

MEMO# 24816

December 28, 2010

CFTC and SEC Propose Real-Time Reporting Requirements for Swap Transaction Data; Conference Call January 5

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TO: CLOSED-END INVESTMENT COMPANY COMMITTEE No. 30-10
ETF ADVISORY COMMITTEE No. 58-10
EQUITY MARKETS ADVISORY COMMITTEE No. 55-10
FIXED-INCOME ADVISORY COMMITTEE No. 37-10
SEC RULES COMMITTEE No. 69-10
SMALL FUNDS COMMITTEE No. 35-10 RE: CFTC AND SEC PROPOSE REAL-TIME REPORTING REQUIREMENTS FOR SWAP TRANSACTION DATA; CONFERENCE CALL JANUARY 5

The Commodity Futures Trading Commission and the Securities Exchange Commission have proposed rules related to the reporting and public dissemination of real-time swap and security-based swap [\[1\]](#) transaction data, pursuant to Sections 727, 763, and 766 of Title VII of the Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”). [\[2\]](#) Generally, the proposals would require, upon execution, reporting of transaction, volume, and pricing terms of a swap to a registered swap data repository (“SDR”). The SDR then would be required to make some of the swap data publicly available in real time.

The proposals also would require ongoing reporting of specified “lifecycle events” until termination or expiration of a swap and would include specific reporting provisions for block trades and large notional swap transactions. Finally, the proposals would establish reporting obligations and impose additional obligations on swap dealers and major swap participants (“MSPs”) including the establishment of relevant policies and procedures, correction of erroneous information, and provision of additional information. Although substantially similar, there are some significant differences in the proposals, which are

summarized below.

Comments on the CFTC and SEC proposals are due February 7th and January 18th, respectively. We will hold a conference call on Wednesday, January 5, at 2:00 p.m. Eastern time to discuss the CFTC and SEC proposals and possible ICI comments. If you plan to participate on the call, please contact Ruth Tadesse by email at rtadesse@ici.org or by phone at 202-326-5836 to receive the dial-in information. If you are unable to participate on the call but have views to offer, please contact Heather Traeger at htraeger@ici.org prior to the call.

I. CFTC Proposal

A. When to Report

The CFTC proposal would require the parties to a swap transaction to report swap data as soon as technologically practicable after execution of the swap to a SDR that (1) accepts data for the particular asset class and (2) publicly disseminates the data in real time. The proposal would apply to all swaps under the CFTC's jurisdiction (i.e., interest rate, currency, equity, credit, and other commodity), cleared and uncleared, regardless of the method of execution (i.e., swap execution facility ("SEF"), designated contract market ("DCM"), or bilaterally negotiated). "As soon as technologically practicable" would mean as soon as possible, taking into consideration the prevalence, implementation, and use of technology by comparable market participants.

The CFTC proposal would provide that execution of a swap is an agreement by the parties, whether orally, in writing, electronically, or otherwise, to the terms of a swap that legally binds the parties to such swap terms under applicable law. Execution would be defined to occur immediately following or simultaneous with the affirmation of the swap. Affirmation would be defined as the process by which parties to a swap verify that they agree on the primary economic terms of a swap (but not necessarily all terms of the swap). According to the CFTC Release, affirmation could constitute "execution" of the swap or provide evidence of execution of the swap, however, it would not constitute confirmation of the swap.

B. What to Report

Under the CFTC proposal, certain information would be reported and publicly disseminated in real time for each "reportable swap transaction." A "reportable swap transaction" would include the initial execution of a swap, subsequent "life cycle" events and corrections for any errors or omissions. Specifically, a reporting party would be required to prepare a pre-formatted appendix with potentially 29 data fields, as applicable, for each reportable swap transaction. [3] The proposal notes that the CFTC may determine from time to time to amend such data fields.

The data fields would include, among others, the following: the asset class; information that identifies the swap and the underlying instruments on which the swap is based; the notional amounts; the date and time of execution, to the second; the "effective" or "start" date; the scheduled termination or maturity date; the price notations; the frequency with which any payments will be made; any price-forming continuation data; an indication of one of four specific contract types (swap, swaption, forward and stand-alone) and contract sub-types; whether or not the swap will be cleared by a DCM; whether the swap is a block trade or large notional swap; and whether or not the swap is executed on a swap market. [4]

In addition, some reported information would not be publicly disseminated. For example, a

registered SDR would have authority to require reporting of additional information in order to match the reported swap transaction and pricing data to the publicly disseminated data, or to confirm that there was timely compliance with the reporting obligations. This information would not be publicly disseminated. Significantly, the identities of the swap counterparties or data that identifies or otherwise facilitates the identification of a party to a swap transaction would not be publicly disseminated in real time. To help ensure non-disclosure in asset classes with limited counterparties, the proposal would allow reporting parties to provide SDRs with a more general description of the underlying assets and tenor, so long as the description is specific enough to provide for a meaningful understanding of the swap.

C. Who Reports

The reporting obligation would be determined based on whether the swap is executed on a swap market. The CFTC proposal would permit the reporting requirement to be satisfied by executing the swap on a SEF or a DCM. That swap market would become responsible for reporting the swap data to a SDR following execution of the transaction. Swap data also could be reported to a third-party service provider that accepts swap transaction data and pricing data from multiple data sources and publicly disseminates such data in real time pursuant to the CFTC proposal. [\[5\]](#) The proposal also would provide that SEFs and DCMs could provide swap and pricing data to their market participants concurrent with or following the transmittal of such data to a SDR or third-party service provider.

For swaps executed off a SEF or DCM, the proposal specifies the following order of precedence for reporting to a SDR:

- If the swap includes a swap dealer, the swap dealer is responsible for reporting;
- If the swap does not include a swap dealer but includes a MSP, the MSP is responsible for reporting;
- If the swap includes two swap dealers or two MSPs, the parties to the swap must choose which party must report; and
- If the swap does not include either a swap dealer or a MSP, the parties to the swap must choose which party must report.

The swap data would need to be made available in a non-discriminatory manner, through the Internet or other electronic data feed and in a machine readable format.

D. Block Trades and Large Notional Swaps

The CFTC proposal would include a 15-minute delay from the time of execution for the reporting of standard contracts for block trades and large notional swaps to the public. Swap transaction information would still be required to be reported to the SDR as soon as technologically practicable. The SDR, however, would hold the data until the expiration of the 15-minute period following execution. [\[6\]](#) The CFTC has requested comment regarding the appropriate time delay for reporting customized trades.

A block trade would be defined as a swap of large notional or principal value that:

- Is made available for trading on a SEF or DCM;
- Occurs off the SEF's or DCM's trading system or platform pursuant to the SEF or DCM rules;
- Is consistent with the appropriate minimum block size requirements in the proposal; and
- Is reported in accordance with the SEF's or DCM's rules and procedures and subject to

the appropriate time delay in the proposal.

Unlike a block trade, a large notional swap would be a swap that is not available for trading or execution on a SEF or DCM.

The CFTC proposal would implement a two-test procedure to determine the appropriate minimum block size for block trades and large notional transactions: the distribution test and the social-size multiple test. The distribution test would determine the transaction size that is larger than 95 percent of transactions for a swap asset class over the past calendar year. The social size multiple test would determine the transaction size that is five times the largest of the mean, median and mode of transaction sizes for a swap asset class over the past calendar year. The appropriate minimum block size would be the larger size determined by those two tests. [7] SDRs would be responsible for determining the appropriate minimum block size.

II. SEC Proposal

A. When to Report

The SEC proposal would implement Regulation SBSR, requiring real-time reporting of swap data after a swap has been executed to a SDR, which would publicly disseminate some of that information in a “timely fashion.” It would apply to all SEC-regulated swaps whether cleared or not. [8] The proposal would define “execution” as when the counterparties become irrevocably bound under applicable law and “real time” would mean “as soon as technologically practicable, but in no event later than 15 minutes after the time of execution of the [swap].” Non-public data would be subject to the following reporting time frames after the time of execution:

- 15 minutes for a swap that is executed and confirmed electronically;
- 30 minutes for a swap that is confirmed electronically but not executed electronically; and
- 24 hours for a swap that is not executed or confirmed electronically.

Under the proposal, a reporting party could provide all required information in a single transaction report, assuming it satisfied the “timely fashion” time frame. A party could not delay, however, transmission of the “real-time” data to produce a single report that also included the non-public data, even if the report could be produced within the 15-minute time frame for public data.

B. What to Report

Regulation SBSR would require real-time reporting of transaction, volume and pricing information about a swap transaction as well as reporting of “life cycle” events. Such data would include, among other data, information about the asset class, the underlying security, the price, the notional amount, the time of execution, [9] the effective date, and the scheduled termination date. Additional categories of information would need to be reported for regulatory purposes, but would not be publicly disseminated. Non-public information would include: the counterparty; the broker; trader and desk ID; the amounts of any up-front payments and description of the terms of the payment streams; the title of any master agreement governing the transaction; and, the data elements needed to determine the market value of the transaction. Reported information would need to be reported in a uniform electronic format. [10]

As noted above, Regulation SBSR would require reporting of a participant ID of each

counterparty and, as applicable, the broker ID, desk ID and trader ID of the reporting party. [11] The proposal also would require that a “unique identification code” (“UIC”) be assigned to each product or person to facilitate aggregation and monitoring of the reported swaps. [12] A UIC would have to be assigned by or on behalf of an internationally recognized standards-setting body that imposes fees and usage restrictions that are fair and reasonable and not unreasonably discriminatory. The UIC would be assigned by the SDR pursuant to the international protocols.

Reporting parties would have to update certain changes in previously provided information, including a change in counterparties resulting from an assignment or novation; a change in the cash flows; and, for an uncleared swap, any change to the collateral agreement. In addition, reporting parties would need to correct errors identified after a swap has been reported. A counterparty that was not the reporting party would be required to promptly notify the reporting party of any errors so it could correct its report.

C. Who Reports

Regulation SBSR would provide that the reporting party for uncleared swaps is as follows:

- If the swap includes a swap dealer or a MSP, the swap dealer or MSP is responsible for reporting;
- If the swap include a swap dealer and a MSP, the swap dealer is responsible for reporting; and
- With respect to any other combination of market participants, the parties to the swap must choose which party must report. [13]

To meet reporting obligations, the reporting party would be required to: develop and maintain an internal order management system to capture all relevant swap data and send it to the SDR in real time; and establish and maintain compliance program support. According to the SEC Release, a reporting party could enter into an agreement with a third party to report the swap data. The reporting party, however, would retain the obligation to ensure that information is provided in compliance with proposed Regulation SBSR. In addition, the proposal would provide that no person, other than a SDR, could make available to one or more persons (other than a counterparty) a transaction report of a swap before the earlier of: 15 minutes after execution of the swap; or the time that a SDR publicly disseminates a report of that swap.

D. Block Trades

Instead of proposing thresholds, the SEC has sought comment on general criteria that should be used by SDRs to determine whether a transaction is a “block trade.” [14] In the SEC Release, the SEC notes its preliminary belief that the size of a swap that is sufficiently large to signal to other market participants that there is the potential for a subsequent outsized transaction should be suppressed to provide time for those subsequent transactions to be absorbed by the market. It also states that it would not be appropriate to establish different block trade thresholds for similar instruments with different maturities. Thus, Regulation SBSR would provide that an SDR publicly disseminate a report for a block trade (including the transaction ID and the full notional size) as follows:

- If the swap was executed on or after 5:00 UTC and before 23:00 UTC of the same day (12:00 midnight and 6:00 p.m. EST), the report must be disseminated at 7:00 UTC the following day (2:00 a.m. EST);
- If the swap was executed on or after 23:00 UTC and up to 5:00 UTC of the following day (6:00 p.m. until 12:00 midnight EST), the report must be disseminated at 13:00

UTC of that following day (8:00 a.m. EST).

Under Regulation SBSR, market participants would learn the price of a swap block trade in real time, although not the notional size. The size of the block trade would be disseminated up to eight hours later. The SEC Release provides that if a registered SDR is in normal closing hours or special closing hours at a time when it would be required to disseminate information about a block trade pursuant to Regulation SBSR, the SDR would instead disseminate information about the block trade immediately upon re-opening.

The proposal would include exceptions to the undefined term “block trade.” Specifically, a swap would not be a block trade if it is an equity total return swap or is otherwise designed to offer risks and returns proportional to a position in the equity security or securities on which the security-based swap is based. A swap that is determined to be required to be cleared but is not cleared also would not qualify as a block trade.

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endnotes

[\[1\]](#) In this memorandum, the term “swap” will be used to mean “swap” when used in the context of CFTC-regulated swaps and “security-based swap” when used in the context of SEC-regulated security-based swaps.

[\[2\]](#) See Commodity Futures Trading Commission Release, Real-Time Reporting of Swap Transaction Data (December 10, 2010) (“CFTC Release”) and Securities Exchange Act Release No. 63346 (November 19, 2010) (“SEC Release”).

[\[3\]](#) In the CFTC Release, the CFTC notes its belief that standardization of the data fields should develop over time, helping to reduce the search costs to the public and market participants, increase consolidation of real-time swap transaction and pricing data and promote post-trade transparency and price discovery. The CFTC also states that, if developed, unique product identifiers may be used in lieu of the information in one or more of the data fields. See ICI [Memorandum](#) 24773, Regulatory Initiatives Under Dodd-Frank Act Concerning Universal Standard to Identify Parties to Financial Contracts, dated December 9, 2010. See also discussion associated with footnote 12 of this memorandum.

[\[4\]](#) The CFTC requests comment on methods to encourage the consolidation of publicly disseminated swap data.

[\[5\]](#) In the case of an uncleared swap where there is no SDR available to publicly disseminate the data in real time, the reporting party could report it to a third-party service provider.

[\[6\]](#) The CFTC proposal would require swap markets to time-stamp swap transactions and pricing data with the date and time to the nearest second (1) when the market receives the data from a reporting party and (2) when the market transmits the data to a SDR or third-party service provider. SDRs would be required to time-stamp the swap data with the date and time to the nearest second when they receive the data and when the data is publicly disseminated.

[\[7\]](#) The CFTC is requesting comment on whether a third test should be applied in determining minimum block size. Specifically, the CFTC asks whether the size should be set so that no more than 10 percent of swap transactions in the category of swap instrument would have qualified as a block trade or large notional swap transaction.

[\[8\]](#) With respect to swaps that are not cleared at a registered clearing agency and that are reported to a SDR or the SEC, the SEC would require real-time reporting in a manner that does not disclose the business transactions and market positions of any person.

[\[9\]](#) The proposal would require the date and time of execution to be expressed using Coordinated Universal Time (“UTC”).

[\[10\]](#) See Securities Exchange Act Release No. 63347 (November 19, 2010) (proposing standards regarding data that registered SDRs would have to collect and maintain).

[\[11\]](#) The SEC Release notes that the information received by the SEC under this proposal would be kept confidential to the extent allowed by the provisions of the Freedom of Information Act.

[\[12\]](#) See *supra* note 3.

[\[13\]](#) The SEC Release includes provisions for reporting when one of the counterparties is not a U.S. person.

[\[14\]](#) An SDR would be required to establish written policies and procedures for calculating and publicizing block trade thresholds for all swaps reported to it.