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ISDA Dodd-Frank Protocol Update: CFTC Delays Compliance

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The Commodity Futures Trading Commission (CFTC) has issued an interim rule¹ to extend the compliance date with certain business conduct standards (BCS)² and documentation rules³ for swap dealers and major swap participants. The interim rule delays the compliance date for certain BCS and documentation rules until **May 1, 2013**,⁴ and other documentation rules until **July 1, 2013**.⁵ As a result, swap dealers will have additional time to amend existing swaps documentation and exchange information with their counterparties, which includes additional time to complete the August 2012 Dodd-Frank Protocol (DF Protocol). Without this relief, a swap dealer could have been in violation of the BCS and documentation rules if, beginning on January 1, 2013, it engaged in new or amended swap transactions with a counterparty unless the swap dealer already had amended its documentation and exchanged specified information with that counterparty.

This interim rule addresses an earlier request to the CFTC from the International Swaps and Derivatives Association, Inc. (ISDA) to give market participants additional time to amend their swap documentation through the DF Protocol.⁶ ISDA published the DF Protocol to facilitate swap dealer compliance with the certain BCS rules and documentation rules through a web-based system that permits market participants to amend existing swaps documentation and exchange information, including information the BCS and documentation rules require, with multiple counterparties in a streamlined fashion. The delayed compliance date in the CFTC interim rule results in pushing back the date for market participants to complete the DF Protocol process to May 1, 2013. However, changes to the definition of eligible contract participant (ECP) that become effective January 1, 2013 may necessitate certain market

- 1 See CFTC press release, CFTC Issues Interim Final Rules Regarding Business Conduct and Documentation Requirements for Swap Dealers and Major Swap Participants, PR 6470-12 (Dec. 18, 2012), available at <http://www.cftc.gov/PressRoom/PressReleases/pr6470-12>; Interim Final Rule, Business Conduct and Documentation Requirements for Swap Dealers and Major Swap Participants, available at <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/federalregister121812.pdf>.
- 2 See Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties, 77 Fed. Reg. 9734 (Feb. 17, 2012).
- 3 See Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules, 77 Fed. Reg. 20128 (Apr. 3, 2012); see also Confirmation, Portfolio Reconciliation, Portfolio Compression, and Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants, 77 Fed. Reg. 55904 (Sept. 11, 2012).
- 4 CFTC rule 23.201(b)(3)(ii) (notice on complaint submissions); CFTC rules 23.402, 23.410(c), 23.430, 23.431(a)-(c), 23.432, 23.434(a)(2)-(c), 23.440, and 23.450 (certain BCS rules); and 23.505 (end-user exception documentation). The relief in the CFTC interim rule does not extend to certain BCS rules applicable to swap dealers and major swap participants that prohibit fraudulent or manipulative practices (23.410(a)-(b)), require disclosure of a daily mark (23.431(d)), impose fair dealing requirements (23.433), require reasonable diligence to understand the risks and rewards of a recommended swap or strategy (23.434(a)(1)), or certain restrictions on political contributions (23.451).
- 5 CFTC rules 23.502 (portfolio reconciliation) and 23.504 (swap documentation addressing, e.g., payment obligations, netting arrangements, valuation, and dispute resolution).
- 6 See ISDA Dodd-Frank Protocol Update: ISDA Requests the CFTC to Delay Compliance With Business Conduct Standards Rules, available at <https://www.skadden.com/insights/isda-dodd-frank-protocol-update-isda-requests-cftc-delay-compliance-business-conduct-standards-Rules>.

participants, such as commodity pools, to update representations regarding ECP status with counterparties prior to trading in swaps after January 1, 2013.⁷

The CFTC interim rule becomes final upon publication in the Federal Register, but the CFTC will consider comments received on or before 30 days from publication and can revise the interim rules if the CFTC determines it is warranted.

⁷ See Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant,” and “Eligible Contract Participant,” 77 Fed. Reg. 30596, 30743-44 (May 23, 2012) (amending CFTC rule 1.3(m) to further define the term “eligible contract participant” with respect to certain persons including swap dealers, major swap participants, and commodity pools).