

MEMO# 27267

June 4, 2013

CFTC Adopts Final Rules To Make A Swap "Available to Trade" and a Schedule to Phase in Compliance with the Trade Execution Requirement

[27267]

June 4, 2013

TO: CLOSED-END INVESTMENT COMPANY MEMBERS No. 44-13
DERIVATIVES MARKETS ADVISORY COMMITTEE No. 39-13
INVESTMENT ADVISER MEMBERS No. 33-13
SEC RULES MEMBERS No. 49-13 RE: CFTC ADOPTS FINAL RULES TO MAKE A SWAP "AVAILABLE TO TRADE" AND A SCHEDULE TO PHASE IN COMPLIANCE WITH THE TRADE EXECUTION REQUIREMENT

The Commodity Futures Trading Commission ("CFTC" or "Commission") recently adopted final rules regarding the process for a designated contract market ("DCM") or swap execution facility ("SEF") to make a swap "available to trade" for purposes of Section 2(h)(8) of the Commodity Exchange Act ("CEA"), as well as rules to establish a schedule to phase in compliance with the trade execution requirement (together, "Final Rules"). [\[1\]](#) The Final Rules are summarized below.

The Commission confirmed, in the Adopting Release, that the "made available to trade" ("MAT") determination, the determination of whether a swap is subject to mandatory execution, is separate from a mandatory clearing determination. [\[2\]](#) It further stated that, at this time, it will only review MAT submissions for swaps that it has determined to be subject to mandatory clearing. The Final Rules provide that a DCM or SEF may submit an initial MAT determination to the Commission, either under the Commission's §40.5 rule approval process or the §40.6 self-certification process. [\[3\]](#) In either case, the DCM or SEF must list or offer that swap for trading. The DCM or SEF must further consider one or more of the following factors with respect to the swap: (1) whether there are ready and willing buyers and sellers; (2) the frequency or size of transactions; (3) the trading volume; (4) the number and types of market participants; (5) the bid/ask spread; and (6) the usual number of resting firm or indicative bids and offers. The Commission states that "satisfying any one of the determination factors would sufficiently indicate that the contract is available to trade."

The Final Rules require that, once a MAT determination is made, all other SEFs and DCMs, if

they list that particular swap, must comply with the trade execution requirements of the CEA with respect to the swap. The Commission did not adopt the concept of an “economically equivalent swap,” and therefore a DCM or SEF must submit a MAT determination for all swaps that it wishes to make available for trading. The Commission addressed concerns about public comment by explaining that, under the §40.5 rule approval process, it anticipates that market participants would be able to provide the Commission with comments on MAT filings, and that the §40.6 self-certification process would include a 30-day mandatory public comment period. [4]

The Commission determined to not adopt a separate process for a SEF or DCM to submit a determination that a swap is no longer available to trade. Instead, the Commission will deem a swap to be no longer available to trade if all SEFs and DCMs that had listed that swap for trading no longer list the swap. [5] Because it adopted this approach for determining that a swap is no longer available to trade, the Commission did not adopt the proposed requirement that a SEF or DCM perform an annual review and assessment of each swap that it has made available to trade.

SEFs and DCMs will be required to post a notice and copy of their initial MAT submissions on their websites at the same time they submit those filings to the Commission. The Commission will post the filings on its website. The Commission also will post final MAT determinations on its website.

The Commission adopted a modified schedule for the trade execution requirement, which requires that market participants must comply with the requirement upon the later of: (1) the applicable deadline established under the compliance schedule for the clearing requirement for a swap (under §50.25(b)); or (2) 30 days after the MAT determination submission or certification for that swap is deemed approved under §40.5 or deemed certified under §40.6 by the Commission as available to trade. The Final Rules will become effective 60 days after publication in the Federal Register.

Sarah A. Bessin
Senior Counsel

endnotes

[1] Process for a Designated Contract Market or Swap Execution Facility to Make a Swap Available to Trade under Section 2(h)(8) of the Commodity Exchange Act; Swap Transaction Compliance and Implementation Schedule; Trade Execution Requirement under Section 2(h) of the CEA, available at <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/federalregister051613c.pdf> (“Adopting Release”). For a summary of our comment letter on the proposal, please see ICI Memorandum No. 25910 (Feb. 14, 2012), available at http://www.ici.org/my_ici/memorandum/memo25910.

[2] If a swap is deemed MAT, it can only be traded on a DCM or SEF, and all bilateral trading in that swap must cease.

[3] Under the approval process, the Commission has 45 days to review the determination, any time during which it may notify the DCM or SEF that it is not going to approve its MAT determination because it is inconsistent or appears to be inconsistent with the CEA or the

Commission's rules. The Commission may extend this review period for an additional 45 days for swaps that present novel or complex issues. Under the self-certification process, the Commission has 10 business days to review a MAT determination before it is deemed certified and can be made effective, unless the Commission issues a stay of the certification for an additional 90 days. A MAT determination may be subject to a stay if it presents novel or complex issues that require additional time to review or analyze. In that case the MAT determination would become effective at the expiration of the 90-day review period unless the Commission withdraws the stay prior to that time, or notifies the registered entity that the determination is inconsistent with the CEA or the Commission's rules. The Commission states that it anticipate that, because of the novel nature of the MAT determination, the initial determinations would likely be subject to an extension of the 45-day review period under §40.5 or a stay under §40.6, but that over time fewer MAT determinations would warrant extensions of the applicable review periods.

[4] This 30-day mandatory comment period would occur during the 90-day period in which the stay is in effect. See *supra* note 3.

[5] The Commission notes, however, that it may, on its own initiative, review the available-to-trade status of a swap, under §§40.2(b) or 40.3(a)(10) of the Commission's regulations, if it believes a swap that is available to trade potentially should no longer be subject to mandatory trading, but not all SEFs and DCMs have de-listed the swap.