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2011 ISDA EQUITY DERIVATIVES DEFINITIONS

FREQUENTLY ASKED QUESTIONS

The International Swaps and Derivatives Association, Inc. (**ISDA**) has published the 2011 ISDA Equity Derivatives Definitions (**2011 Definitions**).

The 2011 Definitions introduce a new architecture for the documentation of equity derivative transactions and provide a substantial update to the 2002 ISDA Equity Derivatives Definitions (**2002 Definitions**).

Linklaters acted as lead counsel to ISDA on the 2011 Definitions. These FAQs provide an overview of the new architecture and the approach taken in the 2011 Definitions. The responses set out below highlight certain key new provisions, as well as some revisions made to the provisions from the 2002 Definitions.

For a glossary of the FAQs, please click here

A. INTRODUCTION

1 How do the 2011 ISDA Equity Derivatives Definitions differ from the 2002 ISDA Equity Derivatives Definitions?

The principal difference is that the 2011 Definitions adopt an open, modular approach.

During the development of the new definitions, it was noted that many terms that are commonly used in equity derivative transactions are subject to subtle differences when used in the various Master Confirmation Agreements (**MCAs**) and General Terms Confirmations (**GTCs**) developed after publication of the 2002 Definitions. It was determined that a modular approach, which allows parties to vary the scope of key terms via elections, would provide not only the flexibility to replicate the provisions of existing MCAs and GTCs, but would also better accommodate new products and functionality, as and when required.

In addition to the introduction of this new approach, the 2011 Definitions also extend the functionality of the 2002 Definitions. We provide more detail on the various new provisions below but, to give some indication, the 2002 Definitions were 54 pages long whereas the Main Book of the 2011 Definitions is over 300 pages.

2 Why were the 2011 Definitions needed?

Following a number of turbulent years in the international financial markets, global regulators have increased their focus on the detail of legal documentation. This has led to a number of initiatives to increase standardisation across various products and asset classes and a renewed emphasis on electronic processing, matching and reporting of transactions.

Although market participants had become very familiar with the 2002 Definitions, they relied heavily on a large number of additional documents that had been published over the course of the last nine years. That framework included 20 MCAs, GTCs and 47 product annexes.

It was clear that the complexity and variety of additional documentation was not compatible with the emerging regulatory goals and the industry gave a series of commitments to global supervisors that it would publish a new set of equity derivatives definitions.

The 2011 Definitions seek to rationalise the existing documentation and to provide an architecture that allows for the development of new products and features over time, without returning to the current model of fragmented documentation. The 2011 Definitions also revise and extend certain trade and risk allocation provisions which have been adapted to reflect a number of the market events which have occurred in recent years.

3 What is the new approach taken by the 2011 Definitions?

The 2011 Definitions provide parties with flexibility to determine how they wish to apply the various definitions, elections, features, obligations, events and consequences in the 2011 Definitions to particular transactions.

The definitions intentionally avoid the product specific approach taken in earlier documentation. This means that the provisions do not prescribe how terms are to be aggregated to document particular products. This **modular** approach allows parties to select, combine and interchange the variables to create and document different equity derivative transactions.

4 What are the benefits of the new approach?

The 2011 Definitions provide parties with a consolidated set of terms for documenting transactions and establish the basis for standardised, machine readable equity derivative documentation.

The open, modular approach means that new terms and variables can be added without requiring structural change or reform of the existing 2011 Definitions.

5 How has the documentation architecture of the 2011 Definitions changed?

The 2011 Definitions are made up of the main book (**Main Book**) and the appendix to the Main Book (**Appendix**).

6 How does the new documentation architecture work?

Equity derivative transactions will continue to be documented using a confirmation, but confirmations are intended to take the form of a short transaction supplement (**T-Supp**) incorporating by reference an ISDA published transaction matrix (**ISDA Transaction Matrix**).

ISDA Transaction Matrices will identify and select, from the menu of definitions and elections in the Main Book and the Appendix, the operative provisions that the industry agrees should be specified or available for a particular product or transaction. The trade-specific data, such as specific dates and amounts, will be set out in the T-Supp.

Transactions may also be documented under a long-form confirmation or other bilateral transaction agreement which may incorporate and amend an existing ISDA Transaction Matrix.

7 I am keen to start reading them, but the 2011 Definitions are very long. How long will it take me to read them?

We would expect it to take an experienced derivatives lawyer around 15 hours to work through the 2011 Definitions thoroughly for the first time.

8 Was it really necessary to give the 2002 Definitions such a radical overhaul?

Yes. See question 2 above.

9 When should my institution start to use the 2011 Definitions?

It is anticipated that the industry will transition to the 2011 Definitions in phases, following publication and adoption of ISDA Transaction Matrices in respect of particular product or transaction types.

It is, of course, possible for parties to include functionality from the 2011 Definitions in transactions currently being documented under the 2002 Definitions.

10 Should my institution update its equity linked note programmes now?

Equity linked note programmes do not need to be updated immediately to incorporate the new definitions. Adoption of the 2011 Definitions is anticipated to occur in phases and is likely to coincide with the development of ISDA Transaction Matrices for different products.

Given the modular structure of the 2011 Definitions, it is anticipated that, as ISDA Transaction Matrices are published, issuers will identify the types of equity linked note that they wish to issue under a particular programme and include in the terms and conditions of the programme only those terms from the 2011 Definitions needed for such notes.

11 What should my institution be doing now?

Legal, trading and operations teams should familiarise themselves with the 2011 Definitions and consider participating in the various post-publication industry working groups organised by ISDA. The working groups will be focusing on the development of ISDA Transaction Matrices and T-Supps for various products and the related population of the Appendix.

B. NEW ARCHITECTURE

12 What does the Main Book contain?

The **Main Book** sets out core definitions, features, obligations, events, consequences and operative provisions relevant to a wide variety of possible equity derivative transactions. As part of the open, modular approach, these variables are presented as building blocks and are arranged thematically rather than being classified by product type.

13 What will the Appendix contain?

The **Appendix** contains tables that will identify and define possible elections, obligations and methodologies. The Appendix will also create event and consequence combinations that parties may select and combine to give effect to the definitions and operative provisions in the Main Book. These combinations can then be used to construct different types of equity derivative transaction.

The Appendix will also set out:

> different formulae and methodologies that may be selected and combined/interchanged to create particular obligations;

> possible methodologies for identifying particular information (e.g. dates, a type of contract, a value etc.) relating to a defined term; and

> fallbacks for certain terms and elections if not specified in the confirmation.

14 What does the current version of the Appendix contain?

The published Appendix is currently a template and gives an indication of the format, rather than the content, of the finished product. There will be a separate industry initiative to populate the Appendix with definitions, elections, methodologies and combination definitions that the industry agrees are required or should be available for particular equity derivative transactions.

The Appendix will be amended, restated and republished on a more regular basis than the Main Book and will be used to add any new core definitions and operative provisions to the 2011 Definitions before they are consolidated into the Main Book.

15 What are ISDA Transaction Matrices and T-Supps, and what will they contain?

It is intended that **ISDA Transaction Matrices** will form the main part of the confirmation for a transaction incorporating the 2011 Definitions. The ISDA Transaction Matrices will be product/transaction specific and will identify (and, in some cases, complete) certain of the terms, elections, obligations, events and consequences drawn from the Main Book for a particular product or transaction. This approach is a departure from existing matrices, such as the ISDA Credit Derivatives Physical Settlement Matrix.

In contrast, the **T-Supp** will contain trade-specific data, such as specific dates and amounts.

16 Are there any new drafting devices or conventions in the 2011 Definitions?

There are a number of new drafting devices and conventions that are key to understanding and using the 2011 Definitions. In particular, a number of terms are introduced in order to condense the drafting style, examples of these are the terms **Specified**, **Applicable** and **Not Relevant**. The definitions also introduce the concept of **Features**, as well as **methodologies**, **toggles**, **prefixes and suffixes**. An understanding of these devices, and the context in which they are used, is essential for use of the 2011 Definitions.

17 Why do some of the provisions include a list which consists of one item?

The open nature of the 2011 Definitions means that they anticipate the addition of new definitions and operative provisions over time. Where it is possible that a particular provision may be expanded, we have formatted the provision as a list and have included the options which were agreed as part of the working group process. In some cases, this has resulted in a list of one item.

18 Are there any tips for reading the 2011 Definitions?

It is worth noting that the 2011 Definitions adopt a new format for certain defined terms, which are split into two parts. The first part gives the generic meaning of the term and the second part gives the specific meaning of the term in the context of a particular transaction. As with some of the other defined terms mentioned in our earlier responses, we adopted this approach in order to reduce the overall number of definitions required by the 2011 Definitions.

C. NEW CONCEPTS AND DRAFTING DEVICES

19 What are Legs?

The 2011 Definitions use the concept of **Legs** to identify and group one or more cashflows and/or settlement obligations within a transaction. The concept reflects the fact that a single derivative transaction may be made up of several different elements and that these may include both equity and non-equity obligations. The 2011 Definitions envisage that a transaction may have any number of Legs.

The 2011 Definitions also distinguish between those Legs which are documented under the 2011 Definitions (**ED Legs**) and those which are not (**Non ED Legs**) (such as a funding leg documented using the 2006 ISDA Derivatives Definitions).

20 What are Linked Legs?

The 2011 Definitions allow parties to link Legs to one another (**Linked Legs**) with the result that certain key dates for each of the relevant Legs (e.g. for pricing, calculation or settlement) will be adjusted to ensure that they always coincide notwithstanding the occurrence of a disruption for one or more relevant Legs. This feature allows parties to more easily coordinate cashflows and the election of delivery versus payment or net physical settlement, if required.

21 What is a Feature?

Features are used as labels to identify that a particular transaction or Leg has certain characteristics. They generally coincide with terms that are already in common use by the market (such as **Option**, **Multi-Exchange Index** and **Averaging**) and, when specified in relation to a Leg, switch on various terms of the 2011 Definitions relating to that characteristic. In many cases, the election of a Feature has the effect of automatically making one or more further elections in relation to that Leg.

22 What is a methodology?

Methodologies are used for terms in the Main Book that could have a number of formulations and are used to select between different outcomes or values. For example, an Averaging Date could be defined in a number of ways, such as each Scheduled Exchange Business Day in an Averaging Period or the first Scheduled Exchange Business Day of each month in an Averaging Period. Another example would be the determination of a weighted arithmetic mean, which will require a different calculation depending on the context. The Appendix will describe and define the various formulations for different methodologies and parties may select, via an ISDA Transaction Matrix or otherwise, which methodology will apply in relation to a particular equity derivative transaction.

23 Why are there so many methodologies?

The functionality of some aspects of the Main Book has been deliberately deferred to the matrix negotiation process, so that market participants can decide upon the appropriate methodology in the context of different types of product or transaction. Once a methodology has been adopted for one ISDA Transaction Matrix, it is available for use in others.

24 What is a toggle?

Although the term **toggle** is not used in the 2011 Definitions, working group members used the term to refer to certain binary switches within the definitions that switch on or off particular terms, obligations or other provisions or create a particular version of a particular term, obligation or provision. The flexibility to toggle provisions allows the 2011 Definitions to cover a large number of product types across a wide range of regions and inter-party relationships (e.g. client/dealer and interdealer). As a guide to the reader, if a toggle does not have a specific definition (i.e. it is not a defined term in its own right, but rather operates to invoke, or alter the effect of, other provisions), it will be italicised in the Main Book.

25 What are prefixes and suffixes?

Prefixes and **suffixes** are ancillary to, and act upon, other terms in order to alter the meaning of those other terms.

For example, **Scheduled** is a prefix that can be combined with a type of day (e.g. an Exchange Business Day) or a time (e.g. Close), so as to distinguish between a day or time when something was scheduled to happen and a day or time when something actually happened (or did not happen).

26 What is an ED Leg Reference Underlier?

This refers to the basket, derivatives contract, index, share, depositary receipt or other equity asset that is directly referenced by an ED Leg. Each ED Leg will have one **ED Leg Reference Underlier** and one or more **ED Leg Underliers**.

27 What are the different types of ED Leg Underlier?

The term **ED Leg Underlier** refers to each **ED Leg Reference Underlier** and each share, depositary receipt, derivatives contract, basket and index which is a Component or Sub-Component of that ED Leg Reference Underlier.

Components and Sub-Components are relative concepts that are expressed by reference to an Index or a Basket, such that the assets that directly form part of that Index or Basket are referred to as **Components** and the components of those assets are referred to as **Sub-Components**. As these terms are relative, they can be used to refer to the constituents of any Index or Basket that is an ED Leg Underlier (and are not restricted to direct constituents of the ED Leg Reference Underlier).

28 What is the difference between an ED Leg Reference Underlier and an ED Leg Underlier?

The term **ED Leg Underlier** refers to each of the equity underliers over which an ED Leg is directly or indirectly written. The ED Leg Underliers of an ED Leg will always include the ED Leg Reference Underlier but will also cover each equity asset or index in the chain of equity underliers below the ED Leg Reference Underlier. Taking as an example, an ED Leg on a basket of equity indices, the ED Leg Reference Underlier is the basket and each of the basket, each index comprising the basket and each share referenced by each index is an ED Leg Underlier.

29 Why are there three types of Derivatives Contracts?

The 2011 Definitions provide a general definition of **Derivatives Contract** and also refer to three particular types of Derivatives Contract which form part of particular provisions within the definitions. The three types of Derivatives Contract are: **Exercise Derivatives Contracts** (which are used for certain of the option transaction provisions), **Relevant Derivatives Contracts** (which are used as a reference point for pricing and exchange identification purposes, amongst other things) and **Pricing Disruption Derivatives Contracts** (which are used for determining whether pricing disruption events have occurred in relation to the underliers of those Pricing Disruption Derivatives Contracts).

D. NEW AND REVISED FUNCTIONALITY

30 What is Component Modification?

The election of **Component Modification** allows parties to elect to treat the Components and Sub-Components of baskets and indices differently from each other in the context of determining whether pricing disruption events have occurred, and what consequential adjustments to the terms of the transaction will need to be made as a result, rather than applying such events and consequential adjustments to the basket or index as a whole.

Component Modification can also be applied to the consequences of a particular date not falling on a business day and to settlement disruption.

31 What are all these references to "(level i)"? I find them confusing.

The Component provisions are amongst the most complex provisions in the 2011 Definitions. We will be preparing separate materials relating to the details of **Component Modification**, **(level i)**, **Test at Each Level**, **Sub-Component Modification** and **Pricing Disruption Percentage**.

32 How are exchanges categorised?

The 2011 Definitions distinguish between exchanges, quotation systems and execution facilities on which securities are listed or traded (**Securities Exchanges**) and those on which derivatives contracts are listed, quoted or traded (**Derivatives Exchanges**). A further distinction is made between, on the one hand, **Primary Securities Exchanges** and **Primary Derivatives Exchanges** (the primary exchange, quotation system and execution facility for a security or derivatives contract) and, on the other hand, **Material Securities Exchanges** and **Material Derivatives Exchanges** (other exchanges, quotation systems and execution facilities on which the securities or derivatives contract(s) are listed, quoted or traded where trading has a material effect on the overall market for that security or derivatives contract).

33 Why are there so many categories of Exchange?

The expansion of the terms relating to **Exchanges** adds functionality to the 2011 Definitions because different **Types of Exchange** can be specified as reference points for different purposes, for example by combining them with the definition of Exchange Business Day for the purposes of pricing and settlement.

34 What is the difference between days and dates?

A distinction is made in the 2011 Definitions between **Days** and **Dates**. A **Day** is a type of day (e.g. a Business Day) that needs to be satisfied in order for a type of **Date** to occur, such that a Pricing Date will not fall on a non-business day where it is subject to a business day adjustment. A **Date** is a date on which something is scheduled to happen (e.g. prices are determined on Pricing Dates and payments and deliveries are made on Settlement Dates).

35 Is there still a Valuation Date?

Yes. **Equity Valuation Date** is used to avoid confusion with Valuation Date as defined in other ISDA definitional booklets. The occurrence of an Equity Valuation Date will drive a settlement and/or an adjustment. Where there are multiple Equity Valuation Dates, each will lead to a separate settlement and/or an adjustment (i.e. multiple Equity Valuation Dates are not like Averaging Dates that, when taken together, provide input into a single settlement and/or adjustment). The more generic definition for the day on which a Price needs to be determined is **Pricing Date**. An Equity Valuation is one type of Pricing Date. Each Equity Valuation Date will result in and link to a **Price Determination Date** and **Calculation Date**.

36 Why is there both a Pricing Date and a Price Determination Date?

There any many types of date on which a **Price** may need to be determined for an equity derivative transaction (e.g. Averaging Dates, Observation Dates, Equity Valuation Dates, Potential Exercise Dates) and the generic term for such dates under the 2011 Definitions is **Pricing Date**.

The **Price Determination Date** is the date by which all Prices that need to feed into a formula must be determined and is itself a Pricing Date. This may derive from a single pricing date (e.g. an Equity Valuation Date or an Exercise Date) or from the last of a series of dates (e.g. Averaging Dates or Observation Dates).

37 What is the difference between the Price Determination Date and the Calculation Date?

The **Calculation Date** is the date on which the calculation of settlement amounts and/or adjustments is made and it also drives the related settlement or adjustment date. In the vast majority of cases, the Calculation Date and the Price Determination Date will be the same date. However, having a separate definition for each provides additional functionality for parties to specify a different date where something else needs to happen that may not fall on or before the Price Determination Date for the calculation to be made, such as an FX fixing. For products with a single payment linked to a comparison of prices across more than one set of Averaging Dates or Observation Dates, such as "best of" products, there will be several Price Determination Dates and the Calculation Date will fall on or after the last Price Determination Date.

38 What are Pricing Groups for?

Pricing Groups allow different pricing elections and/or pricing terms to be applied to different pricing periods or for outputs from different pricing periods to be compared against each other, as for "best of" and "worst of" products.

39 What is the relationship between Eligible Day, Types of Day and Eligible Day Types?

The 2011 Definitions identify as **Eligible Day Types** each of the basic types of business day that may be relevant to an equity derivative transaction. **Eligible Day** is in effect a master business day definition. Eligible Day Types can be selected and combined to create different forms of Eligible Day for the purposes of different Types of Day, such as Pricing Days, Potential Exercise Days, Settlement Days etc. For example, if a Pricing Day needs to be a Scheduled Exchange Business Day and an FX Business Day, then Eligible Day for Pricing Days is "a day that is a Scheduled Exchange Business Day and an FX Business Day".

40 What is the difference between a Type of Date and a Type of Day?

For a particular date to be counted as a **Type of Date** that date must satisfy the **Type of Day** criteria specified for that Type of Date (e.g. for a date to be a good Pricing Date it must be a Pricing Day (i.e. it must be an Eligible Day and satisfy the Eligible Day Types specified for Pricing Days)).

If a particular date is not an Eligible Day (i.e. it does not satisfy the relevant Eligible Day Types), then the specified business day convention (**Eligible Day Adjustment Election**) will apply.

41 Why are there so many times and periods?

The 2011 Definitions contain a wide range of standard times and periods that can be combined in different ways to create an unlimited range of times and periods for any purpose, including pricing, exercise, notices etc.

42 How are Scheduled and Scheduled (no COS) used?

Scheduled and **Scheduled (no COS)** are prefixes that can be combined with any day, date or time to create different forms of times and dates, such as Scheduled Close-Regular or Scheduled Exchange Business Day.

For transactions such as variance swaps where the terms are fixed as at the trade date and subsequent changes in schedule (e.g. an announced early closure of an exchange or additional public holidays) are disregarded, the prefix **Scheduled (no COS**) can be used. Where the parties are flexible to changes in schedule provided sufficient notice of the change is received, the prefix **Scheduled** can be used and the relevant notice period set by the parties.

43 How are FX conversions addressed in the 2011 Definitions?

The 2011 Definitions include significant flexibility for any value to be converted from one currency into another and for the parties to select the date for conversion. In addition, if a Pricing Date is selected as an **FX Determination Date**, different business day conventions and Pricing Disruption Events can be applied in respect of the same date, so that, if desired, the FX Determination Date and Pricing Date may fall on different days as a result of non-business days or Pricing Disruption Events. The 2011 Definitions also include new FX related Additional Disruption Events.

44 Why are there so many Prices and Values?

The 2011 Definitions identify the different types of price that may be used in an equity derivative transaction. **Price** has been split into its four core elements: (i) **Pricing Time or Period**; (ii) the **Type of Value** to be used (e.g. closing auction price, price determined by the calculation agent, exchange price, hedge execution official price etc.); (iii) the **Value Source** (e.g. exchange, index sponsor, screen, hedging party, calculation agent etc.); and (iv) the **Valuer** (e.g. calculation agent, hedging party). With over 40 Types of Value and accompanying suffixes and prefixes drawn from the MCAs, GTCs, product annexes and market participant requests, the 2011 Definitions contain significant new pricing optionality.

45 What is a Daily Observed Price?

A **Daily Observed Price** allows the parties to select a time period in a day and select the highest or lowest type of price that occurs during that period or to provide for a lock-in price should it be attained during that period.

46 What is a Comparative Price?

A **Comparative Price** allows the parties to compare types of prices across different dates and choose one of those prices, such as the best of them, the worst of them, their mean or median average or the difference between them.

47 What is a Conditional Price?

A **Conditional Price** allows the parties to specify price dependent conditions such as barrier or range conditions.

48 How are the market disruption events treated?

The market disruption events under the 2011 Definitions have been considerably expanded. They have also been renamed as **Pricing Disruption Events**. The 2011 Definitions contain 60 Pricing Disruption Events and 28 **Pricing Disruption Event Consequences**, each of which can be varied for even greater optionality using a number of suffixes and different means of testing disruptions for basket components and index components. Reflecting the modular approach of the 2011 Definitions, the possible Pricing Disruption Events and possible Pricing Disruption Event Consequences are not hardwired but can be selected and combined as the parties see fit.

49 Why are there Pricing Disruption Events for Physically Settled Options?

In the 2002 Definitions Potential Exercise Dates and Expiration Dates are subject to adjustment if there is a Market Disruption Event. This functionality is replicated in Section 9.1.2 of the 2011 Definitions. However, the parties will need to select the applicable Pricing Disruption Events and Pricing Disruption Consequences.

50 Why are there so many versions of the different Pricing Disruption Events?

There are seven types of **Basic Trading Disruption**. They relate to **Securities**, **Whole Baskets** and **Indices**, **Basket** and **Index Components** and ***de minimis***. The same variants are also included for other Pricing Disruption Events. The ***Whole Basket*** and ***Whole Index Pricing Disruption Events*** are designed to catch pricing disruptions that are material in the context of a Whole Basket or Index only. The materiality threshold is set by the **Pricing Disruption Percentage** (which can now be selected by the parties, but has typically been 20 per cent.). The **Component Pricing Disruption Events** are designed to catch Pricing Disruptions that affect one or more individual Components regardless of materiality by value (or numerical contribution) to the Basket or Index. The ***de minimis Pricing Disruption Events*** are designed to catch pricing disruptions that affect one or more individual Components where the Pricing Disruption Percentage materiality test has not been exceeded.

51 What is the Pricing Disruption Testing Period?

This is the period on a Pricing Day during which the determination of whether a Pricing Disruption Event has occurred will be made. Different **Pricing Disruption Testing Periods** may be specified for different Pricing Disruption Events.

52 What additional functionality has been included for Baskets and Indices?

Parties may choose between the three Basket or Index **Pricing Disruption Events** depending upon the consequence that they wish to specify. If the parties wish the consequence to occur if any Component is affected, no matter how material or immaterial, and the consequence will always be the same, then **Component Pricing Disruption Events** should be used. If the parties wish the consequence to occur only if a sufficiently large portion of the Basket or Index is affected, then **Whole Basket** or **Index Pricing Disruption Events** should be used. If the parties wish different consequences to apply depending upon the amount of the Basket or Index that is affected (e.g. if only one Component is affected, adjust that Component only, but if more than, say, 30 per cent. (which would be the Pricing Disruption Percentage) by value of the Components are affected, adjust the whole Basket or Index, then **de minimis Pricing Disruption Events** should be used for the first case and Whole Basket or Index Pricing Disruption Events should be used for the second).

53 Can you explain how "Test at Each Level", "Sub-Component Modification", "Pricing Disruption Percentage" and their related definitions work?

These provisions have been introduced to allow parties to choose the manner in which the Pricing Disruption Events and Pricing Disruption Consequences apply to Baskets and Indices and their Components and Sub-Components. The Component provisions are amongst the most complex provisions in the 2011 Definitions. We will be preparing separate materials relating to the details of Component Modification, (level i), Test at Each Level, Sub-Component Modification and Pricing Disruption Percentage.

54 I don't understand how Article 10 (*Equity Notional Amount and Other Amounts*) works. Can you explain it?

Much of the functionality of Article 10 has been deferred to Appendix Methodologies.

55 Have the option provisions changed much?

The terms for options and their exercise have been extensively remodelled and functionality for parties to select and specify different automatic exercise events and for the knock-in or knock-out of exercise has been included.

56 Where are the knock-in/knock-out provisions?

These are included in Article 12 and a new framework has been adopted that provides flexibility for the parties to select and specify knock-in and knock-out events and the consequences of such events.

57 Have the OET and ADTV limit provisions from the MCAs and GTCs been retained?

Yes. **OET** and **ADTV** limit provisions drawn from the MCAs and GTCs have been included in the 2011 Definitions under **Electable Transaction Events**.

58 How are dividends dealt with?

A new framework for Dividends has been developed that provides new flexibility and functionality to identify and treat different types and forms of dividends in different ways using the concept of **Relevant Dividends**. The 2011 Definitions provide flexibility for Relevant Dividends to trigger a settlement obligation (**Dividend Obligation Settlement Amount**) and/or an adjustment of the terms of the transaction (**Dividend Obligation Adjustment**). Dividend Obligation Adjustment is the equivalent of Reinvestment of Dividends under the 2002 Definitions. The settlement amount or adjustment for a Relevant Dividend is not prescribed in the 2011 Definitions but is determined in accordance with the relevant methodology specified by the parties. Possible elections for such methodologies will be incorporated into the Appendix and ISDA Transaction Matrices.

59 What is the difference between an ED Transaction Settlement Amount and an EO Settlement Amount?

ED Transaction Settlement Amount is a generic term that is used to capture any cash settlement amount or delivery amount that may be payable in relation to an ED Transaction, whether under an ED Leg or a Non ED Leg.

EO Settlement Amount is the term used for any cash amount or delivery amount due upon settlement or exercise of an ED Leg. Each EO Settlement Amount will be due on the date identified as the **EO Settlement Date** for that amount and payable/deliverable by the party identified as the **EO Party** for that amount. EO Settlement Amounts are not prescribed in the 2011 Definitions but determined in accordance with the relevant methodology specified by the parties. Possible elections for such methodologies for different equity derivative transactions will be incorporated into the Appendix as ISDA Transaction Matrices are developed and published.

60 How have the settlement provisions changed?

A flexible framework for settlement has been included in the 2011 Definitions. The modular, open approach extends to **Settlement Disruption Events** and **Settlement Disruption Event Consequences**, which are not prescribed but can be combined to suit the nature of the relevant settlement obligations.

61 Are all settlement obligations made on a DvP basis?

The modular menu approach of the 2011 Definitions means that terms and operative provisions only have effect if specified or switched on for a particular transaction. Whereas under the 2002 Definitions delivery versus payment (**DvP**) applies to Settlement Dates on which there is a corresponding payment obligation if the relevant Clearance System permits DvP settlement, under the 2011 Definitions, DvP will not be relevant unless the parties specify DvP for an ED Leg and/or across Linked Legs.

E. RISK ALLOCATION PROVISIONS

62 Have the Extraordinary Events changed much?

Yes. The majority of the events in the 2002 Definitions have been amended and a number of new **Additional Disruption Events** (**ADEs**) have been included. For example, the 2011 Definitions introduce new **Dislocation** and FX related ADEs as well as events linked to a party's costs of performance increasing. Potential Adjustment Event has also now become an **Extraordinary Event**.

63 Have the consequences following Extraordinary Events changed much?

In substance, a large part of the 2002 Definitions remain. Whereas the 2002 Definitions tie particular consequences to particular events, the 2011 Definitions largely adopt a modular approach, enabling parties to choose one or more consequences to apply to a particular Extraordinary Event. Some events (**Prescribed Consequence Events**) are not compatible with modularity and so one or more of a prescribed set of consequences must flow from those events. Except in the case of Prescribed Consequence Events, the parties can choose to apply a waterfall of consequences such that if one consequence does not yield a result, the parties can then apply the next following consequence in the waterfall.

64 The financial crisis has seen a number of government led bail-outs. Do the 2011 Definitions address future governmental assistance?

Yes. The principal changes to **Nationalization** are that:

> it now includes a limb which looks through to governmental interests as a holder of instruments convertible into equity;

> the perceived vagaries behind the “all or substantially all” test in the 2002 Definitions has led to the inclusion of a default 85 per cent. threshold (which the parties can override); and

> it captures governmental acquisitions of securities over a period of time.

Governmental Intervention and **Modified Governmental Intervention** have been introduced as new ADEs. Given the elective nature of ADEs, these are broader than Nationalization. Based on examples from the financial crisis, Governmental Intervention sets out a number of methods by which a governmental body can support a company, ranging from liability transfers to board influence. Modified Governmental Intervention focuses not only on the intervention of a governmental body but also requires there to have been a pre-agreed impact on the company's share price, trading volume and/or available free float.

65 How have the change in law related ADEs changed?

The change in law related ADEs have been significantly expanded and developed in the 2011 Definitions. The number of these ADEs has increased from one (**Change in Law**) in the 2002 Definitions to three in the 2011 Definitions, namely **Change in Law**, **Transaction Illegality** and **Increased Performance Cost due to Change in Law**. Significantly, the 2011 Definitions also give the parties the option, by electing **Legal Uncertainty** or **Inadvisability** to apply, to expand the types of situations that would constitute the relevant change in law related ADEs.

66 Why does Change in Law look so different?

The two limbs (X) and (Y) of the definition of Change in Law in the 2002 Definitions have been separated to form the new **Change in Law** ADE and the **Increased Performance Cost** due to Change in Law ADE. The Change in Law ADE in the 2011 Definitions is a refinement of limb (X) of the 2002 Definitions Change in Law definition, and relates to illegality in connection with a Hedging Party holding or dealing with its hedge positions. Unlike the 2002 Definitions, which only covers existing illegality, Change in Law in the 2011 Definitions also covers illegality that will occur within a specified number of days in the future. In addition, the 2011 Definitions give the parties the option, by electing **Avoidance** to apply, to require the Hedging Party to take commercially reasonable action to avoid the Change in Law ADE before it can trigger termination based on that Change in Law ADE.

67 What is Increased Performance Cost due to Change in Law?

Increased Performance Cost due to Change in Law in the 2011 Definitions is expanded from limb (Y) of the 2002 Definitions Change in Law definition, and relates to the incurrence of materially increased Performance Costs by the Hedging Party due to a change in law. Unlike limb (Y) of the 2002 Definitions Change in Law definition, which only covers costs in performing obligations under the transaction, **Performance Costs** in the 2011 Definitions also covers hedging costs as well as costs in connection with receiving payments and/or deliveries under the transaction.

68 What is Transaction Illegality?

Transaction Illegality is a new ADE. Unlike Change in Law, which deals with illegality in holding or dealing with a hedge position, Transaction Illegality deals with illegality in a party continuing to be a party to, or exercising its rights or performing its obligations under, the relevant transaction. Transaction Illegality may be considered similar in scope to Illegality Termination Event under Section 5(b)(i) of the ISDA 2002 Master Agreement although there are important differences. For example, the consequence of Transaction Illegality is termination of the transaction and payment of the **Cancellation Amount**, which is determined differently from the Close-out Amount for a termination due to an Illegality Termination Event under the ISDA 2002 Master Agreement.

69 How do the Legal Uncertainty and Inadvisability elections interact with the Change in Law related ADEs?

The **Legal Uncertainty** and **Inadvisability** elections allow parties to expand the types of situations that would constitute a Change in Law, Transaction Illegality and/or Increased Performance Cost due to Change in Law. The elections are intended to be used in markets (e.g. in closed markets) where there could be uncertainty in respect of the applicable laws and regulations, or where it would not be advisable for a party to enter into or maintain a transaction or its related hedge positions due to the private actions or statements of a government or regulatory authority, even though such activity may not be strictly illegal.

If neither Legal Uncertainty nor Inadvisability is elected, a change in law related ADE needs to result from an official change in law (e.g. official adoption or change in law or regulation, or in the interpretation of law or regulation by the relevant government or regulatory authority).

70 What does Legal Uncertainty do?

Legal Uncertainty modifies the change in law related ADEs in two principal ways. Firstly, as well as official change in law, a change in law related ADE can also result from any public statement or action of any government or regulatory authority. Secondly, instead of requiring the relevant activity to be or become illegal, there only needs to be a reasonable likelihood that the relevant activity (for Change in Law and Transaction Illegality) may be, or will become, illegal or (for Increased Performance Cost due to Change in Law) lead to the incurrence of increased cost as a result of the official change in law or public statement or action.

71 What does Inadvisability do?

The **Inadvisability** modifications go even further than Legal Uncertainty so that a change in law related ADE can result from any private statement or action (and not just official change in law or public statement or action) of any government or regulatory authority, notwithstanding that the relevant activity may not be strictly illegal. Significantly, an event (even if not illegal) could also constitute a Change in Law or Transaction Illegality ADE if the Hedging Party has suffered, or there is a reasonable likelihood that it will suffer, a material penalty, injunction, non-financial burden, reputational harm or other material adverse consequence in connection with the relevant activity specified in Change in Law or Transaction Illegality as a result of the relevant official change in law or public or private statement or action.

72 How have the hedging disruption related ADEs changed?

The number of hedging disruption related ADEs has increased from two (Hedging Disruption and Increased Cost of Hedging) in the 2002 Definitions to five in the 2011 Definitions, namely **Market Wide Hedging Disruption**, **Hedging Party Hedging Disruption**, **Foreign Ownership Event**, **Increased Cost of Hedging** and **Increased Capital Charge Event**. Market Wide Hedging Disruption, Hedging Party Hedging Disruption and Foreign Ownership Event in the 2011 Definitions have been expanded from Hedging Disruption in the 2002 Definitions and Increased Cost of Hedging is a refinement of its equivalent in the 2002 Definitions, whereas Increased Capital Charge Event is a new ADE.

73 Where is Hedging Disruption?

Hedging Disruption in the 2002 Definitions is replaced by two new ADEs, namely Market Wide Hedging Disruption and Hedging Party Hedging Disruption. Both ADEs introduce the concept of **Hedge Positions**, which expand the types of hedges covered to include any arrangements that are commercially reasonable to hedge any risk (other than non-performance risk by the other party). Also, both ADEs could only be triggered if the Hedging Party is unable, after using commercially reasonable efforts, to freely realize, recover or remit the proceeds of the hedge in order to address particular closed market issues.

74 What is the difference between Hedging Party Hedging Disruption and Market Wide Hedging Disruption?

Of the two ADEs, **Market Wide Hedging Disruption** is the harder to occur. This is because the Hedging Party and other Market Participants of a defined category need to be generally unable to hedge or obtain the proceeds of the hedge. On the other hand, **Hedging Party Hedging Disruption** requires that only the Hedging Party is unable to hedge or obtain the proceeds of its actual hedge. It is expected that parties wishing to apply hedging disruption will elect to specify either Market Wide Hedging Disruption or Hedging Party Hedging Disruption. Market Wide Hedging Disruption may be more appropriate for use in open markets where laws are generally applied across the relevant market, or where parties wish to specify a more objective ADE, whereas Hedging Party Hedging Disruption may be more appropriate for use in closed markets.

The Avoidance election is deemed to apply to Hedging Party Hedging Disruption but cannot be applied to Market Wide Hedging Disruption. This is because for Market Wide Hedging Disruption to occur in the first place, there needs to be no commercially practicable alternative hedge positions available to the Hedging Party and other market participants.

75 What is Foreign Ownership Event?

Foreign Ownership Event is a new ADE dealing specifically with hedging disruption due to a foreign ownership restriction imposed by any issuer of securities or any relevant government or regulatory authority. This ADE would be more relevant for closed markets and can be elected as an alternative if parties do not agree to elect the wider Hedging Party Hedging Disruption ADE.

76 What is Avoidance?

The **Avoidance** election gives parties the option to impose certain obligations on the Hedging Party to avoid an ADE before triggering the relevant ADE consequence. If an ADE occurs and Avoidance applies to that ADE, then a Hedging Party is obliged to take commercially reasonable action (including the establishment of alternative hedge positions) that would satisfy all the Avoidance Conditions to avoid the relevant ADE before triggering the consequence(s) of that ADE. The Avoidance election amplifies and consolidates existing concepts in the 2002 Definitions and ISDA Master Confirmation Agreements.

Parties can elect for Avoidance to apply to (but only to) the following ADEs: Change in Law, Foreign Ownership Event, Hedging Party Hedging Disruption (deemed to apply), Increased Cost of Hedging, Increased Performance Cost due to Change in Law, Increased Cost of Hedging and Loss of Synthetic Securities Borrow.

77 What are the Avoidance Conditions?

The **Avoidance Conditions** set out the limits of the action(s) the Hedging Party is expected to take to avoid an ADE, and cover matters relating to the legality, cost and commercial practicality of the relevant action.

78 How has Increased Cost of Hedging changed?

The 2011 Definitions refine the definition of **Increased Cost of Hedging** by expanding or in some cases clarifying the type of costs covered by the ADE. A new definition of **Hedging Costs** has been introduced, which includes costs relating to Hedge Positions (and not just relating to transactions or assets that hedge equity price risk). It also expressly excludes capital charges, brokerage commissions payable to the Hedging Party’s affiliates to the extent they exceed market rate and income tax.

79 What is Increased Capital Charge Event?

Increased Capital Charge Event is similar to Increased Cost of Hedging but relates to capital charges (which are expressly carved out from the definition of Hedging Costs) instead of Hedging Costs.

80 What are Hedge Losses?

The **Hedge Losses** provisions can be used to protect the Hedging Party in a Lehman-type bankruptcy scenario. Hedge Losses include commercially reasonable losses incurred by a Hedging Party due to payment or performance default by a hedge counterparty or a custodian (unless excluded). These types of losses are also taken into account in calculating the Cancellation Amount if an ADE consequence is triggered resulting in termination. Hedge Losses can be passed on to the non-Hedging Party through increased cost ADEs. So, if a counterparty to the Hedging Party in a Hedge Position defaults and the Hedging Party suffers losses as a result and those losses are not excluded from the definition of Hedge Losses, then the Hedging Party may recover those losses through the increased cost provisions or, if the transaction is terminated as a result, Cancellation Amount.

81 What are the principal changes to securities borrowing related ADEs?

The 2011 Definitions have significantly expanded the securities borrowing related ADEs from the original two events, namely Loss of Stock Borrow and Increased Cost of Stock Borrow (re-named as **Loss of Securities Borrow** and **Increased Cost of Securities Borrow**) to a total of seven events. The additional securities borrowing related ADEs are **Inability to Borrow**, **Loss of Synthetic Securities Borrow**, **Increased Collateral Percentage Event**, **Increased Long Divergence Event** and **Increased Short Divergence Event**.

Instead of referring to Shares, the 2011 Definitions securities borrowing related ADEs refer to a broader concept of **HP Securities**, which includes any share, depositary receipt or security constituent of an index that may be referenced by the relevant transaction or used in a Hedge Position for the relevant transaction.

The changes to the securities borrowing related ADEs have been made to bring them in line with market practice and to facilitate sound industry practice. Examples of these changes include the option to use a Hypothetical Broker Dealer standard, and expanding on or updating the provisions so that they more closely reflect how parties conduct securities borrowing in practice.

82 What are the principal changes to Loss of Stock Borrow and Increased Cost of Stock Borrow?

The 2011 Definitions have introduced three main changes to **Loss of Stock Borrow** and **Increased Cost of Stock Borrow** in the 2002 Definitions. First, a distinction between cash collateralised securities borrowing and uncollateralised or non-cash collateralised securities borrowing has been introduced to reflect market practice. Secondly, new concepts of securities borrowing by a Hypothetical Broker Dealer or a third party customer have been introduced as alternative standards to securities borrowing by the Hedging Party. Lastly, the

2011 Definitions expressly provide for two new ADEs that are related to Loss of Stock Borrow, namely Inability to Borrow and Loss of Synthetic Securities Borrow.

83 What is an Increased Collateral Percentage Event?

This ADE deals with the situation where the collateral required to be posted by the Hedging Party (or the Hypothetical Broker Dealer if specified by the parties) in connection with the securities borrow is more than the acceptable collateral threshold, and so the securities borrow becomes more costly.

84 What is an Increased Short Divergence Event and Increased Long Divergence Event?

These ADEs deal with market dislocations resulting in a divergence between the floating rate payable under the transaction and either the return from collateral posted in connection with any related securities borrow (where the Hedging Party holds a short position) or funding costs for the related hedge position (where the Hedging Party holds a long position) and where the extent of such divergence has exceeded a certain acceptable threshold. **Increased Short Divergence Event** is relevant where a Party is short the underlying securities, and the excess of the floating rate payable by such Party over the base collateral return rate is greater than a certain acceptable threshold. Conversely, **Increased Long Divergence Event** is relevant where a Party is long the underlying securities, and the excess of the funding rate of the cash required by the Party to fund the related hedge position over the floating rate payable to the Party is greater than a certain acceptable threshold.

85 What are increased cost events and what are their consequences?

Under the **Increased Cost of Hedging**, **Increased Cost of Stock Borrow**, **Increased Capital Charge Event**, **Increased Collateral Percentage Event**, **Increased Long Divergence Event**, **Increased Performance Cost due to Change in Law and Increased Short Divergence Event**, the Hedging Party is allowed to reclaim the relevant increased cost, provided that the Hedging Party provides effective notice of that increased cost to the other Party within a certain period after it becomes aware or (if earlier) should have become aware of the relevant increased cost event.

The increased cost events provide for similar consequences to Increased Cost of Hedging under the 2002 Definitions, namely payment by the non-Hedging Party to the Hedging Party of the relevant increased cost, adjustment of the transaction or termination of the transaction. In the case of the securities borrow related increased cost events, there is an additional alternative of finding a lending party to lend the shares to the Hedging Party.

86 What are decreased cost events?

The 2011 Definitions introduce a new concept of decreased cost events. They relate to the situation where the Hedging Party has claimed an increased cost and triggered the consequences of an increased cost event, but such costs have then subsequently decreased. There is a corresponding decreased cost event for each increased cost event. The decreased cost events automatically apply where the parties have applied the corresponding increased cost event unless excluded by the parties and they are only capable of being triggered after the corresponding increased cost event has been triggered.

87 Are there any ADEs specifically addressed at FX disruption?

The 2011 Definitions include three new ADEs related to foreign exchange or currency disruption events, namely **FX Hedging Disruption**, **FX Inbound Valuation Disruption** and **FX Settlement Disruption**, which are based on FX disruption provisions included in ISDA Master Confirmation Agreements for Asian and European emerging markets. The FX disruption ADEs are distinct from, and can operate concurrently with, the Hedging Disruption ADE, and Change in Law, with different consequences.

88 What is FX Hedging Disruption?

FX Hedging Disruption includes both a general limb and a specific limb. The general limb covers the inability to hedge any foreign exchange risk, while the specific limb covers events relating to non-transferability, inconvertibility and the inability to obtain a rate affecting the hedge positions of the Hedging Party, similar to the ISDA Master Confirmation Agreements for Asian and European emerging markets (but extended to cover non-transferability into the relevant local jurisdiction as well). Both limbs would apply if FX Hedging Disruption is elected as an ADE, but the party making the determination is different for each limb and Avoidance can apply to the general limb but not the specific limb. The consequence of FX Hedging Disruption is termination.

89 What is FX Settlement Disruption?

FX Settlement Disruption covers similar events to the specific limb of FX Hedging Disruption, but only applies where such events affect a payment obligation under the relevant transaction. The consequence of FX Settlement Disruption is postponement (subject to a long-stop date) or termination, at the parties' election. If postponement is elected, the 2011 Definitions also include certain electable provisions allowing the parties to apportion costs or risks associated with postponement and/or require the Hedging Party to instead pay in the local currency.

90 What is FX Inbound Valuation Disruption?

FX Inbound Valuation Disruption deals with restrictions in transfer of funds into a local jurisdiction resulting in the Hedging Party not being able to close out a short position in such jurisdiction. The consequence of FX Inbound Valuation Disruption is postponement (subject to a long-stop date).

91 Have Merger Event or Tender Offer changed?

Yes. Reverse mergers have been separated from Merger Event so that the consequences applicable to a **Reverse Merger Event** do not necessarily have to be the same as those that apply to a Merger Event. A new **High Tender Offer** ADE has been included, which as a default (which the parties can amend) captures tenders of between 50 per cent. and 100 per cent. of a company's stock.

92 How has the treatment of spin-offs changed?

Under the 2002 Definitions, spin-offs were expressed to fall within Potential Adjustment Events. The 2011 Definitions contemplate two separate Extraordinary Events relating to a distribution, issue or dividend of third party shares (**Spin-off – Acceptable Securities Exchange** and **Spin-off – Other**). The consequences available to parties following a spin-off include one of the forms of Calculation Agent Adjustment, reinvestment into the original security, splitting the transaction to cover both the original and the spin-off security or creating/adjusting a basket transaction to cover both the original and the spin-off security.

93 Why have "Dislocation" ADEs been introduced?

Four **Dislocation-related Additional Disruption Events** have been included in the 2011 Definitions as working group members wanted the flexibility to adjust or terminate a transaction if the underlying company's share price, trading volume or available free float changed significantly over a prescribed period. The way in which that change is measured and the extent of the change required is for parties to agree bilaterally or as part of Appendix/Matrix development.

94 What does the introduction of Announcement Event achieve?

Announcement Event is an ADE that occurs upon the announcement of an event which would constitute an Extraordinary Event (such as a Delisting, Tender Offer, Merger Event or Nationalization). The mere announcement of an event can have an impact on the value or trading volume of a share and so Announcement Event enables the parties to adjust or terminate the transaction without having to wait for the actual event to occur.

95 How do the 2011 Definitions treat an issuer insolvency?

An issuer insolvency features in **Security Transfer Restriction**, which is broadly in line with **Insolvency** under the 2002 Definitions. The **Insolvency Filing** ADE under the 2011 Definitions enables parties to capture the insolvency of material affiliates of the issuer as well as third party insolvency filings. The 2011 Definitions also include two new Bankruptcy ADEs, both of which follow the definition of Bankruptcy from the ISDA Credit Derivatives Definitions. One requires the parties to follow any relevant determination of Bankruptcy by a Credit Derivatives Determinations Committee. The other gives the Calculation Agent discretion to assess whether a bankruptcy has occurred.

96 Why is Cancellation Amount now a twelve page provision?

Cancellation Amount was a heavily discussed provision. The concept under the 2002 Definitions follows the replacement value approach embodied within the ISDA Master Agreement. It was felt that this was not appropriate in some cases, for example on a Nationalization where the share is no longer available. The new provision covers the perspective from which the Cancellation Amount is to be determined, the types of data input and the times as of which those data inputs can be taken, and how losses and gains stemming from hedge close-outs can be factored in.

97 How does the new Calculation Dispute Resolution Procedure work?

When compared with other asset classes, the Calculation Agent under equity derivative transactions has a less mechanical role. This is commonly addressed in inter-dealer trades by Co-Calculation Agent language. Primarily with dealer-client trades in mind, it was felt that the 2011 Definitions would be well served by including a **Calculation Dispute Resolution Procedure**. The parties can elect to apply the procedure either to assess whether or not a determination was commercially reasonable or to assess the appropriateness of a determination by way of dealer poll. The process contemplates the appointment of **Independent Dealers** as **Dispute Resolution Calculation Agents** who can, if the parties so choose, appoint a third party **Resolver** as a final arbiter.

F. WHAT NEXT?

98 When will the first ISDA Transaction Matrices be published?

ISDA and the industry have committed to the global supervisors to publish the first two ISDA Transaction Matrices and T-Supps for US and EU Variance Swaps by 31 August 2011 and to identify additional products for ISDA Transaction Matrix adoption on a rolling quarterly basis commencing in October 2011.

99 Will there be a Determinations Committee for equity derivatives as there is for credit derivatives?

Yes. Linklaters is acting for ISDA on the creation of an **Equity Derivatives Determinations Committee**.

Glossary of FAQs:

Linklaters

Further Information and Contacts

Linklaters acted as lead counsel to ISDA on the 2011 Definitions. For further information or assistance please contact one of the Linklaters 2011 Definitions team below or your usual Linklaters contacts:

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