

ClientAlert

Capital Markets/Derivatives

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CFTC Swap Data Recordkeeping and Reporting Requirements for End-Users



Overview of the Dodd-Frank Recordkeeping and Reporting Requirements

The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") imposes certain recordkeeping and reporting obligations on parties to swap transactions. While compliance with the final reporting rules passed in December of 2011 is not yet required, the CFTC currently imposes a recordkeeping obligation of transaction data by parties to a swap transaction entered into at any time after the enactment of Dodd-Frank on July 21, 2010 or that were unexpired as of such date.

New Reporting and Recordkeeping Rules

The CFTC recently adopted two final rules that impose recordkeeping and reporting obligations on market participants. On December 20, 2011, the CFTC adopted Part 45, Swap Data Recordkeeping and Reporting Requirements ("SDR Reporting Rule") and Part 43, Real-Time Public Reporting of Swap Transaction Data Obligations ("Real-Time Reporting Rule"; collectively the "SDR and Real-Time Reporting Rules"). While the rules mainly apply to swap dealers ("SDs"), major swap participants ("MSPs"), swap execution facilities ("SEFs"), designated contract markets ("DCMs"), derivatives clearing organizations ("DCOs") and swap data repositories ("SDRs"), they do impose certain recordkeeping obligations on end-users and, in some cases, regulatory and real-time reporting obligations of swap transactions.

In general, under the SDR Reporting Rule, the reporting party will be required to report swap transaction data to the SDR "as soon as technologically practicable," subject only to specified time delays for large notional off-facility trades and block trades. The Real-Time Reporting Rule requires the reporting party to transmit a limited transaction data set to the SDR for public dissemination by the SDR.

Compliance with SDR and Real-Time Reporting Rules will be phased-in in three stages. Reporting parties are not required to comply with the reporting rules until the later of July 16, 2012 or 60 days after the publication of the rules defining "swap," SD and MSP. While the CFTC stated that it would finalize both of these definitional rules by the end of March 2012 (Q1), to date it has not done so. As a result, the precise timing of the initial date for compliance with these final rules remains uncertain at this time.

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Current Recordkeeping Obligation for Historical Swaps

The CFTC has enacted two interim final rules that apply to the swap transactions an end-user has entered into and enters into today. These interim final rules cover (1) swaps entered into prior to the enactment of Dodd-Frank on July 21, 2010 that were unexpired as of such date and (2) swaps entered into after the enactment of Dodd-Frank but prior to the date on which the SDR Reporting Rule becomes effective (i.e., when compliance begins) (referred to herein as “historical swaps”).

The interim final rules require the reporting party to report such historical swaps. The reporting obligation, however, is a prospective one; the reporting party will only need to report the historical swaps once the SDRs are up and running. We note that it is unlikely that an end-user would be the reporting party. However, each party to a historical swap has a record retention obligation which requires it to preserve data from each swap transaction to ensure that such data will be available for reporting at a later date. End-users should accordingly retain the following records for each swap transaction they enter into:

- The date and time of execution
- Any information necessary to value the swap
- The notional or principal amount (volume)
- Information relevant to the price and payment of the swap until its maturity, termination or novation
- Whether the swap was accepted for clearing, and if so, who cleared it
- Any modifications made to the terms of the contract
- Final confirmation

This information may be maintained in the usual format in which the end-user has traditionally retained this information (i.e., there is no prescribed record retention format).

The CFTC has stated that it will issue final rules in the coming months to set a date and will provide further guidance with respect to the reporting obligations of historical swaps. Until such time, parties should retain records of information as stated above.

Application of Real-Time and SDR Reporting Rules to End-Users

The following Q&A sets forth the recordkeeping and reporting requirements applicable to end-users.

Recordkeeping Requirements for End-Users

Once compliance with the Real-Time and SDR Reporting Rules begins, end-users will be subject to the recordkeeping requirements under SDR Reporting Rules. As mentioned above, the interim final rules will no longer be applicable to swap transactions entered into once mandatory compliance with the SDR Reporting Rules becomes effective.

■ What records must be kept?

End-users must keep full, complete and systematic records of each and every swap transaction they enter into, together with all pertinent data and memoranda. End-user records must include all records demonstrating that they are entitled to elect the end-user clearing exemption with respect to any swap and how they satisfy such end-user exemption requirements.

■ How long must records be kept?

End-users must keep these records throughout the term of each swap and for a period of five years after termination.

■ In what form may records be kept?

While electronic format is preferred, end-users may keep records in either electronic or paper form, so long as they are retrievable.

■ How may records be retrieved?

An end-user's records must be retrievable within five business days throughout the retention period.

■ How will the CFTC examine records?

Records must be opened for inspection upon the request of the CFTC, the SEC, the US Department of Justice, or by any representative of a prudential regulator as authorized by the CFTC. Copies of all records must be provided at the expense of the party providing the records.

Reporting Requirements for End-Users

■ **What are the reporting requirements if a swap is executed on a trading facility?**

For swaps executed on a trading facility known as a SEF or a DCM (a "Facility"), the regulatory and real-time reporting obligations will be borne by the SEFs and DCMs and end-users have no reporting obligation other than to report to the SEF/DCM any errors or omissions that it may discover.

■ **What are the reporting requirements for swaps executed off a trading Facility?**

Generally, so long as an end-user enters into swap transactions with a counterparty that is an SD or MSP, it will not have any reporting obligations. This remains the case even if the SD or MSP is a foreign entity. If however, an end-user enters into a swap with another end-user, the two parties will have to determine who the "reporting party" will be.

We note that if an end-user is the only US party to a swap with another end-user, the US end-user will have the reporting obligation.

The end-user "reporting party" will need to comply with the regulatory and real-time reporting requirements prescribed by the SDR Real-Time Reporting Rules. These include providing swap creation data (i.e., primary economic terms data and confirmation data) to SDRs "as soon as technologically practicable" and, if such swap is not cleared, continuation data.

Continuation data includes the reporting of valuation data on a daily basis (i.e., the current daily mark or the current valuation of the swap in accordance with accounting standards) and life cycle event data on the day such event occurs (i.e., events that reflect a change to the primary economic terms of the swap, including but not limited to, an assignment, novation, partial termination, changes in cash flows or rates originally reported, or changes in the corporate structure of a counterparty) or state data on a daily basis (i.e., data that provides a snapshot view on a daily basis of the primary economic terms of the swap from the last snapshot). Under the SDR Reporting Rule, "primary economic terms" means all the terms of a swap that are matched or affirmed by the counterparties in verifying the swap terms, including the minimum "primary economic terms" as published by the CFTC for a swap in the applicable asset class. Considering the onerous undertaking and operational difficulty that end-users will face with this obligation, the rules do allow end-users to use third-party service providers to supply SDRs with this information.

■ **Will the identity of the end-user be protected?**

Dodd-Frank mandates that the identity of the counterparties to a swap transaction subject to public dissemination not be disclosed. The CFTC prohibits SDRs from disclosing a counterparty's identification in a swap transaction that is subject to public dissemination.

The CFTC proposed rules in February 2012 related to the final Real-Time Reporting Rules that preserve the identities of the counterparties in other ways as well. These proposed rules establish levels for the notional masking of large notional off-facility trades and block trades and apply geographic masking of the underlying asset of certain commodity swaps.

Compliance

■ **When will end-users be required to comply with the SDR and Real-Time Reporting Rules?**

Compliance with the reporting rules will be phased-in by product and reporting party in three stages.

- Non-end-user reporting parties (i.e., SDs, MSPs, SEFs and DCMs) will be required to comply with the reporting rules with respect to interest rate and credit swaps first. Such compliance will not take effect until the later of July 16, 2012 or 60 days after the publication of the rules defining "swap," SD or MSP.
- Compliance with the reporting rules by non-end-users with respect to foreign exchange, equity and other commodity swaps will be phased-in shortly thereafter.
- End-user reporting parties must comply with the reporting rules with respect to all types of swaps transactions 180 days after compliance by non-end-users is required with respect to interest rate and credit swaps.

Practically, if the relevant rules are finalized by the end of Q2 2012, the earliest an end-user reporting party may be subject clearing would be January 2012.

■ **What will change for non-reporting end-users?**

Non-reporting end-users that generally face SDs or MSPs will see changes and supplements to their on-boarding documentation with other counterparties, SEFs and DCMs. More information will be required from the reporting party in order for such reporting party to comply with the SDR and Real-Time Reporting Rules.

End-users will also see new changes to confirmations and trade documentation, which will incorporate some of the reporting obligations of the reporting party.

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Finally, end-users will also receive notice of a legal entity identifier ("LEI"), which will serve as the end-user's unique identifying alphanumeric number for purposes of the SDR and Real-Time Reporting Rules, as well as a unique product identifier ("UPI") (or other product classification if not sufficiently standardized) and a unique swap identifier ("USI") which will serve as unique alphanumeric codes identifying the product category of a swap transaction and the relevant swap transaction, respectively. In essence, the LEI is akin to a swap counterparty's new "social security number"; the USI will be unique to each swap transaction and the UPI will be assigned according to the asset class of the swap (or if not sufficiently standardized, the CFTC will designate another product classification system).

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