

## ADVISORY | Dodd-Frank Act

January 19, 2012

### CFTC FINALIZES RULES ON SWAP DATA RECORDKEEPING AND REPORTING AND REAL-TIME REPORTING

On December 20, 2011, the Commodity Futures Trading Commission (“CFTC” or “Commission”) unanimously approved two final rules governing the swap data recordkeeping and reporting and real-time reporting requirements under the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”). The final rules on swap data recordkeeping and reporting impose new recordkeeping and reporting requirements on all swap counterparties and on swap data repositories (“SDRs”), derivatives clearing organizations (“DCOs”), designated contract markets (“DCMs”), and swap execution facilities (“SEFs”). The final rules on real-time reporting require real-time reporting of certain swap transaction and pricing data to SDRs and public dissemination of certain swap transaction and pricing data by SDRs. The final rules are effective 60 days after publication in the Federal Register but provide for phased-in compliance dates after key terms such as “swap” are defined by the CFTC in further rulemaking.

#### DODD-FRANK REQUIREMENTS AND PROPOSED RULES

Title VII of Dodd-Frank amends the Commodity Exchange Act to establish a comprehensive new regulatory framework for swaps and imposes new reporting and disclosure requirements for swap market participants. In addition to creating SDRs as a new category of registrant, various Dodd-Frank provisions detail or require rulemaking specifying what swap information is to be reported, by what parties, and how and what information is to be made available to the public in “real time.” The various rules are designed to provide regulators with comprehensive swap transaction data and to fulfill Dodd-Frank’s purpose of enhancing the price discovery process through real-time reporting to the public of certain swap transaction data, including price.

In December 2010, the Commission proposed rules to institute the new reporting framework for swaps. One set of proposed rules categorized swap information into swap creation and swap continuation data and required swap market counterparties and DCMs and SEFs to report such data within certain timeframes to an SDR for regulatory oversight. This set of proposed rules also called for swap market counterparties as well as DCMs, SEFs, and SDRs to maintain records on swaps, with the retention period and accessibility of the records varying by swap participant.

A second set of rules proposed guidelines for public reporting of swap transaction and pricing data and designated entities that would be responsible for reporting such data while also preserving the anonymity of counterparties. The proposed rules further provided procedures for determining the appropriate minimum block sizes for block trades and large notional swaps and specified the appropriate time delays for public dissemination of block trades and large notional swaps.

After a significant comment period, the CFTC approved final rules with certain modifications from the proposed versions. This advisory summarizes the final rules, discusses key changes from the

proposed versions, and highlights responsibilities of end-user market participants under the new reporting and recordkeeping requirements.

## COMPLIANCE DATES OF FINAL RULES

Both final rules have phased-in compliance dates that differ by type of reporting entity and type of swap transaction; there are three compliance dates of interest.

The final rules on swap data recording and recordkeeping set forth the following compliance dates:

- Compliance Date 1. SDRs, SEFs, DCMs, DCOs, SDs, and MSPs must comply with all requirements that relate to credit swaps and interest rate swaps on the later of July 16, 2012, or 60 days after the Commission defines “swap,” “swap dealer,” and “major swap participant.”
- Compliance Date 2. SDRs, SEFs, DCMs, DCOs, SDs, and MSPs must comply with all requirements that relate to equity swaps, foreign exchange transactions, and other commodity swaps 90 days after Compliance Date 1 (October 2012, at the earliest).
- Compliance Date 3. Counterparties who are neither SDs nor MSPs (“non-SD/MSP counterparties”) must comply with all requirements as they relate to all categories of swaps 90 days after Compliance Date 2 (January 2013, at the earliest).

The final rules on real-time reporting set forth the following compliance dates:

- Compliance Date 1. SDRs, SEFs, DCMs, SDs, and MSPs must comply with all requirements that relate to credit swaps and interest rate swaps according to the follow schedule: (a) for swaps executed on or pursuant to the rules of an SEF or DCM and off-platform swaps where at least one party is an SD or MSP, the later of July 16, 2012, or 60 days after the Commission defines “swap,” “swap dealer,” and “major swap participant”; and (b) for swaps not executed on or pursuant to the rules of an SEF or DCM where at least one party is an SD or MSP, the later of 180 days after the publication of the final rules in the Federal Register or 60 days after the Commission defines “swap,” “swap dealer,” and “major swap participant.”
- Compliance Date 2. SDRs, SEFs, DCMs, SDs, and MSPs must comply with all requirements that relate to equity swaps, foreign exchange transactions, and other commodity swaps 90 days after Compliance Date 1 (October 2012, at the earliest).
- Compliance Date 3. All entities, including non-SD/MSP counterparties, must comply with all requirements as they relate to all categories of swaps 90 days after Compliance Date 2 (January 2013, at the earliest).

## FINAL RULES ON SWAP DATA RECORDKEEPING AND REPORTING

The final rules on swap data recordkeeping and reporting require all swap counterparties as well as SEFs, DCMs, and DCOs to keep records throughout the existence of a swap and for five years following the swap’s termination or expiration. SDRs must keep records throughout the existence of a swap and for fifteen years following the swap’s termination or expiration. Additionally, for SEFs, DCMs, DCOs, SDs, and MSPs, the records must be readily accessible for the life of the swap plus two years, and retrievable within three business days for the remaining three years of the mandatory retention period. For non-SD/MSP counterparties, the records must be retrievable within five business days throughout the mandatory retention period. In a change from the proposed rule, non-SD/MSP counterparties may maintain records in either electronic or paper form. Other entities and counterparties, by contrast, must maintain records in electronic form subject to a limited exception.

The final rules require electronic reporting to an SDR of both swap creation data and swap continuation data. Swap creation data includes all primary economic terms (“PET”) and confirmation data of the swap. Swap continuation data includes all changes to PET and valuation data that occur during the life of the swap. The Commission rejected proposals from commenters that would have permitted the reporting of less data, but certain changes were made to ease the reporting burden on non-SD/MSP counterparties.

## SWAP CREATION DATA

The reporting requirements for swap creation data are largely determined by the manner in which the swap is executed. Generally:

- For all swaps executed on a platform (whether cleared or uncleared), the SEF or DCM must report all required creation data “as soon as technologically practicable” after execution. For cleared swaps, the DCO must report all confirmation data as soon as technologically practicable after clearing.
- For off-platform swaps accepted for clearing within the applicable deadline for reporting PET data, the DCO must report all required creation data as soon as technologically practicable after clearing.
- For off-platform swaps not accepted for clearing within the applicable deadline for reporting PET data, the reporting counterparty must report the required swap creation data within prescribed time limits. The time limits are extended for non-SD/MSP counterparties.

## SWAP CONTINUATION DATA

In response to comments, the CFTC made significant changes to the proposed reporting rules for swap continuation data. Whereas the proposed rules varied swap continuation reporting obligations of market participants by asset class, the final rules simplify the obligations. Generally, for all cleared swaps, the DCO must report continuation data, and SD and MSP reporting counterparties must report valuation data. For all uncleared swaps, the reporting counterparty—whether an SD or MSP or a non-SD/MSP counterparty—must report continuation data. The time permitted for submitting reports varies by participant type. DCOs, SDs, and MSPs must submit continuation data reports the same day a relevant change occurs. The rules phase in non-SD/MSP counterparty obligations, requiring continuation data reports by the end of the second business day following the date of a relevant change during the first year of reporting, and by the end of the first business day following the date of a relevant change thereafter.

In another departure from the proposed rules, the final rules do not mandate a particular method for reporting continuation data. So long as continuation data is reported in a manner sufficient to ensure that information in the SDR concerning the swap is current and accurate, and includes all changes to the PET of the swap, market participants are free to employ either the life cycle or snapshot reporting method.

In general, the final rules reduce the reporting burden to non-SD/MSP counterparties from the proposed rules. Essentially, end users only have reporting obligations when contracting with other end users and, even then, obligations are generally limited to off-facility, uncleared swap data. Further, where non-SD/MSP counterparties have reporting obligations, the deadlines for reporting have been extended. Finally, market participants with reporting obligations may contract with third-party service providers to ease the burden of reporting. However, market participants themselves remain at all times responsible for compliance with the reporting rules.

The final rules on swap data recordkeeping and reporting and appendices listing the PET for swaps by asset class are available [here](#).

## FINAL RULES ON REAL-TIME REPORTING

The CFTC also finalized rules requiring reporting for the purpose of real-time dissemination to the public of swap information. Under the final rules, all “publicly reportable swap transactions” must be reported to an SDR for public dissemination. A “publicly reportable swap transaction” is (a) any swap that is an arm’s-length transaction between two parties that results in a corresponding change in the market risk position between the two parties, or (b) any termination, assignment, novation, exchange, transfer, amendment, conveyance, or extinguishing of rights or obligations of a swap that changes the pricing of a swap. Specifically excluded from that definition are inter-affiliate swaps between wholly-owned subsidiaries of the same parent company and portfolio compression exercises. Although such transactions result in a corresponding change in the market risk position between swap parties, the Commission concluded that they are not at arm’s length, and thus not subject to the real-time reporting requirements.

Swap transaction and pricing data must be reported to an SDR “as soon as technologically practicable” after execution of a publicly reportable swap transaction. This means as soon as possible taking into consideration the prevalence of technology and implementation and use of technology by comparable market participants. In adopting this standard, the Commission declined to prescribe rigid reporting deadlines. Instead, it indicated that a flexible standard was needed to account for different technological capabilities of markets and market participants. The timing for what is “as soon as technologically practicable,” therefore, will likely depend on the type of market participant charged with reporting and the type of swap executed.

The time for submission of swap data to an SDR begins when the swap is executed. As set forth in the final rules, execution of a swap occurs when a legally-binding agreement arises between the parties (whether orally, in writing, electronically, or otherwise) to the terms of a swap. Execution of a swap may involve, but does not require, agreement to all of the swap’s terms.

The real-time reporting provisions cover publicly reportable swap transactions, whether cleared or uncleared, and whether executed on or off an exchange, in all five asset classes (i.e., interest rate, credit, equity, foreign exchange, and other commodity swaps). However, the final rules generally forbid public dissemination of swap transactions and pricing data in ways that do not protect the anonymity of counterparties. Some commenters argued that dissemination of even the underlying commodity for certain “other commodity” class transactions could jeopardize anonymity. For liquid commodity contracts having high open interest, the Commission determined that dissemination of the underlying asset will not jeopardize the anonymity of parties.

For off-platform swaps that neither reference nor economically relate to the twenty-eight physical commodity contracts enumerated in the final rules and the Brent Crude Oil ICE contract, the Commission determined that further study was warranted and that, therefore, the real-time reporting provisions will not reach such swaps.<sup>1</sup> In a forthcoming release the CFTC intends to propose special accommodations for public dissemination of these swaps to address concerns that public dissemination of their transaction and pricing data risks disclosing the identities and market positions of parties.

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<sup>1</sup> These swaps nevertheless will be subject to the reporting requirements established by the final rules on swap data recordkeeping and reporting.

Parties to a swap are responsible for reporting swap transaction and pricing data to an SDR. For publicly reportable swap transactions executed on an SEF or DCM, parties fulfill this obligation by executing the swap on or pursuant to the rules of the platform; the relevant SEF or DCM must report the swap transaction and pricing data to an SDR for public dissemination.

For publicly reportable swap transactions not executed on an SEF or DCM, the following parties must report the swap transaction and pricing data to an SDR for public dissemination:

- The SD or MSP, if only one party is an SD or MSP;
- The SD, if one party is an SD and the other party is an MSP; and
- A party designated by agreement of the parties, in all other situations.

Parties may contract out of the reporting hierarchy, but only if they do so before execution of the swap. Any such alternate arrangement would be a term of the swap.

Upon receiving swap transaction and pricing data from market participants for a publicly reportable swap transaction, SDRs must publicly disseminate such data as soon as technologically practicable, unless the swap transaction is subject to a time delay. The time delays, which will be phased in over a two-year period, differ based on, among other things, the type of execution, underlying asset, and market participant. All block trades and large notional off-platform swaps are subject to time delays.

In response to comments, the Commission did not adopt proposed provisions relating to the establishment of block trade sizes. According to the Commission, further study and analysis of block trade data is needed before establishing minimum block trade sizes. The final rules provide that until the CFTC establishes an appropriate minimum block size for a swap or group of swaps, time delays will apply to all swaps that do not have an appropriate minimum block size. Thus, for the time being, all publicly reportable swap transactions will be subject to time delays.

Other significant aspects of the final rules include:

- Foreign exchange swaps and forwards will not be subject to the real-time reporting requirements to the extent they are excluded from the definition of “swap” by a final determination of the Department of the Treasury (“Treasury”). Treasury issued a proposed determination on April 29, 2011, stating that foreign exchange swaps and forwards would be excluded from the definition of swap. However, Treasury’s proposal would not exclude foreign exchange options and non-deliverable forwards. The real-time reporting regime will still apply to foreign exchange instruments not excluded from the definition of swap by Treasury.
- Noting the global nature of the swaps market, the Commission added a definition for “business day.” “Business day” means the twenty-four hour day on all days except Saturdays, Sundays, and legal holidays in the location of the reporting party or registered entity reporting data for the swap.
- Fees charged by an SDR must be equitable and non-discriminatory.
- The Commission did not adopt its proposal permitting publicly reportable swap transactions executed on an SEF or DCM to be publicly disseminated by sending the swap transaction and pricing data to either an SDR or a third-party disseminator. All real-time swap transaction and pricing data must be reported to an SDR—and an SDR only—for public dissemination.
- The CFTC abandoned all proposed recordkeeping requirements, except those relating to timestamps. The Commission determined that the recordkeeping requirements in the real-time reporting rule were unnecessarily duplicative of recordkeeping requirements in the proposed rules on swap data recordkeeping and reporting.

The final rules on real-time reporting are available [here](#).

If you have any questions about the CFTC's rulemakings or their impact on your business, please contact the following members of our firm:

<b>Allison Lurton</b>	202.662.5576	<a href="mailto:lurtonap@cov.com">lurtonap@cov.com</a>
<b>Bruce Bennett</b>	212.841.1060	<a href="mailto:bbennett@cov.com">bbennett@cov.com</a>
<b>Robert Fleishman</b>	202.662.5523	<a href="mailto:rfleishman@cov.com">rfleishman@cov.com</a>
<b>William Massey</b>	202.662.5322	<a href="mailto:wmassey@cov.com">wmassey@cov.com</a>
<b>Mike Sorrell</b>	202.662.5181	<a href="mailto:sorrellmr@cov.com">sorrellmr@cov.com</a>

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