

# Regulation Watch

May 30, 2024

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# The UK's FCA Publishes Webpage on Operational Resilience Requirements

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The UK's Financial Conduct Authority ("FCA") has published a [web page](#) of observations aimed at helping firms prepare for new operational resilience rules due to be enforced by 31 March 2025. The relevant rules apply to banks, building societies, larger investment firms, insurers, and recognised exchanges, but are worth reading for all firms given the current regulatory emphasis on operational preparedness for ever more severe challenges.

While as soon as possible after 31 March 2022, and by no later than 31 March 2025, relevant firms must have performed mapping and testing to remain within their identified impact tolerances for each important business service, those firms should also have conducted a self-assessment covering impact tolerance and how they are mapped to important business services, identified vulnerabilities and the results of scenario testing.

The FCA looks at observations and insights into current practices around identifying and regularly reviewing important business services to make sure that these are identified and can continue to function to keep the firm within impact tolerance parameters. Those parameters must be set in the round and ready for assessed 'severe but plausible scenarios'. The importance of regular scenario review and senior management buy-in is also key.

# CFTC's Recent Revisions to Reporting Rules for Futures, Options and Swaps

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On April 30, 2024 the Commodity Futures Trading Commission (“**CFTC**” or the “**Commission**”) **finalized amendments** to its rules governing reporting requirements for large trader futures and options positions, the latest in a series of changes made to reporting and recordkeeping rules by the Commission<sup>[1]</sup>. In addition to these amendments to 17 CFR Part 17 of the CFTC’s regulatory framework, the CFTC recently **proposed changes** to the real-time reporting and swap data reporting and recordkeeping requirements contained in 17 CFR Parts 43 and 45. <sup>[2]</sup> Taken together, and following the recent “rewrite” exercise of CFTC’s reporting requirements since 2020,<sup>[3]</sup> these changes reflect a larger shift in the CFTC’s approach to recording and collecting information from participants in commodity futures, options and swap markets. An increasing number of enforcement actions involving participants’ failure to comply with futures and particularly swaps reporting and recordkeeping requirements underscores CFTC’s greater attention to compliance with its reporting and recordkeeping rules.

## CFTC’s Reporting Requirements for Futures and Swaps

As required in several provisions of the Commodity Exchange Act of 1936 (“**CEA**”), the CFTC has traditionally set out reporting requirements for futures and options in Parts 15, 16, 17, 18, 19 and 21,<sup>[4]</sup> and after the enactment of the Dodd Frank Act of 2010,<sup>[5]</sup> for swaps in Parts 16, 20, 43, 45 and 46.<sup>[6]</sup> Below we discuss CFTC’s most recent proposed revisions to these reporting regimes.

### Part 17 Amendments to Requirements for Large Trader Reporting on Futures and Options

The CFTC is amending regulations regarding large trader reporting (“**LTR**”) for certain positions in futures and options.<sup>[7]</sup> These rules were first adopted in 1923<sup>[8]</sup> and were designed to give the CFTC information on futures and options positions that are considered sufficiently large to have an impact on the markets. Part 17 of the Commission’s regulations requires reporting clearing members, futures commission merchants, foreign brokers and certain reporting markets (together, “**Reporting Firms**”) to file daily reports on their futures and options positions; if any Reporting Firm has a trader with a position that meets the CFTC’s threshold in a futures or options expiration month, that trader’s entire position in all expiration months must be reported. Collecting data from Reporting Firms across the futures and options markets allows the CFTC to aggregate related trader accounts that may be held across various brokers. Data is collected via Form 102 and 71, which allows Reporting Firms to identify “special accounts” as required by the CFTC’s reporting regime. Following submission of the Part 17 reports by the Reporting Firms, individual traders customarily receive the Form 40 request from the CFTC to provide further information relating to their large positions in futures and options.

The amendments to Part 17 remove the 80-character submission standard, delegate authority to designate a modern submission standard, and replace data fields with an appendix specifying applicable data elements. Historically, Reporting Firms have submitted large trader position reports in the highly specific 80-character format. The proposed amendments aim to modernize reporting and ensure compatibility with other reporting regimes. The amendments empower the Director of the Office of Data and Technology to designate modern submission standards, like Financial Information eXchange Markup Language (“**FIXML**”). They also replace existing data elements with a new set of 50 data elements specified in Appendix C, enabling reporting of positions in newer contracts. Following the enactment of these revisions, the CFTC also published its revised Guidebook for Part 17.00.<sup>[9]</sup>

### **Part 43 Amendments to Real Time Reporting Requirements and Part 45 Amendments to Swap Data Reporting and Recordkeeping Requirements**

On December 28, 2023, the CFTC proposed revisions to Parts 43 and 45<sup>[10]</sup> to further update real-time public reporting regulations and swap data reporting and recordkeeping requirements initially adopted in 2012 (and significantly amended in 2020).<sup>[11]</sup> The proposed amendments to Parts 43 and 45 would allow a unique product identifier (“**UPI**”) to be employed for the Other Commodity asset class. The proposed changes would extend the UPI to the Other Commodity asset class in the future, in accordance with CFTC regulations governing other asset classes’ UPIs. In addition, the proposed modifications would amend appendix A to Part 43 and appendix 1 to Part 45 to include data elements that standardize the CFTC’s reporting regime with international reporting requirements.

In the proposed amendment, the CFTC offers updates under Section 45.7 of the CEA outlining the requirements for the UPI and product classification system to enable regulatory responsibilities and real-time reporting of swaps. The proposed amendments to section 45.7(b) focus on the expansion of CFTC authority regarding the designation, conditions, and potential revocation of a UPI and product classification system. These conditions could include maintaining international standards or setting implementation dates. The amendments also outline proposed modifications to Part 45 to accommodate the UPI system, including provisions for geographic masking and reporting obligations for swap counterparties.

The CFTC proposed updates to the Data Element Appendices including additional standardized data elements for swap data reporting. The proposed additions cover various categories including Custom Baskets, Prices, Products, Notional Amounts and Quantities, Clearing, Counterparty, and Transaction Categories.

1. Custom Baskets: The Commission proposes to add data elements related to custom baskets to address exposure risks and facilitate cross-basket analysis.
2. Prices: Six data elements related to price schedules and settlement price analysis are proposed to be added.
3. Product: Several data elements are proposed to provide information on underliers, pricing indices, physical delivery locations, and product grades.
4. Notional Amounts and Quantities: Ten data elements related to notional amounts and quantities are proposed, particularly for commodities.
5. Clearing: Two clearing-related fields are proposed to indicate mandatory clearing status and provide identifiers for clearing members.

6. Counterparty: Four data elements related to counterparty identifiers and designations are proposed.
7. Transaction Categories: Two transaction-related data elements are proposed to indicate execution on SEFs or DCMs and anonymous execution status.

The CFTC also proposed revisions to the descriptions of existing data elements in the Data Element Appendices. These modifications aim to harmonize descriptions with international standards, simplify reporting requirements, and improve clarity for reporting entities.

1. Harmonization with International Standards: Some modifications align descriptions with standards set by the Regulatory Oversight Committee and related subcommittees. For instance, the description of “Reporting Timestamp” would be adjusted to align with the CDE Technical Guidance<sup>[12]</sup>.
2. Consolidation of Form and Manner Detail: Detailed instructions on the form and manner of reporting would be removed from the Data Element Appendices and incorporated into the Technical Specification.
3. Removal of Asset Class References: References to asset classes would be eliminated from the Data Element Appendices to provide clarity. Instead, reporting entities can refer to the Technical Specification for specific information on when and how to report a particular data element.

## **Recent Reporting Requirement Revisions and the “Rewrite”**

These final and proposed rules are part of an overhaul of CFTC reporting requirements, referred to as the CFTC “rewrite.” As part of the CFTC rewrite, the Commission updated their **Parts 43 and 45 Technical Specifications**. <sup>[13]</sup> In the most recent Version 3.3, the Commission revised guidelines for reporting additional swap data elements in the revised Data Element Appendices to Parts 43 and 45, including the definitions, allowable values, formatting, and data element validation for data required to be reported to an SDR and promulgated publicly. The Technical Specifications were originally published in 2020 alongside earlier amendments to reporting requirements under Parts 43 and 45, and have been modified to conform with the CFTC’s “rewrite” exercise in September 2021, August 2022 and March 2023.

In addition to regular updates made to the Parts 43 and 45 Technical Specifications, the CFTC ordered new UPIs to be used in swaps reporting and recordkeeping in February 2023. <sup>[14]</sup> Under this order the new UPIs, issued by the Derivatives Service Bureau, must be implemented products in the Credit, Equity, Foreign Exchange and Interest Rate asset classes by January 29, 2024. The proposed amendments to Parts 43 and 45 discussed above are significant steps forward in the CFTC’s rewrite initiative.

## **Part 20 Revisited**

On March 18, 2024, the CFTC published a request<sup>[15]</sup> to the Office of Management and Budget for extension of temporary regulations on monitoring physical commodity swap positions in 17 CFR Part 20. <sup>[16]</sup>

In response to this request, some market participants recommended that the temporary regulations not be extended, as the CFTC’s subsequent reporting and monitoring regimes (i.e., Part 43 and Part 45) have rendered the provisions of Part 20 redundant. It is also noted that

Part 20's requirements cost swap dealers and clearing members significant resources, demanding substantial time spent identifying data to be collected and compiling detailed reports for submission to the Commission. For these reasons, the temporary Part 20 regulations should be allowed to sunset.

### **Updated Part 43 Block and Cap Sizes**

Finally, on May 23, 2024, CFTC's Division of Data published<sup>[17]</sup> updated post-initial appropriate minimum block sizes<sup>[18]</sup> and post-initial cap sizes<sup>[19]</sup> and issued a no-action letter extending the no-action position originally taken two years ago relating to block and cap sizes until October 7, 2024.<sup>[20]</sup>

<sup>[1]</sup> *Large Trader Reporting Requirements*, 17 C.F.R. Part 17, RIN 3038-AC22 (as approved May 1, 2024). See also Notice of Proposed Rulemaking, *Large Trader Reporting Requirements*, 88 Fed. Reg. 41522 (June 27, 2023).

<sup>[2]</sup> *Real-Time Public Reporting Requirements and Swap Data Recordkeeping and Reporting Requirements*, 88 Fed. Reg. 90046 (Dec. 28, 2023).

<sup>[3]</sup> See *Reporting, Recordkeeping, Daily Trading Records, and Swap Documentation Requirements for Swap Dealers and Major Swap Participants; Corrections*, 88 Fed. Reg. 8752 (March 13, 2023). The Parts 43 and 45 Technical Specifications, discussed below, were also modified as part of the CFTC's "rewrite" exercise.

<sup>[4]</sup> 17 C.F.R. Part 15 (Reports – General Provisions) includes provisions and several definitions applicable for reports generally; Part 16 (Reports by Contract Markets and Swap Execution Facilities) requires registered trading facilities to submit certain information to the CFTC; Part 17 (Reports by Reporting Markets, Futures Commission Merchants, Clearing Members and Foreign Brokers) requires the submission of large trader position reports and certain account identification information for accounts of large traders (Forms 102 and 71); Part 21 (Special Calls) requires reporting firms to submit certain information to the CFTC; and Parts 18 (Reports by Traders) and 19 (Reports by Persons Holding Reportable Positions in Excess of Position Limits, and by Merchants and Dealers in Cotton) require individual traders to submit certain data to the CFTC (including Form 40 under Part 18 and Form 304 under Part 19). Prior Form 204 under Part 19 has been phased out with the adoption of the new position limits rule in 2020.

<sup>[5]</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929-Z, 124 Stat. 1376, 1871 (2010) (codified at 15 U.S.C. § 78o).

<sup>[6]</sup> 17 C.F.R. Part 16 swap execution facilities to report certain information relating to swaps to the CFTC; Part 20 (Large Trader Reporting for Physical Commodity Swaps) requires reporting of large positions in swap referencing certain physical commodities (Form 102S); and Parts 43 (Real-Time Public Reporting), 45 (Swap Data Recordkeeping and Reporting Requirements) and 46 (Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps) require making reports relating to each executed swap either to a swap data repository ("**SDR**") or to the CFTC.

[7] *Large Trader Reporting Requirements*, 17 C.F.R. Part 17, RIN 3038-AC22 (as approved May 1, 2024).

[8] See *U.S. Futures Trading and Regulation Before the Creation of the CFTC*, [https://www.cftc.gov/About/HistoryoftheCFTC/history\\_precftc.html](https://www.cftc.gov/About/HistoryoftheCFTC/history_precftc.html).

[9] Guidebook for Part 17.00, Reports by Reporting Markets, Futures Commission Merchants, Clearing Members, and Foreign Brokers, Version 1.9, April 16, 2024.

[10] *Real-Time Public Reporting Requirements and Swap Data Recordkeeping and Reporting Requirements*, 88 Fed. Reg. 90046 (Dec. 28, 2023).

[11] Commissioner Caroline D. Pham issued a concurring statement for the proposed rule, noting that her support of the rule was contingent on addressing harmonization concerns. The Commissioner referenced the Global Markets Advisory Committee's recommendation on data collection standardization, noting that almost 40 percent of data fields requested from swap dealers by the CFTC are specific to the Commission's jurisdiction. Commissioner Pham noted that further harmonization efforts, informed by public comment, need to be made before she can fully support these amendments as a final rule.

[12] CDE Technical Guidance, <https://www.bis.org/cpmi/publ/d175.pdf>.

[13] *CFTC Staff Announces Modifications to the Technical Specification for Parts 43 and 45*, <https://www.cftc.gov/PressRoom/PressReleases/8673-23> (March 10, 2023).

[14] *Order Designating the Unique Product Identifier and Product Classification System To Be Used in Recordkeeping and Swaps Data Reporting*, 88 Fed. Reg. 11790 (Feb. 24, 2023).

[15] *Agency Information Collection Activities: Notice of Intent to Renew Collection 3038-0095; Large Trader Reporting for Physical Commodity Swaps*, 89 Fed. Reg. 19298 (March 18, 2024).

[16] *Large Trader Reporting for Physical Commodity Swaps*, 76 Fed. Reg. 43851 (July 22, 2011).

[17] <https://www.cftc.gov/media/10716/Part43BlockThresholdsCapSizes052324/download>

[18] See § 43.6 of CFTC Regulations (block trades and large notional off-facility swaps).

[19] See § 43.4(h) of CFTC Regulations (post-initial cap sizes).

[20] See CFTC Letter No. 22-03 (Jan. 31, 2022) and CFTC Letter No. 23-15 (Oct. 18, 2023).

# The European Commission Consults on Macroprudential Policies for 'Shadow Banks'

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Towards the end of 2023, non-bank financial intermediaries ("NBFIs") accounted for approximately 41% of the EU's total financial assets, against a figure for banks of 36%. This dominance and growth, together with the liquidity events of recent years has focused both supranational and local regulators on macroprudential initiatives for NBFIs, including regarding leverage limits, liquidity management tools and issues for open-ended funds.

In this [paper](#), the European Commission seeks views on the current and future macroprudential treatment of NBFIs to identify vulnerabilities and risks. Questions understandably focus on liquidity mismatches, leverage levels, and interconnectedness between NBFIs and between NBFIs and banks and explore existing measures such as the Money Market Funds Regulations of 2017. Also examined is the current prudential supervision architecture and its pre-emptive and ex-post measures.

NBFI sectors that are discussed in the paper include asset management and open-ended funds, as well as insurance firms and pension funds, and their role in how the NBFI market operates under a prudential system that focuses on those sectors. Particular attention is paid to money market funds, the regulatory framework for which has been a particular area for prudential enhancements in recent years.

Responses are due by 22 November 2024.



# EU Financial Markets Regulator Publishes Criteria for ESG and Sustainable Fund Names

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On May 14, 2024, the European Securities and Markets Authority (ESMA) published final guidelines for funds using ESG or sustainable terms in their names (the Guidelines). If competent authorities in each Member State elect to adopt them, in-scope funds will need to be in compliance with the Guidelines within nine months. The Guidelines apply to all alternative investment funds (AIFs) that are managed by EU alternative investment fund managers (AIFMs), and funds that fall within the scope of the [Undertaking for the Collective Investment in Transferable Securities \(UCITS\) Directive](#). The Guidelines include criteria based on the ESG or sustainability-related terms used by AIFMs and UCITS funds, and can be summarized as follows:

## *Descriptions of key terms*

The Guidelines set out descriptions of relevant key terms.

- Transition-related:
  - This includes terms derived from the base word “transition” e.g. “transitioning,” “transitional,” etc. and terms deriving from “improve,” “progress,” “evolution,” “transformation,” “net-zero,” etc.
- Social-related:
  - This includes terms which give the investor any impression of the promotion of social characteristics, e.g. “social,” “equality,” etc.
- Governance-related:
  - This encompasses words which give the investor any impression of a focus on governance, e.g. “governance,” “controversies,” etc.
- Environmental-related:
  - This includes words which give the investor any impression of the promotion of environmental characteristics e.g. “green,” “environmental,” “climate,” etc. Such terms may include abbreviations such as “ESG” and “SRI.”
- Impact related:
  - This encompasses terms derived from the base word “impact,” e.g. “impacting,” “impactful,” etc.
- Sustainability-related:
  - This includes terms only derived from the base word “sustainable,” e.g. “sustainably,” “sustainability,” etc.

## *Asset allocation*

At least 80% of the assets of funds using transition-, social-, governance-, environmental- and impact-related terms must be used to meet the environmental and/or social characteristics or sustainable investment objectives in accordance with the binding elements of its investment strategy.

The same asset-allocation threshold also applies to funds using sustainability-related terms but in addition, these funds must also make a commitment to invest “meaningfully” in “sustainable investments,” as such term is defined in Article 2(17) of the Sustainable Finance Disclosure Regulation (SFDR). ESMA explains that investing “meaningfully” is a requirement that replaced what was an additional threshold of at least 50% of sustainable investments for funds using sustainability-related terms. The latter requirement was removed following feedback from stakeholders, some of whom cited the lack of clarity of the sustainable investment definition provided in the SFDR. **We have previously discussed** the mass downgrades in fund classification that resulted from that uncertainty. However, no further guidance as to the definition of “meaningfully” has been provided. The lack of a clear definition of what it means to commit to “invest meaningfully in sustainable investments” generates a degree of uncertainty and as such, asset managers will need to carefully consider what they take the term to mean.

### *Exclusionary criteria*

For funds using transition-, social- and governance-related terms, investments should not be made in companies that are excluded from Climate Transition Benchmarks (CTB). CTB exclusions refer to companies involved in any activities related to controversial weapons, the cultivation and production of tobacco, or any activities that benchmark administrators hold in violation of the United Nations Global Compact (UNGC) principles or the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises.

The same CTB exclusions apply to funds using environmental-, impact- or sustainability-related terms, but such funds must also adhere to additional criteria under the Paris Aligned Benchmark (PAB) by excluding companies that derive:

- 1% or more of their revenue from exploration, mining, extraction, distribution or refining of hard coal and lignite;
- 10% or more of their revenue from the exploration, extraction, distribution or refining of oil fuels;
- 50% or more of their revenue from the exploration, extraction, manufacturing or distribution of gaseous fuels; and
- 50% or more of their revenue from electricity generation with a greenhouse gas intensity of more than 100 g CO<sub>2</sub> e/kWh.

### *Further recommendations*

The Guidelines include further specific criteria:

- Funds designating an index as a reference benchmark should only use transition-, social- and governance-related terms, environmental- or impact-related terms or sustainability-related term in their name if they fulfil the relevant requirements set out above.

- Funds using “transition-” or “impact”-related terms in their names should also ensure that investments used to meet the relevant threshold are on a clear and measurable path to social or environmental transition or are made with the objective to generate a positive and measurable social or environmental impact alongside a financial return.

### *Timelines*

The Guidelines are due to be translated into all EU languages, and will be published on ESMA’s website. Application will commence three months after that publication. Competent authorities will have two months after the Guidelines are published on ESMA’s website to notify the regulator whether they (i) comply, (ii) do not comply, but intend to comply, or (iii) do not comply and do not intend to comply with the guidelines. Funds existing before the application date will have six months after that date to comply.

### *Conclusion*

Although it remains to be seen how each Member State implements the Guidelines, fund managers will need to familiarize themselves with them and ensure that any in-scope terms are being used in compliance with the rules. Such a review must be conducted – and any necessary changes implemented – within the next nine months. Non-compliance could potentially lead to greenwashing allegations and therefore carries risk of enforcement and litigation, as well as other consequences such as adverse publicity and reputational damage.

As noted by the U.S. Securities and Exchange Commission when introducing their “names rule” ([which we discussed in detail in a previous edition](#)), a fund’s name “is the first piece of information that investors receive” and signals to investors the types of investments the fund will pursue. It is hoped that the Guidelines published by ESMA will provide clarity, enhance transparency and protect investors from unsubstantiated or exaggerated claims in fund names, increasing confidence and ultimately driving further investment.

This article first appeared in [Cadwalader Climate](#).