

MEMA ISDA Master Agreement Schedule Template

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3. In using this template, MEMA members agree to consult their own legal and other advisors prior to their use of this template or any information it contains.
4. This Schedule template assumes that the Credit Support Annex will be included in the Agreement.
5. If one party is a US municipal or other governmental entity, more appropriate Schedules, or additional Schedule provisions, may be found on the ISDA website.

ISDA International Swaps and Derivatives Association, Inc.

Schedule to the Master Agreement

dated as of \_\_\_\_\_, \_\_\_\_\_

between

Party A Name, a \_\_\_\_\_ organized under the laws of the State of \_\_\_\_\_.

Party B Name, a \_\_\_\_\_ organized under the laws of the State of \_\_\_\_\_.

(“Party A”)

(“Party B”)

Part 1. Termination

- (a) “Specified Entity” means in relation to Party A and Party B: None.
(b) “Specified Transaction” will have the meaning specified in Section 14 of this Agreement except that such term is amended by adding in the eighth line after “currency option” the words “, agreement for the purchase, sale or transfer of any Commodity or any other commodity trading transaction.” For this purpose, the term “Commodity” means any tangible or intangible commodity of any type or description (including, but not limited to electric power, electric power capacity, natural gas and related products and services.
(c) The “Cross Default” provisions of Section 5(a)(vi), as amended herein, will apply to Party A and to Party B.
(i) Section 5(a)(vi) is amended by inserting before the final semi-colon at the period at the end of Section 5(a)(vi) the following:
“, provided, however, that notwithstanding the foregoing, an Event of Default shall not occur under either (1) or (2) above if, as demonstrated to the reasonable satisfaction of

Comment: Note that ISDA is the registered trademark of the International Swaps and Derivatives Association, Inc. Both the Schedule to the 1992 ISDA Master Agreement and the Schedule to the 2002 Master Agreement are ISDA copyrighted documents.

Comment: This template is based on the 1992 Multicurrency Master, however as noted below, certain 2002 Master provisions have been incorporated. The result is a hybrid, but also represents what is commonly seen in ISDA Master Agreements between dealers in wholesale electric commodities.

Comment: Part 1 allows the parties to customize the provisions associated with early termination.

Comment: One or both parties may name specified entities, or third parties, which may be joined to certain of the default or termination provisions (Section 5(a)(v)-(vii) and 5(b)(iv)). Meaning that such a default between the Specified Entity and one of the parties would give the party not at fault the right to close out all transactions. It is not necessary to name a Credit Support Provider, they are automatically joined in the event of a termination/closeout. The idea here is to include those entities whose fortunes are closely linked to the contracting party, for instance parent companies or other affiliates. This option does not appear to be widely used in the energy industry [1]

Comment: The term “Specified Transaction” is clarified by adding energy commodity transactions. In other words, early termination can be triggered here due to an event of default or other issue under some other agreement between the parties. A default under such other agreement would constitute a default under the ISDA, and allow the party [2]

Comment: This is the basic Cross Default provision, it catches defaults in relation to borrowed money in agreements between either of the parties or their Specified Entity or Credit Support Provider with any third party. Such a default must exceed a threshold (this threshold is different than the collateral threshold, which is addressed [3]

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the other party, (a) the event or condition referred to in (1) or the failure to pay referred to in (2) is a failure to pay caused by an error or omission of an administrative or operational nature; and (b) funds were available to such party to enable it to make the relevant payment when due; and (c) such relevant payment is made within three Business Days following receipt of written notice from an interested party of such failure to pay.”

(ii) **“Specified Indebtedness”** will have the meaning specified in Section 14 of this Agreement.

**Comment:** Meaning borrowed money.

(iii) **“Threshold Amount”** means

**Comment:** Cross Default threshold - setting the amount is up to the parties. Typically set at a high figure. Some set it at a % of shareholder equity.

(A) Party A’s [or Party A’s Credit Support Provider]; \_\_\_\_\_ USD; and

(B) Party B’s [or Party B’s Credit Support Provider]; \_\_\_\_\_ USD

(d) The **“Credit Event Upon Merger”** provisions of Section 5(b)(iv), as amended herein, will apply to Party A and to Party B:

**Comment:** The rationale for this Termination Event is that each party should be allowed to terminate in the case of a counterparty that has been taken over by or merges with another party and as a result becomes a much worse credit risk than it was before. The reason for the modified language is to incorporate the 2002 ISDA language which is broader and a common modification of the 1992 ISDA Master.

Section 5(b)(iv) is deleted in its entirety and replaced with the following (italicized text reflects modifications from the ISDA Master Agreement)

**Credit Event Upon Merger.** If “Credit Event Upon Merger” is specified in the Schedule as applying to the party, such party (“X”), any Credit Support Provider of X, or any applicable Specified Entity of X: *(1)(A) consolidates or amalgamates with, or merges with or into, or transfers all or substantially all its assets to, or reorganizes, reincorporates, or reconstitutes into or as* another entity *or (B) enters into any agreement providing for any of the actions described in (A) and (2) such action described in (1)(A) or (1)(B) does not constitute an event described in Section 5(a)(viii) but the creditworthiness of the resulting, surviving or transferee entity is materially weaker as determined by commercially reasonable judgment under the current market conditions* than that of X, such Credit Support Provider, or Specified Entity, as the case may be, immediately prior to such action (and, in such event, X or its successor or transferee will be the Affected Party); *provided, however, that the foregoing action or event shall not constitute a Termination Event so long as in connection with or after such action or Event, X or its successor or transferee provided (or causes to be provided) to the other party (“Y”) within two (2) Local Business Days of Y’s written demand therefor Eligible Credit Support in an amount satisfactory to Y in its sole discretion.*

**Comment:** Not necessary to select in either US or Canada, it is related to the bankruptcy laws in certain other countries (ISDA Master Agreements are used throughout the world).

(e) The **“Automatic Early Termination”** provisions of Section 6(a) will not apply to Party A and will not apply to Party B.

**Comment:** Very common selection. MQ involves obtaining arm’s length quotes from dealers to determine the value of the Transactions to be terminated. Second Method means that if the net close out amount is due to the defaulting party, it is paid to the defaulting party. Under First Method it is not paid to the defaulting party, and is essentially a windfall to the non-defaulting party.

(f) **Payments on Early Termination.** For the purpose of Section 6(e) of this Agreement, Market Quotation and the Second Method will apply.

(g) **“Termination Currency”** means \_\_\_\_\_ Dollars. (US or Canadian)

**Comment:** Currency into which all Transactions are converted at close out.

(h) **“Additional Termination Event”** will apply.

**Comment:** If parties would like to add Termination Events, do it here.

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Section 5(b) is amended by (1) deleting the word “or” at the end of Section 5(b)(iv), (2) deleting the period at the end of Section 5(b)(v) and replacing the period with “; or” and (3) adding the following new Section 5(b)(vi):

**“Force Majeure Event.”** After giving effect to any applicable provision, disruption fallback or remedy specified in, or pursuant to, the relevant Confirmation or elsewhere in this Agreement, by reason of any event or circumstance, including without limitation, any natural, technological, political or governmental (which for greater certainty includes an act of state) or similar event or circumstance occurring after a Transaction is entered into, on any day:-

**Comment:** The template includes a commonly added Force Majeure Termination Event, which is a modified version of the Force Majeure provision that has been incorporated as standard in the 2002 Master. Note that this FM is something that prevents the delivery of \$ or paper, not the delivery of power.

(1) the Office through which such party (which will be the Affected Party) makes and receives payments or deliveries with respect to such Transaction is prevented from performing any absolute or contingent obligation to make a payment or delivery in respect of such Transaction, from receiving a payment or delivery in respect of such Transaction or from complying with any other material provision of this Agreement relating to such Transaction (or would be so prevented if such payment, delivery or compliance were required on that day), or it becomes impossible or impracticable for such Office so to perform, receive or comply (or would be impossible or impracticable for such Office so to perform, receive or comply if such payment, delivery or compliance were required on that day); or

(2) such party or any Credit Support Provider of such party (which will be the Affected Party) is prevented from performing any absolute or contingent obligation to make a payment or delivery which such party or Credit Support Provider has under any Credit Support Document relating to such Transaction, from receiving a payment or delivery under such Credit Support Document or from complying with any other material provision of such Credit Support Document (or would be so prevented if such payment, delivery or compliance were required on that day), or it becomes impossible or impracticable for such party or Credit Support Provider so to perform, receive or comply (or it would be impossible or impracticable for such party or Credit Support Provider so to perform, receive or comply if such payment, delivery or compliance were required on that day), so long as such event or circumstance was not anticipated at the date of entering into the Transaction (or, in the case of the Early Termination Amount, the date of entering into this Agreement), is beyond the control of such Office, such party or such Credit Support Provider, as appropriate, and such Office, party or Credit Support Provider could not, after using all reasonable efforts (which will not require such party or Credit Support Provider to incur a loss, other than immaterial, incidental expenses), overcome such prevention, impossibility or impracticability.

- (i) “Additional Event of Default” will apply.

**Comment:** If the parties would like to add Events of Default, do it here

Section 5(a)(vii) is amended by (1) deleting the word “or” at the end of Section 5(a)(vii), (2) deleting the period at the end of Section 5(a)(viii) and replacing the period with “; or” and (3) adding the following new Section 5(a)(ix):

**“Failure to Provide Adequate Assurance.”** The failure of either party (the “Failing Party”) to provided Adequate Assurance to the other party (the “Demanding Party”) within forty-eight (48) hours, but at least one (1) Business Day, or a written request by the Demanding Party when the request is based on the Demanding Party’s good faith belief that the ability of the Failing Party to perform its obligations is materially impaired under this Agreement.

**Comment:** Another common addition. There are variations on this language, but this is fairly typical of an adequate assurance clause. Each party is reserving the right to request additional assurance of performance in the event of unanticipated economic or other events that affect the counterparty. The parties could delete this section (i) if they plan to provide a collateral threshold in the CSA, however some parties provide both a hard trigger (the collateral threshold) and the less objective (but broader) adequate assurance clause.

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For purposes of this section, “**Adequate Assurance**” means any financial security in a form and amount commercially reasonably satisfactory to the Demanding Party, provided further, that if such financial security is in a form which would qualify as Eligible Credit Support in the Credit Support Annex, if one exists, then upon receipt by Demanding Party, such financial security shall be treated as if it is Posted Collateral or Posted Credit Support; provided, however, such Adequate Assurance shall not be included in the calculation of Delivery Amount or Return Amount as defined in Paragraph 3.

**Part 2.**

**Comment:** Tax Reps

**[Option A] Tax Representation (Party A and Party B are both US parties)**

**Comment:** Parties should select either Option A (both US) or Option B (one US and one CA). Careful to ensure that the appropriate rep is tied to the appropriate counterparty. Underlying notion is that no withholding tax will be assessed by the relevant jurisdiction, which is likely the case for the type of transactions contemplated between MEMA members.

- (a) **Payer Tax Representations.** For the purpose of Section 3(e) of this Agreement, Party A and Party B hereby make the following representation:

It is not required by any applicable law, as modified by the practice of any relevant governmental revenue authority, of any Relevant Jurisdiction to make any deduction or withholding for or on account of any Tax from any payment (other than interest under Section 2(e), 6(d)(ii) or 6(e) of this Agreement) to be made by it to the other party under this Agreement.

In making this representation, it may rely on:

- (i) the accuracy of any representations made by the other party pursuant to Section 3(f) of this Agreement,
- (ii) the satisfaction of the agreement contained in Section 4(a)(i) or 4(a)(iii) of this Agreement and the accuracy and effectiveness of any document provided by the other party pursuant to Section 4(a)(i) or 4(a)(iii) of this Agreement; and
- (iii) the satisfaction of the agreement of the other party contained in Section 4(d) of this Agreement;

*provided* that it shall not be a breach of this representation where reliance is placed on clause (ii) and the other party does not deliver a form or document under Section 4(a)(iii) by reason of material prejudice to its legal or commercial position.

- (b) **Payee Tax Representations**

**Comment:** Typically the parties supply their US taxpayer identification number, and some parties require a W-9 as part of the Part 3 document exchange below.

For the purpose of Section 3(f), Party A and Party B hereby make the following representation:

Each payment received or to be received by it in connection with this Agreement will be effectively connected with its conduct of a trade or business in the United States of America.

Party A is a \_\_\_\_\_ organized under the laws of the State of \_\_\_\_\_. Party A is a U.S. person within the meaning of Section 7701 of the Internal Revenue Code and its U.S. taxpayer identification number is \_\_\_\_\_.

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Party B is a \_\_\_\_\_ organized under the laws of the State of \_\_\_\_\_. Party B is a U.S. person within the meaning of Section 7701 of the Internal Revenue Code and its U.S. taxpayer identification number is \_\_\_\_\_.

**Part 2.**

**[Option B] Tax Representation (Party A is a Canadian party, Party B is a US party)**

(a) **Payer Representations.** For the purpose of Section 3(e) of this Agreement:

(i) Party A and Party B each make the following representation:—

It is not required by any applicable law, as modified by the practice of any relevant governmental revenue authority, of any Relevant Jurisdiction to make any deduction or withholding for or on account of any Tax from any payment (other than interest under Section 9(h) of this Agreement) to be made by it to the other party under this Agreement. In making this representation, it may rely on (i) the accuracy of any representations made by the other party pursuant to Section 3(f) of this Agreement, (ii) the satisfaction of the agreement contained in Section 4(a)(i) or 4(a)(iii) of this Agreement and the accuracy and effectiveness of any document provided by the other party pursuant to Section 4(a)(i) or 4(a)(iii) of this Agreement and (iii) the satisfaction of the agreement of the other party contained in Section 4(d) of this Agreement, except that it will not be a breach of this representation where reliance is placed on clause (ii) above and the other party does not deliver a form or document under Section 4(a)(iii) by reason of material prejudice to its legal or commercial position.

(b) **Payee Representations.** For the purpose of Section 3(f) of this Agreement

(i) Party A and Party B each make the following representation:—

It is fully eligible for the benefits of the “Business Profits” or “Industrial and Commercial Profits” provision, as the case may be, the “interest” provision or the “Other Income” provision, if any, of the Specified Treaty with respect to any payment described in such provisions and received or to be received by it in connection with this Agreement and no such payment is attributable to a trade or business carried on by it through a permanent establishment in the Specified Jurisdiction.

“*Specified Treaty*” means with respect to Party A and Party B: Canada – United States Tax Convention, (1980) as amended from time to time

“*Specified Jurisdiction*” means with respect to Party A United States of America

“*Specified Jurisdiction*” means with respect to Party B Canada

(ii) Party A makes the following representations:

No part of any payments received or to be received by Party A in connection with this Agreement is attributable to a trade or business carried on by it in the U.S.

It is a “foreign person” (as that term is used in section 1.6041-4(a)(4) of United States Treasury Regulations) for United States federal income tax purposes.

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Any payments received by Party A will not be received on an extension of credit made pursuant to a loan agreement entered into in the ordinary course of its trade or business, as described in Section 881(c)(3)(A) of the Internal Revenue Code of 1986 (as amended).

(iii) Party B makes the following representation:

It is a "U.S. person" (as that term is used in section 1.1441-4(a)(3)(ii) of United States Treasury Regulations) for United States federal income tax purposes.

Deleted: ¶  
Formatted: Bullets and Numbering

**Part 3.  
Agreement to Deliver Documents**

For the purpose of Section 4(a)(i) and Section 4(a)(ii) of this Agreement, each party agrees to deliver the following documents, as applicable:

Party required to deliver document	Form/Document/Certificate	Date by which to be delivered	Covered by Section 3(d) Representation
Party A and B	Evidence of the authority and true signatures of each official or representative signing this Agreement or, as the case may be, a Confirmation, on its behalf.	On or before execution of this Agreement and, upon request, before each Confirmation forming a part of this Agreement.	Yes
Party A and B	Certificate of authorization signed by the Secretary or comparable officer, (and each Party's Credit Support Provider, as applicable) evidencing the authorization of the execution and delivery of this agreement, any Confirmation and any Credit Support Document and the performance of its or their obligations thereunder.	Upon execution of this Agreement, and promptly thereafter upon reasonable demand by the other party.	Yes
Party A and B	A copy of the annual report for each party and if applicable, its Credit Support Provider, containing audited or certified financial statements for the most recently ended financial year.	Upon request, as soon as publicly available	Yes

**Comment:** The documents specified in the table below are typically exchanged at the point of execution or shortly thereafter. Can include other items that a party may request of the other, for instance legal opinions on the ability of a party to conduct financials, or acknowledgement of the risk of financial transactions. Careful when including requests for unaudited quarterly financials, may not be possible to answer "Yes" to the Section 3(d) representation. If guarantees are also noted, the Section 3(d) rep may also be inappropriate.

**Deleted:** <#>Party A makes the following representation:¶  
It is a "foreign person" (as that term is used in section 1.6041-4(a)(4) of United States Treasury Regulations) for United States federal income tax purposes. ¶  
<#>Party A makes the following representation:¶  
Any payments received by Party A will not be received on an extension of credit made pursuant to a loan agreement entered into in the ordinary course of its trade or business, as described in Section 881(c)(3)(A) of the Internal Revenue Code of 1986 (as amended).¶

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<b>Party required to deliver document</b>	<b>Form/Document/Certificate</b>	<b>Date by which to be delivered</b>	<b>Covered by Section 3(d) Representation</b>
Party A and B	Duly executed Credit Support Documents in the form attached hereto as Schedule 1.	Upon execution of this Agreement	Yes
Party A and B	Any document required or reasonably requested to allow the other party to make payments under the Agreement without any deduction or withholding for or on account of any Tax or with such deduction or withholding at a reduced rate.	Promptly after the earlier of (i) reasonable demand by either party; or (ii) learning that such form or document is required.	Yes
Party A or Party B	For CA/US cross border agreement, IRS Form W-8BEN, IRS Form W-8ECI, IRS Form W-9 as required	(i) Upon execution of this Agreement, and (ii) promptly thereafter upon reasonable demand by the other party.	Yes
Party A and B	Such other documents as the other party may reasonably request	Promptly after the earlier of (i) reasonable demand by either party; or (ii) learning that such form or document is required.	Yes

**Part 4.  
Miscellaneous.**

- (a) **Addresses for Notices.** For the purpose of Section 12(a) of this Agreement:

Address for notices or communications to Party A:

\_\_\_\_\_

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\_\_\_\_\_  
 \_\_\_\_\_  
 Attention: \_\_\_\_\_  
 Fax: \_\_\_\_\_  
  
 Phone: \_\_\_\_\_

Address for notices or communications to Party B:

\_\_\_\_\_  
 \_\_\_\_\_  
 Attention: \_\_\_\_\_  
 Fax: \_\_\_\_\_  
 Phone: \_\_\_\_\_

- (b) **Process Agent.** For the purpose of Section 13(c):  
 Party A appoints as its Process Agent: Not applicable.  
 Party B appoints as its Process Agent: Not applicable.
- (c) **Offices.** The provisions of Section 10(a) will apply to this Agreement.
- (d) **Multibranch Party.** Neither Party A nor Party B is a Multibranch Party for the purpose of Section 10(c) of this Agreement.
- (e) **Calculation Agent.** The Calculation Agent is Party A [B] unless otherwise agreed in a Confirmation in relation to the relevant Transaction; *provided, however,* if Party A [B] is the Defaulting Party, or a Potential Event of Default has occurred and is continuing with respect to Party A [B], the Calculation Agent shall be Party B [A] until such time as Party A [B] is no longer a Defaulting Party. In the event a calculation or determination is disputed, the parties shall first endeavor to resolve such dispute. If the parties are unable to resolve such dispute within ten (10) Business Days, the parties shall mutually select a dealer in the applicable commodity to act as calculation agent with respect to the issue in dispute, and the decision of such party shall be final and binding upon Party A and Party B absent manifest error. The cost of the substitute calculation agent shall be borne equally by the parties.
- (f) **Credit Support Document.** Details of any Credit Support Document:  
 Party A and Party B: The Credit Support Annex attached hereto.  
 [Party A: A Guaranty issued by \_\_\_\_\_].  
 [Party B: A Guaranty issued by \_\_\_\_\_].

**Comment:** Certain of the miscellaneous provisions are not likely applicable in the case of two North American counterparties who transact in energy derivatives. Process Agent, Offices and Multibranch parties are examples of selections that are likely unnecessary for MEMA members. The usual practice is to note that they are "NA" rather than deleting the item from the Schedule altogether.

**Comment:** The term "Calculation Agent" is not defined in the ISDA Master Agreement but can be found in the Definitions documents. The Calculation Agent is called upon to act in good faith and in a commercially reasonable manner. Its typical duties are to determine floating rates or prices, calculate payments to be made, and verifying if a Market Disruption Event has occurred.

**Comment:** Note here is the Credit Support Annex is included and any other "Credit Support Documents." Such documents might include a guaranty or letter of credit.

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(g) **Credit Support Provider**

[Credit Support Provider means in relation to Party A: \_\_\_\_\_],

[Credit Support Provider means in relation to Party B: \_\_\_\_\_].

(h) **Governing Law** This Agreement will be governed by and construed in accordance with the law of the State of New York (without reference to choice of law doctrine).

(i) **Affiliate** will have the meaning specified in Section 14.

(j) **Netting of Payments** Subparagraph (ii) of Section 2(c) will not apply to any Transactions in the same Commodity starting from the date of this Agreement, such that netting will apply to Transactions in the same Commodity from the date of this Agreement.

(k) **Calculation Period(s) and Payment Date** The Calculation Period(s) and Payment Date for payments subject to Section 2(a)(ii) shall be as provided in the relevant Confirmation, or if not specified in the relevant Confirmation shall be as follows:

**Calculation Period.** Each calendar month during the term of a Transaction.

**Payment Date.** Ten (10) Business Days following the end of each Calculation Period.

**Part 5.**  
**Other Provisions**

(a) **Definitions** Unless otherwise specified in a Confirmation, this Agreement and each Transaction between the parties are subject to the 2000 ISDA Definitions and the 1993 ISDA Commodity Derivatives Definitions and the 2000 Supplement to the 1993 ISDA Commodity Derivatives Definitions, as each of them may be amended, supplemented, updated or restated, each as published by the International Swaps and Derivatives Association, Inc. (the “Definitions”), and will be governed in all relevant respects by the provisions set forth in the Definitions. The provisions of the Definitions are incorporated by reference in and shall be deemed a part of this Agreement, except that references in the Definitions to a “Swap Transaction” shall be deemed references to a “Transaction” for purposes of this Agreement. In the event of any inconsistency between the provisions of this Agreement and the Definitions, this Agreement will prevail.

(b) **Confirmations** Each Confirmation shall be substantially in the form of one of the Exhibits to the Definitions or in such other form as the parties may agree. On or promptly following the date the parties reach agreement on a Transaction, Party B will send to Party A a Confirmation of such Transaction. If Party A has not accepted or disputed the Confirmation within two (2) Local Business Days after it was sent to Party A, the Confirmation shall be deemed binding as sent, absent manifest error.

(c) **Set-off and Conditions to Payment** Section 6 will be amended by adding at the end thereof the following new subsection (f):

**Comment:** If you have a guarantor.

**Comment:** ISDA Master Agreement is intended to be fully effective under the laws of the State of New York. The language in brackets means that the law of NY applies, even if the parties are organized elsewhere.

**Comment:** The term “Affiliate” has limited meaning under the Agreement, nevertheless ensure that you understand where and how it is used. It is possible to modify the definition, for instance the parties could deem that each has no affiliates, or the parties could be deemed to not have affiliates for certain purposes, such as “absence of litigation” in Section 3(c).

**Comment:** This is confusing, but it means that netting applies – for all transactions that are in the same currency, and that are due on the same date.

**Comment:** Industry practice, typically this is included in a confirm rather than the master agreement. This is intended to document the standard practice.

**Comment:** All other customized provisions, template includes very common “others.”

**Comment:** This language provides for the most commonly incorporated definitions, however certain parties are now including the 2005 Commodity Definitions. The Definitions booklets also contain sample confirmations forms which may be useful.

**Comment:** Parties need to agree to some sort of protocol/format for confirmations, including the failure by one or both parties to send a confirmation. The example provided here is very simple. The parties may want to look to the procedure they have agreed to subject to the MEMA agreement. It could be advantageous to maintain a consistent process whether the deal is physical or financial.

**Comment:** This is very similar to the 2002 Master set off language. It provides for close out of debts subject to this agreement and any open physical transactions between the parties subject to the MEMA tariff. Only the non-defaulting party can invoke set off ... [4]

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**Set-off.** Any amount (the “Early Termination Amount”) payable to one party (the “Payee”) by the other Party (the “Payer) under Section 6(e), in circumstances where there is a Defaulting Party or one Affected Party in the case where a Termination Event under Section 5(b)(iv) has occurred, will, at the option of the party (“X”) other than the Defaulting Party or the Affected Party (“Y”) (and without prior notice to Y), be reduced by its set-off against any amount(s) (the “Other Agreement Amount”) payable (whether at such time or in the future or upon the occurrence of a contingency) by the Payee to the Payer (irrespective of the currency, place of payment or booking office of the obligation). To the extent that any Other Amounts are so set off, those Other Amounts will be discharged promptly and in all respects. X will give notice to Y of any set-off affected under this Section 6(f).

**Comment:** A set-off clause should be added. The notion is, in the event of a default or termination event, that the “innocent” party should be able to recoup amounts owed due to all undertakings between the parties (for instance, under both the ISDA and the MEMA tariff). There are many examples of set-off language. The suggested language is fairly common and based on the 2002 ISDA Master Agreement. Note that some set-off provisions also attempt set off vs affiliates of “Y.”

For this purpose, either the Early Termination Amount or the Other Agreement Amount (or the relevant portion of such amounts) may be converted by X into the currency in which the other is denominated at the rate of exchange at which such party is able, acting in a reasonable manner and in good faith, to purchase the relevant amount of such currency.

If an obligation is unascertained, X may in good faith estimate that obligation and set-off in respect of the estimate, subject to the relevant party accounting to the other when the obligation is ascertained.

Nothing in this Section 6(f) shall be effective to create a charge or other security interest. This Section 6(f) shall be without prejudice and in addition to any right of set-off, combination of accounts, lien or other right to which any party is at any time otherwise entitled (whether by operation of law, contract or otherwise).

(d) **Representations.**

- (i) Each party will be deemed to represent to the other party on the date on which it enters into a Transaction that:

**Non-Reliance.** It is acting for its own account, and it has made its own independent decisions to enter into that Transaction and as to whether that Transaction is appropriate or proper for it based upon its own judgment and upon advice from such advisers as it has deemed necessary. It is not relying on any communication (written or oral) of the other party as investment advice or as a recommendation to enter into that Transaction; it being understood that information and explanations related to the terms and conditions of a Transaction shall not be considered to be investment advice or a recommendation to enter into that Transaction. No communication (written or oral) received from the other party shall be deemed to be an assurance or guarantee as to the expected results of that Transaction.

**Comment:** What follows are common representations, the single most important are that each party can represent that it is an “Eligible Contract Participant.” This means that the CFTC will not have jurisdiction over these transactions (the only exception would relate to instances of market manipulation). The later reps are intended to make sure that if one party files for bankruptcy, the other will have the right to close out all open transactions.

**Comment:** This rep and the next two are standard ISDA reps but are not included in the text of the ISDA Master Agreement.

**Assessment and Understanding.** It is capable of assessing the merits of and understanding (on its own behalf or through independent professional advice), and understands and accepts the terms and conditions and risks of that Transaction. It is also capable of assuming, and assumes, the risks of that Transaction.

**Status of Parties.** The other party is not acting as a fiduciary for or adviser to it in respect of that Transaction.

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- (ii) **Commodity Exchange Act.** Each party represents to the other party on and as of the date hereof and on each date on which a Transaction is entered into between them that:

Such party is an “Eligible Contract Participant” within the meaning of the Commodity Futures Modernization Act of 2000 as to Transactions entered into on or after December 21, 2000, and as to Transactions, if any, entered into prior to such date, it is an Eligible Swap Participant within the meaning of Part 35.1(b)(2) of the General Regulations under the Commodity Exchange Act (“Part 35.1(b)(2)”) as to Transactions in effect prior to November 21, 2000 and an Eligible Participant within the meaning of Part 35.1(b)(2) for Transactions in effect for the period November 21, 2000 to December 21, 2000; and

Such party is entering into each Transaction in connection with its line of business and not for purposes of speculation.

- (iii) **Standardization, Creditworthiness, and Transferability.** The material economic terms of the Agreement, any Credit Support Document to which it is a party, and each Transaction have been individually tailored and negotiated by it; it has received and reviewed financial information concerning the other party and has had a reasonable opportunity to ask questions of and receive answers and information from the other party concerning such other party, this Agreement, such Credit Support Document, and such Transaction; the creditworthiness of the other party was a material consideration in its entering into or determining the terms of this Agreement, such Credit Support Document, and such Transaction; and the transferability of this Agreement, such Credit Support Document, and such Transaction is restricted as provided herein and therein.

- (iv) **Eligible Swap Participant.** It is an “eligible swap participant” within the meaning of 17 C.F.R. Section 35.1(b)(2).

- (v) **Swap Agreement.** It acknowledges and agrees that all Transactions constitute “swap agreements” within the meaning of the United States Bankruptcy Code.

- (vi) **Forward Contract.** It acknowledges and agrees that all Transactions constitute “forward contracts” and that each of the parties to this Agreement is a “forward contract merchant” within the meaning of the United States Bankruptcy Code.

- (e) Absence of Litigation. Section 3(c) of this Agreement is hereby amended by: (i) adding in the second line thereof after the word “governmental” the words “or regulatory” and (ii) adding the words “in any material respect” immediately prior to the end of the section.

**Comment:** Another common amendment of the ISDA Master.

- (f) **Account.** Unless otherwise stated in a Confirmation or changed by written notice by the party receiving payment, the parties shall make payment of amounts due hereunder by wire transfer to the following accounts:

**If to Party A:**

Pay:  
For the Account of:

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Account No./CHIPS UID:  
Fed. ABA No.:

**If to Party B:**

Pay:  
For the Account of:  
Account No./CHIPS UID:  
Fed. ABA No.:

- (g) **Default Rate.** The definition of Default Rate provided in Section 14 of this Agreement is deleted in its entirety and replaced with the following:

“Interest on the unpaid portion shall accrue at a rate equal to the lower of (i) the then-effective prime rate of interest published under “Money Rates” by *The Wall Street Journal*, plus two percent (2%) per annum from the date due until the date of payment; or (ii) the maximum rate of interest allowed under applicable law.”

- (h) **Limitation of Liability.** NO PARTY SHALL BE REQUIRED TO PAY OR BE LIABLE FOR INCIDENTAL, CONSEQUENTIAL, INDIRECT, OR PUNITIVE DAMAGES (WHETHER OR NOT ARISING FROM ITS NEGLIGENCE) TO ANY OTHER PARTY EXCEPT TO THE EXTENT THAT THE PAYMENTS REQUIRED TO BE MADE PURSUANT TO THIS AGREEMENT ARE DEEMED TO BE SUCH DAMAGES. IF AND TO THE EXTENT ANY PAYMENT REQUIRED TO BE MADE PURSUANT TO THIS AGREEMENT IS DEEMED TO CONSTITUTE LIQUIDATED DAMAGES, THE PARTIES ACKNOWLEDGE AND AGREE THAT ACTUAL DAMAGES ARE DIFFICULT OR IMPOSSIBLE TO DETERMINE AND THAT SUCH PAYMENT IS INTENDED TO BE A REASONABLE APPROXIMATION OF THE AMOUNT OF SUCH DAMAGES AND NOT A PENALTY.

- (i) **Consent to Recording.** Each party (i) consents to the recording of all telephone conversations between trading, operations and marketing personnel of the parties and their Affiliates in connection with this Agreement or any potential Transaction; (ii) agrees to give notice to such personnel of it and its Affiliates that their calls will be recorded; and (iii) agrees that in any Proceedings, it will not object to the introduction of such recordings in evidence on grounds that consent was not properly given. Each party waives further notice of such monitoring or recording.

- (j) **Dispute Resolution.** Any dispute or need of interpretation between the Parties involving or arising under this Agreement first shall be referred for resolution to a senior representative of each Party. Upon receipt of a notice describing the dispute and designating the notifying Party’s senior representative and that the dispute is to be resolved by the Parties’ senior representatives under this Agreement, the other Party shall promptly designate its senior representative to the notifying Party. The senior representatives so designated shall attempt to resolve the dispute on an informal basis as promptly as practicable.

**Comment:** Parties should decide if they desire any form of ADR. Two options are presented here, negotiation between executives and Arbitration. The Arbitration language shown here is identical to the MEMA tariff.

[Option A] If the dispute has not be resolved within thirty (30) days after the notifying Party’s notice was received by the other Party, or within such period as the Parties may jointly agree, the Parties may pursue any legal or equitable remedies that may be available.

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[*Option B*] If the dispute has not been resolved within thirty (30) days after the notifying Party’s notice was received by the other Party, or within such period as the Parties may jointly agree, the Parties shall submit the dispute to arbitration in accordance with the arbitration procedure set forth below.

**Arbitration.** Any controversy, dispute or claim involving or arising under this Agreement which cannot be resolved pursuant to the above negotiation between senior representatives will be submitted to binding arbitration by one arbitrator qualified by education, experience or training to render a decision upon the issues in dispute and who has not previously been employed by either Party, and does not have a direct or indirect interest in either Party or the subject matter of the arbitration. Such arbitrator shall either be mutually agreed upon by the Parties within thirty (30) days after written notice from either Party requesting arbitration, or failing agreement, the arbitration shall be conducted by a panel of three arbitrators having the qualifications set forth in the preceding sentence, one to be selected by each Party and the third arbitrator to be selected by the two arbitrators selected by the Parties. If either Party fails to notify the other Party of the arbitrator selected by it within ten (10) days after receiving notice of the other Party’s arbitrator, or if the two arbitrators selected fail to select a third arbitrator within ten (10) days after notice is given of the selection of the second arbitrator, then such arbitrator shall be selected under the expedited rules of the American Arbitration Association (the “AAA”). The Parties shall divide equally the cost of the hearing, and each Party shall be responsible for its own expenses and those of its counsel or other representative. The commercial arbitration rules of the AAA shall apply to the extent not consistent with the rules specified above. Unless otherwise agreed to by the parties, all arbitrations shall be held in St. Paul, Minnesota.

- (k) Waiver of Jury Trial. Section 13 of this Agreement is hereby amended by adding the following new Section 13(e):

**Comment:** Very common to agree to no jury trials.

“(c) EACH PARTY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY SUIT, ACTION OR PROCEEDING RELATING TO THIS AGREEMENT OR ANY CREDIT SUPPORT DOCUMENT. EACH PARTY (I) CERTIFIES THAT NO REPRESENTATIVE, AGENT OR ATTORNEY OF THE OTHER PARTY OR ANY CREDIT SUPPORT PROVIDER HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PARTY WOULD NOT, IN THE EVENT OF SUCH A SUIT, ACTION OR PROCEEDING, SEEK TO ENFORCE THE FOREGOING WAIVER AND (II) ACKNOWLEDGES THAT IT AND THE OTHER PARTY HAVE BEEN INDUCED TO ENTER INTO THIS AGREEMENT AND PROVIDE FOR ANY CREDIT SUPPORT DOCUMENT, AS APPLICABLE BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION.”

- (l) **Confidentiality.** Neither Party shall disclose the terms or conditions of a Transaction under this Agreement to a third party (other than the Party’s employees, lenders, counsel, accountants or advisors who have a need to know such information and have agreed to keep such terms confidential) except in order to comply with any applicable law, regulation, or in connection with any court or regulatory proceeding; provided, however, each Party shall, to the extent practicable, use reasonable efforts to

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prevent or limit disclosure. The Parties shall be entitled to all remedies available at law or in equity to enforce, seek relief in connection with, this confidentiality obligation.

- (m) **Cancellation.** If there are no Transactions (or any present or future payment obligations, contingent or otherwise, thereunder) outstanding under this Agreement or any Credit Support Document, either party may terminate this Agreement by giving notice to the other party and termination shall be effective no less than 30 Local Business Days after receipt of such notice. Such termination shall not prejudice any rights or obligations which may have occurred prior to the effective time of such termination.
- (n) **Severability.** In the event any one or more of the provisions contained in this Agreement should be held invalid, illegal, or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions contained herein shall not in any way be affected or impaired thereby. The parties shall endeavor, in good faith negotiations, to replace the invalid, illegal, or unenforceable provisions with valid provision the economic effect of which comes as close as possible to that of the invalid, illegal or unenforceable provisions.

**Comment:** ISDA Master does not provide for cancellation of the Master Agreement. So, typically parties include language similar to this.

**Part 6.**  
**Commodity Transactions.**

- (a) Section 7.3 of the 1993 ISDA Commodity Derivatives Definitions is amended to read as follows:

**Section 7.3. Corrections to Published Prices.** For purposes of determining the Relevant Price for any day, if the price published or announced on a given day and used or to be used by the Calculation Agent to determine a Relevant Price is subsequently corrected and the correction is published or announced by the person responsible for that publication or announcement within 30 calendar days of the original publication or announcement, either party may notify the other party of (i) that correction and (ii) the amount (if any) that is payable as a result of that correction. If, not later than 30 calendar days after the publication or announcement of that correction, a party gives notice that an amount is so payable, the party that originally either received or retained such amount will, no later than 3 Business Days after the effectiveness of that notice, pay, subject to any conditions precedent, to the other party that amount, together with interest on that amount at the Default Rate for the period from and including the day on which a payment originally was (or was not) made to but excluding the day of payment of the refund or payment resulting from that correction.

**Comment:** Reference the appropriate set of ISDA Commodity definitions for more on this subject which is mainly intended to specify the procedures to follow in the event of a market disruption event and how to price the affected transaction(s).

Also note that the Commodity Definitions provide the parties with the option to specify adjustments to the definition of "Business Day" and "Commodity Business Day."

- (b) In lieu of Section 7.4(d)(i) of the 2000 Supplement to the 1993 ISDA Commodity Derivatives Definitions ("Commodity Definitions"), the "**Market Disruption Events**" specified in Section 7.4(c)(i), (c)(ii), (c)(iii), (c)(iv), (c)(v) and (c)(viii) of the Commodity Definitions shall apply, except as otherwise specified in the relevant Confirmation.
- (c) Clause (ii) of Section 7.4(c) of the Commodity Definitions is hereby amended by the addition of the following:

**Comment:** This is actually a very minor, but common, amendment. The amended language provides for the Default Interest Rate rather than the LIBOR rate

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“For these purposes, a suspension of trading on any Commodity Business Day shall be deemed material in the event that: (i) as of each suspension, all trading in such contract on such day is suspended for the entire day; or (ii) (A) as a result of such suspension, all trading in such contract opens, but ceases prior to, and does not recommence from the regularly scheduled closed of trading in such contract, and (B) such suspension is announced less than one (1) hour preceding its commencement.”

- (d) Section 7.4(c)(viii) of the Commodity Definitions is hereby amended by the addition of the following at the end thereof:

“For these purposes, a limitation of trading on any Commodity Business Day shall be deemed to be material only if the relevant Exchange establishes limits on the range within which the price of the Futures contract may fluctuate in the first nearby month and the closing or settlement price of such Futures Contract on such day is at the upper or lower limit of that range.”

- (e) **“Additional Market Disruption Events”** shall apply only if so specified in the relevant Confirmation.

- (f) The following **“Disruption Fallbacks”** specified in Section 7.5(c) of the Commodity Definitions shall apply, in the following order, except as otherwise specified in the relevant Confirmation:

**Comment:** Order of fallbacks shown is fairly arbitrary. Parties should determine their preferred order, does not appear to be any industry standard.

- (i) **“Fallback Reference Price”** (if the relevant parties have specified an alternate Commodity Reference Price in the Confirmation);
- (ii) **“Postponement,”** with three (3) Commodity Business Days as the Maximum Days of Disruption;
- (iii) **“Negotiated Fallback”** (provided that the reference in Section 7.5(c)(iv) to “fifth Business Day” shall be amended to be “twelfth Business Day”; and
- (iv) **“No Fault Termination.”**

- (g) For purposes of any Transaction in which electric power or any product related to power is the relevant Commodity, the phrase “within 30 calendar days” in line 5 of Section 7.3 of the Commodity Definitions shall be changed to “within 90 calendar days.”

- (h) Section 7.5(e) of the Commodity Definitions shall not apply.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first above written.

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PARTY A:

PARTY B:

\_\_\_\_\_

\_\_\_\_\_

By: \_\_\_\_\_  
Name:  
Title:

By: \_\_\_\_\_  
Name:  
Title:

Page 19: [1] Comment

SREADMIN

9/18/2006 3:40 PM

One or both parties may name specified entities, or third parties, which may be joined to certain of the default or termination provisions (Section 5(a)(v)-(vii) and 5(b)(iv)). Meaning that such a default between the Specified Entity and one of the parties would give the party not at fault the right to close out all transactions. It is not necessary to name a Credit Support Provider, they are automatically joined in the event of a termination/closeout. The idea here is to include those entities whose fortunes are closely linked to the contracting party, for instance parent companies or other affiliates. This option does not appear to be widely used in the energy industry.

Page 19: [2] Comment

SREADMIN

9/19/2006 3:35 PM

The term "Specified Transaction" is clarified by adding energy commodity transactions. In other words, early termination can be triggered here due to an event of default or other issue under some other agreement between the parties. A default under such other agreement would constitute a default under the ISDA, and allow the party not at fault to close out all transactions under the ISDA. Applies to the party, the party's Credit Support Provider and any Specified Entities.

Page 19: [3] Comment

SREADMIN

9/19/2006 3:50 PM

This is the basic Cross Default provision, it catches defaults in relation to borrowed money in agreements between either of the parties or their Specified Entity or Credit Support Provider with any third party. Such a default must exceed a threshold (this threshold is different than the collateral threshold, which is addressed later). Note, that as drafted, this template does not contemplate cross acceleration. As drafted, if one party becomes aware of such a default, it is sufficient to trigger the right to close out. If degraded to cross acceleration, the non-defaulting party must wait until the third party has taken action against the defaulting party. The amendment in (i) is common, it is intended to make sure that an administrative error does not trigger Cross Default.

Page 27: [4] Comment

SREADMIN

9/19/2006 10:13 AM

This is very similar to the 2002 Master set off language. It provides for close out of debts subject to this agreement and any open physical transactions between the parties subject to the MEMA tariff. Only the non-defaulting party can invoke set off and will only do so if the defaulting party still owes it money. It will seek to reduce this liability with any money that the non-defaulting party owes the defaulting under the MEMA tariff. It does not seek to drag in affiliates, although some parties do reference affiliates in the set off clause. This is another example where the ISDA Master is flexible, and parties should feel free to customize to their needs.