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CFTC Adopts Interim Final Swap Reporting Rule

Sections 723 and 729 of the Dodd-Frank Act (“Dodd-Frank”) generally require the reporting to swap data repositories or to the Commodity Futures Trading Commission (“CFTC”) of swaps that were entered into prior to July 21, 2010 and which were still outstanding as of that date (“pre-enactment unexpired swaps”). The reporting requirements in those sections of Dodd-Frank are inconsistent, and the CFTC has approved an interim final rule (the “Rule”) in an effort to implement these reporting requirements pending the adoption of final rules relating to the reporting of swaps and associated recordkeeping requirements. In addition, although not explicitly required by Dodd-Frank, the Rule includes a guidance note (the “Note”) that imposes current recordkeeping obligations on the parties to pre-enactment unexpired swaps.

Reporting Obligations

New Rule 44.02 requires that a counterparty to a pre-enactment unexpired swap transaction submit certain information to a registered swap data repository or to the CFTC on the earlier of: (x) the compliance date that will be established by CFTC rules, or (y) within 60 days after a swap data repository is registered with the CFTC and becomes operational. Although not addressed in the Rule, it is possible that the CFTC will require the reporting of swaps that terminate after the date of enactment of Dodd-Frank but before the earlier of these two dates. The information required to be reported includes: (i) a copy of the transaction confirmation in electronic form, if available, or in written form if there is no electronic copy, and (ii) if available, the time the transaction was executed. The Rule also requires the parties to pre-enactment unexpired swaps to provide the CFTC with any information relating to these transactions that the CFTC may request.

Reporting Party

New Rule 44.02 also provides that if only one of the parties to the swap is a swap dealer or major swap participant, that party must report the swap. If one party is a swap dealer and the other party is a major swap participant, the swap dealer must report the swap. If neither party is a swap dealer or major swap participant, then the parties must select which one of them is responsible for reporting the swap.

Record Retention

The Note requires the parties to a pre-enactment unexpired swap to retain all information and documents that currently exist relating to the terms of these transactions. This information includes, but is not limited to: (i) any information necessary to identify and value the transaction; (ii) the date and time of execution of

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the transaction; (iii) information relevant to the price of the transaction; (iv) whether the transaction was accepted for clearing by a “clearing organization,” described in the accompanying Federal Register notice as a “clearing agency” or “derivatives clearing organization,” and if so, the identity of such clearing organization; (v) any modification(s) to the terms of the transaction; and (vi) the final confirmation of the transaction.

The Note does not require the parties to create new records or modify their existing records with respect to pre-enactment unexpired swaps. The CFTC also made it clear that such information may be reported in the format in which it is kept.

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