



**U.S. Commodity Futures Trading Commission**  
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July 28, 2011

Re: Review of Swaps for Mandatory Clearing under Section 723 of the Dodd-Frank Act (the "Act")

To the public:

I am writing to seek your input on a number of important questions regarding the review of swaps for mandatory clearing under Section 723 of the Act. Specifically, the Commission promulgated a final rulemaking on July 19, 2011, regarding the process that the Commission will follow for: (i) determining the eligibility of a derivatives clearing organization ("DCO") to clear swaps; (ii) the submission of swaps by a DCO to the Commission for a mandatory clearing determination; (iii) Commission-initiated reviews of swaps; and (iv) staying of a clearing requirement.<sup>1</sup> Since the final rulemaking focuses on process, it does not provide guidance on, among other things, the manner in which the Commission will determine (i) which swaps would be subject to the clearing requirement and (ii) whether to issue a stay of a clearing requirement.<sup>2</sup>

The final rulemaking will become effective sixty (60) days after being published in the *Federal Register*. The Commission has stated that, after the final rulemaking becomes effective, the Commission will begin reviewing DCO submissions relating to swaps listed for clearing as of the date that the Act was enacted (the "Pre-Enactment Swaps").<sup>3</sup> Before the Commission makes a determination with respect to the Pre-Enactment Swaps, I believe that it would be helpful for guidance to be developed regarding the substantive aspects of such review. To that end, I seek your opinion on the following questions:

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<sup>1</sup> See *Process for Review of Swaps for Mandatory Clearing*, available at: <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/federalregister071911b.pdf>.

<sup>2</sup> See Section 2(h)(3)(D) of the CEA (stating that "...[T]he Commission shall adopt rules for reviewing, pursuant to this paragraph, a derivatives clearing organization's clearing of a swap, or a group, category, type, or class of swaps, that it has accepted for clearing.").

<sup>3</sup> See *Q&A -- Process for Review of Swaps for Mandatory Clearing*, available at: [http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/prmc\\_qa\\_final.pdf](http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/prmc_qa_final.pdf).

1. Section 2(h)(2)(D)(ii) of the Commodity Exchange Act (“CEA”) states:

In reviewing a swap, group of swaps, or class of swaps..., the Commission shall take into account the following factors:

- (I) The existence of significant outstanding notional exposures, trading liquidity, and adequate pricing data.
- (II) The availability of rule framework, capacity, operational expertise and resources, and credit support infrastructure to clear the contract on terms that are consistent with the material terms and trading conventions on which the contract is then traded.
- (III) The effect on the mitigation of systemic risk, taking into account the size of the market for such contract and the resources of the derivatives clearing organization available to clear the contract.
- (IV) The effect on competition, including appropriate fees and charges applied to clearing.
- (V) The existence of reasonable legal certainty in the event of the insolvency of the relevant derivatives clearing organization or 1 or more of its clearing members with regard to the treatment of customer and swap counterparty positions, funds, and property.

2. How should the Commission consider the five factors?

- a. What criteria should the Commission consider when evaluating whether the DCO has properly categorized “group, category, type, or class of swaps”?
- b. Should the Commission accord more weight to one or more of the factors than others? If so, why?
- c. Should the Commission consider the factors differently depending on asset class (*e.g.*, interest rate swaps, credit default swaps, and physical commodities)? If so, how should the Commission consider the factors for each asset class (or instruments therein)?
- d. To what extent should the Commission take into account, in its consideration of the five factors, the connection between (i) mandatory clearing under Section 2(h)(1) through (4) of the CEA and (ii) the trade execution requirement under Section 2(h)(8) of the CEA?
- e. Final regulation 39.5(b)(3) sets forth a list of documents that each DCO must submit in its request for a mandatory clearing determination. What, if any, additional information should the Commission routinely obtain to aid in its consideration of the five factors? Please indicate the specific factor (and element therein) that such information would help the Commission evaluate.

3. Section 2(h)(3)(A) of the CEA states: “After making a determination..., the Commission, on application of a counterparty to a swap or on its own initiative, may stay the clearing requirement... until the Commission completes a review of the terms of the swap (or the group, category, type, or class of swaps) and the clearing arrangement.”
  - a. What criteria should the Commission employ to determine whether staying the clearing requirement would be appropriate?

Thank you in advance for your time and attention to this issue. Please email your comments to [mandatoryclearing@cftc.gov](mailto:mandatoryclearing@cftc.gov). I would encourage you to submit your comments by September 14, 2011, to increase the likelihood that your comments will receive consideration before the Commission makes a determination with respect to the Pre-Enactment Swaps. Please note that this letter is not an official Commission request for comment.

Please do not hesitate to contact me if you have any questions.

Best regards,

SCOTT D. O'MALIA  
COMMISSIONER