

## RECORDKEEPING AND REPORTING FOR HISTORICAL SWAPS

The Commodity Futures Trading Commission has proposed rules<sup>1</sup> regarding recordkeeping and reporting with respect to:

- swaps entered into prior to the enactment of Dodd-Frank<sup>2</sup> on July 21, 2010 (the “**Enactment Date**”), that had not expired as of the Enactment Date (“**Pre-Enactment Swaps**”); and
- swaps entered into on or after the Enactment Date but prior to the Compliance Date (as explained below) (“**Transition Swaps**”).

Proposed Part 46 refers to Pre-Enactment Swaps and Transition Swaps collectively as “**Historical Swaps.**”

### A. Reporting of Historical Swaps

#### 1. When should the data be reported?

Historical Swaps will have to be reported beginning on a date specified by the CFTC in its Part 45 swap data reporting and recordkeeping rules (“**Compliance Date**”).<sup>3</sup> The CFTC has not yet published final rules for Part 45.

#### 2. Who is responsible for reporting?

One counterparty to a Historical Swap must report the swap. If only one counterparty to a swap transaction is a swap dealer (“**SD**”), the SD must report the swap. If one counterparty to a swap transaction is a major swap participant (“**MSP**”) and the other counterparty is neither an SD nor an MSP (“**non-SD/MSP counterparty**”), the MSP must report the swap. Where two counterparties have the same status, whether they are both SDs, MSPs or non-SD/MSP counterparties, the counterparties must select one counterparty between them to report the swap. Where only one counterparty to a swap is a U.S. person, the U.S. person must report the swap.

Determination of which counterparty must report would be made as of the Compliance Date or the date of the swap’s expiration or termination, as applicable.

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<sup>1</sup> CFTC Proposed Rule, *Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps*, 76 Fed. Reg. 22833 (April 25, 2011) (“**Proposed Part 46**”).

<sup>2</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub.L. 111-203, H.R. 4173).

<sup>3</sup> See CFTC Proposed Rule, *Swap Data Reporting and Recordkeeping Requirements*, 75 Fed. Reg. 76574 (December 8, 2010) (“**Proposed Part 45**”).

### 3. Where to report.

Historical Swaps will be reported to a swap data repository, or to the CFTC if no swap data repository for swaps in the asset class is available.

### 4. What to report.

#### *Historical Swaps in existence on or after April 25, 2011*

For each Historical Swap in existence on or after April 25, 2011, the reporting counterparty would be required to report:

- certain terms specified in the appendix to Proposed Part 46<sup>4</sup> (“**Minimum Primary Economic Terms**”);
- the Unique Counterparty Identifier;<sup>5</sup>
- the internal counterparty identifier to identify the non-reporting counterparty; and
- the internal transaction identifier to identify the master agreement governing the swap.

For each Historical Swap, the reporting counterparty would be required to report throughout the existence of the swap all swap continuation data<sup>6</sup> required by Proposed Part 45. A non-SD/MSP reporting counterparty, in some cases, may be permitted to report only the swap continuation data that is in its possession.

#### *Expired or Terminated Historical Swaps*

With respect to each Historical Swap that expired or was terminated prior to April 25, 2011, the reporting counterparty would be required to report:

- for Pre-Enactment Swaps, the information that was in the reporting counterparty’s possession on or after October 14, 2010;<sup>7</sup> or
- for Transition Swaps, the information that was in the reporting counterparty’s possession on or after December 17, 2010.<sup>8</sup>

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<sup>4</sup> See 76 Fed. Reg. at 22846.

<sup>5</sup> See 75 Fed. Reg. at 76589.

<sup>6</sup> See 75 Fed. Reg. at 76601.

<sup>7</sup> Counterparties to Pre-Enactment Swaps are required to keep all information required by *Interim Final Rule for Reporting Pre-Enactment Swap Transactions*, 75 Fed. Reg. 63080 (October 14, 2010).

<sup>8</sup> Counterparties to Transition Swaps are required to keep all information required by *Interim Final Rule for Reporting Certain Post-Enactment Swap Transactions*, 75 Fed. Reg. 78892 (December 17, 2010). See Willkie Farr & Gallagher LLP Client Memorandum, *CFTC and SEC Adopt Interim Swap Reporting Rules*, November 1, 2010.

**B. Recordkeeping**

*Historical Swaps in existence on or after April 25, 2011*

Each counterparty to a Historical Swap that is in existence on or after April 25, 2011 would be required to maintain records with respect to each swap, including:

- Minimum Primary Economic Terms;
- swap confirmation terms;
- any master agreement governing the swap, and any modification thereto; and
- any credit support agreement relating to the swap, and any modification thereto.

*Expired or Terminated Historical Swaps*

Each counterparty to a Historical Swap that expired or was terminated prior to April 25, 2011 would have to keep:

- for Pre-Enactment Swaps, the information and documents possessed by the counterparty on or after October 14, 2010;<sup>9</sup> or
- for Transition Swaps, the information and documents possessed by the counterparty on or after December 17, 2010.<sup>10</sup>

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May 18, 2011

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<sup>9</sup> See note 7.

<sup>10</sup> See note 8.