



Insights

CFTC Issues No-Action Relief Affecting Swaps with Legacy Special Purpose Vehicles

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On March 31, 2015, the U.S. Commodity Futures Trading Commission (CFTC) issued no-action relief stating that, with respect to certain legacy special purpose vehicle (SPV) swaps (as more fully described herein), swap dealers would be exempt from complying with certain CFTC regulations, hereafter the “Specified Regulations.”* The Specified Regulations relate to external business conduct standards and swap trading documentation that swap dealers would otherwise be required to adhere to.

Securitization SPVs commonly enter into interest rate, currency, and other types of swaps. When an SPV enters into a swap with a swap dealer, the SPV takes on the credit risk of the swap dealer. The credit rating agencies have developed delinking criteria intended to permit the assignment of a credit rating to the obligations issued by the SPV based on the assets of the SPV and the structural protections of the SPV, rather than on the credit rating of the swap dealer.

These delinking criteria require that provisions be included in the swap documentation which require the swap dealer to take certain remedial actions following the withdrawal, qualification, or downgrade of the swap dealer’s credit rating below certain thresholds. Such remedial actions can include amending a legacy SPV swap or amending and transferring the obligations of the swap dealer under the legacy SPV swap. While such actions typically do not give rise to a change in the economic terms of a swap, any such amendment or transfer may cause a legacy SPV swap to be considered a “new swap” or “swap transaction” for purposes of compliance with the Specified Regulations. Consequently, a legacy SPV swap may become subject to the Specified Regulations solely because of actions taken by the swap dealer and SPV to remediate a credit ratings downgrade.

A legacy SPV swap is defined as a swap:

- between an SPV whose obligations currently have a credit rating from one of Moody’s, S&P, or Fitch and a swap counterparty that, at the time the swap was executed, had a credit rating from at least one of Moody’s, S&P, or Fitch; and

- that was in existence prior to October 10, 2013.

In most cases, securitization SPVs can take action only through third party service providers, such as trustees or administrators. The securitization SPV's permitted activities are circumscribed by their organizational documents. In addition, contractual provisions in transaction documentation limit the scope and nature of an SPV's activities, often prohibiting an SPV from entering into new arrangements or modifications of the kind that would be required to enable a swap dealer to comply with the Specified Regulations after a remediation. As a result, many third party service providers have found it difficult to definitively establish that they in fact have the authority to take steps on behalf of the securitization SPV that would enable the swap dealer to comply with the Specified Regulations after a remediation.

The CFTC indicated that it would not seek to take enforcement action against a swap dealer for failure to comply with the Specified Regulations subject to the following conditions:

- The Specified Regulations apply to the swap dealer or the legacy SPV swap solely as a result of certain remedial actions taken in accordance with applicable delinking criteria of one or more nationally recognized statistical rating agencies that have rated one or more of the SPV's obligations in response to an actual or reasonably anticipated withdrawal, qualification, and/or downgrade of the credit ratings of the original counterparty to the legacy SPV swap; and
- Any remedial action taken in accordance with the applicable delinking criteria does not alter the material economic terms of the legacy SPV swap.

For more information, [click here](#) to view the text of the No-Action Relief.

** The Specified Regulations include regulations 23.402(b)-(c), 23.430, 23.431 (a)-(b), 23.432, 23.434, 23.502(b), 23.504(b)(4)-(6) and 23.701.*