Regulatory Update, Issues and Concerns for Derivatives End-Users

A Gibson Dunn Energy Group complimentary webcast briefing

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Today's Presenters

Moderator: **William S. Scherman**, Chair of Gibson Dunn's Energy, Regulation & Litigation practice and former General Counsel of the Federal Energy Regulatory Commission and chief of staff and senior legal and policy advisor for the FERC beginning in 1987. Mr. Scherman advises companies on litigation, commercial, regulatory and legislative matters relating to the U.S. and international energy markets, and has litigated high-profile energy investigation and enforcement matters before the FERC and in the federal courts and represents large electric utilities before the FERC and state regulators.

Lael E. Campbell, Director Regulatory and Governmental Affairs, Constellation Energy (An Exelon Company). Mr. Campbell has been with Exelon/Constellation since 2008, where he currently serves as a Director of Regulatory and Governmental Affairs supporting the Constellation business. Prior to joining the Regulatory Affairs team, Mr. Campbell was responsible for regulatory and compliance matters associated with Constellation's commodity trading business. A former CFTC attorney, Mr. Campbell has taken a leading role in the company's Dodd-Frank implementation and regulatory initiatives, advising management on CFTC rulemakings and internal contingency planning, and overseeing Dodd-Frank compliance implementation teams. Previously a Senior Trial Attorney with the Commodity Futures Trading Commission, Mr. Campbell served as lead counsel on a variety of cases involving the derivatives markets. He began his career as a federal appellate lawyer and special assistant U.S. attorney for the U.S. Social Security Administration, where he argued a number of cases in Federal Circuit Court of Appeals.

Today's Presenters

Jeffrey L. Steiner, Counsel in Gibson Dunn's Energy, Regulation & Litigation practice. Mr. Steiner assists clients with requirements resulting from the Dodd-Frank Act and with other matters relating to derivatives, the Commodity Exchange Act and the CFTC. Mr. Steiner previously served as Special Counsel in the Division of Market Oversight at the CFTC and served as Team Lead for the Real-Time Public Reporting of Swap Transaction Data (Part 43) rulemaking team for both the proposed and final rules. He also previously served as an attorney-advisor in the CFTC's Division of Market Oversight.

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CFTC Overview

New CFTC Chairman and Commissioners

- **In June 2014, the Senate confirmed new CFTC Chairman Timothy Massad and new Commissioners Sharon Bowen and J. Christopher Giancarlo**.
  - The new Chairman and Commissioners join Commissioner Mark Wetjen.
  - The fifth Commissioner seat has been vacant since August 2014, when former Commissioner Scott O'Malia resigned.

Chairman Massad

Commissioner Wetjen

Commissioner Bowen

Commissioner Giancarlo

CFTC v. FERC Jurisdiction

- The CFTC has jurisdiction over energy derivatives (e.g., futures contracts, swaps and options).
  - The scope of energy products is extremely broad and includes derivatives on natural gas, oil, electricity, etc.
- FERC has jurisdiction over physical electricity and natural gas contracts (e.g., spot contracts, forward contracts).
- Both agencies have Anti-Manipulation authority.
  - *Hunter* case jurisdictional dispute
- CFTC/FERC Memoranda of Understanding
  - Facilitates information-sharing between agencies
  - Establishes a process for agencies to notify each other of certain activities that may involve overlapping jurisdiction

Key Requirements in Effect for End-Users

Date	Rule/Requirement	Action
June 10, 2013	Mandatory clearing for financial entities (including financial end-users and CTUs) for most interest rate swaps and credit default swap indices	Financial end-users are required to clear certain interest rate swaps and credit default swap indices.
September 9, 2013	Mandatory clearing for all swap market participants (including nonfinancial end-users) with respect to most interest rate swaps and credit default swap indices	Nonfinancial end-users are required to either elect the end-user clearing exception or clear their interest rate and credit default swaps.
October 31, 2013	Final reporting requirements became effective (all reporting requirements now effective)	All end-users that are reporting counterparties must report all swaps for which they cannot claim no-action relief.
October 27, 2014	Final rule permitting exclusion of "utility operations-related swaps" when applying the *de minimis* exception from swap dealer registration.	Allows entities to exclude "utility operations-related swaps" where counterparty is a "utility special entity" for purposes of determining whether its swap dealing activity has exceeded the Special Entity *de minimis* Threshold of $25 million. Such transactions are still subject to the general *de minimis* Threshold (currently $8 billion but may be reduced to $3 billion in late 2017 absent further CFTC action).

Timeline of Upcoming Dates for End-Users

Date	Rule/Requirement	Action
Q4 2014	Comments due on Re-proposals of U.S. margin rules for uncleared swaps	Comments on the Prudential Regulators Re-proposal are due on November 24, 2014. Comments on the CFTC's Re-proposal are due on December 2, 2014 End-users should pay careful attention to the definition of "financial end user."
Q1 2015	Comments due on Proposed Interpretive Guidance relating to the classification of forward contracts with embedded volumetric optionality	The CFTC has proposed interpretive guidance that amends their original guidance related to the seven part test for embedded volumetric optionality in forward contracts.
Q1/Q2 2015	Final Rules for Position Limits on Certain Physical Commodity Derivatives	Chairman Massad and certain CFTC Commissioners have described their goal to finalize position limits rules. We expect them to finalize the rules in the first half of 2015.
December 2015	Variation margin requirements for non-cleared swaps are expected to apply to financial end-users	The international Working Group on Margining Requirements proposed that variation margin requirements begin to apply in December 2015. Would apply to those trades subject to margin requirements.

Swaps vs. Forwards

Classification of Swaps vs. Forwards

- Historically, the CFTC had jurisdiction over futures contracts and options on those futures contracts.
- With the passage of the Dodd-Frank Act in July 2010, the CFTC's oversight of the derivatives markets was greatly expanded by bringing the previously unregulated "swaps" market within the purview of the CFTC.
- Definition of Swap in Final Product Definitions Rule
  - The Dodd-Frank Act directed the CFTC to issue rules further defining the term "swap," which the agency did in August 2012 (77 Fed. Reg. 48,207).
  - Forward Contract Exclusion
    - The Final Product Definitions Rule explained that while swaps and options are within the CFTC's jurisdiction, forward contracts with the intent to physically deliver are outside the scope.
    - Excludes "any sale of a nonfinancial commodity or security for deferred shipment or delivery, so long as the transaction is intended to be physically settled."
    - Includes specific tests for applying the Forward Contract Exclusion to contracts with embedded price and/or volumetric optionality, certain contracts for the supply and consumption of energy, and contracts settled by book-out.

Forward Contracts with Embedded Volumetric Optionality

- In the preamble to the Final Product Definitions Rule, the CFTC explained that forward supply contracts with embedded volumetric optionality will satisfy the forward contract exclusion from the definition of "swap" if they meet all prongs of a seven part test.

  1. The embedded optionality does not undermine the overall nature of the transaction as a forward contract;
  2. The predominant feature of the transaction is actual delivery;
  3. The embedded optionality cannot be severed and marketed separately from the overall transaction in which it is embedded;
  4. The seller of a nonfinancial commodity underlying the transaction intends, at the time it enters into the transaction, to deliver the underlying nonfinancial commodity if the option is exercised;
  5. The buyer of a nonfinancial commodity underlying the transaction intends, at the time it enters into the transaction, to take delivery of the underlying nonfinancial commodity if it exercises the embedded volumetric optionality;
  6. Both parties are commercial parties; and
  7. The exercise or non-exercise of the embedded volumetric optionality is based primarily on physical factors, or regulatory requirements, that are outside the control of the parties and are influencing demand for, or supply of, the nonfinancial commodity.

- This seven-prong test (and, in particular, the seventh prong) has many end-users concerned that even routine supply contracts could be considered swaps (or trade options) and subject to onerous requirements applicable to swaps.

Example Forward Contract with Embedded Volumetric Optionality

- An electric utility enters into a supply contract with a natural gas producer under which it (1) commits to purchase a ***non-nominal amount*** of natural gas and (2) has an option to purchase additional natural gas if load increases due to weather variability (i.e., if load increases due to a physical requirement outside the control of the parties).

- Consider whether contract classification would be different if:
  - The electric utility only committed to receiving a nominal amount of natural gas
  - The option to purchase additional gas was not contingent on weather variability, and could be determined based on economic factors.

CFTC's Proposed Interpretive Guidance

- In response to concerns raised by physical commodity market participants, on November 3, 2014, the CFTC approved proposed interpretive guidance that would modify the seven-part test set forth in the Final Product Definitions Rule.

- The proposed interpretive guidance has not yet been published in the Federal Register.

- Based on the "fact sheet" issued by the CFTC, the proposal will:
  - Modify the fourth and fifth prongs to clarify that they apply to both puts and calls;
  - Modify the seventh prong to clarify that:
    - At the time the parties enter into the agreement, the embedded volumetric optionality must be primarily intended to address physical factors or regulatory requirements that reasonably influence the supply of, or demand for, the commodity;
    - The phrase "physical factors" should be construed broadly to include any fact or circumstance that could reasonably influence the parties' supply of or demand for the commodity, including environmental factors, relevant "operational considerations," and broader social forces, such as changes in demographics or geopolitics; and
  - Clarify that electric demand response agreements may be characterized as the product of a regulatory requirement within the meaning of the seventh prong.

Is it a Trade Option?

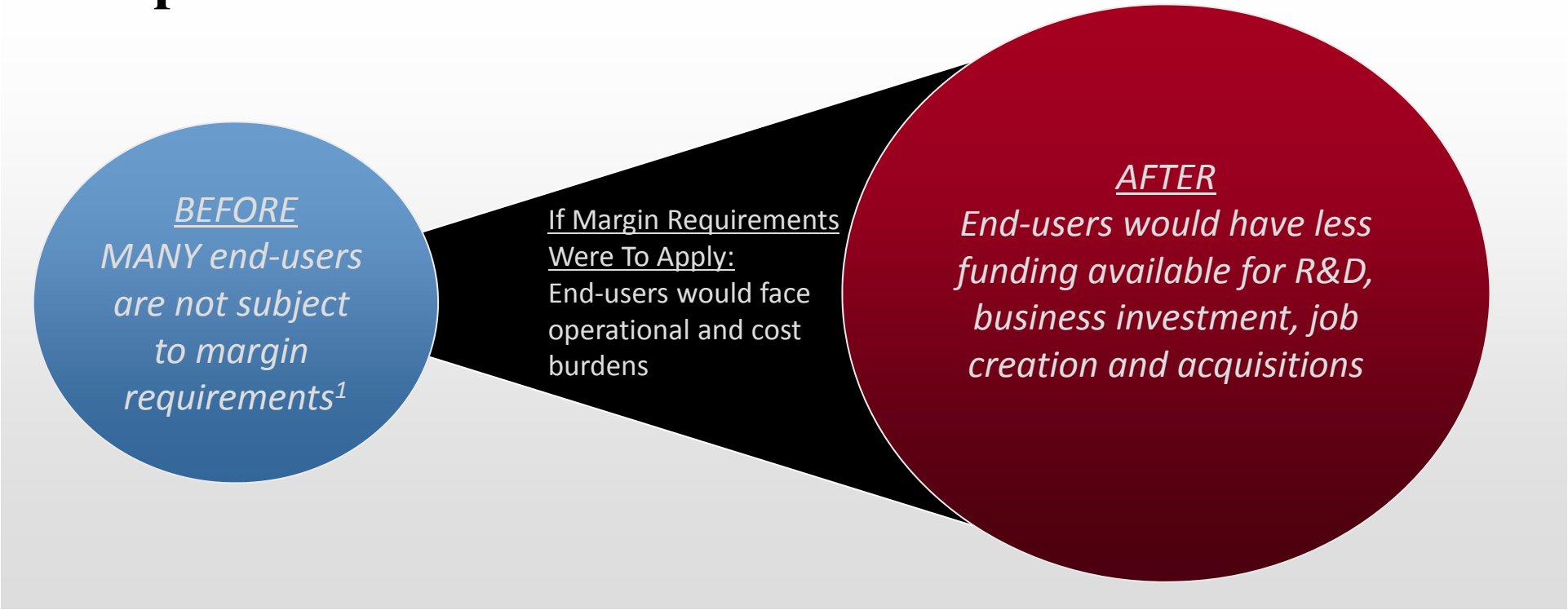
- If a particular contract fails the seven prong test for embedded volumetric optionality, it may still be eligible for the trade option exemption. Trade options are subject to fewer requirements than "swaps."
- To qualify for the trade option exemption, a commodity option must meet the following criteria:
  - Seller of the option (the offeror) must be:
    - An eligible contract participant ("ECP") (See CEA Section 1a(18) and CFTC Regulation 1.3(m)(7)) or
    - a commercial participant (i.e., a producer, processor or commercial user of, or a merchant handling the commodity that is the subject of the commodity option transaction, or the products or byproducts thereof), and such offeror is offering or entering into the commodity option transaction solely for purposes related to business as such (See CFTC Regulation 32.3(a)(2));
  - The option is offered to a commercial participant; AND
  - The parties must intend for the option to be physically settled so that, if exercised, the option would result in the sale of an exempt or agricultural commodity for immediate or deferred shipment or delivery.

Distinguishing Swaps vs. Trade Options vs. Forwards – Why This Matters

Type of Requirement	Swaps	Trade Options	Forwards
Clearing/Trade Execution	Mandatory clearing and trade execution may be required depending on counterparty status/applicability of end-user clearing exception	Mandatory clearing and trade execution may be required depending on counterparty status/applicability of end-user clearing exception	Do not need to be cleared; can be executed via any means
Reporting	Must be reported to an SDR within specified time frame, even if between two commercial end-users	Reporting requirements depend on counterparty status: • If one counterparty SD/MSP, report • If both counterparties commercial end-users or eligible contract participants ("ECP"), may report annually on Form TO.	No reporting requirements
Position Limits	Count towards position limits	Count towards forward position limits, as proposed. May be excluded in final rule.	Do not count towards position limits
SD/MSP Status	Must be considered	Need not be considered	Need not be considered
Counterparty Status	Must verify counterparty status to determine reporting party	Must verify counterparty is either an ECP or a producer, processor, commercial user, or merchant of the commodity AND intends for option to be physically settled	Counterparty status need not be considered
Margin	May be subject to mandatory margin requirements for uncleared swaps, depending on counterparty status	May be subject to mandatory margin requirements for uncleared swaps, depending on counterparty status	Not subject to mandatory margin requirements

Margin Requirements for Uncleared Swaps

Margin for Uncleared Swaps Would Be a Significant Departure From Current Market Practice for End-Users



- According to a recent survey of corporate treasury officials, 65% of respondents have not taken steps to establish credit support arrangements required in proposed margin rules.
- Over two-thirds of respondents reported that a margin requirement on uncleared OTC derivatives would have a moderate or significant impact on capital expenditures.
- 91% of respondents indicated that a margin requirement would alter their hedging strategy.

[1] Coalition for Derivatives End-Users: The Impact of Margin Requirements on Main Street Businesses

Margin Requirements for Uncleared Swaps

- CFTC and Prudential Regulators have re-proposed their rules relating to margin requirements for uncleared swaps.
  - Re-proposals are currently open for public comment (Prudential Regulators' closes on 11/24/14 and CFTC's closes on 12/2/14).
  - Prudential Regulators rule applies to swap dealers that are prudentially regulated (e.g., banks) whereas the CFTC's rule applies to non-bank swap dealers.
  - The Prudential Regulators' and CFTC's Re-proposals are substantively similar, although there are a few differences.
- The re-proposals would place requirements on swap dealers and major swap participants ("MSPs") on uncleared swaps between such entities and (i) other swap dealers or MSPs or (ii) "financial end users" as defined in the rule.
  - The rule would not apply to swaps with commercial end-users.
- There are some concerns as to whether or not certain affiliates (e.g., centralized treasury units) of nonfinancial end-users would be caught in the definition of "financial end user" and subject to monitoring and margin requirements.
- There are also concerns over the indirect effects that may result on non-financial end-users as a result of the new margin requirements on uncleared swaps.

Position Limits and Aggregation

Position Limits and Aggregation

- In October 2011, CFTC issued a final rule to establish federal position limits for futures, options and swaps for certain agriculture, energy and metals commodities.
- That rule was challenged by the International Swaps and Derivatives Association ("ISDA") and the Securities Industry and Financial Markets Association ("SIFMA") in the U.S. District Court for the District of Columbia.
- In September 2012, the District Court vacated and remanded the final position limits rule to the CFTC for further action on the basis that the CFTC incorrectly interpreted Section 4a of the Commodity Exchange Act.
- The CFTC re-proposed its position limits rule in December 2013 and its related aggregation rule in November 2013. The initial comment period for these two proposed rules closed in early 2014. The CFTC later re-opened the comment period until August 4, 2014 after a public roundtable was held on these proposals.
- It is expected that the CFTC will finalize the re-proposed rules in the first half of 2015.
  - In a speech last week, CFTC Commissioner Bowen said regarding the position limits rules, "These rules have been discussed for years now, and it is time for the Commission to make the decisions it needs to make to get the rules finalized."

The Re-Proposed Position Limits Rule

- Establishes Position Limits to 28 "Core Referenced Futures Contracts"
  - 4 of 28 are energy contracts:
    - NYMEX Light Sweet Crude Oil;
    - NYMEX NY Harbor ULSD;
    - NYMEX RBOB Gasoline; and
    - NYMEX Henry Hub Natural Gas.
  - Would apply to all futures contracts, "economically equivalent" futures contracts, options, swaps, and swaptions (including OTC, exchange traded transactions, and affiliate positions) in the Core Referenced Contracts.
- Spot Month Limits
  - Initial limits based on levels currently in place at DCMs.
  - Subsequent limits set by CFTC every two years and cannot exceed 25% of estimated deliverable supply.
- Non-Spot Month Limits - net position cannot exceed 10% of largest annual average open interest for first 25,000 contracts and 2.5% of open interest thereafter.

Concerns With Re-Proposed Position Limits Rule

- The re-proposed position limits rule narrows the scope of the bona fide hedge exemption to only apply to specifically enumerated hedging transactions.
  - Entities can request an interpretive letter regarding risk-reducing practices not enumerated in the proposed rule, but additional enumerated hedges can only be added through notice and comment rulemaking.
  - Cross-commodity hedges may not meet the quantitative factor to qualify for bona fide hedging treatment.
- The re-proposed rule imposes additional reporting requirements on market participants seeking exemptions from the position limits
  - Generally, anyone claiming an exemption must file with the CFTC.
  - Anticipatory hedging transactions must be reported to the CFTC at least 10 days in advance if they would result in the trader exceeding the position limit.
  - The conditional spot month exemption requires daily filings of statements related to cash commodity positions, including inventory, fixed price purchases/sales, etc.

The Re-Proposed Aggregation Rule

- The Re-Proposed Aggregation Rule requires entities to aggregate 100% of accounts or positions in which they hold a greater than 10% ownership or equity interest.

- Entities may be exempt when:
  - Owned Entity Exemption - ownership or equity interest is between 10% and 50% and notice is filed with the CFTC describing circumstances that warrant disaggregation;
    - BUT, if ownership or equity interest is greater than 50%, entities may apply to the CFTC and request an exemption from aggregation, which may be approved if the CFTC concludes that the applicant has met certain criteria outlined in the re-proposal.
  - Law Information Sharing Restriction - there is a reasonable risk that sharing information would cause either party to violate federal, state, or foreign law and notice is filed with the CFTC along with a memorandum of law in support;
  - Broker-Dealer Activity - registered broker-dealers that hold a 50% or less ownership interest in an entity as a result of broker-dealer activities in the normal course of business; **or**
  - Exemption for Underwriting – ownership interest is based on the ownership of securities constituting the whole or part of an unsold allotment to such entity.

Suspension of Early Termination Rights Under Certain Derivatives Contracts

G-SIFI Resolution Issue

- New guidance from the FSB and rules from global regulators could require derivatives end-users to adhere to an ISDA G-SIFI Resolution Default Protocol in order to continue to trade with their G-SIFI counterparties (including their affiliates).

- Adherence to the Protocol would mean overriding the early termination provisions under the ISDA Master Agreement by limiting default rights under a Special Resolution Regime and by addressing default rights under U.S. Insolvency Proceedings with respect to another adhering party. It is expected that regulations will prohibit G-SIFIs and their affiliates from entering into swaps with counterparties that do not adhere to the Protocol or otherwise agree to suspend their early termination rights in the manner set forth in the Protocol with respect to a resolution or insolvency of the G-SIFI or its affiliates.

- The stay of early termination rights could—
  - Create significant uncertainty and risks for derivatives end-users that are using swaps to hedge their risks.
  - Effectively strip congressionally-given rights that provide stability and efficiency in derivatives markets; rights that are relied on by market participants to ensure collateral is protected. Counterparty credit relationships are premised on the long-established certainty of these rights.
  - Create operational complexities for end-users by requiring them to adhere to and opt out of the Protocol and amend existing ISDA Master Agreements.

Reporting Concerns

Inter-affiliate Reporting Concerns

- CFTC Letter 13-09 provides relief for the reporting of inter-affiliate swaps, assuming certain conditions are met.
  - One condition requires that all external market-facing swaps with unaffiliated counterparties must be reported to an SDR pursuant to or as if pursuant to Parts 43 (real-time reporting) and 45 (regulatory reporting).
    - This is a challenging requirement for some companies that execute external swaps out of non-U.S. affiliates.
    - Quarterly reporting is required for swaps between majority-owned affiliates.

- Certain other jurisdictions (e.g., the EU) have not provided similar relief and accordingly end-users are forced to report internal transactions that are of no value to regulators.
  - Given operational burdens, lack of staff and costs, many end-users that enter into inter-affiliate transactions to manage their risk are having trouble complying with such requirements or are forced to enter into costly or unfavorable delegation agreements in order to achieve compliance.

Mandatory Clearing and the Availability of the End-User Exception

Mandatory Clearing and the End-User Exception

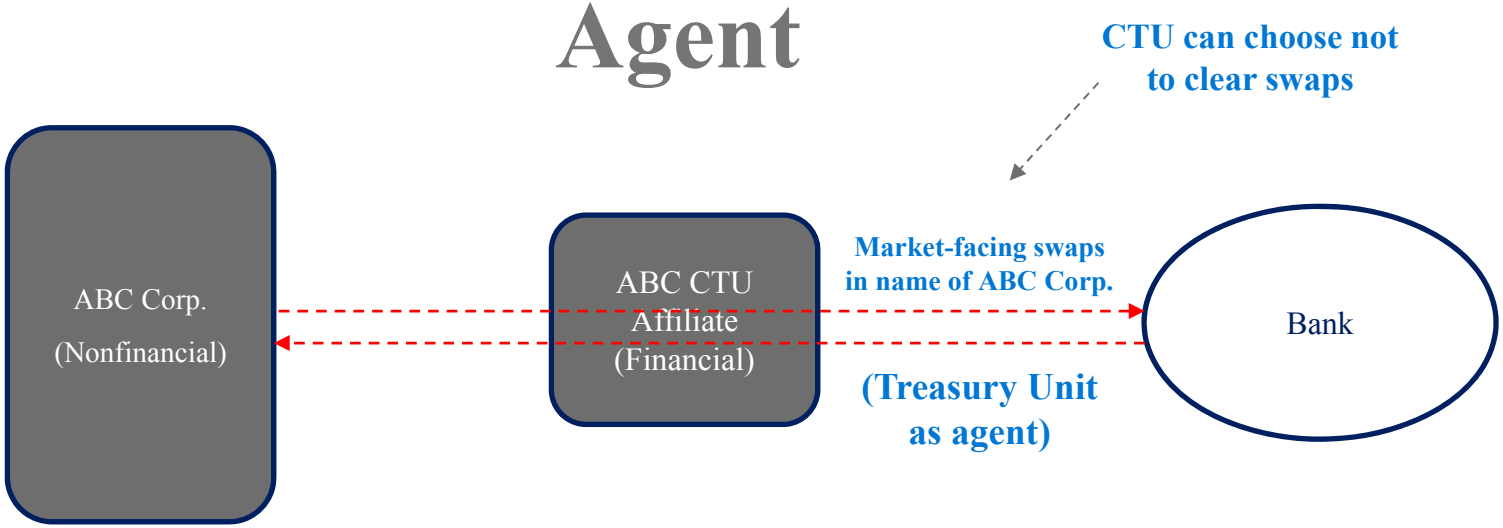
- Currently only certain interest rate swaps and certain credit default index swaps are subject to mandatory clearing requirements.
  - Energy swaps are not subject to mandatory clearing requirements at this time.
- CEA Section 2(h)(7) provides and CFTC regulation 50.50 implements an exception to the mandatory clearing requirement for swaps in which one party:
  - Is not a "financial entity" as defined in CEA Section 2(h)(7)(C)(i).
    - Note that 2(h)(7)(C)(i)(VIII) provides that a financial entity includes "a person predominantly engaged in activities that are in the business of banking, or in activities that are financial in nature, as defined in [section 4k of the Bank Holding Company Act 1956]."
  - Is using swaps to "hedge or mitigate commercial risk."
  - Notifies the CFTC, in a manner set forth by the CFTC, of how it meets its financial obligations with respect to entering into cleared swaps.

Centralized Treasury Units (CTUs)

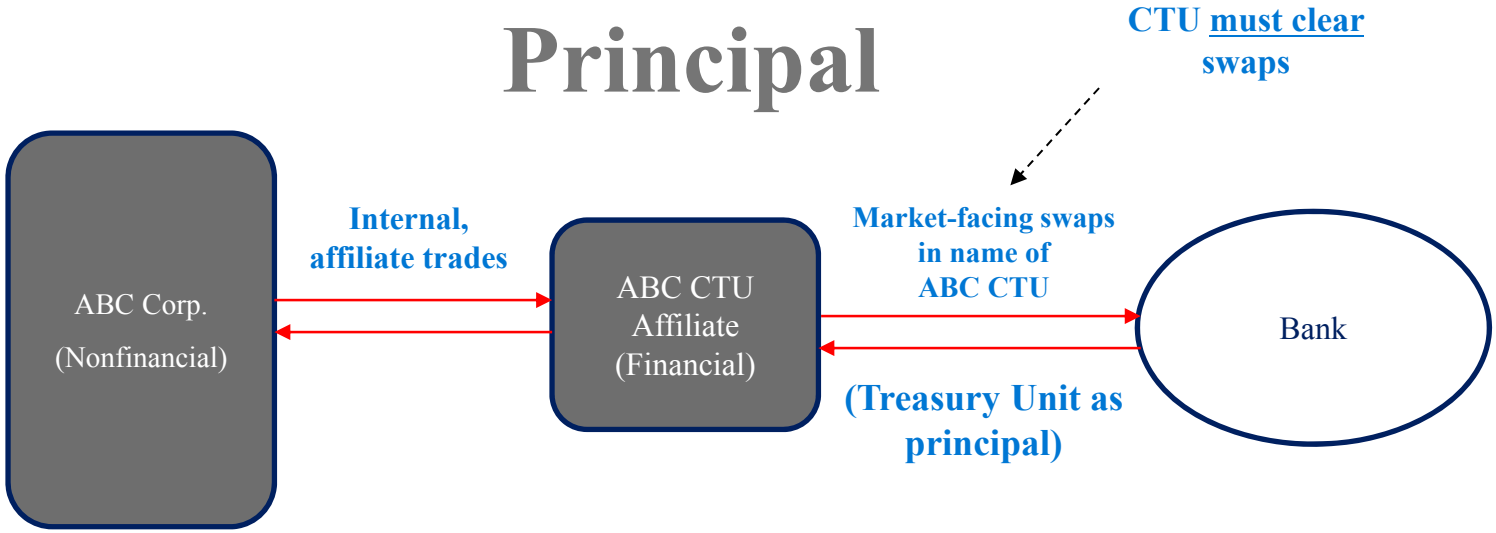
- Section 723 of the Dodd-Frank Act makes the end-user clearing exemption available to *only* those separate, CTUs that "act[] on behalf of the [affiliate] and as an agent."
  - In other words, CTUs that are financial in nature and that act as a "principal" in trades for affiliates would not be eligible for the end-user clearing exception.
- Many end-users that use a CTU to hedge execute trades as a principal to:
  - Reduce risk (i.e., fewer external transactions), reduce costs, reduce duplication, centralize oversight of swaps activities, enable netting.
- Different regulatory treatment of execution as a principal and execution as an agent can create a competitive disadvantage for end-users with CTUs and would discourage end-users from using this proven risk mitigation technique.

Centralized Treasury Unit Acting as Agent/Principal

Agent



Principal



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No-Action Relief for CTUs

- On June 4, the CFTC's Division of Clearing and Risk issued CFTC Letter No. 13-22 which provides no-action relief from the mandatory clearing and trading requirements for "eligible treasury affiliates" that meet several criteria.

- "Eligible treasury affiliates" are eligible for the relief.
  - Must be directly, wholly owned by a non-financial entity and must not be indirectly majority-owned by a financial entity.
  - Must not be affiliated with an SD, SBSD, MSP, MSBSP or SIFI.
  - Ultimate parent must not be a "financial entity" and be able to identify all wholly- and majority-owned affiliates, of which a majority must qualify for the end-user exception.

- The eligible treasury affiliate cannot combine, net or consolidate risk of any financial affiliates.

- All external swaps taking advantage of the relief must be guaranteed.

- Must comply with reporting requirements similar to those to elect the end-user exception.

Concerns with CFTC No-Action Relief

- While end-users can take advantage of the no-action relief in CFTC Letter 13-22, the Letter includes a number of qualifications and conditions that make it of limited or no use to several end-user companies.

- Some of the issues that have been identified by end-user companies include:
  - *Form of relief*: Boards may be hesitant to approve a decision (e.g., not to clear swaps) that violates the law based only on an assurance that staff will not recommend enforcement.
  - CTU are not eligible if ***affiliated*** with a swap dealer, MSP, security-based swap dealer, security-based MSP or a nonbank SIFI.
  - Ultimate parent of the CTU must (1) not be a "financial entity"; and (2) be able to identify all of its wholly- and majority-owned affiliates and, of those identified, a majority must qualify for the end-user exception.
  - "General condition" (iii) could render end-users ineligible for the relief if a CTU and another financial affiliate trade with the same non-financial affiliate.
  - "General condition" (i) requires that a CTU may only enter into *swaps* to mitigate or hedge the risk of one or more affiliates.
  - Swap payment obligations of a CTU must be guaranteed by a non-financial parent.

Questions?

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