

# **Title VII – Over-the-Counter Derivatives Markets Act of 2009**

## **Section-by-Section Analysis**

### **Section 701. Short Title**

#### **Subtitle A — Regulation of Swap Markets**

### **Section 711. Definitions**

This section adds new definitions to the Commodity Exchange Act and directs the Commodity Futures Trading Commission (“CFTC”) and Securities and Exchange Commission (“SEC”) to jointly adopt uniform interpretations. The defined terms include “swap,” “security-based swap,” “swap dealer,” “security-based swap dealer,” “swap repository,” “security-based swap repository,” “major swap participant,” and “major security-based swap participant.”

This section also establishes guidelines for joint CFTC and SEC rulemaking authority under this Act. This section requires that rules and regulations prescribed jointly under this Act by the CFTC and SEC shall be uniform and shall treat functionally or economically equivalent products similarly. This section authorizes the CFTC and SEC to prescribe rules defining “swap” and “security-based swap” to prevent evasions of this Act. This section also requires the CFTC and SEC to prescribe joint rules in a timely manner and authorizes the Secretary of the Treasury to prescribe rules if the CFTC and SEC fail to meet the statutory deadlines.

### **Section 712. Jurisdiction**

This section removes limitations on the CFTC’s jurisdiction with respect to certain derivatives transactions, including swap transactions between “eligible contract participants.”

### **Section 713. Clearing**

#### **Subsection (a). Clearing Requirement**

This subsection requires clearing of standardized swaps by a registered derivatives clearing organization and trading of standardized swaps on a designated contract market or, for eligible contract participants, on a registered alternative swap execution facility. This subsection directs the CFTC and SEC to jointly adopt rules to define the term “standardized,” based on specified criteria; creates a presumption of standardization for swaps that are accepted for clearing by any derivatives clearing organization; authorizes the CFTC and SEC jointly to prescribe rules or issue interpretations as necessary to prevent evasions of section 2(j) of the Commodity Exchange Act; and requires parties who enter into non-standardized swaps to report such transactions to a swap repository or the CFTC.

#### **Subsection (b). Derivatives Clearing Organizations**

This subsection requires derivatives clearing organizations that clear swaps to register with the CFTC, and directs the CFTC and SEC (in consultation with the appropriate federal banking agencies) to jointly adopt uniform rules governing entities registered as derivatives

clearing organizations for swaps under this subsection and entities registered as clearing agencies for security-based swaps under the Securities Exchange Act of 1934 (“Exchange Act”). This subsection also permits dual registration of a derivatives clearing organization with the CFTC and SEC or appropriate banking agency, and authorizes the CFTC to exempt from registration under this subsection a derivatives clearing organization that is subject to comparable, comprehensive supervision and regulation on a consolidated basis by another regulator. This subsection specifies core regulatory principles for derivatives clearing organizations, including 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. This subsection also requires a derivatives clearing organization to provide the CFTC with all information necessary for the CFTC 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 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.

#### **Section 714. 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 715. 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 and SEC to jointly adopt uniform rules governing entities that register with the CFTC as swap repositories and entities that register with the SEC as security-based swap repositories, and authorizes the CFTC to exempt from registration any swap repository subject to comparable, comprehensive supervision or regulation by another regulator.

#### **Section 716. 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 717. Registration and Regulation of Swap Dealers and Major Swap Participants**

This section requires swap dealers and major swap participants to register with the CFTC, and directs the CFTC and SEC to jointly prescribe uniform rules for entities that register with the CFTC as swap dealers or major swap participants and entities that register with the SEC as security-based swap dealers or major security-based swap participants. This section 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 and SEC (for non-banks) shall jointly 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.

### **Section 718. 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 719. Alternative Swap Execution Facilities**

This section requires a facility for the trading of swaps to register with the CFTC as an alternative swap execution facility (“ASEF”), subject to certain criteria relating to deterrence of abuses, trading procedures, and financial integrity of transactions. This section also establishes core regulatory principles for ASEFs relating to enforcement, anti-manipulation, monitoring, information collection and disclosure, position limits, emergency powers, recordkeeping and reporting, antitrust considerations, and conflicts of interest. This section directs the CFTC and SEC to jointly 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 720. 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.

### **Section 721. Designated Contract Markets**

This section requires a board of trade, in order to maintain designation as a contract market, to demonstrate that it provides a competitive, open, and efficient market for trading; has adequate financial, operational, and managerial resources; and has established robust system safeguards to help ensure resiliency.

### **Section 722. Margin**

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

### **Section 723. Position Limits**

This section authorizes the CFTC to establish aggregate position limits across commodity contracts listed by designated contract markets, commodity contracts traded on a foreign board of trade that provides participants located in the United States with direct access to its electronic trading and order matching system, and swap contracts that perform or affect a significant price discovery function with respect to regulated markets.

#### **Section 724. 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 contracts and rules for registered entities.

#### **Section 725. Foreign Boards of Trade**

This section authorizes the CFTC to adopt rules and regulations requiring registration by, and prescribing registration requirements and procedures for, a foreign board of trade that provides members or other participants located in the United States direct access to the foreign board of trade's electronic trading and order matching system. This section also prohibits foreign boards of trade from providing 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 726. 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 727. Multilateral Clearing Organizations**

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.

#### **Section 728. Primary Enforcement Authority**

This section clarifies that the CFTC shall have primary enforcement authority for all provisions of Subtitle A of this Act, other than new Section 4s(e) of the Commodity Exchange Act (as added by Section 717 of this Act, 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 backstop enforcement 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) if the CFTC does not initiate an enforcement proceeding within 90 days of a written recommendation by the appropriate federal banking agency.

### **Section 729. Enforcement**

This section clarifies the enforcement authority of the CFTC with respect to swaps and swap repositories, and 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 730. Retail Commodity Transactions**

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

### **Section 731. 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 regulated markets.

### **Section 732. 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 733. Antitrust**

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

### **Section 734. Effective Date**

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

## **Subtitle B — Regulation of Security-Based Swap Markets**

### **Section 751. 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.

### **Section 752. 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.

## **Section 753. Amendments to the Securities Exchange Act of 1934**

### Subsection (a). Clearing for Security-Based Swaps

This subsection requires clearing of standardized security-based swaps by a registered clearing agency and trading of standardized security-based swaps on a registered national securities exchange or, for eligible contract participants, on a registered alternative swap execution facility. This subsection also requires parties who enter into non-standardized security-based swaps to report such transactions to a security-based swap repository or the SEC. This subsection directs the SEC and CFTC to jointly adopt rules to define the term “standardized,” based on specified criteria; creates a presumption of standardization for swaps that are accepted for clearing by any clearing agency; authorizes the SEC to prescribe rules or issue interpretations as necessary to prevent evasions of section 3A of the Exchange Act; and directs the SEC and CFTC to jointly adopt uniform rules governing entities registered with the CFTC as derivatives clearing organizations for swaps and with the SEC as clearing agencies for security-based swaps.

### Subsection (b). Alternative Swap Execution Facilities

This subsection requires facilities for the trading of security-based swaps to register with the SEC as ASEFs, subject to certain criteria relating to deterrence of abuses, trading procedures, and financial integrity of transactions. This subsection also establishes core regulatory principles for ASEFs relating to enforcement, anti-manipulation, monitoring, information collection and disclosure, position limits, emergency powers, recordkeeping and reporting, antitrust considerations, and conflicts of interest. This subsection directs the SEC and CFTC to jointly prescribe rules governing the regulation of alternative swap execution facilities, and authorizes the SEC to exempt from registration under this subsection an alternative swap execution facility that is subject to comparable, comprehensive supervision and regulation by another regulator.

### Subsection (c). Trading in Security-Based Swap Agreements

This subsection prohibits parties who are not eligible contract participants (as defined in the Commodity Exchange Act) from effecting security-based swap transactions off of a registered national securities exchange.

### Subsection (d). Registration and Regulation of Swap Dealers and Major Swap Participants

This subsection requires security-based swap dealers and major security-based swap participants to register with the SEC, and directs the SEC and CFTC to jointly prescribe uniform rules for entities that register with the SEC as security-based swap dealers or major security-based swap participants and entities that register with the CFTC as swap dealers or major swap participants. This subsection also requires security-based swap dealers and major security-based swap participants to meet capital and margin requirements jointly prescribed by the prudential regulators (for banks) or the SEC and CFTC (for non-banks), and to meet standards jointly prescribed by the SEC and CFTC relating to reporting, recordkeeping, business conduct, documentation and back office standards, position limits, disclosure, conflicts of interest, and antitrust.

#### Subsection (e). Additions of Security-Based Swaps to Certain Enforcement Provisions

This subsection adds security-based swaps to the Exchange Act's list of financial instruments that a person may not use to manipulate security prices.

#### Subsection (f). Rulemaking Authority to Prevent Fraud, Manipulation, and Deceptive Conduct in Security-Based Swaps

This subsection 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.

#### Subsection (g). Position Limits and Position Accountability for Security-Based Swaps and Large Trader Reporting

As a means to prevent fraud and manipulation, this subsection authorizes the SEC to (1) establish limits on the aggregate number or amount of positions that any person or persons may hold across securities listed on a registered national securities exchange and security-based swaps that perform or affect a significant price discovery function with respect to regulated markets; (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 requires reporting and recordkeeping with respect to large security-based swap positions that perform or affect a significant price discovery function with respect to regulated markets.

#### Subsection (h). Public Reporting and Repositories for Security-Based Swap Agreements

This subsection 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 as accepting and maintaining security-based swap data as prescribed by the SEC, requires security-based swap repositories to register with the SEC, and subjects registered security-based swap repositories to SEC inspection and examination. This subsection directs the SEC and CFTC to jointly adopt uniform rules governing entities that register with the SEC as security-based swap repositories and entities that register with the CFTC as 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 754. 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 reporting requirements under Sections 13 and 16 of the Exchange Act.

### **Section 755. State Gaming and Bucket Shop Laws**

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

### **Section 756. 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 757. 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 758. 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.