

Derivatives Alert

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CFTC Amends Swap Data Reporting Rules, Creates Registration Framework for Non-US Clearing Organizations

On September 17, 2020, the Commodity Futures Trading Commission (CFTC) unanimously approved final rules amending the agency's swap data reporting and derivatives clearing organization (DCO) registration requirements.¹ The first set of rules makes significant changes under the CFTC's swap data reporting regulations for numerous categories of market participants. The second rule set creates a framework to allow certain clearing organizations not based in the U.S. to register with the agency while relying largely on their home country regulatory regimes. The swap data reporting and DCO registration amendments will become effective 60 and 30 days after publication in the Federal Register, respectively.²

Swap Data Reporting Amendments

CFTC regulations implemented under the Commodity Exchange Act (CEA), as amended by the Dodd-Frank Act, created a complex framework for reporting swap transactions and pricing data for public dissemination and regulatory purposes. Following the initial adoption of swap data reporting rules, the CFTC's Division of Market Oversight (DMO) began a review of those rules. In July 2017, DMO announced a "Roadmap To Achieve High Quality Swaps Data" (Roadmap) outlining plans for improving the accuracy, completeness and quality of swap data while streamlining the CFTC's swap data reporting requirements.³ Since that time, the CFTC has issued several

¹ See CFTC Press Release, "[CFTC Finalizes Rules To Improve Swap Data Reporting, Approves Other Measures at September 17 Open Meeting](#)" (Sept. 17, 2020); CFTC, "[Real-Time Public Reporting Requirements](#)" (Sept. 17, 2020); CFTC, "[Swap Data Recordkeeping and Reporting Requirements](#)" (Sept. 17, 2020); CFTC, "[Amendments to the Commission's Regulations Relating to Certain Swap Data Repository and Data Reporting Requirements](#)" (Sept. 17, 2020); CFTC, "[Registration With Alternative Compliance for Non-US Derivatives Clearing Organizations](#)" (Sept. 17, 2020).

² The compliance date for the swap data reporting amendments is generally 18 months after the date of publication in the Federal Register, but with respect to amendments under CFTC Regulations 43.4(h) (regarding cap sizes) and 43.6 (regarding block trades), the compliance date is 30 months after the date of publication in the Federal Register. The CFTC stated it believed market participants "should have the chance to adapt to [other] changes to part 43 ... before having to comply with new block and cap sizes." See Real-Time Public Reporting Requirements at 154.

³ See CFTC, "[Roadmap to Achieve High Quality Swaps Data](#)" (July 10, 2017). For more information about the Roadmap, see our [July 13, 2017, client alert](#).

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proposed rulemakings intended to address the issues identified in the Roadmap.⁴ The swap data reporting amendments are the culmination of this process.

The amendments span three final rulemakings, each over 200 pages, that create broad changes in the CFTC's swap data reporting framework, relieving swap counterparties of reporting obligations in some cases and creating new obligations in others; adding, changing and removing definitions; and reorganizing parts of the regulatory framework. CFTC Chairman Heath P. Tarbert remarked that the rulemakings "reflect a hard look" at the data the CFTC needs and collects and are the product of the CFTC's own in-depth analysis and input from market participants.⁵ Noting that the current regulatory reporting regime for swap data has "proven unworkable," leaving market participants with "little guidance about the data elements that the CFTC actually needs," Chairman Tarbert explained that the rule changes are designed to replace "the sprawling mass of disparate [swap data reporting] fields — sometimes running into the hundreds or thousands" with a more limited set of 128 fields that are "important to the CFTC's oversight of the swaps markets."⁶

Part 43 Real-Time Reporting Requirements

The Part 43 swap data reporting amendments revise rules for real-time public reporting and dissemination of swap data. The amendments apply to swap data repositories (SDRs), DCOs, swap execution facilities (SEFs), designated contract markets (DCMs), swap dealers (SDs) and non-SD swap counterparties. The changes include:

- Amending the definition of a "block trade" under CFTC Regulation 43.2 in order to promote swap trading on SEFs, mitigate risks of information leakage and provide SEFs with increased flexibility. Additionally, while the CFTC had proposed imposing a uniform 48-hour delay on block trade reporting — a significant change from the current rules, which set the delay based on transaction and counterparty characteristics — commenters registered concerns regarding negative impacts on transparency, price discovery and liquidity, and

⁴ See Real-Time Public Reporting Requirements, 85 Fed. Reg. 21,516 (Apr. 17, 2020); Swap Data Recordkeeping and Reporting Requirements, 85 Fed. Reg. 21,578 (Apr. 17, 2020); Certain Swap Data Repository and Data Reporting Requirements, 84 Fed. Reg. 21,044 (May 13, 2019); see also our [May 2, 2019, client alert](#) (discussing the first of the three proposed rulemakings).

⁵ See CFTC, "Statement of Chairman Heath P. Tarbert in Support of Final Rules on Swap Data Reporting" (Sept. 17, 2020) [hereinafter "Tarbert Statement Regarding SDR Amendments"].

⁶ See *id.*

the CFTC ultimately declined to adopt this change.⁷ The rules also increase cap sizes⁸ and block trade thresholds.⁹ Once the amendments take effect, certain trades that are currently treated as block trades subject to reporting delays may no longer be subject to those delays if they do not meet the revised block trade thresholds.

- Adding new provisions under Regulation 43.3 to address reporting of "post-priced swaps" to respond to market participants' concerns related to complying with reporting requirements for swaps where one or more terms are unknown at the time of trade execution.¹⁰
- Specifying that a DCO is responsible for publicly reporting clearing swaps.¹¹
- Defining and exempting certain legs of prime brokerage transactions from public dissemination in response to concerns that publicly disseminating all legs of those transactions "incorrectly suggests the presence of more trading activity and price discovery than actually exists."¹²
- Specifying that SDRs make swap transaction and pricing data available on public websites for a period of at least one year after that data is initially publicly disseminated.
- Amendments to the swap transaction and pricing data elements that must be reported in Appendix A to Part 43 of the CFTC's regulations.
- New regulations specifying steps SDRs must take to validate swap transaction and pricing data reported to them and notify reporting counterparties of whether a swap report satisfies the SDR's data validation procedures.

⁷ The CFTC had proposed the uniform 48-hour delay as a "conservative measure to account for potential situations when a market participant requires additional time to place a hedge position without significant unfavorable price movement and to create some consistency with the disclosure requirements of other authorities for non-liquid swaps." See 85 Fed. Reg. at 21,534.

⁸ Cap size is "the maximum notional or principal amount of a publicly reportable swap transaction that is publicly disseminated." 17 C.F.R. § 43.2.

⁹ *I.e.*, the notional threshold at which a swap can qualify as a block trade. See 17 C.F.R. § 43.6(c).

¹⁰ The CFTC defines a post-priced swap as an "off-facility swap for which the price is not determined as of the time of execution." See Real-Time Public Reporting Requirements at 219 (17 C.F.R. § 43.2).

¹¹ A clearing swap is a "swap created pursuant to the rules of a derivatives clearing organization that has a derivatives clearing organization as a counterparty, including any swap that replaces an original swap that was extinguished upon acceptance of such original swap by the derivatives clearing organization for clearing." 17 C.F.R. § 45.1. The CFTC noted that DCOs do not typically report swap data under Part 43 of the CFTC regulations "because cleared swaps have already been reported at execution" by SEFs, DCMs and reporting counterparties that "report the original, market-facing swap ... while sending the swap to a DCO for clearing." See Real-Time Public Reporting Requirements at 171. The amendments would apply to "the limited cases where a DCO executes a publicly reportable swap transaction that has not already been reported under part 43." See *id.*

¹² See Real-Time Public Reporting Requirements at 41.

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Part 45 Regulatory Reporting Requirements

The Part 45 swap data reporting amendments include substantial changes to the CFTC's swap data recordkeeping and regulatory reporting requirements for SDRs, DCOs, SEFs, DCMs, SDs and non-SD swap counterparties. Some of the significant changes in the rulemaking include:

- Requiring a single data report at execution rather than two separate reports for primary economic terms and confirmation data.
- Removing the requirement for SDRs to map allocations.¹³
- Removing regulations for international swaps.¹⁴
- Removing the option for state data reporting (*i.e.*, "snapshot" reporting) in favor of requiring reporting counterparties and DCOs required to report swap continuation data to report life cycle event data for swaps electronically to a SDR.¹⁵
- Extending deadlines for reporting new swaps and swap continuation data.
- Removing requirements for non-SD/DCO reporting counterparties to report valuation data quarterly.
- Requiring SD reporting counterparties to report margin and collateral data on a daily basis.
- Transitioning reporting of Unique Swap Identifiers to reporting of Unique Transaction Identifiers.¹⁶
- Amending the swap data elements in Appendix 1 to Part 45 of the CFTC's regulations that must be reported.

Additional SDR and Data Reporting Requirements

The swap data reporting amendments also encompass wide-spread changes to the agency's regulations related to data reported to and maintained by SDRs, including:

¹³ *I.e.*, the requirement under 17 C.F.R. § 45.3(f)(2)(iii) that the SDR to which an initial swap and post-allocation swaps are reported "must map together the unique swap identifiers of the initial swap transaction and each of the post-allocation swaps."

¹⁴ The CFTC noted that "if the same swap is reported to different jurisdictions, the [Unique Swap Identifier] or [Unique Transaction Identifier] should be the same," and that "[i]f the transaction identifier is the same ... there is no need for the counterparties to send the identifier to other jurisdictions." Swap Data Recordkeeping and Reporting Requirements at 33.

¹⁵ The CFTC said it believed "state data reporting may be contributing to data quality issues by filling SDRs with unnecessary swap messages," and that "eliminating state data reporting will improve data quality without impeding the Commission's ability to fulfill systemic risk mitigation, market transparency, position limit monitoring, and market surveillance objectives." *Id.* at 36-37.

¹⁶ The CFTC believes this step will be consistent with international technical guidance, "reduce cross-border reporting complexity and encourage global swap data aggregation." *Id.* at 49.

- SEFs, DCMs and reporting counterparties must correct errors and omissions for both live and expired or matured swaps (also known as "dead" swaps), unless the applicable record retention period for the swap has expired.¹⁷
- SD/DCO reporting counterparties must verify the completeness and accuracy of their swap data every 30 days, while non-SD/DCO reporting counterparties must do so once each calendar quarter, with at least two months between verifications.¹⁸
- SEFs, DCMs and reporting counterparties must correct any error in swap data as soon as technologically practicable, but in any case within seven business days after discovery. If the SEF, DCM or reporting counterparty fails to timely correct an error for any reason, it must then notify the director of DMO or their designated employees by providing, among other things, "an initial assessment of the scope of the error or errors that were discovered" and "any initial remediation plan for correcting the error or errors," if such a plan exists.¹⁹

DCO Registration Amendments

The DCO registration amendments revise Parts 39 and 140 of the CFTC's regulations to allow certain DCOs organized outside the United States to register with the CFTC and to satisfy the core principles for DCOs set out in the CEA by complying with their home countries' regulations under certain conditions.²⁰

Under the revised regulations, if a non-U.S. clearing organization wants to clear swaps for U.S. persons and does not pose a "substantial risk" to the U.S. financial system, it can register as a DCO by relying largely on the requirements of its home country regulator, subject to meeting certain conditions and requirements

¹⁷ The CFTC's original proposal did not limit the requirement to correct dead swaps to only those for which the applicable record retention period had expired. *See* 84 Fed. Reg. at 21,098 (Proposed CFTC Regulation 43.3(e)(1)).

¹⁸ The CFTC had originally proposed requiring SDs and DCOs to verify swap data completeness and accuracy weekly, and requiring other reporting counterparties to do so monthly. *See id.* at 21,103 (Proposed CFTC Regulations 49.11(b)(2)-(3) & (c)).

¹⁹ Amendments to the Commission's Regulations Relating to Certain Swap Data Repository and Data Reporting Requirements at 212, 216 (17 C.F.R. §§ 43.3(e)(1)(ii) & 45.14(a)(1)(ii)). The CFTC originally proposed a correction deadline of three business days and requiring the provision of a remediation plan. *Id.* at 21,098-99 (Proposed CFTC Regulation 43.3(e)(1) & 45.14(b)(1)).

²⁰ *See* 7 U.S.C. § 7a-1(c)(2) ("Core Principles for Derivatives Clearing Organizations").

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specified in the rulemaking.²¹ In order to be eligible for the alternative registration framework, (1) the CFTC must determine that the clearing organization's compliance with its home country regulatory requirements would satisfy the DCO Core Principles, (2) the clearing organization must be in "good regulatory standing" in its home country, and (3) a memorandum of understanding or similar arrangement satisfactory to the CFTC must be in effect between the CFTC and the clearing organization's home country regulator.²²

²¹The non-U.S. clearing organization could also choose to apply for DCO registration under the CFTC's pre-amendment procedures, which would subject it to all applicable CFTC regulations. See *Registration With Alternative Compliance for Non-US Derivatives Clearing Organizations* at 5-6. And if the non-U.S. DCO poses a "substantial risk" to the U.S. financial system, traditional registration is required. "Substantial risk to the U.S. financial system" is defined as "(1) The derivatives clearing organization holds 20% or more of the required initial margin of U.S. clearing members for swaps across all registered and exempt derivatives clearing organizations; and (2) 20% or more of the initial margin requirements for swaps at that derivatives clearing organization is attributable to U.S. clearing members; provided, however, where one or both of these thresholds are identified as being close to 20%, the Commission may exercise discretion in determining whether an identified threshold is satisfied for the purpose of determining whether the derivatives clearing organization poses substantial risk to the U.S. financial system." *Id.* at 107-08 (17 C.F.R. § 39.2).

²²"Good regulatory standing" means "with respect to a derivatives clearing organization that is organized outside of the United States, and is licensed, registered, or otherwise authorized to act as a clearing organization in its home country, that either there has been no finding by the home country regulator of material non-observance of the relevant home country legal requirements, or there has been a finding by the home country regulator of material non-observance of the relevant home country legal requirements but any such finding has been or is being resolved to the satisfaction of the home country regulator by means of corrective action taken by the derivatives clearing organization." *Id.* at 107 (17 C.F.R. § 39.2).

The clearing organization will be required to file a limited set of the exhibits to Form DCO, including a table (1) showing the applicable, binding home country requirements that correspond to each DCO Core Principle, and (2) explaining how the clearing organization satisfies those requirements.²³ DCOs that register under the alternative framework will still need to comply with certain CFTC requirements, such as customer protection requirements, Part 45 swap data reporting requirements, and certain other regulatory reporting requirements. Subject to certain exceptions, however, DCOs registered under the alternative framework are generally exempt from CFTC DCO rule certification requirements.²⁴

Taken together, the swap data reporting and DCO registration amendments represent the culmination of a multiyear effort to address shortcomings in the CFTC's initial swap data reporting rules and to harmonize swaps regulations with the agency's international counterparts through deference and international comity. Along these lines, Chairman Tarbert touted the importance of seeking to align the CFTC's swap data reporting fields with international standards²⁵ and called the DCO registration amendments "a significant step in building an effective, efficient and cooperative international regulatory framework for the oversight of DCOs operating in the international derivatives markets."²⁶

²³ See *Registration With Alternative Compliance for Non-US Derivatives Clearing Organizations* at 108-09 (17 C.F.R. § 39.3(a)(3)).

²⁴ The exceptions include rules related to customer protection and swap data reporting requirements. See *id.* at 91, 110 (17 C.F.R. § 39.4(c)).

²⁵ See Tarbert Statement Regarding SDR Amendments.

²⁶ See CFTC, "[Statement of Chairman Heath P. Tarbert in Support of Final Rule on Alternative Compliance for Non-US Clearinghouses](#)" (Sept. 17, 2020).