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ADVISORY | Dodd-Frank Act

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CFTC AND SEC JOINTLY ADOPT FINAL SWAP ENTITY DEFINITION RULES

On April 18, 2012, the Commodity Futures Trading Commission ("CFTC") and the Securities and Exchange Commission ("SEC" and, together with the CFTC, "Commissions") voted to issue joint final rules further defining the terms "swap dealer," "security-based swap dealer," "major swap participant," "major security-based swap participant," and "eligible contract participant."[1] All swap market participants will need to know whether they qualify as one of these entities because each type of entity figures prominently in the new swap market requirements imposed by the Dodd-Frank Act.

Title VII of Dodd-Frank sets forth a comprehensive regulatory framework for derivatives. Among other things, it creates new categories of entities, such as Dealers and Major Participants, and requires them to register with the CFTC or SEC, as appropriate, and comply with recordkeeping, reporting, business conduct, capital and margin requirements.

Title VII also includes new trade execution requirements. Among other things, Dodd-Frank makes it unlawful for any person that is not an eligible contract participant ("ECP") to enter into a swap except on a registered exchange (*i.e.*, a designated contract market registered with the CFTC or national securities exchange registered with the SEC). Although ECPs existed before Dodd-Frank, Dodd-Frank amends the definition of ECP in certain respects and instructs the Commissions to "further define" the term to prohibit evasion.

The Commissions initially proposed entity definition rules in December 2010, in response to which many market participants submitted comments. Although the final rules are similar to the proposed rules in many respects, the final rules are different from the Commissions' proposal in certain important areas, as discussed below. The final rules will become effective 60 days after their publication in the Federal Register, which has not yet occurred.

As noted below, the swap dealer definition rules exclude swaps used to hedge physical positions. The Commissions released this exclusion, however, as an interim final rule. Comments on this interim final rule are due 60 days after its publication in the *Federal Register*, which also has not yet occurred.

Entities will not have to register with the CFTC or SEC as Dealers or Major Participants, as applicable, until after the Commissions jointly approve final rules defining "swap" and "security-based swap." The Commissions have stated that final rules further defining "swap" could be approved early this summer. While changes to the ECP definition will generally become effective 60 days after publication, certain rules relating to commodity pools will become effective December 31, 2012.

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[1] This E-Alert refers to swap dealers and security-based swap dealers collectively as "Dealers," major swap participants and major security-based swap participants collectively as "Major Participants," and swaps and security-based swaps collectively as "swaps." This E-Alert generally focuses on the entities — swap dealers and major swap participants — that trade swaps and are subject to CFTC regulation.

DEALERS

Statutory Definition

Dodd-Frank defines a Dealer as any person that:

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

Dodd-Frank provides for several exceptions to the Dealer definitions. First, the definitions exclude an entity that enters into swaps for its own account, but not as part of a "regular business." Second, the statute requires the Commissions to exempt from Dealer status entities engaging in "de minimis" amounts of dealing. Finally, with respect to swap dealers but not security-based swap dealers, an insured depository institution will not be considered a swap dealer to the extent it offers to enter into a swap in connection with originating a loan with a customer.

Final Rules

General Principles

Under the final rules, an entity generally will be considered a Dealer if it satisfies any of the four statutory tests listed above, read in conjunction with the exclusion for swap activities that are not part of the person's "regular business," and excluding certain specific swaps that the rules provide are not considered in the determination of Dealer status. Resulting dealing activity that exceeds de minimis levels will require registration as a Dealer. The Commissions each provided separate guidance in the preamble about what may constitute dealing activity and attributed the need for differing guidance to the differences in uses and markets for swaps and security-based swaps.

The Dealer designation will apply at the entity level. In other words, new requirements will apply to the entire particular legal person that trades swaps even if that person's dealing activity is limited to a trading desk or discrete business unit, unless the person is able to take advantage of a limited purpose designation as a Dealer.

CFTC Dealer-Trader Distinction. In identifying whether a person is a Dealer, the Commissions will consider relevant aspects of the dealer-trader distinction established in securities laws. Although the CFTC identified some differences between the securities market and the swaps market, it noted that the following principles are indicative of dealing in swaps:

- Providing liquidity by accommodating demand for or facilitating interest in swaps, holding oneself out as willing to enter into swaps, or being known in the industry as being available to accommodate demand for swaps;
- Advising a counterparty as to how to use swaps to meet its hedging goals or structuring swaps on behalf of a counterparty;
- Having a regular clientele and actively advertising or soliciting clients in connection with swaps;
- Acting in a market maker capacity on an organized exchange or trading system for swaps; and

- Helping to set the prices offered in the market (such as by acting as a market maker) rather than taking those prices.

Under the dealer-trader distinction, a dealer seeks to profit from providing liquidity to the market (*e.g.*, through spreads or fees), while a trader seeks to profit from changes in the value of the swaps it enters.

CFTC Interpretation of "Regular Business." The CFTC also provided guidance on the meaning of "regular business." Under the final rules, regular business does not mean primary business. Rather, indicia of swap activity as a regular business include:

- Entering into swaps with the purpose of satisfying the business or risk management needs of the counterparty (as opposed to entering into swaps to accommodate one's own demand or desire to participate in the market);
- Maintaining a separate profit and loss statement reflecting the results of swap activity or treating swap activity as a separate profit center; and
- Allocating staff and resources to dealer-type activities with counterparties, including activities relating to credit analysis, customer onboarding, document negotiation, confirmation generation, requests for novations and amendments, exposure monitoring and collateral calls, covenant monitoring and reconciliation.

SEC Dealer-Trader Distinction. The SEC noted that the CFTC's interpretation of the applicability of the dealer-trader distinction to the "swap dealer" definition will not affect the SEC's interpretation of the dealer-trader distinction under the securities laws with respect to both the definition of "security-based swap dealer" and "dealer." The SEC will identify dealing based on factors, such as providing liquidity to market professionals or other persons in connection with security-based swaps; seeking to profit by providing liquidity in connection with security-based swaps; providing advice in connection with security-based swaps; presence of regular clientele and actively soliciting clients; use of inter-dealer brokers; and acting as a market maker on an organized security-based swap exchange or trading system. The SEC said that hedging will likely not be viewed as dealing activity.

Activity-Based Interpretation. Favoring an activity-based approach, the CFTC declined to adopt bright-line tests or categorical exclusions and re-affirmed its view that swap dealers "accommodate demand" for swaps. In evaluating whether a person is a swap dealer, it is not conclusive that a person has accommodated demand with respect to a particular swap. Rather, the CFTC will consider whether, in the context of the overall market, the person fulfills a function of accommodating demand or facilitating interests in swaps for other parties. The CFTC recognized, however, that the "large majority" of market participants using swaps for normal course hedging, financial, investment or trading purposes will not be swap dealers.

Swaps Not Considered in Determining Dealer Status

Swaps Used to Hedge Physical Positions. The CFTC departed from the proposed rules and decided to make clear that swaps used to hedge physical positions will be excluded from the swap dealer determination.[2] The CFTC adopted this portion of the rules as interim final and will accept comments as to this interim final section until 60 days after the date of publication in the Federal Register. This new clarification provides that the determination of swap dealer status will not require the consideration of a swap that:

- The person enters into for the purpose of offsetting or mitigating price risks that arise from the potential change in the value of (1) assets that the person owns, produces, manufactures,

[2] The exclusion for swaps used to hedge physical positions draws upon the CFTC's rules excluding bona fide hedge positions from the position limits rules as defined in CFTC Regulation § 151.5(a)(1).

processes, or merchandizes or anticipates owning, producing, manufacturing, processing, or merchandizing; (2) liabilities that the person owns or anticipates incurring; or (3) services that the person provides, purchases, or anticipates providing or purchasing;

- Is economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise;
- Is entered into in accordance with sound commercial practices; and
- The person does not enter in connection with activity structured to evade designation as a swap dealer.

Swaps Offered by an Insured Depository Institution in Connection with Originating a Loan. Dodd-Frank provides that an insured depository institution will not be considered to be a swap dealer based on swaps offered to or entered into with a customer in connection with originating a loan.[3] The CFTC's final rules provide that the exclusion applies to a swap that meets the following conditions:

- The swap is connected to the financial terms of the loan or is required by loan underwriting criteria to be in place as a condition of the loan in order to hedge the borrower's commodity price risks;
- The swap is entered into within 90 days before or 180 days after the date of the loan agreement, or any draw of principal under the loan;
- The loan is within the common law meaning of "loan"; and
- The insured depository institution is the sole lender or, if it is a participant in a lending syndicate, is responsible for at least 10% of the loan. If this last condition is not satisfied, then the notional amount of the swap may not exceed the amount of the insured depository institution's participation in the loan.

Inter-Affiliate Swaps. Consistent with the proposal to consider the economic reality of a swap transaction, the final rules clarify that both the CFTC and SEC will not consider swaps with majority-owned affiliates in determining whether a person is a Dealer. Counterparties are majority-owned affiliates if one counterparty, directly or indirectly, owns a majority interest in the other or if a third party, directly or indirectly, owns a majority interest in both counterparties to the swap. This rule is designed to exclude swaps that are used to allocate risk within a corporate group, rather than to transfer risk to an unaffiliated third party.

Swaps Between a Cooperative and Its Members. The final CFTC rules provide that a swap will not be considered in making the swap dealer determination if it is entered into by a cooperative with a member of the cooperative, as long as the swap is reported to a swap data repository and is subject to policies and procedures requiring the cooperative to monitor and manage the risk of swaps. The CFTC identified two types of cooperatives that will be able to take advantage of this exception: (1) "cooperative associations of producers" that are at least 75% owned or controlled, directly or indirectly, by producers of agricultural products and must comply with the Capper-Volstead Act, and (2) cooperative financial institutions, such as Farm Credit System institutions and Federal Home Loan Banks.

Swaps Entered into by Registered Floor Traders. The CFTC will not consider swaps entered into by a floor trader in determining whether a person is a swap dealer, provided that the person:

- Is registered with the CFTC as a floor trader pursuant to CFTC Regulation § 3.11;

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[3] A parallel exclusion does not appear in the Dodd-Frank definition of security-based swap dealer.

- Enters into swaps solely with proprietary funds for that trader's own account on or subject to the rules of a designated contract market or swap execution facility, and submits each such swap for clearing to a derivatives clearing organization;
- Is not an affiliated person of a registered swap dealer;
- Does not negotiate the terms of swap agreements, other than price and quantity or to participate in a request for quote process subject to the rules of a designated contract market or swap execution facility;
- Does not offer or provide swap clearing services to third parties;
- Does not enter into swaps that would qualify as hedging physical positions or hedging or mitigating commercial risk, with the exception of swaps executed opposite a counterparty for which the transaction would qualify as bona fide hedging;
- Does not participate in any market making program offered by a designated contract market or swap execution facility; and
- Complies with certain recordkeeping and risk management regulations.

De Minimis Exception

Dodd-Frank requires the Commissions to exempt from designation as a Dealer persons that engage in only a "de minimis" amount of dealing. The final rules differ significantly from the proposed de minimis thresholds. The proposed rules contained the following requirements for the de minimis exception: (1) the aggregate effective notional amount of swaps entered over the prior 12 months in connection with dealing was $100 million (or $25 million with special entities); (2) the person entered into swaps with no more than 15 counterparties over the prior 12 months; and (3) the person entered into no more than 20 swaps over the prior 12 months.

The final rules adopt only a notional value threshold and do not implement tests based on the number of swaps or counterparties. Accepting the proposal of several organizations submitting comments that the de minimis threshold be set at 0.001% of the size of the overall domestic swaps market, the Commissions adopted a final de minimis threshold of $3 billion aggregate notional amount over the prior 12 months in connection with dealing. To determine whether an entity exceeds the de minimis threshold, the entity must aggregate swap positions of all affiliates (other than swaps with majority-owned affiliates) controlling, controlled by, or under common control with it.

However, consistent with the proposed rule, to qualify for the de minimis exception, a person cannot deal more than $25 million aggregate notional amount in swaps to special entities over the prior 12 months. Special entities include federal agencies; states, state agencies, cities, and municipalities; pension funds; and endowments.

To facilitate an orderly transition, the Commissions proposed a "phase-in" period during which the de minimis threshold will be $8 billion aggregate notional amount over the prior 12 months in connection with dealing. Noting the absence of reliable swap data currently available to the Commissions and the potential that implementation of Dodd-Frank will change the swaps market, the CFTC directed its staff to complete a report, within 30 months after swap data reporting becomes effective, regarding relevant factors for the de minimis exception. Nine months after the CFTC staff report is issued, the CFTC may terminate the phase-in period and implement the $3 billion threshold or propose an alternative threshold. If the CFTC takes no action, the phase-in period will terminate five years after data starts being reported to swap data repositories, and the threshold level will be $3 billion.

Limited Purpose Designation

Consistent with the proposed rules, the final rules presume that a person is a Dealer with respect to all of its swap activities unless the CFTC or SEC, as applicable, decides to limit the person's designation to specified swap categories or activities. A person may apply for a limited designation when it registers with the Commissions or at a later time. The Commissions will not designate a person for limited purpose status unless it can demonstrate that it can fully comply with requirements applicable to all swap dealers or security-based swap dealers, such as trading records, documentation, confirmations, capital, risk management, and compliance requirements. A limited purpose designee could be a particular business unit within the company. The applicant must demonstrate full compliance with the requirements that apply to the type, class, or category of swap or security-based swap, or the swap activities, falling within the dealer designation.

MAJOR PARTICIPANTS

Statutory Definition of Major Participant

Dodd-Frank defines a Major Participant as any person, other than a Dealer:

- That maintains a "substantial position" in any of the major swap categories determined by the Commissions;
- With outstanding swaps creating "substantial counterparty exposure" that could have serious adverse effects on the financial stability of the U.S. banking or financial markets; or
- That is a "highly leveraged" "financial entity" not subject to the capital requirements established by a Federal banking agency and maintains a "substantial position" in any of the major swap categories determined by the Commissions.

Exclusion for Captive Finance Subsidiaries. Dodd-Frank excludes from the definition of major swap participant entities the primary business of which is providing financing and that use derivatives to hedge underlying interest rate and foreign currency exposures. To qualify for the exclusion, at least 90% of the interest rate or foreign currency exposure must arise from financing that facilitates the purchase or lease of products, at least 90% of which are manufactured by the parent company or another subsidiary of the parent company.

Final Rules

Major Swap Categories

Consistent with the proposed rules, the CFTC's final rules divide the swaps market into four major categories:

1. *Rate Swaps.* Any swap based on reference rates, such as interest, currency, inflation, or other monetary rates.
2. *Credit Swaps.* Any swap primarily based on instruments of indebtedness, including any swap based on related broad-based indices, and any broad-based index credit default swap or total return swap on one or more indices of debt instruments.
3. *Equity Swaps.* Any swap based on equity securities or on related broad-based indices, including total return swaps on one or more such indices.
4. *Other Commodity Swaps.* Any swap not included in the first three categories, including any swap based on physical commodities.

Also consistent with the proposed rules, the SEC's final rules establish two major categories of security-based swaps: (1) debt security-based swaps and (2) other security-based swaps. Debt security-based swaps are based on instruments of indebtedness or credit events relating to issuers of securities. Other security-based swaps are all other swaps not included in the first category, including swaps on equity securities.

Limited Designation. The final rules retain the Commissions' presumption that an entity that meets one of the Major Participant definitions will be deemed to be a Major Participant in all applicable swap categories. An entity that engages in significant activity in connection with only one type of swap may, however, apply for relief from designation as a Major Participant in one or more categories. The Commissions will not designate a person for limited purpose status unless it can demonstrate that it can fully comply with requirements applicable to all major swap participants and major security-based swap participants, such as trading records, documentation, confirmations, capital, risk management and compliance requirements.

Substantial Position

The first category of Major Participants established by Dodd-Frank are entities that maintain a "substantial position" in any major swap category, excluding positions held for hedging or mitigating commercial risk and positions maintained by ERISA plans for hedging or mitigating risks associated with the plan's operation. The final rules, like the proposed rules, define substantial position based on objective numerical criteria accounting for both a swap participant's current uncollateralized exposure and potential future exposure. A swap participant will have a substantial position in a major swap category if it satisfies one of two tests.

First Substantial Position Test. The first test under the CFTC's final rules defines a substantial position in swaps as current daily average aggregate uncollateralized outward exposure of $1B in any of the credit, equity, or other commodity swaps categories or $3B in the rate swaps category. The threshold for security-based swaps under the SEC's final rules is $1 billion in either of the two security-based swaps categories. The final rules do not prescribe a particular method for measuring current uncollateralized outward exposure. Instead, swap participants must mark their positions to market using industry standards, deduct the value of collateral posted for their positions, and calculate exposure on a net basis according to any master netting agreements with a single counterparty.

Second Substantial Position Test. The second test under the CFTC's final rules defines a substantial position in swaps as combined current daily average uncollateralized exposure and potential future exposure of $2 billion in any of the credit, equity, or other commodity swaps categories or $6 billion in the rate swaps category. The threshold for both categories of security-based swaps under the SEC's final rules is $2 billion. Like the proposed rules, the final rules measure potential future exposure by applying certain risk multipliers to swap participants' notional positions, ranging between 0.5% and 15%, based on the type and duration of the swap. Swaps positions are eligible for discounts up to 60% based on the terms of applicable master netting agreements and further discounts of 80% if they are subject to daily mark-to-market margining or 90% (up from 80% in the proposed rules) if they are centrally cleared.

Hedging or Mitigating Commercial Risk

Dodd-Frank excludes positions held for "hedging or mitigating commercial risk" from the substantial position analysis. Whether a swap hedges or mitigates commercial risk will be determined by analyzing the facts and circumstances at the time the swap is entered into as well as the swap participant's overall hedging and risk mitigation strategies. Under the CFTC's final rules, swaps hedge or mitigate commercial risk if they:

- Are economically appropriate for reducing risks incurred in the ordinary course of business relating to potential changes in the value of assets, liabilities, or services, and interest, currency, or foreign exchange rate exposure;
- Qualify as bona fide hedging for purposes of an exemption from position limits under the Commodity Exchange Act ("CEA"); or
- Qualify for hedging treatment under Financial Accounting Standards Board Accounting Standards Codification Topic 815, Derivatives and Hedging (formerly Statement No. 133) or (in a change from the proposed rules) Governmental Accounting Standards Board Statement 53, Accounting and Financial Reporting for Derivatives Instruments.

The CFTC's final hedging definition does not include swap positions held for speculation, investing, or trading; that is, positions executed primarily to take an outright view on market direction or to benefit from appreciation in the value of the position itself. In contrast to the end-user clearing exception, financial entities are eligible for the hedging exclusion. Entities hedging risks of majority-owned corporate affiliates are also eligible for the exclusion. The exclusion is available to "balance sheet" hedges and does not require demonstration of hedge effectiveness or specific documentation.

Under the SEC's final rules, security-based swaps will be considered to be held for the purpose of hedging or mitigating commercial risk if they:

- Are economically appropriate for reducing risks associated with the conduct and management of a commercial enterprise;
- Are not held for speculative or trading purposes; and
- Are not held to hedge or mitigate the risk of another swap position, unless that other position itself is held for the purpose of hedging or mitigating commercial risk.

In a departure from the proposed rules, security-based swap participants do not have to assess the effectiveness of hedging positions or document that assessment to invoke the hedging exclusion.

Substantial Counterparty Exposure

The second category of Major Participants are entities whose outstanding swaps create "substantial counterparty exposure" that could have serious adverse effects on the U.S. banking or financial markets. The CFTC's final rules define substantial counterparty exposure in swaps as current uncollateralized exposure of $5 billion or a combination of current uncollateralized exposure and potential future exposure of $8 billion across all positions. With respect to security-based swaps, the SEC's final rules establish thresholds of $2 billion current uncollateralized exposure and $4 billion combined current uncollateralized exposure and potential future exposure. The Commissions will calculate these amounts using the same methods used to calculate substantial position under the first Market Participant definition. However, the Commissions will consider all of an entity's positions across all swap categories and will not exclude hedging or employee benefit plan positions. Because this second category includes hedging transactions, a very large end user could be a Major Participant based upon its substantial hedging volume.

Highly Leveraged Financial Entity

The third category of Major Participants are "financial entities" not subject to the capital requirements of a federal banking agency that are "highly leveraged" and maintain a substantial position in any of the major swap categories. Under the final rules, the substantial position test is identical to the test in the first Major Participant definition, without excluding hedging and employee benefit plan positions.

Financial Entity. The final definition of financial entity mirrors the definition for financial entity in Dodd Frank's end-user exception from mandatory clearing. The definition encompasses Dealers, Major Participants, commodity pools, private funds, employee benefit plans, and persons predominantly engaged in financial or banking activities.

Highly Leveraged. The final rules define highly leveraged as a ratio of liabilities to equities greater than 12 to 1. In the proposed rules, the Commissions had proposed, and sought comment on, alternate ratios of 8 to 1 and 15 to 1. The calculation of liabilities and equities will be governed by general accounting principles subject to a limited exception for employee benefit plans.

Affiliate Issues

Treatment of Affiliated Entities. In general, a subsidiary's swap positions are attributed to a majority-owner parent, affiliate, or guarantor for purposes of the Major Participant analysis, but only to the extent that the counterparties to those positions would have recourse to that other entity in connection with the position. Subsidiaries that are already subject to capital regulation by the CFTC or SEC (*i.e.*, Dealers, Major Participants, futures commission merchants, and broker-dealers) or U.S. bank regulators are not subject to these aggregation requirements.

Inter-Affiliate Swaps. Whereas the proposed rules would have excluded from the calculation of Major Participant statue only swap transactions between wholly owned affiliates, the final rules relax that standard and exclude transactions between majority-owned affiliates too. The Commissions determined such transactions — whether between wholly owned or majority-owned affiliates — do not pose a high risk to the broader market.

ELIGIBLE CONTRACT PARTICIPANTS

Dodd-Frank Changes Relevant to ECP Status

As noted above, Dodd-Frank makes it unlawful for a person that is not an ECP to enter into a swap if the swap is not traded on a designated contract market or a national securities exchange.

Dodd-Frank amends the pre-Dodd-Frank definition of ECP by:

- Providing that for purposes of Section 2(c)(2)(B)(vi) and 2(c)(2)(C)(vii) of the CEA — which give the CFTC jurisdiction over retail forex pools — the term ECP does not include a commodity pool in which any participant is not itself an ECP;
- Raising the monetary threshold that government entities may use to qualify as ECPs, in certain situations, from $25 million to $50 million in investments owned and invested on a discretionary basis;
- Replacing the "total asset" standard for individuals to qualify as ECPs with an "amounts invested on a discretionary basis" standard.

Final ECP Rules

Dealers and Major Participants. Consistent with the proposed rules, the final rules explicitly include Dealers and Major Participants in the definition of ECP.

Retail Forex Commodity Pool Look-Through. Prior to Dodd-Frank, a pool could be an ECP regardless of the ECP status of individual participants. With respect to pool engaging in certain retail forex transactions, Dodd-Frank amended the ECP definition to require that individual participants also be ECPs for the pool to qualify as an ECP. This has been referred to as the "look through" requirement. With respect to so-called "transaction-level commodity pools" (those master or other funds that directly enter transactions), the final rules generally prohibit a forex pool from qualifying as an ECP if the forex pool has one or more direct participants that are not ECPs. In determining whether a direct participant in a forex pool is an ECP, the indirect participants in the forex pool (*e.g.*, through "feeder funds") will not be considered unless the forex pool has been structured to evade Dodd-Frank. As an alternative to the look-through, a forex pool may qualify as an ECP notwithstanding that it has one or more direct participants that are not ECPs if the forex pool (1) is not formed for the purposes of evading retail forex regulation; (2) has total assets exceeding $10 million; and (3) is formed and operated by a registered commodity pool operator or a commodity pool operator that is exempt from regulation. The CFTC delayed the effective date of these provisions until December 31, 2012.

Commodity Pools Generally. Under Section 1a(18)(A)(iv) of the CEA, a commodity pool qualifies as an ECP if it has total assets exceeding $5 million and is formed or operated by a person subject to CFTC regulation. Under Section 1a(18)(A)(v), an entity may qualify as an ECP if, among other things, it has a net worth exceeding $1 million and enters into an agreement, contract, or transaction to manage commercial risk. Consistent with the proposed rules, the final rules prohibit a commodity pool that does not have total assets exceeding $5 million (as required under Section 1a(18)(A)(iv)) from qualifying as an ECP under Section 1a(18)(A)(v).

Qualification as an ECP with Respect to Swaps Used to Hedge or Mitigate Commercial Risk. In the proposed rules, the CFTC requested comment on whether additional categories should be added to the ECP definition given that non-ECPs cannot enter into swaps other than on a designated contract market. In response to comments requesting greater flexibility for end users hedging or mitigating commercial risk, the final rules provide that, for purposes of a swap (but not a security-based swap) used to hedge or mitigate commercial risk, an entity may, in determining its net worth for purposes of the ECP definition, include net worth of any owner of the entity, provided that all such owners are ECPs.

The final entity definition rules are available here.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our energy practice group:

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