

CFTC Issues Interim Final Rule With Respect to Reporting Requirements for Pre-Enactment Swaps

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The Commodity Futures Trading Commission (the CFTC) recently adopted an interim final rule with respect to the time frame for reporting pre-enactment swaps (i.e., swaps outstanding on July 21, 2010, the date of enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act¹ (the Dodd-Frank Act)) as required by Section 729 of the Dodd-Frank Act. The interim final rule requires that certain information related to these transactions be reported to a registered swap data repository or to the CFTC within 60 days of the appropriate swap data repository's registration under Section 21 of the Commodity Exchange Act (CEA), or by another date to be established in the permanent rule adopted by the CFTC pursuant to the new Section 2(h)(5) of the CEA (which is found in Section 723 of the Dodd-Frank Act). At this time, the final text of the interim final rule has not been published in the Federal Register. However, the CFTC staff provided a summary of the rule when it was presented to the commissioners at an open meeting held on October 1, 2010. In addition, the CFTC has issued a [press release](#) and a [Q&A](#) discussing the interim final rule.

Background

One policy objective behind the Dodd-Frank Act is to bring greater transparency to the over-the-counter (OTC) derivatives markets. Section 728 of the Dodd-Frank Act requires the CFTC to establish rules governing swap data repositories that will collect information on swaps subject to the agency's jurisdiction. The swap data repositories will allow regulators, such as the CFTC, the Securities and Exchange Commission (the SEC), for security-based swaps, and the prudential regulators for swaps over which they have jurisdiction, to have access to information on all swaps regardless of whether they were executed on swap execution facilities or bilaterally and regardless of whether they have been cleared. In addition, Section 727 of the Dodd-Frank Act calls for real time reporting requirements. However, the interim final rule adopted on October 1 does not address or provide any guidance with respect to these real time requirements.

Congress contemplated that the CFTC would obtain swap data in two ways. First, derivative clearing organizations and other entities will register to become swap data repositories.² If a swap data repository does not exist for a particular type of swap, then a party to the swap will be required to report swap data directly to the CFTC. The repositories and the CFTC will gather information on swaps executed after the enactment of the Dodd-Frank Act. The swap data repositories and the CFTC will be required to provide the CFTC, the SEC and the prudential regulators with access to this swap data. Congress also wanted to ensure that regulators had access to data for swaps that existed as of July 21, 2010, the date that the Dodd-Frank Act was enacted. Section 729 of the Dodd-Frank Act thus directed the CFTC to adopt an interim final rule within 90 days of the enactment of the act in order to establish reporting requirements for pre-enactment swaps that had not expired as of July 21, 2010.

¹ Enacted July 21, 2010, H.R. 4173, Pub. Law 111-203.

² Dodd-Frank Act Section 728, codified at 7 U.S.C. § 24a.

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The Interim Final Rule

Entities subject to the new reporting requirements set forth in the interim final rule include (i) with respect to a swap in which only one counterparty is a swap dealer or a major swap participant, the entity that is the swap dealer or the major swap participant; (ii) 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; and (iii) with respect to any other swap, the party selected by the counterparties.

At this time, no swap data repositories have been registered under the CEA. Perhaps more importantly, the CFTC has not promulgated rules defining which transactions constitute “swaps” and which market participants are considered “swap dealers” or “major swap participants.” As a result, a note to the interim final rule directs “counterparties” to pre-enactment unexpired “swaps” to retain the data that will have to be reported at a later date. Data that will eventually have to be reported includes:

- (1) any information necessary to identify and value the transaction;
- (2) the date and time of execution;
- (3) information related to the price of the transaction;
- (4) whether the transaction was accepted for clearing and, if so, the identity of the clearing organization;
- (5) any modification(s) to the transaction; and
- (6) the final confirmation of the transaction.

Given the present uncertainty with respect to the scope of the term “swap,” the commissioners and the CFTC staff at the opening meeting suggested that market participants retain data for all pre-enactment transactions that may constitute swaps. The commissioners and the staff assured the public that the CFTC will have adopted regulations clarifying which entities and which transactions will ultimately be subject to the reporting requirements in the Dodd-Frank Act by the time the final reporting requirements take effect.

The commissioners also made clear at Friday’s meeting that those pre-enactment transactions that were unexpired on July 21, 2010, but have since expired, must nevertheless be reported to a swap data repository or to the CFTC, as appropriate, when the final reporting rules take effect. The commissioners interpret the reporting requirements for pre-enactment swaps as a way for Congress and the applicable regulators to obtain a picture of the overall swap market as of a certain time. This information about the overall swap market will be important to the regulators as they adopt other rules and regulations pursuant to the new legislation.

As a final point, we note that the interim final rule adopted at the open meeting is now subject to a 30-day comment period.

Implications

Market participants may not believe they have engaged in swap transactions or that they will have to report swap data because they are not the swap dealer, major swap participant or clearing organization subject to a reporting obligation. Until the CFTC can implement the elements of its reporting regulations, however, we recommend that participants in the OTC swap market retain the data described above for all of their pre-enactment transactions that may constitute swaps.



If you have any questions about this development, please feel free to contact the attorneys listed below or the Sutherland attorney with whom you regularly work.

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