



The CFTC Publishes Proposed Regulation Phasing In Dodd-Frank Act Clearing And Trade Execution Requirements

This memorandum describes a proposed CFTC regulation setting start dates for new execution and clearing requirements established by the Dodd-Frank Act. Proposed regulations like the one described here are published before adoption for public comment. Because the CFTC sometimes adopts and finalizes proposed regulations without modification, such regulations may be useful for companies to review when planning for future regulations. However, because the regulation described in this memo is merely a proposed regulation, the Commission may still elect to revise its terms before it comes into effect.

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On Tuesday, September 20, 2011, the federal register published a proposed CFTC regulation setting forth a schedule for compliance with the clearing and trade execution requirements created by the Dodd Frank Act and codified at § 2(h) of the CEA.¹ The proposed rule would phase in required compliance with the clearing and execution requirements and create different compliance deadlines for different categories of entities.² Of course, parties may opt to comply with the execution and clearing requirements before compliance becomes mandatory.

Entities

The proposed rule defines two categories of entities:

- Category 1 includes swap dealers and major swap participants as well as “active funds.”³
- Category 2 includes (i) commodities pools, (ii) private funds as defined in section 202(a) of the Advisers Act; (iii) employee benefit plans as defined in ERISA; (iv) persons predominantly engaged in activities that are in the business of banking or in activities that are financial in nature as defined in section 4(k) of the Bank Holding Company Act of 1956 (except all third party subaccounts.)

¹ These rules were accompanied by proposed rules setting a schedule for trading documentation and margining.

² The proposed rule appears at 76 Fed Reg. No 182, p. 58186, and is entitled: “Swap Transaction Compliance and Implementation Schedule: Clearing and Trade Execution Requirements under Section 2(h) of the CEA.” The RIN number is 3038-AD60 and it would amend 17 CFT Parts 37, 38, and 39.

³ An active fund is any private fund as defined in § 202(a) of the Investment Advisers Act of 1940 that is not a third-party subaccount and that executes 20 or more swaps per month based on a monthly average over the 12 months preceding the CFTC’s issuing a final determination for mandatory clearing of a particular swap.



Clearing

The proposed rule sets out the following timeline for phasing in clearing requirements. After the CFTC has made clearing mandatory for a new group, category, type or class of swaps,⁴ (and if the CFTC opts to allow the phase in) compliance will be required in no later than:

- 90 days, for every transaction between two Category 1 Entities, or between a Category 1 Entity & any other entity that desires to clear the transaction.
- 180 days, for every transaction between a Category 2 Entity and a Category 1 Entity; two Category 2 Entities; or a Category 2 Entity and any other entity that desires to clear the transaction.
- 270 days for all other swap transactions (except those eligible for the end user exception).

Execution

Under the DFA, counterparties to any swap required to be cleared must execute their swap transaction on a DCM or SEF, unless the trade qualifies for the end user exemption, qualifies as a block trade or unless no DCM or SEF makes the swap available to trade. The proposed rule states that this execution requirement will come into effect on the latter of:

- The date clearing becomes mandatory; or
- 30 days after the swap is made available to trade on either a DCM or SEF.

⁴ Note however that the implementation schedule will (probably) not be used after the CFTC mandates clearing for a swap that is in the SAME group, category, type or class of swaps that were covered by a previously issued mandatory clearing order.