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SEC and CFTC Delay Enforcement of Certain Swap Provisions in the Dodd-Frank Act

June 20, 2011

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") established a new system of regulatory oversight for over-the-counter swaps markets. Unless another effective date is specifically provided, provisions in Title VII that do not require rulemaking become effective on July 16, 2011.[1] However, where rulemaking is required, the effective date is either July 16, 2011 or 60 days after the publication of the final rule, whichever is later. Although the Securities and Exchange Commission ("SEC") and the Commodity Futures Trading Commission ("CFTC") have published several proposed rules related to Title VII, neither has completed the necessary rulemaking. Most significantly, the agencies have not yet provided regulatory definitions of the terms "swap," "security-based swap," "swap dealer," "security-based swap dealer," "major swap participant" or "major security-based swap participant."

Because many of the self-executing provisions that will go into effect on July 16, 2011 use terms that the agencies have not yet defined, both the SEC and the CFTC proposed temporary compliance exemptions from certain swap and security-based swap provisions to avoid the inevitable ambiguity and uncertainty that would arise.[2] The CFTC's exemptions will expire on December 31, 2011, while the timeline for SEC exemptions is tied to the completion of applicable rulemaking. As a practical matter, the expiration of CFTC exemptions serves as a deadline for the CFTC to complete the rulemaking process.

The proposed extensions further complicate the already tangled web of effective dates under the Dodd-Frank Act. Indeed, an SEC news release announcing the proposed delay quoted Robert Cook, director of the SEC's Division of Trading and Markets, as saying, "[t]his is the first step in a series of actions the SEC intends to take in coming days to address effective date issues."[3]

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[1] Dodd-Frank Act, 111th Cong. §§ 754, 774 (2010).
[2] Effective Date for Swap Regulation, 76 Fed. Reg. 35372 (June 17, 2011); Order Pursuant to Sections 15F(b)(6) and 36 of the Securities Exchange Act of 1934 Granting Temporary Exemptions and Other Temporary Relief, Together with Information on Compliance Dates for New Provisions of the Securities Exchange Act of 1934 Applicable to Security-Based Swaps, and Request for Comment, Exchange Act Release No. 34-64678 (June 15, 2011).
[3] News Release, Securities and Exchange Commission, "SEC Provides Guidance and Temporary Relief Regarding Security-Based Swap Provisions of Dodd-Frank Act" (June 15, 2011).

We will continue to monitor the developments with the swap and security-based swap provisions in the Dodd-Frank Act and provide updates as appropriate.

Bass, Berry & Sims Financial Institutions Attorneys

Annie T. Christoff
(901) 543-5939
achristoff@bassberry.com

E. Steele Clayton, IV
(615) 742-6205
sclayton@bassberry.com

John S. Golwen
(901) 543-5903
jgolwen@bassberry.com

M. Jason Hale
(615) 742-6573
jhale@bassberry.com

Brian R. Iverson
(615) 742-7918
biverson@bassberry.com

Paul G. Jennings
(615) 742-6267
pjennings@bassberry.com

Nolan M. Johnson
(901) 543-5937
njohnson@bassberry.com

Anthony J. McFarland
(615) 742-6250
amcfarland@bassberry.com

Stephen W. Ragland
(901) 543-5917
sragland@bassberry.com

John C. Speer
(901) 543-5919
jspeer@bassberry.com

William G. Whitman
(901) 543-5931
bwhitman@bassberry.com

Clarence A. Wilbon
(901) 543-5927
cwilbon@bassberry.com

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