

# CLIENT UPDATE

## RECENT DEVELOPMENTS REGARDING CICI REQUIREMENTS AND LOOMING DEADLINES FOR COMPLIANCE BY END-USERS OF SWAPS

### NEW YORK

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Several deadlines are fast approaching for end-users of swaps, particularly for those that continue to enter into swaps.<sup>1</sup> The Commodity Futures Trading Commission (the “CFTC”) requires all swap parties to obtain a “CFTC Interim Compliant Identifier” (a “CICI”) by April 10, 2013. In addition, compliance with certain external business conduct rules by swap dealers will commence on May 1, 2013; therefore, end-users will have to sign up to adhere to the ISDA D-F Protocol (the “DF Protocol”) and provide certain information and representations in order for swap dealers to continue to enter into swaps with end-users on and after May 1.

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<sup>1</sup> See our client updates, “Dodd-Frank Act Compliance Checklist for Swap End-Users” <http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=a72bfbcc-1344-4500-8abb-a4409270d613>, “Swap Participants to Get Temporary Legal Entity Identifiers from DTCC-SWIFT” <http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=ebb882a0-c2f5-4d28-8720-f17541e1f2f6> and “Apply for Your Legal Entity Identifier and Keep Your Swap Data: CFTC Issues Final Rules for Data Recordkeeping and Reporting for Historical Swaps” <http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=2b0ae768-6cb1-4380-b84d-95f7e146675b>

Last, while mandatory clearing for “Category 2 Entities”<sup>2</sup> is not required until June 10, 2013, it will take a fair amount time to establish swap clearing arrangements with one or more futures commission merchants, so Category 2 Entities should start that process sooner rather than later.

#### **APRIL 10: COMPLIANCE WITH CICI REQUIREMENT**

Under the final rules for swap data recordkeeping and reporting requirements for historical swaps and future swaps, all market participants are required to obtain their own legal entity identifiers that will be reported to the relevant swap data repositories or the CFTC. The CFTC has designated DTCC-SWIFT as the provider of an interim legal entity identifier called a CICI. DTCC and SWIFT own, manage and operate the CICI Utility Portal, located at <https://www.ciciutility.org/index.jsp>, through which you can apply for a CICI.

As further detailed in the attached Appendix A, “CICI Guidance on Registration and Certification,” there have been several recent developments that impact CICIs.

#### *Third-party Registration and Assisted Registration*

When the CICI Utility Portal was launched in August 2012, market participants were able to register for a CICI through the following two methods:

- Primary Party Registration – CICI registered by the market participant.
- Third-party Registration – CICI registered on behalf of the market participant by another entity.

On November 16, 2012, Third-party Registration was replaced with Assisted Registration, which requires the registrant to obtain explicit permission of the entity being registered prior to requesting CICI assignment. Records of CICIs registered through Assisted Registration were labeled “NOT\_CERTIFIED,” similar to CICIs registered through Third-party Registration.

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<sup>2</sup> “Category 2 Entity” is defined as an entity that is not a “Third-party Subaccount” and that is: (i) a commodity pool, (ii) a private fund as defined in section 202(a) of the Investment Advisers Act of 1940 other than an “active fund,” (iii) a person predominantly engaged in activities that are in the business of banking, or (iv) a person predominantly engaged in activities that are financial in nature as defined in section 4(k) of the Bank Holding Company Act of 1956. A “Third-party Subaccount” is defined as an account that is managed by an investment manager that is independent of and unaffiliated with the account’s beneficial owner or sponsor, and is responsible for the documentation necessary for the account’s beneficial owner to clear swaps.

On March 7, 2013, the CFTC provided updated guidance indicating that Self-registration (Primary Party Registration) includes Assisted Registration. Records of CICIs registered through Assisted Registration should therefore have a status of “CERTIFIED” upon registration.

### *Impact on Certification Status*

- If you self-registered your CICI, it should continue to have a status of “CERTIFIED.”
- If your CICI was obtained through Assisted Registration and has not been certified, the status will be automatically changed to “CERTIFIED” as of March 15, 2013.
- If your CICI was obtained through Third-party Registration before November 16, 2012, it will remain “NOT\_CERTIFIED” until the record is self-certified, which can be done via the CICI Utility Portal.

### *Important CICI-related Deadline*

CFTC swap reporting rules require CICIs to be assigned and certified for all swap counterparties that are neither swap dealers nor major swap participants by April 10, 2013. Therefore, if your CICI was obtained through Third-party Registration before November 16, 2012, you should certify your record as soon as possible, but no later than April 10, 2013.

Subsequent to initial registration, all entities registered for CICIs must certify the data associated with their CICIs on an annual basis, even if there is no change to the information.

### **MAY 1: ISDA DF PROTOCOL**

If you have not followed the procedures to adhere to the DF Protocol or amended your existing derivatives documents to incorporate the newly-required information and representations which your swap dealer counterparties need to obtain in order to comply with their external business conduct rules, you must do so before May 1, 2013. The interim final rules of the CFTC extended the compliance date for such business conduct rules to May 1, 2013. After May 1, your swap dealer counterparties will no longer be able to enter into new swaps with you unless you have completed the DF Protocol process or have otherwise amended your documentation bilaterally with your swap dealer.

## **JUNE 10: SETTING UP CLEARING ARRANGEMENT**

If you are a “Category 2 Entity,” mandatory clearing of certain interest rate swaps and credit default swaps<sup>3</sup> will commence on June 10, 2013. To continue to enter into those swaps, you must have established an arrangement with one or more futures commission merchants for swap clearing by that date.

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Please do not hesitate to contact us with any questions.

March 22, 2013

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<sup>3</sup> The description of the categories of swaps that are currently required for clearing is set forth in Appendix B of this memorandum.

# APPENDIX A



## CICI Guidance on Registration and Certification

**DEADLINE APPROACHING - CFTC SWAP REPORTING RULES REQUIRE CICIs TO BE ASSIGNED AND CERTIFIED FOR ALL OTC SWAPS COUNTERPARTIES NO LATER THAN APRIL 10, 2013**

There have been several important developments recently that impact the CICI Utility, including new CFTC guidance regarding entity certification (<http://www.cftc.gov/PressRoom/PressReleases/pr6526-13>), and new and upcoming CICI Utility enhancements designed to support CICI registration and certification.

### **New CFTC Guidance**

The CICI Utility Portal was launched in August of 2012 to facilitate the registration of legal entity identifiers; at this time, called CFTC Interim Compliant Identifiers. The Portal included the ability to register for a new CICI identifier through the following two methods:

- Primary Party Registration – Indicates that a CICI was being registered by the entity themselves
- Third-party Registration – Indicates that a CICI was being registered on behalf of another entity

On November 16<sup>th</sup>, 2012, as the result of decisions taken by the Implementation Group, under the auspices of the Financial Stability Board, and subsequent CFTC guidance, Third-party Registration was replaced with Assisted Registration. Assisted Registration is similar to Third-party Registration operationally, but requires the registrant to obtain explicit permission of the entity being registered prior to requesting CICI assignment. To date, records registered through Assisted Registration were deemed “NOT\_CERTIFIED”, similar to third-party registered records.

On March 7<sup>th</sup>, 2013, the CFTC provided updated guidance indicating that Self-registration (Primary Party Registration) includes Assisted Registration. Thus, records that were submitted through Assisted Registration should reflect a Certification State of “CERTIFIED” upon registration.

### **Resulting Changes**

- If you self-registered your CICI, it currently has a status of “CERTIFIED” and no action is required at this time.
- If your CICI was obtained through the Assisted Registration process and has not been certified, the status of the record will be automatically changed to “CERTIFIED” as of March 15, 2013. The Next Certification Date attribute will be set to one year from the record’s date of registration.
- If your record was third-party registered before November 16<sup>th</sup>, 2012, it will remain “NOT\_CERTIFIED” until action is taken to self-certify the record. This is easily done via the CICI Utility Portal. If you are subject to the CFTC rule on swaps reporting, you need to certify your record by April 10, 2013.

### **Other CICI Utility Changes**

#### **Additional Payment Methods**

Starting April 1<sup>st</sup>, you may pay via wire for service requests submitted via the CICI Utility Portal. Wires can be submitted via any on the major wire networks, including ACH, Fed Wire, SWIFT, and CHIPS. Once implemented, this functionality will allow you to complete an order on the Portal, and then submit payment via wire using pre-defined wire instructions. After payment is received and confirmed, the order will be released for CICI assignment and processing.

## Current Pricing

The following table sets out the current pricing all CICI Utility services given the recent guidance changes.

Service	Charge
Self-Registration	\$200
Assisted Registration	\$200
Initial Certification of Third-party Registrations (prior to 16 Nov 2012)	\$100
Annual Certification Maintenance	\$100
Record Challenges	Free

## Clarification on Service Availability for Certain Parties

Due to the reclassification of Assisted Registration, the Certification process can also be completed by those authorized users who can complete an Assisted Registration request.

Service	Authorized Usage
Self-Registration	<ul style="list-style-type: none"> <li>- An employee of the legal entity that is being registered</li> <li>- An employee of a legal entity that has controlling interest over the entity being registered</li> </ul>
Assisted Registration	<ul style="list-style-type: none"> <li>- Any individual who has explicit permission from the legal entity to register on the entity's behalf</li> </ul>
Initial Certification of Third-party Registrations (prior to 16 Nov 2012)	<ul style="list-style-type: none"> <li>- An employee of the legal entity that is being registered</li> <li>- An employee of the legal entity that has controlling interest over the entity being registered</li> <li>- Any individual who has explicit permission from the legal entity to register on the entity's behalf</li> </ul>
Annual Certification Maintenance	<ul style="list-style-type: none"> <li>- An employee of the legal entity that is being registered</li> <li>- An employee of the legal entity that has controlling interest over the entity being registered</li> <li>- Any individual who has explicit permission from the legal entity to register on the entity's behalf</li> </ul>
Record Challenges	<ul style="list-style-type: none"> <li>- Any individual</li> </ul>

## Questions and Answers

### How do I register for a new CICI or certify an existing CICI record?

**Self-Registration via Portal** – Registrations for your entities can be completed via the CICI Utility Portal at [www.ciciutility.org](http://www.ciciutility.org). All self-registered records are initially certified upon registration and the entity is required to maintain/certify the record annually. Payment can be made via credit card. As of **April 1, 2013**, a wire payment mechanism for registrations processed on the CICI Utility Portal will be available.

**Assisted Registration via Portal** – A third-party can register another entity for a CICI via the CICI Utility Portal if they have the entity's explicit permission to do so. All Assisted Registration records are certified upon registration and the entity is required to maintain/certify the record annually. As of **April 1, 2013**, a wire payment mechanism for registrations processed on the CICI Utility Portal will be available.

**Bulk Registration** – Self or Assisted Registration can be completed via a bulk file submission. For bulk registrations, payment can be made via wire transfer. Bulk registration files should contain at least 50 registrations, although

files of fewer than 50 registrations may be considered. Please send an email to [bulksubmission@ciciutility.org](mailto:bulksubmission@ciciutility.org) if you are interested.

**Certification via Portal** – An entity receiving a CICI as part of the initial database population or via Third-party Registration (functionality that was discontinued and replaced by Assisted Registration on November 16, 2012) is required to certify their CICI as soon as possible following registration and annually thereafter. Certification can be done via the web portal. Payment can be made via credit card. As of **April 1, 2013**, wire payments for Certifications done on the CICI Utility Portal will be available.

**Bulk Certification** – Beginning **March 4, 2013**, a Bulk Certification function was implemented to allow users to submit a bulk file certifying the reference data for their CICI records. This process allows for payment via wire transfer. Please send an email to [bulksubmission@ciciutility.org](mailto:bulksubmission@ciciutility.org) if you are interested.

### How do I keep my records up-to-date between annual certification dates?

Individuals should be encouraged to submit the latest information for their entity records between annual Certifications. To facilitate this type of submission, the Challenge process was created on the CICI Utility Portal. This will allow users to submit any new information without being charged. As a result of the user's submission, the CICI Utility Validation Team will review the request, and update the record according to publicly available information. If additional information needs to be supplied to confirm the change, the user can submit information to the CICI Utility Customer Service Team at [customerservice@ciciutility.org](mailto:customerservice@ciciutility.org).

### Why is a CICI required?

- All swap counterparties subject to CFTC jurisdiction are required to have a CICI for recordkeeping as well as reporting.
- Reporting firms must identify themselves and counterparties with CICIs on transactions submitted to registered swap data repositories.

### When are CICIs required?

- **SDs for credit and interest rate swaps:** December 31, 2012; annually thereafter
- **SDs for equity, FX, and commodity swaps:** February 28, 2013; annually thereafter
- **MSPs, for all asset classes:** February 28, 2013; annually thereafter
- **Non-SD/MSP counterparties, for all asset classes:** April 10, 2013; annually thereafter

### Who must perform the registration or certification?

- Each swap counterparty subject to CFTC jurisdiction is expected to:
  - **Self-register** for a CICI or give explicit permission to another party to register it via Assisted Registration
  - **Certify** its CICI record if it was registered during the initial load of the database or via Third-party Registration prior to November 16, 2012.
  - **Maintain** its own record via the annual Certification process
- Subsequent to initial registration, all entities that have Self-registered or Assisted Registered for CICIs must Certify the data associated with their CICI on an annual basis, even if there is no change to the information.
- Entities who obtained a CICI via the initial load of the database prior to implementation, or via Third-party Registration prior to November 16, 2012, should Certify their CICIs as soon as possible, but no later than April 10, 2013 and then annually on an on-going basis.

For more information, please email [customerservice@ciciutility.org](mailto:customerservice@ciciutility.org).



# APPENDIX B

significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis respecting the impact.<sup>255</sup> As stated in the NPRM, the clearing requirement determinations and rules proposed by the Commission will affect only eligible contract participants (ECPs) because all persons that are not ECPs are required to execute their swaps on a DCM, and all contracts executed on a DCM must be cleared by a DCO, as required by statute and regulation; not by operation of any clearing requirement.<sup>256</sup> Accordingly, the Chairman, on behalf of the Commission, certified pursuant to 5 U.S.C. 605(b) that the proposed rules would not have a significant economic impact on a substantial number of small entities. The Commission then invited public comment on this determination. The Commission received no comments.

The Commission has previously determined that ECPs are not small entities for purposes of the RFA.<sup>257</sup> However, in its proposed rulemaking to establish a schedule to phase in compliance with certain provisions of the Dodd-Frank Act, including the clearing requirement under section 2(h)(1)(A) of the CEA, the Commission received a joint comment (Electric Associations Letter) from the Edison Electric Institute (EEI), the National Rural Electric Cooperative Association (NRECA) and the Electric Power Supply Association (EPSA) asserting that certain members of NRECA may both be ECPs under the CEA and small businesses under the RFA.<sup>258</sup> These members of NRECA, as the Commission understands, have been determined to be small entities by the Small Business Administration (SBA) because they are “primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and [their] total electric output for the preceding fiscal year did not exceed 4 million megawatt hours.”<sup>259</sup> Although the Electric Associations Letter does not provide details on whether or how the NRECA members that have been determined to

be small entities use the interest rate swaps and CDS that are the subject of this rulemaking, the Electric Associations Letter does state that the EEI, NRECA, and EPSA members “engage in swaps to hedge commercial risk.”<sup>260</sup> Because the NRECA members that have been determined to be small entities would be using swaps to hedge commercial risk, the Commission expects that they would be able to use the end-user exception from the clearing requirement and therefore would not be affected to any significant extent by this rulemaking.

Thus, because nearly all of the ECPs that may be subject to the proposed clearing requirement are not small entities, and because the few ECPs that have been determined by the SBA to be small entities are unlikely to be subject to the clearing requirement, the Chairman, on behalf of the CFTC, hereby certifies pursuant to 5 U.S.C. 605(b) that the rules herein will not have a significant economic impact on a substantial number of small entities.

#### B. Paperwork Reduction Act

The Paperwork Reduction Act (PRA)<sup>261</sup> imposes certain requirements on federal agencies (including the Commission) in connection with conducting or sponsoring any collection of information as defined by the PRA. As stated in the NPRM, § 50.3(a), would require each DCO to post on its Web site a list of all swaps that it will accept for clearing and clearly indicate which of those swaps the Commission has determined are required to be cleared, builds upon the requirements of § 39.21(c)(1), which requires each DCO to disclose publicly information concerning the terms and conditions of each contract, agreement, and transaction cleared and settled by the DCO. The Commission received no comments related to PRA. Thus, this rulemaking will not require a new collection of information from any persons or entities.

#### List of Subjects

##### 17 CFR Part 39

Business and industry, Reporting requirements, Swaps.

##### 17 CFR Part 50

Business and industry, Clearing, Swaps.

<sup>260</sup> See Electric Associations Letter, at 2. The letter also suggests that EEI, NRECA, and EPSA members are not financial entities. See *id.*, at note 5, and at 5 (the associations’ members “are not financial companies”).

<sup>261</sup> 44 U.S.C. 3507(d).

For the reasons stated in the preamble, amend 17 CFR parts 39 and 50 as follows:

#### PART 39—DERIVATIVES CLEARING ORGANIZATIONS

- 1. The authority citation for part 39 continues to read as follows:

**Authority:** 7 U.S.C. 2 and 7a–1 as amended by Pub. L. 111–203, 124 Stat. 1376.

##### § 39.6 [Removed and Reserved]

- 2. Remove and reserve § 39.6.

#### PART 50—CLEARING REQUIREMENT AND RELATED RULES

- 3. The authority citation to part 50 is revised to read as follows:

**Authority:** 7 U.S.C. 2(h) and 7a–1 as amended by Pub. L. 111–203, 124 Stat. 1376.

- 4. Add subpart A, consisting of §§ 50.1 through 50.24 to read as follows:

##### Subpart A—Definitions and Clearing Requirement

Sec.

50.1 Definitions.

50.2 Treatment of swaps subject to a clearing requirement.

50.3 Notice to the public.

50.4 Classes of swaps required to be cleared.

50.5 Swaps exempt from a clearing requirement.

50.6 Delegation of authority.

50.7–50.9 [Reserved]

50.10 Prevention of evasion of the clearing requirement and abuse of an exception or exemption to the clearing requirement.

50.11–50.24 [Reserved]

##### Subpart A—Definitions and Clearing Requirement

##### § 50.1 Definitions.

For the purposes of this part, *Business day* means any day other than a Saturday, Sunday, or legal holiday.

*Day of execution* means the calendar day of the party to the swap that ends latest, provided that if a swap is:

(1) Entered into after 4:00 p.m. in the location of a party; or

(2) Entered into on a day that is not a business day in the location of a party, then such swap shall be deemed to have been entered into by that party on the immediately succeeding business day of that party, and the day of execution shall be determined with reference to such business day.

##### § 50.2 Treatment of swaps subject to a clearing requirement.

(a) All persons executing a swap that:

(1) Is not subject to an exception under section 2(h)(7) of the Act or § 50.50 of this part; and

<sup>255</sup> See 5 U.S.C. 601 *et seq.*

<sup>256</sup> To the extent that this rulemaking affects DCMs, DCOs, or FCMs, the Commission has previously determined that DCMs, DCOs, and FCMs are not small entities for purposes of the RFA. See, respectively and as indicated, 47 FR 18618, 18619, Apr. 30, 1982 (DCMs and FCMs); and 66 FR 45604, 45609, Aug. 29, 2001 (DCOs).

<sup>257</sup> See 66 F.R. 20740, 20743 (Apr. 25, 2001).

<sup>258</sup> See joint letter from EEI, NRECA, and EPSA, dated Nov. 4, 2011, (Electric Associations Letter), commenting on Swap Transaction Compliance and Implementation Schedule: Clearing and Trade Execution Requirements under Section 2(h) of the CEA, 76 FR 58186 (Sept. 20, 2011).

<sup>259</sup> Small Business Administration, Table of Small Business Size Standards, Nov. 5, 2010.

(2) Is included in a class of swaps identified in § 50.4 of this part, shall submit such swap to any eligible derivatives clearing organization that accepts such swap for clearing as soon as technologically practicable after execution, but in any event by the end of the day of execution.

(b) Each person subject to the requirements of paragraph (a) of this section shall undertake reasonable efforts to verify whether a swap is required to be cleared.

(c) For purposes of paragraph (a) of this section, persons that are not clearing members of an eligible derivatives clearing organization shall be deemed to have complied with

paragraph (a) of this section upon submission of such swap to a futures commission merchant or clearing member of a derivatives clearing organization, provided that submission occurs as soon as technologically practicable after execution, but in any event by the end of the day of execution.

**§ 50.3 Notice to the public.**

(a) In addition to its obligations under § 39.21(c)(1), each derivatives clearing organization shall make publicly available on its Web site a list of all swaps that it will accept for clearing and identify which swaps on the list are required to be cleared under section 2(h)(1) of the Act and this part.

(b) The Commission shall maintain a current list of all swaps that are required to be cleared and all derivatives clearing organizations that are eligible to clear such swaps on its Web site.

**§ 50.4 Classes of swaps required to be cleared.**

(a) *Interest rate swaps.* Swaps that have the following specifications are required to be cleared under section 2(h)(1) of the Act, and shall be cleared pursuant to the rules of any derivatives clearing organization eligible to clear such swaps under § 39.5(a) of this chapter.

Specification	Fixed-to-floating swap class			
Currency .....	U.S. dollar (USD) .....	Euro (EUR) .....	Sterling (GBP) .....	Yen (JPY).
Floating Rate Indexes .....	LIBOR .....	EURIBOR .....	LIBOR .....	LIBOR.
Stated Termination Date Range .....	28 days to 50 years ...	28 days to 50 years ...	28 days to 50 years ...	28 days to 30 years.
Optionality .....	No .....	No .....	No .....	No.
Dual Currencies .....	No .....	No .....	No .....	No.
Conditional Notional Amounts .....	No .....	No .....	No .....	No.
Specification	Basis swap class			
Currency .....	U.S. dollar (USD) .....	Euro (EUR) .....	Sterling (GBP) .....	Yen (JPY).
Floating Rate Indexes .....	LIBOR .....	EURIBOR .....	LIBOR .....	LIBOR.
Stated Termination Date Range .....	28 days to 50 years ...	28 days to 50 years ...	28 days to 50 years ...	28 days to 30 years.
Optionality .....	No .....	No .....	No .....	No.
Dual Currencies .....	No .....	No .....	No .....	No.
Conditional Notional Amounts .....	No .....	No .....	No .....	No.
Specification	Forward rate agreement class			
Currency .....	U.S. dollar (USD) .....	Euro (EUR) .....	Sterling (GBP) .....	Yen (JPY).
Floating Rate Indexes .....	LIBOR .....	EURIBOR .....	LIBOR .....	LIBOR.
Stated Termination Date Range .....	3 days to 3 years .....	3 days to 3 years .....	3 days to 3 years .....	3 days to 3 years.
Optionality .....	No .....	No .....	No .....	No.
Dual Currencies .....	No .....	No .....	No .....	No.
6. Conditional Notional Amounts .....	No .....	No .....	No .....	No.
Specification	Overnight index swap class			
Currency .....	U.S. dollar (USD) .....	Euro (EUR) .....	Sterling (GBP).	
Floating Rate Indexes .....	FedFunds .....	EONIA .....	SONIA.	
Stated Termination Date Range .....	7 days to 2 years .....	7 days to 2 years .....	7 days to 2 years.	
Optionality .....	No .....	No .....	No.	
Dual Currencies .....	No .....	No .....	No.	
Conditional Notional Amounts .....	No .....	No .....	No.	

(b) *Credit default swaps.* Swaps that have the following specifications are required to be cleared under section

2(h)(1) of the Act, and shall be cleared pursuant to the rules of any derivatives clearing organization eligible to clear

such swaps under § 39.5(a) of this chapter.

Specification	North American untranch CDS indices class
Reference Entities .....	Corporate.
Region .....	North America.
Indices .....	CDX.NA.IG; CDX.NA.HY.
Tenor .....	CDX.NA.IG: 3Y, 5Y, 7Y, 10Y; CDX.NA.HY: 5Y.
Applicable Series .....	CDX.NA.IG 3Y: Series 15 and all subsequent Series, up to and including the current Series. CDX.NA.IG 5Y: Series 11 and all subsequent Series, up to and including the current Series. CDX.NA.IG 7Y: Series 8 and all subsequent Series, up to and including the current Series. CDX.NA.IG 10Y: Series 8 and all subsequent Series, up to and including the current Series. CDX.NA.HY 5Y: Series 11 and all subsequent Series, up to and including the current Series.
Tranching .....	No.

Specification	European untranchcd CDS indices class
Reference Entities .....	Corporate.
Region .....	Europe.
Indices .....	iTraxx Europe. iTraxx Europe Crossover. iTraxx Europe HiVol.
Tenor .....	iTraxx Europe: 5Y, 10Y. iTraxx Europe Crossover: 5Y. iTraxx Europe HiVol: 5Y.
Applicable Series .....	iTraxx Europe 5Y: Series 10 and all subsequent Series, up to and including the current Series. iTraxx Europe 10Y: Series 7 and all subsequent Series, up to and including the current Series. iTraxx Europe Crossover 5Y: Series 10 and all subsequent Series, up to and including the current Series. iTraxx Europe HiVol 5Y: Series 10 and all subsequent Series, up to and including the current Series.
Tranchcd .....	No.

**§ 50.5 Swaps exempt from a clearing requirement.**

(a) Swaps entered into before July 21, 2010 shall be exempt from the clearing requirement under § 50.2 of this part if reported to a swap data repository pursuant to section 2(h)(5)(A) of the Act and § 46.3(a) of this chapter.

(b) Swaps entered into before the application of the clearing requirement for a particular class of swaps under §§ 50.2 and 50.4 of this part shall be exempt from the clearing requirement if reported to a swap data repository pursuant to section 2(h)(5)(B) of the Act and either § 46.3(a) or §§ 45.3 and 45.4 of this chapter, as appropriate.

**§ 50.6 Delegation of Authority.**

(a) The Commission hereby delegates to the Director of the Division of Clearing and Risk or such other employee or employees as the Director may designate from time to time, with the consultation of the General Counsel or such other employee or employees as the General Counsel may designate from time to time, the authority:

(1) After prior notice to the Commission, to determine whether one or more swaps submitted by a derivatives clearing organization under § 39.5 falls within a class of swaps as described in § 50.4, provided that inclusion of such swaps is consistent with the Commission's clearing requirement determination for that class of swaps; and

(2) To notify all relevant derivatives clearing organizations of that determination.

(b) The Director of the Division of Clearing and Risk may submit to the Commission for its consideration any matter which has been delegated in this section. Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

**§ 50.7–50.9 [Reserved].**

**§ 50.10 Prevention of evasion of the clearing requirement and abuse of an exception or exemption to the clearing requirement.**

(a) It shall be unlawful for any person to knowingly or recklessly evade or participate in or facilitate an evasion of the requirements of section 2(h) of the Act or any Commission rule or regulation promulgated thereunder.

(b) It shall be unlawful for any person to abuse the exception to the clearing requirement as provided under section 2(h)(7) of the Act or an exception or exemption under this chapter.

(c) It shall be unlawful for any person to abuse any exemption or exception to the requirements of section 2(h) of the Act, including any exemption or exception as the Commission may provide by rule, regulation, or order.

■ 5. Designate § 50.25 under new subpart B under the following heading and add reserved §§ 50.26 through 50.49.

**Subpart B—Compliance Schedule**

Sec.  
50.25 Clearing requirement compliance schedule.

50.26–50.49 [Reserved]

■ 6. Add subpart C, consisting of § 50.50, to read as follows:

**Subpart C—Exceptions and Exemptions to Clearing Requirement**

**§ 50.50 Exceptions to the clearing requirement.**

(a) *Non-financial entities.* (1) A counterparty to a swap may elect the exception to the clearing requirement under section 2(h)(7)(A) of the Act if the counterparty:

(i) Is not a “financial entity” as defined in section 2(h)(7)(C)(i) of the Act;

(ii) Is using the swap to hedge or mitigate commercial risk as provided in paragraph (c) of this section; and

(iii) Provides, or causes to be provided, the information specified in paragraph (b) of this section to a registered swap data repository or, if no registered swap data repository is available to receive the information from the reporting counterparty, to the Commission. A counterparty that satisfies the criteria in this paragraph (a)(1) and elects the exception is an “electing counterparty.”

(2) If there is more than one electing counterparty to a swap, the information specified in paragraph (b) of this section shall be provided with respect to each of the electing counterparties.

(b) *Reporting.* (1) When a counterparty elects the exception to the clearing requirement under section 2(h)(7)(A) of the Act, one of the counterparties to the swap (the “reporting counterparty,” as determined in accordance with § 45.8 of this part) shall provide, or cause to be provided, the following information to a registered swap data repository or, if no registered swap data repository is available to receive the information from the reporting counterparty, to the Commission, in the form and manner specified by the Commission:

(i) Notice of the election of the exception;

(ii) The identity of the electing counterparty to the swap; and

(iii) The following information, unless such information has previously been provided by the electing counterparty in a current annual filing pursuant to paragraph (b)(2) of this section:

(A) Whether the electing counterparty is a “financial entity” as defined in section 2(h)(7)(C)(i) of the Act, and if the electing counterparty is a financial entity, whether it is:

(1) Electing the exception in accordance with section 2(h)(7)(C)(iii) or section 2(h)(7)(D) of the Act; or

(2) Exempt from the definition of “financial entity” as described in paragraph (d) of this section;

(B) Whether the swap or swaps for which the electing counterparty is electing the exception are used by the electing counterparty to hedge or mitigate commercial risk as provided in paragraph (c) of this section;

(C) How the electing counterparty generally meets its financial obligations associated with entering into non-cleared swaps by identifying one or more of the following categories, as applicable:

(1) A written credit support agreement;

(2) Pledged or segregated assets (including posting or receiving margin pursuant to a credit support agreement or otherwise);

(3) A written third-party guarantee;

(4) The electing counterparty's available financial resources; or

(5) Means other than those described in paragraphs (b)(1)(iii)(C)(1), (2), (3) or (4) of this section; and

(D) Whether the electing counterparty is an entity that is an issuer of securities registered under section 12 of, or is required to file reports under section 15(d) of, the Securities Exchange Act of 1934, and if so:

(1) The relevant SEC Central Index Key number for that counterparty; and

(2) Whether an appropriate committee of that counterparty's board of directors (or equivalent body) has reviewed and approved the decision to enter into swaps that are exempt from the requirements of sections 2(h)(1) and 2(h)(8) of the Act.

(2) An entity that qualifies for an exception to the clearing requirement under this section may report the information listed in paragraph (b)(1)(iii) of this section annually in anticipation of electing the exception for one or more swaps. Any such reporting under this paragraph shall be effective for purposes of paragraph (b)(1)(iii) of this section for swaps entered into by the entity for 365 days following the date of such reporting. During such period, the entity shall amend such information as necessary to reflect any material changes to the information reported.

(3) Each reporting counterparty shall have a reasonable basis to believe that the electing counterparty meets the requirements for an exception to the clearing requirement under this section.

(c) *Hedging or mitigating commercial risk.* For purposes of section 2(h)(7)(A)(ii) of the Act and paragraph (b)(1)(iii)(B) of this section, a swap is used to hedge or mitigate commercial risk if:

(1) Such swap:

(i) Is economically appropriate to the reduction of risks in the conduct and

management of a commercial enterprise, where the risks arise from:

(A) The potential change in the value of assets that a person owns, produces, manufactures, processes, or merchandises or reasonably anticipates owning, producing, manufacturing, processing, or merchandising in the ordinary course of business of the enterprise;

(B) The potential change in the value of liabilities that a person has incurred or reasonably anticipates incurring in the ordinary course of business of the enterprise;

(C) The potential change in the value of services that a person provides, purchases, or reasonably anticipates providing or purchasing in the ordinary course of business of the enterprise;

(D) The potential change in the value of assets, services, inputs, products, or commodities that a person owns, produces, manufactures, processes, merchandises, leases, or sells, or reasonably anticipates owning, producing, manufacturing, processing, merchandising, leasing, or selling in the ordinary course of business of the enterprise;

(E) Any potential change in value related to any of the foregoing arising from interest, currency, or foreign exchange rate movements associated with such assets, liabilities, services, inputs, products, or commodities; or

(F) Any fluctuation in interest, currency, or foreign exchange rate exposures arising from a person's current or anticipated assets or liabilities; or

(ii) Qualifies as bona fide hedging for purposes of an exemption from position limits under the Act; or

(iii) Qualifies for hedging treatment under:

(A) Financial Accounting Standards Board Accounting Standards Codification Topic 815, Derivatives and Hedging (formerly known as Statement No. 133); or

(B) Governmental Accounting Standards Board Statement 53, Accounting and Financial Reporting for Derivative Instruments; and

(2) Such swap is:

(i) Not used for a purpose that is in the nature of speculation, investing, or trading; and

(ii) Not used to hedge or mitigate the risk of another swap or security-based swap position, unless that other position itself is used to hedge or mitigate commercial risk as defined by this rule or § 240.3a67-4 of this title.

(d) For purposes of section 2(h)(7)(A) of the Act, a person that is a "financial entity" solely because of section 2(h)(7)(C)(i)(VIII) shall be exempt from

the definition of "financial entity" if such person:

(1) Is organized as a bank, as defined in section 3(a) of the Federal Deposit Insurance Act, the deposits of which are insured by the Federal Deposit Insurance Corporation; a savings association, as defined in section 3(b) of the Federal Deposit Insurance Act, the deposits of which are insured by the Federal Deposit Insurance Corporation; a farm credit system institution chartered under the Farm Credit Act of 1971; or an insured Federal credit union or State-chartered credit union under the Federal Credit Union Act; and

(2) Has total assets of \$10,000,000,000 or less on the last day of such person's most recent fiscal year.

Issued in Washington, DC, on November 29, 2012, by the Commission.

**Sauntia S. Warfield,**

*Assistant Secretary of the Commission.*

**Note:** The following appendices will not appear in the Code of Federal Regulations: Appendices to Clearing Requirement Determination Under Section 2(h) of the CEA—Commission Voting Summary and Statement of the Chairman.

**Note:** The following appendices will not appear in the Code of Federal Regulations.

#### **Appendix 1—Commission Voting Summary**

On this matter, Chairman Gensler and Commissioners Sommers, Chilton, O'Malia and Wetjen voted in the affirmative; no Commissioner voted in the negative.

#### **Appendix 2—Statement of Chairman Gary Gensler**

I support the final rule requiring certain interest rate swaps and credit default swap (CDS) indices to be cleared, as provided by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).

Central clearing is one of the three major building blocks of Dodd-Frank swaps market reform—in addition to promoting market transparency and bringing swap dealers under comprehensive oversight—and this rule completes the clearing building block.

Central clearing lowers the risk of the highly interconnected financial system. It also democratizes the market by eliminating the need for market participants to individually determine counterparty credit risk, as now clearinghouses stand between buyers and sellers.

In a cleared market, more people have access on a level playing field.

Small and medium-sized businesses, banks and asset managers can enter the market and trade anonymously and benefit from the market's greater competition.

Clearinghouses have lowered risk for the public and fostered competition in the futures markets since the late 19th century. Following the 2008 financial crisis, President Obama convened the G-20 leaders in Pittsburgh in 2009, and an international

consensus formed that standardized swaps should be cleared by the end of 2012.

The CFTC has already completed a number of significant Dodd-Frank reforms laying the foundation of risk management for clearinghouses, futures commission merchants and other market participants that participate in clearing. Other reforms paving the way for this rule include straight-through processing for swaps and protections for customer funds.

This rule, which fulfills President Obama's G-20 commitment on clearing, is the last step on the path to required central clearing between financial entities. It benefited from significant domestic and international consultation. Moving forward, we will work

with market participants on implementation. I would like to thank my fellow Commissioners and the CFTC staff for all of their hard work and dedication so that now clearing will be a reality in the swaps market.

For this first set of determinations, the Commission looked to swaps that are currently cleared by four derivatives clearing organizations (DCOs).

This set includes standard interest rate swaps in U.S. dollars, euros, British pounds and Japanese yen, as well as five CDS indices on North American and European corporate names.

With this rule, swap dealers and the largest hedge funds will be required to clear these swaps in March. Compliance would be

phased in for other market participants through the summer of 2013.

I believe that the Commission's determination for each class satisfies the five factors provided for by Congress in the Dodd-Frank Act, including the first factor that addresses outstanding exposures, liquidity and pricing data.

Under the rule, a DCO must post on its Web site a list of all swaps it will accept for clearing and must indicate which swaps the Commission had determined are required to be cleared. In addition, the Commission will post this information on our Web site.

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