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Real-Time Public Reporting of Swap Transaction Data; Final Rule

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 43

RIN 3038–AD08

Real-Time Public Reporting of Swap Transaction Data

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission (''CFTC'' or ''Commission'') is adopting regulations to implement certain statutory provisions enacted by the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act''). Specifically, in accordance with the Dodd-Frank Act, the Commission is adopting rules to implement a framework for the real-time public reporting of swap transaction and pricing data for all swap transactions.

DATES: *Effective date:* March 9, 2012.

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I. Background

A. Overview

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (the ''Dodd-Frank Act'') [1] Title VII of which amended the Commodity Exchange Act (''CEA'' or the ''Act'') [2] to establish a comprehensive new regulatory framework for swaps and security-based swaps. The legislation was intended to reduce risk, increase transparency and promote market integrity within the financial system by, among other things: (1) Providing for the registration and comprehensive regulation of swap dealers (''SDs'') and major swap participants (''MSPs''); (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating robust recordkeeping and real-time reporting regimes; and (4) enhancing the Commission's rulemaking and enforcement authorities with respect to, among others, all registered entities and intermediaries subject to the Commission's oversight.

Section 727 of the Dodd-Frank Act added to the CEA new section 2(a)(13), which establishes standards and requirements related to real-time reporting and the public availability of swap transaction and pricing data. This section directs the Commission to promulgate rules providing for the public availability of such data in real-time,[3] in such form and at such times as the Commission deems appropriate to enhance price discovery.[4] CEA section 2(a)(13)(C) establishes the four types of swaps for which transaction and pricing data must be reported to the public in real-time.[5] Because these categories together comprise all swaps, the real-time reporting requirements apply to all swaps, including those swaps executed on or pursuant to the rules of a registered swap execution facility (''SEF'') or a designated contract market (''DCM''), and those swaps executed bilaterally between counterparties and

[1] Public Law 111–203, 124 Stat. 1376 (2010), available at *http://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm.* 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] 7 U.S.C. 1, *et seq.*

[3] New Section 2(a)(13)(A) of the CEA defines real-time public reporting as reporting ''data relating to a swap transaction, including price and volume, 'as soon as technologically practicable' after the time at which the swap transaction has been executed.''

[4] CEA section 2(a)(13)(B) states that ''[t]he purpose of this section is to authorize the Commission to make swap transaction and pricing data available to the public in such form and at such times as the Commission determines appropriate to enhance price discovery.''

[5] The four categories are: (i) Swaps that are subject to the mandatory clearing requirement in CEA section 2(h)(1) [added by Section 723(a)(3) of the Dodd-Frank Act]; (ii) swaps that are not subject to the mandatory clearing requirement but are nonetheless cleared at a registered derivatives clearing organization (''DCO''); (iii) swaps that are not cleared at a registered DCO and which are reported to a registered swap data repository (''SDR'') or to the Commission pursuant to CEA section 2(h)(6); and (iv) swaps that are ''determined to be required to be cleared'' under CEA section 2(h)(2) but are not cleared.

not pursuant to the rules of a SEF or DCM (''off-facility swaps'').[6]

With regard to swaps that are subject to the mandatory clearing requirement (or excepted from such requirement) and those that are not required to be cleared by a registered DCO but are cleared, CEA section 2(a)(13)(E) directs the Commission to prescribe rules that (i) ensure that publicly disclosed information does not identify the participants; (ii) specify the criteria for determining what constitutes a large notional swap transaction (block trade) for particular markets and contracts; (iii) specify the appropriate time delay for reporting large notional swap transactions (block trades) to the public; and (iv) take into account whether public disclosure will materially reduce market liquidity. CEA section 2(a)(13)(E) does not require explicitly that the rules promulgated by the Commission contain similar provisions for the uncleared swaps described in CEA section 2(a)(13)(C)(iii) and (iv). However, in exercising its authority under CEA section 2(a)(13)(B) to ''make swap transaction and pricing data available to the public in such form and at such times as the Commission determines appropriate to enhance price discovery,'' the Commission is authorized to prescribe rules similar to those provisions in CEA section 2(a)(13)(E) for uncleared swaps described in CEA sections 2(a)(13)(C)(iii) and (iv).[7]

B. Summary of the Proposed Part 43 Regulations

On December 7, 2010, the Commission published for comment proposed part 43 of its regulations to implement the real-time reporting mandate of the Dodd-Frank Act.[8] At the foundation of these regulations was the Commission's belief that real-time public dissemination of swap transaction and pricing data supports the fairness and efficiency of markets and increases transparency, which in turn improves price discovery and decreases risk (*e.g.,* liquidity risk). The Commission's Proposing Release thus introduced, in addition to definitions of terms and processes relevant to real-time public reporting, rules governing: (1) The entities or persons that shall be responsible for reporting swap transaction and pricing data; (2) the entities or persons that shall be responsible for publicly disseminating such data; (3) the data fields and guidance with respect to the appropriate format and manner for data to be reported to the public in real time; (4) the appropriate minimum size and time delay for block trades and large notional swaps; and (5) the proposed effective date and implementation schedule for the proposed rules.

The Commission's proposed part 43 rules reflected consultation with staff of both the Securities and Exchange Commission (the ''SEC'')[9] and the Board of Governors of the Federal Reserve.[10] The proposed rules also were informed by discussions during a joint public roundtable to discuss swap data, SDRs and real-time reporting conducted by CFTC and SEC staff on September 14, 2010 (the ''Roundtable''); public comments received and posted on the Commission's Internet Web site;[11] and meetings and discussions between CFTC staff and market participants.

As proposed, part 43 applied to all swaps[12] as defined in CEA section 1a(47) and as may be further defined by Commission regulations. The proposed rules applied real-time reporting requirements to registered entities (SEFs, DCMs and registered swap data repositories (''SDRs'')) and the swap counterparties—including registered or exempt SDs, registered or exempt MSPs and U.S.-based end-users.

1. Proposed § 43.3—Method and Timing for Real-Time Public Reporting

CEA section 2(a)(13) directed the Commission to prescribe rules specifying the method and timing for real time public reporting. Consistent with that mandate, the Commission proposed in § 43.3 to require: (1) The parties to a swap transaction (including agents of the parties) to report swap transaction and pricing data to the appropriate registered entity in a timely manner;[13] and (2) registered entities to publicly disseminate swap transaction and pricing data.[14] To implement its authority to make swap transaction and pricing data available to the public in such form and at such times as it determines appropriate to enhance price discovery, the Commission proposed in § 43.3 to establish the manner in which swap counterparties must report the swap transaction and pricing data to the appropriate registered entity, the manner in which registered entities must publicly disseminate the data in real time and the responsibilities of the reporting party to each swap. Proposed § 43.3 also established requirements for acceptance and public dissemination of swap transaction and pricing data by SDRs and third-party service providers and specified standards for data recordkeeping and retention as well as availability and accessibility of real-time swap transaction and pricing data. In addition, proposed § 43.3 established the process by which errors or omissions in publicly disseminated swap transaction and pricing data would be cancelled and/or corrected, the hours of operation for SDRs and the procedures for scheduling closing hours.

2. Proposed § 43.4—Swap Transaction and Pricing Data To Be Publicly Disseminated in Real-Time

CEA section 2(a)(13)(B) directs the Commission to make swap transaction and pricing data available to the public in such form and at such times as the Commission determines appropriate to enhance price discovery. Proposed § 43.4 required that swap transaction information be reported to a real-time disseminator and established the manner and format in which this data will be publicly disseminated. In that regard, appendix A to proposed part 43 provides a list of data fields which an SDR must publicly disseminate regarding swap transactions, and pricing data, as well as guidance on an acceptable public reporting format and order for the listed data fields.

CEA sections 2(a)(13)(C) and (E) reflect Congress' intent that regulators ''ensure that the public reporting of swap transactions and pricing data does not disclose the names or identities of

[6] As explained more fully in the Commission's Notice of Proposed Rulemaking, the legislative history of the Dodd-Frank Act suggests that the real-time reporting requirements of CEA section 2(a)(13) apply to all swaps. *See* Commission, Notice of Proposed Rulemaking: Real-Time Public Reporting of Swap Transaction Data, 75 FR 76140 (Dec. 7, 2010) (''Real-Time NPRM'' or ''Proposing Release'').

[7] In addition, the Commission is required by CEA section 2(a)(13)(C)(iii) to prescribe real-time public reporting requirements for uncleared swaps, other than those uncleared swaps described in CEA section 2(a)(13)(C)(iv), ''in a manner that does not disclose the business transactions and market positions of any person.''

[8] *See* Real-Time NPRM *supra* note 6. Interested persons are directed to the Real-Time NPRM for a full discussion of each of the proposed part 43 rules.

[9] Section 763 of the Dodd-Frank Act authorizes the SEC to promulgate rules ''to provide for the public availability of security-based swap transaction, volume, and pricing data * * *.'' The SEC is adopting rules related to the real-time reporting of security-based swaps as required by Section 763 of the Dodd-Frank Act.

[10] Section 712(a)(1) of the Dodd-Frank Act requires staff to consult with the SEC and other prudential regulators.

[11] Comment letters received in response to the Proposing Release may be found on the Commission's Web site at *http://comments.cftc.gov/PublicComments/CommentList.aspx?id=919.*

[12] As noted, the categories of swaps described in CEA section 2(a)(13)(C) account for all swaps, whether cleared or uncleared and regardless of whether executed on or pursuant to the rules of a SEF or DCM, or executed off-facility.

[13] *See* CEA section 2(a)(13)(F).

[14] *See* CEA section 2(a)(13)(D).

the parties to the transactions.'' [15] In response, the Commission proposed in § 43.4(e)(1) to prohibit the public dissemination of swap transaction and pricing information which identifies or otherwise facilitates the identification of a party to a swap. This section further provided that an SDR may not report such data in a manner that discloses or otherwise facilitates the identification of a party to a swap. The Commission recognized that the latter prohibition may result in a loss of clarity with respect to the precise characteristics of swaps in certain circumstances, and required in proposed § 43.4(e)(2) that a reporting party or a swap market [16] provide the real-time disseminator with a specific description of the underlying asset and tenor of a swap that is general enough to provide anonymity but specific enough to permit a meaningful understanding of the swap. For certain off-facility swaps—particularly ''other commodity'' swaps that have underlying assets with specific delivery or pricing points—market participants may be able to infer the identity of a party or swap counterparties based on the description of an underlying asset. Accordingly, proposed § 43.4(e)(2) was intended to permit reporting parties of off-facility swaps to publicly disseminate a description of an underlying asset or tenor in a way that does not disclose a party to a swap but nonetheless provides a meaningful understanding of the swap for purposes of enhancing price discovery.[17]

In proposing § 43.4(e), the Commission recognized that SEFs and DCMs may differ and that new types of swaps may emerge. For that reason, the Commission did not propose specific guidelines for describing an underlying asset for the purposes of this rule. Because the specificity of the description would vary based on particular markets and contracts, the proposed rules were intended to provide reporting parties with discretion in reporting swap transaction and pricing data. Proposed § 43.4(e)(2) and proposed part 23 of the Commission's regulations [18] would require SDs and MSPs who do not specifically describe an underlying asset and/or tenor because such disclosure would facilitate the identification of a counterparty, to document why the specific information was not publicly disseminated.

The Commission anticipated that unique product identifiers may develop for various swap products in various markets. Proposed § 43.4(f) provided that if a unique product identifier is developed that sufficiently describes the information in one or more of the data fields for public dissemination, consistent with appendix A to proposed part 43, the unique product identifier may be used in lieu of such data fields. Absent a unique product identifier, the publicly disseminated swap transaction and pricing data must contain all of the appropriate product identification fields in appendix A to proposed part 43.

As proposed, § 43.4(g) required public dissemination of any swap-specific event [19] that occurs during the life of a swap and affects the price of the swap (a ''price forming continuation event''). Proposed §§ 43.4(h) and (i) would govern public reporting of the notional or principal amount for all swaps. As proposed, these rules would require (i) a reporting party to transmit to a SEF or DCM the actual notional or principal size of any swap (including large notional swaps) or any block trade; and (ii) a SEF or DCM to transmit to a real-time disseminator the actual notional or principal size for all swaps executed on or pursuant to its rules. Section 43.4(j) proposed a rounding convention for notional or principal size and provided that the rounding should be applied at the point of public dissemination.

3. Proposed § 43.5—Block Trades and Large Notional Swaps for Particular Markets and Transactions

CEA sections 2(a)(13)(E)(ii) and (iii) require the Commission to prescribe rules ''to specify the criteria for determining what constitutes a large notional swap transaction (block trade) for particular markets and contracts'' and ''to specify the appropriate time delay for reporting large notional swap transactions (block trades) to the public,'' with respect to swaps subject to the clearing mandate (including swaps that are excepted from the clearing mandate pursuant to CEA section 2(h)(7)) and those swaps that are not subject to the clearing mandate but are cleared. Similar provisions are not explicitly required for uncleared swaps, however, the Commission is authorized pursuant to its authority under CEA section 2(a)(13)(B) to prescribe similar rules for uncleared swaps described in CEA sections 2(a)(13)(C)(iii) and (iv). Proposed § 43.5 established: (1) The procedures for determining the appropriate minimum sizes for block trades and large notional swaps; and (2) the appropriate time delays for the reporting of block trades and large notional swaps. In describing the proposed block trade rules, the Commission noted that it would continue to analyze and study the effects of increased transparency on post-trade liquidity in the context of block trades and large notional swaps.[20] The Commission anticipated that new data would continue to inform this discussion and could cause subsequent revision of the Proposing Release.

As noted, CEA section 2(a)(13)(A) requires that all parties to swap transactions, including parties to block trades and large notional swaps, report data relating to swap transactions ''as soon as technologically practicable after the time at which the swap transaction has been executed.'' The Dodd-Frank Act also requires that the Commission promulgate rules ''to specify the appropriate time delay for reporting large notional swaps transactions (block trades) to the public.'' [21] In writing such rules, the Commission is charged to ''take into account whether public disclosure will materially reduce market

[15] 156 Cong. Rec. S5921 (daily ed. July 15, 2010) (Statement of Sen. Blanche Lincoln).

[16] The term ''swap market'' was defined in proposed § 43.2(z) as ''any registered swap execution facility or registered designated contract market that makes swaps available for trading.'' As discussed below, the Commission is not adopting the term ''swap market'' and is, for clarity, changing such references to ''registered swap execution facility or designated contract market.''

[17] The Commission described a hypothetical example in which the underlying asset to an off-facility swap that has a specific delivery point at Lake Charles, Louisiana—a contract commonly known to be traded by only two companies. Disclosing the underlying asset to the public would effectively disclose that one of those two companies was entering into the trade. *See* Real-Time NPRM *supra* note 6, at 76150. Proposed § 43.4(e)(2) would enable the reporting party to use a broader geographic region in place of the specific delivery point.

[18] The Commission issued proposed part 23 which was published in the **Federal Register** on November 23, 2010. 75 FR 71397. Proposed part 23 provided, inter alia, the business conduct standards for SDs and MSPs. Proposed § 23 establishes reporting, recordkeeping, and daily trading records requirements for SDs and MSPs. Specifically, § 23.201(d) provides that SDs and MSPs would be required to maintain records of information required to be reported on a real-time basis and records of information relating to large notional swaps in accordance with proposed part 43 and CEA section (2)(a)(13). When a less specific data field is reported in order to protect anonymity of participants to such swap, then the record must contain the rationale for reporting a less specific data field. The comment period for proposed part 23 closed on June 3, 2011; however the rule has not yet been adopted.

[19] Swap-specific events would include novations, swap unwinds, partial novations and partial swap unwinds.

[20] *See* 75 FR 76159 at note 67.

[21] CEA section 2(a)(13)(E)(iii). As noted above, the Commission is only required to prescribe rules relating to CEA section 2(a)(13)(E) for swaps subject to the mandatory clearing requirement (including those excepted from such requirement pursuant to CEA section 2(h)(7)) and swaps that are not subject to the mandatory clearing requirement but are cleared, as described in CEA sections 2(a)(13)(C)(i) and (ii).

liquidity.'' [22] The Commission recognized that the potential market impact of reporting a block trade or large notional swap is an important consideration in the determination of an appropriate time delay before public dissemination of block trade or large notional swap transaction and pricing data. Proposed § 43.5(k) specified the appropriate time delays for public dissemination of block trades and large notional swaps and established that the time delay for public dissemination begins at execution of the swap.

4. Proposed Appendix A to Part 43

The Commission anticipated that real-time swap transaction and pricing data may be publicly disseminated by multiple real-time disseminators in the same asset class. In order to minimize the effects of fragmentation and enhance consistency both within and among asset classes, the Commission proposed in appendix A to part 43 a number of data fields that should be publicly disseminated and provided guidance on the format and manner of reporting. The Commission believes that the public dissemination of standardized data should reduce the search costs to the public and market participants while increasing consolidation of real-time swap transaction and pricing data and promoting post-trade transparency and price discovery.

C. Overview of Comments Received [23]

The Commission received comments from 88 interested parties [24] representing a cross-section of the global financial services industry, including trade associations for both financial and non-financial end-users, potential SDs and MSPs; law firms representing diverse interests; exchanges; and numerous service and technology providers.[25] While many commenters expressed general support for the proposed part 43 rules, they also offered recommendations for clarification or modification of specific proposed regulations. Other commenters objected to particular aspects of the Proposing Release.

In addition to a general solicitation for comment on all aspects of the Proposing Release, the Commission requested comment on a number of specific, focused questions related to particular provisions. For example, commenters were asked to address issues related to (i) the appropriate implementation schedule for the final rules; (ii) which swap counterparties should be covered by the reporting requirements of part 43 in order to enhance price discovery; (iii) the responsibilities of the swap counterparties to report swap transaction and pricing data (including the advisability of establishing maximum timeframes in which reporting parties must report data to an SDR); (iv) whether the final rules should address the reporting and public dissemination of swap transaction and pricing data for swaps transacted between two non-U.S. persons; (v) the circumstances under which SEFs and DCMs are deemed to have satisfied their public dissemination requirements; (vi) recordkeeping and retention requirements, including the anticipated costs associated with storing real-time swap transaction and pricing data for an extended period of time; (vii) protection of the anonymity of swap counterparties (including the utility of rounding notional amounts); (viii) the utility of the proposed data fields (including whether dissemination of additional data fields would enhance transparency and price discovery); and (ix) whether there would be an adverse price impact for traders and/or an impact on liquidity if all market participants knew the swap transaction and pricing details of all swaps in real-time.

As noted, the SEC is separately authorized by section 763 of the Dodd-Frank Act to adopt real-time reporting rules for security-based swaps (''SBSs''). Because the Commission and the SEC regulate different products and markets and thus may have proposed differing regulatory requirements, the Commission particularly requested comments on the impact of any differences between the two regulatory approaches.

The Commission also requested comment with respect to its cost-benefit considerations generally, and specifically asked whether there are alternative ways it can meet its mandate under section 727 of the Dodd-Frank Act in a less costly manner. Similarly, commenters were invited to submit data or other information quantifying or qualifying the costs and benefits of the Proposing Release.

The comments received will be addressed as appropriate throughout the following discussion of the final rules.

D. Proposed § 43.5—Block Trades and Large Notional Swaps

Several commenters urged that the Commission study additional data before setting appropriate minimum block sizes and time delays [26] for public dissemination of block trades and large notional off-facility swaps.[27] The Commission recognized the merit in those concerns, and subsequent to publication of the proposed part 43 rules, it continued to receive and analyze swap data for various asset classes in order to make informed decisions with respect to the appropriate criteria for determining block trade sizes and the initial appropriate minimum block trade sizes. The Commission agrees with the commenters that additional analysis is necessary prior to issuance of final rules for appropriate minimum block sizes, and accordingly has determined not to make final its proposed § 43.5 rules specifying the criteria for determining block trade sizes. Instead, the Commission intends to issue a separate notice of proposed rulemaking that will specifically address the appropriate criteria for determining appropriate minimum block trade sizes in light of data and comments received.[28] Comments on these issues received in connection with the instant rulemaking will be considered by the Commission in its re-proposal of the block trade rules.

II. Part 43 of the Commission's Regulations—Final Rules

As proposed in the Real-Time NPRM, the provisions of part 43 governed the

[22] CEA section 2(a)(13)(E)(iv). As noted above, the Commission is only required to prescribe rules relating to CEA section 2(a)(13)(E) for swaps subject to the mandatory clearing requirement (including those excepted from such requirement pursuant to CEA section 2(h)(7)) and swaps that are not subject to the mandatory clearing requirement but are cleared, as described in CEA sections 2(a)(13)(C)(i) and (ii).

[23] In addition to the comments specifically discussed herein, the Commission also received comments from various groups during the course of external meetings. Those commenters include, among others: Rabobank Nederland, Insurance Groups (American Counsel of Life Insurers, Genworth, Manulife, John Hancock Life, New York Life, Northwestern Mutual, Prudential, MetLife and Allstate Life); Fidelity Investments; and Vanguard.

[24] The initial comment period with respect to proposed part 43 closed on February 7, 2011. The comment periods for most proposed rulemakings implementing the Dodd-Frank Act—including the proposed part 43 rules—subsequently were reopened for the period of April 27 through June 2, 2011.

[25] A complete list of the full names and abbreviations of commenters is included in section VII at the end of this release; comment letters are available through the Commission Web site at *http://comments.cftc.gov/PublicComments/CommentList.aspx?id=919.*

[26] Commenters included: MFA; Barclays; AII; GS; UBS; GFXD; Freddie Mac; ISDA/SIFMA; Better Markets; ABC/CIEBA; SIFMA AMG; WMBAA; FHLBanks; Coalition for Derivatives End-Users; Cleary; and Vanguard.

[27] In light of clarifications in § 43.2, the terms ''large notional swap'' and ''large notional off-facility swap'' will be used interchangeably throughout this Adopting Release. *See infra* note 29.

[28] The notice of proposed rulemaking regarding block trade sizes and criteria is referenced throughout this release as the ''block trade re-proposal'' or ''re-proposal of the block trade rules.''

method and timing of real-time public reporting; swap transaction and pricing data to be publicly disseminated in real-time; and time delays for public dissemination of swap transaction and pricing data. The purpose, scope and rules of construction of part 43 were established in proposed § 43.1; proposed definitions of terms and processes relevant to real-time public reporting were specified in proposed § 43.2. Proposed § 43.3 established the method and timing for real-time public reporting and dissemination of swap transaction and pricing data; this rule also delineated the responsibilities of swap counterparties and SDRs, and established procedures for recordkeeping, correction of errors and omissions, and hours of operation. Proposed § 43.4 specified the format in which swap transaction and pricing data would be publicly disseminated and appendix A to proposed part 43 described the fields for which an SDR must publicly disseminate swap transaction and pricing data. As proposed, § 43.5 prescribed the criteria for determining what constitutes a large notional swap transaction (block trade) and specified the appropriate time delay for reporting block trades to the public.

While the Commission has adopted the part 43 rules substantially as proposed, there are several salient changes.[29] As noted above, the Commission is not adopting those elements of proposed § 43.5 relating to the establishment of block trade sizes. The Commission believes, in accordance with comments, that further study and analysis of block trade data is necessary prior to establishing minimum block trade size and for that reason has determined to make final only those elements of proposed § 43.5 relating to timestamp requirements and time delays for the public dissemination of swap transaction and pricing data. In that regard, § 43.5 provides that until the Commission establishes an appropriate minimum block size for a swap or group of swaps, the time delays specified therein will apply to all swaps that do not have an appropriate minimum block size. The anonymity provisions in § 43.4 have been clarified, and the Commission has eliminated a provision in proposed § 43.3 which would have permitted dissemination of swap transaction and pricing data by third-party service providers. Instead, the Commission will require that all public dissemination of such data occur through an SDR. Unless otherwise discussed in this section, the regulations are adopted as proposed.

A. Section 43.1—Purpose, Scope and Rules of Construction

Proposed § 43.1 applied to all swaps as defined in CEA section 1a(47) and as may be further defined by Commission regulation. The provisions of part 43 also applied to the categories of swaps set forth in CEA section 2(a)(13)(C); those categories account for the universe of swaps subject to the Dodd-Frank Act's regulatory regime, whether cleared or uncleared, and regardless of whether executed on a SEF, DCM or off-facility. The proposed rules applied real-time reporting requirements to SEFs, DCMs, SDRs and the swap counterparties, including registered or exempt SDs, registered or exempt MSPs and U.S.-based end-users. The Commission requested comment generally on the scope of transactions covered by this part, and specifically with respect to which swap counterparties should be subject to the reporting requirements of this part.

1. Scope—Generally

Proposed § 43.1(a) stated that the purpose of part 43 related to ''the collection and public dissemination of certain swap transaction and pricing data to enhance transparency and price discovery.'' [30] As proposed, § 43.1(b)(1) stated that the provisions of part 43 applied to all swaps as defined in CEA section 1(a)(47) and any implementing regulations therefrom, including the categories of swaps set forth in section 2(a)(13)(C) of the Act.[31] Further, proposed § 43.1(b)(2) provided that the provisions of part 43 apply to all SEFs, DCMs, SDRs and swap counterparties (including registered or exempt SDs, registered or exempt MSPs and U.S.-based end-users). Proposed § 43.1(c) specified the rules of construction for part 43, and explained that although the examples in part 43 and the related appendices are not exclusive, compliance with an example would constitute compliance with such portions of the rule to which the example relates.

Forty-six commenters addressed various aspects of the scope provisions.[32] Commenters expressed concerns related to swaps between affiliates, portfolio compression exercises,[33] uncleared and bespoke [34] swaps, end-user to end-user swaps, foreign exchange swaps, international issues, distress scenarios and other scope-related issues.[35]

[29] This adopting release is referred to herein as the ''Adopting Release.''

[30] CEA section 2(a)(13)(B) provides that the purpose of section 727 of the Dodd-Frank Act is ''to authorize the Commission to make swap transaction and pricing data available to the public in such form and at such times as the Commission determines appropriate to enhance price discovery.''

[31] CEA section 2(a)(13)(C) provides that ''[t]he Commission is authorized and required to provide by rule for the public availability of swap transaction and pricing data'' for four categories of swaps: (1) Swaps subject to the mandatory clearing requirement described in CEA section 2(h)(1) (including those swaps that are excepted from the requirement pursuant to CEA section 2(h)(7)); (2) swaps that are not subject to the mandatory clearing requirement described in CEA section 2(h)(1), but are cleared at a registered DCO; (3) swaps that are not cleared at a registered DCO and are reported to an SDR under CEA section 2(h)(6) (reporting for this category of swaps must be done in a manner that does not disclose the business transactions and market positions of any person); and (4) swaps that are determined to be required to be cleared under CEA section 2(h)(2) but are not cleared.

[32] *See supra* note 23.

[33] A separate proposed rulemaking under part 23 addresses rules relating to portfolio compression. 75 FR 81519 (Dec. 18, 2010).

[34] As used throughout this Adopting Release, ''bespoke'' indicates that a swap is off-facility and is not standardized.

[35] In addition, one commenter stated that the reporting and disclosure requirements could violate the First and Fifth Amendments to the United States Constitution by purportedly compelling ''non-commercial speech'' without satisfying a heightened standard and by ''taking'' protected private information without just compensation. *See* CL–Sadis and Goldberg. The Commission has carefully considered these comments and pertinent judicial precedent. It believes that the data reporting and disclosure requirements at issue would not violate the First Amendment because, among other reasons, the information at issue is commercial speech subject to a lower, reasonably-related standard. *See, e.g., Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio,* 471 U.S. 626, 650–53 (1985) (state bar did not violate First Amendment by requiring attorneys to fully disclose fee and cost arrangements in advertisements; the speech was commercial because it pertained to the economic interests of the parties, applicable standard was therefore whether the disclosure requirement was reasonably related to legitimate state interest, and the disclosure requirement at issue was rationally related to the state's interest in preventing deception of consumers). The Commission also believes that the requirements at issue would not violate the Fifth Amendment. Among other reasons, participants have no reasonable investment-backed expectation that information they submit will be kept confidential because they voluntarily submit it, knowing that it will be publicly disclosed to the extent provided by statute and regulation. In addition, the reporting and disclosure requirements are reasonably related to the government's legitimate interests in transparency and price discovery. *See, e.g., Ruckelshaus* v. *Monsanto,* 467 U.S. 986, 1006–07 (1984) (determining that there was no regulatory taking where applicant for pesticide registration was required by federal pesticide law to submit certain trade secret product data to EPA that EPA could then publicly disclose; applicant knew at time of submission that statute authorized EPA to do so, applicant therefore could not have had a ''reasonable investment-backed expectation'' that data would be kept confidential, and the government's action was reasonably related to legitimate government interest in an area of public concern and regulation).

2. Swaps Between Affiliates and Portfolio Compression Exercises

Several commenters questioned whether swaps between affiliates should be subject to the real-time public reporting requirements of part 43. Some commenters stated that swaps between affiliates have no price discovery or transparency value and thus should not be publicly reported.[36] One commenter noted that the real time dissemination of anonymous data regarding swaps between affiliates that price credit and market risk at or near zero might distort price discovery, rather than enhance it.[37] Other commenters stated variously that inter-affiliate trades and portfolio management exercises should not be considered ''reportable transactions,''[38] and that reporting swaps between affiliates will add reporting requirements to end-users.[39] A commenter noted the reporting of data on physical gas and power transactions between affiliates is excluded in other contexts.[40] Another argued that the public reporting of inter-affiliate transactions could seriously interfere with the internal risk management practices of a corporate group, thereby prompting market participants to act in a way that would prevent the corporate group from following through with its risk management strategy. This commenter suggested that such a result could raise the costs to corporate groups of managing risk internally, in addition to confusing market participants with irrelevant information.[41]

The Commission agrees with the comments regarding the public dissemination of certain swaps between affiliates and portfolio compression exercises. The Commission concurs that publicly disseminating swap transaction and pricing data related to certain swaps between affiliates would not enhance price discovery, as such swap transaction and pricing data would already have been publicly disseminated in the form of the related market-facing swap. This information may create an inaccurate appearance of market depth. Notably, there is a very high volume of swaps between affiliates in certain asset classes (*e.g.,* foreign exchange).[42] To require public dissemination of all such transactions could be very costly for market participants. Where there are no price discovery benefits to publicly disseminating such transactions, the Commission has determined not to require the public dissemination of these transactions at this time.

Accordingly, the Commission is adopting a definition in § 43.2 for the term ''publicly reportable swap transaction'' that does not presently require the public dissemination of internal swaps.[43] Specifically, a publicly reportable swap transaction means, among other things, any executed swap that is an arm's length transaction between two parties that results in a corresponding change in the market risk position between the two parties. As adopted, the definition of a publicly reportable swap transaction also provides, by way of example, that internal transactions to move risk between wholly-owned subsidiaries of the same parent, without having credit exposure to the other party[44] would not presently require public dissemination because such swaps are not arm's-length transactions.

Similarly, the Commission agrees that portfolio compression exercises should not be publicly disseminated at this time.[45] The purpose of such transactions is to mitigate risk between counterparties and any new swaps that were executed as a result of portfolio compression exercises would be a result of the compression itself and not an arm's-length transaction between the parties.[46] As adopted, the definition of a publicly reportable swap transaction also cites portfolio compression exercises as an example that does not presently require public dissemination.

3. Uncleared or Bespoke Swaps

The Commission received comments from various market participants relating to the scope of CEA section 2(a)(13) and proposed part 43, as it applies to uncleared and bespoke swaps. Some commenters stated that only standardized, cleared swaps should be real-time reported and publicly disseminated. Others urged that uncleared trades be treated differently than cleared trades and that the statute does not require that non-standardized swaps be real-time reported (*e.g.,* customized trades should receive a greater time prior to public dissemination).

A commenter argued that only uncleared swaps that perform a significant price discovery function should be publicly disseminated.[47] Another commenter argued that bespoke trade data has little value and public dissemination of such information involves complex technical issues.[48]

[36] *See, e.g.,* CL–Cleary; CL–FSR; CL–Working Group of Commercial Energy Firms; CL–Coalition of Energy End-Users; CL–ISDA/SIFMA; CL–Japanese Banks; and CL–Coalition for Derivatives End-Users.

[37] The commenter stated that ''default risk among affiliated entities within a corporate group is negligible,'' and ''an inter-affiliate swap does not price hedging costs the same as a market-facing swap because each inter-affiliate swap is entered into on the general assumption that the market risk of all transactions within the corporate group will be hedged by the centralized hedging affiliate under a market-facing transaction.'' CL–Shell at 6.

[38] *See* CL–TriOptima; CL–WMBAA.

[39] *See* CL–Coalition for Derivatives End-Users.

[40] *See* CL–Working Group of Commercial Energy Firms.

[41] *See* CL–Cleary.

[42] *See* CL–GFXD. ''Many millions of trades occur daily between different affiliates of the same institution which are not relevant to the institution's external market positioning.'' *Id.* at p. 13.

[43] As discussed and referenced in this rule, internal swaps between one-hundred percent owned subsidiaries of the same parent entity may include back-to-back swap transactions between or among such wholly-owned subsidiaries to help manage the risks associated with a market-facing swap transaction. In general, a back-to-back swap transaction effectively transfers the risks associated with a market-facing swap transaction to an affiliate that was not an original party to such transaction.

Back-to-back swap transactions may occur in a number of different ways. For example, an affiliate immediately may enter into a mirror swap transaction with its affiliate on the same terms as the marketing-facing swap transaction. By way of further example, a market-facing affiliate may enter into multiple transactions with affiliates that are not at arm's-length in order to transfer the risks associated with an arm's-length, market-facing transaction.

[44] Section 608 of the Dodd-Frank Act adds to paragraph 7 of the definition of ''covered transaction'' in Section 23A of the Federal Reserve Act (12 U.S.C. 371(c)): ''(G) a derivative transaction, as defined in paragraph (3) of section 5200(b) of the Revised Statutes of the United States (12 U.S.C. 84(b)), with an affiliate, to the extent that the transaction causes a member bank or a subsidiary to have credit exposure to the affiliate.'' Hence, all derivatives transactions will be subjected to Section 23A of the Federal Reserve Act to the extent that they cause the bank to have credit exposure to the affiliate. Section 23B of the Federal Reserve Act contains an arm's-length requirement stating that a member bank and its subsidiaries may engage in any covered transaction with an affiliate only ''(A) on terms and under circumstances, including credit standards, that are substantially the same, or at least as favorable to such bank or its subsidiary, as those prevailing at the time for comparable transactions with or involving other nonaffiliated companies, or (B) in the absence of comparable transactions, on terms and under circumstances, including credit standards, that in good faith would be offered to, or would apply to, nonaffiliated companies.'' The Commission considers any covered transaction between affiliates as described in Sections 23A and 23B of the Federal Reserve Act to be publicly reportable swap transactions.

[45] In its proposed part 23 release relating to ''Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants,'' portfolio compression is defined as ''a mechanism whereby substantially similar transactions among two or more counterparties are terminated and replaced with a smaller number of transactions of decreased notional value in an effort to reduce the risk, cost, and inefficiency of maintaining unnecessary transactions on the counterparties' books.'' 75 FR 81532.

[46] *See* CL–TriOptima; CL–Shell.

[47] The commenter recommended that the Commission utilize a process to identify swaps that perform a ''significant price discovery'' function. *See* CL–Dominion.

[48] *See* CL–TriOptima.

Still another commenter explained that the public dissemination of swap transaction and pricing data should be phased in based on liquidity.[49] In contrast, two commenters said that the real-time reporting requirements should apply to all swaps, both standard and bespoke.[50]

Several commenters asserted that bespoke or customized swap transactions are not subject to real-time reporting, citing a perceived absence of authority under CEA section 2(a)(13)(C)(iii) to include these transactions. Others commented that bespoke transactions should not be subjected to real-time public reporting obligations because the transactions do not enhance price discovery and may compromise anonymity of the parties to the swap.

Some commenters focused on perceived burdens to end-users inherent in the proposed rules; many stated that end-users should not be required to report swaps.[51] Additionally, certain commenters stated that end-users do not have sufficient technology to report swaps; one commenter stated that end-user to end-user swaps should have next business day reporting.[52] Others contended that end-users should be treated differently because the public dissemination of swaps information involving such parties does not enhance price discovery.[53] Two commenters questioned the value of disclosing information relating to end-user to end-user power swaps compared to the harm that disclosing such information would have to these end-users and the public in general.[54]

The Commission interprets CEA section 2(a)(13)(C) to grant the Commission the authority to require the real-time public reporting of all swaps in order enhance price discovery.[55] Accordingly, the Commission does not believe that the transactions described above (*e.g.,* bespoke, end-user to end-user, etc.) should be excluded from real-time reporting obligations. Such swap transactions, unlike internal swaps between affiliates and portfolio compression exercises, are executed at arm's length and result in a change in market risk between the swap counterparties. Thus, the Commission believes that the public dissemination of these transactions will provide price discovery benefits and transparency to the swap markets.

However, the Commission agrees with commenters that the real-time public dissemination of swap transaction and pricing data should be phased in with longer initial time delays for public dissemination, as well as phased in compliance dates, for different asset classes and market participants within an asset class. Phasing in real-time reporting for certain transactions by allowing for longer initial time delays and phased compliance dates addresses concerns regarding bespoke transactions, including market liquidity and the ability for parties to report transactions. In particular, phasing in the public dissemination of bespoke transactions will allow the Commission to ensure that the public dissemination of such transactions will protect the identities of swap participants, not disclose the business transactions and market positions of any person involved in an uncleared swap and mitigate any adverse impact on market liquidity.

4. Foreign Exchange (''FX'') Asset Class

Several commenters sought clarification as to which FX swaps will be subject to the real-time public reporting requirements; some argued that FX forwards and swaps should not be subject to real-time public reporting rules. One commenter argued that the universe of FX market participants is massive given that FX transactions are an integral part of the global payment systems, presenting a practical challenge to ensuring that all relevant reporting participants are able to report.

To the extent that FX swaps or forwards, or both, are excluded from the definition of ''swap'' pursuant to a determination by United States Department of the Treasury (''Treasury''), the requirements of CEA section 2(a)(13) would not apply to those transactions, and such transactions shall not be subject to the real-time public reporting requirements of part 43. Treasury issued a proposed determination on April 29, 2011, in which it stated that FX swaps and 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. However, the CEA provides that, even if Treasury determines that FX swaps and forwards may be excluded from the definition of ''swap,'' these transactions are not excluded from regulatory reporting requirements to an SDR.[56] Nonetheless, such transactions would not be subject to the real-time reporting requirements under part 43. Treasury has proposed to act pursuant to the authority in Section 721 of the Dodd-Frank Act that permits a determination that certain FX swaps and forwards should not be regulated as swaps and are not structured to evade the Dodd-Frank Act. The Commission has noted that, as proposed, Treasury's determination would exclude FX swaps and forwards, as defined in CEA section 1a, but would not apply to FX options or non-deliverable forwards (''NDFs'').[57] FX instruments that are not covered by Treasury's final determination would still be subject to the real-time public reporting rules described in part 43.[58]

Section 43.1 as adopted does not distinguish between transactions within the FX asset class; such a decision to exclude FX forwards and swaps will be determined by Treasury pursuant to CEA section 1(a)(47).

5. Limitations and Special Accommodations

Several scope-related comments focused on very specific issues. Some commenters argued that novations should not be publicly reportable swap transactions. Another commenter asserted that the Commission has no statutory basis for requiring that post-swap events (*e.g.,* novations, amendments, terminations, etc.) be subject to part 43. This commenter stated that real-time reporting should be limited to trade execution and that lifecycle events should not be reported.[59]

The Commission agrees that to the extent that novations or other lifecycle events do not change the pricing of an initial execution of the swap they would not be considered publicly reportable swap transactions and therefore would not be publicly disseminated.[60] As two

[49] *See* CL–FINRA.

[50] *See* CL–IECA; CL–Better Markets.

[51] *See* CL–IPAA; CL–IECA; CL–COPE; CL–PCS Nitrogen Fertilizer; CL–Coalition of Energy End-Users; CL–NFPEEU; CL–API; and Meeting with EEI (Feb. 10, 2011).

[52] *See* CL–IPAA.

[53] *See* CL–COPE; CL–Coalition of Energy End-Users.

[54] *See* CL–Coalition of Energy End-Users; CL–NFPEEU.

[55] The Commission stated in in the Proposing Release that it interprets CEA section 2(a)(13)(C) to apply to all swap transactions. The Commission agrees with the overall concern expressed by commenters regarding the statutory duty to ensure confidentiality. CEA sections 2(a)(13)(C)(iii) and 2(a)(13)(E)(i) emphasize the importance of not identifying swap counterparties. As discussed more fully below, CEA section 2(a)(13)(C)(iii) explicitly directs the Commission to require that real-time public reporting of transactions occur in a manner that does not disclose a party's business transactions and market position.

[56] *See* CEA section 1(a)(47)(E).

[57] *See* 76 FR 29818, 29835–29837 (May 23, 2011) (proposed rulemaking issued jointly by Commission and SEC to further define, among others, the term ''swap'').

[58] *See* 76 FR 25774 (May 5, 2011). Treasury's proposed determination may also be found at *http://www.treasury.gov/initiatives/wsr/Documents/FX%20Swaps%20and%20Forwards%20NPD.pdf.*

[59] *See* CL–NFPEEU.

[60] *See* the definition of ''publicly reportable swap transaction'' in § 43.2.

commenters pointed out, the reporting of a novation that is just a change in ownership could lead to duplication in reporting and misrepresentative prices in the market.[61] As discussed more fully below, in the case of novations where there is no change in the pricing, the novations would not be publicly reportable swap transactions pursuant to § 43.2.

The Commission recognizes that there are certain swap contract amendments or other transactions that could enhance price discovery. Those transactions that have a price impact should be subject to the real-time reporting rules of part 43. If price-changing lifecycle events were not required to be publicly disseminated, swap counterparties could enter into a swap at one price and then immediately enter into an amendment to change a material term of the swap. The Commission is clarifying the definition of ''publicly reportable swap transaction'' to ensure that only those lifecycle or continuation events that have a price-changing impact should be publicly disseminated. Requiring such price-forming continuation data to be publicly disseminated eliminates the incentive for swap counterparties to enter into a swap followed by an amendment in order to disguise the price of a swap.

Commenters stated that illiquid markets should not be subject to real-time reporting.[62] The Commission believes that, consistent with CEA section 2(a)(13), such swaps generally are subject to the public dissemination requirements of part 43. Certain accommodations, however, have been made for such swaps in part 43, including longer initial time delays for public dissemination in final § 43.5.

One commenter stated that power markets should not be subject to real-time reporting.[63] The Commission acknowledges this commenter's concern; swaps in the power market are priced in reference to specific locations and thus present issues regarding the protection of the identities of the counterparties. To the extent that these are off-facility swaps, the Commission intends to propose to describe the form and manner for their reporting in its block trade re-proposal. As discussed more fully below, until such standards are adopted, such off-facility swaps would not be subject to the real-time public reporting requirements of part 43.

A few commenters argued that physical forwards should be expressly excluded from the real-time reporting requirements. Others contended that various types of swaps—including total return swaps, stand-alone options and structured transactions—should not be subject to the real-time reporting requirements of part 43 or should be given special accommodations. To the extent that any of these types of swaps are excluded from the definition of ''swap,'' such transactions are not subject to the real-time reporting requirements. Accordingly, the Commission does not intend to provide any specific exemption from part 43 at this time.

The Commission received two comments regarding special accommodations for real-time public reporting in distress scenarios and DCO default scenarios.[64] One commenter stated that special accommodations should be made for distress scenarios; the other stated that swaps in connection with a DCO's default management should not be reported. This commenter also provided language to address this situation in the final rule.

The Commission agrees that, depending on the circumstances, default and distress scenarios may warrant different reporting requirements. The Commission believes that distress and DCO default scenarios may be situations in which the Commission may exercise its authority to temporarily suspend real-time public reporting obligations under part 43. The Commission may address such emergency authority in a future Commission rulemaking. The Commission does not accept the recommendation that real-time reporting obligations be suspended automatically upon the occurrence of a distress scenario; in its view any suspension or delay of reporting should occur only upon a Commission determination. Further, the Commission believes that time delays described in § 43.5 will address some of the concerns expressed in these comments.

6. Liquidity

Some commenters asserted that real-time public reporting could cause a reduction of liquidity, particularly in already illiquid markets.[65] The Commission believes that the availability of previously-inaccessible swap pricing data in close to real-time will increase the competition among potential swap counterparties regarding the pricing of such swaps, and that such increased competition will be a central benefit of the real-time reporting rules. The enhanced transparency and reliability of transactional data provided by the real-time dissemination of swap transaction data can be expected to promote confidence in the fairness and integrity of swaps markets. Thus, the Commission anticipates that while a trade-off between liquidity and transparency may manifest itself in the beginning of the implementation period, the increased transparency ultimately should increase participation in the swaps markets.[66]

Another key benefit of real-time reporting of previously unavailable swap transaction and pricing data is enhanced price discovery. Broader access to information will be of particular value to buy-side participants and end-users. As one commenter noted, the ability to observe information about recent transactions and to seek customized trades offers potential benefits to end-users.[67] In this regard, the Commission disagrees with commenters who opined that transaction data about bespoke, bilateral swaps provides no price discovery information. On the contrary, such information helps to complete the picture of the swap market for all market participants, and would likely inform traders seeking to transact economically similar—although not identical—swaps.

As SDs and MSPs adapt to the real-time public reporting of swap transaction data, the Commission anticipates that these market participants, who typically are large and technologically sophisticated, will compete on price to attract end-users and other typically smaller, less-sophisticated market participants as swap counterparties. The Commission believes that its phase in approach to dissemination delays provided in § 43.5 of this rule will allow market participants time to adapt to the new procedures.

7. International Issues

The Commission received several comments addressing international

[61] *See* CL–Barclays; CL–Working Group of Commercial Energy Firms.

[62] *See* CL–Members of Congress; CL–MS. Additionally, one commenter suggested less frequent reporting for illiquid parts of the market. CL–Chesapeake.

[63] *See* CL–NFPEEU.

[64] *See* CL–Barclays; CL–LCH.Clearnet.

[65] *See, e.g.,* CL–Chesapeake; CL–Dominion; CL–MS; CL–ATA and Meeting with Barclays (January 24, 2011).

[66] The Commission believes that it has achieved the appropriate balance between transparency and liquidity. However, the Commission recognizes that certain market participants may disagree with the Commission and choose not to enter into certain types of swaps. The Commission believes that increased price transparency will attract additional liquidity providers based on confidence that their competitive pricing will better attract business.

[67] *See* CL–Reval.

concerns as they relate to the scope of the Proposing Release. Four commenters stated that the Commission should explicitly require that only data relating to swap transactions involving at least one U.S.-person must be reported and publicly disseminated.[68] Seven comments urged that the Commission consult with foreign regulators before establishing extraterritoriality scope;[69] one comment stated that jurisdictional boundaries should be defined[70] and seven comments stated that any SD or MSP in a swap should be the reporting party regardless of whether it is a U.S. person.[71] Additionally, the Public Roundtable on Dodd-Frank Implementation produced comments regarding the need for the CFTC and SEC to harmonize their reporting requirements with international regulators.[72]

Two commenters questioned whether the Commission has the legal authority to implement proposed § 43.1(b)(2) with respect to non-U.S. parties[73] and suggested the Commission reach agreements with foreign regulators before requiring that all transactions with any U.S. person be subject to the requirements in part 43.[74]

The Commission recognizes the benefits of consultation with international regulators in developing the real-time public reporting rules set forth in part 43 of the Commission's regulations. To that end, Commission staff has had discussions with a number of international regulators, including the UK FSA, AEuropean Commission (''EC''),[75] European Parliament Rapporteur for the Regulation on OTC Derivatives, Central Counterparties and Trade Repositories, European Securities and Markets Authority (''ESMA''), Canadian Provincial Regulators and Japan FSA.[76] Commission staff continues to discuss with international regulators issues related to extraterritoriality.

Several commenters stated that an SD or MSP should be the reporting party regardless of whether it is a U.S. person. The Commission generally agrees that if a registered SD or MSP is a party to a publicly reportable swap transaction, it should be the reporting party, to the extent that such transaction is subject to real-time reporting. The Commission understands the need for flexibility where one party to a swap is a U.S. counterparty and the other is a foreign counterparty. Accordingly, as discussed in greater detail below, the Commission is adopting language in § 43.3(a)(3) that allows parties to a publicly reportable swap transaction involving an off-facility swap to mutually agree on the reporting party for such transaction; such agreement would be a term of the swap.

8. Final Rule Text of § 43.1

After consideration of comments relating to the purpose, scope and rules of construction in proposed § 43.1, the Commission is adopting § 43.1 substantially as proposed, with some clarifying changes responsive to commenters' concerns relating to the extraterritorial scope of part 43. Additionally, as discussed below, the Commission is adopting other provisions, including a revised definition of ''publicly reportable swap transaction'' that responds to many commenters' concerns.

The Commission is adopting § 43.1(a) as proposed, with technical and clarifying changes including (i) changing the words ''set forth'' to ''implements;'' (ii) changing the word ''collection'' to ''reporting;'' and (iii) the addition of a reference to the Dodd-Frank Act. The Commission is adopting § 43.1(b) with technical and clarifying changes relating to numbering and word changes as well as with a change to the last sentence. The last sentence of § 43.1(b), as adopted, states that ''[t]his part shall apply to registered entities as defined in the Act, as well as to parties to a swap including SDs, MSPs and U.S.-based market participants in a manner as the Commission may determine.'' The change to the last sentence of § 43.1(b) deletes the references to ''registered or exempt'' when referring to SDs and adds the clause ''in a manner as the Commission may determine'' as compared to proposed § 43.1(b). Finally, § 43.1(c) is being adopted with two clarifying changes: ''constitute'' is changed to ''shall constitute;'' and ''such'' is changed to ''the particular.''

B. Section 43.2—Definitions

As proposed, § 43.2 specified definitions for a number of terms and concepts related to real-time public reporting of swap transaction and pricing data. In response, the Commission received comments from 20 interested parties, including industry associations representing myriad financial market participants, potential SDs, an asset manager, potential SDRs and a DCM. In addition to comments on the definitions proposed in § 43.2, commenters addressed terms not defined in proposed § 43.2, such as ''illiquid market.''

1. Harmonization

A number of commenters suggested that the Commission and the SEC harmonize the use of the defined terms in proposed § 43.2 in order to foster operational efficiency, lessen the incidence of errors and place fewer burdens on reporting agencies.[77] The Commission agrees that harmonization of certain terms is desirable and the two agencies have coordinated their responses to the Dodd-Frank Act as closely as possible. The Commission notes that the two agencies have jurisdiction over different types of swaps which necessitates some differences in terminology. The Commission believes therefore that any differences between the two commissions with respect to defined terms are justified and necessary to accomplish the purposes of the Act.

[68] *See* CL–ISDA/SIFMA; CL–GFXD; CL–Foreign Headquartered Banks; and CL–Working Group of Commercial Energy Firms.

[69] *See* CL–ISDA/SIFMA; CL–Commodity Markets Council; CL–Foreign Headquartered Banks; CL–WFE/IOMA; CL–Tradeweb; CL–SIFMA AMG; and CL–Soc Gen.

[70] *See* CL–ISDA/SIFMA.

[71] *See* CL–Vanguard; CL–MarkitSERV; CL–SIFMA AMG; CL–ICI; CL–ISDA/SIFMA; CL–BlackRock; and CL–DTCC.

[72] *See* CL–MarkitSERV; CL–AFGI; and CFTC/SEC Public Roundtable on International Issues Relating to Dodd-Frank (Aug. 1, 2011). Public Roundtable comments can be found at http://comments.cftc.gov/publiccomments/commentlist.aspx?id=1065.

[73] As proposed, § 43.1(b) established the scope of part 43. Proposed § 43.1(b)(2) provides that the part 43 rules apply to all SEFs, DCMs, SDRs, as well as parties to a swap including registered SDs, registered MSPs and U.S.-based end-users.

[74] *See* CL–ISDA/SIFMA; CL–GFXD.

[75] It should be noted that the 2004 version of Markets in Financial Instruments' Directive (''MiFID'') contained language for equities that ''Member States shall, at least, require regulated markets to make public the price, volume and time of the transactions executed in respect of shares admitted to trading. Member States shall require details of all such transactions to be made public, on a reasonable commercial basis and as close to real-time as possible.'' The European Commission published its MiFID and Markets in Financial Instruments Regulation (''MiFIR'') on October 20, 2011. The European Commission's legislative proposals require that regulated markets, multilateral trading facilities (''MTFs'') and organized trading facilities (''OTFs'') shall make public the price, volume and time of transaction executed for all derivatives admitted to trading or which are traded on an MTF or an OTF. These organized trading venues shall make this transaction data public as close to real-time as is technically possible. Investment firms that make public trades outside of trading venues must make those trades available through Approved Publication Arrangements which are regulated by MiFID.

[76] In addition, the Commission met with European industry representatives, including Credit Suisse, Deutsche Bank, Citi, J.P. Morgan, Barclays, Goldman Sachs and UBS (Mar. 22, 2011).

[77] *See* CL–GFXD; CL–ISDA/SIFMA; and CL–Vanguard.

2. Defined Terms

Section 43.2 contains the definitions for terms and concepts throughout part 43 and its related appendices.[78] The specific terms defined in § 43.2 are discussed below.

Act—Proposed § 43.2(a)

The Commission is adopting the definition as proposed with a clarifying citation to the United States Code.[79]

Affirmation—Proposed § 43.2(b)

A commenter suggested that the use of terms like ''affirmation'' should reflect long-standing market conventions that differ according to the type of underlying reference asset.[80] Another commenter pointed to a perceived loophole in the Commission's proposed definition that would allow for the avoidance of block trade reporting by agreeing on swap terms at one point in time and affirming terms of trade details later.[81] The Commission believes that the definition as proposed provided adequate clarity to permit flexibility for different market participants, asset classes and methods of execution. The Commission is not persuaded by the argument that the proposed definition contains a loophole that would allow for the avoidance of block trade reporting. The Commission believes that the business conduct and straight-through processing rules proposed in part 23 of its regulations,[82] in addition to anti-evasion requirements (proposed to be included in part 1 of its regulations), should provide adequate oversight rules.[83]

Comments emphasizing the need for harmonization between the CFTC and the SEC focused in part on the definition of ''affirmation.'' The SEC's proposed Regulation SBSR does not include the concept of ''affirmation''; however, the Commission believes that this difference is not material.

For the reasons discussed above, the Commission believes that the proposed definition of ''affirmation'' provides adequate clarity for different market participants, asset classes and methods of execution. Accordingly, the Commission is adopting the definition as proposed.

Appropriate Minimum Block Size—Proposed § 43.2(c)

The Commission is adopting the definition of ''appropriate minimum block size'' with a few modifications. As discussed below, since the definition of ''swap instrument'' is not being adopted in these final rules, the reference to that definition is removed.[84] The statement in the proposed definition regarding the calculation of appropriate minimum block sizes has been removed since those proposed rules are being reconsidered at this time.

As Soon as Technologically Practicable—Proposed § 43.2(d)

Proposed § 43.2(d) defined the term ''as soon as technologically practicable'' as ''as soon as possible, taking into consideration the prevalence of technology, implementation and use of technology by comparable market participants.'' The Commission anticipated that this term could have different interpretations for different swap counterparties (*i.e.,* SDs, MSPs and end-users), for different types of swaps (*e.g.,* energy swaps, credit default swaps, interest rate swaps, etc.) and for different methods of execution (*i.e.,* SEFs, DCMs and off-facility swaps).

The Commission received twelve comments from various interested parties, including trading platforms, industry groups/associations and a data vendor. One commenter[85] stated that while the SEC's proposed definition of ''real time'' more easily replicates current market practice than ''as soon as technologically practicable,'' the CFTC and SEC should propose one consistent definition of real-time reporting for their respective rules.

While the comments generally support the flexibility of the definition, some commenters requested further clarification. One commenter, for example, requested that the Commission distinguish between SDs that are banks and those that are non-banks.[86] Another commenter requested clarification whether ''as soon as technologically practicable'' would mean the same thing for swaps executed on or pursuant to the rules of a SEF or DCM as for swaps under CEA section 2(h)(7).[87]

Some commenters suggested that the Commission refrain from establishing maximum reporting time frames, except for large SDs and MSPs or, at a minimum, either adopt longer time frames for reporting for market participants that are not SDs or MSPs, or allow custom and market practice to eventually define the time period that is a responsible interpretation of ''technologically practicable.''[88] Other commenters addressed the concept of backstops for real-time reporting for non-block trades.[89] One stated that there must be a maximum time limit of no longer than five minutes,[90] while another said that maximum reporting timeframes should be given only for SDs and MSPs (or at a minimum reporting timeframes should be longer for end-users).[91] Another commenter contended that real-time reporting should occur after confirmation to reduce errors and omissions and since the confirmation process is what drives the booking of a trade into a firm's trade capture system.[92]

The Commission acknowledges that SDs and MSPs are more likely to have the infrastructure and resources available to report their swap transaction and pricing data to an SDR faster than other categories of market participants (*i.e.,* financial and non-financial end-users). However, the Commission believes it would be premature to establish maximum timeframes at this time without information on the manner and frequency in which these swaps are executed or a clear understanding of the technological capabilities of reporting parties. Declining to establish backstops is a less prescriptive approach that takes into account the different technological capabilities of different markets and market participants. The Commission can analyze timestamp data, which is not currently available, to determine whether reporting parties are reporting ''as soon as technologically practicable.''

In response to comments requesting further clarification of the definition, the Commission believes that the proposed definition provided adequate flexibility for different market participants, asset classes and methods of execution. If the definition of ''as

[78] Proposed § 43.2 used subparagraph lettering for the definitions; however, the Commission has removed the subparagraph lettering from final § 43.2 to enable the addition of defined terms as rules relating to block trades and large notional off-facility swaps are promulgated, without necessitating a renumbering with § 43.2.

[79] No comments were received in connection with the proposed definition for ''Act.''

[80] *See* CL–ISDA/SIFMA. As discussed below, this comment was broadly applied to terms such as ''execution'' and ''confirmation.''

[81] *See* Communication with Darrell Duffie (Dec. 15, 2010).

[82] *See supra* note 18.

[83] Proposed part 1 of the Commission's regulations provides that all transactions that are willfully structured to evade the requirements of the Dodd-Frank Act will be treated as swaps. *See* 76 FR 29818 at 29865–66 (May 23, 2011). The rule has not yet been adopted.

[84] No comments were received in connection with the language of the proposed definition for ''appropriate minimum block size.''

[85] *See* CL–Chris Barnard.

[86] *See* CL–Working Group of Commercial Energy Firms.

[87] *See* CL–Coalition for Derivatives End-Users.

[88] *Id.*

[89] *See* CL–Better Markets; CL–Markit; and CL–Coalition for Derivatives End-Users.

[90] *See* CL–Better Markets.

[91] *See* CL–Coalition for Derivatives End-users.

[92] *See* CL–DTCC.

soon as technologically practicable'' were more rigid (*e.g.,* setting forth maximum reporting times) the costs to less sophisticated reporting parties could be greater, particularly in the initial phases of the rule.[93]

With respect to comments regarding backstops, the Commission believes that there could be potentially significant costs to certain market participants—particularly end-users—in complying with a backstop. For this reason as well, the Commission has determined to retain the flexibility of the definition by excluding backstops. While the SEC's proposed Regulation SBSR provided a 15-minute backstop, it is important to note that the markets overseen by the SEC have significantly fewer end-users participating in the credit and equities markets than the markets under the Commission's authority. The Commission believes this distinction justifies the difference in approach between the agencies.

For the reasons discussed above, the Commission has retained a less prescriptive definition of ''as soon as technologically practicable'' in order to provide adequate flexibility for different market participants, asset classes and methods of execution, particularly when weighed against the potential costs to market participants to comply with more rigid timeframes. Accordingly, the Commission is adopting the definition as proposed.

Asset Class—Proposed § 43.2(e)

Proposed § 43.2(e) provided that the asset classes include five major categories: Interest rate, currency, credit, equity and ''other commodity,'' as well as any other asset class that may be determined by the Commission. Commenters offered various views with respect to categorizing the asset classes. One commenter recommended that relatively few defined asset classes would create increased aggregation of services and reduce the risks of duplication or omission in public dissemination or erroneous consolidation by the public of available data, while also reducing the burden on market participants to connect and reconcile among multiple SDRs.[94] ISDA and SIFMA jointly opined that providing sub-asset classes for ''other commodity'' would be advisable for reporting requirements.[95]

One commenter expressed concern with respect to the definition, treatment and reporting of an FX forward under the Proposing Release.[96] This commenter requested clarification that spot transactions with value dates less than or equal to T+2 [97] are excluded from the definition and further requested clarification with respect to the reporting obligations on those FX products that may be excluded by Treasury. Commenters also requested further clarification in defining an ''FX swap'' and ''cross currency swap.'' These commenters distinguished between a cross currency swap (an interest rate product with multi-payment schedules, traded by interest rate desks with interest rate market participants) and an FX swap (''FX products traded by distinct FX desks with different market participants using different internal and external systems infrastructure'').[98] In the commenters' opinion, cross-currency swaps should be reported in the interest rate asset class, while FX swaps should be reported in a separate FX asset class.

One commenter suggested that, with respect to FX instruments, market conventions are needed to determine whether (i) both legs of the transaction are reported by a single counterparty; or (ii) whether the transaction is instead reported separately as two legs by two counterparties with two separate trade identifications. Additionally, the commenter suggested that an FX sub-classification system should be categorized by an industry association sufficiently familiar with the FX market.[99]

One commenter recommended that the definition of ''asset class'' be harmonized with the SEC's definition to facilitate ease of tracking by market participants.[100] The Commission believes that references to the credit and equity asset classes should, to the extent possible, be defined consistently between the two agencies, but notes that the SEC will not be regulating products in asset classes other than credit and equity. Because the Commission is best situated to define the asset classes within its jurisdiction, it believes that any differences between the CFTC and the SEC with respect to the definition of ''asset class'' have their origins in different statutory and regulatory schemes and are justified and necessary.

The Commission is persuaded by the suggestions regarding the subdivision of asset classes and agrees that fewer asset classes will decrease fragmentation of data and reduce the burden of market participants to reconcile among multiple SDRs. Additionally, since an SDR that accepts swap transaction and pricing data for a swap within an asset class must accept data for all swaps in that asset class, market participants will more likely be able to report data for both real-time and regulatory reporting purposes.[101] The Commission also agrees that there is merit to providing a sub-class for the ''other commodity'' asset class. The ''other commodity'' asset class may be broken down into sub-asset classes for purposes of public dissemination;[102] however, the ''other commodity'' asset class remains an asset class that includes energy, metals, precious metals, agricultural commodities, weather, property and other commodities.

Finally, the Commission agrees that clarification and additional guidance is needed to address FX products.[103] Specifically, the Commission has determined to include cross-currency swaps in the interest rate asset class and FX options, swaps and forwards will be included in an FX asset class. Therefore, the Commission has modified the definition to better reflect the fact that the industry typically characterizes ''currency'' swaps as ''interest rate swaps.'' [104] Accordingly, the Commission is replacing the term ''currency'' in the definition of asset class with ''foreign exchange'' in § 43.2 to accurately reflect the asset classes employed by the swaps market.

As discussed above, to the extent that FX swaps or forwards, or both, are excluded from the definition of ''swap'' pursuant to a determination by Treasury, the requirements of CEA section 2(a)(13) would not apply to those transactions, and such transactions shall not be subject to the real-time reporting requirements of part 43. Under Treasury's proposed determination, while FX swaps and forwards would be excluded from the

[93] The Commission notes that real-time swap transaction and pricing data must be reported ''as soon as technologically practicable'' after ''execution'' which is linked to the ''affirmation'' of the swap. ''Confirmation'' of the swap may occur at a point after the affirmation and execution, or at the same time (*e.g.,* SEF or DCM execution of a swap).

[94] *See* CL–DTCC.

[95] *See* CL–ISDA/SIFMA.

[96] *See* CL–GFXD.

[97] The terms ''T+1'' and ''T+2'' refer to the transaction date plus one day or two days, respectively.

[98] *See* CL–GFXD.

[99] *Id.*

[100] *See* CL–Vanguard.

[101] *See* § 49.10(b). *See also* 76 FR 54538, 54579 (Sep. 1, 2011). Part 49 establishes the registration and compliance requirements for SDRs. *See also* § 43.3(c)(2).

[102] Accordingly, appendix A to part 43 provides a data field for public dissemination entitled ''sub-asset class for other commodity.''

[103] *See* CL–GFXD.

[104] This characterization is based on the attributes of currency swaps that resemble the structure and operation exhibited by interest rate swaps while in ''foreign exchange'' swaps, the underlying currencies are exchanged by the parties.

real-time reporting requirements of part 43, FX options and NDFs would not be excluded and would be subject to part 43's real-time reporting requirements.[105]

The Commission has determined to clarify the definition of ''asset class'' by changing the asset class from ''currency'' to ''foreign exchange.'' In addition, such change would place ''cross-currency swaps'' in the ''interest rate'' asset class. Finally, the Commission is making technical changes to the definition of ''asset class.'' For example, ''the broad category of goods, services or commodities'' is changed to ''a broad category of commodities, including, without limitation, any 'excluded commodity' as defined in Section 1a(19) of the Act, with common characteristics underlying a swap.'' [106]

Block Trade—Proposed § 43.2(f)

The Commission has determined to modify the proposed definition of ''block trade'' by making certain technical and conforming changes in light of other definitional changes and terminology usage throughout part 43.[107] The Commission clarified that a block trade involves a swap that is ''listed on a SEF or DCM'' and therefore deleted the phrase ''made available for trading.'' Such change ensures that block trades may be executed with respect to any listed contract. Additionally, the Commission clarified certain aspects of the definition, including changing the word ''off'' to ''away from'' to indicate that a block trade is executed away from the trading system or platform. The other revisions to the ''block trade'' definition provide clarification and reflect consistency with other changes to the final rule. As previously discussed, this rulemaking does not address issues related to the determination of appropriate minimum block sizes.

Business Day

The Commission has determined to add ''business day'' as a defined term to address the final time delay provisions in § 43.5. The Commission defined the term ''business day'' in § 43.2 as follows: ''Business day means the twenty-four hour day, on all days except Saturdays, Sundays and legal holidays in the location of the reporting party or registered entity reporting data for the swap.''

The Commission believes that defining business day as twenty-four hours is necessary given the global nature of the swaps market. The determination of the business day will be based on the time zone of the location of the reporting party, SEF or DCM. For example, if the reporting party is an SD located in London who enters into a swap with a U.S.-based entity, London time would be used to determine the business day.

Business Hours

The Commission did not receive comments suggesting a definition of ''business hour;'' however, it believes that the addition of such defined term is necessary to provide clarity with respect to the real-time reporting provisions in final § 43.5. The term ''business hours'' is defined in § 43.2 as follows: ''Business hours means the consecutive hours of one or more consecutive business days.''

Since ''business day'' is defined as the twenty-four hour day, ''business hours'' are consecutive hours during and across ''business days.'' For example if a publicly reportable swap transaction has a time delay of 24 business hours and it is executed at 6 a.m. EST on Friday, then such swap would be publicly disseminated at 6 a.m. EST on Monday, assuming that weekend days are not business days in the locale of the reporting party.

Confirmation—Proposed § 43.2(g)

One commenter stated that the definition of confirmation was appropriately broad.[108] With respect to the proposed requirement that a confirmation would legally supersede any previous agreement (electronic or otherwise), this commenter requested clarification or confirmation that this provision does not mean that a confirmation supersedes terms in the package of documentation that make up the ''agreement,'' unless the parties themselves so agree.[109] The commenter stated that this clarification is necessary because some fiduciaries of plans ensure that the terms of a swap are the best terms available from the perspective and interests of plan participants by having the lead fiduciary centralize the negotiation of the terms of the Schedule and Paragraph 13 of the ISDA Agreement.[110]

A commenter suggested that use of terms such as ''confirmation'' should reflect long-standing market conventions that differ according to the type of underlying reference asset.[111] Another commented similarly that the definition used for ''confirmation'' should reflect the underlying conventions that are prevalent in the FX market, which may be different to those used in other asset classes.[112]

The Commission agrees that clarification is necessary with respect to the proposed requirement that a confirmation would legally supersede any previous agreement (electronically or otherwise).[113] The Commission believes that adding the phrase ''relating to the swap'' following ''previous agreement'' provides sufficient clarity. Absent a requirement that the confirmation legally supersedes the previous agreement relating to the swap, transparency could be lost as key terms could be included in the schedule or credit support annex and conflict with terms later added to the confirmation. It is industry practice that the confirmation is the controlling document, and such confirmation will usually incorporate the schedule, master and any collateral arrangement(s) by reference.

With respect to the comment that ''confirmation'' should reflect long-standing market conventions that differ according to the type of underlying reference class, the Commission believes that the definition as proposed, with the modification as described above, provides adequate clarity to allow flexibility for different market participants, asset classes and methods of execution. Therefore, the Commission is adopting the definition of confirmation as proposed with some minor clarifications, including adding ''relating to the swap'' to the end of the definition to make clear that the agreement that would be legally superseded would have to relate to the same swap.

Confirmation by Affirmation—Proposed § 43.2(h)

This term is adopted as proposed, except for the deletion of the last

[105] *See* 76 FR 25774 at 25776. ''[U]nlike most derivatives, foreign exchange swaps and forwards have fixed payment obligations, are physically settled, and are predominantly short-term instruments.''

[106] The terms ''commodity'' and ''excluded commodity'' as used in the definition of ''asset class'' are defined in CEA sections 1a(9) and 1a(19) respectively.

[107] The Commission received no comments addressing its proposed definition of ''block trade.''

[108] *See* CL–ABC/CIEBA. *See supra* note 80.

[109] *Id.*

[110] The Schedule provides an opportunity for parties to a swap to negotiate terms of or add terms to the pre-printed ISDA Master Agreement. Paragraph 13 provides an opportunity for parties to a swap to negotiate the terms of or add terms to the Credit Support Annex (New York Agreement) for the OTC swap transaction.

[111] *See* CL–ISDA/SIFMA. This suggestion is part of a broader comment recommending that defined terms should follow market conventions.

[112] *See* CL–GFXD.

[113] *See* CL–ABC/CIEBA.

sentence of the proposed definition.[114] Upon further consideration, while it agrees with that statement, the Commission believes that this statement is not necessary and therefore should not be included in the definition.

Embedded Option—Proposed § 43.2(i)

This defined term is adopted as proposed with a minor clarification. The proposed definition stated that an embedded option was a right, but not an obligation, provided to one party of a swap by the other party ''to the same swap that provides the party in possession of the option * * *.'' The Commission is clarifying this language to provide that the ''party holding the option'' that has the ability to change any of the economic terms of the swap ''as those terms previously were established at confirmation (or were in effect on the start date).''

Executed—Proposed § 43.2(j)

The Commission is adopting this term as proposed.

Execution—Proposed 43.2(k)

Proposed § 43.2(k) defined ''execution'' as the agreement between parties to the terms of a swap that legally binds the parties to such terms under applicable law. An agreement may be in electronic form (*e.g.,* on a SEF or DCM or via instant message); oral (*e.g.,* telephonically); in writing (*e.g.,* a bespoke, structured transaction where documents are exchanged); or in some other format not contemplated at this time. Execution is simultaneous with or immediately follows the affirmation of the swap. The SEC does not define ''execution'' in its Proposed Regulation SBSR, but rather defines ''time of execution'' as the ''point at which the counterparties to an SBS become irrevocably bound under applicable law.'' [115] One commenter asserted that the use of terms such as ''execution'' should reflect long-standing market conventions that differ according to the type of underlying reference asset.[116] The commenter further stated that harmonization of these terms in the Commission's and SEC's rules for a particular product type will foster operational efficiency, lessen the incidence of errors, and place fewer burdens on reporting agencies. Another commenter stated that the definition used for ''execution'' should reflect the underlying conventions that are prevalent in the FX market, which may be different from those used in other asset classes.[117]

In response to the comments that ''execution'' should reflect long-standing market conventions that differ according to the type of underlying reference asset and underlying conventions in the FX market, the Commission believes that the definition as proposed provides adequate clarity to allow flexibility for different market participants, asset classes and methods of execution. Additionally, the definition is substantially similar to that in proposed Commission regulation § 23.500(d).[118]

However, in order to provide additional clarity with respect to the definition of ''execution,'' the Commission is modifying the last sentence of the proposed definition to read, ''Execution occurs simultaneous with or immediately following the affirmation of the swap.'' The Commission believes that swaps associated with structured transactions will, for the most part, be bespoke, or customized, transactions. These structured transactions will be identified as bespoke when publicly disseminated. Additionally, the Commission believes it is necessary to make clear that execution (*i.e.,* when a legally binding contract is formed) for certain structured transactions may not occur until the documents are signed and/or the deal is funded.

Large Notional Swap—Proposed § 43.2(l)

Although no comments were received in connection with the proposed definition, the Commission has determined to make certain technical and conforming changes consistent with other definitional changes and terminology throughout part 43: The term ''large notional swap'' is renamed ''large notional off-facility swap'' for added clarity. All references to ''large notional swap'' should be read interchangeably with the term ''large notional off-facility swap'' for the purposes of these part 43 rules. In addition, the Commission has made minor technical and conforming changes to the definition. Specifically, the definition is simplified to clarify that the term large notional off-facility swaps applies to all off-facility swaps with a notional or principal amount at or above the appropriate minimum block size that nevertheless are not block trades.

Minimum Block Trade Size—Proposed § 43.2(m)

The Commission is not adopting a definition for ''minimum block trade size'' at this time; the definition will be addressed in connection with the block trade re-proposal to be published for comment in the **Federal Register**.

Newly-Listed Swap—Proposed § 43.2(n)

The Commission is not adopting a definition for ''newly-listed swap'' in this final rulemaking; the definition will be addressed in connection with the block trade re-proposal to be published for comment in the **Federal Register**.

Novation—Proposed § 43.2(o)

The Commission is adopting the defined term ''novation'' as proposed with a minor, non-substantive clarification.

Off-Facility Swap—Proposed § 43.2(p)

One commenter contended that the definition of ''off-facility swaps'' unnecessarily complicate an already complex process and is not required by the Act.[119] The Commission disagrees: Terms and sufficiently detailed definitions assist readers to understand the rule, to adequately define complex products and to assist in describing the requirements for registered entities and market participants.

While there are no substantive changes to this definition, the Commission made minor technical and conforming changes by adding ''publicly'' before ''reportable swap transaction'' to conform with the change to the defined term.

Other Commodity—Proposed § 43.2(q)

Although the Commission did not receive comments addressing the definition of ''other commodity,'' it has determined to modify the definition to more appropriately reflect other revisions to proposed § 43.2. The proposed definition stated, ''Other commodity means any commodity that cannot be grouped in the credit, currency, equity or interest rate asset class categories.'' Section 43.2 defines ''other commodity'' as follows: ''Other commodity means any commodity that is not categorized in the other asset classes as may be determined by the Commission.''

[114] Proposed § 43.2(h) contained the sentence: ''With the affirmation by one party to the complete swap terms submitted by the other party, the swap is legally confirmed and a legally binding confirmation is consummated (*i.e.,* confirmation by affirmation).''

[115] *See* 75 FR 75211, n. 30 (Dec. 2, 2010).

[116] *See* CL–ISDA/SIFMA. *See supra* note 80.

[117] *See* CL–GFXD.

[118] ''Execution'' is defined in proposed § 23.500(d) to mean, with respect to a swap transaction, ''an agreement by the counterparties (whether orally, in writing, electronically, or otherwise) to the terms of the swap transaction that legally binds the counterparties to such terms under applicable law.'' *See* 75 FR 81519 at 81530.

[119] *See* CL–NFPEEU.

The phrase ''as may be determined by the Commission'' modifies the phrase ''other asset classes'' to adequately reflect the language in the definition of ''asset class.''

Public Dissemination and Publicly Disseminate—Proposed § 43.2(r)

The proposed definition of ''publicly disseminate'' states that data should be disseminated on a non-discriminatory basis. Commenters requested further clarification relating to the definition of ''publicly disseminate.'' One believed that the definition was too passive in describing how the data is delivered. Two commenters asked for clarification whether the data that is publicly disseminated is pre- or post-allocation.

The Commission clarifies that the swap transaction and pricing data that must be publicly disseminated is pre-allocation data. Accordingly, the notional or principal amount that would be publicly disseminated would be the pre-allocated amount.

The Commission disagrees that the definition of ''publicly disseminate'' is too passive in describing how the data are delivered. The Commission believes that ''publicly disseminate'' should mean making the data readily available in a non-discriminatory manner to those who wish to access it, rather than pushing out the data to market participants, data vendors, news media, etc.

In the Commission's view the proposed definition of ''publicly disseminate,'' is sufficiently clear. This definition is intended to convey that the data are available to all interested parties. The Commission believes that posting the swap transaction and pricing data on an Internet Web site and providing the Commission with a link to a conspicuous Internet Web site on which anyone can freely access the information is sufficient to satisfy the definition of publicly disseminate. The Commission expects to post these links on its Web site to provide market participants and the public with a central location to access such data.[120]

The Commission agrees with commenters that the term ''widely published'' should be clarified, and has defined ''widely published'' in § 43.2 to mean, ''to publish and make available through electronic means and in a manner that is freely available and readily accessible to the public.''

Real-Time Disseminator—Proposed § 43.2(s)

All real-time data must be sent to SDRs, and SDRs must ensure that such data is publicly disseminated. For this reason, the Commission has concluded that a separate definition of ''real-time disseminator'' could be confusing and is unnecessary. Accordingly, the Commission has determined not to adopt this defined term in § 43.2.

Real-Time Public Reporting—Proposed § 43.2(t)

The Commission is adopting this term as proposed.[121]

Remaining Party—Proposed § 43.2(u)

This Commission is adopting this term as proposed.[122]

Reportable Swap Transaction—Proposed § 43.2(v)

Proposed § 43.2(v) defined this term as ''any executed swap, novation, swap unwind, partial novation, partial swap unwind or such post-execution event that affects the price of a swap.'' The proposed definition included both the execution of a swap and certain price-affecting events that occur over the life of a swap. The Commission believes novations and swap unwinds are events that may affect the price of the swap and should be publicly disseminated in real-time, but only to the extent that they affect the pricing of the swap. In addition to novations and swap unwinds, other price-affecting events over the life of a swap may be considered ''reportable swap transactions.'' One commenter contended that the criteria for ''reportable swap transaction'' should exclude internal transactions between related or affiliated parties, such as back-to-back transactions between trading centers for the purpose of transferring the management of risk, where the pricing of the individual transaction could be influenced by group internal issues.[123] Another commenter stated that the reporting of lifecycle events should be limited to price-forming events. This commenter further suggested the inclusion of an unconditional requirement to report any information which could affect prices or pricing attributes during the life of a swap.[124]

The Commission recognizes commenters' concerns regarding the criteria for ''reportable swap transaction'' and also agrees that the reporting of lifecycle events should be limited to price-forming events. Accordingly, it is modifying the definition of ''reportable swap transaction'' in proposed § 43.2(v) to address these concerns. The defined term has been changed to ''publicly reportable swap transaction'' to make clear that the scope of the definition covers only those swaps and lifecycle events that are to be publicly disseminated pursuant to part 43, and not necessarily all of the swaps and lifecycle events that must be reported to SDRs for regulatory purposes. The Commission is limiting the scope of publicly reportable swap transactions to those executed swaps that are arm's-length and that result in a change in the market risk position between two parties. The Commission also is providing clarifying examples in the definition regarding executed swaps that need not be publicly disseminated because they are not arm's-length transactions between two parties, notwithstanding that they do result in a corresponding change in the market risk position between the two parties. The definition provides that such swaps include: (1) Internal swaps between one-hundred percent owned subsidiaries of the same parent entity; and (2) portfolio compression exercises.[125]

The Commission's definition of publicly reportable swap transaction does not include swaps that are not executed at arm's-length. These transactions do not serve the price discovery objective of CEA section 2(a)(13)(B). Moreover, the public dissemination of such trades and exercises may reveal the identity of a counterparty in violation of CEA sections 2(a)(13)(E)(i) and (C)(iii). Further, the public dissemination of such information may mislead the market.[126] The definition also modifies the list of lifecycle events (''price-forming continuation events''). This modification was made to provide clarity as to the types of lifecycle events that are publicly reportable swap transactions and to provide conformity between Commission regulations.[127]

[120] The Commission's Web site can be accessed at *www.cftc.gov.*

[121] No comments were received in response to the proposed definition of ''real-time public reporting.''

[122] No comments were received in response to the proposed definition of ''remaining party.''

[123] *See* CL–TriOptima.

[124] *See* CL–Chris Barnard.

[125] The Commission notes that the examples provided in the definition of ''publicly reportable swap transaction'' are not exhaustive.

[126] *See* the discussion of § 43.1 for further discussion relating to swaps between affiliates and portfolio compression exercises.

[127] This language is consistent with the definition of ''swap transaction'' in proposed § 23.500(m). *See* 75 FR 81519 (December 28, 2010).

Reporting Party—Proposed § 43.2(w)

The Commission is adopting this definition as proposed with minor conforming changes including adding the word ''publicly'' before ''reportable swap transaction'' and adding ''43'' after ''part.''

Social Size—Proposed § 43.2(x)

The Commission is not adopting the defined term ''social size'' at this time. The Commission will address the concept of ''social size'' in a forthcoming re-proposal of the block trade rules to be published for comment in the **Federal Register**. Comments regarding ''social size'' received in connection with the Proposing Release will be considered by the Commission in its re-proposal of the block trade rules.

Swap Instrument—Proposed § 43.2(y)

In the Proposing Release, the Commission stated that swap instrument groupings or categories should be relatively broad for the purposes of calculating minimum block sizes.[128] The Commission solicited comments addressing how it should refine the definition and received eleven comments from various interested parties, including industry associations representing myriad financial market participants, SDs, an asset manager, potential SDRs and a financial end-user. Several commenters requested further clarification of this definition. Others challenged the Commission's ability to develop adequate swap instrument categories and a definition without adequate data.

Some commenters urged the Commission to consider various criteria when creating groupings or categories of swaps instruments. One commenter provided a list of major currencies to consider while another cited a list of the key drivers of liquidity. Another commenter submitted information on how liquidity should be considered when determining the swap instrument groupings. Other commenters argued that the groupings or categories for ''swap instrument'' should be more specific. One commenter suggested that the Commission define the relevant swap markets and contracts with sufficient granularity to appropriately reflect different types of swap transactions. The Commission does not believe it is necessary to adopt a more granular definition of swap contracts in light of the revisions to the asset class definition, the re-proposal relating to block trades sizes and the implementation phase in.

The Commission agrees that its ability to develop adequate swap instrument groupings or categories would benefit from adequate market data as well as further research. Therefore the Commission has determined not to define ''swap instrument'' at this time. The Commission will address the concept of ''swap instrument'' in a re-proposal of the block trade rules to be published for comment in the **Federal Register**.[129]

Swap Market—Proposed § 43.2(z)

As discussed above, the Commission disagrees that definitions such as ''swap markets,'' ''off-facility swaps,'' ''real-time price disseminators'' and ''third party service providers'' unnecessarily complicate an already complex process.[130] The Commission believes that such terminology, including sufficiently-detailed definitions, is necessary to assist readers' understanding of the rule and to adequately define and describe complex products and the requirements of registered entities and market participants. Nor does the Commission agree that the creation of such terms is inconsistent with the statute. The Commission believes the terms are consistent with the statutory purposes and/or requirements of CEA section 2(a)(13). However, in the interest of clarity the Commission is replacing the term ''swap market'' with ''registered swap execution facility or designated contract market'' in the final rule.

Swap Unwind—Proposed § 43.2(aa)

In light of changes to the term ''publicly reportable swap transaction,'' the Commission is not adopting the defined term ''swap unwind.''

Third-Party Service Provider—Proposed § 43.2(bb)

In light of changes to final § 43.3, the Commission is not adopting the defined term ''third-party service provider.''

Transferee—Proposed § 43.2(cc)

The Commission is adopting this defined term as proposed.

Transferor—Proposed § 43.2(dd)

The Commission is adopting this defined term as proposed.

Unique Product Identifier—Proposed § 43.2(ee)

The Commission is adopting this defined term as proposed with the clarification that the definition refers to a ''product in an asset class or sub-asset class'' and not the asset class itself, as well as an additional reference to appendix A to part 43.

U.S. Person—Proposed § 43.2(ff)

The Commission is not adopting the defined term ''U.S. person'' since the term is not used in the final rules.

3. Additional Issues Relating to Defined Terms

Several commenters suggested adding defined terms that were not included in proposed § 43.2:

Illiquid Markets

Commenters suggested that the Commission define ''illiquid markets'' subject to this provision by reference to particular commodities, such as jet fuel, or by a formula relating to the average number of transactions per day. One comment suggested that market segments be defined by distance on the forward curve.[131] The commenter believes that many swap contracts in physical commodities that are longer than nine months forward should be eligible for a delay in public dissemination. Another commenter suggested that the determination of what constitutes an illiquid market should be based on the number of reported transactions, and that any market in which the average number of transactions (measured annually) is less than five transactions per day be deemed to be ''illiquid.''[132]

The Commission has considered these comments, but does not believe that a definition of ''illiquid markets'' is necessary to this rulemaking. Comments regarding liquidity are discussed in this Adopting Release and will be further considered by the Commission in its re-proposal of the block trade rules.

Widely Published

One commenter suggested that the term ''widely published,'' as used within the definition of ''public dissemination and publicly disseminate'' is subject to interpretation and should be separately defined.[133] Accordingly, the Commission has defined ''widely published'' in § 43.2 as follows: ''Widely published means to publish and make available through electronic means in a manner that is freely available and readily accessible to the public.''

[128] *See* Real-Time NPRM *supra* note 6, at 76145.

[129] Comments regarding ''swap instrument'' received in connection with the Proposing Release also will be considered by the Commission in its re-proposal of the block trade rules.

[130] *See* CL–NFPEEU.

[131] *See* CL–ATA.

[132] *See* CL–MS.

[133] *See* CL–CME.

C. Section 43.3—Method and Timing for Real-Time Public Reporting

As proposed, § 43.3 specified both the manner in which swap counterparties must report swap transaction and pricing data to the appropriate registered entity, and the manner in which registered entities must publicly disseminate such data. This section also established requirements for: (1) Acceptable forms of media through which swap transaction and pricing data may be made available to the public; (2) appropriate methods to cancel or correct erroneous or omitted data that has been publicly disseminated; (3) the hours of operation that SEFs, DCMs and SDRs must maintain for the public dissemination of swap transaction and pricing data; and (4) recordkeeping of data.

1. Responsibilities of Parties to a Swap (§ 43.3(a))

CEA section 2(a)(13)(F) provides the Commission with authority to determine reporting requirements for swap counterparties:

> [p]arties to a swap (including agents of the parties to a swap) shall be responsible for reporting swap transaction information to the appropriate registered entity in a timely manner as may be prescribed by the Commission.

As proposed, § 43.3(a) provided that the reporting party to each swap transaction would be responsible for reporting to a real-time disseminator ''as soon as technologically practicable.'' The designation of the responsible party depended on the execution of the swap transaction. For swap transactions executed on a SEF or DCM, proposed § 43.3(a)(2)(i) provided that the SEF or DCM must report to a real-time disseminator ''as soon as technologically practicable.'' For off-facility swaps, proposed § 43.3(a)(3) established the following hierarchy of counterparties to determine who has the responsibility to report to an SDR:

- If only one party is an SD or MSP, the SD or MSP shall be the reporting party.
- If one party is an SD and the other party is an MSP, the SD shall be the reporting party.
- If both parties are SDs, the SDs shall designate which party shall be the reporting party.
- If both parties are MSPs, the MSPs shall designate which party shall be the reporting party.
- If neither party is an SD or MSP, the parties shall designate which party (or its agent) shall be the reporting party.

Proposed § 43.3(a)(3) provided that the reporting party must report swap transaction and pricing data to a real-time disseminator ''as soon as technologically practicable.'' The above-referenced hierarchy is consistent with the reporting requirements for uncleared swaps to an SDR under CEA section 4r(a).[134]

Proposed § 43.3(a)(2)(i) also specified that for swaps executed on a SEF's or DCM's trading system or platform, ''a reporting party shall satisfy its reporting requirement under this section by executing such reportable swap transaction on [such SEF or DCM].'' Proposed § 43.3(b) provided that a SEF or DCM satisfies its reporting requirement by (i) sending the real-time swap transaction and pricing data to an SDR that accepts and publicly disseminates such data; or (ii) sending such data to a third party service provider. Proposed § 43.3(a)(3) provided that bilateral swaps must be sent to an SDR that accepts and publicly disseminates swap transaction and pricing data.

The Commission received 21 comments addressing the responsibilities of swap counterparties with respect to real-time public reporting. The commenters included industry associations representing myriad financial market participants, a potential SD, and several service providers to the OTC derivatives industry.[135]

Several commenters expressed concern regarding the proposed framework for determining responsibility to report swap transaction and pricing data pursuant to part 43. Specifically, commenters questioned how responsibility is allocated when two parties are within the same category (*i.e.*, both parties are MSPs or end-users). Proposed § 43.3(a)(3) provided that when both parties to an off-facility swap are within the same category, the parties must designate which of them will be the reporting party. Some commenters agreed with this approach. Others, however, believe that the Commission should amend proposed part 43 to follow current market conventions. For instance, a few commenters noted that in the interdealer market, the seller of protection is responsible for confirming the swap transaction with a confirmation service.[136] Another commenter noted that while adopting current market conventions would eliminate confusion in asset classes like credit and equity, it would not eliminate confusion in other asset classes such as foreign exchange.[137] Commenters also questioned whether DCOs should be able to act as reporting parties when an off-facility swap is cleared.[138] Several other commenters argued that the reporting party should be able to contract with any third-party service providers to fulfill its reporting obligation, including SEFs and existing confirmation/matching service providers.[139] Many of these commenters emphasized the perceived adverse and disproportionate impact that reporting obligations would place on end-users.[140] Indeed, one commenter stated that an end-user would have to expend significant time and resources to develop infrastructure and automation to comply with the reporting requirements in the Proposing Release.[141]

Two commenters argued that, to ensure accuracy and reduce fragmentation, only regulated SDRs should be able to satisfy the real-time reporting requirement. Several commenters also stated that the Commission's Proposing Release was not consistent with the SEC's proposed Regulation SBSR regarding the explicit ability of end-users to use third parties to comply with their reporting obligations.

Certain comments focused on the Commission's reporting framework in proposed § 43.3(a)(3). Three commenters contended that the Proposing Release was somewhat inflexible and would create disproportionate burdens on end-users that would not have the capacity to report swap transaction and pricing data

[134] The Commission notes that CEA section 4r(a)(3) provides: (A) ''With respect to a swap in which only 1 counterparty is a swap dealer or major swap participant, the swap dealer or major swap participant shall report the swap as required under [CEA sections 4r(a)(1) and (2)];'' (B) ''With respect to a swap in which 1 counterparty is a swap dealer and the other is a major swap participant, the swap dealer shall report the swap as required under [CEA sections 4r(a)(1) and (2)];'' and (C) ''With respect to any other swap not described in subparagraph (A) or (B), the counterparties to the swap shall select a counterparty to report the swap as required under [CEA sections 4r(a)(1) and (2)].''

[135] Commenters include: WFE/IOMA; GFXD; Tradeweb; Working Group of Commercial Energy Firms; FHLBanks; SIFMA AMG; DTCC; Markit; MarkitSERV; BlackRock; Barclays; ISDA/SIFMA; Coalition of Derivatives End-Users; ICE; Foreign Headquartered Banks; WMBAA; NFPEEU; ICI; FSR; Coalition of Energy End-Users; and Better Markets.

[136] The commenters addressing this issue include: Barclays; BlackRock; ISDA/SIFMA; GFXD; Coalition of Energy End-Users; ICE; and MarkitSERV.

[137] *See* CL–GFXD.

[138] The commenters include: Barclays; BlackRock; WFE/IOMA; ISDA/SIFMA; WMBAA; SIFMA AMG; ICI; NFPEEU; DTCC; Markit; and MarkitSERV.

[139] *See* CL–MarkitSERV.

[140] *See* CL–ICI; CL–SIFMA AMG.

[141] *See* CL–ICI.

in real-time.[142] To relieve this perceived burden, these commenters asked the Commission to allow parties to off-facility swaps to independently designate the reporting party or, in the alternative, to place most of the responsibility on dealers and MSPs. These commenters believe that the swap counterparties should be able to decide the reporting party, regardless of whether the parties are within the same category.

As noted, the Proposing Release provided that the reporting party must report swap transaction and pricing data ''as soon as technologically practicable.'' [143] The Commission solicited comments as to whether it should establish maximum reporting timeframes for the various categories of reporting parties to swap transactions (*e.g.*, ''as soon as technologically practicable but no later than X minutes''). In response, some commenters recommended that the Commission not establish maximum reporting timeframes, primarily because of the end-users' limited technological reporting capacity and the resulting significant financial burdens on end-users.[144] These commenters argued alternatively that if the Commission prescribes specific timeframes, it should aim for an appropriate balance between speed and accuracy and adopt longer time frames for end-users.

Many commenters supported proposed § 43.3(a)(2)(i), which provided that the swap transaction and pricing data reporting requirement is itself satisfied by the act of execution on the SEF or DCM.[145] Commenters reasoned that SEFs and DCMs should have the capability to report transactions ''as soon as technologically practicable'' and to preserve anonymity. Two commenters recommended that the decision where to report remain with the parties of the swap and not be satisfied by executing on a SEF or DCM.[146] As noted in the discussion of § 43.1(b) above, commenters also raised extraterritoriality concerns with regard to reporting parties of swaps.

After consideration of these comments the Commission is adopting § 43.3(a) with certain revisions. The Commission received no comments directly addressing proposed § 43.3(a)(1). It is adopting these provisions with technical and clarifying changes to reflect changes to defined terms in § 43.2 as well as a clarification that the reporting should occur ''after such publicly reportable swap transaction is executed.'' Additionally, the Commission is adding a sentence at the end of this provision to make clear that, for purposes of part 43, any references to a ''registered swap data repository'' would include provisionally registered SDRs.[147]

With respect to proposed § 43.3(a)(2)(i), the Commission agrees that SEFs and DCMs should serve as reporting parties for swaps that are executed on the execution platform. The Commission acknowledges the recommendation that the decision where to report the swap transaction and pricing data instead remain with the parties to the swap. However, the Commission believes that there are several benefits to requiring SEFs and DCMs to report these transactions directly to SDRs, including utilization of the technology of the execution platform, increased speed of reporting (and therefore increased transparency) and the ability for straight-through processing.

Proposed § 43.3(a)(2)(ii) prescribed the method and timing for real time public reporting of block trades executed pursuant to the rules of a SEF or DCM. Although the Commission has determined not to adopt the proposed § 43.5 rules relating to block trades, it believes that proposed § 43.3(a)(2)(i) and (ii) can be combined in this final rule to simplify the requirement. For the reasons discussed above, the Commission is adopting the provisions of § 43.3(a)(2) largely as proposed, with several clarifying, technical and conforming changes necessitated by other part 43 definitional and terminology changes.

The provision now references swaps ''executed'' on or pursuant to the rules of a SEF or DCM to ensure that block trades executed ''pursuant to the rules of'' a SEF or DCM would be included in the provision. Accordingly, if parties executed a block trade away from a SEF or DCM and then brought the swap transaction and pricing data pertaining to that block trade to the SEF or DCM pursuant to its rules, the parties to the swap would satisfy their reporting requirements under part 43. The SEF or DCM would then report the swap transaction data for public dissemination.

With respect to proposed § 43.3(a)(3), the Commission has considered comments that DCOs should be authorized to act as reporting parties when an off-facility swap is cleared. The Commission has also noted commenters' contention that the reporting party should be able to contract with any third party, including SEFs and existing confirmation/matching service providers, to satisfy its reporting obligation. The Commission agrees that the reporting party to an off-facility swap which is cleared should be able to contract with third parties (including DCOs or confirmation/matching service providers) to meet its reporting obligations under part 43.[148] The Commission believes that competition among third-party providers may foster the development of innovative and cost effective technological solutions that would create efficiencies for market participants that do not have the resources to develop such solutions. The use of third parties in reporting swap transaction and pricing data could reduce costs to market participants. For example, third parties may be able to develop low-cost and readily accessible web-based solutions to enable financial and non-financial end-users to comply with their reporting obligations when entering into transactions with other end-users.[149]

The Commission acknowledges that its Proposing Release and the SEC's proposed Regulation SBSR differ with respect to end-users' reporting obligations.[150] The Commission

[142] The specific commenters include: FSR; ICI; and SIFMA AMG.

[143] Additionally, CEA section 2(a)(13)(A) states that the definition of real-time public reporting means ''to report data relating to a swap transaction, including price and volume, as soon as technologically practicable after the time at which the swap transaction has been executed.''

[144] *See* CL–Coalition for Derivatives End-Users; CL–ISDA/SIFMA.

[145] *See* CL–ICE; CL–Tradeweb; CL–Coalition of Energy End-Users; CL–DTCC; and CL–MarkitSERV.

[146] *See* CL-DTCC; CL–MarkitSERV.

[147] Pursuant to part 49, the Commission may grant provisional registration to an SDR if the applicant is in substantial compliance with the registration standards set forth in § 49.3(a)(4) and is able to demonstrate operational capability, real-time processing, multiple redundancy and robust security controls.

[148] In this circumstance, the Commission notes that the obligation to report remains with the reporting party.

[149] It is important to note that DCOs may provide reporting services; however, real-time reporting and public dissemination must occur ''as soon as technologically practicable'' after execution unless subject to an appropriate time delay as described in § 43.5.

[150] Proposed Regulation SBSR provided, ''[P]roposed Rule 901(a) would not prevent a reporting party to a SBS from entering into an agreement with a third party to report the transaction on behalf of the reporting party. For example, for a SBS executed on a security-based swap execution facility (''SB SEF'') or a national securities exchange, the SB SEF or national securities exchange could transmit a transaction report for the SBS to a registered SDR. By specifying the reporting party with the duty to report SBS information under proposed Regulation SBSR, the Commission does not intend to inhibit the development of commercial ventures to provide trade processing services to SBS counterparties. Nevertheless, a SBS counterparty that is a reporting party would retain the obligation to ensure that information is provided to a registered SDR in the

explicitly permits end-users, SEFs and DCMs to utilize third parties to comply with reporting obligations described in § 43.3 in a manner similar to that described in the SEC's proposed Regulation SBSR. However, unlike proposed Regulation SBSR, the Proposing Release provided that a reporting party's reporting obligation is satisfied by executing a publicly reportable swap transaction on or pursuant to the rules of a SEF or DCM. SEFs and DCMs then have the obligation to report swaps that are executed on or pursuant to their trading system or platform to an SDR pursuant to § 43.3(b)(1), discussed below. A reporting party, SEF or DCM would retain the obligation to ensure that the appropriate information is provided in the appropriate timeframe to an SDR for public dissemination.[151]

The Commission has also considered comments addressing the allocation of reporting obligations when counterparties fall within the same market participant category. The Commission agrees that market conventions may determine which party will be obligated to report to an SDR when both parties to an off-facility swap are within the same category. However, the Commission favors a flexible approach and believes the swap counterparties should decide whether a market convention is used for determining the reporting party. In asset classes where market conventions currently exist, the Commission believes that parties to an off-facility swap should still have the same ability to agree on which party will serve as the reporting party.

In response to these comments, the Commission has added the language ''[u]nless otherwise agreed to by the parties prior to the execution of the publicly reportable swap transaction, the following persons shall be reporting parties for off-facility swaps * * *'' before the listing of reporting parties for off-facility swaps. The Commission concurs with commenters that there may be circumstances in which it makes greater economic or practical sense for a party other than the one described in the hierarchy in § 43.3(a)(3) to be the reporting party. This additional language will give the parties flexibility to agree on the reporting party in situations described in § 43.3(a)(3)(i) and (ii) as long as such agreement occurs prior to the execution of the publicly reportable swap transaction.[152] And the Commission believes that in the situations described in §§ 43.3(a)(3)(iii), (iv) and (v), the designation of the reporting party for an off-facility swap provided for in the rule should be agreed to prior to execution of such swap in order to ensure compliance with the requirements of part 43. The requirement serves to ensure that reporting after execution is not hampered by the parties' inability to agree.

The Commission disagrees that the reporting framework in proposed § 43.3(a)(3) was inflexible and would create disproportionate burdens on end-users which do not have the capability to report swap transaction and pricing data in real-time.[153] In the Commission's view, the approach taken in the Proposing Release created a balanced framework by placing a greater burden on SDs and MSPs, but not mandating which party must report if two parties are of the same category. Further, the Commission is adding to this provision the flexibility to determine the reporting party for a particular transaction if both parties agree prior to execution of the swap. As discussed above, the Commission believes such an approach is preferable to a prescriptive rule governing reporting.

The reporting framework in § 43.3(a)(3) strikes an appropriate balance from a cost-benefit perspective. Avoiding a more prescriptive regime for assigning the reporting responsibility in transactions between parties of the same category should allow the parties to determine which party can report the transaction at a lower cost.[154] In the Commission's view, it is appropriate to assign a greater cost burden to SDs and MSPs than to the buy-side (including end-users), as SDs and MSPs are likely to be larger, more sophisticated and more active in swap markets and thus more able to realize economies of scale in carrying out reporting responsibilities. In addition, allowing reporting parties to contract with third parties should allay concerns regarding the potential disproportionate cost burden placed on end-users. Moreover, the Commission's definition of ''as soon as technologically practicable'' provides additional flexibility as its application includes consideration of the ''prevalence, implementation and use of technology by comparable market participants.''[155] The hierarchy of reporting parties described in § 43.3(a)(3) for off-facility swaps would not apply to counterparties to block trades.

Commenters have asserted that, to avoid ambiguity, the Commission should explicitly state in part 43 that only data relating to swap transactions where at least one party is a U.S.-based person are required to be reported and publicly disseminated in real-time.[156] The Commission believes that both U.S.-based and non-U.S.-based counterparties that transact on or pursuant to the rules of a SEF or DCM should be subject to all of the real-time reporting requirements.

Proposed § 43.3(a)(4) provided a process for reporting off-facility swaps when no SDR was available. As discussed below, under the Commission's phase in and compliance date schedule, an SDR must be registered or provisionally registered for a particular asset class in order to comply with the part 43 requirements.[157] The Commission believes that coordinating the real-time reporting obligations with the regulatory reporting obligations will enable market participants to reduce reporting costs. Therefore, the Commission is not adopting § 43.3(a)(4) at this time.

2. Public Dissemination of Swap Transaction and Pricing Data (§ 43.3(b))

CEA section 2(a)(13)(D) authorizes the Commission to require registered entities to publicly disseminate the swap transaction and pricing data required to be reported under CEA section 2(a)(13). Accordingly, proposed § 43.3(b) specified the method and timeliness of public dissemination of

manner and form required by proposed Regulation SBSR, even if the reporting party has entered into an agreement with a third party to report on its behalf.'' 75 FR 75211–75212.

[151] Thus, a reporting party, SEF or DCM would be liable for a violation of § 43.3 if, for example, a third party acting on behalf of a reporting party did not report the appropriate swap transaction and pricing data to an SDR for public dissemination.

[152] To the extent that the parties have not agreed to the reporting party prior to the execution of the swap, the reporting party would be the SD or the MSP as applicable.

[153] *See* CL–FSR; CL–ICI; and CL–SIFMA AMG.

[154] The Commission recognizes that a publicly reportable swap transaction may be a multi-asset or hybrid instrument (*e.g.*, a commodity-linked interest rate swap), meaning that each leg of such swap falls in a different asset class. The Commission believes that with respect to reporting such multi-asset or hybrid swaps pursuant to part 43, absent an agreement by the swap counterparties stating otherwise, the reporting party, SEF or DCM shall choose the SDR to which the real-time swap transaction and pricing data is reported for public dissemination. The Commission expects that if an SDR is available for only one leg of a hybrid swap, the reporting party, SEF or DCM will send the real-time swap transaction and pricing data to such SDR for public dissemination.

[155] *See supra* § 43.2 and related discussion in section II.B.2.

[156] *See* CL–ISDA/SIFMA; CL–GFXD; CL–Foreign Headquartered Banks; and CL–TriOptima.

[157] The Commission notes that until such time as an SDR is registered or provisionally registered for an asset class, reporting parties, SEFs and DCMs are permitted to publicly disseminate real-time swap transaction and pricing data.

swap transaction and pricing data for swaps that are executed on a SEF or DCM.

Proposed § 43.3(b)(1)(i) provided that a SEF or DCM must send or otherwise electronically transmit swap transaction and pricing data ''as soon as technologically practicable'' to: (1) An SDR that accepts swaps for the particular asset class of ''reportable swap transactions;'' or (2) a third-party service provider operating on behalf of the SEF or DCM. Such data would then be publicly disseminated in the same manner described in proposed § 43.3(a)(3) for swaps that are executed off-facility (*i.e.*, the SDR publicly disseminates such data ''as soon as technologically practicable''). The Proposing Release specified that if a SEF or DCM chose to use a third-party service provider for public dissemination, the obligation to ensure that such data was publicly disseminated would remain with the SEF or DCM, since the third-party service provider would be an unregulated entity.[158] Accordingly, proposed § 43.3(b)(1)(i) required a SEF or DCM to remain vigilant in monitoring the timeliness and accuracy of the public dissemination if it chooses to use a third-party service provider.

Proposed § 43.3(b)(2)(i) prohibited SEFs, DCMs or any reporting party to a swap from disclosing transaction and pricing data for a particular swap before an SDR or third-party service provider has disseminated data for that swap to the public. This prohibition—sometimes referred to as the ''embargo rule''—is intended to ensure that swap transaction and pricing data is disseminated uniformly and is not published in a manner that creates an unfair advantage for any segment of market participants. At the same time, however, proposed § 43.3(b)(2)(ii) permitted a SEF or DCM to make swap transaction and pricing data available to participants on its market prior to public dissemination of such data. Similarly, proposed § 43.3(b)(2)(iii) permitted an SD to share swap transaction and pricing data with its customers prior to public dissemination of such data. These sections were intended to give SEFs, DCMs and SDs the flexibility to share swap transaction and pricing data with their market participants or customers, respectively, concurrent with the transmission of such data to an SDR or third-party service provider for public dissemination.

Various interested parties commented on the method of dissemination of swap transaction and pricing data to the public.[159] These commenters raised a number of issues including: (1) The use of SDRs for public dissemination; (2) the use of third-party service providers for public dissemination; (3) the requirement that SDRs accept all swaps in a particular asset class; (4) the embargo rule; and (5) the consolidation of data.

Two commenters asserted that SDRs should not be used to real-time report swap transaction and pricing data.[160] One urged that SDRs not be used because they are the last party to receive the swap data;[161] the other suggested that SDRs may have an unfair competitive advantage over third-party real-time disseminators.[162] Conversely, four commenters argued that only SDRs should be used for dissemination of real-time data.[163] One commenter requested that the Commission clarify the responsibilities of an SDR under part 43.[164]

Commenters expressed varying opinions with respect to the use of third-party service providers in public dissemination. One commenter supported the Commission's proposal to give SEFs and DCMs the option to use third-party service providers to satisfy their public dissemination obligation.[165] Five commenters opposed the use of potentially unregistered third-party service providers to satisfy the public dissemination obligation.[166] Several commenters expressly supported the use of DCOs to disseminate real-time data.[167] Specifically, one commenter stated that DCOs should publicly disseminate data for real-time purposes, because they currently have the infrastructure to support such operations.[168] One commenter questioned the Commission's statutory authority to introduce the third-party service provider concept. Indeed, this commenter argued that terms not in section 727 of the Dodd-Frank Act, such as third-party service provider, are unnecessary complications to an already complex statutory mandate and are not required by the Dodd-Frank Act.[169]

Commenters also offered solutions to the circumstance in which no SDR is available to disseminate swap transaction data. One commenter asserted that in those circumstances, if both counterparties are end-users, the reporting party should not be obligated to report at all.[170] Another recommended that if no SDR is available to accept swap transaction and pricing data for a specific asset class, the swap transaction and pricing data should be reported to the Commission by the end of the day.[171]

Commenters also questioned the ''embargo rule.'' One commenter stated that permitting SEFs, DCMs and reporting parties to disclose data prior to public dissemination would afford them an unfair competitive advantage over the general public.[172] Another argued that any information embargo should be eliminated entirely.[173] Another commenter, however, argued that if data were publicly disseminated later, it would cause confusion because ''[the] data, if disseminated after the fact * * * will not be representative of current market data when it is made public.'' [174] One commenter argued that the role of ''work-up'' in the interdealer markets is important and data should not be reported to an SDR until the work-up process is completed.[175] Similarly, this commenter argued that with regard to the ''work-up'' process, trading platforms should be able to share the last trade information to market participants prior to reporting such data to an SDR.

Several commenters urged the Commission to require the consolidation of swap transaction and

[158] While proposed § 43.3(c) generally required SDRs to register and comply with the requirements set forth in proposed part 49, neither the Commission's proposal nor the Commission itself has the authority to require third-party service providers to comply with the same requirements. Instead, proposed § 43.3(d) attempted an indirect approach at requiring third-party service providers to comply with proposed part 49's requirements. In particular, proposed § 43.3(d) provided that a [SEF or DCM] must ensure that the third-party service provider maintains standards for public reporting of swap transaction and pricing data that are, at a minimum, equal to those standards for registered SDRs as described in proposed § 43.3(c) and proposed part 49 of the Commission's regulations.

[159] The commenters include: GFXD; Working Group of Commercial Energy Firms; Coalition of Energy End-Users; WFE/IOMA; ICI; NFPEEU; ISDA/SIFMA; Better Markets, Inc.; Coalition for Derivative End-Users; Reval; Tradeweb; DTCC; CME; Argus; Markit; MarkitSERV; BlackRock; FINRA; and NGX.

[160] *See* CL–Reval; CL–Argus.

[161] *See* CL–Reval.

[162] *See* Meeting with Argus (December 15, 2010).

[163] *See* CL–Markit; CL–NFPEEU; CL–MarkitSERV; and CL–DTCC.

[164] *See* CL–MarkitSERV.

[165] *See* CL–ISDA/SIFMA.

[166] *See* CL–Coalition of Energy End-Users; CL–MarkitSERV; CL–Tradeweb; CL–NFPEEU; and CL–DTCC.

[167] *See* CL–Working Group of Commercial Energy Firms; CL–Reval; CL–BlackRock; CL–CME; and CL–NFPEEU.

[168] *See* CL–CME.

[169] *See* CL–NFPEEU.

[170] *See* CL–Coalition of Energy End-Users.

[171] *See* CL–GFXD.

[172] *See* CL–ICI.

[173] *See* CL–Better Markets.

[174] *See* CL–Coalition of Energy End-Users.

[175] *See* CL–WMBAA.

pricing data.[176] One commenter recommended that the Commission and the SEC jointly establish a single consolidator for the public dissemination of swap and security-based swap transaction and pricing data.[177] As the Commission noted in the Proposing Release, neither the CEA nor the Dodd-Frank Act grants the Commission explicit statutory authority to establish a real-time reporting consolidator.[178] The SEC's proposed Regulation SBSR similarly would require public dissemination of real-time swap data by SDRs and does not establish a consolidator.[179]

With respect to proposed § 43.3(b)(1)(i) and comments addressing the use of SDRs for public dissemination, the Commission agrees with the majority of the commenters that third party service providers should not be used for public dissemination. Accordingly, the Commission is modifying the proposed rule to require that SEFs and DCMs satisfy the requirements of this subparagraph by transmitting swap transaction and pricing data to an SDR for public dissemination ''as soon as technologically practicable'' after such swap has been executed on the SEF or DCM.[180] The Commission expects that ''transmittal'' of such data would mean, at a minimum, some form of electronic conveyance. This change removes the requirement in proposed § 43.3(b)(1)(i) that SEFs and DCMs must publicly disseminate by sending data either to an SDR or to a third-party service provider. SEFs and DCMs may enter into a contractual relationship with a third party service provider to transmit the swap transaction and pricing data to an SDR; however, the SEF or DCM will remain responsible for such reporting requirement pursuant to part 43.

In its Proposing Release, the Commission imposed public dissemination obligations on SDRs that accept and publicly disseminate swap transaction and pricing data in real-time. Further, CEA section 2(a)(13)(D) provides the Commission with the authority to require registered entities to publicly disseminate swap data. The Commission is further clarifying § 43.3(b) by adding § 43.3(b)(2) to provide that SDRs must then ensure that such data is publicly disseminated as soon as technologically practicable'' pursuant to part 43 for SEF and DCM executed swaps as well as off-facility swaps, unless a time delay described in § 43.5 is applicable. The Commission believes that this approach addresses various commenters' suggestions and concerns and is consistent with the SEC's approach in proposed Regulation SBSR. The Commission further believes that eliminating the option to use a third-party service provider will reduce (i) fragmentation in the market; (ii) search costs for market participants; and (iii) inconsistencies in data formats reported to various disseminators. Additionally, SDRs will be registered entities subject to the Commission's jurisdiction, whereas third-party service providers are unregistered entities over which the Commission has no authority. The Commission notes that the rule does not prohibit an SDR from contracting with a third party which may perform the public dissemination function. Should an SDR choose to enter into such a contractual relationship, it will remain responsible to ensure public dissemination under CFTC regulations.

With respect to proposed § 43.3(b)(1)(ii), the Commission has considered the comments and, as discussed, believes that reporting parties (including SEFs and DCMs) should be permitted to transmit their swap transaction and pricing data only to SDRs for public dissemination. Consistent with this determination, the Commission is eliminating in the final rule the option for SEFs, DCMs and reporting parties to send or otherwise electronically transmit their swap transaction and pricing data to a third-party service provider. However, the Commission believes that an SDR may ensure public dissemination by contracting with a third-party service provider to assist in the public dissemination of swap transaction and pricing data in real-time. Finally, in requiring that the reporting parties transmit the real-time swap transaction and pricing data only to SDRs, the Commission notes that nothing in part 43 would prohibit DCOs, SEFs or DCMs from registering as SDRs.

The Commission has considered the comments addressing the embargo rule and has determined to modify proposed § 43.3(b)(3) to provide further clarity.[181] Three clarifying criteria are established in the final rule: (1) Disclosure is made only to market participants on such SEF or DCM (changed from ''participants on its market'');[182] (2) market participants are provided advance notice of such disclosure; and (3) any disclosure must be non-discriminatory.[183] A SEF or DCM that wishes to disclose swap data prior to the public dissemination by an SDR must provide advance notice to its market participants of any disclosure of such swap transaction and pricing data.[184] The Commission also notes that this policy is consistent with the practice of public dissemination in the futures markets. Further, pursuant to § 43.3(b)(3)(i)(A), SEFs and DCMs must not disclose such data prior to sending such data to an SDR for public dissemination.

Section 43.3(b)(3)(ii) replaces proposed § 43.3(b)(2)(iii) and establishes data reporting requirements for SDs and MSPs reporting to their customer bases that are substantially similar to part 43's data reporting requirements for SEFs and DCMs providing such information to their market participants. Section 43.3(b)(3)(ii)(B) establishes that an SD's or MSP's ''customer base'' includes parties that maintain accounts with or have been swap counterparties with such SD or MSP. This provision also expands the scope of parties that can share such swap data to include MSPs, as the Proposing Release permitted only SDs to share such data. Section 43.3(b)(3)(ii)(C) requires an SD or MSP to provide a swap counterparty to a publicly reportable swap transaction with advance notice of any disclosure by the SD or MSP of such swap transaction and pricing data.[185] Further, SDs and MSPs must ensure that the data shared with their customer bases is not shared prior to sending such data to an SDR for public dissemination and that any disclosure is non-discriminatory.

There are several advantages to this approach. Allowing participants to see last trade information for the particular markets on which they are trading, in many cases prior to the data being disseminated to the public, will

[176] *See* CL–Coalition for Derivatives End-Users; CL–Better Markets; CL–Markit; CL–MarkitSERV; and CL–FINRA.

[177] *See* CL–FINRA.

[178] *See* 75 FR 76149.

[179] *See* 75 FR 75208.

[180] The Commission notes that, pursuant to § 48.8(a)(9)(i), registered foreign boards of trade must ensure that swap transaction data be sent to an SDR that is either registered with the Commission or has an information sharing arrangement with the Commission.

[181] The Commission does not intend that § 43.3(b)(3) apply to risk management activities, post-trade processing or regulatory reporting where it would be necessary to transmit the full swap details to comply with such activities.

[182] For the purposes of § 43.3(b)(3)(i), the Commission believes that market participants on a SEF or DCM include those persons with trading privileges on such platform, as well as others without trading privileges that subscribe to the SEF or DCM for information services.

[183] The Commission seeks to avoid a situation that would permit discrimination among those market participants of a SEF or DCM.

[184] For example, a SEF or DCM may provide advance notice by including a provision in its rulebook describing the disclosure of swap transaction and pricing data to market participants.

[185] For example, advance notice is sufficiently given when an SD or MSP, prior to the execution of such publicly reportable swap transaction, informs a swap counterparty that it will disclose the relevant swap transaction and pricing data.

enhance price discovery. Information is not delayed to market participants on a particular SEF or DCM. This approach does not allow the sharing of information by a trading facility or platform immediately upon execution, as one commenter suggested. However, the Commission believes that the requirement to send swap transaction and pricing data to an SDR simultaneously with or prior to sharing such information with persons with trading privileges will reduce potential inequities while incentivizing faster reporting by SEFs, DCMs, SDs and MSPs that wish to share such data. If real-time reporting is delayed as part of a phase in, or if no SDR is registered or provisionally registered in an asset class, the individual markets could share the information to allow for last trade information and post-trade price discovery on a particular SEF or DCM, until such time as compliance is required.

The Commission notes that its part 49 rules governing SDRs do not permit SDRs to use real-time data between the time they receive the data from SEFs, DCMs and reporting parties and the time they publicly disseminate the data.[186]

3. Requirements for Registered Swap Data Repositories in Providing the Public Dissemination of Swap Transaction and Pricing Data (§ 43.3(c))

As proposed, § 43.3(c) required that: (1) SDRs register and comply with the requirements set forth in proposed part 49; (2) SDRs that accept and publicly disseminate real-time data for swaps in selected asset classes shall accept and publicly disseminate real-time data for all swaps within such asset classes; and (3) any SDR that accepts and publicly disseminates real-time data perform an annual independent compliance review.

The Commission is adopting § 43.3(c)(1) substantially as proposed with certain technical and conforming changes.[187] For example, the phrase ''unless the data is subject to a time delay in accordance with § 43.5'' was changed to state, ''except as otherwise provided in this part.'' Additionally, the language ''in accordance with this part'' was added as a clarification.

Proposed § 43.3(c)(2) provided that if an SDR chose to publicly disseminate swap transaction and pricing data in real-time for a specific asset class, the SDR must accept all swaps within such asset class. The Commission received three comments[188] supporting this proposal; these commenters contended that such a provision would help avoid fragmentation of the SDR landscape. The Commission agrees that this provision will reduce fragmentation and is adopting § 43.3(c)(2) as proposed with some minor technical and conforming changes. For example, the phrase ''and public dissemination'' was added to the title of (c)(2), and the phrase ''unless otherwise prescribed by the Commission'' was added to the end of the text. The Commission also notes that the definition of ''asset class'' was revised in § 43.2.[189]

The Commission is adopting § 43.3(c)(3) as proposed with one conforming change: ''43'' was added to the end of the text.[190]

4. Requirements for Third-Party Service Providers—Proposed § 43.3(d)

Proposed § 43.3(d) established requirements for SEFs and DCMs that publicly disseminate through a third-party service provider. As discussed above, the Commission is requiring that public dissemination of swap transaction and pricing data for the purposes of part 43 occur through an SDR. This new requirement obviates proposed § 43.3(d), and the Commission is not adopting the provision.

5. Availability of Swap Transaction and Pricing Data to the Public (§ 43.3(d))

Proposed § 43.3(e) required SDRs that report swap transaction and pricing data to the public in real-time to make the data available and accessible in an electronic format that is capable of being downloaded, saved and/or analyzed. Requiring that SDRs make swap transaction and pricing data available to market participants and the public ensures equal access such data.[191]

The Commission believes that additional clarity is needed with regard to proposed § 43.3(e)—which has been renumbered as § 43.3(d) in the final rules—and therefore is adopting § 43.3(d)(1)–(3). Section 43.3(d)(1) is similar in substance to proposed § 43.3(e); however, the Commission has clarified that the data must be in ''a consistent, usable and machine-readable electronic'' format that ''allows the data to be downloaded, saved and analyzed.'' These modifications address several comments relating to the definitions of ''public dissemination or publicly disseminate'' by providing clarity with respect to the format in which publicly disseminated data must be made available.

Section 43.3(d)(2) reflects the Commission's belief that data must be made freely available to market participants and the public, on a non-discriminatory basis. Finally, § 43.3(d)(3) requires that SDRs provide the Commission with a hyperlink to a Web site where the public can access the publicly-disseminated swap transaction and pricing data. The Commission anticipates that it will make these links available to the public on its own Web site. In this manner, the Commission will provide a centralized location where market participants and the public can find all available swap transaction and pricing data, thus enhancing price discovery.

6. Errors or Omissions (§ 43.3(e))

As proposed, § 43.3(f) outlined the process for correcting or cancelling any errors or omissions in swap transaction and pricing data that are publicly disseminated in real-time. Proposed § 43.3(f)(1) established the process by which such errors or omissions must be corrected or cancelled, depending on whether the data error or omission was discovered by the reporting party to the swap or the non-reporting party. The Proposing Release also sought to prevent fraudulent dissemination for the purpose of distorting market pricing. Specifically, pursuant to proposed § 43.3(f)(2) reporting parties, SEFs, DCMs and SDRs that accept and publicly disseminate swap transaction and pricing data in real-time were prohibited from submitting or agreeing to submit a cancellation or correction for the purpose of re-reporting swap transaction and pricing data in order to gain or extend a delay in publication or

[186] *See* 76 FR 54550; *See also* 76 FR 54582. Section 43.3(d), discussed below, does not prohibit an SDR from transmitting real-time swap transaction and pricing data to market participants at the same time that such data is publicly disseminated pursuant to part 43. However, as prescribed in § 49.17(g) of the Commission's regulations, the distribution of such data prior to the public dissemination pursuant to part 43 would constitute a ''commercial use'' of such data.

[187] The Commission received no comments on proposed § 43.3(c)(1).

[188] *See* CL–GFXD; CL–DTCC; and CL–MarkitSERV.

[189] *See* § 49.10(b) of the Commission's regulations regarding SDRs which is identical to § 43.3(c)(2).

[190] The Commission received no comments addressing proposed § 43.3(c)(3).

[191] In addition to the comments discussing the definitions of ''as soon as technologically practicable'' and ''public dissemination or publicly disseminate,'' one commenter stated that the Commission should consider the additional requirement that an SDR make available any real-time reporting data to all market participants, including SEFs, DCMs and DCOs on a non-discriminatory basis. *See* CL-Tradeweb at 5 (''Without such requirements, the Commission is effectively taking away from market participants, including swaps markets and DCOs, a potentially significant and valuable component of their market data services.'').

to otherwise evade the reporting requirements of proposed part 43.

Proposed § 43.3(f)(3) specified the appropriate method of canceling incorrectly published swap transaction and pricing data, providing that a real-time disseminator must cancel incorrect data that has been disseminated to the public by publishing a cancellation in the format and manner described in appendix A to proposed part 43. As proposed, the rule would have required a real-time disseminator to correct any erroneous or omitted data disseminated by (i) first publicly disseminating a cancellation of the incorrect data; and (ii) then publicly disseminating the correct data pursuant to the format described in appendix A to proposed part 43. In addition to the substantive changes discussed below, the Commission has determined to make minor technical and conforming changes to § 43.3. In that regard, proposed § 43.3(f) is redesignated as § 43.3(e) in the final rule and will be referred to accordingly below.

The Commission received five comments addressing the proposed treatment of errors and omissions in real-time reporting of swap transaction and pricing data. The commenters—industry groups and a non-financial end-user—generally supported the Proposing Release that errors and omissions should be reported ''as soon as technologically practicable.'' However, one commenter suggested that in the event of a dispute between counterparties regarding the reported data, the reporting party would control the public record regarding the swap and thus would always prevail. The commenter further urged that the non-reporting party should be permitted to report the disputed data to the SEF, DCM or ''real-time disseminator,'' who would then be obliged by rule to review the disputed data.[192] Two commenters contended that the proposed requirement that the cause of the error or omission be included in any correction was unnecessary. These commenters suggested that reporting parties should not be responsible for data that is inaccurately transcribed or corrupted after it has been submitted to an SDR or for correcting data errors of which they are unaware.[193]

One commenter recommended that cancellations not due to an error in the primary economic terms should not be required to be reported in real time, but should instead be reported in accordance with requirements specified in the general reporting rule.[194]

Two commenters noted that longer reporting times would reduce errors. In this regard, they asserted that the proposed reporting times are more ''aggressive'' than those that the industry has committed to in the past, and may lead to an increase in reporting errors.[195] One commenter suggested a reporting time of T+1,[196] while another suggested that the Commission balance the sometimes competing needs of reporting speed and data accuracy in proposing timeframes for regulatory reporting.[197] Another recommended that the Commission explicitly state in the final rule that it will not prosecute, penalize or otherwise impose ''remedies'' on parties for inadvertent errors in reporting under any new standardized information collection system required by the final rules.[198]

In response to comments suggesting that the non-reporting party should be permitted to submit errors or corrections in the case of a dispute between the non-reporting party and the reporting party, the Commission believes that dispute resolution mechanisms should be exercised before the data is sent back to an SDR for public dissemination. In its view, the execution platform or the parties to the swap are in the best position to determine whether an error has been made in public dissemination and to agree upon the corrected swap transaction and pricing data. The Commission is deleting in final § 43.3(e)(1)(i) references to the ''reporting party'' and is requiring instead that one party to a swap must notify the other party if it becomes aware of an error or omission. As described in § 43.3(e)(1)(ii), the reporting party remains responsible for submitting corrections and cancellations.

The Commission is adopting § 43.3(e)(1)(ii) with clarifications to certain terminology changed in the rule (*e.g.,* references to real-time disseminator are eliminated). This provision requires that the reporting party submit corrections to the same SEF, DCM or SDR to which that data was originally submitted for the purposes of reporting. The reporting party may report corrections to a SEF or DCM if it becomes aware that the SEF or DCM submitted incorrect data to an SDR for public dissemination for a swap executed on the platform or if the reporting party submitted the data to a SEF or DCM with respect to a block trade. The Commission notes that pursuant to CEA section 21(c)(2), an SDR has a duty to ''confirm with both counterparties to a swap the accuracy of the data that was submitted.''

The Commission is adopting § 43.3(e)(1)(iii)–(iv) and § 43.3(e)(2)–(4) with technical and clarifying changes. For example, in § 43.3(e)(3), a clarification has been added that cancellations must be publicly disseminated by an SDR ''as soon as technologically practicable'' to mirror the requirements for corrections in § 43.3(e)(4).

Several comments suggested that the Commission omit from the final rule the requirement that the reason for any amendment to swap transaction and pricing data be reported during the correction process. The Commission notes that there is no requirement in § 43.3(e) that such information be included in any type of correction or cancellation report. The Commission requires that any correction of incorrect data that has been publicly disseminated must be reported in the same format as all other data reported under part 43, ''as soon as technologically practicable'' and as set forth in appendix A to part 43.

The Commission agrees that the reporting parties should not be responsible for data that is inaccurately transcribed or corrupted after it has been submitted to an SDR. However, the Commission expects that reporting parties will take due care to ensure that the data submitted to an SDR is accurate and complete. Under § 43.3(a)(2), a reporting party has satisfied its reporting requirement ''by executing a publicly reportable swap transaction on or pursuant to the rules of a registered swap execution facility or designated contract market.'' For off-facility swaps, § 43.3(a)(3) provides that a reporting party has satisfied its reporting requirement when the swap has been ''reported to a registered swap data repository for the appropriate asset class.'' Once the data have been reported in accordance with the relevant provision, the reporting party has satisfied its reporting requirement under this section and will not be responsible for correction of subsequent inaccuracies in said data; no additional modification is necessary.

The Commission considered the comment that cancellations not due to an error in the primary economic terms need not be reported in real time. The Commission does not agree with the suggestion that the correction of errors

[192] *See* CL–MFA.

[193] *See* CL–GFXD; CL–ISDA/SIFMA.

[194] *See* CL-ISDA/SIFMA; CL–Working Group of Commercial Energy Firms.

[195] *See* CL–ISDA/SIFMA.

[196] *See* CL–MFA.

[197] *See* CL–GFXD; CL–ISDA/SIFMA.

[198] *See* CL–AGA.

in data reported under part 43 should be reported pursuant to a periodic reporting schedule. The correction of errors or omissions in real time is necessary to fulfill the price discovery mandate of Section 727 of the Dodd-Frank Act. In addition, depending on the circumstance, a cancellation may or may not be followed by a correction. For example, a cancellation may occur where a clearinghouse does not accept a particular swap for clearing: Such a swap may be busted and would not require a correction. In another situation, one or more terms to a swap may be incorrectly reported by the reporting party, and the error would be realized upon confirmation of the swap. Under the final rules, such a circumstance would require a cancellation of the original—incorrectly reported—data, followed by a correction with accurate swap transaction and pricing data. When reporting a cancellation or correction, the SDR must report the data in the same form and manner in which it was originally reported and include a date stamp reflecting the time of the original transaction, so that market participants and the public are aware of which swap has been canceled or corrected.

The Commission agrees that a longer reporting time would reduce reporting errors. Section 43.5 (''Time delays for public dissemination of swap transaction and pricing data'') provides initial timeframes for reporting swap transaction and pricing data during an initial interim period. These timeframes will provide additional time for reporting. The Commission believes that longer reporting times during the phase in period should allay concerns about errors resulting from speed of reporting and should also provide market participants and registered entities with the necessary time to develop appropriate systems to reduce errors in the reporting process.

One commenter requested an explicit undertaking from the Commission that it will not prosecute, penalize or otherwise impose ''remedies'' on parties for inadvertent errors in reporting under any new standardized information collection system required by the final rules. Such relief is not appropriately part of a rulemaking. Parties seeking such relief may do so pursuant to the no-action procedures of § 140.99.[199]

7. Hours of Operation of Registered Swap Data Repositories (§ 43.3(f))

Proposed § 43.3(g)(1) specified that an SDR that accepts and publicly disseminates real-time data must be able to do so twenty-four hours a day. However, proposed § 43.3(g)(2) permitted an SDR to declare special closing hours to perform maintenance on an ad hoc basis. Such closing would require advance notice by the SDR to market participants and the public. Proposed § 43.3(g)(3) further provided that special closing hours should not be scheduled during periods when the U.S. markets and major foreign swap markets are most active. Proposed § 43.3(h) provided that during special closing hours, an SDR that is a real-time disseminator must have the capability to receive and hold in queue information regarding ''reportable swap transactions.''

The Commission received three comments regarding an SDR's hours of operation. One commenter suggested that the real-time disseminator should operate continuously in light of the global nature of derivatives markets and participation by non-U.S. persons.[200] Another stated that SDRs should operate 24 hours a day, six days a week to permit continuous access to data by regulators (including during periods where individual exchanges or other trading platforms are closed). Requiring such operating hours recognizes the global nature of trading in derivatives markets and the round-the-clock participation in these markets by U.S. persons.[201] The third commenter suggested that scheduled downtime should be permitted so that the ''real-time disseminator'' could perform routine maintenance and to mark the beginning and end of the trading day. This commenter also stated that the downtime periods should extend for no less than 30 minutes and should be scheduled for time periods that are least disruptive (*i.e.,* when market activity is at low levels).[202]

The Commission agrees that the global nature of the swaps market requires that an SDR be able to publicly disseminate swap transaction and pricing data at all times and believes that SDRs that publicly disseminate swap transaction and pricing data should be fully operational 24 hours a day, 7 days a week.[203] Accordingly, in addition to minor technical changes—including the redesignation of proposed § 43.3(g)(1) as § 43.3(f) in the final rule—the Commission has amended the proposed rule to add: ''Unless otherwise provided in this subsection,'' a registered swap data repository ''shall have systems in place to continuously receive and publicly disseminate swap transaction and pricing data in real time pursuant to this part.''

The Commission also agrees that scheduled downtime should be permitted to allow the SDR to perform routine maintenance and that these periods should be scheduled during time periods that are least disruptive (*i.e.,* when market activity for the asset class of the SDR is low). Accordingly, the Commission is adopting in § 43.3(f)(2) a provision that the SDR should, to the extent reasonably possible, avoid scheduling closing hours when, in its estimation, the U.S. market and major foreign markets are most active. However, the Commission does not believe it is necessary to close an SDR daily to mark the beginning and end of the trading day. The Commission also disagrees that SDRs should operate 24/6 and believes that such continuous operating hours are appropriate given the global nature of trading derivatives.[204]

In addition to minor technical changes, the Commission is deleting the reference to closing ''on an ad hoc basis'' with regard to ''special closing hours.'' Instead, § 43.3(f)(1) refers only to ''closing hours.'' These changes allow SDRs to properly maintain their systems while also providing advance notice of scheduled downtime to market participants and the public.

During these downtimes, SDRs must hold the data for public dissemination in queue and release the information with the appropriate execution timestamp upon re-opening. Any downtime by an SDR should be publicly announced, with adequate notice to the market, and should occur at a time when there is anticipated low market activity, which may vary based on asset class. Further, the Commission strongly encourages SDRs to adopt redundant systems to allow public reporting during closing hours.

The Commission intends to ensure that SDRs will provide market participants and the public with sufficient notice of closing hours. To that end, the Commission is adopting new § 43.3(f)(3) to provide that: ''A

[199] The Commission has the ability to review all error and omission reports and is authorized under the CEA and Commission regulations to investigate and prosecute false reports.

[200] *See* CL–Working Group of Commercial Energy Firms.

[201] *See* CL–DTCC.

[202] *See* CL–CME.

[203] The Commission notes that the CEA does not require SDRs to have any scheduled down time.

[204] By requiring SDRs to operate continuously for the purposes of the real-time public reporting requirements of part 43, market participants will be less likely to execute during SDR downtimes in order to delay public dissemination of swap transaction and pricing data.

registered SDR shall comply with the requirements under part 40 of the Commission's regulations in setting closing hours and shall provide advance notice of its closing hours to market participants and the public.''

The Commission previously has deemed policies such as trading hours to be ''rules'' as that term is defined in § 40.1(i) of the Commission's regulations.[205] Accordingly, an SDR is required under part 40 to self-certify its rules, including the establishment and modification of trading hours.[206] The self-certification process under § 40.6 includes posting notice on the SDR's Web site.[207] However, compliance with the part 40 provisions alone may not suffice to meet the notice requirement under § 43.3(f)(3), which requires an SDR to provide reasonable advance notice to participants and the public of its closing hours.[208]

8. Acceptance of Data During Closing Hours (§ 43.3(g))

Proposed § 43.3(h) required that an SDR have the capability to receive and hold in queue information regarding ''reportable swap transactions'' during special closing hours. Consistent with comments addressing hours of operation, the Commission is adopting § 43.3(g) and adding §§ 43.3(g)(1) and (2) to an SDR's responsibilities to accept data during closing hours.[209]

The Commission is adopting § 43.3(g)(1) to clarify that an SDR must publicly disseminate the data that it has held in queue during closing hours promptly upon reopening after closing hours. The Commission anticipates that there may be circumstances in which an SDR is unable to receive and/or hold swap transaction and pricing data in queue during downtime. To ensure that market participants and the public receive timely notice of any failure to hold data in queue, the Commission is adding § 43.3(g)(2) which requires the SDR, upon reopening, to issue notice that it has resumed normal operations in such cases where data was not held in queue. The Commission believes that such notice should be provided for all market participants. Such notice must state that the SDR resumed normal operations but was unable, while closed or for some other reason, to receive and hold in queue such transaction information. Further, § 43.3(g)(2) requires that upon receiving such notice, any SEFs, DCMs or reporting parties whose data was so ''lost'' shall re-report the data to the SDR immediately.[210]

9. Timestamp Requirements (§ 43.3(h))

Proposed § 43.3(i) required that all data related to a ''reportable swap transaction'' be maintained for a period of not less than five years following the time at which the transaction data is publicly disseminated pursuant to part 43. Specifically, proposed § 43.3(i)(1) required that SEFs and DCMs retain all swap transaction information received from reporting parties for the purposes of public dissemination, including block trade and large notional swap data. As proposed, § 43.3(i)(2) directed that SDs and MSPs retain swap transaction and pricing information in accordance with proposed part 43 and proposed part 23.

The Commission received seven comments from various interested parties, including industry associations and a potential SDR, with respect to proposed § 43.3(i).[211] Two commenters asserted that recordkeeping standards should be coordinated internally between Commission rulemakings as well as externally with the SEC and international regulators.[212] Some commenters focused on perceived burdens to end-users, asserting that that the costs and burdens of recordkeeping for end-users would be very high for less-technologically-sophisticated end-users, and that further clarification is necessary with respect to the precise data that should be retained by end-users.[213] One commenter recommended that this clarification should be written in clear, easy-to-understand terms, and that the final rules should provide for a ''CFTC-lite'' regulatory scheme for commercial end-users.[214]

A commenter stated that § 1.31 of the Commission's regulations is outdated and should not be applied to the proposed recordkeeping rules under this part.[215] This commenter further recommended that data retention should be triggered by the execution of the swap transaction, as proposed in the part 45 rules, and not upon public dissemination.[216]

The Commission does not believe that § 1.31 of the Commission's regulations is outdated and inappropriate to the proposed recordkeeping rules. On the contrary, § 1.31 provides that books and records be kept for a period of five years from the date such records are created. In addition, this section provides that records must be readily accessible during the first two years of the five year period. Adopting proposed § 43.3(i) would duplicate the existing recordkeeping requirements of § 1.31.[217] Further, in response to other commenters, the Commission does not believe that a ''CFTC-lite'' regulatory scheme for commercial end-users is contemplated by the Dodd-Frank Act.

The Commission also disagrees that data retention should be triggered by termination of the publicly reportable swap transaction. Real-time data will have been publicly disseminated upon affirmation and there would be no requirement to maintain the data in the interim period. However, the Commission does see merit in the comment that real-time data should be retained for an appropriate period from the date of the price-forming event to allow re-publication of historic price data and support the error correction process.[218] Proposed § 45.2(c) explicitly states that all records required to be kept for a swap shall be kept ''from the date of the creation of the swap through the life of the swap and for a period of at least five years from the final termination of the swap, in a form and manner acceptable to the Commission.'' Therefore, as required by § 1.31 and proposed part 45, real-time swap transaction and pricing data will be

[205] Section 40.1(i) includes in the definition of ''rule'' both ''stated policy'' and ''terms and conditions.'' Further, § 40.1(j)(1)(iv) defines ''terms and conditions'' to include trading hours. 76 FR 44776 at 44791 (July 27, 2011).

[206] Section 40.4(b)(3) provides that changes in trading hours may be implemented without prior approval of the Commission, as long as such changes have been submitted for self-certification as required under the procedures of § 40.6(a). *See* 76 FR 44776, 44793 (July 27, 2011).

[207] The Commission's part 40 regulations include a process by which registered entities may certify rules or rule amendments that establish standards for responding to an emergency.

[208] For example, an SDR could provide notices to its participants or publicize its closing hours in a conspicuous place on its Web site.

[209] As previously noted, the Commission is not required to provide schedule closing times for SDRs.

[210] In addition to these changes, the Commission has made minor technical and conforming changes to this section. For example, proposed § 43.3(g) (''Hours of Operation'') is renumbered as § 43.3(f) in the final rules; proposed § 43.3(h) (''Acceptance of data during special hours) is redesignated as § 43.3(g).

[211] *See, e.g.,* CL–FSR.

[212] *See* CL–WFE; CL–Working Group of Commercial Energy Firms.

[213] *See* CL–Working Group of Commercial Energy Firms; CL–NFPEEU.

[214] *See* CL–NFPEEU.

[215] *See* CL–Working Group of Commercial Energy Firms.

[216] *See id.; See also* 75 FR 76574.

[217] In addition, registered entities are also subject to the swap recordkeeping provisions of proposed § 45.2. Proposed § 45.2 sets forth the swap transaction records that shall be kept by all parties subject to the Commission's jurisdiction and the manner and form in which such records should be kept, including relevant timeframes for retention and access.

[218] *See* CL–DTCC.

retained for a period of five years after the termination of the swap.

After considering comments and the recordkeeping requirements in both the Commission's existing regulations and proposed part 45 rules, the Commission has determined to limit the recordkeeping requirements in part 43 to timestamps. The Commission agrees that the recordkeeping and data retention requirements should be coordinated between CFTC rulemakings, particularly the data recordkeeping and reporting rules. The Commission believes that the recordkeeping provision in proposed § 43.3(i) is duplicative of recordkeeping requirements found in other proposed Commission regulations (*e.g.,* proposed part 45 and proposed part 23 recordkeeping requirements) and is therefore not adopting proposed § 43.3(i). The Commission believes that eliminating this provision addresses commenters' concerns relating to the cost burden of maintaining data beyond the data retained in the ordinary course of business and eliminates duplicative recordkeeping requirements.

The Commission believes that there is a need for SEFs, DCMs, SDRs, SDs and MSPs to record and maintain certain timestamps regarding the transmission and dissemination of real-time swap transaction and pricing data.

The Commission's proposed block trading rules included a requirement in § 43.5(f) that SEFs and DCMs timestamp swap transaction and pricing data with the date and the time to the nearest second. Additionally, and as discussed with respect to appendix A to part 43 below, the Commission proposed that an ''execution timestamp'' be publicly disseminated for all ''reportable swap transactions.'' As discussed above, the Commission has determined not to adopt the proposed rules establishing appropriate minimum size for block trades at this time; proposed § 43.5(f) has been redesignated as § 43.3(h) (''Timestamp Requirements''). As proposed, § 43.5(f)(1) and appendix A to part 43 required SEFs and DCMs to timestamp swap transaction and pricing data with the date and time to the nearest second.

The Commission received two comments objecting to the timestamp reporting requirement as unreasonable and inconsistent with current market practice. One commenter also suggested that the value derived by moving the industry to Coordinate Universal Time (''UTC'') appears minimal when compared to the costs involved.[219] The Commission recognizes that reporting the timestamp to the second is not current industry practice in some asset classes and may incur some technological and cost challenges. However, a timestamp to the second is necessary both for audit trail and enforcement purposes and to provide market participants and the public with sufficient information to re-create a trading day. The Commission will also use the timestamps described in § 43.3(h) to determine whether swaps are being reported ''as soon as technologically practicable'' and to compare the speed at which similar market participants report swap transaction and pricing data to an SDR for public dissemination. Additionally, the Commission will be able to determine how quickly SDRs are publicly disseminating the information that they receive for public dissemination.

The execution timestamp, described in appendix A to part 43, is critical for SDRs in determining when to publicly disseminate swap transaction and pricing data that is subject to a time delay pursuant to § 43.5. Different market participants and different types of execution may be assigned different time delays, so the execution timestamp that is publicly disseminated will be an important aid in following the order of execution of transactions within a particular market.

Notwithstanding potential costs to the industry, the Commission believes that movement to UTC will facilitate the ability for market participants and the public to harmonize swap transactions across the global market. The Commission notes that use of UTC in the part 43 rules refers only to the execution timestamp that is publicly disseminated. Consistency across the global swaps market will better enhance price discovery, and the Commission believes that requiring UTC will allow market participants and reporting parties to recreate the order of trades, provide consistency across all publicly disseminated swap transaction and pricing data and reduce the need for market participants to convert different transaction times to understand the order of trades in a particular market.

For the reasons discussed above, the Commission is adopting the timestamp requirements as proposed in § 43.5(f), with certain modifications, as § 43.3(h). First, the Commission has clarified that the timestamps in § 43.3(h) are in addition to the execution times in appendix A to part 43. Further, the Commission is not limiting these timestamp requirements to block trades and large notional off-facility swaps, as in the Proposing Release, but rather is requiring such timestamps for all publicly reportable swap transactions. The Commission has also made conforming changes to proposed § 43.5(f)(1)–(3) which are reflected in § 43.3(h)(1), (2) and (4).[220] In § 43.3(h)(1)(i), the Commission has changed the term ''reporting party'' to ''swap counterparty'' since block trades must be reported pursuant to the rules of a SEF or DCM.[221]

The Commission has added § 43.3(h)(3) and (4) to require that SDs and MSPs record and maintain for a period of at least five years a timestamp reflecting when data is sent to an SDR for public dissemination.[222]

The commenters' concerns with respect to the costs and burdens of recordkeeping on end-users also have merit. Accordingly, the Commission has determined that, other than the timestamp requirements of § 43.3(h), no additional recordkeeping burdens will be placed upon end-users under part 43.

The Commission agrees that the recordkeeping requirements should be harmonized with the SEC. Many registered entities, SDs and MSPs will be dually registered with the Commission and the SEC, and they will comply with the agency regime that has more robust recordkeeping standards. Finally, the Commission acknowledges that coordination with international regulators will also be necessary in their rulemaking processes and commits that it will continue to do so.

10. Fees Charged by SDRs (§ 43.3(i))

The Commission interprets CEA sections 2(a)(13) and 21 to require that SDRs ensure open and equal access to their data collection services for the purpose of real-time reporting. Consistent with this interpretation, the Commission proposed in § 43.3(j) that fees charged by a real-time disseminator to reporting parties, SEFs or DCMs should be equitable and non-discriminatory, and that volume

[219] *See* CL–ISDA/SIFMA.

[220] The conforming changes to these sections include changing the phrases ''a swap market and a registered swap data repository'' to ''a registered swap execution facility or designated contract market''; ''real-time disseminator'' to ''registered swap data repository''; and ''swap market or reporting party'' to ''registered swap execution facility, designated contract market or reporting party'' to more accurately reflect the terms as defined in § 43.2.

[221] The circumstance described in § 43.3(h)(1)(i) may occur when a block trade is executed away from a SEF or DCM, but pursuant to the rules of a SEF or DCM. The SEF or DCM would need to record a timestamp of when it received such data from a swap counterparty pursuant to its rules.

[222] The Commission anticipates that the timestamp requirements in § 43.3(h)(3) would likely apply only in the case of off-facility swaps and price-forming continuation data in which the SD or MSP is the reporting party.

discounts for data collection shall not be offered, unless available to all reporting parties.

The Commission received ten comments related to fees charged by an SDR for their public dissemination services. A market data vendor suggested that the Commission permit SDRs to employ the sell-side-pays model, or alternatively, a structure that requires only the reporting party to pay SDR fees.[223] Another commenter criticized proposed § 43.3(j) for permitting volume discounts;[224] while others urged that the Commission monitor what is ''fair and reasonable.''[225] A commenter recommended that the Commission clarify that nothing in its rules is intended to impose or imply any limit on the ability of market participants—including parties to the transaction, SEFs and DCOs—to use and/or commercialize data they create or receive in connection with the execution or reporting of swap data, so long as it is consistent with their confidentiality obligations.[226] Two commenters stated that the final rules should clarify that ownership of data is retained by the counterparties to the swap and does not transfer to a SEF, DCM or SDR.[227] Another requested clarification that market participants may use and/or commercialize real-time swap transaction and pricing data.[228] Finally, several commenters stated that SDRs should not charge reporting parties since they will receive fees from the sale of such data to the public.[229]

A commenter stated that it currently provides data to the public free of charge and expects to continue to do so when satisfying its part 43 obligations.[230] Another commenter urged that SDRs be allowed to charge commercially reasonable fees to disseminate data, because otherwise there would be no incentive to improve systems to the detriment of transparency.[231] A commenter urged that the Commission monitor the fee setting of entities under its jurisdiction to ensure that fees are fair and reasonable and do not favor any class of participant at the expense of others.[232] Some commenters suggested that the fees collected by SDRs relating to public dissemination of swap transaction and pricing data should be redistributed to reporting parties;[233] other commenters stated that such fees should be remitted to the Commission to offset the costs of implementing the Dodd-Frank Act.[234]

The Commission emphasizes that section 727 of the Dodd-Frank Act explicitly requires public dissemination of such data. The Commission believes that implicit in this mandate is the requirement that the data be made available to the public at no cost. On the other hand, however, the Commission believes it is reasonable to permit an SDR that publicly disseminates swap transaction and pricing data to charge fair and reasonable fees to providers of swap transaction and pricing data to offset the costs associated with public dissemination of those data. Further, nothing in these rules would prohibit SDRs responsible for the public dissemination of real-time swap data from making commercial use of such data subsequent to public dissemination of those data.[235]

With regard to specific fee arrangements, the Commission believes such matters are business decisions best left to the parties. Further, the Commission believes that issues of data ownership are outside the scope of this rulemaking.

For these reasons, the Commission is adopting proposed § 43.3(j) with minor technical amendments[236] and additional language to clarify that volume-based discounts offered to any reporting party must be made available to all reporting parties.

D. Section 43.4—Swap Transaction and Pricing Data To Be Publicly-Disseminated in Real-Time

1. In General (§ 43.4(a))

Proposed § 43.4(a) provided that swap transaction information must be reported to a real-time disseminator so that the real-time disseminator could publish swap transaction and pricing data in accordance with part 43. As explained more fully in the discussion of § 43.3(b), the Commission has concluded that third party service providers should not be used for public dissemination and that instead real-time swap transaction and pricing data should be reported to SDRs for public dissemination. Accordingly, § 43.4(a) is amended to eliminate the reference to ''real-time disseminator'' and replace it with ''registered swap data repository'' and to remove the phrase ''and format requirements.''

2. Public Dissemination of Data Fields (§ 43.4(b))

The Commission is adopting this section as proposed, with minor conforming changes.[237]

3. Additional Swap Information (§ 43.4(c))

The Commission is adopting this section as proposed, with minor technical and conforming changes. For example, ''match'' is changed to ''compare'' and the phrase ''that accepts and publicly disseminates swap transaction and pricing data in real-time on a transactional or aggregate basis'' is removed from the end of the text.

4. Amendments to Data Fields (Proposed § 43.4(d))

Two commenters questioned the Commission's authority to summarily modify the data fields described in appendix A to proposed part 43 without the opportunity for notice and comment.[238] One commenter indicated that any changes to data fields should not include the publication of identifying information.[239]

The Commission agrees that any changes to the data fields should reflect careful consideration and should not result in the publication of identifying information. Accordingly, the Commission is not adopting proposed § 43.4(d) (''Amendments to data fields'').[240]

5. Anonymity of the Parties to a Publicly Reportable Swap Transaction (§ 43.4(d))

CEA section 2(a)(13)(E)(i) requires the Commission to protect the identities of counterparties to mandatorily cleared swaps, swaps excepted from the mandatory clearing requirement and voluntarily cleared swaps.[241] Similarly,

[223] *See* CL–MarkitSERV.

[224] *See* CL–Better Markets.

[225] *See* CL–BlackRock; CL–MarkitSERV.

[226] *See* CL–Tradeweb.

[227] *See* CL–Markit; CL–DTCC.

[228] *See* CL–Tradeweb.

[229] *See* CL–Working Group of Commercial Energy Firms.

[230] *See* CL–DTCC.

[231] *See* CL–ICE.

[232] *See* CL–BlackRock.

[233] *See* CL–Tradeweb.

[234] *See* CL–Working Group of Commercial Energy Firms.

[235] Section 49.17(g) of the Commission's regulations governs the commercial use by SDRs of both core regulatory data and real-time publicly reported data; § 49.17(g)(3) explicitly prohibits the commercialization by SDRs of publicly disseminated swap transaction and pricing data prior to the public dissemination of such data pursuant to part 43.

[236] The Commission notes that the rule has been redesignated as § 43.3(i).

[237] One commenter recognized that § 43.4(b) does not require the public dissemination of any counterparty-identifying information. *See* CL–MFA.

[238] *See* CL–MFA; CL–ABC/CIEBA.

[239] *See* CL–MFA.

[240] Proposed § 43.4(d) stated that the ''Commission may determine from time to time to amend the data fields described in appendix A to this part.''

[241] As noted, Congress required that such rules ''ensure that the public reporting of swap transaction and pricing data does not disclose the names or identities of the parties to the

Continued

CEA section 2(a)(13)(C)(iii) requires that the Commission's rules maintain the confidentiality of business transactions and market positions of the counterparties to an uncleared swap.[242]

Proposed § 43.4(e)(1) prohibited the public dissemination of real-time swap transaction and pricing data that would identify or facilitate the identification of a party to a swap and further specified that an SDR may not publicly report such data in a manner that discloses or otherwise facilitates the identification of a party to a swap. Proposed § 43.4(e)(2) directed that a SEF, DCM or reporting party must provide an SDR with a specific description of the underlying asset and tenor of a swap. Proposed § 43.4(e)(2) further provided that ''this description must be general enough to provide anonymity but specific enough to provide for a meaningful understanding of the economic characteristics of the swap.'' Proposed § 43.4(i) established a rounding convention for all swaps, including a ''notional cap'' providing that if the notional size of a swap is greater than $250 million, only ''$250+'' would be publicly disseminated.[243]

The Commission recognized that the public dissemination of the underlying asset and tenor of a swap executed off-facility with a specific underlying asset may be more susceptible to an inference as to the identity, business transactions or market positions of the parties to the swap, particularly in the ''other commodity'' asset class.[244] In contrast, the Commission acknowledged that swaps executed on or pursuant to the rules of a SEF or DCM would likely not be subject to the same disclosure risk.[245] To avoid the former result and comply with the statutory mandate, the Commission determined that a more general description than the specific underlying asset and tenor should be publicly disseminated.[246] The Commission provided an example in the Proposing Release of how such a standard could be applied, but did not propose specific guidelines because it recognized that SEFs or DCMs may differ and that new types of swaps may emerge.[247] Proposed § 43.4(e)(2) made clear that its requirement was separate from the requirement that a reporting party report swap data to an SDR pursuant to CEA section 2(a)(13)(G).[248]

As proposed in § 43.4(e)(2), the standard that swap data be ''general enough to provide anonymity but specific enough to provide for a meaningful understanding of the economic characteristics of the swap'' applied to all swaps. However, in the preamble to the Proposing Release, the Commission recognized that SEFs or DCMs differ and sought to clarify that the standard would be applied differently depending on asset class and place of execution. Even if the specific underlying asset and tenor of a swap executed on or pursuant to the rules of a SEF or DCM were publicly disseminated, it would be difficult for market participants to ascertain the identity, business transactions or market positions of the counterparties. Swaps executed on or pursuant to the rules of a SEF or DCM would generally lack the kind of customization that would permit reverse engineering; therefore, identities, business transactions and market positions and of counterparties could not be inferred from the underlying asset and tenor.

The Commission received 25 comments addressing anonymity in the public dissemination of swap transaction and pricing data. The commenters included industry associations representing financial market participants; potential SDs; end-users (both financial and non-financial); potential SDRs; an asset manager; and a data vendor to the OTC derivatives industry. Some commenters expressed a general concern that the provisions in the Proposing Release would not sufficiently protect the anonymity of the market participants. Within this group, some commenters believed that anonymity would not be sufficiently protected by the proposed provisions because of the structure of the swap (*i.e.,* bilateral swap where at least one counterparty is an end-user; bespoke transaction;[249] uncleared bespoke transaction).[250] Others argued that anonymity would be compromised because of the underlying asset (*i.e.,* energy products);[251] still others focused on the liquidity in the market.[252] In addition to general concerns, one commenter asserted that the information that would be publicly disseminated under the proposed rule would fail to enhance price discovery, and thus its disclosure would not further the statutory purpose embodied in CEA section 2(a)(13)(B).[253]

One commenter stated that the anonymity provisions of proposed § 43.4(e)(2) should be applied to all asset classes and to all swaps, regardless of whether the swap is executed on or pursuant to the rules of a SEF or DCM or off-facility.[254] Another requested that the Commission clarify in the final rule ''that the information required to be publicly disseminated cannot identify the participants to a swap or provide information specific to the participants.''[255]

One commenter asserted that whether a swap is liquid enough to clear at a DCO is not determinative of whether the swap exists in a liquid market.[256] The commenter stated that cleared swaps may exist in illiquid markets and the real-time reporting of such swap transaction and pricing data may both negatively impact the price, and disclose the identity, business transactions or market positions of one or more counterparties.[257] The same commenter suggested that the Commission define an ''illiquid market'' and require that swaps traded in such markets receive special treatment for purposes of public dissemination.[258] Similarly, commenters suggested that the Commission begin phasing in real-time public reporting with more liquid contracts and phase in less liquid contracts as it gains more information on markets with less liquidity.[259]

A common belief expressed by many commenters is that special accommodations should be made for off-facility swaps based upon an underlying physical commodity because of the increased risk that the identities of the parties and their business transactions or market positions may be revealed.[260] Some commenters focused on the illiquid markets that exist for

transactions.'' *See* Statement of Sen. Blanche Lincoln *supra* note 15.

[242] Such provision does not cover swaps that are determined to be required to be cleared but are not cleared.

[243] Given the importance of protecting the identities of the parties to a swap and the business transactions and market positions of market participants, and pursuant to its authority under CEA section 2(a)(13)(B), the Commission in adopting part 43 has considered the protection of the anonymity for all swaps, both cleared and uncleared.

[244] Real-Time NPRM *supra* note 6, at 76150—76151.

[245] Real-Time NPRM *supra* note 6, at 76151.

[246] *Id.*

[247] *See* Real-Time NPRM *supra* note 6.

[248] Real-Time NPRM *supra* note 6, at 76174.

[249] *See* CL–Coalition of Energy End-Users.

[250] *See* CL–FHLBanks.

[251] *See* CL–Dominion; CL–ATA; and CL–EMUS.

[252] *See* CL–MS; CL–EMUS; CL–Argus.

[253] *See* CL–Dominion.

[254] *See* CL–Coalition of Derivatives End-Users. The commenter stated that often, after a bond is issued to raise debt in the capital markets, the issuer will enter into an interest rate swap to hedge the interest rate risk.

[255] CL–ISDA/SIFMA at 15.

[256] *See* CL–MS.

[257] The commenter stated that a market in which products that are illiquid are cleared exists for high-yield single name CDS. The Commission notes, however that such single name CDS are not under the Commission's jurisdiction. CL–MS at 3, fn. 4.

[258] *See* CL–MS.

[259] *See* CL–MS; CL–Barclays.

[260] *See* CL–ISDA/SIFMA.

some swaps that fall within the ''other commodity'' asset class with specific pricing points or delivery points, grade level or tenor, specifically for swaps with an underlying asset in the energy space (*e.g.,* natural gas, electricity, jet fuel, etc.).[261] The commenters explained these markets are very illiquid with few transactions and/or few market participants. They argued that trades executed in illiquid markets are more susceptible to reverse engineering, thereby increasing the likelihood that the counterparties' identities, business transactions or market positions could be discovered.[262]

One commenter suggested that the Commission ''allow for an exclusion [from the requirements of part 43] for any transaction between either two end-users or an end-user and a regulated entity with respect to any class of swaps that does not serve a significant price discovery function.'' [263] The commenter stated that in such situations, particularly when the entity is hedging an energy asset, the public dissemination of the swap transaction and pricing data would serve no price discovery function and may reveal the identity of the end-user, depending on whether the underlying asset is in an illiquid market with few market participants.[264] Another commenter stated that the Commission should ensure anonymity by not requiring the public dissemination of swap transaction and pricing data for any bespoke off-facility swaps.[265] Similarly, a commenter suggested the Commission should not require the public dissemination of any swap which falls under CEA section 2(a)(13)(C)(iii) and any end-user swaps under CEA section 2(a)(13)(C)(i) that are clearable but not cleared, until the Commission determines that these swaps are ''significant price discovery'' swaps as set forth in Section 737 of the Dodd-Frank Act.[266] This commenter believed that given the Commission's anonymity provisions, the public dissemination of the underlying asset would not be specific enough to enhance price discovery.

Some commenters suggested that, to ensure anonymity, the Commission should limit the amount of data or the data fields that are publicly disseminated.[267] In this regard, one commenter observed that ''[i]f the list of data fields is extensive [and carries with it substantial implementation costs], yet not complete enough that pricing of instruments can be reproduced easily, then end-users would bear the implementation costs without the commensurate benefit of enhanced price discovery.'' [268] The commenter emphasized the importance of dissemination of the data fields that allow market participants to deduce the material incentives that SDs or MSPs have in connection with a particular swap.[269] Another commenter noted that credit support arrangements are often privately negotiated; to ensure the confidentiality of the business transactions of the counterparties to an uncleared, bespoke swap with a credit support arrangement, a ''credit'' data field should not be publicly disseminated.[270] Commenters suggested that for swaps with a specific delivery or pricing point, a broad geographic region should be publicly disseminated rather than a specific location.[271]

One commenter stated that the ''Tenor'' data field should allow parties to report using a tenor ladder, rather than the month and year, to protect the anonymity of the parties.[272] However, another commenter suggested that tenor should be reported according to the current market convention for a particular swap instrument.[273] Another commenter suggested a contrary approach: Because the tenor of a swap is a primary economic term, the specific tenor of the swap should be reported.[274]

Many commenters questioned how the Commission intended to enforce the provisions of proposed § 43,2(e)(2).[275] Several commenters believed the proposed standard lacked clarity in terms of its application and requested additional guidance.[276] These commenters noted that the Proposing Release placed the burden to provide the requisite description of the swap on the reporting party and requested that the Commission adopt explicit guidelines as to what data should (and should not) be reported to an SDR for purposes of public dissemination. Several other commenters believed that the confidentiality provisions of proposed § 43.2(e)—which includes the rounding convention and notional cap—would not adequately protect the counterparties, particularly when at least one party to the swap was an end-user or when there was an illiquid market for the swap.[277]

Consistent with its statutory mandate, the Commission is requiring real-time reporting that will enhance price discovery while ensuring the anonymity of the swap counterparties and the confidentiality of business transactions and market positions. The Commission agrees that the Proposing Release did not provide sufficient certainty as to what data was required to be reported by the reporting party to the swap. Accordingly, in adopting § 43.4(d), the Commission is not requiring the reporting party, SEF or DCM, to apply the ''general enough but specific enough'' standard in proposed § 43.4(e)(2). Rather, § 43.4(d)(2) requires that the actual underlying asset be reported and publicly disseminated for all swaps in the interest rate, credit, foreign exchange and equity asset classes (''financial swaps'') and for those swaps described in § 43.4(d)(4) with respect to the ''other commodity'' asset class.

As discussed above, one commenter urged that the final rule make clear that publicly disseminated data cannot identify the participants to the swap or information specific to the participants. The Commission believes that proposed § 43.4(e)(1) adequately addresses this concern. Accordingly, § 43.4(d)(1) incorporates the rule text of proposed

[261] *See* CL–ATA; and CL–Barclays.

[262] *See* CL–Dominion.

[263] *Id.* at 7.

[264] *See id.*

[265] *See* CL–Working Group of Commercial Energy Firms. As stated above in section II.A.1. (''Scope'') discussion, the Commission has determined that Section 2(a)(13)(C) requires all swaps to be publicly reported.

[266] *See* CL–Dominion.

[267] *See* CL–Coalition of Energy End-Users; CL–Working Group of Commercial Energy Firms.

[268] CL–Coalition of Derivatives End-Users at 8.

[269] *See id.*

[270] *See* CL–Working Group of Commercial Energy Firms. In the Proposing Release, the Commission asked about whether creditworthiness of counterparty should be publicly disseminated. Real-Time NPRM *supra* note 6, at 76158. *See also infra* discussion in section II.F. (''Appendix A to Part 43 (''Data Fields for Public Dissemination'')'').

[271] *Id.; See also* CL–Argus.

[272] ''[T]he trade data should be mapped to a tenor ladder for public dissemination with longer dated products mapping to one-year or two-year, for example, rather than specific month and year.'' CL–GFXD at 11.

[273] *See* CL–Working Group of Commercial Energy Firms. The commenter provided an example that because energy products tend to trade in seasonal strips except for short tenors, it may be beneficial to report seasonal strips rather than month for such transactions.

[274] *See* CL–ISDA/SIFMA. The commenter stated: ''The Commission requests comment on whether date information for swaps should be rounded to the nearest tenor/month. Many swaps meet specific requirements for end-users. To limit or manipulate data elements that are part of the Primary Economic Terms in order to allow trades with differing terms to be aggregated will reduce post trade transparency. We recommend that this proposal not be implemented.'' *Id.* at 15.

[275] *See* CL–ABC/CIEBA; CL–MFA; and CL–ISDA/SIFMA.

[276] *Id.*

[277] *See, e.g.,* CL–Dominion; CL–Encana; CL–FHLBanks; CL–Coalition for Derivatives End-Users; CL–Argus; and Meeting with NFPEEU (January 19, 2011).

§ 43.4(e)(1) with non-substantive clarifying changes.[278]

As adopted, § 43.4(d)(2) requires that reporting parties, SEFs and DCMs report the actual description of the underlying assets and tenor to the SDR.[279] The SDR must then publicly disseminate the swap transaction and pricing data related to the swap pursuant to appendix A to part 43. The SDR is responsible for applying the appropriate time delay, rounding convention, and notional cap prior to the public dissemination of the swap transaction and pricing data. Section 43.4(d) eliminates the need for the reporting party to report a generalized description of the underlying asset to the SDR. Further, the Commission anticipates that reporting parties will utilize the data connections that will be required to report regulatory data to an SDR, as described in proposed part 45, and that requiring additional fields may create confusion. However, although reporting parties may use the same data stream for reporting regulatory data and real-time data, § 43.4(d)(2) clarifies the intent of the Proposing Release: The reporting requirements for SEFs, DCMs and reporting parties for real-time reporting purposes are separate from the requirement to report to an SDR for regulatory reporting purposes.[280]

In response to commenters who contended that swaps involving end-users should be treated differently to protect anonymity, the Commission acknowledges that end-users may enter bespoke or customized swaps more often than non-end-users. The Commission nonetheless believes it is unnecessary to differentiate by swap counterparties in promulgating a rule to protect anonymity.[281] Rather, as explained below, it is more appropriate to focus on the asset class, the liquidity of certain types of swaps and the execution venue (*i.e.,* SEF, DCM, off-facility) in determining whether a specific description of the underlying asset should be publicly disseminated.[282] In response to commenters who claimed that the public dissemination of swap transaction and pricing data for certain swaps entered into by end-users serves no price discovery function, the Commission disagrees; there is price discovery value in publicly disseminating all arm's-length transactions. Publicly disseminating such data will provide market participants and the public with a clearer understanding of the depth of a particular market, the frequency of trading in the market and the pricing of transactions with the same or similar underlying assets.

With respect to financial swaps, the Commission has considered comments and discussions with market participants, and does not believe that disclosure of information relating to the underlying asset, reference price or index will compromise anonymity. Financial swaps do not have underlying assets with specific delivery or pricing points (such as swaps with underlying physical commodities). Further, the liquidity to hedge such financial swaps, either in the swaps markets or in alternative markets (*i.e.,* futures, cash markets, etc.), reduces concerns that the public dissemination of such swap transaction and pricing data pursuant to part 43 will reveal specific information about market participants.

One commenter asserted that the public dissemination of an interest rate swap in connection with a bond issuance could identify the end-user to the swap.[283] This commenter contended that because bond issuances are a matter of public record, real-time reporting would enable market participants to identify the end-user to the swap by matching the terms of the swap with the bond issuance that is being hedged. In the circumstance described by the commenter, the hedge of interest rate risk after a bond issuance is a routine transaction that market participants expect. The Commission believes that there is sufficient liquidity in the interest rate, credit, equity and foreign exchange asset classes to protect the anonymity of market participants in such asset classes. Further, in the Commission's view, the rounding convention and notional caps provided in §§ 43.4(g) and (h) will help to protect the counterparties' identities, business transactions and market positions for all swaps, regardless of asset class. Therefore, the Commission believes that the public dissemination of the full information relating to financial swaps, such as swaps executed in connection with a bond issuance, will enhance price discovery and will not compromise the anonymity of market participants.

Accordingly, § 43.4(d)(3), as adopted, requires that the actual underlying asset and tenor be publicly disseminated for all swaps in the interest rate, credit, foreign exchange and equity asset classes, regardless of whether a swap is executed on or pursuant to the rules of a SEF or DCM or is an off-facility swap. The rounding convention and notional caps provide sufficient protection to ensure the anonymity of the identities, business transactions and market positions of market participants with respect to financial swaps.

Some commenters asserted that to protect the identities of the counterparties, the actual tenor of the swap should not be publicly disseminated (*i.e.,* use of a tenor ladder or use of current market convention). The Commission has considered the implications of publicly disseminating the various data fields on disclosing the anonymity, business transactions and market positions of swap counterparties. As further explained in the discussion of appendix A to part 43, the Commission is clarifying the data fields in order to protect the identities, business transactions and market positions of market participants while enhancing price discovery to market participants and the public. The Commission agrees with the commenter who stated that the tenor of a financial swap is a primary economic term of the swap. Because the tenor is material to the pricing of a swap, the Commission is requiring that the actual tenor for all swaps be publicly disseminated.[284]

The Commission agrees that there are bespoke, off-facility transactions in which the underlying asset is a physical commodity; these transactions carry a significantly increased likelihood that the public dissemination of the underlying asset may disclose the identity, business transactions or market positions of a counterparty. Several commenters focused on the lack of liquidity in certain ''other commodity'' markets, expressing the view that the public dissemination of the underlying asset or delivery point would reveal information about market participants.

[278] Due to the deletion of proposed § 43.4(d), the anonymity provisions in proposed § 43.4(e) are being moved to final § 43.4(d). Final § 43.4(d)(1) states that ''[s]wap transaction and pricing data that is publicly disseminated in real-time may not disclose the identities of the parties to the swap or otherwise facilitate the identification of a party to a swap. A registered swap data repository that accepts and publicly disseminates swap transaction and pricing data in real-time may not publicly disseminate such data in a manner that discloses or otherwise facilitates the identification of a party to a swap.''

[279] Sections 43.4(d)(2)–(4) replace proposed § 43.4(e)(2).

[280] Certain clarifying language was added to the provision found in proposed § 43.4(e)(2).

[281] Further, the statute requires that all swaps, including bespoke swaps, be publicly disseminated so long as the identity, business transactions and market positions of the parties to the swap are not disclosed. *See* CEA sections 2(a)(13)(C) and 2(a)(13)(E)(i).

[282] In determining the appropriate time delay, the Commission also focuses on asset class and place of execution.

[283] *See* CL–Coalition for Derivatives End-Users.

[284] *See infra* discussion in section II.F. (''Appendix A to Part 43 (''Data Fields for Public Dissemination'')'').

Commenters' concerns about illiquid swaps in the ''other commodity'' asset class may be valid; however, the Commission believes that for certain bilateral ''other commodity'' swaps, adequate liquidity exists such that the counterparty's identity, business transactions and market positions will not be disclosed by the public dissemination of such swap transaction and pricing data.[285]

As discussed above, commenters recommended phasing in public reporting and dissemination based on liquidity, and the Commission agrees that, given the anonymity concerns, such an approach is appropriate. The Commission is phasing in the public dissemination requirements for ''other commodity'' swaps, as discussed directly below.

As adopted, §§ 43.4(d)(4)(ii)(A) and (B) provide that for any publicly reportable swap transaction in the ''other commodity'' asset class that references any of the 28 ''Enumerated Physical Commodity Contracts'' including ''other commodity'' swaps that are economically-related to such contracts,[286] the actual underlying physical commodity or referenced price or index must be publicly disseminated by the SDR, regardless of execution method. Additionally, the Commission believes that the public dissemination of any swap that references Brent Crude Oil (ICE) (and any swaps that are economically-related thereto) must reference the actual underlying asset, regardless of execution method.

The 28 Enumerated Physical Commodity Contracts have been identified by the Commission as (i) having high levels of open interest and significant cash flow; and (ii) serving as a reference price for a significant number of cash market transactions.[287] These 28 Enumerated Physical Commodity Contracts are identical to those that will have federally-administered limits imposed on them by the Commission's part 151 rules (Position Limits) generally covering contracts based on the agricultural, metals and energy commodities. Additionally, using the same criteria enumerated above, the Commission is requiring that any swap that references Brent Crude Oil (ICE), or economically-related to Brent Crude Oil (ICE), be reported and publicly disseminated by an SDR.[288] The Commission has determined that these contracts and economically related contracts have sufficient liquidity to ensure that the public dissemination of swap transaction and pricing data for swaps based on these reference assets poses little risk of disclosing identities of parties, business transactions or market positions.

Appendix B to part 43 (''Enumerated Physical Commodity Contracts and Other Contracts'') lists the 28 Enumerated Physical Commodity Contracts and Other Contracts (*i.e.,* Brent Crude Oil (ICE)) for which the actual underlying asset must be publicly disseminated. For the purposes of part 43, swaps are economically related, as described in § 43.4(d)(4)(ii)(B), if such contract utilizes as its sole floating reference price the prices generated directly or indirectly[289] from the price of a single contract described in appendix B to part 43.

For all off-facility swaps that reference an underlying asset(s) in the ''other commodity'' asset class which are not listed on appendix B to part 43, the Commission intends to propose special accommodations for the public dissemination of transaction and pricing data in a future Commission release to be published for comment in the **Federal Register**. Until such time as the Commission adopts these special accommodations, those off-facility swaps not listed in appendix B to part 43 will not be required to comply with the real-time reporting and public dissemination requirements under this part. However, such swaps will be subject to the regulatory reporting requirements, described in proposed part 45, when adopted.[290] The Commission believes that the phasing in of these illiquid, off-facility swaps in the ''other commodity'' asset class addresses commenters' concerns that public dissemination of such information would disclose the identities of the parties, market positions or business transactions.[291]

The Commission is not persuaded by commenters' concerns that public disclosure of ''other commodity'' swaps executed on or pursuant to the rules of a SEF or DCM could disclose the identities of the parties. Parties will execute swaps on or pursuant to the rules of a SEF or DCM because either (i) the swap is subject to the trade execution mandate of CEA section 2(h)(8) and therefore must be traded on a SEF or DCM; or (ii) the swap is not subject to the trade execution mandate but the parties voluntarily execute the swap on or pursuant to the rules of a SEF or DCM.[292] When counterparties voluntarily execute on or pursuant to the rules of a SEF or DCM, the parties' choice to execute such swap evidences their belief that the market is sufficiently liquid and has a sufficient number of participants that the identity of the parties cannot be reverse engineered; thus counterparties' business transactions or market positions would not be discernible.[293]

[285] Additionally, one commenter urged that the fact that a swap may be cleared is not determinative of whether a swap is trading in an ''illiquid'' market. *See* CL–MS. The Commission believes that the interim time delays described in § 43.5(c) adequately address this commenter's concerns, and the Commission intends to further address this comment in the block trade re-proposal.

[286] Similar contracts are described in the Position Limits final rulemaking. *See* 76 FR 71626 (final rule available at *http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2011-28809a.pdf,* last visited Nov. 30, 2011).

[287] The 28 Enumerated Physical Commodity Contracts are: ICE Futures U.S. Cocoa, ICE Futures U.S. Coffee C, Chicago Board of Trade Corn, ICE Futures U.S. Cotton No. 2, ICE Futures U.S. FCOJ–A, Chicago Mercantile Exchange Live Cattle, Chicago Board of Trade Oats, Chicago Board of Trade Rough Rice, Chicago Board of Trade Soybeans, Chicago Board of Trade Soybean Meal, Chicago Board of Trade Soybean Oil, ICE Futures U.S. Sugar No. 11, ICE Futures U.S. Sugar No. 16, Chicago Board of Trade Wheat, Minneapolis Grain Exchange Hard Red Spring Wheat, Kansas City Board of Trade Hard Winter Wheat, Chicago Mercantile Exchange Class III Milk, Chicago Mercantile Exchange Feeder Cattle, Chicago Mercantile Exchange Lean Hogs, Commodity Exchange, Inc. Copper, New York Mercantile Exchange Palladium, New York Mercantile Exchange Platinum, Commodity Exchange, Inc. Gold, Commodity Exchange, Inc. Silver, New York Mercantile Exchange Light Sweet Crude Oil, New York Mercantile Exchange New York Harbor Gasoline Blendstock, New York Mercantile Exchange Henry Hub Natural Gas, New York Mercantile Exchange New York Harbor Heating Oil.

[288] The 28 Enumerated Physical Commodity Contracts are traded on U.S. DCMs, while Brent Crude Oil (ICE) futures contracts are primarily traded in Europe. Nonetheless, Commission has determined that swaps that utilize a reference price based on Brent Crude Oil (ICE) futures have sufficient trading activity such that public dissemination of the actual underlying asset would not disclose the identities of counterparties or the business transactions and market positions of any person.

[289] An ''indirect'' price link to an Enumerated Physical Commodity Contract or an Other Contract described in appendix B to part 43 includes situations where the swap reference price is linked to prices of a cash-settled contract described in appendix B to part 43 that itself is cash-settled based on a physical-delivery settlement price to such contract.

[290] *See* 75 FR 76574.

[291] As one commenter noted: ''A strict set of real-time reporting rules could apply to all ''benchmark'' instruments that have significant price-discovery functions, while non-benchmark instruments could fall under a different set of real-time reporting requirements. In so doing, the Commission would achieve the majority of the price-discovery benefits without the danger of damaging the market structure for the non-benchmark transactions that do not have a meaningful price discovery function.'' CL–Coalition for Derivatives End-Users at 4.

[292] The Commission notes that a swap which is voluntarily executed on or pursuant the rules of a SEF or DCM may or may not be cleared at a DCO.

[293] To the extent that counterparties avail themselves to the rules of a SEF or DCM, they will typically choose to do for the purpose of taking advantage of the liquidity of the SEF or DCM.

The Commission believes that by voluntarily executing a swap on a SEF or DCM, the swap counterparties are already consenting to price transparency, regardless of the manner in which such transaction is executed. If the parties believed that their identities, market positions and business transactions could be exposed, they may choose to enter into an off-facility swap. Accordingly, the Commission is adopting § 43.4(d)(4)(ii)(C) which requires that the actual underlying physical commodity or referenced price or index must be publicly disseminated by an SDR for any swap that is executed on or pursuant to the rules of a SEF or DCM.[294]

The Commission's Proposing Release did not address the manner in which a basis swap should be publicly disseminated and the Commission received no comments addressing the issue. Basis swaps are swaps that are cash-settled based on the difference in pricing of the same (or substantially the same) commodity at different delivery points. Since the parties to a basis swap price the difference between the same (or substantially the same) commodity in two different locations and not the underlying commodity itself, the Commission has not yet determined how such swaps that reference commodities with specific delivery points should be publicly disseminated. Accordingly, for this initial phase in period, the Commission is not requiring the public dissemination of basis swaps when such swap is not executed on or pursuant to the rules of a SEF or DCM and when at least one leg is not based on one of the 28 Enumerated Physical Commodity Contracts or Other Contracts listed in appendix B to part 43.

The Commission agrees that the Proposing Release did not provide adequate certainty as to the reporting requirements applicable to the reporting party to the swap. Accordingly, as described above, § 43.4 does not require the reporting party to a swap or a SEF or DCM to apply a standard which would ensure that transaction data would remain anonymous. Section 43.4(d)(2) provides that for all swaps, the reporting party must report the actual underlying asset and tenor to an SDR. The SDR is responsible for applying the appropriate time delay, rounding convention and notional cap prior to the public dissemination of the swap transaction and pricing data. Furthermore, if the underlying asset of the swap reported is an ''other commodity'' which does not reference one of the Enumerated Physical Commodity Contracts or Other Contracts described in appendix B to part 43, and is not economically related to one of the 28 Enumerated Physical Commodity Contracts or Other Contracts, the SDR which receives such data shall not publicly disseminate such swap's transaction and pricing data at this time.

6. Unique Product Identifier (§ 43.4(e))

Proposed § 43.4(f) provided that if a unique product identifier is developed that sufficiently describes one or more data fields as set forth in appendix A to part 43, then the unique product identifier may be used in lieu of the data fields that it describes. An SDR could determine whether to publicly disseminate the UPI and may ask reporting parties, SEFs and DCMs to provide the UPI as part of the swap transaction and pricing data that must be reported to the SDR for public dissemination.

Several commenters questioned this provision. One commenter stated that multiple unique identifiers could be assigned by different regulators to the same financial entity for the products traded by such entity, unnecessarily creating compliance burdens, operational difficulties, and opportunities for confusion.[295] Another contended that any rule regarding product identifiers should require that they be made available on a ''commercially reasonable basis.''[296] Yet another stated that unique product identifiers should be in place before real-time public reporting begins.[297] The commenter argued that it would be expensive to begin real-time public reporting without unique product identifiers and then have to change systems to account for new unique product identifiers.

The Commission acknowledges that multiple unique identifiers could be assigned by different regulators to the same financial entity but notes as well that the industry, the Commission and prudential regulators are currently working to develop unique product identifiers for the industry.[298] The Commission continues to work with other regulators and market participants to provide support during the development process for unique product identifiers. However, discussion of the assignment process for unique product identifiers is outside the scope of this rulemaking and the Commission does not find it appropriate to make compliance with the part 43 rules contingent upon the existence of unique product identifiers.

For the reasons discussed above, the Commission has determined that no substantial modifications are necessary to proposed § 43.4(f). The Commission has made only technical and conforming changes to § 43.4(f). For example, the section was renumbered as § 43.4(e), and the ''43'' was inserted after ''of this part.''

7. Reporting of Notional or Principal Amounts to a Registered Swap Data Repository (§ 43.4(f))

The information related to the ''price-forming continuation data'' that must be publicly disseminated is included in the definition for ''publicly reportable swap transaction.'' Accordingly, because such provision is redundant, the Commission is not adopting proposed § 43.4(g).

8. Public Dissemination of Rounded Notional or Principal Amounts (§ 43.4(g))

Proposed § 43.4(i) established a rounding convention for the public dissemination of all swaps, as follows:

> The notional or principal amount data fields described in appendix A to this part shall be publicly disseminated as follows:
> (1) If the notional or principal amount is less than 1 million, round to nearest 100 thousand;
> (2) If the notional or principal amount is less than 50 million but greater than 1 million, round to the nearest million;
> (3) If the notional or principal amount is less than 100 million but greater than 50 million, round to nearest 5 million;
> (4) If the notional or principal amount is less than 250 million but greater than 100 million, round to the nearest 10 million;
> (5) If the notional or principal amount is greater than 250 million, round to ''250+.

Several commenters supported the rounding convention as an effective way to protect the anonymity of swap counterparties and recognized that rounding would provide a degree of protection against the front-running of larger transactions.[299] Some commenters contended that because markets vary, so too should the

[294] Section 43.4(d)(4)(ii)(C) includes the public dissemination of the actual underlying physical commodity or referenced price or index for all swaps executed on a SEF or DCM, not just those that are made available for trading, and any block trades executed pursuant to the rules of a SEF or DCM.

[295] *See* CL–ICI.

[296] *See* CL–MarkitSERV.

[297] *See* Meeting with Credit Suisse (April 15, 2011).

[298] The Technology Advisory Committee Subcommittee on Data Standards is one such group that is working to develop unique product identifiers.

[299] *See* CL–Coalition for Derivatives End-Users; CL–WMBAA; and CL–MFA.

rounding convention and notional caps in order to account for the differences in trade sizes and liquidities in different markets.[300] These commenters asserted that these considerations would ensure that material information is not disclosed.[301]

One commenter supported the use of a rounding convention but did not believe the Proposing Release considered the particularity of specific categories of swaps.[302] The commenter suggested that the Commission adopt a more nuanced and granular rounding convention that recognizes that various categories of swaps and their markets.[303] Another commenter argued that the Proposing Release's perceived failure to consider the liquidity, type and tenor of swaps would lead to increased costs for market participants who transact in bespoke swaps in illiquid markets.[304] This commenter further stated that SDs' concerns about the front-running of large transactions would cause them to include an additional premium in their swaps pricing, which ultimately would lead to increased costs of hedging in illiquid markets, and that such costs would, in turn, be passed on to end-users. In contrast, one commenter argued that a rounding convention should not be used and that the notional or principal amounts for all swaps should be publicly disseminated.[305]

The Commission believes that the actual notional or principal amount should be reported to an SDR by reporting parties, SEFs and DCMs. Accordingly, the Commission is adopting § 43.4(f), to assign responsibilities to reporting parties, SEFs and DCMs for reporting the notional or principal amount of a swap to an SDR. As adopted, § 43.4(f)(1) and (2) are similar to the provisions in proposed § 43.4(h)(1) and (2); however, certain conforming and clarifying changes have been made to these rules in light of changes to other provisions of the part 43 regulations.[306]

The Commission agrees that the rounding convention should be more nuanced to take into account the various types of swaps in different asset classes. However, the Commission does not believe it is necessary to have a different rounding convention for each asset class and sub-asset class. Rather, as explained below, the Commission is adopting different notional caps based on asset class as defined in § 43.2 and is separating the notional caps from the rounding convention.[307] The rounding convention is intended to protect the anonymity of swap counterparties. In addition, the rounding convention, combined with the notional caps discussed below and adopted in § 43.4(h), will inhibit parties who may seek to front-run a swap transaction, especially for large swap transactions.

The Commission does not believe the actual notional or principal amounts should be publicly disseminated. The public dissemination of the exact notional or principal amount presents a risk that confidential information would be disclosed in violation of CEA section 2(a)(13). In the Adopting Release, the Commission has revised its proposed rounding convention to adopt a more granular rounding convention in § 43.4(g). This rounding convention will apply to all swaps and should be read in conjunction with the notional caps provided in § 43.4(h), which are asset class specific.[308] The Commission believes that even with the rounding convention, price discovery will be enhanced, as market participants and the public will gain an understanding of the sizes of swaps in particular asset classes while the identities of the parties, market positions and business transactions are protected.

9. Public Dissemination Caps on Notional or Principal Amounts (§ 43.4(h))

Proposed § 43.4(h)(2)(i) established a cap on the public dissemination of notional or principal amounts that were embedded in the proposed rounding convention. The notional caps in the Proposing Release provided that, for all swaps, regardless of asset class or place of execution, ''[i]f the notional or principal amount is greater than 250 million, round to '250+''' for public dissemination purposes.[309] The Commission proposed the notional cap to ensure the anonymity of the parties to a large swap and maintain the confidentiality of business transactions and market positions.

The majority of comments addressing notional caps supported their use. Many commenters suggested modifications to the Proposing Release based on the belief that notional caps should be more granular to account for the differences in tenor, asset class, types of swaps and liquidity of different markets.[310]

Many commenters criticized the proposed cap of $250 million as too high and contended that the Commission failed to consider market liquidity, duration and type of swap. One commenter stated that the notional cap was sufficient to permit the most liquid interest rate derivative products to be executed in very large sizes and to enable dealers to offset risk, confident that the market does not know the actual size of the transaction.[311] Another believed that the proposed notional cap unfairly disadvantaged the natural hedgers in the marketplace. These market participants may have specific portfolio needs that require trading swaps with longer tenors, which are less standardized and are more illiquid.[312]

Others suggested that the Commission set the notional cap at the

[300] *See* CL–WMBAA; CL–MFA; CL–MetLife; and CL–ISDA/SIFMA.

[301] *Id.* If market participants in an illiquid market know that a large swap has been executed, they may be able to identify at least one counterparty, as well as certain market positions or business transactions.

[302] *See* CL–Coalition for Derivatives End-Users.

[303] *Id.*

[304] *See* CL–ABC/CIEBA.

[305] *See* CL–Chris Barnard.

[306] Similarly, proposed part 45 requires that the actual notional or principal amount be reported for the purposes of regulatory reporting to registered swap data repositories.

[307] The term ''asset class'' is defined in § 43.2 and discussed in section II.B.2. (''Defined Terms'').

[308] Section 43.4(g) provides:

''Rounding of notional or principal amount. The notional or principal amount data fields, as described in appendix A to this part, shall be rounded as follows:

(1) If the notional or principal amount is less than 1,000, round to nearest five, but in no case shall a publicly disseminated notional or principal amount be less than five;

(2) If the notional or principal amount is less than 10 thousand but equal to or greater than 1 thousand, round to nearest 1 hundred;

(3) If the notional or principal amount is less than 100 thousand but equal to or greater than 10 thousand, round to nearest 1 thousand;

(4) If the notional or principal amount is less than 1 million but equal to or greater than 100 thousand, round to nearest 10 thousand;

(5) If the notional or principal amount is less than 100 million but equal to or greater than 1 million, round to the nearest 1 million;

(6) If the notional or principal amount is less than 500 million but equal to or greater than 100 million, round to the nearest 10 million;

(7) If the notional or principal amount is less than 1 billion but equal to or greater than 500 million, round to the nearest 50 million;

(8) If the notional or principal amount is less than 100 billion but equal to or greater than 1 billion, round to the nearest 1 billion;

(9) If the notional or principal amount is greater than 100 billion, round to the nearest 50 billion.''

[309] Real-Time NPRM *supra* note 6, at 76174.

[310] *See* CL–ABC/CIEBA. (''For instance, an interest rate swap with a 2 year duration may be highly liquid and thus the threshold of $250 million as the highest rounding threshold might be appropriate. However, an interest rate swap with a 35 year duration may be off-market and illiquid, and typical trades may be significantly less than $250 million, and as such, a lower rounding threshold would be appropriate.''). *Id.* at 9. *See also* CL–ISDA/SIFMA; CL–MetLife.

[311] *See* CL–Coalition of Derivatives End-Users.

[312] *See* CL–SIFMA AMG (''For instance, for a low duration, plain vanilla, highly liquid swap, $250 million as the highest rounding threshold might be appropriate. For a higher duration, less standardized and more illiquid swap, a large trade is typically significantly less than $250 million in notional amount, and a much lower rounding threshold would be appropriate.''). *Id.* at 5.

predetermined, appropriate minimum block trade size.[313] Several commenters agreed that the Commission should use FINRA's Trade Reporting and Compliance Engine (''TRACE'') framework to establish caps for public dissemination of the notional or principal amounts of swaps.[314] One commenter believed that a TRACE-like approach, whereby full trade information is provided to regulators and publicly disseminated within a size range, would sufficiently protect counterparty anonymity and preserve liquidity and price competition in the markets.[315] Another commenter opined that the use of a TRACE-type volume dissemination cap would ensure end-users have sufficient sources of liquidity.[316] Another wrote that if the Commission extended the TRACE masking framework to swaps, the masking thresholds for plain vanilla fixed-floating interest rate swaps would be: $8 Million for 2 year interest rate swaps; $3 million for 5 year interest rate swaps; and $1 million for 10-year and 30-year interest rate swaps.[317] However, this commenter recognized these notional caps were extremely low and suggested, as an alternative, that the Commission set the notional cap at the social size (as defined in proposed § 43.2(x)).[318]

One commenter recommended that the Commission create a tiered system for different categories of swaps.[319] This commenter suggested the following notional cap thresholds for interest rate swaps: $250 Million for swaps with 0–2 year tenors; $200 million for swaps with 2–5 year tenors; $100 million for swaps with 6–10 year tenors; $75 million for interest rate swaps with 11–20 year tenors; and $50 million for swaps with tenors over 20 years.[320] The commenter also suggested three to five year tenor buckets and differentiating between high yield and investment grade for credit index swaps.[321]

Another commenter advocated that notional amounts for commodity swaps be reported and disseminated by units of measure (*e.g.,* MMBtus for gas, MWh for power, etc.) rather than in dollar amounts.[322] This commenter asserted that the sizes of commodity trades are typically smaller than interest rate swap trades, and therefore the notional cap should be smaller to take into account this difference.[323]

One commenter suggested that the Commission could require end of day reporting of swap notional size to regulators until an appropriate minimum block size can be appropriately set, provided that all trades above a certain notional threshold would be reported as ''$X or above.'' This commenter recommended that the Commission revisit the threshold amounts periodically and that the effects on market liquidity be studied.[324]

Another commenter believed the Commission should set notional caps (embedded in the rounding convention) only after the Commission has had the opportunity to analyze data from an SDR.[325] Two commenters objected to the Commission's proposal to use notional caps on the ground that failure to report the actual notional or principal amount would result in underreporting and would fail to enhance price discovery.[326] Another, citing the substantial volume of trading in the FX markets, suggested that the Commission set a notional floor threshold of $1 million whereby all FX swaps which are smaller than the threshold would not be reported.[327]

A commenter stated that accurate aggregate trade volumes by instrument should be computed and disseminated by the end of the day, independent of the choice of masking threshold, and that un-masked trade-by-trade notional amounts should eventually be disseminated after the application of both the masking rule and timing delays in order to facilitate analysis of market trends by market participants and academics.[328]

The Commission agrees with many of the comments and has, for some asset classes, adjusted the notional caps to take into account the differences between various types of swaps.[329] In § 43.4(h), the Commission proposed notional caps for public dissemination purposes. The Commission agrees that a ''one-size-fits-all'' notional cap was inappropriate, and accordingly has established notional caps according to each asset class. Additionally, the Commission extracted the notional caps from the rounding convention and made it a stand-alone section in the final rule to provide the flexibility to adjust the notional caps—as the Commission may determine is appropriate or when an appropriate minimum block size is determined—without having to also change the rounding convention.

The notional caps provided in § 43.4(h) will apply until an appropriate minimum block size is established for a particular group of swaps. However, when an appropriate minimum block size is established for a particular asset class, the notional cap will be adjusted to align with the appropriate minimum block size.[330] The Commission also agrees with commenters that the appropriate minimum block size should have a direct relationship to the notional cap. The Commission believes that the notional cap for a publicly reportable swap transaction should never be less than the appropriate minimum block size for such swap.

The Commission has provided notional caps because it believes that market participants' anonymity should be protected during the period before appropriate minimum block trade sizes are established as well as after the establishment of appropriate minimum block sizes. The notional caps should be read in conjunction with the rounding convention of § 43.4(g) and the publicly reportable data fields provided in appendix A to part 43. The Commission believes that the notional caps, the rounding convention and the data fields required to be publicly disseminated will adequately protect counterparties' identities, business transactions and market positions. The Commission further believes that the public dissemination of the capped notional amount, as opposed to the actual notional or principal amount, will help to prevent front-running of very large trades. In turn, the Commission expects

[313] *See* CL–UBS; CL–SDMA; and CL–WMBAA.

[314] *See* Real-Time NPRM *supra* note 6, at 76161; CL–WMBAA.

[315] *See* CL–WMBAA.

[316] *See* CL–ISDA/SIFMA.

[317] *See* CL–JPM. The commenter calculated the suggested masking thresholds by ''computing how much market risk is represented by the TRACE masking thresholds and using those numbers to map the masking thresholds into other asset classes.'' *Id.* at 13. This commenter also suggested that the Commission should set masking levels near the level that represents the dividing line between retail and institutional trades.

[318] *Id.* In the Proposing Release, ''social size'' was defined to mean ''the greatest of the mode, median and mean transaction sizes for a particular swap contract or swap instrument, as commonly observed in the marketplace.'' Real-Time NPRM *supra* note 6, at 76172.

[319] *See* CL–PIMCO.

[320] *Id.*

[321] *See* Meeting with PIMCO (February 4, 2011).

[322] *See* CL–ISDA/SIFMA.

[323] *Id.*

[324] *See* CL–FIA/FSF/ISDA/SIFMA.

[325] *See* CL–ABC/CIEBA.

[326] *See* CL–Chris Barnard; CL–SDMA.

[327] *See* CL–GFXD.

[328] *See* CL–JPM.

[329] The Commission notes that many comments discussed ''block trades'' as being the only trades which would be able to avail themselves of the notional cap. The Commission did not intend the notional cap to be available only to swaps which would be considered ''block trades'' under the proposed rule, but rather intended that the notional cap be available to all swaps which were greater than a notional or principal amount of $250 MM.

[330] The Commission's block trade re-proposal will address the notional caps as they align with the appropriate minimum block sizes.

that the public dissemination of a notional cap for large trades will not adversely impact market liquidity because market participants will not have to exit the market over concerns that they will be unable to adequately offset their risk without being front run.[331]

The Commission has considered the specific examples and data provided by the commenters for interest rate swaps and agrees that interest rate swaps with different tenors should be provided with different notional caps. The differences take into account the fact that interest rate swaps with longer-dated tenors tend to have smaller notional amounts than those with shorter dated tenors. The difference in notional amounts between longer tenor interest rate swaps (*e.g.,* 30 year) and shorter dated interest rate swaps (*e.g.,* three months) can be attributed to the risk exposure that counterparties are willing to assume for such swaps. Because market participants are willing to assume larger notional sizes based on the duration-adjusted risk of the swap, large trade sizes are more frequently executed for interest rate swaps with a short tenor, as compared to those interest rate swaps with a longer tenor. Therefore, the Commission believes that the notional cap for short term interest rate swaps should be greater than the notional cap for interest rate swaps with longer tenors.

Accordingly, the Commission is providing the following ''interim'' notional caps until such time as an appropriate minimum block size is established. These notional caps are required to be applied by an SDR prior to the public dissemination of the swap transaction and pricing data.[332]

- For Short Term (0–2 year (including 2 year)) interest swaps: $250 MM;
- For Intermediate Term (2–10 year (including 10 year)) interest rate swaps: $100 MM; and
- For Long Term (Greater than 10 year): $75 MM.

For credit swaps (broad-based group or index), pursuant to § 43.4(h)(2), the Commission considered specific examples provided by the commenters in establishing the notional caps for credit index swaps. In the Commission's view, the proposed cap of $250 MM was too high as an interim cap for credit swaps. The Commission recognizes that while certain credit indices may trade at larger notional values than other indices, one cap for the asset class is appropriate for an interim notional cap. Accordingly, the Commission is setting the notional cap for all credit swaps (broad-based group or index) at $100 MM.

The Commission is retaining the $250 MM notional cap for both the equity (broad-based group or index) and FX asset classes. The Commission is confident that a $250 MM notional cap, along with the rounding convention discussed above, will sufficiently protect the anonymity, business transactions and market positions of the counterparties who engage in trades of a large size in these markets.[333]

The Commission agrees that the notional cap for commodity swaps should be lower than for other swaps and is setting the interim notional cap for ''other commodities'' at $25 MM. The Commission made this determination after reviewing block trade sizes for various commodities in the futures markets, exchange of futures for swaps (''EFS'') data on futures, and net position change data in futures.[334] The Commission believes that setting the interim notional cap at such a low notional or principal amount will allow traders entering into very large swaps in the various ''other commodity'' markets a sufficient opportunity to hedge a swap transaction in the market, and will protect the identities, business transactions and market positions of those counterparties who enter into large commodity swaps.

For the ''other commodity'' asset class, the Commission agrees that ''other commodity'' swaps are typically smaller than interest rate swaps. However, the Commission does not agree that it is appropriate to determine the notional cap according to units for each particular ''other commodity;'' such a rule is unnecessarily complicated and will lead to inconsistency across the various types of commodities and across all asset classes. Thus, the Commission believes that, at this time, the notional cap should be expressed as a dollar amount that will apply to all ''other commodities'' and not by different units of measurement (*e.g.,* barrels, MWh, etc.). The Commission anticipates that a determination of whether a swap is capped will depend on whether the price of the underlying commodity as multiplied by the number of units is above the notional cap. Further, the Commission anticipates that the publicly disseminated information for a particular underlying asset may be in units that are adjusted based on the $25 MM cap described below. For example, if crude oil is priced at $100 a barrel and two parties enter into a swap with a notional value of 260,000 barrels, the SDR may publicly disseminate ''$25 MM+'' or may publicly disseminate ''250,000 bbl+.''

E. Section 43.5—Time Delays for Public Dissemination of Swap Transaction and Pricing Data

CEA section 2(a)(13)(E)(iii) provides that, with respect to cleared swaps, the rule promulgated by the Commission shall contain provisions ''to specify the appropriate time delay for reporting large notional swap transactions (block trades) to the public.'' In exercising its authority under CEA section 2(a)(13)(B) to ''make swap transaction and pricing data available to the public in such form and at such times as the Commission determines appropriate to enhance price discovery,'' the Commission is authorized to prescribe rules reflecting those provisions in CEA section 2(a)(13)(E)(iii) for uncleared swap transactions described in CEA sections 2(a)(13)(C)(iii) and (iv). Consistent with the Commission's statutory obligations, proposed § 43.5(k)(1) specified that the time delay for the public dissemination of swap transaction and pricing data for a block trade or large notional swap shall commence at the time of execution of such block trade or large notional swap.[335]

Proposed § 43.5(k)(2) set the time delay for public reporting of standardized block trades and large notional swaps [336] at 15 minutes from the time of execution. The Proposing Release did not provide specific time delays for customized large notional off-facility swaps. Instead, proposed § 43.5(k)(3) provided that public dissemination of ''customized'' large notional swaps would be subject to a time delay that may be prescribed by the Commission. The Commission also noted in the preamble to the Proposing Release a presumption that large notional swaps in the equity, credit,

[331] Commenters' concerns about front running are substantially mitigated by the time delays for public dissemination. *See* Time Delays discussion and § 43.5.

[332] As discussed above, pursuant to § 43.3(f)(1) and (2), reporting parties, SEFs and DCMs are required to send the actual notional or principal amount of a publicly reportable swap transaction to a SDR. The SDR is then responsible for publicly disseminating the rounded (and capped, if applicable) amount.

[333] No commenters addressed this proposal with respect to notional caps for the equity and FX asset classes.

[334] *See* § 43.4(h)(5).

[335] Proposed § 43.2(l) defined the term ''large notional swap.'' This term has been modified in final § 43.2 to be called ''large notional off-facility swap.'' Accordingly, all references to ''large notional swap'' shall be interchangeable with the term ''large notional off-facility swap'' for the purposes of this final rule.

[336] For example, those swaps that fall under CEA section 2(a)(13)(C)(i) and (iv)—swaps subject to the mandatory clearing requirement or otherwise required to be cleared.

foreign exchange and interest rate asset classes (*i.e.,* financial swaps) would be subject to the same 15 minute time delay proposed for block trades. The Commission solicited comments addressing whether 15 minutes would be an appropriate time delay for large notional swaps in the ''other commodity'' asset class, but acknowledged that longer time delays for the ''other commodity'' asset class may be appropriate.[337]

Twenty-three commenters expressed the view that the time delays for publicly disseminating block trades and large notional off-facility swaps should be longer than those described in the Proposing Release. The commenters recommended several alternatives for various types of swaps. Specifically, commenters recommended a range of time delays for public dissemination of block trades and large notional off-facility swaps, including end-of-day, 24 hours, T+1, T+2 for large notional swaps,[338] a minimum of four hours and 180 days.[339] One commenter recommended beginning with a time delay for block trades of 75 minutes and then decreasing the time delay to between 15 minutes and 45 minutes.[340] The approach described by this commenter would be similar to the method for reducing time delays utilized by TRACE. The same commenter recommended that the time delay for large notional swaps should be at least 24 hours.[341] Five commenters advised the Commission to adopt tiered time delays based on average daily trading volume or appropriate minimum block size.[342] One recommended that the time delay should be set at the lesser of time it takes a dealer to cover its risk and 24 hours after execution.[343] Another commenter recommended that illiquid trades be allowed to report weekly; the same commenter recommended that the Commission conduct an exhaustive study of illiquid bilateral contracts before deciding on an appropriate time delay.[344]

A commenter recommended that the time delay for financial swaps should be one minute or, alternatively, that there should be no delay. This commenter argued that a time delay must be directly related to the market in which the block trade or large notional swap is executed.[345]

Several commenters cautioned that the Commission needs more data before it can set time delays for block trades and large notional swaps.[346] For example, one commenter noted that there is currently insufficient trading data available on which to base the determinations for block trades and public dissemination delays.[347] This commenter suggested waiting until SDRs have collected the relevant data for the Commission to analyze.

In its Proposing Release, the Commission solicited comments on the appropriate time delays for ''customized'' large notional swaps, particularly for commodity swaps with physical underlying assets. Several commenters stated that different markets should have different time delays for public dissemination of block trades and large notional swaps. Specifically, one commenter stated that time delays should be based on asset class, two commenters advised that longer time delays are appropriate for swaps with underlying physical risk (*e.g.,* large notional customized commodities trades); two commenters argued that reporting should be tailored for illiquid markets; and one commenter stated that time delays should be tailored within the foreign exchange asset class.[348] Another commenter stated that time delays should initially be based on current market practices.[349]

One commenter contended that time delays should not be based on the method of execution or market participant and that a 15 minute time delay is adequate.[350] This commenter expressed concern that the voice or hybrid systems would be allowed a longer delay over their electronic competitors and recommended that there be one universal time delay.

A commenter argued that smaller transactions in illiquid markets should be handled similarly to block trades with respect to time delay.[351] This commenter stated that, in illiquid markets, the notional or principal size of a swap may be lower and therefore may not qualify as a block trade or large notional swap. The commenter further explained that time delays for swaps with lower notional or principal amounts in illiquid markets may be just as important as the time delays for very large trades in more liquid markets.

Commenters addressed harmonization between the CFTC and SEC time delay provisions. Some of these commenters asserted that the failure to harmonize the two Commissions' rules could create arbitrage opportunities.[352] One commenter asserted that differences in market structure for swaps and SBS, particularly with regard to end-user participation in the commodity swap markets, should be reflected in the rules.[353]

After considering the comments discussed above, the Commission is adopting § 43.5 to address time delays for the public dissemination of swap data as described below. As adopted, § 43.5 incorporates the language from proposed § 43.5(k)(1) and replaces the language in proposed § 43.5(k)(2) and (3) in order to address commenters' concerns and recommendations and to clarify the time delays for public dissemination of real-time data in consideration of the type of market participant, method of execution and asset class. Additionally, § 43.5 adopts interim time delays for all swaps until such time as appropriate minimum block sizes are finalized in a forthcoming Commission release.

One commenter indicated that SEFs and DCMs should have the technological capability to electronically report the data fields described in proposed part 45.[354] To ensure consistency and reduce reporting costs to market participants, the Commission has coordinated the time delays in this rule with the timeframes for regulatory reporting in the proposed part 45 (''Swap Data Recordkeeping and

[337] The Commission asked specific questions regarding time delays for large notional off-facility swaps. *See* Real-Time NPRM *supra* note 6, at 76167.

[338] *See supra* note 97.

[339] *See* CL–BlackRock; CL–Coalition for Derivatives End-Users; CL–Chesapeake Energy; CL–PIMCO; CL–SIFMA AMG; CL–ATA; CL–Freddie Mac; CL–ICI; CL–Vanguard; CL–Working Group of Commercial Energy End-users; CL–MFA; CL–MetLife; CL–Fannie Mae; CL–Jackson; CL–Eris; and CL–Encana.

[340] *See* CL–FHLBanks.

[341] The Commission notes that although these commenters are suggesting time delays for block trades and large notional off-facility swaps, the Commission is not considering appropriate minimum block sizes in this Adopting Release.

[342] *See* CL–JPM; CL–WMBAA; CL–Barclays; CL–MetLife; and CL–GS.

[343] *See* CL–ATA.

[344] *See* CL–MS.

[345] *See* CL–Better Markets.

[346] *See, e.g.,* CL–JPM; CL–Barclays; CL–Coalition for Derivatives End-Users; CL–FHLBanks; CL–ISDA/SIFMA; CL–SIFMA AMG; CL–Freddie Mac; CL–GFXD; CL–ABC/CIEBA; CL–ATA; CL–Cleary; CL–ICI; and CL–MFA.

[347] *See* CL–SIFMA AMG.

[348] *See* CL–ATA; CL–Barclays; CL–MS; CL–GFXD; CL–ISDA/SIFMA; and CL–BlackRock.

[349] *See* CL–Committee on Capital Markets Regulation.

[350] *See* CL–SDMA.

[351] *See* CL–ATA.

[352] *See, e.g.,* CL–Tradeweb; CL–CME; CL–Markit.

[353] *See* CL–NFPEEU.

[354] *See* CL–Tradeweb. The Commission notes that, since the data that is being required to be publicly disseminated under part 43 and reported for regulatory purposes (as described in proposed part 45) are substantially similar, the ability for SEFs and DCMs to report the data fields required for regulatory purposes indicates that SEFs and DCMs should be able to report the data to an SDR that is required for public dissemination under part 43.

Reporting Requirements'') rules.[355] The Commission anticipates that reporting parties may use one data reporting stream for both regulatory and real-time reporting to reduce costs and optimize efficiency.[356] Accordingly, § 43.5, as adopted, harmonizes the time delays between the two regulatory requirements.

The Commission has added § 43.5(b) to clarify the SDR's responsibilities to publicly disseminate swap transaction and pricing data that is subject to a time delay. Section 43.5(b) provides that, with respect to any time delay that is associated with a particular swap, the SDR shall publicly disseminate the swap transaction and pricing data upon the precise expiration of the time delay specified in § 43.5 and as further described in appendix C to part 43 (''Time Delays for Public Dissemination''). The time delay period is measured from the time of execution of the swap transaction; in this regard, all publicly reportable swap transactions are required to have an execution timestamp. An SDR must hold the data for public dissemination for the precise amount of time specified in § 43.5, as measured from the execution timestamp.[357] For any publicly reportable swap transaction that is not subject to a time delay pursuant to § 43.5 or that is received by an SDR after a time delay has expired, such publicly reportable swap transactions shall be publicly disseminated by the SDR ''as soon as technologically practicable'' after the SDR receives the swap transaction and pricing data.

One commenter recommended that the Commission require end of day reporting of aggregate trade volumes in order to facilitate analysis of market trends by market participants and the academic community.[358] Several other commenters recommended that the Commission phase in the real-time public reporting of swap transaction and pricing data.[359] The Commission acknowledges the commenter's concern that certain swaps in illiquid markets may have small notional sizes, but may still need a time delay. In response, the Commission in adopting § 43.5(c) which provides interim time delays for all swaps, not just block trades and large notional off-facility swaps, but only to the extent that such swaps do not have an appropriate minimum block size.[360] As previously discussed, the Commission intends to address appropriate minimum block sizes in its block trade re-proposal. Accordingly, it is possible that compliance with part 43 may be required before the establishment of appropriate minimum block sizes for certain asset classes and/or groupings of swaps within an asset class. In order to address this situation, § 43.5(c) allows all swaps that do not have established appropriate minimum block sizes to utilize the time delays set forth in final § 43.5(d)–(h). As appropriate minimum block sizes are established for a particular category of swap, all swaps in such category that are below the appropriate minimum block size must be publicly disseminated ''as soon as technologically practicable'' after execution.[361] Those swaps that are at or above the appropriate minimum block size will continue to receive the time delays set forth in § 43.5(d)–(h).

In response to commenters' arguments that the time delays for public dissemination of block trades and large notional off-facility swaps should be longer than 15 minutes, the Commission is phasing in the time delays for public dissemination. The Commission recognizes that it may take time for SEFs, DCMs and SDRs to ensure that the appropriate technology is in place; and market participants may need some phase in time to modify trading strategies to accommodate the new real-time public reporting rules. Thus, the Commission believes that providing longer time delays for public dissemination during the first year or years of real-time reporting will enable market participants to perfect and develop technology and to adjust hedging and trading strategies in connection with the introduction post-trade transparency.[362]

As adopted, § 43.5(d) describes the time delays for the public dissemination of swap transaction and pricing data relating to block trades executed pursuant to the rules of a SEF or DCM. With respect to such swaps, the Commission is imposing an initial time delay of 30 minutes for the one year beginning on the compliance date[363] (''Year 1'') and a 15-minute delay beginning on the first anniversary of the compliance date. These time delays will be assigned to all block trades executed pursuant to the rules of a SEF or DCM regardless of asset class or whether such trade was made available for trading on the SEF or DCM. The Commission believes that SEFs and DCMs will have the technology available to ensure compliance to report data to SDRs within the time delays for public dissemination described in this section.[364]

Further, until the Commission establishes an appropriate minimum block size for a swap or group of swaps, the time delays set forth in § 43.5(d) shall apply to all swaps executed on or pursuant to the rules of a SEF or DCM that do not have an appropriate minimum block size (including swaps that are not made available for trading on the SEF or DCM, but are executed on or pursuant to the rules of a SEF or DCM), so that all such swaps will be subject to a 30 minute time delay for public dissemination for Year 1 and a 15 minute time delay beginning on the first anniversary of the compliance date, as described in § 43.5(c)(2). When an appropriate minimum block size is set for a swap or group of swaps, and such swap is executed on or pursuant to the rules of a SEF or DCM, swap transactions that fall below the appropriate minimum block size are required to be publicly disseminated ''as soon as technologically practicable'' and only block trades would be subject to a 30- or 15-minute time delay.[365] The

[355] *See* 75 FR 76574.

[356] However, the Commission notes that although the same data stream for reporting may be utilized by reporting parties, SEFs and DCMs, real-time data for public dissemination and regulatory data required to be sent to an SDR are viewed as separate regulatory requirements.

[357] Appendix A to part 43 describes the ''execution timestamp'' requirement for public dissemination. See discussion, *infra.*

[358] *See* CL–JPM.

[359] *See* comments relating to Implementation and Phase in discussed in section IV (''Effectiveness/Implementation and Interim Period'') below.

[360] In addition to the initial temporary time delays for all swaps without appropriate minimum block sizes, as provided in final § 43.5(c), § 43.4(g) and (h) provide a rounding convention and caps on the public dissemination of notional or principal amounts to be applied to all swaps in order to help protect counterparties' anonymity and the parties' ability to hedge very large transactions. See discussion above.

[361] The Commission recognizes that the establishment of appropriate minimum block sizes may be an ongoing process. Swaps that do not have appropriate minimum block sizes would continue to receive time delays pursuant to § 43.5(c), however once a swap has an appropriate minimum block size, only block trades and large notional off-facility swaps will receive the time delays § 43.5.

[362] TRACE, which introduced post-trade transparency into the corporate bond market, followed a similar approach by reducing the amount of time delay for public dissemination over time. *See* CL–JPM.

[363] Compliance dates are described below in section III (''Effectiveness/Implementation and Interim Period'').

[364] *See* CL–Tradeweb.

[365] To the extent that an appropriate minimum block trade size is established after the compliance date of the rule, the time delays for the block trades (and large notional off-facility swaps, as described immediately below) would be reduced after the one year period expires. For example, if the compliance date for an interest rate swap is July 1, 2012 and an appropriate minimum block size for interest rate swaps is effective on September 15, 2012, from June

Continued

Commission believes that parties that choose to execute on or pursuant to the rules of a SEF or DCM consent to such price transparency;[366] therefore shorter time delays for public dissemination (*i.e.*, post-trade transparency) are appropriate as compared to certain off-facility swaps.

The Commission agrees that swaps in less liquid markets, as well as large notional off-facility swaps, may be subject to longer time delays, while shorter time delays are appropriate for swaps in more liquid markets. Swaps in the ''other commodity'' asset class and swaps in which non-SDs/non-MSPs are counterparties tend to be less liquid (particularly when such parties are end-users) and may require additional time to offset risk. The Commission also believes that large notional off-facility swaps that are subject to the mandatory clearing requirement (*i.e.*, swaps that are not executed on or pursuant to the rules of a SEF or DCM but are required to be cleared pursuant to CEA section 2(h)(1) and Commission action) will tend to be more liquid than other large notional off-facility swaps.[367]

For large notional off-facility swaps subject to the mandatory clearing requirement, the Commission believes that a distinction should be made between different classes of reporting parties for the purposes of time delays for public dissemination.[368] Large notional off-facility swaps that are subject to mandatory clearing and that have at least one SD or MSP as a counterparty, should have the same time delays as block trades executed pursuant to the rules of a SEF or DCM. The Commission believes that SDs and MSPs will have the ability to report real-time data to SDRs within the time delay periods. Further, the Commission believes that a difference in the time delay between swaps executed off-facility that are subject to the mandatory clearing requirement and those executed on or pursuant to the rules a SEF or DCM could discourage SDs and MSPs from executing such swaps on or pursuant to the rules of a trading platform, which would inhibit the enhancement of price discovery.

As adopted, § 43.5(e) provides time delays for large notional off-facility swaps that are subject to the mandatory clearing requirement. Section 43.5(e)(1) provides that the time delays in § 43.5(e) do not apply to (i) off-facility swaps that are excepted from the mandatory clearing requirement in accordance with CEA section 2(h)(7) and the Commission's regulations; and (ii) those swaps that are subject to the clearing mandate under CEA section 2(h)(2) but which are not cleared.[369] The swaps that are not covered by § 43.5(e) are subject to the longer time delays described in final § 43.5(f)–(h).

Section 43.5(e)(2) applies to large notional off-facility swaps that are subject to the mandatory clearing requirement, in which at least one party to such swap is an SD or MSP. Real-time data relating to such swaps shall be subject to a time delay for public dissemination of 30 minutes for the first year beginning on the compliance date. Section 43.5(e)(2)(B) specifies that the time delay shall be reduced to 15 minutes beginning on the first anniversary of the compliance date of part 43. These time delays correspond to the time delays established in § 43.5(d) for block trades. The Commission believes that SDs and MSPs will have the technology to ensure these swaps are reported to an SDR prior to the expiration of the time delays for public dissemination.[370]

With respect to large notional off-facility swaps subject to the clearing mandate in which neither party is an SD or MSP, such swaps will receive a longer time delay for public dissemination than those swaps in which an SD or MSP is a counterparty. The Commission believes that reporting parties that are not SDs or MSPs and that do not invoke the end-user exception pursuant to CEA section 2(h)(7) and Commission regulations,[371] may not have the same level of infrastructure or reporting technology as SDs and MSPs. Large notional off-facility swaps that are subject to the mandatory clearing requirement will tend to be liquid and generally should be reported sooner than those not subject to the mandatory clearing requirement. Making such swap transaction and pricing data available to market participants quickly and efficiently will enhance price discovery in these markets, while the longer time delays for public dissemination in less liquid markets will provide market participants with a longer period in which to hedge the risk associated with their liquid large notional off-facility swaps.

Accordingly, § 43.5(e)(3), as adopted, provides longer time delays for large notional off-facility swaps that are subject to mandatory clearing and in which neither party is an SD or MSP. Specifically, § 43.5(e)(3)(A) provides that for Year 1, which begins on the compliance date, such large notional off-facility swaps shall be subject to a four hour time delay from the time of execution to the time of public dissemination by the SDR. Section 43.5(e)(3)(B) provides that beginning on the first anniversary of the compliance date of part 43 and for the year following (''Year 2''), the time delay for public dissemination will be reduced to two hours from the time of execution; § 43.5(e)(3)(C) provides that beginning on the second anniversary of the compliance date and thereafter, the time delay for large notional off-facility swaps will be reduced to one hour after execution.

Additionally, § 43.5(c)(3) provides that, until the Commission establishes an appropriate minimum block size for a particular swap or group of swaps, the time delays set forth in § 43.5(e) shall apply to publicly reportable swap transactions that do not have appropriate minimum block sizes, with respect to (i) off-facility swaps that are subject to the mandatory clearing requirement, excluding those off-facility swaps that are excepted from the mandatory clearing requirement pursuant to CEA section 2(h)(7); and (ii) those swaps that are determined to be required to be cleared under CEA

1, 2012—September 14, 2012, all swaps in the interest rate asset class would receive the time delays for ''Year 1.'' From September 15, 2012—June 30, 2013 only block trades and large notional off-facility swaps in the interest rate asset class will receive the time delays described under ''Year 1,'' while any swap in the interest rate asset class that is not a block trade or large notional off-facility swap must be reported and publicly disseminated ''as soon as technologically practicable.'' In this example, beginning on July 1, 2013 block trades and large notional off-facility swaps in interest rates will receive the time delay described for beginning on the first or second anniversary (depending on the type of execution and market participants) and non-block trades/non-large notional off-facility swaps in the interest rate asset class would be required to be reported and publicly disseminated ''as soon as technologically practicable'' after execution.

[366] The price transparency with respect to SEFs and DCMs may be in the form of pre-trade price transparency (depending on the execution method) and post-trade price transparency (through sharing swap execution data with those that have trading privileges on the SEF or DCM).

[367] Such large notional off-facility swaps will only be executed when there is an exception to the mandatory clearing requirement and to the trade execution mandate.

[368] Additionally, the Commission believes that off-facility swaps that are excepted from the mandatory clearing requirement pursuant to CEA section 2(h)(7) and those swaps that are determined to be required to be cleared under CEA section 2(h)(2) but are not cleared should not be included.

[369] The description of these two scenarios is derived from the language in CEA Section 2(a)(13)(C).

[370] Accordingly, the Commission has sought to substantially align the time delays for public dissemination with the timeframes for regulatory reporting.

[371] As mentioned above, § 43.5(e)(1) excludes such swaps from this category of time delays for public dissemination. § 43.5(e)(1) also excludes swaps that are required to be cleared under CEA section 2(h)(2) but are not cleared because no DCO is available to clear.

section 2(h)(2) but which are not cleared. Those off-facility swaps that are subject to (i) and (ii), immediately above, will follow the time delay set forth in § 43.5(e)(2) (*i.e.*, 30 minutes for the year beginning on the compliance date and 15 minutes beginning on the first anniversary of the compliance date). Those off-facility swaps that are subject to the mandatory clearing requirement in which neither party is an SD or MSP will follow the time delay set forth in § 43.5(e)(3) (*i.e.,* four hours for the year beginning on the compliance date, two hours for the year beginning on the first anniversary of the compliance date and one hour beginning on the second anniversary of the compliance date). Once an appropriate minimum block size is established for a particular swap or group of swaps, all swaps described in § 43.5(e) that are below the appropriate minimum block size shall be reported ''as soon as technologically practicable'' and only large notional off-facility swaps shall receive the time delays for public dissemination described in § 43.5(e).

The Proposing Release stated a presumption that the time delay for financial bilateral swaps would be shorter than the time delay for non-financial bilateral swaps. In this regard, two commenters asserted that commodity swaps should have longer time delays for public dissemination than swaps in other asset classes; one stated that financial swaps should have shorter time delays than ''other commodity'' swaps. The Commission agrees and believes that a distinction should be made between swaps that are in the interest rates, equity, credit and foreign exchange asset classes (*i.e.*, financial swaps) and swaps in the ''other commodity'' asset class, since such ''other commodity'' swaps generally have physical commodities as the underlying asset or reference price/index. The Commission believes a longer time delay for the ''other commodity'' swaps is necessary because (i) such swaps reference underlying physical commodities; and (ii) the hedging strategies for swaps in the ''other commodity'' asset class are generally more complex and may take longer than financial swaps (*e.g.,* interest rate swaps, which can be quickly hedged in the swaps, futures or treasury markets).

As adopted, § 43.5(f) provides the time delays for public dissemination of large notional off-facility swaps in the interest rate, credit, foreign exchange and equity asset classes, that are not subject to the mandatory clearing requirement (or are excepted from such requirement pursuant to CEA section 2(h)(7)), in which at least one party is an SD or MSP. Section 43.5(f)(1) provides that the time delay for such large notional off-facility swaps for Year 1 shall last for one hour following execution of such large notional off-facility swap. However, § 43.5(f)(1) includes a provision applicable to those large notional off-facility swaps in the interest rate, credit, foreign exchange and equity asset classes in which the non-SD/non-MSP counterparty is not a financial entity, as defined in CEA section 2(h)(7)(C) and Commission regulations.[372] Under this provision, for situations where real-time swap transaction and pricing data is received by the SDR later than one hour after the time of execution, the SDR must publicly disseminate such data ''as soon as technologically practicable'' after it receives such data. The purpose of this accommodation is to align the time delays for public dissemination with the timeframes provided in the regulatory reporting requirements in order to reduce reporting costs to market participants and to avoid inconsistencies between the reporting rules.[373]

Section 43.5(f)(2) establishes a time delay for public dissemination of such large notional off-facility swaps in the interest rate, credit, foreign exchange and equity asset classes of 30 minutes following the execution such swap for Year 2. Section 43.5(f)(2) provides the same accommodation for large notional off-facility swaps in the interest rate, credit, foreign exchange and equity asset classes in which the non-SD/non-MSP counterparty is not a financial entity, as defined in CEA section 2(h)(7)(C) and Commission regulations. Section 43.5(f)(3) states that beginning on the second anniversary of the compliance date, the time delay for public dissemination for all large notional off-facility swaps in the interest rate, credit, foreign exchange and equity asset classes in which at least one counterparty is an SD or MSP shall be 30 minutes, regardless of the status of any non-SD/non-MSP counterparty.

Section 43.5(c)(4) provides that until the Commission establishes an appropriate minimum block size for a particular swap or group of swaps, the time delays set forth in § 43.5(f) shall apply to publicly reportable swap transactions that do not have appropriate minimum block sizes, with respect to off-facility swaps in the interest rate, credit, foreign exchange and equity asset classes that are not subject to the mandatory clearing requirement, and in which at least one counterparty is an SD or MSP. These time delays shall be one hour for Year 1 and reduced to 30 minutes beginning on the first anniversary of the compliance date. However, those off-facility swaps in the interest rate, credit, foreign exchange and equity asset classes, in which the non-SD/non-MSP counterparty is not a financial entity as defined in CEA section 2(h)(7)(C) and Commission regulations, shall receive the same accommodation to the time delay for public dissemination for Year 1 and Year 2, as described in § 43.5(f)(1) and (2). Once an appropriate minimum block size is established for a particular swap or group of swaps, all swaps described in § 43.5(f) that are below the appropriate minimum block size shall be publicly disseminated ''as soon as technologically practicable'' and only large notional off-facility swaps shall receive the time delays for public dissemination described in § 43.5(f).

As previously noted, the Commission believes that large notional off-facility swaps in the ''other commodity'' asset class should receive longer time delays for public dissemination, as it may take longer to hedge such swap transactions involving physical underlying assets. The Commission believes that the

[372] CEA section 2(h)(7)(C)(i) provides the financial entity definition as it relates to Section 723 of the Dodd-Frank Act. Specifically, the definition states that for the purposes of paragraph 2(h), the term ''financial entity'' means: ''(I) a swap dealer; (II) a security-based swap dealer; (III) a major swap participant; (IV) a major security-based swap participant; (V) a commodity pool; (VI) a private fund as defined in section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80–b–2(a)); (VII) an employee benefit plan as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002); (VIII) a person predominantly engaged in activities that are in the business of banking, or in activities that are financial in nature, as defined in section 4(k) of the Bank Holding Company Act of 1956.'' Additionally, CEA section 2(h)(7)(C)(ii) provides exclusions to the definition by stating that ''the Commission shall consider whether to exempt small banks, savings associations, farm credit system institutions, and credit unions, including—(I) depository institutions with total assets of $10,000,000,000 or less; (II) farm credit system institutions with total assets of $10,000,000,000 or less; or credit unions with total assets of $10,000,000,000 or less.'' CEA section 2(h)(7)(C)(iii) further provides an important limitation to the definition of financial entity by stating that ''such definition 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.''

[373] Proposed part 45 recognizes that certain end-users may not have an ability to verify trade information electronically which may increase the time for the reporting party to verify the primary economic terms and real-time data and consequently, the time for the reporting party to report such data to an SDR pursuant to proposed part 45. *See* 75 FR 76574.

''other commodity'' asset class will likely have more non-SDs/non-MSPs that are excepted pursuant to CEA section 2(h)(7) (*i.e.*, non-financial end-users) than the other defined asset classes. Market participants and commenters have expressed concern about the ability to hedge physical commodity swaps and suggested that longer time delays may be appropriate for such swaps. Accordingly, in § 43.5(g), the Commission has established longer time delays for large notional off-facility swaps in the ''other commodity'' asset class.

Section 43.5(g) establishes the time delays for the public dissemination of large notional off-facility swaps in the ''other commodity'' asset class that are not subject to the mandatory clearing requirement (or are excepted from such requirement pursuant to CEA section 2(h)(7)), in which at least one party is an SD or MSP. Specifically, § 43.5(g)(1) provides that for Year 1, the time delay for public dissemination is four hours following the execution of the large notional off-facility swap. However, final § 43.5(g)(1) includes a provision similar to that in § 43.5(f)(1) and (2), for those large notional off-facility swaps in the ''other commodity'' asset class that are not subject to the mandatory clearing requirement and in which the non-SD/non-MSP counterparty is not a financial entity as defined in CEA section 2(h)(7)(C) and Commission regulations. For such swaps, where the real-time swap transaction and pricing data is received by the SDR more than four hours after execution, the SDR must publicly disseminate such data ''as soon as technologically practicable'' after it receives such data. As noted above with respect to § 43.5(f)(1) and (2), the purpose of the provision in § 43.5(g)(1) is to align the time delays for public dissemination with the timeframes for regulatory reporting in order to reduce reporting costs to market participants and to avoid inconsistencies between the reporting rules.

Section 43.5(g)(2) provides a two-hour time delay for the public dissemination of large notional off-facility swaps in the ''other commodity'' asset class, in which at least one party is an SD or MSP, for Year 2. Section 43.5(g)(2) provides a similar accommodation to § 43.5(f)(1) and (2) for large notional off-facility swaps in the ''other commodity'' asset class in which the non-SD/non-MSP counterparty is not a financial entity, as defined in CEA section 2(h)(7)(C) and Commission regulations. Section 43.5(g)(3) specifies that the time delay for public dissemination, beginning on the second anniversary of the compliance date, for all large notional off-facility swaps in the ''other commodity'' asset class, in which at least one counterparty is an SD or MSP, shall be two hours, regardless of the status of any non-SD/non-MSP counterparty.

Section 43.5(c)(5) additionally provides that until the Commission establishes an appropriate minimum block size for a particular swap or group of swaps, the time delays set forth in § 43.5(g) shall apply to publicly reportable swap transactions that do not have appropriate minimum block sizes, with respect to off-facility swaps in the ''other commodity'' asset class that are not subject to the mandatory clearing requirement and in which at least one counterparty is an SD or MSP. Specifically, the time delays shall be four hours for Year 1 and two hours beginning on the first anniversary of the compliance date. However, those off-facility swaps in the ''other commodity'' asset class in which the non-SD/non-MSP counterparty is not a financial entity, as defined in CEA section 2(h)(7)(C) and Commission regulations, shall receive the same accommodation to the time delay for public dissemination during Year 1 and Year 2, as described in § 43.5(g)(1) and (2). Once an appropriate minimum block size is established for a particular swap or group of swaps, all swaps described in § 43.5(g) that are below the appropriate minimum block size shall be reported ''as soon as technologically practicable'' and only large notional off-facility swaps shall receive the time delays for public dissemination described in § 43.5(g).

Several commenters recommended that end-user to end-user large notional swaps have longer time delays. The Commission agrees: Such swaps tend to be customized and the reporting party for such swaps may be less sophisticated and have less ability to leverage existing and new technology as compared to an SD or MSP. The longer time delays for public dissemination ensures consistency to allow the reporting party to mitigate reporting costs by sending real-time swap data at the same time that regulatory data is sent to an SDR.

Section 43.5(h) prescribes the time delay for the public dissemination of large notional off-facility swaps in which neither counterparty is an SD or MSP. Pursuant to § 43.5(h)(1), for Year 1, the time delay for public dissemination of swap transaction and pricing data for such swaps shall be 48 business hours after execution of the swap.[374] Pursuant to § 43.5(h)(2) the time delay for such swaps will reduce to 36 business hours for Year 2. Finally, pursuant to § 43.5(h)(3), beginning on the second anniversary of the compliance date for part 43, the time delay for such swaps will be 24 business hours.

Additionally, § 43.5(c)(6) provides that until the Commission establishes an appropriate minimum block size for a particular swap or group of swaps, the time delays set forth in § 43.5(h) shall apply to publicly reportable swap transactions that do not have appropriate minimum block sizes, with respect to off-facility swaps in which neither counterparty is an SD or MSP. Once an appropriate minimum block size is established for a particular swap or group of swaps, all swaps described in § 43.5(h) that are below the appropriate minimum block size shall be reported ''as soon as technologically practicable'' and only large notional off-facility swaps shall receive the time delays for public dissemination described in § 43.5(h).

With respect to the comment that 15 minutes is a sufficient time delay for all swaps, the Commission believes 15 minutes is a sufficient time delay for swaps executed on or pursuant to the rules of a SEF or DCM and those swaps subject to mandatory clearing in which at least one party is an SD or MSP. However, the Commission has determined to phase in time delays over a two year period and, consistent with comments received and in order to minimize implementation costs, has adopted § 43.5(d) and (e)(2). Further, as discussed above, the Commission believes that large notional off-facility swaps should be provided longer time delays based on market participant and asset class.

The Commission is also adopting § 43.5(c)(7), which provides that, upon the establishment of an appropriate minimum block size for a particular swap or category of swaps, all publicly reportable swap transactions that are below the appropriate minimum block size shall be publicly disseminated ''as soon as technologically practicable'' after execution pursuant to § 43.3. The Commission believes that § 43.5(c)(7) clarifies that, as an appropriate minimum block size becomes effective for a swap or group of swaps, registered entities, market participants and swap

[374] Section 43.2 defines ''business hours'' to mean consecutive hours during on one or more business days. Section 43.2 also defines ''Business day'' to mean the twenty-four hour day, on all days except Saturdays, Sundays and legal holidays, in the location of the reporting party or registered entity reporting data for the swap.

counterparties should anticipate that public dissemination of swap data for transactions below the appropriate minimum block size will occur significantly sooner (*i.e.,* ''as soon as technologically practicable'') following execution of a publicly reportable swap transaction.

With respect to the contention that shorter or no time delays are appropriate, the Commission notes that CEA section 2(a)(13)(E)(iii) explicitly requires the Commission to promulgate rules establishing time delays for reporting large notional swaps (block trades). While the Commission agrees that financial swaps should have shorter time delays, the Commission believes that one minute—as suggested by one commenter—is insufficient for many large trades, particularly where transparency is being introduced into the swaps market for the first time.[375] As noted above, the appropriate minimum block size for swaps will be addressed in the block trade re-proposal that will be published for comment in the **Federal Register**. Until an appropriate minimum block size is set for a swap or grouping of swaps, all such swaps will receive time delays for public dissemination. As explained above, the Commission is initially adopting longer time delays and is reducing those time delays over time in an effort to allow market participants to become accustomed to reporting and publicly disseminating, to minimize costs to market participants and registered entities and to ensure that market participants have adequate time to hedge their large swap transactions.

Several commenters advised that the Commission needs more data before it can set appropriate minimum block sizes and time delays for public dissemination of block trades and large notional off-facility swaps. The Commission agrees that these concerns are valid with respect to the determination of appropriate minimum block sizes, but does not believe that additional data is needed for setting time delays for public dissemination. The Commission has considered all comments relating to the time delays for public dissemination, and as discussed above, § 43.5 takes into account the liquidity of swaps; the ability for certain reporting parties to report to SDRs; the cost-benefit considerations of reporting real-time swap pricing and transaction data; the cost-benefit considerations of publicly disseminating swap pricing and transaction data; and the statutory mandate to provide post-trade transparency and enhance price discovery in the swaps markets.

In its final rule, the Commission has added appendix C to part 43 to further clarify the time delays discussed in § 43.5(d)–(h) as well as the interim time delays described in § 43.5(c); appendix C to part 43 provides Tables C1–C6, each of which represent the time delays for a particular type of swap or swaps described in § 43.5.

Several commenters requested that the SEC's and the Commission's respective public dissemination time delay rules be harmonized. The Commission has routinely coordinated with the SEC regarding the time delays for public dissemination of certain swap transaction and pricing data; however, the two Commissions have jurisdiction over different types of swaps and, as a result, a different concentration of market participants. For example, the ''other commodity'' asset class will tend to have significantly more non-SD/non-MSP counterparties than the credit or equity asset classes.

By initially providing time delays for the public dissemination of all swaps, the Commission will ensure that some public dissemination occurs from the outset, prior to the adoption of rules for appropriate minimum block sizes. Once the appropriate minimum block sizes for particular swaps or swap categories are adopted, only swaps that have a notional or principal amount at or above the appropriate minimum block size threshold will receive a time delay for public dissemination, and all other swaps in the asset class (or sub-asset class or grouping of swaps) must be publicly disseminated by an SDR ''as soon as technologically practicable.'' Providing post-trade price transparency in the swaps markets, even if initially delayed during an interim period, will enhance price discovery and increase transparency. Additionally, as appropriate minimum block sizes are finalized, transparency and price discovery in the swaps markets will be further enhanced as swap transaction and pricing data for swaps below the appropriate minimum block size is publicly disseminated ''as soon as technologically practicable.''

F. Appendix A to Part 43

CEA section 2(a)(13)(B) ''authorizes the Commission to make swap transaction and pricing data available to the public in such form and at such times as the Commission determines appropriate to enhance price discovery.'' Consistent with this authorization, the Commission proposed appendix A to proposed part 43. That provision established the appropriate form and manner in which swap transaction and pricing data shall be publicly disseminated. Specifically, appendix A to proposed part 43 included: (1) Data fields to be publicly disseminated; (2) a description of the type of information to be captured in the data fields; (3) an example of how the data fields may be reported; and (4) the application of the data fields.

To account for the differences in publicly reportable swap transactions among asset classes, the descriptions of the data fields in the Proposing Release were not intended to be prescriptive; rather, the data fields were intended to provide flexibility to report various types of swaps while achieving consistency in the data. Further, certain data fields described in the Proposing Release may not be relevant to certain types of transactions; for such transactions, such data fields would not be publicly disseminated. For example, the swap transaction and pricing data that is publicly disseminated with respect to an uncleared off-facility swap will likely be different than those swaps that are executed on a SEF or DCM. Appendix A to proposed part 43 was intended to ensure that the swap transaction and pricing data that is publicly disseminated is sufficient to give meaning to the price of the publicly reportable swap transaction, while protecting the anonymity of the counterparties and considering both the potential effects of the proposal on market liquidity and the cost burden of reporting.

The Commission requested general comments regarding all aspects of the data fields, and asked specific questions related to specific data field including (i) whether to add or delete data fields; (ii) effects on market liquidity; and (iii) the appropriate format for data and manner of public dissemination.

Twenty-six commenters addressed various issues related to the data fields.[376] These commenters focused on specific data fields, the value of reporting data, the Commission's ability to modify data fields, pricing information for customized swaps, end-user to end-user reporting of data and harmonization with the SEC with regard to data fields that must be publicly disseminated.

Two commenters asserted that end-users will face a greater burden in

[375] *See* CL–Better Markets.

[376] Commenters include: FHL Banks; IPAA; IECA; MFA; Working Group of Commercial Energy Firms; ISDA/SIFMA; ABC/CIEBA; GFXD; Better Markets; Committee on Capital Markets Regulation; COPE; Coalition of Energy End-Users; NFPEEU; Markit; Tradeweb; DTCC; TriOptima; Reval; MarkitSERV; Cleary; Argus; Professor Darrell Duffie; Coalition for Derivatives End-Users; Barclays; API; and AGA.

reporting the real-time data for public dissemination since end-users only maintain trading capabilities and associated information technology to meet their current commercial needs.[377] These commenters argue that the burden placed on end-users for reporting end-user to end-user trades (*i.e.,* neither party is an SD or MSP) is not justified by the limited value of the data. These commenters argued that under the Proposing Release end-users would be required to create systems, hire additional personnel and purchase technology, which may compel such end-users to only enter into transactions with SDs and MSPs. According to the commenters, these requirements would hinder the ability of end-users to manage commercial risk and increase their costs, which they would then pass on to their consumers.

Similarly, two commenters argued that data for off-facility swaps involving end-users do not have value for the purposes of price discovery; in their view, the cost burdens to send the swap transaction and pricing data for public dissemination would be substantial.[378] They contend that off-facility end-user swaps should not be subject to Section 727 of the Dodd-Frank Act. One commenter contended that if the Commission were to subject off-facility end-user swaps to real-time reporting requirements, end-users should be allowed to utilize a number of options for compliance with the real-time reporting requirements and only core commercial terms applicable to the swap should be reported.[379]

Two additional commenters similarly argued that until certain other definitions are finalized (*e.g.,* swap, SD, MSP, non-financial commodity), it is premature to comment on the data fields described in appendix A with respect to energy commodity swaps.[380]

One commenter argued that the Commission should follow the approach taken by the SEC in its proposal to allow SDRs to define the relevant fields based on general guidelines so that real-time reporting can be flexible enough to track market trends.[381] Another commenter expressed concern that the SDR may not have sufficient knowledge to identify all information in its possession and could inadvertently disclose the identity of a swap counterparty; the commenter therefore requested more guidance on what should and what should not be publicly disseminated.[382]

Three commenters asserted that credit terms should not be publicly disseminated. One of these commenters contended that the public dissemination of such terms could cause confusion, while the other commenters wrote that public dissemination could have a negative impact since market participants could determine a counterparty's view on the creditworthiness of another counterparty.[383]

Three commenters argued that the public dissemination of an indication that a swap is bespoke could confuse the market since all of the other terms of the bespoke swap that make up the price would not be publicly disseminated.[384] The commenters stated that since the public dissemination of bespoke swaps does not enhance price discovery, such swap transaction and pricing data should not be required to be reported. One commenter suggested that condition flags may be needed in the swaps markets to provide indications of established conventions.[385]

Several commenters addressed specific data fields set forth in appendix A to proposed part 43. The comments on these specific data fields are summarized as follows:

- *Additional Price Notation*—One commenter indicated that the ''Additional Price Notation'' field should not be publicly disseminated since it will provide information on one party's creditworthiness to another party.[386] Another commenter argued that the ''Additional Price Notation'' data field is likely to have little application for most commodity transactions and that it will be challenging to compute and populate such field in real-time.[387] Another commenter stated that the pricing and separate display of an ''Additional Price Notation'' data field could make the price of publicly reported swaps more meaningful; however, the commenter cautioned that the implementation of a standardized approach for calculating the amount in the ''Additional Price Notation'' data field would be challenging, would take time and could confuse the market if parties took different approaches toward calculating this data field.[388]
- *Tenor*—Three commenters responded to the Commission's request for specific comment regarding whether date information (*i.e.,* tenor information) should be rounded to the nearest month.[389] One of the commenters stated that in illiquid markets, the rounding of tenor would be necessary to protect anonymity of parties to a trade. The commenter further suggested that with respect to illiquid foreign exchange markets, the tenor could map to one or two years, rather than to a specific month and year. Another commenter argued that public dissemination should follow market conventions for reporting. Yet another commenter stated that by not reporting the actual tenor of the swap, one of the primary economic terms of the swap would be manipulated and would therefore reduce post-trade price transparency.
- *Timestamp*—Commenters argued that requiring that the timestamp be reported to the second is not reasonable and not consistent with current market practice.[390] One commenter argued that the value derived of moving the industry to UTC appears minimal when compared to the costs involved.[391]
- *Notional Amount*—One commenter stated that reporting the notional amount in total dollar value for commodities provides little value in terms of price discovery value in the market.[392] Therefore, the commenter recommended that the reporting of notional quantity in the units of the underlying quantity would provide more relevant information. Similarly, another commenter suggested that since there is not a universal definition of notional amount, the Commission should provide guidelines on how to publicly disseminate notional amount similar to the guidelines provided by the Federal Reserve Bank of New York (''FRBNY'').[393] Another commenter

[377] *See* CL–COPE; CL–IECA.

[378] *See* CL–Coalition of Energy End-Users; CL–IPAA.

[379] *See* CL–Coalition of Energy End-Users.

[380] *See* CL–NFPEEU; CL–Coalition of Energy End-Users.

[381] *See* CL–MarkitSERV.

[382] *See* CL–ABC/CIEBA.

[383] *See* CL–Coalition for Derivatives End-Users; CL–Working Group of Commercial Energy Firms; and CL–ISDA/SIFMA.

[384] *See* CL–DTCC; CL–FHLBanks; and CL–Reval.

[385] *See* CL–MarkitSERV.

[386] *See* CL–ISDA/SIFMA. The ISDA and SIFMA joint comment letter further argued that bilaterally executed trades may contain a premium over market which would also need to be excluded from public dissemination to prevent the price from being misinterpreted by market observers.

[387] *See* CL–Working Group of Commercial Energy Firms.

[388] *See* CL–MarkitSERV.

[389] *See* CL–Working Group of Commercial Energy Firms; CL–GFXD; and CL–ISDA/SIFMA.

[390] *See, e.g.,* CL–ISDA/SIFMA; CL–Working Group of Commercial Energy Firms.

[391] *See* CL–ISDA/SIFMA.

[392] *See* CL–Working Group of Commercial Energy Firms.

[393] *See* CL–ISDA/SIFMA. The FRBNY's guidelines are included under ''Line Item Instructions for Derivatives and Off-Balance Sheet Items Schedule HC–L'' in the Board of Governors of the Federal Reserve System's ''Instructions for Preparation of Consolidated Financial Statements for Bank Holding Companies Reporting Form FR Y–9C,'' available at *http://www.federalreserve.gov/reportforms/forms/FR_Y-9C20110630_i.pdf* (last visited Nov. 9, 2011).

argued that the notional amount field should not be publicly disseminated for non-standardized swaps.[394]

• *Indication of Other Price Affecting Terms*—One commenter argued that this field, which applies only to non-standardized or bespoke ''reportable swap transactions,'' should be deleted and only price and volume should be required, if anything, for bespoke swaps. The commenter further argued that there would be little price discovery value in reporting this field.[395] Another commenter suggested that the Commission require that certain condition flags be publicly disseminated with respect to bespoke transactions that would provide market participants and the public with more information about the bespoke swap.[396]

• *Price-Forming Continuation Data*—Commenters stated that novations and partial novations should not be ''reportable swap transactions'' since they do not have a material impact on the primary economic terms of the transaction.[397]

• *Contract Type*—One commenter suggested that the ''Contract Type'' data field be modified to delete ''options'' (to the extent the Commission is referring to physical options) and ''forwards'' given that the Commission has no jurisdiction over physical transactions.[398]

One commenter emphasized the importance of maintaining flexibility in the data fields described in appendix A to proposed part 43, which may mean that no information at all may be reported for certain fields.[399] In contrast, another commenter recommended that the data elements be made more specific to provide clarity and avoid the risk of inconsistencies when specifying the data elements.[400] Four commenters recommended that a standardized data format be required for the reporting and public dissemination of swap transaction and pricing data. These four commenters argued that a single data format would maximize efficient and cost-effective access to the information by the greatest number of users.[401]

Several commenters also requested that the Commission and the SEC harmonize the data fields that are required to be publicly disseminated so that there can be an accurate depiction of prices within the same asset classes.[402]

The Commission received comments discussing the ''Swap Instrument'' data field. The Commission is not including this data field in appendix A to part 43, as it intends to address this concept in the block trade re-proposal. Additionally, one commenter interpreted that Table A2 would only relate to embedded options and as a result the primary economic terms for options were not covered by appendix A to part 43.[403]

After considering the comments, the Commission has determined to adopt appendix A to proposed part 43 as described below.

The Commission agrees with concerns expressed by some commenters regarding the costs and burdens that end-users will face in reporting the data fields described in appendix A to proposed part 43. Accordingly, the Commission is adopting data fields in appendix A to part 43 that provide sufficient flexibility for reporting both standardized and bespoke swap transactions in all asset classes. While the Commission recognizes that there will be costs associated with reporting the data fields described in appendix A to part 43, the Commission does not believe that a distinction should be made for swaps in which an end-user is a reporting party. The Commission believes that swaps with similar characteristics must have the same standards for public dissemination, regardless of the type of reporting party, so that identical data fields will be publicly disseminated for similar swaps. Such consistency in public dissemination will provide market participants and the public with uniform public reporting and enhanced transparency and price discovery. To the extent that non-SD/non-MSPs are reporting parties, these parties may use industry solutions, such as third-party reporting agents or web-based data reporting, to assist in reporting such swap transaction and pricing data to an SDR.[404] The Commission believes that industry solutions, combined with the longer initial time delays for public dissemination,[405] the flexibility of the data fields and the flexibility of the meaning of ''as soon as technologically practicable'' [406] will mitigate the costs that may be incurred by non-SD/non-MSP reporting parties.

The Commission disagrees with commenters that stated that off-facility end-user swaps should not be publicly disseminated or alternatively should be permitted to report less information than the data fields required in appendix A to part 43. As noted in the previous discussion related to the scope of part 43,[407] the Commission interprets CEA section 2(a)(13)(C) to cover all swap transactions, including bespoke swaps. The Commission nonetheless recognizes that there are differences among various types of swap transactions based on asset class and whether a swap is subject to mandatory clearing, standardized or bespoke. As further discussed below, the Commission believes that the reporting of swap transaction and pricing data for bespoke transactions, including off-facility end-user transactions, enhances price discovery by bringing transparency to the market. Requiring that certain data fields be reported—such as ''Indication of Other Price Affecting Term'' and ''Additional Price Notation''—adds value to the swap transaction and pricing data that is publicly disseminated without compromising the anonymity of the swap counterparties. It is possible that some of the data fields listed in Tables A1 and A2 in appendix A to part 43 may not be relevant to the terms of a particular publicly reportable swap transaction and therefore need not be publicly disseminated. However, to the extent that a data field for a particular swap is a relevant term of the publicly reportable swap transaction, the reporting party, SEF or DCM must provide the SDR with sufficient information to publicly disseminate such swap transaction and pricing data.

The Commission notes that the data fields described in appendix A to part 43 only reflect data that is to be publicly disseminated by an SDR. The Commission has added introductory language to appendix A to part 43 to clarify that reporting parties, SEFs and

[394] *See* CL–MFA.

[395] *See* CL–Working Group of Commercial Energy Firms.

[396] *See* Meeting with Markit (June 26, 2011).

[397] *See* Meeting with Barclays (January 24, 2011); CL–Working Group of Commercial Energy Firms.

[398] *See* CL–Working Group of Commercial Energy Firms.

[399] *See* CL–GFXD.

[400] *See* CL–ISDA/SIFMA.

[401] *See* CL–Barclays; CL–DTCC; CL–TriOptima; and CL–Better Markets.

[402] *See* CL–ISDA/SIFMA; CL–DTCC; CL–Committee on Capital Markets Regulation; and CL–MarkitSERV.

[403] *See* CL–GFXD.

[404] The Commission notes that CEA section 2(a)(13)(F) explicitly permits that agents to the parties to a swap may report swap transaction and pricing information: ''Parties to a swap (including agents of the parties to a swap) shall be responsible for reporting swap transaction information to the appropriate registered entity in a timely manner as may be prescribed by the Commission.'' *See supra* § 43.3 discussion, which discusses the use of third parties for reporting and public dissemination.

[405] *See supra* discussion in section II.E (''Section 43.5—Time Delays for Public Dissemination of Swap Transaction and Pricing Data'').

[406] *See supra* discussion in section II.B.2 (''Defined Terms'').

[407] *See supra* discussion in section II.A, regarding the scope of part 43.

DCMs must report to an SDR ''as soon as technologically practicable'' after execution of the publicly reportable swap transaction, the swap transaction and pricing data that is needed to publicly disseminate the relevant data fields described in Tables A1 and A2.

The Commission acknowledges the comment that it is premature to comment on the data fields described in appendix A to proposed part 43 since certain definitions have not been finalized; however, the Commission disagrees that the absence of such definitions would preclude an interested party from commenting on the data fields in appendix A to proposed part 43. Further, in response to similar comments, the Commission previously re-opened the comment period for the Proposing Release so that market participants and interested parties would have an opportunity to comment after seeing the entire mosaic of proposed rules.[408] The Commission did not receive any additional comments on the proposed data fields during the re-opened comment period.

The Commission sees merit in the suggestion that SDRs have discretion to determine how to publicly disseminate data fields. As discussed, § 43.3(a) requires that all swap transaction and pricing data be reported by reporting parties, SEFs and DCMs to an SDR for public dissemination. Accordingly, the Commission anticipates that the SDRs will have discretion to publicly disseminate the swap transaction and pricing data in a form and manner that covers all of the information described in appendix A to part 43. The introductory language to appendix A to part 43 now makes clear that the form and manner in which an SDR publicly disseminates information should be consistent for swaps within a particular asset class. Such consistency will better enable market participants to compare prices for swaps within the same asset class. The data fields listed in appendix A to part 43 are intended to be informative and flexible to accommodate all types of publicly reportable swap transactions. Additionally, appendix A to part 43 provides examples of how each data element may be publicly disseminated. These examples are not meant to be prescriptive and may not be applicable to certain types of swaps. The Commission believes that part 43 and appendix A to part 43 provide sufficient guidance to SDRs regarding information that should and should not be publicly disseminated. With respect to the public dissemination of swap transaction and pricing data related to certain off-facility swaps in the ''other commodity'' asset class, the Commission intends to provide further guidance in its block trade re-proposal.[409]

The Commission agrees with commenters that separate data fields that represent creditworthiness should not be publicly disseminated. The Commission does not agree, however, that reporting the value of creditworthiness as part of the ''Additional Price Notation'' data field, as stated in the Proposing Release, will disclose the business transactions or market positions of any person. Creditworthiness is one of several factors that would comprise the amount set forth in the ''Additional Price Notation'' field. In the description of the ''Additional Price Notation'' data field in the Proposing Release, the Commission stated that the field should include any premiums associated with, among other things, margin, collateral and independent amounts. To clarify, the actual amounts of variation margin and initial margin would not be included in this field; rather, any premiums associated with the presence of collateral that are factored into the price of the publicly reportable swap transaction would be included. The Commission believes that an indication whether an uncleared swap is collateralized should be publicly disseminated to provide greater meaning to the price of the swap in lieu of a separate field for creditworthiness. The Commission is therefore requiring that the margin, collateral and independent amount terms be reported as a separate field entitled ''Indication of Collateralization.'' The ''Indication of Collateralization'' field is only required for uncleared swaps, as, unlike cleared swaps, uncleared swaps have collateral arrangements. The inclusion of the ''Indication of Collateralization'' data field in the final rule requires that reporting parties for uncleared swaps must provide the SDR with the appropriate information so that the SDR can publicly disseminate one of four descriptions of the terms of the swap relating to the collateral arrangement for such swap. The four descriptions to be publicly disseminated are as follows:

(1) ''Uncollateralized''—An uncleared swap shall be described as ''Uncollateralized'' when there is no credit arrangement between the parties to the swap or when the agreement between the parties states that no collateral (neither initial margin nor variation margin) is to be posted at any time.

(2) ''Partially Collateralized''—An uncleared swap shall be described as ''Partially Collateralized'' when the agreement between the parties states that both parties will regularly post variation margin. The word ''regularly'' is used to exclude situations where the parties may set a threshold amount(s) that is so high that one or both parties will rarely post variation margin, if at all.

(3) ''One-way Collateralized''—An uncleared swap shall be described as ''One-way Collateralized'' when the agreement between the parties states that only one party to such swap agrees to post initial margin, regularly post variation margin or both with respect to the swap. The word ''regularly'' is used to exclude situations where the parties may set a threshold amount(s) that is so high that one or both parties will rarely post variation margin, if at all.

(4) ''Fully Collateralized''—An uncleared swap shall be described as ''Fully Collateralized'' when the agreement between the parties states that initial margin must be posted and variation margin must regularly be posted by both parties. The word ''regularly'' is used to exclude situations where the parties may set a threshold amount(s) that is so high that one or both parties will rarely post variation margin, if at all.

The Commission does not agree that the public dissemination of bespoke swaps will confuse the market or fail to enhance price discovery. The public dissemination of bespoke swaps provides the public with the full scope of publicly reportable swap transactions that are being transacted in an asset class, which will inform market participants and the public of market depth and the execution of swaps with similar underlying assets. In the Commission's opinion, the designation of such swaps as ''bespoke'' in the ''Indication of Other Price Affecting Term'' data field (and the ''Additional Price Notation'' and ''Indication of Collateralization'' data fields) will provide information that enhances price discovery. While the Commission agrees with the comment that condition flags may provide greater clarity to the market as to the pricing of a bespoke swap, such indications may also disclose the identities, business transactions and/or market positions of the parties. Further, the Commission believes that the ''Additional Price Notation,'' ''Indication of

[408] *See* Commission, Reopening and Extension of Comment Periods for Rulemakings Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act, 76 FR 25274 (May 4, 2011).

[409] *See supra* discussion in section II.D.5 (''Anonymity of Parties to a Publicly Reportable Swap Transaction (§ 43.4(d))'').

Collateralization'' and the ''Indication of Other Price Affecting Term'' data fields will provide sufficient information to the market to enhance price discovery with respect to these types of publicly reportable swap transactions.

The Commission is modifying or adding certain data fields in response to comments received.

• *Additional Price Notation*—The Commission believes that the Additional Price Notation field will not disclose the creditworthiness of the counterparty as one commenter suggested. This data field provides a single number that accounts for the combined premiums associated with the publicly reportable swap transaction. The actual content of what constitutes this number will not be publicly disseminated. As discussed earlier, the references to margin, collateral and independent amount are being replaced in the description of this field with the term ''presence of collateral.'' Additionally, the description of this data field in the final rule makes clear that ''counterparty credit risk'' would be included as part of the number. With respect to the comment that the Additional Price Notation field will have little application to commodity transactions, the final rule provides that to the extent that this data field does not apply, the data field would not need to be publicly disseminated.

The Commission does not anticipate that computing this field should be difficult, even for transactions in the ''other commodity'' asset class. The price of the swap should be known and the premium or spread is generally negotiated outside of the actual price of the swap. The Commission believes that the comment that a standardized approach for calculating the amount in the Additional Price Notation field would be challenging to achieve has merit. The Commission acknowledges that this field may be calculated slightly differently in different asset classes, by different swap counterparties, and even within the same asset class. Notwithstanding these potential discrepancies in the calculation of the ''Additional Price Notation'' data field, the Commission believes that breaking out the premiums for a swap would enhance price discovery and allow for better comparison for all swaps within an asset class—both platform executed swaps and off-facility swaps.

• *Tenor*—In response to comments regarding whether tenor should be reported as month and year, the Commission agrees with the commenter who stated that to not report the exact tenor of a swap would essentially mean not reporting a primary economic term of the swap. To not require the exact end date of swap would detract from the meaning of the price and therefore the Commission is requiring that the actual end date be required to be publicly disseminated for all swaps. The field that was called ''Tenor'' in the Proposing Release will be called ''End Date'' and the time between the ''Effective or Start Date'' and the ''End Date'' will provide market participants and the public with the exact tenor of the swap. Similarly, the ''Option Expiration Date'' field should be reported as an actual date and not the month and year, as described in the Proposing Release.

• *Execution Timestamp*—While the Commission understands that the reporting of the timestamp to the second is a shift from the standard practice in the previous OTC derivatives market, the Commission does not believe that this historical practice is persuasive on the point of whether swaps under the new regulatory regime established by the Dodd-Frank Act should receive execution timestamps to the second. A timestamp to the second is necessary for both audit trail and enforcement purposes, as well as to allow market participants and the public an opportunity to re-create a trading day. Different market participants and different types of execution may receive different time delays, so the timestamp will become critical in determining the order of execution of transactions within a particular market. The Commission will also use the timestamps to determine whether swaps are being reported by reporting parties, SEFs and DCMs ''as soon as technologically practicable'' and to compare the speed at which similar market participants report swap transaction and pricing data to an SDR for public dissemination. Additionally, the Commission can use the timestamp to determine how quickly SDRs are publicly disseminating the information that they receive for public dissemination. Further, SDRs will use the Execution Timestamp to measure the time delays for public dissemination to be applied to publicly reportable swap transactions, as described in § 43.5 and appendix C to part 43.

A commenter suggested that the benefit of moving the industry to UTC appears minimal when compared to the costs involved. The Commission believes that consistency across the global swaps market is important and requiring public dissemination in UTC will allow market participants and reporting parties to re-create the order of trades and will reduce the need for market participants to convert different times to understand the order of trades in a particular market.[410] Further, the appendix A to part 43 combines the ''Execution Date'' field to be included in the ''Execution Timestamp'' field so that both a time and date will be publicly disseminated to assist market participants and the public with understanding the trading of publicly reportable swap transactions.

• *Notional or Principal Amount*—The Commission agrees with the comment that the notional quantity should be reported and publicly disseminated in the units of the underlying quantity, as it would provide more relevant information to enhance price discovery. The Commission, however, does not believe that the Commission needs to provide guidelines on how to publicly disseminate the notional or principal amount. The Commission believes that the SDR should have the discretion on how to publicly disseminate the notional amounts for certain types of commodity transactions that are traded in units. The Commission does not agree with the comment that the notional amount should not be disseminated for non-standardized swaps, as such public dissemination will enhance price discovery and provide information on market depth. The final rules provide for the rounding of the notional or principal amount as well as caps on the public dissemination of notional or principal amounts.[411] Accordingly, the data fields in appendix A to part 43 indicate that it is the ''Rounded Notional or Principal Amount'' that is to be publicly disseminated.

• *Indication of Other Price Affecting Term*—One commenter argued that the ''Indication of Other Price Affecting Term'' data field should not be reported and only price and volume information should be reported for bespoke ''reportable swap transactions.'' The Commission intends that this data field will merely serve as an indication that a swap is not standardized (*i.e.,* bespoke). The Commission believes that such indication will provide market participants and the public with an opportunity to more easily discern the differences in prices of bespoke swaps with those swaps that are standardized (*e.g.,* executed on a SEF or DCM and subject to the clearing mandate). An indication of other price affecting terms will allow market participants and the

[410] The use of UTC with regard to part 43 only refers to the execution timestamps that are publicly disseminated; reporting parties, SEFs and DCMs can agree to report different timestamps to the SDR that can then convert the time to UTC for public dissemination.

[411] *See* § 43.4(g) and (h).

public to look to other fields such as ''Indication of Collateralization,'' ''Additional Price Notation'' and ''Day Count Convention'' to better understand the price of the swap. The Commission has deleted the reference to common material price affecting terms to avoid confusion and has added a description under the example to indicate that the field should be utilized if there is a material price affecting term that is not otherwise publicly disseminated.

• *Price-Forming Continuation Data*—The Commission agrees that novations and partial novations should not be publicly reportable swap transactions, but only to the extent that such swaps do not have a material effect on the price of the swap. To the extent there is any price effect from the novation (*e.g.,* payments associated with the novation, changes to material terms of the swap, etc.), such novations would be publicly reportable swap transactions and an indication of the type of price forming continuation data would need to be publicly disseminated pursuant to part 43. The final rule clarifies the types of transactions that may be included in the price forming continuation data field to match with the types of transactions in the definition of publicly reportable swap transaction.[412]

• *Contract Type*—In response to the comment that options and forwards should be deleted to the extent they relate to physical transactions, the Commission does not believe that any action is necessary regarding the data field. The extent to which certain products fall under the Commission's jurisdiction will be defined in another Commission rulemaking. To that end, the list is meant to be illustrative and to ensure that all publicly reportable swap transactions would be included to the extent that they are under the Commission's jurisdiction.

In response to the comment that Table A2 only applies to embedded options, the Commission notes that Table A2 applies to options, swaptions and embedded options; the Commission has added clarifying language to the description.[413]

It is the Commission's intent to ensure harmonization between the data fields in appendix A to proposed part 43 and the data fields required to be reported to an SDR for regulatory purposes. In light of the changes to proposed § 43.3 that require reporting to an SDR, which in turn must publicly disseminate the data fields described in appendix A to part 43, the Commission believes that reporting parties, SEFs and DCMs may report the data elements for real-time reporting and regulatory reporting in the same data stream. Accordingly, it is important that the data fields for both the real-time and regulatory reporting requirements work together. Further, certain changes to the final rules make the public dissemination of additional data fields important to provide market participants and the public with an understanding of the swap. For these reasons, the Commission is adding to appendix A the following data fields that were not included in the Proposing Release:

• *Indication of End-User Exception*—Given the other changes in the final rules regarding the time delays for public dissemination, such indication is necessary to provide market participants and the public with information as to why such swap received a time delay for public dissemination as compared to other swaps with substantially similar terms. Additionally, such information would be required to be reported pursuant to the regulatory reporting requirements described in proposed part 45, thus reducing the cost for reporting parties to provide such information.[414]

• *Day Count Convention*—The day count convention is a description of how interest accrues over time and is a material term that is necessary for pricing certain swaps. Common day count convention methods include the 30/360 method and the Actual method. The day count convention is necessary to be publicly disseminated so that the public can better understand the price and the terms for how to value the swap.

• *Settlement Currency*—The settlement currency is a necessary data field for foreign exchange transactions that physically settle. To the extent that such transactions are subject to the real-time reporting requirements of part 43, this field should be publicly disseminated to give meaning to the price of a publicly reportable swap transaction. The field would be required to be reported pursuant to the regulatory reporting requirements in proposed part 45, thus reducing the cost for reporting parties to provide such information.[415]

All other data fields in appendix A to part 43 that are not discussed above are adopted as proposed with certain clarifying or conforming changes and certain changes to ensure that the language in the description is not unduly prescriptive. Some of the conforming or clarifying changes include matching changes to definitions and section numbers, describing the examples with a parenthetical and clarifying certain names of fields (*e.g.,* ''Notional or principal amount 1'' has been changed to ''Rounded notional or principal amount 1'' since only the rounded notional amount will be publicly disseminated, and changed the name of ''Start Date'' to ''Effective or Start Date'' for clarity). Additionally, the Commission has removed certain language from the descriptions of the data fields that might have been construed as prescriptive. For example, the final rule removed ''[s]uch letter convention may be reported as follows: D (daily), W (weekly), M (monthly), Y (yearly)'' from the payment frequency data fields to make clear that payment frequency may be publicly disseminated in a different manner as long as an SDR is consistent in the way that data fields are publicly disseminated. With respect to the ''Execution Venue'' data field, the Commission has made clear that the actual SEF or DCM name need not be reported. Further, the Commission has modified the ''Price Notation'' field to clarify that this field indicates the price (and not the premium), and the language relating to netting to a present value of zero at execution was removed since it might not be true in all cases.

The Commission has also added clarification to the examples described for each data element. These examples are meant to provide guidance with respect to the public dissemination of swap transaction and pricing data.

In response to commenters who recommended that the Commission harmonize the data fields with the SEC, the Commission notes that it has consulted with the SEC regarding the data fields for public dissemination. The Commission believes that the data fields described in appendix A to part 43 are sufficiently flexible to cover swaps in all asset classes. The Commission has determined that the data elements described in Tables A1 and A2 of appendix A to part 43 are necessary to enhance price discovery.

[412] *See* entry for ''price forming continuation data'' in Table A1 (''Data Fields and Suggested Form and Order for Real-Time Public Reporting of Swap Transaction and Pricing Data'') in appendix A to this part. *See* Real-Time NPRM *supra* note 6, at 76179. Such price-forming continuation data may include: terminations, assignments, novations, exchanges, transfers, amendments and conveyances of extinguishing of rights that change the price of the swap.

[413] The Commission notes that the title of Table A2 in the Proposing Release was ''Additional real-time public reporting data fields for options, swaptions and swaps with embedded options.'' Real-Time NPRM *supra* note 6, at 76181.

[414] *See* 75 FR 76574.

[415] *Id.*

III. Effectiveness/Implementation and Interim Period

In its Proposing Release the Commission solicited responses to specific questions regarding the implementation of real-time public reporting, including whether (i) different reporting parties should have different implementation timeframes; (ii) different types of execution should have different reporting phase in timeframes; (iii) different asset classes, markets, or contracts should have different timeframes; and (iv) public dissemination of block trades should be implemented according to a different schedule than non-block trades.

The Commission received responsive comments from 47 market participants, including SDs, non-financial end-users, financial end-users, industry groups/associations, asset managers, trading platforms and data vendors.[416] Commenters discussed the following issues relating to implementation: (1) Timing for real-time reporting vis-a-vis other rules; (2) a phase in approach based on liquidity/standardization/asset class; (3) harmonization with the SEC and foreign regulators; (4) implementation schedules; (5) a testing phase; (6) technology challenges; (7) comparison to TRACE phase in; (8) large notional swaps/customized swaps; (9) end-users should be phased in last; and (10) re-proposal and re-open comment period.

Twenty-seven comments supported a phase in approach with regard to real-time reporting requirements for the rules set forth in the Proposing Release. Commenters' proposed approaches to phasing in the rules varied in timing and scope. One commenter further suggested that a phase in be adopted similar to that proposed in the SD/MSP Recordkeeping NPRM.[417] Five commenters recommended that in implementing the part 43 rules the Commission follow the manner in which FINRA phased in TRACE;[418] some supported a testing phase in period during which compliance would not be required.[419] These commenters further suggested that such a phase in period would provide an opportunity to both address anticipated technology challenges and allow parties to become familiar with the reporting process. Other comments advised the Commission to subject more liquid/standardized contracts to public real-time reporting first and phase in less liquid contracts later.[420] Still others recommended beginning with reporting of more advanced asset classes with established infrastructure for reporting (*e.g.,* credit) or by entity/market participants.[421] In addition, commenters stated that real-time reporting for large notional swaps should be phased in.[422]

Twenty-six commenters contended that the Commission must first collect and analyze data per the Commission's data recordkeeping and reporting and SDR registration rules, before adopting final rules addressing certain aspects of the block trade rules (*e.g.,* calculations and time delay).[423] Consistent with this approach, four commenters asserted that the entire rulemaking should be re-proposed after the Commission has had the opportunity to review and analyze the data collected by SDRs. One commenter requested that the Commission wait until it publishes the standardized computer-readable algorithmic study before developing real-time reporting rules.[424] One commenter urged the Commission to re-propose this rule, and all other rules establishing the new framework for swaps regulation, in the order in which they will be implemented—preferably starting with data gathering in order to capture most effectively the appropriate products and market participants. This commenter recommended a minimum sixty-day comment period for each of the re-proposed rules. While this process would delay implementation by some months, the commenter believed that the desire for an accelerated and/or premature regulatory certainty should not outweigh the need for comprehensive consideration of the market impact and potential market disruptions prior to finalizing the regulatory requirements.[425]

Several commenters stated that the Commission should adopt an implementation timeline similar to those of other federal regulators, including the SEC.[426] One commenter observed that inconsistencies between the Commissions' proposals would, if adopted, significantly complicate implementation.[427] Two additional commenters recommended that the Commissions harmonize their phase in approaches.[428]

The Commission received comments from several commenters that recommended specific implementation schedules for the Commission's consideration.[429]

One of these comments supported re-proposing the rule after data are collected.[430] As discussed throughout this Adopting Release, the Commission has determined not to adopt certain aspects of the block trade rules pending further collection and analysis of data.

One commenter stated that the Commission's implementation period and process should be broadly consistent with the proposed European implementation; in its view such consistency would foster consistency across regions and minimize regulatory arbitrage.[431]

The Commission also received several comments asserting that end-user swap data reporting should be delayed. For example, one of these commenters commented that non-bank SDs and end-users should be able to establish information technology systems related to business process for approximately one year before reporting is required.[432] Another commenter stated that end-users should not begin reporting until an SDR has been registered and the systems between the SDR and end-user can be set up and tested.[433] Other comments contended that end-users should be phased in last.[434]

A number of other commenters responded, directly or indirectly, to the Commission's decision to reopen the comment periods for all Dodd-Frank Act rulemakings and specific request for comment on the order in which the Commission should consider final rulemakings under the Dodd-Frank

[416] The Commission received comments specifically addressing the implementation of part 43 and additionally received general implementation comments in response to the Public Roundtable Discussion on Dodd-Frank Implementation.

[417] *See* CL–ISDA/SIFMA.

[418] *See* CL–ISDA/SIFMA; CL–DTCC; CL–GFXD; CL–WMBAA; and CL–Cleary.

[419] *See* CL–Barclays; CL–Committee on Capital Markets Regulation; CL–DTCC; CL–Cleary; and CL–Working Group of Commercial Energy Firms.

[420] *See* CL–UBS; CL–Barclays; and CL–DTCC.

[421] *See* CL–Barclays; CL–AIMA; and CL–MarkitSERV.

[422] *See* CL–JPM; CL–MS.

[423] Commenters include: Barclays; GS; UBS; Cleary; Freddie Mac; FHL Banks; MFA; GFXD; ISDA/SIFMA; Better Markets; ABC/CIEBA; SIFMA AMG; WMBAA; Coalition for Derivatives End-Users; FIA/SIFMA/ISDA/FSR; AII; Vanguard; MarkitSERV; JPM; ATA; MFA; WMBAA; Vanguard; MS; and SIFMA AMG.

[424] *See* CL–Cleary.

[425] *See* CL–ABA. As discussed throughout this Adopting Release, the Commission has determined not to adopt certain rules relating to block trades and other off-facility swaps in the ''other commodity'' asset class in this Adopting Release.

[426] *See* CL–MFA; CL–UBS; CL–Reval; and Meeting with Markit (Jan. 13, 2011).

[427] *See* CL–Cleary.

[428] *See* CL–Commodity Markets Council; and CL–MarkitSERV.

[429] *See* CL–DTCC; CL–ABC–CIEBA; and CL–Working Group of Commercial Energy Firms.

[430] *See* CL–ABC/CIEBA.

[431] *See* CL–MarkitSERV.

[432] *See* CL–Working Group of Commercial Energy Firms.

[433] *See* CL–Dominion.

[434] *See* CL–Dominion; CL–DTCC; and CL–Working Group of Commercial Energy Firms.

Act.[435] Six commenters challenged the sequencing and timing of the Proposing Release in relation to the publication of the final entity and/or product definitions rulemakings published after the Proposing Release. These commenters contended that the Commission's failure to sequence the proposals deprived them of the opportunity for meaningful, informed comment on the Proposing Release; they suggested that the Commission extend the comment periods on all rulemakings.

Consistent with section 754 of the Dodd-Frank Act, part 43 of the Commission's Regulation will be effective on March 9, 2012 (''Effective Date''). In that regard, however, the Commission wishes to emphasize that implementation or compliance dates for various regulatory requirements in part 43 are contingent upon the adoption and effective dates of other, related, regulatory provisions and definitions. In consideration of these contingencies and in response to commenters, the Commission is adopting a three-phase schedule for compliance with part 43, along with several new procedures.

Compliance Date 1

On the first compliance date (''Compliance Date 1''), all SEFs, DCMs, SDs and MSPs will be required to comply with all part 43 requirements with respect to publicly reportable swap transactions in the interest rate and credit asset classes, including reporting such transactions to an SDR pursuant to the rules of part 43. On Compliance Date 1, all publicly reportable swap transactions in the interest rate and credit asset classes that are either (1) executed on or pursuant to the rules of a SEF or DCM, or (2) ''off-facility swaps'' in which at least one party to the swap is an SD or MSP (collectively, ''Compliance Date 1 transactions''), must be reported to an SDR for public dissemination, pursuant to part 43. In addition, on Compliance Date 1, all SDRs for the interest rate and credit asset classes will be required to accept and publicly disseminate real-time swap transaction and pricing data for the Compliance Date 1 transactions pursuant to part 43 and appendix A to part 43. With respect to swaps in the interest rate and credit asset classes that are executed on or pursuant to the rules of a SEF or DCM, Compliance Date 1 will be the date that is the later of (1) July 16, 2012, or (2) 60 calendar days after the publication in the **Federal Register** of Commission regulations defining the term ''swap'' pursuant to sections 721 and 712(d)(1) of the Dodd-Frank Act. With respect to swaps in the interest rate and credit asset classes that are not executed on or pursuant to the rules of a SEF or DCM and that have at least one party that is an SD or MSP, Compliance Date 1 will be the date that is the later of (1) July 16, 2012 of this Adopting Release in the **Federal Register**, or (2) 60 calendar days after the publication in the **Federal Register** of the last Commission regulations defining the terms ''swap,'' ''swap dealer'' and ''major swap participant'' pursuant to sections 721 and 712(d)(1) of the Dodd-Frank Act.

Compliance Date 2

On the second compliance date (''Compliance Date 2''), all SEFs, DCMs, SDs and MSPs will be required to comply with all part 43 requirements with respect to publicly reportable swap transactions in the foreign exchange, equity and ''other commodity'' asset classes, including reporting such transactions to an SDR pursuant to the rules of part 43. On Compliance Date 2, all publicly reportable swap transactions in the foreign exchange, equity and ''other commodity'' asset classes that are either (1) executed on or pursuant to the rules of a SEF or DCM, or (2) off-facility swaps in which at least one party to the swap is an SD or MSP (collectively, ''Compliance Date 2 transactions''), must be reported to an SDR for public dissemination, pursuant to part 43. Consequently, on Compliance Date 2, all SDRs for the interest rate, credit, equity, foreign exchange and ''other commodity'' asset classes will be required to accept and publicly disseminate the Compliance Date 2 transactions pursuant to part 43. Compliance Date 2 shall begin 90 calendar days after the commencement of Compliance Date 1.

Compliance Date 3

On the third compliance date (''Compliance Date 3'') all publicly reportable swap transactions in all asset classes will be required to comply with all part 43 requirements. Compliance Date 3 will require, among other part 43 requirements, the reporting and public dissemination of all publicly reportable swap transactions in all asset classes by all SEFs, DCMs and reporting parties, including reporting parties that are non-SDs or non-MSPs. Compliance Date 3 shall begin 90 calendar days after the commencement of Compliance Date 2.

If no SDR for a particular asset class is registered or provisionally registered at the commencement of one or more compliance dates, compliance for swaps in such asset class shall not be required until registration or provisional registration of an SDR occurs in the asset class. Reporting parties, SEFs and DCMs may share and publicly disseminate swap transaction and pricing data without restriction until an SDR is registered or provisionally registered in an asset class. Further, the Commission notes that the compliance dates relating to the implementation of part 43 are not contingent on the publication of Commission regulations implementing Section 733 of the Dodd Frank Act relating to registration and compliance with core principles for SEFs.

In addition to the compliance dates, the Commission is adopting a number of phasing procedures in response to commenters' concerns. As discussed above, the Commission expects to re-propose for comment a rulemaking to address the appropriate minimum block size criteria and determination. Consequently, until such time as an appropriate minimum block size is established for particular swaps, the Commission is providing initial time delays for all swaps subject to the reporting requirement in § 43.5. Further, the Commission will be phasing in the time delays over time so that market participants can adjust hedging strategies and secure the technology or make arrangements necessary to comply with part 43. The Commission has provided longer time delays for the ''other commodity'' asset class, since such parties using such swaps tend to follow more complex hedging strategies to lay off risk. In response to comments regarding end-users, the Commission is providing longer time delays for public dissemination of swaps in which a non-SD/non-MSP is the reporting party since such parties may not have the technology available to report swap transaction and pricing data. Additionally, the Commission expects to address in the block trade re-proposal the reporting of publicly reportable swap transactions in the ''other commodity'' asset class that are not executed on or pursuant to a SEF or DCM and that do not reference one of the contracts listed in appendix B to part 43 or a swap that is economically related to such contracts. Until rules regarding such ''other commodity'' swaps are adopted, such swaps will not be subject to the real-time reporting requirements of part 43.

[435] *See* CL–ABA; CL–ABC/CIEBA; CL–COPE; CL–Citadel; CL–DC Energy; CL–BP; CL–Alice; CL–FHLBanks; CL–Cleary; CL–GFXD; CL–NFPEEU; CL–Working Group of Commercial Energy Firms; CL–FIA/FSR/IIB/IRI/ISDA/SIFMA/Chamber; and Meeting with Citi, MS and JPM (May 17, 2011).

IV. Paperwork Reduction Act

The Paperwork Reduction Act (''PRA'') imposes certain requirements on federal agencies in connection with their conducting or sponsoring any collection of information as defined by the PRA.[436] This final rulemaking contains information collection requirements. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number issued by the Office of Management and Budget (''OMB''). The Commission submitted its proposing release and supporting documentation to OMB for review, and requested that OMB approve, and assign a new control number for, the collections of information covered by the Proposing Release, both in an information collection request associated with this rulemaking and the part 49 rulemaking that would establish requirements for SDRs. The Commission invited the public and other federal agencies to comment on any aspect of the information collection requirements discussed in the Proposing Release.

The Commission received comments from two interested parties on its burden estimates or on other aspects of the information collection requirements contained in its Proposing Release. One commenter asserted that the actual burden imposed on end-users to report swap data was significantly higher than the Proposing Release's estimate, and suggested that the actual burden would be several orders of magnitude higher than the Commission estimated.[437] This same commenter said that the Commission failed to estimate the financial impact that would be imposed on the swap industry because of this rule, particularly those costs associated with end-users.[438] Another commenter stated that when promulgating rules and estimating costs, the Commission should take into consideration ''issues of scale in participants and volumes.''[439]

OMB issued a notice of action providing that the Commission should examine the comments received and submit a revised supporting statement, including ''a description of how the agency has responded to any public comment on the [information collection request], including comments on maximizing the practical utility of the collection and minimizing the burden.''[440]

The title for the collection of information under part 43 is ''Real-Time Public Reporting of Swap Transaction Data.'' OMB has assigned OMB control number 3038–0070 to this collection of information, but OMB is withholding its approval of this collection of information pending the submission of the revised supporting statement. The Commission has revised some of its assumptions and estimates as a result of changes in the requirements imposed by part 43 and after considering the comments received. The revised estimates are being submitted to OMB and can be found in the updated form 83–I and supporting statement, which can be found at *http://www.reginfo.gov/public/do/PRAMain.*

The Proposing Release described the new collections of information in terms of four broad categories of requirements: Reporting, public dissemination, recordkeeping and determining appropriate minimum block size. As further described below, the Commission revised some of its estimates regarding the reporting, public dissemination and recordkeeping estimates from the Proposing Release. The Commission notes that part 43 does not require an SDR to determine an appropriate minimum block size.[441] Additionally, part 43 no longer permits a SEF, DCM or reporting party to report swap transaction and pricing data to a third-party service provider for purposes of satisfying the public dissemination obligations under part 43 (*i.e.,* all real-time swap data must be reported to an SDR for public dissemination).

A. Burden Estimates for Reporting Requirements

The Commission estimated in the Proposing Release that annual hourly burdens for SEFs and DCMs to report swap transaction and pricing data to a real-time disseminator would be approximately 2,080 hours per SEF and DCM. In addition, the Commission anticipated there would be 40 SEFs and 17 DCMs who may be required to report pursuant to part 43's obligations.[442]

For those swaps executed off-facility, the Proposing Release estimated the reporting burdens associated with SDs and MSPs to be approximately 2,080 annual burden hours. In the Proposing Release, the Commission took ''a conservative approach'' to calculating the burden hours for this information collection by estimating that as many as 250 SDs and 50 MSPs would register.[443] Since publication of the Proposing Release in November 2010, the Commission has had ample opportunity to meet with industry participants and trade groups, to discuss extensively the universe of potential registrants with the National Futures Association (''NFA''), and to review public market information about dealers active in the market and certain trade groups. Over time, and as the Commission has gathered more information on the swaps market and its participants, the estimated number of SDs and MSPs has decreased. In its FY 2012 budget drafted in February 2011, the Commission estimated that 140 SDs might register with the Commission.[444] After recently receiving additional specific information from NFA on the regulatory program it is developing for SDs and MSPs,[445] however, the Commission believes that approximately 125 Swaps Entities, including only a handful of MSPs, will register. Therefore, the information collection's proposed total burden hour estimate of 624,000 burden hours for SDs and MSPs will decrease to 260,000 burden hours, assuming there are 125 respondents and no adjustments to the response times for the registration forms.

When an off-facility swap is executed and neither an SD nor MSP is a counterparty (*e.g.,* an end-user to end-user swap), the reporting responsibility would fall on one of the end-users to the swap.[446] For that reason, the Commission estimated that the total number of swap end-users that would be required to report their swap

[436] 44 U.S.C. 3501 *et seq.*

[437] *See* CL–Dominion.

[438] *Id.;* The Commission notes that its estimates regarding the costs related to ''collections of information'' required by the Proposing Release can be found in the supporting statement and form 83–I posted on the Office of Management and Budget's Web site, which can be found at *http://www.reginfo.gov/public/do/PRAMain.* The revised supporting statement and form 83–I can be found at the same Web site.

[439] *See* CL–GXFD.

[440] CL–OMB Notice of Action (received 04/01/11).

[441] Rules related to block trades and large notional off-facility swaps will be addressed in a separate rulemaking.

[442] At the time of the Proposing Release there were 17 DCMs; there are now 18 DCMs.

[443] 75 FR 76169.

[444] CFTC, President's Budget and Performance Plan Fiscal Year 2012 (Feb. 2011), p. 13–14, *available at http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/cftcbudget2012.pdf.* The estimated 140 SDs includes ''[a]pproximately 80 global and regional banks currently known to offer swaps in the United States;'' ''[a]pproximately 40 non-bank swap dealers currently offering commodity and other swaps;'' and ''[a]pproximately 20 new potential market makers that wish to become swap dealers.'' *Id.*

[445] Letter from Thomas W. Sexton, Senior Vice President and General Counsel, NFA to Gary Barnett, Director, Division of Swap Dealer and Intermediary Oversight, CFTC (Oct. 20, 2011) (NFA Cost Estimates Letter).

[446] Part 43 no longer uses the term end-user, but uses the term ''non-SD/non-MSP'' to represent a reporting party who is not an SD or MSP.

transaction and pricing data would be 1,500 entities or persons.[447] The Commission estimated that swap end-users (*i.e.,* non-SD/non-MSPs) would expend four (4) annual burden hours per reporting party or person, for a total of 6,000 aggregate annual burden hours.[448]

In the Proposing Release, the Commission assumed that end-users who would be required to report pursuant to part 43 would contract with a third party to satisfy their obligations. However, as one commenter indicated, some end-users may choose not to contract with a third party, but will build infrastructure and hire personnel for purposes of reporting swap transaction and pricing data to an SDR.[449]

After consideration of the comments received and further discussions with the Commission's technology experts, the Commission is retaining its estimates related to SEFs, DCMs, SDs and MSPs reporting burdens, but is revising its estimates as they relate to non-SDs/non-MSPs reporting burdens. The Commission cannot estimate with precision the number of non-SDs/non-MSPs that will be obligated to report under this rule, how many will conduct their own reporting or contract with a third party, or how many transactions they will have to report. Moreover, there will be significant deviations in reporting burdens on a reporting party-by-reporting party basis, based upon the type and transactional activity of each individual reporting party.

Consequently, of the estimated 30,000 non-SDs/non-MSPs who will transact in the swaps markets, the Commission is estimating that only 1,000 non-SDs/non-MSPs will be required to report in a year.[450] Of those 1,000 non-SDs/non-MSPs, the Commission continues to believe a majority, estimated now at 75%, will contract with third parties to satisfy their reporting obligations. For those non-SDs/non-MSPs who are required to report swap transaction and pricing data to an SDR and contract with a third party, the Commission estimates that such non-SDs/non-MSPs will expend 22 annual burden hours per reporting party or entity for reporting errors and omissions. Thus, the Commission estimates that 750 non-SDs/non-MSPs that will contract with a third party will expend a total of 16,500 aggregate annual burden hours complying with the reporting requirements.[451]

Conversely, for the 250 non-SDs/non-MSPs that the Commission estimates will not contract with a third party, the Commission estimates such non-SDs/non-MSPs will expend 676 annual burden hours per reporting party or entity, for a total of 169,000 aggregate annual burden hours.

B. Burden Estimates for Public Dissemination Requirements

Proposed § 43.3 required an SDR to publish, through an electronic medium, swap transaction and pricing data received from reporting parties as soon as technologically practicable, unless such publicly reportable swap transaction is subject to a time delay. Moreover, SDRs would be required to receive and publicly disseminate real-time swap transaction and pricing data at all times, 24-hours a day. The Commission estimated that there would be approximately 15 SDRs.[452] In its Proposing Release, the Commission estimated that compliance with the public dissemination requirements would cause an SDR to expend 6,900 annual burden hours, resulting in estimated aggregate annual burden hours of 103,500 for all SDRs. The Commission received no comments on its proposed public dissemination estimates, and the Commission is not revising them.

C. Burden Estimates for Recordkeeping Requirements

Under proposed § 43.3(i), SEFs and DCMs (an estimated 57 entities or persons),[453] SDRs (an estimated 15 entities or persons) and reporting parties would be required to retain all data relating to a reportable swap transaction for a period of not less than five years following the time at which such reportable swap transaction is publicly disseminated in real-time. With respect to SEFs, DCMs and real-time disseminators, the Commission estimated in the Proposing Release that the proposed recordkeeping requirement would be 250 annual burden hours per SEF, DCM and SDR. The Commission anticipated that 1,500 swap end-users would be reporting parties for the purposes of this part of the Commission's regulations. Since the Commission anticipated that there would be lower levels of activity relating to the requirement for swap end-users, the Commission estimated that there would be two (2) annual burden hours per swap end-user.

Commenters on the substantive aspects of the proposed rulemaking argued that these recordkeeping requirements were duplicative of existing Commission regulations and provisions of other proposed rulemakings. In consequence, these recordkeeping requirements have been omitted from the final rulemaking, and thus the Commission will be withdrawing the burden estimates associated with them.

The only remaining recordkeeping requirements retained from the Proposal Release are the timestamping requirements in § 43.3(h). Specifically, timestamps will be required for all publicly reportable swap transactions and must be applied by SEFs, DCMs, SDRs, SDs and MSPs. Non-SDs/non-MSPs who are required to report will not be obligated to comply with the timestamping requirements. Accordingly, the Commission is revising downward the estimated burden associated with recordkeeping.

For the estimated 57 SEFs and DCMs who must comply with the timestamping requirements with respect to receipt of certain swap transactions and transmission of all transactions, which the Commission expects will be conducted electronically, the Commission estimates 25 annual burden hours per entity, which accounts for any system programming that may be required and periodic maintenance, for an aggregate of 1,425 annual burden hours. For the estimated 300 SDs and MSPs who must comply with the timestamping requirements only on transmission, which the Commission also expects to be conducted electronically, the Commission estimates that such entities will expend 20 annual burden hours per entity, for an aggregate of 6,000 annual burden hours. Finally, for the estimated 15 SDRs who must comply with the

[447] In the Proposing Release, the Commission requested comment on the number of swap end-users that would be required to report their swap transaction and pricing data pursuant to proposed Section 43.3. The Commission estimated that there would be a total of 30,000 swap market participants and that 1,500 of those participants would engage in end-user-to-end-user swap transactions (5% of 30,000) requiring at least one of those participants to report such swap transaction and pricing data.

[448] This estimate included the expectation that end users who participate in end-user-to-end-user swaps will contract with other entities to report the swap transaction and pricing data to an SDR or third-party service provider.

[449] *See* CL–Dominion.

[450] This is a change from the Proposing Release which estimated that 1,500 end-users (5% of 30,000) would be required to report swap transaction and pricing data to an SDR or third-party service provider.

[451] Non-SDs/non-MSPs reporting parties that contract with a third party to report swap transaction and pricing data to an SDR may still be required to submit corrected data to a SEF, DCM or SDR when they become aware of an error or omission.

[452] Because the Commission has not regulated the swap market, the Commission was unable to collect data relevant to the Proposing Release's estimates. For that reason, the Commission requested comment on these estimates.

[453] *See supra* note 442.

timestamping requirements on the receipt of transaction data as well as on its public dissemination, the Commission estimates that such entities will have 76 annual burden hours per entity, for an aggregate of 1140 annual burden hours.

D. Cost Burden

In addition to the hour burdens identified above, reporting parties, SEFs or DCMs where swaps are executed, and SDRs that must accept and ensure the public dissemination of real-time swap transaction and pricing data in their selected asset class will incur cost burdens in connection with reporting, public dissemination and recordkeeping obligations.[454] The direct, quantifiable costs imposed on reporting parties, SEFs and DCMs will take the forms of (i) non-recurring expenditures in technology and personnel; and (ii) recurring expenses associated with systems maintenance, support, and compliance.

Although the Commission is retaining the cost burden estimates described in connection with the Proposing Release in substantial part, after reviewing comments received and consulting with market participants, the Commission has revised some of these estimates.[455] Specifically, the Commission has revised its wage rate calculation from the wage rate used to calculate cost burdens in the Proposing Release.[456] Additionally, the Commission has revised its cost burden estimates with respect to non-SD/non-MSP reporting parties. With respect to the cost burden estimates related to such non-SD/non-MSP reporting parties, the Commission has assumed a non-financial end-user lacking the technical capability and other infrastructure to comply with the part 43 requirements as the reference point for its cost burden estimates—in other words, a new market entrant with no prior swaps market participation or infrastructure. Further, the Commission has revised its estimates with respect to recordkeeping requirements, since part 43 now only requires recordkeeping with respect to timestamps. SDs, MSPs, non-SDs/non-MSPs, SEFs, DCMs and SDRs will incur initial and recurring costs, including capital and start-up costs related to reporting and public dissemination of swap transaction and pricing data pursuant to part 43. The Commission did not receive comments regarding the cost burden estimates for initial non-recurring costs for reporting with respect to SDs, MSPs, SEFs, DCMs and SDRs. The Commission is therefore retaining its estimates that the initial non-recurring costs for each SD, MSP, SD, SEF and DCM to be $300,000; however, the Commission has estimated that, annualized over a useful life of 6 years, and accounting for the total operational cost per year associated with these initial non-recurring costs, the annual total cost of these initial non-recurring costs will be $200,000.[457]

With respect to non-SDs/non-MSPs, the Commission estimates that the initial non-recurring costs for its reference point, a non-financial end-user that does not contract with a third party to report swap data (''non-financial end-user''), will likely consist of (i) developing an internal Order Management System (''OMS'') capable of capturing all relevant swap data in real-time; (ii) establishing connectivity with an SDR that accepts data; (iii) developing written policies and procedures to ensure compliance with part 43; and (iv) compliance with error correction procedures. Based on comments received and meetings with market participants, the Commission estimates that many non-financial end-users will likely engage in swap transactions in only one asset class.[458] Accordingly, for purposes of estimating relevant cost burdens, the Commission estimates that a non-financial end-user will establish connectivity with one SDR.[459] The Commission estimates that the total initial non-recurring costs to each non-financial end-user to be $56,369.[460] Further, if non-SDs/non-MSPs utilize a third party to assist in reporting real-time swap transaction and pricing data to an SDR, the Commission estimates the initial non-recurring costs per non-SD/non-MSP to be $2,063.

The recurring cost burden estimates with respect to reporting and public dissemination of real-time swap transaction and pricing data have been revised from the estimates provided in connection with the Proposing Release, with respect to SDRs, SDs, MSPs, SEFs, DCMs and non-SDs/non-MSPs. The revisions to the cost burden estimate for recurring costs associated with reporting and public dissemination for SDRs have been adjusted to take into account the changes to the wage rate calculation. Accordingly, the Commission estimates the aggregate annual recurring costs for reporting and public dissemination for SDRs to be $23,255,210.[461]

The Commission has also revised its cost burden estimate for recurring costs for SEFs, DCMs, SDs and MSPs with respect to reporting and public dissemination. These estimates have been revised to take into account changes in the estimates for the number of entities, as well as changes to the wage rate calculation. Accordingly, the

[454] SDRs may pass on costs of public dissemination through equitable and non-discriminatory fees to the real-time reporting market participants. *See* § 43.3(i).

[455] As the Commission noted in the Proposing Release, the supporting statement submitted in connection with the proposal may be obtained by visiting RegInfor.gov. *See* Real-Time NPRM *supra* note 6, at 76170.

[456] In so doing, the Commission at times has utilized wage rate estimates based on salary information for the securities industry compiled by the Securities Industry and Financial Markets Association (''SIFMA''). These wage estimates are derived from an industry-wide survey of participants and thus reflect an average across entities; the Commission notes that the actual costs for any individual company or sector may vary from the average.

The Commission estimated the dollar costs of hourly burdens for each type of professional using the following calculations:

[(2009 salary + bonus) * (salary growth per professional type, 2009–2010)] = Estimated 2010 total annual compensation.] The most recent data provided by the SIFMA report describe the 2009 total compensation (salary + bonus) by professional type, the growth in base salary from 2009 to 2010 for each professional type, and the 2010 base salary for each professional type; thus, the Commission estimated the 2010 total compensation for each professional type, but, in the absence of similarly granular data on salary growth or compensation from 2010 to 2011 and beyond, did not estimate dollar costs beyond 2010.

[(Estimated 2010 total annual compensation)/(1,800 annual work hours)] = Hourly wage per professional type.]

[Hourly wage) * (Adjustment factor for overhead and other benefits, which the Commission has estimated to be 1.3)] = Adjusted hourly wage per professional type.]

[(Adjusted hourly wage) * (Estimated hour burden for compliance)] = Dollar cost of compliance for each hour burden estimate per professional type.]

The sum of each of these calculations for all professional types involved in compliance with a given element of part 43 represents the total cost for each reporting party, SD/MSP, SEF, DCM or SDR, as applicable to that element of part 43.

[457] The capital and start-up costs for part 43's reporting requirements for high activity respondents is estimated as 5% of the entity's estimated average total capital and start-up cost of $6 million.

[458] *See, e.g.,* CL–NFPEEU.

[459] Depending on the number of swap asset classes in which a reporting party transacts (or that a SEF or DCM lists), and the number of SDRs that accept the resulting swap transaction and pricing data in such asset class, multiple connections to different SDRs may be necessary or desirable. As the regulatory structure develops and the swap markets evolve, the average number of SDR connections established and maintained by each reporting party, registered SEF and DCM may be different and fluid.

[460] The aggregate estimate represents the sum total of the following initial non-recurring costs: [$26,689 for 355 personnel hours to develop an internal order management system] + [$12,824 for 172 burden hours to establish connectivity with an SDR] + [$14,793 for 180 burden hours to develop written policies and procedures to comply with reporting requirements of part 43] + [$2,063 for 26 burden hours to establish a program for reporting errors and omissions] = $56,369.

[461] This estimate is the aggregate annual cost burden for 15 SDRs, including the costs for burden hours, operational costs and annualized capital and start-up costs.

Commission estimates the aggregate annual recurring costs for reporting and public dissemination for SEFs to be $17,245,242.[462] Additionally, the Commission estimates the aggregate annual recurring costs for reporting and public dissemination for DCMs to be $7,760,359.[463] Further, the Commission estimates the aggregate annual recurring costs for reporting and public dissemination for SDs/MSPs to be $28,891,383.[464]

With respect to non-SDs/non-MSPs, the Commission estimates that the recurring cost burdens for a non-financial end-user will likely consist of (i) capturing swap transaction and pricing data in a manner sufficient to comply with part 43; (ii) maintaining connectivity to an SDR; (iii) maintaining compliance and operational support programs; and (iv) reporting of errors and omissions. The Commission estimates the aggregate annual recurring costs for reporting and public dissemination for a non-financial end-user to be $45,159,000.[465] Further, if non-SDs/non-MSPs utilize a third party to assist in reporting real-time swap transaction and pricing data to an SDR, the Commission estimates the aggregate annual recurring costs for reporting and public dissemination for such non-SD/non-MSP reporting parties to be $2,056,500.[466]

In addition to the costs burdens associated with reporting and public dissemination, part 43 imposes costs on SDRs, SDs, MSPs, SEFs and DCMs with respect to recordkeeping.[467] These estimated cost burdens have been adjusted downward from the estimates associated with the Proposing Release since the part 43 rules only require recordkeeping in connection with timestamps. The Commission estimates the total aggregate non-recurring and recurring costs for recordkeeping as follows:[468] $93,855 for SDRs; $328,000 for SDs/MSPs; $157,440 for SEFs; and $70,848 for DCMs.

Accordingly, the estimated aggregate cost burden for all market participants to comply with part 43 is $150,017,837.00.[469]

For further information relating to the revised cost burden estimates, please refer to the updated form 83–I and supporting statement submitted to OMB, which can be found at *http://www.reginfo.gov/public/do/PRAMain.*

V. Cost-Benefit Considerations

A. Introduction

The swaps markets, which have grown exponentially in recent years, are now an integral part of the nation's financial system. As the financial crisis of 2008 demonstrated, the absence of transparency in the swaps markets can pose systemic risk to this system.[470] In part, the Dodd-Frank Act seeks to promote the financial stability of the United States by improving financial system accountability and transparency. More specifically, Title VII of the Dodd-Frank Act directs the Commission to promulgate regulations to increase swaps markets' transparency and thereby reduce the potential for counterparty and systemic risk.[471]

Transaction reporting is a fundamental component of the legislation's objective to reduce risk, increase transparency, and promote market integrity within the financial system generally, and the swaps market in particular. Title VII designates the Commission to oversee the swaps markets and develop appropriate regulations. Specifically, section 727 of the Dodd-Frank Act amends the Commodity Exchange Act by inserting new section 2(a)(13), which requires that swap transaction and pricing data be made publicly available. The Dodd-Frank Act specifies that swap price and volume data be reported to the public as soon as technologically practicable after the swap has been executed, *i.e.,* real-time public reporting, and at the same time requires that public dissemination not identify the participants to the swap transaction.[472]

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[462] This estimate is the aggregate annual cost burden for 40 SEFs, including $100,000 per DCM to maintain connectivity to an SDR, costs for burden hours, operational costs and annualized capital and start-up costs.

[463] This estimate is the aggregate annual cost burden for 18 DCMs, including $100,000 per DCM to maintain connectivity to an SDR, costs for burden hours, operational costs and annualized capital and start-up costs. The number of DCMs was changed from 17 to 18 to reflect the designation of an additional contract market since the publication of the NPRM in the **Federal Register**. As of December 13, 2011. *See http://sirt.cftc.gov/SIRT/SIRT.aspx?Topic=TradingOrganizations&implicit=true&type=DCM&CustomColumnDisplay=TTTTTTTT.*

[464] This estimate is the aggregate annual cost burden for 125 SDs/MSPs, including $100,000 per SD/MSP to maintain connectivity to an SDR, costs for burden hours, operational costs and annualized capital and start-up costs.

[465] The cost burden estimate represents the aggregate recurring costs relating to reporting and public dissemination for 250 non-SDs/non-MSPs that do not utilize third parties at a total estimated cost of $180,636 per non-SD/non-MSP. The estimated cost per non-SD/non-MSP represents the sum total of [$27,943 for 436 burden hours for capturing swap transaction and pricing data] + [$13,747 for 218 burden hours for maintenance of compliance and operational support programs] + [$1,366 for 22 burden hours to report errors and omissions] + [$100,000 to maintain connectivity to an SDR] + [$28,185 for operational costs] + [$9,395 for annualized capital and start up costs].

[466] This cost burden estimate represents the aggregate recurring costs relating for reporting and public dissemination requirements for 750 non-SDs/non-MSPs that utilize a third party for reporting requirements pursuant to part 43. The Commission recognizes that these costs may vary based on the level of swap activity by a non-SD/non-MSP.

[467] Non-SDs/non-MSPs do not have any recordkeeping obligations pursuant to part 43.

[468] The Commission estimates 15 SDRs, 125 SDs/MSPs, 40 SEFs and 18 DCMs.

[469] $150,017,837.00 (total) = $23,349,065 (SDRs) + $54,219,383 (SDs and MSPs) + $17,402,682. (SEFs) + $7,831,207. (DCMs) + $45,159,000 (RP Non-SD/non-MSP) + $2,056,500 (RP non-SD/non-MSP that contracts with a third party).

[470] As the U.S. Senate Committee on Banking, Housing, and Urban Affairs explained concerning the 2008 financial crisis:

Information on prices and quantities [in ''over-the-counter,'' or ''OTC,'' derivatives contracts] is opaque. This can lead to inefficient pricing and risk assessment for derivatives users and leave regulators ill-informed about risks building up throughout the financial system. Lack of transparency in the massive OTC market intensified systemic fears during the crisis about interrelated derivatives exposures from counterparty risk. These counterparty risk concerns played an important role in freezing up credit markets around the failures of Bear Stearns, AIG, and Lehman Brothers.

S. Rep. No. 111–176, at 30 (2010). More specifically with respect to credit default swaps (''CDSs''), the Government Accountability Office found that ''comprehensive and consistent data on the overall market have not been readily available,'' that ''authoritative information about the actual size of the CDS market is generally not available,'' and that regulators currently are unable ''to monitor activities across the market.'' Government Accountability Office, Systemic Risk: Regulatory Oversight and Recent Initiatives to Address Risk Posed by Credit Default Swaps, GAO–09–397T (March 2009) at 2, 5, 27.

[471] *See* Congressional Research Service Report for Congress, The Dodd-Frank Wall Street Reform and Consumer Protection Act: Title VII, Derivatives, by Mark Jickling and Kathleen Ann Ruane (August 30, 2010); Dep't of the Treasury, Financial Regulatory Reform: A New Foundation: Rebuilding Financial Supervision and Regulation 1 (June 17, 2009) at 47–48.

[472] CEA section 2(a)(13)(B) authorizes the Commission to ''make swap transaction and pricing data available to the public in such form and at such times as the Commission determines appropriate to enhance price discovery.'' CEA sections 2(a)(13)(C) and (E) authorize and require the Commission ''to provide by rule for the public availability of swap transaction and pricing data.'' These provisions specify that the rules shall, with respect to the swaps that are subject to the clearing mandate (or excepted from such mandate pursuant to CEA section 2(h)(7)) or that are voluntarily cleared, provide for the ''real-time public reporting'' of such transactions in a manner that: (1) Preserves swap counterparty anonymity; (2) takes into account whether the public dissemination will materially reduce market liquidity; and (3) specifies the appropriate criteria and time delays for reporting large notional swaps (block trades). With respect to certain uncleared swaps, CEA section 2(a)(13)(C)(iii) requires that the rules require real-time public reporting for such transactions in a manner that does not disclose the business transactions and market positions or any person. CEA section 2(a)(13)(A) defines ''real-time public reporting'' as ''to report data relating to a swap transaction, including price and volume, as soon as technologically practicable after the time at which the swap transaction has been executed.'' In addition, section 721(b) of the Dodd-Frank Act authorizes the Commission to define certain terms added to the CEA by the Dodd-Frank Act, including the term ''as soon as technologically practicable.''

In promulgating part 43 of its regulations, the Commission implements Congress' mandate that swap transaction and pricing data be made available to the public in real-time. Together, the statute and Commission's rules promote transparency and enhance price discovery while protecting the anonymity of market participants.[473] Part 43 achieves the statutory objectives of transparency and enhanced price discovery by, *inter alia,* requiring that market participants ultimately report swap transaction and pricing data to an SDR[474] and by requiring SDRs to ensure the public dissemination of such data in real time.[475] The Commission expects that the increased transparency achieved by the increased availability of pricing information will enhance the price discovery process and improve financial market systemic risk management. In the sections that follow, the Commission considers the costs and benefits of part 43 as required by CEA section 15(a).

1. Background

CEA section 15(a) requires the Commission to consider the costs and benefits of its actions in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations.[476] The Commission, in its discretion, may give greater weight to any one of the five enumerated areas and may determine that, notwithstanding costs, a particular rule protects the public interest.

To the extent that these new rules reflect the statutory requirements of the Dodd-Frank Act, they will not create costs and benefits beyond those mandated by Congress in passing the legislation. However, the rules may generate costs and benefits attributable to the Commission's determinations regarding implementation of the Dodd-Frank Act's statutory requirements. Moreover, as this rulemaking is a reporting rule, many of the costs of the rulemaking are associated with collections of information. The Commission is obligated to estimate the burden of and provide supporting statements for any collections of information it seeks to establish under considerations contained in the PRA, 44 U.S.C. 3501 *et seq.,* and to seek approval of those requirements from the OMB. Therefore, the estimated burden and support for the collections of information in this this rulemaking, as well as the consideration of comments thereto, are discussed in the PRA section of this rulemaking and the information collection requests filed with OMB as required by that statute. Otherwise, the costs and benefits of the Commission's determinations are considered in light of the five factors set forth in CEA section 15(a).

To aid in fulfilling its statutory responsibility to consider the costs and benefits of its proposed rules, the Commission sought comment on its proposed rulemaking for a period of 60 days, and specifically requested that commenters submit any data or other information quantifying or qualifying the costs and benefits of the proposal with their comment letters. The Commission received approximately 60 comments addressing the costs and benefit considerations of the proposed rule, which addressed primarily regulatory alternatives and the costs associated with the proposed information collection requirements, which are covered in the PRA section of this rulemaking and in the supporting statements that were filed and will be filed with OMB, as required under that statute. Nevertheless, wherever reasonably feasible, the Commission has endeavored to quantify the costs and benefits of the final rules, and did so in the proposed rule to the extent that the costs of the rulemaking were related to collections of information for which the Commission must account under the PRA. In a number of instances, however, it is not reasonably feasible to quantify, particularly with regard to the benefits of the final rules. Where quantification is not feasible, the Commission has considered the costs and benefits of the final rule in qualitative terms.

In the paragraphs the follow, the Commission, after explaining its cost estimation methodology, discusses the economic effects of part 43 along the two major drivers of the costs and benefits of the rulemaking: (1) Reporting and public dissemination; and (2) recordkeeping and timestamping.

2. Cost Estimation Methodology

The Commission recognizes that the costs of complying with part 43 are largely attributable to reporting, the costs for which are covered in the Commission's PRA analysis, as required by that statute. With respect specifically to SDRs, the Commission has estimated their incremental costs to comply with the real-time reporting and public dissemination requirements of this rulemaking above the base operating costs reflected in a separate rulemaking and the PRA analysis associated with it.[477] The Commission expects SDRs to recover these incremental costs in the form of fees assessed on reporting parties, SEFs and DCMs for use of the SDRs' public dissemination services.[478]

B. Reporting and Public Dissemination Requirements of Part 43

CEA section 2(a)(13)(F) provides the Commission with the authority to determine the reporting requirements for parties to a swap. Consistent with this authority, § 43.3(a)(2) provides that a reporting party satisfies its obligation to report real-time swap transaction and pricing data when it executes a swap on or pursuant to the rules of a SEF or DCM. In turn, § 43.3(b)(1) requires SEFs and DCMs to report data related to publicly reportable swap transactions to an SDR for public dissemination. For ''off-facility swaps,''[479] § 43.3(a)(3) establishes a protocol for determining counterparty responsibility to report real-time swap transaction and pricing data to an SDR.[480] Further, § 43.3(c)(2) specifies that an SDR must accept and publicly disseminate swap transaction and pricing data in real-time for all swaps in its selected asset class, unless otherwise prescribed by the Commission.[481] Thus, depending on the place of execution and the counterparties to a swap, the reporting obligation may fall on a SEF, DCM, SD, MSP, or a non-SD/non-MSP.

CEA section 2(a)(13)(D) provides that ''[t]he Commission may require registered entities to publicly disseminate the swap transaction and pricing data required to be reported under this paragraph.'' Pursuant to this authority, the Commission is adopting

[473] Part 43 covers all swaps under the Commission's jurisdiction (*i.e.,* interest rate, foreign exchange, equity, credit and ''other commodity''), cleared and uncleared, regardless of the method of execution (*e.g.,* executed on a SEF, DCM or bilaterally negotiated).

[474] Section 43.3(a)(1) states that for purposes of part 43, a ''registered swap data repository'' shall include swap data repositories that are provisionally registered pursuant to the Commission's part 49 rules.

[475] Section 43.4 and appendix A to part 43 specify the data an SDR is required to publicly disseminate. Consistent with its obligations under the statute, the Commission considered whether the public dissemination of such data would compromise the anonymity of the parties to a swap, or would disclose the business transactions and market positions of any party to an uncleared swap.

[476] 7 U.S.C. 19(a).

[477] *See* SDR Final Rule. 76 FR 54538 at 54572.

[478] Section 43.3(i) authorizes an SDR to charge fees to persons reporting the real-time data, so long as such fees are equitable and non-discriminatory.

[479] The term ''off-facility swap'' is defined in § 43.2.

[480] Such responsible counterparty would be the ''reporting party,'' as defined in § 43.2.

[481] *See* discussion regarding § 43.3(c)(2).

rules requiring an SDR to ensure the public dissemination of all swap transaction and pricing data it accepts pursuant to part 43. Specifically, § 43.3(b)(2) requires an SDR to ensure that swap transaction and pricing data for all publicly reportable swap transactions within an asset class are publicly disseminated as soon as technologically practicable, unless the transaction is subject to a time delay described in § 43.5. In addition, § 43.4(b) prescribes the manner in which an SDR must publicly disseminate the data to comply with part 43.[482]

1. Benefits of the Reporting and Public Dissemination Requirements

The Commission anticipates that part 43 will generate several overarching, if presently unquantifiable, benefits to swaps market participants and the public generally. These include: Improvements in market quality; price discovery; improved risk management; economies of scale and greater efficiencies; and improved regulatory oversight.

The Commission believes these benefits, made possible by the public dissemination of comprehensive and timely swap transaction data, will accrue to market participants in a number of ways:

- Enhanced price discovery made possible by the comprehensive and timely swap transaction data that the part 43 requires be reported and publicly disseminated.
- Enhanced ability to manage risk as a result of the greater visibility into swap market risk pricing, made possible by the comprehensive and timely swap transaction data that the part 43 requires be reported and publicly disseminated.
- Enhanced swap market price competition made possible by the comprehensive and timely swap transaction data that the part 43 requires be reported and publicly disseminated.[483]
- Market price transparency provides a check against SDs or other market participants trading at noncompetitive prices; provides post-trade information market participants may use to negotiate lower transaction costs; and facilitates price competition between swap dealers.
- More robust risk monitoring and management capabilities as a result of the systems required under part 43 which, concurrent with real-time reporting capability, will monitor the participant's current swap market position.
- New tools to process transactions at a lower expense per transaction attributable to the systems required under part 43. These tools will enable participants to handle increased volumes of swaps with less marginal expense, or existing volumes of swaps with greater efficiency.
- Furthers the development of internationally recognized standards for the financial services industry by utilizing UTC.

Transaction reporting and public dissemination under part 43 also benefits the public generally by supporting the Commission's supervisory function over the swaps market, as well as the broader supervisory responsibilities of U.S. financial regulators to protect against financial market systemic risk. Real-time public reporting provides a means for the Commission to gain a better understanding of the swaps market—including the pricing patterns of certain commodities. The public dissemination of swap transaction and pricing data will further enable the Commission, market participants and the public to observe the effects of transparency on the swaps markets.

Public dissemination of swap transaction and pricing data will enhance the Commission's ability to detect anomalies in the market. For example, the availability of such data in real-time will help Commission monitor the markets subject to its jurisdiction.

Transparency facilitated by real-time transaction reporting also will help provide a check against a reoccurrence of the type of systemic risk build-up that occurred in 2008, when ''the market permitted enormous exposure to risk to grow out of the sight of regulators and other traders [and d]erivatives exposures that could not be readily quantified exacerbated panic and uncertainty about the true financial condition of other market participants, contributing to the freezing of credit markets.'' [484]

While the Commission believes that part 43 will yield significant benefits to the public and swaps market participants, the Commission acknowledges that the final rules will entail costs. As discussed more fully below, the Commission is mindful of the costs of its rules and has carefully considered comments regarding the same. To the extent possible and consistent with the statutory and regulatory objectives of this rulemaking, the Commission has incorporated comments presenting cost-mitigating alternatives.

2. Costs of the Reporting and Public Dissemination Requirements

The Commission has not identified quantifiable costs of data collection that are not associated with an information collection subject to the PRA. These costs therefore have been accounted for in the PRA section of this rulemaking and the information collection requests filed with OMB, as required by the PRA.

3. Reporting and Public Dissemination: Consideration of Studies, Alternatives and Cost-Mitigation

i. Studies

Several commenters cited economic or academic studies in their comment letters or submitted studies relating to the introduction of transparency resulting from the public reporting of trade data.[485] The comments and studies generally discussed the effects of transparency on liquidity and the costs to market participants.

None of these studies explicitly address the issue of market transparency as it pertains to the real-time public dissemination of swap transaction and pricing data and as adopted in part 43. Five of the studies cited by commenters addressed issues that were tangential to the issue of market transparency as it relates to part 43, since they did not analyze the effects of market transparency directly. One study identified, and differentiated among, a number of related concepts of market quality that fall under the umbrella of ''liquidity.'' [486] One commenter analogized the benefits of transparency to the financial sector and the reticence of market participants to acknowledge those benefits to the energy and industrial sector of the early 1970s, citing a study that addressed the

[482] Section 43.4(b) provides ''Any registered swap data repository that accepts and publicly disseminates swap transaction and pricing data in real-time shall publicly disseminate the information described in appendix A to this part.''

[483] Congress recognized the competitive pricing benefit of real-time information in the related context of swap exchange trading. *See* S.Rep. No. 111–176, at 34 (2010) (''the relative opaqueness of the OTC market implies that bid/ask spreads are in many cases not being set as competitive as they would be on exchanges''') (quoting Stanford University Professor Darrel Duffie).

[484] Congressional Research Service Report for Congress, The Dodd-Frank Wall Street Reform and Consumer Protection Act: Title VII, Derivatives, by Mark Jickling and Kathleen Ann Ruane (August 30, 2010).

[485] At least six commenters cited at least 13 studies by institutional, academic and industry professionals. *See, e.g.,* CL–JPM; CL–Better Markets; CL–ATA; CL–FINRA; CL–Cleary; and CL–ISDA/SIFMA.

[486] *See* Kyle, Albert S., Continuous Auctions and Insider Trading, *Econometrica* 53, no. 6 (1985): 1315–1335. This study is also cited in Bessembinder *et al.* (2008). *See infra* note 497. *See also,* CL–JPM.

benefits of environmental regulation to the energy and industrial sectors.[487] One cited study addressed the manner in which airlines use jet fuel swaps to hedge risk.[488] Another addressed the impacts of high-frequency trading on the marketplace, which the commenter cited in a discussion of high frequency and algorithmic trading.[489] Another commenter cited a study that addressed differences in reporting obligations in domestic and foreign jurisdictions when discussing the real-time public reporting of cross-border transactions.[490] The remaining studies cited by commenters addressed the general effects of transparency on the marketplace.

One commenter[491] cited five studies that addressed the benefits of the introduction of transparency through the Transaction Reporting and Compliance Engine (''TRACE'') system, which provides the real-time transaction reporting and public dissemination in the corporate bond market.[492] Acknowledged differences between the swaps market and the corporate bond market notwithstanding, the Commission believes that to the extent the study discusses the benefits of transparency in the corporate bond market, such benefits may be relevant to the discussion of transparency in the swaps market. One study of TRACE cited by the commenter suggests that, according to transaction data, the transaction costs of bonds fell following the introduction of transparency to the corporate bond market.[493] Another study suggests that the implementation of TRACE played a part along with other factors in reducing the dispersion of the valuation of corporate bonds.[494] The commenter cited another study that suggests that post-trade transparency alone, while less beneficial than the full transparency (pre-trade and post-trade) offered by exchanges, could serve as a partial substitute for the price transparency offered by exchanges. This study further stated that the implementation of a TRACE-like price reporting system could ''offer substantial improvements in market efficiency'' for many actively-traded derivative products.[495]

Another study implied that the implementation of TRACE had either no effect or a positive effect on liquidity for BBB corporate bonds, and that spreads on newly transparent bonds declined relative to bonds that did not experience a change in transparency. The study further implied that additional transparency is not associated with greater trading volume.[496]

Another study discussing TRACE indicated that TRACE presented a number of important benefits to the corporate bond marketplace.[497] As the authors note:

> The results * * * are important because they verify that market design, and in particular decisions as to whether to make the market transparent to the public, have first-order effects on the costs that customers pay to complete trades. Further, since the sample employed * * * consists of institutional trades, these results indicate that public trade reporting is important not only to relatively unsophisticated small traders, but also to professional investors who make multi-million dollar transactions.[498]

In examining the effects of introducing transparency through TRACE, the same authors identify a ''remarkable'' average decrease in execution costs of 50% for TRACE-eligible bonds.[499] Bessembinder *et al.* state that the magnitude of that estimate, which reflects the impact of implementing transparency in the corporate bond market through TRACE, ''emphasizes the potential economic importance of designing market mechanisms optimally.''[500] Indeed, it is entirely plausible that, should a similar savings effect be realized in the swaps markets as a result of real-time public reporting required under part 43, such savings would ultimately be passed on to the end-users of the swaps.

Bessembinder *et al.* further identify a decrease of 20% in the execution costs of non-TRACE-eligible bonds. The authors state that this ''likely reflects a liquidity externality by which better pricing information regarding a subset of bonds improves valuation and execution cost monitoring for related bonds.''[501] The Commission believes it is entirely plausible that a similar savings effect could be realized in the swaps markets as a result of part 43's requirements. Improved pricing information for standardized swaps could improve the pricing of swaps, and thus reduce the transaction costs of non-standardized swaps whose prices could be sufficiently and reliably correlated with the prices of the standardized swaps by market participants.

In a subsequent work,[502] Bessembinder and Maxwell acknowledge that liquidity can refer to a number of related but distinct concepts, but the literature regarding TRACE's effects on the corporate bond market have focused primarily on a single one of these concepts: Customers' trading costs.[503] The study states that ''the cost of trading corporate bonds decreased [following the introduction of TRACE], but so did the quality and quantity of the services formerly provided by bond dealers.''[504] One commenter also stated that this study suggests that the implementation of TRACE reduced the market depth available to institutional customers.[505]

Bessembinder *et al.* state that ''consistent with the reasoning that market makers earned economic rents in

[487] *See* Porter, Michael E., and Claas van der Linde, Green and Competitive: Ending the Stalemate, *Harvard Business Review* 73, no. 5 (1995): 120–134. *See also* CL–Better Markets.

[488] *See* Cobbs, Richard, and Alex Wolf, Jet Fuel Hedging Strategies: Options Available for Airlines and a Survey of Industry Practices (2004). *See also* CL–ATA.

[489] *See* Kirilenko, Andrei, Kyle, Albert S., Samadi, Mehrdad, and Tugkan Tuzun, The Flash Crash: The Impact of High Frequency Trading on an Electronic Market (2011). *See also* CL–Better Markets.

[490] *See* CFTC staff, Derivatives Reform: Comparison of Title VII of the Dodd-Frank Act to International Legislation (2010). *See also* CL–Cleary.

[491] *See* CL–FINRA.

[492] TRACE enables real-time reporting and public dissemination in the corporate bond market. Currently, TRACE requires public dissemination to occur within 15 minutes of the time of execution for most trades. Congress was cognizant of TRACE in passing the Dodd-Frank Act. *See* S. Rep. No. 111–176, at 34 (2010) ('''empirical evidence appearing in the academic literature has not given much support''' to claims of resistant bond dealers that '''more price transparency would reduce the incentives of dealers to make markets and in the end reduce market liquidity''') (quoting Stanford University Professor Darrell Duffie).

[493] *See* Edwards, Amy K., Harris, Lawrence E., and Michael S. Piwowar, Corporate Bond Market Transaction Costs and Transparency, *The Journal of Finance* 62, no. 3 (2007): 1421–1451.

[494] *See* Cici. Gjergji, Gibson, Scott, and John J. Merrick, Working Paper, Missing the Marks? Dispersion in Corporate Bond Valuations Across Mutual Funds (2010).

[495] *See* Duffie, Darrell, Li, Ada, and Theo Lubke, Federal Reserve Bank of New York Staff Reports, Policy Perspectives on OTC Derivatives Market Infrastructure (2010).

[496] *See* Goldstein, Michael A., Hotchkiss, Edith S., and Erik R. Sirri, Transparency and liquidity: A controlled experiment on corporate bonds, *The Review of Financial Studies* 20, no. 2 (2007): 235–273.

[497] *See* Hendrik Bessembinder, William Maxwell, and Kumar Venkataraman, Market transparency, liquidity externalities, and institutional trading costs in corporate bonds, *Journal of Financial Economics* 82 (2006): 251–288. *See also,* CL–Cleary, CL–FINRA, CL–ISDA/SIFMA, and CL–JPM.

[498] *Id.* at 284.

[499] The study indicates that this can be extrapolated by calculating a trading cost reduction of approximately $1 billion across the entire market for TRACE-eligible bonds.

[500] Bessembinder *et al.* at 283.

[501] *Id.*

[502] *See* Bessembinder, Hendrik and Maxwell, William F., Transparency and the Corporate Bond Market, *Journal of Economic Perspectives,* 22, no. 2 (2008): 217–234.

[503] As one commenter noted, ''most studies of TRACE have focused only on its effect on spreads (particularly in smaller transaction sizes) and have not examined its effect on either market depth or resiliency, particularly in the case of large-sized transactions.'' CL–Cleary. *See also supra* note 492.

[504] Bessembinder and Maxwell at 232.

[505] *See* CL–JPM.

the opaque market, or that the costs of market making are lower in the more transparent environment,'' trading costs were reduced for large institutional traders after the implementation of TRACE.[506] With regard to the economic rents earned by market makers in the ''opaque market,'' the authors' findings imply that in an opaque marketplace, dealers are able to extract economic rents from customers, especially less-informed customers, and that these rents are reduced after the introduction of transparency because customers are able to view more pricing information. In addition, the study suggests that introducing transparency could improve the ability of dealers to share risks, which may result in a decrease in inventory carry costs, translating into reduced costs of trading for customers.

The Commission anticipates that, just as trading costs were reduced in the corporate bond market following the implementation of TRACE, the requirements of part 43 will similarly result in reduced trading costs and increased efficiency in the swaps market.

ii. Alternatives and Cost Mitigation

In response to the Commission's Proposing Release, several commenters presented reasonable alternatives. The Commission carefully considered—and where reasonable, adopted—those in an effort to reduce the burden of its regulations while achieving the desired regulatory objective. Other alternatives presented, however, were not accepted because, in the Commission's judgment they would not have achieved the regulatory objectives discussed throughout this rulemaking.

The comments and alternatives presented can be classified along several broad themes: (1) Who reports; (2) what is (and is not) to be reported; (3) when the data is to be reported and made public; (4) how the data is to be reported (*i.e.,* data fields); and (5) phasing of compliance. These categories are discussed in the paragraphs that follow.

Who Reports

Commenters requested that the Commission allow parties to negotiate independently who will report rather than follow the reporting hierarchy for off-facility swaps discussed in the Proposing Release.[507] The Commission accepted this alternative and as adopted § 43.3(a)(3) permits independent negotiation between counterparties of off-facility swaps to determine the reporting party for such swap. The Commission anticipates that the party with the most cost-effective means for reporting will take that role.

The reporting protocol established in § 43.3(a)(3), which requires the SD to report an off-facility swap with a non-SD counterparty when the reporting responsibility is not negotiated, is also cost-mitigating.[508] Section 43.3(a)(2) requires that for any swap executed on or pursuant to the rules[509] of a SEF or DCM, the SEF or DCM—not the transacting party—must report the transaction and pricing data to an SDR for public dissemination.[510] The Commission anticipates that SEFs and DCMs, as part of their registration and ongoing compliance requirements, will be required to have the technological capability to transmit real-time swap transaction and pricing data to SDRs, thus reducing the costs of transmission for persons that execute publicly reportable swap transactions on the SEF or DCM. The Commission further anticipates that SDs and MSPs will be more capable than financial and non-financial end-users of implementing the necessary infrastructure and personnel to comply with part 43, thus reducing the costs of reporting amongst the parties to the transaction.

To further reduce the financial burden of complying with part 43, particularly for end-users, the Commission is allowing reporting parties to contract with a third party—including a DCO that clears the swap—to report the data to an SDR. The Commission recognizes that the use of a third party service provider will likely result in costs to the reporting party. However, the Commission anticipates that the costs to the reporting party will be less burdensome than those that would be incurred by certain non-SD/non-MSP counterparties to establish infrastructure and hire personnel to comply with the part 43 real-time reporting requirements. The Commission does not agree, however, that reporting for all swaps should be required to be processed through a SEF or DCM. Rather, the Commission believes it more efficient to allow flexibility for those capable of directly reporting real-time swap transaction and pricing data to an SDR.

The proposed rule permitted public dissemination to occur through either an SDR or a third-party service provider.[511] The Commission received several comments regarding this aspect of its proposal: Some commenters agreed with the Proposing Release and others thought it would be more appropriate to permit only registered entities to publicly disseminate swap data. One commenter stated that because many DCOs already have the necessary infrastructure and will establish connectivity with SEFs and DCMs, the Commission should require that public dissemination occur through DCOs.[512] There is nothing in part 43 that would prevent a DCO from registering as an SDR[513] and ensuring that swap transaction and pricing data is publicly disseminated, or from operating as a third party; however, the Commission is not requiring that such dissemination occur through DCOs.

What Is (and Is Not) To Be Reported

Commenters expressed concern that the costs of reporting swaps between affiliates would be high.[514] Many of these same commenters asserted that the benefits to reporting swaps between affiliates are minimal or non-existent.[515] Others contended that the public dissemination of swaps between affiliates would distort, rather than enhance, price discovery.[516] To address these concerns, and as discussed previously in sections II.A.2 and II.B.2 of this Adopting Release, the Commission's definition of ''publicly reportable swap transaction'' does not, at this time, include certain swaps that are not arm's length transactions.[517] The Commission further clarified in an example that internal swaps[518] between

[506] Bessembinder *et al.* at 283.

[507] *See* CL–FSR.

[508] As one commenter noted: ''[D]ue to their commercial interests, technological know-how and business relationships, swap dealers and MSPs are more appropriate reporting counterparties than U.S. end-users and are just as, if not more, capable of complying with reporting obligations. * * * In addition, swap dealers and MSPs will be best positioned to develop at the lowest cost the technological infrastructure or relationships with third-party service providers necessary to meet the reporting obligation.'' CL–SIFMA AMG at 2.

[509] Swaps executed ''pursuant to the rules'' of a SEF or DCM would include block trades.

[510] *See* CL–Tradeweb.

[511] *See* Proposed § 43.4(a). 75 FR 76174.

[512] *See* CL–CME.

[513] *See* CEA section 21(a)(1)(B), added by section 728 of the Dodd-Frank Act: ''A derivatives clearing organization may register as a swap data repository.''

[514] *See* CL–Cleary.

[515] *Id.*

[516] *See* CL–Shell.

[517] *See supra* section II.B.2 for a discussion of definition of ''publicly reportable swap transaction'' in § 43.2 and section II.A.1 for a discussion of § 43.1.

[518] As discussed and referenced in this rule, internal swaps between wholly-owned subsidiaries of the same parent entity may include back-to-back swap transactions which are a combination of two or more swap transactions between or among affiliates to help manage the risks associated with a market-facing swap transaction. In general, a back-to-back swap transaction effectively transfers the risks associated with a market-facing swap transaction to an affiliate that was not an original party to such transaction. Back-to-back swap transactions may occur in a number of different

wholly-owned subsidiaries of the same parent entity and portfolio compression exercises are not subject to part 43 because they fail to meet the definition of ''publicly reportable swap transaction.'' [519]

When the Data Is To Be Reported and Made Public

Section 43.5 provides the time delays for public dissemination of swap transactions and pricing data for (i) publicly reportable swap transactions that have notional or principal amounts that are equal to or greater than the appropriate minimum block sizes for such swaps; and (ii) publicly reportable swap transactions that do not have established appropriate minimum block sizes. The Commission anticipates there will be technology costs associated with ensuring that the correct time delay is applied to a swap that is publicly disseminated by the SDR, including the cost to an SDR in holding swap data until the appropriate time delay expires and costs associated with adjusting the time delay in accordance with § 43.5. In an effort to mitigate these costs, the Commission is phasing in the time delays for public dissemination. These time delays will reduce the potential for lost market liquidity by providing market participants adequate time to hedge prior to public dissemination. The Commission believes the phasing in of shorter time delays will support post-trade transparency in the swaps markets and will preserve market liquidity while enabling market participants to adjust trading strategies.

Commenters offered numerous suggestions with respect to time delays for particular asset classes.[520] However, the Commission does not believe that the direct costs associated with the various suggestions would be quantitatively significant (*i.e.,* all the suggested time delays would require technological systems and operating systems). The Commission chose the time delays and phase in schedule adopted herein because it finds the approach reasonable in ensuring that all relevant swap data is eventually publicly disseminated, while minimizing the burden on the industry at the outset.

How the Data Is To Be Reported (i.e., Coordinate Universal Time and Data Fields)

Commenters suggested that the value derived from moving the industry to Coordinate Universal Time (''UTC'') appears minimal when compared to the costs involved.[521] Notwithstanding the comments regarding costs of requiring UTC, the Commission anticipates that the move to UTC will better facilitate the efficient dissemination of pricing data by eliminating the need to conduct time conversions. The Commission notes that use of UTC in the part 43 rules refers only to the execution timestamp that is publicly disseminated.[522] Consistency across the global swaps market is an important goal, and the Commission believes that requiring UTC will allow market participants and reporting parties to recreate the order of trades, reduce fragmentation and reduce the need for market participants to convert different transaction times to understand the order of trades in a particular market.

Commenters requested that the data fields required to be reported for off-facility swaps pursuant to part 43 be the same data fields that end-users typically record in their spreadsheets or trade capture systems.[523] The Commission believes all the applicable data fields listed in Appendix A to part 43 are necessary to enhance price discovery by giving context and meaning to the price and volume information required to be publicly disseminated. The data recorded in end-user spreadsheets and trade capture systems typically are not sufficiently comprehensive for purposes of providing enhanced price discovery. However, the Commission has reduced the costs of reporting by coordinating the data fields in Appendix A to part 43 with those data fields that are expected to be required in part 45 for regulatory reporting. This coordination is expected to reduce costs by allowing reporting parties, SEFs and DCMs to send one set of data to an SDR for the purpose of satisfying the requirements of both rules.

Phasing of Compliance

In response to commenters' requests for a phased in implementation of the part 43 real-time reporting requirements,[524] the Commission is adopting a three-phase schedule for compliance with part 43, in addition to several other phase in procedures, including the phasing in of time delays for public dissemination. The compliance schedule and additional phase in procedures will ensure efficient compliance with part 43 while considering the costs of implementation to market participants, registered entities and the public. In developing the part 43 compliance schedule and time delays for public dissemination, the Commission considered the different market characteristics of swap products and asset classes, differences in market participants and available technology and infrastructure. Accordingly, the Commission provides less developed markets and less sophisticated market participants longer lead time for compliance and public dissemination.

C. Reporting and Public Dissemination in Light of CEA Section 15(a)

As noted above, CEA section 15(a) directs the Commission to consider particular criteria in evaluating the costs and benefits of a particular Commission action. These are considered below.

1. Protection of Market Participants and the Public

The reporting and public dissemination requirements described in part 43 will provide transparency and enhanced price discovery in the swaps market. The Commission anticipates that the increase in transparency will lead to greater competition for swap market participants' business and will increase liquidity in the swaps markets. Accordingly, the Commission anticipates that compliance by market participants and registered entities with part 43's reporting and public dissemination requirements will lower the cost of commodities, goods and services to American businesses. This, in turn, will support the overall economy and the general public.

In deciding the manner in which to facilitate real-time reporting, the Commission was cognizant of how the current swap market operates. Thus, for example, the reporting requirements remain flexible to account for differences among market participants, including differences based on asset class, sophistication of swap

ways. For example, an affiliate immediately may enter into a mirror swap transaction with its affiliate on the same terms as the marketing-facing swap transaction. By way of further example, a market-facing affiliate may enter into multiple transactions with affiliates that are not at arm's length in order to transfer the risks associated with an arm's length, market-facing transaction.

[519] *See* CL–TriOptima. The definition of ''publicly reportable swap transaction'' also states that portfolio compression exercises would be excluded from the definition. The Commission agrees with those commenters who asserted the reporting of portfolio compression exercises would be costly without the public dissemination of such swap transaction and pricing data enhancing price discovery.

[520] *See* section II.E. (''Section 43.5—Time Delays for Public Dissemination of Swap Transaction and Pricing Data'').

[521] *See* CL–ISDA/SIFMA.

[522] Reporting parties, SEFs and DCMs may agree to report different timestamps to the SDR or to record different timestamps pursuant to § 43.3(i).

[523] *See, e.g.,* CL–Coalition of Energy End-Users.

[524] *See supra* section III. (''Effectiveness/Implementation and Interim Period'').

counterparties and differences based on the methods of execution. Section 43.2 provides a flexible definition of ''as soon as technologically practicable'' that would enable certain market participants, such as non-financial end-users, longer time periods for the reporting of swap transaction and pricing data to an SDR as compared to reporting parties with greater technological reporting capabilities (*e.g.,* swap dealers). Further, the definition of ''as soon as technologically practicable'' aims to ensure that similarly situated market participants are subject to the same standards.

The Commission believes that certain swaps in the ''other commodity'' asset class require further analysis before requiring public dissemination of such swaps. Therefore, § 43.4(d) does not subject certain swaps in the ''other commodity'' asset class to part 43 requirements at this time.[525]

The Commission also believes that the rounding convention and notional caps that an SDR must apply on the publicly disseminated notional or principal amount will enable market participants to effectively hedge risk without disclosing the actual size of the trade to the market. Such provisions will further protect the identities of parties, business transactions and market positions of market participants. Additionally, the Commission is providing time delays in § 43.5 which will protect market participants by enabling them to enter into swaps with limited concern about other market participants trading ahead of such information.

The definition of ''publicly reportable swap transaction'' in § 43.2 does not require that certain swaps that are not executed at arm's length be reported to an SDR for public dissemination. The Commission believes that public dissemination of swaps between affiliates may reveal the identities of the parties or disclose information about the business transactions or market positions of market participants. By not requiring the reporting and public dissemination of such transactions, the Commission is further protecting market participants who may engage in swaps between affiliates.

The Commission also believes that the data fields in appendix A to part 43 will provide market participants and the public with the ability to analyze the data for similar swaps while adequately protecting the identities of market participants. The data fields do not require identifying information to be publicly disseminated and the Commission believes that the ''Additional Price Notation,'' ''Indication of Other Price Affecting Term'' and ''Indication of Collateralization'' data fields, among others, will enable market participants and the public to more easily compare bespoke transactions to standardized transactions thereby enhancing the usefulness of such data for market participants and the public.

2. Efficiency, Competitiveness and Financial Integrity of Markets [526]

The Commission believes that part 43 promotes market efficiency in a number of respects, including:

- *Reduced trading cost potential.* As discussed above, the Commission anticipates that, similar to the reduction in corporate bond market trading costs following the implementation of TRACE, the requirements of part 43 will likely result in reduced trading costs and the lowering of economic rents earned by dealers in swaps markets.
- *Straight-through processing.* Sections 43.3(a)(2) and 43.3(b)(1) establish a streamlined, straight-through process for SEFs and DCMs to utilize their technological expertise and ability to report swap transaction and pricing data ''as soon as technologically practicable'' to an SDR. The Commission believes this is the more efficient approach compared to alternatives that would interpose an intermediary in the data reporting chain.[527]
- *Assignment of off-facility swap reporting responsibilities to the presumptively more capable party.* Section 43.3(a)(3) establishes a protocol that assigns greater reporting responsibility to counterparty categories presumed to possess greater technological capabilities and resources as a result of their likely greater swap transaction volume. For example, unless otherwise agreed to by the swap counterparties, SDs (and MSPs) are required to serve as the reporting party for off-facility swaps. The Commission believes responsibility assignment on this basis increases the potential to realize reporting scale economies.
- *Choice of SDRs for real-time data dissemination.* The Commission believes that § 43.3(a)(1)'s designation of SDRs to receive real-time swap transaction and pricing data ''as soon as technologically practicable'' for public dissemination also promotes potential scale economy efficiencies. Under the proposed part 45 rules, reporting parties, SEFs and DCMs must transmit a separate set of data to SDRs for regulatory reporting purposes. Accordingly, § 43.3(a)(1) may accommodate SEFs' and DCMs' ability to utilize technology and connections with an SDR for both real-time and regulatory reporting purposes.
- *Reduction of data fragmentation.* The Commission believes that exercise of its authority under CEA section 2(a)(13)(D) to designate SDRs as the public disseminators of real-time reported swap transaction and pricing data will reduce fragmentation of swap data available to the public. Greater data consistency, in turn, will facilitate the ability of market participants, and the public generally, to efficiently access, interpret, and compile a complete data set.

The Commission believes that part 43 promotes market competitiveness in a number of respects:

- *Reduction of data fragmentation.* As noted above, the Commission believes that exercise of its CEA section 2(a)(13)(D) authority to designate SDRs as the public disseminators of real-time reported swap transaction and pricing data will reduce fragmentation of swap data available to the public. Greater data consistency, in turn, should guard against information asymmetries that market participants with superior knowledge of, or access to, might arbitrage for competitive advantage.
- *Front running prevention via SDR continuous receipt requirements.* Sections 43.3(f) and (g) require that SDRs be able to accept real-time swap transaction and pricing data for public dissemination at all times, including during closing hours. Specifically, § 43.3(g) provides that during closing hours real-time swap transaction and pricing data that is accepted by an SDR be held in queue. As a result, these provisions enable continuous reporting of real-time swap transaction and pricing data by reporting parties, SEFs and DCMs, notwithstanding reporting party or registered entity location and time zone. In so doing, the Commission believes the rules promote swaps market competitiveness by foreclosing avenues for market participants to arbitrage reporting by execution location for competitive advantage.

[525] The Commission has indicated that it will address the public dissemination of such ''other commodity'' swaps in a forthcoming Commission release.

[526] The Commission has identified no impact to the financial integrity of futures markets from part 43 in its consideration of CEA section 15(a)(2)(B). Although by its terms CEA section 15(a)(2)(B).applies to futures, not swaps, the Commission finds this factor useful in analyzing the costs and benefits of swaps regulations as well.

[527] However, as the Commission has noted previously, nothing would prevent a SEF or DCM from contracting with a third party to assist with reporting the real-time swap transaction and pricing data to an SDR.

• *Time delay regime that protects market liquidity and prevents front-running.* The Commission believes that the time delay regime established in § 43.5 will enhance the competitiveness of swap markets by protecting market liquidity until appropriate minimum block sizes are adopted. Such time delays, which initially apply until a swap or group of swaps has an appropriate minimum block size, reduce the risk of large notional trade data being exposed to the market before the trade can be adequately hedged (*e.g.,* front-running or trading ahead).[528]

The Commission believes that part 43 promotes market integrity in a number of respects:

• *Error correction.* Section 43.3(e) provides reporting parties and SDRs with a clear process for addressing errors in real-time swap transaction and pricing data. These provisions will foster financial market integrity by ensuring that incorrectly disseminated swap transaction and pricing data is canceled and/or corrected. Further, this section gives the Commission enforcement powers, enhancing the Commission's ability to police market integrity.

• *Time delay phase in to prevent front-running.* The Commission believes that the phase in regime for time delays prescribed in § 43.5, discussed above, will counter the possibility for front-running large block trades before they can be adequately hedged.

• *SDR tools to ensure data accuracy.* Section 43.4(c) enables SDRs to ensure that they receive the data necessary to process and publicly disseminate the data fields described in appendix A to part 43. Section 43.4(c) provides that SDRs can ask reporting parties for additional data to ensure the accuracy of the real-time data (compared to regulatory data) as well as to ensure that the data is being reported in a timely manner. Such provisions will improve the integrity of the real-time reporting process by allowing SDRs an additional opportunity to ensure the accuracy of the data they received for public dissemination purposes.

3. Price Discovery

The Commission believes generally that swaps market price discovery will be enhanced by making useful, accurate swaps transaction price and volume data available to market participants and the public within the shortest time frame possible. The Commission further believes that the reporting and public dissemination requirements of part 43, working in concert, promote the goal of swaps market price discovery enhancement. The components that contribute to the attainment of this goal are described below.

• The provisions in part 43, reflecting the mandate of CEA section 2(a)(13)(A),[529] generally require that reporting of real-time data by reporting parties—SEFs and DCMs and public dissemination by SDRs—occur ''as soon as technologically practicable.'' The Commission believes that this approach means that swap transaction and pricing data is to be publicly disseminated at the fastest rate allowable given a market participant's technological capability.

• The error correction provisions of § 43.3(e) assign swap counterparties and registered entities responsibility to correct erroneous or omitted swap data and require the public dissemination of cancellations and corrections to errors and omissions. These provisions will help ensure the accuracy of swap transaction and pricing data, thereby increasing the data's price discovery value to market participants and the public. Absent this provision, uncorrected erroneous data could distort price discovery.

• Appendix A to part 43 specifies the data fields an SDR must use in public dissemination, and what each data field represents. The Commission believes that the values assigned to the data fields are appropriately tailored to facilitate price transparency and inform price discovery. Moreover, data field consistency will enhance price discovery by ensuring the integrity of the price and volume reflected in a particular reported asset class.

• The definition of ''publicly reportable swap transaction'' in § 43.2 does not, at this time, require the public dissemination of swaps that are not executed at arm's length. Accordingly, certain swaps between affiliates of a corporate group and portfolio compression exercises are not subject to part 43. The Commission believes that not requiring such transactions to be publicly disseminated precludes the public dissemination of transaction and pricing data that could misinform the market and create an inaccurate appearance of market depth.

• Swap transaction and pricing data is to be publicly disseminated in a consistent, usable and machine-readable electronic format that allows the data to be downloaded, saved and analyzed, as described in § 43.3(d)(1).

• SDRs are required pursuant to § 43.3(f) to continuously accept and publicly disseminate swap transaction and pricing data (with the exception of certain closing hours). The Commission believes this requirement enhances the breadth of the swap data available and the speed at which such data is available to market participants and the public.

• The requirements of §§ 43.4(d)(3) and (4), require the public dissemination of data that identifies the underlying asset for the transaction, except with respect to certain swaps in the ''other commodity'' asset class where dissemination could compromise anonymity.

• The rounding convention and the caps on the publicly disseminated notional or principal amounts provided for in §§ 43.4(g) and (h) allow for price discovery for market participants and the public while protecting swap counterparty anonymity.

4. Sound Risk Management Practices

The Commission believes that the enhanced price discovery afforded by reporting and public dissemination of swap transaction and pricing data will better enable market participants to measure risk. Accordingly, because market participants will be better able to manage their risk at an entity level, risk will be better managed. Allowing market participants and the public to measure risk will reduce the risk of another financial crisis.

Additionally, the Commission is not requiring that portfolio compression exercises, which market participants use for risk management purposes, be subject to part 43 at this time. In so doing, the Commission is attempting to tailor real-time public dissemination requirements to accommodate, rather than chill, prudent risk management by market participants.

Finally, commenters asserted that the costs of risk management to end-users may increase if data relating to large sized trades is publicly disseminated to the market before swap counterparties have an opportunity to hedge a publicly reportable swap transaction.[530] The Commission believes that the provisions in § 43.5 provide for adequate time delays for public dissemination of swap transaction and pricing data, providing end-users and other market participants the latitude necessary to manage their risks.

[528] See supra, section II.E (''Time Delays for Public Dissemination of Swap Transaction and Pricing Data'').

[529] That is: ''real-time public reporting means to report data relating to a swap transaction, including price and volume, as soon as technologically practicable after the time at which the swap transaction has been executed.''

[530] *See, e.g.,* CL–Chesapeake; CL–ATA.

5. Other Public Interest Considerations

The Commission does not believe that the public dissemination requirements of part 43 discussed above will have a material effect on public interest considerations other than those previously identified.

D. Recordkeeping and Timestamping Requirements of Part 43

Proposed § 43.3(i) provided recordkeeping requirements for data related to part 43, including a general provision that all data relating to a ''reportable swap transaction'' shall be maintained for a period of not less than five years after public dissemination of such swap. The provision also provided specific provision for the retention of data by a SEF or DCM and a provision for the retention of data by an SD or MSP. Further, proposed § 43.5(f) provided timestamp requirements for block trades and large notional swaps, which included a requirement to maintain records of all timestamps. Upon consideration of the comments received and as discussed elsewhere in this rulemaking, the utility of the Commission's existing regulations in achieving the regulatory objective proposed, and the recordkeeping requirements proposed elsewhere, including part 45, the Commission significantly limited the recordkeeping requirements of proposed Part 43. The only recordkeeping requirements imposed will be the timestamping requirements as described in § 43.3(h).

Section 43.3(h) timestamps are required for all publicly reportable swap transactions and must be applied by SEFs and DCMs, SDRs, and registrants (SDs and MSPs). In consideration of a commenter's concerns regarding the costs to end-users to comply with any recordkeeping requirements, § 43.3(h) is not applicable to non-SDs/MSPs.[531]

The Commission received multiple comments addressing the timestamping requirements of proposed § 43.5(f). As proposed, the timestamping requirements would have applied only to swaps considered ''block trades.'' However, the Commission believes that there is a need for SEFs, DCMs, SDRs SDs and MSPs to record and maintain certain timestamps regarding the transmission and dissemination of all real-time swap transaction and pricing data,[532] notwithstanding that proposed § 43.5(f)'s timestamping requirement is inconsistent with current industry practice.

1. Benefits of the Recordkeeping and Timestamping Requirements

The Commission believes a timestamp remains necessary for two reasons: (1) It establishes an audit trail that serves enforcement purposes; and (2) it allows market participants and the public to re-create the trading day, thereby enhancing price discovery. Accordingly, the Commission is adopting in § 43.3(h) timestamp requirements for all reportable swap transactions. However, in response to commenters' concerns about the costs of timestamping and retaining records for non-SDs/MSPs, the Commission is not requiring non-SDs/non-MSPs who engage in an off-facility swap to retain similar timestamp.[533] The Commission believes that requiring non-SDs/MSPs to retain any timestamp other than the execution timestamp would be unduly burdensome to those parties.

2. Costs of the Recordkeeping and Timestamping Requirements

The Commission has not identified quantifiable costs of timestamping that are not associated with an information collection subject to the PRA. These costs therefore have been accounted for in the PRA section of this rulemaking and the information collection requests filed with OMB, as required by the PRA.

E. Recordkeeping and Timestamping Requirements in Light of CEA Section 15(a)

1. Protection of Market Participants and the Public

The Commission believes that the timestamp requirement of § 43.3(h) will enable the Commission to ensure that reporting parties, SEFs and DCMs are reporting and that SDRs are publicly disseminating swap transaction and pricing data ''as soon as technologically practicable.'' Absent a timestamp requirement, the Commission would be unable to create an audit trail to identify potential inadequacies in reporting and public dissemination. The Commission's oversight to ensure that similarly situated SD, MSPs, SEFs and DCMs are reporting in the same timeframes, and that SDRs are publicly disseminating in the same manner, is essential to protecting market participants and the public.

2. Efficiency, Competitiveness and Financial Integrity of Markets[534]

The Commission believes that the requirement to maintain timestamps will enable it to ensure the integrity of the data being disseminated. This in turn promotes the operational efficiency, competitiveness, and integrity of the swaps market to which the data pertains. Further, it provides a basis for the Commission to perform audit trail and compliance reviews with respect to SDs, MSPs, SEFs, DCMs and SDRs, thus bolstering the positive market benefits.

3. Price Discovery

The Commission believes that the requirement to maintain timestamps will promote price discovery in an important way. By providing a means for the Commission to ensure that SDs, MSPs, SEFs, DCMs and SDRs are reporting and publicly disseminating swap transaction and pricing data ''as soon as technologically practicable,'' timestamp information will promote price discovery because non-compliance will be readily detectable through timestamps and may be an effective enforcement tool in an enforcement action.

4. Sound Risk Management Practices

The Commission believes that the requirement for SDs, MSPs, SEFs, DCMs and SDRs to maintain the timestamps described in § 43.3(h) will become part of these entities' risk management policies and procedures in an effort to ensure compliance with the part 43 rules.

5. Other Public Interest Considerations

The Commission does not believe that the timestamp recordkeeping requirements of part 43 discussed above will have a material effect on public interest considerations other than those identified above.

VI. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA'') requires Federal agencies to consider the impact of its rules on ''small entities.''[535] A regulatory flexibility analysis or certification typically is required for ''any rule for which the agency publishes a general notice of proposed rulemaking pursuant to'' the notice-and-comment provisions of the Administrative Procedure Act, 5 U.S.C. 553(b).[536]

[531] In other words, when an end-user has a reporting obligation because it engaged in an off-facility swap, the end-user is not required to timestamp the data pursuant to § 43.3(h). However, the execution timestamps in appendix A to part 43 must be performed.

[532] This is swap transaction and pricing data associated with ''publicly reportable swap transactions.''

[533] However, end-users must still submit a timestamp of the execution time if they are the reporting party to a swap.

[534] *See supra,* note 526.

[535] 5 U.S.C. 601 *et seq.*

[536] 5 U.S.C. 601(2), 603, 604 and 605.

With respect to the proposed real-time public reporting rule, the Commission provided in its RFA statement that the proposed rule would have a direct effect on numerous entities, specifically DCMs, SDRs, SEFs, SDs, MSPs, and certain single end-users.[537] In the proposal, the Chairman, on behalf of the Commission, certified that the rulemaking would not have a significant economic effect on a substantial number of small entities. Comments on that certification were sought.

In the Proposing Release, the Commission then provided that it previously had established that certain entities subject to its jurisdiction are not small entities for purposes of the RFA. Because of the central role they play in the regulatory scheme concerning futures trading, the importance of futures trading in the national economy, and the financial requirements needed to comply with the regulatory requirements imposed on them under the CEA, DCMs have long been determined not to be not small entities.[538]

The Commission also provided that certain entities that would be subject to the proposed rule—namely SDRs, SEFs, SDs, and MSPs—are entities for which the Commission had not previously made a size determination for RFA purposes. It proposed that these entities should not be considered to be small entities based upon their size and other characteristics.[539]

Finally, the Commission recognized that the proposed rule could have an economic effect on certain single end users, in particular those end users that enter into swap transactions with another end-user. Unlike the other parties to which the proposed rulemaking would apply, these end users are not subject to designation or registration with or to comprehensive regulation by the Commission. The Commission recognized that some of these end users may be small entities.

Notwithstanding that some small entities may be subject to the real-time reporting rules, the determination to certify pursuant to section 605(b) of the RFA that the proposed rule would not have a significant economic effect on a substantial number of small entities was based upon the nature of the reporting hierarchy that was set forth in the proposal. The proposed rule was structured so that most swaps that are expected to be executed by an end user would not be required to be reported by the end user, but rather by a party that is subject to Commission registration and regulation.

The reporting obligations primarily would fall on the trading facility on which an end-user executes a swap or, in the case of a swap executed ''off-facility'' with an SD or MSP, on the SD or MSP. Under the proposed rules, end users would only be required to report swaps that are executed ''off-facility'' with another end user, and in such circumstances, only one of the end users subject to the transaction would be required to report.

The Commission received one comment respecting its RFA certification. An association of not-for-profit electric end users provided that its membership includes small entities as that term is defined in the RFA.[540] The association commented that the Commission should conduct a regulatory flexibility analysis for each of its rulemakings individually, as well as a regulatory flexibility analysis for all of its rulemakings on a cumulative basis. The association supported its comment by providing that ''[e]ach of the complex and interrelated regulations currently being proposed by the Commission has both an individual, and a cumulative, effect on such small entities.''

Though the association asserted that some of its members are small, it did not provide any factual support to indicate that the proposed real-time reporting rule would have a significant economic effect on a substantial number of small entities, contrary to the Commission's certification. Nonetheless, in light of the association's comments, the Commission has given further consideration to the reporting hierarchy that was proposed.

Critically, as noted above, the reporting hierarchy was established in order to ensure that any end users that may be required to comply with these real-time reporting rules would only have to do so with respect to transactions that are not conducted on or pursuant to the rules of a DCM or SEF or with a counterparty that is registered with and regulated by the Commission. Moreover, as the CEA as amended by the Dodd-Frank Act provides, most of the end users who will transact with each other ''off-facility'', are not expected to be small entities.

Section 2(e) of the CEA was amended to provide that ''it shall be unlawful for any person, other than an eligible contract participant, to enter into a swap unless the swap is entered into on, or subject to the rules of [a regulated trading venue].'' [541] Eligible Contract Participants (''ECPs'') were first defined in section 1a(12) of the CEA in the Commodity Futures Modernization Act (''CFMA'') in 2000, creating a category of individuals and entities that Congress determined to be sufficiently sophisticated in financial matters that they should be permitted to trade over-the-counter swaps without the protection of federal regulation.[542] In the Dodd-Frank Act, Congress made two changes to the statutory ECP definition, both of which increased the thresholds to qualify as an ECP, making it harder for some entities and individuals to qualify.[543] Thus, only entities that reach a significant level of financial resources or sophistication are eligible to transact in swaps ''off-facility.''

We understand from the association's comments that some of their members who qualify as ECPs under the CEA have been determined to be ''small entities'' by the SBA. A member will be an SBA small entity if its total electric output for the preceding fiscal year did not exceed four million megawatt hours. Notwithstanding that some members that are ECPs may fall within the SBA small entity determination, the Commission understands this to be an anomaly. As a general rule, there are few small entities that will be eligible to transact in swaps ''off-facility'' under the CEA in light of the financial resource and sophistication thresholds established in the ECP definition.

Accordingly, for the reasons stated in the proposal and foregoing discussion in response to the comments received from the association, the Commission continues to believe that the rulemaking will not have a significant impact on a substantial number of small entities. Therefore, the Chairman, on behalf of the Commission, hereby certifies, pursuant to 5 U.S.C. 605(b), that the

[537] *See* 75 FR at 76170.

[538] *Id.*

[539] *Id.*

[540] *See* CL–NFPEUU.

[541] 7 U.S.C. 2(e).

[542] *See* ''Report of the President's Working Group on Financial Markets'' (Nov. 1999) at 16 (recommending that ''sophisticated counterparties that use OTC derivatives simply do not require the same protections under the CEA as those required by retail investors''); H.R. Rep. No. 106–711 pt. 1, at 28 (2000) (Committee on Agriculture reporting that the CFMA ''implements the PWG recommendations,'' including the exclusion for ''bilateral swap agreements entered into by eligible parties (large and/or sophisticated) and done on a principal-to-principal basis)); and H.R. Rep. No. 106–711 pt. 2, at 212 (2000) (statement of Representative John J. LaFalce, providing that the ''rationale * * * is that swaps can be complex instruments requiring a variety of protections for financially unsophisticated consumers [and] come in a great variety of tailored obligations, some of which might, indeed, be so complex as to be inappropriate for all but the most seasoned of investors'').

[543] *Compare* section 1a(12) of the CEA, 7 U.S.C. 1a(12) (2009), with sections 721(a)(1) and (9) of the Dodd-Frank Act, respectively redesignating section 1a(12) as section 1a(18) and increasing thresholds for certain categories of ECP.

real-time reporting requirements being adopted herein will not have a significant economic impact on a substantial number of small entities.

VII. List of Commenters

1. Markit
2. Asset Management Group of the Securities Industry and Financial Markets Association (''SIFMA AMG'')
3. Managed Funds Association (''MFA'')
4. Lawrence Schultz
5. The Energy Authority
6. Argus Media, Inc. (''Argus'')
7. Professor Darrell Duffie, Stanford University (''Darrell Duffie'')
8. Chesapeake Energy Corporation (''Chesapeake'')
9. Members of Congress of the United States (House Committee on Financial Services—Congressman Spencer Bachus and Congressman Frank Lucas) (''Members of Congress'')
10. Barclays Bank PLC, BNP Paribas S.A., Deutsche Bank AG, Royal Bank of Canada, The Royal Bank of Scotland Group PLC, Société Générale, UBS AG ('' Seven Foreign Headquartered Banks'')
11. J.P. Morgan (''JPM'')
12. Gibson Dunn on behalf of the Coalition for Derivatives End-Users (''Coalition for Derivatives End-Users'')
13. Committee on Capital Markets Regulation
14. Goldman Sachs & Co. (''GS'')
15. Not-For-Profit Energy End-User Coalition (''NFPEEU'')
16. Barclays Capital, Inc. (''Barclays'')
17. Air Transport Association (''ATA'')
18. Pacific Investment Management Company, LLC (''PIMCO'')
19. Committee on the Investment of Employee Benefit Assets & American Benefits Council (''ABC/CIEBA'')
20. Commodity Markets Council (''CMC'')
21. Better Markets, Inc. (''Better Markets'')
22. Investment Company Institute (''ICI'')
23. Intercontinental Exchange, Inc. (''ICE'')
24. MarkitSERV
25. Coalition of Physical Energy Companies (''COPE'')
26. International Options Markets Association/World Federation of Exchanges (''WFE/IOMA'')
27. UBS Securities LLC (''UBS'')
28. Global Foreign Exchange Division of Association for Financial Markets in Europe (''AFME''), the Securities Industry and Financial Markets Association (''SIFMA'') and the Asia Securities Industry and Financial Markets Association (''ASIFMA'') (collectively, ''GFXD'')
29. Edison Electrical Institute (''EEI'')
30. Encana Marketing (USA) Inc. (''Encana'')
31. LCH.Clearnet Group Limited (''LCH.Clearnet'')
32. CME Group, Inc. (''CME'')
33. Tradeweb Markets LLC (''Tradeweb'')
34. Coalition of Energy End-Users
35. Federal National Mortgage Association (''FNMA'')
36. Reval.com, Inc. (''Reval'')
37. Independent Petroleum Association of America (''IPAA'')
38. PCS Nitrogen Fertilizer, L.P. (''PCS Nitrogen'')
39. International Swaps and Derivatives Association & Securities Industry and Financial Markets Association (''ISDA/SIFMA'')
40. International Energy Credit Association (''IE Credit Association'')
41. Morgan Stanley (''MS'')
42. Hunton & Williams LLP on behalf of the Working Group of Commercial Energy Firms (''Working Group of Commercial Energy Firms'')
43. Freddie Mac
44. Financial Services Roundtable (''FSR'')
45. Vanguard
46. TriOptima
47. BlackRock, Inc. (''BlackRock'')
48. Dominion Resources, Inc. (''Dominion'')
49. Sadis & Goldberg LLP (''Sadis & Goldberg'')
50. Metlife, Inc. (''Metlife'')
51. Federal Home Loan Banks (''FHLBanks'')
52. Wholesale Markets Brokers' Association, Americas (''WMBAA'')
53. Depository Trust & Clearing Corporation (''DTCC'')
54. Cleary Gottlieb on behalf of Bank of America Merrill Lynch, BNP Paribas, Citi; Credit Agricole Corporate and Investment Bank; Credit Suisse Securities (USA), Deutsche Bank AG, Morgan Stanley, Nomura Securities International, In., PNC Bank, National Association, Société Générale, UBS Securities LLC, Wells Fargo & Company (''Cleary'')
55. Barclays Bank PLC; BNP Paribas S.A.; Credit Suisse AG; Deutsche Bank AG; HSBC; Nomura Securities International, Inc.; Rabobank Nederland; Royal Bank of Canada; The Royal Bank of Scotland Group PLC; Société Générale; The Toronto-Dominion Bank; UBS AG (''12 Foreign Headquartered Financial Institutions'')
56. Financial Industry Regulatory Authority (''FINRA'')
57. Société Générale (''Soc Gen'')
58. European Parliament Rapporteur for the Regulation on OTC Derivatives, Central Counterparties and Trade Repositories
59. European Industry Representatives (Credit Suisse, Deutsche Bank, Citi, JP Morgan, Barclays, Goldman Sachs, UBS)
60. Rabobank Nederland
61. Insurance Groups (American Council of Life Insurers, Genworth, Manulife, John Hancock Life, New York Life, Northwestern Mutual, Prudential, MetLife, Allstate Life) (''Insurance Groups'')
62. Fidelity Investments & Vanguard
63. Credit Suisse
64. ISDA & Kalorama Partners
65. ISDA
66. National Rural Electric Cooperative Association, American Public Power Association, Large Public Power Council, Edison Electric Institute, Electric Power Supply Association
67. Futures Industry Association, Financial Services Forum, International Swaps and Derivatives Association, Securities Industry and Financial Markets Association (''FIA/FSF/ISDA/SIFMA'')
68. The Bank of Tokyo-Mitsubishi UFJ, Ltd.; Mizuho Corporate Bank, Ltd.; Sumitomo Mitsui Banking Corporation (''Japanese Banks'')
69. NextEra Energy, Inc. (''NextEra'')
70. Chris Barnard
71. Citi, Morgan Stanley, JP Morgan
72. BP
73. Industrial Energy Consumers of America (''IE Consumers of America'')
74. Alice Corporation (''Alice'')
75. Futures Industry Association, The Financial Services Roundtable, Institute of International Bankers, Insured Retirement Institute, International Swaps and Derivatives Association, Securities Industry and Financial Markets Association, U.S. Chamber of Commerce (''FIA/FSR/IIB/IRI/ISDA/SIFMA/Chamber'')
76. Association of Institutional Investors (''AII'')
77. American Gas Association (''AGA'')
78. Natural Gas Exchange, Inc. (''NGX'')
79. Shell Trading (US) Company & Shell Energy North America (''Shell'')
80. American Petroleum Institute (''API'')
81. Swaps & Derivatives Market Association (''SDMA'')
82. Jackson National Life Insurance (''Jackson'')
83. Eris Exchange, LLC (''Eris'')
84. Citadel LLC (''Citadel'')

85. American Bankers Association & ABA Securities Association (''ABA/ABASA'')
86. DC Energy, LLC (''DC Energy'')
87. The Alternative Investment Management Association Ltd (''AIMA'')
88. FXall

List of Subjects in 17 CFR Part 43

Real-time public reporting; Block trades; Large notional off-facility swaps; Reporting and recordkeeping requirements.

In consideration of the foregoing, and pursuant to the authority in the Commodity Exchange Act, as amended, and in particular Section 2(a)(13) of the Act, the Commission hereby adopts an amendment to Chapter I of Title 17 of the Code of Federal Regulations by adding part 43 to read as follows:

PART 43—REAL-TIME PUBLIC REPORTING

Sec.
43.1 Purpose, scope, and rules of construction.
43.2 Definitions.
43.3 Method and timing for real-time public reporting.
43.4 Swap transaction and pricing data to be publicly disseminated in real-time.
43.5 Time delays for public dissemination of swap transaction and pricing data.
43.6 [Reserved]
Appendix A to Part 43—Data Fields for Public Dissemination
Appendix B to Part 43—Enumerated Physical Commodity Contracts and Other Contracts
Appendix C to Part 43—Time Delays for Public Dissemination

Authority: 7 U.S.C. 2(a), 12a(5) and 24a, as amended by Title VII of the Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

§ 43.1 Purpose, scope, and rules of construction.

(a) *Purpose.* This part implements rules relating to the reporting and public dissemination of certain swap transaction and pricing data to enhance transparency and price discovery pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111–203, 124 Stat. 1376 (2010).

(b)(1) *Scope.* The provisions of this part shall apply to all swaps as defined in Section 1a(47) of the Act and any implementing regulations thereunder, including:

(i) Swaps subject to the mandatory clearing requirement described in Section 2(h)(1) of the Act, including those swaps that are excepted from the requirement pursuant to Section 2(h)(7) of the Act;

(ii) Swaps that are not subject to the mandatory clearing requirement described in Section 2(h)(1) of the Act, but are cleared at a registered derivatives clearing organization;

(iii) Swaps that are not cleared at a registered derivatives clearing organization and are reported to a registered swap data repository that accepts and publicly disseminates swap transaction and pricing data in real-time; and

(iv) Swaps that are required to be cleared under Section 2(h)(2) of the Act, but are not cleared.

(2) This part also shall apply to registered entities as defined in the Act, as well as to parties to a swap including swap dealers, major swap participants and U.S.-based market participants in a manner as the Commission may determine.

(c) *Rules of construction.* The examples in this part and in appendix A to this part are not exclusive. Compliance with a particular example or application of a sample clause, to the extent applicable, shall constitute compliance with the particular portion of the rule to which the example relates.

(d) *Severability.* If any provision of this part, or the application thereof to any person or circumstance, is held invalid, such invalidity shall not affect other provisions or application of such provision to other persons or circumstances which can be given effect without the invalid provision or application.

§ 43.2 Definitions.

As used in this part:

Act means the Commodity Exchange Act, as amended, 7 U.S.C. 1 *et seq.*

Affirmation means the process by which parties to a swap verify (orally, in writing, electronically or otherwise) that they agree on the primary economic terms of a swap (but not necessarily all terms of the swap). Affirmation may constitute ''execution'' of the swap or may provide evidence of execution of the swap, but does not constitute confirmation (or confirmation by affirmation) of the swap.

Appropriate minimum block size means the minimum notional or principal amount for a category of swaps that qualifies a swap within such category as a block trade or large notional off-facility swap.

As soon as technologically practicable means as soon as possible, taking into consideration the prevalence, implementation and use of technology by comparable market participants.

Asset class means a broad category of commodities including, without limitation, any ''excluded commodity'' as defined in Section 1a(19) of the Act, with common characteristics underlying a swap. The asset classes include interest rate, foreign exchange, credit, equity, other commodity and such other asset classes as may be determined by the Commission.

Block trade means a publicly reportable swap transaction that:

(1) Involves a swap that is listed on a registered swap execution facility or designated contract market;

(2) Occurs away from the registered swap execution facility's or designated contract market's trading system or platform and is executed pursuant to the registered swap execution facility's or designated contract market's rules and procedures;

(3) Has a notional or principal amount at or above the appropriate minimum block size applicable to such swap; and

(4) Is reported subject to the rules and procedures of the registered swap execution facility or designated contract market and the rules described in this part, including the appropriate time delay requirements set forth in § 43.5 of this part.

Business day means the twenty-four hour day, on all days except Saturdays, Sundays and legal holidays, in the location of the reporting party or registered entity reporting data for the swap.

Business hours means the consecutive hours of one or more consecutive business days.

Confirmation means the consummation (electronic or otherwise) of legally binding documentation (electronic or otherwise) that memorializes the agreement of the parties to all terms of a swap. A confirmation shall be in writing (electronic or otherwise) and shall legally supersede any previous agreement (electronic or otherwise) relating to the swap.

Confirmation by affirmation means the process by which one party to a swap acknowledges its assent to the complete swap terms submitted by the other party to the swap. If the parties to a swap are using a confirmation service vendor, complete swap terms may be submitted electronically by a party to such vendor's platform and the other party may affirm such terms on such platform.

Embedded option means any right, but not an obligation, provided to one party of a swap by the other party to the swap that provides the party holding the option with the ability to change any one or more of the economic terms of the swap as those terms previously were established at confirmation (or were in effect on the start date).

Executed means the completion of the execution process.

Execution means an agreement by the parties (whether orally, in writing, electronically, or otherwise) to the terms of a swap that legally binds the parties to such swap terms under applicable law. Execution occurs simultaneous with or immediately following the affirmation of the swap.

Large notional off-facility swap means an off-facility swap that has a notional or principal amount at or above the appropriate minimum block size applicable to such publicly reportable swap transaction and is not a block trade as defined in § 43.2 of the Commission's regulations.

Novation means the process by which a party to a swap transfers all of its rights, liabilities, duties and obligations under the swap to a new legal party other than the counterparty to the swap. The transferee accepts all of the transferor's rights, liabilities, duties and obligations under the swap. A novation is valid as long as the transferor and the remaining party to the swap are given notice, and the transferor, transferee and remaining party to the swap consent to the transfer.

Off-facility swap means any publicly reportable swap transaction that is not executed on or pursuant to the rules of a registered swap execution facility or designated contract market.

Other commodity means any commodity that is not categorized in the other asset classes as may be determined by the Commission.

Public dissemination and publicly disseminate means to publish and make available swap transaction and pricing data in a non-discriminatory manner, through the Internet or other electronic data feed that is widely published and in machine-readable electronic format.

Publicly reportable swap transaction means:

(1) Unless otherwise provided in this part—

(i) Any executed swap that is an arm's-length transaction between two parties that results in a corresponding change in the market risk position between the two parties; or

(ii) Any termination, assignment, novation, exchange, transfer, amendment, conveyance, or extinguishing of rights or obligations of a swap that changes the pricing of the swap.

(2) Examples of executed swaps that do not fall within the definition of publicly reportable swap may include:

(i) Internal swaps between one-hundred percent owned subsidiaries of the same parent entity; and

(ii) Portfolio compression exercises.

(3) These examples represent swaps that are not at arm's length and thus are not publicly reportable swap transactions, notwithstanding that they do result in a corresponding change in the market risk position between two parties.

Real-time public reporting means the reporting of data relating to a swap transaction, including price and volume, as soon as technologically practicable after the time at which the swap transaction has been executed.

Remaining party means a party to a swap that consents to a transferor's transfer by novation of all of the transferor's rights, liabilities, duties and obligations under such swap to a transferee.

Reporting party means the party to a swap with the duty to report a publicly reportable swap transaction in accordance with this part and section 2(a)(13)(F) of the Act.

Transferee means a party to a swap that accepts, by way of novation, all of a transferor's rights, liabilities, duties and obligations under such swap with respect to a remaining party.

Transferor means a party to a swap that transfers, by way of novation, all of its rights, liabilities, duties and obligations under such swap, with respect to a remaining party, to a transferee.

Unique product identifier means a unique identification of a particular level of the taxonomy of the product in an asset class or sub-asset class in question, as further described in § 43.4(f) and appendix A to this part. Such unique product identifier may combine the information from one or more of the data fields described in appendix A.

Widely published means to publish and make available through electronic means in a manner that is freely available and readily accessible to the public.

§ 43.3 Method and timing for real-time public reporting.

(a) *Responsibilities of parties to a swap to report swap transaction and pricing data in real-time*—(1) *In general.* A reporting party shall report any publicly reportable swap transaction to a registered swap data repository as soon as technologically practicable after such publicly reportable swap transaction is executed. For purposes of this part, a registered swap data repository includes any swap data repository provisionally registered with the Commission pursuant to part 49 of this chapter.

(2) *Swaps executed on or pursuant to the rules of a registered swap execution facility or designated contract market.* A party to a publicly reportable swap transaction shall satisfy its reporting requirement under this section by executing a publicly reportable swap transaction on or pursuant to the rules of a registered swap execution facility or designated contract market.

(3) *Off-facility swaps.* All off-facility swaps shall be reported by the reporting party as soon as technologically practicable following execution, to a registered swap data repository for the appropriate asset class in accordance with the rules set forth in this part. Unless otherwise agreed to by the parties prior to the execution of the publicly reportable swap transaction, the following persons shall be reporting parties for off-facility swaps:

(i) If only one party is a swap dealer or major swap participant, then the swap dealer or major swap participant shall be the reporting party;

(ii) If one party is a swap dealer and the other party is a major swap participant, then the swap dealer shall be the reporting party;

(iii) If both parties are swap dealers, then the swap dealers shall designate which party shall be the reporting party;

(iv) If both parties are major swap participants, then the major swap participants shall designate which party shall be the reporting party;

(v) If neither party is a swap dealer or a major swap participant, then the parties shall designate which party (or its agent) shall be the reporting party.

(b) *Public dissemination of swap transaction and pricing data*—(1) *Publicly reportable swap transactions executed on or pursuant to the rules of a registered swap execution facility or designated contract market.* A registered swap execution facility or designated contract market shall satisfy the requirements of this subparagraph by transmitting swap transaction and pricing data to a registered swap data repository, as soon as technologically practicable after the publicly reportable swap transaction has been executed on or pursuant to the rules of such trading platform or facility.

(2) *Public dissemination of swap transaction and pricing data by registered swap data repositories.* A registered swap data repository shall ensure that swap transaction and pricing data is publicly disseminated, as soon as technologically practicable after such data is received from a registered swap execution facility, designated contract market or reporting party, unless such publicly reportable swap transaction is subject to a time delay described in § 43.5 of this part, in which case the publicly reportable swap

transaction shall be publicly disseminated in the manner described in § 43.5.

(3) Prohibitions on disclosure of data. (i) If there is a registered swap data repository for an asset class, a registered swap execution facility or designated contract market shall not disclose swap transaction and pricing data relating to publicly reportable swap transactions in such asset class, prior to the public dissemination of such data by a registered swap data repository unless:

(A) Such disclosure is made no earlier than the transmittal of such data to a registered swap data repository for public dissemination;

(B) Such disclosure is only made to market participants on such registered swap execution facility or designated contract market;

(C) Market participants are provided advance notice of such disclosure; and

(D) Any such disclosure by the registered swap execution facility or designated contract market is non-discriminatory.

(ii) If there is a registered swap data repository for an asset class, a swap dealer or major swap participant shall not disclose swap transaction and pricing data relating to publicly reportable swap transactions in such asset class, prior to the public dissemination of such data by a registered swap data repository unless:

(A) Such disclosure is made no earlier than the transmittal of such data to a registered swap data repository for public dissemination;

(B) Such disclosure is only made to the customer base of such swap dealer or major swap participant, including parties who maintain accounts with or have been swap counterparties with such swap dealer or major swap participant;

(C) Swap counterparties are provided advance notice of such disclosure; and

(D) Any such disclosure by the swap dealer or major swap participant is non-discriminatory.

(c) *Requirements for registered swap data repositories in providing the public dissemination of swap transaction and pricing data in real-time*—(1) *Compliance with 17 CFR part 49.* Any registered swap data repository that accepts and publicly disseminates swap transaction and pricing data in real-time shall comply with part 49 of this chapter and shall publicly disseminate swap transaction and pricing data in accordance with this part as soon as technologically practicable upon receipt of such data, except as otherwise provided in this part.

(2) *Acceptance and public dissemination of all swaps in an asset class.* Any registered swap data repository that accepts and publicly disseminates swap transaction and pricing data in real-time for swaps in its selected asset class shall accept and publicly disseminate swap transaction and pricing data in real-time for all publicly reportable swap transactions within such asset class, unless otherwise prescribed by the Commission.

(3) *Annual independent review.* Any registered swap data repository that accepts and publicly disseminates swap transaction and pricing data in real-time shall perform, on an annual basis, an independent review in accordance with established audit procedures and standards of the registered swap data repository's security and other system controls for the purposes of ensuring compliance with the requirements in this part.

(d) *Availability of swap transaction and pricing data to the public.* (1) Registered swap data repositories shall publicly disseminate swap transaction and pricing data in a consistent, usable and machine-readable electronic format that allows the data to be downloaded, saved and analyzed.

(2) Data that is publicly disseminated pursuant to this part shall be available from an Internet Web site in a format that is freely available and readily accessible to the public.

(3) Registered swap data repositories shall provide to the Commission a hyperlink to the Internet Web site where publicly disseminated swap transaction and pricing data can be accessed by the public.

(e) *Errors or omissions*—(1) *In general.* Any errors or omissions in swap transaction and pricing data that were publicly disseminated in real-time shall be corrected or cancelled in the following manner:

(i) If a party to the swap becomes aware of an error or omission in the swap transaction and pricing data reported with respect to such swap, such party shall promptly notify the other party of the error and/or correction.

(ii) If a reporting party to a swap becomes aware of an error or omission in the swap transaction or pricing data which it reported to a registered swap data repository or which was reported by a registered swap execution facility or designated contract market with respect to such swap, either through its own initiative or through notice by the other party to the swap, the reporting party shall promptly submit corrected data to the same registered swap execution facility, designated contract market or registered swap data repository.

(iii) If the registered swap execution facility or designated contract market becomes aware of an error or omission in the swap transaction or pricing data reported with respect to such swap, or receives notification from the reporting party, the registered swap execution facility or designated contract market shall promptly submit corrected data to the same registered swap data repository.

(iv) Any registered swap data repository that accepts and publicly disseminates swap transaction and pricing data in real-time shall publicly disseminate any cancellations or corrections to such data, as soon as technologically practicable after receipt or discovery of any such cancellation or correction.

(2) *Improper cancellation or correction.* Reporting parties, registered swap execution facilities, designated contract markets and registered swap data repositories shall not submit or agree to submit a cancellation or correction for the purpose of re-reporting swap transaction and pricing data in order to gain or extend a delay in public dissemination of accurate swap transaction or pricing data or to otherwise evade the reporting requirements in this part.

(3) *Cancellation.* A registered swap data repository shall cancel any incorrect data that had been publicly disseminated by publicly disseminating a cancellation of such data, as soon as technologically practicable, in the manner described in appendix A to this part.

(4) *Correction.* A registered swap data repository shall correct any incorrect data that had been publicly disseminated by publicly disseminating a cancellation of the incorrect swap transaction and pricing data and then publicly disseminating the correct data, as soon as technologically practicable, in the manner described in appendix A to this part.

(f) *Hours of operation of registered swap data repositories.* Unless otherwise provided in this subsection, a registered swap data repository shall have systems in place to continuously receive and publicly disseminate swap transaction and pricing data in real-time pursuant to this part.

(1) A registered swap data repository may declare closing hours to perform system maintenance.

(2) A registered swap data repository shall, to the extent reasonably possible, avoid scheduling closing hours when, in its estimation, the U.S. market and major foreign markets are most active.

(3) A registered swap data repository shall comply with the requirements under part 40 of this chapter in setting closing hours and shall provide advance notice of its closing hours to market participants and the public.

(g) *Acceptance of data during closing hours.* During closing hours, a registered swap data repository shall have the capability to receive and hold in queue any data regarding publicly reportable swap transactions pursuant to this part.

(1) Upon any reopening after closing hours, a registered swap data repository shall promptly and publicly disseminate the swap transaction and pricing data of swaps held in queue, in accordance with the requirements of this part.

(2) If at any time during closing hours a registered swap data repository is unable to receive and hold in queue swap transaction and pricing data pursuant to this part, then the registered swap data repository shall immediately upon reopening issue notice that it has resumed normal operations. Any registered swap execution facility, designated contract market or reporting party that is obligated under this section to report data to the registered swap data repository shall report the data to the registered swap data repository immediately after receiving such notice.

(h) *Timestamp requirements.* In addition to the execution timestamp described in appendix A to this part, registered entities, swap dealers and major swap participants shall have the following timestamp requirements with respect to real-time public reporting of swap transaction and pricing data for all publicly reportable swap transactions:

(1) A registered swap execution facility or designated contract market shall timestamp swap transaction and pricing data relating to a publicly reportable swap transaction with the date and time, to the nearest second of when such registered swap execution facility or designated contract market:

(i) Receives data from a swap counterparty (if applicable); and

(ii) Transmits such data to a registered swap data repository for public dissemination.

(2) A registered swap data repository shall timestamp swap transaction and pricing data relating to a publicly reportable swap transaction with the date and time, to the nearest second when such registered swap data repository:

(i) Receives data from a registered swap execution facility, designated contract market or reporting party; and

(ii) Publicly disseminates such data.

(3) A swap dealer or major swap participant shall timestamp swap transaction and pricing data relating to an off-facility swap with the date and time, to the nearest second when such swap dealer or major swap participant transmits such data to a registered swap data repository for public dissemination.

(4) Records of all timestamps required by this subsection shall be maintained for a period of at least five years from the execution of the publicly reportable swap transaction.

(i) *Fees.* Any fees or charges assessed on a reporting party, registered swap execution facility or designated contract market by a registered swap data repository that accepts and publicly disseminates swap transaction and pricing data in real-time for the collection of such data shall be equitable and non-discriminatory. If such registered swap data repository allows a fee discount based on the volume of data reported to it for public dissemination, then such discount shall be made available to all reporting parties, registered swap execution facilities and designated contract markets in an equitable and non-discriminatory manner.

§ 43.4 Swap transaction and pricing data to be publicly disseminated in real-time.

(a) *In general.* Swap transaction and pricing information shall be reported to a registered swap data repository so that the registered swap data repository can publicly disseminate swap transaction and pricing data in real-time in accordance with this part, including the manner described in this section and appendix A to this part.

(b) *Public dissemination of data fields.* Any registered swap data repository that accepts and publicly disseminates swap transaction and pricing data in real-time shall publicly disseminate the information described in appendix A to this part, as applicable, for any publicly reportable swap transaction.

(c) *Additional swap information.* A registered swap data repository that accepts and publicly disseminates swap transaction and pricing data in real-time may require reporting parties, registered swap execution facilities and designated contract markets to report to such registered swap data repository, such information that is necessary to compare the swap transaction and pricing data that was publicly disseminated in real-time to the data reported to a registered swap data repository pursuant to Section 2(a)(13)(G) of the Act or to confirm that parties to a swap have reported in a timely manner pursuant to § 43.3 of this part. Such additional information shall not be publicly disseminated by the registered swap data repository.

(d) *Anonymity of the parties to a publicly reportable swap transaction*—(1) *In general.* Swap transaction and pricing data that is publicly disseminated in real-time shall not disclose the identities of the parties to the swap or otherwise facilitate the identification of a party to a swap. A registered swap data repository that accepts and publicly disseminates swap transaction and pricing data in real-time shall not publicly disseminate such data in a manner that discloses or otherwise facilitates the identification of a party to a swap.

(2) *Actual product description reported to registered swap data repository.* Reporting parties, registered swap execution facilities and designated contract markets shall provide a registered swap data repository with swap transaction and pricing data that includes an actual description of the underlying asset(s). This requirement is separate from the requirement that a reporting party, registered swap execution facility or designated contract market shall report swap data to a registered swap data repository pursuant to Section 2(a)(13)(G) of the Act and the Commission's regulations.

(3) *Public dissemination of the actual description of underlying asset(s).* Notwithstanding the anonymity protection for certain swaps in the other commodity asset class in § 43.4(d)(4)(ii), a registered swap data repository shall publicly disseminate the actual underlying asset(s) of all publicly reportable swap transactions in the interest rate, credit, equity and foreign exchange asset classes.

(4) *Public dissemination of the underlying asset(s) for certain swaps in the other commodity asset class.* A registered swap data repository shall publicly disseminate swap transaction and pricing data in the other commodity asset class as described in this subsection.

(i) A registered swap data repository shall publicly disseminate swap transaction and pricing data for publicly reportable swap transactions in the other commodity asset class in the manner described in § 43.4(d)(4)(ii).

(ii) The actual underlying asset(s) shall be publicly disseminated for the following publicly reportable swap transactions in the other commodity asset class:

(A) Any publicly reportable swap transaction that references one of the contracts described in appendix B to this part;

(B) Any publicly reportable swap transaction that is economically related

to one of the contracts described in appendix B to this part; and

(C) Any publicly reportable swap transaction executed on or pursuant to the rules of a registered swap execution facility or designated contract market.

(e) *Unique product identifier.* If a unique product identifier is developed that sufficiently describes one or more of the swap transaction and pricing data fields for real-time reporting described in appendix A to this part, then such unique product identifier may be publicly disseminated in lieu of the data fields that it describes.

(f) *Reporting of notional or principal amounts to a registered swap data repository*—(1) *Off-facility swaps.* The reporting party shall report the actual notional or principal amount of any off-facility swap to a registered swap data repository that accepts and publicly disseminates such data pursuant to part 43.

(2) *Swaps executed on or pursuant to the rules of a registered swap execution facility or designated contract market.* (i) A registered swap execution facility or designated contract market shall transmit the actual notional or principal amount for all swaps executed on or pursuant to the rules of such registered swap execution facility or designated contract market, to a registered swap data repository that accepts swaps in the asset class.

(ii) The actual notional or principal amount for any block trade executed pursuant to the rules of a registered swap execution facility or designated contract market shall be reported to the registered swap execution facility or designated contract market pursuant to the rules of the registered swap execution facility or designated contract market.

(g) *Public dissemination of rounded notional or principal amounts.* The notional or principal amount of a publicly reportable swap transaction, as described in appendix A to this part, shall be rounded and publicly disseminated by a registered swap data repository as follows:

(1) If the notional or principal amount is less than one thousand, round to nearest five, but in no case shall a publicly disseminated notional or principal amount be less than five;

(2) If the notional or principal amount is less than ten thousand but equal to or greater than one thousand, round to nearest one hundred;

(3) If the notional or principal amount is less than 100 thousand but equal to or greater than ten thousand, round to nearest one thousand;

(4) If the notional or principal amount is less than one million but equal to or greater than 100 thousand, round to nearest ten thousand;

(5) If the notional or principal amount is less than 100 million but equal to or greater than one million, round to the nearest one million;

(6) If the notional or principal amount is less than 500 million but equal to or greater than 100 million, round to the nearest ten million;

(7) If the notional or principal amount is less than one billion but equal to or greater than 500 million, round to the nearest 50 million;

(8) If the notional or principal amount is less than 100 billion but equal to or greater than one billion, round to the nearest one billion;

(9) If the notional or principal amount is greater than 100 billion, round to the nearest 50 billion.

(h) *Public dissemination caps on notional or principal amounts.* The rounded notional or principal amount that is publicly disseminated for a publicly reportable swap transaction shall be capped in a manner that adjusts in accordance with the appropriate minimum block size that corresponds to such publicly reportable swap transaction. If there is no appropriate minimum block size applicable to a publicly reportable swap transaction, then the cap on the notional or principal amount that is publicly disseminated shall be applied in the following manner:

(1) *Interest rate swaps.* (i) The publicly disseminated notional or principal amount for an interest rate swap subject to the rules in this part with a tenor greater than zero up to and including two years shall be capped at USD 250 million.

(ii) The publicly disseminated notional or principal amount for an interest rate swap subject to the rules in this part with a tenor greater than two years up to and including ten years shall be capped at USD 100 million.

(iii) The publicly disseminated notional or principal amount for an interest rate swap subject to the rules in this part with a tenor greater than ten years shall be capped at USD 75 million.

(2) *Credit swaps.* The publicly disseminated notional or principal amount for a credit swap subject to the rules in this part shall be capped at USD 100 million.

(3) *Equity swaps.* The publicly disseminated notional or principal amount for an equity swap subject to the rules in this part shall be capped at USD 250 million.

(4) *Foreign exchange swaps.* The publicly disseminated notional or principal amount for a foreign exchange swap subject to the rules in this part shall be capped at USD 250 million.

(5) *Other commodity swaps.* The publicly disseminated notional or principal amount for any other commodity swap subject to the rules in this part shall be capped at USD 25 million.

§ 43.5 Time delays for public dissemination of swap transaction and pricing data.

(a) *In general.* The time delay for the real-time public reporting of a block trade or large notional off-facility swap begins upon execution, as defined in § 43.2 of this part. It is the responsibility of the registered swap data repository that accepts and publicly disseminates swap transaction and pricing data in real-time to ensure that the block trade or large notional off-facility swap transaction and pricing data is publicly disseminated pursuant to this part upon the expiration of the appropriate time delay described in § 43.5(d) through (h).

(b) *Public dissemination of publicly reportable swap transactions subject to a time delay.* A registered swap data repository shall publicly disseminate swap transaction and pricing data that is subject to a time delay pursuant to this paragraph, as follows:

(1) No later than the prescribed time delay period described in this paragraph;

(2) No sooner than the prescribed time delay period described in this paragraph; and

(3) Precisely upon the expiration of the time delay period described in this paragraph.

(c) *Interim time delay*—(1) *In general.* The public dissemination of swap transaction and pricing data relating to any publicly reportable swap transaction shall receive the same time delays for block trades and large notional off-facility swaps, as described in this subsection, until such time as an appropriate minimum block size is established with respect to such publicly reportable swap transaction.

(2) *Swaps executed on or pursuant to the rules of a registered swap execution facility or designated contract market.* Any publicly reportable swap transaction that does not have an appropriate minimum block size and that is executed on or pursuant to the rules of a registered swap execution facility or designated contract market shall follow the time delays set forth in § 43.5(d) until such time that an appropriate minimum block size is established for such publicly reportable swap transaction.

(3) *Off-facility swaps subject to the mandatory clearing requirement.* Any

off-facility swap that does not have an appropriate minimum block size and that is subject to the mandatory clearing requirement described in Section 2(h)(1) of the Act and Commission regulations, with the exception of those off-facility swaps that are either excepted from the mandatory clearing requirement pursuant to Section 2(h)(7) of the Act and Commission regulations or that are required to be cleared under Section 2(h)(2) of the Act and Commission regulations but are not cleared, shall follow the time delays set forth in § 43.5(e) until such time that an appropriate minimum block size is established for such off-facility swap.

(4) *Off-facility swaps in the interest rate, credit, foreign exchange and equity asset classes not subject to the mandatory clearing requirement with at least one swap dealer or major swap participant counterparty.* Any off-facility swap in the interest rate, credit, foreign exchange or equity asset classes, where at least one party is a swap dealer or major swap participant, that is not subject to the mandatory clearing requirement or is excepted from such mandatory clearing requirement and that does not have an appropriate minimum block size shall follow the time delays set forth in § 43.5(f) until such time that an appropriate minimum block size is established for such off-facility swap.

(5) *Off-facility swaps in the other commodity asset class not subject to the mandatory clearing requirement with at least one swap dealer or major swap participant counterparty.* Any off-facility swap in the other commodity asset class, where at least one party is a swap dealer or major swap participant, that is not subject to the mandatory clearing requirement or is excepted from such mandatory clearing requirement and that does not have an appropriate minimum block size shall follow the time delays set forth in § 43.5(g) until such time that an appropriate minimum block size is established for such off-facility swap.

(6) *Off-facility swaps in all asset classes not subject to the mandatory clearing requirement in which neither counterparty is a swap dealer or major swap participant.* Any off-facility swap, in all asset classes, where neither party is a swap dealer or major swap participant, that is not subject to the mandatory clearing requirement or is excepted from such mandatory clearing requirement and that does not have an appropriate minimum block size shall follow the time delays set forth in § 43.5(h) until such time that an appropriate minimum block size is established for such off-facility swap.

(7) *Time delays for public dissemination upon establishment of an appropriate minimum block size.* After an appropriate minimum block size is established for a particular swap or category of swaps, all publicly reportable swap transactions that are below the appropriate minimum block size shall be publicly disseminated as soon as technologically practicable after execution pursuant to § 43.3 of this part.

(d) *Time delay for block trades executed pursuant to the rules of a registered swap execution facility or designated contract market.* Any block trade that is executed pursuant to the rules of a registered swap execution facility or designated contract market shall receive a time delay in the public dissemination of swap transaction and pricing data as follows:

(1) *Time delay during Year 1.* For one year beginning on the compliance date of this part, the time delay for public dissemination of swap transaction and pricing data for all publicly reportable swap transactions described in § 43.5(d) shall be 30 minutes immediately after execution of such publicly reportable swap transaction.

(2) *Time delay after Year 1.* Beginning on the first anniversary of the compliance date of this part, the time delay for public dissemination of swap transaction and pricing data for all publicly reportable swap transactions described in § 43.5(d) shall be 15 minutes immediately after execution of such publicly reportable swap transaction.

(e) *Time delay for large notional off-facility swaps subject to the mandatory clearing requirement*—(1) *In general.* This subsection shall not apply to off-facility swaps that are excepted from the mandatory clearing requirement pursuant to Section 2(h)(7) of the Act and Commission regulations, and this subsection shall not apply to those swaps that are required to be cleared under Section 2(h)(2) of the Act and Commission regulations but are not cleared.

(2) *Swaps subject to the mandatory clearing requirement where at least one party is a swap dealer or major swap participant.* Any large notional off-facility swap that is subject to the mandatory clearing requirement described in Section 2(h)(1) of the Act and Commission regulations, in which at least one party is a swap dealer or major swap participant, shall receive a time delay as follows:

(i) *Time delay during Year 1.* For one year beginning on the compliance date of this part, the time delay for public dissemination of swap transaction and pricing data for all swaps described in § 43.5(e)(2) shall be 30 minutes immediately after execution of such swap.

(ii) *Time delay after Year 1.* Beginning on the first anniversary of the compliance date of this part, the time delay for public dissemination of swap transaction and pricing data for all swaps described in § 43.5(e)(2) shall be 15 minutes immediately after execution of such swap.

(3) *Swaps subject to the mandatory clearing requirement where neither party is a swap dealer or major swap participant.* Any large notional off-facility swap that is subject to the mandatory clearing requirement described in Section 2(h)(1) of the Act and Commission regulations, in which neither party is a swap dealer or major swap participant, shall receive a time delay as follows:

(i) *Time delay during Year 1.* For one year beginning on the compliance date of this part, the time delay for public dissemination of swap transaction and pricing data for all swaps described in § 43.5(e)(3) shall be four hours immediately after execution of such swap.

(ii) *Time delay during Year 2.* For one year beginning on the first anniversary of the compliance date of this part, the time delay for public dissemination of swap transaction and pricing data for all swaps described in § 43.5(e)(3) shall be two hours immediately after execution of such swap.

(iii) *Time delay after Year 2.* Beginning on the second anniversary of the compliance date of this part, the time delay for public dissemination of swap transaction and pricing data for all swaps described in § 43.5(e)(3) shall be one hour immediately after execution of such swap.

(f) *Time delay for large notional off-facility swaps in the interest rate, credit, foreign exchange or equity asset classes not subject to the mandatory clearing requirement with at least one swap dealer or major swap participant counterparty.* Any large notional off-facility swap in the interest rate, credit, foreign exchange or equity asset classes where at least one party is a swap dealer or major swap participant, that is not subject to the mandatory clearing requirement or is excepted from such mandatory clearing requirement, shall receive a time delay in the public dissemination of swap transaction and pricing data as follows:

(1) *Time delay during Year 1.* For one year beginning on the compliance date of this part, the time delay for public dissemination of swap transaction and pricing data for all swaps described in § 43.5(f) shall be one hour immediately

after execution of such swap; however, any large notional off-facility swap in the interest rate, credit, foreign exchange or equity asset classes in which one party is not a swap dealer or major swap participant and such party is not a financial entity as defined in Section 2(h)(7)(C) of the Act and Commission regulations, shall receive a time delay of one hour immediately after execution of such swap; or if such swap transaction or pricing data is received by the registered swap data repository later than one hour immediately after execution, the registered swap data repository shall publicly disseminate such data as soon as technologically practicable after the data is received.

(2) *Time delay during Year 2.* For one year beginning on the first anniversary of the compliance date of this part, the time delay for public dissemination of swap transaction and pricing data for all swaps described in § 43.5(f) shall be 30 minutes immediately after execution of such swap; however, any large notional off-facility swap in the interest rate, credit, foreign exchange or equity asset classes in which one party is not a swap dealer or major swap participant and such party is not a financial entity as defined in Section 2(h)(7)(C) of the Act and Commission regulations, shall receive a time delay of 30 minutes immediately after execution of such swap; or if such swap transaction or pricing data is received by the registered swap data repository later than 30 minutes immediately after execution, the registered swap data repository shall publicly disseminate such data as soon as technologically practicable after the data is received.

(3) *Time delay after Year 2.* Beginning on the second anniversary of the compliance date of this part, the time delay for public dissemination of swap transaction and pricing data for all swaps described in § 43.5(f) shall be 30 minutes immediately after execution of such swap.

(g) *Time delay for large notional off-facility swaps in the other commodity asset class not subject to the mandatory clearing requirement with at least one swap dealer or major swap participant counterparty.* Any large notional off-facility swap in the other commodity asset class where at least one party is a swap dealer or major swap participant, that is not subject to the mandatory clearing requirement or is exempt from such mandatory clearing requirement, shall receive a time delay in the public dissemination of swap transaction and pricing data as follows:

(1) *Time delay during Year 1.* For one year beginning on the compliance date of this part, the time delay for public dissemination of swap transaction and pricing data for all swaps described in § 43.5(g) shall be four hours immediately after execution of such swap; however, any large notional off-facility swap in the other commodity asset class in which only one party is not a swap dealer or major swap participant and such party is not a financial entity as defined in Section 2(h)(7)(C) of the Act and Commission regulations, shall receive a time delay of four hours immediately after execution of such swap, or if such swap transaction or pricing data is received by the registered swap data repository later than four hours immediately after execution of such swap, the registered swap data repository shall publicly disseminate such data as soon as technologically practicable after the data is received.

(2) *Time delay during Year 2.* For one year beginning on the first anniversary of the compliance date of this part, the time delay for public dissemination of swap transaction and pricing data for all swaps described in § 43.5(g) shall be two hours immediately after execution of such swap; however, any large notional off-facility swap in the other commodity asset class in which only one party is not a swap dealer or major swap participant and such party is not a financial entity as defined in Section 2(h)(7)(C) of the Act and Commission regulations, shall receive a time delay of two hours immediately after execution of such swap, or if such swap transaction or pricing data is received by the registered swap data repository later than two hours immediately after execution, the registered swap data repository shall publicly disseminate such data as soon as technologically practicable after the data is received.

(3) *Time delay after Year 2.* Beginning on the second anniversary of the compliance date of this part, the time delay for public dissemination of swap transaction and pricing data for all swaps described in § 43.5(g) shall be two hours after the execution of such swap.

(h) *Time delay for large notional off-facility swaps in all asset classes not subject to the mandatory clearing requirement in which neither counterparty is a swap dealer or a major swap participant.* Any large notional off-facility swap in which neither party is a swap dealer or a major swap participant, which is not subject to the mandatory clearing requirement or is exempt from such mandatory clearing requirement, shall receive a time delay in the public dissemination of swap transaction and pricing data as follows:

(1) *Time delay during Year 1.* For one year beginning on the compliance date of this part, the time delay for public dissemination of swap transaction and pricing data for all swaps described in § 43.5(h) shall be 48 business hours immediately after execution of such swap.

(2) *Time delay during Year 2.* For one year beginning on the first anniversary of the compliance date of this part, the time delay for public dissemination of swap transaction and pricing data for all swaps described in § 43.5(h) shall be 36 business hours immediately after the execution of such swap.

(3) *Time delay after Year 2.* Beginning on the second anniversary of the compliance date of this part, the time delay for public dissemination transaction and pricing data for all swaps described in § 43.5(h) shall be 24 business hours immediately after the execution of such swap.

§ 43.6 [Reserved]

Appendix A to Part 43—Data Fields for Public Dissemination

The data fields described in Table A1 and Table A2, to the extent applicable for a particular publicly reportable swap transaction, shall be publicly disseminated pursuant to part 43. Table A1 and Table A2 provide guidance for compliance with the reporting and public dissemination of each data field. Reporting parties, registered swap execution facilities and designated contract markets shall report swap transaction and pricing data necessary to publicly disseminate such data, pursuant to part 43 and this appendix A to part 43, to a registered swap data repository as soon as technologically practicable after execution of the publicly reportable swap transaction. A registered swap data repository shall publicly disseminate the information in Table A1 and A2 in a consistent form and manner for swaps within the same asset class.

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TABLE A1.—Data Fields and Suggested Form and Order for Real-time Public Reporting of Swap Transaction and Pricing Data.

Field	Description	Example	Data application
Cancellation	An indication that a publicly reportable swap transaction has been incorrectly or erroneously publicly disseminated and is canceled. There shall be a clear indication to the public that the publicly reportable swap transaction is being canceled (e.g., "CANCEL") followed by the swap transaction and pricing data that is being canceled in the same form and manner that it was erroneously reported. Any cancellations should be made in accordance with § 43.3(e). If a publicly reportable swap transaction is canceled, it may be corrected by reporting the "Correction" data field and the correct information.	CANCEL…… (e.g., the information is being cancelled in accordance with § 43.3(e))	Information is needed to inform market participants and the public that swap transaction and pricing data was erroneously disseminated to the public.
Correction	An indication that the swap transaction and pricing data that is being publicly disseminated is a correction to previously publicly disseminated swap transaction and pricing data that contained an error or omission. In order for a correction to occur, the registered swap data repository that accepts and publicly	CORRECT …… (e.g., the information is a correction to a previously reported swap)	Information needed to inform market participants and the public that a particular publicly reportable swap transaction that is being reported is a correction to swap transaction and pricing data that has previously been publicly disseminated by a registered swap data

	disseminates swap transaction and pricing data shall first cancel the incorrectly reported swap transaction and pricing data and the follow such cancellation with the correction. There shall be a clear indication to the public that the swap transaction and pricing data that is being reported is a correction (e.g., "CORRECT"). Any corrections should be made in accordance with § 43.3(e).		repository.
Execution timestamp	The time and date of execution of the publicly reportable swap transaction in Coordinated Universal Time (UTC). The timestamp shall be displayed with two digits for each of the hour, minute and second, or in such other manner that clearly publicly disseminates the information.	13-10-2007; 15:25:47 (e.g., the date (October 13, 2007) and time in UTC (15:25:47))	Information needed to indicate the time and date of execution of the publicly reportable swap transaction.
Cleared or uncleared	An indication of whether or not a publicly reportable swap transaction is going to be cleared by a derivatives clearing organization. If the publicly reportable swap transaction is cleared by a derivatives clearing organization, a "C" may be used and if uncleared a "U" may be used.	C……. (e.g., cleared)	Information needed to indicate whether or not a publicly reportable swap transaction is cleared through a derivatives clearing organization.
Indication of Collateralization	If a swap is not cleared, an indication of whether a swap is (A) Uncollateralized –	PC …… (e.g., partially collateralized)	Information needed to provide information regarding differences

	there is no credit arrangement between the parties or the agreement between the parties of an uncleared swap states that no collateral (neither initial margin nor variation margin) has to be posted at any time; (B) Partially Collateralized – the agreement between the parties states that both parties will regularly post variation margin; (C) One-Way Collateralized – the agreement between the parties of an uncleared swap states that only one party to such swap agrees to post initial margin, regularly post variation margin or both; or (D) Fully Collateralized – the agreement between the parties of an uncleared swap states that initial margin must be posted and variation margin must be regularly posted by both parties.		in prices in uncleared swaps.
Indication of end-user exception	An indication of whether a party to a swap is using the end-user exception pursuant to CEA Section 2(h)(7) and Commission regulations.	EU …… (e.g., swap is not required to be cleared under CEA Section 2(h)(7) and Commission regulations)	Information needed to indicate the reason why a swap that would otherwise be subject to mandatory clearing is not being cleared and to help market participants and the public evaluate the price of the publicly reportable swap transaction.
Indication of other price affecting term (indication for	An indication that the publicly reportable swap transaction has	B*……..... (e.g., bespoke swap that has a material	Information needed to indicate whether a publicly reportable

non-standardized (bespoke) swaps)	one or more additional term(s) or provision(s), other than those listed in the required real-time data fields, that materially affect(s) the price of the publicly reportable swap transaction. Publicly reportable swap transactions that are reported with this designation would be non-standardized (bespoke) swaps.	price affecting term that is not otherwise publicly disseminated)	swap transaction is non-standardized (bespoke) and to inform the public that there are one or more additional term(s) or provision(s) that materially affect the price of the publicly reportable swap transaction.
Block trades and large notional off-facility swaps	An indication of whether a publicly reportable swap transaction is a block trade or large notional off-facility swap. If a publicly reportable swap transaction is a block trade or a large notional off-facility swap and subject to a time delay in real-time public reporting pursuant to § 43.5, such block trade or large notional off-facility swap may be indicated as follows: Block trade or large notional off-facility swap ("BLK"). If a trade is not a block trade or large notional off-facility swap, then no indication would be publicly disseminated.	BLK…… (e.g., swap is block trade or large notional off-facility swap)	Information needed to indicate whether a publicly reportable swap transaction is a block trade or a large notional off-facility swap. This information is important since it will alert market participants and the public to the differences in notional or principal amount and the time delay in the public dissemination of the swap transaction and pricing data.
Execution venue	An indication of the venue of execution of a publicly reportable swap transaction. The specific name of a registered swap execution facility or designated contract market need not be reported; however, an	OFF…… (e.g., off-facility swap)	Information needed to indicate whether a publicly reportable swap transaction is executed on a swap market, as an off-facility swap, or as a block trade or large notional off-facility swap.

	indication of whether the publicly reportable swap transaction is executed on or pursuant to the rules of a registered swap execution facility or designated contract market or is executed as an off-facility swap.		
Effective or Start date	The date that the publicly reportable swap transaction becomes effective or starts.	20-02-2009…… (e.g., February 20, 2009)	Information needed to indicate when the terms of the publicly reportable swap transaction become effective or start.
End Date	The maturity, termination, or end date of the publicly reportable swap transaction. The time between the Effective or Start Date and End Date field will indicate the tenor of the swap.	04-02-2014 …… (e.g., February 4, 2014)	Information needed to determine the end month and year of the publicly reportable swap transaction and to help market participants and the public evaluate the price of the reportable swap transaction.
Day count convention	The determination of how interest accrues over time for the swap.	Actual/360 …..…… (e.g., day count convention uses Actual/360 day count fraction)	Information needed to better inform market participants and the public about the price of the swap.
Settlement currency (i.e., value date)	The settlement currency type for publicly reportable swap transactions in the foreign exchange asset class.	Settle JPY …… (e.g., the foreign exchange swap is settled in Japanese Yen)	Information needed to inform market participants and the public about how to price the publicly reportable swap transaction.
Asset class	An indication of one of the broad categories as described in § 43.2(e).	IR……... (e.g., interest rate asset class)	Information needed to broadly describe the underlying asset to facilitate comparison with other similar publicly reportable swap transactions.
Sub-asset class for other commodity	An indication of a more specific description of	AG……. (e.g., agriculture)	Information needed to define with greater

	the asset class for other commodity. Such sub-asset classes for other commodity publicly reportable swap transactions may include, but are not limited to, energy, precious metals, metals-other, agriculture, weather, emissions and volatility.		specificity, the type of other commodity that is being publicly disseminated and to facilitate comparison with other similar publicly reportable swap transactions.
Contract type	An indication of one of four specific contract types of publicly reportable swap transactions. Such contract types may include but are not limited to: Swap, swaption and stand-alone options.	S-…… (e.g., swap)	Information needed to describe the publicly reportable swap transaction and to be able to compare such publicly reportable swap transaction to other similar publicly reportable swap transactions.
Contract sub-type	An indication of more specificity into the type of contract described in the contract type field. Such contract sub-types may include, but are not limited to, basis swaps, index swaps, broad-based security swaps, and basket swaps.	SS…….. (e.g., basis swap)	Information needed to define with greater specificity, the type of contract that is being publicly disseminated and to facilitate comparison with other similar publicly reportable swap transactions.
Price-forming continuation data	An indication of whether such publicly reportable swap transaction is a post-execution event that affects the price of the publicly reportable swap transaction. Such price-forming continuation data may include: Terminations, assignments, novations, exchanges, transfers, amendments, conveyances or	NOV……... (e.g., novation)	Information needed to describe whether the reportable swap transaction is a post-execution event for a pre-existing swap (i.e., not a newly executed swap) that materially affects the price of the publicly reportable swap transaction.

	extinguishing of rights that change the price of the swap.		
Underlying asset 1	The asset, reference asset or reference obligation for payments of a party's obligations under the publicly reportable swap transaction reference. The underlying asset may be a reference price, index, obligation, physical commodity with delivery point, futures contract or any other rate or instrument agreed to by the parties to a publicly reportable swap transaction.	TX……. (e.g., TX may represent "Treasury 10 year")	Information needed to describe the publicly reportable swap transaction and to help market participants and the public evaluate the price of the publicly reportable swap transaction.
Underlying asset 2	The asset, reference asset or reference obligation for payments of a party's obligations under the publicly reportable swap transaction reference. The underlying asset may be a reference price, index, obligation, physical commodity with delivery point, futures contract or any other rate or instrument agreed to by the parties to a publicly reportable swap transaction. If there are more than two underlying assets, such underlying assets shall be reported in the same manner as above.	IIIL……. (e.g., IIIL may represent 3-month LIBOR)	Information needed to describe the publicly reportable swap transaction and to help market participants and the public evaluate the price of the publicly reportable swap transaction.
Price notation	The price, yield, spread, coupon, etc., depending on the type of swap, which is calculated at affirmation. The pricing characteristic shall not include any	162……. (e.g., 162 may indicate the spread for a credit default swap index)	Information needed to describe the publicly reportable swap transaction and to help market participants and the public evaluate the price of the publicly

	premiums associated with margin, collateral, independent amounts, reconcilable post-execution events, options on a swap, or other non-economic characteristics. The format in which the pricing characteristic is real-time reported to the public shall be the format commonly sought by market participants for each particular market or contract.		reportable swap transaction.
Additional price notation	The additional price notation shall include any premiums associated with reconcilable post-execution events, the presence of collateral, front-end payments, back-end payments, or other non-economic characteristics (e.g., counterparty credit risk) not illustrated in the reporting field for pricing characteristic. The additional price notation shall not include options as they are reported elsewhere. The additional price notation shall be publicly disseminated as an addition or subtraction of the pricing characteristic and in a way commonly sought by market participants for each particular market or contract.	+0.25…….. (e.g., +0.25 would indicate the net present value of the premiums separated from the price notation)	Additional information needed to describe the publicly reportable swap transaction and to help market participants and the public evaluate the price of the publicly reportable swap transaction.
Unique product identifier	Certain fields may be replaced with a unique	12345 ……. (e.g., 12345 may	Information needed to describe the

	product identifier, if such unique identifier exists, to the extent that such unique product identifier adequately describes such fields.	represent a 10 year interest rate swap based on 3 month LIBOR)	publicly reportable swap transaction and enable market participants and the public to compare such publicly reportable swap transaction to other similar publicly reportable swap transactions. Such information would substitute the information described in one or more reportable fields in accordance with §43.4(e).
Notional currency 1 (i.e., base currency)	An indication of the type of currency of the notional or principal amount. The notional currency may be reported in a commonly accepted code (e.g., the three character alphabetic ISO 4217 currency code).	EUR…… (e.g., Euro)	Information needed to describe the type of currency of the notional or principal amount.
Rounded notional or principal amount 1	The total rounded currency amount or quantity of units of the underlying asset. The notional or principal amounts for publicly reportable swap transactions, including block trades and large notional off-facility swaps, shall be reported and rounded amounts shall be publicly disseminated pursuant § 43.4.	200……. (e.g., 200 may represent 200 million of the notional currency 1)	Information needed to identify the size of the publicly reportable swap transaction and to help evaluate the price of the publicly reportable swap transaction.
Notional currency 2 (i.e., counter currency)	An indication of the type of currency of the notional or principal amount. The notional currency may be reported in a commonly accepted code (e.g., the	USD……... (e.g., U.S. Dollar)	Information needed to describe the type of currency of the notional or principal amount.

	three character alphabetic ISO 4217 currency code).		
Rounded notional or principal amount 2	The total rounded currency amount or quantity of units of the underlying asset. The notional or principal amounts for the publicly reportable swap transactions, including block trades and large notional off-facility swaps, shall be reported and rounded amounts shall be publicly disseminated pursuant to § 43.4. Each notional or principal amount (if there is more than one) should be labeled (e.g., 1, 2, 3, etc.) such that the number corresponds to the underlying asset for which the notional or principal amount is applicable. If there are more than two notional or principal amounts, then each additional notional or principal amount shall be reported in the same manner.	45…… (e.g., 45 may represent 45 million of the notional currency 2)	Information needed to identify the size of the publicly reportable swap transaction and to help market participants and the public evaluate the price of the publicly reportable swap transaction.
Payment frequency 1	An integer multiplier of a time period describing how often the parties to the publicly reportable swap transaction exchange payments associated with each party's obligation under the publicly reportable swap	2M…….. (e.g., payment would occur every two months)	Information needed to identify the pricing characteristic of the publicly reportable swap transaction and to help market participants and the public evaluate the price of the publicly reportable swap

	transaction. Such payment frequency may be described as one letter preceded by an integer.		transaction.
Payment frequency 2	An integer multiplier of a time period describing how often the parties to the publicly reportable swap transaction exchange payments associated with each party's obligation under the publicly reportable swap transaction. Such payment frequency may be described as one letter preceded by an integer. Each payment frequency (if there is more than one) should be labeled (e.g., 1, 2, 3, etc.) such that the number corresponds to the underlying asset for which the payment frequency is applicable. If there are more than two payment frequencies, then each additional payment frequency shall be reported in the same manner.	6W……. (e.g., payment would occur every six weeks)	Information needed to identify the pricing characteristic of the publicly reportable swap transaction and to help market participants and the public evaluate the price of the publicly reportable swap transaction.
Reset frequency 1	An integer multiplier of a period describing how often the parties to the publicly reportable swap transaction shall evaluate and, when applicable, change the price used for the underlying assets of the publicly reportable swap transaction. Such reset frequency may be	1Y…… (e.g., reset occurs every year)	Information needed to identify the pricing characteristic of the publicly reportable swap transaction and to help market participants and the public evaluate the price of the publicly reportable swap transaction.

	described as one letter preceded by an integer.		
Reset frequency 2	An integer multiplier of a period describing how often the parties to the publicly reportable swap transaction shall evaluate and, when applicable, change the price used for the underlying assets of the publicly reportable swap transaction. Such reset frequency may be described as one letter preceded by an integer. Each reset frequency (if there is more than one) should be labeled with a number (e.g., 1, 2, 3, etc.) such that the number corresponds to the underlying asset for which the reset frequency is applicable. If there are more than two reset frequencies, then each additional reset frequency shall be reported in the same manner.	6M…….. (e.g., reset occurs every six months)	Information needed to identify the pricing characteristic of the publicly reportable swap transaction and to help market participants and the public evaluate the price of the publicly reportable swap transaction.

TABLE A2.—Additional real-time public reporting data fields for options, swaptions and swaps with embedded options.

The data fields described in Table A2 of appendix A to this part apply to all options, swaptions and embedded options. If a swap has more than one embedded option, or multiple swaptions provisions, all such option provisions shall be reported in the same manner pursuant to the fields in Table A2 of appendix A to this part. When publicly disseminated, multiple embedded options associated with the same swap shall be clearly described and clearly linked to the swap with which the embedded option is associated.

Field	Description	Example	Data application
Embedded Option on Swap	An indication of whether or not the option fields are for an embedded option. This indication may be displayed as "EMBED1," "EMBED2," etc.	EMBED1…….. (e.g., the option is embedded in the terms of the swap)	Information needed to describe whether an option is embedded in a swap to prevent confusion and allow the market participants and the public to understand the information that is being reported.
Option Strike Price	The level or price at which an option may be exercised.	O25…… (e.g., the option strike price may be displayed with an "O" followed by the level or price, in this case 25 of the given underlying)	Information needed to indicate the level or price at which the option may be exercised to market participants and the public.
Option Type	An indication of the type of option. The option types may include, but are not limited to: Puts, calls, caps, floors, collars, straddles, strangles, amortizing, cancelable and other exotic option types.	P-…… (e.g., put)	Information needed to adequately describe the option to market participants and the public.
Option Family	An indication of the style of the option transaction. The option style/family may include, but are not limited to: European, American, Bermudan and Asian.	EU……..... (e.g., European option)	Information needed to adequately describe the option to market participants and the public.

Option currency	An indication of the type of currency of the option premium. The option currency may be reported in a commonly accepted code (e.g., the three character alphabetic ISO 4217 currency code).	USD……. (e.g., U.S. Dollar)	Information needed to identify the type of currency of the option premium to market participants and the public.
Option premium	An indication of the additional cost of the option to the publicly reportable swap transaction as a numerical value, not as the difference of the premiums of the parties' obligations to the reportable swap transaction. This field is associated with the option currency field.	50000…… (e.g., the cost would be 50,000 to purchase the option)	Information needed to explain the market value of the option to market participants and the public at the time of execution. This field will allow the public to understand the price of the publicly reportable swap transaction.
Option lockout period	An indication of the first allowable exercise date of the option.	20-08-2010…… (e.g., August 20, 2010)	Information is needed to identify when the option can first be exercised and to help market participants and the public evaluate the price of the option.
Option expiration date	An indication of the date that the option is no longer available for exercise.	20-08-2012……... (e.g., August 20, 2012)	Information is needed to identify when the option can no longer be exercised and to help market participants and the public evaluate the price of the option.

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Appendix B to Part 43—Enumerated Physical Commodity Contracts and Other Contracts

Enumerated Physical Commodity Contracts

Agriculture

ICE Futures U.S. Cocoa
ICE Futures U.S. Coffee C
Chicago Board of Trade Corn
ICE Futures U.S. Cotton No. 2
ICE Futures U.S. FCOJ–A
Chicago Mercantile Exchange Live Cattle
Chicago Board of Trade Oats
Chicago Board of Trade Rough Rice
Chicago Board of Trade Soybeans
Chicago Board of Trade Soybean Meal
Chicago Board of Trade Soybean Oil
ICE Futures U.S. Sugar No. 11
ICE Futures U.S. Sugar No. 16
Chicago Board of Trade Wheat
Minneapolis Grain Exchange Hard Red Spring Wheat
Kansas City Board of Trade Hard Winter Wheat
Chicago Mercantile Exchange Class III Milk
Chicago Mercantile Exchange Feeder Cattle
Chicago Mercantile Exchange Lean Hogs

Metals

Commodity Exchange, Inc. Copper
New York Mercantile Exchange Palladium
New York Mercantile Exchange Platinum
Commodity Exchange, Inc. Gold
Commodity Exchange, Inc. Silver

Energy

New York Mercantile Exchange Light Sweet Crude Oil
New York Mercantile Exchange New York Harbor Gasoline Blendstock
New York Mercantile Exchange Henry Hub Natural Gas

New York Mercantile Exchange New York Harbor Heating Oil

Other Contracts

Brent Crude Oil (ICE)

Appendix C to Part 43—Time Delays for Public Dissemination

The tables below provide clarification of the time delays for public dissemination set forth in § 43.5. The first row of each table describes the asset classes to which each chart applies. The column entitled ''Yearly Phase-In'' indicates the periods beginning on the compliance date of this part and beginning on the anniversary of the compliance date thereafter. The column entitled ''Time Delay for Public Dissemination'' indicates the precise length of time delay, starting upon execution, for the public dissemination of such swap transaction and pricing data by a registered swap data repository.

Table C1. Block Trades Executed on or Pursuant to the Rules of a Registered Swap Execution Facility or Designated Contract Market (Illustrating §§ 43.5(d)(1) and (d)(2))

Table C1 also designates the interim time delays for swaps described in § 43.5(c)(2).

ALL ASSET CLASSES

Yearly phase-in	Time delay for public dissemination
Year 1	30 minutes.
After Year 1	15 minutes.

Table C2. Large Notional Off-Facility Swaps Subject to the Mandatory Clearing Requirement With at Least One Swap Dealer or Major Swap Participant Counterparty (Illustrating §§ 43.5(e)(2)(A) and (e)(2)(B))

Table C2 excludes off-facility swaps that are excepted from the mandatory clearing requirement pursuant to Section 2(h)(7) of the Act and Commission regulations and those off-facility swaps that are required to be cleared under Section 2(h)(2) of the Act and Commission regulations but are not cleared.

Table C2 also designates the interim time delays for swaps described in § 43.5(c)(3).

ALL ASSET CLASSES

Yearly phase-in	Time delay for public dissemination
Year 1	30 minutes.
After Year 1	15 minutes.

Table C3. Large Notional Off-Facility Swaps Subject to the Mandatory Clearing Requirement in Which Neither Counterparty Is a Swap Dealer or Major Swap Participant (Illustrating §§ 43.5(e)(3)(A), (e)(3)(B), and (e)(3)(C))

Table C3 excludes off-facility swaps that are excepted from the mandatory clearing requirement pursuant to Section 2(h)(7) of the Act and Commission regulations and those swaps that are required to be cleared under Section 2(h)(2) of the Act and Commission regulations but are not cleared.

Table C3 also designates the interim time delays for swaps described in § 43.5(c)(3).

ALL ASSET CLASSES

Yearly phase-in	Time delay for public dissemination
Year 1	4 hours.
Year 2	2 hours.
After Year 2	1 hour.

Table C4. Large Notional Off-Facility Swaps Not Subject to the Mandatory Clearing Requirement With at Least One Swap Dealer or Major Swap Participant Counterparty (Illustrating §§ 43.5(f)(1), (f)(2) and (f)(3))

Table C4 includes large notional off-facility swaps that are not subject to the mandatory clearing requirement or are exempt from such mandatory clearing requirement pursuant to Section 2(h)(7) of the Act and Commission regulations.

Table C4 also designates the interim time delays for swaps described in § 43.5(c)(4).

INTEREST RATES, CREDIT, FOREIGN EXCHANGE, EQUITY ASSET CLASSES

Yearly phase-in	Time delay for public dissemination
Year 1	1 hour. However, if such swap includes a non-swap dealer/non-major swap participant counterparty that is not a financial entity as defined in Section 2(h)(7)(C) of the Act and Commission regulations, then one hour immediately after execution; or if received later than one hour by the registered swap data repository, then public dissemination shall occur as soon as technologically practicable after the data is received.
Year 2	30 minutes.

INTEREST RATES, CREDIT, FOREIGN EXCHANGE, EQUITY ASSET CLASSES—Continued

Yearly phase-in	Time delay for public dissemination
	However, if such swap includes a non-swap dealer/non-major swap participant counterparty that is not a financial entity as defined in Section 2(h)(7)(C) of the Act and Commission regulations, then 30 minutes immediately after execution; or if received later than 30 minutes by the registered swap data repository, then public dissemination shall occur as soon as technologically practicable after the data is received.
After Year 2	30 minutes.

Table C5. Large Notional Off-Facility Swaps Not Subject to the Mandatory Clearing Requirement With at Least One Swap Dealer or Major Swap Participant Counterparty (Illustrating §§ 43.5(g)(1), (g)(2), and (g)(3))

Table C5 includes large notional off-facility swaps that are not subject to the mandatory clearing requirement or are excepted from such mandatory clearing requirement pursuant to Section 2(h)(7) of the Act and Commission regulations.

Table C5 also designates the interim time delays for swaps described in § 43.5(c)(5).

OTHER COMMODITY ASSET CLASS

Yearly phase-in	Time delay for public dissemination
Year 1	4 hours.
	However, if such swap includes a non-swap dealer/non-major swap participant counterparty that is not a financial entity as defined in Section 2(h)(7)(C) of the Act and Commission regulations, then four hours immediately after execution; or if received later than four hours by the registered swap data repository, then public dissemination shall occur as soon as technologically practicable after the data is received.
Year 2	2 hours.
	However, if such swap includes a non-swap dealer/non-major swap participant counterparty that is not a financial entity as defined in Section 2(h)(7)(C) of the Act and Commission regulations, then two hours immediately after execution; or if received later than two hours by the registered swap data repository, then public dissemination shall occur as soon as technologically practicable after the data is received.
After Year 2	2 hours.

Table C6. Large Notional Off-Facility Swaps Not Subject to the Mandatory Clearing Requirement in Which Neither Counterparty Is a Swap Dealer or Major Swap Participant (Illustrating §§ 43.5(h)(1), (h)(2) and (h)(3))

Table C6 includes large notional off-facility swaps that are not subject to the mandatory clearing requirement or are exempt from such mandatory clearing requirement pursuant to Section 2(h)(7) of the Act and Commission regulations.

Table C6 also designates the interim time delays for swaps described in § 43.5(c)(6).

ALL ASSET CLASSES

Yearly phase-in	Time delay for public dissemination
Year 1	48 business hours.
Year 2	36 business hours.
After Year 2	24 business hours.

Issued in Washington, DC, on December 20, 2011, by the Commission.

David A. Stawick,

Secretary of the Commission.

Note: The following appendices will not appear in the Code of Federal Regulations

Appendices to Real-Time Public Reporting of Swap Transaction Data—Commission Voting Summary and Statements of Commissioners

Appendix 1—Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Sommers, Chilton, O'Malia and Wetjen voted in the affirmative; no Commissioner voted in the negative.

Appendix 2—Statement of Chairman Gary Gensler

I support the final rule to implement a real-time, public reporting regime for swaps. This rule fulfills Congress' direction under the Dodd-Frank Wall Street Reform and Consumer Protection Act to bring public transparency to the entire swaps market for both cleared and uncleared swaps. This rule will give the public critical information on the pricing of transactions—similar to what has been working for decades in the securities and futures markets.

Real-time reporting introduces post-trade transparency to the swaps market, which lowers costs for market participants and consumers.

In response to commenters, the final rule provides for the phasing in of compliance dates and time delays based on market participant, place of execution and underlying asset. As directed by Congress, the final rule protects the anonymity of counterparties to a swap and takes into account the effect of the rule on market liquidity.

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