

REPORT OF THE INTERNATIONAL ENERGY LAW & TRANSACTIONS COMMITTEE

This report summarizes three areas of significant energy policy development affecting the United States in recent years. First, it describes current and upcoming initiatives of the European Union's Agency for Cooperation of Energy Regulators. Second, it describes recent developments in United States export policy with respect to liquefied natural gas. Third, it discusses the transnational application of the Dodd-Frank Wall Street Reform and Consumer Protection Act.*

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I. CURRENT AND UPCOMING INITIATIVES OF THE AGENCY FOR THE COOPERATION OF ENERGY REGULATORS

A. Background

Prior reports by this Committee have chronicled the development of European Union (EU) energy policy. This report builds upon those prior reports and covers the period of 2012 and 2013. One significant initiative of EU energy policy is the liberalization and regulation of EU energy markets in both the electricity and natural gas sectors. The European Union's Agency for the Cooperation of Energy Regulators (ACER or Agency)¹ is responsible for performing a number of functions intended to assist, and when necessary,

* The International Energy Law & Transactions Committee acknowledges the substantial drafting contributions made to this Report by Dennis J. Hough, Jr., Stephen J. Hug, and Sarah A. Tucker.

1. Regulation 713/2009 of the European Parliament and of the Council of 13 July 2009 Establishing an Agency for the Cooperation of Energy Regulators, 2009 O.J. (L 211) 1 [hereinafter Agency Regulation], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:211:0001:0014:EN:PDF>.

coordinate Member States' national regulatory authorities with a set of common rules for internal markets in electricity and natural gas."²

In addition to the authority and obligation to provide an opinion or recommendation to the European Parliament, the Council, and the European Commission on any issue relating to the Agency's purpose,³ the ACER's principal responsibilities are to:

- Provide opinions and recommendations concerning draft statutes and rules of the European Network of Transmission System Operators (ENTSO) for electricity and natural gas;⁴
- Monitor the tasks of ENTSO, including providing opinions and recommendations on draft annual work programs, participating in the development of network codes, and submitting non-binding framework guidelines to the European Commission;⁵
- Provide opinions on ENTSOs that have failed to implement network codes, and to monitor the implementation of network codes and guidelines;⁶
- Adopt individual decisions on technical issues and to provide a framework within which national regulatory authorities can cooperate among themselves and with community-level agencies;⁷
- Issue opinions at the request of another regulatory authority or the European Commission on whether the actions of a regulatory authority comply with the applicable guidelines;⁸
- Limited authority to decide upon issues pertaining to the terms and conditions for access and operational security for cross-border infrastructure;⁹
- Decide exemptions concerning infrastructure issues, in consultation with market participants, consumers, and other stakeholders;¹⁰
- Ensure that the public has access to objective and reliable information on the Agency's work;¹¹ and
- Monitor the internal electricity and natural gas markets, including such aspects as retail prices, access to the network, and compliance with consumer rights laws, and annually report the results of its efforts.¹²

B. Agency Initiatives

Since the beginning of the Agency's operation in 2011, it has developed the framework guidelines for network codes.¹³ These network codes are the basis

2. *Id.* at art. 1(2).

3. *Id.* at art. 5.

4. *Id.* at art. 6(1).

5. *Id.* at art. 6(2)-(3).

6. *Id.* at art. 6(4)-(9).

7. *Id.* at art. 7(1)-(3).

8. *Id.* at art. 7(4).

9. *Id.* at art. 8.

10. *Id.* at art. 9.

11. *Id.* at art. 10.

12. *Id.* at art. 11.

for Internal Energy Market (IEM) rules, which the European Council has targeted for completion by 2014.¹⁴ In addition to its framework initiatives, in 2012, the Agency began to implement the Regulation for Energy Market Integrity and Transparency (REMIT)¹⁵ and the Trans-European Energy Network (TEN-E) Regulation¹⁶ pursuant to the terms of those regulations.

Looking forward to 2014, the ACER plans to continue to develop and review framework guidelines and network codes, including framework guidelines for the harmonization of electricity transmission tariff structures and the rules for trading in regard to network access services and system balancing in natural gas.¹⁷ The ACER also expects to transition from the preparatory design phase to the operational phase for REMIT and the TEN-E Regulation.¹⁸

1. Prevention of Abusive Practices Within the Wholesale Energy Market

The purpose of REMIT was to monitor the wholesale energy market and establish rules and practices to prohibit and prevent abusive practices.¹⁹ REMIT contains four main provisions aimed at prohibiting and preventing market abuses. First is a prohibition on insider trading:

Persons who possess inside information in relation to a wholesale energy product shall be prohibited from: (a) using that information by acquiring or disposing of, or by trying to acquire or dispose of, for their own account or for the account of a third party, either directly or indirectly, wholesale energy products to which that information relates (b) disclosing that information to any other person unless such disclosure is made in the normal course of the exercise of their employment, profession or duties; (c) recommending or inducing another person, on the basis of

13. AGENCY FOR THE COOPERATION OF ENERGY REGULATORS, WORK PROGRAMME 2014 8 (2013) [hereinafter WORK PROGRAMME], available at http://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Publication/ACER%20Work%20Programme%202014.pdf; see also Agency Regulation *supra* note 1, at pmb1. 9; Regulation 714/2009 of the European Parliament and of the Council of 13 July 2009 on Conditions for Access to the Network for Cross-Border Exchanges in Electricity and Repealing Regulation (EC) No 1228/2003, art. 6, 2009 O.J. (L 211) 15 [hereinafter Electricity Regulation], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:211:0015:0035:EN:PDF>.

14. WORK PROGRAMME, *supra* note 13, § 4.

15. Regulation 1227/2011 of the European Parliament and of the Council of 25 October 2011 on Wholesale Energy Market Integrity and Transparency, 2011 O.J. (L 326) 1 [hereinafter REMIT], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:326:0001:0016:en:PDF>.

16. Regulation 347/2013 of the European Parliament and of the Council of 17 April 2013 on Guidelines for Trans-European Energy Infrastructure and Repealing Decision No 1364/2006/EC and Amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009, 2013 O.J. (L 115) 39 [hereinafter TEN-E Regulation], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:115:0039:0075:EN:PDF>.

17. WORK PROGRAMME, *supra* note 13, § 5. The most recently issued framework guidelines were released on December 3, 2013, and addressed harmonized transmission tariff structures for gas. AGENCY FOR THE COOPERATION OF ENERGY REGULATORS, FG-2013-G-01, FRAMEWORK GUIDELINES ON RULES REGARDING HARMONISED TRANSMISSION TARIFF STRUCTURES FOR GAS (2013), available at http://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Framework_Guidelines/Framework%20Guidelines/Framework%20Guidelines%20on%20Harmonised%20Gas%20Transmission%20Tariff%20Structures.pdf.

18. WORK PROGRAMME, *supra* note 13, § 5.

19. REMIT, *supra* note 15, at art. 1(1).

inside information, to acquire or dispose of wholesale energy products to which that information relates.²⁰

It also specifies the types of persons who are subject to the prohibition and expressly exempts certain types of transactions.²¹

In conjunction with the prohibition on insider trading is a market participant's obligation to disclose inside information in a timely and effective manner,²² where the non-disclosure of such information "would be likely to significantly affect the prices of those wholesale energy products."²³ A market participant is permitted to "delay the public disclosure of inside information so as not to prejudice its legitimate interests provided that such omission is not likely to mislead the public and provided that the market participant is able to ensure the confidentiality of that information" and does not rely on that information to conduct wholesale transactions.²⁴

REMIT prohibits any attempt or engagement of wholesale energy market manipulation, defined in part as any transaction or order to trade in wholesale energy products which:

(i) gives, or is likely to give, false or misleading signals, as to the supply of, demand for, or price of wholesale energy products; (ii) secures or attempts to secure, by a person, or persons acting in collaboration, the price of one or several wholesale energy products at an artificial level, unless the person who entered into the transaction or issued the order to trade establishes that his reasons for doing so are legitimate and that the transaction or order to trade conforms to accepted market practices on the wholesale energy market concerned; or (iii) employs or attempts to employ a fictitious device or any other form of deception or contrivance which gives, or is likely to give, false or misleading signals regarding the supply of, demand for, or price of wholesale energy products.²⁵

REMIT provides the ACER with a number of tools with which to detect and prevent abusive practices affecting wholesale energy markets. The ACER is responsible for updating certain definitions in REMIT to account for the current and future functioning of the wholesale energy market, "monitor[ing] trading activity in wholesale energy products to detect and prevent trading based on inside information and market manipulation," and cooperating with the national regulatory authorities in their efforts to monitor for unlawful market practices.²⁶ The ACER has the authority to collect data on wholesale energy market transactions.²⁷ REMIT also establishes a registration requirement for wholesale energy market participants and obligates any person who is professionally arranging transactions in wholesale energy products to report any activity that he or she reasonably suspects to be a breach of the prohibitions on insider trading or market manipulation.²⁸

20. *Id.* at art. 3(1).

21. *Id.* at art. 3(2)-(6).

22. *Id.* at art. 4.

23. *Id.* at art. 2(1).

24. *Id.* at art. 4(2).

25. *Id.* at art. 2(2)(a).

26. *Id.* at arts. 6(1), 7(1)-(2).

27. *Id.* at art. 8(1).

28. *Id.* at art. 15.

REMIT also has enforcement powers, including directing national regulatory authorities to ensure that the prohibitions are applied and requiring each Member State to “ensure that its national regulatory authorities have the investigatory and enforcement powers necessary” to carry out their obligations under REMIT.²⁹ Such powers include the ability to access and copy relevant documentation, demand information from persons associated with the event or transaction under investigation, perform on-site inspections, obtain telephone and data records, require the cessation of any practice inconsistent with REMIT, and request a court to freeze assets or impose a temporary prohibition of professional activity.³⁰

The power to enforce prohibitions on abusive practices in wholesale energy markets is held by the national regulatory authorities, not the ACER.³¹ In contrast, section 314 of the Federal Power Act gives the Commission the authority to take action on its own initiative, rather than having to work through a state-level regulatory agency:

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this [Act], or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper [United States federal court] . . . , to enjoin such acts or practices and to enforce compliance with this [Act] or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond.³²

Under REMIT,³³ the Agency expects to enter into an administrative agreement with the Commission sometime during 2014, which will address the cooperation between the two agencies in regard to an exchange of information related to market monitoring activities.³⁴

2. Infrastructure Initiatives

In addition to the Agency's efforts to stem abusive wholesale energy market practices, the Agency is diligently working to implement the TEN-E Regulation, which is intended to establish guidelines “for the timely development and interoperability of priority corridors and areas of trans-European energy infrastructure.”³⁵ More specifically, those guidelines address the identification of projects of common interest, facilitate the timely implementation of such projects, establish rules for the allocation of project costs, and set forth conditions in regard to project eligibility for EU financial assistance.³⁶

TEN-E Regulation provides detailed criteria for projects of common interest.³⁷ For a project to qualify, it must be necessary for one of the energy infrastructure priority corridors listed in the regulation, its potential benefits must

29. *Id.* at art. 13(1).

30. *Id.* at art. 13(2).

31. *Id.* at art. 13(1).

32. 16 U.S.C. § 825m(a) (2012).

33. REMIT, *supra* note 15.

34. WORK PROGRAMME, *supra* note 13 § 8.8.

35. TEN-E Regulation, *supra* note 16, at art. 1(1).

36. *Id.* at art. 1(2).

37. *Id.* at art. 4.

outweigh its costs, and it must involve or impact at least two Member States (which could include a European Economic Area country).³⁸ Projects of common interest must also fall within the specified energy infrastructure categories of electricity transmission and storage,³⁹ natural gas, electricity smart grid, oil transport, and carbon dioxide transport.³⁹

Within the context of the TEN-E Regulation, the Agency is responsible for activities relating to the process for identifying projects of common interest, development of a cross-border cost allocation methodology, monitoring of the implementation of projects of common interest, and issuing opinions and decisions when requested.⁴⁰

II. UNITED STATES EXPORT OF LIQUEFIED NATURAL GAS

The United States is now expected to become a net exporter of liquefied natural gas (LNG) by 2016 and an overall net exporter of natural gas by 2018.⁴¹ “The United States has been exporting [a relatively small amount of] natural gas since at least the 1930s, primarily to Canada and Mexico.”⁴² As recently as 2012, 98% of United States natural gas exports were by pipeline to Canada and Mexico.⁴³

A. LNG Exports to FTA Countries

U.S. natural gas exports require federal approval from the U.S. Department of Energy’s Office of Fossil Energy (DOE/FE), pursuant to section 3 of the Natural Gas Act (NGA).⁴⁴ Natural gas export applications must be approved by the DOE/FE unless it finds that the proposed export is contrary to the public interest.⁴⁵ Exports to nations with which a free trade agreement (FTA) is in effect are presumed to be consistent with the public interest and must be granted without modification or delay.⁴⁶ Currently the United States has FTAs requiring national treatment for trade in natural gas and LNG with Australia, Bahrain, Canada, Chile, Colombia, Dominican Republic, El Salvador, Guatemala, Honduras, Jordan, Mexico, Morocco, Nicaragua, Oman, Panama, Peru, Republic of Korea, and Singapore.⁴⁷ As of December 6, 2013, thirty-five applications to

38. *Id.* at art. 4(1).

39. *Id.* at art. 4(2).

40. WORK PROGRAMME, *supra* note 13, § 5; *id.* at annex 3, tbl. E.

41. ENERGY INFO. ADMIN., U.S. DEP’T OF ENERGY, ANNUAL ENERGY OUTLOOK 2014 EARLY RELEASE 13 (2013) [hereinafter ANNUAL ENERGY OUTLOOK 2014], available at [http://www.eia.gov/forecasts/aeo/er/pdf/0383er\(2014\).pdf](http://www.eia.gov/forecasts/aeo/er/pdf/0383er(2014).pdf).

42. MICHAEL RATNER, CONG. RESEARCH SERV., R42074, U.S. NATURAL GAS EXPORTS: NEW OPPORTUNITIES, UNCERTAIN OUTCOMES 9 (2013), available at <https://www.fas.org/sgp/crs/misc/R42074.pdf>.

43. *Id.*

44. 15 U.S.C. § 717b (2012).

45. *Id.* § 717b(a).

46. *Id.* § 717b(c).

47. *How to Obtain Authorization to Import and/or Export Natural Gas and LNG*, ENERGY.GOV, <http://energy.gov/fe/services/natural-gas-regulation/how-obtain-authorization-import-and-or-export-natural-gas-and-lng#LNG> (last visited Apr. 27, 2014) [hereinafter *Authorization to Import/Export Natural Gas and LNG*].

export domestically produced LNG to FTA countries had been approved or were pending approval.⁴⁸

B. LNG Exports to Non-FTA Countries

When considering exports to non-FTA nations, the DOE/FE performs a public interest analysis that takes into account levels of domestic supply and demand for natural gas, as well as economic, international, and environmental considerations.⁴⁹ Applications to export domestically-produced LNG to non-FTA countries are announced in the Federal Register and subject to a public comment period.⁵⁰ In 2011, the DOE/FE conditionally granted Sabine Pass long-term authorization to export LNG to non-FTA nations for a twenty-year period.⁵¹ The DOE/FE subsequently commissioned a two-part study (the LNG Export Study) to evaluate the cumulative economic impact of the *Sabine Pass* authorization and any future requests for authority to export LNG.⁵² The first part, conducted by the Energy Information Administration (EIA) and first published in January 2012, assessed how specific scenarios of increased natural gas exports could affect domestic energy markets.⁵³ The second part, performed by NERA Economic Consulting (NERA) and released in December 2012, evaluated the macro-economic impact of LNG exports on the U.S. economy.⁵⁴

The EIA study identified four general impacts associated with LNG exports:

1. Increased gas exports would lead to increased U.S. gas prices with the rate of the increase determined by how rapidly exports grew.⁵⁵
2. "Increased natural gas production [would] satisf[y] about 60 to 70% of the increase in natural gas exports, with a minor additional contribution from increased [Canadian] imports."⁵⁶
3. The remainder of gas exports would be met by reduced U.S. consumption because of higher prices.⁵⁷

48. U.S. DEP'T OF ENERGY, APPLICATIONS RECEIVED BY DOE/FE TO EXPORT DOMESTICALLY PRODUCED LNG FROM THE LOWER-48 STATES (2013) [hereinafter APPLICATIONS TO EXPORT LNG], available at http://energy.gov/sites/prod/files/2013/12/f5/Summary%20of%20LNG%20Export%20Applications_0.pdf; see, e.g., Sabine Pass Liquefaction, LLC, Order No. 2833, FE Docket No. 10-85 (Dep't of Energy Sept. 7, 2010).

49. *The Department of Energy's Strategy for Exporting Liquefied Natural Gas: Hearing Before the Subcomm. on Energy Policy, Health Care & Entitlements of the H. Comm. on Oversight & Gov't Reform*, 113th Cong. 46 (2013) (statement of Christopher Smith, Assistant Sec'y for Fossil Energy (Acting), Dep't of Energy).

50. *Authorization to Import/Export Natural Gas and LNG*, supra note 47.

51. Sabine Pass Liquefaction, LLC, Order No. 2961, FE Docket No. 10-111, at 2 (Dep't of Energy May 20, 2011).

52. Notice of Availability and Request for Comments, 2012 LNG Export Study, 77 Fed. Reg. 73,627, 73,628 (Dep't of Energy Dec. 11, 2012).

53. *Id.* at 73,627.

54. *Id.*

55. ENERGY INFO. ADMIN., EFFECT OF INCREASED NATURAL GAS EXPORTS ON DOMESTIC ENERGY MARKETS 6 (2012), available at http://www.eia.gov/analysis/requests/fe/pdf/fe_lng.pdf.

56. *Id.*

57. *Id.*

4. “Even while consuming less, on average, consumers [would] see an increase in . . . natural gas and electricity” costs, the amount of increase varying based on how rapidly gas exports grew.⁵⁸

The NERA study concluded that “LNG exports have net economic benefits in spite of higher domestic natural gas prices.”⁵⁹ It also determined that:

1. In all scenarios, the United States would experience net economic benefits from allowing LNG exports, with the greatest benefits occurring with unrestrained exports.⁶⁰
2. United States natural gas prices would increase, but competing global markets would limit how high U.S. natural gas prices could rise because importers will not purchase U.S. exports if U.S. wellhead price rises above the cost of competing supplies.⁶¹
3. LNG exports will cause shifts in industrial output and employment and in sources of income. Overall, both total labor compensation and income from investment are projected to decline, and income to owners of natural gas resources will increase.⁶²
4. Serious competitive impacts are likely to be confined to narrow segments of industry that are sensitive to natural gas prices.⁶³

The DOE/FE received nearly 200,000 comments on the LNG Export Study, including 800 unique comments and 11 economic studies prepared by commenters or organizations under contract to commenters, and from federal, state, and local political leaders, large public companies, public interest organizations, academia, industry associations, foreign interests, and thousands of individual U.S. citizens.⁶⁴

The DOE/FE weighed the comments on the LNG Export Study and issued its second order authorizing LNG exports to non-FTA countries on May 17, 2013.⁶⁵ The order conditionally granted Freeport LNG Expansion LP and FLNG Liquefaction, LLC authorization to export LNG to non-FTA countries from Freeport’s LNG terminal in Texas.⁶⁶ The DOE/FE included in the *Freeport* order its comments and analysis on the LNG Export Study, and stated that the LNG Export Study was “fundamentally sound” in its conclusion that the United States will experience net economic benefits from the issuance of authorizations

58. *Id.*

59. NERA ECONOMIC CONSULTING, MACROECONOMIC IMPACTS OF LNG EXPORTS FROM THE UNITED STATES 1 (2012), available at http://energy.gov/sites/prod/files/2013/04/f0/nera_lng_report.pdf.

60. *Id.* at 1-2.

61. *Id.* at 2.

62. *Id.*

63. *Id.*

64. Freeport LNG Expansion, L.P., Order No. 3282, FE Docket No. 10-161, at 4 (Dep’t of Energy May 17, 2013). DOE/FE organized the initial comments into 399 docket entries and the reply comments into 375 entries. See also *Initial Comments—LGN Export Study*, U.S. DEP’T ENERGY, http://www.fossil.energy.gov/programs/gasregulation/authorizations/export_study/export_study_initial_comments.html (last updated May 15, 2013); *Invitation to Offer Reply Comments—LNG Export Study*, U.S. DEP’T ENERGY, http://www.fossil.energy.gov/programs/gasregulation/authorizations/export_study/export_study_reply_comments.html (last updated Mar. 5, 2013).

65. *Freeport LNG Expansion*, Order No. 3282, FE Docket No. 10-161, at 1-2.

66. *Id.* at 2.

to export domestically produced LNG.⁶⁷ The DOE/FE indicated that it will take a “measured approach” in reviewing other pending LNG export applications, and will “assess the cumulative impacts of each succeeding request for export authorization on the public interest with due regard to the effect on domestic natural gas supply and demand fundamentals.”⁶⁸ The DOE/FE further cautioned that it may “issue, make, amend, and rescind such orders . . . as it may find necessary” and that it “cannot precisely identify all the circumstances under which such actions may be taken.”⁶⁹

The DOE/FE in 2013 issued several more orders approving LNG exports to non-FTA countries. These orders conditionally allow LNG exports to non-FTA countries from Lake Charles, Dominion Cove Point, and the Freeport expansion terminals.⁷⁰ As of December 2013, twenty-four non-FTA applications were awaiting DOE/FE review.⁷¹

III. TRANSNATIONAL APPLICATION OF DODD-FRANK AND SUBSTITUTED COMPLIANCE

A. Background

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), which amended the Commodity Exchange Act (CEA) in an attempt to reduce systemic risk and promote transparency by establishing a comprehensive regulatory regime applicable to swaps.⁷² Among other things, Dodd-Frank amended the CEA to require registration of Swap Dealers (SDs) and major swap participants (MSPs), and subjects persons meeting these definitions to certain requirements set out in the CEA and the regulations of the Commodity Futures Trading Commission (CFTC).⁷³ The requirements imposed on such persons are generally divided into entity-level and transaction level-requirements. In particular, as relevant here, the CEA and the CFTC’s regulations impose the following classes of entity-level requirements:

- Capital adequacy—Non-bank SDs and MSPs must hold a minimum level of net capital;⁷⁴
- Chief compliance officer (CCO)—Each SD and MSP must designate an individual to serve as CCO, who is responsible for compliance policies and procedures, reports to the board of directors or a senior officer of the SD or MSP, and files a compliance report with the CFTC;⁷⁵

67. *Id.* at 110.

68. *Id.* at 112-13.

69. *Id.* at 112 n.126.

70. Freeport LNG Expansion, L.P., Order No. 3357, FE Docket No. 11-161 (Dep’t of Energy Nov. 15, 2013); Dominion Cove Point LNG, LP, Order No. 3331, FE Docket No. 11-128 (Dep’t of Energy Sept. 11, 2013); Lake Charles Exports, LLC, Order No. 3324, FE Docket No. 11-59 (Dep’t of Energy Aug. 7, 2013).

71. APPLICATIONS TO EXPORT LNG, *supra* note 48.

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

73. *Id.* at 1703.

74. *Id.* at 1705.

75. *Id.* at 1711.

- Risk management—SDs and MSPs must establish internal policies and procedures designed to address risk management, ensure compliance with position limits, avoid conflicts of interest, and address contingencies;⁷⁶
- Recordkeeping—SDs and MSPs are required to keep records detailing their transactions and positions for all swap activities for the duration of the swap plus five years (one year in the case of voice recordings) and comply with additional recordkeeping requirements set out in certain parts of the CFTC's regulations;⁷⁷
- Swap data repositories (SDR)—all swaps must be reported to a registered SDR;⁷⁸
- Swap Data Recordkeeping Relating to Complaints and Marketing and Sales Materials—all SDs and MSPs keep records of all activities related to its business including records of complaints and marketing and sales.⁷⁹

In addition, SDs and MSPs must comply with the following transaction-level requirements:

- Clearing and Swap Processing—SDs and MSPs are required to clear certain swaps detailed in the CFTC's regulations with a derivatives clearing organization and comply with prescribed processing guidelines;⁸⁰
- Margin and Segregation Requirements—SDs and MSPs that trade in non-cleared swaps must comply with CFTC margin requirements and are required to segregate funds provided as margin upon a request by a counterparty;⁸¹
- Execution—Swaps subject to the mandatory clearing requirement must be executed on a designated contract market (DCM) or swap execution facility (SEF) unless no such DCM or SEF makes the swap available to trade;⁸²
- Documentation Requirements—SDs and MSPs are required to execute written swap trading relationship documentation detailing all terms governing the trade relationship between the SD and MSP and its counterparty, credit support arrangements, and other details;⁸³

76. *Id.* at 1710.

77. *Id.* at 1715.

78. Creatures of Dodd-Frank, SDRs are entities registered with the CFTC that are responsible for accepting, confirming, and maintaining data about each swap and providing the CFTC with access to such data. 17 C.F.R. §§ 49.3, 49.10 (2013). The CFTC also has adopted large trader reporting rules, which require routine reports from entities that hold significant swap positions tied to certain prescribed physical commodity futures contracts. Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 45,292 (CFTC July 26, 2013) [hereinafter Interim Policy Statement].

79. 78 Fed. Reg. at 45,331-33, 45,338.

80. *Id.* at 45,333.

81. *Id.* at 45,334.

82. *Id.*

83. *Id.*

- Portfolio Reconciliation and Compression—SDs and MSPs must perform post-trade reconciliation and compression;⁸⁴
- Real-Time Public Reporting—SDs and MSPs must comply with CFTC requirements regarding real-time reporting and dissemination of transaction and pricing data;⁸⁵
- Trade Confirmation—SDs and MSPs must confirm swap transactions by the end of the first business day following the day of execution;⁸⁶
- Trading Records—SDs and MSPs must maintain daily trading records needed to reconstruct each swap and retain records of certain cash or forward transactions;⁸⁷ and
- External Business Conduct Standards—SDs and MSPs are required to comply with standards governing their dealings with counterparties, including a requirement to conduct due diligence on counterparties and disclose material information regarding each swaps.⁸⁸

B. Extraterritorial Application of Title VII of Dodd-Frank and Substituted Compliance

In addition to imposing the requirements set out above, Dodd-Frank amended the CEA to explicitly apply the swap provisions of Dodd-Frank extraterritorially. Specifically, section 722(d) of the act amended section 2(i) of the CEA to provide that the swaps provisions of the CEA shall apply to activities outside of the United States if those activities “have a direct and significant connection with activities in, or effect on, commerce of the United States” or contravene CFTC rules promulgated to prevent evasion of the swap provisions of title VII of Dodd-Frank.⁸⁹ The CFTC has explained that section 2(i) is intended to encompass activities “that have either: (1) [a] direct and significant effect on U.S. commerce; or, in the alternative, (2) a direct and significant connection with activities in U.S. commerce, and through such connection present the type of risks to the U.S. financial system and markets that [t]itle VII” of Dodd-Frank was intended to protect against.⁹⁰

The CFTC has indicated that it will permit non-U.S. SDs and MSPs, with certain exceptions, to rely on compliance with the laws and regulations of a foreign jurisdiction if the CFTC finds that they are “comparable to and as comprehensive as a corresponding category of U.S. laws and regulations.”⁹¹ The

84. *Id.*

Portfolio reconciliation is a post-execution risk management tool to ensure accurate confirmation of a swap’s terms and to identify and resolve any discrepancies between counterparties regarding the valuation of the swap. Portfolio compression is a post-trade processing and netting mechanism that is intended to ensure timely, accurate processing and netting of swaps.

Id. at 45,367.

85. *Id.* at 45,335.

86. *Id.*

87. *Id.*

88. *Id.*

89. 7 U.S.C. § 2(i) (2012); Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, 77 Fed. Reg. 41,214, 41,215 (CTFC July 12, 2012).

90. Interim Policy Statement, *supra* note 78, at 45,300.

91. *Id.* at 45,301, 45,340.

CFTC has stated that it will make comparability determinations on a requirement-by-requirement basis—as opposed to a jurisdiction-by-jurisdiction basis—and that it will assess whether the foreign jurisdiction's requirements achieve the regulatory objectives underlying title VII of Dodd-Frank such that substituted compliance is appropriate.⁹²

C. July 2013 Interim Exemptive Relief

In a July 2013 order, the CFTC granted temporary relief from certain entity-level and transaction-level requirements for certain non-U.S. SDs and MSPs until the earlier of December 21, 2013, or thirty days following a substituted compliance determination for a relevant jurisdiction.⁹³ In particular, the CFTC determined that it would permit substituted compliance for non-U.S. SDs and MSPs for the purpose of compliance with capital adequacy, chief compliance officer, risk management, and certain swap data recordkeeping requirements in those jurisdictions to the extent that the CFTC had made a substituted compliance determination with respect to the particular foreign regulatory regime.⁹⁴ The CFTC further determined that non-U.S. SDs and MSPs that are not part of an affiliated group in which the ultimate parent entity is a U.S. SD, MSP, bank, or financial holding company may rely on substituted compliance for compliance with SDR reporting and swap data recordkeeping relating to complaints and marketing and sales in such jurisdictions for swaps in which the counterparty is a non-U.S. person, so long as the CFTC has direct access to the relevant data stored at a foreign trade depository.⁹⁵ Because the CFTC had only recently received requests for substituted compliance determinations from market participants or regulators in Australia, Canada, the European Union, Hong Kong, Japan, and Switzerland, the CFTC decided to temporarily delay compliance with the aforementioned entity-level requirements for non-U.S. SDs and MSPs in these jurisdictions.⁹⁶

With respect to transaction-level requirements, the CFTC determined that the availability of substituted compliance should depend on the transaction's connection to a U.S. SD, MSP, or other institution and that it would temporarily permit substituted compliance for entities located in the aforementioned foreign jurisdictions.⁹⁷ The CFTC determined that the parties to a transaction involving a U.S. SD or MSP or other U.S. person must comply with all transaction-level requirements that are in effect, even if the other counterparty to the swap is a non-U.S. person.⁹⁸ However, the CFTC determined that substituted compliance generally would be appropriate for requirements related to clearing and swap processing, margining and segregation, swap trading documentation, reconciliation and compression, real-time reporting, trade confirmation, and

92. *Id.* at 45,342-43.

93. Exemptive Order Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 43,785, 43,788 n.40 (CFTC July 22, 2013) [hereinafter Interim Exemptive Order].

94. *Id.*; Interim Policy Statement, *supra* note 78, at 45,348.

95. Interim Policy Statement, *supra* note 78, at 45,349.

96. Interim Exemptive Order, *supra* note 93, at 43,788.

97. *Id.* at 43,789.

98. *Id.*

daily trading records (“Category A Transaction-Level Requirements”) for the purpose of transactions between (a) two foreign branches of U.S. banks that are SDs or MSPs; (b) a non-U.S. SD or MSP (including the affiliate of a U.S. person) and the foreign branch of a U.S. bank that is a SD or MSP; (c) a foreign branch of a U.S. bank that is a SD or MSP and a non-U.S. person guaranteed by a guaranteed affiliate⁹⁹ or an affiliate conduit¹⁰⁰ of a U.S. person; (d) a non-U.S. SD or MSP (including an affiliate of a U.S. person) and a non-U.S. person guaranteed by or an affiliate conduit of a U.S. person; and (e) a foreign branch of a U.S. bank that is a SD or MSP and a non-U.S. person that is not guaranteed by or an affiliate conduit of a U.S. person.¹⁰¹ The CFTC further explained that swaps between a non-U.S. SD or MSP (including the affiliate of a U.S. person) and a non-U.S. person that is not a guaranteed or conduit affiliate are not required to comply with Category A Transaction-Level Requirements, as application of these requirements to such transactions was not warranted given the greater supervisory interest of foreign regulators in such transactions.¹⁰² With respect to external business conduct standards requirements, the CFTC determined that substituted compliance would not be available but that these requirements generally would not be applicable to non-U.S. SDs or MSPs or foreign branches of U.S. banks that are SDs or MSPs for transactions involving foreign branches, non-U.S. persons guaranteed by or an affiliate conduit of a U.S. person, or other non-U.S. persons.¹⁰³

D. December 2013 Substituted Compliance Determinations

On December 20, 2013, as the interim relief provided in July 2013 was set to expire, the CFTC issued final comparability determinations for certain foreign jurisdictions. More specifically, the CFTC determined, with certain exceptions, that local laws in Australia, Canada, the European Union, Hong Kong, Japan, and Switzerland were comparable to entity-level requirements applicable to COOs, swap data recordkeeping and reporting, and risk management and associated requirements.¹⁰⁴ The CFTC further found that local requirements in Japan and the European Union were comparable to certain transaction-level requirements, including requirements respecting daily trading records, swap confirmation, reconciliation and compression, and swap trading relationship documentation.¹⁰⁵

99. A guaranteed affiliate is a non-U.S. person that is affiliated with a U.S. person and guaranteed by a U.S. person. *Id.* at 43,789 n.45.

100. An affiliate conduit is defined to encompass “those entities that function as a conduit or vehicle for U.S. persons conducting swaps transactions with third-party counterparties.” Interim Policy Statement, *supra* note 78, at 45,358.

101. *Id.* at 45,350-59; *id.* app. D.

102. *Id.* at 45,353.

103. *Id.* app. D.

104. COMMODITY FUTURES TRADING COMM’N, BUSINESS CONDUCT RULES FOR SWAP DEALERS AND MAJOR SWAP PARTICIPANTS: SUMMARY OF ENTITY-LEVEL COMPARABILITY DETERMINATIONS (2013), available at <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/cptable122013.pdf>.

105. Comparability Determination for Japan: Certain Transaction-Level Requirements, 78 Fed. Reg. 78,890, 78,895, 78,897 (CTFC Dec. 27, 2013); Comparability Determination for the European Union: Certain Transaction-Level Requirements, 78 Fed. Reg. 78,878, 78,883-88 (CTFC Dec. 27, 2013).

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