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CFTC Publishes Thirteenth Series of Dodd-Frank Rules

Co-authored by Kevin M. Foley and Joshua A. Penner

The Commodity Futures Trading Commission has published its thirteenth series of proposed rules under the Dodd-Frank Wall Street Reform and Consumer Protection Act. The proposals relate to the establishment of initial and variation margin requirements for uncleared swaps and to recordkeeping and reporting requirements for existing swaps.

Margin Requirements for Uncleared Swaps

The CFTC has proposed rules to implement Section 731 of the Dodd-Frank Act, which requires the CFTC to adopt rules imposing initial and variation margin requirements on all swaps that are not cleared by a derivatives clearing organization (DCO). The margin requirements would apply to uncleared swaps entered into after the effective date of the rules.

The proposed rules would apply to swap dealers (SDs) and major swap participants (MSPs) that are not subject to oversight by a regulator other than the CFTC. Margin requirements would vary by counterparty, depending on whether the counterparty is a "financial entity," as defined under Section 2(h)(7)(C) of the Commodity Exchange Act. The proposed rules would require initial and variation margin to be paid on all uncleared swaps that are entered into between an SD or MSP with an SD or MSP. Initial margin posted for swaps between SDs and MSPs would have to be deposited with a third-party custodian and could not be rehypothecated.

The rules also would require that an SD or MSP collect, but not pay, initial and variation margin on uncleared swaps that are entered into with a financial entity, subject to certain thresholds, but would not require an SD or MSP to pay or collect initial or variation margin from counterparties that are not financial entities, including commercial entities, provided that it has entered into credit support arrangements with such counterparties.

Initial margin required under the proposed rules could be calculated using any model approved by the CFTC that is either (1) used by a DCO for clearing swaps, (2) used by any entity subject to oversight by a prudential regulator for clearing swaps, or (3) made available for licensing to any market participant. If no model meeting these requirements is available, initial margin would be calculated by selecting a comparable cleared swap or futures contract and applying a multiplier to the initial margin required thereunder as set forth in the proposed rules. Initial margin would in all cases be required to cover 99% of price moves over a 10-day liquidation period.

Variation margin required under the proposed rules would be calculated to cover current exposure arising from market moves since the execution of the swap or the previous time the swap was marked-to-market for variation margin calculation purposes.

SDs, MSPs and financial entities would be permitted to meet margin requirements with only specified assets, subject to haircuts set forth in the proposed rules. Non-financial entities would be permitted to post non-traditional forms of collateral in accordance with the credit support arrangements entered into with the SD or MSP counterparty. SDs and MSPs would also be required to offer non-SDs or MSPs the option to have any initial margin posted segregated.

The comment period will close 60 days after the proposed rules are published in the *Federal Register*. The proposing release for the proposed rules regarding margin requirements for uncleared swaps can be found here.

Swap Data Reporting and Recordkeeping

The CFTC has proposed rules to provide for the reporting of data relating to swaps entered into before the date of enactment of the Dodd-Frank Act and data relating to swaps entered into on or after the date of enactment of the Dodd-Frank Act and prior to the effective date of swap data reporting rules promulgated by the CFTC (collectively, historical swaps).

Among other things, the proposed rules would require that:

- Counterparties to swaps existing on or after the publication date of the proposed rule preserve records of specified minimum primary economic terms of the swap based on the underlying asset class as provided in appendices to the proposed rule. If a confirmation for the swap exists as of the publication date of the proposed rules, that confirmation would be required to be preserved as well.
- Counterparties to swaps that have expired prior to the publication date of the proposed rule preserve any records of the swap in their possession in the form they exist.

Records would be required to be preserved for the term of the historical swap and for five years following the termination or expiration thereof.

- The proposed rules would separately establish reporting requirements for historical swaps. In particular, at least one party to each historical swap existing on or after the publication date of the proposed rules would be required to provide (1) an initial data report to be filed on the effective date of the swap, and (2) ongoing reporting of data during the historical swap's remaining existence. The determination of which counterparty would be responsible for such reporting would be governed by the CFTC's previously proposed rules on swap data reporting. The initial data report would be required to include the minimum primary economic terms for the swap based on the underlying asset class as provided in an appendix to the proposed rules. Any confirmation terms of the swap existing on or after the publication date of the proposed rule and included in the automated reporting system of a counterparty would be required to be included in the initial report.

The proposed rules would permit the parties to a swap to contract with third-party service providers to satisfy reporting requirements, but the parties would ultimately be responsible for satisfying all reporting requirements.

A CFTC summary of the proposed rules regarding recordkeeping and reporting requirements for swaps can be found here.

Katten Muchin Rosenman LLP
Charlotte Chicago Irving London Los Angeles New York Washington, DC