

● INDUSTRY CURRENT

Corporate Renewable Energy Purchases Can Trigger Dodd-Frank Swap Reporting Requirements - Part II

In the second part of this Industry Comment, **Paul Forrester**, a partner in the Chicago office of **Mayer Brown**, explains the swap reporting requirements that result from the recent rise of non-utility renewables offtakers, and that may have taken project owners by surprise. Forrester's corporate finance and securities practice is especially focused on structured credit, including collateralized loan obligations, energy financings and project development and financing.

What are the Dodd-Frank Reporting Requirements for Contracts for Difference?

The Dodd-Frank Act added new section 2(a) (13(G) to the Commodity Exchange Act (CEA) and required all swaps, whether cleared or not, to be reported to swap data repositories, which are new registered entities created by Section 728 of the Dodd-Frank Act. Pursuant to its applicable authority under CEA section 21, the **Commodity Futures Trading Commission** in its Swap Data Recordkeeping and Reporting Requirements final rule has adopted rules regarding the reporting requirements for swaps. These rules often distinguish swaps to which swap dealers or major swap participants are counterparties and swaps that are cleared (and generally impose more stringent reporting requirements therefor).

The relevant reporting requirements are set forth in the CFTC's regulations and include part 45 (real-time reporting)—both for "creation" data (CFTC regulation 45.3) as well as for "continuation," including "life-cycle" and "state" data, (CFTC regulation 45.4). Additionally, if applicable, the related reporting requirements for the related end-user exception under part 50.50(b).

The real-time reporting requirements include the provision of specified information to a swap data repository (e.g., **Depository Trust**

& Clearing Corporation) that is currently accepting such data at the inception of the swap. The requirements are set forth in the related regulation, including the minimum primary economic terms (PETs) set forth in Exhibit D (Other Commodity Swaps) in Appendix I to part 45.

The PETs required to be reported at inception include the applicable parties and the specified primary economic terms for the related swap. They are generally required to be reported "as soon as technologically practicable" to do so, but, in any event, not later than 48 business hours in the first year following the rule's compliance date; 36 business hours in the second year; and 24 in the third year.

Notably, while certain of the specified real-time reporting data is anonymized (e.g., the applicable swap counterparties' unique legal entity identifiers), the pricing and other PET data for the reported swap are intended to be publicly available to provide transparency. As a result, however, it may be possible to determine the parties to the CFD due to the relatively specific data that is available.

The required real-time swap inception reporting is triggered by "execution" of the related swap.

Since an agreement will often be "legally binding" even though performance by the swap counterparties of their obligations may be subject to required satisfaction of specified conditions precedent, the prudent view is to file the required information immediately following signing of the agreement and, as a practical matter, coordinate that signing with the ability and readiness to make the required reporting.

CFTC regulation 45.1 also defines the following:

Life cycle event means any event that would result in either a change to a primary economic term of a swap or to any primary economic terms data previously reported to a swap data repository in connection with a swap.



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Examples of such events include, without limitation, a counterparty change resulting from an assignment or novation; a partial or full termination of the swap; a change to the end date for the swap; a change in the cash flows or rates originally reported; availability of a legal entity identifier for a swap counterparty previously identified by name or by some other identifier; or a corporate action affecting a security or securities on which the swap is based (e.g.,

a merger, dividend, stock split, or bankruptcy).

State data means all of the data elements necessary to provide a snapshot view, on a daily basis, of all of the primary economic terms of a swap in the swap asset class of the swap in question, including any change to any primary economic term or to any previously-reported primary economic terms data since the last snapshot. At a minimum, state data must include each of the terms included in the most recent Federal Register release by the Commission listing minimum primary economic terms for swaps in the swap asset class in question. The Commission's current lists of minimum primary economic terms for swaps in each swap asset class are found in Appendix 1 to Part 45.

Swap continuation data reporting requirements include any change to the previously reported PETs as well as life cycle events. Information about non-cleared swaps with only non-swap dealer/major swap participant counterparties generally must be reported by the second business day following the date of a life cycle event during the first year following the rule's compliance date, and the date immediately following the life cycle event thereafter. There is a sole exception for life cycle event data relating to a corporate event affecting the non-reporting counterparty that must be reported not later than the third business day after the date on which such event occurs during the first year following the rule's compliance date and the second business day thereafter. Mean-

while, state data must be reported on a daily basis.

Who Must Undertake the Required Dodd-Frank Reporting for CFDs?

CFTC regulation 45.8 determines which swap counterparty must be the reporting counterparty for a swap. Generally, the regulation requires reporting by the swap counterparty that is a swap dealer or, if none, the major swap participant or, if none, that the swap must specify which counterparty is to be the reporting counterparty.

Corporate buyers (even ones with significant experience with other swaps) are usually reluctant to assume the responsibility for this required Dodd-Frank swap reporting and will probably lack first-hand and immediate access to some of the data required to be reported (e.g., actual swap volumes for variable or “as generated” CFDs and the related fixed and floating financial payments due). As a result, it will likely fall

on the renewable energy project owner (or an affiliate) to agree to be the reporting counterparty for the swap and to undertake the required swap reporting, even though this may be the only type of swap for which such an owner will be required to do so.

These requirements have caught many project owners by surprise and, as a result, they were sometimes unprepared for the required reporting obligations and especially the relatively tight timing therefor. While the CFTC’s regulations acknowledge the use of third-party service providers to provide assistance with the required reporting, the regulations (see, e.g., CFTC regulation 45.9) also make clear that the required reporting obligations remain with the applicable reporting counterparty. ■

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