

CFTC-SEC Final Swap Rules Start Regulatory Compliance Countdown

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Last Friday, July 6, 2012, the Securities and Exchange Commission (SEC) adopted final rules further defining the terms “swap” and “security-based swap” (SB swap). The Commodity Futures Trading Commission (CFTC) plans to adopt these same definitional rules tomorrow at a public meeting.¹ The publication of the swap definition in the Federal Register will start a countdown to compliance for many of the CFTC’s Dodd-Frank rules regulating the swap markets.

Part one of this client alert is a timeline showing estimated initial compliance dates for CFTC rules that are triggered by the publication of the final swap definition in the Federal Register.² To estimate the compliance dates we have assumed that the final swap definition will be published in the Federal Register 23 days after the CFTC approves the rule — since December 2011, 23 days is the average time it has taken rules adopted by the CFTC to appear in the Federal Register. The actual timeline could be longer or shorter.

Part two of this client alert summarizes the SEC’s plan for phasing in compliance with SB swap rules. Federal Register publication of the SB swap definition **will not** start the clock ticking toward compliance deadlines for most aspects of SB swap market regulation. Instead, the SEC plans to sequence implementation of SB swap rules according to a policy statement released in June.³ This policy statement should help SB swap market participants better plan for compliance with the SEC’s new rules.

Part One – CFTC Rules That Require Compliance Upon The Effective Date Of The Swap Definition

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|---|------------------|--|
| ● | 07/10/12 | Expected date of adoption of swap definition |
| ● | 08/02/12 | Estimated date of CFTC publication of swap definition in the Federal Register |
| ● | 10/01/12 | <p>Estimated effective date of swap definition (60 days after publication in the Federal Register)</p> <p>Compliance with the following rules will be required 60 days after publication of the swap definition in the Federal Register:</p> <ul style="list-style-type: none"> • Recordkeeping and reporting for interest rate and credit swaps for swap dealers (SDs) and major swap participants (MSPs) (three rulemakings);⁴ • Position Limits (spot-month limits and non-spot month legacy limits); • Large trader reporting rules applicable to SDs and MSPs; • Commodity options⁵; and • Privacy of consumer financial information applicable to SDs and MSPs. <p>Compliance with the following rules will be required on the effective date of the swap definition:</p> <ul style="list-style-type: none"> • Registration of SDs and MSPs (foreign SDs and MSPs can apply for temporary relief from certain Dodd-Frank Act requirements under the CFTC’s proposed exemptive order regarding cross-border jurisdictional issues); • Internal business conduct rules for registered SDs and MSPs addressing: i) reporting, record-keeping and daily trading records of SDs; ii) risk management; iii) monitoring of position limits; iv) diligent supervision; v) conflicts of interest; vi) the availability of records for disclosure and inspection; and vii) antitrust considerations; • Swap data repositories, registration standards, duties and core principles; and • Business affiliate marketing and disposal of consumer information rules applicable to SDs and MSPs. <p>Compliance with the following rules will be required on the later of October 1, 2012, or the effective date of the swap definition:</p> <ul style="list-style-type: none"> • Internal business conduct standards for SDs and MSPs addressing: Business Continuity and Disaster Recovery;⁶ and Chief Compliance Officers (also applies to FCMs);⁷ and • Customer clearing documentation and timing of acceptance for clearing (provisions applicable to SDs and MSPs). |
| ● | 10/15/12 | Compliance with external business conduct standards for SDs and MSPs will be required on the later of October 15, 2012 or the effective date of the swap definition |
| ● | 12/30/12 | SDs and MSPs must comply with reporting rules for equity swaps, foreign exchange swaps and other commodity swaps |
| ● | 12/31/12 | Compliance with the Rule 4.5 CPO registration exemption is effective on the later of December 31, 2012, or 60 days after the effective date of the swap definition |
| ● | 03/30/13 | End-users must comply with reporting rules |
| ● | July 2013 | Expiration of relief for foreign SDs and MSPs under the CFTC’s proposed exemptive order regarding cross-border jurisdictional issues |

Part Two – SEC General Policy Statement on Sequencing of Compliance Dates Applicable to Security-Based Swaps

The following chart shows the proposed sequence of final rules outlined in the SEC’s policy statement. The SEC divides its discussion into the five categories set out in the chart below. The specific rules listed under each category are the prerequisite rules that need to be finalized before the category can be effective. The SEC did not provide a definitive sequence or anticipated timeline. The SEC did, however, outline the following guiding principles:

- (1) first, the SB swap definition needs to be adopted and effective and cross-border rules must be at least proposed;
- (2) second, SB swap data repositories (SB SDRs) need to be in place and SB swap data reporting should begin;
- (3) before requiring clearing, the clearing infrastructure (clearing member capital, collateral protection and margin) needs to be reassessed;
- (4) exchange and SB swap execution facility (SB SEF) trading may be required at the same time clearing is required; and
- (5) market participants need sufficient time to comply with new rules.

| First | Second | Unclear Sequence | | |
|--|--|--|--|---|
| Definitional and Cross-Border Rules 1) Entity Definitions: Further defining SB swap dealer (SBSD) and major SB swap participant (MSBSP) 2) Product Definitions: SB swap, SB swap agreement, mixed swap 3) Cross-border rules | SDR Registration and SB Swap Reporting 1) SB SDR registration, applicable duties and core principles 2) Regulation SBSR – regulatory and real-time reporting for SB swaps 3) Reporting requirements for pre-enactment SB swaps 4) Establishment of block trade thresholds | Mandatory Clearing 1) Clearing procedures 2) Clearing agency standards 3) End-user exception from mandatory clearing 4) Mandatory clearing determinations | SBSD and MSBSP Registration and Regulation 1) SBSD and MSBSP registration 2) Business conduct standards for SBSDs and MSBSPs 3) Trade acknowledgment and verification of SB swap transactions by SBSDs and MSBSPs 4) Capital, margin and segregation rules applicable to SBSDs and MSBSPs 5) Reporting and recordkeeping requirements applicable to SBSDs and MSBSPs | SB SEF Registration and Regulation and the Mandatory Trade Execution Requirement 1) SB SEF registration and core principles 2) Regulation MC – mitigation of conflicts of interest 3) SB swap mandatory trade execution requirement |

END NOTES

- 1 The meeting also will consider final rules on the commercial end user exception to the clearing requirement for swaps and proposed rules to exempt from clearing certain swaps by cooperatives.
- 2 This client alert does not address compliance dates for swap rules that are not dependent on the final swap definition, like the clearing mandate. Those rules require further action by the CFTC before they will take effect.
- 3 See Statement of General Policy on the Sequencing of the Compliance Dates for Final Rules Applicable to Security-Based Swaps Adopted Pursuant to the Securities Exchange Act of 1934 and the Dodd-Frank Wall Street Reform and Consumer Protection Act, 77 Fed. Reg. 35625, (Jun. 14, 2012).
- 4 Compliance dates for these rules will depend on the category of swap and the type of entities involved in the transaction. The earliest compliance date is 60 days after the publication of the swap definition in the Federal Register.
- 5 In addition, compliance with Form TO filing requirements will not be required until the 2013 calendar year.
- 6 For an SD or MSP not regulated by a U.S. prudential regulator and that is not an SEC registrant, compliance will not be required until December 29, 2012 or, if later, the date on which the SD or MSP is required to register.
- 7 For an SD, MSP or FCM not regulated by a U.S. prudential regulator and that is not an SEC registrant, compliance will not be required until March 29, 2013 or, if later, the date on which the SD, MSP or FCM is required to register.