

CFTC Proposes Guidance on the Extraterritorial Application of the Dodd-Frank Act's Swaps Requirements

July 2, 2012

On June 29, the Commodity Futures Trading Commission (CFTC) issued highly anticipated [proposed interpretive guidance and a policy statement](#) concerning the extraterritorial application of certain swaps provisions of the Commodity Exchange Act (CEA) that were added by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) and CFTC rules issued or to be issued thereunder. The CFTC is soliciting comments in response to questions posed in the proposed interpretive guidance and policy statement. Comments must be submitted within 45 days of the publication of the proposed guidance and policy statement in the Federal Register, which is expected to occur shortly.

The proposed interpretive guidance and policy statement specify how the CFTC intends to interpret its jurisdiction over foreign swaps transactions and entities in light of Section 722 of the Dodd-Frank Act, which states that the CEA's swaps provisions will not apply to activities outside the United States unless those activities (1) have a direct and significant connection with activities in, or effect on, U.S. commerce or (2) contravene CFTC rules that were promulgated to prevent the evasion of the CEA's swaps provisions.

The proposed interpretive guidance and policy statement address (1) swap dealer and major swap participant registration requirements for non-U.S. persons (including the treatment, for registration purposes, of foreign branches, agencies, affiliates, and subsidiaries of U.S. swap dealers and of branches of non-U.S. swap dealers), (2) the applicability of the CEA and CFTC regulations to the swaps activities of non-U.S. swap dealers, non-U.S. major swap participants, and the foreign branches, agencies, affiliates and subsidiaries of U.S. swap dealers, and (3) the applicability of the Title VII clearing, trade execution, recordkeeping, and reporting requirements with respect to cross-border swaps involving one or more counterparties that are not swap dealers or major swap participants. Also, the proposed interpretive guidance and policy statement provide for substituted compliance with comparable foreign regulatory requirements by non-U.S. swap dealers and non-U.S. major swap participants, with CFTC approval, under certain circumstances.

Due to the global nature of the swaps market, swaps market participants may wish to review the CFTC's proposed interpretive guidance and policy statement to determine how Title VII of the Dodd-Frank Act may impact them. The proposed guidance and policy statement were not required to be issued under the Dodd-Frank Act and are not a rulemaking that requires the CFTC to conduct a cost benefit analysis. Nevertheless, as noted above, the CFTC has posed a number of questions with respect to the proposed interpretive guidance and policy statement to which swaps market participants may wish to respond. We are continuing to review the proposed guidance and statement and their application to U.S. and foreign companies.

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