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# CFTC's Evolving Disclosure Requirements

## An L&C Division Webinar

September 26, 2024

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# Required Disclosures for Derivatives (Swaps)

Traditionally, in contrast to the securities industry, transactions involving commodities and commodity derivatives have not been associated with extensive disclosures. After the Dodd Frank amendments, swap dealers are required to provide certain disclosures to their counterparties. Recent CFTC enforcement actions involving disclosure requirements test the outer boundaries and scope of required disclosures, in part channeling disclosure requirements imposed by the SEC. This seminar will discuss these requirements, emerging enforcement trends as well as developing industry responses, including in the United States, European Union and United Kingdom.



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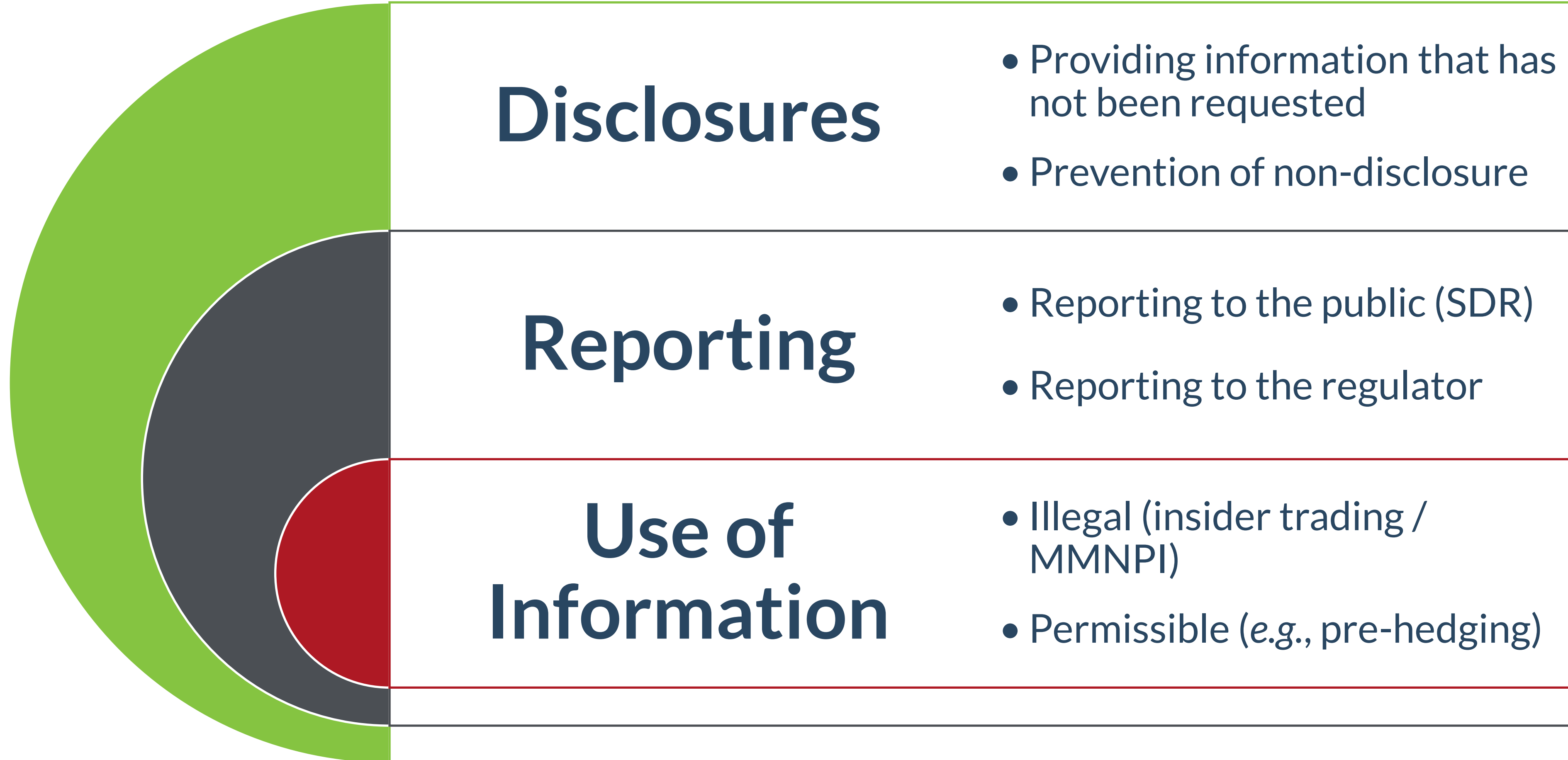
# Focus on “Disclosures”



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# Introduction to CFTC-Required Disclosures

Section 1

*Peter Y. Malyshev*

# CFTC Disclosure Regime

| Required for Regulated Entities | Required for Swaps SD/MSP (post-Dodd Frank) | Apply Generally for Anyone |
|---|---|---|
| • § 1.55, 30.6, 33.7, 190.10<br>• Part 4 (e.g., § 4.7)<br>• NFA § 2-29, 35, 36, virtual currency<br>• SROs | • § 23.410<br>• § 23.431 (daily mark, PTMMM)<br>• § 23.432<br>• § 23.433 | • § 6(c) (based on § 10b-5)<br>• § 180.1(general antifraud)<br>• § 165.19 (whistleblower)<br>• ISDA Disclosures |



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# A Paradigm Shift

*"[swap disclosure requirements] are aimed at reversing what was hitherto a caveat emptor trading environment and providing transparency in dealings between swap dealers and counterparties."*

In re [Swap Dealer], Apr. 25, 2023.

# New Main Provisions Requiring Swap-Related Disclosures

- § 23.410 – Prohibition on fraud, manipulation; prohibition of misappropriation of material non-public information (MMNPI); carve out for pre-hedging
- § 23.431 – Disclosure of material information; pre-trade mid market marks (PTMMM) and daily marks
- § 23.432 – Clearing Disclosures
- § 23.433 – Communications – fair dealing
- § 23.450(g) – Disclosures to "Special Entities"
- § 23.605(e) – Prevention of undue influence on counterparties and disclosure of material incentives
- § 165.19(b) – Whistleblower rulers, prohibition on waivers of disclosure rights
- § 6(c)(1) of the CEA and § 180.1 of CFTC Regulations – anti-fraud and anti-manipulation
  - application to transactions in commodities generally and swaps and futures specifically;
  - disclosure of MNPI is not required, unless must be made to prevent other statement from being misleading § 180(b)



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**§ 180.1 – Prohibition on the employment, or attempted employment, of manipulative and deceptive devices.**

- Rule 180.1 of the CFTC was adopted in July of 2011 to implement § 6(c)(1) of the CEA. § 6(c)(1) was added to the CEA by The Dodd-Frank Wall Street Reform and Consumer Protection Act and directs the CFTC to promulgate rules making it unlawful for any person to use "any manipulative or deceptive device" in connection with any swap or futures contract.
- § 6(c)(1) specifies, however, that **no such rule "shall require any person to disclose** to another person nonpublic information that may be material to the market price, rate, or level of a commodity transaction, **except as necessary to make any statement made to the other person in or in connection with the transaction not misleading in any material respect**."
- Rule 180.1 implements the foregoing mandate by providing that it shall be unlawful for any person, in connection with any swap or futures contract, "to intentionally or recklessly:

  1. Use or employ, or attempt to use or employ, any manipulative device, scheme or artifice to defraud;
  2. Make, or attempt to make, any untrue or misleading statement of a material fact or **omit to state a material fact necessary in order to make the statements made not untrue or misleading**; [or]
  3. Engage, or attempt to engage, in any act, practice or course of business, which operates or would operate as a fraud or deceit upon any person...."

# § 180.1 – required disclosures

- The Rule 180.1 Adopting Release repeatedly states that § 180.1 was modeled after Rule 10b-5 promulgated by the SEC; and the CFTC noted its intention to be "guided," but not "bound by," Rule 10b-5 judicial precedents, at least as to certain issues.

- However, the § 180.1 Adopting Release draws a distinction between Rule 10b-5 and § 180.1 by noting that: "unlike securities markets, derivatives markets have long operated in a way that allows for market participants to trade on the basis of **lawfully obtained** material nonpublic information."

- The release therefore emphasizes that § 180.1 does not prohibit trading on the basis of material nonpublic information **except when**: (1) the material nonpublic information was obtained through fraud or deception; *i.e.*, was obtained unlawfully; or (2) trading on the basis of material nonpublic information breaches "a pre-existing duty (established by another law or rule, or agreement, understanding, or some other source)." The § 180.1 Adopting Release emphasizes that, absent a pre-existing duty to disclose, remaining silent as to MNPI is not "deceptive" for purposes of the rule.

- It also makes clear that the rule does not itself create an affirmative duty of disclosure, except as necessary to make the statements made not untrue or misleading. That is, consistent with § 6(c)(1) of the CEA, § 180.1 can be violated if a trader fails to disclose material nonpublic information that it is necessary to disclose to make any statements made "in connection with the transaction not misleading in any material respect."



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# § 180.1 – private right of action

- Note that, pursuant to § 6(c)(1), claims asserting violations of § 180.1 can be brought by a private plaintiff, as well as by the CFTC. That is, there is a statutory "private right of action" under § 180.1, just as there is a private right of action under Rule 10b-5.

- Note also that the CFTC's enforcement actions relating to § 180.1 have employed the "misappropriation" theory of "insider trading" developed by the courts under Rule 10b-5; *i.e.*, the theory that the violator has misappropriated confidential information for trading purposes, in breach of a duty owed to the source of the information.



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Section 2

*Christian Larson*

# Required Disclosures § 23.431

- *Registered Swap Dealer* (March 15, 2022):
  - Failed to disclose material characteristics, incentives and conflicts of interest related to swaps to counterparties.
  - SD did not disclose that employees making proprietary trades on behalf of an affiliate had access to trade execution information of SD's customers and counterparties.
  - In addition, SD failed to disclose its pre-trade mid-market marks (PTMMMs) to counterparties, as required under § 23.431(a)(3)(i).
  - $3.25mil civil penalty, and orders to cease and desist from further violations.
- *FCM / Swap Dealer* (April 10, 2023):
  - Failure to disclose any PTMMM or an accurate PTMMM in dozens of cases, resulting in violations of both § 23.431 and 23.433.
  - The CFTC found that the firm "opportunistically solicited or agreed to enter into same-day swaps only on days and at times that were financially advantageous to [SD] and disadvantageous to its clients[,]" and "caused the same-day swaps to appear more economically advantageous to the clients than they actually were."
  - $15mil civil penalty.
- *Registered Swap Dealer* (April 25, 2023):
  - Failed to disclose pre-hedging activity in which it would trade "in the minutes or seconds before" providing the spot exchange rate and executing the transaction with a customer. The CFTC found this activity likely moved the spot exchange rate against the customer, and allowed SD to potentially hedge its exposure; failing to disclose this to customers violated the SD Business Conduct Standards in § 4s(h) of the CEA.
  - Nearly $7mil civil penalty.
- *Registered Swap Dealer* (September 20, 2023):
  - Failure to disclose thousands of PTMMMs, due to a failure of oversight in the PTMMM disclosure process that led to an additional violation of § 23.602 (requiring diligent supervision of the PTMMM compliance process).
  - $650k civil penalty, remediation and filings with the CFTC Enforcement Division to confirm compliance.

# Business Conduct Violations under § 23.433

- *Registered Swap Dealer* (November 8, 2019):
  - After entering into a $4bn FX forward contract, the SD knew that it was required "to provide a weighted average rate based on actual spot trades… [and] did not have a system in place to accurately track trades used to fill the counterparty's order."
  - This oversight was found to violate § 23.433, as this system failure was relevant information to the transaction that was not shared in a fair and balanced manner as required under the rule.
  - The SD selected a rate believed to be in the true weighted average range, and that the counterparty would accept, rather than actually calculating the rate; it also shared a spreadsheet claiming to calculate the rate with the counterparty that did not actually reflect the trades it claimed to.
  - $15mil civil penalty.
- **Concurrent with § 23.431 Violations:**
  - *Registered Swap Dealer* (March 15, 2022):
    - In not disclosing that employees making proprietary trades on behalf of an affiliate had access to trade execution information of SD's customers and counterparties, SD failed to disclose conflicts of interest and to communicate in a "fair and balanced manner based upon principles of good faith and fair dealing," violating § 23.433.
  - *FCM / Swap Dealer* (April 10, 2023):
    - Failure to disclose any PTMMM or an accurate PTMMM in dozens of cases, resulting in violations of both § 23.431 and § 23.433.



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# Enforcement under § 180.1

- **Misappropriation of MNPI / Insider Trading**:
  - *Commodities Trading Firm* (December 3, 2020):
    - The CFTC found that the firm paid bribes and kickbacks to Brazilian, Ecuadorian and Mexican state-owned entity employees to gain access and preferential treatment in their energy and commodities markets.
    - These payments, funneled through offshore banks or shell entities, were made in exchange for confidential information to benefit the firm's trades in these markets. This included specific price information to win competitive bids.
    - $95mil civil penalty, reduced by the firm's cooperation with the investigation into its conduct.
  - *Commodity Trading Platform* (most recent decision January 22, 2024):
    - An employee of the platform allegedly "took the other side of orders," trading against a customer's order without the customer's consent in violation of § 155.4(b)(2)(i).
    - The Fifth Circuit reversed a lower court verdict against the platform, finding that the text of the rule was too ambiguous to give sufficient notice to the platform or its employee that their conduct was prohibited.
  - *Commodity Trading Firm* (June 17, 2024):
    - Multiple allegations of MNPI misappropriation and manipulation, including trades made despite possession of MNPI from a Mexican trading entity, manipulation of oil benchmarks, and non-disclosure requirements with no exception for law enforcement or regulatory agencies.
    - $55mil civil penalty and remedial measures determined by Enforcement Division.



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# Enforcement under § 180.1 (cont'd)

- **Material Misrepresentations / Omissions – § 180.1(a)(2)**:
  - *Futures Trader* (September 30, 2019):
    - A futures trader misrepresented the shared ownership of three corporate entities, all owned by a trust of which he was trustee. When one corporate entity accrued a $2.1mil debit in its account, the trader applied for new accounts for the other entities without disclosing the debit or shared ownership to the FCMs with which he applied for new accounts.
    - $160k civil penalty and 90 day ban on trading and registration with the CFTC.



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# Pre-Hedging and Front Running

- **Pre-hedging**:
  - *Registered Swap Dealer* (May 12, 2023):
    - Allegedly manipulated prices by structuring trades to move prices at interdealer broker firms, intending to "increase the profitability of issuer swaps for [SD], to the detriment of [SD]'s counterparties." This included sometimes trading at worse prices than necessary in order to move pricing screens in the desired direction.
    - $45mil civil penalty and remedial measures as specified by CFTC.
- **Front running**:
  - *U.S. v. Bogucki*, 3:18-CR-00021 (N.D. Cal. Mar. 4, 2019):
    - Bogucki, formerly head of an FX trading desk at a large bank, was acquitted in the Northern District of California after a judge found insufficient evidence had been presented by the DOJ showing a clear rule violation.
    - Bogucki was alleged to have engaged in a front running scheme, placing orders on his firm's behalf before an expected transaction with a counterparty.
    - The judge found that the ISDA agreement governing the transaction established an arm's length relationship between its parties; this contributed to the finding that there was no expectation of full disclosure between FX trader and its counterparty, and therefore no material misstatement or omission on Bogucki's part.

# Sample Transactions / Documentation Issues

Section 3

*Bobby DiNardo*

*Michael Ena*

# What is a Deal-Contingent Hedge Transaction?

*Key Features and Benefits*

**Definition**:

A deal-contingent hedge is a specialized derivative contract that settles or becomes effective only if a specific event, such as the closing of an M&A transaction or project financing, occurs within a predetermined timeframe.

**Key Features**:

1. **Conditional Effectiveness:** The derivative takes effect only if the deal-contingent event (*i.e.*, closing of the M&A transaction or project financing) occurs before a specific deadline.

2. **No-Liability Termination:** If the deal fails to close within the specified period, both parties can walk away without payment or penalty, provided the deal or a similar deal isn't closed with a specified period of time after the hedge is terminated.



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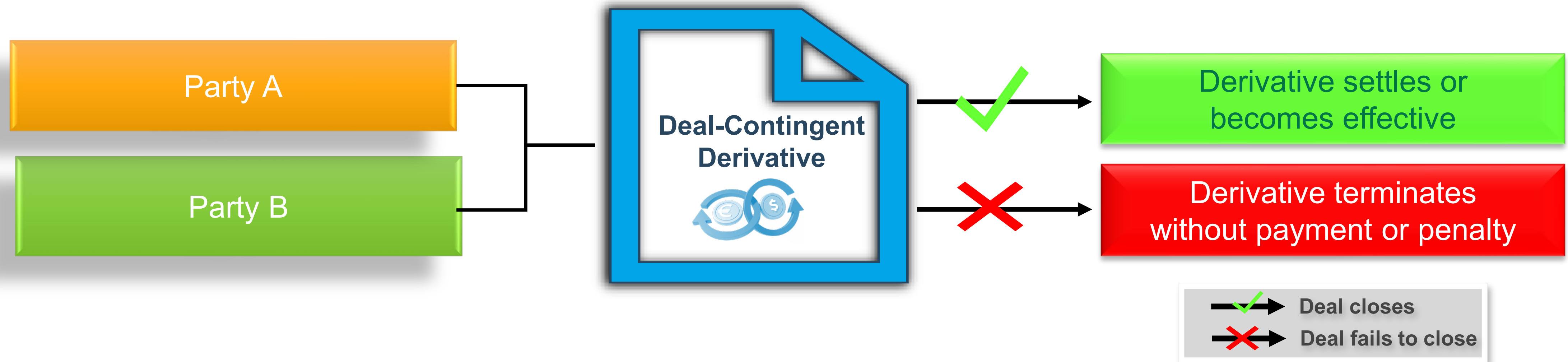
# What is a Deal-Contingent Hedge Transaction?



# Why Use a Deal-Contingent Hedge Transaction?

*Optimizing Financial Risk Management in M&A and Project Finance with Deal-Contingent Derivatives*

**Risk Landscape in M&A and Project Finance:**

- Corporations and private equity sponsors face interest rate and FX rate risks in M&A and project finance.
- Traditional derivatives offer protection but can incur 'dead hedging costs' if deals fail.

**Deal-Contingent Solution:**

- Deal-contingent derivatives serve as a specialized financial instrument that allows corporations or private equity sponsors to protect themselves against the risk of fluctuating rates in the interim period between the signing and the closing of a deal.
- These derivatives are uniquely structured to become effective only if the associated M&A or project finance transaction successfully closes within a predetermined time frame.
- This structure eliminates the risk of incurring unnecessary hedging costs, commonly referred to as "dead hedging costs," should the deal fail to materialize.



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# Hedging Deal-Contingent Risk

*Regulatory Implications – Pre-Hedging Disclosures*

What are pre-hedging disclosures?

- Swap dealers are required to disclose material information in a manner reasonably designed to allow a counterparty to assess the material incentives and conflicts of interests that the swap dealer may have in connection with a particular swap. When a swap dealer enters into hedging activity prior to the execution of a trade which might create a conflict of interest with the counterparty (e.g., if its hedging activity may move the market against the counterparty), it must disclose such activity.

Importance of pre-hedging disclosures

- Swap dealers must hedge their own risks in deal-contingent transactions and must weigh the regulatory risks of disclosing too much or too little regarding their planned pre-trade hedging activity. If too detailed or too general of information regarding pre-hedging activity is provided and it does not accurately describe the potential risks to the counterparty, a swap dealer may be found liable for a regulatory violation despite its best intentions.

Key CFTC Rules

- **CFTC § 23.431 & 23.433**: Require transparency and fair dealing.

Legal Risks

- Not providing adequate disclosures can subject a swap dealer to regulatory liability regardless of whether or not the counterparty is actually disadvantaged by the swap dealer's pre-hedging activities – it is sufficient that the counterparty merely could have been disadvantaged and the swap dealer failed to disclose such fact.

Safeguards

- **Disclosures**: Employ disclosures that include an accurate description of pre-hedging activity that may occur to mitigate duty-to-disclose risks.
- **Internal Protocols**: Implement guidelines to review planned pre-hedging activity to ensure that targeted disclosures have been provided.

Key Takeaways

- Safeguards, such as making the necessary disclosures, offer protection but are not foolproof. A swap dealer must determine how much disclosure is adequate, which is not a bright-line rule.

# Hedging Deal-Contingent Risk

***Deal-Contingent Risk Transfer Hedging Arrangements***

**What is a Deal-Contingent Risk Transfer Hedging Arrangement?**

- A deal-contingent risk transfer arrangement is a specialized hedge that enables a swap dealer to hedge its deal-contingent risk exposure from a deal-contingent hedge transaction.

**Objective:**

- The primary aim is to offset the swap dealer's potential losses from market hedges if the associated deal-contingent hedge is terminated due to a failed M&A transaction or project financing.

**Payment Obligations:**

- **Deal-Success Fee**: If the Deal-Contingent Event occurs under the underlying deal-contingent hedge transaction, the swap dealer pays the counterparty a fee as compensation for providing the protection.
- **Conditional Mark-to-Market Payment**:
  - If the deal-contingent hedge is terminated due to a failed underlying M&A transaction or project financing, the counterparty is required to pay the swap dealer an amount equal to the losses incurred by the swap dealer on its market hedges.
  - Conversely, any gains the swap dealer realizes on its market hedges are passed on to the counterparty.



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***Regulatory Implications – Material, Non-Public Information (MNPI)***

<u>What is MNPI</u>?

- In this context, MNPI refers to material, non-public information about both the deal-contingent hedge transaction itself and its underlying M&A or project financing transaction.

<u>Importance of MNPI</u>

- Swap dealers receive confidential MNPI before entering a deal-contingent hedge transaction and must weigh the regulatory risks of disclosing (or not disclosing) this information in subsequent risk transfer arrangements.

<u>Key CFTC Rules</u>

- **CFTC § 180.1**: Prohibits deceptive practices but doesn't mandate MNPI disclosure unless preventing a misleading statement.
- **CFTC § 23.431 & 23.433**: Require transparency and fair dealing but don't add MNPI disclosure obligations beyond § 180.1.

<u>Legal Risks</u>

- Sharing MNPI (or not sharing MNPI), explicitly or implicitly, in a deal-contingent risk transfer transaction can expose parties to legal risks and regulatory scrutiny.

<u>Safeguards</u>

- **Authorizations**: Obtain explicit counterparty consent to use MNPI.
- **Disclosures**: Employ targeted disclosures, including "big boy" clauses, to mitigate duty-to-disclose risks.
- **Internal Protocols**: Implement guidelines to avoid statements that could necessitate MNPI disclosure.

<u>Key Takeaways</u>

- Safeguards, such as making the necessary disclosures, offer protection but are not foolproof. Given the regulatory landscape and the sensitive nature of these transactions, careful MNPI management is crucial.

# Documentation Issues

- In 2013, the International Swaps and Derivatives Association (“ISDA”) started publishing the General Disclosure Statement for Transactions document (“General Disclosure”) with annexes containing disclosures of risks that are specific to certain classes of reference assets, such as interest rates, foreign exchange rates and currencies, credit instruments, asset-backed instruments, equities, and commodities.

- The General Disclosure, together with asset-specific annexes, is intended to help SDs and MSPs comply with the external business conduct rule disclosure requirements (§ 23.431, § 23.450(g) and § 23.605(e)) enacted by the CFTC under the Dodd-Frank Act.

- At least biannually, the Disclosure Package is reviewed and updated to reflect changes in relevant transaction disclosure requirements.

- Nov. 14, 2023 amendment is intended to provide a more robust pre-hedging disclosure as a response to recent CFTC enforcement actions where CFTC raised issues of inadequate disclosure of pre-hedging activities.



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# Securities Law Similarities and Distinctions

Section 4

*Maurine Bartlett*

COMMODITY FUTURES TRADING COMMISSION
1975
U.S. SECURITIES AND EXCHANGE COMMISSION
MCMXXXIV

# Securities Law Similarities And Distinctions

**1. Disclosure Obligations in the Securities Offering and SEC Reporting Context**

- It is a myth that the securities laws subject securities issuers and SEC reporting companies to a general, fundamental requirement to disclose all material information. Rather, a leading Supreme Court decision, Basic v. Levinson, acknowledged the fundamental principle that under the securities laws, the failure of a securities issuer or reporting company to disclose material information is only actionable if there is a duty to disclose. This duty to disclose may arise by virtue of:

  (1) Requirements set forth in an explicit SEC disclosure requirement, *e.g.*, the requirements of particular securities offering registration forms, such as the Forms S-1 and S-3; specific SEC reporting forms, such as Forms 8-K, 10-Q and 10-K; or other specific SEC rules. As discussed below, Rule 10b-5 is NOT such a rule.

  (2) The need to make other statements made by the issuer materially accurate or not misleading.

  (3) The issuer plans to purchase or sell its stock in the securities markets (which is related to the "classical theory" of insider trading discussed in Section 3. below).

- As a practical matter, in the securities offering context, disclosures may be made purely to help avoid the risk that the offering materials provided to investors may be deemed to contain material misstatements or omissions.



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# Securities Law Similarities And Distinctions (cont.)

**2. Rule 10b-5 Disclosure Obligations**

- Rule 10b-5 (upon which Rule 180.1 was patterned) makes it unlawful for any person to: (1) employ a device, scheme or artifice to defraud; (2) make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or (3) engage in any act, practice, or course of business which operates or would operate as a fraud or deceit.
- As the previous section indicates, and as is the case with Rule 180.1, Rule 10b-5 does not create an affirmative duty to disclose any and all material information. Rather, material information must be disclosed only when necessary "to make … statements made, in the light of the circumstances under which they were made, not misleading."

# Securities Law Similarities And Distinctions (cont.)

**3. Disclosure Obligations in the Securities Trading Context**

- The offense of "insider trading" is not defined in the federal securities laws. Rather, it has been developed primarily from judicial decisions and SEC interpretations of Rule 10b-5. Because Section 10(b) of the Securities Exchange Act and Rule 10b-5 are predicated upon fraud and deceit, the law of insider trading has been built upon the premise that such trading is deceptive.
- The nature of the deception depends upon the legal theory that is being applied. The courts currently recognize two primary theories of insider trading liability: (1) the classical "abstain or disclose" theory; and (2) the "misappropriation theory." Both of these theories are constructed around the perceived breach of a duty.
- In the "abstain or disclose" theory, this duty is owed to the issuer of the securities and/or its shareholders. In the "misappropriation" theory, this duty is owed to the source of the information, so long as there is a fiduciary or fiduciary-like relationship between the misappropriator and the source of the information and the trading was in breach of a duty to not misuse the information.
- Tipper/tippee liability can exist under either theory.
- A third "duty free" theory of Rule 10b-5 liability also has been emerging, pursuant to which liability may exist when material nonpublic information has been obtained by deceptive means, such as a computer hacking.
- Note that disclosing the material information does not avoid liability under the misappropriation theory; however, obtaining consent to trade from the source of the information does. Because there is an affirmative duty to disclose material nonpublic information under the "classical theory" of insider trading (or to refrain from trading), this theory does cause liability to arise in circumstances in which it would not arise under CFTC Rule 180.1.



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# Securities Law Similarities And Distinctions (cont.)

**4. Additional Antifraud Rules Apply Specifically to Security-Based Swaps ("SBS")**

- In June of 2023, the SEC adopted Rule 9j-1 under the Securities Exchange Act, a rule that overlaps, in major part, with Rule 10b-5 (which also applies in the security-based swap context), including by making it unlawful for **any person** to effect any SBS transaction in connection with which such person "obtains money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order the make the statements made, in light of the circumstances under which were made, not misleading" or "engages in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person."
- However, unlike Rule 10b-5, liability under the foregoing prongs of Rule 9j-1 need not be predicated upon a showing of "scienter"; rather, mere negligence can suffice. (Other prongs of Rule 9j-1 do require scienter.)
- Rule 9j-1 also imposes liability for transacting in SBS while in possession of material nonpublic information regarding the underlying security (an activity that also would be subject to liability under Rule 10b-5).
- Previously, the SEC adopted a rule -- Rule 15fh-4(a) – imposing antifraud provisions patterned after certain portions of Rule 10b-5 on SEC-registered SBS dealers and major SBS participants when they engage in SBS transactions with "special entities" (a term that encompasses various types of state and municipal entities).



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# Securities Law Similarities And Distinctions (cont.)

**5. Other Security-Based Swap Disclosure Requirements**

- Just as the CFTC has adopted specific disclosure rules for CFTC-registered swap dealers, the SEC has adopted rules imposing disclosure requirements applicable specifically to SEC-registered SBS dealers and major SBS participants.
- Most notably, Rule 15Fh-3 relating to business conduct standards requires that, at a reasonably sufficient time prior to entering into an SBS, an SEC-registered SBS dealer or major SBS participant must disclose to its counterparty (other than an SBS dealer or major SBS participant counterparty) "material information concerning the [SBS] in a manner reasonably designed to allow the counterparty to assess the material risks and characteristics and material incentives or conflicts of interest, as described [in the rule]…." The terms "material risks and characteristics" and ""material incentives or conflicts of interest" are broadly defined, in a manner similar to the manner in which they are defined in CFTC Rule 23.431.
- Rule 15Fh-3 also imposes certain disclosure requirements relating to daily marks and clearing rights.



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# Securities Law Similarities And Distinctions (cont.)

**6. Significance of "Big Boy Letters"**

- The legal significance of so-called "Big Boy" letters (*i.e.*, disclosures to the effect that an entity may possess material nonpublic information that it does not intend to share) does not appear to have been addressed, to date, by the CFTC in the Rule 180.1 context.
- In the securities transaction context, there is judicial support for the view that disclosures of this sort are helpful to prevent a private plaintiff from satisfying the "reliance" prong of asserting a Rule 10b-5 claim. However, an SEC enforcement proceeding involving [a bank] has been cited as evidence that "Big Boy" disclosures will not preclude the SEC from bringing an action based upon the misappropriation theory in instances in which transactions have occurred on the basis of information misappropriated from the source of the information.

Section 5

*Alix Prentice*

# Insider Dealing

- Primary legislation is the Market Abuse Regulation (“MAR”) Regulation (EU) No 596/2014 of the European Parliament.
- UK onshored MAR post-Brexit.
- Definition of “inside information” and how it relates to derivatives – what is a “price-affected security?”
- What are the disclosure obligations applicable to parties in possession of inside information?
- Guidelines issued by the European Securities and Markets Authority issued under article 7 (5) of MAR on the definition of inside information in the context of commodity derivatives.
- “Market Soundings” – bringing counterparties over the wall through disclosures.
- Worked example – single name CDS.

# EMIR

- European Markets Infrastructure Regulation (EMIR) Regulation (EU) No 648/2012 of the European Parliament.
- UK onshored into UK EMIR post Brexit.
- Primarily focused on increasing transparency in the OTC derivatives market and mitigating credit and operational risk.
- Scope of EMIR reporting.
- Two sided reporting requires one counterparty to provide data to the reporting counterparty.
- What is EMIR REFIT?

Section 6

*Andrew Karp*

# Confidential Supervisory Information

- Some disclosures by banks and bank holding companies are unlawful.
- The federal bank regulators (the Federal Reserve, the Office of the Comptroller of the Currency, and the FDIC) forbid the disclosure or sharing of "confidential supervisory information" ("CSI"). State regulators, such as the New York Department of Financial Services, also typically forbid such disclosure. For a good summary of these matters, see https://www.federalreserve.gov/boarddocs/srletters/2005/SR0504a1.pdf.
  - Each of the federal and state regulators defines CSI somewhat differently, but each definition is alike in concept.
  - In general, CSI refers to information related to or arising in connection with the supervisory relationship between federal or state regulators and a supervised organization.
  - The typical concept of CSI is expansive.
  - CSI usually includes communications and other information related to supervision by regulatory agencies, and to investigations and enforcement actions.
  - The best-known example of CSI would be examination reports. Other common examples are supervisory assessments and ratings, requests for documents or other information, and certain supervisory correspondence or other supervisory communications.

# Confidential Supervisory Information

- CSI cannot be shared or disclosed without a regulatory exemption or waiver.
- Subject to certain regulatory exemptions, the authority to determine whether CSI can be disclosed to any third party belongs not with the supervised organization, but rather with the relevant supervisor.
- Unauthorized disclosures of CSI can give rise to civil or criminal penalties.
- Recent coordinated enforcement actions taken in January of 2024 by the Federal Reserve and the NYDFS demonstrate the gravity of these disclosure restrictions.
- A NY branch of a non-US bank responded to an information request from a non-US bank regulator forwarded by the branch's non-US affiliate with material that included CSI. The branch had in fact advised the NYDFS and the Federal Reserve of the request and its proposed reply before responding, but sent the information to the non-US supervisor through its affiliate before receiving any clearance from the NYDFS or the Federal Reserve.
  - The branch agreed to pay a penalties of $30 million to the NYDFS and $2.4 to the Federal Reserve, and to undertake monitored remedial governance and training measures.



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# Cadwalader at a Glance

**Cadwalader is a premier legal advisor to the world's leading financial institutions, corporations, financial sponsors and investment funds, with a 230-year history of delivering innovative, commercial advice and exceptional client service.**

More than 450 attorneys work seamlessly across our market-leading practices to provide clients with efficient and results-oriented advice to achieve their business and legal goals.

## Our Practices

- Antitrust and Competition
- Capital Markets
- Commercial Litigation
- Corporate Finance
- Corporate Governance
- Derivatives and Structured Products
- Executive Compensation, Benefits and ERISA
- Financial Regulation
- Financial Restructuring
- Fund Formation
- Intellectual Property
- International Litigation and Arbitration
- Investment Management
- Leveraged Finance
- Mergers and Acquisitions
- Private Credit
- Private Equity
- Real Estate
- Securities Litigation
- Securitization
- Shareholder Activism and Defense
- State Attorneys General Investigations and Litigation
- Tax
- Trusts and Estates
- White Collar Defense and Investigations

**NEW YORK** | **CHARLOTTE** | **LONDON** | **WASHINGTON, D.C.**

# Financial Services Practice

We provide end-to-end bespoke solutions to clients with our wide-ranging regulatory and transactional experience. Our transactional experience focuses on structured finance, structured products, derivatives, fund formation and municipal finance (including municipal bankruptcy). We cover all financial services-related regulation in the U.S., EU and UK, focusing on the areas of banking, securities, broker-dealer, commodities, consumer finance and ERISA regulation. The nature of much of the work within the financial services group is inter-disciplinary including advising on ESG, and crypto and blockchain matters. Our clients include banks and bank holding companies, foreign banking organizations, nonbank finance companies and lenders, broker- dealers, securities and futures exchanges, swap dealers, investment advisers, hedge funds, private equity funds and asset managers. We also represent issuers, dealers and end-users as well as a variety of secondary market investors.

Ranked in **Tier 1** for Financial Services Regulatory and ranked in **Tier 2** for Capital Markets: Derivatives (2024)

Ranked in **Band 2** for Derivatives Nationwide by *Chambers USA* (2024) and ranked in **Band 2** for Derivatives in the U.S. by *Chambers Global* (2024)

Recognized in **Tier 3** for Financial Services Regulation: Banking and in **Tier 4** for Financial Services Regulation: Consumer Finance (2024)

Ranked in **Band 2** in Capital Markets: Structured Finance and Derivatives by *Chambers Global* (Global Multi-Jurisdictional) (2024)

Recognized in **Tier 1** for Structured Finance: Derivatives and Structured Products (2024)

*“Experienced, sophisticated, capable attorneys with real courtroom experience and strong brief writing capabilities.”* (*The Legal 500 USA*, 2024)



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# With You Today

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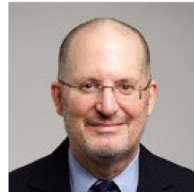

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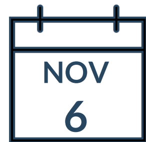
## Upcoming Webinar:

**Double Trouble (or More): Effectively Navigating Parallel Investigations**
10:00 – 11:00 AM ET




**Trends in ETD Trading Q3 2024**
09:30 – 10:30 AM ET

**Commodities Enforcement Trends and Developments**
10:00 – 11:00 AM ET

**Self-Reporting in the Age of Whistleblowers**
10:00 – 11:00 AM ET



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