

**Subject**

(d) Air Transport Association (ATA) of America Code 25: Equipment/Furnishings.

**Reason**

(e) The mandatory continuing airworthiness information (MCAI) states:

Cracks have been found on seats [with] backrest links P/N (part number) 90-000200-104-1 and 90-000200-104-2. These cracks can significantly affect the structural integrity of seat backrests.

Failure of the backrest links could result in injury to an occupant during emergency landing conditions. The required actions include a general visual inspection for cracking of the backrest links; replacement with new, improved links if cracking is found; and eventual replacement of all links with new, improved links.

**Actions and Compliance**

(f) Unless already done, do the following actions.

(1) At the later of the compliance times specified in paragraphs (f)(1)(i) and (f)(1)(ii) of this AD, do a general visual inspection of the backrest links having P/Ns 90-000200-104-1 and 90-000200-104-2, in accordance with Part One of Sicma Aero Seat Service Bulletin 90-25-013, Issue 4, dated March 19, 2004:

(i) Before 6,000 flight hours on the backrest link since new.

(ii) Within 900 flight hours or 5 months after the effective date of this AD, whichever occurs later.

(2) If, during the inspection required by paragraph (f)(1) of this AD, cracking is found between the side of the backrest link and the lock-out pin hole but the cracking does not pass this lock-out pin hole (refer to Figure 2 of Sicma Aero Seat Service Bulletin 90-25-013, Issue 4, dated March 19, 2004): Within 600 flight hours or 3 months after doing the inspection, whichever occurs first, replace both backrest links of the affected seat with new, improved backrest links having P/Ns 90-100200-104-1 and 90-100200-104-2, in accordance with Part Two of Sicma Aero Seat Service Bulletin 90-25-013, Issue 4, dated March 19, 2004.

(3) If, during the inspection required by paragraph (f)(1) of this AD, cracking is found that passes beyond the lock-out pin hole (refer to Figure 2 of Sicma Aero Seat Service Bulletin 90-25-013, Issue 4, dated March 19, 2004): Before further flight, replace both backrest links of the affected seat with new, improved backrest links having P/Ns 90-100200-104-1 and 90-100200-104-2, in accordance with Part Two of Sicma Aero Seat Service Bulletin 90-25-013, Issue 4, dated March 19, 2004.

(4) If no cracking is found during the inspection required by paragraph (f)(1) of this AD: Do the replacement required by paragraph (f)(5) of this AD at the compliance time specified in paragraph (f)(5) of this AD.

(5) At the later of the compliance times specified in paragraphs (f)(5)(i) and (f)(5)(ii) of this AD, replace the links, P/Ns 90-000200-104-1 and 90-000200-104-2, with new improved links, P/Ns 90-100200-104-1 and 90-100200-104-2, in accordance with Part Two of Sicma Aero Seat Service Bulletin

90-25-013, Issue 4, dated March 19, 2004. Doing this replacement for an affected passenger seat assembly terminates the inspection requirements of paragraph (f)(1) of this AD for that passenger seat assembly.

(i) Before 12,000 flight hours on the backrest links, P/Ns 90-000200-104-1 and 90-000200-104-2, since new.

(ii) Within 900 flight hours or 5 months after the effective date of this AD, whichever occurs later.

**Credit for Actions Done in Accordance With Previous Service Information**

(6) Actions done before the effective date of this AD in accordance with Sicma Aero Seat Service Bulletin 90-25-013, Issue 3, dated December 19, 2001, including Annex 1, Issue 2, dated March 19, 2004, are acceptable for compliance with the corresponding actions of this AD.

**FAA AD Differences**

**Note 2:** This AD differs from the MCAI and/or service information as follows: The MCAI specifies doing repetitive inspections for cracking of links having over 12,000 flight hours since new until the replacement of the link is done. This AD does not include those repetitive inspections because we have reduced the compliance time for replacing those links. This AD requires replacing the link before 12,000 flight hours since new or within 900 flight hours or 5 months of the effective date of this AD, whichever occurs later.

**Other FAA AD Provisions**

(g) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Boston Aircraft Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the ACO, send it to ATTN: Jeffrey Lee, Aerospace Engineer, Boston Aircraft Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, Massachusetts 01803; telephone (781) 238-7161; fax (781) 238-7170. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

**Related Information**

(h) Refer to MCAI French Airworthiness Directive 2001-613(AB), dated December 12, 2001; and Sicma Aero Seat Service Bulletin 90-25-013, Issue 4, dated March 19, 2004,

including Annex 1, Issue 2, dated March 19, 2004; for related information.

Issued in Renton, Washington, on April 18, 2011.

**Kalene C. Yanamura,**

*Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.*

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**COMMODITY FUTURES TRADING COMMISSION****17 CFR Part 46**

**[3038-AD48]**

**Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps**

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Proposed rulemaking.

**SUMMARY:** The Commodity Futures Trading Commission (“Commission” or “CFTC”) is proposing rules to implement new statutory provisions introduced by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”). The Dodd-Frank Act amends the Commodity Exchange Act (“CEA” or “Act”) directing that rules adopted by the Commission shall provide for the reporting of data relating to swaps entered into before the date of enactment of the Dodd-Frank Act, the terms of which have not expired as of the date of enactment of that Act (“pre-enactment swaps”) and data relating to swaps entered into on or after the date of enactment of the Dodd-Frank Act and prior to the compliance date specified in the Commission’s final swap data reporting rules (“transition swaps”). This proposal would establish recordkeeping and reporting requirements for pre-enactment swaps and transition swaps.

**DATES:** Comments must be received by June 9, 2011.

**ADDRESSES:** You may submit comments, identified by RIN number 3038-AD48, by any of the following methods:

• *Agency Web site, via its Comments Online process:* <http://comments.cftc.gov>. Follow the instructions for submitting comments through the Web site.

• *Mail:* David A. Stawick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581.

• *Hand Delivery/Courier:* Same as mail above.

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

All comments must be submitted in English, or must be accompanied by an English translation. Comments will be posted as received to <http://www.cftc.gov>. You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that may be exempt from disclosure under the Freedom of Information Act, you may submit a petition for confidential treatment according to the procedures established in CFTC Regulation 145.9.<sup>1</sup> The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from <http://www.cftc.gov> that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

**FOR FURTHER INFORMATION CONTACT:**

David Taylor, Branch Chief, Market Continuity, Division of Market Oversight, 202-418-5488, [dtaylor@cftc.gov](mailto:dtaylor@cftc.gov); or Irina Leonova, Financial Economist, Division of Market Oversight, 202-418-5646, [ileonova@cftc.gov](mailto:ileonova@cftc.gov); Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

**SUPPLEMENTARY INFORMATION:** The Commission is proposing rules under its part 46 regulations relating to recordkeeping and reporting requirements applicable to both pre-enactment and transition swaps, and is soliciting comment on all aspects of the proposed rules. These rules, when adopted, will supersede interim final rules previously adopted by the Commission in part 44 of its regulations.

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**I. Background**

*A. Swap Data Provisions of the Dodd-Frank Act*

On July 21, 2010, President Obama signed into law the Dodd-Frank Act.<sup>2</sup> Title VII of the Dodd-Frank Act<sup>3</sup> amended the CEA<sup>4</sup> to establish a comprehensive new regulatory framework for swaps and security-based swaps. The legislation was enacted 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 and major swap participants; (2) imposing clearing and trade execution requirements on standardized derivatives 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.

To enhance transparency, promote standardization, and reduce systemic risk, Section 728 of the Dodd-Frank Act establishes a newly-created registered entity—the swap data repository (“SDR”)<sup>5</sup>—to collect and maintain data related to swap transactions as prescribed by the Commission, and to make such data electronically available to regulators.<sup>6</sup>

Section 728 directs the Commission to prescribe standards for swap data recordkeeping and reporting. Specifically, Section 728 provides that:

The Commission shall prescribe standards that specify the data elements for each swap that shall be collected and maintained by each registered swap data repository.<sup>7</sup>

These standards are to apply to both registered entities and counterparties involved with swaps:

<sup>2</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at <http://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm>.

<sup>3</sup> Pursuant to Section 701 of the Dodd-Frank Act, Title VII may be cited as the “Wall Street Transparency and Accountability Act of 2010.”

<sup>4</sup> 7 U.S.C. 1 *et seq.*

<sup>5</sup> See also CEA § 1a(40)(E).

<sup>6</sup> Regulations governing core principles and registration requirements for, and the duties of, SDRs are the subject of a separate notice of proposed rulemaking under part 49 of the Commission's regulations. See CFTC Swap Data Repositories: Proposed Rule, 75 FR 80898 (Dec. 23, 2010).

<sup>7</sup> CEA § 21(b)(1)(A).

In carrying out [the duty to prescribe data element standards], the Commission shall prescribe consistent data element standards applicable to registered entities and reporting counterparties.<sup>8</sup>

Section 727 of the Dodd-Frank Act requires that each swap, either cleared or uncleared, shall be reported to a registered SDR. That Section also amends Section 1(a) of the CEA to add the definition of swap data repository:

The term ‘swap data repository’ means any person that collects and maintains information or records with respect to transactions or positions in, or the terms and conditions of, swaps entered into by third parties for the purpose of providing a centralized recordkeeping facility for swaps.<sup>9</sup>

Section 728 also directs the Commission to regulate data collection and maintenance by SDRs.

The Commission shall prescribe data collection and data maintenance standards for swap data repositories.<sup>10</sup>

Section 729 of the Dodd-Frank Act added to the CEA new Section 4r, which addresses reporting and recordkeeping requirements for uncleared swaps. Pursuant to this section, each swap not accepted for clearing by any derivatives clearing organization (“DCO”) must be reported to an SDR (or to the Commission if no SDR will accept the swap).

Section 729 ensures that at least one counterparty to a swap has an obligation to report data concerning that swap. The determination of this reporting counterparty depends on the status of the counterparties involved. If only one counterparty is a swap dealer (“SD”), the SD is required to report the swap. If one counterparty is a major swap participant (“MSP”), and the other counterparty is neither an SD nor an MSP (“non-SD/MSP counterparty”), the MSP must report. Where the counterparties have the same status—two SDs, two MSPs, or two non-SD/MSP counterparties—the counterparties must select a counterparty to report the swap.<sup>11</sup>

Section 729 also provides for reporting to the Commission of uncleared swaps that are not accepted by any SDR. Under this provision, counterparties to such swaps must maintain books and records pertaining to their swaps in the manner and for the time required by the Commission, and must make these books and records available for inspection by the Commission or other specified

<sup>8</sup> CEA § 21(b)(1)(B).

<sup>9</sup> CEA § 1a(48).

<sup>10</sup> CEA § 21(b)(2).

<sup>11</sup> See CEA § 4r(a)(3).

regulators if requested to do so.<sup>12</sup> It also requires counterparties to such swaps to provide reports concerning such swaps to the Commission upon its request, in the form and manner specified by the Commission.<sup>13</sup> Such reports must be as comprehensive as the data required to be collected by SDRs.<sup>14</sup>

Section 729 establishes in new CEA Section 4r(a)(2)(A) a transitional rule applicable to pre-enactment swaps. Section 4r(a)(2)(A) provides for the reporting of pre-enactment swaps the terms of which have not expired as of the enactment of the Dodd-Frank Act to an SDR or the Commission, by a date that the Commission determines to be appropriate.<sup>15</sup> Section 4r(a)(2)(B) directed the Commission to promulgate an interim final rule within 90 days of the date of enactment of the Dodd-Frank Act providing for the reporting of such pre-enactment swaps.<sup>16</sup>

Section 723 of the Dodd-Frank Act, which adds to the CEA new Section 2(h)(5), addresses the reporting of swap data for both swaps executed before the enactment of the Dodd-Frank Act<sup>17</sup> and swaps executed on or after the date of that enactment but before the compliance date specified in the Commission's final swap data recordkeeping and reporting rules.<sup>18</sup> In a July 15, 2010 floor statement concerning swap data reporting as well

<sup>12</sup> CEA § 4r(c)(2) requires individuals or entities that enter into an uncleared swap transaction that is not accepted by an SDR to make required books and records open to inspection by any representative of the Commission; an appropriate prudential regulator; the Securities and Exchange Commission; the Financial Stability Oversight Council; and the Department of Justice.

<sup>13</sup> CEA § 4r(c).

<sup>14</sup> CEA § 4r(d).

<sup>15</sup> Subsection (A) of CEA Section 4r(a)(2) provides that "Each swap entered into before the date of enactment of the Wall Street Transparency and Accountability Act of 2010, the terms of which have not expired as of the date of enactment of that Act, shall be reported to a registered swap data repository or the Commission by a date that is not later than—(i) 30 days after issuance of the interim final rule; or (ii) such other period as the Commission determines to be appropriate."

<sup>16</sup> Pursuant to Section 4r(a)(2)(B), the Commission on October 14, 2010 published in part 44 of its regulations an interim final rule instructing specified counterparties to pre-enactment swaps to report data to a registered SDR or to the Commission by a compliance date to be established in reporting rules to be promulgated under Section 2(h)(5)(A) of the CEA and advising counterparties of the necessity, inherent in the reporting requirement, to retain information pertaining to the terms of such swaps until reporting can be effectuated under permanent rules. *See Pre-Enactment Swaps IFR, supra*, note 17.

<sup>17</sup> See CFTC Interim Final Rule for Reporting Pre-Enactment Swap Transactions ("Pre-Enactment Swaps IFR"), 75 FR 63080 (Oct. 14, 2010).

<sup>18</sup> See CFTC Interim Final Rule for Reporting Post-Enactment Swap Transactions ("Post-Enactment Swaps IFR" or "Transition Swaps IFR"), 75 FR 78892 (Dec. 17, 2010).

as other aspects of the Dodd-Frank Act, Senator Blanche Lincoln emphasized that the provisions of new CEA Section 4r (added by Section 729 of the Dodd-Frank Act) and new CEA Section 2(h)(5) (added by Section 723 of the Dodd-Frank Act) "should be interpreted as complementary to one another to assure consistency between them. This is particularly true with respect to issues such as the effective dates of these reporting requirements \* \* \*"<sup>19</sup>

This proposed rule refers to the two types of swaps addressed in CEA Section 2(h)(5) as follows. "Pre-enactment swap" means a swap executed before date of enactment of the Dodd-Frank Act (i.e., before July 21, 2010) the terms of which have not expired as of the date of enactment of that Act.<sup>20</sup> "Transition swap" means a swap executed on or after the date of enactment of the Dodd-Frank Act (i.e., July 21, 2010) and before the compliance date specified in the final swap data reporting and recordkeeping requirements regulations in part 45 of this chapter.<sup>21</sup> Collectively, the proposed rule refers to pre-enactment swaps and transition swaps as "historical swaps."

#### B. The Commission's Proposed Rule on Swap Data Recordkeeping and Reporting Requirements

On December 8, 2010, the Commission published for comment a notice of proposed rulemaking concerning swap data (the "Swap Data NPRM") that would establish swap data recordkeeping and reporting requirements applicable to registered SDRs, derivatives clearing organizations ("DCOs"), designated contract markets ("DCMs"), swap execution facilities ("SEFs"), SDs, major swap participants MSPs, and non-SD/MSP counterparties.<sup>22</sup> The latter category of swap counterparties would include but not be limited to counterparties who qualify for the statutory end user

<sup>19</sup> Senator Blanche Lincoln, "Wall Street Transparency and Accountability Act," *Congressional Record*, July 15, 2010, at S5923.

<sup>20</sup> Subsection (A) of CEA Section 2(h)(5) *Reporting Transition Rules* provides that "Swaps entered into before the date of the enactment of this subsection shall be reported to a registered swap data repository or the Commission no later than 180 days after the effective date of this subsection."

<sup>21</sup> Subsection (B) of CEA Section 2(h)(5) *Reporting Transition Rules* provides that "Swaps entered into on or after [the] date of enactment [of the Dodd-Frank Act] shall be reported to a registered swap data repository or the Commission no later than the later of (i) 90 days after [the] effective date [of Section 2(h)(5)] or (ii) such other time after entering into the swap as the Commission may prescribe by rule or regulation."

<sup>22</sup> 75 FR 76574 (Dec. 8, 2010) ("Swap Data NPRM").

exception with respect to particular swaps.<sup>23</sup> Consistent with the purposes of the Dodd-Frank Act, the Swap Data NPRM would require generally that all DCOs, DCMs, SEFs, and swap counterparties keep full, complete and systematic records, together with all pertinent data and memoranda, of all activities relating to the business of such entities or persons with respect to swaps. The proposed rules contemplate that swap data reporting should include data from each of two important stages in the existence of a swap: the creation of the swap, and the continuation of the swap over its existence until its final termination or expiration. The proposed rules call for reporting of two sets of data generated in connection with the creation of the swap: primary economic terms data and confirmation data.<sup>24</sup> Reporting of swap continuation data can follow either of two conceptual approaches described in the Swap Data NPRM: The life cycle or event flow approach, or the state or snapshot approach.<sup>25</sup>

The Swap Data NPRM did not address CEA Section 2(h)(5)'s mandate that the Commission adopt recordkeeping and reporting rules applicable to pre-enactment swaps or transition swaps, but instead noted that a separate rulemaking to establish requirements for these historical swaps would address the records, information and data required to be maintained and the timeframe for reporting such information to a registered SDR or to the Commission.<sup>26</sup> This proposal would establish recordkeeping and reporting standards applicable to pre-enactment and transition swaps.

#### C. The Interim Final Rules for Pre-Enactment and Transition Swaps

*Interim Final Rule for Pre-Enactment Swaps.* As described above, Title VII of the Dodd-Frank Act added new Section 4r(a)(2) to the CEA, which provided for the reporting of pre-enactment swaps and directed that the Commission promulgate, within 90 days of enactment of the Dodd-Frank Act, an interim final rule ("IFR") providing for the reporting of such swaps. On October 14, 2010, pursuant to the mandate of CEA Section 4r(a)(2)(B), the Commission published in new part 44 of its regulations an IFR instructing specified counterparties to pre-enactment swaps to report data to a registered SDR or to the Commission by

<sup>23</sup> CEA Section 2(h)(7).

<sup>24</sup> See Swap Data NPRM, *supra*, note 22 at 76580–76582.

<sup>25</sup> *Id.* at 76583–76584.

<sup>26</sup> *Id.* at 76580 note 37.

a compliance date to be established in reporting rules to be promulgated under CEA Section 2(h)(5), and advising such counterparties of the necessity, inherent in the reporting requirement, to preserve information pertaining to the terms of such swaps until reporting was effectuated under permanent rules.<sup>27</sup> This Pre-Enactment Swaps IFR stated that the reporting and recordkeeping provisions established by Section 4r and §§ 44.00–44.02 of the Commission's regulations would remain in effect until the effective date of the permanent reporting rules to be adopted by the Commission pursuant to Section 2(h)(5) of the CEA.<sup>28</sup> A principal purpose of this IFR was to advise counterparties of the need to retain data related to swap transactions so that reporting could be effectuated under permanent rules subsequently to be adopted.

With respect to the scope and coverage of the Pre-Enactment Swaps IFR, the Commission acknowledged inconsistencies between the two Dodd-Frank provisions governing the Commission's rulemaking. Specifically, new CEA Section 4r(a)(2) limits reportable pre-enactment swaps to those whose terms have not expired on the date of enactment of the Dodd-Frank Act; Section 2(h)(5) does not contain the same qualifying language. As discussed in the Pre-Enactment Swaps IFR, the Commission believes that failure to limit the term "pre-enactment swap" to unexpired swaps would require reporting of every swap that has ever been entered into; accordingly, the Commission concluded that reportable pre-enactment swaps should be limited to those whose terms had not expired at the time of enactment.<sup>29</sup>

*Interim Final Rule for Transition Swaps.* Section 4r of the CEA did not mandate an IFR establishing reporting provisions for transition swaps. The Commission nonetheless believed that such a rule would provide clarity and guidance with respect to such swaps, by establishing that transition swaps will be subject to Section 2(h)(5)(B)'s reporting requirements and to Commission regulations to be promulgated thereunder. The Commission also believed it was prudent to advise potential counterparties to such swaps that implicit in this prospective reporting requirement is the need to retain relevant data until such time as reporting can be effected. Accordingly, on December 17, 2010 the Commission

published under Part 44 of its regulations interim final rules establishing that counterparties to transition swaps will be subject to permanent recordkeeping and reporting requirements to be adopted by the Commission pursuant to Section 2(h)(5)(B) of the CEA.<sup>30</sup>

The Commission intended both the Pre-Enactment Swaps IFR and the Transition Swaps IFR to put counterparties on notice that swap data should be retained pending the adoption of permanent rules for pre-enactment and transition swaps under proposed part 46 of this chapter. With respect to both pre-enactment and transition swaps, the Commission stated that counterparties to these transactions should retain material information about such transactions. The Commission emphasized, however, that in the context of the interim rules, no counterparty was being required to create new records with respect to transactions that occurred in the past; instead, records relating to the terms of such transactions could be retained in their existing format to the extent and in such form as they presently exist.<sup>31</sup>

*Comments Received.* The Commission received a number of comments in response to each of the IFRs. Comments generally fell into one or more of several broad categories and in a number of instances were common to both IFRs. Some commenters observed that issuance of IFRs in advance of regulations further defining the term "swap" (or defining other key terms in the Dodd-Frank Act) creates legal and regulatory uncertainty and increases compliance risk; most of these commenters urged the Commission to further detail the record retention aspects of the interim final rules.<sup>32</sup> In this connection, commenters requested that the Commission issue guidance clarifying and limiting the information that must be retained,<sup>33</sup> or create a safe harbor for good faith compliance efforts.<sup>34</sup> Energy interests suggested that the Commission should ensure that end

users need only report basic data in a simplified reporting scheme, or should outline categories of information that need not be retained by persons who anticipate becoming eligible for the end user exemption under the Dodd-Frank Act.<sup>35</sup> One commenter urged greater specificity with respect to the Pre-Enactment IFR's requirements, as well as consistency with the standards adopted by the Securities and Exchange Commission ("SEC") and international regulators, and proposed alternatives to the requirements adopted in the IFR for pre-enactment swaps, particularly with respect to reporting protocols, record retention, and confidentiality issues (notably, those confidentiality issues arising in the context of cross-border transactions).<sup>36</sup> Another commenter urged that U.S. swap data reporting requirements should not apply with respect to foreign swaps transactions, where counterparties are non-U.S. entities.<sup>37</sup>

The Commission is mindful of these concerns and expects to consider and address them, as well as all comments received in response to this proposed rule, in formulating permanent rules applicable to pre-enactment and transition swaps.

## II. Proposed New Regulations, Part 46

As provided in the Commission's Swap Data NPRM,<sup>38</sup> Pre-Enactment Swaps IFR,<sup>39</sup> and Transition Swaps IFR,<sup>40</sup> this proposed rule addresses the records, information, and data that must be retained for historical swaps, the timeframe for reporting data to an SDR or the Commission concerning such swaps, and the specific data to be reported.

*Recordkeeping.* For historical swaps in existence on or after the date of publication of the proposed rule, the rule would impose limited, specific recordkeeping obligations. Counterparties to such swaps would be required to keep records of an asset class-specific set of specified, minimum primary economic terms. The Commission believes that counterparties to historical swaps will possess this limited set of asset class-specific information as part of their normal

<sup>27</sup> See Pre-Enactment Swaps IFR, *supra* note 17, at 63083.

<sup>28</sup> See Pre-Enactment Swaps IFR, *supra* note 17, at 63086, and Transition Swaps IFR, *supra* note 18, at 78894.

<sup>29</sup> See, e.g., letters dated November 15, 2010 and January 18, 2011 from the Working Group of Commercial Energy Firms ("Working Group letters"); letter dated November 15, 2010 from Hess Corporation ("Hess Corporation letter"); letter dated November 15, 2010 from the Edison Electric Institute ("EEI letter"); letters dated November 15, 2010 and January 18, 2011 from the Not-for-Profit Electric End User Coalition ("Coalition letters"); letter dated January 18, 2011 from the American Gas Association ("AGA letter").

<sup>30</sup> EEI letter.

<sup>31</sup> Working Group letters; EEI letter; Hess Corporation letter.

<sup>32</sup> AGA letter; Coalition letters.

<sup>33</sup> Letter dated November 12, 2010, from the International Swaps and Derivatives Association, Inc. and the Futures Industry Association.

<sup>34</sup> Letter dated January 11, 2011, from Barclays Bank PLC, BNP Paribas S.A., Deutsche Bank AG, Royal Bank of Canada, The Royal Bank of Scotland Group PLC, Société Générale and UBS AG.

<sup>35</sup> See Swap Data NPRM, *supra* note 20, at fn. 37.

<sup>36</sup> See Pre-Enactment Swaps IFR, *supra* note 17.

<sup>37</sup> See Transition Swaps IFR, *supra* note 18.

business practices.<sup>41</sup> Commission staff have consulted with industry representatives, including buy-side counterparties, concerning information routinely kept in this connection for swaps in different asset classes. Counterparties to historical swaps in existence on or after the date of publication of this proposed rule would also be required to keep records of a confirmation of their swaps if they have that information in their possession on or after the publication date (the date from which public notice of this specific proposed recordkeeping requirement is available). The Commission requests comment concerning the appropriateness of these limited recordkeeping requirements, and specifically requests comment concerning whether all counterparties to historical swaps will possess the limited set of asset class-specific information called for by the proposed rule as part of their normal business practices. If there are any counterparties to historical swaps who do not possess the limited set of asset class-specific information called for by the proposed rule, the Commission requests comment from such counterparties concerning what information concerning historical swaps such counterparties do possess, and concerning what information such counterparties retain concerning their swaps in order to meet the requirements of other applicable law, such as hedge accounting requirements or the requirements of applicable state law.

For historical swaps that were in existence as of the date of enactment of the Dodd-Frank Act but have expired or been terminated prior to the publication date of this proposed rule, a counterparty would only be required to keep records as provided in the Commission's IFRs concerning pre-enactment and transition swaps: namely, the information and documents relating to the terms of the swap that the counterparty possessed when the applicable IFR was published, in whatever format that information is kept by the counterparty.<sup>42</sup>

<sup>41</sup> The Commission understands that the terminology used to describe the specific terms and conditions of a swap can vary among market participants, and that agreed definitions for certain terms could increase consistency among participants in how historical swaps are described. The Commission therefore requests comment on whether the proposed minimum primary economic terms for each asset class are sufficiently clear in terms of what economic data is expected to be reported, or whether further clarification is needed in this respect.

<sup>42</sup> As used in the IFRs, "format" refers to the method by which the information is organized and stored. It does not refer to a recording format (i.e., a format for electronic encoding of data).

The Commission understands that the minimum primary economic terms for a swap can vary widely depending on the asset class of the underlying products or on the nature of a particular product within an asset class. Consequently, the Commission encourages the industry to reach an internal consensus about the appropriate, asset class-specific, minimum primary economic terms to be reported for pre-enactment and transition swaps. The Commission welcomes comments from industry and market participants in this regard, and will consider them in determining the minimum primary economic terms to be specified in the final swap data recordkeeping and reporting rules.

*Reporting timeframe.* The proposed rule provides that swap data reporting for historical swaps would commence on the compliance date specified in the Commission's final swap data recordkeeping and reporting regulations in part 45 of this chapter.<sup>43</sup> The Commission believes that the purposes of the Dodd-Frank Act can be best served by establishing a single date for the commencement of all swap data reporting pursuant to that Act. It also believes that the compliance date for the final swap data reporting regulations in part 45—the date on which reporting must commence—is the most practicable and appropriate date for this purpose. The effective date will be set by the Commission in its final swap data reporting regulations.<sup>44</sup> In the Swap Data NPRM, the Commission requested comments concerning the time needed to prepare automated systems for swap data recordkeeping and reporting prior to implementation of the regulations, and it will carefully consider the comments received in response to that request. The Commission similarly requests comment concerning the proposal to specify the same compliance date as the date for initial data reporting concerning pre-enactment and transition swaps, and the time needed in this connection for preparation of necessary automated systems prior to the specified compliance date.

*Data to be reported.* The proposed rule specifies data to be reported for historical swaps. For pre-enactment and transition swaps in existence on or after the date of publication of this proposed rule, the rule specifies the data elements to be reported. For historical swaps in existence as of enactment of the Dodd-

Frank Act which expired or were terminated prior to publication of this proposed rule, the rule provides for reporting of the information relating to the terms of the transaction that was in the possession of a reporting counterparty as of publication of the applicable Commission IFR regarding pre-enactment or transition swaps, in such format as it is kept by the reporting counterparty.

As noted above, the Dodd-Frank Act requires reporting of data concerning all swaps in existence as of the legislation's enactment.<sup>45</sup> Data concerning pre-enactment swaps and transition swaps will assist achievement of the systemic risk mitigation, market transparency, and market supervision purposes for which the Dodd-Frank Act was enacted. Such data will be needed to give regulators the complete picture of the swap market which the comprehensive regulatory framework and reporting requirements of the statute are designed to provide. Data concerning historical swaps also is necessary for the Commission to prepare the semi-annual reports it is required to provide to Congress regarding the swap market.

The Commission is aware that internal swap data retention policies are not uniform among swap counterparties, and that the current automated systems of market participants vary with respect to their suitability for swap data reporting. The Commission believes it is appropriate to limit the burden placed on swap counterparties in connection with data reporting for historical swaps, to the extent that this can be done in a manner consistent with the requirements of the Dodd-Frank Act and the Commission's need for such data. The Commission has also considered comments received concerning the Pre-Enactment Swaps IFR and Transition Swaps IFR which requested that the Commission specify clearly what data would be required to be reported concerning historical swaps.

*Data reporting for historical swaps in existence as of or after publication of this proposed rule.* For each pre-enactment or transition swap in existence as of or after publication of this proposed rule, the rule calls (a) for an initial data report on the compliance date for data reporting, and (b), if such a historical swap has not expired or been terminated as of the compliance date specified in the final part 45 swap data reporting regulations, for ongoing reporting of required swap continuation data (as defined in the Commission's final part 45 swap data reporting

<sup>43</sup> 17 CFR part 45.

<sup>44</sup> As provided in CEA Section 2(h)(5)(B), the effective date must be no sooner than 90 days after the effective date of CEA Section 2(h)(5), but may be a later date set by the Commission.

<sup>45</sup> CEA Section 4r(a)(2)(A).

regulations) during the remaining existence of the swap.

The proposed rule calls for the initial data report for historical swaps in existence as of or after publication of this proposed rule to include the transaction terms included in the swap confirmation if the confirmation was in the reporting counterparty's possession on or after the publication date of this proposed rule,<sup>46</sup> and in any event to include all of the minimum primary economic terms for a pre-enactment or transition swap specified in the appropriate table in the Appendix to the proposed rule.

The Commission understands that industry definitions used in documenting some swap transactions, for instance in some master agreements or confirmations, may not match exactly the asset class definitions included in this proposed rule, which are the same as the asset class definitions in the Commission's part 45 proposed rules regarding swap data recordkeeping and reporting requirements. The Commission requests comment on how the proposed asset class definitions in this proposed rule and the overall swap classification scheme embodied in them might most appropriately be aligned with current swap instrument classifications used by the industry, and with definitions employed by, e.g., the International Swaps and Derivatives Association ("ISDA"), the Edison Electric Institute, the North American Energy Standards Board, and others.

In addition, the Commission anticipates that some swaps subject to its jurisdiction may belong to two other swap categories: mixed swaps, and multi-asset swaps. Generally, a mixed swap is in part a security-based swap subject to the jurisdiction of the SEC and in part a swap belonging to one of the swap asset classes subject to the jurisdiction of the Commission.<sup>47</sup> Multi-asset swaps are those that do not have one easily identifiable primary underlying notional item within the Commission's jurisdiction. The Dodd-Frank Act defines "mixed swap" as follows: "The term 'security-based swap' includes any agreement, contract, or transaction that is as described in section 3(a)(68)(A) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(68)(A)) and is also based on the value of 1 [sic] or more interest or other rates, currencies, commodities, instruments of indebtedness, indices,

quantitative measures, other financial or economic interest or property of any kind (other than a single security or a narrow-based security index), or the occurrence, non-occurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence (other than an event described in subparagraph (A)(iii)."<sup>48</sup> The Commission requests comment concerning how such swaps should be treated with respect to swap data reporting for historical swaps, and concerning the category or categories under which swap data for such swaps should be reported to SDRs and maintained by SDRs.

The initial data report for historical swaps in existence as of or after publication of this proposed rule would also be required to include the Unique Counterparty Identifier of the reporting counterparty (as defined in part 45),<sup>49</sup> and the reporting counterparty's internal system identifiers for the non-reporting counterparty and the particular swap transaction in question.

The proposed rule would give non-reporting counterparties an additional 180 days after the compliance date specified in the Commission's final part 45 rules for data reporting before they would be required to obtain and use a Unique Counterparty Identifier in connection with pre-enactment and transition swaps. The Commission is proposing this additional time because it understands that the majority of non-reporting counterparties are likely to be non-SD/MSP counterparties. While SDs and MSPs are likely to have infrastructure in place that can incorporate and track Unique Counterparty Identifiers, non-SD-MSP counterparties could need to acquire new automated systems or undertake modifications of existing systems in order to incorporate identifiers. The Commission requests comment concerning the appropriateness of this additional time, concerning the length of the additional time provided, and concerning whether the Commission should differentiate further between SD and MSP counterparties versus non-SD/MSP counterparties with respect to use of Unique Counterparty Identifiers for non-reporting counterparties to pre-enactment and transition swaps.

The proposed rule also requires the reporting counterparty to report the master agreement identifier (if any) used

by the reporting counterparty's automated systems to identify the master agreement governing a pre-enactment or transition swap. This information would allow the Commission and other regulators to aggregate transactional data to calculate net or gross exposure of a particular counterparty. The Commission requests comment concerning whether its final swap data recordkeeping and reporting regulations for pre-enactment and transition swaps should require such reporting of a master agreement identifier.

The Commission requests comment concerning the appropriateness and adequacy of these initial data report requirements. Additionally, the Commission requests comment on the appropriate method for identifying the association of an individual swap transaction with a particular master agreement or with a swap portfolio, in order to identify individual swaps that may be subject to close-out netting and other provisions typical in portfolio compression.<sup>50</sup> Identifying this association could be a necessary means of enabling regulators to determine a counterparty's net exposure (current or future) on the basis of transactional data reported to SDRs. In particular, the Commission requests comment on whether reporting of a master agreement identifier as provided in this proposed rule is needed in this connection and would provide a workable means of achieving this goal.

The Commission has chosen to propose limited requirements for recordkeeping and initial data reports concerning pre-enactment and transition swaps because it understands that the current recordkeeping and reporting systems that some counterparties to such swaps have at present might not be able to fulfill, with respect to historical swaps, recordkeeping and reporting requirements as extensive as those proposed in part 45. In these circumstances, the Commission believes it is appropriate to limit the burden imposed on such counterparties, to the extent that this can be done in a way

<sup>46</sup> The Commission understands that counterparties may use either a short-form or a long-form confirmation. Either form can be used to satisfy this requirement.

<sup>47</sup> See Swap Data NPRM, *supra* note 20, at 76586.

<sup>48</sup> Dodd-Frank Act § 721(21), CEA § 1a(47)(D).

<sup>49</sup> The Commission intends to take the need for reporting counterparties to obtain Unique Counterparty Identifiers into account in setting the effective date for the data reporting rules in part 45.

<sup>50</sup> The Commission's proposed rule regarding confirmation, portfolio reconciliation and portfolio compression requirements for SDs and MSPs, 17 CFR part 23, defines portfolio compression 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. See CFTC Notice of Proposed Rulemaking: Confirmation, Portfolio Reconciliation and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants, 75 FR 81519 (Dec. 28, 2010).

that is consistent with the requirements of the Dodd-Frank Act and the Commission's need for data concerning historical swaps. The Commission believes, however, that the limited set of minimum primary economic terms data set forth in this proposed rule with respect to historical swaps is the minimum necessary to give regulators a picture of the risk exposures and counterparty participation in such swaps at the minimum level necessary for the Commission and other regulators to fulfill their regulatory responsibilities. The Commission requests comment concerning the appropriateness of this approach to initial data reporting for pre-enactment and transition swaps.

Regarding ongoing reporting of required swap continuation data during the remaining existence of a pre-enactment or transition swap after the compliance date, the proposed rule follows the life cycle approach for credit swaps and equity swaps, and the state or snapshot approach for interest rate swaps, currency swaps, and other commodity swaps. This same distinction is made in the Commission's Swap Data NPRM, which sets forth the Commission's reasons for making this distinction, reasons which also apply with respect to part 46. The Commission believes that this unified approach to swap data reporting rules for pre-enactment, transition, and post-compliance-date swaps will minimize recordkeeping and swap data reporting burdens for industry and provide a coherent and consistent picture of the overall swap market to regulators. Since the proposed part 45 continuation data reporting requirements are aligned with the approach taken in the SEC's proposed rules for security-based credit and equity swaps, this also serves to avoid differing requirements for security-based swaps and swaps. The Commission requests comment concerning whether required reporting of the same swap continuation data for pre-enactment and transition credit swaps and equity swaps, in line with the requirements of proposed part 45 and of the SEC's proposed rules, is appropriate in this connection.

For pre-enactment or transition interest rate swaps, currency swaps, and other commodity swaps, this proposed rule also limits continuation data reporting obligations for non-SD/MSP reporting counterparties. Specifically, the proposal requires that SD or MSP reporting counterparties must meet continuation data reporting requirements for pre-enactment and transition swaps in those asset classes that are the same as the continuation

data reporting requirements of proposed part 45 for swaps in those asset classes. While non-SD/MSP reporting counterparties for such swaps are required to report the state data<sup>51</sup> necessary to provide a daily snapshot view of the primary economic terms of the swap, the state data that must be reported by non-SD/MSP reporting counterparties for such swaps is limited to the state data available to the non-SD/MSP reporting counterparty on the compliance date. This may consist of only the data elements contained in the table of minimum primary economic terms for various swap asset classes, as set forth in Appendix 1 to part 46, if that is all that was available to the non-SD/MSP reporting counterparty on that date. This approach is designed to avoid placing undue recordkeeping and reporting burdens on non-SD/MSP counterparties, who are the reporting counterparties least likely to have the automated systems needed for more extensive reporting with respect to pre-enactment or transition swaps. The Commission requests comment concerning the appropriateness of this approach to continuation data reporting for pre-enactment and transition swaps.

*Data reporting for historical swaps in existence as of enactment of the Dodd-Frank Act but expired or terminated prior to publication of this proposed rule.* For historical swaps in existence as of enactment of the Dodd-Frank Act which expired or were terminated prior to publication of this proposed rule, only an initial data report would be required.<sup>52</sup> For such swaps, the proposed rule would require that the reporting counterparty report such information relating to the terms of the transaction as was in that counterparty's possession as of issuance of the relevant Commission IFR.<sup>53</sup> This information would be permitted to be reported in the format in which it was kept by the reporting counterparty.<sup>54</sup>

*Selection of reporting counterparty.* This proposed rule provides that determination of which counterparty to a pre-enactment or transition swap is the reporting counterparty for that swap shall be made according to Dodd-Frank Act's hierarchy of counterparty types for reporting obligation purposes, in which SDs outrank MSPs, who outrank non-SD/MSP counterparties. Where both

<sup>51</sup> For purposes of this proposed rule, "state data" has the meaning defined in part 45 of this chapter. See Swaps Data NPRM, *supra* note 20, at 76599.

<sup>52</sup> By its nature, continuation data reporting occurs during the continuation of a swap prior to its expiration or termination.

<sup>53</sup> Pre-Enactment Swaps IFR, *supra* note 15, and Transition Swaps IFR, *supra* note 18.

<sup>54</sup> This could include submission of a PDF file.

counterparties are at the same hierarchical level, the statute calls for them to select the counterparty obligated to report. The proposed rule establishes a mechanism for counterparties to follow in choosing the counterparty to report in situations where both counterparties have the same hierarchical status. Where both counterparties are SDs, or both are MSPs, or both are non-SD/MSP counterparties, the proposed rule requires the counterparties to agree as on term of their swap transaction which counterparty will fulfill reporting obligations. The proposed rule also provides that, where only one counterparty to a swap is a U.S. person, the U.S. person should be the reporting counterparty. The Commission believes, preliminarily, that this approach may be necessary in order to ensure compliance with reporting requirements in such situations. In these respects, the proposed rule mirrors the provision of the part 45 Swap NPRM regarding selection of the reporting counterparty.

The proposed rule also provides that determination of the reporting counterparty shall be made with respect to the current counterparties to the swap as of the compliance date (for historical swaps in existence as of that date) or as of the prior expiration or termination of the swap (for historical swaps expired or terminated prior to the compliance date), regardless of who the counterparties to the swap were when it was originally executed.

As noted above, where both counterparties have the same hierarchical status, the proposed rule calls for the counterparties to agree as one term of their swap transaction which counterparty will fulfill reporting obligations. In the case of a historical swap executed prior to publication of this proposed rule, for which the agreement to enter into the swap has already been made, agreement by the counterparties on selection of the reporting counterparty would require negotiation occurring after the agreement to enter into the swap was made, and could require amendment of the agreement to enter into the swap in this respect. The Commission requests comment concerning how two SD counterparties, two MSP counterparties, or two non-SD/MSP counterparties should select the reporting counterparty for a pre-enactment or transition swap which was executed prior to the publication date of this proposed rule, and thus does not include an agreement term selecting the reporting counterparty. The Commission also requests comment concerning whether its final data recordkeeping and

reporting rules for historical swaps should prescribe a method for selecting a reporting counterparty in such circumstances. The Commission may include such a method in the final data recordkeeping and reporting rules for historical swaps.

The Commission has received comments regarding the part 45 Swap NPRM suggesting that, where only one counterparty to a swap is a U.S. person, the counterparty designated as the reporting counterparty under the hierarchical approach based on the Dodd-Frank Act and discussed above should be applied in the same way as for a swap where both counterparties are U.S. persons. This would mean, for example, that for a swap between a non-U.S. SD and a U.S. non-SD/MSP counterparty, the non-U.S. SD would be the reporting counterparty. The Commission requests comment concerning how the reporting counterparty for a historical swap should be selected when one counterparty is a non-U.S. person.

*Non-duplication of previous reporting.* The Commission is aware that in some instances, reporting counterparties may have reported data concerning pre-enactment or transition swaps to a presently-existing trade repository prior to the compliance date. If such a repository is registered with the Commission as an SDR as of the compliance date, the Commission would not require reporting counterparties to report duplicate information to the SDR, although it would require reporting on the compliance date of any information required by this proposed rule that had not already been reported to the SDR.

### III. Related Matters

#### A. Regulatory Flexibility Act

The Regulatory Flexibility Act (“RFA”)<sup>55</sup> requires that agencies consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis respecting the impact.<sup>56</sup> The regulations proposed by the Commission would affect SDs, MSPs, and non-SD/MSP counterparties who are counterparties to one or more pre-enactment or transition swaps. The Commission has previously established certain definitions of “small entities” to be used by the Commission in evaluating the impact of its regulations on small entities in accordance with the RFA.<sup>57</sup>

<sup>55</sup> 5 U.S.C. 601 *et seq.*

<sup>56</sup> 5 U.S.C. 601 *et seq.*

<sup>57</sup> 47 FR 18618 (Apr. 30, 1982).

The Commission hereby determines that SDs and MSPs should not be considered small entities for purposes of the RFA. SDs and MSPs will play a central role in the national regulatory scheme overseeing the trading of swaps. With respect to SDs, the Commission previously has determined that Futures Commission Merchants (“FCMs”) should not be considered to be small entities for purposes of the RFA.<sup>58</sup> Like FCMs, SDs will be subject to minimum capital and margin requirements and are expected to comprise the largest global financial firms.<sup>59</sup> Similarly, with respect to MSPs, the Commission has previously determined that large traders are not “small entities” for RFA purposes.<sup>60</sup> Like large traders, MSPs will maintain substantial positions, creating substantial counterparty exposure that could have serious adverse effects on the financial stability of the U.S. banking system or financial markets.

With respect to non-SD/MSP counterparties, the Commission believes that the proposed regulations will not create a significant economic impact on a substantial number of small entities. The proposed rule sets forth recordkeeping and reporting requirements with respect to pre-enactment and transition swaps. The Commission believes that the records the proposed rule would require to be kept are already kept by swap counterparties in their normal course of business. The proposed rule would require limited swap data reporting for pre-enactment or transition swaps, and would require such reporting by non-SD/MSP counterparties only with respect to such swaps in which neither counterparty is an SD or MSP. The considerable majority of swaps involve at least one SD or MSP. In addition, most end users and other non-SD/MSP counterparties who are regulated by the Employee Retirement Income Security Act of 1974 (“ERISA”), such as pension funds, which are among the most active participants in the swap market, are prohibited from transacting directly with other ERISA-regulated participants.<sup>61</sup> For these reasons, the Commission does not believe that the regulations would have a significant economic impact on a substantial number of small entities.

Accordingly, the Chairman, on behalf of the Commission, hereby certifies

<sup>58</sup> 47 FR 18618 (Apr. 30, 1982).

<sup>59</sup> Additionally, the Commission is required to exempt from designation entities that engage in a de minimis level of swaps. Id. at 18619.

<sup>60</sup> 47 FR at 18620.

<sup>61</sup> 29 U.S.C. 1106.

pursuant to 5 U.S.C. 605(b) that the proposed rule will not have a significant economic impact on a substantial number of small entities. Nonetheless, the Commission specifically requests comment on the impact this proposed rule may have on small entities.

#### B. Paperwork Reduction Act

*Introduction.* Provisions of the proposed rule would result in new collection of information requirements within the meaning of the Paperwork Reduction Act (“PRA”).<sup>62</sup> The Commission therefore is submitting this proposal to the Office of Management and Budget (OMB) for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The title for this collection of information is “Regulations 46.2 and 46.3—Swap Data Recordkeeping and Reporting: Pre-Enactment and Transition Swaps,” OMB control number 3038-NEW. If adopted, responses to this new collection of information would be mandatory. The Commission will protect proprietary information according to the Freedom of Information Act and 17 CFR part 145, “Commission Records and Information.” In addition, section 8(a)(1) of the Act strictly prohibits the Commission, unless specifically authorized by the Act, from making public “data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.” The Commission also is required to protect certain information contained in a government system of records according to the Privacy Act of 1974, 5 U.S.C. 552a.

*Information Provided by Reporting Entities/Persons.* The proposed rule sets forth recordkeeping and reporting requirements for SDs, MSPs, and non-SD/MSP counterparties.

*Recordkeeping Burdens.* Under proposed Regulation 46.2, all counterparties to pre-enactment or transition swaps would be required to keep records relating to such swaps. For swaps that are in existence as of or after the enactment of the Dodd-Frank Act, but are expired as of the publication of the proposed rule, the proposed Regulation 46.2 requires that parties simply maintain the swap records already in their possession, in the form in which they are already maintained. For purposes of the PRA, the Commission will not calculate the burden for this requirement; the Commission has previously calculated the burden for this requirement in the

<sup>62</sup> 44 U.S.C. 3501 *et seq.*

PRA analyses for the interim final rules for pre-enactment and transition swaps.

For pre-enactment or transition swaps that are in existence as of or after the publication of the proposed rule, the proposed Regulation 46.2 would require counterparties to keep records of a minimum set of primary economic data relating to such swaps. The Commission believes that counterparties already would possess this set of primary economic data as part of their normal business practices. The proposed regulation provides that counterparties must record certain additional information (e.g., information relating to confirmation) only if the counterparty is in possession of that information on or after the publication date of the proposed rule. After the compliance date specified in the Commission's final swap data rules in Part 45, proposed Regulation 46.2 provides that counterparties must record information required by recordkeeping provisions of those final swap rules only if such information is available to the counterparty on or after the compliance date specified in those rules.

For historical swaps that are in existence as of or after the publication date of the proposed rule, the rule would require the counterparties to keep the records beginning on the publication date of the proposed rule and through the life of the swap, and for a period of at least five years from the final termination of the swap. In calculating the burden of this recordkeeping requirement for purposes of the PRA, the Commission will not include the burdens occurring after the compliance date specified in the Commission's final swap data rules in Part 45; the burden occurring after the compliance date is and will be subsumed by the recordkeeping burdens calculated for those final rules.<sup>63</sup> Therefore, for this proposed rule, the Commission will only calculate a recordkeeping burden for the time period beginning with the publication date of this proposed rule, and ending on the compliance date. The Commission estimates this period of time to be approximately one year. The Commission estimates that 30,300 SDs, MSPs, and non-SD/MSP counterparties will be affected by these recordkeeping burdens during this time.<sup>64</sup> With respect

<sup>63</sup> The recordkeeping burden for those final rules is calculated based on the number of annual counterparties to swaps and therefore implicitly includes counterparties to pre-enactment and transition swaps that are unexpired after the effective date.

<sup>64</sup> As noted, the applicable recordkeeping burden applies during a period estimated by the Commission to be one year. The Commission has

to SDs and MSPs (an estimated 300 entities or persons), which will have higher levels of swap recording activity than non-SD/MSP counterparties, the Commission estimates that the average one-time burden per entity is 40 hours, excluding customary and usual business practices. With respect to non-SD/MSP reporting counterparties (an estimated 30,000 entities or persons), who will have lower levels of swap recording activity, the Commission estimates that the average one-time burden per entity is 10 hours, excluding customary and usual business practices. Therefore, the total aggregate one-time burden is 312,000 hours. The Commission requests comment on this estimate.

**Reporting Burdens.** The reporting obligations set forth in proposed Regulation 46.3 involve both an initial data report and ongoing reporting of required swap continuation data relating to pre-enactment and transition swaps. For historical swaps that are in existence as of or after the enactment of the Dodd-Frank Act, but expired prior to publication of the proposed rule, the rule would require only an initial data report.

The proposed regulation provides that reporting counterparties for pre-enactment or transition swaps must make an initial data report relating to those swaps. The frequency of the report would be once per swap, and the report would occur on the compliance date of the Commission's final swap data recordkeeping and reporting regulations in Part 45. The report would not be required to be made for historical swaps that are expired as of the enactment of the Dodd-Frank Act. The Commission estimates that there are 1,800 affected entities who will be reporting counterparties for pre-enactment and transition swaps.<sup>65</sup> The Commission estimates that the average one-time

previously estimated that there are annually 30,000 non-SD/MSP entities who are counterparties to a swap (see, e.g., the Commission's Paperwork Reduction Act statement for the Swap Data Recordkeeping and Reporting Requirements Proposed Rulemaking). The Commission has also previously estimated that there are 250 SDs and 50 MSPs. Therefore, a total of 30,300 entities would be subject to the recordkeeping burdens of the proposed rule.

<sup>65</sup> The Commission has previously estimated that there are annually 1,500 non-SD/MSP counterparties who are a "reporting counterparty" (see, e.g., the Commission's Paperwork Reduction Act statement for the Swap Data Recordkeeping and Reporting Requirements Proposed Rulemaking). In addition, the Commission has previously estimated that there are 250 SDs and 50 MSPs. The Commission believes that the number of entities who are reporting counterparties to pre-enactment or transition swaps (that are in existence as of or after the enactment of the Dodd-Frank Act) is similar to the number of annual reporting counterparties. The Commission requests comment on this estimate.

reporting burden for each affected entity is 24 hours. Therefore, the total aggregate one-time burden is 43,200 hours. The Commission requests comment on this estimate.

The proposed regulation also provides for an ongoing reporting obligation that must be fulfilled by reporting counterparties to pre-enactment and transition swaps that are in existence as of the compliance date specified in the Commission's final swap data reporting rules in part 45. The burden for this ongoing reporting is and will be subsumed by the reporting burden calculated for the Commission's final swap data recordkeeping and reporting regulations in part 45.<sup>66</sup> Therefore, for this proposed rulemaking, the Commission will not calculate a burden estimate for ongoing reporting.

**Information Collection Comments.** The Commission invites the public and other federal agencies to comment on any aspect of the reporting and recordkeeping burdens discussed above. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments in order to: (i) evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (ii) evaluate the accuracy of the Commission's estimate of the burden of the proposed collections of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collections of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Comments may be submitted directly to the Office of Information and Regulatory Affairs, by fax at (202) 395-6566 or by e-mail at [OIRAsubmissions@omb.eop.gov](mailto:OIRAsubmissions@omb.eop.gov). Please provide the Commission with a copy of submitted comments so that all comments can be summarized and addressed in the final rule preamble. Refer to the Addresses section of this notice of proposed rulemaking for comment submission instructions to the Commission. A copy of the supporting statements for the collections of information discussed above may be obtained by visiting [RegInfo.gov](http://RegInfo.gov). OMB is required to make a decision

<sup>66</sup> The reporting burden for those final rules is calculated based on the number of annual "reporting counterparties" to swaps and therefore implicitly include reporting counterparties to pre-enactment and transition swaps that are unexpired after the effective date.

concerning the collection of information between 30 and 60 days after publication of this release.

Consequently, a comment to OMB is most assured of being fully effective if received by OMB (and the Commission) within 30 days after publication of this notice of proposed rulemaking.

#### C. Cost-Benefit Analysis

**Introduction.** Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions before issuing a rulemaking under the Act. By its terms, section 15(a) does not require the Commission to quantify the costs and benefits of the rulemaking or to determine whether the benefits of the rulemaking outweigh its costs; rather, it requires that the Commission “consider” the costs and benefits of its actions.

Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) the efficiency, competitiveness and financial integrity of markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular rule is necessary or appropriate to protect the public interest or to effectuate any of the provisions of or accomplish any of the purposes of the Act.

#### Summary of Proposed Requirements.

The proposed rule provides that counterparties to pre-enactment or transition swaps must keep records of, and must report, certain information relating to the swaps. The proposed reporting requirements involve both an initial report and ongoing reporting that continues until the final termination of the swap.

**Costs.** There are recordkeeping and reporting costs associated with the proposed requirements to record and report certain swap information. The Commission has crafted the rule to be efficient in terms of those costs and has also attempted to minimize the burden on non-SD/MSP counterparties. The proposed rule provides that certain records must be kept by a counterparty only if the counterparty is in possession of that information on or after certain dates as provided in the regulations. The proposed rule would require a counterparty to a pre-enactment or transition swap in existence as of or after publication of this proposed rule to keep, at a minimum, records of a specified set of primary economic terms

data; however, the Commission believes that counterparties already would possess this information as part of their normal business practices. For non-SD/MSP reporting counterparties for pre-enactment or transition swaps in the interest rate, currency, or other commodity asset classes, the proposed rule limits the scope of required continuation data reporting to the data elements available to the reporting counterparty on the compliance date specified in the Commission’s final swap data rules in Part 45.

**Benefits.** In addition to being mandated by the Dodd-Frank Act, reporting of data concerning pre-enactment and transition swaps is essential to the fundamental systemic risk mitigation, transparency, and market supervision purposes for which the Dodd-Frank Act was enacted. This reporting is necessary to give regulators complete information regarding the entire swap market. It provides the Commission and other financial regulators with necessary insight concerning the number of transactions and the number and type of participants involved in the swap market, as well as its outstanding notional size. Such information provides both a baseline against which to assess the development of the swap market over time and a first step toward a transparent and well-regulated market for swaps. Data concerning pre-enactment and transition swaps also is necessary for the Commission to prepare the semi-annual reports it is required to provide to Congress.

**Public Comment.** For the reasons set forth above, the Commission believes that the benefits of the proposed regulations outweigh their costs, and has decided to issue them. The Commission invites public comment on its cost-benefit considerations. Commenters are also invited to submit any data or other information that they may have quantifying or qualifying the costs and benefits of the proposal with their comment letters.

#### IV. Proposed Compliance Date

The Commission understands that, after the date on which the Commission issues final swap data recordkeeping and reporting regulations, including its final regulations concerning pre-enactment and transition swaps, the industry will need a reasonable period of time to implement the requirements of those regulations. Time may be required for entities to register as SEFs, DCMs, DCOs, or SDRs (or for extant DCMs or DCOs to revise their rules and procedures) pursuant to new Commission regulations concerning

such entities. Time may also be needed for registered entities and potential swap counterparties to adapt or create automated systems capable of fulfilling the requirements of Commission regulations concerning swap data recordkeeping and reporting.

Accordingly, it may be appropriate for the Commission’s final swap data recordkeeping and reporting regulations, including those for pre-enactment and transition swaps, to establish a compliance date that is later than the date the final regulations are issued.

The Commission requests comment concerning the need for a compliance date for its final swap data recordkeeping and reporting regulations, including those for pre-enactment and transition swaps, that is later than the date of their issuance; concerning the benefits or drawbacks of such an approach; concerning the length of time needed for registered entities and potential swap counterparties to prepare for implementation in the ways discussed above, or otherwise; and concerning the compliance date which the Commission should specify in its final regulations concerning swap data recordkeeping and reporting.

#### V. General Solicitation of Comments

The Commission requests comments concerning all aspects of the proposed regulations, including, without limitation, all of the aspects of the proposed regulations on which comments have been requested specifically herein.

#### Proposed Rules

##### List of Subjects in 17 CFR Part 46

Swaps, Data recordkeeping requirements and Data reporting requirements.

For the reasons set forth in the preamble, and pursuant to the authority in the Commodity Exchange Act, as amended, and in particular Sections 2(h)(5) and 4r(a), the Commission also hereby proposes to amend Chapter 1 of Title 17 of the Code of Federal Regulations by adding Part 46 to read as follows:

#### PART 46—SWAP DATA RECORDKEEPING AND REPORTING REQUIREMENTS: PRE-ENACTMENT AND TRANSITION SWAPS

Sec.

- 46.1 Definitions.
- 46.2 Recordkeeping for pre-enactment swaps and transition swaps.
- 46.3 Swap data reporting for pre-enactment swaps and transition swaps.
- 46.4 Unique identifiers.

46.5 Determination of which counterparty must report.

46.6 Third-party facilitation of data reporting.

46.7 Reporting to a single swap data repository.

46.8 Data reporting for swaps in a swap asset class not accepted by any swap data repository.

46.9 Required data standards.

46.10 Reporting of errors and omissions in previously reported data.

Appendix to Part 46—Tables of Minimum Primary Economic Terms Data for Pre-Enactment and Transition Swaps.

**Authority:** Title VII, sections 723 and 729, Pub. L. 111-203, 124 Stat. 1738.

#### § 46.1 Definitions.

Terms used in this part are defined as follows:

**Asset class** means the particular broad category of goods, services or commodities underlying a swap. The asset classes include interest rate, currency, credit, equity, other commodity, and such other asset classes as may be determined by the Commission.

**Compliance date** means the compliance date specified in the final swap data recordkeeping and reporting regulations in part 45 of this chapter as the date on which those regulations will be implemented, i.e., the date on which registered entities and swap counterparties must begin to comply with those regulations.

**Confirmation (confirming)** means the consummation (electronically or otherwise) of legally binding documentation (electronic or otherwise) that memorializes the agreement of the parties to all terms of a swap. A confirmation must be in writing (whether electronic or otherwise) and must legally supersede any previous agreement (electronically or otherwise).

**Confirmation data** means all of the terms of a swap matched and agreed upon by the counterparties in confirming the swap.

**Credit support agreement** means an International Swaps and Derivatives Association, Inc. credit support agreement or equivalent agreement.

**Credit swap** means any swap that is primarily based on instruments of indebtedness, including, without limitation: any swap primarily based on one or more broad-based indices related to instruments of indebtedness; and any swap that is an index credit swap or total return swap on one or more indices of debt instruments.

**Currency swap** means any swap which is primarily based on rates of exchange between different currencies, changes in such rates, or other aspects of such rates. This category includes

foreign exchange swaps as defined in Commodity Exchange Act Section 1a(25).

**Electronic reporting** or reporting *electronically* means reporting data in compliance with § 46.9 of this part. The obligation to report electronically is not satisfied by electronic transmission of an image of a document.

**Equity swap** means any swap that is primarily based on equity securities, including, without limitation: any swap primarily based on one or more broad-based indices of equity securities; and any total return swap on one or more equity indices.

**Interest rate swap** means any swap which is primarily based on one or more interest rates, such as swaps of payments determined by fixed and floating interest rates.

**Major swap participant** has the meaning set forth in Commodity Exchange Act, Section 1a(33), and any Commission regulation implementing that Section.

**Master agreement** means an agreement, signed by the counterparties, providing comprehensive documentation of standard terms and conditions covering one or more swap transactions between such counterparties.

**Non-swap dealer/major swap participant counterparty** means a swap counterparty that is neither a swap dealer nor a major swap participant.

**Other commodity swap** means any swap not included in the credit swap, currency swap, equity swap, or interest rate swap categories, including, without limitation, any swap for which the primary underlying item is a physical commodity or the price or any other aspect of a physical commodity.

**Pre-enactment swap** means any swap entered into prior to enactment of the Dodd-Frank Act of 2010 (July 21, 2010), the terms of which have not expired as of the date of enactment of that Act.

**Reporting counterparty** means the counterparty required to report swap data pursuant to § 45.5 of this chapter.

**Swap data repository** has the meaning set forth in Commodity Exchange Act Section 1a(48), and any Commission regulation implementing that Section.

**Swap dealer** has the meaning set forth in Commodity Exchange Act, Section 1a(49), and any Commission regulation implementing that Section.

**Transition swap** means any swap entered into on or after the enactment of the Dodd-Frank Act of 2010 (July 21, 2010) and prior to the compliance date specified in the final swap data reporting and recordkeeping requirements regulations in part 45 of this chapter.

#### § 46.2 Recordkeeping for pre-enactment swaps and transition swaps.

(a) **Recordkeeping for pre-enactment and transition swaps in existence on or after April 25, 2011.** Each counterparty to any pre-enactment swap or transition swap that is in existence on or after April 25, 2011 shall keep the following records concerning each such swap:

(1) **Minimum records required.** The minimum records required to be kept concerning each pre-enactment swap and transition swap shall be as follows:

(i) Each counterparty shall keep records of all of the minimum primary economic terms data specified in the appendix to this part.

(ii) If at any time on or after April 25, 2011 a counterparty is in possession of a confirmation of the swap executed by the counterparties, the counterparty shall keep records of all terms of that confirmation.

(2) **Additional records required to be kept if possessed by a counterparty.** In addition to the minimum records required pursuant to paragraph (a)(1) of this part, a counterparty that is in possession at any time on or after April 25, 2011 of any of the following documentation shall keep copies thereof:

(i) Any master agreement governing the swap, and any modification or amendment thereof.

(ii) Any credit support agreement or equivalent documentation relating to the swap, and any modification or amendment thereof.

(3) **Records created or available after the compliance date.** In addition to the records required to be kept pursuant to paragraphs (a)(1) and (2) of this section, each counterparty to any pre-enactment swap or transition swap that remains in existence on the compliance date shall keep for each such swap, from the compliance date forward, all of the records required to be kept by § 45.2 of this chapter, to the extent that any such records are created by or become available to the counterparty on or after the compliance date.

(b) **Recordkeeping for pre-enactment and transition swaps expired or terminated prior to April 25, 2011.** Each counterparty to any pre-enactment swap or transition swap that is expired or terminated prior to April 25, 2011 shall keep the following records concerning each such swap:

(1) **Pre-enactment swaps expired prior to April 25, 2011.** Each counterparty to any pre-enactment swap that expired or was terminated prior to April 25, 2011 shall retain the information and documents relating to the terms of the transaction that were possessed by the counterparty on or after October 14,

2010 (17 CFR 44.00 through 44.02). Such information may be retained in the format in which it existed on or after October 14, 2010, or in such other format as the counterparty chooses to retain it. This paragraph (b)(1) does not require the counterparty to create or retain records of information not in its possession on or after October 14, 2010, or to alter the format, i.e., the method by which the information is organized and stored.

(2) *Transition swaps expired prior to April 25, 2011.* Each counterparty to any transition swap that expired or was terminated prior to April 25, 2011 shall retain the information and documents relating to the terms of the transaction that were possessed by the counterparty on or after December 17, 2010 (17 CFR 44.03). Such information may be retained in the format in which it existed on or after December 17, 2010, or in such other format as the counterparty chooses to retain it. This paragraph (b)(2) does not require the counterparty to create or retain records of information not in its possession on or after December 17, 2010, or to alter the format, i.e., the method by which the information is organized and stored.

(c) *Retention period.* All records required to be kept by this § 46.2 shall be kept from the applicable dates specified in paragraph (b) of this section 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.

(d) *Retrieval.* Records required to be kept pursuant to this § 46.2 shall be retrievable as follows:

(1) Each record required to be kept by a counterparty that is a swap dealer or major swap participant shall be readily accessible via real time electronic access by the counterparty throughout the life of the swap and for two years following the final termination of the swap, and shall be retrievable by the registrant or its affiliates within three business days through the remainder of the period following final termination of the swap during which it is required to be kept.

(2) Each record required to be kept by a non-swap dealer/major swap participant counterparty shall be retrievable by the counterparty within three business days through the period during which it is required to be kept.

(e) *Inspection.* All records required to be kept pursuant to this section shall be open to inspection upon request by any representative of the Commission, the United States Department of Justice, or the Securities and Exchange Commission, or by any representative of a prudential regulator. Copies of all

such records shall be provided, at the expense of the entity or person required to keep the record, to any representative of the Commission upon request, either by electronic means, in hard copy, or both, as requested by the Commission.

#### § 46.3 Swap data reporting for pre-enactment swaps and transition swaps.

##### (a) Reporting for pre-enactment and transition swaps in existence on or after April 25, 2011. (1) Initial data report.

For each pre-enactment swap or transition swap in existence on or after April 25, 2011, the reporting counterparty shall report electronically to a swap data repository (or to the Commission if no swap data repository for swaps in the asset class in question is available), on the compliance date, the following:

(i) All of the terms of the confirmation that are recorded in the automated systems of the reporting counterparty, if the terms so reported include all of the minimum primary economic terms data specified in the appendix to this part; or all of the minimum primary economic terms data specified in the appendix to this part;

(ii) The Unique Counterparty Identifier required pursuant to § 46.4 of this part; and

(iii) The following additional identifiers:

(A) The internal counterparty identifier used by the automated systems of the reporting counterparty to identify the non-reporting counterparty;

(B) The internal transaction identifier used by the automated systems of the reporting counterparty to identify the swap; and

(C) The internal master agreement identifier (if any) used by the automated systems of the reporting counterparty to identify the master agreement governing the swap.

(2) *Non-duplication of previous reporting.* If the reporting counterparty for a pre-enactment or transition swap has reported any of the information required as part of the initial data report by paragraph (a) of this section to a trade repository prior to the compliance date, and if as of the compliance date that repository has registered with the Commission as a swap data repository, then:

(i) The counterparty shall not be required to report such previously reported information to the swap data repository again;

(ii) The counterparty shall be required to report to the swap data repository on the compliance date any information required as part of the initial data report by § 46.3(a) of this part that has not been

reported prior to the compliance date; and

(iii) The initial data report required by paragraph (b)(2) of this section and all subsequent data reporting concerning the swap shall be made to the same swap data repository to which data concerning the swap was reported prior to the compliance date (or to its successor in the event that it ceases to operate, as provided in part 49 of this chapter).

(3) *Reporting of required swap continuation data for a credit swap or equity swap.* For each pre-enactment or transition swap in either the credit swap or equity swap asset class, that is in existence on or after April 25, 2011, throughout the existence of the swap following the compliance date, the reporting counterparty, as defined in part 45 of this chapter, shall report all required swap continuation data required to be reported for credit swaps or equity swaps under part 45 of this chapter.

(4) *Reporting of required swap continuation data for an interest rate swap, other commodity swap, or currency swap.* For each pre-enactment or transition swap in the interest rate, other commodity, or currency asset class, that is in existence on or after April 25, 2011, throughout the existence of the swap following the compliance date, the reporting counterparty as defined in part 45 shall report required swap continuation data as follows:

(i) *Swaps for which the reporting counterparty is a swap dealer or major swap participant.* For each pre-enactment swap or transition swap in existence on or after April 25, 2011, for which the reporting counterparty as defined in part 45 is a swap dealer or major swap participant, the reporting counterparty shall report to a swap data repository electronically all required swap continuation data concerning the swap as provided in part 45.

(ii) *Swaps for which the reporting counterparty is a non-swap dealer/major swap participant counterparty.* For each pre-enactment swap or transition swap in existence on or after April 25, 2011, for which the reporting counterparty as defined in part 45 is a non-swap dealer/major swap participant counterparty, the reporting counterparty shall report to a swap data repository electronically all required swap continuation data concerning the swap as provided in part 45. However, notwithstanding any other provision of part 45, the state data reported to provide a snapshot view, on a daily basis, of the primary economic terms of the swap shall be the greater of the following which is in the possession of

the reporting counterparty on the compliance date:

(A) The state data, or any part thereof, for the swap as defined in part 45 of this chapter; or

(B) All of the data elements contained in the table of minimum primary economic terms for pre-enactment or transition swaps in the asset class of the swap in question that is included in the appendix to this part.

(b) *Reporting for pre-enactment and transition swaps expired or terminated prior to April 25, 2011.* (1) *Pre-enactment swaps expired or terminated prior to April 25, 2011.* For each pre-enactment swap which expired or was terminated prior to April 25, 2011, the reporting counterparty shall report to a swap data repository (or to the Commission if no swap data repository for swaps in the asset class in question is available), on the compliance date, such information relating to the terms of the transaction as was in the reporting counterparty's possession on or after October 14, 2010 (17 CFR 44.00 through 44.02). This information can be reported via any method selected by the reporting counterparty.

(2) *Transition swaps expired or terminated prior to April 25, 2011.* For each transition swap which expired or was terminated prior to April 25, 2011, the reporting counterparty shall report to a swap data repository (or to the Commission if no swap data repository for swaps in the asset class in question is available), on the compliance date, such information relating to the terms of the transaction as was in the reporting counterparty's possession on or after December 17, 2010 (17 CFR 44.03). This information can be reported via any method selected by the reporting counterparty.

#### **§ 46.4 Unique identifiers.**

The unique identifier requirements for swap data reporting with respect to pre-enactment or transition swaps shall be as follows:

(a) By the compliance date, the reporting counterparty (as defined by part 45 of this chapter) for each pre-enactment or transition swap in existence on or after April 25, 2011, for which an initial data report is required by this part 46, shall obtain a Unique Counterparty Identifier, as provided in part 45, for itself, and shall include its own Unique Counterparty Identifier in the initial data report concerning the swap. With respect to that Unique Counterparty Identifier, the reporting counterparty and the swap data repository to which the swap is reported shall comply thereafter with all unique identifier requirements of part 45

respecting Unique Counterparty Identifiers.

(b) Within 180 days after the compliance date, the non-reporting counterparty for each pre-enactment or transition swap in existence on or after April 25, 2011 for which an initial data report is required by this part 46, shall obtain a Unique Counterparty Identifier, as provided in part 45, for itself, and shall provide that Unique Counterparty Identifier to the reporting counterparty. Upon receipt of the non-reporting counterparty's Unique Counterparty Identifier, the reporting counterparty shall provide that Unique Counterparty Identifier to the swap data repository to which swap data for the swap was reported. Thereafter, with respect to the Unique Counterparty Identifier of the non-reporting counterparty the counterparties to the swap and the swap data repository to which it is reported shall comply with all requirements of part 45 respecting Unique Counterparty Identifiers.

(c) The Unique Counterparty Identifier requirements of parts 46 and 45 of this chapter shall not apply to pre-enactment or transition swaps expired or terminated prior to April 25, 2011.

(d) The Unique Swap Identifier and Unique Product Identifier requirements of part 45 of this chapter shall not apply to pre-enactment or transition swaps.

#### **§ 46.5 Determination of which counterparty must report.**

(a) Determination of which counterparty must report swap data concerning each pre-enactment or transition swap shall be made as follows:

(1) If only one counterparty is an SD, the SD shall fulfill all counterparty reporting obligations.

(2) If neither party is an SD, and only one counterparty is an MSP, the MSP shall fulfill all counterparty reporting obligations.

(3) For each pre-enactment swap or transition swap for which both counterparties are SDs, or both counterparties are MSPs, or both counterparties are non-SD/MSP counterparties, the counterparties shall agree as one term of their swap transaction which counterparty shall fulfill reporting obligations with respect to that swap; and the counterparty so selected shall fulfill all counterparty reporting obligations.

(4) Notwithstanding the provisions of paragraphs (a)(1) through (3) of this section, if only one counterparty to a pre-enactment swap or transition swap is a U.S. person, that counterparty shall be the reporting counterparty and shall

fulfill all counterparty reporting obligations.

(5) If a reporting counterparty selected pursuant to paragraphs (a)(1) through (4) of this section ceases to be a counterparty to a swap due to an assignment or novation, and the new counterparty is a U.S. person, the new counterparty shall be the reporting counterparty and fulfill all reporting counterparty obligations following such assignment or novation. If a new counterparty to a swap due to an assignment or novation is not a U.S. person, the counterparty that is a U.S. person shall be the reporting counterparty and fulfill all reporting counterparty obligations following such assignment or novation.

(b) For pre-enactment and transition swaps in existence as of the compliance date, determination of the reporting counterparty shall be made by applying the provisions of paragraph (a) of this section with respect to the current counterparties to the swap as of the compliance date, regardless of whether either or both were original counterparties to the swap when it was first executed.

(c) For pre-enactment and transition swaps for which reporting is required, but which have expired or been terminated prior to the compliance date, determination of the reporting counterparty shall be made by applying the provisions of paragraph (a) of this section to the counterparties to the swap as of the date of its expiration or termination, regardless of whether either or both were original counterparties to the swap when it was first executed.

#### **§ 46.6 Third-party facilitation of data reporting.**

Counterparties required by this part 46 to report swap data for any pre-enactment or transition swap, while remaining fully responsible for reporting as required by this part 46, may contract with third-party service providers to facilitate reporting.

#### **§ 46.7 Reporting to a single swap data repository.**

All data reported for each pre-enactment or transition swap pursuant to this part 46, and all corrections of errors and omissions in previously reported data for the swap, by any registered entity or counterparty, shall be reported to the same swap data repository to which the initial data report concerning the swap is made (or to its successor in the event that it ceases to operate, as provided in part 49 of this chapter).

**§ 46.8 Data reporting for swaps in a swap asset class not accepted by any swap data repository.**

Should there be a swap asset class for which no swap data repository currently accepts swap data, each counterparty required by this part 46 to report swap data with respect to a pre-enactment or transition swap in that asset class must report that same data at a time and in a form and manner determined by the Commission.

**§ 46.9 Required data standards.**

In reporting swap data to a swap data repository as required by this part 46, each reporting counterparty shall use the facilities, methods, or data standards provided or required by the swap data repository to which counterparty reports the data.

**§ 46.10 Reporting of errors and omissions in previously reported data.**

(a) Each swap counterparty required by this part 46 to report swap data shall report any errors and omissions in the data so reported. Corrections of errors or omissions shall be reported as soon as technologically practicable after discovery of any such error or omission.

(b) For pre-enactment or transition interest rate swaps, currency swaps, or other commodity swaps in existence as of the compliance date, reporting counterparties fulfill the requirement to report errors or omissions in state data previously reported as part of required continuation data reporting by making appropriate corrections in their next daily report of state data as required by this part 46 and part 45 of this chapter.

(c) Each counterparty to a pre-enactment or transition swap that is not the reporting counterparty as determined pursuant to part 45, and that discovers any error or omission with

respect to any swap data reported to a swap data repository for that swap, shall promptly notify the reporting counterparty of each such error or omission. Upon receiving such notice, the reporting counterparty shall report a correction of each such error or omission to the swap data repository, as provided in § 45.10(a) and (b) of this chapter.

(d) Unless otherwise approved by the Commission, or by the Director of Market Oversight pursuant to part 45 of this chapter, each swap counterparty reporting corrections to errors or omissions in data previously reported as required by this part 46 shall report such corrections in the same format as it reported the erroneous or omitted data.

**Appendix to Part 46—Tables of Minimum Primary Economic Terms Data for Pre-Enactment and Transition Swaps**

**MINIMUM PRIMARY ECONOMIC TERMS DATA FOR PRE-ENACTMENT AND TRANSITION CREDIT SWAPS AND EQUITY SWAPS**

Sample category	Comment
An indication of the counterparty purchasing protection and of the counterparty selling protection.	E.g., option buyer and option seller; buyer and seller.
Information identifying the reference entity .....	The entity that is the subject of the protection being purchased and sold in the swap.
An indication of whether or not both counterparties are swap dealers.	
An indication of whether or not both counterparties are major swap participants.	
An indication of whether or not either counterparty is a swap dealer or major swap participant.	
The date and time of trade, expressed using Coordinated Universal Time (“CUT”).	
The venue where the swap was executed.	
The effective date for the swap.	
The expiration date for the swap.	
The price .....	E.g., strike, initial price, spread, etc.
The notional amount, the currency in which the notional amount is expressed, and the equivalent notional amount in U.S. dollars.	
The amount and currency or currencies of any up-front payment.	
A description of the payment streams of each counterparty .....	E.g., coupon.
The title of any master agreement incorporated by reference and the date of any such agreement.	E.g., annex, credit agreement.
If the transaction involved an existing swap, an indication that the transaction did not involve an opportunity to negotiate a material term of the contract, other than the counterparty.	E.g., assignment.
The data elements necessary for a person to determine the market value of the transaction.	
Whether or not the swap will be cleared by a derivatives clearing organization.	
The name of the derivatives clearing organization that will clear the swap, if any.	
If the swap is not cleared, all of the settlement terms, including, without limitation, whether the swap is cash-settled or physically settled, and the method for determining the settlement value.	
Any other primary economic term(s) of the swap matched by the counterparties in verifying the swap.	

**MINIMUM PRIMARY ECONOMIC TERMS DATA FOR PRE-ENACTMENT AND TRANSITION CURRENCY SWAPS**

Sample data field	Comments
1 Contract type .....	E.g., swap, swaption, forwards, options, basis swap, index swap, basket swap, other.
2 Swap transaction date .....	Date when the swap was entered.

## MINIMUM PRIMARY ECONOMIC TERMS DATA FOR PRE-ENACTMENT AND TRANSITION CURRENCY SWAPS—Continued

Sample data field	Comments
3 Currency 1 .....	International Organization for Standardization Code.
4 Currency 2 .....	International Organization for Standardization Code.
5 Notional amount 1 .....	For currency one.
6 Notional amount 2 .....	For currency two.
7 Settlement agent of the reporting counterparty .....	ID of the settlement agent.
8 Settlement agent of the non-reporting counterparty .....	ID of the settlement agent.
9 Settlement currency .....	If applicable.
10 Exchange rate 1 .....	At the moment of trade/agreement.
11 Exchange rate 2 .....	At the moment of trade/agreement, if applicable.
12 Swap delivery type .....	Cash or physical.
13 Expiration date .....	Expiration date of the contract.
Any other primary economic term(s) of the swap matched by the counterparties in verifying the swap.	

## MINIMUM PRIMARY ECONOMIC TERMS DATA FOR PRE-ENACTMENT AND TRANSITION INTEREST RATE SWAPS

Sample data field	Comment
1 Contract type .....	E.g., swap, swaption, option, basis swap, index swap, etc.
2 Swap transaction date .....	Date when the swap was entered.
3 Swap effective date .....	Effective date of the contract.
4 Swap end-date .....	Expiration date of the contract.
5 Notional amount one .....	The current active notional in local currency.
6 Notional currency one .....	International Organization for Standardization code of the notional currency.
7 Notional amount two .....	The second notional amount (e.g., receiver leg).
8 Notional currency two .....	International Organization for Standardization code of the notional currency.
9 Payer (fixed rate) .....	Is the reporting party a fixed rate payer? Yes/No/Not applicable.
10 Fixed leg payment frequency .....	How often will the payments on fixed leg be made.
11 Direction .....	For swaps—if the principal is paying or receiving the fixed rate. For float-to-float and fixed-to-fixed swaps, it is unspecified. For non-swap instruments and swaptions, the instrument that was bought or sold. E.g., put, call, straddle.
12 Option type .....	
13 Fixed rate.	
14 Fixed rate day count fraction.	
15 Floating rate payment frequency.	
16 Floating rate reset frequency.	
17 Floating rate index name/rate period.	
18 Leg 1 .....	If two floating legs, report what is paid.
19 Leg 2 .....	If two floating legs, report what is received.
Any other primary economic term(s) of the swap matched by the counterparties in verifying the swap.	

## MINIMUM PRIMARY ECONOMIC TERMS DATA FOR PRE-ENACTMENT AND TRANSITION OTHER COMMODITY SWAPS

Sample data field	Comment
1 Contract type .....	E.g., swap, swaption, option, etc.
2 Swap transaction date .....	Date when the swap was entered.
3 Quantity .....	The unit of measure applicable for the quantity on the swap.
4 Start date .....	Predetermined start date from which payments will be exchanged.
5 End-date .....	Predetermined end date from which payments will be exchanged.
6 Buyer pay index .....	The published price as paid by the buyer.
7 Seller pay index .....	The published price as paid by the seller.
8 Buyer .....	Party purchasing product, e.g. payer of the fixed price (for swaps), or payer of the floating price (for put swaption), or payer of the fixed price (for call swaption).
9 Seller .....	Party offering product, e.g. payer of the floating price (for swaps), payer of the fixed price (for put swaption), or payer of the floating price (for call swaption).
10 Price .....	E.g., fixed price, the heat rate value, etc.
11 Price unit .....	The unit of measure applicable for the price on the transaction.
12 Grade .....	E.g., the grade of oil or refined product being delivered.
Any other primary economic term(s) of the swap matched by the counterparties in verifying the swap.	

Issued in Washington, DC, on April 6, 2011, by the Commission.

**David A. Stawick,**  
Secretary of the Commission.

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## DEPARTMENT OF DEFENSE

### Office of the Secretary

#### 32 CFR Part 83

[Docket ID DOD-2010-OS-0108]

**RIN 0790-AI63**

### Alternative Dispute Resolution (ADR) and Conflict Management

**AGENCY:** Defense Legal Services Agency, DoD.

**ACTION:** Proposed rule.

**SUMMARY:** This part establishes policy and assigns responsibilities. It establishes a framework for encouraging the expanded use of alternative means of dispute resolution and conflict management practices as an integral part of normal business practices within the Department of Defense.

**DATES:** Comments must be received by June 24, 2011.

**ADDRESSES:** You may submit comments, identified by docket number and or RIN number and title, by any of the following methods:

- **Federal Rulemaking Portal:** <http://www.regulations.gov>. Follow the instructions for submitting comments.

- **Mail:** Federal Docket Management System Office, 1160 Defense Pentagon, Room 3C843, Washington, DC 20301-1160.

**Instructions:** All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:**  
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**SUPPLEMENTARY INFORMATION:**

### Regulatory Procedures

*Executive Order 12866, “Regulatory Planning and Review” and Executive Order 13563, “Improving Regulation and Regulatory Review”*

It has been certified that 32 CFR part 83 does not:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities;

- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency;

- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or

- (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in these Executive Orders.

*Sec. 202, Public Law 104-4, “Unfunded Mandates Reform Act”*

It has been certified that 32 CFR part 83 does not contain a Federal mandate that may result in expenditure by State, local and tribal governments, in aggregate, or by the private sector, of \$100 million or more in any one year.

*Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. 601)*

It has been certified that 32 CFR part 83 is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it [would or would not], if promulgated, have a significant economic impact on a substantial number of small entities.

*Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)*

It has been certified that 32 CFR part 83 does not impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995.

*Executive Order 13132, “Federalism”*

It has been certified that 32 CFR part 83 does not have federalism implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

- (1) The States;
- (2) The relationship between the National Government and the States; or
- (3) The distribution of power and responsibilities among the various levels of Government.

### List of Subjects in 32 CFR Part 83

Personnel, Dispute resolution.

Accordingly, 32 CFR Part 83 is proposed to be added to read as follows:

### PART 83—ALTERNATIVE DISPUTE RESOLUTION (ADR) AND CONFLICT MANAGEMENT

Sec.

83.1 Purpose.

83.2 Applicability.

83.3 Definitions.

83.4 Policy.

83.5 Responsibilities.

**Authority:** 5 U.S.C. 571–584; Executive Order 12988.

#### § 83.1 Purpose.

This part:

- (a) Establishes policy pursuant to title 5, United States Code (U.S.C.) 571–584 and Executive Order 12988.

- (b) Assigns responsibilities, and

- (c) Establishes a framework for encouraging the expanded use of alternative means of dispute resolution and conflict management practices as an integral part of normal business practices within the Department of Defense.

#### § 83.2 Applicability.

This part applies to the Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the Department of Defense (hereafter referred to collectively as the “DoD Components”).

#### § 83.3 Definitions.

These terms and their definitions are for the purpose of this part.

**Alternative dispute resolution (ADR).** Any procedure that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, fact finding, mini-trials, arbitration, and use of ombuds, or any combination thereof.

**ADR coordinating committee.** The group consisting of the dispute resolution specialists designated under title 5 U.S.C. 571–584 or their representatives from the DoD Components and other officials appointed by the Deputy General Counsel (Legal Counsel) (DGC(LC)). The purpose of the ADR Coordinating Committee is to promote among the DoD Components the exchange of information on ADR and conflict management design and implementation.

**Conflict management.** A systemic process used to proactively identify and manage, at the earliest stage possible, conflict that can lead to one or more disputes, for the purpose of reducing the