

## CFTC Finalizes Swap Data Recordkeeping and Reporting Requirements

The Commodity Futures Trading Commission (CFTC) on December 20, 2011 finalized two rules related to swap data reporting, recordkeeping and public dissemination under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act). The CFTC has also finalized its extension of temporary exemptive relief for certain swap regulatory requirements.

### Real-Time Public Reporting of Swap Transaction Data

Section 727 of the Dodd-Frank Act added new Section 2(a)(13) to the Commodity Exchange Act (CEA), which requires that the CFTC adopt rules to implement a real-time public reporting regime for swap transaction and pricing data. The CFTC has now adopted final rules (Public Reporting Rules) implementing this statutory requirement.<sup>1</sup>

Under the Public Reporting Rules, transaction and pricing data must be reported to the appropriate swap data repository (SDR), when registered and operational, for (1) any executed swap that is an arm's-length transaction between two parties that results in a corresponding change in the market risk position between such parties, and (2) any termination, assignment, novation, exchange, transfer, amendment, conveyance, or extinguishing of rights or obligations of a swap that changes the

pricing of such swap. As such, internal swaps between wholly owned subsidiaries of the same parent and swaps providing portfolio compression, among others, would not be required to be reported under the Public Reporting Rules.

Data on swaps meeting either of the above two criteria must be reported whether the swaps are executed on a regulated trading platform (such as a swap execution facility (SEF), a designated contract market (DCM)), or bilaterally (also referred to as off-facility). For swaps executed on an SEF or DCM, the SEF or DCM must transmit the relevant data to an SDR as soon as technologically practicable after execution.<sup>2</sup> In off-facility swap transactions, the "reporting party" is responsible for reporting the relevant data to an SDR as soon as technologically practicable after execution. The responsibility for reporting off-facility swaps is as follows:

- If only one party is a swap dealer (SD) or major swap participant (MSP), the SD or MSP is the reporting party.

<sup>1</sup> Real-Time Public Reporting of Swap Transaction Data, 77 Fed. Reg. \_\_ (\_\_, 2012) (to be codified at 17 C.F.R. Part 43). At the time of publication of this *DechertOnPoint*, the final rules discussed have not yet been published in the Federal Register. This update is based on copies of the rules, available at [http://www.cftc.gov/PressRoom/Events/opaevent\\_cftcdoddfrank122011](http://www.cftc.gov/PressRoom/Events/opaevent_cftcdoddfrank122011), and does not reflect any technical amendments that may be made to the rules before official publication.

<sup>2</sup> "Execution" is defined as an agreement by the parties (whether orally, in writing, electronically, or otherwise) to the terms of a swap that legally binds such parties to such swap terms under applicable law. Execution occurs simultaneously with or immediately following the affirmation of a swap.

- If one party is an SD and the other party is an MSP, the SD is the reporting party.
- If both parties are SDs, the SDs must designate which of the two will be the reporting party.
- If both parties are MSPs, the MSPs must designate which of the two will be the reporting party.
- If neither party is an SD or MSP, the parties must designate which of the two (or its agent) will be the reporting party.<sup>3</sup>

SDRs are responsible for publicly disseminating the swap transaction and pricing data that they receive from this process as soon as technologically practicable after such data is received, subject to certain provisions and time delays discussed below that are designed to protect market participant anonymity and liquidity.

No data that identifies or facilitates the identification of a party to a swap will be publicly available. However, parties reporting swap data to an SDR must include an actual description of the underlying assets. Such information on the underlying assets will be publicly disseminated for all publicly reportable swap transactions in the interest rate, credit default, equity, and foreign exchange asset classes. With regard to swaps with other underlying commodity assets, the information on the underlying assets will be publicly disseminated for publicly reportable swap transactions involving any of 29 physical commodity contracts — the 28 “enumerated physical commodity contracts” identified in the CFTC’s recently finalized position limits rules<sup>4</sup> plus Brent Crude Oil — and publicly reportable swap transactions economically related to one of those physical commodity contracts.

The Public Reporting Rules also place caps, under certain circumstances, on the notional or principal

<sup>3</sup> Where only one of the non-SD/MSP counterparties is a “financial entity” as defined under CEA §2(h)(7)(C), then that entity will be the reporting counterparty.

<sup>4</sup> ICE U.S. Cocoa, ICE U.S. Coffee C, CBOT Corn, ICE U.S. Cotton No. 2, CME Feeder Cattle, ICE U.S. FCOJ-A, CME Lean Hogs, CME Live Cattle, CME Class III Milk, CBOT Oats, CBOT Rough Rice, CBOT Soybeans, CBOT Soybean Meal, CBOT Soybean Oil, ICE U.S. Sugar No. 11, ICE U.S. Sugar No. 16, CBOT Wheat, MGE Hard Red Spring Wheat, KCBOT Hard Winter Wheat, COMEX Gold, COMEX Silver, COMEX Copper, NYMEX Palladium, NYMEX Platinum, NYMEX Light Sweet Crude Oil, NYMEX New York Harbor No. 2 Heating Oil, NYMEX New York Harbor Gasoline Blendstock, and NYMEX Henry Hub Natural Gas.

amount of a swap transaction that will be made publicly available. Such caps act to mask from public view the actual size of a transaction above the threshold set by the applicable cap. For interest rate swaps, the amount publicly disseminated for swaps with a term: from zero to two years is capped at \$250 million; greater than two years but less than or equal to ten years is capped at \$100 million; and greater than ten years is capped at \$75 million. With respect to credit default swaps, the cap is set at \$100 million. For equity swaps, the cap is set at \$250 million. For foreign exchange swaps, the cap is set at \$250 million. For other commodity swaps, the cap is set at \$25 million.<sup>5</sup>

The time delay between execution and public dissemination of transaction and pricing data will depend on a number of factors, including the underlying assets, the type of market participant, and the type of execution. Delays during the first year the Public Reporting Rules are in effect will vary from 30 minutes to 48 business hours, but such delays are set to decrease after the first year the Public Reporting Rules are effective.

Compliance dates for the Public Reporting Rules are staggered according to applicable type of market participant and underlying asset. The earliest compliance date is July 16, 2012, when all SEFs, DCMs, SDs and MSPs will be required to start reporting swap transaction data with respect to interest rate and credit default swaps. Those swaps include transactions where only one of the parties is an SD or MSP. Reporting by these same entities on swaps on the remaining types of underlying assets will commence 90 days later. A further 90 days after the second compliance date, reporting by remaining market participants will begin with respect to swaps on underlying assets in any of the five asset classes.

The Public Reporting Rules will have two consequences for asset managers. Swap position data will be publicly available on an anonymous basis for all market participants, including mutual funds, private funds, and separately managed accounts, whereas none of this data was previously available to the public. In addition, regulators such as the CFTC will have access to swap data for market participants on a named-basis. This will allow the CFTC, for example, to aggregate market

<sup>5</sup> The masking effect of these caps is illustrated by the situation where an \$800 million interest rate swap with a five-year term is reported. Although the full amount is reported to the SDR, the SDR will only report to the public that the trade exceeded the \$100 million cap.

participants' swap positions with their on-exchange futures and options positions for position limit compliance surveillance purposes. In addition, in any instance where an asset manager is managing a fund or account engaging in off-facility swaps, there may be a narrow set of instances where the asset manager must report the necessary swap data to an SDR or come to an agreement with its swap counterparty as to which entity will do so.

## Swap Data Recordkeeping and Reporting Content Requirements

In addition to finalizing rules regarding what swaps must be reported and by whom, the CFTC approved new rules implementing reporting content and recordkeeping requirements for certain participants and institutions involved in swap transactions (SDR Reporting Rules and SDR Recordkeeping Rules, respectively).<sup>6</sup>

### SDR Reporting Requirements

The SDR Reporting Rules delineate what swap creation and swap continuation data counterparties must report to an SDR.<sup>7</sup> Swap creation data encompasses the primary economic terms (PET) and confirmation data for each swap. Swap continuation data captures any changes to the valuation or PET data of the swap during its existence, as well as all "life cycle event" data or "state data" depending on the reporting method utilized by the reporting party.<sup>8</sup>

<sup>6</sup> Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. \_\_ (\_\_, 2012) (to be codified at 17 C.F.R. Part 45).

<sup>7</sup> After swap creation data is reported to an SDR, all related swap continuation data must be reported to the same SDR that received the creation data report. The rules provide that reporting entities and counterparties may engage third parties to assist with the reporting process. In addition, the rules create a system of unique identifiers that apply to swap activities in order to connect reported data to specific counterparties, swap transactions, and asset classes.

<sup>8</sup> "Life cycle event" means any event that would result in either a change to a primary economic term of a swap or to any primary economic term data previously reported to an SDR in connection with a swap. "State data" means all of the data elements necessary to provide a snapshot view, on a daily basis, of all of the primary economic terms of a swap in the swap asset class of the swap in question.

For swaps executed on an SEF or DCM, the SEF or DCM will be required to report the necessary swap creation data to an SDR. Likewise, DCOs that accept an off-facility swap for clearing within the PET data deadline must report the required swap creation data to the appropriate SDR.<sup>9</sup> For off-facility swaps that are subject to the mandatory reporting requirement but not accepted for clearing by a DCO, one of the counterparties must act as the reporting counterparty. This determination is based on the relative status of the counterparties, and follows the same hierarchy as delineated in the Reporting Rules above.

In order to reduce the potential reporting burden on smaller swap participants, non-SD/MSP counterparties — the category for most, if not all, mutual funds, private funds, and separately managed accounts — are only required to report data to SDRs in limited circumstances. When a swap is executed between non-SD/MSP counterparties on an SEF or DCM, neither counterparty will have any reporting obligations. Similarly, if the swap is executed off-facility but accepted for clearance by a DCO within the deadline for the non-SD/MSP reporting counterparty to submit PET data to an SDR, the DCO will assume the reporting obligations of the non-SD/MSP reporting counterparty. When a DCO accepts an off-facility swap for clearing after the PET deadline, the DCO will be required to provide the confirmation data to an SDR. However, when the swap is executed on an SEF or DCM but is not cleared by a DCO, the non-SD/MSP reporting counterparty will be required to provide continuation data to an SDR for the life of the swap. Finally, where one counterparty is a foreign SD/MSP, the domestic non-SD/MSP counterparty has no obligation to report creation or continuation data to an SDR. Although it is possible that a mutual fund, private fund, or separately managed account could qualify as an MSP, it is anticipated that most, if not all, of such market participants will benefit from these aspects of the SDR Reporting Rules.

### Recordkeeping Requirements

Under the SDR Recordkeeping Rules, each SEF, DCM, DCO, SD, and MSP must maintain "full, complete, and systematic" records of its respective activities related to

<sup>9</sup> In this situation, SD/MSP reporting counterparties must provide required valuation data to the relevant SDR.

swap transactions.<sup>10</sup> Likewise, all non-SD/MSP counterparties must maintain similar records for any swaps to which they are a counterparty.

Parties must retain those records for the duration of the swap and for a period of five years following its termination. SEFs, DCMs, DCOs, SDs, and MSPs must maintain those records in a format prescribed by the CFTC, and be capable of retrieving such records within three business days during the duration of the swap and for two years following its expiration. Non-SD/MSP counterparties must be able to retrieve their records within five business days for the entire retention period. The CFTC will have real-time access to the records in an electronic format during the life of a swap and for five years after its termination.<sup>11</sup>

SEFs, DCMs, DCOs, SDs, MSPs and SDRs will be required to comply with the SDR Reporting Rules and SDR Recordkeeping Rules with respect to interest rate swaps and credit default swaps on July 16, 2012, or 60 days after the CFTC publishes definitions for “swap,” “swap dealer,” and “major swap participant,” whichever is later. The same entities will be required to comply with the SDR Reporting Rules and SDR Recordkeeping Rules with respect to swaps on all asset classes 90 days thereafter. Non-SD/MSP counterparties will be required to comply 180 days after July 16, 2012, or 240 days after the CFTC publishes definitions for “swap,” “swap dealer,” and “major swap participant,” whichever is later.

## Extension of Exemptive Relief from Swap Regulatory Requirements

On December 19, 2011, the CFTC issued a final order (Final Order)<sup>12</sup> extending the temporary exemptive relief the CFTC had granted on July 14, 2011 (July 14

<sup>10</sup> The information contained in those records must include all “pertinent data and memoranda,” as well as records required by CFTC Regulation Parts 37, 38, 39, and 23, as applicable.

<sup>11</sup> SDRs must maintain such records for an additional ten-year period throughout which such records must be retrievable within three business days.

<sup>12</sup> A copy of the Final Order is available at, <http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2011-32841a.pdf>.

Order)<sup>13</sup> from certain swap regulatory requirements under the CEA that otherwise would have taken effect on July 16, 2011. The Final Order extends the potential latest expiration date of the July 14 Order from December 31, 2011 to July 16, 2012 and adds provisions to account for the repeal and replacement of Part 35 of the CFTC’s Regulations (Part 35).<sup>14</sup>

With respect to the provisions of the Dodd-Frank Act that are self-effectuating (*i.e.*, do not require a rulemaking) and that reference one or more of the terms for which the CFTC and the Securities and Exchange Commission are required jointly to provide further definition (e.g., “swap,” “swap dealer,” “major swap participant,” “eligible contract participant” and “security-based major swap participant”), the Final Order extends the exemptive relief provided in the July 14 Order until the earlier of (i) the effective date of the applicable final rule defining the relevant term referenced in the provision, or (ii) July 16, 2012.

With respect to any agreement, contract or transaction in a non-agricultural commodity that was exempt from the CFTC’s regulatory oversight prior to the enactment of the Dodd-Frank Act (e.g., financial, energy and metals commodity contracts), which complies with Part 35 as in effect prior to December 31, 2011, the Final Order extends the exemptive relief provided in the July 14 Order until the earlier of (i) July 16, 2012, or (ii) such other compliance date as may be determined by the CFTC. This is notwithstanding that the

<sup>13</sup> A copy of the July 14 Order is available at, <http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2011-18248a.pdf>.

<sup>14</sup> Part 35 exempts “swap agreements,” as defined therein, from most provisions of the CEA if: (1) they are entered into by “eligible swap participants;” (2) they are not part of a fungible class of agreements standardized as to their material economic terms; (3) the creditworthiness of any party having an actual or potential obligation under the swap agreement would be a material consideration in entering into or determining the terms of the swap agreement (including pricing, costs or credit enhancement terms); and (4) they are not entered into or traded on a multilateral transaction execution facility. Part 35 was originally adopted in 1993 and served as the exemptive authority for bilateral swaps activity until the enactment of the Commodity Futures Modernization Act of 2000, after which it was only relevant for agricultural swaps. On August 10, 2011, the CFTC promulgated a rule pursuant to Section 723(c)(3) of the Dodd-Frank Act and CEA §§4(c) and 4c(b) that, effective December 31, 2011, repealed and replaced existing Part 35.

agreement, contract or transaction may not satisfy certain requirements of Part 35.<sup>15</sup>

<sup>15</sup> Specifically, the Final Order extends the exemptive relief provided in the July 14 Order notwithstanding that: (a) the agreement, contract or transaction may be executed on a multilateral transaction execution facility; (b) the agreement, contract or transaction may be cleared; (c) persons offering or entering into the agreement, contract or transaction may not be eligible swap participants, provided that all parties are eligible contract participants as defined in the CEA prior to July 21, 2010; (4) the transaction may be part of a fungible class of agreements that are standardized as to their material economic terms; and/or (5) no more than one of the parties to the transaction is entering into the transaction in conjunction with its line of business, but it is neither an eligible contract participant nor an eligible swap participant, and the transaction was not and is not marketed to the public.

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This update was authored by M. Holland West (+1 212 698 3527; holland.west@dechert.com), Matthew K. Kerfoot (+1 212 641 5694; matthew.kerfoot@dechert.com), Audrey Wagner (+1 202 261 3365; audrey.wagner@dechert.com), William G. Allensworth (+1 617 728 7174; william.allensworth@dechert.com), Ross M. Oklewicz (+1 202 261 3423; ross.oklewicz@dechert.com) and Aaron D. Withrow (+1 202 261 3442; aaron.withrow@dechert.com).

## Practice group contacts

For more information, please contact the authors, one of the attorneys listed or any Dechert attorney with whom you regularly work. Visit us at [www.dechert.com/financial\\_services](http://www.dechert.com/financial_services).

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### Karen L. Anderberg

London  
+44 20 7184 7313  
karen.anderberg@dechert.com

### Stephen H. Bier

New York  
+1 212 698 3889  
stephen.bier@dechert.com

### Christopher D. Christian

Boston  
+1 617 728 7173  
christopher.christian@dechert.com

### David L. Ansell

Washington, D.C.  
+1 202 261 3433  
david.ansell@dechert.com

### Gus Black

London  
+44 20 7184 7380  
gus.black@dechert.com

### Elliott R. Curzon

Washington, D.C.  
+1 202 261 3341  
elliott.curzon@dechert.com

### Peter Astleford

London  
+44 20 7184 7860  
peter.astleford@dechert.com

### Thomas C. Bogle

Washington, D.C.  
+1 202 261 3360  
thomas.bogle@dechert.com

### Douglas P. Dick

Washington, D.C.  
+1 202 261 3305  
douglas.dick@dechert.com

### Margaret A. Bancroft

New York  
+1 212 698 3590  
margaret.bancroft@dechert.com

### Julien Bourgeois

Washington, D.C.  
+1 202 261 3451  
julien.bourgeois@dechert.com

### Peter Draper

London  
+44 20 7184 7614  
peter.draper@dechert.com

### Sander M. Bieber

Washington, D.C.  
+1 202 261 3308  
sander.bieber@dechert.com

### Kevin F. Cahill

Orange County  
+1 949 442 6051  
kevin.cahill@dechert.com

### Olivier Dumas

Paris  
+33 1 57 57 80 09  
olivier.dumas@dechert.com

**Karl J. Paulson Egbert**  
Hong Kong  
+1 852 3518 4738  
karl.egbert@dechert.com

**Ruth S. Epstein**  
Washington, D.C.  
+1 202 261 3322  
ruth.epstein@dechert.com

**Joseph R. Fleming**  
Boston  
+1 617 728 7161  
joseph.fleming@dechert.com

**Brendan C. Fox**  
Washington, D.C.  
+1 202 261 3381  
brendan.fox@dechert.com

**Richard Frase**  
London  
+44 20 7184 7692  
richard.frase@dechert.com

**Robert M. Friedman**  
New York  
+1 212 649 8735  
robert.friedman@dechert.com

**Allison Harlow Fumai**  
New York  
+1 212 698 3526  
allison.fumai@dechert.com

**David M. Geffen**  
Boston  
+1 617 728 7112  
david.geffen@dechert.com

**John Gordon**  
London  
+44 20 7184 7524  
john.gordon@dechert.com

**David J. Harris**  
Washington, D.C.  
+1 202 261 3385  
david.harris@dechert.com

**Christopher P. Harvey**  
Boston  
+1 617 728 7167  
christopher.harvey@dechert.com

**Richard Heffner**  
London  
+44 20 7184 7665  
richard.heffner@dechert.com

**Robert W. Helm**  
Washington, D.C.  
+1 202 261 3356  
robert.helm@dechert.com

**Richard M. Hervey**  
New York  
+1 212 698 3568  
richard.hervey@dechert.com

**Richard Horowitz**  
New York  
+1 212 698 3525  
richard.horowitz@dechert.com

**Andrew Hougie**  
London  
+44 20 7184 7373  
andrew.hougie@dechert.com

**Megan C. Johnson**  
Washington, D.C.  
+1 202 261 3351  
megan.johnson@dechert.com

**Jane A. Kanter**  
Washington, D.C.  
+1 202 261 3302  
jane.kanter@dechert.com

**Geoffrey R.T. Kenyon**  
Boston  
+1 617 728 7126  
geoffrey.kenyon@dechert.com

**Matthew Kerfoot**  
New York  
+1 212 641 5694  
matthew.kerfoot@dechert.com

**Steven P. Kirberger**  
New York  
+1 212 698 3698  
steven.kirberger@dechert.com

**Robert H. Ledig**  
Washington, D.C.  
+1 202 261 3454  
robert.ledig@dechert.com

**Angelo Lercara, LL.M. EuR**  
Munich  
+49 89 2121 6322  
angelo.lercara@dechert.com

**Angelyn Lim**  
Hong Kong  
+852 3518 4718  
angelyn.lim@dechert.com

**Stuart Martin**  
London  
+44 20 7184 7542  
stuart.martin@dechert.com

**George J. Mazin**  
New York  
+1 212 698 3570  
george.mazin@dechert.com

**Gordon L. Miller**  
Washington, D.C.  
+1 202 261 3467  
gordon.miller@dechert.com

**Michelle Moran**  
Dublin  
+353 1 436 8511  
michelle.moran@dechert.com

**Jack W. Murphy**  
Washington, D.C.  
+1 202 261 3303  
jack.murphy@dechert.com

**Antonios Nezeritis**  
Luxembourg  
+352 45 62 62 27  
antonios.nezeritis@dechert.com

**John V. O'Hanlon**  
Boston  
+1 617 728 7111  
john.ohanlon@dechert.com

**Declan O'Sullivan**  
Dublin  
+353 1 436 8510  
declan.o'sullivan@dechert.com

**Reza Pishva**  
Washington, D.C.  
+1 202 261 3459  
reza.pishva@dechert.com

**Edward L. Pittman**  
Washington, D.C.  
+1 202 261 3387  
edward.pittman@dechert.com

**Jeffrey S. Poretz**  
Washington, D.C.  
+1 202 261 3358  
jeffrey.poretz@dechert.com

**Achim Pütz**  
Munich  
+49 89 2121 6334  
achim.puetz@dechert.com

**Jon S. Rand**  
New York  
+1 212 698 3634  
jon.rand@dechert.com

**Robert A. Robertson**  
Orange County  
+1 949 442 6037  
robert.robertson@dechert.com

**Keith T. Robinson**  
Washington, D.C.  
+1 202 261 3438  
keith.robinson@dechert.com

**Kevin P. Scanlan**  
New York  
+1 212 649 8716  
kevin.scanlan@dechert.com

**Marc Seimetz**  
Luxembourg  
+352 45 62 62 23  
marc.seimetz@dechert.com

**Jeremy I. Senderowicz**  
New York  
+1 212 641 5669  
jeremy.senderowicz@dechert.com

**Frederick H. Sherley**  
Charlotte  
+1 704 339 3100  
frederick.sherley@dechert.com

**Michael L. Sherman**  
Washington, D.C.  
+1 202 261 3449  
michael.sherman@dechert.com

**Hans Stamm**  
Munich  
+49 89 2121 6342  
hans.stamm@dechert.com

**Stuart Strauss**  
New York  
+1 212 698 3529  
stuart.strauss@dechert.com

**Patrick W. D. Turley**  
Washington, D.C.  
+1 202 261 3364  
patrick.turley@dechert.com

**Brian S. Vargo**  
Philadelphia  
+1 215 994 2880  
brian.vargo@dechert.com

**Thomas P. Vartanian**  
Washington, D.C.  
+1 202 261 3439  
thomas.vartanian@dechert.com

**David A. Vaughan**  
Washington, D.C.  
+1 202 261 3355  
david.vaughan@dechert.com

**James Waddington**  
London  
+44 20 7184 7645  
james.waddington@dechert.com

**M. Holland West**  
New York  
+1 212 698 3527  
holland.west@dechert.com

**Jennifer Wood**  
London  
+44 20 7184 7403  
jennifer.wood@dechert.com

**Anthony H. Zacharski**  
Hartford  
+1 860 524 3937  
anthony.zacharski@dechert.com