



The CFTC and the SEC Issue Interim Final Reporting Rules for “Pre-Enactment Unexpired” Swaps and Security-Based Swaps

October 22, 2010

As required under the Dodd-Frank Act, the Commodities Futures Trading Commission (the “CFTC”) and the Securities Exchange Commission (the “SEC”)¹ have issued interim rules with respect to the reporting of swaps and security-based swaps entered into prior to July 21, 2010, the date of enactment of the Dodd-Frank Act (the “enactment date”), that had not expired as of the enactment date (“pre-enactment unexpired swap transactions”).

Under the Dodd-Frank Act, a pre-enactment unexpired swap transaction must be reported to a registered swap data repository or to the CFTC or the SEC, as applicable, by the later of (1) 30 days after the interim rules are issued or (2) such other period as the CFTC or the SEC, as applicable, determines to be appropriate. Another provision of the Dodd-Frank Act requires pre-enactment unexpired swap transactions to be reported to a registered swap data repository or a registered security-based swap data repository (together, “SDRs”) or to the CFTC or the SEC, as applicable, by January 12, 2012. However, because there are no registered SDRs with the capacity to accept the swap data and because further rulemaking is required by the SEC and the CFTC regarding the registration of SDRs and the definitions of various terms such as “substantial net position”, there are no immediate reporting obligations under the interim rules. Instead, in anticipation of the reporting of pre-enactment unexpired swaps, parties who may be required to report such transactions must retain records pertaining to the terms of pre-enactment unexpired swaps so that they will be able to comply with the reporting requirement once the SDRs come into existence or if required to be provided directly to the CFTC or the SEC, as applicable. These interim rules are effective until the earlier of (1) the adoption of final rules or (2) January 12, 2012.

A. REPORTING OBLIGATION

A counterparty to a pre-enactment unexpired swap transaction is required to report to a registered SDR or the CFTC or the SEC, as applicable, by the earlier of (1) the compliance date established in the final rulemaking or (2) 60 days after a SDR becomes registered with the CFTC or the SEC, as applicable, and becomes operational. The information required to be reported with respect to pre-enactment unexpired swap transactions includes:

- a copy of the transaction confirmation (in electronic format, if available, or otherwise in written format); and
- the time of trade execution, if available.

¹ SEC [Release No. 34-63094](#) (October 13, 2010).

During the time that the interim rules are in effect, a counterparty may also be obligated to provide information upon request by the CFTC or the SEC, as applicable, any information related to these transactions.

B. REPORTING PARTY

The interim rules incorporate provisions of the Dodd-Frank Act for purposes of determining which counterparty will be responsible for reporting pre-enactment unexpired swap transactions. Where only one counterparty is a swap dealer or a major swap participant, such party will be required to report the transaction. Where one counterparty is a swap dealer and the other counterparty is a major swap participant, the swap dealer will be required to report the transaction. Where neither counterparty is a swap dealer or a major swap participant, the counterparties to the transaction will be required to select the counterparty who will report the transaction.

C. RECORDKEEPING

An interpretive Note to the interim rules includes a list of information relating to pre-enactment unexpired swap transactions that should be retained in anticipation of reporting. It should be noted that this record retention requirement does not require a counterparty to create new records or reformat existing records. Such records include, but are not limited to, the following:

- any information necessary to identify and value the transaction;
- the date and time of execution of the transaction;
- in the case of swaps, information relevant to the price of the transaction and, in the case of security-based swaps, all information from which the price of the transaction was derived;
- whether the transaction was accepted for clearing by any clearing agency or derivatives clearing organization and, if so, the identity of such entity;
- any modification(s) to the terms of the transaction; and
- the final confirmation of the transaction.

D. CONFIDENTIALITY OF INFORMATION REPORTED

In the SEC release accompanying the interim final rule, the SEC stated that the information collected pursuant to the interim final rule will not be kept confidential and will be publically available. However, a reporting entity may request confidential treatment and have such reported information withheld from the public in accordance with two exemptions the Freedom of Information Act ("FOIA") recognizes for commercial information. First, the FOIA provides an exemption for "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Second, the FOIA provides an exemption for matter that are "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions." The SEC will consider any requests for confidential treatment under these two exemptions or other exemptions in the FOIA.

E. PUBLIC COMMENT PERIOD

The CFTC and the SEC included a public comment periods on the interim rules. The CFTC provided a 30 day public comment period ending on November 15, 2010. The SEC provided a 60 day public comment period ending on December 20, 2010.

The SEC is seeking comments on all aspects of its interim rule, including the definitions in the interim rule, what specific information is necessary to derive the “price” of a security-based swap transaction, any industry standard format for information regarding security-based swaps, the appropriate counterparty to have the reporting obligation, what documents and data are typically kept and maintained by market participants regarding security-based swaps, what documents and data the SEC should require market participants to maintain and/or report regarding security-based swaps and whether January 12, 2012 is a reasonable expiration date for the interim rule unless the SEC adopts a permanent rule prior to that date.

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