

Section-by-Section Analysis

Over-the-Counter Derivatives Markets Act of 2009

Section 1. Short Title

This Act may be cited as the “Derivative Markets Transparency & Accountability Act”.

Section 2. Table of Contents

Section 3. Review of Regulatory Authority

This section requires inter-agency consultation prior to rulemaking under the bill. It clarifies that the bill is not intended to give CFTC jurisdiction over security-based swaps, nor to give the SEC jurisdiction over (non-security-based) swaps. It requires regulators to treat functionally or economically similar products similarly and provides for judicial review of inter-agency conflicts.

Section 4. International Harmonization

This section requires US regulators to consult and coordinate with foreign regulators on the establishment of consistent international standards with respect to the regulation of futures contracts, swaps and security-based swaps.

Title I — Regulation of Swap Markets

Section 101. Definitions

This section adds new definitions to the Commodity Exchange Act. The defined terms include “swap”, “security-based swap”, “swap dealer”, “security-based swap dealer”, “swap repository”, “major swap participant”, “major security-based swap participant”, “foreign exchange forward”, and “foreign exchange swap”. This section amends the definition of “eligible contract participant”: (1) by increasing (from \$25 to \$50 million) the amount that an instrumentality, agency, or department of a government must own and invest on a discretionary basis to be considered an eligible contract participant; and (2) by modifying asset requirements for an individual to be considered an eligible contract participant. This section also amends the definition of “registered entity” to include alternative swap execution facilities and swap repositories. This section provides that the CFTC may not exempt swaps from the provisions of the bill unless the bill expressly authorizes such an exemption.

Section 102. Jurisdiction

This section clarifies that the CFTC has exclusive jurisdiction over swaps.

Section 103. Clearing

Subsection (a). Clearing Requirement

This section requires persons other than eligible contract participants entering swaps to do so on

or subject to the rules of a board of trade designated as a contract market. It establishes a process under which swap clearing organizations submit to the CFTC, for prior approval, each swap or category, group, type, or class of swaps that the clearing organization seeks to accept for clearing. The CFTC must act on such requests within 90 days. Swaps must be submitted for clearing if a derivatives clearing organization will accept the swap. Swaps that are not accepted for clearing must be reported to a swap repository or the CFTC. This section also sets out reporting and clearing transition rules and provides an exception from the clearing requirement if one counterparty is neither a swap dealer or major swap participant and demonstrates to the CFTC's how they generally meet financial obligations associated with entering into non-cleared swaps. The exception does not apply if any counterparty is a Tier 1 financial holding company. This section further requires that swaps subject to the clearing requirement must not be traded except on a designated contract market (DCM) or an alternative swap execution facility, unless the swap is not listed on any DCM or ASEF. Agricultural swaps are not permitted except pursuant to a CFTC rule.

Subsection (b). Derivatives Clearing Organizations

Section 103(b)(1) requires derivatives clearing organizations that clear swaps to register with the CFTC. Section 103(b)(2) directs the CFTC to adopt rules governing entities registered as derivatives clearing organizations for swaps under this subsection and authorizes the CFTC to exempt from registration under this subsection a derivatives clearing organization (DCO) that is subject to comparable, comprehensive supervision and regulation on a consolidated basis by another regulator. Section 103(b)(2) further requires each DCO to designate a compliance officer. Section 103(b)(3) modifies core regulatory principles for DCOs, which include standards for minimum financial resources, participant and product eligibility, risk management, settlement procedures, safety of member or participant funds and assets, rules and procedures for defaults, rule enforcement, system safeguards, reporting, recordkeeping, disclosure, information-sharing, antitrust considerations, governance arrangements, conflict of interest mitigation, board composition, and legal risk. Section 103(b)(4) requires a DCO to provide the CFTC with all information necessary for the agency to perform its responsibilities.

Subsection (c). Legal Certainty for Identified Banking Products

This subsection clarifies that the Federal banking agencies, rather than the CFTC or SEC, retain regulatory authority with respect to identified banking products, unless: (1) a Federal banking agency, in consultation with the CFTC and SEC, determines that a product has been structured as an identified banking product for the purpose of evading the provisions of the Commodity Exchange Act, Securities Act of 1933, or Exchange Act; or (2) the identified banking product is a product of a non-Federally regulated bank, meets the definition of swap or security based swap, and has become known in the trade as a swap or security-based swap.

Section 104. Public Reporting of Aggregate Swap Data

This section directs the CFTC (or a derivatives clearing organization or swap repository designated by the CFTC) to make available to the public, in a manner that does not disclose the business transactions or market positions of any person, aggregate data on swap trading volumes and positions.

Section 105. Swap Repositories

This section describes the duties of a swap repository as accepting, maintaining, and making available swap data as prescribed by the CFTC; requires swap repositories to register with the CFTC; and subjects registered swap repositories to CFTC inspection and examination. This section also directs the CFTC to adopt rules governing entities that register as swap repositories, and authorizes the CFTC to exempt from registration any swap repository subject to comparable, comprehensive supervision or regulation by another regulator.

Section 106. Reporting and Recordkeeping

This section requires reporting and recordkeeping by any person who enters into a swap that is not cleared through a registered derivatives clearing organization or reported to a swap repository.

Section 107. Registration and Regulation of Swap Dealers and Major Swap Participants

This section sets out requirements for swap dealers and major swap participants, including registration with the CFTC, and directs the CFTC to prescribe rules for swap dealers or major swap participants. It also requires a registered swap dealer or major swap participant to (1) meet such minimum capital and margin requirements as the prudential regulators (for banks) or CFTC (for non-banks) shall prescribe; (2) meet reporting and recordkeeping requirements; (3) conform with business conduct standards; (4) conform with documentation and back office standards; and (5) comply with requirements relating to position limits, disclosure, conflicts of interest, and antitrust considerations. This section also requires registered swap dealers to meet set aside requirements for funds or property associated with an uncleared swap.

Section 108. Conflicts of Interest

This section directs the CFTC to require futures commission merchants and introducing brokers to implement conflict-of-interest systems and procedures relating to research activities and trading.

Section 109. Alternative Swap Execution Facilities

This section requires a facility for the trading of swaps to register with the CFTC as a designated contract market (DCM) or an alternative swap execution facility (ASEF). It permits voice brokers to enter and execute swaps subject to the clearing requirement if they process the swap through a regulated exchange or ASEF. This section also establishes core regulatory principles for ASEFs relating to enforcement, deterrence of abuses, anti-manipulation, monitoring, information collection and disclosure, position limits, emergency powers, recordkeeping and reporting, antitrust considerations, conflicts of interest, financial resources, and system safeguards. This section directs the CFTC to prescribe rules governing the regulation of alternative swap execution facilities, and authorizes the CFTC to exempt from registration under this section an alternative swap execution facility that is subject to comparable, comprehensive supervision and regulation by another regulator.

Section 110. Derivatives Transaction Execution Facilities and Exempt Boards of Trade

This section repeals the existing provisions of the Commodity Exchange Act relating to derivatives transaction execution facilities and exempt boards of trade, but allows such entities to petition the CFTC to be allowed to continue current operations for up to one year after the bill's effective date.

Section 111. Designated Contract Markets

Section 111 amends the core principles for contract markets in section 5(d) of the Commodity Exchange Act (CEA) to add a requirement that boards of trade must demonstrate adequate financial and other resources. It also makes clarifying and other amendments to core principles to improve transparency and enforcement. The core principles require compliance with core principles and CFTC rules.

Section 112. Margin

This section authorizes the CFTC to set margin levels for registered entities.

Section 113. Position Limits

This section requires the CFTC to establish position limits on swaps that perform a significant price discovery function and require aggregate limits across markets. This section further requires the CFTC to establish position limits on futures transactions for physically deliverable commodities that are applicable to spot month, each month, and all months aggregated, and to hold hearings on such position limits. The CFTC is also authorized to provide exemptions to position limits.

Section 114. Enhanced Authority over Registered Entities

This section enhances the CFTC's authority to establish mechanisms for complying with regulatory principles and to review and approve new rules for registered entities.

Section 115. Foreign Boards of Trade

This section prohibits the CFTC from permitting a foreign board of trade to provide members or other participants located in the United States with direct access to the electronic trading and order matching systems of the foreign board of trade with respect to a contract that settles against the price of a contract listed for trading on a CFTC-registered entity, unless the foreign board of trade meets, in the CFTC's determination, certain standards of comparability to the requirements applicable to U.S. boards of trade. This section also provides legal certainty for certain contracts traded on or through a foreign board of trade.

Section 116. Legal Certainty for Swaps

This section clarifies that no hybrid instrument sold to any investor and no transaction between eligible contract participants shall be void based solely on the failure of the instrument or transaction to comply with statutory or regulatory terms, conditions, or definitions.

Section 117. FDICIA Amendments

This section makes conforming amendments to the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA) to reflect that the definition of "over-the-counter derivative instrument" under FDICIA no longer includes swaps or security-based swaps as defined in this bill.

Section 118. Enforcement Authority

This section clarifies that the CFTC shall have exclusive authority for all provisions of Title I of the bill, other than new Section 4s(d) of the CEA (as added by Section 107, relating to capital and margin requirements for swap dealers and major swap participants), for which the federal banking agencies shall have exclusive enforcement authority with respect to banks and branches or agencies of foreign banks that are swap dealers or major swap participants.

This section also provides the federal banking agencies with referral authority with respect to the nonprudential requirements of the new Section 4s of the Commodity Exchange Act (relating to registration and regulation of swap dealers and major swap participants) and provides the CFTC with similar referral authority with regard to the prudential requirements of section 4s.

Section 119. Enforcement

This section clarifies that the anti-fraud and other enforcement authorities of the CFTC applies with respect to swaps and swap repositories, and clarifies the authority of the federal banking agencies with respect to swaps, swap dealers, major swap participants, swap repositories, alternative swap execution facilities, and derivatives clearing organizations.

Section 120. Retail Commodity Transactions

This section clarifies CFTC jurisdiction with respect to certain retail commodity transactions.

Section 121. Large Swap Trader Reporting

This section requires reporting and recordkeeping with respect to large swap positions that perform or affect a significant price discovery function with respect to registered entities.

Section 122. Other Authority

This section clarifies that this title, unless otherwise provided by its terms, does not divest any appropriate federal banking agency, the CFTC, the SEC, or other federal or state agency of any authority derived from any other applicable law.

Section 123. Antitrust

This section clarifies that nothing in this title shall be construed to modify, impair, or supersede antitrust law.

Section 124. Review of Prior Actions

This section requires the CFTC to review its prior actions to ensure that they are in compliance with the provisions of this bill.

Section 125. Expedited Process

This section authorizes the CFTC to use expedited and emergency procedures to carry out this bill.

Section 126. Effective Date

This section specifies that this title shall become effective 180 days after the date of enactment.

TITLE II—REGULATION OF SECURITY-BASED SWAP MARKETS

Section 201. Definitions under the Securities Exchange Act of 1934

This section adds and amends definitions under the Exchange Act, including amending the definition of “security” to include security-based swaps. A security-based swap is one that is primarily based on a security or a narrow-based security index. This section also provides that a securities dealer does not include a person who buys and sells security-based swaps unless they do so for persons who are not eligible contract participants. It further clarifies that, with regard to security-based swaps, the terms “buy” and “sell” include execution, early termination, assignment, exchanges, or extinguishments.

Section 202. Repeal of Prohibition on Regulation of Security-Based Swaps

This section repeals provisions enacted as part of the Gramm-Leach-Bliley Act and the Commodity Futures Modernization Act that prohibit the SEC from regulating security-based swaps and makes conforming amendments to the Securities and Exchange Act of 1934 (SEA).

Section 203. Amendments to the Securities Exchange Act of 1934

Section 203(a) adds a new section 3B to the Securities Exchange Act of 1934. New section 3B(a) requires security-based swap clearing organizations to submit to the SEC, for prior approval, each security-based swap or category, group, type, or class of security-based swaps that it seeks to accept for clearing. The SEC must act on such requests within 90 days. Security-based swaps must be submitted for clearing if a derivatives clearing organization will accept the security-based swap. Security-based swaps that are not accepted for clearing must be reported to a security-based swap repository or the SEC (3B(a)(5)). This subsection also sets out reporting and clearing transition rules (3B(a)(6) and (7)) and provides an exception from the clearing requirement if one counterparty is neither a security-based swap dealer or major security-based swap participant and none of the counterparties is a Tier 1 financial holding company (3B(a)(8)).

New section 3B(b) requires that security-based swaps subject to the clearing requirement must be traded on an exchange or an alternative swap execution facility, unless the security-based swap is not listed on any exchange or ASEF.

New section 3B(c) requires a clearing agency to provide the SEC with all information necessary for the agency to perform its responsibilities.

New section 3B also requires each clearing agency to designate a compliance officer, directs the SEC to adopt rules governing entities registered as clearing agencies for security-based swaps, and authorizes the SEC to exempt from registration a clearing agency that is subject to comparable, comprehensive supervision and regulation on a consolidated basis by another regulator. New section

3B(h) specifies core regulatory principles for clearing agencies, which include standards for minimum financial resources, participant and product eligibility, risk management, settlement procedures, safety of member or participant funds and assets, rules and procedures for defaults, rule enforcement, system safeguards, reporting, recordkeeping, disclosure, information-sharing, antitrust considerations, governance arrangements, conflict of interest mitigation, board composition, and legal risk.

Section 203(b) adds a new section 3C (Alternative Swap Execution Facilities) to the Securities Exchange Act of 1934. New section 3C requires facilities for the trading of security-based swaps to register with the SEC as an alternative swap execution facility (ASEF) and permits voice brokers to enter and execute swaps subject to the clearing requirement if they process the swap through a regulated exchange or ASEF. This section also establishes core regulatory principles for ASEFs relating to enforcement, deterrence of abuses, anti-manipulation, monitoring, information collection and disclosure, position limits, emergency powers, recordkeeping and reporting, antitrust considerations, conflicts of interest, financial resources, system safeguards, and compliance. This section directs the SEC to prescribe rules governing the regulation of alternative swap execution facilities, and authorizes the SEC to exempt from registration an alternative swap execution facility that is subject to comparable, comprehensive supervision and regulation by another regulator.

Section 203(c) adds a new section 3D (Segregation of Assets Held as Collateral in Swap Transactions). New section 3D requires that for cleared security-based swaps, security-based swaps dealers or clearing agencies that hold funds or property as margin or collateral to secure the obligations of a counterparty must treat such funds or property as customer property. For non-cleared security-based swaps, a dealer must segregate margin or collateral at the counterparty's request.

Section 203(d) prohibits parties who are not eligible contract participants from effecting security-based swap transactions off of a registered national securities exchange.

Section 203(e) requires security-based swap dealers and major security-based swap participants to register with the SEC. It directs the SEC to prescribe rules for entities that register with the SEC as security-based swap dealers or major security-based swap participants, except that the SEC may not prescribe rules imposing prudential requirements on banks.

Section 203 also sets out other requirements for security-based swap dealers or major security-based swap participants including: (1) minimum capital and margin requirements, as the prudential regulators (for banks) or SEC (for non-banks) shall prescribe; (2) reporting and recordkeeping requirements; (3) conform with business conduct standards; (4) documentation and back office standards; and (5) requirements relating to position limits, disclosure, conflicts of interest, and antitrust considerations.

Section 203(f) adds security-based swaps to the SEA list of financial instruments that a person may not use to manipulate security prices.

Section 203(g) prohibits fraudulent, manipulative, and deceptive acts involving security-based swaps, and directs the SEC to prescribe rules and regulations to define and prevent such conduct.

Section 203(h) authorizes the SEC to (1) establish aggregate limits on the size of positions that any person or persons may hold; (2) exempt from such limits any person, class of persons, transaction, or

class of transactions; and (3) direct a self-regulatory organization to adopt rules relating to position limits for security-based swaps. This subsection also provides SEC with authority to require reporting by persons that effect transactions in security-based swaps.

Section 203(i) requires the SEC or its designee to make available to the public, in a manner that does not disclose the business transactions and market positions of any person, aggregate data on security-based swap trading volumes and positions. This subsection also describes the duties of a security-based swap repository, which include accepting and maintaining security-based swap data as prescribed by the SEC, registration with the SEC, and submission to SEC inspection and examination. This subsection directs the SEC to adopt rules governing entities that register with the SEC as security-based swap repositories and authorizes the SEC to exempt from registration any security-based swap repository subject to comparable, comprehensive supervision or regulation by another regulator.

Section 204. Reporting and Recordkeeping

This section requires reporting and recordkeeping by any person who enters into a security-based swap that is not cleared with a registered clearing agency or reported to a security-based swap repository. This section also includes security-based swaps within the scope of certain provisions in the Securities and Exchange Act of 1934, including reporting requirements under Sections 13 and 16 and administrative proceeding authority under section 15.

Section 205. State Gaming and Bucket Shop Laws

This section clarifies the applicability of certain state laws to security-based swaps.

Section 206. Amendments to the Securities Act of 1933; Treatment of Security-Based Swaps

This section amends the Securities Act of 1933 to include security-based swaps within the definition of “security.” This section also amends Section 5 of the Securities Act of 1933 to prohibit offers to sell or purchase a security-based swap without an effective registration statement to any person other than an eligible contract participant (as defined in the Commodity Exchange Act).

Section 207. Other Authority

This section clarifies that this title, unless otherwise provided by its terms, does not divest any appropriate federal banking agency, the SEC, the CFTC, or other Federal or State agency of any authority derived from any other applicable law.

Section 208. Jurisdiction

This section clarifies that the SEC shall not have authority to grant exemptions from the provisions of this Act, except as expressly authorized by this Act.

Section 209. Effective Date

This section provides that title II is effective 180 days after enactment.

TITLE III—IMPROVED FINANCIAL AND COMMODITY MARKETS OVERSIGHT AND ACCOUNTABILITY

Section 301. Elevation of certain Inspectors General to appointment pursuant to Section 3 of the Inspector General Act of 1978

This section would amend the Inspector General Act of 1978 by elevating the Board of Governors of the Federal Reserve System, the CFTC, the National Credit Union Administration, the Pension Benefit Guaranty Corporation, and the SEC to “establishments” for the purposes of the Inspector General Act.

Section 302. Continuation of provisions relating to personnel

This section preserves the existing pay requirement for the position of inspector general at these agencies by ensuring that the position be classified at a grade, level, or rank designation consistent with those of a majority of the senior level executives (such as a General Counsel, Chief Information Officer, Chief Financial Officer, Chief Human Capital Officer, or Chief Acquisition Officer) at the agency. This section extends the current pay requirement for these IGs under subsections (b) and (c) of section 4 of the Inspector General Reform Act of 2008 (Public Law 110-409). The section also extends existing, agency-specific hiring and personnel system authority to these inspectors general so that the IGs may continue to hire personnel according to agency rules, with pay comparable to other employees at the agencies.

Section 303. Subpoena authority of certain Inspectors General

This section authorizes the inspectors general at the agencies to subpoena records and testimony from any officer or employee of a contractor or grantee of the establishment, any officer or employee of a subcontractor or subgrantee of such a contractor or grantee, or any person or entity regulated by the establishment.

Section 304. Corrective Responses by Heads of Certain Establishments to Deficiencies Identified by Inspectors General

This section requires the heads of the five designated agencies take action to address deficiencies identified by a report or investigation of the Inspector General of the establishment concerned or to certify to both Houses of Congress that no action is necessary or appropriate.

Section 305. Effective date; Transition rule

This section provides that the effective date of title III is 30 days after date of enactment.