



## COMMODITY FUTURES TRADING COMMISSION

### 17 CFR Part 23

### RIN 3038-AF03

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

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Commodity Futures Trading Commission (“Commission” or “CFTC”) is seeking comment on a proposed amendment to the margin requirements for uncleared swaps for swap dealers (“SD”) and major swap participants (“MSP”) for which there is no prudential regulator (the “CFTC Margin Rule”). As adopted in January 2016, the CFTC Margin Rule, which mandates the collection and posting of variation margin and initial margin (“IM”), was to take effect under a phased compliance schedule extending from September 1, 2016, to September 1, 2020. On April 9, 2020, the Commission published in the *Federal Register* a final rule extending the September 1, 2020 compliance date by one year to September 1, 2021, for a portion of what was to be the final phase consisting of entities with smaller average daily aggregate notional amounts of swaps and certain other financial products (the “Smaller Portfolio Group”) to reduce the potential market disruption that could result from a large number of entities coming into the scope of compliance on September 1, 2020 (“April 2020 Final Rule”). Subsequently, on May 28, 2020, to mitigate the operational challenges faced by certain entities subject to the CFTC Margin Rule as a result of the coronavirus disease 2019

(“COVID-19”) pandemic, the Commission adopted an interim final rule (the “IFR”) extending the September 1, 2020 compliance date for certain entities by one year (“IFR Extension Group”) to September 1, 2021. This rulemaking proposal (“Proposal”) would further delay the compliance date for the Smaller Portfolio Group from September 1, 2021, to September 1, 2022, to avoid market disruption due to a large number of entities being required to comply by September 1, 2021, under the revised compliance schedule.

**DATES:** Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments, identified by RIN 3038-AF03, by any of the following methods:

- *CFTC Comments Portal:* <https://comments.cftc.gov>. Select the “Submit Comments” link for this rulemaking and follow the instructions on the Public Comment Form.

- *Mail:* Send to Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581.

- *Hand Delivery/Courier:* Follow the same instructions as for Mail, above.

Please submit your comments using only one of these methods. Submissions through the CFTC Comments Portal are encouraged.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to <https://comments.cftc.gov>. You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the

Freedom of Information Act (“FOIA”), a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission’s regulations.<sup>1</sup>

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from <https://comments.cftc.gov> that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the FOIA.

**FOR FURTHER INFORMATION CONTACT:** Joshua B. Sterling, Director, 202-418-6056, [jsterling@cftc.gov](mailto:jsterling@cftc.gov); Thomas J. Smith, Deputy Director, 202-418-5495, [tsmith@cftc.gov](mailto:tsmith@cftc.gov); Warren Gorlick, Associate Director, 202-418-5195, [wgorlick@cftc.gov](mailto:wgorlick@cftc.gov); or Carmen Moncada-Terry, Special Counsel, 202-418-5795, [cmoncada-terry@cftc.gov](mailto:cmoncada-terry@cftc.gov), Division of Swap Dealer and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

Section 4s(e) of the Commodity Exchange Act (“CEA”)<sup>2</sup> requires the Commission to adopt rules establishing minimum initial and variation margin

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<sup>1</sup> 17 CFR 145.9. Commission regulations referred to herein are found at 17 CFR chapter I.

<sup>2</sup> 7 U.S.C. 6s(e) (capital and margin requirements).

requirements for all swaps<sup>3</sup> that are (i) entered into by an SD or MSP for which there is no prudential regulator<sup>4</sup> (collectively, “covered swap entities” or “CSEs”) and (ii) not cleared by a registered derivatives clearing organization (“uncleared swaps”).<sup>5</sup> To offset the greater risk to the SD<sup>6</sup> or MSP<sup>7</sup> and the financial system arising from the use of uncleared swaps, these requirements must (i) help ensure the safety and soundness of the SD or MSP and (ii) be appropriate for the risk associated with the uncleared swaps held by the SD or MSP.<sup>8</sup>

The Basel Committee on Banking Supervision and the Board of the International Organization of Securities Commissions (“BCBS/IOSCO”) established an international framework for margin requirements for uncleared derivatives in September 2013 (the “BCBS/IOSCO Framework”).<sup>9</sup> After the establishment of the BCBS/IOSCO Framework, on January 6, 2016, the CFTC, consistent with section 4s(e), promulgated

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<sup>3</sup> CEA section 1a(47), 7 U.S.C. 1a(47) (swap definition); Commission regulation 1.3, 17 CFR 1.3 (further definition of a swap). A swap includes, among other things, an interest rate swap, commodity swap, credit default swap, and currency swap.

<sup>4</sup> CEA section 1a(39), 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). The definition of prudential regulator further specifies the entities for which these agencies act as prudential regulators. The prudential regulators published final margin requirements in November 2015. *See generally* Margin and Capital Requirements for Covered Swap Entities, 80 FR 74840 (Nov. 30, 2015) (“Prudential Margin Rule”). The Prudential Margin Rule is similar to the CFTC Margin Rule, including with respect to the CFTC’s phasing-in of margin requirements, as discussed below.

<sup>5</sup> CEA section 4s(e)(2)(B)(ii), 7 U.S.C. 6s(e)(2)(B)(ii). In Commission regulation 23.151, the Commission further defined the term uncleared swap to mean a swap that is not cleared by a registered derivatives clearing organization or by a derivatives clearing organization that the Commission has exempted from registration as provided under the CEA. 17 CFR 23.151.

<sup>6</sup> CEA section 1a(49), 7 U.S.C. 1a(49) (swap dealer definition); Commission regulation 1.3 (further definition of swap dealer).

<sup>7</sup> CEA section 1a(32), 7 U.S.C. 1a(32) (major swap participant definition); Commission regulation 1.3 (further definition of major swap participant).

<sup>8</sup> CEA section 4s(e)(3)(A), 7 U.S.C. 6s(e)(3)(A).

<sup>9</sup> *See generally* BCBS and IOSCO, Margin requirements for non-centrally cleared derivatives (Sept. 2013), <https://www.bis.org/publ/bcbs261.pdf>.

rules requiring CSEs to collect and post initial and variation margin for uncleared swaps,<sup>10</sup> adopting the implementation schedule set forth in the BCBS/IOSCO Framework, including the revised implementation schedule adopted on March 18, 2015.<sup>11</sup>

In July 2019, BCBS/IOSCO further revised the framework to extend the implementation schedule to September 1, 2021.<sup>12</sup> Consistent with this revision to the international framework, the Commission promulgated the April 2020 Final Rule, which amended the compliance schedule for the IM requirements under the CFTC Margin Rule by splitting the last phase of compliance into two compliance phases beginning on September 1, 2020, and September 1, 2021, respectively.<sup>13</sup>

The World Health Organization declared the COVID-19 outbreak a global pandemic on March 11, 2020.<sup>14</sup> On March 13, 2020, President Donald J. Trump declared a national emergency due to the COVID-19 pandemic.<sup>15</sup> The disease has impacted

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<sup>10</sup> See generally Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 81 FR 636 (Jan. 6, 2016). The CFTC Margin Rule, which became effective April 1, 2016, is codified in part 23 of the Commission's regulations. 17 CFR 23.150 through 23.159 and 23.161. In May 2016, the Commission amended the CFTC Margin Rule to add Commission regulation 23.160, 17 CFR 23.160, providing rules on its cross-border application. See generally 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>11</sup> See generally BCBS/IOSCO, Margin requirements for non-centrally cleared derivatives (March 2015), <https://www.bis.org/bcbs/publ/d317.pdf>.

<sup>12</sup> See generally BCBS/IOSCO, Margin requirements for non-centrally cleared derivatives (July 2019), <https://www.bis.org/bcbs/publ/d475.pdf> ("2019 BCBS/IOSCO Margin Framework").

<sup>13</sup> See generally Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 85 FR 19878 (April 9, 2020).

<sup>14</sup> WHO Director-General's opening remarks at the media briefing on COVID-19 (March 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

<sup>15</sup> Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (March 13, 2020), <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

individuals across the world and severely disrupted domestic and international business, and adversely impacted the global economy.

In response to significant concerns regarding the COVID-19 outbreak, BCBS/IOSCO decided to amend its margin policy framework to further extend the implementation schedule for the margin requirements for non-centrally cleared derivatives by one year.<sup>16</sup> BCBS/IOSCO, in a joint statement, stated that the extension would provide additional operational capacity for firms to respond to the immediate impact of COVID-19 and at the same time facilitate firms' diligent efforts to comply with the requirements by the revised deadlines.<sup>17</sup>

After taking into consideration the revised BCBS/IOSCO implementation schedule, in May 2020, the Commission amended the IM compliance schedule for the IFR Extension Group, which otherwise would have been required to comply with the IM requirements beginning on September 1, 2020, to extend the compliance date to September 1, 2021.<sup>18</sup> The Commission accomplished this change by means of an interim

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<sup>16</sup> See generally BCBS/IOSCO, Margin requirements for non-centrally cleared derivatives (April 2020), <https://www.bis.org/bcbs/publ/d499.htm> ("2020 BCBS/IOSCO Margin Framework") and Press Release, April 3, 2020, <https://www.bis.org/press/p200403a.htm> ("April 2020 BCBS/IOSCO Press Release").

<sup>17</sup> Basel Committee and IOSCO announce deferral of final implementation phases of the margin requirements for non-centrally cleared derivatives (April 3, 2020), <https://www.bis.org/press/p200403a.htm>.

<sup>18</sup> See CFTC Unanimously Approves an Interim Final Rule and a Proposed Rule at May 28 Open Meeting (May 28, 2020) (announcing unanimous approval by the Commission of an interim final rule extending the September 1, 2020 compliance date for the IM requirements to September 1, 2021). Recently, a Global Markets Advisory Committee ("GMAC") subcommittee encouraged the adoption of the BCBS/IOSCO recommendation to extend the implementation schedule given the circumstances brought about by the COVID-19 pandemic. See Recommendations to Improve Scoping and Implementation of Initial Margin Requirements for Non-Cleared Swaps, Report to the CFTC's Global Markets Advisory Committee by the Subcommittee on Margin Requirements for Non-Cleared Swaps, at 3 (April 2020), [https://www.cftc.gov/media/3886/GMAC\\_051920MarginSubcommitteeReport/download](https://www.cftc.gov/media/3886/GMAC_051920MarginSubcommitteeReport/download). The GMAC adopted the subcommittee's report and recommended to the Commission that it consider adopting the report's recommendations. The GMAC subcommittee was not tasked to respond to the COVID-19 pandemic. Rather, its establishment pre-dates the pandemic's impact, and its directive was to address the ongoing challenges involving the implementation of the CFTC margin requirements during the last stages

final rule in order to address the immediate impact of the COVID-19 pandemic on the IFR Extension Group in an expedited and timely manner; however, the Commission did not extend the compliance date for the Smaller Portfolio Group, which is still September 1, 2021, the same day as the revised IFR Extension Group compliance date.

## **II. Proposed Changes to the CFTC Margin Rule**

Covered swap entities are required to post and collect IM with counterparties that are SDs, MSPs, or financial end users with material swap exposure (“MSE”)<sup>19</sup> (“covered counterparties”) in accordance with a compliance schedule set forth in Commission regulation 23.161.<sup>20</sup> After the amendments described above, the compliance schedule comprises five compliance dates, from September 1, 2016 to September 1, 2021, staggered such that CSEs and covered counterparties, starting with the largest average daily aggregate notional amounts (“AANA”) of uncleared swaps and certain other financial products, and then successively lesser AANA, are required to come into compliance with the IM requirements in a series of five phases.

The fourth compliance date, September 1, 2019, brought within the scope of compliance CSEs and covered counterparties each exceeding \$750 billion in AANA. The

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of the compliance schedule. *See* CFTC Commissioner Stump Announces New GMAC Subcommittee on Margin Requirements for Non-Cleared Swaps (Oct. 28, 2019), <https://www.cftc.gov/PressRoom/PressReleases/8064-19>.

<sup>19</sup> Commission regulation 23.151 provides that MSE for an entity means that the entity and its margin affiliates have an average daily aggregate notional amount of uncleared swaps, uncleared security-based swaps, foreign exchange forwards, and foreign exchange swaps with all counterparties for June, July or August of the previous calendar year that exceeds \$8 billion, where such amount is calculated only for business days. A company is a “margin affiliate” of another company if: (i) either company consolidates the other on a financial statement prepared in accordance with U.S. Generally Accepted Accounting Principles, the International Financial Reporting Standards, or other similar standards; (ii) both companies are consolidated with a third company on a financial statement prepared in accordance with such principles or standards; or (iii) for a company that is not subject to such principles or standards, if consolidation as described in paragraph (1) or (2) of this definition would have occurred if such principles or standards had applied. 17 CFR 23.151.

<sup>20</sup> 17 CFR 23.161.

fifth and last compliance date (“phase 5”) was originally scheduled to occur on September 1, 2020 and as described in Section I above, was split into two phases with the compliance date for the Smaller Portfolio Group extended to September 1, 2021. Following the adoption of the IFR, the IFR Extension Group compliance date was also extended to September 1, 2021 and as a result, the IFR Extension Group and Smaller Portfolio Group are currently required to begin IM compliance on the same day.

The IFR Extension Group and the Smaller Portfolio Group, together, comprise CSEs and their covered counterparties that are not yet subject to the IM requirements, including financial end user counterparties with an MSE exceeding \$8 billion in AANA. The onset of the compliance phase starting on September 1, 2021, would result in a very large reduction in the AANA threshold for financial end user counterparties. Specifically, entities in the fourth phase were subject to a \$750 billion AANA threshold, and beginning on September 1, 2021, entities would come within the scope of IM compliance if their AANA exceeds \$8 billion.

According to the CFTC’s Office of the Chief Economist (“OCE”), compared with the first through fourth phase of compliance, which brought approximately 40 entities into scope, the two groups now subject to the September 1, 2021 compliance date would bring into scope approximately 700 entities, along with 7,000 swap trading relationships.<sup>21</sup> This means that approximately 700 entities may have to amend or enter into up to 7,000 new sets of credit support or other IM agreements in order to continue to engage in swap transactions.

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<sup>21</sup> Richard Haynes, Madison Lau, & Bruce Tuckman, *Initial Margin Phase 5*, at 4-7 (Oct. 24, 2018), [https://www.cftc.gov/sites/default/files/About/Economic%20Analysis/Initial%20Margin%20Phase%205%20v5\\_ada.pdf](https://www.cftc.gov/sites/default/files/About/Economic%20Analysis/Initial%20Margin%20Phase%205%20v5_ada.pdf) (“OCE Initial Margin Phase 5 Study”). The OCE Study defines “a ‘relationship’ as an entity and a swap dealer, where the entity is an aggregation of related affiliates.”

The Commission adopted the April 2020 Final Rule postponing the compliance date for the Smaller Portfolio Group in order to address concerns that the large number of counterparties preparing to meet the September 1, 2020 deadline would seek to engage the same limited number of entities that provide IM required services, involving, among other things, the preparation of IM-related documentation, the approval and implementation of risk-based models for IM calculation, and in some cases the establishment of custodial arrangements. In the preamble to the April 2020 Final Rule, the Commission stated that compliance delays could lead to disruption in the markets; for example, some counterparties could, for a time, be restricted from entering into uncleared swaps and therefore might be unable to use swaps to hedge their financial risk.

Because the IFR postponed the compliance date for the IFR Extension Group to the same date as the Smaller Portfolio Group in response to the COVID-19 pandemic, both groups face again effectively the same issues that the April 2020 Final Rule intended to address, including the limited number of entities that provide IM required services. In recognition of this concern, the most recent BCBS/IOSCO margin framework revision recommended extending the September 1, 2021 deadline for smaller entities to September 1, 2022.<sup>22</sup> The Commission's proposed amendment, which is consistent with both the revised BCBS/IOSCO framework and the Commission's rationale for adopting the April 2020 Final Rule, would further delay the compliance date for the Smaller Portfolio Group entities to alleviate the potential market disruptions described above. The proposed amendment also would be consistent with similar actions by the prudential

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<sup>22</sup> See 2020 BCBS/IOSCO Margin Framework.

regulators and the Commission’s international counterparts.<sup>23</sup> By helping to achieve regulatory harmonization with respect to uncleared swaps margin, the Proposal may help to reduce regulatory arbitrage.

In proposing the change in the Smaller Portfolio Group compliance date in the April 2020 Final Rule, the Commission also considered the relatively small amount of swap activity of the financial end users that would be subject to the one year extension. The OCE estimated in 2018 the average AANA per entity subject to the original September 1, 2020 compliance date to be \$54 billion, compared to an average \$12.71 trillion AANA for each entity in the earlier phases 1, 2, and 3 and \$1 trillion in phase 4. OCE has also estimated that the total AANA for the Smaller Portfolio Group that would be subject to the one year extension is approximately four percent of the total AANA across all the phases.<sup>24</sup> Given the relatively small amount of swap activity of the financial end users in the Smaller Portfolio Group, the Commission believes the proposed compliance date extension would have a muted impact on the systemic risk mitigating effects of the IM requirements during the extension period.

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<sup>23</sup> The prudential regulators recently issued an interim final rule to, among other things, revise their margin compliance schedule consistent with the revised BCBS/IOSCO implementation schedule. *See* Agencies finalize amendments to swap margin rule (June 25, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20200625b.htm> (“Prudential Regulators’ June 2020 IFR”). In addition, the European Securities and Markets Authority (ESMA), the European Banking Authority (EBA) and the European Insurance and Occupational Pensions Authority (EIOPA), collectively known as the European Supervisory Authorities (ESAs), issued joint draft Regulatory Technical Standards (RTS) proposing, among other amendments, changes to the European Union margin rules to effectively implement the 2020 BCBS/IOSCO Margin Framework implementation schedule revisions. *See* Final Report, EMIR RTS on Various Amendments to the Bilateral Margin Requirements in View of the International Framework (May 4, 2020), [https://www.esma.europa.eu/sites/default/files/library/esas\\_2020\\_09\\_-\\_final\\_report\\_-\\_bilateral\\_margin\\_amendments.pdf](https://www.esma.europa.eu/sites/default/files/library/esas_2020_09_-_final_report_-_bilateral_margin_amendments.pdf). The ESAs submitted the draft RTS for endorsement by the European Commission.

<sup>24</sup> The methodology for calculating AANA is described in the OCE Initial Margin Phase 5 Study at 3.

The muted impact on systemic risk reflects the relatively small size of portfolios of entities in the Smaller Portfolio Group compared to the larger swap portfolios of entities that are already required to exchange IM pursuant to the CFTC Margin Rule. In the Commission's view, although the impact of Smaller Portfolio Group swap activity on systemic risk is likely to be muted during the one year delay, the time limited risk for the additional year should not be interpreted as dismissive of the longer term regulatory implications of this swap activity. The exchange of IM by entities with relatively small portfolios supports the health and stability of the overall financial system.

Accordingly, the Commission is committed to implementing the full CFTC Margin Rule as directed by Congress.

Hence, the Commission proposes to further amend Commission regulation 23.161(a), which sets forth the schedule for compliance with the CFTC Margin Rule, to delay the compliance date for the Smaller Portfolio Group by another year.

Request for comment: The Commission requests comment regarding the proposed amendments to Commission regulation 23.161. The Commission specifically requests comment on the following questions:

- The CFTC Margin Rule, including the original compliance schedule, was adopted in January 2016 and many, although not all, firms in the Smaller Portfolio Group will have expected for some time that they are likely to fall within that group. Given the amount of time some of these firms have known of the need to establish IM-related arrangements, is it necessary to provide another one year delay to September 1, 2022 for these firms? Might a decision to delay the compliance date by one year for the Smaller Portfolio Group result in unnecessary expense if firms have already undertaken

preparatory work, which might need to be redone the following year? Are there other approaches the Commission could take to bring about earlier compliance with the IM requirements? For example, should the Commission include in the rule text a stated expectation that Smaller Portfolio Group entities proceed expeditiously to establish and implement IM arrangements prior to September 1, 2022?

### **III. Related Matters**

#### **A. Paperwork Reduction Act**

The Paperwork Reduction Act of 1995 (“PRA”)<sup>25</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. This Proposal contains no requirements subject to the PRA.

#### **B. Regulatory Flexibility Act**

The Regulatory Flexibility Act (“RFA”) requires that agencies consider whether the regulations they propose will have a significant economic impact on a substantial number of small entities.<sup>26</sup> This Proposal only affects 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>27</sup> The Commission has previously determined

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<sup>25</sup> 44 U.S.C. 3501 *et seq.*

<sup>26</sup> 5 U.S.C. 601 *et seq.*

<sup>27</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).

that SDs, MSPs, and ECPs are not small entities for purposes of the RFA.<sup>28</sup> Therefore, the Commission believes that this Proposal 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 this Proposal will not have a significant economic impact on a substantial number of small entities. The Commission invites comment on the impact of this Proposal on small entities.

### **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. Further, the Commission reflected upon the extraterritorial reach of this Proposal and notes where this reach may be especially relevant.

This Proposal would delay the compliance schedule for the CFTC Margin Rule for CSEs and covered counterparties in the Smaller Portfolio Group, including financial

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<sup>28</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).

end user counterparties exceeding the MSE threshold of \$8 billion in AANA. These entities would come into scope in a final sixth phase, beginning September 1, 2022.

As discussed above, the Commission believes that with the adoption of the IFR and the resulting reapplication of the same compliance deadline for both the Smaller Portfolio Group and the IFR Extension Group, the resulting large number of counterparties that would be required to comply with the IM requirements for the first time on September 1, 2021, could cause certain market disruptions. Some CSEs and covered counterparties may be strained given the demand for resources and services to meet the September 2021 deadline and operationalize the exchange of IM, involving, among other things, counterparty onboarding, approval and implementation of risk-based models for the calculation of IM, and documentation associated with the exchange of IM.

The baseline against which the benefits and costs associated with this Proposal are compared is the uncleared swaps markets as they exist today, including the impact of the current compliance schedule and the implementation of the September 1, 2021 deadline. With this as the baseline for this Proposal, the following are the benefits and costs of this Proposal.

*1. Benefits*

As described above, this Proposal will extend the compliance schedule for the IM requirements for the Smaller Portfolio Group to September 1, 2022. The extension may benefit some entities in the Smaller Portfolio Group by allowing them to trade uncleared swaps more easily and cheaply over this period. It also may benefit entities in the IFR Extension Group by making it easier for them to obtain the resources needed to comply with IM requirements. The Proposal is specifically intended to alleviate the potential

market disruption resulting from the large number of counterparties that would come into scope under the current compliance schedule and the strain on the uncleared swaps markets resulting from the increased demand for limited resources and services to set up operations to comply with the IM requirements, including counterparty onboarding, adoption and implementation of risk-based models to calculate IM, and documentation associated with the exchange of IM. In contrast with the CFTC's existing requirements mandating that the entities in the Smaller Portfolio Group comply with initial margin requirements at the same time as entities in the IFR Extension Group, the Proposal reduces the potential for bottlenecks by creating a one year separation in the applicable compliance dates for the two categories of entities.

The Proposal would provide a 12-month delay for smaller counterparties that comprise the Smaller Portfolio Group to September 1, 2022, whose swap trading may not pose the same level of risk, to prepare for their compliance with the IM requirements. The Proposal therefore would promote the smooth and orderly transition into IM compliance for both the IFR Extension Group and the Smaller Portfolio Group.

The Proposal would amend the CFTC Margin Rule consistent with the revised BCBS/IOSCO 2020 Margin Framework, and the Prudential Regulators' June 2020 IFR amending the IM compliance schedule. The Proposal therefore promotes harmonization with international and domestic margin regulatory requirements thereby reducing the potential for regulatory arbitrage.

## *2. Costs*

The Proposal would extend the time frame for compliance with the IM requirements for the smallest, in terms of notional amount, CSEs and covered

counterparties, including SDs and MSPs and financial end users that exceed an MSE of \$8 billion, by an additional 12 months. Swaps entered into during this period with the smallest CSEs have the potential to be treated as legacy swaps and thus would not be subject to the IM requirements. In the event that IM would have been collected on any of these swaps,<sup>29</sup> by delaying the compliance date one year, these positions would increase the level of counterparty credit risk to the financial system. While potentially meaningful, this risk is a relatively lesser concern because these legacy swap portfolios would be entered into with counterparties that engage in lower levels of notional trading.

### *3. Section 15(a) Considerations*

In light of the foregoing, the CFTC has evaluated the costs and benefits of this Proposal pursuant to the five considerations identified in section 15(a) of the CEA as follows:

#### *(a) Protection of Market Participants and the Public*

This Proposal would protect market participants and the public against the potential disruption that may be caused by the large number of counterparties that would come into scope of the IM requirements at the end of the current compliance schedule.

Under the proposed compliance schedule, fewer counterparties would come into scope by September 1, 2021 and many small counterparties would be able to defer compliance until the last compliance date on September 1, 2022. As such, the demand for resources and services to achieve operational readiness would be reduced, mitigating the potential strain on the uncleared swaps markets.

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<sup>29</sup> While all entities that are covered by the Commission's margin requirements are required to exchange variation margin, the Commission notes that some entities may not be required to post and collect IM, as certain thresholds must be met before the posting and collection of IM are required.

Inasmuch as this Proposal delays the implementation of IM for the smallest CSEs, there may not be as much IM posted to protect the financial system as would otherwise be the case.

(b) Efficiency, Competitiveness, and Financial Integrity of Markets

The Proposal would be expected to make the uncleared swaps markets more efficient by facilitating counterparties' transition into compliance with the IM requirements, thus avoiding inefficiencies in the documentation and implementation process. Counterparties would have additional time to document their swap relationships and set up adequate processes to operationalize the exchange of IM. As such, the Proposal would promote more even competition among counterparties in the uncleared swaps markets, as it would remove the potential incentive of CSEs to prioritize arrangements with larger counterparties to the detriment of smaller counterparties and would help maintain the current state of market efficiency.

By preventing the market disruption that would result from the large number of counterparties that would come into scope at the end of the current compliance schedule, the Proposal promotes the financial integrity of the markets, reducing the probability of disruption resulting from the heightened demand for limited financial infrastructure resources. On the other hand, for a one year period, there would be less IM posted overall, making uncleared swaps markets more susceptible to financial contagion where the default of one counterparty could lead to subsequent defaults of other counterparties potentially harming market integrity.

(c) Price Discovery

This Proposal may enhance or negatively impact price discovery. Without the Proposal, counterparties, in particular smaller counterparties, may be discouraged from trading uncleared swaps because they may not be able to secure resources and services in a timely manner to operationalize the exchange of IM, or may forgo such trading absent relief from the requirement to post regulatory IM. The reduction in uncleared swaps trading may reduce liquidity and harm price discovery. Conversely, by further delaying implementation of the IM requirements for the Smaller Portfolio Group, during the delay period, the pricing of the swaps entered into by those counterparties may be adjusted to incorporate additional risks that would otherwise have been covered by IM. These additional adjustments, which may vary from swap dealer to swap dealer, could result in pricing differentiations between swaps entered into by some Smaller Portfolio Group entities and comparable swaps entered into by entities already subject to the margin requirements. As result, the ability of entities in the Smaller Portfolio Group to compare prices may be reduced, harming effective market price discovery by these entities.

(d) Sound Risk Management

As discussed above, by delaying the compliance date for the Smaller Portfolio Group, swaps entered into during this period would not be subject to the IM requirements, potentially increasing the level of counterparty credit risk to the financial system. At the same time, this Proposal would stave off the potential market disruption that could result from the large number of counterparties that would come into the scope of the IM requirements at the end of the current compliance schedule. The delayed compliance schedule would alleviate the potential disruption in establishing the financial

infrastructure for the exchange of IM between in-scope entities and would give counterparties time to prepare for IM compliance and to establish operational processes tailored to their uncleared swaps and associated risks.

(e) Other Public Interest Considerations

The Proposal promotes harmonization with international and domestic margin regulatory requirements, reducing the potential for regulatory arbitrage. The Proposal would amend the CFTC Margin Rule consistent with the revised BCBS/IOSCO margin framework, and the Prudential Regulators' June 2020 IFR amending the IM compliance schedule.

*4. Request for Comments on Cost-Benefit Considerations*

The Commission invites public comment on its cost-benefit considerations, including the section 15(a) factors described above. Commenters are also invited to submit any data or other information that they may have quantifying or qualifying the costs and benefits of the proposed amendments with their comment letters. In particular, the Commission seeks specific comment on the following:

(a) Has the Commission accurately identified all the benefits of this Proposal? Are there other benefits to the Commission, market participants, and/or the public that may result from the adoption of this Proposal that the Commission should consider? Please provide specific examples and explanations of any such benefits.

(b) Has the Commission accurately identified all the costs of this Proposal? Are there additional costs to the Commission, market participants, and/or the public that may result from the adoption of this Proposal that the Commission should consider? Please provide specific examples and explanations of any such costs. For example, is there a

potential for increased counterparty credit risk in trades or contagion involving firms that will get the benefit of the proposed margin deadline extension, i.e., with respect to trades for those entities during the period between September 2021 and September 2022? Is it possible to identify reliably the amount of any such increase in potential risk? Should the margin amounts that these firms are required to post by contract, rather than by CFTC regulations, be considered as a risk mitigant during that period?

(c) Does this Proposal impact the section 15(a) factors in any way that is not described above? Please provide specific examples and explanations of any such impact.

#### **D. Antitrust Laws**

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 Act, in issuing any order or adopting any Commission rule or regulation (including any exemption under section 4(c) or 4c(b)), 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 Act.<sup>30</sup>

The Commission believes that the public interest to be protected by the antitrust laws is generally to protect competition. The Commission requests comment on whether this Proposal implicates any other specific public interest to be protected by the antitrust laws.

The Commission has considered this Proposal to determine whether it is anticompetitive and has preliminarily identified no anticompetitive effects. The

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<sup>30</sup> 7 U.S.C. 19(b).

Commission requests comment on whether this Proposal is anticompetitive and, if it is, what the anticompetitive effects are.

Because the Commission has preliminarily determined that this Proposal is not anticompetitive and has no anticompetitive effects, the Commission has not identified any less anticompetitive means of achieving the purposes of the CEA. The Commission requests comment on whether there are less anticompetitive means of achieving the relevant purposes of the CEA that would otherwise be served by adopting this Proposal.

### **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 proposes to amend 17 CFR part 23 as follows:

### **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.

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 § 23.161, republish paragraph (a) introductory text and revise paragraph (a)(7) to read as follows:

#### **§ 23.161 Compliance dates.**

(a) Covered swap entities shall comply with the minimum margin requirements for uncleared swaps on or before the following dates for uncleared swaps entered into on or after the following dates:

\* \* \* \* \*

(7) September 1, 2022 for the requirements in § 23.152 for initial margin for any other covered swap entity for uncleared swaps entered into with any other counterparty.

\* \* \* \* \*

Issued in Washington, DC, on June 26, 2020, by the Commission.

Christopher Kirkpatrick,

*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 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 – Statement of Commissioner Rostin Behnam**

Today’s notice of proposed rulemaking (“NPRM”) is necessitated as a result of global policy and domestic regulatory considerations to address the impact of the COVID-19 pandemic on potential market disruption that could result from a large number of entities simultaneously coming into compliance with the initial margin (or “IM”) requirements of the CFTC Margin Rule.<sup>1</sup> In our attempts to remain consistent

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<sup>1</sup> See Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 85 FR 19878 (Apr. 9, 2020).

with revisions to the BCBS/IOSCO international framework's implementation schedule, we have now created an additional compliance phase, moving from five to six, and postponing full compliance by one year to September 1, 2021.<sup>2</sup> This seems reasonable, save for the fact that our last action to provide relief for those who would have to come into compliance in September of this year has resulted in a reuniting of phases five and six, reintroducing the same set of concerns regarding potential market disruptions we sought to avoid. Accordingly, we are here today with a new NPRM to further postpone the compliance date for the final phase, phase six, to September 1, 2022.

I will support the NPRM today because it is, at this time, being presented as the swiftest means to establish a realistic compliance deadline for which we will hold covered entities accountable. The circumstances of the COVID-19 pandemic are significant cause for concern, and I believe the Commission has responded with workable, targeted solutions aimed at ensuring our policies remain intact when the rigor of our regulations prove too burdensome to balance with competing overarching financial stability concerns.

However, as I have maintained throughout this process, delaying IM requirements as a means to provide temporary, targeted relief to address increased market volatility seems counterintuitive.<sup>3</sup> Moreover, as we continue to prolong compliance, we inevitably invite further requests for deferral of an indefinite nature. As the ten year anniversary of

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<sup>2</sup> 85 FR 19878; Interim Final Rule: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, \_\_ FR \_\_\_\_ (\_\_\_\_, 2020), voting draft available at <https://www.cftc.gov/PressRoom/PressReleases/8168-20>.

<sup>3</sup> Rostin Behnam, Commissioner, Statement of Commissioner Rostin Behnam Regarding Interim Final Rule with Request for Comment on Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants (May 28, 2020), <https://www.cftc.gov/PressRoom/SpeechesTestimony/behnamstatement052820>.

the Dodd-Frank Act<sup>4</sup> approaches, we cannot presume that the risks this core-reform seeks to address have morphed into anything of lesser concern, and I will not support any further relief absent truly compelling facts and lockstep agreement with the prudential regulators responsible for establishing margin requirements for swap dealers and major swap participants within their respective jurisdictions.

### **Appendix 3 – Concurring Statement of Commissioner Dan M. Berkovitz**

I concur with issuing for public comment the proposal to extend the swap initial margin compliance date to September 1, 2022 for certain financial entities that have smaller swap portfolios (“Proposal”).

This is the second extension for these entities. The original compliance date was September 1, 2020. The reasons for this proposed extension are essentially the same as the first extension. The first extension was meant to avoid congestion in negotiating and implementing thousands of initial margin arrangements for the approximately 700 entities that would otherwise have needed to enter into initial margin arrangements by September 1, 2020. The extension split the compliance timeline for the smaller swap portfolio entities from the timeline for the entities with larger portfolios. The larger portfolio entities were still expected to comply by September 1, 2020, but the compliance date for the smaller entities was extended to September 1, 2021. However, more recently, in light of the disruptions caused by the Covid-19 pandemic, the compliance date for the larger swap portfolio entities was extended to September 1, 2021, thus again establishing the same compliance date for both the larger and smaller swap portfolio groups.

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<sup>4</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

Although the Proposal is based on essentially the same rationale as the first extension for the smaller entities, I am not presupposing that the full extension is necessary. The smaller swap portfolio entities and their swap dealers will have had nearly six years to prepare for the deadline as of September 1, 2021. These entities, as well as the larger portfolio entities for which September 1, 2021 is the deadline, will have had plenty of time to spread the negotiation and implementation process out over those many years. It is my understanding that many of the larger swap portfolio entities were already well on the way to completing the necessary documentation when the Covid-19 pandemic struck. The Proposal includes several questions as to whether the further extension in the Proposal could increase costs by possibly stopping and restarting negotiations again. In determining whether an extension will be finalized in regulation, the Commission will benefit from input from the public through the notice and comment process provided for in the Administrative Procedure Act.

For these reasons, I concur in the issuance of the Proposal and look forward to comments from the public.

[FR Doc. 2020-14254 Filed: 7/9/2020 8:45 am; Publication Date: 7/10/2020]