

# Client Alert

Latham & Watkins  
Corporate Department

## CFTC and SEC Issue Final Rule Defining Certain Swap Products and Triggering Several Dodd-Frank Obligations Relating to Swaps

On July 10, 2012, the Commodity Futures Trading Commission (the CFTC) approved its joint final rules with the Securities and Exchange Commission<sup>1</sup> (the SEC, and together with the CFTC, the Commissions) defining the products that are at the heart of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the Dodd-Frank Act) — namely, swaps and security-based swaps (the Product Definitions Rule).<sup>2</sup> The Product Definitions Rule is important not only because it is one of the foundational rules required by the Dodd-Frank Act but also because the compliance dates for several of the most important rules that have already been finalized by the CFTC are triggered by or connected to the effective date of this rule. The Product Definitions Rule was published in the Federal Register on August 13, 2012, and will become effective on October 12, 2012.

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### Background

Title VII of the Dodd-Frank Act provides the CFTC with regulatory authority over swaps, the SEC with regulatory authority over security-based swaps, and the Commissions with joint authority over mixed swaps. In addition, the CFTC has general jurisdiction over “security-based swap agreements”— swaps that are related to securities in certain ways — although the SEC is also given antifraud authority and certain other rights relating to such agreements. The Product Definitions Rule largely defines these terms by referring to the definitions in the Dodd-Frank Act and then adds several interpretations related to those definitions.

This Client Alert will describe the types of products that are included and excluded from the swap and security-based swap definitions (as well as security-based swap agreements and mixed swaps), the dividing lines between CFTC and SEC jurisdiction and the rules that are triggered by the publication of the Product Definitions Rule. The CFTC is expected to issue further guidance and questions and answers under the Product Definitions Rule.

### Exclusions from the Terms “Swap” and “Security-Based Swap”

Much of the Product Definitions Rule consists of discussion regarding particular products that are *not* “swaps” or “security-based swaps.” Specifically, the rule

states that forward contracts on non-financial commodities, insurance products, consumer or commercial agreements and certain loan participations are outside the scope of the definitions (and therefore, do not count for the purposes of swap dealer and major swap participant determination, position limits, reporting or clearing, among other things).

## **Forward Contracts on Non-Financial Commodities**

Forward contracts on non-financial commodities<sup>3</sup> are excluded from most of the CFTC's pre-Dodd-Frank authority (over futures and options), and the Product Definitions Rule adopts this exclusion and applies it to swaps.<sup>4</sup> A forward contract is an agreement regarding the sale of a commodity for deferred shipment or delivery so long as the transaction is intended to be physically settled.<sup>5</sup> The forward contract exclusion only applies to forwards on non-financial commodities, however. Forward contracts are typically considered to be commercial merchandising transactions because the purpose is to transfer ownership of a commodity and not merely its price risk.

A critical aspect of whether an agreement constitutes a forward or a swap (or a future) is the actual intent to deliver. Because these products often involve many components and complexities, however, it may be difficult to determine whether a transaction would be determined, after the fact, to have been intended to settle through physical delivery. In general there are few bright line rules for this determination, but the Product Definitions Rule does state that force majeure clauses, bona fide termination rights triggered by certain events and certain other provisions will not restrict a contract from qualifying as a forward.

*Book-outs.* The Product Definitions Rule applies the CFTC's "Brent Interpretation" to swaps. Under this interpretation, a transaction between two commercial market participants would qualify as a forward contract if the parties originally intended to deliver the commodity even if they enter into a subsequent contract that extinguishes the requirement for delivery. Two important aspects of this rule are that: (i) the parties must both be "commercial market participants" who regularly make or take delivery of the referenced commodity; and (ii) the agreement to terminate the transaction must be reached through subsequent, separate negotiation such that either party could require actual delivery.<sup>6</sup>

*Forwards with embedded optionality.* Forward contracts containing embedded options will be considered excluded forward contracts (and not swaps) if the embedded options: (1) may be used to adjust the forward contract price, but do not undermine the overall nature of the contract as a forward contract; (2) do not affect the delivery term, so that the predominant feature of the contract is actual delivery; and (3) cannot be severed and marketed separately from the overall forward contract.<sup>7</sup> The CFTC will apply a facts and circumstances test in making these determinations.

Several commenters requested clarification as to whether forwards with embedded volumetric optionality, which allows one party to alter the amount of the commodity to be delivered if the option is exercised, would be considered forwards or swaps. Under the Product Definitions Rule, a forward with volumetric optionality will qualify for the forward contract exclusion if it satisfies a seven-part test (including that the variable demand for or supply of the commodity giving rise to the volumetric optionality is caused by physical factors or regulatory requirements beyond the control of the parties).<sup>8</sup> Specific types of contracts that *may* meet the seven-part volumetric optionality test include resource adequacy agreements, full

requirements contracts, capacity contracts, transmission or transportation services agreements, tolling agreements and peaking supply agreements.<sup>9</sup>

Commissioner Bart Chilton voted against the Product Definitions Rule in part due to his concerns that including forwards with embedded volumetric optionality within the forward contract exclusion would potentially open up avenues for evasion. Specifically, he objected to the fact that even contracts that permit one party to completely negate any delivery obligations could be considered forwards. According to Commissioner Chilton, these contracts did not have actual delivery as their essential feature and therefore cannot be excluded forwards. The rule's provisions relating to embedded volumetric optionality are included as an interpretation and will be open to public comment for 60 days after publication in the Federal Register.

*Other components of forwards.* The Commissions also provided guidance regarding several issues raised in comment letters in relation to the forward contract exclusion, including the following:

- Contract provisions such as liquidated damages, renewal or evergreen provisions, and optionality regarding delivery points and dates generally will not disqualify transactions from being forward contracts
- Certain types of arrangements such as fuel delivery agreements and physical exchange transactions will be considered forwards so long as they satisfy the factors described above<sup>10</sup>
- Forward sales of mortgage-backed securities in the to-be-announced market are excluded from the swap and security-based swap definitions<sup>11</sup>

## **Insurance**

The Commissions were concerned that the definition of a "swap" could be read to include common insurance products that were not intended to be captured by swaps regulations. Accordingly, the Product Definitions Rule clarifies that certain insurance contracts provided by certain entities are not swaps or security-based swaps so long as they fall into a safe harbor contained in the rule. The safe harbor requires two categories of tests to be satisfied, which relate to the product and the issuer. Any product outside the safe harbor may still be insurance subject to a facts and circumstances analysis.

*Requirements for the contract (Product Test).* A transaction must meet the following conditions relating to the product in order to be excluded from the swap definition as an insurance product: (1) the beneficiary must have an insurable interest and carry the risk of loss continuously throughout the duration of the contract; (2) the loss must occur and be proved and indemnification must be limited by the insurable interest; (3) the contract must not be traded, separately from the insured interest, on an organized market or over-the-counter; and (4) for financial guaranty insurance only, upon default or insolvency of the obligor, any acceleration must be at the sole discretion of the insurer.<sup>12</sup> The first prong of the Product Test distinguishes insurance products from typical credit default swaps in that credit default swaps do not require the purchaser of protection to hold any underlying obligation issued by the reference entity on which the credit default swap is written.

*Requirements for the provider of the contract (Provider Test).* In order for the transaction to be excluded from the swap definition as an insurance product, the rule also requires that the person or entity providing the contract be either: (1) subject to supervision by the State or US federal insurance commissioner and such

agreement must be regulated as insurance; or (2) the United States, any State or any agencies thereof, or pursuant to a statutorily authorized program thereof (directly or indirectly).

However, if the product is reinsurance, it may be offered by any person that is not prohibited by Applicable State or Federal law from offering the transaction provided that: (i) the recipient of the reinsurance satisfies the Provider Test; (ii) the agreement to be reinsured satisfies the Product Test or is one of the Enumerated Products (defined below); and (iii) subject to state law, the total amount reimbursable by all reinsurers does not exceed the claims or losses paid by the person writing the risk.

Finally, a person would satisfy the Provider Test for non-admitted insurance if that person is either located outside of the United States and listed on the Quarterly Listing of Alien Insurers (as maintained by the International Insurers Department of the National Association of Insurance Commissioners) or meets the eligibility criteria for non-admitted insurers under applicable State law.<sup>13</sup>

*Identified insurance products.* The Commissions provided a list of products (expanded from the proposed rule) that they deem to be insurance instead of swaps or security-based swaps (Enumerated Products). This is a non-exclusive list and includes: surety bonds; fidelity bonds; life insurance; health insurance; long-term care insurance; title insurance; property and casualty insurance; annuities; disability insurance; insurance against default on individual residential mortgages (commonly known as private mortgage insurance, as distinguished from financial guaranty of mortgage pools); and reinsurance (including retrocession) of any of the foregoing, so long as that reinsurance or retrocession is not accomplished by entering into swaps or security-based swaps. The Commissions declined to expand the list of Enumerated Products to include other types of contracts such as guaranteed investment contracts (GICs), synthetic GICs, funding agreements, structured settlements, deposit administration contracts, immediate participation guaranty contracts, industry loss warrants and catastrophe bonds because these products do not receive the benefit of state insurance guaranty funds and their providers are not limited to insurance companies.<sup>14</sup>

*Grandfathering of existing insurance products.* A transaction entered into on or before the effective date of the Product Definitions Rule will be considered insurance if, at the time it was entered into, the transaction satisfied the Provider Test. Therefore, market participants need not analyze whether their historical transactions satisfy the Product Test.

## **Consumer and Commercial Transactions**

The Product Definitions Rule clarifies that certain consumer and commercial transactions will not be considered to be swaps or security-based swaps. In general, the Commissions explained that agreements where: (i) the payment obligations are not severable from the agreement itself; and (ii) the agreement is not traded on an organized market or over-the-counter and does not involve risk-shifting arrangements, are not likely to be considered swaps or security-based swaps.<sup>15</sup> The Commissions primarily distinguished these consumer and commercial agreements from swaps and security-based swaps by providing examples of agreements that will not be considered swaps (*i.e.*, rather than setting forth factors for contracts to meet in order to qualify as consumer or commercial agreements).

*Consumer Transactions.* The following transactions, whether entered into on a principal or agency basis, will be considered consumer transactions instead of

swaps or security-based swaps: (1) agreements to acquire or lease real or personal property, to obtain a mortgage, to provide personal services, or to sell or assign rights owned by such consumer; (2) agreements to purchase products or services for personal, family or household purposes at a fixed, capped or collared price, at a future date or over a certain time period; (3) agreements that provide for an interest rate cap or lock on a consumer loan or mortgage, where the benefit of the rate cap or lock is realized only if the loan or mortgage is made to the consumer; (4) consumer loans or mortgages with variable rates of interest or embedded interest rate options; (5) service agreements that are consumer product warranties, extended service plans or buyer protection plans; (6) consumer options to acquire, lease, or sell real or personal property; (7) consumer agreements where, by law or regulation, the consumer may cancel the transaction without legal cause; and (8) consumer guarantees of debt of others.<sup>16</sup>

*Commercial Transactions.* The following business arrangements will be considered commercial transactions instead of swaps or security-based swaps: (1) employment contracts and retirement benefit arrangements; (2) sales, servicing or distribution arrangements; (3) agreements for a business combination; (4) the purchase, sale, lease or transfer of real property, intellectual property, equipment, or inventory; (5) securitization warehouses; (6) mortgage or mortgage purchase commitments, or sales of installment loan agreements or contracts or receivables; (7) fixed or variable interest rate commercial loans or mortgages with embedded interest rate locks, caps, floors or interest rate options entered into by banks and non-banks with no additional exposures; and (8) commercial agreements containing escalation clauses linked to an underlying commodity such as an interest rate or consumer price index.<sup>17</sup>

### **Loan Participations**

Loan participations are not swaps or security-based swaps if the participant acquires a current or future direct or indirect ownership interest in the related loan or commitment and if certain other conditions are met. However, a derivative on a loan (*e.g.*, an option exercisable into a transfer of a security interest in a loan or a mortgage) may qualify as a security-based swap (see more on security-based swaps below).<sup>18</sup>

## **Transactions That Are Swaps or Security-Based Swaps**

The Product Definitions Rule also specifies certain types of agreements that expressly *are* swaps and/or security-based swaps.

### **Guarantees**

In a controversial decision, the CFTC determined that guarantees of swaps are swaps themselves and implied that this interpretation will apply whether a guarantee is a full, limited or partial guarantee.<sup>19</sup> As a result, certain CFTC rules will apply to any guarantee of a swap, but the CFTC did not address how or to what extent these rules will be imposed. Instead, the CFTC stated that it will propose a rule relating to reporting, position limits and large trader reporting requirements for guarantees in a separate release.<sup>20</sup>

Similarly, the SEC determined that guarantees of security-based swaps are securities and will be subject to certain reporting requirements, which will be proposed in a separate rulemaking.

## **Foreign Exchange Products**

The Dodd-Frank Act grants the Secretary of the Treasury the authority to exempt foreign exchange forwards and foreign exchange swaps (Forex Forwards and Forex Swaps) from the definition of a swap. Forex Forwards and Forex Swaps are transactions that involve the physical exchange of two different currencies; Forex Forwards involve an exchange of two currencies on one future date and Forex Swaps involve an exchange of two currencies on one date and then a reverse exchange on a future date.<sup>21</sup> The Treasury Secretary has proposed to exempt these transactions from the definition of a swap<sup>22</sup> but has not finalized that determination.

If the Treasury Secretary finalizes the determination regarding Forex Forwards and Forex Swaps as proposed, these products will not be considered swaps but will still be subject to certain CFTC regulations. Specifically, they will still be subject to regulatory reporting requirements<sup>23</sup> and any swap dealer that is a party to such transactions must comply with the CFTC's external business conduct standards requirements.<sup>24</sup>

Importantly, even if the Treasury Secretary finalizes its determination to exempt Forex Forwards and Forex Swaps from the definition of a swap, several other foreign exchange products will still be considered swaps. This includes foreign currency options, non-deliverable forwards in foreign exchange (NDFs), currency swaps and cross-currency swaps as well as options on Forex Forwards and options on Forex Swaps. Several commenters requested that the Commissions interpret NDFs to be included in the definition of a Forex Forward and therefore subject to the Treasury determination, but the Commissions refused to do so. NDFs are similar to Forex Forwards except that they are settled in a single currency (e.g., US dollars or Euros) based on the difference between a spot market exchange rate and an agreed-upon forward price instead of physically delivering two currencies. According to the Commissions, NDFs are properly considered swaps because they transfer exchange rate risk without transferring ownership in the asset or liability and because there is no exchange of two currencies, as required by the statute. Therefore, NDFs are considered to be swaps and will not be affected by the Treasury determination.

## **Relationship Between Swaps and Security-Based Swaps**

CFTC and SEC rules pertaining to swaps and security-based swaps, respectively, differ in several important ways. Whether a product is a swap or security-based swap may be unclear in certain circumstances, particularly when a transaction is based on a security index. Therefore, the Product Definitions Rule clarifies when a product will be considered a swap, security-based swap or mixed swap (collectively referred to as Title VII Instruments).

### **General Principles**

The dividing lines between swaps and security-based swaps is based upon the product underlying the transaction. If an instrument otherwise satisfies the definition of a swap and the underlying is a commodity (which is defined broadly under the Commodities Exchange Act (CEA<sup>25</sup>)) or a broad-based security index, then the product is subject to CFTC jurisdiction.<sup>26</sup> However, if the underlying is a narrow-based security index, a single security or loan, or an occurrence, non-occurrence or extent of an event relating to a single issuer of securities or the issuers of securities in a narrow-based index, then the product will be subject to SEC jurisdiction.<sup>27</sup> A mixed swap is a swap with characteristics of both swaps and security-based swaps.

The determination of whether a Title VII Instrument is a swap, security-based swap or mixed swap will be made based on its characteristics prior to execution. That determination will remain the same throughout the life of the instrument (unless the instrument is amended or modified in a material respect). For example, a Title VII Instrument on a broad-based security index (which is a swap) that becomes narrow-based (which would otherwise be a security-based swap) during the life of the instrument, without amendment or modification of the instrument in a material respect by the counterparties, will remain a swap subject to CFTC regulation (and *vice versa*).

### **Interest Rates, Other Monetary Rates and Yields**

Title VII Instruments on interest rates and other non-security based monetary rates (including interbank offered rates, money market rates, government target rates, general lending rates, rates from indexes and other monetary rates) are swaps. Title VII Instruments on "yields," where "yield" is a proxy for the price or value of a debt security, loan or narrow-based security index, are security-based swaps, except in the case of certain US government debt obligations. However, Title VII Instruments on rates or yields of US Treasuries and other exempted securities (other than municipal securities) are swaps and are not security-based swaps.

### **Total Return Swaps**

A total return swap is an instrument where one party makes a payment that is based on the price appreciation and income from an underlying security or security index and the other party makes a financing payment that is often based on a variable interest rate, such as LIBOR. Under the Product Definitions Rule, a total return swap can either be a swap, security-based swap or mixed swap depending on its characteristics. Specifically, a total return swap on a single security, loan or narrow-based security index generally would be a security-based swap. However, if the instrument includes certain non-securities components such as embedded interest-rate optionality, the instrument would be a mixed swap. Finally, total return swaps based on broad-based security index or on two or more non-security loans will be considered swaps.

### **Credit Default Swaps**

Like total return swaps, credit default swaps (CDS) can be security-based swaps or swaps.<sup>28</sup> Where the underlying reference of a CDS is a single entity or a single obligation of a single entity (*e.g.*, a specific bond or loan or any tranche or series of the same), the instrument will be considered a security-based swap. An index CDS where the underlying reference is a narrow-based security index will also be considered to be a security-based swap.

However, an index CDS where the underlying reference is neither a narrow-based security index nor the issuers of securities in a narrow-based security index will be considered to be a swap.<sup>29</sup> Any option to enter into these transactions will be determined according to the same rules (*e.g.*, an option to enter into a CDS on a single name will be a security-based swap), and each of the transactions needs to be analyzed separately if multiple transactions use the same ISDA Master Agreement.

### **Other Issues Regarding Classification of Title VII Instruments**

The Product Definitions Rule also provides an analysis of several circumstances in which the determination of whether a product is a swap, security-based swap or mixed swap determination is more complex. For example, if the parties to a Title

VII Instrument directly or indirectly have discretion to change the composition or weighting of securities making up a security index, that instrument will be a security-based swap regardless of the size of the index. However, if the parties have no such control or if the securities making up the index are subject to change based only upon a pre-determined formula, the product will either be a swap or security-based swap depending on the traditional analysis applicable to narrow and broad-based security indices based on the characteristics of the instrument on or before the time of execution. Additionally, any instrument that is based on an index which, at the time of execution, is intentionally designed to migrate from narrow to broad-based (or *vice versa*) will be considered a mixed swap throughout the life of the swap.

Many of these rules are complex and technical, so the Commissions provided a means for market participants to request a joint interpretation regarding the characterization of a particular Title VII Instrument (or class thereof). The Commissions must generally respond to a request within 120 days but this period is tolled during a public comment period.

## **Mixed Swaps**

A mixed swap is a security-based swap that is also based on the value of one or more interest or other rates, currencies, commodities, instruments of indebtedness, indices, quantitative measures, other financial or economic interest or property of any kind, or the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence (with certain exceptions).<sup>30</sup> Mixed swaps are both swaps and security-based swaps and therefore, absent any further interpretation, would be subject to comprehensive regulation by both the CFTC and SEC.

The Product Definitions Rule therefore sets forth rules for the regulation of mixed swaps. Specifically, bilateral mixed swaps will be subject to all SEC rules and only those CFTC rules related to: (i) examinations and information sharing; (ii) enforcement; (iii) regulatory reporting; (iv) real-time reporting; (v) capital; and (vi) position limits. All other mixed swaps will be subject to both CFTC and SEC rules, but the Product Definitions Rule permits counterparties, execution venues and clearinghouses to request a joint order that would permit such mixed swaps to transact subject to either CFTC or SEC rules where those rules differ.<sup>31</sup> Mixed swaps should be distinguished from hybrid instruments that are predominantly securities.<sup>32</sup>

## **Security-Based Swap Agreements**

Certain swaps — those that have a material term that is “based on the price, yield, value, or volatility of any security or any group or index of securities, or any interest therein”<sup>33</sup> — are also considered to be security-based swap agreements (SBSAs). SBSAs therefore include, but are not limited to: (1) swaps on broad-based security indexes; (2) an index CDS that is not based on a “narrow-based security index” or on the “issuers of securities in a narrow-based security index”; and (3) swaps on exempted securities (other than municipal securities), such as US Treasury bonds.

While the CFTC has regulatory and enforcement authority over SBSAs, the SEC also has antifraud and certain other authority over them. The Dodd-Frank Act requires the Commissions to adopt rules regarding books and records requirements for SBSAs, but the Commissions determined that these products would already be

subject to sufficient recordkeeping and reporting requirements under CFTC rules applicable to swaps in general. Therefore, the Product Definitions Rule does not impose any additional recordkeeping or reporting requirements on SBSAs.

## **Other Rules Triggered by the Product Definitions Rule**

As stated above, several CFTC rules that have already been finalized will be triggered 60 days after the Product Definitions Rule is published in the Federal Register. Specifically, regulatory and real-time reporting, position limits applicable to all spot-month limits and non-spot-month legacy limits, and (potentially) certain rules incorporating swaps into the trading thresholds applicable to commodity pool operators and commodity trading advisors.<sup>34</sup> Additionally, on that date, persons or entities engaging in swap dealing activity will have to begin counting any swaps entered into in that capacity toward the *de minimis* thresholds set forth in the CFTC's entity definitions rule.<sup>35</sup> If those persons or entities exceed one of the *de minimis* thresholds, they will be required to register as a swap dealer two months after the end of the month in which they exceed the *de minimis* threshold, at which time several other CFTC rules will become applicable to that person or entity.

The SEC has yet to finalize most of its rules under Title VII of the Dodd-Frank Act, so no SEC rules will be triggered by the effective date of the Product Definitions Rule.<sup>36</sup> However, on that date, as required by the Dodd-Frank Act, market participants will only be permitted to effect transactions in security-based swaps with or for persons that are "eligible contract participants" (as defined in the joint CFTC-SEC entity definitions rulemaking<sup>37</sup>) unless the transaction is effected on a national securities exchange.<sup>38</sup>

### Endnotes

- <sup>1</sup> The SEC approved this rule on July 9, 2012 by a unanimous seriatim vote.
- <sup>2</sup> See Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 Fed. Reg. 48208 (Aug. 16, 2012).
- <sup>3</sup> Exempt commodities (mainly energy commodities and metals), agricultural commodities and certain intangible commodities like environmental commodities (e.g., emission allowances) are non-financial commodities. See *id.* at 48232-33.
- <sup>4</sup> Non-financial forwards are excluded from the definition of a swap under the Dodd-Frank Act, see Commodity Exchange Act (“CEA”) § 1a(47)(B)(ii), but are still subject to the CFTC’s jurisdiction in certain ways. For example, the CFTC has authority over any attempts to manipulate the price of a commodity in interstate commerce even if the instrument is a forward and not a swap (or futures) contract. See CEA §§ 6(c), 6(d) and 9(a)(2).
- <sup>5</sup> See Product Definitions Rule, 77 Fed. Reg. at 48227.
- <sup>6</sup> See *id.* at 48228-29. Note that oral book-outs must be followed up with a written or electronic confirmation in order to qualify for the Brent Interpretation.
- <sup>7</sup> See *id.* at 48237.
- <sup>8</sup> See *id.* at 48238. A forward with embedded volumetric optionality must satisfy the following factors in order to qualify as a forward and not a swap: (1) the embedded optionality does not undermine the overall nature of the agreement, contract, or transaction as a forward contract; (2) the predominant feature of the agreement, contract, or transaction is actual delivery; (3) the embedded optionality cannot be severed and marketed separately from the overall agreement, contract, or transaction in which it is embedded; (4) the seller of a nonfinancial commodity underlying the agreement, contract, or transaction with embedded volumetric optionality intends, at the time it enters into the agreement, contract, or transaction to deliver the underlying nonfinancial commodity if the optionality is exercised; (5) the buyer of a nonfinancial commodity underlying the agreement, contract or transaction with embedded volumetric optionality intends, at the time it enters into the agreement, contract, or transaction, to take delivery of the underlying nonfinancial commodity if it exercises the embedded volumetric optionality; (6) both parties are commercial parties; and (7) the exercise or non-exercise of the embedded volumetric optionality is based primarily on physical factors, or regulatory requirements, that are outside the control of the parties and are influencing demand for, or supply of, the nonfinancial commodity.
- <sup>9</sup> CFTC staff issued a no-action letter on August 14, 2012 regarding trade options (*i.e.*, physically-settled options).
- <sup>10</sup> See Product Definitions Rule, 77 Fed. Reg. at 48236. Relatedly, the CFTC issued an interpretative letter regarding regional transmission organizations and independent system operators on August 16, 2012.
- <sup>11</sup> See *id.* at 48245.
- <sup>12</sup> See *id.* at 48350 (to be codified at 17 C.F.R. § 1.3(xxx)(4)(i)(A)).
- <sup>13</sup> See *id.* at 48350 (to be codified at 17 C.F.R. § 1.3(xxx)(4)(i)(B)).
- <sup>14</sup> See *id.* at 48215-16.
- <sup>15</sup> See *id.* at 48247-48.
- <sup>16</sup> See *id.* at 48246-47.
- <sup>17</sup> See *id.* at 48247.
- <sup>18</sup> See Securities Exchange Act § 3(68)(A)(ii)(II).
- <sup>19</sup> See Product Definitions Rule, 77 Fed. Reg. at 48225-26.
- <sup>20</sup> See *id.* at 48226 n.189.
- <sup>21</sup> See CEA §§ 1a(24), (25).
- <sup>22</sup> See Determination of Foreign Exchange Swaps and Foreign Exchange Forwards Under the Commodity Exchange Act, 76 Fed. Reg. 25774 (May 5, 2011).
- <sup>23</sup> See Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. 2136 (Jan. 9, 2012).
- <sup>24</sup> See Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties, 77 Fed. Reg. 9734 (Feb. 17, 2012).
- <sup>25</sup> See CEA § 1a(9).

<sup>26</sup> See CEA § 1a(47).

<sup>27</sup> See Securities Exchange Act § 3(a)(68).

<sup>28</sup> Presumably, a single-name CDS or other type of CDS that would otherwise be considered a security-based swap would be considered a mixed swap if it included non-securities components such as embedded interest rate optionality. The Product Definitions Rule does not explicitly state this, however.

<sup>29</sup> See Product Definitions, 77 Fed. Reg. at 48273.

<sup>30</sup> See CEA § 1a(47)(D); Securities Exchange Act § 3(a)(68)(D).

<sup>31</sup> See Product Definitions Rule, 77 Fed. Reg. at 48355-56 (to be codified at 17 C.F.R. §§ 1.9(b), (c)).

<sup>32</sup> See CEA § 2(f).

<sup>33</sup> See Product Definitions Rule, 77 Fed. Reg. at 48294 n. 966.

<sup>34</sup> The CFTC has issued no-action relief for many CPOs and CTAs exempting them from the requirement to include swaps in the trading thresholds until December 31, 2012, but it is unclear whether this no-action relief covers all potential CPOs and CTAs.

<sup>35</sup> See Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant”, 77 Fed. Reg. 30596, 30744 (17 C.F.R. § 1.3(ggg)(4)) (May 23, 2012); see also Latham & Watkins Client Alert, *Are You a Swap Dealer? The CFTC and SEC Finalize Swap Entity Definitions* (June 20, 2012), available [here](#).

<sup>36</sup> See Testimony on Title VII Implementation by Robert Cook, Director of Division of Trading & Markets of the SEC Before the Committee on Agriculture, Nutrition & Forestry of United States Senate on July 17, 2012 (stating that “this step will not trigger compliance with other rules the Commission is adopting under Title VII.”).

<sup>37</sup> Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant”, 77 Fed. Reg. 30596 (May 23, 2012).

<sup>38</sup> See Securities Exchange Act § 6(l).

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