event of acceleration—obligation to repay to remain subordinate. (i) A subordinated loan agreement may provide that the lender may, upon prior written notice to the security-based swap dealer and the Commission of the occurrence of any Event of Acceleration (as hereinafter defined) given no sooner than six months after the effective date of such subordinated loan agreement, accelerate the date on which the Payment Obligation of the security-based swap dealer, together with accrued interest or compensation, is scheduled to mature, to the last business day of a calendar month which is not less than six months after notice of acceleration is received by the security-based swap dealer and the Commission. Any subordinated loan agreement containing such Events of Acceleration may also provide, that if upon such accelerated maturity date the Payment Obligation of the security-based swap dealer is suspended as required by paragraph (b)(7) of this section and liquidation of the security-based swap dealer has not commenced on or prior to such accelerated maturity date, then notwithstanding paragraph (b)(7) the Payment Obligation of the security-based swap dealer with respect to such subordinated loan agreement shall mature on the day immediately following such accelerated maturity date and in any such event the Payment Obligations of the security-based swap dealer with respect to all other subordinated loan agreements then outstanding shall also mature at the same time but the rights of the respective lenders to receive Payment, together with accrued interest or compensation, shall remain subordinate as required by the provisions of this section. Events of Acceleration which may be included in a subordinated loan agreement complying with this paragraph (b)(9) shall be limited to:

(A) Failure to pay interest or any installment of principal on a subordinated loan agreement as scheduled;

(B) Failure to pay when due other money obligations of a specified material amount;

(C) Discovery that any material, specified representation or warranty of the security-based swap dealer which is included in the subordinated loan agreement and on which the subordinated loan agreement was based or continued was inaccurate in a material respect at the time made;

(D) Any specified and clearly measurable event which is included in the subordinated loan agreement and which the lender and the security-based swap dealer agree:

(*1*) Is a significant indication that the financial position of the security-based swap dealer has changed materially and adversely from agreed upon specified norms; or

(*2*) Could materially and adversely affect the ability of the security-based swap dealer to conduct its business as conducted on the date the subordinated loan agreement was made; or

(*3*) Is a significant change in the senior management of the security-based swap dealer or in the general business conducted by the security-based swap dealer from that which obtained on the date the subordinated loan agreement became effective;

(E) Any continued failure to perform agreed covenants included in the subordinated loan agreement relating to the conduct of the business of the security-based swap dealer or relating to the maintenance and reporting of its financial position; and

(ii) Notwithstanding the provisions of paragraph (b)(7) of this section, a subordinated loan agreement may provide that, if liquidation of the business of the security-based swap dealer has not already commenced, the Payment Obligation of the security-based swap dealer shall mature, together with accrued interest or compensation, upon the occurrence of an Event of Default (as hereinafter defined). Such agreement may also provide that, if liquidation of the business of the security-based swap dealer has not already commenced, the rapid and orderly liquidation of the business of the security-based swap dealer shall then commence upon the happening of an Event of Default. Any subordinated loan agreement which so provides for maturity of the Payment Obligation upon the occurrence of an Event of Default shall also provide that the date on which such Event of Default occurs shall, if liquidation of the security-based swap dealer has not already commenced, be the date on which the Payment Obligations of the security-based swap dealer with respect to all other subordinated loan agreements then outstanding shall mature but the rights of the respective lenders to receive Payment, together with accrued interest or compensation, shall remain subordinate as required by the provisions of this section. Events of Default which may be included in a subordinated loan agreement shall be limited to:

(A) The net capital of the security-based swap dealer falling to an amount below its minimum requirement under § 240.18a–1, or, if the security-based swap dealer is approved to calculate net capital under § 240.18a–1(d), its tentative net capital falling below the minimum requirement, throughout a period of 15 consecutive business days, commencing on the day the security-based swap dealer first determines and notifies the Commission, or the Commission first determines and notifies the security-based swap dealer of such fact;

(B) The Commission revoking the registration of the security-based swap dealer;

(C) The Commission suspending (and not reinstating within 10 days) the registration of the security-based swap dealer;

(D) Any receivership, insolvency, liquidation, bankruptcy, assignment for the benefit of creditors, reorganization whether or not pursuant to bankruptcy laws, or any other marshalling of the assets and liabilities of the security-based swap dealer. A subordinated loan agreement that contains any of the provisions permitted by this paragraph (b)(9) shall not contain the provision otherwise permitted by paragraph (b)(8)(i) of this section.

(c) *Miscellaneous provisions*—(1) *Prohibited cancellation.* The subordinated loan agreement shall not be subject to cancellation by either party; no Payment shall be made with respect thereto and the agreement shall not be terminated, rescinded or modified by mutual consent or otherwise if the effect thereof would be inconsistent with the requirements of §§ 240.18a–1 and 240.18a–1d.

(2) *Notification.* Every security-based swap dealer shall immediately notify the Commission if, after giving effect to all Payments of Payment Obligations under subordinated loan agreements then outstanding that are then due or mature within the following six months without reference to any projected profit or loss of the security-based swap dealer, either its net capital would fall below 120 percent of its minimum requirement under § 240.18a–1, or, if the security-based swap dealer is approved to calculate net capital under § 240.18a–1(d), its tentative net capital would fall to an amount below 120 percent of the minimum requirement.

(3) *Certain legends.* If all the provisions of a satisfactory subordinated loan agreement do not appear in a single instrument, then the debenture or other evidence of indebtedness shall bear on its face an appropriate legend stating that it is issued subject to the provisions of a satisfactory subordinated loan agreement which shall be adequately referred to and incorporated by reference.

(4) *Revolving subordinated loan agreements.* A security-based swap dealer shall be permitted to enter into a revolving subordinated loan agreement that provides for prepayment within less than one year of all or any portion of the Payment Obligation thereunder at the option of the security-based swap dealer upon the prior written approval of the Commission. The Commission, however, shall not approve any prepayment if:

(i) After giving effect thereto (and to all Payments of Payment Obligations under any other subordinated loan agreements then outstanding, the maturity or accelerated maturities of which are scheduled to fall due within six months after the date such prepayment is to occur pursuant to this provision or on or prior to the date on which the Payment Obligation in respect of such prepayment is scheduled to mature disregarding this provision, whichever date is earlier) without reference to any projected profit or loss of the security-based swap dealer, either its net capital would fall below 120 percent of its minimum requirement under § 240.18a–1, or, if the security-based swap dealer is approved to calculate net capital under § 240.18a–1(d), its tentative net capital would fall to an amount below 120 percent of the minimum requirement; or

(ii) Pre-tax losses during the latest three-month period equaled more than 15 percent of current excess net capital. Any subordinated loan agreement entered into pursuant to this paragraph (c)(4) shall be subject to all the other provisions of this section. Any such subordinated loan agreement shall not be considered equity for purposes of §240.18a–1(g), despite the length of the initial term of the loan.

(5) *Filing.* Two copies of any proposed subordinated loan agreement (including nonconforming subordinated loan agreements) shall be filed at least 30 days prior to the proposed execution date of the agreement with the Commission. The security-based swap dealer shall also file with the Commission a statement setting forth the name and address of the lender, the business relationship of the lender to the security-based swap dealer, and whether the security-based swap dealer carried an account for the lender for effecting transactions in security-based swaps at or about the time the proposed agreement was so filed. All agreements shall be examined by the Commission prior to their becoming effective. No proposed agreement shall be a satisfactory subordinated loan agreement for the purposes of this section unless and until the Commission has found the agreement acceptable and such agreement has become effective in the form found acceptable.

[84 FR 44065, Aug. 22, 2019]

§ 240.18a–2 Capital requirements for major security-based swap participants for which there is not a prudential regulator.

(a) Every major security-based swap participant for which there is not a prudential regulator and is not registered as a broker or dealer pursuant to section 15(b) of the Act (15 U.S.C. 78o(b)) must at all times have and maintain positive tangible net worth.

(b) The term *tangible net worth* means the net worth of the major security-based swap participant as determined in accordance with generally accepted accounting principles in the United States, excluding goodwill and other intangible assets. In determining net worth, all long and short positions in security-based swaps, swaps, and related positions must be marked to their market value. A major security-based swap participant must include in its computation of tangible net worth all liabilities or obligations of a subsidiary or affiliate that the participant guarantees, endorses, or assumes either directly or indirectly.

(c) Every major security-based swap participant must comply with §240.15c3–4 as though it were an OTC derivatives dealer with respect to its security-based swap and swap activities, except that §240.15c3–4(c)(5)(xiii) and (xiv) and (d)(8) and (9) shall not apply.

[84 FR 44068, Aug. 22, 2019]

§ 240.18a–3 Non-cleared security-based swap margin requirements for security-based swap dealers and major security-based swap participants for which there is not a prudential regulator.

(a) Every security-based swap dealer and major security-based swap participant for which there is not a prudential regulator must comply with this section.

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

(1) The term *account* means an account carried by a security-based swap dealer or major security-based swap participant that holds one or more non-cleared security-based swaps for a counterparty.

(2) The term *commercial end user* means a counterparty that qualifies for an exception from clearing under section 3C(g)(1) of the Act (15 U.S.C. 78o–3(g)(1)) and implementing regulations or satisfies the criteria in section 3C(g)(4) of the Act (15 U.S.C. 78o–3(g)(4)) and implementing regulations.

(3) The term *counterparty* means a person with whom the security-based swap dealer or major security-based swap participant has entered into a non-cleared security-based swap transaction.

(4) The term *initial margin amount* means the amount calculated pursuant to paragraph (d) of this section.

(5) The term *non-cleared security-based swap* means a security-based

swap that is not, directly or indirectly, submitted to and cleared by a clearing agency registered pursuant to section 17A of the Act (15 U.S.C. 78q–1) or by a clearing agency that the Commission has exempted from registration by rule or order pursuant to section 17A of the Act (15 U.S.C. 78q–1).

(6) The term *security-based swap legacy account* means an account that holds no security-based swaps entered into after the compliance date of this section and that only is used to hold one or more security-based swaps entered into prior to the compliance date of this section and collateral for those security-based swaps.

(c) *Margin requirements*—(1) *Security-based swap dealers*—(i) *Calculation required*. A security-based swap dealer must calculate with respect to each account of a counterparty as of the close of each business day:

(A) The amount of the current exposure in the account of the counterparty; and

(B) The initial margin amount for the account of the counterparty.

(ii) *Account equity requirements*. Except as provided in paragraph (c)(1)(iii) of this section, a security-based swap dealer must take an action required in paragraph (c)(1)(ii)(A) or (B) of this section by no later than the close of business of the first business day following the day of the calculation required under paragraph (c)(1)(i) of this section or, if the counterparty is located in another country and more than four time zones away, the second business day following the day of the calculation required under paragraph (c)(1)(i) of this section:

(A)(*1*) Collect from the counterparty collateral in an amount equal to the current exposure that the security-based swap dealer has to the counterparty; or

(*2*) Deliver to the counterparty collateral in an amount equal to the current exposure that the counterparty has to the security-based swap dealer, provided that such amount does not include the initial margin amount collected from the counterparty under paragraph (c)(1)(ii)(B) of this section; and

(B) Collect from the counterparty collateral in an amount equal to the initial margin amount.

(iii) *Exceptions*—(A) *Commercial end users*. The requirements of paragraph (c)(1)(ii) of this section do not apply to an account of a counterparty that is a commercial end user.

(B) *Counterparties that are financial market intermediaries*. The requirements of paragraph (c)(1)(ii)(B) of this section do not apply to an account of a counterparty that is a security-based swap dealer, swap dealer, broker or dealer, futures commission merchant, bank, foreign bank, or foreign broker or dealer.

(C) *Counterparties that use third-party custodians*. The requirements of paragraph (c)(1)(ii)(B) of this section do not apply to an account of a counterparty that delivers the collateral to meet the initial margin amount to an independent third-party custodian.

(D) *Security-based swap legacy accounts*. The requirements of paragraph (c)(1)(ii) of this section do not apply to a security-based swap legacy account.

(E) *Bank for International Settlements, European Stability Mechanism, and Multilateral development banks*. The requirements of paragraph (c)(1)(ii) of this section do not apply to an account of a counterparty that is the Bank for International Settlements or the European Stability Mechanism, or is the International Bank for Reconstruction and Development, the Multilateral Investment Guarantee Agency, the International Finance Corporation, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the European Bank for Reconstruction and Development, the European Investment Bank, the European Investment Fund, the Nordic Investment Bank, the Caribbean Development Bank, the Islamic Development Bank, the Council of Europe Development Bank, or any other multilateral development bank that provides financing for national or regional development in which the U.S. government is a shareholder or contributing member.

(F) *Sovereign entities*. The requirements of paragraph (c)(1)(ii)(B) of this section do not apply to an account of a counterparty that is a central government (including the U.S. government) or an agency, department, ministry, or central bank of a central government if the security-based swap dealer has determined that the counterparty has only a minimal amount of credit risk pursuant to policies and procedures or credit risk models established pursuant to § 240.15c3–1 or § 240.18a–1 (as applicable).

(G) *Affiliates*. The requirements of paragraph (c)(1)(ii)(B) of this section do not apply to an account of a counterparty that is an affiliate of the security-based swap dealer.

(H) *Threshold amount*. (*1*) A security-based swap dealer may elect not to collect the initial margin amount required under paragraph (c)(1)(ii)(B) of this section to the extent that the sum of that amount plus all other credit exposures resulting from non-cleared swaps and non-cleared security-based swaps of the security-based swap dealer and its affiliates with the counterparty and its affiliates does not exceed $50 million. For purposes of this calculation, a security-based swap dealer need not include any exposures arising from non-cleared security based swap transactions with a counterparty that is a commercial end user, and non-cleared swap transactions with a counterparty that qualifies for an exception from margin requirements pursuant to section 4s(e)(4) of the Commodity Exchange Act (7 U.S.C. 6s(e)(4)).

(*2*) *One-time deferral*. Notwithstanding paragraph (c)(1)(iii)(H)(*1*) of this section, a security-based swap dealer may defer collecting the initial margin amount required under paragraph (c)(1)(ii)(B) of this section for up to two months following the month in which a counterparty no longer qualifies for this threshold exception for the first time.

(I) *Minimum transfer amount*. Notwithstanding any other provision of this rule, a security-based swap dealer is not required to collect or deliver collateral pursuant to this section with respect to a particular counterparty unless and until the total amount of collateral that is required to be collected or delivered, and has not yet been collected or delivered, with respect to the counterparty is greater than $500,000.

(2) *Major security-based swap participants*—(i) *Calculation required*. A major security-based swap participant must with respect to each account of a counterparty calculate as of the close of each business day the amount of the current exposure in the account of the counterparty.

(ii) *Account equity requirements*. Except as provided in paragraph (c)(2)(iii) of this section, a major security-based swap participant must take an action required in paragraph (c)(2)(ii)(A) or (B) of this section by no later than the close of business of the first business day following the day of the calculation required under paragraph (c)(2)(i) or, if the counterparty is located in another country and more than four time zones away, the second business day following the day of the calculation required under paragraph (c)(2)(i) of this section:

(A) Collect from the counterparty collateral in an amount equal to the current exposure that the major security-based swap participant has to the counterparty; or

(B) Deliver to the counterparty collateral in an amount equal to the current exposure that the counterparty has to the major security-based swap participant.

(iii) *Exceptions*—(A) *Commercial end users*. The requirements of paragraph (c)(2)(ii)(A) of this section do not apply to an account of a counterparty that is a commercial end user.

(B) *Security-based swap legacy accounts*. The requirements of paragraph (c)(2)(ii) of this section do not apply to a security-based swap legacy account.

(C) *Bank for International Settlements, European Stability Mechanism, and Multilateral development banks*. The requirements of paragraph (c)(2)(ii)(A) of this section do not apply to an account of a counterparty that is the Bank for International Settlements or the European Stability Mechanism, or is the International Bank for Reconstruction and Development, the Multilateral Investment Guarantee Agency, the International Finance Corporation, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the European

Bank for Reconstruction and Development, the European Investment Bank, the European Investment Fund, the Nordic Investment Bank, the Caribbean Development Bank, the Islamic Development Bank, the Council of Europe Development Bank, or any other multilateral development bank that provides financing for national or regional development in which the U.S. government is a shareholder or contributing member.

(D) *Minimum transfer amount.* Notwithstanding any other provision of this rule, a major security-based swap participant is not required to collect or deliver collateral pursuant to this section with respect to a particular counterparty unless and until the total amount of collateral that is required to be collected or delivered, and has not yet been collected or delivered, with respect to the counterparty is greater than $500,000.

(3) *Deductions for collateral.* (i) The fair market value of collateral delivered by a counterparty or the security-based swap dealer must be reduced by the amount of the standardized deductions the security-based swap dealer would apply to the collateral pursuant to § 240.15c3–1 or § 240.18a–1, as applicable, for the purpose of paragraph (c)(1)(ii) of this section.

(ii) Notwithstanding paragraph (c)(3)(i) of this section, the fair market value of assets delivered as collateral by a counterparty or the security-based swap dealer may be reduced by the amount of the standardized deductions prescribed in 17 CFR 23.156 if the security-based swap dealer applies these standardized deductions consistently with respect to the particular counterparty.

(4) *Collateral requirements.* A security-based swap dealer or a major security-based swap participant when calculating the amounts under paragraphs (c)(1) and (2) of this section may take into account the fair market value of collateral delivered by a counterparty provided:

(i) The collateral:

(A) Has a ready market;

(B) Is readily transferable;

(C) Consists of cash, securities, money market instruments, a major foreign currency, the settlement currency of the non-cleared security-based swap, or gold;

(D) Does not consist of securities and/or money market instruments issued by the counterparty or a party related to the security-based swap dealer, the major security-based swap participant, or the counterparty; and

(E) Is subject to an agreement between the security-based swap dealer or the major security-based swap participant and the counterparty that is legally enforceable by the security-based swap dealer or the major security-based swap participant against the counterparty and any other parties to the agreement; and

(ii) The collateral is either:

(A) Subject to the physical possession or control of the security-based swap dealer or the major security-based swap participant and may be liquidated promptly by the security-based swap dealer or the major security-based swap participant without intervention by any other party; or

(B) The collateral is carried by an independent third-party custodian that is a bank as defined in section 3(a)(6) of the Act or a registered U.S. clearing organization or depository that is not affiliated with the counterparty or, if the collateral consists of foreign securities or currencies, a supervised foreign bank, clearing organization, or depository that is not affiliated with the counterparty and that customarily maintains custody of such foreign securities or currencies.

(5) *Qualified netting agreements.* A security-based swap dealer or major security-based swap participant may include the effect of a netting agreement that allows the security-based swap dealer or major security-based swap participant to net gross receivables from and gross payables to a counterparty upon the default of the counterparty, for the purposes of the calculations required pursuant to paragraphs (c)(1)(i) and (c)(2)(i) of this section, if:

(i) The netting agreement is legally enforceable in each relevant jurisdiction, including in insolvency proceedings;