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Derivatives End-User Primer Version 1.0

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Action Items for Derivatives End-Users

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act")[1] and related Commodity Futures Trading Commission ("CFTC") regulations require derivatives end-users to take certain actions to ensure compliance with the new rules. Below please find a summary of required action items to assist end-users that are preparing to comply with the new derivatives regulations.

I. Obtain a CFTC Interim Compliance Identifier ("CICI")

All swap counterparties will have to obtain a legal entity identifier ("LEI") to identify such counterparty for recordkeeping and reporting purposes. The LEI is an identification number that will be used for all recordkeeping and reporting to swap data repositories ("SDRs").[2] The CFTC has designated a DTCC-SWIFT entity to issue CFTC Interim Compliant Identifiers ("CICI") for satisfying the LEI requirement.[3]

End-users can obtain a CICI by submitting limited information online at: https://www.ciciutility.org. It is recommended that end-users obtain a CICI as soon as possible; however, the CFTC has recently clarified that end-users need not obtain a CICI until April 10, 2013.[4] End-users will need to obtain a CICI/LEI for each entity that enters into swaps, including entities that only enter into inter-affiliate swaps.

II. Amend swap documentation

Beginning on January 1, 2013,[5] new CFTC rules impose requirements on registered swap dealers ("SDs") and major swap participants ("MSPs") to provide their counterparties with certain representations, agreements and notices and to obtain certain representations and agreements from their counterparties before executing any new swaps or changing existing swaps. Accordingly, end-users will need to amend their current swap relationship

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[1] Public Law 111-203, 124 Stat. 1376 (2010). Pursuant to Section 701 of the Dodd-Frank Act, Title VII may be cited as the "Wall Street Transparency and Accountability Act of 2010."

[2] See 77 Fed. Reg. 2136 (January 13, 2012). CFTC regulation 45.6 provides that "[e]ach counterparty to any swap subject to the jurisdiction of the Commission shall be identified in all recordkeeping and all swap data reporting pursuant to this part by means of a single legal entity identifier as specified in this section." Id. at 2204.

[3] See CFTC Order Determining the Availability of a Legal Entity Identifier Meeting the Requirements of Commission Regulations, and Designating the Provider of Legal Entity Identifiers to be Used in Recordkeeping and Swap Data Reporting Pursuant to the Commission's Regulations (July 23, 2012).

[4] See CFTC staff "Questions and Answers: On Start of Swap Data Reporting," (October 10, 2012). Available at: http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/startreporting_qa_final.pdf.

[5] On August 27, 2012, the CFTC released their final rules relating to swap relationship documentation which extended the compliance date for certain external business conduct standard requirements from October 15, 2012 to January 1, 2013. See 77 Fed. Reg. 55904, 55942 (September 11, 2012).

documentation by January 1, 2013 to continue to trade with their registered SD and MSP counterparties. In response to these new requirements, the International Swaps and Derivatives Association ("ISDA") has developed a standardized protocol (the "ISDA August 2012 DF Protocol" or the "ISDA DF Protocol") to provide an industry solution to the documentation challenges imposed by the new requirements.[6] An end-user's alternative to adherence to the ISDA DF Protocol would be to negotiate appropriate amendments to existing swap agreements with each SD or MSP counterparty to address the necessary documentation requirements, which could be a more time-consuming process.

The ISDA DF Protocol is designed to supplement existing swap documentation (including, but not limited to, ISDA Master Agreements) under which counterparties may execute swaps.[7] The ISDA DF Protocol consists of five documents:

- Adherence Letter – A signed letter, that is publicly available, indicating an entity's adherence to the ISDA DF Protocol.
- Protocol Questionnaire – Method of confidentially delivering certain representations, elections and other information between counterparties.
- DF Protocol Agreement – Describes the status and binding nature of the ISDA DF Protocol and the legal terms and conditions governing the amendment process.
- DF Supplement – Sets forth the standardized representations, covenants, agreements and notifications that are required to be provided or obtained pursuant to new CFTC regulations.
- DF Terms Agreement – An optional document that is used for swaps that are not governed by an ISDA Master Agreement.

While the ISDA DF Protocol is a standardized method of amending swap relationship documentation to ensure SD and MSP compliance to allow end-users to continue trading, the ISDA DF Protocol's language is complex, and counterparties may choose to seek specific amendments to their agreements in addition to the amendments in the ISDA DF Protocol (e.g., representations regarding who will serve as the reporting party). Note that adherence to the ISDA DF Protocol is not required by law; however, if market participants do not adhere to the ISDA DF Protocol, they must otherwise amend their existing swap relationship documentation before they can enter into new swaps with SDs or MSPs which, depending on the number of counterparties, may prove to be a time consuming and costly endeavor.

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[6] The ISDA DF Protocol contains representations and agreements between the SD/MSP and end-user, including, but not limited to, (i) representations that the information furnished is true and complete in all material respects and that no representations are materially incorrect or misleading in any material respect; (ii) an agreement to notify the other party in accordance with the "Notice Procedures" of any material change in information previously provided, or if any representation previously provided has become incorrect or misleading in any material respect, agreement to timely amend any relevant representation; (iii) an agreement for the end-user to consent to disclosure of trade information including a party's identity to an SDR or relevant regulators; (iv) an agreement of the end-user to, as soon as practicable, but in no event later than 10:00 a.m. on the second business day after the occurrence, report any "life cycle event" relating to a corporate event; and (v) an agreement of the end-user to, consent to the disclosure of material confidential information by the SD to comply with requests from any regulatory authority or self-regulatory organization with jurisdiction over the SD or of which the SD is a member.

[7] ISDA will likely issue future protocols to address additional CFTC's rules (e.g., the end-user exception and orderly liquidation provisions).

III. Prepare for the End-User Exception

The Commodity Exchange Act ("CEA") establishes a clearing requirement for swaps by providing that "it shall be unlawful for any person to engage in a swap unless that person submits such swap for clearing to a [derivatives clearing organization] that is registered under the [CEA] if the swap is required to be cleared."[8] The CEA also provides that swaps subject to the clearing requirement be executed on a designated contract market ("DCM") or a swap execution facility ("SEF") if such swaps are made "available to trade."[9] In July 2012, the CFTC approved a rule implementing an "end-user exception" to the clearing and execution requirements if one of the counterparties to the swap: (a) is not a financial entity; (b) is using the swap to hedge or mitigate commercial risk;[10] (c) notifies the CFTC, in a manner set forth by the CFTC, how it generally meets its financial obligations associated with entering into uncleared swaps; and (d) if an SEC Filer (as defined below), obtains board approval to enter into swaps subject to clearing and execution exemptions.[11]

Before a swap or category of swaps is subject to mandatory clearing and/or execution, the CFTC must make a final determination that the particular category of swaps is subject to mandatory clearing and/or execution requirements.[12] Once the CFTC publishes its final clearing determinations in the Federal Register, an end-user will have 270 days[13] from such publication date to comply with the mandatory clearing requirements or to elect the end-user exception from

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[8] See CEA Section 2(h)(1)(A).

[9] See CEA Section 2(h)(8). The CFTC has proposed, but not finalized, rules regarding the process for a DCM or SEF to make a swap "available to trade." See 77 Fed. Reg. 77728 (December 14, 2011).

[10] See 77 Fed. Reg. 42560 (July 19, 2012). The CFTC makes clear that it does not believe that the end-user exception was intended to apply only to physical commodity hedging and accordingly, the final rule provides that "commercial" risk may include either financial risks or commodity risks. For example, the CFTC explains that "a change in interest rate risk of a non-financial entity's debt incurred for commercial business operations (e.g., to fund the purchase of inputs or to build a factory for the entity) can constitute commercial risk." 77 Fed. Reg. at 42571. However, the CFTC clarifies "that the use by non-financial entities of the end-user exception for financial risk hedging or mitigation must be an incidental part of (i.e., not central to) the electing counterparty's business and must fully qualify under all other applicable provisions of the CEA and § 39.6." Id.

[11] See CFTC Regulation 39.6 which implements CEA Section 2(h)(7). 77 Fed. Reg. 42560, 42590-91.

[12] While it is expected that many, if not all, of the swaps subject to the clearing mandate will also be subject to the execution mandate, the CFTC will make a separate determination with respect to which swaps are subject to the execution requirement. Therefore it is possible that swaps may be subject to the clearing mandate, but not subject to the execution mandate. The CFTC has proposed, but not yet finalized mandatory clearing determinations for certain interest rate and credit default index swaps. See 77 Fed. Reg. 47169 (August 7, 2012). It is expected that the CFTC will finalize the first groups of swaps subject to mandatory clearing by the end of 2012.

[13] See 77 Fed. Reg. 44441 (July 30, 2012).

such requirements.[14] The election to use the end-user exception is done on a swap-by-swap basis, meaning that an end-user will need to inform its counterparty of its election to rely on the end-user exception for each swap and ensure that required information is provided to the counterparty or reported to the SDR by the end-user.

In preparation for making this election, end-users should take the following actions:

A. Each end-user must determine whether it is a "financial entity"

An end-user that falls under the definition of "financial entity" would not be eligible to elect to use the end-user exception to the mandatory clearing requirement.[15] Effectively, financial end-users will be required to clear and execute swaps in the same manner as swap dealers and major swap participants, at least with respect to swaps entered into by a financial entity of such end-user. Therefore, it is important for an end-user to conclude whether each of its affiliates or other entities that enters into swaps is a "financial entity," which will determine whether it is ineligible to elect the end-user exception.[16] To make this determination, each end-user must examine the business activities of its affiliates or other entities that enter into swaps.

While Title VII of the Dodd-Frank Act provides a list of entities considered to be "financial entities," uncertainty and concern remains about what it means to be 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."[17] For example, non-financial end-users that execute market facing swaps from centralized hedging centers in the centralized hedging center's own name (i.e., as principal), may find that their centralized hedging center is "predominantly engaged in activities that are financial in nature", and therefore such entity would be ineligible to elect to use the end-user exception.[18] Effectively,

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[14] See CFTC Regulation 23.432 which requires SDs and MSPs to notify end-users of their right to clear any swap and to have the right to select the derivatives clearing organization ("DCO") at which such swap is cleared. 77 Fed. Reg. 9734, 9824-25 (February 17, 2012).

[15] See CEA Section 2(h)(7)(C)(i); see also, CFTC Regulation 39.6(d). CEA Section 2(h)(7)(C)(i) defines the term "financial entity" to mean: (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 80b–2 (a) of title 15; (vii) an employee benefit plan as defined in paragraphs (3) and (32) of section 1002 of title 29; (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 1843 (k) of title 12.

[16] It should be noted that the CEA and CFTC regulations provide that certain small banks are excluded from the definition of "financial entity." See CEA section 2(h)(7)(C)(ii); see also, 77 Fed. Reg. 42577-80. Further, captive finance entities and transactions on behalf of affiliates that meet certain criteria may be eligible to elect to use the end-user exception. See CEA sections 2(h)(7)(C)(iii) and 2(h)(7)(D); see also, CFTC regulation 39.6(b)(1)(iii)(A)(*1*).

[17] See CEA Section 2(h)(7)(C)(i)(VIII).

[18] Another area of concern in the definition "financial entity" is the CFTC's interpretation of the defined term "commodity pool" in the context of portfolio or operating companies owned by private funds. The Dodd-Frank Act added to the CEA, section 1a(10) which is the definition of the term "commodity pool." While the term had not been previously defined in the CEA, the terms "commodity" and "commodity pool operator" were defined

such treatment could cause an otherwise non-financial end-user that is hedging or mitigating commercial risk in connection with its business to be treated as a "financial entity" and unable to elect the end-user exception simply because of its organizational structure.[19]

Further, the CEA provides that captive finance companies (i.e., entities that provide purchase or lease financing to customers for the purchase or lease of products manufactured or assembled by the parent company or its affiliates) are not financial entities if they meet certain conditions.[20] In order for an entity to be excluded from the financial entity definition and eligible to elect the end-user exception, the captive finance company must be in the primary business of providing financing and must use derivatives to hedge commercial risks relating to interest rate and foreign exchange ("FX") exposures. Further, the captive finance company must separately meet each of the following two prongs: (1) at least 90% of the interest rate and FX derivatives exposures arise from financing that facilitates the purchase or lease of products; and (2) at least 90% of such products are manufactured by the parent company or a subsidiary of the parent. The CFTC has indicated that captive finance entities can take broad views of the term "products" and "facilitates"; however, the CFTC has declined to determine whether specific entities would qualify for the captive finance exception.[21]

B. Board approval for SEC Filers

If a derivatives end-user is an issuer of securities that are registered under Section 12 of the Securities Exchange Act of 1934 or is required to file reports pursuant to Section 15(d) of the Securities Exchange Act of 1934 (an "SEC Filer"),[22] such SEC Filer's board (or appropriate

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in the CEA and the Commission regulations defined the term "pool." Because "commodity pool" is now a defined term in the CEA, whether an entity is included in the definition of "commodity pool" becomes a very important distinction, since under CEA section 2(h)(7)(C)(i)(V), a "commodity pool" is considered a "financial entity" and therefore would be precluded from using the end-user exception to the mandatory clearing requirement. The fact that a person claims an exemption from registration as a "commodity pool operator" under § 4.13 of the CFTC's regulations does not exclude the entity from the definition of "commodity pool." Therefore, any person that claims such exemption from registration is, by virtue of claiming such exemption, stating that it is operating a "commodity pool" as defined under CEA section 1a(10) and could therefore be considered a financial entity under CEA section 2(h)(7)(C).

[19] Financial entities will only have 180 days from the publication date of the CFTC's final clearing determinations to comply with the mandatory clearing requirements. See 77 Fed. Reg. 44456.

[20] The definition of 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." CEA section 2(h)(7)(C)(iii).

[21] The CFTC discusses captive finance companies in the final end-user exception rule. See 77 Fed. Reg. 42564-65.

[22] The CFTC has explained that it is interpreting the term "SEC Filer" in the same manner as the Securities and Exchange Commission ("SEC"). 77 Fed. Reg. 42570. The SEC has stated that, for purposes of its proposed rule governing the end-user exception to mandatory clearing of security-based swaps, ''a counterparty invoking the end-user clearing exception is considered by the [SEC] to be an issuer of securities registered under Exchange Act Section 12 or required to file reports pursuant to Exchange Act Section 15(d) if it is controlled by a person that is an issuer of securities registered under

committee of the board) must review and approve the decision to enter into swaps that are exempt from clearing and execution requirements.[23] If an SEC Filer wishes to use an "appropriate committee" then the committee should be appropriately authorized to review and approve the SEC Filer's decision to enter into swaps.[24] Board/committee approval is not required for each decision by an SEC Filer to enter into a swap that is exempt from the clearing requirement. The CFTC permits board/committee approval on a swap-by-swap basis or on a general basis. If done on a general basis, approval must be done at least annually. There is no requirement that the SEC Filer's charter address this board/committee action, but it is prudent for the charter to confirm a committee's authority to grant the approval.

The CFTC also indicated in the release that accompanies the end-user exception final rule that the CFTC expects the board/committee to set appropriate policies governing the use of swaps subject to the end-user exception.[25] The board/committee should review these policies at least annually, or more often if there is a significant change in the policies. Therefore, boards/committees should consider reviewing and discussing with management policies that management develops on the use of swaps. The review and discussion could occur as part of the process of approving the decision to enter into uncleared swaps that are exempt from the clearing and execution requirements.

In sum, an SEC Filer end-user's board/committee must annually approve that the board/committee has reviewed and approved the decision to enter into swaps that are exempt from the clearing requirements of CEA section 2(h)(1) and execution requirements of CEA section 2(h)(8). SEC Filers should consider including in the board/committee approval, an approval of the policies governing the SEC Filer's use of swaps subject to the end-user exception.

C. Prepare and submit an annual filing

An end-user that plans to elect the end-user exception for its swaps must provide certain information before making the election. The information may be provided on a swap-by-swap basis or in an annual filing. An end-user may provide the information on a swap-by-swap basis to their counterparties who will then report the data to a registered SDR. This option may be appealing if such end-users do not enter into many swaps or have very few counterparties. Alternatively, an end-user that wants to elect the end-user exception may choose to report the following information to an SDR on an annual basis: (1) Whether the electing counterparty is a financial entity or a finance affiliate (i.e., is a financial entity electing the end-user exception by virtue of Sections 2(h)(7)(C)(ii) or (iii) or 2(h)(7)(D) of the CEA); (2) whether the swap hedges or mitigates commercial risk (the annual filing will state that the electing counterparty will only

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Exchange Act Section 12 or required to file reports pursuant to Exchange Act Section 15(d).'' See 75 FR 79992 at 79996 n. 34 (Dec. 21, 2010) (End-User Exception to Mandatory Clearing of Security-Based Swaps).

[23] See CEA section 2(h)(7)(j); see also CFTC regulation 39.6(b)(3)(D)(ii).

[24] An end-user may find that it is necessary to amend its charter or provide some other form of authorization for a committee to review and approve the company's decision to enter into swaps.

[25] See 77 Fed. Reg. 42569.

elect the end-user exception for swaps that hedge or mitigate commercial risk); (3) how the electing counterparty generally expects to meet its financial obligations; and (4) information related to whether the electing counterparty is an SEC Filer with board approval to not clear the swaps for which the end-user exception is elected. The annual filing option may be easier for end-users that enter into swaps on a regular basis with multiple counterparties.

IV. Comply with and Prepare for Recordkeeping Requirements

A. Maintain records of historical swaps (ongoing)

The historical swaps covered by Part 46 of the CFTC's regulations encompass (1) swaps entered into before July 21, 2010 and still outstanding as of July 21, 2010 ("Pre-Enactment Swaps") and (2) swaps entered into on or after July 21, 2010, but prior to April 10, 2013 ("Transition Swaps," and, together with Pre-Enactments Swaps, "Historical Swaps").[26] Therefore, end-users should currently be maintaining and preserving existing information that relates to its swaps as follows:

Type of Historical Swap	Information that must be maintained
Historical Swaps in existence on or after April 25, 2011	• Minimum primary economic terms as described in Appendix 1 to Part 46[27] • Swap confirmation terms • Any master agreement to the swap (including modifications) • Any credit support agreement relating to the swap (including modifications)
Historical Swaps that are expired or terminated prior to April 25, 2011	For pre-enactment swaps (entered into before July 21, 2010): Information and documents possessed by the counterparty on or after October 14, 2010 For transition swaps (entered into after July 21, 2010): Information and documents possessed by the counterparty on or after December 17, 2010[28]

[26] See 77 Fed. Reg. 35200 (June 12, 2012).

[27] See 77 Fed. Reg. 35231 – 35239. The primary economic terms described in Appendix I are broken down by asset class and include items such as start date, end date, notional amount, payment frequency, execution timestamp, etc.

[28] An end-user is not required to create or retain records of information not in its possession on October 14, 2010 for pre-enactment swaps or December 17, 2010 for transition swaps, or to alter the method by which the information is stored. A note to the interim final rule ("IFR") for Transition Swaps and the IFR for Pre-enactment Swaps mentions that the following documentation should be retained: all information and documents, to the extent and in such form as they exist on the effective date of this section, relating to: the terms of a swap transaction, including but not limited to any information necessary to identify and value the transaction (e.g., underlying asset and tenor); the date and time of execution of the transaction; volume (e.g., notional or principal amount); information relevant to the price and payment for the transaction until the swap is

These records must be maintained for all Historical Swaps to which an end-user is a counterparty for a period of at least five years from the final termination of the swap. The data may be maintained in either electronic or paper form and must be retrievable within five business days during the required retention period.

B. Prepare for compliance with Part 45 recordkeeping requirements

Beginning on April 10, 2013, end-users will have to comply with the recordkeeping requirements set forth in Part 45, which require an end-user to "keep full, complete, and systematic records, together with all pertinent data and memoranda" of each swap transaction in which the end-user is a counterparty until the swap has been fully terminated for five years.[29] These requirements would apply to swaps entered into on or after April 10, 2013 and to amendments to existing Historical Swaps. The records may be kept in either electronic or paper format, but must be retrievable within five business days throughout the required retention period.

While the CFTC's final Part 45 rules do not elaborate on what it means to keep "all pertinent data and memoranda," it may be interpreted to include information relating to pre-trade negotiation of swaps that are entered into by end-users. If end-users do not currently retain records of pre-trade negotiations they may face increased recordkeeping requirements. The CFTC may be providing additional guidance on this issue in an upcoming rulemaking or guidance.

V. Prepare for Reporting Requirements

The CFTC's regulations require that swap data be reported to an SDR for Historical Swaps (Part 46), for new swaps and continuation data during the life of a swap (Part 45), and for real-time public reporting purposes (Part 43).[30] It is possible that an end-user might have reporting requirements for its bilateral, off-exchange swaps. Further, an end-user would be required to report information relating to its inter-affiliate swaps in the same manner as swaps with external third parties.[31] Reporting requirements for SDs and MSPs will begin when they register with the CFTC (many SDs and MSPs will be required to register by December 31, 2012,

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terminated, reaches maturity or is novated; whether the transaction was accepted for clearing and, if so, the identity of such clearing organization; any modification(s) to the terms of the transaction; and the final confirmation of the transaction.

[29] See 77 Fed. Reg. 2136; see also, CFTC Regulation 45.2(b). 77 Fed. Reg. 2198.

[30] See "Swap Data Recordkeeping and Reporting Requirements," 77 Fed. Reg. 2136 (January 13, 2012); "Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps," 77 Fed. Reg. 35200 (June 12, 2012); "Real-Time Public Reporting of Swap Transaction Data," 77 Fed. Reg. 1182 (January 9, 2012).

[31] An end-user generally would not be required to report inter-affiliate swaps for the purposes of Part 43 (real-time public reporting).

but an SD or MSP could choose to register with the CFTC sooner). If there is no SD or MSP that is a counterparty to the swap, then reporting requirements will begin on April 10, 2013.

A. Determine swap counterparty's status

Pursuant to the CFTC's regulations and Title VII of the Dodd-Frank Act, if an end-user's swap counterparty is registered as an SD or MSP, the requirement to report swap data to an SDR will fall on the SD or MSP. If an end-user has any counterparties that are not SDs or MSPs but that are U.S. persons, the end-user and the counterparty will need to agree about which party will report to the SDR.[32] To the extent that an end-user's counterparty is not a registered SD or MSP and is not a U.S. person,[33] reporting obligations would fall on the U.S. person end-user.[34] An end-user's non-U.S., non-SD/non-MSP counterparties could agree to send the data to the SDR on behalf of such end-user; however, the obligation under Part 45 and Part 46 of the CFTC's regulations would still fall on the end-user as a U.S. person.

Given the CFTC's rules relating to reporting, it is important for an end-user to determine the status of its counterparties so that the end-user will be able to prepare for compliance with reporting requirements. SDs and MSPs will be required to reach out to their counterparties to amend their swap transaction documentation to comply with new CFTC requirements, which will inform end-users of their counterparties' status. To the extent that a U.S. end-user is entering into swaps with a non-U.S. entity that is not registered with the CFTC as an SD or MSP or with a non-financial U.S. entity that is not registered as an SD or MSP, such end-user would likely have reporting obligations.

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[32] Pursuant to Parts 45 and 46, if both parties are U.S. persons and only one party is a "financial entity," then the financial entity is the reporting party and must report to an SDR. It should be noted that Part 43's real-time public reporting rules do not distinguish between U.S. and non-U.S. persons or between financial and non-financial entities. Accordingly, with respect to a swap between two non-SD/MSP counterparties, the parties would be required to decide who will report Part 43 swap data to an SDR.

[33] It should be noted that the CFTC has proposed guidance (which is not yet finalized) on the definition of U.S. person. See 77 Fed. Reg. 41214. Pursuant to such proposed guidance, the CFTC has said that the term "U.S. person" would include, but is not limited to: "(i) Any natural person who is a resident of the United States; (ii) any corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund, or any form of enterprise similar to any of the foregoing, in each case that is either (A) organized or incorporated under the laws of the United States or having its principal place of business in the United States 29 (''legal entity'') or (B) in which the direct or indirect owners thereof are responsible for the liabilities of such entity and one or more of such owners is a U.S. person; (iii) any individual account (discretionary or not) where the beneficial owner is a U.S. person; (iv) any commodity pool, pooled account, or collective investment vehicle (whether or not it is organized or incorporated in the United States) of which a majority ownership is held, directly or indirectly, by a U.S. person(s); (v) any commodity pool, pooled account, or collective investment vehicle the operator of which would be required to register as a commodity pool operator under the CEA; (vi) a pension plan for the employees, officers, or principals of a legal entity with its principal place of business inside the United States; and (vii) an estate or trust, the income of which is subject to United States income tax regardless of source." 77 Fed. Reg. 41218.

[34] See CFTC regulation 45.8(e) which states that "if both counterparties to a swap are non-SD/MSP counterparties and only one counterparty is a U.S. person, that counterparty shall be the reporting counterparty." 77 Fed. Reg. 2207.

End-users may choose to refer to the following to assist in determining potential reporting obligations under Parts 45 and 46.

Is the counterparty registered with the CFTC as an SD or MSP?

- **Yes**. If the counterparty is registered with the CFTC as an SD or MSP, then the SD or MSP counterparty will be required to report swaps to an SDR.
  - SDs and MSPs will begin registering on December 31, 2012 – and will need to amend swap relationship documentation with end-users prior to registration in order to continue trading.
- **No**. If a counterparty is not a registered SD or MSP, then:
  - Is the non-SD/non-MSP counterparty a U.S. person?
    - If yes:
      - Is the non-SD/non-MSP counterparty a "financial entity" as defined in CEA section 2(h)(7)(C)(i)?
        - If yes, then non-SD/non-MSP counterparty must report historical and regulatory swap data to an SDR
        - If no, then the end-user and its non-SD/non-MSP counterparty must decide who will report swap data to an SDR
    - If no:
      - The U.S. person end-user must report Historical Swaps and regulatory swap data to an SDR[35]

B. Prepare to report swap data to an SDR

If an end-user is required to report swap data to an SDR, then such end-user would need to decide which SDR to report to and review and sign a user agreement and related documentation in preparation to report to such SDR. Further, end-users with reporting obligations should prepare a process to report the swap data described the CFTC's regulations to an SDR "as soon as technologically practicable" after execution of such swap, but no later than the timeframes provided in the CFTC's final rules and as described below.

If an end-user is a reporting counterparty, it must send real-time data described under Part 43 and primary economic terms ("PET") data described under Part 45 to an SDR "as soon as technologically practicable" after execution. Part 45 provides longer timeframes for a reporting counterparty to an off-facility swap to send confirmation data to an SDR for regulatory reporting purposes. However, the Part 45 rules provide that if an off-facility swap is cleared, then the DCO would be responsible for reporting the PET and confirmation data to an SDR. The Part 45 rules also set forth both an outer boundary within which an end-user reporting party must send PET data to an SDR, as well as the specific timeframes for reporting confirmation data (which includes the full terms of the swap) for uncleared off-facility swaps. Further, end-users with

[35] The end-user will likely also report real-time reporting data under Part 43, but the counterparties would need to decide who reports the real-time data to the SDR since the Part 43 rules do not distinguish between U.S. persons and non-U.S. persons and between financial and non-financial entities.

reporting obligations would be responsible for reporting swap data to an SDR with respect to Historical Swaps pursuant to Part 46.

Additionally, all end-users that engage in inter-affiliate swaps should prepare to report data for such inter-affiliate swaps to an SDR in accordance with the CFTC's Part 45 and Part 46 regulatory reporting rules for new and Historical Swaps. End-users that enter into inter-affiliate swaps but only enter into market-facing swaps with registered SD or MSP counterparties should pay particular attention to this requirement, since such end-users would have reporting obligations with respect to their inter-affiliate swaps, but not with their market-facing swaps. The Part 45 and Part 46 regulations do not provide specific rules for reporting inter-affiliate swaps to an SDR and, absent additional CFTC rules or guidance, all end-users should prepare to report their inter-affiliate swaps to an SDR in the form and manner that external swaps would be reported.

End-User Reporting Counterparty's Obligations for Reporting to an SDR				
Type of reporting	**Executed on a SEF or DCM (cleared)**	**Executed on a SEF or DCM (uncleared)**	**Off-facility swap (cleared)**	**Off-facility swap (uncleared)**
Real-time data	None	None	As soon as technologically practicable after execution	As soon as technologically practicable after execution
PET data	None	None	None (If accepted for clearing before the applicable deadline*)	As soon as technologically practicable, but no later than the applicable deadline*
PET data (If accepted for clearing after the applicable deadline*)	N/A	N/A	As soon as technologically practicable, but no later than the applicable deadline*	N/A
Confirmation data	None	None	None	Year 1: within 48 business hours after confirmation Year 2: within 36 business hours after confirmation After Year 2: within 24 hours

				after confirmation
Valuation data	None	Quarterly	None	Quarterly
Other Continuation data	None	Year 1: end of second business day following change to PET data After Year 1: end of first business day following change to PET data	None	Year 1: end of second business day following change to PET data After Year 1: end of first business day following change to PET data

As mentioned above, Part 45 of the CFTC's regulations provides an outer-boundary for reporting PET data to an SDR. Below is a summary of the applicable deadlines for end-users to report PET data to an SDR.

***Applicable Deadlines for End-User Reporting Counterparties to Report PET data Under Part 45**			
Year	**Off-facility swaps subject to mandatory clearing in which an end-user reporting counterparty is not excepted from mandatory clearing pursuant to CEA section 2(h)(7) or covered by CEA section 2(a)(13)(C)(iv)**[36]	**Off-facility swaps subject to mandatory clearing in which the end-user reporting counterparty is excepted from mandatory clearing pursuant to CEA section 2(h)(7) or covered by CEA section 2(a)(13)(C)(iv)**	**Off-facility swaps not subject to mandatory clearing**
Year 1	4 hours after execution	48 business hours after execution	48 business hours after execution
Year 2	2 hours after execution	36 business hours after execution	36 business hours after execution
After Year 2	1 hour after execution	24 business hours after execution	24 business hours after execution

[36] CEA section 2(a)(13)(C)(iv) refers to "swaps that are determined to be required to be cleared under [CEA section 2(h)(2)] but are not cleared."

End-user reporting counterparties may send PET data and real-time data to an SDR in the same data stream in order to improve efficiency and reduce costs. If an end-user is required to report swap transaction and pricing data, both Part 43 and Part 45 permit an end-user to use a third-party to assist in reporting obligations.

Pending Rules/Issues Affecting Derivatives End-Users

Determination by the U.S. Department of Treasury ("Treasury") to exclude FX swaps and FX forwards from the definition of "swap"

Treasury is authorized, pursuant to CEA section 1a(47)(E), to make a written determination under CEA section 1b that FX swaps or FX forwards should not be regulated as "swaps" under the Dodd-Frank Act. Treasury issued a proposed determination on April 29, 2011, in which it stated that FX swaps and FX forwards that would be excluded from the definition of "swap," and thereby exempt from certain requirements established in the Dodd-Frank Act, including registration and clearing.[37]

There are a few limitations on this potential exemption: (1) All FX swaps and FX forwards must be reported to either an SDR, or if there is no SDR, to the CFTC pursuant to CEA section 4r and Part 45 of the CFTC's regulations; (2) Any party to an FX swap or FX forward that is a swap dealer or major swap participant must comply with the requirements in CEA section 4s(h); and (3) Non-deliverable forwards ("NDFs") and options would not be subject to the exemption and would still be considered "swaps" under CEA section 1a(47) and therefore could be subject to clearing, trading and margin requirements.[38]

Treasury has not provided a specific timeline for releasing a final determination regarding the treatment of FX swaps and forwards, but it is estimated to be released in late 2012.

Final Rules Regarding Margin and Capital

The CFTC and the Prudential Regulators have each published separate proposed rules governing margin requirements for uncleared swaps. The proposals – and the Prudential Regulators' proposed rule in particular – have the potential to place margin requirements on end-users. The Prudential Regulators' proposed rule ostensibly would apply to SDs and MSPs that are regulated as banks, while the CFTC's proposed rule would apply to non-bank SDs and MSPs. Both rules operate by requiring that SDs and MSPs collect margin from their counterparties with respect to uncleared swaps. Further, a consultative document was proposed in July 2012 by the Bank of International Settlements and the Board of International Organization of Securities Commissions that addresses margin requirements for non-centrally-cleared derivatives.

The CFTC's and Prudential Regulators' final margin rules are expected sometime in the first half of 2013. The CFTC and international regulators have publicly stated the importance of having consistent margin requirements globally, and accordingly, the preliminary commitments from global regulators would exclude non-financial end-users from margin requirements. The Prudential Regulators, however, have explained that they do not believe they have the authority to exclude non-financial end-users from margin requirements.

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[37] See 76 Fed Reg. 25774 (May 5, 2011).

[38] It should be noted that CFTC's final rules further defining the term "swap" have distinguished NDFs from FX swaps and forwards in the same way that Treasury made the distinction in its proposed determination.

Inter-affiliate Clearing Exemption

The CFTC's final end-user exception rule did not provide separate relief from clearing for inter-affiliate swaps. The CFTC explained in that rule that non-financial end-users would be permitted to use the end-user exception for inter-affiliate swaps in which at least one party is a non-financial end-user and the swap hedges or mitigates commercial risk; however, financial end-users that use a centralized hedging unit model for executing market-facing swaps and inter-affiliate swaps would not be able to elect to use the end-user exception for their inter-affiliate swaps that hedge or mitigate commercial risk. Under this approach, the CFTC effectively treats financial end-users in the same manner that it treats swap dealers with respect to inter-affiliate swaps.

In response to this and other concerns, the CFTC proposed a rule in August 2012 that would exempt certain inter-affiliates from the clearing and execution requirements so long as certain conditions were met.[39] The public comment period has closed on for this rule and it is expected that the final rules will be approved towards the end of the year.

Centralized Hedging Units

Treating centralized hedging units as financial entities under CEA section 2(h)(7)(C)(i) would effectively create a competitive disadvantage for those non-financial end-user companies that use centralized hedging units. It would require such end-users to be subject to clearing and execution requirements simply because they are using a risk mitigation structure that differs from their competitors. Such a result would discourage end-users from using central hedging units, effectively eliminate the risk mitigation, netting, and other benefits, and create more risk, cost, and duplication by requiring each affiliate to enter into swaps directly with swap dealing counterparties.

The CFTC has been urged to address this issue and to confirm that centralized hedging units shall not be considered financial entities with respect to swaps executed with third parties on behalf of non-financial entities, regardless of whether a swap is executed by the centralized hedging unit in its own name as principal or in the name of its corporate parent or affiliate as an agent of the corporate parent or affiliate. While the CFTC is aware of the issue, the agency has not yet proposed any further guidance.

Captive Finance Entities (Interpretation of the 90/90 Test)

The CFTC relies on the plain language of CEA Section 2(h)(7)(C)(iii) when interpreting the captive finance company exception. Any entity that meets the definition in CEA Section 2(h)(7)(C)(iii) would not be included in the definition of "financial entity" and would be eligible to elect the end-user exception. However, there are some ambiguities in the statutory language and the CFTC's guidance in the preambles of the final end-user exception rule and the final entity definitions rule that may lead to different interpretations of the two pronged test to

[39] See 77 Fed. Reg. 50425 (August 21, 2012). For example, one proposed requirement to elect to use the inter-affiliate exemption from clearing is that variation margin would be required to be exchanged between affiliates.

determine if a captive finance entity can take advantage of the end-user exception. As written, the captive finance exception would not apply when a captive provides financing to its member-owners to support their general business activities. Additionally, certain captives may finance products that fall outside the scope of the CFTC's interpretation of "manufactured."

Derivatives End-User Compliance Timeline

Date	Rule/Requirement	Action
October 12, 2012	Definition of "swap" becomes effective	No action to be taken, however compliance schedules for SDs and MSPs, reporting, etc. now begin.
	Determine status as a "financial entity"	An end-user should begin to determine whether or not it is a "financial entity" as a determination will be necessary to understand the end-user's obligations under the Dodd-Frank Act and the CFTC's regulations.
	Under CEA section 2(e), it is unlawful to enter into off-exchange swaps if you are not an eligible contract participant ("ECP")	No action to be taken, unless an end-user is concerned that it is not an ECP or that one of its counterparties may not be an ECP.
	Reporting and Recordkeeping (Parts 43, 45 and 46) for SDs, MSPs, DCOs, DCMs and SEFs	Registered SDs and MSPs will be required to report swap data relating to interest rates and credit, including historical swap data and real-time data, to an SDR. Since the earliest that SDs would be *required* to register is December 31, 2012, only those that choose to register beforehand would need to comply. DCOs will be required to report data to an SDR for cleared interest rate and credit swaps. Interest rate and credit swaps executed on a SEF or DCM must be reported to an SDR.

Date	Rule/Requirement	Action
		Real-time reporting will begin for interest rate and credit swaps submitted by registered SDs, MSPs, DCOs, DCMs and SEFs.
Late November/ December 2012 (estimated)	Treasury's Final Determination Relating to FX swaps and forwards	Treasury has not provided much information regarding the issuance of a final determination to exclude FX swaps and forwards from the definition of "swap." It is anticipated that Treasury's final determination will be published before the end of 2012.
	Inter-Affiliate Exemption from Clearing Final Rule	The CFTC proposed a rule exempting inter-affiliate swaps from clearing, so long as certain conditions are met. It is estimated that the final rule will come out prior to the time when SDs and MSPs must comply with mandatory clearing requirements.
	Trading, Execution and Block Trade requirements	The CFTC has not issued final rules relating to these topic areas relating to trading and execution. CFTC is in the process of preparing the final rules. It is estimated that the final rules may be approved before the end of 2012.
December 31, 2012	Swap Dealer Registration	SDs that exceeded the de minimis threshold in October 2012 will be required to register as SDs. When SDs register, they will be required to report swap data relating to interest rates and credit, including historical swap data and real-time data, to an SDR. SDs that do not exceed the de miminis threshold in October 2012 would not need to register until two months after the end of the month in which they exceed the threshold.
January 1, 2013	External Business Conduct Standards	All registered SDs and MSPs will be required to comply with the

Date	Rule/Requirement	Action
		CFTC's external business conduct standards (non-U.S. persons may have longer time period to comply). End-users will be required to amend their swap relationship documentation (i.e., ISDA documentation) to continue trading with swaps with registered SDs and MSPs under existing documentation (new documentation will need to contain the appropriate representations). End-users can either adhere to the ISDA 2012 DF Protocol or amend their swap documentation on a counterparty by counterparty basis.
January 10, 2013	Reporting and Recordkeeping (Parts 43, 45 and 46) for SDs, MSPs, DCOs, DCMs and SEFs	SDs and MSPs will be required to report swap data relating to FX, equities and other commodities, including historical swap data and real-time data, to an SDR. DCOs will be required to report data to an SDR for cleared FX, equity and other commodity swaps. FX, equity and other commodity swaps executed on a SEF or DCM must be reported to an SDR. Real-time reporting will begin for FX, equity and other commodity swaps submitted by registered SDs, MSPs, DCOs, DCMs and SEFs.
April 10, 2013	Acquire a CICI/LEI for compliance with reporting and recordkeeping obligations for new or existing swaps	All entities that are parties to a swap should have acquired a CICI from the online CFTC approved utility at www.ciciutility.org The CFTC recently clarified in an FAQ that end-users must

Date	Rule/Requirement	Action
		obtain a CICI/LEI no later than April 10, 2013.
	Recordkeeping and Reporting (Parts 43, 45 and 46)	End-users are required to comply with all recordkeeping requirements under Part 45 for all asset classes. To the extent the end-user's counterparties are not SDs and MSPs and swaps are not executed on a SEF or DCM, an end-user would be required to comply with reporting requirements under Parts 43, 45 and 46. End-users would be responsible for reporting inter-affiliate swap data to an SDR – even if their market facing swaps are done only with SDs or MSPs.
October 7, 2013	Acquire a CICI/LEI for compliance with reporting obligations for historical swaps (if a CICI/LEI was not previously obtained)	Even if an end-user is no longer entering into new swaps, it would need to obtain a CICI/LEI with respect to its historical swaps by October 7, 2013 if it had not previously obtained such CICI/LEI.
Q2 2013 (estimated)	Margin requirements for uncleared swaps	There are currently efforts among global regulators to come up with consistent margin requirements. The Prudential Regulators' proposal would place margin requirements on non-financial end-users. The CFTC's proposal would not place margin requirements on non-financial end-users. Final rules can be expected in early 2013.
	Final clearing requirement for certain standardized interest rate swaps and credit default index swaps for non-SD/non-MSP financial entities (180 days after the final	End-users that are financial entities will be required to clear interest rate swaps and credit default index swaps.

Date	Rule/Requirement	Action
	clearing determinations are published)	
Early Q3 2013 (estimated)	Final clearing requirement for certain standardized interest rate swaps and credit default index swaps for non-financial end-users (270 days after the final clearing determinations are published)	End-users will be required to elect to use the end-user exception if they do not want to be subject to the clearing and trading requirements for certain standardized interest rate and credit default index swaps. End-users must have appropriate board approval in place prior to electing to use the end-user exception. End-users wishing to use the annual filing method for providing notice should also have such annual filing in place prior to electing the exception.

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