

Guidance on the Effective Date of Section 716 of the Dodd-Frank Wall Street Reform and Consumer Protection Act

The Board of Governors of the Federal Reserve System (“Board”), the Office of the Comptroller of the Currency (“OCC”), and the Federal Deposit Insurance Corporation (“FDIC”) are issuing this guidance to provide clarity regarding the effective date of section 716 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”)¹ with respect to entities for which each is the prudential regulator.

Background

Section 716 prohibits the provision of Federal assistance to any entity defined under that section to be a swaps entity with respect to any swap, security-based swap, or other activity of the swaps entity.² “Federal assistance” is defined for purposes of section 716 as “the use of any advances from any Federal Reserve credit facility or discount window that is not part of a program with broad-based eligibility under section 13(3)(A) of the Federal Reserve Act,” and “[FDIC] insurance or guarantees” for certain purposes specified in section 716(b)(1).³

¹ Section 716 of Pub. L. No. 111-203, 124 Stat. 1376; 15 U.S.C. § 8305.

² See section 716(a) of the Dodd-Frank Act; 15 U.S.C. § 8305(a).

³ See section 716(b)(1) of the Dodd-Frank Act; 15 U.S.C. § 8305(b)(1).

The prudential regulator (as defined in the Commodity Exchange Act)⁴ of a swaps entity is authorized to prescribe rules implementing section 716 with respect to that swaps entity.⁵ The Board is the prudential regulator for state member banks, bank holding companies, savings and loan holding companies, state branches and agencies of foreign banks, and certain other swaps entities.⁶ In addition, the Board is charged with responsibility for establishing and overseeing the provision of credit through any Federal Reserve credit facility and the discount window. The FDIC is the prudential regulator for state nonmember banks and state savings associations.⁷ In addition, the FDIC is charged with insuring the deposits of banks and savings associations and managing the Deposit Insurance Fund. The OCC is the prudential regulator for national banks, federal savings associations, and Federal branches and agencies of foreign banks.⁸

⁴ Pursuant to section 711 of the Dodd-Frank Act, the term “prudential regulator” as used in section 716 has the same meaning as in the Commodity Exchange Act. 15 U.S.C. § 8301.

⁵ Section 716(k) of the Dodd-Frank Act; 15 U.S.C. § 8305(k).

⁶ See 7 U.S.C. § 1a(39)(A).

⁷ See id. at § 1a(39)(C).

⁸ See id. at § 1a(39)(B).

Effective Date

Section 716(h) provides that its general prohibition on Federal assistance is “effective 2 years following the date on which this Act is effective.”⁹ Section 716 is contained in Title VII of the Dodd-Frank Act. Section 701 in Title VII provides that Title VII may be cited as the “Wall Street Transparency and Accountability Act of 2010.”¹⁰ Thus, while enacted within the Dodd-Frank Act, Title VII is itself “an Act,” and references within Title VII to “this Act” should be, in context, interpreted as references to the Wall Street Transparency and Accountability Act of 2010, not to the broader Dodd-Frank Act. This interpretation is supported by the fact that section 716(m) refers specifically to the Dodd-Frank Act by name—a reference that would not be necessary if the reference to “this Act” in section 716(h) and other provisions of the Wall Street Transparency and Accountability Act were intended to refer to the Dodd-Frank Act. Nothing in the context of subsection (m) or other provisions of section 716 suggest a different reading was intended.¹¹

In general, the Wall Street Transparency and Accountability Act became effective on July 16, 2011, which is later than the effective date of the Dodd-Frank Act generally. The Wall Street Transparency and Accountability Act has two

⁹ See section 716(h) of the Dodd-Frank Act; 15 U.S.C. § 8305(h).

¹⁰ See section 701 of the Dodd-Frank Act; 15 U.S.C. § 8301 note.

¹¹ Section 716(m) of the Dodd-Frank Act; 15 U.S.C. § 8305(m).

subtitles. Both subtitles contain provisions that establish an effective date that is 360 days after the enactment of the subtitle (unless otherwise noted in that subtitle).¹² The date of enactment was July 21, 2010, making the effective date of the subtitles comprising the Wall Street Transparency and Accountability Act July 16, 2011. Because section 716 specifically adopts an effective date that is 2 years following the effective date of the Wall Street Transparency and Accountability Act, section 716 will become effective on July 16, 2013.¹³

¹² Section 754 sets forth the effective date of subtitle A of Title VII, and section 774 sets forth the effective date of subtitle B of Title VII. See 7 U.S.C. 7a note and 15 U.S.C. 77b note.

¹³ The agencies intend to invite comment on a separate proposal that would establish the appropriate transition period for insured depository institutions pursuant to section 716(f).