

CFTC AND SEC ADOPT INTERIM SWAPS REPORTING RULES

The Commodity Futures Trading Commission and Securities and Exchange Commission have adopted interim final rules with respect to reporting of swap and security-based swap transactions, as applicable, entered into before and still outstanding on July 21, 2010 (“Pre-Enactment Unexpired Swaps”).¹ The Interim Rules establish nearly identical recordkeeping requirements and require counterparties to Pre-Enactment Unexpired Swaps who may be subject to reporting obligations under the Dodd-Frank Act to retain certain information. Eventually all swap transactions will be reported to either (i) a registered swap data repository (“SDR”) or (ii) the SEC or CFTC, as applicable. Several important terms introduced by the Dodd-Frank Act are yet to be defined, so the full scope of the reporting requirements for Pre-Enactment Unexpired Swaps cannot be fully determined.

Who is responsible for reporting?

The Interim Rules allocate responsibility for reporting of Pre-Enactment Unexpired Swaps. With respect to a swap in which only one counterparty is a swap dealer or major swap participant,² such swap dealer or major swap participant must report the swap. With respect to a swap in which one counterparty is a swap dealer and the other counterparty is a major swap participant, the swap dealer must report the swap. With respect to any other swap, the counterparties must select which one of them will report. This responsibility waterfall is identical under both the SEC and CFTC Interim Rules.

What information is to be retained for subsequent reporting?

The Interim Rules require the obligated counterparty to submit a copy of the transaction confirmation (in electronic form, if available) and other prescribed information to a registered SDR within 60 days after the SDR commences operation or to the CFTC or SEC, as applicable, within the time prescribed by the relevant agency. Since no SDRs have been established and neither the CFTC nor the SEC has established a mechanism by which to accept swap reporting

¹ See *Interim Final Rule for Reporting Pre-Enactment Swap Transactions*, 75 FR 63080 (October 14, 2010) promulgating CFTC Interim Rule 44.02, and *Reporting of Security-Based Swap Transaction Data*, SEC Release No. 34-63094 (October 13, 2010), 75 FR 64643 (October 20, 2010) promulgating SEC Interim Rule 13Aa-2T. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “Dodd Frank Act”) bifurcates regulation of OTC derivatives with security-based swaps regulated by the SEC and all other swaps regulated by the CFTC. The reporting of Pre-Enactment Unexpired Swaps is required by Sections 729 and 766 of the Dodd-Frank Act. Those sections require the CFTC and SEC, respectively, within 90 days of enactment of the Dodd-Frank Act, to adopt interim final rules for the reporting of Pre-Enactment Unexpired Swaps.

² References in this memorandum to “swap dealer” and “major swap participant” encompass security-based swap dealers and major security-based swap participants, as applicable. These terms are expected to be further defined by the CFTC and SEC, respectively, later this fall.

information, the Interim Rules establish an obligation to retain information and documents relating to Pre-Enactment Unexpired Swaps.

Interpretive notes to both the CFTC and SEC Interim Rules require counterparties that may be required to report Pre-Enactment Unexpired Swaps to retain in their existing format all information and documents relating to the terms of such transactions. While the Interim Rules are in effect, the CFTC or the SEC may request this information directly from counterparties. Information that must be retained and may be requested includes, but is not limited to:

- any information necessary to identify and value the transaction;
- date and time (if available) of execution of the transaction;
- information relevant to the price of the transaction;
- whether the transaction was accepted for clearing by any clearing agency or derivatives clearing organization;
- any modification to the terms of the transaction; and
- the final confirmation of the transaction.

Both the CFTC and SEC releases state that there is no requirement for any counterparty to create or retain new records or reformat existing records with respect to Pre-Enactment Unexpired Swaps.

Effective Dates

CFTC Interim Rule

The CFTC Interim Rule goes into effect immediately but the CFTC will accept comments on the rule until November 15, 2010. After November 15, 2010, the rule will be in effect until a final rule is promulgated. The final reporting rules to be adopted by the CFTC will require swaps to be reported to an SDR by January 12, 2012 (180 days from the effective date of the Dodd-Frank Act, July 16, 2011).

SEC Interim Rule

The SEC Interim Rule goes into effect immediately but the SEC will accept comments on the rule until December 20, 2010. After December 20, 2010, the rule will be in effect until a final rule is promulgated. The final reporting rules to be adopted by the SEC also will require security-based swaps to be reported to an SDR by January 12, 2012.

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November 1, 2010

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