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Impending Swap Reporting Requirements to Impact All Swap Market Participants

All swap market participants, including commercial end-users, should be aware of the upcoming April 10 deadline for Commodity Futures Trading Commission (CFTC) swap reporting and recordkeeping requirements under Parts 43, 45 and 46.¹ These impending requirements are notable in their breadth, with many of the requirements applying to U.S. swap counterparties that are not required to register with the CFTC as swap dealers or major swap participants (non-SD/MSPs). **The new reporting requirements will in some instances make non-SD/MSPs responsible for reporting both new and certain pre-existing (even terminated or expired) swaps, FX forwards and FX swaps that are exempt from many other Dodd-Frank Act regulations, inter-affiliate swaps, and swaps entered into with foreign entities that are not registered with the CFTC, including certain foreign banks and financial institutions.**

The CFTC and its staff are considering a range of requests to provide some form of relief from its Parts 43, 45 and 46 reporting and recordkeeping rules or to delay the April 10 compliance date. We are monitoring developments but have no way to know when or if an announcement of relief or a delayed compliance date will be forthcoming. If such an announcement is made, we will quickly issue a follow-up client alert. In the interim, please call us if you have any questions or concerns relating to your compliance obligations under Parts 43, 45 and 46.

All Swap Market Participants Must Obtain an LEI or CICI by April 10, 2013 to Continue Trading Swaps

CFTC rules require all swaps entered into on or after April 10, 2013, to be identified with a Legal Entity Identifier (LEI) or CFTC Interim Compliant Identifier (CICI) in all swap reporting and swap recordkeeping.² Since an LEI or CICI is required to complete the 2012 ISDA Dodd-Frank Protocol,³ many non-SD/MSPs already may have obtained an LEI/CICI. If the LEI/CICI for an entity was issued through third-party registration (e.g., by an investment manager), the entity must self-certify the LEI/CICI data record before April 10, 2013.

Each entity that will be a counterparty to a swap (including inter-affiliate swaps) must obtain an LEI/CICI to enter into swaps on or after April 10, 2013.

Swap Reporting Requirements for Non-SD/MSPs

The Dodd-Frank Act amended the Commodity Exchange Act (CEA) to require that certain swap transaction and pricing data be reported to a swap data repository (SDR) on a transaction-by-transaction basis.⁴

The transactions that must be reported are swaps outstanding as of July 21, 2010, or entered into between July 21, 2010 and April 10, 2013 (Historical Swaps), and swaps entered into on or after April 10, 2013 (New Swaps). The CFTC's regulations govern which party to a transaction is required to do the reporting. Swap counterparties that are registered SDs or MSPs will be responsible for reporting. A non-SD/MSP is not responsible for reporting a Historical Swap or New Swap if its counterparty is registered as an SD or MSP by April 10, 2013 (for a Historical Swap), or at the time the swap is

executed (for a New Swap). If neither party to the transaction is an SD or an MSP, the parties must determine which party will be the reporting party. **This means that in certain instances, a U.S. non-SD/MSP could be required to report Historical Swaps to an SDR on April 10, 2013, even if it anticipates that its future New Swaps will be entered into with, and reported by, SD or MSP counterparties.**

U.S. non-SD/MSPs will be generally responsible for reporting Historical Swaps and New Swaps entered into with 1) affiliates or 2) any non-U.S. person that is not registered as an SD or MSP. The following chart sets forth the hierarchy for determining whether a non-SD/MSP party to a swap or its counterparty is responsible for swap reporting.⁵

Counterparty 1 is a:	Counterparty 2 is a:			
	Registered SD or MSP	Non-U.S. person, non-SD/ MSP	U.S. person, non-SD/MSP, financial entity	U.S person, non-SD/MSP, not a financial entity
U.S. person, ⁶ non-SD/ MSP, financial entity ⁷	Counterparty 2	Counterparty 1	Parties must agree which party will report	Counterparty 1
U.S. person, non-SD/MSP, not a financial entity	Counterparty 2	Counterparty 1	Counterparty 2	Parties must agree which party will report

Note that even if another person is responsible for reporting the swap to an SDR, the nonreporting party may still be required to confirm the accuracy of swap data that was reported⁸ or notify the reporting party of any errors or omissions in a report.⁹

What Must Be Reported

New Swaps

There are two types of reporting required for New Swaps: 1) real-time public reporting and 2) regulatory reporting.

- *Real-Time Public Reporting for New Swaps.* Part 43 of the CFTC’s rules requires transaction and pricing data¹⁰ for New Swaps to be reported to an SDR for public dissemination as soon as technologically practicable after execution.
- *Regulatory Reporting for New Swaps.* Part 45 of the CFTC’s rules requires 1) the economic terms of the swap and information about the parties¹¹ to be reported to an SDR as soon as technologically practicable after execution and 2) ongoing reporting obligations throughout the life of the swap for life-cycle events, such as assignments or terminations, and quarterly valuations of the swap.

Certain cleared swaps may be reported by the clearing house or derivatives clearing organization rather than by the parties.

Historical Swaps

Regulatory Reporting for Historical Swaps. Part 46 of the CFTC’s rules requires the “primary economic terms” of the swap and information about the parties¹² to be reported to an SDR on April 10, 2013. There are ongoing reporting obligations for historical swaps that

are not expired or terminated prior to April 10, 2013, *e.g.*, reporting for the remaining life of the swap, including life-cycle events and quarterly valuations of the swap.

Reporting to SDRs

Parties responsible for reporting must report to one of three SDRs that are provisionally registered with the CFTC: Chicago Mercantile Exchange Swap Data Repository, DTCC Data Repository and ICE Trade Vault.

A reporting party may contract with another person to facilitate reporting of New Swaps and Historical Swaps, although the reporting party retains the regulatory responsibility for reporting.¹³

Recordkeeping Requirements

There also are recordkeeping requirements for Historical Swaps and New Swaps that will apply to swap market participants. The recordkeeping requirements for Historical Swaps require non-SD/MSPs to keep information and documents related to the terms of the historical swaps, which would include confirmations, master agreements and credit support annexes. For New Swaps, a non-SD/MSP will be required to keep “*full, complete, and systematic records*, together with all pertinent data and memoranda, with respect to each swap in which [it is] a counterparty, including, without limitation all records demonstrating that [it is] entitled, with respect to any swap, to elect the clearing requirement exception.”¹⁴ All records must be retained for the life of the swap plus five years.

END NOTES

- 1 CFTC Rules Parts 43, 45 and 46; 17 C.F.R. Parts 43, 45 and 46.
- 2 See CFTC's [Division of Market Oversight Advisory](#) Reminding All Swap Counterparties of April 10 Deadline to Obtain an LEI/CICI (Mar. 15, 2013).
- 3 See the Dec. 20, 2012, Skadden Client Alert: ISDA Dodd-Frank Protocol Update, available at <http://www.skadden.com/insights/isda-dodd-frank-protocol-update-cftc-delays-compliance>.
- 4 See, *e.g.*, CEA Sections 2(a)(13), 2(h)(5), 4r and 21.
- 5 CFTC Rules 45.8 and 46.5.
- 6 For information on the CFTC's current definition of a “U.S. person,” see CFTC Final Exemptive Order Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 858 (Jan. 7, 2013); see *also* the January 11, 2013, Skadden Client Alert “[CFTC Issues Final Exemptive Order on Cross-Border Application of Certain Swap Regulations](#).” The CFTC also has proposed further amendments to the definition of “U.S. person.” See Further Proposed Guidance Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 909 (Jan. 7, 2013).
- 7 A “financial entity” includes commodity pools, private funds as defined in Section 202(a) of the Investment Advisers Act of 1940, pension plans, and persons predominantly engaged in activities that are in the business of banking or in activities that are financial in nature, as defined in Section 4(k) of the Bank Holding Company Act of 1956. See CEA Section 2(h)(7)(C).
- 8 See, *e.g.*, CEA Section 21(c)(2) (“A swap data repository shall ... confirm with both counterparties to the swap the accuracy of the data that was submitted.”); see *also* CFTC rule 49.11.
- 9 See CFTC rules 43.3(e), 45.14(b) and 46.11(c).
- 10 For a list of real-time public reporting transaction and pricing data terms, see [Appendix A](#) to the Part 43 rules, 17 C.F.R. Part 43, Appendix A.
- 11 For a list of creation data terms for New Swaps, see [Appendix 1](#) to the Part 45 rules, 17 C.F.R. Part 45, Appendix 1.
- 12 See CFTC rule 46.3(a)(1). For a list of “primary economic terms” for Historical Swaps, see [Appendix 1](#) to the Part 46 rules, 17 C.F.R. Part 46, Appendix 1.
- 13 See CFTC rules 45.9 and 46.6; see *also* [CFTC Staff Frequently Asked Questions on the Reporting of Cleared Swaps – Revised](#), pp. 5, 7 (Nov. 29, 2012).
- 14 See CFTC Rule 45.2(b).