

MASTER AGREEMENT FOR FINANCIAL TRANSACTIONS (EMA)
DRAFT PRODUCT ANNEX FOR DEPOSITS AND LOANS
Explanations (2 March 2009)

Deposit Annex

- Basis for drafting the new Product Annex for Deposits and Loans was the existing Product Annex for Securities Loans (edition January 2001).
- Section 1(2): As far as the inclusion of Deposits or Loans into the Agreement is concerned, the Annex provides for two different mechanisms.
 - (i) “Bottom-up”: Inclusion is done by reference in the Confirmation of the relevant Deposit or Loan (“...*which shall be subject to the FBE Master Agreement for Financial Transactions between us*”) or
 - (ii) “Top-down”: All Deposit or Loans are included automatically without further reference in the relevant Confirmation as contemplated in the Special Provisions.
- Deposit or Loans are usually concluded either orally or through an electronic trading system (e.g. Reuters Dealing 3000). Confirmations are usually executed via the SWIFT system (based on MT 320). Whether SWIFT Message types provide for sufficient free text for any reference to the relevant master agreement has to be analysed.
- Section 2. It should be possible to agree on Market Standard Documentation used in the money market or to incorporate the general business conditions of one party. If this option is used, the terms and conditions provided in Sections 3 and 4 would be obsolete.
- Section 3(5)(b) governs a failure to pay of the Borrower and provides for the payment of default interests only. It has to be indicated by business that the reference to the default interests (Section 3(5) of the General Agreement) might not be appropriate.
- Section 3(5)(d) clarifies that a failure to pay would also constitute an Event of Default that would justify a termination of the Agreement pursuant to Section 6(a) of the General Provision. In case of a close-out pursuant to such Section 6(a), the Non-Defaulting Party could claim the Transaction Values (as defined in Section 7(1)(a) of the General Provisions) of the terminated Deposits and Loans.
- Section 4 governs the calculation of interests. The definitions and terms provided therein reflect the standard used under the EMA Interest Rate Supplement. Section 4(3) allows for references to Floating Rate Options (e.g., EURIBOR). Section 4(5) governs Price Source Disruptions or Price Source Conversions. The day count convention menu provided for in Section 4(6) reflects the standards in the Eurosystem (Actual/360) and in other money markets.
- Section 5 reflects the discussion following the Peregrine-Case (Peregrine Fixed Income v Robinson Department Store) on whether the creditworthiness of the Calculation Party should be accounted for when applying Market Quotation. It is clarified that Transaction Value means loss or gains including Break Costs. The

concept of Break Costs resembles the 1996 International Deposit Netting Agreement (IDNA).

Special Provisions

Two changes have been made.

- I. (12) The list of Booking Offices has been extended.
- II. (1) Although possible, the standard Special Provisions do not provide that Loans and Deposits are covered by an existing Margin Maintenance Annex.
- III. A new menu has been introduced to address the selections contemplated under Section 1(2) and 2 of the Annex. The menu provides for a carve-out of deposits and loans that should not be covered by the EMA. It should allow parties to comply with the requirements for regulatory recognition of deposit netting (see below).

Regulatory Recognition of Deposit Netting

Annex VIII of the Directive 2006/48/EC¹ (the Banking Directive) provides:

- On-balance sheet netting is limited to mutual claims between credit institutions and its counterparty.
- Only loans and deposits of the lending credit institution may benefit from on-balance sheet netting.
- The on-balance-sheet netting agreement must be legally effective and enforceable in all relevant jurisdictions in the event of the insolvency or bankruptcy of the counterparty.
- The credit institution must be able to determine at any time those assets and liabilities that are subject to the on-balance-sheet netting agreement.
- Loans and deposits with the lending credit institution are to be treated as cash collateral. The credit institution must therefore account for currency mismatches and maturity mismatches.
- The credit institution must monitor and control the risks associated with the termination of the credit protection.
- The credit institution must monitor and control the relevant exposure on a net basis.

¹

See Annex VIII, Part 1 points 3 and 4, Part 2 point 3 and Part 3 point 3.