

Corporate & Financial Weekly Digest

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CFTC Announces Fourth Series of Dodd-Frank Rulemakings

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

- **Registration of Foreign Boards of Trade:** Section 738 of the Dodd-Frank Act provides the CFTC with authority to implement a registration system for a foreign board of trade (FBOT) that provides direct access to its trading system to market participants located in the United States. The CFTC's proposed rules would create a registration process for FBOTs to replace the existing system of staff-issued no-action relief (from which the proposed rules are substantially derived), and would make it unlawful for any FBOT to permit direct access to U.S. participants without first registering with the CFTC. An FBOT that seeks to provide direct access to participants in the United States must submit a registration application to the CFTC that includes information regarding the FBOT's membership criteria, trading system, contracts to be made available to U.S. participants, settlement and clearing systems, home regulatory regime, and rules and rule enforcement. FBOTs currently operating pursuant to no-action relief would be required to apply for registration pursuant to a "limited" registration application process. The factors to be considered by the CFTC in determining whether to grant an FBOT application are substantially similar to those currently applicable to the no-action review process, including evaluation of whether the FBOT's home regulatory authority oversees the FBOT in a manner that is comparable to CFTC oversight of designated contract markets (DCMs).

FBOTs would also be required to satisfy certain conditions to retain their registration, including general conditions with respect to documentation and information sharing; real time, quarterly and annual reporting obligations; and specific conditions for contracts that are "linked" to U.S. contracts. The CFTC's proposed rules also set out several circumstances under which an FBOT's registration could be revoked by the CFTC, and specify the process by which an FBOT may seek approval to offer additional contracts to U.S. participants.

- **Registration and Regulation of Swap Dealers and Major Swap Participants:** The CFTC is requesting comment on proposed regulations governing registration requirements of, as well as duties to be imposed on, “swap dealers” (SDs) and “major swap participants” (MSPs), as required under Section 731 of the Dodd-Frank Act.

Under the proposals, registration as an SD or MSP would be similar to the process currently required for other registrants. The proposals provide for a phased implementation of the registration requirement, including an optional “provisional registration” process beginning on April 15, 2011. SDs and MSPs that choose not to apply under the interim process by July 21, 2011, will be required to register by the effective date of the CFTC’s forthcoming rule proposals defining the terms “swap dealer” and “major swap participant.”

The CFTC is also requesting comment on its proposal regarding the threshold at which a person’s swap dealing activity outside of the United States should be considered to “have a direct and significant connection with activities in, or effect on, commerce of the United States” such that registration as an SD would be required. The proposal states that the CFTC generally would not require registration for persons whose only connection to the United States is the use of, or reporting of transactions to, U.S.-registered trading or clearing organizations, but expects that persons outside of the United States who engage in swap dealing and regularly enter into swaps with U.S. persons would likely be required to register as SDs.

Finally, the CFTC is requesting comment on proposed business conduct rules for registered SDs and MSPs.

- **Designation of CCO and Preparation of Annual Compliance Report:** The CFTC has also proposed rules that would require each FCM, SD and MSP to designate a chief compliance officer (CCO). Under the proposed rules, the CCO would be a principal of the FCM, SD or MSP; would be required to have the appropriate background and skills to perform compliance duties for the registered entity; and could not be a person disqualified from registration under the Commodity Exchange Act. The duties of the CCO would include establishing compliance policies, resolving conflicts of interest, reviewing ensuring compliance with applicable law and establishing remediation procedures for noncompliance issues. The CCO would also be required to prepare and certify an annual report to the CFTC assessing the FCM’s, SD’s or MSP’s compliance policies and their effectiveness.
- **Research and Conflicts of Interest:** The CFTC has released two sets of proposed rules relating to the implementation of conflict of interest policies and procedures by (1) FCMs and introducing brokers (IBs), and (2) SDs and MSPs, respectively. The proposed rules were adapted in part from comparable rules applicable to securities broker-dealers, and would require that FCMs, IBs, SDs and MSPs implement policies and procedures, including appropriate informational barriers, to appropriately segregate the activities of research analysts from the influence of personnel involved in pricing, trading or clearing activities. The proposed rules would restrict non-research personnel from influencing the content of research reports, and would prohibit the supervision of research personnel by

certain trading and clearing personnel, the consideration of a research analyst's contributions to the firm's trading or clearing business when setting the analyst's compensation, and any retaliation against research analysts in connection with research reports that may adversely affect the firm's trading or clearing activities.

The CFTC's rules also require that appropriate partitions be established between SDs and MSPs and any affiliated clearing member (or, in the case of SDs and MSPs that are also registered as FCMs, between clearing unit personnel and business trading personnel of such firm), and prohibit SDs and MSPs from interfering with or attempting to influence decisions relating to the provision of clearing services or acceptance of clearing customers by an affiliated FCM (for example, due to a perceived competitive threat posed to the SD or MSP by such clearing customer).

- **Whistleblower Incentives and Protections:** The CFTC has proposed rules in response to Section 748 of the Dodd-Frank Act, which directs the CFTC to promulgate rules regarding whistleblower incentives and protections. Specifically, the CFTC is required to promulgate rules implementing the payment of awards to whistleblowers who provide original information to the CFTC that leads to successful enforcement of a CFTC action resulting in monetary sanctions exceeding \$1 million. The amount of such awards, as determined by the CFTC, will be between 10% and 30% of the sanctions collected in either a CFTC action or a related action based upon the original information provided by the whistleblower.

The proposed rule includes the procedures for submitting relevant information to the CFTC and criteria for determinations by the CFTC of eligibility for and the amount of awards. Certain government employees and other statutorily ineligible individuals would not be eligible to receive awards. The CFTC proposal further provides that information submitted and the identity of the whistleblower would be treated as confidential by the CFTC, subject to certain exceptions.

The comment periods for the proposals described above will expire 60 days from the dates of their respective publications 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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