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Ask The Professors:

What Is The Impact Of The Recent D.C. District Court's Decision In *SIFMA et al. v. CFTC* On The CFTC's Cross-Border Guidance?

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On September 16, 2014, Judge Paul Friedman of the U.S. District Court for the District of Columbia issued a major decision in *Securities Industry and Financial Markets Association et al. v. U.S. Commodity Futures Trading Commission*[1] (hereinafter referred to as "*SIFMA v. CFTC*") regarding the validity of the Interpretive Guidance and Policy Statement issued by the U.S. Commodity Futures Trading Commission ("CFTC") on July 26, 2013.[2] This article will analyze this court decision and will discuss its impact on the CFTC's Final Guidance.

Background

OTC derivatives[3] represent an important financial product in today's global marketplace. While virtually unknown to the financial world just a few decades ago, their

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growth began to explode in the 1990s. There was, however, significant legal uncertainty[4] then as to whether an OTC derivative fell within the definition of a futures contract and would therefore be subject to the exclusive jurisdiction of the CFTC pursuant to Section 2(a)(1)(A) of the Commodity Exchange Act ("CEA").[5] This uncertainty grew from the concern that, if such contracts were deemed to be illegally traded off-exchange futures contracts, they would be void *ab initio*, and losing parties could simply walk away from their obligations under the contracts. In an attempt to provide more clarity and certainty, Congress provided the CFTC with exemptive authority in the 1992 Futures Trading Practices Act,[6] and, as noted in the Conference Report to the 1992 Act, Congress instructed the Agency to use the provision "promptly."[7]

The CFTC reacted to the 1992 Act with the promulgation of Part 35 of Commission Regulations[8] in an initial attempt to provide certain safe harbors to allow OTC derivatives not only to avoid being subject to regulation by the CFTC, but also to benefit from preemption from other federal and state regulations due to the exclusive jurisdiction provision of the CEA.[9]

While this administrative relief was welcomed, it did not go far enough. Market participants during the mid-to-late 1990s continued to clamor for a legislative fix to the problem. In November 1999, the President's Working Group issued a report on OTC Derivatives, which contained a specific recommendation to provide statutory deregulation to the OTC derivatives markets.[10] In response, Congress enacted the Commodity Futures Modernization Act of 2000 ("CFMA").[11] The Plaintiffs in this case referenced the CFMA, citing:

> **"In passing the Commodity Futures Modernization Act in 2000, Congress sided with the proponents of deregulation and barred the CFTC and the United States Securities and Exchange Commission ("SEC") from regulating most derivative swaps markets. The CFMA left the markets for mostly derivative swaps 'essentially unregulated and unmonitored – effectively dark – in most respects.' And those markets flourished until the 2008 financial crisis, citing Inv. Co. Inst."[12]**

As the district court noted, OTC derivatives flourished, reaching an estimated notional value on a global basis between $500 to $650 trillion.[13] Certain OTC derivatives, however, were deemed to have contributed to the 2008 financial crisis,[14] in particular, credit default swaps. In large part, as a reaction to this, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act").[15] Title VII of the Dodd-Frank Act[16] created myriad new mandates relating to OTC derivatives, which, among other things, directly repealed much of the CFMA of 2000 that applied to OTC derivatives, and represented a massive revision in the federal oversight of OTC derivatives regulation. [17]

One of the areas of revision in OTC regulation—and indeed, one of the most complex areas—relates to the extraterritorial reach of the Dodd-Frank Act. Just before the enactment of the Dodd-Frank Act, the U.S. Supreme Court issued a significant decision in *Morrison v. National Australian Bank*, which restricted the extraterritorial applicability of Section 10b-5 of the Securities Exchange Act of 1934 by barring federal lawsuits in the U.S. based upon allegedly fraudulent securities transactions on non-U.S. securities exchanges.[18] In the Dodd-Frank Act, Congress reacted to the *Morrison* case by enacting Section 722, which added a new Section 2(i) of the CEA, stating that:

> **"The provisions of this chapter relating to swaps that were enacted by the Wall Street Transparency and Accountability Act of 2010 (including any rule prescribed or regulation promulgated under that Act), shall not apply to activities outside the United States unless those activities—**
>
> **(1) have a direct and significant connection with activities in, or effect on, commerce of the United States; or**
>
> **(2) contravene such rules or regulations as the Commission may prescribe or as are necessary or appropriate to prevent the evasion of any provision of this chapter that was enacted by the Wall Street Transparency and Accountability Act of 2010".[19]**

One of the primary arguments made by the Plaintiffs in this case was that the CFTC (a) did not properly interpret this section of the Dodd-Frank Act, and (b) exceeded its authority in issuing

the Final Guidance. This article will analyze the Plaintiffs' allegations, the district court's rulings on their claims, and the impact of this decision on future application and effect of the Final Guidance.[20]

The District Court Case

The Plaintiffs were three large trade associations: the Securities Industry and Financial Markets Association ("SIFMA"); the International Swap Dealers Association ("ISDA"); and the Institute of International Bankers ("IIB"). The Complaint was filed on December 4, 2013. An Amended Complaint was filed on December 27, 2013. Collectively, the pleadings alleged, in essence, that:

1. The CFTC unlawfully circumvented the requirements of the Administrative Procedure Act and the CEA by characterizing its cross-border regulation as a guidance, and ignored the CEA's Section 19(a) cost-benefit requirements,
2. The challenged OTC regulatory rules lack independent regulatory effect "on their face," and
3. The CFTC's action was an arbitrary and capricious interpretation of Section 2(i) of the CEA.[21]

Both parties filed a Motion for Summary Judgment, and Supplemental Briefs. The CFTC also filed a Motion to Dismiss and a Memorandum of Law, challenging the Complaint. Several amici briefs were filed, including one from several current and former Democratic Senators and Representatives.[22]

Summary of the Opinion

The Plaintiffs' challenges to the Final Guidance raised both procedural and substantive arguments. Procedurally, Plaintiffs argued that the Final Guidance was, in essence, a legislative rule and, thus, the CFTC had failed to comply with the Administrative Procedure Act's ("APA") notice and comment rulemaking requirements; therefore, the CFTC's action is arbitrary and capricious. Plaintiffs also argued that the CFTC failed to comply with the CEA's cost-benefit analysis. Substantively, Plaintiffs' argument was that the CFTC misinterpreted Section 2(i) of the CEA, and thus exceeded its authority to regulate non-U.S. swap dealers.

In his separate Order,[23] Judge Friedman granted in part and denied in part the CFTC's Motion to Dismiss and the Motions for Summary Judgment of both Parties. In sum and substance, he ruled in favor of the CFTC with regard to one rule by dismissing Plaintiffs' claim as to the "trade execution rule"[24] based on a lack of standing, ruled in favor of the CFTC as to the characterization of its Final Guidance as a policy statement (and also ruled that one four-page section of the document constituted an interpretive rule), and ruled in favor of the Plaintiffs' argument that the CFTC had failed to perform the required Section 19(a) cost-benefit analyses on ten rules recently adopted by the CFTC pursuant to Title VII (the "Title VII rules") that had extraterritorial effect.[25] He declined, however, to grant Plaintiffs' motion to stay the effect of the rules, stating that such a stay would be "unnecessarily disruptive," and that "[a]ny deficiency in the Title VII Rules is not no so 'serious' as to favor vacatur . . . ."[26] Accordingly, the court remanded back to the CFTC only those rules that required a cost-benefit analysis, namely:

1. the Real-Time Public Reporting of Swap Transaction Date Rule;
2. the Recordkeeping and Reporting Requirements (to SDRs) Rule;
3. the Registration of Swap Dealers and Major Swap Participants Rule;
4. the Swap Dealer and Major Swap Participant Recordkeeping, Reporting and Duties Rules;
5. the FCM and IB Conflicts of Interest Rules;
6. the Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants and FCMs; and
7. the Definitions of Swap Dealers, Security-Based Swap Dealers, Major Swap Participants, the Major Security-Based Swap Participants and Eligible Contract Participants Rules.[27]

A. Standing and Ripeness Issues

In his opinion, Judge Friedman first dealt with the standing and ripeness issues. With regard to standing, he addressed whether the Plaintiffs, three large trade associations, had standing under Article III, to challenge the Final Guidance and the underlying CFTC regulations established under Title VII. To demonstrate standing, a plaintiff must show: (1) that is has suffered an "injury in fact"; (2) that the injury is traceable to the challenged action of the defendant; and (3) that it is likely that the injury will be addressed in a favorable decision."[28] In this case, a trade association, on its own behalf, does not have such standing but may have standing (a) if one of

its members would have had standing to bring this challenge in its own right, (b) the interest it seeks to protect is germane to its purpose, and (c) neither the claim asserted nor the relief requested requires the member to participate in the lawsuit.[29] The court held that the second and third prongs clearly applied in this case.[30] It therefore focused on the first prong and noted:

> **"…. the plaintiff associations must identify for each challenged Title VII Rule at least one member or one of their associations that is regulated or directly harmed by that Rule's extraterritorial application. For the limited purpose of its standing analysis, the Court must assume that the plaintiffs are correct that the Cross-Border Action is a binding legislative rule carrying the force of law."[31]**

In support of their claim, several senior executives at the member firms submitted affidavits and declarations that confirmed that many of their firms were affected by the extraterritorial aspects of the Final Guidance.[32] The court concluded that the Plaintiffs did have standing to challenge the extraterritorial aspects of the Final Guidance and several of the transaction-level regulations that had been promulgated by the CFTC under Title VII[33] but not the Trade Execution Rule.[34] The Court further held that, as to the member firms of the Plaintiffs that were based in the U.S., with respect to the entity-level Title VII rules, such as the Entity Definition rule, the Swap Entity Registration rule, the Risk Management rule, the Chief Compliance Officer rule, the SDR Reporting rule, the Historical SDR Reporting rule, and the Large Trading Rule, the U.S. member firms of the Plaintiffs did not have standing[35] whereas the member firms of the Plaintiffs that were based outside the U.S. (e.g., their foreign affiliates, such as their U.K affiliates), did have standing to challenge the extraterritorial aspects of the Final Guidance.[36] Therefore, except for the Trade Execution Rule, the court held that the Plaintiffs had standing to bring this challenge.[37]

As to ripeness, Judge Friedman ruled that the procedural claims brought by the Plaintiffs are "clearly ripe for review"[38] because they require "no further factual or contextual development" of whether the CFTC's action was legislative, interpretive, or a statement of policy. The district court stated that the substantive claims "hinge on the CFTC's potential future application of the Cross-Border Action to a variety of future factual situations".[39] The court noted this was a difficult question, but determined that it need not be addressed now. Specifically, Judge Friedman held that

> **"Here, the Court need not look so far away as a companion case or even consult Circuit precedent. For the Court's consideration of plaintiff's ripe procedural claims reveals that the Cross-Border Action is not a 'final agency action' subject to review under the APA. [. . .]. This conclusion requires judgment for the CFTC as to all of the plaintiffs' pre-enforcement challenges to the Cross-Border Act—both procedural and substantive." (emphasis added)[40]**

Accordingly, the Court determined that all issues before it were ripe for judicial review.

B. The Final Guidance

On July 12, 2012, the CFTC issued a proposed interpretative guidance and policy statement regarding the cross-border application of Title VII, including new Section 2(i) of the CEA.[41] The Proposed Guidance was very controversial, resulting in approximately 300 comment letters, including several from non-U.S. governmental regulators who criticized the attempted broad regulatory reach of the CFTC on non-U.S. firms as proposed in the Proposed Guidance.[42] The Proposed Guidance dealt with a number of issues, including, among other things, a very broad definition of a "U.S. Person," that, as initially proposed, would require many non-U.S. Swap Dealers to be required to registered as a "swap dealer" with the CFTC. The CFTC's Global Markets Advisory Committee ("GMAC") held hearings in November 2012, in which a number of U.S. industry leaders and non-U.S. government leaders commented on the Proposed Guidance. On January 7, 2013, the CFTC issued further proposed guidance on certain provisions set forth in the initial Proposed Guidance.[43] Several new comment letters followed. On July 22, 2013, the CFTC issued an Exemptive Order that provided certain temporary relief from some of the Swap Dealer regulations that had been promulgated to date by the CFTC.[44] One day later, the CFTC adopted the Final Guidance.[45]

While hardly satisfied with the Final Guidance, market participants, in the main, worked diligently to attempt to comply with the numerous new rules

imposed upon them, not only in the U.S., but in other jurisdictions around the world, particularly the European Union. It is significant to note that, in issuing the Final Guidance and its complicated definition of "U.S. Person," there was no "locational requirement" included with regard to foreign branches of foreign entities that transacted swaps business in the U.S. The key issue was thus whether a foreign branch office or affiliate of a U.S. firm should or should not be deemed to be a "U.S. Person" or be required to have their swap positions aggregated with those of its U.S. affiliates for purposes of meeting the $8.0 billion *de minimus* test.[46]

Subsequently, on November 14, 2013, the CFTC's Division of Swap Dealer and Intermediary Oversight ("DSIO") published an advisory, which essentially reversed this position. In an interpretation of Footnote 513 in the Final Guidance,[47, 48] the staff letter provided that such activity would now constitute conduct by a "U.S. Person," such that swaps activity undertaken by that person (e.g., the non-U.S. affiliates) would be required to comply with regulations promulgated by the CFTC.[49] This Advisory was quite controversial, to put it mildly. Indeed, the CFTC, recognizing the difficulties created by this action, in effect backed away from this position in January 2013, and issued a request for comments on the issue, and a temporary reprieve, to September 15, 2014 (later extended for some rules to December 2014) of the application of the Dodd-Frank Act rules.[50] It is noteworthy that the opinion in this case was issued prior to that compliance deadline. The consequences will be discussed below.

The District Court Opinion

First, the opinion provided an excellent summary of the regulatory history regarding how OTC derivatives were not regulated prior to 2010, and how they became subject to extensive regulation following the enactment of the Dodd-Frank Act. As part of the Dodd-Frank Act, Congress ordered that 398 new regulations needed to be promulgated by various federal financial regulatory agencies, including 60 new regulations by the CFTC. As noted above, in this opinion Judge Friedman addressed several of these new CFTC regulations involving OTC derivatives in addition to the Final Guidance, and determined that the CFTC had not acknowledged the cost-benefit analyses of the extraterritorial applications of several of these new regulations.[51]

Interpretation of Section 2(i) of the CEA

The court held that the CFTC's interpretation of Section 2(i) as a "clear expression of congressional intent that the swaps provisions of Title VII of the Dodd-Frank Act apply to activities beyond the borders of the United States when circumstances are present" was a correct one. Judge Friedman then stated:

> **"The Cross-Border Action goes on to construe the word 'direct' in Section 2(i)(1) to require only 'a reasonable proximate causal nexus' and not 'foreseeability, substantiality or immediacy.'" In making this determination, the Cross-Border Action adopts the position of the Department of Justice Antitrust Division with respect to the meaning of the same term in the Foreign Trade Antitrust Improvements Act, 15 U.S.C. 6a, which had been recently adopted by the Seventh Circuit sitting en banc in Minn-Chem Inc. v. Agrium Inc. 683 F. 3d 845 (7th Circuit 2012)."[52]**

Judge Friedman added:

> **"The Cross-Border Action also rejects any interpretation of Section 2(i)(1) that would 'require a transaction-by-transaction basis determination that a specific swap outside the United States' has the jurisdictional requisite 'connection with activities in, or effect on, commerce in the United States . . . .'"[53]**

> **"The Cross-Border Action distinguishes itself from a 'binding rule' that 'would state with precision when particular requirements do and do not apply to particular situations,' Instead, the Cross-Border Action is 'a statement of the [CFTC]'s general policy regarding cross—border activities and allows for flexibility in application to various situations . . . ."[54]**

The Opinion discussed various aspects of the Final Guidance, in particular, its interpretation of a "U.S. person," its aggregation analysis in connection with the de minimus quantity of swap-dealing

transactions, the categorization of certain Title VII rules as either "entity-level" or "transaction-level," and the substituted compliance treatment.

The Opinion also analyzed the doctrine of "legislative rule" vs. "interpretive rules" and stated that, distinguishing between the two, the court would look to whether a "substantive regulatory change" was effected. To evaluate whether any such change has occurred, the court applied a four-factor test that considers:

> **"(1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, [and] (4) whether the rule effectively amends a prior legislative rule."[55]**

> **"Generally, if any of these prongs is satisfied, the rule is legislative rather than interpretative."[56]**

The court found none of the prongs were present in this case, and therefore concluded that the Cross-Border Action is binding on neither the CFTC nor on market participants. Indeed, the court stated specifically that the Cross-Border Action does not "purport to carry the force of law."[57] The Guidance, the Court confirmed, merely "announces the CFTC's 'general policy regarding cross-border swap activities and allows for flexibility in application to various situations "[58] The court relied heavily on numerous references contained in the Final Guidance whereby the CFTC qualified "its policy positions with the conditional terms 'generally' and 'ordinarily.'"[59] The court then stated:

> **"The Court therefore is satisfied that no CFTC staff member or market participant could, after consulting the Cross-Border Action in its entirety, reasonably construe it as setting forth binding norms."[60]**

The court added:

> **"The CFTC has yet to rely on the Cross-Border Action in a single enforcement action, let alone in enough enforcement actions and with enough consistency to signal that the agency considers it a binding rule."[61]**

> **"The important fact in this case is that plaintiffs' members remain *completely 'free to ignore'* the Cross-Border Action's 'writing on the wall.'"[62] *(emphasis added)***

The court addressed the challenge brought by the Plaintiffs that the Title VII rules issued to date by the CFTC did not adequately address the extraterritorial aspect of the respective rules, in particular, that the Title VII rules cannot apply extraterritorially because, in essence, they do not take into consideration the plain language of Section 2(i). The court held that the plain text of Section 2(i) "clearly expresses Congress' 'affirmative intention' to give extraterritorial effect to Title VII's statutory requirements as well as to the Title VII rules prescribed by the CFTC".[63] The court also held that the CFTC is not required to address the scope of each rule's extraterritorial application.[64]

The court did agree that the CFTC was required, but failed to consider the costs and benefits of some of the Title VII rules. The court held that "the CEA requires the CFTC before promulgating a regulation to consider the costs and benefits of its actions.[65] In particular, the CFTC has a duty to consider the costs and benefits of a given Title VII rule's extraterritorial application.[66]

The court then ruled that it had the authority to remand these Title VII rules back to the CFTC but without vacatur.[67] However, the court also held that the CFTC need only consider the "substance" of the Title VII rules, not their "scope", in their review.[68]

Conclusion

So, if the Final Guidance has "no binding effect," how will it be interpreted in eventual enforcement actions? Certainly, future defendants will argue that it has no purpose or relevance, and just as certainly the CFTC will rely on it as a "best practice" guideline. Now labeled by a federal district court as a mere interpretative notice, however, it appears that this opinion certainly lessens the strength of the document as it applies to future usage by the CFTC in administrative or injunctive actions. In addition, it would appear that the "Footnote 513" imbroglio becomes less of a burning issue, and that firms should be less concerned about compliance with the

infamous staff advisory come midnight December 2014.

The opinion also raises other provocative questions. For example, inasmuch as other countries have taken some adverse actions against U.S. swap dealers, does this now make the Final Guidance an albatross for the CFTC here in the U.S?

The court took certain actions in favor of the CFTC and granted and dismissed in part several of the challenges brought by the Plaintiffs. It will be interesting to see whether either or both parties will appeal Judge Friedman's decision. Equally as importantly, it may be a while before we really know the true meaning and effect of this decision. What will the CFTC do with respect to the remand of the Title VII rules as required by this court decision? How quickly will they react to the adjuration to undertake cost-benefit analyses, and will those outcomes then be challenged? Query, is there an internal contradiction in the opinion, if the Court is requiring the CFTC on remand to address the cost-benefit analysis of the Final Guidance on the extraterritoriality of certain Title VII rules, when the court did not interpret the Final Guidance as a rule, inasmuch as Section 19(a) does not apply to an interpretative notice issued by the CFTC?

And what will the CFTC do now? At a recent hearing held on September 17, 2014, one day after the opinion was issued, Timothy Massad, the new CFTC Chair, noted that: "the importance of international harmonization cannot be understated". Does this comment, and others like it, signal a new wind—and a welcome one—blowing at the CFTC in terms of true global comity with regard to OTC regulation?[69] Certainly, the Chairman's thoughtful, deliberative, and well-analyzed actions since taking office would hopefully indicate that things are moving in the right direction. One day later, on September 18, 2014, the Financial Stability Board issued a report to the G20 Finance Ministers and Central Bank Governors that addressed whether any country had deferred its regulatory approach to another country's regulatory regime.[70] In essence, the FSB opined that few countries had deferred any of their own OTC derivatives rulemakings to other countries. It did mention the Comparability Determinations issued by the CFTC in December 2013[71] but held that, overall, the G20 countries have not cooperated among themselves as they had agreed to at the G-20 Summit held in Pittsburgh, PA in September 2009.

Finally, given the criticism that erupted when the Proposed Guidance was issued and even with the Final Guidance, this decision in *SIFMA v. CFTC* may give the CFTC the impetus to revisit the Final Guidance and apply a more harmonized regulatory approach regarding the extraterritorial applications of its various rules that have been promulgated as a result of the Dodd-Frank Act.

The OTC derivatives industry is indeed a global one. Global regulatory harmonization is at a critical junction, and there is a signal opportunity for the CFTC to take advantage of this grace period, and resolve this thorniest of issues facing our international markets.

NOTES

1. U.S. District Court for the District of Columbia, Civil Action No. 13-1916 (PLF) (hereinafter referred to as the "Opinion"). As noted below, the Plaintiffs were three large U.S. trade associations that represented several large banks and brokerage firms (hereinafter referred to as the "Plaintiffs").
2. Interpretative Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 45292 (July 26, 2013) (hereinafter referred to as the "Final Guidance" or the "Cross-Border Action").
3. A "derivative" is a transaction traded on or off an exchange, the price of which is directly dependent upon (i.e. derived from) the value of an underlying security or commodity, as those terms are defined very broadly. Derivative instruments, including futures, options, and now swaps, are used to manage risk and to discover prices. An "Over-the Counter Derivative" ("OTC") is defined as: "The trading of commodities, contracts, or other instruments not listed on any exchange. OTC transactions can occur electronically or over the telephone. Also referred to as Off-Exchange." See CFTC Glossary at www.cftc.gov. See also Section 1a(9) of the CEA, 7 U.S.C. 1a(9), for the definition of a "commodity," Section 1a(19) of the CEA, 7 U.S.C. 1a(19), for the definition of "exempt commodity," Section 1a(20) of the CEA, 7 U.S.C. 1(a)(20), for the definition of "excluded commodity, and Section 1a(47) of the CEA, 7 U.S.C. 1a(47), for the definition of a "swap."
4. *See* Chapter Six, entitled "Regulation of OTC Derivatives" in *Regulation of Derivative Financial Instruments (Swaps, Options and Futures)*. by Ronald Filler and Jerry Markham, West Academic (2014) (hereinafter referred to as "Filler and Markham").
5. 7 U.S.C. 2(a)(1)(A)
6. Public Law 102-546, 106 Stat. 3590 (Futures Trading Practices Act of 1992).

7. Conference Report on H.R. 707, Futures Trading Practices Act of 1992 (Approved House of Representatives on October 2, 1992; Approved Senate on October 8, 1992)
8. 17 CFR Part 35
9. *Supra*, Note 5
10. *"Over-The-Counter Derivatives and the Commodity Exchange Act,"* Report of "The President's Working Group on Financial Markets," November 9, 1999.
11. Pub. L. No. 106-554, 114 Stat. 2763 (2000). *See also,* Filler and Markham, pages 267 – 272.
12. *See* Opinion at page 3.
13. *Ibid*, at pages 3-4 for a brief but excellent summary of the role played by OTC derivatives.
14. *See FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES,* at http//www.gpogov/fdsyskg/GP-FCIC/pdf/GPO-fcic.pdf
15. Pub. L. No. 111-203, 124 Stat. 1376 (2010)
16. Title VII to the Dodd-Frank Act is a separate law, entitled "Wall Street Transparency and Accountability Act of 2010."
17. The Dodd-Frank Act repealed Section 2g of the CEA. See Filler and Markham, page 272.
18. 561 U.S. 247 (2010). *See* also Filler & Markham, pages 719-732.
19. 7 U.S.C. 2(i)(emphasis added). Query, what did Congress intend by the words "direct and significant connection with activities in, or effect on, commerce of the United States"? The U.S. commerce is the largest of the world. Does the *de minimis* amount to $8.0 billion satisfy the test or should the amount be a much larger one, such as $5.0 trillion?
20. The SEC has adopted its own Cross-Border Rules, choosing instead to promulgate a new regulation rather than an interpretative approach that the CFTC took. See "Application of 'Security-Based Swap Dealer' and 'Major Security-Based Swap Participant' Definitions of Cross-Border Security-Based Swap Activities," SEC Release No. 34-72472, File No. S7—02-13 (June 25, 2014).
21. See Press Release issued by the three trade See which appears on the ISDA website, www.isda.org. *See also* Opinion, at pages 24-25 for a summary of the Complaint and the various motions filed.
22. *See* Motion for Leave to File Brief Amicus Curiae of Current and Former Members of Congress in Support of Defendant, dated March 21, 2014.
23. The Order was a separate document that, in essence, summarized Judge Friedman's findings.
24. The Trade Execution Rule is the "Process for a Designated Contract Market or Swap Execution Facility to Make a Swap Available to Trade, Swap Transaction Compliance and Implementation Schedule, and Trade Execution requirement Under the Commodity Exchange Act Rule, 78 Fed. Reg. 33606 (June 4, 2013).
25. *See* Order issued by Judge Paul Friedman, Civil Action No. 13-1916 (PLF), September 16, 2014).
26. *Ibid*.
27. *Ibid*.
28. *See* Opinion at page 29.
29. *Ibid*, at pages 29-30.
30. *Ibid*, at page 30.
31. *Ibid*, at page 31.
32. *Ibid*, at pages 32-33.
33. *Ibid*, at page 34.
34. *Ibid*, at pages 37-39.
35. *Ibid*, at page 45.
36. *Ibid* at pages 47-49.
37. *Ibid*. *See* also Note 23, *supra*.
38. *Ibid*, at page 52.
39. *Ibid*.
40. *Ibid*, at page 54.
41. *See* "Cross-Border Application of Certain Swaps of the Commodity Exchange Act", 77 Fed. Reg. 41214 (July 12, 2012) (hereinafter referred to as the "Proposed Guidance").
42. *See*, for example, Letter from Michel Barnier, the EU Commissioner, which strongly criticized the CFTC's aggressive regulatory approach as reflected by the Proposed Guidance. *See also* article in Financial Times, dated September 30, 2013, co-written by Alex Barker, Tom Braithwaite, Gina Chon and Michael Mackenzie.
43. *See* "Further Proposed Guidance regarding Compliance with Certain Swap Regulations", 78 fed. Reg. 909 (January 7, 2013).
44. *See* "Exemptive Order Regarding Compliance with Certain Swap Regulations", 78 fed. Reg. 43785 (July 22, 2013). *See* also CFTC Press Release, entitled "The European Commission and the CFTC reach a Common Path Forward on Derivatives, www.cftc.gov/PressRoom/PressReleases/pr6640-13 (July 11, 2013).
45. *Supra*, Note 2.
46. See Note 19, *Supra*.
47. CFTC Letter No. 13-69 (2013 WL 6056614), November 14, 2013.
48. See *Opinion* at page 23-24, which quoted Stephen O'Connor, the ISDA Chairperson, who stated that the Advisory "was the straw that broke the camel's back", that thus led to this litigation. The Complaint was filed a few weeks later on December 4, 2013.
49. *Supra*, Note 44.
50. *See* ISDA OTC Compliance Calendar, file:///C:/Users/er35561/Downloads/OTCd%20Compliance%20Calendar%202014-05-01.pdf.
51. *See Opinion* at page 11.
52. *Ibid*, at page 15.
53. *Ibid*.

54. *Ibid*, at page 13.
55. *Ibid*, at page 57. The court cited *Am. Mining Cong. V. Mine Safety & Health Admin.*, 995 F.2d 1112 (D.C. Cir. 1993).
56. *Ibid*.
57. *Ibid*, at page 58.
58. *Ibid*.
59. *Ibid*, at page 59.
60. *Ibid*.
61. *Ibid*, at page 65.
62. *Ibid*, at page 67.
63. *Ibid*, at page 73.
64. *Ibid*, at page 76.
65. *Ibid*, at page 80.
66. *Ibid*, at page 83.
67. *Ibid*, at page 87.
68. *Ibid*, at page 88.
69. *See* Statement of Chairman Timothy G. Massad before the Open meeting on proposed Rule on Margin Requirements for Uncleared Swaps and Final Rule on Utility Special Entities, dated September 17, 2014, www.cftc.gov/pressRoom/SpeechesTestimony/massadstatement091714.
70. Report on the Jurisdictions' Ability to Defer to Each Other's OTC Derivatives Market Regulatory Regimes, issued by the Financial Stability Board (September 18, 2014). The FSB examined several countries' attempts to cooperate and defer to regulations established in other countries.
71. The CFTC's Comparability Determinations provided some guidance as to which Title VII rules would not be subject to certain non-U.S. swap dealers located in six selected jurisdictions (Australia, Canada, the European Union, Hong Kong, Japan and Switzerland) as those jurisdictions had already established a comparable set of regulations on some of these select rules. These non-U.S. swap dealers were, however, still required to register as a swap dealer with the CFTC. See also Filler & Markham, pages 735-737.