



## COMMODITY FUTURES TRADING COMMISSION

### 17 CFR Part 190

### RIN 3038-AE67

### Bankruptcy Regulations

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Supplemental notice of proposed rulemaking.

**SUMMARY:** In April of 2020, the Commodity Futures Trading Commission (the “Commission”) proposed amendments to its regulations governing bankruptcy proceedings of commodity brokers. In light of comments on the proposed amendments, the Commission is proposing a revision of the proposed amendments with respect to a particular issue, specifically, efforts to foster a resolution proceeding under Title II of the Dodd-Frank Act.

**DATES:** Comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** You may submit comments, identified by “Part 190 Bankruptcy Regulations” and RIN number 3038-AE67, 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. To avoid possible delays with mail or in-person deliveries, 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:** Robert B. Wasserman, Chief Counsel and Senior Advisor, 202-418-5092, [rwasserman@cftc.gov](mailto:rwasserman@cftc.gov), Commodity Futures

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<sup>1</sup> 17 CFR 145.9. Commission regulations referred to in this release are found at 17 CFR chapter I (2019), and are accessible on the Commission's website at <https://www.cftc.gov/LawRegulation/CommodityExchangeAct/index.htm>.

Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581.

## **I. Introduction**

In April 2020, the Commission approved a proposal to update comprehensively its commodity broker bankruptcy rules, 17 CFR Part 190 (the “Proposal”).<sup>2</sup> Subpart C of those proposed rules is intended to establish a bespoke set of rules for the bankruptcy of a derivatives clearing organization (“DCO”). Within Subpart C, § 190.14 addresses operation of the estate of the debtor clearing organization subsequent to the order for relief. Proposed § 190.14(b)(1) states that except as otherwise explicitly provided in paragraph (b), the DCO shall cease making calls for variation or initial margin.

That alternative provision is found in proposed § 190.14(b)(2) and (3), and was intended to provide a brief opportunity, after the order for relief, to enable paths alternative to liquidation – that is, resolution under Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act<sup>3</sup> (“Title II Resolution”), or transfer of clearing operations to another DCO – in cases where a short delay (*i.e.*, less than or equal to six days) might facilitate such an alternative path.<sup>4</sup> The aim of proposed § 190.14(b)(2) and (3) was to avoid a DCO’s bankruptcy filing having an irrevocable consequence of termination of clearing operations, an event that would likely be disruptive of markets and possibly the broader United States financial system, in a case where an alternative path was close to fruition. Proposed § 190.14(b)(2) and (3) applied to all DCOs, and was intended to foster either Resolution or transfer of clearing operations.

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<sup>2</sup> 85 FR 36000 (June 12, 2020).

<sup>3</sup> 12 U.S.C. 5381 *et. seq.*

<sup>4</sup> Proposed § 190.14(b)(2) would enable the trustee to request permission of the Commission to continue operations of the DCO while proposed paragraph (b)(3) would set forth the procedure for the Commission to respond to the request.

A number of commenters<sup>5</sup> indicated strong concern that the approach in proposed § 190.14(b) might interfere with DCO rules concerning close-out netting, noting that these rules, and the enforceability of such rules, are necessary for the DCO's rules to constitute a "Qualifying Master Netting Agreement" ("QMNA") for purposes of bank capital requirements. These bank capital requirements are established by the regulators of the banks and bank holding companies that many clearing members are affiliated with or part of: The Federal Deposit Insurance Corporation ("FDIC"), the Board of Governors of the Federal Reserve System ("Federal Reserve"), and the Office of the Comptroller of the Currency ("OCC") (together, the "Prudential Regulators"); qualification of such DCO rules as a QMNA is, in turn, necessary in order for the banks and bank holding companies that clearing members are affiliated with or part of to net the exposures of their contracts cleared with the DCO in calculating bank capital requirements.<sup>6</sup>

*Qualified Master Netting Agreements.* The definition of QMNA<sup>7</sup> requires that any exercise of rights under the agreement will not be stayed or avoided under applicable law in the relevant jurisdictions, other than receivership, conservatorship, or resolution under the Federal Deposit Insurance Act,<sup>8</sup> Title II Resolution or under any similar insolvency law applicable to government-sponsored enterprises, or laws of foreign jurisdictions that are substantially similar to the foregoing. A Chapter 7 bankruptcy (including such a bankruptcy subject to part 190) does not fit within the foregoing list, and thus to the extent that proposed § 190.14(b)(2) and (3) acts as a stay, it

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<sup>5</sup> See, e.g., FIA at 3-6.

<sup>6</sup> For the FDIC, see 12 CFR 324.35(c)(2)(i) (measuring clearing member's trade exposure to a qualifying CCP based on either individual derivative contracts or netting sets of derivative contracts); 12 CFR 324.2 (defining netting set to mean, as relevant here, a group of transactions with a single counterparty that are subject to a qualifying master netting agreement). Analogous rules apply to banks regulated by the Federal Reserve (12 CFR 217.133(c)(2)(i) and 217.2) and the OCC (12 CFR 3.35(c)(2)(i) and 3.2).

<sup>7</sup> See 12 CFR 324.2 (FDIC), 217.2 (Federal Reserve), and 3.2 (OCC).

<sup>8</sup> 12 U.S.C. 1811.

would undermine the QMNA status of DCO rules. If clearing members that are part of banks are not able to net their contracts cleared with a DCO, there would be significantly increased bank capital requirements associated with such contracts. Such an increase in bank capital requirements would disrupt both proprietary and customer clearing.

Some commenters noted that proposed § 190.14(b)(2)(ii)(A) already required, for continued operation on a temporary basis, that such operation would need to be practicable, and that rules of the DCO that would compel the termination of outstanding contracts upon the order for relief would be inconsistent with the practicability of continued operation.<sup>9</sup> Others considered that the references to continued operation created an unacceptable level of legal uncertainty regarding the enforceability of closeout netting provisions. In addition, some commenters expressed doubt that continued operation of a DCO by a trustee in bankruptcy, including collection and payment of margin, would be practicable.<sup>10</sup>

*Withdrawal of proposed §190.14(b)(2) and (3).* No DCO registered with the Commission has ever been subject to bankruptcy, or even come close to insolvency. In the unprecedented and highly unlikely case that such a bankruptcy were to happen, it would be beneficial to foster the transfer of clearing operations, including contracts, from the DCO in Chapter 7 liquidation to another DCO, to the extent that such an opportunity presents itself. However, to the extent that fostering the transfer of clearing operations in a hypothetical unprecedented bankruptcy undermines the present-day netting treatment under bank capital rules of all bank-affiliated clearing members of a DCO, the benefit is

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<sup>9</sup> See, e.g., CME section IV.D.

<sup>10</sup> See, e.g., FIA at 6.

not worth the cost.<sup>11</sup> Moreover, while it would be beneficial, and it may be possible to develop an acceptable means, to foster Resolution under Title II in the case of certain DCOs in Chapter 7 liquidation, the means proposed in § 190.14(b)(2) and (3) do not result in a practicable and effective way to achieve this result at an acceptable cost. Accordingly, the Commission is withdrawing proposed § 190.14(b)(2) and (3).<sup>12</sup>

As discussed further below, the Commission is instead proposing that the part 190 regulations include a provision that is intended to foster, for a brief period after a bankruptcy filing, the Title II Resolution of a DCO, in particular a systemically important DCO (“SIDCO”),<sup>13</sup> but through means different to those in the original proposal for § 190.14(b)(2) and (3).

*Resolution under Title II of Dodd-Frank.* Title II Resolution is designed to address cases where a financial company is in default or danger of default, and where the failure of the financial company and its resolution under otherwise applicable Federal or State law would have serious adverse effects on financial stability in the United States.<sup>14</sup> Default or danger of default includes a circumstance where a case has been, or likely will promptly be, commenced with respect to the financial company under the Bankruptcy Code.<sup>15</sup> The Financial Stability Oversight Council (“FSOC”) has determined that the failure of either of the two systemically important derivatives clearing organizations,

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<sup>11</sup> As noted below, *see infra* n.233, a transfer approved pursuant to 11 U.S.C. 363 (unlike a transfer pursuant to a Title II Resolution) would not have the effect of avoiding a contractual termination provision.

<sup>12</sup> The Commission will make appropriate edits to the language in proposed § 190.14(b)(1) as part of the process of finalizing the Part 190 rule proposal.

<sup>13</sup> 17 CFR 39.2 defines systemically important derivatives clearing organization to mean a financial market utility that is a derivatives clearing organization registered under section 5b of the Act, which is currently designated by the Financial Stability Oversight Council to be systemically important and for which the Commission acts as the Supervisory Agency pursuant to 12 U.S.C. 5462(8).

<sup>14</sup> 12 U.S.C. 5383(b)(1, 2).

<sup>15</sup> 12 U.S.C. 5383(c)(4)(A).

CME and ICE Clear Credit, would likely threaten the stability of the broader U.S. financial system.<sup>16</sup>

The process for placing a financial company into Title II Resolution is deliberate and intricate. In the case of a SIDCO, this would include a written recommendation by each of the FDIC and the Federal Reserve covering eight statutory factors.<sup>17</sup> Following that recommendation, the Secretary of the Treasury would then need to make a determination, in consultation with the President, that each of seven statutory factors is met.<sup>18</sup> Following such a determination, the board of directors of the financial company may acquiesce or consent to the appointment of the FDIC as receiver, or there may be a period of judicial review which may extend to 24 hours.<sup>19</sup>

By contrast, a voluntary petition in bankruptcy commences the case, which in turn constitutes an order for relief.<sup>20</sup>

Accordingly, there exists a possibility that (in the highly unlikely event that a SIDCO would consider bankruptcy), the SIDCO could file for bankruptcy before a

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<sup>16</sup> See 2012 FSOC Annual Report, Appendix A, at 163 (“a significant disruption or failure of CME could have a major adverse impact on the U.S. financial markets, the impact of which would be exacerbated by the limited number of clearing alternatives currently available for the products cleared by CME. Accordingly, a failure or disruption of CME would likely have a significant detrimental effect on the liquidity of the futures and options markets, clearing members, which include large financial institutions, and other market participants, which would, in turn, likely threaten the stability of the broader U.S. financial system”); *id.* at 178 (same for ICE Clear Credit with respect to swaps markets and the broader U.S. financial system).

<sup>17</sup> See 12 U.S.C. 5383(a)(1)(A). These include a description of the effect that the default of the financial company would have on financial stability in the United States and an evaluation of why a case under the Bankruptcy Code is not appropriate for the financial company. See 12 U.S.C. 5383(a)(2).

<sup>18</sup> See 12 U.S.C. 5383(b). These include that the failure of the financial company under otherwise applicable Federal or State law would have serious adverse effects on financial stability in the United States.

<sup>19</sup> See 12 U.S.C. 5382(a)(1)(A).

<sup>20</sup> See 12 U.S.C. 301.

process to place that SIDCO into a Title II Resolution would have completed.<sup>21</sup> While the appointment of the FDIC as receiver under Title II would automatically result in the dismissal of the prior bankruptcy,<sup>22</sup> if the bankruptcy filing were to immediately and irrevocably result in the termination of the SIDCO's derivatives contracts with its members, that would undermine the potential success of any subsequent Title II Resolution.

By contrast, if the FDIC is appointed as receiver in a Title II Resolution before a SIDCO's derivatives contracts with its members are terminated as a result of a bankruptcy filing, such termination would be stayed by operation of Title II until 5:00 p.m. (eastern time) on the business day following the date of the appointment and, if the FDIC were to transfer such contracts to, *e.g.*, a bridge entity before that time, termination based on the insolvency or financial condition of the SIDCO would be permanently avoided,<sup>23</sup> again by operation of Title II.<sup>24</sup>

## **II. Supplemental Proposal**

In view of the points raised by commenters on the Proposal and upon further review of the matter, the Commission is proposing a limited revision to the Proposal that would (1) stay the termination of SIDCO contracts for a brief time after bankruptcy in order to foster the success of a Title II Resolution, if the FDIC is appointed receiver in such a Resolution within that time, but (2) do so in a manner that does not undermine the

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<sup>21</sup> The timeline for an involuntary bankruptcy is longer, in that it involves a petition, an answer (that the debtor has 21 days to file), and (if the petition is timely controverted) a trial. *See* 12 U.S.C. 303 (b, h), Federal Rule of Bankruptcy Procedure 1011(b).

<sup>22</sup> *See* 12 U.S.C. 5388(a).

<sup>23</sup> *See* 12 U.S.C. 5390(c)(10)(B)(i). By contrast, a transfer within a bankruptcy proceeding (including a "sale free and clear" pursuant to 11 U.S.C. 363), would not have the effect of preventing termination of the contracts.

<sup>24</sup> As noted above, limitations of termination rights pursuant to Title II are explicitly made consistent with QMNA status of an agreement.

QMNA status of SIDCO rules (the “Supplemental Proposal.”) All other aspects of the Proposal remain the same.

Specifically, the Supplemental Proposal would impose a temporary stay on the termination of derivatives contracts of a SIDCO that is the subject of a bankruptcy case.<sup>25</sup> However, that provision would become effective only if the Commission finds that the Prudential Regulators have taken steps to make such a stay consistent with the QMNA status of SIDCO rules. As discussed further below, the Commission is seeking comment on whether the Supplemental Proposal can reasonably be expected to achieve both of those goals, is feasible, is the best design for such a solution, and appropriately reflects consideration of benefits and costs.

As noted above, the present regulations of the Prudential Regulators of the banks and bank holding companies that SIDCO clearing members may be affiliate with or part of make any stay under Part 190 inconsistent with QMNA status for DCO rules. Thus, to meet the second goal, the Prudential Regulators must take action sufficient to change that result.

*Following analogous stay provision.* The Commission notes that the regulations of the Prudential Regulators encourage a limited stay period in certain contexts. For example, 12 CFR 382.4(b)(1) (FDIC) provides that a covered qualified financial contract (“QFC”) may not permit the exercise of any default right with respect to the covered QFC that is related, directly or indirectly, to an affiliate of the direct party becoming subject to a receivership, insolvency, liquidation, resolution, or similar proceeding. However, § 382.4(f) provides that, notwithstanding paragraph (b), under certain

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<sup>25</sup> Under the Supplemental Proposal, the temporary stay would not apply in the case of the bankruptcy of a DCO that is not a SIDCO.

circumstances, a covered QFC may permit the exercise of a default right after the stay period. The term “stay period” is defined in § 382.4(g) as, with respect to a receivership, insolvency, liquidation, resolution, or similar proceeding, the period of time beginning on the commencement of the proceeding and ending at the later of 5 p.m. (EST) on the business day following the date of the commencement of the proceeding and 48 hours after the commencement of the proceeding.<sup>26</sup>

While the “stay period” in 12 CFR 382.4(g) does not apply to a contract with a SIDCO (or any other central counterparty (“CCP”)) in bankruptcy, it would appear more likely that the Prudential Regulators would be comfortable with – and, thus, willing to make changes to the QMNA definition that would conform to – a stay period that is of identical length to a stay period that the Prudential Regulators already use in another context.

Thus, instead of continued operation for up to six days as originally proposed, the Supplemental Proposal would provide for the use of a stay period, applicable to the bankruptcy of a SIDCO, that would extend for the period of time beginning on the commencement of the proceeding and ending at the later of 5 p.m. (EST) on the business day following the date of the commencement of the proceeding and 48 hours after the commencement of the proceeding.

Unlike the original Proposal, there would be no continued collection or payments of initial or variation margin during the stay period. Rather, the termination of contracts outstanding at the time of the order for relief would be stayed for the stay period. To be sure, risk levels would increase during the stay period, as the design of CCPs is based on

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<sup>26</sup> Similar provisions are found in the regulations of the Federal Reserve (*see* 12 CFR 252.84) and of the OCC (*see* 12 CFR 47.5).

daily collection and payment of variation margin.<sup>27</sup> However, in a context where the DCO is (based on the prior bankruptcy filing) already *in extremis*, and collection and payment of variation margin is impracticable, such a stay may be the best available alternative (as compared to an immediate and irrevocable result of termination of contracts). The Commission notes that this risk is mitigated, albeit incompletely, by the limited maximum length of the stay period.<sup>28</sup>

*Need for a Springing Provision.* For the reasons discussed above, in order to avoid undermining the QMNA status of SIDCO rules, no stay provision regarding DCO contract termination rules may be made effective as an element of the DCO bankruptcy provisions of Part 190 unless and until each of the three Prudential Regulators takes action to make such a stay provision consistent with such QMNA status. The Commission seeks to complete the work of amending Part 190 in one coherent rulemaking. Moreover, the inclusion of such a stay provision, contingent on such action, might encourage the Prudential Regulators promptly to take such action.

Accordingly, the Supplemental Proposal would provide for the implementation of a stay provision, as discussed above, applicable to the bankruptcy of a SIDCO, that would only become effective after each of the three Prudential Regulators has publically taken action sufficient to make such a stay provision consistent with the QMNA status of SIDCO rules. The length of the stay period would be the shorter of (a) the stay period

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<sup>27</sup> See 17 CFR 39.14(b) (requiring daily variation settlement). Moreover, while no transactions would be entered into during the stay period, and thus there would be no changes in initial margin levels due to change in positions, the SIDCO would be unable to change initial margin levels even if an increase in such levels would otherwise be warranted.

<sup>28</sup> The Commission notes that 48 hours/5 p.m. on the next business day is the *maximum* length of the stay period. To the extent that the process of placing the SIDCO into Title II would be completed sooner, that would further mitigate the impact of not collecting and paying variation margin.

discussed above (found in, *e.g.*, 12 CFR 382.4(g)) or (b) the shortest such period specified in the action by any of the Prudential Regulators.

If the Prudential Regulators take such action prior to the finalization of the rulemaking embodied in the Proposal (as modified by this Supplemental Proposal), the Commission could implement the stay period provision as part of that finalization. Otherwise, the stay period provision would not become effective unless and until the Commission subsequently issues an Order, confirming that the stay provision is consistent with the QMNA status of SIDCO rules.<sup>29</sup> In either event, before acting to implement a stay provision, the Commission would issue a request for public comment, limited to the issue of whether the Prudential Regulators' actions are each sufficient to make such a stay provision consistent with the QMNA status of SIDCO rules.<sup>30</sup>

In summary, the Commission is withdrawing proposed § 190.14(b)(2) and (3) from the Proposal and instead proposing that the final amendments to part 190 would contain a regulation with the following elements:

- Subsequent to the order for relief with respect to a SIDCO, a stay period would apply to the termination of derivatives contracts outstanding at the time of the order for relief and the exercise of any other default right. There would be no continued collection or payments of initial or variation margin during the stay period.
- The length of the stay period would be the shorter of (a) the period of time beginning on the commencement of the proceeding and ending at the later of 5 p.m. (EST) on the business day following the date of the commencement of the proceeding

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<sup>29</sup> Authority to issue such an Order would not be delegated to staff, and thus would be excluded from the delegation of authority set forth in proposed § 190.02(b).

<sup>30</sup> As a practical matter, the Commission expects that before issuing the request for public comment, there would be contacts by Commission staff with relevant staff at each of the three Prudential Regulators confirming understanding of such action.

and 48 hours after the commencement of the proceeding; or (b) the shortest such period specified in the action by any of the Prudential Regulators.

- This aspect of the regulation would not be effective until the Commission determines (whether as part of finalizing the rulemaking in the Proposal (as modified by the Supplemental Proposal) or by a subsequent Order), following public notice and comment, that each of the three Prudential Regulators has taken action sufficient to make the stay provision consistent with the QMNA status of SIDCO rules. Public comment would be limited to whether the Prudential Regulators' actions are sufficient on that point.

### **III. Cost-Benefit Considerations**

*Introduction.* 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 or issuing certain orders.<sup>31</sup> 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) factors (collectively referred to herein as “Section 15(a) Factors”).

In the Proposal, the Commission proposed amendments to its regulations governing bankruptcy proceedings of commodity brokers in part 190. The Proposal provided the public with an opportunity to comment on the Commission's cost-and-

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<sup>31</sup> Section 15(a) of the CEA, 7 U.S.C. 19(a).

benefit considerations of the proposed amendments, including identification and assessment of any costs and benefits not discussed therein. In particular, the Commission requested that commenters provide data or any other information that they believe supports their positions with respect to the Commission's considerations of costs and benefits.

*Baseline.* In this release, the Commission sets out the Supplemental Proposal described above, and withdraws proposed § 190.14(b) and (c). All other aspects of the Proposal remain the same. The Proposal set forth the costs and benefits of the Commission's proposed amendments of Part 190. All aspects of the Proposal's considerations of costs and benefits remain the same other than those related specifically to the Supplemental Proposal. Thus, while the Commission's practices under existing part 190 serve as the baseline for the consideration of costs and benefits of the Supplemental Proposal, we also discuss as appropriate for clarity the differences from the Proposal. The Commission seeks comment on all aspects of the baseline laid out above.

The Commission recognizes that the Supplemental Proposal could create benefits, but also could impose costs. The Commission has endeavored to assess the expected costs and benefits of the proposed rulemaking in quantitative terms, but has not found it possible to do so, and instead has identified and considered the costs and benefits of the applicable proposed rules in qualitative terms. The lack of data and information to estimate those costs is attributable in part to the nature of the Supplemental Proposal, including that it relates to a situation – the failure of a DCO – that is unprecedented and is considered to be highly unlikely.

*Consideration of benefits and costs.* The benefit of the Supplemental Proposal would be to provide a brief opportunity for a Title II Resolution of a SIDCO that has filed for bankruptcy to be initiated without the termination of the outstanding derivatives contracts. In the event that such a Resolution is initiated during the stay period, this would mitigate, and possibly avoid, the disruption to clearing members and clients, and to the U.S. financial system more broadly, that would result from such termination of the outstanding contracts. By delaying the effectiveness of this provision until a Commission Order confirming that the Prudential Regulators had taken action to make such a stay provision consistent with QMNA status for the DCO's rules, the Supplemental Proposal would avoid undermining QMNA status, and thus would avoid increasing capital requirements for bank-affiliated clearing members.

The Commission does not anticipate material administrative costs associated with the Supplemental Proposal. Nonetheless, there is at least one significant cost: for the duration of the stay period, clearing members and clients will be uncertain whether their contracts will continue (as part of a Resolution) or be terminated (and thus would need to be replaced). That uncertainty would mean that clearing members and clients would be disadvantaged in determining how best to protect their positions.

The Commission notes that it has considered alternatives to the Supplemental Proposal. First, the Commission could simply withdraw proposed § 190.14(b)(2) and (3), and not propose anything additional. As discussed above, that would permit the immediate and irrevocable result of the termination of a SIDCO's derivatives contracts with its members, and that result would undermine the success of any subsequent Title II Resolution. Second, and proceeding in the opposite direction, the Commission could

propose to make the proposed solution immediately effective. However, that approach would undermine QMNA status for DCO rules. Third, the proposed solution could be extended to all DCOs with respect to potential resolution under Title II. However, while it is possible that a DCO that has not been designated as systemically important pursuant to Title VIII of Dodd-Frank could nonetheless, in the event of its bankruptcy, be found eligible for Title II Resolution in that the bankruptcy proceeding would have serious adverse effects on financial stability in the United States, that is much less likely than in the case of a SIDCO and, in light of the impact on clearing members and clients, the Commission has determined not to propose to apply a stay period to DCOs that are not SIDCOs.

Finally, while the original proposed § 190.14(b)(2) and (3) would have been applied to cases where a prompt transfer of clearing operations (including contracts) outside of Title II Resolution might be facilitated, the Supplemental Proposal does not include transfers outside of Title II Resolution because, as noted above, such a transfer would not avoid the effect of a termination provision. Nor does the Commission anticipate that the Prudential Regulators would be inclined to permit avoidance of such termination outside the context of a Title II Resolution.

#### **IV. Request for Comment**

The Commission requests comment on all aspects of the Supplemental Proposal and the issues raised in this document, including in particular:

- 1) Do commenters agree with the concerns identified (or consider that there are additional or different concerns) with respect to the status of DCO rules as qualifying master netting agreements for purposes of bank capital rules?

2) Does the Supplemental Proposal achieve the goals of fostering the success of a Title II Resolution while avoiding undermining the QMNA status of SIDCO rules?

Are these the right goals?

3) Do commenters see a better way to achieve these goals? Do commenters see specific provisions that should be included in, or exclude from, the Supplemental Proposal?

4) Do commenters agree that the Supplemental Proposal should be limited to SIDCOs (*i.e.*, that it should not be applied to DCOs that are not SIDCOs)?

5) The Commission generally requests comment on all aspects of its cost-benefit considerations, including the identification and assessment of any costs and benefits not discussed herein; the potential costs and benefits of the alternatives discussed herein; data and any other information to assist or otherwise inform the Commission's ability to quantify or qualitatively describe the costs and benefits of the proposed solution; and substantiating data, statistics, and any other information to support positions posited by commenters with respect to the Commission's discussion. The Commission welcomes comment on such costs from all members of the public. Commenters may also suggest other alternatives to the proposed approaches.

Issued in Washington, DC, on September 18, 2020 by the Commission.

Christopher Kirkpatrick,

*Secretary of the Commission.*

## **Appendices to Bankruptcy Regulations—Commission Voting Summary and Commissioner’s Statement**

### **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 Dan M. Berkovitz**

The part 190 rulemaking supplemental notice of proposed rulemaking (“Supplemental NPRM”) addresses a potential unintended outcome of the original NPRM identified in a number of comments on the proposal. These comments stated that certain provisions in the original proposed rule related to the bankruptcy of a derivatives clearing organization (“DCO”) could have significant, unintended and detrimental impacts on various market participants with contracts cleared at the DCO. The Supplemental NPRM presents new, alternative provisions governing DCO bankruptcy that are intended to avoid these impacts. In issuing the Supplemental NPRM, the Commission seeks public comment on these alternative provisions.

I support the issuance of this Supplemental NPRM because it will provide all interested persons with an opportunity to comment on the alternative provisions formulated by the Commission. This alternative approach was not set forth in the proposal. Providing the public with notice and opportunity to comment on rules being considered by the Commission is not only a basic legal requirement for agency rulemaking, but it is sound public policy as well. Public input from all interested persons is critical to sound regulation.

Under the Administrative Procedure Act, the provisions in a final rule must be reasonably foreseeable and a logical outgrowth of the provisions in the proposal.<sup>1</sup> The NPRM must contain more than a passing reference or question about an issue; the proposal must be sufficiently descriptive for members of the public to evaluate and comment on the approach being considered. The Supplemental NPRM meets that standard.

I look forward to reviewing all perspectives on these alternative provisions.

[FR Doc. 2020-21005 Filed: 9/23/2020 8:45 am; Publication Date: 9/24/2020]

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<sup>1</sup> See, e.g., *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1402-03 (9th Cir. 1995).