

Derivatives Law and Regulation

Derivatives Law and Regulation

THIRD EDITION

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*To George Edward Kalbaugh
for teaching me anything is possible*

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Preface to the Third Edition

In 2010, the Dodd-Frank Act initiated an era of frenzied implementation of an immense and comprehensive swap and security-based swap regulatory regime. The last rules required by this statute were finalized in 2020. The Securities and Exchange Commission's regulatory regime for security-based swaps is slated to be operative in November 2021. After ten long years, the era of implementing the Dodd-Frank Act has passed. What fruit it bears may well be determined by the students of this generation.

Much has changed in the years following the last edition, requiring most chapters to be significantly overhauled. The finalization of the Dodd-Frank regulations means a new capital regime for swap dealers and a wholistic rule framework for security-based swaps. The Commodity Futures Trading Commission worked feverishly on efforts to simplify elements of its regulatory framework. This resulted in changes to longstanding rules and new rules to replace assortments of no-action letters and interpretations. Meanwhile, in 2020, a record number of enforcement actions were initiated, often involving novel questions such as those arising in the nascent virtual currency market.

The author during this time has only grown more indebted to his students. Their insights, perspectives, and participation in the world of ideas has been a joy. He also remains indebted to his friend, Richard A. Miller, for Richard's unflagging confidence in him.

A tradition is developing where this author recognizes the immense sacrifices of his wife, Kristin P. Kalbaugh, who weeks ago delivered their sixth child. There is no way to adequately acknowledge her sacrifices; there is no day that passes without gratitude for her. Sacrifice also has fallen on the author's children whose patience is more than anyone is entitled to expect from such little ones.

Preface to the Second Edition

Derivatives Law and Regulation was first published in 2014. Since then, the Commodity Futures Trading Commission has finalized most of the swaps regulatory framework required by the Dodd-Frank Act and a meaningful corpus of swaps regulatory caselaw has developed. Both of these occurrences are reflected in substantial updates to chapters 7 through 10.

Whereas, in 2014 the Securities and Exchange Commission's regulatory regime for security-based swaps had not begun to take shape, many of the rules are now finalized. A new chapter, chapter 16, has been added. It exclusively focuses on the regulatory framework for security-based swaps.

Had the author heeded his students' recommendation to buy virtual currency in 2011, this edition may not have been written. Due to the rapid growth of virtual currency markets, chapter 12 now includes a section on virtual currency, along with new sections on retail foreign exchange dealers and leverage transaction merchants.

Major legal developments have impacted nearly every facet of derivatives law, spanning from bankruptcy to enforcement to the extent to which commodities and securities laws have extraterritorial effect. These developments have been faithfully included.

Once more, the author is indebted to the generosity and friendship of Richard A. Miller. He has been the recipient of a collection of Richard's materials that Richard carefully accumulated and curated during the decades of his influential derivatives law practice. Many are no longer available through ordinary channels. Their availability has been a boon to the author.

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In the first edition of *Derivatives Law and Regulation*, the author thanked his wife, Kristin P. Kalbaugh, for her support, especially through the birth of their son. The author now has four children and, to be able to accomplish this edition in such a busy environment, testifies to Kristin's sacrifices, capabilities, and grace.

Preface to the First Edition

In keeping with common practice in the field of derivatives law, all references herein to the Commodity Exchange Act are to the named statute, not to the United States Code. The sole exception is for cases and materials which cite to the United States Code. These citations have been retained. For the reader's convenience, a Commodity Exchange Act to United States Code conversion table is appended.

Throughout, some footnotes and citations have been omitted from cases and materials.

Part of the regulatory framework for derivatives is the regulation of security-based swaps by the Securities and Exchange Commission. Though the jurisdiction of the Securities and Exchange Commission over these products is discussed in Chapter 3, at the time of writing the implementation of this regulatory framework by the SEC had still not occurred and, therefore, it is not otherwise covered herein.

Though there are many rewards for writing this book (thanking those who contributed to its production is just one), my friendship with Richard A. Miller counts foremost among them. Richard, both through his establishment of the Futures and Derivatives Law Report and his continuing encouragement and contributions to the derivatives bar, has selflessly inspired and driven the academic study of derivatives law like no other practitioner.

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