

Advisory Note: Upcoming Documentation Requirements

This advisory note highlights a recent rulemaking by the Commodity Futures Trading Commission (“CFTC”), and actions you may need to take to avoid disruption in your ability to trade swaps on and after **November 3, 2014**.

In November 2013, the CFTC published final rules implementing requirements for swap dealers and major swap participants to notify counterparties of their right to require segregation of margin (other than variation margin) for uncleared swap transactions.¹ Pursuant to CFTC Regulation 23.701:

- notices must be provided at least once each calendar year to an officer responsible for the management of collateral,²
- swap dealers and major swap participants must obtain confirmation of receipt by the appropriate officer, and
- swap dealers and major swap participants must also obtain counterparty elections whether or not to require segregation of collateral in accordance with CFTC Regulations 23.702 and 23.703.

CFTC Regulation 23.701 became effective on January 6, 2014. For market participants that became “new counterparties” of a swap dealer or major swap participant after that date (*e.g.*, by putting in place an ISDA Master Agreement in order to begin trading uncleared swaps), the relevant swap dealer or major swap participant must comply with CFTC Regulation 23.701 by **May 5, 2014**.³ For market participants that were existing counterparties on or prior to January 6, 2014, the compliance date is **November 3, 2014**.

Once these requirements go into effect, swap dealers and major swap participants must obtain the required receipt confirmations and elections prior to confirming additional swap transactions with the counterparty. Consequently, market participants who wish to avoid potential trading disruptions should be prepared to receive these notices and provide the necessary responses **prior to the applicable compliance date(s)**.

In addition, market participants should note that elections to segregate margin in accordance with CFTC Regulations 23.702 and 23.703 (“**CFTC Segregation**”) require segregation with a separate legal entity pursuant to agreements that comply with the specific requirements of the

¹ *Protection of Collateral of Counterparties to Uncleared Swaps; Treatment of Securities in a Portfolio Margining Account in a Commodity Broker Bankruptcy*, 78 Fed. Reg. 66621 (Nov. 6, 2013) (adopting CFTC Regulations 23.700-23.704).

² See CFTC Regulation 23.701(c). If no such officer is identified by the counterparty, the notification is to be made to the Chief Risk Officer of the counterparty, or, if there is no such officer, to the Chief Executive Officer. If no Chief Executive Officer exists, the notice may be given to highest-level decision-maker for the counterparty.

³ See 78 Fed. Reg. at 66621 & n. 1.

regulations. Some of the contractual terms required in connection with CFTC Segregation have not commonly been used in segregation arrangements. As an election for CFTC Segregation is effective for all uncleared swaps executed after the election is made (or, if such election is made before the relevant compliance date, on or after such compliance date), market participants electing CFTC Segregation will need to establish compliant segregation arrangements, and those with existing arrangements will likely need to amend or replace them, prior to executing new uncleared swaps with the relevant swap dealer or major swap participant.⁴

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In order to provide for the delivery of notices to the personnel required by CFTC Regulation 23.701, market participants should be prepared to provide the necessary contact information to their swap dealer and major swap participant counterparties well in advance of the relevant compliance date.

ISDA and Markit have developed the CFTC Initial Margin Segregation tool on ISDA Amend to assist market participants in delivering required contact information, receipt confirmations and elections to their swap dealer and major swap participant counterparties through electronic forms that can be sent to multiple counterparties. These tools are available at no cost to market participants. To register for ISDA Amend, please see: <http://www.markit.com/Product/ISDA-Amend>.

⁴ Market participants wishing to elect segregation in accordance with CFTC Regulations 23.702 and 23.703 may wish to consult with legal counsel as to the potential impact on trading in uncleared swaps and whether an election to not require such segregation is preferable until such time as appropriate arrangements are established. The CFTC has advised that market participants may continue to agree to alternative arrangements for the handling of collateral that do not conform to the requirements of CFTC Regulations 23.702 and 23.703.