

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

## **Introduction**

The Master Confirmation Agreement for Non-Deliverable Forward FX Transactions (“Master Confirmation”) is being published on December 13, 2006 by the Foreign Exchange Committee (FXC) with the support of the Financial Markets Lawyers Group (FMLG) and the Master Confirmation’s cosponsors, EMTA, Inc. (EMTA) and the Foreign Exchange Joint Standing Committee (FX JSC). The FXC published the Master Agreement Addendum for Non-Deliverable Forwards in April, 2003 (the “2003 Addendum”) to facilitate the electronic confirmation of non-deliverable forward foreign exchange transactions (“NDF Transactions”) under the 1998 FX and Currency Option Definitions published by the International Swaps and Derivatives Association, Inc., EMTA, and the FXC (the “1998 Definitions”) under the terms of currency-specific NDF Transaction confirmation templates published by EMTA that were in effect at the time of such publication. After publication of the 2003 Addendum, EMTA issued several new currency-specific NDF Transaction confirmation templates. It is anticipated that EMTA, from time to time, may issue new or amend current currency-specific NDF Transaction confirmation templates. However, by its terms the 2003 Addendum does not incorporate such new or amended templates. Rather, the parties to the 2003 Addendum must bilaterally amend the 2003 Addendum in order to obtain the benefits of such new or amended template terms, which can be administratively burdensome. Furthermore, there has been an increasing global demand for a flexible form of master confirmation that permits parties to confirm NDF Transactions through the facilities of a variety of electronic messaging, trading and settlement systems. These developments have prompted the cosponsors to revisit the 2003 Addendum and produce a substantially different Master Confirmation that meets these and other important objectives.

To highlight, the Master Confirmation is a bilateral agreement for the use of parties that enter into NDF Transactions. It takes the form of a confirmation so that, as a general matter, it can be executed by operations personnel with authority to execute confirmations for the firm. (Note, however, that each firm should make its own determination as to whether its operations personnel have authority to execute the Master Confirmation.) It accommodates NDF Transactions with a U.S. Dollar Settlement Currency, as well as cross-currency NDF Transactions with a non-U.S. Dollar Settlement Currency. Currently, no standard market practice exists for documenting cross-currency NDF Transactions with a non-U.S. Dollar Settlement Currency. Parties seeking to specify terms to standardize, on a bilateral basis, their cross-currency NDF Transactions may wish to include the language set forth in these practice notes under “Addendum.”

The Master Confirmation incorporates by reference the terms of effective EMTA currency-specific NDF confirmation templates, which are published and available at [www.emta.org](http://www.emta.org). Accordingly, new or updated EMTA NDF confirmation template terms will apply automatically to new NDF Transactions in the relevant Currency Pair entered

into on or after the effective date of the terms. Such new or updated EMTA NDF confirmation template terms will not, however, apply to or amend previously executed NDF Transactions, unless otherwise agreed by the parties. The Addendum to the Master Confirmation allows parties to elect counterparty-specific terms and agree to customized terms for NDF Transactions in Currency Pairs that have not yet been addressed by an EMTA NDF confirmation template (such as cross-currency NDF Transactions). If EMTA publishes new NDF confirmation template terms for a Currency Pair, these terms, once they become effective, will replace any customized terms in the Addendum and will apply to new NDF Transactions in the relevant Currency Pair entered into on or after their effective date. However, as stated above, any new terms will not apply to or amend previously executed NDF Transactions, unless otherwise agreed by the parties.

The Master Confirmation sets out Economic Terms of NDF Transactions to be included in a Transaction Confirmation, which may be executed by fax, telex, email, or electronic messages exchanged between the parties or matched on an electronic system. Because a major objective of the Master Confirmation is to facilitate use of a wide variety of methods of confirming NDF Transactions, the cosponsors anticipate that electronic systems may be interested in implementing it on a multilateral basis for the benefit of their members. The cosponsors will work with any interested electronic system in developing an appropriate multilateral form of the Master Confirmation for purposes of its implementation in the electronic system. However, it should be noted that the cosponsors do not make any representations regarding whether firms will or should rely on any particular electronic system to confirm their NDF Transactions even if it does implement the Master Confirmation. Each firm should review with its counsel whether it would be comfortable with relying on a particular electronic system to confirm its NDF Transactions, in light of applicable laws, rules, and procedures specific to the electronic system.

The practice notes below provide further explanation of the provisions of the Master Confirmation. All capitalized words in these practice notes have the meanings given to them in the Master Confirmation or the 1998 Definitions, unless otherwise specified herein.

### **Paragraph 1: Application**

Paragraph 1 defines the scope of the Master Confirmation. Presumptively, parties entering into the Master Confirmation intend that it govern all NDF Transactions between them entered into on or after its effective date (except as otherwise provided in Paragraph 6(c)). Accordingly, the Master Confirmation applies to NDF Transactions entered into between the parties on or after its effective date, unless the parties specify in the Addendum or a Transaction Confirmation that the Master Confirmation does not apply. For example, if the parties enter into a customized NDF Transaction with a long-form confirmation that should stand on its own terms, such confirmation should specify that the Master Confirmation does not apply to it. Similarly, parties can exclude from the scope of the Master Confirmation any class of NDF Transactions (such as NDF

Transactions involving a particular Currency Pair) by specifying this in Part 6 of the Addendum.

It also should be noted that, for the Master Confirmation to apply, Settlement of the NDF Transaction must be Non-Deliverable (see Paragraph 5 below).

## **Paragraph 2: FX Definitions**

The Master Confirmation incorporates the terms of the 1998 Definitions, as those terms may have been modified or amended in the Master Agreement between the parties. Any amendments to the 1998 Definitions, or successor definitions that replace the 1998 Definitions, are incorporated into the Master Confirmation only on a prospective basis. That is, such amendments or successor definitions will apply to new NDF Transactions entered into on or after their effective date but not to outstanding NDF Transactions entered into prior to their effective date. The parties, however, may agree to change this general rule (e.g., in a separate bilateral agreement or a subsequent agreement that applies on a multilateral basis).

## **Paragraph 3: Transaction Confirmation**

The parties must create a Transaction Confirmation for each NDF Transaction that sets out its specific Economic Terms. Paragraph 3 makes clear that the Transaction Confirmation may be created by fax, telex, email, or through the facilities of electronic messaging, trading or settlement systems. As noted in the Introduction above, the cosponsors do not make any representations regarding whether firms will or should rely on any particular electronic system to confirm their NDF Transactions, even if it does implement the Master Confirmation. Each firm should review with its counsel whether it would be comfortable with relying on a particular electronic system to confirm its NDF Transactions, in light of applicable law, rules, and procedures specific to the electronic system.

## **Paragraph 4: Relevant EMTA Template**

Paragraph 4 incorporates into each NDF Transaction governed by the Master Confirmation 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 parties otherwise agree in the Addendum or 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 as follows. If the Relevant EMTA Template is the Argentina Peso (ARS) – U.S. Dollar Currency Pair dated May 17, 2006, the terms which would be incorporated by reference (unless the parties otherwise agree in the Addendum or a Transaction Confirmation) include the Settlement Rate Option, Disruption Events, Disruption Fallbacks, definitions and provisions related to “Unscheduled Holiday”, Deferral Period for Unscheduled Holiday, “Valuation Postponement” for Price Source Disruption, Cumulative Events, Maximum Days of Postponement, and Relevant Cities for Business Days for Valuation Date and

Settlement Date. The proviso (“ . . . except to the extent otherwise provided in the Addendum or a Transaction Confirmation”) allows parties to alter this general incorporation by reference into their NDF Transaction of all terms of a Relevant EMTA Template. Accordingly, if the parties agree to Paragraph 4, they do not need to specify in the Transaction Confirmation or the Addendum any of the terms already incorporated into their NDF Transactions by reference to a Relevant EMTA Template. However, the parties are free to agree to not apply any terms of Relevant EMTA Templates to all or any class of NDF Transactions. In such case, Part 6 of the Addendum or the Transaction Confirmation must specify which terms do not apply.

NDF confirmation templates published by EMTA are available on its website at [www.emta.org](http://www.emta.org). 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 necessary adjustments. Paragraph 4 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 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 parties. For example, the parties may agree to a protocol that retroactively applies new EMTA NDF confirmation template terms to outstanding NDF Transactions, which would supersede this limitation in Paragraph 4.

#### **Paragraph 5: Economic Terms**

Paragraph 5 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 apply automatically 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 messaging, trading and settlement systems have different message formats, and it is possible that not all of them will permit for specification in a Transaction Confirmation of all of the Economic Terms listed in Paragraph 5. The cosponsors believe, however, that 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 5 allows for the specification in the Transaction Confirmation of terms different from those listed in Paragraph 5. 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 5 further specifies that, for a NDF Transaction to be governed by the Master Confirmation, the Transaction Confirmation must provide, or the parties must otherwise agree in the Transaction Confirmation, that Settlement is Non-Deliverable. This requirement is intended to provide certainty on the universe of NDF Transactions between the parties that will be covered by the 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, some electronic systems may require use of a particular message type for NDF Transactions.

#### **Paragraph 6: Priority**

The rules of priority specify that the terms of the Confirmation of a NDF Transaction prevail over 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 2). In addition, the terms of the Confirmation prevail over the Master Agreement. As the Confirmation incorporates the 1998 Definitions, this paragraph has the effect of providing that the 1998 Definitions also prevail over the Master Agreement.

The terms of the Addendum or Transaction Confirmation prevail over those of a Relevant EMTA Template, subject to an exception. When the parties have specified in the Addendum general terms for a NDF Transaction in a Currency Pair that currently is not the subject of an EMTA NDF confirmation template (for example, a cross-currency NDF) and, after the effective date of the Addendum, EMTA publishes NDF confirmation template terms for such Currency Pair, those terms will apply to NDF Transactions entered into on or after their effective date, and will supersede the customized terms set out in the Addendum. In order to modify this approach generally or with respect to any particular NDF Transaction, the parties must agree to do so on a bilateral basis.

After the parties execute this bilateral Master Confirmation, a multilateral form of a master confirmation agreement for NDF Transactions (a “Multilateral Master Confirmation”) may be adopted by one or more electronic messaging, trading or settlement systems. Parties to the Master Confirmation may (by protocol or otherwise) sign onto or become subject to a Multilateral Master Confirmation for NDF Transactions executed and/or settled over an electronic system. In such event, Paragraph 6(c) provides that a Multilateral Master Confirmation would prevail over the previously executed Master Confirmation with respect to NDF Transactions governed by that Multilateral Master Confirmation in the event of any inconsistency between the two documents, unless otherwise agreed by the parties. If, however, the parties enter into the Master Confirmation or any other bilateral agreement after (or on the same date as) having signed onto or become subject to a Multilateral Master Confirmation, the Master Confirmation or such bilateral agreement would prevail over such Multilateral Master Confirmation with respect to NDF Transactions governed by such Multilateral Master

Confirmation in the event of any inconsistency between the two documents. This is in keeping with the general principle that parties may bilaterally agree to vary terms that otherwise would apply to them by virtue of signing a protocol or becoming subject to rules, procedures, or guidelines of an electronic messaging, trading, or settlement system. Note that each electronic system may adopt its own Multilateral Master Confirmation for NDF Transactions traded and/or settled in its system. Thus, multiple forms of Multilateral Master Confirmations could exist concurrently. Each one would govern the NDF Transactions entered into through the electronic system that adopted the applicable Multilateral Master Confirmation.

Note further that a Multilateral Master Confirmation will not apply to or amend the terms of previously executed NDF Transactions, unless otherwise specified in the Multilateral Master Confirmation or otherwise agreed by the parties.

#### **Paragraph 7: 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 8: Representations**

The representations in paragraph 8 are standard legal enforceability and non-reliance representations also found in industry master agreements.

#### **Paragraph 9: Governing Law/Jurisdiction**

Paragraph 9 makes clear that the election of governing law and the provisions on submission of jurisdiction in the Master Agreement – either executed between the parties or in the form elected in the Addendum – apply to the Master Confirmation.

## Addendum

The Addendum is part of the bilateral version of the Master Confirmation and provides a means for specifying counterparty-specific terms. Part 1 (Master Agreement) requires the parties to specify the Master Agreement they have entered into or, if they have not entered into a Master Agreement, to specify the form of Master Agreement that will apply for purposes of the Master Confirmation (together with an election of governing law and the Termination Currency/Base Currency). Part 2 (Calculation Agent) requires the parties to elect whether one or both parties will act as Calculation Agent. Part 3 (Account Details), Part 4 (Contact Information), Part 5 (Representations), and Part 6 (Other Terms) allow for the specification of other relevant provisions.

In particular, Part 6 enables the parties to (i) change the terms of Relevant EMTA Templates that otherwise would apply to their NDF Transactions under the operation of Paragraph 4; (ii) vary any other terms of the Master Confirmation; (iii) provide customized terms that will apply to NDF Transactions in Currency Pairs for which a Relevant EMTA Template does not exist; and (iv) carve out any class of NDF Transactions from the scope of the Master Confirmation (see paragraph 1 above).

Currently, no standard market practice exists for documenting cross-currency NDF Transactions. In the course of developing the Master Confirmation, it was determined not to include any terms for cross-currency NDF Transactions in the Master Confirmation, and to commence a separate effort to develop industry documentation for such NDF Transactions. Currently, parties seeking to specify terms to standardize, on a bilateral basis, their cross-currency NDF Transactions may wish to include the following provision in Part 6:

This Master Confirmation shall apply to a Cross-Currency NDF Transaction, which means a NDF Transaction for which the Transaction Confirmation specifies (i) that Settlement is Non-Deliverable, and (ii) a Settlement Currency that is not the subject of a Relevant EMTA Template on the Trade Date of the Cross-Currency NDF Transaction. In such a case, the Relevant EMTA Template (that is effective on the Trade Date of the NDF Transaction) shall be the confirmation template for the Reference Currency specified in the Transaction Confirmation, and all of the terms of such Relevant EMTA Template shall apply to such NDF Transaction, except as follows: (i) the Settlement Rate Option specified in the Relevant EMTA Template shall be deemed to be the Reference Currency Spot Rate for the Cross-Currency NDF Transaction, and (ii) the Settlement Rate Option for the Cross-Currency NDF Transaction shall mean the Cross-Currency Spot Rate, which shall be determined by reference to the Reference Currency Spot Rate and the Settlement Currency Spot Rate on the Valuation Date. The Transaction Confirmation shall specify the following Economic Terms for a Cross-Currency NDF Transaction, in addition to those listed in paragraph 5 of the Master Confirmation:

Cross-Currency Spot Rate  
Settlement Currency Spot Rate