

## Corporate & Financial Weekly Digest

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### CFTC Announces Fifth Series of Dodd-Frank Rulemakings

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The Commodity Futures Trading Commission has requested comments on the following five rule proposals to implement provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

- *Segregation of Customer Funds Relating to Cleared Swaps*: Section 724 of the Dodd-Frank Act requires the CFTC to promulgate new rules concerning the segregation and protection of the collateral of swaps customers of futures commission merchants (FCMs). The CFTC is requesting information concerning the costs and benefits of various models for such segregation and protection requirements both at individual entities and across the industry. In particular, the CFTC is considering a range of models, including: (1) a model requiring individual segregation of each customer's collateral at all levels (at the FCM, the clearinghouse and at each custodian); (2) a model in which collateral of multiple customers may be commingled, but the value of the collateral for each customer's positions is treated on an individual basis; (3) a model in which the collateral of non-defaulting customers may be used in the event of an FCM default, but only after other elements of the clearinghouse's default resources package, including the clearinghouse's own contribution and the clearing member-funded guarantee fund; and (4) the current futures model, which treats an FCM's customers on an omnibus basis. Comments on these proposed rules must be submitted within 45 days of the proposal's publication in the Federal Register.
- *Protection of Collateral of Counterparties to Uncleared Swaps*: Section 724(c) of the Dodd-Frank Act requires that swap dealers (SDs) and major swap participants (MSPs) notify their counterparties that they have a right to require that any initial margin posted to guarantee uncleared swaps be held with a third party custodian. The CFTC is proposing a rule which would require any such custodian to be independent from both the SD or MSP and the counterparty, and that any such custody arrangement be made pursuant to a written custody agreement that meets certain minimum standards of clarity.

The proposed rule would additionally require segregated margin to be invested only pursuant to CFTC Rule 1.25. The proposed rule would not, however, limit the types of margin collateral that a customer could post or limit any commercial arrangements

between the parties concerning allocation of gains and losses resulting from such investments.

The proposed rule further touches on two additional unrelated matters. Section 713(c) of the Dodd-Frank Act requires the CFTC to ensure that, and the proposed rules clarify that, securities held in a portfolio margining account carried as a futures account are customer property and the owners of those accounts are customers for the purposes of the commodity broker provisions of the Bankruptcy Code. Finally, the proposed rule would change certain time periods concerning commodity broker bankruptcies to seven calendar days to conform with the Statutory Time-Periods Technical Amendments Act of 2009.

- *Real Time Public Reporting of Swap Transactions and Pricing Data:* The Dodd-Frank Act requires that information regarding swap price and volume be publicly reported “as soon as technologically practicable” following execution of a swap transaction. Accordingly, the CFTC has announced proposed rules requiring reporting of swap data (such as the contract type, the underlying asset class and commodity and the payment frequencies) to a “real-time disseminator,” such as a swap data repository (SDR), which would make such information publicly available. The reporting requirement would be satisfied either by (a) a swap execution facility (SEF) or designated contract market (DCM) for swaps executed on an SEF or DCM, or (b) the appropriate counterparty to the swap for swaps not executed on an SEF or DCM, according to the following order of precedence set forth in the rules: (1) an SD counterparty, if applicable, (2) an MSP counterparty, if applicable, or (3) either counterparty, as decided by the parties, if neither of the parties is an SD or MSP, or both parties are SDs or MSPs.

According to the CFTC, “as soon as technologically practicable” means “as soon as possible, taking into consideration the prevalence, implementation and use of technology by comparable market participants.” Under the proposed rules, data regarding block trades and other large notional swaps is subject to a reporting delay. The delay for standard contracts which are traded on an SEF or DCM (or are subject to the end-user exemption) is 15 minutes from the time the transaction is executed. The CFTC has requested comment on the appropriate time delay for reporting customized trades.

The appropriate minimum block size for block trades and other large notional transactions would be determined by using the larger size outcome of two tests: the “distribution” test, which determines the transaction size that is larger than 95% of transactions for the applicable category of swap instrument over the prior calendar year, and the “social size multiple” test, which determines the transaction size that is five times the largest of the mean, median and mode of transaction sizes for the applicable category of swap instrument over the prior calendar year. The CFTC has requested comment on whether the appropriate minimum block size should be set such that less than 10% of swap transactions in the applicable category of swap instrument would have qualified as a block trade or large notional swap transaction.

- *Registration and Regulation of Swap Data Repositories:* The CFTC has also proposed a new series of rules (the Part 49 Rules) to implement Section 728 of the Dodd-Frank Act,

which creates a new registration category under the Commodity Exchange Act for “swap data repositories.” SDRs will collect and maintain data related to swap transactions and will make such data directly available to the CFTC and other specified foreign and domestic regulatory agencies. Under the Part 49 Rules, SDRs would be required to file for registration electronically using new Form SDR, after which the CFTC would have a 180-day period in which to review such application (subject to extension for good cause). However, during the first year after adoption of the Part 49 Rules, an applicant would be permitted to request provisional registration while its application remains under review by the CFTC.

The Part 49 Rules implement various statutory duties applicable to SDRs, including requirements that SDRs (a) establish policies and procedures regarding the acceptance, confirmation and confidential treatment of data collected by an SDR, (b) provide the CFTC with direct electronic access to such information, and (c) maintain records in accordance with CFTC regulations. The Part 49 Rules also (1) prescribe additional duties for SDRs, including the adoption of system safeguards and recovery plans, provision of disclosure documents to market participants, maintenance of sufficient financial resources and establishment of provisions to ensure non-discriminatory access, and (2) implement the core principles applicable to SDRs under the Dodd-Frank Act (relating to antitrust considerations, governance arrangements and conflicts of interest). Under the CFTC proposal, the new Part 49 Rules would take effect no earlier than July 15, 2011.

- *Swap Data Recordkeeping and Reporting*: Section 728 of the Dodd-Frank Act requires SDRs to collect and maintain information regarding swap transactions, and to make such data electronically available to regulators. The CFTC has accordingly issued a proposed rulemaking to establish standards for SDRs’ recording of swap data. The proposal would require that such records (a) be maintained during the life of a swap transaction and for at least five years following the swap’s termination or expiration, and (b) be readily accessible during the course of the transaction and for at least the first two years of this five-year period. Additionally, swap data must be reported at the time of the swap’s creation and during the life of the swap, until its termination or expiration, using unique identifiers specified by the proposed rules. The proposals provide for SDRs to designate appropriate facilities, methods and data standards for reporting. Finally, while the proposed rules permit registered entities and counterparties to contract with third-party service providers to facilitate reporting of swap data, such parties would remain accountable for reporting requirements under the rules.

Unless otherwise noted, the comment periods for the above proposed rulemakings will expire 60 days from the dates of the publications of the respective rule proposals in the Federal Register. Information regarding all of the CFTC proposals, including the text of the CFTC releases, fact sheets and Q&As can be found [here](#).

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