

CLIENT ALERT

CFTC Finalizes Swap Data Reporting Rules, Approves Other Measures

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AUTHORS

**Paul J. Pantano, Jr. | J. Christopher Giancarlo | Athena Eastwood | Neal E. Kumar
Michael Hartz**

On September 17, 2020, the CFTC held an open meeting during which it unanimously approved three final rules related to swap data reporting.¹ The compliance date for these final rules is 18 months from the date of publication in the Federal Register.² Although the date of publication in the Federal Register is unknown, if the final rules are published in October 2020, the compliance date would be in April 2022. One critical aspect to the new reporting framework is that reporting counterparties have an obligation to reconcile their books and records against reports provided by a swap data repository (“SDR”). If the reporting counterparty discovers (or should have discovered) errors or omissions in the SDR reports, the reporting counterparty must correct those reports within seven business days of discovering the error or omission. If the reporting counterparty cannot correct the error or omission within seven business days, then the reporting counterparty must notify the CFTC’s Division of Market Oversight, and include a remediation plan if such plan is available. These new obligations will impose a significant burden on the compliance, legal, and technology departments across the industry to address reporting errors, and potentially interact with the regulator on an accelerated timeframe.

Below is a brief overview of key changes resulting from the final swap data reporting rules approved at the open meeting. The Commission also approved two other measures: a final rule governing compliance by non-U.S.-based derivatives clearing organizations (“DCOs”), and a re-proposed rule regarding DCO bankruptcies.

¹ See Commodity Futures Trading Commission, *CFTC Finalizes Rules to Improve Swap Data Reporting, Approves Other Measures at September 17 Open Meeting* (Sep. 17, 2020), [here](#).

² See Real-Time Public Reporting Requirements at 156–57 (Sep. 17, 2020) (to be codified at 17 C.F.R. pt. 43) (voting draft), [here](#).

CFTC Finalizes Swap Data Reporting Rules, Approves Other Measures

Please contact us if you have any questions about how these final rules will affect your organization's compliance with CFTC regulations.

Final Rule: Amendments to the Real-Time Public Reporting Requirements (Part 43)

The Commission approved the final "Real-Time Public Reporting Requirements" rule, which will amend Part 43 of the CFTC regulations.³ The final Part 43 rule amends the list of specific data elements subject to Part 43 real-time reporting, and also provides a greater degree of guidance for each data element. The enhanced guidance was designed to promote uniformity when reporting counterparties submit real-time reports to an SDR. In addition, the final Part 43 rule will alter the reporting rules for block trades and reduce the amount of duplicative and non-essential data for post-priced swaps and prime brokerage transactions.

The final Part 43 rule modifies the dissemination delay for reporting block trades, the size threshold for a swap to be eligible for the block trade reporting delay, and the ability to mask the size of large swap transactions. The approach the CFTC adopted to determine the length of the real-time dissemination delay utilizes factors such as liquidity and market depth. This flexible approach differs from the proposed uniform 48-hour dissemination delay across all swaps. The net impact between the proposed 48-hour delay and the final adopted delay appears to be that most block trades will be subject to a shorter reporting delay under the final Part 43 rule compared to the proposed rule.⁴ In terms of the size threshold for a swap to be eligible as a block trade, the final rule increases the threshold amount for block trade treatment from a 50% to a 67% notional calculation. Finally, under the CFTC's current real-time reporting rules, the notional size of a swap disseminated to the market is capped at a specific notional size, so if the size of a swap meets or exceeds the cap, only the cap is disseminated to the market. Under the final rule, the CFTC increased the size of the cap, which means more swaps will be disseminated with the actual notional size as opposed to the capped notional size.⁵

The Commission also clarified the timing for reporting post-priced and prime-brokerage swaps. Under the final Part 43 rule, post-priced swaps will not be published to the market until after pricing occurs.⁶ Reporting counterparties, however, may still be required to report post-priced swaps to an SDR before the price is set. The final Part 43 rule follows the proposed rule's approach, namely that post-priced swaps must be reported by the earlier of (a) the price being determined, or (b) 11:59:59 pm eastern time on the execution date.⁷ Then, once price data is determined, it must be

³ See *id.* at 1.

⁴ See Commodity Futures Trading Commission, *Statement of Chairman Heath P. Tarbert in Support of Final Rules on Swap Data Reporting* (Sep. 17, 2020) (the "Tarbert Statement of Support"), [here](#).

⁵ See *id.*

⁶ See *id.*

⁷ See Real-Time Public Reporting Requirements at 28 (Sep. 17, 2020) (to be codified at 17 C.F.R. pt. 43) (voting draft), [here](#).

CFTC Finalizes Swap Data Reporting Rules, Approves Other Measures

reported as soon as technologically practicable (“ASATP”). Additionally, the final Part 43 rule will reduce the reporting requirements for swaps executed with prime brokers to avoid publishing duplicative data on the public tape.⁸

Final Rule: Amendments to the Swap Data Recordkeeping and Reporting Requirements (Part 45)

The Commission also approved the final “Swap Data Recordkeeping and Reporting Requirements” rule, which primarily amends Part 45 of the CFTC regulations.⁹ Among other things, the final Part 45 rule will streamline the data reported to SDRs, require certain counterparties to report uncleared margin, and increase the amount of time for parties to report trades to an SDR. The rule also seeks to harmonize CFTC requirements with international standards.

The final Part 45 rule substantially reduces the number of data fields to be reported to SDRs. The current approach, in which parties report hundreds of different data fields, will be replaced by the requirement to report a streamlined set of 128 data fields.¹⁰ In his statement of support, Chairman Tarbert asserted that the required data fields are those that “truly advance the CFTC’s regulatory goals,” including that “market participants are not burdened with swap reporting obligations that do not advance [the Commission’s] statutory mandates.”¹¹

Although the rule streamlines some data fields, it also introduces new reporting elements. For example, swap dealer (“SD”) reporting counterparties now will be required to report daily margin and collateral data for uncleared swaps.¹² DCO reporting counterparties will not be required to report margin and collateral data for cleared swaps—instead, the CFTC will continue to rely on margin and collateral data reported by DCOs pursuant to Part 39.¹³ Lastly, non-swap dealer/major swap participant (“MSP”) reporting counterparties will have no requirement to report valuation, margin, or collateral information.¹⁴

The final Part 45 rule also extends the deadline for reporting to an SDR. Currently, trades must be reported ASATP. The new rule requires SD/MSP/DCO reporting counterparties to report swap data by T+1 following the execution date, while non-SD/MSP/DCO reporting counterparties must report swap data by T+2 following the execution date.¹⁵

⁸ See Tarbert Statement of Support.

⁹ See Swap Data Recordkeeping and Reporting Requirements (Sep. 17, 2020) (to be codified at 17 C.F.R. pts. 45, 46, and 49) (voting draft), [here](#).

¹⁰ See *id.* at 261–289.

¹¹ See Tarbert Statement of Support.

¹² See Commodity Futures Trading Commission, *Supporting Statement of Commissioner Brian Quintenz Regarding Final Rules Amending the Swap Data Recordkeeping and Reporting Requirements* (Sep. 17, 2020), [here](#).

¹³ See *id.*

¹⁴ See *id.*

¹⁵ See *id.*

CFTC Finalizes Swap Data Reporting Rules, Approves Other Measures

Notably, the final Part 45 rule aims to harmonize CFTC swap data reporting requirements with international standards. The reportable data fields incorporate certain critical data elements (“CDE”) identified by the Committee on Payments and Infrastructures and the International Organization of Securities Commissioners (the “CPMI-IOSCO”).¹⁶ Additionally, the final Part 45 rule replaces the current system of Unique Swap Identifiers (“USIs”) with Unique Transaction Identifiers (“UTIs”), which more closely aligns CFTC reporting requirements with those of other regulators.

Final Rule: Amendments to the Commission’s Regulations Relating to Certain Swap Data Repository and Data Reporting Requirements (Part 49 Verification)

The Commission also approved the final rule titled “Amendments to the Commission’s Regulations Relating to Certain Swap Data Repository and Data Reporting Requirements,” which will amend Parts 23, 43, 45, and 49 of the CFTC regulations.¹⁷ Among other things, the final rule will modify the requirements for SDRs to confirm the accuracy of reported swap data.

Although the final Part 49 rule will leverage SDR validation procedures, it also requires SDRs to provide reporting counterparties with access to their open swap data in order to correct any errors or omissions. Any errors or omissions must be corrected ASATP, but no later than within seven business days of discovery.¹⁸ If the reporting entity determines that the error will not be corrected in that time period, it must notify the Division of Market Oversight (“DMO”) within 12 hours of that determination.¹⁹ The notification to DMO must include an initial assessment of the scope of the error(s) and an initial remediation plan, if such remediation plan exists.²⁰

The final rule does not use the message-based system for error identification and correction that was contemplated in the proposed rule. Rather, each reporting counterparty must use the mechanism for verification adopted by its SDR. All SD/MSP/DCO reporting counterparties are required to perform verification of open swap data every 30 calendar days, while non-SD/MSP/DCO reporting counterparties must perform verification once every calendar quarter, with at least two months between verifications.²¹

¹⁶ See Tarbert Statement of Support.

¹⁷ See Amendments to the Commission’s Regulations Relating to Certain Swap Data Repository and Data Reporting Requirements (Sep. 17, 2020) (to be codified at 17 C.F.R. pts. 23, 43, 45, and 49) (voting draft), [here](#).

¹⁸ See *id.* at 97.

¹⁹ See *id.*

²⁰ See *id.*

²¹ See *id.* at 99.

CFTC Finalizes Swap Data Reporting Rules, Approves Other Measures

Other Business: Final Rule for Non-U.S. Derivatives Clearing Organizations, and Supplemental Notice of Proposed Rulemaking: Part 190 Bankruptcy Regulations

At the open meeting, the CFTC also unanimously approved a final rule allowing DCOs organized outside the U.S. to be registered with the CFTC. Additionally, the CFTC unanimously approved a supplemental notice of proposed rulemaking for amendments to the CFTC's regulations governing bankruptcy proceedings for commodity brokers.

In adopting the final "Registration With Alternative Compliance for Non-U.S. Derivatives Clearing Organizations" rule, the Commission is allowing DCOs organized outside the U.S. to be registered with the CFTC without the need to adhere to every CFTC regulation applicable to U.S.-based DCOs.²² Rather, these DCOs will be found to be in compliance with CFTC regulations, provided that (1) compliance with the regulatory regime of the DCO's home country constitutes compliance with the CFTC's Core Principles; (2) the DCO is in good standing in its home jurisdiction; (3) the DCO does not pose a substantial risk to the U.S. financial system; and (4) the DCO's home country regulator has a satisfactory memorandum of understanding (or similar arrangement) in effect.²³

Finally, the Commission approved a supplemental notice of proposed rulemaking for the "Part 190 Bankruptcy Regulations" rule.²⁴ In doing so, the Commission invites comments on newly proposed amendments to CFTC regulations concerning commodity broker bankruptcy proceedings. The Commission originally proposed a rule in April 2020, but commenters expressed concern that the rule could have significant, unintended consequences for market participants with contracts cleared at the bankrupt DCO.²⁵ The supplemental notice of proposed rulemaking provides new, alternative provisions intended to avoid the impacts indicated by commenters.

If you have any questions regarding this client alert, please contact one of the authors, any member of our CFTC team listed below, or the Willkie attorney with whom you regularly work.

²² See Registration With Alternative Compliance for Non-U.S. Derivatives Clearing Organizations (Nov. 13, 2018) (to be codified in 17 C.F.R. pts. 39 and 140) (voting draft), [here](#).

²³ See Commodity Futures Trading Commission, *Statement of Chairman Heath P. Tarbert in Support of Final Rule on Alternative Compliance for Non-U.S. Clearinghouses* (Sep. 17, 2020), [here](#).

²⁴ See Part 190 Bankruptcy Regulations (Sep. 17, 2020) (to be codified at 17 C.F.R. pt. 190) (voting draft), [here](#).

²⁵ See Commodity Futures Trading Commission, *Statement of Commissioner Dan M. Berkovitz Regarding Part 190 Bankruptcy Regulations, Supplemental Proposal* (Sep. 17, 2020), [here](#).

CFTC Finalizes Swap Data Reporting Rules, Approves Other Measures

Willkie has a dedicated team of attorneys with extensive knowledge and experience in all aspects of the Commodity Exchange Act and the CFTC regulatory regime. We would be pleased to assist on your matters.

Athena Eastwood 202 303 1212 aeastwood@willkie.com	J. Christopher Giancarlo 212 728 3816 jcgiancarlo@willkie.com	Rita M. Molesworth 212 728 8727 rmolesworth@willkie.com	Paul J. Pantano Jr. 202 303 1211 ppantano@willkie.com
Deborah A. Tuchman 212 728 8491 dtuchman@willkie.com	Conrad G. Bahlke 212 728 8233 cbahlke@willkie.com	Lisa Eskenazi 212 728 3349 leskenazi@willkie.com	Neal E. Kumar 202 303 1143 nkumar@willkie.com
James E. Lippert 212 728 8945 jlippert@willkie.com	Steven C. Matos 212 728 8757 smatos@willkie.com	Michael Hartz 202 303 1161 mhartz@willkie.com	

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