

The CFTC's New Swap Reporting and Recordkeeping Requirements

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On December 20, 2011, the Commodity Futures Trading Commission (CFTC) adopted three major parts of the transparency reforms for swaps contemplated by Title VII of the Dodd-Frank Act: regulatory reporting, public reporting and recordkeeping.¹ As of January 13, 2012, these rules were published in the Federal Register. See Swap Data Recordkeeping and Reporting Requirements, *77 Fed. Reg. 2136* (Jan. 13, 2012) and Real-Time Public Reporting of Swap Transaction Data, *77 Fed. Reg. 1182* (Jan. 9, 2012). The CFTC's new rules will require: (1) every new swap to be reported to a CFTC-regulated Swap Data Repository (SDR), where the data will be stored for use by government officials; (2) SDRs to report publicly in "real time" the basic economic terms of most swaps; and (3) recordkeeping by all parties to swaps. The CFTC's new rules will not require full compliance until at least July 16, 2012 (and for end users until at least January 2013).²

Statutory Background

The CFTC adopted these rules to implement major aspects of the Dodd-Frank Act's regulation for swaps. This legislation added several provisions to the Commodity Exchange Act (CEA) that establish SDRs as new registered entities; require reporting of all swap transaction data to SDRs; and call for reporting of some of that data to the public. CEA Sections 2(a)(13)(G), 4r and 21(b) relate to regulatory reporting and swap data recordkeeping requirements. CEA Section 2(a)(13) establishes standards and requirements relating to real-time reporting and the public availability of data relating to swap transactions.

New Legal Architecture for Swaps

A swap will be subject to the new reporting rules from the moment of execution, whether that execution occurs on, or otherwise is subject to the rules of, a regulated trading platform such as a Designated Contract Market (DCM) or Swap Execution Facility (SEF) or through a private, bilateral negotiation between the two parties to the swap (for example, a Swap Dealer and an end user). Under the CFTC's rules, execution occurs when the parties reach a legally binding agreement on the terms of the swap transaction. Execution may be written or oral.

The terms of each swap transaction also must be confirmed. Under the CFTC's rules, confirmation means the completion of legally binding documentation that memorializes the parties' agreement to all terms of a swap. A confirmation must be in writing, must legally supersede any previous agreement relating to the swap and can occur at or after the execution of the swap.

1 On January 11, 2012, the CFTC held an open meeting at which it considered several more proposed and final rules. At that meeting, Commissioners discussed which Dodd-Frank Title VII final rules and interpretive orders the CFTC may consider in 2012. A list of those rules and orders is provided in the appendix to this article.

2 The obligations with respect to swaps entered into prior to this date and still in existence on or after July 15, 2010 will be set forth in a different set of rules.

Regulatory Reporting

What Information Must Be Reported to an SDR Once a Swap is Executed on a SEF or DCM?

SEFs and DCMs must report all swaps executed on their trading platforms and all swaps otherwise subject to their rules. The SEF or DCM must prepare a single report that captures all of the terms of the swap agreed upon at execution, including the identity of each counterparty, the price of the swap, the underlying asset(s) and volume. The SEF or DCM must submit this swap report to an SDR as soon as “technologically practicable” following execution. If the swap is cleared on a Derivatives Clearing Organization (DCO), that DCO must also report, to the same SDR, all of the terms of the swap as soon as technologically practicable. In other words, if a swap is executed on a SEF and cleared on a DCO, the SEF and DCO will be required to “double” report the swap to the SDR.

What Information Must Be Reported to an SDR Once a Swap is Executed Bilaterally?

For any swap **not** executed on or under SEF or DCM rules (an “off-facility swap”), two reports must generally be made to an SDR.

The first report must include the basic economic terms agreed upon at execution. One of the parties to the swap must file this report by the deadline set forth in the rules (ranging from 15 minutes to 48 business hours after execution), unless the swap is accepted by a DCO for clearing before the deadline. If the swap is accepted for clearing, this report need not be filed. Typically, a Swap Dealer must file this report. An end user generally would only be required to file this report if its counterparty is another end user and the swap has not been accepted for clearing by the reporting deadline.

The second report must include all of the terms of the swap agreed to at the time the swap is either cleared or confirmed (whichever occurs first). If the swap is cleared, the DCO must file this report as soon as technologically practicable following clearing. If the swap is uncleared, a party to the swap must file this report by the applicable deadline (ranging from 30 minutes to 48 business hours after confirmation). Again, typically a Swap Dealer must file this report. An end user generally would only be required to file this report if its counterparty is another end user and the swap has not been accepted for clearing by the reporting deadline.

What Other Information Must Be Reported to an SDR Over the Lifetime of Any Swap?

In order for the reports filed with the SDR to be useful for government officials, the data on the reported transactions must be current. As terms of the swap may change over the swap’s lifetime, updates to reports must be filed with the SDR. If the swap is cleared, the DCO that accepts the swap must make these reports. If the swap is uncleared, a party to the swap must make these reports either daily or generally on any day that certain terms change. Swap Dealers typically will be required to file these updates. End users will rarely be required to file.

In addition to updates, daily information regarding the value of the swap must generally be sent to the SDR. For any cleared swap, the DCO must send to the SDR all of the data elements necessary to fully describe the daily mark. A party to any swap (whether cleared or not) must also report this same information on a daily basis to the SDR, with two exceptions that apply to swaps with only end user parties (“End User Swaps”). First, for a cleared End User Swap, there is no requirement that either party to the swap report valuation data. Second, for an uncleared End User Swap, once each fiscal quarter, one of the end users must report the current daily mark (if available, or alternatively the current valuation of the swap as recorded on its books).

Who Selects the SDR?

The SDR will be selected by the person that first reports data on the swap to the SDR. Thus, a SEF or DCM will select the SDR for any swap entered into on or under its rules. For all other swaps, the SDR will be selected either by a party to the swap (typically, a Swap Dealer) or a DCO (if cleared).³ SDRs must establish, maintain and enforce policies and procedures reasonably designed to protect the privacy and confidentiality of any and all information reported to an SDR that is not required to be reported publicly.

Who Is Liable If Data Required to Be Reported Is Not Reported or Reported Incorrectly?

The person responsible for reporting data has an obligation to report such data accurately and is expected to develop processes to achieve this goal. A person with reporting obligations may contract with a third-party service provider to report on that person's behalf, but the person will remain fully responsible for compliance. The rules do not require any person to monitor whether data is accurately reported to an SDR, but any error or omission that is discovered must be reported to the person responsible for reporting the swap and to the SDR.

May a Swap Counterparty Elect to Report Data Voluntarily?

Either party to a swap (or a third-party service provider acting on its behalf) may submit to any SDR a voluntary, supplemental report provided that this report includes certain identifying information about the swap (such as the identity of the SDR to which all requisite swap data is reported).

Public Reporting

Is Real-Time Public Reporting Required for All Swaps?

Real-time public reporting will be required for all swap transactions except: (1) those that are not executed at arm's length or do not change the market risk position between the counterparties and (2) certain events that do not change the pricing of the swap.⁴

What Swap Data Must SDRs Disseminate Publicly?

An SDR will publish only some of the information it receives about swap transactions. These public reports will give market participants general information about the timing, price and volume of a swap transaction, but will not disclose the identity of the counterparties. The final rules provide certain protections to preserve the confidentiality of swap counterparties. For example, an SDR will be required to round the notional amount of a swap transaction in its public report. If the notional amount exceeds a CFTC-provided cap, only the cap level will be disseminated as the size of the swap.

An SDR must also publish an update to a swap's terms upon receiving (1) notification of an error or omission in previously published data or (2) data relating to any post-execution event that affects the price of a swap such as a termination, assignment or novation.

3 If no SDR exists that accepts swap data for the relevant asset class of a swap, the data must be reported directly to the CFTC.

4 Under the CFTC's rules, internal swaps between 100 percent owned subsidiaries of the same parent and portfolio compression exercises would not be publicly reportable because they are not entered into at arm's length.

An SDR must publish swap data in a machine-readable electronic format that allows the data to be downloaded, saved and analyzed. The data must be freely available to the public on the SDR's website.⁵

When Must SDRs Make Swap Data Public?

The “real-time” in which an SDR must publicly report data relating to a swap transaction is generally as soon as technologically practicable after such data is received. But swap transactions that meet or exceed CFTC-determined size thresholds will qualify for delayed reporting. The CFTC has not yet established these thresholds and, until it does, public reporting for all swaps will be delayed by at least 30 minutes (and possibly as much as 48 business hours). Once the thresholds are established, SDRs will continue to delay public reports for swaps that meet the thresholds and will publicly report all other swaps as soon as technologically practicable after receiving the required information.

Recordkeeping

What Records Must Swap Dealers, Major Swap Participants, SEFs, DCMs and DCOs Keep?

Each Swap Dealer, Major Swap Participant, SEF, DCM and DCO must “keep full, complete, and systematic records, together with all pertinent data and memoranda” of all activities relating to its business with respect to swaps until any relevant swap has been fully terminated for five years. The CFTC does not define what is a “record,” but does specify that records may be kept in electronic form or, if originally created and exclusively retained in paper form, in paper form. These records must be readily accessible via real time electronic access until any relevant swap has been fully terminated for two years and must be retrievable within three business days for the following three years.

What Records Must End Users Keep?

End users that enter into a swap must “keep full, complete, and systematic records, together with all pertinent data and memoranda” of each swap transaction until the swap has been fully terminated for five years. The CFTC does not define what is a “record.” End users may keep these records in either electronic or paper form. End users must be able to retrieve these records within five business days.

Will Regulators Have Access to These Records?

Any records required to be kept by these rules must be made available for inspection by the CFTC and certain other federal agencies, upon request. If requested, copies of these records must be provided to the CFTC.

⁵ The CFTC plans to publish on its website links to SDRs' websites.

Appendix – Dodd-Frank Title VII Final Rules and Interpretive Orders the CFTC May Consider in 2012

1. First Quarter 2012
 - Client Clearing Documentation, Clearing Member Risk Management, Straight Through Processing
 - Commodity Options
 - DCM Core Principles
 - End-User Exception
 - Entity Definitions
 - Internal Business Conduct (Duties, Recordkeeping, Chief Compliance Officers)
 - Product Definitions
 - Reporting of Historical Swaps
 - Amendments to Compliance Obligations for Commodity Pool Operators and Commodity Trading Advisors
 - External Business Conduct (CFTC adopted on January 11, 2012)
 - Segregation for Cleared Swaps (CFTC adopted on January 11, 2012)
 - Registration of Swap Dealers and Major Swap Participants (CFTC adopted on January 11, 2012)
2. April 2012 and Beyond
 - Block Rule
 - Capital and Margin Requirements
 - Conforming Rules
 - Disruptive Trade Practices
 - Extraterritoriality
 - Governance and Conflict of Interest
 - Implementation (clearing and trade execution)
 - Internal Business Conduct (documentation)
 - Process for Making a Swap Available to Trade (SEFs and DCMs)
 - SEF Core Principles
 - Segregation for Uncleared Swaps