

SWAP DATA RECORDKEEPING AND REPORTING  
UNDER CFTC RULE PART 45 AND REAL-TIME PUBLIC  
REPORTING UNDER CFTC RULE PART 43 FOR SWAP  
COUNTERPARTIES THAT ARE NOT SWAP DEALERS  
OR MAJOR SWAP PARTICIPANTS

January 18, 2012

To Our Clients and Friends:

On December 13, 2011, the Commodity Futures Trading Commission (the “CFTC”) adopted Part 43 of its rules on real-time public reporting of swap transaction data and Part 45 of its rules on swap data recordkeeping and reporting requirements.

This memorandum describes these two sets of rules as applicable to swap counterparties that are not swap dealers (“SD”) or major swap participants (“MSP”). All references to a swap counterparty in this memorandum are to a non-SD/MSP swap counterparty, unless otherwise specified. As the CFTC acknowledged in the releases for these rules, the two sets of rules need to be harmonized in the future.

REGULATORY SWAP DATA RECORDKEEPING AND REPORTING

SWAP DATA RECORDKEEPING

A swap counterparty is required to keep full, complete and systematic records, together with all pertinent data and memoranda, with respect to each swap, including all records demonstrating that it is entitled to elect the end-user clearing exception under section 2(h)(7) of the Commodity Exchange Act (the “CEA”) with respect to each swap as to which such counterparty elects to claim such exception.

All records required to be kept with respect to each swap must be retained throughout the life of such swap and for a period of at least 5 years following the final termination of such swap.

All records must be kept in either electronic or paper form, so long as they are retrievable and information contained in such form is reportable under Part 45.

All records required to be kept under Part 45 or any other CFTC Rule must be retrievable within 5 business days<sup>1</sup> throughout the period such records are required to be kept.

## SWAP DATA REPORTING

### Determination of the Reporting Counterparty

- If only one counterparty is an SD, the reporting counterparty is the counterparty that is an SD.
- If neither counterparty is an SD and only one counterparty is an MSP, the reporting counterparty is the counterparty that is an MSP.
- If both counterparties are non-SD/MSP counterparties and only one counterparty is a financial entity,<sup>2</sup> the reporting counterparty is the counterparty that is a financial entity.
- If both counterparties are SDs, both are MSPs, both are non-SD/MSPs and financial entities, or both are non-SD/MSP counterparties and neither is a financial entity, then (a) for a swap executed on or pursuant to the rules of a swap execution facility (“SEF”) or designated contract market (“DCM”) (an “on-facility swap”), the counterparties must agree on the reporting counterparty after notice from the relevant SEF or DCM but not later than the end of the 1<sup>st</sup> business day following the date of execution and (b) for a swap not executed on or pursuant to the rules of an SEF or DCM (an “off-facility swap”), the counterparties must agree on the reporting counterparty as one term of the swap.
- Notwithstanding the above, if both counterparties are non-SD/MSP counterparties and only one counterparty is a US person, the reporting counterparty is the counterparty that is a US person.

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<sup>1</sup> *Business day means the 24-hour day, on all days except, Saturdays, Sundays, and legal holidays in the location of the reporting counterparty.*

<sup>2</sup> *Financial entity means an SD, MSP, security-based swap dealer, security-based MSP, commodity pool, private fund as defined in section 202(a) of the Investment Advisers Act of 1940, ERISA plan, or person predominantly engaged in activities that are in the business of banking or that are financial in nature as defined in section 4(k) of the Bank Holding Company Act of 1956.*

- Notwithstanding the above, if neither counterparty is a US person, but the swap is an on-facility swap or otherwise executed in the U.S., or is cleared by a derivatives clearing organization (“DCO”), then (a) for an on-facility swap, the counterparties must agree on the reporting counterparty after notice from the relevant SEF or DCM but not later than the 1<sup>st</sup> business day following the date of execution and (b) for an off-facility swap, the counterparties must agree on the reporting counterparty as one term of the swap.
- If a reporting counterparty ceases to be a party to a swap due to an assignment or novation:
  - if only one counterparty is an SD, the reporting counterparty is the counterparty that is an SD;
  - if neither counterparty is an SD and only one counterparty is an MSP, the reporting counterparty is the counterparty that is an MSP;
  - if both counterparties are non-SD/MSP counterparties and only one counterparty is a US person, the reporting counterparty is the counterparty that is a US person; and
  - in all other cases, the reporting counterparty is the counterparty that replaced the previous reporting counterparty.

## SWAP CREATION DATA REPORTING

### On-facility Swaps

A swap counterparty will have no reporting obligation under Part 45 with respect to an on-facility swap.

### Off-facility Swaps that Are Subject to the Mandatory Clearing Requirement

With respect to all off-facility swaps that are subject to the mandatory clearing requirement, other than (a) swaps that are excepted from clearing under the end-user exception under section 2(h)(7) of the CEA and (b) swaps that are determined by the CFTC to be cleared but are not cleared as described in section 2(h)(a)(13)(C)(iv) of the CEA, the requirements set forth below will apply.

### Primary Economic Terms Data

- The reporting party must report all primary economic terms data<sup>3</sup> as soon as technologically practicable after execution but no later than: (a) 4 business hours<sup>4</sup> after execution during the first year following the compliance date; (b) 2 business hours after execution during the second year following the compliance date; and (c) 1 business hour after execution thereafter.
- If the swap is voluntarily submitted for clearing and accepted for clearing by a DCO before the applicable reporting deadline above and if the swap is so accepted for clearing before the reporting party reports any primary economic terms data to a swap data repository (“SDR”), the reporting party will be excused from reporting obligations under Part 45.

### Confirmation Data

The reporting party must report all confirmation data<sup>5</sup> as soon as technologically practicable following confirmation, but no later than: (a) the end of the 2<sup>nd</sup> business day after the date of confirmation during the first year following the compliance date; and (b) the end of the 1<sup>st</sup> business day after the date of confirmation thereafter.<sup>6</sup>

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<sup>3</sup> Primary economic terms means all of the terms of a swap matched or affirmed by the counterparties in verifying the swap, and primary economic terms data means all of the data elements necessary to fully report all of the primary economic terms of a swap.

<sup>4</sup> Business hours means consecutive hours during one or more business days.

<sup>5</sup> Confirmation data means all of the terms of a swap matched and agreed upon by the counterparties in confirming the swap. In the case of a cleared swap, it includes the internal identifier assigned by the automated system of the relevant DCO to the two transactions resulting from novation to the DCO. Confirmation means the consummation (electronically or otherwise) of legally binding documentation (electronic or otherwise) that memorializes the agreement of the parties to all terms of a swap. A confirmation must be in writing and must legally supersede any previous agreement.

<sup>6</sup> During the first 180 calendar days following the compliance date, if and to the extent the reporting confirmation data normalized in data fields is not yet technologically practicable for the reporting counterparty, the reporting counterparty may report confirmation data to an SDR by transmitting an image of the confirmation. Beginning 180 days after the compliance date, the reporting counterparty must report all confirmation data to the SDR electronically.

## Off-facility Swaps that Are Not Subject to Mandatory Clearing

### Primary Economic Terms Data

- The reporting counterparty must report all primary economic terms data as soon as technologically practicable after execution, but no later than: (a) 48 business hours after execution during the 1<sup>st</sup> year following the compliance date; (b) 36 business hours after execution during the 2<sup>nd</sup> year following the compliance date; and (c) 24 business hours after execution thereafter.
- If a swap is voluntarily submitted for clearing and accepted for clearing before the applicable reporting deadline above and if the swap is accepted for clearing before the reporting counterparty reports any primary economic terms data, then the reporting counterparty is excused from reporting.

### Confirmation Data

- If the swap is accepted for clearing by a DCO, the reporting counterparty shall not be required to report confirmation data.
- If the swap is not voluntarily submitted for clearing, the reporting counterparty must report all confirmation data as soon as technologically practicable after confirmation but no later than: (a) 48 business hours after confirmation during the 1<sup>st</sup> year following the compliance date; (b) 36 business hours after confirmation during the 2<sup>nd</sup> year following the compliance date; and (c) 24 business hours after confirmation thereafter.

### Certain Special Situations

- For a swap that is allocated to a number of counterparties post-execution, required swap creation data must be reported initially to an SDR by the reporting counterparty, and the agent for post-execution counterparties must notify the reporting counterparty of the identities of post-execution counterparties not later than 8 business hours after execution. The reporting counterparty must report all swap creation data resulting from allocation to the same SDR.
- For a multi-asset swap, required swap creation data must be reported to an SDR that accepts swaps in the asset class treated as the primary asset class involved in the swap by the reporting counterparty making the first report.

- For a mixed swap, required swap creation data and swap construction data must be reported to an SDR and a security-based SDR.

#### SWAP CONTINUATION DATA

The reporting counterparty must report swap continuation data in a manner sufficient to ensure that all data in the SDR concerning the relevant swap remains current and accurate and includes all changes to the primary economic terms of the swap occurring during the existence of the swap. The reporting counterparty fulfills this obligation by reporting either life cycle event data<sup>7</sup> or state data<sup>8</sup> for the swap within the applicable deadline. The reporting counterparty also has an obligation to report valuation data.<sup>9</sup>

##### Cleared Swaps

The reporting counterparty has no reporting obligation.

##### Uncleared Swaps

###### Life Cycle Event Data or State Data

If reporting life cycle event data, the reporting counterparty must report it no later than (a) the end of the 2<sup>nd</sup> business day following the date of any life cycle event during the 1<sup>st</sup> year after the compliance date, and (b) the end of the 1<sup>st</sup> business day following the date of any life cycle event thereafter, except that life cycle event data relating to a corporate event of the non-reporting counterparty must be reported no later than the end of the 3<sup>rd</sup> business day following the date of such event during the 1<sup>st</sup> year following the compliance date and no later than the end of the 2<sup>nd</sup> business day following such event thereafter.

If reporting state data, the reporting counterparty must report it daily.

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<sup>7</sup> *Life cycle event means any event that would result in either a change to a primary economic term of a swap or to any primary economic terms of data previously reported to an SDR, including a counterparty change, a partial or full termination of a swap, a change to the end date for a swap, or a change in the cash flows or rates originally reported. Life cycle event data means all of the data elements necessary to fully report any life cycle event.*

<sup>8</sup> *State data means all of the data elements necessary to provide a snapshot view, on a daily basis, of all of the primary economic terms of a swap.*

<sup>9</sup> *Valuation data means all of the data elements necessary to fully report the daily mark of a swap.*

## Valuation Data

The reporting counterparty must report the current daily mark of a swap as of the last day of each fiscal quarter to the SDR within 30 calendar days of the end of such fiscal quarter. If the daily mark of the swap is not available, the reporting counterparty may report the current valuation of the swap recorded on its books in accordance with applicable accounting standards.

## VARIOUS IDENTIFIERS

### Unique Swap Identifier

All swaps subject to the jurisdiction of the CFTC will be identified in all recordkeeping and swap data reporting by using a unique swap identifier (“USI”).

#### On-facility Swaps

An SEF or DCM will create a USI and assign it to each swap executed on the SEF or DCM and transmit it to the relevant SDR, each counterparty and the relevant DCO, if any.

#### Off-facility Swaps

- Where an SD or MSP is the reporting counterparty, it will create and assign a USI to the relevant swap and transmit it to the relevant SDR, the non-reporting counterparty and the relevant DCO, if any.
- Where a non-SD/MSP is the reporting counterparty, the SDR to which the primary economic terms data is reported will create a USI to the swap and transmit it to the counterparties and the DCO, if any.

### Legal Entity Identifiers

Each counterparty to a swap subject to the jurisdiction of the CFTC must be identified in all recordkeeping and swap data reporting under Part 45 by using a single legal entity identifier (“LEI”). Only one LEI shall be assigned to any legal entity, and no LEI shall be reused. Each legal entity within a corporate organization or group structure that acts as a counterparty must have its own LEI.

The CFTC will designate by order a legal identifier system that issues or is capable of issuing an LEI conforming to the requirements of Part 45. Level one reference data (the minimum information necessary to identify the legal entity to which an LEI is assigned, including at a

minimum the data elements contained in ISO Standard 17442) shall be reported by means of self-registration, third-party registration or both into a public level one reference database maintained by a legal identifier system. Level two reference data (information concerning the corporate affiliations or company hierarchy relationships of a legal entity) shall be similarly reported into a level two reference database, subject to confidentiality protection for non-public level two reference data in accordance with Part 45.

Until a legal identifier system is designated, an SDR will create and assign a substitute counterparty identifier, and all CFTC-registered entities and swap counterparties must use such substitute counterparty identifiers in all recordkeeping and swap data reporting.

#### Unique Product Identifiers

Each swap subject to the jurisdiction of the CFTC must be identified in all recordkeeping and swap data reporting by using a unique product identifier (“UPI”) and product classification system (“PCS”) to be designated by the CFTC. Each swap sufficiently standardized to receive a UPI shall be identified by a UPI, and each swap not so sufficiently standardized shall be identified by its description using the PCS.

Until a UPI or PCS is designated by the CFTC, all CFTC-registered entities and counterparties must use the internal product identifier or product description used by the SDR to which the relevant swap is reported.

#### Certain Operational Rules

A reporting counterparty may use a third-party service provider to facilitate swap data reporting, but the reporting counterparty remains fully responsible for all reporting requirements under Part 45.

All swap data must be reported to a single SDR, which is the SDR to which the first report of required swap creation data is made.

If there is a swap asset class for which no SDR accepts swap data, the reporting counterparty must report all required swap creation data and continuation data to the CFTC in an electronic file in a format acceptable to the CFTC.

In reporting swap data to an SDR, a reporting counterparty must use the facilities, methods or data standards provided or required by the SDR. An SDR may permit the use of various

facilities, methods or data standards so long as the SDR is able to meet its obligations with respect to the maintenance and transmission of swap data under Part 45.

Corrections of errors or omissions must be reported as soon as technologically practicable after discovery of any such error or omission. A non-reporting counterparty that discovers any error or omission must promptly notify the reporting counterparty of such error or omission.

#### REAL-TIME PUBLIC REPORTING

##### PUBLICLY REPORTABLE SWAP TRANSACTIONS

Real-time public reporting rules under Part 43 will apply with respect to publicly reportable swap transactions. A publicly reportable swap transaction means (a) any executed 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 (b) any termination, assignment, novation, exchange, transfer, amendment, conveyance, or extinguishing of rights or obligations of a swap that changes the pricing of the swap. Certain transactions are not publicly reportable swap transactions because they are not at arm's length, even if they result in a corresponding change in the market risk position between two parties. They include internal swaps between wholly-owned subsidiaries of the same parent entity and portfolio compression exercises. Note that as long as a particular swap is a publicly reportable swap transaction, it must be reported to an SDR under Part 43 on a real-time basis, whether or not it is a block trade, large notional off-facility swap or bespoke swap.

##### REPORTING PARTY

A party to a publicly reportable swap transaction will have no reporting obligation under Part 43 if such swap transaction is an on-facility swap.

A reporting party to an off-facility swap that is a publicly reportable swap transaction must report it as soon as technologically practicable following execution to an SDR for the appropriate asset class. Unless otherwise agreed to by the parties, the reporting party of such off-facility swap will be:

- if only one party is an SD or MSP, then the SD or MSP is the reporting party;
- if one party is an SD and the other party is an MSP, then the SD is the reporting party;

- if both parties are SDs or both are MSPs, then the party designated by the two parties is the reporting party; and
- if neither party is an SD or MSP, then the party designated by the two parties is the reporting party.

#### Certain Operational Rules

If a reporting party becomes aware of an error or omission in the swap transaction or pricing data reported to an SDR by it or by the relevant SEF or DCM, the reporting party must promptly submit corrected data to the same SDR and the relevant SEF or DCM.

A reporting party shall not submit or agree to submit a cancellation or correction for the purpose of re-reporting swap transaction and pricing data in order to gain or extend a delay in public dissemination of accurate swap transaction or pricing data or otherwise evade the reporting requirements under Part 43.

#### COMPLIANCE DATES

##### Swap Data Recordkeeping and Reporting

Swap recordkeeping and data reporting requirements under Part 45 must be complied with by:

- with respect to credit swaps and interest rate swaps,<sup>10</sup> from 90 days after the later of (a) July 16, 2012 or (b) 60 days after the Federal Register publication of the last final rule defining swap, SD or MSP; and
- with respect to equity swaps, foreign exchange swaps<sup>11</sup> and other commodity swaps:<sup>12</sup> 90 days after the compliance date for credit swaps and interest rate swaps.

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<sup>10</sup> For purposes of Part 45, *interest rate swap* means any swap which is primarily based on one or more interest rates, or any swap which is primarily based on rates of exchange between different currencies, changes in such rates, or other aspects of such rates (known as “cross-currency swaps”).

<sup>11</sup> For purposes of Part 45, *foreign exchange swap* means a swap that solely involves an exchange of 2 different currencies on a specific date at a fixed rate and a reverse exchange of such 2 currencies at a later date and at a fixed rate, all agreed upon at inception, and does not include cross-currency swaps.

<sup>12</sup> For purposes of Part 45, *other commodity swap* means any swap that is not included in the credit, equity, foreign exchange or interest rate asset classes.

**Real-Time Public Reporting**

All reporting parties that are non-SD/MSP parties must comply with Part 43 beginning on Compliance Date 3, which is 180 calendar days after the later of (a) July 16, 2012 or (b) 60 calendar days after the Federal Register publication of the last final rule defining swap, SD or MSP.

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Please do not hesitate to call us if you have any questions.

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