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Process for a Designated Contract Market or Swap Execution Facility To Make a Swap Available to Trade, Swap Transaction Compliance and Implementation Schedule, and Trade Execution Requirement Under the Commodity Exchange Act; Final Rule

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 37 and 38

RIN 3038-AD18

Process for a Designated Contract Market or Swap Execution Facility To Make a Swap Available to Trade, Swap Transaction Compliance and Implementation Schedule, and Trade Execution Requirement Under the Commodity Exchange Act

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission (“Commission”) is adopting regulations that establish a process for a designated contract market (“DCM”) or swap execution facility (“SEF”) to make a swap subject to the trade execution requirement pursuant to the Commodity Exchange Act (“CEA”). The Commission is also adopting regulations to establish a schedule to phase in compliance with the trade execution requirement. The schedule will provide additional time for compliance with this requirement.

DATES: The rules will become effective August 5, 2013.

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I. Background

Section 723(a)(3) of the Dodd-Frank Act added section 2(h)(8) of the Commodity Exchange Act (“CEA”) to require that swap transactions subject to the clearing requirement must be traded on either a designated contract market (“DCM”) or swap execution facility (“SEF”), unless no DCM or SEF “makes the swap available to trade” or the transaction is not subject to the clearing requirement under section 2(h)(7) (the “trade execution requirement”).¹

On December 14, 2011, the Commodity Futures Trading Commission (“Commission”) proposed regulations to establish a process for a DCM or SEF to notify the Commission that a swap is “available to trade” for purposes of the trade execution requirement (“Further Notice of

¹ For example, section 2(h)(7) of the CEA, as amended by section 723 of the Dodd-Frank Act, provides an exception to the CEA section 2(h)(1) clearing requirement (“the end-user exception”) if one of the counterparties to a swap (i) is not a financial entity, (ii) is using swaps to hedge or mitigate commercial risk, and (iii) notifies the Commission how it generally meets its financial obligations associated with entering into non-cleared swaps. 7 U.S.C 2(h)(7). Under the authority given by section 2(h)(7)(C)(ii) of the CEA, the Commission has also adopted regulations to exempt certain small banks, saving associations, farm credit system institutions, and credit unions from the definition of “financial entity,” thus potentially allowing the transactions of those entities to qualify for an exemption from the clearing requirement. 17 CFR 50.5(d). The Commission may determine that swap transactions exempted from the clearing requirement pursuant to other statutory authority would also not be subject to the section 2(h)(8) trade execution requirement. For example, on April 11, 2013, the Commission published final rules issued under section 4(c) of the CEA to exempt swaps between certain affiliated entities (“inter-affiliates”) within a corporate group from the clearing requirement. The Commission determines that such swaps would not be subject to the trade execution requirement.

Proposed Rulemaking” or “FNPRM”).² The proposed regulations would be included in part 37 and part 38 of the Commission’s regulations to implement the available-to-trade provision in section 2(h)(8) of the CEA. The comment period for the FNPRM ended on February 13, 2012. The Commission received 32 written comments from members of the public and hosted a public roundtable on this topic. Commission staff also participated in several meetings with market participants.³ As a result of the written comments received and dialogue with market participants, the Commission in this final rule has revised and/or eliminated certain provisions that were proposed in the FNPRM.

On September 20, 2011, the Commission also proposed regulations to establish a schedule to implement the trade execution requirement.⁴ The proposed regulations would be included in part 37 and part 38 of the Commission’s regulations. The comment period for the proposed regulations ended on November 4, 2011. The Commission received 33 written comments from members of the public, and after consideration of those comments, is adopting the final implementation schedule for the trade execution requirement as proposed, but with certain clarifications.

The final regulations adopted herein will become effective August 5, 2013.

II. Sections 37.10 and 38.12 of the Commission’s Regulations—Final Rules

As proposed in the FNPRM, §§ 37.10 and 38.12 established a process for a SEF or a DCM, respectively, to make a swap available to trade under section 2(h)(8) of the CEA.

- Proposed §§ 37.10(a) and 38.12(a) set forth the filing procedure that SEFs

² Process for a Designated Contract Market or Swap Execution Facility to Make a Swap Available to Trade, 76 FR 77728 (Dec. 14, 2011). Sections 5(d)(1) and 5h(f)(1) of the CEA require DCMs and SEFs, respectively, to comply with any requirement that the Commission may impose by rule or regulation pursuant to section 8a(5) of the CEA, 7 U.S.C. 12a(5), which authorizes the Commission to promulgate such regulations as, in the judgment of the Commission, that are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of the CEA. In addition, section 721(b) of the Dodd-Frank Act provides the Commission with authority to adopt rules to define “[any] term included in an amendment to the Commodity Exchange Act . . . made by [the Dodd-Frank Act].” 15 U.S.C. 8321, as enacted by section 721 of the Dodd-Frank Act.

³ Meeting summaries are available through the Commission’s Web site at <http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1125>.

⁴ Swap Transaction Compliance and Implementation Schedule: Clearing and Trade Execution Requirements under Section 2(h) of the CEA, 76 FR 58186 (Sep. 20, 2011).

and DCMs would utilize to demonstrate that a swap is available to trade. Under the proposal, a SEF or DCM would be required to submit an available-to-trade determination with the Commission under the rule approval and self-certification procedures in part 40 of the Commission's regulations.

- Proposed §§ 37.10(b) and 38.12(b) set forth eight factors that a DCM or SEF may consider, as appropriate, to determine that a swap is available to trade.⁵

- Proposed §§ 37.10(c) and 38.12(c) required that upon a determination that a swap is available to trade by a SEF or DCM, all other DCMs and SEFs listing or offering that swap or an economically equivalent swap for trading must also make those swaps available to trade.

- Proposed §§ 37.10(d) and 38.12(d) required DCMs and SEFs to perform an annual review and assessment of their determinations.

A. Sections 37.10(a) and 38.12(a)— Procedure To Make a Swap Available to Trade

1. Sections 37.10(a)(1) and 38.12(a)(1)— Required Submission

Under proposed §§ 37.10(a) and 38.12(a), a SEF or DCM would initially determine that a swap is available to trade and submit that determination to the Commission, either for approval or self-certification, pursuant to the rule filing procedures of part 40 of the Commission's regulations.⁶

Under § 40.5, a registered entity may request Commission approval of a new rule prior to its implementation.⁷ The Commission has a 45-day review period to review the request and may extend the review period for an additional 45 days in specified circumstances.⁸ The

Commission may also extend the review period beyond an additional 45 days, based on a written agreement with the registered entity.⁹ Under § 40.6, a registered entity may submit a new rule to the Commission under self-certification procedures. The Commission has 10 business days to review the rule before it is deemed certified and can be made effective. The Commission, however, may stay the certification for an additional 90 days, during which time it must provide a 30-day public comment period.¹⁰ Under either procedure, the registered entity must initially provide an explanation and analysis of the rule and its compliance with the applicable provisions of the CEA, including the core principles, and the Commission's regulations thereunder.¹¹

In the case of an available-to-trade determination, the accompanying explanation and analysis in the submission would detail the manner in which the SEF or DCM considered the factors in proposed § 37.10(b) or § 38.12(b).¹² At any time during its review under § 40.5 or during the 90-day review period under § 40.6, the Commission may notify the registered entity that it objects to the proposed certification because it is inconsistent or appears to be inconsistent with the CEA or the Commission's regulations.¹³

Upon the Commission approving a SEF's or DCM's available-to-trade determination or permitting a SEF's or DCM's available-to-trade determination certification to become effective, the swap involved would be deemed available to trade. If that swap also is subject to the clearing requirement, then the swap must be executed on a SEF as a Required Transaction (as defined in part 37 of the Commission's regulations) or on a DCM in order to satisfy the trade execution requirement under section 2(h)(8) of the CEA. The Commission notes that the trade execution requirement does not apply to swaps that are not subject to the clearing

requirement under section 2(h)(1) of the CEA.¹⁴

Summary of Comments

With respect to the filing procedures set forth in proposed §§ 37.10(a) and 38.12(a), several commenters opposed the procedures and recommended that all swaps subject to the clearing requirement under section 2(h)(1) of the CEA should be subject to the trade execution requirement because the Dodd-Frank Act does not specify a separate process to make a swap available to trade.¹⁵ In this regard, some commenters stated that under section 2(h)(8)(B) of the CEA, swaps subject to the clearing requirement are automatically subject to mandatory trade execution unless a SEF or DCM does not list the swap for trading.¹⁶ Some commenters viewed the proposed procedure as duplicative of the mandatory clearing determination process and accordingly stated that the Commission should rely on the clearing determination process to also determine whether a swap is available to trade.¹⁷ The commenters further stated that utilizing the clearing determination as the exclusive basis for finding that a swap is available to trade would subject more swaps to the trade execution

¹⁴ See *supra* note 1. The Commission addresses the methods by which swaps that are subject to the trade execution requirement must be executed on a SEF or DCM. Swaps that are subject to the trade execution requirement (and are not block trades as defined under § 43.2 of the Commission's regulations) and that are traded on a SEF are defined as Required Transactions under part 37 of the Commission's regulations governing SEFs. Under § 37.9(a)(2), Required Transactions must be executed by either (1) an Order Book, as defined in § 37.3(a)(3); or (2) a Request for Quote System, as defined in § 37.9(a)(3), that operates in conjunction with an Order Book. See Core Principles and Other Requirements for Swap Execution Facilities (May 17, 2013). Swaps that are subject to the trade execution requirement and traded on a DCM must be executed pursuant to subpart J of part 38 of the Commission's regulations, which implements revised DCM Core Principle 9 under section 5(d)(9) of the CEA, as amended by section 735(b) of the Dodd-Frank Act. 7 U.S.C. 7(d)(9).

¹⁵ MarketAxess Comment Letter at 3; WMBAA Comment Letter at 3; AFR Comment Letter at 3; SDMA Comment Letter at 3; ODEX Comment Letter at 1.

¹⁶ MarketAxess Comment Letter at 2; AFR Comment Letter at 4; ODEX Comment Letter at 1. Section 2(h)(8)(B) of the CEA states that mandatory trade execution does not apply "if no [DCM or SEF] makes the swap available to trade" (emphasis added). 7 U.S.C. 2(h)(8)(B).

¹⁷ SDMA Comment Letter at 4–5; WMBAA Comment Letter at 3; MarketAxess Comment Letter at 3–5; AFR Comment Letter at 4. See *infra* note 90 and accompanying text for a description of the proposed determination factors. Under § 39.5(a)(3)(ii)(A) of the Commission's regulations, a mandatory clearing submission must include information regarding the "existence of significant outstanding notional exposures, trading liquidity, and adequate pricing data" of a subject swap.

⁵ See *infra* note 90 and accompanying text.

⁶ See Sections 40.5 and 40.6 and Provisions Common to Registered Entities, 76 FR 44776 (Jul. 27, 2011). The Commission views a DCM or SEF's determination that a swap is available to trade as a "trading protocol" that falls under the definition of a "rule" under § 40.1 of the Commission's regulations. Section 40.1(i) defines a rule as "any constitutional provision, article of incorporation, bylaw, rule, regulation, resolution, interpretation, stated policy, advisory, terms and conditions, trading protocol, agreement or instrument corresponding thereto, including those that authorize a response or establish standards for responding to a specific emergency, and any amendment or addition thereto or repeal thereof, made or issued by a registered entity or by the governing board thereof or any committee thereof, in whatever form adopted." Therefore, SEFs and DCMs would be required to submit a determination to the Commission for approval or self-certification under part 40 of the Commission's regulations.

⁷ 17 CFR 40.5(a).

⁸ 17 CFR 40.5(c) and (d). In determining whether to extend the review period, the Commission will consider whether the proposed rule raises novel or complex issues, the submission is incomplete, or

the requestor does not respond completely to Commission questions in a timely manner. 17 CFR 40.5(d)(1).

⁹ 17 CFR 40.5(d)(2).

¹⁰ 17 CFR 40.6(b) and (c). In determining whether to stay a self-certification, the Commission will consider whether the rule presents novel or complex issues; is accompanied by inadequate explanation; or is potentially inconsistent with the CEA. 17 CFR 40.6(c)(1).

¹¹ See 17 CFR 40.5(a)(5), 40.6(a)(7)(v).

¹² See *infra* note 90 and accompanying text for a list of the proposed determination factors in the FNPRM.

¹³ See 17 CFR 40.5(e), 40.6(c)(3).

requirement and further the objectives of the Dodd-Frank Act.¹⁸

In contrast, some commenters stated that the process for determining whether a swap is available to trade is separate from the process for determining whether a swap is subject to the clearing requirement. Some of the commenters relied on the statutory language¹⁹ and legislative history²⁰ of the Dodd-Frank Act to support this view, with some commenters arguing that “available for trading” should mean more than mere listing.²¹ As statutory support, several commenters stated that section 2(h)(8) of the CEA specifies two distinct prerequisites for subjecting a swap to mandatory trade execution: (1) The swap must be subject to mandatory clearing and (2) the swap must be made available to trade.²² Markit also noted that the language of the clearing requirement under section 2(h)(1)–(2) of the CEA, as enacted by the Dodd-Frank Act, does not address making a swap available to trade.²³ Further, AIMA noted that the clearing determination factors differ from the proposed factors in an available-to-trade determination.²⁴

Some commenters also asserted that the mandatory clearing determination and the proposed available-to-trade determination differ from one another in practical respects.²⁵ For example, SIFMA AMG stated that whether a swap should be mandatorily cleared depends on whether the swap (1) can be priced for a derivatives clearing organization’s (“DCO”) risk management purposes; and (2) is standardized; therefore, unlike

the available-to-trade determination, liquidity is not a primary consideration.²⁶ AIMA and Morgan Stanley similarly commented that stated liquidity is considered in a clearing determination to make certain that a DCO could adequately price the swap to calculate margin requirements and fulfill risk management requirements. They further stated that the minimum liquidity needed to clear a swap is lower than the minimum liquidity needed to support mandatory trade execution on a DCM or a SEF.²⁷ Markit and FXall also stated that differing tenors of a given swap would be clearable if any tenor of that swap is cleared, but different tenors would have significantly different liquidity characteristics.²⁸

Therefore, commenters stated that only the more liquid swaps should be available to trade²⁹ to avoid negatively affecting swap pricing and liquidity.³⁰ Morgan Stanley and FXall stated that subjecting illiquid swaps to the trade execution requirement would further reduce liquidity in those swaps, as market participants would be reluctant to reveal their trading interest in low volume markets; such premature imposition of the trade execution requirement upon illiquid swaps would likely result in increasing bid-ask spreads and trading costs.³¹ ICI commented that the risks of low trading volume would drive market participants to other markets.³²

MFA also commented that separate processes, with adequate Commission oversight and public comment, would mitigate potential “first-mover advantage” issues.³³

Of the commenters who supported separate processes, some commenters supported the proposed filing procedures.³⁴ CBOE stated that §§ 40.5 and 40.6 allow for timely Commission

review and have been successfully utilized in other areas.³⁵

Other commenters, however, opposed the proposed filing procedures.³⁶ ISDA stated that neither § 40.5 nor § 40.6 should be used because an available-to-trade determination is neither a trading protocol nor a rule.³⁷ Some opposing commenters stated that the Commission, not SEFs and DCMs, should determine whether a swap is available to trade.³⁸ Some commenters asserted that the Commission is more qualified to make the determination based on its access to market data.³⁹ Several commenters also stated that SEFs and DCMs should not make the determination because they may have a financial incentive-based conflict of interest to maximize the number of swaps subject to mandatory trade execution.⁴⁰ Commenters expressed a related concern that a SEF’s or DCM’s determination would be influenced by a desire to gain a “first-mover advantage,” (*i.e.*, acquiring market share in the trading of a particular swap before other venues can list and develop trading activity in that swap), which would lead to premature or ill-advised mandatory trading of illiquid swaps on a SEF or DCM.⁴¹ Further, several commenters stated that neither § 40.5 nor § 40.6 would provide the Commission with adequate time to review rule filings and to solicit public comment, which would allow SEFs and DCMs to acquire this advantage⁴² and

¹⁸ WMBAA Comment Letter at 2; MarketAxess Comment Letter at 9.

¹⁹ Markit Comment Letter at 2; ICI Comment Letter at 3–4; SIFMA AMG Comment Letter at 3; CEWG Comment Letter at 2; AIMA Comment Letter at 1.

²⁰ Some commenters cited the July 2010 Senate floor remarks of U.S. Senator Blanche Lincoln, in which she stated that determining whether a swap is available to trade should consist of more than conducting a listing inquiry. According to Senator Lincoln, “[t]he [Commission] could consider, for example, whether there is a minimum amount of liquidity such that the swap can actually be traded on the facility. The mere ‘listing’ of the swap by a [SEF], in and of itself . . . should not be sufficient to trigger the Trade Execution Requirement.” Markit Comment Letter at 2 n.6; Chatham Comment Letter at 2–3; ICI Comment Letter at 3–4.

²¹ Morgan Stanley Comment Letter at 3; Bloomberg Comment Letter at 4; Sunguard Kiodes Comment Letter at 2; Spring Trading Comment Letter at 3 (Jan. 12, 2012); ICI Comment Letter at 3–4.

²² SIFMA AMG Comment Letter at 3; ICI Comment Letter at 3; CEWG Comment Letter at 2.

²³ Markit Comment Letter at 2.

²⁴ AIMA Comment Letter at 1.

²⁵ MFA Comment Letter at 3; SIFMA AMG Comment Letter at 4; Morgan Stanley Comment Letter at 4; AIMA Comment Letter at 1–2; FHLB Comment Letter at 4 n.2; ICI Comment Letter at 3–4; Markit Comment Letter at 3; FXall Comment Letter at 5.

²⁶ SIFMA AMG Comment Letter at 4.

²⁷ AIMA Comment Letter at 1–2; Morgan Stanley Comment Letter at 4.

²⁸ Markit Comment Letter at 3; FXall Comment Letter at 5.

²⁹ MFA Comment Letter at 3; Markit Comment Letter at 2; FXall Comment Letter at 2–3; CEWG Comment Letter at 2; JPMorgan Comment Letter at 2; FHLB Comment Letter at 4 n.2; Morgan Stanley Comment Letter at 3; Vanguard Comment Letter at 4; ICI Comment Letter at 3–4; Chatham Comment Letter at 2.

³⁰ Vanguard Comment Letter at 4; FXall Comment Letter at 5; ICI Comment Letter at 4; Morgan Stanley Comment Letter at 3–4.

³¹ Morgan Stanley Comment Letter at 3; FXall Comment Letter at 5.

³² ICI Comment Letter at 4.

³³ MFA Comment Letter at 2. *See infra* discussion at note 41.

³⁴ CBOE Comment Letter at 1–2; Spring Trading Comment Letter at 2 (Jan. 12, 2012); AIMA Comment Letter at 3 (supporting use of the § 40.5 rule approval process only).

³⁵ CBOE Comment Letter at 1–2.

³⁶ Markit Comment Letter at 5; ISDA Comment Letter at 4–5; Bloomberg Comment Letter at 3; CEWG Comment Letter at 2–3; Morgan Stanley Comment Letter at 5–6; AIMA Comment Letter at 2–3 (opposing use of § 40.6 certification process).

³⁷ ISDA Comment Letter at 6.

³⁸ Markit Comment Letter at 5–6; Vanguard Comment Letter at 5; Geneva Energy Markets Comment Letter at 2; JPMorgan Comment Letter at 1; CME Comment Letter at 4–5; FHLB Comment Letter at 3; FSR Comment Letter at 4; FXall Comment Letter at 5–6; Morgan Stanley Comment Letter at 5–6; CEWG Comment Letter at 6; ISDA Comment Letter at 3–4, 6; Tradeweb Comment Letter at 4–5.

³⁹ FHLB Comment Letter at 3–4; ISDA Comment Letter at 3; Markit Comment Letter at 5; FXall Comment Letter at 6.

⁴⁰ Bloomberg Comment Letter at 2; CME Comment Letter at 4–5; FHLB Comment Letter at 3; Markit Comment Letter at 5; CEWG Comment Letter at 2; ISDA Comment Letter at 3; Morgan Stanley Comment Letter at 5–6; AIMA Comment Letter at 2; Vanguard Comment Letter at 5; Geneva Energy Markets Comment Letter at 2; JPMorgan Comment Letter at 2.

⁴¹ FXall Comment Letter at 6–7; Bloomberg Comment Letter at 2; Tradeweb Comment Letter at 2–3; FSR Comment Letter at 2; ISDA Comment Letter at 3; CME Comment Letter at 4; Morgan Stanley Comment Letter at 5–6.

⁴² UBS Comment Letter at 1; Chatham Comment Letter at 3; AIMA Comment Letter at 2; ISDA Comment Letter at 3–5; CEWG Comment Letter at 3; Markit Comment Letter at 5–6; Morgan Stanley Comment Letter at 5.

make it hard for the Commission to reject a determination.⁴³

Several commenters offered alternative approaches to the proposed process. Bloomberg recommended a separate standalone rule.⁴⁴ Several commenters, however, recommended that the Commission establish a “pilot program” to phase in the available-to-trade process by initially deeming certain highly liquid swaps as available to trade (and therefore making them subject to the trade execution requirement) for a fixed time period. Commenters stated that this approach would provide market participants and trading venues with time to adjust to the trade execution requirement⁴⁵ and minimize market disruptions caused during implementation.⁴⁶

MarketAxess and CME recommended that only swaps that have been determined to be subject to the clearing requirement should be subject to an available-to-trade determination.⁴⁷ Both commenters argued that determining whether a swap is available to trade, for purposes of the trade execution requirement, would be legally insignificant unless a swap is required to be cleared first, and thus believe that the Commission should first determine which swaps will be subject to the clearing requirement.⁴⁸

Bloomberg also noted that the Commission has the authority under § 5c(c) of the CEA to deny an available-to-trade determination only if it is “inconsistent with” the CEA or the Commission’s regulations and requested clarification on how the Commission would interpret this term in this context.⁴⁹

Commission Determination

The Commission is adopting the proposed available-to-trade process, subject to modifications discussed herein. The Commission agrees with commenters who assert that the CEA’s statutory language supports an available-to-trade determination that is separate from a mandatory clearing determination.⁵⁰ In response to

comments, the Commission has determined that at this time, it will only review available-to-trade submissions for swaps that it has first determined to be subject to the clearing requirement under § 39.5 of the Commission’s regulations.⁵¹ The Commission believes that adopting a sequenced approach in such a manner is consistent with the trade execution requirement under section 2(h)(8) of the CEA because the trade execution mandate only applies if a swap is (1) subject to mandatory clearing and (2) made available to trade by a SEF or DCM.⁵²

The clearing determination process, which the Commission notes is not initiated by a SEF or DCM, primarily focuses on the ability to mitigate risk through clearing by a DCO and the five statutory factors under section 2(h)(2)(D) of the CEA.⁵³ In particular with respect

to promulgate such regulations as, in its judgment, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of the CEA. 7 U.S.C. 12a(8). Further, section 721(b) of the Dodd-Frank Act provides the Commission with authority to adopt rules to define “[any] term included in an amendment to the Commodity Exchange Act . . . made by [the Dodd-Frank Act].” 15 U.S.C. 8321, as enacted by section 721 of the Dodd-Frank Act. Additionally, sections 5(d)(1) and 5h(f)(1) of the CEA require DCMs and SEFs, respectively, to comply with any requirement that the Commission may impose by rule or regulation pursuant to section 8a(5) of the CEA.

⁵¹ Section 39.5 of the Commission’s regulations sets forth a process under which the Commission will review swaps to determine whether the swaps are required to be cleared.

⁵² Section 50.25 of the Commission’s regulations establishes a schedule to phase in compliance with the clearing requirement by category of market participant. Category 1 entities, which include a swap dealer, a security-based swap dealer, a major swap participant, a major security-based swap participant, or an active fund, have 90 days to comply with the clearing requirement. Category 2 entities, which include a commodity pool, private fund, or person predominantly engaged in activities that are in the business of banking or that are financial in nature, have 180 days to comply with the clearing requirement. Certain third-party subaccounts and all other swap transactions receive 270 days to comply with the clearing requirement. See Swap Transaction Compliance and Implementation Schedule: Clearing Requirement under Section 2(h) of the CEA, 77 FR 44441 (July 20, 2012). The Commission notes that it will accept for review available-to-trade determinations for swaps determined to be subject to the clearing requirement, prior to the applicable date for compliance.

⁵³ To make a clearing determination, the Commission must consider five factors: (1) The existence of significant outstanding notional exposures, trading liquidity, and adequate pricing data; (2) the availability of rule framework, capacity, operational expertise and resources, and credit support infrastructures to clear the contract on terms that are consistent with the material terms and trading conventions on which the contract is then traded; (3) the effect on the mitigation of systemic risk, taking into account the size of the market for such contract and the resources of the DCO available to clear the contract; (4) the effect on competition, including appropriate fees and charges applied to clearing; and (5) the existence of

to risk management, the Commission considers whether imposing the clearing requirement would mitigate systemic risk through the collateralization of risk exposures, which includes counterparty credit risk that arises between two counterparties to an uncleared swap.⁵⁴ In this regard, the Commission assesses whether a particular class of swaps has sufficient liquidity for risk management purposes, *i.e.*, pricing and margining of the cleared swaps.⁵⁵ The Commission has noted in the context of clearing for interest rate swaps, for example, that DCOs do not focus on the liquidity of specific individual swaps from a risk management perspective, but rather on a portfolio basis.⁵⁶ In contrast, the available-to-trade determination process will be initiated by a SEF or DCM and may focus primarily on whether a swap has sufficient trading liquidity to be subject to mandatory trade execution.

With respect to the proposed procedure to determine that a swap is available to trade, the Commission is adopting the rule as proposed and codifying the proposed rule text to §§ 37.10(a)(1) and 38.12(a)(1).⁵⁷ The part

reasonable legal certainty in the event of the insolvency of the relevant derivatives clearing organization or one or more of its clearing members with regard to the treatment of customer and swap counterparty positions, funds, and property. 7 U.S.C. 2(h)(2)(D)(ii)(I)–(IV), as enacted by section 723 of the Dodd-Frank Act.

⁵⁴ 77 FR 74285. In the Commission’s clearing requirement final rule, certain classes of credit default swaps (CDS) and interest rate swaps (IRS) would become subject to the clearing requirement, *i.e.*, cleared by a registered DCO. Per section 2(h)(2)(D)(ii) of the CEA, the Commission considered the effect of clearing those classes of swaps on mitigating systemic risk. With respect to the proposed CDS indices, the Commission believes that mandatory clearing would (1) mitigate counterparty credit risk by allowing a DCO to become the buyer to every seller of those indices, and vice versa; and (2) collateralize risk exposures by allowing a DCO to calculate and collect initial margin and guaranty fund contributions. 77 FR 74297–98. With respect to the IRS proposed to be cleared, the Commission believes that the three DCOs that have submitted clearing determinations—CME, LCH, and IDCH—would (1) mitigate counterparty credit risk by establishing themselves as a central counterparty to reduce the number of open bilateral contracts; and (2) facilitate collateral efficiency through a central counterparty clearing approach. 77 FR 74312.

⁵⁵ For example, the Commission has noted that higher trading liquidity in swaps would assist DCOs in end-of-day settlement procedures, as well as in managing the risk of CDS portfolios, particularly in mitigating the liquidity risk associated with unwinding a portfolio of a defaulting clearing member. 77 FR 47176.

⁵⁶ Specifically, liquidity is viewed by a DCO as a function of whether a portfolio of swaps has common specifications that are determinative of their economic characteristics, such that a DCO can price and risk manage the portfolio in a default situation. 77 FR 74301.

⁵⁷ In response to ISDA’s comment that neither 17 CFR 40.5 nor § 40.6 should apply because an available-to-trade determination is neither a trading

Continued

⁴³ Markit Comment Letter at 6; ISDA Comment Letter at 3; ICI Comment Letter at 5.

⁴⁴ Bloomberg Comment Letter at 3 n.10.

⁴⁵ Vanguard Comment Letter at 4; FSR Comment Letter at 5; JPMorgan Comment Letter at 2.

⁴⁶ Markit Comment Letter at 3; Tradeweb Comment Letter at 3–4.

⁴⁷ CME Comment Letter at 3; MarketAxess Comment Letter at 7–8.

⁴⁸ *Id.*

⁴⁹ Bloomberg Comment Letter at 3 n.10.

⁵⁰ In response to comments that the Dodd-Frank Act does not condition mandatory trade execution of a swap on an affirmative Commission determination, the Commission further notes that section 8a(5) of the CEA authorizes the Commission

40 procedures provide a reasonable approach by allowing DCMs and SEFs—the entities responsible for listing or offering the swaps for trading and supporting related trading activity—to initially determine whether a swap is available to trade, and therefore, subject to the trade execution requirement. The Commission notes that although it will have access to market data, SEFs and DCMs will have sufficient expertise and experience with respect to swaps trading to make an initial determination and to submit that determination to the Commission under the part 40 procedures. Accordingly, the part 40 procedures provide SEFs and DCMs with the flexibility to make an initial available-to-trade determination while allowing for appropriate Commission review and regulatory oversight, as well as an opportunity for public comment.

The Commission also believes that the part 40 procedures should afford sufficient time for market participants to offer public comment on available-to-trade submissions and for the Commission to review such submissions and any related comments. In this regard, for swaps submitted by a SEF or DCM under the § 40.5 rule approval process or the § 40.6 rule certification process, initial available-to-trade determinations may present novel and complex issues that will warrant retention for an additional review.⁵⁸ Under § 40.6(c)(2) of the Commission's regulations, interested parties would have sufficient opportunity to comment on the certification during a 30-day mandatory public comment period. Therefore, swaps self-certified as available to trade may initially be subject to a review period of up to 100 days.⁵⁹ Similarly, for swaps submitted

protocol nor a rule, the Commission notes that the definition of "rule" under 17 CFR 40.1(h) of the Commission's regulations would encompass an available-to-trade determination. Section 40.1(h) defines "rule" as "any constitutional provision, article of incorporation, bylaw, rule, regulation, resolution, interpretation, stated policy, term and condition, trading protocol, agreement or instrument corresponding thereto, in whatever form adopted, and any amendment or addition thereto or repeal thereof, made or issued by a registered entity . . ." The Commission views an available-to-trade determination as a "trading protocol."

⁵⁸ Under §§ 40.5(d)(1) and 40.6(c) of the Commission's regulations, the Commission may stay the certification of a new rule or rule amendment that, among other things, presents "novel or complex issues that require additional time" to review or analyze.

⁵⁹ Under 17 CFR 40.6(c)(3), a new rule subject to a stay would become effective, pursuant to its certification, at the expiration of the 90-day review period unless the Commission withdraws the stay prior to that time, or the Commission notifies the registered entity during the 90-day period that it objects to the proposed certification on the grounds that the proposed rule or rule amendment is

under the § 40.5 rule approval process that present novel or complex issues, the review period for initial rule approval submissions may be extended for at least additional 45 days for the same reason.⁶⁰ The Commission notes that it routinely solicits public comments for § 40.5 rule approval submissions and anticipates that market participants would be similarly able to provide the Commission with comments on available-to-trade filings.

The Commission expects that over time, available-to-trade filings should present fewer novel or complex issues, thereby not warranting extensions of the applicable review period; SEFs and DCMs would likely submit swap determinations that are similar to previous submissions and the Commission would become more experienced with the process. The Commission, however, will continue to consider whether to stay rule certifications or rule approval submissions on a case-by-case basis.

In response to Bloomberg's request for clarification, the Commission notes that whether a SEF's or DCM's initial determination is "inconsistent" with the CEA and the Commission's rules and regulations would depend upon the SEF's or DCM's analysis and application of the determination factors to the swap submitted as available to trade, as discussed further below. The Commission also notes that a determination could also be deemed inconsistent if it does not consider one or more of the required factors, or the swap otherwise does not meet other prerequisites established in the submission process, discussed further below.

2. Sections 37.10(a)(2) and 38.12(a)(2)—Listing Requirement

The FNPRM requested comment on (1) whether the Commission should allow a SEF or DCM to submit an available-to-trade determination for a swap under proposed §§ 37.10(a) and 38.12(a) if the SEF or DCM making the submission does not itself list that swap for trading; and (2) if so, whether the Commission would allow that SEF or DCM to consider the same swap or an economically equivalent swap that trades on another SEF, DCM, or primarily or solely in bilateral transactions.⁶¹

inconsistent with the CEA or the Commission's regulations.

⁶⁰ As noted, under 17 CFR 40.5(d)(2), the Commission may extend the review period beyond an additional 45 days based on written agreement with the submitting SEF or DCM.

⁶¹ 76 FR 77733.

Summary of Comments

Several commenters recommended that a SEF or DCM must list the swap that it submits for an available-to-trade determination.⁶² For example, Spring Trading and SIFMA AMG recommended that a SEF or DCM must list a swap for at least 90 days before submitting its determination.⁶³ ISDA recommended that a SEF or DCM must list the swap during the 6-month period that it proposed for Commission review of the available-to-trade determination.⁶⁴ ISDA noted that the lack of a listing requirement would incentivize SEFs and DCMs to try to submit as many determinations as possible merely to promote centralized trading.⁶⁵ According to some commenters, the Commission or the trading facility could evaluate the data gathered⁶⁶ and obtain experience⁶⁷ during the listing period to determine whether the swap should be made available to trade. SDMA, however, recommended that a SEF or DCM should be allowed to submit a determination for a swap that it does not list.⁶⁸

Commission Determination

The Commission agrees with commenters who support a listing requirement and is amending the proposed rule text to adopt new §§ 37.10(a)(2) and 38.12(a)(2), which requires a SEF or DCM to certify that it is listing the swap for which it submits an available-to-trade determination.⁶⁹ The Commission believes that an initial determination that a swap is available to trade should be made by a SEF or a DCM that offers the swap for trading.⁷⁰

⁶² Eaton Vance Management Comment Letter at 3; SIFMA AMG Comment Letter at 10; UBS Comment Letter at 2; Morgan Stanley Comment Letter at 6 n.6; ISDA Comment Letter at 7; Tradeweb Comment Letter at 5.

⁶³ SIFMA AMG Comment Letter at 10; Spring Trading Comment Letter at 3 (Jan. 12, 2012).

⁶⁴ ISDA Comment Letter at 7. ISDA proposed eliminating the proposed § 40.6 certification process and stated that the Commission should establish a minimum 6-month review period for determinations submitted by a SEF or DCM.

⁶⁵ ISDA Comment Letter at 6.

⁶⁶ ISDA Comment Letter at 7; SIFMA AMG Comment Letter at 10; Spring Trading Comment Letter at 3.

⁶⁷ Tradeweb Comment Letter at 5; UBS Comment Letter at 2; Morgan Stanley Comment Letter at 6 n.6.

⁶⁸ SDMA Comment Letter at 9.

⁶⁹ The Commission notes that such swap would be certified or approved under § 40.2 or § 40.3 of the Commission's regulations prior to listing the swap for trading.

⁷⁰ Bloomberg requested that a SEF submitting an available-to-trade determination for a particular swap would be able to incorporate by reference, in its submission, information and analysis already completed by a DCO and the Commission as part of the mandatory clearing determination process

The Commission, however, is not adopting a minimum listing period so as to avoid delaying the determination process, and hence implementation of the trade execution requirement as discussed below. The Commission also notes, as discussed further below, that a SEF or DCM is allowed to consider activity in the same swap listed on another SEF or DCM as well as the amount of off-exchange activity in the same swap.

3. Submission of a Group, Category, Type or Class of Swaps

The FNPRM requested comment on (1) whether the Commission should allow a SEF or DCM to submit its available-to-trade determination for a “group, category, type or class of swaps” based on the factors proposed in §§ 37.10(b) and 38.12(b) of the FNPRM; and (2) how “group, category, type or class of swaps” should be defined.⁷¹

Summary of Comments

Some commenters stated that the Commission should allow SEFs and DCMs to submit determinations for a group, category, type, or class of swap.⁷² In defining “group, category, type, or class” of swap, AIMA stated that the Commission should take into account specific characteristics of certain swaps to avoid subjecting certain illiquid swaps to mandatory trade execution.⁷³

Other commenters, however, expressed concern about making determinations based on group, category, type or class of swap.⁷⁴ SIFMA AMG and CEWG commented that swaps within a potential “group” may feature different liquidity and trading patterns,⁷⁵ while Markit and ISDA

with respect to that swap. Bloomberg Comment Letter at 4–5. In response to Bloomberg’s request, the Commission views the part 40 process as flexible and would allow relevant information from a clearing determination to be referenced in an available-to-trade submission. The Commission, however, emphasizes that such information leading to an affirmative clearing determination would not automatically indicate that a swap is available to trade.

⁷¹ 76 FR 77733.

⁷² Spring Trading Comment Letter at 5 (Jan. 12, 2012); AIMA Comment Letter at 2; SDMA Comment Letter at 7; AFR Comment Letter at 2 (inferring that mandatory trade execution should be determined for a “class” of swaps).

⁷³ AIMA Comment Letter at 2.

⁷⁴ Markit Comment Letter at 2–3; SIFMA AMG Comment Letter at 11; CEWG Comment Letter at 3–4; ISDA Comment Letter at 10; UBS Comment Letter at 2; Morgan Stanley Comment Letter at 9.

⁷⁵ SIFMA AMG Comment Letter at 11; CEWG Comment Letter at 4. With respect to energy commodities, CEWG provided Henry Financial LD1 Fixed Swap, Henry Financial LD4 Fixed Swap, and ICE’s Physical Basis LD1, which differ in contract size and term, as examples of swaps within a potential group or class that each possess different liquidity characteristics, thereby warranting

stated that liquidity may differ significantly even among different tenors of a given swap.⁷⁶ ISDA and Morgan Stanley also highlighted the difficulty at the outset of defining “group, category, type or class of swap.”⁷⁷ Markit stated that determinations should be allowed for individual swaps and then applied to “buckets” of maturities and tenors.⁷⁸

Commission Determination

The Commission is allowing SEFs and DCMs to submit determinations for a group, category, type or class of swap to provide greater efficiency to the available-to-trade determination process. To address commenters’ concerns that swaps within a group, category, type or class may have different liquidity and trading characteristics, a SEF or DCM must address, in its submission, the applicable determination factor or factors apply to all of the swaps within that group, category, type or class. Further, a SEF and DCM will be allowed to define the scope of the group, category, type or class of swap that it determines is available to trade.⁷⁹ To the extent that a SEF or DCM possesses flexibility to define that scope, however, the Commission still may approve or deem only part or some of the swaps within that group, category, type or class as available to trade, based on its review.⁸⁰

individual determinations. SIFMA AMG also noted that the liquidity of interest rate swaps differs significantly depending on time to maturity.

⁷⁶ Markit Comment Letter at 2; ISDA Comment Letter at 11. ISDA offered the Federal Reserve Bank of New York’s analysis of trade data as a demonstration of varying trading volumes for different tenors of credit default swaps.

⁷⁷ Morgan Stanley Comment Letter at 9.

⁷⁸ Markit Comment Letter at 2. Markit defines “buckets” as groups of maturities and tenors for a given swap that have similar liquidity measures.

⁷⁹ The Commission notes that for clearing determinations under § 39.5, it may define a particular group, category, type or class of swaps for purposes of a clearing determination based on several considerations. 76 FR 44468. To the extent that such a determination is informative as to whether a proposed group, category, type or class of swap that is defined by a SEF or DCM is available to trade, the Commission may take those considerations into account. For example, a SEF or a DCM could define a group, category, type or class of interest rate swaps based on characteristics that include the nature of the payments streams (e.g., fixed-to-floating, floating-to-floating, forward rate agreement (FRA), or overnight indexed swap (OIS)); currency (e.g., U.S. dollar, euro, British pound, Japanese yen); floating rate index referenced (e.g., LIBOR, EURIBOR); and stated termination date (e.g., 1-year, 2-year, 5-year, 10-year).

⁸⁰ Where the Commission does not approve or deem all of the swaps within a group, category, type or class submitted by a SEF or DCM as available to trade, DMO would notify the SEF or DCM of such an action.

4. Consideration of Swaps on Another SEF or DCM, or Bilateral Transactions

The FNPRM requested comment on whether the Commission should allow a SEF or DCM, in evaluating the factors under proposed §§ 37.10(b) and 38.12(b), to consider (1) the same swap or an economically equivalent swap on another SEF or DCM; and (2) the amount of activity in the same swap or an economically equivalent swap available primarily or solely in bilateral transactions.⁸¹

Summary of Comments

Several commenters stated that a SEF or DCM should be able to consider relevant swap activity on other SEFs and DCMs when making an available-to-trade determination.⁸² Vanguard commented that determining whether a “meaningful” portion of trading in the swap occurs on a SEF or DCM is important in determining that a swap is available to trade.⁸³ SIFMA AMG stated that the existence of a liquid trading environment on SEFs and DCMs could indicate that a swap could be made available to trade without harm to liquidity.⁸⁴ FXall stated that determinations should be based on a swap’s marketwide trading patterns, so as to avoid unintended effects on liquidity.⁸⁵

Some commenters also stated that a SEF or DCM should be able to consider swaps executed on a bilateral basis.⁸⁶ CBOE stated that considering a swap’s trading activity only on a SEF or DCM would otherwise incentivize market participants to minimize centralized trading in order to limit the number of swaps made available to trade.⁸⁷ SIFMA AMG stated that examining the bilateral market could reveal a liquid trading environment, but could then raise questions as to whether a swap should be made available to trade.⁸⁸ MFA and Vanguard recommended that the Commission utilize data for on- and off-

⁸¹ 76 FR 77733.

⁸² MFA Comment Letter at 3; Spring Trading Comment Letter at 6 (Jan. 12, 2012); Markit Comment Letter at 3 (discussing importance of marketwide data); Vanguard Comment Letter at 5; SIFMA AMG Comment Letter at 6; AIMA Comment Letter at 2; Morgan Stanley Comment Letter at 6 n.6; FXall Comment Letter at 6 n.18; CBOE Comment Letter at 3.

⁸³ Vanguard Comment Letter at 5.

⁸⁴ SIFMA AMG Comment Letter at 6.

⁸⁵ FXall Comment Letter at 6 n.18.

⁸⁶ MFA Comment Letter at 3; SIFMA AMG Comment Letter at 6; Markit Comment Letter at 3; FXall Comment Letter at 6; Vanguard Comment Letter at 5; Spring Trading Comment Letter (Jan. 12, 2012) at 6; CBOE Comment Letter at 3; AIMA Comment Letter at 2; Morgan Stanley Comment Letter at 6; SDMA Comment Letter at 7.

⁸⁷ CBOE Comment Letter at 3.

⁸⁸ SIFMA AMG Comment Letter at 6.

exchange trading to make the available-to-trade process more objective.⁸⁹

Commission Determination

The Commission will allow a SEF or DCM to consider activity in the same swap listed on another SEF or DCM and the amount of off-exchange activity in the same swap when determining whether a swap is available to trade. The Commission agrees with commenters that since the available-to-trade determination applies marketwide, a SEF or DCM should be able to consider activity on other SEFs and DCMs, as well as activity that takes place off-exchange, to the extent that such information becomes available. Information about trading activity in the entire swaps marketplace would better inform market participants about how the swap trades in the overall market and provide interested parties with additional information and analysis to comment upon. More comprehensive information would also better inform the Commission in its evaluation of the available-to-trade submission. The Commission also believes that consideration of off-exchange trading could provide additional data and insight about a swap's trading patterns, e.g., trading volume or numbers and types of market participants, that would help a SEF or a DCM address one or more of the determination factors under §§ 37.10(b) and 38.12(b).

B. Sections 37.10(b) and 38.12(b)—Factors To Consider To Make a Swap Available To Trade

Proposed §§ 37.10(b) and 38.12(b) required a SEF or DCM to consider, as appropriate, the following factors with respect to a swap that it determines is available to trade: (1) Whether there are ready and willing buyers and sellers; (2) the frequency or size of transactions on SEFs, DCMs, or of bilateral transactions; (3) the trading volume on SEFs, DCMs, or of bilateral transactions; (4) the number and types of market participants; (5) the bid/ask spread; (6) the usual number of resting firm or indicative bids and offers; (7) whether a SEF's trading system or platform or a DCM's trading facility will support trading in the swap; or (8) any other factor that the SEF or DCM may consider relevant.⁹⁰ Under the proposed rule, no single factor would be dispositive, as the DCM or SEF could consider any one factor or any

⁸⁹ MFA Comment Letter at 3; Vanguard Comment Letter at 5.

⁹⁰ As noted above, the Commission believes that the mere listing or offering for trading of a swap on a DCM or SEF does not mean that the swap is available to trade.

combination of factors in its determination that a swap is available to trade.

Summary of Comments

Commenters expressed general support for the first seven proposed factors.⁹¹ Some commenters stated, however, that SEFs and DCMs should be required to consider specific factors.⁹² Some commenters also offered additional factors to consider, such as the ability to establish connectivity with new market participants without imposing undue burden;⁹³ the level of pre-trade transparency in the existing market;⁹⁴ and market depth and market breadth.⁹⁵

Other commenters opposed the proposed factors.⁹⁶ In particular, several commenters objected to the use of "any other factor" in a determination.⁹⁷ Eaton Vance Management and ISDA, for example, considered "any other factor" to be too broad and subjective and thought that it would incentivize SEFs and DCMs to make illiquid swaps available to trade.⁹⁸ ICI stated that the Commission would effectively delegate its authority to establish available-to-trade standards by allowing a SEF or DCM to use this factor alone.⁹⁹ CEWG similarly stated that use of non-enumerated factors by a SEF or DCM

⁹¹ MFA Comment Letter at 2; Markit Comment Letter at 3; Tradeweb Comment Letter at 3 (proposing a pilot program based on the proposed factors); Bloomberg Comment Letter at 4; ICI Comment Letter at 4–5; Vanguard Comment Letter at 4; SIFMA AMG Comment Letter at 5; Geneva Energy Markets Comment Letter at 2; Spring Trading Comment Letter at 4 (Jan. 12, 2012); AIMA Comment Letter at 1; CME Comment Letter at 6; FHLB Comment Letter at 4.

⁹² For example, ISDA recommended that whether a SEF lists and supports trading in a swap should be a prerequisite. ISDA Comment Letter at 8. FSR emphasized that broad market participation must be shown. FSR Comment Letter at 7. Some commenters requested that SEFs and DCMs be required to consider both the size and frequency of swap transactions on SEFs, DCMs, and in bilateral transactions. AIMA Comment Letter at 2; ICI Comment Letter at 5 n.13; SIFMA AMG Comment Letter at 6.

⁹³ FSR Comment Letter at 4.

⁹⁴ Geneva Energy Markets Comment Letter at 2.

⁹⁵ SDMA Comment Letter at 7. According to SDMA, a market depth test consists of calculating the sum of available bids and offers at or near the current price for a swap at a particular time, while a market breadth test consists of calculating the sum of market depth for a particular swap or class of swaps.

⁹⁶ For example, SDMA considered the factors to be duplicative of the mandatory clearing determination factors set forth in section 2(h)(2)(D) of the CEA, and therefore burdensome and costly. SDMA Comment Letter at 5.

⁹⁷ Eaton Vance Management Comment Letter at 2; ISDA Comment Letter at 8; ICI Comment Letter at 5; CEWG Comment Letter at 3.

⁹⁸ Eaton Vance Management Comment Letter at 2; ISDA Comment Letter at 8.

⁹⁹ ICI Comment Letter at 5.

would create "uncertainty and variability" in the process.¹⁰⁰

Some commenters also objected to allowing a SEF or DCM to make an available-to-trade determination based on any one proposed factor and some recommended that SEFs and DCMs be required to consider all of the factors.¹⁰¹ Vanguard and SIFMA AMG asserted that all of the factors are relevant¹⁰² and that consideration of all factors would be consistent with the mandatory clearing determination process.¹⁰³ CBOE, however, contended that required consideration of all the factors would frustrate Congress's intent for greater transparency, competition, and oversight of the swaps market.¹⁰⁴

Several commenters requested that the Commission set objective threshold criteria for the proposed factors.¹⁰⁵ Commenters stated that without objective criteria, a SEF or DCM would otherwise have unlimited discretion¹⁰⁶ to act in its financial self-interest¹⁰⁷ by determining that a swap is available to trade. Some commenters, however, acknowledged the difficulty of developing objective liquidity measurements.¹⁰⁸

¹⁰⁰ CEWG Comment Letter at 3.

¹⁰¹ FHLB Comment Letter at 3; CEWG Comment Letter at 3 (adopting ICI's recommendation); ICI Comment Letter at 2, 5; Vanguard Comment Letter at 4; Bloomberg Comment Letter at 4; SIFMA AMG Comment Letter at 5; Chatham Comment Letter at 3; AIMA Comment Letter at 2. Markit stated that this approach would grant "unfettered discretion" to SEFs and DCMs to disregard a swap's actual liquidity. Markit Comment Letter at 3. MarketAxess stated that the Commission would lack any basis to reject a determination. MarketAxess Comment Letter at 8.

¹⁰² Vanguard Comment Letter at 4; SIFMA AMG Comment Letter at 5.

¹⁰³ SIFMA AMG Comment Letter at 5.

¹⁰⁴ CBOE Comment Letter at 2.

¹⁰⁵ Markit Comment Letter at 3; Spring Trading Comment Letter at 4; AIMA Comment Letter at 4; Bloomberg Comment Letter at 4; FXall Comment Letter at 6; Eaton Vance Management Comment Letter at 3; ICI Comment Letter at 5–6; FSR Comment Letter at 3, 6–7. Some commenters recommended that the swap must (1) trade a minimum number of times each day; (2) feature a minimum number of market participants trading it; and (3) meet an overall notional trading volume over a set period of time. Vanguard Comment Letter at 5; ISDA Comment Letter at 7; SIFMA AMG Comment Letter at 5, 7. Morgan Stanley recommended that the swap must (1) have resting bids and offers on the applicable SEF or DCM for at least half of the relevant trading hours for the 90-day period prior to a determination; and (2) have been traded an average of at least 5 times per day during the same period. Morgan Stanley Comment Letter at 4, 6. JPMorgan recommended that the swap must show an actual level of liquidity on the applicable DCM or SEF during a sample period of at least 180 days prior to the submission. JPMorgan Comment Letter at 1.

¹⁰⁶ Morgan Stanley Comment Letter at 4.

¹⁰⁷ FSR Comment Letter at 3; Morgan Stanley Comment Letter at 5; ICI Comment Letter at 6.

¹⁰⁸ ICI Comment Letter at 6; Markit Comment Letter at 3; SIFMA AMG Comment Letter at 5–6.

Some commenters recommended imposing additional requirements on SEFs and DCMs with respect to considering the proposed factors. For example, SIFMA AMG recommended that a SEF or DCM must provide detailed reasoning and supporting evidence for the factors that it has considered.¹⁰⁹ CEWG recommended that a SEF or DCM should provide an explanation to the Commission, subject to public comment, when it believes that certain factors do not apply.¹¹⁰

Commission Determination

The Commission is adopting the rule as proposed under final §§ 37.10(b) and 38.12(b), subject to two modifications and minor technical corrections. The Commission acknowledges commenters' concerns regarding the consideration of "any other factor" and thus is removing that factor from the final rule. The Commission believes that removing this factor will provide market participants with a more precise set of factors from which a swap may be made available to trade, thereby improving clarity, lessening uncertainty regarding how a determination may be made, and promoting a more consistent determination process. Further, given the adoption of a listing requirement, the Commission is removing an additional factor—whether a SEF's or DCM's trading facility or platform will support trading in the swap. This factor contemplated, among other things, whether the SEF or DCM lists the swap for trading on its trading facility or platform. Therefore, in light of the listing requirement, this factor is redundant.

As discussed above, the Commission has determined in this final rule that a SEF or DCM may consider activity in the same swap listed on another SEF or DCM and the amount of off-exchange activity in the same swap.¹¹¹ Therefore, the Commission is amending the second and third determination factors in proposed §§ 37.10(b)(2) and (3) and 38.12(b)(2) and (3) to remove duplicative language related to this matter.

The Commission believes that the remaining enumerated factors provide a sufficient framework from which SEFs, DCMs, the Commission and market participants may evaluate whether a swap is subject to the trade execution requirement. While each of the enumerated factors is an indicator of

trading activity and may be relevant in a determination, the Commission believes that no single factor must always be considered, nor must a SEF or DCM consider more than one factor in a determination. Therefore, the Commission believes that satisfying any one of the determination factors would sufficiently indicate that the contract is available to trade. By adopting a more flexible approach, SEFs and DCMs will be able to accommodate swaps with different trading characteristics that can be supported in a centralized trading environment. The Commission does not believe that it is necessary for a SEF or DCM to analyze and demonstrate compliance with every factor in a submission.

In response to SIFMA AMG's recommendation that a SEF or DCM should be required to provide detailed reasoning and supporting evidence for the factors considered, the Commission notes that §§ 40.5(a)(5) and 40.6(a)(7) each requires submissions to contain an explanation and analysis of the determination, including the factors considered and its compliance with the CEA and Commission regulations. The Commission expects such an explanation and analysis to be clear and informative as to how the factor or factors apply to the swap.

The Commission declines to adopt additional factors in the final rule as suggested by several commenters. The Commission believes that the enumerated factors provide a sufficient framework to allow: (1) A SEF or DCM to consider whether a swap should be subject to the trade execution requirement; (2) market participants to evaluate a determination and provide public comment; and (3) the Commission to evaluate a SEF's or DCM's determination that a swap is available to trade. Further, the Commission believes that the enumerated factors are broad in nature and incorporate many of the concepts recommended by commenters.

The Commission acknowledges commenters' request for establishing objective criteria associated with the factors and reiterates the view expressed in the FNPRM that as centralized trading develops and the Commission gains experience in oversight of swap markets, the Commission could then consider adopting objective criteria in a future rulemaking based upon an empirical analysis of swap trading data.

C. Sections 37.10(c) and 38.12(c)—Applicability

Proposed §§ 37.10(c)(1) and 38.12(c)(1) required that upon the Commission deeming that a swap is

available to trade based on a SEF or DCM submission, all other SEFs and DCMs listing or offering for trading such swap and/or any economically equivalent swap must make those swaps available to trade for purposes of the trade execution requirement under section 2(h)(8) of the CEA. The Commission defined "economically equivalent swap" under proposed §§ 37.10(c)(2) and 38.12(c)(2) as a swap that the SEF or DCM determines to be economically equivalent with another swap after consideration of each swap's material pricing terms. The Commission also noted that if a DCM or SEF makes a swap available to trade, then the proposed rule would not require other DCMs and SEFs to list or offer that swap, or an economically equivalent swap, for trading.

Summary of Comments

Some commenters expressed general support for the economic equivalence requirement because it would enforce marketwide compliance with the trade execution requirement,¹¹² increase liquidity, and promote a more efficient available-to-trade process by allowing SEFs and DCMs to rely on existing determinations.¹¹³ Many commenters, however, viewed the proposed definition of "economically equivalent swap" as excessively broad¹¹⁴ and vague.¹¹⁵ Some commenters stated that the proposed definition would create uncertainty about which swaps are available to trade.¹¹⁶ Other commenters stated that the vagueness of the proposed definition would allow SEFs and DCMs to subject more swaps to mandatory trade execution,¹¹⁷ thereby allowing illiquid swaps to be available to trade.¹¹⁸ In addition, MarketAxess and CEWG commented that the proposed requirement is not prescribed

¹¹² Tradeweb Comment Letter at 5.

¹¹³ SDMA Comment Letter at 7.

¹¹⁴ Eaton Vance Management Comment Letter at 3; CEWG Comment Letter at 5; Chatham Comment Letter at 4.

¹¹⁵ FXall Comment Letter at 7; ICI Comment Letter at 8; ISDA Comment Letter at 9; Morgan Stanley Comment Letter at 8–9; Spring Trading Comment Letter at 1 (Feb. 13, 2012); UBS Comment Letter at 2; Chatham Comment Letter at 4–5.

¹¹⁶ MFA Comment Letter at 5; ICI Comment Letter at 8; AIMA Comment Letter at 3.

¹¹⁷ MFA Comment Letter at 5; FXall Comment Letter at 7; ICI Comment Letter at 8; FHLB Comment Letter at 3; Morgan Stanley Comment Letter at 8; CEWG Comment Letter at 5–6; SIFMA AMG Comment Letter at 9; ISDA Comment Letter at 9; AIMA Comment Letter at 4; MarketAxess Comment Letter at 8–9.

¹¹⁸ CEWG Comment Letter at 5; FXall Comment Letter at 7; JPMorgan Comment Letter at 3; Chatham Comment Letter at 4.

¹⁰⁹ SIFMA AMG Comment Letter at 2.

¹¹⁰ CEWG Comment Letter at 3.

¹¹¹ See *supra* Section II.A.4—Consideration of Swaps on Another SEF or DCM, or Bilateral Transactions for the Commission's discussion.

by statute.¹¹⁹ Morgan Stanley and AIMA stated that the concept itself is inherently “elusive and subjective.”¹²⁰ Other commenters thought that the process would create uncertainty as to which swaps are subject to mandatory trade execution.¹²¹ SIFMA AMG stated that swaps with slightly different characteristics, *e.g.*, time to maturity, could differ in the requisite liquidity, yet both be determined to be available to trade based on economic equivalence.¹²²

To prevent evasion of the trade execution requirement through slight modification of a swap’s terms, some commenters recommended that the Commission should rely on its anti-evasion authority under section 6(e) of the CEA.¹²³

Commission Determination

At this time, the Commission is adopting the rule as proposed with certain modifications under a new subsection titled, “Applicability,” for SEFs or DCMs that list or offer the same swap for trading. The Commission, however, is not adopting the proposed definition of economically equivalent swaps. The Commission intended the economic equivalence requirement as a means to avoid knowing or reckless evasion of the trade execution requirement, which could potentially occur if a SEF or DCM, acting in concert with a market participant, lists and allows trading of swaps with slightly amended terms to a swap previously determined to be available to trade. Given that the factors that could be considered may vary across different asset classes and products, the Commission recognizes the complexity of determining economic equivalence between swaps. Further, based on the comments received, the Commission has determined that it is not feasible, for purposes of determining which swaps

are available to trade, to define “economic equivalent” with sufficient precision and clarity.

The Commission is also amending the rule text to clarify that once a swap is determined to be available to trade under part 40 of the Commission’s regulations (*i.e.*, the Commission approves a SEF’s or DCM’s available-to-trade submission under § 40.5 or the submission is deemed as certified under § 40.6), then all other SEFs and DCMs that choose to list or offer the swap for trading must do so in accordance with the trade execution requirement.¹²⁴ Subsequent SEFs and DCMs will not be required to submit separate available-to-trade determinations to the Commission for a particular swap after it has been determined to be available to trade. Importantly, no SEF or DCM is required to list or offer a swap for trading even if another SEF or DCM has determined it is available to trade. Once a swap is available for trade for purposes of section 2(h)(8), however, that swap may only be executed on a SEF or DCM.

In response to commenters who recommended that the Commission rely on its existing anti-evasion authority, the Commission notes that its anti-evasion authority as constituted under section 6(e) of the CEA would not apply to SEFs and DCMs.¹²⁵ Section 6(e)(5), however, would apply to the actions of certain market participants—swap dealers and major swap participants in particular—that are carried out to evade the trade execution requirement.

D. Sections 37.10(d) and 38.12(d)—Removal

The proposed rule requested comment on (1) whether the Commission should specify a process where a swap may be determined to be no longer available to trade; and (2) if so, whether the part 40 processes should be used for this process. The proposed rule also requested comment on whether such a determination should apply only to the SEF or DCM that seeks to make the swap no longer available to trade.¹²⁶

Summary of Comments

Several commenters responded to the Commission’s request for comments

related to whether the Commission should specify a process whereby a swap that has been determined to be available to trade may no longer be available to trade. Several commenters supported the development of a process under which a swap could be determined to be no longer available to trade for the purposes of the trade execution requirement. Commenters recommended that the Commission retain the authority to make such a determination¹²⁷ based on the Commission’s access to data demonstrating a swap’s overall liquidity¹²⁸ and the desire to prevent a SEF or DCM from making conflicting determinations with respect to the same swap.¹²⁹ ISDA, however, recommended that market participants should be able to submit to the Commission that a swap is no longer available to trade because they would have experience and relevant knowledge of market trends and changes.¹³⁰

Some commenters recommended use of the same factors as those used when making a determination that a swap is available to trade, albeit with objective thresholds.¹³¹ FXall asserted that using objective criteria would render the removal process “transparent and impartial.”¹³²

Some commenters recommended that a determination that a swap is no longer available to trade should be subject to public notice and comment.¹³³ Accordingly, ICI recommended against using the procedures under §§ 40.5 and 40.6 because they lack adequate opportunity for public comment.¹³⁴ MFA also recommended that the Commission provide public notice after a swap is determined to be no longer available to trade.¹³⁵

Some commenters stated that a determination that a swap is no longer available to trade should only apply to the petitioning SEF or DCM.¹³⁶ Spring Trading and SDMA stated that to apply the determination on a marketwide

¹¹⁹ MarketAxess Comment Letter at 9; CEWG Comment Letter at 5.

¹²⁰ Morgan Stanley Comment Letter at 8; AIMA Comment Letter at 3 (based on the multitude of factors that affect the economic terms of a swap).

¹²¹ AIMA Comment Letter at 3; Morgan Stanley Comment Letter at 8; ICI Comment Letter at 8; MFA Comment Letter at 5; SIFMA AMG Comment Letter at 10; ISDA Comment Letter at 9; Sungard KiodeX Comment Letter at 2; FXall Comment Letter at 7.

¹²² SIFMA AMG Comment Letter at 9. Several other commenters, though not all in support of eliminating the proposed requirement, also acknowledged that two otherwise identical swaps would also possess different liquidity characteristics if cleared at different clearinghouses. FSR Comment Letter at 3; Morgan Stanley Comment Letter at 9; Spring Trading Comment Letter at 2 (Feb. 13, 2012).

¹²³ SIFMA AMG Comment Letter at 10; CEWG Comment Letter at 5; ISDA Comment Letter at 9; AIMA Comment Letter at 4; Morgan Stanley Comment Letter at 9.

¹²⁴ See *supra* note 14 for a discussion of the methods by which swaps that are subject to the trade execution requirement must be executed on a SEF or DCM.

¹²⁵ Section 6(e)(5) of the CEA, as amended by section 741(b)(11) of the Dodd-Frank Act, prescribes that “[a]ny swap dealer or major swap participant that knowingly or recklessly evades or participates in or facilitates evasion of the requirements of section 2(h) [of the CEA] shall be liable . . .” (emphasis added). 7 U.S.C. 9a.

¹²⁶ 76 FR 77734.

¹²⁷ MFA Comment Letter at 4; FXall Comment Letter at 7–8; ICI Comment Letter at 7; SIFMA AMG Comment Letter at 11–12; Spring Trading Comment Letter at 7 (Jan. 12, 2012); ISDA Comment Letter at 8–9; JPMorgan Comment Letter at 2.

¹²⁸ ISDA Comment Letter at 8–9; MFA Comment Letter at 4.

¹²⁹ FXall Comment Letter at 8; MFA Comment Letter at 4.

¹³⁰ ISDA Comment Letter at 8–9.

¹³¹ MFA Comment Letter at 4; ICI Comment Letter at 7–8; FXall Comment Letter at 7–8.

¹³² FXall Comment Letter at 8.

¹³³ FXall Comment Letter at 8; ICI Comment Letter at 7; Spring Trading Comment Letter at 7.

¹³⁴ ICI Comment Letter at 7.

¹³⁵ MFA Comment Letter at 5.

¹³⁶ Spring Trading Comment Letter at 7–8 (Jan. 12, 2012); SDMA Comment Letter at 10.

basis would otherwise unfairly penalize other non-petitioning SEFs or DCMs.¹³⁷ ICI and MFA, however, stated that the determination should apply to all SEFs and DCMs that list or offer the swap for trading.¹³⁸ ICI stated that applying the determination to only one SEF or DCM would be inconsistent with the trade execution requirement.¹³⁹

Commission Determination

The Commission is not adopting a separate process for a SEF or DCM to submit a determination that a swap is no longer available to trade. Rather, the Commission believes that where all SEFs and DCMs that had listed a swap for trading, including the SEF or DCM that submitted the initial available-to-trade determination under part 40, no longer list that swap for trading on their respective facility or platform, (*i.e.*, all such SEFs and DCMs have “de-listed” the swap),¹⁴⁰ then the Commission would deem the swap to be no longer available to trade. In such a case, trading in the swap would no longer be subject to the trade execution requirement. The Commission believes that this approach is consistent with section 2(h)(8) of the CEA, which states a swap would otherwise not be subject to the trade execution requirement if, among other things, no SEF or DCM makes it available to trade.

Where all SEFs and DCMs no longer list that swap for trading—denoting that open interest in that swap does not exist on any facility or platform¹⁴¹—the

Commission would deem the swap as no longer available to trade because that swap would no longer meet any of the determination factors. The Commission, which will maintain and update a list of the SEFs and DCMs that list those available-to-trade swaps, will have access to the information and the ability to make the determination, without requiring a separate process. In response to FXall, the Commission believes that this approach would be transparent and impartial. In response to MFA’s recommendation, the Commission will inform the public that a swap is no longer available to trade via notice pursuant to new §§ 37.10(d) and 38.12(d) (“Removal”). The Commission is also delegating authority to the Director of the Division of Market Oversight to issue notice in this instance.

E. Annual Review

Proposed §§ 37.10(d) and 38.12(d) required that a SEF or DCM perform an annual review and assessment of each swap that it has made available to trade. The proposed rule envisioned that an annual review would ensure that SEFs and DCMs evaluate on a regular basis whether swaps previously determined to be “available to trade” for the purposes of the trade execution requirement. In the annual review and assessment, SEFs and DCMs would be required to consider the proposed factors in §§ 37.10(b) and 38.12(b), respectively. Upon completion of the annual review, a SEF or DCM would be required to provide the Commission with an electronic report of the review and assessment, including any supporting information or data, no later than 30 days after its fiscal year end. The proposed rule requested comment on whether SEFs and DCMs should conduct the review and assessment.

Summary of Comments

Several commenters supported the proposed annual review requirement.¹⁴² Tradeweb, however, requested that the Commission clarify the effect of the proposed annual review process.¹⁴³ Some commenters stated that additional reviews were necessary because swaps could become illiquid between scheduled annual reviews, yet still be subject to the trade execution requirement. Thus, they recommended more frequent reviews, such as a

submission, submitted in compliance with §§ 40.6(a)(1) and (2) and 40.6(a)(7).

¹⁴² Tradeweb Comment Letter at 5; CME Comment Letter at 7; Spring Trading Comment Letter at 7 (Jan. 12, 2012).

¹⁴³ Tradeweb Comment Letter at 5.

quarterly basis.¹⁴⁴ Several commenters, however, stated that the Commission, rather than SEFs, should conduct the review and assessment for similar reasons as those offered in support of allowing the Commission to exclusively determine whether a swap is available to trade.¹⁴⁵ CME, for example, recommended that the Commission conduct the review by obtaining data from SDRs in order to minimize overall costs.¹⁴⁶

Some commenters further recommended that market participants have the opportunity to participate in the process. Tradeweb recommended that reviews and assessments be subject to public comment because of their market impact.¹⁴⁷

Other commenters opposed the proposed requirement. WMBAA stated that an annual review and assessment would be arbitrary, time-consuming, and offers insufficient regulatory value.¹⁴⁸ Sunguard Kiodes asserted that periodic reviews would cause swaps’ available-to-trade status to fluctuate, therefore negating the benefit of an initial determination.¹⁴⁹ WMBAA and SDMA recommended that a SEF or DCM be able to rely solely on the clearing determination review instead and annually renew its self-certification without submitting a report.¹⁵⁰

With respect to the factors to be considered in an annual review, some commenters supported use of the proposed determination factors in §§ 37.10(b) and 38.12(b).¹⁵¹ Eaton Vance Management recommended that a SEF or DCM must affirmatively report each factor that a swap meets to continue to

¹⁴⁴ Morgan Stanley Comment Letter at 8; MFA Comment Letter at 4–5; ISDA Comment Letter at 8; AIMA Comment Letter at 2–3; Eaton Vance Management Comment Letter at 4; ICI Comment Letter at 7; Markit Comment Letter at 4; Vanguard Comment Letter at 6; JPMorgan Comment Letter at 2; SIFMA AMG Comment Letter at 11; FSR Comment Letter at 3–4.

¹⁴⁵ Markit Comment Letter at 4; MFA Comment Letter at 4; Vanguard Comment Letter at 6; SIFMA AMG Comment Letter at 11. CME recommended that the Commission conduct the review of all existing available-to-trade determinations within 30 days of December 31 of each year to minimize costs and administrative burdens. For determinations submitted after June 30 of a given year, the annual review would occur within 30 days of December 31 of the following year. CME Comment Letter at 7.

¹⁴⁶ CME Comment Letter at 7.

¹⁴⁷ Tradeweb Comment Letter at 5.

¹⁴⁸ WMBAA Comment Letter at 4.

¹⁴⁹ Sunguard Kiodes Comment Letter at 2.

¹⁵⁰ SDMA Comment Letter at 10; WMBAA Comment Letter at 4.

¹⁵¹ Spring Trading Comment Letter at 7 (Jan. 12, 2012); Eaton Vance Management Comment Letter at 4; Tradeweb Comment Letter at 5; SIFMA AMG Comment Letter at 11; MFA Comment Letter at 4; Markit Comment Letter at 4.

¹³⁷ *Id.*

¹³⁸ MFA Comment Letter at 4–5; ICI Comment Letter at 8.

¹³⁹ ICI Comment Letter at 8.

¹⁴⁰ In some instances, a swap that is available to trade potentially should no longer be subject to the trade execution requirement, but not all SEFs and DCMs have de-listed the swap. In such a case, the Commission may choose to review the available-to-trade status of such a swap, under § 40.2(b) or § 40.3(a)(10) of the Commission’s regulations, which authorizes Commission staff to request, on an ongoing basis, additional information, evidence, or data that meets the requirements of the CEA or the Commission’s regulations or policies thereunder. Further, market participants may request that the Commission, under section 8a(7) of the CEA, designate a swap to be no longer available to trade. Under section 8a(7), the Commission could initiate a proceeding to amend a SEF or DCM’s available-to-trade designation of a swap if such a change is necessary for . . . the protection of traders” with respect to “other trading requirements.” First, however, the Commission must request in writing that the change be made and provide for appropriate notice and opportunity for hearing. The Commission, however, acknowledges that the section 8a(7) process is complex and emphasizes that the process should only be invoked where a swap clearly should not remain available to trade, but a SEF or DCM has declined a request to initiate a new assessment.

¹⁴¹ Under § 40.6(a) of the Commission’s regulations, the Commission would receive notice that a SEF or DCM has de-listed a swap through a

be available to trade.¹⁵² Other commenters stated that the Commission should establish objective review and assessment criteria.¹⁵³

ICI and Eaton Vance Management requested that the electronic reports to be submitted to the Commission also be made available to the public.¹⁵⁴

Commission Determination

The Commission is not adopting the proposed annual review requirement. The Commission intended the requirement to ensure that a SEF or DCM would regularly evaluate trading for the swaps that it has determined to be available to trade for purposes of the trade execution requirement. Based on the approach adopted for determining that a swap is no longer available to trade, however, the Commission believes that requiring SEFs and DCMs to submit a review or assessment is not necessary. A SEF or DCM will likely review, on an ongoing basis, whether swaps listed or offered for trading on its system or platform should continue to be listed or offered for trading. Such a review would likely consider one or more factors that are similar to those that can be used to determine if a swap is available to trade. Further, if the Commission believes that a review of a swap's available-to-trade status is warranted, then it may request that SEFs and DCMs submit relevant information to conduct that review under §§ 40.2(b) and 40.3(a)(10) of the Commission's regulations, respectively.¹⁵⁵

F. Notice to the Public of Available To Trade Determinations

The Commission noted in the FNPRM that §§ 40.5 and 40.6 provide a process for notifying the public that a SEF or DCM has made an available-to-trade determination—SEFs and DCMs are required to post a notice and a copy of the rule submission on their respective Web sites concurrent with their filings at the Commission. The Commission stated that it would also post the filings

¹⁵² Eaton Vance Management Comment Letter at 4.

¹⁵³ SIFMA AMG Comment Letter at 11; MFA Comment Letter at 4; Markit Comment Letter at 4; AIMA Comment Letter at 3.

¹⁵⁴ ICI Comment Letter at 7; Eaton Vance Management Comment Letter at 2.

¹⁵⁵ See *supra* note 140. Under 17 CFR 40.2(b) and 40.3(a)(10), when requested by Commission staff, a SEF or DCM is required to submit additional evidence, information, or data that demonstrates that a swap listed for trading meets the CEA's requirements or the Commission's regulations. Under §§ 37.5 and 38.5 of the Commission's regulations, respectively, the Commission may also request a SEF or DCM to file information related to its business as a SEF or DCM, including trading information, in a particular form, manner, and time as specified.

on its Web site. The Commission also stated that it would assess the feasibility of posting notices of all swaps that are determined to be available to trade on an easily accessible page on its Web site. Commenters supported the proposal to provide notice to market participants through a central location on the Commission's Web site.¹⁵⁶ SIFMA AMG stated that a list would help market participants comply with the rules.¹⁵⁷

The Commission agrees with commenters that a centralized list would help market participants, as well as SEFs and DCMs, comply with the Commission's rules and regulations related to the trade execution requirement. Therefore, the Commission will post such determinations on its Web site where market participants can readily ascertain which swaps have been determined to be available to trade, and therefore subject to the trade execution requirement, including the SEFs and DCMs that list or offer those swaps for trading.

III. Sections 37.12 and 38.11 of the Commission's Regulations—Trade Execution Compliance Schedule

Proposed §§ 37.12(a) and 38.11(a) required market participants to comply with the trade execution requirement under section 2(h)(8) of the CEA upon the later of (1) the applicable deadline established under the compliance schedule for the clearing requirement for a swap,¹⁵⁸ or (2) 30 days after the

¹⁵⁶ ICI Comment Letter at 10; Bloomberg Comment Letter at 3 n.9; SIFMA AMG Comment Letter at 12–13; AIMA Comment Letter at 4. SIFMA AMG and AIMA also recommended that such a centralized location could be operated by an independent third party.

¹⁵⁷ SIFMA AMG Comment Letter at 13. SIFMA AMG requested that the Commission establish the Web site location prior to designating any swaps as available to trade. *Id.* In response to SIFMA AMG's comment, the Commission anticipates that this Web page will be established as soon as technologically feasible, and may or may not occur prior to the effective date of this rule. CME also requested that the Commission publish a list, on its Web site and in the *Federal Register*, of all swaps under current assessment. CME Comment Letter at 7. The Commission notes that §§ 40.5 and 40.6 filings will already be posted on its Web site.

¹⁵⁸ The Commission proposed to phase in compliance with the clearing requirement, and the trade execution requirement thereof, by category of market participant. As proposed, Category 1 entities, which included a swap dealer, a security-based swap dealer, a major swap participant, a major security-based swap participant, or an active fund, would have 90 days to comply with the clearing requirement. Category 2 entities, which include a commodity pool, private fund, employee benefit plan, or person predominantly engaged in activities that are in the business of banking or are financial in nature, would have 180 days to comply with the clearing requirement. Certain third-party subaccounts and all other swap transactions would receive 270 days to comply with the clearing requirement. With the exception of removing employee benefit plans from Category 2 and

swap is first made available to trade on either a SEF or DCM.¹⁵⁹ In the proposed rule, the Commission noted that while the available-to-trade determination could precede the clearing requirement and vice versa, the trade execution requirement would not be in effect until the clearing requirement takes effect.¹⁶⁰ The Commission sought comment as to whether 30 days would be sufficient for necessary technological linkages to be established between (1) DCOs, DCMs, and SEFs; and (2) DCMs, SEFs, and market participants.¹⁶¹

Summary of Comments

Some commenters generally supported the proposed compliance schedule for the trade execution requirement,¹⁶² but Tradeweb commented that a 30-day implementation period may not be sufficient for a class of swaps that is available to trade for the first time and recommended that the Commission maintain the authority to set an appropriate implementation period on a case-by-case basis for a class of swaps, with input from SEFs, DCMs, and market participants.¹⁶³

Several commenters recommended that the trade execution requirement should become effective only after the clearing requirement is fully implemented.¹⁶⁴ MFA commented that allowing mandatory trade execution to become effective simultaneously with mandatory clearing would potentially dilute market participants' resources to comply with both requirements.¹⁶⁵ MFA also recommended that all market participants be required to comply with

allowing such plans 270 days to comply with the clearing requirement, the Commission adopted this compliance schedule generally as proposed. See Swap Transaction Compliance and Implementation Schedule: Clearing Requirement under Section 2(h) of the CEA, 77 FR 44441 (July 20, 2012).

¹⁵⁹ See Swap Transaction Compliance and Implementation Schedule: Clearing and Trade Execution Requirements under Section 2(h) of the CEA, 76 FR 58186 (Sep. 20, 2011). In this final rule, the Commission is finalizing the compliance and implementation schedule for the trade execution requirement, and therefore, addresses the relevant comments submitted in response to this proposed rule.

¹⁶⁰ 76 FR 77731 n.38.

¹⁶¹ 76 FR 58192.

¹⁶² Chris Barnard Comment Letter at 2 (Sep. 23, 2011); Tradeweb Comment Letter at 2–4 (Nov. 4, 2011); Better Markets Comment Letter at 2 (Nov. 4, 2011).

¹⁶³ Tradeweb Comment Letter at 4.

¹⁶⁴ AIMA Comment Letter at 3 (Nov. 3, 2011); MarkitSERV Comment Letter at 5 (Nov. 2011); Citadel Comment Letter at 5 (Nov. 4, 2011); MFA Comment Letter at 7 (Nov. 4, 2011); Vanguard Comment Letter at 5 (Nov. 4, 2011) (recommending 180-day compliance period between the effective date of the clearing requirement and the trade execution requirement).

¹⁶⁵ MFA Comment Letter at 10–11.

the trade execution requirement at the same time, rather than through a phased-in approach, to avoid fragmenting market liquidity.¹⁶⁶

Other commenters stated that the proposed schedule does not afford adequate time for market participants to comply with the trade execution requirement, particularly with regards to the proposed 30-day post-determination implementation period.¹⁶⁷ JPMorgan and UBS stated that where a SEF or DCM submits a swap as available to trade using § 40.6, market participants could be required to transfer their existing trading in that swap onto a SEF or DCM within only 40 days of the submission.¹⁶⁸

Some commenters noted that implementing new infrastructure, standards, and procedures necessary to comply with the trade execution requirement would require a longer post-determination period.¹⁶⁹ For example, FHLBanks commented that new infrastructure and procedures are necessary to ensure that swaps are properly submitted to a counterparty's FCM and to a DCO.¹⁷⁰ Some commenters also cited the need for market participants to develop adequate connectivity¹⁷¹ and to obtain trading access¹⁷² to a SEF or DCM. CME commented that DCOs, DCMs, and SEFs would not likely be able to establish the requisite technological linkages within the proposed 30-day implementation period,¹⁷³ while ICI commented that smaller market participants could need

more than 30 days to connect to a SEF or DCM offering an actively traded swap.¹⁷⁴ Other commenters noted that market participants would also need time to complete applicable documentation and agreements.¹⁷⁵ Some commenters further stated that a longer implementation period would promote greater competition among trading venues and mitigate a SEF's or DCM's attempt to capture market share.¹⁷⁶

Commenters provided several suggestions for a longer post-determination period. Several commenters recommended a 90-day period after a swap is made available to trade,¹⁷⁷ while Chatham and FSR recommended at least a 6-month period.¹⁷⁸ SIFMA AMG recommended an implementation period of at least 90 days after the swap becomes subject to the trade execution requirement,¹⁷⁹ while some commenters recommended a similar period of at least 6 months,¹⁸⁰ particularly for market participants who are neither swap dealers or major swap participants.¹⁸¹ SIFMA AMG and Vanguard stated that the period could be shortened over time as market participants become more experienced with centralized trading.¹⁸²

Commission Determination

The Commission is adopting §§ 37.12(a) and (b) and 38.11(a) and (b) as proposed with minor technical corrections, but is also amending the proposed rule text to clarify that market participants must comply with the trade execution requirement upon the later of (1) the applicable deadline established under the compliance schedule for the clearing requirement for a swap,¹⁸³ or (2) 30 days after the available-to-trade determination for that swap is deemed approved under § 40.5 or deemed certified under § 40.6 by the

Commission as available to trade. As noted earlier, the Commission anticipates that because of the novel nature of the available-to-trade determinations, the initial determinations would likely be subject to a stay under § 40.6 for an additional 90-day review period or an extension of the 45-day review period under § 40.5 for an additional 45 days. Accordingly, the Commission's part 40 rule review procedures should provide market participants with adequate advance notice of the possible application of the trade execution requirement to a particular swap. The Commission believes that this period, along with the subsequent 30-day post-determination implementation period, is a sufficient amount of time for SEFs, DCMs, and market participants to become familiar and comply with the trade execution requirement. Taken in concert with the implementation schedule adopted for swaps subject to clearing requirement, the Commission also believes that this time is sufficient with respect to mandatory trade execution for an individual swap or a group, type, category, or class of swaps.¹⁸⁴

To the extent that the phased-in compliance schedule for the clearing requirement previously adopted by the Commission may lead to phased-in compliance with the trade execution requirement, the Commission supports this approach. The Commission believes that the phased-in schedule for the former requirement—which accounts for a market participant's ability to comply based on risk profile, compliance burden, resources, and expertise—also applies with respect to compliance with the latter requirement. The Commission further notes that the concerns about fragmenting market liquidity caused by a phased-in approach are mitigated by (1) the phasing-in of similar entities, who transact similar volumes of swaps, under similar timelines and (2) the relatively compact timeframe in which market participants in all three clearing implementation and compliance categories must comply with the trade execution requirement.¹⁸⁵

Finally, the Commission notes that a trading facility could still clear and list a swap for trading after it is determined to be subject to the trade execution requirement, but prior to the effective date.

¹⁶⁶ *Id.* at 12.

¹⁶⁷ JPMorgan Comment Letter at 3–4; UBS Comment Letter at 2; ICI Comment Letter at 5 (Nov. 4, 2011); CME Comment Letter at 2 (Nov. 4, 2011); Westpac Comment Letter at 3 (Nov. 4, 2011); Regional Banks Comment Letter at 7 (Nov. 4, 2011); FHLBanks Comment Letter at 5 (Nov. 4, 2011); ICI Comment Letter at 9; ISDA Comment Letter at 11; AIMA Comment Letter at 2–3; UBS Comment Letter at 2; ISDA Comment Letter at 11; ACLI Comment Letter at 2.

¹⁶⁸ JPMorgan Comment Letter at 3; UBS Comment Letter at 2. Based on proposed §§ 37.12(a) and 38.11(a), commenters assumed that 30 days after the swap is made available to trade falls upon the later date than the applicable compliance date for the clearing requirement.

¹⁶⁹ JPMorgan Comment Letter at 3–4; ISDA Comment Letter at 11; FHLBanks Comment Letter at 5 (Nov. 4, 2011); Westpac Comment Letter at 2–3 (Nov. 4, 2011).

¹⁷⁰ FHLBanks Comment Letter at 5 (Nov. 4, 2011).

¹⁷¹ FSR Comment Letter at 4; Bloomberg Comment Letter at 5; ICI Comment Letter at 8; ISDA Comment Letter at 11; Eaton Vance Management Comment Letter at 3; Chatham Comment Letter at 4; SIFMA AMG Comment Letter at 9; CME Comment Letter at 6–7; Westpac Comment Letter at 3 (Nov. 21, 2011); ICI Comment Letter at 5 (Nov. 4, 2011).

¹⁷² MFA Comment Letter at 4; Vanguard Comment Letter at 6; SIFMA AMG Comment Letter at 9; AIMA Comment Letter at 3; CME Comment Letter at 6–7.

¹⁷³ CME Comment Letter at 2 (Nov. 4, 2011).

¹⁷⁴ ICI Comment Letter at 5 (Nov. 4, 2011).

¹⁷⁵ SIFMA AMG Comment Letter at 9; ICI Comment Letter at 9; AIMA Comment Letter at 3; CME Comment Letter at 7; ISDA Comment Letter at 11; Westpac Comment Letter at 3; FIA/ISDA/SIFMA Comment Letter at 8 (Nov. 4, 2011).

¹⁷⁶ Chatham Comment Letter at 4; FXall Comment Letter at 7; ICI Comment Letter at 8; SIFMA AMG Comment Letter at 9.

¹⁷⁷ FXall Comment Letter at 7; ICI Comment Letter at 9; CME Comment Letter at 6–7; Vanguard Comment Letter at 6; Bloomberg Comment Letter at 5; Westpac Comment Letter at 3 (Nov. 4, 2011).

¹⁷⁸ Chatham Comment Letter at 4; FSR Comment Letter at 4.

¹⁷⁹ SIFMA AMG Comment Letter at 9.

¹⁸⁰ Eaton Vance Management Comment Letter at 3; ISDA Comment Letter at 11.

¹⁸¹ Westpac Comment Letter at 3 (Nov. 4, 2011); FHLBanks Comment Letter at 5 (Nov. 4, 2011).

¹⁸² SIFMA AMG Comment Letter at 9; Vanguard Comment Letter at 6.

¹⁸³ *See supra* note 52.

¹⁸⁴ *See id.*

¹⁸⁵ *See id.*

IV. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (“RFA”) requires federal agencies, in promulgating regulations, to consider the impact of those regulations on small entities.¹⁸⁶ The Commission has previously established certain definitions of “small entities” to be used by the Commission in evaluating the impact of its regulations on small entities in accordance with the RFA.¹⁸⁷ The Commission has previously determined that DCMs and SEFs are not “small entities” for purposes of the RFA.¹⁸⁸ The subject of this rulemaking also provides a compliance schedule for a new statutory requirement, section 2(h)(8) of the CEA, and does not itself impose significant new regulatory requirements.¹⁸⁹ Accordingly, the Commission received no comments on the Chairman’s certification of the impact of the rules contained herein on small entities. Therefore, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the rule will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

The Paperwork Reduction Act (“PRA”) ¹⁹⁰ imposes certain requirements on federal agencies in connection with their conducting or sponsoring any collection of information as defined by the PRA. An agency may not conduct or sponsor, and a registered entity is not required to respond to, a collection of information unless it displays a currently valid control number by the Office of Management and Budget (“OMB”). This final rule contains new collection of information requirements within the meaning of the PRA. Accordingly, in connection with the FNPRM, the Commission submitted an information collection requested, titled “Parts 37 and 38—Process for a Swap Execution Facility or Designated Contract Market to Make a Swap Available to Trade” and supporting documentation to OMB for its review and approval in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11, and requested that OMB approve and assign a new control number for the collections of information covered by the FNPRM.

Additionally, pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission, in the FNPRM, requested comments from the public on the proposed information collection requirements in order to, among other items, evaluate the necessity of the proposed collections of information and minimize the burden of the information collection requirements on respondents. On September 12, 2012, OMB assigned control number 3038–0099 to this collection of information, but withheld final approval pending the Commission’s resubmission of the information collection, which includes a description of the comments received on the collection and the Commission’s responses thereto.

With respect to the adoption of §§ 37.12(a) and 38.11(a)—the trade execution compliance schedule—as stated in the prior proposed rule, this requirement will not require a new collection of information from any persons or entities.¹⁹¹

The Commission protects proprietary information according to the Freedom of Information Act and 17 CFR part 145, “Commission Records and Information.” In addition, section 8(a)(1) of the CEA strictly prohibits the Commission, unless specifically authorized by the CEA, from making public “data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.”¹⁹² The Commission is also required to protect certain information contained in a government system of records according to the Privacy Act of 1974.¹⁹³

1. Proposed Information Provided by Reporting Entities/Persons

In the FNPRM, the Commission estimated that 50 registered entities will be required to file part 40 rule submissions and annual reports.

Based on the previously estimated hours of burden under part 40 and the estimated additional time that a SEF or DCM would require to review applicable factors and data to make a determination, the Commission estimated that the hourly burden for a SEF or DCM under proposed §§ 37.10(a) and 38.12(a) to submit an available-to-trade determination would be 8 hours per submission. The Commission, however, did not provide an average annual hours of burden for each SEF or DCM to submit available-to-trade determinations under proposed §§ 37.10(a) and 38.12(a) because, as

stated in the FNPRM, it is not feasible to determine the number of part 40 rule submission filings, on average, that each SEF or DCM would submit, as the number of swap contracts to be traded on a DCM or SEF and the number of those swaps that a SEF or DCM will eventually submit as available to trade is presently unknown.

2. Summary of Comments and Commission Response

Sections 37.10(a) and 38.12(a)—Process To Make a Swap Available To Trade

MarketAxess and SDMA characterized the proposed approach as burdensome and commented that it would require SEFs to expend a significant amount of time and resources.¹⁹⁴ MarketAxess recommended an alternative “recognition and notification” process in which a SEF or DCM provides notice to the Commission that a swap is available to trade when it becomes subject to the clearing requirement.¹⁹⁵ MarketAxess stated that this approach would allow SEFs to use their resources in a more efficient manner.¹⁹⁶ SDMA supported the part 40 approach, but stated that a SEF should determine if a swap is available to trade based on whether the swap is required to be cleared, not based on the enumerated factors.¹⁹⁷ Sunguard Kiodes also recommended an alternative approach—a real-time “illiquidity” test that would temporarily permit off-facility trading in a swap based on certain market observations—that would require less time and reduce costs.¹⁹⁸ WMBAA and Spring Trading commented that the Commission’s estimate of the hours of burden for a SEF or DCM to make an available-to-trade determination are too low based on the different types of personnel that would be involved in a determination.¹⁹⁹ Spring Trading estimated that each rule filing would require at least 15–20 hours.²⁰⁰

The Commission notes that the alternative approaches proposed by commenters would eliminate a separate formal determination process. As stated in the preamble, however, the Commission believes that determining whether a swap is available to trade and whether a swap should be mandatorily cleared should remain separate

¹⁸⁶ 5 U.S.C. 601 *et seq.*

¹⁸⁷ 47 FR 18681–31 (Apr. 30, 1982).

¹⁸⁸ See 47 FR 18618, 18619 (Apr. 30, 1982) discussing DCMs; 66 FR 45604, 45609 (Aug. 29, 2001) discussing DTEFs; 76 FR 1214, 1235 discussing SEFs.

¹⁸⁹ 76 FR 58193.

¹⁹⁰ 44 U.S.C. 3501 *et seq.*

¹⁹¹ 76 FR 58193.

¹⁹² 7 U.S.C. 12(a)(1).

¹⁹³ 5 U.S.C. 552a.

¹⁹⁴ MarketAxess Comment Letter at 7–8; SDMA Comment Letter at 4–5.

¹⁹⁵ MarketAxess Comment Letter at 6.

¹⁹⁶ *Id.* at 7.

¹⁹⁷ SDMA Comment Letter at 6–7.

¹⁹⁸ Sunguard Kiodes Comment Letter at 3.

¹⁹⁹ WMBAA Comment Letter at 5; Spring Trading Comment Letter at 5 (Jan. 12, 2012).

²⁰⁰ *Id.*

processes because each inquiry addresses different concerns. Further, adopting a real-time “illiquidity” test would require objective criteria, which the Commission has declined to adopt at this time.

The Commission acknowledges the comments from WMBAA and Spring Trading regarding the resources required to make a determination. Therefore, the Commission is revising its estimate of the hours of burden to reflect the addition of additional personnel that would process and analyze trading data, for which the Commission estimates this hourly burden to be 8 hours per submission. The Commission is also adopting a listing requirement in the final rule under new §§ 37.10(a)(2) and 38.12(a)(2), which requires a SEF or DCM to certify that it is listing the swap for which it submits an available-to-trade determination. The Commission notes that the listing process is governed by §§ 40.2 and 40.3 of the Commission’s regulations, for which it has previously estimated the average hourly burden to be 2 hours per submission in a previous rulemaking.²⁰¹

Accordingly, the Commission revises its estimate of the total hourly burden to be 16 hours per submission.

C. Cost-Benefit Considerations

Introduction

Title VII of the Dodd-Frank Act seeks to prevent a repeat of the harm caused by the 2008 financial crisis by establishing a comprehensive new regulatory framework for swaps and security-based swaps.²⁰² Among other things, the legislation seeks to promote market integrity, reduce risk, and increase transparency within the financial system and swaps markets. Consistent with the view that several weaknesses contributed to the crisis,²⁰³ Title VII establishes a multidimensional regulatory approach designed to “mitigate costs and risks to taxpayers and the financial system.”²⁰⁴ Provisions designed to move the transaction of swaps from primarily opaque, over-the-counter (“OTC”) markets—which traditionally feature bilateral negotiation

and execution—to registered swap execution facilities (“SEFs”) and designated contract markets (“DCMs”)—which provide market participants and the public with improved swap market transparency—represent an important element of this approach.

In particular, section 733 of the Dodd-Frank Act amended the CEA to, among other things, move swap trading and execution to SEFs and DCMs.²⁰⁵ Section 723(a)(3) of the Dodd-Frank Act added a trade execution requirement,²⁰⁶ which requires that swap transactions subject to the clearing requirement under section 2(h)(1) of the CEA be executed on a SEF or a DCM, unless no SEF or DCM “makes the swap available to trade” or the clearing exception under section 2(h)(7) of the CEA applies.²⁰⁷ Taken together, these provisions are intended to transform the swaps market from one in which prices for bilaterally-negotiated contracts are privately quoted—typically by dealers who, unlike non-dealer market participants (typically the “buy-side”), enjoy asymmetric information advantages—to one in which bid/offer prices for swap contracts are accessible to multiple market participants to compare, assess, and accept or reject.²⁰⁸ With this release, in conjunction with the Commission’s final rulemaking

establishing SEFs²⁰⁹ and the final rulemaking defining appropriate minimum block sizes for swaps,²¹⁰ the Commission is implementing the trade execution requirement.

In this release, the Commission is adopting final rules (1) specifying the process by which a swap is made “available to trade,” thereby making it subject to the trade execution requirement under section 2(h)(8) of the CEA (“available-to-trade rule”); and (2) establishing the compliance schedule of the trade execution requirement, following a Commission determination that a swap is both required to be cleared and is available to trade (“trade execution compliance schedule”).²¹¹ More specifically, these rules allow SEFs and DCMs to designate swaps that they list or offer for trading as “available to trade,”²¹² thereby requiring market participants who transact such swaps (and who are subject to the clearing requirement under section 2(h)(1)(A) of the CEA) to comply with the trade execution requirement in carrying out these transactions. Swaps that are subject to the trade execution requirement (and are not block trades as defined under § 43.2 of the Commission’s regulations) must be executed in accordance with other separately promulgated rules that implement the Dodd-Frank Act’s swap exchange trading requirements and are intended to provide improved price transparency for swap transactions.²¹³

Operating in concert with the statutory requirements and other rules,²¹⁴ the rules adopted in this rulemaking are designed to provide a process that fosters swaps becoming available to trade, and therefore subject to the trade execution requirement; this,

²⁰⁵ SEFs are a new type of regulated marketplace modeled largely on the existing Commission-regulated DCM structure. Section 1a(50) of the CEA, as enacted by section 721 of the Dodd-Frank Act, defines a SEF as “a trading system or platform in which multiple participants have the ability to execute or trade swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate commerce, including any trading facility, that (A) facilitates the execution of swaps between persons; and (B) is not a designated contract market.” 7 U.S.C. 1a(50). Section 5h(a)(1) of the CEA, as amended by the section 733 of the Dodd-Frank Act, prohibits any person from operating a facility for the trading and processing of swaps unless the facility is registered as a SEF or a DCM. 7 U.S.C. 7b–3(a)(1).

²⁰⁶ CEA section 2(h)(8), 7 U.S.C. 2(h)(8).

²⁰⁷ 7 U.S.C. 2(h)(7).

²⁰⁸ Asymmetric information exists when one counterparty to a transaction has more or better information than the other counterparty. In some instances, a dealer could have an information advantage over a non-dealer, and vice versa. Abuse of this advantage is likely to contribute to market failure. By definition, bilateral negotiations imply lower levels of transparency of orders, quotes, trades and transaction prices. In the context of swap markets, as dealers are on one side of a large fraction of trades, they are privy to better information on prevailing market conditions and valuations relative to their non-dealer counterparties. See “An Analysis of OTC Interest Rate Derivatives Transactions: Implications for Public Reporting,” Michael Fleming, John Jackson, Ada Li, Asani Sarkar, and Patricia Zobel, Federal Reserve Bank of New York Staff Reports, no. 557, at 6 n.14 (Mar. 2012). Major derivatives dealer activity accounts for 89 percent of the total interest rate swap activity in notional terms. *Id.*

²⁰⁹ See Core Principles and Other Requirements for Swap Execution Facilities (May 16, 2013).

²¹⁰ See Procedures to Establish Appropriate Minimum Block Sizes for Large Notional Off-Facility Swaps and Block Trades (May 16, 2013).

²¹¹ CEA section 2(h)(8), 7 U.S.C. 2(h)(8).

²¹² See *supra* note 1.

²¹³ The rules establishing SEFs focus on measures to promote pre-trade transparency and trade execution of swaps. To comply with the trade execution requirement, swaps that are traded on a SEF must be executed as Required Transactions. Under § 37.9(a)(2), Required Transactions must be executed by either (1) an Order Book, as defined in § 37.3(a)(3); or (2) a Request for Quote System, as defined in § 37.9(a)(3). See Core Principles and Other Requirements for Swap Execution Facilities (May 16, 2013). Swaps that are subject to the trade execution requirement, under section 2(h)(8) of the CEA, and traded on a DCM must be executed pursuant to subpart J of part 38 of the Commission’s regulations, which implements revised DCM Core Principle 9 under section 5(d)(9) of the CEA, as amended by section 735(b) of the Dodd-Frank Act. 7 U.S.C. 7(d)(9).

²¹⁴ See part 37 and subpart J of part 38 of the Commission’s regulations.

²⁰¹ 76 FR 77734.

²⁰² Dodd-Frank Act section 701, *et seq.*

²⁰³ See, e.g., Financial Crisis Inquiry Commission, “The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States” at xxiv (Jan. 2011), available at <http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf>. (listing uncontrolled leverage; lack of transparency, capital and collateral requirements; speculation; interconnection among firms; and concentrations of risk in the market as contributing factors).

²⁰⁴ S. Rep. No. 111–176, at 92 (2010).

indirectly will counter information asymmetry and in turn, the informational advantage enjoyed by dealers to the potential detriment of other market participants. In this way, these rules will promote a competitive market environment with improved price discovery and characterized by narrower spreads and more reliable prices. Ultimately, these rules will benefit the financial system as a whole by creating a more efficient marketplace where market participants will be able to take into account the price at which recent transactions have occurred when determining at what price to quote or place orders.

The Commission believes that some of the costs related to the application of these rules are a consequence of the Congressional trade execution requirement under section 2(h)(8) of the CEA. For example, those market participants who are not eligible for the end-user exception under section 2(h)(7) of the CEA²¹⁵ will not have the option to execute swaps made available to trade on a bilateral basis, even if they consider it more costly or less convenient to execute trades on a SEF or a DCM. As described further below, the Commission was cognizant of these costs in adopting these final rules, and has, where appropriate, attempted to mitigate the costs while observing CEA section 2(h)(8).

The Statutory Mandate To Consider the Costs and Benefits of the Commission's Action: Section 15(a) of the CEA

Section 15(a)²¹⁶ of the CEA requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing certain orders. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of the following five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the section 15(a) factors.

In this rulemaking to implement the trade execution requirement, the Commission is exercising its discretion

²¹⁵ The Commission may determine that swap transactions exempted from the section 2(h)(1) clearing requirement pursuant to other statutory authority would also not be subject to the section 2(h)(8) trade execution requirement. See *supra* note 1.

²¹⁶ CEA section 15(a), 7 U.S.C. 19(a).

to adopt the available-to-trade rule and the trade execution compliance schedule. The discussion that follows considers the section 15(a) factors for each set of rules separately. Prior to the section 15(a) consideration for each set of rules, the Commission discusses the costs, benefits, and alternatives to the approach adopted in these final rules as well as relevant comment letters.²¹⁷ With respect to the available-to-trade rule, costs, benefits, and alternatives are further broken out and discussed separately for various components of the process—Part 40 Process and Determination Factors, and Applicability.

Quantifying the costs and benefits to SEFs and DCMs is not reasonably feasible for many aspects of the available-to-trade rule because costs will depend, among other things, on the future business decisions of SEFs and DCMs. The Commission expects that the costs and benefits with respect to the available-to-trade rule will vary, based on the specific circumstances of the individual SEFs, DCMs, and market participants. Where the Commission is unable to quantify the costs and benefits, the Commission identifies and considers the costs and benefits of these rules in qualitative terms.

Given the novelty of the trade execution requirement—the mandatory trading of swaps on a new type of entity, SEFs, or on DCMs—the Commission is inherently limited by a lack of available data in attempting to quantify the costs and benefits of implementing the trade execution compliance schedule. As discussed further below, the Commission is not aware of any analog to another requirement that would provide information that is sufficient to ascertain such costs and benefits in quantitative terms. Accordingly, the Commission identifies and considers the costs and benefits of the compliance schedule in qualitative terms.

1. Available-to-Trade Rule

a. Part 40 Process and Determination Factors

Final §§ 37.10 and 38.12 govern the process that a SEF or DCM must use to determine whether a swap is available to trade for purposes of the trade execution requirement. For a swap to be subject to the trade execution requirement under section 2(h)(8) of the CEA, a SEF or DCM must have first determined that a swap is available to

²¹⁷ The Commission solicited comments to aid its consideration of the costs and benefits resulting from (1) the proposed available-to-trade rule, 76 FR 77733, and (2) the proposed trade execution compliance schedule. 76 FR 58192.

trade. The Commission views this determination as a trading protocol issued by the SEF or DCM (and therefore as a “rule,” as defined in § 40.1 of the Commission's regulations); as a rule, the SEF or DCM must submit the determination to the Commission in accordance with the procedures contained in part 40 of the Commission's regulations. Final §§ 37.10(a) and 38.12(a) set forth the procedure for a SEF or DCM to submit the determination under § 40.5 or § 40.6 of the Commission's regulations.

Final §§ 37.10(b) and 38.12(b) require a SEF or DCM to consider, as appropriate, six factors with respect to each swap when determining whether a swap is available to trade: (1) Whether there are ready and willing buyers and sellers; (2) the frequency or size of transactions; (3) the trading volume; (4) the number and types of market participants; (5) the bid/ask spread; or (6) the usual number of resting firm or indicative bids and offers. No single factor must always be considered as to whether a swap is available to trade; therefore, the SEF or DCM may consider any one or more of the factors in its initial determination. In its submission to the Commission under § 37.10(a) or § 38.12(a), a SEF or DCM must describe how it considered the factors that it deems appropriate.

Costs

Costs to SEFs and DCMs

In the proposed rule, the Commission estimated that conducting the assessment and submission process in §§ 37.10(a) and (b) and 38.12(a) and (b) could be performed internally by one compliance personnel of the SEF or DCM over approximately eight hours on average. The Commission further estimated that the cost per hour for one compliance personnel to be \$43.25 per hour;²¹⁸ therefore, it would cost each SEF and DCM \$346 per rule submission to comply with the proposed requirements.²¹⁹ The Commission also noted that this estimate was general in nature and that it would be difficult to determine the number of hours involved with reasonable precision, given the novelty of the process.²²⁰ The

²¹⁸ See Report on Management & Professional Earnings in the Securities Industry 2010, Securities Industry and Financial Markets Association at 4 (Sept. 2010). The report lists the average total annual compensation for a compliance specialist (intermediate) as \$58,878. The Commission estimated the personnel's hourly cost by assuming an 1,800 hour work year and by multiplying by 1.3 to account for overhead and other benefits.

²¹⁹ 76 FR 77735.

²²⁰ The Commission also noted that certain additional factors could affect these estimates, such as the complexity of the swap's terms. *Id.*

Commission solicited comments on the costs associated with §§ 37.10(a) and (b) and 38.12(a) and (b), *i.e.*, assessing whether a swap is available to trade and submitting a determination pursuant to part 40 of the Commission's regulations.²²¹

Some commenters claimed that the Commission's estimate for the number of personnel required to carry out the process was low.²²² For example, WMBAA stated that the Commission under-estimated the different types of personnel that would be required to make an available-to-trade determination, which include information technology professionals, operations staff, legal and compliance staff, and management.²²³ Spring Trading anticipated that the Commission would require large amounts of data and analysis from SEFs and DCMs to support their determinations; therefore, the costs required to make a determination and submit a filing would be similar to the effort required by a DCM to assess whether a new futures contract is susceptible to manipulation.²²⁴ WMBAA also asserted that the initial costs of implementing the new procedure would be higher than the Commission's proposed projection.²²⁵ MarketAxess commented that the process would require SEFs to expend significant resources, which would pose a barrier to entry and lead to fewer trading platforms for market participants.²²⁶

Commenters did not provide alternative numerical estimates or discuss the magnitude of costs that would be imposed by the determination process. Based on the qualitative comments received from WMBAA and Spring Trading, however, the Commission is revising its estimated cost of conducting the assessment and submission process to reflect the addition of an economist to the estimate of necessary personnel. The Commission agrees with Spring Trading that SEFs and DCMs may analyze trading data in considering the factors

under §§ 37.10(b) and 38.12(b); the compliance personnel would likely be assisted by an economist in carrying out such an analysis over approximately eight hours on average. Further, the Commission is also revising its estimates based on updated wage rate data. The Commission's updated estimate of the cost per hour for one compliance personnel is \$42.16 per hour²²⁷ and \$64.60 per hour for one economist.²²⁸

The Commission is also adopting a listing requirement under final §§ 37.10(a)(2) and 38.12(a)(2) that requires the SEF or DCM to demonstrate that they have listed or offered for trading the swap for which they are submitting an available-to-trade determination. A SEF or DCM incurs costs to list or offer a swap for trading pursuant to § 40.2 and 40.3 of the Commission's regulations, which requires a product filing that includes, among other things, a "concise explanation and analysis" of the product, that the Commission has acknowledged as *de minimis*.²²⁹ Although a SEF or DCM may decide to list a product for trading without a desire to submit an available-to-trade determination, to the extent that the SEF or DCM lists a product exclusively to meet the requirements of §§ 37.10(a)(2) or 38.12(a)(2), the Commission estimates that it would take one compliance personnel approximately 2 hours, on average, to submit a product filing.

Therefore, the Commission estimates that it would cost a SEF and DCM a maximum of \$938.40 per rule submission filing to comply with final §§ 37.10(a) and (b) and 38.12(a) and (b).

²²⁷ See Report on Management & Professional Earnings in the Securities Industry 2011, Securities Industry and Financial Markets Association at 4 (Oct. 2011). The FRPRM calculated the proposed estimate for the assessment and submission process based on salary information in the 2010 report. See *supra* note 218. The 2011 report lists the average total annual compensation for a compliance specialist (intermediate) as \$58,371. The Commission estimated the personnel's hourly cost by assuming an 1,800 hour work year and by multiplying by 1.3 to account for overhead and other benefits.

²²⁸ See Bureau of Labor Statistics, U.S. Department of Labor, Occupational Outlook Handbook, 2012–13 Edition, Economists, <http://www.bls.gov/ooh/life-physical-and-social-science/economists.htm>. The report lists the average total annual compensation for an economist as \$89,450. The Commission estimated the personnel's hourly cost by assuming an 1,800 hour work year and by multiplying by 1.3 to account for overhead and other benefits.

²²⁹ For further Commission discussion of the costs associated with listing or offering a product for trading under §§ 40.2 and 40.3 of the Commission's regulations, see Provisions Common to Registered Entities, 76 FR 44776, 44787 (Jul. 27, 2011).

With respect to MarketAxess's comment, the Commission does not believe that the costs associated with the determination process pose a barrier to entry for trading platforms. The rule does not affirmatively require a SEF or DCM to first submit to the Commission that a swap is available to trade via a part 40 filing in order to list or offer that swap for trading on its platform. If one SEF or DCM makes the swap available to trade through the part 40 process, then other SEFs and DCMs who subsequently choose to list or trade the swap are only required to do so through methods of execution consistent with the trade execution requirement. The Commission notes that in order to register and operate as a SEF, a trading platform or facility must already be able to demonstrate that they offer certain minimum functionality in terms of methods of execution (*i.e.*, a central limit order book ("CLOB") or request-for-quote ("RFQ") system).²³⁰

The Commission specifically designed the process to mitigate costs by allowing SEFs and DCMs to utilize existing personnel and infrastructure to carry out the determination and submission process under part 40 procedures. Further, the process affords SEFs and DCMs the flexibility to consider any one or more enumerated factors in determining that a swap is available to trade. This flexibility will allow them to tailor their considerations, while also managing costs of research and analysis, by selecting from a range of factors. Moreover, the Commission believes that the costs will decrease for both SEFs and DCMs as they become more familiar with using the part 40 procedures to make a swap available to trade. The Commission also believes that the part 40 process will require fewer resources as centralized trading develops and SEFs and DCMs become more familiar with the types of swaps that can be made available to trade.

The Commission believes that Spring Trading's comparison between the costs of the process and the costs to assess whether a new futures contract is susceptible to manipulation rests on a flawed analogy. The costs of the latter are based upon the Commission's annual burden hours estimate, in the aggregate, for the information collection requirements under §§ 40.2 and 40.3 of the Commission's regulations,²³¹ estimated per registered entity to be 200 hours based on 100 responses and an estimated average of 2 hours per

²³⁰ See Core Principles and Other Requirements for Swap Execution Facilities (May 16, 2013).

²³¹ 76 FR 44790.

²²¹ *Id.*

²²² WMBAA Comment Letter at 5; Spring Trading Comment Letter at 5 (Jan. 12, 2012).

²²³ WMBAA Comment Letter at 5.

²²⁴ Spring Trading Comment Letter at 5 (Jan. 12, 2012). The Commission has noted that the costs of compliance with DCM Core Principle 3—Contracts Not Readily Subject to Manipulation, as codified in § 38.200 of the Commission's regulations—consist of supplying supporting information and documentation to justify the contract specifications of a new product. That process is governed by the product listing submission procedures codified in §§ 40.2 and 40.3 of the Commission's regulations.

²²⁵ *Id.*

²²⁶ MarketAxess Comment Letter at 9.

response.²³² The Commission's estimate of 18 hours to comply with final §§ 37.10(a) and (b) and 38.12(a) and (b), however, is based upon a single submission of an available-to-trade determination.²³³ It is not feasible at this time to estimate the average number of rule submissions that a SEF or DCM will file per year; therefore, the Commission believes that the burden hours estimate for the information collection requirements under §§ 40.2 and 40.3 is not illustrative here.

Costs to Market Participants

Some commenters also stated that the process would impose direct costs on market participants. For example, Chatham stated that end-users would have to expend resources to monitor whether swaps are subject to the trade execution requirement, and if so, connect to a SEF or DCM that offers or lists that swap for trading.²³⁴

Some commenters also expressed concern that the available-to-trade determination process would impose indirect costs on market participants. These commenters maintained that SEFs and DCMs would be incentivized to exploit the process by indiscriminately determining that swaps are available to trade. Making determinations in this manner, they claimed, would lead to illiquid swaps trading on a SEF or DCM, which could result in increasing swap price volatility; increased spreads; misleading market prices; and front-running behavior.²³⁵ Chatham commented that end-users would encounter higher hedging and swap execution costs, particularly from swap dealers passing on the costs of higher volatility.²³⁶ ISDA stated that those costs would deter market participants from executing hedge transactions.²³⁷ FSR stated that improper determinations by a SEF or DCM, such as one primarily driven by the desire to capture market share rather than on the merits, would compel market participants to avail themselves of exemptions to the trade execution

requirement, thus undermining the goal of promoting a centralized trading market.²³⁸

Notwithstanding the fact that commenters did not provide data to support or monetize their cost concerns, the Commission has qualitatively considered their comments about the direct and indirect costs of the available-to-trade determination process. First, with respect to the direct costs cited by Chatham—that end-users would have to follow which swaps are subject to mandatory trade execution and connect to a SEF or DCM to trade that swap—these costs are primarily attributable to the statutory trade execution requirement and not to the Commission's action in this final rule. The costs incurred by market participants to connect to a SEF or DCM are attendant to complying with the trade execution requirement. While the number of swaps subject to the trade execution requirement will be affected by this final rule in conjunction with business decisions by SEFs and DCMs, market participants (as well as SEFs and DCMs) would incur these costs for any swap subject to the statutory trade execution requirement. While commenters did not provide any quantitative estimates regarding connectivity costs, the Commission understands that clearing firms' connectivity services to DCMs can be bundled into the clearing services provided by clearing firms, and expects that this will occur at SEFs as well. Hence, the connectivity costs arising directly from the trade execution requirement are likely to be subsumed into the costs of complying with the mandatory clearing requirement.²³⁹ It is also possible that SEFs and DCMs will bundle connectivity costs into transaction fees. Moreover, SEFs and DCMs have an incentive to keep connectivity costs low in order to attract market participants.

Further, while there may be some attendant search costs, the Commission's approach in this final rule greatly minimizes the costs to market participants to monitor whether a SEF or DCM is subject to the trade execution requirement. Under existing

practice for part 40 rule submissions, the Commission will post a notice and copy of all available-to-trade submissions on its Web site. The Commission also intends to establish an updated, centralized list of all of the swaps that are available to trade. This will provide market participants with a single reference for knowing whether a particular swap has been determined to be available to trade.

With respect to the potential indirect costs imposed upon market participants if illiquid swaps are made available to trade and become subject to the trade execution requirement, the Commission acknowledges the concerns of commenters. The Commission, however, believes that the part 40 process is appropriate and well-suited to moderate this possibility and views the adopted determination factors as probative of whether an actual trading market exists.²⁴⁰ Mandating SEFs and DCMs to consider these factors prior to making a determination will compel them at the outset to internally consider the benefits versus the costs that will be incurred to list and subsequently support trading in a particular swap. The Commission also believes that the transparency of the process (e.g., submissions must be posted on the submitting SEF or DCM's Web site and will be posted on the Commission's Web site as well), coupled with Commission review and potential for public comment, provides an important backstop to protect the integrity of the determinations that are submitted.

Benefits

The process set forth in §§ 37.10 and 38.12 will advance the Congressional goal of promoting swap execution and developing a centralized trading market that facilitates price discovery in the manner as described below.

Most importantly, the adopted process in the final rule will provide an up-to-date, singular reference for SEFs, DCMs, and market participants for identifying which swaps are available to trade, and therefore subject to the trade execution requirement. Sections 37.10(a) and 38.12(a) prescribe the use of the part 40 process for the submission of rules for Commission review and approval (§ 40.5) or the self-certification

²³² *Id.*

²³³ As discussed above, the Commission estimates the assessment and submission process in §§ 37.10(a) and (b) and 38.12(a) and (b) for each submission will be performed by one compliance personnel and one economist over approximately eight hours each on average. In addition, the Commission estimates that it would take one compliance personnel approximately 2 hours, on average, to comply with the listing prerequisite under §§ 37.10(a)(2) and 38.12(a)(2) by submitting a product filing.

²³⁴ Chatham Comment Letter at 2.

²³⁵ AIMA Comment Letter at 1; CME Comment Letter at 6; Morgan Stanley Comment Letter at 3; CEWG Comment Letter at 4.

²³⁶ Chatham Comment Letter at 2.

²³⁷ ISDA Comment Letter at 4.

²³⁸ FSR Comment Letter at 2.

²³⁹ Depending on their individual business needs, market participants could also use connectivity services provided by independent software vendors to trade swaps subject to the trade execution requirement. These costs may also be bundled into transaction fees. The Commission also notes that it is typically the case that for most new contracts, DCMs tend to waive execution and other fees during the initial six to twelve months after listing, and such fee waivers are meant to help mitigate any incremental costs for market participants to connect to a new platform or trade a new product.

²⁴⁰ The Commission believes that market participants can use any or each of the factors to demonstrate that active trading is occurring for a particular swap. For example, a high frequency of transactions, narrow bid/ask spread, or large trading volume would indicate execution of transactions for that swap. A large number of buyers or sellers, or a large number of resting firm or indicative bids and offers would also indicate an active market based on the presence of market participants seeking to execute transactions in that swap.

of rules (§ 40.6).²⁴¹ Under these processes, SEFs and DCMs must submit an initial available-to-trade determination to the Commission either for rule approval or as a self-certification; both require Commission review. If appropriate, the Commission may approve a § 40.5 or § 40.6 rule submission within the designated timeframes. SEFs and DCMs will be familiar with this process; part 40 is already used by DCMs for other rule filings and similarly will be used by SEFs going forward. Part 40 further requires SEFs and DCMs to post a copy and notice of their submissions on their respective Web sites; the Commission also posts that information on its own Web site. Therefore, the adopted process will allow market participants to know (1) whether a particular swap has been submitted as available to trade; (2) whether that swap has been deemed as available to trade by the Commission; and (3) when the swap was made or will be made available to trade. In those submissions, SEFs and DCMs must consider the six enumerated factors under §§ 37.10(b) and 38.12(b) as appropriate, which provides other SEFs, DCMs, and market participants with information about the basis for determining that a swap is available to trade.

The process adopted in §§ 37.10 and 38.12 also increases transparency for market participants and the public. Under part 40, submissions must contain an explanation of how the SEF or DCM determined that a swap is available to trade, including the consideration of one or more of the relevant factors listed in §§ 37.10(b) and 38.12(b), as well as a brief explanation of any substantive opposing views. The part 40 process allows the Commission to go back to the submitting entity in the case that an insufficient explanation of the determination is provided.²⁴² In addition, when warranted (e.g., when a submission presents novel or complex issues), market participants and the public will have the opportunity to provide public comment on the merits of the SEF or DCM's submission directly

²⁴¹ Part 40 of the Commission's regulations governs regulatory obligations of registered entities, which include DCMs and SEFs under section 1(a)(40) of the CEA, with respect to, among other things, the certification or approval of new products for trading; and the certification or approval of rules governing the SEF or DCM.

²⁴² Under rule approval process, the Commission may extend the review period of a determination submitted if, among other things, the submission is incomplete. § 40.5(d)(1). Under the self-certification process, the Commission may stay the certification if, among other things, the rule submission is accompanied by an inadequate explanation. § 40.6(c)(1).

through the Commission's Web site.²⁴³ Therefore, part 40 will not only inform market participants of the justifications for and against an available-to-trade determination, but provides an opportunity for market participants and the public to submit their own views as well.

The adopted process also provides SEFs and DCMs with flexibility in determining whether a swap is available to trade. Under §§ 37.10(b) and 38.12(b), a SEF or DCM may consider any one or more of the enumerated factors in its initial determination, given that the Commission believes that no single factor must always be considered. Accordingly, this approach allows SEFs and DCMs to submit swaps with different trading characteristics to the Commission as available to trade. Rather than require SEFs and DCMs to respond to a rigid set of determination criteria, this flexibility was designed to encourage SEFs and DCMs to make a broader range of swaps subject to the trade execution requirement.

The Commission anticipates that these benefits will produce a more efficient process and consistent determinations over time. Under the part 40 procedures, SEFs and DCMs will submit to the Commission, for further review with the potential for public comment, an initial determination of whether a swap is available to trade. This approach will (1) benefit market participants during the initial stages of implementation by providing them, in circumstances as described above, with an opportunity to comment on determinations and (2) help the Commission track and maintain a record of which swaps are subject to the trade execution requirement.

The transparency and flexibility offered under the adopted processes will further the development of a centralized trading market, consistent with the objectives of the Dodd-Frank Act.²⁴⁴ By requiring a submission that

²⁴³ Under § 40.6(c)(2) of the Commission's regulations, the Commission will provide a 30-day public comment period where the available-to-trade determination submitted is subject to a stay because, among other things, it presents novel or complex issues that require additional time to analyze. As discussed in section II.A.1 of the preamble to the final rule, the Commission will also provide an opportunity to submit public comment for determinations submitted to the Commission under the § 40.5 rule approval process. See *supra* notes 58–60 and accompanying text.

²⁴⁴ See CEA section 5h(e), as enacted by section 733 of the Dodd-Frank Act, 7 U.S.C. 7b–3(e) (stating that one of the Act's objectives is "to promote the trading of swaps on swap execution facilities and to promote pre-trade price transparency in the swaps market"); CEA section 5(d)(9)(A), as amended by section 735(b) of the Dodd-Frank Act, 7 U.S.C. 7(d)(9) (stating under a DCM core principle

details the analysis and justifications behind an available-to-trade determination, the part 40 procedures provide the Commission with a well-established protocol for reviewing whether swaps should be subject to the trade execution requirement. The procedures set forth in the final rule provide the building blocks for the development of a robust and liquid centralized trading market, consisting of a diverse array of offered or listed swaps, thus inviting market participation. Competition between SEFs and DCMs is expected to increase the number of swaps available for trading on SEFs and DCMs, thereby encouraging innovation and inviting broader market participation. Growth in swaps trading on SEFs and DCMs will benefit market participants by increasing price transparency and facilitating price discovery.

Consideration of Alternatives

Several commenters recommended that swaps subject to the clearing requirement should be subject to the trade execution requirement without an additional available-to-trade determination. Some of these commenters stated that the CEA does not specify a formal process with determination factors.²⁴⁵ Other commenters asserted that the clearing determination considers a swap's trading liquidity and therefore already addresses whether the swap should be subject to mandatory trade execution.²⁴⁶ Several commenters stated that requiring trading facilities to consider the enumerated factors in an available-to-trade determination would be "inefficient and burdensome" and waste limited regulatory resources.²⁴⁷ MarketAxess asserted that allowing a SEF or DCM to (1) recognize that a swap is available to trade based on the clearing determination and (2) notify the Commission that it is listing the swap, thereby making the swap subject to

that "the board of trade shall provide a competitive, open and efficient market and mechanism for executing transactions that protects the price discovery process of trading in the centralized market of the board of trade".

²⁴⁵ MarketAxess Comment Letter at 3; WMBAA Comment Letter at 3; AFR Comment Letter at 2–3; ODEX Comment Letter at 1; SDMA Comment Letter at 3–4.

²⁴⁶ SDMA Comment Letter at 4–5; WMBAA Comment Letter at 3; MarketAxess Comment Letter at 5. AFR claimed that a DCO can only clear a class of swaps if a reasonable level of market liquidity is demonstrated; otherwise, the DCO could not establish the statistically expected loss levels in a liquidation of positions so as to set an initial margin level. AFR Comment Letter at 4.

²⁴⁷ SDMA Comment Letter at 5–6; WMBAA Comment Letter at 3; MarketAxess Comment Letter at 7–8.

mandatory trade execution, would not require the Commission, or a SEF or DCM to expend any resources.²⁴⁸

The Commission considered the costs and benefits of subjecting swaps to mandatory trade execution based on whether the swap must be cleared rather than through a separate available-to-trade determination. While the Commission recognizes that adopting a distinct determination process may impose some additional costs on SEFs and DCMs, it believes that these costs are warranted by the benefits that market participants will realize from the process: transparency and knowledge that only swaps that are either deemed certified or approved by the Commission as available to trade are subject to the trade execution requirement. This process insulates against SEFs or DCMs engaging in inconsistent or improper determinations to subject swaps to the trade execution requirement. As previously stated, the Commission expects the cost of making a determination to decrease over time as SEFs, DCMs, and market participants become more knowledgeable about the process and gain more experience in considering the factors to make a swap available to trade.

Several commenters proposed that the Commission, not SEFs and DCMs, should maintain the exclusive authority to determine whether a swap is available to trade.²⁴⁹ Commenters expressed concern that illiquid swaps would become subject to the trade execution requirement if SEFs and DCMs were allowed to make the determination based on their incentives to maximize the number of swaps traded on a facility or platform.²⁵⁰ CME stated a Commission-based review of whether a swap is available to trade would lead to a more “logical and efficient” use of Commission and industry resources.²⁵¹

The Commission believes that benefits are maximized under the

approach adopted, rather than an alternative under which the Commission would hold sole authority to determine whether a swap is available to trade. The part 40 approach leverages the trading expertise of SEFs and DCMs to determine whether a swap is available to trade, while the Commission’s authority to review these determinations under part 40 will help ensure that they are appropriate. The Commission expects that SEFs and DCMs will have an understanding of the markets that they list for trading and will regularly communicate with market participants about liquidity in their markets. Accordingly, the Commission believes that SEFs and DCMs are best positioned to make appropriate available-to-trade determinations. Relying on SEFs and DCMs, who would be incentivized to make swaps available to trade, to initiate the determination process in consultation with market participants will also facilitate innovation and promote swaps trading in accordance with section 5h(e) of the CEA. By allowing SEFs and DCMs to make these determinations, the Commission will be able to focus on its responsibilities in conducting market oversight.

The Commission has also considered whether a SEF or DCM should be able to submit an available-to-trade determination for a swap that it does not list or offer for trading. While SDMA responded in the affirmative,²⁵² several other commenters stated that a SEF or DCM should be required to list the swap for a period of time prior to submitting a determination.²⁵³ ISDA stated that the lack of such a requirement would otherwise incentivize SEFs and DCMs to submit as many determinations as possible, merely to promote centralized trading.²⁵⁴

The Commission has determined that a listing requirement supports the integrity of the available-to-trade determination process. Moreover, the Commission expects that a SEF or DCM will have no business incentive to submit an available-to-trade determination for a swap that it has no intention of listing for trading. While the Commission recognizes that the listing SEF or DCM will likely incur some cost to submit an available to trade determination, the Commission believes that those costs would necessarily be accompanied by a stream of benefits

once the swap is subject to the trade execution requirement. Accordingly, the Commission has adopted a listing requirement under new §§ 37.10(a)(2) and 38.12(a)(2). As discussed above, the Commission believes that a SEF or DCM will incur *de minimis* costs to list or offer a swap for trading under the part 40 procedures for listing a product for trading—the Commission estimates that it would take one compliance personnel approximately 2 hours, on average, to submit a product filing.

The Commission has also considered the costs and benefits of, and requested comment on, whether or not a SEF or DCM should (1) be allowed to submit its available-to-trade determination for a “group, category, type or class of swap”; and (2) be allowed to consider the determination factors under §§ 37.10(b) and 38.12(b) for the same swap on another SEF or DCM, or activity primarily or solely in bilateral transactions. Because each of the adopted provisions is permissive rather than compulsory in nature, neither should impose costs upon SEFs and DCMs relative to the alternative of not providing such allowances. SEFs and DCMs will internally analyze the costs and benefits before availing themselves of either provision, and forego the opportunity if not warranted by the perceived benefits. Should a SEF or DCM choose to submit a “group, category, type or class of swap,” the adopted approach would impose fewer costs than requiring a submission for each individual swap.

The Commission has identified the benefits of both provisions relative to the alternatives of not providing such allowances. First, allowing a SEF or DCM to submit a determination for a group, category, type or class of swap would promote economies of scale and streamline the process for SEFs, DCMs, and the Commission; rather than submit separate determinations for individual swaps with similar characteristics, a SEF or DCM may elect to include them in a single filing.²⁵⁵ Based on its review, however, the Commission may approve or deem only part or some of the swaps within that group, category, type or class as available to trade. Second, allowing a SEF or DCM to consider activity in the same swap that is listed on another trading platform or in the bilateral market would yield information about how that swap trades in the overall market and better inform market participants and the Commission

²⁴⁸ MarketAxess Comment Letter at 7–8.

²⁴⁹ Markit Comment Letter at 5–6; Vanguard Comment Letter at 5; Geneva Energy Markets Comment Letter at 2; JPMorgan Comment Letter at 1; CME Comment Letter at 4–5; FHLB Comment Letter at 3; FSR Comment Letter at 4; FXall Comment Letter at 5–6; Morgan Stanley Comment Letter at 5–6; CEWG Comment Letter at 6; ISDA Comment Letter at 3–4, 6; Tradeweb Comment Letter at 4–5.

²⁵⁰ Bloomberg Comment Letter at 2; Vanguard Comment Letter at 5; Geneva Energy Markets Comment Letter at 2; JPMorgan Comment Letter at 1–2; CME Comment Letter at 4–5; FHLB Comment Letter at 3; ISDA Comment Letter at 3–4; Markit Comment Letter at 5; CEWG Comment Letter at 2; Morgan Stanley Comment Letter at 5–6; AIMA Comment Letter at 2; FXall Comment Letter at 6–7; Tradeweb Comment Letter at 2–3; FSR Comment Letter at 2.

²⁵¹ CME Comment Letter at 4–5.

²⁵² SDMA Comment Letter at 9.

²⁵³ Eaton Vance Management Comment Letter at 3; SIFMA AMG Comment Letter at 10; UBS Comment Letter at 2; Morgan Stanley Comment Letter at 6 n.6; ISDA Comment Letter at 7; Tradeweb Comment Letter at 5.

²⁵⁴ ISDA Comment Letter at 6.

²⁵⁵ The Commission notes that it also considers swaps as a group, category, type or class in other instances, such as for clearing determinations. See *supra* note 79.

about how the swap may trade in a centralized environment.

A number of commenters recommended that the Commission pursue an alternative approach that would establish objective threshold criteria for the determination factors.²⁵⁶ For example, Markit and FSR commented that without objective thresholds, SEFs and DCMs would not be able to determine that a swap is available to trade with regards to its liquidity.²⁵⁷ ICI and Eaton Vance Management stated that buy-side market participants would indirectly incur higher trading costs in the event that a swap with limited liquidity were to trade on a SEF or DCM.²⁵⁸

The Commission does not deem the risk of limited liquidity swaps becoming available to trade as significant relative to the benefits of the final rule's flexible approach. As such, the Commission does not believe that establishing objective threshold criteria would provide a sufficient benefit to warrant imposing additional administrative burdens—the Commission would first be required to determine which swaps (among a wide variety) may potentially be available to trade, and establish and update criteria for those swaps. Market participants would then have to fulfill the burden of processing and analyzing trade data to demonstrate that those criteria are met for swaps that they submit. The rule, as adopted, allows the Commission to consider data and other objective factors submitted by SEFs and DCMs, or the comments from other market participants during the determination process. The Commission will review and assess each available-to-trade submission to ensure that it is consistent with the CEA and the Commission's regulations. Further, the Commission believes that the adopted approach promotes greater swaps trading on SEFs and DCMs, in accordance with the statutory objectives of the CEA, by providing the flexibility to make swaps with different trading characteristics available to trade, rather than imposing rigid threshold criteria.

Several commenters recommended that SEFs and DCMs must consider and demonstrate that a swap is available to

trade based on more than one factor.²⁵⁹ Many of these commenters stated that SEFs and DCMs should be required to consider all of the enumerated factors;²⁶⁰ Vanguard and SIFMA AMG, for example, supported this approach because they believed that all of the factors are relevant in determining if a swap is available to trade.²⁶¹ Bloomberg commented that the factors are all important indicators of an actual trading market and recommended mandatory consideration of all of them, given the implications of making a swap available to trade and potential conflicts of interest.²⁶² FHLB commented that a determination should be based on multiple factors.²⁶³

The Commission has considered the range of alternatives suggested by some commenters with respect to more specific or mandatory consideration of the determination factors, but believes that requiring consideration of every factor or a specific set of factors would require additional effort on the part of the SEFs or DCMs without significant added benefit.²⁶⁴ In the event that a SEF's or DCM's submission does not adequately support an available-to-trade determination, the Commission, under part 40, may request additional information in order to complete its review²⁶⁵ or extend the review period. The adopted approach achieves the goal of making swaps available for centralized trading, while allowing SEFs and DCMs the flexibility to subject swaps with different trading characteristics to the trade execution requirement.

Several commenters supported incorporating a process for determining whether a swap is no longer available to trade;²⁶⁶ some recommended using the same factors as those used to determine whether a swap is available to trade,

albeit with objective thresholds.²⁶⁷ Commenters were split on the issue of applicability; some expressed that a determination that a swap is no longer available to trade should apply only to individual SEFs or DCMs,²⁶⁸ while others recommended that such a determination should apply on a marketwide basis, consistent with how the trade execution requirement is applied.²⁶⁹

The Commission believes that inclusion at this time of a separate process for determining that a swap is no longer available to trade is unnecessary and unwarranted by the limited, if any, benefit that would be afforded. In this circumstance, to impose a requirement for the last SEF or DCM that ceases to list a swap for trading to submit an official determination that the swap is no longer available to trade would be unnecessary.²⁷⁰

The Commission proposed, and several commenters supported, a requirement that each SEF or DCM (1) conduct an annual review and assessment of each swap it has made available to trade to determine whether or not each of these swaps should continue to be available to trade; and (2) submit an electronic copy of the review and assessment, including any supporting information or data, to the Commission no later than 30 days after its fiscal year end. The Commission estimated that it would cost each DCM an additional \$1,730 per review to comply with the proposed requirement.²⁷¹ Some commenters recommended more frequent reviews in order to identify illiquid swaps on a timelier basis.²⁷²

²⁵⁶ MFA Comment Letter at 4; ICI Comment Letter at 7–8; FXall Comment Letter at 7–8.

²⁵⁷ Spring Trading Comment Letter at 7–8 (Jan. 12, 2012); SDMA Comment Letter at 10.

²⁵⁸ MFA Comment Letter at 4–5; ICI Comment Letter at 8.

²⁵⁹ The Commission acknowledges the concern that the de-listing of swaps by one or more SEFs or DCMs may affect the liquidity in the market for such swaps, or could be a reflection of reduced liquidity in such markets, and that such reduced liquidity could affect the costs of executing such swaps on a SEF or DCM. In such circumstances where swaps are de-listed by SEFs or DCMs, however, the Commission may review the available-to-trade status of such a swap under part 40 of the Commission's regulations; additionally, section 8a(7) of the CEA affords market participants an avenue to request the Commission to designate a swap as no longer available to trade. *See supra* note 140.

²⁶⁰ 76 FR 77735.

²⁶¹ Morgan Stanley Comment Letter at 8; MFA Comment Letter at 4–5; ISDA Comment Letter at 8; AIMA Comment Letter at 2–3; Eaton Vance Management Comment Letter at 4; ICI Comment Letter at 7; Markit Comment Letter at 4; Vanguard Comment Letter at 6; JPMorgan Comment Letter at

²⁵⁶ Markit Comment Letter at 3; Spring Trading Comment Letter at 4; AIMA Comment Letter at 4; Bloomberg Comment Letter at 4; FXall Comment Letter at 6; Vanguard Comment Letter at 5; SIFMA AMG Comment Letter at 5; JPMorgan Comment Letter at 1; ISDA Comment Letter at 7; Eaton Vance Management Comment Letter at 3; ICI Comment Letter at 6; Morgan Stanley Comment Letter at 6; FSR Comment Letter at 6–7.

²⁵⁷ Markit Comment Letter at 3; FSR Comment Letter at 3, 6–7.

²⁵⁸ ICI Comment Letter at 6; Eaton Vance Management Comment Letter at 2–3.

²⁵⁹ FHLB Comment Letter at 3; Markit Comment Letter at 3; ICI Comment Letter at 5; CEWG Comment Letter at 3.

²⁶⁰ Markit Comment Letter at 3; ISDA Comment Letter at 7; Morgan Stanley Comment Letter at 4; FSR Comment Letter at 3; ICI Comment Letter at 5; SIFMA AMG Comment Letter at 7.

²⁶¹ Vanguard Comment Letter at 4; SIFMA AMG Comment Letter at 5.

²⁶² Bloomberg Comment Letter at 4.

²⁶³ FHLB Comment Letter at 4.

²⁶⁴ The Commission notes that a SEF or DCM, if it chooses, may consider more than one factor in determining if a swap is available to trade.

²⁶⁵ Under §§ 40.5(c)(2)(ii) and 40.6(a)(8), the Commission may request that a registered entity to supplement the submission with additional information.

²⁶⁶ MFA Comment Letter at 4; FXall Comment Letter at 7–8; ICI Comment Letter at 7; SIFMA AMG Comment Letter at 11–12; Spring Trading Comment Letter at 7 (Jan. 12, 2012); ISDA Comment Letter at 8–9; JPMorgan Comment Letter at 2.

Other commenters, however, opposed the requirement. MarketAxess commented that conducting annual assessments would require SEFs and DCMs to allocate substantial resources.²⁷³ WMBAA stated that the proposed requirement is arbitrary, time-consuming, and offered insufficient regulatory value, and that the costs and burdens of an annual review would be higher than the Commission's projections.²⁷⁴ Sunguard Kiodesx asserted that periodic reviews would cause swaps' statuses to fluctuate, therefore negating the benefit of an initial determination.²⁷⁵ WMBAA and SDMA alternatively recommended that a SEF or DCM annually renew its self-certification based on the clearing determination review.²⁷⁶

In line with its reasoning for not adopting a separate process for determining that a swap is no longer available to trade, the Commission is also not adopting an annual review and assessment requirement. A swap will no longer be available to trade when all relevant SEFs and DCMs have de-listed the swap; in the ordinary course of business, the Commission believes that a SEF or DCM will already assess whether it should continue to list or offer a swap for trading. Such an assessment would likely consider similar factors, such as trading volume, to those used to determine that a swap is available to trade. Therefore, the Commission believes that imposing a separate review and assessment requirement would necessitate duplicative and costly effort with limited, if any, additional benefit. In response to commenters who support more frequent reviews to identify illiquid swaps that should no longer be available to trade, the Commission notes that market participants themselves may request that a SEF or DCM review and assess an available-to-trade determination. The Commission may also request relevant information from SEFs and DCMs to conduct a review and assessment.²⁷⁷

b. Applicability

Sections 37.10(c) and 38.12(c) of the final rule require that once a swap is deemed to be available to trade, then all other SEFs and DCMs listing or offering the same swap must do so in accordance with the trade execution requirement

under section 2(h)(8) of the CEA.²⁷⁸ The Commission did not identify alternatives to this requirement. Further, the Commission also requested, but did not receive, comments on alternatives to the proposed requirement.

Costs

The Commission anticipates that final §§ 37.10(c) and 38.12(c) will impose some minimal costs for SEFs and DCMs related to monitoring and identifying swaps to discern whether a swap is available to trade on another SEF or DCM, and therefore would be subject to the trade execution requirement. The Commission has almost entirely eliminated these costs by assuming the responsibility for maintaining a public record of all of the swaps that are subject to the trade execution requirement in an accessible, central location on its Web site.

The Commission solicited comments on the costs associated with §§ 37.10(c) and 38.10(c) and received one comment. WMBAA stated that the ongoing surveillance necessary to determine which swaps have been made available to trade would impose excessive costs on SEFs and DCMs.²⁷⁹ WMBAA, however, did not provide an estimate of such costs or further substantiate its claim. Therefore, the Commission does not deem WMBAA's comment sufficient to alter its belief that these costs will be minimal, given that the Commission will maintain on its Web site a centralized list of all swaps that are available to trade.

Benefits

Sections 37.10(c) and 38.12(c) promote trading on SEFs and DCMs, consistent with the trade execution requirement under section 2(h)(8) of the CEA. Specifically, swaps traded on a SEF will be executed as Required Transactions under § 37.9 of the Commission's regulations, which means that they will be executed via an Order Book or RFQ. Swaps that are subject to the trade execution requirement and traded on a DCM must be executed pursuant to subpart J of part 38 of the Commission's regulations, which implements revised DCM Core Principle 9, as amended by section 735(b) of the Dodd-Frank Act. Core Principle 9 requires DCMs to "provide a competitive, open, and efficient market and mechanism for executing transactions that protects the price discovery process of trading in the centralized market of the board of trade." Accordingly, market participants

in these swaps will benefit from the pre-trade transparency and price discovery associated with trading on DCMs and SEFs as well as the application of other DCM and SEF core principles. The Commission also anticipates that greater competition among SEFs and DCMs will lower bid-ask spreads and transaction costs for some market participants.²⁸⁰

c. Consideration of Section 15(a) Factors—Available-to-Trade Rule

Protection of Market Participants and the Public

In crafting the final rule to provide a method for determining that a swap is subject to the trade execution requirement under section 2(h)(8) of the CEA, the Commission has endeavored to create a regime that foremost will protect market participants and the public. Under the final rule, a SEF or DCM must consider certain factors specified by the Commission under § 37.10(b) or § 38.12(b), respectively, in determining that a swap is available to trade. A SEF or DCM must also submit such determinations to the Commission, either for approval or under self-certification procedures, pursuant to part 40 of the Commission's regulations. Part 40 also requires SEFs and DCMs to post a notice and a copy of rule submissions on their Web site concurrent with the filing of the submissions with the Commission. The Commission, consistent with current practice, will also post SEF and DCM rule submission filings on its Web site. Therefore, under the final rule, SEFs, DCMs, and market participants will have full information about the factors that a SEF or DCM considered in determining that a swap is available to trade, the procedure for a SEF or DCM to submit a swap as available to trade, the swaps that are presently available to trade, and the progress of swaps under review. Accordingly, the final rule promotes the protection of market participants by ensuring transparency in the available-to-trade process.

The final rule will also promote the protection of market participants and the public by providing for Commission review and encouraging public comment in appropriate circumstances. Under the final rule, the Commission will review the SEF's or DCM's available-to-trade determination. To facilitate this review, part 40 requires

2; SIFMA AMG Comment Letter at 11; FSR Comment Letter at 3–4.

²⁷³ MarketAxess Comment Letter at 9.

²⁷⁴ WMBAA Comment Letter at 5.

²⁷⁵ Sunguard Kiodesx Comment Letter at 2.

²⁷⁶ SDMA Comment Letter at 10; WMBAA Comment Letter at 4.

²⁷⁷ See *supra* note 155 and accompanying text.

²⁷⁸ See *supra* note 14.

²⁷⁹ WMBAA Comment Letter at 5.

²⁸⁰ S. Rep. No. 111–176, at 34 (2010) (quoting International Risk Analytics co-founder Christopher Whalen, "[t]he absence of an exchange trading mandate provides 'supra-normal returns paid to the dealers in the closed OTC derivatives market [and] are effectively a tax on other market participants, especially investors who trade on open, public exchanges'").

SEFs and DCMs to provide the Commission with, and to post on their Web sites, a brief explanation of any substantive opposing views in rule filings, and allow for a public comment period when warranted.

The final rule also will promote the protection of market participants and the public by ensuring that transactions in swaps that are available to trade and subject to the trade execution requirement are executed on regulated SEFs and DCMs in accordance with section 2(h)(8) of the CEA, rather than the bilateral OTC market. Therefore, these swaps will be transacted with the pre-trade and post-trade transparency that swap execution on SEFs and DCMs provide, reducing search costs relative to the bilateral OTC market, and potentially lowering bid-ask spreads.

At the same time, the final rule will further promote the protection of market participants and the public by providing for a Commission review of the available-to-trade process. SEFs and DCMs will have considerable discretion on the application and consideration of the factors to make swaps available to trade, which may vary depending on the nature of the relevant swap market. This approach will enable SEFs and DCMs to utilize their expertise in the markets in which they list swaps for trading to determine which swaps should be available to trade, subject to Commission review of these determinations to ensure that they are consistent with the CEA and the Commission's regulations, and therefore for market participants and the public.

Efficiency, Competitiveness, and Financial Integrity of the Markets

The final rule promotes the trading of swaps on SEFs and DCMs by establishing a process that specifies when a swap is available to trade; once a swap is deemed available to trade, that swap must be traded on a SEF or DCM if it is subject to the clearing requirement. Accordingly, the adopted process will promote market efficiency and competitiveness by (1) informing market participants of when the trade execution requirement applies and (2) prescribing the methods by which all market participants may execute a particular swap, depending on whether the trade execution requirement applies.

The final rule further promotes market efficiency by tasking SEFs and DCMs with the primary responsibility and discretion to consider any one or several factors in determining whether a swap is available to trade. This approach reflects the Commission's view that SEFs and DCMs have (or will have) the expertise and ability to form

reasonable conclusions about which swaps should be subject to the trade execution requirement and which swaps should not be traded pursuant to mandatory trade execution. By assigning primary responsibility to SEFs and DCMs in this manner—subject to Commission review to assure consistency with the CEA and the Commission's regulations—the Commission believes that the final rule further promotes both market efficiency and integrity. Further, by assuming the responsibility for maintaining an up-to-date list of swaps made available to trade, the Commission is also mitigating the search costs for market participants to identify whether a swap is available to trade on SEF or a DCM, thereby promoting the overall efficiency of the swaps markets for SEFs, DCMs and market participants.

Price Discovery

As stated above, the final regulations are expected to promote the trading of swaps on SEFs and DCMs. Swaps that are subject to the clearing requirement must be executed on a SEF or DCM, in a manner consistent with the trade execution requirement, if made available to trade on a SEF or DCM. By providing the procedural mechanism to establish when a swap is available to trade—an issue on which the statute is silent—the rule operationalizes the trade execution requirement. Accordingly, the rule reinforces price discovery promoted through mandatory trade execution. For example, swaps traded on DCMs that are made available to trade would be subject to DCM Core Principle 9, which requires DCMs to “provide a competitive, open, and efficient market and mechanism for executing transactions that protects the price discovery process of trading in the centralized market of the board of trade.”²⁸¹ Under § 37.9 of the Commission's regulations, SEFs will be required to provide an order book or an RFQ method of trade execution that offers pre-trade price transparency for swaps listed or offered for trading that are available to trade. This pre-trade transparency promotes price discovery for swaps.

Sound Risk Management Practices

The enhanced pre-trade and post-trade transparency and price discovery in contracts that have been made available to trade, and thus subject to the trade execution requirement, under

the procedures set out in this rule will promote sound risk management practices by ensuring that market participants and clearing organizations are able to base their risk management decisions on publicly available prices discovered on the competitive and efficient markets offered by SEFs and DCMs. As trading on SEFs and DCMs is not relationship-based, as is typical of trading in the OTC market, market participants will have access to a broader range of risk management options in the form of swaps that are available to trade.

Other Public Interest Considerations

The final regulations are not expected to affect public interest considerations other than those identified above.

2. Trade Execution Compliance Schedule

Final §§ 37.12 and 38.11 establishes a compliance schedule following a determination that a swap is subject to the trade execution requirement under section 2(h)(8) of the CEA. Market participants are required to comply with the trade execution requirement upon the later of (1) the applicable deadline established under the compliance and implementation schedule for the clearing requirement for a swap under section 2(h)(1) of the CEA;²⁸² or (2) 30 days after the swap is first made available to trade on either a SEF or DCM. Absent this final rule, market participants would have been required to comply with the trade execution requirement immediately after a swap is determined to be available to trade and required to be cleared. To provide further flexibility to registrants and market participants, the Commission is exercising its discretion to stagger implementation of the trade execution requirement.

For reasons discussed below, the cost and benefits associated with requiring mandatory trade execution immediately upon making a swap available to trade and requiring it to be cleared, or after some longer versus shorter period of delay, are not susceptible to meaningful quantification. Costs and benefits associated with trade execution are independent of costs and benefits of implementing mandatory trade execution itself and pertain exclusively to the pace of implementation. The Commission is not aware of any analog,

²⁸¹ 7 U.S.C. 7(d)(9); subpart J of part 38 of the Commission's regulations, which implements revised DCM Core Principle 9, as amended by section 735(b) of the Dodd-Frank Act.

²⁸² The Commission has adopted the final compliance and implementation schedule for the clearing requirement under section 50.25(b). Swap Transaction Compliance and Implementation Schedule: Clearing Requirement Under Section 2(h) of the CEA, 77 FR 44441 (July 20, 2012). See *supra* note 158.

to either an immediate or delayed requirement, to comply with the trade execution requirement that would produce data useful in estimating the difference in costs and benefits between the two approaches. Notwithstanding these limitations, the Commission identifies and considers the costs and benefits of this rule in qualitative terms.

Costs

The Commission solicited comments regarding costs associated with §§ 37.12 and 38.11, including the costs and benefits of any alternative compliance schedule proposed. Although the Commission requested quantification of those costs discussed, commenters did not provide specific estimates in dollar terms.

The Commission recognizes that the compliance schedule entails certain initial costs to the market and public—in particular, a delay in obtaining the benefits of pre-trade price transparency and price discovery. The Commission believes, however, that such costs are warranted because incurring them at the outset facilitates the ability to more fully realize the intended pre-trade price transparency and price discovery benefits upon the compliance date and thereafter. As discussed below in connection with the benefits of this rule, this compliance schedule provides market participants with sufficient time to transition trading from the OTC markets to SEFs and DCMs. Absent this window for transition, market participants would likely encounter an impaired ability to manage their risks and adequately hedge their positions. Further, the inability of market participants to execute swaps on SEFs and DCMs as they engage in necessary transaction activities would likely reduce liquidity in certain swaps and increase transaction costs for other market participants.

In response to requests for comment on the compliance schedule, some commenters stated that 30 days would be insufficient for market participants to comply with the trade execution requirement.²⁸³ For example, ISDA and AIMA expressed concern that such a compressed schedule would preclude market participants from hedging their exposures,²⁸⁴ while CME commented

that DCOs, DCMs, and SEFs would not be able to establish technological linkages within 30 days.²⁸⁵ MFA stated that the Commission's compliance schedule could require simultaneous compliance with the trade execution requirement and the clearing requirement, which would require devoting resources to both efforts and create a significant burden.²⁸⁶

Given that the final rule does not impose a fixed 30-day requirement, the Commission disagrees that the schedule is overly costly or onerous. In response to commenters concerned that 30 days would be insufficient to achieve compliance, the Commission notes that the implementation period for the trade execution requirement may vary depending on the timing of the available-to-trade determination and the clearing determination. In some, if not many, instances, market participants will have more than 30 days after a swap is made available to trade to comply. For example, depending upon when a swap is deemed as available to trade and the amount of time a particular market participant is afforded to comply with the clearing requirement under the Commission's final schedule (90 days, 180 days, or 270 days), the 30th day after a swap is deemed as available to trade pursuant to the part 40 procedures may occur prior to the date in which the market participant must comply with the clearing requirement. Further, part 40 review procedures will provide market participants advance awareness that a swap may potentially be deemed as available to trade, during which time market participants logically should undertake initial transition planning in the event that the swap is ultimately deemed as available to trade.²⁸⁷ Moreover, certain prerequisite activities, such as establishing SEF or DCM connectivity, will be carried out infrequently or on a one-time basis, such that a longer implementation period would not be necessary when preparing to comply with the trade execution requirement for future swap trading.²⁸⁸

²⁸⁵ CME Comment Letter at 2 (Nov. 4, 2011).

²⁸⁶ MFA Comment Letter at 10–11.

²⁸⁷ Similarly, where a swap first becomes subject to the clearing requirement before being made available to trade, the clearing determination would alert market participants to the fact that specific classes of swaps may become subject to the trade execution requirement.

²⁸⁸ Under the §§ 37.10(a)(2) and 38.12(a)(2) of the final rule, a SEF or DCM that submits a swap as available to trade must certify that it is listing it for trading on its own trading system or platform. This requirement will ensure that a minimum level of connectivity is present between a SEF or DCM and market participants prior to determining whether it is available to trade.

Benefits

The compliance schedule set forth in final §§ 37.12 and 38.11 will allow market participants to comply with the trade execution requirement in an organized and timely manner, while mitigating potential disruptions to trading during the transition. The schedule will afford market participants the opportunity to resolve logistical issues prior to trading swaps on a SEF or DCM,²⁸⁹ such as establishing connectivity to a registered trading facility or platform; notifying customers and completing or amending any applicable legal documentation; and revising internal standards and procedures. The additional time will facilitate a greater number of potential swap counterparties who are prepared to participate in centralized trading, thereby increasing competition, pre-trade price transparency, and price discovery. Increasing the number of potential market participants will also promote market liquidity and reduce the costs of using swaps to manage risk.

Consideration of Alternatives

Tradeweb commented that 30 days may not be sufficient to achieve compliance for a class of swaps that is being made available to trade for the first time, and recommended that the Commission set an appropriate implementation period on a case-by-case basis, with input from SEFs, DCMs, and market participants.²⁹⁰

The Commission, however, believes that a case-by-case approach is neither feasible nor necessary to establish an appropriate implementation period for different classes of swaps. The data needed to precisely determine the optimal time period—accommodating a reasonable transition while not unduly delaying the benefits of trade execution—does not yet exist; such data would be obtained from the transition process itself. Further, the adopted approach will allow the Commission to accommodate a large number of submissions for different classes of swaps through the transition process. Accordingly, the Commission believes that it is more appropriate to opt for an approach that is flexible and provides market participants with notice and

²⁸⁹ The Commission believes that DCMs will be prepared to comply with the trade execution requirement to a certain extent because they may have the infrastructure in place to facilitate the trading of swaps. DCMs may require fewer technology, legal arrangements, and changes to operational patterns. As the Commission noted in the proposed rule, however, they may still have to update their internal policies and procedures. 76 FR 58190.

²⁹⁰ Tradeweb Comment Letter at 4.

²⁸³ JPMorgan Comment Letter at 3–4; UBS Comment Letter at 2; ICI Comment Letter at 5 (Nov. 4, 2011); CME Comment Letter at 2 (Nov. 4, 2011); Westpac Comment Letter at 3 (Nov. 4, 2011); Regional Banks Comment Letter at 7 (Nov. 4, 2011); FHLBanks Comment Letter at 5 (Nov. 4, 2011); ICI Comment Letter at 9; ISDA Comment Letter at 11; AIMA Comment Letter at 2–3; ACLI Comment Letter at 2.

²⁸⁴ ISDA Comment Letter at 11; AIMA Comment Letter at 2–3.

certainty, rather than one that attempts to assign a definite time period for swaps on a case-by-case basis.

The Commission views the ideal implementation period for a class of swaps to depend on, among other factors, how the class of swaps is defined, and the number and complexity of those swaps within that class. This amount of time also depends on the nature, experience, and resources of the market participant to whom the requirement applies. The Commission's adopted approach accounts for the latter consideration by incorporating the implementation periods for the clearing requirement—90, 180, and 270 days—that are based on the type of market participant.²⁹¹ Where a swap first becomes subject to the clearing requirement before being made available to trade, the clearing determination would alert market participants to the fact that specific classes of swaps may become subject to the trade execution requirement. Therefore, the rule as adopted addresses Tradeweb's concern by providing sufficient flexibility to accommodate different classes of swaps, without the added complexity of instituting a compliance schedule that applies on a case-by-case basis. In contrast, a case-by-case approach would likely increase the administrative burden by requiring an additional review and determination process, thereby further delaying the benefits of the trade execution requirement.

Several commenters recommended a longer implementation period, *i.e.*, more than 30 days after a swap is made available to trade, ranging from 90 to 180 days after a swap is made available to trade.²⁹² Some commenters also recommended establishing the implementation period after the swap becomes subject to the trade execution requirement.²⁹³ Other commenters recommended that the trade execution requirement should not apply until full implementation of the clearing requirement.²⁹⁴ Commenters generally stated that lengthening the implementation period would provide

²⁹¹ See *supra* note 158.

²⁹² FXall Comment Letter at 7; ICI Comment Letter at 9; CME Comment Letter at 6–7; Vanguard Comment Letter at 6; Bloomberg Comment Letter at 5; Westpac Comment Letter at 3 (Nov. 4, 2011); Chatham Comment Letter at 4; FSR Comment Letter at 4.

²⁹³ SIFMA AMG Comment Letter at 9; Eaton Vance Management Comment Letter at 3; ISDA Comment Letter at 11; Westpac Comment Letter at 3 (Nov. 4, 2011); FHLBanks Comment Letter at 5 (Nov. 4, 2011).

²⁹⁴ AIMA Comment Letter at 3 (Nov. 3, 2011); MarkitSERV Comment Letter at 5 (Nov. 4, 2011); Citadel Comment Letter at 5 (Nov. 4, 2011); MFA Comment Letter at 7 (Nov. 4, 2011); Vanguard Comment Letter at 5 (Nov. 4, 2011).

market participants with adequate time to establish new infrastructure, standards, and procedures;²⁹⁵ develop adequate connectivity²⁹⁶ and obtain trading access;²⁹⁷ and complete documentation and agreements.²⁹⁸ Tradeweb, however, stated that 30 days would be adequate to comply with the trade execution requirement for individual swaps.²⁹⁹

The Commission believes that the adopted approach appropriately balances the benefits of attaining mandatory trade execution as expeditiously as possible with the need for sufficient preparation time for compliance. As noted above, 30 days represents a minimum duration of time provided for compliance. Depending on when a swap is submitted and deemed available to trade, market participants may also utilize the time afforded under the clearing implementation schedule to complete the requisite activities necessary to trade on a SEF or DCM. The Commission also notes that the final rule requires that a SEF or DCM submitting a swap as available to trade must already list it for trading. This requirement will ensure that a minimum level of connectivity is present between a SEF or DCM and market participants prior to determining whether it is available to trade.

Consideration of Section 15(a) Factors—Trade Execution Compliance Schedule Protection of Market Participants and the Public

An extended implementation period will help facilitate an orderly transition of swaps trading to a centralized market structure. The inability of SEFs and DCMs to comply with the trade execution requirement by any particular designated date risks excluding market participants from transacting swaps that are subject to mandatory trade execution; this would reduce overall liquidity and increase the costs of

²⁹⁵ JPMorgan Comment Letter at 3–4; ISDA Comment Letter at 11; FHLBanks Comment Letter at 5 (Nov. 4, 2011); Westpac Comment Letter at 2–3 (Nov. 4, 2011).

²⁹⁶ FSR Comment Letter at 4; Bloomberg Comment Letter at 5; ICI Comment Letter at 8; ISDA Comment Letter at 11; Eaton Vance Management Comment Letter at 3; Chatham Comment Letter at 4; SIFMA AMG Comment Letter at 9; CME Comment Letter at 6–7; Westpac Comment Letter at 3 (Nov. 21, 2011); ICI Comment Letter at 5 (Nov. 4, 2011).

²⁹⁷ MFA Comment Letter at 4; Vanguard Comment Letter at 6; SIFMA AMG Comment Letter at 9; AIMA Comment Letter at 3; CME Comment Letter at 6–7.

²⁹⁸ SIFMA AMG Comment Letter at 9; ICI Comment Letter at 9; AIMA Comment Letter at 3; CME Comment Letter at 7; ISDA Comment Letter at 11; Westpac Comment Letter at 3; FIA/ISDA/SIFMA Comment Letter at 8 (Nov. 4, 2011).

²⁹⁹ Tradeweb Comment Letter at 4 (Nov. 4, 2011).

executing those swaps for other market participants. Thus, absent a reasonable implementation schedule, market participants could potentially be exposed to higher market risk due to increased costs of hedging their positions or the inability to hedge their positions. The implementation period allows for timely compliance and protects market participants by mitigating the potential disruptions to the transition to trading on a SEF or DCM.

Efficiency, Competitiveness, and Financial Integrity of the Markets

The implementation period promotes efficiency in the markets by providing additional time for market participants to identify and resolve technical or logistical issues related to trading on a SEF or DCM in a manner consistent with the trade execution requirement. By enabling a broader group of market participants to comply with the trade execution requirement in a timely manner, the implementation period will facilitate competition in the centralized market, which in turn will promote greater pre-trade price transparency and price integrity in the market.

Price Discovery

By providing adequate time to prepare for such trading, the implementation period will facilitate an orderly transition to centralized trading and mitigate instances in which some market participants would not be prepared to enter the market by the given compliance date. In doing so, the Commission is affording the opportunity for the maximum number of potential swap counterparties to participate, thereby enhancing the price discovery process.

Sound Risk Management Practices

The implementation period reflected in the final rule should ensure that market participants have adequate time to comply with the trade execution requirement and will be prepared to transact swaps on a SEF or DCM. As a result, market participants should be able to maintain hedges that have been executed through swap transactions, thereby mitigating market and counterparty risks. Moreover, a compliance schedule that facilitates SEF and DCM swap execution by the greatest number of potential market participants, as does the final rule, indirectly promotes market liquidity, thereby reducing the overall costs of utilizing swaps for risk management purposes.

Other Public Interest Considerations

The final regulations are not expected to affect public interest considerations other than those identified above.

V. List of Commenters

1. Alternative Investment Management Association (“AIMA”)
2. Americans for Financial Reform (“AFR”)
3. American Council of Life Insurers (“ACLI”)
4. Asset Management Group, Securities Industry and Financial Markets Association (“SIFMA AMG”)
5. Bloomberg
6. CBOE Futures Exchange (“CBOE”)
7. Chatham Financial (“Chatham”)
8. Chris Barnard
9. Citadel
10. CME Group (“CME”)
11. Commercial Energy Working Group (“CEWG”)
12. Eaton Vance Management
13. Federal Home Loan Banks (“FHLB”)
14. Fifth Third Bank, PNC Bank, Regions Bank, U.S. Bank National Association (“Regional Banks”)
15. Financial Services Roundtable (“FSR”)
16. Futures Industry Association (“FIA”)
17. FX Alliance (“FXall”)
18. Geneva Energy Markets, LLC
19. ICAP
20. International Swaps and Derivatives Association (“ISDA”)
21. Investment Company Institute (“ICI”)
22. Javelin Capital Markets
23. JP Morgan
24. Managed Funds Association (“MFA”)
25. MarketAxess Holdings, Inc. (“MarketAxess”)
26. Markit
27. MarkitSERV
28. Morgan Stanley
29. ODEX Group, Inc. (“ODEX”)
30. Spring Trading, LLC (“Spring Trading”)
31. Swaps & Derivatives Market Association (“SDMA”)
32. Sunguard Kiodex LLC (“Sunguard Kiodex”)
33. Tradeweb Markets LLC (“Tradeweb”)
34. UBS Securities LLC (“UBS”)
35. Vanguard
36. Westpac Banking Corporation (“Westpac”)
37. Wholesale Markets Brokers’ Association, Americas (“WMBAA”)

List of Subjects*17 CFR Part 37*

Registered entities, Reporting and recordkeeping requirements, Swap execution facilities, Swaps.

17 CFR Part 38

Designated contract markets, Registered entities, Reporting and recordkeeping requirements, Swaps.

For the reasons stated in the preamble, the Commission amends 17 CFR part 37 and part 38 as follows:

PART 37—SWAP EXECUTION FACILITIES

■ 1. The authority citation for part 37 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 5, 6, 6c, 7, 7a-2, 7b-3 and 12a, as amended by Titles VII and VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).

■ 2. Subpart A, as amended elsewhere in this issue of the **Federal Register**, is further amended by adding §§ 37.10 through 37.12 to read as follows:

Subpart A—General Provisions

Sec.

- | | | | | |
|-------|--|---|---|---|
| * | * | * | * | * |
| 37.10 | Process for a swap execution facility to make a swap available to trade. | | | |
| 37.11 | [Reserved]. | | | |
| 37.12 | Trade execution compliance schedule. | | | |

§ 37.10 Process for a swap execution facility to make a swap available to trade.

(a)(1) *Required submission.* A swap execution facility that makes a swap available to trade in accordance with paragraph (b) of this section, shall submit to the Commission its determination with respect to such swap as a rule, as that term is defined by § 40.1 of this chapter, pursuant to the procedures under part 40 of this chapter.

(2) *Listing requirement.* A swap execution facility that makes a swap available to trade must demonstrate that it lists or offers that swap for trading on its trading system or platform.

(b) *Factors to consider.* To make a swap available to trade, for purposes of section 2(h)(8) of the Act, a swap execution facility shall consider, as appropriate, the following factors with respect to such swap:

- (1) Whether there are ready and willing buyers and sellers;
- (2) The frequency or size of transactions;
- (3) The trading volume;
- (4) The number and types of market participants;
- (5) The bid/ask spread; or
- (6) The usual number of resting firm or indicative bids and offers.

(c) *Applicability.* Upon a determination that a swap is available to trade on any swap execution facility or

designated contract market pursuant to part 40 of this chapter, all other swap execution facilities and designated contract markets shall comply with the requirements of section 2(h)(8)(A) of the Act in listing or offering such swap for trading.

(d) *Removal—(1) Determination.* The Commission may issue a determination that a swap is no longer available to trade upon determining that no swap execution facility or designated contract market lists such swap for trading.

(2) *Delegation of Authority.* (i) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, the authority to issue a determination that a swap is no longer available to trade.

(ii) The Director may submit to the Commission for its consideration any matter that has been delegated in this section. Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

§ 37.11 [Reserved].**§ 37.12 Trade execution compliance schedule.**

(a) A swap transaction shall be subject to the requirements of section 2(h)(8) of the Act upon the later of:

(1) The applicable deadline established under the compliance schedule provided under § 50.25(b) of this chapter; or

(2) Thirty days after the available-to-trade determination submission or certification for that swap is, respectively, deemed approved under § 40.5 of this chapter or deemed certified under § 40.6 of this chapter.

(b) Nothing in this section shall prohibit any counterparty from complying voluntarily with the requirements of section 2(h)(8) of the Act sooner than as provided in paragraph (a) of this section.

PART 38—DESIGNATED CONTRACT MARKETS

■ 3. The authority citation for part 38 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 6, 6a, 6c, 6d, 6e, 6f, 6g, 6i, 6j, 6k, 6l, 6m, 6n, 7, 7a-2, 7b, 7b-1, 7b-3, 8, 9, 15, and 21, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376.

Subpart A—General Provisions

■ 4. Add § 38.11 to subpart A to read as follows:

§ 38.11 Trade execution compliance schedule.

(a) A swap transaction shall be subject to the requirements of section 2(h)(8) of the Act upon the later of:

(1) The applicable deadline established under the compliance schedule provided under § 50.25(b) of this chapter; or

(2) Thirty days after the available-to-trade determination submission or certification for that swap is, respectively, deemed approved under § 40.5 of this chapter or deemed certified under § 40.6 of this chapter.

(b) Nothing in this section shall prohibit any counterparty from complying voluntarily with the requirements of section 2(h)(8) of the Act sooner than as provided in paragraph (a) of this section.

■ 5. Add § 38.12 to subpart A to read as follows:

§ 38.12 Process for a designated contract market to make a swap available to trade.

(a)(1) *Required submission.* A designated contract market that makes a swap available to trade in accordance with paragraph (b) of this section, shall submit to the Commission its determination with respect to such swap as a rule, as that term is defined by § 40.1 of this chapter, pursuant to the procedures under part 40 of this chapter.

(2) *Listing requirement.* A designated contract market that makes a swap available to trade must demonstrate that it lists or offers that swap for trading on its trading system or platform.

(b) *Factors to consider.* To make a swap available to trade, for purposes of section 2(h)(8) of the Act, a designated contract market shall consider, as appropriate, the following factors with respect to such swap:

(1) Whether there are ready and willing buyers and sellers;

(2) The frequency or size of transactions;

(3) The trading volume;

(4) The number and types of market participants;

(5) The bid/ask spread; or

(6) The usual number of resting firm or indicative bids and offers.

(c) *Applicability.* (1) Upon a determination that a swap is available to trade on any designated contract market or swap execution facility pursuant to part 40 of this chapter, all other designated contract markets and swap execution facilities shall comply with the requirements of section 2(h)(8)(A) of the Act in listing or offering such swap for trading.

(d) *Removal—(1) Determination.* The Commission may issue a determination

that a swap is no longer available to trade upon determining that no swap execution facility or designated contract market lists such swap for trading.

(2) *Delegation of Authority.* (i) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, the authority to issue a determination that a swap is no longer available to trade.

(ii) The Director may submit to the Commission for its consideration any matter that has been delegated in this section. Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

Issued in Washington, DC, on May 17, 2013, by the Commission.

Christopher J. Kirkpatrick,

Deputy Secretary of the Commission.

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

Appendices To Process for a Designated Contract Market or Swap Execution Facility to Make a Swap Available to Trade, Swap Transaction Compliance and Implementation Schedule, and Trade Execution Requirement Under the Commodity Exchange Act— Commission Voting Summary and Statements of Commissioners

Appendix 1—Commission Voting Summary

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

Appendix 2—Statement of Chairman Gary Gensler

I support the final rulemaking to implement a process for swap execution facilities (SEFs) and designated contract markets (DCMs) to “make a swap available to trade” (MAT). Today’s rule also finalizes the Commission’s separate rule proposal to phase in compliance for the trade execution requirement.

Completion of these two rules facilitates the congressionally mandated critical reform promoting pre-trade transparency in the swaps market.

The trade execution provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act requires that swaps be traded on SEFs or DCMs if they are (1) subject to mandatory clearing, and (2) made available to trade. Such platforms allow multiple participants the ability to trade swaps by accepting bids and offers made by multiple participants with all participants given impartial access to the market.

The MAT rule establishes a flexible process for a SEF or DCM to make a swap available to trade. The SEFs and DCMs first will determine which swaps they wish to make available to be traded on their

platforms. Then these determinations will be submitted to the Commission either as self-certified by the trading platform or for approval under the Commission’s Part 40 rules.

The phase-in rule would provide market participants with 30 days after the SEF’s or DCM’s self-certification or submission is deemed approved prior to such swaps being subject to the trade execution mandate.

Those swaps that are made available to trade and thus subject to the trade execution requirement will be publicly posted on the Commission’s Web site.

Appendix 3—Dissenting Statement of Commissioner Scott D. O’Malia—May 16, 2013

I respectfully dissent from the Commission’s approval today of the rule establishing Process for a Designated Contract Market or Swap Execution Facility to Make a Swap Available to Trade under Section 2(h)(8) of the Commodity Exchange Act (CEA).

I supported the proposed rule because I wanted to solicit public comment and engage market participants in an open discussion on how the Commission should implement the available-to-trade provision in section 2(h)(8) of the CEA.

During the comment period, the Commission received 33 comment letters and held a roundtable³⁰⁰ to solicit public views on this matter. The commenters provided various recommendations but in general virtually all of them rejected the proposal; the Commission would be hard pressed to point to one comment letter that supported the Commission’s approach. Unfortunately, despite this strong feedback from the public, the Commission has chosen to follow its original proposal.

I recognize the challenge that the Commission is facing in interpreting the “make available to trade” provision. Unfortunately, Congress did not provide the Commission with any guidance as to how and under what conditions the trade execution mandate must be triggered. Nevertheless, a lack of direction from Congress should not be an excuse for the Commission to come up with an unworkable rule.

As I explain below, the rule provides illusory comfort that the Commission will have a legal authority to review and, if necessary, challenge a mandatory trading determination made by a Swap Execution Facility (SEF) or Designated Contract Market (DCM). In fact, the only authority that the Commission has is to “rubber stamp” a SEF or DCM’s initial determination.

Sections 40.5 and 40.6 of the Commission’s Regulations Do Not Provide an Appropriate Avenue for a Made Available-to-Trade Determination

I have deep reservations about the process that the Commission is proposing for “making a swap available to trade.”

First, the Commission’s determination under the rule approval process (§ 40.5) or the rule certification process (§ 40.6) is

³⁰⁰ January 30, 2012.

intended to apply to only one particular DCM or SEF that requested such rule approval or submitted such rule certification. However, under this rule, an available-to-trade determination has a far reaching effect. It binds not only the requesting SEF or DCM but the entire market, thus forcing all SEFs and all DCMs to trade a particular swap by using more restrictive methods of execution.

Second, the Part 40 process does not give the Commission any legal authority to object to a SEF or DCM's made available-to-trade determination. Under the rule approval procedures, the Commission must approve a rule unless such rule is inconsistent with the CEA or the Commission's regulations.³⁰¹ Similarly, a new rule subject to stay will become effective, pursuant to its certification, unless the rule is inconsistent with the CEA or the Commission's regulations.³⁰²

How will the Commission be able to point to a provision in the CEA or in the regulations that is inconsistent with one or all subjective factors?

The Commission's Determinations Must Be Based on Objective Criteria

In essence, the rule allows a SEF or a DCM to make a made available-to-trade determination based solely on factors it deems relevant, while ignoring other considerations that may be of vital importance to the trading liquidity of a particular contract. The Commission needs to

require more than a simple "consideration" of these factors.³⁰³

The lack of specific objective criteria for determining trading liquidity introduces uncertainty into the market and makes it unfeasible for the Commission to have any meaningful regulatory oversight over the made available-to-trade determination process.

The Commission's Factors Are Not Supported by Data

I agree with the commenters who requested that the Commission implement a pilot program or perform an in-depth study of various classes of swaps to determine the appropriate criteria for a made available-to-trade determination.³⁰⁴ A better approach would be for the Commission to review trading data currently submitted to the Commission pursuant to the Swap Data Repository (SDR) rules and after thorough analysis, come up with objective criteria that would define trading liquidity. Instead, the Commission chose to implement a flawed process that does not lead to any substantive analysis of trading liquidity.

The Commission Failed to Establish a Process for Removing Made Available-to-Trade Determinations

Without providing any reasoning, the Commission has decided that only after all

SEFs and all DCMs have de-listed a particular swap, will such swap be deemed by the Commission to be no longer available-to-trade.³⁰⁵ This process lacks any logical or legal basis and is the exact opposite of what is required to make the initial available-to-trade determination. The initial made available-to-trade determination provides that, if one SEF or DCM determines a swap to be made available to trade, then such swap is deemed to be made available-to-trade on all SEFs or DCMs.

Again, the Commission neglects to analyze swap transaction data that it receives from SDRs. In my view, if a swap does not have sufficient trading liquidity to be traded in a more restrictive manner on a SEF or DCM, as determined by the Commission's broader view of market trading data, then such product must be determined by the Commission to be no longer available-to-trade.

Conclusion

Due to the above concerns, I respectfully dissent from the decision of the Commission to approve this final rule for publication in the **Federal Register**.

[FR Doc. 2013-12250 Filed 6-3-13; 8:45 am]

BILLING CODE 6351-01-P

³⁰³ Commission Regulations § 37.10(b) and 38.12(b).

³⁰⁴ Tradeweb Markets Comment Letter at 3-5 (Feb. 13, 2012); ISDA/SIFMA Comment Letter at 8-9 (March 8, 2011).

³⁰⁵ Commission Regulations §§ 37.10(c), 37.10(d), 38.12(c), 38.12(d).

³⁰¹ Commission Regulation § 40.5(b)

³⁰² Commission Regulation § 40.6(c)(3).