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Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps; Final Rule

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 46

[3038–AD48]

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

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rulemaking.

SUMMARY: The Commodity Futures Trading Commission (''Commission'' or ''CFTC'') is adopting rules to further implement the Commodity Exchange Act (''CEA'' or ''Act'') with respect to the new statutory framework regarding swap data recordkeeping and reporting established by the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act''). The Dodd-Frank Act, which amended the CEA, directs that rules adopted by the Commission shall provide for the reporting of data relating to swaps entered into before the date of enactment of the Dodd-Frank Act, the terms of which have not expired as of the date of enactment of the Dodd-Frank Act (''pre-enactment swaps'') and data relating to swaps entered into on or after the date of enactment of the Dodd-Frank Act and prior to the compliance date specified in the Commission's final swap data reporting rules (''transition swaps''). These final rules establish swap data recordkeeping and reporting requirements for pre-enactment swaps and transition swaps.

DATES: The effective date of this part is August 13, 2012. *Compliance dates:* (1) Swap dealers and major swap participants shall commence full compliance with this part with respect to credit swaps and interest rate swaps on the later of: July 16, 2012; or 60 calendar days after publication in the **Federal Register** of the later of the Commission's final rule defining the term ''swap'' or the Commission's final rule defining the terms ''swap dealer'' and ''major swap participant;'' (2) Swap dealers and major swap participants shall commence full compliance with this part with respect to equity swaps, foreign exchange swaps, and other commodity swaps on or before 90 days after the compliance date for credit swaps and interest rate swaps; (3) Non-SD/MSP counterparties shall commence full compliance with this part with respect to all swaps on or before 90 days after the compliance date applicable to swap dealers and major swap participants with respect to equity swaps, foreign exchange swaps, and other commodity swaps.

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SUPPLEMENTARY INFORMATION: The Commission is adopting new part 46 of its regulations relating to recordkeeping and reporting requirements applicable to both pre-enactment and transition swaps. These rules, when adopted, will supersede interim final rules previously adopted by the Commission in part 44 of its regulations.

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I. Background

A. Introduction

On July 21, 2010, President Obama signed into law the Dodd-Frank Act.[1] Title VII of the Dodd-Frank Act[2] amended the CEA[3] 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: providing for the registration and comprehensive regulation of swap dealers (''SDs'') and major swap participants (''MSPs''); imposing clearing and trade execution requirements on standardized derivatives products; creating robust recordkeeping and 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 jurisdiction.

B. Swap Data Provisions of the Dodd-Frank Act

To enhance transparency, promote standardization, and reduce systemic risk, Section 727 of the Dodd-Frank Act added to the CEA new section 2(a)(13)(G), which requires all swaps, whether cleared or uncleared, to be reported to swap data repositories (''SDRs''),[4] which are new registered entities 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 electronically available to regulators.[5] New 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 and reporting. Specifically, CEA section 21(b)(1)(A) provides that:

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

These standards are to apply to both registered entities and counterparties involved with swaps. CEA section 21(b)(1)(B) provides that:

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

CEA section 21 also directs the Commission to prescribe data standards for SDRs. Specifically, CEA section 21(b)(2) provides that:

> The Commission shall prescribe data collection and data maintenance standards for swap data repositories.

These standards are to be comparable to those for clearing organizations. CEA section 21(b)(3) provides that:

> The [data] standards prescribed by the Commission under this subsection shall be comparable to the data standards imposed by the Commission on derivatives clearing organizations in connection with their clearing of swaps.

In addition, CEA section 21(c)(3) provides that, once the data elements prescribed by the Commission are reported to an SDR, the SDR shall:

> maintain the data [prescribed by the Commission for each swap] in such form, in such manner, and for such period as may be required by the Commission.

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

[2] Pursuant to Section 701 of the Dodd-Frank Act, Title VII may be cited as the ''Wall Street Transparency and Accountability Act of 2010.''

[3] 7 U.S.C. 1 *et seq.*

[4] *See also* CEA § 1a(40)(E).

[5] Regulations governing core principles and registration requirements for, and the duties of, SDRs are the subject of part 49 of this chapter.

Section 727 of the Dodd-Frank Act, which added to the CEA new section 2(a)(13)(G), provides that ''Each swap (whether cleared or uncleared) shall be reported to a registered swap data repository.'' Section 729 of the Dodd-Frank Act added to the CEA new section 4r, which addresses reporting and recordkeeping requirements for uncleared swaps. Pursuant to this section, each swap not accepted for clearing by any derivatives clearing organization (''DCO'') must be reported to an SDR (or to the Commission if no repository will accept the swap). In a July 15, 2010 floor statement concerning swap data reporting as well as other aspects of the Dodd-Frank Act, Senator Blanche Lincoln emphasized that these provisions should be interpreted as complementary to one another to assure consistency between them, stating that: ''All swap trades, even those which are not cleared, would still be reported to regulators, a swap data repository, and subject to the public reporting requirements under the legislation.'' [6]

CEA Section 4r(a)(3) ensures that at least one counterparty to a swap has an obligation to report data concerning that swap. The determination of this reporting counterparty depends on the status of the counterparties involved. If only one counterparty is an SD, the SD is required to report the swap. If one counterparty is an MSP, and the other counterparty is neither an SD nor an MSP (''non-SD/MSP counterparty''), the MSP must report. For any other swap, CEA section 4r(a)(3)(C) provides that the counterparties to the swap shall select a counterparty to report the swap as specified in section 4r.[7]

In addition, CEA section 4r provides for reporting to the Commission of swaps neither cleared nor accepted by any SDR. Under this provision, counterparties to such swaps must maintain books and records pertaining to their swaps in the manner and for the time required by the Commission, and must make these books and records available for inspection by the Commission or other specified regulators if requested to do so.[8] It also requires counterparties to such swaps to provide reports concerning such swaps to the Commission upon its request, in the form and manner specified by the Commission.[9] Such reports must be as comprehensive as the data required to be collected by SDRs.[10]

Section 729 of the Dodd-Frank Act establishes in new CEA section 4r(a)(2)(A) a transitional rule applicable to pre-enactment swaps. Section 4r(a)(2)(A) provides for the reporting of pre-enactment swaps the terms of which have not expired as of the enactment of the Dodd-Frank Act to an SDR or the Commission, by a date that the Commission determines to be appropriate.[11] Section 4r(a)(2)(B) directed the Commission to promulgate an interim final rule within 90 days of the date of enactment of the Dodd-Frank Act providing for the reporting of such pre-enactment swaps.[12]

Section 723 of the Dodd-Frank Act, which added to the CEA new Section 2(h)(5), addressed the reporting of swap data for both swaps executed before the enactment of the Dodd-Frank Act [13] and swaps executed on or after the date of that enactment but before the compliance date specified in the Commission's final swap data recordkeeping and reporting rules.[14] As discussed above, in a July 15, 2010 floor statement concerning swap data reporting as well as other aspects of the Dodd-Frank Act, Senator Lincoln emphasized that these provisions should be interpreted as complementary in order to assure consistency between them, and emphasized that ''[T]his is particularly true with respect to issues such as the effective dates of these reporting requirements, the applicability of these provisions to cleared and/or uncleared swaps, and their applicability—or non-applicability—to swaps whose terms have expired at the date of enactment.'' [15]

This part refers to the two types of swaps addressed in CEA Section 2(h)(5) as follows. ''Pre-enactment swap'' means a swap executed before date of enactment of the Dodd-Frank Act (*i.e.*, before July 21, 2010) the terms of which have not expired as of the date of enactment of Dodd-Frank Act.[16] ''Transition swap'' means a swap executed on or after the date of enactment of the Dodd-Frank Act (*i.e.*, July 21, 2010) and before the applicable compliance date set forth in this part and also specified in the final swap data reporting and recordkeeping requirements regulations in part 45 of this chapter.[17] Collectively, this part refers to pre-enactment swaps and transition swaps as ''historical swaps.''

C. The Commission's Part 45 Rules on Swap Data Recordkeeping and Reporting Requirements

On January 13, 2012, the Commission published in new part 45 of its regulations final rules establishing swap data recordkeeping and reporting requirements applicable to SDs, MSPs, and non-SD/MSP counterparties,[18] as well as to registered SDRs, DCOs, designated contract markets (''DCMs''), and swap execution facilities (''SEFs'').[19]

With respect to recordkeeping, part 45 requires SDs and MSPs to keep records of all activities relating to their business with respect to swaps, and requires non-SD/MSP counterparties to keep records with respect to each swap in which they are a counterparty. Required records must be kept by all swap counterparties throughout the existence of a swap and for five years following termination of the swap. In the case of an SD or MSP, the records must be readily accessible

[6] Senator Blanche Lincoln, ''Wall Street Transparency and Accountability Act,'' *Congressional Record,* July 15, 2010, at S5905.

[8] CEA § 4r(c)(2) requires individuals or entities that enter into a swap transaction that is neither cleared nor accepted by an SDR to make required books and records open to inspection by any representative of the Commission; an appropriate prudential regulator; the Securities and Exchange Commission; the Financial Stability Oversight Council; and the Department of Justice.

[9] CEA § 4r(a)(1)(B) and § 4r(c).

[10] CEA § 4r(d).

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

[12] Pursuant to Section 4r(a)(2)(B), the Commission on October 14, 2010 published in part 44 of its regulations an interim final rule instructing specified counterparties to pre-enactment swaps to report data to a registered SDR or to the Commission by a compliance date to be established in reporting rules to be promulgated under Section 2(h)(5)(A) of the CEA and advising counterparties of the necessity, inherent in the reporting requirement, to retain information pertaining to the terms of such swaps until reporting can be effectuated under permanent rules. *See* CFTC Interim Final Rule for Reporting Pre-Enactment Swap Transactions (''Pre-Enactment Swaps IFR''), 75 FR 63080 (Oct. 14, 2010).

[13] *See* Pre-Enactment Swaps IFR.

[14] *See* CFTC Interim Final Rule for Reporting Post-Enactment Swap Transactions (''Post-Enactment Swaps IFR'' or ''Transition Swaps IFR''), 75 FR 78892 (Dec. 17, 2010).

[15] Senator Blanche Lincoln, ''Wall Street Transparency and Accountability Act,'' *Congressional Record,* July 15, 2010, at S5923.

[16] Subsection (A) of CEA Section 2(h)(5) *Reporting Transition Rules* provides: ''Swaps entered into before the date of the enactment of this subsection shall be reported to a registered swap data repository or the Commission no later than 180 days after the effective date of this subsection.''

[17] Subsection (B) of CEA Section 2(h)(5) *Reporting Transition Rules* provides: ''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 [the] effective date [of Section 2(h)(5)] or (ii) such other time after entering into the swap as the Commission may prescribe by rule or regulation.''

[18] The category of non-SD/MSP counterparties includes but is not limited to counterparties who are entitled, with respect to any swap, to elect the clearing requirement exception pursuant to CEA section 2(h)(7) with respect to particular swaps.

[19] 77 FR 2136 (February 13, 2012).

throughout the life of the swap and for two years following its termination, and retrievable by the SD or MSP within three business days during the remainder of the retention period. In the case of a non-SD/MSP counterparty, the records must be retrievable by the counterparty within five business days throughout the retention period.

In order to ensure that complete data concerning swaps is available to regulators, part 45 calls for electronic reporting to an SDR of swap data from each of two important stages of the existence of a swap: the creation of the swap, and the continuation of the swap over its existence until its final termination or expiration. Creation data required to be reported pursuant to part 45 includes both primary economic terms (''PET'') data and confirmation data for a swap. Continuation data required to be reported includes all changes to primary economic terms and all required valuation data. For swaps executed on or after the applicable compliance date, part 45 establishes a streamlined reporting regime calling for reporting by the entity or reporting counterparty the Commission believes has the easiest, fastest, and cheapest access to the data. For all swaps executed on a SEF or DCM, all required creation data is reported by the SEF or DCM. For off-facility swaps accepted for clearing within the applicable deadline for reporting PET data, all required swap creation data is reported by the DCO. For off-facility swaps not cleared or not accepted for clearing within the applicable deadline, required swap creation data is reported by the reporting counterparty. Continuation data for cleared swaps is reported by the DCO, though SD and MSP reporting counterparties must also report valuation data. For uncleared swaps, all continuation data is reported by the reporting counterparty.

Part 45 notes that the obligations of swap counterparties with respect to historical swaps, *i.e.,* swaps executed prior to the applicable compliance date and in existence on or after the date of enactment of the Dodd-Frank Act, will be as provided in part 46.

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

Interim Final Rule for Pre-Enactment Swaps. New section 4r(a)(2) to the CEA, added by the Dodd-Frank Act, provided for the reporting of pre-enactment swaps and directed that the Commission promulgate, within 90 days of enactment of the Dodd-Frank Act, an interim final rule (''IFR'') providing for the reporting of such swaps. On October 14, 2010, pursuant to the mandate of section 4r(a)(2)(B), the Commission published in new part 44 of its regulations an IFR advising specified counterparties to pre-enactment of the Commission's intent to promulgate rules pursuant to CEA sections 2(h)(5) and 4r requiring that such data be reported to a registered SDR or to the Commission by a compliance date to be established in those rules, and advising such counterparties of the necessity, inherent in the reporting requirement, to preserve information pertaining to the terms of such swaps until reporting was effectuated under permanent rules.[20] This Pre-Enactment Swaps IFR stated that the reporting and recordkeeping provisions established by Section 4r and sections 44.00–44.02 of the Commission's regulations would remain in effect until the effective date of the permanent reporting rules to be adopted by the Commission pursuant to Section 2(h)(5) of the CEA.[21] A principal purpose of this IFR was to advise counterparties of the need to retain data related to swap transactions so that reporting could be effectuated under permanent rules subsequently to be adopted.

With respect to the scope and coverage of the Pre-Enactment Swaps IFR, the Commission acknowledged that while new CEA Section 4r(a)(2) limits reportable pre-enactment swaps to those whose terms have not expired on the date of enactment of the Dodd-Frank Act, Section 2(h)(5) does not contain the same qualifying language. As discussed in the Pre-Enactment Swaps IFR, the Commission believes that failure to limit the term ''pre-enactment swap'' to unexpired swaps would require reporting of every swap that has ever been entered into; accordingly, the Commission concluded that reportable pre-enactment swaps should be limited to those whose terms had not expired at the time of enactment.[22]

Interim Final Rule for Transition Swaps. Section 2(h)(5) also prescribes reporting requirements applicable to swaps entered into on or after the date of enactment (''Transition Swaps''). To provide clarity and guidance with respect to such swaps, the Commission promulgated an IFR for transition swaps to establish that these swaps will be subject to Commission regulations to be promulgated under Section 2(h)(5)(B). The Commission also believed it was prudent to advise potential counterparties to such swaps that implicit in this prospective reporting requirement is the need to retain relevant data until such time as reporting can be effected. Accordingly, on December 17, 2010 the Commission published under Part 44 of its regulations interim final rules establishing that counterparties to transition swaps will be subject to permanent recordkeeping and reporting requirements to be adopted by the Commission pursuant to Section 2(h)(5)(B) of the CEA.[23]

The Commission intended both the Pre-Enactment Swaps IFR and the Transition Swaps IFR to put counterparties on notice that swap data should be retained pending the adoption of permanent rules prescribing recordkeeping and reporting requirements for pre-enactment and transition swaps under part 46 of the Commission's regulations. With respect to both pre-enactment and transition swaps, the Commission stated that counterparties to these transactions should retain material information about such transactions. The Commission emphasized, however, that in the context of the interim rules, no counterparty was being required to create new records with respect to transactions that occurred in the past; instead, records relating to the terms of such transactions could be retained in their existing format to the extent and in such form as they presently exist.[24]

Comments Received. The Commission received a number of comments in response to each of the IFRs and considered them all. Comments generally fell into one or more of several broad categories and in a number of instances were common to both IFRs. Some commenters observed that issuance of IFRs in advance of regulations further defining the term ''swap'' (or defining other key terms in the Dodd-Frank Act) creates legal and regulatory uncertainty and increases compliance risk; most of these commenters urged the Commission to further detail the record retention aspects of the interim final rules.[25] In this connection, commenters requested that the Commission issue guidance

[20] *See* Pre-Enactment Swaps IFR, *supra* note 17, at 63083.

[21] *See* Pre-Enactment Swaps IFR, *supra* note 17.

[22] *Id.* at 63082.

[23] *See* Transition Swaps IFR, *supra* note 18.

[24] *See* Pre-Enactment Swaps IFR, *supra* note 17, at 63086, and Transition Swaps IFR, *supra* note 18, at 78894.

[25] *See,* e.g., letters dated November 15, 2010 and January 18, 2011 from the Working Group of Commercial Energy Firms (''Working Group letters''); letter dated November 15, 2010 from Hess Corporation (''Hess Corporation letter''); letter dated November 15, 2010 from the Edison Electric Institute (''EEI letter''); letters dated November 15, 2010 and January 18, 2011 from the Not-for-Profit Electric End User Coalition (''Coalition letters''); letter dated January 18, 2011 from the American Gas Association (''AGA letter'').

clarifying and limiting the information that must be retained,[26] or create a safe harbor for good faith compliance efforts.[27] Several commenters recommended that the Commission should ensure that end users need only report basic data in a simplified reporting scheme, or should outline categories of information that need not be retained by persons who anticipate becoming eligible for the end user exemption under the Dodd-Frank Act.[28] One commenter urged greater specificity with respect to the Pre-Enactment IFR's requirements, as well as consistency with the standards adopted by the Securities and Exchange Commission (''SEC'') and international regulators, and proposed alternatives to the requirements adopted in the IFR for pre-enactment swaps, particularly with respect to reporting protocols, record retention, and confidentiality issues (notably, those confidentiality issues arising in the context of cross-border transactions).[29] Another commenter urged that U.S. swap data reporting requirements should not apply with respect to foreign swaps transactions, where counterparties are non-U.S. entities.[30]

The Commission considered these comments in preparing its part 46 Notice of Proposed Rulemaking (''NOPR'') with respect to historical swaps.[31]

E. Summary of the Proposed Part 46 Rule

1. Fundamental Goals

The fundamental goals of the part 46 NOPR were to provide for recordkeeping and reporting with respect to pre-enactment swaps and transition swaps as required by the Dodd-Frank Act; to provide specificity and clarity, to the extent possible, concerning what records must be kept and what data must be reported with respect to such historical swaps; and to ensure that data needed by regulators concerning historical swaps is available to regulators through SDRs when swap data reporting begins.

2. Historical Swap Recordkeeping

The NOPR proposed limited recordkeeping requirements for counterparties to historical swaps. For swaps in existence on or after April 25, 2011, the date of publication of the NOPR, counterparties would be required to keep records of specified, minimum primary economic terms for a swap of the asset class in question, listed in Tables in the Appendix to the NOPR. In addition, if a historical swap counterparty had a confirmation of the historical swap as of that date, the NOPR called for the counterparty to keep it. For historical swaps that expired or were terminated prior to April 25, 2011, the NOPR provided that counterparties should keep the records they already have, in the form they are already kept. For all historical swaps, the required records would have to be kept throughout any remaining existence of a historical swap and for five years following its final termination or expiration.

3. Historical Swap Data Reporting

a. *Historical swaps in existence on or after April 25, 2011.* For each historical swap in existence on or after April 25, 2011, the NOPR called for an initial data report by the reporting counterparty on the applicable compliance date, and for ongoing reporting of data from the continuation of the historical swap during its remaining existence. As proposed, the initial data report would include the minimum primary economic terms for a historical swap of the asset class in question, as specified in the appropriate Table in the Appendix to the rule. If the reporting counterparty possessed a confirmation of the historical swap on or after April 25, 2011, the confirmation terms recorded in the automated system of the reporting counterparty would also be included in the initial data report. For historical swaps already reported to an existing repository prior to the effective date of the final reporting rules, the NOPR would not require duplicate reporting. With respect to ongoing reporting of continuation data during the remaining existence of a historical swap, the NOPR aligned with the proposed part 45 rule in following the life cycle approach for credit swaps and equity swaps, and the state or snapshot approach for interest rate swaps, currency swaps, and other commodity swaps.

b. *Historical swaps expired or terminated prior to April 25, 2011.* For each historical swap which expired or was terminated prior to April 25, 2011, the NOPR called for the reporting counterparty to report such information relating to the terms of the transaction as was in the reporting counterparty's possession as of issuance of the interim final rule, in either electronic or non-electronic form at the option of the reporting counterparty.

4. Unique Identifiers

The NOPR called for the initial data report for each historical swap in existence on or after April 25, 2011, to include the legal entity identifier (''LEI''),[32] as provided in part 45 of this chapter, of the reporting counterparty. The NOPR proposed giving the non-reporting counterparty for each such historical swap an additional 180 days after the applicable compliance date to obtain an LEI. Once this LEI was obtained, the NOPR called for it to be provided to the reporting counterparty and reported by the reporting counterparty to the SDR. After LEIs were obtained for either counterparty, the NOPR proposed requiring the counterparty identified by an LEI and the SDR to comply with the LEI requirements of part 45 of this chapter with respect to LEIs. The NOPR provided that the LEI requirements of parts 45 and 46 of this chapter would not apply to historical swaps expired or terminated prior to April 25, 2011.

The NOPR proposed that the unique swap identifier and unique product identifier requirements of part 45 of this chapter would not apply to historical swaps.

5. Determination of Which Counterparty Must Report

The NOPR provided that determination of which counterparty is the reporting counterparty for a historical swap would be made in the same way provided in part 45 of this chapter. Counterparty reporting would follow the hierarchy outlined in the statute, giving SDs or MSPs the duty to report when possible, and limiting reporting by non-SD/MSP counterparties to situations where there is no SD or MSP counterparty. Where both counterparties have the same hierarchical status, the NOPR required them to agree as one term of their swap which of them is to report. Where only one counterparty to a historical swap is a U.S. person, the NOPR called for that counterparty to be the reporting

[26] EEI letter.

[27] Working Group letters; EEI letter; Hess Corporation letter.

[28] AGA letter; Coalition letters.

[29] Letter dated November 12, 2010, from the International Swaps and Derivatives Association, Inc. and the Futures Industry Association.

[30] Letter dated January 11, 2011, from Barclays Bank PLC, BNP Paribas S.A., Deutsche Bank AG, Royal Bank of Canada, The Royal Bank of Scotland Group PLC, Société Générale and UBS AG.

[31] *See* CFTC Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps, 76 FR 22833 (April 25, 2011).

[32] The NOPRs for both parts 45 and 46 of this chapter used the term ''unique counterparty identifier'' in this context. As explained in the final part 45 rule, in response to comments the Commission has decided to use the term ''legal entity identifier,'' which refers to the same identifier and is in common international use, in order to prevent confusion.

counterparty. For historical swaps in existence as of the applicable compliance date, the NOPR called for determination of the reporting counterparty to be made by applying the above provisions to the current counterparties to the swap as of the compliance date. For historical swaps for which reporting is required, but which have terminated prior to the compliance date, the NOPR called for determination of the reporting counterparty to be made as of the date of the swap's expiration or termination.

6. Third-Party Facilitation of Reporting

The NOPR proposed explicit permission for third-party facilitation of data reporting with respect to historical swaps, without removing the reporting responsibility from the appropriate reporting counterparty.

7. Reporting a Swap To a Single SDR

To avoid fragmentation of data for a given historical swap across multiple SDRs, the NOPR provided that all data for a particular historical swap must be reported to the same SDR to which the initial data report concerning the swap is made.

8. Reporting Swaps in an Asset Class Not Accepted by any SDR

As required by section 729 of the Dodd-Frank Act, the NOPR provided that if there were an asset class for which no SDR currently accepted data, registered entities or counterparties required to report concerning historical swaps in such an asset class would be required to report the same data to the Commission at a time and in a form and manner determined by the Commission.

9. Data Standards

The NOPR required reporting counterparties for historical swaps to use the facilities, methods, or data standards provided or required by the SDR to which the counterparty reports swap data.

10. Reporting Errors in Previously Reported Data

Finally, the NOPR required reporting counterparties to report any errors or omissions in reported data, in the same format as the original data report, as soon as technologically practicable after their discovery. Non-reporting counterparties discovering an error or omission would be required to notify the reporting counterparty, who in turn would be required to report them to the SDR.

F. Overview of Comments Received

The Commission received 12 comment letters in response to its proposal. Commission staff also held three public roundtables relating to swap data reporting, on September 14, 2010, January 28, 2011, and June 6, 2011, which provided input from a broad cross-section of industry and private sector experts concerning issues relating to the NOPR. Comments are addressed in the discussion below. Some comments received by the Commission requested further clarification relating to definitions provided in the NOPR, or regarding the application of NOPR provisions in various contexts. Additional or modified definitions included in the final rule are provided for clarification and do not impose new substantive requirements.

II. Part 46 of the Commission's Regulations

New part 46 contains provisions governing swap data recordkeeping and reporting for pre-enactment swaps and transition swaps. Definitions are set forth in § 46.1. Section 46.2 establishes swap recordkeeping requirements for swap counterparties subject to the Commission's jurisdiction. Section 46.3 establishes swap data reporting requirements. Required use of unique identifiers in swap data recordkeeping and reporting for historical swaps is addressed in § 46.4. Determination of which counterparty must report swap data for each swap is established by § 46.5. Third-party facilitation of swap data reporting is addressed by § 46.6. Section 46.7 establishes requirements for reporting all data concerning a swap to a single SDR. Section 46.8 addresses data reporting for swaps in a swap asset class not accepted by any SDR. Section 46.9 addresses voluntary supplemental reporting. Section 46.10 establishes required data standards for swap data reporting. Finally, § 46.11 sets forth requirements for reporting concerning errors and omissions in previously reported swap data.

A. Recordkeeping Requirements

1. Proposed Rule

For historical swaps in existence on or after April 25, 2011, the NOPR imposed limited, specific recordkeeping obligations. Counterparties to such swaps would be required to keep records of an asset class-specific set of specified, minimum primary economic terms. They would also be required to keep records of a confirmation of their swaps if they had that information in their possession on or after April 25, 2011, the date from which public notice of specific recordkeeping requirements for historical swaps was available. In parallel with the proposed rules in part 45 of this chapter, the NOPR also called for counterparties to such swaps to keep copies of any master agreement or credit support agreement pertaining to the swap, if such copies were in the counterparty's possession on or after April 25, 2011. For a historical swap in existence on or after April 25, 2011, that remains in existence after the applicable compliance date, counterparties would also be required to keep for that swap any records required by § 45.2 of this chapter, to the extent that such records are created by or become available to the counterparty on or after the compliance date.

For a pre-enactment swap expired or terminated prior to April 25, 2011, the NOPR called for counterparties to keep the information and documents relating to the terms of the swap that were possessed by the counterparty on or after October 15, 2010, the publication date for the Interim Final Rule For Pre-Enactment Swaps. For a transition swap expired or terminated prior to April 25, 2011, the NOPR called for counterparties to keep the information and documents relating to the terms of the swap that were possessed by the counterparty on or after December 17, 2010, the date of publication of the Interim Final Rule For Transition Swaps. For all such historical swaps, the NOPR provided that counterparties could retain this information in the format in which it existed on or after the relevant Interim Final Rule publication date, or in such other format as the counterparty chooses to retain it.

For all historical swaps, the NOPR called for retention of required records through the life of the swap and for five years following its termination. Records kept by SDs and MSPs would be required to be readily accessible through the life of the swap and for two years following its termination, and retrievable within three business days during the remainder of the retention period. Records kept by non-SD/MSP counterparties would be required to be retrievable within three business days throughout the retention period.

2. Comments Received

a. *Recordkeeping for historical swaps in existence on or after April 25, 2011.* The Coalition of Physical Energy Companies (''COPE'') and the Electric Trade Association (''ETA'') supported limiting the records required for historical swaps in existence on or after April 25, 2011, to minimum PET data and related documentation as proposed.

Both these commenters stated that such data includes commercially relevant terms typically retained by most swap counterparties, although both noted that small entities involved in few swaps might not retain all such data. COPE also stated that requiring a counterparty to keep records of ''all terms'' of any confirmation in its possession is too vague, and that a counterparty could not be sure of meeting a requirement to keep records of any modification of a master or credit support agreement. The International Swaps and Derivatives Association (''ISDA'') stated that the scope and nature of the required minimum PET data, particularly time of trade data for credit swaps, could require some retroactive data creation. The Financial Services Roundtable (''FSR'') noted that its members might not necessarily have all the specified minimum PET data, particularly in the context of mergers or identification of settlement agents for historical currency swaps.

b. *Recordkeeping for historical swaps expired prior to April 25, 2011.* ISDA noted that, for historical swaps expired prior to April 25, 2011, the proposed rule did not require parties to alter the format in which they already retain records, and requested clarification concerning whether this conflicted with the NOPR's general requirement for records to be kept in a form and manner acceptable to the Commission. ISDA argued that reporting counterparties whose current recordkeeping format would not enable making records electronically accessible in real time should not have to meet this accessibility requirement for historical swaps already reported to a repository that registers as an SDR. ISDA further recommended that SDs and MSPs not be required to keep records readily accessible during the first two years of the five years following termination of the swap, but instead that they should be required to make such records accessible within a reasonable time during the five years following termination of the swap. The Working Group of Commercial Energy Firms (''WGCEF'') requested clarification that keeping records in the form in which they are already retained would be acceptable to the Commission for all historical swaps, and requested that its members be required to make records available within three business days throughout the retention period. COPE stated that the requirement for counterparties to keep whatever information and documents they have relating to the terms of a historical swap expired before April 25, 2011, is too vague and overbroad, and asked that the requirement be limited to only the PET data listed in the NOPR Appendix.

c. *Records relating to credit support agreements.* With respect to the NOPR requiring for counterparties to keep records of credit support agreements or ''equivalent documentation relating to the swap,'' WGCEF commented that the term ''equivalent documentation'' was overbroad, and asked for clarification of what constitutes such documentation.

3. Final Rule

a. *Recordkeeping for historical swaps in existence on or after April 25, 2011.* The Commission has considered all of the comments, including the comments stating that most counterparties to historical swaps will have records of the commercially relevant, limited set of minimum PET data called for in the NOPR. It has also considered the comments stating that all counterparties to historical swaps in existence on or after April 25, 2011, and particularly smaller counterparties not involved in large numbers of swaps, might not have records of all such terms for each such swap in which they were a counterparty, and the comments noting the undesirability of retroactive creation or recreation of records concerning historical swaps, particularly records of execution times, which some counterparties may not have. In light of these considerations, and in order to limit burdens on counterparties to the extent consistent with the minimum information the Commission will need concerning historical swaps, the Commission has determined that the final rule will require counterparties to historical swaps in existence on or after April 25, 2011 (the date on which publication of the NOPR provided notice of what records would be required) to keep records of all information specified in the minimum PET data tables included in Appendix 1 which was in their possession on or after April 25, 2011. The NOPR provided that a counterparty to such a swap must keep records of confirmation terms, and of master or credit support agreements and modifications thereto, only if such records are in the possession of the counterparty on or after April 25, 2011. The Commission does not believe this requirement is unclear or unduly burdensome, and has determined that it should be retained in the final rule.

b. *Recordkeeping for historical swaps expired prior to April 25, 2011.* The Commission has considered these comments, and has determined that the final rule should retain the NOPR provisions concerning limited recordkeeping for historical swaps expired prior to April 25, 2011, which required counterparties to keep only the information and documents concerning such swaps that were in their possession on or after the date of the applicable Interim Final Rule. The final rule provides that counterparties may keep these records in any format they choose. The final rule calls for all counterparties to historical swaps expired prior to April 25, 2011 to be able to retrieve such records within five business days throughout the retention period, rather than requiring counterparties to keep the records readily accessible for part of the retention period or to be able to retrieve records within three business days, as provided in the NOPR. This reduced retrievability requirement is designed to mitigate costs for counterparties to historical swaps expired prior to April 25, 2011, while achieving the same regulatory objective.

c. *Records relating to credit support agreements.* The Commission has considered the comment requesting clarification of the meaning of ''equivalent documentation'' in the context of records of credit support agreements for historical swaps. The Commission recognizes that, while some swap counterparties may enter into credit support agreements, others may enter into other agreements that fulfill the same function. The Commission believes that records of such agreements can be important for market supervision and enforcement purposes as well as for prudential supervision. To clarify the intent of the rule in this regard, the final rule eliminates the phrase ''equivalent documentation,'' and addresses records of credit support agreements or other agreements between counterparties having the same function as a credit support agreement.

B. Swap Data Reporting

1. Proposed Rule

a. *Reporting for historical swaps in existence on or after April 25, 2011.* For each pre-enactment or transition swap in existence on or after April 25, 2011, the NOPR called for an initial data report on the applicable compliance date; and, if the swap has not expired or been terminated as of the compliance date, for ongoing reporting of required swap continuation data, as defined in part 45 of this chapter, during the remaining existence of the swap.

The NOPR called for the initial data report for such swaps to include either all of the minimum primary economic terms specified in the NOPR Appendix,

or all of the terms of the confirmation of the swap if those terms include all of the minimum primary economic terms specified in the NOPR Appendix. It also called for the initial data report to include: the LEI of the reporting counterparty and the internal identifier used by the automated systems of the reporting counterparty to identify the non-reporting counterparty;[33] the internal transaction identifier used by the automated systems of the reporting counterparty to identify the swap; and the internal master agreement identifier (if any) used by the automated systems of the reporting counterparty to identify the master agreement governing the swap.

Where the reporting counterparty has reported any of the information required as part of the initial data report to a trade repository prior to the applicable compliance date, if that repository has registered as an SDR by the compliance date the NOPR provided that the reporting counterparty would not be required to report such previously reported information again, and would be required to report only such initial data report information as had not been previously reported.

With respect to continuation data reporting, the NOPR followed the proposed rules for part 45 of this chapter in calling for continuation data reporting to follow the life cycle approach for credit swaps and equity swaps, and the snapshot approach for interest rate swaps, currency swaps, and other commodity swaps. Where the snapshot approach was required, the NOPR called for SD and MSP reporting counterparties to report all continuation data required under part 45, but limited such reporting by non-SD/MSP reporting counterparties to the data elements in the PET data tables in the Appendix to part 46 in cases where they did not possess all continuation data specified in part 45 on the compliance date.

b. *Reporting for historical swaps expired or terminated prior to April 25, 2011.* For historical swaps expired or terminated prior to April 25, 2011, the NOPR proposed only a single data report, made on the applicable compliance date. In the case of a pre-enactment swap, this report would include such information relating to the terms of the swap as was in the reporting counterparty's possession on or after October 14, 2010, the date of publication of the Interim Final Rule for Pre-Enactment Swaps. In the case of a transition swap, this report would include such information relating to the terms of the swap as was in the reporting counterparty's possession on or after December 17, 2010, the date of publication of the Interim Final Rule for Transition Swaps. In both cases, the information would be permitted to be reported via any method or in any format selected by the reporting counterparty.

2. Comments Received

a. *PET data for historical swaps.* Commenters made a number of suggestions with respect to the PET data required to be reported for historical swaps in existence on or after April 25, 2011. Commenters generally viewed the NOPR requirement for reporting a specified, limited set of minimum PET data for historical swaps as reasonable, since they believed the specified PET data elements reflect the commercially relevant terms typically retained by swap counterparties. However, ETA, WGCEF, ISDA, and the Global Foreign Exchange Division (''Global Forex'') recommended that the requirement to report PET data should be limited to the data elements in the minimum PET data tables that are in the possession of the reporting counterparty. They argued that some counterparties, particularly smaller counterparties that may not trade swaps frequently, may not have captured or retained all of the specified data elements.

Three commenters, ISDA, ETA, and WGCEF, requested that the Commission drop the catch-all category of ''any other primary economic term'' verified or matched by the counterparties from the required PET data for historical swaps, arguing that it would be better to define PET data precisely for historical swaps. ETA stated that requiring such information could require extensive text submissions of non-standardized transaction terms, complicating the compilation task of the SDRs.

Both ISDA and Global Forex requested that the Commission not require reporting the time of trade for a historical swap, arguing that in many cases counterparties may not have recorded this information when a historical swap was executed.

ISDA recommended that the PET data tables should not include indications of whether either or both counterparties are SDs or MSPs, arguing that if the SDR already has this information from registration, it would be simpler and more reliable for this indication to be centrally supplied by the SDR. ISDA requested that reporting counterparties be permitted to report the legally binding record already present in an existing trade repository (called a ''gold record'' by some existing trade repositories), in lieu of reporting the required minimum PET data.

b. *Master agreement identifiers.* ISDA, ETA, Global Forex, and WGCEF recommended eliminating the requirement to report master agreement identifiers. Global Forex noted that providing this data would impose a significant burden because such information is not routinely stored on the same systems as the other PET data specified in the tables. WGCEF argued that counterparties are in the best position to make exposure calculations and that the Commission already has the ability to request such information from them. The Coalition of Derivative End-Users (''End-User Coalition'') requested that the Commission explain the use and value of reporting master agreement identifiers.

c. *Continuation data reporting.* ETA requested that non-SD/MSP reporting counterparties not be required to report continuation data, arguing that transactions not involving SDs and MSPs represent only a small portion of the swaps market, and that such a requirement would be unduly burdensome. Alternatively, ETA asked that non-SD/MSP reporting counterparties be permitted to report continuation data for historical energy swaps on a quarterly basis.

d. *Electronic images of swap documentation.* WGCEF disagreed with the Commission's proposed prohibition on the electronic transmission of an image of a document to satisfy the electronic reporting requirements of the proposed rule, arguing that by prohibiting the use of images for reporting, the Commission is effectively requiring market participants to rely on more burdensome, costly, and less efficient means of gathering and submitting required data to SDRs. WGCEF asked the Commission to allow reporting counterparties to submit images of confirmations and other paper swap documentation in lieu of submission of normalized data in data fields.

e. *Reporting of data beyond specified PET data.* WGCEF requested that reporting counterparties be permitted to report data beyond the data required in the proposed rules, including all data pertaining to the swap if that is less burdensome for the reporting counterparty, as long as the data required by the proposed rules is included in the data reported.

f. *Reporting by both counterparties to a swap.* WGCEF asked the Commission to allow both counterparties to a historical swap report the data to an

[33] The NOPR also called for later reporting of the LEI of the non-reporting counterparty, after that LEI was obtained as provided in the NOPR.

SDR if they so choose. WGCEF argued that permitting such dual reporting would avoid the need for counterparties of equal reporting hierarchy status to negotiate which will be the reporting counterparty.[34]

g. *Safe harbor for good faith reporting.* Global Forex asked that counterparties be allowed to meet their reporting and recordkeeping obligations on a best efforts basis without the need to recreate or report data that might have been lost. Global Forex expressed concerned that parties to FX swaps who use the SWIFT Accord system or use paper confirmations to keep records would need to transfer this information to new systems to meet the proposed reporting and retrieval requirements of the rules. It noted that in the time between the enactment of the Dodd-Frank Act and the compliance date for reporting, internal systems may have gone through a number of upgrades or migrations, potentially resulting in loss of information and thus in incomplete data. The Financial Services Roundtable (''FSR'') also requested a safe harbor for institutions that have complied with the previously issued interim-final rules by preserving all information on file, yet do not have full records for pre-enactment swaps. ETA also asked the Commission to create a safe harbor for non-financial entities that keep records for historical swaps consisting of data elements routinely captured prior to enactment of the Dodd-Frank Act, in the format in which they are already kept, and report only such data, whether or not it includes all of the data required by the final rules, without having to gather any required data from paper records.

3. Final Rule

a. *PET data for historical swaps.* The Commission has considered the comments stating that the minimum PET data proposed to be reported for historical swaps reflects the commercially relevant terms typically retained by swap counterparties. It has also considered the comments noting that some counterparties, particularly smaller counterparties that may not trade swaps frequently, may not have captured or retained all of the specified data elements. In order to mitigate costs and burdens for swap counterparties while achieving the same regulatory objective, the Commission has determined that the final rule will require reporting of all of the minimum primary economic terms specified in Appendix 1 that were in the possession of the reporting counterparty on or after April 25, 2011. The final rule will not require reporting of unspecified, additional primary economic terms matched or verified by the counterparties to such swaps. With respect to execution times, the final rule will require reporting the date of execution, and call for reporting the time of execution only if that time was recorded when the trade was executed and is known to the reporting counterparty on or after April 25, 2011.

The Commission believes that the minimum PET data for historical swaps should include indications of whether either or both counterparties are SDs or MSPs, and that this information should be provided to SDRs. SDs and MSPs will register with the Commission, and their status will be determined by Commission rules. SDs and MSP will need to possess this information in order to comply with the final rule, and the Commission believes they will have automated systems capable of recording and reporting it. The Commission has also determined that the final rule will not provide for reporting a legally binding record already present in an existing trade repository in lieu of reporting the required minimum PET data. Both the NOPR and the final rule provide that reporting counterparties need not re-report required PET data already reported to an existing trade repository that registers with the Commission as an SDR prior to the applicable compliance date for reporting.

b. *Master agreement identifiers.* The Commission has considered the comments recommending elimination of the requirement to report master agreement identifiers for historical swaps. In the final swap data reporting rules in part 45 of this chapter, the Commission has already determined that it should not require master agreement reporting in its first swap data reporting final rules. As noted in the *Joint Study on the Feasibility of Mandating Algorithmic Descriptions for Derivatives* released by the CFTC and SEC in April 2011, at present the terms of such agreements are not readily reportable in an electronic format, as market participants have not developed electronic fields representing terms of a master agreement.[35] For these reasons, the Commission has determined that the final rule will not require reporting of master agreement identifiers. The Commission may choose to revisit this issue at some point in the future, if and when market participants and SDRs develop ways to represent the terms of such agreements electronically.

c. *Continuation data reporting.* The Commission believes that continuation data reporting for uncleared historical swaps must be retained to enable regulators to monitor exposures and systemic risk, and to fulfill their market supervision and enforcement responsibilities.[36] Quarterly reports concerning changes to the primary economic terms of such a swap would impede regulators' ability to see a current and accurate picture of the swap market. To take just one example, delaying reporting of a partial novation for a quarter would give regulators an inaccurate picture of what counterparties are exposed to the swap for a substantial period of time. The Commission has therefore determined that the final rule will retain the NOPR requirements with respect to continuation data reporting for uncleared historical swaps.[37]

Continuation data reporting for cleared historical swaps in existence on or after April 25, 2011, is affected by the fact that such swaps will have been cleared prior to the start of reporting on the applicable compliance date. Part 45 requires DCOs to report continuation data, including valuation data, for cleared swaps, and limits continuation data reporting by reporting counterparties to reporting of valuation data by SD or MSP reporting counterparties. For swaps executed after the applicable compliance date, continuation data reporting will be linked to the original swap through use of unique swap identifiers. However, the Interim Final Rules for pre-enactment and transition swaps and the

[34] WGCEF also stated that dual reporting may be necessary if the Commission has not issued a final rule on entity definitions before data reporting begins, since in that event counterparties would be unable to determine which of them has the obligation to report. The compliance dates established in parts 45 and 46 for swap data reporting eliminate this issue, since the initial compliance date will be the later of July 16, 2012 or 60 days after issuance of entity and product definitions.

[35] Commodity Futures Trading Commission and Securities and Exchange Commission, *Joint Study on the Feasibility of Mandating Algorithmic Descriptions for Derivatives,* April 7, 2011, available at *http://www.sec.gov/news/studies/2011/719b-study.pdf.*

[36] The final part 45 rules, which apply to continuation data reporting for uncleared historical swaps, extend and phase in continuation data reporting for non-SD/MSP counterparties in order to reduce burdens to the extent consistent with the purposes of such reporting.

[37] Section 46.3(a)(2) of this final rule provides that ''For each uncleared pre-enactment or transition swap in existence on or after April 25, 2011, throughout the existence of the swap following the compliance date, the reporting counterparty must report all required swap continuation data * * *.'' This means that reporting counterparties for such swaps must report changes to primary economic terms occurring after the applicable compliance date. It does not require reporting of changes occurring after execution of the historical swap but prior to the compliance date.

NOPR took the fundamental approach that the data reported for historical swaps should be the data possessed by those involved in originating such swaps. Neither the Interim Final Rules nor the NOPR placed an obligation on DCOs to report to an SDR or to be able to trace the link between a historical swap submitted for clearing on or after April 25, 2011, and the transactions or positions resulting from novation of such a historical swap to the clearing house.[38] The Commission understands that it therefore could be problematic for a DCO to be able to report valuation data for historical swaps cleared prior to the applicable compliance date. In addition, neither the Interim Final Rules nor the NOPR directly addressed the effect of clearing on the reporting requirements for the swap. In light of these factors, and in order to reduce burdens to the extent consistent with the purposes of the Dodd-Frank Act, the Commission has determined that this final rule regarding swap data reporting for historical swaps will not require reporting of continuation data for cleared historical swaps. This determination is limited to the reporting of cleared historical swaps pursuant to part 46 and has no effect on reporting required under part 45. As noted above, all historical swaps in existence on or after April 25, 2011 that have been accepted for clearing will be reported by the reporting counterparty, and these reports will include an indication that the swap has been accepted for clearing and the identity of the DCO clearing the swap.[39] Under part 46, a DCO will have no duty to make an initial data report for the resulting novated swaps. The Commission plans to further clarify how novated and cleared historical swaps should be reported under the Commission's data reporting rules

d. *Electronic images of swap documentation.* The Commission believes that permitting reporting to be limited to submission of images would prevent regulators from searching, retrieving, aggregating, and manipulating historical swap data in SDRs for essential purposes, including monitoring systemic risk, conducting market oversight and enforcement, and calculating block trade sizes relevant to real time reporting, among others. The NOPR proposed to reduce the reporting burden to the extent possible in this respect, by allowing submission of images to fulfill reporting requirements for historical swaps that expired prior to April 25, 2011. The Commission is adopting the rule as proposed and, in so doing, notes that a reporting counterparty that maintained information concerning a historical swap in paper form could fulfill the final rule electronic reporting requirements by entering the minimum PET data from a paper confirmation into a web interface provided by the SDR.

e. *Reporting of data beyond specified PET data.* With respect to the comment requesting that reporting counterparties be permitted to report data beyond the data required by the final rule, as long as the required data is included in the data reported, the Commission notes that neither the NOPR nor the final rule bars reporting of additional data beyond the minimum required, provided that such additional data is accepted by the SDR to which required swap data is reported. The Commission also notes that it is a business decision of the SDR whether to accept such additional data.

f. *Reporting by both counterparties to a swap.* The Commission has considered the comment asking that the final rule permit voluntary reporting for a historical swap by the non-reporting counterparty. The Commission received a number of comments to the same effect in connection with the swap data reporting rules in part 45 of this chapter.

The Commission determined in part 45 that voluntary supplement reporting is technologically feasible and may have benefits for both data accuracy and counterparty business processes.[40] As noted in part 45, while the Dodd-Frank Act requires swap data reporting by only one counterparty and establishes a hierarchy for choosing the reporting counterparty, it does not prohibit voluntary swap data reporting to an SDR that supplements required reporting. The Commission's final part 49 rules permit counterparties to access to information in SDRs concerning their own swaps, and notes that nothing forbids swap counterparties to use an SDR as a provider of third-party services going beyond acceptance of required swap data reports for regulatory purposes. For these reasons, the final rules in part 45 provide for voluntary supplemental reporting to any SDR by either counterparty of swap data that part 45 does not require that counterparty to report.

The Commission also determined in part 45 that, to avoid double-counting of the same swap due to voluntary supplemental reports, and to ensure that data reported via a voluntary supplemental report (''VSR'') to the same SDR to which required data is reported is integrated into that SDR's record for the swap, each VSR must include minimum VSR information that ensures achievement of these purposes. As provided in part 45, this required VSR information includes: an indication that the report is a VSR; the USI for the swap that has been created as required by this part; the identity of the SDR to which all required creation data and continuation data is reported for the swap, if the VSR is made to a different SDR; the LEI of the counterparty making the VSR; and if applicable, an indication that the VSR is made pursuant to the law of a jurisdiction outside the U.S. To avoid confusion and double-counting, and to ensure that each VSR includes the USI for the swap, part 45 also provides that a VSR may not be made until after the USI for the swap has been created as provided in § 45.5 and transmitted to the counterparty making the VSR.

In light of these comments and considerations, the Commission has determined that the final rules in this part should align with part 45 and permit voluntary supplemental reporting for historical swaps in existence on or after April 25, 2011. The Commission believes, for the reasons noted above, and as provided in part 45, that appropriate safeguards are needed with respect to such VSRs, to avoid confusion and double counting with respect to these swaps. The final rule therefore provides that a VSR concerning a historical swap may not be made until after the initial data report required by part 46 concerning the swap is made. The final rule also provides that a VSR concerning a historical swap must include: an indication that the report is a VSR; the identity of the SDR to which the required initial data report concerning the swap has been made; the LEI of the counterparty making the VSR; and, if applicable, an indication that the VSR is made pursuant to the law of a jurisdiction outside the U.S.

One of the safeguards provided in part 45 is the inclusion in each VSR of the USI for the swap in question. SDRs are required by part 45 to create USIs for swaps with a non-SD/MSP reporting counterparty through what is known as the ''name space'' method, under which the first characters of each USI created by an SDR will consist of a unique code that identifies that SDR, given to the SDR by the Commission during the SDR registration process. The automated systems of SDRs will create an identifier for each historical swap reported in the normal course of SDR operation. Due to the above-mentioned requirements of part 45, SDRs will have the capacity to

[38] Unique swap identifiers will not be available for such swaps.

[39] If further information concerning a cleared historical swap is needed, the Commission will have ability to obtain it through its special call authority.

[40] 77 FR 2136 (January 13, 2012), at 2171.

create SDR identifiers for historical swaps using the name space technique. This would make the SDR identifiers for historical swaps functionally equivalent to USIs. The part 46 NOPR provided that the USI requirements of part 45 would not apply to historical swaps, and the final rule retains this provision. To provide for historical swaps an essential safeguard against confusion and double-counting in the context of VSRs similar to the safeguard provided for swaps reported pursuant to part 45 by USIs, the final part 46 rule requires that each VSR for a historical swap in existence on or after April 25, 2011, must include the SDR identifier assigned to the swap by the automated systems of the SDR to which the required initial data report concerning the swap is made. The Commission strongly encourages all SDRs to use the name space capability they are required to have pursuant to part 45 to create such SDR identifiers using the name space technique, making them functionally equivalent to USIs.[41] This would enhance the safeguard provided by such SDR identifiers.

g. *Safe harbor for good faith reporting.* The Commission has considered the comments which addressed possible safe harbor provisions. As discussed above, the Commission has determined in response to comments that the final rule will only require counterparties to historical swaps in existence on or after April 25, 2011, the publication date of the NOPR, to report specified information in their possession as of that date. The final rule will only require counterparties to historical swaps expired or terminated prior to April 25, 2011, to report whatever information was in their possession as of publication of the relevant Interim Final Rule. The Commission believes this is the appropriate way to address the fundamental concerns raised in these comments, which centered on problems that could be caused by requiring reporting of information not possessed by some counterparties and on the technological burdens involved.

[41] The Commission is mindful in this connection of a comment made by TriOptima in the context of part 45 of this chapter concerning USIs. TriOptima noted that the swap market has a relatively large outstanding stock of transactions, some quite long-dated, and a relatively thin flow of new transactions, and stated that having USIs for new transactions only would result in a long transition period where there are live contracts both with and without USIs, something TriOptima stated would be problematic from a technology perspective. TriOptima recommended the creation of USIs via the name-space technique as the best way to resolve the issue.

C. Unique Identifiers

1. Proposed Rule

The NOPR called for the initial data report for each historical swap in existence on or after April 25, 2011, to include the legal entity identifier (''LEI''),[42] as provided in part 45 of this chapter, of the reporting counterparty, as well as the reporting counterparty's internal system identifiers for the non-reporting counterparty and the particular swap transaction in question. The NOPR proposed giving the non-reporting counterparty for each such historical swap an additional 180 days after the applicable compliance date to obtain an LEI. Once this LEI was obtained, the NOPR called for it to be provided to the reporting counterparty and reported by the reporting counterparty to the SDR. After LEIs were obtained for either counterparty, the NOPR proposed requiring the counterparty identified by an LEI and the SDR to to comply with the LEI requirements of part 45 of this chapter with respect to LEIs. The NOPR provided that the LEI requirements of parts 45 and 46 would not apply to historical swaps expired or terminated prior to April 25, 2011. The NOPR proposed that the unique swap identifier and unique product identifier requirements of part 45 of this chapter would not apply to historical swaps.

2. Comments Received

a. *Obtaining LEIs by the compliance date.* The End-User Coalition, ETA, and ISDA raised concerns regarding whether counterparties will be able to obtain LEIs by the compliance date. ISDA commented that the requirement for reporting an LEI for each counterparty would require finalization of parts 45 and 46 in advance of the compliance date to allow the LEI system to be built. In the event that LEIs are not available by the applicable compliance date, WGCEF asked that the final rule LEI provisions not require re-reporting a historical swap in order to include LEIs in the data for such a swap, but instead permit submission of a cross-referenced table of counterparties' internal counterparty identifiers matched with the new LEIs.

b. *Non-SD/MSPs and LEIs.* ETA asked that non-SD/MSP counterparties be placed on a compliance schedule separate from SDs and MSPs to allow time for entities to develop and implement the requisite systems and procedures to input and report identifiers. The End-User Coalition asked that non-SD/MSP counterparties be given at least 18 months after the final rule is issued to obtain LEIs, stating that a potential ''logistical traffic jam'' of entities seeking LEIs, as well as the currently undefined process for obtaining the identifiers, could make obtaining LEIs difficult for non-SD/MSP counterparties.

[42] The NOPRs for both parts 45 and 46 of this chapter used the term ''unique counterparty identifier'' in this context. As explained in the final part 45 rule, in response to comments the Commission has decided to use the term ''legal entity identifier,'' which refers to the same identifier and is in common international use, in order to prevent confusion.

3. Final Rule

a. *Obtaining LEIs by the compliance date.* The Commission has determined that the final rule should maintain the NOPR provisions requiring use of LEIs in data reporting for historical swaps in existence on or after April 25, 2011. LEIs will be a crucial tool for enabling the Commission and other regulators to search, aggregate, and use the swap data reported to SDRs to fulfill the purposes of the Dodd-Frank Act. Both the NOPR and the final rule address concerns regarding whether a Commission-approved LEI will be available by the compliance date by applying the provisions of part 45 of this chapter, including the provision for use of a substitute counterparty identifier in the event that an LEI is not available on the compliance date, until a Commission-approved LEI is available.

b. *Non-SD/MSPs and LEIs.* The Commission has determined that the final rule should maintain the NOPR provisions concerning LEIs for non-SD/MSP counterparties. The applicable compliance date set in the final rule for non-SD/MSP counterparties is 180 days after the compliance date for SDs and MSPs, and the final rule provides an additional 180 days after the applicable compliance date for non-reporting counterparties to obtain an LEI. The Commission believe this appropriately addresses commenters' concerns relating to obtaining LEIs for non-SD/MSP counterparties.

c. *USIs and UPIs.* The final rule retains the NOPR provision stating that the USI and UPI requirements of part 45 do not apply to historical swaps.

D. Determination of the Reporting Counterparty

1. Proposed Rule

The NOPR provided that determination of which counterparty is the reporting counterparty for a historical swap would be made in the same way provided in part 45 of this chapter. Counterparty reporting would follow the hierarchy outlined in the

statute, giving SDs or MSPs the duty to report when possible, and limiting reporting by non-SD/MSP counterparties to situations where there is no SD or MSP counterparty. Where both counterparties have the same hierarchical status, the NOPR required them to agree as one term of their swap which of them is to report. Where only one counterparty to a historical swap is a U.S. person, the NOPR called for that counterparty to be the reporting counterparty. For historical swaps in existence as of the applicable compliance date, the NOPR called for determination of the reporting counterparty to be made by applying the above provisions to the current counterparties to the swap as of the compliance date. For historical swaps for which reporting is required, but which have terminated prior to the compliance date, the NOPR called for determination of the reporting counterparty to be made as of the date of the swap's expiration or termination.

2. Comments Received

a. *Non-agreement by counterparties at the same hierarchical level.* WGCEF, Global Forex, ISDA, ETA, and Encana Marketing (''Encana'') each raised the issue of how to assign the reporting obligation in cases where counterparties cannot come to an agreement. ETA recommended that the Commission clarify that the parties are under no obligation to renegotiate the transaction to provide for additional consideration, and should structure its rules to assume that the transaction data will be reported by one or both counterparties, or neither. WGCEF recommended allowing both counterparties to report if they cannot agree. ISDA stated that in cases where the hierarchy does not resolve the issue, the final rules should designate the calculation agent as the reporting counterparty. Global Forex recommended not requiring reporting of historical swaps that expire prior to the compliance date, to reduce the number of instances where counterparties would need to agree on which of them should report.

b. *Date for determining counterparty reporting obligations.* For historical swaps which must be reported but which have expired prior to the compliance date, the proposed regulations called for determining the reporting counterparty by applying the statutory reporting hierarchy to the parties who were counterparties to the swap when it expired. ISDA noted that it may be difficult or impossible to determine whether a counterparty was an SD or MSP as of an expiration that occurred before final SD or MSP definitions and a registration system are put in place, and recommended that the reporting counterparty for such swaps be determined as of the compliance date.

c. *Non-U.S. counterparties.* The End-User Coalition, ETA, WGCEF and ISDA recommended that a foreign SD or MSP should be the reporting counterparty for a historical swap in which the other counterparty is a U.S. non-SD/MSP. ISDA argued that requiring a non-SD/MSP to report in circumstances where the counterparty is a foreign SD could dissuade U.S. parties from engaging in transactions with foreign SDs. In contrast, Encana supported the proposed rule provision requiring the U.S. person to be the reporting counterparty in circumstances where only one of the parties is a U.S. person.

d. *Historical swaps platform-executed or cleared prior to the compliance date.* ETA recommended that the final regulations should provide that, if a reportable historical swap between non-SD/MSP counterparties was executed prior to the compliance date on a platform later registered as a SEF or DCM, or was cleared prior to the compliance date by a DCO, the SEF, DCM, or DCO should be required to make the initial data report for the swap, in lieu of a report by either non-SD/MSP counterparty.

3. Final Rule

a. *Non-agreement by counterparties at the same hierarchical level.* The Commission has determined that the final rule should substantially maintain the NOPR provisions concerning determination of the reporting counterparty. The Commission believes that requiring swap counterparties to agree on which of them is the reporting counterparty ''as one term of their swap transaction'' could require potentially problematic renegotiation of a pre-existing swap agreement. Accordingly, the final regulations remove the phrase ''as one term of their swap transaction'' from § 46.5. The final rule requires counterparties to a historical swap at the same hierarchical level to agree prior to the applicable compliance date on which of them is the reporting counterparty, but does not require them to do so as a term of the swap.[43] The final rule follows part 45 of this chapter in providing an additional decision factor for determining the reporting counterparty for a swap between two non-SD/MSP counterparties: in such situations, if only one of the two non-SD/MSP counterparties is a financial entity as defined in the Dodd-Frank Act, the financial entity will be the reporting counterparty. The final rule addresses the concern raised in one comment about the difficulty of determining the reporting counterparty in the absence of definitions of swap dealer and major swap participant, by providing that the compliance dates on which historical swaps must be reported will come no less than 60 days after publication of such definitions.

b. *Date for determining counterparty reporting obligations.* The Commission believes that it is prudent to determine the reporting counterparty for a historical swap as of the applicable compliance date where possible. The final rule provides that for historical swaps in existence as of the applicable compliance date, the reporting counterparty shall be determined by applying § 46.5 to the current counterparties as of that date. For historical swaps expired or terminated prior to the compliance date, the final rule requires determination of the reporting counterparty by applying § 46.5 to the counterparties to the swap as of the date of its expiration or termination (except for determination of a counterparty's status as an SD or MSP, which shall be determined as of the compliance date).

c. *Non-U.S. counterparties.* The Commission has considered the comments recommending that a non-U.S. SD or MSP in a historical swap with a U.S. counterparty at a lower hierarchical level should be the reporting counterparty despite its status as a non-U.S. person. The Commission received a large number of similar comments in connection with its part 45 rules. It determined in part 45 in response to those comments that, because non-U.S. SDs and MSPs will be required to register with the Commission in this connection, the Commission will have sufficient oversight and enforcement authority with respect to such counterparties.[44] The Commission therefore determined in part 45 that, with a single exception, the determination of the reporting counterparty in situations where only one counterparty is a U.S. person should be made by applying the normal counterparty determination procedure. In cases where both counterparties are non-SD/MSP counterparties and only one counterparty is a U.S. person, part 45 requires the U.S. person to be the reporting counterparty, which is

[43] The Commission expects to provide interpretative guidance concerning determination of the reporting counterparty in situations where a historical swap was executed and submitted for clearing via a platform on which the counterparties to the swap do not know each other's identity.

[44] 77 FR 22136 (January 13, 2012), at 2167.

necessary in such situations because the non-U.S. non-SD/MSP counterparty will not be required to register with the Commission. Where neither counterparty to a swap executed on a SEF or DCM, otherwise executed in the U.S., or cleared on a DCO is a U.S. person, part 45 applies the same hierarchical selection criteria as for other swaps. In response to the comments on this subject made in connection with both parts 45 and 46, and for the same reasons, the Commission has determined that this final rule will follow part 45, as set forth above, with respect to determination of the reporting counterparty in this context.

d. *Historical swaps platform-executed or cleared prior to the compliance date.* The NOPR did not call for platform reporting of PET data or DCO reporting of confirmation data with respect to historical swaps, but mandated reporting by the reporting counterparty. The Commission has determined that the final rule should maintain these NOPR provisions. Counterparties to historical swaps in existence on or after April 25, 2011, were put on notice by the NOPR to retain records of the minimum PET data that will be required to be reported for such swaps, and as discussed above, the final rule limits required reporting for such swaps to the specified minimum PET data in the possession of the reporting counterparty as of April 25, 2011. Such reporting by the reporting counterparty should therefore be practicable. The Commission believes it may be impracticable to require execution facilities or DCOs to report data for swaps executed or cleared by them at a time when they were neither required by a rule nor on notice pursuant to a notice of proposed rulemaking to retain data for the purpose of making such a report.[45]

E. Third-Party Facilitation of Data Reporting

1. Proposed Rule

The NOPR proposed explicit permission for third-party facilitation of data reporting with respect to historical swaps, without removing the reporting responsibility from the appropriate reporting counterparty.

2. Comments Received

The Commission received no comments concerning this NOPR provision.

3. Final Rule

The Commission has determined that the final rule should maintain this NOPR provision as proposed.

F. Reporting to a Single Swap Data Repository

1. Proposed Rule

To avoid fragmentation of data for a given historical swap across multiple SDRs, the NOPR provided that all data for a particular historical swap must be reported to the same SDR to which the initial data report concerning the swap is made.

2. Comments Received

The Commission received no comments concerning this NOPR provision.

3. Final Rule

The Commission has determined that the final rule should maintain this NOPR provision as proposed.

G. Data Reporting for Swaps in a Swap Asset Class Not Accepted by Any Swap Data Repository

1. Proposed Rule

As required by section 729 of the Dodd-Frank Act, the NOPR provided that if there were an asset class for which no SDR currently accepted data, registered entities or counterparties required to report concerning historical swaps in such an asset class would be required to report the same data to the Commission at a time and in a form and manner determined by the Commission.

2. Comments Received

The Commission received no comments concerning this NOPR provision.

3. Final Rule

The Commission determined in part 45 that, in this circumstance, data should be reported at times announced by the Commission and in an electronic format acceptable to the Commission. Part 45 delegates to the Commission's Chief Information Officer the authority to determine such times and formats. Since the part 46 NOPR called for reporting in this context at a time and in a form and manner determined by the Commission, the final rule must specify the Commission's requirements in these respects. The Commission has determined that, for historical swaps in existence on or after April 25, 2011, the final rule should provide, in parallel with part 45, that in this circumstance, data must be reported at times announced by the Commission and in an electronic format acceptable to the Commission. The final rule delegates to the Commission's Chief Information Officer, also in parallel with part 45, the authority to determine such times, and to determine with respect to historical swaps in existence on or after April 25, 2011, the electronic format for making the report. For historical swaps expired or terminated as of that date, the final rule permits reporting in any format chosen by the reporting counterparty.

H. Required Data Standards

1. Proposed Rule

The NOPR required reporting counterparties for historical swaps to use the facilities, methods, or data standards provided or required by the SDR to which the counterparty reports swap data.

2. Comments Received

The Commission received no comments concerning this NOPR provision.

3. Final Rule

The Commission has determined that the final rule should maintain these NOPR provisions as proposed.

I. Reporting of Errors and Omissions in Previously Reported Data

1. Proposed Rule

The NOPR required reporting counterparties to report any errors or omissions in reported data, in the same format as the original data report, as soon as technologically practicable after their discovery. Non-reporting counterparties discovering an error or omission would be required to notify the reporting counterparty, who in turn would be required to report them to the SDR.

2. Comments Received

The Commission received no comments concerning this NOPR provision.

3. Final Rule

The Commission has determined that the final rule should maintain these NOPR provisions as proposed.

J. Compliance Dates

1. Proposed Rule

The proposed rules require swap data reporting for historical swaps to commence on the compliance date specified in the Commission's final swap data recordkeeping and reporting regulations in part 45.

2. Comments Received

a. *Compliance date on which reporting begins.* Due to the dependence

[45] As discussed above at pages 31–33, the Commission plans to further clarify how novated and cleared historical swaps should be reported under the Commission's data reporting rules.

of part 46 on other rulemakings, especially final rules defining ''swap,'' ''swap dealer,'' and ''major swap participant,'' several commenters requested that Part 46 compliance and implementation take place on a staggered basis that takes the need for such definitions into account. Commenters stated that differences between asset classes with respect to both existing automation and existing data normalization are significant and should also be taken into account. Commenters made several specific recommendations concerning compliance dates and phasing also made by them in connection with part 45, which the Commission has already considered and addressed in part 45, and will not address again here.

b. *Using the same compliance dates for parts 45 and 46.* WGCEF stated that the compliance date on which the initial data report for historical swaps must be made should not be the same compliance date provided for the beginning of swap data reporting pursuant to part 45, in order to avoid subjecting SDRs to a logjam of data on that date, and advocated setting the part 46 compliance date for historical swap data reporting somewhat earlier than the part 45 compliance date.

3. Final Rule

a. *Compliance date on which reporting begins.* The Commission believes that the compliance dates for swap data reporting under part 46 should take into account the need for Commission definitions of ''swap,'' ''swap dealer,'' and ''major swap participant.'' The Commission also believes that the compliance dates for swap data reporting should take both asset class differences and the needs of non-SD/MSP reporting counterparties into account. As set forth in part 45, the compliance dates established in part 45 phase in compliance dates in both these respects. Accordingly, the Commission has determined that this final rule will maintain the NOPR provision setting the same compliance dates for both parts 45 and 46. The Commission believes that these compliance dates strike the appropriate balance between the need for swaps data by the Commission charged with achieving the purposes of the Dodd-Frank Act and potential costs and burdens that may be imposed on market participants.

b. *Using the same compliance dates for parts 45 and 46.* Since automated systems for swap data reporting must be developed, tested, and used for reporting with respect to both historical and new swaps, the Commission believes that setting the same compliance dates for data reporting in both part 45 and part 46, as provided in the proposed rules, remains appropriate. However, the Commission recognizes that having some initial data reporting for historical swaps pursuant to part 46 precede the start of data reporting for new swaps pursuant to part 45 could have the practical benefit of reducing the volume of data SDRs would have to receive on a single day if data reporting for all historical swaps as well as new swaps began on the same date. In light of comments and these considerations, the final rule will permit voluntary initial data reporting for historical swaps prior to the applicable compliance date, if a registered SDR is prepared to accept the initial data report required by this part prior to the applicable compliance date. Where such a voluntary early initial data report is made, continuation data reporting for the swap in question will still be required to commence as of the applicable compliance date.

III. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601 *et seq.,* requires that agencies consider the impact of their rules on ''small entities.'' As provided in the NOPR, this part will have a direct effect on SDs, MSPs, and non-SD/MSP counterparties who are counterparties to one or more pre-enactment or transition swaps and subject to the Commission's jurisdiction.

As stated in the NOPR,[46] the Commission proposed that certain entities for which the Commission had not previously made a determination for RFA purposes—namely SDs, and MSPs—should not be considered to be small entities, for reasons set forth in the NOPR.

As noted in the NOPR, this part requires limited swap data reporting by a non-SD/MSP counterparty regarding pre-enactment and transition swaps only with respect to the swaps in which neither counterparty is an SD or MSP. With respect to such swaps, which represent a minority of swap transactions, only one of the swap non-SD/MSP counterparties will be required to report—the counterparty designated as the reporting counterparty. In addition, the Commission has determined that the final rule provides that for swaps between non-SD/MSP counterparties where only one counterparty is a ''financial entity'' as defined in CEA section 2(h)(7)(C), the financial entity shall be the reporting counterparty. As the NOPR noted, most end users and other non-SD/MSP counterparties who are regulated by the Employee Retirement Income Security Act of 1974 (''ERISA''), such as pension funds, which are among the most active participants in the swap market, are prohibited from transacting directly with other ERISA-regulated participants.[47]

With respect to SDs, the Commission previously has determined that Futures Commission Merchants (''FCMs'') should not be considered to be small entities for purposes of the RFA.[48] Like FCMs, SDs will be subject to minimum capital and margin requirements and are expected to comprise the largest global financial firms.[49] Similarly, with respect to MSPs, the Commission has previously determined that large traders are not ''small entities'' for RFA purposes.[50] Like large traders, MSPs will maintain substantial positions, creating substantial counterparty exposure that could have serious adverse effects on the financial stability of the U.S. banking system or financial markets.

For these reasons, the Commission does not believe that the regulations would have a significant economic impact on a substantial number of small entities. The Commission believes these provisions of the final rule reduce the economic impact on any non-SD/MSP counterparties that may be considered to be small entities under the RFA.

Due to the operation of certain provisions of the CEA and the final rule, non-SD/MSP counterparties who may be considered small entities for RFA purposes are never required to report any swap creation data. Under the CEA, a non-SD/MSP counterparty is required to transact on a SEF or DCM unless that non-SD/MSP is an Eligible Contract Participant (''ECP'').[51] The Commission

[46] 76 FR 22833.

[47] 29 U.S.C. 1106.

[48] 47 FR 18618 (Apr. 30, 1982).

[49] Additionally, the Commission is required to exempt from designation entities that engage in a de minimis level of swaps. *Id.* at 18619.

[50] 47 FR at 18620.

[51] CEA section 2(e) provides that ''It shall be unlawful for any person, other than an eligible contract participant, to enter into a swap unless the swap is entered into on, or subject to the rules of, a board of trade designated as a contract market under section 5.'' Congress created the ECP category in the Commodity Futures Modernization Act in 2000, to include individuals and entities that Congress determined to be sufficiently sophisticated in financial matters that they should be permitted to trade over-the-counter swaps without the protection of federal regulation. *See, e.g.,* ''Report of the President's Working Group on Financial Markets'' (Nov. 1999) at 16 (recommending that ''sophisticated counterparties that use OTC derivatives simply do not require the

Continued

has previously determined that ECPs are not ''small entities'' for RFA purposes.[52] For all swaps executed on a SEF or DCM, the final rule requires the SEF or DCM to report all required swap creation data. Therefore, no ''small entities'' for RFA purposes are required to report any swap creation data under the final rule.

In the NOPR, the Chairman, on behalf of the Commission, certified that the rulemaking would not have a significant economic effect on a substantial number of small entities. Nonetheless, the Commission specifically requested comment on the impact these proposed rules may have on small entities. The Commission received one comment on its RFA statement, from the Electric Coalition, stating that the vast majority of members of the National Rural Electric Cooperative Association and the American Public Power Association are considered small entities for purposes of the RFA. The Electric Coalition recommended that the Commission should consider the overall impact of its Dodd-Frank Act rules on nonfinancial entities, including small entities, and conduct a comprehensive analysis under the RFA.

In response to this comment, and to other comments by non-SD/MSP counterparties, the Commission has adjusted the final reporting regime to reduce burdens and costs for non-SD/MSP counterparties in a variety of ways, as set forth in detail in the discussion above concerning §§ 45.3 and 45.4 of the final rule. The Commission notes that the commenter did not dispute the reasons for the Commission's conclusion that this part does not have a significant impact on a substantial number of small entities. For these reasons, and for the reasons stated above and in the NOPR, the Commission continues to believe that this part will not have a significant impact on a substantial number of small entities. Therefore, the Chairman, on behalf of the Commission, hereby certifies, pursuant to 5 U.S.C. 605(b), that this part as finally adopted will not have a significant economic impact on a substantial number of small entities.

same protections under the CEA as those required by retail investors''). In the Dodd-Frank Act, Congress made two changes to the statutory ECP definition, both of which increased the thresholds to qualify as an ECP, making it harder for some entities and individuals to qualify. *Compare* CEA section 1a(12), 7 U.S.C. 1a(12) (2009), with §§ 721(a)(1) and (9) of the Dodd-Frank Act, respectively redesignating section 1a(12) as section 1a(18) and increasing thresholds for certain categories of ECP.

[52] 66 FR 20740, 20743, Apr. 25, 2001.

B. Paperwork Reduction Act

1. Introduction

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 issued by the Office of Management and Budget (''OMB''). Provisions of Commission Regulations 46.2, 46.3, 46.4, 45.8, 45.10 and 45.11 result in information collection requirements within the meaning of the Paperwork Reduction Act (''PRA'').[53] The Commission submitted the NOPR and supporting documentation to OMB for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The Commission requested that OMB approve, and assign a new control number for, the collections of information covered by the NOPR.

The title for the proposed collection of information under part 46 is ''Swap Data Recordkeeping and Reporting: Pre-Enactment and Transition Swaps.'' The OMB has assigned this collection control number 3038–0089. The responses to this new collection of information are mandatory. The Commission will protect proprietary information according to the Freedom of Information Act and 17 CFR part 145, ''Commission Records and Information.'' In addition, section 8(a)(1) of the Act strictly prohibits the Commission, unless specifically authorized by the Act, from making public ''data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.'' The Commission also is required to protect certain information contained in a government system of records according to the Privacy Act of 1974, 5 U.S.C. 552a.

2. Need for Information Collection

To the extent that the recordkeeping and reporting requirements in this rulemaking overlap with the requirements of other rulemakings for which the Commission prepared and submitted an information collection request to OMB, the burdens associated with those requirements are not being accounted for in the information collection request for this rulemaking, to avoid unnecessary duplication of information collection burdens.

The collection of information under these regulations is necessary to implement certain provisions of the CEA, as amended by the Dodd-Frank Act. Specifically, it is essential to reducing risk, achieve market transparency, and for market supervision purposes for which the Dodd-Frank Act was enacted. Such data will be needed to give the Commission a complete picture of the swap market. Data concerning historical swaps also is necessary for the Commission to prepare the semi-annual reports it is required to provide to Congress regarding the swap market.

[53] 44 U.S.C. 3301 *et. seq.*

3. Comment on Proposed Information Collection

The Commission invited the public and other federal agencies to comment on any aspect of the reporting and recordkeeping burdens estimates. There was one comment from Encana relating to the collection of information estimates. Encana commented that the 10 hour one-time burden estimate in the proposal for non-reporting entities was too low. The Commission addresses this and other related comments as follows.

Under the final rules, the Commission has revised its estimates provided for in the proposal for reporting entities and persons who will provide information under sections 46.2, 46.3, 46.4, 45.8, 45.10 and 45.11 of this part. The information provided under each regulation is set forth below, together with burden estimates that were calculated, through research and through consultation with the Commission's technology staff, using wage rate estimates based on salary information for the securities industry compiled by the Securities Industry and Financial Markets Association (''SIFMA'').[54]

[54] These wage estimates are derived from an industry-wide survey of participants and thus reflect an average across entities; the Commission notes that the actual costs for any individual company or sector may vary from the average. The Commission estimated the dollar costs of hourly burdens for each type of professional using the following calculations:

(1) [(2009 salary + bonus) * (salary growth per professional type, 2009–2010)] = Estimated 2010 total annual compensation. The most recent data provided by the SIFMA report describe the 2009 total compensation (salary + bonus) by professional type, the growth in base salary from 2009 to 2010 for each professional type, and the 2010 base salary for each professional type; thus, the Commission estimated the 2010 total compensation for each professional type, but, in the absence of similarly granular data on salary growth or compensation from 2010 to 2011 and beyond, did not estimate dollar costs beyond 2010.

(2) [(Estimated 2010 total annual compensation)/(1,800 annual work hours)] = Hourly wage per professional type.]

(3) [Hourly wage) * (Adjustment factor for overhead and other benefits, which the Commission has estimated to be 1.3)] = Adjusted hourly wage per professional type.]

(4) [(Adjusted hourly wage) * (Estimated hour burden for compliance)] = Dollar cost of compliance for each hour burden estimate per professional type.]

4. Recordkeeping Burdens

Section 46.2. Under § 46.2, counterparties to a swap unexpired on or after April 25, 2011 are required to keep records containing minimum primary economic terms data, and (if they have them) confirmation documentation, master agreements, credit support or similar agreements, and any records required by § 45.2 if the swap remains unexpired after the compliance date. The final rules allow counterparties to keep either paper or electronic records as long as they are reportable but require swap dealers and major swap participants to keep electronic records unless their paper records were ''originally created and exclusively maintained'' in paper form.

For historical swaps that expired prior to April 25, 2011, the final rules require that each counterparty ''retain the information and documents relating to the terms of the transaction that were possessed by the counterparty on or after the publication date of the relevant Interim Final Rule (October 14, 2010 for pre-enactment swaps and December 17, 2010 for transition swaps). They do not require counterparties to create or confirm any data that they possessed prior to October 14, 2010 for pre-enactment swaps or December 17, 2010 for transition swaps. The Commission has not calculated the burden for this requirement to the extent the Commission has previously calculated such burden in the PRA analyses for the Interim Final Rules covering ''pre-enactment swaps'' and ''transition swaps.''

For historical swaps still in existence on or after April 25, 2011, the final rules require that records kept by swap dealers or major swap participants be readily accessible via real time electronic access throughout the life of the swap and for two years following termination. Following this two year-post expiration period, the final rules require that records be retrievable within three business days ''through the remainder of the period following final termination of the swap during which it is required to be kept.'' For records maintained by non-SD/MSP counterparties the final rules require that they be retrievable within five business days ''through the remainder of the period following final termination of the swap during which it is required to be kept.'' The Commission has calculated the recordkeeping burden for the time period beginning on or after April 25, 2011, and ending on the compliance date; the burden occurring after the compliance date having been already considered in the Commission's final swap data rules.[55]

The Commission believes that some percentage of the estimated 30,000 non-SD/MSP counterparties who would be subject to the recordkeeping requirements of section 46.2 would contract with third-party service providers to fulfill these requirements, and would therefore pay some fee to such providers in lieu of incurring the Commission's estimated costs of reporting. The identity of such third parties, the composition of the marketplace for third party services, and the costs to third parties to provide recordkeeping services given the economies of scale and scope they may realize in providing those services are all presently unknowable. Therefore, the Commission does not believe it is feasible to quantify the fees charged by third parties to non-SD/MSPs at the present time, but believes that they will likely vary with the volume of records to be retained. The remaining non-SD/MSP counterparties would elect to perform these functions themselves and incur the costs enumerated below.[56] The Commission notes that this final rule allows non-SD/MSP counterparties to retain records in either an electronic or paper form, which will facilitate recordkeeping for less technologically resourced counterparties, who will likely choose to retain the records in the form in which they currently exist. For historical swaps still in existence on or after April 25, 2011, non-SD/MSP counterparties will already be required to normalize the data for those swaps to the minimum PET data tables, and the burdens associated with this task are addressed in the discussion of reporting burdens below; however, the recordkeeping requirements of section 46.2 do not require non-SD/MSP counterparties to retroactively revise or recreate data for those swaps. Non-SD/MSP counterparties will therefore not be required to manipulate, move, or update swap records in any way to comply with the recordkeeping requirements of the final rule; accordingly, the Commission believes that the recordkeeping requirements of this final rule will not impose costs on non-SD/MSP counterparties.[57]

With respect to SDs and MSPs (an estimated 125 entities or persons),[58] which will have higher levels of swap recording activity[59] than non-SD/MSP counterparties, the Commission estimates that this requirement would impose an initial non-recurring burden of 335 hours per SD/MSP reporting counterparty at a cost of $22,172, equating to an aggregate estimated one-time burden of 41,875 hours at a cost of $2,771,500 for all SD/MSP reporting counterparties. The Commission also estimates that § 46.2 will result in retrieval costs for swap counterparties that do not currently have the ability to retrieve records within the required timeframe. The Commission expects that this requirement will present costs to registered entities and swap counterparties in the form of non-recurring investments in technological systems and personnel associated with establishing data retrieval processes, and recurring expenses associated with the actual retrieval of swap data records. These same costs (including non-recurring investments in technological

The sum of each of these calculations for all professional types involved in compliance with a given element of the final rule represents the total cost for each counterparty, reporting counterparty, SD, MSP, SEF, DCM, or SDR, as applicable to that element of the final rule.

[55] These are one-time recordkeeping costs, which necessarily take place in the period prior to the compliance date; therefore, the applicable recordkeeping burden applies during the period between the publication date and compliance date of Part 46, rather than the one year noted in the proposal.

[56] The proposed rule estimated an average one-time per-entity burden of 40 hours (for SD/MSP reporting counterparties) and 10 hours (for non-SD/MSP counterparties). These estimates have been revised following additional research by OCE staff and consultation with staff in the Commission's Office of Data and Technology.

[57] The Commission estimates that the percentage of non-SD/MSP counterparties that will contract with a third-party service provider to perform this function will likely be very low, given that the Commission has estimated that the recordkeeping requirements of section 46.2 would not impose costs on non-SD/MSP counterparties, which would not be required to manipulate, move, or update records, and would therefore not present a burden that could be more efficiently satisfied by contracting with a third-party service provider. Nevertheless, the Commission recognizes that some non-SD/MSP counterparties may contract with third-party service providers for a variety of regulatory compliance services, and may elect to engage a third-party service provider to manage its historical swap records, either as an individual service to satisfy the recordkeeping requirements of section 46.2, as part of a broader set of data management services for regulatory compliance, or to otherwise facilitate its own internal recordkeeping.

[58] The Commission previously estimated that as many as 250 SDs and 50 MSPs would register. After recently receiving additional information, particularly a letter from Thomas Sexton, NFA Senior Vice President and General Counsel to Gary Barnett, Director of the Division of Swap Dealer and Intermediary Oversight, the Commission is revising its estimate downward. Accordingly, the Commission now believes that approximately 125 Swaps Entities, including only a handful of MSPs, will register with the Commission as SDs or MSPs.

[59] For purposes of this Paperwork Reduction Act analysis, the Commission estimates that ''high activity'' entities or persons are those who process or enter into hundreds or thousands of swaps per week that are subject to the jurisdiction of the Commission. Low activity users would be those who process or enter into substantially fewer than the high activity users.

systems and personnel associated with establishing data storage and retrieval systems, and recurring expenses associated with data storage and retrieval, and maintenance of data storage systems), however, are required to comply with the requirements of part 45. Accordingly, they are not incremental to, and inappropriate for, consideration in this rulemaking.[60]

5. Reporting Burdens

Sections 46.3, 46.4, 46.8, 46.10 and 46.11. Pursuant to §§ 46.3 and 46.4, each historical swap in existence on or after April 25, 2011 will be reported to an SDR electronically [on or before the applicable compliance date], or to the Commission if no SDR accepts such a swap under § 46.8. The initial data report must contain all of the minimum primary economic terms data listed in Appendix 1 that were in the possession of the reporting counterparty on or after April 25, 2011, the legal entity identifier of the reporting counterparty, the internal counterparty 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. For each such swap that remains in existence after the compliance date, the reporting counterparty must report swap continuation data as provided in part 45 of this chapter, with the exception that such reports need only include changes to the minimum primary economic terms listed in Appendix 1 to this part, rather than changes to the larger list of primary economic terms provided in part 45. Continuation data must be reported to the same SDR which received the initial data report. In parallel with part 45 of this chapter, the final rule provides that multi-asset historical swaps must be reported to a single SDR that accepts swaps in the asset class that is treated as the primary asset class involved in the swap by the reporting counterparty; and provides that mixed historical swaps must be reported to an SDR or security-based SDR registered with both the Commission and the SEC.

For historical swaps that expired prior to April 25, 2011, the final rules require that counterparties report to a SDR on the compliance date such information relating to the terms of the transaction as was in the counterparty's possession on or after the publication date of the relevant Interim Final Rule (October 14, 2010 for pre-enactment swaps and December 17, 2010 in the case of transition swaps.) This information may be reported via any method selected by the reporting counterparty. The Commission has not calculated the burden for this requirement to the extent the Commission has previously calculated such burden in the PRA analyses for the Interim Final Rule covering ''pre-enactment swaps'' and ''transition swaps.''

For historical swaps still in existence on or after April 25, 2011, the Commission anticipates that the reporting required by §§ 46.3 and 46.4 will to a significant extent be automatically completed by electronic computer systems; the following burden hours are calculated based on the annual burden hours necessary to oversee, maintain, and utilize the reporting functionality. SDs and MSPs (an estimated 125 entities or persons) are anticipated to have high levels of reporting activity; the Commission estimates that their average one-time burden may be approximately 285 hours per MSP or SD reporting counterparty at a cost of $20,169,[61] equating to an estimated one-time aggregate burden of 35,625 hours at a cost of $2,521,125 for all SD/MSP reporting counterparties. The Commission believes that this is a reasonable assumption due to the volume of swap transactions that will be processed or entered into by these entities, the varied nature of the information required to be reported, and the frequency with which information may be required to be reported.[62]

Non-SD/MSP counterparties who would be required to report—which presently would include an estimated 1,000 entities [63]—are anticipated to have lower levels of activity with respect to reporting. Of those 1,000 non-SD/MSPs, the Commission believes that a majority, estimated now at 75%, or 750 entities, will contract with third parties to satisfy their reporting obligations. The identity of such third parties, the composition of the marketplace for third party services, and the costs to third parties to provide reporting services given the economies of scale and scope they may realize in providing those services are all presently unknowable. Therefore, the Commission does not believe it is feasibly to quantify the fees charged by third parties to non-SD/MSPs at the present time, but believes that they will likely vary with the volume of reports to be made. For those estimated 250 non-SDs/non-MSPs who are required to report swap transaction and pricing data to an SDR and do not contract with a third party, the Commission estimates a one-time burden of 55 hours per non-SD/MSP reporting counterparty at a cost of $4,191, equating to an aggregate estimated one-time burden of 13,750 hours at a cost of $1,047,750 for all non-SD/MSP reporting counterparties that do not contract with a third party.[64] For swaps unexpired on or after April 25, 2011, the reporting counterparty shall obtain for itself an LEI as provided in § 45.6 (or substitute LEI if applicable) and include such identifier in the relevant initial report. Within 180 days of the compliance date non-reporting counterparties must provide their LEI (or substitute if applicable) to the reporting counterparty, which then must report it to the relevant SDR, as set forth in part 45. Final § 46.5 sets forth the criteria for determining which counterparty must report. For unexpired swaps the provisions apply to the current counterparties as of the compliance date, notwithstanding whether they were the original counterparties.

Final § 46.9 permits voluntary early submission of the initial data report (and of subsequent continuation data reports) prior to the applicable compliance date if a registered SDR is prepared to accept the reports and § 46.10 require that each counterparty use the ''facilities, methods, or data standards provided for or required by'' the SDR to which the counterparty reports the data. Final § 46.11 also requires that corrections be reported ''as soon as technologically practicable'' to the applicable SDR in the same format that data was reported erroneously or omitted. It provides that reporting counterparties who report state data can report error corrections by updating

[60] These are one-time recordkeeping costs, which necessarily take place in the period prior to the compliance date. For the purposes of this rulemaking, the Commission has considered only the one-time costs associated with recordkeeping; as noted in the Part 46 Consideration of Costs and Benefits section, the forward-looking (recurring) costs associated with recordkeeping are already covered by the recurring costs of recordkeeping enumerated in the Part 45 Consideration of Costs and Benefits section. *See* Final Data Rules, 77 FR 2136, 2171.

[61] The Commission obtained this estimate in consultation with the Commission's information technology staff.

[62] The estimated burden hours have been adjusted from the proposal. The estimated burden hours were obtained in consultation with the Commission's information technology staff.

[63] The estimated burden hours have been adjusted from the proposal. This is the estimated number of non-SD/MSP counterparties who will be required to report in a given year. Only one counterparty to a swap is required to report, typically an SD or a MSP as determined by § 45.8. Therefore, a non-SD/MSP counterparty that is in a swap with an SD or MSP counterparty will not be subject to the reporting obligations of §§ 45.3 and 45.4.

[64] In the event that all estimated 1,000 non-SD/MSP reporting counterparties elect to perform their reporting functions themselves, rather than contract with a third-party service provider, the aggregate burden would be 55,000 hours at a cost of $4,191,000.

their next daily report. Recordkeeping and reporting requirements that exist after compliance dates and those of §§ 46.9, 46.10 and 46.11 are covered by other rulemakings for which the Commission prepared and submitted an information collection request to OMB, the burdens associated with those requirements are not being accounted for in the information collection request for this rulemaking.[65]

C. Consideration of Costs and Benefits

1. Introduction

The Dodd-Frank Act's swap reporting requirements apply to all swaps in existence on or after the date of the legislation's enactment. Previously, in its separate Part 45 rulemaking, the Commission adopted final rules to implement the data reporting and recordkeeping requirements for swaps entered into on or after the applicable compliance date specified in Part 45. This final Part 46 rulemaking implements the mandate of sections 723 and 729 of the Dodd-Frank Act[66] requiring that data be reported to SDRs for historical swaps. In so doing, the final rule specifies the Commission's recordkeeping requirements with respect to historical swaps; and specifies the manner and form for reporting historical swap transaction data to an SDR, including the identification of entities and transactions through unique identifiers.

As discussed in more detail below, the requirements of Part 46, working in tandem with Part 45, will enhance swaps market transparency beyond the level afforded by Part 45 alone; this enriches its value to regulators for the ultimate benefit of swap market participants and the general public. More specifically, the benefits of the improved transparency engendered by this rule include improved regulatory oversight of markets (with respect to surveillance, enforcement, and analysis); improved regulatory understanding of the behavior of swap market participants; improved regulatory understanding of the concentrations of risk in swap markets; and greater market integrity. In addition, the requirements of the regulation, in tandem with the requirements of Part 45, promote the development of firm-level infrastructure and practices well-suited to improve market participants' risk management capabilities. Further, market participants will be able to use data associated with their own historical swaps for which continuation data reporting extends past the Part 45 compliance date to better understand and manage the risk associated with their swap exposure.

The Commission also recognizes that compliance with these rules will impose costs. However, because certain non-SD/MSP counterparties are subject to the Commission's part 45 regulations, which impose swap data recordkeeping and reporting requirements similar in certain key respects to those of part 46, the Commission does not consider expenditures to be costs of this regulation if they are also required to comply with part 45. These expenditures would only constitute costs of this final rule, independent of the costs of part 45, in the case of a market participant that exits the swap market entirely immediately following the part 45 compliance date.[67] Such an entity would not be required to comply with part 45, having no active swap data to report, but would still be required to report its historical swap data pursuant to part 46, because it was active during the pre-compliance date time period affected by this rule. The Commission cannot presently estimate the number of entities that may exit the swap market immediately after the compliance date.

The two chief cost-driver categories in this final rulemaking are recordkeeping and reporting (including unique identifier requirements). For both categories, the Commission identifies the costs and benefits of the final rule, discusses comments regarding them, and considers them in relation to the five broad areas of market and public concern as required by section 15(a) of the CEA.

a. Section 15(a) of the CEA

Section 15(a) of the CEA[68] requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing an order. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of the following five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. Accordingly, the Commission considers is the costs and benefits resulting from its discretionary determinations with respect to the Section 15(a) factors.

b. Cost Estimation Methodology

In the NOPR, the Commission asked for public comment on the costs and benefits of the proposed regulations, and specifically invited commenters ''to submit any data or other information that they may have quantifying or qualifying the costs and benefits'' of the proposed requirements.[69] The Commission also asked for comments on the overall costs and benefits of the proposed rules implementing the Dodd-Frank Act.[70] The Commission received numerous comments addressing various cost and benefit considerations of the proposed rule, including several that recommended alternatives, but none provided data from which the costs and benefits of the rule could be quantified. Nevertheless, the Commission has endeavored to estimate quantifiable costs and benefits of the final rule where possible.[71] Where estimation or quantification is not feasible, the Commission provides a qualitative assessment of the costs and benefits.

The Part 46 final rules will affect three types of market participants, including SD/MSP counterparties, non-SD/MSP counterparties, and SDRs. To serve as the reference point for estimating the costs of these rules to non-SD/MSP counterparties, the Commission selected a non-SD/MSP counterparty that is not a financial entity as defined in CEA section (2)(h)(7)(C).[72]

[65] Costs associated with reporting are already covered by the Part 45 rules. *See* Data Final Rules, 77 FR 2136, 2171.

[66] These sections established new sections 2(h)(5) and 4r(a)(2)(A) of the CEA, respectively. This rulemaking is undertaken to implement those two CEA sections. They are discussed in greater detail in section [ ], *supra,* including their interrelationship and the import of the Commission's October 14, 2010 and December 17, 2010 Part 44 interim final rules.

[67] For discussion of costs of compliance with part 45, see 77 FR 2136 (January 13, 2012) at 2176 *et seq.*

[68] 7 U.S.C. 19(a).

[69] 75 FR 76574 (December 8, 2010), at 76597.

[70] *Id.*

[71] The Commission made these estimates in consultation with experts on its information technology staff through a collaborative process that involved determining the types of personnel needed to complete each aspect of the tasks necessary for compliance, determining the number of hours required of each of those personnel types, and comparing the burden estimates for separate tasks to identify and eliminate any redundancies.

[72] To aid in cost estimates, the Commission at times has used wage rate estimates compiled by the Securities Industry and Financial Markets Association (''SIFMA''). These wage estimates are derived from a securities industry-wide survey of participants and thus reflect an average across entities; the Commission notes that the actual costs for any individual company or sector may differ.

The Commission estimated the dollar costs of hourly burdens for each type of professional using the following calculations:

(5) [(2009 salary + bonus) * (salary growth per professional type, 2009–2010)] = Estimated 2010 total annual compensation. The most recent data provided by the SIFMA report describe the 2009 total compensation (salary + bonus) by professional

Continued

The Commission expects that the actual costs to established market participants will often be lower than this reference point—perhaps significantly so, depending on the extent to which swap counterparties currently format, organize, and store swap transaction data that would be reported as historical swap data pursuant to this final rule.

To address costs specific to SDRs, the Commission has estimated the incremental costs SDRs would incur to comply with the reporting and recordkeeping requirements of this rulemaking above the base operating costs for SDRs to comply with part 45 regulations.[73]

2. Recordkeeping

a. Summary of Final Rule

The final rule requires counterparties to a historical swap in existence on or after April 25, 2011 to keep records of the minimum primary economic terms data specified in the Appendix to the rule, as well as copies (if they have them) of confirmation documentation, master agreements, credit support or similar agreements. If the swap remains unexpired after the applicable compliance date, counterparties must also keep any records required by section 45.2 of this chapter. Non-SD counterparties may keep records in either paper or electronic form so long as they are retrievable and reportable as required, while SD or MSP counterparties must keep electronic records unless their paper records were originally created and are exclusively maintained in paper form. Records kept by SDs and MSPs must be readily accessible during the existence of the swap and for two years thereafter, and be retrievable within three business days during the remainder of the retention period, while records kept by non-SD/MSP counterparties must be retrievable within five business days throughout the retention period.

For historical swaps that expired prior to April 25, 2011, each counterparty must retain the information and documents relating to the terms of the transaction that were in its possession on or after the date of the relevant Interim Final Rule (October 14, 2010 for pre-enactment swaps and December 17, 2010 for transition swaps). The final rule does not require counterparties to create or retain records of information regarding such swaps that was not in their possession as of those dates, or to alter how the records are organized or stored.

For all historical swaps, the final rule requires retention of records throughout the existence of the swap and for five years following expiration of the swap.

b. Benefits

By providing for the collection and retention of historical swap data (as well as its reporting), part 46 ensures the availability of data that will enhance the transparency of the swap markets. The Commission believes that improved swap market transparency (including transparency with respect to the historical swap transaction activity subject to Part 46's recordkeeping requirements) is important to the Commission's efforts to better identify, assess, and respond to risks, including systemic risks that swaps market may pose for market participants and the public in the future. The recordkeeping requirements of part 46 will increase the Commission's and other regulatory agencies' visibility into the activities and exposures of swap market participants and the dynamics of the swap market at large. This serves the public interest in effective regulatory enforcement. These recordkeeping requirements will enable Commission oversight and enforcement staff to reconstruct a comprehensive, sequenced record of swap transactions active between the enactment of the Dodd-Frank Act and this final rule's compliance date. This data is necessary to effectively monitor and investigate activities that could compromise the integrity of swap markets. Additionally, the presence of an effective monitoring and investigation regime may deter parties from engaging in behavior that undermines the integrity of swap markets.

In addition, the requirement to retain historical swap records for five years provides substantial benefit to market participants and the public because it affords the Commission the capability to analyze market trends through time-series analysis for a reasonable period of time in the future. This in turn enhances the Commission's ability to efficiently regulate the markets subject to its jurisdiction. A swap can continue to exist for a substantial period of time prior to its final termination or expiration, and key economic terms of the swap can change during this time. Thus, recordkeeping requirements with respect to a swap must necessarily cover the entire period of time during which the swap exists, as well as an appropriate period following final termination or expiration of the swap. A five-year retention period following termination of the swap also will ensure document retention consistent with the information that the Commission needs to carry out its oversight and enforcement responsibilities. It parallels the Commission's existing five-year record retention requirement in the context of futures and is consistent with the Commission's final part 49 rules regarding SDR registration. The identical retention periods provided in parts 45 and 46 will ensure that a single, comprehensive record is produced in the event that regulators require a data set spanning both Part 45 and Part 46 data. Additionally, data collected on swap market activity both before and after the compliance date of part 45 and part 46 will be available to inform any pre/post-Dodd-Frank Act comparative analysis that might be performed in the future. Part 46 data would provide the starting point for such an assessment.

c. Costs

The Commission believes that the incremental[74] costs to comply with the recordkeeping requirements of this part are limited to those related to historical swap data storage. The rules do not require counterparties to recreate data that does not presently exist, and thus imposes no costs in this respect.[75]

type, the growth in base salary from 2009 to 2010 for each professional type, and the 2010 base salary for each professional type; using this, the Commission estimated the 2010 total compensation for each professional type. In the absence of similar data for 2011 and beyond, the Commission did not estimate dollar costs beyond 2010.

(6) [(Estimated 2010 total annual compensation)/(1,800 annual work hours)] = Hourly wage per professional type.

(7) [(Hourly wage) * (Adjustment factor for overhead and other benefits, which the Commission has estimated to be 1.3)] = Adjusted hourly wage per professional type.

(8) [(Adjusted hourly wage) * (Estimated hour burden for compliance)] = Dollar cost of compliance for each hour burden estimate per professional type.

The sum of each of these calculations for all professional types involved in compliance with a given element of the final rule represents the total cost for each counterparty, reporting party, SD, MSP, SEF, DCM, or SDR, as applicable to that element of the final rule.

[73] Again, because these costs have been considered in the context of the part 45 rulemaking, to reconsider them in this rulemaking would double-count them.

[74] Swap counterparties that currently do not retain historical swap records for the period of time and in the form required by this final rule will incur costs to comply with these requirements. These same costs (including non-recurring investments in technological systems and personnel associated with establishing data storage and retrieval systems, and recurring expenses associated with data storage and retrieval, and maintenance of data storage systems), however, are required to comply with the requirements of part 45. Accordingly, they are not incremental to, and inappropriate for, consideration in this rulemaking.

[75] For pre-enactment swaps, the rule allows swap counterparties to retain swap data in whatever form it currently exists. For transition swaps, the rule only requires the retention of data to populate the minimum PET data tables for swaps that were in existence after the issuance of the proposed rule.

The Commission believes that any incremental costs will be incurred primarily by SD/MSP swap counterparties, which are required to retain historical swap data according to the format and retrieval requirements of § 46.2. The costs to SDRs of retaining historical swap data reported by swap counterparties pursuant to this final rule will be addressed in the discussion of the costs and benefits of reporting historical swap data in this Consideration of Costs and Benefits.

Historical swap data storage. The Commission believes that storing historical swap data for the period of time required by this final rule will impose a one-time burden on swap counterparties associated with gathering and transferring the historical swap data onto a server for secure storage.[76]

Non-SD/MSP counterparties are permitted by the rule to keep records in either electronic or paper form at their discretion, so as to eliminate the burden of gathering and transferring historical swap data for recordkeeping. To satisfy the recordkeeping provision of this final rule, non-SD/MSP counterparties can simply retain their records as and wherever they currently exist.

For SD/MSPs, the Commission estimates a one-time burden of 335 hours per SD/MSP counterparty[77] at an estimated cost of $22,172.[78] The Commission anticipates that SD/MSPs will likely be required to process a larger volume of historical swap data than non-SD/MSPs, though many may be able to leverage existing technology and personnel expertise to reduce the burden to perform this function.

d. Comments, Alternatives, and Cost Mitigation

Recordkeeping for historical swaps in existence on or after April 25, 2011. The Commission received several comments related to the costs of recordkeeping for swaps in existence on or after April 25, 2011. COPE supported the NOPR provision that limited the records required to be kept for such swaps to the minimum PET data specified in the NOPR Appendix (plus any confirmation, master agreement, or credit support agreement that the counterparty has), stating this is a reasonable requirement. COPE added that the specified PET data elements reflect the commercially relevant terms typically retained by swap counterparties, although a counterparty involved in few swaps might not retain all of this data in the ordinary course of its business. ETA also supported the requirement to keep records of the specified minimum PET data, stating that it believes all or most counterparties will have this data, although it could not be certain that all smaller non-financial entities in the energy sector will have all of it.

As noted above, ISDA and Global Forex requested that the Commission eliminate the time of trade from the NOPR's required PET data, arguing that including the time of trade would require some participants to retroactively create data they do not possess. FSR stated that its members have made best efforts to comply with the interim final rules for historical swaps by retaining the records in their possession, but that they do not necessarily have all of the required minimum PET data. The specific concerns FSR raised include identifying the settlement agent for pre-enactment currency swaps, and having data for pre-enactment swaps that were acquired through merger or acquisition.

The Commission made two important modifications in the final rule in an effort to address these comments and mitigate the costs of the final rule while achieve the same regulatory benefits.

First, as discussed above, the final rule requires counterparties to keep records of only the minimum PET data specified in Appendix 1 that was in their possession as of publication of the NOPR, which gave notice of what records would be required. The Commission believes that this will reduce costs and burdens associated with recordkeeping by counterparties to historical swaps to the extent consistent with ensuring the availability of swap data needed to fulfill the purposes of the Dodd-Frank Act.

Second, as discussed above, the final rule will require reporting the date of execution for a historical swap, and require reporting the time of execution only if that time was recorded when the trade was executed and is known to the reporting counterparty on or after April 25, 2011, the NOPR publication date. As noted above, the Commission believes that it would be undesirable for counterparties who did not record the execution time when a historical swap was executed to attempt to assign an execution time retroactively.

Recordkeeping for historical swaps expired prior to April 25, 2011. ISDA noted that, for historical swaps expired prior to the publication date of the NOPR, the NOPR does not require parties to alter the format in which they already retain records concerning such swaps. ISDA asked the Commission to clarify whether this requirement allowed counterparties to keep records in the form already used. Similarly, WGCEF requested clarification that keeping records in the form in which they are already retained will be acceptable to the Commission for all historical swaps.

As discussed above, and in order to achieve the benefits of the rule, the Commission has determined that the final rule should retain the NOPR provisions concerning limited recordkeeping for such swaps, which required counterparties to keep only the information and documents concerning such swaps that were in their possession on or after the publication date of the applicable Interim Final Rule. The final rule provides that counterparties may keep such records in any format they choose. The retrievability requirement for all counterparties to such swaps will require counterparties to be able to retrieve such records within five business days throughout the retention period, rather than to keep records readily accessible for part of the retention period or to be able to retrieve records within three business days, as provided in the NOPR. This reduced retrievability requirement is designed to further reduce costs and burdens for counterparties to historical swaps that have expired prior to April 25, 2011.

e. Recordkeeping in Light of CEA Section 15(a)

The Commission has evaluated the benefits of the recordkeeping provisions of this part in light of the specific considerations identified in section 15(a) of the CEA as follows:

Protection of market participants and the public. The Commission believes that the recordkeeping requirements in

[76] While swap counterparties also may have costs to maintain data storage infrastructure and/or costs to require the necessary data retrieval ability, these costs duplicate those that would be incurred to comply with part 45. Accordingly, they are not incremental to, and appropriate for, consideration in this rulemaking.

[77] The costs of historical swap data storage were estimated based on the costs to SD/MSPs that decide not to contract with a third party to comply with the recordkeeping requirements of Part 46. See ''Overview of Cost Calculations.'' This estimate is calculated as follows: [(Computer Operations Supervisor at 80 hours) + (Computer Operations Group/Section Manager at 80 hours) + (Computer Operations Department Manager at 40 hours) + (Sr. Database Administrator at 40 hours) + (Programmer at 40 hours) + (Systems Analyst at 20 hours) + (Compliance Manager at 10 hours) + (Director of Compliance at 5 hours) + (Compliance Attorney at 20 hours)] = 335 hours per SD/MSP counterparty; [(335 hours per SD/MSP) × (125 SD/MSPs) = 41,875 aggregate hours. The Commission believes that information on swap transactions is currently being retained by many market participants in the ordinary course of business, which may result in lesser burden for those parties.

[78] See Table 2.

the final rule protect market participants and the public by improving the ability of the Commission and other regulatory agencies to fulfill their oversight and enforcement responsibilities, and contributing to improved transparency necessary to identify and assess risks that swaps markets may pose.

The record retention periods in the final rule are consistent with both the Commission's existing retention requirement in the context of futures, pursuant to Commission Regulation 1.31, and with applicable statutes of limitation. A general five-year record retention requirement helps assure the Commission ready access to records and data essential to its mission to protect market participants and the public from violations of the CEA and Commission regulations. For example, records retained pursuant to Part 46 will enable Commission staff to reconstruct a comprehensive, sequenced record of swap transactions active during the window between statutory enactment and the final rule's compliance date for purposes of analysis; investigation; and, if appropriate, prosecution of an enforcement action.

Moreover, by providing for the collection and retention of historical swap data (as well as its reporting), Part 46 assures that data valuable to enrich the depth and perspective of regulators' understanding of swap markets over time is available for reporting and regulatory analysis. In this way, historical recordkeeping requirements serve an important role in counteracting the swap market opacity and potential for under-appreciation of systemic risk that contributed to the financial crisis of 2008. The Commission believes that improved swap market transparency (including transparency with respect to the historical swap transaction activity subject to Part 46's recordkeeping requirements) is critical to the Commission's efforts to better identify, assess, and respond to risks that swap markets may pose for market participants and the public in the future.

Efficiency, competitiveness, and financial integrity. This rule promotes efficiency and competitiveness. The historical swaps transaction data subject to these recordkeeping requirements will provide a basis for comparative assessments of the swap markets that might be conducted in the future (including potential comparative assessments of market efficiency and competitiveness [79]). In addition, electronic recordkeeping, which will aid required electronic reporting, may improve efficiency and reduce initiation and maintenance costs in the future.

Further, the Commission believes that the final Part 46 recordkeeping requirements promote swap market financial integrity. As previously discussed, the Commission believes that historical swap transaction data as collected and retained under these final rules will aid it in effective swap market oversight and legal enforcement, including by helping to assure the availability of records needed to monitor and investigate market abuses. Also, by ensuring a data pool that provides historical swap transaction transparency to better inform regulators' swap market analysis, the recordkeeping requirements serve an important role in counteracting swap market opacity that, as evidenced in the 2008 financial crisis, may contribute to a loss of confidence in market integrity.

The Commission does not believe that costs of these recordkeeping requirements will impede swaps market efficiency, competitiveness, or integrity.

Price discovery. The Commission does not believe that this requirement has a significant effect on the price discovery process.

Sound risk management practices. The Commission believes that the final rule's recordkeeping requirements, in tandem with the recordkeeping requirements of Part 45, will serve to improve the soundness of the risk management practices of market participants. The Commission is essentially requiring the maintenance of accurate records in a manner that makes them appropriately available for reproduction to regulators. Market participants may leverage the highly organized and streamlined internal records system they will possess in order to comply with Parts 45 and 46 for an ancillary risk management benefit; the system will be useful for analysis and for development of enhanced risk management practices.[80] The cost of implementation of the recordkeeping rule may be partially compensated by error avoidance and the mitigation of internal risk.

3. Reporting

a. Summary of Final Rule

The final rule requires that each historical swap in existence on or after April 25, 2011 be reported to a SDR electronically on or before the applicable compliance date. The initial data report must contain all of the minimum primary economic terms data listed in Appendix 1 that were in the possession of the reporting counterparty on or after April 25, 2011, the legal entity identifier of the reporting counterparty, the internal counterparty 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. For each such swap that remains in existence after the compliance date, the reporting counterparty must report swap continuation data as provided in part 45 of this chapter, with the exception that such reports need only include changes to the minimum primary economic terms listed in Appendix 1 to this part, rather than change to the larger list of primary economic terms provided in part 45. Continuation data must be reported to the same SDR that received the initial data report. In parallel with part 45 of this chapter, the final rule provides that multi-asset historical swaps must be reported to a single SDR that accepts swaps in the asset class that is treated as the primary asset class involved in the swap by the reporting counterparty, and that mixed historical swaps must be reported to an SDR or security-based SDR registered with both the Commission and the SEC.

For historical swaps that expired prior to April 25, 2011, the final rule requires that counterparties report to an SDR on the applicable compliance date such information relating to the terms of the transaction as was in the counterparty's possession on or after the publication date of the relevant Interim Final Rule (October 14, 2010 for pre-enactment swaps and December 17, 2010 in the case of transition swaps). This information may be reported via any method selected by the reporting counterparty.

The rule permits voluntary early submission of the initial data report (and of subsequent continuation data reports) prior to the applicable compliance date if a registered SDR is prepared to accept the reports.

For historical swaps in existence on or after April 25, 2011, by the applicable compliance date the reporting counterparty must obtain, report, and provide to its counterparty an LEI as

[79] For example, such assessments may compare measures such as the concentration of swap activity by type of market participant, the volumes of cleared and uncleared swap transactions, or the effective cost to the user of engaging in similar swap transactions in the pre- and post-compliance marketplace.

[80] The Commission notes that non-SD/MSP counterparties will be able to retain either electronic or paper records at their discretion; if paper rather than electronic records are retained, this system will not be necessary for compliance, and thus this ancillary risk management benefit will not apply.

provided in part 45. Within 180 days of the applicable compliance date, the non-reporting counterparty must obtain an LEI and provide it to the reporting counterparty, which then must report it to the relevant SDR.

The final rule sets forth the criteria for determining which counterparty must report. For historical swaps in existence on the applicable compliance date, these provisions apply to the current counterparties as of the compliance date, notwithstanding whether they were the original counterparties. If only one counterparty is an SD, the SD reports. If neither counterparty is an SD and only one is an MSP, the MSP reports. If both counterparties are non-SD/MSP counterparties, and only one is a financial entity as defined in CEA section 2(h)(7)(C), the financial entity reports. If the counterparties share the same status, the rule requires them to agree which of them is the reporting counterparty for that swap. If both counterparties are non-SD/MSP counterparties but only one is a U.S. person, the U.S person must report. After the initial data report is made, if the reporting counterparty exits the original transaction (*e.g.,* through an assignment), the new reporting counterparty will be: The SD (or the MSP if there is no SD) if only one is present; the U.S. person if both counterparties are non-SD/MSP counterparties and only one is a U.S. person; or, in all other cases, the counterparty that replaced the previous reporting counterparty, unless otherwise agreed by the counterparties.

The final rule provides for third-party facilitation of reporting. It also requires that all data for a historical swap must be reported to the same SDR to which the initial data report is made. It permits either counterparty to make voluntary supplemental reports (''VSRs''), to either the same or a different SDR. To provide minimum safeguards against confusion or double-counting resulting from VSRs, the rule requires that each VSR must include an indication that it is a VSR, as well as the SDR identifier created for the swap by the automated systems of the SDR to which the required, initial data report is made.

The final rule requires the reporting counterparty to use the facilities, methods, or data standards provided or required by the SDR to which it reports the data. Corrections must be reported, as soon as technologically practicable after discovery of an error or omission, to the same SDR that received the initial data report.

b. Benefits

The Commission believes that the part 46 reporting requirements will improve regulatory oversight, enforcement, and understanding of systemic risks.

The Commission's harmonization of the reporting requirements of this part with those of part 45 will benefit market participants by enabling reporting counterparties to satisfy the reporting requirements of both parts in the same way, and avoiding redundant costs that could be caused by differing reporting requirements.

Historical swap reporting under part 46 also benefits the general public by supporting the Commission's supervision of the swaps market. As considered above in the discussion of the benefits of historical swap recordkeeping in this final rule, the reporting requirements provide a means for the Commission to gain a better understanding of the swaps market.

The incorporation of unique identifier requirements within the part 46 reporting regime also provides important benefits to market participants and the public by enhancing the quality and usability of the historical swap data that will be provided to the Commission.[81]

The beneficial contributions attributable to the specific unique identifiers addressed in the final rule, including both SDR identifiers for VSRs and LEIs, are as follows:

• *SDR identifiers* will facilitate the collating of various data reports concerning a swap into a single, accurate data record. Through them it is possible to identify the origins of each swap as well as events that affect the swap during its existence; aggregate transaction information without double-counting swaps reported to different SDRs or to foreign trade repositories, or reported in VSRs; and create a clear and unified data stream that spans the pre- and post-part 46 compliance date periods. Accordingly, the Commission believes they provide a vital tool for regulatory agencies' analysis of historical swap market data to better protect market participants and the public from systemic risk.

• *LEIs* will enhance the ability of the Commission and other regulatory agencies to oversee swap markets by providing necessary clarity and cohesion to the swap data used for regulatory analyses, particularly with regard to clearly understanding the activities of participants in the pre- and post- part 46 compliance date periods. Among the benefits of an LEI regime, GFMA identified more efficient data aggregation; more powerful modeling and risk analysis; facilitation of information sharing and reconciliation between regulators; better supervision of cross-border firms and firms whose business lines are overseen by multiple regulators; and facilitating identification of affiliates and parent companies. GFMA also called the LEI regime ''a powerful tool for regulators in monitoring and managing systemic risks.''[82] As recognized in the CPSS–IOSCO Report on OTC Derivatives Data Reporting and Aggregation Requirement, which recommends expeditious development of a global LEI:

[A] standard system of LEIs is an essential tool for aggregation of OTC derivatives data. An LEI would contribute to the ability of authorities to fulfill the systemic risk mitigation, transparency, and market abuse protection goals established by the G20 commitments related to OTC derivatives, and would benefit efficiency and transparency in many other areas. As a universally available system for uniquely identifying legal entities in multiple financial data applications, LEIs would constitute a global public good.[83]

c. Costs

Incremental[84] costs to comply with the reporting requirements of this part

[81] Unique identifier use also reflects a harmonized approach between the part 45 and part 46 regulations. Accordingly, historic swaps will be reported in a consistent fashion with part 45 swaps, ensuring comparable data for analysis. The use of unique identifiers also enabled the Commission to allow for historical swap reporting through a VSR; without unique identifiers, the value and usability of the data reported in a VSR would be greatly diminished because of potential double-counting (recording the same transaction from the reporting counterparty and from the VSR reported by the non-reporting counterparty), and would not be readily comparable to the data reported pursuant to Part 45 after the compliance date (which are required to incorporate unique identifiers).

[82] GFMA, *Creating a Global Legal Entity Identifier (LEI) Standard,* September 21, 2001, p. 10. Publicly available at *http://www.sifma.org/uploadedfiles/issues/technology_and_operations/legal_entity_identifier/lei-project-summary-slides.pdf.*

[83] CPSS–IOSCO *Report on OTC Derivatives Data Reporting and Aggregation Requirement,* August 2011, p.36. Publicly available at *http://www.bis.org/publ/cpss96.pdf.*

[84] Swap counterparties that have not previously established a reporting infrastructure, including connectivity to an SDR (or the Commission in the absence of an SDR that collects data for a given asset class), will incur costs to comply with these requirements. The Commission anticipates, however, that swap counterparties will satisfy the reporting requirements of part 46 with a single, non-recurring transmission of data to an SDR occurring at the same time and through the same mechanism as its initial transmission of swap creation and continuation data pursuant to part 45. Thus, the costs (including non-recurring investments to train personnel, implement data reporting technology, and establish the required data connectivity; and recurring expenses associated with personnel hours and maintenance of the data reporting technology infrastructure), to comply with part 46 are already necessitated by part 45 and were considered in that rulemaking. Accordingly, they are not incremental to, and inappropriate for, consideration in this rulemaking.

Similarly, swap counterparties will experience a one-time cost to format swap records subject to part 46 and part 45 to the same minimum PET data tables required in both regulations. Because these costs were considered previously in the part 45 rulemaking, they are not incremental to, and inappropriate for, consideration in this rulemaking.

Continued

will be incurred only by reporting counterparties for historical swaps, most of whom will be SDs or MSPs. The reporting requirements of the final rule apply only to reporting counterparties. They will incur costs associated with normalizing required PET data for historical swaps in existence on or after April 25, 2011 in data fields for electronic reporting, and obtaining LEIs and including them in reported data as required by the rule. SDRs will incur costs for data receipt and storage. The SDR identifiers used to provide a safeguard against confusion and double-counting of historical swaps in the context of VSRs will be created automatically by the automated systems of SDRs when they receive the initial data report for a historical swap and transmit that identifier to the counterparties to the swap in the normal course of their business. SDRs are already required by part 45 to have the systems and personnel necessary to create unique swap identifiers, and the creation of SDR identifiers by SDR automated systems will not impose any additional costs in these respects due to the requirements of part 46.

Normalizing data for electronic reporting. The Commission anticipates that formatting transition swaps to populate the minimum PET data tables would impose a one-time burden on swap counterparties associated with the manipulation of the electronic files from their existing form to the form required by the final rule. For SDs and MSPs, the Commission estimates a one-time burden of 285 hours per SD or MSP counterparty [85] at an estimated cost of $20,169.[86] For non-SD/MSPs, the Commission estimates a one-time burden of 55 hours per non-SD/MSP counterparty [87] at an estimated cost of $4,191.[88] The Commission estimates that this requirement will present a larger burden for SD and MSP counterparties than for non-SD/MSP counterparties, because SDs and MSPs are likely to be required to process a larger volume of historical swap data. The Commission notes that this burden may be reduced for swap counterparties, especially SDs or MSPs that are able to leverage existing technology and personnel expertise to perform this function.

Applying unique identifiers. The Commission anticipates that including LEIs in historical swap data, as required by this final rule, would impose a one-time burden on swap counterparties associated with reviewing the subset of historical swap data and appending the LEIs. The Commission believes that it may be possible to achieve a high degree of automation or computer-assisted processing for the task of reporting the LEI and adding it to the historical swap data files in storage.

For SD and MSP reporting counterparties, the Commission estimates a one-time burden of 440 hours per SD or MSP reporting counterparty [89] at an estimated cost of $29,681.[90] For non-SD/MSP reporting counterparties, the Commission estimates a one-time burden of 220 hours per non-SD/MSP reporting counterparty [91] at an estimated cost of $18,481.[92] The Commission estimates that this requirement will present a larger burden for SDs and MSPs than for non-SD/MSP reporting counterparties because SDs and MSPs are likely to be required to process a larger volume of historical swap data. The Commission notes that this burden may be reduced for swap counterparties, especially SDs or MSPs that are able to leverage existing technology and personnel expertise to perform this function.

Receiving and storing data. The Commission believes that receiving and storing historical swap data, as required by this final rule, would impose a one-time burden on SDRs associated with importing, examining/approving, and organizing/storing the historical swap data. The Commission anticipates that this incremental burden will involve the additional usage of the processes and personnel time and expertise necessary for receiving the stream of swap data reported by market participants for Part 45 compliance.

The Commission anticipates that some aspects of this task, such as programming a code to process historical swap data, will require manual intervention; for other aspects of this task, such as submitting the code and updating the historical swap data files in storage, it may be possible to achieve a high degree of automation or computer-assisted processing. Furthermore, the Commission notes that this burden may be further reduced to an extent dependent on the ability of an

SDRs will also incur recurring costs to maintain their data storage infrastructure. Since the same SDR infrastructure expectedly will support storage activities under part 45, however, the Commission believes that the same maintenance activities undertaken to support part 45 will support part 46. Because these costs were considered previously in the part 45 rulemaking, they are not incremental to, and inappropriate for, consideration in this rulemaking.

[85] The costs of normalizing data for historical swaps in existence on or after April 25, 2011 in data fields for electronic reporting were estimated based on the costs to SD/MSPs that decide not to contract with a third party to comply with the recordkeeping requirements of Part 46. See ''Overview of Cost Calculations.'' This estimate is calculated as follows: [(Sr. Database Administrator at 80 hours) + (Programmer at 80 hours) + (Systems Analyst at 80 hours) + (Compliance Manager at 20 hours) + (Director of Compliance at 5 hours) + (Compliance Attorney at 20 hours)] = 285 hours per SD/MSP counterparty; [(285 hours per SD/MSP) x (125 SD/MSPs) = 35,625 aggregate hours. The Commission believes that information on swap transactions is currently being retained by many market participants in the ordinary course of business, which may result in lesser burden for those parties.

[86] See Table 1.

[87] The costs of formatting transition swaps for storage were estimated based on the costs to non-SD/MSPs that decide not to contract with a third party to comply with the recordkeeping requirements of Part 46. See ''Overview of Cost Calculations.'' This estimate is calculated as follows: [(Compliance Manager at 10 hours) + (Director of Compliance at 5 hours) + (Compliance Attorney at 20 hours) + (Compliance Clerk at 20 hours)] = 55 hours per non-SD/MSP counterparty; [(55 hours per non-SD/MSP) x (1,000 non-SD/MSPs) = 55,000 aggregate hours. The Commission believes that information on swap transactions is currently being retained by many market participants in the ordinary course of business, which may result in lesser burden for those parties.

[88] See Table 1.

[89] The costs of applying unique identifiers to historical swap data were estimated based on the costs to SD/MSPs that decide not to contract with a third party to comply with the recordkeeping/reporting requirements of Part 46. See ''Overview of Cost Calculations.'' This estimate is calculated as follows: [(Sr. Database Administrator at 80 hours) + (Programmer at 160 hours) + (Systems Analyst at 160 hours) + (Compliance Manager at 20 hours) + (Director of Compliance at 10 hours) + (Compliance Attorney at 10 hours)] = 440 hours per SD/MSP counterparty; [(440 hours per SD/MSP) x (125 SD/MSPs) = 55,000 aggregate hours. The Commission believes that information on swap transactions is currently being retained by many market participants in the ordinary course of business, which may result in lesser burden for those parties.

[90] See Table 3. The Commission notes that while tasks required for compliance with the unique identifier requirements of this rule may ultimately overlap to some extent with the tasks required for compliance with the unique identifier requirements of part 45, the Commission believes that the process of appending a unique identifier to historical data submissions will be substantially different than the process of incorporating a unique identifier into the submissions of active swaps from a technological implementation perspective, and has therefore estimated the burden of the two processes separately. The Commission notes that, in the event that SD/MSP counterparties find it practical to combine duplicative elements of the two task (for example, writing a single program to process both historical and active swaps), the burden of compliance with the unique identifier requirements of this rule may be reduced for those entities.

[91] The costs of applying unique identifiers to historical swap data were estimated based on the costs to non-SD/MSPs that decide not to contract with a third party to comply with the recordkeeping requirements of Part 46. See ''Overview of Cost Calculations.'' This estimate is calculated as follows: [(Sr. Database Administrator at 40 hours) + (Programmer at 80 hours) + (Systems Analyst at 80 hours) + (Compliance Manager at 10 hours) + (Director of Compliance at 5 hours) + (Compliance Attorney at 5 hours)] = 220 hours per non-SD/MSP counterparty; [(220 hours per non-SD/MSP) x (1,000 non-SD/MSPs) = 220,000 aggregate hours. The Commission believes that information on swap transactions is currently being retained by many market participants in the ordinary course of business, which may result in lesser burden for those parties.

[92] See Table 3.

SDR to leverage existing technology and personnel expertise to perform this function. Finally, the Commission notes that SDRs will be required by Part 45 to have the automated technological systems in place to assign SDR identifiers to swap data; therefore, assigning SDR identifiers to VSRs should not impose costs on SDRS. The Commission estimates a one-time burden of 460 hours per SDR [93] at a cost of $29,882 [94] for receiving and storing historical swap data.

d. Comments, Alternatives, and Cost Mitigation

Parties required to report certain historical swap data. Numerous commenters urged the Commission to phase in swap data reporting by both asset class and counterparty type. The Financial Services Roundtable recommended a phased implementation timeline based on a participant's level of sophistication, resources and swap trading volume. Global Forex advocated phased implementation of reporting that takes into account both the readiness of a particular asset class for reporting and the type of reporting counterparty involved. ETA urged that reporting be phased in by asset class and product type, and noted that one or more SDRs must be prepared to accept data for an asset class before effective reporting can begin. ETA also advocated beginning reporting by SDs and MSPs before non-SD/MSP counterparties are required to report. ISDA called for reporting to be phased in based on the state of readiness of different asset classes and market participant types.

After considering these comments, the Commission made a number of modifications in the final rule. The final rule phases in the start of reporting by counterparty type, by setting the compliance date for non-SD/MSP reporting counterparties six months after the compliance date for SDs and MSPs. The Commission believes that this approach reduces the costs of compliance for reporting counterparties that are likely to be smaller or less technologically sophisticated, while retaining the essential benefits of receiving historical swap transaction data from all swap market participants. This approach parallels that of the part 45 rulemaking, which recognized the appropriateness of a phase-in period for non-SD/MSP counterparties.

ETA urged that non-SD/MSP reporting counterparties not be required to report continuation data, arguing that transactions not involving SDs and MSPs represent only a small portion of the swaps market, and that such a requirement would be unduly burdensome. Alternatively, they asked that non-SD/MSP reporting counterparties be permitted to report continuation data for historical energy swaps on a quarterly basis.

The Commission has determined that the final rule will require continuation data reporting as provided in part 45 of this chapter. Timely reporting of changes to primary economic terms of all swaps, including historical swaps, is necessary to give the Commission and other regulators the ability to see a current and accurate picture of the swap market as called for by the Dodd-Frank Act. In light of this comment, and after further considering the costs to non-SD/MSP counterparties, the Commission extended and phased in the continuation data reporting deadlines for non-SD/MSP reporting counterparties. For non-SD/MSP reporting counterparties, the NOPR applied the same continuation data reporting deadlines found in Part 45. The final rule's deadlines for continuation data reporting by non-SD/MSP counterparties require such reporting no later than the end of the first business day following a relevant change to a primary economic term during the first year of reporting, and require such reporting no later than the end of the second business day following a relevant change to the primary economic terms of the swap thereafter. This approach should reduce the costs of Part 46 compliance to non-SD/MSP counterparties, while retaining the benefits of receiving continuation data.

Scope of reporting requirements. ISDA and Global Forex requested that the Commission not require reporting of the time of trade for a historical swap, arguing that in many cases counterparties may not have recorded this information when a historical swap was executed. ISDA argues that it would be undesirable, if not impossible, for a participant to attempt to recreate an execution time not previously recorded.

The Commission believes that it would not be desirable for counterparties to assign an execution time retroactively when no record exists, and the Commission also recognizes that the costs of doing so could be significant to reporting counterparties. To mitigate costs and maintain the integrity of the historical swap data record, the final rule limits the execution timestamp reporting requirement to the transaction date, calling for reporting the time of the trade only if the time was recorded when the trade was executed and is known to the reporting counterparty when the report is made.

Three commenters, ISDA, ETA, and WGCEF, requested that the Commission drop the catchall category of ''any other primary economic term(s)'' from the required PET data for historical swaps, arguing that it would be better to define PET data precisely. ETA stated reporting such information could require extensive text submissions of non-standardized transaction terms, complicating the compilation task of the SDRs.

In response, the Commission has removed ''any other primary economic term(s) of the swap matched by the counterparties in verifying the swap'' from the minimum PET data tables. The Commission believes the PET data in the NOPR tables provides the minimum information regulators will need concerning historical swaps, information counterparties almost surely will possess (*e.g.,* trade date, price, expiration date). Other primary economic terms that might be captured by the catch-all category are not crucial to fulfill the purposes of reporting data on historical swaps under Dodd-Frank, and the PET data elements specified in the tables should be sufficient in this respect. In addition, the burden of reporting data on swaps executed prior to issuance of the Commission's final Dodd-Frank rules would be reduced by limiting required PET data for historical swaps to specified data elements.

The End User Coalition requested that the Commission explain the use and value of reporting Master Agreement Identifiers. ISDA, ETA, and Global Forex stated that eliminating the requirement to report such identifiers, arguing that they would not necessarily allow regulators to calculate net exposures. Global Forex stated that providing this data would impose a significant burden because such information is not routinely stored on the same systems as the other PET data specified in the tables. WGCEF also asked that this requirement be eliminated, arguing that counterparties are in the best position to make exposure calculations and that the Commission already has the ability to request such information from them.

[93] The costs of receiving and storing historical swap data were estimated based on the costs to SDRs. See ''Overview of Cost Calculations.'' This estimate is calculated as follows: [(Computer Operations Supervisor at 80 hours) + (Computer Operations Group/Section Manager at 80 hours) + (Computer Operations Department Manager at 20 hours) + (Sr. Database Administrator at 80 hours) + (Programmer at 80 hours) + (Systems Analyst at 80 hours) + (Compliance Manager at 20 hours) + (Director of Compliance at 10 hours) + (Compliance Attorney at 10 hours)] = 460 hours per SDR; [(460 hours per SDR) x (15 SDRs) = 6,900 aggregate hours.

[94] See Table 4.

In response, the Commission has eliminated the requirement to report master agreement identifiers. The terms of master agreements are not readily reportable in an electronic format, since no schema for reporting these terms in data fields has yet been developed. In addition, Dodd-Frank does not provide explicit authority for requiring such reporting; Dodd-Frank authorizes transaction-based reporting of the terms of a swap, and a master agreement is not a transactional agreement. Furthermore, the Commission notes that reporting of master agreements may eventually be initiated by the Office of Financial Research under its statutory authority. Eliminating this requirement therefore represents a reduction in the costs associated with Part 46 compliance. In addition, because master agreement identifiers are not required to be reported pursuant to Part 45, eliminating this requirement also represents improved harmonization between Parts 45 and 46.

Reporting of Valuation Information

ISDA recommended that data elements necessary for a person to determine the market value of a transaction be dropped from the proposed data reporting requirements for historical credit swaps. ISDA stated that such a requirement would be overly burdensome in that it would require a trader to retain a variety of information irrelevant to the purposes of the rule, is not currently retained by traders, and may be proprietary to the trader.

The Commission considered this comment, and does not require these data elements in the final rule. The Commission eliminated the requirement to report data elements necessary to value a swap from the final Part 45 data reporting rule; for the same reasons explained in that rulemaking, the Commission believes that such a requirement is not appropriate for inclusion in the historical swaps data reporting rule.

Alternative Submission Formats

WGCEF requested that the Commission allow reporting counterparties to submit images of confirmations and other paper swap documentation in lieu of submission of normalized data in data fields, arguing that prohibiting the use of images for reporting would make the requirement more burdensome.

The Commission considered this comment, but determined to maintain the NOPR's requirement for electronic reporting of normalized data for historical swaps in existence on or after the date the NOPR was issued. Permitting submission of images in lieu of submission of normalized data in data fields would hinder regulators' ability to efficiently search, retrieve, aggregate, and manipulate historical swap data in SDRs for essential purposes intended in the Dodd-Frank Act, including monitoring systemic risk and conducting market oversight and enforcement. In light of these considerations, the Commission believes that this final rule, by allowing submission of images to fulfill reporting requirements for swaps that expired prior to issuance of the NOPR on April 25, 2011 reduces the reporting burden to the extent appropriate.

e. Reporting in Light of CEA Section 15(a)

The Commission has evaluated the costs and benefits of the reporting provisions of this part in light of the specific considerations identified in Section 15(a) of the CEA as follows.

Protection of market participants and the public. The Commission believes that historical swap data reporting as provided in part 46 enhances protections for market participants and the public in important ways. Information revealed through the requirements of § 46.3 and the use of unique identifiers as provided in § 46.4 will provide the Commission with a significant body of previously unavailable data in a cohesive form that will enhance oversight and enforcement abilities to the benefit of both market participants and the public. For reasons identified above in the discussion of reporting requirement benefits, reporting of historical swap data in the manner prescribed in part 46 promotes the Commission's market participant and public protection goals by improving the ability to: (1) Detect and protect market participants against fraud, manipulation, and abusive trading practices; (2) conduct effective surveillance to oversee the integrity and efficiency of market operation; and, (3) understand, monitor, and appropriately react to systemic risk indicators.

Furthermore, the Commission believes that the requirements of this final rule, and the associated compliance costs, represent a transfer of the costs associated with the systemic risks inherent in transacting in opaque swap markets from the public to private entities, particularly to those that are better positioned to realize economies of scale and scope in assuming those costs; the Commission believes that because historical swap data could be used as a benchmark to better understand systemic risks associated with swap market activity in the future, the costs of reporting historical swap data relate to the systemic risks of ongoing swap market activity, as well as historical swap market activity.

Efficiency, competitiveness, and financial integrity. This rule promotes efficiency and competitiveness in several ways. First, the Commission has exercised its discretion to specify reporting requirements in a manner designed to mitigate costs to the extent consistent with statutory requirements and fulfillment of the purposes of the Dodd-Frank Act.

Second, by allowing reporting parties to utilize third-party service providers to transmit required data, the Commission provides flexibility for reporting parties to utilize the most efficient means for compliance. The Commission believes that, relative to the capabilities of at least certain reporting parties, third-party providers likely will have a comparative advantage in data processing costs. The rule affords reporting parties the opportunity to avail themselves of potential efficiencies that use of such a third-party provider could provide.

Third, the reporting hierarchy employed in the final rule assigns reporting responsibility based on factors including the relative size and sophistication of market participants (for example, SD/MSP counterparties, which are likely to have technological resources more readily available for reporting than non-SD/MSP counterparties, will serve as the reporting counterparty when facing a non-SD/MSP counterparty in a swap). The Commission believes that this is an efficient approach to swap reporting, as it provides the opportunity for larger, more sophisticated entities to realize economies of scale and scope in their reporting processes (for example, a swap dealer can collect data from swaps to which it is a counterparty from a variety of asset classes and send the data to an SDR in a single report; this allows for the creation of fewer reports and a reduced burden vis-à-vis a system in which numerous small non-SD/MSP counterparties would need to collect and report data).

Fourth, the Commission believes that the provisions of the final rule that relate to the format of the historical swap data to be reported will serve to reduce costs and burdens for registered entities and swap counterparties by (a) Allowing reporting counterparties to report data for pre-enactment swaps in the form in which it currently exists, thereby removing the need for (and costs associated with) reformatting or recreating the data; (b) allowing reporting entities and counterparties to

use whatever facilities, methods, or data standards are provided or required by the SDR to which data is reported; (c) allowing SDRs to use various facilities, methods, and data standards to receive data, so long as the SDR can provide data to the Commission in the format required by the Commission; and (d) allowing for the dual reporting, additional information reporting, and early submission of historical swap data in the form of a VSR. The Commission believes this approach is preferable to having the Commission mandate that reporting entities or counterparties adopt a particular format or data standard for reporting historical swap data and/or a particular form for pre-enactment swap data, which in some cases could impose the additional burden of acquiring new technological capability different or more extensive that what the entity or counterparty already possesses. The Commission believes that, in light of this provision of the final rule, market competition is likely to lead SDRs to allow reporting entities and counterparties to report using data formats or standards that are easiest and least costly for them. Costs for market participants may also be lowered by the final rule provision authorizing the Commission's Chief Information Officer to require use of a particular data standard in order to accommodate the needs of different communities of users.[95]

Furthermore, the Commission does not anticipate that the reporting requirements (including unique identifier requirements) of this final rule present costs that would impede the efficiency of swaps markets.

The Commission anticipates that the reporting requirements of this final rule will work in concert with the recordkeeping requirements of this final rule to improve the integrity of swap markets. Accordingly, the manner in which these reporting requirements will aid market integrity mirrors those considered in the preceding discussion of the integrity benefits of recordkeeping— namely, by aiding the prosecution and deterrence of market abuses and assisting regulatory supervision of markets through improved transparency.

Price discovery. The Commission does not believe that the historical swap data reporting requirements (including unique identifier requirements) of this final rule will impact the price discovery process.

Sound risk management practices. The Commission does not believe that the historical swap data reporting requirements (including unique identifier requirements) of this final rule have a significant effect on sound risk management practices.

Other public interest considerations. The Commission believes that the data reporting requirements of this final rule will allow the Commission to readily acquire and analyze market data, thus streamlining the surveillance process. The Commission believes that by receiving historical swap data from the same market participants that will likely report a comparable stream of creation and continuation data pursuant to part 45, part 46 will allow the economists and other analysts employed by the Commission the opportunity to compare aspects of the swap market before and after the effective date of parts 45 and 46. This will likely create the potential for an analysis of the effects of implementing these rules.

With regard to unique identifiers, the Commission anticipates that the unique identifier requirements of this final rule will facilitate the Commission's efforts in the course of their investigations by providing a clear framework for data aggregation and comparison across financial instruments and between the pre- and post- part 46 compliance date periods.

TABLE 1—NORMALIZING DATA FOR ELECTRONIC REPORTING

	Hours	Personnel cost
SD/MSPs	285	$20,169
Non-SD/MSPs	55	4,191

TABLE 2—HISTORICAL SWAP DATA STORAGE

	Hours	Personnel cost
SD/MSPs	335	$22,172

TABLE 3—APPLYING UNIQUE IDENTIFIER

	Hours	Personnel cost
SD/MSPs	440	$29,681
Non-SD/MSPs	220	18,481

TABLE 4—RECEIVING AND STORING DATA

	Hours	Personnel cost
SDRs	460	$29,882

IV. Compliance Dates

A. Introduction

As discussed above, the final rule retains the NOPR provision requiring compliance with recordkeeping and reporting requirements for historical swaps to commence on the same compliance dates specified in the Commission's final swap data recordkeeping and reporting regulations in part 45 of this chapter. The provisions of both part 45 and part 46 phase in compliance dates by both asset class and counterparty type. As noted above, this final rule permits voluntary initial data reporting for historical swaps prior to the applicable compliance date, if a registered SDR is prepared to accept the required initial data report prior to the applicable compliance date. Where such a voluntary early initial data report is made, continuation data reporting for the swap in question, if applicable, is still required to commence as of the applicable compliance date.

Accordingly, the Commission has determined that each swap dealer, major swap participant, and non-SD/MSP counterparty subject to the jurisdiction of the Commission shall commence full compliance with all provisions of this part on the applicable compliance dates set forth below.

B. Compliance Dates for Swap Dealers and Major Swap Participants

Swap dealers, and major swap participants shall commence full compliance with all provisions of this part as follows:

Credit swaps and interest rate swaps. Compliance date 1, the compliance date with respect to credit swaps and interest rate swaps, shall be the later of: July 16, 2012; or 60 calendar days after the publication in the **Federal Register** of the later of the Commission's final rule defining the term ''swap'' or the Commission's final rule defining the terms ''swap dealer'' and ''major swap participant.''

Equity swaps, foreign exchange swaps, and other commodity swaps. Compliance date 2, the compliance date with respect to equity swaps, foreign exchange swaps, and other commodity swaps, shall be 90 calendar days after compliance date 1.

[95] This authority could be used, for example, to require SDRs to accept swap data reports using a particular computer language already used by firms in a particular segment of the swap marketplace, so that they are not forced to incur additional cost by acquiring the capability needed to report using a different computer language.

C. Compliance Date for Non-SD/MSP Counterparties

Non-SD/MSP counterparties shall commence full compliance with all provisions of this part for all pre-enactment and transition swaps on compliance date 3, which shall be 90 calendar days after compliance date 2.

Final Rules

List of Subjects in 17 CFR Part 46

Swaps, data recordkeeping requirements and data reporting requirements.

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

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

Sec.
46.1 Definitions.
46.2 Recordkeeping for pre-enactment swaps and transition swaps.
46.3 Swap data reporting for pre-enactment swaps and transition swaps.
46.4 Unique identifiers.
46.5 Determination of which counterparty must report.
46.6 Third-party facilitation of data reporting.
46.7 Reporting to a single swap data repository.
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Appendix to Part 46—Tables of Minimum Primary Economic Terms Data for Pre-Enactment and Transition Swaps.

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

§ 46.1 Definitions.

Terms used in this part are defined as follows:

Asset class means the broad category of goods, services or commodities, including any ''excluded commodity'' as defined in CEA section 1a(19), with common characteristics underlying a swap. The asset classes include credit, equity, foreign exchange (excluding cross-currency), interest rate (including cross-currency), other commodity, and such other asset classes as may be determined by the Commission.

Compliance date means the applicable date, as specified in part 45 of this chapter, on which a registered entity or swap counterparty subject to the jurisdiction of the Commission is required to commence full compliance with all provisions of this part and with all applicable provisions of part 45 of this chapter, as set forth in the preamble to this part.

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

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

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

Electronic reporting (''report electronically'') means the reporting of data normalized in data fields as required by the data standard or standards used by the swap data repository to which the data is reported. Except where specifically otherwise provided in this chapter, electronic reporting does not include submission of an image of a document or text file.

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

Financial entity has the meaning set forth in CEA section 2(h)(7)(C).

Foreign exchange forward has the meaning set forth in CEA section 1a(24).

Foreign exchange instrument means an instrument that is both defined as a swap in part 1 of this chapter and included in the foreign exchange asset class. Instruments in the foreign exchange asset class include: any currency option, foreign currency option, foreign exchange option, or foreign exchange rate option; any foreign exchange forward as defined in CEA section 1a(24); any foreign exchange swap as defined in CEA section 1a(25); and any non-deliverable forward involving foreign exchange.

Foreign exchange swap has the meaning set forth in CEA section 1a(25). It does not include swaps primarily based on rates of exchange between different currencies, changes in such rates, or other aspects of such rates (sometimes known as ''cross-currency swaps'').

Interest rate swap means any swap which is primarily based on one or more interest rates, such as swaps of payments determined by fixed and floating interest rates; or any swap which is primarily based on rates of exchange between different currencies, changes in such rates, or other aspects of such rates (sometimes known as ''cross-currency swaps'').

International swap means a swap required by U.S. law and the law of another jurisdiction to be reported both to a swap data repository and to a different trade repository registered with the other jurisdiction.

Major swap participant has the meaning set forth in CEA section 1a(33) and in part 1 of this chapter.

Minimum primary economic terms means, with respect to a historical swap, the terms included in the list of minimum primary economic terms for swaps in each swap asset class found in Appendix 1 to this part.

Minimum primary economic terms data means all of the data elements necessary to fully report all of the minimum primary economic terms required by this part to be reported for a swap in the swap asset class of the swap in question.

Mixed swap has the meaning set forth in CEA section 1a(47)(D), and refers to an instrument that is in part a swap subject to the jurisdiction of the Commission, and in part a security-based swap subject to the jurisdiction of the SEC.

Multi-asset swap means a swap that does not have one easily identifiable primary underlying notional item, but instead involves multiple underlying notional items within the Commission's jurisdiction that belong to different asset classes.

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

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

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

Reporting counterparty means the counterparty required to report swap

data pursuant to this part, selected as provided in § 46.5.

Required swap continuation data means all of the data elements that must be reported during the existence of a swap as required by part 45 of this chapter.

Swap data repository has the meaning set forth in CEA section 1a(48), and in part 49 of this chapter.

Swap dealer has the meaning set forth in CEA section 1a(49), and in part 1 of this chapter.

Transition swap means any swap entered into on or after the enactment of the Dodd-Frank Act of 2010 (July 21, 2010) and prior to the applicable compliance date on which a registered entity or swap counterparty subject to the jurisdiction of the Commission is required to commence full compliance with all provisions of this part, as set forth in the preamble to this part.

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

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

(1) *Minimum records required.* Each counterparty shall keep records of all of the minimum primary economic terms data specified in Appendix 1 to this part.

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

(i) Any confirmation of the swap executed by the counterparties.

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

(iii) Any credit support agreement, or other agreement between the counterparties having the same function as a credit support agreement, relating to the swap, and any modification or amendment thereof.

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

(4) *Retention form.* Records required to be kept pursuant to this section with respect to historical swaps in existence on or after April 25, 2011, must be kept as required by paragraph (a)(4)(i) or (ii) of this section, as applicable.

(i) Records required to be kept by swap dealers or major swap participants may be kept in electronic form, or kept in paper form if originally created and exclusively maintained in paper form, so long as they are retrievable, and information in them is reportable as required by this part.

(ii) Records required to be kept by non-SD/MSP counterparties may be kept in either electronic or paper form, so long as they are retrievable, and information in them is reportable, as required by this part.

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

(1) *Pre-enactment swaps expired prior to April 25, 2011.* Each counterparty to any pre-enactment swap that expired or was terminated prior to April 25, 2011 shall retain the information and documents relating to the terms of the transaction that were possessed by the counterparty on or after October 14, 2010 (17 CFR 44.00 through 44.02). Such information may be retained in the format in which it existed on or after October 14, 2010, or in such other format as the counterparty chooses to retain it. This paragraph (b)(1) does not require the counterparty to create or retain records of information not in its possession on or after October 14, 2010, or to alter the format, *i.e.,* the method by which the information is organized and stored.

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

(c) *Retention period.* All records required to be kept by this section shall be kept from the applicable dates specified in paragraphs (a) or (b) of this section through the life of the swap, and for a period of at least five years from the final termination of the swap.

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

(1) *Retrieval for pre-enactment and transition swaps in existence on or after April 25, 2011.* Records concerning pre-enactment and transition swaps in existence on or after April 25, 2011, shall be retrievable as follows:

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

(ii) Each record required to be kept by a non-SD/MSP counterparty shall be retrievable by the counterparty within five business days throughout the period during which it is required to be kept.

(2) *Retrieval for pre-enactment and transition swaps expired or terminated prior to April 25, 2011.* Records concerning pre-enactment and transition swaps expired or terminated prior to April 25, 2011, shall be retrievable by the counterparty within five business days throughout the period during which they are required to be kept.

(e) *Inspection.* All records required to be kept pursuant to this section by any registrant or its affiliates or by any counterparty subject to the jurisdiction of the Commission shall be open to inspection upon request by any representative of the Commission, the United States Department of Justice, or the Securities and Exchange Commission, or by any representative of a prudential regulator as authorized by the Commission. Copies of all such records shall be provided, at the expense of the entity or person required to keep the record, to any representative of the Commission upon request. With respect to historical swaps in existence on or after April 25, 2011, copies of records required to be kept by any swap dealer or major swap participant shall

be provided either by electronic means, in hard copy, or both, as requested by the Commission, with the sole exception that copies of records originally created and exclusively maintained in paper form may be provided in hard copy only; and copies of records required to be kept by any non-SD/MSP counterparty shall be provided in the form, whether electronic or paper, in which the records are kept. With respect to historical swaps expired or terminated prior to April 25, 2011, records shall be provided in the form, whether electronic or paper, in which the records are kept.

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

(a) *Reporting for pre-enactment and transition swaps in existence on or after April 25, 2011.* (1) *Initial data report.* For each pre-enactment swap or transition swap in existence on or after April 25, 2011, the reporting counterparty shall report electronically to a swap data repository (or to the Commission if no swap data repository for swaps in the asset class in question is available), on the compliance date, the following:

(i) All of the minimum primary economic terms data specified in Appendix 1 to this part that were in the possession of the reporting counterparty on or after April 25, 2011;

(ii) The legal entity identifier of the reporting counterparty required pursuant to § 46.4; and

(iii) The following additional identifiers:

(A) The internal counterparty identifier or legal entity identifier used by the reporting counterparty to identify the non-reporting counterparty; and

(B) The internal transaction identifier used by the reporting counterparty to identify the swap.

(2) *Reporting of required swap continuation data.* (i) For each uncleared pre-enactment or transition swap in existence on or after April 25, 2011, throughout the existence of the swap following the compliance date, the reporting counterparty must report all required swap continuation data required to be reported pursuant to part 45 of this chapter, with the exception that when a reporting counterparty reports changes to minimum primary economic terms for a pre-enactment or transition swap, the reporting counterparty is required to report only changes to the minimum primary economic terms listed in Appendix 1 to this part and reported in the initial data report made pursuant to paragraph (a)(1) of this section, rather than changes to all minimum primary economic terms listed in Appendix 1 to part 45.

(ii) Swap continuation data reporting is not required for a pre-enactment or transition swap in existence on or after April 25, 2011, that has been cleared by a designated clearing organization.

(3) *Data reporting for multi-asset swaps and mixed swaps.* (i) For each pre-enactment or transition swap in existence on or after April 25, 2011, that is a multi-asset swap, all data required to be reported by this part shall be reported to a single swap data repository that accepts swaps in the asset class treated as the primary asset class involved in the swap by the reporting counterparty making the first report of required swap creation data pursuant to this section.

(ii) For each pre-enactment or transition swap in existence on or after April 25, 2011, that is a mixed swap, all data required to be reported pursuant to this part shall be reported to a swap data repository registered with the Commission and to a security-based swap data repository registered with the Securities and Exchange Commission. This requirement may be satisfied by reporting the mixed swap to a swap data repository or security-based swap data repository registered with both Commissions.

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

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

(c) *Voluntary early submission of initial data report.* For all pre-enactment and transition swaps required to be reported pursuant to this part, the reporting counterparty may make the initial data report required by paragraph (a)(1) of this section, or the data report required by paragraph (b) of this section, prior to the applicable compliance date, if a swap data repository accepting swaps in the asset class in question is prepared to accept the report. The obligation to report continuation data as required by paragraph (a)(2) of this section with respect to a swap for which a voluntary early submission is made commences on the applicable compliance date. However, the reporting counterparty may submit continuation data at any time after a voluntary early submission made pursuant to this paragraph, if the swap data repository is prepared to accept such continuation data, and if that repository has registered with the Commission as a swap data repository as of the applicable compliance date.

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

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

(2) The counterparty shall be required to report to the swap data repository on the compliance date any information required as part of the initial data report by paragraph (a) of this section that has not been reported prior to the compliance date: and

(3) In the case of pre-enactment and transition swaps in existence on or after April 25, 2011, the initial data report required by paragraph (a) of this section and all subsequent data reporting concerning the swap shall be made to the same swap data repository to which data concerning the swap was first reported prior to the compliance date (or to its successor in the event that it ceases to operate, as provided in part 49 of this chapter).

§ 46.4 Unique identifiers.

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

(a) By the compliance date, the reporting counterparty (as defined by part 45 of this chapter) for each pre-

enactment or transition swap in existence on or after April 25, 2011, for which an initial data report is required by this part 46, shall obtain for itself a legal entity identifier as provided in § 45.6 of this chapter (or if the Commission has not yet designated a legal entity identifier system, a substitute counterparty identifier as provided in § 45.6(f) of this chapter), and shall include its own legal entity identifier (or substitute counterparty identifier) in the initial data report concerning the swap. With respect to the legal entity identifier (or substitute counterparty identifier) of the reporting counterparty, the reporting counterparty and the swap data repository to which the swap is reported shall comply thereafter with all unique identifier requirements of § 45.6 of this chapter.

(b) Within 180 days after the compliance date, the non-reporting counterparty for each pre-enactment or transition swap in existence on or after April 25, 2011, for which an initial data report is required by this part 46, shall obtain a legal entity identifier as provided in § 45.6 of this chapter (or if the Commission has not yet designated a legal entity identifier system, a substitute counterparty identifier as provided in § 45.6(f) of this chapter), and shall provide its legal entity identifier (or substitute counterparty identifier) to the reporting counterparty. Upon receipt of the non-reporting counterparty's legal entity identifier (or substitute counterparty identifier), the reporting counterparty shall provide it to the swap data repository to which swap data for the swap was reported. Thereafter, with respect to the legal entity identifier (or substitute counterparty identifier) of the non-reporting counterparty, the counterparties to the swap and the swap data repository to which it is reported shall comply with all requirements of § 45.6 of this chapter.

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

(d) The unique swap identifier and unique product identifier requirements of part 45 of this chapter shall not apply to pre-enactment or transition swaps.

§ 46.5 Determination of which counterparty must report.

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

(1) If only one counterparty is a swap dealer, the swap dealer shall fulfill all counterparty reporting obligations.

(2) If neither party is an swap dealer, and only one counterparty is an major swap participant, the major swap participant shall fulfill all counterparty reporting obligations.

(3) If both counterparties are non-SD/MSP counterparties, and only one counterparty is a financial entity as defined in CEA section 2(h)(7)(C), the counterparty that is a financial entity shall be the reporting counterparty.

(4) For each pre-enactment swap or transition swap for which both counterparties are swap dealers, or both counterparties are major swap participants, or both counterparties are non-SD/MSP counterparties that are financial entities as defined in CEA section 2(h)(7)(C), or both counterparties are non-SD/MSP counterparties and neither counterparty is a financial entity as defined in CEA section 2(h)(7)(C), the counterparties shall agree which counterparty shall fulfill reporting obligations with respect to that swap; and the counterparty so selected shall fulfill all counterparty reporting obligations.

(5) Notwithstanding the provisions of paragraphs (a)(1) through (3) of this section, for pre-enactment or transition swaps for which both counterparties are non-SD/MSP counterparties, if only one counterparty is a U.S. person, that counterparty shall be the reporting counterparty and shall fulfill all counterparty reporting obligations.

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

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

(d) After the initial report required by § 46.3 is made, if a reporting counterparty selected pursuant to this section ceases to be a counterparty to a swap due to an assignment or novation, the reporting counterparty for reporting of required swap continuation data following the assignment or novation shall be selected from the two current counterparties as provided in paragraphs (d)(1) through (4) of this section.

(1) If only one counterparty is a swap dealer, the swap dealer shall be the reporting counterparty and shall fulfill all counterparty reporting obligations.

(2) If neither counterparty is a swap dealer, and only one counterparty is a major swap participant, the major swap participant shall be the reporting counterparty and shall fulfill all counterparty reporting obligations.

(3) If both counterparties are non-SD/MSP counterparties, and only one counterparty is a U.S. person, that counterparty shall be the reporting counterparty and shall fulfill all counterparty reporting obligations.

(4) In all other cases, the counterparty that replaced the previous reporting counterparty by reason of the assignment or novation shall be the reporting counterparty, unless otherwise agreed by the counterparties.

§ 46.6 Third-party facilitation of data reporting.

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

§ 46.7 Reporting to a single swap data repository.

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

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

(a) Should there be a swap asset class for which no swap data repository registered with the Commission currently accepts swap data, each registered entity or counterparty required by this part to report any required swap creation data or required swap continuation data with respect to a swap in that asset class must report that same data to the Commission.

(b) Data reported to the Commission pursuant to this section shall be reported at times announced by the Commission. Data reported to the Commission pursuant to this section with respect to pre-enactment and transition swaps in existence on or after April 25, 2011 shall be reported in an electronic format acceptable to the Commission.

(c) Delegation of authority to the Chief Information Officer: The Commission hereby delegates to its Chief Information Officer, until the Commission orders otherwise, the authority set forth in paragraph (c) of this section, to be exercised by the Chief Information Officer or by such other employee or employees of the Commission as may be designated from time to time by the Chief Information Officer. The Chief Information Officer may submit to the Commission for its consideration any matter which has been delegated in this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph. The authority delegated to the Chief Information Officer by paragraph (c) of this section shall include:

(1) With respect to all pre-enactment and transition swaps required to be reported by this part, the authority to determine the dates and times at which data concerning such swaps shall be reported pursuant to this part.

(2) With respect to all pre-enactment swaps or transition swaps in existence on or after April 25, 2011:

(i) The authority to determine the manner, format, coding structure, and electronic data transmission standards and procedures acceptable to the Commission for the purposes of paragraphs (a) and (b) of this section; and

(ii) The authority to determine whether the Commission may permit or require use by reporting entities or counterparties in reporting pre-enactment or transition swaps in existence on or after April 25, 2011, of one or more particular data standards (such as FIX, FpML, ISO 20022, or some other standard), in order to accommodate the needs of different communities of users.

(d) The Chief Information Officer shall publish from time to time in the **Federal Register** and on the Web site of the Commission the dates and times, format, data schema, and electronic data transmission methods and procedures for reporting acceptable to the Commission with respect to swap data reporting pursuant to this section.

§ 46.9 Voluntary supplemental reporting

(a) For purposes of this section, the term *voluntary, supplemental report* means any report of swap data for a pre-enactment or transition swap to a swap data repository that is not required to be made pursuant to this part or any other part in this chapter.

(b) A voluntary, supplemental report for a pre-enactment or transition swap may be made only by a counterparty to the swap in connection with which the voluntary, supplemental report is made, or by a third-party service provider acting on behalf of a counterparty to the swap.

(c) A voluntary, supplemental report for a pre-enactment or transition swap may be made only after the initial data report for the swap required by section 46.3(a) or the report required by section 46.3(b), as applicable, has been made.

(d) A voluntary, supplemental report for a pre-enactment or transition swap may be made either to the swap data repository to which the initial data report for the swap required by section 46.3(a) or the report required by section 46.3(b), as applicable, has been made, or to a different swap data repository.

(e) A voluntary, supplemental report for a pre-enactment or transition swap must contain:

(1) An indication that the report is a voluntary, supplemental report.

(2) The swap data repository identifier created for the swap by the automated systems of the swap data repository to which the initial data report required by section 46.3(a) or the report required by section 46.3(b), as applicable, has been made.

(3) An indication of the identity of the swap data repository to which the initial data report required by section 46.3(a) or the report required by section 46.3(b), as applicable, has been made, if the voluntary supplemental report is made to a different swap data repository.

(4) If the pre-enactment or transition swap was in existence on or after April 25, 2011, the legal entity identifier (or substitute identifier) of the counterparty making the voluntary, supplemental report.

(5) If applicable, an indication that the voluntary, supplemental report is made pursuant to the laws or regulations of any jurisdiction outside the United States.

(f) If a counterparty that has made a voluntary, supplemental report discovers any errors in the swap data included in the voluntary, supplemental report, the counterparty must report a correction of each such error to the swap data repository to which the voluntary, supplemental report was made, as soon as technologically practicable after discovery of any such error.

§ 46.10 Required data standards.

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

§ 46.11 Reporting of errors and omissions in previously reported data.

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

(b) For pre-enactment or transition swaps for which this part requires reporting of continuation data, reporting counterparties reporting state data as provided in part 45 of this chapter may fulfill the requirement to report errors or omissions by making appropriate corrections in their next daily report of state data pursuant to part 45 of this chapter.

(c) Each counterparty to a pre-enactment or transition swap that is not the reporting counterparty as determined pursuant to § 46.5, and that discovers any error or omission with respect to any swap data reported to a swap data repository for that swap, shall promptly notify the reporting counterparty of each such error or omission. As soon as technologically practicable after receiving such notice, the reporting counterparty shall report a correction of each such error or omission to the swap data repository.

(d) Each swap counterparty reporting corrections to errors or omissions in data previously reported as required by this part shall report such corrections in the same format as it reported the erroneous or omitted data.

Appendix 1 to Part 46—Tables of Minimum Primary Economic Terms Data For Pre-Enactment and Transition Swaps

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EXHIBIT A

Minimum Primary Economic Terms Data For Pre-Enactment And Transition Swaps

CREDIT SWAPS AND EQUITY SWAPS

(Enter N/A for fields that are not applicable)

Data categories and fields	**Comment**
The Legal Entity Identifier of the reporting counterparty	As provided in § 45.6. If no CFTC-designated Legal Entity Identifier for the reporting counterparty is yet available, enter the internal identifier for the reporting counterparty used by the swap data repository. If no repository identifier yet exists, the repository fills in this field after creating its identifier
An indication of whether the reporting counterparty is a swap dealer with respect to the swap	Yes/No
An indication of whether the reporting counterparty is a major swap participant with respect to the swap	Yes/No
If the reporting counterparty is not a swap dealer or a major swap participant with respect to the swap, an indication of whether the reporting counterparty is a financial entity as defined in CEA section 2(h)(7)(C)	Yes/No
An indication of whether the reporting counterparty is a U.S. person.	Yes/No
The Legal Entity Identifier of the non-reporting party	As provided in § 46.4. This information is only required 180 days after the applicable compliance date
If no CFTC-approved Legal Entity Identifier for the non-reporting counterparty is yet available, the internal identifier for the non-reporting counterparty used by the swap data repository	If no repository identifier yet exists, the repository fills in this field after creating its identifier
An indication of whether the non-reporting counterparty is a swap dealer with respect to the swap	Yes/No
An indication of whether the non-reporting counterparty is a major swap participant with respect to the swap	Yes/No
If the non-reporting counterparty is not a swap dealer or a major swap participant with respect to the swap, an indication of whether the non-reporting counterparty is a financial entity as defined in CEA section 2(h)(7)(C)	Yes/No

An indication of whether the non-reporting counterparty is a U.S. person.	Yes/No
An indication that the swap is a multi-asset swap	Field values: Yes, Not applicable
For a multi-asset class swap, an indication of the primary asset class	Generally, the asset class traded by the desk trading the swap for the reporting counterparty. Field values: credit, equity, FX, rates, other commodity
For a multi-asset class swap, an indication of the secondary asset class(es)	Field values: credit, equity, FX, rates, other commodity
An indication that the swap is a mixed swap	Field values: Yes, Not applicable
For a mixed swap reported to two non-dually-registered swap data repositories, the identity of the other swap data repository (if any) to which the swap is or will be reported	
An indication of the counterparty purchasing protection	Field values: LEI if available, or substitute identifier as above if LEI is not yet available
An indication of the counterparty selling protection	Field values: LEI if available, or substitute identifier as above if LEI is not yet available
Information identifying the reference entity	The entity that is the subject of the protection being purchased and sold in the swap. Field values: LEI if available, or substitute identifier as above if LEI is not yet available, or name
Contract type	E.g., swap, swaption, forward, option, basis swap, index swap, basket swap
Execution timestamp	The date of the trade. If the time of the trade was recorded when the trade was executed and is known to the reporting counterparty, also include the time of the trade
Execution venue	The venue on or pursuant to the rules of which the swap was executed. Field values: name or identifier (if available) of the venue, or "off-facility" if not so executed
Start date	The date on which the swap starts or goes into effect
Maturity, termination or end date	The date on which the swap expires
The price	E.g., strike price, initial price, spread
The notional amount, and the currency in which the notional amount is expressed	
The amount and currency (or currencies) of any up-front payment	
Payment frequency of the reporting counterparty	A description of the payment stream of the reporting counterparty, e.g., coupon
Payment frequency of the non-reporting counterparty	A description of the payment stream of the non-reporting counterparty, e.g., coupon
Clearing indicator	Yes/No indication of whether the swap was or will be cleared by a derivatives clearing organization
Clearing venue	If the swap was or will be cleared, the identifier (if available) or name of the derivatives clearing organization

EXHIBIT B

Minimum Primary Economic Terms Data For Pre-Enactment And Transition Swaps

FOREIGN EXCHANGE TRANSACTIONS

(OTHER THAN CROSS-CURRENCY SWAPS)

(Enter N/A for fields that are not applicable)

Data fields	**Comments**
The Legal Entity Identifier of the reporting counterparty	As provided in § 45.6. If no CFTC-designated Legal Entity Identifier for the reporting counterparty is yet available, enter the internal identifier for the reporting counterparty used by the swap data repository. If no repository identifier yet exists, the repository fills in this field after creating its identifier
An indication of whether the reporting counterparty is a swap dealer with respect to the swap	Yes/No
An indication of whether the reporting counterparty is a major swap participant with respect to the swap	Yes/No
If the reporting counterparty is not a swap dealer or a major swap participant with respect to the swap, an indication of whether the reporting counterparty is a financial entity as defined in CEA section 2(h)(7)(C)	Yes/No
An indication of whether the reporting counterparty is a U.S. person	Yes/No
The Legal Entity Identifier of the non-reporting party	As provided in § 46.4. This information is only required 180 days after the applicable compliance date
If no CFTC-approved Legal Entity Identifier for the non-reporting counterparty is yet available, the internal identifier for the non-reporting counterparty used by the swap data repository	If no repository identifier yet exists, the repository fills in this field after creating its identifier
An indication of whether the non-reporting counterparty is a swap dealer with respect to the swap	Yes/No
An indication of whether the non-reporting counterparty is a major swap participant with respect to the swap	Yes/No
If the non-reporting counterparty is not a swap dealer or a major swap participant with respect to the swap, an indication of whether the non-reporting counterparty is a financial entity as defined in CEA section 2(h)(7)(C)	Yes/No
An indication of whether the non-reporting counterparty is a U.S. person.	Yes/No
An indication that the swap is a multi-asset swap	Field values: Yes, Not applicable
For a multi-asset class swap, an indication of the primary asset class	Generally, the asset class traded by the desk trading the swap for the reporting counterparty. Field values: credit, equity, FX, rates, other commodity

For a multi-asset class swap, an indication of the secondary asset class(es)	Field values: credit, equity, FX, rates, other commodity
An indication that the swap is a mixed swap	Field values: Yes, Not applicable
For a mixed swap reported to two non-dually-registered swap data repositories, the identity of the other swap data repository (if any) to which the swap is or will be reported	
Contract type	E.g., forward, non-deliverable forward (NDF), non-deliverable option (NDO), vanilla option, simple exotic option, complex exotic option
Execution timestamp	The date of the trade. If the time of the trade was recorded when the trade was executed and is known to the reporting counterparty, also include the time of the trade
Execution venue	The venue on or pursuant to the rules of which the swap was executed. Field values: name or identifier (if available) of the venue, or "off-facility" if not so executed
Currency 1	ISO code
Currency 2	ISO code
Notional amount 1	For currency 1
Notional amount 2	For currency 2
Exchange rate	Contractual rate of exchange of the currencies
Delivery type	Physical (deliverable) or cash (non-deliverable)
Settlement or expiration date	Settlement date, or for an option the contract expiration date
Clearing indicator	Yes/No indication of whether the swap was or will be cleared by a derivatives clearing organization
Clearing venue	If the swap was or will be cleared, the identifier (if available) or name of the derivatives clearing organization

EXHIBIT C

Minimum Primary Economic Terms Data For Pre-Enactment And Transition Swaps

INTEREST RATE SWAPS (INCLUDING CROSS-CURRENCY SWAPS)

(Enter N/A for fields that are not applicable)

Data field	**Comment**
The Legal Entity Identifier of the reporting counterparty	As provided in § 45.6. If no CFTC-designated Legal Entity Identifier for the reporting counterparty is yet available, enter the internal identifier for the reporting counterparty used by the swap data repository. If no repository identifier yet exists, the repository fills in this field after creating its identifier
An indication of whether the reporting counterparty is a swap dealer with respect to the swap	Yes/No
An indication of whether the reporting counterparty is a major swap participant with respect to the swap	Yes/No
If the reporting counterparty is not a swap dealer or a major swap participant with respect to the swap, an indication of whether the reporting counterparty is a financial entity as defined in CEA section 2(h)(7)(C)	Yes/No
An indication of whether the reporting counterparty is a U.S. person.	Yes/No
The Legal Entity Identifier of the non-reporting counterparty	As provided in § 46.4. This information is only required 180 days after the applicable compliance date
If no CFTC-approved Legal Entity Identifier for the non-reporting counterparty is yet available, the internal identifier for the non-reporting counterparty used by the swap data repository	If no repository identifier yet exists, the repository fills in this field after creating its identifier
An indication of whether the non-reporting counterparty is a swap dealer with respect to the swap	Yes/No
An indication of whether the non-reporting counterparty is a major swap participant with respect to the swap	Yes/No
If the non-reporting counterparty is not a swap dealer or a major swap participant with respect to the swap, an indication of whether the non-reporting counterparty is a financial entity as defined in CEA section 2(h)(7)(C)	Yes/No
An indication of whether the non-reporting counterparty is a U.S. person.	Yes/No
An indication that the swap is a multi-asset swap	Field values: Yes, Not applicable
For a multi-asset class swap, an indication of the primary asset class	Generally, the asset class traded by the desk trading the swap for the reporting counterparty. Field values: credit, equity, FX, rates, other commodity
For a multi-asset class swap, an indication of the secondary asset class(es)	Field values: credit, equity, FX, rates, other commodity

An indication that the swap is a mixed swap	Field values: Yes, Not applicable
For a mixed swap reported to two non-dually-registered swap data repositories, the identity of the other swap data repository (if any) to which the swap is or will be reported	
Contract type	E.g., swap, swaption, option, basis swap, index swap
Execution timestamp	The date of the trade. If the time of the trade was recorded when the trade was executed and is known to the reporting counterparty, also include the time of the trade
Execution venue	The venue on or pursuant to the rules of which the swap was executed. Field values: name or identifier (if available) of the venue, or "off-facility" if not so executed
Start date	The date on which the swap starts or goes into effect
Maturity, termination or end date	The date on which the swap expires or ends
Day count convention	
Notional amount (leg 1)	The current active notional amount
Notional currency (leg 1)	ISO code
Notional amount (leg 2)	The current active notional amount
Notional currency (leg 2)	ISO code
Payer (fixed rate)	Is the reporting party a fixed rate payer? Yes/No/Not applicable
Payer (floating rate leg 1)	If two floating legs, the payer for leg 1
Payer (floating rate leg 2)	If two floating legs, the payer for leg 2
Direction	For swaps: whether the principal is paying or receiving the fixed rate. For float-to-float and fixed-to-fixed swaps: indicate N/A. For non-swap instruments and swaptions: indicate the instrument that was bought or sold.
Option type	E.g., put, call, straddle
Fixed rate	
Fixed rate day count fraction	E.g., actual 360
Floating rate payment frequency	
Floating rate reset frequency	
Floating rate index name/rate period	E.g., USD-Libor-BBA
Clearing indicator	Yes/No indication of whether the swap was or will be cleared by a derivatives clearing organization
Clearing venue	Identifier (if available) or name of the derivatives clearing organization

EXHIBIT D

Minimum Primary Economic Terms Data For Pre-Enactment And Transition Swaps

OTHER COMMODITY SWAPS

(Enter N/A for fields that are not applicable)

Data field	**Comment**
The Legal Entity Identifier of the reporting counterparty	As provided in § 45.6. If no CFTC-designated Legal Entity Identifier for the reporting counterparty is yet available, enter the internal identifier for the reporting counterparty used by the swap data repository. If no repository identifier yet exists, the repository fills in this field after creating its identifier
An indication of whether the reporting counterparty is a swap dealer with respect to the swap	Yes/No
An indication of whether the reporting counterparty is a major swap participant with respect to the swap	Yes/No
If the reporting counterparty is not a swap dealer or a major swap participant with respect to the swap, an indication of whether the reporting counterparty* is a financial entity as defined in CEA section 2(h)(7)(C)	Yes/No
An indication of whether the reporting counterparty is a U.S. person.	Yes/No
The Legal Entity Identifier of the non-reporting party	As provided in § 46.4. This information is only required 180 days after the applicable compliance date
If no CFTC-approved Legal Entity Identifier for the non-reporting counterparty is yet available, the internal identifier for the non-reporting counterparty used by the swap data repository	If no repository identifier yet exists, the repository fills in this field after creating its identifier
An indication of whether the non-reporting counterparty is a swap dealer with respect to the swap	Yes/No
An indication of whether the non-reporting counterparty is a major swap participant with respect to the swap	Yes/No
If the non-reporting counterparty is not a swap dealer or a major swap participant with respect to the swap, an indication of whether the non-reporting counterparty is a financial entity as defined in CEA section 2(h)(7)(C)	Yes/No
An indication of whether the non-reporting counterparty is a U.S. person.	Yes/No
An indication that the swap is a multi-asset swap	Field values: Yes, Not applicable
For a multi-asset class swap, an indication of the primary asset class	Generally, the asset class traded by the desk trading the swap for the reporting counterparty. Field values: credit, equity, FX, rates, other commodity
For a multi-asset class swap, an indication of the secondary asset class(es)	Field values: credit, equity, FX, rates, other commodity

An indication that the swap is a mixed swap	Field values: Yes, Not applicable
For a mixed swap reported to two non-dually-registered swap data repositories, the identity of the other swap data repository (if any) to which the swap is or will be reported	
Contract type	E.g., swap, swaption, option, basis swap, index swap
Execution timestamp	The date of the trade. If the time of the trade was recorded when the trade was executed and is known to the reporting counterparty, also include the time of the trade
Execution venue	The venue on or pursuant to the rules of which the swap was executed. Field values: name or identifier (if available) of the venue, or "off-facility" if not so executed
Start date	The date on which the swap commences or goes into effect (e.g., in physical oil, the pricing start date)
Maturity, termination, or end date	The date on which the swap expires or ends (e.g., in physical oil, the pricing end date)
Buyer	The counterparty purchasing the product: e.g., the payer of the fixed price (for a swap), or the payer of the floating price on the underlying swap (for a put swaption), or the payer of the fixed price on the underlying swap (for a call swaption). Field values: LEI if available, or substitute identifier as above if LEI is not yet available
Seller	The counterparty offering the product: e.g., the payer of the floating price (for a swap), the payer of the fixed price on the underlying swap (for a put swaption), or the payer of the floating price on the underlying swap (for a call swaption). Field values: LEI if available, or substitute identifier as above if LEI is not yet available
Quantity unit	The unit of measure applicable for the quantity on the swap. E.g., barrels, bushels, gallons, pounds, tons
Quantity	The amount of the commodity (the number of quantity units) quoted on the swap
Quantity frequency	The rate at which the quantity is quoted on the swap. E.g., hourly, daily, weekly, monthly
Total quantity	The quantity of the commodity for the entire term of the swap
Settlement method	Physical delivery or cash
Price	The price of the swap. For options, the strike price
Price unit	The unit of measure applicable for the price of the swap
Price currency	ISO code

Buyer pay index	The published price as paid by the buyer (if applicable). For swaptions, applies to the underlying swap
Buyer pay averaging method	The averaging method used to calculate the index of the buyer pay index. For swaptions, applies to the underlying swap
Seller pay index	The published price as paid by the seller (if applicable). For swaptions, applies to the underlying swap
Seller pay averaging method	The averaging method used to calculate the index of the seller pay index. For swaptions, applies to the underlying swap
Grade	If applicable, the grade of the commodity to be delivered, e.g., the grade of oil or refined product
Option type	Descriptor for the type of option transaction. E.g., put, call, straddle
Option style	E.g., American, European, European Daily, European Monthly, Asian
Option premium	The total amount paid by the option buyer
Hours from through	For electric power, the hours of the day for which the swap is effective
Hours from through time zone	For electric power, the time zone prevailing for the hours during which electricity is transmitted
Days of week	For electric power, the profile applicable for the delivery of power
Load type	For electric power, the load profile for the delivery of power
Clearing indicator	Yes/No indication of whether the swap will be cleared by a derivatives clearing organization
Clearing venue	Identifier (if available) or name of the derivatives clearing organization

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Issued in Washington, DC on May 17, 2012 by the Commission.

David A. Stawick,

Secretary of the Commission.

Appendix to Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps—Commission Voting Summary and Statement of Chairman Gensler

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

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

Appendix 2—Statement of Chairman Gary Gensler

I support the final rule establishing swap data recordkeeping and reporting requirements for pre-enactment and transition swaps, collectively called ''historical swaps.'' One of the main goals of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) is to bring transparency to the unregulated swaps market. Starting this summer, light will shine for the first time on this market with the reporting both to the public and to regulators of nearly every swap transaction.

The historical swaps rule builds on already completed swaps market transparency rules. It will help give regulators a complete picture of the swaps market, including data on swaps in existence at the time of the Dodd-Frank Act's passage.

The rule provides market participants guidance on the reporting requirements for pre-enactment swaps (those entered into before the enactment of the Dodd-Frank Act) as well as transition swaps (those entered into between the enactment date of the law and the applicable compliance date for swap data reporting). The rule specifies clearly what records must be kept and what data must be reported to swap data repositories (SDRs) with respect to these historical swaps. It ensures that the historical swaps data needed by regulators is available through SDRs beginning on the compliance date for swap data reporting.

The rule achieves the reporting benefits of Dodd-Frank while reducing the costs and burdens associated with recordkeeping for historical swaps. Recordkeeping requirements for these swaps are minimized for counterparties who are not swap dealers or major swap participants. These counterparties are permitted to maintain records in any format they choose, and are allowed five days to retrieve their records.

[FR Doc. 2012–12531 Filed 6–11–12; 8:45 am]

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