

CFTC Issues First Set of Mandatory Clearing Determinations and Time-Limited No-Action Relief

November 30, 2012

On November 28, the Commodity Futures Trading Commission (CFTC) issued final clearing determinations (Final Determinations) with respect to four classes of interest rate swaps (IRS) and two classes of credit default swaps (CDS). The CFTC was scheduled to adopt the Final Determinations at an open meeting to be held yesterday, but the meeting was canceled and the Final Determinations were issued by seriatim on November 28 instead.

The Final Determinations were widely anticipated by market participants and are significant because they mark the first set of swaps that will be subject to mandatory clearing pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act. CFTC Chairman Gary Gensler, in a [statement of support](#) for the Final Determinations, indicated that the Final Determinations “[complete] the clearing building block” that “is one of three major building blocks of Dodd-Frank [Act] swaps market reform.”

The CFTC’s [proposal](#) to clear the IRS and CDS that are the subjects of the Final Determinations (conforming IRS and CDS) was issued last summer. Based on the CFTC’s [press release](#) and a [pre-publication copy](#) of the Final Determinations, there do not appear to be any changes between the types of swaps that were proposed to be subject to mandatory clearing and those that will be.

The pre-publication release for the Final Determinations sets the following staggered compliance dates for mandatory clearing, which are based counterparty type.¹ The pre-publication release makes clear that the mandatory clearing requirement will only apply to conforming IRS and CDS executed on or after the applicable compliance date.

- Swap dealers, major swap participants, security-based swap dealers, major security-based swap participants and active funds² (Category 1 Entities) must clear conforming IRS and CDS that are executed on or after March 11, 2013;
- Financial entities, other than ERISA pension plans (Category 2 Entities), must clear conforming IRS and CDS that are executed on or after June 10, 2013; and
- Third-party subaccounts, ERISA pension plans and all other entities (Category 3 Entities) must clear conforming IRS and CDS that are executed on or after September 9, 2013.

To the extent that counterparties to a swap fall in different compliance date categories, the later compliance date will govern. For example, if a Category 1 Entity and a Category 2 Entity enter into a conforming IRS on

¹ No eligible derivatives clearing organization currently offers client clearing for CDS based on iTraxx indices. Counterparties engaging in such CDS will be subject to the staggered compliance deadlines but, if no eligible derivatives clearing organization has begun offering client clearing for iTraxx by February 11, 2013, the CFTC will delay compliance for clearing those CDS until 60 days after the date on which an eligible derivatives clearing organization offers client clearing for CDS based on the iTraxx indices. Compliance will be phased in for Category 2 and Category 3 Entities provided that client clearing is offered prior to September 9, 2013.

² For purposes of the staggered compliance dates, an “active fund” is any private fund, as defined in section 202(a) of the Investment Advisers Act of 1940, that is not a third-party subaccount and that executes 200 or more swaps per month based on a monthly average over the 12 months preceding November 1, 2012.

March 12, 2013, such conforming IRS would not need to be cleared, despite the Category 1 Entity compliance date. However, if those two entities enter into the conforming IRS on June 11, 2013, such conforming IRS would need to be cleared. Despite this, market participants may voluntarily clear conforming IRS and CDS prior to the applicable compliance dates.

The tables on the following pages, taken from the CFTC's press release, summarize the types of IRS and CDS that will be subject to mandatory clearing pursuant to the Final Determinations.

No-Action Relief Related to Clearing

In addition to the Final Determinations, on November 28, the CFTC's Division of Clearing and Risk issued two no-action letters that afford relief from the mandatory clearing requirement for conforming IRS and CDS transacted between [affiliated entities](#) or [cooperatives and their members](#). Both no-action letters: (1) were issued due to pending CFTC action on two sets of proposed rules that would extend the end-user exception from mandatory clearing to (a) [interaffiliate swaps](#) and (b) [swaps between cooperatives and their members](#), each subject to certain conditions; and (2) will expire on the earlier of April 1, 2013, or the effective date of final CFTC action with respect to the proposed 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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1. Conforming IRS

| <i>Specification</i> | <i>Fixed-to-Floating Swap Class</i> | | | |
|----------------------------------|-------------------------------------|---------------------|---------------------|---------------------|
| 1. Currency | U.S. Dollar (USD) | Euro (EUR) | Sterling (GBP) | Yen (JPY) |
| 2. Floating Rate Indexes | LIBOR | EURIBOR | LIBOR | LIBOR |
| 3. Stated Termination Date Range | 28 days to 50 years | 28 days to 50 years | 28 days to 50 years | 28 days to 30 years |
| 4. Optionality | No | No | No | No |
| 5. Dual Currencies | No | No | No | No |
| 6. Conditional Notional Amounts | No | No | No | No |

| <i>Specification</i> | <i>Basis Swap Class</i> | | | |
|----------------------------------|-------------------------|---------------------|---------------------|---------------------|
| 1. Currency | U.S. Dollar (USD) | Euro (EUR) | Sterling (GBP) | Yen (JPY) |
| 2. Floating Rate Indexes | LIBOR | EURIBOR | LIBOR | LIBOR |
| 3. Stated Termination Date Range | 28 days to 50 years | 28 days to 50 years | 28 days to 50 years | 28 days to 30 years |
| 4. Optionality | No | No | No | No |
| 5. Dual Currencies | No | No | No | No |
| 6. Conditional Notional Amounts | No | No | No | No |

| <i>Specification</i> | <i>Forward Rate Agreement Class</i> | | | |
|----------------------------------|-------------------------------------|-------------------|-------------------|-------------------|
| 1. Currency | U.S. Dollar (USD) | Euro (EUR) | Sterling (GBP) | Yen (JPY) |
| 2. Floating Rate Indexes | LIBOR | EURIBOR | LIBOR | LIBOR |
| 3. Stated Termination Date Range | 3 days to 3 years | 3 days to 3 years | 3 days to 3 years | 3 days to 3 years |
| 4. Optionality | No | No | No | No |
| 5. Dual Currencies | No | No | No | No |
| 6. Conditional Notional Amounts | No | No | No | No |

| <i>Specification</i> | <i>Overnight Index Swap Class</i> | | |
|----------------------------------|-----------------------------------|-------------------|-------------------|
| 1. Currency | U.S. Dollar (USD) | Euro (EUR) | Sterling (GBP) |
| 2. Floating Rate Indexes | FedFunds | EONIA | SONIA |
| 3. Stated Termination Date Range | 7 days to 2 years | 7 days to 2 years | 7 days to 2 years |
| 4. Optionality | No | No | No |
| 5. Dual Currencies | No | No | No |
| 6. Conditional Notional Amounts | No | No | No |

2. Conforming CDS

| <i>Specification</i> | <i>North American Untranching CDS Indices Class</i> |
|-----------------------|--|
| 1. Reference Entities | Corporate |
| 2. Region | North America |
| 3. Indices | CDX.NA.IG CDX.NA.HY |
| 4. Tenor | CDX.NA.IG: 3Y, 5Y, 7Y, 10Y CDX.NA.HY: 5Y |
| 5. Applicable Series | CDX.NA.IG 3Y: Series 15 and all subsequent Series, up to and including the current series CDX.NA.IG 5Y: Series 11 and all subsequent Series, up to and including the current series CDX.NA.IG 7Y: Series 8 and all subsequent Series, up to and including the current series CDX.NA.IG 10Y: Series 8 and all subsequent Series, up to and including the current series CDX.NA.HY 5Y: Series 11 and all subsequent Series, up to and including the current series |
| 6. Tranching | No |

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| <i>Specification</i> | <i>European Untranchred CDS Indices Class</i> |
| 1. Reference Entities | Corporate |
| 2. Region | Europe |
| 3. Indices | iTraxx Europe iTraxx Europe Crossover iTraxx Europe HiVol |
| 4. Tenor | iTraxx Europe: 5Y, 10Y iTraxx Europe Crossover: 5Y iTraxx Europe HiVol: 5Y |
| 5. Applicable Series | iTraxx Europe 5Y: Series 10 and all subsequent Series, up to and including the current Series iTraxx Europe 10Y: Series 7 and all subsequent Series, up to and including the current Series iTraxx Europe Crossover 5Y: Series 10 and all subsequent Series, up to and including the current Series iTraxx Europe HiVol 5Y: Series 10 and all subsequent Series, up to and including the current Series |
| 6. Tranchred | No |