

SEC and CFTC Finalize Swap Product Definitions: The Title VII Swap Countdown Begins

The SEC and CFTC have adopted joint final rules further defining the terms “swap,” “security-based swap” and “security-based swap agreement,” and delineating jurisdiction over mixed swaps between the agencies. The SEC voted to adopt the rules unanimously on July 6. The CFTC held an open meeting yesterday at which it voted 4-1 to adopt the rules (Commissioner Chilton voting against). The rules will become effective 60 days after their publication in the *Federal Register*. The SEC, however, stated in its [press release](#) that the rules provide for some interim exemptions for security-based swaps under federal securities laws for 180 days after publication of the final rules.

The final product definition rules provide guidance on the classification of many types of derivative instruments as swaps, security-based swaps, mixed swaps or as none of those. These classifications determine whether the instruments are subject to regulation by the CFTC, the SEC (or both) or whether they fall outside either agency’s general regulatory authority under Title VII of the Dodd-Frank Act.

Although the CFTC staff described several substantive changes to the proposed product definition rules, the most significant aspect of the finalization of these rules is the impact on timing. With these rules, the CFTC has turned the corner from rulemaking to implementation, as the compliance dates for many CFTC Title VII rules are keyed to the date when the final product definition rules are published in the *Federal Register*. To illustrate this aspect of the final rules, the chart on the following pages sets out the waterfall of CFTC Title VII compliance dates for key rules the CFTC has finalized to date, under the assumption that the final product definition rules are published in the *Federal Register* on July 16, 2012. The chart also shows two examples of the compliance-date waterfall – for U.S. swap dealers and non-U.S. swap dealers that have no U.S. swap dealer affiliates or subsidiaries – under the CFTC’s proposed Title VII cross-border exemptive order, assuming that order is published in the *Federal Register* on July 12, 2012 and is adopted as proposed.¹

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¹ Our client newsflash on the CFTC’s Title VII cross-border proposal is available [here](#).

This chart shows compliance dates for key CFTC Title VII swaps rules under three illustrative scenarios. The first column provides a baseline view of compliance dates absent finalization of the CFTC’s proposed cross-border exemptive order described [here](#). The second column shows the effect of the exemptive order on compliance dates for U.S. swap dealers. The third column shows the effect of the exemptive order on compliance dates for non-U.S. swap dealers, with no U.S. swap dealer affiliates or subsidiaries, with respect to their dealings with U.S. persons. All three of these columns assume, for sake of illustration, that the final product definition rules are published in the *Federal Register* on 7/16/2012. The second and third columns assume that the CFTC’s proposed exemptive order will be published in the *Federal Register* on 07/12/2012 and subsequently finalized as proposed. 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 show compliance dates for swap dealers under other circumstances, such as non-U.S. branches of U.S. swap dealers or non-U.S. swap dealers transacting with non-U.S. persons. The chart also does not 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.*

Red dates are already certain. **Blue** dates reflect assumptions made about rule publication timing. **Green** dates are the results of calculations based on assumed blue dates.

	Compliance Dates based on Title VII Rules	Under Proposed Title VII Cross-Border Exemptive Order		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)	
Definitional Rules and Proposed Cross-Border Exemption				
Publication of swap entity definitions:	5/23/2012			
Publication of swap product definitions:	7/16/2012			
Publication of proposed cross-border exemptive relief:	7/12/2012			
Registration Rules				
Effective date:	3/19/2012	3/19/2012	3/19/2012	
Registration required:	9/14/2012	9/14/2012	9/14/2012	
Reporting Rules				
<i>Real-time reporting:</i>				
Exchange-traded swaps:				
Credit and interest rate swaps:	9/14/2012	9/14/2012	9/14/2012	Transaction

	Compliance Dates based on Title VII Rules	Under Proposed Title VII Cross-Border Exemptive Order		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)	
All other asset classes:	12/13/2012	12/13/2012	12/13/2012	Transaction
Off-exchange swaps:				
Credit and interest rate swaps:	9/14/2012	9/14/2012	9/14/2012	Transaction
All other asset classes:	12/13/2012	12/13/2012	12/13/2012	Transaction
Non real-time reporting, including historical swap reporting:				
Credit and interest rate swaps:	9/14/2012	9/14/2012	9/14/2012	Entity
All other asset classes:	12/13/2012	12/13/2012	12/13/2012	Entity
External Business Conduct Rules				
Rule becomes effective:	4/17/2012	4/17/2012	4/17/2012	
Swap dealers / MSPs must comply:	10/14/2012	10/14/2012	10/14/2012	Transaction
Internal Business Conduct Rules				
Rule becomes effective:	6/4/2012	6/4/2012	6/4/2012	
For swap dealers and MSPs that are SEC registrants or are currently regulated by a prudential regulator:				
Risk management program:	9/14/2012	1/1/2013	7/12/2013	Entity
Business continuity and disaster recovery:	9/30/2012	1/1/2013	7/12/2013	Entity

	Compliance Dates based on Title VII Rules	Under Proposed Title VII Cross-Border Exemptive Order		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)	
Position limit monitoring, diligent supervision, information availability and disclosure, antitrust considerations, and conflict-of-interest rules:	9/14/2012	1/1/2013	7/12/2013	Entity
Swap data recordkeeping:	9/14/2012	9/14/2012	7/12/2013	Entity
Daily trading records:	9/14/2012	9/14/2012	9/14/2012	Transaction
Designation and duties of a chief compliance officer:	9/30/2012	1/1/2013	7/12/2013	Entity
<i>For swap dealers and MSPs that are <u>not</u> SEC registrants and are <u>not</u> currently regulated by a prudential regulator:</i>				
Risk management program:	9/30/2012	1/1/2013	7/12/2013	Entity
Business continuity and disaster recovery:	12/29/2012	1/1/2013	7/12/2013	Entity
Position limit monitoring, diligent supervision, information availability and disclosure, antitrust considerations, and conflict-of-interest rules:	9/14/2012	1/1/2013	7/12/2013	Entity

	Compliance Dates based on Title VII Rules	Under Proposed Title VII Cross-Border Exemptive Order		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)	
Swap data recordkeeping:	9/30/2012	9/30/2012	7/12/2013	Entity
Daily trading records:	9/30/2012	9/30/2012	9/30/2012	Transaction
Designation and duties of a chief compliance officer:	3/29/2013	3/29/2013	7/12/2013	Entity
Customer Clearing Documentation, Timing of Acceptance for Clearing and Clearing Member Risk Management				
Rule becomes effective:	10/1/2012	10/1/2012	10/1/2012	
Swap processing:	10/1/2012	10/1/2012	10/1/2012	Transaction
Clearing member risk management and clearing conflicts:	10/1/2012	1/1/2013	7/12/2013	Entity
Protection of Cleared Swaps Customer Contracts and Collateral				
Rule becomes effective:	4/9/2012	4/9/2012	4/9/2012	
Compliance with respect to cleared swaps is required:	11/8/2012	11/8/2012	11/8/2012	
Large Trader Reporting for Physical Commodity Swaps				
Rule becomes effective:	9/20/2011	9/20/2011	9/20/2011	
<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"***:	7/27/2012	7/27/2012	7/27/2012	Entity

	Compliance Dates based on Title VII Rules	Under Proposed Title VII Cross-Border Exemptive Order		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)	
**pursuant to CFTC no-action relief and exemptive orders				
<i>For Non-Clearing Member Reporting Entities:</i>				
Daily reporting of “reportable positions”:	7/23/2012	7/23/2012	7/23/2012	Entity
Position Limits for Futures and Swaps				
Rule becomes effective:	1/17/2012	1/17/2012	1/17/2012	
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:	9/14/2012	9/14/2012	9/14/2012	

	Compliance Dates based on Title VII Rules	Under Proposed Title VII Cross-Border Exemptive Order		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)	
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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