

# Regulators Define Swaps

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*July 11, 2012* -- The SEC and CFTC (the "Commissions") have approved long-awaited joint rules and interpretations concerning certain key definitions, including "swap" and "security-based swap" (collectively "Swaps"). The promulgating release will be published in the Federal Register (probably around August 1st) and the new rules and interpretations will be effective 60 days thereafter. Although the Commissions have not yet made public the text of the release, the SEC has posted a fact sheet [here](#) and the CFTC has posted a fact sheet [here](#).

The Swap definition is central to the comprehensive new regulatory scheme that Dodd-Frank establishes for instruments that fall within the definition. Following effectiveness of the definition, affected persons must comply with applicable new regulatory requirements in accordance with timetables that the SEC and CFTC, respectively, have developed and will continue to refine. Some of the implications for insurance companies are outlined below.

The Commissions' formal proposal (promulgated more than a year ago) concerning the Swap definition raised concerns as to whether insurance products might be regulated as Swaps under the Dodd-Frank Act. It appears that the Commissions have been responsive to many of the industry's concerns in this regard. For example:

- The description of certain specific insurance products that are excluded from being Swaps (provided that they are issued by an insurance company and regulated as insurance) has been broadened. Such excluded products now include:
  - annuities and life insurance
  - disability and long-term care insurance
  - surety and fidelity bonds
  - private residential mortgage insurance
  - title insurance
- Most reinsurance (including by retrocession) of any of the foregoing excluded products also is now specifically excluded from being a Swap.
- In addition, all of the foregoing exclusions for specific insurance products and reinsurance have been codified in the rules (rather than, as proposed, merely being part of the interpretive material).
- The Commissions deleted a proposed requirement that, in order for an annuity to avoid being a Swap, it must be subject to taxation as an annuity under the Internal Revenue Code.
- The Commissions confirmed that the rules are merely a "safe harbor." Accordingly, if any insurance product does not qualify for any of the specifically enumerated exclusions from Swap status, a further facts and circumstances analysis would determine whether the product is to be regulated as a Swap or insurance.
- Transactions entered into before the effective date of the final rules will be "grandfathered" (as not involving a Swap), if the product was issued by an insurance company and regulated as insurance at the time of the transaction.

