

US

Morrison & Foerster

Cart Before the Horse

Just recently, the CFTC adopted final rules that establish a process for registering swap dealers and major swap participants. The National Futures Association has been tasked with performing the registration functions.

The registration process permits provisional registration and voluntary registration may start within the next few months. The deadline for mandatory provisional registration will be finalised once the definitions relating to crucial terms (terms such as swap, security-based swap, swap dealer) are actually finalised.

For most market participants, formulating a registration strategy is quite a challenge in the absence of these rules. For foreign banks, formulating a registration strategy is pretty well impossible. Regulators in the US have not provided any guidance on the extraterritorial application of the provisions of Title VII of the Dodd-Frank Act.

Swap dealers who have begun to consider the registration process are only now beginning to confront the overwhelming operational, disclosure and conduct requirements. The CFTC also finalised certain business conduct standards recently.

These external business standards impose new and incredibly burdensome procedures for swap dealers. Among other things, swap dealers will be required to conduct diligence on counterparties in order to verify that each counterparty is an eligible contract participant or a special entity that must be treated differently. New disclosures will be required that provide material information about a transaction, including the risks, terms, incentives and conflicts of interest.

In addition, a dealer must provide daily mid-market marks for uncleared swaps. Swap dealers will have to establish new procedures to discharge their suitability obligations and to ensure that all communications with counterparties are fair and balanced. In dealing with special entities, such as municipalities, government agencies, and pension plans, swap dealers will be subject to higher standards and will have to act in the best interest of the special entity if it is an advisor to the special entity or it fails to rely on a limited safe harbor

for certain ERISA plans and other special entities.

All of this will require swap dealers to formulate compliance policies, update their procedures and their documentation, conduct detailed training and implement significant IT changes. A lot to do for swap dealers especially in light of the fact that important prerequisites have yet to be addressed by the CFTC and the SEC.

Contacts:

1290 Avenue of the Americas
New York, NY 10104-0050
United States

Tel: +1 212 468 8000

Fax: +1 212 468 7900

Web: www.mofo.com