

b. The Types of Information BIS Seeks Regarding the How Items on the CCL Could Be Tiered

As described above, there are two primary aspects to determining how an item on the CCL should be tiered—(i) the degree to which the item provides a military or intelligence advantage to the United States and (ii) its availability outside of certain groups of countries.

i. Request for Comments on How Items on the CCL Could Be Described Based on the Tier Criteria

BIS seeks public comments on whether items on the CCL that are controlled for other than solely Anti-Terrorism (AT) or Crime Control (CC) reasons provide a “critical,” “substantial,” or “significant” military or intelligence advantage to the United States, as these terms are defined above. This includes a request for comments on how existing ECCNs, down to the subparagraph level, could be further divided so that their descriptions are divided by technical or other objective characteristics consistent with the “critical,” “substantial,” and “significant” criteria. The U.S. Government will make the final decisions on what types of CCL-listed items are within the scope of any of the three tiers and, thus, may or may not accept suggestions regarding how items should be tiered. Nonetheless, BIS is interested in the public’s comments on the issue of how CCL-listed items can be described so that they are distinguished even within ECCNs by tier.

ii. Request for Comments on the Availability of Items on the CCL

BIS also seeks public comments on whether items with the capabilities and characteristics described on the CCL, and controlled for other than solely anti-terrorism (AT) reasons or Crime Control (CC) reasons, are indigenously developed, produced, or enhanced (a) almost exclusively in the United States or (b) in destinations other than Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland, Turkey, Ukraine, or the United Kingdom. For purposes of this notice, “enhanced” means that (a) the basic characteristics, such as accuracy, capability, performance, or productivity of the item listed on the CCL are improved to provide greater

functionality, and (b) the enhancement is effected in destinations outside the above-listed destinations. Information about the availability of these CCL-listed items will help BIS and the other relevant U.S. Government agencies determine the appropriate tier for these items.

Public comments should do more than merely state that specific items are available outside the United States or this group of countries. Rather, they should include specific, objectively verifiable information regarding the availability—that is, the indigenous development, production, or enhancement of the CCL-listed items. The types of availability information that will be most useful to BIS include, for example, those set out in EAR section 768.6, which are evidence that the item is (i) available-in-fact, (ii) from a non-U.S. source, (iii) in sufficient quantity, and (iv) of comparable quality.

For example, a public comment identifying a CCL-listed item as being manufactured outside the above-listed countries should ideally include (a) information about its foreign manufacturer(s), (b) relevant company catalogues or print-outs from company websites that describe the item’s technical capabilities and parameters, and (c) a detailed, documented explanation of why these parameters equal or exceed those contained in the relevant ECCN entry. Company claims that are made in catalogues or Web sites that are based on accepted international standards or other internationally recognized certification authorities are more likely to be useful to BIS than claims that are more difficult to objectively verify.

3. *Comments That Are Outside the Scope of This Notice*

As a separate regulatory initiative, BIS and the State Department are planning to coordinate on the parallel publishing of proposed rules in the **Federal Register** that would create a definition of the term “specially designed” that would be common within the CCL and that would replace the definition of “specifically designed” in the ITAR. Accordingly, this notice of inquiry does not solicit comments pertaining to the use of this term. In addition, this notice does not seek public comment on whether an item should or should not be controlled on the CCL, whether the United States should ask any of the four export control regimes to change the controls on an item, or whether an item should be controlled differently for export and reexport to different countries. General comments on the overall reform process or the other

aspects of current export controls are similarly outside the scope of this inquiry.

Comments should be submitted to BIS as described in the **ADDRESSES** section of this notice by February 7, 2011.

Dated: December 6, 2010.

Kevin J. Wolf,

Assistant Secretary of Commerce for Export Administration.

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COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 23

RIN 3038–AC96

Reporting, Recordkeeping, and Daily Trading Records Requirements for Swap Dealers and Major Swap Participants

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commodity Futures Trading Commission (Commission or CFTC) is proposing regulations to implement new statutory provisions established under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). Section 731 of the Dodd-Frank Act added new sections 4s(f) and (g) to the Commodity Exchange Act (CEA), which set forth reporting and recordkeeping requirements and daily trading records requirements for swap dealers and major swap participants. The proposed rules would establish the regulatory standards for compliance with these new sections of the CEA.

DATES: Submit comments on or before February 7, 2011.

ADDRESSES: You may submit comments, identified by RIN number 3038–AC96 and Reporting, Recordkeeping, and Daily Trading Records Requirements for Swap Dealers and Major Swap Participants, by any of the following methods:

- *Agency Web site, via its Comments Online process:* <http://comments.cftc.gov>. Follow the instructions for submitting comments through the Web site.

- *Mail:* David A. Stawick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

- *Hand Delivery/Courier:* Same as mail above.

• *Federal eRulemaking Portal*: <http://www.regulations.gov>. Follow the instructions for submitting comments. Please submit your comments using only one method.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to <http://www.cftc.gov>. You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that may be exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the established procedures in § 145.9 of the Commissions regulations, 17 CFR 145.9.

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

FOR FURTHER INFORMATION CONTACT: Sarah E. Josephson, Associate Director, 202-418-5684, sjosephson@cftc.gov; Frank N. Fisanich, Special Counsel, 202-418-5949, ffisanich@cftc.gov; or Christopher Hower, Attorney Advisor, 202-418-6703, chower@cftc.gov; Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Background

On July 21, 2010, President Obama signed the Dodd-Frank Act.¹ Title VII of the Dodd-Frank Act² amended the Commodity Exchange Act (CEA)³ to establish a comprehensive regulatory framework to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) Providing for the registration and comprehensive

regulation of swap dealers and major swap participants; (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating rigorous recordkeeping and real-time reporting regimes; and (4) enhancing the Commission's rulemaking and enforcement authorities with respect to all registered entities and intermediaries subject to the Commission's oversight.

Section 731 of the Dodd-Frank Act amends the CEA by adding a new Section 4s, which sets forth a number of requirements for swap dealers and major swap participants. Specifically, sections 4s(f) and 4s(g) of the CEA establish reporting and recordkeeping requirements and daily trading records requirements for swap dealers and major swap participants.

Section 4s(f)(1) requires swap dealers and major swap participants to "make such reports as are required by the Commission by rule or regulation regarding the transactions and positions and financial condition of the registered swap dealer or major swap participant."⁴ Under sections 4s(f)(1)(B)(i) and (ii), the Commission is authorized to prescribe the books and records requirements of "all activities related to the business of swap dealers or major swap participants," regardless of whether or not the entity has a prudential regulator. All books and records shall be open to inspection and examination by any representative of the Commission, and under section 4s(f)(1)(D), books and records relating to security-based swap agreements also must be open to inspection and examination by the Securities and Exchange Commission.

Section 4s(g)(1) requires that swap dealers and major swap participants "maintain daily trading records of the swaps of the registered swap dealer and major swap participant and all related records (including related cash and forward transactions) and recorded communications, including electronic mail, instant messages, and recordings of telephone calls." Section 4s(g)(3) requires that daily trading records for each swap transaction be identifiable by counterparty, and section 4s(g)(4) specifies that swap dealers and major swap participants maintain a "complete audit trail for conducting comprehensive and accurate trade reconstructions."

The Commission would adopt the regulations discussed below pursuant to

authority granted under sections 4s(h)(1)(D), 4s(h)(3)(D), 4s(f), 4s(g), and 8a(5) of the CEA.⁵ The Dodd-Frank Act requires the Commission to promulgate these provisions by July 15, 2011.

The proposed regulations reflect consultation with staff of the following agencies: (i) The Securities and Exchange Commission; (ii) the Board of Governors of the Federal Reserve System; (iii) the Office of the Comptroller of the Currency; and (iv) the Federal Deposit Insurance Corporation. Staff from each of these agencies has had the opportunity to provide oral and/or written comments to the proposal, and the proposed regulations incorporate elements of the comments provided.

The Commission requests comment on all aspects of the proposed regulations, as well as comment on the specific provisions and issues highlighted in the discussion below. The Commission further requests comment on an appropriate effective date for final regulations, including comment on whether it would be appropriate to have staggered or delayed effective dates for some regulations based on the nature or characteristics of the activities or entities to which they apply. Moreover, the Commission recognizes that there will be differences in the size and scope of the business of particular swap dealers and major swap participants. Therefore, comments are solicited on whether certain provisions of the proposed regulations should be modified or adjusted to reflect the differences among swap dealers and major swap participants.

II. Proposed Regulations

A. General Records Requirements

Section 4s(f)(1)(B) of the CEA requires registered swap dealers and major swap participants to keep records of all activities related to their business. Section 4s(f)(2) directs the Commission to adopt rules governing recordkeeping for swap dealers and major swap participants.

Proposed § 23.201 sets forth the records swap dealers and major swap participants must maintain. The records required under the proposed rule would include full and complete swap transaction information, including all documents on which swap information is originally recorded. Under proposed § 23.201(a)(1), such records would be required to be maintained in a manner

¹ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at <http://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm>.

² Pursuant to Section 701 of the Dodd-Frank Act, Title VII may be cited as the "Wall Street Transparency and Accountability Act of 2010."

³ 7 U.S.C. 1 et seq.

⁴ Recordkeeping related to the swap dealer's or major swap participant's financial condition reports will be prescribed in separate rulemaking proposals and are not included in the proposed rules below.

⁵ Section 8a(5) of the CEA authorizes the Commission to promulgate such regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of the CEA.

that is identifiable and searchable by transaction and by counterparty. The rule would require retention of all documents customarily generated in accordance with market practice that demonstrate the existence and nature of the transaction.

Proposed § 23.201(a)(2) would require retention of records of each position held by the swap dealer or major swap participant, identified by product and counterparty. Position records would be required to be linked to transaction records in a manner that permitted identification of the transaction that established the position. Position information would be retained in accordance with Commission regulations under part 45, which provides for unique product identifiers and unique counterparty identifiers.

Proposed § 23.201(a)(3) would require swap dealers and major swap participants to maintain records for transactions executed on a swap execution facility (SEF) or designated contract market (DCM) or cleared by a derivatives clearing organization (DCO). It should be noted, that for transactions that are executed on a SEF or DCM, or cleared on a DCO, many of the requirements of the daily trading record rule, described below, would be easily achieved through procedures established by the SEF, DCM, or DCO (e.g., confirming the transaction, valuing the transaction, or margining the position).

Proposed § 23.201(b) would require that swap dealers and major swap participants keep basic business records, including, among other things, minutes from meetings of the entity's governing body, organizational charts, and documentation of audits conducted. Additionally, certain financial records,⁶ records of complaints⁷ against personnel, and marketing materials would be required to be kept. Under proposed § 23.201(c), swap dealers and major swap participants would be required to maintain records of information required to be submitted to a swap data repository.

⁶ Financial condition reporting, including reporting for compliance with capital rules, will be proposed in a separate rulemaking.

⁷ A complaint is defined in proposed rule 23.200 as any formal or informal complaint, grievance, criticism, or concern communicated to the swap dealer or major swap participant in any format relating to, arising from, or in connection with, any trading conduct or behavior or with the swap dealer or major swap participant's performance (or failure to perform) any of its regulatory obligations, and includes any and all observations, comments, remarks, interpretations, clarifications, notes, and examinations as to such conduct or behavior communicated or documented by the complainant, swap dealer, or major swap participant.

Finally, under proposed § 23.201(d) swap dealers and major swap participants would be required to maintain records of information required to be reported on a real-time public basis and records of information relating to large notional swaps in accordance with proposed part 43 and CEA section 2(a)(13).⁸ Specifically, with regard to large notional swaps, swap dealers and major swap participants should retain a record of the rationale for determining that the swap is a large notional swap in accordance with new part 43 of the Commission regulations. Additionally, for the purposes of real-time reporting under part 43, if less specific information relating to a required data field is reported to protect the identities of the parties to a swap (e.g., underlying asset or tenor), a swap dealer or major swap participant must retain a record of the rationale for why reporting less specific information is necessary to protect the anonymity of the parties to the swap.

The Commission requests comment on all aspects of proposed § 23.201. In particular, the Commission solicits comment on the following questions:

- Should the Commission provide greater specificity on the requirement that transaction records be kept in a form and manner identifiable and searchable by transaction and counterparty?
- Are there additional types of records that should be required to be kept by swap dealers and major swap participants? For example, should drafts of documents be kept?

B. Daily Trading Records

Section 4s(g)(1) of the CEA requires that swap dealers and major swap participants maintain daily trading records of their swaps and "all related records (including related cash and forward transactions)." This section also requires that swap dealers and major swap participants maintain recorded communications, including electronic mail, instant messages, and recordings of telephone calls. Section 4s(g)(2) provides that the daily trading records shall include such information as the Commission shall require by rule or regulation. Section 4s(g)(3) requires that daily trading records for each swap transaction be identifiable by counterparty, and section 4s(g)(4) specifies that swap dealers and major swap participants maintain a "complete audit trail for conducting

comprehensive and accurate trade reconstructions."

Proposed § 23.202 would prescribe daily trading record requirements, which would include trade information related to pre-execution, execution, and post-execution data. Proposed § 23.202(a) would require swap dealers and major swap participants to ensure (1) that they preserve all information necessary to conduct a comprehensive and accurate trade reconstruction for each swap, and (2) that they maintain each transaction record as a separate electronic file identifiable and searchable by transaction and counterparty.

Proposed § 23.202(a)(1) would require registrants to keep pre-execution trade information. This would include records of all oral and written communications that lead to the execution of a swap, whether communicated by telephone, voicemail, facsimile, instant messaging, chat rooms, electronic mail, mobile device, or other digital or electronic media. This rule would require swap dealers and major swap participants to maintain recordings of telephone calls and other communications created in the normal course of its business, but would not establish an affirmative new requirement to create recordings of all telephone conversations if the complete audit trail requirement can be met through other means, such as electronic messaging or trading.

Significant technological advancements in recent years, particularly with respect to the cost of capturing and retaining copies of electronic material, including telephone communications, have made the prospect of establishing recordkeeping requirements for digital and electronic communications more economically feasible and systemically prudent. Evidence of these trends was examined in March 2008 by the United Kingdom's Financial Services Authority ("FSA"), which studied the issue of mandating the recording and retention of voice conversations and electronic communications.⁹ The FSA issued a Policy Statement detailing its findings and ultimately implemented rules relating to the recording and retention of such communications, including a recent determination that all financial service firms will be required to record any relevant communication by

⁸ The proposed real-time reporting rules under part 43 are available on the Commission's Web site at <http://www.cftc.gov>.

⁹ Financial Services Authority, "Policy Statement: Telephone Recording: recording of voice conversations and electronic communications," (March 2008).

employees on their work cell phones.¹⁰ Similar rules that mandate recording of certain voice and/or telephone conversations have been promulgated by the Hong Kong Securities and Futures Commission¹¹ and by the Autorité des Marchés Financiers in France,¹² and have been recommended by the International Organization of Securities Commissions (IOSCO).¹³

While technological advancements have made capturing and retaining such material more economically feasible, modern technologies likewise have altered the methods by which market participants conduct their business, especially the means through which such persons communicate solicitations, bids, offers, orders, instructions, trading, and prices.

On February 5, 2009, the Commission's Division of Market Oversight (DMO) issued an advisory, which made clear that the existing language of § 1.35 of the Commission's regulations "appl[ies] to records that are created or retained in an electronic format, including e-mail, instant messages, and other forms of communication created or transmitted electronically for all trading."¹⁴ The advisory, which specifically addresses the Commission's recordkeeping requirements as applicable to futures commission merchants, introducing brokers, and DCM members, states that "[t]he Commission's recordkeeping regulations, by their terms, do not distinguish between whatever medium is used to record the information covered by the regulations, including e-mails, instant messages, and any other form of communication created or transmitted electronically."

It is also noteworthy that the Commission's enforcement success in cases involving market manipulation and false reporting often has correlated

directly with the existence of high-quality recordings of voice communications and of electronic communications between the persons involved. Conversely, the Commission's enforcement capabilities have been limited in cases where such voice recordings and copies of electronic communications were not available.

Accordingly, the Commission is proposing § 23.202(a)(1), which would require swap dealers and major swap participants to maintain records of all communications provided or received concerning information that leads to the execution of a swap, whether conveyed by telephone, voicemail, facsimile, instant messaging, chat rooms, electronic mail, mobile device, or other digital or electronic media. As noted above, the proposed § 23.202(a) would require that each recorded communication be maintained as a separate electronic file identifiable and searchable by transaction and counterparty.

The Commission solicits comments on the potential costs and effects of requiring that all pre-execution communications be recorded. Additionally, the Commission requests comment on whether it should require a record of the source of quotations, including the source of any input if the quotation is generated by a formula or model. Comments also are requested regarding whether the retention period for pre-execution communications should be shorter than the retention period applicable to other business records.

Proposed § 23.202(a)(2) would require the recording of execution information, including all terms of each swap and the date and time, to the nearest minute, that the swap was executed. Post-execution data, such as records of all confirmations, reconciliations, and margining of swaps would be required under proposed § 23.202(a)(3). The collateralization of risk exposure resulting from the business of the swap dealer or major swap participant would be recorded under § 23.202(a)(4).

Proposed § 23.202(b) would require that swap dealers and major swap participants retain information of cash or forward transactions that are related to swaps as required by section 4s(g)(1). Proposed § 23.200 defines a related cash or forward transaction as "a purchase or sale for immediate or deferred physical shipment or delivery of an asset related to a swap where the swap and the related cash or forward transaction are used to hedge, mitigate the risk of, or offset one another." The recordkeeping requirements for related cash and forward transactions generally track the

same requirements as swaps. The Commission believes that requiring one approach to recordkeeping will be simpler for swap dealers and major swap participants to implement and will provide the Commission with information necessary for its regulatory oversight.

The Commission requests comment on all aspects of proposed § 23.202. With respect to records regarding related cash and forward transactions, the Commission solicits comment upon whether the Commission has provided sufficient clarity concerning what type of information would be required to be retained. The Commission also requests comment on whether it should require swap dealers and major swap participants to keep records related to high frequency trading, and what the nature of those records should be.

C. Retention and Inspection of Records

Proposed § 23.203 prescribes the form and manner in which records shall be retained, and prescribes the period of time for which maintenance of records is required. Generally speaking, § 23.203 corresponds to the recordkeeping requirements of § 1.31 insofar as records are required to be kept for a period of at least 5 years, and shall be readily accessible for the first two years of that period.

Proposed § 23.203(a) would require that records be kept at the principal place of business of the swap dealer or major swap participant. If the principal place of business is outside of the United States, then the swap dealer or major swap participant must provide the requested records at a place designated by a representative of the Commission within 72 hours of receiving the request.

Proposed § 23.203(b) would require that all records be maintained in accordance with § 1.31 of the Commission's regulations, except that records of, or related to, each swap transaction be retained until the termination, maturity, expiration, transfer, assignment, or novation of the swap, and for five years after such time. In other words, the swap dealer or major swap participant must maintain records for the life of the swap or the period in which the entity holds the position on its books (whichever is shorter), plus five additional years. Additionally, records of any swap data must be maintained in accordance with requirements under part 45, which was recently proposed by the Commission.¹⁵

¹⁰ Julia Werdigier, "Britain to Tape Traders' Cell Phones to Fight Fraud," *New York Times* (Nov. 12, 2010).

¹¹ Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission para. 3.9 (2010) (H.K.).

¹² General Regulation of the Autorité des Marchés Financiers art. 313–51 (2010) (Fr.).

¹³ Press Release, International Organization of Securities Commissions, "IOSCO Publishes Recommendations to Enhance Commodity Futures Markets Oversight," (Mar. 5, 2009), <http://www.iosco.org/news/pdf/IOSCONEWS137.pdf>. The IOSCO members on the committee formulating the recommendations included Brazil, Canada (Ontario and Quebec), Dubai, France, Germany, Hong Kong, Italy, Japan, Norway, Switzerland, the United Kingdom, and the United States.

¹⁴ A copy of the advisory, titled "Advisory for Futures Commission Merchants, Introducing Brokers, and Members of a Contract Market over Compliance with Recordkeeping Requirements," is available on the Commission's Web site at <http://www.cftc.gov>.

¹⁵ The proposed rules under part 45 are available on the Commission's Web site at <http://www.cftc.gov>.

In addition to any other comments on retention and inspection requirements, the Commission requests comment on the approach it has proposed for the retention of swap data.

D. Reports to Swap Data Repositories and Real-time Public Reporting

Section 4(s)(f)(1)(A) of the CEA requires each registered swap dealer and major swap participant to make such reports as are required by the Commission by rule or regulation regarding the transactions and positions and financial condition of the registered swap dealer or major swap participant.

Proposed § 23.204 implements the reporting requirements of Commission rules to be prescribed under CEA section 4r(a) related to reporting of swaps to a swap data repository. Proposed § 23.205 implements the reporting requirements of Commission rules to be prescribed under CEA section 2(a)(13) related to real-time public reporting of swap transactions and pricing data.¹⁶ Each of the reports required under the proposed rules would assist the Commission to monitor the swap markets and the operations of swap dealers and major swap participants and to enforce their compliance with the Commission's rules.

III. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)¹⁷ requires that agencies consider whether the rules they propose will have a significant economic impact on a substantial number of small entities. The Commission previously has established certain definitions of "small entities" to be used in evaluating the impact of its regulations on small entities in accordance with the RFA.¹⁸ The proposed rules would affect swap dealers and major swap participants.

Swap dealers and major swap participants are new categories of registrants. Accordingly, the Commission has not previously addressed the question of whether such persons are, in fact, small entities for purposes of the RFA. The Commission previously has determined, however, that futures commission merchants are not small entities for purposes of the RFA.¹⁹ The Commission's

determination was based, in part, upon the obligation of futures commission merchants to meet the minimum financial requirements established by the Commission to enhance the protection of customers' segregated funds and protect the financial condition of futures commission merchants generally.²⁰ Like futures commission merchants, swap dealers will be subject to minimum capital and margin requirements and are expected to comprise the largest global financial firms. In addition, the Commission is required to exempt from swap dealer designation any entities that engage in a *de minimis* level of swaps dealing in connection with transactions with or on behalf of customers. The Commission anticipates that this exemption would exclude small entities from registration. For essentially the same reasons that futures commission merchants have previously been determined not to be small entities and in light of the exemption from the definition of swap dealer for those engaging in a *de minimis* level of swap dealing, the Commission is hereby proposing that swap dealers not be considered "small entities" for purposes of the RFA for this rulemaking.

The Commission also has determined previously that large traders are not "small entities" for RFA purposes.²¹ In that determination, the Commission considered that a large trading position was indicative of the size of the business. Major swap participants, by statutory definition, maintain substantial positions in swaps or maintain outstanding swap positions that create substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets. Accordingly, for purposes of the RFA for this rulemaking, the Commission is hereby proposing that major swap participants not be considered "small entities" for essentially the same reasons that large traders have previously been determined not to be small entities.

Moreover, the Commission is carrying out Congressional mandates by proposing this regulation. Specifically, the Commission is proposing these regulations to comply with the Dodd-Frank Act, the aim of which is to reduce systemic risks presented by swap dealers and swap market participants through comprehensive regulation. The Commission does not believe that there are regulatory alternatives to those being proposed that would be consistent with

the statutory mandate. Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the proposed rules will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

The Paperwork Reduction Act (PRA)²² 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. This proposed rulemaking would result in new collection of information requirements within the meaning of the PRA. The Commission therefore is submitting this proposal to the Office of Management and Budget (OMB) for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The title for this collection of information is "Reporting, Recordkeeping, and Daily Trading Records Requirements for Swap Dealers and Major Swap Participants." An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. The OMB has not yet assigned this collection a control number.

The collection of information under these proposed regulations is necessary to implement certain provisions of the CEA, as amended by the Dodd-Frank Act. Specifically, it is essential to ensuring that each swap dealer and major swap participant maintains records of all the activities related to its business including, but not limited to, daily trading records and transaction reporting as required by section 4s(f) of the Act. The recordkeeping requirement also is necessary for a complete audit trail to conduct comprehensive and accurate trade reconstructions. Commission staff would use the information required to be preserved or reported when conducting the Commission's examination and oversight program with respect to the applicable registrants.

If the proposed regulations are adopted, responses to this collection of information would be mandatory. The Commission will protect proprietary information according to the Freedom of Information Act and 17 CFR part 145, "Commission Records and Information." In addition, section 8(a)(1) of the CEA strictly prohibits the Commission, unless specifically authorized by the CEA, from making public "data and information that would separately disclose the business transactions or market positions of any person and

¹⁶ In a recent release of proposed Part 43 and pursuant to CEA section 2(a)(13)(A), reporting parties, for the purposes of real-time public reporting, will be obligated to report certain data fields relating to swaps "as soon as technologically practicable" following the execution of a swap.

¹⁷ 5 U.S.C. 601 *et seq.*

¹⁸ 47 FR 18618, Apr. 30, 1982.

¹⁹ *Id.* at 18619.

²⁰ *Id.*

²¹ *Id.* at 18620.

²² 44 U.S.C. 3501 *et seq.*

trade secrets or names of customers.” The Commission is also required to protect certain information contained in a government system of records according to the Privacy Act of 1974, 5 U.S.C. 552a.

1. Information Provided by Reporting Entities/Persons

Swap dealers and major swap participants would be required to comply with the recordkeeping requirements of §§ 23.201, 23.202, and 23.203 and the reporting requirements of §§ 23.204 and 23.205. The proposed regulations generally would require swap dealers and major swap participants to keep transaction and position records of their swaps (including daily trading records of swaps and related cash and forward transactions); to maintain specified business records (including records related to the swap dealer’s or major swap participant’s governance, financial status, and complaints); to report certain swap transaction data to swap data repositories; to satisfy certain real time public reporting requirements; and to maintain records of information reported to swap data repositories and for real time public reporting purposes.

The annual burden associated with these proposed regulations is estimated to be 2,096 hours, at an annual cost of \$209,600 for each swap dealer and major swap participant. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose, or provide information to or for a federal agency. This hourly burden primarily results from the recordkeeping obligations that would be imposed by proposed §§ 23.201 and 23.202.

Specifically, the Commission anticipates that swap dealers and major swap participants will spend approximately eight hours per trading day (2,016 hours per year) compiling and maintaining transaction records, including daily trading records. The Commission believes that swap dealers and major swap participants already maintain the vast majority of the required transaction records (particularly execution and post-execution records) as part of their customary and usual business practices and that any additional expenditure generally would be limited to the costs associated with developing and preserving certain pre-execution data and communications set forth in proposed § 23.202, which currently may not be kept by affected registrants (for example, records of oral and written communications and records related to quotes, bids, and offers) as well as the

time required to input any unique transaction terms into electronic recordkeeping systems. The Commission believes that registrants will expend an additional 63 hours per year compiling daily records of their positions, identified by product and counterparty, as required by proposed § 23.201.

The Commission estimates that each swap dealer and major swap participant will spend 5 hours per year compiling the complaint records required by the proposed regulations. This approximation is based on the belief that the affected registrants primarily engage in principal to principal transactions, which are less likely to generate complaints than transactions conducted on an agency basis. It also assumes that most registrants possess pre-existing complaint recordkeeping systems and thus, any hourly burden imposed would be limited to the time required to document and retain the specific complaint information mandated by the rule that is not already kept. Finally, the Commission estimates the hourly burden associated with compliance with the marketing communication recordkeeping requirement to be approximately 12 hours per year. The Commission expects that swap dealers and market participants presently maintain records of most of their marketing presentations, advertisements, sales literature, and marketing communications as part of their customary business practices and, thus, any new hourly burden is limited to the requirement to maintain a record of compliance with relevant marketing regulations.

The Commission believes that several aspects of the rule would not result in any additional hourly burdens upon affected registrants. For example, the required records of transactions executed on a swap execution facility or designated contract market or transactions cleared by a designated clearing organization would be the same transaction and daily trading records accounted for previously and, therefore, have not been assigned an extra hourly burden. The Commission also expects that swap dealers and major swap participants currently make and/or maintain their meeting minutes; organizational charts; the resumes of relevant managers; records of their assets, liabilities, income, and expenses; and other governance or financial records in the ordinary course of their businesses.

Finally, the Commission does not anticipate that the requirements to report swap transactions to swap data repositories in accordance with

proposed § 23.204, to engage in real time public reporting of swap transaction and pricing data in accordance with proposed § 23.205, and to maintain the electronic systems and procedures necessary to report transactions and data in the manner required by the regulations would result in any additional hourly burdens or costs to swap dealers and major swap participants other than those set forth in the recently proposed part 45 regulations for swap data recordkeeping and reporting²³ and in the recently proposed part 43 regulations governing real-time public reporting of swap transaction data²⁴ promulgated as part of the Commission’s implementation of the Dodd-Frank Act.

It is not currently known how many swap dealers and major swap participants will become subject to these rules, and this will not be known to the Commission until the registration requirements for these entities become effective after July 16, 2011, the date on which the Dodd-Frank Act becomes effective. The Commission believes that there are likely to be approximately 200 swap dealers and 50 major swap participants that would be required to register with the Commission. It has chosen to take a more conservative approach for PRA purposes, however, and has estimated that there will be a combined number of 300 swap dealers and major swap participants who will be required to comply with the recordkeeping and reporting obligations imposed by the proposed regulations. The Commission estimated the number of affected entities based on industry data.

According to recent Bureau of Labor Statistics, the mean hourly wage of an

²³ The proposed rules are available on the Commission’s Web site at <http://www.cftc.gov>. The Commission has estimated the average hour burden incurred by swap dealers and major swap participants in connection with reporting to swap data repositories to be 2,080 hours. This estimate was based upon the assumption that a significant number of swap dealers and major swap participants would dedicate the equivalent of at least one full time employee to ensuring compliance with the relevant reporting obligations (2,080 hours = 52 weeks × 5 days × 8 hours). The Commission noted that it believed this assumption to be reasonable due to the volume of swap transactions to be processed by such entities, the information required by proposed regulations and the frequency with which reports would be made. The Commission also estimated the cost of the obligation to report a unique swap identifier to other registered entities and swap participants to be 6 annual burden hours per entity and the estimated cost of reporting their ownership and affiliation information into a confidential database to be 2 hours per entity.

²⁴ The Commission has estimated that swap dealers and major swap participants will incur 2,080 annual burden hours in connection with the real-time reporting requirements.

employee under occupation code 11–3031, “Financial Managers,” (which includes operations managers) that is employed by the “Securities and Commodity Contracts Intermediation and Brokerage” industry is \$74.41.²⁵ Because swap dealers and major swap participants include large financial institutions whose operations management employees’ salaries may exceed the mean wage, the Commission has estimated the cost burden of these proposed regulations based upon an average salary of \$100 per hour.

Accordingly, the estimated hour burden was calculated as follows:

Recordkeeping: Transaction Records (including Daily Trading Records)

Number of registrants: 300.

Frequency of collection: Daily.

Estimated number of responses per registrant: 252 [252 trading days].

Estimated aggregate number of responses: 75,600 [300 registrants × 252 trading days].

Estimated annual burden per registrant: 2,016 hours [252 trading days × 8 hours per trading day].

Estimated aggregate annual hour burden: 604,800 hours [300 registrants × 252 trading days × 8 hours per trading day].

Recordkeeping: Position Records

Number of registrants: 300.

Frequency of collection: Daily.

Estimated number of responses per registrant: 252 [252 trading days].

Estimated aggregate number of responses: 75,600 [300 registrants × 252 trading days].

Estimated annual burden per registrant: 63 hours [252 trading days × .25 hours per record].

Estimated aggregate annual hour burden: 18,900 hours [300 registrants × 252 trading days × .25 hours per record].

Recordkeeping: Complaints

Number of registrants: 300.

Frequency of collection: As needed.

Estimated number of responses per registrant: 5.

Estimated aggregate number of responses: 1,500 [300 registrants × 5 complaints per registrant].

Estimated annual burden per registrant: 5.

Estimated aggregate annual hour burden: 1,500 [300 registrants × 5 complaints per registrant].

Recordkeeping: Marketing Communications

Number of registrants: 300.

Frequency of collection: As needed.

Estimated number of responses per registrant: 12 (monthly compilation of records).

Estimated aggregate number of responses: 3,600 [300 registrants × 12 monthly compilations].

Estimated annual burden per registrant: 12 hours [1 hour × 12 months].

Estimated aggregated annual hour burden: 3,600 [300 registrants × 12 monthly compilations].

Based upon the above, the aggregate hour burden cost for all registrants is 628,800 burden hours and \$62,880,000 [628,800 × \$100 per hour].

In addition to the per hour burden discussed above, the Commission anticipates that swap dealers and major swap participants may incur certain start-up costs in connection with the proposed recordkeeping obligations. Such costs would include the expenditures related to developing and installing new technology or re-programming or updating existing recordkeeping technology and systems to enable the swap dealer or major swap participant to collect, capture, process, maintain, and re-produce any newly required records. The Commission believes that swap dealers and major swap participants generally could adapt their current infrastructure to accommodate the new or amended technology and thus no significant infrastructure expenditures would be needed. The Commission estimates the programming burden hours associated with technology improvements to be 160 hours.

According to recent Bureau of Labor Statistics, the mean hourly wages of computer programmers under occupation code 15–1021 and computer software engineers under program codes 15–1031 and 1032 are between \$34.10 and \$44.94.²⁶ Because swap dealers and major swap participants generally will be large entities that may engage employees with wages above the mean, the Commission has conservatively chosen to use a mean hourly programming wage of \$60 per hour. Accordingly, the start-up burden associated with the required technological improvements would be \$9,600 [\$60 × 160 hours] per affected registrant or \$2,880,000 in the aggregate.

2. Information Collection Comments

The Commission invites the public and other federal agencies to comment on any aspect of the recordkeeping burdens discussed above. The Commission specifically request comment upon its determination that certain of the proposed recordkeeping requirements would not impose any additional information collection

burdens upon affected registrants and the appropriateness of the burden hours attributed to other recordkeeping obligations.²⁷ Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments in order to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (ii) evaluate the accuracy of the Commission’s estimate of the burden of the proposed collection of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Comments may be submitted directly to the Office of Information and Regulatory Affairs, by fax at (202) 395–6566 or by e-mail at OIRASubmissions@omb.eop.gov. Please provide the Commission with a copy of submitted comments so that all comments can be summarized and addressed in the final rule preamble. Refer to the **ADDRESSES** section of this notice of proposed rulemaking for comment submission instructions to the Commission. A copy of the supporting statements for the collections of information discussed above may be obtained by visiting RegInfo.gov. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication.

C. Cost-Benefit Analysis

Section 15(a) of the CEA²⁸ requires the Commission to consider the costs and benefits of its actions before issuing a rulemaking under the CEA. By its terms, section 15(a) does not require the Commission to quantify the costs and benefits of a new regulation or to determine whether the benefits of the rule outweigh its costs; rather, it requires that the Commission “consider” the costs and benefits of its actions.

²⁷ The Commission notes that, because it has not regulated swap dealers, swap market participants, or the swaps market in the past, it has not previously collected data on the number of particular swap market participants or the average number of daily transactions in which particular types of swaps market participants engage.

²⁸ 7 U.S.C. 19(a).

²⁵ <http://www.bls.gov/oes/current/oes113031.htm>.

²⁶ <http://www.bls.gov/oes/current/oes113031.htm>.

Section 15(a) further specifies that costs and benefits of a proposed rulemaking shall be evaluated in light of 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 may, in its discretion, give greater weight to any one of the five enumerated considerations and could, in its discretion, determine that, notwithstanding its costs, a particular regulation was necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the CEA.

Summary of proposed requirements. The proposed regulations would implement certain provisions of section 731 of the Dodd-Frank Act, which adds new sections 4s(f) and 4s(g) to the Commodity Exchange Act. The proposed regulations would set forth certain duties imposed upon swap dealers and major swap participants registered with the Commission with regard to recordkeeping and reporting of information and data in connection with such entities' activities in the swap market.

Costs. With respect to costs, the Commission has determined that for swap dealers and major swap participants, costs to institute recordkeeping and reporting systems and personnel in order to satisfy the new regulatory requirements are far outweighed by the benefits to the financial system as a whole. As described above, it is expected that the any additional cost imposed by the recordkeeping requirements of proposed regulations 23.201, 23.202, and 23.203²⁹ would be minimal because the information and data required to be recorded is information and data a prudent swap dealer or major swap participant would already maintain during the ordinary course of its business. Moreover, most swap dealers and major swap participants have adequate, existing resources and recordkeeping structures that are capable of adjusting to the new regulatory framework without material diversion of resources away from commercial operations.

Benefits. With respect to benefits, the Commission has determined that the

²⁹ As discussed previously, the cost burdens associated with the reporting requirements contained in proposed regulation 23.204 and 23.205 are addressed in separately proposed rulemakings.

proposed regulations would require a swap dealer or major swap participant to keep records and make reports that will result in reduced risk and greater market integrity in the swap market. Reporting to swap data repositories under 23.204 will provide regulators with a more transparent view of the swap market when such data is aggregated. Such reporting would further the goal of avoiding market disruptions and financial losses to market participants and the general public. Therefore, the Commission believes it is prudent to prescribe recordkeeping and reporting requirements for swap dealers and major swap participants.

The proposed regulations also would promote appropriate back office data management, thereby fostering better risk management. The proposed regulations also would reward efficiency insofar as swap dealers and major swap participants that operate efficiently would have lower operating costs and thus would require fewer resources to comply with the regulations. Finally, the proposed regulations are designed to ensure that swap dealers and major swap participants can sustain their market operations and meet their financial obligations to market participants, thus contributing to the integrity of the financial markets. Therefore, the Commission believes it is prudent to require risk management requirements for swap dealers and major swap participants.

Public Comment. The Commission invites public comment on its cost-benefit considerations. Commentators are also invited to submit any data or other information that they may have quantifying or qualifying the costs and benefits of the proposed rules with their comment letters.

List of Subjects in 17 CFR Part 23

Antitrust, Commodity futures, Conduct standards, Conflict of Interests, Major swap participants, Reporting and recordkeeping, Swap dealers, Swaps.

For the reasons stated in this release, the Commission proposes to amend 17 CFR part 23 as proposed to be added by FR Doc. 2010-29024, published on November 23, 2010 (75 FR 71379) as follows:

PART 23—SWAP DEALERS AND MAJOR SWAP PARTICIPANTS

1. The authority citation for part 23 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.

2. Subpart F, (consisting of §§ 23.200, 23.201, 23.202, 23.203, 23.204 and 23.205) is added to read as follows:

Subpart F—Reporting, Recordkeeping, and Daily Trading Records Requirements for Swap Dealers and Major Swap Participants

Sec.

23.200	Definitions.
23.201	Required records.
23.202	Daily trading records.
23.203	Records; retention and inspection.
23.204	Reporting to swap data repositories.
23.205	Real-time public reporting.

Subpart F—Reporting, Recordkeeping, and Daily Trading Records Requirements for Swap Dealers and Major Swap Participants

§ 23.200 Definitions.

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

(a) *Business trading unit* means any department, division, group, or personnel of a swap dealer or major swap participant or any of its affiliates, whether or not identified as such, that performs or is involved in any pricing, trading, sales, purchasing, marketing, advertising, solicitation, structuring, or brokerage activities on behalf of a registrant.

(b) *Clearing unit* means any department, division, group, or personnel of a registrant or any of its affiliates, whether or not identified as such, that performs any proprietary or customer clearing activities on behalf of a registrant.

(c) *Complaint* means any formal or informal complaint, grievance, criticism, or concern communicated to the swap dealer or major swap participant in any format relating to, arising from, or in connection with, any trading conduct or behavior or with the swap dealer or major swap participant's performance (or failure to perform) any of its regulatory obligations, and includes any and all observations, comments, remarks, interpretations, clarifications, notes, and examinations as to such conduct or behavior communicated or documented by the complainant, swap dealer, or major swap participant.

(d) *Counterparty* means any party to a derivative. When referring to a derivative between a swap dealer or major swap participant and any other person, "counterparty" means such other person.

(e) *Executed* means the completion of the execution process.

(f) *Execution* means, with respect to a swap, an agreement by the parties (whether orally, in writing,

electronically, or otherwise) to the terms of a swap that legally binds the parties to such swap terms under applicable law.

(g) *Governing body* typically means, with respect to:

- (1) A sole proprietorship, the proprietor;
- (2) A corporation, its board of directors;
- (3) A partnership, any general partner;
- (4) A limited liability company or limited liability partnership, the manager, managing member or those members vested with management authority; and
- (5) Any other person, the body or person with ultimate decision-making authority over the activities of such person.

(h) *Prudential regulator* has the meaning given to such term in section 1a(39) of the Commodity Exchange Act and includes 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 Association, and the Federal Housing Finance Agency, as applicable to the swap dealer or major swap participant. The term also includes the Federal Deposit Insurance Corporation, with respect to any financial company as defined in section 201 of the Dodd-Frank Wall Street Reform and Consumer Protection Act or any insured depository institution under the Federal Deposit Insurance Act, and with respect to each affiliate of any such company or institution.

(i) *Registered entity* has the meaning given to such term in section 1a(40) of the Commodity Exchange Act, and includes boards of trade designated as contract markets, derivatives clearing organizations, swap execution facilities, and swap data repositories.

(j) *Related cash or forward transaction* means a purchase or sale for immediate or deferred physical shipment or delivery of an asset related to a swap where the swap and the related cash or forward transaction are used to hedge, mitigate the risk of, or offset one another.

(k) *Swap confirmation* means the consummation (electronically or otherwise) of legally binding documentation (electronic or otherwise) that memorializes the agreement of the parties to all the terms of the swap. A confirmation must be in writing (whether electronic or otherwise) and must legally supersede any previous agreement (electronically or otherwise).

§ 23.201 Required records.

(a) *Transaction and position records.* Each swap dealer and major swap

participant shall keep full, complete, and systematic records, together with all pertinent data and memoranda, of all its swaps activities. Such records shall include:

(1) *Transaction records.* Records of each transaction, including all documents on which transaction information is originally recorded. Such records shall be kept in a form and manner identifiable and searchable by transaction and by counterparty, and shall include:

(i) All documents customarily generated in accordance with market practice that demonstrate the existence and nature of an order or transaction, including, but not limited to, records of all orders (filled, unfilled, or cancelled); correspondence; journals; memoranda; ledgers; confirmations; risk disclosure documents; statements of purchase and sale; contracts; invoices; warehouse receipts; documents of title; and

(ii) The daily trading records required to be kept in accordance with § 23.202.

(2) *Position records.* Records of each position held by each swap dealer and major swap participant, identified by product and counterparty, including records reflecting whether each position is "long" or "short" and whether the position is cleared. Position records shall be linked to transaction records in a manner that permits identification of the transactions that established the position.

(3) *Records of transactions executed on a swap execution facility or designated contract market or cleared by a derivatives clearing organization.* Records of each transaction executed on a swap execution facility or designated contract market or cleared by a derivatives clearing organization maintained in compliance with the Act and Commission regulations.

(b) *Business records.* Each swap dealer and major swap participant shall keep full, complete, and systematic records of all activities related to its business as a swap dealer or major swap participant, including but not limited to:

(1) *Governance.*

(i) Minutes of meetings of the governing body and relevant committee minutes, including handouts and presentation materials;

(ii) Organizational charts for its governing body and relevant committees, business trading unit, clearing unit, risk management unit, and all other relevant units or divisions;

(iii) Biographies or resumes of managers, senior supervisors, officers, and directors;

(iv) Job descriptions for manager, senior supervisor, officer, and director

positions, including job responsibilities and scope of authority;

(v) Internal and external audit, risk management, compliance, and consultant reports (including management responses); and

(vi) Business and strategic plans for the business trading unit.

(2) *Financial records.*

(i) Records reflecting all assets and liabilities, income and expenses, and capital accounts as required by the Act and Commission regulations; and

(ii) All other financial records required to be kept under the Act and Commission regulations.

(3) *Complaints.*

(i) A record of each complaint received by the swap dealer or major swap participant concerning any partner, member, officer, employee, or agent. The record shall include the complainant's name, address, and account number; the date the complaint was received; the name of all persons identified in the complaint; a description of the nature of the complaint; the disposition of the complaint, and the date the complaint was resolved.

(ii) A record indicating that each counterparty of the swap dealer or major swap participant has been provided with a notice containing the physical address, email or other widely available electronic address, and telephone number of the department of the swap dealer or major swap participant to which any complaints may be directed.

(4) *Marketing and sales materials.* All marketing and sales presentations, advertisements, literature, and communications, and a record documenting that the swap dealer or major swap participant has complied with, or adopted policies and procedures reasonably designed to establish compliance with, all applicable federal requirements, Commission regulations, and the rules of any self-regulatory organization of which the swap dealer or major swap participant is a member.

(c) *Records of data reported to a swap data repository.* With respect to each swap, each swap dealer and major swap participant shall identify, retain, and produce for inspection all information and data required to be reported in accordance with part 45 of this chapter, along with a record of the date and time the swap dealer or major swap participant made the report.

(d) *Records of real-time reporting data.*

(1) Each swap dealer and major swap participant shall identify, retain, and produce for inspection all information and data required to be reported in

accordance with part 43 of this chapter, along with a record of the date and time the swap dealer or major swap participant made the report.

(2) When the swap dealer or major swap participant reports a less specific data field in accordance with part 43 of this chapter in order to protect the anonymity of the participants to such swap as permitted under part 43 of this chapter, the record shall contain the rationale for reporting a less specific data field.

(3) Each swap dealer and major swap participant shall identify and retain a record of any determination that any swap is a block trade or large notional swap, as defined in part 43 of this chapter. When the swap dealer or major swap participant enters into such a swap, the record shall contain the rationale for determining that the swap is a large notional swap, in accordance with part 43 of this chapter.

§ 23.202 Daily trading records.

(a) *Daily trading records for swaps.* Each swap dealer and major swap participant shall make and keep daily trading records of all swaps it executes, including all documents on which transaction information is originally recorded. Each swap dealer and major swap participant shall ensure that its records include all information necessary to conduct a comprehensive and accurate trade reconstruction for each swap. Each swap dealer and major swap participant shall maintain each transaction record as a separate electronic file identifiable and searchable by transaction and counterparty.

(1) *Pre-execution trade information.* Each swap dealer and major swap participant shall make and keep pre-execution trade information, including, at a minimum, records of all oral and written communications provided or received concerning quotes, solicitations, bids, offers, instructions, trading, and prices, that lead to the execution of a swap, whether communicated by telephone, voicemail, facsimile, instant messaging, chat rooms, electronic mail, mobile device or other digital or electronic media. Such records shall include, but are not limited to:

(i) Reliable timing data for the initiation of the trade that would permit complete and accurate trade reconstruction; and

(ii) A record of the date and time, to the nearest minute, using Coordinated Universal Time (UTC), by timestamp or other timing device, for each quotation provided to, or received from, the counterparty prior to execution.

(2) *Execution trade information.* Each swap dealer and major swap participant shall make and keep trade execution records, including:

(i) All terms of each swap, including all terms regarding payment or settlement instructions, initial and variation margin requirements, option premiums, payment dates, and any other cash flows;

(ii) The trade ticket for each swap (which, together with the time of execution of each swap, shall be immediately recorded electronically for further processing);

(iii) The unique swap identifier, as required by § 45.4(a) of this chapter, for each swap;

(iv) A record of the date and time of execution of each swap, to the nearest minute, using Coordinated Universal Time (UTC), by timestamp or other timing device;

(v) The name of the counterparty with which each such swap was executed, including its unique counterparty identifier, as required by § 45.4(b) of this chapter;

(vi) The date and title of the agreement to which each swap is subject, including but not limited to, any master swap netting agreement or swap credit support agreement;

(vii) The product name of each swap, including its unique product identifier, as required by § 45.4(c) of this chapter;

(viii) The price at which the swap was executed;

(ix) Fees or commissions and other expenses, identified by transaction; and

(x) Any other information relevant to the swap.

(3) *Post-execution trade information.* Each swap dealer and major swap participant shall make and keep records of post-execution trade information containing an itemized record of all relevant post-trade processing and events.

(i) Records of post-trade processing and events shall include all of the following, as applicable:

- (A) Confirmation;
- (B) Termination;
- (C) Novation;
- (D) Amendment;
- (E) Assignment;
- (F) Netting;
- (G) Compression;
- (H) Reconciliation;
- (I) Valuation;
- (J) Margining;
- (K) Collateralization; and
- (L) Central clearing.

(ii) Each swap dealer and major swap participant shall make and keep a record of all swap confirmations, along with the date and time, to the nearest minute, using Coordinated Universal

Time (UTC), by timestamp or other timing device; and

(iii) Each swap dealer and major swap participant shall make and keep a record of each swap portfolio reconciliation, including the number of portfolio reconciliation discrepancies and the number of swap valuation disputes (including the time-to-resolution of each valuation dispute and the age of outstanding valuation disputes, categorized by transaction and counterparty);

(iv) Each swap dealer and major swap participant shall make and keep a record of each swap portfolio compression exercise in which it participates, including the dates of the compression, the swaps included in the compression, the identity of the counterparties participating in the exercise, the results of the compression, and the name of the third-party entity performing the compression, if any; and

(v) Each swap dealer and major swap participant shall make and keep a record of each swap that it centrally clears, categorized by transaction and counterparty.

(4) *Ledgers.* Each swap dealer and major swap participant shall make and keep ledgers (or other records) reflecting the following:

(i) Payments and interest received;

(ii) Moneys borrowed and moneys loaned;

(iii) The daily calculation of the value of each outstanding swap;

(iv) The daily calculation of current and potential future exposure for each counterparty;

(v) The daily calculation of initial margin to be posted by the swap dealer or major swap participant for each counterparty and the daily calculation of initial margin to be posted by each counterparty;

(vi) The daily calculation of variation margin payable to or receivable from each counterparty;

(vii) The daily calculation of the value of all collateral, before and after haircuts, held by or posted by the swap dealer or major swap participant;

(viii) All transfers of collateral, including any substitutions of collateral, identifying in sufficient detail the amounts and types of collateral transferred; and

(ix) All charges against and credits to each counterparty's account, including funds deposited, withdrawn, or transferred, and charges or credits resulting from losses or gains on transactions.

(b) *Daily trading records for related cash and forward transactions.* Each swap dealer and major swap participant shall make and keep daily trading

records of all related cash or forward transactions it executes, including all documents on which the related cash or forward transaction information is originally recorded. Each swap dealer and major swap participant shall ensure that its records include all information necessary to conduct a comprehensive and accurate trade reconstruction for each related cash or forward transaction. Each swap dealer and major swap participant shall maintain each transaction record as a separate electronic file identifiable and searchable by transaction and by counterparty. Such records shall include, but are not limited to:

(1) A record of all oral and written communications provided or received concerning quotes, solicitations, bids, offers, instructions, trading, and prices, that lead to the conclusion of a related cash or forward transaction, whether communicated by telephone, voicemail, facsimile, instant messaging, chat rooms, electronic mail, mobile device or other digital or electronic media;

(2) Reliable timing data for the initiation of the transaction that would permit complete and accurate trade reconstruction;

(3) A record of the date and time, to the nearest minute, using Coordinated Universal Time (UTC), by timestamp or other timing device, for each quotation provided to, or received from, the counterparty prior to execution;

(4) A record of the date and time of execution of each related cash or forward transaction, to the nearest minute, using Coordinated Universal Time (UTC), by timestamp or other timing device;

(5) All terms of each related cash or forward transaction;

(6) The price at which the related cash or forward transaction was executed; and

(7) A record of the daily calculation of the value of the related cash or forward transaction and any other relevant financial information.

§ 23.203 Records; retention and inspection.

(a) *Location of records.* (1) All records required to be kept by a swap dealer or major swap participant by the Act and by Commission regulations shall be kept at the principal place of business of the swap dealer or major swap participant or such other principal office as shall be designated by the swap dealer or major swap participant. If the principal place of business is outside of the United States, its territories or possessions, then upon the request of a Commission representative, the swap dealer or major swap participant must provide such

records as requested at the place in the United States, its territories, or possessions designated by the representative within 72 hours after receiving the request.

(2) *Contact information.* Each swap dealer and major swap participant shall maintain for each of its offices a listing, by name or title, of each person at that office who, without delay, can explain the types of records the swap dealer or major swap participant maintains at that office and the information contained in those records.

(b) *Record retention.* (1) The records required to be maintained by this chapter shall be maintained in accordance with the provisions of § 1.31, except as provided in paragraphs (b)(2) and (3) of this section. All records required to be kept by the Act and by Commission regulations shall be kept for a period of five years from the date the record was made and shall be readily accessible during the first two (2) years of the five-year period. All such records shall be open to inspection by any representative of the Commission, the United States Department of Justice, or any applicable prudential regulator. Records relating to swaps defined in section 1a(47)(A)(v) shall be open to inspection by any representative of the Commission, the United States Department of Justice, the Securities and Exchange Commission, or any applicable prudential regulator.

(2) Records of any swap or related cash or forward transaction shall be kept until the termination, maturity, expiration, transfer, assignment, or novation date of the transaction, and for a period of five years after such date. Such records shall be readily accessible until the termination, maturity, expiration, transfer, assignment, or novation date of the transaction and during the first two years of the 5-year period following such date. All such records shall be open to inspection by any representative of the Commission, the United States Department of Justice, or any applicable prudential regulator. Records relating to swaps defined in section 1a(47)(A)(v) shall be open to inspection by any representative of the Commission, the United States Department of Justice, the Securities and Exchange Commission, or any applicable prudential regulator.

(3) Records of any swap data reported in accordance with part 45 of this chapter shall be maintained in accordance with the requirements of § 45.2 of this chapter.

§ 23.204 Reports to swap data repositories.

(a) *Reporting of swap transaction data to swap data repositories.* Each swap dealer and major swap participant shall report all information and data in accordance with part 45 of this chapter.

(b) *Electronic reporting of swap transaction data.* Each swap dealer and major swap participant shall have the electronic systems and procedures necessary to transmit electronically all information and data required to be reported in accordance with part 45 of this chapter.

§ 23.205 Real-time public reporting.

(a) *Real-time public reporting of swap transaction and pricing data.* Each swap dealer and major swap participant shall report all information and swap transaction and pricing data required to be reported in accordance with the real-time public recording requirements in part 43 of this chapter.

(b) *Electronic reporting of swap transaction data.* Each swap dealer and major swap participant shall have the electronic systems and procedures necessary to transmit electronically all information and data required to be reported in accordance with part 43 of this chapter.

Issued in Washington, DC, on December 1, 2010, by the Commission.

David A. Stawick,
Secretary of the Commission.

Appendices to Reporting, Recordkeeping, and Daily Trading Records Requirements for Swap Dealers and Major Swap Participants—Commission Voting Summary and Statements of Commissioners

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendix 1—Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Dunn, Sommers, Chilton and O'Malia voted in the affirmative.

Appendix 2—Statement of Chairman Gary Gensler

I support the proposed rule regarding reporting, recordkeeping and daily trading records for swap dealers and major swap participants. The rule establishes the records to be maintained by swap dealers and major swap participants and the required reporting by such entities. This proposal will help increase transparency and promote market integrity. The proposed rules are consistent with the Congressional requirement that swap dealers and major swap participants

comply with rigorous recordkeeping and real-time reporting regimes.

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DEPARTMENT OF THE TREASURY

31 CFR Part 103

RIN 1506-AB02

Financial Crimes Enforcement Network: Anti-Money Laundering Program and Suspicious Activity Report Filing Requirements for Residential Mortgage Lenders and Originators

AGENCY: Financial Crimes Enforcement Network (“FinCEN”), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: FinCEN, a bureau of the Department of the Treasury (“Treasury”), is issuing proposed rules defining non-bank residential mortgage lenders and originators as loan or finance companies for the purpose of requiring them to establish anti-money laundering programs and report suspicious activities under the Bank Secrecy Act.

DATES: Written comments on this notice of proposed rulemaking (“NPRM”) must be submitted on or before February 7, 2011.

ADDRESSES:

FinCEN: You may submit comments, identified by Regulatory Identification Number (RIN) 1506-AB02, by any of the following methods:

- *Federal E-rulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments. Include 1506-AB02 in the submission. Refer to Docket Number FINCEN-2010-0001.

- *Mail:* FinCEN, P.O. Box 39, Vienna, VA 22183. Include 1506-AB02 in the body of the text. Please submit comments by one method only. Comments submitted in response to this NPRM will become a matter of public record. Therefore, you should submit only information that you wish to make publicly available.

Inspection of comments: Public comments received electronically or through the U.S. Postal Service sent in response to a notice and request for comment will be made available for public review as soon as possible on <http://www.regulations.gov>. Comments received may be physically inspected in the FinCEN reading room located in Vienna, Virginia. Reading room appointments are available weekdays (excluding holidays) between 10 a.m.

and 3 p.m., by calling the Disclosure Officer at (703) 905-5034 (not a toll-free call).

FOR FURTHER INFORMATION CONTACT: The FinCEN regulatory helpline at (800) 949-2732 and select Option 6.

SUPPLEMENTARY INFORMATION:

I. Background

The Bank Secrecy Act (“BSA”) ¹ authorizes the Secretary of the Treasury (the “Secretary”) to issue regulations requiring financial institutions to keep records and file reports that the Secretary determines “have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism.” ² In addition, the Secretary is authorized to impose anti-money laundering program requirements on financial institutions. ³ The authority of the Secretary to administer the BSA has been delegated to the Director of FinCEN. ⁴

A. Anti-Money Laundering Programs

Financial institutions are required to establish anti-money laundering (“AML”) programs that include, at a minimum: (1) The development of internal policies, procedures, and controls; (2) the designation of a compliance officer; (3) an ongoing employee training program; and (4) an independent audit function to test programs. ⁵ When prescribing minimum standards for AML programs, FinCEN must “consider the extent to which the requirements imposed under [the AML program requirement] are commensurate with the size, location, and activities of the financial institutions to which such regulations apply.” ⁶

The BSA defines the term “financial institution” to include, in part, “a loan or finance company.” ⁷ On April 29, 2002, and again on November 6, 2002, FinCEN temporarily exempted this

category of financial institution, among others, from the requirement to establish an AML program. ⁸ The purpose of the temporary exemption was to enable Treasury and FinCEN to study the exempted categories of institutions and to consider the extent to which AML requirements should be applied to them, taking into account their specific characteristics and money laundering vulnerabilities.

The statutory mandate that all financial institutions establish an anti-money laundering program is a key element in the national effort to prevent and detect money laundering and the financing of terrorism. This NPRM proposes to apply the AML program requirement to companies performing specified services in connection with residential mortgages. This would put these institutions on par with depository institutions performing such services in this respect. ⁹

B. Suspicious Activity Reporting Programs

With the enactment of 31 U.S.C. 5318(g) in 1992, ¹⁰ Congress authorized the Secretary to require financial institutions to report suspicious transactions. As amended by the USA PATRIOT Act, subsection (g)(1) states:

The Secretary may require any financial institution, and any director, officer, employee, or agent of any financial institution, to report any suspicious transaction relevant to a possible violation of law or regulation.

There has been a regulatory gap between the BSA’s coverage of depository institutions and residential mortgage lenders and originators in that the latter are currently not subject to BSA requirements, the Suspicious Activity Report (“SAR”) foremost among them. Imposing a SAR requirement would address this regulatory gap. Moreover, a SAR requirement would potentially expand the kinds of activities being reported to FinCEN’s BSA database, thereby giving our regulatory and law enforcement partners a more complete picture, both on a systemic and case-specific level, of

⁸ See 31 CFR 103.170; 67 FR 21113 (Apr. 29, 2002), as amended at 67 FR 67549 (Nov. 6, 2002) and corrected at 67 FR 68935 (Nov. 14, 2002).

⁹ See 31 CFR 103.120.

¹⁰ 31 U.S.C. 5318(g) was added to the BSA by section 1517 of the Annunzio-Wylie Anti-Money Laundering Act, Title XV of the Housing and Community Development Act of 1992, Public Law 102-550; it was expanded by section 403 of the Money Laundering Suppression Act of 1994 (the Money Laundering Suppression Act), Title IV of the Riegle Community Development and Regulatory Improvement Act of 1994, Public Law 103-325, to require designation of a single government recipient for reports of suspicious transactions.

¹ “Bank Secrecy Act” is the name that has come to be applied to the Currency and Foreign Transactions Reporting Act (Titles I and II of Pub. L. 91-508), its amendments, and the other statutes referring to the subject matter of that Act. These statutes are codified at 12 U.S.C. 1829b, 12 U.S.C. 1951-1959, and 31 U.S.C. 5311-5314 and 5316-5332, and notes thereto.

² 31 U.S.C. 5311.

³ 31 U.S.C. 5318(h).

⁴ See Treasury Order 180-01 (Sept. 26, 2002).

⁵ 31 U.S.C. 5318(h).

⁶ Public Law 107-56 § 352(c), 115 Stat. § 322, codified at 31 U.S.C. 5318 note. Public Law 107-56 is the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (“USA PATRIOT Act”).

⁷ 31 U.S.C. 5312(a)(2)(P).