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Dodd Frank Update: Impact on Gas & Power Transactions

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The Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act" or "Dodd-Frank"), enacted on July 21, 2010, is a massive undertaking both in terms of the length of the statute and the breadth of its scope.[1] It affects numerous industries in numerous ways that are anticipated to be large both in impact and in cost.

Apart from the complex provisions contained in the Act itself, the Commodity Futures Trading Commission ("CFTC") is currently in the process of implementing proposed and final rules expanding on the scope of the Act. Because the CFTC's rulemaking process is ongoing and many of the rules have not yet been finalized, it is extremely difficult for companies and legal practitioners to understand all implications of the Act across industries.

The purpose of this article is to analyze certain provisions of the Wall Street Transparency and Accountability Act of 2010 codified in Title VII of the Act ("Title VII"), including relevant updates set forth in related CFTC rules, and examine the practical impact of these regulations on market participants engaging in natural gas and power transactions ("Energy Traders"). This paper is not a comprehensive analysis of Title VII or the CFTC's rules, but instead is intended to provide assistance to Energy Traders by analyzing three (3) specific issues:

(i) Who is impacted by the Act?

(ii) What steps should Energy Traders take to prepare for compliance with the Act?

(iii) In light of industry push back and CFTC implementation hurdles, where will the Act end up?

By examining the above-stated issues, Energy Traders can better understand how the Act will impact their business and take proactive measures to avoid compliance concerns.

I. WHO DOES THE DODD-FRANK ACT IMPACT?

A. Major Swap Participants

Under Title VII, a "Major Swap Participant" generally is a person (i) who maintains a substantial position in Swaps (except positions held for hedging or mitigating commercial risk); (ii) whose outstanding Swaps create substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets; or (iii) who is a highly-leveraged Financial Entity not subject to Federal banking requirements.[2]

1. Category 1: Substantial Position in Swap Categories

Most energy trading companies would likely fall under the first category of a Major Swap Participant, if at all, by maintaining a "substantial position" in any of the major Swap categories

[1] The Act is available online at http://docs.house.gov/rules/finserv/111_hr4173_finsrvcr.pdf. For purposes of this article, citations herein to the "Act" refer to the provisions set forth in the Dodd-Frank Wall Street Reform and Consumer Protection Act. Citations to the Commodity Exchange Act ("CEA") herein refer to 7 U.S.C. §§ 1, *et seq*.

[2] Act § 721(a)(16) (adding CEA § 1a(33)).

(*e.g.*, commodity swaps, energy swaps, interest rate swaps, etc.).[3] A "substantial position" is one that meets either of the following tests:

(i) If the daily average current uncollateralized exposure for a category of Swaps held by an entity exceeds $1 billion (for commodity Swaps) or $3 billion (for interest rate Swaps); or

(ii) If (A) the daily average current uncollateralized exposure for a category of Swaps, *plus* (B) potential future exposure for such Swaps held by an entity exceeds $2 billion (for commodity Swaps) or $6 billion (for interest rate Swaps).[4]

Even if a person otherwise holds a "substantial position" in Swaps, they are not considered a Major Swap Participant if those positions are held for "hedging or mitigating commercial risk." According to the CFTC, Swaps which "hedge or mitigate commercial risk" include Swap positions that: (i) qualify as "bona fide hedges" under Commodity Exchange Act ("CEA") rules; (ii) qualify for hedging treatment under FASB Statement No. 133; or (iii) are "economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise," where the risks arise in the ordinary course of business from (A) a potential change in the value of assets, liabilities or services; or (B) a potential change in value arising from interest rates, forex rates or other rate exposures.[5]

2. Category 2: Substantial Counterparty Exposure

The second category of Major Swap Participant is a person whose outstanding Swaps create "substantial counterparty exposure" that could have serious adverse effects on the financial stability of the U.S. banking system.[6] To determine "substantial counterparty exposure," the CFTC uses the same general calculation methods used to calculate "substantial position" for a Category 1 Major Swap Participant.[7] However, the definition of "substantial counterparty exposure" does not exclude hedging transactions.[8] Within such limitations, the CFTC considers a person to have "substantial counterparty exposure" if, across all of such person's Swap positions, it has: (i) a current uncollateralized exposure of $5 billion, or (ii) a sum of current uncollateralized exposure and potential future exposure of $8 billion.[9]

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[3] *Id*; *see also* Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant," 75 Fed. Reg. 80174 (Dec. 21, 2010). With respect to the definition of "Swap", *see* Act § 721(a)(21) (adding CEA § 1a(47)) and discussion *infra* at Section I(C)(2).

[4] Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant," 75 Fed. Reg. 80,174 (Dec. 21, 2010).

[5] *Id*.

[6] Act § 721(a)(16) (adding CEA § 1a(33)).

[7] Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant," 75 Fed. Reg. 80,174 (Dec. 21, 2010).

[8] *Id*.

[9] *Id*.

3. Category 3: Highly-Leveraged Financial Entities

A person who is a highly-leveraged Financial Entity not otherwise subject to Federal banking agency capital requirements and maintains a substantial position in a major category of Swaps.[10] Generally, a Financial Entity includes (but is not limited to) a Major Swap Participant or a Swap Dealer.[11] The CFTC has specified two possible definitions of "highly-leveraged"—either (i) a ratio of total liabilities to equity (as determined in accordance with GAAP) of 8 to 1; or (ii) a ratio of 15 to 1, measured in the same way.[12] Finally, a "substantial position" is subject to the same thresholds applicable to a Category 1 Major Swap Participant (as discussed above).[13]

B. Swap Dealers

1. Statutory Definition and CFTC Guidance

Under Title VII, a "Swap Dealer" means any person who (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.[14]

For Energy Traders involved in natural gas and power transactions, probably the most significant language in the definition of "Swap Dealer" is the inclusion of any person that "regularly enters into Swaps with counterparties as an ordinary course of business for its own account."[15] On its face, such language seems to cover most energy trading Swap participants—even those who enter into Swaps for hedging purposes. However, recent CFTC rulemakings provide a more narrow view of a Swap Dealer than originally stated in the Act.[16] Specifically, the CFTC's proposed rules clarify that a Swap Dealer subject to the Act:

(i) Tends to accommodate demand for Swaps from other parties;

(ii) Generally is available to enter into Swaps to facilitate other parties' interest in entering into Swaps;

(iii) Tends not to request that other parties propose the terms of Swaps, but instead enter into Swaps on their own standard terms or on terms they arrange in response to other parties' interests; and

[10] Act § 721(a)(16) (adding CEA § 1a(33)).

[11] Act § 723(a)(3) (adding CEA § 2(h)(7)(C)).

[12] Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant," 75 Fed. Reg. 80,174 (Dec. 21, 2010).

[13] *Id*.; *see also* discussion *supra* at Section I(A)(1).

[14] Act § 721(a)(21) (adding CEA § 1a(49)).

[15] *Id*.

[16] Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant," 75 Fed. Reg. 80,174 (Dec. 21, 2010).

(iv) Tends to be able to arrange customized terms for Swaps upon request, or to create new types of Swaps at their own initiative.[17]

The problem with this proposed rulemaking is that it remains unclear where the precise paramaters are set that define which entities qualify as "Swap Dealers" under the Act. This uncertainty is exacerbated by the fact that thus far rules promulgated by the CFTC are still only proposed and no finalized rule clearly defines "Swap Dealer."

2. Exclusions to the Definition of "Swap Dealer"

The definition of "Swap Dealer" does not include a person that (i) enters into Swaps for its own account, but not as a part of its regular business; or (ii) engages in a "de minimus" quantity of Swaps in connection with transactions with or on behalf of its customers.[18]

The CFTC has not defined the phrases "regularly" and "ordinary course of business" stated in the definition of a "Swap Dealer," and therefore the CFTC's interpretation of this provision remains ambiguous. However, the CFTC has quantified a "de minimus" number of Swaps as follows:

(i) The aggregate effective notional amount, measured on a gross basis, of the Swaps that the person entered into over the prior 12 months in connection with dealing activities does not exceed $100 million;

(ii) The aggregate effective notional amount of such Swaps with "Special Entities" (*e.g.*, governmental entities and municipalities) over the prior 12 months does not exceed $25 million;

(iii) The person has not entered into Swaps with more than 15 counterparties (other than security-based swap dealers) over the prior 12 months; and

(iv) The person has not entered into more than 20 Swaps as a dealer over the prior 12 months.[19]

C. End Users that Enter Into Swaps

Upon analyzing the Act's statutory language and CFTC rulemaking guidelines, many Energy Traders dealing in natural gas and power transactions may conclude that they do not qualify as Major Swap Participants or Swap Dealers under the Act because of the significant trading thresholds required to meet such definitions and/or the fact that the Energy Trader's Swaps are used simply to hedge or mitigate underlying commercial risks. Energy Traders that do not meet such definitions may assume that Title VII will not impact their business, but such assumption would be misplaced. Even if an Energy Trader is not considered a Major Swap

[17] *Id*.

[18] Act § 721(a)(21) (adding CEA § 1a(49)).

[19] Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant," 75 Fed. Reg. 80,174, 80,179-80,180 (Dec. 21, 2010).

Participant or a Swap Dealer, the Act still applies to the extent such Energy Trader (i) qualifies as an "End User" under the Act; and (ii) enters into Swaps regulated by the CFTC.

1. Who is an "End User"?

a. *General Interpretation Under the Act*

The term "End User" is used throughout Title VII, in the Congressional record and in a letter dated June 30, 2010 from Senators Dodd and Lincoln to Representatives Frank and Peterson clarifying certain provisions of the Act (the "Dodd-Lincoln Letter").[20] However, the term "End User" is not explicitly defined in the Act itself.[21]

The Congressional record and the Dodd-Lincoln Letter both indicate that the term "End User" should include any end user of the commodity being hedged, including energy producers, power retailers, airlines and those financing routine business activities.[22] These sources also support the positions that (i) End Users are comprised of "entities that use swaps to hedge or mitigate commercial risk";[23] (ii) the Act should not create cost-prohibitive requirements for End Users;[24] (iii) margin requirements may not be imposed on End Users;[25] and (iv) standardized derivatives may be impractical for End-User hedging.[26] However, these limitations on the burdens that End Users may realize as a result of the Act are not included in the Act itself, and the CFTC has not recognized the Dodd-Lincoln Letter as authority it will follow.

b. *End-User Exception to Mandatory Clearing of Swaps*

The general rule under the Act is that a Swap must be cleared through a registered derivatives clearing organization ("DCO") if the CFTC determines that such category or type of Swap must be cleared.[27] However, a Swap otherwise subject to mandatory clearing is subject to an elective exception if the following three (3) conditions are met:

(i) At least one party to the Swap is not a Financial Entity;[28]

(ii) Such party is using the Swap to "hedge or mitigate commercial risk;"[29] and

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[20] A copy of the Dodd-Lincoln Letter is available online at http://online.wsj.com/public/resources/documents/dodd-lincoln-letter070110.pdf.

[21] *But see* discussion *infra* at Section I(C)(1)(b).

[22] Dodd-Lincoln Letter ¶ 7.

[23] Dodd-Lincoln Letter ¶ 2.

[24] Dodd-Lincoln Letter ¶ 1.

[25] Dodd-Lincoln Letter ¶ 2.

[26] Dodd-Lincoln Letter ¶ 6.

[27] Act § 723(a)(3) (adding CEA § 2(h)(1)(A)).

[28] Act § 723(a)(3) (adding CEA § 2(h)(7)(A)). Although the term "Financial Entity" includes both Major Swap Participants and Swap Dealers, it does not include an End User.

[29] The phrase "hedging or mitigating commercial risk" has the same meaning as in the definition of Major Swap Participant, *i.e.*, the Swap positions (i) qualify as "bona fide hedges" under CEA rules; (ii) qualify for treatment under FASB Statement No. 133; or (iii) are "economically appropriate to the reduction of risks in the conduct and

(iii) Notice is provided to the CFTC regarding how the party generally meets its financial obligations associated with entering into non-cleared Swaps.[30]

The above-stated test is termed the "End User Exception" to mandatory clearing because the CFTC defines an "End User" as an entity who meets the first two prongs of the analysis above, *i.e.*, "a non-Financial Entity that is using Swaps to hedge or mitigate its commercial risks."[31] It is important to note, however, that although this is an exception to mandatory clearing, the provision imposes an additional obligation on End Users to notify the CFTC of its credit policies.[32]

2. What is a "Swap"?

The Act's definition of "Swap" is very broad in scope and includes (but is not limited to) a commodity swap, an energy swap and an interest rate swap.[33] The Act also contains exclusions to the definition of a Swap and regulations concerning master agreements under which Swaps are traded, such as the Master Agreement published by the International Swaps and Derivatives Association (the "ISDA").[34] Apart from stand-alone Swap transactions, the CFTC has indicated that any contract with a Swap component could cause the entire contract to be treated as a Swap for purposes of the Act, even if the primary focus of the contract does not relate to Swap obligations.[35]

For Energy Traders dealing in natural gas and power transactions, it is important to note that forward contracts generally are not considered Swaps under the Act.[36] The key determination is whether the parties intend to physically settle the transaction.[37] Even when physical delivery is anticipated, however, the CFTC has indicated that certain physical commodity transactions may otherwise qualify as Swaps under the Act under specific circumstances.[38]

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management of a commercial enterprise", where the risks arise in the ordinary course of business from changes in the value of assets, liabilities or services. *See* End-User Exception to Mandatory Clearing of Swaps, 75 Fed. Reg. 80,747 (Dec. 23, 2010).

[30] *See* Act § 723(a)(3) (adding CEA § 2(h)(7)(A)).

[31] *See* End-User Exception to Mandatory Clearing of Swaps, 75 Fed. Reg. 80,747 (Dec. 23, 2010).

[32] *See* discussion *supra* at Section I(C)(3)(a).

[33] Act § 721(a)(21) (adding CEA § 1a(47)(A)).

[34] Act § 721(a)(21) (adding CEA § 1a(47)(B)-(C)).

[35] *E.g.*, an index-based physical supply agreement that also contains a fixed-floating swap within such agreement may be considered a "Swap" under the Act even if the primary purpose of the agreement is the physical supply of the commodity. *See* Act § 721(a)(21) (adding CEA § 1a(47)(D)); *see also* Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 76 Fed. Reg. 29,818 (May 23, 2011)..

[36] *See* Act § 721(a)(21) (adding CEA § 1a(47)(B)); *see also* Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 76 Fed. Reg. 29,818 (May 23, 2011).

[37] *Id*.

[38] Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 76 Fed. Reg. 29,818, 29,828 (May 23, 2011).

For example, book-outs of physical commodity transactions are considered Swaps under the Act unless (i) the book-out is effectuated through a separately negotiated agreement; and (ii) the parties involved regularly make or take delivery of the relevant commodity in their "ordinary course of business."[39] The CFTC has not clearly defined what constitutes taking delivery of a commodity in the "ordinary course of business," and therefore uncertainty remains as to which physical book-outs will constitute Swaps under the Act. In addition, the CFTC has proposed rules clarifying that options on physical commodities are expressly included in the definition of "Swap" under the Act.[40]

The definition of "Swap" also includes any transaction that is willfully structured to evade the requirements of Title VII.[41] The CFTC has not further defined the meaning of "willfully structured," and such ambiguity may create additional issues for Energy Traders to consider when determining how its trading business will adapt to Dodd-Frank requirements. For example, if an Energy Trader that has used commodity Swaps to hedge trading risk determines that it will only trade in physical commodity transactions to avoid stringent and costly Dodd-Frank requirements, are such physical transactions "willfully structured" to evade the Act's requirements? The answer is not clear under the Act or CFTC regulations, and Energy Traders should ensure that they are cognizant of this ambiguity when determining how to structure their business activities in response to the Act's requirements.

3. How Are End Users Impacted by the Act?

Although Title VII of the Act is aimed primarily at regulating the Swap-trading activities of Major Swap Participants and Swap Dealers, End Users encounter additional obligations and rights when entering into Swaps with Major Swap Participants, Swap Dealers, or other End Users. Specifically, End Users should note the following provisions of the Act that may directly impact trading activities:

(i) Clearing transition recordkeeping and reporting obligations (§ 723);

(ii) Opt-out of clearing requirements and/or elective clearing (§ 723);

(iii) Real-time public reporting of Swap data (§ 727);

(iv) Reporting of Swap data for use by regulators (§ 729);

(v) Swap confirmation and documentation standards (§ 731); and

[39] *Id*. at 29,828-29,829. A "book-out" is an industry term describing a situation where parties to a commodity contract each have delivery obligations to the other party in the same commodity on the same delivery date. In such case, the parties offset the quantities of the commodity to be delivered between them such that only one party delivers the net quantity remaining following such offset. To the extent delivery obligations are "booked out", such obligations are discharged.

[40] *See* Commodity Options and Agricultural Swaps, 76 Fed. Reg. 6,095 (Feb. 3, 2011).

[41] Act § 721(c); *see also* Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 76 Fed. Reg. 29,818, 29,828 (May 23, 2011).

(vi) Credit support requirements for uncleared Swaps (§ 731).

a. *Clearing Transition Recordkeeping and Reporting Obligations (§ 723)*

The CFTC has clarified how the Commission will address those Swaps that would otherwise be subject to mandatory clearing under the Act, but (i) the Swaps were entered into prior to enactment of Dodd-Frank on July 21, 2010 and had not yet expired as of such date ("Pre-Enactment Swaps"); or (ii) the Swaps were entered into on or after enactment of Dodd-Frank on July 21, 2010, but prior to the effective date of the CFTC's final Swap data reporting rules ("Transition Swaps").[42] The CFTC requires that Pre-Enactment Swaps and Transition Swaps (collectively, "Historical Swaps") be reported to a Swap Data Repository ("SDR") or the CFTC.[43] If such Swaps are timely reported, they will be exempt from further clearing requirements under the Act.[44] Pre-Enactment Swaps that expired prior to July 21, 2010 are not required to be reported.[45]

On April 25, 2011, the CFTC issued a proposed rulemaking relating to Historical Swap records and reporting requirements.[46] With respect to Historical Swaps that had not expired as of date of the proposed rule, (*i.e.*, April 25, 2011), any counterparty to such Historical Swap (whether a Major Swap Participant, Swap Dealer or End User) is required to (i) keep records of certain primary economic terms of Historical Swaps (pursuant to retention requirements stated in CFTC-published data tables); and (ii) keep copies of all Historical Swap confirmations.[47] With respect to Historical Swaps that expired prior to April 25, 2011, any counterparty to such Historical Swap (whether a Major Swap Participant, Swap Dealer or End User) is required to keep all records in existence in their current format. All such records must be maintained for the duration of the Historical Swap plus 5 years.[48]

Apart from record-retention requirements under the Act, both initial and ongoing Historical Swap data must be reported to an SDR or the CFTC.[49] If one party to the Historical Swap is a Swap Dealer and the other is a Major Swap Participant, the Swap Dealer reports.[50] If only one party is a Swap Dealer or Major Swap Participant and the other party is not, the Swap Dealer or Major Swap Participant reports.[51] In all other cases (*e.g.*, both parties are—or are not—Major Swap Participants or Swap Dealers, including Historical Swaps between two End

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[42] Act § 723(a) (adding CEA § 2(h)(5)-(6)); *see also* Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps, 76 Fed. Reg. 22,833 (Apr. 25, 2011).

[43] *Id*.

[44] *Id*.

[45] *Id*.

[46] *See supra* note 41.

[47] *Id*.

[48] *Id*.

[49] *Id*.

[50] Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps, 76 Fed. Reg. 22,833 (Apr. 25, 2011).

[51] *Id*.

Users), the parties must decide which of them will report Historical Swap data.[52] This is significant for End Users, as the Act and CFTC regulations impose an affirmative obligation to submit data to an SDR or the CFTC.

b. *Opt-Out of Clearing Requirements and/or Elective Clearing (§ 723)*

Even if an Energy Trader qualifies as an End User because it is a non-Financial Entity that uses Swaps to hedge or mitigate its commercial risks, such End User's Swap transactions are not exempt from mandatory clearing unless the End User affirmatively notifies the CFTC of how it generally meets its financial obligations associated with entering into non-cleared Swaps.[53]

According to the CFTC's proposed rules, the Commission anticipates that it will publish a "user-friendly" check-the-box form for End Users to submit to an SDR when a Swap is initially executed.[54] The form will require End Users to (i) describe how credit risk is mitigated in the absence of clearing; (ii) disclose if an affiliate or Financial Entity is involved in the deal; (iii) affirmatively represent that the Swap is being used for hedging purposes; and (iv) disclose certain other commercial terms relating to the Swap.[55]

Apart from the ability to opt-out of mandatory clearing requirements, an End User may be able to elect that a Swap be cleared even if such Swap is otherwise eligible for the End User Exception.[56] Specifically, if a Major Swap Participant or Swap Dealer enters into a Swap with an End User that is not required to be cleared, the End User has the right to require that the parties clear the Swap and select the DCO used for clearing.[57]

c. *Real-Time Public Reporting of Swap Data (§ 727)*

Under the Act, certain transaction data for all Swaps (whether cleared or uncleared, and regardless of execution method) must be made publicly available "as soon as technologically practicable" after the Swap has been "executed."[58] Specifically, data affecting the price of the Swap must be publicly reported, including but not limited to (i) contract type (*e.g.*, commodity swap, interest rate swap, etc.); (ii) the underlying asset class and/or commodity type; (ii) the tenor of the Swap; and (iv) payment frequency.[59] Notably, reported information must not identify the participants to the Swap transaction.[60]

If the parties execute a Swap on a designated Swap Execution Facility ("SEF") or a Designated Contract Market ("DCM") (*e.g.*, ICE or NYMEX), the parties satisfy their public

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[52] *Id*.

[53] Act § 723(a) (adding CEA § 2(h)(7)(A)).

[54] *See* End-User Exception to Mandatory Clearing of Swaps, 75 Fed. Reg. 80,747 (Dec. 23, 2010).

[55] *Id*.

[56] *See* Act § 723(a) (adding CEA § 2(h)(7)(B)).

[57] *Id*; *see also* End-User Exception to Mandatory Clearing of Swaps, 75 Fed. Reg. 80,747 (Dec. 23, 2010).

[58] Act § 727 (adding CEA § 2(a)(13)).

[59] *See* Real-Time Public Reporting of Swap Transaction Data, 75 Fed. Reg. 76,140 (Dec. 7, 2010).

[60] *Id*.

reporting obligations by executing the Swap on the facility.[61] However, if the Swap is executed off-exchange (*i.e.*, not through an SEF or DCM), one party to the Swap must report data to a "real-time disseminator."[62] Specifically, if one party is a Swap Dealer and the other is a Major Swap Participant, the Swap Dealer reports. If only one party is a Swap Dealer or Major Swap Participant and the other party is not, the Swap Dealer or Major Swap Participant reports. In all other cases (*e.g.*, both parties are—or are not—Major Swap Participants or Swap Dealers, including Swaps between two End Users), the parties decide which of them will report Swap data to the real-time disseminator.[63]

The timing requirement for public-reporting of Swap data also is significant: "as soon as technologically practicable" after the Swap has been "executed."[64] Per the CFTC's rulemaking updates, the phrase "as soon as technologically practicable" means "as soon as possible, taking into consideration the prevalence, implementation and use of technology by comparable market participants."[65] Likewise, the term "execution" means "an agreement by the parties (whether orally, in writing, electronically or otherwise) to the terms of a Swap that legally binds the parties to such Swap terms under applicable law."[66] According to the CFTC, execution occurs immediately following (or simultaneous with) the "affirmation" of a Swap.[67] "Affirmation" occurs when the parties verify (orally, in writing electronically or otherwise) that they agree on the primary economic terms of a Swap (but not necessarily all terms of the Swap).[68] Affirmation may constitute execution of a Swap, or may simply be evidence of execution of a Swap, but it is not necessarily the same as confirmation of a Swap.[69]

End Users should be aware of (i) whether it will need to report; and (ii) the identity of the "real-time disseminator" to whom it should report. Internal operations may need to be updated to ensure that required data is reported "as soon as technologically practicable," as defined by the CFTC.[70] It also should be noted that CFTC reporting obligations arise upon "execution," which may occur before the parties actually sign any confirmation to a Swap. This may differ from confirmation procedures agreed upon by the parties under Swap trading documentation. Even if an End User is not the reporting counterparty with respect to a Swap, the End User should note that information about its Swaps will be made public.

d. *Reporting of Swap Data for Use by Regulators (§ 729)*

Apart from real-time public reporting obligations under Section 727 of the Act, Section 729 of the Act also requires at least one counterparty to a Swap to report additional Swap data to

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[61] *Id*.

[62] *Id*.

[63] *See* Real-Time Public Reporting of Swap Transaction Data, 75 Fed. Reg. 76,140 (Dec. 7, 2010).

[64] Act § 727 (adding CEA § 2(a)(13)).

[65] Real-Time Public Reporting of Swap Transaction Data, 75 Fed. Reg. 76,140 (Dec. 7, 2010).

[66] *Id*.

[67] *Id*.

[68] *Id*.

[69] *See* Real-Time Public Reporting of Swap Transaction Data, 75 Fed. Reg. 76,140 (Dec. 7, 2010).

[70] *Id*.

a registered SDR for use by Swap regulators.[71] If an SDR does not accept the Swap data, the counterparty must report such Swap data directly to the CFTC.[72] If the Swap is cleared through a Derivatives Clearing Organization ("DCO"), the DCO reports Swap data on the parties' behalf.[73]

Data must be reported from two important stages of a Swap's existence: (i) the creation of a Swap ("Swap Creation Data"); and (ii) the continuation of a Swap over its existence until its final termination or expiration ("Swap Continuation Data").[74] Swap Creation Data includes the Swap's primary economic terms and the Swap confirmation executed by the parties.[75] Swap Continuation Data for interest rate, currency and commodity Swaps includes a daily snapshot of the Swap's primary economic terms and Swap valuation data.[76]

The party required to report Swap data to an SDR varies depending on (i) the type of data being reported (*i.e.*, Swap Creation Data v. Swap Continuation Data), (ii) whether the Swap is executed on-exchange (*i.e.*, through an SEF or DCM) or off-exchange, and (iii) whether cleared through a DCO.[77] If a Swap is entered into off-exchange between two End Users and is not cleared through a DCO, one of the End Users to the transaction is required to report both Swap Creation Data and Swap Continuation Data to an SDR or the CFTC.[78]

Apart from reporting obligations, the CFTC requires End Users to maintain records of Swap Creation Data and Swap Continuation Data. Specifically, records must (i) be "readily accessible" throughout the existence a Swap and for two (2) years after termination or expiration of the Swap; and (ii) be kept throughout the existence of a Swap and for five (5) years after termination or expiration of the Swap.[79]

e. *Swap Confirmation and Documentation Standards (§ 731)*

The Act imposes confirmation and documentation requirements on Major Swap Participants and Swap Dealers when entering into a Swap with an End User.[80] A Swap Dealer or Major Swap Participant must send an acknowledgement of the Swap transaction to the End User counterparty on the same day as execution.[81] In addition to such acknowledgment, the Swap

[71] Act § 729 (adding CEA § 4r).

[72] *Id*.

[73] *See* Swap Data Recordkeeping and Reporting Requirements, 75 Fed. Reg. 76,574 (Dec. 8, 2010).

[74] *Id*.

[75] *Id*.

[76] *Id*.

[77] *See* Swap Data Recordkeeping and Reporting Requirements, 75 Fed. Reg. 76,574 (Dec. 8, 2010).

[78] *Id*.

[79] *Id*.

[80] *See* Act § 731 (adding CEA § 4s(i)); *see also* Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants, 75 Fed. Reg. 81,519 (Dec. 28, 2010); Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants, 76 Fed. Reg. 6715 (Feb. 8, 2011).

[81] *See* Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants, 75 Fed. Reg. 81,519 (Dec. 28, 2010).

Dealer or Major Swap Participant must have procedures in place to confirm the Swap transaction (i) on the same calendar day as execution (for Financial Entities such as banks), or (ii) on the next business day for all other counterparties, including End Users.[82] With respect to offsetting Swap positions, Swap Dealers and Major Swap Participants must have written procedures in place for periodically terminating offsetting Swaps and engaging in portfolio compression exercises with End User counterparties.[83]

f. *Credit Support Requirements for Uncleared Swaps (§ 731)*

If a "Covered Swap Entity" (such as a Swap Dealer or Major Swap Participant) enters into a Swap with an End User, the parties are not required to exchange CFTC-prescribed levels of initial margin when the Swap is executed or variation margin during the life of the Swap.[84] However, the CFTC does expressly require the Covered Swap Entity and the End User to enter into a credit support arrangement which, by its negotiated terms, may require initial or variation margin.[85]

The CFTC's proposed rules discuss the terms of the credit support arrangement between a Covered Swap Entity and an End User.[86] The Commission acknowledges that the parties may include minimum transfer amounts or threshold amounts applicable to the calculation and transfer of collateral in an effort to mitigate posting obligations.[87] With respect to the types of collateral permitted to be exchanged, the CFTC has stated that the parties can exchange any assets "for which the value is reasonably ascertainable on a periodic basis."[88] While a custodian is not explicitly required by the CFTC for purposes of holding collateral exchanged between a Covered Swap Entity and an End User, the End User must have the right to elect a custodian to hold any collateral the End User posts to the Covered Swap Entity under the credit support arrangement.[89]

These CFTC-prescribed collateral regulations may directly impact the way that End Users operate their business. To the extent an End User enters into a Swap with a Covered Swap Entity, it now will be required to enter into a credit support arrangement with such counterparty. The terms of the credit support arrangement will need to individually negotiated, potentially increasing the time in which a transaction is finalized. Moreover, as a result of CFTC regulations imposing significant margin and capital requirements on Covered Swap Entities, such Covered Swap Entities entering into Swap with End Users likely will pass on such

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[82] *Id*.

[83] *Id*.

[84] Act § 731 (adding CEA § 4s(e)(3)); *see also* Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 76 Fed. Reg. 23,732 (April 28, 2011).

[85] *Id*.

[86] *Id*.

[87] *Id*.

[88] *See* Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 76 Fed. Reg. 23,732 (April 28, 2011).

[89] *Id*.

increased costs to End Users through the pricing of Swap products or credit terms negotiated in the parties' credit support arrangement.[90]

II. WHAT SHOULD ENERGY TRADERS DO TO PREPARE FOR THE ACT?

Regardless of whether an Energy Trader qualifies as a Major Swap Participant, Swap Dealer or End User under the Act, Dodd-Frank's requirements—even those applicable to End Users—will impact business operations and costs. To prepare for compliance with the Act, Energy Traders should not delay in taking the following actions: (i) evaluating internal systems, processes and personnel; (ii) analyzing the cost of compliance with the Act; and (iii) analyzing the cost of alternatives to compliance with the Act.

A. Evaluate Internal Systems, Processes and Personnel

Because the Act mandates strict reporting, recordkeeping and data retention requirements, Energy Traders should analyze internal systems and procedures to ensure that day-to-day operations will be carried out in compliance with the Act. For example, the Act's clearing transition recordkeeping obligations require all parties to Swaps to maintain Historical Swap data during the life of the Swap and for five (5) years after termination.[91] In addition, the real-time public reporting requirements mandate that Swap data must be submitted "as soon as technologically practicable" after the Swap has been "executed," which under the CFTC's interpretation may occur prior to execution of a Swap confirmation.[92] To avoid non-compliance, information software, hardware and data storage systems should be assessed to determine whether upgrades and/or new implementation procedures are necessary.

Energy Traders also should determine which personnel will be directly responsible for carrying out the CFTC's reporting, recordkeeping and data retention functions. For example, will Swap data reporting obligations be carried out by the trading desk, operations group or risk management department? Does the Energy Trader need to hire additional personnel, such as a compliance manager, to manage communications with the CFTC and SDRs and to ensure that the Act's requirements are met?[93]

B. Analyze the Cost of Compliance With the Act

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[90] *See, e.g.*, Act § 731 (adding CEA § 4s(e)(3)); *see also* Capital Requirements of Swap Dealers and Major Swap Participants, 76 Fed. Reg. 27,802 (May 12, 2011).

[91] *See* Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps, 76 Fed. Reg. 22,833 (Apr. 25, 2011); *see also* discussion *supra* at Section I(C)(3)(a) herein.

[92] Act § 727 (adding CEA § 2(a)(13)); *see also* Real-Time Public Reporting of Swap Transaction Data, 75 Fed. Reg. 76,140 (Dec. 7, 2010).

[93] With respect to Major Swap Participants and Swap Dealers, designation of a Chief Compliance Officer is required. Section 731 of the Dodd-Frank Act adds section 4s(k) of the CEA to provide for designation of a Chief Compliance Officer for Swap Dealers and Major Swap Participants to establish and administer the compliance policies of the registrant and resolve conflicts of interest within the organization. *See* § 731; *see also* Proposed Rule on Designation of Chief Compliance Officer and Preparation of Annual Compliance Report, 75 Fed. Reg. 70,881 (November 19, 2010). Even if designation of a Chief Compliance Officer is not expressly required for End Users, establishing a manager or officer to oversee operations and ensure compliance with the Act may be helpful.

To understand the scope of compliance costs, an Energy Trader first must analyze whether the company would be considered a Major Swap Participant, Swap Dealer, End User or other entity regulated by the Act (*e.g.*, a Financial Entity such as a bank).[94] While a detailed analysis of the Act's regulations applicable to Swap Dealers and Major Swap Participants extends beyond the scope of this article, it is clear that the primary focus of Title VII is to target the Swap trading activities of Major Swap Participants and Swap Dealers. Regulations such as mandatory clearing requirements, capital requirements, margin requirements and position limits will not only increase an Energy Trader's internal costs of doing business but also the prices for Swap products.

Even if an Energy Trader is not a Major Swap Participant or Swap Dealer but otherwise qualifies as an End User, the Act's requirements detailed herein may potentially increase compliance costs in a significant manner. As a practical matter, it may be helpful for Energy Traders to employ consulting firms that specialize in Dodd-Frank compliance matters to analyze the company's operations and personnel in order to better understand the scope of the Act's financial impact on the Energy Trader's business.

C. Analyze the Cost of Alternatives to Compliance With the Act

Because of the Act's significant oversight of Swap transactions, some Energy Traders active in commodities markets—particularly those that would qualify as End Users under the Act—have considered an alternative business model to avoid the Act's requirements. By entering into only fixed-price physical commodity transactions instead of index-based physical trades with corresponding Swaps to hedge risk, an Energy Trader may be able to avoid entering into Swaps regulated by the Act. To the extent the Energy Trader does not use any Swaps in its business, the requirements of Title VII (and ensuing compliance costs) would not directly apply.

While avoiding the Act's requirements altogether may seem like an attractive solution, an Energy Trader currently trading in Swaps should closely analyze whether this approach makes sense for its overall business. Transitioning to the use of only fixed-price physical transactions may limit the number of counterparties willing to take on the mark-to-market exposure associated with fixed-price deals and may create physical settlement risk not present in derivative transactions. Based on the inherent credit risks involved, the term of a fixed-price physical commodity transaction may be shorter than an Energy's Trader's current index-based physical deals, and the premiums involved in taking on positions with additional credit risk may be reflected in a deal's pricing.

Apart from the business impact of moving all commodity transactions to physical instead of financial deals, the Act's definition of "Swap" expressly includes any transaction that is willfully structured to evade the requirements of Title VII.[95] Because the CFTC has not clarified

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[94] *See* discussion *supra* at Section I(A)-(C) herein. As of the date of publication of this article, the CFTC has not issued final rules with respect to entity definitions used in the Act. It is anticipated that final rulemakings will be in place by the end of 2011, and therefore Energy Traders should closely monitor upcoming CFTC rulemaking procedures to be aware of regulations that impact compliance obligations.

[95] Act § 721(c); *see also* Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 76 Fed. Reg. 29,818, 29,828 (May 23, 2011).

the meaning of the phrase "willfully structured," it remains unclear whether an Energy Trader's transition of its financial Swap transactions to fixed-price physical deals would be considered an evasion of the Act's requirements and result in such transaction being subject to CFTC regulations.[96]

III. WHERE WILL THE ACT END UP?

A. Implementation Delays

1. Delayed Effective Date for Certain Swap Regulations

On July 14, 2011, the CFTC issued a final order ("Final Order") granting temporary exemptions to certain requirements in Title VII that otherwise would have become effective on July 16, 2011.[97]

Swap-related requirements under Title VII of the Act, including key amendments to the CEA, generally would have become effective on July 16, 2011. However, Section 754 of the Act states that if a provision of Title VII requires implementation by agency rulemaking, such provision shall become effective not less than sixty (60) days after publication of the final rule. Despite the CFTC's introduction of numerous proposed rules to implement the Act's requirements, such rulemakings were not finalized on or before the July 16, 2011 effective date and many rules have yet to be finalized to date.

To address concerns regarding which CEA provisions would (or would not) apply as of July 16, 2011, the Final Order granted a temporary extension of the effective date with respect to two categories of self-effectuating CEA regulations that, without such extension, would have otherwise applied to market participants as of July 16, 2011: (i) CEA provisions added or amended by Title VII that reference key terms which require further definition; and (ii) Title VII provisions that repeal various exemptions and exclusions set forth in the CEA.[98]

a. *Provisions Relating to Key Defined Terms*

Certain provisions of Title VII do not themselves require further rulemaking and thus became effective as of July 16, 2011.[99] However, such provisions reference defined terms such as "swap," "swap dealer," "major swap participant," or "eligible contract participant" that were not finalized on or before July 16, 2011. Therefore, the Final Order temporarily exempts persons from complying with provisions in Title VII that reference terms requiring further definition, such as "swap," "swap dealer," "major swap participant" and "eligible contract participant," until the earlier of (i) the effective date of the definitional rulemaking for such terms, or (ii) December

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[96] *See* discussion *supra* at Section I(C)(2) herein.

[97] *See* Effective Date for Swap Regulation, 76 Fed. Reg. 42,508 (July 19, 2011). A copy of the Federal Register notice relating to the Final Order is available online at http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2011-18248a.pdf.

[98] *Id*.

[99] *E.g.*, Act § 712(e)-(f); §§ 714-716; for a comprehensive list of self-effectuating provisions not subject to the Final Order, see the Final Order online at http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2011-18248a.pdf.

31, 2011.[100] Notably, the temporary exemption only applies to the extent the relevant provision (or a portion thereof) specifically relates to the referenced term.[101]

b. *Provisions Repealing CEA Exemptions and Exclusions*

Prior to Dodd-Frank, the CEA exempted from CFTC jurisdiction certain types of bilateral swap transactions in "exempt commodities" (including energy and metals commodities) and "excluded commodities."[102] However, Title VII of the Act repealed these exemptions as of July 16, 2011, anticipating that all over-the-counter swap transactions would be subject to CFTC jurisdiction and governed by the Act's regulatory framework by such date.[103] Based on concerns raised by market participants regarding timely compliance efforts, the Final Order temporarily exempts a transaction in an exempt or excluded commodity from CEA requirements (other than fraud or anti-manipulation provisions) until the earlier of (i) December 31, 2011; or (ii) the repeal or replacement of certain CFTC regulations.[104]

c. *Provisions Not Subject to the Final Order*

The Final Order clarifies that regulations subject to further CFTC or SEC rulemaking are not covered by the exemption because such regulations did not become effective as of July 16, 2011.[105] In addition, the CFTC has clarified that certain self-effectuating provisions in Title VII that otherwise became effective July 16, 2011 are not covered by the Final Order.[106]

2. Timeline of Final CFTC Rules

In a statement issued on September 8, 2011, CFTC Chairman Gary Gensler noted that twelve (12) CFTC rulemakings are currently finalized and many more rules will be considered during the remainder of 2011 and the first quarter of 2012.[107] The Chairman stressed that the CFTC is considering the proposed rules thoughtfully—not "against a clock."[108] In conjunction

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[100] *Id*.

[101] *Id*.

[102] *E.g.*, CEA § 2(h)(1)-(2) provides that transactions in "exempt commodities" between "eligible contract participants" traded on an "over-the-counter" basis (*i.e.*, not via an exchange) are exempt from CFTC jurisdiction.

[103] *See* Act § 723(a)(1).

[104] *See* Effective Date for Swap Regulation, 76 Fed. Reg. 42,508 (July 19, 2011).

[105] *Id*. The CFTC has published a list of Title VII provisions that are subject to further rulemaking per the Act's terms and thus are not covered by the Final Order. Such list is attached to the CFTC's Final Order available online at http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2011-18248a.pdf.

[106] *See* Effective Date for Swap Regulation, 76 Fed. Reg. 42,508 (July 19, 2011). The CFTC has published a list of Title VII provisions that are self-effectuating as of July 16, 2011 but are not otherwise covered by the Final Order. Such list is attached to the CFTC's Final Order available online at http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2011-18248a.pdf.

[107] Chairman Gary Gensler, Opening Statement, Meeting of the Commodity Futures Trading Commission, (September 8, 2011), available online at http://www.cftc.gov/PressRoom/SpeechesTestimony/genslerstatement090811.html.

[108] *Id*.

with the Chairman's statement, the CFTC published the following table of rules the Commission hopes to finalize in the upcoming months:[109]

Remainder of 2011	• Clearinghouse Rules • Data Recordkeeping and Reporting • End-User Exception • Entity Definitions/Registration • External Business Conduct • Internal Business Conduct (Duties, Recordkeeping and Chief Compliance Officers) • Position Limits • Product Definitions/Commodity Options • Real-Time Reporting • Segregation for Cleared Swaps • Trading—Designated Contract Markets and Foreign Boards of Trade
First Quarter of 2012	• Capital and Margin • Client Clearing Documentation and Risk Management • Conforming Rules • Disruptive Trading Practices • Governance and Conflict of Interest • Internal Business Conduct (Documentation) • Investment of Customer Funds • Swap Execution Facilities • Segregation for Uncleared Swaps • Straight-Through Trade Processing

The Chairman noted that there would likely be changes to the above-stated outline as the Commission moves forward, indicating that further delays in the Act's implementation are likely.[110] Moreover, the Chairman noted that in the fall of 2011 the Commission would consider further exemptive relief from Title VII requirements similar to the Final Order it published on July 14, 2011, acknowledging the fact the entity and product definitional rules may not yet be in place when final rules are otherwise established later this year.[111]

B. Legal Challenges

[109] *See* "Outline of Final Dodd-Frank Title VII Rules the CFTC May Consider in 2011 and the First Quarter of 2012", available online at http://www.cftc.gov/PressRoom/SpeechesTestimony/genslerstatement090811c.html.

[110] Chairman Gary Gensler, "Opening Statement, Meeting of the Commodity Futures Trading Commission", September 8, 2011.

[111] *Id*.

1. Court of Appeals Strikes Down SEC Rule Under Dodd-Frank

On July 22, 2011, the U.S. Court of Appeals in Washington D.C. rejected a Securities Exchange Commission ("SEC") rule promulgated under the Act that required a company subject to the SEC's proxy rules to include in its proxy materials "the name of a person or persons nominated by a [qualifying] shareholder or group of shareholders for election to the board of directors."[112] This requirement is contrary to industry practice, where typically incumbent directors on a company's board of directors nominate a candidate for each vacancy prior to the election held at the company's annual meeting and issue a proxy statement to shareholders who cannot attend the annual meeting.[113] Before this rule, to the extent shareholders desired to nominate a different candidate, such shareholders had to file a separate proxy statement and solicit votes from other shareholders.[114] By requiring a company to include shareholder nominations on company-issued proxy statements, the SEC concluded that the Dodd-Frank rule would create "potential benefits of improved board and company performance and shareholder value" sufficient to "justify [its] potential costs."[115]

Organizations with corporate members that issued publicly-traded securities challenged the Act's requirement under the Administrative Procedure Act ("APA"), claiming that the SEC acted arbitrarily and capriciously by neglecting to sufficiently analyze the economic impact of the rule and connect such impacts to efficiency, competition and capital formation.[116] The court of appeals agreed, holding that (i) the SEC's economic impact analysis inconsistently and opportunistically framed the costs and benefits of the rule; (ii) failed adequately to quantify the certain costs or to explain why those costs could not be quantified; (iii) neglected to support its predictive judgments; (iv) contradicted itself; and (v) failed to respond to substantial problems raised by commenters.[117] The court noted that its holding was consistent with other recent decisions striking down SEC rules because the agency failed to sufficiently analyze and justify the economic impact of its regulations.[118]

2. CFTC Rethinks Cost-Benefit Analysis

In light of the U.S. Court of Appeal's decision in *Business Roundtable*, the CFTC has recently taken steps to protect dozens of the Commission's proposed and final rulemakings from similar legal challenges.[119] CFTC Commissioner Scott O'Malia has indicated that the agency is rewriting rules, including those concerning position limits, to more comprehensively analyze the

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[112] *See Business Roundtable and Chamber of Commerce of the United States of America v. Securities and Exchange Commission*, 647 F.3d 1144 (D.C. Cir. 2011).

[113] *Id*.

[114] *Id*.

[115] *Id*.

[116] *See Business Roundtable*, 647 F.3d 1144.

[117] *Id*.

[118] *Id*. (*citing American Equity Investment Life Insurance Company v. SEC*, 613 F.3d 166, 167-68 (D.C. Cir. 2010); *Chamber of Commerce v. SEC*, 412 F.3d 133, 143 (D.C. Cir. 2005)).

[119] Ben Protess, *Regulators Fear Legal Challenges to Derivatives Rules,* DealB%k, The New York Times*,* Sept. 13, 2011, http://dealbook.nytimes.com/2011/09/13/regulators-fear-legal-challenges-to-derivatives-rules/.

economic impact of such regulations on the financial industry.[120] Although affirmative steps have been made to avoid scrutiny by courts, the Commissioner admitted that the CFTC's cost-benefit analyses are not comprehensive and further work needs to be done.[121] This conclusion seems evidenced by the fact that the CFTC has recently announced a revised timeline for issuing final rulemakings which extends into the first quarter of 2012—well beyond the deadlines originally proposed.[122] In the wake of the federal court of appeals decision issued in July, industry groups continue to analyze and examine legal challenges to the Act and it seems likely that push-back will continue.[123]

C. Other Factors

1. Budget Fights in Washington

The Senate Appropriations Committee recently approved a bill that would increase the SEC's fiscal 2012 budget approximately 19 percent to $1.407 billion and also increase the CFTC's fiscal 2012 budget roughly 19 percent to $240 million.[124] The push to increase the agencies' resources is directly tied to the anticipated implementation of Dodd-Frank in the upcoming year.[125] It is likely the U.S. Senate bill will advance to the full Senate for a vote rather quickly, as the SEC's and CFTC's fiscal budget years begin on October 1.

Even if the Senate Appropriations Committee's funding bill were to receive approval by the full Senate, the fate of the agencies' funding remains an open issue. Any bill passed by the Senate to increase CFTC and SEC funding would also require approval by the U.S. House of Representatives before becoming effective, a measure which could prove to be a challenge based on recent track record. On June 16, 2011, the House denied the Obama administration's request to increase CFTC funding for 2012, instead approving an appropriations bill that lowed the agency's budget to $171.9 million.[126] Similarly, in June of 2011 the House Appropriations Committee refused to increase funding for the SEC's 2012 budget, voting to keep the agency's budget unchanged for the upcoming year.[127] Based on the strong push-back against increased CFTC and SEC funding by Republican lawmakers in the House, it remains unclear whether the agencies will actually receive sufficient resources to implement the provisions of the Act in 2012.

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[120] *Id*.

[121] *Id*.

[122] *See* discussion *supra* at Section III(A)(2).

[123] *See supra* note 117.

[124] Christopher Doering and Sarah N. Lynch, *Senate Panel Keeps Budget Boosts for SEC, CFTC*, Reuters, Sept. 15, 2011, http://www.reuters.com/article/2011/09/15/financial-regulation-budgets-idUSS1E78E19Q20110915.

[125] *Id*.

[126] Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2012, H.R. 2112, 112th Cong. (as passed by House, June 16, 2011).

[127] Financial Services and General Government Appropriations Act, 2012, H.R. 2434, 112th Cong. (2011). While H.R. 2434 has passed the House Appropriations Committee, the bill has not yet been sent to the full House for approval.

2. Derivatives Attorney as New CFTC Director

The CFTC has recently appointed Gary Barnett as Director of the Division of Swap Dealer and Intermediary Oversight, a new component of the CFTC charged with authority to regulate Swap activities governed by the Act.[128] Prior to joining the CFTC, Barnett served as head of the U.S. structured finance and derivatives practice group at Linklaters in New York and advised clients on the impacts of Dodd-Frank.[129] He also is a former partner at Cadwalader Wickersham and Taft and O'Melveny & Myers.[130]

The CFTC's appointment of Barnett is an interesting choice. Appointing a New York derivatives lawyer—and not a banker or politician—as the head of a CFTC division regulating Swap Dealers under Dodd-Frank is understandable, as Barnett's legal background should help him obtain a firm grasp of the statutory provisions and CFTC rules comprising the Act's framework. The fact that Barnett brings "real-world" derivatives experience to the table also may prove helpful to market participants under the Act, as this experience may result in the CFTC taking a more pragmatic approach to the implementation of certain requirements.

IV. CONCLUSION

Although the Act's statutory framework is in place, the CFTC's interpretation of the Act and specific regulations impacting Energy Traders are still being developed and finalized. Because of the level of detail involved in the regulations and the broad scope of the Act's impact, the CFTC's pace of implementing final rules is slow and shows no signs of accelerating in the upcoming months. Apart from the uncertainty surrounding the passage of final rules, it remains unclear whether the CFTC and SEC will receive adequate funding from Congress to implement and enforce the Act's provisions in the comprehensive manner required by the Act. Also, in light of the recent court of appeals decision in *Business Roundtable* and continued industry push back, fights at the courthouse regarding the enforceability of Dodd-Frank seem inevitable. While Energy Traders should analyze the Act and proposed CFTC regulations for guidance on how to prepare for compliance, the shifting political and legal factors surrounding the Act continue to foster uncertainty in the energy trading industry.

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[128] Friederike Heine and Dana Olsen, *Linklaters U.S. Derivatives Chief Exits to Take New Role at Futures Regulator*, legalweek.com, Aug. 24, 2011, http://www.legalweek.com/legal-week/news/2104003/linklaters-derivatives-chief-exits-role-regulator.

[129] *Id*.

[130] *Id*.