

CFTC Adopts Final SEF, “Available to Trade” and Block Trade Rules – Implications for End-Users

July 3, 2013

The Commodity Futures Trading Commission (CFTC) recently adopted three final rules pursuant to Title VII of the Dodd-Frank Wall Street Reform and Customer Protection Act that impact the manner in which end-users’ cleared swaps will be executed. These rules (i) set forth a regulatory framework for swap execution facilities (SEFs) ([the SEF Final Rule](#)), (ii) establish a process for a designated contract market (DCM), typically referred to as an exchange, or a SEF to make a swap that is subject to mandatory clearing and trade execution “available to trade” ([the Available to Trade Final Rule](#)), and (iii) establish a process for determining which large swap transactions can qualify as “block trades” ([the Block Trade Final Rule](#)). This Legal Alert provides a high-level summary of each of the three final rules as they relate to trading entities in the swap markets.

Currently, only certain classes of interest rate and credit default swaps are subject to mandatory clearing and trade execution by the CFTC under sections 2(h)(1) and 2(h)(8) of the Commodity Exchange Act (CEA). Category 1 and Category 2 market participants are now required to clear such swaps, while Category 3 market participants (including all non-financial entity end-users and certain funds) will be required to do so by September 9, 2013. Once these swaps are made available to trade, market participants will also be required to execute these transactions on a registered SEF or DCM. Block trades and large notional off-facility swaps, however, are not required to be executed on a SEF or DCM, and will be reported on a time delay for purposes of the real-time reporting obligations under CFTC Regulation 43.

The CFTC will allow temporary registration for SEF applicants that have submitted all of their application materials to the CFTC and that submit concurrent notice requesting that the CFTC grant temporary registration. Temporary registration applicants may begin operating as SEFs immediately upon receipt of notice granting such registration from the CFTC, but such notice cannot occur until after August 5, 2013, the effective date of the SEF Final Rule. A SEF’s temporary registration will not expire until the CFTC grants or denies full registration as a SEF. Compliance with the SEF Final Rule is required as of October 2, 2013, with certain limited exceptions.¹

The Available to Trade Final Rule becomes effective on August 5, 2013. End-users must begin executing swaps subject to a clearing mandate on a SEF or DCM on the later of (i) September 9, 2013 and (ii) 30 days after an available to trade determination (which is expected to take anywhere from 10 to 100 days for approval or self-certification). As a result, end-users will only be required to execute swaps subject to the first clearing mandate on a SEF or DCM by Fall 2013 at the earliest.

The Block Trade Final Rule will be effective on July 30, 2013.

¹ As of June 14, 2013, Bloomberg L.P. is the [sole SEF applicant](#).

1. The SEF Final Rule

a. *Why Should Market Participants Care About SEFs?*

In addition to potentially providing better pricing of swaps, certain swaps traded on SEFs or DCMs will not be permitted to be executed bilaterally and *must* be executed through those facilities. More specifically, categories of swaps that are subject to a mandatory clearing determination by the CFTC under section 2(h)(1) of the CEA are also subject to the trade execution requirement under CEA section 2(h)(8) (each, a Required Transaction). As a result, these swaps must be executed on a SEF or DCM, unless (i) no SEF or DCM makes such swaps available to trade, or (ii) one of the swap counterparties qualifies for an exception from clearing and trade execution.

“Permitted Transactions,” on the other hand, are swaps that are not subject to the trade execution requirement. Permitted transactions and block trades (discussed in more detail below) need not be executed on a SEF or DCM, even if such swaps have been made available to trade.

b. *What is a SEF?*

A SEF is a trading platform in which more than one market participant has the ability to execute swaps with more than one other market participant (i.e., a “many-to-many” trading platform), and that is also not a DCM. A person meeting this definition must register as a SEF.

A SEF is *not* a one-to-one voice service or a single dealer platform, because the participants do not have the ability to trade swaps with multiple participants. Moreover, swap processors² are not SEFs because they do not provide the ability to “execute” or “trade” a swap.

An entity may operate as both a SEF and a DCM, but it must register as two separate entities. If such entity uses the same electronic platform for executing swaps, it must clearly identify to market participants whether the swap is taking place on the SEF or DCM.

c. *Who May Participate in a SEF?*

SEFs are obligated to provide all eligible contract participants (each, an ECP)³ and “independent software vendors”⁴ with impartial access to their markets and market services. SEFs have to develop their own criteria governing access, provided that the SEFs apply the criteria in a transparent, fair and non-discriminatory manner. SEFs should also adopt procedures where ECPs provide the SEFs with written or electronic confirmation of their status as ECPs prior to obtaining access. SEFs must also develop comparable fee structures for the ECPs.

² Swap processors only provide post-execution services that facilitate clearing and settlement, and not services related to the execution of swaps.

³ An “eligible contract participant” is a financial institution, an insurance company regulated by a state or regulated by a foreign government, an investment company subject to the Investment Company Act of 1940, a commodity pool with a certain amount of assets, a corporation, partnership, proprietorship, organization or trust with a certain amount of assets and net worth, an employee benefit plan subject to the Employee Retirement Income Security Act of 1974 or a governmental employee benefit plan, a governmental entity, a broker or dealer subject to the Exchange Act of 1934, a futures commission merchant, a floor broker or trader, an individual who has a certain amount of assets, or any other person that the CFTC determines to be eligible in light of the financial or other qualifications of the person. 7 U.S.C. § 1(a)(18).

⁴ Examples of independent software vendors include smart order routers, trading software companies that develop front-end trading applications, and aggregator platforms. See *Final SEF Rule* at 33,508 n. 423.

SEFs have the responsibility to ensure that their members and market participants using the SEF meet the definition of “eligible contract participant.” SEFs must also establish minimum financial standards for members. SEFs may rely on representations from their members to fulfill this requirement.

d. How Will SEFs Operate?

SEFs must establish their own rules governing the operation of the SEF, including rules specifying participant requirements and trading procedures to be followed by members and market participants when entering and executing orders. Through a user’s agreement or equivalent, participants in a SEF will agree to be subject to the SEF’s rules.

SEFs are required to offer a “minimum trading functionality,”⁵ consisting of (i) an Order Book, or (ii) a Request for Quote (RFQ) system in conjunction with an Order Book. For purposes of execution and communication, a SEF may use “any means of interstate commerce,” including the use of a voice-based system⁶ or e-mail, provided that the SEF satisfies the minimum trading functionality requirement.

i. Order Books

An Order Book is an electronic trading facility, a trading facility, or any other trading system or platform in which multiple participants have the ability to execute swap transactions (i) by accepting bids or offers made by other market participants, or (ii) through a predetermined non-discretionary automated trade matching and execution algorithm providing multiple bids and offers that can be matched automatically.

When transacting via an Order Book, brokers and dealers⁷ that execute two customer orders against each other will be subject to a 15-second timing delay between the entry of the two orders, so that one side of the potential transaction is disclosed and made available to the other market participants before the second side of the potential transaction is submitted for execution. This requirement will provide other market participants with an opportunity to join in the trade, thus preventing any pre-arranged trades. SEFs will have the ability to adjust the 15-second time period of the delay based on the liquidity or other product-specific considerations. The CFTC may also decide at a later date to apply this time delay requirement to any asset managers regardless of size, in addition to brokers and dealers. This time delay is not applicable to trades that are executed through an RFQ System.

ii. Request for Quote Systems Operating in Conjunction With an Order Book

An RFQ system is one in which a market participant transmits a request for quote to enter into a swap. Such RFQs must be transmitted to no less than *three* market participants on the trading system or platform, to which all market participants may respond. The three market participants may not be affiliates of or controlled by each other or by the requester. During a one-year phase-in period, RFQs must be transmitted to at least *two* market participants. There is no minimum number of responsive bids or offers that an RFQ requester must receive in order to execute a swap.

⁵ The minimum trading functionality is the minimum function a SEF must provide in order to register as a SEF. At a minimum, the SEF must be able to give market participants the ability to make executable bids and offers, and to display them to all other market participants on the SEF. An Order Book or a Request for Quote system with an Order Book will satisfy the minimum trading functionality requirement.

⁶ A voice-based system is a trading system or platform in which a market participant executes or trades a transaction using a telephone or other voice-based service.

⁷ A broker or dealer in this scenario would be an intermediary acting on behalf of a customer.

Acceptable RFQ systems must give RFQ requesters the option to make an RFQ visible to the entire market, though the requester is not obligated to do so. At the same time that a requester receives its first firm bid or offer in response to an RFQ, the SEF must communicate any resting bids or offers⁸ on the SEF's Order Book to the RFQ requester. The RFQ requester may accept any of the responsive bids or offers, and is not required to accept one from the Order Book.

SEFs must ensure that their trading protocols provide each of their market participants with equal priority in receiving RFQs and in transmitting and displaying for execution responsive orders. SEFs do not need to establish a minimum latency or specific period of time for the transmission of responsive orders, provided that the SEF's rulebook and prohibition on transmission and display priorities are appropriately designed to prevent market participants from seeking to avoid the three market participant requirement.

The SEF Final Rule does not require that the identity of the RFQ requester be disclosed.

Finally, the CFTC [proposed a rule](#) in 2010 that would require SEFs and DCMs to adopt certain procedures in order to mitigate conflicts of interest. The rule prohibited SEF and DCM members (and related persons) from beneficially owning more than 20% of any class of voting equity in the SEF or DCM, or from directly or indirectly voting an interest exceeding 20% of the voting power of any class of equity interest in the SEF or DCM. The rule has not been finalized.

e. How Will Market Participants Transact on SEFs?

In order to comply with the trade execution requirement, all Required Transactions that are transacted on a SEF must be executed through its Order Book or through its RFQ system operating in conjunction with the Order Book. While SEFs are, at a minimum, required to provide an Order Book as a means of execution for Permitted Transactions, market participants may execute these swaps by any method, including a voice-based system. Market participants may, but need not, use intermediaries in executing the transaction.

As a result, voice brokers will continue to play an integral role under the new SEF regime. While they are not required to register as SEFs themselves, the SEF Final Rule contemplates that market participants would continue using voice brokers as intermediaries to their on-exchange swap transactions, including initiating RFQs on behalf of requesting counterparties.

Note that the use of information provided by market participants to a SEF to help the SEF fulfill its regulatory obligations may not be used for business or marketing purposes unless such person consents, and the SEF may not condition access to its market service on the person's consent. SEFs may not share such data or information with other SEFs or DCMs without consent, unless required for regulatory purposes.

SEFs must provide counterparties with written documentation of all of the terms of the swap which serves as a confirmation of such transaction. The SEF, rather than the intermediary or other market participants executing the swap on the SEF, must report confirmation data consisting of all of the terms of a transaction to a swap data repository (SDR) for each swap executed on or pursuant to the rules of the SEF.

⁸ Resting bids are bids or offers waiting to be executed on the SEF's or DCM's trading platform that are responsive to the requester.

Market participants that choose to execute a transaction not submitted for clearing, on or pursuant to the rules of a SEF, must have all terms including possible long-term credit support arrangements, agreed to no later than execution, so that the SEF can provide a written confirmation inclusive of those terms at the time of execution and report a complete and non-duplicative data to an SDR as soon as possible after execution. This process will provide market participants that execute swap transactions on or pursuant to the rules of a SEF with legal certainty with respect to such transactions. This requirement will help promote the CFTC's policy goal of facilitating orderly markets, whether bilateral or traded on a SEF or DCM.

f. What Other Aspects of the SEF Final Rule Will Impact Market Participants?

SEFs are required to establish their own rules governing the operation of the SEF, including rules on trading procedures for entering and executing orders, terms and conditions of any swaps, access to the SEF, trade practice rules, audit trail requirements, disciplinary rules, and mandatory trading requirements. As noted above, SEFs must also provide market participants with impartial access to the market. Notwithstanding the foregoing, SEFs may establish rules to limit access, provided that the access criteria are impartial, transparent, non-discriminatory and not anti-competitive. SEFs may establish different access criteria for each of their markets.

SEFs are required to prohibit certain abusive trading practices like front-running,⁹ wash trading,¹⁰ pre-arranged trading,¹¹ fraudulent trading, money passes,¹² and any other trading practices that the SEFs deem to be abusive. Pre-arranged trading is prohibited except for block trades. Market participants, however, are allowed to engage in pre-execution communications, and SEFs must establish rules regarding those communications.

SEFs have the authority to examine their members' books and records as well as those of any persons under investigation for violating the SEF's rules. SEFs are also required to capture and retain all audit trail data necessary to detect and prevent customer and market abuses.¹³ The audit trail data must be sufficient to reconstruct all trades, and sufficient to reconstruct indications of interest, requests for quotes, and orders within a reasonable period of time. Audit trail data includes all communications between market participants and a SEF's trading system or platform. SEFs must track a customer order from the time of receipt through fill, allocation or other disposition.

Market participants that conduct substantial trading on a SEF are required to keep and make available records of their activity in underlying commodities and related derivative markets and swaps.

SEFs must submit to the CFTC a notification of each transaction involving the transfer of 50% or more of the equity interest in a SEF. Such notification must be provided at the earliest possible time, and must provide the CFTC with sufficient time to review the implications of the change of ownership, including

⁹ Front-running happens when a broker trades a security or commodity interest based on information from the analyst department before his or her clients have been given the information.

¹⁰ Wash trading is the process of buying or selling a security or commodity interest through a broker while selling the same through a different broker. For example, it can make securities or commodity interests appear to have a lot of activity resulting from the repeated buying and selling done by an individual or a firm when the securities or commodity interests have never changed owners.

¹¹ Pre-arranged trading is the buying and selling of futures, options or commodities that occur between brokers or dealers at an agreed-upon price. This can create an unfair market for other brokers, traders and investors.

¹² Money passes occur when two traders trade for their personal accounts and execute a buy and sell with each other at different prices, resulting in a profit for one and a loss for the other.

¹³ The CFTC noted that the information required to detect abuses may, in some cases, include *all* communication between market participants and a SEF's trading system or platform.

whether the change in ownership will adversely impact the SEF's ability to comply with the core principles and the CFTC's regulations. Upon receiving a notification of an equity interest transfer, the CFTC may request supporting documentation of the transaction.

g. SEF Core Principles

Pursuant to CEA section 5(h), SEFs must comply with 15 core principles:

<ol style="list-style-type: none"> 1. SEFs shall comply with the core principles. 2. SEFs shall establish and enforce compliance with its rules. 3. SEFs shall only permit trading in swaps that are not readily susceptible to manipulation. 4. SEFs shall enforce rules on trading and trade monitoring procedures to prevent manipulation, price distortion, and disruptions of the delivery or cash settlement process. This includes conducting real-time monitoring of trading. 5. SEFs shall establish and enforce rules that allow the facility to obtain information to share with the CFTC. 6. SEFs shall adopt position limits or position accountability rules as necessary. 7. SEFs shall establish and enforce rules to ensure the financial integrity of swaps. 8. SEFs shall adopt rules to provide for the exercise of emergency authority. 	<ol style="list-style-type: none"> 9. SEFs shall timely make information public on trades. 10. SEFs shall maintain comprehensive business records. 11. SEFs shall not adopt any rules that result in an unreasonable restraint of trade, unless necessary or appropriate to achieve the purposes of the CEA. 12. SEFs shall establish and enforce rules to minimize and resolve conflicts of interest. 13. SEFs shall have adequate resources to discharge its responsibilities. 14. SEFs shall establish and maintain a program that minimizes risk; maintain backup resources of the facility to ensure continued trading, price reporting, and market surveillance; and maintain an audit trail. 15. SEFs shall have an individual serving as a chief compliance officer.
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2. The Available to Trade Final Rule

Swaps subject to a mandatory clearing determination will also be subject to the trade execution requirement once a SEF or DCM makes the swap available to trade, and this final rule establishes a process for a SEF or a DCM to make a swap available to trade. Once this designation has been made, swaps that are required to be cleared must be executed on a SEF or DCM on which such swaps are available to trade. When making this designation, a SEF or a DCM must consider certain enumerated factors (set forth below). If a SEF or DCM makes the determination that a swap is available to trade, a SEF or DCM must either (i) submit the determination to the CFTC for approval, or (ii) self-certify such determination to the CFTC.

With respect to any swap that is made available to trade, end-users must begin executing swaps subject to a clearing mandate on a SEF or DCM on the later of (i) September 9, 2013 (the deadline established under the compliance schedule for the clearing requirements), or (ii) 30 days after an available to trade determination. The Available to Trade Final Rule will become effective on August 5, 2013. The approval procedure for an available to trade determination will take 45 days but the CFTC will likely exercise a stay of execution for an additional 45 days because of the novel nature of these determinations. The self-certification procedure will take 10 days, but the CFTC will likely exercise a stay of execution for 90 days.

Therefore, end-users will only be required to execute swaps subject to the first clearing mandate on a SEF or DCM by Fall 2013 at the earliest, but likely closer to the end of the year.

a. What Factors Must a SEF or DCM Consider in Making a Swap Available to Trade?

SEFs and DCMs will initially determine whether a swap they list should be made available to trade. Swaps that are subject to a mandatory clearing requirement and that are available to trade will also be subject to the trade execution requirement. In making this determination, a SEF or DCM must consider at least one of the following factors, and should provide an explanation and analysis of its determination.

1. Whether there are ready and willing buyers and sellers
2. Frequency or size of transactions
3. Trading volume
4. Number and types of market participants
5. Bid/ask spread
6. Usual number of resting firm or indicative bids and offers

If a SEF or DCM satisfies any one of these factors, this will be considered sufficient indication that a swap is available to trade.

b. When is a Swap Available to Trade?

Once a SEF or DCM determines that a swap should be made available to trade, it must either (i) submit such determination to the CFTC for approval, or (ii) self-certify the transaction as available to trade. For both procedures, the SEF or DCM should provide an explanation and analysis of its determination, including which factor (of the six outlined above) it considered in reaching its decision.¹⁴ The CFTC stated that satisfying any one of the factors would sufficiently indicate that the swap is available to trade. The Available to Trade Final Rule does not set forth any objective criteria for satisfying the factors enumerated above, though the CFTC may consider adopting such objective criteria in the future based on an empirical analysis of the data it collects from the swap markets.

i. Approval Process

The SEF or DCM can submit its available to trade determination to the CFTC for approval. The CFTC has a 45-day review period to review the request and may extend it for an additional 45 days in some circumstances. An opportunity for public comment is only available if the CFTC elects to allow comments.

ii. Self-Certification Process

Alternatively, a SEF or DCM may self-certify its determination that a swap is available to trade rather than submitting its determination to the CFTC for review and approval. In a self-certification process, the CFTC has 10 business days to review the determination before it is deemed certified and effective. But the CFTC may also stay the review period for an additional 90 days, in which case it must provide a 30-day public comment period.

¹⁴ The CFTC noted in the preamble of the final rule that a SEF or DCM need only consider one factor in its determination.

c. Submission of a Group, Category, Type or Class of Swaps

SEFs and DCMs may submit determinations for approval or self-certification for a group, category, type or class of swaps to provide greater efficiency for available to trade determinations. In turn, however, the CFTC may approve only a subset of swaps within that group, category, type or class as available to trade. SEFs and DCMs are also allowed to consider activity in the same swap listed on other SEFs or DCMs and the amount of off-exchange activity in the same swap when determining whether a swap is available to trade.

d. Denial of Approval or Self-Certification

Either the approval or self-certification may be denied if the SEF's or DCM's initial determination was inadequate or inconsistent with the CEA or the CFTC's regulations. The initial determination may be deemed inconsistent if the SEF or DCM does not consider one of the required factors, or the swap otherwise does not meet other prerequisites in the submission process.

e. Who Must Comply with This Rule?

Market participants must comply with the trade execution requirement either at the later of the (i) applicable deadline under the compliance schedule for the clearing requirement for a swap, or (2) 30 days after the swap is first made available to trade on either a SEF or DCM through the approval or self-certification process. Available to trade determinations may precede the clearing requirement determinations and vice versa, but the trade execution requirement would not be effective until the clearing requirement takes effect.

Once a swap is made available to trade, all SEFs and DCMs that list or offer this swap for trading must do so in accordance with the trade execution requirement. Subsequent SEFs and DCMs will not be required to submit separate available to trade determinations to the CFTC for a particular swap after it has been determined to be available to trade. No SEF or DCM is required to list or offer a swap for trading even if another SEF or DCM has determined it is available to trade. However, once the CFTC determines a swap to be available to trade, the swap may only be executed on a SEF or DCM.

The CFTC will post all determinations on its website where market participants can readily ascertain which swaps have been made available to trade, and which SEFs and DCMs list those swaps for trading.

f. Removal of Available to Trade Status

If all SEFs and DCMs that had listed a swap for trading, including the SEF or DCM that submitted the initial available to trade determination, no longer list that swap for trading, the CFTC may deem the swap no longer available to trade. The CFTC will issue a notice when a swap is no longer available to trade.

3. The Block Trade Final Rule

Public dissemination of data pertaining to block trades and large notional off-facility swaps will be subject to time delays. In addition, block trades can be executed away from a SEF or DCM trading platform. The Block Trade Final Rule sets out the minimum sizes for block trades and large notional off-facility swaps. Moreover, the Block Trade Final Rule establishes cap sizes to determine the appropriate notional amount at which a publicly disseminated swap transaction can be masked.

Under CFTC Regulation 43, data regarding certain swap transactions must be reported to an SDR as soon as technologically practicable after the time at which the swap transaction has been executed (i.e., real-time reporting). However, the public dissemination of data pertaining to block trades and large

notional off-facility swaps will be subject to time delays.¹⁵ In the Block Trade Final Rule, the CFTC sets forth (i) the minimum sizes for block trades and large notional off-facility swaps for an initial period of one year, and (ii) a process for determining minimum sizes for block trades and large notional off-facility swaps following the initial period. Prior to July 30, 2013, all swaps will be treated as block trades.

The CFTC also establishes “cap sizes” for notional amounts above which swaps will be reported as a single set of block trades and large-notional off-facility swaps (e.g., \$250 million+). Such cap sizes are generally larger than the minimum sizes for identifying trades as block trades or large notional off-facility swaps.

All five asset classes (i.e., interest rate, credit, equity, foreign exchange (FX) and other commodity), whether cleared or uncleared, and regardless of method of execution (e.g., executed bilaterally or on a registered SEF or DCM) are subject to appropriate minimum block sizes. The Block Trade Final Rule does not establish the time delays for reporting of block trades and large notional off-facility swaps, because they were already established in the CFTC’s final rules regarding real-time reporting of swap transaction data.

a. Minimum Block Thresholds

During the initial period, the minimum block thresholds for swaps are set forth in Appendix F to CFTC Regulation 43 (with interest rate and credit swaps calculated using a 50% notional amount). After an SDR has collected at least one year of reliable data for a particular asset class, the CFTC will establish post-initial minimum block sizes for each swap category within that asset class by applying a 67% notional amount calculation to such data. The chart below sets forth these thresholds by asset class.

Asset Class	Swap Category	Initial Implementation Period	Post-Initial Implementation Period
Interest Rates	9 tenor groups and 3 currency groups (27 swap categories in total)	50% notional amount calculation	67% notional amount calculation by swap category
Credit	6 tenor groups and 3 conventional spread groups) (18 swap categories in total)	50% notional amount calculation	67% notional amount calculation by swap category
Equity	Single Category	No Blocks	No Blocks
FX	3 currency groups: super major currency, major currencies and non-major currency (78 swap categories in total)	If the swap is economically related to a futures contract, like a futures related swap, the CFTC will set minimum block sizes based on block trade size thresholds set by DCMs for economically related futures contracts. ¹⁶	67% notional amount calculation to determine appropriate minimum block sizes, but only for those swap categories established in 43.6(b)(4)(i) that will have minimum block sizes set using this 67% calculation.
		If the swap is not	Remainder of swaps

¹⁵ Block trades are executed pursuant to the rules of a SEF or DCM, whereas large notional off-facility swaps are not.

¹⁶ For example, if Swap A is economically related to futures F, and futures F is subject to the block trade rules of a DCM that applies at a notional amount of \$1 million, then Swap A would qualify for treatment as a block trade or large notional off-facility swap if the notional amount of Swap A exceeds \$1 million.

		economically related to a futures contract, such swap would be treated as a block trade or a large notional off-facility swap.	covered under 43.6(b)(4)(ii) will continue to be treated as blocks.
Other Commodity	<p>3 categories:</p> <p>First: Swaps that are economically related to one of the contracts listed in Appendix B to part 43 of the CFTC's regulations.</p> <p>Second: Certain swaps that are not economically related to futures or swap contracts listed in Appendix B, and economically related to a relevant futures contract that is subject to the block trade rules of a DCM.</p> <p>Third: Product types listed in Appendix D to part 43 of the CFTC's regulations.</p>	<p>For swaps economically related to one of the futures contracts listed in appendix B of part 43 or 43.6(b)(5)(ii), the CFTC will set appropriate minimum block sizes based on block sizes for related futures contracts set by DCMs.</p> <p>For swaps economically related to one of the futures contracts listed in appendix B to part 43 that is not subject to DCM block size minimums, treatment as a block trade is not available.</p> <p>For swaps economically related to one of the futures contracts listed in the CFTC's final rulemaking, appropriate minimum block sizes would be determined by the block sizes for related contracts set by DCMs.</p> <p>For swaps not related to futures contracts, such swaps will be treated as block trades or large notional off-facility swaps.</p>	67% notional amount calculation to determine minimum block sizes.

The CFTC will publish post-initial block sizes on its website and will update block sizes at least once each calendar year. These sizes will become effective on the first day of the second month following the date of publication.

If the swaps satisfy the minimum block trade size threshold and block status were elected, then the public trade dissemination of such swaps is delayed. Only swaps that have a notional amount at or above the minimum block trade size and for which the status is elected will receive the delay in public dissemination.

b. Election Process

The election process through which a swap transaction would be treated as a block trade or large notional off-facility swap is a two-step notification process. Parties to a block trade are required to notify the SEF or DCM of their election to have their swap transaction treated as a block trade. Once the SEF or DCM receives an election notification, it is required to notify the relevant SDR of such block trade election when transmitting swap transaction and pricing data to the SDR for public dissemination.

If the transaction is done as a large notional off-facility swap, the reporting party that executes an off-facility swap with a notional amount at or above the applicable appropriate minimum block size is required to notify the relevant SDR of its election to treat it as a large notional off-facility swap. The reporting party is required to notify the SDR in connection with the reporting party's transmission of the swap transaction and pricing data to the SDR, pursuant to the CFTC's regulations.

c. Large Notional Off-Facility Swaps

The Final Rule established minimum sizes for large notional off-facility swaps in the same manner and at the same level as minimum sizes for block trades established under the Final Rule. Additionally, a reporting party that executes an off-facility swap that has a notional amount at or above the appropriate minimum block size must notify the applicable SDR that such swap transaction qualifies as a large notional off-facility swap concurrent with the transmission of swap transaction and pricing data in accordance with the real-time reporting rules.

d. Eligible Block Trade Parties

Parties to a block trade must be "eligible contract participants" as defined in section 1a(18) of the CEA. However, a DCM may allow the following persons to transact block trades for customers that are not eligible contract participants if such person has more than \$25 million in total assets under management and is either (i) a registered or exempt CTA, or principal thereof, who has discretionary trading authority or directs client accounts, (ii) an investment adviser with discretionary trading authority or who directs client accounts, or (iii) a foreign person who performs a similar function as the CTA or investment adviser described in clauses (i) and (ii), and is subject as such to foreign regulation.

A person transacting a block trade on behalf of a customer must receive prior written instruction or consent from the customer to do so.

e. Cap Sizes

The Block Trade Final Rule also allows for the notional amount of a publicly disseminated swap transaction to be masked if such notional amount equals or exceeds certain levels. Under the real-time reporting rules, cap sizes are determined in a manner that adjusts in accordance with the appropriate minimum block size that corresponds to a publicly reportable swap transaction. If no appropriate minimum block size exists, then the cap size on the notional or principal amount will correspond to the interim cap sizes that the CFTC has established for the five asset classes. As an example, if the block size for a category of interest rate swaps was \$1 billion, the cap size was \$1.5 billion and an actual transaction had a notional value of \$2 billion, then the swap transaction would be reported publicly with a delay and with a notional value of \$1.5 billion.

The cap sizes are intended to (1) help protect the anonymity of counterparties' market positions and business transactions, and (2) reduce any negative impact on market liquidity that could result from real-time reporting of swap transactions.

The initial cap sizes for interest rate swaps are \$250 million for tenors greater than zero up to and including two years, \$100 million for tenors greater than two years up to and including 10 years, and \$75 million for tenors greater than 10 years. The initial cap sizes for credit swaps are \$100 million, for equity swaps \$250 million, for FX \$250 million, and for other commodities \$25 million. These cap sizes also apply to swaps in categories that are not covered by Appendix F.

In the post-initial period, the CFTC will use a 75% notional amount calculation, using the same methodology as that used for the 50% and 67% notional calculations for the initial and post-initial periods for block thresholds. The CFTC will publish these cap sizes on its website.

If market participants think that the CFTC has set cap sizes for a specific swap category in a way that will materially reduce market liquidity, the participants are encouraged to submit data to support their conclusion. The CFTC may also mitigate the potential effects of cap sizes on market liquidity with respect to swaps in a particular swap category.



If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

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