

April 15, 2013

CFTC Swap Reporting No-Action Relief Granted; Other Dodd-Frank Deadlines Approaching

If you wish to receive more information on the topics covered in this publication, you may contact your regular Shearman & Sterling contact person or any of the following:

Contacts

Azam H. Aziz
New York
+1.212.848.8154
aaziz@shearman.com

Patrick Clancy
London
+44.20.7655.5878
patrick.clancy@shearman.com

Thomas Donegan
London
+44.20.7655.5566
thomas.donegan@shearman.com

Geoffrey B. Goldman
New York
+1.212.848.4867
geoffrey.goldman@shearman.com

Ian Harvey-Samuel
London
+44.20.7655.5000
ian.harvey-samuel@shearman.com

Donna M. Parisi
New York
+1.212.848.7367
dparisi@shearman.com

Barnabas W.B. Reynolds
London
+44.20.7655.5528
barney.reynolds@shearman.com

Bradley K. Sabel
New York
+1.212.848.8410
bsabel@shearman.com

On April 9, 2013, the US Commodity Futures Trading Commission (the “CFTC”) granted last minute no-action relief from portions of the CFTC’s swap reporting rules. The relief delays certain compliance deadlines for many swap market participants, including corporate end-users and buy-side financial institutions.¹ The no-action relief generally grants financial entities² (other than Swap Dealers and Major Swap Participants) and non-financial entities additional time to comply with their swap reporting obligations, but financial entities did not receive any additional time to report interest rate and credit swaps, and must have started reporting on April 10, 2013 if they are the reporting party.

- ¹ Time-Limited No-Action Relief for Swap Counterparties that are not Swap Dealers or Major Swap Participants, from Certain Swap Data Reporting Requirements of Parts 43, 45 and 46 of the Commission’s Regulations, CFTC No-Action Letter No. 13-10 (April 9, 2013).
- ² Pursuant to Section 2(h)(7)(C)(i) of the Commodity Exchange Act, the term “financial entity” means: (I) a swap dealer; (II) a security-based swap dealer; (III) a major swap participant; (IV) a major security-based swap participant; (V) a commodity pool; (VI) a private fund as defined in Section 202(a) of the Investment Advisers Act of 1940; (VII) an employee benefit plan as defined in paragraphs (3) and (32) of Section 3 of the Employee Retirement Income Security Act of 1974; or (VIII) a person predominantly engaged in activities that are in the business of banking, or in activities that are financial in nature, as defined in Section 4(k) of the Bank Holding Company Act of 1956. Pursuant to Section 2(h)(7)(C)(iii), the term “financial entity” shall not include an entity whose primary business is providing financing, and uses derivatives for the purpose of hedging underlying commercial risks related to interest rate and foreign currency exposures, 90 percent or more of which arise from financing that facilitates the purchase or lease of products, 90 percent or more of which are manufactured by the parent company or another subsidiary of the parent company. Any small bank that the CFTC has exempted from the definition of a “financial entity” for purposes of the clearing exception is considered to be a non-financial swap counterparty for purposes of the no-action letter.

Contacts (cont.)

Donald N. Lamson
Washington, DC
+1.202.508.8130
donald.lamson@shearman.com

James Duncan
London
+44.20.7655.5757
james.duncan@shearman.com

Jared R. Gianatasio
New York
+1.212.848.4384
jared.gianatasio@shearman.com

James Larsen
New York
+1.212.848.5343
james.larsen@shearman.com

Nhung Pham
New York
+1.212.848.7885
nhung.pham@shearman.com

SHEARMAN.COM

The CFTC has also granted separate no-action relief for the reporting obligations imposed on inter-affiliate swaps.³ There has been no extension of the deadline to comply with the CFTC's swap recordkeeping requirements or the deadline for all swap market participants to obtain a legal entity identifier, for which the deadline remains April 10, 2013.⁴ Finally, Swap Dealers and Major Swap Participants must comply with external business conduct rules on May 1, 2013 and ISDA continues to encourage market participants to adhere to the August 2012 Dodd-Frank Protocol ("Protocol") as quickly as possible in order to facilitate compliance with these rules.⁵

CFTC Swap Reporting Requirements

Pursuant to Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), the CFTC has mandated that all swaps must be reported to swap data repositories ("SDR") in accordance with its reporting rules.⁶ Swap Dealers and Major Swap Participants ("Regulated Entities") have already been subject to these reporting requirements for several months, and the requirements were scheduled to become applicable to all persons participating in the swap market on April 10, 2013.⁷ The CFTC's rules contain a reporting hierarchy that allocates the reporting obligations to a reporting party ("Reporting Party"), which is always the Regulated Entity for a swap transaction between a Regulated Entity and a non-Regulated Entity. Where neither of the parties to a swap is a Regulated Entity, then the reporting obligation falls on one of the two non-Regulated Entities by agreement.

- ³ No-Action Relief for Swaps Between Affiliated Counterparties That Are Neither Swap Dealers Nor Major Swap Participants from Certain Swap Data Reporting Requirements Under Parts 45, 46 and Regulation 50.50(b) of the Commission's Regulations, CFTC No-Action Letter No. 13-09 (April 5, 2013).
- ⁴ CFTC Advisory Regarding Upcoming Legal Identity Identifier Deadline (March 15, 2013), available at http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/dmo_0dtadvisory.pdf (last accessed March 19, 2013).
- ⁵ Advisory Note: Important Dates (March 18, 2013), available at: <http://assets.isda.org/media/ea4a4753/94e8ea59.pdf/> (last accessed March 19, 2013).
- ⁶ 17 C.F.R. pts. 43, 45 and 46.
- ⁷ The CFTC has issued proposed cross-border guidance and a temporary Final Exemptive Order to clarify how these rules apply to non-US persons. For further information regarding the proposed cross-border guidance you may wish to refer to our publication on this topic, available at: <http://www.shearman.com/cross-border-application-of-the-swaps-provisions-of-the-dodd-frank-act-07-18-2012/>.⁷ For further information regarding the Final Exemptive Order you may wish to refer to our publication on this topic, available at: <http://www.shearman.com/cftc-issues-final-exemptive-order-temporarily-limiting-cross-border-application-of-the-swaps-provisions-of-the-dodd-frank-act-12-28-2012/>.

Non-Regulated Entity Reporting Party No-Action Relief

The following table summarizes the reporting deadlines for swaps if a non-Regulated Entity is the Reporting Party.

SWAP REPORTING REQUIREMENT	REPORTING PARTY IS NON-FINANCIAL ENTITY	REPORTING PARTY IS FINANCIAL ENTITY
Part 43 (Real-time Public Reporting)⁸	<u>Interest Rate and Credit Swaps:</u> July 1, 2013 <u>Equity, Foreign Exchange and Other Commodity Swaps:</u> August 19, 2013	<u>Interest Rate and Credit Swaps:</u> April 10, 2013 <u>Equity, Foreign Exchange and Other Commodity Swaps:</u> May 29, 2013
Part 45 (Swap Data Reporting)	<u>Interest Rate and Credit Swaps:</u> July 1, 2013 (but swaps from April 10, 2013 until this date must be reported by August 1, 2013) <u>Equity, Foreign Exchange and Other Commodity Swaps:</u> August 19, 2013 (but swaps from April 10, 2013 until this date must be reported by September 19, 2013)	<u>Interest Rate and Credit Swaps:</u> April 10, 2013 <u>Equity, Foreign Exchange and Other Commodity Swaps:</u> May 29, 2013 (but swaps from April 10, 2013 until this date must be reported by June 29, 2013)
Part 46 (Historical Swap Reporting for Pre-enactment and Transition Swaps)	<u>All Swaps:</u> October 31, 2013	<u>All Swaps:</u> September 30, 2013

The CFTC’s swap recordkeeping requirements are not modified by this no-action relief and the April 10, 2013 compliance deadline is still effective.

Inter-Affiliate Swap Reporting No-Action Relief

The CFTC’s swap reporting requirements (other than the real-time reporting requirements) also apply to inter-affiliate transactions.⁹ In response to requests from market participants, the CFTC has issued no-action relief delaying the requirement to report certain inter-affiliate swaps. This relief is particularly relevant for corporate end-users that utilize centralized hedging operations. However, corporate end-users should be aware that the relief is conditional on both parties to an unreported inter-affiliate swap reporting all of their swap activity with unaffiliated counterparties. This could potentially impose a CFTC reporting requirement on non-US persons trading swaps with non-US persons that are not Regulated Entities.

According to the CFTC’s no-action letter, swaps between affiliates do not need to be reported where one of the parties, directly or indirectly, holds a 100% ownership interest in the other party or they are both owned by a third party that, directly or indirectly, holds a 100% ownership interest in them both.¹⁰ Swaps between affiliates where one of the parties, directly or indirectly, holds a majority ownership interest in the other party or they are both owned by a third party that,

⁸ Excluded Foreign Exchange Swaps and Forwards are not subject to the Part 43 rules. For further information regarding this you may wish to refer to our publication on this topic, available at: <http://www.shearman.com/dodd-frank--treasury-exempts-fx-swaps-and-fx-forwards-12-06-2012/>.

⁹ 17 C.F.R. pt. 43.

¹⁰ An affiliated counterparty or third party directly or indirectly holds a 100% ownership interest if it directly or indirectly holds 100% of the equity securities of an entity, or the right to receive upon dissolution, or the contribution of, 100% of the capital of a partnership.

directly or indirectly, holds a majority ownership interest in them both, only need to be reported on a quarterly basis within 30 days following the end of each quarter following June 30, 2013.¹¹ To be eligible for the majority ownership reporting relief, the swap must also be exempt from the Part 43 reporting requirement, which only applies to arm's-length transactions.

In both cases, however, the inter-affiliate swap reporting no-action relief only applies if the affiliates report their financial statements on a consolidated basis and if certain other conditions are satisfied, including the requirement for both affiliates to report any swap with any unaffiliated counterparty.¹² Relief is also granted for historical swap reporting requirements for non-exchange traded, uncleared swaps between affiliates that are not Regulated Entities or affiliates of Regulated Entities or systemically important financial companies. The April 10, 2013 recordkeeping requirements applicable to inter-affiliate swaps are not modified by this no-action relief.

The CFTC also issued no-action relief to non-swap dealers and non-major swap participants that would otherwise be required to report commodity trade option transactions.¹³ The Part 45 reporting rules do not have to be complied with, provided that the commodity trade option is reported on Form TO and notice is given to the CFTC if more than \$1 billion of aggregate notional in trade options are entered into in a single year.

CFTC Interim Compliant Identifier

While the Reporting Party bears the obligation to report the swap to the SDR, the non-reporting party must obtain and provide a unique legal entity identifier, also known as a CFTC Interim Compliant Identifier ("CICI"). Every swap submitted to an SDR should have two CICIs, one for each party to the transaction. This theoretically allows regulators to aggregate all of the data associated with one market participant. Beginning on April 10, 2013, all market participants must have a CICI and non-reporting counterparties must provide their CICIs to the Reporting Party, something many market participants may have already done using the Protocol. The no-action relief does not push back this deadline, and market participants without CICIs should obtain them as soon as possible.

- Market participants can check their CICI status and obtain a CICI through the CICI Utility website at www.ciciutility.org.
- Investment managers should note that some Regulated Entities may require investment managers to obtain a CICI if they are entering into block transactions on behalf of multiple clients.

¹¹ An affiliated counterparty or third party directly or indirectly holds a majority ownership interest if it directly or indirectly holds a majority of the equity securities of an entity, or the right to receive upon dissolution, or the contribution of, a majority of the capital of a partnership.

¹² The inter-affiliate swap reporting no-action relief only applies to non-exchange traded, uncleared swaps between affiliates that are not swap dealers or major swap participants or affiliates of swap dealers, major swap participants or systemically important financial companies. The relief is not available to parties relying on the inter-affiliate clearing exception. The recordkeeping requirements must still be satisfied and the reporting party must internally generate swap identifiers.

¹³ Staff No-Action Relief from the Reporting Requirements of § 32.3(b)(1) of the Commission's Regulations, and Certain Recordkeeping Requirements of § 32.3(b), for End Users Eligible for the Trade Option Exemption, CFTC No-Action Letter No. 13-08 (April 5, 2013).

- The CICI requirements do not apply to swaps expired or terminated prior to April 25, 2011.¹⁴

August 2012 Dodd-Frank Protocol

ISDA has separately issued an advisory note to counterparties trading with swap dealers regarding on-boarding timelines for the Protocol. The Protocol is designed to enable swap dealers to comply with the CFTC's external business conduct rules, swap reporting requirements and certain other regulations by amending the swap documentation in place between the swap dealer and its counterparty. Many of the external business conduct rules require compliance by May 1, 2013, but because the swap dealers must review their counterparty's questionnaire before this deadline, ISDA is advising market participants to complete the Protocol well in advance.¹⁵ To avoid significant disruptions in swaps trading, ISDA is advising market participants to adhere to the Protocol and sign-up to ISDA Amend as soon as possible.¹⁶

Recommended Steps

To ensure compliance with the CFTC's requirements and the timely update of trading documentation with swap dealers, the following steps may be appropriate:

1. Check the entity's CICI status by accessing the CICI Utility web portal at www.ciciutility.org. If the entity does not have a CICI, it should self-register for a CICI without delay. If the entity already has been assigned a CICI, check for the accuracy of the data and certify the information if it was recorded through third-party registration.
2. Determine which party to the swap is the Reporting Party under the CFTC's swap data reporting requirements. The Reporting Party should contact the non-Reporting Party to determine if it has a CICI, and if necessary, remind the counterparty of its obligation to obtain a CICI before April 10, 2013, and obtain such CICI information for reporting purposes.
3. Determine the Reporting Party's financial entity status and the appropriate reporting deadline for each type of swap that it enters into and establish a reporting capability before that deadline.
4. Parties wishing to avoid potential trading disruptions should complete the Protocol as soon as possible.

¹⁴ 17 C.F.R. pt. 46.4(c). If a market participant is a non-reporting party, not a Regulated Entity and will not be entering into any new swaps, then the CFTC's Part 46 historical swap reporting rules allow until October 7, 2013 to obtain a CICI. However, best practice would be to obtain all CICIs by April 10, 2013.

¹⁵ The original compliance deadline was January 1, 2013, but in a last minute reprieve, the CFTC issued an interim final rule delaying the compliance deadline for many of the rules that the Protocol is designed to address. For further information regarding this rule you may wish to refer to our publication on this topic, available at: <http://www.shearman.com/cftc-defers-compliance-dates-for-business-conduct-and-documentation-requirements-until-mid-2013-12-19-2012/>.

¹⁶ For more information, see <http://www.markit.com/isda-amend>.