INTRODUCTION TO THE UNITED STATES REGULATION OF SWAPS AND SECURITY-BASED SWAPS UNDER TITLE VII OF THE DODD-FRANK ACT

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BACKGROUND

On July 21, 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") was signed into law by President Obama. The Dodd-Frank Act constitutes the most sweeping financial reform package since the 1930s. Title VII of the Dodd-Frank Act ("Title VII") brought about a complete overhaul of the regulation of the over-the-counter ("OTC") derivatives market in the United States. In place of the previous regime in which OTC derivatives were largely exempt from substantive regulation, Title VII subjects all derivatives to substantive regulatory oversight. "Swaps" are generally regulated by the Commodity Futures Trading Commission (the "CFTC") under the Commodity Exchange Act (the "CEA"), and "security-based swaps" are regulated by the Securities and Exchange Commission (the "SEC" and, together with the CFTC, the "Commissions") under the Securities Exchange Act of 1934, as amended (the "Exchange Act").

On July 18, 2012, pursuant to Title VII, the SEC and the CFTC jointly issued a final release (the "Final Release") adopting final rules to further define the terms "swap," "security-based swap," "security-based swap agreement," and "mixed swap." 77 Fed. Reg. 48208 (Aug. 13, 2012). The Final Release also provided interpretive guidance with respect to the application of those definitions and exclusions from their scope.

The categorization of a financial instrument as a "swap" or a "security-based swap" has sweeping implications for its treatment under law. Among other matters, this categorization affects whether the instrument is considered a security for purposes of the federal securities laws, whether the instrument may lawfully be traded OTC or must be traded on, or subject to the rules of, an exchange, whether the instrument must be centrally cleared, and which reporting and recordkeeping requirements apply to the instrument.

Accordingly, this practice note provides an introduction to swaps and security-based swaps, including definitions, exclusions, governing entities and general regulatory requirements. Please be aware that this area of regulation is continuing to evolve and new rules are continuously being proposed and finalized.

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