

Dodd-Frank Wall Street Reform and Consumer Protection Act  
NAESB Board Presentation (December 6, 2012)

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Act) was signed into law by the President on July 21, 2010. This summary is from the perspective of Non-Financial End-User which comprises a majority of NAESB membership.

**Background:**

Generally, the rules appear to be manageable by end-users, but would impose an additional administrative and cost burdens associated with establishing and maintaining an end-user's eligibility to use the end-user exception from the mandatory clearing requirement. There remains concern that the rules may reduce both the availability of various swap instruments, and counterparty liquidity, thereby restricting an end-user's ability to execute swap transactions with counterparties on a timely basis.

The Commodity Futures Trading Commission (CFTC) previously issued an order amending the previously-issued "Temporary Exemptive Relief" from certain provisions of the Act that would have otherwise taken effect on July 16, 2011. The temporary exemptive relief applies to provisions of the Act that require rulemakings. The temporary exemptive relief will expire upon the earlier of the effective date of the relevant Final Rules or December 31, 2012.

**Major Final Rules affecting End-Users:**

Position Limits – Final Rule on position limits during both short term and long term periods was effective on 1/17/2012. ISDA and SIFMA filed a complaint at the U.S. District Court for D.C. contending the decision making process in developing the rule was flawed and the CFTC adopted the rule without making findings as to the necessary and appropriateness of the position limits, required by the Act. In regulatory terms, the rule is "arbitrary and capricious". On 9/28/2012, the District Court for D.C. vacated and remanded Position Limits final rule to CFTC. On 11/16/2012, the CFTC filed an appeal of this court ruling with the U.S Court of Appeals for the D.C. Circuit. Position Limits are not likely to be resolved until mid to late 2013.

Definition of "Swap Dealer" (SD), "Major Swap Participant" (MSP), "Eligible Contract Participant" (ECP), etc. – Final Rule was effective 7/23/2012.

End-User Exception – Final rule setting forth requirements to select exception to mandatory clearing was effective 9/17/2012. On 11/28/2012, the CFTC finalize the determination that certain interest rate swaps and credit default swaps must be cleared. The clearing determination will be phased-in pursuant to a previously-adopted compliance schedule. The CFTC must still propose and finalize determinations that other types of swaps, including "other commodity" swap must be cleared.

Definitions of "Swap" – Final Rule will be effective on 10/12/2012. Final Rule requests comments on forward contracts with embedded volumetric options. ConocoPhillips and others in comments filed with CFTC are concerned with the forward contract exclusion that is at best ambiguous. Industry comments also raise serious issues on whether transportation, storage and similar services are swaps subject to recordkeeping, reporting, position limits and margin requirements (See INGAA comments). ISDA, EEI and NAESB conducted meetings and conferences to advise their membership on compliance efforts. On 11/14/2012, CFTC's Office of General Counsel (OGC) issued a response to Frequently Asked Questions (FAQ) that provided OGC's view that typical transport and storage agreements with demand/commodity charges would not be found to be a swap. OGC's document is available at this link: ([http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/leaselike\\_faq.pdf](http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/leaselike_faq.pdf))  
**NAESB 2012/2013 WGQ Annual Plans include CFTC Final Rule impact on NAESB Contracts (Base Gas Contract, NGL Master Agreement, Retail Gas/Electric Contract). Meetings held 10/5/2012 and 11/9/2012. Next meeting will be scheduled after CFTC takes actions in response to industry comments and the questions in the swap definition Final Rule.**

Commodity Options – Final Rule was effective 6/26/2012. **This rule's trade option exemption will be analyzed in conjunction with Swap definition above.**

Recordkeeping and Reporting – Final Rule was effective on 3/13/2012. Reporting compliance deadlines will be phased-in depending on counterparties and types of swap transactions. Recordkeeping requirements are in effect at this time. Non-Financial End-Users' compliance date for reporting of all types of swap transactions is 4/10/2013.

Real-Time Reporting – Final Rule was effective on 3/9/2012. Reporting Compliance deadlines will be phased-in depending on counterparties and types of swap transactions. Non-Financial End-Users' compliance date is 4/10/2013.

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Recordkeeping and Reporting of Pre-Enactment or Transition Swaps (Historical Swaps) – Final Rule was effective on 8/13/2012. Reporting Compliance deadlines will be phased-in depending on counterparties and types of swap transactions. For “other commodity swaps” (e.g., energy swaps) SD reporting requirements begins 1/10/2013 with completion of reporting by 2/9/2013. Non-Financial End-Users’ reporting date begins 4/10/2013 with completion of reporting by 5/10/2013. These reporting deadlines were clarified by a CFTC No-Action Letter No 12-32 issued on 11/19/2012 that is available at the following link: (<http://cftc.gov/ucm/groups/public/@lrllettergeneral/documents/letter/12-32.pdf>)

Anti-Market Manipulation Rule – Final Rule on market manipulation or attempted market manipulation was effective 8/15/2011.

Whistleblower Rule – Final Rule on whistleblower program was effective 10/24/2011.

**Other Final Rules affecting End-users:**

Internal Business Conduct Standards for SDs and MSPs – Final Rule was effective 6/4/2012. Duties, reporting, recordkeeping, and daily trading records requirements for SDs and MSPs to impact conduct of trading and resulting transactions with counterparties.

External Business Conduct Standards for SDs and MSPs – Final Rule was effective 4/17/2012. External business conduct standards will govern SDs and MSPs in their dealings with swap counterparties. It is anticipated that these requirements may extend times for execution of swap transactions. SDs are in the process of amending ISDAs with counterparties in order to to comply with these requirements. See below.

Margin Requirements for Uncleared Swaps for SDs and MSPs – Comment period on Proposed Rule reopened until 9/12/2012 in light of consultative paper by Basel Commission on Banking Supervision (BCBS) and the International Organization of Securities Commissions (IOSCO).

Swap Trading Relationship Documentation Requirements for SDs and MSPs– Proposed Rule would impose swap trading relationship documentation requirements on SDs and MSPs which impact counterparties. It is anticipated that most end-users should have no issues or concerns with providing this documentation to its SD and MSP counterparties.

Inter-Affiliate Clearing Exemption – Proposed exemption from clearing requirement for certain affiliates within a corporate group subject to conditions. On 11/28/2012, the CFTC issued No-Action Letter 12-35 granting relief from the clearing requirement for certain interest rate and credit default swaps entered into by affiliates. The no-action relief will remain in effect until the earlier of 4/1/2013, or the effective date of a CFTC final rule on the proposed inter-affiliate clearing exemption.

**Other Information for non-Financial End-Users:**

- Most applicable Final Rules are issued and the compliance timelines have started. Illustrative timeline with some deadlines are set forth on the embedded document compliments of Skadden Law Firm of Washington, DC:



CFTC\_Effective\_Dates\_Timeline Skadden

- CFTC approves a Re-Proposed Rule on Procedures to Establish Appropriate Minimum Block Sizes for Large Notional Off-Facility Swaps and Block Trades and Further Measures to Protect the Identities of Parties to Swap Transactions.
- On 6/28/2012, CFTC granted ICE Trade Vault provisional registration as Swap Data Repository (SDR). Depository Trust & Clearing Organization and Reval SDR Inc. have also sought “provisional” registration. (SDR Registration Rule issued 9/1/2011 effective 10/31/2011).
- On 7/23/2012, CFTC issues Legal Entity Identifier Order designating DTCC-SWIFT as the provider of CFTC Interim Compliance Identifier (CICI) used for recordkeeping and reporting of swap transactions. DTCC-SWIFT established a web portal that provides free access to legal names, parent-company names and other information on participants in financial transactions (including CICI, where available). The latest portal link is: <http://www.ciciutility.org> .
- On 8/13/2012, ISDA opened its ISDA D-F Protocol as part of its documentation Initiative to assist the industry with its compliance efforts including revisions to existing ISDA Agreements. More information available at the following links: (ISDA DF Documentation Initiative) <http://www2.isda.org/dodd-frank-documentation-initiative/> and

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(ISDA DF Protocol) <http://www2.isda.org/functional-areas/protocol-management/protocol/8> ISDA is targeting 1/1/2013 for adoption by counterparties to match SD's CFTC requirements.

- On 9/20/2012, EEI announced that its EEI Contract Drafting Committee is sponsoring an industry event on 9/12/2012 at various locations (Houston (live) with video-linked to New York, Chicago and Los Angeles). Event covered proposal on documentation for "book-outs" (required by 10/12/2012) and other document changes under swap definition and related rules.
- On 8/21/2012, CFTC issued a proposed Rule to exempt purchase or sale of specifically defined "financial transmission rights," "energy transactions," "forward capacity transactions," and "reserve or regulation transactions" that are offered or sold in a market administered by RTOs and ISOs pursuant to a protocol that is approved or permitted by FERC or PUCT.