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Title: Public Reporting Requirements of Swap Transactions under the Dodd-Frank Act

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On July 21, 2010 President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (“the Act”) into law.¹ The Act is a sweeping piece of legislation designed to “promote the financial stability of the United States.”² This article will focus on the Act’s public reporting requirements for parties to swap transactions.

Title VII of the Act amended the Commodity Exchange Act to establish a “comprehensive new regulatory framework for swaps and security-based swaps.”³ The Act delegates regulatory authority over “security-based swaps” to the Securities and Exchange Commission and gives regulatory authority over all other swaps to the Commodity Futures Trading Commission (“the Commission”).⁴ Title VII requires that parties to swap transactions publicly report information relating to the swap transaction. Whether a party is required to publicly report the information will depend on their status as a “swap dealer,” “major swap participant,” or neither under the Act.

Companies will need to review all of their swap positions and counterparties in order to determine their reporting responsibility for each individual swap transaction. It is important to note that a company’s reporting responsibility may be different for each swap they own. Additionally, one must note the Act does not solely cover prospective swaps. The Act also establishes reporting requirements for swaps entered into before the Act whose terms have not expired as of the date of enactment.

¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

² A sample of the areas covered by the Act include creation of a Financial Stability Oversight Council, liquidation procedures for financial companies, regulations of advisers to hedge funds, and investor protections.

³ 75 Fed. Reg. 63,081 (Oct. 14, 2010). Section 721 of the Act amends Section 1a of the Commodity Exchange Act to define swap. Section 761 of the Act amends Section 3(a) of the Securities Exchange Act of 1934 to define security-based swap.

⁴ See Section 2 of the Act (defining the “primary financial regulatory agency”).

The first section of this article will review the “real-time public reporting” requirement. The second section will review the reporting duties of parties to swap transactions. Finally, the third section will review reporting requirements for “pre-enactment unexpired swaps.”

REAL-TIME PUBLIC REPORTING

Section 727 of the Act amends the Commodity Exchange Act to require “real-time public reporting” of swap transactions. “Real-time public reporting” is defined by the Act as reporting “as soon as technologically practicable after the time at which the swap transaction has been executed.” The purpose of Section 727 is to “authorize the Commission to make swap transaction and pricing data available to the public”

Section 727 classifies swaps into four categories for the reporting requirement. The first two categories cover (1) swaps that are subject to the mandatory clearing requirement and (2) swaps that are not subject to the mandatory clearing requirement but are cleared at a registered derivatives clearing organization.⁵ Section 723 of the Act establishes a mandatory clearing requirement for swaps. This section makes it unlawful to engage in a swap transaction unless the swap is cleared at a derivatives clearing organization registered under the Commodity Exchange Act. Swaps that fall into the first two categories must be reported “as soon as technologically practicable.”

The third category consists of swaps that are required to be cleared under new section 2(h)(2) of the Commodity Exchange Act but are not cleared.⁶ Swaps in the third category must also be reported “as soon as technologically practicable.” The fourth category is swaps that are not cleared at a

⁵ See 7 U.S.C. § 1a(9) for a definition of derivatives clearing organization.

⁶ New section 2(h)(2) of the Commodity Exchange Act mandates the Commission will conduct an ongoing review to determine what types of swaps should be required to be cleared.

registered derivatives clearing organization and “which are reported to a swap data repository⁷ or the Commission.” These swaps must meet the “real-time public reporting” requirement. However, in meeting the reporting requirement, these swaps can be reported in a manner that “does not disclose the business transactions and market positions of any person.”

Section 727 mandates “real-time public reporting” for swap transactions. However, the manner in which swap transactions meet this requirement is different depending on whether the swaps fall under the mandatory clearing requirement. To ensure compliance with the Act, companies should implement a recordkeeping system that will track whether their swaps meet the mandatory clearing requirement outlined in Section 723 of the Act. Companies will also need to keep track of which swaps were cleared at a derivatives clearing organization. Finally, companies will need to record which swaps were reported to a swap data repository or the Commission.

REPORTING DUTIES OF PARTIES TO A SWAP TRANSACTION

Section 729 of the Act requires that any swap that is not accepted for clearing at a derivatives clearing organization be reported to either a swap data repository⁸ or to the Commission. The Act classifies swap transactions into three categories based on the identities of the parties.

The first category is a swap transaction in which only one of the parties is a “swap dealer”⁹ or “major swap participant.”¹⁰ In this transaction, it is the responsibility of the swap dealer or major swap

⁷ Section 721 of the Act amends Section 1a of the Commodity Exchange Act to define swap data repository as “any person that collects and maintains information or records with respect to transactions or positions in, or the terms and conditions of, swaps entered into by third parties for the purposes of providing a centralized recordkeeping facility for swaps.”

⁸ Section 728 of the Act requires that a swap data repository be registered with the Commission.

⁹ Section 721 of the Act defines a swap dealer as any person who (1) holds itself out as a dealer in swaps; (2) makes a market in swaps; (3) regularly enters into swaps with counterparties as an ordinary course of business for its own account; or (4) engages in any activity causing the person to be commonly known in the trade as a dealer or market maker in swaps. Satisfying any of the above categories will result in a person being classified as a “swap dealer” under the Act.

participant to report the transaction. In the second category, one of the parties is a swap dealer and the other is a major swap participant. In this transaction, the swap dealer shall report the transaction. The third category is where companies will have to be vigilant in tracking the counterparties to their swaps. In the event that neither of the parties is a swap dealer or major swap participant, then the parties shall elect one party to report the swap transaction to a swap data repository or the Commission.

In order to comply with the reporting requirement under Section 729 of the Act, companies will need to maintain a list of every counterparty with whom they have entered into a swap transaction. Upon reviewing a list of counterparties, companies will need to assess what counterparties meet the definition of swap dealer or major swap participant. Swaps entered into with a swap dealer or major swap participant will relieve the company of any reporting obligations. However, if the counterparty is not a swap dealer or major swap participant, then the company must come to an agreement with their counterparty to determine who will report the swap transaction.

REPORTING & RECORDKEEPING OF PRE-ENACTMENT UNEXPIRED SWAPS

Section 729 of the Act requires all swap transactions entered into before the enactment of the Act whose terms have not yet expired as of the date of enactment (“pre-enactment unexpired swaps”) shall be reported to a registered swap data repository or the Commission not later than thirty days after issuance of the interim final rule or by a date determined by the Commission to be appropriate.¹¹ On October 14, 2010, the Commission issued an interim final rule to cover the reporting of swap

¹⁰ Section 721 of the Act defines a major swap participant as any person who is not a swap dealer and (1) maintains a substantial position in swaps for a major swap category; (2) whose outstanding swaps create substantial counterparty exposure that could have serious adverse effects on the stability of the United States banking system; or (3) is a highly leveraged financial entity not subject to capital requirements from a Federal banking agency and maintains a substantial position in outstanding swaps in a major swap category.

¹¹ The Act is written to allow the swap transaction to be reported to the Commission in the event no swap data repository would accept the swap. In the background of the interim final rule, the Commission noted there might be circumstances whereby no swap data repository has been approved for an asset class. 75 Fed. Reg. 63,082.

transactions entered into before July 21, 2010 whose terms had not expired as of that date.¹² The interim final rule is effective October 14, 2010¹³ and will remain in effect until the permanent reporting rules for swap transactions are adopted by the Commission within 360 days of the enactment of the Act.

The interim final rule establishes a reporting time frame for pre-enactment unexpired swaps. The rule requires swap transactions be reported on the earlier of: (1) 60 days from the date an appropriate swap data repository is registered with the Commission, or (2) by the compliance date established in the swap reporting rules required by Section 2(h)(5) of the Commodity Exchange Act. The interim final rule requires that the party reports to the swap data repository or Commission a copy of the swap transaction confirmation and, if available, the time the transaction was executed. A note to the interim final rule requires the following information be retained by each party (assuming the information presently exists): (1) any information necessary to identify and value the transaction; (2) the date and time of execution; (3) information relevant to the price; (4) whether the transaction was accepted for clearing and the identity of the clearing organization; (5) any modifications to the term of the transaction; and (6) the final confirmation of the transaction.¹⁴

In order to comply with the reporting requirement for pre-enactment unexpired swaps, companies will need to take inventory of all swaps held on July 21, 2010 that were unexpired. The same reporting obligations for counterparties established under Section 729 for prospective swaps will also apply for pre-enactment unexpired swaps. Companies will need to retain required supporting information of the swap transaction.

¹² Interim Final Rule for Pre-enactment Swap Transactions, 17 C.F.R. §§ 44.00-44.02 (2010). On October 20, 2010 the Securities and Exchange Commission issued an interim final rule for the reporting of pre-enactment security-based swap transactions. Interim Rule for Reporting Pre-enactment Security-based Swap Transactions, 17 C.F.R. § 240.13Aa-2T (2010).

¹³ 17 C.F.R. § 44.01.

¹⁴ The note to the interim final rule does not require that a party to a pre-enactment unexpired swap create new records. Parties may report to the Commission the information in the form that it presently exists. 17 C.F.R. § 44.02.

CONCLUSION

To comply with reporting requirements of the Act, any company or pension holding swaps that were unexpired at July 21, 2010 or enters into swap transactions after July 21, 2010 will need to maintain a list of their swap transactions and respective counterparties. Companies will then need to determine if their counterparties meet the statutory definitions of “swap dealer” or “major swap participant” in order to determine the company’s reporting requirement under the Act. Because the reporting requirement may be different for each individual swap a company has entered into, it is imperative that companies begin to take an inventory of their swap positions and counterparties.