Swap Dealers and Major Swap Participants Should Not be Treated as Identical Twins

Swap Dealers (SDs) and Major Swap Participants (MSPs) are twin pillars of Dodd-Frank's comprehensive regulation of swaps. The statute defines SDs and MSPs as mutually exclusive entities and then sets out parallel regulatory authorizations for them. But Dodd-Frank does not state that SDs and MSPs should be subject to identical regulation.

This statutory ambiguity raises the question: Did Congress intend that the agencies charged with implementing Dodd-Frank would subject SDs and MSPs to the same substantive regulation? Thus far, the agencies' answer apparently is "yes." The Commodity Futures Trading Commission ("CFTC") has proposed substantive regulations for SDs and MSPs that are identical, and the Securities and Exchange Commission ("SEC") seems poised to do the same.[1] However, the separate definitions of SD and MSP indicate that different rules may be warranted.

By definition, SDs are entities that make markets in swaps or sell swaps to others. MSPs are defined as parties that are NOT SDs, yet maintain swap positions with sufficient exposures to create systemically important default risk.

This paper summarizes the problems with the CFTC's application of the statute and its proposed rules for MSPs. At its core, the CFTC ignores the fundamental differences in SDs and MSPs. By definition, SDs are entities that make markets in swaps or sell swaps to others. MSPs are defined as parties that are NOT SDs, yet maintain swap positions with sufficient exposures to create systemically important default risk. Based on these definitions, MSP regulation should focus exclusively on default risk, while SD regulation should focus on market making, pricing and sales practices, as well as default risk. By equating MSPs with SDs for purposes of every substantive rule, the CFTC instead would impose regulation on MSPs that is a mismatch, resulting in unwarranted and over-burdensome costs for MSPs, including those qualifying corporate hedgers, pension plans and investment funds.[2] The CFTC should reconsider its approach of having identical regulation.

How Dodd-Frank Defines MSP and SD

Under Dodd-Frank, a "swap dealer" is defined to be any person who makes a market in swaps or holds itself out as a dealer in swaps. Section 1(a)(49) of the Commodity Exchange Act ("CEA"), as amended by Dodd-Frank, provides:

The term 'swap dealer' means any person who—

i. Holds itself out as a dealer in swaps;
ii. Makes a market in swaps;
iii. Regularly enters into swaps with counterparties as an ordinary course of business for its own account; or
iv. Engages in any activity causing the person to be commonly known in the trade as a dealer or market maker in swaps.[3]

This definition includes entities engaging in wide-scale marketing and selling of swaps. Generally, financial institutions are understood to be SDs; often these parties are known as the "sell-side" because they offer or market swaps to others.

Congress defined an MSP, by contrast, as "any person who is ***not*** a swap dealer" and who maintains outstanding swap positions that exceed certain thresholds determined by the CFTC under three different statutory tests.[4] MSPs are therefore those entities commonly known as the "buy-side" of the swaps market. The MSP swap position thresholds are designed to make sure that buy-side swap market participants whose swap positions could create system-wide risk if they default would be subject to regulation that would ameliorate that risk.

Though SDs and MSPs play different roles in the swap market, Congress recognized that both types of entities could pose systemic risks and should be regulated to protect against those risks.[5] No one could dispute that conclusion. But swap dealing or market-making activities also trigger **other** regulatory concerns not related to

systemic risk. Congress wanted to address these concerns as well. However, imposing regulation on MSPs that is geared to the activities of SDs would be misplaced.

It would therefore have been illogical for Congress to require the CFTC to regulate SDs and MSPs alike in every way. Instead, as we will now see, Congress authorized, but did not necessarily require, regulation of SDs and MSPs in many areas, leaving the CFTC to decide whether regulation was needed and, if so, to tailor its regulation in each area to the distinct activities of the different regulatory classifications. The CFTC's proposals do not take into account these key differences.

Regulatory Authorizations for SDs and MSPs

Dodd-Frank authorizes the CFTC to impose a wide-array of regulations on SDs and MSPs. Below, we group the provisions according to the risks they target.

Default Risk

- Registration requirements – Dodd-Frank requires that SDs and MSPs register with the CFTC.[6]
- Capital and margin requirements – Dodd-Frank obligates SDs and MSPs to comply with minimum capital and margin requirements for swaps.[7]
- Reporting, recordkeeping, and daily trading records – Dodd-Frank subjects SDs and MSPs to swap recordkeeping and reporting requirements as determined by the CFTC.[8]
- Documentation standards – Dodd Frank directs the CFTC to adopt rules governing documentation standards for swap transactions entered into by SDs and MSPs.[9]

Other Risks

- Business conduct standards – Dodd-Frank imposes a plethora of business conduct standards on SDs and MSPs consistent with such regulations as the CFTC may prescribe.[10] In addition, the statute imposes additional regulation to cover situations where a SD or MSP enters into a swap with so-called Special Entities (which ironically and circularly could also be MSPs). There are also requirements for situations where a SD acts as an advisor to a Special Entity (as such term is defined in the Appendix).[11]
- Designation of a chief compliance officer – Dodd-Frank requires each SD and MSP to appoint an individual to serve as a chief compliance officer ("CCO").[12]
- Duties – Dodd-Frank imposes general trading, disclosure, risk management and conflict of interest prevention duties on SDs and MSPs.[13]
- Segregation of collateral for uncleared swaps – Dodd-Frank allows any person who enters into an uncleared swap with a SD or MSP to choose whether to require that the collateral it posts to margin, guarantee, or secure its obligations for that swap be carried by an independent third-party custodian and designated as a segregated account for the benefit of the counterparty.[14]
- Restrictions on ownership – Dodd-Frank allows the CFTC to limit the ability of SDs and MSPs to own equity in and participate in the operation of designated contract markets ("DCMs"), swap execution facilities ("SEFs"), and derivatives clearing organizations ("DCOs").[15]

Although Dodd-Frank directs the CFTC to adopt regulations for some of the provisions mentioned above and authorizes the CFTC to adopt rules in others, Dodd-Frank typically gives the CFTC discretion to adopt rules tailored to the specific risks targeted by a provision. The statute never mandates that the CFTC adopt an "identical twin" approach to regulation. In some cases, as with certain of the business conduct standards, the statute allows the CFTC to determine not only what regulations are appropriate, but whether regulations should be adopted at all.[16] In other words, the statute grants the CFTC flexibility to establish an effective regulatory regime for MSPs that is not a clone of SD regulation.

CFTC proposals applicable to SDs and MSPs

To date, the CFTC has largely ignored its regulatory flexibility and has consistently interpreted Dodd-Frank as if the statute required identical regulations for SDs and MSPs. In the following proposals, which cover each of the substantive requirements for SDs and MSPs proposed to date, the CFTC would treat SDs and MSPs the same:

- Registering as a SD or MSP;[17]
- Duties of an SD or MSP with respect to risk management procedures, diligent supervision, business continuity and disaster recovery, disclosure and the ability of regulators to obtain general information, and antitrust considerations;[18]
- Reporting, recordkeeping, and daily trading records;[19]

- Confirmation, portfolio reconciliation, and portfolio compression;[20]
- Designating a Chief Compliance Officer, required compliance policies and required annual reports;[21] and
- Business conduct standards for entering swaps with counterparties;[22]
- Ownership limitations and governance standards for DCOs.[23]
- Swap trading relationship documentation requirements.[24]

Inconsistencies and Anomalies

Consistent rules for credit and default risk make sense, as both SDs and MSPs may have sizable swaps positions that could create systemic risk. The CFTC's proposed rules that address credit or default risk for both SDs and MSPs are appropriate. Unfortunately, some of the CFTC's proposed rules would implement Dodd-Frank provisions intended to mitigate other types of risk, such as those risks associated with swap dealing. By law, MSPs do not engage in swap dealing activities and regulating them as if they did leads to regulatory anomalies at best and regulatory impossibilities in some instances.

The universe of potential MSPs is large. It includes corporate hedgers, investment funds, ERISA plans, and a host of other non-dealer entities. Regulating these buy-side participants as if they were SDs could lead to unintended and undesirable consequences. To avoid these outcomes, the CFTC should use the regulatory flexibility bestowed by Dodd-Frank, as well as its own expertise, to craft workable regulations for MSPs. The examples below provide a sample of problematic proposed regulations.

By law, MSPs do not engage in swap dealing activities and regulating them as if they did leads to regulatory anomalies at best and regulatory impossibilities in some instances.

Business Conduct Standards

Dodd-Frank imposes certain business conduct standards on SDs and MSPs, including requiring that SDs and MSPs "verify that any counterparty meets the eligibility standards for an eligible contract participant" and disclose certain information about a swap transaction.[25] The CFTC's proposed business conduct standards, however, would extend far beyond the statutory provision by requiring additional duties of MSPs, including the duties to protect the interest of their counterparties, even if those counterparties are SDs.

For example, proposed rule 23.402(c)(2) would require SDs and MSPs to use reasonable diligence to gather facts necessary to "[e]ffectively service the counterparty … [i]mplement any special instructions from the counterparty…[and] [e]valuate the previous swaps experience, financial wherewithal and flexibility, trading objectives and purposes of the counterparty."[26] If adopted, this rule would stand the business conduct standards, which were proposed to protect the buyer of a swap from the seller, on their head. Instead of protecting the corporate hedger from its SD, the CFTC's proposal would require the hedger to protect the SD.

This outcome is illogical, as it would require the SD's counterparty to look out for the interests of the SD. Moreover, customer protections of this sort, which seek to ensure that SDs treat counterparties fairly, are distinct from the prevention of default or credit risk. Since MSPs do not create risks other than default or credit risk, the requirements of proposed rule 23.402(c)(2) should not apply to MSPs. The CFTC should use its discretion to apply this rule and other business conduct standards to SDs alone.[27]

Duties of SDs and MSPs

Dodd-Frank requires that SDs and MSPs establish a risk management program meeting certain criteria, but otherwise allows the CFTC broad latitude to tailor its regulations to SDs and MSPs.[28] The CFTC's proposal for regulating uniformly both SDs and MSPs fails to consider the particular business arrangements of the wide array of buy-side participants who may be subject to MSP regulation.

Apparently, the CFTC assumes that all MSPs will be organizations with numerous employees. For some MSPs, this may be true. But others could have no employees at all. For example, pooled investment funds (e.g., registered investment companies and exempt private funds) have a unique operational structure and would struggle to comply with the CFTC's proposed rules. Usually, funds employ, at most, a handful of people. They rely instead on their asset managers to provide risk management, recordkeeping, compliance, and other business services. They are not, generally speaking, divided into business units.

The proposed regulations on the duties of SDs and MSPs would require each SD and MSP to "establish and maintain a risk management unit with sufficient authority; qualified personnel; and financial, operational, and other resources to carry out the risk management program" of

the SD or MSP.[29] In order to comply, a fund MSP would need to create a new risk management unit and hire new personnel. Congress did not intend to force MSPs to choose between altering their organizational structures and ceasing their swaps activities, but the CFTC's proposed regulations could create such a choice.

Chief Compliance Officer

Dodd-Frank requires each SD and MSP to designate a Chief Compliance Officer ("CCO") who will be responsible for reviewing and reporting on the entity's compliance with the CEA as well as resolving any compliance issues that may arise. The CFTC's rule proposal on CCOs would require each of SDs, MSPs and Futures Commission Merchants ("FCMs") to adhere to identical requirements.[30]

This approach is a poor fit for MSPs. CCOs typically monitor whether an intermediary is discharging its regulatory obligations to its customers. MSPs are customers and it would be odd to have CCOs created to make sure MSPs do not take advantage of SDs. In addition, for many MSPs, this would create another unnecessary cost burden.

Conflicts of Interest

New CEA § 4s(j)(5) contains a broad mandate for SDs and MSPs to implement conflict of interest procedures that, among other things, ensure almost complete separation of the research and trading functions of the SD or MSP. As written, this requirement could be unworkable for many MSPs, such as corporate hedgers who hire personnel to research commodity prices and recommend trading strategies. In addition, those funds that hire staff may use this staff to conduct research reports to inform the funds' trading decisions or selection of asset managers. In either case, forcing separation of research and trading personnel would defeat the purpose of conducting research.

The CFTC's proposed rules on the implementation of conflict of interest policies for SDs and MSPs attempt to narrow Dodd-Frank's mandate to apply in situations where research personnel create reports to be distributed outside of the particular SD or MSP.[31] While we applaud the CFTC for attempting to give a workable construction to the statutory language, we believe that this approach may still subject certain MSPs, like corporate hedgers or investment funds, to exposure. In order to effectuate its goal of crafting workable regulation, the CFTC's rules on conflict of interest should explicitly exempt entities whose research personnel produce reports for internal use only. This would remove any ambiguity with respect to the steps that a MSP would need to take to fulfill its duties.

Documentation Standards

New CEA § 4s(i) requires SDs and MSPs to "conform with such standards as may be prescribed by the [CFTC] by rule or regulation that relate to timely and accurate confirmation, processing, netting, documentation and valuation of all swaps." Instead of adopting specific documentation requirements, the statute grants broad rulemaking discretion to the CFTC. The CFTC's proposed documentation rules treat SDs and MSPs equally.[32]

This approach is inappropriate for MSP regulation. MSPs are buy-side entities, yet many of the proposed documentation standards are designed to regulate dealing activity. These requirements are unnecessary and will cause both MSPs and the CFTC to use resources inefficiently.

Special Entity-Specific Concerns

In addition to the anomalies discussed above, which would apply with equal force to many MSPs, regardless of their organizational form, the CFTC's proposed rules governing SDs and MSPs that enter into swap transactions with Special Entities (cities, states, endowments and pension plans) pose unique problems that should be addressed. Dodd-Frank requires that SDs and MSPs who act as the counterparty to a Special Entity observe heightened business conduct standards to protect the Special Entity counterparty. The CFTC's proposed rules, however, could actually harm Special Entities, instead of protecting them, because they do not account for situations where the MSP is also a Special Entity.

Assume that a pension plan (a Special Entity by definition) maintains swap positions that exceed the second test of the MSP definition (making the pension plan a MSP). Under the CFTC's proposed business conduct standards, the pension plan, as an MSP would owe all of its counterparties – including SDs – the full array of business conduct standards protections contemplated by Dodd-Frank. For example, the CFTC's proposed rules would obligate the plan to learn information to service effectively its counterparty (SD) and otherwise consider whether a particular swap transaction is suitable for its counterparty (SD).

This result is illogical and incompatible with the notion of Special Entities. Congress created the Special Entity classification to ensure that certain types of market participants receive a heightened level of protection when entering into swaps, not to saddle them with the duty of protecting major banks and other SDs.[33] Since the CFTC has, at least to date, refused to categorically exclude Special Entities from the MSP definition, it must revisit other areas of its proposed rules governing the

duties of MSPs to ensure Special Entities receive the treatment Congress intended.

Other Concerns

In addition to the concerns raised above, the CFTC has proposed ownership and governance standards for DCOs, DCMs and SEFs to implement this provision that would create anomalies if adopted in their current form.[34] These proposed rules would treat MSPs strangely. On the one hand, they would limit the ability of MSPs to own a stake in DCOs. On the other hand, they would also require DCOs to install "customers" on their Risk Management Committees or their Boards of Directors.[35] These rules appear not to recognize that MSPs likely will also be customers – they are, after all, buy-side entities. In fact, the customers that are most likely to be MSPs (and thus limited in their ability to own a DCO) are likely to be some of the largest and most well-informed customers, meaning that their input on the Risk Management Committee or Board of Directors could be most valuable.

It is hard to understand why the CFTC would, with one set of rules, seek to limit buy-side ownership of DCOs while simultaneously requiring buy-side involvement in key DCO committees with a different regulation. We believe the CFTC should examine these rules and ensure that they encourage, rather than discourage, customer involvement with DCOs.

Conclusion

Although the statute does not specify how the CFTC should tailor its regulations to either SDs or MSPs, there is no need for such explicit guidance. The advantage of delegating rulemaking to a regulatory agency like the CFTC is that agencies have expertise in particular areas of law and are better suited to write subject matter specific regulation. An agency is exactly the forum for developing nuanced and workable regulation. We recommend that the CFTC reconsider all of its proposed substantive regulations for MSPs to tailor those rules to the interests and activities of the major buy-side market participants that could become MSPs and not seek to subject SDs and MSPs to identical regulation.

[1] This analysis will focus on the CFTC because the CFTC, which has been coordinating with the SEC, has issued a more complete set of swap rule proposals to date. But this analysis would apply equally to the SEC as well if, as seems likely, it follows the same course as the CFTC.

[2] The statute expressly excludes corporate and pension plan use of swaps for hedging from the MSP calculation under one of the three tests for MSP status, but not the other tests. In a joint rulemaking, the CFTC and SEC have construed the MSP definition potentially to apply to corporate hedgers as well as pension plans. See Further Definition of "Swap Dealer," Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant," and "Eligible Contract Participant", 75 Fed. Reg. 80,174, 80,197 (Dec. 21, 2010) (Noting that the second prong of the MSP definition "does not explicitly account for positions for hedging commercial risk or ERISA Positions." Noting further that the threshold for the second prong " reflect[s] the fact that this second test (unlike the first major participant test) encompasses certain hedging positions.")

[3] *See* Dodd-Frank § 721(a)(21) (New CEA § 1a(49)) (for swap dealers). Dodd-Frank § 761(a)(21) provides a substantially similar definition of security-based swap dealer. It will be incorporated as Exchange Act § 3(a)(71).

[4] *See* Dodd-Frank § 721(a)(16) (New CEA § 1a(33)) (emphasis added).

Section 761(a)(6) of Dodd-Frank contains a provision defining Major Security-based Swap Participant that is substantially similar but lacks the exclusion for captive finance affiliates. It will be incorporated as Exchange Act § 3(a)(67).

[5] As key liquidity providers, SDs will be interconnected with many swap market participants and with each other. This interconnectedness means that a default by one SD, unless properly regulated, could result in myriad other defaults throughout the financial system. Similarly, absent appropriate regulation, the magnitude of an MSP's swap positions could create systemic risk if that MSP defaults because an MSP default could be large enough to cause a SD to default as well.

[6] *See* Dodd Frank § 731 (New CEA § 4s(a) and (b)).

[7] *See* Dodd Frank § 731 (New CEA § 4s(e)).

[8] *See* Dodd Frank § 731 (New CEA §§ 4s(f) and (g)).

[9] *See* Dodd Frank § 731 (New CEA § 4s(i)).

[10] *See* Dodd Frank § 731 (New CEA § 4s(h)(1) and (3)).

[11] *See* Dodd Frank § 731 (New CEA § 4s(h)(5)). The statutory title reads "Special Requirements for Swap Dealers as Counterparties to Special Entities," but the section addresses requirements for swap dealers and MSPs. See also Dodd Frank § 731 (New CEA § 4s(h)(4)), addressing situations where an SD acts as an advisor to a Special Entity. Note that certain of the statutory provision apply only to SDs, see New CEA §§ 4s(h)(B) and (C), while others may also apply to MSPs, see New CEA § 4s(h)(4)(A).

[12] *See* Dodd Frank § 731 (New CEA § 4s(k)).

[13] *See* Dodd Frank § 731 (New CEA § 4s(j)). Some, but not all of these duties may address systemic risk, but others, particularly the duties that address conflict of interest, are inapposite to mitigating systemic risk.

[14] *See* Dodd-Frank § 724(c) (New CEA § 4s(l)). Technically speaking, this category is related to default risk, but it concerns the default risk of the counterparty, not the SD or MSP.

[15] *See* Dodd-Frank § 726(a).

[16] *See* Dodd-Frank § 731 (New CEA § 4s(h)(1)) ("Each registered swap dealer and major swap participant shall confirm with such business conduct standards as prescribed in paragraph (3) and as may be prescribed by the Commission by rule or regulation…") (emphasis added).

[17] Registration of Swap Dealers and Major Swap Participants, 75 Fed. Reg. 71379 (Nov. 23, 2010).

[18] Regulations Establishing and Governing the Duties of Swap Dealers and Major Swap Participants, 75 Fed. Reg. 71397 (Nov. 23, 2010).

[19] Reporting, Recordkeeping, and Daily Trading Records Requirements for Swap Dealers and Major Swap Participants, 75 Fed. Reg. 76666 (Dec. 9, 2010).

[20] Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants, 75 Fed. Reg. 81519 (Dec. 28, 2010).

[21] Designation of a Chief Compliance Officer; Required Compliance Policies; and Annual Report of a Futures Commission Merchant, Swap Dealer, or Major Swap Participant, 75 Fed. Reg. 70881 (Nov. 19, 2010).

[22] Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties, 75 FR 80638 (Dec. 22, 2010). Some provisions of this rule differ to reflect the fact that certain provisions of the statute apply only to SDs and not to MSPs.

[23] Requirements for Derivatives Clearing Organizations, Designated Contract Market, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest, 75 Fed. Reg. 63, 732 (Oct. 18, 2010); Governance Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities; Additional Requirements Regarding the Mitigation of Conflicts of Interest, 76 Fed. Reg. 722 (Jan. 6, 2011).

[24] Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants, 76 Fed. Reg. 6725 (Feb. 8, 2011); Orderly Liquidation Termination Provision in Swap Trading Relationship Documentation for Swap Dealers and Major Swap Participants, 76 Fed. Reg. 6708 (Feb. 8, 2011).

[25] *See* Dodd-Frank § 731 (New CEA § 4s(h)(3)(A-C)).

[26] *See* 75 Fed. Reg. at 80657.

[27] The statute grants the CFTC the discretion to "establish such other standards and requirements as the [CFTC] may determine are appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of [the CEA]." See Dodd-Frank § 731 (New CEA § 4s(h)(3)(D)). The use of the disjunctive specifically gives the CFTC the discretion to tailor its requirements to swap dealers (when addressing investor or customer protection) or to MSPs (when acting otherwise in furtherance of the CEA).

[28] Specifically, New CEA § 4s(j)(2) requires SDs and MSPs to "establish robust and professional risk management systems adequate for managing the day-to-day business of the [SD] or [MSP]."

[29] *See* 75 Fed. Reg. at 71404.

[30] *See* Designation of a Chief Compliance Officer; Required Compliance Policies; and Annual Report of a Futures Commission Merchant, Swap Dealer, or Major Swap Participant, 75 Fed. Reg. 70881 (Nov. 19, 2010).

[31] *See* Proposed Rule 23.605(a)(9)(iv) (exempting internal communications that are not given to current or prospective customers from the definition of "research report").

[32] *See* Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants, 76 Fed. Reg. 6725 (Feb. 8, 2011); see also Orderly Liquidation Termination Provision in Swap Trading Relationship Documentation for Swap Dealers and Major Swap Participants, 76 Fed. Reg. 6708 (Feb. 8, 2011).

[33] Dodd-Frank may require MSPs that are also special entities to follow certain de minimis business conduct standards, but the Commission has chosen to propose additional standards for MSPs (even those MSPs that are also Special Entities) without considering the different functions of SDs and MSPs. See Dodd-Frank § 731 (New CEA § 4s(h)(3)) (requiring MSPs and SDs to certify that their counterparty is an ECP, to communicate in a fair and balanced manner based on principles of good faith and fair dealing and, to provide certain disclosure when entering into a swap with a non-SD/MSP counterparty).

[34] *See* Requirements for Derivatives Clearing Organizations, Designated Contract Market, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest, 75 Fed. Reg. 63, 732 (Oct. 18, 2010); Governance Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities; Additional Requirements Regarding the mitigation of Conflicts of Interest, 76 Fed. Reg. 722 (Jan. 6, 2011).

[35] *Compare* Proposed Rule 39.25(b)(2) (establishing ownership limits) with Proposed Rules 39.13(g)(3) (proposing to require customer representation on the DCO Risk Management Committee) and 39.26(b) (proposing to require customer representation a DCO's Board of Directors). It is also worth noting that the ownership limitation would group SDs and MSPs together and would not account for the fact that SDs and MSPs play different roles in the swaps markets and are likely to have different interests.