

REPORT OF THE FINANCE & TRANSACTIONS COMMITTEE

The period covered by this report is July 1, 2011, through January 20, 2012.*

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I. OVERVIEW OF RECENT DEVELOPMENTS IN THE IMPLEMENTATION OF DODD-FRANK TITLE VII

The Finance and Transaction Committee Report published in the 2011 Energy Law Journal (2011 Report),¹ which examined the potential impact of Dodd-Frank² on the way in which energy companies conduct their hedging transactions, cautioned that the transactions and markets most impacted by Title VII of Dodd-Frank were complex; “therefore, these statutory provisions and regulations are equally complex.”³ A year later policymakers from the Commodity Futures Trading Commission (CFTC), the Securities and Exchange

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1. *Report of the Finance & Transactions Committee*, 32 ENERGY L.J. 323 (2011) [hereinafter *2011 Report*].

2. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Pub. L. No. 111-203, 124 Stat. 1376 (2010).

3. *2011 Report*, *supra* note 1, at 324.

Commission (SEC), and other affected agencies continue to work through numerous issues in order to publish the final rules to implement Dodd-Frank. As of the end of the period covered by this report, the CFTC and SEC have yet to publish many of the definitions and rules that will form the backbone of the Dodd-Frank regulatory framework, and the effective dates for implementation of the regulations will be phased in, with the result that the typical utility end-user will have the longest amount of time to come into compliance – in many cases, a compliance date that could be in 2013.

This report brings current the 2011 Report with updates examining the rules that have been finalized thus far and estimating the timing for establishing the key rules that remain.

II. KEY FEATURES OF DODD-FRANK TITLE VII AFFECTING ENERGY COMPANIES

A. *End-User Exemption from Clearing and Exchange-Trading Requirements*

Dodd-Frank created a new section 2(h)(7) of the Commodity Exchange Act (CEA) that provides an exemption for “end users” from the swap-clearing requirement.⁴ The exemption applies when a counterparty to a swap:

- (i) is not a financial entity; (ii) [uses the relevant] swaps to hedge or mitigate commercial risk; and (iii) notifies the [CFTC]⁵ . . . how it . . . meets its financial obligations associated with [un]cleared swaps.⁶

The definition of “financial entity” and the December 2010 proposed rules issued by the CFTC⁶ and the SEC⁷ regarding implementation of the “end-user exception” to the mandatory swap clearing requirement were discussed extensively in the 2011 Report.⁸ The comment deadline on the CFTC’s proposed rules was extended until June 3, 2011, and publication of final rules is expected in early 2012.⁹

B. *Reporting and Record Retention Requirements*

Section 727 of Dodd-Frank added a new section 2(a)(13) to the CEA, which requires that all swaps, “whether cleared or uncleared,” be reported to a registered swap data repository (SDR).¹⁰ SDRs are entities created by section 728 of Dodd-Frank to gather and store data regarding swap transactions and to make it available to regulators electronically.¹¹ On December 20, 2011, the

4. Dodd-Frank at sec. 723(a)(3) (codified at 7 U.S.C. §2(h)(7)).

5. 7 U.S.C. §2(h)(7) (Supp. 2010) (as amended by Dodd-Frank sec. 723(a)(3)).

6. Proposed Rulemaking, End-User Exception to Mandatory Clearing of Swaps, 75 Fed. Reg. 80,747, 80,752 (2010) (to be codified at 17 C.F.R. pt. 39).

7. Proposed Rulemaking, End-User Exception to Mandatory Clearing of Security-Based Swaps, 75 Fed. Reg. 79,992, 80,001 (2010) (to be codified at 17 C.F.R. pt. 240).

8. 2011 Report, *supra* note 1, at 325-26.

9. Reopening and Extension of Comment Periods for Rulemakings Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act, 76 Fed. Reg. 25,274, 25,274 (2011) [hereinafter Extension of Comment Periods].

10. Dodd-Frank at sec. 727, § 2(a)(13)(G).

11. *Id.* at sec. 728, § 24(c)(4).

CFTC issued the Swap Data Recordkeeping and Reporting Requirements Final Rulemaking.¹² It requires that:

Each swap execution facility, designated contract market, derivatives clearing organization [(DCO)], swap dealer [(SD)], and major swap participant [(MSP)] subject to the jurisdiction of the Commission . . . keep full, complete, and systematic records, together with all pertinent data and memoranda, of all activities relating to the business of such entity or person with respect to swaps . . .¹³

As to non-SD/MSP counterparties, the Reporting Requirements Final Rulemaking requires retention “with respect to each swap in which they are a counterparty” as opposed to the broader requirement “of all activities relating to the business of such entity or person with respect to swaps” described above.¹⁴

All records must be retained for the life of each swap and for at least five years following the swap’s final termination.¹⁵ Typically, records must be kept in electronic form, unless they were originally created and are exclusively maintained in paper form, although non-SD/MSP counterparties are allowed to keep records in paper format if they are retrievable within five business days.¹⁶

The Reporting Requirements Final Rulemaking also requires that creation data and continuation data be reported for each swap.¹⁷ Creation data consists of the swap’s primary economic terms and confirmation data.¹⁸ For swaps executed on a swap execution facility (SEF) or designated contract market (DCM), the SEF or DCM is responsible for reporting swap creation data.¹⁹ For all off-facility swaps accepted for clearing by a DCO before the applicable reporting deadline, the DCO is responsible for reporting swap creation data.²⁰ For off-facility swaps not cleared or accepted for clearing within the applicable deadline, the party responsible for reporting swap creation data will generally be determined as follows:

- (a) If only one counterparty is a [SD], the [SD] shall be the reporting counterparty.
- (b) If neither counterparty is a [SD], and only one counterparty is a [MSP], the [MSP] shall be the reporting counterparty.
- (c) If both counterparties are non-SD/MSP counterparties, and only one counterparty is a financial entity . . . , the counterparty that is a financial entity shall be the reporting counterparty.²¹

If both counterparties are in the same category, they must agree which of them shall be the reporting counterparty, although if both counterparties are non-SD/MSP counterparties *and* only one counterparty is a U.S. person, the U.S. person must be the reporting counterparty.²²

12. Final Rule, Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. 2,136 (2012) (to be codified at 17 C.F.R. pt. 45).

13. *Id.* at 2,198 (to be codified at 17 C.F.R. § 45.2(a)).

14. *Id.* (to be codified at 17 C.F.R. § 45.2(b)).

15. *Id.* (to be codified at 17 C.F.R. § 45.2(c)). This provision also applies to swap execution facilities, designated contract markets, DCOs, SDs, MSPs, and non-SD/MSPs. *Id.*

16. *Id.* at 2,198-99 (to be codified at 17 C.F.R. § 45.2(d), (e)(2)).

17. *Id.* at 2,199 (to be codified at 17 C.F.R. § 45.3).

18. *Id.* (to be codified at 17 C.F.R. § 45.3(a)).

19. *Id.*

20. *Id.* (to be codified at 17 C.F.R. § 45.3(b)).

21. *Id.* at 2,207 (to be codified at 17 C.F.R. § 45.8(a)-(c)).

22. *Id.* (to be codified at 17 C.F.R. § 45.8(d)). Note that under the new regulations, a non-U.S. bank that is a swap dealer would be required to report the swap. *Id.*

Continuation data is required “to ensure that all data in the swap . . . repository concerning the swap remains current and accurate, and includes all changes to the primary economic terms of the swap occurring during the existence of the swap.”²³ The continuation data reporting obligation can be fulfilled “by reporting either life cycle event data or state data for the swap.”²⁴ For cleared swaps, the applicable DCO is responsible for reporting continuation data and daily valuation data and, if the reporting counterparty is a SD or MSP, the DCO must also report daily valuation data.²⁵ For uncleared swaps, the reporting counterparty, determined in accordance with the method described above, must report swap continuation or amendment data.²⁶ To ease the reporting burden, counterparties are permitted to “contract with third-party service providers to facilitate reporting,” although such counterparties remain responsible for compliance with the reporting requirements.²⁷

C. Key Definitions: Swap Dealer and Major Swap Participant

1. Swap Dealer

The 2011 Report discussed Dodd-Frank’s definition of “swap dealer” and the CFTC’s proposed rulemaking regarding the definition.²⁸ The February 22, 2011 comment deadline on the CFTC’s proposed rules, noted in the 2011 Report, was extended until June 3, 2011, and publication of final rules is expected in early 2012.²⁹

2. Major Swap Participant

The 2011 Report discussed Dodd-Frank’s definition of “major swap participant” and the CFTC’s proposed rulemaking regarding the definition.³⁰ The February 22, 2011 comment deadline on the CFTC’s proposed rules noted in the report was extended until June 3, 2011, and publication of final rules is expected in early 2012.³¹

3. Consequences of Being a Swap Dealer or Major Swap Participant

As discussed in the prior version of this report, SDs and MSPs are required to register with the CFTC and “are subject to increased monitoring, oversight, and reporting requirements . . . and must satisfy certain capital and margin requirements.”³² The CFTC’s final rulemaking regarding the definitions of SD and MSP is expected in 2012.³³

23. *Id.* at 2,202 (to be codified at 17 C.F.R. § 45.4(a)).

24. *Id.*

25. *Id.* (to be codified at 17 C.F.R. § 45.4(b)).

26. *Id.* (to be codified at 17 C.F.R. § 45.4(c)).

27. *Id.* at 2,208 (to be codified at 17 C.F.R. § 45.9).

28. *2011 Report, supra* note 1, at 328.

29. Extension of Comment Periods, *supra* note 9, at 25,276.

30. *2011 Report, supra* note 1 at 328-29.

31. Extension of Comment Periods, *supra* note 9, at 25,276.

32. *2011 Report, supra* note 1, at 329.

33. Extension of Comment Periods, *supra* note 9, at 25,276.

D. Collateral Segregation and Credit Risk Assessments

As noted in the 2011 Report, section 724(a) of the Dodd-Frank Act amends section 4d of the CEA to add a new paragraph (f) requiring Futures Commission Merchants (FCMs) and Derivatives Clearing Organizations (DCOs) to (1) hold “customer collateral in an account (or location) that is separate from the property belonging to the FCM or DCO” and (2) “not use the collateral of one customer to . . . cover [either] the obligations of another customer or . . . the obligations of the FCM or DCO.”³⁴

By way of background, a market participant that uses a DCO to clear derivatives transactions (a Clearing Member) may do so on behalf of itself or, in the case of FCMs, on behalf of a customer.³⁵ The DCO, traditionally a well-capitalized financial institution, guarantees contract performance for swap transactions entered into between various Clearing Members, thus exposing itself to default risks.³⁶ To mitigate the DCO’s risk, each Clearing Member must post collateral with the DCO. In addition, DCOs conduct daily or twice-daily settlements through which they collect payment from those Clearing Members with net losses, and pay those with net gains.³⁷ If the Clearing Member defaults on these daily or twice-daily payment obligations, the DCO may immediately liquidate that Clearing Member’s collateral and apply it to the obligation.³⁸ In addition to collateral posted with the DCO by an FCM, any FCM customer must also post collateral, although it would be posted with the FCM rather than the DCO.³⁹ Where an FCM has collateral posted by multiple customers, each customer is potentially exposed to risks that do not arise out of obligations that such customer has directly occurred, such as the insolvency of the FCM through which that customer clears.⁴⁰ This so-called “fellow-customer risk” is central to CFTC’s implementation of new CEA section 4d(f).⁴¹

On June 9, 2011, the CFTC issued a Notice of Proposed Rulemaking about the protection of cleared swaps customer contracts and collateral and conforming amendments to commodity broker bankruptcy provisions.⁴² The CFTC proposed a Complete Legal Segregation Model to separate collateral, arguing that this model “provides the best balance between benefits and costs in order to protect market participants and the public.”⁴³

Under the Complete Legal Segregation Model, each FCM and DCO would enter (or “segregate”), in its books and records, the cleared swap of each individual customer and the [related] collateral. . . . [S]uch entries would be separate from

34. Notice of Proposed Rule, Protection of Cleared Swaps Customer Contracts and Collateral; Conforming Amendments to the Commodity Broker Bankruptcy Provisions, 76 Fed. Reg. 33,818, 33,819 (June 9, 2011) (citing Dodd-Frank at sec. 724(a), § 6d(f)) (to be codified at 17 C.F.R. pts. 22, 190).

35. Final Rule, Protection of Cleared Swaps Customer Contracts and Collateral; Conforming Amendments to the Commodity Broker Bankruptcy Provisions, 77 Fed. Reg. 6,336, 6,337 (Feb. 7, 2012) (to be codified at 17 C.F.R. pts. 22, 190).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 6,338.

40. *Id.*

41. *Id.*

42. 76 Fed. Reg. 33,818.

43. *Id.* at 33,825.

entries indicating (i) FCM or DCO obligations, or (ii) the obligations of non-cleared swaps customers. Operationally, . . . , each FCM and DCO would be permitted to hold (or “commingle”) the relevant collateral in one account[, but must] ensure that such account is separate from any account holding FCM or DCO property or holding property belonging to non-cleared swaps customers.⁴⁴

Prior to the simultaneous default of an FCM and one of its cleared swaps customers (which the CFTC refers to as a “double default”), the FCM “would ensure that the DCO does not use the collateral of one cleared swaps customer to support the obligations of another customer.”⁴⁵ This would be done “by making certain that the value of the cleared swaps [customer’s] collateral that the DCO holds equals or exceeds the value of all cleared swaps [customer] collateral that it has received to secure the contracts of the FCM’s customers.”⁴⁶ Following a double default, the DCO would be permitted “to access the collateral of the defaulting cleared swaps customers, but not the collateral of the non-defaulting cleared swaps customers.”⁴⁷ Thus, in the event of bankruptcy, the collateral attributable to the non-defaulting cleared swaps customers would be available for the pro rata distribution required by section 766(h) of the Bankruptcy Code.⁴⁸ The Collateral NOPR also established other requirements, such as designating the legal situs of customer accounts in the United States.⁴⁹

The Natural Gas Exchange (NGX), the only energy-related entity to file comments on the Collateral NOPR, noted general support, but took issue with the U.S. situs for customer accounts.⁵⁰ NGX argued that the requirement would increase legal “uncertainty with respect to the insolvency regime” that would apply to a bankruptcy, and such uncertainty could slow down resolution of a clearing participant’s default and bankruptcy.⁵¹

The CFTC recently issued its final rule regarding the treatment of cleared swaps customer contracts and related collateral (Final Collateral Rule).⁵² The CFTC adopted the Complete Legal Segregation Model (also known as the LSOC Model) for collateral as described above.⁵³ The CFTC summarized that this model was

“the most cost effective framework to adequately protect the margin that customers post to cleared swap transactions” because it effectively mitigates Fellow-Customer Risk, avoids the costs associated with establishing a Physical Segregation Model by allowing margin to be held in an omnibus account, and enhances the portability of cleared swap positions and related margin.⁵⁴

44. *Id.* at 33,820.

45. *Id.*

46. *Id.*

47. *Id.* at 33,820.

48. *Id.* at 33,829.

49. *Id.* at 33,854.

50. Comments of the Natural Gas Exchange, Inc. on Proposed Rule, Protection of Cleared Swaps Customer Contracts and Collateral; Conforming Amendments to the Commodity Broker Provisions (Aug. 8, 2011), available at <http://comments.cftc.gov/publiccomments/viewcomment.aspx?id=48027>.

51. *Id.* at 4-5.

52. Final Rule, Protection of Cleared Swaps Customer Contracts and Collateral; Conforming Amendments to the Commodity Broker Bankruptcy Provisions, 77 Fed. Reg. 6,336 (2012) (to be codified at 17 C.F.R. pts. 22, 190).

53. *Id.* at 6,337.

54. *Id.* at 6,344.

In response to NGX's comments, the CFTC stated that

in the event of an FCM's bankruptcy, the legal situs provision is intended to make clear that the insolvency regime that will apply to the customers of the FCM is the U.S. insolvency regime embodied in Subchapter IV of Chapter 7 of the U.S. Bankruptcy Code and Part 190 of the [CFTC's] regulations.⁵⁵

The CFTC noted that “[w]hile a DCO is free to make the choice that local law applies to all other aspects of a DCO's relationships with its members, the [CFTC] has historically required, and intends to continue requiring, that customers of FCMs in bankruptcy must be treated in accordance with U.S. bankruptcy law.”⁵⁶

E. Position Limits

1. The CFTC's Final Rule on Position Limits for Futures and Swaps

As discussed in the 2011 Report, the CFTC issued proposed rules on position limits in January of 2011.⁵⁷ Since then, the CFTC has received over 15,000 comments in response to those proposed rules, and it issued the final rule on October 18, 2011.⁵⁸ Some commenters opposed the CFTC's authority to impose position limits without first analyzing enough data to demonstrate the need for and appropriateness of the proposed position limits, while other commenters supported the CFTC's rulemaking actions.⁵⁹ In the Final Position Limits Rule, the CFTC reaffirmed that its final rule was mandated by Congress in section 4a of the CEA.⁶⁰

The Final Position Limits Rule maintains the coverage, phased implementation, and the hedging exemptions of the proposed rules, with some modifications based on the comments received about these issues. Under the final rule, position limits must take into account swaps and other non-futures instruments (referred to as “Referenced Contracts”)⁶¹ that are “[d]irectly or indirectly linked” or priced at a fixed differential to a related futures contract (referred to as “Core Referenced Contracts”)⁶² or priced based on the same commodity underlying the Core Referenced Contract.⁶³ The initial position limits in this part of the Final Position Limits Rule are established as an interim final rule, which will be effective sixty days after the CFTC's final rules defining “swap” are published in the Federal Register.⁶⁴ Subsequent position limits will be established by the CFTC effective on January 1st of the second calendar year

55. *Id.* at 6,356.

56. *Id.*

57. Notice of Proposed Rulemaking, Position Limits for Derivatives, 76 Fed. Reg. 4,752 (2011) (to be codified at 17 C.F.R. pts. 1, 150, 151).

58. Final Rule, Position Limits for Futures and Swaps, 76 Fed. Reg. 71,626 (2011) (to be codified at 17 C.F.R. pts. 1, 150, 151).

59. *Id.* at 71,627-28.

60. *Id.* at 71,643.

61. *Id.* at 71,629.

62. *Id.* The Core Referenced Contracts are listed in 17 C.F.R. § 151.2 and include futures and options contracts for 19 agricultural commodities, 5 metals, and 4 energy commodities. 17 C.F.R. § 151.2 (2011).

63. 76 Fed. Reg. 71,626, at 71,629.

64. *Id.* at 71,632.

following the effective date of the interim final rule.⁶⁵ These subsequent position limits will be established by the CFTC based on data and deliverable supply estimates for the various Core Referenced Futures Contracts, which the CFTC will receive from each designated contract market.⁶⁶ The hedging exemption was modified substantially, clarifying the parameters of a “bona fide hedging transaction” so that, for example, hedging is permitted on a portfolio basis rather than only transaction by transaction.⁶⁷ The list of enumerated hedging transactions permits anticipated transactions, and the CFTC added a financial distress exemption.⁶⁸ The hedging exemption with respect to position limits remains, however, narrower than the hedging activity that is the basis for the end-user clearing exception,⁶⁹ because the CFTC noted that the language Congress used in the bona fide hedging transaction exemption with respect to position limits was not as broad as the language Congress used in crafting the exception to the clearing requirements.⁷⁰

2. Court Challenge to Final Position Limits Rule

Appendix 4 of the Final Position Limits Rule contains CFTC Commissioner O’Malia’s dissent. Noting that “[h]istorically, the Commission has taken a much more disciplined and fact-based approach,”⁷¹ Commissioner O’Malia stated he believed that the statute required the CFTC to establish limits only after it had made a “determination that such limits are necessary and effective in relation to the identifiable burdens of excessive speculation on interstate commerce,”⁷² and laid out a roadmap for a judicial challenge in setting forth several further objectionable aspects of the final rule.⁷³

On December 2, 2011, the International Swaps and Derivatives Association (ISDA) and the Securities Industry and Financial Market’s Association (SIFMA) jointly brought actions challenging the final rule in U.S. District Court for the District of Columbia and the D.C. Circuit Court of Appeals.⁷⁴ The plaintiffs’ grounds were the perceived flaws in the rule and procedural infirmities as pointed out by Commissioner O’Malia, including lack of statutory authority, failure to consider all the evidence, and failure to conduct an adequate cost-benefit analysis.⁷⁵

The litigation is important beyond the position limits rule itself, because it is expected that its outcome will establish the template for judicial challenges of other rules under Dodd-Frank. The CFTC is a relatively young agency, established in 1975, and judicial challenges of its rules generally have been in the context of enforcement proceedings. Therefore, it is not yet clear whether

65. *Id.* at 71,688.

66. *Id.*

67. *Id.* at 71,688-89.

68. *Id.* at 71,650.

69. *See generally* Section II(A) of this report.

70. 76 Fed. Reg. 71,626, at 71,645.

71. *Id.* at 71,700 (O’Malia, Comm’r, dissenting).

72. *Id.*

73. *Id.*

74. Complaint, Int’l Swaps & Derivatives Ass’n v. CFTC, No. 1:11-cv-02146 (D.D.C. Dec. 2, 2011). The same action was filed on the same day with the U.S. Court of Appeals for the District of Columbia.

75. *Id.* at pp. 26-28.

the Court of Appeals or District Court will have original jurisdiction, and the District Court has stayed the action before it while the Court of Appeals decides that issue. The CFTC's position is that the District Court has original jurisdiction.

ISDA and SIFMA seek to stay the rule coming into effect.⁷⁶ In order to obtain a stay, the Appellants would need to demonstrate irreparable harm, *e.g.*, that the rule would require businesses to close trading desks, sell assets, or irrevocably alter strategy.⁷⁷ The outcome of this challenge could well set the temperature for other potential challenges.⁷⁸

F. Commodity Futures Trading Commission, Federal Energy Regulatory Commission (FERC) and State Public Utility Commission (PUC) Jurisdictional Issues

Although Dodd-Frank directed the CFTC and the FERC to enter into a memorandum of understanding to establish procedures for applying their respective authorities effectively and efficiently, and for resolving conflicts concerning overlapping jurisdictions, the two commissions have yet to reach such an understanding. On February 22, 2011, FERC General Counsel Michael Bardee submitted comments to the CFTC, arguing that the CFTC should not regulate the instruments used by organized wholesale electric markets (RTOs and ISOs) and other entities operating under a FERC-approved rate schedule or tariff.⁷⁹ The FERC stated that it had “oversight of wholesale sales and transmission/transportation in energy markets and the reliability of the grid” and that “the CFTC should interpret and apply the CEA as amended by Dodd-Frank to ensure that CFTC jurisdiction and FERC jurisdiction do not overlap[,] except as determined by Congress in anti-manipulation contexts.”⁸⁰ The FERC argued that “market participants should not be subjected to potentially duplicative and conflicting regulatory requirements,” warning of “regulatory uncertainty [that] could chill investment critically needed in [U.S.] energy infrastructure.”⁸¹

On May 23, 2011, the CFTC issued joint proposed rules with the SEC on definitions such as “swap” and “security-based swap.”⁸² The Joint Notice of Proposed Rulemaking recognized that “[s]ection 722 of Dodd Frank amended CEA section 4(c) to provide that, if the CFTC determines that an exemption for FERC-regulated instruments or other specified electricity transactions would be in accordance with the public interest, then it shall exempt such instruments or

76. Motion of ISDA and SIFMA for a Stay of the Effective Date of the Position Limits Rule, Int'l Swaps and Derivatives Ass'n v. CFTC, No. 1:11-cv-02146 (D.D.C. Dec. 12, 2011).

77. *Id.* at 6-7.

78. Kathleen Hoffelder, *ISDA Suit Could Go to Supreme Court*, REUTERS BREAKINGVIEWS (Dec. 10, 2011), <http://www.breakingviews.com/isda-suit-could-go-to-supreme-court/1619559.article>.

79. Comment of the FERC Staff on Proposed Rule, Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and Eligible Contract Participant,” RIN 3235-AK65 (Feb. 22, 2011), *available at* <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=30966&SearchText=bardee>.

80. *Id.* at 3.

81. *Id.*

82. Joint Proposed Rule, Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 76 Fed. Reg. 29,818 (2011) (to be codified at 17 C.F.R. pt. 1).

transactions from the requirements of the CEA.”⁸³ Accordingly, the CFTC found that such instruments and transactions would “be considered under the standards and procedures specified in section 722 of the Dodd-Frank Act for a public interest waiver, rather than through this joint rulemaking to further define the terms ‘swap’ and ‘security-based swap.’”⁸⁴

G. Whistleblower Awards

The CFTC has issued final rules implementing the whistleblower incentives and protections of section 748 of Dodd Frank.⁸⁵ As noted in the 2011 Report, the statute enables the CFTC to pay an award, under regulations prescribed by the CFTC and subject to certain limitations, to an eligible whistleblower who voluntarily provides the CFTC with original information about a violation of the CEA that leads to the successful enforcement of a CFTC covered judicial or administrative action, or related action.⁸⁶

The final rule is substantially similar to the proposed regulations. In response to comment letters, the CFTC included provisions to encourage internal reporting by whistleblowers.⁸⁷ Specifically, “with respect to the criteria for determining the amount of an award,” the CFTC will consider a whistleblower’s internal report of information to its employer’s compliance, whistleblower, or legal system “as a factor that potentially [could] increase the amount of an award.”⁸⁸ To this end, the CFTC also will consider whether a whistleblower interfered with such internal systems, which would “potentially decrease the amount of an award.”⁸⁹ In addition,

[a] whistleblower may be eligible for an award for reporting original information to an entity’s internal compliance and reporting systems if the entity later reports information to the [CFTC] that leads to a successful [CFTC] action or related action. Under this provision, all of the information provided by the entity to the [CFTC] will be attributed to the whistleblower.⁹⁰

The Commission has also made minor changes to the final regulations to ensure consistency and promote harmonization with the SEC’s final regulations and whistleblower program as amended by Dodd-Frank.

III. KEY FEATURES OF TITLE IX AFFECTING ENERGY COMPANIES

A. Shareholder Votes on Executive Compensation and Golden Parachutes

In March, 2011, the SEC issued its proposed rules about listing standards of national securities exchanges and associations to address compensation committees and compensation advisers of companies wishing to list any equity

83. *Id.* at 29,839.

84. *Id.*

85. Final Rule, Whistleblower Incentives and Protection, 76 Fed. Reg. 53,172 (2011) (to be codified at 17 C.F.R. pt. 165).

86. 2011 Report, *supra* note 1, at 335-336.

87. 76 Fed. Reg. 53,172, at 53,177-78.

88. *Id.* at 53,173.

89. *Id.*

90. *Id.*

security.⁹¹ The listing standards of the various exchanges currently do not mandate that a company establish a compensation committee, nor do the proposed rules contain such a mandate. The proposed rules require that the listing standards must apply to any committee, regardless of its label, that oversees executive compensation.⁹² With respect to the independence requirements for compensation committee members contained in section 952 of Dodd-Frank,⁹³ the proposed regulations allow quite a lot of flexibility for the listing standards, so long as they consider the relevant factors in new section 10C, and the exchanges may also exempt certain structures and relationships from the independence requirements.⁹⁴ The proposed regulations take a similarly flexible approach with respect to the independence of advisers retained by a compensation committee.⁹⁵

The proposed amendments to the disclosure requirements of Item 407⁹⁶ of Regulation S-K⁹⁷ would expand the scope of disclosure so that they would apply to all registered companies subject to the SEC's proxy rules, whether the company is listed or not. The proposed amendments would require disclosure about whether a "compensation committee retained or obtained the advice of a compensation consultant,"⁹⁸ about any conflict of interest, a description of the conflict and "how the conflict is being addressed."⁹⁹

On all of these issues, the proposed regulations also solicited comments from interested persons, asking more than twenty-five questions.¹⁰⁰

B. New Disclosure Rules for Oil and Gas Developers

As noted in the 2011 Report, section 1504 of Dodd-Frank requires the SEC to create final rules requiring any issuer that engages in oil, natural gas, or mineral development to include in its annual report information on any payments to the United States or non-U.S. governments in connection with such development made by the issuer¹⁰¹ or its subsidiaries or entities under the issuer's control.¹⁰² The disclosures are to include, among other things, the types and amounts of payments made for each project and to each government.¹⁰³ The

91. Proposed Rulemaking, Listing Standards for Compensation Committees, 76 Fed. Reg. 18,966 (2011) (to be codified at 17 C.F.R. pts. 229, 240).

92. *Id.* at 18,968.

93. Dodd-Frank at sec. 952 (adding § 10C to the Securities Exchange Act).

94. The independence requirements may include but are not limited to the source of compensation of a board member and whether a board member is affiliated with the issuer or any affiliate. 76 Fed. Reg. 18,966, at 18,970.

95. *Id.* at 18,990.

96. 17 C.F.R. § 229.407 (2011).

97. 17 C.F.R. § 229.10 (2011).

98. 76 Fed. Reg. 18,966, at 18,967.

99. *Id.*

100. *Id.* at 18,988.

101. 2011 Report, *supra* note 1, at 338-39. A "resource extraction issuer" is an entity that is required to file an annual report with the SEC. Dodd-Frank at sec. 1504 (adding Securities Exchange Act (SEA) § 13(q)(1)(D)(i)).

102. Dodd-Frank at sec. 1504; SEA § 13(q).

103. Payment types include "taxes, royalties, fees (including license fees), production entitlements, bonuses, and other material benefits . . . part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals." Dodd-Frank at sec. 1504 (adding SEA § 13(q)(1)(C)).

SEC issued its proposed rules in December 2010.¹⁰⁴ It has not issued its final rules as of the date of this Report.

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104. Proposed Rulemaking, Disclosure of Payments by Resource Extraction Issuers, 75 Fed. Reg. 80,978 (2010) (to be codified at 17 C.F.R. pts. 229, 249).