section 6(f).

[21] Some market participants advocate a limitation on the scope of this "withholding/conditionality" right so that a party would have to make payments to the extent amounts owing to the Defaulting Party exceeded amounts owing to the Non-defaulting Party and its Affiliates.

VII. GLOBAL DOCUMENTATION STEERING COMMITTEE RECOMMENDATIONS

In June 1999, a report entitled "Improving Counterparty Risk Management Practices" (the "Report") was published by the Counterparty Risk Management Policy Group ("CRMPG"). The Report is available at www.mfainfo.org. CRMPG, established under the auspices of the Federal Reserve Bank, was a group of twelve major internationally active commercial and investment banks formed with the objective of promoting enhanced strong practices in counterparty credit and related risk management after the market disruptions in 1997 and 1998. The Global Documentation Steering Committee (the "GDSC") was established to implement the documentation-related recommendations of the Report. The GDSC is comprised of senior representatives from multiple commercial and investment banks, hedge funds and trade associations, including ISDA.

One aspect of the GDSC's mission is the development of harmonised documentation across industry master agreements. Inconsistencies across industry master agreements create "documentation basis risk". Documentation basis risk occurs when economically similar transactions are documented under different industry master agreements, which may have varying valuation and termination provisions, and produces different economic results in the event of a close-out. Thus, the objective of developing harmonised documentation is to provide counterparties with uniform provisions in order to avoid documentation inconsistencies, thereby reducing risk and improving the functioning of markets.

The GDSC has examined a number of industry master agreements and offered recommended model provisions for key provisions of those agreements. The GDSC's website, www.ny.frb.org/globaldoc/index.html, offers an analysis of its model provisions as well as the model provisions themselves. The model provisions may be used to supplement concepts set forth in the 2002 Agreement or other industry master agreements.

VIII. ADDITIONAL MODIFICATIONS TO THE 2002 AGREEMENT REGARDING PHYSICALLY-SETTLED TRANSACTIONS

The 2002 Agreement includes several provisions designed to assist parties who document Transactions that settle by physical delivery under the 2002 Agreement. However, parties should consider making additional modifications to the 2002 Agreement in the Schedule or in the relevant Confirmation or elsewhere in the 2002 Agreement to address issues raised by such Transactions that may not be adequately covered in the 2002 Agreement, including:[22]

i. specifying the means for settlement by delivery rather than relying on the

[22] This Section VIII is not intended to suggest that only Transactions that settle by physical delivery will require modifications to a 2002 Agreement. Parties may find that a particular cash-settled Transaction requires modifications to a 2002 Agreement that are also Transaction-specific.

language in Section 2(a)(ii);[23]

ii. including a provision that is analogous to Section 2(b) for the place of delivery;

iii. providing in the Confirmation or in Section 9(h) for a means of determining compensation owed that is more specific than Section 9(h)(i)(2);

iv. including a representation in Section 3 to the effect that, at the time of delivery, the party making delivery has good title to the subject of the relevant physical delivery obligation and that the subject of such obligation is free of liens and other encumbrances;

v. depending on the underlying asset, increasing or decreasing the grace period in Section 5(a)(i) for obligations that settle by delivery;

vi. addressing the impact of relevant market or settlement disruption events *(e.g.*, events making delivery difficult or impractical that are not covered by the Force Majeure Event provisions) and providing for contingencies in the case of such events; and

vii. narrowing or expanding the definition of "Specified Transaction".

Before documenting obligations that settle by physical delivery under the 2002 Agreement, parties should also note that certain tax issues raised by such obligations are not addressed in the 2002 Agreement and, accordingly, those issues should be addressed in the Schedule or the relevant Confirmation. Specifically, parties should consider allocating the risk of any taxes (in addition to Indemnifiable Taxes) that may be payable in respect of such Transactions. (*See* Section IV.F. above). In addition, parties should note that, although some ISDA definitional booklets provide a framework for addressing some of the issues above, some have been generally designed with a view to the documentation of cash-settled derivative transactions; parties should therefore consider whether modifications are necessary to the relevant definitions.

THE DISCUSSION ABOVE SHOULD NOT BE VIEWED AS A COMPLETE OR MANDATORY LIST OF ALL AREAS OF THE 2002 AGREEMENT REQUIRING MODIFICATION IN CONNECTION WITH THE DOCUMENTATION OF A TRANSACTION THAT SETTLES BY PHYSICAL DELIVERY. THE FACTS OF A PARTICULAR TRANSACTION THAT SETTLES BY PHYSICAL DELIVERY MAY DICTATE THAT MODIFICATIONS IN ADDITION TO THOSE LISTED ARE NECESSARY OR THAT CERTAIN OF SUCH MODIFICATIONS TO THE 2002 AGREEMENT

[23] As part of the consideration of this modification, parties could also provide that a failure to deliver by a party ("X") resulting from a failure of the other party ("Y") to make adequate arrangements to accept delivery shall not constitute an Event of Default and, in such an event, Y shall indemnify X for reasonable losses suffered by X in connection with such attempted delivery.

ARE NOT APPROPRIATE. ACCORDINGLY, PARTIES SHOULD CAREFULLY CONSIDER THE 2002 AGREEMENT AND ANY NECESSARY MODIFICATIONS AND CONSULT WITH THEIR LEGAL ADVISERS BEFORE DOCUMENTING A TRANSACTION THAT SETTLES BY PHYSICAL DELIVERY UNDER APPLICABLE LAWS (INCLUDING, WITHOUT LIMITATION, SECURITIES LAWS AND INSOLVENCY LAWS) AND REGULATORY REQUIREMENTS.

IX. FINANCIAL PRODUCTS MARK-UP LANGUAGE

As mentioned in Section II.O. above, a new definition, "electronic messages", was added to Section 14 of the 2002 Agreement to cover documents expressed in markup languages such as Financial products Mark-up Language or "FpML". Under Section 12 of the 2002 Agreement, one of the methods for the effective delivery of notices or other communications is via an "electronic messaging system". Notices or other communications delivered via an electronic messaging system are effective on the date received according to Section 12(a)(v) of the 2002 Agreement. The addition of this clause was specifically intended to encompass the possible delivery of notices and other communications through FpML. In addition, the language in the Preamble to the 2002 Agreement was expanded to accommodate the fact that Confirmations may be created either through the exchange of documents or other confirming evidence between the parties or through the exchange of anything else that is "effective for purposes of confirming or evidencing those Transactions". Thus, Confirmations via FpML were intended to be covered by the revised language in the Preamble and the new definition of "electronic messages".

FpML is an ISDA initiative to streamline the processes supporting trading activities in the financial derivatives domain through the creation, maintenance and promotion of an e-commerce language for describing these products and associated business interactions based on industry standards. One of FpML's primary objectives is the standardisation of electronic documents. Members of ISDA interested in this product should consult the FpML website, www.fpml.org.

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APPENDIX A

ISDA Agreement Structure (2003)

- 2001 ISDA Margin Supplement (incorporating 2001 ISDA Margin Provisions)
- 1995 Credit Support Annex *(Transfer-English law)*
- 1994 Credit Support Annex *(Security Interest - New York law)*

Confirmations (long form)

<u>2002 Master Agreement</u>

- Governs legal and credit relationship between the parties
- Includes representations, events of default/termination events, covenants
- Incorporates Confirmations
- *Schedule* makes elections and changes to standard provisions

- 1995 Credit Support Deed *(Security Interest-English law)*

- 1995 Credit Support Annex *(Japanese law)*

Definitions: for use in documenting transactions

- 2003 Credit Derivatives Definitions
- 2002 Equity Derivatives Definitions
- 2000 Definitions (plus Annex)
- 1999 Credit Derivatives Definitions (plus Supplements)
- 1998 Euro Definitions
- 1998 FX and Currency Option Definitions (plus revised Annex A)
- 1997 Bullion Definitions
- 1997 Government Bond Option Definitions
- 1993 Commodity Derivatives Definitions (as amended)

Bridges

- 2002 Energy Agreement Bridge
- 2001 Cross-Agreement Bridge
- 1996 FRABBA Bridge
- 1996 BBAIRS Bridge

Confirmations (short form)

- Incorporate Definitions
- Specify economic terms of each Transaction
- Include Transaction-specific modifications

APPENDIX B
MARCH 2003

ISDA®

International Swaps and Derivatives Association, Inc.

AMENDMENT[1]

dated as of ……………………..

to the

ISDA MASTER AGREEMENT

dated as of ……………………..

between

.... and ....

(the "Agreement")

The parties have previously entered into the Agreement and have now agreed to amend the Agreement by the terms of this Amendment (this "Amendment").

THE INTERNATIONAL SWAPS AND DERIVATIVES ASSOCIATION, INC. ("ISDA") HAS PUBLISHED THE 2002 MASTER AGREEMENT. THE PARTIES WISH TO MODIFY THE AGREEMENT TO REFLECT CERTAIN PROVISIONS OF THE 2002 MASTER AGREEMENT. THE SPECIFIC MODIFICATIONS THAT THE PARTIES WISH TO INCORPORATE IN THE AGREEMENT ARE SET FORTH IN THE ATTACHMENT TO THIS AMENDMENT (THE "ATTACHMENT"). THE PURPOSE OF THIS AMENDMENT IS TO AMEND THE AGREEMENT ON THE TERMS SET FORTH IN THE ATTACHMENT.

Accordingly, in consideration of the mutual agreements contained in this Amendment, the parties agree as follows:

1. Amendment of the Agreement

The Agreement is amended in accordance with the amendments set forth in the Attachment.

2. Representations

Each party represents to the other party in respect of the Agreement, as amended pursuant to this Amendment, that all representations made by it pursuant to the Agreement are true and accurate as of the date of this Amendment.

3. Miscellaneous

(a) ***Entire Agreement; Restatement***.

(i) This Amendment constitutes the entire agreement and understanding of the parties with respect to its subject matter and supersedes all oral communication and prior writings (except as otherwise provided herein) with respect thereto.

(ii) Except for any amendment to the Agreement made pursuant to this Amendment, all terms and conditions of the Agreement will continue in full force and effect in accordance with its provisions on the date of this Amendment. References to the Agreement will be to the Agreement, as amended by this Amendment.

(b) ***Amendments***. No amendment, modification or waiver in respect of the matters contemplated by this Amendment will be effective unless made in accordance with the terms of the Agreement.

(c) ***Counterparts***. This Amendment may be executed and delivered in counterparts (including by facsimile transmission), each of which will be deemed an original.

(d) ***Headings***. The headings used in this Amendment are for convenience of reference only and are not to affect the construction of or to be taken into consideration in interpreting this Amendment.

(e) ***Governing Law***. This Amendment will be governed by and construed in accordance with [English law][the laws of the State of New York (without reference to choice of law doctrine)].[1]

IN WITNESS WHEREOF the parties have executed this Amendment on the respective dates specified below with effect from the date specified first on the first page of this Amendment.

....	....
(Name of Party)	(Name of Party)
By:	By: ....
Name:	Name:
Title:	Title:
Date:	Date:

1 Delete as applicable.

ATTACHMENT
Amendments to Master Agreement

1. The terms of Section 6(d)(i) of the Agreement are amended in their entirety as follows:

"(d) ***Calculations; Payment Date.***

(i) ***Statement.*** On or as soon as reasonably practicable following the occurrence of an Early Termination Date, each party will make the calculations on its part, if any, contemplated by Section 6(e) and will provide to the other party a statement (l) showing, in reasonable detail, such calculations (including any quotations, market data or information from internal sources used in making such calculations), (2) specifying (except where there are two Affected Parties) any Early Termination Amount payable and (3) giving details of the relevant account to which any amount payable to it is to be paid. In the absence of written confirmation from the source of a quotation or market data obtained in determining a Close-out Amount, the records of the party obtaining such quotation or market data will be conclusive evidence of the existence and accuracy of such quotation or market data."

2. The terms of Section 6(e) of the Agreement are amended in their entirety as follows[1]:

"(e) ***Payments on Early Termination.*** If an Early Termination Date occurs, the amount, if any, payable in respect of that Early Termination Date (the "Early Termination Amount") will be determined pursuant to this Section 6(e) and will be subject to any Set-off.

(i) ***Events of Default.*** If the Early Termination Date results from an Event of Default, the Early Termination Amount will be an amount equal to (1) the sum of (A) the Termination Currency Equivalent of the Close-out Amount or Close-out Amounts (whether positive or negative) determined by the Non-defaulting Party for each Terminated Transaction or group of Terminated Transactions, as the case may be, and (B) the Termination Currency Equivalent of the Unpaid Amounts owing to the Non-defaulting Party less (2) the Termination Currency Equivalent of the Unpaid Amounts owing to the Defaulting Party. If the Early Termination Amount is a positive number, the Defaulting Party will pay it to the Non-defaulting Party; if it is a negative number, the Non-defaulting Party will pay the absolute value of the Early Termination Amount to the Defaulting Party.

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[1] Those parties who selected First Method as their payment method should note that this Amendment eliminates First Method and imposes Second Method as the sole payment method.

(ii) ***Termination Events.*** If the Early Termination Date results from a Termination Event:

(1) *One Affected Party*. If there is one Affected Party, the Early Termination Amount will be determined in accordance with Section 6(e)(i), except that references to the Defaulting Party and to the Non-defaulting Party will be deemed to be references to the Affected Party and to the Non-affected Party, respectively.

(2) *Two Affected Parties*. If there are two Affected Parties, each party will determine an amount equal to the Termination Currency Equivalent of the sum of the Close-out Amount or Close-out Amounts (whether positive or negative) for each Terminated Transaction or group of Terminated Transactions, as the case may be, and the Early Termination Amount will be an amount equal to (A) the sum of (I) one-half of the difference between the higher amount so determined (by party "X") and the lower amount so determined (by party "Y") and (II) the Termination Currency Equivalent of the Unpaid Amounts owing to X less (B) the Termination Currency Equivalent of the Unpaid Amounts owing to Y. If the Early Termination Amount is a positive number, Y will pay it to X; if it is a negative number, X will pay the absolute value of the Early Termination Amount to Y.

(iii) ***Adjustment for Bankruptcy.*** In circumstances where an Early Termination Date occurs because "Automatic Early Termination" applies in respect of a party, the Early Termination Amount will be subject to such adjustments as are appropriate and permitted by applicable law to reflect any payments or deliveries made by one party to the other under this Agreement (and retained by such other party) during the period from the relevant Early Termination Date to the date for payment determined under Section 6(d)(ii).

(iv) ***Pre-Estimate.*** The parties agree that an amount recoverable under this Section 6(e) is a reasonable pre-estimate of loss and not a penalty. Such amount is payable for the loss of bargain and the loss of protection against future risks and except as otherwise provided in this Agreement neither party will be entitled to recover any additional damages as a consequence of the termination of the Terminated Transactions."

3. The term "Termination Currency Equivalent" in Section 14 of the Agreement is hereby amended by replacing "Market Quotation or Loss (as the case may be)" with "Close-out Amount".

4. The following terms are added to Section 14 of the Agreement in the appropriate alphabetical position:

““Close-out Amount” means, with respect to each Terminated Transaction or each group of Terminated Transactions and a Determining Party, the amount of the losses or costs of the Determining Party that are or would be incurred under then prevailing circumstances (expressed as a positive number) or gains of the Determining Party that are or would be realised under then prevailing circumstances (expressed as a negative number) in replacing, or in providing for the Determining Party the economic equivalent of, (a) the material terms of that Terminated Transaction or group of Terminated Transactions, including the payments and deliveries by the parties under Section 2(a)(i) in respect of that Terminated Transaction or group of Terminated Transactions that would, but for the occurrence of the relevant Early Termination Date, have been required after that date (assuming satisfaction of the conditions precedent in Section 2(a)(iii)) and (b) the option rights of the parties in respect of that Terminated Transaction or group of Terminated Transactions.

Any Close-out Amount will be determined by the Determining Party (or its agent), which will act in good faith and use commercially reasonable procedures in order to produce a commercially reasonable result. The Determining Party may determine a Close-out Amount for any group of Terminated Transactions or any individual Terminated Transaction but, in the aggregate, for not less than all Terminated Transactions. Each Close-out Amount will be determined as of the Early Termination Date or, if that would not be commercially reasonable, as of the date or dates following the Early Termination Date as would be commercially reasonable.

Unpaid Amounts in respect of a Terminated Transaction or group of Terminated Transactions and legal fees and out-of-pocket expenses referred to in Section 11 are to be excluded in all determinations of Close-out Amounts.

In determining a Close-out Amount, the Determining Party may consider any relevant information, including, without limitation, one or more of the following types of information:

(i) quotations (either firm or indicative) for replacement transactions supplied by one or more third parties that may take into account the creditworthiness of the Determining Party at the time the quotation is provided and the terms of any relevant documentation, including credit support documentation, between the Determining Party and the third party providing the quotation;

(ii) information consisting of relevant market data in the relevant market supplied by one or more third parties including, without limitation, relevant rates, prices, yields, yield curves, volatilities, spreads, correlations or other relevant market data in the relevant market; or

(iii) information of the types described in clause (i) or (ii) above from internal sources (including any of the Determining Party’s Affiliates) if that information is of the same type used by the Determining Party in the regular course of its business for the valuation of similar transactions.

The Determining Party will consider, taking into account the standards and procedures described in this definition, quotations pursuant to clause (i) above or relevant market data pursuant to clause (ii) above unless the Determining Party reasonably believes in good faith that such quotations or relevant market data are not readily available or would produce a result that would not satisfy those standards. When considering information described in clause (i), (ii) or (iii) above, the Determining Party may include costs of funding, to the extent costs of funding are not and would not be a component of the other information being utilised. Third parties supplying quotations pursuant to clause (i) above or market data pursuant to clause (ii) above may include, without limitation, dealers in the relevant markets, end-users of the relevant product, information vendors, brokers and other sources of market information.

Without duplication of amounts calculated based on information described in clause (i), (ii) or (iii) above, or other relevant information, and when it is commercially reasonable to do so, the Determining Party may in addition consider in calculating a Close-out Amount any loss or cost incurred in connection with its terminating, liquidating or re-establishing any hedge related to a Terminated Transaction or group of Terminated Transactions (or any gain resulting from any of them).

Commercially reasonable procedures used in determining a Close-out Amount may include the following:

(1) application to relevant market data from third parties pursuant to clause (ii) above or information from internal sources pursuant to clause (iii) above of pricing or other valuation models that are, at the time of the determination of the Close-out Amount, used by the Determining Party in the regular course of its business in pricing or valuing transactions between the Determining Party and unrelated third parties that are similar to the Terminated Transaction or group of Terminated Transactions; and

(2) application of different valuation methods to Terminated Transactions or groups of Terminated Transactions depending on the type, complexity, size or number of the Terminated Transactions or group of Terminated Transactions."

""Determining Party" means the party determining a Close-out Amount."

""Early Termination Amount" has the meaning specified in Section 6(e)."

""Non-affected Party" means, so long as there is only one Affected Party, the other party."

5. The following terms in Section 14 of the Agreement are deleted in their entirety: "*Loss*", "*Market Quotation*", "*Reference Market-makers*" and "*Settlement Amount*"[2].

6. Part 1(f) of the Schedule is deleted in its entirety and the subsequent paragraphs are renumbered sequentially. In case the parties have used another designation for the paragraph of the Schedule specifying the selection of Market Quotation or Loss and First Method or Second Method, the reference herein to Part 1(f) of the Schedule shall be deemed a reference to that paragraph.

[2] If any of these terms are used in any Annex or Schedule to the Agreement or a Confirmation, the 1994 ISDA Equity Option Definitions, the 1996 ISDA Equity Derivatives Definitions, the 2002 ISDA Equity Derivatives Definitions, the 1997 ISDA Government Bond Option Definitions, the 1998 FX and Currency Option Definitions, the 1999 ISDA Credit Derivatives Definitions or any other ISDA document incorporated by reference or executed by the parties hereto, the terms will have the respective meanings ascribed to them in the standard form 1992 ISDA Master Agreement (Multicurrency-Cross Border).

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APPENDIX C
MAY 2003
(ISDA Agreements Subject to New York Law)

ISDA®

International Swaps and Derivatives Association, Inc.

AMENDMENT[1]

dated as of ……………………..

to the

CREDIT SUPPORT ANNEX

dated as of ……………………..

between

.... and ....

(the "Agreement")

The parties have previously entered into a Credit Support Annex (the "Annex"), which forms part of, and is subject to, the ISDA Master Agreement referred to above and is part of its Schedule. The parties have now agreed to amend the Annex by the terms of this Amendment (this "Amendment").

THE INTERNATIONAL SWAPS AND DERIVATIVES ASSOCIATION, INC. ("ISDA") HAS PUBLISHED THE 2002 MASTER AGREEMENT. THE PARTIES HAVE PREVIOUSLY ENTERED INTO AN AMENDMENT AGREEMENT TO INCORPORATE CERTAIN PROVISIONS OF THE 2002 MASTER AGREEMENT AND WISH TO MODIFY THE ANNEX TO REFLECT THE PROVISIONS

---

1 **PARTIES SHOULD CONSULT WITH THEIR LEGAL ADVISERS AND ANY OTHER ADVISERS THEY DEEM APPROPRIATE PRIOR TO USING THIS FORM OF AMENDMENT. BECAUSE OF THE RANGE OF MODIFICATIONS THAT PARTIES MAY HAVE MADE TO THE ANNEX, MODIFICATIONS TO THIS FORM OF AMENDMENT MAY BE NECESSARY OR AN ENTIRELY DIFFERENT FORM OF AMENDMENT MAY BE APPROPRIATE IN REGARD TO A PARTICULAR AGREEMENT.**

INCORPORATED THEREIN[2]. THE SPECIFIC MODIFICATIONS THAT THE PARTIES WISH TO INCORPORATE IN THE ANNEX ARE SET FORTH IN THE ATTACHMENT TO THIS AMENDMENT (THE "ATTACHMENT"). THE PURPOSE OF THIS AMENDMENT IS TO AMEND THE ANNEX ON THE TERMS SET FORTH IN THE ATTACHMENT.

Accordingly, in consideration of the mutual agreements contained in this Amendment, the parties agree as follows:

1. Amendment of the Agreement

The Annex is amended in accordance with the amendments set forth in the Attachment.

2. Representations

Each party represents to the other party in respect of the ISDA Master Agreement, that all representations made by it pursuant to the ISDA Master Agreement are true and accurate as of the date of this Amendment.

3. Miscellaneous

(a) ***Entire Agreement; Restatement***.

(i) This Amendment constitutes the entire agreement and understanding of the parties with respect to its subject matter and supersedes all oral communication and prior writings (except as otherwise provided herein) with respect thereto.

(ii) Except for any amendment to the Annex made pursuant to this Amendment, all terms and conditions of the Annex will continue in full force and effect in accordance with its provisions on the date of this Amendment. References to the Annex will be to the Annex, as amended by this Amendment.

(b) ***Amendments***. No amendment, modification or waiver in respect of the matters contemplated by this Amendment will be effective unless made in accordance with the terms of the Annex.

(c) ***Counterparts***. This Amendment may be executed and delivered in counterparts (including by facsimile transmission), each of which will be deemed an original.

(d) ***Headings***. The headings used in this Amendment are for convenience of reference only and are not to affect the construction of or to be taken into consideration in interpreting this Amendment.

(e) ***Governing Law***. This Amendment will be governed by and construed in accordance with the laws of the State of New York (without reference to choice of law doctrine).

IN WITNESS WHEREOF the parties have executed this Amendment on the respective dates specified below with effect from the date specified first on the first page of this Amendment.

....	....
(Name of Party)	(Name of Party)
By:	By: ....
Name:	Name:
Title:	Title:
Date:	Date:

[2] This Amendment is drafted on the premise that parties have a 1992 ISDA Master Agreement in place, and have amended it to add Close-out Amount. If parties have entered into a 2002 ISDA Master Agreement, this Amendment should be reviewed and changed accordingly.

ATTACHMENT
Amendments to Annex

1. References throughout this Annex to "Swap Transactions" are deleted.

2. The terms of Paragraph 5(i)(B) are amended in their entirety as follows:

"(B) calculating the Exposure for the Transactions in dispute by seeking four actual quotations at mid-market from third parties for purposes of calculating the relevant Close-out Amount, and taking the arithmetic average of those obtained; *provided that* if four quotations are not available for a particular Transaction, then fewer than four quotations may be used for that Transaction, and if no quotations are available for a particular Transaction, then the Valuation Agent's original calculations will be used for the Transaction; and".

3. The definition of "Exposure" in Paragraph 12 of the Annex is hereby amended to read in its entirety as follows:

"***'Exposure'*** means for any Valuation Date or other date for which Exposure is calculated and subject to Paragraph 5 in the case of a dispute, the amount, if any, that would be payable to a party that is the Secured Party by the other party (expressed as a positive number) or by a party that is the Secured Party to the other party (expressed as a negative number) pursuant to Section 6(e)(ii)(1) of this Agreement if all Transactions were being terminated as of the relevant Valuation Time, on the basis that (i) that party is not the Affected Party and (ii) United States Dollars is the Termination Currency; *provided that* the Close-out Amount will be determined by the Valuation Agent on behalf of that party using its estimates at mid-market of the amounts that would be paid for transactions providing the economic equivalent of (x) the material terms of the Transactions, including the payments and deliveries by the parties under Section 2(a)(i) in respect of the Transactions that would, but for the occurrence of the relevant Early Termination Date, have been required after that date (assuming satisfaction of the conditions precedent in Section 2(a)(iii)); and (y) the option rights of the parties in respect of the Transactions." [1]

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[1] If parties are using this Amendment with a 2002 Master Agreement rather than a 1992 Master Agreement (amended to include the Close-out Amount definition), they should include a definition of Set-off. The 2002 Master Agreement, unlike the 1992 Master Agreement, does not have a defined term "Set-off". In addition, if using a 2002 Master Agreement parties may wish to amend Paragraph 13(d) to add Force Majeure Event as a Specified Condition that may be specified in relation to Party A and/or in relation to Party B.

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MAY 2003
(ISDA Agreements Subject to English Law)

ISDA®

International Swaps and Derivatives Association, Inc.

AMENDMENT[1]

dated as of ……………………..

to the

CREDIT SUPPORT ANNEX

to the Schedule to the

ISDA MASTER AGREEMENT

dated as of ……………………..

between

.... and ....

(the "Agreement")

The parties have previously entered into a Credit Support Annex (the "Annex"), which forms part of, and is subject to, the ISDA Master Agreement referred to above and is part of its Schedule. The parties have now agreed to amend the Annex by the terms of this Amendment (this "Amendment").

THE INTERNATIONAL SWAPS AND DERIVATIVES ASSOCIATION, INC. ("ISDA") HAS PUBLISHED THE 2002 MASTER AGREEMENT. THE PARTIES HAVE PREVIOUSLY ENTERED INTO AN AMENDMENT AGREEMENT TO INCORPORATE CERTAIN PROVISIONS OF THE 2002 MASTER AGREEMENT AND WISH TO MODIFY THE ANNEX TO REFLECT THE PROVISIONS

1 **PARTIES SHOULD CONSULT WITH THEIR LEGAL ADVISERS AND ANY OTHER ADVISERS THEY DEEM APPROPRIATE PRIOR TO USING THIS FORM OF AMENDMENT. BECAUSE OF THE RANGE OF MODIFICATIONS THAT PARTIES MAY HAVE MADE TO THE ANNEX, MODIFICATIONS TO THIS FORM OF AMENDMENT MAY BE NECESSARY OR AN ENTIRELY DIFFERENT FORM OF AMENDMENT MAY BE APPROPRIATE IN REGARD TO A PARTICULAR AGREEMENT.**

INCORPORATED THEREIN[2]. THE SPECIFIC MODIFICATIONS THAT THE PARTIES WISH TO INCORPORATE IN THE ANNEX ARE SET FORTH IN THE ATTACHMENT TO THIS AMENDMENT (THE "ATTACHMENT"). THE PURPOSE OF THIS AMENDMENT IS TO AMEND THE ANNEX ON THE TERMS SET FORTH IN THE ATTACHMENT.

Accordingly, in consideration of the mutual agreements contained in this Amendment, the parties agree as follows:

1. Amendment of the Agreement

The Annex is amended in accordance with the amendments set forth in the Attachment.

2. Representations

Each party represents to the other party in respect of the ISDA Master Agreement, that all representations made by it pursuant to the ISDA Master Agreement are true and accurate as of the date of this Amendment.

3. Miscellaneous

(a) ***Entire Agreement; Restatement***.

(i) This Amendment constitutes the entire agreement and understanding of the parties with respect to its subject matter and supersedes all oral communication and prior writings (except as otherwise provided herein) with respect thereto.

(ii) Except for any amendment to the Annex made pursuant to this Amendment, all terms and conditions of the Annex will continue in full force and effect in accordance with its provisions on the date of this Amendment. References to the Annex will be to the Annex, as amended by this Amendment.

(b) ***Amendments***. No amendment, modification or waiver in respect of the matters contemplated by this Amendment will be effective unless made in accordance with the terms of the Annex.

(c) ***Counterparts***. This Amendment may be executed and delivered in counterparts (including by facsimile transmission), each of which will be deemed an original.

(d) ***Headings***. The headings used in this Amendment are for convenience of reference only and are not to affect the construction of or to be taken into consideration in interpreting this Amendment.

(e) ***Governing Law***. This Amendment will be governed by and construed in accordance with English law.

IN WITNESS WHEREOF the parties have executed this Amendment on the respective dates specified below with effect from the date specified first on the first page of this Amendment.

....	....
(Name of Party)	(Name of Party)
By:	By: ....
Name:	Name:
Title:	Title:
Date:	Date:

[2] If parties have entered into a 2002 Master Agreement rather than the Amendment Agreement, they should make appropriate changes to this section.

ATTACHMENT
Amendments to Annex

1. The terms of Paragraph 4(a)(4)(i)(B) are amended in their entirety as follows:

   "(B) calculating that part of the Exposure attributable to the Transactions in dispute by seeking four actual quotations at mid-market from third parties for purposes of calculating the relevant Close-out Amount, and taking the arithmetic average of those obtained; *provided that* if four quotations are not available for a particular Transaction, then fewer than four quotations may be used for that Transaction, and if no quotations are available for a particular Transaction, then the Valuation Agent's original calculations will be used for the Transaction; and"

2. The terms of Paragraph 6 are amended to read in their entirety as follows:

   "If an Early Termination Date is designated or deemed to occur as a result of an Event of Default in relation to a party, an amount equal to the Value of the Credit Support Balance, determined as though the Early Termination Date were a Valuation Date, will be deemed to be an Unpaid Amount due to the Transferor (which may or may not be the Defaulting Party) for purposes of Section 6(e). For the avoidance of doubt, the Close-out Amount determined under Section 6(e) in relation to the Transaction constituted by this Annex will be deemed to be zero. For purposes of this Paragraph 6, the Value of the Credit Support Balance shall be determined on the basis that the Valuation Percentage applicable to each item of Eligible Credit Support is 100%."

3. The term "Exposure" in Paragraph 10 of the Annex is hereby amended to read in its entirety as follows:

   "'Exposure' means, with respect to a party on a Valuation Date and subject to Paragraph 4 in the case of a dispute, the amount, if any, that would be payable to that party by the other party (expressed as a positive number) or by that party to the other party (expressed as a negative number) pursuant to Section 6(e)(ii)(1) of this Agreement if all Transactions (other than the Transaction constituted by this Annex) were being terminated as of the relevant Valuation Time, on the basis that (i) that party is not the Affected Party and (ii) the Base Currency is the Termination Currency; *provided that* the Close-out Amount will be determined by the Valuation Agent on behalf of that party using its estimates at mid-market of the amounts that would be paid for transactions providing the economic equivalent of (x) the material terms of the Transactions, including the payments and deliveries by the parties under Section 2(a)(i) in respect of the Transactions that would, but for the occurrence of the relevant Early Termination Date, have been required after that date (assuming satisfaction of the conditions precedent in Section 2(a)(iii)); and (y) the option rights of the parties in respect of the Transactions."

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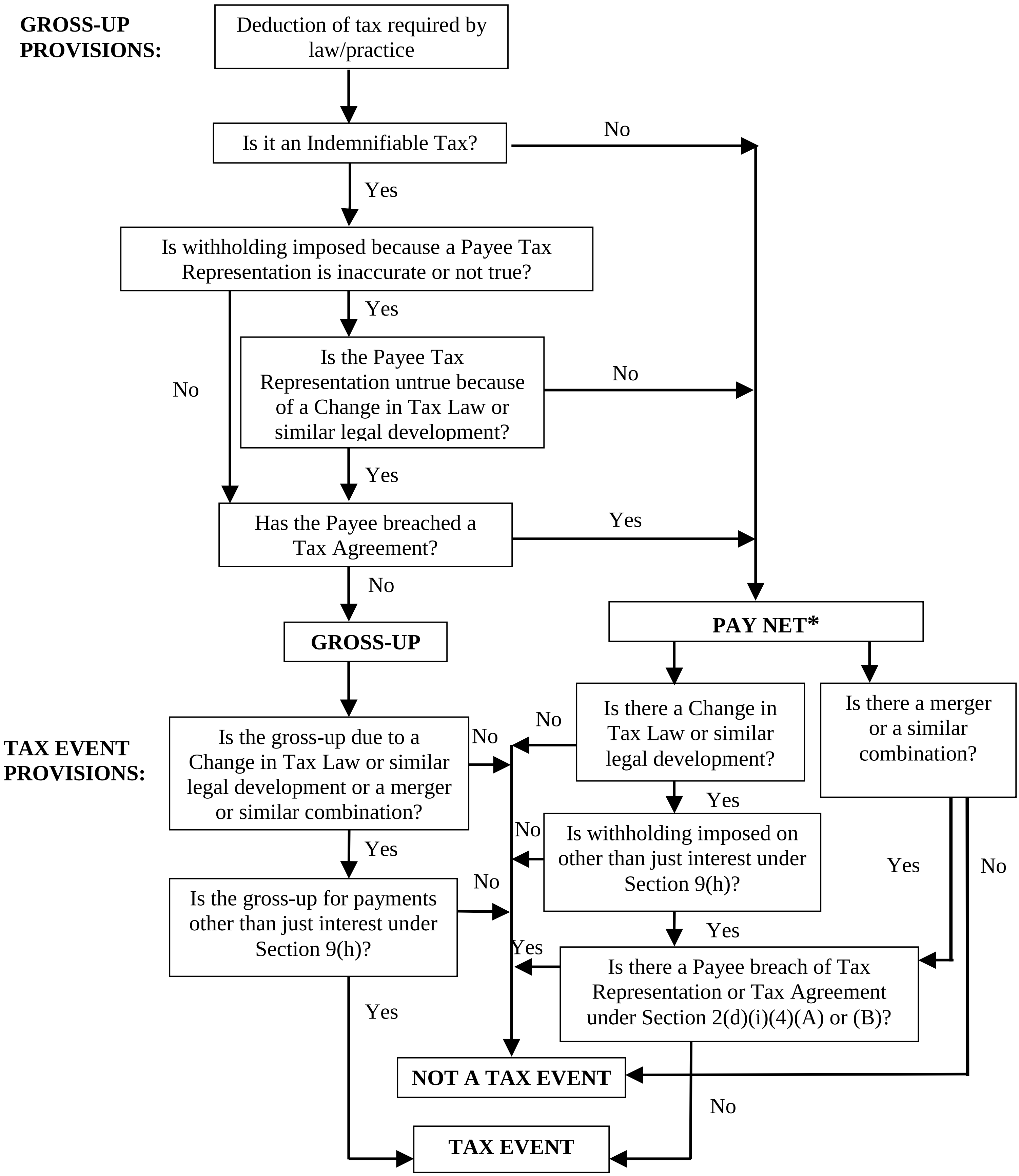
APPENDIX D

ISDA 2002 MASTER AGREEMENT (MULTICURRENCY–CROSS BORDER) GROSS-UP/TAX EVENT PROVISIONS



* A reader must follow both arrows leading out of the "Pay Net" box. A Tax Event will exist if either one of the two arrows leads to the "Tax Event" box.

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