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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: Final rule.

SUMMARY: The Commodity Futures Trading Commission (“Commission” or “CFTC”) is adopting amendments to the margin requirements for uncleared swaps for swap dealers (“SD”) and major swap participants (“MSP”) for which there is not a prudential regulator (the “CFTC Margin Rule”). Specifically, the CFTC Margin Rule mandated the collection and posting of variation margin and initial margin (“IM”) under a phased compliance schedule extending from September 1, 2016, to September 1, 2020. The Commission is hereby amending the compliance schedule to further delay the compliance date for entities with smaller average daily aggregate notional amounts (“AANA”) of swaps and certain other financial products (the “Smaller Portfolio Group”) from September 1, 2021, to September 1, 2022, to avoid market disruption due to the large number of entities being required to comply by September 1, 2021, as a result of the adoption of the interim final rule (“Final Rule”).

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

Section 4s(e) of the Commodity Exchange Act (“CEA”)¹ requires the Commission to adopt rules establishing minimum initial and variation margin requirements for all swaps² that are (i) entered into by an SD or MSP for which there is not a prudential regulator³ (collectively, “covered swap entities” or “CSEs”) and (ii) not cleared by a registered derivatives clearing organization (“uncleared swaps”).⁴ To offset the greater risk to the SD⁵ or MSP⁶ and the financial system arising from the use of uncleared swaps, these requirements must (i) help ensure the safety and soundness of the

¹ 7 U.S.C. 6s(e) (capital and margin requirements).

² 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.

³ 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.

⁴ 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.

⁵ CEA section 1a(49), 7 U.S.C. 1a(49) (swap dealer definition); Commission regulation 1.3 (further definition of swap dealer).

⁶ CEA section 1a(32), 7 U.S.C. 1a(32) (major swap participant definition); Commission regulation 1.3 (further definition of major swap participant).

SD or MSP and (ii) be appropriate for the risk associated with the uncleared swaps held by the SD or MSP.⁷

The Basel Committee on Banking Supervision and 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”).⁸ After the establishment of the BCBS/IOSCO Framework, on January 6, 2016, the CFTC, consistent with Section 4s(e), promulgated rules requiring CSEs to collect and post initial and variation margin for uncleared swaps,⁹ adopting the implementation schedule set forth in the BCBS/IOSCO Framework, including the revised implementation schedule adopted on March 18, 2015.¹⁰

In July 2019, BCBS/IOSCO further revised the framework to extend the implementation schedule to September 1, 2021.¹¹ Consistent with this revision to the international framework, the Commission promulgated the April 2020 Final Rule,¹² which amended the compliance schedule for the IM requirements under the CFTC

⁷ CEA section 4s(e)(3)(A), 7 U.S.C. 6s(e)(3)(A).

⁸ See generally BCBS and IOSCO, Margin requirements for non-centrally cleared derivatives (Sept. 2013), <https://www.bis.org/publ/bcbs261.pdf>.

⁹ 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 - 23.159, 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).

¹⁰ See generally BCBS/IOSCO, Margin requirements for non-centrally cleared derivatives (March 2015), <https://www.bis.org/bcbs/publ/d317.pdf>.

¹¹ 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”).

¹² 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 the Smaller Portfolio Group, which were required to comply with IM requirements in the last phase of compliance, to reduce the potential market disruption that could result from the large number of entities that would come into the scope of compliance on September 1, 2020, absent the amendment of the compliance schedule (“April 2020 Final Rule”).

Margin Rule by splitting the last phase of compliance into two compliance phases beginning on September 1, 2020, and September 1, 2021, respectively.¹³

The World Health Organization declared the coronavirus disease 2019 (“COVID-19”) outbreak a global pandemic on March 11, 2020.¹⁴ On March 13, 2020, President Donald J. Trump declared a national emergency due to the COVID-19 pandemic.¹⁵ The disease has impacted 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.¹⁶ 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.¹⁷

After taking into consideration the revised BCBS/IOSCO implementation schedule, in May 2020, the Commission amended the IM compliance schedule for certain entities by one year (“IFR Extension Group”), which otherwise would have been required

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

¹⁴ 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>.

¹⁵ 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/>.

¹⁶ 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”).

¹⁷ 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>.

to comply with the IM requirements beginning on September 1, 2020, to extend the compliance date to September 1, 2021.¹⁸ The Commission accomplished this change by means of an interim final rule (“IFR”)¹⁹ 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.

As a result of the IFR, the IFR Extension Group and the Smaller Portfolio Group are effectively consolidated into one phase and will be required to begin compliance at the same time on September 1, 2021. The IFR Extension Group and the Smaller Portfolio Group will face 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 Commission, after adopting the IFR extending the IFR Extension Group compliance date to September 1, 2021, approved a notice of proposed

¹⁸ See Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 85 FR 41346 (July 10, 2020). A Global Markets Advisory Committee (“GMAC”) subcommittee also 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 (May 2020), 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 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>.

¹⁹ Subsequently, on July 10, 2020, to mitigate the operational challenges faced by certain entities subject to the CFTC Margin Rule as a result of the COVID-19 pandemic, the Commission published in the *Federal Register* an interim final rule extending the September 1, 2020 compliance date for the IFR Extension Group to September 1, 2021.

rulemaking to amend and extend the IM compliance schedule for the Smaller Portfolio Group to September 1, 2022 (“Proposal”).²⁰

II. Final Rule

The Commission is adopting the Final Rule to amend the CFTC Margin Rule to extend the compliance schedule for the IM requirements for the Smaller Portfolio Group. As a result of this rule amendment, the compliance date of September 1, 2021, applicable to the Smaller Portfolio Group, will be delayed by one year, and entities in this group will now be required to comply with the IM requirements in a final sixth phase beginning on September 1, 2022. As stated in the Proposal, the extension of the schedule for compliance with the IM requirements is consistent with the 2020 BCBS/IOSCO Margin Framework and similar action undertaken by the U.S. prudential regulators and the Commission’s international counterparts.²¹

The Commission received one comment letter expressing support for the Proposal to extend the CFTC compliance schedule for the Smaller Portfolio Group.²² This

²⁰ See Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 85 FR 41463 (July 10, 2020).

²¹ The U.S. prudential regulators (*i.e.*, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency) recently issued an interim final rule to revise their margin compliance schedule consistent with the revised BCBS/IOSCO implementation schedule. See Margin and Capital Requirements for Covered Swap Entities, 85 FR 39464 (July 1, 2020). 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), submitted, for endorsement by the European Commission, joint draft Regulatory Technical Standards (RTS) proposing changes to the European Union margin rules to effectively implement the 2020 BCBS/IOSCO Margin Framework’s 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.

²² Comment letter no. 62694 from the International Swaps and Derivatives Association, the Securities Industry and Financial Markets Association, SIFMA Asset Management Group, the Global Financial Markets Association, the Global Foreign Exchange Division of GFMA, Managed Funds Association, Investment Adviser Association, the Institute of International Bankers, the Investment Company Institute, the U.S. Chamber’s Center for Capital Markets Competitiveness (CCMC) and the American Council of Life Insurers (Aug. 5, 2020), <https://comments.cftc.gov/Handlers/PdfHandler.ashx?id=29412>.

comment letter, which was a joint industry letter submitted by eleven trade associations, stated that deferral of the Smaller Portfolio Group compliance date is necessary to facilitate orderly preparation for the exchange of regulatory IM between CSEs and covered counterparties expected to come into the scope of the IM requirements in the last phases of compliance. The comment letter went on to note that given the disruptive nature of the pandemic, notwithstanding robust business continuity plans, efforts to prepare for the final phases of regulatory IM have been disrupted due to personnel, systems, and other issues, and, therefore, the commenters appreciate the additional time afforded to market participants in the Proposal.

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”)²³ (“covered counterparties”) in accordance with a phased compliance schedule set forth in Commission regulation 23.161.²⁴ The compliance schedule, which originally extended from September 1, 2016 to September 1, 2020, and comprised five phases, brings into compliance with the IM requirements CSEs and covered counterparties on staggered dates, starting with entities with the largest AANA of uncleared swaps and certain other financial products, and then progressively with successively lesser AANA.

²³ 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.

²⁴ 17 CFR 23.161.

The April 2020 Final Rule split the fifth and last phase of compliance into two phases, extending the compliance date for the Smaller Portfolio Group to September 1, 2021. Subsequently, the IFR extended the IFR Extension Group's September 1, 2020 compliance date to September 1, 2021, and as a result, the IFR Extension Group and Smaller Portfolio Group would be required to begin IM compliance on the same day absent the Commission's adoption of this Final Rule.

Absent the Commission's adoption of the Proposal in this Final Rule, the onset of the compliance phase starting on September 1, 2021, would result in a very large number of entities coming into compliance simultaneously, because the AANA threshold for compliance with the IM requirements would be significantly reduced. Specifically, entities in the fourth phase were subject to a \$750 billion AANA threshold, and beginning on September 1, 2021, under the schedule being revised by the Final Rule, entities will 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 fewer than 40 entities into scope, the two groups now subject to the September 1, 2021 compliance date will bring into scope approximately 670 entities, along with 7,500 swap trading relationships.²⁵ This means that approximately 670 entities may have to amend or enter into up to 7,500 new sets of credit support or other IM agreements in order to continue to engage in swap transactions.

The Commission adopted the April 2020 Final Rule, which postponed the

²⁵ 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 ("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."

compliance date for the Smaller Portfolio Group, 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 moved 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 would face, absent the Commission's adoption of this Final Rule, effectively the same issues that the April 2020 Final Rule intended to address, including the limited number of entities that provide IM-required services. The Commission is adopting the Final Rule to further delay the compliance date for the Smaller Portfolio Group entities to alleviate the potential market disruption described above, consistent with the rationale for the Commission's adoption of the April 2020 Final Rule.

The Final Rule will align the CFTC Margin Rule with the 2020 BCBS/IOSCO Margin Framework and is in line with similar efforts by the U.S. prudential regulators and international counterparts.²⁶ The Final Rule will thus advance the Commission's goal of achieving regulatory harmonization with respect to uncleared swaps margin and may help reduce regulatory arbitrage.

²⁶ See *supra* note 19.

The Commission notes that the Smaller Portfolio Group comprises entities with a relatively small amount of swap activity. The OCE estimates that the average AANA per entity subject to the original September 1, 2020 compliance date is about \$59 billion, compared to an average \$10.6 trillion AANA for each entity in the earlier phases 1, 2, and 3 and \$1 trillion in phase 4. OCE also estimates that the total AANA for the Smaller Portfolio Group would be approximately four percent of the total AANA across all the phases.²⁷ Given the relatively small amount of swap activity of entities in the Smaller Portfolio Group, the Commission believes that delaying compliance with the IM requirements by one year for such group will have a muted impact on the systemic risk mitigating effects of the IM requirements. In addition, the Commission notes that the potential for systemic risk also is reduced because the Final Rule does not relieve Smaller Portfolio Group firms from their existing obligations to cover their current exposure on a daily basis through mandated variation margin payments once such firms have reached the minimum transfer amount, as this term is defined in the Commission's rules.²⁸

Although the impact of Smaller Portfolio Group swap activity on systemic risk is likely to be muted during the one year delay, the Commission notes that 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 Commission believes that the exchange of IM by entities with relatively small portfolios supports the health and stability of the overall financial system.

III. Related Matters

²⁷ The methodology for calculating AANA is described in the OCE Initial Margin Phase 5 Study at 3.

²⁸ 17 CFR 23.151.

A. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (“PRA”)²⁹ 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 Final Rule, as adopted, contains no requirements subject to the PRA.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (“RFA”) requires that agencies, in promulgating regulations, consider whether the regulations they propose will have a significant economic impact on a substantial number of small entities, and, if so, to provide a flexibility analysis regarding the economic impact on those entities.³⁰ In the Proposal, the Commission certified that it 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 Rule 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”).³¹ The Commission has previously determined that SDs, MSPs, and ECPs are not small entities for purposes of the RFA.³² Therefore, the Commission believes that this Final Rule will not have a significant

²⁹ 44 U.S.C. 3501 *et seq.*

³⁰ 5 U.S.C. 601 *et seq.*

³¹ 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).

³² *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).

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 Final Rule will not have a significant economic impact on a substantial number of 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 has considered the extraterritorial reach of the Final Rule and notes where this reach may be especially relevant.

This Final Rule extends the compliance schedule for the CFTC Margin Rule for CSEs and covered counterparties in the Smaller Portfolio Group, including financial end user counterparties exceeding the MSE threshold of \$8 billion in AANA. As a result of the Commission's adoption of this Final Rule, these entities will come into scope in a final sixth phase, which will begin on September 1, 2022.

As discussed above, the Commission believes that with the earlier 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 have been required to comply with the IM requirements for the first time on September 1, 2021, absent the Final Rule, could have caused certain market disruptions. Some CSEs and covered counterparties would have been 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 Final Rule are compared is the uncleared swaps markets as they exist today, including the impact of the compliance schedule being amended herein, which would have required IM compliance by September 1, 2021. With this as the baseline, the following are the benefits and costs of this Final Rule.

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

1. Benefits

As described above, this Final Rule extends the compliance schedule for the IM requirements for the Smaller Portfolio Group to September 1, 2022. The extension benefits entities in the Smaller Portfolio Group by allowing them to trade uncleared swaps more easily and cheaply over this period. It also benefits entities in the IFR Extension Group by making it easier for them to obtain the resources needed to comply with the IM requirements. This Final Rule is specifically intended to alleviate the potential market disruption resulting from the large number of counterparties that would have come into scope on September 1, 2021, under the compliance schedule being

amended, 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 the IM requirements at the same time as entities in the IFR Extension Group, the Final Rule reduces the potential for bottlenecks by creating a one-year separation in the applicable compliance dates for the two categories of entities.

The Final Rule provides 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 as entities in the IFR Extension Group, to prepare for their compliance with the IM requirements. The Final Rule therefore promotes the smooth and orderly transition into IM compliance for both the IFR Extension Group and the Smaller Portfolio Group.

The Final Rule amends the CFTC Margin Rule consistent with the 2020 BCBS/IOSCO Margin Framework and the prudential regulators' June 2020 IFR amending the IM compliance schedule. The Final Rule therefore promotes harmonization with international and domestic margin regulatory requirements, thereby reducing the potential for regulatory arbitrage.

2. Costs

The Final Rule extends 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. Uncleared swaps entered into during this period with the smallest CSEs may be treated as legacy swaps not subject to the IM requirements. As IM might not be required to be collected on some of these swaps,³³ the one-year compliance delay may increase the level of counterparty credit risk to the financial system. While potentially meaningful, in the Commission's view 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 Final Rule pursuant to the five considerations identified in section 15(a) of the CEA as follows:

(a) Protection of Market Participants and the Public

This Final Rule will protect market participants and the public against the potential disruption that may have been caused by the large number of counterparties that would have come into the scope of the IM requirements on September 1, 2021, under the compliance schedule being amended by this Final Rule.

Under the revised compliance schedule set forth in the Final Rule, fewer counterparties will come into scope by September 1, 2021, and many small counterparties will 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 will be reduced, mitigating the potential strain on the uncleared swaps markets.

³³ 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 Final Rule 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 Final Rule is 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 will have additional time to document their swap relationships and set up adequate processes to operationalize the exchange of IM. As such, the Final Rule could promote more even competition among counterparties in the uncleared swaps markets, as the one-year delay period may remove the potential incentive for CSEs to prioritize arrangements with larger counterparties to the detriment of smaller counterparties and may thus help maintain the current state of market efficiency.

By preventing the market disruption that would have resulted from the large number of counterparties that would have come into scope by September 1, 2021, and the use of finite financial infrastructure resources, the Final Rule promotes the financial integrity of the markets. On the other hand, for a one-year period, there will 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 Final Rule may enhance or negatively impact price discovery. Absent the Final Rule, counterparties, in particular smaller counterparties, may have been

discouraged from trading uncleared swaps because they may not have been able to secure resources and services in a timely manner to operationalize the exchange of IM. The resultant reduction in uncleared swaps trading may have reduced liquidity and harmed price discovery. Conversely, the delay in implementation of the IM requirements for the Smaller Portfolio Group may cause those counterparties to adjust the pricing of their swaps to incorporate additional risks that would otherwise have been covered by IM. These additional adjustments could result in pricing differentiations between swaps entered into by some Smaller Portfolio Group entities and entities already subject to the margin requirements. As a result, the ability of entities in the Smaller Portfolio Group to compare realized trade prices may be reduced, harming effective market price discovery by these entities.

(d) Sound Risk Management

As discussed above, the Final Rule will delay the compliance date for the Smaller Portfolio Group by one year. As a result, swaps entered into during the one-year period will not be subject to the IM requirements, potentially increasing the level of counterparty credit risk to the financial system. At the same time, the Final Rule will reduce the potential market disruption that could have resulted from the large number of counterparties that would have come into the scope of the IM requirements at the end of the compliance schedule being amended, which would have required compliance by September 1, 2021. The delayed compliance schedule will alleviate the potential disruption in establishing the financial infrastructure for the exchange of IM between in-scope entities and will give counterparties time to prepare for IM compliance and to establish operational processes tailored to their uncleared swaps and associated risks. In

addition, to the extent some entities would have been precluded from trading swaps during that one-year period, the rule allows those firms to continue their current risk management practices.

(e) Other Public Interest Considerations

The Final Rule promotes harmonization with international and domestic margin regulatory requirements, reducing the potential for regulatory arbitrage. The Final Rule amends the CFTC Margin Rule consistent with the 2020 BCBS/IOSCO Margin Framework, and the prudential regulators' June 2020 IFR amending the IM compliance schedule.

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 this 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 this Act.”³⁴

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

The Commission has considered this Final Rule to determine whether it is anticompetitive and has identified no anticompetitive effects. The Commission requested

³⁴ 7 U.S.C. 19(b).

comments on whether the Proposal was anticompetitive and, if so, what the anticompetitive effects were, and received no comments.

Because the Commission has determined that this Final Rule is not anticompetitive and has 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 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. Amend § 23.161 by revising paragraph (a)(7) as follows:

§ 23.161 Compliance dates.

(a) * * *

(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 October 20, 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 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—Supporting Statement of Commissioner Brian Quintenz

I support today's final rule that extends the last phase of compliance for initial margin requirements to September 1, 2022. In light of the unprecedented economic and social impacts of COVID-19 and the potential market disruption that could result from a large number of entities coming into scope on September 1, 2021, I strongly support an additional one year deferral for these firms. As I have noted previously, given the large number of firms covered by the final compliance phases, the estimated 7,000 initial margin relationships that need to be negotiated, and the small overall percentage of swap activity these firms represent, a one year delay for these firms is appropriate in order to facilitate an efficient, orderly transition for the market into the uncleared margin regime. In addition, today's final rule also ensures the Commission is consistent with the BCBS-IOSCO recommended margin framework and with actions taken by U.S. prudential regulators to extend the margin compliance schedule.¹

[FR Doc. 2020-23473 Filed: 11/6/2020 8:45 am; Publication Date: 11/9/2020]

¹ See Basel Committee on Banking Supervision and Board of the International Organization of Securities Commissions, Margin Requirements for Non-Centrally Cleared Derivatives (Apr. 2020), available at <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD651.pdf>.