

CFTC Issues No-Action Relief From Certain Inter-Affiliate Swap Reporting Requirements

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On April 5, 2013, the Commodity Futures Trading Commission's (CFTC) Division of Market Oversight and Division of Clearing and Risk provided no-action relief (the No-Action Letter) from certain reporting requirements relating to swaps between affiliates that are not swap dealers (SDs) or major swap participants (MSPs).¹

As a result of the Dodd-Frank Act, the CFTC adopted rules requiring that information concerning swaps, including swaps between affiliates, be reported to the CFTC or to a swap data repository (SDR).² Specifically, the CFTC has adopted Part 46 (historical reporting) establishing swap data reporting requirements for "historical swaps,"³ Part 45 (regulatory reporting) establishing ongoing swap data reporting requirements for swaps entered into after specific compliance dates⁴ and Rule 50.50(b) (end-user reporting) requiring reporting of certain information to an SDR when a swap counterparty has elected the "end-user exception" from the clearing and exchange-trading mandates.⁵

Relief Granted by the No-Action Letter

The No-Action Letter provides non-SD/MSP "reporting counterparties"⁶ of swaps involving wholly owned or majority-owned affiliates with relief from the following reporting requirements:

1. Regulatory reporting* for over-the-counter, uncleared swaps, including:
 - "creation data" reports;⁷
 - "confirmation data" reports;⁸ and
 - "continuation data" reports;⁹

** The reporting counterparty for swaps involving majority-owned affiliates must still report quarterly (instead of daily) for regulatory reporting purposes.*
2. End-user reporting;¹⁰
3. Historical reporting of historical swaps;¹¹ and
4. Obtaining a unique swap identifier for each swap (only for swaps involving wholly owned affiliates).¹²

Conditions for Relief for Swaps Involving Wholly Owned Subsidiaries

The No-Action Letter applies to swaps involving wholly owned subsidiaries (each a qualifying wholly owned subsidiary) if:

- one of the affiliated counterparties, directly or indirectly, holds a 100 percent ownership interest in the other, or the counterparties share a common parent that directly or indirectly owns 100 percent of each counterparty, and
- the parent counterparty or common parent reports its financial statements on a consolidated basis (including the financial results of the 100 percent subsidiary(-ies)) under GAAP or IFRS.¹³

For swaps involving qualifying wholly owned subsidiaries, the No-Action Letter imposes the following additional conditions for relief (but only conditions one through three are necessary for historical reporting relief):

1. Non-SD/MSP Counterparties. Neither affiliated counterparty is (a) an SD or MSP, (b) affiliated with an SD or MSP or (c) affiliated with a financial company that has been designated as systemically important by the Financial Stability Oversight Council;
2. Over-The-Counter Swaps. The swap was not executed on or pursuant to the rules of a designated contract market, a swap execution facility, a foreign board of trade, a trading facility, or any other trading platform;
3. Uncleared Swaps. The swap has not been submitted for clearing to a derivatives clearing organization;
4. Inter-Affiliate Clearing Exemption. The parties have not claimed the exemption from mandatory clearing for inter-affiliate swaps pursuant to Rule 50.52;
5. All Other Swaps Are Reported. Swaps entered into with any unaffiliated counterparty must be reported to an SDR;
6. Recordkeeping Required. The reporting counterparty must maintain records as required by Rules 45.2 (general recordkeeping) and 45.6 (legal entity identifiers/CFTC Interim Compliant Identifiers — LEI/CICIs); and
7. Internally-Generated Swap Identifiers. The reporting counterparty must maintain internally generated unique swap identifiers for each swap.

Conditions for Relief for Swaps Involving Majority-Owned Subsidiaries

The No-Action Letter applies to swaps involving majority-owned subsidiaries (each a “qualifying majority-owned subsidiary”) if:

- one of the counterparties, directly or indirectly, holds a majority ownership interest in the other, or the counterparties share a common parent that directly or indirectly owns 100 percent of each counterparty, and
- the majority owner counterparty or common parent reports its financial statements on a consolidated basis (including the financial results of the majority-owned subsidiary(-ies)) under GAAP or IFRS.

For swaps involving qualifying majority-owned subsidiaries, the No-Action Letter imposes the same or substantially similar conditions for relief (conditions one through six above) applicable to a qualifying wholly owned subsidiary (and again, only conditions one through three above are necessary for Part 46 relief) and also imposes the following additional conditions:

1. SDR-Generated Unique Swap Identifiers. The reporting counterparty must maintain unique swap identifiers generated by the SDR for each swap; and
2. Quarterly Regulatory Reporting. The reporting counterparty must report all swap data to an SDR as described in Part 45 no later than 30 days following the end of each fiscal quarter beginning on **June 30, 2013**.

Finally, if any swap involving a qualifying majority-owned subsidiary is required to be reported pursuant to Part 43 — the CFTC’s real-time reporting rules — (*e.g.*, executed at arm’s-length), that swap is not eligible for the relief under the No-Action Letter.¹⁴

END NOTES

- 1 See [CFTC Letter No. 13-09](#).
- 2 See Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (amending the Commodity Exchange Act (CEA) to include §§ 2(a)(13) and 4r).
- 3 Historical swaps are swaps outstanding as of July 21, 2010, or swaps entered into between July 21, 2010, and specific compliance dates — currently April 10, 2013, for end-users absent further relief from the CFTC. Under Part 46, certain counterparties to historical swaps must report specified swap data to an SDR before designated deadlines. See Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps, [77 Fed. Reg. 35200](#) (Jun. 12, 2012). For a summary of the historical reporting requirements, see our [prior client alert](#).
- 4 Under Part 45, certain counterparties must report to an SDR (i) the “primary economic terms” of a swap, (ii) specific information about the counterparties and (iii) certain other data throughout the life of the swap. See Swap Data Recordkeeping and Reporting Requirements, [77 Fed. Reg. 2136](#) (Jan. 12, 2012). For a summary of the Regulatory Reporting requirements, see our [prior client alert](#).
- 5 Under the CEA and CFTC regulations, “commercial end-users” meeting certain conditions may elect not to clear or exchange-trade swaps otherwise subject to clearing and exchange-trading mandates. For a summary of the end-user exception, see our [prior client alert](#). See also 17 C.F.R. § 50.50(a). To satisfy the end-user reporting requirements, a counterparty must report to an SDR certain information concerning the counterparty’s eligibility to claim the commercial end-user exception. See 17 C.F.R. § 50.50(b).
- 6 For a summary of non-SD/MSPs’ reporting obligations, see our [prior client alert](#).
- 7 See 17 C.F.R. § 45.3(d)(1).
- 8 See 17 C.F.R. § 45.3(d)(3).
- 9 See 17 C.F.R. § 45.4(c)(1)(ii).
- 10 See 17 C.F.R. § 50.50(b).
- 11 See 17 C.F.R. § 46.3(a) and (b).
- 12 See 17 C.F.R. § 45.5, which requires each swap to be identified with a “unique swap identifier” in all records and reports.
- 13 An affiliated counterparty or common parent directly or indirectly holds a 100 percent ownership interest if it directly or indirectly holds 100 percent of the equity securities of an entity, or the right to receive upon dissolution, or the contribution of, 100 percent of the capital of a partnership.
- 14 Part 43 of the CFTC’s rules require real-time public reporting of swap pricing and transaction data for any swap executed at arm’s-length. In general, swaps between wholly owned affiliates are not considered to be executed at arm’s-length and, therefore, are not reportable pursuant to Part 43. The CFTC has not provided guidance on whether a swap between majority-owned affiliates would be considered “at arm’s-length.” See 17 C.F.R. § 43.1 (defining “publicly reportable swap transaction”).