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Swap Data Repositories: Registration Standards, Duties and Core Principles; Final Rule

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 49

RIN 3038–AD20

Swap Data Repositories: Registration Standards, Duties and Core Principles

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission (''CFTC'' or ''Commission'') is adopting its regulations to implement section 21 of the Commodity Exchange Act (''CEA'' or ''Act''), which establishes registration requirements, statutory duties, core principles and certain compliance obligations for registered swap data repositories (''SDRs''). Section 21 of the CEA was added by section 728 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'').

DATES: Effective date is October 31, 2011. Applicants at that time may apply for registration as SDRs but are not required to do so. Mandatory registration and compliance with the registration rules will occur upon the effective date of the swap definition rulemaking, which the Commission will publish at a later date.

FOR FURTHER INFORMATION CONTACT: For questions relating to this rulemaking: Jeffrey P. Burns, Assistant General Counsel, Office of the General Counsel (''OGC''), at (202) 418.5101, *jburns@cftc.gov;* Susan Nathan, Senior Special Counsel, Division of Market Oversight (''DMO''), at (202) 418.5133, *snathan@cftc.gov;* or Adedayo Banwo, Counsel, OGC, at (202) 418.6249, *abanwo@cftc.gov,* Commodity Futures Trading Commission, Washington, DC 20581. With respect to questions relating to registration processing and compliance matters: Riva Spear Adriance, Associate Director, DMO, at (202) 418.5494, *radriance@cftc.gov* and Sebastian Pujol Schott, Associate Deputy Director, Market Compliance, DMO, at (202) 418.5641, *sschott@cftc.gov,* respectively.

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I. Background

A. Overview

On July 21, 2010, President Obama signed into law the Dodd-Frank Act.[1] Title VII[2] amended the CEA[3] to establish a comprehensive new regulatory framework for swaps and security-based swaps. The legislation was enacted 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 (''SDs'') and major swap participants (''MSPs''); (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating robust recordkeeping and real-time reporting regimes; and (4) enhancing the Commission's rulemaking and enforcement authorities with respect to, among others, all registered entities and intermediaries subject to the Commission's oversight.

To enhance transparency, promote standardization and reduce systemic risk, section 727 of the Dodd-Frank Act added to the CEA new section 2(a)(13)(G), which requires all swaps—whether cleared or uncleared—to be reported to SDRs,[4] which are new registered entities created by section 728 of the Dodd-Frank Act.[5] SDRs are required to perform specified functions related to the collection and

[1] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010), available 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] Section 721 of the Dodd-Frank Act amends section 1a of the CEA to add the definition of SDR. Pursuant to section 1a(48), the term ''swap data repository means any person that collects and maintains information or records with respect to transactions or positions in, or the terms and conditions of, swaps entered into by third parties for the purpose of providing a centralized recordkeeping facility for swaps.'' 7 U.S.C. 1a(48).

[5] The Commission notes that currently there are global trade repositories for credit, interest rate and equity swaps. Since 2009, all G–14 dealers have submitted credit swap data to the Depository Trust and Clearing Corporation's (''DTCC'') Trade Information Warehouse. In January 2010 TriOptima launched the Global OTC Derivatives Interest Rate Trade Reporting Repository after selection by the Rates Steering Committee of the International Swaps and Derivatives Association (''ISDA'') to provide a trade repository to collect information on trades in interest rate swaps. In August 2010, DTCC also launched the Equity Derivatives Reporting Repository for equity swaps and other equity derivatives. Other entities may also perform trade repository functions on a more limited basis based on various business models and/or regional or localized considerations. In addition, a variety of firms also provide ancillary services and functions essential to the efficient operation of trade reporting of swaps. Recently, ISDA in anticipation of the implementation of swap data reporting and SDR requirements related to the Dodd-Frank Act selected DTCC and a joint venture between DTCC's Deriv/SERV and EFETnet as ''global'' repositories for interest rates available at *http://www2.isda.org/attachment/MzExMQ==/InterestRatesRepositorySelection.pdf* and commodities available at *http://www2.isda.org/attachment/MzIwNw==/CommodityRepositorySelection.pdf.* In addition, the Global FX Divisions of the Association of Financial Markets Europe (AFME), Securities industry and Financial Markets (SIFMA) and the Asian Securities industry and Financial Markets (ASIFMA) have recommended a partnership with DTCC and SWIFT for the purpose of developing a foreign exchange trade repository available at *http://www.sifma.org/news/news.aspx?id=8589934651.*

maintenance[6] of swap transaction data and information and to make such data and information directly and electronically available to regulators. Section 728 of the Dodd-Frank Act added to the CEA new section 21 governing registration and regulation of SDRs and directed the Commission to promulgate rules governing those duties and responsibilities. Section 21 requires that SDRs register with the Commission regardless of whether they are also licensed as a bank or registered as a security-based swap data repository with the Securities and Exchange Commission (''SEC''), and to submit to inspection and examination by the Commission.[7]

To register and maintain registration with the Commission, SDRs are required to comply with specific duties and core principles enumerated in section 21 as well as other requirements that the Commission may prescribe by rule. As described more fully in the Commission's Notice of Proposed Rulemaking (''SDR NPRM''),[8] new section 21(c) mandates that SDRs (1) accept data; (2) confirm with both counterparties the accuracy of submitted data; (3) maintain data according to standards prescribed by the Commission; (4) provide direct electronic access to the Commission or any designee of the Commission (including another registered entity); (5) provide public reporting of swap data in the form and frequency required by the Commission; (6) establish automated systems for monitoring and analyzing data (including the use of end user clearing exemptions) at the direction of the Commission; (7) maintain user privacy; (8) on a confidential basis, pursuant to section 8 of the CEA,[9] upon request and after notifying the Commission, make data available to other specified regulators; and (9) establish and maintain emergency and business continuity-disaster recovery procedures (''BC–DR''). In connection with the sharing of confidential information with other regulators, the SDR must, pursuant to new section 21(d), receive a written agreement from such regulator, prior to sharing the information, stating that it will abide by the confidentiality provisions of section 8 and agree to indemnify both the SDR and the Commission against any litigation expenses relating to information provided under section 8.

New section 21(e) also added a provision that each SDR designate a chief compliance officer (''CCO'') with specified duties. New section 21(f) established three focused core principles. First, unless necessary or appropriate to achieve the purposes of the CEA, an SDR may not adopt any rule or take any action that results in any unreasonable restraint or trade, or impose any material anticompetitive burden on the trading, clearing or reporting of transactions. Second, each SDR must establish transparent governance arrangements to fulfill the public interest requirements of the CEA and support the objectives of the Federal government, owners and participants. Third, each SDR must establish and enforce rules to minimize conflicts of interest in the SDR's decision-making processes and establish a process for resolving conflicts of interest. Section 21(f) further directs the Commission to establish additional duties for SDRs to minimize conflicts of interest, protect data, ensure compliance and guarantee the safety and security of the SDR.[10]

B. International Considerations

Section 752(a) of the Dodd-Frank Act directs the Commission to consult and coordinate with foreign regulatory authorities regarding the establishment of consistent international standards for the regulation of swaps and various ''swap entities.'' The Commission is committed to a cooperative international approach to the registration and regulation of SDRs and has consulted extensively with various foreign regulatory authorities in promulgating both its proposed and final regulations. In this regard, both the proposed and final part 49 regulations reflect the Commission's intent to harmonize our approach to the extent possible with the European Commission's regulatory proposal related to OTC derivatives, central counterparties and trade repositories.[11] The Commission's part 49 regulations also largely adopt the recommendations of the May 2010 ''CPSS–IOSCO Consultative Report, Considerations for Trade Repositories in the OTC Derivatives Market'' (''Working Group Report'').[12] The Commission believes that the Dodd-Frank Act and the part 49 regulations are consistent with the goals of the Working Group Report. As noted in the SDR NPRM, section 21 of the CEA does not authorize the Commission to exempt any entity performing the functions of an SDR from the registration requirements or any other duties established by the Dodd-Frank Act.[13] Certain non-U.S. swap activity is excluded, however, from the reach of the Dodd-Frank Act and Commission regulations pursuant to section 2(i) of the CEA.[14]

C. Summary of the Proposed Part 49 Regulations

Against this background, the Commission developed and published for comment part 49 of the

[6] *See* Commission, Notice of Proposed Rulemaking: Swap Data Recordkeeping and Reporting Requirements, 75 FR 76574 (Dec. 8, 2010) (''Data NPRM''). The Data NPRM, among other things, proposed regulations governing SDR data collection and reporting responsibilities under part 45 of the Commission's regulations.

[7] Section 21(a)(1)(B) permits derivatives clearing organizations (''DCOs'') to register as SDRs.

[8] Commission, Notice of Proposed Rulemaking: Swap Data Repositories, 75 FR 80898 (Dec. 23, 2010).

[9] Section 8(e) of the CEA, 7 U.S.C. 12(e), establishes among other things the conditions under which the Commission may furnish information obtained in connection with the administration of the CEA to any department or agency of the United States. Such information shall not be disclosed by such department or agency except in any action or proceeding under the laws of the United States to which it, the Commission or the United States is a party.

[10] Pursuant to this provision, the Commission also may develop additional duties taking into account evolving standards of the United States and the international community. Section 21(f)(4) of the CEA, 7 U.S.C. 24a(f)(4). This provision is sometimes referred to as ''Core Principle 4.''

[11] *See* Proposal for a Regulation of the European Parliament and of the Council on OTC Derivatives, Central Counterparties, and Trade Repositories (the ''European Commission Proposal''), COM (2010). *See also* SDR NPRM *supra* note 8 at 80899–80900 and note 16. The proposal, if implemented, would become a part of the European Union's framework for financial supervision. The European Union is composed of 27 member states and the European Securities and Markets Authority will supervise the European securities markets along with the national regulators of the member states.

[12] This working group was jointly established by the Committee on Payment and Settlement Systems (''CPSS'') of the Bank of International Settlements (''BIS'') and the Technical Committee of the International Organization of Securities Commissions (''IOSCO''). The Working Group Report presented a set of factors to consider in connection with the design, operation and regulation of SDRs. A significant focus of the Working Group Report is access to SDR data by appropriate regulators: the report urges that a trade repository ''should support market transparency by making data available to relevant authorities and the public in line with their respective information needs.'' The Working Group Report is available at *http://www.bis.org/publ/cpss90.pdf. See also* CPSS–IOSCO Consultative Report, Principles of Financial Market Infrastructures (March 2011) available at *http://www.bis.org/publ/cpss94.pdf.* See also Financial Stability Board, Implementing OTC Derivatives Market Reforms, October 25, 2010 (''FSB Report''); FSB, Derivative Market Reforms, Progress Report on Implementation, April 15, 2010 (''FSB Progress Report'').

[13] Section 721(d) of the Dodd-Frank Act, which as relevant here amended the Commission's exemptive authority under section 4c(1) of the CEA, does not permit the Commission to grant exemptions with respect to new section 21 of the CEA unless expressly authorized.

[14] Section 2(i) of the CEA, as amended by section 722 of the Dodd-Frank Act, excludes from U.S. jurisdiction all swap activity that does not have a ''direct and significant connection with activities in, or effect on, commerce of the United States'' unless such activity contravenes regulations necessary to prevent evasion. 7 U.S.C. 2(i)(1)–(2).

Commission's regulations establishing provisions applicable to the registration and regulation of SDRs.[15] Proposed part 49 of the Commission's regulations included procedures and substantive requirements to achieve and maintain registration as an SDR—including proposed standards for compliance with each of the statutory duties enumerated in section 21(c), the three core principles outlined in section 21(f), and proposed additional duties consistent with the authority conferred by section 21(f)(4).

1. Proposed Regulations Related to Registration

Section 21(a)(1)(A) makes it unlawful for any person, unless registered with the Commission, directly or indirectly to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of an SDR. Consistent with this statutory directive, the Commission proposed regulations establishing procedural and substantive requirements governing registration as an SDR.[16] The proposed regulations required that SDRs specify the asset class or classes for which they will accept swap data and undertake to accept all swaps in asset classes for which they have specified.[17] If the applicant is a foreign entity, the proposed regulations specified that it be required to certify, and provide an opinion of counsel, that as a matter of law it is able to provide the Commission with prompt access to its books and records and to submit to onsite inspection and examination by the Commission.[18] The proposal established the standard of review as well as the standards for denial, suspension and revocation of registration. In addition, the proposed rules provided a ''provisional registration'' for SDR applicants that are in substantial compliance with the registration standards set forth in the regulations.[19] With respect to Commission review of SDR rules and rule amendments, the proposed rules provided procedures by which an applicant for SDR registration may either request that the Commission approve any or all of its rules or self-certify that its rules comply with the CEA or Commission regulations thereunder (''self certification'').[20]

The proposed regulations separately required SDRs to file with the Commission a notice of an equity interest transfer of ten percent or more, as defined in the Commission's revised part 40 rules[21] and specified the necessary information and related notifications. Similarly, the proposed rules described the procedures and requirements for registering successor entities of an SDR.[22]

2. Proposed Regulations Related to Statutory Duties of SDRs

Section 21(c) of the CEA prescribes the minimum duties required of SDRs. To register and maintain registration, an SDR must (i) accept swap data as prescribed by the Commission; (ii) confirm with both counterparties to a swap the accuracy of the data; (iii) maintain the data submitted; (iv) provide the Commission or its designee (including another registered entity) with direct electronic access to the swap data; (v) provide the information prescribed by the Commission to comply with the public reporting requirements set forth in section 2(a)(13) of the CEA; (vi) establish automated systems for monitoring, screening, and analyzing swap data; (vii) maintain the privacy and confidentiality of any and all swap data received by the SDR; (viii) provide access to the swap data to specified appropriate domestic and foreign regulators; and (ix) adopt and implement emergency and BC–DR procedures.

Pursuant to the authority granted by sections 21(f)(4)[23] and 8a(5)[24] of the CEA, the Commission proposed to include in part 49 four additional duties requiring SDRs to (i) adopt and implement system safeguards, including BC–DR plans; (ii) maintain sufficient financial resources; (iii) furnish market participants with a disclosure document setting forth the risks and costs associated with using the services of an SDR; and (iv) provide fair and open access and fees and charges that are equitable and non-discriminatory. Proposed §§ 49.9–49.18 and 49.23–49.27 described the standards for compliance with each of these duties.

3. Proposed Regulations Related to Data Acceptance, Accuracy and Recordkeeping

Sections 21(c)(1)–(5) of the CEA, as adopted by section 728 of the Dodd-Frank Act, address the duties of SDRs in connection with accepting and maintaining swap data, ensuring accuracy and reliability, and providing direct electronic data access to the Commission or its designee.[25] To implement section 21(c)(1), the Commission proposed that SDRs adopt policies and procedures that will enable them to electronically accept data and other regulatory information, and to accept all swaps in an asset class, or classes, for which they have registered.[26] The Commission also proposed that SDRs establish policies and procedures to prevent a valid swap from being invalidated, altered or modified through the SDR's confirmation or recording process, and provide facilities for effectively resolving disputes concerning the accuracy of swap data and positions recorded by the SDR.[27]

Proposed § 49.11 implemented section 21(c)(2) of the CEA and specified that an SDR adopt policies and procedures to ensure the accuracy of swap data reported to it, and must confirm with both counterparties to the swap[28] the accuracy of data and information submitted by them.[29]

Proposed § 49.12 implemented section 21(c)(3) of the CEA and required

[15] A full description and discussion of each proposed rule can be found in the SDR NPRM, *supra* note 8.

[16] Proposed §§ 49.3–49.4 and 49.6–49.7; Proposed Form SDR.

[17] Proposed § 49.10. Proposed § 49.2(a)(2) defines the term ''asset class'' as those swaps in a particular broad category of goods, services or commodities underlying a swap. The asset classes include credit, equity, interest rates, currency, other commodities, and such other asset classes as may be determined by the Commission.

[18] Proposed § 49.7.

[19] Proposed § 49.3(b).

[20] Proposed § 49.8.

[21] *See* Commission, Notice of Proposed Rulemaking: Revisions to part 40 (Provisions Common to Registered Entities), 75 FR 67282 (Nov. 2, 2010)(''Part 40 NPRM'') and Final rule: Revisions to part 40 (Provisions Common to Registered Entities), 76 FR 44776 (July 27, 2011)(''Part 40 Adopting Release'') (collectively, ''part 40'').

[22] Proposed § 49.6.

[23] Section 21(f)(4) of the CEA; *see supra* note 10.

[24] Section 8a(5) of the CEA, 7 U.S.C. 12a(5), authorizes the Commission to promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or accomplish any of the purposes of the CEA. In connection with SDRs, section 21(a)(3)(A)(ii), 7 U.S.C. 24a(3)(A)(ii), specifically requires that an SDR, to be registered and maintain registration, must comply with any requirement that the Commission may impose by rule or regulation pursuant to section 8a(5) of the CEA.

[25] In a companion rulemaking under new part 45 of its regulations, the Commission has proposed data elements that must be reported to SDRs and has in addition provided specific requirements for SDRs relating to (i) determining which counterparty must report the swap data to the SDR; (ii) third-party facilitation of swap data reporting; (iii) reporting to a single SDR in connection with the reporting of swap data; and (iv) reporting errors and omissions. *See* Data NPRM *supra* note 6.

[26] Proposed § 49.10.

[27] *Id.*

[28] These proposed confirmation requirements would not apply to real-time public reporting. *See* proposed § 43.3(f) set forth in Commission, Notice of Proposed Rulemaking: Real-Time Public Reporting of Swap Transaction Data, 74 FR 76140 (Dec. 7, 2010) (the ''Real-Time NPRM'').

[29] As noted, the form and content of the swap data ultimately will be established in the Commission's part 45 regulations related to data elements and standards. The Data NPRM detailed and defined the terms ''confirmation'' and ''confirmation data.'' *See* Data NPRM *supra* note 6.

SDRs to maintain the books and records of all activity and data relating to swaps reported to the SDR, consistent with recordkeeping and reporting rules to be established in new parts 43 and 45 of the Commission's regulations.[30] As proposed, § 49.12 required that SDR books and records be open to inspection on request by any representative of the Commission, the United States Department of Justice, the SEC or any representative of a prudential regulator authorized by the Commission. The proposal would further require each SDR that publicly disseminates swap data in real time to comply with the real-time reporting requirements prescribed in part 43.[31]

The Commission proposed two requirements in connection with the provision of direct electronic access mandated by section 21(c)(4) of the CEA. First, SDRs would be required to provide the Commission or its designee with connectivity and access to the SDR's database; second, SDRs would be required to electronically deliver to the Commission or its designee certain data in the form and manner prescribed by the Commission.[32] The Commission also proposed that SDRs be required to provide it with monitoring tools identical to those provided to the SDR's compliance staff and CCO.[33] In connection with section 21(c)(5)'s mandate that SDRs establish automated systems for monitoring, screening and analyzing swap data, the Commission proposed that at this time SDRs establish the infrastructure necessary to fulfill the statutory requirement.[34]

4. Proposed Regulations Relating to Data Privacy, Confidentiality and Access

Section 21(c)(6) of the CEA requires that an SDR maintain the privacy of all swap transaction information that it receives from an SD, counterparty or any other registered entity. The Commission recognized that data related to real-time public reporting is, by its nature, publicly available, while detailed core data intended for use by the Commission and other regulators is subject to statutory confidential treatment. Accordingly, the Commission proposed to implement section 21(c)(6)'s mandate—and also in part the conflicts of interest core principle applicable to SDRs (''Core Principle 3'')—by requiring that ''SDR Information'' that is not subject to real-time reporting be treated as non-public and confidential and may not be accessed, disclosed, or used for purposes unrelated to SDR responsibilities under the CEA unless the submitters of the data explicitly agree to such use.[35] The proposed regulation also directed SDRs to establish and maintain safeguards, policies and procedures addressing the misappropriation or misuse of swap data that the Commission is prohibited from disclosing pursuant to section 8 of the CEA (''Section 8 Material'')[36] or similar material, such as intellectual property.

The Commission proposed to prohibit the use of SDR data for commercial or business purposes by the SDR or any of its affiliated entities with a limited exception where the SDR has received the express written consent of the market participants who submitted the swap data.[37] The proposal required that SDRs develop and maintain firewalls to protect data they are required to maintain, and permitted access to third-party service providers so long as they have implemented stringent confidentiality procedures to protect data and information from improper disclosure.[38]

Section 21(c)(7) requires that an SDR make data available to certain domestic and foreign regulators (''Appropriate Domestic Regulator'' or ''Appropriate Foreign Regulator'') under specified circumstances. To implement this provision, the Commission proposed definitions and standards for determining appropriateness—such as an existing memorandum of understanding (''MOU'') or similar agreement executed with the Commission—as well as procedures for gaining access to data maintained by SDRs.[39] Separately, section 21(d) mandates that prior to receipt of any requested data or information from an SDR, the Appropriate Foreign or Appropriate Domestic Regulator must execute a ''Confidentiality and Indemnification Agreement'' with the SDR. The Commission proposed to implement this provision by requiring that such an agreement be executed between SDRs and each appropriate regulator.[40] The Commission acknowledged in the SDR NPRM that this requirement could have the unintended effect of inhibiting access to data maintained by SDRs. Consistent with the international harmonization envisioned by section 752 of the Dodd-Frank Act, the Commission stated that it will endeavor to provide sufficient access to SDR data to Appropriate Foreign and Domestic Regulators. In that regard, the Commission noted that pursuant to section 8(e) of the CEA it may share confidential information in its possession with any foreign futures authority, department or agency of any foreign government or political subdivision thereof.[41]

5. Proposed Regulations Related to Emergency Procedures

To implement section 21(c)(8), the Commission proposed § 49.23 to require SDRs to adopt specific policies and procedures for the exercise of emergency authority. The Commission based its proposals on existing emergency authority concepts—in particular, the application guidance for former designated contract market (''DCM'') Core Principle 6.[42] As proposed, § 49.23 required SDRs to enumerate the circumstances in which it is authorized to invoke its emergency authority, applicable procedures, and the range of measures it is authorized to take in response to an emergency. Further, the emergency policies and procedures adopted by an SDR must specifically address conflicts of interest and include a requirement that the SDR's CCO be consulted in any emergency that may raise conflicts of interest. The proposal further required an SDR to identify to the Commission the persons authorized to exercise emergency authority and the chain of command, and to promptly notify the

[30] *See* § 45.2 set forth in the Data NPRM *supra* note 6 and § 43.3 set forth in Real-Time NPRM *supra* note 28.

[31] *Id.*

[32] Proposed § 49.17.

[33] *Id.*

[34] Proposed §§ 49.13 and 49.14. The latter proposal was designed to implement the Commission's program to monitor and prevent abuse of end-user clearing exemption claims. *See* section 2(h)(7) of the CEA, as amended, which creates a framework by which certain swaps may be exempt from clearing if one of its counterparties is (i) not a financial entity; (ii) is using swaps to hedge or mitigate commercial risk; and (iii) notifies the Commission as to how it generally meets the financial obligations associated with entering into non-cleared swaps (the ''end-user clearing exemption''). *See* Commission, Notice of Proposed Rulemaking: End-User Exemption to Mandatory Clearing of Swaps, 75 FR 80747 (Dec. 23, 2010) (''End-User NPRM'').

[35] Proposed § 49.16. However, aggregated data that cannot be attributed to individual transactions or market participants may be made publicly available by SDRs.

[36] *Id.* Section 8(a) of the CEA prohibits the Commission from disclosing information or material if it ''would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.'' *See also* the definition of ''Section 8 Material'' in § 49.2(a)(14).

[37] Proposed § 49.17(g)(2).

[38] *Id.* This proposal was intended to partially implement section 21(c)(6)'s privacy provisions as well as the provisions of section 21(f)(3), which requires an SDR to establish and enforce rules to mitigate conflicts of interest. *See* SDR NPRM *supra* note 8 at 80911.

[39] *Id.*

[40] Proposed § 49.18.

[41] SDR NPRM *supra* note 8 at 80910.

[42] *Id.* at 80911.

Commission of any emergency action taken.

6. Regulations Related to Designation of a Chief Compliance Officer

Section 21(e) establishes the CCO as a focal point for compliance. The Commission implemented section 21(e) in proposed § 49.22, which further developed and detailed CCO statutory requirements and responsibilities. Specifically, proposed § 49.22 established the supervisory regime applicable to CCOs; specified removal provisions; specified the duties and authorities of CCOs; and detailed the information that must be included in the required annual compliance report and the procedure for submission of the report to the Commission.

7. Core Principles Applicable to SDRs

Unlike prescriptive rules, core principles generally provide the registered entity with reasonable discretion in establishing the manner of compliance with each specified principle. Section 21(f) enumerates three focused core principles applicable to SDRs: (1) Antitrust considerations (''Core Principle 1''); (2) governance arrangements (''Core Principle 2''); and (3) conflicts of interest, Core Principle 3.[43] With respect to Core Principle 1, antitrust considerations, the Commission proposed in § 49.19 that, unless necessary or appropriate to achieve the purposes of the CEA, SDRs should avoid adopting any rule, regulation or policy or taking any action that results in an unreasonable restraint of trade or imposes any material anticompetitive burden on the trading, clearing, reporting, and/or processing of swaps.

Core Principle 2 requires that each SDR establish governance arrangements that are transparent to fulfill public interest requirements and to support the objectives of the Federal government, owners and participants. Core Principle 3 provides that each SDR establish and enforce rules to minimize conflicts of interest in its decision-making processes and establish a process for resolving such conflicts. In order to ensure proper implementation of Core Principles 2 and 3, the Commission proposed § 49.20 (focusing on the transparency of SDR governance arrangements) and § 49.21 (addressing SDR identification and mitigation of existing and potential conflicts of interest).

Proposed § 49.20 prescribed minimum standards for the transparency of SDR governance arrangements and required that the SDR make available certain information to the Commission and the public that is current, accurate, clear and readily accessible; and that it disclose summaries of significant decisions. In addition, proposed § 49.20 required each SDR to ensure that an independent perspective be reflected in the nominations process for its board of directors as well as the process for assigning members of the board or others to SDR committees. Finally, the proposal included a number of substantive requirements for SDR boards of directors and committees. In implementing Core Principle 3, the Commission proposed in § 49.21 that each SDR maintain and enforce rules that would identify and mitigate existing and potential conflicts of interest in its decision-making processes.

8. Proposed Regulations Relating to Additional Duties

As noted above, section 21(f)(4) provides authority under which the Commission may prescribe additional duties for SDRs. Pursuant to section 21(f)(4) and section 8a(5) of the CEA, the Commission proposed to include in part 49 four additional duties that would require SDRs to (i) adopt and implement system safeguards, including BC–DR plans;[44] (ii) maintain sufficient financial resources;[45] (iii) furnish to market participants a disclosure document setting forth the risks and costs associated with using the services of an SDR;[46] and (iv) provide fair and open access to the SDR and fees that are equitable and non-discriminatory.[47]

9. Proposed Regulations Related to Real-Time Public Reporting

As discussed above, section 727 of the Dodd-Frank Act established certain public reporting requirements for all swap transactions and participants, creating new section 2(a)(13)(B) which establishes the reporting requirements pursuant to which the Commission is authorized to promulgate rules mandating the public availability of swap transaction and pricing data in ''real time.''[48] To implement these provisions, the Commission proposed a real-time public reporting framework for swap transaction and pricing data in new part 43 of its Regulations.[49] Proposed § 49.15 details SDRs' ability to accept and publicly disseminate swap transaction and pricing data on a swap market as well as those executed off-exchange; its provisions apply to off-facility swap transactions and to all swap transactions executed on a SEF or DCM that fulfill the public dissemination requirement of proposed part 43 by reporting to a registered SDR. As proposed, § 49.15 required SDRs to establish electronic reporting systems necessary to receive and publicly disseminate all required data fields and further requires SDRs who disseminate swap transaction and pricing data in real time to promptly notify the Commission when such data is not timely reported.

10. Proposed Regulations Relating to Implementation of SDR Rules

Proposed § 40.8 was intended to conform SDR implementation procedures to the proposed amendments to the Commission's part 40 regulations addressing provisions common to all registered entities.[50] The proposal provided that an applicant for registration as an SDR may request Commission approval of some or all of its rules or, alternatively, may self-certify its rules. Proposed § 40.8 specified procedures applicable to both alternatives.

D. Overview of Comments Received[51]

The Commission received a total of 29 comments from a broad range of

[43] Section 21(f)(4), the ''fourth core principle,'' grants broad rulemaking authority to the Commission to establish additional duties for SDRs. The Commission proposed to add several additional duties pursuant to this authority; they are discussed in section II. E, below.

[44] Proposed § 49.24.

[45] Proposed § 49.25.

[46] Proposed § 49.26.

[47] Proposed § 49.27.

[48] Section 2(a)(13)(A) of the CEA defines real-time public reporting to mean ''as soon as technologically practicable after the time at which the swap transaction has been executed.''

[49] *See* Real-Time NPRM *supra* note 28.

[50] *See* Part 40 *supra* note 21.

[51] The initial comment period with respect to proposed part 49 closed on February 22, 2011. The comment periods for most proposed rulemakings implementing the Dodd-Frank Act were reopened for 30 days from April 27 through June 2, 2011. Throughout this release, comment letters (''CL'') are identified by ''CL'' and the submitter. Each letter will be addressed as appropriate in connection with the discussion, *infra,* of the final regulatory provision or provisions to which they relate. All comment letters are available through the Commission Web site at *http://comments.cftc.gov/PublicComments/CommentList.aspx?id=939.* Comments addressing the proposed part 49 regulations were received from: (1) American Benefits Council (''ABC'') and the Committee on the Investment of Employee Benefits Assets (''CIEBA'') on February 22, 2011 (''CL–ABC/CIEBA''); (2) Americans for Financial Reform (''AFR'') on February 22, 2011 (''CL–AFR''); (3) Argus Media Inc. (''Argus'') on February 22, 2011 (''CL–Argus''); (4) Association of Institutional Investors (''AII'') on June 2, 2011 (''CL–AII''); (5) Chris Barnard (''Barnard'') on May 25, 2011 (''CL–Barnard''); (6) Better Markets on February 22, 2011 (''CL–Better Markets''); (7) CIEBA on June 3, 2011 (''CL–CIEBA''); (8) CME Group (''CME'') on February 22, 2011 (''CL–CME''); (9) Council of Institutional Investors (''Council'') on February 18, 2011 (''CL–Council''); (10) Depository Trust & Clearing

interested persons, including existing trade repositories and potential SDRs, foreign regulatory authorities, trade organizations, banks, commercial end-users, and DCMs. While commenters generally expressed support for the proposed part 49 rules, they also offered recommendations for clarification or modification of specific provisions. Comments generally focused on one or more of a dozen broad themes, including (i) SDRs as a public utility; (ii) commercialization of data; (iii) indemnification requirements; (iv) monitoring, screening and analyzing swap data; (v) ability of SDRs to invalidate or modify the terms of an executed swap; (vi) real-time public reporting; (vii) pricing; (viii) bundling of services; (ix) registration; (x) governance and conflicts of interest; (xi) access to data; and (xii) implementation and phase-in.[52] Individual comments will be described and discussed as appropriate throughout this section.

II. Part 49 of the Commission's Regulations: The Final Rules

As proposed in the SDR NPRM, part 49 contains provisions governing the registration and regulation of SDRs. The scope of part 49 is established in § 49.1; definitions are contained in § 49.2. Proposed §§ 49.3–49.4 and 49.6–49.7, along with Form SDR, establish the procedures and substantive requirements for registration as an SDR. Proposed § 49.5 governs equity interest transfers and § 49.8 establishes procedures under which an SDR must implement its rules. Compliance with the statutory duties described in section 21(c) of the CEA is established in § 49.9 and detailed in §§ 49.10 through 49.18 and §§ 49.23 and 49.24. Core principles applicable to SDRs as outlined in section 21(f) are set forth in §§ 49.19 through 49.22. Additional duties promulgated pursuant to section 21(f)(4) of the CEA (''Core Principle 4'') are set forth in §§ 49.25 through 49.27. Unless otherwise discussed in this section, the regulations are adopted as proposed.

A. Requirements of Registration

1. Procedures for Registration—§ 49.3

To implement the requirements of section 21(a), the Commission proposed § 49.3 to establish application and approval procedures. Proposed § 49.3 required each SDR applicant to file for registration electronically on proposed Form SDR.[53] Form SDR would require each applicant to provide the Commission with documentation relating to its business organization, financial resources, technological capabilities, and accessibility of services.[54] The Commission is adopting §§ 49.3–49.7 substantially as proposed subject to the minor modifications discussed below.

The Commission received one comment relating to registration generally. CIEBA requested that the Commission clarify that it will register any qualified applicant as an SDR.[55] The Commission confirms that it expects to register any applicant that satisfies the requirements for registration established in section 21 of the CEA and this part 49.[56]

As discussed below, although it received no comments regarding proposed Form SDR, the Commission has determined to make minor technical and conforming changes to Form SDR and also to amend certain provisions of §§ 49.3–49.7.[57]

(a) Form SDR

The Commission is making certain technical amendments to Form SDR to harmonize, to the extent possible, the SDR registration procedures with the application procedures for DCMs, DCOs, and SEFs. For example, the word ''material'' has been added to the registration instructions to make clear that ''intentional misstatements or omissions of material fact may constitute federal criminal violations.'' Because the registration application must be filed electronically, Form SDR as adopted no longer requires the applicant to provide two copies of Form SDR and attached exhibits. Additionally, the Commission revised Item 8 to account for various organizational structures. Moreover, instead of requesting ''State/Country'' of the entity's incorporation or filing, the final Form SDR requests that the applicant note the ''Jurisdiction'' of the organization and list the jurisdictions in which the applicant is qualified to do business. This information will assist the Commission in determining whether other domestic and foreign regulators should be contacted during the application process.

Corporation (''DTCC'') on February 22, 2011 (''CL–DTCC I''); (11) DTCC on June 3, 2011 (''CL–DTCC II''); (12) DTCC on June 10, 2011 (''CL–DTCC III''); (13) European Securities and Markets Authority (''ESMA'') on January 17, 2011 (''CL–ESMA''); (14) Foreign Banking Organizations—Barclays, BNP Paribas, Deutsche Bank, Royal Bank of Canada, The Royal Bank of Scotland Group, Societe Generale and UBS (''Foreign Banks'') on January 11, 2011 (''CL–Foreign Banks''); (15) Global Foreign Exchange Division (''Global FX Division') formed in cooperation with the Association for Financial Markets in Europe (''AFME''), the Securities Industry and Financial Markets Association (''SIFMA'') and the Asia Securities Industry and Financial Markets Association (''ASIFMA'') on February 22, 2011 (''CL–Global FX Division''); (16) Managed Funds Association (''MFA'') on February 21, 2011 (''CL–MFA''); (17) Markit on February 7, 2011 (''CL–Markit''); (18) MarkitSERV on February 7, 2011 (''CL–MarkitSERV I''); (19) MarkitSERV on June 3, 2011 (''CL–MarkitSERV II''); (20) MarkitSERV on June 3, 2011 (''CL–MarkitSERV III''); (21) Not-For-Profit Electric End-User Coalition consisting of the National Rural Electric Cooperative Association, the American Public Power Association and the Large Public Power Council (''NFPE Coalition'') on February 22, 2011 (CL–NFPE Coalition''); (22) The Office of the Comptroller of the Currency (''OCC'') on June 30, 2011 (''CL–OCC''); (23) Regis—TR on February 22, 2011 (''CL–Regis-TR''); (24) Reval.com, Inc. (''Reval'') on January 24, 2011 (''CL–Reval I''); (25) Reval on February 18, 2011 (''CL–Reval II''); (26) Reval on February 20, 2011 (''CL–Reval III''); (27) Securities Industry and Financial Markets Association (''SIFMA'') Asset Management Group (''AMG'') on February 7, 2011 (''CL–AMG''); (28) SunGard Energy & Commodities (''Sungard'') on February 22, 2011 (''CL–Sungard''); and (29) TriOptima on February 22, 2011 (''CL–TriOptima'').

In addition, five comment letters submitted in response to the Data NPRM also referenced the proposed part 49 regulations. Those commenters are: (1) DTCC on February 7, 2011 (''CL–Data-DTCC''); (2) Encana Marketing (USA) Inc. (''Encana'') on February 7, 2011 (''CL–Data-Encana''); (3) Foreign Banks on February 17, 2011 (''CL–Data-Foreign Banks''); (4) Global FX Division on February 7, 2011 (''CL–Data-Global FX Division''); and (5) InterContinentalExchange, Inc. (''ICE'') on February 7, 2011 (''CL–Data-ICE''). The comments have been considered in connection with the promulgation of these final rules, and will be addressed in connection with the discussion of the provisions to which they relate.

The Commission notes that both DTCC and CME submitted additional late comment letters related to the SDR Rulemaking on July 21, 2011 and July 29, 2011, respectively. These late-filed comment letters were received very close to the Commission's decision on the final part 49 rules; the letters raised no new issues, and therefore, the Commission is not providing a specific response to any issues raised by the letters.

[52] The Commission in its SDR NPRM requested comment on the nature and length of any implementation or phase-in period for proposed part 49. Six commenters responded, recommending variously that there be separate phase-in periods for different asset classes and/or that the Commission sequence the implementation of reporting rules by first implementing parts 45 and 49. Subsequently, when sufficient information is collected to fully study the markets, rules related to real-time and block trading should be implemented. The Commission has determined to separately address implementation and sequencing issues and will consider and address comments related to those concerns in connection with that action. In addition, 14 additional comments were received by the Commission in connection with its request for comment on the order in which it should consider final rulemakings made under the Dodd-Frank Act. *See infra* note 315 for cites to the additional letters.

[53] This form would be used for initial or provisional registration as an SDR as well as for any amendments to the applicant's registration status.

[54] SDR NPRM *supra* 8 at 80900–80901.

[55] *See* CL–CIEBA *supra* note 51.

[56] In particular, the Commission notes that section 21(B) of the CEA, as amended by section 728 of the Dodd-Frank Act, expressly provides that a DCO may register as an SDR.

[57] The Commission in approving applicants for registration as SDRs expects to provide an identifying code that is unique for each ''approved'' SDR in order to provide proper identification for each SDR and the transactions that are reported to it.

Both § 49.3(a)(5) and Form SDR, as adopted, require that an annual amendment on Form SDR be filed within 60 days of the end of each fiscal year rather than on a calendar year basis. The Commission believes that this is consistent with the CCO filing provisions set forth in § 49.22 and will provide the Commission with more timely financial statements.

The Commission is also making technical amendments to the form to eliminate redundant and ambiguous undefined language. For example, the term ''Applicant'' is capitalized and is referred to as a proper person to create consistency and references to ''facing page'' were removed as this concept was not defined in Form SDR or the regulations.

Form SDR as adopted clarifies that in order to assist the Commission in its review of an application, applicants for registration are encouraged to supplement Form SDR with any additional information that may be significant to their operation as an SDR. In addition, the Commission in adopting final Form SDR clarifies that SDR applicants must be mindful that certain information submitted for application purposes may be made available to the public and therefore advises applicant to request confidential treatment, where appropriate, when submitting application materials.

(b) Provisional Registration

As proposed, § 49.3(b) permitted the Commission, upon the request of an applicant, to grant provisional registration as an SDR if the applicant is in substantial compliance with the standards set forth in proposed § 49.3(a)(4).[58] Because the Commission believed that provisional registration should not be a permanent part of part 49, proposed regulation 49.3(b) provided for a ''sunset'' provision so that the provisional registration provision would terminate 365 days from the effective date of the proposed regulations. The Commission has determined to amend proposed § 49.3(b) to remove this sunset provision and provide that the Commission may terminate granting new provisional registrations at a later date.[59] The Commission believes that removal of the sunset provision will allow the Commission to fully evaluate applications for registration and provide greater flexibility in establishing compliance deadlines with registration requirements under § 49.3. The Commission expects to work with applicants to ensure that the transition from provisional registration to full registration is as prompt and seamless as possible.

In its comment letter, DTCC urged that applicants for provisional registration be required to demonstrate operational capability, real-time processing, multiple redundancy and robust information security controls.[60] The Commission agrees that SDRs should have sufficient operational capabilities to operate on a 24-hour basis based on a 6-day working week and accordingly has clarified in § 49.3(b) that in considering a grant of provisional registration it will require both (i) a demonstrated ability to substantially comply with the standards established in § 49.3(a)(4) and statutory duties and core principles; and (ii) demonstrated operational capability, real-time processing, multiple redundancy and robust information security controls.

(c) Registration of Existing Registered Entities

Although comments addressing the proposed application and registration procedures generally indicated satisfaction with the Commission's proposal, CME recommended that DCOs wishing to register as SDRs be given relief from ''duplicative'' registration and requested that the Commission adopt an abbreviated notice registration procedure for registered DCOs in good standing with the Commission.[61]

The Commission acknowledges the merits of CME's suggestion that there be a process to streamline the application procedures for existing DCO registrants, and therefore, is adopting a modification to § 49.3. The Commission is making a minor revision to § 49.3(a)(3) so that applicants are not subject to unnecessary duplicative review by the staff of the Commission. Specifically, staff in considering an application for registration as an SDR shall include in its review an applicant's past relevant submissions to the Commission and its compliance history. In addition, the Commission believes that once it gains experience with the SDR registration process it may re-evaluate whether a shortened or ''notice'' registration process should be available to existing non-SDR registrants (such as a DCO) seeking registration as an SDR.[62]

2. Withdrawal From Registration—§ 49.4

As proposed, § 49.4(a) outlined the process for withdrawal from registration and specified that written notice of a request to withdraw be served at least 90 days prior to the desired effective date of the withdrawal. The Commission has corrected § 49.4(a) to clarify that notice must be served at least 60 days prior to the desired effective date of the withdrawal; this correction achieves consistency with § 49.4(b), which provides that a notice of withdrawal from registration shall be effective on the 60th day after its filing with the Commission.

3. Notification of Equity Interest Transfers—§ 49.5

As proposed, § 49.5 required SDRs to file with the Commission a notice of the equity interest transfer of ten percent or more, no later than the business day following the date on which the SDR enters into a firm obligation to transfer the equity interest. The Commission proposed a ten percent threshold because it believes that a change in ownership of such magnitude, even without a corresponding change in control, may have an impact on the operations of the SDR.[63]

The Commission received a single comment relating to this provision which recommended that the Commission lower the notification threshold from ten percent to five percent. The same commenter also urged that the Commission obtain notification at or prior to the firm commitment to transfer the equity interest.[64] The Commission has considered these comments and believes that the notification threshold as proposed is adequate, based on its belief that a ten percent threshold appropriately covers those transfers that may result in significant control or lead to control of the SDR's management.

As proposed, § 49.5(a) and (c) required filings with the Commission relating to equity transfer notifications and certifications electronically through dedicated e-mail addresses. The Commission believes that future procedures may change, and therefore,

[58] Proposed § 49.3(a)(4) delineated the standards for approval of an SDR application: The SDR (i) is appropriately organized, and has the capacity, to ensure the prompt, accurate and reliable performance of its functions as an SDR; (ii) can comply with any applicable provisions of the CEA and regulations thereunder; (iii) can carry out its functions in a manner consistent with the purposes of section 21 of the CEA; and (iv) can operate in a fair, equitable and consistent manner.

[59] No comments were received in response to the proposed provisional registration provisions.

[60] CL–DTCC I *supra* note 51 at 4.

[61] *See* CL–CME *supra* note 51.

[62] The Commission notes that the additional cost of providing documents that may already be available to the Commission is expected to be limited to the expense of providing electronic copies of the exhibits set forth in Form SDR.

[63] SDR NPRM *supra* note 8 at 80902, n.25.

[64] *See* CL–Better Markets *supra* note 51.

is revising these provisions so that SDRs file certain equity transfer notifications and certifications in a format and manner to be specified by the Secretary of the Commission. Accordingly, the Commission is adopting this provision largely as proposed subject to the modification described above.

4. Swap Data Repositories Located in Foreign Jurisdictions—§ 49.7

The Commission proposed § 49.7 to enable it to obtain necessary swap data and related books and records maintained by an SDR located outside the United States. As proposed, § 49.7 required each SDR located outside the United States to provide an opinion of counsel that the SDR can, as a matter of law, provide the Commission with prompt access to its books and records and submit to onsite inspection and examination by the Commission. The Commission believes this provision is necessary because different jurisdictions may have different legal frameworks, which in turn may limit or restrict the Commission's ability to receive information from an SDR. An opinion of counsel in this regard will allow the Commission to better evaluate an SDR's capability to meet the requirements of registration and ongoing supervision.

The Commission requested comment on a series of questions relating to registration of a foreign-based SDR.[65] In response, the Commission received several comments regarding the potential for ''duplicative'' registration requirements.[66] With one exception, commenters supported a system of cross-registration or ''recognition'' in order to reduce potential burdens.

ESMA in particular requested that the Commission consider a recognition regime in which an SDR located in a foreign jurisdiction could register with the Commission if (i) the laws and regulations of the foreign jurisdiction are equivalent to those in the U.S.; and (ii) a MOU has been signed by the Commission and the foreign regulator.[67] ESMA suggested that the MOU would ensure access to all information the Commission will need in order to fulfill its statutory duties.

Reval, however, urged that that all foreign-based SDRs be required to comply with U.S. regulations and procedures, and to physically host the data in the U.S. or create a daily backup of the data with an entity in the U.S.[68] DTCC also maintained that foreign-based SDRs should not be approved by the Commission under reduced registration requirements[69] and asserted that an abbreviated or notice registration procedure for foreign SDRs should be based on a comparable regulatory structure for repositories in the home country of the foreign SDR.

The Commission notes that the Dodd-Frank Act and the CEA do not authorize the Commission to exempt SDRs located in foreign jurisdictions from the registration requirements set forth in section 21. At the same time, the Commission is cognizant of the global nature of the swaps market and of concerns regarding regulatory responsibilities and costs associated with requiring foreign-based SDRs to comply with multiple, separate regulatory regimes. To that end, the Commission expects to consult, cooperate, and exchange information with foreign regulators in connection with the oversight of foreign-based SDRs that are separately registered in jurisdictions outside of the U.S.

The Commission is mindful of the commenters' concerns and emphasizes that the extent of the Commission's ability to coordinate with foreign regulators will depend largely on the comparability and comprehensiveness of supervision and regulation by the foreign jurisdiction in which the SDR is located. In considering the feasibility of a particular recognition regime, the Commission intends to review regulatory requirements and the supervision or oversight programs of a ''home'' or foreign regulator of an SDR to determine the extent to which the Commission potentially could rely on such foreign regulators. The level of cooperation and the extent of any coordination would be evaluated on an individual basis and would be governed by an MOU. For example, the Commission and the foreign regulator should be capable of exchanging regulatory reports (including examination reports) and filings, as well as other information applicable to the operation of such entity as an SDR. This exchange of information would assist the Commission in determining whether the SDR located in a foreign jurisdiction is in compliance with duties mandated under part 49. Such cooperation or coordination with foreign regulators would not limit or in any way condition the discretion of the Commission in the discharge of its regulatory responsibilities.

B. Duties of Registered SDRs

Section 21(c) sets forth the minimum duties that an SDR is required to perform to become registered and to maintain registration. These statutory duties require that SDRs (i) accept swap data as prescribed by the Commission; (ii) confirm with both counterparties to a swap the accuracy of the data; (iii) maintain the data submitted; (iv) provide the Commission or its designee (including another registered entity) with direct electronic access to the swap data; (v) provide the necessary information as prescribed by the Commission to comply with the public reporting requirements set forth in section 2(a)(13) of the CEA; (vi) establish automated systems for monitoring, screening, and analyzing swap data; (vii) maintain the privacy or confidentiality of any and all swap data that the SDR receives; (viii) provide access to the swap data to certain ''appropriate'' domestic and foreign regulators; and (ix) adopt and implement emergency procedures. In addition, the Commission pursuant to its authority under sections 21(f)(4) and 8a(5)[70] of the CEA proposed that registered SDRs (i) adopt and implement system safeguards, including BC–DR plans; (ii) maintain sufficient financial resources; (iii) furnish market participant with a disclosure document setting forth the risks and costs associated with using the services of the SDR; and (iv) provide fair and open access and fees and charges that are equitable and non-discriminatory.

1. Acceptance of Data—§ 49.10

As proposed, § 49.10 required that SDRs adopt policies and procedures that would enable the SDR to electronically accept data and other regulatory

[65] Specifically, the Commission requested comment with respect to whether (i) the registration process for the foreign SDR be any different than the Commission's proposed registration process; (ii) there are any factors that the Commission should consider to ensure that an SDR located outside the United States seeking to register as an SDR can, in compliance with applicable foreign laws, provide the Commission with access to the SDR's books and records that are required pursuant to proposed § 49.7 and can submit to onsite inspection and examination by the Commission; and (iii) there are any other factors the Commission should consider relating to an SDR located outside of the United States *See* SDR NPRM *supra* 8 at 80903.

[66] *See* CL–DTCC II; CL–Foreign Banks; CL–ESMA; CL–TriOptima; CL–Regis-TR; CL–Reval *supra* note 51.

[67] CL–ESMA *supra* note 51.

[68] CL–Reval II *supra* note 51.

[69] CL–DTCC I *supra* note 51.

[70] Section 8a(5) of the CEA, 7 U.S.C. 12a(5), authorizes the Commission to promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or accomplish any of the purposes of the CEA. In connection with SDRs, section 21(a)(3)(A)(ii), 7 U.S.C. 24a(a)(3)(A)(ii) specifically requires that an SDR to be registered and maintain its registration must comply with any requirement that the Commission may impose by rule or regulation pursuant to section 8a(5) of the CEA.

information;[71] accept all swaps in the asset class(es)[72] for which they have registered;[73] establish sufficient policies and procedures to prevent a valid swap from being invalidated, altered or modified through the confirmation or recording process of the SDR; and establish procedures and provide facilities for effectively resolving disputes over the accuracy of the swap data and positions that are recorded in the SDR.

The Commission received one comment relating to the definition of asset class that indicated cross-currency (also known as currency) swaps are not properly characterized under the ''currency'' asset class but instead are interest rate products.[74] Therefore, the Commission believes a modification is necessary to better reflect the fact that the industry typically characterizes ''currency'' swaps as ''interest rate swaps.'' This characterization is based on the attributes of currency swaps that resemble the structure and operation exhibited by interest rate swaps while in ''foreign exchange'' swaps, the underlying foreign currency is exchanged by the parties. Accordingly, the Commission is replacing the term ''currency'' in the definition of asset class with ''foreign exchange'' as set forth in § 49.2(a)(2) to accurately reflect the asset classes employed in the swaps market.

The Commission received a single comment relating to data formats and protocols for data submission to SDRs.[75] DTCC commented that a registered SDR should have the flexibility to specify the acceptable data formats, connectivity requirements, and other protocols for submitting information.[76] While the Commission generally agrees with DTCC that SDRs should have flexibility to specify acceptable data formats and other technical requirements, the Commission does not believe that DTCC's recommendations are necessary to operational flexibility. Several commenters supported[77] the proposed requirement in § 49.10(b) that an SDR accept all swaps from any asset class or classes for which it registers. CME, however, recommended that DCO–SDRs should only be required to accept data for swaps that they clear and not for uncleared/bilateral transactions.[78] The Commission believes that CME's approach would lead to greater data fragmentation. Additionally, the Commission believes that pursuant to section 2(a)(13)(G), SDRs are required to accept cleared and uncleared swaps. Accordingly, the Commission is adopting § 49.10(b) substantially as proposed, with the addition of the phrase ''unless otherwise prescribed by the Commission'' so that the Commission may, in its discretion, provide flexibility to the general rule that an SDR must accept all swaps in an asset class for which it has registered. This flexibility will be especially relevant in connection with the implementation or phasing of reporting obligations of market participants.

The Commission received four comments relating to proposed § 49.10(c).[79] The comments were supportive of the Commission's efforts to prevent improper invalidation of swap transactions; as discussed below, however, some commenters felt that further refinement of the text is necessary.

ABC/CIEBA and AMG requested that the Commission clarify that § 49.10(c) would prevent an SDR from adopting user agreements that indirectly serve to modify or invalidate terms that have been agreed upon by the counterparties.[80] The Commission has adopted the recommended clarification. ABC/CIEBA and AMG also requested that the Commission seek to prevent confirmation and reporting platforms from adopting provisions in their user agreements that would permit the modification or invalidation without the consent of the counterparties.[81] CIEBA also separately suggested that the Commission prohibit SDRs from using third-party service providers which invalidate a swap without the consent of a counterparty.[82] The Commission believes that § 49.10(c), as proposed, would clearly prohibit SDRs as well as any agent or third-party service provider of the SDR to modify or invalidate a swap transaction without the consent of the counterparties.

2. Confirmation of Data Accuracy—§ 49.11

As proposed, § 49.11 required SDRs to establish and adopt policies and procedures to ensure the accuracy of swap data that is reported to an SDR.[83] In particular, proposed § 49.11 required that the SDR confirm with both counterparties to the swap the accuracy of the data and information submitted[84] and receive acknowledgement of all data submitted as well as corrections of any errors.[85] The SDR NPRM specified that confirmation is unnecessary when the reporting party is a SEF, DCM, DCO or a confirmation or matching service provider to whom the swap counterparty has delegated its reporting obligation. However, the SDR would still be required to ensure that the data and information it receives from such entity is accurate.

As detailed in proposed part 45, the reporting of swap creation data (primary economic terms data and confirmation data) and swap continuation data will take place through different channels, depending on the nature of the transaction and counterparties. Primary economic terms data is required to be reported by a SEF or DCM if the swap is executed on a platform, and by the reporting counterparty (SD, MSP, or other counterparty) if the swap is not platform executed. Confirmation data

[71] *See* section 21(c)(1) of the CEA, 7 U.S.C. 24a(c)(1). The Commission proposed in new part 45 to the Commission's Regulations the specific data elements that must be reported and applicable to DCMs, DCOs, swap execution facilities (''SEFs''), foreign boards of trade (''FBOTs''),1 SDs, MSPs, non-end-user SDs/MSPs and end-users in connection with the reporting of such swap data to SDRs. These data elements and standards would include the reporting of continuation data throughout the life of the swap. In addition, the Data NPRM also provides specific requirements for SDRs relating to (i) determining which counterparty must report to the SDR; (ii) third-party facilitation of swap data reporting; (iii) reporting to a single SDR in connection with the reporting of swap data; (iv) required data standards; and (v) the reporting of errors and omissions. *See* Data NPRM *supra* note 6.

[72] Proposed § 49.2(a)(2) defined ''asset class'' as those swaps in a particular broad category of goods, services or commodities underlying a swap. The asset classes include credit, equity, interest rates, currency, other commodities and such other assets as may be determined by the Commission. *See also* Department of the Treasury, Notice of Proposed Determination of Foreign Exchange Swaps and Foreign Exchange Forwards Under the Commodity Exchange Act, 76 FR 25774 (May 5, 2011) and Request for Comments: Determination of Foreign Exchange Swaps and Forwards, 75 FR 66829 (Oct. 29, 2010) and 75 FR 66426 (Oct. 28, 2010).

[73] As detailed in proposed § 49.27, SDRs would be required to provide fair and open access to their services. The Commission submits that SDRs would not be permitted to discriminate in connection with the access to their services. As a result, market participants with sufficient technology resources for connectivity and the payment of fees would be granted access to the services of the SDR.

[74] *See* CL–Global FX Division *supra* note 51 at 2.

[75] *See* CL–DTCC I *supra* note 51.

[76] *Id.*

[77] *See* CL–Better Markets, CL–DTCC I and CL–Global FX Division *supra* note 51.

[78] *See* CL–CME *supra* note 51.

[79] *See* CL–ABC/CIEBA, CL–AMG and CL–CIEBA *supra* note 51.

[80] CL–ABC/CIEBA and CL–AMG *supra* note 51 at 3–4 and 9, respectively.

[81] *Id.*

[82] CL–CIEBA *supra* note 51 at 5.

[83] *See* Data NPRM *supra* note 6.

[84] The Data NPRM details and defines ''confirmation'' and ''confirmation data.'' The term confirmation is proposed in § 45.1(b) to mean ''the full, signed legal confirmation by the counterparties of all of the terms of a swap.'' The term ''confirmation data'' is proposed in § 45.1(c) to mean ''all of the terms of a swap matched and agreed upon by the counterparties in confirming the swap.'' *See* Data NPRM, *supra* note 6.

[85] This requirement does not apply to real-time public reporting. *See* proposed § 43.3(f) *supra* note 28.

will be reported by a DCO if the swap is cleared, and by the reporting counterparty if the swap is uncleared. Swap continuation data will be reported throughout the life of a swap by the DCO and/or the reporting counterparty. Consistent with proposed part 45 and § 49.12, SDRs are required to accept swap data from these entities, as well as from third-party service providers who may be acting on their behalf.

The Commission received five comments relating to an SDR's obligation to confirm the accuracy of the reported swap data.[86] Several commenters recommended that an SDR should not be required to affirmatively communicate with both counterparties in order to confirm the accuracy of data submitted. Reval commented that the SDR should only be required to confirm the accuracy of the trade with the reporting entity.[87] DTCC[88] and MarkitSERV[89] both supported the use of confirmation records in fulfilling the obligation of the SDR to confirm data submissions.

The Commission notes that section 21(c)(2) of the CEA states that an SDR must confirm the accuracy of the data that was submitted with both counterparties to the swap and does not draw any distinction between submitted swap data that has or has not been legally confirmed. However, the Commission agrees with the commenters that it may not be necessary to affirmatively communicate with both counterparties in all circumstances. Therefore, the Commission has modified the manner in which an SDR may fulfill the requirement to confirm the accuracy of the data. As adopted, § 49.11 will not require an SDR to affirmatively communicate with both counterparties when data is received from a SEF, DCM, DCO, or third-party service provider under certain conditions. Communication need not be direct and affirmative where the SDR has formed a reasonable belief that the data is accurate, the data or accompanying information reflects that both counterparties agreed to the data, and the counterparties were provided with a 48-hour correction period. The SDR must affirmatively communicate with both counterparties to the swap when data is submitted directly by a swap counterparty such as an SD, MSP or non-SD/MSP counterparty such as an end-user.

Encana requested that the Commission provide additional guidance on how proposed § 45.10 and § 49.11 work together. Both regulations impose obligations on reporting parties and SDRs relating to errors and omissions in the reporting of swap transaction data.[90] The Commission submits that the regulations are complementary and are both expected to protect the integrity and the accuracy of reported data. While § 45.10 provides an ongoing obligation for counterparties to provide error corrections, § 49.11 imposes a duty on the SDR to provide a correction period to receive from counterparties, within a short time period after the data has been submitted, acknowledgment of the accuracy of the data.

3. Recordkeeping Requirements—§ 49.12

Proposed § 49.12 implements section 21(c)(3) consistent with existing Commission regulations and the Commission's proposed part 45 regulations[91] and required that SDRs maintain swap data throughout the existence of the swap and for five years following termination during which time the records must be readily accessible by the SDR and available to the Commission via real-time electronic access and in archival storage capable of being retrieved within three business days.

The Commission received one comment[92] recommending that swap data be kept indefinitely.[93] As proposed, § 49.12(a) required SDRs to maintain books and records as prescribed by proposed § 45.2. Rather than specifically referencing and incorporating the provisions of proposed § 45.2, the Commission believes § 49.12(a) should require SDRs to comply with any and all recordkeeping provisions adopted under part 45.[94] Accordingly, § 49.12(a) as adopted requires registered SDRs to ''maintain books and records in accordance with the requirements of part 45 of this chapter regarding the data required to be reported to the swap data repository.'' Under § 49.12(a), registered SDRs will be required to maintain swap data for the time periods and under the standards to be set forth in part 45.[95]

The Commission is revising proposed § 49.12 to require SDRs to comply with the time periods set forth in part 45 for maintaining books and records. The Commission does not believe that SDRs should be required to keep records indefinitely following the expiration of the underlying transactions.

Proposed § 49.12(c) required all books and records to be open to inspection upon request by any representative of the Commission, the United States Department of Justice, the SEC or prudential regulators as authorized by the Commission. The Commission is revising § 49.12(c) to remove the SEC and prudential regulators so that only the Commission and the Department of Justice will have books and records inspection rights.[96] This change will maintain consistency with existing Commission regulations on recordkeeping.[97]

The Commission believes that the proper procedure for Appropriate Domestic Regulators to obtain SDR Information is through the mechanism set forth in § 49.17 (Access to SDR Data) discussed below in section II.B.7.

The Commission is adopting § 49.12(d) largely as proposed, subject to a slight modification discussed below in connection with § 49.15 relating to real-time public reporting requirements.

[86] *See* CL–Reval II, CL–DTCC I, CL–MarkitSERV I, CL–ABC/CIEBA and CL–Data-Encana *supra* note 51.

[87] CL–Reval II *supra* note 51 at 6.

[88] CL–DTCC I *supra* note 51 at 20.

[89] CL–MarkitSERV I *supra* note 51 at 6.

[90] *See* CL–Encana *supra* note 51.

[91] *See* Data NPRM *supra* note 6.

[92] *See* CL–Barnard *supra* note 51 at 2.

[93] The Commission has also received several comments in connection with the proposed part 45 recordkeeping provisions. Comments received in connection with proposed part 45 will be reviewed in connection with that rulemaking; the Commission is adopting § 49.12(a) largely as proposed subject to the modifications discussed below.

[94] Like other rules that are tied to related rulemakings, § 49.12(c) will become effective 60 days after publication in the **Federal Register** but compliance will not be required until such time as the part 45 rules become effective.

[95] The time period and standards in part 45 are currently proposed as throughout the existence of the swap and for five years following termination during which time the records must be readily accessible by the SDR and available to the Commission via real-time electronic access and in archival storage capable of being retrievable within three business days.

[96] *See* proposed rule 13n–7 under the Securities Exchange Act of 1934, 17 CFR 240.13n–7 set forth in the SEC's proposal relating to security-based swap data repositories. The SEC in that proposal did not provide inspection rights of the books and records of a security-based swap data repository to the Commission or prudential regulators. *See* SEC, Notice of Proposed Rulemaking: Security-Based Swap Data Repository Registration, Duties and Core Principles, 75 FR 77306 (Dec. 10, 2010).

[97] Commission regulation § 1.31 requires that all ''books and records required to be kept by the act or by these regulations shall be kept for a period of five years from the date thereof and shall be readily accessible during the first 2 years of the 5-year period. All such books and records shall be open to inspection by any representative of the Commission or the United States Department of Justice.'' The Commission notes that section 4r(c) of the CEA adopted by Section 729 of the Dodd-Frank Act provides inspection rights to, among others, the SEC, prudential regulators and the FSOC. However, these rights are limited to counterparties that do not clear or have their swap transactions reported to, or accepted by, an SDR. Accordingly, the Commission lacks the statutory authority to provide books and records inspection rights to those named other regulators.

4. Monitoring, Screening and Analyzing Swap Data—§ 49.13 and § 49.14

Proposed §§ 49.13 and 49.14 implement section 21 of the CEA and together reflect SDRs' significant responsibilities in the new swaps market regulatory structure established by the Dodd-Frank Act. Under this new regulatory structure, SDRs will function not only as repositories for swap transaction data, but also as potential sources of support for the Commission's oversight of swaps markets and swap market participants. Section 21(c)(5) of the CEA, as amended by section 728 of the Dodd-Frank Act, requires SDRs to establish ''automated systems for monitoring, screening, and analyzing swap data, including compliance and frequency of end-user clearing exemption claims by individuals and affiliated entities.'' [98] By its terms, section 21(c)(5) requires that such automated systems be established ''at the direction of the Commission,'' but does not provide for specific functions which SDRs should undertake with respect to the swap transaction data in their possession. The only specific requirement set forth in section 21(c)(5) is that SDRs have systems in place capable of fulfilling such requirements as the Commission may assign.

Proposed §§ 49.13 and 49.14 required that SDRs: (1) Monitor, screen, and analyze all swap data in their possession as the Commission may require; (2) develop systems and resources as necessary to execute any monitoring, screening, or analyzing functions assigned by the Commission; and (3) monitor, screen, and analyze swap transactions which are reported to the SDR as exempt from clearing pursuant to section 2(h)(7) of the CEA (*i.e.,* end-user clearing exemption).

The Commission received eight comment letters relating to proposed §§ 49.13 and 49.14.[99] While the commenters were generally supportive of the proposed rules and their objectives, they articulated a number of concerns, including: (1) The level of detail concerning routine and ad hoc monitoring, screening and analysis requirements; (2) future compliance costs; and (3) the level of responsibilities imposed on SDRs and/or retained by the Commission. Four of the commenters [100] requested additional detail and clarity on the anticipated requirements in proposed § 49.13(a) and (b).

Sungard, in particular, expressed concern that proposed § 49.13(a) provided only ''limited guidance'' on the requirements to be imposed on SDRs' automated systems for monitoring, screening, and analyzing swap data.[101] Sungard referenced the SDR NPRM which stated that the Commission ''will consider specific tasks to be performed by SDRs at a later date'' and requested that in the final rule 49.13(a), the Commission ''provide an implementation period and effective date which are based on such later date.'' [102] Sungard also commented that the potentially rising cost of compliance with proposed § 49.13(b), which requires that SDRs maintain sufficient resources to fulfill the requirements in § 49.13(a), monitor their resources annually, and make adjustment as needed to remain in regulatory compliance, might harm the commercial viability of SDRs.[103]

Three commenters [104] suggested that the Commission should play a larger role in the monitoring, screening, and analyzing of swap market data; while two commenters [105] took the opposing view and suggested that data monitoring, screening, and analyzing should be performed centrally by an SDR. Both AFR and Better Markets believed that aggregated data monitoring and analysis should be performed by the Commission rather than relying on SDRs.[106] CME's comments raised concerns with providing SDRs with surveillance responsibilities.[107] DTCC, however, recommended that certain monitoring, screening, and analyzing functions be performed centrally by an SDR.[108] Reval recommended that SDRs be more than a data warehouse and provide data analysis to the Commission.[109]

Commenters expressed concern that §§ 49.13(a) and 49.14 do not sufficiently describe the specific tasks SDRs are expected to perform. The Commission recognizes that §§ 49.13(a) and 49.14 do not contain specific requirements. Its intention in §§ 49.13(a) and 49.14 is to codify the statutory requirements in section 21(c)(5) and establish that specific monitoring, screening, and analyzing duties will be imposed when its knowledge of the markets is more fully developed.[110] At that time, the Commission will provide SDRs with adequate notice to permit them to meet specific requirements of §§ 49.13(a) and 49.14.

Regarding proposed § 49.13(b), the Commission believes that SDRs and other regulated entities should always maintain sufficient resources to comply with regulatory requirements under the CEA. The Commission also recognizes the necessity for adequate resource requirements for SDRs given the expectation that SDRs may play a significant role in assisting the Commission to fulfill its regulatory mandate. Therefore, the Commission has not implemented Sungard's suggestion to impose a cap on the growth of required information technology, staff, and other resources required under § 49.13(b). The Commission also notes that the requirement of § 43.13(b) to ''establish and maintain sufficient information technology, staff, and other resources'' is similar to provisions proposed and already existing for DCMs and proposed for SEFs.[111] Furthermore, any increased

[98] Section 21(c)(5) of the CEA.

[99] These letters represent comments from five potential SDRs, two non-profit organizations, and one individual . *See* CL–AFR, CL–Barnard, CL–Better Markets, CL–CME, CL–DTCC I, CL–Reval II, CL–Sungard, and CL–TriOptima *supra* note 51.

[100] CL–Barnard, CL–CME, CL–Sungard and CL–TriOptima *supra* note 51.

[101] See CL–Sungard *supra* note 51 at 2.

[102] *Id.* at 2. *See also* SDR NPRM *supra* note 8 at 80907.

[103] Sungard made a number of recommendations to ensure the commercial viability of SDRs, including (1) a constraint on the growth in resources required under § 49.13(b), (2) a mechanism to recover at least a portion of resource costs in a manner other than user fees, or (3) ''some other mechanism to allow for the business planning necessary for the SDR to function while being certain of compliance with applicable rules.'' *Id.*

[104] *See* CL–AFR, CL–Better Markets and CL–CME *supra* note 51.

[105] *See* CL–DTCC I and CL–Reval II *supra* note 51.

[106] AFR further suggested that the Commission develop ''the capacity to perform key data analysis in-house, using raw data from SDRs, instead of becoming dependent on privately owned SDRs to measure aggregate exposures.'' *Id.* at 4. Better Markets suggested that the Commission build its own ''single, in-house system'' for monitoring and analyzing swap data rather than rely on individual SDRs. CL–Better Markets *supra* note 51 at 8.

[107] CME stated that it is ''not convinced that SDRs should be given wide ranging surveillance responsibilities.'' CL–CME *supra* note 51 at 5. And instead, opined that ''[m]arket-wide surveillance duties are best placed with a regulator or self-regulatory organization empowered with disciplinary powers * * *.'' *Id.*

[108] CL–DTCC I *supra* note 51 at 24.

[109] CL–Reval II *supra* note 51 at 7. Reval suggested that SDRs should be required to provide an independent valuation of the swaps submitted to the SDR, provide the relevant market data that goes into the calculation of the swap value, verify the credit value adjustment for uncleared trades, and provide the Commission with historic, current, and future risk analysis to anticipate systemic risk. *Id.* at 8.

[110] *See* proposed § 49.13(a). SDR NPRM *supra* note 8 at 80907.

[111] *See* Core Principle 2, Acceptable Practices, in appendix B to part 38 of the Commission's regulations. The Application Guidance for this Core Principle requires designated contract markets to ''have arrangements and resources for effective trade practice surveillance programs'' and ''have arrangements, resources and authority for effective rule enforcement.'' 17 CFR 38, appendix B. *See also* proposed § 38.155(a) which requires a designated contract market to ''establish and maintain sufficient compliance department resources and staff to ensure that it can conduct effective audit trail reviews, trade practice surveillance, market

regulatory functions covered by proposed § 49.13(b), which may result in increase costs, will apply to all SDRs equally. As discussed above, the Commission has also committed to giving sufficient notice before imposing specific obligations under §§ 49.13 and 49.14, giving SDRs time to also address any resulting financial needs.

AFR, Better Markets and CME recommended that the Commission play a larger role than proposed in the monitoring, screening, and analyzing of swap market data. Both AFR and Better Markets, in particular, recommended that the Commission build its own systems for monitoring, screening and analyzing swap data. The Commission believes that the proper role of an SDR is to provide the Commission with a centralized recordkeeping facility to facilitate its surveillance and oversight responsibilities in the swaps markets. The Commission does not propose that SDRs displace the Commission's regulatory responsibilities, but neither does it propose to displace SDRs statutory obligations to monitor, screen and analyze swap market data. The Commission largely agrees with AFR and Better Markets in that the Commission should retain the responsibility for surveillance and oversight of the swaps market; however, the Commission believes it is unnecessary to duplicate systems that will already be available through the SDR infrastructure. Additionally, the Commission believes that SDRs, at the direction of the Commission, will provide sufficient capacity for monitoring, screening, and analyzing swap data. The Commission believes that the approach of proposed §§ 49.13 and 49.14 adequately balances the Commission's regulatory responsibilities with SDRs statutory duties and, as articulated by DTCC, ''promotes efficiency in the system.'' [112]

Commenters also made recommendations relating to uniform recordkeeping and reporting requirements across different SDRs. The Commission notes that it addressed this issue in a separate, related, rulemaking.[113] Nonetheless, the Commission does not agree with Better Markets that it must also require SDR systems to be uniform and compatible. The Commission believes that its designation of uniform recordkeeping and reporting requirements will sustain a level of system compatibility. In addition, when established, the monitoring, screening, and analyzing tasks required of SDRs will likely impose a level of uniformity of system outputs within similarly situated SDRs.

Lastly, the Commission agrees with Reval's assertion that in order to minimize systemic risk, SDRs need to engage in certain data analysis and reporting rather than function merely as warehouses of transaction data. However, as articulated above, at this time the Commission has not proposed, nor is it implementing, specific data analysis functions for SDRs. The Commission intends to consider additional specific tasks to be performed by SDRs when its knowledge and experience of the regulatory oversight needs with respect to the swap markets has developed more fully.

With the clarifications and modifications described above, the Commission is adopting §§ 49.13 and 49.14 substantially as proposed.[114]

5. Real-Time Public Reporting—§ 49.15

Section 2(a)(13)(D) of the CEA permits the Commission to require registered entities to publicly disseminate swap transaction and pricing data. To implement section 2(a)(13), the Commission is establishing a real-time public reporting framework in a new part 43 of the Commission's regulations that is subject to a separate rulemaking.[115]

As proposed, § 49.12(d) and § 49.15 together set forth the requirements for SDRs regarding the public dissemination of swap transaction and pricing data. Proposed § 49.12(d) required each SDR to comply generally with the requirements prescribed in part 43, while proposed § 49.15 described additional duties of an SDR relating to the acceptance and public dissemination of swap transaction and pricing data in real-time.

The Commission received a total of seven comments relating to proposed §§ 49.12(d) and 49.15.[116] Markit and Argus urged the Commission to adopt tighter restrictions on the commercial non-public dissemination of real-time data,[117] while Markit also recommended that the part 43 rules explicitly state that ownership of swap transaction data does not transfer from counterparties to other regulated entities such as DCMs, SEFs and DCOs.[118] AMG and AII both requested that the Commission phase-in block size determinations and time-limits for real-time dissemination.[119] NFPE Coalition also requested a clarification regarding aspects of the real-time reporting requirements and suggested that SDRs should not be used to determine the timeliness of real-time public reporting.[120] ICE and DTCC believed that SDRs should be designated as the sole vehicle for the dissemination of swap data [121] while DTCC also expressed the concern that public dissemination could disclose the identities of swap counterparties.[122] Better Markets also recommended that the Commission have real-time streaming or instantaneous access to swap transaction data in order to fulfill its regulatory obligations.[123]

The Commission is adopting § 49.15 substantially as proposed. As adopted, § 49.15(a) will no longer limit the real-time reporting of swap transactions for SDRs to ''off facility swaps.'' The Commission is currently considering comments received in connection with the proposed part 43 regulations,[124] including those relating to an SDR's role in the public dissemination of swap transaction and pricing data in real time. The Commission may include limitations on the type of public reporting and dissemination for SDRs. As adopted, § 49.15(c), relating to the untimely submission of swap data for real-time public reporting and dissemination purposes will not reference the specific time periods and notification procedures proposed in part 43. Instead, § 49.15(c) will require SDRs to ''notify the Commission of any swap transaction for which the real-time swap data was not received by the swap data repository in accordance with part 43 of

surveillance, and real-time market monitoring.'' 75 FR 80572, 80613 (Dec. 22, 2010)(''DCM NPRM''). *See also* proposed § 37.203(c)(1) which requires a swap execution facility to ''establish and maintain sufficient compliance department resources and staff to ensure that it can conduct effective audit trail reviews, trade practice surveillance, market surveillance and real-time market monitoring.'' Commission, Notice of Proposed Rulemaking: Core Principles and Other Requirements for Swap Execution Facilities, 76 FR 1214, 1241 (Jan. 7, 2011)(''SEF NPRM'').

[112] CL–DTCC *supra* note 51 at 24.

[113] *See* Data NPRM *supra* note 6.

[114] The Commission is making two non-substantive modifications to §§ 49.13(a) and 49.14. The word ''perform'' will be added to the last sentence in § 49.13(a) and the word ''of'' will be added to the last sentence in § 49.14. These modifications are being made to improve the sentence structure of both of these sections.

[115] *See* Real-Time NPRM *supra* note 28. As noted above, §§ 49.12(d) and 49.15 will become effective 60 days from the date of publication in the **Federal Register,** but compliance will not be required until such time as the part 43 rules become effective. *See* note 93 *supra.*

[116] *See* CL–Markit, CL–AMG, CL–Argus, CL–AII, CL–NFPE Coalition, CL–DTCC I and CL–DTCC II *supra* note 51.

[117] CL–Markit and CL–Argus *supra* note 51.

[118] CL–Markit *supra* note 51.

[119] CL–AMG and CL–AII *supra* note 51.

[120] CL–NFPE Coalition *supra* note 51.

[121] CL–Data-ICE, CL–DTCC I and CL–DTCC II *supra* note 51.

[122] CL–DTCC I *supra* note 51.

[123] CL–Better Markets *supra* note 51.

[124] Real-Time NPRM *supra* note 28.

this chapter.'' The Commission believes this change provides appropriate flexibility to adjust SDR responsibilities with regard to the untimely reporting of swap transaction data in accordance with any future adoption of part 43. The Commission will consider the comment received in connection with proposed § 49.15(c) when addressing the relevant provisions in part 43, which is expected to be finalized subsequent to this rulemaking.

In response to comments received [125] concerning the commercial use of real-time public swap data and the commercialization of data generally, the Commission submits that persons responsible [126] for the public dissemination of swap data are prohibited from distributing such data prior to public dissemination. Such pre-publicly available dissemination would constitute a ''commercial use'' under § 49.17(g). Therefore, SDRs may not make commercial use of real-time swap data before dissemination to the public, including any analysis for commercial purposes. As set forth in 49.17(g)(1), the Commission also notes that SDRs must maintain appropriate firewalls to protect swap data from unlawful commercial uses.

Additionally, as discussed above, in light of the comments received and as a result of its consideration of proposed § 49.15, the Commission will continue to consider the role SDRs will play in the public dissemination of real-time swap data and will address these issues in the context of the part 43 rules.

6. Maintenance of Data Privacy—§ 49.16

To implement the statutory requirements of sections 21(c)(6)[127] and 21(f)(3)[128] of the CEA, as added by section 728 of the Dodd-Frank Act,[129] the Commission proposed in § 49.16 that SDRs maintain the privacy and confidentiality of reported swap data.

Section 21(c)(6) of the CEA provides that an SDR shall ''maintain the privacy of any and all swap transaction information that the swap data repository receives from an SD, counterparty, or any other registered entity.'' Section 21(f)(3) of the CEA also sets forth a conflict of interest ''core principle'' applicable to an SDR. As detailed further below, the Commission has identified certain conflicts that may implicate access, disclosure, or use of SDR Information.[130] SDR Information includes any information that an SDR receives from a reporting counterparty,[131] including market participants [132] such as DCMs, DCOs, SEFs, SDs, MSPs and non-SD/MSP counterparties.

The Commission emphasizes that SDRs are expected to receive two separate ''streams'' of data: (i) Data related to real-time public reporting which by its nature is publicly available and (ii) data that is intended for use by the Commission and other regulators which is subject to statutory confidential treatment (''Core Data''). Accordingly, pursuant to sections 21(c)(6) and 21(f)(3) (Core Principle 3—Conflicts of Interest) of the CEA, SDR information that is not subject to real-time public reporting should be treated as non-public and held strictly confidential such that it may not be accessed, disclosed, or used for purposes not related to SDR responsibilities under the CEA or the regulations thereunder, unless such use is explicitly agreed to by the reporting entities. However, aggregated data that cannot be attributed to individual transactions or market participants may be disclosed by an SDR on a voluntary basis or as required by the Commission.

As proposed, § 49.16 required SDRs to establish, maintain, and enforce specific policies and procedures to protect the privacy or confidentiality of any and all SDR Information, including privacy or confidentiality policies and procedures for the sharing of SDR Information with SDR affiliates [133] as well as certain non-affiliated third parties.[134] Proposed § 49.16 also required SDRs to establish and maintain safeguards, policies, and procedures that would, at a minimum, address the misappropriation or misuse of swap data that the Commission is prohibited (save for limited exceptions) from disclosing Section 8 Material.[135] As discussed, Section 8 Material is that information or material described in section 8(a) of the CEA that the Commission is prohibited from publishing if it ''would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.'' [136] Such information would typically

[125] *See* CL–Markit and CL–Argus *supra* note 51.

[126] Although SDRs are permitted to delegate the performance of various functions to 3rd party service providers, the SDR retains the responsibility for compliance with this and other regulatory restrictions.

[127] 7 U.S.C. 24a(c)(6). For a discussion of commercial data privacy, *see generally* Department of Commerce, Internet Policy Task Force, Commercial Data Privacy and Innovation in the Internet Economy: A Dynamic Policy Framework (Dec. 2010) and Federal Trade Commission (FTC), Preliminary Staff Report, Protecting Consumer Privacy in an Era of Rapid Change (Dec. 2010). *See also* FTC, Final Rule: Standards for Safeguarding Customer Information, 67 FR 36484 (May 23, 2002).

[128] According to such ''core principle,'' each SDR shall ''establish and enforce rules to minimize conflicts of interest in [its] decision-making process * * *'' and ''establish a process for resolving conflicts of interest. *See infra* section II D. 4.

[129] *See* section 21(f)(3) of the CEA, 7 U.S.C. 24a(f)(3).

[130] The term ''SDR Information'' is defined in proposed § 49.2(a)(15) to mean ''any information that the swap data repository maintains.'' § 49.17(f) and (g) discussed below contain more specific prohibitions on access or use of SDR Information.

[131] The term ''reporting counterparty'' is set forth in proposed § 45.5 of the Data Rulemaking NPRM. The proposed definition is based on section 4r(3) of the CEA.

[132] The term ''market participant'' is defined in proposed § 49.2(a)(6) to mean any person participating in the swap market, including, but not limited to, DCMs, DCOs, SEFs, SDs, MSPs, and any other counterparties to a swap transaction.

[133] The term ''affiliate'' is defined in proposed § 49.2(a)(1) to mean a person that ''directly, or indirectly, controls, is controlled by, or is under common control with, the swap data repository.''

[134] The term ''non-affiliated third party'' is defined in proposed § 49.2(a)(7) to mean ''any person except (i) swap data repository, (ii) the swap data repository's affiliate, or (iii) a person employed by a swap data repository and any entity that is not the swap data repository's affiliate (and ''non-affiliated third party'' includes such entity that jointly employs the person).''

[135] The term ''Section 8 Material'' is defined in proposed § 49.2(a)(13) as ''the business transactions, trade data, or market positions of any person and trade secrets or names of customers.'' The legislative history of section 8 of the CEA reflects substantial Congressional concern with protecting the legitimate interests of certain market participants. In particular, Congressional members were concerned that ''bona fide hedging transactions'' and ''legitimate'' or ''necessary'' speculative transactions would be impracticable if disclosure of positions or transactions was permitted. Congress was also concerned that publication of the names and market positions of large traders would facilitate manipulation and place traders at a competitive disadvantage. *See generally* 61 *Cong. Rec.* 1321 (1921); Regulation of Grain Exchanges, Hearing on H.R. 8829 Before the H. Comm. on Agriculture, 73rd Cong. (1934).

[136] Section 8(a) of the CEA outlines the scope and authority of the Commission to publish or otherwise publicly disclose information that is gathered in the course of its investigative and market surveillance activities. While the section authorizes the Commission to publish or disclose the information obtained through the use of its powers, it expressly provides that, except in specifically prescribed circumstances, the Commission may not lawfully: publish data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers. * * *

7 U.S.C. 12(a).

The statutory bar to disclosure of ''business transactions, market positions and trade secrets'' is qualified by several narrowly-defined exceptions set forth in section 8(e) of the CEA. 7 U.S.C. 12(e). Section 8(e) generally provides that ''upon request,'' the CFTC may furnish ''any information'' in its possession ''obtained in connection with its administration of the [CEA]'' to another U.S. government department or agency, individual states, foreign futures authorities and foreign governments and any committee of the U.S. Congress that is ''acting within the scope of its jurisdiction.'' Section 8(b) of the CEA permits disclosure of Section 8 Material in connection with certain congressional, administrative or judicial proceedings. In addition, section 8(e) also provides an exception for information that was previously disclosed publicly pursuant to section 8.

include trade data, position data, business transactions, trade secrets and any other non-public personal information about a market participant or any of its customers. Moreover, proposed § 49.16 required an SDR to also protect information that is not Section 8 Material as well as intellectual property that may include trading strategies.

The Commission submits that these SDR safeguards, policies, and procedures addressing privacy and confidentiality—as well as misuse and misappropriation—of data should provide (i) limitations on access related to Section 8 Material and other SDR Information; (ii) standards related to controlling persons associated with the SDR trading for their personal benefit or the benefit of others; and (iii) adequate oversight to ensure SDR compliance with § 49.17. As set forth in § 49.17 discussed below in the section entitled ''Access to SDR Data,'' an SDR may share swap data and information with certain ''appropriate'' domestic and foreign regulators. Commercial use of the data maintained by an SDR—exclusive of real-time reporting data—is strictly circumscribed as provided in § 49.17. As noted above, swap data that is publicly disseminated in real-time by SDRs pursuant to proposed part 43 of the Commission's Regulation would not be subject to the privacy and confidentiality requirements set forth in § 49.16.

The Commission received two comments relating to privacy and confidentiality concerns.[137] DTCC specifically supported the Commission's efforts to keep swap data reported to SDRs confidential but noted the possibility of unintentional disclosure of participant identities in connection with the public dissemination of swap data. The concern raised by DTCC focused on the perceived potential for market participants to extrapolate identities of counterparties to a transaction that is publicly reported pursuant to the real-time public reporting requirements. The Commission, however, believes that the manner in which real-time public reporting will occur pursuant to part 43 will mitigate this concern because counterparty identities will not be disclosed and the actual underlying notional amount will not be associated with any particular transaction. MFA similarly believes that the requirements of § 49.16 may not be sufficient to protect the confidentiality of trading positions.

The Commission agrees with MFA that the confidentiality of position level data held by an SDR is extremely important and notes that § 49.16, as proposed, would require that each SDR ''[e]stablish and maintain safeguards, policies, and procedures reasonably designed to prevent the misappropriation or misuse, directly or indirectly, of: (i) Section 8 Material; (ii) other SDR Information; and/or Intellectual property * * *''[138] Accordingly, the Commission believes that this requirement covers the matters that MFA proposed for inclusion in § 49.16. ''Section 8 Material'' as defined in proposed § 49.2(a)(11) means the ''business transactions, trade data or market positions of any person and trade secrets or names of customers.'' The details of any master agreements governing a swap would clearly fall within a ''business transaction'' referenced in the definition of Section 8 Material.

In connection with MFA's desire to have the legal standard of care set forth in § 49.16, the Commission submits that SDRs, rather than the Commission, are in the better position to establish appropriate procedures to protect the confidentiality of SDR data consistent with § 49.16. In addition, the Commission believes that MFA's recommendation to hold current and former SDR employees, directors, officers, agents and representatives liable by regulation for any breach of the SDR's privacy policies and procedures is beyond the scope of section 21(c)(6). Consistent with MFA's comments, the Commission believes that SDRs must be prohibited, as a condition of accepting data from reporting entities, from requiring the waiver of any legal rights such entities may have with respect to breaches of confidentiality by the SDR. The Commission also received comments on confidentiality and aggregated data from DTCC, which was concerned that market participants may be able to identify the parties to a particular transaction through extrapolation even though the disclosed data is ''aggregated.''[139]

In order to clarify its position with respect to the disclosure of ''aggregated data,'' the Commission believes that it is permissible under the Dodd-Frank Act and part 49 of the Commission's regulations for an SDR to disclose, for non-commercial purposes, data on an aggregated basis such that the disclosed data reasonably cannot be attributed to individual transactions or market participants. In addition, the Commission submits that if requested by the Commission, an SDR would be required to disclose aggregated data in such form and manner as the Commission prescribes.

Accordingly, the Commission is adopting § 49.16 largely as proposed with the addition of (i) paragraph (b) to clarify that an SDR is prohibited from requiring a waiver of a reporting entity's legal rights for breaches of confidentiality by the SDR or affiliated entities; and (ii) paragraph (c) to clarify that SDRs may disclose aggregated data voluntarily or as requested by the Commission.

7. Access to SDR Data—§ 49.17

(a) Definition of Appropriate Domestic Regulator

As detailed in the SDR NPRM, the Commission in proposed § 49.17 specifically included the Federal Reserve Bank of New York (''FRBNY'') as an ''Appropriate Domestic Regulator'' because section 21(c)(7) of the CEA does not specifically provide for the sharing of information between an SDR and the FRBNY. The Commission believes that only including the FRBNY as an Appropriate Domestic Regulator is overly restrictive, and therefore, is revising the definition of ''Appropriate Domestic Regulator'' to include any ''Federal Reserve Bank.''[140]

(b) Commission Access

As detailed in the SDR NPRM, a critical function and responsibility of an SDR is to provide ''direct electronic access'' to the Commission or its designee, which could include another registered entity.[141] The Commission in § 49.17(b)(3) defined the term ''direct electronic access'' as ''an electronic system, platform or framework that provides internet or web-based access to real-time swap transaction data.'' The Commission believes that a clarification to the definition of ''direct electronic access'' is necessary to include

[137] *See* CL–DTCC I and CL–MFA *supra* note 51.

[138] Proposed § 49.16(a)(2) set forth in SDR NPRM *supra* note 51 at 80931.

[139] CL–DTCC I *supra* note 51.

[140] The Commission notes that the expansion of ''Appropriate Domestic Regulator'' to include any Federal Reserve Bank will serve to ensure that the Board of Governors of the Federal Reserve System (''FRB'') will be able to effectively and efficiently perform its statutory responsibilities as prescribed by the Federal Reserve Act (''FRA'').

[141] *See* section 21(c)(4)(A) of the CEA. The term ''registered entity'' is defined in section 1a(40) of the CEA to include (i) a board of trade designated as a contract market under section 5 of the CEA; (ii) a DCO registered under section 5b of the CEA; (iii) a SEF registered under section 5h of the CEA; (iv) an SDR registered under section 21 of the CEA; and (v) with respect to a contract that the Commission determines is a significant price discovery contract, any electronic trading facility on which the contract is executed or traded. 7 U.S.C. 1a(40).

''scheduled data transfers to the Commission's electronic systems.''

The Commission received seven comments on direct electronic access.[142] Although most commenters were generally supportive of the Commission's approach, a few objected to certain provisions of § 49.17(c) as proposed. Each comment is discussed below.

In connection with the Commission's request for comment,[143] Better Markets and AFR both registered their preference for real-time direct streaming of swap data versus periodic electronic transfer of data.[144] The Commission agrees with both Better Markets and AFR that real-time access to swap data is necessary for adequate oversight and surveillance of the swaps market.

In response to a Commission request [145] for comment relating to the most cost-effective method or manner in providing direct electronic access, Reval stated that SDRs should be required to provide the Commission with internet browser-based access to a hosted SDR solution. Consistent with Reval's comments, the Commission believes that an internet or Web-based method to access reported swap data held and maintained by SDRs would be the least disruptive and most efficient process.

DTCC noted its experience with the Trade Information Warehouse for OTC credit derivatives [146] and recommended that the Commission permit SDRs to adopt in their discretion the manner and method of providing data sets to the Commission. The Commission believes that the manner and method of obtaining access to the swap data held by SDRs is the function and prerogative of the Commission and should not be left to the judgment or discretion of the SDR and its management. In connection with its separate comment letter responsive to the Data NPRM, DTCC also asserted that the Commission should allow sufficient reporting flexibility. As set forth above, the Commission does not believe that SDRs should have the discretion or ability to determine the appropriate data sets that should be provided to the Commission.

CME stated that it is impractical to provide Commission staff with access identical to that provided to the SDR's CCO because of technical considerations.[147] CME also disagreed with the premise of ''direct electronic access'' set forth in § 49.17(c), maintaining that SDRs should not be required to provide ''proprietary'' systems to the Commission without compensation and without adequate assurances that the swap data would remain confidential. Moreover, CME asserted that ''real-time'' electronic access to the swap data maintained by an SDR is not necessary.

The Commission disagrees with CME's view regarding Commission direct electronic access. As stated previously, section 21(c)(4)(A) of the CEA mandates that SDRs provide the Commission (or any Commission designee) with direct electronic access.[148] Accordingly, the Commission submits that this requirement to provide the Commission with direct electronic access is not qualified or at the discretion of the SDR. With respect to CME's concern relating to improper disclosure of confidential swap data, the Commission notes that section 8 of the CEA prohibits the Commission from disclosing information ''that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.'' [149] Accordingly, the Commission believes that CME's comments are unwarranted and should not serve to limit direct electronic access by the Commission and its staff.

NFPE Coalition commented that the Commission should not have access to entity data submitted by non-financial entities, including the identity of such entities, unless they engage in swaps to the extent that their exposure could pose a systemic risk. The Commission notes that the Dodd-Frank Act generally provides regulators with the ability to monitor and oversee the swaps markets by reviewing and analyzing the data to be held by SDRs. The Commission submits that the ability to review and analyze all swap transactions (whether by a financial or non-financial entity) is essential in order for the entire market to be sufficiently monitored and analyzed. The Commission does not agree with the NFPE Coalition's view that non-financial entity transactions should remain confidential given the direct statutory requirements in section 21(c)(6) of the CEA that SDRs ''maintain the privacy of any and all swap transaction information that the swap data repository receives from a swap dealer, counterparty, or any other registered entity.''

Based on the analysis set forth above relating to proposed § 49.17(c) and an SDR's statutory duty to provide the Commission or its designee with direct electronic access, the Commission is adopting § 49.17(c) as proposed. In addition, as discussed above, the Commission is also adopting a minor revision to the definition of ''direct electronic access'' set forth in § 49.17(b)(3) to clarify that ''direct electronic access'' would include ''scheduled data transfers to Commission's electronic systems.''

(c) Other Regulator Access to SDR Data

Section 21(c)(7) [150] of the CEA requires a registered SDR, on a confidential basis pursuant to section 8 of the CEA, upon request and after notifying the Commission, to make available all data [151] obtained by the registered SDR, to ''Appropriate Domestic Regulators'' and ''Appropriate Foreign Regulators.''

The Commission also proposed that the term ''Appropriate Foreign Regulator'' be defined in § 49.17. As proposed, the definition of ''Appropriate Foreign Regulator'' has two parts or elements. First, § 49.17(b)(2) defines an Appropriate Foreign Regulator as those ''foreign regulators'' [152] with an existing MOU or

[142] *See* CL–Better Markets, CL–AFR and CL–Reval I *supra* note 51. *Compare* CL–DTCC II, CL–Data-DTCC, CL–CME and CL–NFPE Coalition *supra* note 51.

[143] The Commission in the SDR NPRM requested comment on real-time access as follows: ''What are the advantages and disadvantages of requiring SDRs to provide a direct streaming of the data to the Commission or its designee? Should the Commission require periodic electronic transfer of data as an alternative? If so, how often should such transfer occur (*e.g.,* hourly, a few times a day, every few days, once a week)?'' SDR NPRM *supra* note 51 at 80906.

[144] CL–AFR and CL–Better Markets *supra* note 51 at 3 and 7–8, respectively.

[145] The Commission in the SDR NPRM requested the comment on the following: ''What would be the most feasible and cost-effective method for an SDR to provide direct electronic access to the Commission or its designee?'' SDR NPRM *supra* note 8 at 80906.

[146] CL–DTCC II *supra* note 51.

[147] CL–CME *supra* note 51 at 5–6.

[148] *Id.*

[149] *See* 7 U.S.C. 12(a). The statutory bar to disclosure of ''business transactions, market positions and trade secrets'' is qualified by several narrowly-defined exceptions set forth in section 8(e) of the CEA.

[150] Section 21(c)(7) of the CEA reads:

A swap data repository shall—* * * on a confidential basis pursuant to Section 8, upon request, and after notifying the Commission of the request, make available all data obtained by the swap data repository, including individual counterparty trade and position data, to—(A) each appropriate prudential regulator; (B) the Financial Stability Oversight Council; (C) the Securities and Exchange Commission; (D) the Department of Justice; and (E) any other person that the Commission determines to be appropriate. * * *

7 U.S.C. 24a(c)(7). Included in the definition of Appropriate Domestic Regulators are all domestic entities listed in section 21(c)(7) and other persons that the Commission has determined to be appropriate.

[151] The sharing of data with an Appropriate Domestic Regulator by a registered SDR is subject to the confidentiality and indemnification restrictions in section 21(d) of the CEA, 7 U.S.C. 24a(d).

[152] The term ''foreign regulator'' is defined in proposed § 49.2(a)(4) to mean ''a foreign futures authority as defined in section 1a(26) of the

other similar type of information sharing arrangement executed with the Commission. Second, § 49.17(b)(2) provides that foreign regulators without an MOU with the Commission may be deemed ''Appropriate Foreign Regulators'' as determined on a case-by-case basis by the Commission. Accordingly, § 49.17 as proposed set forth detailed filing procedures for foreign regulators who do not currently have an MOU with the Commission to obtain the status of ''Appropriate Foreign Regulator.'' The Commission received no comments relating to the proposed definition of Appropriate Domestic Regulator and Appropriate Foreign Regulator. Accordingly, the Commission is adopting § 49.17(b) as proposed.

The procedure for Appropriate Domestic Regulators or Appropriate Foreign Regulators to gain access to the data held and maintained by an SDR was detailed in proposed § 49.17(d). First, an Appropriate Domestic Regulator or Appropriate Foreign Regulator is required to request access with the registered SDR in sufficient detail so that the SDR is able to determine the basis of the request. As part of this request, the Appropriate Domestic Regulator or Appropriate Foreign Regulator must also certify (i) its statutory authority; and (ii) that it is acting within the scope of its jurisdiction. The registered SDR must then notify the Commission promptly by electronic means of any request received from an Appropriate Domestic Regulator or Appropriate Foreign Regulator. As proposed, the registered SDR will then provide access to the requested swap data if satisfied that the Appropriate Domestic Regulator or Appropriate Foreign Regulator is acting within the scope of its authority.

The Commission received one comment from the OCC expressing concern that SDRs would serve a ''gate keeping'' function relating to regulator access.[153] OCC maintained that SDRs should not be permitted to question the statutory authority of a regulator to receive swaps data maintained by the SDR. Although other commenters[154] did not specifically comment on the procedure set forth in § 49.17(d) relating to regulators' access, these commenters generally indicated that SDRs should operate in a manner that would freely provide information to regulators. These commenters viewed the purpose of SDRs as one of assisting regulators in fulfilling their regulatory obligations. The theme of these comments is that SDRs should serve as an impartial vehicle for assisting regulators.

Upon review of the comments received and the access procedure generally, the Commission believes that other regulator access (Appropriate Domestic Regulator and Appropriate Foreign Regulators) should not be constrained or limited by SDRs. Therefore, the Commission is revising proposed § 49.17(d) so that Appropriate Domestic Regulator and Appropriate Foreign Regulators when filing a request for access are only required to certify that they are acting within the scope of their jurisdiction. As proposed, § 49.17(d)(i) required the Appropriate Domestic Regulator or Appropriate Foreign Regulator to set forth in sufficient detail the basis for its request. The Commission is eliminating this requirement in § 49.17(d) as adopted. In addition, proposed § 49.17(d)(3) required an SDR to provide access to the requested swap data ''if satisfied that the Appropriate Domestic Regulator or Appropriate Foreign Regulator is acting within the scope of its authority.'' The Commission is also revising proposed § 49.17(d)(3) so that Appropriate Domestic Regulators' and Appropriate Foreign Regulators' access to SDR swap data is provided once the SDR notifies the Commission of the request.

(d) Confidentiality and Indemnification Agreement

For the purpose of implementing section 21(c)(7) and (d) of the CEA, the Commission proposed § 49.18. Consistent with section 21(d),[155] § 49.18, as proposed, provided that an Appropriate Domestic Regulator or Appropriate Foreign Regulator prior to receipt of any requested data or information from a registered SDR must execute a ''Confidentiality and Indemnification Agreement'' with the registered SDR. The Commission further provided in proposed § 49.18 that an Appropriate Domestic Regulator or Appropriate Foreign Regulator must notify and provide a copy of the Confidentiality and Indemnification Agreement to the Commission.

Proposed § 49.18 required that the Confidentiality and Indemnification Agreement executed with each Appropriate Domestic Regulator and/or Appropriate Foreign Regulator provide that such entity abide by the confidentiality requirements set forth in section 8 of the CEA relating to the swap data that is to be provided by the registered SDR. Moreover, the Confidentiality and Indemnification Agreement must provide that each section 21(c)(7) entity agree to indemnify the registered SDR and the Commission for any expenses arising from litigation relating to the information provided under section 8 of the CEA. The Commission received four comments[156] relating to the confidentiality and indemnification agreement requirement and/or information sharing among regulators.

DTCC stated that proposed § 49.18 is not consistent with the OTC Derivatives Regulators' Forum (''ODRF'')[157] guidelines which generally provide that ''[a]uthorities, including central banks, prudential supervisors, resolution authorities and market regulators, with a material interest in [credit derivatives] information in furtherance of their regulatory and/or governmental responsibilities should have unfettered access to the relevant data, irrespective of the location of the trade repository.''[158] Accordingly, DTCC recommended that the indemnification provisions of section 21(d) as proposed in § 49.18 should not apply where regulators are carrying out regulatory responsibilities, acting in a manner consistent with international agreements and maintaining the confidentiality of the data.[159] With this recommendation, DTCC requested the

Commodity Exchange Act, foreign financial supervisors, foreign central banks and foreign ministries.''

[153] CL–OCC *supra* note 51.

[154] *See* CL–DTCC I, CL–TriOptima, CL–Regis—TR and CL–ESMA *supra* note 51.

[155] Section 21(d) of the CEA provides:

Before the swap data repository may share information with any entity described in subsection (c)(7)–(1) the swap data repository shall receive a written agreement from each entity stating that the entity shall abide by the confidentiality requirements described in Section 8 relating to the information on swap transactions that is provided; and (2) each entity shall agree to indemnify the swap data repository and the Commission for any expenses arising from litigation related to the information provided under section 8.

7 U.S.C. 24a(d).

[156] *See* CL–DTCC I, CL–TriOptima, CL–ESMA and CL–Foreign Banks *supra* note 51.

[157] ODRF includes representatives from central banks, prudential supervisors and market regulators from over 20 countries globally. The ODRF is not a standard-setting body, but instead, supports the application of standards set by other bodies in the international regulatory community. The Forum provides an environment for regulators and authorities to exchange views and to share information related to OTC derivatives central counterparties and trade repositories on a regular basis. It also provides mutual assistance among the authorities in carrying out their respective responsibilities with respect to OTC derivatives. However, it is important to note that the ODRF does not supersede any regulator's statutory mission or national and otherwise applicable laws.

[158] *See* letter from OTC Derivatives Regulators' Forum to the Warehouse Trust Company, dated June 18, 2010. *Available at: http://www.dtcc.com/downloads/legal/imp_notices/2010/derivserv/tiw044.zip. See also* Working Group Report *supra* note 12.

[159] *Id.*

Commission together with other global regulators provide ''model indemnity language'' for use by all repositories or SDRs.

TriOptima specifically encouraged the Commission to ''adopt as flexible as interpretation as possible'' of the indemnification provision proposed in § 49.18.[160] Similarly, ESMA questioned the necessity of an indemnification agreement between a foreign regulator and a U.S.-registered SDR.[161] ESMA stated that this proposal would undermine the trust necessary among various regulators in connection with data access from SDRs. Although not specific to the indemnification provision, the Foreign Banks also commented that regulators should support cross-border information sharing efforts so that a complete picture of the overall swaps market is available for supervision and surveillance purposes.[162]

The Commission is mindful that the Confidentiality and Indemnification Agreement requirement set forth in section 21(d) and § 49.18 may be difficult for certain domestic and foreign regulators to execute with an SDR due to various home country laws and regulations. We note in this regard that section 752 of the Dodd-Frank Act seeks to ''promote effective and consistent global regulation of swaps'' and provides that the CFTC and foreign regulators ''may agree to such information-sharing arrangements as may be deemed to be necessary or appropriate in the public interest * * *.'' In light of this statutory directive, the Commission continues to work to provide sufficient access to SDR data to appropriate domestic and foreign regulatory authorities.

The Commission believes that, under the circumstances described below, certain Appropriate Domestic Regulators may be provided access to the swap data reported and maintained by SDRs without being subject to the notice and indemnification provisions of section 21(c)(7) and (d).[163] First, the SDR must be subject to the regulatory jurisdiction, and register with, the Appropriate Domestic Regulator. Second, consistent with section 21(c)(4)(A) of the CEA, the SDR would be permitted to provide direct electronic access to such Appropriate Domestic Regulator as a designee of the Commission.[164] Under these circumstances, the Appropriate Domestic Regulator would be provided direct electronic access to the SDR subject to the same terms and conditions as would apply to the Commission.[165]

In connection with foreign regulatory authorities, the Commission believes that confidential swap data reported to, and maintained, by an SDR may be appropriately accessed by an Appropriate Foreign Regulator without the execution of a Confidentiality and Indemnification Agreement when the Appropriate Foreign Regulator is acting in a regulatory capacity with respect to a SDR that is also registered with the Appropriate Foreign Regulator.[166] In such dual-registration cases, the Appropriate Foreign Regulator may receive information directly from the SDR without notice to the Commission and/or the execution of the Confidentiality and Indemnification Agreement, subject to applicable statutory confidentiality provisions set forth in section 8 of the CEA.[167]

Lastly, The Commission notes that the notice and indemnification requirements set forth in section 21(c)(7) and (d) of the CEA would not apply when the Commission, pursuant to section 8(e) of the CEA, shares confidential information in its possession obtained in connection with the administration of the CEA to ''any foreign futures authority, department or agency of any foreign government or any political subdivision thereof'' acting within the scope of their jurisdiction. Thus, Appropriate Foreign Regulators may, pursuant to section 8(e), receive SDR Information from the Commission without the execution of the Confidentiality and Indemnification Agreement.

Accordingly, the Commission is adopting § 49.18 as revised to provide that SDRs that are dually-registered with the Commission and an Appropriate Domestic or Foreign Regulator may provide access without the execution of a Confidentiality and Indemnification Agreement. The Commission is similarly revising § 49.17(d), as noted above, so that Appropriate Domestic and Foreign Regulators with regulatory responsibilities over SDRs are not required to file data access requests with their regulated repository or SDR.

(e) Third-Party Service Providers Employed by SDRs

The Commission in the SDR NPRM recognized that SDRs from time to time may contract with third parties in order to fulfill certain operational and data-related obligations. Data access to a third-party service provider may be especially important in connection with certain technology and infrastructure services.

The Commission received one comment letter relating to proposed § 49.17(e). MFA was concerned that § 49.17(e) may not be sufficient to protect data and information held and maintained by SDRs from improper disclosure.[168] MFA recommended that the Commission require the confidentiality procedures between an SDR and a third-party service provider to follow the same standard of care and protocol that applies to an SDR's obligation to protect confidential swap information.

The Commission agrees with MFA's recommendation and accordingly has revised § 49.17(e) to require that any ''Confidentiality Agreement'' between an SDR and a third party include a provision that the third-party service provider have the same or equivalent confidentiality procedures as the SDR outlined in § 49.16.

[160] CL–TriOptima *supra* note 51 at 3–4.

[161] CL–ESMA *supra* note 51.

[162] CL–Foreign Banks *supra* note 51 at 7.

[163] Pursuant to the directive set forth in section 712(a) of the Dodd-Frank Act, 15 U.S.C. 8302, the Commission has interpreted this provision as providing the basis to permit access to the swap data maintained by SDRs to Appropriate Domestic Regulators that have concurrent regulatory jurisdiction over such SDRs, without the application of the notice and indemnification provisions of sections 21(c)(7) and (d) of the CEA, respectively. As indicated above, the SDR, among other things, must be subject to the regulatory oversight, and be registered with, the Appropriate Domestic Regulator.

[164] As part of such designation, the Commission would require an Appropriate Domestic Regulator to enter into a MOU or similar type of information sharing arrangement with the Commission. *See* section 8(e) of the CEA, 7 U.S.C. 12(a).

[165] The Commission notes that certain SDRs are likely to register with both the Commission and the SEC because the same entity will offer its services for both swaps and security-based swaps. In addition, the Board of Governors of the Federal Reserve System currently supervises the Warehouse Trust, the global repository for credit derivatives. The Commission expects Warehouse Trust to register with the Commission as an SDR and continue to be a member of the Federal Reserve System, thereby, subject to the concurrent jurisdiction of the Commission and the Board of Governors of the Federal Reserve System.

[166] *See* section 752 of the Dodd-Frank Act, 15 U.S.C. 8325. Consistent with the directive in section 752 to ''promote effective and consistent global regulation of swaps,'' the Commission does not interpret the notice and indemnification provisions set forth in sections 21(c)(7) and (d) of the CEA to apply in circumstances in which an Appropriate Foreign Regulator possesses independent sovereign legal authority to obtain access to the information and data held and maintained by an SDR.

[167] *See* Written Testimony of Gary Gensler, Chairman of the Commission, before the U.S House Committee on Financial Services on June 16, 2011 available at *http://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-86.html* and letter from Gary Gensler, Chairman of the Commission, and Mary Schapiro, Chairman of the SEC, to Michael Barnier, European Commissioner for Internal Markets and Services, European Commission, dated June 8, 2011.

[168] CL–MFA *supra* note 51.

(f) Counterparty Access to SDRs

The Commission proposed § 49.17(f) to generally prohibit access to the swaps data maintained by a registered SDR by market participants, such as SDs and MSPs, unless the specific data was originally submitted by such party. The underlying basis for this regulation was to maintain the privacy and confidentiality of the reported data while also limiting potential access to reported swap data to the rightful parties to a swap.

The statutory authority for proposed § 49.17(f) is two-fold. First, section 21(c)(6) of the CEA requires registered SDRs to maintain the privacy of any and all swap transaction information that the registered SDR receives from an SD, counterparty, or any other registered entity. Second, section 21(f)(3) [169] of the CEA requires an SDR to establish and enforce rules to mitigate conflicts of interest.

The Commission received two comment letters relating to § 49.17(f). ABC/CIBEA noted that § 49.17(f), as proposed, generally prohibits access to swap data maintained by an SDR subject to an exception permitting access ''* * * if the specific data was originally submitted by such party.'' [170] ABC/CIEBA asserts that this provision would only include the reporting party, and therefore, recommended the Commission revise § 49.17(f) so that the exception provides ''[d]ata and information related to a particular swap that is maintained by the registered swap data repository may be accessed by either counterparty to that particular swap.'' [171] The Global FX Division similarly indicated that § 49.17(f) should be modified to permit both counterparties to a swap to view the reported data that is held and maintained by such SDR.[172]

Based on the comments noted above, the Commission is adopting § 49.17(f) largely as proposed with a revision to § 49.17(f)(2) to allow both counterparties to a swap to access information held and maintained at an SDR for that particular swap.

(g) Commercial Use of Data

The Commission in the SDR NPRM proposed § 49.17(g) to generally prohibit an SDR from using the data it accepts and maintains for commercial or business purposes. As part of this prohibition, § 49.17(g) required a registered SDR to adopt and implement adequate ''firewalls'' to protect the swaps data from any improper, commercial use. Proposed § 49.17(g)(2) provided for a limited exception to the commercial use prohibition if the submitters of the data provide express written consent to the SDR that its reported data can be used for commercial purposes. The statutory basis for § 49.17(g), as proposed, is established in sections 21(c)(6) and 21(f)(3) of the CEA.[173]

Section 21(c)(6) provides that an SDR shall ''maintain the privacy of any and all swap transaction information that the swap data repository receives from a swap dealer, counterparty, or any other registered entity.'' As indicated in the SDR NPRM, SDRs are expected to receive two separate ''streams'' of data: (i) Data related to real-time public reporting which by its nature is publicly available; and (ii) ''core'' regulatory data that is intended for use by the Commission and other regulators which is subject to statutory confidential treatment (''Core Data''). Accordingly, SDR Information that is not subject to real-time public reporting should be treated as non-public and subject to the prohibitions on commercial use set for in proposed § 49.17(g). In this manner, the Core Data could not be accessed, disclosed, or used for purposes not related to SDR responsibilities under the CEA or the regulations thereunder, unless such use is explicitly agreed to by the submitters of the data.

Section 21(f)(3) of the CEA, Core Principle 3, also provides that each SDR must establish and enforce rules to minimize conflicts of interest in the decision-making process of the SDR and to establish a process for resolving such conflicts.[174] Because of the inherent conflicts in connection with maintaining swap data and SDR operations (*e.g.,* the incentive to develop ancillary services using swap data), the Commission proposed that ''commercial use'' of any data submitted and maintained by an SDR must be severely restricted. The Commission was also concerned that an SDR may attempt to use this limited ''commercial use'' exception as a precondition for accepting non-SD/non-MSP, SD and/or MSP swap transactions. Accordingly, proposed § 49.27 required registered SDRs to provide fair, open and equal access to its services and must not discriminate against submitters of data regardless of whether such a submitter has agreed to any ''commercial use'' of its data. The Commission received a total of six comment letters relating to the commercialization of data.[175] Each of these comments is discussed in turn below.

Markit sought clarification regarding the application of proposed § 49.17(g) to the (i) preservation of data ownership rights and (ii) the permissible uses of data by an SDR.[176] Markit recommended that regulations relating to the real-time reporting of swap data make clear that swap data ownership does not transfer to the SEF, DCM or any other regulated entity, as appropriate.

The Commission believes that (i) counterparty ''consent'' to real-time reporting proposed in part 43 does not provide consent under proposed § 49.17(g) adequate to permit an SDR to use such Core Data for commercial purposes; and (ii) regulated entities responsible for the public dissemination of real-time swap data should be restricted from making commercial use of that data prior to public dissemination. The Commission does not agree with Markit's suggestion that the commercial use of real-time data by SDRs requires the consent of the data owners but, as discussed, has modified § 49.17(g)(3) to prohibit SDRs from making commercial use of real-time data before disseminating such data publicly.

CME commented that the Commission should adopt more stringent requirements to protect commercialization of data received from any entity. Accordingly, CME recommended the Commission revise proposed § 49.17(g) so that: (i) The SDR must receive express written consent before commercializing any data received, whether the entity is a swap counterparty or other registered entity (such as a DCO); (ii) the term ''market participant'' should apply more broadly than just to counterparties; and (iii) information submitted by a DCO to an SDR should not be considered to be aggregated data exempt from the commercialization prohibition.[177]

The Commission shares the CME's view that information submitted to an SDR by a registered entity, such as a DCO, is not aggregated data exempt from the commercialization prohibition.

The Commission notes that the definition of ''market participant'' set forth in proposed § 49.2(a)(6) applies to various registered entities such as DCMs, DCOs and SEFs and, therefore, is not limited to swap counterparties.

[169] *See infra* section II.D.4.

[170] CL–ABC/CIEBA *supra* note 51.

[171] CL–ABC/CIEBA *supra* note 51 at 6.

[172] CL–Global FX Division *supra* note 51.

[173] *See* section 728 of the Dodd-Frank Act.

[174] *See* section 21(f)(3) of the CEA, 7 U.S.C. 24a(f)(3) as added by section 728 of the Dodd-Frank Act.

[175] *See* CL–Markit, CL–CME, CL–Argus, CL–DTCC I, CL–DTCC II and CL–Better Markets *supra* note 51.

[176] CL–Markit I *supra* note 51 at 2.

[177] CL–CME *supra* note 51 at 4–5.

However, in terms of proposed § 49.17(g) and the underlying privacy provision related to SDRs set forth in section 21(c)(6) of the CEA, the Commission agrees with the CME's recommendation for additional clarity regarding market participants that are able to consent to the commercial use of data. Therefore, consistent with CME's comment, the Commission is revising proposed § 49.17(g) by replacing the term ''market participant'' with the language of section 21(c)(6) of the CEA which states ''swap dealer, counterparty, or any other registered entity.''

Argus commented that proposed § 49.17(g) may not be sufficient to prevent the indirect commercial use of confidential data held by an SDR. In its role of collecting and disseminating information for real-time reporting of swap transactions, Argus believes that SDRs may seek to ''monetize'' or commercially use ''real-time'' data.

The Commission believes that § 49.17(g) adequately protects swap data reported to an SDR from improper disclosure to affiliates of the SDR and other third parties. In particular, the Commission notes that § 49.17(g)(1) specifically requires that an SDR ''adopt and implement adequate 'firewalls' to protect the data required to be maintained under § 49.12 of this part and section 21(b) of the Act from any improper, commercial use.'' [178] As a preliminary matter, the Commission believes that adequate controls or firewalls would require SDR staff that is involved with any commercial use of real-time data to be restricted from obtaining access to any Core Data. The Commission does not support Argus' recommendation that would prohibit the commercial use of real-time data by an SDR if such SDR has access to non real-time data.

DTCC commented that data reported and maintained by SDRs should not be ''commercialized.'' [179] As a result, DTCC believes that a prohibition against commercial uses or practices relating to commercial use of SDR data will lead to a more cost efficient and less risky swap market. DTCC also submitted that SDRs should provide open access to offered services while preserving trading parties' control over the reported data maintained by the SDR.[180] Accordingly, DTCC believes that the particular SDR for which a trade is reported should be based on the counterparty's selection and not by a SEF, DCO, confirmation facility or other service provider.

The Commission generally agrees with DTCC's views relating to commercialization of data. However, with respect to the selection of the SDR by the reporting counterparty,[181] the Commission notes that the reporting counterparty may contractually delegate its decision to an agent such as a SEF, DCO, confirmation facility or other service provider. Accordingly, the Commission does not believe § 49.17(g) requires a revision on this point.

Better Markets asserted that if the SDR uses data for ''commercial purposes'' the SDR must be required to provide the data to the public on equal terms as to price, priority and speed of transmittal.[182] The Commission believes that generally the reporting counterparty may consent to the commercial use of its data without an additional requirement on an SDR to provide such data access to the public on equal terms.

The Commission continues to believe that conflicts are inherent in the reporting and maintaining of swap data by SDRs, and submits that the ''commercial use'' of Core Data should be restricted. However, as noted above, an SDR could, consistent with section 8 of the CEA, commercially use swap data that was reported on a real-time basis pursuant to proposed part 43 of the Commission's Regulations. However, the Commission notes that an SDR would be in violation of § 49.17(g) and if it were to require the express consent of a market participant to use any reported data held and maintained by the SDR as a condition for the reporting of such swap transaction data. Accordingly, the Commission is adopting § 49.17(g) largely as proposed subject to the revisions noted above.

8. Emergency Authority Procedures and System Safeguards—§§ 49.23 and 49.24

Section 21(c)(8) of the CEA requires SDRs to ''establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery that allows for the timely recovery and resumption of operations and the fulfillment of the responsibilities and obligations of the organization.'' Proposed §§ 49.23 and 49.24 of the Commission's regulations implement section 21(c)(8).

Proposed § 49.23, consistent with former DCM Core Principle 6 [183] and new application guidance for both DCMs and SEFs,[184] required SDRs to set forth emergency contingency plans, including the designation of officials to act in the event of an emergency, chains of command and emergency conflict of interest policies and procedures.[185] Consistent with new core principle 20 for DCMs and new core principle 14 for SEFs added by sections 735 and 733 of the Dodd Frank Act, respectively, proposed § 49.24 required system safeguards for SDRs including business continuity and resumption of services plans and coordinated system testing.[186]

Proposed § 49.24(d) specifically required that SDRs have sufficient BC–DR plans and resources to enable a resumption of the SDR's operations within one business day following a disruption in SDR operations. For SDRs determined by the Commission to be ''critical,'' [187] proposed § 49.24(e)

[178] 17 CFR 49.17(g)(1).

[179] CL–DTCC I *supra* note 51 at 3.

[180] CL–DTCC II *supra* note 51 at 3.

[181] *See* proposed §§ 45.5–45.7 of the Commission's Regulations set forth in the Data NPRM *supra* note 6.

[182] *Id.* at 13.

[183] Former section 5(d)(6) of the CEA, 7 U.S.C. 7(d)(6); 17 CFR part 38, App. B, Application Guidance for former Core Principle 6.

[184] The new DCM emergency procedures core principle is also enumerated as DCM Core Principle 6 and codified in section 5(d)(6) of the CEA, 7 U.S.C. 7(d)(6); it is substantively similar to its predecessor. The new SEF emergency procedures core principle is enumerated as SEF Core Principle 8 and codified in section 5h(f)(8) of the CEA, 7 U.S.C. 7b–3(f)(8).

[185] *See* SDR NPRM *supra* note 8 at 80911–80912.

[186] Core principle 20 (DCMs) and core principle 14 (SEFs) are virtually identical and provide that each respective registered entity shall ''(A) establish and maintain a program of risk analysis and oversight to identify and minimize sources of operational risk, through the development of appropriate controls and procedures, and the development of automated systems, that are reliable, secure, and have adequate scalable capacity; (B) establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery that allow for the timely recovery and resumption of operations and the fulfillment of the responsibilities and obligations of the board of trade [or swap execution facility]; and (C) periodically conduct tests to verify that backup resources are sufficient to ensure continued order processing and trade matching, price reporting, market surveillance, and maintenance of a comprehensive and accurate audit trail.'' The new DCM Core Principle 20 is codified in section 5(d)(20) of the CEA, 7 U.S.C. 7(d)(20). The new SEF Core Principle 14 is codified in section 5h(f)(14) of the CEA, 7 U.S.C. 7b–3(f)(14). *See* DCM NPRM and SEF NPRM, *supra* note 111.

[187] The Commission in § 49.24 has not defined a ''critical'' SDR, but instead, believes a determination of ''critical'' is a fact-intensive analysis. However, the Commission submits that a ''critical'' SDR would be an SDR that is integral to the swaps market generally or based on a particular asset class. Generally, the Commission will evaluate each SDR on a case-by-case basis, giving consideration to whether the SDR provides essential reporting and other services (such as swap confirmation and/or risk management) that is integral to the swaps market. Because of the nature of the swaps market and the essential reporting and maintenance of accurate data, the Commission is likely to view ''critical'' on a collective rather than individual basis. The Commission may also consider other relevant factors that it finds important such as whether a single or select number of SDRs maintain the vast majority of swap transaction data. *See* Commission, Notice of Proposed Rulemaking: Business Continuity and

required that they (i) implement a disaster recovery plan and BC–DR resources sufficient to enable a same-day recovery time objective in the event that its normal capabilities become inoperable, including a wide-scale disruption; and (ii) maintain geographic dispersal of infrastructure and personnel sufficient to enable achievement of a same-day recovery time objective, in the event of a wide-scale disruption.

The Commission received no comments regarding the provisions in proposed § 49.23. The Commission received one comment from Chris Barnard regarding proposed § 49.24(j).[188] Barnard, in connection with proposed recordkeeping requirements, indicated his view that proposed § 49.24(j) should be amended so that SDRs are required to keep system safeguard records indefinitely. The Commission notes that apart from the specific recordkeeping for reported swap transactions set forth in proposed § 49.12, the general recordkeeping requirements set forth in § 1.31 of the Commission Regulation's would apply to BC–DR testing records.[189] The Commission believes that § 1.31 subjects SDRs to adequate record retention requirements for BC–DR testing, and therefore, has not adopted Barnard's recommendation.

Upon review of the comment received and the proposed emergency procedures and system safeguard regulations, the Commission is adopting § 49.23 and § 49.24 as proposed.

C. Designation of Chief Compliance Officer—§ 49.22

Section 21(e) of the CEA, as amended by section 728 of the Dodd-Frank Act, establishes the position of CCO and enumerates specific responsibilities for CCOs at all SDRs. Section 21(e) contains three parts, which, taken together, establish CCOs as the focal points for SDRs' compliance with the CEA and applicable Commission regulations. Section 21(e) requires, first, that every SDR designate an individual to serve as CCO.[190] Second, it enumerates specific duties for CCOs and establishes their responsibilities within an SDR.[191] Third, it outlines the requirements of a mandatory annual report from SDRs to the Commission, which must be prepared and signed by an SDR's CCO.[192]

Proposed § 49.22 expanded upon the statutory provisions of section 21(e) of the CEA and granted CCOs the authority necessary to fulfill their responsibilities.[193] Proposed § 49.22 is composed of six general parts. Proposed § 49.22(a) defined the term ''board of directors.'' Proposed § 49.22(b) set forth the requirement that each SDR must appoint a CCO, and detailed the minimum qualifications for the CCO. Proposed § 49.22(c) provided for the supervisory structure that the CCO is subject to within an SDR. Proposed § 49.22(d) enumerated the duties and responsibilities of the CCO. Proposed §§ 49.22(e) and (f) detailed the information that must be included in the annual compliance report and set forth the process by which this report must be submitted to the Commission. Lastly, proposed § 49.22(g) detailed the recordkeeping requirements that the swap data repository must follow in relation to compliance matters and the annual compliance report that is submitted to the Commission.

The Commission requested comment on a number of issues relating to proposed § 49.22. Of particular note were two issues relating to the appointment and supervisory structure of the CCO. Due to concerns about potential conflicts of interest, the Commission requested comment on whether a CCO should be permitted to also serve as the general counsel of an SDR or as a member of the SDR's legal department. The Commission also requested comment on any additional measures that could be required of an SDR to adequately protect CCOs from undue influence in the performance of their duties.[194] These issues, and any comments received, are discussed in greater detail below.

The Commission received six comments relating to the SDR's CCO provisions, including three from potential SDRs, one from an operator of a number of registered DCMs, one from a public interest organization, and one from a private individual.[195]

In response to persuasive arguments by various commenters, § 49.22 as adopted includes a number of revisions. The Commission is modifying: (1) The qualifications of a CCO to include a requirement that the CCO not serve as the general counsel of the SDR or be a member of the SDR's legal department; (2) the procedures relating to removing the CCO to require that an SDR notify the Commission when a CCO is removed; (3) the enumerated duties of the CCO to clarify that potential conflicts of interest listed are not exhaustive and that the CCO is not required to guarantee compliance with Commission regulations, but only to take reasonable steps to ensure compliance; (4) the required contents of the annual compliance report that must be submitted to the Commission to reflect that policies and procedures cannot guarantee compliance with Commission regulations; (5) the

Disaster Recovery, 75 FR 42,633 (July 22, 2010); Interagency Paper on Sound Practices to Strengthen the Resilience of the U.S. Financial System issued by the Board of Governors of the Federal Reserve System, the Department of the Treasury and the SEC, 68 FR 17,809 (Apr. 11, 2003); SEC, Policy Statement Relating to Business Continuity Planning for Trading Markets, Exchange Act Release No. 48,545 (Sept. 25, 2003), 68 FR 56,656 (Oct. 1, 2003).

[188] CL–Barnard *supra* note 51 at 2.

[189] § 1.31(a)(1) specifically provides that ''[a]ll books and records required to be kept by the Act or by these regulations shall be kept for a period of five years from the date thereof and shall be readily accessible during the first 2 years of the 5-year period. All such books and records shall be open to inspection by any representative of the Commission or the United States Department of Justice.''*See* 17 CFR 1.31(a)(1).

[190] *See* section 21(e)(1) of the CEA, 7 U.S.C. 24a(e)(1).

[191] *See* section 21(e)(2) of the CEA, adopted as part of the Dodd-Frank Act, providing that a CCO shall:

(A) report directly to the board or to the senior officer of the swap data repository; (B) review the compliance of the swap data repository with respect to the requirements and core principles described in this section; (C) in consultation with the board of the swap data repository, a body performing a function similar to the board of the swap data repository, or the senior officer of the swap data repository, resolve any conflicts of interest that may arise; (D) be responsible for administering each policy and procedure that is required to be established pursuant to this section; (E) ensure compliance with this Act (including regulations) relating to agreements, contracts, or transactions, including each rule prescribed by the Commission under this section; (F) establish procedures for the remediation of noncompliance issues identified by the chief compliance officer through any—(i) compliance office review; (ii) look-back; (iii) internal or external audit finding; (iv) self-reported error; or (v) validated complaint; and (G) establish and follow appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.

7 U.S.C. 24a(e)(2).

[192] *See* section 21(e)(3)(A) of the CEA, adopted as part of the Dodd-Frank Act, providing that a CCO shall:

[A]nnually prepare and sign a report that contains a description of—(i) the compliance of the swap data repository of the chief compliance officer with respect to this Act (including regulations); and (ii) each policy and procedure of the swap data repository of the chief compliance officer (including the code of ethics and conflict of interest policies of the swap data repository). (B) REQUIREMENTS.—A compliance report under subparagraph (A) shall—(i) accompany each appropriate financial report of the swap data repository that is required to be furnished to the Commission pursuant to this section; and (ii) include a certification that, under penalty of law, the compliance report is accurate and complete.

7 U.S.C. 24a(e)(3)(A)–(B).

[193] *See* SDR NPRM *supra* note 51.

[194] SDR NPRM *supra* note 8 at 80914.

[195] The potential SDR commenters included: TriOptima, Reval and DTCC. The public interest organization commenter was Better Markets and the private individual commenter was Chris Barnard. CME submitted a comment letter on behalf of the four DCMs which it operates. *See* CL–TriOptima, CL–Reval, CL–DTCC I, CL–Better Markets, CL–Barnard and CL–CME *supra* note 51.

procedures relating to the submission of the annual compliance report to the Commission to clarify that the report must be submitted with the annual amendment to Form SDR and to remove certain provisions relating to the process by which the Commission may disclose the report to other parties; and (6) additional provisions as detailed below.

1. Definition of Board of Directors

The Commission in proposed § 49.22(a) defined the term ''board of directors'' as ''the board of directors of a swap data repository or for those swap data repositories whose organizational structure does not include a board of directors, a body performing a function similar to a board of directors.'' [196] The Commission also requested comment on a number of issues, including whether: (1) There should be additional rules around the types of bodies which may perform board-like functions at an SDR; (2) the proposed definition of board of directors appropriately address issues related to parent companies, subsidiaries, affiliates, and SDRs located in foreign jurisdictions; and (3) the proposed rule allowed for sufficient flexibility with regard to an SDR's business structure.[197]

The Commission received no comments on the proposed definition of board of directors.

The Commission believes that the flexibility of the proposed definition of board of directors adequately reflects the various forms of business associations which an SDR could conceivably take, including forms which do not include a corporate board of directors. Accordingly, the Commission is adopting § 49.22(a) as proposed.

2. Designation and Qualifications of Chief Compliance Officer

The Commission received three comments related to the designation and qualifications of an SDR's CCO, as described in proposed § 49.22(b)(1) and § 49.22(b)(2), respectively. Two of these comments, from Chris Barnard and Better Markets, relate to whether a CCO should be allowed to serve as general counsel of the SDR. The third comment, from CME, discusses its concern regarding the CCO's authority to ''enforce'' policies and procedures necessary to fulfill the duties set forth for CCOs.[198]

Better Markets and Chris Barnard commented that the CCO should not be allowed to serve as general counsel or be a member of the legal department of the SDR. Both commenters were concerned about the conflicts of interest that would result from a CCO also representing the SDR in legal matters. In addition to its comment regarding CCO's serving as general counsel, Better Markets also commented that in situations where there are a number of affiliate organizations, ''a single senior CCO should have overall responsibility of each affiliated and controlled entity, even if individual entities within the group have CCOs.'' [199]

Proposed § 49.22(b)(1), pertaining to the designation of a CCO, also addresses the authority and resources available to a CCO. In connection, CME commented that the use of the word ''enforce'' in proposed § 49.22(b)(1)(i) gives the CCO authority that should be reserved for senior management.

The Commission agrees with the comments made by Better Markets and Chris Barnard regarding the inherent conflicts of interest that would occur if a CCO were to serve as general counsel of an SDR or as an attorney in the legal department. Any member of the legal department of an SDR must act as an advocate for the SDR and pursue the SDR's self-interest as narrowly defined by management. If a CCO were to serve as general counsel of the SDR or as a member of the legal department, this role as an advocate may diverge with the CCO's statutory and regulatory responsibilities. The Commission believes that placing both sets of obligations in a single individual creates potential conflicts of interest, and therefore, has determined to mitigate such potential conflicts by prohibiting the CCO of an SDR from serving in the SDR's legal department.[200] As a result, the Commission is revising proposed § 49.22(b)(2) to add § 49.22(b)(2)(ii), which states that ''[t]he chief compliance officer may not be a member of the swap data repository's legal department or serve as its general counsel.''

In other respects, the Commission disagrees with commenters' views on the structure and conception of the CCO position. Section 21(e)(2) of the CEA requires the CCO to ''resolve any conflicts of interest that may arise'' and ''ensure compliance with this Act.'' [201] These duties suggest that the CCO is more than just an advisor to management and would have the ability to enforce compliance with the CEA and Commission regulations. While the CEA does not specifically use the word ''enforce,'' the Commission believes that this language is necessary to ensure that CCOs have the authority to fulfill their statutory and regulatory obligations and is consistent with the statutory directive for the CCO to ''ensure compliance with the Act (including regulations).'' [202] These considerations are particularly important given an SDR CCO's unique responsibilities with respect to fair and open access requirements set forth in § 49.27 and protecting commercially valuable swap data from improper use. The Commission notes that the authority granted to the CCO pursuant to § 49.22(b)(1)(i) does not include the ability to hire and fire SDR personnel other than its compliance staff. For purposes of clarification, however, the Commission is adopting a minor modification to § 49.22(b)(1)(ii) to state that ''[t]he chief compliance officer shall have supervisory authority over all staff acting at the direction of the chief compliance officer.'' Section 49.22(b)(1)(ii) now provides greater clarity as to the SDR staff that must be under the managerial oversight of the CCO.

The Commission believes that § 49.22(b) effectively establishes the CCO as the focal point of regulatory compliance at an SDR and ensures that the CCO will have the authority to fulfill his or her duties as set forth in the CEA and Commission regulations. Accordingly, the Commission is adopting § 49.22(b)(1) and § 49.22(b)(2) subject to the above modifications.

3. Appointment, Supervision and Removal of Chief Compliance Officer

As set forth in the SDR NPRM, proposed §§ 49.22(c)(1), 49.22(c)(2) and 49.22(c)(3) provide the supervisory regime applicable to CCOs [203] by requiring that a CCO be appointed by a majority of the SDR's board of directors or senior officer, and that a majority of the board or senior officer be responsible for approving the CCO's compensation; by allowing an SDR with a board of directors to grant oversight authority to either its board or to its senior officer; and by requiring the approval of a majority of an SDR's board of directors for CCO removal (or in the

[196] SDR NPRM *supra* note 8 at 80934.

[197] SDR NPRM *supra* note 8 at 80913.

[198] CL–CME *supra* note 51 at 7.

[199] CL–Better Markets *supra* note 51 at 10.

[200] The Dodd-Frank Act also created the position of CCO for a number of other regulated entities, including swap execution facilities. For these other regulated entities the Commission determined that the conflicts of interest associated with a CCO serving as in-house counsel were substantial and prohibited the CCO from serving as in-house counsel for these regulated entities. *See* proposed § 37.1501(b)(2)(ii) and SEF NPRM *supra* note 111 at 1251.

[201] Sections 21(e)(2)(C) and (E) of the CEA.

[202] Section 21(e)(2)(E) of the CEA.

[203] SDR NPRM *supra* note 8 at 80914.

case where a SDR has no board of directors, its senior officer).[204]

Proposed §§ 49.22(c)(1) and 49.22(c)(3) sought ''to provide an SDR's CCO with a measure of independence from management in the performance of his or her duties.'' [205] However, the Commission requested comment regarding any additional measures that should be required to adequately protect CCOs from undue influence. The Commission was particularly interested in how it might offer such protection to a CCO who reports to his or her senior officer, either at the SDR's choosing or because the SDR does not have a board of directors.

The Commission specifically requested comments on (1) whether a CCO should report to the SDR's board rather than to its senior officer; (2) what potential conflicts of interest might arise if a CCO reports to the senior officer rather than to the board, and how might those conflicts be mitigated; and (3) whether ''senior officer'' of an SDR should be a defined term, and if so, how the term should be defined.[206] In addition, the Commission also requested comment on whether the provision that would require a majority of a board of directors to remove the CCO is sufficiently specific.[207]

The Commission received four comments relating to the appointment, supervision and removal of a CCO. Three of these comments suggested additional measures to protect the CCO from excessive influence by management. The fourth commenter requested that, in the final rule, SDRs be granted ''a reasonable amount of flexibility in determining how certain aspects of the CCO role (*e.g.,* reporting lines, measures to ensure CCO independence) will be designed.'' [208]

Chris Barnard and Better Markets both recommended that the ability to appoint or remove the CCO be granted to only the independent public directors of the board and not of the entire board. Better Markets also commented that the CCO ''must have a direct reporting line to the independent directors or Audit Committee.'' [209] Additionally, Better Markets stated that the CCO should be required to meet with the entire board of directors and the senior officer at least once a year and meet with the independent directors at least quarterly. Better Markets believes that these quarterly meetings should be required to ensure that the independent members of the board can adequately supervise the CCO. With regard to compensation, Better Markets commented that the CCO's compensation should be set by the independent members of the board and should not be the responsibility of the senior officer. Chris Barnard also commented on compensation, stating that the compensation of the CCO must be ''specifically designed in such a way that avoids potential conflicts of interest with its compliance role.'' [210]

Reval commented that a CCO should have ''a direct reporting line to the senior officer of the company,'' but should also report to a compliance or audit committee at the board level and have the ability to take any compliance matters to this committee if the CCO does not feel the senior officer has properly addressed the issue.[211] Additionally, in response to the Commission's request for comment, Reval commented that it was not necessary for the Commission to define ''senior officer.''

As stated above, the proposal, in connection with the oversight and reporting structure of the CCO, was modeled on section 21(e)(2)(A) of the CEA, which requires a CCO to ''report directly to the board or to the senior officer of the swap data repository.'' [212] However, the Commission notes that § 49.22(c) sets forth the minimum standards, so that SDRs may implement additional measures if deemed necessary to insulate the CCO from influence. The Commission encourages SDRs to review and enact conflict mitigation procedures as appropriate for their specific corporate and/or organizational structure.

While a majority of commenters expressed their concern that the proposed rules do not sufficiently protect the independence of the CCO, the Commission believes that the package of protections offered in the proposed rules are appropriately calibrated to insulate the CCO from day-to-day commercial pressure. The proposed rules set forth detailed appointment, supervisory and removal procedures that protect the CCO from undue influence. Accordingly, the Commission does not believe it is necessary to adopt commenters' recommendations. The Commission has revised proposed § 49.22(c)(1) in one respect, however, by eliminating the requirement that a CCO's appointment and compensation require the approval of a majority of an SDR's board of directors. The Commission believes that board approval is a sufficient requirement, and that SDRs should have appropriate discretion to determine the voting percentage necessary to appoint a CCO or determine their salary.

However, to further protect the CCO, the Commission will clarify and expand on the notification procedures regarding the appointment and removal of a CCO. Proposed § 49.22(c)(3) required an SDR to notify the Commission within two business days of appointing any new CCO. While this would effectively require an SDR to notify the Commission whenever a CCO is removed, the Commission believes that an explicit requirement is appropriate. Therefore, the Commission is adding the following sentence to § 49.22(c)(3): ''The swap data repository shall notify the Commission of such removal within two business days.''

The Commission believes that the appointment, supervisory and removal provisions of § 49.22(c) will serve to effectively protect the CCO from undue influence and will ensure that the CCO will be sufficiently shielded against retaliatory termination by the board or the senior officer of the SDR. Accordingly, the Commission is adopting § 49.22(c)(2) as proposed and is adopting §§ 49.22(c)(1) and 49.22(c)(3) subject to the above modifications.

4. Duties of the Chief Compliance Officer

Proposed § 49.22(d) detailed the duties of a CCO and is based on the CCO duties set forth in section 21(e)(2) of the CEA. The proposed rule listed the following as duties of the CCO: (1) Overseeing and reviewing compliance with the CEA and Commission regulations; (2) in consultation with the board of directors or the senior officer, resolving any conflicts of interest that may arise; (3) establishing and administering written policies and procedures designed to prevent violations of the CEA and Commission regulations; (4) ensuring compliance with the CEA and Commission regulations relating to agreements, contracts, or transactions, and with commission regulations under section 21 of the CEA; (5) establishing procedures for the remediation of noncompliance issues identified by the chief compliance officer; (6) establishing and following appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues; and (7) establishing and administering a written code of ethics. In expanding on the CCO's duty to resolve conflicts of

[204] *Id.* at 80934.

[205] *Id.* at 80914.

[206] SDR NPRM *supra* note 8 at 80914.

[207] *Id.*

[208] See CL–CME *supra* note 51 at 7.

[209] CL–Better Markets *supra* note 51 at 11.

[210] CL–Barnard *supra* note 51 at 3.

[211] CL–Reval *supra* note 51 at 10.

[212] Section 21(e)(2)(A) of the CEA.

interest, the proposed rule also listed a number of potential conflicts that may confront a CCO.[213] This list of conflicts of interest was intended to indicate ''the types of conflicts that the Commission believes an SDR's CCOs should be aware of, but [was] not exhaustive.'' [214] Additionally, to assist the CCO in meeting these responsibilities, proposed § 49.22(b)(1), granted a CCO oversight authority over all compliance functions and staff acting in furtherance of those compliance functions.

In the SDR NPRM, the Commission requested comment on any additional CCO duties which the Commission should include, particularly addressing a CCO's role in managing conflicts of interest within an SDR, the types of conflicts which commenters believe might arise within an SDR, and how and by whom those conflicts should be resolved. The Commission also requested comment on whether the Commission should adopt a rule that prohibits an officer, director or person employed by the SDR or related person to coerce, manipulate, mislead, or fraudulently influence the CCO in performing his or her duties.[215]

The Commission received four comments relating to the duties of an SDR's CCO.[216] Three of the commenters—TriOptima, DTCC and CME—expressed concern that the enumerated duties of the CCO may cause the CCO to infringe on traditionally management functions. CME also stated the Commission should not require the CCO to ''ensure'' compliance with the CEA and Commission regulations. Additionally, as summarized below, Better Markets and DTCC commented on the CCO's duty to resolve any conflicts of interest that may arise.

DTCC expressed its belief that the CCO should not be ''required to be responsible for the overall operation of the SDR's business.'' [217] DTCC noted that while there are regulatory components in many areas, oversight of certain functions such as operational readiness and data security should not be the responsibility of the CCO, but should instead remain with senior management. TriOptima expressed similar concerns and stated its belief that the CCO's duties should focus on establishing, monitoring and reporting on the SDR's compliance policies. CME took issue with what it believes is an overly broad set of responsibilities assigned to CCOs; it objects to, among other provisions, a CCO's duty to ''resolve conflicts of interest.'' [218] While the CEA directs an SDR's CCO to, among other things, ''resolve any conflicts of interest that may arise,'' [219] CME believes that the word ''resolving'' in proposed § 49.22(d)(2) gives the CCO authority that should be reserved for senior management.

CME also commented on proposed § 49.22(d)(4), which listed ''ensuring compliance with the Act and Commission regulations relating to agreements, contracts, or transactions and with Commission regulations under section 21 of the Act'' as one of the CCO's duties.[220] CME believes that instead of requiring the CCO to ''ensure'' compliance, the rule should require the CCO to ''establish policies and procedures reasonably designed to ensure compliance.'' [221]

DTCC also requested that the Commission provide greater detail as to which conflicts of interest the CCO is responsible for resolving. It believes that ''the Commission should clarify that the CCO's specific responsibilities related to conflicts are limited to compliance with the provisions of section 21 of the CEA and the final rules thereunder as they relate to the swap operations of an SDR.'' [222] DTCC also suggested a materiality threshold for conflicts that require the CCO to consult with the board of directors. Lastly, Better Markets requested that the CCO be required to consult with both the independent members of the board of directors and the senior officer of the SDR when resolving conflicts of interest.

The Commission does not agree with those commenters that suggest that the proposed duties of the CCO improperly infringe on areas that are traditionally management functions. Many of the commenters based their objections on their view that the role of a CCO should be limited to monitoring compliance and advising management on compliance issues. The Commission does not believe that this limited view is appropriate for the CCO of an SDR. In listing the duties of a CCO, section 21(e)(2) of the CEA specifies that the CCO shall ''resolve any conflicts of interest that may arise'' and ''ensure compliance with this Act.'' [223] As stated above, successful execution of these duties will require that a CCO have the ability to enforce compliance with the CEA and Commission regulations. The Commission believes the language of the CEA suggests that the CCO is more than just an advisor to management on compliance issues.

In that regard, the Commission understands that a single individual cannot guarantee an SDR's compliance with the CEA and Commission regulations. However, an individual can take reasonable steps to ensure compliance. Accordingly, the Commission is revising § 49.22(d)(4) to state that one of the CCO's duties shall include ''taking reasonable steps to ensure compliance with the Act and Commission regulations relating to agreements, contracts, or transactions, and with Commission regulations under Section 21 of the Act, including confidentiality and indemnification agreements entered into with foreign or domestic regulators pursuant to Section 21(d) of the Act.''

The Commission also disagrees with DTCC's comment that a CCO's duty to resolve conflicts of interest should be limited to those conflicts that relate to the swap operations of an SDR or that there be a materiality threshold for the CCO to consult with the board of the SDR. The Commission based this duty on the language of section 21(e)(2)(C) of the CEA. This section does not limit the CCO's duty to resolve conflicts to only those that relate to the swap operations of an SDR, nor does it suggest that there be a materiality threshold for consultation with the board of directors. Similarly, the Commission does not agree with Better Market's recommendation to add a requirement that the CCO consult with both the independent members of the board and the senior officer when resolving conflicts of interest. However, the Commission notes that while section 21(e)(2)(C) of the CEA and § 49.22(d)(2) do not require SDRs to consult both the independent members of the board and the senior officer when resolving conflicts of interest, the Commission would be supportive of any SDR that enacts this measure.

In proposed §§ 49.22(d)(2)(i)–(iii), the Commission identified a number of potential conflicts that may confront a CCO.[224] While the SDR NPRM expressly stated that this list of conflicts ''is not exhaustive,'' the Commission believes that § 49.22(d)(2) should be modified to clarify this point.[225] Therefore, the

[213] SDR NPRM *supra* note 8 at 80934.

[214] *Id.* at 80914.

[215] *Id.*

[216] *See* CL–TriOptima, CL–DTCC I, CL–CME and CL–Better Markets *supra* note 51.

[217] CL–DTCC I *supra* note 51 at 27.

[218] CL–CME *supra* note 51 at 7.

[219] Section 21(e)(2)(C) of the CEA.

[220] SDR NPRM *supra* note 8 at 80934.

[221] CL–CME *supra* note 51 at 4.

[222] CL–DTCC I *supra* note 51 at 28.

[223] Sections 21(e)(2)(C) and (E) of the CEA, 7 U.S.C. 24a(e)(2)(C) and (E).

[224] SDR NPRM *supra* note 8 at 80934.

[225] *See* SDR NPRM *supra* note 8 at 80914 which states: ''The proposed Regulation also lists a number of potential conflicts that may confront a

Commission has revised proposed § 49.22(d)(2) to add the word ''including'' before the list of potential conflicts of interest.

The Commission believes the revisions to § 49.22(d) discussed above will provide greater clarity and effectiveness with respect to the duties of an SDR's CCO. Accordingly, the Commission is adopting § 49.22(d) largely as proposed, with the modifications detailed above for § 49.22(d)(2), and § 49.22(d)(4).

5. Preparation and Submission of Annual Compliance Report

The Commission in proposed § 49.22(e) detailed the information that must be included in the annual compliance report, including a description of the SDR's written policies and procedures, an assessment by the CCO of the effectiveness of the SDR's policies and procedures in ensuring compliance with section 21 of the CEA and a description of any material changes to the policies and procedures that were made to these since the last annual compliance report.[226] In addition, proposed § 49.22(e) also required the annual report to include a certification by the CCO that, under penalty of law, the compliance report is accurate and complete.[227]

Proposed § 49.22(f)(1) set forth the procedures for review of the annual compliance report by the board of directors or senior officer of the SDR prior to submission to the Commission and proposed § 49.22(f)(2) described the process for the submission of the report.[228]

The Commission requested comment with respect to whether the annual compliance report should contain additional content beyond what is proposed in § 49.22(e) and whether additional provisions are necessary to ensure that an SDR's board of directors cannot adversely influence the content of an annual compliance report as drafted by the CCO.[229] Alternatively, the Commission also requested comment on any additional provisions that might be necessary to ensure that individual directors or other SDR employees have an adequate opportunity to register any concerns or objections they might have to the contents of an annual compliance report. The Commission received three comments regarding the preparation and submission of the annual compliance report. Both CME and DTCC commented primarily on the required provisions of the report, whereas Better Markets commented on the procedures for review by the board and submission to the Commission.

CME suggested that the Commission require that the SDR's senior officer, not its CCO, make the required certification under § 49.22(e)(7). DTCC expressed its belief that the report should be limited to detailing compliance with requirements of the CEA and the policies and procedures of the SDR that relate to its swap activities.

Better Markets supported the requirement that the CCO present the report to the board of directors prior to its submission to the Commission and proposed that the Board be required to approve the report in its entirety or detail where and why it disagrees with any provision. Better Markets also proposed that this approval or statement of disagreement be submitted to the Commission along with the report. DTCC also expressed its concern about public release of the reports and stated its belief that the annual report should be kept confidential by the Commission and should not be available to the public or to market participants.

The Commission understands that compliance with the CEA and Commission regulations cannot be guaranteed by an individual or by any policies or procedures and accordingly is revising proposed § 49.22(e)(2)(i) to require that the annual compliance report identify ''the policies and procedures that are designed to ensure compliance with each subsection and core principle, including each duty specified in section 21(c).'' The Commission is also removing proposed § 49.22(e)(6). While some commenters were supportive of the provision, the Commission has determined that it is not necessary as a mandatory requirement. The annual compliance report is a product of the CCO and intended to reflect his or her assessment of an SDR's compliance. The board of directors may append its own comments if desired, but the statutory text and the Commission's implementing regulations do not require it.

The Commission disagrees with CME's comment regarding the certification requirement for the annual compliance report. While the CEA does not explicitly require that the CCO certify the report, it does require that the CCO ''annually prepare and sign'' and that the report ''include a certification that, under penalty of law, the compliance report is accurate and complete.''[230] The Commission believes that these two requirements read together provide sufficient basis for the CCO to certify that the report is accurate and complete. However, the Commission is modifying § 49.22(e) to explicitly state that the CCO ''sign'' the annual compliance report in order to follow the statutory text more closely. The Commission also disagrees with DTCC's comment regarding limiting the scope of the report. There is no indication in the CEA that the report should be limited to only the swap activities of the SDR and the Commission believes there is no reason for the report to be limited in such a manner.

The Commission also disagrees with Better Market's suggestion to require the board to approve the report in its entirety or submit a statement detailing its objection. The Commission believes that requiring the board to approve the report would increase the risk that the CCO would be subject to undue influence by the board or by management. The proposed rule, as modified above, strikes the appropriate balance between ensuring that the board cannot adversely influence the content of a report and giving the board the opportunity to express their opinion of the report to the Commission. Additionally, the Commission acknowledges DTCC's concerns regarding public release of the report but believes that part 145 of Commission regulations sufficiently ensures that the annual compliance report will remain confidential. The Commission also does not believe § 49.22(f)(5) is necessary to protect the report from unnecessary release to the public or market participants. Therefore, the Commission has modified § 49.22(f) to remove § 49.22(f)(5).

Section 21(e)(3)(B)(i) of the CEA requires that an annual compliance report ''accompany each appropriate financial report of the swap data repository that is required to be furnished to the Commission pursuant to this section.''[231] Under the proposed rules, since an SDR's year-end financial information must be submitted as an exhibit to Form SDR, the annual compliance report was required to accompany this annual amendment to Form SDR.[232] Because this language was missing from proposed § 49.22(f)(2), the Commission has revised § 49.22(f)(2) to state that ''The annual compliance report shall be provided electronically

CCO. The list of conflicts of interest indicates the types of conflicts that the Commission believes an SDR's CCOs should be aware of, but it is not exhaustive.''

[226] SDR NPRM *supra* note 8 at 80934.

[227] *Id.* at 80934–80935.

[228] *See* proposed §§ 49.22(f)(1) and(2). *Id.* at 80935.

[229] *Id.* at 80915.

[230] Section 21(e)(3) of the CEA.

[231] Section 21(e)(3)(B)(i) of the CEA.

[232] *See* Exhibits M and N of proposed Form SDR set forth in the SDR NPRM *supra* note 8 at 80943.

to the Commission not more than 60 days after the end of the registered swap data repository's fiscal year, concurrently with the filing of the annual amendment to Form SDR that must be submitted to the Commission pursuant to § 49.3(a)(5) of this part.''

The Commission believes that §§ 49.22(e) and (f) successfully establish requirements to ensure that the annual compliance report accomplishes the regulatory goal of providing the Commission with a complete and accurate picture of an SDR's regulatory compliance program. Accordingly, the Commission is adopting §§ 49.22(e) and (f) as proposed, with the exception that §§ 49.22(e), 49.22(e)(2)(i), 49.22(e)(6), 49.22(f)(2), and 49.22(f)(5) are revised as detailed above.

6. Recordkeeping

Proposed § 49.22(g) detailed recordkeeping requirements for records relating to a CCO's areas of responsibility. This proposed regulation required an SDR to maintain: (1) A copy of its written policies and procedures, including its code of ethics and conflicts of interest policies; (2) copies of all materials, including written reports provided to the board of directors in connection with review of the annual report, as well as the board minutes or other similar written records, that record the submission of the annual compliance report to an SDR's board of directors or its senior officer; and (3) any records relevant to an SDR's annual report. The proposed rule required SDRs to maintain these records in accordance with § 1.31 of the Commission's regulations.

The Commission received one comment regarding the compliance recordkeeping provisions in proposed § 49.22(g) from Chris Barnard, who recommended that compliance records be kept indefinitely.

As stated in the SDR NPRM, the Commission designed § 49.22(g) to ensure that Commission staff would be able to obtain the information necessary to determine whether an SDR has complied with the CEA and applicable regulations.[233] The Commission believes that proposed § 49.22(g) successfully accomplishes this goal in accordance with existing Commission regulation § 1.31 which requires that regulated entities maintain records for five years. Accordingly, the Commission is adopting § 49.22(g) as proposed.

[233] *Id.* at 80915.

D. Core Principles Applicable to SDRs—§ 49.19

Proposed §§ 49.19–49.21 implement the three substantive core principles prescribed by section 21(f) of the CEA for registered SDRs.[234] The Commission is largely adopting the core principles as proposed. Each core principle is discussed in turn below.

1. Antitrust Considerations (Core Principle 1)

Core Principle 1 directs SDRs to consider competition issues in connection with its rules and/or activities.[235] The Commission is adopting as proposed § 49.19 (Core Principle 1),[236] which provides that unless appropriate to achieve the purposes of the CEA, a registered SDR shall avoid adopting any rule or taking any action that results in any unreasonable restraint of trade, or imposing any material anticompetitive burden on trading, clearing or reporting swaps. Like all core principles, § 49.19 directly incorporates statutory language, and the absence of particular guidance or safe harbors at this time does not diminish an SDR's obligation to comply with the core principle itself.

2. Governance Arrangements (Core Principle 2) and Conflicts of Interest (Core Principle 3)

Section 21(f)(2) of the CEA, Core Principle 2, requires that each SDR establish governance arrangements that are transparent to fulfill public interest requirements and to support the objectives of the Federal Government, owners, and participants. Section 21(f)(3) of the CEA, Core Principle 3, provides that each SDR must establish and enforce rules to minimize conflicts of interest in the decision-making process of the SDR and to establish a process for resolving such conflicts. In the SDR NPRM, the Commission proposed regulations regarding (i) the transparency of SDR governance arrangements (Proposed § 49.20) and (ii) SDR identification and mitigation of existing and potential conflicts of interest (Proposed § 49.21), in order to implement Core Principles 2 and 3, respectively.

The Commission received ten comments from interested parties.[237] As discussed below, the Commission is adopting § 49.20 and § 49.21 substantially as proposed, subject to the revisions described below.

3. Governance Arrangements (Core Principle 2)—§ 49.20

(a) Transparency of Governance Arrangements

Proposed § 49.20(a) required each registered SDR to establish governance arrangements that are well-defined and include a clear organizational structure with consistent lines of responsibility and effective internal controls.[238] In addition, proposed § 49.20(b) mandated certain minimum standards for the transparency of SDR governance arrangements. These minimum standards required an SDR to: (1) Include a statement in its charter documents regarding the transparency of its governance arrangements, and the manner in which such transparency supports the objectives of the Federal Government; (2) make available certain information to the public and relevant authorities;[239] (3) ensure that the information made available is current, accurate, clear and readily accessible; and (4) disclose summaries of significant decisions in a sufficiently comprehensive and detailed fashion so that the public and relevant authorities would have the ability to discern the SDR policies or procedures implicated and the manner in which SDR decisions

[234] Section 21(f)(4), 7 U.S.C. 24a(f)(4), establishes as a fourth core principle Commission authority to establish additional rules for registered SDRs. The Commission proposed and is today adopting §§ 49.25–49.27 pursuant to this authority. These rules are discussed in section E, below.

[235] The Commission itself is required to consider the antitrust laws in fulfilling its statutory obligations. Section 15(b) of the CEA provides that the Commission shall take into consideration the public interest to be protected by the antitrustlaws and endeavor to take the least anticompetitive means of achieving the objective of this chapter, as well as the policies and purposes of this chapter, in issuing any order or adopting any Commission rule or regulation * * * or in requiring or approving any bylaw, rule or regulation of a contract market or registered futures association * * *

[236] The Commission received no comments in connection with proposed § 49.19.

[237] *See* CL–AFR, CL–CME, CL–Council, CL–DTCC I, CL–DTCC II, CL–Reval II, CL–TriOptima, CL–Better Markets, CL–ABC/CIEBA and CL–Barnard *supra* note 51.

[238] *See* SDR NPRM *supra* note 8 at 80932–80933.

[239] Such information includes: (i) The registered SDR mission statement; (ii) the mission statement and/or charter of the registered SDR Board of Directors and certain committees; (iii) the board of directors nominations process of the registered SDR, as well as the process for assigning members of the board of directors or other persons to certain committees; (iv) names of all members of (a) the board of directors and (b) certain committees; (v) a description of how the board of directors and certain committees consider an independent perspective in their decision-making processes; (vi) the lines of responsibility and accountability for each operational unit of the registered SDR; and (vii) summaries of significant decisions implicating the public interest, the rationale for such decisions, and the process for reaching such decisions. These significant decisions include decisions relating to pricing of repository services, the offering of ancillary services, access to data, and the use of SDR Information. SDR NPRM *supra* note 8 at 80916.

implement or amend such policies or procedures.[240] Proposed § 49.20(b) would not require SDRs to publicly disclose minutes of board of directors or committee meetings, however, disclosure to the Commission would be required upon request.

The Commission received no comments addressing proposed § 49.20(a), but received two comment letters related to proposed § 49.20(b). One comment, from the Council, discussed the need for greater transparency in certain areas including SDR director independence. TriOptima's comment related to the public disclosure of summaries of significant decisions implicating the public interest.

The Council commented that the Commission's proposal relating to the public disclosure of an SDR's mission statement, board nomination process and board committee assignment process is consistent with the Council's best practices for corporate boards.[241] However, the Council requested that the Commission consider whether there should be greater transparency with respect to: (1) Director independence; (2) the board's role in risk oversight; and (3) director compensation in the final rule.[242]

TriOptima expressed its concern regarding proposed § 49.20(b)(vii), which required each registered SDR to make available to the public and relevant authorities, including the Commission, summaries of significant decisions implicating the public interest.[243] As an alternative to public disclosure, TriOptima proposed that the Commission require SDRs to make ongoing reports to the Commission regarding board of directors and committee decisions that affect SDR compliance with the applicable regulations, particularly changes to its procedures and compliance status.[244]

The Commission has considered the Council's comments regarding the need for greater transparency with respect to: (1) Director independence; (2) the board's role in risk oversight and (3) director compensation, and has concluded that the proposed minimum transparency requirements are sufficient to support the objectives of the Federal Government and fulfill the public interest. With respect to TriOptima's proposed alternative regarding the public disclosure of significant decisions, the Commission declines to adopt TriOptima's recommendation to report only SDR board of directors or committee decisions that would affect the SDR's compliance with the Commission's regulations and to limit such reporting to the Commission solely. Since an SDR is required to have governance arrangements that are transparent to fulfill the public interest,[245] the Commission believes that the public should be fully informed of the manner in which an SDR satisfies such requirement. The Commission emphasizes, however, that SDRs should not be required to disclose Section 8 Material (as defined in § 49.2(a)(14)) or, where appropriate, information that the SDR may have received on a confidential basis from a reporting entity. Accordingly, the Commission has adopted § 49.20(a) as proposed and has revised § 49.20(b) to exclude the disclosure of Section 8 Material and, where appropriate, information received by an SDR from a reporting entity on a confidential basis.

(b) Consideration of an Independent Perspective

In proposed § 49.20(c)(1)(i)(A), the Commission required that each registered SDR establish, maintain, and enforce policies and procedures to ensure that (i) its board of directors, as well as (ii) any SDR committee that has the authority to (A) act on behalf of the board of directors or (B) amend or constrain the action thereof, adequately considers a perspective independent of competitive, commercial, or industry interests in its deliberations.[246] As discussed in the SDR NPRM, ''the Commission believes that the board of directors, as well as each abovementioned committee, would be more likely to contemplate the manner in which a decision might affect all constituencies, and less likely to concentrate on the manner in which a decision affects the interests of the control group, if it integrates an independent perspective in its deliberations.'' [247] Therefore, in counterbalancing the perspective of certain reporting entities controlling an SDR, the Commission believes that the integration of an independent perspective would aid in addressing the conflicts of interest identified in the SDR NPRM. The Commission also proposed that the independent perspective be reflected in the nominations process for the board of directors, as well as the process for assigning members of the board of directors or other persons to the abovementioned class of committees. Thus, proposed § 49.20(c)(1)(i)(B) also required each registered SDR to establish, maintain, and enforce policies and procedures to ensure that such nominations and assignment processes adequately incorporate an independent perspective. In addition to the independent perspective requirement, the Commission proposed to promote the transparency of governance arrangements through proposed § 49.20(c)(1)(ii), which required that a registered SDR meet certain reporting requirements relating to its board of directors, as well as each SDR committee of the type mentioned above.[248]

The Commission received no comments regarding the reporting requirements in § 49.20(c)(1)(ii) and has adopted this regulation as proposed. The Commission received three comment letters regarding its proposed independent perspective requirement.[249]

DTCC recommended that SDR conflicts of interest be mitigated through the imposition of structural governance requirements designed to ensure an independent perspective on the board of directors and committees, as well as broad representation from all classes of market participants.[250] In addition, DTCC indicated that an SDR should have governance that is independent from its affiliates and that such independence and the broad representation of market participants would support the Commission's open access provisions.[251] Barnard suggested that the Commission require an SDR to have independent public directors on their boards of directors and any committee that has authority to act on behalf of the board directors or amend or constrain the action of the board of directors.[252] Reval recommended that the Commission prohibit a representative of a reporting entity from sitting on a board committee that

[240] SDR NPRM *supra* note 8 at 80933 n.116.

[241] CL–Council *supra note 51* at 1.

[242] *Id.* at 2.

[243] CL–TriOptima *supra* note 51 at 5.

[244] *Id.*

[245] Section 21(f)(2) of the CEA, 7 U.S.C. 24a(f)(2).

[246] SDR NPRM *supra* note 8 at 80917 (discussing the importance of the independent perspective in mitigating conflicts of interest).

[247] *Id.*

[248] Specifically, the Commission proposed to require an SDR to submit the following within thirty (30) days after an election of the board of directors: (i) For the board of directors, as well as each such committee, a list of all members; (ii) a description of the relationship, if any, between such members and the SDR or its affiliates; and (iii) any amendments to the policies and procedures that the SDR maintains with respect to consideration of the independent perspective. *See* SDR NPRM *supra* note 8 at 80933.

[249] *See* CL–DTCC II, CL–Barnard and CL–Reval II *supra* note 51.

[250] CL–DTCC I *supra* note 51 at 16.

[251] *Id.*

[252] CL–Barnard *supra* note 51 at 3.

nominates public directors or governs compliance, or on any other relevant committee.[253]

The Commission agrees with DTCC regarding the importance of open access, and notes that proposed §§ 49.20 and 49.21 complement the proposed SDR open access requirements set forth in § 49.27. The Commission notes that an SDR could choose to have governance that is independent from affiliates, as one of a number of complementary methods to ensure the consideration of an independent perspective. However, the Commission declines to include a ''fair representation'' requirement as DTCC recommends. Section 21(f)(2) of the CEA requires an SDR to establish governance arrangements that are transparent (i) to fulfill public interest requirements; and (ii) to support the objectives of the Federal Government, owners, and participants. The Commission observes that even if an SDR is governed by a broad cross-section of market participants, such governance may not serve the public interest. For example, if an SDR is governed by three constituencies with equal voice and two are conflicted (but in the same direction), the decision of such conflicted constituencies would stand.

With respect to requiring an SDR to include public directors on its board of directors and any committee that has authority to act on behalf of the board directors or amend or constrain the action of the board of directors, the Commission declines to mandate the method in which an SDR incorporates the consideration of an independent perspective on its board of directors or committees. As discussed below, the Commission believes that it is appropriate to afford SDRs more flexibility in determining their ownership, and governance, structures. The Commission notes that an SDR's implementation of the ''public director'' concept (*e.g.*, as explicitly set forth for DCOs, DCMs and SEFs) would be one method of meeting the requirement to consider an independent perspective with a greater degree of certainty.

The Commission also declines to adopt Reval's recommendation with respect to the board and committee nominations processes. The Commission believes that the inclusion of an independent perspective in the board nominations process, as well as on board committees that govern compliance (or other relevant committees), is sufficient to counterbalance the perspective of reporting entities that sit on such bodies, especially given the Commission's preference to afford SDRs flexibility. Accordingly, the Commission is adopting the ''independent perspective'' requirement in § 49.20(c)(1) as proposed.

(c) Structural Governance Requirements and Limitations on Ownership of Voting Equity and the Exercise of Voting Rights

Although the Commission did not propose specific structural governance requirements relating to the composition of the Board of Directors and the establishment of board committees for SDRs or limitations on ownership of SDR voting equity and the exercise of voting rights, the Commission requested comment on the imposition of such requirements and limitations in the SDR NPRM.[254] Six commenters [255] addressed the necessity of such requirements for SDRs, and two commenters [256] discussed the effect of such requirements on competition.

AFR, Barnard and Better Markets [257] suggested that, at a minimum, the SDR governance regulations should contain the same board composition requirements and ownership and voting limitations that the Commission proposed for DCOs, DCMs, and SEFs in the Conflicts of Interest Notice of Proposed Rulemaking.[258] AFR submitted that ''the information controlled by SDRs can create conflicts that are potentially as great as many of the conflicts that could exist for other derivatives infrastructure organizations'' such as DCOs, DCMs, and SEFs,[259] while Better Markets submitted that the potential conflicts of interest for an SDR stem from the SDR being dominated by or subject to the direct or indirect influence of their major customers—large financial institutions which generate the data that an SDR collects, manages and distributes.[260] For these reasons, both AFR and Better Markets believe that SDR governance regulations should parallel the governance rules of a DCO, DCM and SEF.

Only one commenter stated that ownership and voting limitations should not be considered for SDRs.[261] DTCC indicated that the imposition of such limitations ''would be an imprecise tool with which to achieve the policy goals of the Commission regarding conflicts of interest.'' [262]

Reval and TriOptima expressed the concern that, as proposed, §§ 49.20 and 49.21 would create an ''uncompetitive environment'' by deterring independent service providers from registering as SDRs.[263] Both Reval and TriOptima recommended that the Commission impose certain structural governance requirements and/or ownership and voting limitations to market participants that own or control an SDR to mitigate such an anticompetitive effect. Specifically, Reval recommended that the Commission require that (i) no financial entity, swap dealer, or major swap participant be allowed to become an SDR, (ii) no SDR permit its equity or

[253] CL–Reval *supra* note 51 at 5.

[254] SDR NPRM *supra* note 8 at 80917.

[255] *See* CL–AFR, CL–Barnard, CL–Better Markets, CL–DTCC I, CL–Reval and CL–TriOptima *supra* note 51.

[256] *See* CL–Reval and CL–TriOptima *supra* note 51.

[257] CL–AFR *supra* note 51 at 2; CL–Barnard, *supra* note 51 at 3 (stating that there should be a level playing field between SDRs and DCOs with respect to board membership requirements and ownership and voting limits); and CL–Better Markets *supra* note 51 at 10.

[258] Commission, Notice of Proposed Rulemaking: Requirements For Derivatives Clearing Organizations, Designated Contract Markets, And Swap Execution Facilities Regarding The Mitigation Of Conflicts Of Interest, 75 FR 63732 (Oct. 18, 2010) (''Conflicts of Interest NPRM''). In the Conflicts of Interest NPRM, the Commission proposed rules to mitigate potential conflicts of interest in the operation of a DCO, DCM, and SEF through (i) structural governance requirements and (ii) limits on the ownership of voting equity and the exercise of voting power. The proposed structural governance requirements include composition requirements for DCO, DCM, or SEF Boards of Directors. Specifically, such boards must be composed of at least 35 percent, but no less than two, public directors. With respect to limits on ownership of voting equity and the exercise of voting power, the proposed rules limit DCM or SEF members (and related persons) from beneficially owning more than twenty (20) percent of any class of voting equity in the registered entity or from directly or indirectly voting an interest exceeding twenty (20) percent of the voting power of any class of equity interest in the registered entity. With respect to a DCO only, the proposed rules require a DCO to choose one of two alternative limits on the ownership of voting equity or the exercise of voting power. Under the first alternative, no individual member may beneficially own more than twenty (20) percent of any class of voting equity in the DCO or directly or indirectly vote an interest exceeding twenty (20) percent of the voting power of any class of equity interest in the DCO. In addition, the enumerated entities, whether or not they are DCO members, may not collectively own on a beneficial basis more than forty (40) percent of any class of voting equity in a DCO, or directly or indirectly vote an interest exceeding forty (40) percent of the voting power of any class of equity interest in the DCO. Under the second alternative, no DCO member or enumerated entity, regardless of whether it is a DCO member, may own more than five (5) percent of any class of voting equity in the DCO or directly or indirectly vote an interest exceeding five (5) percent of the voting power of any class of equity interest in the DCO. The proposed rules also provide a procedure for the DCO to apply for, and the Commission to grant, a waiver of the limits specified in the first and second alternative.

[259] CL–AFR *supra* note 51 at 2.

[260] CL–Better Markets *supra* note 51 at 9–10.

[261] *See* CL–DTCC I and CL–DTCC II *supra* note 51 at 16 and 2, respectively.

[262] *Id.*

[263] CL–Reval *supra* note 51 at 5 and CL–TriOptima *supra* note 51 at 4.

debt to be held by any market participant that, together with its related persons, would have more than 5 percent of the notional principal swap volume in the asset class for which the SDR is registering, and (iii) no SDR permit any market participant to hold more than 5 percent of its equity (or alternatively, 20 percent, if the Commission believes that 5 percent is too low a threshold).[264] TriOptima recommended that potential conflicts of interest and compliance with the applicable Core Principles be addressed by more tailored rules that distinguish between ''Independent SDRs'' and ''Tied SDRs,'' which are actually or presumptively, controlled by swap market participants.[265] Therefore, TriOptima suggested that the Commission adopt a two-tiered approach to mitigating SDR conflicts of interest.[266] Under this approach, ''Tied SDRs'' would be subject to the full panoply of conflicts of interest and governance requirements, including (i) restrictions on ownership and voting rights, (ii) provisions for board nominations procedures and public directors, and (iii) requirements for policies and procedures to ensure that board members and certain committees do not favor the interests of a control group. In contrast, ''Independent SDRs'' would be subject only to requirements that concentrate on procedures, reporting and examination, which would ensure that changes in the SDR's business, governance structure or organization do not adversely affect impartiality.[267]

In determining the appropriate regulatory approach for the governance and the mitigation of potential conflicts of interest in the operation of DCOs, DCMs, SEFs and SDRs, the Commission examined the ways in which such entities exercised discretion in performing their respective functions. The Commission notes that the discretion exercised by a DCO, DCM or SEF with respect to their ability to influence participation on the entity (*e.g.*, execution, clearing membership, portfolio compression) or the acceptance of all trades in an asset class differs significantly from that of an SDR. The Commission agrees with DTCC that an SDR lacks discretion similar to that exercised by DCOs, DCMs and SEFs in its collection and maintenance of data related to swap transactions in that ''the SDR is not defining the reporting party, timeliness, or content for public dissemination, and similarly the SDR is not defining the reporting party, content, or process for regulatory access. The SDR does not have significant influence over the inclusion or omission of information in the reporting process, nor does it control the output of the process.'' [268] Accordingly, the Commission believes that it is appropriate to afford SDRs more flexibility in determining their ownership and governance structures, in contrast to DCOs, DCMs and SEFs and declines to impose additional structural governance requirements and ownership and voting limitations on SDRs. However, the Commission may in the future re-examine SDR governance requirements based on changing conditions and/or market developments.

The Commission has also considered and rejected Reval and TriOptima's recommendations to impose limitations on SDR ownership and voting equity as well as separate regulatory schemes for independent and tied/market participant owned or controlled SDRs. Preliminarily, the Commission notes that the Dodd-Frank Act neither endorses nor discourages a particular SDR market structure (*e.g.*, the ''public utility'' or the ''for-profit'' model); from a policy perspective, so long as an entity complies with the CEA and the regulations thereunder, the Commission has no preference whether the entity is an ''Independent SDR,'' a ''Tied SDR,'' or a market-participant owned or controlled SDR. The Commission acknowledges that control of an SDR by one or more reporting entities may lead to conflicts of interest; however, the Commission notes that ownership is only one form of control. The Commission believes that the substantive requirements (*e.g.*, transparency of governance arrangements, consideration of an independent perspective, policies and procedures on conflicts of interest) proposed in part 49 appropriately mitigate SDR conflicts of interest, especially in conjunction with (i) non-discrimination requirements regarding access and fees; and (ii) limitations on disclosure and use of non-public information. Moreover, the Commission notes that these substantive requirements are the minimum requirements necessary to ensure the adequacy of governance arrangements and the amelioration of conflicts of interest, for an ''Independent SDR,'' a ''Tied SDR,'' or a market-participant owned or controlled SDR.

(d) Substantive Requirements for SDR Boards of Directors (and Certain SDR Committees)

The Commission proposed a number of substantive requirements for SDR boards of directors and certain SDR committees to mitigate existing and potential conflicts of interest. Proposed § 49.20(c)(5) required that the SDR board of directors, SDR senior management, and members of any SDR committee that has the authority to (i) act on behalf of the board of directors; or (ii) amend or constrain the actions thereof, in each case, have the following attributes: (a) Sufficiently good reputations; (b) the requisite skills and expertise to fulfill their responsibilities in the management and governance of the registered SDR; (c) a clear understanding of such responsibilities; and (d) the ability to exercise sound judgment about SDR affairs.

In addition to the expertise requirement, the Commission proposed other substantive requirements in § 49.20(c) to enhance the accountability of SDR boards of directors to the Commission.

The Commission received one comment regarding the substantive requirements for SDR boards of directors and certain committees. DTCC addressed the expertise requirement in proposed § 49.20(c)(5). DTCC recognized the value of requiring that an SDR board incorporate an independent perspective, but questioned whether potential directors that do not directly participate in the markets would have ''sufficient, timely, and comprehensive expertise on issues critical to the extraordinarily complex financial operations of an SDR.'' [269]

Since the operations of an SDR are not specialized in the same manner as, for example, a DCO, the Commission questions whether the ''comprehensive'' expertise referenced by DTCC is necessary. The Commission is not persuaded that it will be difficult to find directors that can (i) bring an independent perspective; and (ii) sufficient, timely and comprehensive expertise. In addition, the Commission is not convinced that directors with an independent perspective would lack incentive to acquire any necessary

[264] CL–Reval *supra* note 51 at 4. Reval suggested that bank-related trade repositories be permitted to be a third-party reporting entity that can, on behalf of its owners, report to a registered SDR.

[265] CL–TriOptima *supra* note 51 at 4. TriOptima defines a Tied SDR as an SDR with voting stock that is more than 50 percent owned or controlled, directly or indirectly, by one or more market participants, or where a majority of its board was nominated or appointed, directly or indirectly, by one or more market participants, or where the Commission has determined, after examination and review, that an SDR is under effective control of one or more market participants. TriOptima defines an Independent SDR as one that meets none of the above criteria.

[266] CL–TriOptima *supra* note 51 at 4.

[267] *Id.*

[268] CL–DTCC I *supra* note 51 at 16.

[269] CL–DTCC I *supra* note 51 at 16–17.

expertise (especially because such directors may be removed). Accordingly, the Commission is adopting § 49.20(c)(5) as proposed.

The Commission received no comments on the proposed substantive requirements mandated by § 49.20(c)(1)(i)(C) and § 49.20(c)(2)–(4) and is adopting these regulations as proposed.

4. Conflicts of Interest (Core Principle 3)—§ 49.21

In the SDR NPRM, the Commission discussed the conflicts of interest that a registered SDR may confront in its operations.[270] As the Commission noted, such conflicts may involve (i) discrimination against certain reporting entities in SDR access, pricing, and provision of services; and (ii) unfair or anticompetitive disclosure or use of SDR Information.[271] The Commission noted that such conflicts of interest may originate in the control of an SDR by one reporting entity or a small subset of reporting entities (a ''control group''). Such control may result from representation on SDR governing bodies, whether through (i) ownership of voting equity or the exercise of voting rights; or (ii) other direct or indirect means. As the Commission stated, a control group may compete with other reporting entities in the execution or clearing of swap transactions and may have an incentive to leverage its influence over the registered SDR to gain a competitive advantage in relation to other reporting entities.

In addition, the Commission discussed the commercial value of swap data and SDR analyses of SDR information and the incentive that a control group may have to ''(i) limit or burden access to such analyses on a discriminatory basis; or (ii) disclose or use the data of other reporting entities for its own competitive purposes (*e.g.*, front-running).'' [272] The Commission also stated that ''the control group may also have an incentive to cause the SDR to provide such data to an affiliate for derivative applications or ancillary services (especially if such applications or services are bundled).'' [273]

The Commission is concerned that a control group can dominate an SDR to further its economic interests to the detriment of other reporting entities. The Commission proposed § 49.21 to implement Core Principle 3 and to mitigate this and other conflicts that may arise in the operation of an SDR. Proposed § 49.21(a) required each registered SDR to establish and enforce rules to minimize conflicts of interest in the decision-making process of the SDR, and establish a process for resolving such conflicts of interest. The Commission also proposed in § 49.21(b) that each registered SDR maintain and enforce rules (i) that would identify, on an ongoing basis, existing and potential conflicts of interest; and (ii) that would enable the SDR to make decisions if a conflict exists. As stated in the SDR NPRM, the Commission believes such rules should require, at a minimum, the recusal of any person involved in the conflict from such decision-making.

The Commission received three comments on the identification of conflicts of interest and proposed § 49.21.[274] AFR expressed concern regarding the vulnerability of SDRs to significant conflicts of interest that could interfere with their public utility mission.[275] Specifically, AFR expressed concern that ''the owners of SDRs could use preferential access to the information gathered to favor some market participants at the expense of others, or to deny transparent pricing information to customers.'' [276] DTCC reiterated its view that potential conflicts of interest are best addressed by open access provisions, governance that is independent from its affiliates, and a market participant owned SDR.[277] ABC/CIEBA voiced concerns relating to swap counterparties who are SDs/MSPs electing the SDR to be used where the SD/MSP has an ownership or governance interest in the SDR.

For swaps that could be cleared by multiple SDRs, ABC/CIEBA suggested that, if the Commission required the swap counterparty that is not the SD/MSP to elect the SDR to be used, then such requirement may address potential conflicts of interest where the SD/MSP has an ownership or governance interest in a particular SDR and then attempts to steer reported trades to the SDR.[278]

The Commission is adopting § 49.21(a) and (b) as proposed. The Commission believes that the substantive requirements of §§ 49.20 and 49.21 (*e.g.,* transparency of governance arrangements, consideration of an independent perspective, policies and procedures on conflicts of interest) appropriately mitigate SDR conflicts of interest, especially in conjunction with (i) non-discrimination requirements regarding access and fees; and (ii) limitations on disclosure and use of non-public information. In addition, § 49.21 simply requires an SDR to have policies and procedures to (i) identify, on an ongoing basis, existing and potential conflicts of interest; and (ii) make decisions in the event of a conflict of interest. Even assuming that the specified requirements resolve all current conflicts of interest, they may not be sufficient to address future conflicts. Thus, the Commission believes that having policies and procedures to resolve future as well as current conflicts is central to compliance with Core Principle 3. With respect to ABC/CIEBA's comment, the Commission believes that if an SD/MSP elects to report transactions at an SDR that it owns or governs, that action may constitute a SD/MSP conflict (presuming that such election does not serve the interests of its swap counterparties), but not an SDR conflict under Core Principle 3. The Commission will consider this comment in connection with its final rulemaking for Swap Data Recordkeeping and Reporting Requirements.[279]

5. Core Principle Compliance

Both proposed § 49.20(d) and § 49.21(c) required the SDR's CCO to review the compliance of the SDR with Core Principles 2 and 3, respectively. The Commission received one comment letter discussing SDR and DCO core principle compliance. CME suggested that a DCO that is also registered as an SDR should be able to achieve compliance with SDR core principles by demonstrating compliance with applicable DCO core principles.[280] The Commission has considered CME's comment and maintains that DCOs which are SDRs are responsible for compliance with the SDR core principles. Should a particular DCO core principle be identical in its requirements to an SDR core principle, compliance with the latter could be demonstrated by showing compliance with the former.[281]

[270] SDR NPRM *supra* note 8 at 80918–80919.

[271] *Id.* at 80916 n.106. In addition, the Commission stated that ''the existence of such conflicts may frustrate the public interest, as well as the objectives of the Federal Government, certain owners, and participants, in facilitating the reporting of swap transactions. Therefore, in establishing governance arrangements that are transparent as to (i) the sources of such control and (ii) the decisions resulting from such control, the SDR may be satisfying Core Principles 2 and 3 simultaneously.'' *Id.*

[272] *Id.* at 80919.

[273] *Id.*

[274] *See* CL–AFR, CL–DTCC I and CL–ABC/CIEBA *supra* note 51.

[275] CL–AFR *supra* note 51 at 1.

[276] *Id.* at 2.

[277] CL–DTCC I and CL–DTCC II *supra* note 51 at 17 and 2, respectively.

[278] CL–ABC/CIEBA *supra* note 51 at 13.

[279] *See* Data NPRM *supra* note 6.

[280] CL–CME *supra* note 51 at 2–3.

[281] The Commission reiterates that if a DCO registers as an SDR the DCO would be expected to meet the more stringent set of rules to the extent that the SDR and DCO final rules on governance

E. Additional Duties

In addition to the core principles set forth above in section D, section 21(f)(4) of the CEA authorized the Commission to prescribe additional duties for SDRs for the purpose of minimizing conflicts of interest, protecting data, ensuring compliance and guaranteeing the safety and security of the SDR. In its SDR NPRM, the Commission proposed four additional duties that would require an SDR to (i) adopt and implement system safeguards, including BC–DR plans; (ii) maintain sufficient financial resources; (iii) furnish to market participants a disclosure document setting forth the risks and costs associated with using the services of the SDR; and (iv) provide fair and open access to the SDR and fees that are equitable and non-discriminatory. In connection with final part 49 regulations, the Commission has adopted only three of the four proposed additional duties pursuant to section 21(f)(4). The Commission has determined that the statutory authority for adopting proposed § 49.24 relating to system safeguards is properly and adequately established in section 21(c)(8) of the CEA, and this is not an additional duty imposed under the authority of section 21(f)(4). Accordingly, the Commission believes that it is unnecessary to use its discretion under section 21(f)(4) of the CEA to adopt § 49.24. A description of the three additional duties and related comments are discussed in turn below.

1. Financial Resources—§ 49.25

Proposed § 49.25(a)(1) required an SDR to maintain sufficient financial resources to fulfill its responsibilities as set forth in proposed § 49.9 and the core principles set forth in proposed § 49.19. As described in the SDR NPRM, the Commission believes that ''requiring SDRs to maintain sufficient financial resources will help to ensure the protection of the swap data maintained by the SDR as well as the safety and security of the SDR.'' [282]

Proposed § 49.25(b) established that the financial resources relied upon by the SDR to meet its obligations under paragraph (a) may include the SDR's own capital and any other financial resource acceptable to the Commission.[283] Additionally, proposed § 49.25(c) provided that an SDR must compute, at least on a quarterly basis, its financial resource requirement, making a reasonable calculation of its projected operating costs over a 12-month period. The proposed rule allowed the SDR reasonable discretion in determining the methodology used to compute such projected operating costs, although the Commission reserved the right to review the methodology utilized by the SDR and require changes as appropriate.[284] Similarly, under proposed § 49.25(d), an SDR must undertake to compute, at least quarterly, ''the current market value of each financial resource used to meet its obligations under [§ 49.25(a)]'' with appropriate reductions in value (haircuts) applied to reflect market and credit risk.

The Commission requested comment on ''whether the methodology set forth [in § 49.25] for determining sufficient financial resources would provide the necessary resources to ensure the financial integrity of the SDR.'' [285] If not, the Commission requested that commenters submit different methodologies or manner for calculating sufficient SDR financial resources.[286]

The Commission received three comments relating to the financial resources required of SDRs.[287] While the letters were generally supportive of the proposed rules and their objectives, the commenters articulated concern with respect to (1) the length of the resource requirement; (2) the types of financial resources required by the Commission; (3) the use of a parent company's financial resources for purposes of § 49.25; and (4) the reporting of an SDR's solvency ratio.

One area of concern was the proposed requirement in § 49.25(a)(3) that an SDR's financial resources would only be considered sufficient if their value were equal to the total operating costs of the SDR for a period of at least one year. Reval believed that SDRs should not be required to have 12 months of operating expenses on an on-going basis. It argued that requiring 12 months of operating expenses on hand ''would not be how most businesses operate and would be prohibitive to many new businesses from forming an SDR * * *.'' [288] In addition, it noted that such a requirement would ''be a constraint limiting the SDRs from: improving technology, having the proper resources, and making other long-term investments.'' [289] Chris Barnard, on the other hand, articulated support for the ''requirement that an SDR maintain financial resources exceeding the total amount that would cover its operating costs for a 1-year rolling period.'' [290]

A second area of concern was the types of financial resources deemed acceptable by the Commission in proposed § 49.25(b). Reval's comment letter argued for broader allowances in the measures used to determine whether an SDR has sufficient resources. It suggested the Commission consider an SDR's profitability, level of positive operating cash flow, and cash balance. Reval also suggested that perhaps initially an SDR should be allowed to demonstrate sufficient working capital either directly, or through its parent company, or from debt, letters of credit or capital call structures. Under Reval's plan, after an initial 12-month period an SDR should ''be able to demonstrate that it has adequate financial support from one or more of the following: positive operating cash flow, six months of operating expenses on hand, or profitability on a quarterly basis.'' [291]

Reval and TriOptima offered comments on parent company contributions to SDR resources and, conversely, on their contribution to an SDR's calculated resource requirements for purposes of § 49.25. Reval suggested that ''[n]ot allowing the SDR to be financially supported by a parent company may also limit the pool of companies willing to register to become an SDR as it would involve raising new capital for a start-up business.'' [292] TriOptima believes that the ''proposed rule should be drafted broadly enough to recognize that an SDR may be a stand-alone entity or a unit or division of a larger entity'' and that the financial resource requirements be limited to the activities of the SDR ''and not to the broader activities of the entity as a whole.'' [293]

Lastly, Chris Barnard suggested that, in addition to the proposed requirements in § 49.25, an SDR should be required to calculate and regularly publish a solvency ratio and that such ratio should not fall below 105%.[294] Barnard also believes that the ''CFTC should be immediately notified when the Solvency Ratio falls below 105%.'' [295]

Proposed § 49.25 was intended to ensure the protection of the swap data maintained by the SDRs, the financial

and conflicts of interest differ. *See also* SDR NPRM *supra* note 8 at 80899 n.9.

[282] SDR NPRM *supra* note 8 at 80937.

[283] *Id.*

[284] *Id.*

[285] SDR NPRM *supra* note 8 at 80920.

[286] *Id.*

[287] *See* CL–Barnard, CL–Reval and CL–TriOptima *supra* note 51.

[288] CL–Reval *supra* note 51 at 10.

[289] *Id.*

[290] CL–Barnard *supra* note 51 at 4. The Commission notes that its proposal under § 49.25(a)(3) required that the financial resource of an SDR be at least equal to its operating costs for at least one year, calculated on a rolling basis.

[291] CL–Reval *supra* note 51 at 10–11.

[292] CL–Reval *supra* note 51 at 10.

[293] CL–TriOptima letter *supra* note 51 at 6.

[294] CL–Barnard *supra* note 51 at 4.

[295] CL–Barnard *supra* note 51 at 4.

safety and security of SDRs, and an orderly wind-down of individual SDRs without disruption to the markets., The framework established by the Dodd-Frank Act and envisioned in the Commission's proposed regulations places important responsibilities upon all SDRs to serve as centralized storehouses of swap transaction data, facilitate regulators' surveillance of swaps markets, and help mitigate systemic risk in the financial system. As described above, SDRs' responsibilities will include accepting swap data from counterparties, confirming the accuracy of the swap data, and maintaining data according to standards prescribed by the Commission. SDRs may also disseminate swap transaction data to the public, on a real-time basis, and will engage in monitoring, screening, and analyzing swap data to assist the Commission in the fulfillment of its regulatory objectives with respect to the swap markets. Given the vital importance of the functions described above, the Commission believes that adequate financial resource requirements are of the upmost importance for all SDRs. Accordingly, the Commission disagrees with Reval's suggestion that an SDR should be subject to the proposed financial resource requirements only for the initial 12 months, and to a lower standard after the first year of operation, as the important responsibilities placed upon an SDR continue past its first year of operation. Additionally, sufficient resources to execute an orderly wind-down will be crucial to any SDR no matter how long it has been in business. The Commission believes that proposed § 49.25(a) strikes a proper balance between the potential barrier to entry posed by its financial resources requirements, on the one hand, and the protection of a systemically important entity, on the other.[296]

The Commission acknowledges the detailed alternatives articulated in Reval's comment letter regarding the types of financial resources that should be acceptable in satisfaction of the requirements proposed in § 49.25(a). In particular, Reval suggested that measures to determine if an SDR has sufficient resources to ensure the financial integrity of the SDR could include the SDRs profitability, level of positive operating cash flow, and cash balance. After considering these alternative measures, however, the Commission has determined to adopt § 49.25(b) as proposed. The Commission again notes that the purpose of proposed § 49.25 was not only to ensure the continued viability of an operating SDR, but also the orderly wind-down of a failing SDR. As such, the intent of the rule is to be certain that each SDR has sufficient capital on hand to cover its operating costs for one year, regardless of its profitability or cash flow; Reval's proposed alternatives do not capture this intent. The Commission emphasizes that the provision § 49.25(b)(2) stating that the acceptable financial resources include an SDR's own capital and ''any other financial resources deemed acceptable by the Commission'' was meant to capture other types of resources on a case-by-case basis and provide flexibility to SDRs and the Commission.[297]

The Commission also disagrees with Reval that, at least initially, an SDR should be able to demonstrate sufficient working capital through a letter of credit or similar type of credit facility. The Commission clarifies that a letter of credit should not be taken into account in calculating the financial resource requirement in proposed § 49.25(a). However, an SDR may be able to take into account a committed letter of credit or line of credit for the six month liquidity requirement in proposed § 49.25(e) if there are no, or very few, restrictions on the credit and, for example, the credit is available even if the SDR's financial position changes in a materially adverse manner.

Finally, the Commission is not adopting Reval's recommendation that an SDR should be allowed to be financially supported by a parent company. The Commission believes that when relying on the resources of a parent company, there is a risk that future capital contributions, even if contractually obligated, will not be paid if an SDR must wind-down its business. Due to the risk of potential harm caused from possible data loss and market disruptions, the Commission does not view this as a viable alternative. Conversely, the Commission does agree with TriOptima that an SDR's financial resource requirements should be limited to the activities of the SDR and not to the broader activities of the parent company.

The Commission also declines to adopt Barnard's recommendation that an SDR be required to calculate and publish its solvency ratio. Accordingly, for the reasons discussed above, the Commission is adopting § 49.25 as proposed.

3. Disclosure Requirements of Swap Data Repositories—§ 49.25

The Commission proposed that SDRs furnish market participants a disclosure document (''SDR Disclosure Document'') setting forth the risks and costs associated with using the services of the SDR. Specifically, § 49.26 required that each SDR Disclosure Document contain the following information:

- The SDR's criteria for providing others with access to services offered and data maintained by the SDR;
- The SDR's criteria for those seeking to connect to or link with the SDR;
- A description of the SDR's policies and procedures regarding its safeguarding of data and operational reliability, as described in proposed § 49.24;
- The SDR's policies and procedures designed to protect the privacy and confidentiality of any and all swap transaction information that the SDR receives from market participants, as described in proposed § 49.16;
- The SDR's policies and procedures regarding its non-commercial and/or commercial use of the swap data;
- The SDR's dispute resolution procedures involving market participant;
- A description of all the SDR's services, including any ancillary services;
- The SDR's updated schedule of any fees, rates, dues, unbundled prices, or other charges for all of its services, including any ancillary services; any discounts or rebates offered; and the criteria to benefit from such discounts or rebates; and
- A description of the SDR's governance arrangements.

The Commission in proposing this disclosure requirement believed it would benefit market participants and the swap market generally by helping to (i) minimize conflicts of interest; and (ii) ensure SDR compliance with its statutory responsibilities and duties.

The Commission received a comment from DTCC related to the proposal that SDRs furnish a disclosure document outlining the costs and risks of using such services.[298] DTCC noted in particular the requirements set forth in § 49.26 and indicated that they provide market participants with sufficient disclosure of the costs and risks through disclosure documents and other information provided on their Web site.

[296] The Commission in the final adoption of § 49.25(a)(2), relating to DCOs that also operate as SDRs, revised the reference to DCO financial resource requirements to refer to § 39.11 of the Commission's Regulations rather than ''core principles.''

[297] For example, the Commission believes that commitments from equity investors to provide the resources necessary to fulfill the SDR's responsibilities would satisfy the requirements of § 49.25(b).

[298] CL–DTCC I *supra* note 51 at 25.

The Commission believes that the prominent posting of the SDR Disclosure Document itself or the information contained in the SDR Disclosure Document on an SDR's Web site is sufficient for compliance with this § 49.26.

The Commission notes that the disclosure of SDR costs and risks will provide market participants with information regarding SDR operations that is essential for informed decision-making. Specifically, the Commission believes that it is especially important for market participants to know an SDR's policies and procedures relating to the safeguarding and use of reported data as well as the operational capability and reliability of the SDR.

After reviewing § 49.26 generally and the comment received, the Commission is adopting § 49.26 as proposed.

4. Access and Fees—§ 49.27

The Commission proposed in § 49.27 to establish open, non-discriminatory access to the services provided by SDRs. The Commission believes that the Dodd-Frank Act requires SDRs to provide services on a non-discriminatory basis based largely on the requirement in section 2(a)(13)(G) of the CEA [299] that all swap transactions be reported to an SDR. The Commission further believes that the intent and purpose of section 21 of the CEA [300] is for SDRs to provide open and equal access to its services. Consistent with the principles of open and equal access to SDR services, the Commission submits that the fees or charges adopted by an SDR must also be equitable and otherwise non-discriminatory.

(a) Access

As proposed, § 49.27(a) required that the services provided by SDRs be available to all market participants, such as DCMs, SEFs, DCOs, SDs, MSPs and any other counterparty, on a fair, open and equal basis. SDRs that register and agree to accept swap data in a particular asset class (such as interest rates or commodities) could not offer their services on a discriminatory basis to select market participants or select categories of market participants. The Commission continues to believe that access should be fair, open and equal.

The Commission received four comment letters from interested parties relating to open access.[301] Several additional comments relating to fees (discussed below) that raise open access issues will also be discussed in connection with the fee provisions of § 49.27(b).

ABC/CIEBA asserted that the ''open access'' provision set forth in proposed § 49.27(a) could allow an SDR to set discriminatory restrictions on the type of swap transaction terms it could receive to the detriment of benefit and pension plans. ABC/CIEBA requested the Commission in its adoption of § 49.27(a) provide additional clarity that an SDR may not ''* * * require, as a condition to reporting a swap transaction or providing information to an SDR, that a counterparty be exposed to more liability (via a user agreement or otherwise) than it would have otherwise been exposed to had its transaction not been reported to the SDR.'' [302]

The Commission in the SDR NPRM recognized the potential difficulty for plan fiduciaries in managing benefit plans, and accordingly, proposed § 49.10(c) to partly address concerns regarding the modification or invalidation of swap transaction terms. In addition, § 49.27(a), as proposed, was intended to prevent discriminatory access to SDR services.

The Commission believes that ABC/CIEBA's proposed clarification is overly broad, and may place an SDR in a position to determine whether any given counterparty will be exposed to additional liability—even a non-reporting counterparty's. The Commission submits that this could place the SDR in a position of evaluating risks outside of the statutory mandate imposed by the Dodd-Frank Act. Therefore, the Commission believes that the measures proposed in §§ 49.10(c) and 49.27(a) to prevent modification and invalidation and to ensure fair and equal access adequately address ABC/CIEBA's concerns.

DTCC commented that SDRs should provide open access to services offered while also preserving the trading parties' control over the reported data maintained by the SDR.[303] DTCC specifically believes that agents of a reporting party (such as a SEF, DCO, confirmation facility or other service provider) must be acting on behalf of the reporting counterparty and submits that the particular SDR for which the trade is reported should be based on the counterparty's selection and not by the SEF, DCO, confirmation facility or other service provider.

Although the Commission largely shares DTCC's views regarding the authority of the reporting counterparty to choose or select the particular SDR for the reporting of swaps, the Commission submits that this authority to select a particular SDR may be contractually delegated to other parties. In addition, the rules and regulations of a particular SEF, DCM or DCO may provide for the reporting to a particular SDR. However, the Commission notes that this would not prevent the counterparties from also reporting their swap transaction data to an additional SDR for recordkeeping and other risk management or ancillary purposes consistent with the requirements set forth in proposed part 45 of the Commission's Regulations. Accordingly, the Commission believes that the reporting of swap transaction data to SDRs is adequately addressed in proposed part 45 of the Commission's Regulations [304] and section 4r(3) of the CEA.

MarkitSERV commented that it generally supports the proposed open access and fee provision set forth in § 49.27.[305] However, MarkitSERV believes that if § 49.27 is implemented, as proposed, it may have some unintended consequences. In particular, MarkitSERV asserted that without clarification as to the meaning of ''non-discriminatory'' fees and ''preferential pricing arrangements,'' the ''dealer-pays'' fee structure historically used by SDR-like entities could be seen as preferential.

MarkitSERV believes that the current ''dealer pays'' pricing model ensures fair and open access because buy-side participants are often smaller entities that may find it difficult to afford SDR fees. MarkitSERV is concerned that without clarification the proposed regulation could cause an increase in costs for buy-side market participants, and thereby, discourage the use of SDRs. The Commission believes that this argument ignores the statutory mandate that all swaps whether cleared or uncleared must be reported to an SDR.[306]

The Commission further believes that, consistent with fair, open and equal access, an SDR may appropriately utilize any pricing model subject to § 49.27(b)'s requirement that such fees be non-discriminatory. The Commission notes that ''open access'' and ''non-discriminatory'' fees are complementary notions of fair dealing and open market access that are necessary in order for compliance with the statutory mandate

[299] *See* section 727 of the Dodd-Frank Act.

[300] *See* section 728 of the Dodd-Frank Act.

[301] *See* CL–ABC/CIEBA, CL–DTCC II and CL–MarkitServ I *supra* note 51.

[302] CL–ABC/CIEBA *supra* note 51 at 5.

[303] CL–DTCC II *supra* note 51 at 3.

[304] *See* Data NPRM *supra* note 6.

[305] CL–MarkitServ I *supra* note 51.

[306] Section 2(a)(13)(G) of the CEA, 7 U.S.C. 2(a)(13)(G).

set forth in the Dodd-Frank Act that all swaps be reported to an SDR.

The Commission also received several comments in connection with the issue of bundling or tying of SDR regulatory services with ancillary services.[307] DTCC urged the Commission to prohibit the bundling of core regulatory services mandated by the Dodd-Frank and part 49 with non-core or ancillary services. Similarly, MarkitSERV also recommended that the SDR regulations be amended to explicitly prohibit tying of core services and ancillary services. MarkitSERV also commented that SDRs be allowed (but not required) to offer an array of services that are ancillary to those narrowly defined duties outlined in the Dodd-Frank Act and part 49. TriOptima requested clarification on the ability of an SDR or its affiliates to offer ancillary services on terms commercially agreed to between the SDR and its customer/subscriber.

The Commission believes that it is appropriate for SDRs to offer ancillary services to market participants. However, SDRs in offering such ancillary services are prohibited from bundling these services with mandated regulatory services such as swap data reporting. Accordingly, the Commission is revising § 49.27 to clarify that SDRs are prohibited from requiring market participants to make use of SDR ancillary services in order to gain access to the SDR's mandated regulatory services.

For the reasons discussed above, the Commission is adopting § 49.27(a) largely as proposed with the modification relating to bundling noted above.

(b) Fees

As proposed, § 49.27(b) ensured that fees or other charges established by an SDR are not used as a means to deny access to some market participants by employing disparate and/or discriminatory pricing. The Commission continues to be concerned that SDRs could attempt to adopt disparate pricing for performing their statutory duties and obligations set forth in section 21 of the CEA. The Commission believes that such action would be inconsistent with Core Principle 3 discussed above, the CEA generally, and the guiding principles set forth in the Dodd-Frank Act.

The Commission recognizes that SDRs will be subjected to significant costs both in connection with part 49, as well as the recordkeeping and reporting of swap data as proposed in part 45 and real-time public reporting as proposed in part 43.[308] These costs, in part, include the ability to accept and maintain reported swaps data, technology, personnel, technical support and appropriate BC–DR plans. Accordingly, § 49.27(b), as proposed, seeks to ensure that the fees charged to reporting parties are equitable and do not become an artificial barrier to access. The Commission is concerned that the swaps markets are dominated by a select number of financial entities and related utilities, and therefore, sought through proposed § 49.27 to promote fair and open competition for SDR services.

As proposed, § 49.27(b) prohibited SDRs from offering preferential pricing arrangements to any market participant, including volume discounts or reductions, unless such discounts or reductions apply to all market participants uniformly and are not otherwise established in a manner that would effectively limit the application of such discount or reduction to a market participant or a select number of market participants. Proposed § 49.27 also would require SDRs to provide fee transparency to market participants through its Web site as well as in the Disclosure Document discussed above in § 49.26.

The Commission received seven comment letters relating to SDR pricing from various interested parties.[309]

Reval commented that the core component of pricing will be a per transaction charge with each SDR having varying costs and quality of service. Reval thought that a comparison of pricing among SDRs may be difficult because of the many aspects that will comprise SDR pricing. Reval submitted that SDRs should be able to charge for client implementation, consulting or development services that are separate and apart from the ''core'' regulatory services of SDR reporting. Given the level of transparency as proposed by the Commission in § 49.27, Reval expects robust price competition under the assumption that several SDRs become registered.

MarkitSERV generally supported the principle set forth in proposed § 49.27 that fees charged by SDRs must be equitable and established in a uniform and non-discriminatory manner. However, as discussed above, MarkitSERV questioned the application of ''non-discriminatory'' fees and ''preferential pricing arrangements,'' based on its belief that current repository fee structures are preferential. For example, MarkitSERV commented that current trade repositories commonly require only dealer participants to pay for the cost of reporting swaps.[310]

As discussed above, MarkitSERV is concerned that, without clarification, the regulation as proposed could increase the costs for end-users (buy-side participants) and thereby discourage end-users from using SDRs. In addition to the reasons discussed above, the Commission believes that this argument fails to address the reporting regime set forth in the Data NPRM and section 4r of the CEA, and further, assumes that a single entity serves as the SDR so that buy-side participants are unable to ''shop'' for competitive pricing.

MarkitSERV recommended that the Commission explicitly endorse the ''dealer pays'' commercial model. DTCC echoed MarkitSERV's approach with its view that fee structures should reflect an ''at cost'' pricing model with only SDs subject to fees.[311] Alternatively, MarkitSERV thought the Commission could clarify § 49.27, as proposed, so that different fee structures for different classes of participants would not be deemed discriminatory as long as the pricing model is not discriminatory within those classes. In addition, MarkitSERV also asserted that adopting a ''reporting party pays'' pricing model would meet the Commission's objectives of uniform and non-discriminatory fees. Lastly, MarkitSERV asserted that the application of § 49.27 to ancillary services may prove detrimental to the market. MarkitSERV believes that because ancillary services are non-core services, and therefore, may be provided independently by un-regulated third-party service providers, these services should be priced commercially and consistently with market practices if they are also offered by SDRs.

Sungard acknowledged the Commission's rationale for applying an

[307] *See* CL–DTCC, CL–MarkitSERV, CL–MarkitSERV II and CL–TriOptima *supra* note 51. The Commission understands ancillary services to consist of asset servicing; confirmation, verification and affirmation facilities; collateral management, settlement, trade compression and netting services; valuation, pricing and reconciliation functionalities; position limits management; dispute resolution; and counterparty identify verification.

[308] *See* SDR NPRM *supra* note 8 and Real-Time NPRM *supra* note 28.

[309] *See* CL–Reval I, CL–MarkitSERV I, CL–Sungard, CL–DTCC I, CL–AFR and CL–Better Market *supra* note 51.

[310] CL–MarkitSERV I *supra* note 51 at 4. The Commission submits in a reporting party fee pricing model that reporting fees paid by SD/MSP reporting counterparties to an SDR would be factored into the pricing between the SD/MSP and its buy-side customer so that the buy-side customer does not directly pay for reporting.

[311] CL–DTCC I *supra* note 51 at 3.

equitable standard to fees charged by SDRs and supports the Commission's decision in § 49.27 to refrain from acting as a ''rate setter'' with respect to the establishment of SDR fees. Sungard specifically noted that proposed § 49.27(b)(3) does not call for specific Commission review and approval of fees. The Commission notes that although SDR fees would not be ''approved,'' any and all fees charged by SDRs will be filed with the Commission and subject to sufficient transparency and disclosure via the SDR's Web site and SDR Disclosure Document. AFR recommended that all market participants be treated equally by requiring SDRs to provide the Commission with a justification for its fees.

The Commission does not endorse or adopt any particular business or pricing model but instead believes that any regulation should permit a variety of business models to flourish. Accordingly, the Commission is adopting § 49.27 as proposed. The Commission submits that a determination of what may constitute an ''equitable'' and ''non-discriminatory'' price must be performed on a case-by-case basis. In response to DTCC, the Commission believes that the cost of offering a service or product is not determinative, but is one factor in this analysis.[312] The Commission in proposing § 49.27 was careful not to designate or sanction any particular pricing or business model relating to SDRs. Instead, the Commission seeks to foster or encourage competition as the best way in which to keep swap reporting costs to a minimum.

Given the varying cost structures and business models that may emerge, the Commission will not approve or set ''fees.'' In addition, the Commission believes that the Dodd-Frank Act and the CEA requires the Commission, to the extent possible, to promote competition between and among various SDRs. The Commission notes that § 49.27 would prohibit SDRs from establishing fees in a manner that restrict fair, free and open access to SDR services.

Both AFR and Better Markets argue that the Commission should prohibit volume discounts in SDR pricing based on their belief that most reporting flow will be ''dealer dominated,'' and therefore, unfairly discriminate against non-SDs/MSPs (*i.e.* end-users). This may be true for more ''customized'' swap transactions; however, for those more standardized transactions that may be executed on a SEF or DCM, reporting to an SDR would be part of the SEF's or DCM's transaction services. Accordingly, the reporting flow in these cases would be determined by the SEF or DCM and not the SD/MSP. In addition, SDs/MSPs will be required to negotiate customer agreements with non-SD/MSP counterparties so that volume pricing discounts should otherwise be reflected in the pricing structure to the non-SD/MSP counterparty. This will especially be the case because any fees charged by SDRs for services must be transparent and disclosed publicly.

Accordingly, the Commission will permit volume discounts as long as these discounts are not structured in a way that is anti-competitive. However, the Commission expects to study the effect of volume discounts that are offered by SDRs, and will re-evaluate both its view and § 49.27, if warranted.

With respect to MarkitSERV and DTCC's comments relating to the ''dealer pays'' commercial pricing model, the Commission is not entirely persuaded regarding this recommendation but does agree that an SDR may appropriately utilize a pricing model by which the reporting entity is required to pay the SDR reporting fees. In this manner, the reporting entity—SD, MSP or non-SD/MSP—and its counterparty will as part of their agreement negotiate the payment of SDR fees. Consistent with MarkitSERV's comments, the Commission believes that SDRs may charge participants a reasonable fee to recoup additional costs associated with accepting and processing ''customized'' reportable transactions to the SDR.

F. Procedures for Implementing Swap Data Repository Rules

The Commission's part 40 regulations contain provisions related to submissions to the Commission by registered entities of new products and rules. In order to implement new statutory provisions imposed by the Dodd-Frank Act, the Commission has adopted amendments to its part 40 rules.[313] These amendments implement a new statutory framework for certification and approval procedures for new products, new rules and rule amendments submitted to the Commission by registered entities and, as relevant to this rulemaking, include new registered entities such as SDRs.

In this connection, the Commission proposed § 49.8 to conform to the framework established in the part 40 rules. The proposed rule provided that an applicant for registration as an SDR may request that the Commission approve, pursuant to section 5c(c) of the CEA, any or all of its rules and subsequent amendments, either prior to implementation or, notwithstanding the provisions of section 5c(c)(2) of the CEA, at any time thereafter, under the procedures established in § 40.5 of the Commission's Regulations. Under the proposal, rules of an SDR not voluntarily submitted for prior Commission approval as described above must be submitted to the Commission with a certification that the rule or rule amendment complies with the CEA and Commission Regulations under the procedures specified in § 40.6.

The Commission received no comments on § 49.8. Based on its review of the proposed regulation and the absence of comments, the Commission is adopting § 49.8 as proposed.

III. Effectiveness and Transition Period

Consistent with section 754 of the Dodd-Frank Act, part 49 of the Commission's Regulations will be effective on October 31, 2011 (''Effective Date''). Once part 49 is effective, the Commission will accept applications to register as an SDR on new Form SDR adopted by the Commission in this Adopting Release.[314] As explained below and as noted elsewhere in this Adopting Release, the compliance date for various regulatory requirements is contingent upon the adoption and effectiveness of other, related, regulatory provisions and definitions. Because the Commission believes that the suite of rules implementing the Dodd-Frank Act are complex and interconnected, it has determined that implementation can best be accomplished through a separate rulemaking. The Commission expects in this separate rulemaking to establish an implementation and phase-in plan for

[312] *See e.g.* Report of SEC Advisory Committee On Market Information: A Blueprint For Responsible Change (September 14, 2001) (known as the ''Seligman Report'') available at *http://www.sec.gov/divisions/marketreg/marketinfo/finalreport.htm. See also,* SEC, Concept Release: Regulation of Market Information Fees and Revenues, Securities Exchange Act Release No. 42208 (December 9, 1999), 64 FR 70613 (December 17, 1999). Cost basis pricing in connection with national securities exchange market data fees was recently discussed in *NetCoalition* v. *Securities and Exchange Commission,* 615 F.3d 525 (DC Cir. 2010).

[313] *See* Part 40 *supra* note 21.

[314] The Commission notes that although it is unable to mandate registration as an SDR prior to the effective date of the swap definition rulemaking, SDRs can file applications with, and be granted approval, on a provisional basis, prior to that date. *See* Commission and SEC, Notice of Proposed Joint Rulemaking: Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement;'' Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 76 FR 29818 (May 23, 2011). Authority for registration in advance of an effective date is provided in section 712(f) of the Dodd-Frank Act, 15 U.S.C. 8302(f).

the numerous rulemakings related to the Dodd-Frank Act.[315]

The Commission in this Adopting Release has not established a ''compliance date'' for SDRs that differs from the effective date of part 49. The Commission believes that the adoption of registration requirements (including a provisional registration) and applicable statutory duties and core principles does not itself necessitate a delayed compliance date with part 49 for registered SDRs. In particular, the adoption of the provisional registration process set forth in § 49.3(b) should provide SDR applicants with sufficient time to fully comply with part 49 while at the same time permitting those SDR that are operational to function. Entities that currently operate in a manner similar to an SDR and seek to be registered under part 49 will require operational and systems changes in order to comply with part 49. For those entities that do not currently operate as a repository or in a similar capacity, the Commission believes that significant operational and technology resources would be required in order for such entities to register and comply with part 49.

The Commission notes that SDRs will not otherwise be fully operational as of the effective date of part 49 but instead will require an implementation or compliance period based on requirements for reporting swap transaction data as well as the real-time dissemination of swap data that are the subject of separate rulemakings by the Commission.[316] In both the Data and Real-Time Rulemakings, a delayed effectiveness date or compliance date is likely given the complexities and technology changes that must be implemented on an industry-wide basis.

IV. Related Matters

A. Paperwork Reduction Act

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 issued by the Office of Management and Budget (''OMB''). The final part 49 rules result in information collection requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[317] The Commission submitted its proposing release and supporting documentation to OMB for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The Commission requested that OMB approve, and assign a new control number for, the collections of information covered by the proposing release. The information collection burdens created by the Commission's proposed rules, which were discussed in detail in the proposing release,[318] are identical to the collective information collection burdens of the final rules.

The Commission invited the public and other Federal agencies to comment on any aspect of the information collection requirements discussed in the NPRM.[319] Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicited comments in order to: (i) Evaluate whether the proposed collections of information were 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 estimates of the burden of the proposed collections 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 collections of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology. The Commission received no comment on its burden estimates or on any other aspect of the information collection requirements contained in its proposing release.

The title for the collection of information under part 49 is ''Swap Data Repositories Registration and Regulatory Requirements.'' OMB has approved and assigned OMB control number 3038–0086 to this collection of information.

B. Cost-Benefit Considerations

Section 15(a) of the CEA explicitly requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA. In particular, costs and benefits must 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 areas depending upon the nature of the regulatory action.

Section 728 of the Dodd-Frank Act provides the Commission with authority to adopt and implement rules and regulations regarding the registration and regulation of SDRs. Pursuant to that authority the Commission proposed the adoption of new part 49 to the Commission's regulations to require persons that meet the definition of an SDR to register and comply with specific duties and core principles enumerated in section 21 as well as other requirements that the Commission may prescribe by regulation. In particular, the Commission proposed to (1) create a new part 49 of its regulations for the registration and regulation of SDRs and (2) the adoption of a new form, Form SDR, to register as an SDR with the Commission.

The cost-benefit discussion in the proposing release[320] analyzed the costs and benefits of adopting new part 49 to the market generally and to the limited number of potential entities expected to register as SDRs. Specifically, the Commission determined that the proposed regulations would benefit market participants and the public by improving transparency in the swaps market and fostering competition in the data and trade repository industries. In addition, by providing regulators with access to the data maintained by SDRs, the Commission believed that its proposal would promote greater risk management and give global regulators a better measure of systematic risk

[315] In connection with the SDR Rulemaking, the Commission received fourteen comments that directly relate to implementation and phase-in. These comments resulted from the Commission re-opening of the comment period for several rulemakings, including the SDR Rulemaking, and a request for comment on the order in which it should consider final rulemakings made under the Dodd-Frank Act. See Commission, Reopening and Extension of Comment Periods for Rulemakings Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act, 76 FR 25274 (May 4, 2011). Comments addressing implementation and phase-in were received from: (1) Working Group of Commercial Energy Firms (''WGCEF'') on March 23, 2011; (2) CME on March 23, 2011; (3) Financial Services Roundtable on April 6, 2011; (4) Financial Services Forum, Futures Industry Association, International Swaps and Derivatives Association and the Securities Industry and Financial Markets Association on May 4, 2011; (5) Financial Services Roundtable, on May 12, 2011; (6) Swaps & Derivatives Market Association on June 1, 2011; (7) AII on June 2, 2011; (8) Wholesale Markets Brokers' Association Americas on June 3, 2011; (9) Encana on June 7, 2011; (10) Chris Barnard on June 8, 2011; (11) Alternative Investment Management Association on June 10, 2011; (12) Futures Industry Association, Institute of International Bankers, International Swaps and Derivatives Association, Investment Company Institute, Securities Industry and Financial Markets Association, U.S. Chamber of Commerce on June 10, 2011; (13) AII on June 10, 2011; and (14) MarkitSERV on June 10, 2011. All comment letters are available through the Commission Web site at *http://comments.cftc.gov/PublicComments/CommentList.aspx?id=939.*

[316] *See* Data NRPM and Real-Time NPRM *supra* notes 6 and 28, respectively.

[317] 44 U.S.C. 3301 *et seq.*

[318] SDR NPRM *supra* note 8 at 80923–80925.

[319] *Id.* at 80925.

[320] SDR NPRM *supra* note 8 at 80925.

throughout the financial markets.[321] The Commission stated in the SDR NPRM that the failure to enact proposed part 49 regulations would be a cost measured by the absence of transparency in the swaps market. This determination was based on the belief that costs would appear as a result of market inefficiencies related to price discovery and risk management and the inability of regulators to properly monitor systemic risk.[322]

The Commission has considered the costs and benefits of the final regulations pursuant to section 15(a) of the Act. The Commission has considered the public comments received regarding costs and benefits in response to the SDR NPRM. A discussion of the final regulations in light of section 15(a) factors is set out immediately below, followed by a discussion of comments on cost-benefit considerations received in response to the SDR NRPM.

1. Protection of Market Participants and the Public

The Commission believes that the registration and regulation of SDRs under part 49 of the Commission's Regulations will serve to better protect market participants by providing the Commission and other regulators with important oversight tools to monitor, measure, and comprehend the swaps markets. It is expected that the Commission's surveillance and enforcement capabilities will accordingly be enhanced by the adoption of part 49. In addition, the greater transparency to be furnished by mandated reporting to SDRs will also better improve the management of systemic risk throughout the financial markets by the Commission as well as the FSOC and OFR.

The Commission has estimated that the initial start up cost for the estimated 15 SDR registrants to become registered under part 49 is between $105.5 and $135.5 million, including between $60 and $90 million for initial technological capital costs.[323] Ongoing operations are estimated to be between $47.07 and $77.072 million annually for all SDRs, which includes between $30 and $60 million dedicated to ongoing annual technological costs.[324]

The Commission is unable to estimate accurately the cost of recordkeeping given existing technologies, the current state of the swaps market and the potential growth in the future. The difficulty in estimating future and ongoing costs for SDRs is significantly related to the range of duties that can vary by asset class as well as the probability that SDR responsibilities will increase and change over time.

2. Efficiency, Competitiveness, and Financial Integrity of Futures Markets

The Commission believes that the adoption of the SDR regulation set forth in part 49 together with the swap data recordkeeping and reporting requirements proposed in part 45 will provide a robust source of information on activities in the swaps market that is expected to promote increased efficiency and competition. To date, the swaps market generally has been characterized by a lack of transparency with a select number of dealers dominating the business. Although dealers will likely continue to have a significant presence in the swaps market, the transparency that is envisioned in the Dodd-Frank Act and thereby implemented by part 49 is expected to provide enhanced competition for services, and accordingly, lead to greater efficiencies for market participants executing swap transactions.

In addition, greater transparency for the Commission and other regulators will provide better oversight of the swaps market and its various market participants. Specifically, based on § 49.17, SDRs will provide transaction data, including price points and counterparty matches, to a host of regulatory agencies (including the Commission) providing regulators additional tools for various surveillance and enforcement programs. This type of transparency is currently unavailable to regulators monitoring the swaps market. In addition, empirical data obtained from SDRs will also be employed by the Commission and other regulatory agencies to further study the behavior of the swaps market.

The Commission also believes that the introduction of SDRs will further automate the execution and reporting of swap transactions. This is likely to benefit market participants and reduce transactional risks through SDRs and related service providers offering important ancillary services such as confirmation and matching services, valuations, pricing, reconciliation functions, position limits management, dispute resolution and counterparty identification. The ability of regulators to access the swap data maintained by SDRs will assist regulators to, among other things, monitor risk exposures of individual counterparties to swap transactions, monitor concentrations of risk exposure, and evaluate systemic risk. In addition, the ability of DCOs to also register as SDRs will help regulators better identify the significant participants in the swap market and better assess their financial exposures.

The Commission believes that the ''cost'' of the ''public'' or regulatory function of an SDR could potentially conflict with its commercial interests. This is especially true for those SDRs that seek registration that are privately-owned and managed. As a result, the Commission in adopting § 49.17(g) and § 49.21 has sought to identify various conflicts inherent in SDR operations with the expectation that these conflicts be minimized to the greatest extent possible.

The Commission notes that SDRs could potentially commercialize the swap transactional data that is reported to it through relationships and alliances with various market data vendors and similar firms. Moreover, the disclosure of certain proprietary swap data potentially could compromise the submitters' intellectual property rights or proprietary interests—for example, investment strategies, technology systems and algorithmic trading systems. The Commission has attempted to minimize this possibility through the adoption of § 49.17(g) which prohibits the commercial use of data by SDRs unless consented to by the reporting party. The Commission believes that ancillary services provided by SDRs or related entities may also create incentives for SDRs to further promote such ancillary services. This conflict could be manifested in the manner in which swaps are required to be reported and through various legal provisions in user agreements between the SDR and reporting party.

In the Commission's view, fees charged by SDRs for reporting and storage of data will depend upon a

[321] *Id.*

[322] *Id.*

[323] These estimates were provided to the Office of Management and Budget in compliance with the Paperwork Reduction Act of 1995 (''PRA''), 44 U.S.C. 3501 *et seq.* The estimates were arrived at by considering the document entitled ''Possible Role for NFA as a Utility for Swap Transactions,'' which appears on the NFA Web site at *http://www.cftc.gov/ucm/groups/public@swaps/documents/file/derivative13sub083110-nfa.pdf.* These estimates do not include personnel costs. Because the Commission has not regulated the swap market, it has not previously collected data on actual costs. Accordingly, the Commission solicited comment on any aspect of the reporting and recordkeeping burdens associated with the proposed rules, including the accuracy of the Commission's estimates of the burdens, in connection with OMB's review of the proposed rules and the attendant information collections. *See* SDR NPRM *supra* note 8 at 80925. No comments were received. The Commission's submissions to OMB, including supporting documentation, may be obtained by visiting the Web site RegInfo.gov.

[324] This estimate was obtained in consultation with the Commission's IT staff.

number of factors including, but not limited to, the (1) SDR's cost structure; (2) availability of competitors; and (3) regulatory oversight of fees. A variety of different business models could develop whereby the reporting and storage of data to the SDR is but one facet of the SDR's operations with various ancillary services taking on greater importance.

Because of the global nature of the swaps market, ''regulatory arbitrage'' could occur in connection with the reporting of swap data to an SDR or repository if there are significant differences in the regulatory regimes in the U.S. and abroad. In such a scenario, SDs could find it advantageous to report their trades to a foreign-based repository that is not subject to the stringent requirements embodied in the Dodd-Frank Act. The Commission and other regulators globally have been working to reduce the instances of regulatory arbitrage that may occur in connection with the regulation of the swaps markets. In particular, regulators have focused on SDRs and the reporting of swaps as an area that should be relatively consistent or uniform worldwide. The Commission continues to work with other regulators to coordinate and harmonize laws and regulations relating to SDRs or repositories.

3. Price Discovery

The Commission believes that part 49, together with such Dodd-Frank Act requirements as mandatory clearing and trading, will promote greater price efficiency and increased competition for swaps and other related financial instruments. Part 49's provisions relating to regulator access will permit the Commission, other domestic regulators and foreign regulators to examine potential price discrepancies and other trading inconsistencies in the swaps market.

The Commission notes that requirements set forth in § 49.13, relating to an SDR's obligation to confirm the accuracy of reported data, will create additional cost burdens for SDRs that may marginally increase based on the scope and volume of data transmitted. In adopting § 49.13, the Commission recognizes the potential cost burdens of this regulation based on section 21(c)(2) of the CEA, and has sought to reduce the effect on SDRs by permitting an SDR to rely on the accuracy of reported data if submitted by an electronic matching/confirmation platform.

Where there are multiple SDRs for a particular asset class, the Commission is concerned that swap data may be vulnerable to fragmentation due to the potential for swaps in such an asset class to be reported to more than one SDR. In addition, the Commission submits that permitting a DCO acting as an SDR to limit its reporting to ''cleared'' swap transactions would further fragment data reporting.[325] The Commission also notes that if SDR regulations adopted by the Commission and the SEC significantly diverge, SDRs and market participants would accordingly be subject to potentially higher fees and charges because of conflicting and/or duplicative requirements.

4. Sound Risk Management Practices

The Commission believes that part 49 and related part 45, which addresses the reporting and recordkeeping of swap transactions by all market participants, will greatly strengthen the risk management practices of the swap industry. Prior to this time, participants in the swaps markets have operated largely unregulated and without obligation to disclose transactions to regulators and/or the public. The Dodd-Frank Act specifically changed the transparency of the swaps market with the adoption of section 21 of the CEA and the establishment of SDRs as the entity to which swap transaction data will be reported and maintained for the use of regulators. The Commission believes that the reporting of all swap transactions to an SDR will serve to improve risk management practices by market participants through better knowledge of open positions and SDR services related to various trade, collateral, and risk management practices that are likely to be offered. The Commission notes that total transaction costs incurred by market participants will invariably increase as a result of additional reporting and business conduct obligations.

As adopted, § 49.17 (c) provides the Commission with direct electronic access to SDR data on a real-time basis. This access will enable the Commission to better monitor the swap market and promptly react to potential market emergencies from unreasonable risks and exposures. In addition, the requirement that SDRs have in place a CCO—mandated by section 21(e) of the CEA and implemented in § 49.22—will further support the importance of risk management and proper conflict of interest management going forward.

Consistent with the Dodd-Frank Act, part 49 provides that swap data reported and maintained by SDRs will be made available to both U.S. and foreign regulators in an effort to increase global transparency and reduce systemic risk. Because of the global and international aspects of the swaps market, the Commission has sought, to the extent possible, to coordinate and cooperate with foreign regulators in order to facilitate access to swap data.

To ensure that swap data will not impermissibly be disclosed or breached, potentially subjecting SDRs and the Commission to litigation risks and expenses, the Dodd-Frank Act in section 21(d) of the CEA mandated that domestic and foreign regulators (except for Supervisory Appropriate Foreign Regulators) must execute a confidentiality and indemnification agreement with the SDR prior to receiving access to SDR information. Section 49.18, implementing section 21(d) of the CEA, provides that other domestic and foreign regulators must comply with the confidentiality requirements set forth in section 8 of the CEA relating to the swap data that is to be provided by the registered SDR. This confidentiality and indemnification agreement would require the regulator to indemnify the SDR and the Commission for any expenses arising from litigation relating to the information provided under section 8 of the CEA. The Commission received a comment regarding access to SDR data by foreign regulators that raised concerns with respect to confidentiality and the role of the Commission as a gatekeeper.[326]

The Commission believes that regulator access (both domestic and foreign) to the data held by an SDR is essential for appropriate risk management to be performed by regulators. This is especially important for regulators to be able to monitor the swap market and certain participants relating to systemic risk.

5. Other Public Interest Considerations

The Commission believes that increased transparency resulting from the data collected from SDRs will facilitate greater understanding of how the swaps market interacts with and affects financial markets and the overall economy. Increased transparency and disclosure through SDRs to various

[325] *See* CL–CME *supra* note 51.

[326] *See* CL–MFA *supra* note 51 at 3–4. MFA urged that the Commission actively participate in verifying the validity of access requests by foreign regulators. The Commission believes it is inappropriate to place unnecessary burdens on foreign regulators' access to swap data held by U.S. SDRs. The confidentiality and indemnification agreement required to be executed between the SDR and foreign regulators, as well as any memorandum of understanding MOU between the Commission and foreign regulators, should ensure that data is accessed appropriately and maintained confidentially.

regulators will support oversight and enforcement efforts and capabilities. In addition, empirical data that will be provided to the Commission from SDRs in all asset classes should provide the Commission, legislators and the public with a better understanding of the market, thereby producing more effective public policy to reduce overall systemic risk.

The Dodd-Frank Act and implementing regulations such as part 49 will likely have extraterritorial effects because of the global nature of the swaps market and market participant operations. Consequently, the Commission is cognizant of the potential for part 49 to overlap with foreign regulations with respect to repositories or SDRs that also operate in foreign jurisdictions. Duplicative or overlapping regulations would potentially burden SDRs and firms that operate globally. The Commission in implementing part 49 expects to rely on foreign regulators and regulations to the extent possible consistent with the Dodd-Frank Act. However, section 4(c) of the CEA, as amended by the Dodd-Frank Act, severely limits the Commission's ability to accommodate SDRs because of the prohibition against providing any exemptive relief under section 21.

Pursuant to section 2(a)(13)(G) and proposed part 43 of the Commission's regulations, the Commission expects SDRs to play a significant role in the public dissemination of swap data. Because it is likely that SDRs will assume a major role in the real time dissemination of swap data, SDRs may incur greater costs in the development of increased technology and operational resources. The Commission is unable presently to quantify those costs; they will be addressed in the context of the part 43 rules.

6. Comments

In the SDR NPRM, the Commission solicited comment on its consideration of these costs and benefits. The Commission received two comments with respect to the cost benefit analysis in the SDR NPRM.[327] In addition, several market participants commented more generally that the registration procedures as proposed by the Commission in part 49 are burdensome and could be revised to reduce the burden on applicants for registration.[328] CME Group asserted that the Commission's primary focus in implementing the Dodd-Frank Act should be on the least costly, least burdensome and most efficient alternatives available. In that regard, CME suggested that DCOs that are also SDRs can achieve compliance with SDR core principles by demonstrating compliance with analogous DCO core principles. By the same token, CME urges that the Commission offer registration relief to DCOs wishing to register as SDRs in order to reduce the burden of filing duplicative materials. After careful consideration, the Commission has concluded, first, that the burden of filing duplicative materials is limited to the costs of providing these materials electronically. Second, with respect to core principle compliance, where a particular DCO core principle is identical in its requirements to an SDR core principle, the Commission believes that compliance with the latter could be demonstrated by compliance with the former. Potential non-U.S. SDRs expressed concern with respect to the burden of registering in multiple countries or jurisdictions. The Dodd-Frank Act does not permit exceptions to its registration requirements; however, as noted above in the discussion related to registration, the Commission is undertaking to work cooperatively with foreign regulators toward establishing, where appropriate, a form of recognition regime to partly alleviate the perceived burden.[329]

Consistent with section 15(a) of the CEA, the Commission believes that part 49 as adopted is in the public interest and will further protect participants and the public, promote efficiency, competition and the financial integrity of financial markets, promote accurate and efficient price discovery, enhance sound risk management practices and address other public interest considerations such as access to SDR data by other domestic and foreign regulators.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601 *et seq.,* requires that agencies consider the impact of their rules on small businesses. The Commission noted in the proposing release that although it has established certain definitions of ''small entity'' to be used in evaluating the impact of its rules under the RFA,[330] it had not previously addressed the question of whether SDRs are small entities for purposes of the RFA. For the reasons set forth in the proposing release, the Commission determined that, similar to DCOs and DCMs, SDRs are not ''small entities'' for purposes of the RFA. Accordingly, the Chairman, on behalf of the Commission, certified in the NPRM pursuant to 5 U.S.C. 605(b) that the actions to be taken herein will not have a significant economic impact on a substantial number of small entities.[331]

V. List of Subjects

List of Subjects in 17 CFR Part 49

Swap data repositories; registration and regulatory requirements.

In consideration of the foregoing, and pursuant to the authority in the Commodity Exchange Act, as amended, and in particular sections 8a(5) and 21 of the Act, the Commission hereby adopts an amendment to Chapter I of Title 17 of the Code of Federal Regulation by adding a new part 49 as follows:

PART 49—SWAP DATA REPOSITORIES

Sec.
49.1 Scope.
49.2 Definitions.
49.3 Procedures for registration.
49.4 Withdrawal from registration.
49.5 Equity interest transfers.
49.6 Registration of successor entities.
49.7 Swap data repositories located in foreign jurisdictions.
49.8 Procedures for implementing registered swap data repository rules.
49.9 Duties of registered swap data repositories.
49.10 Acceptance of data.
49.11 Confirmation of data accuracy.
49.12 Swap data repository recordkeeping requirements.
49.13 Monitoring, screening and analyzing swap data.
49.14 Monitoring, screening and analyzing end-user clearing exemption claims by individual and affiliated entities.
49.15 Real-time public reporting of swap data.
49.16 Privacy and confidentiality requirements of swap data repositories.

[327] CL–CME and CL–NFPE Coalition *supra* note 51.

[328] *See* CL–CME, CL–Foreign Banks, CL–TriOptima, CL–Regis-TR and CL–DTCC I *supra* note 51. These comments are discussed above in connection with the Commission's registration procedures set forth in § 49.3.

[329] *See* CL–NFPE Coalition *supra* note 51. As a separate matter, the NFPE Coalition highlighted what it views as the potential increased burden on end-users who employ swaps to hedge against commercial risk. The NFPE Coalition expressed concern that non-financial entities would be treated in a substantially similar manner as swap dealers or financial services firms, thereby unnecessarily increasing the burdens on such non-financial entities. The Commission believes that these concerns are more properly addressed in the Data and Real-Time Reporting rulemakings. *See* Data NPRM *supra* note 6 and Real-Time NPRM *supra* note 28.

[330] The Commission previously has established that, because of the central role they play in the regulatory scheme concerning futures trading, the importance of futures trading in the national economy, and the stringent requirements of the CEA, DCOs and DCMs are not small entities. *See* SDR NPRM *supra* note 8 at 80926.

[331] SDR NPRM *supra* note 8 at 80926.

49.17 Access to SDR data.
49.18 Confidentiality and indemnification agreement.
49.19 Core principles applicable to registered swap data repositories.
49.20 Governance arrangements (Core Principle 2).
49.21 Conflicts of interest (Core Principle 3).
49.22 Chief compliance officer.
49.23 Emergency policies and procedures.
49.24 System safeguards.
49.25 Financial resources.
49.26 Disclosure requirements of swap data repositories.
49.27 Access and fees.
Appendix A to Part 49—Form SDR

Authority: 7 U.S.C. 12a and 24a, as amended by Title VII of the Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010), unless otherwise noted.

§ 49.1 Scope.

The provisions of this part apply to any swap data repository as defined under Section 1a(48) of the Act which is registered or is required to register as such with the Commission pursuant to Section 21(a) of the Act.

§ 49.2 Definitions.

(a) As used in this part:

(1) Affiliate. The term ''*affiliate*'' means a person that directly, or indirectly, controls, is controlled by, or is under common control with, the swap data repository.

(2) Asset Class. The term ''asset class'' means the particular broad category of goods, services or commodities underlying a swap. The asset classes include credit, equity, interest rates, foreign exchange, other commodities, and such other asset classes as may be determined by the Commission.

(3) Commercial Use. The term ''*commercial use*'' means the use of swap data held and maintained by a registered swap data repository for a profit or business purposes. The use of swap data for regulatory purposes and/or responsibilities by a registered swap data repository would not be considered a commercial use regardless of whether the registered swap data repository charges a fee for reporting such swap data.

(4) Control. The term ''control'' (including the terms ''*controlled by*'' and ''*under common control with*'') means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

(5) Foreign Regulator. The term ''*foreign regulator*'' means a foreign futures authority as defined in Section 1a(26) of the Act, foreign financial supervisors, foreign central banks and foreign ministries.

(6) Independent Perspective. The term ''*independent perspective*'' means a viewpoint that is impartial regarding competitive, commercial, or industry concerns and contemplates the effect of a decision on all constituencies involved.

(7) Market Participant. The term ''*market participant*'' means any person participating in the swap market, including, but not limited to, designated contract markets, derivatives clearing organizations, swaps execution facilities, swap dealers, major swap participants, and any other counterparties to a swap transaction.

(8) Non-affiliated third party. The term ''*non-affiliated third party*'' means any person except:

(i) The swap data repository;

(ii) The swap data repository's affiliate; or

(iii) A person employed by a swap data repository and any entity that is not the swap data repository's affiliate (and ''non-affiliated third party'' includes such entity that jointly employs the person).

(9) Person Associated with a Swap Data Repository. The term ''*person associated with a swap data repository*'' means:

(i) Any partner, officer, or director of such swap data repository (or any person occupying a similar status or performing similar functions);

(ii) Any person directly or indirectly controlling, controlled by, or under common control with such swap data repository; or

(iii) Any person employed by such swap data repository.

(10) Position. The term ''*position*'' means the gross and net notional amounts of open swap transactions aggregated by one or more attributes, including, but not limited to, the:

(i) Underlying instrument;

(ii) Index, or reference entity;

(iii) Counterparty;

(iv) Asset class;

(v) Long risk of the underlying instrument, index, or reference entity; and

(vi) Short risk of the underlying instrument, index, or reference entity.

(11) Registered Swap Data Repository. The term ''*registered swap data repository*'' means a swap data repository that is registered under Section 21 of the Act.

(12) Reporting Entity. The term ''*reporting entity*'' means those entities that are required to report swap data to a registered swap data repository. These reporting entities include designated contract markets, swaps execution facilities, derivatives clearing organizations, swap dealers, major swap participants and certain non-swap dealers/non-major swap participant counterparties.

(13) SDR Information. The term ''*SDR Information*'' means any information that the swap data repository receives or maintains.

(14) Section 8 Material. The term ''*Section 8 Material*'' means the business transactions, trade data, or market positions of any person and trade secrets or names of customers.

(15) Swap Data. The term ''*swap data*'' means the specific data elements and information set forth in part 45 of this chapter that is required to be reported by a reporting entity to a registered swap data repository.

(b) *Defined Terms.* Capitalized terms not defined in this part shall have the meanings assigned to them in § 1.3 of this chapter.

§ 49.3 Procedures for registration.

(a) *Application Procedures.* (1) An applicant, person or entity desiring to be registered as a swap data repository shall file electronically an application for registration on Form SDR provided in appendix A to this part, with the Secretary of the Commission at its headquarters in Washington, DC in a format and in the manner specified by the Secretary of the Commission in accordance with the instructions contained therein.

(2) The application shall include information sufficient to demonstrate compliance with core principles specified in Section 21 of the Act and the regulations thereunder. Form SDR consists of instructions, general questions and a list of Exhibits (documents, information and evidence) required by the Commission in order to determine whether an applicant is able to comply with the core principles. An application will not be considered to be materially complete unless the applicant has submitted, at a minimum, the exhibits as required in Form SDR. If the application is not materially complete, the Commission shall notify the applicant that the application will not be deemed to have been submitted for purposes of the 180-day review procedures.

(3) *180-Day Review Procedures.* The Commission will review the application for registration as a swap data repository within 180 days of the date of the filing of such application. In considering an application for registration as a swap data repository, the staff of the Commission shall include in its review, an applicant's past relevant submissions and compliance history. At or prior to

the conclusion of the 180-day period, the Commission will either by order grant registration; extend, by order, the 180-day review period for good cause; or deny the application for registration as a swap data repository. The 180-day review period shall commence once a completed submission on Form SDR is submitted to the Commission. The determination of when such submission on Form SDR is complete shall be at the sole discretion of the Commission. If deemed appropriate, the Commission may grant registration as a swap data repository subject to conditions. If the Commission denies an application for registration as a swap data repository, it shall specify the grounds for such denial. In the event of a denial of registration for a swap data repository, any person so denied shall be afforded an opportunity for a hearing before the Commission.

(4) *Standard for Approval.* The Commission shall grant the registration of a swap data repository if the Commission finds that such swap data repository is appropriately organized, and has the capacity: to ensure the prompt, accurate and reliable performance of its functions as a swap data repository; comply with any applicable provisions of the Act and regulations thereunder; carry out its functions in a manner consistent with the purposes of Section 21 of the Act and the regulations thereunder; and operate in a fair, equitable and consistent manner. The Commission shall deny registration of a swap data repository if it appears that the application is materially incomplete; fails in form or substance to meet the requirements of Section 21 of the Act and part 49; or is amended or supplemented in a manner that is inconsistent with this § 49.3. The Commission shall notify the applicant seeking registration that the Commission is denying the application setting forth the deficiencies in the application, and/or the manner in which the application fails to meet the requirements of this part.

(5) *Amendments and Annual Filing.* If any information reported on Form SDR or in any amendment thereto is or becomes inaccurate for any reason, whether before or after the application for registration has been granted, the swap data repository shall promptly file an amendment on Form SDR updating such information. In addition, the swap data repository shall annually file an amendment on Form SDR within 60 days after the end of each fiscal year.

(6) *Service of Process.* Each swap data repository shall designate and authorize on Form SDR an agent in the United States, other than a Commission official, who shall accept any notice or service of process, pleadings, or other documents in any action or proceedings brought against the swap data repository to enforce the Act and the regulations thereunder.

(b) *Provisional Registration.* The Commission, upon the request of an applicant, may grant provisional registration of a swap data repository if such applicant is in substantial compliance with the standards set forth in paragraph (a)(4) of this section and is able to demonstrate operational capability, real-time processing, multiple redundancy and robust security controls. Such provisional registration of a swap data repository shall expire on the earlier of: the date that the Commission grants or denies registration of the swap data repository; or the date that the Commission rescinds the temporary registration of the swap data repository. This paragraph (b) shall terminate within such time as determined by the Commission. A provisional registration granted by the Commission does not affect the right of the Commission to grant or deny permanent registration as provided under paragraph (a)(3) of this section.

(c) *Withdrawal of Application for Registration.* An applicant for registration may withdraw its application submitted pursuant to paragraph (a) of this section by filing with the Commission such a request. Withdrawal of an application for registration shall not affect any action taken or to be taken by the Commission based upon actions, activities, or events occurring during the time that the application for registration was pending with the Commission, and shall not prejudice the filing of a new application by such applicant.

(d) *Reinstatement of Dormant Registration.* Before accepting or re-accepting swap transaction data, a dormant registered swap data repository as defined in § 40.1(e) of this chapter shall reinstate its registration under the procedures set forth in paragraph (a) of this section; provided, however, that an application for reinstatement may rely upon previously submitted materials that still pertain to, and accurately describe, current conditions.

(e) *Delegation of Authority.* (1) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or the Director's delegates, with the consultation of the General Counsel or the General Counsel's delegates, the authority to notify an applicant seeking registration as a swap data repository pursuant to Section 21 of the Act that the application is materially incomplete and the 180-day period review period is extended.

(2) The Director of the Division of Market Oversight may submit to the Commission for its consideration any matter which has been delegated in this paragraph.

(3) Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in paragraph (e)(1) of this section.

(f) *Request for Confidential Treatment.* An applicant for registration may request confidential treatment for materials submitted in its application as set forth in §§ 40.8 and 145.9 of this chapter. The applicant shall identify with particularity information in the application that will be subject to a request for confidential treatment.

§ 49.4 Withdrawal from registration.

(a)(1) A registered swap data repository may withdraw its registration by giving notice in writing to the Commission requesting that its registration as a swap data repository be withdrawn, which notice shall be served at least sixty days prior to the date named therein as the date when the withdrawal of registration shall take effect. The request to withdraw shall be made by a person duly authorized by the registrant and shall specify:

(i) The name of the registrant for which withdrawal of registration is being requested;

(ii) The name, address and telephone number of the swap data repository that will have custody of data and records of the registrant;

(iii) The address where such data and records will be located; and

(iv) A statement that the custodial swap data repository is authorized to make such data and records available in accordance with § 1.44.

(2) Prior to filing a request to withdraw, a registered swap data repository shall file an amended Form SDR to update any inaccurate information. A withdrawal of registration shall not affect any action taken or to be taken by the Commission based upon actions, activities or events occurring during the time that the facility was designated by the Commission.

(b) A notice of withdrawal from registration filed by a swap data repository shall become effective for all matters (except as provided in this paragraph (b)) on the 60th day after the filing thereof with the Commission, within such longer period of time as to which such swap data repository

consents or which the Commission, by order, may determine as necessary or appropriate in the public interest.

(c) *Revocation of Registration for False Application.* If, after notice and opportunity for hearing, the Commission finds that any registered swap data repository has obtained its registration by making any false or misleading statements with respect to any material fact or has violated or failed to comply with any provision of the Act and regulations thereunder, the Commission, by order, may revoke the registration. Pending final determination whether any registration shall be revoked, the Commission, by order, may suspend such registration, if such suspension appears to the Commission, after notice and opportunity for hearing, to be necessary or appropriate and in the public interest.

§ 49.5 Equity interest transfers.

(a) *Equity transfer notification.* Upon entering into any agreement(s) that could result in an equity interest transfer of ten percent or more in the swap data repository, the swap data repository shall file a notification of the equity interest transfer with the Secretary of the Commission at its headquarters in Washington, *DC* in a format and in the manner specified by the Secretary of the Commission, no later than the business day, as defined in § 40.1 of this chapter, following the date on which the swap data repository enters into a firm obligation to transfer the equity interest. The swap data repository shall also amend any information that is no longer accurate on Form SDR consistent with the procedures set forth in § 49.3 of this part.

(b) *Required information.* The notification must include and be accompanied by: any relevant agreement(s), including any preliminary agreements; any associated changes to relevant corporate documents; a chart outlining any new ownership or corporate or organizational structure; a brief description of the purpose and any impact of the equity interest transfer; and a representation from the swap data repository that it meets all of the requirements of Section 21 of the Act and Commission regulations adopted thereunder. The swap data repository shall keep the Commission apprised of the projected date that the transaction resulting in the equity interest transfer will be consummated, and must provide to the Commission any new agreements or modifications to the original agreement(s) filed pursuant to this section. The swap data repository shall notify the Commission of the consummation of the transaction on the day in which it occurs.

(c) *Certification.* (1) Upon a transfer of an equity interest of ten percent or more in a registered swap data repository, the registered swap data repository shall file with the Secretary of the Commission at its headquarters in Washington, *DC* in a format and in the manner specified by the Secretary of the Commission, a certification that the registered swap data repository meets all of the requirements of Section 21 of the Act and Commission regulations adopted thereunder, no later than two business days, as defined in § 40.1 of this chapter, following the date on which the equity interest of ten percent or more was acquired. Such certification shall state whether changes to any aspects of the swap data repository's operations were made as a result of such change in ownership, and include a description of any such change(s).

(2) The certification required under this paragraph may rely on and be supported by reference to an application for registration as a swap data repository or prior filings made pursuant to a rule submission requirement, along with any necessary new filings, including new filings that provide any and all material updates of prior submissions.

§ 49.6 Registration of successor entities.

(a) In the event of a corporate transaction, such as a re-organization, merger, acquisition, bankruptcy or other similar corporate event, that creates a new entity, in which the swap data repository continues to operate, the swap data repository shall request a transfer of the registration, rules, and other matters, no later than 30 days after the succession. The registration of the predecessor shall be deemed to remain effective as the registration of the successor if the successor, within 30 days after such succession, files an application for registration on Form SDR, and the predecessor files a request for vacation of registration on Form SDR *provided, however,* that the registration of the predecessor swap data repository shall cease to be effective 90 days after the application for registration on Form SDR is filed by the successor swap data repository.

(b) If the succession is based solely on a change in the predecessor's date or state of incorporation, form of organization, or composition of a partnership, the successor may, within 30 days after the succession, amend the registration of the predecessor swap data repository on Form SDR to reflect these changes. This amendment shall be an application for registration filed by the predecessor and adopted by the successor.

§ 49.7 Swap data repositories located in foreign jurisdictions.

Any swap data repository located outside of the United States applying for registration pursuant to § 49.3 of this part shall certify on Form SDR and provide an opinion of counsel that the swap data repository, as a matter of law, is able to provide the Commission with prompt access to the books and records of such swap data repository and that the swap data repository can submit to onsite inspection and examination by the Commission.

§ 49.8 Procedures for implementing registered swap data repository rules.

(a) *Request for Commission approval of rules.* An applicant for registration as a swap data repository may request that the Commission approve under Section 5c(c) of the Act, any or all of its rules and subsequent amendments thereto, prior to their implementation or, notwithstanding the provisions of Section 5c(c)(2) of the Act, at anytime thereafter, under the procedures of § 40.5 of this chapter.

(b) Notwithstanding the timeline under § 40.5(c) of this chapter, the rules of a swap data repository that have been submitted for Commission approval at the same time as an application for registration under § 49.3 of this part or to reinstate the registration of a dormant registered swap data repository, as defined in § 40.1 of this chapter, will be deemed approved by the Commission no earlier than when the swap data repository is deemed to be registered or reinstated.

(c) *Self-certification of rules.* Rules of a registered swap data repository not voluntarily submitted for prior Commission approval pursuant to paragraph (a) of this section must be submitted to the Commission with a certification that the rule or rule amendment complies with the Act or rules thereunder pursuant to the procedures of § 40.6 of this chapter, as applicable.

§ 49.9 Duties of registered swap data repositories.

(a) *Duties.* To be registered, and maintain registration, as a swap data repository, a registered swap data repository shall:

(1) Accept swap data as prescribed in § 49.10 for each swap;

(2) Confirm, as prescribed in § 49.11, with both counterparties to the swap the accuracy of the swap data that was submitted;

(3) Maintain, as prescribed in § 49.12, the swap data described in part 45 of the

Commission's Regulations in such form and manner as provided therein and in the Act and the rules and regulations thereunder;

(4) Provide direct electronic access to the Commission (or any designee of the Commission, including another registered entity) as prescribed in § 49.17;

(5) Provide the information set forth in § 49.15 to comply with the public reporting requirements set forth in Section 2(a)(13) of the Act;

(6) Establish automated systems for monitoring, screening, and analyzing swap data as prescribed in § 49.13;

(7) Establish automated systems for monitoring, screening and analyzing end-user clearing exemption claims as prescribed in § 49.14;

(8) Maintain the privacy of any and all swap data and any other related information that the swap data repository receives from a reporting entity as prescribed in § 49.16;

(9) Upon request of certain appropriate domestic and foreign regulators, provide access to swap data and information held and maintained by the swap data repository as prescribed in § 49.17;

(10) Adopt and establish appropriate emergency policies and procedures, including business continuity and disaster recovery plans, as prescribed in § 49.23 and § 49.24.

(11) Designate an individual to serve as a chief compliance officer who shall comply with § 49.22; and

(12) Subject itself to inspection and examination by the Commission.

(b) This Regulation is not intended to limit, or restrict, the applicability of other provisions of the Act, including, but not limited to, Section 2(a)(13) of the Act and rules and regulations promulgated thereunder.

§ 49.10 Acceptance of data.

(a) A registered swap data repository shall establish, maintain, and enforce policies and procedures for the reporting of swap data to the registered swap data repository and shall accept and promptly record all swap data in its selected asset class and other regulatory information that is required to be reported pursuant to part 45 and part 43 of this chapter by designated contract markets, derivatives clearing organizations, swap execution facilities, swap dealers, major swap participants and/or non-swap dealer/non-major swap participant counterparties.

(1) *Electronic Connectivity.* For the purpose of accepting all swap data as required by part 45 and part 43, the registered swap data repository shall adopt policies and procedures, including technological protocols, which provide for electronic connectivity between the swap data repository and designated contract markets, derivatives clearing organizations, swaps execution facilities, swap dealers, major swap participants and/or certain other non-swap dealer/non-major swap participant counterparties who report such data. The technological protocols established by a swap data repository shall provide for the receipt of swap creation data, swap continuation data, real-time public reporting data, and all other data and information required to be reported to such swap data repository. The swap data repository shall ensure that its mechanisms for swap data acceptance are reliable and secure.

(b) A registered swap data repository shall set forth in its application for registration as described in § 49.3 the specific asset class or classes for which it will accept swaps data. If a swap data repository accepts swap data of a particular asset class, then it shall accept data from all swaps of that asset class, unless otherwise prescribed by the Commission.

(c) A registered swap data repository shall establish policies and procedures reasonably designed to prevent any provision in a valid swap from being invalidated or modified through the confirmation or recording process of the swap data repository. The policies and procedures must ensure that the swap data repository's user agreements are designed to prevent any such invalidation or modification.

(d) A registered swap data repository shall establish procedures and provide facilities for effectively resolving disputes over the accuracy of the swap data and positions that are recorded in the registered swap data repository.

§ 49.11 Confirmation of data accuracy.

(a) A registered swap data repository shall establish policies and procedures to ensure the accuracy of swap data and other regulatory information required to be reported by part 45 that it receives from reporting entities or certain third-party service providers acting on their behalf, such as confirmation or matching service providers.

(b) A registered swap data repository shall confirm the accuracy of all swap data that is submitted pursuant to part 45.

(1) *Confirmation of data accuracy for swap creation data as defined in part 45.*

(i) A registered swap data repository has confirmed the accuracy of swap creation data that was submitted directly by a counterparty if the swap data repository has notified both counterparties of the data that was submitted and received from both counterparties acknowledgement of the accuracy of the swap data and corrections for any errors.

(ii) A registered swap data repository has confirmed the accuracy of swap creation data that was submitted by a swap execution facility, designated contract market, derivatives clearing organization, or third-party service provider who is acting on behalf of a counterparty, if the swap data repository has complied with each of the following:

(A) The swap data repository has formed a reasonable belief that the swap data is accurate;

(B) The swap data that was submitted, or any accompanying information, evidences that both counterparties agreed to the data; and

(C) The swap data repository has provided both counterparties with a 48 hour correction period after which a counterparty is assumed to have acknowledged the accuracy of the swap data.

(2) *Confirmation of data accuracy for swap continuation data as defined in part 45.*

(i) A registered swap data repository has confirmed the accuracy of the swap continuation data that was submitted directly by a counterparty if the swap data repository has notified both counterparties of the data that was submitted and provided both counterparties with a 48 hour correction period after which a counterparty is assumed to have acknowledged the accuracy of the data.

(ii) A registered swap data repository has confirmed the accuracy of swap continuation data that was submitted by a swap execution facility, designated contract market, derivatives clearing organization, or third-party service provider who is acting on behalf of a counterparty, if the swap data repository has complied with each of the following:

(A) The swap data repository has formed a reasonable belief that the swap data is accurate; and

(B) The swap data repository has provided both counterparties with a 48 hour correction period after which a counterparty is assumed to have acknowledged the accuracy of the swap data.

(c) A registered swap data repository shall keep a record of corrected errors that is available upon request to the Commission.

§ 49.12 Swap data repository recordkeeping requirements.

(a) A registered swap data repository shall maintain its books and records in accordance with the requirements of part 45 of this chapter regarding the swap data required to be reported to the swap data repository.

(b) A registered swap data repository shall maintain swap data (including all historical positions) throughout the existence of the swap and for five years following final termination of the swap, during which time the records must be readily accessible by the swap data repository and available to the Commission via real-time electronic access; and in archival storage for which such swap data is retrievable by the swap data repository within three business days.

(c) All records required to be kept pursuant to this Regulation shall be open to inspection upon request by any representative of the Commission and the United States Department of Justice. Copies of all such records shall be provided, at the expense of the swap data repository or person required to keep the record, to any representative of the Commission upon request, either by electronic means, in hard copy, or both, as requested by the Commission.

(d) A registered swap data repository shall comply with the real time public reporting and recordkeeping requirements prescribed in § 49.15 and part 43 of this chapter.

(e) A registered swap data repository shall establish policies and procedures to calculate positions for position limits and any other purpose as required by the Commission, for all persons with swaps that have not expired maintained by the registered swap data repository.

§ 49.13 Monitoring, screening and analyzing swap data.

(a) *Duty to Monitor, Screen and Analyze Data.* A registered swap data repository shall monitor, screen, and analyze all swap data in its possession in such a manner as the Commission may require. A swap data repository shall routinely monitor, screen, and analyze swap data for the purpose of any standing swap surveillance objectives which the Commission may establish as well as perform specific monitoring, screening, and analysis tasks based on ad hoc requests by the Commission.

(b) *Capacity to Monitor, Screen and Analyze Data.* A registered swap data repository shall establish and maintain sufficient information technology, staff, and other resources to fulfill the requirements in this § 49.13 in a manner prescribed by the Commission. A swap data repository shall monitor the sufficiency of such resources at least annually, and adjust its resources as its responsibilities, or the volume of swap transactions subject to monitoring, screening, and analysis, increase.

§ 49.14 Monitoring, screening and analyzing end-user clearing exemption claims by individual and affiliated entities.

A registered swap data repository shall have automated systems capable of identifying, aggregating, sorting, and filtering all swap transactions that are reported to it which are exempt from clearing pursuant to Section 2(h)(7) of the Act. Such capabilities shall be applicable to any information provided to a swap data repository by or on behalf of an end user regarding how such end user meets the requirements of Sections 2(h)(7)(A)(i), 2(h)(7)(A)(ii), and 2(h)(7)(A)(iii) of the Act and any Commission regulations thereunder.

§ 49.15 Real-time public reporting of swap data.

(a) *Scope.* The provisions of this § 49.15 apply to real-time public reporting of swap data, as defined in part 43 of this chapter.

(b) *Systems to Accept and Disseminate Swap Data In Connection With Real-Time Public Reporting.* A registered swap data repository shall establish such electronic systems as are necessary to accept and publicly disseminate real-time swap data submitted to meet the real-time public reporting obligations of part 43 of this chapter. Any electronic systems established for this purpose must be capable of accepting and ensuring the public dissemination of all data fields required by part 43 of this chapter.

(c) *Duty to Notify the Commission of Untimely Data.* A registered swap data repository must notify the Commission of any swap transaction for which the real-time swap data was not received by the swap data repository in accordance with part 43 of this chapter.

§ 49.16 Privacy and confidentiality requirements of swap data repositories.

(a) Each swap data repository shall:

(1) Establish, maintain, and enforce written policies and procedures reasonably designed to protect the privacy and confidentiality of any and all SDR Information that is not subject to real-time public reporting set forth in part 43 of this chapter. Such policies and procedures shall include, but are not limited to, policies and procedures to protect the privacy and confidentiality of any and all SDR Information (except for swap data disseminated under part 43) that the swap data repository shares with affiliates and non-affiliated third parties; and

(2) Establish and maintain safeguards, policies, and procedures reasonably designed to prevent the misappropriation or misuse, directly or indirectly, of:

(i) Section 8 Material;

(ii) Other SDR Information; and/or

(iii) Intellectual property, such as trading strategies or portfolio positions, by the swap data repository or any person associated with the swap data repository. Such safeguards, policies, and procedures shall include, but are not limited to,

(A) limiting access to such Section 8 Material, other SDR Information, and intellectual property,

(B) standards controlling persons associated with the swap data repository trading for their personal benefit or the benefit of others, and

(C) adequate oversight to ensure compliance with this subparagraph.

(b) Swap data repositories shall not, as a condition of accepting swap data from reporting entities, require the waiver of any privacy rights by such reporting entities.

(c) Subject to Section 8 of the Act, swap data repositories may disclose aggregated swap data on a voluntary basis or as requested, in the form and manner, prescribed by the Commission.

§ 49.17 Access to SDR data.

(a) *Purpose.* This Section provides a procedure by which the Commission, other domestic regulators and foreign regulators may obtain access to the swaps data held and maintained by registered swap data repositories. Except as specifically set forth in this Regulation, the Commission's duties and obligations regarding the confidentiality of business transactions or market positions of any person and trade secrets or names of customers identified in Section 8 of the Act are not affected.

(b) *Definitions.* For purposes of this § 49.17, the following terms shall be defined as follows:

(1) *Appropriate Domestic Regulator.* The term ''*Appropriate Domestic Regulator*'' shall mean:

(i) The Securities and Exchange Commission;

(ii) Each prudential regulator identified in Section 1a(39) of the Act with respect to requests related to any of such regulator's statutory authorities, without limitation to the activities listed for each regulator in Section 1a(39);

(iii) The Financial Stability Oversight Council;

(iv) The Department of Justice;

(v) Any Federal Reserve Bank;

(vi) The Office of Financial Research; and

(vii) Any other person the Commission deems appropriate.

(2) *Appropriate Foreign Regulator.* The term ''*Appropriate Foreign Regulator*'' shall mean those Foreign Regulators with an existing memorandum of understanding or other similar type of information sharing arrangement executed with the Commission and/or Foreign Regulators without an MOU as determined on a case-by-case basis by the Commission.

(i) *Filing Requirements.* For those Foreign Regulators who do not currently have a memorandum of understanding with the Commission, the Commission has determined to provide the following filing process for those Foreign Regulators that may require swap data or information maintained by a registered swap data repository. The filing requirement set forth in this § 49.17 will assist the Commission in its analysis of whether a specific Foreign Regulator should be considered ''appropriate'' for purposes of Section 21(c)(7) of the Act.

(A) The Foreign Regulator is required to file an application in the form and manner prescribed by the Commission.

(B) The Foreign Regulator in its application is required to provide sufficient facts and procedures to permit the Commission to analyze whether the Foreign Regulator employs appropriate confidentiality procedures and to satisfy itself that the information will be disclosed only as permitted by Section 8(e) of the Act.

(ii) The Commission in its analysis of Foreign Regulator applications shall be satisfied that any information potentially provided by a registered swap data repository will not be disclosed except in limited circumstances, such as an adjudicatory action or proceeding involving the Foreign Regulator, as identified in Section 8 of the Act.

(iii) The Commission reserves the right in connection with any determination of an ''Appropriate Foreign Regulator'' to revisit or reassess a prior determination consistent with the Act.

(3) *Direct Electronic Access.* For the purposes of this regulation, the term ''direct electronic access'' shall mean an electronic system, platform or framework that provides Internet or Web-based access to real-time swap transaction data and also provides scheduled data transfers to Commission electronic systems.

(c) *Commission Access.*

(1) *Direct Electronic Access.* A registered swap data repository shall provide direct electronic access to the Commission or the Commission's designee, including another registered entity, in order for the Commission to carry out its legal and statutory responsibilities under the Act and related regulations.

(2) *Monitoring Tools.* A registered swap data repository is required to provide the Commission with proper tools for the monitoring, screening and analyzing of swap transaction data, including, but not limited to, Web-based services, services that provide automated transfer of data to Commission systems, various software and access to the staff of the swap data repository and/or third-party service providers or agents familiar with the operations of the registered swap data repository, which can provide assistance to the Commission regarding data structure and content. These monitoring tools shall be substantially similar in analytical capability as those provided to the compliance staff and the Chief Compliance Officer of the swap data repository.

(3) *Authorized Users.* The swap transaction data provided to the Commission by a registered swap data repository shall be accessible only by authorized users. The swap data repository shall maintain and provide a list of authorized users in the manner and frequency determined by the Commission.

(d) *Other Regulators.* (1) *General Procedure for Gaining Access to Registered Swap Data Repository Data.* Appropriate Domestic Regulators and Appropriate Foreign Regulators seeking to gain access to the swap data maintained by a swap data repository are required to apply for access by filing a request for access with the registered swap data repository and certifying that it is acting within the scope of its jurisdiction.

(2) *Appropriate Domestic Regulator with Regulatory Responsibility over a Swap Data Repository.* An Appropriate Domestic Regulator that has regulatory jurisdiction over a swap data repository registered with it pursuant to a separate statutory authority that is also registered with the Commission pursuant to this chapter is not subject to this paragraph (d) and § 49.18(b) as long as the following conditions are met:

(i) The Appropriate Domestic Regulator executes a memorandum of understanding or similar information sharing arrangement with the Commission; and

(ii) The Commission, consistent with Section 21(c)(4)(A) of the Act, designates the Appropriate Domestic Regulator to receive direct electronic access.

(3) *Appropriate Foreign Regulator with Regulatory Responsibility over a Swap Data Repository.* An Appropriate Foreign Regulator that has supervisory authority over a swap data repository registered with it pursuant to foreign law and/or regulation that is also registered with the Commission pursuant to this chapter is not otherwise subject to this paragraph (d) and § 49.18(b).

(4) *Obligations of the Registered Swap Data Repository in Connection with Appropriate Domestic Regulator or Appropriate Foreign Regulator Requests for Data Access.*

(i) A registered swap data repository shall promptly notify the Commission regarding any request received by an Appropriate Domestic Regulator or Appropriate Foreign Regulator to gain access to the swaps transaction data maintained by such swap data repository.

(ii) The registered swap data repository shall notify the Commission electronically in a format specified by the Secretary of the Commission.

(5) *Timing.* Once the swap data repository provides the Commission with notification of a request for data access by an Appropriate Domestic Regulator or Appropriate Foreign Regulator as required by paragraph (d)(2) of this section, such swap data repository shall provide access to the requested swap data.

(6) *Confidentiality and Indemnification Agreement.* Consistent with § 49.18 of this part, the Appropriate Domestic Regulator or Appropriate Foreign Regulator prior to receipt of any requested data or information shall execute a ''Confidentiality and Indemnification Agreement'' with the registered swap data repository as set forth in Section 21(d) of the Act.

(e) *Third-Party Service Providers to a Registered Swap Data Repository.* Access to the data and information maintained by a registered swap data repository may be necessary for certain third parties that provide various technology and data-related services to a registered swap data repository. Third-party access to the swap data maintained by a swap data repository is permissible subject to the following conditions:

(1) Both the registered swap data repository and the third party service provider shall have strict confidentiality procedures that protect data and information from improper disclosure.

(2) Prior to swap data access, the third-party service provider and the

registered swap data repository shall execute a ''Confidentiality Agreement'' setting forth minimum confidentiality procedures and permissible uses of the information maintained by the swap data repository that are equivalent to the privacy procedures for swap data repositories outlined in § 49.16.

(f) *Access by Market Participants.* (1) *General.* Access of swap data maintained by the registered swap data repository to market participants is generally prohibited.

(2) *Exception.* Data and information related to a particular swap that is maintained by the registered swap data repository may be accessed by either counterparty to that particular swap.

(g) *Commercial Uses of Data Accepted and Maintained by the Registered Swap Data Repository Prohibited.* Swap data accepted and maintained by the swap data repository generally may not be used for commercial or business purposes by the swap data repository or any of its affiliated entities.

(1) The registered swap data repository is required to adopt and implement adequate ''firewalls'' or controls to protect the reported swap data required to be maintained under § 49.12 of this part and Section 21(b) of the Act from any improper commercial use.

(2) *Exception.* (A) The swap dealer, counterparty or any other registered entity that submits the swap data maintained by the registered swap data repository may permit the commercial or business use of that data by express written consent.

(B) Swap data repositories shall not as a condition of the reporting of swap transaction data require a reporting party to consent to the use of any reported data for commercial or business purposes.

(3) Swap data repositories responsible for the public dissemination of real-time swap data shall not make commercial use of such data prior to its public dissemination.

§ 49.18 Confidentiality and indemnification agreement.

(a) *Purpose.* This section sets forth the obligations of registered swap data repositories to execute a ''Confidentiality and Indemnification Agreement'' in connection with providing access to swap data to certain domestic and foreign regulators.

(b) *Confidentiality and Indemnification Agreement.* Prior to the registered swap data repository providing access to the swap data with any Appropriate Domestic Regulator or Appropriate Foreign Regulator as defined in § 49.17(b), the swap data repository shall receive a written agreement from each such entity stating that the entity shall abide by the confidentiality requirements described in Section 8 of the Act relating to the swap data that is provided; and each such entity shall agree to indemnify the swap data repository and the Commission for any expenses arising from litigation relating to the information provided under Section 8 of the Act.

(c) *Certain Appropriate Domestic and Foreign Regulators with Regulatory Responsibility over a Swap Data Repository.* The requirements set forth above in paragraph (b) shall not apply to certain Appropriate Domestic and Foreign Regulators with regulatory responsibility over a swap data repository as described in § 49.17(d)(2) and (3). The swap data repository and such Appropriate Domestic or Foreign Regulator in each case is required to comply with Section 8 of the Act and any other relevant statutory confidentiality provisions.

§ 49.19 Core principles applicable to registered swap data repositories.

(a) *Compliance with Core Principles.* To be registered, and maintain registration, a swap data repository shall comply with the core principles as described in this paragraph. Unless otherwise determined by the Commission by rule or regulation, a swap data repository shall have reasonable discretion in establishing the manner in which the swap data repository complies with the core principles described in this paragraph.

(b) *Antitrust Considerations (Core Principle 1).* Unless necessary or appropriate to achieve the purposes of the Act, a registered swap data repository shall avoid adopting any rule or taking any action that results in any unreasonable restraint of trade; or imposing any material anticompetitive burden on trading, clearing or reporting swaps.

(c) *Governance Arrangements (Core Principle 2).* Registered swap data repositories shall establish governance arrangements as set forth in § 49.20.

(d) *Conflicts of Interest (Core Principle 3).* Registered swap data repositories shall manage and minimize conflicts of interest and establish processes for resolving such conflicts of interest as set forth in § 49.21.

(e) *Additional Duties (Core Principle 4).* Registered swap data repositories shall also comply with the following additional duties:

(1) *Financial Resources.* Registered swap data repositories shall maintain sufficient financial resources as set forth in § 49.25;

(2) *Disclosure Requirements of Registered Swap Data Repositories.* Registered swap data repositories shall furnish an appropriate disclosure document setting forth the risks and costs of swap data repository services as detailed in § 49.26; and

(3) *Access and Fees.* Registered swap data repositories shall adhere to Commission requirements regarding fair and open access and the charging of any fees, dues or other similar type charges as detailed in § 49.27.

§ 49.20 Governance arrangements (Core Principle 2).

(a) *General.* (1) Each registered swap data repository shall establish governance arrangements that are transparent to fulfill public interest requirements, and to support the objectives of the Federal Government, owners, and participants.

(2) Each registered swap data repository shall establish governance arrangements that are well-defined and include a clear organizational structure with consistent lines of responsibility and effective internal controls, including with respect to administration, accounting, and the disclosure of confidential information. § 49.22 of this part contains rules on internal controls applicable to administration and accounting. § 49.16 of this part contains rules on internal controls applicable to the disclosure of confidential information.

(b) *Transparency of Governance Arrangements.* (1) Each registered swap data repository shall state in its charter documents that its governance arrangements are transparent to support, among other things, the objectives of the Federal Government pursuant to Section 21(f)(2) of the Act.

(2) Each registered swap data repository shall, at a minimum, make the following information available to the public and relevant authorities, including the Commission:

(i) The mission statement of the registered swap data repository;

(ii) The mission statement and/or charter of the board of directors, as well as of each committee of the registered swap data repository that has:

(A) The authority to act on behalf of the board of directors or

(B) The authority to amend or constrain actions of the board of directors;

(iii) The board of directors nomination process for the registered swap data repository, as well as the process for assigning members of the board of directors or other persons to

any committee referenced in paragraph (b)(2)(ii) of this section;

(iv) For the board of directors and each committee referenced in paragraph (b)(2)(ii) of this section, the names of all members;

(v) A description of the manner in which the board of directors, as well as any committee referenced in paragraph (b)(2)(ii) of this section, considers an Independent Perspective in its decision-making process, as § 49.2(a)(14) of this part defines such term;

(vi) The lines of responsibility and accountability for each operational unit of the registered swap data repository to any committee thereof and/or the board of directors; and

(vii) Summaries of significant decisions implicating the public interest, the rationale for such decisions, and the process for reaching such decisions. Such significant decisions shall include decisions relating to pricing of repository services, offering of ancillary services, access to swap data, and use of Section 8 Material, other SDR Information, and intellectual property (as referenced in § 49.16 of this part). Such summaries of significant decisions shall not require the registered swap data repository to disclose Section 8 Material or, where appropriate, information that the swap data repository received on a confidential basis from a reporting entity.

(3) The registered swap data repository shall ensure that the information specified in paragraph (b)(2)(i) to (vii) of this section is current, accurate, clear, and readily accessible, for example, on its Web site. The swap data repository shall set forth such information in a language commonly used in the commodity futures and swap markets and at least one of the domestic language(s) of the jurisdiction in which the swap data repository is located.

(4) Furthermore, the registered swap data repository shall disclose the information specified in paragraph (b)(2)(vii) of this section in a sufficiently comprehensive and detailed fashion so as to permit the public and relevant authorities, including the Commission, to understand the policies or procedures of the swap data repository implicated and the manner in which the decision implements or amends such policies or procedures. A swap data repository shall not disclose minutes from meetings of its board of directors or committees to the public, although it shall disclose such minutes to the Commission upon request.

(c) *The Board of Directors.* (1) *General.* (i) Each registered swap data repository shall establish, maintain, and enforce (including, without limitation, pursuant to paragraph (c)(4) of this Regulation) written policies or procedures:

(A) To ensure that its board of directors, as well as any committee that has:

(*1*) Authority to act on behalf of its board of directors or

(*2*) Authority to amend or constrain actions of its board of directors, adequately considers an Independent Perspective in its decision-making process;

(B) To ensure that the nominations process for such board of directors, as well as the process for assigning members of the board of directors or other persons to such committees, adequately incorporates an Independent Perspective; and

(C) To clearly articulate the roles and responsibilities of such board of directors, as well as such committees, especially with respect to the manner in which they ensure that a registered swap data repository complies with all statutory and regulatory responsibilities under the Act and the regulations promulgated thereunder.

(ii) Each registered swap data repository shall submit to the Commission, within thirty days after each election of its board of directors:

(A) For the board of directors, as well as each committee referenced in paragraph (c)(1)(i)(A) of this section, a list of all members;

(B) A description of the relationship, if any, between such members and the registered swap data repository or any reporting entity thereof (or, in each case, affiliates thereof, as § 49.2(a)(1) of this part defines such term); and

(C) Any amendments to the written policies and procedures referenced in paragraph (c)(1)(i) of this section.

(2) *Compensation.* The compensation of non-executive members of the board of directors of a registered swap data repository shall not be linked to the business performance of such swap data repository.

(3) *Annual Self-Review.* The board of directors of a registered swap data repository shall review its performance and that of its individual members annually. It should consider periodically using external facilitators for such reviews.

(4) *Board Member Removal.* A registered swap data repository shall have procedures to remove a member from the board of directors, where the conduct of such member is likely to be prejudicial to the sound and prudent management of the swap data repository.

(5) *Expertise.* Each registered swap data repository shall ensure that members of its board of directors, members of any committee referenced in paragraph (c)(1)(i)(A) of this Regulation, and its senior management, in each case, are of sufficiently good repute and possess the requisite skills and expertise to fulfill their responsibilities in the management and governance of the swap data repository, to have a clear understanding of such responsibilities, and to exercise sound judgment about the affairs of the swap data repository.

(d) *Compliance with Core Principle.* The chief compliance officer of the registered swap data repository shall review the compliance of the swap data repository with this core principle.

§ 49.21 Conflicts of interest (Core Principle 3).

(a) *General.* (1) Each registered swap data repository shall establish and enforce rules to minimize conflicts of interest in the decision-making process of the swap data repository, and establish a process for resolving such conflicts of interest.

(2) Nothing in this section shall supersede any requirement applicable to the swap data repository pursuant to § 49.20 of this part.

(b) *Policies and Procedures.* (1) Each registered swap data repository shall establish, maintain, and enforce written procedures to:

(i) Identify, on an ongoing basis, existing and potential conflicts of interest; and

(ii) Make decisions in the event of a conflict of interest. Such procedures shall include rules regarding the recusal, in applicable circumstances, of parties involved in the making of decisions.

(2) As further described in § 49.20 of this part, the chief compliance officer of the registered swap data repository shall, in consultation with the board of directors or a senior officer of the swap data repository, as applicable, resolve any such conflicts of interest.

(c) *Compliance with Core Principle.* The chief compliance officer of the registered swap data repository shall review the compliance of the swap data repository with this core principle.

§ 49.22 Chief compliance officer.

(a) *Definition of Board of Directors.* For purposes of this part 49, the term ''board of directors'' means the board of directors of a registered swap data repository, or for those swap data repositories whose organizational structure does not include a board of directors, a body performing a function similar to that of a board of directors.

(b) *Designation and qualifications of chief compliance officer.* (1) *Chief Compliance Officer Required.* Each registered swap data repository shall establish the position of chief compliance officer, and designate an individual to serve in that capacity.

(i) The position of chief compliance officer shall carry with it the authority and resources to develop and enforce policies and procedures necessary to fulfill the duties set forth for chief compliance officers in the Act and Commission regulations.

(ii) The chief compliance officer shall have supervisory authority over all staff acting at the direction of the chief compliance officer.

(2) *Qualifications of Chief Compliance Officer.* The individual designated to serve as chief compliance officer shall have the background and skills appropriate for fulfilling the responsibilities of the position and shall be subject to the following requirements:

(i) No individual disqualified from registration pursuant to Sections 8a(2) or 8a(3) of the Act may serve as a chief compliance officer.

(ii) The chief compliance officer may not be a member of the swap data repository's legal department or serve as its general counsel.

(c) *Appointment, Supervision, and Removal of Chief Compliance Officer.* (1) *Appointment and Compensation of Chief Compliance Officer Determined by Board of Directors.* A registered swap data repository's chief compliance officer shall be appointed by its board of directors. The board of directors shall also approve the compensation of the chief compliance officer and shall meet with the chief compliance officer at least annually. The appointment of the chief compliance officer and approval of the chief compliance officer's compensation shall require the approval of the board of directors. The senior officer of the swap data repository may fulfill these responsibilities. A swap data repository shall notify the Commission of the appointment of a new chief compliance officer within two business days of such appointment.

(2) *Supervision of Chief Compliance Officer.* A registered swap data repository's chief compliance officer shall report directly to the board of directors or to the senior officer of the swap data repository, at the swap data repository's discretion.

(3) *Removal of Chief Compliance Officer by Board of Directors.* (i) Removal of a registered swap data repository's chief compliance officer shall require the approval of the swap data repository's board of directors. If the swap data repository does not have a board of directors, then the chief compliance officer may be removed by the senior officer of the swap data repository;

(ii) The swap data repository shall notify the Commission of such removal within two business days; and

(iii) The swap data repository shall notify the Commission within two business days of appointing any new chief compliance officer, whether interim or permanent.

(d) *Duties of Chief Compliance Officer.* The chief compliance officer's duties shall include, but are not limited to, the following:

(1) Overseeing and reviewing the swap data repository's compliance with Section 21 of the Act and any related rules adopted by the Commission;

(2) In consultation with the board of directors, a body performing a function similar to the board, or the senior officer of the swap data repository, resolving any conflicts of interest that may arise including:

(i) Conflicts between business considerations and compliance requirements;

(ii) Conflicts between business considerations and the requirement that the registered swap data repository provide fair and open access as set forth in § 49.27 of this part; and

(iii) Conflicts between a registered swap data repository's management and members of the board of directors;

(3) Establishing and administering written policies and procedures reasonably designed to prevent violation of the Act and any rules adopted by the Commission;

(4) Taking reasonable steps to ensure compliance with the Act and Commission regulations relating to agreements, contracts, or transactions, and with Commission regulations under Section 21 of the Act, including confidentiality and indemnification agreements entered into with foreign or domestic regulators pursuant to Section 21(d) of the Act;

(5) Establishing procedures for the remediation of noncompliance issues identified by the chief compliance officer through a compliance office review, look-back, internal or external audit finding, self-reported error, or validated complaint;

(6) Establishing and following appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues; and

(7) Establishing and administering a written code of ethics designed to prevent ethical violations and to promote honesty and ethical conduct.

(e) *Annual Compliance Report Prepared by Chief Compliance Officer.* The chief compliance officer shall, not less than annually, prepare and sign an annual compliance report, that at a minimum, contains the following information covering the time period since the date on which the swap data repository became registered with the Commission or since the end of the period covered by a previously filed annual compliance report, as applicable:

(1) A description of the registered swap data repository's written policies and procedures, including the code of ethics and conflict of interest policies;

(2) A review of applicable Commission regulations and each subsection and core principle of Section 21 of the Act, that, with respect to each:

(i) Identifies the policies and procedures that are designed to ensure compliance with each subsection and core principle, including each duty specified in Section 21(c);

(ii) Provides a self-assessment as to the effectiveness of these policies and procedures; and

(iii) Discusses areas for improvement, and recommends potential or prospective changes or improvements to its compliance program and resources;

(3) A list of any material changes to compliance policies and procedures since the last annual compliance report;

(4) A description of the financial, managerial, and operational resources set aside for compliance with respect to the Act and Commission regulations;

(5) A description of any material compliance matters, including noncompliance issues identified through a compliance office review, look-back, internal or external audit finding, self-reported error, or validated complaint, and explains how they were resolved; and

(6) A certification by the chief compliance officer that, to the best of his or her knowledge and reasonable belief, and under penalty of law, the annual compliance report is accurate and complete.

(f) *Submission of Annual Compliance Report by Chief Compliance Officer to the Commission.* (1) Prior to submission of the annual compliance report to the Commission, the chief compliance officer shall provide the annual compliance report to the board of the registered swap data repository for its review. If the swap data repository does not have a board, then the annual compliance report shall be provided to the senior officer for their review. Members of the board and the senior officer may not require the chief compliance officer to make any changes to the report. Submission of the report

to the board or senior officer, and any subsequent discussion of the report, shall be recorded in board minutes or similar written record, as evidence of compliance with this requirement.

(2) The annual compliance report shall be provided electronically to the Commission not more than 60 days after the end of the registered swap data repository's fiscal year, concurrently with the filing of the annual amendment to Form SDR that must be submitted to the Commission pursuant to § 49.3(a)(5) of this part.

(3) Promptly upon discovery of any material error or omission made in a previously filed compliance report, the chief compliance officer shall file an amendment with the Commission to correct any material error or omission. An amendment shall contain the oath or certification required under paragraph (e)(67) of this section.

(4) A registered swap data repository may request the Commission for an extension of time to file its compliance report based on substantial, undue hardship. Extensions for the filing deadline may be granted at the discretion of the Commission.

(g) *Recordkeeping.* (1) The registered swap data repository shall maintain:

(i) A copy of the written policies and procedures, including the code of ethics and conflicts of interest policies adopted in furtherance of compliance with the Act and Commission regulations;

(ii) Copies of all materials, including written reports provided to the board of directors or senior officer in connection with the review of the annual compliance report under paragraph (f)(1) of this section and the board minutes or similar written record of such review, that record the submission of the annual compliance report to the board of directors or senior officer; and

(iii) Any records relevant to the registered swap data repository's annual compliance report, including, but not limited to, work papers and other documents that form the basis of the report, and memoranda, correspondence, other documents, and records that are:

(A) Created, sent or received in connection with the annual compliance report and

(B) Contain conclusions, opinions, analyses, or financial data related to the annual compliance report.

(2) The registered swap data repository shall maintain records in accordance with § 1.31 of this chapter.

§ 49.23 Emergency authority policies and procedures.

(a) *Emergency Policies and Procedures Required.* A registered swap data repository shall establish policies and procedures for the exercise of emergency authority in the event of any emergency, including but not limited to natural, man-made, and information technology emergencies. Such policies and procedures shall also require a swap data repository to exercise its emergency authority upon request by the Commission. A swap data repository's policies and procedures for the exercise of emergency authority shall be transparent to the Commission and to market participants whose swap transaction data resides at the swap data repository.

(b) *Invocation of Emergency Authority.* A registered swap data repository's policies and procedures for the exercise of emergency authority shall enumerate the circumstances under which the swap data repository is authorized to invoke its emergency authority and the procedures that it shall follow to declare an emergency. Such policies and procedures shall also address the range of measures that it is authorized to take when exercising such emergency authority.

(c) *Designation of Persons Authorized to Act in an Emergency.* A registered swap data repository shall designate one or more officials of the swap data repository as persons authorized to exercise emergency authority on its behalf. A swap data repository shall also establish a chain of command to be used in the event that the designated person(s) is unavailable. A swap data repository shall notify the Commission of the person(s) designated to exercise emergency authority.

(d) *Conflicts of Interest.* A registered swap data repository's policies and procedures for the exercise of emergency authority shall include provisions to avoid conflicts of interest in any decisions made pursuant to emergency authority. Such policies and procedures shall also include provisions to consult the swap data repository's chief compliance officer in any emergency decision that may raise potential conflicts of interest.

(e) *Notification to the Commission.* A registered swap data repository's policies and procedures for the exercise of emergency authority shall include provisions to notify the Commission as soon as reasonably practicable regarding any invocation of emergency authority. When notifying the Commission of any exercise of emergency authority, a swap data repository shall explain the reasons for taking such emergency action, explain how conflicts of interest were minimized, and document the decision-making process. Underlying documentation shall be made available to the Commission upon request.

§ 49.24 System safeguards.

(a) Each registered swap data repository shall, with respect to all swap data in its custody:

(1) Establish and maintain a program of risk analysis and oversight to identify and minimize sources of operational risk through the development of appropriate controls and procedures and the development of automated systems that are reliable, secure, and have adequate scalable capacity;

(2) Establish and maintain emergency procedures, backup facilities, and a business continuity-disaster recovery plan that allow for the timely recovery and resumption of operations and the fulfillment of the duties and obligations of the swap data repository; and

(3) Periodically conduct tests to verify that backup resources are sufficient to ensure continued fulfillment of all duties of the swap data repository established by the Act or the Commission's regulations.

(b) A registered swap data repository's program of risk analysis and oversight with respect to its operations and automated systems shall address each of the following categories of risk analysis and oversight:

(1) Information security;

(2) Business continuity—disaster recovery planning and resources;

(3) Capacity and performance planning;

(4) Systems operations;

(5) Systems development and quality assurance; and

(6) Physical security and environmental controls.

(c) In addressing the categories of risk analysis and oversight required under paragraph (b) of this section, a registered swap data repository should follow generally accepted standards and best practices with respect to the development, operation, reliability, security, and capacity of automated systems.

(d) A registered swap data repository shall maintain a business continuity—disaster recovery plan and business continuity—disaster recovery resources, emergency procedures, and backup facilities sufficient to enable timely recovery and resumption of its operations and resumption of its ongoing fulfillment of its duties and obligations as a swap data repository following any disruption of its operations. Such duties and obligations include, without limitation, the duties

set forth in § 49.9 and the core principles set forth in § 49.19; and maintenance of a comprehensive audit trail. The swap data repository's business continuity—disaster recovery plan and resources generally should enable resumption of the swap data repository's operations and resumption of ongoing fulfillment of the swap data repository's duties and obligations during the next business day following the disruption.

(e) Registered swap data repositories determined by the Commission to be critical swap data repositories are subject to more stringent requirements as set forth below.

(1) Each swap data repository that the Commission determines is critical must maintain a disaster recovery plan and business continuity and disaster recovery resources, including infrastructure and personnel, sufficient to enable it to achieve a same-day recovery time objective in the event that its normal capabilities become temporarily inoperable for any reason up to and including a wide-scale disruption.

(2) A same-day recovery time objective is a recovery time objective within the same business day on which normal capabilities become temporarily inoperable for any reason up to and including a wide-scale disruption.

(3) To ensure its ability to achieve a same-day recovery time objective in the event of a wide-scale disruption, each swap data repository that the Commission determines is critical must maintain a degree of geographic dispersal of both infrastructure and personnel such that:

(i) Infrastructure sufficient to enable the swap data repository to meet a same-day recovery time objective after interruption is located outside the relevant area of the infrastructure the entity normally relies upon to conduct activities necessary to the reporting, recordkeeping and/or dissemination of swap data, and does not rely on the same critical transportation, telecommunications, power, water, or other critical infrastructure components the entity normally relies upon for such activities; and

(ii) Personnel sufficient to enable the swap data repository to meet a same-day recovery time objective, after interruption of normal swap data reporting, recordkeeping and/or dissemination by a wide-scale disruption affecting the relevant area in which the personnel the entity normally relies upon to engage in such activities are located, live and work outside that relevant area.

(4) Each swap data repository that the Commission determines is critical must conduct regular, periodic tests of its business continuity and disaster recovery plans and resources and its capacity to achieve a same-day recovery time objective in the event of a wide-scale disruption. The swap data repository shall keep records of the results of such tests, and make the results available to the Commission upon request.

(f) A registered swap data repository that is not determined by the Commission to be a critical swap data repository satisfies the requirement to be able to resume operations and resume ongoing fulfillment of the swap data repository's duties and obligations during the next business day following a disruption by maintaining either:

(1) Infrastructure and personnel resources of its own that are sufficient to ensure timely recovery and resumption of its operations, duties and obligations as a registered swap data repository following any disruption of its operations; or

(2) Contractual arrangements with other registered swap data repositories or disaster recovery service providers, as appropriate, that are sufficient to ensure continued fulfillment of all of the swap data repository's duties and obligations following any disruption of its operations, both with respect to all swaps reported to the swap data repository and with respect to all swap data contained in the swap data repository.

(g) A registered swap data repository shall notify Commission staff promptly of all:

(1) Systems malfunctions;

(2) Cyber security incidents or targeted threats that actually or potentially jeopardize automated system operation, reliability, security, or capacity; and

(3) Any activation of the swap data repository's business continuity-disaster recovery plan.

(h) A registered swap data repository shall give Commission staff timely advance notice of all:

(1) Planned changes to automated systems that may impact the reliability, security, or adequate scalable capacity of such systems; and

(2) Planned changes to the swap data repository's program of risk analysis and oversight.

(i) A registered swap data repository shall provide to the Commission upon request current copies of its business continuity and disaster recovery plan and other emergency procedures, its assessments of its operational risks, and other documents requested by Commission staff for the purpose of maintaining a current profile of the swap data repository's automated systems.

(j) A registered swap data repository shall conduct regular, periodic, objective testing and review of its automated systems to ensure that they are reliable, secure, and have adequate scalable capacity. It shall also conduct regular, periodic testing and review of its business continuity-disaster recovery capabilities. Both types of testing should be conducted by qualified, independent professionals. Such qualified independent professionals may be independent contractors or employees of the swap data repository, but should not be persons responsible for development or operation of the systems or capabilities being tested. Pursuant to §§ 1.31, 49.12 and 45.2 of the Commission's Regulations, the swap data repository shall keep records of all such tests, and make all test results available to the Commission upon request.

(k) To the extent practicable, a registered swap data repository should:

(1) Coordinate its business continuity-disaster recovery plan with those of swap execution facilities, designated contract markets, derivatives clearing organizations, swap dealers, and major swap participants who report swap data to the swap data repository, and with those regulators identified in Section 21(c)(7) of the Act, in a manner adequate to enable effective resumption of the registered swap data repository's fulfillment of its duties and obligations following a disruption causing activation of the swap data repository's business continuity and disaster recovery plan;

(2) Participate in periodic, synchronized testing of its business continuity—disaster recovery plan and the business continuity—disaster recovery plans of swap execution facilities, designated contract markets, derivatives clearing organizations, swap dealers, and major swap participants who report swap data to the registered swap data repository, and the business continuity—disaster recovery plans required by the regulators identified in Section 21(c)(7) of the Act; and

(3) Ensure that its business continuity—disaster recovery plan takes into account the business continuity—disaster recovery plans of its telecommunications, power, water, and other essential service providers.

§ 49.25 Financial resources.

(a) *General rule.* (1) A registered swap data repository shall maintain sufficient financial resources to perform its

statutory duties set forth in § 49.9 and the core principles set forth in § 49.19.

(2) An entity that operates as both a swap data repository and a derivatives clearing organization shall also comply with the financial resource requirements applicable to derivatives clearing organizations under § 39.11 of this chapter.

(3) Financial resources shall be considered sufficient if their value is at least equal to a total amount that would enable the swap data repository, or applicant for registration, to cover its operating costs for a period of at least one year, calculated on a rolling basis.

(4) The financial resources described in this paragraph (a) must be independent and separately dedicated to ensure that assets and capital are not used for multiple purposes.

(b) *Types of financial resources.* Financial resources available to satisfy the requirements of paragraph (a) of this section may include:

(1) The swap data repository's own capital; and

(2) Any other financial resource deemed acceptable by the Commission.

(c) *Computation of financial resource requirement.* A registered swap data repository shall, on a quarterly basis, based upon its fiscal year, make a reasonable calculation of its projected operating costs over a 12-month period in order to determine the amount needed to meet the requirements of paragraph (a) of this section. The swap data repository shall have reasonable discretion in determining the methodology used to compute such projected operating costs. The Commission may review the methodology and require changes as appropriate.

(d) *Valuation of financial resources.* At appropriate intervals, but not less than quarterly, a registered swap data repository shall compute the current market value of each financial resource used to meet its obligations under paragraph (a) of this section. Reductions in value to reflect market and credit risk (haircuts) shall be applied as appropriate.

(e) *Liquidity of financial resources.* The financial resources allocated by the registered swap data repository to meet the requirements of paragraph (a) shall include unencumbered, liquid financial assets (*i.e.,* cash and/or highly liquid securities) equal to at least six months' operating costs. If any portion of such financial resources is not sufficiently liquid, the swap data repository may take into account a committed line of credit or similar facility for the purpose of meeting this requirement.

(f) *Reporting requirements.* (1) Each fiscal quarter, or at any time upon Commission request, a registered swap data repository shall report to the Commission the amount of financial resources necessary to meet the requirements of paragraph (a), the value of each financial resource available, computed in accordance with the requirements of paragraph (d); and provide the Commission with a financial statement, including the balance sheet, income statement, and statement of cash flows of the swap data repository or of its parent company. Financial statements shall be prepared in conformity with generally accepted accounting principles (GAAP) applied on a basis consistent with that of the preceding financial statement.

(2) The calculations required by this paragraph shall be made as of the last business day of the swap data repository's fiscal quarter.

(3) The report shall be filed not later than 17 business days after the end of the swap data repository's fiscal quarter, or at such later time as the Commission may permit, in its discretion, upon request by the swap data repository.

§ 49.26 Disclosure requirements of swap data repositories.

Before accepting any swap data from a reporting entity or upon a reporting entity's request, a registered swap data repository shall furnish to the reporting entity a disclosure document that contains the following written information, which shall reasonably enable the reporting entity to identify and evaluate accurately the risks and costs associated with using the services of the swap data repository:

(a) The registered swap data repository's criteria for providing others with access to services offered and swap data maintained by the swap data repository;

(b) The registered swap data repository's criteria for those seeking to connect to or link with the swap data repository;

(c) A description of the registered swap data repository's policies and procedures regarding its safeguarding of swap data and operational reliability to protect the confidentiality and security of such data, as described in § 49.24;

(d) The registered swap data repository's policies and procedures reasonably designed to protect the privacy of any and all swap data that the swap data repository receives from a reporting entity, as described in § 49.16;

(e) The registered swap data repository's policies and procedures regarding its non-commercial and/or commercial use of the swap data that it receives from a market participant, any registered entity, or any other person;

(f) The registered swap data repository's dispute resolution procedures;

(g) A description of all the registered swap data repository's services, including any ancillary services;

(h) The registered swap data repository's updated schedule of any fees, rates, dues, unbundled prices, or other charges for all of its services, including any ancillary services; any discounts or rebates offered; and the criteria to benefit from such discounts or rebates; and

(i) A description of the registered swap data repository's governance arrangements.

§ 49.27 Access and fees.

(a) *Fair, Open and Equal Access.* (1) A registered swap data repository, consistent with Section 21 of the Act, shall provide its services to market participants, including but not limited to designated contract markets, swap execution facilities, derivatives clearing organizations, swap dealers, major swap participants and any other counterparties, on a fair, open and equal basis. For this purpose, a swap data repository shall not provide access to its services on a discriminatory basis but is required to provide its services to all market participants for swaps it accepts in an asset class.

(2) Consistent with the principles of open access set forth in paragraph (a)(1) of this Regulation, a registered swap data repository shall not tie or bundle the offering of mandated regulatory services with other ancillary services that a swap data repository may provide to market participants.

(b) *Fees.* (1) Any fees or charges imposed by a registered swap data repository in connection with the reporting of swap data and any other supplemental or ancillary services provided by such swap data repository shall be equitable and established in a uniform and non-discriminatory manner. Fees or charges shall not be used as an artificial barrier to access to the swap data repository. Swap data repositories shall not offer preferential pricing arrangements to any market participant on any basis, including volume discounts or reductions unless such discounts or reductions apply to all market participants uniformly and are not otherwise established in a manner that would effectively limit the application of such discount or reduction to a select number of market participants.

(2) All fees or charges are to be fully disclosed and transparent to market

participants. At a minimum, the registered swap data repository shall provide a schedule of fees and charges that is accessible by all market participants on its Web site.

(3) The Commission notes that it will not specifically approve the fees charged by registered swap data repositories. However, any and all fees charged by swap data repositories must be consistent with the principles set forth in paragraph (b)(1) of this section.

Appendix A to Part 49—Form SDR

COMMODITY FUTURES TRADING COMMISSION

FORM SDR

SWAP DATA REPOSITORY APPLICATION OR AMENDMENT TO APPLICATION FOR

REGISTRATION REGISTRATION INSTRUCTIONS

Intentional misstatements or omissions of material fact may constitute federal criminal violations (7 U.S.C. § 13 and 18 U.S.C. § 1001) or grounds for disqualification from registration.

DEFINITIONS

Unless the context requires otherwise, all terms used in this Form SDR have the same meaning as in the Commodity Exchange Act, as amended, and in the Regulations of the Commission thereunder.

For the purposes of this Form SDR, the term ''Applicant'' shall include any applicant for registration as a swap data repository or any registered swap data repository that is amending Form SDR.

GENERAL INSTRUCTIONS

1. Form SDR and Exhibits thereto are to be filed with the Commodity Futures Trading Commission by Applicants for registration as a swap data repository, or by a registered swap data repository amending such registration, pursuant to Section 21 of the Commodity Exchange Act and the regulations thereunder. Upon the filing of an application for registration, the Commission will publish notice of the filing and afford interested persons an opportunity to submit written data, views and arguments concerning such application. No application for registration shall be effective unless the Commission, by order, grants such registration.

2. Individuals' names shall be given in full (Last Name, First Name, Middle Name).

3. Signatures must accompany each copy of the Form SDR filed with the Commission. If this Form SDR is filed by a corporation, it must be signed in the name of the corporation by a principal officer duly authorized; if filed by a limited liability company, this Form SDR must be signed in the name of the limited liability company by a member duly authorized to sign on the limited liability company's behalf; if filed by a partnership, this Form SDR must be signed in the name of the partnership by a general partner authorized; if filed by an unincorporated organization or association which is not a partnership, it must be signed in the name of the organization or association by the managing agent, i.e., a duly authorized person who directs, manages or who participates in the directing or managing of its affairs.

4. If Form SDR is being filed as an initial application for registration, all applicable items must be answered in full. If any item is not applicable, indicate by ''none,'' ''not applicable,'' or ''N/A'' as appropriate.

5. Under Section 21 of the Commodity Exchange Act and the regulations thereunder, the Commission is authorized to solicit the information required to be supplied by this form from Applicants for registration as a swap data repository and from registered swap data repositories amending their registration. Disclosure of the information specified on this form is mandatory prior to processing of an application for registration as a swap data repository. The information will be used for the principal purpose of determining whether the Commission should grant or deny registration to an Applicant. The Commission may determine that additional information is required from the Applicant in order to process its application. An Applicant is therefore encouraged to supplement this Form SDR with any additional information that may be significant to its operation as a swap data repository and to the Commission's review of its application. **A Form SDR which is not prepared and executed in compliance with applicable requirements and instructions may be returned as not acceptable for filing. Acceptance of this Form SDR, however, shall not constitute any finding that the Form SDR has been filed as required or that the information submitted is true, current or complete.**

6. Except in cases where confidential treatment is requested by the Applicant and granted by the Commission pursuant to the Freedom of Information Act and Commission Regulation § 145.9, information supplied on this form will be included routinely in the public files of the Commission and will be available for inspection by any interested person. The Applicant must identify with particularity the information in these exhibits that will be subject to a request for confidential treatment and supporting documentation for such request pursuant to Commission Regulations § 40.8, and § 145.9.

UPDATING INFORMATION ON THE FORM SDR

1. Section 21 requires that if any information contained in Items 1 through 17, 23, 29, and Item 53 of this application, or any supplement or amendment thereto, is or becomes inaccurate for any reason, an amendment must be filed promptly, unless otherwise specified, on Form SDR correcting such information.

2. Registrants filing Form SDR as an amendment (other than an annual amendment) need file only the first page of Form SDR, the signature page (Item 13), and any pages on which an answer is being amended, together with such exhibits as are being amended. The submission of an amendment represents that all unamended items and exhibits remain true, current and complete as previously filed.

ANNUAL AMENDMENT ON THE FORM SDR

Annual amendments on the Form SDR shall be submitted within 60 days of the end of the Applicant's fiscal year. Applicants must complete the first page and provide updated information or exhibits.

An Applicant may request an extension of time for submitting the annual amendment with the Secretary of the Commission based on substantial, undue hardship. Extensions for filing annual amendments may be granted at the discretion of the Commission.

WHERE TO FILE

File registration application and appropriate exhibits electronically with the Commission at the Washington, D.C. headquarters in a format and in the manner specified by the Secretary of the Commission.

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

FORM SDR

SWAP DATA REPOSITORY
APPLICATION OR AMENDMENT TO APPLICATION FOR REGISTRATION

_____

Exact name of Applicant as specified in charter

_____

Address of principal executive offices

☐ If this is an **APPLICATION** for registration, complete in full and check here.

☐ If this is an **APPLICATION FOR PROVISIONAL REGISTRATION**, complete in full and check here.

☐ If this is an **AMENDMENT** to an application, or to an effective registration (other than an annual amendment) list all items that are amended and check here and list below.

☐ If this is an **ANNUAL AMENDMENT** to an application, or to an effective registration (other than an annual amendment) list all items that are amended and check here and list below.

_____
_____
_____
_____

GENERAL INFORMATION

1. Name under which business is/will be conducted, if different than name specified above:

_____

2. If name of business is being amended, state previous business name:

_____

3. Contact information, including mailing address if different than address specified above:

_____
Number and Street

_____
City State Country Zip Code

_____
Main Phone Number Fax

_____
Website URL E-mail Address

4. List of principal office(s) and address(es) where swap data repositories activities are conducted

Office	Address

5. If Applicant is a successor to a previously registered swap data repository, please complete the following:

a. Date of succession

_____

b. Full name and address of predecessor registrant

_____
Name

_____
Number and Street

_____
City State Country Zip Code

_____ _____ _____
Phone Number Fax Number E-mail Address

6. Furnish a description of the function(s) that the Applicant performs or proposes to perform:

_____

_____

_____

Please indicate which asset class(es) the Applicant intends to serve:

- ☐ Interest Rate
- ☐ Equity
- ☐ Credit
- ☐ Foreign Exchange
- ☐ Commodity (Specify) _____
- ☐ Other (Specify) _____

BUSINESS ORGANIZATION

7. Applicant is a:

- ☐ Corporation
- ☐ Partnership
- ☐ Limited Liability Company

☐ Other (Specify) _____

8. Date of formation: _____

9. Jurisdiction of organization: _____

List all other jurisdictions in which Applicant is qualified to do business (including non-US jurisdictions):

_____

_____

10. List all other regulatory licenses or registrations of Applicant (or exemptions from any licensing requirement) including with non-US regulators:

_____

_____

11. Fiscal Year End: _____

12. Applicant agrees and consents that the notice of any proceeding before the Commission in connection with its application may be given by sending such notice by certified mail to the person named below at the address given.

_____
Print Name and Title

_____
Number and Street

_____
City State Zip Code

_____ _____ _____
Phone Number Fax Number E-mail Address

SIGNATURES

13. The Applicant had duly caused this application or amendment to be signed on its behalf by the undersigned, hereunto duly authorized, this _____ day of _____, 20_____. The Applicant and the undersigned represent hereby that all information contained herein is true, current and complete. It is understood that all required items and Exhibits are considered integral parts of this form and that the submission of any amendment represents that all unamended items and Exhibits remain true, current, and complete as previously filed.

_____
Name of Applicant

By:_____
Manual Signature of Authorized Person

_____
Print Name and Title of Signatory)

EXHIBITS INSTRUCTIONS

The following exhibits must be included as part of Form SDR and filed with the Commodity Futures Trading Commission by each Applicant seeking registration as a swap data repository, or by a registered swap data repository amending such registration, pursuant to Section 21 of the Commodity Exchange Act and regulations thereto. Such exhibits must be labeled according to the items specified in this Form. If any exhibit is not applicable, please specify the exhibit letter and indicate by "none," "not applicable," or "N/A" as appropriate. The Applicant must identify with particularity the information in these exhibits that will be subject to a request for confidential treatment and supporting documentation for such request pursuant to Commission Regulation §40.8, and §145.9.

If the Applicant is a newly formed enterprise and does not have the financial statements required pursuant to Items 25 and 26 of this form, the Applicant should provide *pro forma* financial statements for the most recent six months or since inception, whichever is less.

EXHIBITS I – BUSINESS ORGANIZATION

14. Attach as **Exhibit A** any person who owns ten (10) percent or more of Applicant's equity or possesses voting power of any class, either directly or indirectly, through agreement or otherwise, in any other manner, may control or direct the management or policies of Applicant. "Control" for this purpose is defined in Commission Regulation §49.2(a)(3).

    State in Exhibit A the full name and address of each such person and attach a copy of the agreement or, if there is none written, describe the agreement or basis upon which such person exercises or may exercise such control or direction.

15. Attach as **Exhibit B** to this application a narrative that sets forth the fitness standards for the board of directors and its composition including the number or percentage of public directors.

    Attach a list of the present officers, directors (including an identification of the public directors), governors (and, in the case of an Applicant not a corporation, the members of all standing committees grouped by committee), or persons performing functions similar to any of the foregoing, of the swap data repository or of the entity identified in Item 16 that performs the swap data repository activities of the Applicant, indicating for each:

    a. Name
    b. Title
    c. Date of commencement and, if appropriate, termination of present term of position
    d. Length of time each present officer, director, or governor has held the same position
    e. Brief account of the business experience of each officer and director over the last five (5) years
    f. Any other business affiliations in the securities industry or OTC derivatives industry
    g. A description of:
        (1) any order of the Commission with respect to such person pursuant to Section 5e of the Act;
        (2) any conviction or injunction within the past 10 years;
        (3) any disciplinary action with respect to such person within the last five (5) years;
        (4) any disqualification under Sections 8b, and 8d of the Act.
        (5) any disciplinary action under Section 8c of the Act.
        (6) any violation pursuant to Section 9 of the Act.
    h. For directors, list any committees on which they serve and any compensation received by virtue of their directorship.

16. Attach as **Exhibit C** to this application the following information about the chief compliance officer who has been appointed by the board of directors of the swap data repository or a person or group performing a function similar to such board of directors:
    a. Name
    b. Title
    c. Dates of commencement and termination of present term of office or position
    d. Length of time the chief compliance officer has held the same office or position
    e. Brief account of the business experience of the chief compliance officer over the last five (5) years
    f. Any other business affiliations in the derivatives/securities industry or swap data repository industry
    g. A description of:
        (1) any order of the Commission with respect to such person pursuant to Section 5e of the Act;
        (2) any conviction or injunction within the past 10 years;
        (3) any disciplinary action with respect to such person within the last five (5) years;
        (4) any disqualification under Sections 8b, and 8d of the Act.
        (5) any disciplinary action under Section 8c of the Act.
        (6) any violation pursuant to Section 9 of the Act.

17. Attach as **Exhibit D** a copy of documents relating to the governance arrangements of the Applicant, including, but not limited to:
    a. the nomination and selection process of the members on the Applicant's board of directors, a person or group performing a function similar to a board of directors (collectively, "board"), or any committee that has the authority to act on behalf of the board, the responsibilities of each of the board and such committee, and the composition of each board and such committee; and
    b. a description of the manner in which the composition of the board allows the Applicant comply with applicable core principles, regulations, as well as the rules of the Applicant.
    c. a description of the procedures to remove a member of the board of directors , where the conduct of such member is likely to be prejudicial to the sound and prudent management of the swap data repository.

18. Attach as **Exhibit E** a narrative or graphic description of the organizational structure of the Applicant. Note: If the swap data repository activities are conducted primarily by a division, subdivision, or other segregable entity within the Applicant's corporation or organization, describe the relationship of such entity within the overall organizational structure and attach as Exhibit E only such description as applies to the segregable entity. Additionally, prove any relevant jurisdictional information, including any and all jurisdictions in which the Applicant or any affiliated entity is doing business and registration status, including pending application (e.g., country, regulator, registration category, date of registration). In addition, include a description of the lines of responsibility and accountability for each operational unit of the Applicant to (i) any committee thereof and/or (ii) the board.

19. Attach as **Exhibit F** a copy of the conflicts of interest policies and procedures implemented by the Applicant to minimize conflicts of interest in the decision-making process of the swap data repository and to establish a process for the resolution of any such conflicts of interest.

20. Attach as **Exhibit G**, a list of all affiliates of the swap data repository and indicate the general nature of the affiliation. Provide a copy of any agreements entered into or to be entered by the swap data repository, including partnerships or joint ventures, or its participants, that will enable the Applicant to comply with the registration requirements and core principles specified in Section 21 of the Commodity Exchange Act. With regard to an affiliate that is a parent company of the Applicant, if such parent controls the Applicant, an Applicant must provide (i) the board composition of the parent, including public directors, and (ii) all ownership information requested in Exhibit A for the parent. "Control" for this purpose is defined in Commission Regulation §49.2(a)(3).

21. Attach as **Exhibit H** to this application a copy of the constitution, articles of incorporation or association with all amendments thereto, and existing by-laws, rules or instruments corresponding

thereto, of the Applicant. A certificate of good standing dated within one week of the date of the application shall be provided.

22. Where the Applicant is a foreign entity seeking registration or filing an amendment to an existing registration, attach as **Exhibit I,** an opinion of counsel that the swap data repository, as a matter of law, is able to provide the Commission with prompt access to the books and records of such swap data repository and that the swap data repository can submit to onsite inspection and examination by the Commission.

23. Where the Applicant is a foreign entity seeking registration, attach as **Exhibit I-1,** to designate and authorize an agent in the United States, other than a Commission official, to accept any notice or service of process, pleadings, or other documents in any action or proceedings brought against the swap data repository to enforce the Act and the regulations thereunder.

24. Attach as **Exhibit J**, a current copy of the Applicant's rules as defined in Commission Regulation §40.1, consisting of all the rules necessary to carry out the duties as a swap data repository.

25. Attach as **Exhibit K**, a description of the Applicant's internal disciplinary and enforcement protocols, tools, and procedures. Include the procedures for dispute resolution.

26. Attach as **Exhibit L,** a brief description of any material pending legal proceeding(s), other than ordinary and routine litigation incidental to the business, to which the Applicant or any of its affiliates is a party or to which any of its or their property is the subject. Include the name of the court or agency in which the proceeding(s) are pending, the date(s) instituted, and the principal parties thereto, a description of the factual basis alleged to underlie the proceeding(s) and the relief sought. Include similar information as to any such proceeding(s) known to be contemplated by the governmental agencies.

EXHIBITS II — FINANCIAL INFORMATION

27. Attach as **Exhibit M** a balance sheet, statement of income and expenses, statement of sources and application of revenues and all notes or schedules thereto, as of the most recent fiscal year of the Applicant. If a balance sheet and statements certified by an independent public accountant are available, such balance sheet and statement shall be submitted as Exhibit M.

28. Attach as **Exhibit N** a balance sheet and an income and expense statement for each affiliate of the swap data repository that also engages in swap data repository activities as of the end of the most recent fiscal year of each such affiliate.

29. Attach as **Exhibit O** the following:

    a. A complete list of all dues, fees and other charges imposed, or to be imposed, by or on behalf of Applicant for its swap data repository services and identify the service or services provided for each such due, fee, or other charge.

    b. Furnish a description of the basis and methods used in determining the level and structure of the dues, fees and other charges listed in paragraph a of this item.

    c. If the Applicant differentiates, or proposes to differentiate, among its customers, or classes of customers in the amount of any dues, fees, or other charges imposed for the same or similar services, so state and indicate the amount of each differential. In addition, identify and describe any differences in the cost of providing such services, and any other factors, that account for such differentiations.

EXHIBITS III — OPERATIONAL CAPABILITY

30. Attach as **Exhibit P** copies of all material contracts with any swap execution facility, clearing agency, central counterparty, or third-party service provider. To the extent that form contracts are used by the Applicant, submit a sample of each type of form contract used. In addition, include a list of swap execution facilities, clearing agencies, central counterparties, and third-party service providers with

whom the Applicant has entered into material contracts. Where swap data repository functions are performed by a third party, attach any agreements between or among the Applicant and such third party, and identify the services that will be provided.

31. Attach as **Exhibit Q** any technical manuals, other guides or instructions for users of, or participants in, the market.

32. Attach as **Exhibit R** a description of system test procedures, test conducted or test results that will enable the Applicant to comply, or demonstrate the Applicant's ability to comply with the core principles for swap data repositories.

33. Attach as **Exhibit S** a description in narrative form or by the inclusion of functional specifications, of each service or function performed as a swap data repository. Include in Exhibit S a description of all procedures utilized for the collection, processing, distribution, publication and retention (e.g., magnetic tape) of information with respect to transactions or positions in, or the terms and conditions of, swaps entered into by market participants.

34. Attach as **Exhibit T** a list of all computer hardware utilized by the Applicant to perform swap data repository functions, indicating where such equipment (terminals and other access devices) is physically located.

35. Attach as **Exhibit U** a description of the personnel qualifications for each category of professional employees employed by the swap data repository or the division, subdivision, or other segregable entity within the swap data repository as described in Item 16.

36. Attach as **Exhibit V** a description of the measures or procedures implemented by Applicant to provide for the security of any system employed to perform the functions of a swap data repository. Include a general description of any physical and operational safeguards designed to prevent unauthorized access (whether by input or retrieval) to the system. Describe any circumstances within the past year in which the described security measures or safeguards failed to prevent any such unauthorized access to the system and any measures taken to prevent a reoccurrence. Describe any measures used to verify the accuracy of information received or disseminated by the system.

37. Attach as **Exhibit W** copies of emergency policies and procedures and Applicant's business continuity-disaster recovery plan. Include a general description of any business continuity-disaster recovery resources, emergency procedures, and backup facilities sufficient to enable timely recovery and resumption of its operations and resumption of its ongoing fulfillment of its duties and obligations as a swap data repository following any disruption of its operations.

38. Where swap data repository functions are performed by automated facilities or systems, attach as **Exhibit X** a description of all backup systems or subsystems that are designed to prevent interruptions in the performance of any swap data repository function as a result of technical malfunctions or otherwise in the system itself, in any permitted input or output system connection, or as a result of any independent source. Include a narrative description of each type of interruption that has lasted for more than two minutes and has occurred within the six (6) months preceding the date of the filing, including the date of each interruption, the cause and duration. Also state the total number of interruptions that have lasted two minutes or less.

39. Attach as **Exhibit Y** the following:

a. For each of the swap data repository functions:

(1) quantify in appropriate units of measure the limits on the swap data repository's capacity to receive (or collect), process, store or display (or disseminate for display or other use) the data elements included within each function (e.g., number of inquiries from remote terminals);

(2) identify the factors (mechanical, electronic or other) that account for the current limitations reported in answer to (1) on the swap data repository's capacity to

receive (or collect), process, store or display (or disseminate for display or other use) the data elements included within each function;

b. If the Applicant is able to employ, or presently employs, the central processing units of its system(s) for any use other than for performing the functions of a swap data repository, state the priorities of assignment of capacity between such functions and such other uses, and state the methods used or able to be used to divert capacity between such functions and such other uses.

EXHIBITS IV — ACCESS TO SERVICES AND DATA

40. Attach as **Exhibit Z** the following:

a. As to each swap data repository service that the Applicant provides, state the number of persons who presently utilize, or who have notified the Applicant of their intention to utilize, the services of the swap data repository.

b. For each instance during the past year in which any person has been prohibited or limited in respect of access to services offered by the Applicant as a swap data repository, indicate the name of each such person and the reason for the prohibition or limitation.

c. Define the data elements for purposes of the swap data repository's real-time public reporting obligation. Appendix A to Part 43 of the Commission's Regulations (Data Elements and Form for Real-Time Reporting for Particular Markets and Contracts) sets forth the specific data elements for real-time public reporting.

41. Attach as **Exhibit AA** copies of any agreements governing the terms by which information may be shared by the swap data repository, including with market participants. To the extent that form contracts are used by the Applicant, submit a sample of each type of form contract used.

42. Attach as **Exhibit BB** a description of any specifications, qualifications or other criteria that limit, are interpreted to limit, or have the effect of limiting access to or use of any swap data repository services furnished by the Applicant and state the reasons for imposing such specifications, qualifications, or other criteria, including whether such specifications, qualifications or other criteria are imposed.

43. Attach as **Exhibit CC** any specifications, qualifications, or other criteria required of participants who utilize the services of the Applicant for collection, processing, preparing for distribution, or public dissemination by the Applicant.

44. Attach as **Exhibit DD** any specifications, qualifications, or other criteria required of any person, including, but not limited to, regulators, market participants, market infrastructures, venues from which data could be submitted to the Applicant, and third-party service providers who request access to data maintained by the Applicant.

45. Attach as **Exhibit EE** policies and procedures implemented by the Applicant to review any prohibition or limitation of any person with respect to access to services offered or data maintained by the Applicant and to grant such person access to such services or data if such person has been discriminated against unfairly.

EXHIBITS — OTHER POLICIES AND PROCEDURES

46. Attach as **Exhibit FF**, a narrative and supporting documents that may be provided under other Exhibits herein, that describe the manner in which the Applicant is able to comply with each core principle and other requirements pursuant to Commission Regulation §49.19.

47. Attach as **Exhibit GG** policies and procedures implemented by the Applicant protect the privacy of any and all swap information that the swap data repository receives from reporting entities.

48. Attach as **Exhibit HH** a description of safeguards, policies, and procedures implemented by the Applicant to prevent the misappropriation or misuse of (a) any confidential information received by the Applicant, including, but not limited to "Section 8 Material" and "SDR Information," as those terms are defined in Commission Regulation §49.2, about a market participant or any of its customers; and/or (c) intellectual property by Applicant or any person associated with the Applicant for their personal benefit or the benefit of others.

49. Attach **Exhibit II** policies and procedures implemented by the Applicant regarding its use of the SDR information that it receives from a market participant, any registered entity, or any person for non-commercial and/or commercial purposes.

50. Attach as **Exhibit JJ** procedures and a description of facilities of the Applicant for effectively resolving disputes over the accuracy of the transaction data and positions that are recorded in the swap data repository.

51. Attach as **Exhibit KK** policies and procedures relating to the Applicant's calculation of positions.

52. Attach as **Exhibit LL** policies and procedures that are reasonably designed to prevent any provision in a valid swap from being invalidated or modified through the procedures or operations of the Applicant.

53. Attach as **Exhibit MM** a plan to ensure that the transaction data and position data that are recorded in the Applicant continue to be maintained after the Applicant withdraws from registration as a swap data repository, which shall include procedures for transferring the transaction data and position data to the Commission or its designee (including another registered swap data repository).

Issued in Washington, DC, on August 4, 2011, by the Commission.

David A. Stawick,

Secretary of the Commission.

Appendix To Swap Data Repositories: Registration Standards, Duties and Core

Principles—Commission Voting Summary

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

Appendix 1—Commission Voting Summary

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

Appendix 2—Chairman Gary Gensler Statement

I support the final rulemaking to establish registration and regulatory requirements for swap data repositories (SDRs). When this rule is fully implemented, all swaps—whether cleared or uncleared—will be reported to an SDR registered with the Commodity Futures Trading Commission (CFTC). Registration will enable the Commission and other regulators to monitor market participants for compliance with the Dodd-Frank Wall Street Reform and Consumer Protection Act as well as CFTC regulations. The rule implements congressional direction that the Commission and other regulators have direct access to the information maintained by SDRs. It requires SDRs to verify the accuracy and completeness of all of the swaps data they accept. It also contains provisions to permit SDRs to aggregate certain information for regulators and the public. This rule will enhance transparency in the swaps market and help reduce systemic risk.

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