

December 26, 2012

CFTC Issues Clearing Determination for Certain Interest Rate and Credit Default Swaps

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “**Dodd-Frank Act**”) mandates central clearing for all swaps that are required to be cleared. The Commodity Futures Trading Commission (“**CFTC**”) must first make a determination as to which swaps are required to be cleared either based upon a CFTC initiated review or submission by a clearinghouse that the clearinghouse intends to accept such swap for clearing. On December 13, 2012, the CFTC issued a determination that certain interest rate and credit default swaps are required to be cleared (the “**Clearing Determination**”), the first clearing determinations under the Dodd-Frank Act.¹ The new regulations issued by the CFTC obligates market participants to submit a swap that is required to be cleared to a designated clearing organization as soon as technologically practicable but no later than the end of the day of execution. The Clearing Determination applies only to swaps currently cleared by four derivative clearing organizations: CME; ICE Clear Credit; ICE Clear Europe; and LCH.Clearnet Ltd.

The CFTC has adopted a phase-in approach to clearing, with compliance dates staggered by counterparty type to allow for time to address anticipated technological challenges and build familiarity with the process. The Clearing Determination also clarifies that a market participant need only clear a swap executed on or after the applicable compliance date. Swap dealers, major swap participants and active funds² will be required to comply beginning on March 11, 2013, for swaps they enter into on or after that date. Funds other than active funds, commodity pools, and those primarily engaged in the business of banking will be required to clear swaps beginning on June 10, 2013, for swaps entered into on or after that date. All other market participants (unless eligible for, and electing, the end-user exception to the clearing requirements) will have until September 9, 2013, to begin clearing swaps entered into on or after that date.

Corporate end-users and other non-financial entities may elect the end-user exception to the clearing requirement³ if the swaps are being used to hedge or mitigate commercial risk and they report to the CFTC how they generally meet their financial obligations under non-cleared swaps. Market participants electing the end-user exception do not need to

¹ 77 FR 74284 (December 13, 2012) (17 CFR Parts 39 and 50 – Clearing Requirement Determination Under Section 2(h) of the CEA), available at <http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2012-29211a.pdf>.

² An Active Fund is a private fund that executes 200 or more swaps per month based on a monthly average over the 12 months preceding November 1, 2012.

³ For a complete discussion of the end-user exception to the clearing requirement, see Client Memorandum entitled “CFTC Finalizes End-user Exception to the Clearing and Trade Execution Requirement for Swaps”, available at <http://www.paulweiss.com/media/1125175/30-jul-12alert.pdf>.

Certain interest rate and credit default swaps will be required to be cleared beginning on March 11, 2013, with compliance dates staggered by counterparty type.

Negotiation and execution of documentation designed for the clearing of swaps will need to be completed prior to the applicable compliance date (June 10, 2013 in most cases).

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comply with the reporting requirements for electing the exception until September 9, 2013.

Funds and other entities not eligible for, or not electing, the end-user exception to the clearing requirements will need to establish relationships with one or more futures commission merchants to enable them to submit swaps to a clearinghouse. This will require the negotiation and execution of documentation designed for the clearing of swaps. This documentation will need to be in place prior to the applicable compliance date (June 10, 2013 in most cases).

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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