

ISDA Close-out Amount Protocol

Frequently Asked Questions

ISDA has prepared this brief summary of frequently asked questions to assist in your consideration of the Close-out Amount Protocol (the “Protocol”). **THIS FREQUENTLY ASKED QUESTIONS DOES NOT PURPORT TO BE AND SHOULD NOT BE CONSIDERED A GUIDE TO OR AN EXPLANATION OF ALL RELEVANT ISSUES OR CONSIDERATIONS IN CONNECTION WITH THE PROTOCOL. PARTIES SHOULD CONSULT WITH THEIR LEGAL ADVISERS AND ANY OTHER ADVISER THEY DEEM APPROPRIATE PRIOR TO USING OR ADHERING TO THE PROTOCOL. ISDA ASSUMES NO RESPONSIBILITY FOR ANY USE TO WHICH ANY OF ITS DOCUMENTATION OR OTHER DOCUMENTATION MAY BE PUT.**

This Frequently Asked Questions webpage is divided into three sections: (i) questions relating to the submission of Adherence Letters; (ii) questions relating to adherence by investment managers; and (iii) questions relating to the substance of the Protocol itself.

ADHERENCE LETTER SUBMISSION

Due diligence requirement

I see that I am required to give various representations including in paragraph 3(f) that my adherence will not adversely affect any obligations owed under any Credit Support Document in respect of my obligations. Will this require a lot of due diligence?

That is correct. Adherents cannot avoid the obligation to due diligence their existing agreements to ensure that the amendments made by the Protocol to Covered Master Agreements are appropriate in all cases applicable to it and that there will be no unintended consequences of adherence. As stated above, we would recommend that parties consult with their advisers prior to adherence.

With respect to the representation at paragraph 3(f) in particular, however, the due diligence required to give this representation will also assist the party giving the representation to ensure that its adherence does not trigger an Event of Default under Section 5(a)(iii) of the ISDA Master Agreement (Credit Support Default). Please note, however, that Agreements that include third party credit support documentation (whether or not defined as a Credit Support Document under the Master Agreement) given on terms that expressly require the consent of the third party to any amendment to the Master Agreement are excluded from the scope of the Protocol. We would suggest that parties wishing to amend any such agreement should enter into a tri-party amendment agreement (including the third party credit support provider).

If I am relying on ISDA’s netting opinions, will the amendments that the Protocol makes mean that I can no longer rely on them?

ISDA will ask each counsel that provides a netting and/or collateral opinion to confirm that the amendments made by the Protocol do not affect the conclusions reached in their opinions. Counsel will be entitled to assume that the amendments work as a matter of the governing law of the Covered Master Agreement. On the basis that ISDA’s opinions assume that the governing law of the Master Agreement will be English or New York, we will also ask counsel in England and Wales and in New York to confirm that the amendments are effective as a matter of their respective laws.

To the extent that you have Covered Master Agreements governed by a law other than that laws of England and Wales or New York, you should consult with counsel in the relevant jurisdiction. Similarly, to the extent that you rely on opinions relating to the ISDA Master

Agreement other than the netting opinions commissioned by ISDA, you should obtain confirmation from opining counsel that the amendments are not material to and do not affect the conclusions reached in their opinion.

Correct Execution Version

We understood that the Protocol was to be published on Monday 23 February and did find a copy of the Protocol on the ISDA website on that day but the page subsequently disappeared until Friday 27 February, why was this?

ISDA had prepared to publish the Protocol on Monday 23 February but a question was raised with ISDA concerning the scope of the Loss Election that ISDA felt required clarification in the proposed publication version. As a result, the Protocol was taken down from our website and the version now available for adherence has been slightly amended.

In particular, paragraph 1(c) of the Protocol has been amended to clarify that the election to preserve Loss would apply whether the provision electing Loss is the main payment measure provision (for example selected in Part 1(f) of the Schedule) or equally if it is a provision applying Loss as the payment measure applicable to less than all trades on a termination of all trades. We have also clarified that where the Loss Preserved Election applies to a Covered Master Agreement that contains a provision that applies Loss as the payment measure to less than all trades, whilst that Loss provision will not be amended by the Protocol, any other provision which applies Market Quotation as the payment measure to other trades under that agreement will be amended by the Protocol. Please note that the Loss Election applies to provisions that apply on the termination of Transactions pursuant to a Section 5(a) Event of Default or Section 5(b)(i) - (iv) Termination Event and to provisions that apply on the termination of all Transactions under the Covered Master Agreement (but not to provisions that apply on the termination of only specified Transactions even where those specified Transactions are in fact the only Transactions under the Master Agreement. For the impact of the Protocol on such provisions, please see the definition of Express Provisions discussed below).

In addition, slight modifications have been made to paragraph 8 of the Attachment to feed any amount resulting from the application of a preserved Loss provision into the Section 6(e) close out (if Section 6(e) is amended by the Protocol).

Paragraph 9 of the Attachment has also been amended to clarify that Part 1(f) of the Schedule (or any corresponding provision) will only be amended if the Covered Master Agreement contains provisions that are amended by the Protocol (despite the Loss Preserved Election).

We have also made a clarification in paragraph 6 of the Attachment in relation to the application of the Protocol where the Covered Master Agreement contains Express Provisions.

Click [here](#) for a blackline of the Execution Version against the 23/2 version

Adherence Letter Submission Process

Can I change the text of the Adherence Letter?

No. The Adherence Letter must be in the same format as the form letter published in the Protocol.

Does it cost any money to adhere to the Close-out Amount Protocol?

No.

When do I need to send in my Adherence Letter?

The Protocol is open on Friday, 27 February 2009. There is currently no cut off date for adherence. ISDA may, by giving 30 days' notice on its website designate a cut off date, but it currently has no plans to do so.

How do I send in my Adherence Letter?

All Adherence Letters must be delivered by email to COAprotocol@isda.org. In the email, you must submit both your conformed and executed copies of the Adherence Letter. You must use the form of letter for the Close-out Amount Protocol available on the ISDA website. Click here for form of adherence letter.

The Adherence Letter(s) should be on your institution's letterhead. Nothing in the form Adherence Letter available on ISDA's website may be changed with the exception of completing the details of your institutional name, date and signature block and checking the relevant box for each of the Loss Election and Annex 1 – 9 Election.

Please do not send your original Adherence Letter(s) by mail to ISDA.

What is a conformed copy?

A conformed copy of the Adherence Letter means that the name of the authorized signatory (for example, Patricia Smith) is typed rather than having Patricia Smith's actual signature on the letter. ISDA only posts on its website the conformed copy of all Adherence Letters. You must also submit an executed, or signed, copy of the Adherence Letter in addition to the conformed copy of the Adherence Letter. ISDA keeps the executed copy of the Adherence Letter for its files and does not share the executed copy with anyone else.

Who is an authorized signatory?

An authorized signatory to the Adherence Letter is an individual who has the legal authority to bind the adhering institution.

SPECIAL CONSIDERATIONS FOR INVESTMENT/ASSET MANAGERS

What if I am an investment or asset manager, not all of my discretionary management agreements permit me to amend my client's agreements?

If you are an investment or asset manager and act on behalf of multiple funds, you have the following options:

1. If you have authority to adhere on behalf of all of your clients you may do so by indicating the following in the signature block:

“Investment/Asset Manager, acting on behalf of the funds and accounts listed in the relevant Covered Master Agreement (or other agreement which deems a Covered Master Agreement to have been created) between it (as agent) and another Adhering Party from time to time”.

In doing so, you offer to make the amendments contained in the Protocol to any 1992 Master Agreement you have entered or will enter into on behalf of clients (present or future) with any other adhering party either: a) which was signed by you as agent before the date you adhered in respect of counterparties that have also already adhered to the Protocol whether or not your clients are added to that agreement

before or after your adherence; or b) which is signed by you as agent before adherence by your counterparty if your counterparty is later to adhere to the Protocol.

If you wish to adhere in this way, you must ensure that you do and will have the authority to do so from all existing and future clients on whose behalf you enter into 1992 Master Agreements.

If you have the ability to add new funds to a Master Agreement by an amendment, the Master Agreement with that new fund will still be covered by the Protocol if the umbrella agreement was signed before the date on which you have adhered to the Protocol on behalf of such client even if that client is added after such adherence.

Any new Master Agreement you sign on behalf of any clients on or after your adherence on behalf of such clients and adherence by the relevant counterparty will not be amended by the Protocol. To the extent that you wish such new master agreement to contain Close-out Amount as the payment measure, you could enter into a 2002 ISDA Master Agreement which replaces the two 1992 payment measures Loss and Market Quotation with Close-out Amount as well as containing certain other enhancements (for example inclusion of a Force Majeure provision) or, to the extent that you wish to enter into a new 1992 Master Agreement, you can include the relevant amendments in the Schedule to that master agreement. You may find the wording suggested below helpful to incorporate the amendments made by this protocol into such new agreements.

2. If you do not have authority from all of your funds, you can adhere on behalf of those funds whose permission you have by indicating the following in the signature block "Investment/Asset Manager, acting on behalf of the funds and accounts identified in the attachment to this Adherence Letter". The attachment to your Adherence Letter can either name the clients or funds, or identify them with a unique identifier which will be known and recognized by all other Adhering Parties with which the relevant funds or clients have entered into Covered Master Agreements. The attachment to your letter will be posted on the ISDA website with your Adherence Letter.

You can later adhere on behalf of new funds by sending an additional Adherence Letter listing those additional funds. Please contact ISDA at the time if you wish to do this since your additional Adherence Letter will need to confirm that it does not revoke or prejudice your previous letter(s).

If you adhere in this way you offer to make the amendments contained in the Protocol to any 1992 Master Agreement you have entered or will enter into on behalf of such identified clients with any other adhering party either: a) which was signed by you as agent before the date you adhered in respect of counterparties that have also already adhered to the Protocol whether or not such clients are added to that agreement before or after your adherence on their behalf; or b) which is signed by you before adherence by your counterparty if your counterparty is later to adhere to the Protocol.

Any 1992 Master Agreement which you enter into on behalf of funds that are not listed in your adherence letter(s) or which you sign after adherence by you on behalf of that fund and by the relevant counterparty will not be covered by the Protocol and you and the relevant counterparty will have to enter into a bilateral amendment agreement as discussed in 3 below if you wish to replace Market Quotation/Loss with Close-out Amount.

3. To the extent that you do not have authority from all of your funds and you are not able to disclose your clients whether by name or a unique identifier, you cannot adhere to the Protocol on behalf of any fund that you cannot identify. Your option in these circumstances is to enter into bilateral amendment agreements with each relevant counterparty listing the funds whose Master Agreement(s) with that counterparty will be amended by incorporating the amendments made by the

Protocol. ISDA will publish a form of bilateral amendment agreement that can be used for this shortly after the Protocol opens.

DETAILS RELATING TO THE PROTOCOL

What does the Protocol do?

Following the default of various Lehman Brothers trading entities many members, having seen the benefit of Close-out Amount as a payment measure, requested that ISDA facilitate amendment of existing 1992 ISDA Master Agreements to replace Market Quotation and Loss with Close-out Amount. This is the goal of the Protocol.

What Agreements and Transactions are covered by the Protocol?

The Protocol will cover:

1. any 1992 ISDA Master Agreement which has been entered into (whether deemed entered into by virtue of the fact that two Adhering Parties have entered into a long form confirmation or actually executed in full by the parties) before the date on which the latest of the two Adhering Parties adheres to the Protocol (the "Implementation Date"); and
2. any 1992 ISDA Master Agreement which has been entered into by an agent on behalf of a client by adding or including that client in a list of clients which are party to the Agreement with the counterparty if that master agreement was signed by the agent and the counterparty before the date on which the latest of the agent (on behalf of the relevant client) and the counterparty adheres to the Protocol. Such agreements will be covered even if the relevant client is added after adherence by the agent on his behalf and by the counterparty. This is because such agreements will not be renegotiated and it is considered appropriate that all agreements created by that umbrella agreement are treated consistently, each a "Covered Master Agreement".

Any Transaction entered into under a Covered Master Agreement will be included in the scope of the Protocol, even if the Transaction was traded after the Implementation Date, provided that the relevant Covered Master Agreement was entered into (i.e. signed rather than "effective as of") before the relevant date.

What Agreements are excluded from the Protocol?

Any 1992 ISDA Master Agreement that involves a third party credit support document (whether or not defined as a "Credit Support Document" in the relevant master agreement) given on terms which expressly require the consent of the third party to any amendment to the master agreement is excluded from the definition of Covered Master Agreement and will not be amended by the Protocol.

Where two Adhering Parties have entered into a long form confirmation which deems there to be a 1992 ISDA Master Agreement in place between them prior to the second of those parties adhering, as mentioned above, this deemed master agreement will be amended as anticipated by the Protocol. If, however, those two parties subsequently negotiate and execute an ISDA Master Agreement which supersedes the deemed agreement, if this happens after the Implementation Date, this agreement will not be amended by the Protocol and the parties will have to bilaterally agree to incorporate the amendments into their Schedule. We provide suggested wording below.

1992 Master Agreements that have been or are subsequently bilaterally amended by the parties using the ISDA Form of Amendment to the 1992 Master Agreement or any other form of bilateral amendment which results in replacing Market Quotation or Loss with Close-Out

Amount also fall outside the scope of the Protocol.

If one or more of my 1992 ISDA Master Agreements isn't a Covered Master Agreement but I want to make the changes that the Protocol provides for, what are my options?

Your only option is to bilaterally agree the amendments with your counterparty. In so far as the agreement is pre-existing, you could use the ISDA Form of Amendment to the 1992 ISDA Master Agreement available on our website (www.isda.org click "Bookstore/publications" click "ISDA Master Agreements and Bridges"). If the agreement has not yet been executed you could include wording along the following lines to incorporate the amendments made by the Protocol into that agreement:

"The parties to this Agreement agree that the amendments set out in [the Attachment and Annexes [10 – 14 (inclusive)] to] the ISDA Close-out Amount Protocol published by ISDA on Friday, 23 February 2009 and available on the ISDA website (www.isda.org) shall be made to this Agreement and that the [Loss Preserved Election][Loss Amended Election] and the [Annex 1 - 9 Applicable Election][Annex 1 - 9 Not Applicable Election] have been made. The parties further agree that this Agreement will be deemed to be a Covered Master Agreement and that the Implementation Date shall be the date this Agreement is entered into for the purposes of the amendments regardless of the definitions of such terms in the Protocol."

Please note that this wording is merely suggested wording and we would strongly recommend that you consult with your counsel to confirm that it is appropriate to the particular circumstances and provisions of your agreement.

Some of my 1992 ISDA Master Agreements contain bespoke valuation mechanics that we agreed with our counterparty and are part of the commercial agreement; I don't want these to be amended by the Protocol.

The general purpose of the Protocol is to permit parties to agree that Close-out Amount will be the appropriate valuation in circumstances in which there may be numerous trades to close-out in the market (and where it may then be difficult to obtain the necessary quotations for Market Quotation calculations). For this reason, any provision which uses the concepts of Market Quotation or Loss (subject to the Loss Election, see below) in circumstances in which there may be numerous trades closed out and requiring valuation will be amended (for example, where the standard Events of Default or Termination Events are likely to apply to and trigger close out of a number of Master Agreements or where the event, such as an Additional Termination Event or an additional Event of Default applying generally results in the termination of all Transactions).

In order to give effect to these principles, the Protocol seeks to preserve "Express Provisions". Express Provisions are:

1. any bespoke valuation mechanic that two Adhering Parties may have agreed:
 - a. in relation to a specific Transaction and documented in the Confirmation to that Transaction; and
 - b. in relation to one or more specific Transactions and documented in the Schedule to the Covered Master Agreement.

Accordingly, references in such provisions to "Market Quotation", "Loss" or "Settlement Amount" will not be amended to Close-out Amount.

The following provisions will not be preserved and so will be amended by the Protocol to substitute Close-out Amount:

1. Any standard provisions contemplated by a form of Confirmation or related provision appearing as an exhibit to any of the ISDA Definition booklets that rely upon the 1992

concepts “Loss” (subject to the Loss Election, see below), “Market Quotation” or “Settlement Amount”;

2. Any bespoke valuation provision which uses the concept of Market Quotation or Loss (subject to the Loss Election) to apply following the occurrence of either an Event of Default contained in Section 5(a) of the Covered Master Agreement, a Termination Event contained in Section 5(b) (even to the extent that such Termination Event results in the close-out of only some Transactions under the relevant Covered Master Agreement) or an Additional Termination Event or any other event which the parties have agreed will result in the general termination and close-out of all Transactions under that Covered Master Agreement. Provisions which expressly apply to specified Transactions (as discussed in “1b” above to be “Express Provisions”) will not fall in this category simply because those specified Transactions are the only Transactions under the Covered Master Agreement and such provisions will remain preserved.

Adhering Parties should be aware that to the extent that they have amended any of the standard language included in a form of Confirmation or related provision appearing as an exhibit to any of the ISDA Definition booklets that relies upon the 1992 concepts “Loss”, “Market Quotation” or “Settlement Amount”, such an amendment may result in the provision not being amended by the Protocol.

Note that the terms of certain documents published by ISDA which contain credit support provisions (the NY Annex, English Annex, English Deed, Japanese Annex and 2001 ISDA Margin Provisions) will be preserved except as expressly modified by Annex 10 - 14 of the Protocol.

Some of my 1992 ISDA Master Agreements contain Loss as the agreed calculation measure; I don't want these to be amended by the Protocol.

The principal driver behind this Protocol was the perceived difficulty during times of market turmoil surrounding the requirement to obtain quotes. Since only Market Quotation requires this, parties who wish to preserve Loss in their pre-existing agreements are given the election to do so by checking the “Preserve” box opposite “Loss Election” in their Adherence Letter. If an Adhering Party does not check any box opposite “Loss Election” in their Adherence Letter, they will be deemed to have checked “Amend”. The Protocol will only replace Loss in those Covered Master Agreements between two Adhering Parties that have both elected (either by checking the “Amend” box or by checking no box) the Loss Amend Election. If one Adhering Party has elected the “Preserve” box, any provision in a Covered Master Agreement to where he is a party which applies Loss as the elected payment measure will not be amended by the Protocol even if his counterparty, himself an Adhering Party, has made the Loss Amend Election.

I would rather not amend the various ISDA definitions as proposed by the Annexes to the Protocol; can we preserve these?

Annexes 1 – 9 of the Protocol make certain amendments to certain of the ISDA definitional booklets. These amendments are considered consequential to the amendments made by the Attachment (replacing Market Quotation or, where elected Loss, with Close Out Amount). However, to the extent that entities do not want to amend these definitions the Protocol allows Adhering Parties to elect for Annexes 1 – 9 not to apply to their Covered Master Agreements by checking the “Not Applicable” box opposite “Annex 1-9 Election” in their Adherence Letter. If an Adhering Party does not check any box opposite “Annex 1-9 Election” in their Adherence Letter, they will be deemed to have checked “Applicable”. Annexes 1 – 9 of the Protocol will only apply to those Covered Master Agreements between two Adhering Parties that have both made (either by checking the “Applicable” box or by checking no box) the Annex 1-9 Applicable Election. If one Adhering Party has checked the “Not-Applicable” box, Annexes 1-9 will not apply to any Covered Master Agreement to which he is a party even if his

counterparty, himself an Adhering Party, has made the Annex 1-9 Applicable Election.

Annexes 10 – 14 amend the ISDA credit support documents principally to ensure that the collateral requirement calculations reflect the valuations that will be performed on close-out (ie by using Close-out Amount rather than Market Quotation). On this basis we consider it appropriate that these amendments should apply in all cases where a Covered Master Agreement is amended by the Protocol. These Annexes are not, therefore, optional and an Adhering Party can not opt out of these amendments. However, we are mindful that some parties may have made other bespoke amendments to the provisions amended by these Annexes. To the extent that those amendments do not address the same issue as this Protocol (replacing the 1992 Master Agreement valuation measure(s) with Close-out Amount) the Protocol seeks to preserve those bilateral amendments whilst making the same amendment to such bespoke provision as is made by the Protocol to the standard provision.

What alternatives are there to adhering to the Protocol?

The changes that the Protocol makes to Covered Master Agreements could be made by way of individually negotiated agreements. Parties could sign up to a 2002 Master Agreement and novate all/any of their existing trades to that 2002 Agreement which would mean that all of the amendments made by the 2002 Master Agreement to the 1992 Master Agreement (including replacing Market Quotation / Loss with Close-out Amount) would be made to the trading relationship.

Parties could also use the ISDA Form of Amendment Agreement or incorporate language such as that discussed above (“*If one of more of my 1992 ISDA Master Agreements isn’t a Covered Master Agreement...*”)

Limited Right of Revocation

Can I revoke my participation in the Protocol?

No. Once an Adherence Letter has been accepted by ISDA, an Adhering Party is bound by all amendments with other parties that have already adhered to the Protocol or, subject to the discussion below, that adhere before a designation of the Annual Revocation Date. An Adhering Party may, at any time during the period from October 1 to October 31 of a calendar year, deliver to ISDA a notice specifying the Annual Revocation Date as its cut-off date in respect of amendments with future Adhering Parties. The effect of such a letter will be to withdraw adherence for future Adhering Parties as of December 31 in that calendar year. Although amendments already made will not be revoked, any subsequent adherence by new Adhering Parties after the designated Annual Revocation Date, will not bind the party that has submitted a Revocation Notice.

You can, however, bilaterally agree to amend your Covered Master Agreement with your counterparty (the other Adhering Party) and any such subsequent amendments will supersede those made by the Protocol to the extent that they are inconsistent.