

August 31, 2012

## Key Dodd-Frank Compliance Considerations for End-Users

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “**Dodd-Frank Act**”) requires the CFTC and SEC to issue a multitude of rules and regulations to implement the detailed regulatory regime for swaps and security-based swaps outlined by the Dodd-Frank Act. To date, the CFTC has finalized most rules and issued compliance schedules with respect to many obligations under such rules. Phase-in of the new regime is set to begin on October 12, 2012 and will extend over several months. This alert outlines key considerations, timelines and action steps to aid corporate and investment fund end-users in their preparation to comply with the new regulatory regime.

### ISDA August 2012 Dodd-Frank Protocol

External business conduct standards applicable to swap dealers and major swap participants in their dealings with swap counterparties became effective on April 17, 2012. Swap dealers and major swap participants are required to comply with this rule on or before October 14, 2012. Compliance with this rule may require swap dealers and major swap participants to collect additional information from counterparties and/or amend existing documentation. To facilitate compliance with the external business conduct rule and other Dodd-Frank regulatory requirements, ISDA launched the ISDA August 2012 Dodd-Frank Protocol (the “**ISDA DF Protocol**”). The ISDA DF Protocol allows adhering market participants to deliver required information to their counterparties and to amend their existing ISDA documentation to comply with certain requirements under the Dodd-Frank Act.

### ISDA August 2012 Protocol Action Step: Adhere to the ISDA DF Protocol

Adherence to the ISDA DF Protocol is a two-step process:

- (1) Parties must first send ISDA an Adherence Letter indicating their desire to adhere to the ISDA DF Protocol; and
- (2) Parties must complete a questionnaire providing information about themselves, making certain elections regarding the scope of the amendments they are willing to agree to and identifying the counterparties to whom they would like this information to be sent.

**Timing:**

All parties should adhere to the ISDA DF Protocol before October 15, 2012. Swap dealers and major swap participants are unlikely to enter into new trades with market participants that have not adhered to the ISDA DF Protocol or separately negotiated similar amendments to existing documentation after such date.

**Recordkeeping**

The CFTC has published final rules regarding recordkeeping requirements for swap transaction data. Each market participant is required to keep “full, complete and systematic records” of its activities related to swaps. The details of the information to be maintained include all data regarding the creation of a swap, swap confirmations and, where applicable, all records demonstrating that the parties to a swap are entitled to make use of the end-user exception from the clearing requirements.

**Recordkeeping Action Step:  
Retain Records of all Trades**

All parties to a swap must maintain records of the swap for the duration of the swap and for a period of five years following the swap’s termination. End-users may choose to keep these records electronically or in paper form and must be able to retrieve records within five business days.

**Timing:**

All swap counterparties should currently be collecting and maintaining records of all trades.

**Reporting**

The CFTC published final rules regarding real-time reporting and public dissemination, regulatory reporting and recordkeeping requirements for swap transaction data on January 9 and 13, 2012, (the “**Final Reporting Rules**”). The Final Reporting Rules apply to all market participants and are intended to facilitate regulatory oversight, promote transparency and enhance price discovery in the swaps markets by making swap transaction and pricing data available to regulators and the public in real-time while protecting the anonymity of market participants. Swap transactions must be reported to a registered swap data repository and disseminated by the swap data repository to the public as soon as technologically practicable following execution and upon any material amendment.

Any swap that is not executed on a designated contract market or swap execution facility (an “**off-facility swap**”) must be reported to a swap data repository by the “Reporting Party,” which is determined based on the regulatory status of the parties to the swap. Where one party to an off-facility swap is a swap dealer or major swap participant, the swap dealer or major swap participant will be the Reporting Party for that swap. If neither party to an off-facility swap is a swap dealer or major swap participant, the parties must

agree as to which of them will be the Reporting Party. In most cases, end-users will not be the Reporting Party.

### Reporting Action Step: Obtain CFTC Interim Compliant Identifier

Among the information required to be reported upon execution of every swap is the CFTC Interim Compliant Identifier (“CICI”) of each party to the swap. A CICI (also known as a legal entity identifier) is a unique identifier assigned to each market participant. The CFTC has approved DTCC-SWIFT as provider of CICIs to be used in connection with the reporting requirements under the Dodd-Frank Act. Any party to a swap will need to register with DTCC-SWIFT to obtain a CICI. The CFTC allows entities to self-register or have a third party register and obtain the CICI on their behalf.

### Timing:

End-user CICIs will need to be reported when entering into a new swap following the applicable reporting compliance date or, in connection with existing swaps, by April 10, 2013. CICIs also will need to be supplied upon adherence to the ISDA DF Protocol. It is recommended that end-users register for a CICI, or confirm that registration has been completed on their behalf, as soon as possible.

### Reporting Compliance Dates

#### Compliance Date 1: October 12, 2012

60 calendar days following publication of the Final Definitional Rule in the Federal Register

Applies to all interest rate and credit swaps that are either:

- Executed on a SEF or DCM  
or
- Off-facility swaps where at least one party is a swap dealer or major swap participant

#### Compliance Date 2: January 10, 2013

90 days after Compliance Date 1

Applies to all foreign exchange, equity and “other commodity” swaps that are either:

- Executed on a SEF or DCM  
Or
- Off-facility swaps where at least one party is a swap dealer or major swap participant

#### Compliance Date 3: April 10, 2013

180 days after Compliance Date 1

Applies to all other swaps including those where neither party is a swap dealer or major swap participant

## Clearing

The Dodd-Frank Act mandates central clearing for all swaps that are required to be cleared. The CFTC must first make a determination as to which swaps are required to be cleared either based upon a CFTC initiated review or submission by a clearinghouse that the clearinghouse intends to accept such swap for clearing. On August 7, 2012, the CFTC proposed regulations requiring the clearing of certain interest rate and credit index derivatives, the first clearing determinations under the Dodd-Frank Act. The CFTC will make its determination as to whether these categories of swaps will be required to be cleared following the end of a 30-day public comment period.

Corporate end-users and other non-financial entities may elect the end-user exception to the clearing requirement if the swaps are being used to hedge or mitigate commercial risk and they report to the CFTC how they generally meet their financial obligations under non-cleared swaps.

### **Clearing Action Step: Clearing Relationships and Documentation**

Funds and other entities not eligible for, or not electing, the end-user exception to the clearing requirements will need to establish relationships with one or more futures commission merchants to enable them to submit swaps to be cleared. This will require the negotiation and execution of documentation designed for the clearing of swaps. Funds and other entities clearing swaps will also need to choose the clearinghouse at which they would like the swaps to be cleared.

### **Timing:**

Clearing documentation will need to be in place in time to comply with the clearing mandate. Funds and other financial entities are expected to be required to clear certain interest rate and credit swaps in the second quarter of 2013. Non-financial end-users are expected to be required to clear such swaps in the third quarter of 2013.

### **Clearing Action Step: Non-Financial End-Users Elect the End-User Exception**

Corporate end-users and other non-financial entities electing the end-user exception will need to make an annual filing detailing their legal status, confirming that the swaps are being used to hedge or mitigate commercial risk and indicating how they generally meet their financial obligations with respect to non-cleared swaps (e.g. guaranty, credit support arrangements, available financial resources). The Board of Directors (or an appropriately authorized committee) of a company with securities registered under Section 12 of the Securities Exchange Act of 1934 or required to file reports pursuant to Section 15(d) of the Securities Exchange Act of 1934 ("**SEC Filers**") must review and approve the company's decision to elect the end-user exception. End-users electing the end-user exception will likely be required to make certain representations to their counterparties regarding eligibility to elect the exception.

**Timing:**

The annual filing required to elect the end-user exception must be made upon first use of the exception and then updated every year thereafter. Similarly, board (or appropriate committee) approval of an SEC Filer's election of the end-user exception must be obtained prior to the first instance the SEC Filer makes the election. It is recommended that any SEC Filer desiring to elect the end-user exception take steps to have its Board of Directors (or appropriate committee) approve entry into non-cleared swaps in advance of the clearing requirement in the third quarter of 2013.

**Margin**

The Dodd-Frank Act and related regulations provide for clearinghouses to impose margin requirements for all swaps that are centrally cleared and also provide for margin requirements to apply to non-cleared swaps. The CFTC and banking regulators have proposed regulations requiring that all swap dealers and major swap participants collect appropriate margin from their swap counterparties. The proposed regulations prescribe margin calculation methodologies and uncollateralized exposure limitations. As proposed, swap dealers and major swap participants will not be required to collect margin from non-financial end users unless uncollateralized exposure exceeds certain thresholds set by the swap dealer or major swap participant. Collateral documentation likely will be required for all swaps even if no collateral is expected to be transferred.

**Margin Action Step:  
Negotiate Collateral Documentation**

Entities that are not currently required to post collateral likely will be required to put credit support arrangements in place with their swap counterparties. Corporate end-users and other non-financial entities should carefully negotiate this documentation to ensure that appropriate thresholds for posting collateral are included.

**Timing:**

The CFTC's margin requirements are expected to apply to non-financial end-users at the end of 2013. End-users that do not already have credit support arrangements in place likely will need to do so by the end of 2013.

**Margin Action Step:  
Elect Segregation of Independent Amounts and Negotiate Custody Agreement**

The Dodd-Frank Act allows end-users to request that any upfront collateral collected by a swap dealer or major swap participant with respect to non-cleared swaps be segregated at a third-party custodian. End-users desiring to elect such segregation should inform their swap counterparties of such election and will need to negotiate custody agreements with their swap counterparties and the third-party custodian.

**Timing:**

End-users may elect to have upfront margin collected by a swap dealer or major swap participant segregated at a third-party custodian at any time.

**Position Limits**

The CFTC adopted interim final rules regarding position limits for certain physical commodity derivatives. The rules establish spot-month and non-spot-month position limits for 28 commodity futures contracts ("**Core Referenced Futures Contracts**") as well as futures, options and swaps that are economically equivalent to those contracts (collectively, "**Referenced Contracts**"). These position limits will apply to all positions, whether cash-settled or physically-settled, across different trading venues. The Core Referenced Futures Contracts were selected by the CFTC due to high open interest and include contracts in metals and energy. In calculating a trader's total position in a Referenced Contract, the rules require the aggregation of positions across accounts owned or controlled by such trader, including accounts in which a trader has a 10% or greater ownership or equity interest, as well as funds or accounts in multiple pools with identical trading strategies held or controlled by such trader. The CFTC has proposed an exemption from aggregation in certain circumstances, including where 10% or greater owners of an entity have no knowledge of the trading decisions of the owned entity, trade pursuant to separate trading systems and written procedures, and do not own more than a 50% ownership or equity interest in the owned entity. Persons seeking to use this exemption from aggregation must file a notice with the CFTC. The rules include an exemption for bona fide hedging transactions as well as independent account controllers and commodity pool operators that do not control the pool's trading decisions. Financial hedging and risk management are not exempt as bona fide hedging.

**Position Limits Action Step:  
Establish Procedures for the Monitoring and Aggregation of Position Limits**

Market participants will need to establish procedures to monitor compliance with applicable position limits. An entity that owns 10% or more of a company or account that trades in Referenced Contracts and has not applied for an exemption will need to have systems in place to aggregate the positions of those companies and accounts and apply position limits across accounts and companies.

**Position Limits Action Step:  
Report Positions Exceeding Specified Visibility Levels and Position Limit Levels**

Positions in excess of the position limits are subject to liquidation and must be reported to the CFTC. To provide the CFTC with additional insight into positions held by different entities, market participants are required to report positions in Referenced Contracts once those positions equal or exceed a certain number of net long or net short positions (the "**visibility thresholds**"). Entities seeking to make use of the bona fide hedging exemption must file notice with the CFTC at least ten days in advance of the date the entity expects to exceed the position limits and will incur ongoing reporting obligations.

**Timing:**

The position limits for new trades will be applicable beginning on October 12, 2012. It is recommended that market participants have the necessary procedures for monitoring compliance with position limits in place as soon as possible.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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