



Commodity Futures Trading Commission

Office of Public Affairs

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Proposed Rule on Process for Review of Swaps for Mandatory Clearing

The Commodity Futures Trading Commission (Commission) is proposing rules concerning procedures for determining the eligibility of derivatives clearing organizations (DCOs) to clear swaps; for the submission of swaps by DCOs to the Commission for a determination on a clearing requirement; for Commission-initiated reviews of swaps; and for staying a clearing requirement while the clearing of a swap is reviewed.

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

Section 723(a)(3) of the Dodd-Frank Act amends the Commodity Exchange Act (CEA) to provide that “it shall be unlawful for any person to engage in a swap unless that person submits such swap for clearing to a [DCO] that is registered under [the CEA] or a [DCO] that is exempt from registration under [the CEA] if the swap is required to be cleared.” Section 723(a)(3) requires the Commission to adopt rules for the review of a swap, or group, category, type, or class of swaps (collectively, “swaps”) to make a determination as to whether the swaps should be required to be cleared.

Section 745(b) of the Dodd-Frank Act directs the Commission to prescribe criteria, conditions, or rules under which the Commission will determine the initial eligibility or the continuing qualification of a DCO to clear swaps.

Eligibility of a DCO to Clear Swaps

Under the proposed rule, a DCO would be presumed eligible to accept for clearing any swap that is within a group, category, type, or class of swaps that the DCO already clears. A DCO that plans to accept for clearing any swap that is not within a group, category, type, or class of swaps that the DCO already clears also would be required to request a determination by the Commission of its eligibility to clear the swap.

To receive a determination of eligibility to clear a swap, a DCO would have to file a written request with the Commission that addresses its ability to maintain compliance with the DCO core principles if it accepts the swap for clearing, specifically: 1) the sufficiency of its financial resources; and 2) its ability to manage the risks associated with clearing the swap, especially if the Commission determines that the swap is required to be cleared.

Submission of Swaps to the Commission for Review

The Dodd-Frank Act requires a DCO that plans to accept swaps for clearing to submit the swaps to the Commission for a determination as to whether the swaps are required to be cleared. The proposed rule sets out the process for DCOs to follow when submitting swaps to the Commission.

The DCO would have to provide a statement that would assist the Commission in the assessment of five specific factors that the Dodd-Frank Act requires the Commission to take into account when reviewing a swap submission:

- The existence of significant outstanding notional exposures, trading liquidity, and adequate pricing data;
- 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;

- The effect on the mitigation of systemic risk, taking into account the size of the market for such contract and the resources of the DCO available to clear the contract;
- The effect on competition, including appropriate fees and charges applied to clearing; and
- The existence of reasonable legal certainty in the event of the insolvency of the relevant DCO or one or more of its clearing members with regard to the treatment of customer and swap counterparty positions, funds, and property.

The DCO would also be required to provide specific information relating to product specifications; participant eligibility standards; pricing sources, models, and procedures; risk management procedures; measures of market liquidity and trading activity; the effect of a clearing requirement on the market for the swap; applicable rules, manuals, policies, or procedures; terms and trading conventions on which the swap is currently traded; and a description of the manner in which the DCO has provided notice of the submission to its members and a summary of any opposition to the submission expressed by members.

Commission-initiated Reviews of Swaps

The Dodd-Frank Act requires the Commission on an ongoing basis to review swaps that have not been accepted for clearing by a DCO to make a determination as to whether the swaps should be required to be cleared. If no DCO has accepted for clearing swaps that the Commission finds would otherwise be subject to a clearing requirement, the Commission would investigate the relevant facts and circumstances and, within 30 days of the completion of its investigation, issue a public report containing the results of the investigation. The Commission would take such actions as it determines to be necessary and in the public interest, which may include establishing margin or capital requirements for parties to the swaps.

Stay of Clearing Requirement

After making a determination that a swap (or group, category, type, or class of swaps) is required to be cleared, the Commission, on application of a counterparty to a swap or on its own initiative, may stay the clearing requirement until it completes a review of the terms of the swap and the clearing arrangement.

The proposed rule would require a counterparty to a swap that wants to apply for a stay of the clearing requirement to submit a written request that includes: the identity and contact information of the counterparty; the terms of the swap subject to the clearing requirement; the name of the DCO that clears the swap; a description of the clearing arrangement; and a statement explaining why the swap should not be subject to a clearing requirement.

The Commission would complete its review of the clearing of the swap not later than 90 days after issuance of the stay, unless the DCO that clears the swap agrees to an extension. Upon completion of its review, the Commission could determine, subject to any terms and conditions as the Commission determines to be appropriate, that the swap must be cleared, or that the clearing requirement will not apply but clearing may continue on a non-mandatory basis.