

Corporate & Financial Weekly Digest

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CFTC Approves Final Rules under Dodd-Frank

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At a July 7 meeting, the Commodity Futures Trading Commission approved five final rulemakings under the Dodd-Frank Wall Street Reform and Consumer Protection Act: (1) large trader reporting for physical commodity swaps; (2) anti-manipulation and anti-fraud requirements; (3) the definition of an "agricultural commodity;" (4) protection of consumer information under the Fair Credit Reporting Act; and (5) the scope of consumer privacy protections under the Gramm-Leach-Bliley Act.

- **Large Trader Reporting for Physical Commodity Swaps:** The CFTC approved rules governing position reporting for physical commodity swaps (i.e., swaps for which the underlying interest is a physical commodity) that are deemed economically equivalent to regulated futures contracts. These rules are intended to implement a system for the collection of swap position data until such time as the registered swap data repository system established by the Dodd-Frank Act becomes fully operational. The new rules will apply to 46 physical commodities (which include agricultural commodities, soft commodities, metals and energy contracts) and will require clearing organizations, clearing members and swap dealers to report economically equivalent swap positions in excess of a specified size to the CFTC on a daily basis. Under the new rules, a swap transaction may be deemed economically equivalent to a regulated futures contract because the swap transaction either (1) references the settlement price of the regulated futures contract, or (2) is priced on the same commodity at the same location(s) as that of the regulated futures contract. A swap position would be deemed reportable under the new rules if it is, in any one futures equivalent month, comprised of 50 or more economically equivalent swaps (on a futures equivalent basis) based on the same commodity underlying any of the regulated futures contracts identified in the rules.

Clearing organizations will be required to make daily reports with respect to the aggregate proprietary and aggregate customer accounts of each of their clearing members, while clearing members and swap dealers will be required to make daily reports regarding their reportable principal (proprietary) and counterparty positions. The new rules will also require clearing organizations, clearing members, swap dealers and other market participants with reportable positions to maintain certain records relating to their

transactions in economically equivalent swaps governed by the rules and to submit to CFTC special calls for information with respect to any reportable positions.

- **Anti-Manipulation and Anti-Fraud Requirements:** The CFTC also approved rules to implement Section 753 of the Dodd-Frank Act, which prohibits manipulation and fraud in connection with any swap or contract of sale of a commodity in interstate commerce or for future delivery on or subject to the rules of a registered entity. Specifically, Section 753 expands the CFTC's power to prosecute manipulative and fraudulent behavior, including price manipulation (even in the absence of fraud) and manipulation by false reporting. Final Rule 180.1 is modeled after Securities and Exchange Commission Rule 10b-5 and prohibits manipulative and deceptive devices and contrivances, employed intentionally or recklessly, whether or not the conduct at issue created, or was intended to create, an artificial price. Failing to disclose information prior to entering into a transaction, either in an anonymous market setting or in bilateral negotiations, will not alone violate Rule 180.1, although trading based on material nonpublic information that was obtained either through fraud or deception or in breach of a pre-existing duty may. Rule 180.2 makes it unlawful for any person, directly or indirectly, to manipulate or attempt to manipulate the price of any swap or any commodity in interstate commerce or for future delivery on or subject to the rules of a registered entity. The four-part test for manipulation developed by case law (under former Commodity Exchange Act (CEA) Sections 6(c) and 9(a)(2)) will guide the application of Rule 180.2. Rules 180.1 and 180.2 take effect 30 days after their publication in the Federal Register.
- **Definition of Agricultural Commodity:** The CFTC adopted a definition of the term "agricultural commodity" comprised of the following four categories:
 1. the enumerated commodities listed in CEA Section 1a (e.g., wheat, cotton, corn, livestock);
 2. a general operational definition that covers "[a]ll other commodities that are, or once were, or are derived from, living organisms, including plant, animal and aquatic life, which are generally fungible, within their respective classes, and are used primarily for human food, shelter, animal feed, or natural fiber." This category distinguishes between products derived from living organisms used for human food, shelter, animal feed or natural fiber (which are covered by the definition) and products that are produced through processing plant or animal-based inputs to create products largely used as industrial inputs (which are not covered by the definition);
 3. a catch-all category for commodities that would generally be recognized as agricultural in nature, but that do not satisfy the general operational definition: "Tobacco, products of horticulture, and such other commodities used or consumed by animals or humans as the Commission may by rule, regulation, or order designate after notice and opportunity for hearing;" and
 4. a provision applicable to "[c]ommodity-based indices based wholly or principally on underlying agricultural commodities."
- **Protection of Consumer Information Under the Fair Credit Reporting Act:** The CFTC also approved rules permitting consumers to prohibit entities that are subject to

CFTC jurisdiction (regardless of whether such entities are required to register with the CFTC) from using certain consumer information obtained from an affiliate to make "solicitations" to consumers for marketing purposes. Further, such entities maintaining or possessing consumer information in connection with their business activities are required to develop and implement written programs and procedures for the proper disposal of such information. Under the rules, "solicitation" means the marketing of financial products or services to a particular consumer based on certain information communicated by the entity's affiliates. The term does not include communications to the general public without regard to consumers' personal information, even if the communications are intended to encourage consumers to purchase final products and services from the entity initiating the communications.

The final rules also present a variety of measures that an entity may use to satisfy the "reasonable disposal" requirement. An entity subject to the adopted regime can make solicitations to a consumer based on the consumer's information if (1) the consumer is given clear, conspicuous, and concise notice, (2) the consumer is given a reasonable opportunity to opt out of such use of the information, and (3) the consumer does not opt out. Should a consumer opt out, the opt-out period is for a period of at least five years. The final regulations take effect 120 days after the date of their publication in the *Federal Register*.

- **Scope of Consumer Privacy Protections Under the Gramm-Leach-Bliley Act:** Finally, the CFTC approved rules expanding the scope of existing Part 160 regulations, pertaining to privacy of consumer financial information, to include swap dealers and major swap participants (regardless of whether such entities are required to register with the CFTC). The final rules become effective 120 days after the date of their publication in the *Federal Register*.

Information regarding these final rules, including the fact sheets and Q&As regarding each of the rules, is available [here](#).

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