Client**Alert**

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The Impact of CFTC Proposed Rules to Implement Title VII of Dodd-Frank on Energy Market End-Users: Where Are We Now?

The Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act") was enacted on July 21, 2010, bringing with it substantial uncertainty on how the derivatives activities of energy market end-users, including public and privately owned energy producers such as utilities and independent power companies, consumers of energy such as municipalities, energy traders such as utilities, power companies and their respective trading subsidiaries and affiliates, would be regulated under Title VII of the Act. Since then, the Commodity Futures Trading Commission (the "CFTC") has published over 30 proposed rules to implement the provisions of the Commodity Exchange Act (the "CEA") as amended by Title VII. These proposed rules have addressed many ambiguous provisions in Title VII. However, a substantial number of questions have yet to be addressed. In addition, a number of provisions in Title VII have been interpreted by the CFTC in a manner that gives rise to concern. This paper focuses on proposed and final rules of the CFTC regarding "swaps," as broadly defined in Title VII,[1] and the issues on which the energy market should focus, including the anticipated regulatory burden and potential impact on how the energy market operates.

Executive Summary

Scope of "Swap" Definition

One of the primary issues of concern for energy market end-users is with regard to what activities and transactions constitute "swaps" and therefore are subject to regulation under Title VII of the Act. The broad and ambiguous definition of the term "swap" under the Act covers transactions that either are not typically thought of as swaps or are currently subject to an exemption from regulation. The CFTC has yet to publish proposed rules further defining the term "swap" and potentially narrowing its scope.

Designation as a Swap Dealer or Major Swap Participant

End-users should be concerned by their potential designation as "swap dealers" ("SDs") or "major swap participants" ("MSPs"). The joint SEC/CFTC proposed rules defining these terms (amongst others) addressed many concerns that the use of swaps by end-users to hedge their own commercial risks would lead to their designation as SDs or MSPs. Some questions remain, however. Also, as entities within a corporate group will be evaluated on an entity-by-entity basis for purposes of the SD and MSP definitions, this raises the concern for end-users who enter into hedging or trading transactions through a designated affiliate that such affiliate could be designated as an SD.

1 Rather than security-based swaps, which are under the jurisdiction of the Securities Exchange Commission (the "SEC").

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The consequences of an entity's designation as an SD or MSP are substantial and will undoubtedly raise the cost of doing business. In addition to registration, an SD or MSP will be subject to clearing requirements; capital and margin requirements; substantial reporting and recordkeeping obligations; business conduct rules; the duty to evaluate the suitability of a swap for a counterparty; the need to appoint a chief compliance officer with certain prescribed duties and qualifications; and the duty to segregate counterparty funds at its customer's request.

Clearing

End-users should also consider the implications of the upcoming shift to a cleared swap paradigm. The Act provides that all swaps accepted for clearing by derivatives clearing organizations ("DCOs") will be subject to mandatory clearing and sets forth a mechanism by which swaps would become eligible for (and therefore generally subject to) clearing. However, the Act also provides an exception from the clearing requirement for commercial end-users. The exception only applies to swaps used to mitigate commercial risk. The exception also does not apply to swaps entered into by an affiliate if that affiliate is subject to registration as an SD or MSP. End-users who are eligible for the exception should consider whether to elect to use it, particularly since it will not exempt the swap from the other requirements of Title VII—most notably with respect to posting margin. It is not clear whether and to what extent a commercial end-user who opts out of clearing will be subject to margin requirements.

Margin Requirements

End-users should be aware of the potential burden of the Act's margin requirements. The Act requires each DCO to establish margin requirements in order to limit the exposure of the DCO to potential losses from defaults by DCO members. In addition, the Act requires the CFTC to impose initial and variation margin requirements in connection with swaps entered into with SDs and MSPs. While it is currently unclear whether the CFTC will require both SDs and MSPs themselves and their counterparties to comply with the margin requirements, as well as whether it will allow the posting of noncash collateral, end-users can expect a resulting increase in the cost of entering into uncleared swaps.

Collateral Segregation

End-users should be mindful of how any collateral posted to margin cleared swaps will be treated in the event of a default by another customer of its futures commission merchant ("FCM") that is a clearing member of a DCO. To date, futures markets have been permitted by the CFTC to hold posted margin in a segregated but commingled account, where the funds are held separately from the clearing member's property but commingled with the funds of other customers of the clearing member. In such instances, each customer bears "fellow customer risk," meaning that if another customer fails to post margin with the FCM and the FCM fails to post margin with the clearing house, then the first customer bears the risk that margin it has posted will be used to cover the defaults by the defaulting customer and the defaulting FCM. The CFTC has proposed for consideration four models for the segregation of collateral posted in connection with cleared swaps. It remains unclear at this time which of these four will prevail and whether the CFTC will allow DCOs to determine whether customers or their member FCMs will bear "fellow customer risk."

Reporting and Recordkeeping

End-users need to be cognizant of Title VII's substantial recordkeeping requirements, some of which are already effective and apply to existing records despite the lack of clarity about what they require. The ambiguous definition of "swaps" and the CFTC's broad pronouncements of what records must be retained have made and will make it difficult for end-users to decide on appropriate modifications to their document retention policies. In addition, the recordkeeping obligations that will be applicable to SDs and MSPs are particularly prescriptive, requiring the maintenance of daily trading records and the recording of all related communications.

Further, end-users should also be aware of the substantial reporting requirements under Title VII that will need to be fulfilled by one of the parties to the swap (or by the clearinghouse or swap market, if applicable). The designated reporting party will be determined based on each party's status (as an SD/MSP or as a US entity, for example). End-users should be concerned, in particular, that the onus of these requirements will fall on them if they are either (a) designated as SDs or MSPs (and are therefore the reporting entity by default, unless their counterparty is also an SD or MSP), (b) entering into swaps across from other (non-SD/MSP) end-users (as is often the case for energy swaps) and are designated the reporting party, or (c) entering into swaps with a non-US entity (which cannot serve as the reporting entity under the proposed rules).

Position Limits

The energy market should also consider the potential effects of the imposed position limits on commodity transactions including energy, oil and gas swaps and options. The CFTC, pursuant to its expanded authority under the amended CEA, is moving towards imposing position limits on many futures and options traded on or subject to the rules of a designated contract market and swaps that are economically equivalent to such futures and exchange-traded options. While these limits may not directly restrict end-users' ability to enter into bona fide hedges, they may have a substantial negative impact on liquidity and price discovery due to their effect on other commodity-related transactions, whether in energy, natural gas or other commodities.

Market Manipulation

End-users should also note the CFTC's significantly expanded authority to regulate market manipulation, fraud and disruptive practices. The CFTC's proposed rules implementing this authority would subject end-users to additional disclosure requirements and duties of inquiry. In addition, end-users should note that, under the proposed rules, reckless behavior (as opposed to intent) could constitute actionable manipulation.

Retroactivity and Jurisdictional Issues

End-users should also be mindful of the effects of Title VII on existing swaps. While Title VII ostensibly provides that existing swaps will not be affected, the exact implications of certain provisions of the Act are unclear and may lead to illogical results. End-users should pay attention to how the CFTC interprets these provisions in future rulemaking.

Finally, energy end-users should monitor CFTC rulemaking that defines the boundaries of its jurisdiction with respect to the energy market. The energy market and its swaps activities, unlike the bulk of the swap market, are already highly regulated, most notably by the Federal Energy Regulatory Commission ("FERC"). The boundaries of the CFTC's and the FERC's respective jurisdictions have yet to be addressed.

The Definition of "Swaps"

Analyzing the definition of the term "swap" is the first step in determining the applicability of Title VII and whether an end-user needs to be concerned with its implications. "Swap" is defined expansively in Section 721 of the Act and captures (or may capture) many types of transactions not traditionally considered to be a swap. Further rules on the definition have yet to be published by the CFTC and SEC.[2] July 16, 2011, the effective date of Title VII, is fast approaching, and with it, the compliance obligations it imposes. The lack of clarity on this fundamental component should be of concern to market participants, including end-users, as they determine the impact that the Act will have on their businesses and operations.

Energy company end-users need to be aware that the definition of "swap" affects them because it covers, among other things: energy swaps; commodity swaps and emissions swaps; certain options covering commodities including energy; and transactions for any purchase, sale, payment or delivery that is dependent on the occurrence, nonoccurrence or the extent of the occurrence of an event or contingency associated with a potential financial, economic or commercial consequence. This last criterion literally includes every energy-related contract; its scope needs to be narrowed by regulations that have not yet been promulgated.

Excluded from the definition are, among other things, futures contracts (and options thereon),[3] security-based swaps[4] (other than mixed swaps) and forward contracts intended to be physically settled.

Discussed below are certain key issues this broad definition raises for energy-market participants.

Physical Delivery Exclusion or Forward Contract Exclusion

According to the Act, a "swap" does not include "any sale of a nonfinancial commodity or security for deferred shipment or delivery as long as the transaction is intended to be physically settled."[5] In considering how the CFTC will interpret this exclusion for forward contracts intended to be physically settled, we may be guided by the "forward contract" exclusion in relation to futures contracts (as discussed below). The term "non-financial commodity" used in the carve-out from the definition of "swap" is new and is not defined in the Act or the CEA.

The discussion and uncertainty around the element of "intent" is reintroduced by the proposed rules as they require that "the transaction [must be one that] is intended to be physically settled." The CFTC had moved away from the requirement of actual intent to

2 The SEC and CFTC published a joint advance notice of proposed rulemaking (the "definitions ANPRM") seeking public comment on how they should define the term "swap" and other new terms under Title VII. The definitions ANPRM provides that the SEC and CFTC will jointly further define each term and sought public comment on such further definitions. *See* Joint SEC/CFTC Advance Notice of Proposed Rulemaking; Request for Comments, *Definitions Contained in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, 75 FR 51429 (Aug. 20, 2010). White & Case LLP submitted comments in response to the ANPRM on September 20, 2010 (available at http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=26177).

3 "Futures" are generally referred to throughout the CEA as "contracts of sale of a commodity for future delivery." The contours of this definition are not precise and only an exclusion included in the CEA offers some certainty: Section 1a(27) of the CEA excludes from the definition certain contracts by confirming that "future delivery" does not include "any sale of a cash commodity for deferred shipment or delivery."

4 A security-based swap is subject to the jurisdiction of the SEC.

5 Including intent as a factor is not new. In the past, the CFTC determined that a contract for the sale of Brent Crude was a forward transaction because the parties intended physical settlement, and the possibility of booking-out the transaction did not disqualify it as a forward merely because the booking-out transaction was a subsequent transaction.

physically settle in relation to forward contracts (the forward contract exclusion) as long as the contract was between sophisticated participants and each party to the contract was able to make and receive delivery, regardless of the intent to deliver. This extended to "book-outs" (see below), which did not disqualify the transaction as a forward because the booking-out transaction was a subsequent transaction. The reigniting of the "intent" requirement means that there is an uncertainty for energy companies as to whether they are entering into a "swap." The lack of a definition of "nonfinancial commodity" adds to the uncertainty. A letter sent by US Senate Banking Committee Chairman Christopher Dodd and US House Agriculture Committee Chairman Blanche Lincoln to their US House of Representatives counterparts (the "Dodd-Lincoln letter")[6] confirms that Congress intended forward contracts to be excluded from the Act and encourages the CFTC to clarify through rulemaking that a nonfinancial commodity intended for physical delivery will be treated consistently with the current forward contract exclusion.[7] Without further rulemaking from the CFTC, the treatment of forwards remains unclear.

As noted, a forward contract for a physical commodity entered into by an end-user would not be exempt from the definition of "swap" unless there was intent to deliver the underlying physical commodity. Requiring intent to physically deliver raises the questions of what constitutes intent, whose intent is relevant and at what point in the negotiation of the contract intent is required. For example, where an end-user enters into multiple contracts and takes delivery under only one of them, is the intent requirement satisfied for all contracts or only those that are physically settled? Must both the purchaser and the seller under the contract have intent and must they intend the same thing at the same time? What level of intent is sufficient? For example, must a party intend to take delivery of the entire contract or is intent as to partial delivery sufficient? What happens if a party intends physical settlement at the outset but changes its mind? Without further clarification, there is much uncertainty for end-users as to whether they are entering into a swap in respect of a physical commodity.

The current uncertainty affects energy companies in many ways, not least because it muddies the water surrounding "booking-out" transactions (i.e., those where the parties later agree to accept net cash settlement rather than physical delivery). At present, "book-outs" are exempt from CFTC regulations; however, there is no specific exemption under the Act.[8] Further, the energy market needs clarification that options that settle into forwards or physically settled spot contracts are not swaps. These products are used widely by energy companies to manage commercial risk and are fundamentally a physical contract, even if the option is not exercised. Energy companies have requested that the CFTC recognize this and clarify that such options are not "swaps."

Commodity Options and Commodity Contracts

A substantial number of energy company end-users routinely manage commercial risk by entering into contracts in and options on energy commodities. Many of these are currently "exempt commodities" under the CEA but may soon be redefined as "swaps", as the exemptions under the CEA are repealed by the Act and the broad definition of a "swap" under the Act specifically refers to commodity swaps and options on commodities (which term is, itself, very broadly defined in the CEA). Many end-users have requested that the CFTC clarify the position of commodity options and commodity swaps, particularly where physical settlement is intended.

In its notice of proposed rulemaking concerning options (the "option NPRM"),[9] the CFTC confirmed that the definition of "swap" in the Act covers all options on commodities (other than options on futures contracts) and has proposed rules whereby all such commodity options will be subject to the same rules and regulations that govern all other "swaps." In part, the proposed rules would remove references to options on physical commodities from the CFTC's regulations for exchange-traded options on futures, thus making it clear that commodity options are not exempt even where physical settlement is intended.[10]

The CFTC has not yet addressed the interplay between the Act's inclusion in the definition of "swap" of (i) any option on a commodity and (ii) any agreement for any purchase or sale or delivery that is dependent on the occurrence, nonoccurrence or the extent of the occurrence of an event or contingency associated with a potential financial economic or commercial consequence, and the exclusion from the definition of "swap" of

6 Letter from US Senate Banking Committee Chairman Christopher Dodd and US House Agriculture Committee Chairman Blanche Lincoln to US House Financial Services Committee Chairman Barney Frank and US House Agriculture Committee Colin Peterson (June 30, 2010).

7 The Dodd-Lincoln Letter encourages Congress to clarify through rulemaking that the exclusion for "nonfinancial commodities" intended for physical delivery should be consistent with the forward contract exclusion that is currently in the CEA.

8 The Dodd-Lincoln letter encourages the CFTC to promulgate rules that would treat "book-out" transactions in line with current policy and construe intent to physically deliver. A "book-out" has been defined by the CFTC as "a separate, subsequent agreement whereby two commercial parties to a forward contract, who find themselves in a delivery chain or circle at the same delivery point, can agree to settle (or "book-out") their delivery obligations by exchanging a net payment." CFTC Notice of Proposed Rulemaking, *Commodity Options and Agricultural Swaps,* 76 FR 6095 n. 46 (Feb. 3, 2011).

9 *Id.* 76 FR 6095.

10 The option NPRM also addresses the issue of commodity swaps that are entered into on an agricultural commodity, treating them the same as other "swaps." *See* id. for the definition of "agricultural commodity."

any sale of a nonfinancial commodity for future shipment or delivery. Parties to energy contracts commonly enter into forward energy contracts that provide for an unfixed quantity or contain an embedded option. While it appears that components of such contracts are within the literal definition of "swap", the Congressional colloquy does not indicate that such contracts were meant to be treated as swaps under the Act.[11]

Commentators have requested that the CFTC clarify that embedded options in forward contracts and book-outs fall within the definition of an excluded forward contract instead of the definition of a "swap." End-users of energy and fuel must await further rulemaking for clarification on these points.

The Definitions of "Swap Dealer" and "Major Swap Participant" and the Resulting Implications[12]

Defining "Swap Dealer" and "Major Swap Participant"

The Act inserts a new Section 1a(49) into the CEA that defines an SD as a person who:

- Holds itself out as a dealer in swaps;
- Makes a market in swaps;
- Regularly enters into swaps with counterparties as an ordinary course of business for its own account; or
- Engages in activity causing itself to be commonly known in the trade as a dealer or market maker in swaps.

On December 21, 2010, the CFTC and the SEC issued joint proposed rules to further define, amongst other things, the terms "Swap Dealer" and "Major Swap Participant."[13] Prior to the release of these joint proposed rules, there was concern that the third limb of the definition could be construed to capture any person, including an end-user, who regularly enters into swaps as hedging transactions or otherwise in connection with its business. However, the CFTC has clarified that the third limb is to be read keeping in mind the exemption from SD status for those persons who enter into swaps for their own account and not as part of a regular business, absent other activities. In the proposed rules, the CFTC provides guidance as to what activities would cause a person to be an SD (i.e., a person who enters into swaps as a part of a "regular business") such as tending to accommodate demand for swaps, being generally available to enter into swaps, tending to propose the terms of swaps and possessing an ability to arrange customized terms for swaps. While this guidance is helpful, concerns arise that an energy trader, or another company or entity that similarly enters into a substantial number of energy transactions with companies or entities that are not SDs, may be classified as an SD. In general, the CFTC has proposed that an entity meeting the SD definition would be treated as an SD, and therefore subject to regulation, for all swaps or activities related to swaps it engages in. However, the CFTC has stated that SDs could seek a limited designation for specified categories of swaps or activities. An SD would need to demonstrate to the CFTC, based on relevant facts and circumstances applicable to the SDs' particular activities, that a limited designation was appropriate and could do so either simultaneously with or following its initial SD registration.

In addition, the proposed rules raise concerns for those end-users who enter into their swaps through one affiliate which subsequently enters into back-to-back swaps with the operating entities. In a Congressional colloquy, Chairman Lincoln and Chairman Dodd agreed that an end-user should not become a swap dealer by virtue of using an affiliate to hedge its own commercial risk.[14] However, under the proposed rules, affiliates would be considered separate persons for purposes of the definitions. Thus, a commercial enterprise will need to evaluate each entity on a separate basis to determine whether the definitions apply to it. Furthermore, to the extent that such an affiliate is designated as an SD, it would not be eligible for the end-user clearing exception (as further discussed below). The release does state that the "economic realities" of inter-affiliate swaps should be considered, specifically stating that inter-affiliate swaps would not meet the definition of holding oneself out as a dealer. Thus, the inter-affiliate swaps themselves should not trigger a registration requirement.

The SD definition contains an exemption for those engaging in a de minimis level of swap activity. According to the CFTC, the de minimis exemption addresses amounts of dealing activity that are sufficiently small so as not to warrant registration. End-users have sought clarification from the CFTC that swaps entered into for hedging are excluded from the de minimis exemption and have

11 *See* 156 Cong. Rec. 5902 (July 15, 2010). As noted in the White & Case LLP comment letter to the definitions ANPRM, one implication of the broad definition of "swaps" under the Act is that it would make offering utility rate caps to consumers illegal, as most consumers would not be considered "eligible contract participants." *See* supra note 2.

12 For further information about the definition of a Swap Dealer and Major Swap Participant, please see the White & Case LLP Client Alert, *CFTC and SEC Propose Rules to Assist Market Participants in Determining Their Status with Respect to Key Defined Terms* (Dec. 2010).

13 SEC/CFTC Joint Proposed Rule; Proposed Interpretations, *Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant"* and *"Eligible Contract Participant,"* 75 FR 80174 (Dec. 21, 2010).

14 *See* 156 Cong. Rec. S5907 (July 15, 2010).

urged the CFTC to make sure the exemption is substantial enough not to capture those who trade in physical commodities.

The CFTC has acknowledged that (a) markets in physical commodities such as oil, natural gas, chemicals and metals have developed highly customized transactions that facilitate efficiencies, (b) some of these transactions will be caught by the Act's definition of "swap" and (c) some participants engage in swap-dealing activities in physical commodities that are above the proposed de minimis threshold. The CFTC has requested comment on the application of the SD definition to such activities.

The CFTC has also acknowledged that the use of swaps in the generation and transmission of electricity is complex because electricity cannot be stored and therefore is generated, transmitted and used on a continuous, real-time basis. Further, the number and variety of participants in the electricity market is large, some electricity services are provided as a public good rather than for profit and some participants engage in swap-dealing activities that are above the de minimis threshold set forth in the proposed rule. In the joint proposed rules, the CFTC requested comment as to different or additional factors that should be considered in applying the SD definition to participants in the generation and transmission of electricity. Specifically, the CFTC requested comment on whether there are special considerations, including conditions arising under the Federal Power Act related to non-profit, public power systems such as rural electric cooperatives and entities operating as political subdivisions of a state, and the applicability of the exemptive authority in the Act to address those considerations.

The Act inserts a new Section 1a(33) into the CEA that defines an MSP as any person who is not an SD and:

- Maintains a substantial position in any major category of swaps/security-based swaps excluding positions held for commercial hedging or mitigating risk and certain positions held by employee benefit plans;
- Whose outstanding swaps create substantial counterparty exposure that could have serious adverse effects on the stability of the US banking system or financial markets; or
- Is a financial entity that is highly leveraged relative to the amount of capital such entity holds and is not subject to capital requirements established by an appropriate federal banking agency and that maintains a substantial position in any major swaps category.[15]

The CFTC has proposed to designate four major categories of swaps for purposes of the "major swap participant" definition. The four categories are rate swaps, credit swaps, equity swaps and other commodity swaps. The fourth category includes without limitation any swap for which the primary underlying item is a physical commodity or the price or any other aspect of a physical commodity. In general, a person who meets the definition of MSP in respect of one or more of such major categories will be designated as an MSP for all swap categories and related activities. That said, the CFTC has stated that a limited designation may be available to MSPs that engage in significant activity in respect of certain swap types, classes or categories and that such limited designation should be applied for simultaneously with or following that entity's initial registration as an MSP. Parties who enter into energy-related swaps often enter into interest rate swaps and foreign exchange swaps, which would be rate swaps in the first category,[16] and commodity (including energy) transactions and options, that are commodity swaps in the fourth category, and could be an MSP under either category.

In determining whether a person maintains a "substantial position" in any major category of swaps, the CFTC has proposed two tests. One test would focus on an entity's current uncollateralized exposure; i.e., swaps having a negative value to the extent such swaps are not collateralized. The second test would measure potential future exposure.

To be excluded from the calculation of a substantial position, a swap must be held for the purpose of hedging or mitigating commercial risk. In interpreting what this means, the CFTC noted that virtually identical language is found in the Act provisions granting an exception from mandatory clearing requirement to nonfinancial entities that are using swaps to hedge or mitigate commercial risk. Because Congress used virtually identical language in both instances, the CFTC intends to interpret the phrase "hedging or mitigating commercial risk" with respect to the MSP definition in the same manner as the phrase is used in the exception from the mandatory clearing requirement (see discussion below). However, although only nonfinancial entities that are using swaps to hedge or mitigate commercial risk may qualify for the clearing exemption, with respect to the first test in the definition of who is an MSP, positions established to hedge or mitigate commercial risk may qualify for the exclusion regardless of the nature of the entity; i.e., whether a financial entity (including a bank) or a nonfinancial entity. The CFTC further stated in the proposed rule that whether a position hedges or mitigates commercial risk should be determined by the facts and circumstances at the time the swap is entered

15 The Act requires the SEC and CFTC to define substantial position by setting "prudent thresholds for effective monitoring, management and oversight of entities that are systemically important." This is addressed somewhat in the proposed rules defining SD and MSP. *See* supra note 13, 75 FR 80174.

16 This assumes that the US Treasury will not exempt foreign exchange transactions and options from the Act, which it has the power to do.

into, and should take into account the person's overall hedging and risk mitigation strategies. A swap used to hedge or mitigate a person's business risk will qualify for exclusion even if it does not constitute a hedge for accounting purposes or a "bona fide hedge" for purposes of a CFTC exemption from position limit requirements. However, a swap will not qualify for the exclusion if it is held for a purpose that is in the nature of speculation, investing or trading (the CFTC acknowledged that, while the Act makes such distinction, determining whether a swap is in the nature of speculation, investing or trading may not be obvious). Although this gives some guidance as to how the CFTC will interpret what hedges are to be excluded, uncertainty remains for end-users as to whether they may fall within the definition of an MSP.

Consequences of SD or MSP Status

There are numerous consequences to SD or MSP status, not least the fact that neither is eligible for the end-user exemption to mandatory clearing (see "Mandatory Clearing and the End-User Clearing Exception" below).[17]

Registration

The Act requires a person meeting the definition of SD or MSP to register in accordance with the Act.[18] A registered entity must demonstrate compliance with the Section 4 requirements discussed below. It is important that end-users correctly assess whether they fall within the scope of the definitions of "swap dealer" or "major swap participant" as the CFTC has authority to take enforcement action in response to a failure to register. Registration is not required until the proposed rules become effective. However, entities that believe they are an SD or MSP are permitted to register as of April 15, 2011.

Because of the uncertainty surrounding what constitutes an SD or MSP, end-users have suggested that the CFTC adopt an initial process for determining which entities are SDs and MSPs and proactively notify such entities[19] (analogous to the system used by the North American Electric Reliability Council) or allow a safe harbor for those that in good faith do not register.

Section 4 Requirements

SDs and MSPs must comply with the requirements set out in Section 4 of the CEA, as amended by the Act. Failure to demonstrate compliance will cause cessation of registration. The Section 4 requirements include:

Margin

- SDs and MSPs will be subject to mandatory initial and variation margin on swaps entered into with other SDs and MSPs, and likely also on swaps entered into with commercial end-users. Mandatory margin requirements would increase the costs of entering into swaps, tying up capital and reducing liquidity. Many energy companies do not have significant assets to post as margin or lines of credit available to post margin. See "Margin Requirements" below.

Reporting

- All swaps, including those for hedging and those that are not cleared, are subject to reporting by one of the counterparties. Section 4 provides that, where an SD or MSP is one of the parties to a swap, it shall be responsible for the bulk of those reporting obligations. See "Swap Data Reporting and Recordkeeping" below.

Recordkeeping

- Swap counterparties will be required to keep extensive records related to their swaps. The proposed reporting and recordkeeping rules for SDs and MSPs set forth a prescriptive (and, in may respects, onerous) recordkeeping regime. These requirements include keeping detailed daily trading records and communication recording. See "Swap Data Reporting and Recordkeeping" below.

Business conduct rules[20]

- The CFTC has proposed numerous business conduct rules with which an SD or MSP must comply. The rules require, among other things, that an SD or MSP establish written risk-management procedures, monitor trading to prevent violations of position limits and disclose material information about a swap to its customer including material risks and undisclosed conflicts of interest. In addition, any recommendations made must be "suitable." More onerous rules apply if the counterparty is a "special entity."[21]

17 The proposed requirements applicable to SDs and MSPs are set out in the CFTC Proposed Rule, *Registration of Swap Dealers and Market Participants*, 75 FR 71379 (Nov. 23, 2010).

18 Section 4s(a) of the CEA, as amended.

19 *See* Comments on Behalf of the Working Group of Commercial Energy Firms, on Registration Requirements for Swap Dealers and Major Swap Participants submitted Oct. 22, 2010.

20 For further information, see the White & Case LLP Client Alert, *CFTC Proposes Swap Dealer and MSP Business Conduct Standards, Conflict of Interest Rules* (Dec. 2010).

21 The term "special entity" encompasses: federal agencies, states, state agencies and political subdivisions (including cities, counties and municipalities), "employee benefit plans" as defined under the Employee Retirement Income Security Act of 1974 ("ERISA"), "governmental plans" as defined under ERISA, and endowments.

Counterparty eligibility and suitability requirements

- Each SD and MSP must verify that any counterparty meets the standards for an eligible contract participant under the CEA.[22]

Appointment of chief compliance officer (CCO)

- Each SD and MSP must designate a CCO whose duty will be to oversee and administer the SD's or MSP's compliance with the CEA. Under the CFTC's proposed rules,[23] the CCO must have the appropriate background and skills for the position and may not be subject to disqualification from registration under the CEA. The CFTC has proposed that the CCO report directly to the board of directors or the senior officer of the SD or MSP but that the board of directors would not be absolved in any way of its own duties. The board of directors and senior officers of the SD or MSP may not have undue influence over the CCO or retaliate for the CCO's performance of the CCO's duties. In addition to its other duties, the CCO will be required to file an annual compliance report with the CFTC. The CFTC has proposed restricting the CCO position from being held by a lawyer that represents the registrant.[24]

Segregation of uncleared funds

- SDs and MSPs will be required to comply with certain requirements with respect to posted collateral, including giving their counterparties the option of having initial margin posted to a segregated account. See "Collateral Segregation" below.

The Section 4 Requirements are of concern as they raise questions about potential fiduciary duties, dramatically increase disclosure requirements and impose a heightened administrative burden that will lead to cost increases in the industry.

Mandatory Clearing and the End-User Clearing Exception

Under the CEA, as amended by the Act, all swaps that are accepted for clearing by a DCO will be subject to mandatory clearing, unless one of the parties is eligible for an exception as a commercial end-user and elects not to clear. End-users should consider (a) whether their swaps will be subject to mandatory clearing, (b) whether they will be eligible for the exception, (c) how they will properly make an election not to clear and (d) what the implications of electing not to clear will be.

Swaps Required to Be Cleared

Section 2(h)(1) of the CEA, as amended by the Act, requires any person engaging in a swap that is required to be cleared to submit such swap for clearing to a DCO that is qualified to clear that swap or type of swap. On November 2, 2010, the CFTC issued proposed rules setting forth the process by which swaps will become subject to clearing.[25] Pursuant to the proposed rules, swaps already being accepted for clearing by a DCO will be automatically subject to clearing and be eligible for clearing by that DCO. In addition, a DCO may submit any swap or type of swap to the CFTC to consider whether such swap or type of swap should be subject to clearing. If the CFTC decides that such swap or type of swap should be cleared, it may also establish any limitations on trading for that particular swap or type of swap which it deems appropriate, including imposing margin or capital requirements.

Section 2(h)(2)(A) of the CEA, as amended by the Act, requires the CFTC to initiate reviews on an ongoing basis to determine whether additional swaps or types of swaps should be cleared. Pursuant to the proposed rules, the CFTC would use information gathered pursuant to CFTC regulations (including information submitted to swap data repositories ("SDRs"), as described below) to make such determinations. It is unclear at this point (a) whether the CFTC will require parties to submit swaps for clearing if it determines that they are sufficiently similar to swaps being cleared, notwithstanding that they may have certain customized provisions, and (b) whether the CFTC could require a DCO to clear a particular swap or group of swaps because it clears similar swaps.

Qualifying for the End-User Exception

Section 2(h)(7) of the CEA, as amended, provides a so-called "end-user clearing exception", pursuant to which certain parties to a swap that otherwise would be subject to the clearing requirement will have the right to decide whether such swap will be cleared and, if cleared, by whom. For the end-user exception to apply, (a) the swap must be "used to hedge or mitigate commercial risk", (b) the electing party must not be a "financial entity" and (c) the party must notify the CFTC how the party generally meets its financial obligations associated with entering into non-cleared swaps.

22 CFTC Notice of Proposed Rule, *Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties*, 75 FR 80638 (Dec. 22, 2010).

23 CFTC Proposed Rule, *Designation of a Chief Compliance Officer; Required Compliance Policies; and Annual Report of a Futures Commission Merchant, Swap Dealer, or Major Swap Participant*, 75 FR 70881 (Nov. 19, 2010).

24 For further information, see the White & Case LLP Client Alert, *CFTC Proposes Chief Compliance Officer Rules* (Dec. 2010).

25 CFTC Notice of Proposed Rulemaking, *Process for Review of Swaps for Mandatory Clearing*, 75 FR 67277 (Nov. 2, 2010).

One of the concerns raised by the energy industry is what constitutes "commercial risk."[26] The Act does not require the CFTC to define the term, but it was urged to do so, and consequently did so in the proposed rules, in order to provide legal certainty both for purposes of the MSP definition (described above) and for purposes of the end-user clearing exception.

On December 23, 2010, the CFTC issued proposed rules to govern and apply the end-user clearing exception.[27] Under the proposed rules, a swap is "used to mitigate commercial risk" if it meets two prongs. First, it must be economically appropriate to the reduction of risks in the management of a commercial enterprise generally associated with (a) the potential change in the value of the assets, services, inputs, products or commodities that a person owns, produces, manufactures, processes, merchandises, leases or sells, or reasonably anticipates owning, producing, manufacturing, processing, merchandising, leasing or selling in the ordinary course of business of the enterprise; (b) the potential change in the value of liabilities incurred or reasonably anticipated to be incurred by the person in the ordinary course of business of the enterprise; (c) the potential change in the value related to any of the foregoing arising from fluctuations in foreign exchange rates associated with such assets, liabilities, services, inputs, products or commodities and (d) any fluctuations in interest rates associated with such assets, services or liabilities. Alternatively, a swap would be deemed "economically appropriate" if it qualifies as "bona fide hedging" for purposes of the exception from position limits or if it qualifies for hedging treatment under the FASB Accounting Standards. Second, it must not be used for speculation, investing or trading or to hedge another swap that is not itself used to mitigate commercial risk. In other words, the CFTC has proposed to examine both whether the swap is of a type commonly used to mitigate a typical end-user's risks and whether such swap is actually used to mitigate such risks rather than for investment or speculation. Note also that the CFTC has specifically included transactions used to mitigate financial risk (e.g., interest rate and foreign exchange swaps) in addition to those related to physical risk.

The CFTC acknowledged that the line between speculation and hedging can at times be difficult to discern. The CFTC stated that whether a position is used to hedge or mitigate commercial risk should be determined by the facts and circumstances at the time the swap is entered into, and should take into account the person's overall hedging and risk mitigation strategies.

An issue of concern is whether an end-user can rely on the exception if it enters into swaps through an affiliate. Under Section 2(h)(7)(D)(i) and (ii) of the CEA, as amended, an affiliate of a qualifying person that does not itself qualify for the exception may nonetheless qualify if (a) the affiliate is not a financial entity, (b) it is acting on behalf of and as an agent of the person who qualifies for the exception and (c) the swap is used to mitigate the commercial risk of the qualifying person or of another nonfinancial entity affiliate. The definition of "financial entity" under Section 2(h)(7)(C) of the CEA, as amended, includes SDs and MSPs, but excludes finance affiliates, i.e., entities whose primary business is providing financing and that use derivatives to hedge underlying commercial risks related to interest rate and foreign exchange exposure, 90 percent or more of which arise from financing to facilitate purchase or lease of products, 90 percent or more of which are manufactured by the parent company or a subsidiary thereof.

Section 2(h)(7)(D)(iii) of the CEA also provides for a separate broader exception for finance affiliates, albeit one that will expire in two years. Under the so-titled "transition rule for affiliates," affiliates of a person qualifying for the end-user exception who are predominantly engaged in providing financing for the purchase or lease of merchandise or manufactured goods of the person shall be exempt from both the mandatory clearing requirements and from the margin requirements described below with respect to swaps entered into to mitigate the risk of those activities for at least a two-year period from enactment of the Act (i.e., July 21, 2012).

In summary, any affiliate of an end-user, if the affiliate is an SD or MSP, would automatically be ineligible for the exception unless it can meet one of the carve-outs for finance affiliates, with the broader carve-out potentially expiring in July 2012. Moreover, while the CFTC has yet to propose rules implementing the transitional carve-out, the fact that Congress has specifically provided for two carve-outs and designated one as temporary suggests that it is unlikely that the CFTC will broaden the scope of the permanent carve-out in any significant way.

Electing Not to Clear

Under the proposed clearing exception rules,[28] a qualifying end-user who elects not to clear a swap must provide notice of such election to an SDR (as defined and described under "Reporting and Recordkeeping" below) or, if no SDR accepts reports with respect to such swap, to the CFTC. In addition to providing certain identifying information, the electing party would have to "check the box" as to its intended means of meeting its

26 *See* Comments on Behalf of the Working Group of Commercial Energy Firms Regarding the Definition of "Commercial Risk" under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, submitted Nov. 5, 2010.

27 CFTC Proposed Rule, *End-User Exception to Mandatory Clearing of Swaps*, 75 FR 80747 (Dec. 23, 2010).

28 *Id.,* 75 FR 80747.

financial obligations under the swap—for example, pursuant to a credit support annex, pledged or segregated assets, a third-party guaranty and so on. The CFTC has asked whether specific supporting information should also be provided, though in any case the end-user would need to retain any such information and make it available at the CFTC's request under the Act's new recordkeeping requirements (discussed below). Thus, information pertaining to the election not to clear would be filed with an SDR (or the CFTC) together with information required to be reported regarding the swap itself, on a form prescribed by the CFTC.

In addition, the proposed rules provide that SEC filers would also need to indicate in their notice whether an appropriate committee of the board of directors (or its equivalent) has reviewed and approved the decision not to clear a swap. Though not explicitly stated, this representation could essentially require that each decision not to clear a swap be separately approved by the electing entity's board of directors or its committee formed for this purpose.

One significant issue that remains uncertain is whether an end-user who elects to utilize the exception will be required to post margin with respect to the swap as a result. This is discussed further below. The Act and the CFTC's proposed rules are also silent with regard to whether a swap would be subject to clearing if both counterparties are eligible for the exception and only one counterparty elects not to clear.

Margin Requirements

End-users should be aware that they may be required to post both initial and variation margin with respect to swaps they enter into in the future, whether in connection with cleared or uncleared swaps. These may be as a result of the application by the CFTC of certain margin requirements in the Act to end-users, but more likely will be a result of facing SD or MSP counterparties or clearinghouses.

Margin with Respect to Uncleared Swaps

Section 4s(e)(2)(A)(ii) of the CEA, as added by the Act, directs the CFTC to impose initial and variation margin requirements in connection with uncleared swaps entered into with SDs and MSPs. During the reconciliation of the Senate and House bills, the language clarifying that such limits are to be imposed on the SDs and MSPs themselves rather than on their counterparties was omitted. Thus, the Act is currently silent on which side of the transaction the CFTC margin requirements are to be imposed. In addition, Section 4s(e)(2)(A)(ii) does not distinguish between swaps that are not subject to clearing and swaps that are uncleared at the election of an end-user relying on the clearing exception described above. This leaves open the possibility that end-users may be required to post margin with respect to swaps that they either elect not to clear or that are not subject to clearing. If margin requirements do apply, they will require the posting both of initial margin (or an "independent amount," in ISDA argot) and of variation margin (in other words, an amount to cover any exposure).

The legislators ostensibly responsible for the change have expressed the view that the change to the text was inadvertent and that the intent was to impose the margin requirements solely on SDs and MSPs. The Dodd-Lincoln Letter states that the Act should be interpreted so as to "not punish those who are trying to hedge their own commercial risk." Moreover, CFTC Chairman Gary Gensler expressed his personal view that any margin requirements "should focus only on transactions between financial entities rather than those transactions that involve nonfinancial end-users."[29]

Section 4s(e)(2)(D) of the CEA, as added by the Act, provides that the CFTC and SEC are required to periodically consult with the prudential regulators and ensure that they are establishing comparable minimum capital and margin requirements, including with respect to the use of noncash collateral. Governor Daniel K. Tarullo of the Board of Governors of the Federal Reserve System (the "Board") stated in testimony to the US House of Representatives Committee on Financial Services on February 15, 2011 that the Board is working to impose initial and variation margin requirements in a way that reflects the relatively low systemic risk posed by most end-users. Governor Tarullo stated that the Board is considering whether it would be appropriate to allow a bank that is an SD or MSP to establish a threshold with respect to an end-user counterparty, based on a credit exposure limit that is approved and monitored as part of the credit approval process, below which the end-user would not have to post margin. He stated that the Board appreciates that posting margin would impose costs on end-users, possibly inhibiting their ability to manage their risks.

The CFTC has still not released proposed rules to implement the aforementioned provisions of the Act. Until it does, it will remain unclear whether the CFTC views itself as having the power to exempt end-users from margin requirements entirely. A possible alternative, however, would be that the CFTC imposes very low requirements on end-users. End-users should also note that any end-user affiliate that meets the broader definition of "finance affiliate" described above will be exempt from any margin requirements for at least until July 21, 2012, as discussed above with regard to the end-user clearing exception.

29 See CFTC Chairman Gary Gensler, Opening Statement, Meeting of the Commodity Futures Trading Commission (Dec. 1, 2010).

Notwithstanding whether they themselves would need to post margin, end-users may be concerned both with a rise in the cost of swaps as a result of their dealer counterparties being required to post both initial and variation margin. The Dodd-Lincoln Letter asks regulators to "carefully consider the potential burdens that [SDs] and [MSPs] may impose on end-user counterparties" as a result of any requirements imposed on those SDs and MSPs, and Chairman Gensler has hinted that any margin requirements would be more onerous with regard to uncleared swaps entered into between financial entities. However, there is no doubt that some margin requirements will apply. It is also possible that the CFTC will use its power to impose margin requirements as an incentive to standardize and clear swaps where such option exists. Moreover, it is unlikely as a practical matter that SDs and MSPs will agree to post margin without insisting that the obligation be bilateral.

Another issue to consider is whether noncash collateral may be used to satisfy any imposed margin requirements. Section 4s(e)(2)(C) of the CEA, as added by the Act, states that the CFTC "shall" permit the use of noncash collateral as it determines to be consistent with preserving the financial integrity of the markets and the stability of the United States financial system. There is disagreement over whether this amounts to prescriptive or permissive language, and the CFTC has yet to express a view on the subject. Even if not applied to end-users, the resulting impact on the cost of entering into swaps will undoubtedly increase significantly if dealers will be required to use cash collateral in every swap they enter into.

End-users should also note that one of the tests of whether a person is an MSP focuses on the uncollateralized exposure of such person's swaps. Thus, a person who opts out of clearing and is not required to collateralize all positions could, as a result of such uncollateralized positions, if the exposure were sufficiently large, become an MSP who is subject to margin requirements.

One of the purposes of Title VII was to reduce counterparty risk in the financial system. In order to achieve that purpose, the CFTC may impose margin requirements on commercial end-users who opt out of clearing. That said, both Congress and regulators have stated that they did not intend to burden commercial end-users unnecessarily, which would justify the CFTC permitting a commercial end-user who opts out of clearing and its SD counterparty to agree to a collateral arrangement that is appropriate for the particular end-user and transaction, instead of imposing rigid and standardized margin requirements similar to those of a DCO or FCM. For example, an SD who enters into a swap with an end-user may permit portfolio margining, which is feasible in the OTC market but is not feasible if margin were held by a FCM.

Margin with Respect to Cleared Swaps

Regardless of whether the CFTC, the Board and the other prudential regulators set margin requirements with respect to uncleared swaps, it is certain that margin requirements will apply to all cleared swaps and that end-users will have little to no leverage to negotiate them. Section 5b(c)(2)(D) of the CEA (known as "Core Principle D"), as amended by the Act, requires each DCO to limit its exposure to potential losses from defaults by clearing members through clearing requirements and other risk control mechanisms. On January 20, 2011, the CFTC proposed rules regarding DCO risk management that, amongst other things, require DCOs to impose certain minimum initial margin requirements on their members.[30] The clearing members will carry these over to their customers above and beyond any margin requirements they would themselves require.

Moreover, either cleared swaps will be entered into under a new standardized agreement or they will be cleared subject to the entry into a standardized addendum to an existing swap agreement. Any additional margin requirements will be incorporated in such agreement or addendum, giving the end-user the choice of either entering into the cleared swap with non-negotiable standardized margin requirements or not entering into the cleared swap.

Collateral Segregation

Uncleared Swaps

As a result of the financial crisis, market participants have become more aware of issues related to their collateral. Most notably, they are very focused on where it is held, who is holding it and whether it can be reused and rehypothecated. Section 724(c) of the Act adds a requirement to newly added Section 4s of the CEA that an SD or MSP entering into an uncleared swap must notify its counterparty that the counterparty has the right to elect the segregation of any initial margin posted in respect of the swap.[31] If the counterparty elects segregation, the SD or MSP must maintain the posted margin in a segregated account separate from the assets of the SD or MSP and such account must be held by an independent third-party custodian.

Section 724 makes it clear that the segregation requirements apply only to initial margin posted by the counterparty and not variation margin. For counterparties who elect not to require margin segregation, the SD or MSP must report to the

30 CFTC Notice of Proposed Rulemaking, *Risk Management Requirements for Derivatives Clearing Organizations,* 76 FR 3698 (Jan. 20, 2011).

31 CFTC Notice of Proposed Rulemaking, *Protection of Collateral of Counterparties to Uncleared Swaps: Treatment of Securities in a Portfolio Margining Account in a Commodity Broker Bankruptcy*, 75 FR 75432 (Dec 3. 2010).

counterparty on a quarterly basis that the back-office procedures of the SD or MSP relating to margin and collateral requirements are in compliance with the agreement of the parties. While Section 724(c) requires segregation from the assets of the SD or MSP, it does not require segregation of margin among customers of the SD/MSP. Therefore, one counterparty's margin could be placed in a segregated account together with margin posted from the SD/MSP's other counterparties.

Concerns have been raised about who will select the third-party custodian, whether the relationship will be documented in a bilateral or tri-party agreement and what safeguards will be in place to protect posted collateral in the event of a bankruptcy or a default of another customer of the custodian. Currently, in the bilateral market, a counterparty who posts collateral only takes on the credit risk of the SD/MSP or the custodian holding the collateral (if different). Other issues arise around cash collateral, how and where such cash may be invested and how new collateral segregation requirements will impact existing collateral arrangements.

In Paragraph 13 of an ISDA (governed by New York law), the parties elect whether the secured party may use posted collateral. Secured parties earn income by using posted collateral. If the pledgor does not permit the secured party to use posted collateral, the secured party will no doubt increase the pricing of the swap which increase will be paid by the pledgor. Consequently, notwithstanding provisions in the Act permitting an end-user to require an SD or MSP to segregate collateral, the increased costs to the end-user of requiring segregation of collateral may cause the end-user to forego segregation of its posted collateral, especially if the end-user is not concerned about the creditworthiness of its counterparty, the SD or MSP.

Cleared Swaps

Section 4d(f) of the CEA, as added by the Act, deals with the treatment of collateral received for margining cleared swaps. Section 4d(f) requires that an FCM treat all collateral received from a customer as belonging to the customer and segregate it from the property of the FCM. This approach is modeled on the treatment of collateral in the futures markets. However, the Act permits the FCM to commingle collateral from a customer with collateral from that FCM's other customers in an account at a DCO.

To flesh out the requirements of Section 4d(f), the CFTC has proposed four segregation models and has invited industry comment on each:[32]

Individual Segregation

This model requires individual segregation of each customer's collateral at all levels (at the FCM, the DCO and each custodian). While offering the best protection to customers, there are concerns that such a system is unworkable as it would require thousands of accounts to be created and would significantly increase processing, administrative and audit costs. Further, it would create a two-tier system whereby the cleared swaps customers of an FCM would get preferential treatment over the futures customers of that FCM as the futures market employs the omnibus account model (see below). The individual segregation model will impose high costs on FCMs that will be passed on to customers through fees and increased margin requirements and would therefore seem to contradict Congress's intent "to protect end-users from burdensome costs associated with margin requirements and mandatory clearing."[33] There is a risk that the increase in costs could result in a reduction in customers using smaller FCMs where cost increases will likely hit hardest, leading to those FCMs going out of business and ultimately to less competition in the market.

Omnibus Account

Under this model, collateral of each customer is segregated from the assets of the FCM but commingled with the collateral of the FCM's other customers. This is the current futures model, which treats an FCM's customers on an omnibus basis. An omnibus account model has benefits because of the efficiencies in being able to net all payments across the account.

With the omnibus account model, if an FCM defaults to a DCO and the default is caused by a customer of the FCM, the DCO is permitted to use collateral belonging to the FCM's other customers to satisfy the obligation. This is not the case if the default is caused by the FCM itself. This essentially means that customers bear the risk of default of each other ("fellow customer risk") but not as against the FCM.

Legal Segregation with Commingling

Under this model, collateral of the FCM's customers is placed in a commingled account, but the FCM is required to send a daily report to the DCO showing each customer's positions and each customer is effectively treated as being separate. The DCO may not use the collateral attributable to the defaulting FCM's non-defaulting customers as a DCO default resource so there is no fellow customer risk. This method uses one account so there are less additional costs, but it requires FCMs to report daily about the customer's cleared positions which will require the creation of new reporting systems at FCMs and increase administration costs.

32 CFTC Advanced Notice of Proposed Rulemaking; Requests for Comments, *Protection of Cleared Swaps Customers Before and After Commodity Broker Bankruptcies,* 75 FR 75162 (Dec. 2, 2010).

33 *See* Dodd-Lincoln Letter, *supra* note 6.

Waterfall

This model sets out the order in which a DCO may reach assets to cure an FCM default and provides that the collateral of non-defaulting customers would be moved to the last level of the asset waterfall. With this model, the guaranty fund bears more risk as the DCO cannot look to the collateral of the FCM's other customers until the fund is exhausted. We note that it is unclear whether only the funded portion of the guaranty fund must be exhausted or if the unfunded portion is also relevant. Guaranty funds are likely to become larger, and therefore more costly, if this model is adopted.

There are concerns in the market that using any model other than the omnibus account model will significantly increase costs, particularly through higher initial margin requirements—something that energy company end-users are particularly sensitive to. Further, there are concerns about a system that treats the collateral for cleared and uncleared swaps differently. Commentators have opposing views on which model is optimal. Many end-users prefer individual segregation of their collateral, which is the model most consistent with the provisions of an ISDA Credit Support Annex, so that they will not bear fellow customer risk and will have less risk of losing their collateral if the FCM defaults in its obligations to the DCO. Such end-users state that while arguments are made that segregation will increase the costs of entering into swaps, this has not been shown to be the case. Exchanges prefer the baseline omnibus model, which is most similar to the model for futures, since this model requires the least amount of new accounts, computer systems and administrative procedures, and entails the least cost. Many propose that the CFTC allow DCOs to offer different models to end-users, who, if given the choice among different DCOs using different models, will choose either a model that offers more protection from FCM and DCO failure and fellow customer risk, or a model with lower associated costs.

Reporting and Recordkeeping

Under the CEA, as amended by the Act, swap participants would be subject to two disclosure and recordkeeping regimes. First, under new Section 2(a)(13) of the CEA, all swap data would be subject to real-time public reporting with the purpose of leveling the playing field with regard to pricing. Second, under newly added Section 4r of the CEA, all swap participants would be subject to confidential reporting and recordkeeping obligations that would vary substantially based on their status (as SDs, MSPs or otherwise), the status of their counterparty and whether the swap is cleared. This includes swaps entered into before enactment of Title VII which have not expired as of the date of enactment (July 21, 2010). Regardless of whether they are classified as SDs or MSPs, energy company end-users may face significant reporting requirements.

Real-Time Public Reporting

Section 2(a)(13) of the CEA directs the CFTC to require real-time public reporting of data relating to any swap transaction, including price and volume, as soon as technologically practicable after the execution of the swap transaction. This section provides that such data shall include price and volume but shall not include the business transactions and the market positions of any person.

Section 21 of the CEA, as added by the Act, establishes a newly created type of registered entity called a swap data repository (an "SDR") whose role will be to collect the swap data prescribed to be collected under the Act and, with respect to real-time public reporting data, to make that information available to the public. On December 7, 2010, the CFTC published a notice of proposed rulemaking governing the collection of real-time swap data.[34] Under the CFTC's proposal, parties to a swap would report the information described above to a real-time disseminator, which would either be an SDR that accepts such data or a third-party service provider. Any party to a swap executed on a swap execution facility or a designated contract market, i.e., an exchange (each, a "swap market") will not be subject to any real-time reporting requirements; such reporting would be handled by the swap market. For off-facility swaps (i.e., executed off of a swap market, whether cleared or uncleared) one of the parties would be responsible for such real-time reporting. The proposed rules specify that, if one party is an SD and the other is an MSP, the SD should report; if one party is an SD or MSP and the other party is not, the SD or MSP should report; and if neither is an SD or MSP, the parties shall decide which party to the swap will report.

Reporting must occur "as soon as technologically practicable" after execution. The CFTC has interpreted "as soon as technologically practicable" to mean "as soon as possible, taking into consideration the prevalence, implementation and use of technology by comparable market participants." It is contemplated that reporting will occur almost immediately after execution of a swap. While financial entities are expected to establish technology solutions to facilitate such reporting, reporting may be more challenging to end-users who enter into swaps with other (non-SD/MSP) end-users and are tasked with the reporting obligation. Web portals established by SDRs should facilitate reporting.

Please note that "execution" is not the moment when a confirmation is sent but rather the moment at which the parties agree to the primary terms (but not necessarily all terms) of a swap, whether orally (generally by phone), electronically, in writing or otherwise and are legally bound. For example, New York law provides that swaps need not be in writing in order to be legally binding.

34 CFTC Notice of Proposed Rulemaking, *Real-Time Public Reporting of Swap Transaction Data*, 75 FR 29994 (Dec. 7, 2010).

There is an exception to the real-time reporting requirement for block trades and large notional swaps, which will be subject to a delay in reporting to the public. For standard trades executed on a swap market, there will be a 15-minute reporting delay. The CFTC has requested comment on the appropriate time delay for reporting large customized notional swap transactions.

Energy and commodity markets have experienced fraudulent reporting of transactions to price publishing sources in order to obtain advantageous results under existing energy trades. The CFTC requires reporting parties to report errors or omissions in swap transaction and pricing data that were publicly disseminated. In order to prevent fraudulent dissemination for the purpose of distorting market pricing, reporting parties, swap markets and registered SDRs that accept and publicly disseminate swap transaction and pricing data in real-time are prohibited from submitting or agreeing to submit a cancellation or correction for the purpose of re-reporting swap transaction and pricing data in order to gain or extend a delay in publication or otherwise to evade the reporting requirements.

In accordance with the requirements of the Act, the proposed rules prohibit the public disclosure of information that identifies or otherwise facilitates the identification of a party to a swap. The SDR may not make publicly available swap transaction and pricing data in a manner that discloses or otherwise facilitates the identification of a party to a swap. However, particularly for commodity swaps with specific underlying assets, market participants may be able to infer the identity of a party to a swap based on the description of the underlying asset. For example, if the underlying asset is an energy commodity contract that has a specific delivery point at Lake Charles, Louisiana and such contract is only traded by two companies, then disclosing the underlying asset to the public would effectively disclose that one of those companies was entering into the trade. The proposed rules allow reporting parties to publicly disseminate a description of an underlying asset or tenor in a way that does not disclose the party but provides a meaningful understanding of the swap for the purpose of price discovery. In the example, instead of saying a specific delivery point of Lake Charles, Louisiana, the reporting party may use a broader geographic region, such as Louisiana, Gulf Coast.

One concern these requirements raise is that the proposed rules do not take into account the negative impact on illiquid segments of the market such as long-dated swaps. In an illiquid market, the real-time reporting requirements might impede the ability of an end-user to offload a significant position if the market almost immediately moved against the end-user's position. In addition, SDs may impose higher credit charges or exit illiquid segments or time periods entirely, recognizing that they will only have a short time to offload or offset a trade before they need to report it and thus run the risk of being unable to liquidate a large position at a favorable price. This is of particular concern in the energy market, where production is typically hedged well beyond the next two or three years. An end-user, in its analysis of a swap it intends to execute, must now consider the possible effect of immediate dissemination to customers of the SD with whom the end-user will enter into the swap and, regardless of whether the end-user enters into the swap with an SD, immediate public dissemination of the swap terms including pricing of the swap.

The CFTC has not specified an effective date for the real-time reporting requirements and has requested comments on the appropriate implementation schedule, specifically asking whether different types of reporting parties should have different implementation timeframes. However, it noted that minimum block sizes would be published by registered SDRs by January 2012, and that "it is anticipated that registered entities and registrants will have begun their compliance by that time."

Swap Data Reporting and Recordkeeping

Newly added Section 4r of the CEA provides for the reporting of data related to all swaps to an SDR (or to the CFTC until SDRs are ready to accept such data), which would make such data electronically available to regulators. Furthermore, Section 4r directs the CFTC to collect information with regard to swaps entered into prior to the date of enactment of the Act, and states that the CFTC may require such reporting as early as 30 days from the date of enactment of the Act. These provisions became effective upon the enactment of the Act. On December 8, 2010, the CFTC published a proposed rulemaking to implement these provisions.[35]

Swap Data Reporting

The CEA, as amended, directs the CFTC to prescribe rules with regard to the reporting of uncleared swaps that are to be comparable to those applicable to clearing organizations. The CEA further requires that at least one counterparty must report data concerning that swap to an SDR or, if not accepted by an SDR, to the CFTC directly.

As with real-time data reporting, if one party is an SD and the other is an MSP, the SD should report; if one party is an SD or MSP and the other party is not, the SD or MSP should report; and in all other situations, the parties must select a party that will report.[36] However,

35 CFTC Proposed Rulemaking, *Swap Data Recordkeeping and Reporting Requirements,* 75 FR 76574 (Dec. 8, 2010).

36 Commentators have suggested that the CFTC prescribe who should report if neither party is a SD or MSP although the Act may not afford the CFTC this latitude since it expressly states that the counterparties "shall select a counterparty to report."

the proposed CFTC recordkeeping and reporting rule includes a significant deviation from this formula: if only one counterparty is a US person, that counterparty shall fulfill all counterparty reporting obligations. Therefore, an end-user who enters into a swap with a non-US branch of a foreign bank would be responsible for reporting with respect to the swap, notwithstanding the counterparty's greater capacity to fulfill such obligations. Depending on whether the swap is executed on a trading platform, cleared or both, some (but not all) of these reporting requirements will be fulfilled by the platform or the DCO.

Energy companies should note that, even if they are not designated as SDs or MSPs, they may face significant reporting obligations (both with respect to general swap data reporting and with respect to the real-time reporting discussed above) in connection with their commodity swaps. Energy swaps are often entered into across from other commercial counterparties as opposed to dealers. In addition, many of these swaps are entered into off-exchange and only recently have some CFTC-regulated clearing entities begun accepting such swaps for clearing. As a result, one of the counterparties will need to bear the full brunt of the reporting obligations enacted under the Act with respect to many of these swaps.

Under the proposed rules, the reporting party will need to provide information both at the swap's inception and, based on the swap asset class, either (a) to report contract intrinsic (that is, scheduled) event data and life cycle event (that is, an event that changes the terms of the swap) data or (b) to provide a daily snapshot of all primary economic terms. The former would be applicable to relatively standardized asset classes, which shall initially include security-based swaps, credit default swaps and equity swaps, while the latter would be applicable to the more customized asset classes such as interest rate swaps and currency swaps and to all other swap asset classes. In addition, all swaps will be subject to daily valuation reporting. Events that affect the price of a swap during its term must be reported, such as amendments, full and partial novations and unwinds. While not stated in the CFTC's proposed rules, the occurrence of an event triggering a barrier option would be a price-affecting event required to be reported.

Corporate Affiliation Reporting

The proposed rules provide the onerous requirement that every swap counterparty would be obligated to report all of its corporate affiliations into a confidential database that shall be available to the CFTC and all parties that can access data from SDRs. Each counterparty will also have the obligation to report all changes to this information and to ensure that it is current and accurate at all times. One reading of the proposed rules would require entities of a corporate group that have numerous swap counterparties to each separately report and keep current their corporate affiliation information. The proposed rules do not detail when this database would become available or when these reporting obligations would commence.

Information Sharing and Confidentiality Concerns

End-users may have cause for concern regarding the protection of the confidential information they disclose to SDRs. The CEA, as amended by the Act, provides that any information provided to an SDR shall be made available on a confidential basis to US regulatory authorities as well as "to any other person that the [CFTC] determines to be appropriate." While the SDR is required to enter into a written agreement with each recipient of such information to ensure the confidentiality of such information, the Act only provides that such agreement will indemnify the CFTC for any resulting litigation; it does not provide that the swap entities will have any right of action for breach of such confidentiality obligations or that the CFTC will be required to litigate such breach.

Recordkeeping Obligations

There is also a great deal of uncertainty in respect of swap counterparties' obligations with respect to retaining swap information, including with respect to preexisting unexpired swaps. The CFTC has published two interim final rules, one with regard to swaps entered into prior to the enactment of the Act and another with regard to swaps entered into between the enactment of the Act and the effective date of the final reporting and recordkeeping rules.[37] The interim final rules are substantively identical to each other and provide generally for the retention of all existing swap information until the final reporting and recordkeeping rules become effective and specify exact recordkeeping obligations. Specifically, the interim final rules direct parties to retain "all information, to the extent and in such form as they exist on the effective date of the section, relating to…the terms of the swap transaction, including but not limited to any information necessary to identify and value the transaction" and "information relevant to the price and payment of the transaction."

The breadth of these requirements should be cause for concern. First, since the definition of the term "swap" in the Act is broad and the CFTC has yet to further define it, information with regard to transactions not intuitively thought of as swaps fall within these requirements, including any option and any conditional purchase or sale contract. In addition, end-users may find it difficult to determine what information would be considered necessary to value a swap or

37 CFTC Interim Final Rule; Request for Public Comment, *Interim Final Rule for Reporting Pre-Enactment Swap Transactions*, 75 FR 63080 (Oct. 14, 2010); CFTC Interim Final Rule, *Reporting Certain Post-Enactment Swap Transactions*, 75 FR 78892 (Dec. 17, 2010).

what is relevant to its price, as hedges may be valued and prices determined in relation to the commercial risk being hedged. Energy companies have requested that the CFTC specify exactly what records must be retained for pre-enactment swaps.[38]

Similarly, while the proposed reporting and recordkeeping rules provide specific information on what data would be required to be reported, they are even more vague about what information a non-SD/MSP swap party would need to retain. The proposed rules provide generally that, with respect to non-SD/MSP counterparties, the information to be retained shall "include, without limitation, … 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 that they are required to report," as well as any information that demonstrates that a counterparty is entitled to rely on the end-user clearing exception with respect to a swap.

On December 8, 2010, the CFTC also released a separate proposed reporting and recordkeeping rule specifically applicable to SDs and MSPs.[39] This release is prescriptive and specific with regard to the information to be retained. Though it is unclear what specific recordkeeping obligations will be applicable to non-SDs/MSPs, they will likely be less onerous than those applicable to SDs and MSPs. In addition to requiring the retention of all information related to their reporting obligations, the proposed rule requires SDs and MSPs to maintain highly detailed daily trading records and all related records (including records of related cash and forward transactions), as well as to record all related communications (including e-mail, instant messages and telephone calls). In addition, SDs and MSPs must keep a complete audit trail related to all swaps that would allow "comprehensive and accurate trade reconstructions."

Under the proposed rules pertaining to general reporting and recordkeeping requirements,[40] swap data records must be retained from swap creation until five years following termination, "in a form and manner acceptable to the CFTC." Swap data records must be retrievable within three business days of a CFTC request. In addition, swap data records maintained by SDs and MSPs must be readily accessible electronically during the life of the swap and for two years thereafter.

Position Limits

Section 4a of the CEA, as amended by the Act, directs the CFTC to set position limits for all regulated exempt and agricultural commodity derivatives within 180 and 270 days, respectively, of the Act's enactment date. In addition, the CEA, as amended, requires the CFTC to implement aggregate position limits across certain derivatives positions established on designated contract markets ("DCMs") swap execution facilities, foreign boards of trade or through bilateral trading. The CEA, as amended, directs the CFTC to establish spot-month, single-month and all-months combined position limits on 28 core physical delivery futures contracts (including energy, metals and agricultural commodities) and their "economically equivalent" derivatives,[41] including swaps (collectively, "referenced contracts").

In January 2010, the CFTC proposed to implement position limits for futures and options contracts based on a limited set of exempt energy commodities. The 2010 proposed limits would have established CFTC-set position limits for four enumerated types of contracts and, with limited exceptions, any other type of contract that was exclusively or partially based on such enumerated contracts' commodities and delivery points. The CFTC withdrew the 2010 proposed limits in August 2010 in anticipation of enacting position limits based on its broader authority under the Act. While the CFTC has taken into account and addressed certain comments from the industry in its newly proposed position limits rulemaking, many concerns remain.

On January 26, 2011, the CFTC proposed a framework for implementing position limits for certain commodity futures contracts and derivatives.[42] Under the CFTC's newly proposed rules, the CFTC would establish the required position limits in two phases. During the first phase, the CFTC would establish spot-month position limits at levels equal to those currently imposed by the DCMs. These limits would apply in the same way the exchange spot-month position limits currently function. During the second phase, the CFTC would establish single-month and all-months combined position limits and would set its own spot-month limits based on its determination of deliverable supply. Any positions established in good faith prior to the effective date of the proposed position limits will be exempt from such position limits.

38 *See* Comments on Behalf of the Not-For-Profit Electric End-user Coalition (NRECA) Regarding the Interim Final Rule on Data Recordkeeping and Reporting, submitted November 15, 2010. The suggested documents to be retained include swap confirmations, applicable master agreements to the extent they contain or define commercial terms in such confirmations, and any modification of those documents.

39 CFTC Notice of Proposed Rulemaking, *Recordkeeping and Daily Trading Records Requirements for Swap Dealers and Major Swap Participants*, 75 FR 76666 (Dec. 9, 2010).

40 *Supra* note 35, 75 FR 76574.

41 An "economically equivalent" derivative is one that is (1) directly or indirectly linked, including being partially or fully settled on, or priced at a differential to, the price of any core referenced futures contract; or (2) directly or indirectly linked, including being partially or fully settled on, or priced at a differential to, the price of the same commodity for delivery at the same location, or at locations with substantially the same supply and demand fundamentals, as that of any core referenced futures contract.

42 CFTC Notice of Proposed Rulemaking, *Position Limits for Derivatives*, 76 FR 4752 (Jan. 26, 2011).

Exemption for Bona Fide Hedging Transactions

The position limits established by the CFTC would be subject to exemptions for bona fide hedging transactions, which the proposed rules define as a transaction or position in a referenced contract that (i) represents a substitute for transactions made or to be made or positions taken or to be taken at a later time in a physical marketing channel; (ii) is economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise; (iii) arises from the potential change in the value of assets a person owns, produces, manufactures, processes or merchandises (or anticipates owning, producing, manufacturing, processing or merchandising), liabilities a person owns (or anticipates incurring) or services a person provides or purchases (or anticipates providing or purchasing); or (iv) reduces risk attendant to a position resulting from a swap executed opposite a counterparty for which the transaction would qualify as a bona fide hedging transaction in (i), (ii) or (iii) above or meets the requirements of (i), (ii) or (iii) above.

Notwithstanding the fact that end-users would not technically be limited in their ability to enter into bona fide hedges, they should consider the impact on liquidity and price discovery that will result from taking SDs outside the scope of the bona fide hedging exception other than with regard to swaps facing end-users or directly offsetting such swaps. For example, SDs will be subject to position limits when facing speculators and investors who are themselves already subject to the same position limits.

Aggregation and Netting of Positions

The proposed position limits would apply to the aggregate positions of all entities in which a trader (i) has a direct or indirect ownership interest of greater than 10 percent or (ii) controls trading. Similarly, all positions held by two or more traders acting pursuant to an express or implied agreement must be aggregated.

Under the proposed spot-month position limits, a trader's position in physical delivery contracts and cash-settled contracts would be calculated separately. Therefore, traders could hold positions up to the spot-month position limit in both types of contracts, unless the cash-settled contract positions were held pursuant to the conditional-spot-month position limit.[43] On the other hand, the proposed non-spot-month position limits would consist of single-month and all-months combined limits that would apply both across classes and to contracts of the same class.[44] To determine a trader's compliance with non-spot month position limits, a trader's position would be combined and the net resulting position would be applied against the applicable proposed single-month and all-months combined position limits. To determine a trader's compliance with non-spot month class limits, a trader's position in contracts of the same class would be combined and the net resulting position would be applied against the applicable class single-month and all-months combined position limits.

The alarming "crowding out" provisions that were included in the CFTC's January 2010 proposal have, to the relief of many, been omitted in the CFTC's newly proposed rules. However, commentators have noted that the requirement to apply certain limits both at the per-class level and at the aggregate level, combined with the narrow definition of bona fide hedging, will significantly increase the cost for market participants. For example, certain derivative transactions that advance the goals of risk transfer and price discovery will fall outside the scope of the bona fide hedge exemption and count against the limits of the SDs' acting as counterparties. Because the proposed within-class limits will restrict the ability of an SD (and other market makers) to hedge the risks of acting as counterparties to legitimate investors and speculators, an SD will probably limit the size of the positions that such SD will be willing to hold and the amount of liquidity it will be willing to supply to the OTC market.

Position Visibility Levels

In order to monitor large positions for metals and energy contracts, the proposed rules would also require any trader who holds or controls positions in referenced contracts that exceed the proposed visibility levels to submit additional information regarding their cash market and derivatives activity, including positions in substantially the same commodity.

The proposed rules provide that, as a general matter, such information must be submitted no later than 9 a.m. on the business day following the day such reporting or filing obligation is incurred. This imposes very tight time constraints on market participants. Though unspecified, this would presumably mean 9 a.m. Eastern Standard Time (since the CFTC is located in Washington, DC), making compliance particularly problematic for trading parties in the Midwest and on the West Coast.

43 With respect to cash-settled contracts, the proposed rules incorporate a "conditional-spot-month limit" that permits traders without a hedge exemption to acquire position levels that are five times the spot-month limit if such positions are exclusively in cash-settled contracts and the trader holds physical commodity positions that are less than or equal to 25 percent of the estimated deliverable supply.

44 "Contracts of the same class" are defined in the proposed rules as referenced contracts based on the same commodity that are (1) futures or options contracts executed pursuant to the rules of a designated contract market or (2) cleared or uncleared swaps.

Antifraud, Anti-manipulation, and Anti-Disruptive Practices Provisions[45]

The CFTC has issued proposed rules to implement Section 753 of the Act which expands the authority of the CFTC to prohibit manipulative behavior, fraud or disruptive practices in connection with a swap or contract of sale of a commodity.[46] The CFTC has suggested that it will interpret what constitutes manipulation by following the judicial interpretation of Rule 10b-5 under the Securities Exchange Act, which has been interpreted as a broad catch-all for fraud and manipulation. The CFTC has also stated that it takes a broad view of what manipulation covers and that every effort to influence the price of a swap, commodity or commodities futures contract will fall foul of the rules. The anti-manipulation, antifraud, and anti-disruptive practices rules require specific intent to defraud or manipulate or recklessness thereto, not mere negligence or gross negligence, which seems to lower the current legal standard requiring intent. End-users have raised concerns about whether recklessness is an appropriate standard.

As of yet, it is unclear where the CFTC will end up in relation to the various elements required for establishing manipulation, fraud and disruption. It is clear, however, that the CFTC wishes to retain a flexible approach in interpreting what actions constitute prohibited practices and activities. This approach is at odds with the market's desire for certainty and bright-line rules and end-users' concerns that common practices may now fall within the scope of what is prohibited given the vague and unclear language in the proposed rules.

Effect on Existing Swaps

Another issue of concern is what effect the Act will have on swaps entered into prior to the date of enactment of the Act. Section 739 of the Act provides that, unless "specifically reserved," neither the Act nor any requirement or amendment thereunder shall constitute a termination event, illegality, regulatory change or similar event that would permit a party to terminate, renegotiate, modify, amend or supplement such a swap. This section raises significant unanswered questions, both with regard to interpretation—what does "specifically reserved" mean? Does it mean the Act, or specific provisions thereunder, need to be specifically referenced? And with regard to enforceability, can Congress impinge to this extent on the contract rights of private parties, including barring them from treating a change in law as a change in law?

In addition, it is unclear whether this provision prevents counterparties afforded new rights under the Act (such as the segregation of collateral) from demanding them with regard to preexisting swaps.

CFTC and FERC Concurrent Jurisdiction

The energy industry is concerned with the overlap in jurisdiction between the CFTC and FERC. FERC is authorized by law to regulate agreements, contracts and transactions (i) that are not executed, traded or cleared on a registered entity or trading facility and (ii) that are entered into pursuant to a tariff or rate schedule approved by FERC. These would include energy swaps, which, as discussed above, also fall within the Act's definition of "swap" and therefore under the CFTC's jurisdiction. As also discussed above, the CFTC's anti-manipulation authority was expanded under the Act, but the FERC already has similar anti-manipulation authority through the Energy Policy Act.

Section 720 of the Act requires the CFTC and FERC to negotiate memoranda of understanding ("MOUs") to establish their respective jurisdictional boundaries, as well as to share information in connection with their enforcement authority. These MOUs were required to be concluded in January, but no substantive status updates have been forthcoming. End-users have requested that the CFTC address the overlaps resulting from its newly expanded jurisdiction and set out potential jurisdictional issues in the MOUs and cooperate with the FERC in its rulemaking.

The purpose of Title VII is to regulate the, as of yet, largely unregulated swap market. By contrast, the energy market is already highly regulated at a federal, state and local level. As a general matter, additional regulation of the energy industry through the Act is viewed by the industry as unnecessarily burdensome, expensive and duplicative.

45 For further information, please see the White & Case LLP Client Alert, CFTC and SEC Propose Antifraud Rules; *CFTC Promulgates Anti-Manipulation Rules and Seeks Comment on Disruptive Practices Rulemaking* (Dec. 2010).

46 CFTC Notice of Proposed Rulemaking; Request for Comments, *Prohibition of Market Manipulation*, 75 FR 67657 (Nov. 3, 2010); CFTC Advance Notice of Proposed Rulemaking; Request for Comment, *Antidisruptive Practices Authority Contained in the Dodd-Frank Wall Street Reform and Consumer Protection Act*, 75 FR 67301 (Nov. 2, 2010).