Regulatory Notices and Analyses

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

This proposal would be subject to an environmental analysis in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.11B, Airspace Designations and Reporting Points, dated August 3, 2017, and effective September 15, 2017, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward from 700 Feet or More Above the Surface of the Earth

* * * * *

ASO MS E5 Crystal Springs, MS [New]

Copiah County Airport, MS
(Lat. 31°54′09″ N, long. 90°22′00″ W)

That airspace extending upward from 700 feet above the surface within a 7-mile radius of Copiah County Airport.

Issued in College Park, Georgia, on July 19, 2018.

Ryan W. Almasy,

Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2018–16134 Filed 7–27–18; 8:45 am]

BILLING CODE 4910–13–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 23

RIN 3038–AE78

Segregation of Assets Held as Collateral in Uncleared Swap Transactions

AGENCY: Commodity Futures Trading Commission.

ACTION: Proposed rule.

SUMMARY: The Commodity Futures Trading Commission (''Commission'' or ''CFTC'') is proposing to amend selected provisions of its regulations in order to simplify certain requirements for swap dealers (''SDs'') and major swap participants (''MSPs'') concerning notification of counterparties of their right to segregate initial margin for uncleared swaps, and to modify requirements for the handling of segregated initial margin (the ''Proposal'').

DATES: Comments must be received on or before September 28, 2018.

ADDRESSES: You may submit comments, identified by RIN 3038–AE78, by any of the following methods:

- *CFTC Comments Portal: https://comments.cftc.gov.* Select the ''Submit Comments'' link for this rulemaking and follow the instructions on the Public Comment Form.
- *Mail:* Send to Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.
- *Hand Delivery/Courier:* Follow the same instructions as for Mail, above.

Please submit your comments using only one of these methods. To avoid possible delays with mail or in-person deliveries, submissions through the CFTC Comments Portal are encouraged.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *https://comments.cftc.gov.* You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act (''FOIA''),[1] a petition for confidential treatment of the exempt information may be submitted according to the procedures set forth in § 145.9 of the Commission's regulations.[2]

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

FOR FURTHER INFORMATION CONTACT: Matthew Kulkin, Director, (202) 418–5213, *mkulkin@cftc.gov;* Erik Remmler, Deputy Director, (202) 418–7630, *eremmler@cftc.gov;* or Christopher Cummings, Special Counsel, (202) 418–5445, *ccummings@cftc.gov,* Division of Swap Dealer and Intermediary Oversight, Commodity Futures Trading Commission, 1155 21st Street NW, Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Introduction

A. Existing Requirements

Subpart L of the Commission's regulations (''Segregation of Assets Held as Collateral in Uncleared Swap Transactions'' consisting of Regulations 23.700 through 23.704) was published in the **Federal Register** on November 6, 2013 and became effective January 6, 2014.[3] Subpart L implements the requirements for segregation of initial margin for uncleared swap transactions set forth in section 4s(*l*) of the Commodity Exchange Act (''CEA'' or the ''Act'').[4]

CEA section 4s(*l*) addresses segregation of initial margin held as collateral in certain uncleared swap transactions. The section applies only to swaps between a counterparty and an SD or MSP that are not submitted for clearing to a derivatives clearing

[1] 5 U.S.C. 552.

[2] 17 CFR 145.9 (2017). Commission regulations referred to herein are found at 17 CFR chapter I, and can be accessed through the Commission's website, *www.cftc.gov.*

[3] *See* 78 FR 66621 (Nov. 6, 2013).

[4] 7 U.S.C. 6s(*l*) (2012 & Supp. 2015). Like the Commission's regulations, the CEA can be accessed through the Commission's website.

organization (''DCO''). It requires that an SD or MSP notify a counterparty that the counterparty has the right to require that any funds or property the counterparty provides as initial margin be segregated in a separate account from the SD's or MSP's assets. The separate account must be held by an independent third-party custodian and designated as a segregated account for the counterparty. CEA section 4s(*l*) does not preclude the counterparty and the SD or MSP from agreeing to their own terms regarding investment of initial margin (subject to any regulations adopted by the Commission) or allocation of gains or losses from such investment. If the counterparty elects not to require segregation of margin, the SD or MSP is required to report quarterly to the counterparty that the SD's or MSP's back office procedures relating to margin and collateral are in compliance with the agreement between the counterparty and the SD or MSP.

In January 2016, the Commission adopted margin requirements for certain uncleared swaps applicable to SDs and MSPs for which there is no prudential regulator (''CFTC Margin Rule'').[5] The prudential regulators (''Prudential Regulators'') include the Federal Reserve Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Farm Credit Administration, and the Federal Housing Finance Agency.[6] The Prudential Regulators adopted margin requirements similar to the CFTC Margin Rule for swaps entered into by SDs and MSPs that they regulate (''Prudential Regulator Margin Rules'') in November 2015.[7] The CFTC Margin Rule and the Prudential Regulator Margin Rules establish initial and variation margin requirements for SDs and MSPs.[8]

Prior to the CFTC Margin Rule effective date of April 1, 2016, if initial margin was to be exchanged by counterparties to uncleared swaps involving an SD or MSP, the requirements of subpart L applied. The CFTC Margin Rule amended Regulation 23.701 to clarify that from and after the effective date of the CFTC Margin Rule, the requirements of Regulations 23.702 and 23.703 did not apply in those circumstances where segregation is mandatory under the CFTC Margin Rule.[9] As a result, Regulations 23.702 and 23.703 generally only apply when initial margin is to be exchanged between an SD or MSP and (i) a nonfinancial end-user, or (ii) a financial end-user without ''material swaps exposure,'' as defined in the CFTC Margin Rule.

Regulation 23.700 defines certain terms used in subpart L. Regulation 23.701 requires an SD or MSP: (1) To notify each counterparty to a swap that is not submitted for clearing, that the counterparty has the right to require that any initial margin it provides be segregated; (2) to identify a creditworthy custodian that is a non-affiliated legal entity, independent of the SD or MSP and the counterparty, to act as depository for segregated margin assets; and (3) to provide information regarding the costs of such segregation. The regulation specifies that the notification is to be made (with receipt confirmed in writing) to an officer (of the counterparty) responsible for management of collateral (or to specified alternative person(s)), and that it need only be made once in any calendar year. Finally, the regulation provides that a counterparty can change its election to require (or not to require) segregation of initial margin by written notice to the SD or MSP.

Regulation 23.702 reiterates the requirement that the custodian be a legal entity independent of the SD or MSP and the counterparty. It also requires that segregated initial margin be held in an account segregated for, and on behalf of, the counterparty and designated as such. Finally, the regulation specifies that the segregation agreement is to provide that: (1) Withdrawals from the segregated account be made pursuant to agreement of both the counterparty and the SD or MSP, with notification to the non-withdrawing party; and (2) the custodian can turn over segregated assets upon presentation of a sworn statement that the presenting party is entitled to control of the assets pursuant to agreement among the parties.

Regulation 23.703 restricts investment of segregated assets to investments permitted under Regulation 1.25, and (subject to that restriction) permits the SD or MSP and the counterparty to agree in writing as to investment of margin and allocation of gains and losses.

Regulation 23.704 requires the SD's or MSP's chief compliance officer (''CCO'') to report quarterly to any counterparty that does not elect to segregate initial margin whether or not the SD's or MSP's back office procedures regarding margin and collateral requirements were, at any point in the previous calendar quarter, not in compliance with the agreement of the counterparties.

B. Factors Considered by the Commission

After more than four years of administering subpart L of part 23, the Commission has observed that the detailed requirements of those regulations have proven difficult for SDs and MSPs to implement and to satisfy in a reasonably efficient manner. These observations have been buttressed by suggestions submitted in response to the Commission's Project KISS initiative as described below. In addition, the Commission understands that very few swap counterparties have exercised their rights to elect to segregate initial margin collateral pursuant to subpart L during the four years the regulations have been effective.

Early in the implementation period, in response to multiple inquiries, Commission staff issued Staff Letter 14–132 (October 31, 2014)[10] providing interpretative guidance to SDs and MSPs regarding application of certain of the segregated margin requirements. In particular, the letter noted concerns expressed by SDs and MSPs that despite their earnest efforts to obtain confirmation of receipt of notification and election regarding segregation, failure by a counterparty to respond to the SD or MSP could bar any further swap transactions with the counterparty until a response was received.[11] However, notwithstanding the issuance of Staff Letter 14–132, issues regarding compliance with subpart L continue to be raised.[12]

[5] Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 81 FR 636 (Jan. 6, 2016). The CFTC Margin Rule, which became effective April 1, 2016, is codified in part 23 of the Commission's regulations. 17 CFR 23.150 through 23.159, 23.161.

[6] 7 U.S.C. 1a(39).

[7] *See* Margin and Capital Requirements for Covered Swap Entities, 80 FR 74840 (Nov. 30, 2015).

[8] *See* 17 CFR 23.151.

[9] 81 FR 704 (Jan. 6, 2016). The amendment did not address the application of subpart L to swaps subject to mandatory segregation under the Prudential Regulator Margin Rules. As described below, this Proposal would clarify that the swaps subject to the Prudential Regulator Margin Rules are to be addressed in the same manner as swaps subject to the CFTC Margin Rule.

[10] *See* CFTC Staff Letter No. 14–132 (October 31, 2014), available at *https://www.cftc.gov/sites/default/files/idc/groups/public/@lrlettergeneral/documents/letter/14-132.pdf.*

[11] The Proposal would address generally some of the confusion that prompted the issuance of Staff Letter 14–132 in the context of other changes to subpart L that are proposed.

[12] For example, issues regarding compliance with these regulations have been raised with the National Futures Association as recently as January 2018, indicating ongoing uncertainty. *See* pp. 6–7 of the transcript of the NFA Swap Dealer Examination Webinar, January 18, 2018, available at *https://www.nfa.futures.org/members/member-*

Continued

On May 9, 2017, the Commission published in the **Federal Register** a request for information [13] pursuant to the Commission's Project KISS initiative seeking suggestions from the public for simplifying the Commission's regulations and practices, removing unnecessary burdens, and reducing costs. A number of suggestions received addressed various provisions of subpart L. In general, the suggestions echoed Commission staff concerns that the requirements in subpart L may be more burdensome than is necessary to achieve the purposes of the statute and that the requirements may be counterproductive by discouraging the use of individual segregation accounts.[14] Persons responding to Project KISS also noted that some requirements cause confusion because they overlap with segregation requirements in the margin regulations more recently adopted by the CFTC and Prudential Regulators.[15] Furthermore, responders noted that the requirements in subpart L are overly prescriptive eliminating the possibility for reasonable bilateral negotiation of certain terms that takes place in the normal course to determine appropriate collateral arrangements based on the circumstances of the broader counterparty relationship.[16]

Responders also asserted that counterparties to uncleared swaps rarely elect to require segregation of margin pursuant to the existing provisions of subpart L.[17] Commission staff has observed evidence of minimal uptake of the election to segregate. In addition, Commission staff has discussed this issue with the National Futures Association (''NFA'') to ascertain NFA's observations from examining a substantial number of SDs in connection with the implementation of subpart L. Based on this experience, it appears that for nearly every SD examined, fewer than five counterparties elected segregation pursuant to subpart L since registration. For some SDs, not a single counterparty has elected to segregate pursuant to subpart L.

In light of these considerations, the Commission is proposing to amend the regulations governing segregation of margin for uncleared swaps. The Commission believes that the amendments proposed today will reduce unnecessary burdens on registrants and market participants by simplifying some overly detailed provisions, thereby reducing the intricate and prescriptive requirements that have been found during implementation to provide little or no benefit. These changes will also facilitate more efficient swap execution by eliminating complexity and confusion that slows down documentation and negotiation of hedging and other swap transactions. Finally, the amendments, by reducing the prescriptive elements of the rule, potentially could encourage more segregation (as was intended by the statute) by providing flexibility for the parties to establish segregation arrangements that better suit their specific needs.

At the same time that the Commission is proposing specific changes, it is seeking comment from the public on the appropriateness of these changes, as well as suggestions for other amendments that can streamline, simplify, and reduce the costs of these regulations without sacrificing the protections called for by CEA section 4s(*l*).

II. The Proposal

A. Regulation 23.700—Definitions

Section 23.700 defines ''Margin'' as ''both Initial Margin and Variation Margin.'' [18] As proposed to be amended, subpart L would no longer refer collectively to initial margin and variation margin, since the right to require segregation applies only to initial margin, and not to variation margin. Thus, there is no need for the separate defined term ''Margin.'' The Commission therefore proposes to eliminate the definition of Margin from Regulation 23.700, and to make conforming changes to subpart L by replacing the term ''Margin'' with ''Initial Margin'' in Regulations 23.701, 23.702, and 23.703.[19]

B. Regulation 23.701—Notification of the Right To Require Segregation

Paragraphs (a) and (b) of Regulation 23.701 direct an SD or MSP to notify each counterparty of the right to require segregation of initial margin. The language used is consistent with CEA section 4s(*l*). Paragraphs (c), (d) and (e) add specific requirements not expressly established in the statute. Paragraph (c) requires the SD or MSP to furnish the required notification to an officer of the counterparty responsible for management of collateral, or if no such person is identified by the counterparty, then to the chief risk officer, or if there is no such officer, to the chief executive officer, or if none, the highest-level decision-maker for the counterparty. Paragraph (d) requires the SD or MSP, ''prior to confirming the terms of any such swap,'' to obtain confirmation of receipt of the notification, and the counterparty's election to require or not require segregation of initial margin (such confirmation to be retained in accordance with Regulation 1.31). Paragraph (e) provides that the notification need be made only once in any calendar year.[20] Finally, paragraph (f) provides that the counterparty may change the segregation election at its discretion by providing a written notice to the SD or MSP. Paragraph (f) is not being amended in this Proposal except to redesignate it as paragraph (d).

Based on staff's implementation experience and on suggestions received in connection with Project KISS, the Commission believes that these requirements are unnecessarily prescriptive and that they do not reflect the practical realities of how over-the-counter swap transactions are negotiated and managed by the parties. Accordingly, the Commission is proposing to modify the notification requirement in paragraph (a) and to remove the requirements in existing paragraphs (c), (d) and (e).

Under the Proposal, paragraph (a) would be revised to require that the notification to a counterparty be made prior to execution of the first uncleared swap transaction that provides for the

resources/files/transcripts/sdexamswebinar transcriptjan2018.pdf.

[13] *See* 82 FR 21494 (May 6, 2017) and 82 FR 23765 (May 24, 2017).

[14] *See, e.g.* letter from the Financial Services Roundtable (''FSR Letter''), dated September 30, 2017 at 55 (noting that ''compliance with these regulations has proven to be unduly burdensome for swap dealers when weighed against the protections afforded to swap counterparties thereunder''), *https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61427&SearchText=.*

[15] *Id. See also* letter from the Securities Industry and Financial Markets Association (''SIFMA Letter'') dated September 29, 2017 at 2 (''These requirements create unnecessarily burdensome obligations, which in many instances are duplicative or create confusion due to parallel mandatory collateral segregation requirements found within the CFTC and [prudential regulator] rules on margin requirements for non-centrally cleared swaps, and similar requirements in foreign jurisdictions.'').

[16] *See* SIFMA Letter at 2. *See also* letter from the Global Foreign Exchange Division of the Global Financial Markets Association, dated September 29, 2017.

[17] *See* FSR Letter at 55 (''Our members have advised that counterparties (i) rarely, if ever, elect to segregate [initial margin] and (ii) have found little use for receiving the notices.'').

[18] *See* 17 CFR 23.700.

[19] A grammatical change is also proposed for the definition of the term ''segregate.''

[20] Some confusion has been caused by the requirement in paragraph (d) to provide the notice ''prior to confirming the terms of any such swap,'' and the requirement in paragraph (e) to provide the notice once in any calendar year.

exchange of initial margin,[21] not prior to each transaction or annually as currently prescribed by paragraphs (d) and (e).[22] CEA section 4s(*l*) requires notification of the right to segregate ''at the beginning of a swap transaction.'' The Commission is interpreting that phrase to mean at the beginning of an SD's or MSP's swap transaction relationship with each counterparty.

This interpretation is consistent with the Commission's stated view when it originally proposed and adopted Regulation 23.701(e), which only requires notice once a year. With respect to the phrase in the statute ''at the beginning of a swap transaction,'' the Commission noted that ''[w]hile this language could be read to require transaction-by-transaction notification, where the parties have a pre-existing or on-going relationship, such repetitive notification could be redundant, costly and needlessly burdensome.'' [23]

When adopting final Regulation 23.701(e), the Commission considered comments requesting a loosening of the once-per-year notice requirement and rejected the requests in the belief that requiring notification once each year would balance the burden of providing notices and getting responses with the importance of the right to segregate initial margin.[24] At this time, based on implementation experience, the Commission is proposing to require notification at the beginning of a swap trading relationship that provides for exchange of initial margin. The importance of the notification informing the counterparty of the right to segregate is paramount at the beginning of the SD/MSP—counterparty relationship. It is at the time the parties initiate the first transaction that the decision to segregate initial margin will typically be made.[25] Subsequent notifications are repetitive to the initial notification and risk adding confusion over the duration of the contractual relationship of the parties. In this regard, the Commission understands that counterparties rarely change their election, once made. Accordingly, in addition to modifying the notification requirement in paragraph (a), the Commission proposes to eliminate paragraph (e)'s annual notification requirement in lieu of the proposed notification at the beginning of the first uncleared swap transaction that provides for exchange of initial margin.

Paragraph (a) would also be revised to eliminate the notification requirement where segregation is mandatory under Regulation 23.157 and where it is mandated under applicable rules adopted by a Prudential Regulator under CEA section 4s(e)(3). Paragraph (a)(2) (the requirement that the notification identify one or more creditworthy, independent custodians) would be deleted because selection of a custodian can be made when and if the counterparty elects to require segregation. Because very few counterparties elect to require segregation, it is unnecessarily burdensome to require an SD or MSP to confirm which custodians are available and continually update its notification form with the name of the custodian(s) available. Moreover, the Commission understands that a counterparty's initial decision to consider requiring (or not requiring) segregation is driven principally by whether the counterparty is concerned about protecting its initial margin and the terms of the segregation agreement, and not by the identity of the custodian. Similarly, paragraph (a)(3) (information regarding the price for segregation for each custodian) would be deleted because such pricing may vary for each segregation arrangement and would normally be subject to negotiation. To the extent pricing would be a factor in the decision to segregate, counterparties can and do discuss pricing as a term of the custodial arrangement when the counterparty indicates an interest in segregation. Moreover, the requirements in paragraphs (a)(2) and (a)(3) are not found in CEA section 4s(*l*).

Similarly, the Proposal would eliminate the requirement in current paragraph (c) that the SD or MSP provide the notification to a person at the counterparty with a specific job title. Based on implementation experience, the Commission is of the view that the regulation as initially adopted is unnecessarily prescriptive in dictating who must receive the notification. For example, in many cases, the person at the counterparty best situated to evaluate the notification and the decision to segregate will be a person directly involved in negotiating the swap regardless of that person's title. The Commission notes that in removing the specific designation of officers to receive the notification it is not eliminating the expectation that each registrant will use reasonable judgment in identifying an appropriate person at the counterparty who can evaluate the right to elect segregation (and either act on it or bring it to the attention of someone in a position to act on it). The Commission continues to believe that, to be effective, the notification must be made to a person at the counterparty who understands its meaning and, to the extent necessary, can direct it to the appropriate personnel at the counterparty. The proposed change seeks to advance the same underlying policy objective as the current requirement (namely that the notification be given to appropriate personnel at the counterparty), but would recognize that dictating how counterparties communicate the information in question creates unnecessary burdens and potentially hinders the ability of the parties to direct the information to the person(s) best situated to evaluate it.

As proposed, new paragraph (c) would simplify requirements in existing Regulation 23.701 by providing that ''[i]f the counterparty elects to segregate initial margin, the terms of segregation shall be established by written agreement.''

As noted above, the Commission is proposing to eliminate the additional requirements in existing paragraph (d), which are more extensive than the notification requirements set forth in CEA section 4s(*l*). Subsequent to adoption of subpart L, experience with implementation of the requirements of Regulation 23.701 has made the Commission aware of problems experienced by registrants in complying with these additional requirements. For example, persons seeking guidance have noted that paragraph (d)'s current requirement that the SD not execute a swap with the counterparty until it receives confirmation of the counterparty's receipt of the notification has the potential to block swap trading in some circumstances.[26] Instances of forestalled trading caused by this requirement could be particularly harmful for nonfinancial end-users that have ongoing, dynamic hedging programs (to hedge, for example, commodity price risk or foreign exchange risk).

Based on implementation experience, compliance with the existing segregation notification requirements in the regulation necessitates lengthy explanations and instructions from SDs and MSPs to their counterparties and imposes additional administrative

[21] This revision is consistent with guidance provided in Staff Letter 14–132, cited above.

[22] Thus, under the Proposal paragraph (e) of Regulation 23.701 (providing that the notification need only be made once in any calendar year) would become unnecessary, and is proposed to be deleted.

[23] 78 FR 66625.

[24] *Id.*

[25] For existing master netting agreements for which the SD has already sent a segregation notice, the Commission is of the view that such notice would be sufficient for purposes of complying with the amended regulations, if adopted, and therefore the SD would not be required to send a new notice.

[26] *See* Staff Letter 14–132, cited above.

processes requiring counterparties to take steps that are outside of the normal course of transacting in swaps. Some of these steps cause transaction delays and deviations from established business procedures for collateral custodial arrangements and disclosure of counterparty rights generally, and do not advance the counterparty's right to segregate initial margin. For nonfinancial end-user counterparties who tend to use swaps primarily for hedging purposes, these added compliance steps often cause confusion and uncertainty that can inhibit opportune, timely hedging. For counterparties that execute swaps frequently and have determined that they wish to segregate, the additional requirements merely add unnecessary hurdles to the transaction process. Accordingly, the Commission does not believe that the burdens imposed by these prescriptive requirements provide meaningful regulatory benefits beyond those provided by the provisions in proposed amended Regulation 23.701.

C. Regulation 23.702—Requirements for Segregated Margin

Existing Regulation 23.702 sets forth requirements for the custody of initial margin segregated pursuant to a counterparty's election under Regulation 23.701. Paragraph (c)(2) of Regulation 23.702 provides specific requirements for the withdrawal and turnover of control of initial margin. In particular, paragraph (c)(2) requires the custodian to turn over control of initial margin upon presentation of a written statement made by an authorized representative under oath or under penalty of perjury as specified in 28 U.S.C. 1746. The Statement must state that the counterparty, SD or MSP, as the case may be, is entitled to assume control of the initial margin pursuant to the parties' agreement. The other party must be immediately notified of the turnover of control.

The Commission believes that, while paragraph (c)(2) may generally be consistent with the manner in which custodial arrangements work, the prescriptive requirements of the regulation, including requiring a specific form, the language used, and the certification needed, do not account for change in control arrangements in custodial agreements that are sometimes customized to reflect the unique business facts and circumstances that may exist between any two parties and the custodian. For example, the unique nature of the collateral posted or the specific terms of change in control triggers may warrant different notice procedures than those specified by paragraph (c)(2). Alternative notice procedures may allow for more timely and effective change in control under real-world circumstances and better protect each party's interests. Accordingly, the Commission believes that more flexibility is warranted, and that it is more appropriate to leave these matters up to negotiation by the parties.

D. Regulation 23.703—Investment of Segregated Margin

Regulation 23.703 requires initial margin segregated pursuant to subpart L to be invested consistent with Commission Regulation 1.25. Regulation 1.25 sets forth standards for investment of customer funds by a futures commission merchant or derivatives clearing organization in the context of exchange-traded futures and cleared swaps. When proposing Regulation 23.703, the Commission expressed its view that Regulation 1.25 ''has been designed to permit an appropriate degree of flexibility in making investments with segregated property, while safeguarding such property for the parties who have posted it, and decreasing the credit, market, and liquidity risk exposures of the parties who are relying on that margin.'' [27]

A suggestion in response to the Project KISS initiative noted that Regulation 1.25 is designed to protect exchange customers for which margin investment decisions are outside of their control.[28] Regulation 1.25 includes fairly extensive and specific requirements as to the mechanisms for holding and investing margin and the qualitative aspects of the investments held. With respect to initial margin for uncleared swaps that is not held in accordance with Regulation 23.157 or with the Prudential Regulator Margin Rules, the margin investment decisions are typically a matter of contract subject to negotiation between the parties. As such, each counterparty has a voice in how the initial margin may be invested.

In addition, the terms of most exchange-traded and cleared products are standardized and the customer's primary relationship with the FCM or DCO centers upon the trading and clearing of those standardized products. Conversely, over-the-counter swaps, by their nature, tend to be more customized and are often part of a broader financial relationship. For example: Interest rate swaps with end-users are often designed to match maturities of loans or bonds, with the rate of the swap tied to the rate on the loan or bond; commodity swaps often hedge the counterparty's physical commodity production or consumption risks that arise from a particular commercial enterprise; and foreign exchange swaps often hedge an entity's exposure to cross-border commercial transactions. In each case, the SD or MSP sometimes plays additional financial roles, such as providing a loan or other credit or liquidity support, brokering physical commodity purchases or sales, or acting as a correspondent bank. Accordingly, each counterparty, particularly nonfinancial end-user counterparties, may find better transactional efficiencies and may be better served and protected in related credit transactions if the types of collateral and the investment procedures and mechanisms used are determined through bilateral negotiation of the terms thereof by the parties.

Given the greater breadth and variability, both in the terms and purposes of uncleared swaps and in the nature of the relationship between the counterparty and the SD or MSP, the Commission believes a regulation that provides greater flexibility for the parties to negotiate appropriate initial margin investment terms will, in most cases, better serve the interests of the parties. For the same reasons, allowing greater flexibility may also encourage more counterparties to elect to segregate pursuant to subpart L.

The Commission recognizes that in some circumstances, nonfinancial end-user counterparties might have less negotiating leverage with a sophisticated SD or MSP. However, the regulations as originally adopted give little or no flexibility for counterparties and SDs or MSPs to negotiate mutually beneficial terms and to consider other factors such as the broader financial relationship between the parties. For nonfinancial end-user counterparties the segregation of initial margin is at their discretion. If these counterparties have a voice in how segregated initial margin is invested, the returns of which they will often receive, they may be more likely to elect to require segregation.

E. Regulation 23.704—Requirements for Non-Segregated Margin

Existing Regulation 23.704(a) requires the CCO of each SD or MSP to report quarterly to each counterparty that does not elect segregation of initial margin on whether or not the SD's or MSP's back office procedures relating to margin and collateral requirements failed at any time during the previous calendar quarter to comply with the agreement of

[27] *See* 75 FR 75432, 75434 (Dec. 3, 2010).

[28] *See* SIFMA Letter at 4.

the counterparties.[29] The Commission believes it is unnecessary to specify that the CCO be the individual that makes such reports, so long as the information is provided to counterparties. For many firms, middle or back office staff, not the CCO, implement collateral management pursuant to the terms of each collateral management agreement. Those staff people are therefore better situated to assess compliance with agreements and to provide the quarterly report. Accordingly, there are likely personnel at each SD other than the CCO who are better situated to more accurately and efficiently provide the report.[30] The Commission therefore proposes to require that the SD or MSP make the reports without specifying any particular person to perform that requirement. The Commission further proposes to simplify the language regarding timing of the required reports to eliminate uncertainty as to the regulation's meaning. With respect to paragraph (b) of the regulation, the Commission is proposing to specify that the reports required under paragraph (a) need be delivered only to counterparties who choose not to require segregation (as opposed to the current wording that simply says ''with respect to each counterparty'') to more closely follow the statutory language underlying this requirement.

III. Request for Comment

The Commission requests comments, generally, regarding the proposed changes to Regulations 23.700, 23.701, 23.702, 23.703, and 23.704. The Commission also specifically requests comment on the following questions:

- Are the proposed amendments to subpart L appropriate in light of the requirements of CEA section 4s(*l*) and in light of the commercial realities encountered by SDs, MSPs, and counterparties engaging in uncleared swap transactions?
- Should the Commission revise or eliminate any other provisions of subpart L? Are there additional ways in which the Commission can simplify, streamline, and reduce the costs of these regulations without impairing the rights and safeguards intended by CEA section 4s(*l*)?
- Do the proposed amendments appropriately preserve the rights of counterparties articulated in CEA section 4s(*l*)? Is the Commission's proposed interpretation of CEA section 4s(*l*)(1)(A) reasonable given the commercial realities of uncleared swaps transactions and relationships between SDs and MSPs and their counterparties?
- As proposed, Regulation 23.701(a) provides that ''[a]t the beginning of the first swap transaction that provides for the exchange of Initial Margin'' an SD or MSP must notify the counterparty of its right to require segregation of initial margin. Should the Commission provide specific benchmark events that call for delivery of a segregation notification? If so, would entering into a master netting agreement or other contractual relationship be appropriate? What other events may be relevant for marking ''the beginning of the first swap transaction''? Should the Commission provide that the counterparty may request or opt to continue to receive an annual or some other periodic notification? Should the Commission provide that the counterparty may request or opt to receive notification at the beginning of each swap transaction?
- The Commission notes that the proposed deletion of paragraph (a)(2) of Regulation 23.701 (requirement to identify one or more custodians as an acceptable depository for segregated initial margin) also removes language specifying that one of the identified custodians ''be a creditworthy non-affiliate.'' Under the Proposal, Regulation 23.702(a) would continue to require that the custodian ''must be a legal entity independent of both the swap dealer or major swap participant and the counterparty.'' Should the Commission adopt more specific financial or affiliation qualifications for the custodian that an SD or MSP uses as a depository for segregated initial margin, and if so, what should those qualifications be?
- Under Regulation 23.703(a), margin that is segregated pursuant to an election under Regulation 23.701 may only be invested consistent with Regulation 1.25. How has the limitation impacted counterparties' decisions to make an election under Regulation 23.701?

IV. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA'') requires Federal agencies to consider whether the regulations they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis respecting the impact.[31] Whenever an agency publishes a general notice of proposed rulemaking for any regulation, pursuant to the notice-and-comment provisions of the Administrative Procedure Act,[32] a regulatory flexibility analysis or certification typically is required.[33] The Commission previously has established certain definitions of ''small entities'' to be used in evaluating the impact of its regulations on small entities in accordance with the RFA.[34] The Commission has previously established that SDs, and MSPs and ECPs [35] are not small entities for purposes of the RFA.[36]

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

B. Paperwork Reduction Act

1. Background

The Paperwork Reduction Act of 1995 (''PRA'') [37] imposes certain requirements on Federal agencies (including the Commission) in connection with their conducting or sponsoring a collection of information as defined by the PRA. The Proposal would result in such a collection, as discussed below. A person is not required to respond to a collection of information unless it displays a currently valid control number issued by the Office of Management and Budget (''OMB''). The Proposal contains a collection of information for which the Commission has previously received a control number from OMB. The title for this collection of information is ''Disclosure and Retention of Certain Information Relating to Swaps Customer Collateral, OMB control number 3038–0075.'' [38] Collection 3038–0075 is currently in force with its control number having been provided by OMB.

The Commission is proposing to revise collection 3038–0075 to

[29] Consistent with Staff Letter 14–132, the Commission confirms that the reporting requirement under Regulation 23.704 does not apply if no initial margin will be required as part of the swap transaction.

[30] The Commission notes that the CCO continues to be responsible, under Commission regulation 3.3, to report in the CCO annual report any material non-compliance issues involving back office procedure relating to margin and collateral requirements.

[31] 5 U.S.C. 601 *et seq.*

[32] 5 U.S.C. 553. The Administrative Procedure Act is found at 5 U.S.C. 500 *et seq.*

[33] *See* 5 U.S.C. 601(2), 603, 604, and 605.

[34] *See* Registration of Swap Dealers and Major Swap Participants, 77 FR 2613 (Jan. 19, 2012).

[35] Eligible contract participants, as defined in CEA section 1a(18), 7 U.S.C. 1a(18).

[36] *See* Further Definition of ''Swap Dealer,'' ''Security-Based Swap Dealer,'' ''Major Swap Participant,'' ''Major Security-Based Swap Participant'' and ''Eligible Contract Participant,'' 77 FR 30596, 30701 (May 23, 2012).

[37] 44 U.S.C. 3501 *et seq.*

[38] *See* OMB Control No. 3038-0075, *https://www.reginfo.gov/public/do/PRAOMBHistory?omb ControlNumber=3038-0075#* (last visited June 29, 2017).

incorporate proposed changes to reduce the number of notices a SD or MSP must provide to its counterparties with respect to the rights of such counterparties to segregate initial margin for uncleared swaps. The Commission does not believe the Proposal would impose any other new collections of information that require approval of OMB under the PRA.

2. Modification of Collection 3038–0075

The Proposal would modify collection 3038–0075 by eliminating the requirement that the notification of the right to segregate be provided on an annual basis to a specified officer of the counterparty such that the notice would only need to be provided once to each counterparty at the beginning of the first non-cleared swap transaction that provides for the exchange of initial margin. The Commission originally estimated that each SD and MSP would, on average, provide the segregation notice to approximately 1,300 counterparties each year and that the burden for preparing and furnishing the notice would be 2 hours, for an annual burden of 2,600 hours.[39] The Commission is estimating that each SD and MSP would, on average, have approximately 300 new counterparties each year for a total burden of 600 hours per registrant. Accordingly, the Commission is proposing to revise its overall burden estimate associated with Regulation 23.701 for this collection by reducing the per registrant annual burden by 2,000 hours.

C. Cost-Benefit Considerations

1. Background

Section 15(a) 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.[40] Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. With respect to the proposed regulation changes discussed above, the Commission considers the costs and benefits resulting from its discretionary determinations with respect to the section 15(a) factors, and seeks comments from interested persons regarding the nature and extent of such costs and benefits.

2. Regulations 23.700, 23.701, 23.702 and 23.703—Notification of Right to Initial Margin Segregation

The baseline for these cost and benefit considerations is the status quo, which is existing market conditions and practice in response to the requirements of current §§ 23.700, 23.701, 23.702, and 23.703.[41] Subpart L: (1) Requires SDs or MSPs to notify counterparties of the right to segregate initial margin; (2) establishes certain procedures regarding the notification; and (3) establishes certain requirements for the initial margin segregation arrangements.

The Commission is proposing a more flexible approach that reduces some regulatory burdens that provide little or no corresponding benefit. The Proposal would eliminate the definition of ''Margin'' because it would no longer be needed. The Proposal would also revise when the segregation notice is required. Additionally, the Proposal would eliminate the requirements that (1) the SD or MSP provide the segregation notice to an officer of the counterparty with specific qualifications, and (2) the SD or MSP obtain the counterparty's confirmation of receipt of the segregation notice. Finally, the Proposal would allow the parties to establish the notice of change of control provisions and the commercial arrangements for investment of segregated collateral by contract instead of imposing specific requirements.

(i) Cost and Benefit Considerations

The general purpose of the changes proposed is to reduce burdens and improve the benefits intended by subpart L. The Commission preliminarily believes the proposed changes to subpart L would not impose any new requirements on registrants and instead would reduce or make the regulations more flexible allowing market participants to use standard market practices regarding the implementation of the initial margin segregation requirements. The simplification of the notification requirements would likely reduce the time needed to complete the notification process and may facilitate more efficient and timely trading for new customer relationships. The proposed changes would also reduce costs by eliminating the requirements for those swaps that must comply with the Prudential Regulator Margin Rules mandatory margin requirements. In addition, the changes will provide benefits to the parties to swaps by allowing the parties to establish by contract the terms for collateral management and for change in control and investment of segregated initial margin in a manner that better suits their business needs. To the extent the parties would be able to negotiate more efficient segregation agreements and agree to investment arrangements that generate higher returns that are passed on to the counterparty, as is most often the case for uncleared swaps, the parties would benefit. The Commission believes that the simplification of the requirements and greater flexibility will therefore encourage more counterparties to elect to segregate initial margin.

As noted above, in some circumstances, nonfinancial end-user counterparties might have less negotiating leverage when negotiating the terms of segregation agreements with experienced SDs or MSPs. Reducing the prescriptive requirements in the current rule could therefore reduce protections for the counterparties. However, it is not clear how incentives or disincentives may impact the negotiating choices of SDs and MSPs as well as the counterparties and therefore the extent to which the requirements provide protections. For example, regarding the choice of investments, the SD or MSP may seek to restrict investments to the most liquid investments that would be easily liquidated if the counterparty defaults. Those liquid investments, which would likely be similar to the investments permitted under Regulation 1.25, may in turn generate lower returns passed on to the SD/MSP's counterparties. Conversely, the current regulations give little or no flexibility for counterparties and SDs or MSPs to negotiate mutually beneficial terms and consider other factors such as the broader financial relationship between the parties. Furthermore, for nonfinancial end-user counterparties, the segregation of initial margin is discretionary. If the counterparties have no voice in how segregated initial margin is invested, there may be less incentive for the counterparty to elect to require segregation.

The Commission believes that the proposed changes to subpart L might lead to reduced costs for registrants, because they would no longer have to comply with some of the more prescriptive requirements imposed by the regulations. The Commission is, however, unable to quantify the potential cost savings because the cost savings depend on numerous factors that are particular to each SD or MSP

[39] *See* 78 FR at 66631.

[40] 7 U.S.C. 19(a).

[41] *See* 78 FR at 66632–36 (discussing the cost-benefit considerations with regard to the segregation regulation).

and each counterparty relationship. For example, the factors affecting the costs involved could include: The size and complexity of an SD's dealing activities, the complexity of the swap transactions, the level of sophistication of each counterparty, the degree to which automated notice technologies may be used to satisfy these requirements, and the nature of the custodial and investment documents in particular segregation arrangements.

(ii) Section 15(a) Considerations

a. Protection of Market Participants and the Public

Subpart L is intended to provide counterparties to SDs and MSPs with notice of the right to elect to segregate initial margin. The Commission recognizes that the proposed changes to make the regulations less prescriptive might potentially negatively impact the goal of protecting market participants by removing specific requirements for the segregation agreements. However, the Commission is of the view that the intended purpose and benefits of subpart L remain in place because the Proposal continues to implement the statutory requirements. In addition, the parties and the selected custodian would now have the flexibility to establish requirements for margin segregation through negotiated contracts that meet their respective needs, thereby providing market participants with the flexibility and opportunity to protect themselves better by contract. Finally, the greater flexibility provided by the amended regulations may increase the voluntary use of initial margin segregation by counterparties, a process that was intended to provide better protection for the counterparty in the event of default by the SD or MSP.

b. Efficiency, Competitiveness, and Financial Integrity of Markets

Subpart L promotes the financial integrity of markets by providing for the protection of counterparty collateral and by mitigating systemic risk that may result from the loss of access to the collateral in the event of a counterparty default. As discussed above, given that registrants would still be expected to enter into segregation arrangements with counterparties that elect to segregate, and, with the amendments, registrants would now be able to develop segregation arrangements tailored to their businesses and swap transactions, the Commission is of the view that the proposed changes likely would have a positive impact on market integrity.

The Commission preliminarily believes that the proposed amendments will not have a significant impact on the competiveness or efficiency of markets because this rulemaking only affects how collateral is protected and segregated but not how market participants elect to trade.

c. Price Discovery

The Commission believes the proposed amendments to subpart L will not have a significant effect on price discovery.

d. Sound Risk Management

Subpart L provides for the management and protection of counterparty collateral and therefore mitigates the risk of loss of access to the collateral, which loss can have an adverse impact on registrants, counterparties and the U.S. financial markets. As discussed, the proposed changes remove certain prescriptive requirements, but do not alter the overall principles of the existing requirements of subpart L. Therefore, the Commission is of the view that sound risk management practices will not be adversely impacted by the proposed changes.

e. Other Public Interest Considerations

The Commission has not identified any other public purpose considerations for the proposed changes to subpart L.

(iii) Request for Comment

The Commission invites comment on its preliminary consideration of the costs and benefits associated with the proposed changes to subpart L, especially with respect to the five factors the Commission is required to consider under CEA section 15(a). In addressing these areas and any other aspect of the Commission's preliminary cost-benefit considerations, the Commission encourages commenters to submit any data or other information they may have quantifying and/or qualifying the costs and benefits of the proposal. The Commission also specifically requests comment on the following questions:

- To what extent do the proposed amendments reduce or increase burdens and costs for SDs or MSPs or their counterparties?
- To what extent do the proposed amendments impact collateral management risk considerations?
- Will there be any effects on the financial system if initial margin is not invested pursuant to Regulation 1.25? If yes, please explain.
- Are counterparties to SDs or MSPs at a substantial disadvantage when negotiating the terms for segregation arrangements that would no longer be required if the proposed amendments are adopted? Would that disadvantage cause them to receive unfair terms on those segregation arrangements? Are there mitigating factors?
- Would the elimination of the requirement to list at least one non-affiliated custodian and the cost of the custodial services have an effect on the selection of an independent custodian and the cost of the services to the non-SD/MSP counterparty? If yes, please explain.

D. Antitrust Considerations

Section 15(b) of the CEA requires the Commission to take into consideration the public interest to be protected by antitrust laws and endeavor to take the least anticompetitive means of achieving the purposes of the CEA, in issuing any order or adopting any Commission rule or regulation (including any exemption under section 4(c) or 4c(b)), or in requiring or approving any bylaw, rule, or regulation of a contract market or registered futures association established pursuant to section 17 of the CEA.[42]

The Commission believes that the public interest to be protected by the antitrust laws is generally to protect competition. The Commission requests comment on whether the proposed rule implicates any other specific public interest to be protected by the antitrust laws.

The Commission has considered the proposed rule to determine whether it is anticompetitive and has preliminarily identified no anticompetitive effects. The Commission requests comment on whether the proposed rule is anticompetitive and, if it is, what the anticompetitive effects are.

Because the Commission has preliminarily determined that the proposed rule is not anticompetitive and has no anticompetitive effects, the Commission has not identified any less anticompetitive means of achieving the purposes of the Act. The Commission requests comment on whether there are less anticompetitive means of achieving the relevant purposes of the Act that would otherwise be served by adopting the proposed rule.

List of Subjects in 17 CFR Part 23

Custodians, Major swap participants, Margin, Segregation, Swap dealers, Swaps, Uncleared swaps.

For the reasons stated in the preamble, the Commodity Futures

[42] *See* 7 U.S.C. 19(b).

Trading Commission proposes to amend 17 CFR part 23 as follows:

PART 23—SWAP DEALERS AND MAJOR SWAP PARTICIPANTS

■ 1. The authority citation for part 23 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 6, 6a, 6b, 6b–1, 6c, 6p, 6r, 6s, 6t, 9, 9a, 12, 12a, 13b, 13c, 16a, 18, 19, 21.

Section 23.160 also issued under 7 U.S.C. 2(i); Sec. 721(b), Pub. L. 111–203, 124 Stat. 1641 (2010).

■ 2. Revise subpart L to read as follows:

Subpart L—Segregation of Assets Held as Collateral in Uncleared Swap Transactions

Sec.
23.700 Definitions.
23.701 Notification of right to segregation.
23.702 Requirements for segregated initial margin.
23.703 Investment of segregated initial margin.
23.704 Requirements for non-segregated margin.

Subpart L—Segregation of Assets Held as Collateral in Uncleared Swap Transactions

§ 23.700 Definitions.

As used in this subpart:

Initial Margin means money, securities, or property posted by a party to a swap as performance bond to cover potential future exposures arising from changes in the market value of the position.

Segregate means to keep two or more items in separate accounts, and to avoid combining them in the same transfer between two accounts.

Variation Margin means a payment made by or collateral posted by a party to a swap to cover the current exposure arising from changes in the market value of the position since the trade was executed or the previous time the position was marked to market.

§ 23.701 Notification of right to segregation.

(a) At the beginning of the first swap transaction that provides for the exchange of Initial Margin, a swap dealer or major swap participant must notify the counterparty that the counterparty has the right to require that any Initial Margin the counterparty provides in connection with such transaction be segregated in accordance with §§ 23.702 and 23.703, except in those circumstances where segregation is mandatory pursuant to § 23.157 or rules adopted by the prudential regulators pursuant to section 4s(e)(2)(A) of the Act.

(b) The right referred to in paragraph (a) of this section does not extend to Variation Margin.

(c) If the counterparty elects to segregate Initial Margin, the terms of segregation shall be established by written agreement.

(d) A counterparty's election, if applicable, to require segregation of Initial Margin or not to require such segregation, may be changed at the discretion of the counterparty upon written notice delivered to the swap dealer or major swap participant, which changed election shall be applicable to all swaps entered into between the parties after such delivery.

§ 23.702 Requirements for segregated initial margin.

(a) The custodian of Initial Margin, segregated pursuant to an election under § 23.701, must be a legal entity independent of both the swap dealer or major swap participant and the counterparty.

(b) Initial Margin that is segregated pursuant to an election under § 23.701 must be held in an account segregated for, and on behalf of, the counterparty, and designated as such. Such an account may, if the swap dealer or major swap participant and the counterparty agree, also hold Variation Margin.

(c) Any agreement for the segregation of Initial Margin pursuant to this section shall be in writing, shall include the custodian as a party, and shall provide that any instruction to withdraw Initial Margin shall be in writing and that notification of the withdrawal shall be given immediately to the non-withdrawing party.

§ 23.703 Investment of segregated initial margin.

The swap dealer or major swap participant and the counterparty may enter into any commercial arrangement, in writing, regarding the investment of Initial Margin segregated pursuant to § 23.701 and the related allocation of gains and losses resulting from such investment.

§ 23.704 Requirements for non-segregated margin.

(a) Each swap dealer or major swap participant shall report to each counterparty that does not choose to require segregation of Initial Margin pursuant to § 23.701(a), on a quarterly basis, no later than the fifteenth business day after the end of the quarter, that the back office procedures of the swap dealer or major swap participant relating to margin and collateral requirements are in compliance with the agreement of the counterparties.

(b) The obligation specified in paragraph (a) of this section shall apply no earlier than the 90th calendar day after the date on which the first swap is transacted between the counterparty and the swap dealer or major swap participant.

Issued in Washington, DC, on July 24, 2018, by the Commission.

Christopher Kirkpatrick,

Secretary of the Commission.

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

Appendices to Segregation of Assets Held as Collateral in Uncleared Swap Transactions—Commission Voting Summary, Chairman's Statement, and Commissioner's Statement

Appendix 1—Commission Voting Summary

On this matter, Chairman Giancarlo and Commissioners Quintenz and Behnam voted in the affirmative. No Commissioner voted in the negative.

Appendix 2—Statement of Chairman J. Christopher Giancarlo

After more than four years of administering the final rules in subpart L of part 23 (Commission Regulations 23.700–23.704), CFTC staff have observed that the detailed requirements of these regulations have been difficult and burdensome for swap dealers to satisfy. The requirements have also caused some confusion by end user counterparties who rely on our markets to hedge commercial risk. These observations were supported by comments made in response to the Commission's Project KISS initiative.

Congress mandated that counterparties of swap dealers be given a choice regarding whether or not they elect the protections that come from segregation of initial margin collateral, which I support. Part of this important decision is protected by making sure the counterparty clearly, and easily, understands its rights. It appears that very few swap counterparties have exercised their right to make that choice. Part of the reluctance may be because that choice is accompanied by a range of overly complicated regulatory requirements and obligations.

The swaps market is a marketplace of professional market participants. It is closed to retail participation. Public policy is not well served by imposing prescriptive consumer and investor protections in markets that exclusively serve professional market participants.

This proposal looks to reduce the burdens, costs and confusion that have proved counterproductive and discouraged the election of segregation. This proposal will also make it more efficient for counterparties, such as pension funds, insurance companies, and community banks, to be able to elect segregation and receive those protections while hedging their risk in the swaps markets.

As part of the proposal, the Commission would permit more flexibility in custodial arrangements and margin investment. Rather than the current prescriptive requirements of the regulation, it would leave it up to commercial negotiation by professional trading counterparties. Another change is removing the overly prescriptive requirement that initial margin segregation be invested pursuant to Commission Regulation 1.25, in the anticipation that doing so could encourage more segregation elections.

Enabling the election of segregation is a bipartisan goal, starting with a unanimous Commission rulemaking by a previous commission. Now with time and experience, we see that this goal could be more easily met, and changes to the rules are appropriate to better further these important public policy objectives.

I support this proposed rule from the Division of Swap Dealer & Intermediary Oversight. I look forward to hearing comments on the proposal.

Appendix 3—Concurring Statement of Commissioner Rostin Behnam

I respectfully concur with the Commodity Futures Trading Commission's (the ''Commission'' or ''CFTC'') approval of its proposed rule (the ''Proposal'') regarding amendments to subpart L of the Commission's Regulations (''Segregation of Assets Held as Collateral in Uncleared Swap Transactions'' consisting of Regulations 23.700 through 23.704), which implement Section 4s(*l*) of the Commodity Exchange Act (''CEA'' or the ''Act''). While I have strong reservations about the Commission's proposed interpretation of CEA section 4s(*l*) and its slash and burn approach to ''simplify'' requirements for swap dealers (''SDs'') and major swap participants (''MSPs'') absent meaningful consideration of the impact on swap counterparties, I am hopeful that the Proposal's solicitation of comments on these key points will produce a balanced record from which to adopt a final rule that more precisely simplifies the current requirements and provides tailored regulatory relief.

Since joining the Commission, I have emphasized both my strong opposition to any rollbacks of Dodd-Frank initiatives and my belief that, while a more principles-based approach may be suitable in certain situations, any changes must be narrowly targeted to ensure that core reforms remain whole and intact. I am concerned that this Proposal forgoes a surgical approach in favor of a blunt, insensitive strike at the purpose of the statute and implementing regulations.

While the preamble purports that the Proposal is supported by Commission experience, in reality the Commission heavily relies on a few comment letters from a limited segment of the market submitted in response to its ''Project KISS'' initiative. In the absence of corroborative evidence from those most impacted by the Proposal—non-financial end-users and financial end-users without ''material swaps exposure,'' as defined in the CFTC Margin Rule [1]—I am concerned that the Commission's proposed amendments take too much of a shoot first, ask questions later tactic. While I am supportive of the Project KISS initiative, I believe that the exercise requires a more diligent approach to evaluating the potential impact of proposing amendments to existing rules.

My greatest concerns with the Proposal relate to the Commission's proposed interpretation of the notice requirement in CEA section 4s(*l*)(1) and the proposed removal of all limitations on the investment of margin that is segregated pursuant to an election under Regulation 23.701. As I explain below, I am concerned that the Proposal's focus on reducing burdens to SDs and MSPs through amending the rules in subpart L may obscure valid issues regarding implementation—matters which may be resolved through more precise amendments with less chance of negatively impacting market participants.

The Commission previously interpreted the language in CEA section 4s(*l*)(1)(A) ''as a segregation right that can be elected or renounced by the SD's or MSP's counterparty.'' [2] Citing the plain language of the statute, the Commission noted Congress's emphasis on the importance of the ability of a counterparty to elect to have its collateral segregated by describing segregation as a ''right.'' [3] Regarding this ''right,'' the Commission understood that, ''the statute does not merely grant counterparties the legal right to segregation; it specifically requires that the existence of this right be communicated to them.'' [4] At a minimum, the Commission determined that this requirement is met when an SD or MSP provides notification to a counterparty at least once in each calendar year in which the SD or MSP enters a swap with the counterparty.[5] At the time, the Commission recognized that requiring notification on a transaction-by-transaction basis—*e.g.,* ''at the beginning of *a* swap transaction,'' [6] may be overly costly and burdensome, and that annual notification ''ensures that the right to segregation is called to the attention of the counterparties reasonably close in time to the point at which they make decisions regarding the handling of collateral for *particular* swaps transactions.'' [7] While the Commission considered requiring only an initial notification, it rejected that approach, noting the importance of the counterparty's right to elect to have its collateral segregated, and the minimal administrative burden on SDs and MSPs.[8]

The Commission and subpart L are largely silent with regard to content and delivery manner and method of the notice required by CEA section 4s(*l*)(1)(A) other than provisions in Regulation 23.701(a)(1) and (2) requiring the notification to identify one or more creditworthy, independent custodians and to include information regarding the price of segregation for each custodian, to the extent the SD or MSP has such information.[9] Though not specifically required by CEA section 4s(*l*)(1)(A), the Commission determined that this limited set of disclosures represents information material to a counterparty's informed decision making process regarding exercise of the right to segregation and when considering a segregation package offered by an SD or MSP.[10]

The Proposal would amend subpart L, in part, to require a single, one-time notification to a counterparty of their right to require segregation of any initial margin the counterparty provides in connection with all transactions following the first transaction that provides for the exchange of initial margin. The Proposal would also entirely remove Regulations 23.701(a)(2) and (3), generally finding that, since very few counterparties elect to require segregation, the underlying activity of ''confirming which custodians are available'' is ''unnecessarily burdensome'' and that pricing for segregation may vary, is normally subject to negotiation, and can be discussed when the counterparty indicates an interest in segregation. Consistent with CEA section 4s(*l*)(1)(B), the Proposal preserves the ability of a counterparty to change its election upon written notice.

In proposing these amendments, the Commission appears to be taking the view that a counterparty's decision with regard to segregation is made with respect to a trading relationship with a particular SD or MSP at the relationship's inception, and that while these types of counterparties are sophisticated enough to elect segregation and negotiate the terms of segregation arrangements, the annual receipt of a notice reminding them that they may change their election at any time is confusing. It also assumes that evidence of minimal uptake of

[1] 17 CFR 23.150–23.159, 23.161.

[2] Protection of Collateral of Counterparties to Uncleared Swaps; Treatment of Securities in a Portfolio Margining Account in a Commodity Broker Bankruptcy, 78 FR 66621, 66623 (Nov. 6, 2013).

[3] *Id.* at 66623 and 66625.

[4] *Id.* at 66625.

[5] *Id.;* 17 CFR 23.701(e).

[6] 7 U.S.C. 6s(*l*)(1)(A) (emphasis added).

[7] 78 FR at 66635 (emphasis added); *see also* 78 FR at 66633 (adding that annual notice offers this benefit ''without requiring excessive or repetitive notification in cases where a counterparty engages in multiple swaps with a particular SD or MSP over the course of a year.'').

[8] 78 FR at 66633 (''The Commission believes that the cost of requiring SDs and MSPs to deliver one notification per year to each counterparty is not overly burdensome, particularly when one considers the importance of the counterparty's decision to require segregation and the large dollar volume of business that is typically done by SDs and MSPs.'').

[9] 17 CFR 23.701(a)(2) and (3). While Commission Regulation 23.701(d) requires the SD or MSP to obtain confirmation of receipt of the segregation notification, since 2014, the Commission has permitted SDs and MSPs to rely on negative consent for purposes of Regulation 23.701(d), provided that the notice under Regulation 23.701(a) includes a prominent and unambiguous statement to that effect. *See* CFTC Staff Letter No. 14–132 (Oct. 31, 2014) at 7, available at *https://www.cftc.gov/sites/default/files/idc/groups/public/@lrlettergeneral/documents/letter/14-132.pdf; See also* Transcript of the NFA Swap Dealer Examinations Webinar at 6 (Jan. 18, 2018), *available at https://www.nfa.futures.org/members/member-resources/files/transcripts/sdexamswebinar transcriptjan2018.pdf.*

[10] *See* 78 FR at 66624.

the election to segregate indicates that subpart L is largely superfluous.

While it may be true that swap counterparties have not elected segregation in droves, CEA section 4s(*l*) and subpart L are not intended to advance any particular outcome. Rather they concern the rights of counterparties to SDs and MSPs and aim to increase the safety in the market for uncleared swaps by creating a self-effectuating requirement for the segregation of counterparty initial margin in an entity legally separate from the SD or MSP.[11] As previously noted by the Commission in proposing subpart L, a goal of the regulation was to ''increase the likelihood that any lack of use of segregated collateral accounts by uncleared swaps counterparties is the result of genuine choices by counterparties and reduce the likelihood that it is the result of inertia, market power, or other market imperfections.'' [12] Indeed, based on some of the preamble discussion, it may be that we should consider the possibility that swap counterparties are not electing segregation specifically because the current system of annual notification does not provide them adequate notice of their ongoing right to segregation. If that is the case, the appropriate Commission response may be more (or clearer) notification, rather than the reduction in notification proposed today.

I am concerned that the Commission's proposal could undermine the right to segregation as well as Congressional intent by removing the periodic notification and minimal disclosures currently required by subpart L. I believe there are prescriptive elements of subpart L that can be removed with little impact to counterparties.[13] However, I am concerned by the Proposal's reliance on representations by SDs and unverified assumptions regarding counterparty behavior to justify regulatory rollbacks in the absence of further examination of whether and how the manner in which the annual notice requirement is currently implemented has contributed to claims of confusion and burden. I am also concerned that the Proposal may discourage commenters from suggesting alternative means of complying with the current language in Regulation 23.701(a) which may better preserve Congressional intent.[14]

I am similarly concerned that the Proposal's removal of the requirement in Regulation 23.703 that limits the investment of initial margin segregated pursuant to subpart L to be invested consistent with Commission Regulation 1.25 is a knee-jerk response to a single Project KISS comment letter that ignores current practice and presupposes that the rollback will encourage more counterparties to elect to segregate pursuant to subpart L, which, as stated above, is not the goal of the statute or implementing regulation. While I am not opposed to permitting greater flexibility with regard to the investment of initial margin, I would have preferred that the Commission seek additional information regarding whether and how the current limitations in Regulation 23.703 have impacted counterparties and their decision making under subpart L before proposing alternative regulatory language.

I commend the Commission and its staff for engaging through Project KISS in efforts to identify and reduce unnecessary burdens in the Commission regulations. I appreciate staff's consideration and inclusion of several of my suggested edits to this Proposal. To be clear, I believe the Proposal provides for many sound improvements to subpart L that respond to ongoing concerns and confusion created by the finalization of the CFTC and Prudential Regulator Margin Rules and CFTC interpretive guidance.[15] However, where the Proposal aims to strip out regulatory provisions that the Commission previously determined were essential to effectuating the language and purpose of CEA section 4s(*l*), I believe the Commission may be engaging in shortsighted and unnecessary rollbacks to the detriment of the swap counterparties subpart L is intended to protect.

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[11] *Id.* at 66621 and 66632.

[12] Protection of Collateral of Counterparties to Uncleared Swaps; Treatment of Securities in a Portfolio Margining Account in a Commodity Broker Bankruptcy, 75 FR 75432, 75437 (proposed Dec. 3, 2010).

[13] I also believe that the Commission can respond to specific burdens identified by SDs and MSPs by, for example, codifying staff interpretive guidance. *See, e.g.* Letter from the Financial Services Roundtable at 56 (Sept. 30, 2017) (urging the Commission to codify its interpretation in CFTC Staff Letter No. 14–132 with respect to SDs' ability to rely on negative consent), *https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61427&SearchText=.*

[14] For example, through the use of additional clauses in customer onboarding or relationship documentation as a means to append the required notification and disclosures to each new swap confirmation thereby ensuring and simultaneously documenting that the counterparty is notified of their right to require segregation at least at the beginning of each swap transaction.

[15] *See* CFTC Staff Letter No. 14–132, *supra* note 9.

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1904

[Docket No. OSHA–2013–0023]

RIN 1218–AD17

Tracking of Workplace Injuries and Illnesses

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Proposed rule.

SUMMARY: This proposed rule would amend OSHA's recordkeeping regulation by rescinding the requirement for establishments with 250 or more employees to electronically submit information from OSHA Forms 300 and 301. These establishments will continue to be required to submit information from their Form 300A summaries. OSHA is amending its recordkeeping regulations to protect sensitive worker information from potential disclosure under the Freedom of Information Act (FOIA). OSHA has preliminarily determined that the risk of disclosure of this information, the costs to OSHA of collecting and using the information, and the reporting burden on employers are unjustified given the uncertain benefits of collecting the information. OSHA believes that this proposal maintains safety and health protections for workers while also reducing the burden to employers of complying with the current rule. OSHA seeks comment on this proposal, particularly on its impact on worker privacy, including the risks posed by exposing workers' sensitive information to possible FOIA disclosure. In addition, OSHA is proposing to require covered employers to submit their Employer Identification Number (EIN) electronically along with their injury and illness data submission.

DATES: Comments must be submitted by September 28, 2018.

ADDRESSES: You may submit comments, identified by docket number OSHA–2013–0023, or regulatory information number (RIN) 1218–AD17, by any of the following methods:

Electronically: You may submit comments electronically at *https://www.regulations.gov/,* which is the federal e-rulemaking portal. Follow the instructions on the website for making electronic submissions;

Fax: If your submission, including attachments, does not exceed 10 pages, you may fax it to the OSHA docket office at (202) 693–1648;

Regular mail, express mail, hand delivery, or messenger/courier service (hard copy): You may submit your materials to the OSHA Docket Office, Docket No. OSHA–2013–0023, Room N–3653, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210; telephone: (202) 693–2350 (TTY (887) 889–5627). OSHA's Docket Office accepts deliveries (hand deliveries, express mail, and messenger/courier service) from 10 a.m. to 3 p.m. ET, weekdays.

Instructions for submitting comments: All submissions must include the docket number (Docket No. OSHA–2013–0023) or the RIN (RIN 1218–AD17) for this rulemaking. Because of security-related procedures, submission by regular mail may result in significant delay. Please contact the OSHA docket office (telephone: (202) 693–2350; email: *technicaldatacenter@dol.gov*) for