

SEC Proposes Compliance Schedule for Final Dodd-Frank Rules

June 26, 2012

On June 14, 2012, the Securities and Exchange Commission (SEC) published a proposed policy statement (the [Policy Statement](#)) in the Federal Register pertaining to the order in which its final rules to implement Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) should take effect. The primary responsibility of the SEC under Title VII relates to “security-based swaps,” though the SEC will, in many instances, share responsibilities with the Commodity Futures Trading Commission (CFTC).¹ Specifically, although the Dodd-Frank Act granted the CFTC primary jurisdiction over swaps and the SEC primary jurisdiction over security-based swaps, both agencies are charged with adopting joint rules to further define, among other things, the terms “swap” and “security-based swap.” Such rules were [proposed](#) last year, but final rules have yet to be adopted. As a result, to the extent the SEC’s proposed timetable for finalizing its rules (including these definitions) differs from that of the CFTC, the effective date of other CFTC rules, as well as the definitions, will be impacted.

In the Policy Statement, the SEC emphasizes that it will implement a phased-in compliance schedule rather than issue all of its final rules simultaneously. Instead of setting specific timelines or concrete compliance dates, however, the Policy Statement only proposes the sequence in which the SEC’s final rules may take effect relative to each other. This phased-in schedule recognizes that the SEC’s final rules are interconnected and that certain of its rules are issued jointly with the CFTC and/or are dependent on rulemakings by federal banking regulators (so-called Prudential Regulators). The Policy Statement is intended to provide regulated entities with an adequate amount of time to comply with each final rule. The SEC seeks public comments on the Policy Statement, which comments must be submitted to the SEC by August 13, 2012 and will be addressed in the relevant rulemakings discussed in the Policy Statement.

Rule Categories

The SEC Policy Statement organizes the SEC’s rulemakings to implement Title VII of the Dodd-Frank Act into five categories:

- **Category 1:** Final Definitional Rules (defined below) and proposed cross border rules.
- **Category 2:** Final rules concerning (1) the registration and regulation of swap data repositories (SDRs) and (2) security-based swap data reporting (SBSR), which pertains to the reporting of security-based swap information to SDRs.
- **Category 3:** Final rules pertaining to (1) the process for review of security-based swaps for mandatory clearing, (2) the requirement that systemically important financial market utilities, which may include clearing agencies, give 60 days’ advance notice to regulators of certain internal changes, (3) the end-user exception from mandatory clearing, and (4) clearing agency

¹ “Security-based swaps” are defined in the Dodd-Frank Act as swaps that are based on (1) a single security or loan, (2) a narrow-based security index or (3) the occurrence or non-occurrence of an event, relating to a single security of an issuer or issuers of securities in a narrow-based security index, that directly affects the financial statements, financial condition or financial obligations of the issuer.

standards, which include (a) clearing agency governance, operation and participation standards and risk management practices, (b) rules to limit conflicts of interest and (c) rules addressing specific components of internal operations, administrative practices, and clearance and settlement services.

- **Category 4:** Final rules addressing the registration and regulation of Security-Based Swap Dealers (SBSDs) and Major Security-Based Swap Participants (MSBSPs), which will cover the registration of SBSBs and MSBSPs with the SEC, business conduct standards, trade acknowledgement and verification of security-based swap transactions, capital, margin and segregation requirements, and reporting and recordkeeping requirements.
- **Category 5:** Final rules addressing (1) mandatory electronic exchange trading of security-based swap transactions, (2) registration and regulation of security-based swap execution facilities (SEFs), and (3) proposed mitigation of SEF conflicts of interest through governance requirements and ownership and voting limitations (Proposed Reg MC).

The SEC's Proposed Compliance Schedule²

The SEC proposes that, with the exception of two final rules (discussed in the next paragraph), the Category 1 Definitional Rules should take effect, and the cross border rules should be proposed, first because they clarify the scope of Title VII and dictate who falls within the new Dodd-Frank Act regulatory regime. The final Definitional Rules define necessary terms such as “swap,” “security-based swap,” “security-based swap agreement,” “mixed swap,” “security-based swap dealer” and “major security-based swap participant.”³ The proposed cross border rules would clarify when Title VII's requirements will apply to cross border swap transactions and non-U.S. persons.

The only two rules that may precede Category 1 final rules fall within Category 3. The SEC suggests that (1) the requirement that systemically important financial market utilities give advance notice to regulators about certain internal policy changes, and (2) rules addressing clearing agency standards, the end-user exception from mandatory clearing, and the procedures for submitting security-based swaps for clearing should take effect before any other final rules, including the Category 1 rules.

Following the Category 1 rules' effectiveness, the SEC proposes that the Category 2 rules pertaining to security-based SDRs and SBSR should take effect. Specifically, the rules addressing the registration and regulation of SDRs should take effect as soon as practicable after the Category 1 rules take effect. The rules concerning reporting of security-based swaps data and public dissemination of this information by SDRs will follow after the registration and regulation of SDRs.

The SEC then proposes that the end-user exception be the next rule to take effect after the Category 2 rules, so long as the SEC affords enough time so that swap counterparties that may seek this exemption will have already begun submitting their security-based swap transaction information to registered SDRs.

² The Policy Statement also describes the timing of the expiration of relief previously granted by the SEC. Please see the [Policy Statement](#) for detailed information.

³ The CFTC and SEC issued [final rules](#) to further define “swap dealer,” “security-based swap dealer,” “major swap participant,” “major security-based swap participant” and “eligible contract participant” earlier this year. For more information, please see Sutherland's [Legal Alert](#). As noted above, the CFTC and SEC proposed rules last year to further define “swap” and “security-based swap,” among other things, but final rules have not been issued.

Aside from the above, the Policy Statement proposes somewhat flexible timing requirements with respect to:

- **Category 3(a) (mandatory clearing submission procedure for security-based swaps)** cannot come into effect until certain clearing agency standards final rules and the end-user exception final rules take effect. Additionally, these final rules for security-based swaps cannot take effect until the SEC decides whether to address portfolio margining with swaps and whether to propose amendments to the existing new capital and customer protection requirements applicable to broker dealers.
- **Category 3(d)(ii) (specific clearing agency governance and mitigation of conflicts of interest requirements)** cannot take effect until after the mandatory clearing of swaps commences.
- **Category 3(d)(iii) (specific clearing agency internal operations and administrative practice requirements)** cannot take effect until after the mandatory clearing of swaps commences, and after Category 3(d)(ii) takes effect.
- **Category 4 (regulation and registration of SBSs and MSBSPs)** compliance dates differ among the five subsets of rules within this category because SBSs and MSBSPs may need more time to comply with some rules, as compared to others. Whatever compliance dates the SEC chooses, however, SBSs and MSBSPs must have enough time to come into compliance.
- **Category 5(a) (mandatory trading of security-based swap transactions)** can only come into effect after the rules concerning the mandatory clearing submission procedure for security-based swaps, the registration and regulation of SEFs, and the objective standards defining when a stock has been “made available to trade” have taken effect.
- **Category 5(b) (registration and regulation of SEFs)** may take effect in any future release adopting final SEF rules, but must take effect before the mandatory trading of security-based swap transaction rules because, according to the SEC, some entities may seek to register as SEFs before the mandatory trade execution requirement becomes effective.
- **Category 5(c) (Proposed Reg MC)**, which would apply governance requirements and ownership limitations on SEFs as a means to mitigate conflicts of interest, may be finalized after the SEC receives and reviews public comments on this issue that are submitted in response to the Policy Statement.

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If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

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