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NEW AND DEVELOPING FEDERAL REGULATION

CFTC Issues Supplemental Proposal on Position Limits

On May 26, 2016, the U.S. Commodity Futures Trading Commission (CFTC) approved a supplement (Supplemental Proposal)[1] to its December 2013 proposal to establish speculative position limits on 28 exempt and agricultural commodity futures and option contracts and swaps that are "economically equivalent" to such contracts (2013 Proposal).[2] The CFTC's regulatory framework for position limits is comprised of three basic components: (i) the levels of the limits themselves; (ii) exemptions from those limits for positions that constitute bona fide hedging and certain other types of transactions; and (iii) rules regarding the aggregation of accounts for purposes of applying the limits. The Supplemental Proposal deals primarily with the second of these elements.[3]

Most significantly, the Supplemental Proposal would (i) provide processes for designated contract markets and swap execution facilities (collectively, the exchanges) to recognize certain types of positions as bona fide hedges and to grant exemptions from federal position limits for certain spread positions and (ii) amend certain relevant definitions, including the definition of bona fide hedging. The Supplemental Proposal would also delay the requirement that the exchanges establish and monitor position limits on swaps when they lack access to sufficient swap position information. In the interim, the CFTC would monitor position limits for swaps.

New Processes for Exchange Recognition of Bona Fide Hedges and Exemption of Spread Positions. The definition of bona fide hedging for purposes of the CFTC's position limits, as proposed to be revised, includes an enumerated list of strategies that qualify as bona fide hedging positions and therefore are exempt from the limits.[4] Under the 2013 Proposal, a market participant seeking an exemption from the position limits for hedging transactions not enumerated in CFTC rules (non-enumerated hedges) would need to either request an interpretive letter from the CFTC staff pursuant to CFTC Regulation 140.99 or file a petition with the CFTC pursuant to Section 4a(a)(7) of the Commodity Exchange Act (CEA). The 2013 Proposal would have also required market participants seeking to rely on an exemption for an enumerated anticipatory bona fide hedge to file a request with the CFTC in advance of relying on the exemption. With respect to spread positions, the 2013 Proposal would have permitted the exchanges to grant exemptions from exchange-set limits (but not federal limits) for certain spread transactions.

The Supplemental Proposal would give the exchanges the authority to recognize certain non-enumerated bona fide hedging positions and anticipatory bona fide hedging positions in "referenced contracts" (*i.e.*, futures, options, economically equivalent swaps, and certain foreign board of trade contracts, in physical commodities, that are subject to the proposed federal position limits), and grant exemptions from the position limits for certain spread positions.[5] When determining whether to recognize positions as bona fide hedges, an exchange would be required to apply the standards in the CFTC's general definition of bona fide hedging, which incorporates the standards in Section 4a(c)(2) of the CEA.[6] Similarly, when determining whether to exempt spread positions, an exchange would be required to consider the four policy objectives of position limits set forth in Section 4a(a)(3)(B) of the CEA.[7] Market participants seeking an exemption would be required to submit an application to the relevant exchange prior to exceeding any applicable limit.[8] Exemptions would remain applicable for one year, after which the market participant would need to reapply.[9] All determinations made by an exchange would be subject to CFTC review and, if necessary, remediation.[10]

Amended Definition of Bona Fide Hedging. In the 2013 Proposal, the CFTC proposed a new definition of the term "bona fide hedging position" to be set forth in proposed CFTC Regulation 150.1, which would replace the definition in current CFTC Regulation 1.3(z) and would set forth requirements for hedges of excluded (financial) as well as physical commodities. As proposed in 2013, the definition had contained two requirements for a bona fide hedging position that are not included in Section 4a(c)(2) of the CEA but are part of current Regulation 1.3(z): (i) an incidental test, which would have required that the risks offset by a commodity derivative position be incidental to the position holder's commercial operations, and (ii) an orderly trading requirement, which would have required that a bona fide hedge position be established and liquidated in an orderly manner in accordance with sound commercial practices. The Supplemental Proposal proposes to eliminate the incidental test and orderly trading requirement (*i.e.*, these tests which currently apply to bona fide hedges of excluded commodities would no longer apply with respect to any bona fide hedges) and set forth a definition that incorporates only the standards in Section 4a(c)(2) of the CEA.[11]

The comment period for the Supplemental Proposal closed on July 13, 2016.

Federal Reserve's Proposed Rule on Qualified Financial Contracts of Global Systemically Important Banking Institutions and ISDA's Resolution Stay Jurisdictional Modular Protocol

On May 3, 2016, the Board of Governors of the Federal Reserve System (Federal Reserve Board) proposed a rule that would require U.S. top-tier bank holding companies identified as global systemically important banking institutions (GSIBs) and the U.S. operations of foreign GSIBs (each, a covered entity) to amend qualified financial contracts (QFCs) – which include commodity contracts, forward contracts, and swap agreements – to prevent early termination when a GSIB enters bankruptcy or a resolution process.[12] First, a covered entity would generally be required to ensure that QFCs to which it is a party, including QFCs entered into outside the United States, provide that any default rights and restrictions on the transfer of the QFCs are limited to the same extent as they would be under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) and the Federal Deposit Insurance Act. Second, a covered entity would generally be prohibited from being a party to QFCs that would allow a QFC counterparty to exercise default rights against the covered entity based on the entry of a resolution proceeding under Dodd-Frank, the Federal Deposit Insurance Act or any other resolution proceeding of an affiliate of the covered entity. The Federal Reserve Board stated that the purpose of the proposed rule is to provide stability in times of potential financial crisis, consistent with Dodd-Frank's focus on minimizing the risks of GSIBs to the global financial system. Under the proposed rule, GSIBs may comply with the new requirements by using QFCs that have been modified by the International Swaps and Derivatives Association (ISDA) 2015 Universal Resolution Stay Protocol. The Resolution Stay Protocol permits adhering parties to amend ISDA master agreements to (i) include the necessary stay provisions; (ii) allow for the cross-border reach of special resolution regimes; and (iii) ensure that, consistent with the proposed rule, resolution will be governed by the U.S. Bankruptcy Code. On the same day, the ISDA published its Resolution Stay Jurisdictional Modular Protocol (Jurisdictional Modular Protocol), which complements the Resolution Stay Protocol. While both protocols are intended to help ensure the preservation of transactions between banking organizations that become subject to resolution or reorganization proceedings, the Jurisdictional Modular Protocol would permit parties to specify the resolution regimes through country-specific modules. Comments on the proposed rule are due August 5, 2016.

CFTC Proposes Clearing for Interest Rate Swaps in Nine Currencies

On June 9, 2016, the CFTC proposed to subject an additional group of interest rate swaps denominated in nine specified currencies to mandatory clearing.[13] The proposed additional swaps for mandatory clearing are the first since the implementation of mandatory clearing for certain index credit default swaps and interest rate swaps back in March 2013. Specifically, the CFTC proposed to amend CFTC Regulation 50.4(a) to add a requirement to clear fixed-to-floating interest rate swaps denominated in nine additional currencies in which the Chicago Mercantile Exchange, Inc., Eurex Clearing AG, LCH.Clearnet Ltd., and Singapore Exchange Derivatives Clearing Ltd., each a CFTC-registered derivatives clearing organization (DCO), clear interest rate swaps. The nine additional currencies are the Australian dollar, Canadian dollar, Hong Kong dollar, Mexican peso, Norwegian krone, Polish zloty, Singapore dollar, Swedish krona and Swiss franc. In addition, certain basis swaps denominated in Australian dollars would also have to be centrally cleared. The proposed rule would apply to all market participants entering into any of the proposed covered swaps. The proposed rule would not apply where the market participant has an exception (such as the end-user exception) or exemption (such as the inter-affiliate exemption). Although the CFTC phased in compliance with the first swaps-clearing requirement, the CFTC proposed not to phase in compliance with the proposed additional interest rate swaps, as the CFTC believes that most market participants that would be subject to the proposed clearing requirement already clear thetypes of interest rate swaps subject to the existing clearing requirement.

The comment period for the proposed rule amendments closed on July 18, 2016.

Adoption of Cross-Border Application of Margin Requirements for Uncleared Swaps

On May 24, 2016, the CFTC issued final rules (Cross-Border Rules) regarding the cross-border application of its uncleared swap margin requirements for swap dealers (SDs) and major swap participants (MSPs) that are not subject to oversight by the Prudential Regulators[14] (Covered Swap Entities or CSEs), which were published on January 6, 2015 (Margin Requirements).[15] The Cross-Border Rules establish the jurisdictional reach of the Margin Requirements, based on the location of the counterparties to an uncleared swap and the relationship of those parties to the U.S. The CFTC clarified that an entity may reasonably rely on a counterparty's representation as to its status for purposes of the Cross-Border Rules, unless such entity has information that would cause a reasonable person to question the accuracy of the representation.[16]

Circumstances in Which Margin Requirements Apply. Under the Cross-Border Rules, the Margin Requirements will apply to all uncleared swaps involving a CSE who is (i) a U.S. person (as specifically defined for this purpose) or (ii) a non-U.S. person that is guaranteed by the U.S. person (U.S. Guaranteed CSE).[17] For uncleared swaps falling in this category, substituted compliance would be available only with respect to initial margin posted to (but not collected from) any non-U.S. person counterparty whose obligations are not guaranteed by a U.S. person.[18]

The definition of a "U.S. person" as set forth in the Cross-Border Rules differs from the U.S. person definition provided by the CFTC in its 2013 Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations (2013 Guidance) in several respects.[19] Among other things, the CFTC eliminated the U.S. majority ownership prong that was included in the 2013 Guidance for funds or other collective investment vehicles. In addition, the definition includes certain legal entities owned by one or more U.S. persons and for which such persons bear unlimited responsibility for the obligations and liabilities of the legal entity, without the requirement from the 2013 Guidance that the entity be majority owned by one or more U.S. persons.

Circumstances in Which Substituted Compliance Is Available. Compliance with the margin requirements of a foreign jurisdiction in lieu of the Margin Requirements (*i.e.*, general substituted compliance) would be available for non-U.S. CSEs (including Foreign Consolidated Subsidiaries)[20] that are not guaranteed by U.S. persons, with respect to uncleared swaps with any counterparty that is not a U.S. CSE or a U.S. Guaranteed CSE.[21] If a counterparty is a U.S. CSE or U.S. Guaranteed CSE, the swap is subject to the Margin Requirements (see above).

In order for CSEs to rely on substituted compliance, the CFTC must first determine that the applicable foreign jurisdiction's requirements are comparable to the CFTC's (*i.e.*, a comparability determination). The Cross-Border Rules establish a process for requesting a comparability determination, including eligibility and submission requirements, as well as the standard of review the CFTC would apply in assessing the comparability of a foreign jurisdiction's margin requirements.[22]

Exclusion From the Margin Requirements. The Cross-Border Rules exclude from the Margin Requirements any swap entered into by a non-U.S. CSE with a non-U.S. person, provided that neither party's obligations are guaranteed by a U.S. person and neither party is a Foreign Consolidated Subsidiary or a U.S. branch of a non-U.S. CSE.[23] The Cross-Border Rules provide that in connection with inter-affiliate swaps that are exempt from the Margin Requirements under certain conditions, this exclusion is not available if the market-facing transaction of the non-U.S. CSE is not subject to comparable initial margin collection requirements in its home jurisdiction and any risk of the swap is transferred, directly or indirectly, through inter-affiliate transactions, to a U.S. CSE.[24]

In addition to the foregoing, the Cross-Border Rules include special provisions to accommodate swap activities in jurisdictions that do not have a legal framework to support custodial arrangements or that do not have netting arrangements that comply with the CFTC's Margin Requirements.[25]

The Cross-Border Rules are scheduled to become effective on August 1, 2016. The Margin Requirements will be phased in starting September 1, 2016.[26]

CFTC Staff Roundtable on Regulation AT Proposal

On June 10, 2016, the CFTC's Division of Market Oversight held a public roundtable meeting to discuss certain elements of the CFTC's proposed Regulation Automated Trading (Regulation AT). During the roundtable meeting, industry panelists argued that (i) the proposed definitions of Direct Electronic Access (DEA) and AT Person were overly broad (as proposed, AT Person would include futures commission merchants (FCMs), floor traders, swap dealers, major swap participants, commodity pool operators, commodity trading advisors and introducing brokers); (ii) risk control parameters on AT Persons should be introduced but should emphasize the role of Designated Contract Markets (DCMs) and de-emphasize the role of FCMs; (iii) the rules should not distinguish third-party algorithms from those developed internally; and (iv) the requirement placed on AT Persons to maintain and provide access to a source code repository should be revised to only require AT Persons to maintain their source code.[27] Following the roundtable meeting, the CFTC reopened the comment period to seek comments related to the announced roundtable agenda and any topics that arose during the roundtable. The CFTC sought additional comments regarding alternatives to (i) the definition of DEA; (ii) the definition of AT Person; (iii) certain regulatory requirements placed on AT Persons; (iv) requirements when using third-party algorithms or systems; and (v) source code access and retention.[28] The day before reopening the comment period for Regulation AT, CFTC Chairman Timothy Massad indicated his willingness to introduce Regulation AT "in phases," with a priority on issuing a final rule related to risk controls this year.

The comment period was reopened from June 10 through June 24, 2016.

NFA UPDATE

NFA to Begin Imposing Late Fees on CPO/CTA Filings

Commencing with filings due after September 30, 2016, the NFA will impose a fine of $200 per day on CPO and CTA members that fail to file timely quarterly and annual reports. Registered CPOs are required to file Form PQR within 60 days of each calendar quarter-end (for quarters ending in March, June and September) and within either 60 or 90 days of the end of each calendar year (depending on the size of the CPO). Registered CTAs are required to file Form PR within 45 days of each calendar quarter-end.

FINANCIAL OVERSIGHT STABILITY COUNCIL DEVELOPMENTS

The Financial Stability Oversight Council (FSOC) has recently (i) released a review of systemic risk posed by the asset management industry; (ii) filed an appeal with the U.S. Court of Appeals for the D.C. Circuit seeking the reversal of the United States District Court for the District of Columbia's (the District Court) ruling in *MetLife, Inc. v. Financial Stability Oversight Council* [29]; and (iii) voted to remove an entity's designation as a systemically important financial institution (SIFI) for the first time since the label was created. Because FSOC is sometimes referred to as a "super regulator" with responsibility for monitoring systemic risk across the financial markets, many participants in the financial markets, including CPOs, CTAs and other asset managers, watch FSOC developments closely for their potential impact on future U.S. financial regulation.

FSOC Update on Review of Asset Management Products and Activities

On April 18, 2016, FSOC released a review of the risks posed to U.S. financial stability by the asset management industry (the Update).[30] The Update, which was also referenced in FSOC's 2016 annual report released in June, presented FSOC's risk assessment of five areas: (i) liquidity and redemption; (ii) leverage; (iii) operations; (iv) securities lending; and (v) resolvability and transition planning. The Update follows FSOC's December 2014 notice, which sought public comment regarding whether and how certain asset management products and activities could pose potential risks to U.S. financial stability.[31]

Liquidity and Redemption. The Update addressed financial stability risks when underlying asset liquidity does not match investors' redemption rights and emphasized liquidity and redemption as particular risks for mutual funds. In order to mitigate the financial stability risks caused by liquidity and redemption risks, FSOC recommended that (i) funds develop robust liquidity management practices, which include a response to stress scenarios; (ii) regulators establish limits on mutual funds' ability to hold illiquid assets; (iii) funds be subjected to enhanced disclosure of their liquidity profiles and liquidity risk management practices; (iv) funds be encouraged to allocate more of the redemption costs to redeeming shareholders; (v) regulators perform additional analysis of external financing and events that trigger the use of external financing; and (vi) regulators consider what measures would reduce liquidity and redemption risks in Collective Investment Funds (CIFs) and similar pooled investment vehicles.

Leverage. The Update addressed financial stability risks posed by funds' use of leverage, with a particular focus on hedge funds. FSOC announced the formation of an interagency working group to assess (i) the use of leverage in the hedge fund industry and any potential risks to financial stability; (ii) the sufficiency of existing data and how it could be improved or modified; and (iii) standards governing how leverage is measured.

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Operations. FSOC considered whether disruptions by service providers could present risks to the broader financial system. The Update noted that FSOC will further evaluate those operational risks that could cause significant losses and disrupt market functioning. Specifically, FSOC will focus its evaluation on (i) the concentration of service providers; (ii) the level of outsourcing of particular services; and (iii) the complexity of the infrastructure and activities supported by such providers.

Securities Lending. The Update addressed the financial stability risks posed by securities lending transactions. FSOC praised member agencies' current efforts to collect data on securities lending activities, and suggested (i) a permanent data collection program to assess the securities lending activities of a greater number of market participants and (ii) that member agencies work with foreign counterparts to enhance data collection efforts across a number of jurisdictions.

Resolvability and Transition Planning. The Update addressed the financial stability risks posed by the resolution or liquidation of an asset management entity, focusing on how resolution and liquidation challenges could amplify the transmission of risks related to liquidity and redemption or leverage. FSOC emphasized advance planning by asset managers to mitigate any resolvability or transition risks, and noted that the SEC staff is working to develop a proposed rule that would require investment advisers to create and maintain transition plans that address, among other things, a major disruption in their business.

FSOC Files Brief in MetLife Case

On April 20, 2016, FSOC filed an appeal with the U.S. Court of Appeals for the D.C. Circuit seeking the reversal of the District Court ruling in the MetLife case, which had rescinded FSOC's designation of MetLife as a SIFI.[32] The District Court agreed "as an initial matter" that the company was eligible for such a designation, but identified two flaws in FSOC's designation. First, the Court found that FSOC had "made critical departures from two of the standards it adopted in its own guidance, never explaining such departures or even recognizing them as such," which "render[ed] FSOC's determination process fatally flawed." Second, the Court found that FSOC had "purposefully omitted any consideration of the cost of designation to MetLife" in its cost-benefit analysis. For these reasons, the Court found that FSOC's determination had been arbitrary and capricious.[33]

On June 16, 2016, FSOC filed its appellate brief arguing that (i) Dodd-Frank requires FSOC to assess the impact that a company's material financial distress would have on the U.S. financial system, and does not require FSOC to assess either the likelihood of the company's distress or estimate of losses imposed on counterparties caused by the company's distress; (ii) although FSOC's interpretive guidance did "seek to assess the vulnerability of a nonbank financial company to financial distress," FSOC did not intend to consider the likelihood of an institution suffering from material financial distress and never intended to provide for "separate analysis" in addition to the factors listed in Dodd-Frank; and (iii) FSOC's designation of MetLife as a SIFI was consistent with Dodd-Frank and the interpretive guidance.[34]

Various amicus briefs have been filed to date. MetLife's appellate brief is due August 15, 2016.

FSOC Removes an Entity's SIFI Designation for the First Time

On June 28, 2016, against the backdrop of its pending appeal in the MetLife case, FSOC voted to remove the SIFI designation of GE Capital Global Holdings, LLC (GE Capital), marking the first time FSOC has removed a SIFI designation since the label was created.[35] Treasury Secretary Jacob Lew stated that this development "proves that [SIFI designation] is an analytic process, that [it's] fact driven, and if a firm changes its business line and its profile, there's [an] exit path from the designation." In explaining its reasons for voting to rescind the designation, FSOC noted that GE Capital had "decreased its total assets by over 50 percent, shifted away from short-term funding, and reduced its interconnectedness with large financial institutions." FSOC also noted that GE Capital "no longer owns any U.S. depository institutions and does not provide financing to consumers or small business customers in the United States."

OTHER DEVELOPMENTS

Derivatives Bill Introduced in Senate

On June 29, 2016, Senators Elizabeth Warren and Mark Warner and Congressman Elijah Cummings introduced the Derivatives Oversight and Taxpayer Protection Act.[36] According to the fact sheet prepared to accompany the bill, the bill seeks to strengthen derivatives oversight by (i) directing the CFTC to collect user fees from financial firms to cover its budget, similar to what the SEC does;

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(ii) updating the CFTC's enforcement authority so the agency can impose civil penalties on firms that break the law and can deter misconduct by repeat offenders; (iii) closing the "cross-border loophole," which, according to the bill's sponsors, currently allows big financial firms with operations abroad to avoid key CFTC requirements; (iv) ending the exemption of certain foreign exchange swaps from CFTC jurisdiction; and (v) improving data sharing between financial firms and the CFTC and between the CFTC and other financial regulators. The fact sheet also describes certain provisions of the bill as protecting taxpayers by (i) ending the favorable treatment of derivatives in bankruptcy, thus creating an incentive for private parties to better assess the risk of the derivatives contracts; (ii) requiring the posting of initial margin in inter-affiliate swaps; (iii) banning the use of closeout netting for purposes of calculating minimum capital requirements; and (iv) requiring the CFTC and other financial regulators to issue a report addressing concerns about derivatives clearinghouses.

Possible Implications of Brexit for Derivatives Markets

On June 23, 2016, the citizens of the United Kingdom (UK) voted to leave the European Union (the departure of the UK from the European Union is referred to as the Brexit). The following day, CFTC Chairman Timothy Massad issued a statement saying, "Following the United Kingdom's vote to leave the European Union, the CFTC is closely monitoring the derivatives markets and working with the exchanges and clearinghouses to ensure that they function properly and with integrity. While there is significant volatility, the markets we oversee are currently functioning normally."[37] ISDA also issued a statement calling the Brexit vote a "momentous decision" that will have "significant implications for financial markets."[38] That said, with respect to derivatives documentation, ISDA stressed that the Brexit vote "will not have an immediate impact on the legal certainty of existing derivatives contracts, nor will it require any immediate contractual change or action from counterparties. Once the UK government serves formal notice of its intention to withdraw, the UK will continue to remain a member of the EU for at least two years. During that time, existing European treaties, directives and regulations will remain in force." Currently, it is not possible to predict what, if any, specific Brexit-related adjustments will need to be made to cleared derivatives documentation, but once greater clarity develops with respect to the post-Brexit regime, such arrangements will need to be further assessed.

Financial Stability Board Publishes Proposed Policy Recommendations to Address Structural Vulnerabilities From Asset Management Activities

On June 22, 2016, the Financial Stability Board (FSB), which was established in April 2009 by the G-20 in response to the 2008 financial crisis, published for public consultation "Proposed Policy Recommendations to Address Structural Vulnerabilities from Asset Management Activities."[39] In particular, the FSB is charged with studying potential financial stability risks from structural vulnerabilities associated with asset management activities. The recommendations reflect FSB's study of the asset management industry since March 2015. The proposal recognizes that evidence it has reviewed suggests that most open-ended funds have been generally resilient and, with the exception of some money market funds, have not created financial stability concerns in recent periods of stress and heightened volatility. Nonetheless, the FSB wishes to understand and address financial stability risks associated with the asset management sector, including developments relating to increased investments in less actively traded asset classes through open-end funds that offer daily redemption.

The FSB proposal seeks comment on four principal areas of concern which it has identified as "structural vulnerabilities" associated with asset management activities, the first two of which the FSB considers key vulnerabilities: (i) liquidity mismatch between fund investments and redemption terms and conditions for fund units; (ii) leverage within investment funds; (iii) operational risk and challenges in transferring investment mandates in stressed conditions; and (iv) securities lending activities of asset managers and funds. The proposal sets out 14 proposed policy recommendations to address structural vulnerabilities from asset management activities that could potentially present financial stability risks. The policy recommendations to address leverage within investment funds are meant to apply to all types of funds that may use leverage, including through the use of derivatives.

Comments on the proposal are due September 21, 2016.

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[1] Position Limits for Derivatives: Certain Exemptions and Guidance, 81 Fed. Reg. 38458 (June 13, 2016), http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2016-12964a.pdf.

[2] Position Limits for Derivatives, 78 Fed. Reg. 75680 (Dec. 12, 2013), http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2013-27200a.pdf.

[3] The CFTC has already issued a supplement regarding the third element (*i.e.,* aggregation). Aggregation of Positions, 80 Fed. Reg. 58365 (Sept. 29, 2015), http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2015-24596a.pdf. *See also* Aggregation of Positions, 78 Fed. Reg. 68946 (Nov. 15, 2013), http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2013-27339a.pdf.

[4] Proposed CFTC Regulation 150.1(3).

[5] Proposed CFTC Regulations 150.9 through 150.11. The enumerated anticipatory bona fide hedge positions that would be eligible for recognition are unfilled anticipated requirements, unsold anticipated production, anticipated royalties, anticipated service contract payments or receipts, and anticipatory cross-commodity hedges. Proposed CFTC Regulation 150.11(a)(1). Spreads for which the exchanges may grant exemptions include calendar spreads, quality differential spreads, processing spreads and product or by-product differential spreads. Proposed CFTC Regulation 150.10(b)(2).

[6] Proposed CFTC Regulation 150.9(a)(1). Section 4a(c)(2) of the CEA generally requires the CFTC to define a bona fide hedging position as a position that (a)(1) is a substitute for activity in the physical marketing channel, (2) is economically appropriate to the reduction of risk, and (3) arises from the potential change in value of current or anticipated assets, liabilities or services); or (b) reduces the risk of a swap that was executed opposite a counterparty for which such swap would satisfy the three tests set forth in (a). More detailed requirements applicable to the exchanges and market participants seeking exemptions are set forth in the Supplemental Proposal, *supra* note 1.

[7] Proposed CFTC Regulation 150.10(a). The policy objectives set forth in Section 4a(a)(3)(B) of the CEA are (i) to diminish, eliminate, or prevent excessive speculation; (ii) to deter and prevent market manipulation, squeezes, and corners; (iii) to ensure sufficient market liquidity for bona fide hedgers; and (iv) to ensure that the price discovery function of the underlying market is not disrupted.

[8] Proposed CFTC Regulations 150.9(a), 150.10(a) and 150.11(a).

[9] Proposed CFTC Regulations 150.9(a)(4), 150.10(a)(4) and 150.11(a)(3)(i).

[10] Proposed CFTC Regulations 150.9(d), 150.10(d) and 150.11(d).

[11] *See supra* note 6 for a description of Section 4a(c)(2).

[12] Restrictions on Qualified Financial Contracts of Systemically Important U.S. Banking Organizations and the U.S. Operations of Systemically Important Foreign Banking Organizations; Revisions to the Definition of Qualifying Master Netting Agreement and Related Definitions, 81 Fed. Reg. 29169 (May 11, 2016), https://www.federalreserve.gov/newsevents/press/bcreg/bcreg20160503b1.pdf.

[13] Clearing Requirement Determination Under Section 2(h) of the CEA for Interest Rate Swaps, 81 Fed. Reg. 39506 (June 16, 2016), http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2016-14035a.pdf.

[14] The Prudential Regulators are the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Farm Credit Administration and the Federal Housing Finance Agency.

[15] Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants—Cross-Border Application of the Margin Requirements, 81 Fed. Reg. 34818 (May 31, 2016), http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2016-12612a.pdf (Cross-Border Adopting Release). For more detail regarding the Margin Requirements, which were published on January 6, 2016, *see* Peter M. Hong and Nicole Simon, Quarterly Review: CFTC & NFA Developments For CPOs, CTAs and Other Asset Managers (April 2016), http://www.stradley.com/insights/publications/2016/04/ctfc-alert-april-2016.

[16] Cross-Border Adopting Release, *supra* note 15, at 34,827.

[17] CFTC Regulation 23.160(b)(1).

[18] *Id.*

[19] Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 45292 (July 26, 2013), http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2013-17958a.pdf. CFTC Regulation 23.160(a)(10) defines a U.S. person as:

(i) a natural person who is a resident of the United States;

(ii) an estate of a decedent who was a resident of the United States at the time of death;

(iii) a corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund or any form of entity similar to any of the foregoing (other than an entity described in paragraph (a)(10)(iv) or (v) of this section) (a "legal entity"), in each case that is organized or incorporated under the laws of the United States or having its principal place of business in the United States, including any branch of such legal entity;

(iv) a pension plan for the employees, officers or principals of a legal entity described in paragraph (a)(10)(iii) of this section, unless the pension plan is primarily for foreign employees of such entity;

(v) a trust governed by the laws of a state or other jurisdiction in the United States, if a court within the United States is able to exercise primary supervision over the administration of the trust;

(vi) a legal entity (other than a limited liability company, limited liability partnership or similar entity where all of the owners of the entity have limited liability) that is owned by one or more persons described in paragraphs (a)(10)(i) through (v) of this section and for which such person(s) bears unlimited responsibility for the obligations and liabilities of the legal entity, including any branch of the legal entity; or

(vii) an individual account or joint account (discretionary or not) where the beneficial owner (or one of the beneficial owners in the case of a joint account) is a person described in paragraphs (a)(10)(i) through (vi) of this section.

[20] For purposes of the Cross-Border Rules, a Foreign Consolidated Subsidiary is defined as a non-U.S. CSE in which an ultimate parent entity that is a U.S. person has a controlling financial interest, in accordance with U.S. Generally Accepted Accounting Principles (GAAP), such that the U.S. ultimate parent entity includes the non-U.S. CSE's operating results, financial position and statement of cash flows in the U.S. ultimate parent entity's consolidated financial statements, in accordance with U.S. GAAP. CFTC Regulation 23.160(a)(1).

[21] CFTC Regulation 23.160(b)(2).

[22] CFTC Regulation 23.160(c).

[23] CFTC Regulation 23.160(b)(2)(ii).

[24] CFTC Regulation 23.160(b)(2)(ii)(B)(2).

25 CFTC Regulation 23.160(a)(10).

[26] More specifically, initial margin requirements under them will be phased in starting September 1, 2016, and ending September 1, 2020, with entities engaged in higher volumes of swap activity having earlier compliance dates. Variation margin requirements are effective as of September 1, 2016, for entities with the highest volume of swap activity and March 1, 2017, for the rest.

[27] *See* Transcript of Staff Roundtable: Elements of Proposed Regulation Automated Trading (June 10, 2016), http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/transcript061016.pdf.

[28] CFTC Reopens Comment Period for Certain Elements of Regulation AT, PR7392-16, (June 16, 2016), http://www.cftc.gov/PressRoom/PressReleases/pr7392-16.

[29] No. 15–0045, 2016 WL 1391569 (D.D.C. Mar. 30, 2016).

[30] Financial Stability Oversight Council Update on Review of Asset Management Products and Activities (April 18, 2016), https://www.treasury.gov/initiatives/fsoc/news/Documents/FSOC%20Update%20on%20Review%20of%20Asset%20Management%20Products%20and%20Activities.pdf. *See* also FSOC 2016 Annual Report (June 2016), https://www.treasury.gov/initiatives/fsoc/studies-reports/Documents/FSOC%202016%20Annual%20Report.pdf.

[31] Financial Stability Oversight Council Notice Seeking Comment on Asset Management Products and Activities, 79 Fed. Reg. 77488 (Dec. 24, 2014), https://www.treasury.gov/initiatives/fsoc/news/Documents/FSOC%20Update%20on%20Review%20of%20Asset%20Management%20Products%20and%20Activities.pdf.

[32] *MetLife,* 2016 WL 1391569, *supra* note 30.

[33] For additional background regarding the MetLife case, see our Quarterly Review for the first quarter of 2016, *supra* note 15.
[34] Brief for Appellant Financial Stability Oversight Council, *MetLife, Inc. v. Financial Stability Oversight Council,* 16-5086 (June 16, 2016).

[35] Basis for the Financial Stability Oversight Council's Rescission of Its Determination Regarding GE Capital Global Holdings, LLC (June 28, 2016), https://www.treasury.gov/initiatives/fsoc/designations/Documents/GE%20Capital%20Public%20Rescission%20Basis.pdf.

[36] Derivatives Oversight and Taxpayer Protection Act, H.R. 5592, 114th Cong. 2d. Sess. (2016).

[37] Statement of CFTC Chairman Timothy Massad on the UK Referendum (June 24, 2016), http://www.cftc.gov/PressRoom/SpeechesTestimony/massadstatement062416.

[38] ISDA Statement on UK Referendum Vote for Brexit (June 24, 2016), https://www2.isda.org/attachment/ODQ1MA==/Brexit%20release%20FINAL.pdf.

[39] Financial Stability Board, "Proposed Policy Recommendations to Address Structural Vulnerabilities from Asset Management Activities" (June 22, 2016), http://www.fsb.org/wp-content/uploads/FSB-Asset-Management-Consultative-Document.pdf.