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Swap Definitions Rules Finalized by the SEC and the CFTC under Dodd-Frank

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Introduction

On July 18, 2012, the Securities and Exchange Commission (the “SEC”) and the Commodity Futures Trading Commission (the “CFTC” and, together with the SEC, the “Commissions”) jointly published several final rules (the “Final Rules”) and provided interpretive guidance with respect to the definitions of the terms “swap,” “security-based swap,” “security-based swap agreement,” and “mixed swap” (the “Final Release”).¹ The Final Rules represent one of a series of regulatory initiatives that the Commissions have undertaken in order to provide further guidance and clarity on the parallel regulatory regimes under the federal securities and commodity laws implemented for derivatives by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”). The Final Rules will generally be effective October 12, 2012.

The Final Rules revise the proposed definitions published on April 29, 2011 (the “Proposed Rules”).²

Background

Title VII of the Dodd-Frank Act bifurcates the regulation of derivatives. “Swaps” are regulated by the CFTC under the Commodity Exchange Act (the “CEA”) and “security-based swaps” are regulated by the SEC under the federal securities laws.³

The categorization of a financial instrument as a “swap” or a “security-based swap” has sweeping implications for its treatment under the law. Among other matters, this categorization affects whether the instrument is considered a security for purposes of the federal securities laws, whether the instrument may lawfully be traded over-the-counter or must be traded on, or subject to the rules of, an exchange, whether the instrument must be centrally cleared, which reporting and recordkeeping requirements apply to the instrument, and whether an investment manager using the instrument meets certain *de minimis* exemptions from registration as a commodity pool operator or a commodity trading advisor or must register as such.⁴

Due to the wide variety of transactions within the derivatives marketplace, the continually evolving and bespoke nature of certain of these transactions and the breadth of these two definitions, there is considerable room for interpretation as to whether a given instrument constitutes a swap or a security-

¹ Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 Fed. Reg. 48208 (Aug. 13, 2012) (Release Nos. 33-9338 and 34-67453, July 18, 2012).

² For our prior alert on the Proposed Rules, please click [here](#).

³ For our prior alert on the statutory mandate of Title VII of the Dodd-Frank Act, please click [here](#).

⁴ See Regulations 4.5 and 4.13(a)(3) of the CFTC (17 C.F.R. §§ 4.5, 4.13(a)(3)). For our Alerts discussing the commodity pool and commodity pool operator registration issues in more detail, please click [here](#) and [here](#).

based swap. The Commissions' Final Release and Final Rules are intended to provide guidance to reduce these ambiguities. This Alert provides a broad overview of the Final Rules and summarizes, in turn, the following topics:

- A. General Interpretive Guidance
- B. Foreign Exchange Products
- C. Swaps Referencing One or More Securities or Loans and Securities Indices
- D. Security Based Swap Agreements
- E. Mixed Swaps
- F. Transactions That Do Not Constitute Title VII Instruments
- G. Transactions in Regional Transmission Organizations
- H. Recordkeeping Requirements
- I. Anti-Evasion Rules

For sake of clarity, and in keeping with the approach of the Commissions under the Final Release, we will use the term "Title VII Instrument" throughout this Alert to refer to any instrument constituting either a swap, a security-based swap or both.

The Final Rules

A. General Interpretive Guidance

The Final Release makes clear that the determination of whether an instrument is a Title VII Instrument should be based primarily on the substantive terms and characteristics of the instrument rather than its form. However, the Commissions stated that a relevant consideration may be whether the transaction is documented using an industry standard form agreement that is typically used for swaps and security-based swaps.

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

Rates v. Yields. The Commissions draw a distinction between Title VII Instruments based on "rates" and Title VII Instruments based on "yields." Title VII Instruments wherein payments exchanged are based solely by reference to certain interest rates or other monetary rates such as LIBOR, prime rates, central bank discount rates and general lending rates will be considered swaps. Title VII Instruments referencing rates based on the volatility, variance, rate of change, spread, correlation or difference between the foregoing and other monetary rates, such as the consumer price index or the rate of change in the money supply, will also be considered swaps, as would correlation or basis swaps based on the difference between such rates.

Conversely, a Title VII Instrument wherein one of the payments references the price "yield" of a debt security, loan or narrow-based security index will generally be considered a security-based swap—for example, a Title VII Instrument where a payment is based upon the yield to maturity of a debt security. A Title VII Instrument that references a yield that is not based upon that of a debt security, a loan or a narrow-based security index will be considered a swap or a mixed swap, depending on its

terms. Furthermore, a Title VII Instrument referencing the yield on exempted securities, as defined in Section 3(a)(12) (“exempted securities”) of the Securities Exchange Act of 1934 (the “Exchange Act”) will be considered a swap.

Reference Sources. The Commissions also clarify that the source of certain *fixed* terms or conditions in a Title VII Instrument, such as the source of the interest rate payable by one party, may be informed by a term or condition of a security, rate or other commodity determined at the time of execution without changing its characterization. For example, the fact that a 5% fixed payment under an interest rate swap is based upon the yield of a security would not affect its characterization as a swap. It is worth contrasting here a transaction where one of the payments under the Title VII Instrument actually references a security with a floating yield. In such a case, the payment is not merely informed by the yield of another security; it directly mimics that yield and, as such, the term would impact the characterization of the Title VII Instrument.

B. Foreign Exchange Products

Section 1a(47) of the CEA, as amended by the Dodd-Frank Act, defines swaps to include cross-currency rate swaps, currency swaps and options based upon the value of one or more currencies (“currency options”). In addition, Section 1a(47)(E) of the CEA provides that foreign exchange swaps (“FX swaps”) and non-deliverable (i.e., cash-settled) foreign exchange forwards (“FX forwards”) shall be considered swaps unless the Secretary of the Treasury makes a determination that such instruments should not be considered swaps. As discussed in greater detail below, including these foreign exchange products in the definition of swaps could entail new CFTC registration obligations for the advisers of funds that hedge foreign exchange risk associated with securities positions.

FX Swaps and FX Forwards

On April 29, 2011, the Treasury Department (“Treasury”) issued a notice of proposed determination (the “Treasury Notice of Proposed Determination”) stating that FX swaps and FX forwards should not be considered swaps.⁵ In the Final Release, the Commissions offer explanatory guidance to clarify the scope of each of these terms, and which of these instruments should, or should not, fall under the definition of swap and the related consequences.

Consistent with the Treasury Notice of Proposed Determination, the Final Rules call for the explicit exclusion of FX swaps and FX forwards from the definition of swap if Treasury makes such a finding. As mandated by the Dodd-Frank Act, the Final Rules state explicitly that FX swaps and FX forwards will nonetheless remain subject to the reporting requirements set forth in Section 4r of the CEA (requiring the reporting of swaps to a swap data repository or to the CFTC) and that swap dealers and major swap participants who are party to such transactions will nonetheless remain subject to the business conduct standards set forth in Section 4s(h) of the CEA.

Certain Other Foreign Exchange Products

As Section 1a(47)(E) of the CEA only empowers Treasury to make findings with respect to FX swaps and FX forwards, the Commissions clarify in the Final Release the characterization of certain other foreign exchange products. In particular, the Final Release states that any contract, agreement or

⁵ See 76 Fed. Reg. 25774 (May 5, 2011). Treasury noted that, unlike most other derivatives, FX swaps and FX forwards have a risk profile that is different from other derivatives because they have fixed payment obligations, are physically settled and are predominantly short-term instruments.

transaction that is a currency option, foreign currency option, foreign exchange option or a foreign exchange rate option would be a swap (but subject to the exclusions as set forth in Section 1a(47)(B) of the CEA).⁶ The Final Release also includes non-deliverable forward contracts involving foreign exchange within the definition of swap. Such contracts are cash settled in a single currency owing to currency controls or other regulations that make physical settlement impossible or impracticable.⁷

Similarly, the Commissions include *currency swaps* and *cross-currency swaps* as swaps, each of which can best be described as interest rate swaps with a currency component. A currency swap is a transaction in which one party agrees to pay a stream of payments at a fixed rate and denominated in one currency in exchange for the other party paying another stream of payments at a fixed rate and denominated in another currency. A cross-currency swap is the same arrangement except that one party pays a fixed rate and another party pays a floating rate. By way of example, this would include an arrangement where Party A agrees to pay to Party B 5% on a notional amount of U.S.\$1,000,000 on the first day of every month and Party B agrees to pay to Party A EURIBOR plus 20 bps on a notional amount of €704,000 on the first day of every month.⁸

Finally, the CFTC provides a new interpretation excluding bona fide foreign exchange spot transactions from the definition of “swap.” This interpretation responds to a concern that such transactions, which often settle one or two business days after execution, would be considered an exchange of two different currencies “on a specific future date” under the Dodd-Frank Act’s definition of a foreign exchange forward.⁹ The CFTC will consider any agreement to purchase or sell an amount of foreign currency equal to the price of a foreign security to be a bona fide foreign currency spot transaction provided that (i) the security and related foreign currency transactions are executed contemporaneously in order to effect delivery by the relevant securities settlement deadline (or the relevant foreign exchange spot market settlement deadline) and (ii) actual delivery of the foreign security and foreign currency occurs by that deadline. The CFTC notes that the treatment of foreign exchange spot transactions will depend on the relevant facts and circumstances. In this regard, the

⁶ In addition to the exclusions expressly included in Section 1a(47)(B), the CFTC decided to exclude retail foreign currency options (i.e., off-exchange foreign currency options entered into with a person other than an eligible contract participant (an “ECP”) as described in Section 2(c)(2)(B) of the CEA) from the definition of a swap. The CFTC notes that Section 2(e) of the CEA, as added by the Dodd-Frank Act, prohibits a non-ECP to enter into an off-exchange swap and assumes that Congress did not intend to implicitly repeal the permission in Section 2(c)(2)(B) of the CEA.

⁷ Non-deliverable FX forward contracts provide for a net settlement payment in one currency at the future settlement date based on spot market exchange rates. For example, on January 1, 2012 Party A and Party B agree that on February 1, 2012, a net settlement payment will be made by one party to the other based upon the understanding that (i) Party A will owe U.S.\$100 to Party B and Party B will owe CN¥ 647 to Party A and (ii) the parties will settle these payment obligations on a net basis in U.S. dollars based upon the prevailing spot USD-RMB exchange rate on February 1, 2012.

⁸ In the Final Release, the Commissions provide additional interpretive guidance addressing quanto equity swaps and compo equity swaps. In a quanto equity swap, the underlying reference is denominated in a foreign currency, the swap itself is denominated in the domestic currency, and payments under the swap are calculated using the exchange rate prevailing at inception, thereby protecting the investor from fluctuations in the foreign currency. The Commissions state that a quanto equity swap will be considered a swap (if the underlying is a broad-based security index) or a security-based swap (if the underlying is a security or a narrow-based security index), but not a mixed swap, where (i) the purpose of the quanto equity swap is to transfer exposure to the return of the underlying without transferring exposure to any currency or exchange rate risk and (ii) any exchange rate or currency risk exposure incurred by the dealer due to a difference between the domestic currency and the foreign currency is incidental to the quanto equity swap, arises from the instrument(s) the dealer chooses to use to hedge the quanto equity swap, and is not a direct result of any expected payment obligations by either party under the quanto equity swap. The Commissions distinguish compo equity swaps, where the parties assume exposure to, and the total return is calculated based on, both the performance of specified foreign stocks and the change in the relevant exchange rate. Compo equity swaps are classified as mixed swaps.

⁹ Foreign exchange forwards will be subject to reporting and business conduct standards under the CEA even if Treasury determines that they are not swaps. The CFTC believes that Congress did not intend these standards to apply to spot transactions.

CFTC does not expect that an unintentional settlement failure or delay for operational reasons or due to a market disruption will prevent characterization of such a transaction as a bona fide foreign exchange spot transaction.

Implications for Funds and Fund Advisers

The inclusion of currency options, FX swaps and non-deliverable FX forwards as swaps could entail a significant expansion of the scope of CEA regulation of funds and their advisers that do not consider themselves to be in the business of trading swaps or commodities, but that use cash-settled FX transactions to hedge currency risk. This possibility arises because the Dodd-Frank Act has amended the definition of the term “commodity interest” to include “swaps,” which means that funds that are “operated for the purpose of trading in commodity interests” -- now including swaps -- may be considered to be “commodity pools.” This could have implications for the registration of an adviser with the CFTC as a commodity pool operator or commodity trading advisor.¹⁰ Thus, for example, the U.S. adviser of a global equity fund that enters into cash-settled forwards to hedge currency risk associated with an investment in a Chinese company would have to consider whether the currency transactions would subject it or the fund to registration with and oversight by the CFTC, in addition to any registration with or oversight by the SEC or other securities markets regulator. Similarly, an adviser to a fund that engages in a currency transaction that is excluded from the definition of swap but that rolls delivery forward through book-outs may convert the transaction into a non-deliverable FX forward, thus converting it into a swap. With respect to private funds that invest in swaps, but not in other commodity interests, the compliance date is October 12, 2012.

The CFTC has noted in the Final Release that it may be prepared to entertain requests for individualized relief from characterization of currency-related transactions from the definition of swap, but it may be open to doubt whether the CFTC would actually grant such relief in most circumstances. Therefore it may be important to be sensitive to the potential impact of swap regulation on entities that do not consider that they are engaged in swaps transactions.

C. Swaps Referencing One or More Securities or Loans and Securities Indices

Section 761(a)(6) of the Dodd-Frank Act defines security-based swaps as a sub-category of swaps (without regard to the exclusion of security-based swaps under the definition of swap). Security-based swaps are swaps that are based on either (i) an index that is a narrow-based security index (including any interest therein or on the value thereof), (ii) a single security or loan (including any interest therein or on the value thereof), or (iii) the occurrence, nonoccurrence, or extent of the occurrence of an event relating to a single issuer of a security or the issuers of securities in a narrow-based security index,

¹⁰ The Dodd-Frank Act's amendment of the definition of the term “commodity interest” is of greater consequence than might otherwise have been the case because the CFTC has rescinded regulation 4.13(a)(4), which exempted from CFTC regulation commodity pools with highly sophisticated investors. As a result of the rescission of Regulations 4.5 and 4.13(a)(4), advisers of a fund engaging in currency hedging may have to comply with Regulation 4.13(a)(3) and register with the CFTC as a commodity pool operator (in addition to any registration with the SEC under the Investment Advisers Act of 1940) or exit the “commodity interest” markets. Regulation 4.13(a)(3) provides an exemption from commodity pool status for a pool that issues interests in transactions that are exempt from registration under the Securities Act of 1933, as amended (the “Securities Act”), are marketed and sold only to certain categories of investors and trade only a *de minimis* amount of commodity interest positions, whether entered into for bona fide hedging purposes or otherwise. For our Alerts discussing the commodity pool and commodity pool operator registration issues in more detail, please click [here](#) and [here](#).

provided that this event directly affects the financial statements, financial condition or financial obligations of the issuer.¹¹

Swaps Based on a Single Security or Loan

The second prong of the security-based swap definition (swaps based on a single security or loan) is the most straightforward, and the Commissions' guidance in this regard with respect to single-name credit default swaps and total return swaps is not revelatory.

Single Name Credit Default Swaps. Where a credit default swap references a single obligation of an entity, the Commissions state that it should be considered a security-based swap based on a single security or loan (or any interest therein or the value thereof) as per the second or third prong of the definition of security-based swap.

Single Name Total Return Swaps. If a total return swap is based on a single security or loan, the Commissions will consider it to be a security-based swap under the second prong of the definition of security-based swap.¹² The Commissions have stated that they do not consider the variable interest rate payment to affect this characterization, so long as such payment is merely a form of financing reflecting the seller's cost of financing the position. However, the Commissions note that it may be appropriate to consider a total return swap to be a mixed swap where the interest rate payment incorporates additional elements creating other exposures and/or risk shifting (such as embedded caps, calls or puts) or where the underlying references are not securities (such as commodity prices).¹³

Swaps Based on a Security Index

An "index" under the Dodd-Frank Act is defined to mean an "index or group of securities, including any interest therein or based on the value thereof." A Title VII Instrument based on a narrow-based security index is statutorily defined as a security-based swap, and as such, is subject to regulation by the SEC. In the Final Release, the Commissions clarify that a Title VII Instrument which is based on a security index that is not a narrow-based security index (a "broad-based security index") is a swap subject to regulation by the CFTC. The Commissions are adopting the following rules to help delineate narrow-based security indices from broad-based security indices:

- (1) in general, the term "narrow-based security index" will have the same meaning as set forth in Section 3(a)(55) of the Exchange Act and Section 1a(35) of the CEA and the rules and regulations of the Commissions implementing such provisions (as further discussed below),

¹¹ It is worth noting that an index CDS based on an index of loans that are not securities may in certain circumstances still constitute a security-based swap. If the borrowers under such loans are also issuers of securities, to the extent the index CDS is based on an event relating to a loan in the index, such as a default on a loan, the Commissions have clarified that such an event is an event "relating to" the borrower for purposes of the third prong of the security-based swap definition. If the index CDS otherwise meets the requirements in the third prong of the definition, the index CDS would be a security-based swap.

¹² The Commissions clarify in the Final Release that an instrument (including a total return swap) that is based on two or more non-security loans will be considered a swap. The Commissions note, however, that a loan may be a "security" under Section 3(a)(10) of the Exchange Act if it is a note or evidence of indebtedness, depending on the facts and circumstances. Whether an instrument that is based on two or more securities will be considered a swap or security-based swap depends on the narrow-based security index analysis summarized below.

¹³ The Commissions state that a total return swap referencing an exempted security, such as a U.S. Treasury bond, would be considered a swap. The Commissions also state that total return swaps wherein the payments are based upon the price appreciation/depreciation of a narrow-based security index would be considered a security-based swap per the first prong of the security-based swap definition.

- (2) for purposes of determining whether a credit default swap is based on a narrow-based security index, the terms “narrow-based security index” and “issuers of securities in a narrow-based security index” will have certain specified meanings (as further discussed below),
- (3) certain index migration rules with respect to Title VII Instruments referencing security indices will apply to indices that migrate from being “narrow-based” to “broad-based,” and vice versa, and
- (4) the characterization of a credit default swap will be affected by the method of settlement, notwithstanding the foregoing rules.

The Existing Definition of Narrow-Based Security Index

The Commissions state that the existing statutory definition of the term “narrow-based security index” and the related rules and guidance, which were enacted to permit the trading of security futures on narrow-based securities indices in certain circumstances, will determine the characterization of Title VII Instruments other than credit default swaps that reference indices of securities (“Index CDS”). The general definition, as set forth in Sections 3(a)(55)(B) and (C) of the Exchange Act and Section 1a(35)(A) and (B) of the CEA, was developed with equity securities indices in mind and, as such, would apply to determinations regarding the characterization of Title VII Instruments (other than Index CDS) based on indices of equity securities.¹⁴ For Title VII Instruments based on debt securities indices (other than Index CDS), the July 2006 joint determination of the Commissions would apply (the “July 2006 Debt Index Rules”).¹⁵ That joint determination extended the definition of narrow-based security index to apply to debt securities indices.

The Narrow-Based Security Index Definition with respect to Index CDS

In determining whether an index underlying an Index CDS is narrow-based, the Commissions are adopting a definition of narrow-based security index that is informed by the July 2006 Debt Index Rules. In order to assure consistent treatment of Index CDS, the Commissions are defining “narrow-based security index” and “issuers of securities in a narrow-based security index” separately, but essentially identically, so that they would be expected to “yield the same substantive results.” The remainder of this discussion will focus on the former definition, i.e., the definition of “narrow-based security index.”

The Commissions state that solely for purposes of determining whether a credit default swap is a security-based swap, the term “narrow-based security index” would mean an index that meets any of the four following criteria:

¹⁴ Subject to certain exclusions, a narrow-based security index is generally defined to mean an index (i) that has nine or fewer component securities; (ii) in which a component security comprises more than 30% of the index’s weighting; (iii) in which the five highest weighted component securities in the aggregate comprise more than 60% of the index’s weighting; or (iv) in which the lowest weighted component securities comprising, in the aggregate, 25% of the index’s weighting have an aggregate dollar value of average daily trading volume of less than \$50,000,000 (or in the case of an index with 15 or more component securities, \$30,000,000).

¹⁵ See Joint Final Rules: Application of the Definition of Narrow-Based Security Index to Debt Securities Indexes and Securities Futures on Debt Securities, 71 Fed. Reg. 39534, July 13, 2006. Under the July 2006 Debt Index Rules, an index is generally not a narrow-based security index if (i) each of the securities of an issuer included in the index is a debt security, (ii) the index is comprised of more than nine securities issued by non-affiliated issuers, (iii) the securities of any issuer in the index do not comprise more than 30% of the index’s weighting, (iv) the securities of any five non-affiliated issuers included in the index do not comprise more than 60% of the index’s weighting and (v) each security of an issuer included in the index meets specified criteria regarding disclosure, float and certain other requirements. For these purposes, two issuers are considered to be affiliated if one issuer controls, is controlled by or is under common control with the other issuer, where the determination of “control” is based on equity ownership or voting power of 20% or more.

- (i) the index is composed of nine or fewer securities or securities that are issued by nine or fewer non-affiliated issuers (thus ensuring that an index with a small number of issuers or securities or “concentrated in only a few issuers or securities” would be narrow-based);¹⁶
- (ii) the effective notional amount¹⁷ allocated to the securities of any issuer included in the index comprises more than 30% of the index’s weighting;
- (iii) the effective notional amount allocated to the securities of any five non-affiliated issuers included in the index comprises more than 60% of the index’s weighting; or
- (iv) at least 80% of the index’s weighting consists of securities with respect to which there is no publicly available information and the effective notional amount of each security with respect to which there is publicly available information is less than 5%.¹⁸

For purposes of determining the characterization of indices underlying Index CDS, two issuers (other than issuers of asset-backed securities) are considered to be affiliated if one issuer controls, is controlled by or is under common control with the other issuer, where the determination of “control” is based on equity ownership or voting power of more than 50%, in contrast with the 20% threshold under the approach to indices underlying Title VII Instruments other than Index CDS. An issuer of asset-backed securities is not considered to be affiliated with any other issuer included in the index.

¹⁶ Under the Final Rules, the term “issuer” for this purpose will include (a) an issuer of securities included in the index other than asset-backed securities and (b) an issuer of securities that is an issuing entity of an asset-backed security as defined in Section 3(a)(79) of the Exchange Act (an “asset-backed security”).

In the definition of “issuer of securities in a narrow-based securities index,” the term “reference entity” serves a function parallel to that of the term “issuer” in the definition of “narrow-based securities index.” It should be noted that the Final Rules specifically revise the term “reference entity” (but not the term “issuer”) to include, in addition to (a) and (b) above, any issuer of securities that is a borrower with respect to any loan identified in an index of borrowers or loans.

¹⁷ It should be noted that by using the term “effective notional amount” in the second and third criteria and the exception to the fourth criterion, the Final Release specifically addresses calculations of the notional amount in situations where the payout on securities or the allocation of notional amounts among securities is not uniform across the component securities. For example, if, through the use of leverage, the payout in respect of a security is magnified, the “effective” notional amount for such security would be commensurately magnified for purposes of determining the threshold percentages. It remains to be seen how this calculation will work in practice.

¹⁸ The public availability of information test is designed to decrease the likelihood that credit default swaps referencing securities indices composed of a large number of securities would be susceptible to manipulation. The criteria for public availability of information that will cause an index to be considered broad-based are generally as follows: (1) the issuer of the security is required to file reports pursuant to Section 13 or Section 15(d) of the Exchange Act; (2) the issuer of the security is eligible to rely on the exemption provided in Rule 12g3-2(b) under the Exchange Act; (3) the issuer of the security has a worldwide market value of its outstanding common equity held by non-affiliates of \$700 million or more; (4) the issuer of the security (other than an issuing entity of an asset-backed security) has outstanding securities that are notes, bonds, debentures, loans or evidences of indebtedness (other than revolving credit facilities) having a total remaining principal amount of at least \$1 billion; (5) the security is an exempted security as defined in Section 3(a)(12) of the Exchange Act (other than a municipal security as defined in Section 3(a)(29) of the Exchange Act); (6) the issuer of the security is a government of a foreign country or a political subdivision of a foreign country; (7) if the security is an asset-backed security, the security was issued in a transaction registered under the Securities Act and has publicly available distribution reports; or (8) for a credit default swap entered into solely between eligible contract participants as defined in Section 1a(18) of the CEA: (i) the issuer of the security (other than an issuing entity of an asset-backed security) makes available to the public or otherwise makes available to such eligible contract participant information about such issuer pursuant to Rule 144A(d)(4) under the Securities Act; (ii) financial information about the issuer of the security (other than an asset-backed security) is otherwise publicly available; or (iii) in the case of an asset-backed security, information of the type and level included in publicly available distribution reports for similar asset-backed securities is publicly available about both the issuing entity and such asset-backed security.

In addition to being required to meet one of the four criteria above, the security index may not be composed solely of certain exempted securities, and, if a portion of the index is composed of such securities, the remaining securities in the index would need to satisfy one of these criteria.¹⁹

The Commissions in the Proposing Release requested comment on whether a securities index underlying an Index CDS should be considered broad-based if a third-party index provider makes publicly available information about the composition of the index (such as the component securities, index adjustment rules, etc.). The Commissions decided in the Final Release not to exclude indices from the public information availability test by virtue of being compiled by a third-party index provider.

Index Migration

The Commissions state in the Final Release that the characterization of a Title VII Instrument as a swap, security-based swap or mixed swap is made prior to execution (but no later than when the parties offer to enter into the Title VII Instrument) and that changes in the character of the index after that time generally will not affect this initial characterization during the entire term of the Title VII Instrument unless those changes are contemplated in the index terms at the time of execution.

However, potential or actual migration of a security index could affect the characterization of the related Title VII Instrument. If the future composition of a security index is certain, or intentionally designed, to migrate from narrow-based to broad-based (or vice versa) during the term of the instrument owing to predetermined criteria or a predetermined self-executing formula (such as trading rules providing for certain mandatory non-discretionary index adjustments upon the occurrence of certain events), the Commissions will view the Title VII Instrument as a mixed swap. The Commissions clarify in the Final Release that if it is possible for future migration to occur based on such criteria or such a formula, but future migration is neither certain nor contemplated, then the Title VII Instrument will be considered a swap or a security-based swap, as appropriate, at execution and for the term thereof, and not a mixed swap. Conversely, if the composition of the index may change in the future at the discretion of one or both parties, then the Commissions will regard the index as a narrow-based security index and the Title VII Instrument a security-based swap. In addition, if the material terms of a Title VII Instrument are amended subsequent to execution (based on an exercise of discretion and not through predetermined criteria or a predetermined self-executing formula), the instrument as so amended will be considered a new Title VII Instrument, and the characterization of that instrument will be determined anew at the time of amendment.²⁰

Index migration may cause practical difficulties where a market participant desires to enter into a new swap that references a migrated security index or for the purposes of offsetting an existing position that references a migrated security index with a new Title VII Instrument. The market participant may need to purchase the new Title VII Instrument on a different platform and would be subject to different, and possibly conflicting, responsibilities and obligations. To mitigate these difficulties, the Commissions established a tolerance period. With respect to broad-based security indices that migrate

¹⁹ In particular, the requirement is that (A) the index is not composed solely of exempted securities as defined in Section 3(a)(12) of the Exchange Act, as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in Section 3(a)(29) of the Exchange Act, as in effect on the date of enactment of the Futures Trading Act of 1982); and (B) without taking into account any portion of the index composed of exempted securities, as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security), the remaining portion of the index would be a narrow-based security index.

²⁰ In a footnote, the Commissions note that "material terms" would include, for example, an amendment changing the composition of a securities index from 12 securities (broad) to 8 securities (narrow), but would not include a change to "key person" provisions.

to being narrow-based, the tolerance period provides that the security index will continue to be treated as broad-based so long as (without giving effect to the tolerance period) the security index is not narrow-based for more than 45 business days over three consecutive calendar months.²¹ Once the tolerance period has elapsed, the Commissions established an additional grace period of three months during which the swap will continue to be treated as if it references a broad-based security index. The Commissions state that the intention of this grace period is to provide market participants with sufficient time to satisfy any listing and clearance requirements on an alternative trading platform.²²

This tolerance period and grace period for swaps referencing migrated broad-based security indices will only apply to swaps trading on a designated contract market (“DCM”), a swap execution facility (“SEF”) or a foreign board of trade. In order for a swap to be eligible for the tolerance period, (i) the swap must not have referenced a narrow-based security index during the first 30 days of trading or (ii) if the security index becomes narrow-based during the first 30 days of trading, then, during every trading day of the six full calendar months preceding a date no earlier than 30 days prior to the commencement of trading of the swap on the index, the index must not have been narrow-based.²³

The Commissions have adopted a similar tolerance period and grace period for securities indices that migrate from narrow-based to broad-based and that are traded on security-based SEFs (“security-based SEF”) and national securities exchanges.

Methods of Settlement for Index CDS

For Index CDS, the Commissions are adopting additional interpretive guidance relating to methods of settlement that, in certain cases, conflict with the general rule that Title VII Instruments referencing narrow-based security indices should be considered security-based swaps while Title VII Instruments referencing broad-based security indices should be considered swaps. In particular, if an Index CDS that references a broad-based security index provides for mandatory physical settlement of a security that is not an exempted security or loan, it will be considered a mixed swap. However, if an Index CDS that references a broad-based security index provides for mandatory cash settlement, including through an auction process, it will be treated as a swap.

D. Security-Based Swap Agreements

Security-based swap agreements are swaps over which the CFTC has regulatory and enforcement authority, but for which the SEC also has antifraud and certain other authority. The Commissions state that they are committed to working cooperatively regarding this dual enforcement authority. The Commissions acknowledge that, outside of market practice, there is no “bright-line test” to define a security-based swap agreement. However, the Commissions emphasize that certain types of

²¹ This concept is generally modeled on the tolerance period applicable to futures on security indices under the CEA and the Exchange Act. CEA section 1a(35)(B)(iii)(I), and section 3(a)(55)(C)(iii)(I) of the Exchange Act.

²² The Commissions also note that the tolerance period cannot be “re-triggered” during the grace period. During the grace period, the tolerance period rules do not apply, even where there is a migration of the security index back to being a broad-based security index.

²³ For example, if the swap commenced trading on January 1, 2012 and became narrow-based on January 15, 2012, it would not be eligible for the tolerance period under the first prong. If, during the period from July 1, 2011 to December 31, 2011, the related security index was broad-based, the swap would be eligible for the tolerance period under the second prong. However, if the security index was narrow-based during any single trading day of that period, it would not qualify under the second prong. Furthermore, if the security index was continuously broad-based for the period from January 1, 2011 to November 30, 2011 but thereafter became narrow-based, because November 30, 2011 would fall more than 30 days prior to the commencement of trading of the swap, the swap would not be eligible under the second prong.

agreements do fall under the definition even though they do not fall under the definition of security-based swap. Because security-based swap agreements are defined to include any swap agreement of which “a material term is based on the price, yield, value or volatility of any security or any group or index of securities, including any interest therein,” a swap based on a broad-based securities index (including an Index CDS based on a broad-based security index) would fall under the definition. Swaps based on exempted securities (other than municipal securities) will also be considered security-based swap agreements.

E. Mixed Swaps

A mixed swap is generally defined as a security-based swap that is also a swap.²⁴ The Commissions are adopting two rules intended to clarify the regulatory treatment of mixed swaps. First, the Commissions are establishing a process to provide interpretation as to the proper characterization of a Title VII Instrument.²⁵ Such a request for joint findings may be initiated by the Commissions themselves in situations where, for example, the Commissions receive a request to list, trade or clear a Title VII Instrument and the Commissions question the appropriate characterization. Second, the Commissions are providing some limited regulatory relief for dually registered swap entities who are parties to certain mixed swaps. Such relief is intended to prevent such dually registered parties from being subject to conflicting or redundant regulatory requirements imposed by the parallel regulatory regimes applicable to swaps and security-based swaps.

F. Transactions That Do Not Constitute Title VII Instruments

Because the definitions of swap and security-based swap under the Dodd-Frank Act are expansive, various commentators have pointed out that the definitions could be read to include certain types of agreements and transactions that Congress probably did not intend to be considered swaps or security-based swaps. The Final Release states that the following instruments will be excluded from those statutory definitions.

Insurance Products

The Commissions generally acknowledge that traditional insurance products should not be regulated as Title VII Instruments and should be separately regulated as insurance. Yet, the “Insurance Safe Harbor” set forth in the Final Rules does not simply exclude from the definitions those products issued by a state or federally regulated insurance company that are state or federally regulated as insurance. Instead, the safe harbor also requires that such insurance products generally satisfy four additional requirements and that the providers of such insurance meet one of four criteria. To the extent that insurance products issued by regulated insurance companies do not satisfy these additional

²⁴ Under CEA Section 1a(47)(D), as added by the Dodd-Frank Act, a mixed swap is defined as any security-based swap that “includes any agreement, contract, or transaction that is as described in Section 3(a)(68)(A) of the [Exchange Act of 1934] and also is based on the value of 1 or more interest or other rates, currencies, commodities, instruments of indebtedness, indices, quantitative measures, other financial or economic interest or property of any kind (other than a single security or a narrow-based security index), or the occurrence, non-occurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence (other than an event described in subparagraph (A)(iii) [of Section 1a(47) of the CEA].” Section 3(a)(68)(D) of the Exchange Act includes a similar definition.

²⁵ The Commissions decided in the Final Release that an option on a swap or security-based swap will itself be considered a swap or security-based swap, respectively; a contract for differences will be considered a swap or a security-based swap, as per the related underlying; and a Title VII Instrument that is based on a futures contract will be considered a swap, a security-based swap, or both (i.e., a mixed swap), depending on its nature, including its underlying reference.

requirements and are regulated as swaps or security-based swaps, their regulation by the states as an insurance product would be pre-empted under the terms of the Dodd-Frank Act.

The Commissions caution that future market conditions or other developments may warrant further rulemaking to determine whether certain products meeting the Insurance Safe Harbor should nonetheless be classified as swaps or security-based swaps. Conversely, the Commissions provide assurance that the safe harbor is non-exclusive and that the Commissions will examine the applicable facts and circumstances, including a product's form and substance, to determine whether a product that does not meet the Insurance Safe Harbor is an insurance product or a Title VII Instrument.

In order for an insurance product to be excluded from the definitions of a swap or a security-based swap, the product would need to satisfy the following additional requirements (the "Product Test"): (i) the beneficiary must have an insurable interest and carry the risk of loss throughout the term of the contract; (ii) loss must occur and be proved as a condition of performance, and payment or indemnification must be limited to the value of the insurable interest; (iii) the product may not be traded separately from the insured interest, either over-the-counter or on an organized market (clearly a condition intended to capture life settlement agreements within federal regulation); and (iv) with respect to financial guaranty insurance (such as bond insurance or "wraps"), in the event of payment default or insolvency of the obligor, any acceleration of payments under the policy must be at the sole discretion of the insurer.²⁶

Moreover, the Final Release notes the possibility of future federal regulation of insurance based on suggestions in the Dodd-Frank Act, and the Final Rules will exclude federally-regulated insurance products in addition to those regulated by the states. To assure that qualifying insurance products are generally issued by a regulated insurance company and regulated as insurance, the insurance provider also would have to satisfy one of the following criteria (the "Provider Test"), which are generally derived from existing definitions of insurance under the federal securities laws: (i) it is a person that is subject to supervision by the insurance commissioner (or other similar official or agency) of any state or the United States, and the product it provides is regulated as insurance under applicable state law or the laws of the United States;²⁷ (ii) it is the United States federal government, any state or any of its agencies or instrumentalities, or any statutorily authorized program thereof;²⁸ (iii) in the case of reinsurance, it is a person that is providing (and is not prohibited by applicable state law or the laws of the United States from offering) the reinsurance product to another person that satisfies the Provider Test, provided that (A) the agreement, contract or transaction to be reinsured (the "underlying

²⁶ These four additional criteria do not, however, need to be applied under the Final Rules to the following "Enumerated Products": surety bonds; fidelity bonds; life insurance; health insurance; long-term care insurance; title insurance; property and casualty insurance; annuities; disability insurance; insurance against default on individual residential mortgages (commonly known as private mortgage insurance, as distinguished from financial guaranty of mortgage pools); and reinsurance (including retrocession) of any of the foregoing. The Final Rules expand and codify the list of Enumerated Products originally proposed and eliminate the proposed requirement that an annuity be subject to Section 72 of the Internal Revenue Code in order to be excluded from the swap or security-based swap definitions.

The Final Release, in agreement with the Proposing Release, recognizes that variable life insurance and variable annuity products registered with the SEC as "securities" by definition will not satisfy the definition of swap or security-based swap. The Proposing Release had suggested adding a fifth criterion for qualification under the Product Test – that the payment on the insurance contract not be based on the price, rate or level of a financial instrument, asset or interest or any commodity – and creating an exception for variable life and variable annuity products, which deliver guarantees that vary with the performance of specified assets, such as mutual funds. The Final Release, however, rejects any such additional criterion, so the exception is not necessary.

²⁷ In a change from the Proposed Rules, this criterion may be satisfied by insurers that are not organized as "insurance companies," as well as insurers that are domiciled outside of the United States.

²⁸ In a change from the Proposed Rules, states are included under this criterion.

product”) meets the Product Test or is one of the Enumerated Products and (B) except as otherwise permitted under applicable state law, the total amount reimbursable by all reinsurers for the underlying product may not exceed the claims or losses paid by the person transferring the risk under the underlying product;²⁹ or (iv) in the case of non-admitted insurance, it is a person that either (A) is located outside of the United States and is listed on the Quarterly Listing of Alien Insurers as maintained by the International Insurers Department of the National Association of Insurance Commissioners or (B) meets the eligibility criteria for non-admitted insurers under applicable state law.³⁰

Under the “Insurance Grandfather” set forth in the Final Rules, the Commissions will consider as insurance any agreement meeting the Provider Test that was entered into on or before the effective date of the Final Rules, notwithstanding the Product Test.

The CFTC has decided to interpret the term “swap” to include guarantees of swaps. In particular, when a counterparty to a swap (that is not a security-based swap or a mixed swap) has full or partial recourse to a guarantor, including via financial guaranty insurance, then the guarantee will be considered part of the swap. The CFTC states that this interpretation does not limit or otherwise affect the Insurance Grandfather. The CFTC intends in a future release to finalize this interpretation and its effective date and to address its practical implications, including any overlap of regulatory obligations respecting guarantees of swaps with regulatory obligations respecting the related guaranteed swaps.

Forward Contracts

General. The Title VII Instrument definitions exclude “forward contracts.” A forward contract is a contract for “any sale of a nonfinancial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically settled.” A contract for the deferred shipment of grain where the buyer intends to take delivery would fall under this exclusion.³¹ The Commissions note that intent to physically settle is an important element of this analysis and that assessing intent requires a facts-and-circumstances analysis. The Final Release generally endorses the approach that the CFTC has adopted in the past for determining intent to effectuate physical delivery of energy commodities.³² The CFTC provides interpretive guidance that the forward contract exclusion from the swap definition will apply to environmental commodities, such as emissions allowances, carbon offsets/credits, or renewable energy certificates, provided that the commodity can be physically

²⁹ The Insurance Safe Harbor under the Final Rules includes all reinsurers wherever incorporated or organized, and not just those based outside of the United States. The requirement set forth in this clause (B) did not appear in the Proposed Rules.

³⁰ The Final Rules add the fourth criterion. For purposes of the Final Rules, a “non-admitted insurance” is any property and casualty insurance permitted to be placed directly or through a surplus lines broker with a non-admitted insurer eligible to accept such insurance. A “non-admitted insurer” is, with respect to any state, an insurer not licensed to engage in the business of insurance in the state, but is not a risk retention group, as that term is defined in Section 2(a)(4) of the Liability Risk Retention Act of 1986, 15 U.S.C. §3901(a)(4).

³¹ Forward rate agreements are to be treated as swaps because they transfer interest rate risk without a transfer of ownership or liability and because they do not involve nonfinancial commodities and are not commercial merchandizing transactions.

³² Addressing ability of some parties to forward contracts to cancel delivery via “booking out,” thereby eschewing the physical delivery requirement of the exclusion, the Final Release indicates that the CFTC will generally apply its “Brent Interpretation” (55 Fed. Reg. 39188, CFTC Statutory Interpretation Concerning Forward Transactions, Sept. 25, 1990) to all *nonfinancial* commodities for purposes of the swap definition. The Brent Interpretation, as expanded under the Final Release, allows commercial market participants who regularly make or take delivery of the referenced commodity in the ordinary course of their business to qualify for the forward contract exclusion from both the future delivery and swap definitions even if they from time to time enter into a subsequent transaction to “book out,” and thereby cancel, a specific forward contract.

delivered and consumed and that the transaction is intended to be physically settled.³³ The Commissions have decided to treat forward rate agreements as swaps, subject to the exclusions set forth in Section 1a(47)(B) of the CEA.

Commodity Options Embedded in Forward Contracts. The CFTC is extending the forward contract exclusion to forward contracts with embedded non-financial commodity options, while reaffirming that commodity options by themselves are included in the statutory swap definition.³⁴ The CFTC provides in a final interpretation that a forward contract with an embedded option will qualify for the forward contract exclusion so long as the embedded option, while permitted to adjust the forward contract price, does not undermine the actual delivery of the purchased commodity (as in the former example). In addition, the forward contract and its embedded option will have to trade together in order for the contract to qualify for the exclusion.

The CFTC in the Final Release proposes an additional interpretation regarding forward contracts containing flexible or variable terms related to volume, price and/or delivery (generally known as “volumetric optionality”). Such a contract would be considered an excluded nonfinancial commodity forward contract, although its embedded option undermines the actual delivery of the purchased commodity, so long as the contract meets additional criteria set forth in the Final Release. These criteria are designed to ensure that the parties intend physical delivery and are engaged in a commercial business involving the underlying nonfinancial commodity and that the transaction is commercially reasonable. Comments on the new interpretation will be due October 12, 2012.

Security Forwards. The Dodd-Frank Act excludes purchases and sales of securities from the definitions of swap and security-based swap. Accordingly, the Commissions stated that purchases and sales of securities for deferred shipment or delivery (i.e., securities forwards) will be excluded from the definitions of swap and security-based swap so long as the securities are intended to be physically delivered based on a fixed price. The Commissions also stated that a forward sale of a security on a contingent basis may, depending upon its terms, be excluded.

Of particular importance to the mortgage-backed securities market, the Final Release confirmed that forward sales of mortgage-backed securities in the “TBA” market fall within the exclusion for sales of securities on a deferred settlement or delivery basis under Section 1a(47)(B)(ii) of the CEA notwithstanding that the precise MBS are not in existence at the time the forward MBS sale is entered into. In addition, as the purchase or sale of a security, the SEC and the CFTC also confirmed that such forward sales of MBS in the TBA market would fall within the exclusions for the purchase or sale of one or more securities on a fixed basis (or, depending on its terms, a contingent basis) and therefore would fall outside the swap and security-based swap definitions altogether.

Consumer and Commercial Agreements

Acknowledging that Congress did not intend common business and household agreements that have attributes of swaps and security-based swaps to fall within the parameters of the new regulations, the Commissions are excluding from the definitions – (1) agreements to acquire or lease real or personal

³³ With respect to environmental commodities, the CFTC appears to take a broad view of what “physical” delivery may encompass. As an example, it states that an emission allowance can be physically delivered and consumed by emitting the amount of pollutant specified in the allowance.

³⁴ An example of a forward contract with an embedded option would be an agreement whereby a grain elevator commits to sell grain to a merchant at a future date for a specified minimum price for the grain subject to upward adjustment depending upon the prevailing futures price for grain at the time of delivery, with both parties obligated to deliver or take delivery of the grain as the case may be. Another example would be an agreement that permits a grain elevator to sell grain to the merchant on a future date at a certain minimum price but that does not obligate the elevator to do so.

property, (2) mortgage applications, (3) agreements for personal services, (4) sales or assignments of rights owned by a consumer, (5) purchases of products or services for personal, family or household purposes at a fixed, capped or collared price at a future date, (6) mortgage rate caps or locks on consumer mortgages, (7) employment and retirement benefits arrangements, (8) sales, servicing or distributions arrangements, (9) business combination transactions, (10) warehouse lending transactions in connection with building an inventory of assets in advance of a securitization of the assets (as with mortgages, student loans, etc.), (11) commercial loans entered into by non-banks, (12) consumer product warranties, extended service plans and buyer protection plans, (13) consumer options to acquire, lease or sell real or personal property, (14) consumer agreements that the customer may cancel without legal cause pursuant to consumer protection laws or regulations (e.g., the Federal Reserve Board's Regulation Z) and (15) consumer guarantees of credit card debt, automobile loans and mortgages of a friend or relative.

Participations in Loans and Lending Commitments

Pursuant to an interpretation contained in the Final Release, the Commissions are excluding participations in loans and lending commitments from the definition of swap and security-based swap. In order to be within the exclusion, a participation must satisfy the following conditions: (i) the participation seller must be a lender under or a participant in the loan; (ii) the participation interest may not exceed the participation seller's ownership interest in the loan; (iii) the entire purchase price for the participation (a) must be paid up front and (b) may not be financed; and (iv) the participation must transfer the full economic risk and reward of the participated asset rather than just price return. These conditions are essentially intended to distinguish a loan participation from a credit default swap or total return swap.

G. Transactions in Regional Transmission Organizations

The CFTC declined in the Final Release to address the status and characterization of transactions in regional transmission organizations and independent system operators, such as financial transmission rights. It has taken this step because it believes that the appropriate forum in which to address those issues is provided by the process set forth in Section 722 of the Dodd-Frank Act. That statutory provision requires that the CFTC exempt regional electricity transmission transactions from the CEA if it determines that it would be in accordance with the public interest to exempt from the CEA a category of electricity transactions that are regulated by the Federal Energy Regulatory Commission or otherwise.

H. Recordkeeping Requirements

Section 712(d)(2)(B) and (C) of the Dodd-Frank Acts requires the Commissions, in consultation with the Board of Governors of the Federal Reserve, to adopt rules governing books and records requirements for security-based swap agreements. In the Final Release, the Commissions stated that because the CFTC already has proposed books and records requirements for swaps, those rules will apply to swaps that are security-based swap agreements. The Commissions stated that there will be no additional books and records requirements for security-based swap agreements.

I. Anti-evasion Rules

The Dodd-Frank Act empowers the Commissions to adopt changes to certain definitions (including the definition of swap and security-based swap) in order to assure that transactions cannot be structured to evade the requirements of Title VII of the Dodd-Frank Act. In addition, various

provisions of the Dodd-Frank Act empower the Commissions to implement anti-evasion rules in other contexts. In the Final Release, the CFTC provides guidance in this regard but the SEC elects not to do so, noting that existing anti-fraud and anti-manipulation regulations will apply to security-based swaps, which are “securities” for purposes of the federal securities laws.

Rule 1.3(xxx)(6) under the CEA defines as swaps those transactions that are willfully structured to evade the CEA, as amended by the Dodd-Frank Act. The rule contains similar provisions regarding currency and interest rate swaps that are willfully structured as FX swaps or FX forwards in order to avoid being characterized as swaps. Similar rules will also apply to transactions of a bank that is not federally regulated, which transactions are structured to evade the requirements of the Dodd-Frank Act. Furthermore, the CFTC will deem as unlawful any activities conducted outside the United States, including entering into agreements and structuring entities, with the purpose of willfully evading the relevant provisions of the Dodd-Frank Act. In addition, the CFTC states that, in determining whether a person is a major swap dealer or a major swap participant, it will take into account whether such person willfully designed a transaction to evade the Dodd-Frank Act. The CFTC reasons that such a provision is necessary to prevent those who seek to evade the requirements from also enjoying the benefits of such evasion.

It should be noted that all of the foregoing anti-evasion rules adopted by the CFTC will not apply to agreements, contracts and transactions structured as securities under the securities laws, because such determinations would be left to the SEC. These anti-evasion rules also do not apply to security-based swaps.

The CFTC provides assurance in the Final Release that entering into transactions that qualify for the forward exclusion from the swap definition will not be considered evasive. However, noting that forward contracts are economically substantially similar to swaps, the CFTC states that it will attempt to identify evasive behavior by carefully scrutinizing the facts and circumstances associated with transactions structured as forward contracts that do not, in fact, qualify for the forward exclusion.

The CFTC clarifies in the Final Release that a transaction that has been self-certified by a SEF (or a DCM), or that has received prior approval from the CFTC, will not be considered evasive, although a SEF or DCM may be found to have falsely self-certified.

Finally, the CFTC clarifies in the Final Release that a transaction willfully structured to evade will be subject to the anti-evasion rules even if the counterparty is innocent of willful evasion. However, the CFTC notes that it will impose sanctions only on the willful evader. The CFTC further suggests that in a case of fraud or misrepresentation by a willful evader, the CFTC may seek restitution on behalf of any innocent counterparties, who additionally would retain their usual private rights of action for breach of contract and any related equitable remedies.

Conclusion

The status and character of a Title VII Instrument is going to be a foundational issue for derivatives markets because of the jurisdictional consequences of the character of a transaction. The Final Rules of the Commissions regarding this characterization reach more broadly than the Proposed Rules to provide delineations of many questions, but the Final Rules might also leave many market participants troubled by the lines the Commissions have drawn, which arguably include in the definition of Title VII Instruments many types of transactions that arguably could properly not have been so characterized. They also leave many other questions unresolved and will likely be followed by a long line of interpretive questions to be resolved by the Commissions.

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