

CFTC Adopts Historical Swap Recordkeeping and Reporting Requirements

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On May 18, 2012, the CFTC adopted Part 46 rules for recordkeeping and reporting of “historical swaps.”¹ Historical swaps include “pre-enactment swaps”—swaps entered into before the enactment of Dodd-Frank on July 21, 2010 but not terminated or expired as of that date—and “transitional swaps”—swaps entered into between July 21, 2010 and the upcoming effective date of the CFTC’s swap reporting rules. Like the CFTC’s Part 45 swap reporting rules, which will govern recordkeeping and reporting for swaps entered into on or after its compliance date, the historical swap rules require swap counterparties to retain information about swap activity and for the “reporting counterparty” to report swap information to a swap data repository (“SDR”). While the historical swap recordkeeping and reporting rules are generally less onerous than the Part 45 rules, they nonetheless impose significant burdens on market participants who may need to collect dispersed information and match it to the rule’s specified data fields, as well as develop new data retention and retrieval systems.

CFTC Recordkeeping and Reporting Regime

To improve regulators’ oversight of the swap market, the Dodd-Frank Act requires the CFTC to adopt rules providing for reporting of swap information to SDRs or, if no appropriate SDR exists, the CFTC. The data reported to SDRs will be available to the CFTC and other regulators. In order to increase market transparency, the Dodd-Frank Act also requires the CFTC to adopt rules requiring that a subset of information about the swap, including price and notional size, be publicly disseminated in real time, subject to certain delays for block trades. The CFTC has already finalized swaps recordkeeping and reporting rules (Parts 43 and 45 of the CFTC rules) for both cleared and uncleared swaps that are entered into on or after the applicable compliance date for those rules. Under the CFTC’s final Part 45 rules, the “reporting counterparty” to the swap is responsible for reporting information about the swap to an appropriate SDR. Under the CFTC’s final Part 43 rules, the SDR will publicly disseminate the required information about the swap in real time. Both counterparties are responsible for keeping records about the swap, and the reporting counterparty is responsible for reporting “lifecycle” events to the SDR. The

¹ CFTC Final Rule on Swap Data Recordkeeping and Reporting: Pre-Enactment and Transition Swaps (May 18, 2012), [available here](#).

Part 43 and 45 rules are discussed in greater detail in our January 11, 2012 memorandum [CFTC Adopts Rules Establishing Swap Reporting Regime](#).

Compliance Dates

The estimated dates below are based on the possible effective date of the final rule defining the term “swap” and the final historical swap rule’s implementation period.

60 days after the publication of the final rules defining the term “swap” in the Federal Register (no earlier than August 2012):

Compliance required for SDs/MSPs with respect to credit swaps and interest rate swaps.

150 days after the publication of the final rules defining the term “swap” in the Federal Register (no earlier than November 2012):

Compliance required for SDs/MSPs with respect to all swaps.

240 days after the publication of the final rules defining the term “swap” in the Federal Register (no earlier than February 2013):

Compliance required for all market participants with respect to all asset classes.

While the Part 43 and 45 rules apply to swaps executed on or after their respective compliance dates, Dodd-Frank also requires that market participants report information about historical swaps to SDRs. The historical swap final rule, modeled on Part 45, implements this requirement. On October 14, 2010, the CFTC adopted an interim final rule related to recordkeeping and reporting for pre-enactment swaps, as required by Dodd-Frank. Though not explicitly required by Dodd-Frank, the CFTC also adopted an interim final rule related to recordkeeping and reporting for transition swaps on December 17, 2010. Both interim final rules required market participants to retain information about swap transactions for reporting in the future, and stated that the interim final rule would remain in effect until final historical swap reporting rules were adopted. The CFTC published proposed permanent historical swap reporting rules on April 25, 2011 (the “**Proposal Publication Date**”) and finalized them on May 18, 2012.

The historical swap final rule’s compliance dates align with those in the CFTC’s Part 45 rules. Swap dealers (“**SDs**”) and major swap participants (“**MSPs**”) will need to comply with the rule, and provide initial data reports, with respect to interest rate swaps and credit default swaps by 60 days after the SEC and CFTC publish final rules defining “swap” in the Federal Register (the “**First Compliance Date**”). Compliance by SDs/MSPs for other swap asset classes is required 90 days after the First Compliance Date. Compliance by non-SDs/MSPs is required 180 days after the First Compliance Date.

Historical Swap Recordkeeping Requirements

Like the Part 45 rules, the historical swap rules require all market participants to keep records regarding swaps to which they are a counterparty. The data that must be kept, the form the data must be kept in and the speed with which the data must be retrievable depends on whether the counterparty is an SD/MSP or an end-user, and whether the swap expired or was terminated before the Proposal Publication Date. The key provisions of the recordkeeping requirements can be found in Appendix A.

The historical swap rule release states that, in order to minimize the burden on market participants, counterparties to swaps that were in effect on or after the Proposal Publication Date are only required to retain information that was in their possession on or after that date. This relieves market participants of the need to create or calculate new information about historical swaps for recordkeeping purposes. However, the final rule text does not limit the information required to be retained to information in the counterparty’s possession on or after the Proposal Publication Date.

Historical Swap Reporting Requirements

Reporting Counterparty

The “reporting counterparty” is dependent on the party’s hierarchy on the following list:

- SD;
- MSP;
- financial end-user; and
- non-financial end-user.

Parties at the same level of the hierarchy can choose which is the reporting counterparty. However, if both counterparties are financial end-users or both parties are non-financial end-users, and only one party is a U.S. person, the U.S. person must be the reporting counterparty.

For swaps that have not been terminated and have not expired as of the compliance date, the determination of the “reporting party” is made on the relevant compliance date. Otherwise, the reporting party determination is made as of the termination or expiration date, but the status of a party of an SD or MSP is made as of the relevant compliance date.

Like the Part 45 reporting rules, the historical swap reporting rules designate a “reporting counterparty” with the responsibility of reporting specified swap data to an SDR. The reporting counterparty is designated through the hierarchy described in the sidebar at left. A reporting counterparty may use third-party services to comply with the rules but remains responsible for ensuring compliance.

Primary Economic Terms Data Reporting

Part 45 requires the reporting counterparty to provide “primary economic terms” data to the SDR upon execution of a swap. The historical swap rule requires the reporting counterparty to an historical swap to provide an “initial data report” to the SDR on the relevant compliance date that includes the minimum primary economic terms data listed in [Appendix I](#) to the rule. Reporting counterparties to historical swaps in effect on or after the Proposal Publication Date are responsible for reporting the minimum primary economic terms in their possession on or after the Proposal Publication Date. Reporting counterparties to historical swaps terminated or expired prior to the Proposal Publication Date are required to report these terminated or expired swaps, but are only responsible for reporting the minimum primary economic terms in their possession on or after the date of publication of the interim final rule for pre-enactment or transition swaps, as appropriate.

Continuation Data Reporting

Part 45 requires the reporting counterparty to report “continuation data” to the same SDR to which the swap was initially reported for uncleared swaps, and for derivatives clearing organizations (“DCOs”) to report the same information for cleared swaps. The historical swap rule requires the reporting counterparty to an uncleared historical swap to report any change in the data in the initial report to the same SDR to which the initial report was made. However, the historical swap rule does not require DCOs to report or retain continuation data for cleared historical swaps.

Reporting of Errors and Omissions in Previously Reported Data

The historical swap rule requires the reporting counterparty to a swap to report any errors or omissions in reported data “as soon as technologically practicable” after discovering the error. Non-reporting counterparties that discover an error or omission are required to notify the reporting counterparty, who in turn is required to report the error to the SDR. These requirements only apply if the parties “discover” an error or omission; neither counterparty is required to verify proactively the accuracy of SDR records.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

Daniel N. Budofsky
212 450 4907
daniel.budofsky@davispolk.com

Gerard Citera
212 450 4881
gerard.citera@davispolk.com

Susan C. Ervin
202 962 7141
susan.ervin@davispolk.com

Annette L. Nazareth
202 962 7075
annette.nazareth@davispolk.com

Lanny A. Schwartz
212 450 4174
lanny.schwartz@davispolk.com

Gabriel D. Rosenberg
212 450 4537
gabriel.rosenberg@davispolk.com

Unique Identifiers

Part 45 requires that all swap records and reports contain three unique data identifiers – a legal entity identifier (“**LEI**”), a unique swap identifier (“**USI**”) and a unique product identifier (“**UPI**”). The USI and UPI requirements do not apply to historical swaps. However, the initial data report for each historical swap in existence on or after the Proposal Publication Date must include the LEI of the reporting party as well as the reporting party’s internal identifier for the non-reporting counterparty.

LEIs will be generated and assigned by a yet-to-be determined non-governmental body. Until the CFTC designates an LEI provider, the SDR to which a counterparty reports a swap for the first time after the rule goes into effect must assign an identifier to that counterparty, which will be used by the counterparty and all other SDRs. Non-reporting counterparties are required to obtain an LEI within 180 days of the initial reporting date for the relevant swap.

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Appendix A: Summary of Historical Swap Recordkeeping Requirements

	Historical Swaps Terminated or Expired Before 4/25/2011		Historical Swaps Not Terminated or Expired Before 4/25/2011	
	SDs/MSPs	End-Users	SDs/MSPs	End-Users
Information Required by Recordkeeping Requirements	Information and documents in possession on or after the date of the relevant Interim Final Rule (10/14/10 and 12/17/10 for pre-enactment and transition swaps, respectively).	Information and documents in possession on or after the date of the relevant Interim Final Rule (10/14/10 and 12/17/10 for pre-enactment and transition swaps, respectively).	<ul style="list-style-type: none"> ▪ All minimum PET in Appendix I (unclear whether limited to information in possession as of 4/25/11) ▪ Records of confirmation terms and of master or credit support agreements and modifications, only if they were in possession of the counterparty on or after April 25, 2011 ▪ Records required by Part 45.2 to the extent it is created or becomes available to the counterparty on or after the compliance date. 	<ul style="list-style-type: none"> ▪ All minimum PET in Appendix I (unclear whether limited to information in possession as of 4/25/11) ▪ Records of confirmation terms and of master or credit support agreements and modifications, only if they were in possession of the counterparty on or after April 25, 2011 ▪ Records required by Part 45.2 to the extent it is created or becomes available to the counterparty on or after the compliance date.
Allowed Form of Records	Whatever format the counterparty chooses.	Whatever format the counterparty chooses.	May keep records in paper form only if originally created and exclusively maintained in paper form	May choose to keep records in either paper or electronic form
Retention Period	Life of swap + 5 years.	Life of swap + 5 years.	Life of swap + 5 years.	Life of swap + 5 years.
Retrievability Requirement	Must be retrievable within 5 business days throughout the retention period.	Must be retrievable within 5 business days throughout the retention period.	Must be readily accessible via real time electronic access for life of swap + 2 years after termination, then retrievable by registrant or affiliate within 3 business days through remainder of retention period.	Must be retrievable within 5 business days throughout the retention period.