



The CFTC Adopts Final Rules on the Recordkeeping and Reporting of Historical Swaps

June 20, 2012

The U.S. Commodity Futures Trading Commission (the “CFTC”) has adopted final rules governing the recordkeeping and reporting of historical swaps.¹ Together with the swap data recordkeeping and reporting rules previously published by the CFTC,² these final rules create a comprehensive recordkeeping and reporting regime governing swaps and swap counterparties, including end-users.

The historical swaps covered by these final rules encompass (i) swaps entered into before July 21, 2010, the enactment date of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) and still outstanding as of July 21, 2010 (“pre-enactment swaps”) and (ii) swaps entered into on or after July 21, 2010, but prior to the compliance date set forth in the CFTC’s final swap data recordkeeping and reporting rule³ (“transition swaps”). These final rules override existing interim recordkeeping and reporting rules for historical swaps⁴ and establish a two-tiered recordkeeping and reporting hierarchy, which imposes heightened recordkeeping and reporting requirements on historical swaps that were in existence on or after April 25, 2011, versus historical swaps that expired prior to April 25, 2011.⁵

A. HISTORICAL SWAP DATA RECORDKEEPING

1. *Historical Swaps Expired Prior to April 25, 2011*

New CFTC Regulation 46.2 imposes recordkeeping and retrievability requirements for historical swaps that expired or terminated prior to April 25, 2011. For pre-enactment swaps, the final rule requires each counterparty to retain records “relating to the terms of the transaction” that the counterparty possessed on or after October 14, 2010.⁶ For transition swaps, the final rule requires each counterparty to retain records “relating to the terms of the

¹ See Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps, 77 F.R. 35200 (Jun. 12, 2012) (the “Adopting Release”).

² See Swap Data Recordkeeping and Reporting Requirements, 77 F.R. 2136 (Jan. 13, 2012).

³ See Swap Data Recordkeeping and Reporting Requirements, 77 F.R. 2136 (Jan. 13, 2012); see also Overview of Final Rules on Recordkeeping and Reporting of Swaps, available at <http://stblaw.com/siteContent.cfm?contentID=4&itemID=75&focusID=1374>.

⁴ See Interim Final Rule for Reporting Pre-Enactment Swap Transactions, 75 F.R. 63080 (Oct. 14, 2010); Reporting Certain Post-Enactment Swap Transactions, 75 F.R. 78892 (Dec. 17, 2010). A principal purpose for both interim final rules was “to advise counterparties of the need to retain data . . . so that reporting could be effectuated under permanent rules subsequently to be adopted.”

⁵ April 25, 2011 is the publication date of the proposed rulemaking for pre-enactment and transition swaps. See Swap Data Recordkeeping and Reporting Requirements, 76 F.R. 22833 (Apr. 25, 2011).

⁶ October 14, 2010 is the publication date of the interim final rule for the reporting of pre-enactment swaps. See 75 F.R. 63080 (Oct. 14, 2010).

transaction” that the counterparty possessed on or after December 17, 2010.⁷ Although the CFTC did not provide interpretive guidance in the Adopting Release further defining the phrase “terms of the transaction”, in the interim final rules, the CFTC specified that such information includes, but is not limited to: (i) information necessary to identify and value the transaction; (ii) the date and time of execution of the transaction; (iii) the volume of the transaction; (iv) information relevant to the price and payment of the transaction until the swap is terminated, reaches maturity, or is novated; (v) whether the swap was accepted by a derivatives clearing organization (“DCO”) for clearing and, if so, the identity of the DCO; (vi) any modification(s) to the terms of the transaction; and (vii) the final confirmation of the transaction.⁸ Because a principal purpose of the interim final rules was to advise counterparties of the need to retain records in anticipation of permanent rules, it may be prudent for parties to historical swaps to retain the above-listed records. To the extent, however, that a record was not in a counterparty’s possession on or after October 14, 2010, for pre-enactment swaps, or December 17, 2010, for transition swaps, the final rules do *not* require the counterparty to create or retain the record.

Under the final rule, all records must be retained throughout the life of the swap and for five years thereafter. Although the records may be retained in any format, electronic or otherwise, counterparties must be able to retrieve the records throughout the retention period within five business days. The table below summarizes the recordkeeping requirements for historical swaps that expired prior to April 25, 2011.

Swap Data Recordkeeping for Historical Swaps that Expired Prior to April 25, 2011		
	Records to be Retained - Throughout the Life of the Swap and for 5 Years Thereafter -	Record Retrievability
Pre-Enactment Swaps	Records “relating to the terms of the transaction” possessed on or after October 14, 2010	Within 5 business days throughout the retention period
Transition Swaps	Records “relating to the terms of the transaction” possessed on or after December 17, 2010	Within 5 business days throughout the retention period

⁷ December 17, 2010 is the publication date of the interim final rule for the reporting of transition swaps. See 75 F.R. 78892 (Dec. 17, 2010).

⁸ See Interim Final Rule for Reporting Pre-Enactment Swap Transactions, 75 F.R. 63080, 63083 (Oct. 14, 2010); Reporting Certain Post-Enactment Swap Transactions, 75 F.R. 78892, 78894 (Dec. 17, 2010). “Volume” was excluded from the interim final rule for pre-enactment swaps.

2. *Historical Swaps in Existence On or After April 25, 2011*

For historical swaps in existence on or after April 25, 2011, the recordkeeping requirements are more extensive. CFTC Regulation 46.2 requires counterparties to these swaps to retain records of all the primary economic terms data (“PET Data”) designated by the CFTC for swaps in the particular swap asset class. Under the final rule, the swap asset classes include: credit swaps, equity swaps, foreign exchange swaps (other than cross-currency swaps), interest rate swaps (including cross-currency swaps), and other commodity swaps. In an appendix to the final rule, the CFTC included tables of PET Data for each swap asset class. In addition to the records relating to PET Data, the final rule also requires counterparties to retain any confirmation, master agreement, or credit support agreement, including any modification or amendment thereto, that was in the counterparty’s possession on or after April 25, 2011. Moreover, counterparties to historical swaps that have not expired by the applicable compliance date (*see* Part III below) must comply with the recordkeeping requirements in Part 45 of the CFTC’s Regulations⁹ to the extent that any such records are created or become available to the counterparty after that date. The table below summarizes the recordkeeping requirements for historical swaps that were in existence on or after April 25, 2011.

Swap Data Recordkeeping for Historical Swaps in Existence On or After April 25, 2011
Records to be Retained - Throughout the Life of the Swap and for 5 Years Thereafter -
<ul style="list-style-type: none"> ▪ Records of all PET Data for the particular swap asset class; ▪ Confirmations, Master Agreements, and Credit Support Agreements possessed on or after April 25, 2011; <i>and</i> ▪ Part 45 Recordkeeping Requirements, if the swap extends beyond the compliance date.

Under the final rule, counterparties to historical swaps in existence on or after April 25, 2011 must retain records throughout the life of the swap and for a period of five years thereafter. While any counterparty may maintain records in an electronic format, Swap Dealers (“SDs”) and Major Swap Participants (“MSPs”) may only retain records in paper form if the record was originally created and exclusively maintained in that format. For non-SD/MSP counterparties, there is no corresponding restriction on paper records, so long as the information is retrievable within the required timeframe. Throughout the life of the swap and for two years thereafter, SDs and MSPs to historical swaps in existence on or after April 25, 2011 must have real time electronic access to the records that are required to be retained. For the remaining retention period, SDs and MSPs must be able to retrieve these records within three business days. By contrast, the final rules require non-SD/MSP counterparties to historical swaps in existence on or after April 25, 2011 to retrieve records within five business days throughout the retention period. The table below summarizes the data format and retrievability requirements for historical swaps that were in existence on or after April 25, 2011.

⁹ *See* Swap Data Recordkeeping and Reporting Requirements, 77 F.R. 2136 (Jan. 13, 2012).

Swap Data Recordkeeping for Historical Swaps In Existence On or After April 25, 2011 - Data Format & Retrievability -		
	Record Format	Record Retrievability
Swap Dealers & Major Swap Participants	<ul style="list-style-type: none"> ▪ Electronic Form; <i>or</i> ▪ Paper Form, only if originally created and maintained in paper form 	<ul style="list-style-type: none"> ▪ Readily accessible via real time electronic access during the life of the swap and for 2 years thereafter ▪ Within 3 business days for the remaining 3 years
Non-Swap Dealers & Non-Major Swap Participants	<ul style="list-style-type: none"> ▪ Electronic Form; <i>or</i> ▪ Paper Form 	<ul style="list-style-type: none"> ▪ Within 5 business days throughout the retention period

B. HISTORICAL SWAP DATA REPORTING

New CFTC Regulation 46.3 implements the statutory mandate pursuant to Section 723 of the Dodd-Frank Act that each pre-enactment and transition swap be reported to a swap data repository (“SDR”). Like the recordkeeping rules discussed above, the scope of the reporting obligations for pre-enactment and transition swaps depends primarily on whether the swap expired on or prior to April 25, 2011.

1. *Historical Swaps Expired Prior to April 25, 2011*

For pre-enactment swaps that expired prior to April 25, 2011, the final rule requires the reporting counterparty to report “information relating to the terms of the transaction” that was in the reporting counterparty’s possession on or after October 14, 2010, on the applicable compliance date.¹⁰ For transition swaps that expired prior to April 25, 2011, the final rule requires the reporting counterparty to report “information relating to the terms of the transaction” that was in the reporting counterparty’s possession on or after December 17, 2010, on the compliance date.¹¹ Under the final rules, the information for historical swaps that expired prior to April 25, 2011 may be reported via any method selected by the counterparty. The CFTC noted in the Adopting Release that counterparties may satisfy this reporting requirement by submitting images to an SDR or by entering confirmation data into a web interface provided by the SDR.

¹⁰ To avoid a flood of data into SDRs on the compliance date, the final rule provides that the reporting counterparty may elect to report data prior to the compliance date, so long as an SDR is prepared to accept the report. See 17 C.F.R. § 46.3(c).

¹¹ See *id.*

Swap Data Reporting for Historical Swaps that Expired Prior to April 25, 2011		
	Data to be Reported	Date to be Reported
Pre-Enactment Swaps	Information “relating to the terms of the transaction” possessed on or after October 14, 2010	<ul style="list-style-type: none"> ▪ Compliance Date
Transition Swaps	Information “relating to the terms of the transaction” possessed on or after December 17, 2010	<ul style="list-style-type: none"> ▪ Compliance Date

2. *Historical Swaps in Existence On or After April 25, 2011*

For historical swaps in existence on or after April 25, 2011, the final rules require an initial data report on the applicable compliance date to an SDR of the relevant PET Data.¹² In addition to PET Data, the initial report must also include the legal entity identifier (“LEI”) of the reporting counterparty,¹³ the internal counterparty identifier used by the reporting counterparty to identify the non-reporting counterparty (or the LEI of the non-reporting counterparty), and the internal transaction identifier used by the reporting counterparty to identify the swap.

In addition to the initial data report, the final rule also requires the reporting of swap continuation data for *uncleared* historical swaps in existence on or after April 25, 2011. For these swaps, the reporting counterparty must report swap continuation data in accordance with Part 45 of the CFTC’s Regulations.¹⁴ In broad terms, Part 45 requires the reporting of all changes to PET Data as well as “valuation data” for each swap. Importantly, for historical swaps the reporting party is only required to report changes to the limited set of PET Data listed in the annex to Part 46, rather than the more extensive list of PET Data required by the annex to Part 45. For historical swaps in existence on or after April 25, 2011 that have been *cleared*, there is *no* continuation data reporting requirement. A summary of swap data reporting for historical swaps in existence on or after April 25, 2011 is below.

¹² To avoid a flood of data into SDRs on the compliance date, the final rule provides that the reporting counterparty may make the initial data report prior to the compliance date, if an SDR is prepared to accept the report. See 17 C.F.R. § 46.3(c). Although the reporting counterparty may also report continuation data at any time after the submission of the initial data report, the obligation to report continuation data is not triggered until the applicable compliance date. *Id.*

¹³ To facilitate the tracking of swap transaction data, the new regulations also provide that each reporting counterparty must obtain a legal entity identifier by the compliance date and non-reporting counterparties to historical swaps in existence on or after April 25, 2011 must obtain a legal entity identifier within 180 days after the compliance date. Importantly, unlike Part 45 of the CFTC’s Regulations, unique swap identifiers and unique product identifiers are not required for historical swaps.

¹⁴ See Swap Data Recordkeeping and Reporting Requirements, 77 F.R. 2136 (Jan. 13, 2012); see also Overview of Final Rules on Recordkeeping and Reporting of Swaps, available at <http://stblaw.com/siteContent.cfm?contentID=4&itemID=75&focusID=1374>.

Swap Data Reporting for Historical Swaps in Existence On or After April 25, 2011		
	Data to be Reported	Date to be Reported
Initial Data Report for Uncleared Swaps and Cleared Swaps	<ul style="list-style-type: none"> ▪ PET Data designated by the CFTC for the swap asset class, as possessed by the reporting counterparty on or after April 25, 2011; ▪ LEI for the reporting counterparty; ▪ Internal Counterparty Identifier or LEI for the non-reporting counterparty; <i>and</i> ▪ Internal Transaction Identifier for the swap. 	<ul style="list-style-type: none"> ▪ Compliance Date
Continuation Data for Uncleared Swaps	<ul style="list-style-type: none"> ▪ All swap continuation data required by Part 45, including: <ul style="list-style-type: none"> ○ All changes to previously reported PET Data; <i>and</i> ○ Valuation Data 	<ul style="list-style-type: none"> ▪ Depending on the reporting method, as frequently as daily – See Part 45
Continuation Data for Cleared Swaps	<ul style="list-style-type: none"> ▪ No continuation data reporting required 	<ul style="list-style-type: none"> ▪ Not applicable

3. Determining Reporting Obligations

To determine the reporting counterparty for historical swaps, the CFTC has issued the following guidelines:

1. if only one party is an SD, the SD is the reporting party;
2. if neither party is an SD and one party is an MSP, the MSP is the reporting party;
3. if both parties are non-SDs/MSPs, but only one party is a financial entity,¹⁵ the financial entity is the reporting party;
4. if both parties are non-SDs/MSPs, but only one party is a U.S. person, the U.S. person is the reporting party; and
5. if both parties fall within the same entity classification—e.g., both parties are non-SD/MSPs and neither party is a financial entity—the parties *must agree* which party will be the reporting party.

¹⁵ In general, a “financial entity” includes: an SD/MSP, a security-based SD/MSP, a commodity pool, a private fund, an employee benefit plan, and any “person predominately engaged in activities that are in the business of banking.” 7 U.S.C. § 2(h)(7)(C).

For historical swaps in existence on the compliance date, the determination of the reporting counterparty is made by applying the guidelines above with respect to the current counterparties to the swap as of the compliance date, regardless of whether either or both were original counterparties to the swap when it was first executed. For historical swaps that have expired prior to the compliance date, the determination of the reporting counterparty is made by applying the guidelines above to the counterparties to the swap as of its date of expiration or termination, provided that a counterparty's status as an SD or MSP will be determined as of the compliance date.

In the event that a reporting counterparty ceases to be a counterparty to a historical swap due to an assignment or novation, the below guidelines will be applied to the remaining counterparties:

1. if only one party is an SD, the SD is the reporting party;
2. if neither party is an SD and one party is an MSP, the MSP is the reporting party;
3. if both parties are non-SDs/MSPs, but only one party is a U.S. person, the U.S. person is the reporting party; and
4. in all other cases, the counterparty that replaced the previous reporting counterparty is the reporting party, unless otherwise agreed by the counterparties.

To ensure the completeness and accuracy of data, all reports for a given swap must be made to a single SDR, which is the SDR that received the initial report of swap data. In the event that no SDR accepts swap data for a particular asset class, reports for that swap asset class must be made directly to the CFTC. If a reporting counterparty discovers an error or omission in data that has previously been reported, it must notify the SDR or the CFTC, as appropriate, as soon as technologically practicable. Likewise, non-reporting counterparties must "promptly" notify reporting counterparties if they discover an error or omission in previously reported data.

C. COMPLIANCE DATES

For the recordkeeping and reporting rule for historical swaps, the CFTC has provided for limited compliance phasing by both asset class and counterparty type.

1. For SDs and MSPs, the compliance date for credit swaps and interest rate swaps will be the later of: July 16, 2012 or 60 calendar days after the publication in the *Federal Register* of the CFTC's final rule defining the term "swap" ("Compliance Date 1").
2. For SDs and MSPs, the compliance date for equity swaps, foreign exchange swaps, and other commodity swaps will be 90 calendar days after Compliance Date 1 ("Compliance Date 2").
3. For Non-SD/MSP counterparties, including end-users, full compliance will begin 90 calendar days after Compliance Date 2.

D. CONCLUSION

The recordkeeping and reporting rules for historical swaps impose new regulatory burdens on all historical swap counterparties. As a result, counterparties to historical swaps must begin to undertake a review of these regulations and the resulting impact on their compliance policies and swap documentation. Among others considerations, historical swap counterparties would be well-advised to consider:

1. an update to recordkeeping policies and record-retention procedures;
2. a review of technological capabilities with respect to record-retrieval and electronic data reporting; and
3. amendments to existing ISDA documentation, including reporting party elections and entity representations.

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For more information about any of the foregoing, please contact a member of the Firm's Derivatives Practice Group.

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