



6351-01-P

## COMMODITY FUTURES TRADING COMMISSION

### 17 CFR Part 23

### RIN 3038-AE77

## Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Final rule.

**SUMMARY:** The Commodity Futures Trading Commission (“Commission” or “CFTC”) is amending the margin requirements for uncleared swaps for swap dealers (“SD”) and major swap participants (“MSP”) for which there is no prudential regulator to add the European Stability Mechanism (“ESM”) to the list of entities that are expressly excluded from the definition of financial end user under Commission regulations and to correct an erroneous cross-reference in Commission regulations (“Final Rules”).

**DATES:** This final rule is effective **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].**

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## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

In January 2016, the Commission adopted regulation §§23.150 through 23.161 (collectively, “CFTC Margin Rule”) to implement section 4s(e) of the Commodity Exchange Act (“CEA”),<sup>1</sup> which requires SDs and MSPs for which there is not a prudential regulator (“CSEs”) to meet minimum initial and variation margin requirements adopted by the Commission by rule or regulation.<sup>2</sup>

Since adopting the CFTC Margin Rule, the Commission’s Division of Swap Dealer and Intermediary Oversight (“DSIO”) has issued staff guidance, including no-action letters, addressing the application of the rule. In July 2017, DSIO issued CFTC Letter No. 17-34 in response to a request for relief submitted by the ESM.<sup>3</sup> The ESM sought relief with respect to uncleared swaps transactions it entered into with SDs, representing that it was similar to multilateral development banks, as the term is defined in Commission regulation §23.151, which are excluded from the definition of financial end user and whose swaps are exempt from the CFTC Margin Rule.

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<sup>1</sup> See Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 81 FR 636 (Jan. 6, 2016) (“Final Margin Rule”); Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants — Cross-Border Application of the Margin Requirements, 81 FR 34818 (May 31, 2016).

<sup>2</sup> See 7 U.S.C. 6s(e)(1)(B). SDs and MSPs for which there is a “Prudential Regulator” must meet the margin requirements for uncleared swaps established by the applicable “Prudential Regulator.” 7 U.S.C. 6s(e)(1)(A). See also 7 U.S.C. 1a(39) (defining the term “Prudential Regulator” to include the Board of Governors of the Federal Reserve System; the Office of the Comptroller of the Currency; the Federal Deposit Insurance Corporation; the Farm Credit Administration; and the Federal Housing Finance Agency, and specifying the entities for which these agencies act as Prudential Regulators). The Prudential Regulators published final margin requirements in November 2015. See Margin and Capital Requirements for Covered Swap Entities, 80 FR 74840 (Nov. 30, 2015).

<sup>3</sup> CFTC Letter No. 17-34, Commission regulation §§23.150 through 23.159, 23.161; No-Action Position with Respect to Uncleared Swaps with the European Stability Mechanism (July 24, 2017) (“CFTC Letter No. 17-34”), available at <http://www.cftc.gov/idc/groups/public/@lrllettergeneral/documents/letter/17-34.pdf>.

In October 2019, the Commission proposed to codify CFTC Letter No. 17-34 and amend Commission regulation §23.151 to exclude the ESM from the definition of financial end user and thus exempt from the CFTC Margin Rule uncleared swaps entered into by the ESM.<sup>4</sup> The Commission also proposed to correct a typographical error in Commission regulation §23.157.<sup>5</sup>

## **II. Final Rules**

The Commission is adopting the amendments to Commission regulation §§23.151 and 23.157 as proposed. The Commission received three comments in the file for the Proposal,<sup>6</sup> only one of which directly addressed the Proposal.<sup>7</sup> The Futures Industry Association (“FIA”) indicated, among other things, that its commodities members generally support the Proposal.<sup>8</sup>

### **A. Commission regulation §23.151 – Definition of financial end user**

The CFTC Margin Rule applies to swap transactions between CSEs and counterparties that are SDs, MSPs or financial end users. Commission regulation §23.151 defines the term “financial end user,”<sup>9</sup> excluding from the definition sovereign entities, multilateral development banks, the Bank for International Settlements, entities

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<sup>4</sup> Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 84 FR 56392 (Oct. 22, 2019) (the “Proposal”), at 56393-4.

<sup>5</sup>*Id.* at 56394.

<sup>6</sup> Comments for the Proposal are available on the Commission website at <https://comments.cftc.gov/PublicComments/CommentList.aspx?id=3038>. Comment letter no. 62275 dated Dec. 23, 2019 from the Asset Management Group of the Securities Industry and Financial Markets Association, available at <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=62275&SearchText=>, discussed other margin issues outside the scope of the Proposal. In addition, an anonymous commenter submitted a comment addressing issues unrelated to margin. Comment no. 62220 dated Oct. 22, 2019, available at <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=62220&SearchText=>.

<sup>7</sup> Comment letter no. 62272 dated Dec. 23, 2019 from FIA, available at <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=62272&SearchText=> (the “FIA letter”), discussed other margin issues outside the scope of the Proposal.

<sup>8</sup> FIA letter at 2.

<sup>9</sup> 17 CFR 23.151.

exempt from the definition of financial entity pursuant to section 2(h)(7)(C)(iii) of the Act and implementing regulations, affiliates that qualify for the exemption from clearing pursuant to section 2(h)(7)(D) of the Act, and eligible treasury affiliates that the Commission exempts from the requirements of Commission regulation §§23.150 through 23.161 by rule.<sup>10</sup>

The Commission is adopting the proposed amendment to Commission regulation §23.151. As amended, Commission regulation §23.151 excludes the ESM from the definition of financial end user, effectively exempting uncleared swaps transactions entered into by the ESM from the CFTC Margin Rule. With respect to the proposed amendment, FIA stated that its commodity members generally support the Commission's efforts to amend its rules to relieve burdens on market participants.

The amendment to Commission regulation §23.151 codifies the relief provided by CFTC Letter No. 17-34, which extends no-action relief from the CFTC Margin Rule with respect to uncleared swaps between SDs and the ESM. The no-action relief was granted based on the ESM's representations concerning the nature of its operations. The no-action letter stated that the ESM is an intergovernmental financial institution that provides financial assistance for national or regional development to Euro area member states that are in or are threatened by severe financial distress, similar to multilateral development banks, which are excluded from the definition of financial end user in Commission regulation §23.151. To accomplish its policy goals, the ESM utilizes several financial assistance instruments, including loans in various forms which can be used for multiple purposes and are offered only subject to bespoke specified conditions, including economic reforms. The ESM enters into uncleared swaps with SDs to hedge

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<sup>10</sup> *See id.*

the interest rate and currency risks it faces as a result of entering into and funding loans and to hedge risks associated with its invested capital. The ESM does not, and will not, enter into uncleared swaps for speculative purposes.

In granting no-action relief, DSIO noted that the ESM, like multilateral development banks excluded from the financial end user definition, has a lower risk profile, posing less counterparty risk to an SD and less systemic risk to the financial system. While not explicitly finding that the ESM was a multilateral development bank, DSIO recognized that its functions and credit profile justified relief.<sup>11</sup>

Based on the aforementioned considerations, the Commission amends paragraph (2)(iii) of the definition of *Financial end user* in Commission regulation §23.151 by adding the ESM to the list of entities that are excluded from the definition of financial end user. As a result of the ESM's exclusion from the definition of financial end user, uncleared swaps entered into between the ESM and CSEs are exempt from the CFTC Margin Rule. The Commission believes that the amendment, as adopted, provides clarity and certainty to CSEs that are counterparties to the ESM that uncleared swaps entered into with the ESM are not subject to the CFTC Margin Rule. The Commission is adopting the amendment because activities conducted by the ESM, like activities conducted by multilateral development banks that are excluded from the financial end user definition, generally have a different purpose in the financial system. These types of entities are established by governments and their financial activities are designed to

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<sup>11</sup> The Basel Committee on Banking Supervision ascribes to the ESM a 0% risk weight. The ESM has been included in the list of entities that receive a 0% risk weight in the document entitled "Basel II: International Convergence of Capital Measurement and Capital Standards: A Revised Framework – Comprehensive Version, June 2006." See BIS, Risk Weight for the European Stability Mechanism (ESM) and European Financial Stability Facility (EFSF), [https://www.bis.org/publ/bcbs\\_n117.htm](https://www.bis.org/publ/bcbs_n117.htm).

further governmental purposes, posing less counterparty risk to CSEs and less systemic risk to the financial system.

Furthermore, the Commission believes that the amendment encourages international comity and continued cooperation between the Commission and the European Union (“EU”) authorities. In this regard, the Commission notes that the ESM is exempt from the European Market Infrastructure Regulation or EMIR’s margin rules for OTC derivatives contracts not cleared by a central counterparty.<sup>12</sup> By taking this action, the Commission acknowledges the unique interests of the EU authorities in the ESM and recognizes that the principles of international comity counsel mutual respect for the important interests of foreign sovereigns.<sup>13</sup>

**B. Amendment of Commission regulation §23.157 – Correction of cross-reference**

The Commission is adopting a corrective amendment to Commission regulation §23.157. In its comment letter, FIA indicated that its commodities members generally support the Commission’s efforts to amend its rules when necessary to correct errors.<sup>14</sup>

Commission regulation §23.157 requires initial margin collected from or posted by a CSE to be held by one or more independent custodians. The CSE must enter into a custodial agreement with each custodian that holds the initial margin collateral. In particular, paragraph (c)(1) of Commission regulation §23.157 provides that the custodial

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<sup>12</sup> See Regulation (EU) No 648/2012 of the European Parliament and the Council of the European Union of July 4, 2012.

<sup>13</sup> See Restatement (Third) of Foreign Relations Law of the United States sec. 403 (Am. Law Inst. 2018) (the Restatement). The Restatement provides that even where a country has a basis for jurisdiction, it should not prescribe law with respect to a person or activity in another country when the exercise of such jurisdiction is unreasonable. See Restatement section 403(1). Notably, the Restatement recognizes that, in the exercise of international comity, reciprocity is an appropriate consideration in determining whether to exercise jurisdiction extraterritorially.

<sup>14</sup> FIA letter at 2.

agreement must prohibit the custodian from rehypothecating, repledging, reusing, or otherwise transferring the collateral except that cash collateral may be held in a general deposit account with the custodian if the funds in the account are used to purchase an asset described in Commission regulation §23.156(a)(1)(iv) through (xii).

In administering the Commission’s regulations, DSIO staff noticed that the cross-reference to “§ 23.156(a)(1)(iv) through (xii)” in paragraph (c)(1) of Commission regulation §23.157 was erroneous. First, the existing cross-reference incorrectly refers to non-existing paragraphs. Second, the existing cross-reference excludes treasury securities and U.S. Government agency securities, which are included in the list of eligible collateral set forth in Commission regulation §23.156(a)(1), and which the Commission intended to include as eligible assets into which cash collateral can be converted.<sup>15</sup> To administer the CFTC Margin Rule and prevent confusion in its application, the Commission is hereby amending Commission regulation §23.157(c)(1) to remove the erroneous cross-reference to “§ 23.156(a)(1)(iv) through (xii)” and replace it with the corrected cross-reference “§ 23.156(a)(1)(ii) through (x).”

### **III. Administrative Compliance**

#### **A. Regulatory Flexibility Act**

The Regulatory Flexibility Act (“RFA”) requires Federal agencies, in promulgating regulations, to consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a

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<sup>15</sup> In the Final Margin Rule, the Commission explained that its intent was to exclude “immediately available cash funds,” which is one form of eligible collateral in Commission regulation §23.156(a)(1), because allowing such eligible collateral to be held in the form of a deposit liability of the custodian bank would be incompatible with Commission regulation §23.157(c)’s prohibition against rehypothecation of collateral. *See* Final Margin Rule, 81 FR at 671. However, the Commission expressly stated that the custodian could use cash funds to purchase other forms of eligible collateral. *See id.*

regulatory flexibility analysis respecting the impact.<sup>16</sup> The Commission certified that the Proposal would not have a significant economic impact on a substantial number of small entities. The Commission requested comments with respect to the RFA and received no comments.

As discussed in the Proposal, the Final Rules only affect SDs and MSPs that are subject to the CFTC Margin Rule and their covered counterparties, all of which are required to be eligible contract participants (“ECPs”).<sup>17</sup> The Commission has previously determined that SDs, MSPs, and ECPs are not small entities for purposes of the RFA.<sup>18</sup> Therefore, the Commission believes that the Final Rules will not have a significant economic impact on a substantial number of small entities, as defined in the RFA.

Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the Final Rules will not have a significant economic impact on a substantial number of small entities.

## **B. Paperwork Reduction Act**

The Paperwork Reduction Act of 1995 (“PRA”)<sup>19</sup> imposes certain requirements on Federal agencies, including the Commission, in connection with their conducting or sponsoring any collection of information, as defined by the PRA. The Commission may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget control number. The Final Rules, as adopted, contain no requirements subject to the PRA.

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<sup>16</sup> 5 U.S.C. 601 *et seq.*

<sup>17</sup> Each counterparty to an uncleared swap must be an ECP, as the term is defined in section 1a(18) of the CEA, 7 U.S.C. 1a(18) and Commission regulation §1.3, 17 CFR 1.3. *See* 7 U.S.C. 2(e).

<sup>18</sup> *See* Registration of Swap Dealers and Major Swap Participants, 77 FR 2613, 2620 (Jan. 19, 2012) (SDs and MSPs) and Opting Out of Segregation, 66 FR 20740, 20743 (April 25, 2001) (ECPs).

<sup>19</sup> 44 U.S.C. 3501 *et seq.*

### **C. Cost-benefit considerations**

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of the following five broad areas of market and public concern: (1) protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the section 15(a) considerations.

In addition, the Commission notes that the consideration of costs and benefits below is based on the understanding that the markets function internationally, with many transactions involving U.S. firms taking place across international boundaries; with some Commission registrants being organized outside of the United States; with leading industry members typically conducting operations both within and outside the United States; and with industry members commonly following substantially similar business practices wherever located. Where the Commission does not specifically refer to matters of location, the below discussion of costs and benefits refers to the effects of the Final Rules on all activities subject to the Proposal, whether by virtue of the activity's physical location in the United States or by virtue of the activities' connection with or effect on U.S. commerce under CEA section 2(i).<sup>20</sup>

#### *1. Baseline and Rule Summary*

The baseline for the Commission's consideration of the costs and benefits of these Final Rules is the CFTC Margin Rule. The Commission recognizes that to the

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<sup>20</sup> See 7 U.S.C. 2(i).

extent market participants have relied on CFTC Letter No. 17-34, the actual costs and benefits of the amendment to Commission regulation §23.151, as realized in the market, may not be as significant. The amendment, as adopted, revises the definition of financial end user in Commission regulation §23.151 to exclude the ESM from the definition. The amendment codifies CFTC Letter No. 17-34 and confirms that uncleared swaps with the ESM as a counterparty are not subject to the CFTC Margin Rule. As a result, CSEs facing the ESM will not be required to exchange margin with the ESM, resulting in the collection of lesser amounts of margin to mitigate the risk of uncleared swaps, which could increase the possibility of a systemic event. Nevertheless, after analyzing the swap data repository (“SDR”) data, the Commission believes that by classifying the ESM as a non-financial end-user and excluding it from the margin requirements, it is unlikely that the Final Rule will result in substantial systemic risk.<sup>21</sup>

The Commission notes that the ESM has a lower risk profile, maintaining high capital levels with ultimate financial backing from the EU, and thus poses less counterparty risk to CSEs and less systemic risk to the financial system. In addition, in the Commission’s view, relief from the margin requirements will enable the ESM to fulfill its mission of providing support to member states of the EU in financial distress, in particular, in times of tight liquidity, contributing to the stability of the EU financial system and the reduction of risk.

The Commission is also adopting an amendment to Commission regulation §23.157(c)(1) to remove the erroneous cross-reference to “§ 23.156(a)(1)(iv) through (xii)” and to replace it with the corrected cross-reference “§ 23.156(a)(1)(ii) through (x).” The Commission believes that custodial banks will benefit from being able to convert

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<sup>21</sup> Recent review of data from the SDRs indicates that the ESM engages in limited swap trading activity.

cash posted as initial margin into treasury and U.S. Government agency securities as was originally intended by the Commission.

The Commission sought comment on all aspects of the cost and benefit considerations in the Proposal but received no substantive comments.

2. *Section 15(a) Considerations*

a. *Protection of Market Participants and Public*

The amendment to Commission regulation §23.151, as adopted, codifies CFTC Letter No. 17-34 and confirms that uncleared swaps with the ESM as a counterparty are not subject to the CFTC Margin Rule. As discussed in the Proposal, given the limited activity of the ESM in the swaps markets, the Commission believes that the unmargined exposure resulting from uncleared swaps between CSEs and the ESM is unlikely to result in significant risk to the financial system. Inasmuch as margin is posted to protect counterparties against credit risk, the creditworthiness of the ESM is critical to this analysis. The ESM has maintained high capital levels and has ultimate backing from the EU.<sup>22</sup> Consequently, the Commission is of the view that the ESM does not pose substantial counterparty credit risk. Thus, the Commission believes that there will be no material impact on market participants and the general public relative to the status quo baseline.

b. *Efficiency, Competitiveness, and Financial Integrity of Markets*

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<sup>22</sup> CFTC Letter No. 17-34 states that “[w]ith respect to its credit risk, as part of its emergency procedure, the ESM’s member states have irrevocably agreed to contribute a total of approximately €624 billion in additional capital should the ESM face financial distress. Further, the ESM is subject to limits on its lending and borrowing, and the ESM’s property, funding, and assets in its member states are immune from search, requisition, confiscation, expropriation, or any other form of seizure, taking, or foreclosure. In addition, to the extent necessary to carry out its activities, all property, funding, and assets of the ESM are free from restrictions, regulations, controls, and moratoria of any nature. The combined application of these rules and limits is effective in keeping the ESM’s total liabilities well below its available capital.”

The Commission believes that the efficiency, competitiveness, and financial integrity of markets will not be significantly impacted by amending Commission regulation §23.151 to exclude the ESM from the definition of financial end user and therefore removing the requirement to post and collect margin in uncleared swap transactions with the ESM.

One of the main functions of the ESM is to provide emergency assistance to members states of the EU in financial distress.<sup>23</sup> The Commission believes that relief from the margin requirements will allow the ESM to meet its mission, in particular, in times of tight liquidity, contributing to the stability of the EU financial system and the reduction of risk. Moreover, given the nature of its operations, the ESM is motivated to choose sensible, creditworthy counterparties and to limit its credit risk exposure.

*c. Price Discovery*

The amendment to Commission regulation §23.151 codifies CFTC Letter No. 17-34, relieving the ESM and its counterparties from the CFTC Margin Rule. The codification of the no-action relief as a rule formalizes a no-action position held by DSIO and promotes transparency concerning the applicability of the CFTC Margin Rule. Because there will not be a legal requirement that margin be posted in uncleared swap transactions with the ESM, such transactions will likely be for prices that deviate from similar uncleared swap transactions with financial end users but be in line with swaps with non-financial entities. As a result, uncleared swaps entered into with the ESM could increase, which could enhance, or at least not harm, the price discovery process.

*d. Sound Risk Management*

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<sup>23</sup> See CFTC Letter No. 17-34.

The ESM is an intergovernmental financial institution established by the EU and its financial activities are designed to advance EU objectives. The ESM's purpose is to manage the potential for systemic risk by providing support to member states that are in distress. The exposures posed by the ESM are therefore relatively unique. Accordingly, the amendment to Commission regulation §23.151 to exclude the ESM from the definition of financial end user and thereby remove it from the purview of the CFTC Margin Rule may result in CSEs being more inclined to enter into uncleared swaps with the ESM, benefiting from the overall diversification of their swap portfolios, which is consistent with sound risk management. Also, while relief from the margin requirements will result in the ESM collecting lesser amounts of margin to mitigate the risk of uncleared swaps, increasing the possibility of systemic risk, the Commission believes that the ESM's uncleared swaps activity, as reflected in the SDR data, is unlikely to result in substantial systemic risk.<sup>24</sup>

*e. Other Public Interest Considerations*

As discussed in the Proposal, the Commission believes that the amendment to Commission regulation §23.151 is also warranted based on the interests of comity and the Commission's continuing cross-border coordination with EU authorities, such as the 2016 EC-CFTC Agreement, which has fostered cooperation and mutual respect between the CFTC and EU authorities.

**D. Antitrust Considerations**

Section 15(b) of the CEA requires the Commission to take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the purposes of the CEA, in issuing any order or

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<sup>24</sup> See *supra*, n. 21.

adopting any Commission rule or regulation (including any exemption under section 4(c) or 4c(b) of the CEA), or in requiring or approving any bylaw, rule, or regulation of a contract market or registered futures association established pursuant to section 17 of the CEA.<sup>25</sup>

The Commission believes that the public interest to be protected by the antitrust laws is generally fair competition. The Commission requested comments on whether the Proposal implicated any other specific public interest to be protected by the antitrust laws and received no comments.

The Commission has considered the Final Rules to determine whether they are anticompetitive and has identified no anticompetitive effects. The Commission requested comments on whether the Proposal was anticompetitive and, if it is, what the anticompetitive effects are, and received no comments.

Because the Commission has determined that the Final Rules are not anticompetitive and have no anticompetitive effects, the Commission has not identified any less anticompetitive means of achieving the purposes of the CEA.

### **List of Subjects in 17 CFR Part 23**

Capital and margin requirements, Major swap participants, Swap dealers, Swaps.

For the reasons stated in the preamble, the Commodity Futures Trading Commission amends 17 CFR part 23 as set forth below:

### **PART 23—SWAP DEALERS AND MAJOR SWAP PARTICIPANTS**

1. The authority citation for part 23 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 6, 6a, 6b, 6b-1, 6c, 6p, 6r, 6s, 6t, 9, 9a, 12, 12a, 13b, 13c, 16a, 18, 19, 21.

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<sup>25</sup> 7 U.S.C. 19(b).

Section 23.160 also issued under 7 U.S.C. 2(i); Sec. 721(b), Pub. L. 111-203, 124 Stat. 1641 (2010).

2. In § 23.151, revise paragraph (2)(iii) of the definition of *Financial end user* to read as follows:

**§ 23.151 Definitions applicable to margin requirements.**

\* \* \* \* \*

*Financial end user* \* \* \*

(2) \* \* \*

(iii) The Bank for International Settlements and the European Stability Mechanism;

\* \* \* \* \*

3. In § 23.157, revise paragraph (c)(1) to read as follows:

**§ 23.157 Custodial arrangements.**

\* \* \* \* \*

(c) \* \* \*

(1) Prohibits the custodian from rehypothecating, repledging, reusing, or otherwise transferring (through securities lending, securities borrowing, repurchase agreement, reverse repurchase agreement or other means) the collateral held by the custodian except that cash collateral may be held in a general deposit account with the custodian if the funds in the account are used to purchase an asset described in § 23.156(a)(1)(ii) through (x), such asset is held in compliance with this section, and such purchase takes place within a time period reasonably necessary to consummate such purchase after the cash collateral is posted as initial margin; and

\* \* \* \* \*

Issued in Washington, DC on April 17, 2020, by the Commission.

Robert Sidman,

*Deputy Secretary of the Commission.*

**Note:** The following appendices will not appear in the Code of Federal Regulations.

**Appendices to Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants—Commission Voting Summary, Chairman’s Statement, and Commissioners’ Statements**

**Appendix 1—Commission Voting Summary**

On this matter, Chairman Tarbert and Commissioners Quintenz, Behnam, Stump, and Berkovitz voted in the affirmative. No Commissioner voted in the negative.

**Appendix 2—Supporting Statement of Chairman Heath P. Tarbert**

I am pleased to support today’s final rule codifying relief from the Margin Rule for the European Stability Mechanism (“ESM”).<sup>1</sup> The Margin Rule requires the posting of initial and variation margin for uncleared swaps entered into by certain swap dealers, major swap participants, and “financial end user[s].”<sup>2</sup> Today’s final rule will amend the definition of “financial end user” in Regulation 23.151 to exclude the ESM from the requirements of the Margin Rule.

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<sup>1</sup> The Margin Rule is codified at Commission Regulations 23.150 through 23.161, 17 C.F.R. § 23.150-23.161 (2019).

<sup>2</sup> Regulation 23.151 applies to swap dealers, major swap participants, and financial end users that are not subject to regulation by a “Prudential Regulator,” which term our laws use as shorthand to mean what is essentially a banking regulator.

As I explained when this amendment was proposed last October,<sup>3</sup> the ESM provides financing and bond purchases to support Eurozone member states, serving similar functions as a multilateral development bank. Given that multilateral development banks and related entities<sup>4</sup> are excluded from the Margin Rule, it makes good sense to codify the same relief for the ESM.<sup>5</sup> This is especially true given the ESM's role in the market. As its name suggests, the ESM is an agent of stability and does not raise concerns about risk in the derivatives markets. Codifying the ESM's relief from the Margin Rule is particularly important as Europe responds to the financial fallout of the global coronavirus pandemic.

Erasmus observed long ago that “humility is wisdom.” Keeping that perspective is especially important when it comes to financial regulatory areas where nations have implemented a common set of core principles internationally. Those internationally-shared frameworks serve as a baseline, and national regulators have necessarily tailored their specific rules to the unique attributes of their own domestic markets. But we should be humble, and indeed wise enough, to resist the temptation to insist that a foreign counterpart adopt domestic regulations on a rule-by-rule basis. Cross-border derivatives regulation that utilizes comity and deference can enable the effective implementation of the post-crisis G20 derivatives regulatory reforms.

As I have stated before, were financial regulators to insist that their counterparts overseas import each other's specific rules wholesale, it would lead to an absurd result ad

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<sup>3</sup> See Statement of Chairman Heath P. Tarbert Before the Open Commission Meeting on October 16, 2019 (Oct. 16, 2019), available at <https://www.cftc.gov/PressRoom/SpeechesTestimony/heathstatement101619>.

<sup>4</sup> The Margin Rule excludes from the definition of “financial end user” sovereign entities, multilateral development banks, and the Bank for International Settlements, among other entities. See Regulation 23.151.

<sup>5</sup> The ESM has had no-action relief from the Margin Rule since July 24, 2017. See CFTC Letter 17-34 (July 24, 2017); see also CFTC Letter 19-22 (Oct. 16, 2019).

infinitem.<sup>6</sup> Just as the G20, Financial Stability Board, and various standard-setting bodies were established to prevent a global race to the bottom, their work is also meant to prevent nations from forcing the complete strictures of their domestic regimes onto others. For example, the Principles for Financial Markets Infrastructure (“PFMI”) represent international standards for, among other things, central counterparties and trade repositories. All of the G20 nations have adopted the PFMI, providing an opportunity for meaningful dialogue with both the European Commission and the European Securities and Markets Authority regarding the status of American and European central counterparties.

Those discussions are ongoing and have been productive. In particular, we are working toward a potential cooperative framework for the supervision of central counterparties engaged in international markets. With an eye to this progress, I believe today’s final amendments to the Margin Rule are appropriate. I am encouraged by the tone of the dialogue and the commitment of our EU counterparts to reach a mutually beneficial arrangement that will stand the test of time. I believe such an arrangement for the supervision of third country central counterparties would entail a great degree of regulatory deference and international comity alongside extensive information sharing and regular communications between supervisory authorities. I look forward to continuing to engage with our European colleagues to advance our shared interests in a

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<sup>6</sup> See Statement of Chairman Heath P. Tarbert in Support of the Cross-Border Swaps Proposal (Dec. 18, 2019), available at <https://www.cftc.gov/PressRoom/SpeechesTestimony/tarbertstatement121819> (“If we impose our regulations on non-U.S. persons whenever they have a remote nexus to the United States, then we should be willing for all other jurisdictions to do the same. The end result would be absurdity, with everyone trying to regulate everyone else. And the duplicative and overlapping regulations would inevitably lead to fragmentation in the global swaps market—itsself a potential source of systemic risk.”).

robust and resilient transatlantic derivatives market. In that context, I am pleased to support today's final rule to exclude the ESM from the Margin Rule.<sup>7</sup>

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<sup>7</sup> Today the Commission is also voting on a proposal to codify the ESM's relief from the Clearing Requirement under Part 50 of the CFTC's rules.

### **Appendix 3—Supporting Statement of Commissioner Brian Quintenz**

In March 2018, I articulated my approach to our current regulatory relationship with our European counterparts in light of their refusal to stand by or re-affirm their 2016 commitments in the CFTC’s and European Commission’s common approach to the regulation of cross-border central counterparties (CCPs) (CFTC-EC CCP Agreement).<sup>1</sup> Specifically, I believe that the absence of the agreement’s re-affirmation in the European Market Infrastructure Regulation 2.2 (EMIR 2.2) directly implied the agreement’s abrogation.<sup>2</sup> I therefore vowed that I would either object to or vote against any relief provided to, or requested by, European Union authorities until the agreement’s clarity was restored. Since that time, I have consistently voted against, or objected to, any regulation or relief that provides special accommodations to European entities, including the proposed exemption from margin requirements for the European Stability Mechanism (ESM) that the Commission seeks to finalize today.<sup>3</sup>

However, the unprecedented devastating economic and social impacts of COVID-19 across the globe warrant a reprieve from that position. In the United States, financial regulators have acted swiftly, decisively, and boldly to mitigate economic disruptions and

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<sup>1</sup> Keynote Address of Commissioner Brian Quintenz before FIA Annual Meeting, Boca Raton, Florida (March 14, 2018), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opaquintenz9>; and Joint Statement from CFTC Chairman Timothy Massad and European Commissioner Jonathan Hill, CFTC and the European Commission: Common approach for transatlantic CCPs (Feb. 10, 2016), <https://www.cftc.gov/PressRoom/PressReleases/pr7342-16>.

<sup>2</sup> The proposed implementation of EMIR 2.2 by ESMA is available at, <https://www.esma.europa.eu/press-news/esma-news/esma-consults-tiering-comparable-compliance-and-fees-under-emir-22>.

<sup>3</sup> Dissenting Statement by Commissioner Brian Quintenz before the Open Commission Meeting: FBOT Registration (Nov. 5, 2019), <https://www.cftc.gov/PressRoom/SpeechesTestimony/quintenzstatement110519>; Dissenting Statement by Commissioner Quintenz to the Proposed Exclusion for the European Stability Mechanism from the Commission’s Margin Requirements for Uncleared Swaps (Oct. 16, 2019), <https://www.cftc.gov/PressRoom/SpeechesTestimony/quintenzstatement101619>; Statement of Commissioner Brian Quintenz on Staff No-Action Relief for Eurex Clearing AG (December 20, 2018), <https://www.cftc.gov/PressRoom/SpeechesTestimony/quintenzstatement122018>.

support market liquidity, including providing regulatory relief where necessary. I am very proud of the CFTC's decisive response to the COVID-19 pandemic, which promoted the full functioning of derivatives markets despite the extraordinary challenges facing exchanges, clearinghouses, and market intermediaries as a result of social distancing.<sup>4</sup> I know the Commission, under the strong leadership of Chairman Heath P. Tarbert, is committed to providing any additional relief necessary to ensure that U.S. markets remain accessible.

Our European counterparts are engaged in the same epic struggle as we are to lessen the extraordinary economic and social harms of this pandemic. Although I remain committed to ensuring the terms of the CFTC-EC CCP Agreement are ultimately upheld, I also recognize that issue is one facet of a much broader, deeper bond we share with the European Union—a relationship that has been grounded in goodwill, trust, and partnership. Many of the European institutions affected by the rules and no-action relief before the Commission today are likely to be central to the European Union's COVID-19 economic recovery efforts. As a result, I believe it is appropriate to support the items before the Commission today, which, by providing relief from CFTC clearing and margin requirements, may bolster the ability of EU institutions to provide critical financial assistance to their economies, businesses, and citizens.

For example, the European Commission, ESM, and European Investment Bank (EIB) are working in concert to take unprecedented actions at the European level to

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<sup>4</sup> Statement of CFTC Commissioner Brian Quintenz on Current Market Dynamics and Commission Actions Related to COVID-19 (March 18, 2020), <https://www.cftc.gov/PressRoom/SpeechesTestimony/quintenzstatement031820>.

complement national measures to mitigate the impacts of COVID-19.<sup>5</sup> The ESM has many economic tools at its disposal, including making loans to Eurozone member states, purchasing the bonds of Eurozone members, providing precautionary credit lines that can be drawn upon if needed, and directly recapitalizing financial institutions.<sup>6</sup>

Similarly, the EIB, the lending arm of the European Union, and the European Investment Fund (EIF), which specializes in finance for small and medium sized businesses, are also working together to respond to COVID-19. Together, the EIB and the EIF have proposed a plan to provide immediate financing to combat the health and economic effects of the pandemic.<sup>7</sup> Each of these EU institutions may seek to enter into swaps subject to the CFTC's clearing or uncleared margin requirements in order to hedge the risks associated with these lending and investment activities. Accordingly, I support today's measures that provide relief from those requirements, thereby freeing up additional capital that can be immediately deployed in the European economy.

When the present hardship caused by COVID-19 abates, I look forward to re-engaging with our European counterparts on the critical issue of the oversight of U.S. CCPs. I believe the possibility still exists for a successful implementation of EMIR 2.2 that fully respects the CFTC's ultimate authority over U.S. CCPs, and I am committed to doing everything in my power to achieve this outcome.

### ***Amendments to Swap Clearing Requirement Exemptions Under Part 50***

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<sup>5</sup> *The time for solidarity in Europe is now – a concerted European financial response to the corona-crisis*, <https://www.esm.europa.eu/blog/time-solidarity-europe-concerted-european-financial-response-corona-crisis> (April 2, 2020).

<sup>6</sup> European Stability Mechanism, Lending Toolkit, <https://www.esm.europa.eu/assistance/lending-toolkit>.

<sup>7</sup> Coronavirus outbreak: EIB Group's response to the pandemic, <https://www.eib.org/en/about/initiatives/covid-19-response/index.htm> (April 9, 2020).

I am pleased to support this proposal, which codifies existing relief, from the Commission’s requirement that certain commonly traded interest rate swaps and credit default swaps be cleared following their execution.<sup>8</sup> The new exemptions could be elected by several classes of counterparties that may enter into these swaps, namely: *sovereign nations; central banks; “international financial institutions”* of which sovereign nations are members; *bank holding companies*, and *savings and loan holding companies*, whose assets total no more than \$10 billion; and *community development financial institutions* recognized by the U.S. Treasury Department. Today’s proposal notes that many of these entities have actually relied on existing relief, electing not to clear swaps that are generally subject to the clearing requirement.

I strongly support the policy of international “comity” described in the proposal, recognizing that sovereign nations and their instrumentalities should generally not be subject to the Commission’s regulations. I trust that by proposing this relief, the United States, the Federal Reserve, and other U.S. government instrumentalities will receive the same treatment in foreign jurisdictions. As noted above, this policy is timely in light of the current projects the ESM, the EIB, and the EIF are currently undertaking in response to the pandemic. I am pleased that the Commission can provide flexibility to these entities at this time when entering into swaps with U.S. swap dealers. To this end, I also support the decision of the Division of Clearing and Risk to extend the current, time-limited no-action relief provided to the ESM<sup>9</sup> pending the finalization of the amendments

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<sup>8</sup> The swap clearing requirement is codified in part 50 of the Commission’s regulations (17 CFR part 50).

<sup>9</sup> CFTC Letter 19-23 (Oct. 16, 2019).

to part 50. I note that the EIB, EIF, other international financial institutions, central banks, and sovereign entities currently have relief that is not time-limited.<sup>10</sup>

As for the bank holding companies, savings and loan holding companies, and community development financial institutions that would be provided relief pursuant to this proposal, I am hopeful that the Commission will ultimately finalize this relief, which it first proposed for these entities in 2018.<sup>11</sup> However, I note that these entities currently have relief pursuant to no-action letters issued in 2016 that have no expiration dates.<sup>12</sup>

***Final Rule Excluding the European Stability Mechanism from CFTC Margin Requirements for Uncleared Swaps***

I support today's final rule that would exempt a swap between the European Stability Mechanism and a swap dealer from the Commission's margin requirements applicable to uncleared swaps. This rule is premised on the same policy of international comity referenced in today's proposed exemption from the swap clearing requirement. I would like to highlight that the EIB, EIF, and the other international financial institutions referenced by the proposed exemption from the swap clearing requirement, as well as sovereign entities and central banks, are already exempted from the Commission's margin requirements for uncleared swaps pursuant to Commission regulations.<sup>13</sup> Finally, I am pleased that the Division of Swap Dealer and Intermediary Oversight is today

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<sup>10</sup> End-User Exception to the Clearing Requirement for Swaps, 77 Fed. Reg. 42,560, 42,561-62 (Jul. 19, 2012).

<sup>11</sup> Amendments to Clearing Exemption for Swaps Entered Into by Certain Bank Holding Companies, Savings and Loan Holding Companies, and Community Development Financial Institutions, 83 Fed. Reg. 44,001 (Aug. 29, 2018).

<sup>12</sup> CFTC Letters 16-01 and -02 (both Jan. 8, 2016).

<sup>13</sup> CFTC regulation 23.151.

extending previously granted, time-limited no-action relief to the ESM,<sup>14</sup> pending the effective date of today's final rule.

#### **Appendix 4—Statement of Commissioner Dan M. Berkovitz**

I support today's final rule that excludes the European Stability Mechanism ("ESM") from the definition of financial end user in the Commission's margin rules. The final rule codifies no-action relief that has been in effect since 2017 that exempts the ESM from initial and variation margin requirements for uncleared swaps with swap dealer or major swap participant counterparties. The final rule recognizes the ESM's status as an intergovernmental institution that assists Euro-area members in financial distress and its similarity to multilateral development banks that are excluded from the definition of financial end user. The ESM does not engage in speculative swaps trading and its swaps activities are in furtherance of its financial assistance programs. The final rule provides certainty to both the ESM and its swap dealer counterparties in uncleared swaps, facilitates the ESM's work in mitigating systemic risk, and poses minimal risk to the U.S. financial system.

The final rule also recognizes the importance of international comity in regulating entities established by sovereign governments for governmental purposes. I encourage continued cooperation between the Commission and European authorities in maintaining mutual respect for our corresponding regulatory interests and expertise.

I thank the staff of the Division of Swap Dealer and Intermediary Oversight for their work on this final rule and their responsiveness to suggestions from my office.

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<sup>14</sup> CFTC Letter 19-22 (Oct. 16, 2019).

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