

## Commodity Futures Trading Commission Swap Business Conduct Standards Rules

The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) amended the Commodity Exchange Act (“CEA”) and required that the Commodity Futures Trading Commission (“CFTC”) adopt business conduct standards rules (“BCS Rules”) for swap dealers (“SDs”) and major swap participants (“MSPs,” collectively “SD/MSPs”) governing their dealings with counterparties. The BCS Rules generally prohibit fraud, deception or manipulation, require disclosures of material information to counterparties, and require SDs/MSPs to undertake certain record keeping and due diligence relating to their dealings with counterparties.<sup>1</sup>

### **General Considerations**

1. The BCS Rules generally apply to SDs and (except where indicated) MSPs.
2. Certain BCS Rules do not apply to transactions initiated on a swap execution facility (“SEF”) or designated contract market (“DCM”) when the SD/MSP does not know the identity of the counterparty prior to execution.
3. Many of the BCS Rules are not applicable to an SD/MSP dealing with another SD/MSP.
4. The BCS Rules are generally not applicable to unexpired swaps entered into before the BCS Rules’ effective date; however, material amendment to a previously existing swap generally will be considered a new swap.
5. Know your customer, true name and owner, verification of eligibility, disclosures and suitability rules do not apply where the SD/MSP does not know the counterparty prior to the transaction – e.g., to anonymous transactions on a DCM or SEF.
6. The BCS Rules generally do not apply to non-reportable affiliate transactions – e.g., intercompany transactions to move risk between wholly-owned affiliates without credit exposure to the other party.

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<sup>1</sup> A non-U.S. registrant may be able to comply with certain of the BCS Rules through substituted compliance in its local jurisdiction in accordance with the CFTC’s *Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations*, 78 FR 45292 (July 26, 2013) and any related comparability determination by the CFTC.

7. The BCS Rules include additional requirements when a counterparty is a “Special Entity.”<sup>2</sup>
8. Compliance with certain requirements related to the BCS Rules is facilitated through the use of the International Swaps and Derivatives Association (“ISDA”) August 2012 and March 2013 DF Protocols.

**General Provisions**

Specific Requirements	Action Items
<p><b>Policies and Procedures (17 C.F.R. §23.402(a)):</b></p> <p>Requires that an SD/MSP have policies and procedures reasonably designed to ensure compliance and prevent evasion of applicable provisions of the CEA and CFTC regulations and to implement and monitor compliance with such provisions as part of its supervision and risk management requirements.</p>	<p>Develop policies and procedures for inclusion in the firm’s written supervisory procedures with regard to swap dealing/trading activities.</p>

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<sup>2</sup> CFTC Regulation 401(c) defines the term “Special Entity” to mean:

- (1) A Federal agency;
- (2) A State, State agency, city, county, municipality, other political subdivision of a State, or any instrumentality, department, or a corporation of or established by a State or political subdivision of a State;
- (3) Any employee benefit plan subject to Title I of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002);
- (4) Any governmental plan, as defined in Section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002);
- (5) Any endowment, including an endowment that is an organization described in Section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)); or
- (6) Any employee benefit plan defined in Section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002), not otherwise defined as a Special Entity, that elects to be a Special Entity by notifying a swap dealer or major swap participant of its election prior to entering into a swap with the particular swap dealer or major swap participant.

Specific Requirements	Action Items
<p><b>Know Your Counterparty/True Name and Owner (“KYC/TN&amp;O”) (17 C.F.R. §23.402(b) &amp; (c)):</b></p> <p>Requires an SD to implement policies and procedures reasonably designed to obtain and record information for each counterparty that is known to the SD prior to execution, including:</p> <ul style="list-style-type: none"> <li>• Facts required to comply with applicable laws, regulations and rules;</li> <li>• Facts necessary to implement the SD’s credit and operational risk management policies; and</li> <li>• Information regarding the authority of persons acting for the counterparty.</li> </ul> <p>Requires SD/MSPs to keep records of the true name, address and occupation of each counterparty and the name and address of any person providing a guarantee or exercising control over positions of the counterparty.</p>	<p>Revise swap trading relationship documentation to provide for counterparty KYC/TN&amp;O information, including name, address and occupation of customer; name and address of any guarantor and/or control person; customer ID information sufficient to comply with KYC/TN&amp;O, swap dealer <i>de minimus</i> exception and AML procedures; information for credit and operational risk due diligence; and corporate resolutions/secretary certificate authorizing agents to act for the account. Develop policies and procedures to provide for compliance with KYC/TN&amp;O and related record keeping responsibilities for inclusion in the swap dealing/trading policies and procedures.</p>
<p><b>Counterparty Representations and Reliance (17 C.F.R. §23.402(d)):</b></p> <p>Permits reasonable reliance on written representations of counterparties in performing counterparty KYC/TN&amp;O due diligence, including representations in swap trading relationship documentation, provided that the counterparty agrees to timely update any material changes to representations and the documentation is reviewed regularly.</p>	<p>Revise swap trading relationship documentation to include counterparty representations and agreements necessary or appropriate in connection with the firm’s KYC/TN&amp;O, AML, credit and operational risk due diligence, including provisions for reliance on representations for subsequent swaps.</p> <p>Develop policies and procedures for the completion and review of swap trading relationship documentation with all necessary and appropriate representations and agreements with regard to counterparty due diligence</p>

Specific Requirements	Action Items
	<p>and the review of trading relationship documentation periodically thereafter for inclusion in the swap dealing/trading policies and procedures.</p> <p>See ISDA August 2012 DF Supplement, Schedule 2, Schedule 5 and Schedule 6.</p>
<p><b>Manner of Disclosure (17 C.F.R. §23.402(e) &amp; (f)):</b></p> <p>Permits written agreement on the manner of disclosures required under the BCS Rules, to include the provision of material information that is applicable to multiple swaps in swap trading relationship documentation. For transactions initiated on DCM or SEF, written agreement by the counterparty regarding the reliable means of disclosure is not required.<sup>3</sup></p>	<p>Revise swap trading relationship documentation to provide a methodology for making required disclosures under the BCS Rules.</p>
<p><b>Record keeping (17 C.F.R. §23.402(g)):</b></p> <p>Requires that an SD/MSP create, retain and produce, upon request by regulators, records of compliance with the BCS Rules.</p>	<p>Provide for the preparation and maintenance of records demonstrating compliance with the BCS Rules in the firm's swap dealing/trading policies and procedures. Revise general record keeping policies and procedures to describe records prepared in connection with swap dealing/trading policies and procedures and related preservation and production requirements.</p>

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<sup>3</sup> If agreed to between the parties, information may be conveyed orally and confirmed thereafter in writing. Password-protected internet access to information is expressly permitted, in addition to other technical means. Information applicable to multiple swaps with the counterparty may be made in counterparty relationship documentation.

**Counterparty Communications and Suitability**

Specific Requirements	Action Items
<p><b>Communications Generally (17 C.F.R. §23.433):</b></p> <p>Requires that an SD/MSP communicate in a fair and balanced manner based on principles of fair dealing and good faith in communications with a counterparty by, among other things, (i) providing a sound basis for evaluating the facts with respect to a swap, (ii) not making exaggerated or unwarranted claims, opinions or forecasts, and (iii) balancing any statements that refer to the potential opportunities or advantages of the swap with corresponding risks.</p>	<p>Develop policies and procedures to provide for the training and education of personnel on swap communication requirements and the review of standard and customized disclosures on swap trading relationship documentation and written communications with counterparties to swap transactions.</p>
<p><b>Recommendations to Counterparties (17 C.F.R. §23.434):</b></p> <p>Requires an SD that recommends a swap or swap trading strategy to a counterparty (other than an SD/MSP) to:</p> <p>(1) perform reasonable due diligence to understand the risks and rewards of the swaps or strategy; and</p> <p>(2) have a reasonable basis to believe that the recommendation is suitable for the counterparty.</p> <p>The SD may fulfill its obligation with respect to (2) above by (a) making a reasonable determination that the counterparty or its agent is capable of independently evaluating the risks of the swap or strategy, (b) by obtaining a representation in writing to that effect from the counterparty, and (c) disclosing in writing to the counterparty that the swap dealer is not making any suitability assessment.</p>	<p>Develop policies and procedures to :</p> <p>(1) provide for appropriate due diligence with regard to potential risks and rewards of swap/swap trading strategy recommendations; and</p> <p>(2) to establish a reasonable basis to believe that the recommendation is suitable by information obtained from the counterparty or reliance on the safe harbor with respect to a counterparty exercising independent judgment with regard to the recommendation (including delivery and receipt of all necessary disclosures and representations by the parties).</p> <p>Revise swap trading relationship documentation to provide for all necessary disclosures and representations with regard to suitability determination and reliance on the institutional safe harbor.</p> <p>See ISDA August 2012 DF Supplement, Schedule 3; Schedule 4, Sec. 4.2, 4.3.; Schedule 5, Sec. 5.2, 5.3.; Schedule 6, Sec. 6.2, 6.3.</p>

**Antifraud Provisions**

<b>Specific Requirements</b>	<b>Action Items</b>
<p><b>Prohibition on fraud and other abusive practices and Affirmative Defenses (17 C.F.R. §23.410):</b></p> <p>Prohibits fraud with regard to any customer or prospective customer that is a special entity and others as well as the unauthorized disclosure or use of confidential information obtained from counterparties.</p> <p>Requires implementation of written policies and procedures reasonably designed to protect material, confidential information of a counterparty from unlawful disclosure or use by persons acting for or on behalf of the swap dealer.</p> <p>Provides an affirmative defense to <i>non-scienter</i> violations of the BCS Rules by showing compliance in good faith with written policies and procedures designed to meet the requirements of the rules.</p>	<p>Revise swap trading relationship documentation to provide for authorization to use counterparty information as necessary or appropriate in the firm's business.</p> <p>Revise policies and procedures for the protection of material, nonpublic information to incorporate policies and procedures to protect against the improper or unauthorized disclosure or use of confidential information obtained from swap counterparties for inclusion in the firm's overall policies and procedures for the protection and use of confidential information.</p> <p>Develop written policies and procedures for the conduct and supervision of the BCS Rules and other swap trading activities generally, for inclusion in the firm's swap dealing/trading policies and procedures.</p> <p>See ISDA August 2012 DF Supplement, Schedule 2, Sec. 2.13, 2.16.</p>

**Verifications and Disclosures**

<b>Specific Requirements</b>	<b>Action Items</b>
<p><b>Verification of Counterparty Eligibility (17 C.F.R. §23.430):</b></p> <p>Requires verification that a counterparty is an eligible contract participant (“ECP”) prior to offering or entering into a swap.<sup>4</sup> Also requires a determination of whether a counterparty is a Special Entity (or would elect to be treated as a Special Entity).</p> <p>The SD/MSP may rely on a written representation by the counterparty that makes reference to the specific provision relied on under the definitions.</p> <p>(The verification requirements do not apply with regard to transactions on a DCM or anonymous transactions on an SEF.)</p>	<p>Revise swap trading relationship documentation to include representations by counterparties regarding ECP and Special Entity status. Representations should make reference to specific provisions in the definitions of ECP and Special Entity relied on by the counterparty, by check the box format or otherwise (including a notice in bold of the right to elect Special Entity status under CFTC Regulation 401(c)(6)) and provide for notice to the firm of change in status by the counterparty.</p> <p>Develop policies and procedures to ensure the verification of ECP and Special Entity status prior to offering or entering into a swap with a counterparty for inclusion in the firm’s swap dealing/trading policies and procedures.</p> <p><i>Swap trading relationship documentation and policies and procedures should incorporate any restrictions on dealing with Special Entities to ensure compliance with the de minimis exemption to SD status.</i></p>
<p><b>Disclosures to Counterparties (17 C.F.R. §23.431):</b></p> <p>Requires disclose of material information to a counterparty (other than an SD/MSP) prior to entering into a swap regarding (i) risks of the swap, (ii) characteristics of the swap and (iii) material conflicts of interest and incentives of the SD/MSP, including disclosures regarding price and compensation.</p>	<p>Prepare form of disclosure document of material risks, characteristics and conflicts of interest of particular types and classes of swaps (to be customized as appropriate for nonstandard swaps or relationships) for delivery to counterparties prior to entering into transactions in the various types/classes of swaps.</p>

<sup>4</sup> Under the Dodd-Frank Act, only an ECP may enter into a swap unless the transaction is effected on a DCM. The definition of ECP contained in Section 1a(18) of the CEA and CFTC Regulation 1.3(m).

<b>Specific Requirements</b>	<b>Action Items</b>
<p>Requires an SD, upon notice and request by a counterparty (other than an SD/MSP) to provide the counterparty with a scenario analysis with disclosures over a range of assumptions (including severe downside stress) in consultation with the counterparty and in consideration of its own risk analysis for swaps not made available for trading on a DCM or SEF.</p> <p>Requires an SD/MSP, upon notice and request by the counterparty (other than an SD/MSP) to provide for receipt of the daily mark for the swap by the relevant DCO for cleared swaps, and to provide the counterparty with a daily mark, included related disclosures, methodology and assumptions, for uncleared swaps.</p> <p>(Scenario analysis requirements do not apply to swaps executed anonymously on a DCM or SEF.)</p>	<p>Provide for the preparation of customized scenario analysis for transactions in swaps not available for trading on a DCM or SEF.</p> <p>Provide for daily marks and related disclosures for uncleared swaps.</p> <p>Revise swap trading relationship documentation to address material disclosures, scenario analysis and daily mark requirements.</p> <p>Develop policies and procedures to provide for compliance with counterparty disclosures above.</p> <p>See ISDA August 2012 DF Supplement, Schedule 2, Sec. 2.17-2.19, 2.22 and 2.23.</p>

**Clearing Disclosures**

<b>Specific Requirements</b>	<b>Action Items</b>
<p><b>Clearing Election Disclosure (17 C.F.R. §23.432):</b></p> <p>Requires an SD/MSP to notify a counterparty (other than another SD/MSP) of its right to select the DCO for swaps subject to mandatory clearing, or to elect to require clearing of a swap not subject to mandatory clearing and to select the DCO.</p>	<p>Revise swap trading relationship documentation to include notifications to counterparties on right of clearing and DCO selection.</p> <p>See ISDA August 2012 DF Supplement, Schedule 2, Sec. 2.24 and 2.25.</p>

**Swap Documentation and Portfolio Rules**

***Trading Relationship Documentation, Acknowledgements and Confirmations***

<b><i>Specific Requirements</i></b>	<b><i>Action Items</i></b>
<p>Requires establishment of written policies and procedures (approved by senior management) reasonably designed to ensure the execution of swap trading relationship documentation with a counterparty prior to or contemporaneous with effecting a swap transaction with the counterparty (other than a cleared swap).</p> <p>The policies and procedures should be subject to periodic audits by an independent internal or external auditor to identify any material weaknesses.</p>	<p>Develop policies and procedures to provide for the execution of swap trading relationship documentation (other than confirmations) prior to or in conjunction with any new or initial transactions.</p> <p>Provide for periodic (at least annual) audit of the policies and procedures developed for the preparation and execution of trading relationship documentation.</p>
<p><b>Trade Acknowledgements and Confirmations (17 C.F.R. §23.501:</b></p> <p>Requires an SD/MSP that enters into a swap transaction with an SD/MSP counterparty to execute a confirmation no later than the end of the first business day following the date of the trade. Requires an SD/MSP to implement written policies and procedures reasonably designed to ensure that it executes a confirmation with financial entity by the end of the first business day</p> <p>Requires an SD/MSP that enters into a swap transaction with a non-SD/MSP counterparty to send an acknowledgement to the counterparty no later than the end of the first business day following the date of the trade. Requires an SD/MSP to implement written policies and procedures reasonably designed to ensure that it executes a confirmation with a counterparty that is not an SD/MSP or financial entity by the end of the second business day.</p>	<p>Develop standard form of acknowledgement to serve as confirmation upon execution by the counterparty (other than an SD/MSP) for trades not effected on an SEF or DCM or cleared by a DCO, including all terms of the swap, authorized signature and time and date of transmission of acknowledgement and receipt of executed confirm.</p> <p>Revise trading relationship documentation to provide for the terms of issuance and execution of acknowledgements and confirmations and the availability and provision of draft acknowledgements on request.</p> <p>Develop policies and procedures for the timely issuance and execution of acknowledgements and confirmations in transactions with non-SD/MSP counterparties for inclusion in the swap trading policies and procedures.</p>

<b>Specific Requirements</b>	<b>Action Items</b>
<p>The policies and procedures must provide for sending a draft acknowledgement to a prospective counterparty prior to execution upon request specifying the terms other than price and other terms subject to agreement upon execution.</p> <p>A record must be made and maintained of the date and time of transmission and receipt of all acknowledgements and confirmations.</p> <p>(Swap transactions executed on an SEF or a DCM or cleared by a DCO generally are excepted from the acknowledgement and confirmation requirements described above to the extent that confirmation and related execution requirements are met by the SEF, DCM or DCO within the time frames specified above.)</p>	<p>Develop policies and procedures for the provision of draft acknowledgements on request of a non-SD/MSP counterparty for inclusion in the swap trading policies and procedures.</p>

**Portfolio Reconciliation and Compression**

<b>Specific Requirements</b>	<b>Action Items</b>
<p><b>Portfolio Reconciliation (17 C.F.R. §23.502):</b></p> <p>Requires policies and procedures by an SD/MSP to ensure that it engages in portfolio reconciliation of swaps. For swaps (other than cleared swaps) with counterparties that are not SD/MSPs, portfolio reconciliation shall include (i) written agreement between the parties on terms of portfolio reconciliation (bilateral or third party) and (ii) occur with a frequency not less than quarterly for a portfolio of more than 100 swaps or annually for a portfolio of 100 or less.</p>	<p>Revise swap trading relationship documentation for transactions with counterparties that are not SD/MSPs to provide for periodic reconciliation of all open swap positions.</p> <p>Develop policies and procedures to provide for the periodic (annual or quarterly) reconciliation of all swap positions with a non-SD/MSP counterparty, including (i) the valuation and reconciliation of all material terms (bilaterally or by a third party) as provided for in the trading relationship documentation, (ii) the resolution of any discrepancies in the valuation (i.e., a difference of 10 percent or more of the higher valuation) or reconciliation of terms, (iii) the reporting to regulators, as necessary or appropriate, of any dispute in valuation (more than \$20 million) and (iv) a record of all reconciliations, for inclusion in the swap trading policies and procedures.</p>

<b><i>Specific Requirements</i></b>	<b><i>Action Items</i></b>
<p><b>Portfolio Compression (17 C.F.R. §23.503):</b></p> <p>Requires each SD/MSP to establish and follow written policies and procedures for terminating each fully offsetting swap between the SD/MSP and another SD/MSP in a timely fashion, when appropriate.</p> <p>Provides for policies and procedures to perform the termination of fully offsetting swaps and periodic bilateral and multi-interval compression exercises for transactions in swaps (other than cleared swaps) in transactions between an SD/MSP and a counterparty that is not an SD/MSP at the request of the counterparty.</p>	<p>Revise swap trading relationship documentation with counterparties that are not SD/MSPs to provide for the termination of fully offsetting swaps and periodic compression exercises on election or request of the counterparty and the terms by which such functions are to be performed, including the designation or use of compression services or utilities by third parties.</p> <p>Develop policies and procedures to provide for periodic termination of offsetting swaps and portfolio compression exercises at the election or request of counterparties that are not swap entities in accordance with the terms specified in the swap trading relationship documentation.</p>
<p><b>End-User Exception Documentation (17 C.F.R. §23.505):</b></p> <p>For swaps excepted from a mandatory clearing requirement, each SD/MSP shall obtain, maintain and make available to regulators on request, documentation sufficient to provide a reasonable basis on which to believe that its counterparty meets the statutory conditions required for an exception from a mandatory clearing requirement.</p>	<p>Revise swap trading relationship documentation with counterparties that are not SD/MSPs to obtain documentation regarding the counterparty's status regarding exception from a mandatory clearing requirement.</p>

### **SDR Reporting and Record Keeping**

#### ***General Considerations***

#### **(a) Real-Time Reporting of Swap Transactions (CFTC Regulations – Part 43)**

- (1) Every publicly reportable swap transaction, whether cleared or uncleared, is required to be reported to a U.S.-registered swap data repository (SDR) for the relevant asset class.
- (2) The reporting requirement applies to all U.S.-based market participants – not just SD/MSPs, SEFs, DCMs and SDRs.
- (3) A swap transaction executed in the U.S. will be reportable even if the counterparty is a non-U.S. person.

- (4) In general, all arm's-length transactions between two parties that result in a corresponding change in the market risk between the parties are reportable. Life cycle events that affect the price of a swap are also reportable. Inter-affiliate transactions and portfolio compression exercises are excepted; although covered transactions between affiliates as described in Sections 23A and 23B of the Federal Reserve Act are publicly reportable.
- (5) Only one party is responsible for reporting a swap transaction. For transactions executed on an SEF or DCM, the SEF or DCM will be responsible for reporting. For off-facility swaps, where the transaction involves an SD/MSP, the SD/MSP reports; where neither party is an SD/MSP, the party that is a financial entity reports.<sup>5</sup>
- (6) The CFTC permits the use of third parties, including DCOs, to assist with reporting obligations.

**(b) Swap Data Reporting (CFTC Regulations – Part 45)**

- (1) In addition to real-time reporting, creation data and continuation data relating to the swap must be reported to the same SDR to which the real-time data was reported. Creation data comprises the primary economic terms of the transaction (PET data) and confirmation data (*i.e.*, all of the terms of the swap matched and agreed upon by the counterparties in confirming the swap). Continuation data comprises lifecycle event data (*e.g.*, novations, partial or full terminations) and valuation data (all of the data necessary to fully describe the daily mark of a swap).
- (2) For platform-executed swaps, the SEF or DCM must report the swap creation data.<sup>6</sup>
- (3) For off-facility swaps *not* subject to mandatory clearing, the SD/MSP reporting counterparty or financial entity (non-SD/MSP) reporting counterparty must report the PET data and confirmation data. PET data and confirmation data must be reported by a financial entity (non- SD/MSP) reporting counterparty as soon as technologically practicable after execution and confirmation

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<sup>5</sup> Rule 43.3(v) provides that where both parties are non-swap entities, the parties must designate which party will be the reporting party. However, since for Part 45 reporting purposes (discussed below), the party that is a financial entity reports, in practice, financial entity counterparties will also be the reporting party for Part 43 purposes.

<sup>6</sup> If such a swap is accepted for clearing, the DCO must report the confirmation data.

respectively, but, in each case, no later than 48 business hours after execution or confirmation during the first year; 36 business hours after execution or confirmation during the second year; and 24 business hours after execution or confirmation thereafter.<sup>7</sup>

- (4) For cleared swaps, life cycle event data or state data (i.e., a daily snapshot of all PET terms of a swap, including any change to PET terms since the previous day) must be reported by DCOs. For uncleared swaps, life cycle event data or state data must be reported by the reporting counterparty. Life cycle event data must be reported by a financial entity (non-SD/MSP) reporting counterparty no later than the end of the second business day following the date of any life cycle event during the first year; and the end of the first business day following the date of any life cycle event thereafter.<sup>8</sup> State data must be reported daily.
- (5) Valuation data must be reported by DCOs daily for cleared swaps. (SD/MSPs also must report their own valuation data daily for cleared swaps. Financial entity (non-SD/MSP) reporting counterparties are not required to report valuation data for cleared swaps.)
- (6) Reporting counterparties must report valuation data for uncleared swaps. A financial entity (non-SD/MSP) reporting counterparty must report the current daily mark of the transaction as of the last day of each fiscal quarter; and the report must be transmitted to the SDR within 30 calendar days of the end of the fiscal quarter. If a daily mark of the transaction is not available for the swap, the financial entity (non-SD/MSP) reporting counterparty may report the value recorded on its books in accordance with applicable accounting standards.
- (7) CFTC regulations permits the use of third parties to facilitate reporting.<sup>9</sup>
- (8) A Unique Swap Identifier (“USI”) must be assigned to every swap. The USI is generated *by the SDR* for off-facility swaps between non- SD/MSP counterparties (since the latter may lack the requisite systems for USI creation).<sup>10</sup> The SDR will notify the counterparties and the DCO, if any, of the USI for the trade.<sup>11</sup>

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<sup>7</sup> If the swap is voluntarily submitted for clearing and accepted for clearing prior to the PET data deadline set out in the rule and before the reporting counterparty reports any PET data to an SDR, then the reporting counterparty is excused from reporting the swap creation data (and the DCO must instead report the data).

<sup>8</sup> If the life cycle event data relates to a corporate event of the non-reporting counterparty, it must be reported by the financial entity (non-SD/MSP) reporting party no later than the end of the third business day following the date of such event during the first year, and no later than the end of the second business day following such event thereafter.

<sup>9</sup> The reporting party remains responsible for the reporting.

**(c) Reporting of Historical Swaps (CFTC Regulations – Part 46)**

- (1) Data regarding historical swaps (*i.e.*, swaps entered into prior to the enactment of the Dodd-Frank Act (July 21, 2010), the terms of which had not expired as of that date (“pre-enactment swaps”) and swaps entered into on or after July 21, 2010, and, in the case of financial entity (non-SD/MSP) reporting counterparties, prior to April 10, 2013 (“transition swaps”)) is also required to be reported to an SDR.

***Real-Time Reporting***

<b><i>Specific Requirements</i></b>	<b><i>Action Items</i></b>
<p><b>Real-Time Transaction Reporting (17 C.F.R. §43.3, 43.4 &amp; 43.6):</b></p> <p>Requires a counterparty that is a reporting party to report any publicly reportable swap transaction to an SDR as soon as technologically practicable after execution.</p> <p>Requires a counterparty to provide prompt notification to the other party of any error in the data reported to an SDR, together with any correction, and prompt submission of corrected data to the SDR (or, in the case of a platform-executed swap, to the SEF or DCM) by the reporting party.</p> <p>Requires an SD/MSP to timestamp swap data for off-facility swaps with the date and time, to the nearest second, that it transmits the data to an SDR, and maintenance of a record thereof for a period of at least five years from the execution of the transaction.</p>	<p>Provide for the reporting of off-facility swap transactions in real-time, including follow-up reporting of errors or omissions.</p> <p>Develop policies and procedures to ensure the proper reporting of transactions for inclusion in the swap trading policies and procedures, including policies and procedures with respect to: (i) errors and omissions, (ii) cancellations and corrections, (iii) data reporting during SDR closing hours, and (iv) timestamp requirements.<sup>12</sup></p> <p>Revise swap trading relationship documentation to include provisions regarding responsibility for real-time reporting (and follow-up reporting of errors or omissions) and timely notification to counterparties of required information for reporting purposes.</p>

<sup>10</sup> The USI is generated by the SEF or DCM for on-facility swaps and by the reporting SD/MSP for off-facility swaps involving an SD/MSP.

<sup>11</sup> The USI for the swap must be included in all records and all reporting throughout the existence of the swap and the required record retention period.

<sup>12</sup> While not mandatory for non-swap entities, best practice would be to adhere to the timestamp requirements applicable to swap entities.

**Swap Data Record Keeping and Reporting**

<b>Specific Requirements</b>	<b>Action Items</b>
<p><b>Creation and Continuation Data Reporting (17 C.F.R. Part 45):</b></p> <p>Requires a counterparty that is a reporting party to report creation data and continuation data relating to a swap to an SDR.</p> <p>Requires a counterparty to provide prompt notification to the other party of any error in the data reported to an SDR, and submission of corrected data to the SDR by the reporting party as soon as technologically practicable after discovery thereof.</p>	<p>Provide for the reporting of swap creation data for off-facility swap transactions and the reporting of swap continuation data for uncleared swap transactions, as well as follow-up reporting of errors or omissions.</p> <p>Develop policies and procedures to ensure the proper reporting of swap data for inclusion in the swap trading policies and procedures, including policies and procedures for reporting of errors and omissions to SDRs and notifying counterparties of errors and omissions.</p> <p>Revise swap trading relationship documentation to include provisions regarding responsibility for swap data reporting (and follow-up reporting of errors or omissions) and timely notification to counterparties of required information for reporting purposes.</p>
<p><b>Recordkeeping (17 C.F.R. §45.2):</b></p> <p>Requires retention of full, complete, and systematic records, together with all pertinent data and memoranda, of all activities with respect to swaps.</p> <p>Records must be kept for the life of the swap and for a period of at least five years following final termination of the swap. Records may be kept in either electronic or paper format, must be retrievable within five business days and must be produced upon request by regulators.</p>	<p>Provide for the preparation and maintenance of full and complete records of swap transactions.</p> <p>Revise general record keeping policies and procedures to describe records relating to swap transactions and related preservation and production requirements.</p>

<b>Specific Requirements</b>	<b>Action Items</b>
<p><b>Legal Entity Identifier (17 C.F.R. §45.6):</b></p> <p>Requires a unique ID number known as a Legal Entity Identifier (“LEI”) for all swap counterparties.<sup>13</sup></p>	<p>Provide for the firm (and all of its affiliates that would act as swap counterparties) to obtain LEIs.</p> <p>Develop policies and procedures to ensure that LEIs are timely obtained for swap counterparties (other than SD/MSPs) for inclusion in the swap trading policies and procedures.</p> <p>Revise swap trading relationship documentation to include provisions requiring counterparties to obtain an LEI.</p> <p>See ISDA August 2012 DF Protocol Questionnaire, Part II.</p>

**Recordkeeping and Reporting of Historical Swaps**

<b>Specific Requirements</b>	<b>Action Items</b>
<p><b>Reporting of Historical Swaps (17 C.F.R. Part 46):</b></p> <p>Requires a reporting counterparty to report specified historical data regarding swap transactions to an SDR.</p> <p>Requires a counterparty to provide prompt notification to the other party of any error in the data reported to an SDR, and submission of corrected data to the SDR by the reporting party as soon as technologically practicable after discovery thereof.</p>	<p>Provide for the reporting of data regarding historical swaps, including follow-up reporting of errors or omissions.</p> <p>Develop policies and procedures to ensure the proper reporting of historical swap data for inclusion in the swap trading policies and procedures, including policies and procedures for obtaining LEIs, reporting errors and omissions to SDRs and notifying counterparties of errors and omissions.</p>

<sup>13</sup> LEIs can be obtained through the Global Markets Entity Identifier (GMEI) utility. The GMEI utility creates and assigns globally accepted LEIs. The system validates the accuracy of the associated reference data and stores all the information in a public database.

<i>Specific Requirements</i>	<i>Action Items</i>
	Amend swap trading relationship documentation with counterparties to historical swaps in existence on or after April 25, 2011, to include provisions regarding responsibility for historical data reporting (and follow-up reporting of errors or omissions), obtaining an LEI and timely notification of required information for reporting purposes.
<p><b>Recordkeeping for Pre-enactment Swaps and Transition Swaps (17 C.F.R. §46.2):</b></p> <p>Requires swap counterparties to maintain and produce to regulators on request specified data for pre-enactment and transition swaps.<sup>14</sup></p> <p>Requires that records be kept through the life of the swap, and for a period of at least five years from the final termination of the swap. For non-SD/MSP counterparties, records may be kept in either electronic or paper format and must be retrievable within five business days.</p>	<p>Provide for the maintenance of records relating to historical swaps.</p> <p>Revise general record keeping policies and procedures to describe records relating to historical swaps and related preservation and production requirements.</p>

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<sup>14</sup> For all swaps in existence on or after April 25, 2011, PET data must be kept together with (to the extent in the counterparty's possession) any confirmation, master agreement and/or credit support agreement (or equivalent) relating to the swap. For pre-enactment swaps that expired or terminated prior to April 25, 2011, counterparties must retain the information and documents relating to the terms of the transaction that were possessed by the counterparty on or after October 14, 2010. For transition swaps that expired or terminated prior to April 25, 2011, counterparties must retain the information and documents relating to the terms of the transaction that were possessed by the counterparty on or after December 17, 2010.

## Clearing Requirements

### **General Considerations**

1. Any swap of a class of swaps made subject to mandatory clearing by the CFTC must be cleared through a DCO, unless the counterparty elects to avail itself of the end-user exception.
2. Swaps must be submitted to the DCO for clearing *as soon as technologically practicable after execution* but no later than the end of the day.<sup>15</sup>
3. A counterparty to a swap may elect the end-user exception to clearing the trade if it (i) is not a financial entity,<sup>16</sup> (ii) is using the swap to hedge or mitigate commercial risk,<sup>17</sup> and (iii) provides, or causes to be provided, to an SDR, information regarding how it generally meets its financial obligations associated with entering into non-cleared swaps.<sup>18</sup>
4. If a swap is subject to a clearing requirement, it must be executed on an SEF or DCM, unless no SEF or DCM has made the swap available to trade or the counterparty has elected to avail of the end-user exception.
5. Swaps entered into prior to the enactment of the Dodd-Frank Act or prior to the application of the clearing requirement are not required to be cleared.

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<sup>15</sup> Persons that are not clearing members of a DCO must submit the swap to a futures commission merchant (“FCM”) or clearing member of a DCO as soon as technologically practicable after execution but in any event by the end of the day of execution.

<sup>16</sup> Small banks – defined as banks the deposits of which are insured by the FDIC and that have less than \$10 billion in assets – and other similar entities are excluded from the definition of financial entity for purposes of the end-user exception. Thus, a small bank under the definition may elect not to clear a swap that it enters into in a back-to back trade with another financial institution to hedge the underlying risk of a swap entered into with a customer in connection with a loan.

<sup>17</sup> The CFTC has made clear that the end-user exception *is* available to an entity that is subject to *financial risks* related to its commercial activities. For example, a change in interest rate risk on a non-financial entity’s debt incurred for commercial business operations can constitute commercial risk for purposes of the end-user exception.

<sup>18</sup> When a counterparty elects the end-user exception, the reporting counterparty must submit certain specified information regarding the counterparty and the election of the exception to an SDR.

6. It is unlawful for any person knowingly or recklessly to evade or to participate in or facilitate evasion of the clearing requirement or to abuse the exception to the clearing requirement.

**Mandatory Clearing**

<b>Specific Requirements</b>	<b>Action Items</b>
<p><b>Mandatory Clearing and End-User Exception (17 C.F.R. Part 50):</b></p> <p>Requires any person executing a swap that is included in a class of swaps subject to a clearing requirement to submit the swap to a DCO for clearing, unless a counterparty has elected to rely on the end-user exception from mandatory clearing.</p>	<p>Provide for mandatory clearing of swaps in designated categories (subject to the end-user exception).</p> <p>Develop policies and procedures for ensuring compliance with the mandatory clearing requirement and appropriate reliance, if any, on the end-user exception by customer counterparties for inclusion in the swap trading policies and procedures, including policies and procedures for (i) monitoring CFTC determinations regarding mandatory clearing, (ii) advising clients of the clearing requirement, where applicable, and of the end-user exception, (iii) procuring the requisite information from counterparties electing to avail of the end-user exception, and (iv) making the requisite notices to an SDR.</p> <p>Revise swap trading relationship documentation to provide for mandatory clearing, as applicable, and election of the end-user exception by counterparties, as appropriate (including a provision that the client is responsible for making the determination as to whether the end-user exception applies).</p> <p>See Addendum II to ISDA August 2012 DF Protocol Questionnaire; ISDA March 2013 DF Protocol Questionnaire, Part III.</p>