

# **SWISS MASTER AGREEMENT FOR OTC DERIVATIVE INSTRUMENTS (SMA OTC 2013)**

## **Introduction to the SMA OTC 2013**

### **1. General**

#### **1.1 Preliminary Remarks**

The Swiss Bankers Association<sup>1</sup> (Schweizerische Bankiervereinigung, Association suisse des banquiers, Associazione svizzera dei banchieri) revised its Swiss Master Agreement for OTC derivative instruments (SMA) of 2003 and published two revised versions in 2013:

- **a version without the option to incorporate "ISDA<sup>2</sup> Definitions" (SMA 2013, Non-ISDA Version)** (paragraph 2 below); and
- **a version with the option to incorporate certain "ISDA Definitions" (SMA 2013, ISDA Version)** (paragraph 3 below).

#### **1.2 Objectives of the Revision**

The revision of the SMA is aimed primarily at:

- updating the SMA 2003 to bring it in line with current market practice, in particular regarding: (i) the standard events of default (section 6.1 of the SMA 2013) and termination events (section 6.2 of the SMA 2013); (ii) the calculation of payments following early termination (section 8 of the SMA 2013); (iii) the interest owed upon default (section 9 of the SMA 2013); (iv) the notice details (section 12 of the SMA 2013); and (v) the exemption of FATCA withholding taxes from gross-up payments (section 5.5 of the SMA 2013 in connection with Annex 1 Part 1(e));

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<sup>1</sup> Swiss Bankers Association, Aeschenplatz 7, Postfach 4082, CH-4052 Basel, [www.swissbanking.org](http://www.swissbanking.org).

<sup>2</sup> International Swaps and Derivatives Association (ISDA), 360 Madison Avenue, 16<sup>th</sup> Floor, New York, NY 1017, [www.isda.org](http://www.isda.org). ISDA® is a registered trademark of the International Swaps and Derivatives Association, Inc.

- replacing the product-specific annexes of the SMA 2003 by "SMA Definitions", which may be used for the documentation of transactions in transaction confirmations; and
- allowing the users of the SMA to opt for the application of certain "ISDA Definitions" to document transactions entered into under the SMA.

## 2. SMA 2013, Non-ISDA Version

### 2.1 Introduction of SMA Definitions

The "SMA Definitions" (Annex 2 of the SMA) replace the product annexes of the SMA 2003. The SMA Definitions do not refer to ISDA Definitions (please see the relevance of "ISDA Definitions" for the ISDA-Version of the SMA 2013 under paragraph 3 below). They comprise – besides general definitions (Annex 2, Part A of the SMA) – definitions for the following types of transactions:

- **option transactions on shares, share baskets, indices and fixed income instruments** (Annex 2, Part B of the SMA);
- **interest rate transactions** (Annex 2, Part C of the SMA);
- **foreign exchange transactions, currency option transactions and bullion transactions** (Annex 2, Part D of the SMA); and
- **commodity transactions** (Annex 2, Part E of the SMA).

The parties may agree to add **further definitions** dealing with additional types of transactions (by adding such provisions to Annex 1). To the extent that the parties to an SMA wish to include such further definitions, these changes are made in the sole responsibility of the parties (i.e. the Swiss Bankers Association does not assume any responsibility for such provisions and does not approve such definitions).

### 2.2 Use of ISDA Definitions not permitted

The Non-ISDA Version of the SMA 2013 **must not be used in connection with ISDA Definitions**, because this would be in breach of the licensing agreement entered into between the Swiss Bankers Association and ISDA (please see

paragraph 3.4 below). In the event of a breach, this may lead to legal sanctions and the Swiss Bankers Association must assign its rights to ISDA.

### **3. SMA 2013, ISDA Version**

#### **3.1 Covered ISDA Definitions**

This version of the SMA 2013 was developed jointly with ISDA. In order to allow the inclusion of certain ISDA Definition, ISDA granted a license to the Swiss Bankers Association. Pursuant to the license agreement, the following ISDA Definitions may be used in transactions entered into under such SMA:

- **1998 FX and Currency Option Definitions;**
- **2006 ISDA Definitions;**
- **2002 ISDA Equity Derivatives Definitions;**
- **2003 ISDA Credit Derivatives Definitions;** and
- **2005 ISDA Commodity Definitions.**

#### **3.2 Using ISDA Definitions**

In order to use any such ISDA Definitions, a party must:

- enter into the **SMA 2013, ISDA Version**, and the "**ISDA Definitions Appendix**" (as published by the Swiss Bankers Association) with the other party;
- **be authorized by ISDA** for such use (e.g. as a result of being an ISDA member, by purchasing the relevant ISDA Definitions from ISDA (the Swiss Bankers Association cannot sell ISDA Definitions on behalf of ISDA) or as a result of receiving a copy of the relevant ISDA Definitions from the other party (provided that such other party is authorized by ISDA to do so)); and
- **when a transaction is entered into, agree with the counterparty which ISDA Definitions (or which sections of the "ISDA Definitions Appendix" to the SMA) are applicable.** This forms part of the essential terms of the contract (*essentialia negotii*). Also, the parties must include a reference to the relevant ISDA Definitions (or the relevant sections of the "ISDA

Definitions Appendix" of the SMA) in the **confirmation** documenting the transaction.

### **3.3 Application of "ISDA Definitions" optional**

Even if the parties have entered into the SMA 2013, ISDA Version, and the "ISDA Definitions Appendix", the use of "ISDA Definitions" remains optional. If the parties do not agree that ISDA Definitions are to be used for a transaction, the "SMA Definitions" set out in Annex 2 of the SMA 2013 will apply to such transaction (reference is made to paragraph 2 above – the "SMA Definitions" are identical in both the ISDA as well as the Non-ISDA Version of the SMA 2013).

Thus, it is possible to document – under one and the same SMA 2013, ISDA Version – some transactions under "ISDA Definitions" and others under "SMA Definitions".

### **3.4 Complying with the ISDA Copyright<sup>3</sup>**

The license granted by ISDA only allows the use of the SMA 2013, ISDA Version, and the "ISDA Definitions Appendix" for the **purpose of documenting transactions** (subject to the requirements listed above in paragraph 3.2). Any other use of these documents (e.g. their reproduction and distribution at seminars, be it for training or other purposes, or their inclusion in academic publications) requires the **prior written consent of the Swiss Bankers Association**.

Any breach of such copyright may result in legal sanctions. Under its license agreement entered into with ISDA, the Swiss Bankers Association must assign its rights to ISDA under such circumstances.

## **4. Miscellaneous**

### **4.1 Copyright of the Swiss Bankers Association**

The Swiss Bankers Association has a copyright regarding the SMA 2013 (Non-ISDA Version and ISDA Version) and any documents published by the Swiss Bankers Association in connection thereto (in any language versions). Any

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<sup>3</sup> Reference is made to the copyright wording at the bottom of the first page of the relevant documents.

amendments to such documents the parties wish to agree when entering into an SMA must be included in Annex 1 to the SMA.

The Swiss Bankers Association reserves the right to take legal action in the event that such copyright is breached.

#### **4.2 SMA 2003**

A pre-existing SMA 2003 does not necessarily need to be replaced by the new SMA 2013. Also, the parties are free to continue using the SMA 2003 even after the publication of the SMA 2013. However, it is each party's own responsibility to ensure that any agreements they are entering into are in compliance with applicable laws and regulations (e.g. by entering into appendices to any SMA 2003 they enter into, addressing current developments).

If the parties enter into an SMA 2013 (be it the ISDA or the Non-ISDA Version), a pre-existing SMA 2003 will be automatically replaced by the SMA 2013 and all transactions previously entered into under the SMA 2003 will be deemed to be entered into under the SMA 2013.

#### **4.3 Credit Support Appendix of 2008**

The Credit Support Appendix published in 2008 by the Swiss Bankers Association for the SMA 2003 has not yet been revised. However, it may also be used under the SMA 2013, provided that the parties make such changes as needed to bring it in line with the SMA 2013.<sup>4</sup> These changes are made in the sole responsibility of the parties.

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<sup>4</sup> For these purposes, at least the following amendments must be made:

- (i) in clause 1.2 (Exposure): the part of the sentence "pursuant to section 5.6 of the Master Agreement" must be replaced by "that would become due and payable if an early termination of the Master Agreement in respect of all Transactions entered into thereunder had occurred as of such Valuation Date";
- (ii) in clause 2.7 (Non-Delivery of Eligible Credit Support): the part of the sentence "pursuant to section 5.3 a) of the Master Agreement" must be replaced by "pursuant to section 6.1 f) of the Master Agreement";
- (iii) in clause 4 (Secured Claims): the part of the sentence "pursuant to sections 5.3 to 5.5 of the Master Agreement, i.e. the liquidation value of Transactions pursuant to section 5.6 of the Master Agreement." must be replaced by ", i.e. any payment that become

#### 4.4 Legal Opinions

Legal opinions that have been commissioned by the Swiss Bankers Association covering the different versions of the SMA may be obtained from the Swiss Bankers Association against the payment of a fee.

The legal opinions may only **be used for the purposes of documenting transactions.**

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due and payable upon early termination of the Master Agreement in respect of all Transactions entered into thereunder."; and

- (iv) in clause 7.2 (Interpretation): the part of the sentence "(see section 0 para. 3 of the Master Agreement)" must be deleted.