CLIENT UPDATE

MORE RELIEF FOR SWAP DEALERS FROM CERTAIN SWAP REPORTING REQUIREMENTS AND POLITICAL CONTRIBUTION PROHIBITION

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On November 19, 2012, the Commodity Futures Trading Commission (the "CFTC") granted temporary no-action relief to swap dealers ("SDs") from certain swap data reporting requirements of Parts 43, 45 and 46 of the CFTC regulations. This no-action letter: (1) establishes a common monthly date by which all newly registered SDs must be in compliance with their ongoing reporting obligations and (2) extends the deadline for reporting historical swap transaction data (the "Swap Data Letter").

On November 20, 2012, the CFTC granted no-action relief from its "pay-to-play" rulemaking under Regulation 23.451 of the CFTC's external business conduct rules in connection with SDs' and their covered associates' dealings with certain "governmental plans" as defined in Section 3 of the Employee Retirement Income Security Act of 1974 ("ERISA"). The CFTC also provided clarification in this no-action letter (the "SD Political Contribution Letter") regarding the application of the "look-back" provision in Regulation 23.451.

TEMPORARY NO-ACTION RELIEF FROM REPORTING REQUIREMENTS

Background

Part 43 sets forth rules for the real-time public reporting of swap transaction data. Part 45 establishes ongoing swap data recordkeeping and swap data repository ("SDR") reporting requirements, while Part 46 establishes similar requirements for pre-enactment[1] and transition swaps[2] (collectively, "historical swaps").

The date upon which an entity is required to be in compliance with the reporting obligations of an SD under Parts 43, 45 and 46 is the earlier of: (1) the date upon which the entity applies to be registered as an SD and (2) the deadline applicable to the entity for registration as an SD pursuant to the *de minimis* exception under Regulation 1.3(ggg)(4), which at the earliest would be December 31, 2012 (as the earliest date on which an entity could exceed one of the *de minimis* notional thresholds was October 13, 2012).[3]

Concerns Expressed by Market Participants

Commenters expressed concern regarding the potential for differing compliance dates under the swap data reporting rules in the event that one or more entities apply to register as SDs before their registration deadline. Commenters noted that, with respect to those entities whose swap dealing activities exceeded one of the notional thresholds in the month of October 2012, and that will therefore be among the initial group of SDs required to comply with the reporting rules, the first such entity to apply to register will also be the first—and potentially, for some period of time, the only—entity to have its swap transaction and pricing data publicly disseminated pursuant to Part 43. In the Swap Data Letter, the CFTC acknowledges that public dissemination of data reported by one, or even a few, early registrants may facilitate the identification of parties to the swaps for which data has been reported, raising concerns under Regulation 43.4(d)(1), which provides that

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1 Pre-enactment swaps are swaps entered into prior to the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), the terms of which have not expired as of the date of enactment of the Dodd-Frank Act.

2 Transition swaps are swaps entered into on or after the enactment of the Dodd-Frank Act but prior to the compliance date for reporting historical swaps of the asset class to which the swap belongs, pursuant to Part 46.

3 See our client memorandum "Registration Deadlines Clarified for Swap Dealers and Major Swap Participants; Update on Deferral of Certain Compliance Dates":

http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=9beec1ea-e39c-4f02-893c-430e3e8ee555

swap transaction and pricing data that is publicly disseminated in real time must not disclose the identities of the parties to a swap or otherwise facilitate in their identification.

Additionally, commenters noted that, at least in some instances, market participants have designed their swap data reporting infrastructure on the understanding that all SDs would be required to begin reporting on the same day and that, in order to accommodate differing compliance dates while avoiding reporting errors, costly last-minute modifications to such infrastructure would be required.

Finally, the International Swaps and Derivatives Association, Inc. ("ISDA") expressed concern that, since the reporting obligations with respect to historical swaps under Part 46 will become effective at the same time as the reporting obligations under Parts 43 and 45, it would be a significant technological and operational challenge to ensure that the large volume of historical swap data that must be reported is reported by the same date on which daily reporting must begin under Parts 43 and 45.

Temporary No-Action Relief Granted

To address the concerns of the market participants, the Swap Data Letter provides that, for any swap asset class in respect of which the reporting obligations discussed above are then in effect, the Division of Swap Dealer and Intermediary Oversight ("DSIO") and the Division of Market Oversight ("DMO") of the CFTC will not recommend that the CFTC take enforcement action against an SD for failing to report swap transaction data pursuant to Part 43 or Part 45 until the earlier of:

- 12:01 a.m. (eastern time) on the SD registration deadline applicable to that SD, notwithstanding that the SD may have applied to register as an SD prior to such deadline; or
- 12:01 a.m. (eastern time) on April 10, 2013.[4]

Additionally, the Swap Data Letter provides that DSIO and DMO will not recommend that the CFTC take enforcement action against an SD for failing to report historical swap data pursuant to Part 46 until the earlier of:

- 12:01 a.m. (eastern time) on the date that is 30 days after the date (as extended by the Swap Data Letter) on which the SD is required to begin reporting swap transaction data pursuant to Part 43 or Part 45 for the asset class to which the historical swap belongs; or

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[4] April 10, 2013 is the date by which all swap market participants must comply with applicable swap data reporting rules.

- 12:01 a.m. (eastern time) on April 10, 2013.

In the Swap Data Letter, DSIO and DMO note that any SD that anticipates needing more than 30 days to complete its reporting of historical swap data has the option of starting to report such data before the 30-day relief period begins.

This temporary no-action relief on swap data reporting ends in all respects at 12:01 a.m. (eastern time) on April 10, 2013.

No Change to Compliance Date Applicable to Equity Swaps, Foreign Exchange Swaps and Other Commodity Swaps

DSIO and DMO also note that reporting obligations under the swap data reporting rules with respect to equity swaps, foreign exchange swaps and other commodity swaps ("Enumerated Swaps") will not come into effect for SDs until January 10, 2013, and the Swap Data Letter does not change this compliance date.

As an example, an SD whose swap dealing activities exceeded either of the *de minimis* thresholds during the month of October 2012 will be required: (1) to begin reporting swap transaction data for Enumerated Swaps to which it is a counterparty, pursuant to Parts 43 and 45, by 12:01 a.m. (eastern time) on January 10, 2013, and (2) to report historical swaps data for the Enumerated Swaps to which it is (or was) a counterparty, pursuant to Part 46, by 12:01 a.m. (eastern time) on February 9, 2013 (*i.e.*, 30 days after January 10, 2013).

LIMITED NO-ACTION RELIEF FROM "PAY-TO-PLAY" RULE; CLARIFICATION OF "LOOK-BACK" PROVISION

Background

The CFTC's "pay-to-play" rule under Regulation 23.451 seeks to prevent fraud by restricting the ability of SDs and their covered associates to make or solicit political contributions to officials of a "governmental Special Entity," which term includes certain state and local government entities as well as "governmental plans" as defined in Section 3 of ERISA.

Section 3 of ERISA defines "governmental plan" as:

- a plan established or maintained for its employees by the U.S. Government, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing;

- any plan to which the Railroad Retirement Act of 1935 or 1937 applies, and which is financed by contributions required under that Act and any plan of an international organization which is exempt from taxation under the International Organizations Immunities Act; and
- a plan established and maintained by an Indian tribal government (as defined in Section 7701(a)(40) of the U.S. Internal Revenue Code (the "Code")), a subdivision thereof (determined in accordance with Section 7871(d) of the Code), or an agency or instrumentality of either, and all of the participants of which are employees of such entity substantially all of whose services as an employee are in the performance of essential governmental functions but not commercial activities (whether or not an essential government function).

In addition to "governmental plans" as defined in Section 3 of ERISA, the term "governmental Special Entity" also includes a "State, State agency, city, county, municipality, other political subdivision of a State, or any instrumentality, department or a corporation of or established by a State or political subdivision of a State."

The term "covered associate" is defined in Regulation 23.451(a)(2) as:

- any general partner, managing member or executive officer, or other person with a similar status or function;
- any employee who solicits a governmental Special Entity for the SD and any person who supervises, directly or indirectly, such employee; and
- any political action committee controlled by the SD or by any of the foregoing persons.

Concern Over Harmonizing CFTC Regulations with Existing Regulations

Certain interested parties noted that most SDs are already subject to the current "pay-to-play" rules of the Securities and Exchange Commission (the "SEC") and/or the Municipal Securities Rulemaking Board (the "MSRB"), which restrict political contributions to state and local government agencies, instrumentalities and plans, but unlike Regulation 23.451, they do not apply to officials of federal or other non-state or non-local government agencies, instrumentalities or plans. As a result of the prohibition of Regulation 23.451 being broader than the SEC's and MSRB's existing "pay-to-play" rules, these parties asserted that, absent any CFTC no-action relief, SDs that are subject to the SEC's and MSRB's "pay-to-play" rules would have to expend significant resources to update their current policies and procedures to ensure compliance with Regulation 23.451.

Further, the interested parties noted that the prohibition in Regulation 23.451 with respect to "governmental plans" appears to be inconsistent with the CFTC's stated intent to harmonize its final rules with the SEC's and MSRB's existing "pay-to-play" rules.[5]

Limited No-Action Relief from Regulation 23.451

To address the concerns of the affected parties, the SD Political Contribution Letter provides that the DSIO will not recommend that the CFTC take an enforcement action against any SD or covered associate of any SD for failure to be fully compliant with Regulation 23.451 with respect to "governmental plans" as defined in Section 3 of ERISA. DSIO notes that the other provisions of the term "governmental Special Entity," as defined in Regulation 23.451(a)(3), are unaffected by this limited no-action relief. This relief is granted to further harmonize the CFTC's requirements with those of the SEC.

Clarification of "Look-Back" Provision

Regulation 23.451 prohibits SDs from offering to enter into (or entering into) a swap or a swap trading strategy with a governmental Special Entity within two years after any contribution to an official of such governmental Special Entity was made by the SD or by any covered associate thereof, subject to certain limited exceptions.

The CFTC staff has received a number of inquiries on whether, in determining if a contribution triggers this two-year prohibition, an SD must "look back" beyond the date on which it is required to register as an SD. The SD Political Contribution Letter clarifies that the DSIO will interpret Regulation 23.451 such that the "look-back" period does not include any period preceding the date on which the SD is required to register as such. As an example, if an entity is required to register as an SD on December 31, 2012, any contributions made by it or its covered associates prior to such date are not included in the "look-back."

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Please do not hesitate to contact us if you have any questions.

November 29, 2012

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[5] See CFTC Final Rule on Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties. 77 FR at 9800 (February 17, 2012).