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The New CFTC Regulatory Regime For Private Fund Managers;
First Quarter 2013 Update

The enactment of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") and its implementation by the Commodity Futures Trading Commission ("CFTC") has ushered in a new era of regulation of managers of "private funds."[1] Although not mandated by the Dodd-Frank Act, on April 24, 2012, the CFTC repealed CFTC Rule 4.13(a)(4), the exemption from registration as a "commodity pool operator" under the U.S. Commodity Exchange Act ("CEA") commonly relied upon by managers of private funds. The impact of this action is addressed in our Alert of August 27, 2012.[2]

This White Paper provides a survey of some of the most significant aspects of the new swaps regulatory regime mandated by the Dodd-Frank Act that directly impact private fund managers. The CFTC has regulatory authority over "swaps," the Securities and Exchange Commission ("SEC") has regulatory authority over "security-based swaps,"[3] and the CFTC and SEC share regulatory authority over "mixed swaps."[4] For ease of presentation, this White Paper focuses on the regulatory actions of the CFTC, many of which have been taken in close coordination with the SEC.[5]

I. Swap Transaction Clearing, Reporting and Recordkeeping Requirements.

A. The Obligation to Clear Swaps.

A fundamental component of the Dodd-Frank Act is to generally require exchange trading and central clearing of standard swaps in order to decrease systemic risk. Pursuant to Section 2(h) of the CEA, the CFTC may determine that a group, category, type, or class of swap must be centrally cleared. The CFTC may then exercise its discretion in applying the compliance schedule set forth below in connection with a particular clearing requirement determination. To date, the CFTC has issued such a determination only with respect to certain classes of interest rate swaps and credit default swaps ("Determined IR Swaps and CDS"):[6]

> A swap between a "Category 1 Entity"[7] and another Category 1 Entity, or any other entity that desires to clear the transaction, is required to be cleared no later than 90 days after publication of such clearing requirement determination in the Federal Register (a "Federal Register Publication Date"). The CFTC has set the compliance date as March 11, 2013 for Determined IR Swaps and CDS.
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> A swap between a "Category 2 Entity"[8] and a Category 1 Entity, another Category 2 Entity, or any other entity that desires to clear the transaction, is required to be cleared no later than 180 days from the Federal Register Publication Date. The CFTC has set the compliance date as June 10, 2013 for Determined IR Swaps and CDS.
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> All other swaps (unless an exception for "commercial end users"[9] is elected) are required to be cleared no later than 270 days from the Federal Register Publication Date. The CFTC has set the compliance date as September 9, 2013 for Determined IR Swaps and CDS.

Depending on its level of swap activity, a private fund could be either a Category 1 Entity or a Category 2 Entity.

B. Swap Reporting.

1. The Obligation to Obtain a "LEI."

It is unlikely that a private fund manager or a private fund will be a swap dealer ("SD") and highly unlikely that it will be a major swap participant ("MSP") (each such entity, a "Non-SD/MSP"). The term SD "does not include a person that enters into swaps for such person's own account, either individually or in a fiduciary capacity, but not as part of a regular business."[10] The statutory definition of "major swap participant" includes a "financial entity," such as a private fund,[11] that is "highly leveraged relative to the amount of capital it holds,"[12] but only if it maintains a "substantial position in any major swap category," as determined by the CFTC. To date, only two entities have registered as a MSP and the CFTC has estimated that the total number of MSPs will be six or fewer.[13]

Nonetheless, when a manager engages in swap transactions on behalf of a private fund the fund will be subject to real-time and swap data reporting regulations (CFTC Regulations Parts 43, 45 & 46) as a Non-SD/MSP counterparty. Note that although foreign exchange swaps and forwards are not "swaps" under the Determination issued by the Treasury Department in November 2012[14] (the "Treasury Determination"), the Treasury Determination specifically states that such contracts are subject to certain swap data reporting requirements.

As part of this reporting regime, all swap counterparties that are not natural persons must have a Legal Entity Identifier ("LEI"),[15] which is meant to facilitate the operation of a global system of swap data reporting to swap data repositories (the "Global LEI System")[16] under the management of a Regulatory Oversight Committee (the "ROC"). As the Global LEI System is not yet in operation, the CFTC, DTCC[17] and SWIFT[18] have created the CICI (the ***C***FTC ***I***nterim ***C***ompliant ***I***dentifier) to be used in place of the LEI for swap data reporting. The CFTC expects CICIs will become LEIs once the Global LEI System is fully implemented. Although the ROC targeted implementation of the Global LEI System for March 2013, an updated implementation target date has not yet been set. However, the ROC did publish criteria for the issuance of interim identifiers such as the CICI.[19] The deadline for Non-SD/MSP counterparties to obtain a CICI, depending on type of swap and Non-SD/MSP counterparty, may be as early as April 10, 2013. A SD or MSP may obtain a CICI on behalf of a Non-SD/MSP with its explicit permission.[20]

A private fund manager that engages in proprietary trading in swaps for its own account also will need to obtain a CICI for itself. If the manager is registered with the SEC as an investment adviser, obtaining a CICI will require a prompt amendment to its Form ADV to report the adviser's CICI under Part 1A Item 1.P.

2. Reporting Obligations.[21]

After May 29, 2013, when a private fund that is a Non-SD/MSP enters into a swap transaction with a counterparty that is a SD or MSP, the SD or MSP will be responsible for reporting the

swap. This reporting deadline had been April 10, 2013 for all swaps, but pursuant to a CFTC no-action letter of April 9, 2013, the reporting deadline varies depending on the type of swap and counterparty and could be as early as April 10, 2013 or as late as October 31, 2013."[22]

When a private fund that is a Non-SD/MSP enters into a swap transaction with another Non-SD/MSP counterparty, the reporting obligation runs to the counterparty that is a "financial entity" which term, as defined in Section 2(h)(7)(C) of the CEA, includes a private fund. Thus, the private fund will have the reporting obligation if its Non-SD/MSP counterparty is not a "financial entity." However, if both counterparties to a swap are Non-SD/MSP counterparties and only one counterparty is a U.S. person, then that counterparty will be the reporting counterparty.

When a private fund that is a Non-SD/MSP enters into a swap transaction with a counterparty that is also a Non-SD/MSP counterparty and a financial entity, the counterparties must agree as a term of the swap which counterparty will be the reporting counterparty. In this case also, if both counterparties to a swap are Non-SD/MSP counterparties and only one counterparty is a U.S. person, that counterparty will be the reporting counterparty.

With respect to any other swap, the counterparties are required to agree as a term of the swap as to which counterparty will be the reporting party, except that if only one counterparty is a U.S. person, the U.S. person will be the reporting party.[23]

However, for cleared swaps, a Non-SD/MSP generally has no reporting obligations, because the designated contract market or swap execution facility (or, if the swap is not executed on an exchange, the derivatives clearing organization) will generally serve as the reporting party.[24]

All swap data for a particular swap must be reported to a single swap data repository. Should there be a swap asset class for which no swap data repository registered with the CFTC accepts swap data, the reporting counterparty must report the swap data directly to the CFTC.[25]

Reporting parties are required to report swap data from each of two important stages of the existence of a swap: the creation of the swap ("creation data")[26] and the continuation of the swap over its existence until its final termination or expiration ("continuation data").[27]

C. Recordkeeping.

With respect to a swap entered into on or after April 10, 2013, each counterparty must maintain comprehensive records in paper or electronic form.[28]

With respect to a swap entered into before April 10, 2013, but in existence on or after April 25, 2011, each counterparty is generally required to retain minimum economic information as well as any swap documentation (*i.e.,* ISDA Master Agreement / Credit Support Annex / Confirmation(s), including any amendments thereto) in its possession on or after April 25, 2011.[29] Additionally, if the swap continues in existence on or after April 10, 2013, each counterparty must keep information described in the preceding sentence to the extent any such records are created by or become available to that counterparty on or after such date.

With respect to a swap that expired or terminated before April 25, 2011, but existed on or after July 21, 2010, a counterparty must retain the information and documents relating to the terms of the transaction that it possessed on or after October 14, 2010 (if the swap was entered into before July 21, 2010) or December 17, 2010 (if the swap was entered into on or after July 21, 2010).

Records must be kept throughout the life of the swap and for a period of at least five years from the final termination of the swap, and generally must be retrievable by the counterparty within five business days throughout such period. Swap records retained by a counterparty are open to inspection by the CFTC.

II. The Extra-territorial Reach of the Dodd-Frank Act Requirements.

Questions arise as to extra-territorial application of the Dodd-Frank Act to a non-U.S. domiciled private fund managed by a non-U.S. domiciled fund manager (an "Offshore Fund") and whether the admission of a "U.S. person" as an investor to such Offshore Fund would change the result.

As a general principle, the CFTC stated in its proposed interpretative guidance with respect to the "Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act"[30] (the "Proposed Guidance") that "where a non-U.S. person enters into a swap with another non-U.S. person outside of the United States, and . . . neither counterparty is required to register as a swap dealer or MSP, the [CFTC] would not apply the Dodd-Frank Act requirements to such swaps."[31] In determining whether a non-U.S. person is required to register as a SD or MSP under the Proposed Guidance a critical factor is whether the aggregate notional value of swap dealing transactions between it and U.S. persons exceeds the statutory thresholds for registration.[32] The scope of the definition of "U.S. person" for these purposes, therefore, is critical to determining whether the provisions of the Dodd-Frank Act and the CFTC rules thereunder would be applicable.

The relevant provisions of the definition of "U.S. person" contained in the Proposed Guidance and the related Proposed Exemptive Order Regarding Compliance with Certain Swap Regulations[33] (the "Proposed Order") include a fund that is:

> (ii) . . . either (A) organized or incorporated under the laws of the United States or having its principal place of business in the United States . . . or *(B) in which the direct or indirect owners thereof are responsible for the liabilities of such entity and one or more of such owners is a U.S. person . . . (iv) any commodity pool, pooled account, or collective investment vehicle (whether or not it is organized or incorporated in the United States) of which a majority ownership is held, directly, or indirectly, by a U.S. person(s) [or] (v) any commodity pool, pooled account, or collective investment vehicle the operator of which would be required to register as a commodity pool operator under the CEA . . . .*[34] (*Emphasis added*.)

The public comment periods on the Proposed Order and the Proposed Guidance closed on August 13, 2012 and August 27, 2012, respectively. Approximately 26 letters were received on the Proposed Order and approximately 288 letters were received on the Proposed Guidance.[35]

To address concerns that the application of the definition of "U.S. person" in the Proposed Guidance and the Proposed Order to global financial institutions with respect to certain "Entity Level Requirements" and "Transaction-Level Requirements" (collectively, the "Requirements")[36] generally would be difficult to implement, on December 21, 2012 the CFTC issued "Further Proposed Guidance Regarding Compliance with Certain Swap Regulations"[37] (the "Further Proposed Guidance") and approved a "Final Exemptive Order Regarding Compliance with Certain Swap Regulations"[38] (the "Final Order"). In taking such actions, the CFTC stated that it:

> has determined not take further action on the Proposed Guidance at this time . . . The Commission also believes that further consideration of public comments, including the comments that may be received on the Further Proposed Guidance regarding the Commission's interpretation of the term 'U.S. person'[39] . . . will be helpful to the Commission in issuing final interpretative guidance. Nonetheless, the Commission has separately determined to finalize the Proposed Order as a final, time-limited exemptive order . . . that is substantially similar to the Proposed Order, except for the addition of provisions regarding registration and certain modifications and clarifications addressing public comments.[40]

Subject to certain conditions, the Final Order provides temporary relief (*i.e.,* the relief provided by the Final Order expires on July 12, 2013) to SDs and MSPs with respect to the Requirements and incorporates a significantly more narrow definition of "U.S. person" than that contained in the Proposed Guidance and the Further Proposed Guidance. In particular, as relevant to an Offshore Fund, the Final Order provides that a "U.S. person" would only include a "corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund or any form of enterprise similar to any of the foregoing, in each case that is . . . organized or incorporated under the laws of a state of other jurisdiction in the United States." This definition does not include the prongs of the definition of "U.S. person" in the Proposed Guidance that are italicized in third paragraph of this Section II.

Consequently, in order to determine whether the admission of a "U.S. person" to an Offshore Fund could affect the regulatory status of such fund or its counterparties, it first must be determined whether the narrow definition of "U.S. person" in the Final Rule is applicable.[41] This, in turn, entails a fact sensitive analysis of the contemplated activity of the counterparty, the applicability of the Requirements to such activities, and the characteristics of the Offshore Fund and the prospective investor. If the Final Rule is applicable, then the admission of a U.S. person to an Offshore Fund would not cause the Offshore Fund to become a U.S. person and, consequently, the regulatory status of a non-U.S. swap counterparty should not be affected.

III. The Dodd-Frank Protocol.

To enter into new swaps, or enter into material amendments to and novations or mutual unwinds of existing swaps, after May 1, 2013, SDs will generally require adherence to the Dodd-

Frank Protocol[42] by their counterparties (including private funds). The amendment of trading documentation by counterparties under the Protocol is accomplished in two steps:

> first, by "adhering" to the Protocol *via* execution and online delivery of an executed adherence letter at the "Protocol Management" section of ISDA's website, together with the payment of a $500 Protocol Fee (note that adhering parties will be listed on the website); and
>
> second, by the bilateral exchange of a "DF Questionnaire" between counterparties. At the time of adherence, a party may specify the method through which it wishes to receive DF Questionnaires from its counterparties (*e.g.*, by a Markit portal, e-mail, or fax).

The DF Questionnaire includes information on the identity of a party (including its "CICI," discussed above), whether an agent acts on its behalf, and its status under the Dodd-Frank Act (*e.g.*, swap dealer, Special Entity[43]). It also operates as the mechanism through which the counterparties elect which portions of the "DF Supplement" they wish to incorporate into their trading documentation.[44] Clients should review the Protocol documents and be comfortable with their content, and not simply rely on dealer correspondence that may briefly describe the purpose and content of the Protocol.

SDs generally have been receptive to reasonable modifications to the terms of the Protocol. Among other things, private fund managers should note that Schedule 3 of the DF Supplement includes representations from the fund to the effect that it has written policies and procedures that are reasonably designed to ensure that an evaluation agent, if the fund has one, or the persons responsible for evaluating all swap recommendations (if any), regarding a swap and making trading decisions on behalf of the fund are capable of doing so.[45]

IV. The Application of the CFTC Regulatory Regime to Tax-Exempt Charitable Private Fund Managers and the Funds They Manage.

As a result of the effectiveness of the joint rulemaking of the CFTC and the SEC that adopted the definition of "swap," a private fund that utilizes just one futures contract or just one swaps contract generally is considered by the CFTC to be a "commodity pool" and the general partner or managing member of the fund to be a "commodity pool operator" ("CPO"). In addition, depending on the structure and operations of the fund, the investment manager of the fund might be deemed to be a CPO and a "commodity trading advisor ("CTA") or only a CTA. This development has placed renewed focus on the status of managers of the assets of foundations that are qualified as charitable organizations under Section 501(c)(3) of the Internal Revenue Code of 1986, and collective pools of such assets (each, a "Charitable Foundation").

In several interpretative letters (collectively, the "Interpretative Letters"),[46] the CFTC has advised several different charitable organizations, based upon the specific facts presented, that each such organization would not be deemed to be a commodity pool if it traded commodity interests and that the manager of the assets of such funds would not be deemed to be a CPO thereof.

The reasoning underlying the Interpretative Letters is *not* based on the fact that the organizations might be excluded from the definition of "investment company" in the Investment Company Act of 1940 pursuant to Section 3(c)(10) thereof and that the manager of such funds might be excluded from the registration requirements of the Investment Advisers Act of 1940 pursuant to Section 203(b)(4) thereof.

Section 3(c)(10) of the Company Act, generally, excludes from the definition of "investment company" any collective investment fund or similar fund maintained by a charitable organization exclusively for the collective investment and reinvestment of, among other things, assets of the general endowment fund or other funds of one or more charitable organizations.

Section 203(b)(4) of the Advisers Act excludes from the registration requirement:

> any investment adviser that is a charitable organization as defined in [Section 3(c)(10) of the Company Act] or is a trustee, director, officer or employee, or volunteer of such a charitable organization acting within the scope of such person's employment or duties with such organization, whose advice, analyses, or reports are provided only to [, among others,] (A) any such charitable organization . . . [and] (B) a fund that is excluded from the definition of an investment company under [Section 3(c)(10) of the Company Act] . . . .

Consequently, it is possible that a Charitable Foundation might be exempt from the provisions of the Company Act and the manager thereof might not be required to be registered under the Advisers Act, but the Charitable Foundation might be deemed to be commodity pool and the manager a CPO or CTA.

In this new and evolving regulatory environment it is recommended that the managers of Charitable Foundations that have relied upon Section 203(b)(4) of the Advisers Act and Section 3(c)(10) of the Company Act and the Interpretative Letters review their regulatory status if they engage in, or are authorized to engage in, transactions in futures or swaps.

V. Concluding Observation.

Private fund managers must carefully consider and monitor how the new regulatory regime being implemented by the CFTC and SEC impacts their activities. The forgoing discussion only highlights provisions of general application and how they impact any particular private fund manager is highly fact sensitive.

Please do not hesitate to contact the authors with any questions that may arise.

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[1] As used herein, a "private fund" is a fund that is excluded from the definition of "investment company" pursuant to either Section 3(c)(1) of Section 3(c)(7) of the Investment Company Act of 1940. A discussion of the provisions of Title VII that generally apply to "swap dealers" and "major swap participants," as defined in 17 C.F.R. Part 1, is beyond the scope of this White Paper.

[2] Available at: http://portal3.orrick.com/Documents/FileUpload/Publications/4877.htm.

[3] Under 15 U.S.C. 78c(a), the term "security-based swap" generally is defined as:

> any agreement, contract, or transaction that—
> (i) is a swap, as that term is defined under section 1a of the Commodity Exchange Act . . . and
> (ii) is based on—
> (I) an index that is a narrow-based security index, including any interest therein or on the value thereof;
> (II) a single security or loan, including any interest therein or on the value thereof; or
> (III) the occurrence, nonoccurrence, or extent of the occurrence of an event relating to a single issuer of a security or the issuers of securities in a narrow-based security index, provided that such event directly affects the financial statements, financial condition, or financial obligations of the issuer.

[4] A mixed swap is described as:

> a subset of security-based swaps that also are based on the value of 1 or more interest or other rates, currencies, commodities, instruments of indebtedness, indices, quantitative measures, other financial or economic interest or property of any kind (other than a single security or a narrow-based security index), or the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence (other than the occurrence, non-occurrence, or extent of the occurrence of an event relating to a single issuer of a security or the issuers of securities in a narrow-based security index, provided that such event directly affects the financial statements, financial condition, or financial obligations of the issuer).

Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 Fed. Reg. 48,208, n.10 (August 13, 2012).

[5] For a summary of the actions taken by the SEC regarding the implementation of Title VII of the Dodd-Frank Act through June 2012, *see* "Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act" available at http://www.sec.gov/spotlight/dodd-frank/derivatives.shtml

[6] *See* Clearing Requirement Determination Under Section 2(h) of the CEA, 77 Fed. Reg. 74,284 (December 13, 2012).

[7] "Category 1 Entities" are: swap dealers, security-based swap dealers, major swap participants, major security-based swap participants, and "active funds." "Active funds" are defined as any private fund that is a not a third party subaccount and that executes 200 or more swaps per month based on a monthly average over the past 12 months preceding November 1, 2012. *See* Clearing Requirement Determination Under Section 2(h) of the CEA, 77 Fed. Reg. 74,284, n. 51 (December 13, 2012).

[8] "Category 2 Entities" are: commodity pools, private investment funds other than "active funds," and persons predominantly engaged in activities that are in the business of banking, or in activities that are financial in nature as defined in section 4(k) of the Bank Holding Company Act of 1956, provided that in each case, the entity is not a third-party subaccount. "Active funds" are defined as any private fund that is a not a third party subaccount and that executes 200 or more swaps per month based on a monthly average over the past 12 months preceding November 1,

2012. *See* Clearing Requirement Determination Under Section 2(h) of the CEA, 77 Fed. Reg. 74,284, 74,289, n. 52 (December 13, 2012).

[9] The definition of "commercial end-user" excludes a "financial entity." *See* CEA § 2(h)(7)(A).

[10] "Swap Dealer" is defined in 17 C.F.R. § 1.3(ggg) as:

> any person who:
> (i) Holds itself out as a dealer in swaps;
> (ii) Makes a market in swaps;
> (iii) Regularly enters into swaps with counterparties as an ordinary course of business for its own account; or
> (iv) Engages in any activity causing it to be commonly known in the trade as a dealer or market maker in swaps.
> (2) Exception. The term swap dealer does not include a person that enters into swaps for such person's own account, either individually or in a fiduciary capacity, but not as a part of regular business.

[11] *See* CEA § 1a(33); 17 C.F.R. § 1.3(mmm).

[12] The CFTC has defined "highly leveraged," generally, to mean:

> For purposes of Section 1a(33) of the Act, 7 U.S.C. 1a(33), and paragraph (hhh) of this section, the term *highly leveraged* means the existence of a ratio of an entity's total liabilities to equity in excess of 12 to 1 as measured at the close of business on the last business day of the applicable fiscal quarter. For this purpose, liabilities and equity should each be determined in accordance with U.S. generally accepted accounting principles . . . .

17 C.F.R. 1.3(mmm)

[13] Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant," 77 Fed. Reg. 30,596, n.1351 (May 23, 2012).

[14] Determination of Foreign Exchange Swaps and Foreign Exchange Forwards Under the Commodity Exchange Act, 77 Fed. Reg. 69,694 (November 20, 2012).

[15] Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants, 77 Fed. Reg. 20,128 (April 3, 2012).

[16] In January 2013, the Financial Stability Board established the Regulatory Oversight Committee of the Global LEI System.

[17] The Depository Trust & Clearing Corporation.

[18] Society for Worldwide Interbank Financial Telecommunication.

[19] LEI Regulatory Oversight Committee (ROC): 1st progress note on the Global LEI Initiative (March 8, 2013) (available at http://www.financialstabilityboard.org/publications/r_130308.pdf).

[20] *See* CFTC Interim Compliant Identifier Utility's Frequently Asked Questions (available at https://www.ciciutility.org/frequentlyAskedQuestions.jsp) for additional information regarding the process for obtaining a CICI.

[21] Such obligations are set forth in: Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps, 77 Fed. Reg. 35,200 (June 12, 2012); Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. 2,136 (January 13, 2012); and Real-Time Public Reporting of Swap Transaction Data, 77 Fed. Reg. 1,182 (January 9, 2012).

[22] Time-Limited No-Action Relief for Swap Counterparties That Are Not Swap Dealers or Major Swap Participants, from Certain Swap Data Reporting Requirements of Parts 43, 45 and 46 of the Commission's Regulations, CFTC Letter No. 13-10 (April 9, 2013).

[23] *See* Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. 2,136, 2,207-08 (January 13, 2012).

[24] *See, e.g., id.* at 2,157.

[25] 17 C.F.R. § 45.11.

[26] Creation data includes "primary economic terms" and "confirmation data". The primary economic terms reported for each swap must include, at a minimum, all of the data elements listed in Exhibits A through D, as appropriate, of Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. 2,136, 2,207-08 (January 13, 2012). Confirmation data comprises all of the terms of a swap matched and agreed upon by the counterparties in confirming the swap. *See* 17 C.F.R. § 45.3.

[27] Continuation data includes "valuation data," "life cycle event data," and "state data." Valuation data means all of the data elements necessary to fully describe the daily mark of the transaction. Life cycle event data means all of the data elements necessary to fully report any "life cycle event," which is defined as any event that would result in either a change to a primary economic term of a swap or to any primary economic terms data previously reported in connection with a swap. State data means all of the data elements necessary to provide a snapshot view, on a daily basis, of all of the primary economic terms of a swap in the swap asset class of the swap in question, including any change to any primary economic term or to any previously-reported primary economic terms data since the last snapshot. *See* 17 C.F.R. § 45.4.

[28] *See* Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. 2,136 (January 13, 2012).

[29] *See* Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps, 77 Fed. Reg. 35,200 (June 12, 2012).

[30] Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, 77 Fed. Reg. 41,214 (July 12, 2012).

[31] *Id.* at 41,234.

[32] The Proposed Guidance provides that for purposes of determining

> whether a non-U.S. person is engaged in more than a de minimis level of swap dealing, the person should consider the aggregate notional value of:
>
> - Swap dealing transactions between it (or any of its non-U.S. affiliates under common control) and a U.S. person (other than foreign branches of U.S. persons that are registered swap dealers); and
> - Swap dealing transactions (or any swap dealing transactions of its non-U.S. affiliates under common control) where its obligations or its non-U.S. affiliates' obligations thereunder are guaranteed by U.S. persons.
>
> In determining whether a non-U.S. person holds swap positions above the MSP thresholds, the person should consider the aggregate notional value of:
>
> - Any swap position between it and a U.S. person (but its swap positions where it obligations thereunder are guaranteed by a U.S. person generally should be attributed to that U.S. person and not included in the non-U.S. person's determination); and

- Any swap between another non-U.S. person and a U.S. person, where it guarantees the obligations of the non-U.S. person thereunder.

[33] Proposed Exemptive Order Regarding Compliance with Certain Swap Requirements, 77 Fed. Reg. 41,110 (July 12, 2012).

[34] CEA § 1a(11) defines a "commodity pool operator" to mean

> Any person engaged in a business that is of the nature of a commodity pool . . . or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in commodity interests[.][34]

Absent an exemption, all commodity pool operators are required to register as such. The applicable exemptions are discussed in our Alert of August 27, 2012 (available at http://www.financialstabilityboard.org/publications/r_130308.pdf).

[35] Final Exemptive Order Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 858, 859 (January 7, 2013).

[36] *See* Proposed Guidance at 77 Fed. Reg. 41,214, 41, 227-28 (July 12, 2012).

[37] Further Proposed Guidance Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 909 (January 7, 2013).

[38] Final Exemptive Order Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 858, 862-63 (January 7, 2013).

[39] In the Further Proposed Guidance the CFTC requested comment on the following "alternative prong (ii)" and "alternative prong (iv)" of the definition of "U.S. person":

> (ii) A corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund or any form of enterprise similar to any of the foregoing, in each case that is either (A) organized or incorporated under the laws of a state or other jurisdiction in the United States or having its principal place of business in the United States or (B) directly or indirectly majority-owned by one or more persons described in prong (i) or (ii)(A) and in which such person(s) bears unlimited responsibility for the obligations and liabilities of the legal entity (other than a limited liability company or limited liability partnership where partners have limited liability);

Further Proposed Guidance, 78 Fed. Reg. 909, 912 (January 7, 2013).

> (iv) A commodity pool, pooled account, investment fund, or other collective investment vehicle that is not described in prong (ii) and that is directly or indirectly majority-owned by one or more persons described in prong (i) or (ii), except any commodity pool, pooled account, investment fund, or other collective investment vehicle that is publicly-traded but not offered, directly or indirectly, to U.S. persons.

Further Proposed Guidance, 78 Fed. Reg. 909, 913 (January 7, 2013).

"Prong (i)" and "prong (ii)" provide as follows:

> (i) Any natural person who is a resident of the United States;

(ii) any corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund, or any form of enterprise similar to any of the foregoing, in each case that is either (A) organized or incorporated under the laws of the United States or having its principal place of business in the United States (''legal entity'') or (B) in which the direct or indirect owners thereof are responsible for the liabilities of such entity and one or more of such owners is a U.S. person[.]

Proposed Order at 41,113.

[40] Note 34, *supra*.

[41] The narrow definition of "U.S. person" also is used for purposes of calculating the SD *de minimis* and MSP thresholds. *See* Final Order, 78 Fed. Reg. 858, 879 (January 7, 2013).

[42] Available at: http://www2.isda.org/functional-areas/protocol-management/protocol/8.

[43] The term "special entity" means:

(i) a Federal agency;

(ii) a State, State agency, city, county, municipality, or other political subdivision of a State;

(iii) any employee benefit plan, as defined in section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002);

(iv) any governmental plan, as defined in section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002); or

(v) any endowment, including an endowment that is an organization described in section 501 (c)(3) of title 26.

CEA § 4s(h)(2)(c).

[44] The six schedules contained in the DF Supplement are:

1. Schedules 1 and 2, applicable to an agreement between an SD and any other party, including another SD, set forth definitions and certain agreements and representations.
2. Schedule 3, applicable to an agreement between an SD and a non-Special Entity, sets forth "institutional suitability" safe harbor exceptions. Schedule 3 includes representations that the client has written policies and procedures relating to the evaluation of dealer swap recommendations.
3. Schedule 4, applicable to an agreement between an SD and a non-ERISA Special Entity, sets forth safe harbor exceptions. Schedule 4 includes representations that the client will rely on advice from a Designated Qualified Independent Representative ("QIR") and has written policies and procedures reasonably designed to ensure that each Designated QIR satisfies certain requirements.
4. Schedules 5 and 6, applicable to an agreement between an SD and an ERISA Special Entity, set forth safe harbor exceptions.

The term "special entity" means:

(i) a Federal agency;

(ii) a State, State agency, city, county, municipality, or other political subdivision of a State;

(iii) any employee benefit plan, as defined in section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002);

(iv) any governmental plan, as defined in section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002); or

(v) any endowment, including an endowment that is an organization described in section 501 (c)(3) of title 26.

CEA § 4s(h)(2)(c).

[45] *See* ISDA August 2012 DF Supplement, 16-17 (available at: http://www2.isda.org/functional-areas/protocol-management/open-protocols).

[46] Commodity Futures Releases, Decisions and Interpretations Re: Regulation 4.10(d) and Section 1a(5) of the Act (August 3, 2009); Commodity Futures Trading Commission CPO No-Action Position (November 20, 1985).