

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 49

RIN 3038-AE14

Swap Data Repositories – Access to SDR Data by Market Participants

AGENCY: Commodity Futures Trading Commission.

ACTION: Interim final rule; request for comment.

SUMMARY: The Commodity Futures Trading Commission (“Commission” or “CFTC”) is adopting an interim final rule to clarify the scope of permissible access by market participants to swap data and information maintained by a registered swap data repository (“SDR”). Specifically, the interim final rule clarifies that, for a swap that is executed anonymously on a swap execution facility or designated contract market, and then cleared in accordance with the Commission’s straight-through processing requirements, the data and information maintained by a registered SDR that may be accessed by either counterparty to the swap does not include the identity of the other counterparty to the swap, the identity of the other counterparty’s clearing member for the swap, or such counterparty’s or clearing member’s legal entity identifier.

DATES: Effective date: This interim final rule is effective [insert date of publication in the Federal Register].

Comment date: Comments on this interim final rule must be submitted on or before [insert date that is 30 days after date of publication in the Federal Register].

ADDRESSES: You may submit comments, identified by RIN number 3038-AE14, by any of the following methods:

- Agency website, via its Comments Online process: <http://comments.cftc.gov>.
Follow the instructions for submitting comments through the website.
- Mail: Melissa Jurgens, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581.
- Courier: Same as mail above.
- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments through the portal.

Please submit your comments using only one method.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to <http://www.cftc.gov>. You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission's regulations.¹

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from <http://www.cftc.gov> that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of this action will be retained in the public comment file and will be considered

¹ See 17 CFR § 145.9.

as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT: Nora Flood, Attorney Advisor, (202) 418-5354, nflood@cftc.gov, or Laurie Gussow, Special Counsel, (202) 418-7623, lgussow@cftc.gov, Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

Table of Contents:

I. Background

- A. Dodd-Frank Act Section 728; CEA Section 21
- B. Access to SDR Data by Market Participants

II. Scope of Permissible Access to SDR Data and Information by Counterparties to Anonymously Executed, Cleared Swaps

- A. Discussion
- B. Amendment to 17 CFR § 49.17(f)(2)

III. Request for Comment on Interim Final Rule

IV. Related Matters

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

V. Interim Final Rule

I. Background

A. Dodd-Frank Act Section 728; CEA Section 21

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”).² Title VII of the Dodd-Frank Act amended the Commodity Exchange Act (“CEA” or “Act”)³ to establish a comprehensive new regulatory framework for swaps. The legislation was enacted to reduce systemic risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) providing for the registration and comprehensive regulation of swap dealers and major swap participants; (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating a rigorous recordkeeping and data reporting regime with respect to swaps, including real-time public reporting; and (4) enhancing the Commission’s rulemaking and enforcement authorities over all registered entities, intermediaries and swap counterparties subject to the Commission’s oversight.

Section 728 of the Dodd-Frank Act added new section 21 to the CEA, establishing swap data repositories, or “SDRs”, as a new category of Commission registered entity. The SDR category was established to enhance transparency, promote standardization, and reduce systemic risk by facilitating the collection and maintenance of swap transaction data and information, and making such data and information directly

² Pub. L. 111-203, 124 Stat. 1376 (2010).

³ 7 U.S.C. 1 et seq.

and electronically available to regulators.⁴ New CEA section 21 addresses the registration and regulation of SDRs and sets forth duties and core principles with which an SDR must comply in order to register and maintain registration. One of those duties, set forth at CEA section 21(c)(6), is that an SDR “maintain the privacy of any and all swap transaction information that [it] receives from a swap dealer, counterparty, or any other registered entity.”⁵

Section 21 also directs the Commission to adopt rules governing registered SDRs.⁶ On December 23, 2010, the Commission published in the Federal Register a notice of proposed rulemaking (“NPRM”) to implement the provisions of CEA section 21.⁷ After reviewing the public comments received on the NPRM, the Commission adopted final SDR rules as 17 CFR part 49, published in the Federal Register on September 1, 2011 (“Final SDR Rules”).⁸

B. Access to SDR Data by Market Participants

The Final SDR Rules contain certain provisions addressing access to the data and information reported to and maintained by a registered SDR. Privacy and confidentiality requirements applicable to registered SDRs are set forth at § 49.16, and access to SDR data is addressed at § 49.17.

⁴ Section 2(a)(13)(G) of the CEA, added by Section 727 of the Dodd-Frank Act, requires all swaps — whether cleared or uncleared—to be reported to a registered SDR.

⁵ Section 21(c)(6) of the CEA.

⁶ Section 21(h) of the CEA.

⁷ Swap Data Repositories, 75 FR 80897 (Dec. 23, 2010).

⁸ Swap Data Repositories: Registration Standards, Duties and Core Principles, 76 FR 54538 (Sept. 1, 2011).

Access to SDR data by market participants is directly addressed at § 49.17(f). In the NPRM, the Commission proposed § 49.17(f) to generally prohibit access by a market participant to swap data maintained by a registered SDR unless, pursuant to an exception set forth at § 49.17(f)(2), the specific data was originally submitted by such market participant.⁹ Based on comments received on the NPRM,¹⁰ the Commission adopted final § 49.17(f) largely as proposed, but with a revision to the exception at § 49.17(f)(2) to provide that data and information related to a particular swap may be accessed by either counterparty to the swap.

Final § 49.17(f) provides as follows:

(f) Access by Market Participants.

(1) General. Access of swap data maintained by the registered swap data repository to market participants is generally prohibited.

(2) Exception. Data and information related to a particular swap that is maintained by the registered swap data repository may be accessed by either counterparty to that particular swap.

As noted in the preamble to the Final SDR Rules, “[t]he underlying basis for this regulation was to maintain the privacy and confidentiality of the reported data while also limiting potential access to reported swap data to the rightful parties to a swap.”¹¹

⁹ Proposed § 49.17(f) provided as follows:

(f) Access by Market Participants.

(1) General. Access of swap data maintained by the registered swap data repository to market participants is generally prohibited.

(2) Exception. Data and information maintained by the registered swap data repository may be accessed by market participants if the specific data was originally submitted by such party.

¹⁰ See discussion in the preamble to the Final SDR Rules of comments received from the American Benefits Council and the Committee on the Investment of Employee Benefit Assets, and from the Global Foreign Exchange Division formed in cooperation with the Association for Financial Markets in Europe, the Securities Industry and Financial Markets Association and the Asia Securities Industry and Financial Markets Association, each indicating that proposed § 49.17(f) should be modified to allow both counterparties to a swap to access data and information maintained at an SDR for that swap. 76 FR at 54555.

¹¹ 76 FR at 54555.

II. Scope of Permissible Access to SDR Data and Information by Counterparties to Anonymously Executed, Cleared Swaps

A. Discussion

Pursuant to § 49.17(f)(1), access by market participants to swap data maintained by a registered SDR is generally prohibited. An exception to this general prohibition is set forth at § 49.17(f)(2), which provides that data and information related to a particular swap may be accessed by either counterparty to the swap.

The exception provided at § 49.17(f)(2) must be read with reference to the CEA; as a matter of construction, the exception must fall within the bounds of statutory requirements. The exception provided at § 49.17(f)(2) thus includes an implicit condition: counterparty access to data and information related to a particular swap cannot be obtained in contravention of any CEA requirement or prohibition. As discussed above, CEA section 21(c)(6) requires a registered SDR to maintain the privacy of any and all swap transaction information that the SDR receives from a swap dealer, counterparty or any other registered entity. Accordingly, § 49.17(f)(2) authorizes counterparty access to data and information related to a particular swap only to the extent that such access is consistent with an SDR's privacy obligations under CEA section 21(c)(6).

When a swap is executed anonymously on a swap execution facility (“SEF”) or designated contract market (“DCM”) and then cleared in accordance with the Commission’s straight-through processing requirements¹² – such that the

¹² See 17 CFR §§ 1.74, 23.610 and 39.12(b)(7), which set forth rules governing the timeframe for submitting a trade to, and subsequent acceptance of the trade by, a derivatives clearing organization.

counterparties to the swap would not otherwise be known to one another – the identity of each counterparty to the swap and its clearing member for the swap, as well as the legal entity identifier (“LEI”)¹³ of such counterparty and its clearing member, is information that is private vis-à-vis the other counterparty to the swap, and this privacy must be maintained by a registered SDR pursuant to CEA section 21(c)(6). This statutory privacy obligation now operates implicitly to limit the scope of § 49.17(f)(2) – which, accordingly, does not permit a counterparty to a swap that is executed anonymously on a SEF or a DCM, and then cleared in

¹³ Part 45 of the Commission’s regulations, 77 FR 2136 (January 13, 2012), which establishes swap data recordkeeping and reporting requirements, provides at § 45.6 that each counterparty to any swap subject to the jurisdiction of the Commission must be identified in all recordkeeping and swap data reporting required under part 45 by means of a single legal entity identifier, or “LEI”, issued pursuant to Commission rules. Part 46 of the Commission’s regulations, 77 FR 35200 (June 12, 2012), which establishes swap data recordkeeping and reporting requirements for “pre-enactment swaps” and “transition swaps” (each as defined in part 46), provides at § 46.4 that each counterparty to a pre-enactment swap or transition swap in existence on or after April 25, 2011 must obtain an LEI, which must be used for purposes of swap data recordkeeping and reporting as prescribed in § 46.4.

The Commission is a participant in an international process, now led by an international Regulatory Oversight Committee (“ROC”) of which the Commission is a member, to establish a global LEI system. In response to requests from other international financial regulators participating in this process, the Commission is, on a transitional basis, referring to the identifier designated for use in recordkeeping and reporting pursuant to part 45 and part 46 as the CFTC Interim Compliant Identifier (“CICI”). See Availability of a Legal Entity Identifier Meeting the Requirements of the Regulations of the Commodity Futures Trading Commission and Designation of Provider of Legal Entity Identifiers to be Used in the Recordkeeping and Swap Data Reporting, 77 F.R. 53780 (September 4, 2012), as amended by Amended Order Designating the Provider of Legal Entity Identifiers to Be Used in Recordkeeping and Swap Data Reporting Pursuant to the Commission’s Regulations, 78 F.R. 38954 (June 28, 2013) (the “Amended Designation Order”).

The global LEI system is currently in the process of becoming operational, with the ROC already in place, a number of pre-Local Operating Units (“pre-LOUs”) already endorsed by the ROC, and a Central Operating Unit (“COU”) in the process of being established. The ROC now refers to the identifiers issued by the various endorsed pre-LOUs, including the CICI, as “pre-LEIs”. Since specified conditions set forth in the Amended Designation Order have now been satisfied, any ROC-endorsed pre-LEI may currently be used for purposes of compliance with part 45 and part 46. Once the global LEI system is fully operational, ROC-endorsed pre-LEIs, including CICIs, will transition into the global LEI system and be referred to as LEIs.

For purposes of this interim final rule, the term legal entity identifier, or “LEI”, refers to an LEI, a pre-LEI or a CICI, as the context requires.

accordance with the Commission's straight-through processing requirements, to access the identity of the other counterparty to the swap or that counterparty's clearing member for the swap, or the other counterparty's or its clearing member's LEI.¹⁴ The Commission is adopting this interim final rule to clarify the scope of § 49.17(f)(2),¹⁵ by making explicit the limitation on counterparty access to data and information related to an anonymously executed, cleared swap that applies by virtue of the privacy requirements of CEA section 21(c)(6).

B. Amendment to 17 CFR § 49.17(f)(2)

To effect the clarification described above, the Commission is amending § 49.17(f)(2) by adding the following language: "However, the data and information maintained by the registered swap data repository that may be accessed by either counterparty to a particular swap shall not include the identity or the legal entity identifier (as such term is used in 17 CFR part 45) of the other counterparty to the swap, or the other counterparty's clearing member for the swap, if the swap is executed anonymously on a swap execution facility or designated contract market, and cleared in accordance with Commission regulations 1.74, 23.610, and 37.12(b)(7)."

¹⁴ While the name of a counterparty's clearing member for a swap, and such clearing member's LEI, is not information regarding the swap that is required to be reported to a registered SDR pursuant to part 45 or part 46 of the Commission's regulations, the Commission understands that such information may be included with reports of required swap data, and may therefore be "information related to a particular swap that is maintained by the registered [SDR]".

¹⁵ The Commission notes that it has received inquiries from market participants regarding the scope of permissible counterparty access to data and information maintained by a registered SDR for swaps that are executed anonymously on SEFs and DCMs and cleared, including a request for interpretive guidance dated February 28, 2013 from the Managed Funds Association to the Commission's Division of Market Oversight.

III. Request for Comment on Interim Final Rule

The Commission invites comments on this interim final rule. Comments must be submitted to the Commission on or before the date that is 30 days after the date of publication of the interim final rule in the Federal Register. Comments on the interim final rule must be submitted pursuant to the instructions provided above.

IV. Related Matters

A. Administrative Procedure Act

The Administrative Procedure Act (“APA”)¹⁶ generally requires a Federal agency to publish notice of a proposed rulemaking in the Federal Register.¹⁷ This requirement does not apply, however, when an agency “for good cause finds ... that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”¹⁸ Moreover, while the APA generally requires that an agency publish an adopted rule in the Federal Register 30 days before it becomes effective, this requirement does not apply if the agency finds good cause to make the rule effective sooner.¹⁹

In this interim final rulemaking the Commission is, by amendment, clarifying the scope of § 49.17(f)(2), by making explicit a limitation on counterparty access to SDR data and information that applies by virtue of CEA section 21(c)(6). In the absence of such a clarifying amendment that same limitation would continue to apply implicitly, since the scope of § 49.17(f)(2)

¹⁶ 5 U.S.C. 553 et seq.

¹⁷ See 5 U.S.C. 553(b).

¹⁸ See 5 U.S.C. 553(b)(3)(B).

¹⁹ See 5 U.S.C. 553(d)(3).

cannot exceed the bounds of statutory privacy requirements. Because the interim final rule does not alter in any way substantive rights and obligations under § 49.17(f)(2) – the scope of this regulatory provision is limited in precisely the same manner by CEA section 21(c)(6), regardless of whether such limitation is implicit, as it is currently, or made explicit through the clarifying amendment effected by this interim final rule – the advance notice and public procedure that is generally required pursuant to the APA is not necessary in the present instance. For good cause, the Commission therefore finds that publication of a notice of proposed rulemaking in the Federal Register is unnecessary. Similarly, since the interim final rule simply makes explicit a limitation on the scope of counterparty access to SDR data and information that already applies by operation of statute, the Commission, for good cause, finds that no transitional period, after publication in the Federal Register, is necessary before the amendment to § 49.17(f)(2) made by this interim final rule becomes effective. Accordingly, this interim final rule shall be effective immediately upon publication in the Federal Register.

B. Paperwork Reduction Act

The Paperwork Reduction Act (“PRA”)²⁰ imposes certain requirements on Federal agencies in connection with their conducting or sponsoring any collection of information as defined by the PRA. Under the PRA, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number from the Office of Management and Budget

²⁰ 44 U.S.C. 3501 et seq.

(“OMB”).²¹ Since this interim final rule serves to clarify, by amendment, the scope of an already existing regulatory provision, the Commission has determined that the interim final rule will not impose any new information collection requirements that require approval of OMB under the PRA.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (“RFA”) requires that Federal agencies consider whether the rules that they issue will have a significant economic impact on a substantial number of small entities and, if so, to provide a regulatory flexibility analysis respecting the impact.²² By clarifying the scope of § 49.17(f)(2), this interim final rule serves to clarify existing obligations and responsibilities of registered SDRs, which the Commission has previously, in connection with its swap data recordkeeping and reporting rules, determined are not small entities.²³ Therefore, the interim final rule will not have a significant economic impact on a substantial number of small entities.

D. Cost Benefit Considerations

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing certain orders. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other

²¹ See 44 U.S.C. 3507.

²² See 5 U.S.C. 601 *et seq.*

²³ See 77 FR at 2170-71.

public interest considerations.²⁴ The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the section 15(a) factors.

This interim final rule does not represent an exercise of Commission discretion that alters substantive rights and obligations imposed by statute and Commission rule currently. As discussed earlier, the interim final rule merely clarifies the existing scope of § 49.17(f)(2) by making explicit a statutory limitation that, absent this clarification, applies implicitly: the exception to the general prohibition against market participant access to SDR data does not sanction practices that contravene the statutory privacy requirements of CEA section 21(c)(6). As such, substantively, the interim final rule poses no incremental costs or benefits relative to regulatory requirements that are now operative.²⁵

This interim final rule is not void of any discretionary element, however. By issuing the interim final rule, the Commission is exercising its discretion to clarify, by amendment, the existing scope of § 49.17(f)(2), rather than leaving this regulatory provision in its current form. By making explicit a limitation on the scope of § 49.17(f)(2) that exists by virtue of the statutory privacy requirements of CEA section 21(c)(6), the interim final rule addresses a potential source of uncertainty for market participants,²⁶ and, in so doing, promotes the public interests in market integrity and,

²⁴ CEA section 15(a).

²⁵ Complying with these existing requirements may, however, entail some expenditure. For example, to comply with CEA section 21(c)(6) registered SDRs may incur certain costs associated with programming their systems to recognize swaps that are executed anonymously on a SEF or a DCM and cleared, as described herein, and to prevent a counterparty's access to the identity and LEI of the other counterparty to such a swap, and such counterparty's clearing member for the swap.

²⁶ See note 15, *supra*.

more generally, in regulatory clarity and certainty. Conversely, the Commission sees no costs resultant from this discretionary act of clarification.²⁷

V. Interim Final Rule

List of Subjects

17 CFR Part 49

Swap data repositories; registration and regulatory requirements.

In consideration of the foregoing and pursuant to the authority contained in the Act, as indicated herein, the Commission hereby amends chapter I of title 17 of the Code of Federal Regulations as follows:

PART 49—Swap Data Repositories

§ 49.17 [Amended]

1. Amend § 49.17 as follows:

Amend paragraph (f) by adding the following language at the end of subparagraph (2):

“However, the data and information maintained by the registered swap data repository that may be accessed by either counterparty to a particular swap shall not include the identity or the legal entity identifier (as such term is used in 17 CFR part 45) of the other counterparty to the swap, or the other counterparty’s clearing member for the swap, if the swap is executed anonymously on a swap execution facility or designated

²⁷ The Commission recognizes that if, to date, any market participant has not read § 49.17(f)(2) with reference to the statutory privacy limitations of CEA section 21(c)(6), the market participant may have developed systems and processes that require modification to comply with these statutory limitations. In any such case, the clarifying amendment effected by this interim final rule should alert the market participant to the need for modification. Such modification may entail some cost to implement. However, any such modification costs would not arise from the Commission’s exercise of its discretion, in this interim final rule, to clarify § 49.17(f)(2) by making explicit an existing statutory limitation on the scope of this regulatory provision. Such modification costs would be required to achieve statutory compliance regardless of whether or not the Commission provided such clarification through this interim final rule.

contract market, and cleared in accordance with Commission regulations 1.74, 23.610, and 37.12(b)(7).”

Issued in Washington, DC, on February 10, 2014, by the Commission.

Melissa Jurgens
Secretary of the Commission