

SEC Proposes Joint Rules with CFTC to Define Types of Swap Participants under the Dodd-Frank Act

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On December 3, 2010, the Securities and Exchange Commission (SEC) voted unanimously to propose joint rules with the Commodity Futures Trading Commission (CFTC) under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The proposed rules would further define which types of swaps traders would be subject to the new derivatives regulations.

Title VII of Dodd-Frank, among other things, (i) divides regulatory authority over swaps between the SEC and the CFTC (with the SEC having regulatory authority over security-based swaps, the CFTC having regulatory authority over all other swaps, and both agencies sharing joint regulatory authority over mixed swaps), (ii) creates new categories for market participants who are subject to new registration, capital and margin requirements, record keeping, reporting and other regulatory requirements, and (iii) requires that certain swaps be accepted by a clearing organization.

The rules, originally proposed by the CFTC on December 1, 2010 in a 3-2 vote, further defined the categories of market participants which would be considered “Swap Dealers” and “Major Swap Participants.” The proposed rule will be open to public comment for 60 days after publication in the Federal Register.

The SEC-proposed rules are largely similar to the proposals approved by the CFTC with respect to nonsecurity-based swaps. Like the CFTC rules, the SEC proposal would provide similar de minimis exemptions from the classification of a firm as a Swap Dealer. The SEC proposals also provide certain threshold guidelines to help determine whether a firm has a “substantial position” in swaps or has “substantial counterparty exposure,” which may lead to the classification of such firm as a Major Swap Participant. The SEC proposed that a firm would be considered to have a “substantial position” in swaps if (i) it has a daily average of current uncollateralized exposure of at least \$1 billion in either of two major security-based swap categories: security-based credit derivatives or other security-based swaps, or (ii) it has a daily average of current uncollateralized exposure and future exposure of at least \$2 billion for security-based credit derivatives or other security-based swaps. A firm would be considered to have “substantial counterparty exposure” if it has uncollateralized exposure of more than \$2 billion, or current and future exposure exceeding \$4 billion, across the entirety of a firm’s security-based swap positions.

For a link to the client alert - [CFTC Proposes Definitions for Swap Participants Under the Dodd-Frank Act, click here](#).

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