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Introduction to the United States Regulation of Swaps and Security-Based Swaps Under Title VII of the Dodd-Frank Act

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Background

On July 21, 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") was signed into law by President Obama. The Dodd-Frank Act constitutes the most sweeping financial reform package since the 1930s. Title VII of the Dodd-Frank Act ("Title VII") brought about a complete overhaul of the regulation of the over-the-counter ("OTC") derivatives market in the United States. In place of the previous regime in which OTC derivatives were largely exempt from substantive regulation, Title VII subjects all derivatives to substantive regulatory oversight. "Swaps" are generally regulated by the Commodity Futures Trading Commission (the "CFTC") under the Commodity Exchange Act (the "CEA"), and "security-based swaps" are regulated by the Securities and Exchange Commission (the "SEC" and, together with the CFTC, the "Commissions") under the Securities Exchange Act of 1934, as amended (the "Exchange Act").

On July 18, 2012, pursuant to Title VII, the SEC and the CFTC jointly issued a final release (the "Final Release") adopting final rules to further define the terms "swap," "security-based swap," "security-based swap agreement," and "mixed swap." 77 Fed. Reg. 48208 (Aug. 13, 2012). The Final Release also provided interpretive guidance with respect to the application of those definitions and exclusions from their scope.

The categorization of a financial instrument as a "swap" or a "security-based swap" has sweeping implications for its treatment under law. Among other matters, this categorization affects whether the instrument is considered a security for purposes of the federal securities laws, whether the instrument may lawfully be traded OTC or must be traded on, or subject to the rules of, an exchange, whether the instrument must be centrally cleared, and which reporting and recordkeeping requirements apply to the instrument.

Accordingly, this practice note provides an introduction to swaps and security-based swaps, including definitions, exclusions, governing entities and general regulatory requirements. Please be aware that this area of regulation is continuing to evolve and new rules are continuously being proposed and finalized.

General Interpretative Guidance

The Commissions' guidance in the Final Release makes clear that whether an instrument is a Title VII instrument depends primarily on the substantive terms and characteristics of the instrument rather than its form. However, the Commissions stated that whether a transaction

uses an industry standard form agreement for swaps or security-based swaps is relevant to the determination of the transaction's character as a Title VII instrument.

The Final Release also offers general interpretative guidance regarding the characterization of a Title VII instrument as either a "swap" or "security-based swap." The Final Release states that the characterization of an instrument should be based on the specific terms and conditions of the instrument and the nature of the underlying prices, rates, securities, indices, or commodities.

Swaps

Title VII defines a "swap" as any agreement, contract, or transaction that:

- is a put, call, cap, floor, collar, or similar **option** for the purchase or sale — or based on the value — of interest rates, currencies, commodities, securities, instruments of indebtedness, indices, quantitative measures, or other financial or economic interest or property of any kind;
- provides for any purchase, sale, payment, or delivery that is dependent upon the occurrence, nonoccurrence or the extent of the occurrence of an **event** or contingency associated with a potential financial, economic, or commercial consequence;
- provides for the **exchange of payments** based on the value or level of interest or other rates, currencies, commodities, securities, debt instruments, indices, quantitative measures, or other financial or economic interests or property of any kind that transfers financial risk without transferring ownership risk; or
- is, or in the future becomes, commonly known in the trade as a swap.

7 U.S.C. § 1a(47)(A)(emphasis added).

Examples of swaps cited in Title VII include, among others, interest rate swaps, currency swaps, credit default swaps, energy swaps, and metal swaps. *Id*.

Security-Based Swaps

Title VII defines a "security-based swap" as a swap that is based on either a:

- narrow-based security index;
- a single security or a loan; or
- the occurrence, nonoccurrence or extent of the occurrence of an event relating to a single issuer of a security or the issuers of securities in a narrow-based security index.

15 U.S.C. § 78(a)(68).

A narrow-based security index is generally defined to mean an index that has nine or fewer component securities. 7 U.S.C. § 1a(35); 15 U.S.C. § 78c(a)(55)(B).

Exclusions From the Definition of "Swap"

Insurance Products

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The Commissions generally acknowledge that traditional insurance should not be regulated as a swap and should be separately regulated as insurance. However, the “Insurance Safe Harbor” set forth in the Final Release does not simply exclude these products from the definitions. Instead, the safe harbor requires that such insurance products generally satisfy four additional requirements and that the providers of such insurance meet one of four criteria. 17 C.F.R. 240.3a69-1; Final Release at 48212–25.

Forward Contracts

The Commissions’ guidance excludes “forward contracts” from the definition of swap. A forward contract is defined as a contract for “any sale of a nonfinancial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically settled.” 7 U.S.C. § 1a(47)(B)(ii). Please see “Understanding Financial Derivatives” for more information on forward contracts.

A contract for the deferred shipment of grain where the buyer intends to take delivery would fall under this exclusion. The Commissions note in the Final Release that intent to physically settle is an important element of this analysis and that assessing intent requires an analysis of all facts and circumstances. Final Release at 48228. However, the CFTC provides guidance in the Final Release indicating that both parties must be “commercial” entities to take advantage of the forward contract exclusion. See generally the Final Release at 48228–41. Therefore, a collective investment vehicle such as a hedge fund could not claim that a contract based upon gold, for example, was not a swap, even if the hedge fund took delivery of the gold.

The CFTC also provides interpretative guidance that the forward contract exclusion from the swap definition will apply to environmental commodities, such as emissions allowances, carbon offsets, or renewable energy certificates, provided that the commodity can be physically delivered and consumed, and that the transaction is intended to be physically settled. See generally the Final Release at 48233–35; Final Release at 48234, n.281.

Forward Contracts with Embedded Options

The CFTC has extended the forward contract exclusion to forward contracts with embedded nonfinancial commodity options, while reaffirming that commodity options by themselves are included in the statutory swap definition. Final Release at 48236–38.

In the Final Release, the CFTC stated that a forward contract with an embedded commodity option (typically as a mechanism to adjust the price) will be considered an excluded forward contract (and not a swap) so long as the embedded option satisfies the following three-part test:

- does not undermine the overall nature of the contract as a forward contract;
- does not target the delivery term, so that the predominant feature of the contract is actual delivery; and
- cannot be severed and marketed separately from the forward contract (it must be traded together with the forward contract).

Final Release at 48237–38.

The CFTC also provided in the Final Release an interpretation of when a forward contract with embedded volumetric optionality would fall within the forward contract exclusion. Final

Release at 48238–41. However, in response to market participants, the CFTC proposed to further clarify its interpretation. On May 12, 2015, the Commissions' jointly issued a final interpretation (the "Final Interpretation") clarifying its interpretation of forward contracts with volumetric optionality (contracts with flexible or variable terms related to volume, price, and/or delivery). 80 Fed. Reg. 28239 (May 18, 2015). In the Final Interpretation, the Commissions provided that a forward contract that contains embedded volumetric optionality will fall within the forward exclusion from the swap definition if the following seven-part test is satisfied:

- the embedded optionality does not undermine the overall nature of the forward contract;
- the predominant feature of the contract is actual delivery;
- the embedded optionality cannot be severed and marketed separately from the forward contract;
- the seller intends to deliver the nonfinancial commodity if the option is exercised;
- the buyer intends to take delivery of the commodity if the option is exercised;
- both parties are commercial parties; and
- the embedded volumetric optionality is primarily intended, at the time that the parties enter into the contract, to address physical factors or regulatory requirements that reasonably influence demand for, or supply of, the nonfinancial commodity.

Final Interpretation at 28241.

A particularly important factor to consider is the seventh factor. The Commissions provided that in order to satisfy the seventh factor, the volumetric optionality must primarily be intended as a means of assuring a supply source or providing delivery flexibility in the face of uncertainty regarding the quantity of the nonfinancial commodity that may be needed or produced in the future. *Id*.

Security Forwards

Title VII excludes the purchases and sales of securities from the definition of a swap and a security-based swap. 7 U.S.C. §§ 1(a(47)(B)(ii),(v) and (vi). Accordingly, the Commissions stated that purchases and sales of securities for deferred shipment or delivery (i.e., security forwards) will be excluded from the definitions of a swap and security-based swap, so long as the securities are intended to by physically delivered based on a fixed price. Final Release at 48244–45. This interpretation is important to accommodate standard practices in the "to be announced" or "TBA" market for mortgage-backed securities issued or guaranteed by Fannie Mae, Freddie Mac, and Ginnie Mae. The Commissions also stated that a forward sale of a security on a contingent basis may be excluded from the definition of swap and security-based swap based on facts and circumstances similar to those described above. *Id.*

Consumer and Commercial Agreements

The Commissions' guidance excluded from the swap definition the following common business and household agreements:

- Agreements to acquire or lease real or personal property;
- Mortgage applications;

- Agreements for personal services;
- Sales or assignments of rights owned by a consumer;
- Purchases of products or services for personal, family, or household purposes at a fixed, capped, or collared price at a future date;
- Mortgage rate caps or locks on consumer mortgages;
- Employment and retirement benefits arrangements;
- Sales, servicing, or distribution arrangements;
- Business combination transactions;
- Warehouse lending transactions in connection with building an inventory of assets in advance of a securitization of the assets (as with mortgages, student loans, etc.);
- Commercial loans entered into by nonbanks;
- Consumer product warranties, extended service plans, and buyer protection plans;
- Consumer options to acquire, lease, or sell real or personal property;
- Consumer agreements that the consumer may cancel without cause pursuant to consumer protection laws or regulations (e.g., the Federal Reserve Board's Regulation Z); and
- Consumer guarantees of credit card debt, automobile loans, and mortgages of a friend or relation.

Final Release at 48246–50.

Participations in Loans and Lending Commitments

In the Final Release, the Commissions excluded participants in loans and lending commitments from the definition of swap and security-based swap. In order to be within the exclusion, participation must satisfy four conditions, which are intended to distinguish loan participation from a credit default swap or total return swap. Final Release at 48250–52.

Foreign Exchange Products

The Dodd-Frank Act provides that foreign exchange swaps ("FX swaps") and foreign exchange forwards ("FX forwards") are considered swaps unless the Secretary of the Treasury makes a determination that such instruments should not be considered swaps. 7 U.S.C. § 1a(47)(E). FX swaps and FX forwards require the exchange of different currencies, not simply settlement in a single currency. For more information about FX swaps, see "Understanding Financial Derivatives."

On November 16, 2012, the U.S. Department of the Treasury (the "Treasury") issued a determination that FX swaps and FX forwards should not be regulated as swaps under the CEA for purposes of registration, mandatory clearing, trade execution, and margin requirements. The Treasury's determination can be found here. However, other requirements, such as certain reporting requirements, still apply. On the other hand, nondeliverable forward involving currencies, known as "NDFs," which settle in a single currency, usually U.S. dollars, are considered to be swaps for all purposes.

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Regulatory Jurisdiction of CFTC, SEC, and FERC over Swaps and Security-Based Swaps

Demarcation of Jurisdiction between CFTC and SEC

Title VII of the Dodd-Frank Act creates the framework for the regulation of the swap markets by the CFTC and the SEC. 15 U.S.C. 8302. It generally grants the CFTC jurisdiction over swaps, participants in the markets for swaps (such as swap dealers and major swap participants and their associated persons), and swap execution facilities. Unlike security futures (which include futures on a single security or a narrow-based index of securities), where the CFTC and the SEC have joint jurisdiction, the SEC will have sole jurisdiction over security-based swaps and participants in security-based swaps markets (such as security-based swap dealers and major security-based swap participants and their associated persons) and security-based swap execution facilities. Dealers and major participants that transact in both swaps and security-based swaps must register with both agencies and will be subject to the regulations of each agency depending upon the instrument involved.

Mixed Swaps

While the CFTC generally has jurisdiction over swaps and the SEC generally has jurisdiction over security-based swaps, Title VII and the Final Release address in a particular way the peculiarities of derivatives instruments that have features of both swaps and security-based swaps, referred to as "mixed swaps." A mixed swap has some elements of a security-based swap and also is based upon the value of one or more interest or other rates, currencies, commodities, instruments of indebtedness, indices, quantitative measures, other financial or economic interest or other property of any kind, except for a single security or a narrow-based security index or the occurrence, nonoccurrence, or the extent of the occurrence of the event or contingency associated with a potential financial, economic, or commercial consequence (again, except for an event relating to a single security or a narrow-based security index). 7 U.S.C. § 1a(47(D); 15 U.S.C. § 78c(a)(68)(D). Mixed swaps will be jointly regulated by the CFTC and the SEC, in consultation with the Federal Reserve. 17 C.F.R. § 1.9; 17 C.F.R. § 240.3a68-4.

Security-Based Swap Agreements ("SBSA")

An SBSA is a swap over which the CFTC has regulatory and enforcement authority, but for which the SEC also has antifraud, anti-manipulation, and insider trading authority. 15 U.S.C. § 78c(a)(78). An SBSA is a swap agreement of which a material term is based on the price, yield, value, or volatility of any security or any index of securities, including any interest therein. *Id*. An SBSA could include a swap based on a broad-based security index (generally, an index composed of 10 or more component securities) or on a Treasury security. Final Release at 48294. Although it has yet to be tested in practice, the Commissions have stated that they are committed to working cooperatively regarding their dual enforcement authority. Final Release at 48293, n.963.

Jurisdiction Over Energy and Environmental Derivatives

The Final Release resolved certain questions about the regulatory status of transactions in energy and environmental commodities, but it did not resolve the potential overlap of

jurisdiction between the CFTC and the Federal Energy Regulatory Commission ("FERC"). Among other things, FERC has jurisdiction over the interstate sale of electric energy in the wholesale market under the Federal Power Act. However, under the CEA, the CFTC has exclusive jurisdiction over "accounts, agreements…and transactions involving contracts of sale of a commodity for future delivery..." 7 U.S.C. §2(a)(1)(A). Nonetheless, the CEA also provides that "[n]othing in this Act shall limit or affect any statutory authority of the FERC or a State regulatory authority…with respect to an agreement…that is entered into pursuant to a tariff or rate scheduled approved by the FERC or a State regulatory authority…" 7 U.S.C. § 2(a)(1)(I).

On January 2, 2014, and in accordance with Section 720(a) of the Dodd-Frank Act, the CFTC and FERC entered into a Memorandum of Understanding ("MOU") to address the agencies' overlapping jurisdiction. The MOU can be accessed here. The MOU sets out a process for how the agencies will notify each other of activities that may involve overlapping jurisdiction and a process for resolving conflicting jurisdictional issues. In addition, the CFTC granted a petition exempting certain specified transactions of Regional Transmission Organizations ("RTOs") and Independent System Operators ("ISOs") from certain provisions of the CEA and the CFTC's regulations. RTOs and ISOs are subject to FERC's regulation (or the Public Utility Commission of Texas' ("PUCT") jurisdiction) and petitioned the CFTC to exempt the contracts, agreements, or transactions currently offered or entered into under any FERC-approved (or PUCT-approved) tariff which an RTO/ISO operates. The CFTC issued a final order granting the RTOs/ISO's petition. 78 Fed. Reg. 19880 (April 2, 2013).

General Regulatory Requirements

The Dodd-Frank Act fundamentally changed the regulation of over-the-counter derivatives markets by replacing a laissez faire regime with a regime of detailed substantive regulation and increased transparency. We will generally introduce the substantive regulation here, but for more substantive detail on topics such as clearing requirements, the commercial end-user exception to mandatory clearing, non-cleared swaps under the Dodd-Frank Act and the regulation of cross-border transactions, please see the following practice notes: "Introduction to Clearing of Swaps and Security Based Swaps Under Title VII of the Dodd-Frank Act"; "Introduction to the Commercial End-User Exception to Mandatory Clearing of Swaps and Security-Based Swaps Under Title VII of the Dodd-Frank Act"; "Introduction to Non-Cleared Swaps Under Title VII of the Dodd-Frank Act"; and "Introduction to the U.S. Regulation of Cross-Border Transactions Involving Swaps and Security-Based Swaps".

Process

The CFTC and the SEC are in the process of implementing Title VII. The CFTC began issuing proposed rules and soliciting public comments in August 2010 and as of January 15, 2016, it had issued 69 sets of final rules, exemptive orders or guidance actions for swaps. In cases where final rules have not been completed in time for statutory deadlines, the CFTC has issued interpretive guidance and no-action relief.

To date, the SEC has proposed substantially all of the rules related to the new regulatory regime for derivatives under Title VII and has begun the process of adopting these rules. Pending the adoption of final rules, the SEC has acted under its exemptive authority through a series of temporary exemptive orders. A copy of the current exemptive order is available here.

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Scope of Substantive Regulations

Most of the substantive regulations directly affect dealers and major participants in swaps and security-based swaps. These rules include registration requirements, business conduct standards, reporting requirements, swap data repository requirements, capital standards, margin requirements, collateral segregation requirements, trade confirmation standards and suitability/know-your-customer standards, among others.

The Title VII regulatory regime does not affect just dealers, but impacts other market participants as well, including commercial and financial end-users. Regulations that directly affect end-users include recordkeeping requirements, mandatory clearing of designated categories of swaps and security-based swaps, and requirements relating to the execution of swaps and security-based swaps. Other regulations that impose direct compliance obligations on dealers and major participants affect their counterparties indirectly. Margin and capital requirements will affect the economics of a transaction to an end-user because those obligations will result in increased costs and collateral requirements. Other requirements may impact end-users in the sense that the dealer or major participant will often rely on representations by the counterparty in establishing a reasonable basis for believing that it is in compliance.

In order to facilitate compliance, end-users will often be required to enter into some form of “Dodd-Frank” documentation. Depending upon the type of counterparty and the parties’ trading relationship, this documentation may include the ISDA August 2012 DF Protocol and ISDA March 2013 DF Protocol (often used when one counterparty is a dealer) or the IECA Dodd-Frank Representations and Reporting Amending Agreement (often used between two commercial end-users). These agreements allow transaction parties to (a) supplement the terms of existing master agreements under which parties may execute swaps and security based swaps or (b) enter into an agreement to apply selected Dodd-Frank Act compliance provisions to their trading relationship with respect to swaps and security-based swaps. The agreements add notices, representations, and covenants responsive to Dodd-Frank Act requirements that must be satisfied at or prior to the time that swap transactions are offered and executed. Also, the Dodd-Frank agreements include additional bilateral delivery requirements, including a Questionnaire, to facilitate compliance with “know your counterparty” information requirements under the Dodd-Frank Act. Compliance with representations made in a Dodd-Frank agreement may require a counterparty to modify some of its business policies and practices. The ISDA August 2012 DF Protocol can be found here and the ISDA March 2013 DF Protocol can be found here. The IECA Dodd-Frank Act Representations and Reporting Amending Agreement can be found here.

Selected Specific Regulatory Requirements

Clearing

Section 2(h)(1)(A) of the CEA, as amended by Section 723 of the Dodd-Frank Act, authorizes the CFTC to establish clearing requirements for swaps. It also prohibits any person from entering into a swap that is required to be cleared unless that person submits that swap for clearing to a derivatives clearing organization or an exception from clearing exists (principally the “Commercial End-User Exception”). As a corollary to the clearing requirement, a cleared swap must be executed on a designated contract market (a “DCM”)

or swap execution facility (a "SEF") that is registered or exempt from registration if a DCM or SEF makes the swap "available to trade."

To date, the CFTC has issued only one clearing determination, which applies to certain interest rate swaps and untranched broad-based index credit default swaps. 77 Fed. Reg. 240 (December 13, 2012). It is expected that determinations will be made in the future for other swap categories. Commercial end-users must clear the designated categories of interest rate swaps and credit default swaps that are entered into, unless they qualify to elect the Commercial End-User Exception from clearing and have made a valid election to avail themselves of the Commercial End-User Exception. For more information on clearing generally, see "Introduction to Clearing of Swaps and Security-Based Swaps Under Title VII of the Dodd-Frank Act," and for more information on the Commercial End-User Exception, see "Introduction to the Commercial End-User Exception to Mandatory Clearing of Swaps and Security-Based Swaps Under Title VII of the Dodd-Frank Act."

Reporting

Section 727 of the Dodd-Frank Act provides that each swap must be reported to a registered swap data repository ("SDR"). 7 U.S.C. § 2a(13). The responsibility of reporting swaps and security-based swaps to an SDR will typically not be the responsibility of the commercial end-user. For cleared swaps, the DCM or SEF on which the swap was executed will report the swap to the SDR. For non-cleared swaps, the determination of the reporting counterparty is controlled by a hierarchy set forth in Part 45.8 of the CFTC's Regulations. Generally, the dealer or major participant will be the reporting counterparty; however, if both parties are end-users and both are U.S. persons, then they will need to mutually agree on which party will be the reporting counterparty. The reporting hierarchy is:

- If only one counterparty is a SD, then the SD is the reporting counterparty;
- If neither counterparty is a SD, and only one counterparty is a MSP, the MSP is the reporting counterparty;
- If both counterparties are non-SDs/MSPs, and only one counterparty is a financial entity, the counterparty that is a financial entity is the reporting counterparty;
- If both counterparties are SDs or MSPs or non-SDs/MSPs that are financial entities or non-SDs/MSPs that are not financial entities, then the counterparties are required to agree which counterparty will be the reporting counterparty; however, if both counterparties are non-SDs or MSPs and only one is a U.S. person, that counterparty shall be the reporting counterparty.

The reporting counterparty is required to report all creation data, including all primary economic terms as soon as technologically practicable after execution. 17 C.F.R. § 45.3. In addition, the reporting counterparty must report all swap continuation data to the SDR, including life cycle events and valuation data. 17 C.F.R. § 45.4.

Recordkeeping Requirements

All swap counterparties are subject to recordkeeping requirements under Part 45.2 of the CFTC's regulations. Generally, recordkeeping regulations govern matters such as retention periods, format, retrieval, data, and related requirements. Recordkeeping requirements also vary depending on whether the party is a SD, MSP, or non-SD/MSP.

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A non-SD/MSP counterparty is required to keep "full, complete and systematic records, together with all pertinent data and memoranda," with respect to each swap in which it is a counterparty, including records demonstrating that it is entitled to elect the end-user exception to the CFTC's swap clearing mandate as may be applicable. 17 C.F.R. § 45.2. The CFTC permits a non-SD/MSP to retain records in paper or electronic format. *Id.* All records must be retained throughout the life of each swap and for a period of at least five years following the swap's termination or expiration. *Id.* During this period, records must be retrievable within five business days.

Cross-Border Regulation

Title VII does not apply to activities outside the United States unless those activities have a "direct and significant connection with activities in, or effect on, commerce of the United States." 7 U.S.C. § 2(i). On July 12, 2013, the CFTC adopted interpretive guidance (the "Guidance") that details the CFTC's interpretation of the application of the CEA and the CFTC's regulations to swaps that are entered into or performed outside the United States or involve at least one counterparty that is not organized under U.S. law. 78 Fed. Reg. 45,291 (July 26, 2013) The Guidance covers multiple topics, including (i) the definition of "U.S. person," (ii) registration requirements for SDs and MSPs, (iii) the definition of and regulatory requirements applicable to a "foreign branch" of a U.S. bank, (iv) the application of "Entity-Level Requirements" and "Transaction-Level Requirements" for SDs, MSPs and non-registrants, and (v) substituted compliance with U.S. regulations through compliance with comparable local law.

On June 25, 2014, the SEC adopted the first in a series of final rules and interpretive guidance related to U.S. regulation of cross-border security-based swap activities. The SEC rule and guidance address the circumstances under which non-U.S. persons may be required to register as a security-based swap dealer or a major security-based swap participant, establishes a process by which regulators and market participants outside the United States may apply for substituted compliance, and addresses the scope of the SEC's antifraud enforcement authority with respect to security-based swaps transactions that occur, in part or in whole, outside of the United States. Substituted compliance would permit parties that are in compliance with another jurisdiction's comparable regulatory framework to which a transaction is also subject to be considered in compliance with SEC regulations. The SEC's final rules can be found here. For more information on cross-border regulation, see "Introduction to the U.S. Regulation of Cross-Border Transactions Involving Swaps and Security-Based Swaps."

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