

# To Our Clients and Friends

# Memorandum



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## *Selected Highlights of The Dodd-Frank Act Affecting Derivatives*

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On July 21, 2010 President Obama signed into law The Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). The Dodd-Frank Act imposes a broad new regime for regulating the financial services industry, including in areas such as systemic risk, proprietary trading, consumer finance, investor protection, banking regulation, investment management, securitization, corporate governance and credit rating agencies. This memorandum is limited in scope to an overview of the new regulatory framework for derivatives, which is primarily addressed in Title VII of the Dodd-Frank Act, the Wall Street Transparency and Accountability Act of 2010 (the "Act"). The Act is likely to have a significant impact on the derivatives markets generally and on its participants, including banks, broker-dealers, insurance companies, corporate users of derivatives, and investment advisers and the hedge funds, private equity funds and other commingled investment vehicles that they manage.

As discussed below, the Act prescribes extensive regulation of the derivatives markets, including for the first time, over-the-counter ("OTC") derivatives. To date, OTC derivatives markets and transactions have been largely unregulated pursuant to the existing broad exclusions and exemptions provided by the Commodity Futures Modernization Act of 2000 and related provisions of the Gramm-Leach-Bliley Act. In doing so, the Act amends substantial portions of the Commodity Exchange Act (the "CEA"), as well as the federal securities laws and related provisions of the Gramm-Leach-Bliley Act.

In addition to the repeal of existing regulatory exemptions for OTC derivatives, the Act goes substantially further in a number of important respects. Among other things, the Act prescribes specific requirements for the centralized clearing and exchange trading and execution of many OTC derivative transactions, as well as the application of registration, capital and margin requirements, position limits, large trader reporting, book and recordkeeping, and business conduct and related standards to OTC derivatives dealers and major non-dealer market participants. The Act also provides for increasing the amount of information available to the general public with respect to derivatives trading, with much of that information to be disseminated in real-time.

The Act creates a comprehensive framework that would subject trading in OTC derivatives, as well as OTC derivatives dealers and major non-dealer market participants, to regulatory oversight by the Commodity Futures Trading Commission ("CFTC") and/or the Securities and Exchange Commission ("SEC"), with involvement by the U.S. Department of Treasury (the "Treasury"), the Federal Reserve Board of Governors and other federal banking agencies.

The Act generally includes parallel provisions for swaps, which will be regulated by the CFTC, and for security-based swaps, which will be regulated by the SEC. The parallel provisions are in many cases essentially identical. When differences exist, it is sometimes unclear whether they are intentional. This memorandum will generally address swaps and CFTC oversight, but will also be generally applicable to security-based swaps and SEC oversight. In some instances, specific points will be noted with respect to security-based swaps and SEC oversight, but unless otherwise noted, references to swaps and CFTC oversight should also be deemed to apply to security-based swaps and SEC oversight.

## **Summary**

### **Effective Date and CFTC and SEC Rulemaking.**

**Effective Date.** The Act is generally effective 360 days after the date of its enactment, with regulations required by the Act to be issued in final form within the same time frame.

**Regulatory consistency.** While sweeping changes are outlined in the Act, many significant issues regarding the regulation of OTC derivatives are to be resolved through agency rulemaking. Although the CFTC and SEC will each have jurisdiction over a different portion of the OTC derivatives market, the Act generally provides for regulatory consistency between them. In certain instances, the Act directs the CFTC and SEC to consult with other regulators, primarily federal banking regulators, during the rulemaking process.

### **Scope of the Act.**

**Defined terms.** The Act uses the term “swap” in an expansive manner to encompass perhaps all of what are currently known as OTC derivatives. The Act uses the term “security-based swaps” to define a portion of the OTC derivatives market consisting of swaps based on a single security, a narrow-based security index or a loan (generally including credit default swaps).

**CFTC and SEC jurisdiction.** The CFTC generally will have jurisdiction over most swaps, including, for example, interest rate, commodity, energy and currency swaps, as well as swaps based on broad-based indices of securities. The SEC generally will have jurisdiction over security-based swaps, which will generally include most equity and fixed income swaps that are not based on a broad index. Both agencies will have jurisdiction over “mixed swaps” that incorporate components of both non-security-based swaps and security-based swaps. The Act specifically directs the agencies to jointly prescribe appropriate rules for mixed swaps. The Act also includes security-based swaps in the definition of a security under the Securities Act of 1933 (the “Securities Act”) and the Securities Exchange Act of 1934 (the “Exchange Act”).

### **Mandatory Registration Requirements for Swap Dealers and Major Swap Participants.**

**CFTC and SEC registration.** “Swap dealers” and “major swap participants” would be required to register with the CFTC and “security-based swap dealers” and “major security-based swap participants” would be required to register with the SEC, in each case within 1 year from date of enactment of the Act. Dual registration is required for swap dealers and major swap participants engaging in both swap and security-based swap transactions.

**Defined terms.** The definitions of “security-based swap dealer” and “major security-based swap participant” largely track the definitions of “swap dealer” and “major swap participant.”<sup>1</sup>

- “*Swap dealer*” is generally defined as any person who:
  - holds itself out as a dealer in swaps;

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<sup>1</sup> As alluded to above, the SEC will have jurisdiction over security-based swap dealers and major security-based swap participants.

- makes a market in swaps;
- regularly enters into swaps in the ordinary course of business for its own account; or
- engages in any activity causing the person to be commonly known in the trade as a dealer or market maker in swaps.
  - However, a person who buys or sells swaps for its own account, either individually or in a fiduciary capacity, but not as part of its regular business, is exempt from this definition. In addition, an insured depository institution will not be considered a swap dealer as a result of offering a swap to a customer for which it is also originating a loan.
- “*Major swap participant*” is generally defined as any person who is not a swap dealer and:
  - who maintains a substantial position in swaps for any of the major swap categories as determined by the CFTC, excluding
    - positions held for hedging or mitigating commercial risk; and
    - positions maintained by any employee benefit plan for the primary purpose of hedging or mitigating any risk directly associated with the operation of the plan;
  - whose outstanding swaps create substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets; or
  - that is a financial entity that is highly leveraged relative to the amount of capital it holds and that is not subject to capital requirements established by the applicable banking regulator and maintains a substantial position in outstanding swaps in any major swap category as determined by the CFTC.
- *Open Ambiguities*. The Act does not provide guidance on the meaning of key terms including:
  - “substantial position in swaps;”
  - “create substantial counterparty exposure;” or
  - “could have serious adverse effects on the financial stability.”

The CFTC and SEC have just published a joint advance notice of proposed rulemaking requesting public comment to assist them in defining certain key terms, as well as in prescribing regulations regarding “mixed swaps.”<sup>2</sup>

**Issues for rulemaking.** In addition to the registration requirements described above, the Act directs the CFTC, SEC and federal banking regulators to issue various rules applicable to swap dealers and major swap participants, including rules to establish the following:

- *minimum capital and margin requirements*
  - for insured depository institutions: capital and margin requirements (for swaps not cleared by a registered derivatives clearing organization) established by the applicable banking regulator

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<sup>2</sup> See <http://www.cftc.gov/PressRoom/PressReleases/pr5871-10.html>

- for entities that are not also insured depository institutions: capital and margin requirements (for swaps not cleared by a registered derivatives clearing organization) established by the CFTC
- the requirements are intended to help ensure the financial soundness of the related swap dealer or major swap participant and be appropriate for the risks associated with the non-cleared swaps held by the related swap dealer or major swap participant
- the CFTC, SEC and the applicable federal banking regulators are required to consult at least annually with respect to minimum capital and margin requirements, and to establish generally comparable requirements
- the rules may potentially permit the use of non-cash collateral to satisfy margin requirements;
- *reporting and recordkeeping requirements;*
- *daily trading record maintenance*, potentially including the recording of electronic messages and telephone calls;
- *documentation and back-office standards*, including timely and accurate confirmation, processing, netting, documentation and valuation;
- *miscellaneous duties*, including:
  - conflicts-of-interest systems and procedures (including information walls between research and trading and clearing functions),
  - responsibilities to monitor trades (to prevent violation of applicable position limits), risk management and disclosure of information to the applicable regulator; and
- *the appointment of a chief compliance officer.*

**Implications of mandatory registration.** The mandatory registration requirements will have significant implications, especially for swap market participants who are not currently registered with the CFTC or SEC in any capacity. Such newly registered participants will be subject to extensive regulation, including with respect to information disclosure, duties to counterparties, recordkeeping and capital and margin requirements. Buy-side institutions, such as hedge funds and other collective investment vehicles, may now be required to register as major swap participants as a result of their activity in the swap market.

- The Act contains ambiguities with respect to the treatment of investment vehicles; for example, would separate investment vehicles managed by the same investment manager be aggregated for purposes of assessing their status as a major swap participant?
- For entities that are already registered with the CFTC, SEC or similar regulator, the additional requirements may prove incrementally less burdensome, but they are likely to still be substantial, and the new capital and margin charges may be significant.

**Business Conduct Standards for swap dealers and major swap participants.** The Act requires the CFTC to promulgate rules for the business conduct of swap dealers and major swap participants. Among other things, the rules will require disclosure by a swap dealer or a major swap participant to its counterparty of information about the material risks of a transaction, material conflicts of interest and daily price marks. The rules will also require a swap dealer or a major swap participant to supervise its business diligently and to communicate with its counterparty in a fair and balanced manner based on principles of fair dealing and good faith.

**Special business conduct standards for swap dealers or major swap participants dealing with special entities.** Duties with Respect to “Special Entities.” In addition to the new general business conduct standard, the Act imposes new special business conduct standards on swap dealers or major swap participants transacting with certain federal, state and local government entities, pension plans, endowments and retirement plans (collectively, “Special Entities”). This new duty would require swap dealers and major swap participants transacting with Special Entities to, among other things, disclose to the Special Entity in writing the capacity in which they are acting and comply with any standards and requirements the relevant regulators may determine are appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. The Act specifically requires swap dealers and major swap participants to have a reasonable basis to believe that the Special Entity has an independent representative that, among other things, has sufficient knowledge to evaluate the transaction and the risks, is independent of the swap dealer or major swap participant, makes appropriate disclosures to the Special Entity, provides written representations to the Special Entity regarding fair pricing and the appropriateness of the transaction; and undertakes to act in the best interest of the Special Entity and, with respect to Special Entities that are subject to ERISA, is a fiduciary as defined in Section 3 of ERISA. It is also unclear how dealer activities in making a trading market for counterparties generally can be reconciled with special business conduct standards that must be applied to specific counterparties. How this provision will affect investment funds, including hedge funds that contain “plan assets,” is also unclear.

#### **Mandatory Centralized Clearing and Execution.**

**Requirements.** With the goal of reducing systemic risk, the Act requires the centralized clearing of all swaps or security-based swaps that the CFTC or the SEC, as applicable, has determined should be cleared. The CFTC and the SEC may determine that most, perhaps even the vast majority of, swaps should be centrally cleared. The Act requires that a swap or security-based swap subject to mandatory centralized clearing also be subject to mandatory centralized execution, unless no centralized execution facility will accept it. If centralized clearing is not required, apparently neither is centralized execution.

**Centralized Clearing and Executing Facilities.** Each centralized clearing facility will generally be required to be registered with the CFTC or SEC, as applicable, and will be subject to extensive regulation. The CFTC and/or SEC, as applicable, must approve the clearing facility to be used for a particular type, group or class of swaps or security-based swaps. Centralized execution facilities will generally be boards of trades that are designated contract markets, securities exchanges or swap execution facilities, all of which will be subject to oversight and regulation by the CFTC or SEC, as applicable. Only swaps and securities-based swaps not readily susceptible to manipulation may be traded on a swap execution facility or a securities-based swap execution facility.

**Exemptions for Existing Transactions.** The Act exempts existing transactions from clearing requirements, provided that they are reported to a registered swap data repository or to the CFTC or SEC, as applicable, as described below.

**Exemptions for New Transactions.** The Act generally provides exemptions from mandatory clearing and execution for swaps when:

- No centralized clearing facility will accept the trade for clearing; or
- One counterparty to the swap is a commercial end user who elects for the swap to not be centrally cleared and executed and notifies the CFTC or SEC, as applicable, how it generally meets its financial obligations associated with entering into non-cleared swaps.

- Commercial end user generally means any person who is not a financial entity and, as its primary business activity, owns, uses, produces, processes, manufactures, distributes, merchandises or markets goods, services or commodities (which includes, but is not limited to, coal, natural gas, electricity, ethanol, crude oil, gasoline, propane, distillates and other hydrocarbons) either individually or in a fiduciary capacity. Certain qualified finance affiliates of a commercial end user may also qualify for this exemption.
- Financial Entity, for this purpose, generally means:
  - a swap dealer or a major swap participant;
  - a person predominantly engaged in activities that are in the business of banking or financial in nature;
  - a commodity pool or a private fund (*i.e.*, a fund which relies on an exemption under Section 3(c)(1) or Section 3(c)(7) of the Investment Company Act of 1940); or
  - an employee benefit plan.
- Even if exempt from centralized execution and clearing, a swap may still be subject to other requirements of the Act, including with respect to margin.

**Implications of mandatory execution and clearing.** Mandatory execution and clearing of swaps has several important implications:

- *With respect to mandatory execution*, the Act essentially aims to convert the private OTC derivatives market into a public market with full price discovery and extensive swap and security-based swap related information available both to market participants and the public at large. Regulators will also have access to extensive and detailed swap and security-based swap related information. In addition, the Act requires that customers be given impartial and fair access to centralized swap markets. Finally, centralized clearing and execution should foster the standardization of many swaps and the Act directs the CFTC and SEC to adopt rules to encourage swap standardization.
- *With respect to mandatory clearing*, each party to a swap or security-based swap will be required to post margin, including periodic variation margin, to the applicable derivatives clearing organization. The margin requirements for centrally cleared transactions may be higher than the margin requirements bilaterally negotiated between counterparties at present. Because the derivatives clearing organization must hold and safeguard the margin and interposes itself between the parties to the transaction, centralized clearing should reduce the likelihood of losses upon a counterparty insolvency.
- *Infrastructure Needs.* The clearing of derivatives through derivatives clearing organizations will necessitate the development of significant industry infrastructure. It is likely that many derivatives clearing organizations will be affiliates of a board of trade designated as a contract market, a securities exchange or a swap execution facility.

### **Regulation of Banks' Participation in the Derivatives Markets.**

**The Lincoln Amendment, or Swaps “Push-Out” for Banks.** The Act bans “federal assistance” (e.g., advances from the Federal Reserve or FDIC insurance or guarantees) to any “swaps entity” (which is broadly defined). This provision of the Act is commonly referred to as the “Lincoln Amendment.”

- As a result, depository institutions or other entities with access to Federal Reserve or FDIC aid will effectively be compelled to discontinue their engagement in swap activities (again, subject to certain exemptions), and to “push-out” these swap activities into their non-bank affiliates. Such affiliates will be subject to appropriate regulation by the Federal Reserve and must comply with Sections 23A and 23B of the Federal Reserve Act.
- Not all swap activities must be “pushed-out” to a non-bank affiliate. An insured bank may engage in (i) swap transactions that are related to risk mitigation or hedging activities and (ii) dealing in certain types of swaps, such as swaps on interest rates, foreign currency, precious metals, U.S. government securities and investment grade debt securities.
- Credit default swaps will be permitted under this exception only if centrally cleared or if entered into in conjunction with hedging or risk mitigation activity.
- Banks and non-bank affiliates are subject to additional restrictions under the Dodd-Frank Act, including the Lincoln Amendment. The Lincoln Amendment cross-references Section 619 of the Dodd-Frank Act and includes broader rules related to proprietary trading restrictions with respect to banks and non-bank affiliates.
- This provision of the Act becomes effective two years after the effective date of the Act itself, and affected financial institutions may apply to the applicable federal banking regulator for a grace period of up to 24 months. The grace period is subject to conditions that may be imposed by the applicable regulator.

#### **Registration of Derivatives Clearing Organizations.**

**Derivative clearing organizations will be required to register with the CFTC and comply with an extensive set of core principles.** These core principles include, among other things:

- *adequate financial resources;*
- *appropriate participant and product eligibility;*
- *risk management mechanisms;*
- *settlement procedures;*
- *enforcement standards for defaulting parties;*
- *rule enforcement;*
- *reporting, recordkeeping, public information disclosure and information-sharing; and*
- *governance fitness standards, antitrust considerations, conflicts of interest and standards and procedures designed to ensure the safety of member and participant funds.*

In addition, derivative clearing organizations will be required to have chief compliance officers, and will have reporting requirements to both the CFTC and SEC, as applicable. The safeguarding of customers' collateral is a key function of a derivatives clearing organization.

### Registration of Swap Execution Facilities.

**Definition.** The Act defines a swap execution facility to generally mean a trading system or platform in which multiple participants have the ability to execute or trade swaps by accepting bids and offers made by multiple participants in the facility or system, including any trading facility that facilitates the execution of swaps between persons, and that is not a designated contract market.

Swap execution facilities are an alternative to fully-regulated exchanges, but are accessible only to “eligible contract participants” (as defined in the CEA to include qualified institutions, government entities and political subdivisions and high net worth individuals with assets in excess of a specified monetary threshold). The Act tightens certain qualification requirements for status as an “eligible contract participant.”

**Responsibilities.** Swap execution facilities must provide participants with extensive price discovery information and additional related information, which must be publicly disclosed as directed by the CFTC. Swap execution facilities will be required to register with the CFTC and comply with an extensive set of core principles. In addition, swap execution facilities will be required to have chief compliance officers, and will have reporting requirements to the CFTC. For a swap execution facility to execute security-based swaps, it must register with the SEC as a security-based swap execution facility pursuant to provisions similar to those described above for a swap execution facility (i.e., dual registration is required).

### Swap Data Reporting; Swaps Not Subject to Mandatory Execution and Clearing.

**Data reporting.** For swaps and security-based swaps not subject to mandatory clearing and execution, the Act requires the reporting of data to a swap data repository. Swap data repositories are tasked with collecting and maintaining aggregate data with respect to swaps. If no such depository accepts the information, counterparties would be required to report such information directly to the CFTC or SEC, as applicable, who would then make such information available to the public.

**Registration.** The infrastructure for swap data repositories and security-based swap data repositories is under development and these repositories would be required to register with the CFTC and/or SEC, as applicable, conform to certain core principles and appoint a chief compliance officer. The CFTC and SEC, as applicable, would determine the type of information to be collected, as well as data collection and data maintenance standards.

**Data publication.** The swap data repositories would also be required, on a confidential basis, to provide all data, including individual counterparty and trade position data, to the federal banking agencies, the Department of Justice, and other regulators or such other persons as the CFTC or SEC may deem appropriate, including foreign regulatory authorities.

### Miscellaneous Provisions.

**Position limits.** The Act authorizes the CFTC and the SEC to establish aggregate position limits with respect to derivatives traded on an exchange or a swap execution facility and OTC derivatives that perform significant price discovery functions. The Act also requires the CFTC to establish limits on the amount of positions (other than bona fide hedge positions) that may be held by any trader in futures contracts, options on futures contracts or on commodities traded on or subject to the rules of a designated contract market, or any swaps that are economically equivalent to such contracts or options with respect to physical commodities (other than “excluded commodities” as defined by the CFTC). Holders of large positions will be required to report such positions to the CFTC and SEC as applicable. Swap execution facilities and other swap markets may also be directed by the agencies to impose position limits.

**Segregated accounts.** In the case of swaps that are not subject to centralized clearing and execution, at the election of the counterparty, swap dealers and major swap participants must maintain collateral in a segregated account (although this requirement does not apply to variation margin payments).

**Retail participation in swaps.** The Act generally limits retail participation (e.g., persons who are not eligible contract participants) to transactions effected on fully regulated public exchanges.

**Antimanipulation, antifraud and other market abuses.** The Act amends the CEA, the Securities Act and the Exchange Act to apply and strengthen the CFTC's and SEC's enforcement authority with respect to OTC derivatives and those who trade them. These amendments are intended to give the CFTC and SEC clear authority to deter market manipulation, fraud, insider trading and other abuses in the OTC derivatives market. Among other things, these amendments are designed to facilitate the CFTC's ability to establish market manipulation, without having to prove a specific intent to manipulate by including a "reckless disregard" standard.

**Beneficial ownership reporting requirements.** The Act applies the beneficial ownership reporting requirements of Section 13 of the Exchange Act to equity securities that underlie security-based swaps.

**Foreign boards of trade.** The Act provides for the CFTC to adopt regulations requiring foreign boards of trade having direct access to U.S. customers to adopt certain minimum standards with respect to, among other things:

- *publicly provided daily trading information;*
- *position limits;*
- *requirements for market participants to limit, reduce or liquidate positions necessary to address price manipulation, excessive speculation, price distortion or disruption of the delivery or cash settlement process; and*
- *agreement to provide the CFTC with information regarding large trader positions and other aggregate trader position reports.*

This prohibition would not apply to foreign boards of trade previously granted direct access to U.S. customers by the CFTC until 180 days after the effective date of the Act.

#### **Other Important Provisions and Observations.**

- **Portfolio margining.** The CFTC and SEC are authorized to adopt new regulations to permit portfolio margining across cash, futures and options on futures contracts held in futures and securities accounts.
- **Foreign-domiciled entities.** The CFTC and SEC are granted authority to prohibit a foreign-domiciled entity from participating in any swap or security-based swap activities in the U.S. if the swap regulation of such entity undermines the stability of the U.S. financial system.
- **Foreign exchange.** Under the Act, foreign exchange swaps and forwards will be considered swaps unless exempted by the Treasury Secretary. If exempted, these transactions would be required to be reported to a swap repository or to the CFTC, and would be subject to business conduct standards.
- **Not insurance.** States may not regulate swaps as insurance. This provision confirms that credit default swaps are not insurance, and may not be regulated by states as such.
- **Banking product exemptions.** Certain traditional banking products, such as deposit accounts and letters of credit, are exempted from the swap definition.

- **Regulatory coordination.** The CFTC, SEC and other federal financial regulators are directed to coordinate their standards with respect to swap regulation with foreign regulators and to share such information as may be appropriate.
- **Legal certainty.** Swaps in existence at the Act's effective date will not be voidable for failure to comply with the Act or the regulations promulgated thereunder, nor will the Act or regulations constitute a termination event, force majeure, illegality, increased cost, regulatory charge or similar event that would permit a party to terminate such transactions.
- **Conflicts of Interest.** Futures commission merchants, introducing brokers, swap dealers and major swap participants are required to establish structural and institutional safeguards separating personnel conducting research or analysis on the commodity markets or the prices of commodities or swaps from the review, pressure and oversight of persons involved in pricing, trading or clearing activities.
- **Retroactive effect.** Private swaps and security-based swaps in existence at the Act's effective date must be reported to a registered swap data facility or to the CFTC or the SEC, as applicable, generally within 120 days of the effective date of the Act. While clearing requirements and position limits will not apply to existing swap transactions, the Act does not provide a clear exemption from any applicable new margin requirements. However, the legislative history of the Act suggests that Congress did not intend for margin requirements to be applied retroactively.

### **Conclusion**

The Dodd-Frank Act imposes a broad new regime for regulating the financial services industry and its implementation will materially affect, among other things, the OTC derivatives market and its participants. The practical implications of the Act will become clearer through guidance from the CFTC, SEC and other federal regulators, including by means of the rulemaking authority delegated to the CFTC and SEC.

## Fried Frank Client Memorandum

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its contents. If you have any questions about the contents of this memorandum, please call your regular Fried Frank contact or the attorneys listed below:

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