

Subpart H—Business Conduct Standards for Swap Dealers and Major Swap Participants Dealing With Counterparties, Including Special Entities

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§ 23.400 Scope.

The sections of this subpart shall apply to swap dealers and, unless otherwise indicated, major swap participants. These rules are not intended to limit or restrict the applicability of other provisions of the Act and rules and regulations thereunder, or other applicable laws, rules and regulations. The provisions of this subpart shall apply in connection with transactions in swaps as well as in connection with swaps that are offered but not entered into.

§ 23.401 Definitions.

(a) *Counterparty.* The term “counterparty,” as appropriate in this subpart, includes any person who is a prospective counterparty to a swap.

(b) *Major swap participant.* The term “major swap participant” means any person defined in Section 1a(33) of the Act and §1.3 of this chapter and, as appropriate in this subpart, any person acting for or on behalf of a major swap participant, including an associated person defined in Section 1a(4) of the Act.

(c) *Special Entity.* The term “Special Entity” means:

- (1) A Federal agency;
- (2) A State, State agency, city, county, municipality, other political subdivision of a State, or any instrumentality, department, or a corporation of or established by a State or political subdivision of a State;
- (3) Any employee benefit plan subject to Title I of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002);
- (4) Any governmental plan, as defined in Section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002);
- (5) Any endowment, including an endowment that is an organization described in Section 501(c)(3) of the Inter-

nal Revenue Code of 1986 (26 U.S.C. 501(c)(3)); or

(6) Any employee benefit plan defined in Section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002), not otherwise defined as a Special Entity, that elects to be a Special Entity by notifying a swap dealer or major swap participant of its election prior to entering into a swap with the particular swap dealer or major swap participant.

(d) *Swap dealer.* The term “swap dealer” means any person defined in Section 1a(49) of the Act and §1.3 of this chapter and, as appropriate in this subpart, any person acting for or on behalf of a swap dealer, including an associated person defined in Section 1a(4) of the Act.

§ 23.402 General provisions.

(a) *Policies and procedures to ensure compliance and prevent evasion.* (1) Swap dealers and major swap participants shall have written policies and procedures reasonably designed to:

- (i) Ensure compliance with the requirements of this subpart; and
- (ii) Prevent a swap dealer or major swap participant from evading or participating in or facilitating an evasion of any provision of the Act or any regulation promulgated thereunder.

(2) Swap dealers and major swap participants shall implement and monitor compliance with such policies and procedures as part of their supervision and risk management requirements specified in subpart J of this part.

(b) *Know your counterparty.* Each swap dealer shall implement policies and procedures reasonably designed to obtain and retain a record of the essential facts concerning each counterparty whose identity is known to the swap dealer prior to the execution of the transaction that are necessary for conducting business with such counterparty. For purposes of this section, the essential facts concerning a counterparty are:

- (1) Facts required to comply with applicable laws, regulations and rules;
- (2) Facts required to implement the swap dealer’s credit and operational risk management policies in connection with transactions entered into with such counterparty; and

(3) Information regarding the authority of any person acting for such counterparty.

(c) *True name and owner.* Each swap dealer or major swap participant shall obtain and retain a record which shall show the true name and address of each counterparty whose identity is known to the swap dealer or major swap participant prior to the execution of the transaction, the principal occupation or business of such counterparty as well as the name and address of any other person guaranteeing the performance of such counterparty and any person exercising any control with respect to the positions of such counterparty.

(d) *Reasonable reliance on representations.* A swap dealer or major swap participant may rely on the written representations of a counterparty to satisfy its due diligence requirements under this subpart, unless it has information that would cause a reasonable person to question the accuracy of the representation. If agreed to by the counterparties, such representations may be contained in counterparty relationship documentation and may satisfy the relevant requirements of this subpart for subsequent swaps offered to or entered into with a counterparty, provided however, that such counterparty undertakes to timely update any material changes to the representations.

(e) *Manner of disclosure.* A swap dealer or major swap participant may provide the information required by this subpart by any reliable means agreed to in writing by the counterparty; provided however, for transactions initiated on a designated contract market or swap execution facility, written agreement by the counterparty regarding the reliable means of disclosure is not required.

(f) *Disclosures in a standard format.* If agreed to by a counterparty, the disclosure of material information that is applicable to multiple swaps between a swap dealer or major swap participant and a counterparty may be made in counterparty relationship documentation or other written agreement between the counterparties.

(g) *Record retention.* Swap dealers and major swap participants shall create a record of their compliance with the re-

quirements of this subpart and shall retain records in accordance with subpart F of this part and §1.31 of this chapter and make them available to applicable prudential regulators upon request.

§§ 23.403–23.409 [Reserved]

§ 23.410 Prohibition on fraud, manipulation, and other abusive practices.

(a) It shall be unlawful for a swap dealer or major swap participant—

(1) To employ any device, scheme, or artifice to defraud any Special Entity or prospective customer who is a Special Entity;

(2) To engage in any transaction, practice, or course of business that operates as a fraud or deceit on any Special Entity or prospective customer who is a Special Entity; or

(3) To engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative.

(b) *Affirmative defense.* It shall be an affirmative defense to an alleged violation of paragraph (a)(2) or (3) of this section for failure to comply with any requirement in this subpart if a swap dealer or major swap participant establishes that the swap dealer or major swap participant:

(1) Did not act intentionally or recklessly in connection with such alleged violation; and

(2) Complied in good faith with written policies and procedures reasonably designed to meet the particular requirement that is the basis for the alleged violation.

(c) *Confidential treatment of counterparty information.* (1) It shall be unlawful for any swap dealer or major swap participant to:

(i) Disclose to any other person any material confidential information provided by or on behalf of a counterparty to the swap dealer or major swap participant;

(ii) Use for its own purposes in any way that would tend to be materially adverse to the interests of a counterparty, any material confidential information provided by or on behalf of a counterparty to the swap dealer or major swap participant.

(2) Notwithstanding paragraph (c)(1) of this section, a swap dealer or major swap participant may disclose or use

material confidential information provided by or on behalf of a counterparty to the swap dealer or major swap participant if such disclosure or use is authorized in writing by the counterparty, or is necessary:

(i) For the effective execution of any swap for or with the counterparty;

(ii) To hedge or mitigate any exposure created by such swap; or

(iii) To comply with a request of the Commission, Department of Justice, any self-regulatory organization designated by the Commission, or an applicable prudential regulator, or is otherwise required by law.

(3) Each swap dealer or major swap participant shall implement written policies and procedures reasonably designed to protect material confidential information provided by or on behalf of a counterparty from disclosure and use in violation of this section by any person acting for or on behalf of the swap dealer or major swap participant.

§§ 23.411–23.429 [Reserved]

§ 23.430 Verification of counterparty eligibility.

(a) *Eligibility.* A swap dealer or major swap participant shall verify that a counterparty meets the eligibility standards for an eligible contract participant, as defined in Section 1a(18) of the Act and § 1.3 of this chapter, before offering to enter into or entering into a swap with that counterparty.

(b) *Special Entity.* In verifying the eligibility of a counterparty pursuant to paragraph (a) of this section, a swap dealer or major swap participant shall also verify whether the counterparty is a Special Entity.

(c) *Special Entity election.* In verifying the eligibility of a counterparty pursuant to paragraph (a) of this section, a swap dealer or major swap participant shall verify whether a counterparty is eligible to elect to be a Special Entity under § 23.401(c)(6) and, if so, notify such counterparty of its right to make such an election.

(d) *Safe harbor.* A swap dealer or major swap participant may rely on written representations of a counterparty to satisfy the requirements of this section as provided in § 23.402(d). A swap dealer or major swap

participant will have a reasonable basis to rely on such written representations for purposes of the requirements in paragraphs (a) and (b) of this section if the counterparty specifies in such representations the provision(s) of Section 1a(18) of the Act or paragraph(s) of § 1.3 of this chapter that describe its status as an eligible contract participant and, in the case of a Special Entity, the paragraph(s) of the Special Entity definition in § 23.401(c) that define its status as a Special Entity.

(e) This section shall not apply with respect to:

(1) A transaction that is initiated on a designated contract market; or

(2) A transaction initiated on a swap execution facility, if the swap dealer or major swap participant does not know the identity of the counterparty to the transaction prior to execution.

§ 23.431 Disclosures of material information.

(a) At a reasonably sufficient time prior to entering into a swap, a swap dealer or major swap participant shall disclose to any counterparty to the swap (other than a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant) material information concerning the swap in a manner reasonably designed to allow the counterparty to assess:

(1) The material risks of the particular swap, which may include market, credit, liquidity, foreign currency, legal, operational, and any other applicable risks;

(2) The material characteristics of the particular swap, which shall include the material economic terms of the swap, the terms relating to the operation of the swap, and the rights and obligations of the parties during the term of the swap; and

(3) The material incentives and conflicts of interest that the swap dealer or major swap participant may have in connection with a particular swap, which shall include:

(i) With respect to disclosure of the price of the swap, the price of the swap and the mid-market mark of the swap as set forth in paragraph (d)(2) of this section; and

(ii) Any compensation or other incentive from any source other than the counterparty that the swap dealer or major swap participant may receive in connection with the swap.

(b) *Scenario Analysis.* Prior to entering into a swap with a counterparty (other than a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant) that is not made available for trading, as provided in Section 2(h)(8) of the Act, on a designated contract market or swap execution facility, a swap dealer shall:

(1) Notify the counterparty that it can request and consult on the design of a scenario analysis to allow the counterparty to assess its potential exposure in connection with the swap;

(2) Upon request of the counterparty, provide a scenario analysis, which is designed in consultation with the counterparty and done over a range of assumptions, including severe downside stress scenarios that would result in a significant loss;

(3) Disclose all material assumptions and explain the calculation methodologies used to perform any requested scenario analysis; provided however, that the swap dealer is not required to disclose confidential, proprietary information about any model it may use to prepare the scenario analysis; and

(4) In designing any requested scenario analysis, consider any relevant analyses that the swap dealer undertakes for its own risk management purposes, including analyses performed as part of its “New Product Policy” specified in § 23.600(c)(3).

(c) Paragraphs (a) and (b) of this section shall not apply with respect to a transaction that is:

(1) Initiated on a designated contract market or a swap execution facility; and

(2) One in which the swap dealer or major swap participant does not know the identity of the counterparty to the transaction prior to execution.

(d) *Daily mark.* A swap dealer or major swap participant shall:

(1) For cleared swaps, notify a counterparty (other than a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant) of the counter-

party’s right to receive, upon request, the daily mark from the appropriate derivatives clearing organization.

(2) For uncleared swaps, provide the counterparty (other than a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant) with a daily mark, which shall be the mid-market mark of the swap. The mid-market mark of the swap shall not include amounts for profit, credit reserve, hedging, funding, liquidity, or any other costs or adjustments. The daily mark shall be provided to the counterparty during the term of the swap as of the close of business or such other time as the parties agree in writing.

(3) For uncleared swaps, disclose to the counterparty:

(i) The methodology and assumptions used to prepare the daily mark and any material changes during the term of the swap; provided however, that the swap dealer or major swap participant is not required to disclose to the counterparty confidential, proprietary information about any model it may use to prepare the daily mark; and

(ii) Additional information concerning the daily mark to ensure a fair and balanced communication, including, as appropriate, that:

(A) The daily mark may not necessarily be a price at which either the counterparty or the swap dealer or major swap participant would agree to replace or terminate the swap;

(B) Depending upon the agreement of the parties, calls for margin may be based on considerations other than the daily mark provided to the counterparty; and

(C) The daily mark may not necessarily be the value of the swap that is marked on the books of the swap dealer or major swap participant.

§ 23.432 Clearing disclosures.

(a) *For swaps required to be cleared—right to select derivatives clearing organization.* A swap dealer or major swap participant shall notify any counterparty (other than a swap dealer, major swap participant, securities-based swap dealer, or major securities-based swap participant) with which it entered into a swap that is subject to

mandatory clearing under Section 2(h) of the Act, that the counterparty has the sole right to select the derivatives clearing organization at which the swap will be cleared.

(b) *For swaps not required to be cleared—right to clearing.* A swap dealer or major swap participant shall notify any counterparty (other than a swap dealer, major swap participant, securities-based swap dealer, or major securities-based swap participant) with which it entered into a swap that is not subject to the mandatory clearing requirements under Section 2(h) of the Act that the counterparty:

- (1) May elect to require clearing of the swap; and
- (2) Shall have the sole right to select the derivatives clearing organization at which the swap will be cleared.

§ 23.433 Communications—fair dealing.

With respect to any communication between a swap dealer or major swap participant and any counterparty, the swap dealer or major swap participant shall communicate in a fair and balanced manner based on principles of fair dealing and good faith.

§ 23.434 Recommendations to counterparties—institutional suitability.

(a) A swap dealer that recommends a swap or trading strategy involving a swap to a counterparty, other than a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant, must:

- (1) Undertake reasonable diligence to understand the potential risks and rewards associated with the recommended swap or trading strategy involving a swap; and
- (2) Have a reasonable basis to believe that the recommended swap or trading strategy involving a swap is suitable for the counterparty. To establish a reasonable basis for a recommendation, a swap dealer must have or obtain information about the counterparty, including the counterparty's investment profile, trading objectives, and ability to absorb potential losses associated with the recommended swap or trading strategy involving a swap.

(b) *Safe harbor.* A swap dealer may fulfill its obligations under paragraph

(a)(2) of this section with respect to a particular counterparty if:

(1) The swap dealer reasonably determines that the counterparty, or an agent to which the counterparty has delegated decision-making authority, is capable of independently evaluating investment risks with regard to the relevant swap or trading strategy involving a swap;

(2) The counterparty or its agent represents in writing that it is exercising independent judgment in evaluating the recommendations of the swap dealer with regard to the relevant swap or trading strategy involving a swap;

(3) The swap dealer discloses in writing that it is acting in its capacity as a counterparty and is not undertaking to assess the suitability of the swap or trading strategy involving a swap for the counterparty; and

(4) In the case of a counterparty that is a Special Entity, the swap dealer complies with § 23.440 where the recommendation would cause the swap dealer to act as an advisor to a Special Entity within the meaning of § 23.440(a).

(c) A swap dealer will satisfy the requirements of paragraph (b)(1) of this section if it receives written representations, as provided in § 23.402(d), that:

(1) In the case of a counterparty that is not a Special Entity, the counterparty has complied in good faith with written policies and procedures that are reasonably designed to ensure that the persons responsible for evaluating the recommendation and making trading decisions on behalf of the counterparty are capable of doing so; or

(2) In the case of a counterparty that is a Special Entity, satisfy the terms of the safe harbor in § 23.450(d).

§§ 23.435–23.439 [Reserved]

§ 23.440 Requirements for swap dealers acting as advisors to Special Entities.

(a) *Acts as an advisor to a Special Entity.* For purposes of this section, a swap dealer “acts as an advisor to a Special Entity” when the swap dealer recommends a swap or trading strategy involving a swap that is tailored to the particular needs or characteristics of the Special Entity.

(b) *Safe harbors.* A swap dealer will not “act as an advisor to a Special Entity” within the meaning of paragraph (a) of this section if:

(1) With respect to a Special Entity that is an employee benefit plan as defined in § 23.401(c)(3):

(i) The Special Entity represents in writing that it has a fiduciary as defined in Section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002) that is responsible for representing the Special Entity in connection with the swap transaction;

(ii) The fiduciary represents in writing that it will not rely on recommendations provided by the swap dealer; and

(iii) The Special Entity represents in writing:

(A) That it will comply in good faith with written policies and procedures reasonably designed to ensure that any recommendation the Special Entity receives from the swap dealer materially affecting a swap transaction is evaluated by a fiduciary before the transaction occurs; or

(B) That any recommendation the Special Entity receives from the swap dealer materially affecting a swap transaction will be evaluated by a fiduciary before that transaction occurs; or

(2) With respect to any Special Entity:

(i) The swap dealer does not express an opinion as to whether the Special Entity should enter into a recommended swap or trading strategy involving a swap that is tailored to the particular needs or characteristics of the Special Entity;

(ii) The Special Entity represents in writing that:

(A) The Special Entity will not rely on recommendations provided by the swap dealer; and

(B) The Special Entity will rely on advice from a qualified independent representative within the meaning of § 23.450; and

(iii) The swap dealer discloses to the Special Entity that it is not undertaking to act in the best interests of the Special Entity as otherwise required by this section.

(c) A swap dealer that acts as an advisor to a Special Entity shall comply with the following requirements:

(1) *Duty.* Any swap dealer that acts as an advisor to a Special Entity shall have a duty to make a reasonable determination that any swap or trading strategy involving a swap recommended by the swap dealer is in the best interests of the Special Entity.

(2) *Reasonable efforts.* Any swap dealer that acts as an advisor to a Special Entity shall make reasonable efforts to obtain such information as is necessary to make a reasonable determination that any swap or trading strategy involving a swap recommended by the swap dealer is in the best interests of the Special Entity, including information relating to:

(i) The financial status of the Special Entity, as well as the Special Entity’s future funding needs;

(ii) The tax status of the Special Entity;

(iii) The hedging, investment, financing, or other objectives of the Special Entity;

(iv) The experience of the Special Entity with respect to entering into swaps, generally, and swaps of the type and complexity being recommended;

(v) Whether the Special Entity has the financial capability to withstand changes in market conditions during the term of the swap; and

(vi) Such other information as is relevant to the particular facts and circumstances of the Special Entity, market conditions, and the type of swap or trading strategy involving a swap being recommended.

(d) *Reasonable reliance on representations of the Special Entity.* As provided in § 23.402(d), the swap dealer may rely on written representations of the Special Entity to satisfy its requirement in paragraph (c)(2) of this section to make “reasonable efforts” to obtain necessary information.

§§ 23.441–23.449 [Reserved]

§ 23.450 Requirements for swap dealers and major swap participants acting as counterparties to Special Entities.

(a) *Definitions.* For purposes of this section:

(1) The term “principal relationship” means where a swap dealer or major swap participant is a principal of the representative of a Special Entity or

the representative of a Special Entity is a principal of the swap dealer or major swap participant. The term “principal” means any person listed in § 3.1(a)(1) through(3) of this chapter.

(2) The term “statutory disqualification” means grounds for refusal to register or to revoke, condition, or restrict the registration of any registrant or applicant for registration as set forth in Sections 8a(2) and 8a(3) of the Act.

(b)(1) Any swap dealer or major swap participant that offers to enter or enters into a swap with a Special Entity, other than a Special Entity defined in § 23.401(c)(3), shall have a reasonable basis to believe that the Special Entity has a representative that:

(i) Has sufficient knowledge to evaluate the transaction and risks;

(ii) Is not subject to a statutory disqualification;

(iii) Is independent of the swap dealer or major swap participant;

(iv) Undertakes a duty to act in the best interests of the Special Entity it represents;

(v) Makes appropriate and timely disclosures to the Special Entity;

(vi) Evaluates, consistent with any guidelines provided by the Special Entity, fair pricing and the appropriateness of the swap; and

(vii) In the case of a Special Entity as defined in § 23.401(c)(2) or (4), is subject to restrictions on certain political contributions imposed by the Commission, the Securities and Exchange Commission, or a self-regulatory organization subject to the jurisdiction of the Commission or the Securities and Exchange Commission; provided however, that this paragraph (b)(1)(vii) of this section shall not apply if the representative is an employee of the Special Entity.

(2) Any swap dealer or major swap participant that offers to enter or enters into a swap with a Special Entity as defined in § 23.401(c)(3) shall have a reasonable basis to believe that the Special Entity has a representative that is a fiduciary as defined in Section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002).

(c) *Independent.* For purposes of paragraph (b)(1)(iii) of this section, a representative of a Special Entity will be

deemed to be independent of the swap dealer or major swap participant if:

(1) The representative is not and, within one year of representing the Special Entity in connection with the swap, was not an associated person of the swap dealer or major swap participant within the meaning of Section 1a(4) of the Act;

(2) There is no principal relationship between the representative of the Special Entity and the swap dealer or major swap participant;

(3) The representative:

(i) Provides timely and effective disclosures to the Special Entity of all material conflicts of interest that could reasonably affect the judgment or decision making of the representative with respect to its obligations to the Special Entity; and

(ii) Complies with policies and procedures reasonably designed to manage and mitigate such material conflicts of interest;

(4) The representative is not directly or indirectly, through one or more persons, controlled by, in control of, or under common control with the swap dealer or major swap participant; and

(5) The swap dealer or major swap participant did not refer, recommend, or introduce the representative to the Special Entity within one year of the representative’s representation of the Special Entity in connection with the swap.

(d) *Safe harbor.* (1) A swap dealer or major swap participant shall be deemed to have a reasonable basis to believe that the Special Entity, other than a Special Entity defined in § 23.401(c)(3), has a representative that satisfies the applicable requirements of paragraph (b)(1) of this section, provided that:

(i) The Special Entity represents in writing to the swap dealer or major swap participant that it has complied in good faith with written policies and procedures reasonably designed to ensure that it has selected a representative that satisfies the applicable requirements of paragraph (b) of this section, and that such policies and procedures provide for ongoing monitoring of the performance of such representative consistent with the requirements of paragraph (b) of this section; and

(ii) The representative represents in writing to the Special Entity and swap dealer or major swap participant that the representative:

(A) Has policies and procedures reasonably designed to ensure that it satisfies the applicable requirements of paragraph (b) of this section;

(B) Meets the independence test in paragraph (c) of this section; and

(C) Is legally obligated to comply with the applicable requirements of paragraph (b) of this section by agreement, condition of employment, law, rule, regulation, or other enforceable duty.

(2) A swap dealer or major swap participant shall be deemed to have a reasonable basis to believe that a Special Entity defined in § 23.401(c)(3) has a representative that satisfies the applicable requirements in paragraph (b)(2) of this section, provided that the Special Entity provides in writing to the swap dealer or major swap participant the representative's name and contact information, and represents in writing that the representative is a fiduciary as defined in Section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002).

(e) *Reasonable reliance on representations of the Special Entity.* A swap dealer or major swap participant may rely on written representations of a Special Entity and, as applicable under this section, the Special Entity's representative to satisfy any requirement of this section as provided in § 23.402(d).

(f) *Chief compliance officer review.* If a swap dealer or major swap participant initially determines that it does not have a reasonable basis to believe that the representative of a Special Entity meets the criteria established in this section, the swap dealer or major swap participant shall make a written record of the basis for such determination and submit such determination to its chief compliance officer for review to ensure that the swap dealer or major swap participant has a substantial, unbiased basis for the determination.

(g) Before the initiation of a swap, a swap dealer or major swap participant shall disclose to the Special Entity in writing:

(1) The capacity in which it is acting in connection with the swap; and

(2) If the swap dealer or major swap participant engages in business with the Special Entity in more than one capacity, the swap dealer or major swap participant shall disclose the material differences between such capacities.

(h) This section shall not apply with respect to a transaction that is:

(1) Initiated on a designated contract market or swap execution facility; and

(2) One in which the swap dealer or major swap participant does not know the identity of the counterparty to the transaction prior to execution.

§ 23.451 Political contributions by certain swap dealers.

(a) *Definitions.* For the purposes of this section:

(1) The term "contribution" means any gift, subscription, loan, advance, or deposit of money or anything of value made:

(i) For the purpose of influencing any election for federal, state, or local office;

(ii) For payment of debt incurred in connection with any such election; or

(iii) For transition or inaugural expenses incurred by the successful candidate for federal, state, or local office.

(2) The term "covered associate" means:

(i) Any general partner, managing member, or executive officer, or other person with a similar status or function;

(ii) Any employee who solicits a governmental Special Entity for the swap dealer and any person who supervises, directly or indirectly, such employee; and

(iii) Any political action committee controlled by the swap dealer or by any person described in paragraphs (a)(2)(i) and (a)(2)(ii) of this section.

(3) The term "governmental Special Entity" means any Special Entity defined in § 23.401(c)(2) or (4).

(4) The term "official" of a governmental Special Entity means any person (including any election committee for such person) who was, at the time of the contribution, an incumbent, candidate, or successful candidate for elective office of a governmental Special Entity, if the office:

(i) Is directly or indirectly responsible for, or can influence the outcome of, the selection of a swap dealer by a governmental Special Entity; or

(ii) Has authority to appoint any person who is directly or indirectly responsible for, or can influence the outcome of, the selection of a swap dealer by a governmental Special Entity.

(5) The term “payment” means any gift, subscription, loan, advance, or deposit of money or anything of value.

(6) The term “regulated person” means:

(i) A person that is subject to restrictions on certain political contributions imposed by the Commission, the Securities and Exchange Commission, or a self-regulatory agency subject to the jurisdiction of the Commission or the Securities and Exchange Commission;

(ii) A general partner, managing member, or executive officer of such person, or other individual with a similar status or function; or

(iii) An employee of such person who solicits a governmental Special Entity for the swap dealer and any person who supervises, directly or indirectly, such employee.

(7) The term “solicit” means a direct or indirect communication by any person with a governmental Special Entity for the purpose of obtaining or retaining an engagement related to a swap.

(b) *Prohibitions and exceptions.* (1) As a means reasonably designed to prevent fraud, no swap dealer shall offer to enter into or enter into a swap or a trading strategy involving a swap with a governmental Special Entity within two years after any contribution to an official of such governmental Special Entity was made by the swap dealer or by any covered associate of the swap dealer; provided however, that:

(2) This prohibition does not apply:

(i) If the only contributions made by the swap dealer to an official of such governmental Special Entity were made by a covered associate:

(A) To officials for whom the covered associate was entitled to vote at the time of the contributions, provided that the contributions in the aggregate do not exceed \$350 to any one official per election; or

(B) To officials for whom the covered associate was not entitled to vote at the time of the contributions, provided that the contributions in the aggregate do not exceed \$150 to any one official per election;

(ii) To a swap dealer as a result of a contribution made by a natural person more than six months prior to becoming a covered associate of the swap dealer, provided that this exclusion shall not apply if the natural person, after becoming a covered associate, solicits the governmental Special Entity on behalf of the swap dealer to offer to enter into or to enter into a swap or trading strategy involving a swap; or

(iii) To a swap that is:

(A) Initiated on a designated contract market or swap execution facility; and

(B) One in which the swap dealer does not know the identity of the counterparty to the transaction prior to execution.

(3) No swap dealer or any covered associate of the swap dealer shall:

(i) Provide or agree to provide, directly or indirectly, payment to any person to solicit a governmental Special Entity to offer to enter into, or to enter into, a swap with that swap dealer unless such person is a regulated person; or

(ii) Coordinate, or solicit any person or political action committee to make, any:

(A) Contribution to an official of a governmental Special Entity with which the swap dealer is offering to enter into, or has entered into, a swap; or

(B) Payment to a political party of a state or locality with which the swap dealer is offering to enter into or has entered into a swap or a trading strategy involving a swap.

(c) *Circumvention of rule.* No swap dealer shall, directly or indirectly, through or by any other person or means, do any act that would result in a violation of paragraph (b) of this section.

(d) *Requests for exemption.* The Commission, upon application, may conditionally or unconditionally exempt a swap dealer from the prohibition under paragraph (b) of this section. In determining whether to grant an exemption,

the Commission will consider, among other factors:

(1) Whether the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes of the Act;

(2) Whether the swap dealer:

(i) Before the contribution resulting in the prohibition was made, implemented policies and procedures reasonably designed to prevent violations of this section;

(ii) Prior to or at the time the contribution which resulted in such prohibition was made, had no actual knowledge of the contribution; and

(iii) After learning of the contribution:

(A) Has taken all available steps to cause the contributor involved in making the contribution which resulted in such prohibition to obtain a return of the contribution; and

(B) Has taken such other remedial or preventive measures as may be appropriate under the circumstances;

(3) Whether, at the time of the contribution, the contributor was a covered associate or otherwise an employee of the swap dealer, or was seeking such employment;

(4) The timing and amount of the contribution which resulted in the prohibition;

(5) The nature of the election (e.g., federal, state or local); and

(6) The contributor's apparent intent or motive in making the contribution that resulted in the prohibition, as evidenced by the facts and circumstances surrounding the contribution.

(e) *Prohibitions inapplicable.* (1) The prohibitions under paragraph (b) of this section shall not apply to a contribution made by a covered associate of the swap dealer if:

(i) The swap dealer discovered the contribution within 120 calendar days of the date of such contribution;

(ii) The contribution did not exceed the amounts permitted by paragraphs (b)(2)(i)(A) or (B) of this section; and

(iii) The covered associate obtained a return of the contribution within 60 calendar days of the date of discovery of the contribution by the swap dealer.

(2) A swap dealer may not rely on paragraph (e)(1) of this section more than twice in any 12-month period.

(3) A swap dealer may not rely on paragraph (e)(1) of this section more than once for any covered associate, regardless of the time between contributions.

APPENDIX A TO SUBPART H OF PART 23—
GUIDANCE ON THE APPLICATION OF
§§ 23.434 AND 23.440 FOR SWAP DEALERS THAT MAKE RECOMMENDATIONS TO COUNTERPARTIES OR SPECIAL ENTITIES

The following provides guidance on the application of §§ 23.434 and 23.440 to swap dealers that make recommendations to counterparties or Special Entities.

Section 23.434—Recommendations to Counterparties—Institutional Suitability

A swap dealer that recommends a swap or trading strategy involving a swap to a counterparty, other than a swap dealer, major swap participant, security-based swap dealer or major security-based swap participant, must undertake reasonable diligence to understand the potential risks and rewards associated with the recommended swap or trading strategy involving a swap—general suitability (§ 23.434(a)(1))—and have a reasonable basis to believe that the recommended swap or trading strategy involving a swap is suitable for the counterparty—specific suitability (§ 23.434(a)(2)). To satisfy the general suitability obligation, a swap dealer must undertake reasonable diligence that will vary depending on, among other things, the complexity of and risks associated with the swap or swap trading strategy and the swap dealer's familiarity with the swap or swap trading strategy. At a minimum, a swap dealer's reasonable diligence must provide it with an understanding of the potential risks and rewards associated with the recommended swap or swap trading strategy.

Recommendation. Whether a communication between a swap dealer and a counterparty is a recommendation will turn on the facts and circumstances of the particular situation. There are, however, certain factors the Commission will consider in reaching such a determination. The facts and circumstances determination of whether a communication is a "recommendation" requires an analysis of the content, context, and presentation of the particular communication or set of communications. The determination of whether a "recommendation" has been made, moreover, is an objective rather than a subjective inquiry. An important factor in this regard is whether, given

its content, context, and manner of presentation, a particular communication from a swap dealer to a counterparty reasonably would be viewed as a “call to action,” or suggestion that the counterparty enter into a swap. An analysis of the content, context, and manner of presentation of a communication requires examination of the underlying substantive information transmitted to the counterparty and consideration of any other facts and circumstances, such as any accompanying explanatory message from the swap dealer. Additionally, the more individually tailored the communication to a specific counterparty or a targeted group of counterparties about a swap, group of swaps or trading strategy involving the use of a swap, the greater the likelihood that the communication may be viewed as a “recommendation.”

Safe harbor. A swap dealer may satisfy the safe harbor requirements of §23.434(b) to fulfill its counterparty-specific suitability duty under §23.434(a)(2) if: (1) The swap dealer reasonably determines that the counterparty, or an agent to which the counterparty has delegated decision-making authority, is capable of independently evaluating investment risks with regard to the relevant swap or trading strategy involving a swap; (2) the counterparty or its agent represents in writing that it is exercising independent judgment in evaluating the recommendations of the swap dealer; (3) the swap dealer discloses in writing that it is acting in its capacity as a counterparty and is not undertaking to assess the suitability of the recommendation; and (4) in the case of a counterparty that is a Special Entity, the swap dealer complies with §23.440 where the recommendation would cause the swap dealer to act as an advisor to a Special Entity within the meaning of §23.440(a).

To reasonably determine that the counterparty, or an agent to which the counterparty has delegated decision-making authority, is capable of independently evaluating investment risks of a recommendation, the swap dealer can rely on the written representations of the counterparty, as provided in §23.434(c). Section 23.434(c)(1) provides that a swap dealer will satisfy §23.434(b)(1)'s requirement with respect to a counterparty other than a Special Entity if it receives representations that the counterparty has complied in good faith with the counterparty's policies and procedures that are reasonably designed to ensure that the persons responsible for evaluating the recommendation and making trading decisions on behalf of the counterparty are capable of doing so. Section §23.434(c)(2) provides that a swap dealer will satisfy §23.434(b)(1)'s requirement with respect to a Special Entity if it receives representations that satisfy the terms of §23.450(d) regarding a Special Entity's qualified independent representative.

Prong (4) of the safe harbor clarifies that §23.434's application is broader than §23.440—Requirements for Swap Dealers Acting as Advisors to Special Entities. Section 23.434 is triggered when a swap dealer recommends any swap or trading strategy that involves a swap to any counterparty. However, §23.440 is limited to a swap dealer's recommendations (1) to a Special Entity (2) of swaps that are tailored to the particular needs or characteristics of the Special Entity. Thus, a swap dealer that recommends a swap to a Special Entity that is tailored to the particular needs or characteristics of the Special Entity may comply with its suitability obligation by satisfying the safe harbor in §23.434(b); however, the swap dealer must also comply with §23.440 in such circumstances.

Section 23.440—Requirements for Swap Dealers Acting as Advisors to Special Entities

A swap dealer “acts as an advisor to a Special Entity” under §23.440 when the swap dealer recommends a swap or trading strategy involving a swap that is tailored to the particular needs or characteristics of the Special Entity. A swap dealer that “acts as an advisor to a Special Entity” has a duty to make a reasonable determination that a recommendation is in the “best interests” of the Special Entities and must undertake “reasonable efforts” to obtain information necessary to make such a determination.

Whether a swap dealer “acts as an advisor to a Special Entity” will depend on: (1) Whether the swap dealer has made a recommendation to a Special Entity; and (2) whether the recommendation concerns a swap or trading strategy involving a swap that is tailored to the particular needs or characteristics of the Special Entity. To determine whether a communication between a swap dealer and counterparty is a recommendation, the Commission will apply the same factors as under §23.434, the suitability rule. However, unlike the suitability rule, which covers recommendations regarding any type of swap or trading strategy involving a swap, the “acts as an advisor rule” and “best interests” duty will be triggered only if the recommendation is of a swap or trading strategy involving a swap that is “tailored to the particular needs or characteristics of the Special Entity.”

Whether a swap is tailored to the particular needs or characteristics of the Special Entity will depend on the facts and circumstances. Swaps with terms that are tailored or customized to a specific Special Entity's needs or objectives, or swaps with terms that are designed for a targeted group of Special Entities that share common characteristics, e.g., school districts, are likely to be viewed as tailored to the particular

needs or characteristics of the Special Entity. Generally, however, the Commission would not view a swap that is “made available for trading” on a designated contract market or swap execution facility, as provided in Section 2(h)(8) of the Act, as tailored to the particular needs or characteristics of the Special Entity.

Safe harbor. Under §23.440(b)(2), when dealing with a Special Entity (including a Special Entity that is an employee benefit plan as defined in §23.401(c)(3)),¹ a swap dealer will not “act as an advisor to a Special Entity” if: (1) The swap dealer does not express an opinion as to whether the Special Entity should enter into a recommended swap or swap trading strategy that is tailored to the particular needs or characteristics of the Special Entity; (2) the Special Entity represents in writing, in accordance with §23.402(d), that it will not rely on the swap dealer’s recommendations and will rely on advice from a qualified independent representative within the meaning of §23.450; and (3) the swap dealer discloses that it is not undertaking to act in the best interests of the Special Entity.

A swap dealer that elects to communicate within the safe harbor to avoid triggering the “best interests” duty must appropriately manage its communications. To clarify the type of communications that they will make under the safe harbor, the Commission expects that swap dealers may specifically represent that they will not express an opinion as to whether the Special Entity should enter into a recommended swap or trading strategy, and that for such advice the Special Entity should consult its own advisor. Nothing in the final rule would preclude such a representation from being included in counterparty relationship documentation. However, such a representation would not act as a safe harbor under the rule where, contrary to the representation, the swap dealer does express an opinion to the Special Entity as to whether it should enter into a recommended swap or trading strategy.

If a swap dealer complies with the terms of the safe harbor, the following types of communications would not be subject to the “best interests” duty:² (1) Providing infor-

mation that is general transaction, financial, educational, or market information; (2) offering a swap or trading strategy involving a swap, including swaps that are tailored to the needs or characteristics of a Special Entity; (3) providing a term sheet, including terms for swaps that are tailored to the needs or characteristics of a Special Entity; (4) responding to a request for a quote from a Special Entity; (5) providing trading ideas for swaps or swap trading strategies, including swaps that are tailored to the needs or characteristics of a Special Entity; and (6) providing marketing materials upon request or on an unsolicited basis about swaps or swap trading strategies, including swaps that are tailored to the needs or characteristics of a Special Entity. This list of communications is not exclusive and should not create a negative implication that other types of communications are subject to a “best interests” duty.

The safe harbor in §23.440(b)(2) allows a wide range of communications and interactions between swap dealers and Special Entities without invoking the “best interests” duty, including discussions of the advantages or disadvantages of different swaps or trading strategies. The Commission notes, however, that depending on the facts and circumstances, some of the examples on the list could be “recommendations” that would trigger a suitability obligation under §23.434. However, the Commission has determined that such activities would not, by themselves, prompt the “best interests” duty in §23.440, provided that the parties comply with the other requirements of §23.440(b)(2). All of the swap dealer’s communications, however, must be made in a fair and balanced manner based on principles of fair dealing and good faith in compliance with §23.433.

Swap dealers engage in a wide variety of communications with counterparties in the normal course of business, including but not limited to the six types of communications listed above. Whether any particular communication will be deemed to be a “recommendation” within the meaning of §§23.434 or 23.440 will depend on the facts and circumstances of the particular communication considered in light of the guidance in this appendix with respect to the meaning of the term “recommendation.” Swap dealers that choose to manage their communications to comply with the safe harbors provided in §§23.434 and 23.440 will be able to

does not intend to suggest that they are “recommendations.” Thus, a swap dealer that does not “act as an advisor to a Special Entity” within the meaning of §23.440(a) is not required to comply with the safe harbor to avoid the “best interests” duty with respect to its communications.

¹The guidance in this appendix regarding the safe harbor to §23.440 is limited to the safe harbor for any Special Entity under §23.440(b)(2). A swap dealer may separately comply with the safe harbor under §23.440(b)(1) for its communications to a Special Entity that is an employee benefit plan as defined in §23.401(c)(3).

²Communications on the list that are not within the meaning of the term “acts as an advisor to a Special Entity” are outside the requirements of §23.440. By including such communications on the list, the Commission

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limit the duty they owe to counterparties, including Special Entities, provided that the parties exchange the appropriate representations.

Subpart I—Swap Documentation

SOURCE: 77 FR 21307, Apr. 9, 2012, unless otherwise noted.

§ 23.500 Definitions.

For purposes of this subpart I, the following terms shall be defined as provided.

(a) *Acknowledgment* means a written or electronic record of all of the terms of a swap signed and sent by one counterparty to the other.

(b) *Bilateral portfolio compression exercise* means an exercise in which two swap counterparties wholly terminate or change the notional value of some or all of the swaps submitted by the counterparties for inclusion in the portfolio compression exercise and, depending on the methodology employed, replace the terminated swaps with other swaps whose combined notional value (or some other measure of risk) is less than the combined notional value (or some other measure of risk) of the terminated swaps in the exercise.

(c) *Confirmation* means the consummation (electronically or otherwise) of legally binding documentation (electronic or otherwise) that memorializes the agreement of the counterparties to all of the terms of a swap transaction. A confirmation must be in writing (whether electronic or otherwise) and must legally supersede any previous agreement (electronically or otherwise). A confirmation is created when an acknowledgment is manually, electronically, or by some other legally equivalent means, signed by the receiving counterparty.

(d) *Execution* means, with respect to a swap transaction, an agreement by the counterparties (whether orally, in writing, electronically, or otherwise) to the terms of the swap transaction that legally binds the counterparties to such terms under applicable law.

(e) *Financial entity* means a counterparty that is not a swap dealer or a major swap participant and that is one of the following:

(1) A commodity pool as defined in Section 1a(5) of the Act;

(2) A private fund as defined in Section 202(a) of the Investment Advisors Act of 1940;

(3) An employee benefit plan as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income and Security Act of 1974;

(4) A person predominantly engaged in activities that are in the business of banking, or in activities that are financial in nature as defined in Section 4(k) of the Bank Holding Company Act of 1956; and

(5) A security-based swap dealer or a major security-based swap participant.

(f) *Fully offsetting swaps* means swaps of equivalent terms where no net cash flow would be owed to either counterparty after the offset of payment obligations thereunder.

(g) *Material terms* means the minimum primary economic terms (as defined in appendix 1 of part 45 of this chapter) of a swap other than the following:

(1) An indication of whether the reporting counterparty is a swap dealer with respect to the swap;

(2) An indication of whether the reporting party is a major swap participant with respect to the swap;

(3) If the reporting counterparty is not a swap dealer or a major swap participant with respect to the swap, an indication of whether the reporting counterparty is a financial entity as defined in section 2(h)(7)(c) of the Act;

(4) An indication of whether the reporting counterparty is a U.S. person;

(5) An indication that the swap will be allocated;

(6) If the swap will be allocated, or is a post-allocation swap, the legal entity identifier of the agent;

(7) An indication of whether the swap is a post-allocation swap;

(8) If the swap is a post-allocation swap, the unique swap identifier of the original transaction between the reporting counterparty and the agent;

(9) An indication of whether the non-reporting counterparty is a swap dealer with respect to the swap;

(10) An indication of whether the non-reporting counterparty is a major swap participant with respect to the swap;