

## CFTC and SEC Propose Definitions for Major Swap Participants and Major Security-Based Swap Participants

### Introduction

The Commodity Futures Trading Commission (“CFTC”) and Securities and Exchange Commission (“SEC”) on December 1, 2010 and December 3, 2010, respectively, held open meetings to propose for public comment a joint rulemaking (individually and collectively “Proposed Rules”),<sup>1</sup> to provide further definition to the terms “swap dealer,” “security-based swap dealer,” “major swap participant,” “major security-based swap dealer,” and “eligible contract participant.”<sup>2</sup> The Dodd-Frank Act added these terms (other than eligible contract participant) to the Commodity Exchange Act as amended (“Commodity Act”) and Securities Exchange Act of 1934 as amended (“Exchange Act”) as part of a Congressional mandate to the two agencies to

regulate swaps and security-based swaps. During its debates, Congress concluded that entities with large swap positions, which do not qualify as swap dealers or security-based swap dealers, might nevertheless have a significant negative impact on the financial markets if they default. This prompted Congress to create the separate categories of regulated entities in addition to swap dealers and security-based swap dealers.<sup>3</sup> This *DechertOnPoint* focuses on the potential definition of “major swap participant” and “major security-based swap participant.”<sup>4</sup> Unless the treatment of major swap participants and major security-based swap participants differs, the Proposing Release and this *DechertOnPoint* refer to both collectively as “major participant.”

Various market participants (including registered investment companies, private investment funds, their advisers, and commodity pool operators) have been closely tracking developments relating to the definitions of “major swap participant” and “major security-based swap participant,” since the parameters the two agencies set around these

<sup>1</sup> Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant,” SEC Release No. 34-63452 (Dec. 7, 2010)(joint proposed rule, proposed interpretations) [hereinafter “Proposing Release”], available at <http://www.sec.gov/rules/proposed/2010/34-63452.pdf>. The Proposed Rules are a set of a number of rulemakings the CFTC and SEC have undertaken as mandated by the passage of the Dodd-Frank Wall Street Financial Reform and Consumer Protection Act (“Dodd-Frank Act”).

<sup>2</sup> At its open meeting, the CFTC also considered proposed rules regarding core principles for designated contract markets, core principles and other rules for designated clearing organizations, and recordkeeping and reporting requirements for swap dealers, major swap participants, and designated clearing organizations.

<sup>3</sup> See 156 CONG. REC. S5907 (daily ed. July 15, 2010).

<sup>4</sup> A “security-based swap” is a swap based on a single security, a loan, a narrow-based group or index of securities, or events related to a single issuer or issuers of securities in a narrow-based security index. Proposing Release at 52.

This term should not be confused with an “equity swap,” which is a swap on one or more equity indices or a total return swap on one or more equity indices.

terms would determine if such participants will be subject to comprehensive regulation under the Dodd-Frank Act, including registration as major participants and additional capital, margin, and business conduct requirements.<sup>5</sup> Although CFTC Chairman Gary Gensler remarked at his agency's open meeting that the Proposed Rules are only intended to categorize as a major swap participant those entities that have "large enough [swaps exposure] to pose a threat to the U.S. financial system," it is still not entirely clear from the Proposed Rules whether some registered investment companies and private investment funds could fall into this category of regulated entity.<sup>6</sup>

Commissioners for the SEC voted unanimously to publish the Proposed Rules for public comment;<sup>7</sup> but when put to a vote at the CFTC, only three of the five Commissioners voted to publish the Proposed Rules for comment. CFTC Commissioners Jill Sommers and Scott O'Malia each opposed the proposed rulemaking, with Commission Sommers expressing concerns that the proposal is too broad and far-reaching and Commissioner O'Malia citing a lack of clarity and regulatory certainty as to which market participants would qualify as major participants.

The public has the opportunity to comment on the Proposed Rules within 60 days after the date of publication in the *Federal Register*.<sup>8</sup>

<sup>5</sup> The classification as a major participant would necessarily be backward-looking—being based on an entity's activity in the previous calendar quarter. The Proposed Rules would include a grace period to come into compliance with regulatory requirements once an entity has qualified. There would also be an opportunity no longer to be considered a major participant. See Proposing Release at 103-105.

<sup>6</sup> The CFTC and the SEC believe that under the major swap participant and major security-based swap participant definitions only a few firms—possibly 10 in either case—would even need to conduct the analysis necessary to determine if they must register as major security-based swap participants. Proposing Release at 76, 122 and 126.

<sup>7</sup> Although SEC Commissioner Troy Paredes voted to release the Proposed Rules for public comment, he expressed concern that the various thresholds in the Proposed Rules have been set too low, and as a result, could apply to entities that do not pose systemic risk to the financial markets. Troy Paredes, Commissioner, SEC, Statement at the SEC Open Meeting (Dec. 3, 2010).

<sup>8</sup> When this *DechertOnPoint* went to press, the Proposed Rules had not yet been published in the *Federal Register*.

## Major Swap Participant

Sections 721 and 761 of the Dodd-Frank Act amend the Commodity Act and Exchange Act to include the terms "major swap participant" and "major security-based swap participant," respectively. An entity would be considered a major participant if it meets any one of the following three tests:

- it is an entity that maintains a "substantial position" in any of the major swap categories, excluding positions held for hedging or mitigating commercial risk and excluding positions maintained by employee benefit plans for hedging or mitigating risks in the operation of the plan;
- it is an entity 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
- it is a "financial entity" that is "highly leveraged relative to the amount of capital such entity holds and that is not subject to capital requirements established by an appropriate Federal banking agency" and that maintains a "substantial position" in any of the major swap categories.<sup>9</sup>

The Dodd-Frank Act left the task to the CFTC and SEC to define certain of these terms, including what would be considered a "substantial position," "hedging or mitigating commercial risk," a "financial entity," "highly leveraged," and "substantial counterparty exposure." The Proposed Rules address these definitions.<sup>10</sup>

## Substantial Position Tests

The CFTC and SEC have proposed two alternative tests that would determine if an entity holds a "substantial position" in swaps.

<sup>9</sup> Fact Sheet, CFTC, Proposed Rules Further Defining "Swap Dealer," "Major Swap Participant" and Eligible Contract Participant" (Dec. 1, 2010), available at [http://www.cftc.gov/ucm/groups/pub-lic/@newsroom/documents/file/defs\\_factsheet.pdf](http://www.cftc.gov/ucm/groups/pub-lic/@newsroom/documents/file/defs_factsheet.pdf).

<sup>10</sup> Section 721(d)(1) of the Dodd-Frank Act.

## First Test

For a major swap participant, the threshold for the first test for a “substantial position” would be a daily average exposure of \$1 billion for each of three of the four major swap categories (equity swaps, commodity swaps, and credit swaps), but \$3 billion for the fourth major swap category (rate and foreign exchange swaps).<sup>11</sup> For a major security-based swap participant, the two major swap categories would be security-based credit derivatives (*i.e.*, any security-based swap based on instruments of indebtedness, including loans or credit events relating to one or more issuers or securities) and other security-based swaps.<sup>12</sup> The threshold for both of these categories would be a daily average exposure of \$1 billion.<sup>13</sup> The agencies set the thresholds in the Proposed Rules after taking into consideration both the adverse effect that one major participant’s default could have on the financial markets and the possibility that multiple major participants may fail at the same time.<sup>14</sup> Under this first test, swap exposure is netted against collateral posted to secure the swap. In addition, the position is calculated on a net basis, taking into account any master netting agreements in place between the entity and a single counterparty.

Under the Proposed Rules, the agencies would interpret “hedging or mitigating commercial risk” to mean swap activity that is undertaken for broader reasons than what is considered *bona fide* hedging under Commodity Act rules.<sup>15</sup> Hedging or mitigating commercial risk

would include swap activity that is economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise, where the risks result from a fluctuation in interest, currency, or foreign exchange rate exposure arising from a person’s assets or liabilities, or the potential change in: (1) value of assets that a person owns, produces, manufactures, processes, or merchandises in the ordinary course of business, (2) liabilities that a person incurs, (3) services that a person provides or purchases, or (4) value related to (1)-(3) above arising from foreign exchange rate movements. Additionally, swap activity that qualifies for hedging treatment under Financial Accounting Standards Board Accounting Standards Codification Topic 815, Derivatives and Hedging would also be considered hedging or mitigating commercial risk.<sup>16</sup>

Regardless of classification as a financial entity or non-financial entity, for purposes of the major swap participant definition, a market participant may take advantage of the carve-out for hedging or mitigating risk so long as the underlying activity is “commercial in nature.”<sup>17</sup> For purposes of the major security-based swap participant definition, a market participant may use the carve-out if the swap positions are “economic hedges, regardless of their status under accounting guidelines.”<sup>18</sup>

<sup>11</sup> For purposes of determining thresholds, the size of the notional value of a swap is the measure of exposure.

<sup>12</sup> Both definitions recognize that a major participant may qualify as such based on its activities in one or more categories. Under the Proposed Rules related to major swap participants, an entity in this situation could request CFTC relief from certain of the regulations applicable to major swap participants, to the extent they are inapplicable because the entity does not qualify as a major swap participant in all the major swap categories. Proposing Release at 50, 105-106.

<sup>13</sup> In recognition of the fact that swaps are subject to short-term volatility, the measure of a substantial position would not be based on the size of an entity’s position on a single business day. Instead, the test would be the mean of the amounts measured at the close of each business day in a calendar quarter. If an entity’s daily average position over one of these three-month periods exceeds the applicable threshold, it would qualify for registration as a major participant. Proposing Release at 66-67.

<sup>14</sup> Proposing Release at 66.

<sup>15</sup> 17 C.F.R. § 1.3(z).

<sup>16</sup> See Proposed CFTC Rule 17 C.F.R. 1.3(ttt).

<sup>17</sup> Proposing Release at 82. The following activities would not be considered hedging underlying activity that is commercial in nature: taking positions “primarily to take an outright view on the direction of the market, including positions held for short term resale, or to obtain arbitrage profits. Swap positions that hedge other positions that themselves are held for the purpose of speculation or trading are also speculative or trading positions.” In addition, “swap positions that are held for the purpose of investing are, for example, those positions that are held primarily to obtain an appreciation in value of the swap position itself, without regard to using the swap to hedge an underlying risk.” Proposing Release at n. 128.

<sup>18</sup> Proposing Release at 85. Security-based swap positions held for the same purposes as outlined in footnote 17 would be considered held for speculating or trading and could not qualify as economic hedges. Proposing Release at n. 131. The proposed Exchange Act rules would require the entity seeking to exclude some of its swaps from the substantial position test to document the risks intended to be hedged and the effectiveness of the hedge. Proposing Release at 86.

## Second Test

The threshold for the second test for a “substantial position” is higher than the threshold for the first test. For swaps in the equity, commodity, or credit categories as well as security-based swaps on instruments of indebtedness and other security-based swaps, the threshold would be a daily average exposure of \$2 billion. For rate swaps, the threshold would be \$6 billion. Whether an entity reached one of these thresholds would depend on the size of its daily average current uncollateralized exposure plus “potential future exposure” in each of the major swap categories. The second test recognizes that the notional amount of a swap is not necessarily the best or only way to measure the risk of a swap. The agencies have proposed a complex test based on existing bank capital standards for determining potential future exposure. This test applies a risk factor to the notional amount of the swap and considers the duration of the swap,<sup>19</sup> as well as accounts for the operation of master netting agreements.<sup>20</sup> The test also significantly discounts the size of the position if it is cleared or subject to daily mark-to-market margining, in recognition of the risk-mitigation characteristics of exchange clearing of swaps.<sup>21</sup> Clearing swaps will discount notional positions in these swaps by 80%.<sup>22</sup> This portion of the second test is also intended to incentivize central clearing and daily mark-to-market margining, as the agencies have identified these practices as effective risk mitigation tools.<sup>23</sup> This prong of the second substantial position test will assist entities using standardized, cleared swaps in avoiding registration as major participants.

<sup>19</sup> The notional principal amount of an entity’s swap would be multiplied by a risk factor ranging from 0.5% to 15%, based on the type and duration of the swap.

<sup>20</sup> Depending on the mechanics of the master netting agreements in place, the amount of the position could be discounted by up to 60%.

<sup>21</sup> Under the Dodd-Frank Act, swap traders, with certain exceptions, are required to clear their standardized swaps.

<sup>22</sup> Entities performing this analysis will need to review their ISDA Credit Support Annexes (“CSAs”) carefully. If a CSA includes a threshold amount such that a party is not required to post collateral until its out-of-the-money exposure reaches a certain dollar amount, that exposure would be considered uncollateralized. In addition, if the minimum transfer amount included in a CSA is \$1 million or greater, that amount of exposure would be considered uncollateralized. Proposing Release at n. 113.

<sup>23</sup> Proposing Release at 74.

## Substantial Counterparty Exposure Test

The test for whether an entity has “substantial counterparty exposure,” such that it should be categorized as a major participant, builds on the test for a substantial position. The test aggregates all of an entity’s positions regardless of major swap category or whether the positions are held for hedging or in employee benefit plans. If an entity, in the aggregate, maintains uncollateralized swap exposure of a daily average of \$5 billion or uncollateralized swap exposure plus potential future exposure (as measured under the second substantial position test) of \$8 billion, that entity will qualify as a major participant. This test attempts to address the potential that, even an entity engaging in hedging or employee benefit plans (which historically have been permitted to exceed position limits on exchange-traded futures contracts, because their activities were perceived as analogous to hedging)<sup>24</sup> could still pose systemic risk to the market system.

## Highly Leveraged Financial Entity Test

The test for a “financial entity” that is “highly leveraged” and holds a “substantial position” in a major category of swaps uses another approach to measuring swap positions. However, only certain financial entities would be subject to this test. The CFTC and SEC have chosen to borrow the definition of financial entity from Section 2(h)(7) of the Commodity Act and Section 3C(g)(3) of the Exchange Act, respectively, as amended by the Dodd-Frank Act. As such, the statutory definition of a financial entity would be a swap dealer, security-based swap dealer, major swap participant, major security-based swap participant, commodity pool, private fund, employee benefit plan, or person predominantly engaged in the activities that are the business of banking.<sup>25</sup> The agencies chose this definition of financial entity because it carves out end-users. In addition, the proposed test would not apply to financial entities subject to U.S. Federal banking capital requirements.

<sup>24</sup> Clarification of Certain Aspects of the Hedging Definition, 52 Fed. Reg. 27195, 27196-27197 (July 20, 1987).

<sup>25</sup> Section 723(a) of the Dodd-Frank Act. In this context, the inclusion of the terms “major swap participant” and “major security-based swap participant” in the definition of financial entity is circular. The agencies have recognized this and intend to address the problem in the final rules. Proposing Release at 97.

The agencies have proposed two different ratios of total liabilities to equity for determining whether a financial entity is highly leveraged: leverage in excess of 8 to 1 or 15 to 1, measured on the last day of the applicable fiscal quarter. The ratio of 15 to 1 is borrowed from the definition of “highly leveraged” in Title I of the Dodd-Frank Act as it applies to large bank holding companies and nonbank financial companies supervised by the Board of Governors of the Federal Reserve System.<sup>26</sup> Because the agencies have not concluded that using the same definition of “highly leveraged” is appropriate in the context of the third major participant test, they have also proposed a lower leverage to equity ratio of 8 to 1.<sup>27</sup> A common leverage ratio would apply regardless of an entity’s line of business.<sup>28</sup>

### Limited Exemption for Major Swap Participants

In recognition of the different characteristics of the commodity and securities markets, the Dodd-Frank Act makes available an exemption from the major swap participant definition and regulation, to certain entities that provide financing to commodity market participants so long as such an entity’s “primary business is providing financing, and [it] uses derivatives for the purpose of hedging underlying commercial risks related to interest rate and foreign currency exposures, 90 percent or more of which arise from financing that facilitates the purchase or lease of products, 90 percent or more of which are manufactured by the parent company or another subsidiary of the parent company.”<sup>29</sup>

### Matters Related to Investment Advisers and Commingled Investment Vehicles

The Proposed Rules are directed at the entities that maintain positions in swaps or are considered the beneficial owners of swaps, not the entities that might

control those positions.<sup>30</sup> As a result, testing for qualification as a major participant would be done at the account level rather than at the adviser level. However, an entity would not be able to silo positions for which it is the beneficial owner in various separate accounts to avoid aggregation. What may come as some relief to investment advisers is that the CFTC and SEC would not require the aggregation of these accounts to test for whether an investment adviser qualifies as a major participant. It can be inferred from the Proposed Rules’ treatment of managed accounts and their advisers, but is not explicitly stated, that the test would not be conducted at the investment adviser level for registered investment companies or private investment funds or at the commodity pool operator level for commodity pools.

The Proposed Rules do not explicitly exclude registered investment companies as potential major participants. If registered funds are exchange-clearing their swaps or posting collateral using CSAs, these practices should go a long way toward reducing the size of any swap or security-based swap positions that such funds have for purposes of the three tests. In addition, the statutory and regulatory limits on how much leverage a registered fund may assume under the Investment Company Act of 1940 as amended and rules thereunder should prevent registered funds from being categorized as “highly leveraged.” Nevertheless, these characteristics and practices do not guarantee that a registered fund will not qualify as a major participant; only an exclusion from the Proposed Rules could do so. In response to the SEC/CFTC Advance Notice of Proposed Rule making,<sup>31</sup> the agencies received comments from interested parties such as the Investment Company Institute arguing for such an exclusion.<sup>32</sup>

<sup>26</sup> Section 165(j)(1) of the Dodd-Frank Act.

<sup>27</sup> Proposing Release at 100-101.

<sup>28</sup> Proposing Release at 98.

<sup>29</sup> Section 721(a)(16) of the Dodd-Frank Act.

<sup>30</sup> Proposing Release at 108-109. This is a departure from the CFTC approach to position limit testing. Under the CFTC’s aggregation rules, both ownership and control are considerations for whether positions must be aggregated to determine compliance with position limits. See 17 C.F.R. § 150.4.

<sup>31</sup> Definitions Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act, SEC Release No. 34-62717 (Aug. 13, 2010)(advance joint notice of proposed rulemaking; request for comments).

<sup>32</sup> Comment Letter from Kerrie McMillan, General Counsel, Investment Company Institute (Sept. 20, 2010).

## CFTC and SEC Request for Comments

In the Proposing Release, the agencies have requested further comments on how the definitions are expected to affect *specifically* registered investment companies, as well as employee benefit plans and sovereign wealth funds, focusing especially on whether: (1) such exclusions, if entertained, should be conditional or unconditional; (2) the same results could be achieved through modification of the Proposed Rules without providing for explicit exclusions; (3) with regard to registered investment companies, major participant regulation would be duplicative of already applicable regulations; and (4) also with regard to registered

investment companies, those entities could meet the margin and capital requirements if they qualify as major participants.<sup>33</sup> Market participants that could be affected by the Proposed Rules may wish to consider submitting a comment letter.

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<sup>33</sup> Proposing Release at 114-115.

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