

Alert

CFTC Publishes Final Swap Data Rules and Real-Time Reporting Rules

February 1, 2012

The Commodity Futures Trading Commission (“CFTC”) published its final rules regarding swap data recordkeeping and reporting (the “Swap Data Rules”) pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”). The Swap Data Rules will put into effect the requirements under Title VII of Dodd-Frank that all swap data be reported to a swap data repository (“SDR”). In certain circumstances, U.S. private fund managers on behalf of the funds that they manage will be required to report this information to an SDR. All counterparties, including U.S. private fund managers on behalf of the funds that they manage, will be required to keep detailed records of their swaps for five years following termination of the swaps. The earliest anticipated date for compliance with the requirements of the Swap Data Rules for certain swaps will be the later of July 16, 2012, or 60 days after the publication of the definitions of swap dealer (“SD”) and major swap participant (“MSP”). However, non-SD/MSPs that have the obligation to report will have an additional 90 or 180 days, depending upon the type of swap, to report their swaps.

In addition, the CFTC published its final rules regarding real-time public reporting of swap transaction data (the “Real-Time Rules”). The Real-Time Rules set forth how SDRs will report the data that they collect to the public, including time delays and procedures intended to protect counterparties’ anonymity.

Who Needs to Report and What Needs To Be Reported

U.S. fund managers will not be obligated to report swap information to SDRs other than when they trade with another non-SD/MSP, and even then, only one of the counterparties needs to report the swap. There are several types of information that need to be reported: (1) swap creation data (including primary economic terms (“PET”) and confirmation data)¹ and (2) continuation data and valuation data.²

For a swap that is executed on a swap execution facility (“SEF”) or a designated contract market (“DCM”), the SEF or DCM is required to report “swap creation data” to the SDR.³ If a swap is not executed on an SEF or DCM (an “off-facility swap”) but is cleared by a derivatives clearing organization (“DCO”), then the DCO must report all swap creation data about the swap. Dodd-Frank outlines the hierarchy of who reports if a swap is between only an SD and an MSP and/or a non-SD/MSP. If the swap is an off-facility swap that is not cleared, then if the swap is between an SD and an MSP, the SD must report the swap. If the swap is between an

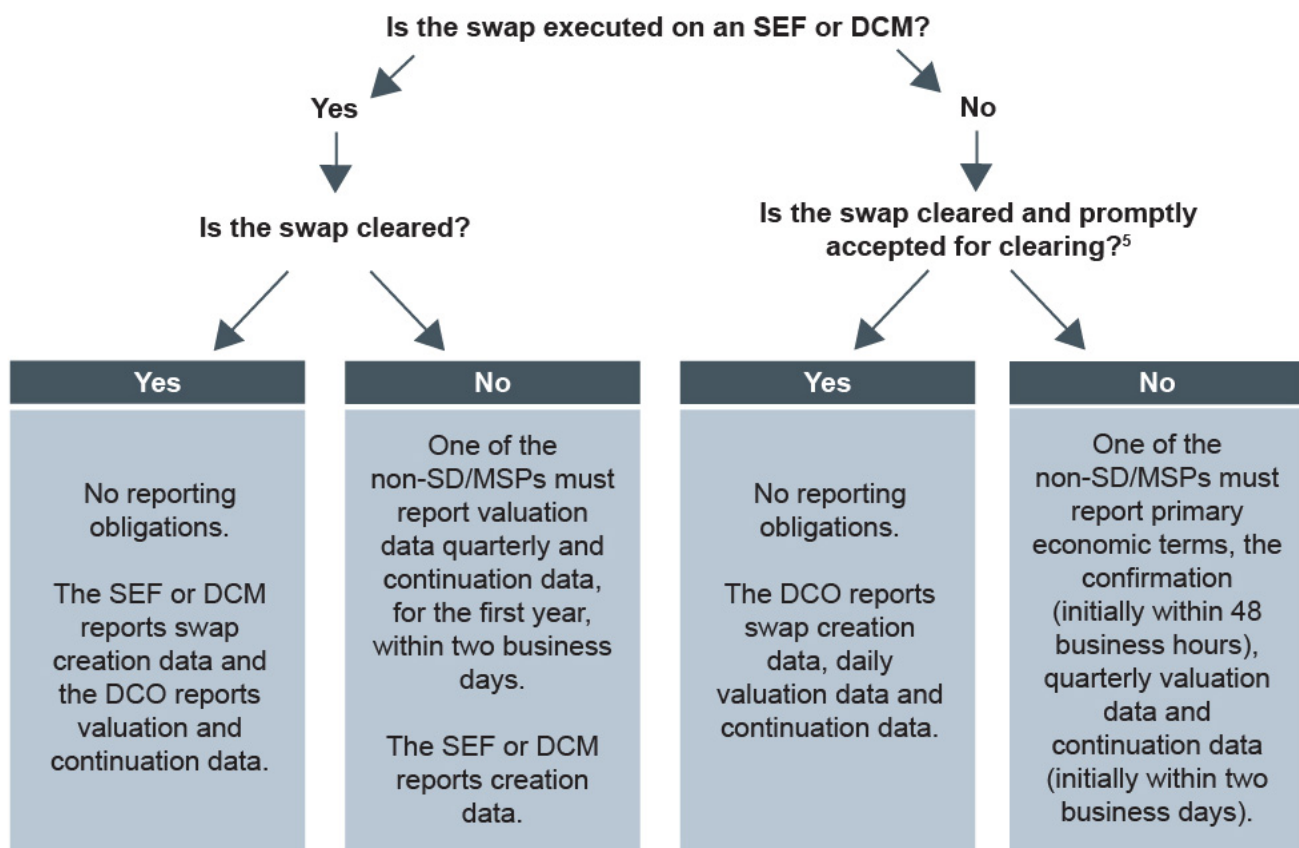
¹ PET data comprises all agreed-upon economic terms of a swap (required PET data varies by asset class and is set forth in the appendices to the Swap Data Rules) while confirmation data comprises all other agreed-upon terms of a swap, including the signed or electronic confirmation itself.

² Continuation data means ongoing data generated during the life of a swap, including valuation data and any modifications to or extensions of the contract.

³ Once swap creation data about a swap is reported to an SDR, subsequent continuation data about that swap must be reported to the same SDR.

SD/MSP and a non-SD/MSP, then the SD or MSP must report the swap. If the swap is between two non-SD/MSPs, then the two non-SD/MSP counterparties are required to agree as to who is the reporting counterparty. Given that most private investment funds will not qualify as MSPs,⁴ U.S. fund managers generally will not have to report unless the fund transacts with another non-SD/MSP. To fulfill its reporting requirements, a fund manager may contract on behalf of a fund with a third-party reporting service to fulfill its obligations; however, the fund is ultimately responsible for its reporting obligations. The original non-SD/MSP reporting party would also have to report valuation data on a quarterly basis and other continuation data about the swap. (The final rule lessens the valuation data frequency burden by requiring non-SD/MSPs to report valuation data quarterly rather than more frequently (for example, SD/MSPs must report valuation data daily)). With respect to continuation data, for the first year of reporting, the non-SD/MSP party is obligated to report by the end of the second business day following the date of a change to a primary economic term. After the first year, the non-SD/MSP party is obligated to report a change to a primary economic term by the end of the first business day.

The following flowchart illustrates the determination of reporting obligations where a swap is traded between two non-SD/MSP counterparties:



Recordkeeping Requirements

The Swap Data Rules contain requirements for swap record retention by swap parties. SEFs, DCMs, DCO, SDs and MSPs must keep “full, complete and systematic” records (including all associated data and memoranda) of their business related to swaps. All non-SD/MSP counterparties, including U.S. private fund managers on behalf of the funds that they manage, are also required to keep full, complete and systematic records (including all associated data and memoranda), however, rather than all records related to their

⁴ The CFTC has not yet finalized the definition of MSP, but a discussion of the proposed definition is available in our Jan. 7, 2011, *Client Alert*: http://www.srz.com/010711_Swap_Market_Regulation/.

⁵ The acceptance deadline for cleared swaps is, initially, four hours after execution for swaps subject to mandatory clearing or 48 business hours after execution for swaps not subject to mandatory clearing. If a swap is not accepted for clearing by the deadline, the non-SD/MSP will be required to report PET data (but the DCO will report confirmation, continuation and valuation data).

business relating to swaps, non-SD/MSPs must maintain records only related to each swap to which they are a counterparty. Commenters to the CFTC's proposed rules on recordkeeping asked that non-SD/MSP counterparties be allowed to keep fewer records, but the CFTC did not further reduce the records required to be kept. All recordkeeping entities must retain these records during the life of each swap and for five years thereafter. SEFs, DCMs, DCOs, SDs and MSPs must make records available in real time using electronic access during the first two years of the five-year retention period, and within three business days thereafter. SDRs must retain records for five years with real-time electronic access, and archive such records for an additional 10 years. Non-SD/MSPs may keep electronic or paper records, but must be able to make them available within five business days.

Compliance Dates

The CFTC's release accompanying the Swap Data Rules indicated that the initial compliance date for swap data reporting (for certain swaps, such as credit swaps and interest rate swaps) is the later of: (1) July 16, 2012; or (2) 60 days following the CFTC's publication of the final definition of "swap," "swap dealer" and "major swap participant" (the "Initial Compliance Date"). On the Initial Compliance Date, SEFs, DCMs, DCOs, SDs, MSPs and SDRs must comply with the Swap Data Rules with respect to interest rate and credit swaps. Such entities then must comply with respect to equity, foreign exchange and commodity swaps 90 days following the Initial Compliance Date. Non-SD/MSPs must comply with the Swap Data Rules 180 days following the Initial Compliance Date.

Real-Time Public Reporting

Dodd-Frank requires that real-time swap pricing data be reported to the public in order to promote market liquidity and transparency. The Real-Time Rules set out which swaps are subject to public dissemination and the manner in which the reporting takes place. Generally, SDRs (not swap counterparties) will disseminate in real time to the public the pricing data that they receive from the reporting parties for swaps.

For any publicly reportable swap that is executed on an SEF or DCM, the SEF or DCM will report pricing data to an SDR for public dissemination. For all other publicly reportable swaps, the reporting party must report pricing data to the SDR. The reporting party must report pricing data about a publicly reportable swap to an SDR "as soon as technologically practicable" following the execution of the swap.⁶ Data required to be reported for public dissemination comprises all material economic terms of a swap including execution time, collateralization, maturity date, underlying asset, currency, notional amount and payment frequency.

Initially, the CFTC had proposed that pricing data about all swaps be disseminated, regardless of the identity of the counterparties. In its final Real-Time Rules, however, the CFTC acknowledged that back-to-back swaps between affiliates and other portfolio compression transactions are not useful for price discovery. Therefore, the Real-Time Rules define "publicly reportable swap transactions" as "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 any change to or transfer of a swap that results in a change to its pricing.

It is the intention of the CFTC that the dissemination of pricing information about certain trades with large notional amounts (sometimes known as "block trades") be subject to a time delay following execution. However, the CFTC did not address the minimum size for such trades in the Real-Time Rules. As a result, until the CFTC establishes such minimums in a subsequent rulemaking, the dissemination of pricing information for all swaps will be subject to time delays. These delays vary by asset class and initially are between 30 minutes and four hours for most swaps executed on an SEF or DCM or where one party is an SD/MSP, four hours for cleared swaps where neither party is an SD/MSP, and 48 hours for non-cleared swaps where neither party is an SD/MSP. As with the swap data reporting rules, these timeframes will contract in subsequent years.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

⁶ The "execution" of a swap means the time at which the counterparties verify that they agree on the economic terms of the swap. Execution precedes the final confirmation of the swap.

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