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New Swap Data Recordkeeping And Reporting Rules

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The Commodity Futures Trading Commission has issued a final rule¹ regarding reporting and recordkeeping

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with respect to swaps. The effective date of the rule is March 13, 2012; compliance dates are dependent upon the completion of other CFTC rulemakings.

I. Reporting Of Swaps

A. Compliance dates

There are three staggered compliance dates based on the types of swaps and the entities involved.

Swap execution facilities, designated contract markets, derivatives clearing organizations, swap data repositories ("SDRs"), swap dealers ("SDs") and major swap participants ("MSPs") will need to be in compliance with respect to credit swaps and interest rate swaps² on the later of July 16, 2012 or 60 calendar days after the CFTC publishes either its final rule defining "swap" or its final rule defining "swap dealer" and "major swap participant."

With respect to equity swaps, foreign exchange swaps and other commodity

swaps, those same entities must be in compliance within 90 days of the first compliance date.

Non-swap dealers and non-major swap participants ("non-SD/MSPs") must be in compliance with respect to all swaps within 90 days of the second compliance date.

B. Who is responsible for reporting?

One counterparty to a swap must report the swap.³ If only one counterparty is an SD, the SD must report the swap. If one counterparty to a swap transaction is an MSP and the other counterparty is a non-SD/MSP, the MSP must report the swap. If both counterparties are non-SD/MSPs and only one is a financial entity,⁴ the financial entity must report the swap. If both counterparties are SDs, or both are MSPs, or both are non-SD/MSPs and are financial entities, or both are non-SD/MSPs and neither is a financial entity, then the counterparties must select one counterparty between them to report the

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swap. Where only one counterparty to a swap is a U.S. person, the U.S. person must report the swap.

Reporting parties may also contract with third parties to facilitate reporting, although such reporting parties will remain fully responsible for their reporting obligations.

C. Where to report

Swap data will be reported to an SDR, or to the CFTC if no SDR for swaps in the relevant asset class is available. Assuming that there is a registered SDR ready to accept the data, reporting parties will need to be proactive in implementing the necessary procedures and systems to connect with, and report to, such SDR by the compliance date.⁵ In addition, based on the timing limits within which data must be reported as summarized below, reporting parties should develop systems to electronically document their swaps to facilitate prompt reporting.

D. Content and timing of reports

Creation Data. For each swap, the counterparties will need to report the primary economic terms (“PET”) data of the swap verified or matched by the counterparties shortly after the time of execution and all of the terms of the swap included in the legal confirmation of the swap. The Appendix to the final rule includes, among other things, minimum PET data that need to be reported. Reporting parties should have systems in place that can track and identify each of the specified data elements. Reporting times and requirements vary based on whether the swap is executed off-facility, whether the swap is accepted for clearing, the parties involved and the applicable reporting counterparty and, in some cases, the type of swap.⁶ In general, times range from (i) “as soon as technologically practicable after execution” for trades executed on a swap execution facility or designated contract market to (ii) no later than 30 minutes (or one hour in the first year following the compliance date) following execution of a swap that is not subject to mandatory clearing.

Continuation Data. Continuation data

include all of the data elements that must be reported during the existence of a swap to ensure that all data in the SDR concerning the swap remain current and accurate. Continuation data include all changes to the PET of the swap occurring during the swap’s existence and all valuation data for the swap. Reporting counterparties must report either life cycle event data (any event resulting in a change to data previously reported in connection with the swap) or “state” data (all data necessary to provide a daily snapshot of the PET data of the swap). The party with the initial reporting obligation is also obligated to report continuation data.

Unique Swap Identifier. Each swap subject to the CFTC’s jurisdiction must have a unique swap identifier (“USI”). In general, each execution facility or designated contract market will create and assign a USI prior to reporting creation data and the reporting SD or MSP counterparty will create and assign a USI for swaps executed off-facility.

Unique Product Identifier. Each swap subject to the CFTC’s jurisdiction must have a unique product identifier (“UPI”). Until the CFTC’s designation of UPIs and a product classification system, in order to facilitate the real-time reporting of swaps, reporting parties will be required to identify each swap “with sufficient distinctiveness and specificity” so that the CFTC and other regulators can fulfill their responsibilities.

“... based on the timing limits within which data must be reported as summarized below, reporting parties should develop systems to electronically document their swaps to facilitate prompt reporting.”

II. Recordkeeping

Each swap execution facility, designated contract market, derivatives clearing organization, SD and MSP subject to

these rules will need to keep full, complete and systematic records, together with all pertinent data and memoranda, relating to all activities with respect to swaps. Each non-SD/MSP counterparty must keep full, complete and systematic records, together with all pertinent data and memoranda, with respect to each swap in which it is a counterparty.

How long must records be retained?

All records must be kept for the life of the swap plus five years. The records must be retrievable via real-time electronic access by the registrant throughout the life of the swap and for the following two years, and must be retrievable within three business days throughout the remainder of the recordkeeping period. For non-SD/MSPs, records must be retrievable within five business days throughout the retention period. SDRs must keep records retrievable via real-time electronic access for the life of the swap plus five years, and then for ten additional years, in archival storage, retrievable within three business days.

¹ CFTC Final Rule, *Swap Data Recordkeeping and Reporting Requirements*, 77 Fed. Reg. 2136 (Jan. 13, 2012).

² Credit swap means “any swap that is primarily based on instruments of indebtedness, including, without limitation: Any swap primarily based on one or more broad-based indices related to instruments of indebtedness; and any swap that is an index credit swap or total return swap on one or more indices of debt instruments.” Interest rate swap means “any swap which is primarily based on one or more interest rates, such as swaps of payments determined by fixed and floating interest rates; or any swap which is primarily based on rates of exchange between different currencies, changes in such rates, or other aspects of such rates (sometimes known as cross-currency swaps).” *Id.* at 2197.

³ While the Swap Data Recordkeeping and Reporting Requirements Release requires that all swaps, whether between 100%-owned subsidiaries or otherwise, need to be reported to an SDR or the CFTC, the CFTC distinguished between such types of swaps in its Real-Time Public Reporting of Swap Transaction Data Release. See CFTC Final Rule, *Real-Time Public Reporting of Swap Transaction Data*, 77 Fed. Reg. 1182 (Jan. 9, 2012).

⁴ For the purposes of this rule, “financial entity” is defined under the Commodity Exchange Act Section 2(h)(7)(C).

⁵ As of the time of this memo, final SDR registration rules had not been released.

⁶ See Section 45.3 of *Swap Data Recordkeeping and Reporting Requirements*, 77 Fed. Reg. at 2199.