

CFTC Clarifies Swap Dealer Registration Timing

September 12, 2012

On September 10, 2012, in response to market uncertainty, the CFTC [issued FAQs](#) clarifying the timing of swap dealer registration. The guidance confirms that entities will not be deemed to be swap dealers, and therefore will not have to register, before December 31, 2012, at the earliest. By clarifying this treatment, the CFTC has, in effect, set compliance dates for many key provisions of the Title VII swap regulatory regime. Full compliance will not be required for entities until the end of 2012, except for those swap dealers that voluntarily register early, and thereby become “swap dealers” before December 31, 2012.

Swap Dealer Registration Deadline

The CFTC’s registration rule, adopted earlier this year, requires “swap dealers” to register with the CFTC by the latest effective date of the CFTC and SEC’s joint final rules further defining “swap dealer,” “swap” and other foundational terms. The rule defining “swap dealer” was published earlier this year, and the rule defining “swap” was published on August 13, 2012, placing the swap dealer registration date on October 12, 2012. However, the rule defining “swap dealer” includes a *de minimis* threshold so that an entity is not a swap dealer if it, together with the entities controlling, controlled by, and under common control with it, engages in swap dealing activity during the prior 12 months in an aggregate amount of less than \$8 billion and less than \$25 million with “special entities.”¹ That rule further specifies that swap dealing activity engaged in before the effective date of both the “swap dealer” and “swap” definition rules (*i.e.*, swap dealing before October 12, 2012) does not count toward the *de minimis* threshold. The rule also provides that an entity that breaches the *de minimis* threshold must register as a swap dealer two months after the end of the month in which it breaches the threshold.

Thus, all entities will be under the *de minimis* threshold on October 12, 2012. An entity that breaches the threshold during the month of October would be required to register with the CFTC by December 31, 2012. Similarly, an entity that exceeds the *de minimis* threshold in December 2012 has until February 28, 2013 to register with the CFTC. Entities will need to start collecting data on swap dealing activities as of October 12, 2012 to determine whether and when they need to register. There remains some ambiguity as to whether certain non-U.S. entities will be required to register as swap dealers because the CFTC has not yet adopted final cross-border guidance.

The CFTC’s FAQs did not address the timing of registration and regulatory requirements for other CFTC registration categories, including major swap participants, commodity trading advisors, introducing brokers and futures commission merchants.

Compliance with Title VII Requirements

Many Title VII requirements apply only to swap dealers and major swap participants (“MSPs”). As a result, regardless of the effective dates of the rules and assuming that most swap dealers do not

¹ Under the CFTC’s proposed cross-border guidance, a prospective swap dealer that is a U.S. person would need to count its swap dealing activity with all counterparties, while a non-U.S. person would only need to count its swap dealing activity with U.S. persons and swaps with non-U.S. persons for which it is guaranteed by a U.S. person. Furthermore, a non-U.S. person would only need to aggregate its swap dealing activity with that of its non-U.S. affiliates for purposes of calculating the *de minimis* threshold.

voluntarily register early, wide-scale compliance with the vast majority of Title VII requirements will not be required until at least December 31, 2012. For example, the widely reported October 12, 2012 date for commencement of swap data reporting only applies to transactions in which one of the counterparties is a swap dealer or an MSP. However, other Title VII requirements, such as the effectiveness of the revised definition of eligible contract participant and position limits, as well as large trader reporting requirements, are not contingent on swap dealer status; compliance dates for those requirements are thus not affected by the CFTC's FAQs.

To illustrate the effect of the CFTC's FAQs on Title VII compliance dates, we have created a chart listing the waterfall of compliance dates for key rules that the CFTC has finalized to date, under the assumption that a person breaches the *de minimis* threshold in October, 2012 and registers as a swap dealer on December 31, 2012. The chart shows the application of this waterfall to two types of entities under the CFTC's proposed Title VII cross-border exemptive order: (1) U.S. swap dealers and (2) non-U.S. swap dealers that have no U.S. swap dealer affiliates or subsidiaries.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

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This chart shows compliance dates for key CFTC Title VII swaps rules as applied to swap dealers under three illustrative scenarios. The first column provides a baseline view of compliance dates in light of the CFTC’s registration FAQs and absent finalization of the CFTC’s proposed cross-border exemptive order. The second and third columns show the effect of the CFTC’s proposed cross-border exemptive order on two illustrative cases. The final column indicates whether a requirement is classified as entity-level or transaction-level for purposes of the proposed exemptive order.

The chart does not illustrate all scenarios, nor does it describe compliance dates for entities other than swap dealers, which may differ from those shown. *This chart is indicative only and should not be relied upon as legal advice.*

	Compliance Dates, assuming 12/31/2012 Registration	Compliance Dates Under Proposed CFTC Title VII Exemptive Order		Proposed Exemptive Order Classification as Entity- or Transaction-Level Requirement
		U.S. Swap Dealers	Non-U.S. Swap Dealers (with no U.S. Swap Dealer Affiliates or Subsidiaries and that Transact with U.S. Counterparties)	
Definitions				
Entity definitional rules, including (i) Revised ECP definition (except § 1.3(m)(5), (6)), (ii) anti-evasion rules, and (iii) books and records requirements for security-based swap agreements	10/12/2012	10/12/2012	10/12/2012	
Revised ECP definition § 1.3(m)(5), (6)	12/31/2012	12/31/2012	12/31/2012	
Registration required	12/31/2012	12/31/2012	12/31/2012	
Reporting				
<i>Real-time reporting (for exchange-traded and off-exchange swaps)</i>				
Credit and interest rate swaps	12/31/2012	12/31/2012	12/31/2012	Transaction
All other asset classes	1/10/2013	1/10/2013	1/10/2013	Transaction
<i>Non real-time reporting, including historical swap reporting</i>				
Credit and interest rate swaps	12/31/2012	12/31/2012	12/31/2012	Entity

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All other asset classes	1/10/2013	1/10/2013	1/10/2013	Entity
External Business Conduct				
Scope, definitions, fraud prohibition and affirmative defense, daily mark, fair dealing, reasonable diligence to understand risks and rewards in recommending a swap, political contributions	12/31/2012	12/31/2012	12/31/2012	
Anti-evasion, maintenance of confidential information, counterparty eligibility verification, material information disclosure, clearing notification, suitability of recommendations to counterparties, acting as advisor to special entities, acting as counterparty to special entities	1/1/2013	1/1/2013	1/1/2013	
Internal Business Conduct				
<i>For swap dealers that are SEC registrants or are currently regulated by a prudential regulator</i>				
Swap dealers must comply (except with respect to daily trading records)	12/31/2012	1/1/2013	7/12/2013	Entity
Daily trading records	12/31/2012	12/31/2012	12/31/2012	Transaction
<i>For swap dealers that are not SEC registrants and are not currently regulated by a prudential regulator</i>				
Swap dealers must comply (except with respect to (i) daily trading records and (ii) CCO rules)	12/31/2012	1/1/2013	7/12/2013	Entity
Daily trading records	12/31/2012	12/31/2012	12/31/2012	Transaction
Designation and duties of a chief compliance officer	3/29/2013	3/29/2013	7/12/2013	Entity

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Customer Clearing Documentation, Timing of Acceptance for Clearing and Clearing Member Risk Management				
Swap processing	12/31/2012	12/31/2012	12/31/2012	Transaction
Clearing member risk management and clearing conflicts	12/31/2012	1/1/2013	7/12/2013	Entity
Swap Trading Relationship Documentation				
Compliance with respect to transactions with (i) SDs / MSPs / SBSDs / MSBSPs, and (ii) active funds	1/1/2013	1/1/2013	1/1/2013	Transaction
Compliance with respect to transactions with (i) commodity pools, (ii) private funds other than active funds, and (ii) persons predominantly engaged in the business of banking that are not third-party subaccounts	4/1/2013	4/1/2013	4/1/2013	Transaction
Compliance with respect to transactions with all other counterparties	7/1/2013	7/1/2013	7/1/2013	Transaction
Compliance with end-user relationship documentation provisions	270 days after applicable CFTC clearing determination	270 days after applicable CFTC clearing determination	270 days after applicable CFTC clearing determination	Transaction

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Trade Confirmation	12/31/2012	12/31/2012	12/31/2012	Transaction
CEA § 2(e), Prohibition on Transactions with non-ECP Counterparties, unless executed on a DCM or SEF	10/12/2012	10/12/2012	10/12/2012	
Portfolio Reconciliation and Portfolio Compression				
Swap dealers that are SEC registrants or are currently regulated by a prudential regulator must comply	12/31/2012	12/31/2012	12/31/2012	Transaction
Swap dealers that are <u>not</u> SEC registrants and are <u>not</u> currently regulated by a prudential regulator must comply	3/10/2013	3/10/2013	3/10/2013	Transaction
Protection of Cleared Swaps Customer Contracts and Collateral, with respect to cleared swaps	11/8/2012	11/8/2012	11/8/2012	
Large Trader Reporting for Physical Commodity Swaps				
<i>For all traders</i>				
Recordkeeping and special call provisions	9/20/2011	9/20/2011	9/20/2011	Entity
<i>For clearing member reporting entities</i>				
Daily reporting of “reportable positions” (pursuant to CFTC no-action relief and exemptive orders)	7/27/2012	7/27/2012	7/27/2012	Entity
<i>For non-clearing-member swap dealer reporting entities</i>				
Daily reporting of “reportable positions”	12/31/2012	12/31/2012	12/31/2012	Entity

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Position Limits for Futures and Swaps				
Revised non-spot month limits for legacy agricultural referenced contracts	1/17/2012	1/17/2012	1/17/2012	
Initial spot-month limits for referenced contracts, initial non-spot month limits for legacy agricultural referenced contracts, bona fide hedging provisions, including revised definition, visibility reporting, aggregation provisions, FBOT provisions, revised filing requirements	10/12/2012	10/12/2012	10/12/2012	
Subsequent spot-month limits for referenced contracts	1/1/2014	1/1/2014	1/1/2014	
Initial non-spot-month limits for non-legacy referenced contracts	Upon CFTC Order	Upon CFTC Order	Upon CFTC Order	

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