News Bulletin

December 30, 2010

2010 Derivatives Rulemaking Wrap-Up

Over the past several months, the Commodity Futures Trading Commission (CFTC) and the Securities and Exchange Commission (SEC) have been actively seeking public comment and proposing rules as part of the regulatory overhaul of the derivatives markets mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). As we await final rules to be published in 2011, which will implement and (hopefully) clarify uncertainties in the statutory provisions of Dodd-Frank, we summarize below the principal actions taken by the regulators during the last half of the year.

On August 13, 2010, the CFTC kicked off its rulemaking initiatives by issuing an advance notice of rulemaking seeking public comment on various definitions.

Acting on its statutory mandate to further define certain definitions, the CFTC sought industry comments with respect to the following definitions: "swap," "swap dealer," "major swap participant," "security-based swap," "security-based swap dealer," "major security-based swap participant" and "eligible contract participant." Joint proposed rules further defining the dealer and participant definitions were approved by the CFTC on December 1, 2010, and by the SEC on December 7, 2010, as discussed below. Neither the CFTC nor the SEC has yet proposed rules with respect to the definition of "swap" or "security-based swap," respectively.

Click here for the CFTC advance notice.

On August 26, 2010, the CFTC issued final rules with respect to the regulation of off-exchange retail foreign exchange transactions and intermediaries.

Largely based on the proposed rules that the CFTC issued six months prior to Dodd-Frank, the final rules represent a comprehensive regulatory scheme for off-exchange transactions in foreign currency with members of the retail public. Comprised of both new rules and amendments to existing rules, the final rules establish requirements for, among other things, registration, disclosure, recordkeeping, financial reporting, minimum capital, and other operational standards relating to retail forex transactions.

Click here for the final rules.

On October 1, 2010, the CFTC adopted an interim final rule on reporting of pre-enactment swaps, and on October 13, 2010, the SEC adopted the corollary interim final rule on reporting of pre-enactment security-based swaps.

The CFTC and the SEC adopted interim final rules for reporting pre-enactment swaps that had not expired as of July 21, 2010 (pre-enactment swaps). Under those rules, certain information concerning pre-enactment swaps

must be reported to a swap data repository (SDR) or, in the absence of one, to the CFTC or SEC, as applicable, by the earlier of the compliance date established in the yet-to-be finalized reporting rules established under Section 2(h)(5) of the CEA and 60 days after a SDR becomes registered with the CFTC or SEC, as applicable, and commences operations to receive and maintain data related to the swaps. Each of the interim final rules contains an interpretive note that requires counterparties to retain all information and documents, to the extent and in the form that they presently exist, relating to the terms of their pre-enactment unexpired swaps.

Click here for the CFTC interim final rule and here for the SEC interim final rule.

On October 1, 2010, the CFTC issued proposed rules on financial resources requirements for derivatives clearing organizations.

The proposed rules would implement Core Principle B, as amended by Dodd-Frank, which requires a derivatives clearing organization (DCO) to maintain a minimum amount of financial resources that would enable the DCO to meet its financial obligations to its members in the event of a default by a clearing member and to cover its operating costs for one year.

Consistent with Core Principle B, the proposed rules would require a DCO to maintain financial resources sufficient to cover its exposures with a high degree of confidence and to enable it to perform its functions in compliance with the core principles under the Commodity Exchange Act (CEA). Specifically, a DCO would be required to maintain financial resources that would enable it to meet its financial obligations to its clearing members notwithstanding a default by the clearing member creating the largest financial exposure for the DCO in extreme but plausible market conditions. (In the case of a systemically important derivatives clearing organization (SIDCO), the SIDCO would be required to maintain financial resources that could withstand a default by the two clearing members creating the largest combined financial exposure to it in extreme but plausible market conditions.) The DCO's financial resources also must enable it to cover its operating costs for at least one year, calculated on a rolling basis. The proposed rules specify the types of financial resources that a DCO may use to satisfy its financial resources requirements, including any applicable haircuts for purposes of valuing those financial resources. A SIDCO, however, may only count the value of potential member assessments, after a 30% haircut, to meet up to 20% of the obligations arising from a default by a clearing member creating the second highest financial exposure to the SIDCO.

The proposed rules would require a DCO, on a monthly basis, to perform stress testing that would allow it to make a reasonable calculation of the financial resources needed to meet the requirement in the case of a defaulting clearing member (or two clearing members, in the case of a SIDCO) and to make a reasonable calculation of its projected operating costs over a 12-month period.

Click here for the proposed rules.

On October 1, 2010, the CFTC issued proposed rules with respect to requirements for derivatives clearing organizations, designated contract markets, and swap execution facilities regarding the mitigation of conflicts of interest. On October 14, 2010, the SEC also issued similar proposed rules intended to mitigate conflicts of interest applicable to clearing agencies that clear security-based swaps, security-based swap execution facilities, and national securities exchanges.

The proposed CFTC rules would impose limits on voting equity ownership and the exercise of voting power in DCOs, designated contract markets (DCMs), and swap execution facilities (SEFs) in order to address any perceived conflicts of interest. Note that the proposed rules would not impose any limitations on non-voting equity ownership. The proposed rules also would impose structural governance requirements on DCOs, DCMs, and SEFs, with a particular focus on those entities' boards of directors and board committees.

With respect to DCMs and SEFs, the proposed rules would prohibit any DCM or SEF member (together with any related persons of such member) from beneficially owning more than 20% of any class of voting equity in the entity or directly or indirectly voting any interest that exceeds 20% of the voting power of any class of equity interest in the entity.

With respect to DCOs, the proposed rules permit DCOs to choose between two sets of limitations, absent a waiver. The First Alternative would, similar to the limitations for DCMs and SEFs, prohibit any DCO member (together with any related persons of such member) from beneficially owning more than 20% of any class of voting equity in the DCO or directly or indirectly voting any interest that exceeds 20% of the voting power of any class of equity interest in the DCO. It also would contain an aggregate test by prohibiting "enumerated entities" (*e.g.*, bank holding companies with total consolidated assets of $50 billion or more, nonbank financial companies supervised by the Federal Reserve, affiliates of either type of entity, swap dealers, or major swap participants), regardless of whether they are DCO members (together with any related persons of such enumerated entities), collectively, from beneficially owning more than 40% of any class of voting equity in the DCO or directly or indirectly voting any interest that exceeds 40% of the voting power of any class of equity interest in the DCO. The Second Alternative would prohibit any DCO member or enumerated entity, regardless of whether it is a DCO member (together with any related persons in each case thereof), from beneficially owning more than 5% of any class of voting equity in the DCO or directly or indirectly voting any interest that exceeds 5% of the voting power of any class of equity interest in the DCO. Unlike the First Alternative, there would be no aggregate test in the Second Alternative.

Proposed Regulation MC is the SEC's comparable ownership limitation and governance requirements for clearing agencies that clear security-based swaps (SBS CAs), security-based swap execution facilities (SB SEFs), and national securities exchanges (NSEs). The ownership and voting limitations for SB SEFs and NSEs under proposed Regulation MC are essentially the same as for SEFs and DCMs under the CFTC's proposed rules. However, the SEC diverges in its treatment of SBS CAs from the CFTC's treatment of DCOs in two respects. First, the SEC would apply the 40% aggregate test in the First Alternative and the 5% test in the Second Alternative only to SBS CA participants and would not include the "enumerated entity" concept from the CFTC's proposed rules. Accordingly, Proposed Regulation MC's ownership and voting limitations may be narrower than the CFTC's. Second, the SEC would apply different governance requirements for SBS CAs depending on which alternative is selected. Specifically, Regulation MC would require higher percentages of independent directors and committee members under the Second Alternative.

Click here for the CFTC proposed rules and here for the SEC proposed rules.

On October 19, 2010, the CFTC issued a proposed rule defining the term "agricultural commodity."

In its proposed definition of "agricultural commodity," the CFTC started with the list of enumerated agricultural commodities in the statutory definition of "commodity" and included additional elements to further define the term. For example, the proposed definition would include commodity-based contracts based wholly or principally on a single underlying agricultural commodity, such as an index made up of more than 50% of any single agricultural commodity.

Click here for the proposed rule.

On October 19, 2010, the CFTC issued proposed rules with respect to the privacy of consumer financial information.

The proposed rules would expand the scope of Part 160 of the CFTC's rules to apply to swap dealers and major swap participants (MSPs) and would change all references to the Federal Trade Commission in Part 160 to the Bureau of Consumer Financial Protection, which was created under Dodd-Frank.

Click here for the proposed rules.

On October 19, 2010, the CFTC issued proposed rules with respect to marketing by business affiliates and disposal of consumer information.

As authorized under Title X of Dodd-Frank, the proposed rules would implement sections 624 and 628 of the Fair Credit Reporting Act. Specifically, the proposed rules would require futures commission merchants (FCMs), retail foreign exchange dealers, commodity trading advisors, commodity pool operators, introducing brokers, swap dealers, and MSPs (collectively, CFTC Registrants) to provide consumers with the opportunity to prohibit affiliates from using certain information to make marketing solicitations to consumers. The proposed rules also would require CFTC Registrants that possess or maintain consumer report information in connection with their business activities to develop and implement a written program for the proper disposal of such information.

Click here for the proposed rules.

On October 19, 2010, the Department of the Treasury issued a notice and request for comments on whether to exclude foreign exchange swaps or foreign exchange forwards, or both, from the definition of "swap" under Dodd-Frank.

Under Dodd-Frank, foreign exchange swaps and foreign exchange forwards are expressly included in the definition of swap. However, the Secretary of the Department of the Treasury (Treasury) may make a written determination that either foreign exchange swaps or foreign exchange forwards, or both, should not be regulated as swaps under the CEA. The Treasury solicited comments on whether, and to what extent, it should make any such determination and on the application of the statutory factors required in making any such determination.

Click here for our client alert and here for the Department of the Treasury notice.

On October 19, 2010, the CFTC issued proposed rules with respect to position reports for physical commodity swaps.

Under Dodd-Frank, the CFTC is required to promulgate, as appropriate, position limits for listed commodity futures and option contracts in exempt and agricultural commodities and position limits, including aggregate limits, for swaps that are economically equivalent to those futures and option contracts. The proposed rules list a broad set of futures and option contracts that may be subject to CFTC-set position limits. The proposed rules also introduce the terms "paired swap" and "paired swaption" that define a subset of swaps that may qualify as economically equivalent to the DCM swaps listed in the proposed rules. Clearing organizations, clearing members, and swap dealers would be required to report certain data regarding paired swaps and paired swaptions to the CFTC, subject to the CFTC finding, via an order, that swap data repositories (SDRs) are processing positional data and that such processing will enable the CFTC to effectively surveil trading in paired swaps and paired swaptions and the markets therefor.

Click here for the proposed rules.

On October 26, 2010, the CFTC issued proposed rules with respect to provisions common to registered entities.

The proposed rules would apply to DCMs, DCOs, SEFs, and SDRs and largely would relate to new product certification and approval, as well as rulemaking procedures for those entities. For example, the proposed rules would provide for the tolling of the CFTC's review period, pending a jurisdictional determination between the CFTC and the SEC, for any proposal to list, trade, or clear an agreement, contract, transaction, or swap having elements of both a security and a derivative. The proposed rules also would provide for self-certification of certain

rules but would require a SIDCO to provide the CFTC with 60 days' notice of any change in its rules, procedures, or operations that could materially affect the nature or level of risks presented by the SIDCO.

Click here for the proposed rules.

On October 26, 2010, the CFTC issued an advance notice of proposed rulemaking and request for comments with respect to disruptive trading practices.

Dodd-Frank amends the CEA to expressly prohibit certain trading practices deemed disruptive of fair and equitable trading. Specifically, Dodd-Frank makes it unlawful for any person to engage in any trading, practice, or conduct on or subject to the rules of a registered entity that (1) violates bids or offers, (2) demonstrates intentional or reckless disregard for the orderly execution of transactions during the closing period, or (3) is of the character of, or is commonly known to the trade as, "spoofing" (bidding or offering with the intent to cancel the bid or offer before execution). The advance notice requests comments to assist the CFTC in its rulemaking with respect to the amended provision.

Click here for the notice.

On October 26, 2010, the CFTC issued proposed rules with respect to the process for the review of swaps for mandatory clearing.

The proposed rules would implement the statutory provisions under Dodd-Frank regarding the CFTC's mandate to determine which swaps are required to be cleared. Under the proposed rules, a DCO would be presumed to be eligible to accept for clearing any swap that is within a group, category, type, or class of swaps that it already clears. Any such presumption, however, is subject to CFTC review. To the extent that a DCO wishes to accept any other swap for clearing, the DCO must request the CFTC to determine the DCO's eligibility to clear such swap.

Once eligibility is established, a DCO would be required to submit to the CFTC each swap, or any group, category, type, or class of swaps, that it plans to accept for clearing. The proposed rules would require, among other things, information regarding the requested swap, or group, category, type, or class of swaps, that would be sufficient to provide the CFTC a reasonable basis to make a quantitative and qualitative assessment of certain enumerated factors (*e.g.*, product specifications; the existence of significant outstanding notional exposures, trading liquidity, and adequate pricing data; and the effect on the mitigation of systemic risk). DCO submissions would be subject to a 30-day public comment period, and the CFTC would be required to make its determination not later than 90 days after receipt of a complete submission, subject to any extension agreed to by the DCO.

The proposed rules also would require the CFTC, on an ongoing basis, to review swaps that have not been accepted for clearing and determine whether such swaps should be required to be cleared. Notices of any such determination would be subject to a 30-day public comment period. If no DCO has accepted for clearing a particular swap, group, category, type, or class of swaps that the CFTC finds would otherwise by subject to a clearing requirement, the CFTC would be required to investigate the relevant facts and circumstances, issue a public report containing the results of the investigation within 30 days of completion, and take such actions as the CFTC determines to be necessary and in the public interest. Such actions may include requiring the retaining of adequate margin or capital by parties to the swap, group, category, type, or class of swaps.

After making any determination with respect to mandatory clearing, the CFTC may stay the application of such clearing requirement upon its own initiative or upon the application of a counterparty to an affected swap, pending a 90-day review period (subject to any extension agreed to by the DCO).

Click here for the proposed rules.

On October 26, 2010, the CFTC issued proposed rules with respect to the investment of customer funds and funds held in accounts for foreign futures and foreign option transactions.

The proposed rules would amend Regulations 1.25 and 30.7 with respect to investment of customer segregated funds and, among other things, would remove provisions setting forth credit rating requirements. By narrowing the scope of investment choices in Regulation 1.25 (*e.g.*, removing foreign sovereign debt as a permitted investment), the CFTC seeks to eliminate the potential use of instruments that may pose an unacceptable level of risk. It also seeks to increase the safety of Regulation 1.25 investments by promoting diversification through new asset-based and repurchase agreement counterparty concentration limits. The proposed rules also would replace the current requirement that an investment be "readily marketable" with a new "highly liquid" standard and would harmonize Regulation 30.7 with the investment limitations of Regulation 1.25.

Click here for the proposed rules.

On October 26, 2010, the CFTC issued, and on November 3, 2010, the SEC similarly issued, proposed rules on the prohibition of fraud, manipulation, and deception in connection with swaps and security-based swaps, respectively.

The CFTC proposed rules broaden the scope of existing prohibitions on price manipulation. The SEC proposed Rule 9j-1 expands the language of 10b-5 as specifically applied to security-based swaps to capture instances of fraud and manipulation in connection with ongoing obligations arising under security-based swaps, such as cash flow payments. The anti-fraud and anti-manipulation provisions of Dodd-Frank will be effective, in the case of the CFTC's rules, on the date on which the related implementing rules take effect and, in the case of those provisions in the Securities Exchange Act of 1934 (Exchange Act), not less than 60 days after publication of the final related rules.

Click here for our client alert, here for the CFTC proposed rules, and here for the SEC proposed rules.

On October 27, 2010, the CFTC issued proposed rules removing references to or reliance on credit ratings and proposed alternatives in replace thereof.

The proposed rules apply to FCMs, DCOs, and commodity pool operators and are part of the CFTC's effort, as required under Dodd-Frank, to remove references to or reliance on credit ratings in its rules.

Click here for the proposed rules.

On November 10, 2010, the CFTC issued a proposed rule with respect to the implementation of conflicts of interest policies and procedures by futures commission merchants and introducing brokers.

The proposed rule would address potential conflicts of interest in the preparation and release of research reports by FCMs and introducing brokers (IBs) and, among other things, the establishment of appropriate informational partitions within those firms. The CFTC adapted many elements of the proposed rule from National Association of Securities Dealers (NASD) Rule 2711.

Under the proposed rule, non-research personnel (and, in particular, any employee of the business trading unit or clearing unit of the FCM or IB or of any affiliate thereof that performs or is involved in any pricing, trading, sales, marketing, advertising, solicitation, structuring, or brokerage activities on behalf of a FCM or IB or that performs or is involved in any proprietary or customer clearing activities on behalf of a FCM) would be prohibited from influencing the content of a research report of the FCM or IB. Note, however, that the term "research report" would exclude, among other things, internal communications that are not given to current or prospective

customers. FCMs and IBs also would be prohibited from directly or indirectly offering favorable research to, or threatening to change research for, an existing or prospective customer in return for business or compensation.

The proposed rule would prohibit non-research personnel, other than the board of directors or any board committee, from reviewing or approving any research report prior to its publication, other than non-substantive reviews or editing, such as verifying its factual accuracy or formatting its layout. Furthermore, no research analyst could be subject to the supervision or control of any employee of the FCM's or IB's business trading unit or clearing unit, no personnel engaged in trading or clearing activities could have any influence or control over the evaluation or compensation of a research analyst, and no FCM or IB could consider as a factor in any research analyst's compensation the contribution of the research analyst to the FCM's or IB's trading or clearing business.

The proposed rule would require each FCM to create and maintain an appropriate informational partition between business trading units of an affiliated swap dealer or MSP and the FCM's clearing unit personnel. In addition, the proposed rule would prohibit FCMs from permitting any affiliated swap dealer or MSP to directly or indirectly interfere with, or attempt to influence, the decision of the FCM's clearing unit personnel with regard to the provision of clearing services or activities.

With respect to disclosure of any conflicts of interest, the proposed rule would require FCMs and IBs to disclose in research reports, and research analysts to disclose in public appearances, whether the research analyst maintains a financial interest in any derivative of a type that he or she follows and the general nature of that interest.

Click here for the proposed rule.

On November 10, 2010, the CFTC issued proposed rules with respect to registration of foreign boards of trade.

The proposed rules would establish a registration requirement and related registration procedures and conditions for foreign boards of trade (FBOTs) that wish to provide their members or other participants located in the United States with direct access to their electronic trading and order matching systems. The proposed registration process would replace the CFTC's current policy of accepting and reviewing requests by FBOTs for such direct access via the no-action process. According to the CFTC, a formal registration procedure would provide more legal certainty for registered FBOTs than the no-action process and would be more consistent with other countries' treatment of U.S. DCMs providing direct access internationally. For FBOTs currently operating under existing no-action relief, the proposed rules would provide for a limited application process.

Click here for the proposed rules.

On November 10, 2010, the CFTC issued proposed rules with respect to the designation of a chief compliance officer, required compliance policies, and an annual report of a futures commission merchant, swap dealer, or major swap participant.

The proposed rules implement the Dodd-Frank provisions that require each FCM, swap dealer, and MSP to designate a chief compliance officer and set forth a non-exclusive list of the chief compliance officer's duties. Foremost among those duties would be the preparation, signing and certifying of an annual compliance report, which, among other things, at a minimum would (1) contain a description of the entity's compliance with respect to the CEA and CFTC regulations and each of the entity's compliance policies, (2) describe any non-compliance issues identified and the corresponding action taken, and (3) provide a statement of certification of compliance with sections 619 (the Volcker Rule) and 716 (the Lincoln Push-Out Provision) of Dodd-Frank and any rules adopted pursuant thereto. As a general matter, the chief compliance officer would be required to certify that, to the best of his or her knowledge and reasonable belief, and under penalty of law, the information contained in the annual compliance report is accurate and complete.

Click here for the proposed rules.

On November 10, 2010, the CFTC issued proposed rules with respect to the registration of swap dealers and major swap participants.

The proposed rules would impose a registration process for swap dealers and MSPs that is similar to that for FCMs. Applicants for registration as a swap dealer or MSP would be required to file a Form 7-R with the National Futures Association and demonstrate compliance, or the ability to comply, with various sections added to the CEA by Dodd-Frank that relate to swap dealers and MSPs. To the extent that a swap dealer or MSP is also an FCM, the proposed rules would require such a dual status entity to register in both capacities. Swap dealers and MSPs also would be required to become and remain members of at least one registered futures association.

Of particular note, the proposed rules provide for a provisional registration process for the transitional period between adoption of the swap dealer and MSP registration regulations and the latest date by which applicants must comply with the other final rulemakings relating to swap dealers and MSPs (*e.g.*, capital and margin requirements, reporting and recordkeeping requirements, business conduct standards). Under the proposed rules, applicants may apply for provisional registration as a swap dealer or MSP beginning April 15, 2011. As the other rulemakings become effective, provisionally registered swap dealers and MSPs would be required to demonstrate compliance within the timeframe required by each such rulemaking. Once all of the relevant rulemakings have become effective and a provisionally registered swap dealer or MSP has demonstrated full compliance with those rules, the applicant would be notified that its provisional registration has become a full registration.

Click here for the proposed rules.

On November 10, 2010, the CFTC issued proposed rules with respect to the implementation of conflicts of interest policies and procedures by swap dealers and major swap participants.

The proposed rules governing conflicts of interest policies for swap dealers and MSPs are essentially the same as those that the CFTC proposed for FCMs and IBs on November 10, 2010 (see above). However, one difference is that the proposed rules add pricing to the list of activities prohibited for personnel having influence or control over a research analyst's evaluation or compensation (*i.e.*, "no personnel engaged in *pricing*, trading or clearing activities may have any influence or control over the evaluation or compensation of a research analyst"). In addition, the proposed rules would require broader disclosure of conflicts of interest in research reports and public appearances. Specifically, swap dealers, MSPs, and research analysts would be required to also disclose any other actual, material conflicts of interest of the research analyst or swap dealer or MSP of which the research analyst has knowledge at the time of publication of the research report or at the time of the public appearance.

Click here for the proposed rules.

On November 10, 2010, the CFTC issued proposed rules establishing and governing the duties of swap dealers and major swap participants.

The proposed rules set forth the duties that would be imposed on each swap dealer and MSP with respect to establishing and maintaining a risk management program; monitoring for and preventing violations of applicable position limits; diligently supervising all activities relating to its business performed by its partners, members, officers, employees, and agents; establishing and maintaining a business continuity and disaster recovery plan; making information available for disclosure and inspection by the CFTC and its prudential regulator, if any; and not adopting any process or engaging in any action that would result in any unreasonable restraint of trade or impose any material anticompetitive burden on trading or clearing, unless necessary or appropriate to achieve the purposes of the CEA.

Click here for the proposed rules.

On November 10, 2010, the CFTC issued proposed rules implementing the whistleblower provisions of Section 23 of the CEA.

The proposed rules would establish a whistleblower program that would enable the CFTC to pay an award to eligible whistleblowers who voluntarily provide the CFTC with original information about a violation of the CEA that leads to successful enforcement of a covered judicial or administrative action. The proposed rules also would provide public notice of the prohibition on retaliation by employers against individuals who provide the CFTC with information pertaining to potential violations.

Click here for the proposed rules.

On November 19, 2010, the CFTC issued a notice requesting comments on the study regarding the oversight of existing and prospective carbon markets.

Dodd-Frank established an interagency working group to conduct a study on the oversight of existing and prospective carbon markets, including spot and derivative markets. A report on the results of the study is due no later than 180 days after enactment of Dodd-Frank. In its notice, the CFTC solicits public comment on a list of topics and questions relating to the study.

Click here for the proposed rules.

On November 19, 2010, the CFTC issued an advanced notice of proposed rulemaking and request for comments with respect to possible models for implementing new statutory provisions concerning the protection of cleared swaps customers before and after commodity broker bankruptcies.

The advance notice of proposed rulemaking requests comments on whether the CFTC should adopt a model for protecting swaps customer collateral similar to the current model for protecting futures customer collateral, which mutualizes loss among all of a defaulting FCM's customers, or whether another model is appropriate.

Click here for the proposed rules.

On November 19, 2010, the SEC issued proposed rules with respect to security-based swap data repository registration, duties, and core principles.

The proposed rules would establish registration procedures and conditions for registering as a security-based swap data repository (SB SDR). Under the proposed rules, applicants would be required to submit a Form SDR electronically to the SEC. Non-resident SB SDR applicants also would be required to provide an opinion of counsel that the SB SDR can, as a matter of law, provide the SEC with prompt access to its books and records and that the SB SDR can, as a matter of law, submit to onsite inspection and examination by the SEC.

SB SDRs will serve as secure, centralized recordkeeping facilities for security-based swap transaction and position data. As such, SB SDRs would be required to establish and enforce written policies and procedures with respect to data collection and maintenance. The proposed rules would require SB SDRs to maintain transaction data for not less than five years after the applicable security-based swap expires. Moreover, SB SDRs would be required to subject themselves to inspection and examination by the SEC. SB SDRs also would be required, upon request and after notice to the SEC, to make available, on a confidential basis to each appropriate prudential regulator, the Financial Stability Oversight Council (FSOC), the CFTC, the Department of Justice, the Federal Deposit Insurance Corporation and any other person that the SEC deems appropriate, including foreign financial supervisors,

foreign central banks and foreign ministries, all data obtained by the SB SDR, including individual counterparty trade and position data.

The proposed rules also would also implement the core principles set forth in Dodd-Frank relating to market access to services and data, governance and conflicts of interest, and would require each SB SDR to designate a chief compliance officer.

Click here for the proposed rules.

On November 19, 2010, the SEC issued proposed rules with respect to reporting and dissemination of security-based swap information.

Proposed Regulation SBSR would establish reporting and dissemination requirements with respect to security-based swaps. As a jurisdictional matter, no security-based swap will be subject to the reporting and dissemination requirements unless it has at least one counterparty that is a U.S. person, was executed in the United States, or was cleared through a clearing agency having its principal place of business in the United States.

For purposes of reporting any security-based swap to a SB SDR, Proposed Regulation SBSR allocates the reporting obligation as follows: (1) if only one counterparty is a U.S. person, the U.S. person would be the reporting party; (2) if both counterparties are U.S. persons, but only one counterparty is a security-based swap dealer or major security-based swap participant, the security-based swap dealer or major security-based swap participant would be the reporting party; (3) if both counterparties are U.S. persons, but one is a security-based swap dealer and the other is a major security-based swap participant, the security-based swap dealer would be the reporting party; (4) in all other situations where both counterparties are U.S. persons, the counterparties would be required to select a counterparty to be the reporting party; and (5) if neither counterparty is a U.S. person, but the security-based swap meets the jurisdictional test, the counterparties would be required to select a counterparty to be the reporting party.

Once the reporting party is determined, Proposed Regulation SBSR would require such party to report specific information about the security-based swap to the SB SDR (or, if no SB SDR would accept such information, to the SEC) either on a real-time basis or promptly, depending on the information. For security-based swaps entered into prior to the effective reporting date (*i.e.*, six months after registration of a SB SDR), such information would be required to be reported to the extent available. Proposed Regulation SBSR also would require the reporting party to promptly report any "life cycle events," such as assignments or novations, partial terminations, or for non-cleared security-based swaps, changes to the collateral agreement, during the term of a security-based swap.

Immediately upon receipt from a reporting party of information relating to a security-based swap, except in the case of a block trade, a SB SDR would be required to publicly disseminate a transaction report of the security-based swap, where such report would consist of such reported information plus any indicator or indicators contemplated by the SB SDR's policies and procedures. For block trades, Regulation SBSR would permit delayed dissemination of the notional size. With respect to any security-based swap, however, Proposed Regulation SBSR would prohibit a SB SDR from disseminating the identity of either counterparty to a security-based swap, any information regarding a security-based swap entered into prior to the effective reporting date, or, for any non-cleared security-based swap, any information disclosing the business transactions and market positions of any person.

Click here the proposed rules.

On November 19, 2010, the CFTC issued proposed rules with respect to the protection of collateral of counterparties to non-cleared swaps and treatment of securities in a portfolio margining account in a commodity broker bankruptcy.

The proposed rules would require swap dealers and MSPs to notify each counterparty at the beginning of each non-cleared swap that such counterparty has the right to require that any initial margin that it provides in connection with the swap be segregated at an independent, third-party custodian. Note that the requirement would not apply to variation margin. The notification would be required to be made to the counterparty's chief risk officer or, if none, chief executive officer or, if none, highest-level decisionmaker. However, the proposed rules also would provide that notification to a particular counterparty by a swap dealer or MSP need only be made once in any calendar year. To the extent that a counterparty does not elect to have its initial margin so segregated, the chief compliance officer of the swap dealer or MSP would be required to report to the counterparty, on a quarterly basis, on whether the entity's back office procedures relating to margin and collateral requirements were, at any point during the previous calendar quarter, not in compliance with the agreement of the parties.

Separately, the proposed rules would make clear that, for purposes of Chapter 7 of the Bankruptcy Code, securities held in a portfolio margining account carried as a futures account would constitute "customer property" and the owner of such account would constitute a "customer."

Click here for the proposed rules.

On November 19, 2010, the CFTC issued proposed rules with respect to real-time public reporting of swap transaction data.

The proposed rules would implement a new framework for the real-time public reporting of swap transaction and pricing data for all swap transactions. As a general matter, the proposed rules would require a reporting party to report any executed swap, novation, swap unwind, partial novation or partial swap unwind, or post-execution event that affects the pricing of a swap (a reportable swap transaction) to a SDR or third-party service provider that accepts swap transaction and pricing data from multiple data sources and publicly disseminates such data in real-time (each, a real-time disseminator) as soon as technologically practicable.

For swaps executed on a SEF or DCM (a swap market), the reporting party would satisfy its reporting requirement simply by executing the reportable swap transaction on the swap market's trading system or platform and the swap market would be required to publicly disseminate all swap transaction and pricing data for such swaps as soon as technologically practicable after execution. The swap market would satisfy its public dissemination requirement by sending the swap transaction information to a real-time disseminator. Note, however, that if a swap market sends swap information to a third-party service provider, the swap market will not satisfy its public dissemination requirement until such information is publicly disseminated.

For swaps that are not executed on a swap market, the reporting party for such swaps would be required to report such swaps to a SDR as soon as technologically practicable after execution; however, if no SDR is available, the reporting party would be permitted to satisfy its real-time public reporting requirement by publicly disseminating the required data through a third-party service provider in the same manner that a swap market could. The proposed rules would allocate the reporting obligation as follows: (1) if only one party is a swap dealer or MSP, the swap dealer or MSP would be the reporting party; (2) if one party is a swap dealer and the other party is a MSP, the swap dealer would be the reporting party; (3) if the parties are either both swap dealers or both MSPs, the parties would be required to designate which party would be the reporting party; and (4) if neither party is a swap dealer or MSP, the parties would be required to designate which party (or its agent) would be the reporting party.

The proposed rules would further require that SDRs publicly disseminate swap transaction and pricing data as soon as technologically practicable upon receipt of such data. Moreover, to the extent that a swap market chooses to publicly disseminate swap transaction and pricing data through a third-party service provider, the swap market would be required, among other things, to ensure that the third-party service provider publicly disseminates the swap market's swap transaction and pricing data in a manner that complies with those standards for SDRs. In

any event, however, the proposed rules would prohibit any swap transaction and pricing data that is publicly disseminated from disclosing the identities of the parties to the swap.

The proposed rules also contain detailed provisions regarding block trades and large notional trades, including a time delay requirement for all swap transaction and pricing data for those trades.

Click here for the proposed rules.

On November 19, 2010, the CFTC issued proposed rules with respect to swap data recordkeeping and reporting requirements.

The proposed rules would apply to SDRs, DCOs, DCMs, SEFs, swap dealers, MSPs, and swap counterparties that are neither swap dealers nor MSPs (Non-SD/MSP Counterparties)

With respect to recordkeeping, the proposed rules would require all DCOs, DCMs, SEFs, swap dealers, and MSPs to keep full, complete, and systematic records, together with all pertinent data and memoranda, of all activities relating to the business of such entities or persons with respect to swaps, as prescribed by the CFTC. A lesser, swap-specific standard would apply to Non-SD/MSP Counterparties, in that they would be required to keep full, complete, and systematic records, together with all pertinent data and memoranda, with respect to each swap in which they are a counterparty, including all required swap creation data and all required swap continuation data that they are required to report under the proposed rules. For SDRs, the requirement would be to keep full, complete, and systematic records, together with all pertinent data and memoranda, of all activities relating to the business of the SDR and all swap data reported to the SDR, as prescribed by the CFTC.

The proposed rules would require that all records that must be kept by DCOs, DCMs, SEFs, swap dealers, MSPs, and Non-SD/MSP Counterparties must be kept with respect to each swap from the date of the creation of the swap through a date at least five years from final termination thereof. For SDRs, the five-year post-termination recordkeeping requirement is a baseline, subject to a further period to be determined by the CFTC. Depending on the entity, the proposed rules would require that records be retrievable via real-time electronic access indefinitely, in the case of an SDR, or at the other end of the spectrum, within three business days throughout the period for which they are required to be kept, in the case of a Non-SD/MSP Counterparty.

The proposed rules also contain detailed provisions that would establish the general swap data reporting obligations of DCOs, DCMs, SEFs, swap dealers, MSPs, and Non-SD/MSP Counterparties to report swap data to SDRs. The provisions address the various reporting obligations, depending on whether a swap is or is not executed on a DCM or SEF and whether or not it is cleared on a DCO.

Click here for the proposed rules.

On December 1, 2010, the CFTC issued proposed rules with respect to reporting, recordkeeping, and daily trading records requirements for swap dealers and major swap participants.

The proposed rules would require swap dealers and MSPs to keep full, complete, and systematic records, together with all pertinent data and memoranda, of their swaps activities. The required records would include (1) records of each transaction, including daily trading records of all swaps the swap dealer or MSP executes, (2) records of each position held by the swap dealer or MSP, identified by product and counterparty and indicating whether the position is long or short and whether it is cleared, (3) records of each transaction executed on a SEF or DCM or cleared by a DCO, and (4) records of all activities related to the swap dealer's or MSP's business as such, including governance records, financial records, complaints, and marketing and sales materials. Transaction records would be required to be kept in a form and manner identifiable and searchable by transaction and counterparty, and

position records would be required to be linked to transaction records in a manner that would permit identification of the transactions that established the positions.

With respect to daily trading records, the proposed rules would require swap dealers and MSPs to maintain a vast amount of pre-execution, execution, and post-execution trade information. For example, pre-execution trade information would include, at a minimum, "records of all oral and written communications provided or received concerning quotes, solicitations, bids, offers, instructions, trading, and prices, that lead to the execution of a swap, whether communicated by telephone, voicemail, facsimile, instant messaging, chat rooms, electronic mail, mobile device, or other digital or electronic media." Swap dealers and MSPs also would be required to make and keep detailed ledgers of various cash flows and calculations of the value, exposure, and margin. The proposed rules also would require swap dealers and MSPs to make and keep daily trading records for related cash and forward transactions.

Click here for the proposed rules.

On December 1, 2010, the CFTC issued proposed rules for derivatives clearing organizations.

The proposed rules would make certain definitional and procedures amendments to the CFTC's rules relating to DCOs. In particular, the proposed rules would streamline the DCO application process by eliminating the 90-day expedited application review period, and also would clarify the procedures for submission by a DCO of rules in connection with the establishment of a portfolio margining program and the procedures for when a DCO requests a transfer of its DCO registration due to a corporate change.

With respect to DCO core principles, the proposed rules would implement Core Principles A, H, N, and R, relating to compliance, rule enforcement, antitrust considerations, and legal risk, respectively. It should be noted that the CFTC stated that this proposed rulemaking is one of a series of rulemakings that will, in their entirety, implement all 18 DCO core principles.

The proposed rules also would implement the requirements under Dodd-Frank relating to chief compliance officers of DCOs.

Click here for the proposed rules.

On December 1, 2010, the CFTC issued proposed rules with respect to information management requirements for derivatives clearing organizations.

The proposed rules would implement DCO Core Principles J, K, L, and M, relating to reporting, recordkeeping, public information, and information sharing, respectively. With respect to reporting requirements, the proposed rules would require DCOs, among other things, to compile at the end of each trading day and report to the CFTC by 10:00 a.m. the next business day (1) initial margin requirements and initial margin on deposit for each clearing member, (2) daily variation margin, separately listing the mark-to-market amount collected from (or paid to) each clearing member, (3) all other daily cash flows relating to clearing and settlement, and (4) end-of-day positions for each clearing member, in each case by customer origin and house origin.

Click here for the proposed rules.

On December 1, 2010, the CFTC issued proposed rules with respect to core principles and other requirements for designated contract markets.

The proposed rules would make substantial revisions and additions to Part 38 of the CFTC Regulations. In doing so, the proposed rules would implement Section 735 of Dodd-Frank, which eliminates the eight criteria for

designation as a DCM, amends many of the core principles, including incorporating many of the substantive provisions from the designation criteria, and adds five new core principles, and would reflect the new regulatory environment where swaps may be executed on a DCM.

Click here for the proposed rules.

On December 1, 2010 and December 7, 2010, the CFTC and SEC, respectively, approved joint proposed rules further defining "swap dealer," "security-based swap dealer," "major swap participant," "major security-based swap participant," and "eligible contract participant."[1]

Under Dodd-Frank and the proposed rules, a "swap dealer" or "security-based swap dealer" is any person who (1) holds itself out as a dealer in swaps or security-based swaps, (2) makes a market in swaps, (3) regularly enters into swaps with counterparties as an ordinary course of business for its own account, or (4) engages in activity causing itself to be commonly known in the trade as a dealer or market maker in swaps. The proposed rules would narrowly implement the *de minimis* exception to the dealer definitions. Specifically, the exception would apply to a person and its swap dealing activity if (i) the swap positions into which the person enters during the immediately preceding 12 months have an aggregate gross notional amount of no more than $100 million (or $25 million with regard to "special entity" counterparties), (ii) the person has not entered into swaps in connection with those activities with more than 15 non-swap dealers during the immediately preceding 12 months, and (iii) the person has not entered into more than 20 swaps in connection with those activities during the immediately preceding 12 months. The proposed rules also would permit the CFTC and SEC to limit a person's designation as a swap dealer and security-based swap dealer, respectively, to specified categories of swaps or specified activities of the person in connection with swaps. With respect to swap dealers only, the proposed rules would clarify the carve-out from that definition for insured depository institutions offering to enter into swaps with customers in connection with origination loans with those customers. In order to qualify for the carve-out, the rate, asset, liability, or other notional item underlying the swap would have to be, or be directly related to, a financial term of the loan. Furthermore, the proposed rules would consider an insured depositary institution having originated a loan if it, among other things, directly transfers the loan amount to the customer, is part of a syndicate of lenders for the loan, or purchases or receives a participation in the loan.

Under the proposed rules, a "major swap participant" or "major security-based swap participant" is any person that is not a swap dealer and (1) that maintains a substantial position in swaps for any of the major swap categories,[2] excluding positions held for hedging or mitigating commercial risk or positions maintained by an employee benefit plan for the primary purpose of hedging or mitigating any risk directly associated with the operation of the plan, (2) whose outstanding swaps create substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets, or (3) that is a financial entity that (i) is highly leverage relative to the amount of capital such entity holds and that is not subject to capital requirements established by an appropriate Federal banking agency and (ii) maintains a substantial position in outstanding swaps in any major swap category. As in the case of swap dealers, the proposed rules would permit the CFTC and SEC to limit a person's designation as a MSP and major security-based swap participant, respectively, to specified categories of swaps or specified activities of the person in connection with swaps.

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[1] For ease of discussion of these joint proposed rules, (1) references to a "swap" shall mean a "swap" in the context of swap dealers and MSPs and shall be deemed to be references to a "security-based swap" in the context of security-based swap dealers and major security-based swap participants, (2) references to a "swap dealer" shall mean a "swap dealer" in the context of swap dealers and MSPs and shall be deemed to be references to a "security-based swap dealer" in the context of security-based swap dealers and major security-based swap participants, and (3) references to "major swap categories" shall mean "major swap categories" in the context of MSPs and shall be deemed to be references to "major security-based swap categories" in the context of major security-based swap participants.

[2] The "major swap categories" would be rate swaps, credit swaps, equity swaps, and other commodity swaps; and the "major security-based swap categories" would be security-based credit derivatives and other security-based swaps.

For the purpose of defining the term "substantial position," the proposed rules would employ a current uncollateralized exposure test and a potential future exposure test in determining the various thresholds applicable to the major swap categories. The two tests also would be used in defining the "substantial counterparty exposure" phrase, although the calculation of those tests would be based on all of a person's swap positions, rather than on any one major swap category.

The proposed rules also clarify when a swap position would be deemed to be held for the purpose of "hedging or mitigating commercial risk," although with some differences between the CFTC and SEC versions. For example, the CFTC version would recognize positions that qualify for the bona fide hedging exemption from position limits under the CEA or that qualify for hedging treatment under Financial Accounting Standards Board Accounting Standards Codification Topic 815, Derivatives and Hedging (formerly known as Statement No. 133), and the SEC version would require the person relying on the exception to identify and document the risks that are being reduced by the security-based swap position, establish and document a method of assessing the effectiveness of the security-based swap as a hedge, and regularly assess the effectiveness of the security-based swap as a hedge.

The CFTC and SEC proposed and sought comment on two alternative ratios for the term "highly leveraged." Specifically, the agencies proposed that the term would mean that the ratio of an entity's total liabilities to equity would be greater than 8:1 or 15:1, measured at the close of business on the last business day of the applicable fiscal quarter.

Lastly, the proposed rules would further define the term "eligible contract participant" (ECP) by adding swap dealer, security-based swap dealer, MSP, and major security-based swap participant to the definition. The proposed rules also would clarify that certain types of commodity pools engaging in retail foreign currency transactions would not qualify as an ECP if one or more direct or indirect participants in the commodity pool is not an ECP.

Click here for the proposed rules.

On December 2, 2010, the SEC and CFTC issued a joint request for public comment with respect to the study mandated by Section 719(b) of Dodd-Frank.

Dodd-Frank mandates that the CFTC and SEC conduct a study on the feasibility of requiring the derivatives industry to adopt standardized computer-readable algorithmic descriptions that may be used to describe complex and standardized financial derivatives. Among other things, the study must examine the extent to which the algorithmic description, together with standardized and extensible legal definitions, could serve as the binding legal definition of derivative contracts. In connection with the study, the CFTC and SEC seek responses to a specific set of questions.

Click here for the request for comment.

On December 9, 2010, the CFTC issued interim final rules with respect to reporting certain post-enactment swap transactions.

The interim final rules establish a reporting obligation for swaps entered into after the enactment of Dodd-Frank but prior to the effective date of the swap data reporting and recordkeeping rule implemented under Section 2(h)(5)(B) of the CEA (transition swaps). The reporting obligation and guidance note under the interim final rules for transition swaps are essentially the same as the interim final rule for pre-enactment swaps that the CFTC adopted on October 1, 2010.

Click here for the interim final rules.

On December 9, 2010, the CFTC issued proposed rules with respect to business conduct standards for swap dealers and major swap participants with counterparties.

The proposed rules would establish business conduct standards for swap dealers and MSPs applicable to their dealings with counterparties, including "special entity" counterparties (*i.e.*, Federal agencies, state and local governments or political subdivisions, employee benefit or governmental plans, and endowments). Such standards and duties would include, among other things, a "know your counterparty" requirement, verification of eligible contract participant status, and a duty to communicate with a counterparty in a fair and balanced manner based on principles of fair dealing and good faith. The proposed rules would apply to transactions in swaps, as wells as in connection with swaps that are offered but not entered into.

In addition, the proposed rules would require swap dealers and MSPs to disclose to their counterparties (other than swap dealers, MSPs, security-based swap dealers, or major security-based swap participants), at a reasonably sufficient time prior to entering into a swap, material information concerning the swap. Such disclosure would have to be in a manner reasonably designed to allow the counterparty to assess the material risks and characteristics of the particular swap and the material incentives and conflicts of interest that the swap dealer or MDP may have in connection with the swap. In its release, the CFTC stated that it anticipates that swap dealers and MSPs typically will rely on a combination of general and more particularized disclosures to satisfy this requirement. Nevertheless, the proposed rules would require swap dealers and MSPs to provide their counterparties with, in the case of a "high-risk complex bilateral swap" (a term which is not defined), a scenario analysis designed in consultation with the counterparty to allow the counterparty to assess its potential exposure under the swap. Moreover, swap dealers and MSPs would have to notify their counterparties of the right to receive such a scenario analysis prior to entering into a bilateral swap that is not available for trading on a DCM or SEF.

Click here for the proposed rules.

On December 15, 2010, the SEC issued proposed rules with respect to the SEC review process for mandatory clearing of security-based swaps.

The proposed rules would require any clearing agency that plans to accept for clearing a security-based swap, or any group, category, type, or class of security-based swaps, to submit to the SEC electronically on Form 19b-4 the information required by such form and under Rule 19b-4 and provide notice to its members of the submission. Any such security-based swap submission would be required to include information that will assist the SEC in the quantitative and qualitative assessment of the required factors under Dodd-Frank. Generally speaking, the SEC's proposed rules would require less information in a security-based swaps submission than would be required under the CFTC's comparable rules for DCOs seeking to clear swaps. As in the CFTC context, security-based swap submissions would be public, in that a clearing agency would be required to post its security-based swap submissions on its website within two business days after its submission to the SEC.

Although not expressly included in the proposed rules, Dodd-Frank requires the SEC to make a determination as to whether any security-based swap, or any group, category, type, or class of security-based swaps, is required to be cleared within 90 days after receipt of a complete security-based swap submission, subject to any extension agreed to by the clearing agency. In connection with any such determination, the proposed rules would require the SEC to take into account the factors addressed in the security-based swap submission, as well as any other factors that the SEC determines to be appropriate.

After making any determination with respect to mandatory clearing, the SEC may stay the application of such clearing requirement upon its own initiative or upon the application of a counterparty to an affected swap, pending a 90-day review period (as required under Dodd-Frank), subject to any extension agreed to by the clearing agency.

Separately, the proposed rules would require any clearing agency for which the SEC is the supervisory agency and that has been designated by the FSOC as systemically important or likely to become systemically important (designated clearing agency) to provide advance notice to the SEC of any proposed changes to its rules, procedures, or operations that could materially affect the nature or level of risks presented by such designated clearing agency.

Click here for the proposed rules.

On December 15, 2010, the SEC issued a proposed rule with respect to the end-user exception to mandatory clearing of security-based swaps.

In order for a non-financial end-user to avail itself of the exception to the mandatory clearing requirement under Dodd-Frank, such end-user must notify the SEC how it generally meets its financial obligations associated with entering into non-cleared security-based swaps. The proposed rule would establish the manner in which end-users provide such notice. Specifically, the end-user would be required to deliver (or cause to be delivered) to a SB SDR, among other things, the identity of the end-user relying on the clearing exception, whether it is a financial entity and whether it is using the security-based swap to hedge or mitigate commercial risk, and how it generally expects to meet its financial obligation associated with the security-based swap (*e.g.*, through the use of a written credit support agreement, a written agreement to pledge or segregate assets, a written third-party guarantee, solely its available financial resources, or some other means).

It is noted in the release that the portion of the proposed rule that would have exempted certain institutions with total assets of $10 billion or less from the definition of "financial entity" is still under consideration by the SEC.

Click here for the proposed rule.

On December 16, 2010, the CFTC issued proposed rules with respect to confirmation, portfolio reconciliation, and portfolio compression requirements for swap dealers and major swap participants.

The proposed rules would establish requirements for swap confirmation, portfolio reconciliation, and portfolio compression for swap dealers and MSPs. Each of the three areas distinguishes between swap transactions between swap dealers and MSPs (institutional swaps) and swap transactions between a swap dealer or MSP and a non-swap dealer/non-MSP (customer swaps).

With respect to the confirmation requirements, counterparties to each institutional swap would be required to execute a confirmation within 15 minutes after execution (for swap transactions that are executed and processed electronically) and no later than the same calendar day as execution (for swap transactions that cannot be processed electronically). For each customer swap, swap dealers and MSPs would be required to send a written or electronic record of all of the terms of the customer swap (an acknowledgment) to their customers under the same timing requirements as for institutional swaps. The proposed rules also would require swap dealers and MSPs to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that they execute confirmations of swap transactions with financial entities on the same calendar day as execution and confirmations of swap transactions with counterparties that are neither swap dealers, MSPs, nor financial entities not later than the next business day after execution. Furthermore, such procedures would be required to include a requirement that, prior to execution, a swap dealer or MSP either sends to, or receives from, its prospective counterparty a draft acknowledgment specifying all terms of the swap transaction, other than the applicable pricing and other relevant terms to be expressly agreed at execution.

With respect to the portfolio reconciliation requirements, swap dealers and MSPs would be required to engage in portfolio reconciliation for their institutional swaps. The proposed rules would permit portfolio reconciliation to

be performed on a bilateral basis or by a qualified third party but would require portfolio reconciliation to be performed no less frequently than (1) once each business day for each swap portfolio with 300 or more swaps, (2) once each week for each swap portfolio with more than 50 but fewer than 300 swaps, and (3) once each calendar quarter for each swap portfolio that includes no more than 50 swaps. Swap dealers and MSPs would be required to immediately resolve any discrepancy in a material term of a swap, and differences identified in a portfolio reconciliation between the lower valuation and the higher valuation of 10% or more would be required to be resolved between swap dealers and MSPs within one business day. For customer swaps, swap dealers and MSPs would need only to establish, maintain, and enforce written policies and procedures for engaging in portfolio reconciliation with their customers and resolving any discrepancies in the material terms of valuation of each swap identified in any portfolio reconciliation process. The frequency of portfolio reconciliation of customer swaps would be the same as for institutional swaps, but the number of swaps in each timing category would be higher, and discrepancies would be required to be resolved in a timely manner.

With respect to the portfolio compression requirements, fully offsetting institutional swaps would be required to be terminated no later than the close of business on the business day following the day on which the counterparties enter into the fully offsetting institutional swap. Swap dealers and MSPs would be required to engage in bilateral portfolio compression of their institutional swaps at least once per calendar year, except to the extent that they participate in multilateral portfolio compression involving those swaps in the same calendar year. For customer swaps, swap dealers and MSPs would be required to establish, maintain, and enforce written policies and procedures for periodically terminating fully offsetting customer swaps and for periodically engaging in portfolio compression exercise, to the extent that such customer swap are able to be terminated through a portfolio compression exercise.

Click here for the proposed rules.

On December 16, 2010, the CFTC issued proposed rules with respect to core principles and other requirements for swap execution facilities.

The proposed rules, guidance, and acceptable practices would implement the statutory framework under Dodd-Frank for SEFs. Of particular note, Proposed § 37.9 sets forth the permitted execution methods that SEFs may offer. It provides that transactions that are subject to the execution requirements under the CEA and that are not block trades may be executed on an "Order Book" or a "Request for Quote System," each as defined in Proposed § 37.9.

Click here for the proposed rules.

On December 16, 2010, the CFTC issued proposed rules with respect to risk management requirements for derivatives clearing organizations.

A full copy of the proposed rules is not yet available.

On December 16, 2010, the CFTC was scheduled to consider proposed rules regarding position limits for derivatives but did not vote to issue them.

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