



Commodity Futures Trading Commission

Office of Public Affairs

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Final Rule on End-User Exception to the Clearing Requirement for Swaps

The Commodity Futures Trading Commission (Commission) is considering a final rule that implements an exception to the clearing requirement for non-financial entities and small financial institutions that use swaps to hedge or mitigate commercial risk.

Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)

Section 723 of the Dodd-Frank Act amended the Commodity Exchange Act (CEA) by adding Section 2(h)(1), which provides that “it shall be unlawful for any person to engage in a swap unless that person submits such swap for clearing to a derivatives clearing organization that is registered under [the CEA] or a derivatives clearing organization that is exempt from registration under [the CEA] if the swap is required to be cleared.” The Dodd-Frank Act also added Section 2(h)(7) to the CEA, which provides that the clearing requirement of Section 2(h)(1) shall not apply to a swap if one of the counterparties to the swap: “(i) is not a financial entity; (ii) is using swaps to hedge or mitigate commercial risk; and (iii) notifies the Commission, in a manner set forth by the Commission, how it generally meets its financial obligations associated with entering into non-cleared swaps.” The exception provided in Section 2(h)(7) is commonly referred to as the “end-user exception.”

Notification to the Commission

To implement the notification requirement, the final rule requires the reporting counterparty to report to a swap data repository (SDR) (or if no SDR is available, to the Commission) the following information for each swap for which the end-user exception is elected: (1) notice of the election of the exception and (2) the identity of the electing counterparty (i.e., the counterparty eligible to elect the end-user exception) to the swap.

Additional information required to be reported under the rule may be provided either in an annual filing by the electing counterparty or on a swap-by-swap basis by the reporting counterparty. This information includes: (1) whether the electing counterparty is a financial entity electing the exception on behalf of an affiliate or as a small financial institution; (2) whether the swap for which the exception is being elected is used to hedge or mitigate commercial risk; (3) information regarding how the electing counterparty generally meets its financial obligations associated with entering into non-cleared swaps; and (4) if the electing counterparty is an “SEC Filer,” whether its board of directors has approved generally the decision to enter into swaps that are exempt from the clearing and trading requirements.

Hedging or Mitigating Commercial Risk

The final rule establishes criteria for determining whether a swap is “hedging or mitigating commercial risk” and therefore eligible for the end-user exception. The criteria set out in the rule are virtually the same as the criteria used in the definition of “major swap participant” recently adopted by the Commission.

Exemption for Small Financial Institutions

Section 2(h)(7)(C)(ii) of the CEA directs the Commission to consider whether to exempt small banks, savings associations, farm credit system institutions, and credit unions from the definition of “financial entity” used in the end-user exception, particularly those with total assets of \$10 billion or less.

The final rule exempts banks, savings associations, farm credit system institutions, and credit unions with total assets of \$10 billion or less from the definition of “financial entity,” making such “small financial institutions” eligible for the end-user exception.