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## **CFTC Staff Provides Broad Relief for Market Participants as Swap Effective Date Arrives**

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By Paul Architzel, Gail Bernstein and Alexander Jadin

**T**he final joint swap definition rules and interpretations (Product Definition Rules) issued by the Commodity Futures Trading Commission (CFTC or Commission) and Securities and Exchange Commission (SEC) became effective on October 12, 2012,<sup>1</sup> triggering a series of requirements related, among other things, to swap dealer (SD) registration, determination of who is a major swap participant (MSP), swap data reporting and recordkeeping, status of eligible contract participants (ECPs), and registration as a commodity pool operator (CPO), commodity trading advisor (CTA), introducing broker (IB), floor broker, or floor trader. The Product Definition Rules are summarized in an earlier WilmerHale alert.<sup>2</sup> On October 11 and October 12, 2012, CFTC Staff issued over a dozen no-action and interpretative letters and FAQs related to the effectiveness and implementation of several of these requirements.<sup>3</sup> This article summarizes several of these publications.

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## No-Action Relief

CFTC Staff recently provided no-action relief with respect to five broad areas:

- (1) Calculating the aggregate gross notional amount for purposes of the de minimis exception to the SD definition (that is, a person whose aggregate swaps dealing is below a de minimis threshold does not need to register as an SD);
- (2) Determining whether a person is an MSP;
- (3) Registration as a CPO, CTA, IB, floor broker, floor trader, or associated person of such registrants;
- (4) Preserving the regulatory status quo related to certain pending proposed electricity-related orders; and
- (5) Status as an ECP.

## SD and MSP Determinations

A portion of the no-action relief granted by the CFTC's Division of Swap Dealer and Intermediary Oversight (DSIO) relates to the determination of when a person is an SD or MSP. The SD-related relief concerns the calculation of the gross notional amount for purposes of determining whether a person satisfies the de minimis exception to the SD definition. The MSP-related relief addresses which swaps need not be included in a person's calculations of "substantial position" and "substantial counterparty" for purposes of determining whether it is an MSP.

### 1. Swaps With Non-US Persons

Earlier this year, the Commission proposed a definition of "US persons" intended to identify those persons whose swap activities fall within the jurisdiction of the swaps provisions of the Commodity Exchange Act (CEA) (Proposed Cross-Border Guidance).<sup>4</sup> However, because this definition has not yet been finalized, the DSIO has granted no-action relief pending its finalizing the Proposed Cross-Border Guidance.

Accordingly, the DSIO will not recommend enforcement action if a person excludes from its calculation towards the SD de minimis exception or the MSP calculation swaps executed within the no-action period *unless*: (a) the person falls within one of the five

categories below, or (b) enters into the swap with a counterparty that falls within one of the five categories. In addition, a person that does *not* fall within one of the enumerated categories need not count swaps with a foreign branch of a US person (that is, a person in one of the enumerated categories) if the US person represents that it intends to register with the Commission as an SD by March 13, 2013. The no-action relief will apply even if the counterparty's obligations under the swap are guaranteed by a US person. The enumerated categories (that is, a US person for purposes of the no-action relief) are:

1. A natural person who is a resident of the United States;
2. A 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 is organized or incorporated under the laws of the United States;
3. A pension plan for the employees, officers or principals of a legal entity described in (2) above, unless the pension plan is exclusively for foreign employees of such entity;
4. An estate or trust, the income of which is subject to US income tax regardless of source; or
5. An individual account (discretionary or not) where the beneficial owner is a person described in (1) through (4) above.

The no-action period covers swaps executed before the earlier of December 31, 2012 or the effective date of a final CFTC definition of "US persons," which may differ from the category of persons accorded the temporary relief.

### 2. Foreign Exchange Swaps and Foreign Exchange Forwards

The CEA provides that "foreign exchange swaps" and "foreign exchange forwards" fall within the definition of a "swap" unless the Treasury Secretary determines that either or both should not be regulated as swaps and are not structured to evade the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).<sup>5</sup> The Treasury Secretary

has proposed an exemption for both foreign exchange swaps and foreign exchange forwards,<sup>6</sup> but has not yet issued a final determination. Thus, in the absence of no-action relief, both of these instruments would be required to be included in the SD and MSP threshold calculations.

The Staff of the DSIO has granted limited temporary no-action relief to alleviate uncertainty for market participants who engage solely or primarily in foreign exchange swap and foreign exchange forward dealing activity. Accordingly, if the Treasury Secretary exempts foreign exchange swaps and/or foreign exchange forwards from the definition of a “swap” effective before December 31, 2012, the DSIO will not recommend enforcement action against an entity that excludes these instruments from the SD and MSP threshold calculations. However, if an entity enters into other types of swaps in connection with swap dealing activities by December 31, 2012 that are in excess of the SD de minimis exception threshold, that entity must also consider its foreign exchange swaps and foreign exchange forwards in determining *when* it must apply for SD registration.

### ***3. Swaps in Agricultural and Exempt Commodities***

All of a person’s swap activities after October 12, 2012, the effective date of the Product Definition Rules, are relevant in determining whether the person meets the SD or MSP definitions, even if the swap in question might be exchanged for a futures contract on a designated contract market (DCM) as part of an exchange-of-futures-for-swap transaction. Several major platforms that have been providing over-the-counter markets for cleared swaps in exempt commodities have recently announced their intention to transition their cleared swap activities to cleared futures contracts. In addition, Commission Staff recently released material guidance, interpretative relief, and no-action relief with respect to the registration of SDs and other swap and futures intermediaries. In light of these developments, the Staff of the DSIO has provided limited transitional no-action relief to allow market participants more time

to evaluate these developments, and to adjust their business accordingly.

Under this relief, the DSIO will not recommend enforcement action against any person who does not include in its SD de minimis or MSP outward exposure calculations swaps that reference an agricultural or exempt commodity, and that are executed before October 20, 2012. In addition, no enforcement action will be recommended against a person who excludes swaps entered into before December 31, 2012 and that reference an agricultural or exempt commodity as long as they are either cleared on a registered derivatives clearing organization (DCO), or entered into contingent upon being exchanged for and cleared as a futures position as part of an exchange-for-related-position transaction conducted in accordance with a DCO’s rules.

### ***4. Swaps With Special Entities (SD Calculation)***

There are two alternative de minimis thresholds for SD registration. The first is an aggregate gross notional amount of swap dealing of \$3 billion, subject to a phase-in level of \$8 billion. The second is a gross notional amount of \$25 million with regard to swaps in which the counterparty is a “special entity,” as defined in CEA Section 4s(h)(2)(C). In response to a petition seeking to exclude from the special entity de minimis threshold certain types of swaps that relate to physical energy utility operations, the Staff of the DSIO has provided no-action relief to provide the Commission additional time to consider the petition and related comments, and to accommodate the particular circumstances related to the physical energy utility markets.

Accordingly, the DSIO will not recommend enforcement action against a non-financial entity, as defined in CEA Section 2(h)(7)(C)(i), that is active in the physical energy markets if it:

1. Limits its utility commodity swaps connected with its dealing activities with utility special entities to no more than \$800 million per year;
2. Is not otherwise within the definition of a “swap dealer”; and

3. Has provided notice to the Commission (by December 31, 2012 and quarterly thereafter) stating that it is applying this relief.

For the purposes of this no-action relief, the term “utility commodity swap” is a swap in which (i) one of the parties is a utility special entity; (ii) that party is using the swap for the purpose of hedging physical positions; and (iii) the swap is related to an exempt commodity in which both parties to the swap transact as part of the normal course of their physical energy businesses.

### **Registration as a CPO, CTA, IB, Floor Broker, Floor Trader, or Associated Person**

#### ***1. Persons That Meet the Definitions of a CPO or CTA Solely as a Result of Foreign Exchange Swap and Foreign Exchange Forward Activity***

As discussed above, foreign exchange swaps and forwards are swaps unless the Treasury Secretary determines that either or both should not be regulated as swaps and are not structured to evade the Dodd-Frank Act. To alleviate uncertainty pending action by the Treasury Secretary, the DSIO has provided the following no-action relief. If the Treasury Secretary exempts foreign exchange swaps and/or forwards from the definition of “swap” by December 31, 2012, the DSIO will not recommend enforcement action against persons who would have to apply to be registered as a CPO or CTA solely as a result of operating a collective investment vehicle that trades foreign exchange swaps and/or forwards or providing advice concerning these instruments.

#### ***2. Registration No-Action Relief for Persons Who Would Be Required to Register Solely by Virtue of Swaps Activity***

The CEA and Commission regulations require that a person who fits within the definition of an IB, CPO, CTA, floor broker, floor trader, or associated person of a futures commission merchant (FCM), IB,

CPO, or CTA, must be registered with the Commission prior to engaging in business as such. Because it anticipated that a significant number of people would need to register with the National Futures Association (NFA) (and thus with the Commission) on or before October 12, 2012 solely as a result of their involvement with swaps, it has provided no-action relief to alleviate the anticipated burden on the NFA.

Accordingly, the DSIO will not recommend enforcement action against persons required to register in any of the above capacities solely by virtue of their involvement with either (i) swaps, or (ii) the transition of certain contracts by Intercontinental Exchange, Inc. and New York Mercantile Exchange to clearing as commodity futures and options contracts. These persons will need to file an application for registration by December 31, 2012, and as of December 31, 2012 will become subject to and must make a good-faith effort to comply with the CEA and Commission regulations as if the person were registered. In addition, persons applying for registration as an IB, a floor broker, or a floor trader must also file with the NFA additional documentation by March 31, 2013.

The no-action relief terminates when the NFA provides notice that the person is registered, or five days after service by the NFA of notice that the person may be disqualified from registration under CEA Section 8a(2) or 8a(3).

#### ***3. Associated Persons of SDs or MSPs Subject to Statutory Disqualification***

The CEA requires associated persons of FCMs, IBs, CPOs, and CTAs to be registered with the Commission. Registration is begun by applying to the NFA. In certain circumstances, the NFA has delegated authority to allow persons who are otherwise statutorily disqualified under CEA Section 8a(2) or 8a(3) to nonetheless register as an associated person.

The Dodd-Frank Act amended the CEA to bar SDs and MSPs from allowing associated persons with statutory disqualifications to effect or be involved in effecting swaps. Because associated persons of swap dealers and major swap participants are not required

to register with the NFA, statutorily disqualified associated persons might not benefit from the NFA's exercise of discretion in favor of an associated person.

To avoid disparate or inconsistent treatment of associated persons, the DSIO has issued no-action relief to allow SDs and MSPs to permit an associated person who would otherwise be subject to a statutory disqualification to effect or be involved in effecting swaps, provided that the NFA gives the SD or MSP notice that, had the person applied to the NFA for registration, it would have granted the application.

Accordingly, the DSIO will not recommend enforcement action against an SD or MSP if (i) the entity notifies the NFA that its associated person is subject to a statutory disqualification; (ii) it submits to the NFA information identifying the person and the matter underlying the statutory disqualification; and (iii) based solely on this information, the NFA informs the entity whether or not it would have granted registration as an associated person.

Where the associated person is effecting or involved in effecting swaps at the time the SD or MSP files its notice with the NFA, the associated person may continue these activities pending the NFA's response. Where the associated person is not effecting or not involved in effecting swaps at the time the SD or MSP files its notice with the NFA, however, he or she may not begin any such activities prior to the NFA's response. Following a notification by the NFA that it would not have registered the person as an associated person, the SD or MSP may not permit the associated person to effect or be involved in effecting swaps.

## **Preserving the Regulatory Status Quo Under Pending Proposed Orders**

### ***1. Not-for-Profit Electric Utilities***

On August 23, 2012, the Commission published a proposed order to exempt certain transactions involving not-for-profit electric utilities.<sup>7</sup> The proposed order would provide relief from the provisions of the CEA and Commission regulations to certain transactions

between non-for-profit electric utilities, subject to anti-fraud, anti-manipulation, and recordkeeping requirements. The Commission did not take action on this proposed order by October 12, 2012, so the DSIO and the Division of Market Oversight, Clearing and Risk (DMO) have issued no-action relief to preserve the regulatory status quo.

Accordingly, the DSIO and DMO will not recommend enforcement action against any not-for-profit electric utility that enters into, with another not-for-profit electric utility, electric operations-related transactions as described in the proposed order. This relief expires on the earlier of March 31, 2013 or the effective date of any final action taken by the Commission with respect to the proposed order.

### ***2. Regional Transmission Organizations (RTOs), Independent System Operators (ISOs), and/or Their Participants***

On August 28, 2012, the Commission published a proposed order to exempt certain authorized energy transactions from the provisions of the CEA and Commission regulations, subject to anti-fraud, anti-manipulation, and enforcement requirements.<sup>8</sup> Each subject transaction is offered or sold pursuant to a tariff that has been approved or permitted to take effect by either the Public Utility Commission of Texas or the Federal Energy Regulatory Commission. Because the Commission did not take action on this proposed order by October 12, 2012, the DSIO and DMO have issued no-action relief to preserve the regulatory status quo.

Accordingly, these Divisions will not recommend enforcement action against any of the petitioners whose request prompted the proposed order, or to any person who is or would be eligible to participate in the petitioners' markets under any currently approved tariff, with respect to the transactions described in the proposed order, for failure to comply with the provisions of the CEA and Commission regulations, subject to anti-fraud, anti-manipulation, and enforcement requirements. This relief expires on the earlier of March 31, 2013 or the effective date of any final action taken by the Commission with respect to the proposed order.

## ECP Status

### 1. Swap Guarantee Arrangements

The CEA confers ECP status upon any “corporation, partnership, proprietorship, organization, trust, or other entity” whose obligations are guaranteed by certain enumerated ECPs.<sup>9</sup> The CFTC’s Office of General Counsel (OGC) has provided no-action relief for certain guarantors of swap obligations and has expanded the list of enumerated guarantor ECPs.

Under this relief, the OGC will not recommend enforcement action against a guarantor of the swap obligations of a non-ECP third-party for violating CEA Sections 2(e) or 13(a), against a guaranteed swap counterparty for violating CEA section 2(e), or against the beneficiary of the swap guarantee for violating CEA section 13(a),<sup>10</sup> if the guarantor is: (i) a corporation, partnership, proprietorship, organization, trust, or other entity that has a net worth exceeding \$1 million; or (ii) an indirect proprietorship that consists of an individual or, if permitted by applicable state law, individuals, with (a) a net worth exceeding \$1 million; or (b) aggregate amounts invested, on a discretionary basis, above \$5 million.

In addition, all of the following conditions must be satisfied, as applicable:

1. The guaranteed swap counterparty enters into the swaps solely to manage the floating interest rate risk associated with a loan received, or reasonably likely to be received, by the guaranteed swap counterparty in the conduct of its business;
2. In the case of all guarantors other than a proprietorship, the guarantor is an owner of the guaranteed swap counterparty and plays an active role in operating the business of the guaranteed swap counterparty (other than performing solely clerical, secretarial or administrative functions);
3. In the case of a proprietorship guarantor, if applicable state law contemplates proprietorships with more than one proprietor, the guarantor and the guaranteed swap counterparty are co-proprietors;
4. The guarantor computes its net worth or amounts invested on a discretionary

basis in accordance with generally accepted accounting principles consistently applied (provided that the value of real property can be determined using fair market value);

5. The guaranteed swap counterparty enters into the guaranteed swaps only as a principal; and
6. The beneficiary verifies that the guarantor and guaranteed swap counterparty satisfy the conditions of this no-action position.

For a non-ECP guarantor of a swap, or a beneficiary of a swap guaranteed by a non-ECP, this no-action relief with respect to a swap guarantee extends until March 31, 2013. The relief extends only until December 31, 2012, however, for any person entering into a swap with a non-ECP party that was either an ECP prior to enactment of the Dodd-Frank Act or eligible to enter into an agreement, contract, or transaction in reliance on the Commission’s “Second Effective Date Extension Order,”<sup>11</sup> if it meets certain conditions.

### 2. “Anticipatory ECPs”

The CEA provides that a corporation, partnership, proprietorship, organization, trust, or other entity with total assets exceeding \$10 million is an ECP. The OGC has issued no-action relief in response to concerns that some entities that engage in common loans and that may seek to enter into swaps in order to lock in a favorable fixed interest rate on a portion of the swap may not be able to qualify for ECP status if they have not received the full proceeds on the loans.

In connection with a swap entered into other than on or subject to the rules of a DCM, before a borrowing swap counterparty receives the proceeds of a related loan in an amount that would be sufficient for the borrower to achieve ECP status under CEA Section 1a(18)(A)(v)(I), if certain conditions regarding the loan and the swap are satisfied, the OGC will not recommend enforcement action against any of the following parties:

- A guaranteed swap counterparty or other non-ECP swap counterparty, for violating CEA section 2(e);
- The guarantor of a swap counterparty, for violating CEA sections 2(e) or 13(a); or

- A beneficiary of a swap guarantee or other swap counterparty to a non-ECP swap counterparty, for violating CEA section 13(a).

For the purposes of this relief, the OGC will treat a loan commitment as bona fide if it is in writing, the loan closing is subject only to the satisfaction of commercially reasonable conditions to closing, and the loan commitment is entered into solely for business purposes unrelated to qualifying as an ECP. The term of the no-action relief is the same as that for swap guarantee arrangements, discussed above.

### ***3. Amounts Invested on a Discretionary Basis***

The Dodd-Frank Act replaced, in the definition of an ECP, the phrase “total assets in an amount” with the phrase “assets invested on a discretionary basis, the aggregate of which is in excess of.”<sup>12</sup> The OGC has issued no-action relief in response to requests for interpretation or guidance on the meaning of this change in language.

This relief is based on the application of the standard found in the definition of a “qualified purchaser” in Rule 2a51-1 of the Investment Company Act of 1940. Accordingly, the OGC will not recommend enforcement action against:

- A guaranteed swap counterparty or other non-ECP swap counterparty, for violating CEA section 2(e);
- The guarantor of a swap counterparty, for violating CEA sections 2(e) or 13(a); or
- A beneficiary of a swap guarantee or other swap counterparty to a non-ECP swap counterparty, for violating CEA section 13(a),

if such persons rely on the standards set forth in Rule 2a51-1 to determine whether a guaranteed swap counterparty, other non-ECP swap counterparty, or a guarantor is an ECP based on having the requisite amounts invested on a discretionary basis. The term of the no-action relief is the same as that for swap guarantee arrangements, discussed above.

## **Interpretations**

Commission Staff has provided interpretative letters with respect to three broad areas:

- (1) ECP status; (2) the definition of hedging used in Regulation 4.5; and (3) commodity pools. Each is discussed in turn.

## **ECP Status**

The Commission and the SEC have both interpreted the term “swap” to include “a guarantee of such swap, to the extent that a counterparty to a swap position would have recourse to the guarantor in connection with the swap.”<sup>13</sup> The OGC has issued the following interpretations in light of the CFTC and SEC view.

### ***1. Swap Guarantors Generally Must be ECPs***

CEA Section 2(e) requires that each guarantor of a swap must be an ECP, unless (i) the guaranteed swap is entered into on, or subject to the rules of, a DCM; (ii) a Commission order issued pursuant to CEA Section 4(c) provides the guarantor relief from compliance with section 2(e); or (iii) the guaranteed swap is a trade option and the terms of Regulation 32.3 are satisfied.

### ***2. Non-ECPs Generally Cannot be Jointly and Severally Liable for Swap Obligations***

The CEA prohibits a non-ECP from entering into a swap other than on or subject to the rules of a DCM. The Staff has stated that CEA Section 2(e) clearly makes it unlawful for a non-ECP to be a jointly and severally liable swap counterparty, because such conduct would constitute entering into a swap.

However, the Staff has also provided that the no-action relief with respect to swap guarantees, described above, may be available to a jointly and severally liable non-ECP swap counterparty, a guarantor of the swap obligations of such a counterparty, or a swap counterparty to such a jointly and severally liable swap counterparty.

### ***3. Cash Proceeds From a Loan Count Towards Total Assets***

The Staff, in response to uncertainty on this point, confirmed that the proceeds of a purchase money loan count towards total assets for purposes of qualifying as an ECP (that is, reaching the \$10 million threshold for total

assets under CEA Section 1a(18)(A)(v)(I), prior to the borrower using the funds to purchase the asset for which the borrower needed the loan.

### **Bona Fide Hedging in Commission Regulation 4.5**

On February 24, 2012, the Commission amended Regulation 4.5 to include, among other things, a commodity interest trading threshold above which the operator of a registered investment company would be included within the definition of a CPO.<sup>14</sup> These amendments excluded from the calculation of these thresholds any positions that would qualify as “bona fide hedging” within the meaning and intent of Regulations 1.3(z)(1) and 151.5, which defined “bona fide hedging” for the separate purpose of exclusions from position limits for futures and swaps.

However, following the amendment of Regulation 4.5, the District Court for the District of Columbia vacated and remanded the rule that promulgated Regulation 151.5 and amended Regulation 1.3(z)(1).<sup>15</sup> The Staff of the DSIO has concluded that the Commission intended to incorporate the substance of Regulations 1.3(z)(1) and 151.5, independent of whether those definitions remain effective with respect to position limits. Accordingly, this guidance restates the terms of the regulations that were incorporated by reference into Regulation 4.5. The DSIO has also stated that it will not recommend enforcement action based on application of the trading threshold test in Regulation 4.5(c)(2)(iii) that excludes transactions falling within the substance of Regulations 1.3(z)(1) and 151.5.

### **Commodity Pools**

#### ***1. Definition of “Commodity Pool” Under Section 1a(10) of the CEA with Respect to Certain Activities of Real Estate Investment Trusts***

In response to a request for interpretation, the Staff of the DSIO confirmed that certain real estate investment trusts (REITs) that hold income-producing real estate and engage in real

estate management activities, including leasing and maintaining real estate, providing a variety of tenant services, and developing and redeveloping real estate, are not within the definition of a “commodity pool” under CEA Section 1a(10). More specifically, the DSIO interpreted the definition of “commodity pool” not to include REITs that satisfy the following criteria:

- The REIT primarily derives its income from the ownership and management of real estate and uses derivatives for the limited purpose of mitigating its exposure to changes in interest rates or fluctuations in currency;
- The REIT is operated so as to comply with all of the requirements of a REIT election under the Internal Revenue Code; and
- The REIT has identified itself as an equity REIT in Item G of its last US income tax return on Form 1120-REIT and continues to qualify as such, or, if the REIT has not yet filed its first tax filing with the Internal Revenue Service, the REIT has stated its intention to do so to its participants and effectuates its stated intention.

Any relief under this interpretation is self-effectuating.

#### ***2. Request for Exclusion From Commodity Pool Regulations for Securitization Vehicles***

In response to a request for interpretation, the DSIO confirmed that certain securitization vehicles should not be included within the definition of “commodity pool,” and that their operators should not be included within the definition of “CPO.” The DSIO stated five criteria for excluding a fund from these definitions:

- The issuer of the asset-backed securities is operated consistent with the conditions set forth in Regulation AB, or Rule 3a-7, whether or not the issuer’s security offerings are in fact regulated pursuant to either regulation, such that the issuer, pool assets, and issued securities satisfy the requirements of either regulation;
- The entity’s activities are limited to passively owning or holding a pool of receivables or



other financial assets, which may be either fixed or revolving, that by their terms convert to cash within a finite time period plus any rights or other assets designed to assure the servicing or timely distributions of proceeds to security holders;

- The entity's use of derivatives is limited to the uses of derivatives permitted under the terms of Regulation AB, which include credit enhancement and the use of derivatives such as interest rate and currency swap agreements to alter the payment characteristics of the cash flows from the issuing entity;
- The issuer makes payments to securities holders only from cash flow generated by its pool assets and other permitted rights and assets, and not from or otherwise based upon changes in the value of the entity's assets; and
- The issuer is not permitted to acquire additional assets or dispose of assets for the primary purpose of realizing gain or minimizing loss due to changes in market value of the vehicle's assets.

In addition, the DSIO expressly highlighted its openness to discussing the facts and circumstances of any other securitization structures to discern commodity pool status and to explore any other relief that may be available, such as treatment as an exempt pool.

## Notes

1. "Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping; Final Rule," 77 Fed. Reg. 48208 (Aug. 13, 2012).
2. "Regulators Issue Final Rules and Interpretations Further Defining Swap-Related Terms," available at: <http://www.wilmerhale.com/publications/whPubsDetail.aspx?publication=10210>.
3. The publications are all available on the CFTC's website, at: <http://eftc.gov/LawRegulation/DoddFrankAct/GuidanceQandA/index.htm>.
4. "Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act," 77 Fed. Reg. 41214

(July 12, 2012); *see also* WilmerHale alert, "Commodity Futures Trading Commission Proposes Guidance on Cross-Border Application of Certain Swaps Provisions," available at <http://www.wilmerhale.com/publications/whPubsDetail.aspx?publication=10194>.

5. CEA § 1a(47)(E)(i).
6. "Determination of Foreign Exchange Swaps and Foreign Exchange Forwards Under the Commodity Exchange Act, Notice of Proposed Determination," 76 Fed. Reg. 25774 (May 5, 2011).
7. *See* "Proposal to Exempt Certain Transactions Involving Not-For-Profit Electric Utilities," 77 Fed. Reg. 50998 (Aug. 23, 2012).
8. *See* "Proposed Order and Request for Comment on a Petition From Certain Independent System Operators and Regional Transmission Organizations To Exempt Specified Transactions Authorized by a Tariff or Protocol Approved by the Federal Energy Commission or the Public Utility Commission of Texas From Certain Provisions of the Commodity Exchange Act," 77 Fed. Reg. 52137 (Aug. 28, 2012).
9. *See* CEA § 1a(18)(A)(v)(II).
10. Section 2(e) makes it "unlawful for any person, other than an eligible contract participant, to enter into a swap unless the swap is entered into on, or subject to the rules of, a board of trade designated as a contract market under section 5." Section 13(a) provides that "Any person who commits, or who willfully aids, abets, counsels, commands, induces, or procures the commission of, a violation of any of the provisions of this chapter, or any of the rules, regulations, or orders issued pursuant to this chapter, or who acts in combination or concert with any other person in any such violation, or who willfully causes an act to be done or omitted which if directly performed or omitted by him or another would be a violation of the provisions of this chapter or any of such rules, regulations, or orders may be held responsible for such violation as a principal."
11. "Second Amendment to July 14, 2011 Order for Swap Regulation," 77 Fed. Reg. 28819 (May 16, 2012).
12. *See* Dodd-Frank Act § 721(a)(9)(A)(ii).
13. "Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping," 77 Fed. Reg. 48208, 48226 (Aug. 13, 2012).
14. *See* "Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations," 77 Fed. Reg. 11252 (Feb. 24, 2012).
15. *See* International Swaps & Derivatives Ass'n v. CFTC, 2012 WL 4466311 (D.D.C. Sept. 28, 2012).

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