
July 10, 2015

Preparing for the Swaps Push-Out: “Pushee” Q&A

Pursuant to Section 716 (the “**Push-out Rule**”) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (as amended by the Consolidated and Further Continuing Appropriations Act, 2015) and the rules and regulations of the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation and the Office of the Comptroller of the Currency, certain banks in the United States will lose access to key Federal Reserve services if they do not cease trading certain derivatives products by July 16, 2015 (the “**Deadline**”).¹ This client alert explains how clients may be affected by the impending deadline and suggests how clients can avoid unnecessary disruptions to their derivatives trading activities.

I. What is the “Push-out Rule”?

The Push-out Rule was added to Title VII of the Dodd-Frank Act as part of a broader legislative effort to prevent taxpayer money from being used to protect financial institutions from risks arising out of their swaps activities. With limited exceptions, the rule prohibits swap dealers, security-based swap dealers, major swap participants, and major security-based swap participants (so-called “swaps entities”) from receiving federal assistance such as access to the Federal Reserve’s discount window (as defined in Section 716, “**Federal Assistance**”).² The Push-out Rule does not apply to major swap participants and major security-based swap participants that are “**Covered Depository Institutions**” (defined in the Push-out Rule as entities that are either (i) insured depository institutions³ or (ii) uninsured branches or agencies of a foreign bank located in the United States), and also does not apply to any other Covered Depository Institution that, with limited exceptions, confines its swaps dealing activities to hedging and other risk

¹ The Push-out Rule took effect two years after the effectiveness of the Dodd-Frank Wall Street Reform and Consumer Protection Act (i.e., on July 16, 2013). 15 USC § 8305 (h). Pursuant to Section 716(f), Covered Depository Institutions were generally granted a 24-month transition period during which they could divest their relevant swaps business. 15 USC § 8305 (f).

² See 15 USC § 8305 (2010), as amended by Pub. L. No. 113-235, 128 Stat. 2130 (2014) available at <http://www.gpo.gov/fdsys/granule/USCODE-2011-title15/USCODE-2011-title15-chap109-subchapI-partA-sec8305>. The Push-out Rule specifically defines “Federal assistance” as “the use of any advance from any Federal Reserve credit facility or discount window that is not part of a program or facility with broad-based eligibility under section 13(3)(A) of the Federal Reserve Act” and certain guarantees and insurance provided by the Federal Deposit Insurance Corporation for certain purposes specified in the Push-out Rule. 15 USC § 8305 (b)(1).

³ 15 USC § 8305 (b)(2)(B)(3).

mitigating swaps and swaps other than swaps and security-based swaps referencing asset-backed securities (or groups or indices primarily composed of asset-backed securities) (those structured finance swaps and security-based swaps, “**In-scope Trades**”).

Because the Push-out Rule generally permits Covered Depository Institutions to establish and maintain affiliates that engage in swaps activities⁴, Covered Depository Institutions can choose to cease such trading activity altogether or “push” such trading activity to entities in the corporate family (e.g., an affiliated broker-dealer) that otherwise comply with applicable laws and regulations (including any capitalization requirements promulgated by the Commodity Futures Trading Commission or the Securities and Exchange Commission, as applicable) (such affiliates, “**Permitted Affiliates**”).

II. Do I Need to Prepare?

Entities that do not have access to Federal Assistance will not see a need to comply with the Push-out Rule. Covered Depository Institutions, on the other hand, likely will no longer engage in In-scope Trades on or after the Deadline. Clients who wish to continue executing In-scope Trades without interruption will need to ensure that they have appropriate trading lines in place with Permitted Affiliates (or other institutions) in order to minimize any disruption to trading. Trades entered into prior to the Deadline are not affected by the Push-out Rule.⁵

III. How Do I Prepare?

Clients may wish to assess their plans regarding future trading to evaluate whether In-scope Trades are likely to be in the pipeline. Clients who anticipate such trades should determine which counterparties they are likely to engage with respect to such trades. Clients who plan to engage Covered Depository Institutions with respect to In-scope Trades should, if they have not already been contacted by their Covered Depository Institution counterparties, reach out to such counterparties to discuss how to minimize any disruptions to future trading in In-scope Trades.

IV. Will I Need to Execute new Documentation?

Clients who need to move their trading activity in In-scope Trades to a Permitted Affiliate or another institution will need to enter into documentation with that entity to govern such trading activity, assuming such documentation does not already exist. This can be accomplished in multiple ways, including by means of a long-form confirmation incorporating the terms of an ISDA Master Agreement by reference, a “push-out” agreement creating a new “deemed” ISDA Master Agreement with the Permitted

⁴ 15 USC § 8305 (c).

⁵ 15 USC § 8305 (e).

Affiliate that replicates the terms of an existing ISDA Master Agreement with the Covered Depository Institution or a new ISDA Master Agreement. Clients should consider if any adjustments are needed in the new documentation and make suitable adjustments.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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