

Investment Funds

Swaps Regulation in Focus: What's In, What's Out and What's Next

September 13, 2012

The Commodity Futures Trading Commission (CFTC) and the Securities and Exchange Commission (SEC) published their joint final rules release further defining the terms “swap,” “security-based swap,” “security-based swap agreement” and “mixed swap” (the “Definitions Release”) in the Federal Register on August 13, 2012.¹ The Definitions Release provides granular detail on the products that are within the scope of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) and also triggers the countdown to the effectiveness of several important requirements in the Dodd-Frank Act.

The Dodd-Frank Act mandates the regulation of swaps and the operators of pooled investment vehicles that invest in them, as described in our client alert [here](#). Authority to administer that regulation has largely been delegated to the CFTC, and pools investing in swaps will be regulated, in many respects, in the same way as pools investing in commodity futures. Identifying whether a transaction is a swap is sometimes difficult because a transaction that may not sound like a commodity transaction to a casual observer may be deemed to be a swap and thereby require the investment manager to the fund engaging in such transaction to register as a commodity pool operator (CPO) or find an exemption. In addition, a transaction that may be referred to as a swap in the parlance of the relevant industry may still be outside of the term “swap” as used in the Dodd-Frank Act.

The product-by-product analysis in the Definitions Release is itself useful for operators of potential commodity pools to determine whether they must be registered with the CFTC by December 31, 2012 or whether they may satisfy the criteria for an exemption. Potential pool operators should review the below list of instruments set forth in Appendices to this alert to determine if the agreements they have entered into are “swaps,” “security-based swaps” or “mixed swaps” (an instrument that is a swap, security-based swap or mixed swap is referred to herein as a “Title VII Instrument”). Any Title VII Instrument that is a swap will, effective as of December 31, 2012,² be included as a commodity interest in the definition of the term “commodity pool” along with the other commodity instruments, such as futures contracts, security futures products, “retail foreign exchange” and “retail commodity” transactions, commodity options and leveraged transaction products, that are currently subject to the jurisdiction of the CFTC and require the investment manager of a fund to either register as a CPO or obtain an exemption from registration. In addition to the analysis of transactions, several other CFTC regulations’ compliance dates are set by reference to the publication of the Definitions Release.

¹ The Definitions Release is available at <http://www.gpo.gov/fdsys/pkg/FR-2012-08-13/pdf/2012-18003.pdf>

² See CFTC Final Order “Effective Date for Swap Regulation,” 76 Fed. Reg. 42508 (July 19, 2011) and CFTC Final Order “Second Amendment to July 14, 2011 Order for Swap Regulation,” 77 Fed. Reg. 41260 (July 13, 2012).



Date	Obligation under the Dodd-Frank Act ³
October 12, 2012	<ul style="list-style-type: none"> • CFTC spot-month position limits⁴ will apply to U.S. exchange-listed physical commodity futures contracts, as well as to swaps that reference the specified contracts and contracts settling against the specified contracts that are executed on, or pursuant to, rules of a foreign board of trade (FBOT) providing direct access to U.S. persons • Non-spot-month position limits relating to the “legacy” contracts will apply to U.S. exchange-listed physical commodity futures contracts, as well as to swaps that reference the specified contracts and contracts settling against the specified contracts that are executed on, or pursuant to, rules of an FBOT providing direct access to U.S. persons • Position visibility levels and related reporting requirements under CFTC Regulation 151.6 • Reporting and recordkeeping requirements will apply for Swaps Execution Facilities (SEFs), Derivatives Clearing Organizations (DCOs), Designated Contract Markets (DCMs), swap dealers (SDs) and Major Swap Participants (MSPs) for credit swaps and interest rate-based swaps • Real time reporting requirements will apply for pricing and transaction information for SEFs, DCOs, DCMs, SDs and MSPs for publicly reportable credit swaps and interest rate-based swaps • Required registration deadline for SDs and MSPs
January 1, 2013	<ul style="list-style-type: none"> • Certain compliance obligations for SDs and MSPs, which will require changes to trading documentation as specified in “Preparation for Dodd-Frank Clearing and Reporting” below • Swap trading relationship documentation requirements for SDs and MSPs will become effective for swap transactions with “active funds”⁵
January 10, 2013	<ul style="list-style-type: none"> • Reporting and recordkeeping requirements will apply for SEFs, DCOs, DCMs, SDs and MSPs for commodity, foreign exchange and equity swaps • Real time reporting requirements will apply for pricing and transaction information for SEFs, DCOs, DCMs, SDs and MSPs for publicly reportable commodity, foreign exchange and equity swaps
April 1, 2013	<ul style="list-style-type: none"> • Swap trading documentation requirements for SDs and MSPs will become effective for swap transactions with commodity pools or private funds that are not active funds
April 10, 2013	<ul style="list-style-type: none"> • Reporting and recordkeeping requirements will apply for all other entities⁶ for all swaps • Real time reporting requirements will apply for all other entities⁷ for all publicly reportable swaps

³ The below list does not include obligations that are particular to other registered market participants, such as the recordkeeping, reporting, conflict of interest rules and chief compliance officer rules applicable only to SDs and MSPs and registration, duties, core principles and data requirements for swap data repositories, which may indirectly affect traders.

⁴ See our prior alert available [here](#) for more information regarding position limits.

⁵ See “Upcoming Compliance Requirements—Clearing” for a definition of “active fund.”

⁶ Note that the obligation to report swaps is subject to a reporting hierarchy, whereby swaps are reported by SEFs and DCMs, then by DCOs, then by SDs, then by MSPs, then by non-SDs and non-MSPs that are financial entities (such as funds and commodity pools) and finally by non-SDs and non-MSPs that are not financial entities. If a person higher in the hierarchy reports, a person lower in the hierarchy is not required to report. SDs, DCOs and DCMs will therefore satisfy the reporting requirements for most swaps.

⁷ The hierarchy for swaps reporting applies to real-time reporting. See note 6 above.

JURISDICTION OVER SWAPS

The parties to a swap must determine whether an agreement is subject to the jurisdiction of the SEC or CFTC prior to entering into the agreement in order to be able to comply with the appropriate swaps compliance regime. In addition, persons who are parties to agreements that may be swaps will also need to determine as soon as possible if they expect to be⁸ able to comply with the *de minimis* standards for swaps set forth in CFTC Regulation 4.13(a)(3) after the effectiveness of the rescission of Regulation 4.13(a)(4)⁹ and when an entity must comply with clearing requirements.

While the definition of the term “swap” in the Dodd-Frank Act provides some initial guidance,¹⁰ the Definitions Release goes into much more detail on specific products and whether they are swaps. Appendix A provides a useful summary of the types of transactions that are analyzed in the Definitions Release, as to whether they are swaps, securities-based swaps or not a Title VII Instrument.¹¹

Once a person determines that an agreement is a Title VII Instrument that is subject to the jurisdiction of the SEC or CFTC, it must determine whether the Title VII Instrument is subject to the SEC’s regime for security-based swaps or the CFTC’s regime for swaps that are not security-based swaps. In general, a securities-based swap is an agreement that 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, 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. Appendix B discusses the criteria used for determining whether a particular index is broad-based or narrow-based. The SEC’s compliance regime has not yet been adopted, but many of its proposed rules are similar to the requirements of the CFTC’s final regulations.

Upcoming Compliance Requirements

Reporting

Persons entering into swaps will be required to ensure that the swap is reported, appropriate records are kept and agreements are cleared as specified in the Dodd-Frank Act. When the reporting requirement phases in as set forth above, most swaps will be reported by the SEF or DCM, the DCO, or the SD or MSP counterparty. Private funds and other parties to swaps for which an SD or MSP is not the counterparty will, however, be required to agree with the swap counterparty which party will report the swap to a swap data repository.¹²

If the swap transaction is an arm’s-length transaction between two parties that results in a change of risk position or is a termination or other change to a swap that changes the pricing of a swap, the swap transaction would be a “publicly reportable swap transaction” that is subject to additional reporting obligations under the real time reporting regime. While the reporting deadline for real time reporting is significantly shorter, the set of data required to be reported in “real time” is smaller, generally consisting only of certain pricing and transaction data. Fortunately, the reporting is

⁸ For more information on the *de minimis* standard, see our previous alert on the rescission of Regulation 4.13(a)(4) (available [here](#)), Regulation 4.13 (available [here](#)) and our alert on the CFTC staff’s responses to FAQs (available [here](#)). Note that the National Futures Association (NFA) has proposed a change to its rules to permit CPOs and CTAs that only trade in swaps or in a *de minimis* amount of swaps to register as a CPO or CTA without taking the Series 3 exam. The NFA’s proposed rule amendment is available [here](#).

⁹ Note that securities-based swaps are not swaps that are subject to CFTC jurisdiction, including for purposes of determining whether a promoter or adviser of a pool is required to register with the CFTC.

¹⁰ The definition of the term “swap” from Section 721 of the Dodd-Frank Act is available [here](#).

¹¹ Appendix A is only a summary of the Definitions Release and the relevant provision of the Definitions Release should be reviewed for the purposes of analyzing a particular transaction.

¹² The terms used in this report refer to Title VII Instruments subject to the jurisdiction of the CFTC. Similar terms, such as “security-based swap dealer,” “major security-based swap participant,” “security-based swap data repository” and “clearing agency” (instead of DCO) are used for analogous concepts with respect to Title VII Instruments subject to the SEC’s jurisdiction. The CFTC terms are used in this alert, because the SEC’s security-based swaps regime is not as clearly developed yet.

subject to the same hierarchy as is applicable to other swap reporting, and therefore SEFs, DCMs, DCOs, SDs or MSPs will most often satisfy the real time reporting requirements.

Recordkeeping

All parties to swaps will be required to keep appropriate records. Specifically, persons that enter into swaps that are not SDs or MSPs are required to “keep full, complete, and systematic records together with all pertinent data and memoranda, with respect to each swap in which they are a counterparty . . . throughout the life of the swap and for a period of at least five years following the final termination of the swap.”¹³ Parties to swaps that are not SDs or MSPs may keep records in electronic or paper form so long as the records are retrievable within five business days.

While the recordkeeping rule summarized above will phase in with the reporting rule, another rule applies for earlier swaps, which requires swap parties to keep records of the minimum primary economic terms of the swap specified in the reporting rules and, if in possession of the party on or after April 25, 2011, a copy of the relevant swap confirmation, master agreement and any credit support or similar agreement.

Clearing

Pool operators also will need to determine, based on their pools’ history of trading swaps, when their pools or other private funds will have to comply with the clearing mandate. Private fund commodity pools that execute 200 or more swaps¹⁴ per month on average will be “active funds” that are included as a “Category 1 Entity” along with MSPs and SDs and will be subject to an earlier clearing schedule. Other private funds, commodity pools and banking entities will be “Category 2 Entities.” The CFTC recently adopted a phase-in schedule for compliance with the clearing mandate of the Dodd-Frank Act as follows:¹⁵

Time for Compliance	Type of Swap
No later than 90 days from the date of publication of the clearing requirement in the Federal Register	A swap between a Category 1 Entity and another Category 1 Entity, or any other entity that desires to clear the transaction, must comply with the clearing requirements of Commodity Exchange Act (CEA)
No later than 180 days from the date of publication of such clearing requirement determination in the Federal Register	A swap between a Category 2 Entity and a Category 1 Entity, another Category 2 Entity, or any other entity that desires to clear the transaction, must comply with the clearing requirements of the CEA
No later than 270 days from the date of publication of such clearing requirement determination in the Federal Register	All other swaps for which neither of the parties to the swap is eligible to claim the exception from the clearing requirement set forth in section 2(h)(7) of the CEA and CFTC Regulation 39.6

The CFTC has proposed a clearing determination for certain classes of credit default swaps (CDS) and interest rate swaps¹⁶ but has not yet published any final clearing determinations for any instruments. The CFTC has also proposed an exception to the clearing requirement for swaps between an entity and a direct or indirect majority owner or subsidiary or between counterparties under common control so long as the swap and the swap counterparties satisfy certain conditions.¹⁷

¹³ CFTC Regulation 45.2(b) and (c).

¹⁴ Note that as used in this alert, including for the purposes of determining whether a fund is an “active fund,” the term “swap” does not include a “security-based swap.”

¹⁵ See 77 Fed. Reg. 44441 (July 30, 2012) and CFTC Regulation 50.25.

¹⁶ See 77 Fed. Reg. 47170 (Aug. 7, 2012).

¹⁷ See 77 Fed. Reg. 50425 (Aug. 21, 2012).

Preparation for Dodd-Frank Clearing and Reporting

Advisers of funds that may be commodity pools should begin preparing for the implementation of the swap regulatory regime in the Dodd-Frank Act. Specifically, they should review their portfolio to determine if they will be able to rely on an exemption and begin the CPO registration process as soon as possible if they cannot. Persons that previously were exempt from registration as a CPO under CFTC Regulation 4.13(a)(4) and plan to take advantage of exemptions under Regulation 4.7 or 4.12 or CFTC Advisory 18-96 may pre-file their exemptions to be effective upon the termination of the 4.13(a)(4) transition period on January 1, 2013 so long as they are registered or pending registration as a CPO when they pre-file the exemption.¹⁸

In addition, the compliance dates for several CFTC regulations that will require specific terms and detail in swaps agreements will occur early in 2013. The recently adopted documentation requirements for swaps transactions between SDs and MSPs and active funds will begin to apply on January 1, 2013. The documentation obligations will begin to apply to swap transactions between SDs or MSPs and commodity pools or other private funds on April 1, 2013 and to swap transactions between SDs or MSPs and most other non-financial counterparties on July 1, 2013.¹⁹ Also, several compliance obligations applicable to SDs and MSPs will become effective on January 1, 2013 that also will impact documentation for any swap transactions with SDs and MSPs. Furthermore, funds should begin entering into clearing arrangements with SDs and futures commission merchants to prepare for clearing.

¹⁸ See National Futures Association Notice to Members 12-20, available [here](#).

¹⁹ See “Confirmation, Portfolio Reconciliation, Portfolio Compression and Swap Trading Documentation Requirements for Swap Dealers and Major Swap Participants” published by the CFTC on August 27, 2012 (and available [here](#) until published in the Federal Register). The International Swaps and Derivatives Association has developed supplements to their forms to address the requirements of the CFTC regulations.

Appendix A

Swaps Jurisdiction Guide

CFTC JURISDICTION:

In addition to providing a general description of the term swap (available [here](#)), Section 1a(47) of the CEA states that the term swap also specifically includes the following, which were not discussed in the Definitions Release summarized above, but are included in the term “swap”: (i) an interest rate swap; (ii) a rate floor; (iii) a rate cap; (iv) a rate collar; (v) a basis swap; (vi) a total return swap; (vii) an equity index swap; (viii) an equity swap; (ix) a debt index swap; (x) a debt swap; (xi) a credit swap; (xii) a credit spread; (xiii) a credit default swap; (xiv) a weather swap; (xv) an energy swap; (xvi) a metal swap; (xvii) an agricultural swap; and (xviii) a commodity swap. The CEA specifically excludes a securities-based swap (which is subject only to SEC jurisdiction) from the definition of a “swap” (which is subject only to CFTC jurisdiction). Swaps on broad-based securities indexes, including credit default swaps on broad-based indexes are “swaps.”

Name of Instrument	Definition and Determining Criteria for a Title VII Instrument Being a “Swap”
Financial Guarantee of a Swap ²⁰	CFTC deems a guarantee of a swap (other than a security-based swap or a mixed swap) to be a swap if counterparties would have recourse to the guarantor or credit support provider (whether limited or full recourse).
Commodity Options ²¹	The CFTC deems an option to purchase a commodity covered by the CEA to be swap.
Foreign Exchange Forward <i>May be excluded by the Secretary of the Treasury (the “Secretary”)</i> ^{22 23}	For now, the CFTC deems a “transaction that <i>solely</i> involves the exchange of two different currencies on a future date at a fixed rate agreed upon the inception of the contract covering the exchange” to be swap. The Secretary may, however, exclude foreign exchange forwards from the term swap. The agreement must settle in the currency (rather than settling in a reference currency) to be subject to exclusion from the term “swap” by the Secretary. ²⁴
Foreign Exchange Swaps <i>May be excluded by the Secretary</i> ^{25 26}	For now, the CFTC deems a “transaction that <i>solely</i> involves (A) an exchange of two different currencies on a specific date at a fixed rate agreed upon the inception of the contract covering the exchange and (B) a reverse exchange of two currencies described in subparagraph (A) at a later date and at a fixed rate agreed upon the inception of the contract covering the exchange” to be a swap. The Secretary may, however, exclude foreign exchange for swaps from the term swap. The agreement must settle in the currencies contemplated by the swap (rather than cash settlement in a reference currency) for the foreign exchange transaction to be subject to exclusion from the term “swap” by the Secretary. ²⁷

²⁰ Definitions Release text at notes 183 to 198. Note that guarantee of a security-based swap is not, as discuss below, a Title VII Instrument.

²¹ Definition of term swap in CEA Section 1a47 and Definitions Release text at notes 312 to 323.

²² Reporting and business conduct standards will continue to apply even after exclusion.

²³ 1a24 of the CEA.

²⁴ Definitions Release at note 538.

²⁵ Reporting and business conduct standards will continue to apply even after exclusion.

²⁶ 1a25 of the CEA.

²⁷ Definitions Release at note 539.

Name of Instrument	Definition and Determining Criteria for a Title VII Instrument Being a “Swap”
Foreign Currency Options <i>Not subject to exclusion by the Secretary</i> ²⁸	Options on currencies are expressly enumerated in the CEA as a swap. Currency options traded on a national securities exchange, however, are “securities” under the federal securities laws and are not Title VII Instruments. ²⁹
Non-Deliverable Forward Contracts Involving Foreign Exchange <i>Not subject to exclusion by the Secretary</i> ³⁰	The CFTC deems non-deliverable forwards to be swaps. Non-deliverable forwards are foreign exchange forwards that settle into a reserve currency, such as U.S. dollars, based on the difference in rates instead of resulting in actual delivery into the relevant foreign currency (typically because of currency controls)
Currency Swaps and Cross-Currency Swaps <i>Not subject to exclusion by the Secretary</i> ³¹	The CFTC deems currency and cross-currency swaps, generally a swap in which the fixed legs or floating legs based on various interest rates are exchanged in different currencies, to be swaps.
Forward Rate Agreement <i>Not subject to exclusion by the Secretary</i> ³²	The CFTC deems an over-the-counter contract for a single cash payment, due on the settlement date, based on a spot rate (determined by a method agreed upon by the parties) and a pre-specified forward rate to be a swap. ³³ Because delivery is not contemplated, it is not a forward contract.
Contract for Differences (CFDs) (Other than Security-Based CFDs) <i>Not subject to exclusion by the Secretary</i> ³⁴	An agreement to exchange the difference in value of an underlying asset between the time at which a CFD position is established and the time at which it is terminated. The CFTC expressly deems CFDs for foreign exchange to be “swaps.”
Swaps Based on Interest Rates and Other Monetary Rates ³⁵	The CFTC deems agreements that result in payments being exchanged based solely on the levels of certain interest rates or monetary rates (as opposed to securities) to be swaps. Examples of underlying rates include (i) interbank offered rates; (ii) money market rates based actual lending or money market transactions; (iii) government target rates, general lending rates (such as prime rate); (iv) other monetary rates (such as the Consumer Price Index or payroll index); or (iv) indexes based on the above.

²⁸ 1a47(A)(i) of the CEA and Definitions Release text at notes 525 to 530, CFTC Regulation 1.3(xxx)(2).

²⁹ Definitions Release at note 529.

³⁰ Regulation 1.3(xxx)(3)(v). Definitions Release at notes 531 to 555

³¹ Regulation 1.3(xxx)(2)(A) and 1.3(xxx)(3)(v)(A). Definitions Release text at notes 556 to 561.

³² Regulation 1.3(xxx)(2)(E) and Definitions Release text at notes 585 to 590.

³³ The single cash payment is equal to the product of the present value (discounted from a specified future date to settlement date) of the difference between the forward rate and the spot rate on the settlement date multiplied by the notional amount.

³⁴ Definitions Release text at notes 595 to 599.

³⁵ Definitions Release text at notes 629 to 637.

Swaps Based on a Single Security or Loan that is Government Security ^{36 37}	Title VII Instruments on “exempted securities” (as defined in Futures Trading Act of 1982 as in effect on the date of its enactment) other than municipal securities or options thereon are specifically excluded from “security-based swap.” ³⁸
Total Return Swap (TRS) on Two or More Non-Security Loans ³⁹	The SEC and the CFTC (the “Commissions”) deem a swap on exclusively two or more non-security loans to be swap. Because the term “narrow-based security index” is based on the term “security,” a multiple loan TRS is a swap and not a security-based swap.
Swap Based on a Commodity Future ⁴⁰	The CFTC deems a swap based on a commodity future to be a swap.
Swap Based on a Security Future on Securities Exempted under Exchange Act Rule 3a12-8 (<i>i.e.</i> , securities issued by certain foreign governments) ⁴¹	The Commissions deem Title VII Instruments based on security futures contracts relating to debt securities issued by certain foreign governments under Exchange Act Rule 3a12-8 (click here for the rule) to be a swap under the jurisdiction of the CFTC if (i) the futures contract is a “qualifying foreign futures contract” as defined in Exchange Act Rule 3a12-8; (ii) the Title VII instrument is traded on or through a board of trade; (iii) neither the underlying debt securities nor any American depository receipt is covered by an effective registration statement under the Securities Act of 1933; (iv) the Title VII Instrument may only be cash settled; and (v) the Title VII instrument is not entered into by the issuer of the underlying security, its affiliates or any underwriter of the securities.

³⁶ “Government securities” are (i) securities which are direct obligations of, or obligations guaranteed as to principal or interest by, the United States; (ii) securities which are issued or guaranteed by the Tennessee Valley Authority or by corporations in which the United States has a direct or indirect interest and which are designated by the Secretary of the Treasury for exemption as necessary or appropriate in the public interest or for the protection of investors; and (iii) securities issued or guaranteed as to principal or interest by any corporation the securities of which are designated, by statute specifically naming such corporation, to constitute exempt securities within the meaning of the laws administered by the SEC. For the purposes of the Dodd-Frank Act swap jurisdiction determination, “government securities” does not include puts, calls, options or other option. Section 3(a)(42) of the Exchange Act.

³⁷ Section 3(a)(68) of the Exchange Act and Definitions Release text at notes 639 to 641.

³⁸ Note, however, that security futures based on the yield of government securities issued by certain foreign governments are exempted from the jurisdiction of the SEC pursuant to Section 3(a)(12) of the Exchange Act and Rule 3a12-8. Title VII instruments on foreign government securities are not excluded from the definitions of “security-based swap” because they were not excluded in 1982.

³⁹ Definitions Release text at notes 661 to 664.

⁴⁰ Definitions Release text at note 698.

⁴¹ CFTC Regulation 1.3(bbbb) and Definitions Release text at notes 700 to 719.

SEC JURISDICTION:

Security-based swaps are subject to the exclusive jurisdiction of the SEC. The Exchange Act defines a securities-based swap as an agreement that is a swap (without giving effect to the exclusion for securities-based swaps) that 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, 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.

Name of Instrument	Definition and Determining Criteria to be Securities-Based Swaps
Securities-Based CFDs ⁴²	The Commissions deem an agreement to exchange the difference in value of a security or a narrow-based security index between the time at which a CFD position is established and the time at which it is terminated to be a security-based swap.
Option on a Securities-Based Swap ⁴³	The Commissions deem options on securities-based swaps to be securities-based swaps.
Swaps Based on an Index that is Narrow-Based (including any interest therein or on the value thereof) ⁴⁴	See Appendix B for more information on whether an index is narrow-based.
Swaps Based on a Single Security (including any interest therein or on the value thereof, such as yield) Other than Government Securities ⁴⁵	The Commissions deem swaps based on the yield of a debt security to be a securities-based swap because yield is deemed to be proxy for the price of the debt security.
Swaps Based on a Loan (including any interest therein or on the value thereof, such as yield) Other than on Government Securities ⁴⁶	Swaps based on a single loan are security-based swaps.
Swaps Based on a Loan or Security Issued by any Foreign Government (including any interest therein or on the value thereof, such as yield) ⁴⁷	The Commissions deem Title VII Instruments based on foreign debt securities to be a security-based swap. Title VII Instruments on “exempted securities” (as defined in Futures Trading Act of 1982 as in effect on the date of its enactment) other than municipal securities or options thereon are specifically excluded from “security-based swap.” Title VII instruments on foreign government securities are not excluded from the definitions of “security-based swap” because they were not excluded in 1982. ⁴⁸

⁴² Definitions Release text at notes 595 to 599.

⁴³ CEA Section 1a(47) and Definitions Release text at notes 591 to 594.

⁴⁴ Section 3(a)(68) of the Exchange Act. See Definitions Release text at notes 639 to 677.

⁴⁵ Section 3(a)(68) of the Exchange Act.

⁴⁶ Section 3(a)(68) of the Exchange Act.

⁴⁷ Section 3(a)(68) of the Exchange Act and Definitions Release text at notes 639 to 641.

⁴⁸ Note, however, that security futures based on the yield of government securities issued by certain foreign governments are exempted from the jurisdiction of the SEC pursuant to Section 3(a)(12) of the Exchange Act and Rule 3a12-8.

Name of Instrument	Definition and Determining Criteria to be Securities-Based Swaps
Swaps Based on 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 ⁴⁹ (e.g., credit default swaps (CDS) or narrow-based CDS) ^{50 51}	See Appendix B for the definition of a narrow-based index on CDS.
Total Return Swap on a Single Security or Loan or Narrow-Based Index ⁵²	The Commissions deem a total return swap on a single security or a narrow-based index to be a security-based swap. A total return swap is an agreement in which one party makes a payment based on the price appreciation and income from an underlying security or index. The other counterparty makes a financing payment and a payment based on the depreciation of the underlying reference. If the financing payment is based on a typical interest rate such as a floating rate payment, it would only be a securities-based swap. If additional elements or atypical financing rates or optionality are included, then the swap may become a mixed swap.
Quanto Swap ⁵³	The Commissions define a quanto swap as an equity swap in which (a) the underlying is denominated in a currency (the foreign currency) other than that in which the equity swap is denominated (the domestic currency); (b) the final value of the underlying is denominated in the foreign currency and is converted into the domestic currency using the exchange rate prevailing at inception, resulting in the investor not being exposed to currency risk. ⁵⁴ The Commissions deem a quanto swap to be a securities-based swap if (i) the purpose of the swap is to gain exposure to the return of a security or a narrow-based security index without transferring exposure to the currency exchange risk and (ii) any exchange rate or currency risk exposure incurred by the dealer due to a difference in the currency denomination of the quanto equity swap and of the underlying security or security index is incidental to the quanto equity swap and arises from the instrument(s) the dealer chooses to use to hedge the quanto equity swap and is not a direct result of any expected payment obligations by either party under the quanto equity swap.
Swap Based on a Security Future ⁵⁵	While security futures are both securities and futures, the Commissions deem a swap on a security future (other than a security future on government securities or certain foreign government securities issued by countries specified in Rule 3a12-8) to be a security-based swap.

⁴⁹ The definition from the Exchange Act also specifies that the event must “directly affect the financial statements, financial condition, or financial obligations of the issuer.”

⁵⁰ Section 3(a)(68).

⁵¹ Each CDS would be separately analyzed to determine if it is a swap or securities-based swap. The fact that the agreements are executed at the same time does not in itself require separate swaps to be aggregated into an index.

⁵² Definitions Release text at notes 642 to 651.

⁵³ Definitions Release text at notes 652 to 657.

⁵⁴ Release text at note 654, quoting Handbook of Corporate Equity Derivatives and Equity Capital Markets § 1.2.10, at 23.

⁵⁵ Definitions Release text at note 697.

CFTC AND SEC JURISDICTION—MIXED SWAPS:

Both of the Commissions have jurisdiction over mixed swaps.

Name of Instrument	Definition and Determining Criteria
Compo Equity Swap ⁵⁶	An agreement in which the total return and exposure is based both the performance of foreign stocks and changes to the exchange rate.

EXCLUDED FROM SWAPS AND SECURITY-BASED SWAPS REGULATION:

Each of the items below is excluded from regulation as a swap or security-based swap in the regulation of the Commissions if the transaction satisfies the criteria specified below.

Name of Instrument	Definition and Determining Criteria to Not be a Title VII Instrument
Insurance ⁵⁷	<p>To be insurance, instead of a swap, an agreement for insurance must both (i) satisfy the “agreement test” (see below) or be one of the specified types of insurance and (ii) be offered by certain types of regulated persons under the “provider test” (see below). In addition, an agreement entered into before October 12, 2012 will be insurance if the insurer satisfied the provider test at the time entered into.</p> <p>Under the agreement test, the agreement must satisfy <u>each</u> of the following: (i) it requires the beneficiary to have an insurable interest throughout the duration of the contract; (ii) it requires that a loss occur and be proved before payout and payments be limited to the amount of the loss; (iii) it is not traded separately from the insurance interest on an organized market or over-the-counter; and (iv) for financial guaranty insurance, payments are only accelerated at the option of the insurer. The specified types of insurance that may also satisfy the agreement test requirements are: surety bonds, fidelity bonds, life insurance, health insurance, long-term care insurance, title insurance, property and casualty insurance, annuities, disability insurance, insurance against default on individual residential mortgages and reinsurance on the above (see below for additional reinsurer requirements).</p> <p>The “provider test” requires that an insurer and the agreement be subject supervision and to regulation by the insurance regulator of the United States or a state of the United States, or in the case of non-admitted insurance, the insurer is located outside of the United States and is included in the National Association of Insurance Commissioners’ quarterly list of alien insurers and meets the requirements for non-admitted insurers under applicable state law. A state or the United States or any of its instrumentalities providing insurance may also satisfy the “provider test.”</p>
Reinsurance ⁵⁸	<p>To be excluded reinsurance, the reinsurance agreement must satisfy the product test or be one of the specified types of insurance, must provide reinsurance to an insurer authorized under the provider test above and must satisfy each of the following: (i) the reinsurer is not prohibited under state or U.S. law from offering insurance and (ii) the total amount reimbursable by all reinsurers under the agreement does not exceed the claim or losses paid by the cedant unless permitted under state law.</p>

⁵⁶ Definitions Release text at notes 658 to 660.

⁵⁷ CFTC Reg. 1.3(xxx)(4)(i)(A) and Rule 3a69-1(a)(1) under the Securities Exchange Act of 1934 (the “Exchange Act”). Definitions Release text at notes 29 to 202.

⁵⁸ CFTC Reg. 1.3(xxx)(4)(i)(B)(3) and Exchange Act Rule 3a69-1(a)(2)(iii). Definitions Release text at notes 35 to 37, 105 to 112 and 150 to 153.

Name of Instrument	Definition and Determining Criteria to Not be a Title VII Instrument
Guarantee of a Securities-Based Swap ⁵⁹	A guarantee of an obligation under a securities-based swap is not a securities-based swap, but the guarantee of a security-based swap may be a security for securities law regulation. The SEC may require reporting of guarantees in its final rules.
Nonfinancial commodity ⁶⁰ forward ⁶¹	Commercial merchandising arrangements with enforceable obligations to deliver that are deferred for reasons of commercial convenience or necessity, are outside of the Commissions' jurisdiction. The parties must have intended to physically deliver as part of commercial activity as a commercial market participant and regularly make or take delivery as part of business. Forwards relating to intangible commodities, such as electricity, can be analyzed as per the above as a physically delivered forward if the underlying commodity can be conveyed in some manner and the commodity can be consumed.
Book-out of a nonfinancial commodity forward ⁶²	A separate opposite-way transaction with a counterparty executed and negotiated subsequent to the original agreement and a separate written book-out agreement to cash settle the differences is outside of the Commissions' jurisdiction. In order to be a bona fide book-out outside of the Commissions' jurisdiction, both parties must have originally intended to receive physical delivery and must regularly make or take delivery as part of business.
Forward contracts relating to environmental commodities ⁶³	Contracts that relate to an environmental commodity that can be consumed through mandatory or voluntary environmental programs and that result in the transfer of ownership of the environmental commodity would be analyzed as a forward per the above.
Physical Exchange Transactions ⁶⁴	Such transactions are defined as a gas utility entering into a transaction with another gas utility or other market participant whereby delivery is tendered at one location in exchange for the same quantity of gas at an alternative delivery point for the purpose of transferring ownership to rationalize delivery of physical supplies. The Commissions deem physical exchange transactions as outside of their jurisdiction if the transaction is physically settled (even if cash payment is also involved) and the transaction satisfies the forward and book-out criteria.
Fuel Delivery Agreements ⁶⁵	A fuel delivery agreement is defined as an agreement whereby two or more parties agree to divide the cost of acquiring fuel for generation facilities based on a formula or factors, such as their respective financial contributions. The Commissions deem fuel delivery agreements as out of their jurisdiction if conditions can be satisfied for forwards above and the agreement is not optional.

⁵⁹ Definitions Release text at notes 199 to 201. Note that the guarantees of swaps are swaps as described above.

⁶⁰ A Nonfinancial commodity is a commodity that can be physically delivered that is not an excluded commodity, such as an interest rate, currency credit risk or other macroeconomic index or measure.

⁶¹ Definitions Release text at notes 206 to 269. See also Statutory Interpretation Concerning Forward Transactions, 55 Fed. Reg. 39188 (Sept. 25, 1990).

⁶² Definitions Release text at notes 206 to 269.

⁶³ Definitions Release text at notes 270 to 301.

⁶⁴ Definitions Release text at notes 302 to 307.

⁶⁵ Definitions Release text at note 308.

Name of Instrument	Definition and Determining Criteria to Not be a Title VII Instrument
Commodity Options Embedded in Commodity Forwards ⁶⁶	While commodity options are deemed to be swaps, the Commissions deem a forward contract with an embedded option as outside of the term “swap” if the option (i) is used to adjust the forward contract price (such as a formulaic strike price based on an index value not known until after exercise); (ii) does not target the delivery term (predominant term is actual delivery); and (iii) cannot be split from the forward contract in which embedded.
Commodity Forwards with Volumetric Optionality ⁶⁷	The Commissions have specific requirements for volumetric options embedded in forwards. A forward contract with volumetric optionality will be subject to the above forward analysis (as opposed to the commodity option analysis) if it satisfies the above non-separability and predominant feature of delivery tests and, ⁶⁸ in addition, (i) the seller and buyer both intend at the time of entering into the agreement to deliver or take delivery, respectively, if the option is exercised; (ii) both parties are commercial parties; and (iii) the decision whether to exercise the option is based on physical factors or regulatory requirements that are outside of the control of the parties and are influencing demand for, or supply of, the nonfinancial commodity. ⁶⁹
Physical Commercial Agreement for the supply of Energy Commodities with Flexibility ⁷⁰	Physical commercial agreements for supply of energy commodities with flexibility, such as power plant tolls, transportation agreements on pipelines and storage agreements may be swaps. The CFTC deems these agreements not to be swaps if (i) the subject of the agreement is facility usage (in whole or part) rather than the commodity created, transported or stored; (ii) the buyer receives unconditional and exclusive use of the whole or part of the facility offered; and (iii) the payments are for the use of the facility as opposed to the right to use it.
Security Forwards ⁷¹	The Commissions deem a purchase contract for a security on a delayed basis that is intended to be physically settled as a security forward. Security forwards are not Title VII Instruments.
Security Forward for TBA Market ⁷²	The Commissions deem an agreement to purchase mortgage-backed securities guaranteed or sold by Fannie Mae, Freddie Mac and Ginnie Mae in the “To-Be-Announced” market in which parties agree on (i) the type of security and underlying mortgage; (ii) the coupon or interest rate; (iii) the face value; (iv) the price; and (v) the settlement date as a security forward that is not a Title VII Instrument.

⁶⁶ Definitions Release text at note 324.

⁶⁷ Definitions Release text at notes 334 to 345.

⁶⁸ In this case the predominant feature test would allow for the contract not to result in delivery if demand does not materialize.

⁶⁹ The Commissions will also look to the context of the agreement and the presence of certain provisions such as liquidated damages provisions may, depending on context, favor treatment as a commodity option.

⁷⁰ Definitions Release text as notes 375 to 380.

⁷¹ Definitions Release text at notes 402 to 410.

⁷² Definitions Release text at notes 411 to 424.

Name of Instrument	Definition and Determining Criteria to Not be a Title VII Instrument
Loan Participations ⁷³	The Commissions deem loan participations that represent a current or future direct or indirect ownership interest in the loan or commitment that is the subject of the loan participation not to be Title VII Instruments. The Commissions will look to the following factors in evaluating whether an ownership interest exists: (i) the grantor of the participation is a lender or a participant or sub-participant in the loan or commitment; (ii) the aggregate participation does not exceed the amount of the loan and the amount that the relevant grantor grants does not exceed the portion that the grantor holds; (iii) the purchase price is paid in full and not financed; and (iv) the participation provides all economic benefit and risk of the whole or part loan commitment subject of the participation
Bona Fide Foreign Exchange Spot Transactions ⁷⁴	The Commissions deem a foreign exchange transaction that is settled on the customary timeline of the relevant spot market (typically two business days) not to be a Title VII Instrument.
Securities Conversion Transaction ⁷⁵	The Commissions deem an agreement, contract or transaction for the purchase or sale of an amount of foreign currency equal to the price of a foreign security with respect to which (i) the security and related foreign currency transactions are executed contemporaneously in order to effect delivery by the relevant security's deadline and (ii) actual delivery of the foreign currency occurs by such deadline as not being a Title VII Instrument. The CFTC also deemed a securities conversion transaction as not being leveraged, margined or financed for CEA's "retail foreign exchange" rules.
Retail Foreign Exchange Options ⁷⁶	The CFTC deems retail foreign exchange options, which are otherwise subject to the CFTC's jurisdiction under Section 2(c)(2)(B) of the CEA (along with other retail foreign exchange contracts), as not being swaps.

On August 21, 2012, the CFTC proposed to exclude from the swap definition certain financial transmission rights, energy transactions, forward capacity agreements, demand response or energy efficiency agreements between "appropriate persons" (as defined in Section 4(c)(3) of the CEA) or "eligible contract participants" (as defined in Section 1a(18)(A) of the CEA) offered or sold by specified regional transmission organizations (RTOs) or independent system operators (ISOs) under an approved tariff so long as information sharing arrangements are in place and the RTOs and ISOs are not required to inform their members if the RTOs or ISOs receive a subpoena or information request from the CFTC.⁷⁷ The CFTC also previously proposed to exempt transactions between not-for-profit electric entities for the primary purpose of satisfying existing or anticipated contractual obligations to facilitate the generation, transmission or delivery of electric energy service.⁷⁸

⁷³ Definitions Release text at notes 479 to 506.

⁷⁴ Definitions Release text at notes 562 to 566.

⁷⁵ Definitions Release text at notes 567 to 575.

⁷⁶ Definitions Release text at notes 576 to 584.

⁷⁷ 77 Fed. Reg. 52137 (Aug. 28, 2012).

⁷⁸ 77 Fed. Reg. 50998 (Aug. 23, 2012).

Appendix B

Broad-Based or Narrow-Based Index

An index is a group of securities, including an interest therein, that has a value based on the value of the securities. Broad-based indexes are those that satisfy the below criteria (or fail to satisfy the criteria of a narrow-based index) and have securities components either set in advance or determined according to published methodology or other preset formula.⁷⁹

Type of Index	Criteria to be Satisfied
Narrow-Based Equity Securities Index ⁸⁰ (Subject to SEC Jurisdiction)	An index is a narrow-based index if it satisfies <u>any one</u> of the following: (i) it has nine or fewer component securities; (ii) a component security comprises more than 30 percent of the index's weighting; (iii) the five highest weighted component securities in the aggregate comprise more than 60 percent of the index's weighting; or (iv) the lowest weighted component securities comprising, in the aggregate, 25 percent of the index's weighting have an aggregate dollar value of average daily trading volume of less than \$50,000,000 (or in the case of an index with 15 or more component securities, \$30,000,000), except that if there are two or more securities with equal weighting that could be included in the calculation of the lowest weighted component securities comprising, in the aggregate, 25 percent of the index's weighting, such securities shall be ranked from lowest to highest dollar value of average daily trading volume and shall be included in the calculation based on their ranking starting with the lowest ranked security.
Broad-Based Volatility Index ⁸¹ (Subject to CFTC Jurisdiction)	As previously specified in the Commissions' "Joint Order Excluding Indexes Comprised of Certain Index Options from the Definition of Narrow-based Security Index" ⁸² and the "Joint Order to Exclude Indexes Composed of Certain Index Options from the Definition of Narrow-Based Security Index," ⁸³ (the "Volatility Orders") a volatility index is a broad-based index if it <u>satisfies each</u> of the following: (i) the index measures the magnitude of changes (as calculated in accordance with the Volatility Orders) in the level of an underlying index that is not a narrow-based security index pursuant to the statutory criteria for equity indexes discussed above; (ii) the index has more than nine component securities, all of which are options on the underlying index; (iii) no component security of the index comprises more than 30 percent of the index's weighting; (iv) the five highest weighted component securities of the index in the aggregate do not comprise more than 60 percent of the index's weighting; (v) the average daily trading volume of the lowest weighted component securities in the underlying index (those comprising, in the aggregate, 25 percent of the underlying index's weighting) have a dollar value of more than \$50,000,000 (or \$30,000,000 in the case of an underlying index with 15 or more component securities), except if there are two or more securities with equal weighting that could be included in the calculation of the lowest weighted component securities comprising, in the aggregate, 25 percent of the underlying index's weighting, such securities shall be ranked from lowest to

⁷⁹ Where one or both counterparties either directly or indirectly are provided discretionary authority to change the composition of the security portfolio by adding or removing securities at will during the term, the index will be treated as narrow-based and, therefore, a security-based swap.

⁸⁰ CEA Section 1a(35), Exchange Act Section 3(a)(55)(B) and Definitions Release text at notes 727 to 730.

⁸¹ Regulation 1.3(yyy)(1) incorporating the Volatility Orders by reference, Exchange Act Rule 3a68-3 and Definitions Release text at notes 731 to 735.

⁸² Joint Order Excluding Indexes Comprised of Certain Index Options From the Definition of Narrow-Based Security Index, 69 Fed. Reg. 16900 (Mar. 31, 2004).

⁸³ Joint Order to Exclude Indexes Composed of Certain Index Options from the Definition of Narrow-Based Security Index, 74 Fed. Reg. 61116 (Nov. 23, 2009).

Type of Index	Criteria to be Satisfied
	highest dollar value of average daily trading volume and shall be included in the calculation based on their ranking starting with the lowest ranked security; (vi) options on the underlying index are listed and traded on a national securities exchange; and (vii) the aggregate average daily trading volume in options on the underlying index is at least 10,000 contracts calculated as of the preceding six full calendar months.
Broad-Based Debt Securities Index (other than CDS) ⁸⁴ (Subject to CFTC Jurisdiction)	As previously specified in the Commissions’ “Joint Final Rules: Application of the Definition of Narrow-Based Security Index to Debt Securities Indexes and Security Futures on Debt Securities,” ⁸⁵ an index in which all of the components that are securities are notes, bonds, debentures or evidences of indebtedness and none of the securities is an “equity security” as defined under the Exchange Act is a broad-based index if it <u>satisfies each</u> of the following: (i) the index has more than nine component securities that are issued by more than nine non-affiliated issuers; (ii) the securities of any issuer included in the index do not comprise more than 30 percent of the index’s weighting; (iii) the securities of any five non-affiliated issuers in the index do not comprise more than 60 percent of the index’s weighting; (iv) the bonds satisfy the minimum remaining principal amounts (\$250 million for all bonds other than municipal bonds); <u>and</u> (v) any of the following are satisfied: (a) the issuer of the debt security is required to file reports pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934; (b) the issuer of the debt security has a worldwide market value of its outstanding common equity held by non-affiliates of \$700 million or more; (c) the issuer of the debt security has outstanding securities that are notes, bonds, debentures or evidence of indebtedness having a total remaining principal amount of at least \$1 billion; (d) the security is an exempted security as defined in section 3(a)(12) of the Securities Exchange Act of 1934 and the rules promulgated thereunder; or the issuer of the security is a government of a foreign country or a political subdivision of a foreign country. ⁸⁶
Narrow-Based Index CDS Swap ⁸⁷ (Subject to SEC Jurisdiction)	The Commissions defined the term “narrow-based index” relating to CDS in two separate rules corresponding to two separate prongs of the “security-based swap” definition – (i) swaps based on a narrow-based index or on interest therein (“Category I CDS”) and (ii) swaps based on the occurrence, nonoccurrence or the extent of the occurrence of an event relating to a single issuer of a security or the issuers in a narrow-based index if such event directly affects the financial statements, financial condition or financial obligations of the issuer (“Category III CDS”). The requirements under both rules are substantially similar, except that the Category III CDS includes loans that are not securities so long as the borrower also issues securities. ⁸⁸ A narrow-based security index as applied to CDS means issuers of securities included in an index (including an index referencing loan borrowers or loans of such borrowers) in which (i) <u>each</u> of index weighing factors is satisfied and (ii) <u>none</u> of the security-based factors or ECP factors (as defined below) applies. The index weighting factors are (i) there are nine or fewer non-affiliated issuers ⁸⁹ of securities that are reference entities or securities components ⁹⁰ included in the index; (ii) the

⁸⁴ CFTC Regulation 41.14 Exchange Act Rule 3a55-4 and Definitions Release text at notes 736 to 744.

⁸⁵ Joint Final Rules: Application of the Definition of Narrow-Based Security Index to Debt Securities Indexes and Security Futures on Debt Securities, 71 Fed. Reg. 39434 (Jul. 13, 2006).

⁸⁶ Elements (iv) and (v) do not apply to issuer securities components if securities of that issuer constitute less than 5 percent of the weighing and securities satisfying (iv) and (v) constitute 80 percent of the basket.

⁸⁷ CFTC Regulation 1.3(222) and (aaaa) and SEC Exchange Act Rules 3a-68-1a and 3a68-1b and Definitions Release text at notes 752 to 892.

⁸⁸ Definitions Release text at note 762.

⁸⁹ For the purposes of determining whether an entity is affiliated for the purposes of the CDS index test, an entity is affiliated if it is controlled, controlling or under common control with another reference entity or component security. Control is defined as 50 percent ownership.

Type of Index	Criteria to be Satisfied
	<p>effective notional amount allocated to any reference entity included in the index comprises more than 30 percent of the index’s weighting; and (iii) the effective notional amount allocated to any five non-affiliated reference entities included in the index comprises more than 60 percent of the index’s weighting.</p> <p>The “security-based factors” are: (i) the reference entity or the issuer of the security included in the index is required to file reports pursuant to section 13 or section 15(d) of the Exchange Act; (ii) the reference entity included in the index is eligible to rely on the exemption for a foreign private issuer provided in Exchange Act Rule 12g3-2(b); (iii) the reference entity or security included in the index has a worldwide market value of its outstanding common equity held by non-affiliates of \$700 million or more; (iv) the reference entity or security included in the index (other than a reference entity included in the index that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Exchange Act has outstanding notes, bonds, debentures, loans or evidences of indebtedness (other than revolving credit facilities) having a total remaining principal amount of at least \$1 billion; (v) the reference entity or security included in the index is the issuer of an exempted security as defined in section 3(a)(12) of the Exchange Act other than any municipal security as defined in section 3(a)(29) of the Exchange Act; (vi) the reference entity included in the index is a government of a foreign country or a political subdivision of a foreign country; and (vii) if the reference entity included in the index is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Exchange Act, such asset-backed security was issued in a transaction registered under the Securities Act of 1933 (the “Securities Act”) and has publicly available distribution reports.</p> <p>Eligible contract participants (as defined in section 1a(18) of the CEA) (ECPs) may satisfy the following (instead of the security-based factors) for agreements between ECPs: (i) the reference entity included in the index (other than a reference entity included in the index that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Exchange Act) makes available to the public or otherwise makes available to such eligible contract participant information about the reference entity included in the index pursuant to rule 144A(d)(4) under the Securities Act; (ii) financial information about the reference entity included in the index (other than a reference entity included in the index that is an issuing entity of an asset-backed security as defined in section 3(a)(77) of the Exchange Act) is otherwise publicly available; or (iii) in the case of a reference entity included in the index that is an issuing entity of an asset-backed security, information of the type and level included in publicly available distribution reports for similar asset-backed securities is publicly available about both the reference entity included in the index and such asset-backed security. The ECP factors will not apply with respect to a reference entity or security included in the index if: (i) the effective notional amounts allocated to such reference entity comprise less than five percent of the index’s weighting; and (ii) the effective notional amounts allocated to reference entities or securities included in the index that satisfy the ECP Factors comprise at least 80 percent of the index’s weighting. The index is not composed solely of reference entities that are issuers of exempted securities as defined in section 3(a)(12) of the Exchange Act, as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in section 3(a)(29) of the Exchange Act, as in effect on the date of enactment of the Futures Trading Act of 1982). Without taking into account any portion of the index composed of reference</p>

⁹⁰ “Reference entities” includes issuers of securities (including asset-backed securities) and an issuer that is a borrower under a loan included in the index. For purposes of whether reference entity or security is included in the index, a loan or security would only be included if (1) a credit event with respect to the issuer, security or reference entity would result in a payment based on the normal amount allocated to the security or loan or (2) the credit event is taken into account in determining whether to make future payments.

Type of Index	Criteria to be Satisfied
	<p>entities that are issuers of exempted securities (as defined in section 3(a)(12) of the Exchange Act), as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in section 3(a)(29) of the Exchange Act), the remaining portion of the index would be within the term “issuer of securities in a narrow-based security index” under the index weighting factors (i) and (ii).</p> <p>The Commissions will focus on the part of an index that does not consist of government securities in determining if it satisfies the requirements above.</p>

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