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## CFTC Proposes Interpretative Guidance on the Extraterritorial Reach of Title VII of the Dodd-Frank Act and Exemptive Relief to Extend Compliance Deadlines for Many Title VII Requirements, Particularly for Non-U.S. Persons

### Key Takeaways:

- > The CFTC's "U.S. person" definition includes, among others, entities organized or having their principal place of business in the United States and their foreign and domestic branches, but excludes foreign subsidiaries and foreign affiliates of a U.S. person even if guaranteed by a U.S. person.
- > Non-U.S. persons would be required to register as swap dealers if they engage in swap dealing activities as part of a regular business in excess of the *de minimis* thresholds previously established by the CFTC. In determining whether it must register, a non-U.S. person would consider its (and its non-U.S. affiliates' under common control) (1) transactions with U.S. persons and (2) transactions with non-U.S. persons in which its (or its non-U.S. affiliates' under common control) performance is guaranteed by a U.S. person.
- > Likewise, if a non-U.S. person has a substantial position in swaps or meets other major swap participant thresholds established by the CFTC, it must register as a major swap participant. In evaluating its duty to register, a non-U.S. person would consider (1) its swap transactions with U.S. persons and (2) swap transactions between a third party non-U.S. person and a third party U.S. person in which such potential registrant guarantees the obligations of such third-party non-U.S. person.
- > In central booking structures, the party bearing the ultimate risk, regardless of how the risk is transferred to it, will be treated as having the relevant exposures for testing purposes, although other entities may be required to register where their activities independently trigger the registration requirements.
- > The CFTC splits Title VII requirements into entity-level and transaction-level requirements. Entity-level requirements would apply to swap dealers and major swap participants that are non-U.S. persons. The transaction-level requirements would apply to cross-border transactions between U.S. persons and non-U.S. persons, and some of those requirements would

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apply to certain transactions between non-U.S. persons or between non-U.S. persons and foreign branches of U.S. persons.

- > Substituted compliance with comparable foreign regulators (as judged by the CFTC) by non-U.S. swap dealers and non-U.S. major swap participants is generally permitted with respect to the entity-level requirements. Substituted compliance with the transaction-level requirements is permitted in some circumstances for transactions between non-U.S. persons or between non-U.S. persons and foreign branches of U.S. persons.
- > The CFTC also proposed exemptive relief that would extend the compliance date of many Title VII requirements, particularly (although not exclusively) for non-U.S. persons.

## Introduction

On June 29, 2012, the Commodity Futures Trading Commission (the “**CFTC**”) voted to propose interpretative guidance (the “**Proposed Guidance**”)<sup>1</sup> concerning the extraterritorial application of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “**Dodd-Frank Act**”).<sup>2</sup> The Proposed Guidance interprets Section 722(d) of the Dodd-Frank Act, which provides, among other things, that Title VII applies to transactions that “have a direct and significant connection with activities in, or effect on, commerce of the United States.”<sup>3</sup> The Proposed Guidance would

- > establish the CFTC’s definition of “U.S. person;”
- > require non-U.S. entities to determine whether they must register with the CFTC as a swap dealer (an “**SD**”) or a major swap participant (an “**MSP**”) by analyzing the nature and volume of their transactions with U.S. persons, and in some cases, other non-U.S. persons; and
- > divide the CFTC’s Title VII rules into entity-level and transaction-level requirements, applying the entity-level requirements to all non-U.S. SDs or MSPs, as applicable, and describing in which situations the transaction-level requirements would apply.

The Securities and Exchange Commission (the “**SEC**”) has not yet put forth any interpretative guidance with respect to extraterritoriality and may adopt a different approach with respect to security-based swaps and related Title VII requirements for security-based swap dealers and major security-based swap participants.

In addition to the Proposed Guidance, the CFTC also proposed to issue an exemptive order (the “**Proposed Exemptive Order**”) that would extend the

<sup>1</sup> Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, 77 Fed. Reg. 41214 (July 12, 2012), available at <http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2012-16496a.pdf>.

<sup>2</sup> Pub. L. 111-4173, 124 Stat. 1376 (2010).

<sup>3</sup> *Id.*, § 722(d).

deadline for non-U.S. entities, and in some cases U.S. entities, to comply with certain Title VII requirements.<sup>4</sup> This note summarizes the core aspects of the Proposed Guidance and the Proposed Exemptive Order.

## What is the CFTC’s definition of “U.S. person” for Title VII purposes?

The CFTC did not propose to adopt the Regulation S definition of “U.S. person,” as many market participants had urged it to do and as many expect the SEC will do.<sup>5</sup> Instead, the Proposed Guidance defines the following as U.S. persons:<sup>6</sup>

### What is a U.S. Person?

- > Any natural person who is a resident of the United States
- > Any corporation, partnership or other business entity that is organized under U.S. law or which has its principal place of business in the United States
- > Any business entity organized under foreign law, the direct or indirect owners of which are responsible for the entity’s liabilities, where at least one such owner is a U.S. person, though this does not include situations in which a U.S. person merely provides a guarantee to a business entity<sup>7</sup>
- > Any foreign branch or agency of a bank or other business entity that is a U.S. person (*i.e.*, a U.S. bank and its branches are collectively considered a single U.S. person and a foreign bank and its branches should likewise be considered a single non-U.S. person, although the Proposed Guidance does not expressly state this)
- > Any individual account for the benefit of a U.S. person
- > Any commodity pool, pooled account or “collective investment vehicle” of which a majority ownership is directly or indirectly held by a U.S. person
- > Any commodity pool, pooled account or “collective investment vehicle” the operator of which is required to register as a commodity pool operator
- > Any pension plan for the benefit of employees of an entity with its principal place of business in the United States
- > Any estate or trust the income of which is subject to U.S. income tax, regardless of source

<sup>4</sup> Exemptive Order Regarding Compliance with Certain Swap Regulations, 77 Fed. Reg. 41110 (July 1, 2012), *available at*

<http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2012-16498a.pdf>.

<sup>5</sup> *See, e.g.*, Transcript of Public Roundtable to Discuss International Issues Relating to the Implementation of Title VII of the Dodd-Frank Act, at 24, *available at* [http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfs submission/dfs submission21\\_08011-trans.pdf](http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfs submission/dfs submission21_08011-trans.pdf). The CFTC sought comment on whether it should instead employ the Regulation S definition of “U.S. person.” Proposed Guidance at 41218.

<sup>6</sup> Proposed Guidance at 41218.

<sup>7</sup> For example, were this to apply in the United States, this would be limited to sole proprietorships and general partnerships.

Foreign affiliates and foreign subsidiaries of U.S. persons are **not U.S. persons**. This is true even if a U.S. person's foreign affiliate's or foreign subsidiary's swaps activities are guaranteed by a U.S. person. However, as discussed in more detail below, many of the rules applicable to swap transactions with U.S. persons also apply to transactions with guaranteed affiliates and subsidiaries.

## Which non-U.S. entities must register with the CFTC as Swap Dealers?

Analysis for whether U.S. persons are required to register as SDs (pursuant to the Entities Rules)	Analysis for whether non-U.S. persons are required to register as SDs (pursuant to the Entities Rules interpreted on the basis of the Proposed Guidance)
Ask the following questions: <sup>8</sup>	
> Do you hold yourself out as a dealer in swaps?	> Do you hold yourself out <b>to U.S. persons</b> as a dealer in swaps?
> Do you make a market in swaps?	> Do you make a market in swaps <b>for U.S. persons</b> ?
> Do you regularly enter into swaps with counterparties as an ordinary course of business for your own account?	> Do you regularly enter into swaps with counterparties <b>who are U.S. persons</b> as an ordinary course of business for your own account?
> Do you engage in any activity that causes you to be commonly known in the trade as a dealer or market maker in swaps?	> Do you engage in any activity that causes you to be commonly known in the trade as a dealer or market maker in swaps <b>for U.S. persons</b> ?
	> <b>Are your swap activities guaranteed by a U.S. person and do you do any of the above with respect to non-U.S. persons?</b>
If you answered yes to any of the above...	
> Aggregate the total notional amount of all swap transactions entered into by you and all of your	> Aggregate the total notional amount of all swap transactions <b>with U.S. persons and swap</b>

<sup>8</sup> In answering these questions and in conducting the *de minimis* calculation discussed below, exclude (i) swaps activities not part of a regular business, (ii) swaps entered into by an insured depository institution with a customer in connection with originating a loan to that customer, (iii) swaps between majority-owned affiliates, (iv) swaps entered into by a cooperative with its members, (v) swaps entered into for hedging physical positions and (vi) certain swaps entered into by registered floor traders.

Analysis for whether U.S. persons are required to register as SDs (pursuant to the Entities Rules)	Analysis for whether non-U.S. persons are required to register as SDs (pursuant to the Entities Rules interpreted on the basis of the Proposed Guidance)
<p>affiliates under common control, excluding interaffiliate swaps, swaps entered into in connection with the making of a loan and certain other transactions.<sup>9</sup></p>	<p><b>transactions with non-U.S. persons in which your performance is guaranteed by a U.S. person</b> entered into by you and all of your <b>non-U.S. person</b> affiliates under common control, excluding interaffiliate swaps, swaps entered into in connection with the making of a loan, <b>swaps with non-U.S. branches of registered U.S. SDs</b> and certain other transactions.<sup>10</sup></p>
<p>If the total notional amount is less than the <i>de minimis</i> threshold (\$8 billion during an initial phase and \$3 billion thereafter; always \$25 million with respect to “special entities”), then you do not need to register as a swap dealer.</p> <p>If the total notional amount exceeds the <i>de minimis</i> thresholds, you must register as a swap dealer.</p>	

Under the Proposed Guidance, the analysis for determining whether a non-U.S. person must register with the CFTC as an SD is very similar to the analysis for U.S. persons under the joint CFTC-SEC rulemaking on the definition of swap market entities (the “**Entities Rule**”),<sup>11</sup> but clarity is provided about what should be counted in that analysis (compare the left and right columns in the table above). Thus, a non-U.S. person would first have to determine whether its swap activities **with U.S. persons** constitute swap dealing and whether those transactions are conducted as part of a “regular business,” utilizing the guidance in the Entities Rule.

The CFTC noted that even if a non-U.S. person is engaged in swap dealing with other non-U.S. persons as a regular business, it would still be able to determine

<sup>9</sup> See note 8.

<sup>10</sup> See note 8.

<sup>11</sup> Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant,” 77 Fed. Reg. 30596 (May 23, 2012) available at <http://www.cftc.gov/ucm/groups/public/@Ifederalregister/documents/file/2012-10562a.pdf>. For a further discussion of the test for determining whether an entity must register as an SD, please see Noah Melnick, Caird Forbes-Cockell, Jeff Cohen, Robin Maxwell & Jacques Schillaci, *CFTC and SEC Finalize a Key Piece of the Dodd-Frank Act Registration Requirements Puzzle with the Final Entity Definitions Rules, but Many Pieces of the Puzzle Remain Missing*, 32 Future & Derivatives L. Rep’t 15 (June 2012).

that it is not so engaged in swap dealing with U.S. persons as a regular business.<sup>12</sup> In other words, one may be engaged in swaps as part of a regular business with non-U.S. persons without, by virtue of that fact alone, its swaps activities with U.S. persons being treated as part of a regular business.

As is the case generally for SD registration, even if they are engaging in swap dealing as part of a regular business with U.S. persons, non-U.S. persons only need to register as SDs if they exceed one of the *de minimis* thresholds. The *de minimis* thresholds established by the Entities Rule for swaps, are (i) \$8 billion in notional amount of swaps (over the prior 12 months), dropping to \$3 billion after five years unless the CFTC changes it, and (ii) \$25 million in notional amount of swaps with special entities.<sup>13</sup> As set forth in the chart above, in determining whether its swap transactions exceed the *de minimis* thresholds, a non-U.S. person would consider its (and its non-U.S. affiliates under common control) (1) swap transactions with U.S. persons (excluding foreign branches of U.S. persons registered as SDs) and (2) swap transactions with non-U.S. persons where its performance (or the performance of its non-U.S. affiliates under common control) is guaranteed by a U.S. person..

### Central booking structures

The CFTC also proposed guidance for financial organizations that use central booking structures whereby swaps are negotiated and/or executed through branches or affiliates but are ultimately booked in a single entity either directly or indirectly (*e.g.*, through back-to-back interaffiliate swaps).<sup>14</sup> Under the Proposed Guidance, the central booking entity of such an organization would be required to register as an SD. Individual affiliates would be required to register if they met the SD thresholds independently, not taking into account transactions in which they act as agent on behalf of the central booking entity.

For instance, if a foreign bank books its swaps through its London branch, but uses a U.S. non-branch affiliate as an agent, such foreign bank would be required to register as a swap dealer (assuming that it met the *de minimis* threshold) and the U.S. affiliate would not be required to register as an SD unless it independently (*i.e.*, through its own swap activities) met the SD definition. The Proposed Guidance is ambiguous as to whether the U.S. affiliate would be required to register where it acts as a principal counterparty to such transactions and back-to-backs the risk to the London branch.

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<sup>12</sup> Proposed Guidance at 41220.

<sup>13</sup> 17 C.F.R. 1.3(ggg)(4). The Proposed Guidance does not explicitly state whether a non-U.S. person must maintain its transactions with U.S. person special entities below the lower \$25 million threshold in order to qualify for the *de minimis* exception.

<sup>14</sup> Proposed Guidance at 41221-22.

## Which non-U.S. entities must register with the CFTC as Major Swap Participants?

Analysis for whether U.S. persons are required to register as MSPs (pursuant to the Entities Rules)	Analysis for whether non-U.S. persons are required to register as MSPs (pursuant to the Entities Rules interpreted on the basis of the Proposed Guidance)
<p>If you answer yes to any of the following questions, you must register as an MSP:</p>	
<p>&gt; Do you have a “substantial position” in a major swap category, excluding hedging positions?</p>	<p>&gt; Do you have a “substantial position” <b>resulting from swap transactions with U.S. persons and transactions between a U.S. person and another non-U.S. person in which you guarantee the non-U.S. person’s performance</b> in a major swap category, excluding hedging positions?</p>
<p>&gt; Do you have “substantial counterparty exposure” as a result of your swap transactions?</p>	<p>&gt; Do you have “substantial counterparty exposure” as a result of your swap transactions <b>with U.S. persons and transactions between a U.S. person and another non-U.S. person in which you guarantee the non-U.S. person’s performance?</b></p>
<p>&gt; Are you a “highly leveraged financial entity” with a “substantial position” in swaps, including hedging positions?</p>	<p>&gt; Are you a “highly leveraged financial entity” with a “substantial position” in swaps <b>resulting from swap transactions with U.S. persons and transactions between a U.S. person and another non-U.S. person in which you guarantee the non-U.S. person’s performance,</b> including hedging positions?</p>

The Proposed Guidance’s approach to determining whether a non-U.S. person is an MSP largely mirrors the approach for SDs described above.<sup>15</sup> A non-U.S.

<sup>15</sup> Proposed Guidance at 41220.

person applies the same thresholds laid out in the Entities Rule, but looks only to the value of swap transactions (1) between the non-U.S. person and U.S. persons and (2) between a different non-U.S. person and a U.S. person in which the would-be MSP guarantees such other non-U.S. person’s performance.<sup>16</sup>

### Which Title VII swap and swap entity requirements apply to non-U.S. persons and cross-border transactions?

The Proposed Guidance spells out which of the requirements of Title VII would apply in cross-border swap transactions. The CFTC divides the Title VII requirements into two categories: those applicable to entities (“**Entity-Level Requirements**”) and those applicable to individual transactions (“**Transaction-Level Requirements**”) as follows:<sup>17</sup>

Entity-Level Requirements	Transaction-Level Requirements
> Capital adequacy	> Mandatory clearing and swap processing
> Chief compliance officer	> Margining and segregation for uncleared swaps
> Risk management	> Trade execution on a swap-exchange facility or designated contract market
> Recordkeeping	> Swap trading relationship documentation (“ <b>Documentation Rules</b> ”)
> Swap data reporting	> Portfolio recognition and compression
> Large trader reporting	> Real-time public reporting
	> Trade confirmation
	> Daily trading records
	> External business conduct rules (“ <b>BC Rules</b> ”)

#### Entity-Level Requirements

Under the Proposed Guidance, the Entity-Level Requirements would apply to all SDs and MSPs, regardless of whether they are U.S. persons. The Proposed Guidance would, however, allow non-U.S. person SDs and MSPs to use

<sup>16</sup> The Proposed Guidance would treat guarantees differently in the context of non-U.S. person SDs and MSPs. While a non-U.S. person with guarantees from a U.S. person would treat all of its transactions as attributable to itself for purposes of the SD *de minimis* thresholds, transactions guaranteed by a U.S. person would be attributable to the guarantor, and not the non-U.S. person beneficiary, for purposes of the MSP analysis. Proposed Guidance at 41220-21.

<sup>17</sup> Proposed Guidance at 41223-27.

“substituted compliance” with their local regulations in circumstances in which the local regulations are comparable to Title VII requirements.

### Transaction-Level Requirements

The applicability of the Transaction-Level Requirements under the Proposed Guidance is more complicated. Generally, all of the Transaction-Level Requirements apply to transactions involving at least one U.S. person, unless that U.S. person is a foreign branch or agency of a U.S. based-swap dealer. With respect to transactions between non-U.S. persons or between non-U.S. persons and foreign branches, the table below summarizes the applicability of the Transaction-Level Requirements.<sup>18</sup>

Do the Transaction-Level Requirements apply to transactions between the following counterparties?			
	<i>U.S. person</i>	<i>Non-U.S. person guaranteed by a U.S. person</i>	<i>Non-U.S. person without a U.S. person guarantee</i> <sup>19</sup>
<i>U.S. person</i>	All apply	All apply	All apply
<i>Foreign branch or agency of a U.S. SD</i> <sup>20</sup>	All apply	All except BC Rules apply (special substituted compliance allowed)	All except BC Rules apply (special substituted compliance allowed)
<i>Non-U.S. person SD or MSP</i> <sup>21</sup>	All apply	All except BC Rules apply (substituted compliance allowed)	Only Documentation Rules apply <sup>22</sup>
<i>Non-U.S. person that is not an SD or MSP</i>	All apply	None apply	None apply

<sup>18</sup> Proposed Guidance at 41228-29.

<sup>19</sup> Under the Proposed Guidance, the Transaction-Level Requirements (excluding the BC Rules) would also apply to non-U.S. persons without a U.S. person guarantee if (1) they are majority-owned by a U.S. person, (2) they regularly enter into swaps with the affiliates of the U.S. person and (3) their financials are included in the U.S. person’s consolidated financial statements. The CFTC indicated that this designed to prevent the use of non-U.S. “conduits” to avoid the Transaction-Level Requirements. Proposed Guidance at 41228-29.

<sup>20</sup> In the Proposed Guidance, the CFTC states that it may allow the foreign branches and agencies of U.S. SDs to conduct substituted compliance with local regulations even if those regulations are not found to be comparable to Title VII requirements. The SD would be required to limit transactions in such branches to five percent of its swaps activity. The CFTC explained that it would allow such substituted compliance in recognition of the fact that such transactions may be conducted in emerging markets by banks and may be an insignificant but “integral element of their global business.” Proposed Guidance at 41230-31.

<sup>21</sup> If a non-U.S. SD affiliate of a U.S. person SD is acting as agent for the U.S. person, the CFTC explained that both parties bear responsibility for complying with applicable Title VII requirements, and that “satisfactory performance by one may satisfy the obligations of both, but an unsatisfactory performance of an obligation owed to a counterparty is a responsibility that will be borne by both entities.” Proposed Guidance at 41231.

<sup>22</sup> Proposed Guidance at 41226. In addition, multilateral portfolio compression exercises must be conducted with respect to *all* dealer-to-dealer trades. Proposed Guidance at 41226-27.

## Substituted Compliance

The Proposed Guidance lays out the process by which non-U.S. persons could obtain CFTC approval for substituted compliance.<sup>23</sup> In considering such requests, the CFTC explains that it “would build on [its] longstanding policy of recognizing comparable regulatory regimes based on international coordination and comity principles with respect to cross-border activities involving futures (and options).”<sup>24</sup> The agency emphasized that it would make comparability determinations on a requirement-by-requirement basis, and it is thus possible that non-U.S. SDs and MSPs would be allowed to abide by home-country regulation for certain requirements but have to follow CFTC rules for others.<sup>25</sup> While the CFTC indicated that it would consider “the comprehensiveness of a foreign regulator’s supervisory compliance programs” and a foreign regulator’s ability to “support and enforce its oversight,”<sup>26</sup> the Proposed Guidance leaves much ambiguity as to how easily substituted compliance would be allowed and under what circumstances it would be granted.

## The Proposed Exemptive Order

The Proposed Exemptive Order would give SDs and MSPs additional time to come into compliance with certain Title VII requirements. Among other things, the Proposed Exemptive Order would:

- > allow non-U.S. person SDs and MSPs until twelve months after the Proposed Exemptive Order is finalized and published in the Federal Register to comply with the Entity-Level Requirements, with the exception of swap data reporting and large trader reporting;
- > permit non-U.S. person SDs and MSPs the same period before they are required to comply with Transaction-Level Requirements applicable to their transactions with non-U.S. persons; and
- > grant U.S. person SDs and MSPs until January 1, 2013 to comply with the Entity-Level Requirements except for recordkeeping, swap data reporting and large trader reporting.

## Questions Left Unanswered

While the Proposed Guidance provides a significant step toward clarifying how Title VII rules will impact non-U.S. entities, a number of questions remain unanswered. Perhaps foremost among these is how the CFTC plans to treat

<sup>23</sup> Proposed Guidance at 41229-30, 41232-34.

<sup>24</sup> Proposed Guidance at 57. The CFTC states that it will employ its “experience exempting foreign brokers from registration as [futures commission merchants].” Proposed Guidance at 68. It notes, however, that determinations made under Part 30 will not be considered binding or precedent-setting with respect to SD and MSP substituted compliance decisions. Proposed Guidance at 41233 n.129.

<sup>25</sup> It is also important to note that the CFTC would only allow substituted compliance with respect to the swap data reporting requirement if it “has direct access to the swap data . . . that is stored at the foreign trade repository.” Proposed Guidance at 41230.

<sup>26</sup> Proposed Guidance at 41230.

situations in which a transaction is subject to mandatory clearing under both Title VII and a foreign regime (such as the European Market Infrastructure Regulation (“EMIR”)). Indeed, the CFTC acknowledges this shortcoming in the Proposed Guidance, and states that it “will continue its efforts to address these issues through close coordination and consultation with its regulatory counterparts in other jurisdictions.”<sup>27</sup> As a matter of practical necessity, we expect some resolution on this issue will ultimately be reached by way of international agreement or harmonization of rulemaking, but at present there is no clear answer.

Similarly, as discussed above, the Proposed Guidance provides very little information about what qualitative or quantitative measures will be used to determine whether a regime or portion of foreign regulations are comparable to the U.S. regime and thus eligible for substituted compliance. The CFTC indicates it will abide by principles of “international coordination and comity,”<sup>28</sup> but does not specify whether regimes such as EMIR (or, for that matter, other implementations of the Group of 20 nations agreement that OTC derivatives should be centrally cleared) would be considered sufficiently comparable to allow substituted compliance.

The Proposed Guidance also leaves open the question of how the status of derivative clearing organizations (“DCOs”) and other market utilities might affect the analysis of whether a non-U.S. person is required to register with the CFTC and which requirements apply to it. For instance, if a swap is cleared through a U.S. person DCO, does a non-U.S. person that transacts in that swap treat the DCO as its counterparty for purposes of the SD and MSP registration analyses? If the DCO is a non-U.S. person, is a non-U.S. SD relieved of its duty to comply with most of the Transaction-Level Requirements? Finally, if a swap is traded on a swap execution facility or a designated contract market, the counterparties may not know each others’ identity until after execution. In that case, how would a non-U.S. person determine whether the Transaction-Level Requirements would apply?

## Conclusion

The Proposed Guidance is a useful step in providing clarity in the extraterritorial application of the swaps and swap entity aspects of Title VII. However, issuing the Proposed Guidance in the form of an interpretative release is not without controversy and it is not clear that there is sufficient Commission support to adopt the Proposed Guidance in its current form as a final release. Additionally, as CFTC Commissioner Jill Sommers noted in her statement accompanying the Proposed Guidance, given that this mechanism essentially skirts the Administrative Procedure Act by having the substance of a rule, but the form of

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<sup>27</sup> Proposed Guidance at 41235.

<sup>28</sup> Proposed Guidance at 41229.

an interpretative release,<sup>29</sup> it could very well be the subject of litigation if adopted. Without a doubt, the Proposed Guidance will be subject to extensive public comment,<sup>30</sup> and we expect that the final version of the Proposed Guidance will reflect at least some changes to address those comments.

There are also a number of instances where the CFTC indicated it was considering something, but not proposing it for now (*e.g.*, whether a U.S. person's foreign subsidiaries should themselves be considered U.S. persons), and if the CFTC's view on those items shifts, it could have a material impact on the final version of the Proposed Guidance. Lastly, foreign regulators may perceive some of the positions taken by the CFTC as over-reaching, and they may exert pressure on the CFTC to change some of the Proposed Guidance. Although we expect there to be a number of not insignificant revisions between the proposed and final versions of the Proposed Guidance, we do not expect to see any major liberalization of the CFTC's approach.

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<sup>29</sup> Proposed Guidance at 41239.

<sup>30</sup> Comments on the Proposed Guidance are due 45 days after its publication in the Federal Register.

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Proposed Guidance on Extraterritorial Reach of Title VII

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