

## **PRACTICE NOTES TO THE MULTILATERAL MASTER CONFIRMATION AGREEMENT FOR NON-DELIVERABLE FX TRANSACTIONS**

### 1. Introduction

The Foreign Exchange Committee (FXC), EMTA, Inc. (EMTA) and the FX Joint Standing Committee (FX JSC) published the Multilateral Master Confirmation Agreement for Non-Deliverable FX Transactions (“Multilateral Master Confirmation”) in October, 2007 to provide the market with an additional tool to facilitate the process of confirming non-deliverable forward FX transactions (“NDFs”) between counterparties. The Multilateral Master Confirmation follows from the Bilateral Master Confirmation Agreement for NDFs (“Bilateral Master Confirmation”), published by the cosponsors in December 2006, which is designed for execution between two counterparties.

The Financial Markets Lawyers Group (“FMLG”), which supports the work of the FXC, determined to develop a Multilateral Master Confirmation with three goals in mind. First, the Multilateral Master Confirmation should be available to be administered by any electronic trading or settlement system or organization (such as a trade association) by protocol, rules, or other form of agreement. The publishers encourage systems and organizations to consider the benefits of administering the Multilateral Master Confirmation in order to improve confirmation processes among their membership. At this time, the publishers understand that CLS Bank intends to administer the Multilateral Master Confirmation by changes to its Member Handbook and by protocol in order to apply its terms to NDF Transactions whose payments are processed and settled within CLS Bank.

Second, the Multilateral Master Confirmation is intended to be incorporated by reference as a whole by a system or organization (called a “Sponsor” in the Multilateral Master Confirmation), without changing any of its provisions. However, certain Sponsor-specific provisions would be set out in the Sponsor’s rules, protocol or other form of agreement, such as those relating to the adherence process described in Paragraph 2. In addition, certain default rules may be modified to meet the Sponsor’s individual requirements, such as designation of the Calculation Agent in Paragraph 10.

Third, the Multilateral Master Confirmation conforms closely to the Bilateral Master Confirmation’s substantive terms, in order to promote consistency in documentation for NDF Transactions across the marketplace. That is, like the Bilateral Master Confirmation, the Multilateral Master Confirmation incorporates by reference the terms of the 1998 FX and Currency Options Definitions (published by the International Swaps and Derivatives Association, Inc., EMTA, and the FXC) (“1998 Definitions”) and of currency-specific NDF Transaction confirmation templates published by EMTA. Accordingly, the Multilateral Master Confirmation offers counterparties the opportunity to streamline their Transaction Confirmations to certain material Economic Terms. Unlike the Bilateral Master Confirmation, the Multilateral Master Confirmation does not have a Schedule in which counterparties may make elections such as designation of a

Master Agreement and a Calculation Agent. Default rules for these types of elections have been built into the main body of the Multilateral Master Confirmation because it would apply across multiple counterparties. However, any two Adhering Parties are free to execute a Bilateral Master Confirmation that would apply to their NDF Transactions and supersede any inconsistent terms set out in a Multilateral Master Confirmation (see Paragraph 7 below).

The following Practice Notes further describe the terms of the Multilateral Master Confirmation. Capitalized terms in these Practice Notes have the meanings ascribed to them in the Multilateral Master Confirmation and the 1998 FX and Currency Option Definitions, unless otherwise defined.

#### Paragraph 1: Application

The Multilateral Master Confirmation applies to NDF Transactions between two Adhering Parties when, on or after the Effective Date, such NDF Transactions are: (1) entered through the facilities of a Sponsor, or (2) processed or settled (or when the underlying payments related to the NDF Transactions are processed or settled) through the facilities of a Sponsor. Accordingly, the Multilateral Master Confirmation would apply to NDF Transactions that fall under the rules/agreements/procedures of a Sponsor. If there are multiple Sponsors, this published form of the Multilateral Master Confirmation would apply to NDF Transactions between two Adhering Parties that are entered into or processed through the facilities of any of its Sponsors. However, its terms as administered by the relevant Sponsor would apply to NDF Transactions entered into or processed through the facilities of that Sponsor and not outside of that Sponsor. If counterparties wish to incorporate standard industry terms into NDF Transactions entered into or processed outside of a Sponsor, they should enter into a Bilateral Master Confirmation.

#### Paragraph 2: Effective Date

The Sponsor of the Multilateral Master Confirmation should determine the adherence process by which its terms will be incorporated by reference and applied to NDF Transactions among the Adhering Parties. The adherence process may involve the submission of adherence letters to a protocol or, alternatively, implementation of provisions in a Sponsor's rules, handbooks or membership agreements that are binding on all members.

If the adherence process includes a protocol, any requirements relating to the process should be specified in the protocol. This would include the designation of an Effective Date for the Multilateral Master Confirmation. If the process for adherence to a protocol is a finite "window" period, at the end of which all Adhering Parties are deemed to be bound to the Multilateral Master Confirmation, then a single Effective Date that falls after the end of the adherence process can be designated. If the adherence process is a "rolling" one, such that the protocol is continuously open for adherence, the Sponsor could add a provision to the protocol that specifies that as between two Adhering Parties,

the Effective Date will be the latest of their respective dates of adherence to the protocol. A similar approach may be taken if the Sponsor determines to bind its membership to the Multilateral Master Confirmation through its rules, handbooks, or other procedures. In such a case, the Sponsor could add a provision that specifies that the Sponsor's members will be deemed to be subject to the Multilateral Master Confirmation as of the time they become subject to the relevant rules, handbooks or other procedures, and that as between any two Adhering Parties, the Effective Date will be the latter of the dates on which they became members of the Sponsor.

A Sponsor also should consider how it will inform its membership in a timely manner of which of its members are currently Adhering Parties to the Multilateral Master Confirmation. In addition, a Sponsor should consider and delineate whether there will be a process for revocation of adherence to the Multilateral Master Confirmation. One possible approach is to allow any Adhering Party to revoke its adherence to the Multilateral Master Confirmation during a certain period of time on an annual basis. Another possible approach is to prohibit revocation of adherence except upon bilateral agreement between the revoking party and its counterparties. In addition, as noted below (see Paragraph 7), any two Adhering Parties may decide to enter into a Bilateral Master Confirmation whose terms would supersede any inconsistent terms contained in any Multilateral Master Confirmation.

#### Paragraph 3: FX Definitions

The definitions and provisions contained in the 1998 Definitions, and any amendments or modifications to the 1998 Definitions contained in the Master Agreement between two Adhering Parties, are incorporated into the Multilateral Master Confirmation. However, NDF Transactions that have Trade Dates prior to the effective date of any amendments or successor definitions to the 1998 Definitions will not be affected by those amendments or successor definitions, unless otherwise agreed by the Adhering Parties to that NDF Transaction. Any such amendments or successor definitions would apply to NDF Transactions only on a prospective basis. Two Adhering Parties are free to agree on a bilateral basis to a different default rule that would apply any such amendments or successor definitions retroactively to outstanding NDF Transactions.

#### Paragraph 4: Transaction Confirmation

A Transaction Confirmation between two Adhering Parties contains the Economic Terms of each NDF Transaction between them (which are specified in paragraph 6). Paragraph 4 provides that a Transaction Confirmation may be created in several ways, including by an exchange of electronic messages within an electronic trading or settlement system. Matching of electronic messages within a system that administers the Multilateral Master Confirmation is one way in which a Transaction Confirmation may be created, but matching is not specified as a requirement. Some systems instead operate by an exchange of electronic messages between parties that are not matched by the system.

While paragraph 4 would permit a Transaction Confirmation to be created through the facilities of a system, each firm should review with its counsel whether it would be comfortable with relying on a particular system to confirm its NDF Transactions, in light of applicable law, rules, and procedures specific to the system. For example, at the trade formation stage, firms should consider whether there is a risk that they may not have a mutual, accurate understanding of the terms of their NDF Transaction due to a technological error within the system. This risk is one that Adhering Parties should weigh in determining whether to eliminate bilateral confirmations outside of a system, even if it administers the Multilateral Master Confirmation. The publishers of the Multilateral Master Confirmation do not make any representations regarding whether firms will or should rely on any particular system to confirm their NDF Transactions. However, any system interested in administering the Multilateral Master Confirmation is encouraged to engage in dialogue with its membership and the publishers of the Multilateral Master Confirmation in order to formulate ways of satisfactorily mitigating risks associated with elimination of bilateral confirmations.

Paragraph 4 also specifies that the “Confirmation” between the Adhering Parties for purposes of their Master Agreement is made up of the Multilateral Master Confirmation and the Transaction Confirmation. Paragraph 5 contains a related provision for situations in which EMTA (or a recognized successor) has not published a currency specific template for a NDF Transaction in a particular Currency Pair. In such a case, certain terms bilaterally agreed between the Adhering Parties may be deemed to be part of their Transaction Confirmation (see Paragraph 5 below).

#### Paragraph 5: Relevant EMTA Template

Like the Bilateral Master Confirmation, the Multilateral Master Confirmation incorporates into each NDF Transaction governed by it the then effective template terms for the confirmation of a NDF Transaction in the relevant Currency Pair published by EMTA or a recognized successor, unless the Adhering Parties otherwise agree in a Transaction Confirmation. An example of the EMTA NDF Confirmation template terms that would be incorporated by reference into a NDF Transaction in the relevant Currency Pair is provided in the Practice Notes to the Bilateral Master Confirmation. These terms are non-Economic Terms (*e.g.*, Disruption Events and Disruption Fallbacks, definitions and provisions related to “Unscheduled Holiday” and “Valuation Postponement” for Price Source Disruption). EMTA may publish new NDF confirmation template terms in advance of their specified effective date in order to give the market notice of the new terms and time to make any necessary adjustments. Paragraph 5 provides that the new NDF confirmation template terms will not apply to a NDF Transaction in the relevant Currency Pair until the terms become effective. Only when the terms become effective will the NDF confirmation template fall under the definition of a Relevant EMTA Template in the Multilateral Master Confirmation. In addition, a Relevant EMTA Template’s terms will apply to NDF Transactions entered into on or after their effective date, but will not apply to or amend the terms of previously executed NDF Transactions, unless otherwise agreed by the two Adhering Parties.

Two Adhering Parties may agree bilaterally to deviate from the terms of a Relevant EMTA Template in their Transaction Confirmation. In the absence of a bilateral agreement, they could only do so if a Sponsor provided accommodation to Adhering Parties to deviate from the terms of a Relevant EMTA Template. It would be necessary for the Sponsor to provide a functionality (*e.g.*, a field in an electronic message format) in which Adhering Parties may agree to a specialized provision for it to become part of their Transaction Confirmation. However, a Sponsor may rely on the fact that Relevant EMTA Templates provide industry accepted terms on which to deal in NDF Transactions in particular Currency Pairs in determining to administer the Multilateral Master Confirmation and decline to provide a means of documenting deviations from those terms through the Multilateral Master Confirmation process.

If a Relevant EMTA Template is not in effect for a NDF Transaction in a particular Currency Pair, each counterparty is responsible for managing the confirmation of its own NDF Transactions. Outside of the Multilateral Master Confirmation, NDF Transactions can be confirmed bilaterally under a long-form confirmation or, if the counterparties have adopted the Bilateral Master Confirmation, under a short-form confirmation. Counterparties also may execute trade documentation for NDF Transactions outside of the facilities of a Sponsor and still have the benefit of streamlining their documentation by confirming the Economic Terms of NDF Transactions through the facilities of a Sponsor. The last sentence of Paragraph 5 provides that separate bilateral confirmations become part of the Transaction Confirmation between two Adhering Parties, and thus the Confirmation for purposes of their Master Agreement (see clause (y)). That is, absent a Relevant EMTA Template, clause (y) treats as part of the Transaction Confirmation any bilateral confirmations between two Adhering Parties outside of the Sponsor, so long as the confirmations are executed by the Adhering Parties. An oral agreement on the Trade Date of a NDF Transaction would not be sufficient for this purpose, nor would an exchange of two different forms of confirmations that the Adhering Parties ultimately do not execute. An executed confirmation must follow on or after the Trade Date for its terms to be treated as part of the Transaction Confirmation, and thus the Confirmation for purposes of their Master Agreement.

Absent a Relevant EMTA Template, counterparties also may determine to agree on a bilateral basis to apply certain terms generally to all NDF Transactions between them in the relevant Currency Pair (see clause (x)). Under this provision, the counterparties must explicitly agree to apply such terms on a general basis, and no precedent is set if the counterparties deal on such terms on one or more occasions. Clause (x) in the last sentence of Paragraph 5 treats such terms as part of the Transaction Confirmation, and thus the Confirmation for purposes of their Master Agreement.

#### Paragraph 6: Economic Terms

Paragraph 6 sets out the Economic Terms of each NDF Transaction that must be specified in the Transaction Confirmation. These Economic Terms are: Trade Date,

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

Electronic trading and settlement systems have different message formats, and it is possible that not all of them will permit specification of all of the Economic Terms in a Transaction Confirmation listed in Paragraph 6. However, parties should be free to agree to use the facilities of various electronic systems to confirm their NDF Transactions under the Master Confirmation. Accordingly, Paragraph 6 allows for the specification of different terms than those listed in Paragraph 6 of the Transaction Confirmation. This alternative is intended to facilitate use of different formats of electronic messaging, and not to provide a broader exception to the need to specify in the Transaction Confirmation the listed Economic Terms, which are material to a NDF Transaction.

Paragraph 6 further specifies that the Transaction Confirmation must provide, or the Adhering Parties must otherwise agree in the Transaction Confirmation, that Settlement is Non-Deliverable for a NDF Transaction to be governed by the Multilateral Master Confirmation. This requirement is intended to provide certainty on the universe of NDF Transactions between the parties that will be covered by the Multilateral Master Confirmation. If an electronic message format does not include a field for specifying that Settlement is Non-Deliverable, it must otherwise be clear from the terms of the Transaction Confirmation that the NDF Transaction is Non-Deliverable. For example, current practice is to include a fixing date in field 77d of the SWIFT MT 300 for a non-deliverable forward fx transaction. Other electronic systems may require use of a particular message type for non-deliverable forward fx transactions.

#### Paragraph 7: Priority

Paragraphs 7(a) and (b) of the rules of priority specify that the terms of the Confirmation of a NDF Transaction supersede those of the FX Definitions (including any amendments or successors to the 1998 Definitions, if they apply to a NDF Transaction in accordance with Paragraph 3). In addition, the terms of the Transaction Confirmation supersede those of the Master Agreement and a Relevant EMTA Template for the purpose of the relevant NDF Transaction.

Paragraph 7(c) of the rules of priority address when Adhering Parties to the Multilateral Master Confirmation also have executed a Bilateral Master Confirmation. In the event of any inconsistency between the Bilateral Master Confirmation and the Multilateral Master Confirmation, the Bilateral Master Confirmation will prevail with respect to NDF Transactions governed by it if it is executed after the Effective Date of

the Multilateral Master Confirmation, unless otherwise agreed by the Adhering Parties (see clause (i)). Conversely, the Multilateral Master Confirmation will prevail with respect to NDF Transactions governed by it (as specified in paragraph 1 on its scope) if its Effective Date is on or after the date on which the Bilateral Master Confirmation was executed by the Adhering Parties (see clause (ii)), unless otherwise agreed by the Adhering Parties.

If two Adhering Parties became subject to the Multilateral Master Confirmation on different dates (such as through a “rolling” protocol adherence process), the latter of their dates of adherence ordinarily will be the Effective Date for purposes of determining whether the Bilateral or Multilateral form of the Master Confirmation applies to their NDF Transactions (assuming both agreements otherwise would apply to the NDF Transactions and there are inconsistent terms). This result would be in keeping with the provision suggested to Sponsors that the Effective Date for purposes of paragraph 2, as between two Adhering Parties, would be the latest of the respective dates of their adherence to the protocol (discussed above). For example, assume Counterparty A is an Adhering Party to the Multilateral Master Confirmation as of January 15<sup>th</sup> and proceeds to execute a Bilateral Master Confirmation with Counterparty Party B as of February 15<sup>th</sup>, and Counterparty B becomes an Adhering Party to the Multilateral Master Confirmation as of March 15<sup>th</sup>. NDF Transactions that are entered between Counterparties A and B between February 15<sup>th</sup> and March 15<sup>th</sup> will be governed by the Bilateral Master Confirmation, unless they otherwise agree. NDF Transactions that are entered between Counterparties A and B after March 15<sup>th</sup> will be governed by the Multilateral Master Confirmation, unless they otherwise agree.

#### Paragraph 8: Quoting Dealer Disclaimer

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

#### Paragraph 9: Representations

The representations in paragraph 9 are standard legal enforceability and non-reliance representations also found in industry master agreements.

#### Paragraph 10: Calculation Agent

Paragraph 10 provides a default rule for the designation of the Calculation Agent for a NDF Transaction that applies unless the rules, protocol, or other form of agreement of the Sponsor provide otherwise. The appropriateness of this default rule should be considered in light of each potential Sponsor’s membership. The default rule provides that (1) both Adhering Parties will be Calculation Agents if they are Members of the Sponsor or dealer affiliates of a Member, (2) both Adhering Parties will be Calculation Agents if neither of them are Members of a Sponsor or dealer affiliates of a Member, and

(3) only the Member or its dealer affiliate will be the Calculation Agent if the other party is neither a Member or a dealer affiliate of a Member. Paragraph 10 also includes a dispute resolution provision that applies when two Adhering Parties to a NDF Transaction are both Calculation Agents.

#### Paragraph 11: Master Agreement

Paragraph 11 provides a default rule for the Master Agreement between any two Adhering Parties to a NDF Transaction. If the Adhering Parties have executed an ISDA Master Agreement which governs foreign exchange transactions, or an IFEMA, FEOMA or IFXCO, then that Master Agreement applies for purposes of the Multilateral Master Confirmation, as it is amended from time to time. However, if the Adhering Parties have not executed a Master Agreement, the Master Agreement that applies for purposes of the Multilateral Master Confirmation will be deemed to be the 2002 ISDA Master Agreement (Multicurrency-Cross Border) without any Schedule, except the governing law shall be New York law and the Termination Currency or Base Currency (as the case may be) shall be U.S. Dollars. The 2002 ISDA Master Agreement was selected as the default Master Agreement because its terms have become generally accepted in the industry. A Sponsor may modify this default rule if it is not appropriate to its own membership by otherwise specifying in its rules, protocol, or other form of agreement.

#### Paragraph 12: Governing Law/Jurisdiction

The Multilateral Master Confirmation has governing law and submission to jurisdiction provisions that are based on those elected, or deemed to be elected, in the Master Agreement between the two Adhering Parties to a NDF Transaction. This approach was taken because it would be appropriate for the law governing the Master Agreement between the two Adhering Parties to govern NDF Transactions entered and Confirmations executed by the Adhering Parties. These governing law and submission to jurisdiction provisions are separate from those that would govern any protocol or other form of agreement by which a Sponsor would administer the Multilateral Master Confirmation.

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