

CFTC and SEC Joint Roundtable on Extraterritorial Scope of Swaps Regulation

Introduction

On Monday, August 1, 2011, the Commodity Futures Trading Commission ("CFTC") and the Securities Exchange Commission ("SEC", and together with the CFTC, the "Commissions") jointly held a public roundtable discussion on international issues related to swaps regulations under the Dodd-Frank Act. The roundtable consisted of three sessions on the following topics: cross-border transactions; global entities; and market infrastructure. Each session was moderated by CFTC and/or SEC staff and the participants included market participants representing dealer firms, investors, public interest groups, clearinghouses and derivatives exchanges. Following is a brief summary of some key discussion points and issues.

Cross-border Transactions

Question: What should trigger imposition of U.S. regulation?

There was general agreement among participants that swaps transactions with a "U.S. person" will fall under U.S. regulation. Beyond that bright line, there was disagreement as to what constitutes "direct and significant" activities or effects that would bring a non-U.S. entity or transaction under U.S. regulation under the Dodd-Frank Act.

Question: Should the Commissions regulate non-U.S. subsidiaries, branches or affiliates of U.S. persons? Or U.S. intermediaries acting for non-U.S. persons?

Participants commented that foreign subsidiaries, branches and affiliates of U.S. persons that are subject to U.S. regulation may be subject to conflicting and duplicative regulation from the regulator in their home jurisdiction. The group further debated whether a guarantee from a U.S. parent should bring a subsidiary under U.S. regulation. Panelists also raised the issue of how the regulations would deal with U.S. intermediaries, such as a U.S. asset manager involved in a non-U.S. transaction between non-U.S. counterparties.

Question: How should "U.S. person" be defined?

The consensus was that there should be a clear definition in the rules. A number of participants suggested that the Commissions look to existing regulation (such as Regulation S under the Securities Act).

Other issues: Level Playing Field/Timing

Some participants stated that regulations should try to maintain a level playing field and equal treatment of similarly situated entities. Also, panelists noted that timing gaps between the U.S. and the rest of the world and inconsistencies in international regulation could have a significant impact on the competitive stance of U.S. entities.

Key Issues

Cross-border Transactions

Global Entities

Market Infrastructure

If you would like to know more about the subjects covered in this publication or our services, please contact:

[David Felsenthal](#) +1 212 878 3452

[David Yeres](#) +1 212 878 8075

[Gareth Old](#) +1 212 878 8539

To email one of the above, please use
firstname.lastname@cliffordchance.com

Clifford Chance, 31 West 52nd Street,
New York, NY 10019-6131, USA
www.cliffordchance.com

Attorney Advertising

Prior results do not guarantee a similar outcome.

Global Entities

Question: What requirements under the Dodd-Frank Act should apply to registered entities in a cross-border context?

For "entity requirements" (requirements applicable to an institution, such as capital), participants debated whether the Commissions should consider deference to home country regulation if the home country imposes comparable standards. For transactional requirements (such as business conduct and reporting rules), some participants suggested that the requirements apply only if the transaction involves a U.S. person. There was discussion and disagreement as to whether margin regulations are entity or transactional requirements and as to the relationship of margin requirements to capital.

Question: Can branches be regulated separately?

The regulators on the panel appeared to take the view that branches of foreign banks cannot be registered as swap dealers because they are not separate legal entities from the foreign bank. Instead, the foreign bank itself would have to register. Panelists argued that the regulators have ample authority to register just a branch but it was not clear whether their argument convinced the regulators.

Market Infrastructure

Question: Should the regulators condition recognition of foreign regulations on reciprocity? (Reciprocity would mean that U.S. regulators would only recognize a foreign country's regulations as satisfying U.S. requirements if the foreign regulators recognized U.S. regulations as meeting foreign requirements.)

Panelists responded that reciprocity would be important to them.

Other Issues: Repositories/Reporting

The regulators on the panel discussed the requirement for swap data repositories to get indemnities from regulators before releasing information to the regulators. The regulators stated that the Commissions are considering how to implement this. Also, the issue of a single, centralized repository was raised and discussed. Finally, participants discussed and generally opposed requirements for inter-operability.

* * *

In addition, we note that Spencer Bachus, Chairman of the Committee on Financial Services of the U.S. House of Representatives, recently wrote to Treasury Secretary Geithner to express his concern over potentially broad interpretations by U.S. regulators of the extraterritorial scope of the Dodd-Frank swap regulations. Letter of Spencer Bachus, Aug. 2, 2011.

This client memorandum does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com