

## CFTC Adopts Final Swap Recordkeeping and Reporting Rules

On December 20, 2011, the Commodity Futures Trading Commission (CFTC) adopted its final swap recordkeeping and reporting rules under the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (Dodd-Frank Act). These rules are designed to increase transparency in the over-the-counter derivatives markets, both to regulators and to the public.

In general, the final rules impose fewer requirements on funds and other buy-side derivatives users than were contemplated by the rules that were proposed in December 2010, although such entities will need to comply with certain new requirements, including recordkeeping requirements and, in certain limited circumstances described below, reporting requirements. These rules could also impact the buy-side indirectly in several ways. Access to information regarding derivatives transactions may give the CFTC additional tools to enforce the new CFTC antifraud rules adopted under the Dodd-Frank Act. Public availability of data regarding derivatives transactions entered into by other market participants could make valuation of derivatives transactions easier, if the data is available in a usable form. It could also increase price competition for certain derivatives transactions.

The burdens imposed by the rules fall largely on swap dealers and major swap participants (and entities such as clearing houses, swap execution facilities and swap data repositories). As described in our prior [Alert](#), the CFTC's proposed definitions of "swap dealer" and "major swap participant" are quite narrow, and if the definitions are adopted as proposed, it is unlikely that many funds or other buy-side participants will meet these definitions. As a result, this summary focuses on the requirements under the rules that apply to entities that do not fall into either of these categories.

### Recordkeeping Requirements

The rules will require entities that are neither swap dealers nor major swap participants to maintain full, complete and systematic records, together with all pertinent data or memoranda, with respect to each swap to which they are party. The records must be maintained until five years after termination of the swap, and generally may be maintained in paper or electronic form. They must be retrievable at any time during the retention period within five business days, and are subject to inspection by the CFTC, the Department of Justice, the Securities and Exchange Commission, and the U.S. bank regulators.

The CFTC has not further clarified what information will need to be maintained to comply with these requirements. The release accompanying the rules notes that the language regarding the records required to be maintained is similar to corresponding language in CFTC Rule 1.35 with respect to futures transactions, although those requirements generally apply to futures commission merchants and brokers. In addition, those requirements are broader than the requirements under the new rules applicable to entities that are neither swap dealers nor major swap participants, since they require maintenance of all records related to the entity's business of dealing in futures (not just records with respect to each transaction). In the absence of existing practice as to what buy-side participants should maintain, we expect that they will maintain copies of master agreements and trade confirmations, and may consider also maintaining valuation information and copies of margin notices received from swap counterparties.

### Reporting to Swap Data Repositories

The rules also require that all swaps (whether cleared or uncleared) must be reported to a swap data repository (SDR), which is a new type of entity registered with the CFTC that will receive reports of derivatives trades, make the information available to regulators, and also make the information (other than

the identity of the parties) available to the public. If no SDR accepts reporting with respect to a certain category of swap, the information must be reported to the CFTC.

In general, the following information must be reported:

- **Swap creation data**, which includes the primary economic terms of the swap, as well as the terms of the legal confirmation. The primary economic terms of each category of swap are specified in the rules, although parties must also report any other terms matched by the parties in confirming the swap; and
- **Continuation data**, which includes daily valuation data regarding each swap and changes to the primary economic terms of the swap.

If a transaction is entered into on a swap execution facility or designated contract market, or if a transaction is accepted for clearing before the reporting deadline, the swap execution facility, designated contract market, or clearing house generally reports the creation data. Also, clearing houses report the continuation data for all cleared swaps. However, information with respect to other swaps (including uncleared swaps) will need to be reported by one of the parties to the swap. If one of the parties is a swap dealer or a major swap participant and the other is not, the swap dealer or major swap participant has the reporting obligation. Since most buy-side participants generally enter into swaps only with swap dealers or major swap participants, it is unlikely that many buy-side participants will bear the reporting burden. This is even less likely because the final rules do not include a provision in the proposed rules that would have required a U.S. person entering into a transaction with a non-U.S. person to be responsible for the reporting, even if the non-U.S. person was a swap dealer or major swap participant.

If neither of the parties to the swap is a swap dealer or major swap participant, then the parties agree as to who will be the reporting party (except that if one party is a financial entity and the other is not, the financial entity is the reporting party, and if one party is a U.S. person and the other is not, the U.S. person is the reporting party).

In the unusual case that a buy-side entity has the reporting obligation, the information will need to be reported within the following time periods:

- Swap creation data will need to be reported as soon as technologically practicable, and in any event within 48 business hours (for the first year after the applicable compliance date, as described under “Compliance Dates” below), 36 business hours (for the second year), and 24 business hours (thereafter), in each case after execution of the swap for primary economic terms data and after confirmation of the swap for confirmation data; and
- Continuation data that relates to a change in the terms of the swap must be reported within two business days (for the first year after the applicable compliance date) and within one business day (thereafter). Parties that are neither swap dealers nor major swap participants are not required to report daily valuation data; they need to provide only quarter end valuation data no later than 30 days after the end of each quarter, and only with respect to uncleared swaps.

Swaps and parties to swap transactions will be identified through unique swap identifiers (which will be assigned to each swap), legal entity identifiers (which will be assigned to each party entering into a swap transaction), and unique product identifiers (which will be assigned to each asset underlying a swap). All reporting and recordkeeping with respect to swaps will be required to use these identifiers.

The rules address how swaps entered into by advisers on behalf of several clients and then allocated among clients will be reported. These transactions will be initially reported as transactions by the adviser (using the

adviser's legal entity identifier) and will then be reported as allocated transactions using the relevant clients' legal entity identifiers. Advisers will be required to provide allocation information to their swap counterparties within eight business hours of execution of a transaction to enable reporting under the rules.

## Public Reporting By Swap Data Repositories

SDRs are required to disseminate publicly certain data that they receive as soon as technologically practicable, subject to a time delay for block trades and large off-facility swaps. SDRs are prohibited from disseminating information regarding the counterparties to the transaction.

The minimum size of block trades and the time delay before dissemination of information regarding block trades has been the subject of much concern, because public reporting of a large transaction immediately following execution could have an adverse impact on the ability of a party to the transaction to enter into offsetting transactions to hedge its exposure. The CFTC has not yet adopted final block trade rules, and has indicated that it will re-propose its block trade rules in 2012. All swaps of a certain type will be treated as block trades or large off-facility swaps until the minimum size of a block trade or large off-facility swap for that particular type of swap has been established. As a result, information regarding those trades will be subject to time delay before being disclosed to the public.

The time delay before public dissemination of swap data for block trades by SDRs varies depending on how the transactions are executed, whether the transactions are subject to the clearing requirement, the identity of the counterparties, and the underlying asset class. Very generally, in the first year after the applicable compliance date, data related to block trades entered into on a swap execution facility or designated contract market will be subject to a 30 minute delay, and following the first year, a 15 minute delay. Data related to large off-facility (uncleared) swaps with a swap dealer or major swap participant as one party in most asset classes will be subject to a one hour delay in the first year after the applicable compliance date, and 30 minutes thereafter.

An SDR must publicly disseminate the information to the public on a non-discriminatory basis, which may include posting a link to the information on a website. The information must be made available in an electronic format that can be downloaded, saved and analyzed.

## Applicability

These rules apply to all swaps under CFTC jurisdiction, which generally include interest rate derivatives, most currency derivatives, commodity derivatives, credit default index derivatives and securities and loan index derivatives. The SEC has not yet issued corresponding rules for derivatives under its jurisdiction (which generally include single name and narrow-based index equity, loan and credit default derivatives).

These rules apply only to transactions entered into after the applicable compliance date. While all swaps outstanding after the enactment of the Dodd-Frank Act in July 2010 will be required to be reported, the reporting of such so-called "historical swaps" will be covered by separate rules, which the CFTC has indicated it will adopt in early 2012.

## Compliance Dates

Parties who are neither swap dealers nor major swap participants will be required to comply with the foregoing recordkeeping and reporting requirements within 180 days of the later of (i) July 16, 2012; or (ii) 60 days after the CFTC publishes final rules defining the terms "swap," "swap dealer," and "major swap participant."

Swap dealers, major swap participants, swap execution facilities, clearing houses and SDRs (among others) will be required to comply more quickly. The requirements with respect to interest rate derivatives and credit default derivatives will become effective on the later of (i) July 16, 2012; or (ii) 60 days after the CFTC publishes the definitions of “swap,” “swap dealer,” and “major swap participant.” The requirements with respect to other derivatives will become effective 90 days after such initial effective date.

The text of the final release regarding recordkeeping and reporting for regulatory purposes is available [here](#), and the text of the final release regarding public dissemination of swap transaction data is available [here](#).

Please contact the Ropes & Gray attorney who usually advises you with any questions.