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## CFTC

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### **CLIENT ALERT: CFTC ISSUES FINAL RULES ON RECORDKEEPING AND REPORTING FOR SWAPS**

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The CFTC has finalized rules on recordkeeping and reporting for all swaps, including current and future swaps as well as pre-enactment and transition swaps.<sup>1</sup> Fewer requirements apply to swaps initiated before Dodd-Frank -- pre-enactment and transition swaps (also jointly called historical swaps) -- than current and future swaps. While the CFTC has not yet finalized a definition of “swap,”<sup>2</sup> it is important to proceed with a compliance plan now.

#### **Current and Future Swaps**

##### **Recordkeeping Requirements**

Although most Spiegel clients are unlikely to be considered Swap Dealers or Major Swap Participants, you must nonetheless keep “full, complete and systematic records, together with all pertinent data and memoranda, with respect to each swap” in which you are a counterparty. These comprehensive records must be kept for the life of the swap and for at least five years after the final termination of the swap. You may store them in either electronic or paper form, as long as they are retrievable within five business days upon request.

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<sup>1</sup> The final rule for current and future swaps has been published in the Federal Register at [77 Fed. Reg. 2136](#). The final rule for pre-enactment and transition swaps (or historical swaps) has not yet been published in the Federal Register but is available on the CFTC website [here](#).

<sup>2</sup> In its rulemaking on the further definition of “swap dealer,” “security-based swap dealer,” “major swap participant,” “major security-based swap participants” and “eligible contract participant,” the CFTC avows that “[i]t is likely ... that a significant portion of the financial risk management by such persons [as end-users] are forward contracts in nonfinancial commodities that are excluded from the definition of the term ‘swap.’” 77 Fed. Reg. 30,596, at 30,620. Further, the CFTC points out that “A coalition of not-for-profit power utilities and electric cooperatives has advised that it plans to submit a request for an exemption for transactions between entities described in section 201(f) of the Federal Power Act, as contemplated by section 722(f) of the Dodd-Frank Act.” *Id.* n.295.

## Reporting Requirements

After the swap definition is final, new and continuing swaps will be required to be reported to the CFTC or to designated data repositories. If your counterparty is a Swap Dealer or a Major Swap Participant, they must assume the reporting obligation. However, if your counterparty is another “end-user,”<sup>3</sup> the contract documents must specify which one of you will report. Before agreeing to be a reporting counterparty, you should carefully evaluate the obligations that will result, as the reporting counterparty incurs substantial obligations that go beyond what you may expect.<sup>4</sup>

The CFTC has identified a range of data and records to be reported upon the creation of a swap. Although 48 hours is provided during the first year after the compliance date, and 36 hours after the second year, by the third year, whichever party assumes that obligation must report a new swap within 24 hours after it is executed. For most of your swaps, the reporting party will be required to report:

- minimum primary economic terms data, such as contract type, settlement method, transaction date, quantity, start and end dates, buyer and seller pay indices, buyer and seller identities, price and price unit, execution venue, load type, options data, commodity grade, and any other primary economic terms;<sup>5</sup>
- records and terms of a confirmation;
- any governing master agreements including modifications; and
- any credit support agreements including modifications.

In addition to creation data, the reporting counterparty has an ongoing obligation to report “continuation data” regarding any changes to the primary economic terms data in a manner sufficient to ensure that all data in the swap data repository concerning the swap remains current and accurate. Among other things, this means that the reporting counterparty must report the current value of the swap as of the last day of each fiscal quarter.

Understandably, developing the capacity to report in this matter could be costly. While your counterparties will likely charge for performing this service, that option could still be less expensive

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<sup>3</sup> An end-user is an entity that enters into swaps to hedge or mitigate the commercial risk of an underlying commodity business, such as an electric or natural gas utility. Because the *de minimis* levels for qualifying as a Swap Dealer or Major Swap Participant have been set quite high, it is likely that a fair number of your counterparties will be end-users.

<sup>4</sup> In addition to the reporting requirements discussed here, the CFTC also has established “real-time reporting requirements” in a separate rulemaking, which requires the reporting counterparty to report new swaps as soon as technologically practicable upon execution. See the final rule on real-time reporting at [77 Fed. Reg. 1182](#).

<sup>5</sup> This list is not exhaustive. If you think you are a reporting counterparty or are considering agreeing to be a reporting counterparty, we recommend that you seek more detailed advice.

than the investments that may be necessary in new hardware, new software and trained personnel to carry out the obligation.

## Pre-enactment and Transition Swaps (Historical Swaps)

### Recordkeeping Requirements

Any counterparty to a swap in existence on or after April 25, 2011 must retain records of minimum primary economic terms data. If a counterparty is in possession (on or after April 25, 2011) of the following types of data, then this data must also be retained:

- confirmation data;
- master agreements, including modifications or amendments; and
- credit support agreements or similar such agreements.

If additional swap-related records, such as data or memoranda, remain in existence as of the compliance date,<sup>6</sup> they must also be retained.

Counterparties to pre-enactment swaps (swaps in effect on July 21, 2010 ) that expired or were terminated before April 25, 2011 must retain in any format records relating to the terms of the transaction that were in your possession on or after October 14, 2010.

Counterparties to transition swaps (swaps entered into between July 21, 2010 and the compliance date) that expired before April 25, 2011 must retain in any format records relating to the terms of the transaction that were in your possession on or after December 17, 2010.

You should retain all records pertaining to pre-enactment and transition swaps through the life of the swap and for five years after termination. Records pertaining to these swaps must be retrievable within five business days.

### Reporting Requirements

The CFTC requires an initial data report, due on the applicable compliance date, regarding pre-enactment and transition swaps in existence on or after April 25, 2011. As with current and future swaps, end-users are unlikely to be reporting counterparties unless both counterparties are end-users. If you and your counterparty are end-users, you must determine which of you will report. The CFTC asks that the following information be submitted by the reporting counterparty, to a swap data repository or to the Commission, by the compliance date:

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<sup>6</sup> The compliance date depends on the date that the CFTC publishes its final rule on the definitions of “swap.” For public power end-users, the compliance date is expected to fall in early 2013.

- ▶ Primary economic terms in the possession of the reporting counterparty on or after April 25, 2011;<sup>7</sup>
- ▶ The legal entity identifier of the reporting counterparty (you must obtain one of these by the compliance date, or 180 days after the compliance date if you are a non-reporting counterparty);
- ▶ The internal counterparty identifier or legal entity identifier used by the reporting counterparty to identify the non-reporting counterparty; and
- ▶ The internal transaction identifier used by the reporting counterparty to identify the swap.

Reporting of swap continuation data is also required for uncleared pre-enactment or transition swaps in existence on or after April 25, 2011.

For pre-enactment swaps expired or terminated prior to April 25, 2011, the reporting counterparty must report, by the compliance date, any information relating to the terms of the transaction that was in its possession on or after October 14, 2010.

For transition swaps expired or terminated before April 25, 2011, the reporting counterparty should report to a swap data repository or to the Commission, by the compliance date, any information relating to the terms of the transaction that was in its possession on or after December 17, 2010.

If you are engaged in transactions that may be considered swaps, the information contained here should not be relied upon to the exclusion of specific and detailed legal advice. Please contact Spiegel attorneys Lisa Dowden, Melissa Birchard, or Daniel Silverman with any questions that you may have about these or other CFTC actions affecting your utility operations. In particular, if you need advice regarding how to report, or whether reporting is necessary, we will be happy to assist you.

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<sup>7</sup> Again, this list is not exhaustive and if you are a reporting counterparty or are considering agreeing to become a reporting counterparty, we recommend that you seek more detailed advice regarding the data that must be reported.

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FOR ADDITIONAL INFORMATION, PLEASE CONTACT THE FOLLOWING SPIEGEL ATTORNEYS:

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