

December 19, 2012

CFTC Defers Compliance Dates for Business Conduct and Documentation Requirements until Mid-2013

In the face of a looming December 31st deadline and industry pressure, the Commodity Futures Trading Commission (the “Commission”) approved interim final rules deferring until May or July of 2013, depending on the requirement, the compliance date for key business conduct, reporting, recordkeeping, and documentation requirements for swaps under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”).

Background

As part of the comprehensive regulatory framework imposed on the swap market by the Dodd-Frank Act, swap dealers (“Dealers”) and major swap participants (“MSPs”)¹ are required to comply with certain newly-adopted business conduct standards, documentation standards, and reporting and recordkeeping requirements. As adopted, such rules would generally have come into effect as of January 1, 2013 for Dealers and MSPs registered by that date. These rules necessitate amendments to existing trading documentation. The ISDA Dodd-Frank Protocol, published by International Swaps and Derivatives Association (“ISDA”) in August 2012, was designed to facilitate compliance with these regulatory requirements, among others, by allowing market participants to make certain required representations and amendments to existing documentation without entering into bilateral negotiations.² Since then, ISDA has reported to the Commission that only 17.5% of counterparties to prospective Dealers and MSPs have submitted an adherence letter for its first Dodd-Frank Protocol and less than 1% have submitted the completed questionnaires necessary for Dealers and MSPs to make use of the protocol and integrate necessary counterparty information into their compliance systems. In response to requests for additional time from ISDA and a variety of other market participants, on December 18, 2012, the Commission deferred until mid-2013 the compliance dates for many of these business conduct, documentation, and reporting requirements.

¹ If you wish to review the definitions of “swap dealer” and “major swap participant,” you may refer to our prior publication entitled [Swap Dealer, Major Swap Participant and Eligible Contract Participant: SEC and CFTC Adopt Entity Definition Rules](#).

² If you wish to review further information about these requirements, you may refer to Sections V and VII of our prior publication entitled [Corporate End-User’s Handbook for Dodd-Frank Title VII Compliance](#).

As detailed in the attached charts, the Interim Rules defer the compliance date for certain reporting and recordkeeping requirements (subpart F of part 23 of the CFTC rules), business conduct standards (subpart H of part 23 of the CFTC rules), and the end-user exception documentation requirements (subpart I of part 23 of the CFTC rules) until May 1, 2013, thereby providing an additional four months from the original compliance date. In addition, the Commission has deferred the compliance dates for the portfolio reconciliation³ and the swap trading relationship documentation⁴ requirement of subpart I of part 23 until July 1, 2013, thereby providing an additional six months from the original compliance date. Compliance dates for all other provisions of subpart F, subpart H, and subpart I of part 23 remain unchanged.

It should also be noted that the deferral does not affect the compliance dates for all business conduct standards promulgated by the Commission. Specifically, compliance dates for fundamental counterparty protections relating to (i) prohibitions on fraud, manipulation, and abusive practices,⁵ (ii) fair dealings in communications,⁶ and (iii) reasonable diligence regarding recommended swaps⁷ will go into effect as previously scheduled.

Final Notes

Although the deferral does not change the substance of the rules,⁸ it does give market participants valuable additional time to comply with these Dodd-Frank requirements. Additional requirements such as mandatory clearing of certain swaps will also be effective in mid-2013, the exact timing of which will depend on an entity's status as a Dealer, MSP, active fund, financial entity or corporate end-user.⁹ We encourage clients to consider such issues as eligible contract participant and financial entity status, clearing documentation, and swaps trading policies and procedures early in the first quarter of 2013 as board-level action may be required in certain circumstances.

³ § 23.502.

⁴ § 23.504.

⁵ § 23.410(a).

⁶ § 23.433.

⁷ § 23.434(a)(1).

⁸ For additional detail on the rules themselves, you may refer to the publications section of our website (<http://www.shearman.com/publications/>), which includes a variety of summaries covering the requirements mentioned herein in greater detail.

⁹ If you wish to review further information about these requirements, you may refer to Section II of our prior publication entitled [Corporate End-User's Handbook for Dodd-Frank Title VII Compliance](#).

Interim Rules Annex

Deferred Four Months

Subpart F:

RULE	DESCRIPTION	COMPLIANCE DATE
23.201(b)(3)(ii)	Requirement to provide each counterparty with an address to which complaints may be directed.	May 1, 2013

Subpart H:

RULE	DESCRIPTION	COMPLIANCE DATE
§ 23.402	Know-your-customer and general policies and procedures to ensure compliance	May 1, 2013
§ 23.410(c)	Confidential treatment of counterparty information	May 1, 2013
§ 23.430	Verification of counterparty eligibility	May 1, 2013
§ 23.431(a)-(c)	Disclosure of material risks, characteristics, material incentives, and conflicts of interest regarding a swap	May 1, 2013
§ 23.432	Clearing disclosures	May 1, 2013
§ 23.434(a)(2), (b), and (c)	Suitability requirements	May 1, 2013
§ 23.440	Requirements for swap dealers acting as advisors to special entities	May 1, 2013
§ 23.450	Requirements for Dealers and MSPs acting as counterparties to special entities	May 1, 2013
§ 23.505	The end-user exception ¹⁰ documentation	May 1, 2013

¹⁰ If you wish to review further information about this exception, you may refer to Section II of our prior publication entitled [Corporate End-User's Handbook for Dodd-Frank Title VII Compliance](#).

Deferred Six Months

Subpart I:

RULE	DESCRIPTION	COMPLIANCE DATE
§ 23.502	Portfolio reconciliation	July 1, 2013
§ 23.504	Swap trading relationship documentation	July 1, 2013

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

If you wish to receive more information on the topics covered in this publication, you may contact your regular Shearman & Sterling contact person or any of the following:

Azam H. Aziz
New York
+1.212.848.8154
aaaziz@shearman.com

Geoffrey B. Goldman
New York
+1.212.848.4867
geoffrey.goldman@shearman.com

Donna M. Parisi
New York
+1.212.848.7367
dparisi@shearman.com

Bradley K. Sabel
New York
+1.212.848.8410
bsabel@shearman.com

Russell D. Sacks
New York
+1.212.848.7585
rsacks@shearman.com

Donald N. Lamson
Washington, DC
+1.202.508.8130
donald.lamson@shearman.com

Jared R. Gianatasio
New York
+1.212.848.4384
jared.gianatasio@shearman.com

Geoffrey J. McGill
New York
+1.212.848.4097
geoffrey.mcgill@shearman.com

James Larsen
New York
+1.212.848.5343
james.larsen@shearman.com