



Commodity Futures Trading Commission

Office of Public Affairs

Three Lafayette Centre

1155 21st Street, NW

Washington, DC 20581

www.cftc.gov

January 13, 2017

Proposed Amendments to Rules Relating to Swap Data Access by Certain Foreign and Domestic Authorities

The Commodity Futures Trading Commission (“CFTC”) is proposing amendments (“Proposal”) to existing rules governing certain foreign and domestic authorities’ access to swap data maintained by swap data repositories (“SDRs”).

Statutory and Regulatory Background

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act added new § 21 to the Commodity Exchange Act (“CEA”) establishing SDRs to, among other things, receive and maintain swap transaction information received from swap dealers and other parties required under other CEA sections to report such information to SDRs. CEA § 21(c)(7) directs SDRs to make swap data available “on a confidential basis pursuant to section 8 [of the CEA]” to certain enumerated domestic authorities and to any other person the CFTC determines to be appropriate, which may include certain types of foreign authorities (collectively, “21(c)(7) entities”). As originally enacted, CEA §§ 21(d)(1) and (2) mandated that, prior to receipt of any requested data or information from an SDR, a 21(c)(7) entity agree in writing to abide by the confidentiality requirements described in CEA § 8 and, separately, to indemnify the SDR and the CFTC for “any expenses arising from litigation relating to the information provided under section 8.”

In 2011, the CFTC adopted rules implementing CEA § 21’s requirements for SDRs by establishing processes by which various categories of entities (defined as “Appropriate Domestic Regulators” (“ADRs”) and “Appropriate Foreign Regulators” (“AFRs”)) could gain access to SDR swap data. ADRs were defined as domestic entities enumerated in CEA § 21(c)(7)(A)-(D) and certain others deemed by the CFTC to be appropriate recipients of SDR swap data pursuant to CEA § 21(c)(7)(E). AFRs were defined as “Foreign Regulators” with either an existing memorandum of understanding (“MOU”) or a similar type of arrangement with the CFTC or as determined by the CFTC case-by-case. A Foreign Regulator in the latter category was required to file with the CFTC an application designed to permit the CFTC to determine whether the Foreign Regulator was appropriate for purposes of receiving SDR swap data. ADRs and AFRs seeking access to SDR swap data are currently required to file an access request with each relevant SDR certifying that it is acting within the scope of its jurisdiction and to execute a “Confidentiality and Indemnification Agreement” with the SDR.

In the preamble to the 2011 final rules, the CFTC acknowledged commenters’ concerns that compliance with the statutory and regulatory indemnification requirements would be difficult for certain domestic and foreign regulators due to various home country laws and other regulations prohibiting such arrangements and outlined circumstances under which it believed the indemnification provision of CEA § 21(d) and rule 49.18 would not apply. In October 2012, the CFTC issued an Interpretative Statement clarifying that a foreign regulatory authority’s access to swap data held in a CFTC-registered SDR would not be subject to the confidentiality and indemnification provisions of CEA § 21(d) or the part 49 regulations if (i) the registered SDR is also registered in, or recognized or otherwise authorized by, the foreign authority’s regulatory regime; and (ii) the data sought to be accessed by the foreign authority has been reported to the registered SDR pursuant to such foreign regulatory regime.

Congress responded to regulators' SDR swap data access concerns in the Fixing America's Surface Transportation Act ("FAST Act") by repealing CEA § 21(d)(2)'s indemnification requirement, while retaining the confidentiality requirement of CEA § 21(d)(1) in CEA § 21(d), as amended. The FAST Act also modified CEA § 21(c)(7)(A) by specifying that "swap" data—as opposed to "all" data—must be provided to 21(c)(7) entities, and added to CEA section 21(c)(7)(E)'s non-exclusive list of persons that the CFTC may determine to be appropriate recipients of SDR swap data the new category "other foreign authorities."

Elimination of Indemnification Precondition to SDR Swap Data Access

The Proposal would remove the existing requirement that foreign and domestic authorities seeking access to SDR swap data first indemnify the CFTC and each SDR from which such authorities access swap data.

Confidentiality Arrangements

The Proposal would permit domestic regulators enumerated as ADRs in rule 49.17(b)(1) to access SDR swap data by entering into a Confidentiality Arrangement with the CFTC. The Proposal would require other domestic authorities, and all foreign authorities, to be determined by the CFTC to be "appropriate" recipients of such swap data, in addition to entering into a Confidentiality Arrangement with the CFTC, in order to access SDR swap data. In each case, certain other conditions to accessing swap data must also be satisfied, and ADRs and AFRs must be acting within the scope of their jurisdiction in seeking SDR swap data access. SDRs would be required, prior to providing access to swap data to any ADR or AFR, to receive from the ADR or AFR an executed Confidentiality Arrangement between the CFTC and the ADR or AFR, either in the form set forth in proposed Appendix B to Part 49 or containing the elements required in that form, including a description of the ADR's or AFR's jurisdiction.

Appropriateness Determination Process

Proposed rules 49.17(h)(1) and (2) would require each entity seeking an appropriateness determination to file an application with the CFTC providing sufficient detail to permit the CFTC to analyze whether the applicant is acting within the scope of its jurisdiction in seeking access to SDR swap data and whether the applicant employs appropriate confidentiality safeguards to ensure that any such swap data received will not, with limited exceptions to be specified in a Confidentiality Arrangement between the applicant and the CFTC, be disclosed. Proposed rule 49.17(h)(3) provides that (a) the CFTC would issue an order setting forth its appropriateness determination, which may be subject to conditions, if it determines an applicant to be an appropriate SDR swap data recipient; (b) the CFTC will not make such a determination unless it is satisfied that (i) the applicant employs appropriate confidentiality safeguards to ensure that any swap data such applicant receives from an SDR will not be disclosed, except as permitted in the form of Confidentiality Arrangement set forth in the Proposal and (ii) the applicant is acting within the scope of its jurisdiction in seeking SDR swap data access. Proposed rule 49.17(h)(4) reserves the CFTC's ability to right to revisit, reassess, limit, suspend or revoke an appropriateness determination.

Notice to the CFTC of ADR and AFR Requests to Access SDR Swap Data

Proposed rule 49.17(d)(4)(i) would require an SDR to notify the CFTC of the initial ADR or AFR request to access swap data rather than, as is currently required, each access request. Proposed rule 49.17(d)(4)(i) also would require an SDR to notify the CFTC of an ADR or AFR request to access swap data that is beyond the scope of the ADR's or AFR's jurisdiction.

SDR Determinations with respect to ADR and AFR Scope of Jurisdiction

The Proposal would require an SDR to determine that the swap data to which an ADR or AFR seeks access is within the then-current scope of its jurisdiction, as described in the required Confidentiality Arrangement between the CFTC and the ADR or AFR.

ADR and AFR Notice to the CFTC of Changes to ADR and AFR Scope of Jurisdiction

Proposed rule 49.17(d)(4)(iii) would require each ADR or AFR that has executed a Confidentiality Arrangement with the CFTC pursuant to proposed rule 49.18(a) and provided such Confidentiality Arrangement to one or more SDRs to notify the CFTC and each such SDR of any change to such ADR's or AFR's scope of jurisdiction.

Suspension, Limitation or Revocation of SDR Swap Data Access

Proposed rule 49.17(d)(4)(iii) provides that the CFTC may direct an SDR to suspend, limit, or revoke access by an ADR or AFR to SDR swap data based on any change to an ADR's or AFR's scope of jurisdiction, and, if so directed, the SDR shall so suspend, limit, or revoke such access. Proposed rule 49.17(d)(5) provides that an SDR shall, as directed by the CFTC, limit, suspend or revoke swap data access should the CFTC limit, suspend or revoke the appropriateness determination for an ADR or AFR or otherwise direct the SDR to limit, suspend or revoke swap data access. Proposed rule 49.17(h)(4) provides that the CFTC reserves the right, in connection with any appropriateness determination with respect to an ADR or AFR, to revisit, reassess, limit, suspend or revoke such determination consistent with the CEA

ADRs and AFRs with Regulatory Responsibility over an SDR

Proposed rules 49.17(d)(2) and (3) specify certain circumstances in which ADRs and AFRs, respectively, are not subject to the requirements of CEA §§ 21(c)(7) or 21(d), or CFTC rules 49.17(d) or 49.18.