
CFTC Staff Provides Broad Reporting Relief to Non-Financial End-Users

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The Commodity Futures Trading Commission (CFTC) staff issued broad no-action relief to non-financial end-users from reporting requirements for new and historical swaps between corporate affiliates. This broad relief is self-effectuating and applies to swaps between wholly-owned or majority-owned affiliates of non-financial end-users where the affiliates' financial results are included in the parent company's consolidated financial statements. This relief will significantly reduce the reporting burden for non-financial entities that enter into inter-affiliate swaps.

Background

As discussed in our January Primer for Nonfinancial Companies,¹ non-financial end-users may elect not to clear their swaps under the Nonfinancial End User Exception available to them under Section 2(h)(7) of the Commodity Exchange Act (CEA) and CFTC Regulation 50.50. However, that exception did not excuse non-financial end-users from reporting obligations with respect to new and historical inter-affiliate swaps.

On April 5, 2013, the CFTC's Division of Market Oversight (DMO) and Division of Clearing and Risk (DCR) (together, the Divisions) granted no-action relief for certain transactions between non-financial end-user affiliates from some of these reporting requirements.² The relief also applies to swaps that are not subject to mandatory clearing for reasons other than an exception from clearing. The relief does not apply to any of the CFTC's recordkeeping requirements.

Who may rely on this relief?

The no-action relief is available for swaps between wholly-owned or majority-owned affiliates of non-financial end-users or of other non-excluded entities³ engaging in swaps that are not subject to mandatory clearing where the affiliates' financial results are included in the parent company's consolidated financial statements,⁴ and the swap is between either: (a) a direct or indirect parent and its subsidiary when the parent has a 100% (or majority) interest in the subsidiary; or (b) between two subsidiaries for which a direct or indirect parent has a 100% (or majority) interest in

both subsidiaries.⁵ Eligible swaps are referred to herein as “intragroup swaps.” As described below, the relief from intragroup swaps reporting differs depending on whether the affiliate(s) are wholly- or majority-owned.

What swap transactions are eligible for the relief?

The no-action relief is available for intragroup swaps that are not subject to mandatory clearing *and* are not cleared, or for which one of the affiliates elects the Nonfinancial End User Exception from mandatory clearing. Swaps are not eligible for the no-action relief if they have been executed on a designated contract market, swap execution facility, or foreign board of trade that is either registered with the CFTC or operating subject to a no-action letter;⁶ or cleared by a derivatives clearing organization (DCO). In addition, swaps for which counterparties elect the Inter-Affiliate Clearing Exemption are not eligible for the relief under this letter.⁷

What is the scope of the relief?

Part 45 Relief – New Swaps

Part 45 of the CFTC’s regulations require that one of the counterparties to a swap (the reporting counterparty) report to a swap data repository (or if none is available, the CFTC) required swap data at the time of execution of the swap (Creation Data) and over the course of the swap’s existence (Continuation Data).⁸ This requirement generally applies regardless of whether the swap is cleared.⁹

Wholly-Owned Affiliates. Under the no-action letter, the Divisions will not recommend enforcement action if wholly-owned affiliates do not report their intragroup swaps. Although these entities are not required to have the Unique Swap Identifiers specified under Part 45, they must use unique, internal swap identifiers for recordkeeping.

Majority-Owned Affiliates. In contrast, majority-owned affiliates must still report their intragroup swaps, but may do so on a quarterly basis instead of on a swap-by-swap basis. Starting with the second quarter of 2013, these entities will be required to report their intragroup swaps 30 days after the end of each quarter.¹⁰

Part 46 Relief – Historical Swaps¹¹

Neither wholly-owned nor majority-owned affiliates are required to report historical swaps.¹²

Recordkeeping

Affiliates availing themselves of this relief nevertheless must maintain records of both new and historical swaps, as required under Parts 45 and 46, respectively, and must make such records available to the Commission promptly upon request.

Conclusion

The no-action relief is self-effectuating. Eligible counterparties need only satisfy the enumerated conditions to qualify. It should also be noted that the no-action relief does not excuse entities from recordkeeping requirements nor does it excuse affiliates from reporting requirements with non-affiliates. Nevertheless, the no-action position should provide non-financial end-users with significant relief from reporting obligations.

¹ WilmerHale, The New Swaps Regime: A Primer for Nonfinancial Companies, (Jan. 9, 2013), available at <http://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=10737419499>.

² CFTC Letter No. 13-09 (April 5, 2013). On April 1, 2013, the CFTC adopted final rules (Final Rules) that provide a clearing exemption for certain majority-owned affiliates from mandatory clearing of certain inter-affiliate swaps (Inter-Affiliate Clearing Exemption). Clearing Exemption for Swaps Between Certain Affiliated Entities (Apr. 1, 2013), available at <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/federalregister040113.pdf>. The Final Rules include specific conditions and reporting requirements that inter-corporate affiliates must satisfy in order to claim the Inter-Affiliate Clearing Exemption. Non-financial end-users may elect to use the Inter-Affiliate Clearing Exemption instead of the Nonfinancial End User Exception. However, the Divisions note that non-financial entities would likely only use the Inter-Affiliate Clearing Exemption in instances where a swap is not being used to hedge or mitigate commercial risk. *Id.* at n. 9. The no-action relief discussed in this alert does not apply to entities (including non-financial end-users) that use the Inter-Affiliate Clearing Exemption.

³ The relief is not available to any affiliate that is a swap dealer (SD), a major swap participant (MSP), an affiliate of an SD or MSP, or an affiliate of a financial company that has been designated “systemically important” by the Financial Stability Oversight Council.

⁴ Consolidated financial statements must be prepared according to either Generally Accepted Accounting Standards or International Financial Reporting Standards.

⁵ The letter defines a 100% (or majority) ownership as the parent owning 100% (or the majority) of the equity securities of the subsidiary or the right of one affiliate “to, receive upon dissolution, or the contribution of, 100% [or majority] of the capital of a partnership.”

⁶ Or executed on another trading platform.

⁷ See *supra* note 2.

⁸ See Swap Data Recordkeeping and Reporting Requirements, 77 *Fed. Reg.* 2136 (Jan. 13, 2012).

⁹ *Id.*

¹⁰ The initial reporting for the second quarter 2013 (at the end of July) must include swaps entered into from April 10, 2013 to June 30, 2013. Subsequent quarterly filings, however, must include swaps entered into during each entire quarter.

¹¹ See Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps, 77 *Fed. Reg.* 35200 (June 12, 2012) for regulations regarding historical swaps.

¹² Historical swaps are swaps that were entered into either (a) prior to July 21, 2010 and which had

not expired by that date (pre-enactment swaps), or (b) after July 21, 2010 but before the applicable compliance date for swap reporting (transition swaps). Note that this part of the no-action relief was only issued by the DMO (not the DCR).

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