

60 Days – Over 175 New Derivatives Provisions

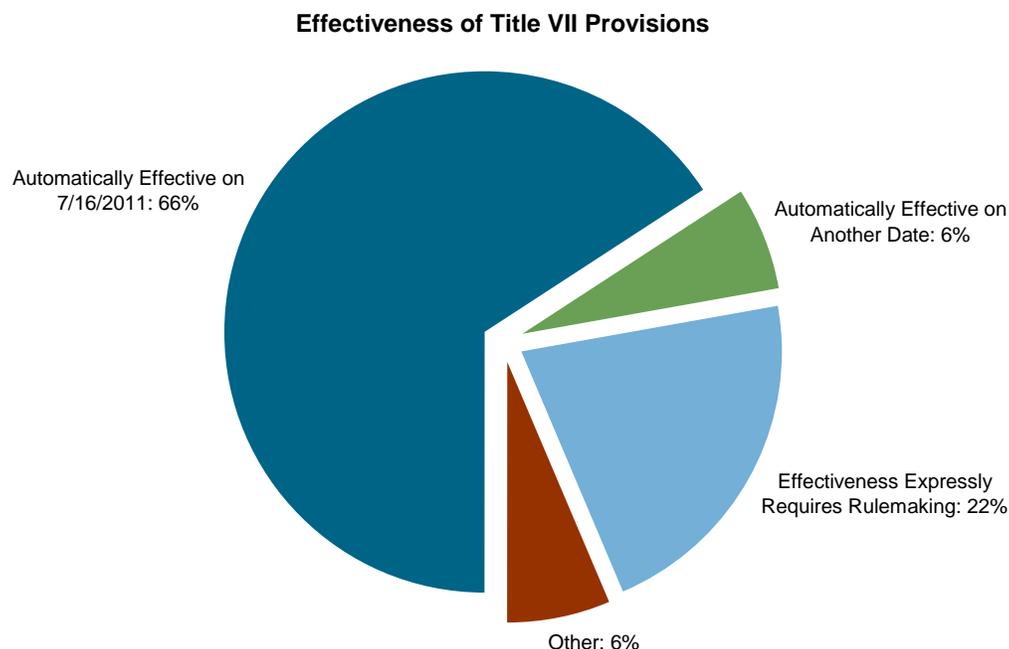
On July 16, 2011—60 days from now—over 175 new Dodd-Frank derivatives provisions are scheduled to automatically go into effect. In the nearly 10 months since Dodd-Frank’s passage, regulators have released 66 proposed rules, concept releases and interim final rules related to regulation of the swaps markets. The frenetic pace of rulemaking and the need to comment at the same pace has left most market participants little time for analysis of other Title VII issues.

However, as the chart below shows, almost two-thirds of Title VII’s provisions automatically become effective on July 16, 2011 without rulemaking. Many of these provisions do not require action from market participants. Many other provisions could be deferred by the regulators based on their close connection to proposed rules. Yet a number of significant self-executing provisions remain. Some of these provisions affect *all* end users of swaps, while others affect only swap dealers or financial entities.

Examples of significant self-executing provisions are as follows:

All entities that enter into swaps, including end users, have 60 days to:

- prepare for the designation of security-based swaps as “securities” for the purposes of the Securities Act and Exchange Act, which will subject single name credit default swaps and total return swaps on equity, in addition to many other products, to voluminous securities compliance requirements;
- analyze how the repeal of Commodity Exchange Act provisions added as part of the Commodity Futures Modernization Act impacts their ability to trade futures-like agreements over-the-counter;
- adapt to the new prohibitions on entering into over-the-counter swaps with entities that do not satisfy the new, stricter definition of “eligible contract participant” (“**ECP**”) and on entering into off-exchange retail foreign exchange contracts;



- file a registration statement before engaging in security-based swaps with non-ECPs;
- ensure compliance with new prohibitions on fraud, manipulation and disruptive practices with respect to swaps and expanded prohibitions against manipulative trading practices for futures;
- consider the effect of the requirement that any offer or sale of a security-based swap by or on behalf of the issuer of the securities upon which the security-based swap is based or is referenced, an affiliate of the issuer, or an underwriter, must be treated as a sale or offer to sell the securities;
- monitor the SEC's rulemaking to include some security-based swaps in the Section 13 and Section 16 beneficial ownership requirements; and
- ensure that agricultural commodity swaps comply with new CFTC requirements or cease entering into some swaps.

Swap dealers, whether registered or not, have 60 days to:

- create new customer documentation, educate customers and notify all non-cleared swap counterparties of their right to have initial margin segregated at an independent third-party custodian;
- develop customer documentation, internal systems and policies and procedures to satisfy new business conduct requirements where they act as advisors to "special entities" to which heightened business conduct requirements apply;
- investigate whether any of their associated persons are subject to a statutory disqualification and, if so, cease association with that person;
- appoint a chief compliance officer and give that officer specified responsibilities and powers;
- register as a broker-dealer if acting as a dealer for security-based swaps with non-ECPs or a broker for any security-based swaps; and
- register as a "futures commission merchant" ("**FCM**") or "introducing broker" if soliciting or accepting orders for cleared swaps or collecting collateral for cleared swaps.

Financial entities, including asset managers, have 60 days to:

- determine whether expanded definitions of "commodity pool operator," "commodity trading advisor," FCM and "introducing broker" apply to their activities and, if so register with the CFTC;
- determine whether the references to these expanded definitions in the Investment Company Act and Investment Advisers Act removes any otherwise available exemptions; and
- reallocate customer segregated funds into eligible investments.

Market infrastructure providers have 60 days to:

- put rules in place, if a registered clearinghouse, to comply with new non-discrimination and offset requirements for cleared swaps;
- implement new core principles for designated contract markets and derivatives clearing organizations, even if providing trading and clearing facilities only for futures and not for swaps; and
- if a clearinghouse, hire a chief compliance officer and give that officer specified responsibilities and powers.

Over time, regulators will adopt rules providing further guidance on some of these self-implementing provisions. Until then, market participants are responsible for analyzing how the self-implementing provisions affect them and preparing for compliance by July 16, 2011.

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.

Daniel N. Budofsky	212 450 4907	daniel.budofsky@davispolk.com
Robert L.D. Colby	202 962 7121	robert.colby@davispolk.com
Annette L. Nazareth	202 962 7075	annette.nazareth@davispolk.com
Lanny A. Schwartz	212 450 4174	lanny.schwartz@davispolk.com
Anjali Sara Bonner	212 450 4787	anjali.bonner@davispolk.com
Joerg Riegel	212 450 4253	joerg.riegel@davispolk.com
Gabriel D. Rosenberg	212 450 4537	gabriel.rosenberg@davispolk.com

© 2011 Davis Polk & Wardwell LLP

Notice: This is a summary that we believe may be of interest to you for general information. It is not a full analysis of the matters presented and should not be relied upon as legal advice. If you would rather not receive these memoranda, please respond to this email and indicate that you would like to be removed from our distribution list. If you have any questions about the matters covered in this publication, the names and office locations of all of our partners appear on our website, davispolk.com.