



Commodity Futures Trading Commission

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Process for a Designated Contract Market or Swap Execution Facility to Make a Swap Available to Trade under Section 2(h)(8) of the Commodity Exchange Act

The Commodity Futures Trading Commission (Commission) is proposing regulations that would establish a process for Designated Contract Markets (DCMs) and Swap Execution Facilities (SEFs) to make a swap “available to trade” as set forth in Section 2(h)(8) of the Commodity Exchange Act (CEA) pursuant to Section 723 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).

Dodd-Frank Act Added New Trade Execution Requirement

Section 723(a)(8) of the Dodd-Frank Act amends the CEA by adding Section 2(h)(8), which requires that the execution of all swap transactions subject to the clearing requirement of Section 2(h)(1) of the CEA occur on a DCM or a SEF, except where no DCM or SEF makes the swap “available to trade” or for swap transactions subject to the clearing exception under Section 2(h)(7) of the CEA.

Proposed Available to Trade Rule

On December 22, 2010, the Commission published a notice of proposed rulemaking, entitled Core Principles and Other Requirements for Designated Contract Markets, which did not establish any obligation for DCMs under Section 2(h)(8) of the CEA, but it did establish certain swap reporting obligations.

On January 7, 2011, the Commission published a notice of proposed rulemaking, entitled Core Principles and Other Requirements for Swap Execution Facilities (SEF NPRM), which addressed the available to trade provision in a limited manner with respect to periodic evaluation and reporting. Commenters to the SEF NPRM requested that the Commission establish a process for DCMs and SEFs to make a swap available to trade, with Commission involvement in the determination. This further notice of proposed rulemaking would set forth a process for both DCMs and SEFs to make a swap available to trade within the meaning of Section 2(h)(8) of the CEA.

The proposed regulations would require DCMs and SEFs to submit any determination that a swap is available to trade to the Commission, either for approval or under self-certification procedures, pursuant to the rule filing procedures of part 40 of the Commission’s regulations. Under this procedure, DCMs and SEFs would make a swap available to trade, while the Commission has a role in reviewing such determinations.

To make a swap available to trade, for purposes of Section 2(h)(8) of the CEA, a DCM or SEF must consider, as appropriate, the following factors with respect to such swap: (1) Whether there are ready and willing buyers and sellers; (2) The frequency or size of transactions on DCMs, SEFs, or of bilateral transactions; (3) The trading volume on DCMs, SEFs, or of bilateral transactions; (4) The number and type of market participants; (5) The bid/ask spread; (6) The usual number of resting firm or indicative bids and offers; (7) Whether a DCM’s trading facility or a SEF’s trading system or platform will support trading in the swap; or (8) Any other factor that the DCM or SEF may consider relevant.

Under the proposed regulations, if a DCM or SEF makes a swap available to trade, all other DCMs and SEFs listing or offering for trading such swap and/or any economically equivalent swap, must make those swaps available to trade for purposes of the trade execution requirement set forth in Section 2(h)(8) of the CEA.

The proposed regulations would also require DCMs and SEFs to conduct an annual review and assessment of each swap they have made available to trade to determine whether or not each swap should continue to be available to trade. DCMs and SEFs would submit a report of their review and assessment to the Commission.