

MEMO# 32575

July 2, 2020

CFTC Adopts Final Rule Prohibiting Post-Trade Name Give-Up on Swap Execution Facilities

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July 2, 2020 TO: ICI Members

Derivatives Markets Advisory Committee SUBJECTS: Derivatives

Disclosure

Investment Advisers

Trading and Markets RE: CFTC Adopts Final Rule Prohibiting Post-Trade Name Give-Up on Swap Execution Facilities

On June 25, 2020, the Commodity Futures Trading Commission (CFTC or “Commission”) unanimously adopted a final rule that prohibits post-trade name give-up for swaps that are executed anonymously on a swap execution facility (SEF) and are intended to be cleared.[\[1\]](#) The Commission adopted the rule largely as proposed,[\[2\]](#) but with several modifications, in response to comments. The final rule is summarized below.

Background

Today, through a practice called “post-trade name give-up,” some SEFs and third-party service providers disclose the identity of each swap counterparty to the other counterparty after a trade has been matched anonymously on the SEF. In November 2018, the CFTC requested public comment on the practice of post-trade name give-up on SEFs for swaps that are executed anonymously on the SEF and are intended to be cleared. In December 2019, the Commission issued a proposed rule that would prohibit post-trade name give-up for anonymously-executed and intended-to-be-cleared swaps. ICI filed comment letters in January 2019 and March 2020 urging the Commission to abolish this harmful practice.[\[3\]](#)

Final Rule

The final rule prohibits post-trade name give-up for swaps that are anonymously executed, pre-arranged or pre-negotiated on, or pursuant to, the rules of, a SEF and are intended to be cleared. Specifically, Regulation 37.9(d)(1) prohibits a SEF from, directly or indirectly, disclosing the identity of a counterparty to a swap that is anonymously executed and intended to be cleared. As proposed, the rule clarifies that this prohibition covers and precludes such disclosure by a SEF’s third-party service provider. The final rule applies to all swaps intended to be cleared and is not limited to those required to be cleared under Section 2(h)(1) of the Commodity Exchange Act (CEA) or swaps subject to the trade

execution requirement under Section 2(h)(8) of the CEA.[\[4\]](#)

Additionally, Regulation 37.9(d)(2) requires each SEF to establish and enforce rules that prohibit any person from directly or indirectly disclosing the identity of a counterparty to such a swap. As proposed, the rule clarifies that this prohibition covers and precludes such disclosure by the SEF's third-party service provider.

Commenters recommended that, to prevent evasion, the Commission clarify that the prohibition on post-trade name give-up also applies to a swap that is pre-arranged or pre-negotiated by a broker on an anonymous basis and then submitted to a SEF for execution. In response, the Commission revised proposed Regulation 37.9(d)(3) to specify that the phrase "executed anonymously" for purposes of subsections (d)(1) and (2) includes a swap that is pre-arranged or pre-negotiated anonymously, including by a participant of the SEF.

In response to comments, the Commission included a limited exception to the prohibition on post-trade name give-up in Regulation 37.9(d)(4) for components of a package transaction that are uncleared swaps or non-swap instruments, such as the US Treasury security leg of a US Treasury swap spread.[\[5\]](#) The Commission noted that commenters differed on whether an explicit exception was necessary in the rule, given that the prohibition applies only to swaps intended to be cleared, but concluded an explicit exception was necessary to provide clarity and regulatory certainty to SEFs and market participants.[\[6\]](#)

In the proposal, the Commission had requested comment on the potential impact of a prohibition on post-trade name give-up on: (i) trading protocols, such as auctions, portfolio compression, and workup sessions ("workups"); and (ii) error trade corrections. The Commission believes that post-trade name give-up is not necessary for workup sessions and was not persuaded by commenters' arguments to the contrary. It also believes that the practice is not necessary to resolve error trades for these swaps, noting that "a SEF can intermediate communications if necessary, and otherwise facilitate error trade corrections, without disclosing counterparty identities."

Consistency with CEA

The CFTC concluded that the final rule is consistent with key provisions of the CEA and its rules. The Commission believes that, consistent with Section 5h(e) of the CEA, the final rule's prohibition on post-trade name give-up for intended-to-be-cleared swaps will promote trading on SEFs and pre-trade transparency by encouraging a greater number, and more diverse set, of market participants to anonymously post bids and offers on SEFs. Commissioners Stump and Quintenz expressed some concern about the rule's potential effects on liquidity. In response, the Commission will conduct a preliminary study on the state of the swaps markets by July 2021, and a further study by July 2023, to observe any changes to trading on SEFs following the rule's implementation.[\[7\]](#)

The Commission also believes that, consistent with Section 3(b) of the CEA, the final rule will promote fair competition among market participants by addressing concerns about information leakage and discriminatory behavior. It will help ensure that SEF rules provide market participants with "impartial access" to the swap market, as required by Section 5h(f)(2)(B) of the CEA. The Commission believes that post-trade name give-up undermines the policy goals of the CEA's impartial access requirement by effectively discriminating against certain market participants.

The Commission asserts that the practice of post-trade name give-up undermines the

objectives of Section 21(c)(6) of the CEA, which addresses privacy of swap transaction information on swap data repositories (SDRs), and Regulation 49.17(f)(2), which addresses limitations on a market participant's access to swap data maintained by an SDR. The Commission explains that the final rule is consistent with these and other provisions aimed at protecting market participants' private information.

Compliance Dates

The Commission adopted a phased compliance schedule for the final rule, based on whether a swap is subject to the CEA's trade execution requirement. For swaps that are subject to the trade execution requirement, SEFs must comply with the final rule by November 1, 2020. For swaps not subject to the trade execution requirement, SEFs must comply with the final rule by July 5, 2021.

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endnotes

[1] The adopting release is *available at* <https://www.cftc.gov/media/4111/FederalRegister062520e/download> ("Adopting Release"). Chairman Tarbert and Commissioners Behnam and Berkovitz issued a joint statement supporting the final rule, which is *available at* <https://www.cftc.gov/PressRoom/SpeechesTestimony/tarbertbehnamberkovitzjointstatemen062520>. Commissioner Quintenz issued a separate supporting statement, which is *available at* <https://www.cftc.gov/PressRoom/SpeechesTestimony/quintenzstatement062520c>.

[2] For a summary of the proposal, *please see* ICI Memorandum No. 32159 (Jan. 17, 2020), *available at* https://www.ici.org/my_ici/memorandum/memo32159.

[3] ICI's January 2019 comment letter is *available at* <https://www.ici.org/pdf/31584a.pdf> and our March 2020 comment letter is *available at* <https://www.ici.org/pdf/32254a.pdf>.

[4] The Commission clarified, however, that "intended to be cleared" means swaps that are intended to be submitted for clearing contemporaneously with execution. An uncleared swap that subsequently is voluntarily submitted for clearing by the counterparties (e.g., a swap "backloaded" into clearing) therefore would not be considered "intended to be cleared" and would not be subject to the rule's prohibition on post-trade name give-up.

[5] The Commission confirmed, however, that the prohibition would fully apply to package transactions that are traded anonymously and involve only intended-to-be-cleared swaps. Adopting Release at 26-27.

[6] The Commission explained that, in the absence of an exception for package transactions, a SEF's disclosure of the identify of a counterparty to an uncleared swap or non-swap component of a package transaction would result in the SEF indirectly disclosing the identity of the counterparty to the intended-to-be-cleared swap component of the package transaction, in violation of the rule.

[\[7\]](#) Adopting Release at n.31 and accompanying text.

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