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PRACTICE NOTES TO THE MASTER CONFIRMATION AGREEMENT FOR NON-DELIVERABLE FORWARD FX TRANSACTIONS

Introduction

The Master Confirmation Agreement for Non-Deliverable Forward FX Transactions (“Master Confirmation”) is being published by the Foreign Exchange Committee with the support of the Financial Markets Lawyers Group (FMLG) and the NDF Master’s cosponsors, EMTA, Inc. (EMTA) and the Foreign Exchange Joint Standing Committee (FX JSC). The FXC published the Master Agreement Addendum for Non-Deliverable Forwards in April, 2003 (the “2003 Addendum”) to facilitate the electronic confirmation of NDF Transactions under the 1998 FX and Currency Option Definitions published by ISDA, EMTA, and the FXC (the “1998 Definitions”) under the terms of currency-specific NDF Transaction confirmation templates published by EMTA. After publication of the 2003 Addendum, EMTA issued several new currency-specific NDF Transaction confirmation templates. Furthermore, there has been an increasing global demand for a flexible form of master confirmation that permits parties to confirm NDF Transactions through the facilities of a variety of electronic messaging, trading and settlement systems. These developments have prompted the cosponsors to revisit the 2003 Addendum and produce a substantially different Master Confirmation that meets these and other important objectives.

To highlight, the Master Confirmation is a bilateral agreement for the use of parties that enter NDF Transactions. It takes the form of a confirmation so that it can be executed by operations personnel with authority to execute confirmations for the firm. It accommodates NDF Transactions with a U.S. Dollar Settlement Currency, as well as cross-currency NDF Transactions with a non-U.S. dollar Settlement Currency. The Master Confirmation incorporates by reference the terms of effective EMTA currency-specific NDF confirmation templates, which are published for convenient reference at www.emta.org. Accordingly, new or updated EMTA NDF confirmation template terms will automatically apply to new NDF Transactions in the relevant Currency Pair after the effective date of the terms. The Addendum to the Master Confirmation allows parties to elect counterparty-specific terms and agree to customized terms for NDF Transactions in Currency Pairs that have not yet been addressed by an EMTA NDF confirmation template (such as cross-currency NDF Transactions). If EMTA publishes new NDF confirmation template terms for a Currency Pair, these terms, once they become effective, will replace any customized terms in the Addendum and will apply to new NDF Transactions in the relevant Currency Pair entered after their effective date.

The Master Confirmation sets out Economic Terms of NDF Transactions to be included in a Transaction Confirmation, which may be executed by fax, telex, email, or electronic messages exchanged between the parties or matched on an electronic system. Because a major objective of the Master Confirmation is to facilitate use of a wide variety of methods of confirming NDF Transactions, the cosponsors anticipate that electronic systems may be interested in implementing it on a multilateral basis for the

benefit of their members. The cosponsors will work with any interested electronic system in developing an appropriate multilateral form of the Master Confirmation for purposes of its implementation in the electronic system. However, it should be noted that the cosponsors do not make any representations regarding whether firms will or should rely on any particular electronic system to confirm their NDF Transactions even if it does implement the Master Confirmation. Each firm should review with its counsel whether it would be comfortable with relying on a particular electronic system to confirm its NDF Transactions, in light of applicable law, rules, and procedures specific to the electronic system.

The practice notes below provide further explanation of the provisions of the Master Confirmation. All capitalized words in these practice notes have the meanings given to them in the Master Confirmation or the 1998 Definitions, unless otherwise specified herein.

Paragraph 1: Application

Paragraph 1 defines the scope of the Master Confirmation. Presumptively, parties entering the Master Confirmation intend for it to govern all NDF Transactions between them entered after its effective date. Accordingly, the Master Confirmation applies to NDF Transactions entered between the parties after its effective date, unless the parties specify in the Addendum or a confirmation that the Master Confirmation does not apply. For example, if the parties enter a customized NDF Transaction with a long-form confirmation that should stand on its own terms, the confirmation should specify that the Master Confirmation does not apply to it. Similarly, parties can exclude from the scope of the Master Confirmation any class of NDF Transactions (such as NDF Transactions involving a particular Currency Pair) by specifying this in Part 6 of the Addendum. It also should be noted that, for the Master Confirmation to apply, Settlement of the NDF Transaction must be Non-Deliverable (see Paragraph 5 below).

Paragraph 2: FX Definitions

The Master Confirmation incorporates the terms of the 1998 Definitions. Any amendments to the 1998 Definitions, or successor definitions that replace the 1998 Definitions, are incorporated into the Master Confirmation only on a prospective basis. That is, such amendments or successor definitions will apply to new NDF Transactions entered on or after their effective date but not to outstanding NDF Transactions entered prior to their effective date. The parties, however, may agree to change this general rule (e.g., in a separate bilateral agreement or an agreement that applies on a multilateral basis).

Paragraph 3: Transaction Confirmation

The parties must execute a Transaction Confirmation for each NDF Transaction that sets out its specific Economic Terms. Paragraph 3 makes clear that the Transaction Confirmation may be executed by fax, telex, email, or through the facilities of electronic

messaging, trading or settlement systems. As noted in the Introduction above, the cosponsors do not make any representations regarding whether firms will or should rely on any particular electronic system to confirm their NDF Transactions even if it does implement the Master Confirmation. Each firm should review with its counsel whether it would be comfortable with relying on a particular electronic system to confirm its NDF Transactions, in light of applicable law, rules, and procedures specific to the electronic system.

Paragraph 4: Relevant EMTA Template

Paragraph 4 incorporates into each NDF Transaction governed by the Master Confirmation the then effective template terms for the confirmation of a non-deliverable forward foreign exchange transaction in the relevant Currency Pair published by EMTA or a recognized successor, unless the parties otherwise agree in the Addendum or a Transaction Confirmation. These terms include the Settlement Rate Option for the Currency Pair, Disruption Events, Disruption Fallbacks, definitions and provisions related to “Unscheduled Holiday” and “Valuation Postponement,” and Relevant Cities for Business Days for Valuation Date and Settlement Date. The proviso (“ . . . unless the parties otherwise agree) allows parties to alter this general incorporation by reference into their NDF Transaction of all terms of a Relevant EMTA Template. Accordingly, if the parties agree to Paragraph 4, they do not need to specify in the Transaction Confirmation or the Addendum any of the terms already incorporated into their NDF Transactions by reference to a Relevant EMTA Template. However, the parties are free to agree to not apply to all or any class of NDF Transactions any terms of Relevant EMTA Templates. In such case, Part 7 of the Addendum or the Transaction Confirmation must specify which terms do not apply.

For convenient reference, EMTA has made its published NDF confirmation templates terms available on its website at www.emta.org. EMTA may publish new NDF confirmation template terms in advance of their specified effective date in order to give the market notice of the new terms and time to make necessary adjustments. Paragraph 4 provides that the new NDF confirmation template terms will not apply to a NDF Transaction in the relevant Currency Pair until the terms become effective. Only when the terms become effective will the NDF confirmation template fall under the definition of a Relevant EMTA Template in the Master Confirmation. In addition, a Relevant EMTA Template’s terms will apply to NDF Transactions entered on or after their effective date, and will not apply to or amend the terms of previously executed NDF Transactions, unless otherwise agreed by the parties. For example, the parties may agree to a protocol that retroactively applies new EMTA NDF confirmation template terms to outstanding NDF Transactions, which would supersede this limitation in Paragraph 4.

Paragraph 5: Economic Terms

Paragraph 5 sets out the Economic Terms of each NDF Transaction that must be specified in the Transaction Confirmation. These Economic Terms are: Trade Date, Reference Currency, Reference Currency Notional Amount, Notional Amount or

Forward Rate (one or both of these terms may be specified), Reference Currency Buyer, Reference Currency Seller, Settlement Currency, Valuation Date, Settlement Date, and Settlement. The Economic Terms are not included in a Relevant EMTA Template, except a Relevant EMTA Template will contain certain terms relating to the impact of an Unscheduled Holiday or Price Source Disruption. These terms will automatically apply to a NDF Transaction in the relevant Currency Pair, but the Transaction Confirmation still needs to specify the actual dates that will be the Valuation Date and the Settlement Date.

Electronic messaging, trading and settlement systems have different message formats, and it is possible that not all of them will permit for specification all of the Economic Terms in a Transaction Confirmation listed in Paragraph 5. The cosponsors believe, however, that parties should be free to agree to use the facilities of various electronic systems to confirm their NDF Transactions under the Master Confirmation. Accordingly, Paragraph 5 allows for the specification of different terms that those that are listed in Paragraph 5 the Transaction Confirmation. This alternative is intended to facilitate use of different formats of electronic messaging, and not to provide a broader exception to the need to specify in the Transaction Confirmation the listed Economic Terms, which are material to a NDF Transaction. For purposes of providing the market guidance on how to map the Economic Terms to terms used in [SWIFT] [electronic messaging, trading or settlement systems], the cosponsors are publishing an Economic Terms Matrix that will be updated from time to time.

Paragraph 5 further specifies that the Transaction Confirmation must provide, or the parties must otherwise agree in the Transaction Confirmation, that Settlement is Non-Deliverable for a NDF Transaction to be governed by the Master Confirmation. This requirement is intended to provide certainty on the universe of NDF Transactions between the parties that will be covered by the Master Confirmation. If an electronic message format does not include a field for specifying that Settlement is Non-Deliverable, it must otherwise be clear from the terms of the Transaction Confirmation that the NDF Transaction is Non-Deliverable. For example, current practice is to include a fixing date in field 77d of the SWIFT MT 300 for a non-deliverable forward fx transaction. Other electronic systems may require use of a particular message type for non-deliverable forward fx transactions.

Paragraph 6: Priority

The rules of priority specify that the terms of the Confirmation of a NDF Transaction supersede those of the FX Definitions (including any amendments or successors to the 1998 Definitions, if they apply to a NDF Transaction in accordance with Paragraph 2). In addition, the terms of the Master Agreement supersede those of the FX Definitions, and the terms of the Addendum or Transaction Confirmation supersede those of a Relevant EMTA Template, subject to an exception. The parties may specify in the Addendum general terms for a NDF Transaction in a Currency Pair that is not currently the subject of an EMTA NDF confirmation template (for example, a cross-currency NDF). If, after the effective date of the Addendum, EMTA publishes NDF

confirmation template terms for the Currency Pair, those terms will apply to NDF Transactions entered after their effective date, and will supersede the customized terms set out in the Addendum. In order to modify this approach generally or with respect to any particular NDF Transaction, the parties must bilaterally agree to do so. Finally, if the parties have executed a form of the Master Confirmation on a multilateral basis, in the event of any inconsistency between the bilateral Master Confirmation and the multilateral form, the bilateral Master Confirmation will prevail. This is in keeping with the general principle that parties may bilaterally agree to vary terms that otherwise would apply to them by virtue of signing a protocol or becoming subject to rules, procedures, or guidelines of an electronic messaging, trading, or settlement system.

Paragraph 7: Quoting Dealer Disclaimer

The quoting dealer disclaimer is commonly used and included in the EMTA NDF confirmation templates to disclose the fact that dealers may be asked to participate in industry-wide surveys that will establish a settlement rate for a Currency Pair that is the subject of a NDF Transaction between the parties.

Paragraph 8: Representations

The representations in paragraph 8 are standard legal enforceability and non-reliance representations also found in industry master agreements.

Paragraph 9: Governing Law/Jurisdiction

Paragraph 9 makes clear that the election of governing law and the provisions on submission of jurisdiction in the Master Agreement – either executed between the parties or in the form elected in the Addendum – apply to the Master Confirmation.

Addendum

The Addendum is part of the bilateral version of the Master Confirmation and provides a means for specifying counterparty-specific terms. Part 1 (Master Agreement) requires the parties to specify the Master Agreement they have entered or, if they have not entered a Master Agreement, to specify the form of Master Agreement that will apply for purposes of the Master Confirmation (together with an election of governing law and the Termination Currency/Base Currency). Part 2 (Calculation Agent) requires the parties to elect whether one or both parties will act as Calculation Agent. Parts 3 (Account Details), 4 (Contact Information), Part 5 (Representations), and Part 6 (Other Terms) allow for the specification of other relevant provisions.

In particular, Part 6 enables the parties to (i) change the terms of Relevant EMTA Templates that otherwise would apply to their NDF Transactions under the operation of Paragraph 4; (ii) vary any other terms of the Master Confirmation; (iii) provide customized terms that will apply to NDF Transactions in Currency Pairs for which a

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Relevant EMTA Template does not exist; and (iv) carve out any class of NDF Transactions from the scope of the Master Confirmation (see paragraph 1 above).

Currently, there is not a standard market practice for documenting cross-currency NDF Transactions. In the course of developing the Master Confirmation, it was determined not include any terms for cross-currency NDF Transactions in the Master Confirmation, and to commence a separate effort to develop industry documentation. Currently, parties seeking to specify terms to standardize, on a bilateral basis, their cross-currency NDF Transactions may wish to include the following provision in Part 6:

This Master Confirmation shall apply to a Cross-Currency NDF Transaction, which means a NDF Transaction for which the Transaction Confirmation specifies (i) that Settlement is Non-Deliverable, and (ii) a Settlement Currency that is not the subject of a Relevant EMTA Template on the Trade Date of the Cross-Currency NDF Transaction. In such a case, the Relevant EMTA Template shall be the confirmation template for the Reference Currency specified in the Transaction Confirmation (and that is effective on the Trade Date of the NDF Transaction), and all of the terms of such Relevant EMTA Template shall apply to such NDF Transaction, except as follows: (i) the Settlement Rate Option specified in the Relevant EMTA Template shall be deemed to be the Reference Currency Spot Rate for the Cross-Currency NDF Transaction, and (ii) the Settlement Rate Option for the Cross-Currency NDF Transaction shall mean the Cross-Currency Spot Rate, which shall be determined by reference to the Reference Currency Spot Rate and the Settlement Currency Spot Rate on the Valuation Date. The Transaction Confirmation shall specify the following Economic Terms for a Cross-Currency NDF Transaction, in addition to those listed in paragraph 5 of the Master Confirmation:

Cross-Currency Spot Rate
Settlement Currency Spot Rate