



**T-H CLIENT ALERT**  
**NOVEMBER 30, 2012**

## **Dodd-Frank Update: *CFTC Issues Final Mandatory Clearing Determination for Certain Credit Default Swaps and Interest Rate Swaps***

- *Phased deadlines for mandatory clearing requirements have now been set.*
- *Market participants should work with their FCMs to ensure that they have OTC clearing documentation in place in advance of the compliance deadlines.*

### ***Summary***

On November 27, 2012 the Commodity Futures Trading Commission (the “CFTC”) unanimously approved final rules subjecting certain swaps in four interest rate swap (“IRS”) classes and two credit default swap (“CDS”) classes to mandatory clearing requirements (the “Final Determination”).<sup>1</sup> In doing so, the Final Determination identifies the first groups of swaps that will be required to be cleared under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”).<sup>2</sup> The Final Determination also provides greater clarity to market participants regarding the points in time at which the clearing requirements will begin to apply.

### ***Background***

In February 2012 several derivatives clearing organizations (“DCOs”) identified to the CFTC those derivatives contracts that they currently accept for clearing. On July 24, 2012, based on these DCO submissions, the CFTC approved a proposed clearing determination (the “Proposed Determination”)<sup>3</sup> covering certain classes of CDS and IRS.

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<sup>1</sup> At the time of publication of this *T-H Client Alert*, the final rules regarding the *Clearing Requirement Determination Under Section 2(h) of the CEA* had not yet been published in the Federal Register. A press release and Q&A document regarding the Final Determination are available on the CFTC’s website at <http://www.cftc.gov/PressRoom/PressReleases/pr6429-12>.

<sup>2</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

<sup>3</sup> See Clearing Requirement Determination Under Section 2(h) of the CEA; Proposed Rule (August 7, 2012), 77 Fed. Reg. 47170.



At the same time the CFTC published final regulations establishing a phased-in compliance schedule for mandatory clearing (the “Compliance Schedule”).<sup>4</sup> Under the Compliance Schedule, the CFTC established 90, 180 and 270-day phase-in periods for mandatory swap clearing, with the applicable deadline varying depending on the entities involved in the particular swap.

### ***Details of the Final Determination***

The Final Determination subjects certain swaps in four IRS classes—Fixed-to-Floating, Basis, Forward Rate Agreement and Overnight Index—and certain swaps in two CDS classes—North American Untranchcd CDS Indices and European Untranchcd CDS Indices—to mandatory swap clearing requirements. The Final Determination also specifies the exact dates by which compliance with the clearing mandate is required for each of three entity categories identified in the Compliance Schedule.<sup>5</sup> Specifically, the Final Determination establishes the following deadlines:

- Category 1 entities will be required to comply with the clearing mandate beginning on March 11, 2013;
- Category 2 entities will be required to comply with the clearing mandate beginning on June 10, 2013;
- Category 3 entities will be required to comply with the clearing mandate beginning September 9, 2013.

Please see Table 1 in the Appendix to this *T-H Client Alert* for a description of the entity types that fit within each of these three categories. Table 2 in the Appendix provides more details about the dates by which the various entity types will become subject to the clearing mandate. Table 3 provides more detailed descriptions of the initial types of swaps that will be subject to mandatory clearing requirements.

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<sup>4</sup> See Swap Transaction Compliance and Implementation Schedule: Clearing Requirement Under Section 2(h) of the CEA (July 30, 2012), 77 Fed. Reg. 44441.

<sup>5</sup> Recently, there was confusion among market participants about the CFTC’s interpretation of the compliance dates for mandatory clearing. This confusion stemmed from the CFTC having established two separate deadlines: one setting an effective date for the clearing mandate to begin and another by which market participants must be in compliance. In response to the industry’s confusion, the CFTC issued a Q&A making clear that any determination by the CFTC regarding the mandatory clearing of specified types of swap transactions will apply only to swaps executed on and after a swap counterparty’s applicable compliance date. The Q&A is available at [http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/crd\\_qa.pdf](http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/crd_qa.pdf).



## **Conclusion**

Market participants are encouraged to work with their futures commission merchants to ensure that they have necessary OTC clearing documentation in place in advance of the applicable compliance deadlines.

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***If you have any questions regarding the implementation of mandatory swap clearing, please contact one of the following:***

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## Appendix

**Table 1**  
**Entity Categories for Mandatory Swap Clearing<sup>6</sup>**

	Category 1	Category 2	Category 3
<b>Entities Included</b>	<ul style="list-style-type: none"> <li>• Swap dealers</li> <li>• Security-based swap dealers</li> <li>• Major swap participants</li> <li>• Major security-based swap participants</li> <li>• Active Funds<sup>7</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Commodity pools</li> <li>• Private Funds other than Active Funds</li> <li>• Persons predominantly engaged in activities that are in the business of banking, or in activities that are financial in nature as defined in section 4(k) of the Bank Holding Company Act of 1956, <i>provided that</i>, in each case, the entity is not a third-party subaccount<sup>8</sup></li> </ul>	All Others

**Table 2**  
**Applicable Deadlines for Implementation of Mandatory Swap Clearing**

<b>Swaps Subject to Mandatory Clearing</b>	A swap between a Category 1 Entity and another Category 1 Entity	A swap between either: (a) a Category 2 Entity and a Category 1 Entity; or (b) a Category 2 Entity and another Category 2 Entity	All other swaps for which neither of the parties to the swap is eligible to claim the exception from the clearing requirement
<b>Date for Required Compliance with the Mandatory Clearing Requirement</b>	<b>March 11, 2013</b>	<b>June 10, 2013</b>	<b>September 9, 2013</b>

<sup>6</sup> Note that, in contrast to the proposed rule, employee benefit plans as defined in paragraphs (3) and (32) of section 3 of ERISA are no longer included within Category 2.

<sup>7</sup> "Active Fund" means any private fund as defined in section 202(a) of the Investment Advisers Act of 1940 (a "Private Fund") that is not a third-party subaccount and that executes 200 or more swaps per month based on a monthly average over the 12 months preceding the CFTC issuing a mandatory clearing determination under section 2(h)(2) of the Dodd-Frank Act.

<sup>8</sup> Third-party subaccount means an account that is managed by an investment manager that (1) is independent of and unaffiliated with the account's beneficial owner or sponsor and (2) is responsible for the documentation necessary for the account's beneficial owner to clear swaps.

**Table 3**  
**Initial Categories of Swaps Subject to Mandatory Clearing Requirements**

<i>Specification</i>	<b>Fixed-to-Floating Swap Class</b>			
1. Currency	U.S. Dollar (USD)	Euro (EUR)	Sterling (GBP)	Yen (JPY)
2. Floating Rate Indexes	LIBOR	EURIBOR	LIBOR	LIBOR
3. Stated Termination Date Range	28 days to 50 years	28 days to 50 years	28 days to 50 years	28 days to 30 years
4. Optionality	No	No	No	No
5. Dual Currencies	No	No	No	No
6. Conditional Notional Amounts	No	No	No	No

<i>Specification</i>	<b>Basis Swap Class</b>			
1. Currency	U.S. Dollar (USD)	Euro (EUR)	Sterling (GBP)	Yen (JPY)
2. Floating Rate Indexes	LIBOR	EURIBOR	LIBOR	LIBOR
3. Stated Termination Date Range	28 days to 50 years	28 days to 50 years	28 days to 50 years	28 days to 30 years
4. Optionality	No	No	No	No
5. Dual Currencies	No	No	No	No
6. Conditional Notional Amounts	No	No	No	No

<b>Specification</b>	<b>Forward Rate Agreement Class</b>			
1. Currency	U.S. Dollar (USD)	Euro (EUR)	Sterling (GBP)	Yen (JPY)
2. Floating Rate Indexes	LIBOR	EURIBOR	LIBOR	LIBOR
3. Stated Termination Date Range	3 days to 3 years	3 days to 3 years	3 days to 3 years	3 days to 3 years
4. Optionality	No	No	No	No
5. Dual Currencies	No	No	No	No
6. Conditional Notional Amounts	No	No	No	No

<b>Specification</b>	<b>Overnight Index Swap Class</b>		
1. Currency	U.S. Dollar (USD)	Euro (EUR)	Sterling (GBP)
2. Floating Rate Indexes	FedFunds	EONIA	SONIA
3. Stated Termination Date Range	7 days to 2 years	7 days to 2 years	7 days to 2 years
4. Optionality	No	No	No
5. Dual Currencies	No	No	No
6. Conditional Notional Amounts	No	No	No

<i>Specification</i>	<b>North American Untranchéd CDS Indices Class</b>
1. Reference Entities	Corporate
2. Region	North America
3. Indices	CDX.NA.IG CDX.NA.HY
4. Tenor	CDX.NA.IG: 3Y, 5Y, 7Y, 10Y CDX.NA.HY: 5Y
5. Applicable Series	CDX.NA.IG 3Y: Series 15 and all subsequent Series, up to and including the current Series CDX.NA.IG 5Y: Series 11 and all subsequent Series, up to and including the current Series CDX.NA.IG 7Y: Series 8 and all subsequent Series, up to and including the current Series CDX.NA.IG 10Y: Series 8 and all subsequent Series, up to and including the current Series CDX.NA.HY 5Y: Series 11 and all subsequent Series, up to and including the current Series
6. Tranchéd	No

<i>Specification</i>	<b>European Untranchéd CDS Indices Class</b>
1. Reference Entities	Corporate
2. Region	Europe
3. Indices	iTraxx Europe iTraxx Europe Crossover iTraxx Europe HiVol
4. Tenor	iTraxx Europe: 5Y, 10Y iTraxx Europe Crossover: 5Y



	iTraxx Europe HiVol: 5Y
5. Applicable Series	<p>iTraxx Europe 5Y: Series 10 and all subsequent Series, up to and including the current Series</p> <p>iTraxx Europe 10Y: Series 7 and all subsequent Series, up to and including the current Series</p> <p>iTraxx Europe Crossover 5Y: Series 10 and all subsequent Series, up to and including the current Series</p> <p>iTraxx Europe HiVol 5Y: Series 10 and all subsequent Series, up to and including the current Series</p>
6. Tranched	No