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Swap Dealer and Major Swap Participant External Business Conduct Rules

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Overview

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the Dodd-Frank Act) was enacted into law on July 21, 2010. Title VII of the Dodd-Frank Act significantly overhauled the over-the-counter (OTC) derivatives market in response to congressional perception that OTC derivatives contributed to or exacerbated the financial crisis of 2008.

Prior to the passage of the Dodd-Frank Act, OTC derivatives in interest rates, currencies, credit indices, commodities and other asset classes were largely unregulated instruments. Dealers in those products and major participants in the market could transact with their counterparties, regardless of counterparty type, in any manner they desired, short of fraud. In the years prior to and during the financial crisis, there were several documented, high-profile situations in which counterparties to dealers experienced significant losses using unsuitable derivative products, products that the counterparties did not fully understand, or products that were entered into under questionable circumstances. (See, e.g., Jefferson County, Alabama; Orange County, California; and Odessa College. See also, *Proctor & Gamble Co. v. Bankers Trust Co.*, 925 F. Supp. 1270 (May 8, 1996) (company claimed bank misrepresented the risks of interest rate swaps resulting in over \$200 million in losses) and *In re BT Securities Corp.*, SEC Rel. No. 33-7124 (Dec. 22, 1994) (Gibson Greetings claimed that BT Securities fraudulently sold complex derivatives to the company by providing values that significantly understated the magnitude of the company's losses)). Because dealers in some cases appeared to have used their informational advantage to the disadvantage of their counterparties, Congress concluded that some business conduct requirements on the part of the dealers and major participants were warranted and prescribed such requirements through the Dodd-Frank Act and regulatory mandates.

For regulatory purposes, the Dodd-Frank Act divides the OTC derivatives marketplace into two sections. The first section consists of swaps that the Commodity Futures Trading Commission (CFTC) regulates and the second section consists of security-based swaps that the Securities and Exchange Commission (SEC) regulates. The division of regulatory responsibility with respect to swaps and security-based swaps largely follows the regulatory responsibility for the instruments that underlie the derivative.

This practice note will focus on the external business conduct rules prescribed by the CFTC that are applicable to swap dealers and major swap participants. A "swap dealer" generally is a person that, subject to de minimis exceptions (i) holds itself out as a dealer in swaps; (ii) makes a market in swaps; (iii) regularly enters into swaps with counterparties as an ordinary course of business for its own account; or (iv) engages in any activity causing the person to be commonly known in the trade as a dealer or market maker in swaps. Commodity Exchange Act (CEA) Section 1a(49). A "major swap participant" is generally a person who maintains a substantial position (generally over \$1 billion) in swaps or whose swaps create substantial counterparty exposure that could have adverse effects on the financial stability of the United States. CEA Section 1a(33) and CFTC Regulation 1.3(hhh). It is important to remember that the external business conduct rules for swap dealers and major swap participants represent only a fraction of the rules that are applicable to them in derivative products and that the overall burden to comply with the Dodd-Frank Act and the rules and regulations thereunder by such parties is significant.

External Business Conduct Standards Established by the Dodd-Frank Act

The Dodd-Frank Act added Section 4s(h) to the CEA which imposes business conduct standards on swap dealers and major swap participants when they deal with others, and gives the CFTC great latitude in setting business conduct standards by rule that relate to fraud, manipulation, abusive practices, supervision, position limits and other matters as determined by the CFTC.

Pursuant to Section 4s(h) of the CEA, the CFTC is charged with adopting rules that:

1. Establish a duty for the swap dealer or major swap participant to verify that a counterparty meets the eligibility requirements of an “eligible contract participant” and determine whether a counterparty is a “special entity” (both of which terms are described below)
2. Require disclosures by swap dealers and major swap participants to counterparties relating to
 - Material risks and characteristics of the swap
 - Material incentives or conflicts of interest that the swap dealer or major swap participant may have in connection with the swap – and -
 - The daily mark, or indicative price, for the swap from the swap dealer or major swap participant or the applicable derivatives clearing organization
3. Establish a duty for a swap dealer or major swap participant to communicate in a fair and balanced manner based on principles of fair dealing and good faith; and
4. Establish other standards in the public interest, for the protection of investors or to otherwise further the purposes of the CEA (see CEA Section 4s(h)(3))

Swap dealers and major swap participants do not have to make disclosures to other swap dealers, major swap participants, security-based swap dealers and major security-based swap participants, who by their nature are presumed to not need the protections of the Dodd-Frank Act. CFTC regulations have added further detail to the statutory mandates for swap dealer and major swap participant business conduct requirements, and these requirements are discussed in greater detail below.

The external business conduct rules apply both to swap transactions as well as to swaps that are offered but not entered into. This means that the relevant analysis, documentation and representations described herein must be in place prior to the swap dealer or major swap participant offering a swap. Therefore, the swap dealer or major swap participant must incur some expense before knowing whether it even has a trade from which to generate revenue.

Eligible Contract Participants and Special Entities

Swap dealers must verify that their counterparty is an “eligible contract participant” and also must determine whether the counterparty is a “special entity” before offering to enter into or entering into a swap with the counterparty. CFTC Regulation 23.430.

An eligible contract participant is a term defined in the CEA and CFTC regulation that is designed to capture those types of persons who are deemed to be sophisticated enough to engage in the swaps market. Generally, the term includes those persons or entities that satisfy either various asset size tests or are subject to certain regulatory regimes. For example, the term includes financial institutions, insurance companies, investment companies, corporations having more than \$10 million in total assets, brokers and dealers, futures commission merchants, and certain commodity pools and pension plans.

A “special entity” is defined as a:

- Federal agency
- State, state agency, city, county, municipality, political subdivision of a state or any instrumentality, department or a corporation

of or established by a state or political subdivision of a state

- Employee benefit plan (as defined in Section 3 of the Employee Retirement Income Security Act of 1974, as amended (ERISA)) subject to Title I of ERISA
- Governmental plan (as defined in Section 3 of ERISA)
- Endowment, including 501(c)(3) endowments
- Employee benefit plan (as defined in Section 3 of ERISA) but that is not otherwise defined as a special entity, that elects to be a special entity by notifying the swap dealer of its election prior to entering into a swap (CEA §4s(h)(2)(C) and CFTC Regulation 23.401(c))

The swap dealer or major swap participant may rely upon written representations of the counterparty, provided that those written representations specify the particular manner in how the counterparty meets the foregoing definitions. CFTC Regulation 23.430(d).

Because Congress was particularly concerned with overreaching on the part of swap dealers and major swap participants when transacting with special entities, the Dodd-Frank Act and the rules thereunder require swap dealers and major swap participants to meet higher standards when dealing with special entities. As described below, those standards vary for a swap dealer depending upon whether the swap dealer is acting as an advisor or a counterparty to the special entity.

Required Disclosures

At a reasonably sufficient time prior to entering into a swap, the swap dealer or major swap participant must disclose material information concerning the swap in a manner designed to allow the counterparty to assess:

- The material risks of the swap (including market, credit, liquidity, foreign currency, legal, operational and other applicable risks)
- The material characteristics of the swap (including the economic terms of the swap, the operation of the swap and the rights and obligations of the parties to the swap)
- The material incentives and conflicts of interest that the swap dealer or major swap participant may have (including the price of the swap, the mid-market mark of the swap, and any compensation or other incentive from any source other than the counterparty that the swap dealer may receive). CFTC Regulation 23.431(a). There is no specified form for such disclosure as long as it is done in a fair and balanced manner.

Prior to entering into a swap, a swap dealer must also notify the counterparty that it can request and consult on the design of a scenario analysis to allow the counterparty to assess its potential exposure. The swap dealer must also disclose all material assumptions and explain the calculation methodologies used to perform the scenario analysis (although proprietary information about models need not be disclosed). When designing any scenario analysis, the swap dealer must consider any analyses that the swap dealer uses for its own risk management purposes, including analyses used as part of any new product policy. CFTC Regulation 23.431(b).

Swap dealers and major swap participants must also notify counterparties that, with respect to mandatorily cleared swaps, they have the sole right to select the derivatives clearing organization at which the swap will be cleared and, with respect to uncleared swaps, that they have the right to elect for the swap to be cleared and to select the derivatives clearing organization at which the swap will be cleared. CFTC Regulation 23.432.

Daily Mark

Swap dealers and major swap participants must also provide counterparties with daily mid-market mark, or the indicative mid-market price, for the swap, in the case of uncleared swaps. For cleared swaps, the swap dealer or major swap participant must notify the counterparty of its right to receive such mark from the derivatives clearing organization. CFTC Regulation 23.431(d).

In addition to disclosing the daily mark, the swap dealer or major swap participant must disclose the methodology and assumptions used to prepare the daily mark and any changes to such methodology or assumptions during the term of the swap. To ensure fair and balanced communication, the swap dealer or major swap participant must also disclose that the daily mark may not necessarily be a price at which either party would be willing to terminate the swap, that margin calls may be based upon considerations other than the daily mark and that the daily mark may not be the value of the swap on the books of the swap dealer or major swap participant. CFTC Regulation 23.431(d).

Antifraud; Duty of Fair Dealing and Good Faith

It is unlawful for a swap dealer or major swap participant to engage in fraudulent, deceptive or manipulative acts. CFTC Regulation 23.410(a). Furthermore, swap dealers and major swap participants must communicate with their counterparties in a fair and balanced manner. CFTC Regulation 23.433.

A swap dealer that recommends a swap must undertake reasonable diligence to understand the potential risks and rewards associated with the recommended swap and have a reasonable basis to believe that the swap is suitable for the counterparty. CFTC Regulation 23.434(a). A swap dealer may rely upon a safe harbor to fulfill the foregoing requirement, if it determines that:

1. The counterparty or the counterparty's agent is capable of independently evaluating the investment risks with regard to the swap.
2. The counterparty or its agent represents in writing that it is exercising independent judgment in evaluating recommendations regarding the swap.
3. The swap dealer discloses in writing that it is acting as a counterparty and is not undertaking to assess the suitability of the swap. CFTC Regulation 23.434(b). Swap dealers rely upon this safe harbor.

It is also unlawful for a swap dealer or major swap participant to disclose any material confidential information provided by a counterparty to the swap dealer or major swap participant. CFTC Regulation 23.410(c).

Compliance Policies and Procedures

Pursuant to CFTC Regulation 23.402(a)(1), swap dealers and major swap participants must have written policies and procedures in place that are reasonably designed to ensure compliance with the business conduct rules and prevent the swap dealer and major swap participant from evading the CEA. Swap dealers and major swap participants must implement and monitor compliance with such policies and procedures as part of their risk management program. CFTC Regulation 23.402(a)(2).

Swap dealers must have policies and procedures to obtain and retain a record of the essential facts concerning each counterparty whose identity is known to the swap dealer that are necessary for conducting business, including:

1. Facts required to comply with applicable laws
2. Facts required to implement credit and operational risk management policies
3. Information (such as resolutions and incumbency certificates) regarding the authority of the person acting for the counterparty ((CFTC Regulation 23.402(b))

Both swap dealers and major swap participants must obtain and retain a record of

1. The true name and address of each counterparty prior to the execution of a swap
2. The principal occupation or business of such counterparty
3. The name and address of any person guaranteeing the obligations of the counterparty or exercising control with respect to the counterparty's swap positions. ((CFTC Regulation 23.402(c))

In fulfilling their respective duties described above, a swap dealer or major swap participant may reasonably rely upon written representations of a counterparty. Such representations may be contained in swap relationship documentation, thereby satisfying requirements for subsequent swaps as long as the counterparty agrees to update any material changes to the representations. CFTC Regulation 23.402(d).

Swap dealers and major swap participants must create a record of such compliance with the business conduct standards and generally retain such records for five years (and in a readily accessible place for the first two years). CFTC Regulation 23.402(g).

Swap Documentation Standards

CFTC rules also prescribe minimal documentation standards that swap dealers and major swap participants must comply with. Swap dealers and major swap participants must execute or send confirmations of swaps within tight timeframes following the execution of a swap (as soon as technologically practicable and no later than the business day following the execution of the swap), and swap dealers and major swap participants must have written policies and procedures in place to ensure that their confirmation obligations are satisfied. CFTC Regulation 23.501. Included with this obligation is an obligation to provide a draft confirmation upon request prior to the execution of the swap. Records must be maintained relating to the time of transmission, receipt and acknowledgement of all confirmations. CFTC Regulation 23.501.

Swap dealers and major swap participants are required to have written policies and procedures to ensure that they execute written swap trading relationship documentation with their counterparties. These policies and procedures must be approved in writing by senior management of the swap dealer or major swap participant and a record of such approval must be retained. The swap documentation (other than the confirmation) must be executed prior to or contemporaneously with entering into a swap. CFTC Regulation 23.504(a). A swap dealer and major swap participant must have an independent internal or external auditor conduct periodic audits that are sufficient to identify any material weaknesses in its documentation policies and procedures, and a record of the results of the audit must be retained. CFTC Regulation 23.504(c).

Swap dealers and major swap participants must also engage in portfolio reconciliation of their swaps with counterparties upon a periodic basis, and agree upon the terms of such portfolio reconciliation. CFTC Regulation 23.502. Portfolio reconciliation is the process by which the parties to a swap agree upon the swaps that are outstanding between them and the terms thereof. In order to reduce the number of irrelevant swaps that are outstanding, swap dealers and major swap participants are required to engage in portfolio compression on a periodic basis. Portfolio compression is the process whereby swaps that fully offset each other are terminated on a bilateral and multilateral basis. CFTC Regulation 23.503.

To the extent that a swap dealer or major swap participant executes a swap with a commercial end-user, the swap dealer or major swap participant must obtain and retain sufficient documentation that is sufficient to form a reasonable basis to believe that the conditions required for the end-user exception to mandatory clearing of swaps is satisfied. CFTC Regulation 23.505.

A commercial end-user is a colloquial term used to describe an entity that may elect not to clear its swaps that are otherwise subject to mandatory clearing. In order to be a commercial end-user with respect to a swap, an entity:

1. May not be a financial entity (*i.e.*, a swap dealer, security-based swap dealer, major swap participant, major security-based swap participant, commodity pool, private fund, employee benefit plan, or an entity primarily engaged in banking activities)
2. Must use the swap to hedge or mitigate commercial risk and
3. Must notify the CFTC through reporting to a swap data repository how it generally meets its financial obligations relating to swaps (for more information on commercial end-users, see [Introduction to the Commercial End-User Exception to Mandatory Clearing of Swaps and Security-Based Swaps Under Title VII of the Dodd-Frank Act](#))

Swap dealers and major swap participants must ensure that they have the capacity to route swap transactions to a derivatives clearing organization for clearing in order to effect prompt and efficient swap processing. Swap dealers and major swap participants must also submit swaps to a derivatives clearing organization for clearing (to the extent clearing is applicable) as soon as technologically

practicable. CFTC Regulation 23.506.

Heightened Standards when Dealing with Special Entities

As noted above, when a swap dealer or major swap participant transacts with a special entity, the business conduct standards applicable to such swap dealer or major swap participant are more rigorous than when dealing with other counterparties. In cases, where a swap dealer is acting as an advisor to a special entity, the business conduct standards are even greater.

It is crucial for a swap dealer to determine at the outset of a client relationship whether it will act as an advisor or as a counterparty to a special entity, because the capacity in which the swap dealer acts will determine which rules will apply to the swap dealer's conduct. Also, before initiating any swap with a special entity, a swap dealer must disclose to the special entity in writing the capacity in which the swap dealer is acting. If the swap dealer engages in business with the special entity in more than one capacity, the swap dealer must disclose the material differences between such capacities. CFTC Regulation 23.450(g).

Acting as Advisor to a Special Entity

A swap dealer acts as an advisor to a special entity when it recommends a swap or trading strategy involving a swap that is tailored to the particular needs or characteristics of the special entity. CFTC Regulation 23.440(a).

Swap dealers can utilize a safe harbor pursuant to which a swap dealer will not be deemed to act as an advisor to a special entity if the following conditions are satisfied:

1. With respect to employee benefit plans subject to Title I of ERISA:
 - The special entity represents in writing that:
 - o It has an ERISA fiduciary that is responsible for representing the special entity in the swap transaction.
 - o It will comply in good faith with written policies and procedures reasonably designed to ensure that any recommendation the special entity receives from the swap dealer materially affecting a swap transaction is evaluated by a fiduciary before the transaction occurs.
 - o Any recommendation the special entity receives from the swap dealer materially affecting a swap transaction will be evaluated by a fiduciary before the transaction occurs.
 - The ERISA fiduciary represents in writing that it will not rely on recommendations provided by the swap dealer. CFTC Regulation 23.440(b)(1).
2. With respect to other special entities:
 - The swap dealer does not express an opinion as to whether the special entity should enter into a recommended swap or trading strategy involving a swap that is tailored to the particular needs or characteristics of the special entity.
 - The special entity represents in writing that the special entity will not rely on recommendations provided by the swap dealer and will rely on advice from a qualified independent representative as described below.
 - The swap dealer discloses to the special entity that it is not undertaking to act in the best interests of the special entity. CFTC Regulation 23.440(b)(2).

A swap dealer that is acting as an advisor to a special entity may not employ any device, scheme or artifice to defraud a special entity or engage in any transaction, practice or course of business that operates as a fraud upon a special entity or is otherwise deceptive or manipulative. CEA §4s(h)(4)(A). Furthermore, when the swap dealer is acting as an advisor to a special entity,

- It will have a duty to make a reasonable determination that any swap or trading strategy involving a swap recommended by the swap dealer is in the best interests of the special entity.

- It must make reasonable efforts to obtain such information as is necessary to make a reasonable determination that any swap or trading strategy involving a swap recommended by the swap dealer is in the best interests of the special entity.

This includes information relating to:

- The financial status of the special entity
- The special entity's future funding needs
- The tax status of the special entity
- The hedging, investment, financing or other objectives of the special entity
- The experience of the special entity with respect to entering into swaps generally and swaps of the type and complexity being recommended
- Whether the special entity has the financial capability to withstand changes in market conditions during the term of the swap
- Such other information relevant to the particular facts and circumstances of the special entity, market conditions and type of swap or trading strategy being recommended (CFTC Regulation 23.440(c))

A swap dealer may rely on written representations of the special entity to satisfy its requirement to use reasonable efforts to obtain necessary information. CFTC Regulation 23.440(d).

Acting as Counterparty to a Special Entity

When a swap dealer is not acting as an advisor and is merely acting as a counterparty to a special entity, the swap dealer must notify the special entity that it is acting as a counterparty and not as an advisor. When a swap dealer or major swap participant offers to enter into or enters into a swap as a counterparty, it must have a reasonable basis to believe that its counterparty has an independent representative that:

- Has sufficient knowledge to evaluate the swap transaction and its risks
- Is not subject to a statutory disqualification
- Is independent of the swap dealer or major swap participant
- Undertakes a duty to act in the best interests of the special entity
- Makes appropriate and timely disclosures to the special entity
- Evaluates, consistent with any guidelines provided by the special entity, fair pricing and the appropriateness of the swap
- In the case of special entities that are states, state agencies, cities, counties, municipalities and governmental plans, the representative is subject to restrictions on certain political contributions imposed by the CFTC or SEC and
- In the case of an employee benefit plan subject to Title I of ERISA, the special entity has a representative that is a fiduciary under ERISA (CFTC Regulation 23.450(b)).

In order for a representative to be independent of a swap dealer or major swap participant:

- The representative may not be and may not have been within one year of representing the special entity an associated person of the swap dealer or major swap participant.
- There can be no principal relationship between the representative and the swap dealer or major swap participant. A principal relationship arises where a swap dealer or major swap participant is a principal of the representative or the representative is a principal of the swap dealer or major swap participant. Principals include directors, presidents, chief executive officers, chief operating officers, chief financial officers, chief compliance officers, persons in charge of principal business units, general

partners, managing members, persons having the power to exercise a controlling influence over an entity's activities, 10% shareholders and persons entitled to receive 10% of the profits of an entity.

- The representative must provide timely and effective disclosures to the special entity of all material conflicts of interest that could reasonably affect the judgment or decision making of the representative.
- The representative must comply with policies and procedures reasonably designed to manage and mitigate such material conflicts of interest.
- The representative cannot be directly or indirectly controlled by, in control of or under common control with the swap dealer or major swap participant.
- The swap dealer or major swap participant may not have recommended or introduced the representative to the special entity within one year of the representative's representation of the special entity. CFTC Regulation 23.450(c).

The foregoing responsibilities do not apply to swaps that are initiated by a special entity on an exchange or swap execution facility if the swap dealer or major swap participant does not know the identity of the counterparty to the swap. CFTC Regulation 23.450(h).

Safe Harbor Relating to Special Entities

Swap dealers and major swap participants have the benefit of a safe harbor whereby they will be deemed to have a reasonable basis to believe that a special entity (other than a special entity subject to Title I of ERISA) has a representative that satisfies the requirements described above if:

- The special entity represents in writing that it has complied in good faith with written policies and procedures reasonably designed to ensure that it has selected a representative that satisfies the foregoing provisions and that such policies provide for ongoing monitoring of the performance of such representative.
- The representative represents in writing to the special entity and the swap dealer or major swap participant that it has policies and procedures reasonably designed to ensure that it satisfies the foregoing requirements, meets the independence test described above, and is legally obligated to comply with the foregoing requirements by agreement, condition of employment, law, rule, regulation, or other enforceable duty. CFTC Regulation 23.450(d)(1).

With respect to special entities that are subject to Title I of ERISA, a swap dealer or major swap participant will be deemed to have a reasonable basis to believe that the special entity has the required ERISA fiduciary as a representative if the special entity provides in writing the representative's name and contact information and represents in writing that the representative is an ERISA fiduciary. CFTC Regulation 23.450(d)(2).

If a swap dealer or major swap participant initially determines that it does not have a reasonable basis to believe that the special entity meets the foregoing criteria, the swap dealer or major swap participant must make a written record of such determination and submit such determination to its chief compliance officer for review to ensure that it has a substantial, unbiased basis for such determination. CFTC Regulation 23.450(f).

Political Contributions by Certain Swap Dealers

Subject to some very limited exceptions involving small dollar amounts, swap dealers may not offer to enter into or enter into a swap or trading strategy involving a swap with a governmental special entity within two years after any contribution to an official of such governmental special entity was made by the swap dealer or any general partner, managing member, executive officer, soliciting employee or any supervisor thereof or any political action committee controlled by the swap dealer or such persons. CFTC Regulation 23.451(b).

ISDA Protocols and Bilateral Agreements

Through the efforts of the International Swaps and Derivatives Association (ISDA), several of the requirements imposed upon swap dealers and major swap participants discussed above can be satisfied through (i) the entity adhering (and having its potential counterparty adhere) to both of the ISDA August 2012 DF Protocol Agreement and the ISDA March 2013 DF Protocol Agreement, and (ii) the parties sharing the relevant informational questionnaires contemplated by those agreements. If the counterparty is unwilling to adhere to such protocols, however, the swap dealer or major swap participant must execute a bilateral agreement with such counterparty which addresses the items described above. The ISDA August 2012 DF Protocol Agreement and the ISDA March 2013 DF Protocol Agreement can be found at <http://www.isda.org>.

Clients of swap dealers or major swap participants may balk at the amount and complexity of the documentation that the swap dealer or major swap participant will seek to put in place before effecting even the simplest types of swaps. In such cases, the swap dealer or major swap participant should explain that the documentation is required by law and that the failure of a swap dealer or major swap participant to fully comply with all CFTC rules, including the external business conduct rules described above, can result in significant penalties and reputational harm for the swap dealer or major swap participant.

Cross-border issues add to the complexity and volume of the documentation required to effect swaps. If one of the parties to a swap is subject to the laws of another jurisdiction such as the European Union, then additional legal requirements that are analogous to (but not identical to) those in the Dodd-Frank Act will have to be considered, followed and documented.

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