

Dated: December 13, 2010.

**Kevin J. Wolf,**

*Assistant Secretary for Export Administration.*

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## COMMODITY FUTURES TRADING COMMISSION

### 17 CFR Part 44

RIN 3038-AD29

#### Reporting Certain Post-Enactment Swap Transactions

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Interim final rule; request for comment.

**SUMMARY:** The Commodity Futures Trading Commission (“Commission” or “CFTC”) is publishing for comment an interim final rule to implement new statutory provisions introduced by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”). Section 723 of the Dodd-Frank Act amends Section 2 of the Commodity Exchange Act (“CEA” or the “Act”) by adding new Section 2(h)(5)(B), which directs that rules adopted by the Commission under this section shall provide for the reporting of “transition” swaps—that is, swaps entered into on or after the date of enactment of the Dodd-Frank Act and prior to the effective date of swap data reporting rules to implement Section 2(h)(5)(B)—to a registered swap data repository (“SDR”) or to the Commission. Each category of data is subject to a reporting timetable specified in Section 2(h)(5). The Commission intends shortly to notice for comment substantive rules implementing the swap data reporting provisions of Section 2(h)(5)(B). In order to ensure the preservation of data pending implementation of such rules, the Commission is today adopting an interim final rule directing specified counterparties to post-enactment, or transition, swap transactions entered into prior to the effective date of the swap data reporting and recordkeeping rules implementing Section 2(h)(5)(B) of the CEA to retain information pertaining to the terms of such swaps.

**DATES:** This interim final rule is effective December 17, 2010. Comments on all aspects of the interim final rule must be received on or before January 18, 2011.

**ADDRESSES:** You may submit comments, identified by RIN number 3038-AD29, 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:* Address to 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, if not, 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 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 <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:** Susan Nathan, Senior Special Counsel, Division of Market Oversight, Commodity Futures Trading Commission, 1155 21st Street, NW., Washington, DC 20581, at (202) 418-5133.

**SUPPLEMENTARY INFORMATION:** The Commission is adopting an interim final rule under part 44 of its regulations under the Commodity Exchange Act and is soliciting comments on all aspects of the rule. The Commission will carefully consider all comments received and will address them, as applicable, in connection with the permanent reporting rules to be adopted under the Dodd-Frank Act.

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

## I. Background

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”).<sup>2</sup> Title VII of the Dodd-Frank Act<sup>3</sup> amended the Commodity Exchange Act (“CEA” or the “Act”)<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 derivative products; (3) creating robust recordkeeping and real-time reporting regimes; and (4) enhancing the Commission’s rulemaking and enforcement authorities with respect to, among others, all registered entities and intermediaries subject to the Commission’s oversight.

Among other things, the Dodd-Frank Act requires that swaps be reported to a registered SDR<sup>5</sup> or to the Commission if there is no registered SDR that would accept the swap. Section 723 of the Dodd-Frank Act adds to the CEA new Section 2(h)(5)(B), to require that transition swaps be reported to a registered SDR or the Commission according to specified timetables. As described below, pursuant to its authority under Sections 4r and 2(h)(5)(A) of the CEA the Commission previously has adopted an interim final rule addressing the reporting timetable for swaps entered into prior to the enactment of the Dodd-Frank Act the terms of which had not expired by that date.

Separately, Section 729 of the Dodd-Frank Act established in new Section 4r(a)(2)(A) a transition rule applicable to pre-enactment swaps, providing for the reporting, by a date certain, of each swap entered into before the date of enactment of the Dodd-Frank Act, the

<sup>2</sup> See Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376 (2010), hereinafter cited as “Dodd-Frank Act.” 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> U.S.C. 1 *et seq.*

<sup>5</sup> The term “swap data repository” is defined in Section 1a(48) of the CEA to mean “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.”

terms of which had not expired as of that date.<sup>6</sup> Section 4r(a)(2)(B) directs 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 each swap entered into before the date of enactment. On October 14, 2010, the Commission 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 the 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 can be effectuated under permanent rules. The reporting requirements established by Section 4r and §§ 44.00–44.02 of the Commission's Regulations will 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>7</sup>

Section 4r did not mandate an interim final rulemaking addressing reporting provisions for transition swap transactions entered into on or after the date of enactment of the Dodd-Frank Act and prior to the effective date of the swap data reporting rule to implement the provisions of Section 2(h)(5)(B). The instant interim final rule is intended to provide clarity and guidance with respect to such swaps by (i) establishing that transition swaps<sup>8</sup> be subject to Section 2(h)(5)(B)'s reporting requirements and to Commission regulations to be promulgated thereunder; and (ii) advising potential counterparties to such swaps that implicit in this reporting requirement is the need to retain relevant data.

The Commission intends to establish permanent data recordkeeping and reporting requirements for transition swaps in a separate rulemaking under Section 2(h)(5)(B) of the CEA.<sup>9</sup> The

Commission anticipates that its rulemaking for transition swaps will address specifically the records, information and data regarding transition swaps that must be retained and the timeframe for reporting such information to a registered SDR or to the Commission.

## II. The Scope of the Interim Final Rule

This interim final rule will apply to all swaps entered into on or after the date of enactment of the Dodd-Frank Act and before the effective date of the swap data reporting and recordkeeping rules implementing Section 2(h)(5)(B) of the CEA.

### 1. Reporting Obligations

The Commission expects that the reporting obligations outlined in § 44.03 will implicate swap transaction information and data that counterparties normally retain as sound business practice. Interim § 44.03 establishes that reporting requirements are applicable to transition swaps and describes the information that would be reported to a registered SDR or to the Commission with respect to such transaction: (i) A copy of the transaction confirmation in electronic form, if available, or in written form if there is no electronic copy; (ii) if available, the time the transaction was executed; and (iii) additional information of the character described in Section 4 ("Record Preservation") below.

In addition, Interim § 44.03 provides that a designated counterparty<sup>10</sup> to a transition swap<sup>11</sup> must provide to the Commission on request any information

*Requirements n. 10*, approved for publication by the Commission at an open meeting on November 19, 2010 and expected to be published shortly in the **Federal Register** (to be codified at 17 CFR part 45). Rules adopted by the Commission under this section shall provide for the reporting of swap data as follows:

(A) Swaps entered into on or 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.

(B) Swaps entered into on or after such date of enactment shall be reported to a registered swap data repository or the Commission no later than the later of—

- (i) 90 days after such effective date; or
- (ii) Such other time after entering into the swap as the Commission may prescribe by rule or regulation.

<sup>10</sup> The reporting obligations of specified counterparties are delineated in Section 4r(a)(3) of the CEA, as amended. Unlike certain other provisions of Section 4r, these obligations are not limited to pre-enactment swaps.

<sup>11</sup> The term "transition swap" is defined in § 44.00(c) of the Commission's Regulations to mean "any swap entered into after the enactment of the Dodd-Frank Act of 2010 (July 21, 2010) and prior to the effective date of the swap data reporting and recordkeeping rules implemented pursuant to Section 2(h)(5)(B)" of the CEA.

relating to such transaction during the time that this interim final rule is in effect. The Commission expects that such information would vary depending upon the needs of the Commission and may include actual as well as summary trade data. Such summary data may include a description of a swap dealer's counterparties or the total number of post-enactment pre-effective swap transactions entered into by the dealer and some measure of the frequency and duration of those contracts. The Commission believes that this requirement will facilitate its ability to understand and evaluate the current market for swaps and may inform its analysis of other required rulemakings under the Dodd-Frank Act.

### 2. Reporting Party

Section 4r(a)(3) of the CEA specifies the party obligated to report a particular swap transaction. Specifically, this section provides, with respect to a swap in which only one counterparty is a swap dealer or major swap participant, that entity must report the swap. With respect to a swap in which one counterparty is a swap dealer and the other counterparty is a major swap participant, the swap dealer is responsible for reporting the swap. With respect to any other swap, the counterparties shall select one of them to report the swap. Interim § 44.03 incorporates these provisions.

### 3. Effective Date for Reporting Transition Swaps

Section 2(h)(5)(B) of the CEA requires that rules adopted by the Commission shall provide for the reporting of data for transition swaps no later than the later of 90 days after the effective date of the Dodd-Frank Act<sup>12</sup> or such other time after entering into the swap as the Commission may prescribe. Section 4r(a)(2)(C) establishes that the reporting obligations described in Section 4r shall be effective on the enactment of that section—July 21, 2010. In a July 15, 2010 floor statement, Senator Lincoln addressed inconsistencies between Sections 4r and 2(h)(5), emphasizing that the provisions of these two sections "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>13</sup> Accordingly,

<sup>12</sup> As relevant here, the effective date is 360 days after the enactment of the Dodd-Frank Act—July 15, 2011.

<sup>13</sup> Lincoln, "Wall Street Transparency and Accountability," *Congressional Record* (July 15, 2010) at S5923.

<sup>6</sup> The statute provides that reporting must occur either (i) 30 days after issuance of the interim final rule; or (ii) such other date as the Commission determines to be appropriate.

<sup>7</sup> See *Interim Final Rule for Reporting Pre-Enactment Swap Transactions*, 75 FR 63080, Oct. 14, 2010.

<sup>8</sup> The term "transition swap" refers to a swap executed on or after the date of enactment of the Dodd-Frank Act and before the effective date of the swap data reporting and recordkeeping rules implementing Section 2(h)(5)(B) of the CEA. As discussed *infra*, Sections 2(h)(5)(A) and 4r describe as a separate category of swaps those executed prior to the enactment of the Dodd-Frank Act, the terms of which had not expired by that date ("pre-enactment swaps").

<sup>9</sup> See *Notice of Proposed Rulemaking Relating to Swap Data Recordkeeping and Reporting*

Section 4r(a)(2)(C) should be read to require that the reporting *obligations* of Section 2(h)(5)(B) became effective on enactment of the Dodd-Frank Act and that counterparties who are or may become subject to this obligation should, as of that date, be prepared to report swap data relating to post-enactment pre-effective swaps at such time as reporting is required: the later of 90 days after July 15, 2011 or such other time after entering into the swap as the Commission may prescribe by rule. The Commission believes that this result achieves Senator Lincoln's goal of assuring consistency between the legislative provisions embodied in Sections 4r and 2(h)(5).

#### 4. Record Preservation

While neither Section 4r nor Section 2(h)(5) expressly requires that counterparties retain data related to transition swaps, implicit in the reporting requirements established by these provisions is the necessity for counterparties to these transactions to retain information and data related to the terms of each transaction so that it may subsequently be reported. In this regard, § 44.03 includes a Note to paragraphs (a)(1) and (a)(2) advising potential counterparties to a post-enactment pre-effective swap transaction to retain all information and documents relating to the terms of the transaction, to the extent and in such form as they presently exist. The Commission expects that counterparties to existing swaps routinely retain, consistent with reasonable business practice, information including but not limited to: (i) Any information necessary to identify and value the transaction (*e.g.*, underlying asset and tenor); (ii) the date and time of execution of the transaction; (iii) volume (*e.g.*, notional or principal amount); (iv) information relevant to the price and payment of the transaction until the swap is terminated, reaches maturity, or is novated; (v) whether the transaction was accepted for clearing by any clearing agency or derivatives clearing organization, and if so, the identity of such agency or organization; (vi) any modification(s) to the terms of the transaction; and (vii) the final confirmation of the transaction.

The Commission believes that counterparties that may be required to report transition swap transactions should preserve such information in order to ensure that they will be able to comply with the reporting requirements of Interim § 44.03 as well as with permanent reporting rules to be promulgated under CEA Section 2(h)(5). The Commission is mindful that the

data retention requirement may be perceived as burdensome, and in that regard the Note attempts to limit the data to material information that may be expected to assist the Commission in performing its oversight functions under the CEA. In addition, to ensure that important information relating to the terms of such swaps may be retained with minimal burden on the counterparties, the Note does not require any counterparty to a transition swap transaction to create new records, and permits records to be retained in their existing format. Similarly, the Commission recognizes that information that the counterparty does not have prior to the effective date of the interim final rule cannot be reported.

#### III. Request for Comments

The Commission requests comments on the questions outlined below:

1. Should the date on which data concerning transition swaps is required to be reported to a registered swap data repository or to the Commission be more than 90 days following the July 15, 2011 effective date of the Dodd-Frank Act? If so, what date(s) should the Commission consider and why?
2. Should the date for such reporting be different for reporting counterparties who are swap dealers or major swap participants than it is for reporting counterparties who are not swap dealers or major swap participants?
3. What information should be reported with respect to transition swaps? Who would use this information, and for what purpose(s)?
4. Should data reporting for transition swaps be asset-class specific?
5. What methods of data accuracy verification should be used for transition swap data?
6. Should the Commission's permanent rules concerning data reporting for transition swaps between counterparties who are not swap dealers or swap participants specify how such counterparties should determine which counterparty will report the swap data? If so, what factors should govern this choice?
7. The Note to the interim final rule advises that counterparties retain, in their existing format, all information and documents relating to the terms of the transition swap, including but not limited to certain data elements. What documents and data typically are kept by swap market participants to memorialize their transactions? In what format? How long are such records currently maintained by market participants?
8. What additional records should be kept, if any, and what burdens or costs

would the retention of such information entail?

In addition to the specific requests for comment above, the Commission welcomes comment on all aspects of the interim final rule and invites interested persons to submit written presentations of views, data and arguments on all aspects of the interim final rule.

#### IV. Related Matters

##### A. Administrative Procedure Act

The Administrative Procedure Act<sup>14</sup> ("APA") generally requires an agency to publish notice of a proposed rulemaking in the **Federal Register**.<sup>15</sup> This requirement does not apply, however, when the agency "for good cause finds \* \* \* that notice and public procedure are impracticable, unnecessary, or contrary to the public interest."<sup>16</sup> Moreover, while the APA requires generally that an agency publish an adopted rule in the **Federal Register** 30 days before it becomes effective, this requirement does not apply if the agency finds good cause to make the rule effective sooner.<sup>17</sup>

By way of background, Section 729 of the Dodd-Frank Act amended the CEA to add new Section 4r, which in turn requires the Commission to adopt, within 90 days of enactment of the Dodd-Frank Act, an interim final rule providing for the reporting of swaps entered into before the date of enactment of the Dodd-Frank Act the terms of which had not expired as of that date. In response to that mandate, the Commission adopted in new part 44 of the CEA an interim final rule whose purpose was to establish reporting requirements for pre-enactment unexpired swaps and to serve as notice to potential reporting entities of a subsequent requirement to report certain data<sup>18</sup> associated with such swaps. This interim rule provides notice to counterparties to preserve data associated with transition swaps until the Commission issues permanent reporting and recordkeeping rules for all swaps pursuant to CEA Section 2(h)(5).<sup>19</sup>

The Commission is mindful that the Dodd-Frank Act did not mandate an interim final rule relating to transition swaps (those entered into after the date of enactment of the Act and prior to its effective date), although such swaps will in the future be subject to a permanent reporting requirement

<sup>14</sup> 5 U.S.C. 553.

<sup>15</sup> 5 U.S.C. 553(b).

<sup>16</sup> *Id.*

<sup>17</sup> 5 U.S.C. 553(d).

<sup>18</sup> 75 FR 63080 (Oct. 14, 2010).

<sup>19</sup> *Id.* at 63084.

pursuant to new Section 2(h)(5)(B) of the CEA. The Commission believes that these circumstances similarly warrant notice to potential counterparties of a present obligation to retain data relating to such swaps until the Commission issues permanent rules pursuant to Section 2(h)(5)(B). Moreover, the Commission believes that issuance of such a rule as an interim final rule serves the public interest. The availability of this data will facilitate the Commission's ability to understand and evaluate the current market for swaps and may inform its analysis of other required rulemaking under the Dodd-Frank Act; any delay in adopting such rules likely will result in a substantial loss of significant swap data. Accordingly, the Commission believes that good cause exists under 5 U.S.C. 553(b) and (d) because delay in clarifying the potential scope of Section 2(h)(5)'s reporting and record preservation obligations likely will result in a substantial loss of material data relating transition swaps that would assist the Commission in performing its oversight and analytic functions under the CEA.

#### B. Paperwork Reduction Act

The Paperwork Reduction Act ("PRA") provides that an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number from the Office of Management and Budget ("OMB").<sup>20</sup> OMB has not yet assigned a control number to the new collection. As described below, the Interim Final Rule will result in new collection of information requirements within the meaning of the PRA.

##### 1. Reporting Requirements

The Commission has determined that this interim final rulemaking will not impose on swap counterparties any new reporting requirements that would be collections of information requiring the approval of the Office of Management and Budget ("OMB") under the Paperwork Reduction Act ("PRA").<sup>21</sup> The Commission intends to propose permanent reporting requirements associated with Section 723 of the Dodd-Frank Act, at which time the Commission will issue a notice of proposed rulemaking, seek comments on the proposed reporting requirements, and seek OMB approval for the collections of information as provided by 5 CFR 1320.8 and 1320.11.

##### 2. Recordkeeping Requirements

In order to comply with the reporting requirements contained in § 44.03, and in anticipation of permanent recordkeeping and reporting requirements to be adopted by the Commission pursuant to Section 2(h)(5)(B) of the CEA, each potential counterparty to a transition swap that may be required to report such transaction should retain information relating to the terms of the swap transaction. The Commission believes that this recordkeeping element, while not explicit, is considered to be a collection of information within the meaning of the PRA. 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 "Regulation 44.03—Interim Final Rule for Reporting Certain Post-Enactment Swap Transactions. OMB control number 3038–NEW."

The Commission will, by separate action, publish in the **Federal Register** a notice and request for comment on the paperwork burden associated with the recordkeeping element of this interim final rule in accordance with 5 CFR 1320.8. If approved, this new collection of information will be mandatory.

##### C. Cost-Benefit Analysis

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its action before issuing a new regulation or order under the Act. By its terms, Section 15(a) does not require the Commission to quantify the costs and benefits of its action or to determine whether the benefits of the action outweigh its costs. Rather, Section 15(a) requires the Commission simply to "consider the costs and benefits" of the subject rule or order. Section 15(a) further specifies that the costs and benefits of Commission regulations shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of the market for listed derivatives; (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 of concern and may, in its discretion, determine that notwithstanding its costs, a particular regulation is necessary or appropriate to protect the public interest or to effectuate any of the

provisions or accomplish any of the purposes of the CEA.

Title VII of the Dodd-Frank Act requires the Commission to undertake a number of rulemakings to implement the regulatory framework for swaps dictated by that Act, including the reporting of swap transactions. This interim final rule implements the Dodd-Frank Act by providing clarity and guidance with respect to the reporting of transition swaps by (i) establishing that transition swaps will be subject to Section 2(h)(5)(B)'s reporting requirements and to Commission regulations to be promulgated thereunder; and (ii) advising potential counterparties to such transition swaps that implicit in this reporting requirement is the present obligation to retain data for reporting at a time to be determined by rules promulgated under Section 2(h)(5)(B). This interim final rule will enable the Commission to obtain data on transition swaps and will also ensure the preservation of such data until permanent recordkeeping and reporting rules are issued by the Commission. The availability of data relating to transition swaps will enable the Commission to gain a better understanding of the swap market—including the size and scope of that market. This understanding ultimately will lead to a more robust and transparent environment for the swaps market. Further, the Commission expects this rule to make available information that could inform the Commission's decision-making with respect to the rules it is required to implement under the Dodd-Frank Act.

The Note to Interim § 44.03(a)(1) and (2) addresses the retention of records relating to transition swaps. Although there are recordkeeping costs associated with retention of existing swap transaction information, the Commission has crafted the Interim Final Rule to be efficient in terms of these costs. The Interim Rule does not require market participants to modify data for retention purposes, and the information that is to be reported should be information that is already kept by swap counterparties in their normal course of business—and it may be reported in the format in which it is kept. Moreover, counterparties must report the time of execution only to the extent such information is available.

The recordkeeping and reporting rules that the Commission is required to adopt under new CEA Section 2(h)(5)(B) will apply to transition swaps. Accordingly, in adopting this Interim Rule the Commission has sought to limit the burden on market participants by

<sup>20</sup> 44 U.S.C. 3501 *et seq.*

<sup>21</sup> 44 U.S.C. 3501 *et seq.*

not imposing substantial or potentially conflicting reporting requirements.

#### D. Regulatory Flexibility Act

The Regulatory Flexibility Act (“RFA”), 5 U.S.C. 601 *et seq.*, requires federal agencies, in promulgating rules, to consider the impact of those rules on small entities. The term “rule” under the RFA is defined as “any rule for which the agency publishes a general notice of proposed rulemaking pursuant to Section 553(b) of this title, or any other law \* \* \*.”<sup>22</sup> However, a general notice of proposed rulemaking under Section 553(b) does not apply “when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor) in the rules [issued] that notice and public procedure thereon are impracticable, unnecessary or contrary to the public interest.”<sup>23</sup> As noted above, the Commission believes that good cause exists under 5 U.S.C. 553(b) because delay in clarifying the scope of 2(h)(5)’s reporting and record preservation obligations will likely result in a substantial loss of material data relating to post-enactment pre-effective swaps that would assist the Commission in performing its oversight functions under the CEA.

#### List of Subjects in 17 CFR Part 44

Swap markets, Counterparties, Reporting and Recordkeeping requirements.

■ In consideration of the foregoing, and pursuant to the authority in the Commodity Exchange Act, as amended, and in particular Sections 2(h)(5), 4r(a) and 12a(5), the Commission hereby proposes to amend Chapter 1 of Title 17 of the Code of Federal Regulations by amending part 44 as follows:

### PART 44—INTERIM FINAL RULE FOR PRE-ENACTMENT SWAP TRANSACTIONS

#### Authority and Issuance

■ 1. The authority citation for part 44 shall continue to read as follows:

**Authority:** 7 U.S.C. 2(h)(5), 4r and 12a(5), as amended by Title VII of the Wall Street Reform and Consumer Protection Act (Dodd-Frank Act of 2010), Pub. L. 111–203, 124 Stat. 1376 (2010).

■ 2. Section 44.00 is amended by redesignating paragraphs (c) through (e) as paragraphs (d) through (f) and by revising paragraph (c) to read as follows:

#### § 44.00 Definition of terms used in Part 44 of this chapter.

\* \* \* \* \*

(c) Transition swap means any swap entered into after the enactment of the Dodd-Frank Act of 2010 (July 21, 2010) and prior to the effective date of the swap data reporting and recordkeeping rule implemented under Section 2(h)(5)(B) of the CEA.

\* \* \* \* \*

■ 3. Section 44.03 is added to read as follows:

#### § 44.03 Reporting transition swaps to a swap data repository or to the Commission.

(a) A counterparty to a post-enactment pre-effective swap transaction shall:

(1) As required by the reporting rules required to be adopted pursuant to Section 2(h)(5)(B) of the Commodity Exchange Act, report data related to a transition swap to a registered swap data repository or the Commission by the compliance date established in such reporting rules or within 60 days after an appropriate swap data repository becomes registered with the Commission and commences operations to receive and maintain data related to such swap, whichever occurs first, the following information with respect to the swap transaction:

(i) A copy of the transaction confirmation, in electronic form if available, or in written form if there is no electronic copy;

(ii) The time, if available, that the transaction was executed; and

(2) Report to the Commission on request, in the form and manner prescribed by the Commission, any information relating to the swap transaction.

**Note to Paragraphs (a).** In order to comply with the reporting requirements contained in paragraphs (a)(1) and (a)(2) of this section, each counterparty to a post-enactment pre-effective swap transaction that may be required to report such transaction should retain, in its existing format, all information and documents, to the extent and in such form as they exist on the effective date of this section, relating to: the terms of a swap transaction, including but not limited to any information necessary to identify and value the transaction (*e.g.*, underlying asset and tenor); the date and time of execution of the transaction; volume (*e.g.*, notional or principal amount); information relevant to the price and payment for the transaction until the swap is terminated, reaches maturity or is novated; whether the transaction was accepted for clearing and, if so, the identity of such clearing organization; any modification(s) to the terms of the transaction; and the final confirmation of the transaction.

(b) Reporting party. The counterparties to a swap transaction shall report the information required under paragraph (a) of this section as follows:

(1) Where only one counterparty to a swap transaction is a swap dealer or a major swap participant, the swap dealer or major swap participant shall report the transaction;

(2) Where one counterparty to a swap transaction is a swap dealer and the other counterparty is a major swap participant, the swap dealer shall report the transaction; and

(3) Where neither counterparty to a swap transaction is a swap dealer or a major swap participant, the counterparties to the transaction shall select the counterparty who will report the transaction.

Issued in Washington, DC, on December 9, 2010, by the Commission.

**David A. Stawick,**

*Secretary of the Commission.*

### Appendices to Interim Final Rule for Reporting Certain Post-Enactment Swap Transactions—Commission Voting Summary and Statements of Commissioners

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

#### Appendix 1—Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Dunn, Sommers, Chilton and O’Malia voted in the affirmative; no Commissioner voted in the negative.

#### Appendix 2—Statement of Chairman Gary Gensler

I support the interim final rulemaking regarding the reporting timetable for swaps entered into after the date of enactment of the Dodd-Frank Act but prior to the effective date of swap data reporting rules, or “transition” swaps. The interim final rule is intended to ensure that data and information related to those transition swaps will be preserved until reporting to swap data repositories or regulators can occur. The rule is indeed to prevent a substantial loss of data on transition swaps and to assist the Commission in performing its oversight functions under the Commodity Exchange Act.

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<sup>22</sup> 5 U.S.C. 601(2).

<sup>23</sup> 5 U.S.C. 553(b).