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ISDA Publishes Updated General Disclosure Statement for Transactions

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In 2013, the International Swaps and Derivatives Association (“ISDA”) started publishing the General Disclosure Statement for Transactions document (“General Disclosure”) with annexes containing disclosures of risks that are specific to certain classes of reference assets, such as interest rates, foreign exchange rates and currencies, credit instruments, asset-backed instruments, equities, and commodities. The General Disclosure, together with asset-specific annexes, is intended to help swap dealers and major swap participants comply with the external business conduct rule disclosure requirements (17 CFR 23.431, 17 CFR 23.450(g) and 17 CFR 23.605(e)) enacted by the Commodity Futures Trading Commission (“CFTC”) under Dodd-Frank Wall Street Reform and Consumer Protection Act.

At least biannually, the Disclosure Package is reviewed and updated to reflect changes in relevant transaction disclosure requirements.

On November 14, ISDA published an updated General Disclosure. The updates include:

- a disclaimer of liability for hedging transactions failing to have the desired effect;
- a warning that a failure of the custodian holding collateral posted by a party under a transaction may result in default that party defaulting under the transaction documentation;
- warning that certain actions of the collateral custodian may result in additional costs;
- a new Section V.G that addresses risks associated with pre-hedging activity; and

- certain technical clarifications.

The most noteworthy update is the addition of Section V.G, which is intended to provide a more robust pre-hedging disclosure as a response to recent CFTC enforcement actions where CFTC raised issues of inadequate disclosure of pre-hedging activities and frontrunning (see Enhancing Disclosure Requirements for Derivatives for a more detailed discussion of these CFTC enforcement actions). Swap dealers and major swap participants should use the updated General Disclosure to alleviate the risk of becoming subject to regulatory scrutiny in connection with their pre-hedging activities.
