

Navigating Key Dodd-Frank Rules Related to the Use of Swaps by End Users

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“**Dodd-Frank**”) enacted a new regime of substantive regulation of over-the-counter (“**OTC**”) derivatives under U.S. securities and commodities laws. Over the course of 2013, many key provisions of Dodd-Frank are being implemented by the Commodity Futures Trading Commission (the “**CFTC**”) with respect to “swaps.” While many of the regime’s requirements focus on “swap dealers” (“**SDs**”) and “major swap participants” (“**MSPs**”), commercial entities that enter into OTC derivatives transactions to hedge or mitigate risk, referred to as “**end users**,” will also become subject to a wide range of substantive requirements.

In particular, end users will need to:

- determine whether the derivatives they use are required to be cleared or to be traded on a regulated execution facility and, if so, whether they are eligible for, and have completed the steps necessary for, reliance on the exception available for commercial end users;
- determine whether they must post collateral to their derivatives counterparties;
- obtain legal entity identifiers for the purpose of public and regulatory reporting requirements;
- maintain full, complete and systematic records with respect to their swap transactions;
- enter into the latest International Swaps and Derivatives Association (“**ISDA**”) Dodd-Frank Protocols or otherwise amend existing swap agreements;
- comply with new position limit requirements; and
- comply with new antifraud and antimanipulation regulations.

Under proposed guidance and a final exemptive order, non-U.S. end users will generally not be subject to such requirements with respect to swaps entered into with other non-U.S. counterparties. Appendix A to this memorandum is a table summarizing the requirements applicable to end users as well as relevant compliance time frames. Appendix B is a list of key CFTC rulemakings.

Table of Contents

| | |
|--|----|
| <i>Which Derivatives Are Subject to Dodd-Frank?.....</i> | 3 |
| <i>Who Is an End User?.....</i> | 5 |
| <i>What Requirements May Apply to End Users?.....</i> | 8 |
| <i>Clearing.....</i> | 8 |
| <i>Trade Execution.....</i> | 17 |
| <i>Margin.....</i> | 20 |
| <i>Reporting.....</i> | 22 |
| <i>Business Conduct and Swap</i> | |
| <i>Documentation.....</i> | 26 |
| <i>Recordkeeping.....</i> | 32 |
| <i>Position Limit.....</i> | 33 |
| <i>Antifraud and Antimanipulation.....</i> | 34 |
| <i>Will Dodd-Frank Impose Requirements on Swaps Between Non-U.S. Persons?.....</i> | 35 |

Which Derivatives Are Subject to Dodd-Frank?

- **In General.** Dodd-Frank regulates a variety of previously unregulated derivatives, including interest rate swaps (“**IRS**”); non-spot foreign exchange transactions (unless exempted as described below); currency swaps; physical commodity swaps; total return swaps; and credit default swaps (“**CDS**”).¹ Dodd-Frank divides this group of previously unregulated derivatives into two categories: “**swaps**” (which come under the jurisdiction of the CFTC) and “**security-based swaps**” (which come under the jurisdiction of the Securities and Exchange Commission (“**SEC**”)). The SEC has not yet finalized most of its substantive rules. Accordingly, this memorandum does not address the regulation of security-based swaps.
- **What Is a “Swap”?** The term “swap” is broadly defined and, unless an exclusion applies, includes a wide range of agreements, contracts or transactions linked to an array of underliers such as physical commodities, rates, foreign currencies, broad-based security indices or U.S. government or other exempt securities (other than municipal securities).² OTC derivatives based on a single non-exempt security or narrow-based security index are generally security-based swaps.
- **Exemption for Physically-Settled Foreign Exchange Swaps and Forwards.** The U.S. Secretary of the Treasury has exempted certain physically-settled foreign exchange swaps and foreign exchange forwards from some Dodd-Frank requirements. The exemption does not apply to products such as non-deliverable foreign exchange forwards, foreign exchange options or currency swaps.³ Exempt foreign exchange swaps and foreign exchange forwards do remain subject to the regulatory reporting requirements and external business conduct standards discussed later in this memorandum.
- **Excluded Instruments.** Some common financial products are excluded from the new framework. These include listed futures, options on listed futures, listed and unlisted options on securities and on broad- and narrow-based security indices,

¹ See 77 Fed. Reg. 48,208 (August 13, 2012) (“**Product Definitions Final Rule**”).

² For these purposes the term “exempt securities” means certain securities exempted under Section 3(a)(12) of the Securities Exchange Act of 1934 (the “**Exchange Act**”) but does not include, among other securities, municipal securities. Examples of exempted securities include U.S. Treasuries and securities issued by the Federal National Mortgage Association (Fannie Mae) and Federal Home Loan Mortgage Corporation (Freddie Mac).

³ See 77 Fed. Reg. 69,694 (Nov. 20, 2012) (“**Final Treasury Determination**”).

commodity trade options,⁴ securities repurchase agreements, depository instruments, security forwards and non-financial commodity forwards intended to be physically settled. The CFTC retains anti-evasion authority with respect to the structuring of certain transactions to evade regulation.

⁴ The CFTC has exempted from many Dodd-Frank rules trade option transactions that are between either two users of the commodity or between a user of the commodity and an ECP. In this context, a user of the commodity is a person that is a producer, processor or commercial user of, or a merchant handling the commodity that is the subject of the trade option transaction, or the products or byproducts thereof, and that is offered or entering into the trade option transaction solely for purposes related to its business. The trade option must also be intended to be physically settled. Such transactions are exempt from many Dodd-Frank requirements, including public reporting and clearing (both discussed below), but only exempt from regulatory reporting (also discussed below) if the end user does not enter into any non-trade option transactions that must otherwise be reported.

Who Is an End User?

- **In General.** Title VII of Dodd-Frank created two new categories of registration for SDs and MSPs. SDs and MSPs are subject to comprehensive, substantive regulation, including capital, margin, documentation, reporting, recordkeeping, and internal and external business conduct requirements.
 - **SDs.** An entity is regarded as a swap dealer if it: (i) holds itself out as a dealer in swaps; (ii) makes a market in swaps; (iii) regularly enters into swaps as an ordinary course of business for its own account; or (iv) engages in any activity causing the person to be commonly known in the trade as a dealer or market maker in swaps.⁵ Dodd-Frank provides a de minimis exception from designation as a swap dealer for a person that enters into less than \$8 billion of gross notional value in swaps over the preceding twelve months.⁶ Under the CFTC’s current cross-border proposed guidance and exemptive order (discussed further below), the calculation of the de minimis threshold excludes swaps with non-U.S. persons and foreign branches of U.S. persons that are registered as swap dealers.
 - **MSPs.** Even if an entity is not an SD, it may still become subject to registration with the CFTC if: (i) it maintains a “substantial position” in any major category of swaps, excluding (I) positions held for hedging or mitigating commercial risk and (II) positions maintained by an employee benefit or governmental plan, as defined under the Employee Retirement Income Security Act of 1974 (“**ERISA**”), for the primary purpose of hedging or mitigating risks directly associated with the operation of the plan; (ii) its swaps create “substantial counterparty exposure”; or (iii) it is a private fund or other “financial entity” that is highly leveraged, is not subject to capital requirements established by an appropriate Federal

⁵ The CFTC has indicated that it interprets this definition in a manner similar (although not bounded by) the SEC’s dealer/broker distinction. See 77 Fed. Reg. 30,596 at 30,607 (May 23, 2012) (the “**Registered Swap Entity Final Rule**”).

⁶ See Registered Swap Entity Final Rule. A smaller, \$25 million notional cap applies in the case of swaps with certain so-called “**Special Entities**.” Special entities include any (i) Federal agency; (ii) State, State agency, city, county, municipality, or other political subdivision of a State; (iii) employee benefit plan subject to Title I of ERISA; (iv) governmental plan, as defined in Section 3 of ERISA; (v) endowment, including an endowment that is an organization described in Section 501(c)(3) of the Internal Revenue Code of 1986; or (vi) employee benefit plan defined in Section 3 of ERISA, not otherwise defined as a Special Entity, that elects to be a Special Entity by notifying an SD or MSP of its election prior to entering into a swap with such SD or MSP. After the expiration of phase-in period in 2016, the \$8 billion cap will decrease to \$3 billion unless the CFTC decides to set it at a different level.

banking agency and maintains a “substantial position” in a major category of swaps.⁷

- A “substantial position” is defined (i) in the case of rate or currency swaps, as \$3 billion in negative mark-to-market exposure or \$6 billion in negative mark-to-market plus potential future exposure or (ii) in the case of credit, equity or commodity swaps, as \$1 billion in negative mark-to-market exposure or \$2 billion in negative mark-to-market plus potential future exposure.
 - “Substantial counterparty exposure” is defined as \$5 billion in negative mark-to-market exposure across all swaps or \$8 billion in negative mark-to-market plus potential future exposure across all swaps.
 - Under the CFTC’s current cross-border exemptive order, the calculation of these thresholds by a non-U.S. person excludes swaps with non-U.S. persons and foreign branches of U.S. persons that are registered as swap dealers.
- **End Users.** Title VII of Dodd-Frank also applies to end users that do not qualify as SDs or MSPs. Dodd-Frank divides end users into two broad categories—financial and non-financial end users.
 - **Financial End Users.** An end user is a financial end user if it is a commodity pool,⁸ private fund,⁹ employee benefit plan,¹⁰ or person that is predominantly engaged in activities that are in the business of banking, or in activities that are financial in nature, as defined in section 4(k) of the Bank Holding Company Act of 1956.
 - **“Predominantly Engaged in Activities that Are Financial In Nature.”** According to final rules under Title I of Dodd-Frank, an entity is

⁷ Id.

⁸ In general, a “commodity pool” is any investment trust, syndicate or similar form of enterprise operated for the purpose of trading in derivatives regulated by the CFTC. See CEA § 1a(10).

⁹ A “private fund” is an issuer that would be an investment company, as defined in the Investment Company Act of 1940, but for sections 3(c)(1) and 3(c)(7) of that Act. See Investment Advisers Act of 1940 § 202(a)(29).

¹⁰ For purposes of this memorandum, an “employee benefit plan” means an employee benefit plan or governmental plan as defined in paragraphs (3) and (32) of section 3 of ERISA, respectively. See CEA § 2(h)(7)(C)(i)(VII).

“predominantly engaged in activities that are financial in nature”¹¹ if in either of its last two fiscal years:

- the annual gross revenues derived by the company and all of its subsidiaries from activities that are financial in nature represents 85 percent or more of the consolidated annual gross revenues of the company; or
 - the consolidated assets of the company and all of its subsidiaries related to activities that are financial in nature represents 85 percent or more of the consolidated assets of the company.¹²
- **Accounting for Subsidiaries.** Under this standard, an end user may take into account its own gross revenues and/or assets as well as the gross revenues and/or assets of all of its consolidated subsidiaries in determining whether it qualifies as a financial end user. This is true even if the end user is an intermediate holding company.

¹¹ Activities that are financial in nature include (1) lending, exchanging, transferring, investing for others or safeguarding money and securities; (2) certain insurance activities; (3) providing financial, investment or economic advisory services, including advising an investment company; (4) securitizing; (5) underwriting, dealing in or making a market in securities; (6) extending credit and servicing loans; (7) activities related to extending credit (e.g., real estate and personal property appraising, arranging commercial real estate financing, collection agency services, credit bureau services); (8) certain of leasing personal or real property; (9) operating nonbank depository institutions; (10) trust company functions; (11) financial and investment advisory activities (including providing information, statistical forecasting and advice with respect to any transaction in swaps); (12) securities and derivatives brokerage, riskless principal and private placement services; (13) investment transactions as principal; (14) management consulting and counseling activities; (15) support services in connection with financial activities; (16) community development activities; (17) issuance and sale of money orders, savings bonds and traveler’s checks; (18) processing of financial, banking or economic data; (19) providing administrative and other services to mutual funds; (20) owning shares of a securities exchange; (21) acting as a certification authority for digital signatures and authenticating the identity of a person; (22) providing employment histories to third parties for use in making credit decisions; (23) check cashing and wire transmission services; (24) postage, vehicle registration or public transportation services; (25) real estate title abstracting; (26) operating a travel agency in connection with financial services; (27) organizing, sponsoring and managing a mutual fund; (28) merchant banking; (29) lending, exchanging, transferring, investing for others or safeguarding financial assets other than money or securities; (30) providing any device or other instrumentality for transferring money or other financial assets; and (31) arranging, effecting or facilitating financial transactions for the account of third parties. See 12 C.F.R. Part 242 (Apr. 5, 2013) (Board of Governors of the Federal Reserve System (“**Federal Reserve**”) rule defining “Predominantly Engaged in Financial Activities”).

¹² See id. See also Dodd-Frank Act Section 102(a)(6). The CFTC has not formally interpreted the “predominantly engaged in financial activities” standard, but the preamble to the CFTC’s final rule regarding the clearing exception for inter-affiliate swaps (discussed below) suggests that the CFTC will defer to the Federal Reserve on this interpretation.

What Does It Mean to Clear a Swap?

- **Overview of Clearing.** To clear a swap, the counterparties to the swap that is subject to mandatory clearing will, as soon as practicable after execution, submit their respective sides of the swap to a derivatives clearing organization (“**DCO**”) either through a clearing broker (called a futures commission merchant or “**FCM**”) or directly (if the party is itself a member of the DCO), rather than establishing a bilateral contract with each other. Since most end users are not self-clearing members, to accomplish this, an end user will need to establish a clearing relationship with an FCM and enter into cleared derivatives execution agreements (sometimes referred to as “give up” agreements) with its counterparties. The two counterparties to a cleared swap are not required to, but may, use the same clearing broker to clear the swap.
- **Margin Requirements.** Cleared swaps are subject to margin requirements established by the DCO, including daily exchanges of cash variation (or mark-to-market) margin and an upfront posting of cash or securities initial margin to cover the DCO’s (and FCM’s) potential future exposure to the end user in the event of its default.
- **End Users May Choose the DCO.** Dodd-Frank provides that the counterparty to a swap transaction that is not an SD or MSP has the sole right to select the DCO for a transaction that is required to be cleared. Swap pricing may be affected by the DCO selected to clear the swap.
- **End Users May Choose to Clear Swap Transactions Not Subject to Mandatory Clearing.** An end user is entitled to elect to clear swap transactions that are not subject to mandatory clearing, at a DCO of such end user’s choice.

Which Swaps Are Subject to Mandatory Clearing?

- **In General.** The Commodity Exchange Act (“**CEA**”) authorizes the CFTC, either upon application by a DCO or upon its own initiative, to require a designated swap or category of swaps to be cleared by a DCO.¹³ On November 28, 2012, the CFTC issued its first mandatory clearing determination for certain IRS and CDS.
- **IRS.** Very generally, the following IRS are subject to mandatory clearing:
 - Fixed-to-floating swaps;
 - Floating-to-floating swaps (also known as basis swaps);

¹³ See CEA § 2(h)(2).

- Forward rate agreements; and
- Overnight indexed swaps.

The mandatory clearing determination only applies to the IRS listed above in the following currencies: United States dollar, Euro, Sterling or Yen.

- **CDS.** Very generally, the following CDS are subject to mandatory clearing:
 - Untranchcd indices covering the CDX.NA.IG and CDX.NA.HY; and
 - Untranchcd indices covering the iTraxx Europe, iTraxx Europe Crossover and iTraxx Europe High Volatility.¹⁴
- The CFTC plans to make additional clearing determinations in the future. End users should consider establishing policies and procedures to monitor which swaps become subject to mandatory clearing.

What Are the Exceptions or Exemptions to Mandatory Clearing?

- **In General.** The CFTC has issued final rules detailing (i) a limited exception to the mandatory clearing requirement for a defined category of non-financial end users and (ii) an exemption to the mandatory clearing requirement for transactions between certain affiliated entities.
- **Swap Terminations.** In a recent no-action letter, the CFTC staff has clarified that swaps that partially or fully terminate existing uncleared swaps are not required to be cleared.¹⁵

What Are the Criteria for the Non-Financial End-User Exception?

- **Eligibility.** The CFTC has issued final rules outlining a limited exception to the mandatory clearing requirement for a defined category of non-financial end users.¹⁶ Both third-party and inter-affiliate trades may qualify for the exception. In order to qualify for the exception for a particular swap transaction:
 - **The Entity Entering into the Swap Must Not Be a Financial Entity.** To qualify for the exception, the particular entity entering into the swap must not be an SD, MSP or financial end user (as described above). Notably, even an entity within a corporate group that, on a group-wide

¹⁴ See 77 Fed. Reg. 74,284 (Dec. 13, 2012) (“**Clearing Requirement Determination**”).

¹⁵ See CFTC Letter No. 13-02, Comm. Fut. L. Rep. (CCH) ¶32,560 (Mar. 20, 2013).

¹⁶ See 77 Fed. Reg. 42,560, 42,590 (July 19, 2012) (“**End-User Exception Final Rule**”).

basis, engages predominantly in non-financial activities may still be a financial entity depending on the activities of the particular entity in question (and those of its subsidiaries). However, there are certain cases where a financial entity is nevertheless eligible for the exception:

- **End-User Exception for Affiliates Acting as Agents for Non-Financial End Users.** The end-user exception provides that an affiliate of a non-financial end user may be permitted to use the exception so long as it acts “on behalf of the [non-financial end user] and as an agent.”¹⁷
 - **Covered Affiliates.** Financial end users acting on behalf of and as an agent for the non-financial end user may make use of the end-user exception. An SD or MSP, however, even if it acts on behalf of and as an agent for a non-financial end user, may not make use of the end-user exception.
 - **Undefined Scope of Agency Requirement.** It is unclear whether the CFTC will interpret the agency requirement narrowly (*i.e.*, the central affiliate may not act as a riskless principal, as is usually the case with centralized hedging programs) or in a *de facto* manner (*i.e.*, to permit a central affiliate to net the demand of various affiliates and act as principal with external counterparties, while at the same time entering into offsetting back-to-back swaps with those affiliates). To address this ambiguity, the Coalition of Derivatives End Users has requested an exemption from mandatory clearing for centralized treasury units.¹⁸
 - **Additional Considerations.** A financial end user wishing to rely on an affiliate’s eligibility to elect the end-user exception may need to enter into an agency agreement to demonstrate that it is acting as an “agent for” the non-financial end user. Such an agreement may expose the non-financial end user affiliate to certain liabilities as a principal to the swap transaction. In addition, such an agency relationship may affect set-off rights as among the various parties to the swap transactions. In order to avoid unanticipated consequences, end users should take care to analyze any potential agency arrangement from the perspective of common law principles of agency and the applicable state law governing the agreement.

¹⁷ CEA §2(h)(7)(D).

¹⁸ Letter from Coalition of Derivatives End Users to Melissa Jurgens, Secretary, the CFTC, dated Feb. 22, 2013, available at http://www.nam.org/~media/B894FEDC2CE4469FA8974459EA5F9FC9/End_UsersCentralizedTreasuryUnits4c_ExemptiveReliefRequest.pdf.

- **Special Treatment of Certain Financial Entities.** For purposes of the end-user exception:
 - **Captive Finance Entities Are Not Financial End Users.** A captive finance entity will be a non-financial entity eligible to make use of the end-user exception if (i) its primary business is providing financing, (ii) it uses derivatives for the purpose of hedging underlying commercial risks related to interest rate and foreign currency exposures, (iii) 90 percent or more of such exposures arise from financing that facilitates the purchase or lease of products and (iv) 90 percent or more of such products are manufactured by the entity's parent company or another subsidiary of the parent company.
 - **Small Financial Institutions Are Not Financial End Users.** The CFTC has exempted certain small financial institutions from the definition of "financial entity." Small financial institutions include those banks, savings associations, farm credit system institutions and credit unions with total assets of \$10 billion or less on the last day of such person's most recent fiscal year.
 - **Certain Foreign Entities Are Not Subject to Mandatory Clearing.** The CFTC has stated that foreign governments, foreign central banks and international financial institutions are not subject to mandatory clearing. This exclusion does not apply to sovereign wealth funds or similar entities that, based on their activities, would likely be considered financial end users. As a result, sovereign wealth funds must be analyzed like any other non-sovereign entity.
 - **The Swap Must Be Used to Hedge or Mitigate Commercial Risk.** The CFTC has defined "hedging or mitigating commercial risk" to include swaps that are economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise, excluding any transactions that are in the nature of speculation, investing or trading or that are used to hedge another swap, unless that other swap is itself used to hedge or mitigate commercial risk. The CFTC has indicated that commercial risk does not refer only to the risk of the end user itself. For example, the parent entity in a corporate group that is itself eligible for the end-user exception may make use of the exception when it enters into a swap for the purpose of hedging the aggregate commercial risk of affiliates within the corporate enterprise. A swap may also be deemed to hedge or mitigate commercial risk if the swap qualifies for hedging treatment under Financial Accounting Standards Board Accounting Standards Codification Topic 815 ("Derivatives and Hedging") or

Governmental Accounting Standards Board Statement 53 (“Accounting and Financial Reporting for Derivative Instruments”).

- **The End User Must Make an Annual Filing with an SDR or the CFTC.** In order for a non-financial end user to rely on the end-user exception for a particular swap transaction, one of the parties to the swap must provide either a swap data repository (“**SDR**”) or the CFTC with information regarding “how the end user generally meets its financial obligations associated with entering into an uncleared swap.” The CFTC has indicated that this requirement would be satisfied if, on at least an annual basis, the end user provides or causes to be provided certain specified information to an SDR or the CFTC, including whether the entity generally meets its financial obligations associated with its swaps by (i) a written credit support agreement, (ii) pledged or segregated assets, (iii) a written third-party guarantee, (iv) its own available resources or (v) some other means. The SDRs currently registered with the CFTC include the DTCC Data Repository, ICE Trade Vault LLC and the Chicago Mercantile Exchange. If an end user does not make an annual filing, it will need to provide its counterparty with information regarding how it meets its financial obligations each time it enters into a transaction in reliance on the end-user exception.
- **SEC Filers Must Obtain Certain Board Approvals.** If a non-financial end user is or is controlled by an entity required to file disclosures with the SEC under the Exchange Act, such end user cannot make use of the exception unless an “appropriate” committee of the board of directors of the entity (which could be the board itself) has approved the decision not to clear the swap. If more than one entity in an end user’s group enters into swaps, an appropriate committee of the board of directors of each entity must approve the decision to rely on the end-user exception.
 - **Annual Committee Resolution Approving Use of End-User Exception.** The board of directors of an end user does not need to approve each swap transaction with respect to which the end user elects the clearing exception. Rather, the CFTC has indicated that an annual certification from the relevant committee of an end user’s board of directors that it has reviewed and approved the decision to utilize the exception will suffice.
 - **Board Approval of a Swap Policy.** As a corporate governance matter, the appropriate boardcommittee may approve a swap policy that contains sufficiently detailed parameters to demonstrate that the board committee has exercised appropriate

oversight of management's authority to clear or not clear certain swaps. For example, the policy could set limits on the types of counterparties or types of swaps that are pre-approved for the exception and require that any transaction outside those parameters be specifically approved by the committee. The committee could also identify factors that are relevant to the decision not to clear a swap, which could include credit risk analysis, the end user's overall hedging policies, the uniqueness of the swap, margin requirements, accounting and tax considerations.

- **Choosing an Appropriate Committee.** The CFTC has indicated that a board committee would be appropriate for these purposes if it is specifically authorized to review and approve the end user's decision to enter into swaps. While the CFTC provides SEC filers and their controlled subsidiaries with reasonable discretion to determine the appropriate committee, for most end users, it is expected that the audit committee (or other committee responsible for oversight of treasury activity) would perform this role.
- **Reporting Obligation for Each Swap Transaction Relying on End-User Exception.** For each swap between an end user and an unaffiliated entity in which the end user relies on the exception, the reporting counterparty¹⁹ will be required to provide the following information to an SDR or the CFTC: (1) whether the end-user exception has been elected; (2) which party is the electing counterparty; and (3) whether the electing counterparty has already provided the information discussed above through an annual filing.
 - **End Users Rarely Will Be the Reporting Counterparty.** If the end user's counterparty is a U.S. or non-U.S. SD or MSP, the obligation to report this election to an SDR or the CFTC will fall upon such SD or MSP counterparty.
 - **Where Both Counterparties are Not SDs/MSPs, and Only One Counterparty is a U.S. Person, the U.S. Person is the Reporting Counterparty.** If a non-financial end user enters into a swap with a financial entity that is not a U.S. person and not a SD or MSP, then the end user has the reporting obligation, unless otherwise agreed by contract.

¹⁹ This memorandum provides a more thorough discussion of reporting obligations in the section entitled "Will End Users Be Required to Report Their Swap Transactions?"

- **Inter-Affiliate Trades.** Under no-action relief issued by the CFTC staff (the “**Inter-Affiliate Reporting No-Action Letter**”),²⁰ end users need not report the information relating to the end-user exception for swaps with certain affiliates, subject to conditions described in “Are End Users Required to Report Inter-Affiliate Transactions?” below. If a non-financial end user is or is controlled by an entity required to file disclosures with the SEC under the Exchange Act, the CEA still requires approval of the use of the end-user exception by the end user’s board or appropriate committee, and therefore board resolutions may still be required for end users that only trade with affiliates.
- **“Reasonable Basis” Requirement.** If the end user is not the reporting counterparty, then the reporting counterparty must have a “reasonable basis to believe” that the end user electing the exception is entitled to do so. The CFTC has not provided an explicit standard for having “reasonable basis” to believe, but has stated that reasonableness depends on the applicable facts and circumstances. The CFTC has clarified, however, that the standard does not require independent investigation by the reporting counterparty of information or documentation provided by an end user. As long as the reporting counterparty has obtained information, documentation or a representation that on its face provides a reasonable basis to conclude that the end user qualifies for the exception, then, absent facts to the contrary, no further investigation would be necessary.

What Are the Criteria for the Inter-Affiliate Exemption from Mandatory Clearing and Trading?

- **In General.** The CFTC has issued rules that exempt from mandatory clearing swaps between affiliated entities under common majority ownership and whose financial statements are consolidated with each other,²¹ whether or not such

²⁰ See *No-Action Relief for Swaps Between Affiliated Counterparties That Are Neither Swap Dealers Nor Major Swap Participants from Certain Swap Data Reporting Requirements Under Parts 45, 46, and Regulation 50.50(b) of the Commission’s Regulations*, CFTC (APR. 5, 2013).

²¹ See *Clearing Exemption for Swaps Between Certain Affiliated Entities*, CFTC, <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/federalregister040113.pdf> (last visited Apr. 2, 2013) (the “**Inter-Affiliate Exemption Final Rule**”). Affiliates are eligible for this exemption if one counterparty directly or indirectly holds a majority ownership interest in the other counterparty or if a common entity directly or indirectly holds a majority ownership interest in each counterparty.

entities qualify as non-financial end users or use swaps to hedge or mitigate commercial risk.

- **Eligibility Criteria.** To be eligible for the exemption, the affiliates must:
 - document their trading relationship consistent with the swap trading relationship documentation requirements discussed below, or where both counterparties are not SDs/MSPs, document in writing all terms governing the trading relationship between the affiliates;
 - establish a centralized risk management program with respect to the inter-affiliate swaps;
 - report the election of the exemption to an SDR or the CFTC, along with the board certification and information regarding how the entity meets its financial obligations, as is also required for reliance on the end-user exception (discussed above); and
 - satisfy the outward-facing swaps conditions, described below.
- **Treatment of Outward-Facing Swaps Condition.** In order to qualify for the exemption, both affiliates to the swap transaction must generally, when entering into swaps with unaffiliated counterparties, either:
 - comply with the mandatory clearing requirement under the CEA;
 - comply with an exception or exemption from the mandatory clearing requirement under the CEA;
 - comply with the requirements for clearing swaps under a foreign jurisdiction's clearing requirement that is comparable, and comprehensive but not necessarily identical to the clearing requirement under the CEA, as determined by the CFTC;
 - comply with an exception or exemption under a foreign jurisdiction's clearing requirement; or
 - clear such swap through a DCO or a clearing organization that is subject to supervision by appropriate government authorities in the home country of the clearing organization and that has been assessed to be in compliance with certain principles for financial market infrastructures published by the International Organization of Securities Commissions ("IOSCO").
- **Time-Limited Alternative Compliance Framework.** Given that the clearing requirement will take effect in the United States before other jurisdictions, the CFTC recognized that it may be difficult for non-U.S. affiliates to meet the outward-facing swaps condition discussed above as such affiliates' home

jurisdictions may not yet have comprehensive clearing requirements comparable to those in the United States. As a result, the CFTC has provided a time-limited alternative compliance framework that will remain in effect until March 11, 2014.

- **Affiliates Located in the European Union (“EU”), Japan or Singapore.** Swaps between a U.S. affiliate and an affiliate located in the EU, Japan or Singapore will be deemed to have met the outward-facing swaps condition if (i) each affiliate pays and collects full variation margin daily on all swaps entered into by the affiliate with unaffiliated counterparties, (ii) each affiliate pays and collects full variation margin daily on all swaps entered into with eligible affiliate counterparties or (iii) the affiliates’ common majority owner is not a financial entity and neither affiliate is affiliated with an SD or MSP.
- **Affiliates Not Located in the EU, Japan or Singapore.** Swaps between a U.S. affiliate and an affiliate that is not located in the EU, Japan or Singapore will be deemed to have met the outward-facing swaps condition if (i) the aggregate notional value²² of swaps entered into by the affiliate counterparty located in the United States with affiliate counterparties outside of the United States, the EU, Japan or Singapore that are required to be cleared does not exceed 5% of the aggregate notional value of all swaps that are required to be cleared and (ii) either the affiliate located outside the U.S., EU, Japan and Singapore pays and collects full variation margin daily on all swaps it enters into with unaffiliated counterparties or both affiliates pay and collect full variation margin daily on all their swaps with eligible affiliate counterparties.
- Generally speaking, because of the additional conditions to the inter-affiliate exemption, and because of the additional reporting obligations (discussed below), an entity eligible for the non-financial end-user exception for a swap with an affiliate may well find reliance on that exception more straightforward.
- **TIMING FOR COMPLIANCE.** If an end user does not qualify for either exception/exemption, then mandatory clearing of the swaps designated by the CFTC will go into effect on June 10, 2013 for most financial end users and on September 9, 2013 for non-financial end users. Swaps entered into before those dates are not subject to mandatory clearing if they are reported in accordance with the rules for described below.

²² In each instance, the notional value as measured in U.S. dollar equivalents and calculated for each calendar quarter.

Are There Restrictions on Trading Imposed on End Users?

- **In General.** Unless subject to an exception, end users will be prohibited from entering into OTC swaps directly with their counterparties if either of the following two conditions is true:
 - Either party is not an “eligible contract participant” (“**ECP**”); or
 - The swap is subject to the mandatory clearing requirement and is made “available to trade” by a designated contract market (“**DCM**”) (i.e., a futures exchange) or a swap execution facility (“**SEF**”).
- **ECP Trading Requirement.**
 - **In General.** Under the CEA, any swap transaction with a person other than an ECP must be entered into on, or subject to the rules of, a DCM.
 - **Who is an ECP?** Generally speaking, for an unregulated corporation, partnership or other entity to qualify as an ECP, its total assets must exceed \$10 million or, if it is entering into the swap in connection with its business or to manage risk, \$1 million. The term “ECP” also includes several defined classes of institutions (e.g., banks, insurance companies, registered investment companies, pension plans, governmental entities, broker-dealers and FCMs) and natural persons that meet certain asset and other requirements.²³
 - **Must All Swap Guarantors be ECPs?** The CFTC’s position is that any guarantee of a swap is, itself, a swap. As a result, each guarantor of a swap must be an ECP in order to avoid the prohibition on entering into OTC swaps discussed above.²⁴ While this requirement may not be particularly onerous for most swap guarantors, it may present an issue in the secured financing context, where multiple affiliates (including those with minimal assets) may guarantee secured obligations that include not just loan obligations but obligations under related IRS or other swaps. If a non-ECP guarantees a swap, the non-ECP guarantor could face enforcement action, the guarantee may be unenforceable (depending on applicable state law) and the SD counterparty, if any, could face

²³ For certain purposes, ECPs also include financial institutions, insurance companies, commodity pools, governmental entities, broker-dealers, FCMs, floor brokers and floor traders acting as a broker or performing an equivalent agency function on behalf of another ECP. In addition, ECPs also include such entities, along with investment advisers, commodity trading advisers and similarly regulated foreign persons, who are acting as investment manager or fiduciary for another ECP and who are authorized by that person to commit that person to the relevant transaction.

²⁴ See CFTC Interpretative Letter No. 12-17, Comm. Fut. L. Rep. (CCH) ¶32,408 (Oct. 12, 2012).

enforcement action for failure to verify the ECP status of the guarantor.²⁵ On February 15, 2013 the Loan Syndications and Trading Association issued a market advisory describing how parties can draft their secured loan agreements to ensure that non-ECPs do not guarantee any swap obligations.²⁶ An ECP may also provide a keepwell to confer ECP status on an entity that would otherwise be a non-ECP guarantor.

- **Trading Requirement for Cleared Swaps.**

- **In General.** Swaps subject to the mandatory clearing requirement will be required to be traded on a DCM or SEF unless the swap is not made “available to trade” by a DCM or SEF.
- **When Is a Swap Made “Available to Trade”?** The CFTC has indicated that the mere listing of a swap for trading is not sufficient.²⁷ Instead, it has proposed a number of factors, including, but not limited to, the presence of willing buyers and sellers, the frequency or size of transactions, the trading volume, the bid/ask spread, the usual number of resting firm bids or indicative bids and offers and whether a SEF or DCM supports trading in the swap.²⁸ A CFTC proposal would allow a SEF or DCM to determine whether a swap is made “available to trade” and to submit such determination to the CFTC for approval or certification. The CFTC has also proposed that, if one SEF makes a swap available to trade, all “economically equivalent” swaps would be deemed “available to trade.”
- **What is a SEF?** Dodd-Frank defines a SEF to include any trading system or platform in which multiple participants have the ability to execute or trade swaps by accepting bids and offers made by multiple participants. SEFs are required to register with the CFTC and are subject to several core principles and other requirements. In addition, the CFTC has proposed to interpret the SEF definitions and core principles to restrict the execution modalities permitted to qualify (e.g., how bids and

²⁵ See “How Does Dodd-Frank Change the Way Swap Transactions Are Documented” below.

²⁶ See Updated Market Advisory: Swap Regulations’ Implications for Loan Documentation, The Loan Syndications and Trading Association (Feb. 15, 2013). As noted in the advisory, whether the ECP requirement also applies to a pledgor pledging collateral to secure an affiliate’s swap is uncertain.

²⁷ See 76 Fed. Reg. 1214, 1222 (Jan. 7, 2011) (“**SEF Proposal**”) (describing frequency of transactions and open interest as potential considerations for determining whether a swap is available to trade).

²⁸ 76 Fed. Reg. 77,728 (Dec. 14, 2011) (“**Available to Trade Proposal**”).

offers may or must be disseminated by a qualifying platform and rules governing order interaction) and to impose certain other requirements on the types of functionalities that a SEF must offer.²⁹ These limitations can be expected to make it more difficult for an end user to execute a large or complex swap over a SEF without suffering adverse price effects from exposing its trading interest to a larger number of other market participants.

○ **Are There Any Exceptions to the Trading Requirement for Cleared Swaps?**

- **Block Trades.** The CFTC has proposed to permit a block-sized swap transaction to be executed off of a SEF through any means of interstate commerce. As proposed, however, only the largest trades — estimated to be the top 5-6% in notional amount for IRS and CDS — would qualify as block trades.
- **Swaps Exempt/Excepted from Mandatory Clearing.** In addition, swaps excepted or exempted from mandatory clearing are not covered.

- **TIMING FOR COMPLIANCE.** The ECP trading requirement is already in effect. The requirement that all swap guarantors be ECPs applies to swaps and guarantees of swaps entered into after October 12, 2012. The trading requirement for cleared swaps will become effective after the finalization of CFTC rules governing SEFs and the CFTC proposal regarding when a swap is “available to trade.”

²⁹ The CFTC has proposed that order book or request for quote (“**RFQ**”) platforms may qualify as SEFs, but systems operated by a single dealer and inter-dealer brokerage platforms would not. A SEF (even an RFQ SEF) would be required to operate an “all-to-all” display functionality. A SEF participant would be required to send an RFQ to at least five recipients, and any resting orders would need to be integrated with responses to RFQs.

Must End Users Post Collateral with Respect to Their Uncleared Swaps?

- **In General.** Dodd-Frank requires SDs and MSPs to collect collateral as initial and variation margin for certain uncleared swaps. Margin requirements for uncleared swaps will generally be higher than the margin required to be posted to a DCO in respect of cleared swaps.
- **Who Sets Margin Requirements?**
 - Very generally, the U.S. federal banking regulators (called the “**Prudential Regulators**”)³⁰ are responsible for setting margin requirements for SDs and MSPs that are banks and the CFTC is responsible for setting margin requirements for SDs and MSPs that are not banks. The CFTC and the Prudential Regulators have proposed margin requirements, but they are not yet finalized.³¹
 - In an effort to achieve harmonization across jurisdictions and regulators, the Basel Committee on Banking Supervision and the International Organization of Securities Commissions (“**BCBS-IOSCO**”) has issued two Consultations on margin requirements for swaps that are not centrally cleared.³²
- **Margin Requirements for Non-Financial End Users.**
 - **Proposed Prudential Regulator Rules.** The proposal of the Prudential Regulators would allow SDs and MSPs to set an unmargined threshold for non-financial end users. Under the Prudential Regulators’ proposal bank SDs and MSPs would be required to collect from non-financial end user counterparties any difference between the initial margin amount specified in the rules and the unmargined threshold.
 - **Proposed CFTC Rules.** The CFTC’s proposed rules include a full exception from the proposed margin requirements for non-financial end users, although credit support documentation would still be required to be executed.

³⁰ The Prudential Regulators are the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Farm Credit Administration and the Federal Housing Finance Agency.

³¹ See CGSH Alert Memos, “Prudential Regulators Propose Swap Margin and Capital Requirements” (Apr. 14, 2011) and “CFTC Proposes Uncleared Swap Margin Requirements” (Apr. 27, 2011).

³² See “Margin requirements for non-centrally-cleared derivatives,” BCBS-IOSCO (July 2012); Margin requirements for non-centrally cleared derivatives (Second Consultative Document), BCBS-IOSCO (Feb. 2013).

- **Margin Requirements for Financial End Users.** Both the Prudential Regulators and the CFTC would effectively divide financial end users into “high risk” financial end users and “low risk” financial end users.³³ For both categories of financial end users, margin would not be required to be transferred below a de minimis minimum transfer amount of \$100,000. In addition, if a financial end user qualifies as a “low risk” counterparty, rather than a “high risk” counterparty, margin would not be required to be transferred until it exceeds the thresholds proposed to be set either based on a fixed dollar threshold (between \$15 million and \$45 million) or a percentage of the SD’s or MSP’s capital (between 0.1% and 0.5%).
 - **Margin Requirements for Certain Foreign Governmental Entities.** The Prudential Regulators’ and CFTC’s proposals would not exempt sovereigns or central banks from the requirement to post and collect margin. However, the recent consultative document on margin requirements published by the BCBS-IOSCO, in which the Prudential Regulators and CFTC were involved, would not require such entities to post margin.
 - **How Can End Users Protect the Margin They Post to their Dealer Counterparties?** Dodd-Frank requires SDs and MSPs to notify counterparties, such as end users, of their right to require that any initial margin that such counterparties post to guarantee uncleared swaps be segregated at an independent custodian. The counterparty will be permitted, but is not required, to elect segregation.
 - **Foreign Exchange.** Current proposals would not impose margin requirements on foreign exchange swaps and forwards eligible for the Department of the Treasury exemption for such transactions.³⁴
- **TIMING FOR COMPLIANCE.** Final rules implementing these margin requirements are still pending.

³³ A financial end user would be considered “high risk” unless (1) it does not have significant swap exposure (a level designed to equal half the level of uncollateralized outward exposure that would require registration as an MSP under the substantial counterparty exposure prong of the MSP definition), (2) it predominantly uses swaps to hedge or mitigate the risks of its business activities, including balance sheet or interest rate risk, and (3) it is subject to capital requirements established by a prudential regulator or state insurance regulator. See 76 Fed. Reg. 27,564 (May 11, 2011) (“**Prudential Regulator Capital and Margin Proposal**”) and 76 Fed. Reg. 23,732 (Apr. 28, 2011) (“**CFTC Margin Proposal**”). Notably, under these proposals, sovereigns and sovereign financial institutions, such as non-U.S. central banks, would be treated as high-risk financial end users.

³⁴ See Final Treasury Determination, 77 Fed. Reg. 69,694, 69,695 (Nov. 20, 2012).

Must End Users Report Their Swap Transactions?

- **In General.** The CEA requires that all swap transactions that were in existence as of July 21, 2010 (the date Dodd-Frank was enacted) or entered into after that date be reported to an SDR or, if no SDR accepts the relevant swap data, the CFTC. This requirement applies to end users, although the CFTC has issued no-action relief regarding certain inter-affiliate swaps.
- **Public Reporting.** The CEA requires that swap transaction and pricing data be reported to the public in real-time as soon as technologically practicable, subject to certain delays for block trades as described below.³⁵ The parties' identities are not made public.
- **Regulatory Reporting.** The CEA also requires that all relevant information about every swap transaction be reported to an SDR or the CFTC for the entire life of the transaction.³⁶ For each swap transaction, the reporting party must report (i) "creation" data comprised of the primary economic terms of the swap transaction and all of the terms of the swap in the legal confirmation and (ii) "continuation" data documenting all of the lifecycle events of the swap transaction (e.g., a daily snapshot of all primary economic terms data, including any changes that have occurred since the previous snapshot) and the valuation of the swap transaction. Such data is maintained for regulatory purposes and will not be made public.
- **Historical Reporting.** The CEA requires that the responsible party report certain information regarding all swaps that were effective as of July 21, 2010, even if they have already expired. For such swaps that expired prior to April 25, 2011, the reporting party must report information in their possession as of specified dates relating to the swaps to an SDR in whatever method the party selects. For swaps still effective as of April 25, 2011, the reporting party must electronically report minimum primary economic terms data and information that identifies each counterparty. Such data is maintained for regulatory purposes and will not be made public.³⁷
- **Reporting Delays for "Block Trades."** The CFTC has provided for certain delays in real-time public dissemination of swap transaction data for block trades. Under proposed rules, block trade thresholds and reporting delays differ depending on the asset class (or sub-asset class swap category), method of

³⁵ See 77 Fed. Reg. 1182, 1243 (Jan. 9, 2012) ("**Real-Time Public Reporting Final Rule**").

³⁶ See 77 Fed. Reg. 2136 (Jan. 13, 2012) ("**Regulatory Reporting and Recordkeeping Final Rule**").

³⁷ See 77 Fed. Reg. 35,200 (June 12, 2012) ("**Reporting of Unexpired Pre-Enactment Swaps Final Rule**").

execution and status of the parties. If a swap exceeds the applicable block trade threshold, the public reporting of data on that swap will be delayed for at least 30 minutes and, in some cases, significantly longer.³⁸ Pending finalization of block trade thresholds, all swaps are eligible for these delays.

Who Is Responsible for Reporting Swap Transaction Data?

- **End Users Are Not Usually Responsible for Reporting.** In general, end users will not be responsible for such reporting with respect to most of their swap transactions.
 - In a transaction in which one of the parties is an SD or MSP and the other is not, the SD or MSP is responsible for satisfying the reporting obligation (even if the SD or MSP is a non-U.S. person).
 - In a transaction in which one of the parties is a financial end user and the other is a non-financial end user, the financial end user is responsible for satisfying the reporting obligation (unless the financial end user is a non-U.S. person).
 - In a transaction in which both parties are non-financial end users, the counterparties are to agree as a term of the transaction as to which counterparty is the reporting party (unless the financial end user is a non-U.S. person).
- **End Users Are Responsible for Reporting Transactions with Certain Non-U.S. Counterparties.** The CFTC has stated that, in the case of a swap between a U.S. and a non-U.S. person, in which neither party is an SD or MSP, the U.S. person is responsible for reporting, regardless of the statuses of the parties. Foreign financial institutions that have not registered as SDs may agree by contract to report swaps on behalf of their U.S. end user counterparties, although a U.S. end user will ultimately be responsible for ensuring that the swaps are reported.

Are End Users Required to Report Inter-Affiliate Transactions?

- **No-Action Relief from Reporting End-User Inter-Affiliate Transactions.** On April 5, 2013, the CFTC staff issued no-action relief to end users for regulatory reporting obligations with respect to certain inter-affiliate swaps (including historical swap reporting and reporting relating to the end-user exception). Public reporting requirements, which apply to all trades that are “arms’ length,” are not the subject of the Inter-Affiliate Reporting No-Action Letter. The no-action relief is not time-limited.

³⁸ See 77 Fed. Reg. 15,460 (Mar. 15, 2012) (“**Block Trade Proposal**”).

- **Conditions to the Inter-Affiliate Reporting No-Action Letter.** Each aspect of the relief only applies to bilateral, uncleared OTC swaps where neither counterparty is an SD, MSP or an affiliate of either. The relief will likely apply to most inter-affiliate swaps between end users. The relief includes the following conditions:
 - **100% Commonly Owned Affiliates – New Swaps.** The no-action relief from regulatory reporting and end-user exception reporting applies to swaps between a counterparty that 100% owns the other counterparty or between counterparties that are 100% commonly owned (directly or indirectly) by a party that reports its financial statements on a consolidated basis.
 - **Majority Commonly Owned Affiliates – New Swaps.** For swaps between a counterparty that owns a majority interest in the other counterparty or between counterparties that are majority commonly owned (directly or indirectly) by a party that reports its financial statements on a consolidated basis, the no-action relief would allow a party to only report the information required under the regulatory reporting rule and the end-user exception rule on a quarterly basis (no more than 30 days after the entity’s fiscal quarter, beginning with the quarter ending June 30, 2013), as long as public reporting requirements do not apply to the individual swaps. (As noted above, public reporting does not apply to trades that are not “arms’ length.”)
 - **All Affiliates – Historical Swaps.** The no-action relief from historical reporting applies to any swaps between affiliates, whether 100% or majority owned or commonly owned.
- **Recordkeeping Obligations Still Apply.** Any end user subject to this relief must still retain records of all swaps as required by the regulatory reporting and historical reporting rules.

If an End User Is Not a Reporting Party, Does It Have Any Reporting Obligations?

- **End Users Must Obtain a Legal Entity Identifier.** Even in those situations where end users are not responsible for reporting swap data to the relevant data repository, the CFTC requires that each counterparty to a swap be identified in all recordkeeping and all swap data reporting by means of a single legal entity identifier. As a result, end users must obtain a legal entity identifier for each legal entity entering into derivatives transactions.³⁹

³⁹ Legal entity identifiers may be obtained online at <https://www.ciciutility.org>.

- **End Users May Need to Provide Consent.** In addition to obtaining a legal entity identifier, an end user may be required, under applicable non-U.S. laws, to consent to having its data reported to the relevant SDR by its SD or MSP counterparty.
- **TIMING FOR COMPLIANCE.**
 - Reporting requirements for SDs and MSPs are already in effect.
 - Under no-action relief issued by the CFTC staff (the “**End-User Reporting No-Action Letter**”),⁴⁰ public and regulatory reporting requirements for non-financial end users, in those instances in which the end user is the reporting party, are currently scheduled to become effective with respect to IRS and CDS on July 1, 2013,⁴¹ and with respect to equity swaps, foreign exchange swaps and commodity swaps, on August 19, 2013.⁴² Historical reporting requirements for non-financial end users are scheduled to become effective October 31, 2013.
 - Under the End-User Reporting No-Action Letter, public and regulatory reporting requirements for financial end users, in those instances in which the financial end user is the reporting party, are currently scheduled to become effective with respect to IRS and CDS on April 10, 2013, and with respect to equity swaps, foreign exchange swaps and commodity swaps, on May 29, 2013.⁴³ Historical reporting requirements for financial end users are scheduled to become effective September 30, 2013.

⁴⁰ See *Time-Limited No-Action Relief for Swap Counterparties that are not Swap Dealers or Major Swap Participants, from Certain Swap Data Reporting Requirements of Parts 43, 45 and 46 of the Commission’s Regulations*, CFTC (APR. 9, 2013).

⁴¹ Non-financial end users must report by August 1, 2013 any data relating to IRS and CDS from the period between April 10, 2013 and July 1, 2013.

⁴² Non-financial end users must report by September 19, 2013 any data relating to equity swaps, foreign exchange swaps and commodity swaps from the period between April 10, 2013 and August 19, 2013.

⁴³ Financial end users must report by June 29, 2013 any data relating to equity swaps, foreign exchange swaps and commodity swaps from the period between April 10, 2013 and May 29, 2013.

How Does Dodd-Frank Change the Way Swap Transactions Are Documented?

- **In General.** Under Dodd-Frank, SDs and MSPs entering into swap transactions are subject to a host of regulations, some of which require them to make and receive certain representations and agreements from their counterparties and receive certain information about their counterparties.
- **SDs and MSPs Are Subject to External Business Conduct Standards that May Have an Impact on End Users.** Dodd-Frank provided the CFTC with mandatory and discretionary rulemaking authority to impose business conduct standards on SDs and MSPs.⁴⁴ Although these standards relate to the conduct of SDs and MSPs, certain of the requirements may impose indirect obligations on end users or require the satisfaction of certain pre-execution requirements.
 - **End Users Will Be Asked to Make Certain Representations to SD and MSP Counterparties.**
 - **Know Your Counterparty.** SDs are required to have policies and procedures reasonably designed to obtain and retain a record of essential facts concerning a known counterparty to a swap transaction. As such, SDs may ask end users for (i) facts required to comply with applicable law and to ensure compliance with the SD's internal credit and operational risk management policies; and (ii) information regarding the authority of any person acting for the counterparty.
 - **True Name and Owner.** SDs and MSPs are required to obtain and retain a record of the true name and address of the counterparty, guarantors, underlying principals and any persons exercising control with respect to the positions of such counterparty.
 - **Eligibility Verification.** Before entering into a swap transaction, an SD or MSP must (i) verify that its counterparty is an ECP and (ii) determine whether its counterparty is a Special Entity or eligible to elect to be treated as a Special Entity.
 - **Suitability.** The CFTC requires that an SD have a reasonable basis to believe that any swap or trading strategy involving swaps that it recommends to a counterparty is suitable for such counterparty. Thus, recommendations trigger a duty by SDs to undertake "reasonable diligence" to understand the "risks and

⁴⁴ See 77 Fed. Reg. 9734 (Feb. 17, 2012) ("**External Business Conduct Standards Final Rule**").

rewards” of a swap and to have a “reasonable basis” to believe the swap is “suitable” to the counterparty’s needs.

- **SD Safe Harbor.** For an end user that is not a Special Entity, suitability requirements are met in circumstances where (i) the end user or its representative represents it is exercising independent judgment and (ii) the SD represents it is not evaluating the suitability of any recommendation.
- **Impact on End Users.** In order to rely on the safe harbor, an SD may request that an end user or its representative represent that it is exercising independent judgment and is capable of evaluating the swap transaction.
- **Additional Obligations Involving Special Entities.** Additional obligations apply to SDs or MSPs transacting with Special Entities. For more information, please refer to our April 12, 2012 Alert Memorandum entitled “CFTC Adopts External Business Conduct Standards.”⁴⁵
- **SDs and MSPs Must Provide End Users with Certain Information.**
 - **Scenario Analysis.** For swaps not subject to Dodd-Frank’s mandatory SEF trading requirement, an SD must offer to provide a scenario analysis to end users, and must provide the analysis if the end user requests it. The SD is required to design the scenario analysis in consultation with the end user and must also disclose all material assumptions and calculation methodologies used to perform the analysis (although it is not required to disclose any confidential, proprietary information about any model used to prepare the analysis).
 - **Clearing.** If a swap is subject to mandatory clearing, an SD or MSP will be required to notify an end user counterparty of its right to select the DCO. If the swap is not subject to mandatory clearing, the SD or MSP will be required to notify such counterparty of its right to elect to require the swap to be cleared and to select the DCO.
 - **Certain Disclosures.** SDs and MSPs will need to update documentation to provide end users with information about the following:

⁴⁵ Available at: <http://www.cgsh.com/files/News/9fd7b0fd-b4a3-417e-950d-bf5bc2129bab/Presentation/NewsAttachment/59773d07-c3da-4991-baab-c01701176d7c/CGSH%20Alert%20-%20External%20Business%20Conduct%20Standards.pdf>.

- material risks;
 - material contract characteristics of the swap transaction;
 - material incentives and conflicts of interest; and
 - notification that an end user counterparty has the right to receive the DCO's daily mark for a cleared swap.
- **TIMING FOR COMPLIANCE.** The CFTC has extended the date by which SDs/MSPs must comply with most of the External Business Conduct Standards until May 1, 2013.⁴⁶
- **Swap Trading Relationship Documentation.** CFTC rules require that SDs and MSPs, but not end users, comply with certain swap trading relationship documentation requirements. These rules require that SDs and MSPs establish policies and procedures reasonably designed to ensure that they execute written (electronic or otherwise) swap trading relationship documentation with their counterparties that includes, among other items, all terms governing the swap trading relationship and all credit support arrangements.⁴⁷
 - **Requirement for Financial End Users to Agree to a Valuation Process.** For swap transactions with financial end users, the financial end user and its SD or MSP counterparty must have written documentation in place in which the parties agree on the process for determining the value of each swap. Non-financial end users do not have a similar requirement, although they may request such documentation.
 - **Documentation of Any Exception to or Exemption from Mandatory Clearing and Trading.** Swap documentation must state whether an end user is relying on an exception or exemption from mandatory clearing and trading for a particular transaction.
 - **Portfolio Reconciliation.** If an end user enters into swap transactions with an SD or MSP, such SD or MSP may request that an end user perform portfolio reconciliation on either a quarterly or annual basis (depending on the level of swap activity with the counterparty). Portfolio reconciliation is the process by which the counterparties to a swap (i) exchange the terms of all swaps between them, (ii) exchange valuations (*i.e.*, the current market value or net present value) of each swap between them as of the close of business on the immediately preceding business day, and (iii) resolve any discrepancies in material terms (including the swaps' primary economic terms) and valuations.

⁴⁶ See 78 Fed. Reg. 17 (Jan. 2, 2013) ("Extension of Compliance Dates").

⁴⁷ See 77 Fed. Reg. 55,904, 55,961–64 (Sept. 11, 2012) ("Swap Documentation Final Rule").

- **Portfolio Compression.** SDs and MSPs are required to establish written policies and procedures for portfolio compression with end users. Thus, although end users are not required to engage in portfolio compression, SDs and MSPs may ask end users to engage in compression from time to time. Portfolio compression is the process by which an SD or MSP and one or more counterparties wholly terminate or change the notional value of some or all of the swaps being considered in the compression process and, depending on the methodology being employed, replace the terminated swaps with other swaps whose combined notional value (or some other measure of risk) is less than the combined notional value (or some other measure of risk) of the terminated swaps being considered in the compression process.
- **Swap Confirmation.** The CFTC enacted rules requiring that SDs and MSPs send post-trade acknowledgments to swap counterparties as well as execute post-trade confirmations for each swap transaction into which they enter (other than those cleared with a DCO or traded on a DCM or SEF). In general, end users will not be responsible for confirming swap transactions. That said, in order to satisfy its own obligations, an SD or MSP may request that an end user take certain actions, such as signing an acknowledgment of the legally binding terms of a swap transaction.
- **Request for Draft Acknowledgment.** An end user may request a pre-trade draft acknowledgment from an SD or MSP prior to entering into a swap transaction.
- **TIMING FOR COMPLIANCE.** The Swap Confirmation and Portfolio Compression rules are already in effect. Compliance with the Swap Trading Relationship Documentation and Portfolio Reconciliation rules has been delayed until July 1, 2013.⁴⁸

How Does the Market Plan to Implement Such Changes in Required Documentation?

- **ISDA's Dodd-Frank Protocols.** ISDA has completed two new protocols in order to provide standardized agreements, representations and information necessary to make the parties who subscribe to them compliant with Dodd-Frank.⁴⁹
 - **The August 2012 DF Protocol.** The August 2012 DF Protocol is intended to help parties to swap transactions comply with certain of the requirements under Dodd-Frank, including the External Business Conduct Standards. The framework is meant to supplement new or

⁴⁸ See Extension of Compliance Dates.

⁴⁹ Information on the Protocols may be found on ISDA's website at: <http://www2.isda.org/functional-areas/protocol-management/open-protocols/>.

existing swap agreements (documented via an ISDA master agreement or other long-form confirmation) with SDs and MSPs in order to bring them into compliance with the initial set of rules finalized by the CFTC.⁵⁰

- **The March 2013 DF Protocol.** The March 2013 DF Protocol is intended to bring new or existing swap agreements into compliance with additional rules finalized by the CFTC since the August 2012 DF Protocol, including the Swap Trading Relationship Documentation, Portfolio Reconciliation, Portfolio Compression and Swap Confirmation rules.⁵¹
- **Ongoing Process.** As the CFTC continues to finalize its rulemaking process, parties to swap transactions will need to update their documentation to remain in compliance with applicable regulations.
- **Impact on End Users.** The CFTC rules covered by the ISDA Dodd-Frank Protocols do not directly apply to end users. Rather, Dodd-Frank imposes certain obligations on SDs and MSPs. In order to continue to deal in swaps with SDs and MSPs once compliance with Dodd-Frank's swap regulatory rules are required, end users will either need to enter into the Dodd-Frank Protocol, amend their ISDA master agreements with such SDs and MSPs, or otherwise enter into separate agreements or supplements to provide individualized representations and disclosures. SD or MSP counterparties may not be able to continue to transact with end users who do not sign on to the August Dodd-Frank Protocol or execute alternative bilateral documentation by May 1, 2013.
- **Adhering to the Dodd-Frank Protocols.** In order to take advantage of the Dodd-Frank Protocols, end users must submit an adherence letter to ISDA in which the end user agrees to certain of the terms that comprise the Dodd-Frank Protocols. Submission of the adherence letter will not, however, amend existing agreements with SD or MSP counterparties. In order to amend existing agreements, each end user must complete a questionnaire that includes representations about the legal status of the end user. The end user can choose which counterparties will receive its completed questionnaire. When an end user's questionnaire is matched to its SD or MSP counterparty, the existing swap transaction is amended to conform to the those requirements of the Title VII regime covered by the Protocol.
- **Limited Flexibility of the Dodd-Frank Protocols.** The Dodd-Frank Protocols are not negotiable. If either party to a swap does not wish to enter into a protocol, then the parties must enter into a bilateral agreement to bring the swap

⁵⁰ Parties may access information about August 2012 DF Protocol at:
<http://www2.isda.org/functional-areas/protocol-management/protocol/8>.

⁵¹ Parties may access information about March 2013 DF Protocol at:
<http://www2.isda.org/functional-areas/protocol-management/protocol/12>.

agreements into compliance with the applicable CFTC regulations. There is, however, some flexibility built into the Dodd-Frank Protocols in that parties to each Protocol need only adopt those optional schedules applicable to their particular swap transaction. End users should consult with both their SD or MSP counterparties and counsel in order to determine the parameters of any amendments.

- **TIMING FOR COMPLIANCE.** There is currently no cut-off date for adherence to the Dodd-Frank Protocols. That said, many of the rules that give rise to the need for the August 2012 DF Protocol and the March 2013 DF Protocol become effective on or before May 1, 2013 and July 1, 2013, respectively.

Does Dodd-Frank Impose New Recordkeeping Obligations?

- **General Recordkeeping Requirements for End Users.** CFTC rules require end users that conduct swaps to “keep full, complete, and systematic records, together with all pertinent data and memoranda” with respect to each of their swaps for a period of five years following termination of the swap. Records can be kept in either paper or electronic form, as long as the records are retrievable upon request by the CFTC within five business days.
- **CFTC Large Swap Trader Reporting.** Dodd-Frank enacted and the CFTC implemented certain “large swap trader reporting” requirements applicable to persons that enter into swaps linked to specified physical commodity futures contracts. While the relevant CFTC rules impose these reporting requirements on DCOs, clearing members and SDs, certain end users that own or control 50 or more gross all-months-combined futures equivalent positions in the relevant types of physical commodity swaps are required to keep records related to those swaps and must produce them upon request by the CFTC.⁵²
- **TIMING FOR COMPLIANCE.** Requirements for the retention of swap data records are already in effect.

⁵² See 76 Fed. Reg. 43,851 (July 22, 2011).

Does Dodd-Frank Impose New Rules With Respect to Position Limits?

- **In General.** Dodd-Frank allows the CFTC to set aggregate position limits on futures and options on physical commodities and economically equivalent swaps. It also narrowed the definition for bona fide hedging transactions exempted from position limits.⁵³ As a result, the CFTC adopted rules that would have applied maximum aggregate position limits across twenty-eight designated listed physical commodity futures contracts and economically equivalent swaps.
 - **Position Limit Rules Currently Invalid.** On September 28, 2012, the District Court for the District of Columbia enjoined and vacated the CFTC rules regarding position limits. The CFTC has approved an appeal of the District Court's decision. It remains possible that the CFTC will propose new position limit rules.
- **TIMING FOR COMPLIANCE.** Not yet applicable.

⁵³ CEA § 4a(a).

How Will Dodd-Frank's New Antifraud and Antimanipulation Rules Affect End Users?

- **In General.** End users, even those making use of certain exceptions or exemptions discussed in this memorandum, are subject to the CFTC's antifraud and antimanipulation provisions.
 - **New CFTC Rules Prohibiting Fraudulent Activity.** With respect to swaps, Dodd-Frank amended the CEA to prohibit fraudulent activity, including material misstatements and omissions in connection with futures contracts, options on futures contracts and swaps. The CFTC's rules harmonize the scope of liability for deceitful behavior and CFTC enforcement under the CEA with fraud liability and SEC enforcement under Section 10(b) of the Exchange Act.
 - **New CFTC Rules Prohibiting Manipulation.** Dodd-Frank amended the CEA, and the CFTC has adopted rules, to provide that no person is permitted to engage in any manipulative or deceptive behavior related to any swap, commodity or futures contract or to attempt to manipulate the price of any swap, commodity or futures contract.⁵⁴
 - **Do the CFTC Rules Impose New Disclosure Obligations?** In its adopting release, the CFTC noted that its new rules do not impose any new disclosure obligations on market participants. That said, market participants could violate the rules due to a breach of other disclosure requirements in the CEA or associated CFTC rules, or by trading on material non-public information (i) in breach of a pre-existing duty (established by law, agreement, or understanding) or (ii) that was obtained through fraud or deception. The application of this guidance to the non-securities derivatives markets, where market participants often trade on the basis of non-public information for hedging purposes, remains unclear.
- **TIMING FOR COMPLIANCE.** These rules are already in effect.

⁵⁴ CFTC Regulations §180.1-180.2; see also 76 Fed. Reg. 41,398 (July 14, 2011) ("Antifraud Final Rule"). In applying the rule prohibiting price manipulation, the CFTC noted that it will use a four-part test, specifically, that: (i) the accused had the ability to influence market prices, (ii) the accused intended to create a price or price trend that does not reflect legitimate forces of supply and demand, (iii) artificial prices existed and (iv) the accused caused the artificial prices. See Antifraud Final Rule, 76 Fed. Reg. 41,398, 41,407 (July 14, 2011).

Will Dodd-Frank Impose Requirements on Swaps Between Non-U.S. Persons?

- **In General.** The CFTC has issued a release regarding the cross-border application of its rules in the form of proposed interpretive guidance in June 2012 (the “**Proposed Guidance**”).⁵⁵ In addition, on December 21, 2012, the CFTC issued an exemptive order that would delay the effectiveness of certain provisions of Dodd-Frank until July 2013 (the “**Exemptive Order**”).⁵⁶ The Exemptive Order and the Proposed Guidance would define which entities qualify as U.S. persons and are therefore generally subject to rules under Dodd-Frank. In addition, the Proposed Guidance would define the circumstances under which non-U.S. persons would be required to register with the CFTC as SDs or MSPs (as well as which of the rules applicable to SDs and/or MSPs would apply).
- **Who Is a U.S. Person?** Under the Proposed Guidance and Exemptive Order, whether CFTC rules apply to an end user largely depends on whether either it or its counterparty is a U.S. person. Under the Exemptive Order, a “U.S. person” includes:
 - (i) any natural person who is a resident of the United States;
 - (ii) any corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund, or any form of enterprise similar to any of the foregoing, in each case that either (A) is organized or incorporated under the laws of the United States (“legal entity”) or (B) for all such entities other than funds or collective investment vehicles, has its principal place of business in the United States;
 - (iii) any individual account (discretionary or not) where the beneficial owner is a U.S. person;
 - (iv) a pension plan for the employees, officers, or principals of a legal entity with its principal place of business in the United States; and
 - (v) an estate or trust, the income of which is subject to United States income tax regardless of source.

The Proposed Guidance included a broader U.S. person definition, particularly with respect to the coverage of funds organized outside the U.S. The CFTC continues to consider what final definition to adopt.

⁵⁵ See 77 Fed. Reg. 41,214 (July 12, 2012). See also CGSH Alert Memo, “CFTC Proposes Guidance on Cross-Border Application of Title VII of the Dodd-Frank Act” (July 3, 2012).

⁵⁶ See 78 Fed. Reg. 858 (Jan. 7, 2013).

- **Requirements Applicable to Non-U.S. Persons.**

- Under the Exemptive Order, non-U.S. persons are only subject to requirements with respect to swaps with U.S. persons. However, under the Proposed Guidance, swaps with non-U.S. persons whose obligations are guaranteed by a U.S. person and non-U.S. persons who are deemed “conduits” of a U.S. person would also be subject to Dodd-Frank under certain circumstances. A non-U.S. person would be considered to operate as a “conduit” for swaps in which (i) the non-U.S. person is majority-owned, directly or indirectly, by a U.S. person; (ii) the non-U.S. person regularly enters into swaps with one or more U.S. affiliates or subsidiaries of the U.S. person; and (iii) the financials of the non-U.S. person are included in the consolidated financial statements of the U.S. person.
- Therefore, a non-U.S. end user would generally be subject to clearing, trade execution, business conduct, swap trading relationship documentation, portfolio reconciliation and compression, real-time public reporting, regulatory reporting, trade confirmation, margin and swap data recordkeeping only in the case of swaps with U.S. persons.⁵⁷
- Although the CFTC has proposed to treat foreign branches of U.S. persons as U.S. persons, the CFTC has temporarily exempted swaps entered into by non-U.S. persons and foreign branches of U.S. swap dealers from compliance with certain requirements, such as clearing and trading, margin and segregation for uncleared swaps, swap trading relationship documentation, portfolio reconciliation and compression, public reporting, trade confirmation, daily trading records and external business conduct standards.⁵⁸
- Other requirements, such as antifraud and antimanipulation rules and position limits, would apply to all of a non-U.S. person’s swaps, including swaps with non-U.S. person counterparties.

* * *

⁵⁷ The Prudential Regulators’ proposal regarding margin for uncleared swaps is similar to the CFTC’s Proposed Guidance. The Prudential Regulators’ margin collection requirements would not apply to a transaction between a non-U.S. domiciled counterparty (other than a branch or office of a U.S. person or a counterparty whose obligations are guaranteed by a U.S. affiliate) and a foreign registered swap dealer or major swap participant. However, for these purposes, a foreign registered swap dealer or major swap participant would not include a branch or office of a U.S. person or an entity controlled by a U.S. person. Depending on the territorial scope of CFTC registration requirements, the proposed margin rules could result in a significant expansion in the extraterritorial application of U.S. law that could intensify the competitive disparities faced by U.S.-domiciled bank holding companies operating outside the United States.

⁵⁸ See Exemptive Order, 78 Fed. Reg. 858, at 880.



Please call any of your regular contacts at the firm or any of the partners and counsel listed under Derivatives in the Practices section of our website (www.cgsh.com) if you have any questions.

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Appendix A: Summary of Dodd-Frank Requirements
Applicable to Non-Financial End Users

| Requirement | Summary description | Are non-financial end users generally required to comply with the requirement? | Compliance date? | Applies to end users who are not “U.S. persons” (under the Exemptive Order)? |
|-----------------------------------|---|---|--|---|
| <i>Registration as SD/MSP</i> | Certain parties will need to register with the CFTC, triggering a host of regulations | No, if activity does not exceed relevant thresholds | December 31, 2012 | Yes, in calculating thresholds, must include transactions where a counterparty is U.S. person other than the non-U.S. branch of a U.S. SD |
| <i>Mandatory Clearing</i> | CFTC will require that certain designated derivatives be cleared through a DCO | No, if swap is for hedging or mitigating commercial risk by non-financial end users | September 9, 2013 for non-financial end users for swaps not excepted. June 10, 2013 for financial end users for swaps not excepted. Rules have only been finalized with respect to certain IRS and CDS | Yes, if counterparty is U.S. person other than the non-U.S. branch of a U.S. SD |
| <i>Mandatory Trade Execution</i> | CFTC will require that certain designated derivatives be traded on a DCM or SEF | No, if swap is for hedging or mitigating commercial risk by non-financial end users | Rules have not been finalized | Yes, if counterparty is U.S. person other than the non-U.S. branch of a U.S. SD |
| <i>ECP Trading Requirement</i> | In general, only ECPs can enter into OTC swaps or guarantee such swaps | Yes | Already in effect | Yes, if counterparty is U.S. person other than the non-U.S. branch of a U.S. SD |
| <i>Margin for Uncleared Swaps</i> | Counterparties will generally need to post margin to SDs and MSPs | Requirement is relaxed for end users | Rules have not been finalized | Yes, if counterparty is U.S. person other than the non-U.S. branch of a U.S. SD |
| <i>Real-Time Public Reporting</i> | The reporting party must make report trade information in real-time to SDRs or the CFTC | Yes, although SD and MSP counterparties will generally be responsible | Already in effect | Yes, if counterparty is U.S. person other than the non-U.S. branch of a U.S. SD |
| <i>Regulatory Reporting</i> | The reporting party must make report trade information in real-time to SDRs or the CFTC | Yes, although SD and MSP counterparties will generally be responsible | Already in effect | Yes, if counterparty is U.S. person (including the non-U.S. branch of a U.S. SD) |
| <i>Recordkeeping</i> | Counterparties must retain records and documents related to trades | Yes | Already in effect | Yes, if counterparty is U.S. person (including the non-U.S. branch of a U.S. SD) |

| Requirement | Summary description | Are non-financial end users generally required to comply with the requirement? | Compliance date? | Applies to end users who are not “U.S. persons” (under the Exemptive Order)? |
|--|---|--|---|---|
| <i>Swap Documentation</i> | Trades must be documented pursuant to CFTC rules | The requirements imposed on end users are limited | Swap confirmation and portfolio compression rules are already in effect. Swap trading relationship documentation and portfolio reconciliation rules are delayed until at least July 1, 2013 | Yes, if counterparty is U.S. person other than the non-U.S. branch of a U.S. SD |
| <i>External Business Conduct Standards</i> | SD and MSP counterparties will respect that end users provide certain representations | The requirements imposed on end users are limited | May 1, 2013 (for most standards) | Yes, if counterparty is U.S. person other than the non-U.S. branch of a U.S. SD |
| <i>Position Limits</i> | CFTC’s rule regarding position limits has been vacated | Unclear | Unclear | Yes, if ultimately adopted |
| <i>Antifraud and antimanipulation</i> | CFTC rules prohibit fraud and manipulation involving swaps | Yes | Already in effect | Yes |

Appendix B: Key CFTC Rulemakings Affecting End Users

- In General
 - *Product Definitions Final Rule*, 77 Fed. Reg. 48,208 (August 13, 2012)
 - *Final Treasury Determination*, 77 Fed. Reg. 69,694 (Nov. 20, 2012)
 - *Registered Swap Entity Final Rule*, 77 Fed. Reg. 30,596 (May 23, 2012)
- Clearing
 - *Mandatory Clearing Requirement for Certain Interest Rate Swaps and Credit Default Swaps Proposal*, 77 Fed. Reg. 47,170 (Aug. 7, 2012)
 - *Clearing Requirement Determination*, 77 Fed. Reg. 74,284 (Dec. 13, 2012)
 - *End-User Exception Final Rule*, 77 Fed. Reg. 42,560 (July 19, 2012)
 - *Inter-Affiliate Exemption Final Rule*,
<http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/federalregister040113.pdf> (last visited Apr. 2, 2013)
- Trade Execution
 - *SEF Proposal*, 76 Fed. Reg. 1214 (Jan. 7, 2011)
 - *Available to Trade Proposal*, 76 Fed. Reg. 77,728 (Dec. 14, 2011)
- Margin
 - *Prudential Regulator Capital and Margin Proposal*, 76 Fed. Reg. 27,564 (May 11, 2011)
 - *CFTC Margin Proposal*, 76 Fed. Reg. 23,732 (Apr. 28, 2011)
- Reporting
 - *Real-Time Public Reporting Final Rule*, 77 Fed. Reg. 1182, 1243 (Jan. 9, 2012)
 - *Regulatory Reporting and Recordkeeping Final Rule*, 77 Fed. Reg. 2136 (Jan. 13, 2012)
 - *Reporting of Unexpired Pre-Enactment Swaps Final Rule*, 77 Fed. Reg. 35,200 (June 12, 2012)
 - *Block Trade Proposal*, 77 Fed. Reg. 15,460 (Mar. 15, 2012)
- Documentation & Business Conduct
 - *Swap Documentation Final Rule*, 77 Fed. Reg. 55,904, (Sept. 11, 2012)
 - *External Business Conduct Standards Final Rule*, 77 Fed. Reg. 9734 (Feb. 17, 2012)
 - *Internal Business Conduct Standards Final Rule*, 77 Fed. Reg. 20,128 (Apr. 3, 2012)
 - *Extension of Compliance Dates*, 78 Fed. Reg. 17 (Jan. 2, 2013)
- Recordkeeping
 - *Regulatory Reporting and Recordkeeping Final Rule*, 77 Fed. Reg. 2136 (Jan. 13, 2012)
- Antimanipulation
 - *Antifraud Final Rule*, 76 Fed. Reg. 41,398 (July 14, 2011)

- Cross-Border Application
 - *Cross-Border Proposed Guidance*, 77 Fed. Reg. 41,214 (Jul. 12, 2012)
 - *Final Exemptive Order Regarding Compliance with Certain Cross-Border Swap Regulations*, 78 Fed. Reg. 858 (Jan. 7, 2013)
 - *Further Proposed Guidance Regarding Compliance with Certain Cross-Border Swap Regulations*, 78 Fed. Reg. 909 (Jan. 7, 2013)

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