

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

SECURITIES INDUSTRY AND FINANCIAL  
MARKETS ASSOCIATION,  
INTERNATIONAL SWAPS AND  
DERIVATIVES ASSOCIATION, and  
INSTITUTE OF INTERNATIONAL  
BANKERS,

Plaintiffs,

v.

UNITED STATES COMMODITY FUTURES  
TRADING COMMISSION,

Defendant.

Case No. 13-cv-1916 (PLF)

**JOINT STATUS REPORT**

Eugene Scalia (DC Bar No. 447524)  
escalia@gibsondunn.com  
Jason J. Mendro (DC Bar No. 482040)  
jmendro@gibsondunn.com  
GIBSON, DUNN & CRUTCHER LLP  
1050 Connecticut Avenue, N.W.  
Washington, D.C. 20036  
(202) 955-8500

*Counsel for Plaintiffs*

Jonathan L. Marcus (DC Bar No. 451172)  
*General Counsel*  
Robert A. Schwartz (DC Bar No. 489240)  
*Deputy General Counsel*  
Martin B. White (DC Bar No. 221259)  
*Assistant General Counsel*  
Kavita Kumar Puri (DC Bar No. 977997)  
*Counsel*

Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21st Street, N.W.  
Washington, D.C. 20581  
(202) 418-5129  
[mwhite@cftc.gov](mailto:mwhite@cftc.gov)

*Counsel for Defendant*

September 1, 2015

The Commodity Futures Trading Commission has taken the following actions, to date, to comply with this Court's September 16, 2014 remand order:

1. On March 10, 2015, the Commission published in the Federal Register a notice entitled Initial Response to District Court Remand Order in Securities Industry and Financial Markets Association, et al. v. United States Commodity Futures Trading Commission, 80 FR 12555 ("Initial Response"). A copy is attached as Exhibit A. In this notice, the Commission described the Court's decision and order and took certain actions.

a. In accordance with the Court's instructions, the Commission made the following clarification about its earlier consideration of costs and benefits with respect to the remanded rules:

The Commission hereby clarifies that it considered costs and benefits based on the understanding that the swaps market functions internationally, with many transactions involving U.S. firms taking place across international boundaries; with leading industry members typically conducting operations both within and outside the United States; and with industry members commonly following substantially similar business practices wherever located. The Commission considered all evidence in the record, and in the absence of evidence indicating differences in costs and benefits between foreign and domestic swaps activities, the Commission did not find occasion to characterize explicitly the identified costs and benefits as foreign or domestic. Thus, where the Commission did not specifically refer to matters of location, its discussion of costs and benefits referred to the effects of its rules on all business activity subject to its regulations, whether by virtue of the activity's physical location in the United States or by virtue of the activity's connection with or effect on U.S. commerce under section 2(i).

Ex. A (80 FR at 12558).

b. In addition to that clarification, the Commission requested public comments "to assist the Commission in determining whether any further consideration or explanation—beyond that contained in the original rule preambles and this release—is needed to respond to [the

Court's] mandate...." Ex. A (80 FR at 12558). The Commission asked commenters to address the following questions:

1. Are there any benefits or costs that the Commission identified in any of the rule preambles that do not apply, or apply to a different extent, to the relevant rule's extraterritorial applications?
2. Are there any costs or benefits that are unique to one or more of the rules' extraterritorial applications? If so, please specify how.
3. Put another way, are the types of costs and benefits that arise from the extraterritorial application of any of the rules different from those that arise from the domestic application? If so, how and to what extent?
4. If significant differences exist in the costs and benefits of the extraterritorial and domestic application of one or more of the rules, what are the implications of those differences for the substantive requirements of the rule or rules?

Ex. A (80 FR at 12558).

c. Finally, the Commission announced that, following review of the comments, it will publish a further response to the remand order which would include any necessary additional supplementation of, or changes to, its consideration of the costs and benefits of the remanded rules. Ex. A (80 FR at 12555). The Commission also stated that it would consider whether to amend any of the rules in light of information developed in this process. *Id.*

2. The comment period for the Initial Response closed on May 11, 2014. The Commission received four comments: a 21-page (plus attachment) comment from plaintiff Institute of International Bankers; a 5-page joint comment from plaintiffs International Swaps and Derivatives Association and the Securities Industry and Financial Markets Association; a 3-page comment from the Japanese Bankers Association; and a 2-page comment from UBS Securities LLC. Plaintiffs and the Japanese Bankers Association submitted comments discussing certain

costs of applying the remanded rules extraterritorially. Plaintiffs noted that during the period when the Commission initially sought public comment on the rules, “the Commission’s policy with respect to the cross-border application of those rules was not yet final.” Comments from IIB on 80 FR 12555 at 3. Thus, “commenters on the Commission’s swap-related rulemakings generally did not address the cost and benefits of applying those rules to Non-U.S. Swaps.” *Id.* at 3-4; *see also* Comments from ISDA & SIFMA on 80 FR 12555 at 2 (explaining that “[s]imple redeployment of the Commission’s apparently domestic previous cost-benefit analysis will yield no new information . . . .”). Plaintiffs believe that the Commission should conduct additional analyses that include meaningful consideration of the costs and benefits of applying the remanded rules extraterritorially, and that the Commission should invite further comments from the public after publishing those analyses.

3. The Commission staff has reviewed the comments and is currently in the process of formulating recommendations to assist the Commission’s deliberation with respect to these matters.

4. Additionally, and for reasons not related to the litigation in the instant case, on August 19, 2015, the Commission issued a Notice of Proposed Rulemaking (“NPRM”) that proposes amendments and additions to the SDR Reporting Rule, one of the remanded rulemakings. *See* Amendments to Swap Data Recordkeeping and Reporting Requirements for Cleared Swaps, 80 FR 52544 (Aug. 31, 2015) (excerpts attached as Exhibit B). This NPRM focuses on amending rules related to the reporting of cleared swaps and was motivated, in large part, by practical experience with the operation of the original rule in connection with cleared swap transactions. *See* Ex. B (80 FR at 52544-545). Consistent with this Court’s opinion, the Commission requested comments, through a series of questions, regarding whether the costs and benefits of

the proposed amendments' overseas application are different than those for their domestic application. *See* Ex. B (80 FR at 52564).

Respectfully submitted,

/s/ Martin B. White

Jonathan L. Marcus (DC Bar No. 451172)

*General Counsel*

Robert A. Schwartz (DC Bar No. 489240)

*Deputy General Counsel*

Martin B. White (DC Bar No. 221259)

*Assistant General Counsel*

Kavita Kumar Puri (DC Bar No. 977997)

*Counsel*

Commodity Futures Trading Commission,

Three Lafayette Centre

1155 21st Street, N.W.

Washington, D.C. 20581

(202) 418-5129

mwhite@cftc.gov

*Counsel for Defendant*

/s/ Eugene Scalia

Eugene Scalia (DC Bar No. 447524)

escalia@gibsondunn.com

Jason J. Mendro (DC Bar No. 482040)

jmendro@gibsondunn.com

GIBSON, DUNN & CRUTCHER LLP

1050 Connecticut Avenue, N.W.

Washington, D.C. 20036

(202) 955-8500

*Counsel for Plaintiffs*

**CERTIFICATE OF SERVICE**

I hereby certify that on September 1, 2015, I filed this Joint Status Report using this Court's CM/ECF electronic filing system. Also on September 1, 2015, I served this document on the following counsel for Plaintiffs using the CM/ECF system:

Eugene Scalia  
[EScalia@gibsondunn.com](mailto:EScalia@gibsondunn.com)

Attorney for Plaintiffs

Stephen B. Kinnaird  
[stephenkinnaird@paulhastings.com](mailto:stephenkinnaird@paulhastings.com)

Attorney for Amicus Curiae Chamber of Commerce

Dennis M. Kelleher  
[Dkelleher@bettermarkets.com](mailto:Dkelleher@bettermarkets.com)

Attorney for Amicus Curiae Better Markets, Inc.

Gregory A. Beck  
[greg@guptabeck.com](mailto:greg@guptabeck.com)

Attorney for Amicus Curiae Current and Former Members  
of Congress

/s/ Martin B. White  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21st Street, N.W.  
Washington, D.C. 20581  
(202) 418-5129  
[mwhite@cftc.gov](mailto:mwhite@cftc.gov)

# **EXHIBIT A**

# Rules and Regulations

Federal Register

Vol. 80, No. 46

Tuesday, March 10, 2015

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 1, 3, 23, 37, 43, 45, 46, and 170

RIN 3038-AE27

### Initial Response to District Court Remand Order in *Securities Industry and Financial Markets Association, et al. v. United States Commodity Futures Trading Commission*

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Supplementation of rulemaking preambles and request for comments.

**SUMMARY:** This release is the Commodity Futures Trading Commission's ("Commission" or "CFTC") initial response to the order of the United States District Court for the District of Columbia in *Securities Industry and Financial Markets Association, et al. v. United States Commodity Futures Trading Commission* remanding eight swaps-related rulemakings to the Commission to address what the court held to be inadequacies in the Commission's consideration of costs and benefits, or its explanation of its consideration of costs and benefits, in those rulemakings. In this release, the Commission: supplements the preambles to the remanded rulemakings by clarifying that the costs and benefits identified therein applied both to domestic swaps activities and activities outside the United States that are subject to the Commission's swaps rules by operation of section 2(i) of the Commodity Exchange Act ("CEA"); and solicits comments on whether there are cross-border costs or benefits associated with the remanded rules that differ from those associated with activities within the United States. Following its review of the comments, the Commission will publish a further response to the District Court remand order which would

include any supplementation of or changes to its consideration of the costs and benefits of the relevant rules as set forth in the rule preambles. The Commission will also consider whether to amend any of these rules in light of information developed in this process.

**DATES:** Comments must be received on or before May 11, 2015.

**ADDRESSES:** You may submit comments, identified by RIN 3038-AE27, by any of the following methods:

- *Agency Web site:* <http://comments.cftc.gov>. Follow the instructions for submitting comments through the Web site.
- *Mail:* Send to Christopher Kirkpatrick, 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.

Please submit your comments using only one of these methods.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to [www.cftc.gov](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 you believe is exempt from disclosure under the Freedom of Information Act ("FOIA"), a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission's regulations.<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 [www.cftc.gov](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 FOIA.

**FOR FURTHER INFORMATION CONTACT:** Rob Schwartz, Deputy General Counsel,

<sup>1</sup> 17 CFR 145.9.

(202) 418-5958, [rschwartz@cftc.gov](mailto:rschwartz@cftc.gov); Martin White, Assistant General Counsel, (202) 418-5129, [mwhite@cftc.gov](mailto:mwhite@cftc.gov); or Kavita Kumar Puri, Counsel, (202) 418-5291, [kpuri@cftc.gov](mailto:kpuri@cftc.gov), in the Office of the General Counsel, Commodity Futures Trading Commission, Three Lafayette Centre, 1151 21st Street NW., Washington, DC 20581.

## SUPPLEMENTARY INFORMATION:

### I. Overview

This release is the Commission's initial response to the order of the United States District Court for the District of Columbia in *Securities Industry and Financial Markets Association, et al. v. United States Commodity Futures Trading Commission*, No. 13-1916 (PLF) (D.D.C. September 16, 2014)<sup>2</sup> ("*SIFMA v. CFTC*") remanding eight swaps-related rulemakings to the Commission to address what the court held to be inadequacies in the Commission's explanation of its consideration of costs and benefits in those rulemakings. The eight remanded rulemakings are:

Real-Time Public Reporting of Swap Transactions Data<sup>3</sup> ("Real-Time Reporting Rule")

Swap Data Recordkeeping and Reporting Requirements<sup>4</sup> ("SDR Reporting Rule")

Registration of Swap Dealers and Major Swap Participants<sup>5</sup> ("Swap Entity Registration Rule")

Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflict of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants<sup>6</sup> ("Daily Trading Records," "Risk Management," and "Chief Compliance Officer" Rules)

Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant," and "Eligible Contract Participant"<sup>7</sup> ("Entity Definition Rule")

<sup>2</sup> —F. Supp. 3d—, 2014 WL 4629567 ("Op.').

<sup>3</sup> 77 FR 1182 (January 9, 2012).

<sup>4</sup> 77 FR 2136 (January 13, 2012).

<sup>5</sup> 77 FR 2613 (January 19, 2012).

<sup>6</sup> 77 FR 20128 (April 3, 2012).

<sup>7</sup> 77 FR 30596 (May 23, 2012).

Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps<sup>8</sup> (“Historical SDR Reporting Rule”)

Confirmations, Portfolio Reconciliation, Portfolio Compression, and Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants<sup>9</sup> (“Portfolio Reconciliation Rule”)

Core Principles and Other Requirements for Swap Execution Facilities<sup>10</sup> (“SEF Registration Rule”)

The court directed the Commission to address explicitly whether the costs and benefits the Commission identified in those rulemakings apply to activities outside the United States, and to address any differences that may exist. In this release, the Commission takes two actions:

*First*, the Commission supplements the preambles to the eight remanded rulemakings by clarifying that, unless otherwise specified, the costs and benefits identified therein addressed both domestic swaps activities and overseas swaps activities subject to the Commission’s jurisdiction by operation of CEA section 2(i).<sup>11</sup> In considering those costs and benefits, the Commission considered all evidence in the record, regardless of whether the evidence pertained to activities in the United States or overseas. The rule preambles, including the Commission’s discussions of costs and benefits, reflect the Commission’s understanding that the swaps market operates across borders, that some regulated activity would occur overseas, and that Congress expressly provided that the Commission’s swaps regulations would apply to activities outside the United States to the extent of CEA section 2(i). As with other variations in the universe of covered swaps activities, where the record evidence contained no information indicating a material difference in costs and benefits based on the geographic locus of swaps activities, the Commission addressed its consideration of costs and benefits of the rules to all swaps activities to which the rules apply. In the small number of instances where commenters raised issues specific to overseas activities or provided data about those activities, the Commission addressed those issues and data.<sup>12</sup> Consistent with this approach, and subject to the limitations of the information available in the rulemaking records, the costs and benefits identified

in the rule preambles applied to all covered activity within the Commission’s jurisdiction.

*Second*, the Commission is soliciting comments on whether there are costs or benefits of the remanded rules as applied to business activities outside the United States that differ from those of the rules as applied to activities within the United States. Following its review of the comments, the Commission will publish a further response to the District Court remand order which would include any supplementation of, or changes to, its consideration of the costs and benefits of the rules as set forth in the rule preambles. The Commission will also consider proposing changes to the rules based on information developed in this process and other relevant considerations.

## II. Background

### A. The District Court Litigation and Decision

On December 4, 2013, three trade associations sued the Commission in the United States District Court for the District of Columbia, challenging, on various grounds, the Commission’s Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations<sup>13</sup> (“Cross-Border Guidance”) as well as the extraterritorial application of fourteen of the rules promulgated by the Commission to implement the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act<sup>14</sup> regarding swaps.<sup>15</sup> The fourteen challenged rules were promulgated by the Commission in twelve rulemakings.<sup>16</sup> On September 16, 2014, the court issued a decision, granting summary judgment to the Commission on most issues.

The court summarized the case by observing,

The majority of plaintiffs’ claims fail because Congress has clearly indicated that the swaps provisions within Title VII of the Dodd-Frank Act—including any rules or regulations prescribed by the CFTC—apply extraterritorially whenever the jurisdictional nexus in 7 U.S.C. 2(i) is satisfied. In this regard, plaintiffs’ challenges to the

extraterritorial application of the Title VII Rules merely seek to delay the inevitable.<sup>17</sup>

Major holdings by the court regarding the cross-border application of the Commission’s swaps rules included the following:

1. The Commission’s Cross-Border Guidance is not subject to judicial review because it is in part a non-binding general statement of policy and in part an interpretive rule, neither of which is subject to judicial review under the Administrative Procedure Act.<sup>18</sup>

2. Section 2(i) of the CEA is a self-effectuating provision that makes Commission swaps rules apply to business activities outside the United States to the extent they meet the test set forth in the statutory language.<sup>19</sup> No Commission rulemaking is needed to make swaps rules extend to the geographic reach established by Congress in this provision.<sup>20</sup> Thus, the Commission’s substantive rules regarding swaps do not need to specify their international scope since that was done by statute.<sup>21</sup>

3. Because Congress determined that the Commission’s swaps rules apply to certain overseas activities and established the test for determining when the rules would apply to those activities, the Commission was not tasked with reconsidering the costs and benefits of those legislative decisions.<sup>22</sup>

4. Because section 2(i) establishes the extraterritorial scope of the Commission’s swaps rules, the Commission can enforce those rules overseas relying on that provision. However, to the extent that it may be useful to develop a more refined interpretation of how section 2(i) applies in particular circumstances, the Commission has discretion to address

<sup>17</sup> Op. at \*42.

<sup>18</sup> Op. at \*34.

<sup>19</sup> Op. at \*34. Section 2(i), 7 U.S.C. 2(i), provides that the provisions of this Act relating to swaps that were enacted by the Wall Street Transparency and Accountability Act of 2010 (including any rule prescribed or regulation promulgated under that Act), shall not apply to activities outside the United States unless those activities—(1) have a direct and significant connection with activities in, or effect on, commerce of the United States; or (2) contravene such rules or regulations as the Commission may prescribe or promulgate as are necessary or appropriate to prevent the evasion of any provision of this Act that was enacted by the Wall Street Transparency and Accountability Act of 2010.

Section 2(i)(2), regarding anti-evasion rules, was not at issue in the *SIFMA v. CFTC* litigation.

<sup>20</sup> Op. at \*33 (“As already noted, Section 2(i) provides the authority—without implementing regulations, see *infra* Section III.A—to enforce the Title VII Rules extraterritorially whenever activities” meet the test set forth in the statute).

<sup>21</sup> Op. at \*36–\*37.

<sup>22</sup> Op. at \*38.

<sup>13</sup> 78 FR 45292 (July 26, 2013).

<sup>14</sup> Public Law 111–203, 124 Stat. 1376.

<sup>15</sup> Op. at \*1, \*5. The plaintiffs were the Securities Industry and Financial Markets Association, the International Swaps and Derivatives Association, and the Institute of International Bankers. Op. at \*1.

<sup>16</sup> See Op. at \*5. Three of the fourteen challenged rules, informally identified by the court as the “Daily Trading Records,” “Risk Management,” and “Chief Compliance Officer” Rules, were promulgated as part of a single rulemaking. *Id.*

<sup>8</sup> 77 FR 35200 (June 12, 2012).

<sup>9</sup> 77 FR 55904 (September 11, 2012).

<sup>10</sup> 78 FR 33476 (June 4, 2013).

<sup>11</sup> 7 U.S.C. 2(i).

<sup>12</sup> See *infra* n.52.

those interpretive issues via either rulemaking or case-by-case adjudication.<sup>23</sup> Whichever choice it makes, the Commission is not required to define the precise scope of section 2(i) each time it promulgates a substantive swaps rule; it can address issues of the scope of section 2(i) as they arise.<sup>24</sup>

Based on these principles, the court held that the rules challenged by the plaintiffs apply to swaps activities outside the United States to the extent specified by section 2(i).<sup>25</sup> The court also held that, even though some commenters asked the Commission to address the geographical scope of the rules, the Commission reasonably determined not to address issues of geographical scope in these particular proceedings and to simply rely on the statute (*i.e.*, section 2(i)) to define the rules' application to activities outside the United States.<sup>26</sup>

On the other hand, the court further held that, in the preambles for ten of the challenged rules, promulgated as part of eight rulemakings,<sup>27</sup> the Commission should have, but did not, state whether the costs and benefits identified in the rule preambles applied not only to domestic swaps activities, but also to swaps activities outside the United States.<sup>28</sup> The eight remanded rulemakings are listed above. Specifically, the court held that the Commission should have discussed whether and to what extent the costs and benefits as to overseas activity may differ from those related to domestic application of the rules.<sup>29</sup> On that basis, the court described the rules as "inadequately explained."<sup>30</sup> It stated, however, that it was "willing to assume for now" that the issue was "one of form and not of substance."<sup>31</sup> It also held that this perceived shortcoming was "not so serious as to favor vacatur" of the rules.<sup>32</sup> The court further reasoned that vacatur of these rules would "produce a bevy of disruptive

consequences," in part because "after vacatur, U.S.-based swap dealers would be able to avoid Title VII regulations by engaging in transactions through their foreign subsidiaries and affiliates, even if the transactions' risk remained with the U.S.-based corporation."<sup>33</sup> Based on its analysis of the statute and rules, the court determined that there "exists at least a serious possibility" that the affected rules would remain unchanged as a result of proceedings on remand to elaborate on the geographic element of the identified costs and benefits.<sup>34</sup> The court therefore remanded without vacatur the eight rulemakings encompassing the rules in question for the Commission to better explain its position on whether the costs and benefits identified in the rule preambles applied to overseas activities, and to explain any relevant differences.<sup>35</sup>

#### *B. The District Court's Rulings on Consideration of Costs and Benefits*

The district court remanded the eight rulemakings "for further proceedings consistent with the Opinion issued this same day."<sup>36</sup> The court's opinion included a number of holdings and observations that provide guidance as to the actions the Commission must take on remand with respect to the consideration of the costs and benefits of the extraterritorial application of the rules in question.

1. The court held that, because Congress made the determination that the swaps rules apply overseas to the extent specified in section 2(i), CEA section 15(a) does not require the Commission to consider whether it is necessary or desirable for particular rules to apply to overseas activities as

specified in section 2(i).<sup>37</sup> Indeed, the court explained, the Commission cannot, based on a consideration of costs and benefits, second-guess Congress's decision that swaps rules apply to certain overseas activities.<sup>38</sup> As a result, the court stated that "the only issues necessarily before the CFTC on remand would be the *substance* of the Title VII rules, *not* the scope of those Rules' extraterritorial applications under 7 U.S.C. 2(i)."<sup>39</sup>

2. At the same time, the court held that, in considering costs and benefits of the substantive regulatory choices it makes when promulgating a swaps rule, the Commission is required to take into consideration the fact that the rule, by statute, will apply to certain overseas activity.<sup>40</sup> Thus, the Commission's consideration of costs and benefits of the application of the rule must encompass both foreign and domestic business activities.<sup>41</sup> The court held that the Commission failed to meet this requirement because, the court stated, in the cost-benefit discussions for the rules at issue the Commission did not give explicit consideration to costs and benefits specific to overseas activities.<sup>42</sup>

3. The court held that the Commission has discretion either to consider costs and benefits of the international application of swaps rules separately from domestic application or to evaluate them together, "so long as the cost-benefit analysis makes clear that the CFTC reasonably considered both."<sup>43</sup> The district court found that, at the time the rules at issue in the litigation were promulgated, foreign swaps regulations were still under development so that costs of possible duplicative regulation were hypothetical and did not have to be considered.<sup>44</sup> The court noted that this fact raised the possibility that the costs and benefits of the rules' extraterritorial application "were essentially identical to those of the Rules' domestic applications" so that the Commission "functionally considered the extraterritorial costs and benefits" of the rules "by considering the Rules' domestic costs and benefits."<sup>45</sup> However, the court concluded that it did not need to address that possibility because the cost-benefit discussions in the rule preambles gave "no indication" that this

<sup>23</sup> Op. at \*35.

<sup>24</sup> Op. at \*36–\*37.

<sup>25</sup> Op. at \*35.

<sup>26</sup> Op. at \*36.

<sup>27</sup> As noted above, three of the rules at issue were promulgated as part of a single rulemaking.

<sup>28</sup> Although the Commission believes that it was sufficiently clear that the discussion of costs and benefits in the rule preambles applied to all swaps activity within the Commission's jurisdiction unless otherwise specified, the Commission has declined to appeal the district court's ruling. Thus, the court's remand order is final and binding on the Commission.

<sup>29</sup> Op. at \*39–\*40.

<sup>30</sup> Op. at \*40, \*42.

<sup>31</sup> Op. at \*41 (internal quotation and citation omitted).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Op. at \*41, \*42–43. The plaintiffs' challenge to the "Trade Execution Rule," Process for a Designated Contract Market or Swap Execution Facility to Make a Swap Available to Trade, Swap Transaction Compliance and Implementation Schedule, and Trade Execution Requirement Under the Commodity Exchange Act, 78 FR 33606 (June 4, 2013), was dismissed for lack of standing. Op. at \*23. For three other rules—the "Large Trader Reporting Rule," Large Trader Reporting for Physical Commodity Swaps, 76 FR 43851 (July 22, 2011); the "Straight-Through Processing Rule," Customer Clearing Documentation, Timing of Acceptance for Clearing, and Clearing Member Risk Management, 77 FR 21278 (April 9, 2012); and the "Clearing Determination Rule," Clearing Requirement Determination Under Section 2(h) of the CEA, 77 FR 74284 (December 13, 2012)—the court granted summary judgment to the Commission without reaching the merits because the plaintiffs did not identify comments submitted to the Commission during the rulemaking proceedings that raised issues regarding the extraterritorial applications of these rules or the associated costs and benefits. Op. at \*36 n.30.

<sup>36</sup> Op. at \*43.

<sup>37</sup> Op. at \*38.

<sup>38</sup> Op. at \*39; *see also id.* at \*41 n.35.

<sup>39</sup> Op. at \*41.

<sup>40</sup> Op. at \*39.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Op. at \*40.

<sup>44</sup> Op. at \*39.

<sup>45</sup> Op. at \*40.

was so.<sup>46</sup> The court further noted that foreign swaps regulations passed since the promulgation of the rules at issue in the litigation “may now raise issues of duplicative regulatory burdens” but that “the CFTC may well conclude that its policy of substituted compliance largely negates these costs.”<sup>47</sup>

4. Finally, the court noted that “[p]laintiffs raise no complaints regarding the CFTC’s evaluation of the general, often unquantifiable, benefits and costs of the domestic application of the Title VII Rules.”<sup>48</sup> As a result, the court held, “[o]n remand, the CFTC would only need to make explicit which of those benefits and costs similarly apply to the Rules’ extraterritorial applications.”<sup>49</sup>

### III. Supplement to Preambles of Remanded Rulemakings Regarding the Scope of the Commission’s Consideration of Costs and Benefits

The Commission hereby clarifies that it considered costs and benefits based on the understanding that the swaps market functions internationally, with many transactions involving U.S. firms taking place across international boundaries; with leading industry members typically conducting operations both within and outside the United States; and with industry members commonly following substantially similar business practices wherever located. The Commission considered all evidence in the record, and in the absence of evidence indicating differences in costs and benefits between foreign and domestic swaps activities, the Commission did not find occasion to characterize explicitly the identified costs and benefits as foreign or domestic. Thus, where the Commission did not specifically refer to matters of location, its discussion of costs and benefits referred to the effects of its rules on all business activity subject to its regulations, whether by virtue of the activity’s physical location in the United States or by virtue of the activity’s connection with or effect on U.S. commerce under section 2(i).<sup>50</sup> In the language of the district court, the Commission “functionally considered the extraterritorial costs and benefits,”<sup>51</sup> and this was because the

evidence in the record did not suggest that differences existed, with certain limited exceptions that the Commission addressed.<sup>52</sup> For example, as the district court found, at the time of the promulgation of the rules at issue, foreign swaps regulations generally were still being developed so any costs associated with potentially duplicative or inconsistent regulations remained hypothetical.<sup>53</sup> Thus, as the court noted, the plaintiffs in *SIFMA v. CFTC* did not “identify any specific data that the CFTC failed to take into account.”<sup>54</sup>

### IV. Request for Comments

As noted above, the district court stated that, on remand, the Commission “would only need to make explicit” which of the costs and benefits identified in the rule preambles “similarly apply to the Rules’ extraterritorial applications.”<sup>55</sup> In order to assist the Commission in determining whether any further consideration or explanation—beyond that contained in the original rule preambles and this release—is needed to respond to this mandate, the Commission requests comments on the following questions:

1. Are there any benefits or costs that the Commission identified in any of the rule preambles that do not apply, or apply to a different extent, to the relevant rule’s extraterritorial applications?

2. Are there any costs or benefits that are unique to one or more of the rules’ extraterritorial applications? If so, please specify how.

3. Put another way, are the types of costs and benefits that arise from the extraterritorial application of any of the rules different from those that arise from the domestic application? If so, how and to what extent?

4. If significant differences exist in the costs and benefits of the extraterritorial and domestic application of one or more of the rules, what are the implications of those differences for the substantive requirements of the rule or rules?

Comments should specify, in the header of the comment, the particular rule or rules that they address. The

<sup>52</sup> See, e.g., Portfolio Reconciliation Rule, 77 FR at 55945–46, 55948–49 & nn.79, 84, 98, 108 (considering ISDA data regarding U.S. and foreign firms, and factoring in European proposals); Risk Management Rule, 77 FR at 20177 n.104 (relying on UK FSA study); Swaps Entity Registration Rule, 77 FR at 2624–25 (stating in response to comments that Commission “does not believe that foreign-based Swaps Entities will bear higher costs associated with the registration process” and giving explanation); SDR Reporting Rule, 77 FR at 2192 (considering costs and benefits of swap identifiers, including in cross-border activities).

<sup>53</sup> Op. at \*39.

<sup>54</sup> Op. at \*39.

<sup>55</sup> Op. at \*41.

Commission requests that comments focus on information and analysis specifically relevant to the inquiry specified by the district court’s remand order. Consistent with the district court’s holding that the Commission is not required to address the issue of what the geographical scope of its rules should be in the challenged rulemakings,<sup>56</sup> the purpose of this request for comments is to further consider the cross-border costs and benefits of the substance of the rules, not to initiate a process to address the rules’ cross-border scope, which, as the district court held, is prescribed by section 2(i).<sup>57</sup> The Commission further requests that commenters supply the Commission with relevant data to support their comments.

Issued in Washington, DC, on March 4, 2015, by the Commission.

**Christopher J. Kirkpatrick,**  
*Secretary of the Commission.*

**Note:** The following appendix will not appear in the Code of Federal Regulations.

### Appendix to Initial Response to District Court Remand Order in Securities Industry and Financial Markets Association, et al. v. United States Commodity Futures Trading Commission—Commission Voting Summary

On this matter, Chairman Massad and Commissioners Wetjen, Bowen, and Giancarlo voted in the affirmative. No Commissioner voted in the negative.

[FR Doc. 2015–05413 Filed 3–9–15; 8:45 am]

BILLING CODE 6351–01–P

## DEPARTMENT OF DEFENSE

### Office of the Secretary

#### 32 CFR Part 317

[DOD–2008–OS–0068]

RIN 0790–AJ23

### DCAA Privacy Act Program

**AGENCY:** Department of Defense.

**ACTION:** Final rule.

**SUMMARY:** The Defense Contract Audit Agency (DCAA) is amending the DCAA Privacy Act Program Regulation. Specifically, DCAA is adding an exemption section to include an exemption for RDCAA 900.1, DCAA Internal Review Case Files. This rule

<sup>56</sup> Op. at \*36–\*37.

<sup>57</sup> However, as it has done in the past, the Commission will continue to consider the proper interpretation and application of section 2(i) in particular circumstances.

<sup>46</sup> *Id.*

<sup>47</sup> Op. at \*41.

<sup>48</sup> Op. at \*41.

<sup>49</sup> *Id.*

<sup>50</sup> The statement in the text reflects the Commission’s approach in its consideration of costs and benefits for all of its Dodd-Frank rules, unless otherwise specified for a particular issue or issues in a particular rulemaking.

<sup>51</sup> Op. at \*40.

# **EXHIBIT B**

**COMMODITY FUTURES TRADING COMMISSION****17 CFR Part 45**

RIN 3038-AE12

**Amendments to Swap Data Recordkeeping and Reporting Requirements for Cleared Swaps****AGENCY:** Commodity Futures Trading Commission.**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Commodity Futures Trading Commission (“Commission” or “CFTC”) is proposing amendments to rules relating to swap data reporting in connection with cleared swaps for swap data repositories (“SDRs”), derivatives clearing organizations (“DCOs”), designated contract markets (“DCMs”), swap execution facilities (“SEFs”), swap dealers (“SDs”), major swap participants (“MSPs”), and swap counterparties who are neither SDs nor MSPs. Commodity Exchange Act (“CEA” or “Act”) provisions relating to swap data recordkeeping and reporting were added by the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”). The proposed amendments to the rules further the goals of the Dodd-Frank Act to reduce systemic risk, increase transparency and promote market integrity within the financial system.

**DATES:** Comments must be received on or before October 30, 2015.**ADDRESSES:** You may submit comments, identified by “Amendments to Swap Data Recordkeeping and Reporting Requirements for Cleared Swaps” and RIN 3038-AE12, by any of the following methods:

- *CFTC Web site:* <http://comments.cftc.gov>. Follow the instructions for submitting comments through the Comments Online process on the Web site.
- *Mail:* Send to Christopher Kirkpatrick, 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. Please submit your comments using only one of these methods.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to [www.cftc.gov](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 you believe is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission’s regulations.<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 [www.cftc.gov](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:** Dan Bucsa, Deputy Director, Division of Market Oversight, 202-418-5435, [dbucsa@cftc.gov](mailto:dbucsa@cftc.gov); Aaron Brodsky, Special Counsel, Division of Market Oversight, 202-418-5349, [abrodsky@cftc.gov](mailto:abrodsky@cftc.gov); Ben DeMaria, Special Counsel, Division of Market Oversight, 202-418-5988, [bdemaria@cftc.gov](mailto:bdemaria@cftc.gov); Esen Onur, Economist, Office of the Chief Economist, 202-418-6146, [eonur@cftc.gov](mailto:eonur@cftc.gov); or Mike Penick, Economist, Office of the Chief Economist, 202-418-5279, [mpenick@cftc.gov](mailto:mpenick@cftc.gov); Commodity Futures Trading Commission, Three Lafayette Centre, 1151 21st Street NW., Washington, DC 20581.

**SUPPLEMENTARY INFORMATION:****Table of Contents**

- I. Background
  - A. Introduction
  - B. Statutory Authority
  - C. Regulatory History—Part 45 Final Rulemaking
  - D. Consultation With Other U.S. Financial Regulators
  - E. Summary of Proposed Revisions to Part 45
- II. Proposed Regulations
  - A. Definitions—Proposed Amendments to § 45.1
  - B. Swap Data Reporting: Creation Data—Proposed Amendments to § 45.3
  - C. Swap Data Reporting: Continuation Data—Proposed Amendments to § 45.4
  - D. Unique Swap Identifiers—Proposed Amendments to § 45.5
  - E. Determination of Which Counterparty Must Report—Proposed Amendments to § 45.8
  - F. Reporting to a Single Swap Data Repository—Proposed Amendments to § 45.10

<sup>1</sup> 17 CFR 145.9.

G. Examples of Cleared Swap Reporting Workflows Under the Proposed Revisions

H. Primary Economic Terms Data—Proposed Amendments to Appendix 1 to Part 45—Tables of Minimum Primary Economic Terms

III. Request for Comments

IV. Related Matters

- A. Regulatory Flexibility Act
- B. Paperwork Reduction Act
- C. Cost-Benefit Considerations
- D. Antitrust Considerations

**I. Background***A. Introduction*

On July 21, 2010, President Obama signed into law the Dodd-Frank Act.<sup>2</sup> Title VII of the Dodd-Frank Act amended the CEA<sup>3</sup> to establish a comprehensive new regulatory framework for swaps and security-based swaps. The legislation was enacted to reduce systemic risk, increase transparency, and promote market integrity within the financial system by, among other things: providing for the registration and comprehensive regulation of SDs and MSPs; imposing clearing and trade execution requirements on standardized derivative products; creating rigorous recordkeeping and data reporting regimes with respect to swaps, including real time reporting; and enhancing the Commission’s rulemaking and enforcement authorities with respect to, among others, all registered entities, intermediaries, and swap counterparties subject to the Commission’s oversight.

*B. Statutory Authority*

To enhance transparency, promote standardization, and reduce systemic risk, section 727 of the Dodd-Frank Act added to the CEA section 2(a)(13)(G), which requires all swaps, whether cleared or uncleared, to be reported to SDRs, which are registered entities<sup>4</sup> created by section 728 of the Dodd-Frank Act to collect and maintain data related to swap transactions as prescribed by the Commission, and to make such data available to the Commission and other regulators.<sup>5</sup> Section 21(b) of the CEA, added by section 728 of the Dodd-Frank Act, directs the Commission to prescribe standards for swap data recordkeeping

<sup>2</sup> See 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/DoddFrankAct/index.htm>.

<sup>3</sup> 7 U.S.C. 1, *et seq.*<sup>4</sup> See also CEA sections 1a(40)(E) and 1a(48).<sup>5</sup> Regulations governing core principles and registration requirements for, and the duties of, SDRs are the subject of part 49 of this chapter.

and reporting, which are to apply to both registered entities and counterparties involved with swaps<sup>6</sup> and which are to be comparable to those for clearing organizations in connection with their clearing of swaps.<sup>7</sup>

### C. Regulatory History—Part 45 Final Rulemaking

On December 20, 2011, the Commission adopted part 45 of the Commission's regulations ("Final Part 45 Rulemaking").<sup>8</sup> Part 45 implements the requirements of section 21 of the CEA by setting forth the manner and contents of reporting to SDRs, and requires electronic reporting both when a swap is initially executed, referred to as "creation" data,<sup>9</sup> and over the course of the swap's existence, referred to as "continuation" data.<sup>10</sup> The part 45 regulations set forth varying reporting timeframes depending on the type of reporting, counterparty, execution, or product.

As part of the Commission's ongoing efforts to improve swap transaction data quality and to improve the Commission's ability to utilize the data for regulatory purposes, Commission staff has continued to evaluate reporting issues relating to the operation of part 45, and cleared swaps in particular. Commission staff's efforts included the formation of an interdivisional staff working group to identify, and make recommendations to resolve, reporting challenges associated with certain swaps transaction data recordkeeping and reporting provisions, including the provisions adopted in the Final Part 45 Rulemaking.<sup>11</sup>

Based in large part on those efforts, the Commission ultimately requested comment on a variety of swap data reporting and recordkeeping provisions to help determine how such provisions were being applied and to determine whether or what clarifications or enhancements may be appropriate.<sup>12</sup> One of the subjects of the request for comment was the reporting of cleared swaps, and, in particular, the manner in which the swap data reporting rules should address cleared swaps.<sup>13</sup> In response to this request, the Commission received a number of comment letters addressing reporting of cleared swaps.<sup>14</sup> References to "commenters" throughout this release refer to those who submitted such comment letters, and summaries and a discussion of the general themes raised by those commenters appear in the relevant sections throughout this release.

The swap data reporting framework adopted in the Final Part 45 Rulemaking was largely based on the mechanisms for the trading and execution of uncleared swaps. Under such a regime,

<http://www.cftc.gov/PressRoom/PressReleases/pr6837-14>.

<sup>12</sup> See "Review of Swap Data Recordkeeping and Reporting Requirements," Request for Comment, 79 FR 16689, Mar. 26, 2014.

<sup>13</sup> *Id.* at 16694.

<sup>14</sup> Commenters included: The American Gas Association, May 27, 2014; American Petroleum Institute, May 27, 2014; Americans for Financial Reform, May 27, 2014 ("AFR"); Australian Bankers' Association, May 27, 2014 ("ABA"); Better Markets, Inc., May 27, 2014, ("Better Markets"); B&F Capital Markets, Inc., May 27, 2014; CME Group, May 27, 2014 ("CME"); Coalition for Derivatives End-Users, May 27, 2014 ("CDEU"); Coalition of Physical Energy Companies, May 27, 2014; Commercial Energy Working Group, May 27, 2014 ("CEWG"); Commodity Markets Council, May 27, 2014 ("CMC"); The Depository Trust & Clearing Corporation, May 27, 2014 ("DTCC"); EDF Trading North America, LLC, May 27, 2014; Edison Electric Institute, May 27, 2014 ("EEI"); Financial InterGroup Holdings Ltd, May 27, 2014; Financial Services Roundtable, May 27, 2014; Fix Trading Community, May 27, 2014; The Global Foreign Exchange Division of the Global Financial Markets Association, May 27, 2014 ("GFMA"); HSBC, May 27, 2014; Interactive Data Corporation, May 27, 2014; Intercontinental Exchange, May 27, 2014 ("ICE"); International Energy Credit Association, May 27, 2014; International Swaps and Derivatives Association, Inc., May 23, 2014 ("ISDA"); Japanese Bankers Association, May 27, 2014 ("JBA"); Just Energy Group Inc., May 27, 2014; LCH.Clearnet Group Limited, May 29, 2014 ("LCH"); Managed Funds Association, May 27, 2014 ("MFA"); Markit, May 27, 2014; Natural Gas Supply Association, May 27, 2014 ("NGSA"); NFP Electric Associations (National Rural Electric Cooperative Association, American Public Power Association, and Large Public Power Council), May 27, 2014 ("NFPEA"); OTC Clearing Hong Kong Limited, May 27, 2014 ("OTC Hong Kong"); Securities Industry and Financial Markets Association Asset Management Group, May 27, 2014 ("SIFMA"); SWIFT, May 27, 2014; Swiss Re, May 27, 2014; Thomson Reuters (SEF) LLC, May 27, 2014 ("TR SEF"); and TriOptima, May 27, 2014.

swap data reporting was premised upon the existence of one continuous swap for reporting and data representation purposes. The Commission has since had additional opportunities to consult with industry and to observe how the part 45 regulations function in practice with respect to swaps that are cleared, including how the implementation of part 45 interacts with the implementation of part 39 of the Commission's regulations, which contains provisions applicable to DCOs.

In particular, § 39.12(b)(6) provides that upon acceptance of a swap by a DCO for clearing, the original swap is extinguished and replaced by equal and opposite swaps, with the DCO as the counterparty to each such swap.<sup>15</sup> The original swap that is extinguished upon acceptance for clearing is commonly referred to as the "alpha" swap and the equal and opposite swaps that replace the original swap are commonly referred to as "beta" and "gamma" swaps. The Commission has observed that certain provisions of part 45 could better accommodate the cleared swap framework set forth in § 39.12(b)(6). The revisions and additions proposed in this release are intended to provide clarity to swap counterparties and registered entities of their part 45 reporting obligations with respect to the swaps involved in a cleared swap transaction. This proposal is also intended to improve the efficiency of data collection and maintenance associated with the reporting of the swaps involved in a cleared swap transaction.

Where possible, the Commission has endeavored to harmonize the rules proposed in this release with the approach proposed by the Securities and Exchange Commission ("SEC") in its release proposing certain new rules and rule amendments to Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information ("Regulation SBSR").<sup>16</sup> The SEC release proposed new rules and rule amendments to Regulation SBSR,

<sup>15</sup> See 17 CFR 39.12(b)(6) (requiring a DCO that clears swaps to "have rules providing that, upon acceptance of a swap by the [DCO] for clearing: (i) The original swap is extinguished; (ii) the original swap is replaced by an equal and opposite swap between the [DCO] and each clearing member acting as principal for a house trading or acting as agent for a customer trade . . ."). The Commission reaffirmed its position regarding the composition of a cleared swap in a statement regarding Chicago Mercantile Exchange ("CME") Rule 1001. See Statement of the Commission on the Approval of CME Rule 1001 at 6, Mar. 6, 2013, available at <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/statementofthecommission.pdf>.

<sup>16</sup> See "Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information," 80 FR 14740, Mar. 19, 2015.

<sup>6</sup> CEA section 21(b)(1)(A).

<sup>7</sup> CEA section 21(b)(3).

<sup>8</sup> See "Swap Data Recordkeeping and Reporting Requirements," 77 FR 2136, Jan. 13, 2012.

<sup>9</sup> See 17 CFR 45.1 (defining "required swap creation data" as "all primary economic terms data for a swap in the swap asset class in question, and all confirmation data for the swap.") "Primary economic terms data" is defined as "all of the data elements necessary to fully report all of the primary economic terms of a swap in the swap asset class of the swap in question," while "confirmation data" is defined as "all of the terms of a swap matched and agreed upon by the counterparties in confirming the swap. For cleared swaps, confirmation data also includes the internal identifiers assigned by the automated systems of the [DCO] to the two transactions resulting from novation to the clearing house." *Id.* See also 17 CFR 45.3.

<sup>10</sup> See 17 CFR 45.1 (defining "required swap continuation data" as "all of the data elements that must be reported during the existence of a swap to ensure that all data concerning the swap in the swap data repository remains current and accurate, and includes all changes to the primary economic terms of the swap occurring during the existence of the swap. . . .") See also 17 CFR 45.4.

<sup>11</sup> See Press Release, CFTC to Form an Interdivisional Working Group to Review Regulatory Reporting, Jan. 21, 2014, available at

(d)(2) to remove certain existing confirmation data reporting requirements. Under the modified rules, SEFs/DCMs and reporting counterparties would continue to be required to report primary economic terms (“PET”) data as part of their creation data reporting, but would not be required to report confirmation data for swaps that are intended to be submitted to a DCO for clearing at the time of execution. Instead, the DCO would be required to report confirmation data for clearing swaps pursuant to proposed § 45.3(e).

The Commission is also proposing new § 45.3(j), which would provide that: For swaps executed on or pursuant to the rules of a SEF or DCM (including swaps that become original swaps), the SEF or DCM would have the obligation to choose the SDR for such swaps; for all other swaps (including for off-facility swaps and/or clearing swaps) the reporting counterparty (as determined in § 45.8) would have the obligation to choose the SDR.

#### i. Costs

The Commission understands that under current industry practice, DCOs commonly report to SDRs creation data for swaps that would fall under the definition of clearing swaps. Accordingly, to the extent that DCOs currently report in conformance with proposed § 45.3(e), the Commission does not expect the proposed rule to result in any additional costs. The Commission requests comment on specific details of market practice of DCOs and whether § 45.3(e) would carry any associated costs and/or impose additional obligations that go beyond existing industry practice of DCOs.

With respect to registered DCOs organized outside of the United States, its territories, and possessions that are subject to supervision and regulation in a foreign jurisdiction, a home country trade reporting regulatory regime may require the DCO to report swap data to a trade repository in the home country jurisdiction. For clearing swaps that a DCO would be required to report both to a registered SDR pursuant to the proposed amendments to part 45, and to a foreign trade repository pursuant to a home country trade reporting regulatory regime, a DCO could be expected to incur some additional costs in satisfying both its CFTC and home country reporting obligations, relative to a DCO that would only be subject to part 45 reporting requirements. As DCOs are not required to provide such cost information to the Commission, the Commission presently lacks access to the information needed to assess the

magnitude of the costs relating to compliance with reporting obligations in multiple jurisdictions. However, the Commission expects that industry technological innovations may effectively allow for satisfaction of swap data reporting requirements across more than one jurisdiction by means of a single data submission, and that a streamlined reporting process or other technology and operational enhancements could mitigate the cost of satisfying reporting requirements for swaps that may be required to be reported to a foreign trade repository under a home country regulatory regime as well as to a registered SDR pursuant to proposed amendments to part 45.<sup>138</sup> Additionally, the Commission anticipates that adopting an approach to the reporting of cleared swaps in the United States that is, to the extent possible, consistent with the approaches adopted in other jurisdictions may also minimize compliance costs for entities operating in multiple jurisdictions.<sup>139</sup> The Commission also notes that any costs arising from reporting swap data with respect to more than one jurisdiction could already have been realized, to the extent that DCOs located outside the United States are already reporting swap data to a registered SDR in addition to reporting swap data to trade repository pursuant to a home country regulatory regime.

The Commission requests comment regarding any unique costs and benefits of proposed § 45.3(e), and the proposed amendments and additions to part 45 generally, in regard to extraterritorial application, including:

- Are there any benefits or costs that the Commission identified in this release that do not apply, or apply to a different extent, to the extraterritorial application of the proposed additions and amendments to part 45?
- Are there any costs or benefits that are unique to the extraterritorial application of the proposed additions and amendments to part 45? If so, please specify how.
- If significant differences exist in the costs and benefits of the extraterritorial and domestic application of the proposed additions and amendments to part 45, what are the implications of those differences for the substantive

<sup>138</sup> As noted above, the part 45 regulations contemplate situations where a swap may be required to be reported pursuant to U.S. law and the law of another jurisdiction.

<sup>139</sup> The Commission’s understanding is that the approach proposed in this release for the reporting of cleared swaps (e.g., requiring separate reporting of alphas, betas, and gammas) is largely consistent with the multi-swap approach adopted by a number of jurisdictions, including, for example, the European Union, Singapore, and Australia.

requirements of the proposed additions and amendments to part 45?

- To what extent would trade reporting requirements in non-U.S. jurisdictions require a DCO to report swap data for clearing swaps to a foreign trade repository in addition to a registered SDR? Please describe any unique costs resulting from such scenarios.

- Are there any consistencies and/or inconsistencies between the proposed amendments to part 45 and any foreign trade reporting regulations that would apply to registered DCOs that would impose costs or provide benefits? If so, please describe any such consistencies and/or inconsistencies and associated cost and/or benefit implications.

The Commission requests that comments focus on information and analysis specifically relevant to the questions posed above as opposed to addressing the cross-border scope of the part 45 regulations. The Commission further requests that commenters supply the Commission with relevant data to support their comments.

With respect to confirmation data reporting, one commenter contended that requiring the reporting of confirmation data, in addition to PET data, is unnecessarily burdensome if the Commission collects the proper PET data.<sup>140</sup> The Commission anticipates that the proposed removal of certain confirmation data reporting requirements will result in decreased costs for swap counterparties and/or registered entities that are currently gathering and conveying electronically the information necessary to report confirmation data for swaps that are intended to be submitted to a DCO for clearing at the time of execution.<sup>141</sup>

Finally, with respect to choice of SDR, the Commission preliminarily believes that amendments to § 45.3(j) will not impose any additional costs because the amendments simply codify existing practice—the Commission understands that the workflows that apply the proposed choice of SDR obligations are already in place.

The Commission preliminarily believes that allowing DCOs to choose

<sup>140</sup> See CEWG letter at 4–5 (stating that reporting confirmation data in addition to PET data is highly redundant because confirmation data simply includes all of the PET data matched and agreed to by the counterparties).

<sup>141</sup> See ISDA letter at 6–8 (noting that “Confirmation data should not be required for an alpha trade that is intended for clearing at point of execution, whether due to the clearing mandate or bilateral agreement. Confirmation data for alpha swaps is not meaningful since they will be terminated and replaced with cleared swaps simultaneously or shortly after execution for which confirmation data will be reported by the DCO.”).