

Chapter 8

Recordkeeping

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§ 8:1 Introduction¹

The Dodd-Frank Act has among its objectives promoting greater transparency in the derivatives market and implementing measures designed to enhance the financial integrity of the market. In order to achieve these objectives, the Dodd-Frank Act amended the CEA to require that the CFTC mandate reporting and recordkeeping requirements. As discussed in Chapter 2 (Swap Data Reporting and Public Dissemination) of this book, swaps, whether cleared or uncleared, are required to be reported to swap data repositories (SDRs), which collect and maintain swap transaction data in the form prescribed by the CFTC and make that data available to regulators. Although SDRs play an essential recordkeeping role, counterparties and other market participants, including SDs, MSPs, derivatives clearing organizations (DCOs), swap execution facilities (SEFs), designated contract markets (DCMs), and unregistered entities, cannot rely on SDRs in order to fulfill all of their recordkeeping obligations.

Part 45 and Part 43 of the CFTC's regulations address swap data recordkeeping and reporting requirements and real-time public reporting of swap transaction data with respect to swaps entered into on and after the applicable compliance date, respectively.² Part 46 of the CFTC's regulations relates to the obligation to report pre-enactment swaps and transition swaps and to maintain appropriate records for these transactions.³ In addition to these reporting and recordkeeping requirements, which are generally applicable to all counterparties, the Dodd-Frank Act also amended the CEA to require the CFTC to mandate additional recordkeeping requirements particular to SDs and MSPs.⁴ These recordkeeping and daily trading records requirements, which

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¹This Chapter is based on information available as of October 1, 2015, and does not reflect developments since that date. For definitions of commonly-used acronyms and terms, please refer to the Glossary.

²CFTC Part 43 and Part 45; 17 C.F.R. pts. 43 and 45.

³CFTC Part 46; 17 C.F.R. pt. 46. This book does not provide a detailed discussion of the CFTC Part 46 requirements because the deadline for meeting those obligations has passed, but see § 8:6 of this Chapter for a general discussion of recordkeeping obligations under CFTC Part 46.

⁴See Pub. L. No. 111-203, 124 Stat. 1376 (2010) [*hereinafter* Dodd-Frank Act]; see also Commodity Exchange Act § 4s(f), (g), 7 U.S.C. § 4s(f),

are part of the internal business conduct standards applicable to SDs and MSPs,⁵ are intended to permit regulators to have ready access to information whether in connection with their audit and oversight function or their enforcement activities. These recordkeeping requirements generally are limited to an SD's or an MSP's swaps activities only and not to the entity's other business activities.⁶ As defined under CFTC Rule 23.200, swaps activities are "the registrant's activities related to swaps and any product used to hedge such swaps, including, but not limited to, futures, options, other swaps or SBSs, debt or equity securities, foreign currency, physical commodities, and other derivatives."⁷ The extensive recordkeeping requirements described in this Chapter, along with the swap reporting requirements described in Chapter 2 (Swap Data Reporting and Public Dissemination) of this book, are intended to provide the CFTC and other regulators with transparency into the swap market and activities of market participants. This Chapter, which should be read in conjunction with Chapter 2 (Swap Data Reporting and Public Dissemination) of this book, provides a summary of the recordkeeping requirements applicable to all counterparties, as well as those requirements applicable only to SDs and MSPs.⁸

The audit trail provided by the data required to be retained by market participants is likely to be central to any regulatory inquiry or investigation. In addition, the CFTC may decide to pursue actions in respect of failures to establish and maintain adequate internal policies and procedures designed to ensure compliance with the CFTC's rules and regulations. In various speeches, CFTC representatives have noted that the CFTC is aware of the compliance challenges and burdens imposed by the new requirements and that it expects that market participants will communicate actively with the agency regarding difficulties in meeting applicable deadlines and request relief if needed. In fact, in March 2014, the CFTC issued a request for public comment on its recordkeeping and reporting requirements under CFTC Part

(g) [*hereinafter* CEA].

⁵CFTC Rules 23.200-23.205, 17 C.F.R. §§ 23.200-23.205.

⁶CFTC Rule 23.201(a), 17 C.F.R. § 23.201(a).

⁷CFTC Rule 23.200(j), 17 C.F.R. § 23.200(j).

⁸Please refer to Chapter 11 (Extraterritorial Application) of this book for information on the extraterritorial application of the U.S. swap regulatory regime.

45 and related provisions.⁹ The request for comment contained nearly 70 questions for the public addressing the reporting of various data types, and it reflected a willingness on the CFTC's part to re-evaluate certain of its recordkeeping requirements. Following the request for comment, in August 2015, the CFTC proposed certain amendments to the Part 45 recordkeeping and reporting requirements to provide swap counterparties with additional clarity regarding, among other things, which counterparty to a swap is responsible for reporting creation and continuation data for certain swap transactions.¹⁰

§ 8:2 General CFTC Recordkeeping Provisions

CFTC Rule 1.31 sets out the general provisions applicable to books and records required to be kept under the CEA by any person.¹¹ Under CFTC Rule 1.31, referred to as the general CFTC recordkeeping provisions, a person is required to:

- maintain all books and records that are subject to the provision for a period of five years provided, however, that records of any swap or related cash or forward transaction shall be kept until the termination, maturity, expiration, transfer, assignment, or novation date of the transaction and for a period of five years after such date;¹²
- maintain all books and records that are subject to the provision in original form (for paper records) or native file format (for electronic records) and make them readily accessible during the first two years of the five-year period.¹³ In addition, electronic records required to be stored under CFTC Rule 1.31 must be stored in nonrewritable, nonerasable format (*i.e.*, write once, read many format);¹⁴
- maintain all books and records that are subject to this

⁹Request for Comment, Review of Swap Data, Recordkeeping and Reporting Requirements, 79 Fed. Reg. 16,689 (Mar. 26, 2014).

¹⁰See Amendments to Swap Data Recordkeeping and Reporting Requirements for Cleared Swaps, 80 Fed. Reg. 52,544 (proposed Aug. 31, 2015).

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¹¹CFTC Rule 1.31, 17 C.F.R. § 1.31.

¹²CFTC Rule 1.31(a)(1), 17 C.F.R. § 1.31(a)(1).

¹³CFTC Rule 1.31(a)(1), 17 C.F.R. § 1.31(a)(1).

¹⁴CFTC Rule 1.31(b)(1)(ii)(A), 17 C.F.R. § 1.31(b)(1)(ii)(A).