

CLIENT UPDATE

REGISTRATION DEADLINES CLARIFIED FOR SWAP DEALERS AND MAJOR SWAP PARTICIPANTS; UPDATE ON DEFERRAL OF CERTAIN COMPLIANCE DATES

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Section 731 of the Dodd-Frank Wall Street Reform and Consumer Protection Act amended the Commodity Exchange Act (the “CEA”) by adding Section 4s(h), which provides the Commodity Futures Trading Commission (the “CFTC”) with both mandatory and discretionary rulemaking authority to impose business conduct standards on swap dealers (“SDs”) and major swap participants (“MSPs”) in their dealings with counterparties. On February 17, 2012, the CFTC published final external business conduct standards under subpart H of Part 23 of its regulations, requiring compliance with such standards by October 15, 2012.

Nonetheless, since compliance with the external business conduct standards under subpart H is not required until a person is registered with the CFTC as a SD or MSP, as applicable, and since no entity will be required to register as a SD or MSP until December 31, 2012¹ and February 28, 2013,² respectively, this October 15 compliance date applies only to persons who voluntarily file an application for registration as a SD or MSP prior to the applicable deadline for submission of such applications. Similarly, with respect to MSPs, the deferred compliance date discussed below (January 1, 2013) applies only to persons who voluntarily file such an application prior to the applicable deadline.

On August 27, 2012, the CFTC published final rules (the “Final Rules”) pursuant to Sections 4s(h), 4s(i) and 8a(5) of the CEA, which, among other things, set forth certain standards for documentation of swap trading relationships between SDs, MSPs, and their counterparties. The compliance date for these swap trading relationship documentation rules is January 1, 2013. In the adopting release accompanying the Final Rules (the “Release”), the CFTC defers the compliance dates for certain provisions of subpart H (the “Deferred Compliance Provisions”) until January 1, 2013 in order to align the compliance dates for the provisions of subpart H that involve documentation with the compliance date for the swap trading relationship documentation rules.

The Deferred Compliance Provisions are:

- all of the provisions of Section 23.402, which include:
 - rules requiring SDs and MSPs to have written policies and procedures to ensure compliance and prevent evasion under Section 23.402(a);
 - “know your counterparty” rules under Section 23.402(b);

¹ The final rules adopted by the CFTC further defining the term “swap dealer” provide an exception from such definition where the aggregate notional amounts of a person’s positions connected with its dealing activity over a specified period of time do not exceed certain thresholds. Persons who otherwise meet the criteria for being a SD must begin monitoring their swaps executed on or after October 12, 2012 and would be required to register as a SD within two months following the end of the month in which they exceed the applicable *de minimis* threshold (unless it takes more than 12 months from October 12 for such an entity to exceed such threshold). Therefore, if the aggregate notional amount of swaps executed by a person on or after October 12, 2012 exceeds the applicable threshold during October 2012, the person would be required to register by December 31, 2012.

² Under the final rules defining the term “major swap participant,” a person that meets the criteria for being a MSP as a result of its swap activities in a fiscal quarter but who has not registered as a MSP will not be deemed to be a MSP until the earlier of (1) the date on which it submits a complete application for registration as a MSP or (2) two months after the end of that fiscal quarter. A person will have to start its MSP calculations based on all swaps still outstanding on and after October 12, 2012. Therefore, the first fiscal quarter for the MSP determination is the one that ends on December 31, 2012 and any person whose swap activities for that quarter exceed any applicable MSP threshold by more than 20% will have to submit an application for registration as an MSP within two months of December 31, 2012 (i.e., no later than February 28, 2013).

- true name and owner rules under Section 23.402(c);
- reasonable reliance on representations rules under Section 23.402(d);
- manner of disclosure rules under Section 23.402(e);
- disclosures in a standard format rules under Section 23.402(f);
- record retention rules under Section 23.402(g);
- rules requiring confidential treatment of counterparty information under Section 23.410(c);
- rules requiring verification of counterparty eligibility under Section 23.430;
- the following provisions of Section 23.431 relating to disclosures of material information:
 - disclosure of material risks and material characteristics of a swap, and of any conflicts of interest that a SD or MSP may have in connection with a swap under Sections 23.431(a); and
 - scenario analysis under Section 23.431(b) [and the associated exception under Section 23.431(c) from this requirement for transactions initiated on designated contract markets or swap execution facilities where the SD or MSP does not know the identity of the counterparty prior to execution];
- clearing disclosure rules under Section 23.432;
- the following provisions of Section 23.434 relating to recommendations to counterparties (i.e., institutional suitability):
 - the requirement under Section 23.434(a)(2) that a SD have a reasonable basis to believe that a recommended swap or swap trading strategy is suitable for the counterparty;
 - the safe harbor from this requirement under Section 23.434(b), and the associated provisions of Section 23.434(c) regarding counterparty representations deemed sufficient to satisfy this safe harbor;
- requirements for SDs acting as advisors to “Special Entities”³ under Section 23.440;

³ “Special Entity” means (1) any federal agency; (2) a state, state agency, city, county, municipality or other political subdivision of a state; (3) an employee benefit plan, as defined in Section 3 of the Employee Retirement Income Security Act of 1974 (“ERISA”); (4) any governmental plan, as defined in Section 3 of ERISA; (5) any endowment, including any endowment that is an organization described in Section 501(c)(3) of the Internal Revenue Code of 1986.

- requirements for SDs and MSPs acting as counterparties to Special Entities under Section 23.450.

In the Release, the CFTC clarifies that compliance with all other provisions of subpart H will continue to be required by October 15, 2012. However, as noted above, since compliance with the external business conduct standards under subpart H is not required until a person is registered with the CFTC as a SD or MSP, as applicable, and since no entity will be required to register as a SD or MSP until December 31, 2012 and February 28, 2013, respectively, this October 15 compliance date applies only to persons who voluntarily file an application for registration as a SD or MSP prior to the applicable deadline for submission of such applications.

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Please do not hesitate to contact us with any questions.

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