CFTC STAFF CONCEPTS AND QUESTIONS REGARDING PHASED IMPLEMENTATION OF EFFECTIVE DATES FOR FINAL DODD-FRANK RULES

The Commodity Futures Trading Commission (CFTC or Commission) and the Securities and Exchange Commission (SEC) staffs will hold a two-day public roundtable to discuss the schedule for implementing final rules for swaps and security-based swaps under the Dodd-Frank Wall Street Reform and Consumer Protection Act. The following sets forth a number of concepts that CFTC staff is considering in framing recommendations to implement the effective dates of final rules for swaps. The following also presents a series of relevant questions aimed at eliciting public comment and input regarding how to phase the implementation of new rules.

Background

The Dodd-Frank Act gives the CFTC and SEC certain flexibility to set effective dates and a schedule for compliance with rules implementing Title VII of the Act, which involves oversight of swaps and security-based swaps. This authority may be used so that market participants have time to develop policies, procedures, systems, and infrastructure needed to comply with the new regulatory requirements.

Public comments on Title VII have helped inform the Commission as to which requirements can be met sooner and which ones will take more time. The order in which the Commission finalizes the rules does not determine the order in which the rules become effective or the applicable compliance dates.

The Commission has the ability to phase implementation of the new requirements based on factors such as: the type of swap, including by asset class; the type of market participants that engage in such trades; the speed with which market infrastructures can meet the new requirements; and whether registered market infrastructures or participants might be required to have policies and procedures in place ahead of compliance with such policies and procedures by non-registrants.

Concepts

The following concepts are being considered by staff in framing their recommendations regarding how to phase the implementation of effective dates for final rules.

1. Implementation will be facilitated if effective dates for the new Dodd-Frank regulatory requirements are phased in over time rather than implemented all at once. Accordingly, it may be appropriate for the effective dates for new rules, or specific provisions of a proposed rulemaking, to be phased over time. Furthermore, for those rules that could be implemented sooner, doing so would be beneficial so as to lower risk.

2. For market infrastructures, such as clearing entities, trading platforms, and data repositories, registration with the Commission and development of new policies,

procedures, and rulebooks must be completed before compliance with those policies, procedures, and rulebooks by market participants could be required. This may suggest that market infrastructures are required to be registered and have in place their policies, procedures, and rulebooks sooner than the required use of the market infrastructure. Under one approach, while transaction compliance would be required later, new policies, procedures, and/or rulebooks could be required to be in place by the later of (i) 60 days after relevant final rules are issued; (ii) December 31, 2011; or (iii) when a new infrastructure registers with the Commission.

3. The Dodd-Frank Act requires open access to both clearinghouses and swap execution facilities. Thus, any effective dates that are set for clearinghouses and trading platforms to establish new rulebooks that are fully compliant with Dodd-Frank (i.e., being open for business) must provide for client clearing and access at the same time for all participants who wish to use the platform.

4. For swap dealers and major swap participants, registration and development of new policies and procedures must be accomplished before compliance with those policies and procedures by their counterparties or customers can be required. This may suggest a sequence for effective dates whereby swap dealers register and develop policies and procedures by a particular date and then the application of those policies and procedures to the transactions of non-registrants would come later (transaction compliance).

5. Swap dealers and major swap participants that have been previously regulated, such as those that are part of bank holding companies and have been subject to oversight by a prudential regulator, may be more likely to have policies and procedures already in place that make it easier to comply with new Dodd-Frank requirements. On the other hand, it may be appropriate to afford those swap dealers and major swap participants that have not been previously regulated additional time to comply with new requirements.

6. Financial entities that are not swap dealers or major swap participants may require more time than swap dealers or major swap participants for the new regulatory requirements of Dodd-Frank to apply to their transactions (transaction compliance). In addition, amongst financial entities there may be different characteristics that would suggest phasing transaction compliance by the type of financial entity. For instance, if a counterparty is a hedge fund, transaction compliance may be appropriate in less time than if the counterparty was another type of financial entity. Similarly, financial entities that are not managing subaccounts may require less time for the new regulatory requirements to apply to their transactions. Thus, it may be possible to phase the effective dates for transaction compliance by type of financial entity. For example, swap dealers and hedge funds could be required to meet transaction compliance the soonest, i.e. within the 60 days after a particular final rule or mandate is issued. Financial entities not managing subaccounts for third parties might be required to meet transaction compliance next. Lastly, those who manage third-party subaccounts, such as asset managers, may be given more time.

7. Non-financial end users have different characteristics than those of financial entities. Consequently, it may be appropriate to provide more time for any new regulatory requirements that may apply to transactions with non-financial end users.

8. The Dodd-Frank Act specifies a number of different requirements for transaction compliance. Among these requirements are (i) the clearing requirement; (ii) the trading requirement; (iii) real-time public reporting; (iv) reporting data to a data repository; (v) swap dealer and major swap participant requirements, such as documentation, confirmation, valuation, and margining; and (vi) compliance with any applicable position limits. Each of these transaction compliance requirements could have different approaches to phased implementation of effective dates depending on the specific requirements of the rules.

9. With regard to transaction compliance, there also may be interdependence of one rule with another. One rule's effective date may be conditioned upon another rule being finalized or becoming effective. For instance, it may be appropriate for the definitions of swap dealer and major swap participant to be final before the business conduct requirements for those entities become effective. However, as noted above, it would be beneficial to implement those rules that can be implemented sooner so as to lower overall risk.

10. Some provisions of the proposed rules under Dodd-Frank rely upon the CFTC having access to data. For example, the Commission's proposed rules on block sizes for swaps and position limits depend on data reported to data repositories. Thus, effective dates for some rules may be dependent upon the effective dates for data reporting.

11. The statute provides for some natural sequencing. A clearing requirement cannot go into effect until the CFTC conducts a 90-day review process of the swap or group, category, type, or class of swaps. Additionally, there can be no trading requirement prior to the Commission's determination that a swap is required to be cleared, a trading platform(s) has listed the swap for trading, and the Commission has determined that the swap is made available for trading.

12. Market infrastructures and participants rely on technology connectivity to communicate and transact. Much of this connectivity may already be in place, but given the new requirements of Dodd-Frank, additional investments will likely need to be made. A rule's effective date may take into account the time and resources needed to achieve the needed technology connectivity.

13. For some asset classes, a certain amount of market infrastructure may already be in place and market participants may have already developed procedures that could be adapted to comply with the new Dodd-Frank regulatory requirements. Other asset classes may not be as far along. This suggests that implementation of effective dates for some rules could differ by asset class.

Specific Questions

- How applicable are each of these concepts in guiding staff recommendations regarding how to phase the effective dates of Dodd-Frank rules?

- What specific timing is suggested by these concepts or any alternative concepts that might be appropriate?

- What particular issues arise from applying each of the concepts outlined above to compliance with the new Dodd-Frank requirements for clearing?

- What particular issues arise from applying each of the concepts outlined above to compliance with the new Dodd-Frank requirements for the clearing mandate?

- What particular issues arise from applying each of the concepts outlined above to compliance with the new Dodd-Frank requirements for trading platforms, such as swap execution facilities?

- What particular issues arise from applying each of the concepts outlined above to compliance with the new Dodd-Frank requirements for the trading mandate?

- What particular issues arise from applying each of the concepts outlined above to compliance with the new Dodd-Frank requirements for reporting swaps data to data repositories and for real-time public reporting purposes?

- What particular issues arise from applying each of the concepts outlined above to compliance with the new Dodd-Frank requirements for swap dealers and major swap participants, such as rules related to documentation, confirmation, valuation, margining, and sales practices?

- What particular issues arise from applying each of the concepts outlined above to compliance with the new Dodd-Frank requirements related to adoption of aggregate positions limits covering futures and swap positions?