

CFTC Extends Compliance Dates for Dodd-Frank Requirements Necessitating Amendments to Existing Trade Documentation

December 21, 2012

On December 18, the Commodity Futures Trading Commission (CFTC), by private vote, adopted interim final rules ([Interim Final Rules](#)) to amend the compliance dates for previously issued final rules that establish external business conduct standards, trade documentation and portfolio reconciliation requirements for swap dealers (SDs) and major swap participants (MSPs). The Interim Final Rules do not change the substance of the aforementioned rules. Rather, they afford SDs and MSPs until May 1, 2013 to comply with the external business conduct standards rules and until July 1, 2013 to comply with the trade documentation and portfolio reconciliation requirements. Although the relief afforded by the Interim Final Rules is directly applicable to SDs and MSPs, other market participants, including end-users, also benefit from the extended compliance dates, for the reasons discussed below.

External Business Conduct Standards

The CFTC's external business conduct standards rules, which were adopted last January, were slated to become effective for SDs and MSPs beginning on December 31, 2012.¹ They impose a myriad of requirements on SDs and MSPs when dealing with counterparties including, among other things, know-your-counterparty requirements, disclosure obligations and pay-to-play restrictions, which requirements would apply on a prospective basis (*i.e.*, to swaps executed after December 31, 2012). Pursuant to the external business conduct standards rules, SDs and MSPs may rely on written representations from their counterparties, and standardized disclosures, to comply with many of these requirements. As a result, SDs and MSPs are requiring their counterparties to amend their existing trade documentation.

To facilitate SDs' and MSPs' compliance with the external business conduct rules, and several other CFTC rules, the International Swaps and Derivatives Association (ISDA) developed an "[ISDA August 2012 DF Protocol](#)" (Protocol).² By adhering to the Protocol and exchanging a "Questionnaire", persons may amend their existing trade documentation so that the SD or MSP counterparty is in compliance with certain of the external business conduct standards requirements. However, the CFTC's rules do not require adherence to the Protocol. Instead, counterparties may elect to facilitate SDs' and MSPs' compliance with the external business conduct standards via an alternative means (*e.g.*, by bilaterally

¹ Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties, 77 Fed. Reg. 9,734 (Feb. 17, 2012) (codified at 17 C.F.R. pts. 4 and 23). The original compliance deadline was October 14, 2012, but that deadline was extended by the CFTC, with respect to a majority of the external business conduct requirements, to December 31, 2012.

² The Protocol consists of a Protocol Agreement, Questionnaire and Supplement. In order to amend their documentation, counterparties must execute a Protocol Agreement, submit a Protocol adherence letter to ISDA, and exchange Questionnaires. The Supplement is the substantive document that amends existing trade documentation; in addition to the external business conduct rules the Supplement addresses the following CFTC rules: (1) large trade reporting for physical commodity swaps; (2) position limits ([vacated earlier this year](#)); (3) real-time reporting; (4) general swap data recordkeeping and reporting; (5) internal business conduct standards; and (6) historical swaps data recordkeeping and reporting. For more information, please see the ISDA webpage dedicated to the Protocol, which can be accessed via the link above.

amending existing trade documentation). Nevertheless, in many cases, entities that intend to register as SDs or MSPs as of December 31, 2012 (the deadline for registration) informed their counterparties that they would be unable to trade with them in the new year unless the counterparties adhered to the Protocol. As a result of the Interim Final Rules, this should no longer be the case. Rather, counterparties will have until May 1, 2013 to adhere to the Protocol or to identify an alternative means of facilitating SDs' and MSPs' compliance with the external business conduct rules.

The issuance of the Interim Final Rules is based on a letter from ISDA to the CFTC requesting additional time for compliance with the external business conduct standards rules because, according to ISDA, only 17.5% of counterparties to prospective SDs and MSPs have adhered to the Protocol, and less than 1% have completed the Questionnaires necessary for the Protocol to actually amend existing trade documentation. Therefore, the extension of time afforded by the Interim Final Rules will give market participants additional time to (1) understand the external business conduct standards, (2) understand the legal consequences of adhering to the Protocol, and (3) gather the information needed to complete the Protocol if they choose to do so.

Trade Documentation and Portfolio Reconciliation

The Interim Final Rules also extend the timing for compliance with the CFTC's final rules establishing trade documentation and portfolio reconciliation requirements for SDs and MSPs.³ These rules, like the external business conduct rules, will require amendments and/or supplements to SDs' and MSPs' trade documentation with counterparties. Prior to the Interim Final Rules, the earliest date that an SD or MSP would have been required to comply with the new trade documentation requirements would have been on January 1, 2013, and with the portfolio reconciliation requirements on December 11, 2012 or March 11, 2013, with the earlier date applying to SDs and MSPs that are subject to the oversight of a federal banking regulator.⁴ As a result of the Interim Final Rules, SDs and MSPs now have until July 1, 2013 to comply with these requirements.

The extension of time for the trade documentation and portfolio reconciliation requirements can also be attributed to a request from ISDA. ISDA is in the process of developing a second protocol that is intended to facilitate SDs' and MSPs' compliance with the trade documentation. Originally, this second protocol was to become available prior to January 1, 2013. However, according to ISDA, the pace of the implementation of the second protocol has been adversely affected by the difficulty of reaching agreement on certain valuation methodologies required by the trade documentation rules.



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

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³ Confirmation, Portfolio Reconciliation, Portfolio Compression, and Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants, 77 Fed. Reg. 55,904 (Sept. 11, 2012) (codified at 17 C.F.R. pt. 23).

⁴ The Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve, the Federal Housing Finance Agency or the Farm Credit Administration, collectively called the "Prudential Regulators".

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