

→ Derivatives and Structured Products

Sheppard Mullin represents swap dealers, asset managers, financial intermediaries, hedge funds and end-users in highly structured transactions as well as in more traditional trading or hedging transactions.

Our derivatives lawyers are fluent in structuring, documenting, and enforcing both exchange traded and over-the-counter (OTC) derivatives in a range of underlying markets, including energy, currency, commodity, credit, and equity derivatives. The practice covers swaps, repurchase agreements, futures, prime brokerage, and securities lending agreements, among other types of transactions.

The group includes attorneys who have structured and documented OTC derivatives before current industry documentation was standardized as well as attorneys who have handled controversies emanating from every market spike and significant bankruptcy or distressed credit in the derivatives market over the past 25 years, including litigation of “safe harbor”-related disputes in bankruptcy cases.

The group teams with the firm's energy practitioners in physical transactions and other energy trading activities. It also calls upon the firm's significant tax, and restructuring capabilities to assist clients with the development, documentation, compliance and enforcement of novel and structured derivatives and structured products.

We believe that the strength of our related practices, the depth of our experience and the range of our client base in this area provide Sheppard Mullin with a unique and significant competitive advantage.

Structured Products

Our derivatives team represents major money-center banks, hedge funds, and asset managers (including several of the leading participants in the tender option bond market) in structuring and documenting highly customized and structured derivatives. In this area, our experience includes: structured risk retention financings; structured vehicles for synthetic ownership of assets often on a leveraged and tax-efficient basis; options over managed accounts of equity portfolios; credit linked notes; and synthetic CLOs and CDOs.

Examples of recent transactions include:

- Representation of multiple market leaders in structuring and implementing tender option bond programs for both tax-exempt and taxable municipal securities.
- Representation of leading financial institutions in structuring and documenting deal contingent swaps.
- Representation of various public REITs and investment funds in structuring and implementing master repurchase financing facilities in a range of underlying asset classes, including commercial mortgage whole loans, business purpose loans and small balance commercial loans.
- Representation of multiple asset managers in financing CLO risk retention securities using repo facilities in a range of structures.

- Representation of various developers of renewable energy projects in limited recourse forward power hedges, related basis swaps, and sales of RECs.

Over-The-Counter Derivatives

In addition to structured products, our derivatives practice represents clients ranging from banks and hedge funds to end-users in OTC derivative transactions. Our lawyers draft ISDA Master Agreements, Credit Support Annexes, and other documentation for equity, interest rate, currency, credit, and commodity trading. This practice often includes negotiating margin loans, repurchase agreements, and securities lending arrangements.

Examples include:

- Advising swap dealers, financial entities, market infrastructure products, and commercial end-users on compliance with Title VII of the Dodd-Frank Act.
- Advising on industry standard documentation platforms including ISDA, SIFMA, EEI, and NAESB.
- Advising various hedge funds in establishing prime brokerage relationships with major market participants.
- Representing of various public company issuers of convertible debt in hedging dilution and price risk through call spreads, capped calls and other hedging products.
- Advising clients in pursuing rights in the bankruptcy proceedings of their counterparties and in restructuring distressed transactions.

Futures and Other Exchange Traded Derivatives

Sheppard Mullin attorneys also advise clients on exchange and clearinghouse issues as well as the implications of trading on swap execution facilities. Our team assists clients in complying with CFTC, CME Group, and ICE regulations, including margin, clearing, notice, and recordkeeping requirements. In addition, we help clients file Form 40s and other reports required under the CFTC's large trader and ownership and control reporting rules. We also advise market participants on other CFTC compliance issues, such as analyzing position limits rules that may be applicable to agricultural and physical commodities, as well as considering how the rules of other Federal agencies (i.e., FERC, SEC, and the banking regulators) can impact trading activities.

Commodity Pools and other Financial End Users

Our team advises a range of buy side clients, including hedge fund and private equity fund managers, REITs, insurance companies and corporations, on the scope and application of the CFTC's commodity pool regime to various structures and trading strategies, as well as related exemptions. We counsel clients on the registration, reporting and other requirements applicable to Commodity Pool Operators ("CPOs"), Commodity Trading Advisors ("CTAs"), 'financial entities', 'financial end-users' and similar categories in other jurisdictions. Our attorneys have successfully represented clients in seeking no-action, exemptive and interpretive relief from such requirements, including by drafting request letters and conferring with CFTC and NFA staff. Our attorneys have also advocated on behalf of industry groups such as the American Investment Council regarding the treatment of certain common investment structures under these regulatory regimes.

Separately, in the 'Futures and Other Exchange Traded Derivatives' section, please add the following at the end of that section: "Our attorneys have advised various US regional banks on the regulatory treatment of cleared swaps entered into by a non-clearing member customer on a U.S. exchange, including the customer's ability to exercise closeout netting rights in the event of a clearinghouse insolvency.

Controversies

Our attorneys have successfully represented clients in controversies arising from derivatives transactions, including in various federal and state court proceedings involving defaulted transactions.

Restructuring and Insolvency

We are actively involved in restructuring OTC derivatives and structured products and in advising clients of their rights in bankruptcy proceedings. In many of these transactions, we were not involved in the original transaction and became involved because of the creative solutions that we are able to suggest based on our experience in the derivatives markets and our proven ability to successfully litigate these issues.

Experience

Representative Engagements

Examples of derivatives and structured products engagements in which our attorneys recently have been involved include:

Synthetic Financing Transactions

- Representation of national bank in structured joint venture to invest and finance investments, on a tax-efficient basis, in renewable energy projects (wind and solar).
- Representation of market leader in industry efforts to restructure tender option bonds for Volcker compliance.
- Representation of a large asset manager in a series of total return swaps on a revolving portfolio of loans.
- Representation of a large hedge fund in a structured put/call over a managed account and in various barrier options.

Energy and Commodity

- Representation of various sponsors and developers of renewable energy projects in long-term power hedges, basis swaps and the sale of RECs and other attributes.
- Representation of various renewable energy project companies in proxy revenue hedge transactions.
- Representation of various lenders in the negotiation and diligence of long-term power hedges for dozens of renewable energy project companies.
- Representation of various power suppliers and of consumers of power in virtual power purchase agreements and contracts for differences.
- Representation of large utilities in various power and natural gas purchase, supply, and hedging agreements, including ISDA-, NAESB-, and EEI-based agreements.

- Representation of a power generation facility in a synthetic tolling agreement.

Municipal Derivatives

- Representation of large asset managers in structuring and implementing Volcker-compliant tender option bond programs for both tax exempt and taxable municipal securities.
- Representation of a major participant in the secondary market for mortgage backed securities in hedging activities connected with tax-exempt tender option bond programs.

Credit Derivatives

- Representation of multiple hedge funds in credit derivatives facilities for bank loans.
- Representation of a major money center investment bank in structuring, documenting, and issuing credit-linked notes.
- Representation of a large hedge fund in implementing a broad-based events trading strategy with multiple counterparties.

Equity Derivatives

- Representation of buy-side counterparties in negotiating master confirmations and other documentation for equity swap, forward and option transactions.
- Representation of various issuers of convertible notes in strategies to hedge dilution and price risk, including capped call transactions.
- Representation of various public companies in hedging strategies related to stock buy-backs, including accelerated share purchases.

Controversies

- Representation of a Fortune 100 corporation in litigation against a large European bank concerning the termination of various interest rate, commodity, and foreign exchange transactions.
- Advised commodities trading firm on issues related to energy futures contracts in the ERCOT market.

Bankruptcy & Insolvency

- Representation of dozens of clients, including several large pension plans, and multiple asset managers in the SIPC proceedings and in the bankruptcy proceedings of *MF Global* and *Lehman Brothers*, as well as in the bankruptcy proceedings of *Enron*.
- Representation of a Fortune 500 integrated, downstream energy company in “safe harbor”-related bankruptcy issues involving a chapter 11 counterparty.
- Representation of an Australian gold mining company in “safe harbor”-related bankruptcy issues involving a chapter 11 counterparty.