

February 7, 2012

## CFTC Adopts Swap Data Recordkeeping and Reporting Requirements

On January 9 and 13, 2012, the Commodity Futures Trading Commission (“CFTC”) published final rules regarding real-time reporting and public dissemination, regulatory reporting and recordkeeping requirements of transaction data for non-security-based swaps (“swaps”).<sup>1</sup> The final rules apply to all market participants and are intended to facilitate regulatory oversight, promote transparency and enhance price discovery in the swaps markets by making swap transaction and pricing data available to regulators and the public in real-time while protecting the anonymity of market participants. Swap transactions must be reported to registered Swap Data Repositories (“SDRs”) and disseminated by the SDRs to the public as soon as technologically practicable following execution and upon any material amendment.<sup>2</sup> Registered entities and swap counterparties are also required to keep records of each swap throughout the existence of the swap and for a period of at least five years following the termination of the swap. Such records must be available to the CFTC upon request. The final rules do not require compliance before July 16, 2012 or, in the case of most end-users, before January 2013.

### Real-Time Public Reporting Requirements

Section 2(a)(13) of the Commodity Exchange Act (the “CEA”), as added by Section 727 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “Dodd-Frank Act”), calls for the public availability of swap transaction data (including price and volume) to promote price discovery of swap trading.<sup>3</sup> The Real-Time Reporting Rule implements this mandate by requiring that primary economic swap data with respect to any “publicly reportable swap transaction” be reported to an SDR and publicly disseminated by the SDR. The CFTC made clear that the reporting requirement does not extend to inter-affiliate trades, portfolio compression exercises and other transactions that are not considered “arms-length” as those trades may distort price discovery and present the risk of disclosing a trading participant’s identity.<sup>4</sup> Swaps that are executed on a Designated Contract Market (“DCM”) or Swap Execution Facility (“SEF”) will be reported to an SDR by such DCM or SEF and require no reporting by the parties upon execution of the swap.<sup>5</sup> Any swap that is not executed on a

“Publicly reportable swap transaction” means any executed swap that is an arms-length transaction between two parties that results in a corresponding change in the market risk position between the two parties or any termination, assignment, novation, exchange, transfer, amendment, conveyance or extinguishing of rights or obligations of a swap that changes the pricing of a swap.

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<sup>1</sup> 77 FR 1182 (January 9, 2012) (17 C.F.R. Part 43 - Real-Time Public Reporting of Swap Transaction Data (“Real-Time Reporting Rule”)), available at <http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2011-33173a.pdf> and 77 FR 2136 (January 13, 2012)(17 C.F.R. Part 45 – Swap Data Recordkeeping and Reporting Requirements (“Regulatory Reporting Rule”)), available at <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/federalregister122011b.pdf>.

<sup>2</sup> 17 C.F.R. Part 43.3(a).

<sup>3</sup> CEA § 2(a)(13)(A).

<sup>4</sup> 17 C.F.R. Part 43.2.

<sup>5</sup> 17 C.F.R. Part 43.3(a)(2).

DCM or SEF (an “off-facility swap”) must be reported to an SDR by the “Reporting Party,” which is determined based on the regulatory status of the parties to the swap.<sup>6</sup>

**Reporting Party for Off-Facility Swaps**

Parties to the Swap	Reporting Party
<ul style="list-style-type: none"> <li>• Only one party is a Swap Dealer or Major Swap Participant</li> </ul>	The Swap Dealer or Major Swap Participant
<ul style="list-style-type: none"> <li>• One party is a Swap Dealer and the other party is a Major Swap Participant</li> </ul>	The Swap Dealer
<ul style="list-style-type: none"> <li>• Both parties are Swap Dealers or both parties are Major Swap Participants</li> </ul>	As designated by the parties
<ul style="list-style-type: none"> <li>• Neither party is a Swap Dealer or Major Swap Participant</li> </ul>	As designated by the parties

**What Needs to Be Reported and When?**

Relevant swap data must be reported as soon as technologically practicable following execution or material modification of a swap.<sup>7</sup> SDRs then must publicly disseminate the information reported to them as soon as technologically practicable, subject to a time delay for block trades.<sup>8</sup> In the dissemination, SDRs must maintain the anonymity of the trade parties. Information to be disseminated includes the following primary economic data:

- the time and date of execution,
- whether the swap is cleared,
- a description of collateralization for uncleared swaps,
- use of the end-user exception,
- the effective and end dates of the swap,
- price and price-forming information,
- a description of the underlying asset(s),
- the notional or principal amounts of the trade and
- payment details.

“As soon as technologically practicable” means as soon as possible, taking into consideration the prevalence, implementation and use of technology by comparable market participants.

Dissemination of swap transaction data by an SDR will not disclose the identity of the market participants or otherwise facilitate identification of a party to a swap.

<sup>6</sup> 17 C.F.R. Part 43.3(a)(3).

<sup>7</sup> 17 C.F.R. Parts 45.3 and 45.4.

<sup>8</sup> 17 C.F.R. Part 43.2. See “Block Trades,” *infra*, for a discussion of the time-delay for reporting block trades.

Any subsequent changes to the economic terms of a swap also must be reported to the SDR to ensure that the information in the SDR is complete and accurate at all times.<sup>9</sup> All information about a given swap must be reported to a single SDR.<sup>10</sup> In addition, DCMs, SEFs and all swap counterparties (whether or not they are the Reporting Party) are required to correct any errors or omissions in reported data in a timely manner.<sup>11</sup> Should there be no SDR that accepts swap data for a particular class of swaps, the Reporting Party is required to report such information to the CFTC at times and in a format to be announced.<sup>12</sup>

### Block Trades

The Real-Time Reporting Rule allows for time delays in the public dissemination of data on trades with large notional or principal amounts (“block trades”) to reduce the potential market impact of immediately disclosing these large trades in real-time.<sup>13</sup> The time delays range from 15 to 30 minutes for trades executed on a DCM or SEF and from 15 minutes to 48 hours for off-facility swaps, depending on the asset class and the regulatory status of the trading counterparties. The CFTC opted for a phased implementation schedule with the applicable time delay being reduced over time following the relevant compliance date.<sup>14</sup> The minimum notional amount to qualify as a block trade (“minimum block size”) will be determined by the CFTC at a later date. Until such time, all swap information regardless of the notional amount of the swap will be subject to the time delay for public dissemination.<sup>15</sup>

### Regulatory Reporting Requirements

Sections 2(a)(13)(G), 4r and 21(b) of the Commodity Exchange Act (the “CEA”), added by Sections 727-729 of the Dodd-Frank Act, direct the CFTC to prescribe standards for swap data collection and maintenance by SDRs.<sup>16</sup> Complementing the stated objective of price transparency and public availability of swap data, the core goal of the Regulatory Reporting Rule is to ensure collection and maintenance of complete swap data in SDRs, where it will be available to the CFTC and other regulators to aid in their exercise of regulatory oversight of the swaps markets. Primary economic swap data must be reported to an SDR at the time of creation of a swap, and valuation data and changes to the primary economic terms of a swap must be reported on an ongoing basis over the course of the swap transaction’s existence.

### Swap Creation Data

For swaps executed on a SEF or DCM, the SEF or DCM must report the primary economic terms of a swap and confirmation data (“swap creation data”) as soon as technologically practicable after execution of the swap.<sup>17</sup> Swap creation data for off-facility swaps must be

“Confirmation data” includes all terms of a swap matched and agreed upon by the parties in confirming a swap. For cleared swaps, this includes internal identifiers assigned to swap by a derivatives clearing organization.

<sup>9</sup> See 17 C.F.R. Part 45.4. The timing for the reporting of changes to a swap differs depending on the status of the parties.

<sup>10</sup> 17 C.F.R. Part 45.10.

<sup>11</sup> 17 C.F.R. Part 45.14 and 17 C.F.R. Part 43.3(e).

<sup>12</sup> 17 C.F.R. Part 45.11.

<sup>13</sup> 17 C.F.R. Part 43.5.

<sup>14</sup> 17 C.F.R. Part 43.5(d)-(h).

<sup>15</sup> 17 C.F.R. Part 43.5(b).

<sup>16</sup> CEA §§ 2(a)(13)(G), 4r and 21(b).

<sup>17</sup> 17 C.F. R. Part 45.3(a).

reported upon execution of the swap but no later than the applicable deadline (between 15 minutes and 48 business hours for primary economic data and between 30 minutes and 48 business hours for confirmation data), which is determined based on the asset class and the regulatory status of the trading counterparties with a phased implementation schedule following the applicable compliance date.<sup>18</sup>

### Swap Continuation Data

To ensure that all data in an SDR remains current and accurate at all times, changes to the primary economic terms of a swap occurring during the existence of the swap as well as all valuation data for a swap (“swap continuation data”) must be reported to the appropriate SDR on an ongoing basis.<sup>19</sup> Derivatives clearing organizations (“DCOs”) are required to report swap continuation data for all cleared swaps daily. Swap dealers and major swap participants (if they are the Reporting Party) also must report changes to the primary economic terms of uncleared swaps, and must report daily valuation data for both cleared and uncleared swaps. End-users need not report valuation data for cleared swaps but must report changes to the primary economic terms of a swap (generally within one to two business days) and all valuation data (at the end of each fiscal quarter) if designated the Reporting Party for that swap.<sup>20</sup>

The Reporting Party for purposes of the Regulatory Reporting Rule is determined essentially consistent with the responsibilities for real-time reporting.<sup>21</sup> In the absence of a swap dealer or major swap participant to a swap, the Regulatory Reporting Rule allocates reporting responsibilities to the party that is a U.S. person or, for swaps between non-U.S. persons, to the party that is a financial entity before defaulting to the parties’ agreement. DCOs, Registered Entities and other Reporting Parties may contract with third-party service providers to facilitate their reporting of swap creation data or swap continuation data but remain fully responsible for reporting the required information within applicable deadlines.<sup>22</sup>

### Recordkeeping Requirements

In addition to the described reporting obligations, the Regulatory Reporting Rule also requires each market participant to keep “full, complete and systematic records” of its activities related to swaps.<sup>23</sup> The details of the information to be maintained will be established by the CFTC in a forthcoming release and will include, where applicable, all records demonstrating that the parties to a swap are entitled to make use of the commercial end-user exception from the clearing requirements.<sup>24</sup>

<sup>18</sup> 17 C.F. R. Part 45.3(b)-(d).

<sup>19</sup> 17 C.F. R. Part 45.4.

<sup>20</sup> 17 C.F. R. Part 45.4(b)-(c).

<sup>21</sup> 17 C.F. R. Part 45.8. See “Reporting Party for Off-Facility Swaps,” *supra*, for details on the determination of which counterparty to a swap must report.

<sup>22</sup> 17 C.F. R. Part 45.9.

<sup>23</sup> See 17 C.F. R. 45.2(a)-(b).

<sup>24</sup> For a summary of the commercial end-user exception see Client Memorandum entitled “Congress Enacts OTC Derivatives Reform” available at [http://www.paulweiss.com/files/upload/24Jun09\\_OTC.pdf](http://www.paulweiss.com/files/upload/24Jun09_OTC.pdf).

DCMs, SEFs and both parties to a swap must maintain such records for the duration of the swap and for a period of five years following the swap's termination.<sup>25</sup> DCMs, SEFs, swap dealers and major swap participants ("Registered Entities") must be able to access records in real time during the duration of a swap and for the two years following its expiration, and within three business days thereafter.<sup>26</sup> Swap counterparties that are not Registered Entities must be able to retrieve records within five business days throughout the period that such records are required to be retained. SDRs must retain all records for at least 15 years, be able to access them in real time during the duration of the swap, for five years following its termination and within three business days for an additional ten years.<sup>27</sup> All records are subject to inspection by the CFTC, the United States Department of Justice, the Securities and Exchange Commission or any prudential regulator as authorized by the CFTC.<sup>28</sup>

### Effectiveness and Compliance

Commenters to the rule first proposed by the CFTC in December 2010 requested a phase-in approach to allow for time to address anticipated technological challenges and build familiarity with the process. The final rules adopt that approach and will take effect in March 2012 with phased-in compliance dates staggered based on counterparty and product type. Compliance with the final rules after their effectiveness is contingent upon the adoption and effectiveness of other rules promulgated by the CFTC defining "swap," "swap dealer," and "major swap participant," etc. (the "Final Definitional Rule").<sup>29</sup> The CFTC adopted the following three-phased compliance schedule:

#### Compliance Date 1:

The later of (1) July 16, 2012 or (2) 60 calendar days following publication of the Final Definitional Rule in the Federal Register

Applies to all interest rate and credit swaps that are either:

- Executed on a SEF or DCM  
or
- Off-facility swaps where at least one party is a swap dealer or major swap participant

#### Compliance Date 2:

90 days after Compliance Date 1

Applies to all foreign exchange, equity and "other commodity" swaps that are either:

- Executed on a SEF or DCM  
Or
- Off-facility swaps where at least one party is a

<sup>25</sup> 17 C.F.R. Part 45.2(c).

<sup>26</sup> 17 C.F.R. Part 45.2(e)(1).

<sup>27</sup> 17 C.F.R. Part 45.2(g).

<sup>28</sup> 17 C.F.R. Part 45.2(h).

<sup>29</sup> For a discussion on the delay in applicability of swap rules see Client Memorandum entitled "CFTC Adopts Position Limits Rule, Proposes to Extend Temporary Exemptive Relief From the Applicability of Certain Swap Provisions of the Dodd-Frank Act" available at <http://www.paulweiss.com/files/upload/10Nov11-DF.pdf>.

swap dealer or major swap participant

**Compliance Date 3:**

180 days after Compliance Date 1

Applies to all other swaps including those where neither party is a swap dealer or major swap participant

If no SDR for a particular asset class exists at the time of any applicable compliance date, compliance for swaps in that asset class will not be required until the registration of an SDR in that asset class.

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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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