DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 45

[Docket No. OCC–2019–0023]

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FEDERAL RESERVE SYSTEM

12 CFR Part 237

[Docket No. R–1682]

RIN 7100–AF62

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 349

RIN 3064–AF08

FARM CREDIT ADMINISTRATION

12 CFR Part 624

RIN 3052–AD38

FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1221

RIN 2590–AB03

Margin and Capital Requirements for Covered Swap Entities

AGENCY: Office of the Comptroller of the Currency, Treasury (OCC); Board of Governors of the Federal Reserve System (Board); Federal Deposit Insurance Corporation (FDIC); Farm Credit Administration (FCA); and the Federal Housing Finance Agency (FHFA).

ACTION: Final rule.

SUMMARY: The OCC, Board, FDIC, FCA, and FHFA (each, an agency, and collectively, the agencies) are adopting a final rule that amends the agencies' regulations requiring swap dealers and security-based swap dealers under the agencies' respective jurisdictions to exchange margin with their counterparties for swaps that are not centrally cleared (Swap Margin Rule). The Swap Margin Rule as adopted in 2015 takes effect under a phased compliance schedule spanning from 2016 through 2020, and the entities covered by the rule continue to hold swaps in their portfolios that were entered into before the effective dates of the rule. Such swaps are grandfathered from the Swap Margin Rule's requirements until they expire according to their terms. The final rule permits swaps entered into prior to an applicable compliance date (legacy swaps) to retain their legacy status in the event that they are amended to replace an interbank offered rate (IBOR) or other discontinued rate, modifies initial margin requirements for non-cleared swaps between affiliates, introduces an additional compliance date for initial margin requirements, clarifies the point in time at which trading documentation must be in place, permits legacy swaps to retain their legacy status in the event that they are amended due to technical amendments, notional reductions, or portfolio compression exercises, and makes technical changes to relocate the provision addressing amendments to legacy swaps that are made to comply with the Qualified Financial Contract Rules, as defined in the Supplementary Information section. In addition, the final rule addresses comments received in response to the agencies' publication of the interim final rule that would preserve the status of legacy swaps meeting certain criteria if the United Kingdom withdraws from the European Union (hereafter ''Brexit) without a negotiated settlement agreement.

DATES: The final rule is effective August 31, 2020.

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SUPPLEMENTARY INFORMATION:

I. Introduction

The agencies are adopting the recently proposed amendments to the agencies' regulations that require swap dealers and security-based swap dealers under the agencies' respective jurisdictions to exchange margin with their counterparties for swaps that are not centrally cleared (Swap Margin Rule or Rule), with certain adjustments (final rule). As discussed in detail below, the final rule (1) permits swaps entered into prior to an applicable compliance date (legacy swaps) to retain their legacy status in the event that they are amended to replace an interbank offered rate (IBOR) or other discontinued rate, (2) modifies initial margin requirements for non-cleared swaps between covered swap entities and their affiliates, (3) introduces an additional compliance date for initial margin requirements, (4) clarifies the point in time at which trading documentation must be in place, (5) permits legacy swaps to retain their legacy status in the event that they are amended due to technical amendments, notional reductions, or portfolio compression exercises, (6) makes technical changes to relocate the provision within the rule addressing amendments to legacy swaps that are made to comply with the qualified financial contract rules (QFC Rules),[1] and (7) addresses comments received in response to the agencies' publication of

[1] 83 FR 50805 (October 10, 2018). The QFC Rules are codified as follows: 12 CFR part 47 (OCC's QFC Rule); 12 CFR part 252, subpart I (Board's QFC Rule); 12 CFR part 382 (FDIC's QFC Rule).

the interim final rule dealing with Brexit-related issues.

A. Background on the Swap Margin Rule

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) required the agencies to jointly adopt rules that establish capital and margin requirements for swap entities that are prudentially regulated by one of the agencies (covered swap entities).[2] These capital and margin requirements apply to swaps that are not cleared by a registered derivatives clearing organization or a registered clearing agency (non-cleared swaps).[3] For the remainder of this preamble, the term ''non-cleared swaps'' refers to non-cleared swaps and non-cleared security-based swaps unless the context requires otherwise.

The Basel Committee on Banking Supervision (BCBS) and the Board of the International Organization of Securities Commissions (IOSCO) established an international framework for margin requirements on non-cleared derivatives in September 2013 (BCBS/IOSCO Framework).[4] Following the establishment of the BCBS/IOSCO Framework, on November 30, 2015, the agencies published the Swap Margin Rule, which includes many of the principles and other aspects of the BCBS/IOSCO Framework.[5] In particular, the Swap Margin Rule adopted the implementation schedule set forth in the BCBS/IOSCO Framework, including the revised implementation schedule adopted on March 18, 2015.[6]

The Swap Margin Rule established an effective date of April 1, 2016, with a phased-in compliance schedule for the initial and variation margin requirements.[7] On or after March 1, 2017, all covered swap entities were required to comply with the variation margin requirements for transactions with other swap entities and financial end user counterparties. The Swap Margin Rule presently requires all covered swap entities to comply with the initial margin requirements for non-cleared swaps with all financial end users with a material swaps exposure and with all swap entities by September 1, 2020.

B. Overview of the Notice of Proposed Rulemaking and General Summary of Comments

On November 7, 2019, the agencies sought comment on a proposal to revise certain parts of the Swap Margin Rule to facilitate the implementation of prudent risk management strategies at covered swap entities (proposed rule or proposal).[8] The proposed amendments permitted legacy swaps to retain their legacy status in the event that they are amended to replace an interbank offered rate (IBOR) or other discontinued rate, introduced an additional compliance date for initial margin requirements, clarified the point in time at which trading documentation must be in place, and permitted legacy swaps to retain their legacy status in the event that they are amended due to technical amendments, notional reductions, or portfolio compression exercises. The proposal would also have made technical changes to relocate the provision within the rule addressing amendments to legacy swaps that are made to comply with the QFC Rules.

The proposal would also have no longer required covered swap entities to collect initial margin for non-cleared swaps with affiliates. However, inter-affiliate transactions would have continued to be subject to variation margin requirements. Inter-affiliate transactions of covered swap entities regulated by the FDIC, the OCC, and the Board also would continue to be subject to other applicable rules and regulations.

The agencies received approximately 20 comments on the proposal, from U.S. financial institutions, public interest groups, trade associations, academic institutions, and other interested parties. Agency staff also met with some commenters at those commenters' request to discuss their comments on the proposal.[9]

Most commenters supported the proposal's relief to amend certain legacy swaps for certain reasons and the proposal's addition of a compliance phase for smaller entities, as a meaningful way to assist market participants in managing and prioritizing their resources, mitigating potential trading disruptions related to the transition of IBORs to other interest rates, complying with documentation requirements, and engaging in certain trade life-cycle events.

With respect to removing the initial margin requirement for inter-affiliate transactions, some commenters supported the proposal while others expressed the view that the proposal would increase risks to covered swap entities individually and financial stability more broadly. For example, a few commenters shared their view that collateralization (in the form of initial margin collected from a covered swap entity's affiliate) is a highly effective tool for reducing closeout risk.[10] These commenters were concerned that the proposed rule would eliminate an estimated $40 billion in collateral held by covered swap entities, which, in their view, is necessary for closeout risk-absorption. Some of the commenters also expressed the view that banking organizations are using inter-affiliate swaps for the primary purpose of concentrating the risks of the organizations' world-wide derivatives activities onto the books of the covered

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[2] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010). *See* 7 U.S.C. 6s; 15 U.S.C. 78o–10. Sections 731 and 764 of the Dodd-Frank Act added a new section 4s to the Commodity Exchange Act of 1936, as amended, and a new section, section 15F, to the Securities Exchange Act of 1934, as amended, respectively, which require registration with the Commodity Futures Trading Commission (CFTC) of swap dealers and major swap participants and the U.S. Securities and Exchange Commission (SEC) of security-based swap dealers and major security-based swap participants (each a swap entity and, collectively, swap entities). Section 1a(39) of the Commodity Exchange Act of 1936, as amended, defines the term ''prudential regulator'' for purposes of the margin requirements applicable to swap dealers, major swap participants, security-based swap dealers and major security-based swap participants. *See* 7 U.S.C. 1a(39).

[3] A ''swap'' is defined in section 721 of the Dodd-Frank Act to include, among other things, an interest rate swap, commodity swap, equity swap, and credit default swap, and a security-based swap is defined in section 761 of the Dodd-Frank Act to include a swap based on a single security or loan or on a narrow-based security index. *See* 7 U.S.C. 1a(47); 15 U.S.C. 78c(a)(68).

[4] *See* BCBS and IOSCO ''Margin requirements for non-centrally cleared derivatives,'' (September 2013), available at *https://www.bis.org/publ/bcbs261.pdf.*

[5] 80 FR 74840 (November 30, 2015).

[6] *See* BCBS and IOSCO ''Margin requirements for non-centrally cleared derivatives,'' (March 2015), available at *https://www.bis.org/bcbs/publ/d317.pdf.*

[7] The applicable compliance date for a covered swap entity is based on the average daily aggregate notional amount of non-cleared swaps, foreign exchange forwards and foreign exchange swaps of the covered swap entity and its counterparty (accounting for their respective affiliates) for each business day in March, April, and May of that year. The applicable compliance dates for initial margin requirements that are currently in place, and the corresponding average daily aggregate notional amount thresholds, are: September 1, 2016, $3 trillion; September 1, 2017, $2.25 trillion; September 1, 2018, $1.5 trillion; September 1, 2019, $0.75 trillion; and September 1, 2020, all swap entities and counterparties. *See* § __.1(e) of the Swap Margin Rule. In this final rule, the agencies are also adding one additional year to this schedule for certain counterparties.

[8] 84 FR 59970 (Nov. 7, 2019).

[9] Summaries of these meetings may be found at the internet sites where the agencies' have posted public comments on the NPR. *See, e.g., https://www.federalreserve.gov/apps/foia/proposedregs.aspx.*

[10] Closeout risk is the risk associated with the period following a confirmed default wherein the defaulting counterparty is unable to perform on the swap contract and the cost of legally closing out the existing swap and establishing a replacement swap with a new counterparty is unknown.

swap entities subject to the Swap Margin Rule, *i.e.,* U.S. insured depository institutions.

By contrast, commenters supporting the removal of the initial margin requirement for inter-affiliate transactions asserted that the proposal would align the Swap Margin Rule with the margin requirements of some other domestic and foreign jurisdictions and facilitate more balanced and effective risk management practices across the spectrum of risks faced within banking organizations that engage in non-cleared swaps.

As discussed below in this **SUPPLEMENTARY INFORMATION** section, the final rule adopts, with certain adjustments in response to the comments received, the proposal that (1) permits swaps entered into prior to an applicable compliance date (legacy swaps) to retain their legacy status in the event that they are amended to replace an IBOR or other discontinued rate, (2) modifies the initial margin requirement for non-cleared swaps between covered swap entities and their affiliates, (3) introduces an additional compliance date for initial margin requirements, (4) clarifies the point in time at which trading documentation must be in place, (5) permits legacy swaps to retain their legacy status in the event that they are amended due to technical amendments, notional reductions, or portfolio compression exercises, (6) makes technical changes to relocate the provision within the rule addressing amendments to legacy swaps that are made to comply with the qualified financial contract rules (QFC Rules),) [11] and (7) addresses comments received in response to the agencies' publication of the interim final rule dealing with Brexit-related issues.

II. Interbank Offered Rates

A. Summary of Proposed Rule

Due to the potential discontinuation of LIBOR at the end of 2021, covered swap entities face uncertainty about the way their swap contracts that include an interest rate based on LIBOR and other IBORs will operate after a permanent discontinuation. An interest rate is a critical term for calculating payments under a swap contract, be it an interest rate swap or another type of swap that includes a reference interest rate as one of the mechanisms for determining payments or premiums. In many instances, covered swap entities may decide to amend existing swap contracts to replace an IBOR before the IBOR becomes discontinued. Such amendments may also trigger follow-on amendments that the counterparties determine are necessary to maintain the economics of the contract.[12] Absent revisions to the Swap Margin Rule, an amendment to a legacy swap could affect the legacy status of such a swap and make it subject to the margin requirements of the rule. In order to enable covered swap entities and their counterparties to minimize disturbance to the financial markets, the agencies proposed to provide relief to permit covered swap entities to amend the interest rates in a legacy swap contract, based on certain conditions of eligibility, and to adopt necessary follow-on amendments, without the swap losing its legacy status.

B. Method of Amendment

1. Proposal

In recognition of the ongoing efforts to transition away from certain IBORs due to their potential discontinuation, the agencies proposed to amend the Swap Margin Rule to remove impediments that would limit the ability of covered swap entities to replace certain interest rates in their legacy non-cleared swaps. Proposed § __.1(h) recognized that these replacements could be carried out using a variety of legal mechanisms by permitting amendments accomplished by the parties' adherence to a protocol, contractual amendment of an agreement or confirmation, or execution of a new contract in replacement of and immediately upon termination of an existing contract (*i.e.,* tear-up), subject to certain limitations found in § __.1(h)(3).

2. Final Rule

Commenters were supportive of the flexibility that the agencies provided regarding the method of amendment, particularly the flexibility to make amendments to an individual non-cleared swap or on a netting set level. Several commenters requested a technical change to the language in proposed § __.1(h) to clarify that the method of adherence to a protocol is itself a contractual amendment. To make this clarification, the agencies are replacing the language ''contractual amendment of an agreement or confirmation'' with ''other amendment of a contract or confirmation'' to make clear that both an adherence to a protocol as well as other amendments are permissible methods of amendment to a legacy swap, and also to maintain consistency in using the term ''contract'' rather than ''agreement'' in § __.1(h). The agencies are also making non-substantive parallel changes to the rule text to clarify that the execution of a new contract or confirmation in replacement of and immediately upon termination of an existing contract or confirmation is a permitted method of amendment.

A few commenters also requested that the agencies expand § __.1(h) to include new, non-legacy swaps entered into solely for managing the transition away from IBORs, or new, non-legacy swaps designed to transition an existing swap away from an IBOR even if the swap may not be amended or terminated. These commenters suggested this expansion would facilitate use of basis swaps to offset IBOR exposure from legacy swaps against new exposure to a risk-free rate (RFR). One commenter argued this would be roughly economically equivalent to directly amending one or more existing swaps to eliminate the IBOR exposure and replacing it with an RFR.

The agencies are not expanding the regulation beyond the methods that were proposed in § __.1(h).) The alternative suggested by the commenters would be ineffective in resolving the problem the agencies seek to address. As long as covered swap entities hold existing swaps contractually obligating them to exchange payments based on IBORs, they bear the risk that those IBORs will be discontinued. If a covered swap entity hedges that IBOR exposure to another benchmark by executing a new basis swap, one leg of that swap will necessarily be linked to the IBOR. While the agencies believe there may be certain circumstances in which sound risk management by a covered swap entity would include new trading activity between IBOR and non-IBOR market exposures (with contract dates ending by December 2021), these activities go beyond the scope of relief the agencies are providing with this rule.

C. Purpose of Amendments

1. Proposal

The proposed rule described the type of interest rate that can be replaced and the accompanying changes that would be permitted. Proposed §§ __.1(h)(3)(i)(A) and (B) would permit amendments that are made solely to accommodate the replacement of an IBOR or of any other non-IBOR interest rate that a covered swap entity

[11] 83 FR 50805 (October 10, 2018). The QFC Rules are codified as follows: 12 CFR part 47 (OCC's QFC Rule); 12 CFR part 252, subpart I (Board's QFC Rule); 12 CFR part 382 (FDIC's QFC Rule).

[12] Follow-on amendments may include, for example, spread adjustments resulting from the move from a term rate to an overnight rate, from an unsecured rate to a secured rate, or from a change in tenor.

reasonably expects to be discontinued or reasonably determines has lost its relevance as a reliable benchmark due to a significant impairment with an alternate interest rate.

2. Final Rule

The agencies did not receive any comments on this part of the proposed rule and are adopting it as proposed.

D. Permitted Interest Rates

1. Proposal

The proposed rule provided that an IBOR could be replaced, including but not limited to LIBOR, TIBOR, BBSW, SIBOR, CDOR, EURIBOR, and HIBOR. Although the current uncertainty surrounding interest rates is tied to IBORs, the agencies also proposed a second, more subjective standard that would be applicable to other categories of interest rates, should the need arise in the future. This forward-looking standard was designed to encourage covered swap entities to resolve critical uncertainties before an interest rate is discontinued, or loses its market relevance, in order to minimize disturbance to the markets.

The proposed rule (§ __.1(h)(3)(i)(C)) also contemplated that an interest rate may need to be replaced more than one time. For example, an IBOR may first be replaced with fallback provisions at a time when a permanent alternative interest rate is not yet available or not yet agreed upon by the swap participants, or amendment documentation has not yet been developed. Subsequently, fallback provisions may be replaced with permanent alternative interest rates. If the original interest rate that is being replaced is an IBOR or any other non-IBOR interest rate that otherwise met the requirements of the proposed rule and that a covered swap entity reasonably expects to be discontinued or reasonably determines has lost its relevance as a reliable benchmark due to a significant impairment, the non-cleared swap may be amended more than once to accommodate ongoing developments toward a permanent replacement interest rate. The proposed rule did not limit the number of amendments that could take place, as long as the interest rate that was originally present in the non-cleared swap met the criteria in either proposed § __.1(h)(3)(i)(A) or § __.1(h)(3)(i)(B). The proposed rule would not permit subsequent amendments that change interest rates or other terms of the non-cleared swap for any purpose other than for those purposes explicitly set out in § __.1(h), without triggering application of the margin requirements.

To benefit from the treatment of this new legacy swap provision, a covered swap entity must make the amendments to the non-cleared swap solely to accommodate the replacement of an interest rate described in the proposed rule. The proposed rule was flexible as to the incoming replacement interest rate by leaving it up to the counterparties to select a mutually agreeable replacement interest rate. The proposed rule provided examples of the Secured Overnight Funding Rate (SOFR), the AMERIBOR and the Overnight Bank Funding Rate as some potential alternatives suggested by some market participants. The agencies expected that any replacement interest rate, including any successor replacement interest rate, would be agreed upon by the parties after assessing its complexity, safety and soundness, and taking into consideration associated risk management practices.[13]

2. Final Rule

The agencies received several comments expressing concern that the proposed rule could be read as applying to interest rate swaps only and requesting similar relief for all other asset categories of swaps, including foreign exchange, equity, commodity, and credit default swaps. The agencies are clarifying that amendments to the rule permit amendments to interest rates but do not restrict the categories of swaps where those interest rates appear and thus do not restrict the categories of swaps in which those amendments could be made. Interest rates could be used in a variety of different categories of swaps, such as an underlying interest rate index in an interest rate swap or as a discounting interest rate for collateral or payment calculations in a commodity, foreign exchange, equity, or credit swap. In other words, the relief provided applies to all categories of non-cleared swaps that include or refer to an IBOR or any other interest rate described in paragraphs (h)(3)(i)(A)–(C) of the final rule.

One commenter requested that the agencies extend the relief in the Proposal to cover amendments made solely to accommodate the replacement of any reference instrument (*e.g.,* iTraxx) reasonably expected to be discontinued or reasonably determined to have lost its relevance as a reliable benchmark due to a significant impairment. The agencies note that there is no current expectation or indication that any major non-interest rate reference instrument is expected to be discontinued. Moreover, the expected discontinuation of IBORs place these interest rates in a special position that does not extend to periodic revisions of underlying reference instruments in commodity, foreign exchange, credit, equity, or other swaps. The agencies are not modifying the final rule to allow the replacement of a non-interest rate reference instrument while retaining the legacy status of the swap. If any expectation of discontinuation arises in the future, the agencies may reconsider their position.

One commenter requested clarification that any new intermediate or permanent interest rate does not necessarily have to be viewed by the market as a ''successor'' to the IBOR or other discontinued rate, but that the counterparties to the swap contract simply have to agree on the appropriate replacement interest rate. The agencies confirm this understanding.

Commenters expressed concern that changes to the discounting methods to adopt RFRs used by some central counterparties (CCPs) would require conforming changes to over-the-counter swaptions that may be presented to these CCPs for clearing. The agencies have modified the proposed rule to allow legacy swaps to be amended to reflect these changes to the discount interest rate and remain legacy swaps.

The agencies did not receive any other comments on this part of the proposed rule and are adopting it largely as proposed.

E. Follow-On Amendments

1. Proposal

In the proposed rule, the agencies acknowledged that replacing an interest rate could require other contractual changes to maintain the economics of the non-cleared swap and to preserve the relative economic values to the parties after incorporating changes to the interest rate. The proposed rule would permit changes that incorporate spreads and other adjustments that accompany and implement the replacement interest rate amendment. The proposed rule would also permit other, more administrative and technical changes necessary to operationalize the determination of payments or other exchanges of economic value using the replacement interest rate, including changes to determination dates, calculation agents, and payment dates. These types of

[13] The replacement rate is also expected to be consistent with international standards, such as the IOSCO Principles for Financial Benchmarks. *See https://www.iosco.org/library/pubdocs/pdf/IOSCOPD415.pdf.*

administrative changes may be necessary to adjust computations and operational provisions to reflect the differences between an IBOR and the replacement interest rate or rates. The agencies envisioned that a number of contractual changes could be necessary to maintain the economics of the non-cleared swap, and for this reason, the proposed rule would permit these changes. However, the agencies did not believe that the relief being provided for interest rate replacement purposes should be expansively applied to encompass all changes to a legacy swap. Accordingly, the proposed rule text clarified that the proposed safe harbor for legacy swaps would be unavailable if the amendments extend the maturity or increase the total effective notional amount of the non-cleared swap, irrespective of the reason for those changes.

2. Final Rule

The agencies received several comments requesting reconsideration of the restriction on extending the maturity or increasing the total effective notional amount of the non-cleared swap. Day count conventions or other factors such as final settlement or final payment occurring on the 30th of the month versus the 15th of the month may result in an extension of the remaining maturity of a swap. Since the counterparty to a non-cleared swap may not know the size of the final payment until the end of the interest period, the swap may incorporate a payment delay, with the final maturity shifting as a result. Commenters also explained that the replacement of an IBOR may increase the total effective notional amount of the non-cleared swap under a few scenarios. For example, a fixed-for-floating IBOR swap may use a 30/360 day count fraction market convention, but the market standard for a replacement reference benchmark rate swap may use an actual/360 day count fraction market convention. Under this scenario, the notional amount would need to be adjusted to ensure that the payment amounts on the fixed leg of the replacement reference benchmark rate swap are the same compared to the IBOR swap.

In response to these comments, the agencies understand that certain differences in market conventions may not yet be well established or expected. The agencies are preserving the proposal's restriction on extensions of maturity and increases of total effective notional amount, but adding language allowing extensions and increases as necessary to accommodate the differences between market conventions for an outgoing interest rate and its replacement. Market conventions could include changes in day count conventions, settlement date, or final payment date.

Several commenters also explained that counterparties may employ portfolio compression to effectuate amendments to legacy swaps for the purpose of eliminating IBORs, and that differences between market conventions for an outgoing interest rate and its replacement in this context could also affect the remaining maturity and total effective notional amount of portfolios of IBOR swaps. The agencies are adding new paragraph (h)(3)(iii) to accommodate portfolio compression exercises that are driven by the sole purpose of replacing an interest rate described in paragraph (h)(3)(i). In such a case, portfolio compression would not be subject to the limitations in paragraph (h)(4), but may not extend the maturity or increase the total effective notional amount of the non-cleared swap or non-cleared security-based swap beyond what is necessary to accommodate the differences between market conventions for an outgoing interest rate and its replacement.

Commenters also expressed a concern that changes associated with the liquidity of specific maturities of swaps with a replacement interest rate may result in an increase in the remaining maturity of the non-cleared swap. For example, a swap with a four-year remaining maturity may not be as liquid as a swap with a five-year remaining maturity. Given that this rationale for an extension of maturity can significantly increase the remaining maturity of a legacy swap, the agencies believe that it could lead to inappropriate extensions or evasion of the requirements of the rule. Accordingly, the agencies are not permitting an extension of the remaining maturity for liquidity or similar reasons.

F. End Date

The proposed rule did not specify an end date by which IBOR-related amendments must be completed, but requested comment on that issue. Several commenters agreed with the agencies' approach to not specify an end date, explaining that amendments related to fallbacks or other transitions to replacement interest rates may not be completed in one step or within a given time frame. Accordingly, the agencies are not adopting any specific end date by which IBOR-related amendments must be completed.

G. Exemptions for Commercial and Cooperative End Users

One commenter requested that the agencies clarify how the Swap Margin Rule treats post-compliance date non-cleared swaps that qualified for the commercial/cooperative end user exemption from the rule under § __.1(d)(1), if such swaps are amended to accommodate changes to referenced benchmark interest rates. The commenter expressed concern that post-compliance date non-cleared swaps originally exempted under § __.1(d)(1) will need to be amended by commercial end users or cooperatives to remove an IBOR benchmark interest rate. Specifically, the commenter noted that the amended swaps might become subject to temporary mismatches between the rate referenced by such swaps and the commercial arrangements being hedged, thereby raising questions about their exempt status.

The commenter's request is based on two no-action letters that the CFTC issued pertaining to non-cleared swaps in which the counterparty qualified for an exemption or exception from mandatory clearing and/or non-cleared margin requirements under the Commodity Exchange Act (CEA) or CFTC regulations.[14]

The scope of the agencies' exemption for commercial and cooperative end users in § __.1(d)(1) is, by its terms, tied to the scope of the commercial end user exemptions in the CEA and their implementing regulations. No-action letters are not included under the agencies' regulations. However, for the same reasons the agencies are amending § __.1(h) to preserve the legacy status of swaps during the IBOR transition, the agencies will treat commercial and cooperative end user swaps originally exempted under § __.1(d)(1) as remaining within the scope of § __.1(d)(1) if those swaps are effectuated under the terms of the two applicable CFTC no-action letters.[15]

[14] *See* CFTC Letter No. 19–28 (December 17, 2019), in section V.A., providing regulatory relief from the mandatory clearing requirement, and CFTC Letter 19–26 (December 17, 2019), in section E.1., which granted relief from the CFTC's margin requirements for non-cleared swaps. In both situations, the counterparties previously relied on the end-user exemptions end-user exemptions in the CEA and applicable CFTC regulations.

[15] *Id.* The agencies' determination is specific to these two CFTC no-action letters, and more specifically to section V.A. of CFTC Letter No. 19–28 and section E.1. of CFTC Letter No. 19–26. The agencies are not applying CFTC no-action letters to modify the terms of the Swap Margin Rule in any other regard.

III. Non-Cleared Swaps Between Covered Swap Entities and an Affiliate

The agencies proposed to amend the treatment of affiliate transactions in the Swap Margin Rule by creating an exemption from the initial margin requirements for non-cleared swaps between affiliates. The agencies also proposed, however, to retain the requirement that affiliates exchange variation margin. Twenty-two interested persons submitted public comments to the agencies on the proposal, including individuals, banking and securities trade groups, public interest advocacy groups, and one custodian bank.

After consideration of these public comments, as discussed below, the agencies are adopting the rule as proposed with a modification (1) requiring a covered swap entity to calculate and monitor the amount of inter-affiliate initial margin that would otherwise be required to be collected by such covered swap entity under the Swap Margin Rule; and (2) requiring a covered swap entity to collect initial margin from its affiliates on all new non-cleared swaps if the aggregate initial margin calculation amount exceeds 15 percent of the covered swap entity's Tier 1 capital (''15% Tier 1 Threshold''). This requirement will apply to inter-affiliate swaps executed on any business day the 15% Tier 1 Threshold is exceeded and remain in place as long as the 15%Tier 1 threshold has been exceeded. A covered swap entity will not be required to collect initial margin from its affiliates if the aggregate inter-affiliate initial margin calculation amount is 15 percent or less of the covered swap entity's Tier 1 capital. For purposes of the calculation described above and as further discussed below, a covered swap entity will treat non-cleared swaps between a subsidiary of the covered swap entity and an affiliate as if the non-cleared swaps were its own. Additionally, the agencies are also clarifying one aspect of the initial margin requirement for affiliates. The final rule clarifies that non-cleared swaps between affiliates remain subject to § __.3(d), which describes the initial margin requirements that apply to non-cleared swaps between a covered swap entity and counterparties that are not subject to the Swap Margin Rule's requirement to calculate and exchange initial margin on a daily basis. That section provides that a covered swap entity shall collect initial margin at such times and in such forms and such amounts (if any), that the covered swap entity determines appropriately addresses the credit risk posed by the counterparty and the risks of such non-cleared swap.

A. Main Proposal

The agencies proposed to amend § __.11 of the Swap Margin Rule, which currently establishes a special set of six regulatory requirements for swap transactions between a covered swap entity and an affiliate. Five of these provisions concern the requirement for a covered swap entity to collect initial margin for covered swap transactions with an affiliate. Each of these five provisions focuses on a particular aspect of the Swap Margin Rule's initial margin requirements as they generally apply to non-affiliated counterparties, and provides corresponding exemptions from or reductions to that particular aspect of the Swap Margin Rule's requirements whenever the counterparty is an affiliate of the covered swap entity.[16] The agencies proposed to replace this set of five exemptive provisions with a single exemption from the initial margin exchange requirement contained in § __.3 of the Swap Margin Rule. The agencies proposed to retain the sixth regulatory requirement in § __.11, which is the requirement for covered swap entities to collect and post variation margin for affiliate swap transactions pursuant to § __.4 of the Swap Margin Rule.[17]

B. Comments and Considerations for the Final Rule

Twelve commenters representing the views of covered swap entities and their counterparties expressed support for the proposed rule. Commenters in this group generally expressed the view that inter-affiliate swaps are an important risk management tool, the use of which would be facilitated by the proposed rule. Several of these commenters further expressed the view that the risks of inter-affiliate swaps are better addressed by other means, such as capital, credit risk limits, and variation margin. Many also noted the inter-affiliate provisions of the current Swap Margin Rule are inconsistent with those of the CFTC and most G20 regulators. One commenter estimates that $39.4 billion of inter-affiliate initial margin collateral was held at year-end 2018 by the group of covered swap entities that first became subject to the Swap Margin Rule in 2016.

Eight commenters, including public interest advocacy groups and individuals, expressed opposition to the agencies' proposal, and provided several different grounds for their objections. These views are grounded on similar core concerns, which the agencies have evaluated as follows.

One concern centers on some commenters' view that initial margin serves a special loss-absorbing function in the inter-affiliate context, and the agencies' proposal would increase risks to covered swap entities individually and financial stability more broadly by removing this protection. One commenter discussed the specific function of initial margin and contrasted it with variation margin.

Initial margin is a risk management tool designed to mitigate a covered swap entity's exposure to market risk associated with a counterparty's default by requiring a counterparty to obtain and provide financial collateral equal to the potential future exposure (PFE) the covered swap entity would face if the counterparty defaults. Under the Swap Margin Rule, a covered swap entity accordingly collects high-quality collateral from its counterparty equal to this PFE, placed in third-party custody to provide a source of payment to offset this risk. This PFE is the measurement of the exposure due to the defaulting counterparty's inability to continue performing on the swap contracts during the period after the counterparty's default but before the covered swap entity closes out its positions with the defaulting counterparty and establishes similar trades with a new counterparty.

In practice, it can take a varying number of days after default for the covered swap entity to establish new trades with new counterparties as necessary to replace or re-hedge the defaulted swaps.[18] The process of

[16] Swap Margin Rule §§ __.11(b)(1) (posting initial margin); (b)(2) (initial margin threshold amount); (d) (custody of margin); (e) (margin model holding period); and (f) (standardized margin amounts).

[17] Swap Margin Rule § __.11(c). This subsection creates no variations from the generally-applicable requirements of § __.4. Accordingly, the agencies proposed to remove it, and § __.4 directly applies to covered swap entities engaging in swap transactions with affiliates on the same terms as it applies with any other counterparty.

[18] If the net value to the covered swap entity of the portfolio with the counterparty (the current exposure amount) was positive at the time of the default, the covered swap entity already holds variation margin—collected from the counterparty on a daily basis as required by the Swap Margin Rule—to cover that amount. The Swap Margin Rule's variation margin provisions require covered swap entities to recalculate the monetary value of the portfolio of swaps with each counterparty every business day. If the monetary value of the portfolio to the covered swap entity has increased, the covered swap entity is required to collect additional variation margin collateral from the counterparty. If the monetary value has decreased, the covered swap entity is required to return an equivalent amount of variation margin collateral to the counterparty. §§ __.2 ''variation margin'' and

Continued

obtaining new swaps contracts with new counterparties creates additional costs that can vary depending on prevailing market conditions at the time default occurs and in the subsequent days needed to obtain the new contracts. This potential *range* of costs represents the covered swap entity's PFE.

As the commenter noted, because these costs will vary depending on whatever market conditions actually exist at the unknown future time when the counterparty defaults, the Swap Margin Rule requires covered swap entities to calculate PFE based on the premise that its market costs will be on the high end of the expected range, statistically speaking. Because of this uncertainty, the amount of initial margin collateral a covered swap entity will collect under the Swap Margin Rule is significantly higher than the daily amount of variation margin exchanged, which is based on current and known changes in the market conditions that change the value of the portfolio of swaps.

Commenters expressing concern about PFE risk asserted that collateralization (in the form of initial margin collected from the covered swap entity's affiliate) is an effective tool for reducing the close-out and re-hedging risk described above. These commenters objected that the proposed rule would eliminate an estimated $40 billion in collateral held by covered swap entities that, in the commenters' views, is necessary for mitigating PFE risk. However, it is incumbent on supervisors to evaluate multiple approaches to controlling the overall risk of inter-affiliate swaps exposures, and to consider which of the available approaches to deploy depending on how those risks occur (and evolve) in the industry. Inter-affiliate counterparty credit risk, in the form of PFE, is one of several risks that affiliated banking organizations need to manage. The nature of these risks, their potential severity, and the mechanisms to manage them in tandem vary such that no single approach to address all risks in isolation is appropriate. Supervisors have a variety of tools at their disposal to ensure protection of a banking organization's financial integrity, in light of the banking organization's particular scope of activities (both financial and geographic).[19] Initial margin can be effective in addressing the PFE risks of inter-affiliate transactions within a banking organization, but viewing it as a comprehensive solution is a simplistic approach.

Some of these commenters also expressed the view that banking organizations are using inter-affiliate swaps for the primary purpose of concentrating the risks of the organizations' world-wide derivatives activities onto the books of the covered swap entities covered by the prudential regulators' Swap Margin Rule, *i.e.,* U.S. insured depository institutions (IDIs). These views are not consistent with the agencies' supervisory experience since the rule took effect. As described in greater detail below, the agencies observe that internationally active banking organizations that have a cross-border organizational structure relying on separate legal entities must use inter-affiliate swaps to manage the risks of the overall banking organization's outward-facing derivatives exposures. Other internationally active banks, operating cross-border through branching structures, do not have the need to use inter-affiliate swaps for risk management.

As the agencies discussed in the proposal, actual supervisory experience in the years since the agencies imposed the Swap Margin Rule's current requirements has raised two inter-related concerns at the institution-specific level and the systemic level about the utility of initial margin to address exposures arising from inter-affiliate swap transactions. These concerns surround impediments to a banking organization's best management practices for cross-border swap risks, and whether these risks are more appropriately addressed through other regulatory and supervisory mechanisms as discussed below, and limitations on the effectiveness of inter-affiliate margin to address systemic cross-border market risks, also discussed below.

1. Effects of the Inter-Affiliate Initial Margin Requirement on Banking Organizations

Some covered swap entities covered by the Swap Margin Rule are internationally active banking organizations and their swaps activities are carried out in a cross-border marketplace. Some commenters perceive that U.S. banking organizations use inter-affiliate swaps primarily to transfer the risks of all their foreign derivatives activities into the U.S. insured depository institution. However, the agencies observe a redistribution of risk based instead on the international scope of the banking organization's business.

In the market for non-cleared derivatives, inter-dealer trading activity for certain types of derivatives is heavily concentrated in one geographic location, while the marketplace for other types of derivatives takes place in a different geographic location. An internationally active U.S. banking organization participates as a covered swap entity in a number of these marketplaces by establishing a place of business in each, such as a locally incorporated business entity, or a foreign branch of the main U.S. bank. The banking organization also has swap customers at home and abroad and services them by establishing a place of business in the same geographic locations as the customers.

If a customer in one market (*e.g.,* the U.K.) needs a non-cleared swap that is traded in the local market (*e.g.,* a sterling interest rate swap), the U.K. operation of the banking organization handles the entire transaction locally. On the other hand, if a U.S. customer needs the same sterling interest rate swap, the U.S.-based establishment of the banking organization enters into the swap with the customer (collecting margin and exchanging periodic payments on the swap) while the banking organization uses its U.K establishment to execute on the market-facing sterling interest rate swap (also exchanging margin with its counterparty in that market). Best safety and soundness practices in risk management dictate that the banking organization's personnel with the expertise in a class of derivatives be located in the relevant

"variation margin amount," __.4. It is generally industry practice to use cash as variation margin collateral; however, if non-cash financial collateral is used, the covered swap entity must re-value it each day and adjust the daily variation margin collection or return amounts to reflect those changes as well. § __.6(e). If the event triggering the counterparty's default under a swap is the counterparty's failure to provide additional collateral in response to a margin call, then the dealer's current credit exposure will be undercollateralized by the amount of the day's changes in current exposure and/or collateral value.

[19] For example, internationally-active banking organizations face the financial risks of each location in which they operate, and one important tool is the coordination by international supervisors to ensure equivalent supervisory requirements are implemented across jurisdictions, normalizing market conditions in each location. For any banking organization with important sources of revenue spread across more than one entity, the strength of the banking organization could be materially affected in the absence of successful strategic management of all the business components. Supervisors play an important role in assessing whether the organization's management maintains an effective process for identifying, measuring, and managing all key risks in this regard. Organization-wide capital, leverage, and liquidity considerations are important supervisory considerations. Other measures include amount limits, concentration limits, collateral amount and quality, qualitative transaction restrictions, or market equivalency standards. Even matters such as addressing market concerns about ring-fencing available assets can have a significant benefit in reducing a U.S. bank's foreign exposures.

market location, where they can obtain the most advantageous swap terms, such as best pricing or a wider range of maturities. On the customer side, market expectations are that the banking organization will locate personnel in the same location as the customer.

As a result, international banking organizations using inter-affiliate swaps as a risk management tool under this business model are hedging market risk arising from the nature of their world-wide customer needs (*e.g.,* dollar swaps, euro swaps) and managing it in the corresponding market location. A foreign customer's need for a U.S. dollar swap product would engage the involvement of the U.S. banking organization's U.S. bank affiliate, due not to the depository institution status of the U.S. bank or some bias in favor of the banking organization's home market, but rather to its place as the banking organization's locus of market activity in the dollar market. As in the example above, if a U.S. customer of the U.S. bank sought a sterling swap product, the opposite occurs. Moreover, if a non-U.S. customer in one location needs a type of swap traded in another non-U.S. location, the risk can be transferred between them without any direct U.S. intermediation.[20]

For internationally-active banking organizations, U.S. supervisors consider this arrangement a better risk management practice than using the U.S. location to manage the market-facing risk of the swap through local trading (in a less liquid market for that that type of exposure), or U.S. personnel endeavoring to make trades with foreign dealers in the relevant market (through cross-border communication and contracts).[21] As discussed below, this is occurring in the context of supervisory oversight of the banking organization aimed at ensuring the affiliates are in good financial standing, utilizing an appropriate system of market and credit risk limits, and the affiliates themselves obtain robust initial margin from their counterparties, to protect the affiliates from PFE risk if their counterparties should default.[22]

Also, as the agencies discussed in the proposal, some internationally active U.S. banking organizations utilize the same arrangement without creating inter-affiliate PFE, because they set up their foreign establishments as a foreign branch of the U.S. bank. From an entity and accounting standpoint, the U.S. bank can transact with the customer and hedge its cross-border swap risk through foreign swap contracts, all within the same entity (and without the need to create an internal swap).

The risk presented to the U.S. bank by the foreign-market swaps themselves is identical under both structural alternatives, whether the banking organization uses a foreign branch or a foreign affiliate. That risk is managed through several tools, including the banking organization's board-approved system of risk limits governing its participation in the foreign swap market; the banking organization's underwriting and ongoing monitoring of the credit risk of the counterparties it faces through swap transactions in the foreign swap market; and the collection of variation margin and initial margin requirements from those foreign market counterparties, under margin regulations developed on a coordinated basis by U.S. and foreign regulators through an established, formal process.

The addition of an affiliated entity instead of a branch may have the effect of creating other regulatory and risk issues to be considered, but these are separate from the risks of the foreign swap itself and are addressed under separate supervisory and regulatory frameworks.

The participation of U.S. banking organizations in the derivatives markets abroad is substantial, making attempts to ''compartmentalize'' the exposures of significant market affiliates on the basis of legal separation and collateral exclusively challenging.[23] Sound risk management for banking organizations necessitates ongoing assessments of financial performance across the organization and corrective incremental responses to undesirable changes in key risk metrics.

The agencies' structural concerns described above have arisen with the benefit of hindsight in the time since the Rule was finalized. In 2014 and 2015, the future structure of the cross-border non-cleared swaps market was potentially subject to significant change in response to key factors such as growth in the cleared derivatives market (reducing non-cleared activity), industry acclamation to significant expected cost increases attributable to the robust world-wide margin regimes about to take effect, and new regulatory resolution planning requirements, causing internal restructuring within banking organizations in response to these factors. These unknowns, and the costs of the inter-affiliate initial margin requirement, could have reasonably been expected to curtail existing use of

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[20] When a non-bank affiliate enters into a non-cleared swap with its counterparty, and then enters into an inter-affiliate swap with a U.S. institution to manage the market risk component, commenters also expressed the view that the affiliate thereby ''transfers the risk'' of the non-cleared swap into the U.S. institution. The agencies have considered this viewpoint and note that the affiliate continues to face the counterparty, actively managing the counterparty credit risk and exchanging margin in accordance with the same margin standards as the U.S. has imposed pursuant to the BCBS–IOSCO framework. To the extent these counterparties are also financial intermediaries, they are themselves subject to the same margin standards, buttressing their financial resiliency. Because the prudential regulators' margin rules apply to covered swap entities that are foreign banks, in many instances those margin rules are, in fact, identical.

[21] Commenters in the group objecting to the agencies' initial margin proposal did not object to maintaining the Rule's variation margin requirement. As one commenter noted, variation margin performs a different function than initial margin. Where initial margin is calibrated to PFE, variation margin reflects the ongoing shift in market value of a swap contract between the covered swap entity and the counterparty on a daily basis. Because a non-cleared swap creates bilateral payment obligations between the two parties, the current market value of the cash flows due to be paid to one party will usually be higher than the current market value of the cash flows due to be paid to other party, depending on how the market value for the underlying reference asset or rate rises or falls. In this regard, the agencies note that variation margin requires ongoing daily payments from the party that is ''out of the money'' over to the party that is ''in the money.'' Internationally active banking organizations routinely exchange variation margin on inter-affiliate swaps, but not exclusively as a counterparty default risk mitigation tool. For strategic purposes, banking organizations internally measure and evaluate the relative profitability of their differing lines of business and locations (typically by comparing profits for the location as a ratio of the level of regulatory capital and funding costs associated with the location). The exchange of variation margin is a natural way for the two different locations (trading desks) to assign the profitability of the swap to the right desk for these internal measurements, and related purposes.

[22] One commenter expressed the view that these considerations would potentially address the commenter's concerns about PFE risk transfer from affiliates, but also posited that the agencies were unconcerned about the potential absence of these factors in issuing the proposal. The agencies note that the presence of these important risk management measures is a supervisory expectation for banking organizations engaged in the practice. The agencies also note the commenter presumes the Swap Margin Rule's methodology for determining the initial margin collection amount—which represents the agencies' implementation of Section 3.1 of the BCBS–IOSCO Framework's requirement for portfolio replacement costs designed to address unexpected third-party counterparty defaults based on a probability statistical model using a 10-day holding period and presuming a period of severe market stress—is properly calibrated for the close-out risk of interaffiliate transactions that are already subject to several additional prudential risk-reducing requirements and reduced information gaps. Moreover, the agencies note that Element 6 of the BCBS–IOSCO Framework itself excludes interaffiliate swaps from the scope of the Framework and did not contemplate that Section 3.1 of the BCBS–IOSCO Framework would be applied to them.

[23] *See, e.g., https://www.bis.org/ifc/publ/ifcb31n.pdf* (U.S.-based banking organizations engage in derivatives activities across G–10 countries actively, with non-U.S. market participation exceeding U.S. market participation in the aggregate); *see* also, Guidance for § 165(d) Resolution Plan Submissions by Domestic Covered Companies, 84 FR 1438 (February 4, 2019).

inter-affiliate non-cleared swaps.[24] For example, some internationally-active covered swap entities conducted their cross-border business through foreign branches, and others might have restructured to eliminate the need for inter-affiliate swaps. The agencies' past expectations of reductions in inter-affiliate swap activity have not been borne out through the completion of the Swap Margin Rule's implementation phase. In addition, among the prudential regulators, the banking agencies continue to assess the proper calibration of regulatory capital requirements including enhanced recognition of collateralization (or the lack of it) for closeout risk.[25]

2. System-Wide Effectiveness of Inter-Affiliate Initial Margin Requirements

Commenters objecting to the agencies' proposal also expressed the view that the agencies are engaging in a ''race to the bottom'' to the extent the agencies discussed how inter-affiliate initial margin requirements have not been universally applied by other domestic and foreign regulators. As stated in the proposal, the agencies raise this concern in the context of observing that limited application of the initial margin requirements to one slice of the market is a blunt tool for enhancing financial stability among interconnected financial market participants. With the benefit of hindsight, the agencies observe that other regulators developing their implementing rules in 2015 and beyond have not implemented the same comprehensive inter-affiliate margin collection requirements that the agencies did in 2015.[26] As a result, certain anticipated systemic protections that would have accrued from comprehensive inter-affiliate initial margin practices world-wide will not be realized.

Commenters opposing the agencies' proposal also expressed the view that the agencies were eliminating an estimated $40 billion of initial margin collateral that will serve a ''loss absorbing capacity'' to protect against potential affiliate default on their swaps exposures. Initial margin, however, is not loss-absorbing in the same sense as equity capital; initial margin collateral is funded with borrowings from the banking organization's creditors.[27] The practice in banking organizations of providing collateral to their bank affiliates as security for the banking organization's financial obligations is a routine and expected aspect of the business. But it is accompanied by market expectations on behalf of each banking organization's creditors if the aggregate extent to which it is employed in the banking organization materially exceeds established expectations. During periods of market distress, those creditors' claims are potentially subordinated to the bank's claim on the banking organization's assets, placing additional stress on the banking organization's access to funding if the subordination effects are materially beyond the norm.

C. Description of the Final Rule

After considering commenters' range of views about the proposed rule, the agencies have determined to finalize it consistent with the proposal, with two revisions.

First, the agencies are including a limit on the aggregate amount that a covered swap entity may recognize pursuant to the inter-affiliate initial margin exemption provided under the final rule. This limit, as further described below, is set at 15 percent of the covered swap entity's tier 1 capital. The agencies are incorporating the 15% Tier 1 Threshold into § __.11 as an augmentation to reflect safety and soundness and financial system risk concerns of the Board, the FDIC, and the OCC surrounding the status of covered swap entities that are U.S. insured depository institutions.[28] The agencies, in their supervisory experience, have observed that covered swap entities have collected inter-affiliate initial margin under the current rule at levels that do not exceed this limit. Nevertheless, the agencies' determinations underlying the decision to issue this final rule are informed significantly by the agencies' supervisory experience overseeing inter-affiliate swap activities at covered swap entities during the first four years the Swap Margin Rule has been in effect. Accordingly, the agencies believe it is appropriate to apply the 15% Tier 1 Threshold as an augmentation, as the agencies continue to supervise covered swap entities further into the maturation of the international derivatives market reforms that have been under development since 2010. This augmentation will address additional supervisory concerns that may arise at a covered swap entity whose tier 1 capital base is contracting in an unusually rapid pattern, a situation that evidences the institution is experiencing

[24] *See* 80 FR at 74,893 (''It is likely the behavior of swap market participants, including affiliate counterparties, will respond to incentives created by these swap margin requirements. Such changes could have a dramatic effect on the pattern of affiliate swap transactions which would itself have a significant impact on the amounts of initial margin that are ultimately collected on inter-affiliate transactions.'')

[25] In this regard, it is worth noting that the analysis in this Supplementary Information Section evaluates comments on the proposal from the perspective of the Swap Margin Rule. The evaluation of risk for inter-affiliate trades and the best way to address such risks from a regulatory perspective could change depending on, among other things, the statutory authority on which a regulatory requirement is premised.

[26] In the EU, intragroup transactions are fully exempt (not only initial margin, but also variation margin), unless the relevant affiliates are subject to specific and identified legal impediments to funds transfers between them, such as currency exchange restrictions, identified defects in one of the affiliate's formal resolution plans, or other specific legal restriction that significantly affects the transfer of funds between the affiliates. See Commodity Futures Trading Commission Comparability Determination for the European Union, 82 FR 48394, 48399–48400 (October 18, 2017) (comparing CFTC non-cleared swap margin rules to comparable EU rules, discussing EU reliance on appropriate centralized risk evaluation, measurement, and control procedures between cross-border affiliates, and margin rule comparability determinations outside the EU); see also Commission Implementing Decision (EU) 2017/1857 (October 13, 2017) (EU comparability determination for US transactions subject to the CFTC non-cleared margin rules), available at *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017D1857&from=ES;* European Supervisory Authorities, EMIR RTS on various amendments to the bilateral margin requirements in view of the international framework (December 5, 2019) (notice of proposed amendments to EMIR non-cleared derivatives margin rule to grant an additional extension of the exemption from comparability determination requirements), available at *https://eba.europa.eu/sites/default/documents/files/document_library//ESAs%202019%2020%20-%20Final%20Report%20-%20Bilateral%20margin%20amendments.pdf.* In Japan, prudential regulators address inter-affiliate non-cleared derivatives with existing capital standards and risk-management principles in the first instance, with margin as a voluntary alternative. See Commodity Futures Trading Commission Amendment to Comparability Determination for the Japan, 84 FR 12074, 12079 (April 1, 2019). All other major jurisdictions also exempt inter-affiliate non-cleared derivatives from margin requirements, including Canada (*https://www.osfi-bsif.gc.ca/Eng/fi-if/rg-ro/gdn-ort/gl-ld/Pages/e22.aspx,* both initial and variation margin); Australia (*https://www.apra.gov.au/sites/default/files/prudential_standard_cps_226_margining_and_risk_mitigation_for_non-centrally_cleared_derivatives.pdf,* initial margin); Hong Kong (*https://www.hkma.gov.hk/media/eng/doc/key-functions/banking-stability/supervisory-policy-manual/CR-G-14.pdf,* both initial and variation margin); and Singapore (*https://www.mas.gov.sg/-/media/MAS/Regulations-and-Financial-Stability/Regulations-Guidance-and-Licensing/Securities-Futures-and-Fund-Management/Regulations-Guidance-and-Licensing/Guidelines/Guidelines-on-Margin-Requirements-for-NonCentrally-Cleared-OTC-Derivatives-Contracts-revised-on-5-October-2018.pdf,* both initial and variation margin).

[27] Two commenters suggested the affiliate's use of leverage to acquire initial margin collateral was a choice, and the affiliate could instead raise additional equity or retain earnings to fund it. This is not consistent with the agencies' supervisory and policy-making experience for internationally-active banks, where public policy and competitiveness concerns serve to establish and maintain capital requirements that must address not only adequacy, but regime equivalency.

[28] 7 U.S.C. 6s(e)(3); 15 U.S.C. 78o–10(e)(3).

heightened levels of stress, or whose inter-affiliate derivative exposures increase in an unusually rapid pattern. Thus, the agencies have set it at a level that exceeds the typical initial margin collection amounts at the affected covered swap entities, to accommodate expected levels and taking into consideration a range of those levels that varies somewhat across those covered swap entities.

This provision requires a covered swap entity to calculate the initial margin collection amount[29] each business day for each counterparty that is a swap entity or a financial end-user with a material swaps exposure that is an affiliate, and aggregate these amounts to determine whether the aggregate amount exceeds the 15% Tier 1 Threshold.[30] When a covered swap entity calculates the 15 percent threshold, it must include all non-cleared swaps between the covered swap entity and its affiliates (which includes subsidiaries of the covered swap entity) plus all non-cleared swaps between an covered swap entity subsidiary and other affiliates (but not double counting non-cleared swaps with the parent covered swap entity). So long as the aggregate remains below the 15% Tier 1 Threshold, the covered swap entity is exempt from the requirement to collect initial margin from its affiliates. If, however, the aggregate exceeds the 15% Tier 1 Threshold on any business day, the final rule requires the covered swap entity to collect initial margin on any additional non-cleared swap executed with an affiliated swap entity or financial end user.[31] Once the 15 percent threshold is exceeded, the covered swap entity is required to collect initial margin on all new transactions with its affiliates (which includes the covered swap entity subsidiaries). Also, if a covered swap entity subsidiary enters into a non-cleared swap with an affiliate other than the covered swap entity,[32] the covered swap entity must collect initial margin from the affiliate, and the subsidiary does not need to also collect initial margin for the affiliate for that non-cleared swap. This provision is designed to provide protection for the covered swap entity. Initial margin collection takes place pursuant to the generally-applicable initial margin requirement specified in § __.3(a) of the current rule, commencing the day after execution of the non-cleared swap and with updates each business day as specified in § __.3(c).[33] The covered swap entity is obligated to continue initial margin collection on these new swaps until they terminate under their own terms. If, however, the covered swap entity's aggregate initial margin collection amount calculation falls below the 15% Tier 1 Threshold, the covered swap entity is no longer obligated to maintain initial margin on these non-cleared swaps. Consistent with § __.11(d) of the current rule, the covered swap entity is permitted to maintain custody of non-cash initial margin collateral collected pursuant to these requirements with the covered swap entity itself or with an affiliate, but is otherwise subject to the segregation requirements of § __.7 of the current rule.[34]

As part of this addition, the agencies are making associated changes to § __.9 of the Swap Margin Rule. Section __.9 addresses cross-border application of the Swap Margin Rule to certain foreign financial firms that are organized under non-U.S. law and operate abroad, and that fall within the scope of the Rule because they are also registered with the CFTC or SEC as swap dealers or security-based swap dealers. These firms include foreign-chartered banks, and foreign-chartered subsidiaries of Edge corporations and agreement corporations.[35] Under the current rule, these foreign firms are currently not subject to comprehensive initial margin collection requirements for affiliate swap transactions under the laws of their home counties.[36] However, if they engage in a swap transaction with a U.S. affiliate, § __.9 currently requires them to collect initial margin from the U.S. affiliate.

The amendment to § __.11 that the agencies issue today would apply to these foreign firms, absent a change to § __.9. As discussed above, the 15 percent threshold in § __.11 is an augmentation reflecting safety and soundness and financial system risk concerns of covered swap entities that are U.S. insured depository institutions. Imposing the 15 percent threshold requirement on these foreign firms is not relevant to these concerns and could even have the incongruous result of requiring a U.S. covered swap entity to post initial margin collateral to an affiliated foreign firm. Accordingly, the agencies are adding a new subsection § __.9(h), which provides that these foreign firms are exempt from the requirement to collect initial margin from their affiliates under § __.3(a), and the foreign firms are not subject to the 15 percent threshold under § __.11(a) unless they are subsidiaries of a covered swap entity subject to the requirements of § __.11. In that case, the firm is treated the same as any other subsidiary, as described above, and the parent covered swap entity is required to treat inter-affiliate exposures between the subsidiary and an affiliate as if it is its own.[37]

Second, the agencies are also including an additional revision that is

[29] Section __.2 of the current rule defines the ''initial margin collection amount'' as the amount of initial margin the covered swap entity calculates for a counterparty using the covered swap entity's approved initial margin model under § __.8 (or if the covered swap entity does not have an initial margin model, the standardized approach under Appendix A).

[30] The final rule specifies that tier 1 capital for this purpose is comprised of common equity tier 1 capital and additional tier 1 capital, as defined in the agencies' respective regulations at 12 CFR 3.20(b)–(c) (OCC); 12 CFR 217.20(b)–(c) (Board); 12 CFR 324.20(b)–(c) (FDIC); 12 CFR 628.20(b)–(c) for Farm Credit System banks and associations and 12 CFR 652.61(b) for the Federal Agricultural Mortgage Corporation (FCA); and 12 CFR 1240(b)–(c) (FHFA). Covered swap entities are required to use the tier 1 capital amounts reported in their most recent Call Report.

[31] The final rule does not require the covered swap entity to begin collecting initial margin on its portfolio of interaffiliate swaps that were executed before the business day on which the 15% Tier 1 Threshold is exceeded.

[32] The rule provides that if any subsidiary of the covered swap entity executes a non-cleared swap with any other affiliated swap entity or financial end user, the covered swap entity must treat that swap as its own for purposes of complying with these requirements. Additionally, the agencies have added an expanded definition of a ''subsidiary'' to § __.11(d) for these purposes, consistent with the structure of the expanded ''affiliate'' definition. The agencies have also incorporated language in § __.11(a)(5)(ii) for multi-tier CSE structures that permit the lower tier CSEs to count their inter-affiliate non-cleared swaps as part of the top-tier IDI's 15% Tier 1 Threshold if the top-tier IDI collects initial margin for additional inter-affiliate swaps entered into by the lower tier CSEs after the limit is reached. This is intended to greatly simply the limit calculations for multi-tiered CSEs, while still ensuring the requirements of § __.11(a) are fully satisfied at the IDI level.

[33] Covered swap entities may avail themselves of the option, pursuant to § __.5(a)(3)(ii) of the current rule, to place these swaps in a separate netting set for purposes of calculating the initial margin collection amount on a portfolio basis under an eligible master netting agreement.

[34] The agencies have also made corresponding technical revisions to the language of § __.11 to provide an exemption from the requirements to post initial margin under § __.3(b), consistent with the current rule. This exemption is not subject to the 15% Tier 1 Threshold.

[35] Specifically, see §§ __.9(a) and __.9(d)(3)(i)–(ii). These entities are often governed by non-U.S. regulatory capital requirements and they do not file Call Reports; U.S. branches and agencies of foreign banks are not subject to stand-alone capital requirements.

[36] See footnote 27, *supra.*

[37] For applicable transactions with U.S. affiliates, these foreign firms will be covered by § __.11(b), exempting them from posting initial margin to affiliates pursuant to § __.3(b). These foreign firms will be subject to § __.4, requiring them to exchange variation margin, which is standard practice for these firms, and § __.11(c), requiring swap dealers to collect initial margin at such times and in such forms and such amounts (if any) that the covered swap entity determines appropriately address the credit risk posed by the counterparty and the risks of the swap, consistent with § __.3(d).

consistent with the Rule's current treatment of counterparties that are not subject to the Rule's quantitative requirement to exchange and segregate initial margin on a daily basis.

Section __.3 of the Rule contains the core initial margin requirement, directing covered swap entities to collect and post initial margin as calculated under § __.8. Accordingly, in drafting the proposed rule text for the initial margin exemption in proposed § __.11(a), the agencies exempted swaps between affiliates from § __.3 in its entirety. In the final rule, the agencies have revised the text of the exemption in § __.11, in order to preserve the applicability of § __.3(d).

Section __.3(d) addresses counterparties who are not financial end users with a material swaps exposure or swap entities. These counterparties are not subject to daily initial margin exchange pursuant to § __.3(a)–(c). For these other counterparties, § __.3(d) requires covered swap entities to collect initial margin at such times and in such forms and such amounts (if any) that the covered swap entity determines appropriately address the credit risk posed by the counterparty and the risks of the swap. When the agencies adopted the Rule in 2015, this provision was included to reflect prudent risk management practices in the industry before the Rule's issuance, whereby an institution would include initial margin on a case-by-case basis for any type of swap counterparty, as part of their internal risk management practices, if the institution judged it to be appropriate.[38]

The agencies, in assessing the risk of PFE to a covered swap entity in transacting swaps with an affiliate, have determined that an across-the-board requirement in the Swap Margin Rule to collect initial margin from affiliates is not the best approach. That being said, the agencies do not assess inter-affiliate swaps to be risk-free, and there can still be circumstances in which the agencies would expect a covered swap entity to incorporate initial margin as well as variation margin into its risk management for exposures to a particular affiliate or particular swaps. Accordingly, the agencies have revised the text of § __.11 to treat inter-affiliate swaps the same way as swaps with other counterparties pursuant to § __.3(d).

Commenters that addressed the agencies' proposed definition of an ''affiliate'' for purposes of § __.11 supported it. The agencies are adopting it without change.

D. Federal Reserve Board Statement on Sections 23A and 23B of the Federal Reserve Act

Although this final rule will exempt non-cleared swaps between a bank and its affiliates from the initial margin requirements of the swap margin rule under the conditions described above, swaps between a bank and its affiliates are of course also subject to sections 23A and 23B of the Federal Reserve Act and the Board's Regulation W.

The Board's position is that, under section 23A, bank-affiliate derivatives generally can be valued at the bank's current exposure to the affiliate. Accordingly, the Board believes that a bank must collect 23A-compliant variation margin from its affiliates to cover its current exposure on bank-affiliate derivatives, but generally is not required to collect initial margin to cover the bank's potential future exposure on the transactions.

Under section 23B, a bank's swaps with its affiliates must be on terms and conditions that are substantially the same, or at least as favorable to the bank, as those prevailing at the time for comparable transactions with third parties. In part because of the swap margin rule and in part due to natural evolution in the financial markets, comparable swap transactions between a bank and a third party today involve the bank collecting initial margin from, and posting initial margin to, the counterparty.

In many cases the Board finds it reasonable to conclude that a bank-affiliate swap with no initial margin requirement is at least as favorable to the bank as a comparable bank-nonaffiliate swap with two-way initial margin requirements. This occurs where the two-way initial margining described above requires each of the two counterparties to give the other counterparty a contractual term of roughly equivalent value. In the Board's view, situations where the bank and affiliate each agree not to require an equivalent exchange of initial margin from the other will generally create a set of contractual terms that is roughly equally favorable to the bank as a two-way initial margin regime.

Some cases of specific bank-affiliate swap arrangements without initial margin requirements could raise issues under section 23B, however, as can every affiliate transaction depending on the facts and circumstances of the arrangement. In the Board's view, relevant facts for the section 23B analysis include the relative creditworthiness of the bank vs. the affiliate, whether the bank-affiliate swap portfolio is more likely to create potential future exposure of the bank to the affiliate or vice versa, and whether or not the affiliate requires initial margin from the bank under the swap arrangement.

E. Other Comments

Four commenters expressed the view that the agencies are without the statutory authority to adopt the proposed rule. One among these commenters provided an analysis of the language Congress used in requiring the prudential regulators to issue the margin requirements. In this commenter's view, the meaning of the words Congress chose are so prescriptive that they compel the agencies to impose initial margin and variation margin requirements on all swap transactions within the scope of the legislation.

The agencies note that, in requiring the prudential regulators to issue margin and capital requirements, the statutory language also mandates that the requirements shall help ensure the safety and soundness of covered swap entities and be appropriate for the risk associated with the swaps held by the covered swap entity.[39] The agencies have previously considered the same line of analysis pursued by the commenters, in connection with adopting the Swap Margin Rule in 2015.[40] The agencies have concluded that the statutes direct the agencies to employ a risk-based approach to imposing margin requirements, and the agencies have done so by imposing rules that vary depending on the type of counterparty in light of the risks presented.[41]

Commenters that opposed the agencies' proposal also expressed the view that the agencies' discussion and analysis in the **SUPPLEMENTARY INFORMATION** section of the proposal was deficient. The commenters were of the view that the agencies discussed the same factors in 2015 and 2019, but in the first instance the agencies determined initial margin was required to address the risk of inter-affiliate swap exposures, whereas in the second instance the agencies drew the opposite conclusion.[42] In this regard, the

[38] 80 FR 74840, 74844 (November 30, 2015).

[39] 7 U.S.C. 6s(e)(3)(A); 15 U.S.C. 78o–10(e)(3)(A).

[40] 80 FR at 74866; *see also* 79 FR 57348, 57354–55 (September 24, 2014).

[41] The agencies also note that the Swap Margin Rule imposes margin requirements on a covered swap entity's non-cleared swaps with affiliates, specifically the variation margin collection requirement of § __4(a)–(b), and the above-described requirement of § __.3(d).

[42] Some commenters also expressed the view that the agencies are obligated to perform an analysis of the PFEs between covered swap entities and their affiliates, using the Swap Margin Rule's framework

agencies note that the analysis in 2015 did not propound the imposition of an across-the-board inter-affiliate initial margin requirement, and the agencies carefully evaluated the extent to which numerous aspects of the Rule's initial margin requirements should be reduced commensurate with the risks the agencies anticipated.[43] In issuing these revisions, the agencies have performed the same probing analysis of the relevant factors, based on industry practices as they have settled after the Rule's compliance period.

IV. Additional Compliance Date for Initial Margin Requirements

A. Proposal

The agencies proposed to give covered swap entities an additional year to implement initial margin requirements for certain smaller counterparties. The implementation of both initial and variation margin requirements started on September 1, 2016. With respect to initial margin requirements, the requirements in the Swap Margin Rule were implemented in five phases from September 1, 2016, through September 1, 2020, depending on the size of the covered swap entity's portfolio of non-cleared swaps and the counterparty's portfolio of non-cleared swaps. Variation margin requirements for all covered swap entities and counterparties were completely phased in by March 1, 2017. This schedule was consistent with BCBS/IOSCO Framework when the Swap Margin Rule was adopted in 2015.

The phase-in schedule for initial margin is based on the average daily aggregate notional amount (AANA) of non-cleared swaps for March, April, and May, held in each party's market-wide portfolio, measured separately from the standpoint of the covered swap entity and the standpoint of the counterparty.[44] With the recent occurrence of the fourth phase of initial margin compliance obligations on September 1, 2019—for covered swap entities and counterparties with an AANA of $750 billion to $1.5 trillion—the group currently scheduled for the fifth phase of compliance in the upcoming year includes all remaining entities within the scope of the initial margin requirements, spanning AANAs from $8 billion up to $750 billion.[45]

The industry raised significant concerns about the operational and other difficulties associated with beginning to exchange initial margin with the large number of relatively small counterparties encompassed in the Swap Margin Rule's fifth phase.[46] Following the revisions adopted in July 2019 to the BCBS/IOSCO Framework to permit an additional phase for smaller counterparties, the agencies proposed to amend the Swap Margin Rule to add an additional phase for smaller counterparties.[47] Specifically, the agencies proposed to amend the compliance schedule to add a sixth phase of compliance for certain smaller entities that are currently subject to the ''phase five'' compliance deadline. The proposed amendments would have required compliance by September 1, 2020, for counterparties with an AANA ranging from $50 billion up to $750 billion, while the compliance date for all other counterparties (with an AANA ranging from a ''material swaps exposure'' of $8 billion up to $50 billion) would have been extended to September 1, 2021.

B. Final Rule

Commenters supported the proposed amendments to the compliance schedule, specifically, the additional phase six for all other counterparties (*i.e.,* with an AANA of $8 billion up to $50 billion) with a compliance date of September 1, 2021. Commenters noted that the proposal did not clarify the convention that should be used for calculating the AANA for purposes of the proposed phase six and therefore, by default, the calculation would be based on the methodology for calculating ''material swaps exposure,'' which is determined based on an entity's and its affiliates AANA for June, July, and August of the previous calendar year (in this case, 2020). Several commenters recommended that the agencies clarify that, for purposes of the new phase six, the calculation is based on the AANA for March, April, and May of the same year, which is consistent with the BCBS/IOSCO Framework. One commenter recommended that the calculation of ''material swaps exposure'' be based on the AANA for March, April, and May, beginning in 2021 and thereafter, and asserted this approach would maintain consistency with the BCBS/IOSCO Framework and other foreign jurisdictions.

The final rule adopts the additional phase six as proposed. The agencies acknowledge that a change to the AANA calculation for phase six would result in greater consistency with the BCBS/IOSCO Framework, but are not adopting the recommended change to the month calculation convention because basing AANA on June, July, and August of the previous calendar year will provide end users subject to phase six with more time to prepare for compliance with initial margin requirements following meeting the material swaps exposure threshold. Moreover, the definition of material swaps exposure is not being amended as part of this final rule. The material swaps exposure definition was not raised as an issue in the proposal, as an amendment to that definition would affect more than just the phase-in periods in § __.1(e). The agencies confirm that the material swaps exposure is to be calculated based on the previous year.[48] For example, for the period January 1, 2022 through December 31, 2022, an entity would determine whether it had a material swaps exposure with reference to June, July, and August of 2021.

V. Documentation Requirements

A. Proposal

The agencies proposed to amend the documentation requirements under § __.10 of the Swap Margin Rule. Pursuant to § __.10 of the Rule, a covered swap entity must execute trading documentation with each counterparty that falls within the scope of the Rule's definition of a ''swap entity'' or a ''financial end user'' regarding credit support arrangements unless the swap entity or financial end user is explicitly exempt from the Rule pursuant to § __.1(d).[49] The documentation must provide the covered swap entity the contractual rights and obligations to collect and post initial and variation margin in such amounts, in such form, and under such circumstances as are required by the Rule. The documentation must also

for quantifying initial margin collection amounts, in order to quantify how much PFEs would increase as a result of the proposed change. As the agencies discussed above, however, the Rule's methodology for evaluating the PFE of an unaffiliated counterparty is not an appropriate measurement of inter-affiliate risk. Among other things, it does not take relevant additional risk management factors into account, and it was originally formulated with the expectation it would not be applied to inter-affiliate swaps.

[43] 80 FR 74887–889.

[44] See supra note 7.

[45] The Swap Margin Rule does not require initial margin to be exchanged with any counterparty whose AANA is less than $8 billion as of the previous June, July, and August. *See* § __.3 and the definition of ''material swaps exposure'' in § __.1.

[46] The industry's implementation work to execute new trading documentation to meet variation margin compliance obligations by 2017 largely excluded any required documentation for initial margin, due to the greater operational complexity associated with ''T+1'' portfolio reconciliation of internally-modeled initial margin amounts and third-party segregation of initial margin collateral.

[47] *See* BCBS and IOSCO ''Margin requirements for non-centrally cleared derivatives,'' (July 2019), available at *https://www.bis.org/bcbs/publ/d475.pdf.*

[48] See 80 FR 74857 (November 30, 2015).

[49] 80 FR 74886–74887 (November 30, 2015).

specify the methods, procedures, rules, and inputs for determining the value of each non-cleared swap for purposes of calculating variation margin and the procedures by which any disputes concerning the valuation of non-cleared swaps or the valuation of assets collected or posted as initial margin or variation margin may be resolved. Finally, the documentation must also describe the methods, procedures, rules, and inputs used to calculate initial margin for non-cleared swaps entered into between the covered swap entity and the counterparty.[50] The proposed rule clarified that under § __.10 of the Rule, a covered swap entity is not required to execute initial margin trading documentation with a counterparty prior to the time that it is required to collect or post initial margin pursuant to § __.3.[51]

B. Final Rule

Commenters supported the proposed amendment to § __.10 of the Rule. The agencies are adopting the amendment to § __.10 of the Rule as proposed.

In addition, the preamble to the proposal discussed the operation of the custody agreement requirements in § __.7 of the Swap Margin Rule. Under § __.7, custody agreements are required to be in place only after initial margin is required to be collected or posted pursuant to § __.3, or when initial margin is posted by a covered swap entity beyond an amount required by the Rule. The agencies explained that they expect that covered swap entities will closely monitor their exposures and take appropriate steps to ensure that trading documentation is in place at such time as initial margin is required to be exchanged pursuant to § __.3. The agencies noted that this view is consistent with statements of the BCBS and IOSCO with respect to internationally agreed standards for margin requirements for non-centrally cleared derivatives.[52] Commenters supported this clarification, and the agencies reaffirm their statement regarding the execution of custody agreements required pursuant to § __.7 of the Rule.

VI. Portfolio Compression Exercises and Other Amendments

A. Summary of Proposed Rule

The Swap Margin Rule applies to non-cleared swaps entered into on or after the applicable compliance date. The agencies are concerned about amendments to a swap that was entered into before the applicable compliance date if the amendments would have the effect of allowing covered swap entities and their counterparties to evade or otherwise artificially delay implementation of margin requirements. In particular, the agencies are concerned that market participants might amend legacy swaps, rather than entering into new swaps and exchanging margin pursuant to the Rule once the legacy swaps expire according to their original terms. The proposed rule permitted certain amendments, particularly non-material amendments to non-economic terms, as well as amendments that are made to reduce operational or counterparty risk, such as notional reductions and portfolio compressions, to be executed while still allowing those amended legacy swaps to remain exempt from the Swap Margin Rule.

The proposed rule clarified the agencies' implementation of the legacy swaps provisions of the Swap Margin Rule since its adoption in 2015. The proposed rule was intended to permit amendments to legacy swaps arising from certain routine industry practices over the life-cycle of a non-cleared swap that are carried out for logistical reasons, risk-management purposes, or IBOR replacement. The proposed rule covered amendments that do not raise concerns that the covered swap entity is seeking to evade or otherwise delay the application of margin requirements for non-cleared swaps.

B. Technical Changes

1. Proposal

The proposed rule recognized the legacy status of a non-cleared swap that has been amended to reflect technical changes, such as addresses, the identities of parties for delivery of formal notices, and other administrative or operational provisions of the non-cleared swap that do not alter the non-cleared swap's underlying asset or indicator, such as a security, currency, interest rate, commodity, or price index, the remaining maturity, or the total effective notional amount. For example, an interest rate swap documentation amendment that changes the counterparty's contact person or a weather swap documentation amendment that changes the margin payment instructions would not impact those swaps' legacy status. However, an interest rate swap amendment to the fixed leg interest rate or a weather swap amendment to the measurement of the precipitation level would impact those swaps' legacy status as it is intended to change the economic valuation of the swap. The technical changes permitted by the proposed rule are necessary to reflect changes in a counterparty's circumstances, but are not associated with a desire by either party to increase or decrease its exposure to market risk factors.

2. Final Rule

Commenters were supportive of the proposal. Commenters agreed with the agencies that amendments made for logistical or risk management purposes arising from routine industry practices over the life-cycle of the swap, should not cause legacy swaps to lose their legacy status. One commenter requested that the agencies permit any technical amendment that does not affect the economic obligations of the parties or the valuation of the legacy swap. Two commenters requested clarification that the language in the proposed rule aligns with the CFTC's Division of Swap Dealer and Intermediary Oversight's June 6, 2019 No Action Position wherein the CFTC took a no action position on legacy swaps that are amended, ''provided that no term is amended that would affect the economic obligations of the parties or the valuation'' of the swap or that are partially terminated or partially novated subject to certain conditions.[53] The agencies are clarifying that the language in the proposed rule is intended to align with the CFTC's No Action Position. With respect to the language in § __.1(h)(5)(i), a commenter requested a technical change from usage of the word ''indicator,'' because it is not a common term in the industry, to the word ''reference.'' The agencies are amending the rule to reflect this technical change.

The agencies did not receive any other comments on this part of the proposed rule and are adopting it, subject to the technical change discussed, as proposed.

[50] *Id.*

[51] Under § __.3, a covered swap entity must collect or post initial margin when it calculates an initial margin amount that, after subtracting the initial margin threshold amount (not including any portion of the initial margin threshold amount already applied by the covered swap entity or its affiliates to other non-cleared swaps or non-cleared security-based swaps with the counterparty or its affiliates), exceeds zero.

[52] BCBS/IOSCO statement on the final implementation phases of the *Margin requirements for non-centrally cleared derivatives,* March 5, 2019, available at *https://www.iosco.org/library/pubdocs/pdf/IOSCOPD624.pdf,* stating that ''the framework does not specify documentation, custodial or operational requirements if the bilateral initial margin amount does not exceed the framework's €50 million initial margin threshold. It is expected, however, that covered entities will act diligently when their exposures approach the threshold to ensure that the relevant arrangements needed are in place if the threshold is exceeded.''

[53] CFTC Letter No. 19–13 (June 06, 2019) at 8.

C. Reduction in Notional Amount

1. Proposal

The proposed rule recognized the legacy status of a non-cleared swap that has been amended solely to reduce the notional amount of the non-cleared swap, without altering other terms of the original non-cleared swap. For these purposes, a reduction in notional amount may be achieved through a partial termination of the original non-cleared swap, with the remaining non-terminated non-cleared swap being able to retain its legacy status. A reduction in notional amount could also be achieved by novating a portion of the original non-cleared swap's notional amount to a third party. The original non-cleared swap, with a lower notional amount, would retain legacy status, but the novated portion would not retain legacy status.

2. Final Rule

The agencies did not receive comments on this amendment and are adopting it as proposed.

C. Portfolio Compression Exercises

1. Proposal

The proposed rule recognized the legacy status of non-cleared swaps that have been modified as part of certain portfolio compression exercises used as a risk management tool or for IBOR replacement. In compression, offsetting trades between two or more parties are amended or torn up and replaced, which reduces the size of gross derivatives exposures and generally reduces the number or frequency of payments between parties, thus maintaining or reducing the overall risk profile of the portfolio.

In a simple bilateral form of compression between two counterparties, the dealer agrees with another dealer to compress trades so that offsetting positions are cancelled and only the net amount remains, without any change to the overall market exposures. The resulting net position is documented by amending one of the original swaps. This ''amended swap'' method is the predominant method used in compressions of non-cleared interest rate swaps. Compression can also be done on a multilateral basis among more than two counterparties, and is often even more efficient, as trades across multiple dealers involved in a compression exercise can be offset, reducing the risk in each relationship across the various counterparties involved in the compression. The resulting net position is documented by creating a replacement swap reflecting the net position. This ''replacement swap'' method is predominantly used in compression exercises for non-cleared credit default swaps, but it can also be used for interest rate swap compression. Compression often results in the cancellation of offsetting positions, but it could also result in new trades being booked into an existing non-cleared portfolio to reflect the netted-down risk of the original portfolio.

2. Final Rule

Commenters were generally supportive of this amendment to maintain legacy status of non-cleared swap after portfolio compression exercises. Commenters noted that portfolio compression generally reduces gross derivative exposures and reduces the frequency of payment, reducing the portfolio's risk profile.

The agencies are modifying the language in § __.1(h)(4) to make clear that when parties engage in portfolio compression, the resulting replacement swap from the compression exercise is accorded legacy treatment so long as it meets the limitations in § __.1(h)(4). As described above, in order to separate compression for the purposes of replacing an interest rate listed in § __.1(h)(3)(i) and compression for other risk reducing or risk neutral purposes, the rule now has a section for the former (under § __.1(h)(3)) and the latter (under § __.1(h)(4)). The rule also makes clear that the resulting non-cleared swap or non-cleared security-based swap from the portfolio compression exercises may not (1) exceed the sum of the total effective notional amounts of all of the swaps that were submitted to the compression exercise that had the same or longer remaining maturity as the resulting swap; or (2) exceed the longest remaining maturity of all the swaps submitted to the compression exercise. This is consistent with the proposal.

As in other areas of the final rule, supervisors may review these changes to confirm that covered swap entities are not purposefully avoiding the requirements of the rule.

VII. Technical Changes

The proposed rule would have deleted § __.1(e)(7), which includes an amendment relating to the QFC Rules. The text of § __.1(e)(7), with slight modifications, would have been moved to § __.1(h)(1), so that it would reside in the section of the Swap Margin Rule dedicated to legacy swap amendments. The methods of amendment listed in § __.1(h) would have applied not only to IBOR replacements, but also to any other contractual modifications permitted under § __.1(h), including amendments relating to the QFC Rules.

The agencies did not receive any comments on this part of the proposed rule and are adopting it as proposed.

VIII. Comments Regarding Broader Changes to the Swap Margin Rule

Several commenters that supported the proposed rule also requested broader changes to the rule. Some commenters requested a carve-out for seeded funds and an alternative approach to US GAAP accounting analysis for purposes of determining the application of the rule. These commenters asserted that the limited and passive nature of the relationship between seeded funds and their sponsors does not warrant the requirement to aggregate a seeded fund's swap exposures with those of its parent or other commonly consolidated entities for the purpose of calculation material swap exposure. One commenter requested the agencies make an announcement to deprioritize compliance with any enforcement of the swap margin rule with respect to seeded funds. Another commenter stated that non-public and mutual insurance companies that are not required to perform GAAP accounting analysis do not routinely do so because the cost to perform such analysis for limited purposes is significant. They suggested engagement with the regulators to determine if an alternative approach may be available.

Other commenters representing nonprofit organizations, asset managers, mutual funds, other institutional asset managers, and custodian banks recommended the types of eligible collateral be expanded to include certain types of money market mutual funds and exchange traded funds. Commenters also requested exclusion of seeded funds from the definition of a consolidated group through limited rule making. Other commenters raised concerns with the current $50 million initial margin threshold and requested that an additional 6-month grace period be provided after a financial end user crosses the initial margin threshold. In addition, commenters requested a less frequent calculation of the initial margin threshold amount because of the burden associated with the testing and monitoring in-scope counterparties. Commenters also requested that the agencies work with regulated entities to develop an approach for the allocation of the initial margin amounts and the minimum transfer amount across multiple asset managers for a given client.

Commenters also requested that the agencies exclude physically settled foreign exchange swaps from the material swaps exposure calculation and consider making comparability and substitute compliance determination for foreign jurisdictions.

The agencies are not adopting these broader proposed changes in this final rule because they fall outside the scope of the changes the agencies sought comment on in the proposed rule. The agencies will continue to evaluate the requirements of this rule to ensure they meet the agencies' objectives.

IX. Brexit IFR

The agencies issued an interim final rule, which became effective on March 19, 2019, to provide certainty for covered swap entities as they prepare for the event commonly described as ''Brexit.'' [54] In particular, the interim final rule provided a covered swap entity with the ability to continue to service its cross-border clients in the event that the U.K. withdraws from the E.U. without a Withdrawal Agreement. A Withdrawal Agreement between the UK and EU was ratified in January 2020.[55] The Withdrawal Agreement addresses certain EU-related matters that will immediately be affected by the withdrawal itself and a transition period. The transition period will run until December 31, 2020 and could be extended by one or two years.

The agencies received one comment letter on the interim final rule. The commenter requested that the agencies amend the interim final rule to exclude swaps with a flip clause. The comment raised an issue that was not within the scope of the interim final rule. Accordingly, the agencies are not making any revisions to the rule and are retaining it as a final rule as initially adopted.

X. Administrative Law Matters

Paperwork Reduction Act Analysis

Certain provisions of the final rulemaking contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521). In accordance with the requirements of the PRA, the agencies may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

The agencies reviewed the final rulemaking and determined that it reduces certain recordkeeping requirements that have been previously cleared under various OMB control numbers. In order to be consistent across the agencies, the agencies are also applying a conforming methodology for calculating the burden estimates. The agencies are proposing to extend for three years, with revision, these information collections. The OCC and FDIC have submitted to OMB for review under section 3507(d) of the PRA (44 U.S.C. 3507(d)) and section 1320.11 of the OMB's implementing regulations (5 CFR 1320). The Board has reviewed the information collection under its delegated authority. The OMB control numbers are 1557–0251 (OCC), 3064–0204 (FDIC), and 7100–0364 (Board). The FCA has determined the final rulemaking has no PRA implications because Farm Credit System institutions are Federally chartered instrumentalities of the United States and instrumentalities of the United States are specifically excepted from the definition of ''collection of information'' contained in 44 U.S.C. 3502(3). The FHFA has determined that the final rulemaking does not contain any collection of information for which the agency must obtain clearance under the PRA.

Current Actions

The final rulemaking removes the record keeping requirement in § __.11(b) that a covered swap entity shall calculate the amount of initial margin that would be required to be posted to an affiliate that is a financial end user with material swaps exposure pursuant to § __.3(b) and provide documentation of such amount to each affiliate on a daily basis.

Final Revision, With Extension, of the Following Information Collections

Title of information collection: Reporting and Recordkeeping Requirements Associated with Swaps Margin and Swaps Push-Out.

Frequency: Annual and event generated.

Affected public: Businesses or other for-profit.

Estimated average hours per response:

Reporting

Section __.1(d)—1 hour (on average of 1,000 times per year).

Sections __.8(c) and __.8(d)—240 hours.

Section __.8(f)(3)—50 hours.

Section __.9(e)—10 hours (on average of 3 times per year).

Sections 237.22(a)(1) and 237.22(e) (*Board only*)—7 hours.

Recordkeeping

Sections __.2 (definition of ''eligible master netting agreement,'' item 4), 237.8(g), and 237.10—5 hours.

Section __.5(c)(2)(i)—4 hours.

Section __.7(c)—100 hours.

Sections __.8(e) and 237.8(f)—40 hours.

Section __.8(h)—20 hours.

Disclosure

Section __.1(h)—1 hour.

OCC

Respondents: Any national bank or a subsidiary thereof, Federal savings association or a subsidiary thereof, or Federal branch or agency of a foreign bank that is registered as a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant.

Estimated number of respondents: 10.

Proposed revisions only estimated annual burden: −2,500 hours.

Total estimated annual burden: 14,900 hours.

Board

Respondents: Any state member bank (as defined in 12 CFR 208.2(g)), bank holding company (as defined in 12 U.S.C. 1841), savings and loan holding company (as defined in 12 U.S.C. 1467a), foreign banking organization (as defined in 12 CFR 211.21(o)), foreign bank that does not operate an insured branch, state branch or state agency of a foreign bank (as defined in 12 U.S.C. 3101(b)(11) and (12)), or Edge or agreement corporation (as defined in 12 CFR 211.1(c)(2) and (3)) that is registered as a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant.

Estimated number of respondents: 41.

Proposed revisions only estimated annual burden: −10,209 hours.

Total estimated annual burden: 61,104 hours.

FDIC

FDIC: Any FDIC-insured state-chartered bank that is not a member of the Federal Reserve System or FDIC-insured state-chartered savings association that is registered as a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant.

Estimated number of respondents: 1.

Proposed revisions only estimated annual burden: −249 hours.

[54] 84 FR 9940 (March 19, 2019).

[55] *See* European Council Press Release ''Brexit: Council adopts decision to conclude the withdraw agreement'' (January 30, 2020), available at *https://www.consilium.europa.eu/en/press/press-releases/2020/01/30/brexit-council-adopts-decision-to-conclude-the-withdrawal-agreement/.*

Total estimated annual burden: 1,490 hours.

Regulatory Flexibility Act Analysis

OCC: In general, the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) requires that in connection with a final rulemaking, an agency publish a final regulatory flexibility analysis that describes the impact of the rule on small entities. Under section 605(b) of the RFA, this analysis is not required if an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities and publishes its certification and a brief explanatory statement in the **Federal Register** along with its rule.

As part of our analysis, we consider whether, pursuant to the RFA, the final rule would have a significant economic impact on a substantial number of small entities. The OCC currently supervises approximately 745 small entities.[56] Among these 745 small entities, 42 could be affected by the final rule if one or more of these small entities are a party to a financial contract with a covered swap entity. Because we believe banks will incur *de minimis* costs, if any, to comply with the final rule, we conclude that the final rule would not have a significant economic impact on a substantial number of small entities.[57]

Board: The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (RFA), generally requires that an agency prepare and make available for public comment a final regulatory flexibility analysis in connection with a final rulemaking or certify that the final rule will not have a significant economic impact on a substantial number of small entities.[58]

As described above, the final rule amends the Swap Margin Rule as follows:

First, the final rule provides relief by allowing legacy swaps to be amended to replace interbank offered rates (IBORs) and other interest rates that are reasonably expected to be discontinued or are reasonably determined to have lost their relevance as a reliable benchmark due to a significant impairment, without such swaps losing their legacy status.

Second, the final rule adds an additional initial margin compliance period for swaps with certain smaller counterparties, and clarifies the existing trading documentation requirements in § __.10 of the Rule.

Third, the final rule permits amendments driven by certain routine life-cycle activities that covered swap entities may conduct for legacy swaps, such as reduction of notional amounts and portfolio compression exercises, without triggering margin requirements.

Fourth, the final rule would make final a previously issued interim final rule that preserve the status of legacy swaps meeting certain criteria after the United Kingdom withdraws from the European Union without a negotiated settlement agreement.

Lastly, the final rule amends the treatment of affiliate transactions by amending the regulatory requirement that a covered swap entity collect initial margin for non-cleared swaps from its affiliates. The final rule retains the requirement that affiliates exchange variation margin. It also makes clear that affiliates should continue to use sound judgment to impose initial margin on non-cleared swaps when appropriate.

This final rule applies to financial institutions that are covered swap entities that are subject to the requirements of the Swap Margin Rule. Under SBA regulations, the finance and insurance sectors include commercial banking, savings institutions, credit unions, other depository credit intermediation and credit card issuing entities (financial institutions). With respect to financial institutions that are covered swap entities under the Swap Margin Rule, a financial institution generally is considered small if it has assets of $600 million or less.[59] Covered swap entities would be considered financial institutions for purposes of the RFA in accordance with SBA regulations. The Board does not expect that any covered swap entity is likely to be a small financial institution, because a small financial institution is unlikely to engage in the level of swap activity that would require it to register as a swap dealer or a major swap participant with the CFTC or a security-based swap dealer or security-based major swap participant with the U.S. Securities and Exchange Commission (SEC).[60] None of the current Board-regulated covered swap entities are small entities for purposes of the RFA.

The Board does not believe that this final rule will result in any new reporting, recordkeeping or other compliance requirements resulting in increased burden to any small entities, nor, therefore, that there are any significant alternatives to the final rule that would reduce the impact on small entities. In light of the foregoing, the Board certifies pursuant to section 605(b) of the RFA that the final rule will not have a significant economic impact on a substantial number of small entities.

FDIC: The RFA generally requires that, in connection with a final rulemaking, an agency prepare and make available for public comment a final regulatory flexibility analysis describing the impact of the final rule on small entities. However, a regulatory flexibility analysis is not required if the agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities. The SBA has defined "small entities" to include banking organizations with total assets of less than or equal to $600 million that are independently owned and operated or owned by a holding company with less than or equal to $600 million in total assets.[61] Generally, the FDIC considers a significant effect to be a quantified effect in excess of 5 percent of total annual salaries and benefits per institution, or 2.5 percent of total non-interest expenses. The FDIC believes that effects in excess of these thresholds typically represent significant effects for FDIC-

[56] We base our estimate of the number of small entities on the Small Business Administration's (SBA's) size thresholds for commercial banks and savings institutions, and trust companies, which are $600 million and $41.5 million, respectively. Consistent with the General Principles of Affiliation, 13 CFR 121.103(a), we count the assets of affiliated financial institutions when determining if we should classify an OCC-supervised institution as a small entity. We use December 31, 2019, to determine size because a "financial institution's assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year." *See* footnote 8 of the SBA's Table of Size Standards.

[57] As one way of determining whether any of the small entities is a covered swap entity, the OCC reviewed the CFTC's listing of registered swap dealers at *http://www.cftc.gov/LawRegulation/DoddFrankAct/registerswapdealer.* The SEC has not yet imposed a registration requirement on entities that meet the definition of security-based swap dealer or major security-based swap participant.

[58] *See* 5 U.S.C. 603(a).

[59] *See* 13 CFR 121.201 (effective December 2, 2014, as amended by 84 FR 34261, effective August 19, 2019); *see also* 13 CFR 121.103(a)(6) (noting factors that the SBA considers in determining whether an entity qualifies as a small business, including receipts, employees, and other measures of its domestic and foreign affiliates).

[60] The CFTC has published a list of provisionally registered swap dealers as of February 27, 2020, that does not include any small financial institutions. *See http://www.cftc.gov/LawRegulation/DoddFrankAct/registerswapdealer.* The SEC has not yet imposed a registration requirement on entities that meet the definition of security-based swap dealer or major security-based swap participant.

[61] The SBA defines a small banking organization as having $600 million or less in assets, where an organization's "assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year." *See* 13 CFR 121.201 (as amended by 84 FR 34261, effective August 19, 2019). In its determination, the "SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates." *See* 13 CFR 121.103. Following these regulations, the FDIC uses a covered entity's affiliated and acquired assets, averaged over the preceding four quarters, to determine whether the covered entity is "small" for the purposes of RFA.

supervised institutions. For the reasons described below, the FDIC certifies pursuant to section 605(b) of the RFA that the final rule will not have a significant economic impact on a substantial number of small entities.

According to data from recent Consolidated Reports of Income and Condition (Call Report),[62] the FDIC supervised 3,344 institutions. Of those, 2,581581 are considered ''small,'' according to the terms of the RFA. As discussed previously, the final rule directly applies to covered swap entities (which includes persons registered with the CFTC as swap dealers or major swap participants pursuant to the Commodity Exchange Act of 1936 and persons registered with the SEC as security-based swap dealers and major security-based swap participants under the Securities Exchange Act of 1934) that are subject to the requirements of the Swap Margin Rule. The FDIC has identified 108 swap dealers and major swap participants that, as of February 27, 2020, have registered as swap entities.[63] One of these institutions is supervised by the FDIC, however that institution holds in excess of $460 billion in assets and does not meet the definition of ''small'' for the purpose of RFA.

As an amendment to the Swap Margin Rule, the final rule also affects counterparties to swaps entered into by covered swap entities. However, the Terrorism Risk Insurance Program Reauthorization Act of 2015 excludes non-cleared swaps entered into for hedging purposes by a financial institution with total assets of $10 billion or less from the requirements of the Swap Margin Rule. Given this exclusion, a non-cleared swap between a covered swap entity and a small FDIC-supervised entity that is used to hedge a commercial risk of the small entity will not be subject to the Swap Margin Rule. The FDIC believes that it is unlikely that any small entity it supervises will engage in non-cleared swaps for purposes other than hedging.

Given that no FDIC-supervised small entities are covered swap entities and that it is unlikely that FDIC-supervised small entities enter into non-cleared swaps for purposes other than hedging, this final rule is not expected to have a significant economic impact on a substantial number of small entities supervised by the FDIC. For these reasons, the FDIC certifies that the final rule will not have a significant economic impact on a substantial number of small entities, within the meaning of those terms as used in the RFA. Accordingly, a regulatory flexibility analysis is not required.

FCA: Pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), FCA hereby certifies that the final rule will not have a significant economic impact on a substantial number of small entities. Each of the banks in the Farm Credit System, considered together with its affiliated associations, has assets and annual income in excess of the amounts that would qualify them as small entities; nor does the Federal Agricultural Mortgage Corporation meet the definition of ''small entity.'' Therefore, Farm Credit System institutions are not ''small entities'' as defined in the Regulatory Flexibility Act.

FHFA: The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires that a regulation that has a significant economic impact on a substantial number of small entities, small businesses, or small organizations must include a final regulatory flexibility analysis describing the regulation's impact on small entities. FHFA need not undertake such an analysis if the agency has certified the regulation will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). FHFA has considered the impact of the final rule under the Regulatory Flexibility Act, and certifies that the final rule does not have a significant economic impact on a substantial number of small entities because the final rule is applicable only to FHFA's regulated entities, which are not small entities for purposes of the Regulatory Flexibility Act.

Unfunded Mandates Reform Act of 1995

The OCC has analyzed the final rule under the factors in the Unfunded Mandates Reform Act of 1995 (UMRA).[64] Under this analysis, the OCC considered whether the final rule includes a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year (adjusted annually for inflation). The UMRA does not apply to regulations that incorporate requirements specifically set forth in law.

The OCC analyzed the amendments proposed in this final rulemaking and has determined that they would not result in expenditures by State, local, and Tribal governments, in the aggregate, or by the private sector, of $157 million in any one year. Accordingly, the OCC has not prepared a written statement under sections 202 and 205.

Riegle Community Development and Regulatory Improvement Act of 1994

Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act (RCDRIA),[65] in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions (IDIs), each Federal banking agency must consider, consistent with principles of safety and soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations. In addition, section 302(b) of RCDRIA requires new regulations and amendments to regulations that impose additional reporting, disclosures, or other new requirements on IDIs generally to take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form.[66]

Each Federal banking agency has determined that the final rule would not impose additional reporting, disclosure, or other requirements on IDIs; therefore, the requirements of the RCDRIA do not apply.

A. Plain Language

Section 722 of the Gramm-Leach-Bliley Act[67] requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The agencies have sought to present the final rule in a simple and straightforward

[62] FDIC Call Report, December 31, 2019.

[63] While the SEC had adopted a regulation that would require registration of security-based swap dealers and major security-based swap participants, as of June 28, 2019, there was no date established as the compliance date and no SEC-published list of any such entities that so registered (*see* 84 FR 4906 at 4925). Accordingly, no security-based swap dealers and no major security-based swap participants have been identified as swap entities by the FDIC. In identifying the 105 institutions referred to in the text, the FDIC used the list of swap dealers set forth, on March 22, 2020 (providing data as of February 27, 2020) at *https://www.cftc.gov/LawRegulation/DoddFrankAct/registerswapdealer.html.* Major swap participants, among others, are required to apply for registration through a filing with the National Futures Association. Accordingly, the FDIC reviewed the National Futures Association *https://www.nfa.futures.org/members/sd/index.html* to determine whether there were registered major swap participants. As of March 22, 2020, there were no major swap participants listed on this link.

[64] 2 U.S.C. 1531 *et seq.*

[65] 12 U.S.C. 4802(a).

[66] 12 U.S.C. 4802.

[67] 12 U.S.C. 4809.

manner and did not receive comment on the use of plain language.

B. The Congressional Review Act

For purposes of Congressional Review Act, the OMB makes a determination as to whether a final rule constitutes a ''major'' rule.[68] If a rule is deemed a ''major rule'' by the OMB, the Congressional Review Act generally provides that the rule may not take effect until at least 60 days following its publication.[69]

The Congressional Review Act defines a ''major rule'' as any rule that the Administrator of the Office of Information and Regulatory Affairs of the OMB finds has resulted in or is likely to result in—(A) an annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions, or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.[70] As required by the Congressional Review Act, the agencies will submit the final rule and other appropriate reports to Congress and the Government Accountability Office for review.

List of Subjects

12 CFR Part 45

Administrative practice and procedure, Capital, Margin requirements, National Banks, Federal Savings Associations, Reporting and recordkeeping requirements, Risk.

12 CFR Part 237

Administrative practice and procedure, Banks, Banking, Foreign Banking, Holding companies, Reporting and recordkeeping requirements, Swaps.

12 CFR Part 349

Administrative practice and procedure, Banks, Banking, Holding companies, Capital, Margin requirements, Reporting and recordkeeping requirements, Savings associations, Risk, Swaps.

12 CFR Part 624

Accounting, Agriculture, Banks, Banking, Capital, Cooperatives, Credit, Margin requirements, Reporting and recordkeeping requirements, Risk, Rural areas, Swaps.

12 CFR Part 1221

Government-sponsored enterprises, Mortgages, Securities.

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Chapter I

Authority and Issuance

For the reasons set forth in the common preamble and under the authority of 12 U.S.C. 93a and 5412(b)(2)(B), the Office of the Comptroller of the Currency amends part 45 of Title 12, Code of Federal Regulations, as follows:

PART 45—MARGIN AND CAPITAL REQUIREMENTS FOR COVERED SWAP ENTITIES

■ 1. The authority citation for part 45 continues to read as follows:

Authority: 7 U.S.C. 6s(e), 12 U.S.C. 1 *et seq.,* 12 U.S.C. 93a, 161, 481, 1818, 3907, 3909, 5412(b)(2)(B), and 15 U.S.C. 78o–10(e).

■ 2. Section 45.1 is amended by revising paragraphs (e)(6) and (7) and (h) introductory text and adding paragraphs (h)(1) and (3) through (5) to read as follows:

§ 45.1 Authority, purpose, scope, exemptions and compliance dates.

* * * * *

(e) * * *

(6) September 1, 2020, with respect to requirements in § 45.3 for initial margin for any non-cleared swaps and non-cleared security-based swaps, where both:

(i) The covered swap entity combined with all its affiliates; and

(ii) Its counterparty combined with all its affiliates, have an average daily aggregate notional amount of non-cleared swaps, foreign exchange forwards and foreign exchange swaps for March, April, and May 2020 that exceeds $50 billion, where such amounts are calculated only for business days; and

(iii) In calculating the amounts in paragraphs (e)(6)(i) and (ii) of this section, an entity shall count the average daily aggregate notional amount of a non-cleared swap, a non-cleared security-based swap, a foreign exchange forward or a foreign exchange swap between the entity and an affiliate only one time, and shall not count a swap or security-based swap that is exempt pursuant to paragraph (d) of this section.

(7) September 1, 2021, with respect to requirements in § 45.3 for initial margin for any other covered swap entity with respect to non-cleared swaps and non-cleared security-based swaps entered into with any other counterparty.

* * * * *

(h) *Legacy swaps.* Covered swaps entities are required to comply with the requirements of this part for non-cleared swaps and non-cleared security-based swaps entered into on or after the relevant compliance dates for variation margin and for initial margin established in paragraph (e) of this section. Any non-cleared swap or non-cleared security-based swap entered into before such relevant date shall remain outside the scope of this part if amendments are made to the non-cleared swap or non-cleared security-based swap by method of adherence to a protocol, other amendment of a contract or confirmation, or execution of a new contract or confirmation in replacement of and immediately upon termination of an existing contract or confirmation, as follows:

(1) Amendments to the non-cleared swap or non-cleared security-based swap solely to comply with the requirements of 12 CFR part 47, 12 CFR part 252 subpart I, or 12 CFR part 382, as applicable;

* * * * *

(3)(i) Amendments to the non-cleared swap or non-cleared security-based swap that are made solely to accommodate the replacement of:

(A) An interbank offered rate (IBOR) including, but not limited to, the London Interbank Offered Rate (LIBOR), the Tokyo Interbank Offered Rate (TIBOR), the Bank Bill Swap Rate (BBSW), the Singapore Interbank Offered Rate (SIBOR), the Canadian Dollar Offered Rate (CDOR), Euro Interbank Offered Rate (EURIBOR), and the Hong Kong Interbank Offered Rate (HIBOR);

(B) Any other interest rate that a covered swap entity reasonably expects to be replaced or discontinued or reasonably determines has lost its relevance as a reliable benchmark due to a significant impairment; or

(C) Any other interest rate that succeeds a rate referenced in paragraph (h)(3)(i)(A) or (B) of this section. An amendment made under this paragraph (h)(3)(i)(C) could be one of multiple amendments made under this paragraph (h)(3)(i)(C). For example, an amendment could replace an IBOR with a temporary interest rate and later replace the temporary interest rate with a permanent interest rate.

[68] 5 U.S.C. 801 *et seq.*

[69] 5 U.S.C. 801(a)(3).

[70] 5 U.S.C. 804(2).

(ii) Amendments to accommodate replacement of an interest rate described in paragraph (h)(3)(i) of this section may also incorporate spreads or other adjustments to the replacement interest rate and make other necessary technical changes to operationalize the determination of payments or other exchanges of economic value using the replacement interest rate, including changes to determination dates, calculation agents, and payment dates. The changes may not extend the maturity or increase the total effective notional amount of the non-cleared swap or non-cleared security-based swap beyond what is necessary to accommodate the differences between market conventions for an outgoing interest rate and its replacement.

(iii) Amendments to accommodate replacement of an interest rate described in paragraph (h)(3)(i) of this section may also be effectuated through portfolio compression between or among covered swap entities and their counterparties. Portfolio compression under this paragraph is not subject to the limitations in paragraph (h)(4) of this section but any non-cleared swaps or non-cleared security-based swaps resulting from the portfolio compression may not have a longer maturity or increase the total effective notional amount more than what is necessary to accommodate the differences between market conventions for an outgoing interest rate and its replacement.

(4) Amendments solely to reduce risk or remain risk-neutral through portfolio compression between or among covered swap entities and their counterparties, as long as any non-cleared swaps or non-cleared security-based swaps resulting from the portfolio compression do not:

(i) Exceed the sum of the total effective notional amounts of all of the swaps that were submitted to the compression exercise that had the same or longer remaining maturity as the resulting swap; or

(ii) Exceed the longest remaining maturity of all the swaps submitted to the compression exercise.

(5) The non-cleared swap or non-cleared security-based swap was amended solely for one of the following reasons:

(i) To reflect technical changes, such as addresses, identities of parties for delivery of formal notices, and other administrative or operational provisions as long as they do not alter the non-cleared swap's or non-cleared security-based swap's underlying asset or reference, the remaining maturity, or the total effective notional amount; or

(ii) To reduce the notional amount, so long as:

(A) All payment obligations attached to the total effective notional amount being eliminated as a result of the amendment are fully terminated; or

(B) All payment obligations attached to the total effective notional amount being eliminated as a result of the amendment are fully novated to a third party, who complies with applicable margin rules for the novated portion upon the transfer.

■ 3. Section 45.9 is amended by adding paragraph (h) to read as follows:

§ 45.9 Cross-border application of margin requirements.

* * * * *

(h)(1) A covered swap entity described in paragraphs (d)(3)(i) and (ii) of this section is not subject to the requirements of § 45.3(a) or § 45.11(a) for any non-cleared swap or non-cleared security-based swap executed with an affiliate of the covered swap entity; and

(2) For purposes of paragraph (h)(1) of this section, ''affiliate'' has the same meaning provided in § 45.11(d).

■ 4. Section 45.10 is amended by revising paragraph (a) to read as follows:

§ 45.10 Documentation of margin matters.

* * * * *

(a) Provides the covered swap entity and its counterparty with the contractual right to collect and post initial margin and variation margin in such amounts, in such form, and under such circumstances as are required by this subpart, and at such time as initial margin or variation margin is required to be collected or posted under § 45.3 or § 45.4, as applicable; and

* * * * *

■ 5. Section 45.11 is revised to read as follows:

§ 45.11 Special rules for affiliates.

(a)(1) A covered swap entity shall calculate on each business day an initial margin collection amount for each counterparty that is a swap entity or financial end user with a material swaps exposure and an affiliate of the covered swap entity.

(2) If the aggregate of all initial margin collection amounts calculated under paragraph (a)(1) of this section does not exceed 15 percent of the covered swap entity's tier 1 capital, the requirements for a covered swap entity to collect initial margin under § 45.3(a) do not apply with respect to any non-cleared swap or non-cleared security-based swap with a counterparty that is an affiliate.

(3) On each business day that the aggregate of all initial margin collection amounts calculated under paragraph (a)(1) of this section exceeds 15 percent of the covered swap entity's tier 1 capital:

(i) The covered swap entity shall collect initial margin under § 45.3(a) for each additional non-cleared swap and non-cleared security-based swap executed that business day with a counterparty that is a swap entity or financial end user with a material swaps exposure and an affiliate of the covered swap entity, commencing on the day after execution and continuing on a daily basis as required under § 45.3(c), until the earlier of:

(A) The termination date of such non-cleared swap or non-cleared security-based swap, or

(B) The business day on which the aggregate of all initial margin collection amounts calculated under § 45.11(a)(1) falls below 15 percent of the covered swap entity's tier 1 capital;

(ii) Notwithstanding § 45.7(b), to the extent the covered swap entity collects initial margin pursuant to paragraph (a)(3)(i) of this section in the form of collateral other than cash collateral, the custodian for such collateral may be the covered swap entity or an affiliate of the covered swap entity;

(4) For purposes of this paragraph (a), ''tier 1 capital'' means the sum of common equity tier 1 capital as defined in 12 CFR 3.20(b) and additional tier 1 capital as defined in 12 CFR 3.20(c), as reported in the institution's most recent Consolidated Reports of Income and Condition (Call Report); and

(5) If any subsidiary of the covered swap entity (including a subsidiary described in § 45.9(h)) executes any non-cleared swap or non-cleared security-based swap with any counterparty that is a swap entity or financial end user with a material swaps exposure and an affiliate of the covered swap entity:

(i) The covered swap entity shall treat such non-cleared swap or security-based swap as its own for purposes of this paragraph (a); and

(ii) If the subsidiary is itself a covered swap entity, the compliance by its parent covered swap entity with this paragraph (a)(5) shall be deemed to establish the subsidiary's compliance with the requirements of this paragraph (a) and to exempt the subsidiary from the requirements for a covered swap entity to collect initial margin under § 45.3(a) from an affiliate.

(b) The requirement for a covered swap entity to post initial margin under § 45.3(b) does not apply with respect to any non-cleared swap or non-cleared security-based swap with a counterparty that is an affiliate.

(c) Section 45.3(d) shall apply to a counterparty that is an affiliate in the same manner as it applies to any counterparty that is neither a financial end user without a material swap exposure nor a swap entity.

(d) For purposes of this section:

(1) An *affiliate* means:

(i) An affiliate as defined in § 45.2; or

(ii) Any company that controls, is controlled by, or is under common control with the covered swap entity through the direct or indirect exercise of controlling influence over the management or policies of the controlled company.

(2) A *subsidiary* means:

(i) A subsidiary as defined in § 45.2; or

(ii) Any company that is controlled by the covered swap entity through the direct or indirect exercise of controlling influence over the management or policies of the controlled company.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

12 CFR Chapter II

Authority and Issuance

For the reasons set forth in the common preamble, the Board of Governors of the Federal Reserve System amends 12 CFR part 237 as follows:

PART 237—SWAPS MARGIN AND SWAPS PUSH-OUT (REGULATION KK)

■ 6. The authority citation for part 237 continues to read as follows:

Authority: 7 U.S.C. 6s(e), 15 U.S.C. 78o–10(e), 15 U.S.C. 8305, 12 U.S.C. 221 *et seq.,* 12 U.S.C. 343–350, 12 U.S.C. 1818, 12 U.S.C. 1841 *et seq.,* 12 U.S.C. 3101 *et seq.,* and 12 U.S.C. 1461 *et seq.*

■ 7. Revise the heading of part 237 to read as shown above.

Subpart A—Margin and Capital Requirements for Covered Swap Entities (Regulation KK)

■ 8. Section 237.1 is amended by revising paragraphs (e)(6) and (7) and (h) introductory text and adding paragraphs (h)(1) and (3) through (5) to read as follows:

§ 237.1 Authority, purpose, scope, exemptions and compliance dates.

* * * * *

(e) * * *

(6) September 1, 2020, with respect to requirements in § 237.3 for initial margin for any non-cleared swaps and non-cleared security-based swaps, where both:

(i) The covered swap entity combined with all its affiliates; and

(ii) Its counterparty combined with all its affiliates, have an average daily aggregate notional amount of non-cleared swaps, foreign exchange forwards and foreign exchange swaps for March, April, and May 2020 that exceeds $50 billion, where such amounts are calculated only for business days; and

(iii) In calculating the amounts in paragraphs (e)(6)(i) and (ii) of this section, an entity shall count the average daily aggregate notional amount of a non-cleared swap, a non-cleared security-based swap, a foreign exchange forward or a foreign exchange swap between the entity and an affiliate only one time, and shall not count a swap or security-based swap that is exempt pursuant to paragraph (d) of this section.

(7) September 1, 2021, with respect to requirements in § 237.3 for initial margin for any other covered swap entity with respect to non-cleared swaps and non-cleared security-based swaps entered into with any other counterparty.

* * * * *

(h) *Legacy swaps.* Covered swaps entities are required to comply with the requirements of this subpart for non-cleared swaps and non-cleared security-based swaps entered into on or after the relevant compliance dates for variation margin and for initial margin established in paragraph (e) of this section. Any non-cleared swap or non-cleared security-based swap entered into before such relevant date shall remain outside the scope of this subpart if amendments are made to the non-cleared swap or non-cleared security-based swap by method of adherence to a protocol, other amendment of a contract or confirmation, or execution of a new contract or confirmation in replacement of and immediately upon termination of an existing contract or confirmation, as follows:

(1) Amendments to the non-cleared swap or non-cleared security-based swap solely to comply with the requirements of 12 CFR part 47, 12 CFR part 252 subpart I, or 12 CFR part 382, as applicable;

* * * * *

(3)(i) Amendments to the non-cleared swap or non-cleared security-based swap that are made solely to accommodate the replacement of:

(A) An interbank offered rate (IBOR) including, but not limited to, the London Interbank Offered Rate (LIBOR), the Tokyo Interbank Offered Rate (TIBOR), the Bank Bill Swap Rate (BBSW), the Singapore Interbank Offered Rate (SIBOR), the Canadian Dollar Offered Rate (CDOR), Euro Interbank Offered Rate (EURIBOR), and the Hong Kong Interbank Offered Rate (HIBOR);

(B) Any other interest rate that a covered swap entity reasonably expects to be replaced or discontinued or reasonably determines has lost its relevance as a reliable benchmark due to a significant impairment; or

(C) Any other interest rate that succeeds a rate referenced in paragraph (h)(3)(i)(A) or (B) of this section. An amendment made under this paragraph (h)(3)(i)(C) could be one of multiple amendments made under this paragraph (h)(3)(i)(C). For example, an amendment could replace an IBOR with a temporary interest rate and later replace the temporary interest rate with a permanent interest rate.

(ii) Amendments to accommodate replacement of an interest rate described in paragraph (h)(3)(i) of this section may also incorporate spreads or other adjustments to the replacement interest rate and make other necessary technical changes to operationalize the determination of payments or other exchanges of economic value using the replacement interest rate, including changes to determination dates, calculation agents, and payment dates. The changes may not extend the maturity or increase the total effective notional amount of the non-cleared swap or non-cleared security-based swap beyond what is necessary to accommodate the differences between market conventions for an outgoing interest rate and its replacement.

(iii) Amendments to accommodate replacement of an interest rate described in paragraph (h)(3)(i) of this section may also be effectuated through portfolio compression between or among covered swap entities and their counterparties. Portfolio compression under this paragraph is not subject to the limitations in paragraph (h)(4) of this section, but any non-cleared swaps or non-cleared security-based swaps resulting from the portfolio compression may not have a longer maturity or increase the total effective notional amount more than what is necessary to accommodate the differences between market conventions for an outgoing interest rate and its replacement.

(4) Amendments solely to reduce risk or remain risk-neutral through portfolio compression between or among covered swap entities and their counterparties, as long as any non-cleared swaps or non-cleared security-based swaps resulting from the portfolio compression do not:

(i) Exceed the sum of the total effective notional amounts of all of the swaps that were submitted to the compression exercise that had the same or longer remaining maturity as the resulting swap; or

(ii) Exceed the longest remaining maturity of all the swaps submitted to the compression exercise.

(5) The non-cleared swap or non-cleared security-based swap was amended solely for one of the following reasons:

(i) To reflect technical changes, such as addresses, identities of parties for delivery of formal notices, and other administrative or operational provisions as long as they do not alter the non-cleared swap's or non-cleared security-based swap's underlying asset or reference, the remaining maturity, or the total effective notional amount; or

(ii) To reduce the notional amount, so long as:

(A) All payment obligations attached to the total effective notional amount being eliminated as a result of the amendment are fully terminated; or

(B) All payment obligations attached to the total effective notional amount being eliminated as a result of the amendment are fully novated to a third party, who complies with applicable margin rules for the novated portion upon the transfer.

■ 9. Section 237.9 is amended by adding paragraph (h) to read as follows:

§ 237.9 Cross-border application of margin requirements.

* * * * *

(h)(1) A covered swap entity described in paragraphs (d)(3)(i) and (ii) of this section is not subject to the requirements of § 237.3(a) or § 237.11(a) for any non-cleared swap or non-cleared security-based swap executed with an affiliate of the covered swap entity; and

(2) For purposes of paragraph (h)(1) of this section, ''affiliate'' has the same meaning provided in 12 CFR 237.11(d).

■ 10. Section 237.10 is amended by revising paragraph (a) to read as follows:

§ 237.10 Documentation of margin matters.

* * * * *

(a) Provides the covered swap entity and its counterparty with the contractual right to collect and post initial margin and variation margin in such amounts, in such form, and under such circumstances as are required by this subpart, and at such time as initial margin or variation margin is required to be collected or posted under § 237.3 or § 237.4, as applicable; and

* * * * *

■ 11. Section 237.11 is revised to read as follows:

§ 237.11 Special rules for affiliates.

(a)(1) A covered swap entity shall calculate on each business day an initial margin collection amount for each counterparty that is a swap entity or financial end user with a material swaps exposure and an affiliate of the covered swap entity.

(2) If the aggregate of all initial margin collection amounts calculated under paragraph (a)(1) of this section does not exceed 15 percent of the covered swap entity's tier 1 capital, the requirements for a covered swap entity to collect initial margin under § 237.3(a) do not apply with respect to any non-cleared swap or non-cleared security-based swap with a counterparty that is an affiliate.

(3) On each business day that the aggregate of all initial margin collection amounts calculated under paragraph (a)(1) of this section exceeds 15 percent of the covered swap entity's tier 1 capital:

(i) The covered swap entity shall collect initial margin under § 237.3(a) for each additional non-cleared swap and non-cleared security-based swap executed that business day with a counterparty that is a swap entity or financial end user with a material swaps exposure and an affiliate of the covered swap entity, commencing on the day after execution and continuing on a daily basis as required under § 237.3(c), until the earlier of:

(A) The termination date of such non-cleared swap or non-cleared security-based swap, or

(B) The business day on which the aggregate of all initial margin collection amounts calculated under paragraph (a)(1) of this section falls below 15 percent of the covered swap entity's tier 1 capital;

(ii) Notwithstanding § 237.7(b), to the extent the covered swap entity collects initial margin pursuant to paragraph (a)(3)(i) of this section in the form of collateral other than cash collateral, the custodian for such collateral may be the covered swap entity or an affiliate of the covered swap entity; and

(4) For purposes of this paragraph (a), ''tier 1 capital'' means the sum of common equity tier 1 capital as defined in 12 CFR 217.20(b) and additional tier 1 capital as defined in 12 CFR 217.20(c), as reported in the institution's most recent Consolidated Reports of Income and Condition (Call Report).

(5) If any subsidiary of the covered swap entity (including a subsidiary described in § 237.9(h)) executes any non-cleared swap or non-cleared security-based swap with any counterparty that is a swap entity or financial end user with a material swaps exposure and an affiliate of the covered swap entity:

(i) The covered swap entity shall treat such non-cleared swap or security-based swap as its own for purposes of this paragraph (a); and

(ii) If the subsidiary is itself a covered swap entity, the compliance by its parent affiliated covered swap entity with this paragraph (a)(5) shall be deemed to establish the subsidiary's compliance with the requirements of this paragraph (a) and to exempt the subsidiary from the requirements for a covered swap entity to collect initial margin under § 237.3(a) from an affiliate.

(b) The requirement for a covered swap entity to post initial margin under § 237.3(b) does not apply with respect to any non-cleared swap or non-cleared security-based swap with a counterparty that is an affiliate.

(c) Section 237.3(d) shall apply to a counterparty that is an affiliate in the same manner as it applies to any counterparty that is neither a financial end user without a material swap exposure nor a swap entity.

(d) For purposes of this section,

(1) An *affiliate* means:

(i) An affiliate as defined in § 237.2; or

(ii) Any company that controls, is controlled by, or is under common control with the covered swap entity through the direct or indirect exercise of controlling influence over the management or policies of the controlled company.

(2) A *subsidiary* means:

(i) A subsidiary as defined in § 237.2; or

(ii) Any company that is controlled by the covered swap entity through the direct or indirect exercise of controlling influence over the management or policies of the controlled company.

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Chapter III

Authority and Issuance

For the reasons set forth in the SUPPLEMENTARY INFORMATION section, the Federal Deposit Insurance Corporation amends 12 CFR chapter III as follows:

PART 349—DERIVATIVES

Subpart A—Margin and Capital Requirements for Covered Swap Entries

■ 12. The authority citation for subpart A of part 349 continues to read as follows:

Authority: 7 U.S.C. 6s(e), 15 U.S.C. 78o–10(e), and 12 U.S.C. 1818 and 12 U.S.C.

1819(a)(Tenth), 12 U.S.C. 1813(q), 1818, 1819, and 3108.

■ 13. Section 349.1 is amended by revising paragraphs (e)(6) and (7) and (h) introductory text, and adding paragraphs (h)(1) and (3) through (5) to read as follows:

§ 349.1 Authority, purpose, scope, exemptions and compliance dates.

* * * * *

(e) * * *

(6) September 1, 2020, with respect to requirements in § 349.3 for initial margin for any non-cleared swaps and non-cleared security-based swaps, where both:

(i) The covered swap entity combined with all its affiliates; and

(ii) Its counterparty combined with all its affiliates, have an average daily aggregate notional amount of non-cleared swaps, foreign exchange forwards and foreign exchange swaps for March, April, and May 2020 that exceeds $50 billion, where such amounts are calculated only for business days; and

(iii) In calculating the amounts in paragraphs (e)(6)(i) and (ii) of this section, an entity shall count the average daily aggregate notional amount of a non-cleared swap, a non-cleared security-based swap, a foreign exchange forward or a foreign exchange swap between the entity and an affiliate only one time, and shall not count a swap or security-based swap that is exempt pursuant to paragraph (d) of this section.

(7) September 1, 2021, with respect to requirements in § 349.3 for initial margin for any other covered swap entity with respect to non-cleared swaps and non-cleared security-based swaps entered into with any other counterparty.

* * * * *

(h) *Legacy swaps.* Covered swaps entities are required to comply with the requirements of this subpart for non-cleared swaps and non-cleared security-based swaps entered into on or after the relevant compliance dates for variation margin and for initial margin established in paragraph (e) of this section. Any non-cleared swap or non-cleared security-based swap entered into before such relevant date shall remain outside the scope of this subpart if amendments are made to the non-cleared swap or non-cleared security-based swap by method of adherence to a protocol, other amendment of a contract or confirmation, or execution of a new contract or confirmation in replacement of and immediately upon termination of an existing contract or confirmation, as follows:

(1) Amendments to the non-cleared swap or non-cleared security-based swap solely to comply with the requirements of 12 CFR part 47, 12 CFR part 252 subpart I, or 12 CFR part 382, as applicable;

* * * * *

(3)(i) Amendments to the non-cleared swap or non-cleared security-based swap that are made solely to accommodate the replacement of:

(A) An interbank offered rate (IBOR) including, but not limited to, the London Interbank Offered Rate (LIBOR), the Tokyo Interbank Offered Rate (TIBOR), the Bank Bill Swap Rate (BBSW), the Singapore Interbank Offered Rate (SIBOR), the Canadian Dollar Offered Rate (CDOR), Euro Interbank Offered Rate (EURIBOR), and the Hong Kong Interbank Offered Rate (HIBOR);

(B) Any other interest rate that a covered swap entity reasonably expects to be replaced or discontinued or reasonably determines has lost its relevance as a reliable benchmark due to a significant impairment; or

(C) Any other interest rate that succeeds a rate referenced in paragraph (h)(3)(i)(A) or (B) of this section. An amendment made under this paragraph (h)(3)(i)(C) could be one of multiple amendments made under this paragraph (h)(3)(i)(C). For example, an amendment could replace an IBOR with a temporary interest rate and later replace the temporary interest rate with a permanent interest rate.

(ii) Amendments to accommodate replacement of an interest rate described in paragraph (h)(3)(i) of this section may also incorporate spreads or other adjustments to the replacement interest rate and make other necessary technical changes to operationalize the determination of payments or other exchanges of economic value using the replacement interest rate, including changes to determination dates, calculation agents, and payment dates. The changes may not have a longer maturity or increase the total effective notional amount of the non-cleared swap or non-cleared security-based swap beyond what is necessary to accommodate the differences between market conventions for an outgoing interest rate and its replacement.

(iii) Amendments to accommodate replacement of an interest rate described in paragraph (h)(3)(i) of this section may also be effectuated through portfolio compression between or among covered swap entities and their counterparties. Portfolio compression under this paragraph is not subject to the limitations in paragraph (h)(4) of this section, but any non-cleared swap[s] or non-cleared security-based swaps resulting from the portfolio compression may not extend the maturity or increase the total effective notional amount more than what is necessary to accommodate the differences between market conventions for an outgoing interest rate and its replacement.

(4) Amendments solely to reduce risk or remain risk-neutral through portfolio compression between or among covered swap entities and their counterparties, as long as any non-cleared swaps or non-cleared security-based swaps resulting from the portfolio compression do not:

(i) Exceed the sum of the total effective notional amounts of all of the swaps that were submitted to the compression exercise that had the same or longer remaining maturity as the resulting swap; or

(ii) Exceed the longest remaining maturity of all the swaps submitted to the compression exercise.

(5) The non-cleared swap or non-cleared security-based swap was amended solely for one of the following reasons:

(i) To reflect technical changes, such as addresses, identities of parties for delivery of formal notices, and other administrative or operational provisions as long as they do not alter the non-cleared swap's or non-cleared security-based swap's underlying asset or reference, the remaining maturity, or the total effective notional amount; or

(ii) To reduce the notional amount, so long as:

(A) All payment obligations attached to the total effective notional amount being eliminated as a result of the amendment are fully terminated; or

(B) All payment obligations attached to the total effective notional amount being eliminated as a result of the amendment are fully novated to a third party, who complies with applicable margin rules for the novated portion upon the transfer.

■ 14. Section 349.9 is amended by adding paragraph (h) to read as follows:

§ 349.9 Cross-border application of margin requirements.

* * * * *

(h)(1) A covered swap entity described in paragraphs (d)(3)(i) and (ii) is not subject to the requirements of § 349.3(a) or § 349.11 for any non-cleared swap or non-cleared security-based swap executed with an affiliate of the covered swap entity; and

(2) For purposes of paragraph (h)(1) of this section, ''affiliate'' has the same meaning provided in § 349.11(d).

■ 15. Section 349.10 is amended by revising paragraph (a) to read as follows:

§ 349.10 Documentation of margin matters.

* * * * *

(a) Provides the covered swap entity and its counterparty with the contractual right to collect and post initial margin and variation margin in such amounts, in such form, and under such circumstances as are required by this subpart, and at such time as initial margin or variation margin is required to be collected or posted under § 349.3 or § 349.4, as applicable; and

* * * * *

■ 16. Section 349.11 is revised to read as follows:

§ 349.11 Special rules for affiliates.

(a)(1) A covered swap entity shall calculate on each business day an initial margin collection amount for each counterparty that is a swap entity or financial end user with a material swaps exposure and an affiliate of the covered swap entity.

(2) If the aggregate of all initial margin collection amounts calculated under paragraph (a)(1) of this section does not exceed 15 percent of the covered swap entity's tier 1 capital, the requirements for a covered swap entity to collect initial margin under § 349.3(a) do not apply with respect to any non-cleared swap or non-cleared security-based swap with a counterparty that is an affiliate.

(3) On each business day that the aggregate of all initial margin collection amounts calculated under paragraph (a)(1) of this section exceeds 15 percent of the covered swap entity's tier 1 capital:

(i) The covered swap entity shall collect initial margin under § 349.3(a) for each additional non-cleared swap and non-cleared security-based swap executed that business day with a counterparty that is a swap entity or financial end user with a material swaps exposure and an affiliate of the covered swap entity, commencing on the day after execution and continuing on a daily basis as required under § 45.3(c), until the earlier of:

(A) The termination date of such non-cleared swap or non-cleared security-based swap, or

(B) The business day on which the aggregate of all initial margin collection amounts calculated under paragraph (a)(1) of this section falls below 15 percent of the covered swap entity's tier 1 capital;

(ii) Notwithstanding § 349.7(b), to the extent the covered swap entity collects initial margin pursuant to paragraph (a)(3)(i) of this section in the form of collateral other than cash collateral, the custodian for such collateral may be the covered swap entity or an affiliate of the covered swap entity;

(4) For purposes of this paragraph (a), ''tier 1 capital'' means the sum of common equity tier 1 capital as defined in 12 CFR 324.20(b) and additional tier 1 capital as defined in 12 CFR 324.20(c), as reported in the institution's most recent Consolidated Reports of Income and Condition (Call Report); and

(5) If any subsidiary of the covered swap entity (including a subsidiary described in § 349.9(h)) executes any non-cleared swap or non-cleared security-based swap with any counterparty that is a swap entity or financial end user with a material swaps exposure and an affiliate of the covered swap entity:

(i) The covered swap entity shall treat such non-cleared swap or security-based swap as its own for purposes of this paragraph (a); and

(ii) If the subsidiary is itself a covered swap entity, the compliance by its parent covered swap entity with this paragraph (a)(5) shall be deemed to establish the subsidiary's compliance with the requirements of this paragraph (a) and to exempt the subsidiary from the requirements for a covered swap entity to collect initial margin under § 349.3(a) from an affiliate.

(b) The requirement for a covered swap entity to post initial margin under § 349.3(b) does not apply with respect to any non-cleared swap or non-cleared security-based swap with a counterparty that is an affiliate.

(c) Section 349.3(d) shall apply to a counterparty that is an affiliate in the same manner as it applies to any counterparty that is neither a financial end user without a material swap exposure nor a swap entity.

(d) For purposes of this section:

(1) An *affiliate* means:

(i) An affiliate as defined in § 349.2; or

(ii) Any company that controls, is controlled by, or is under common control with the covered swap entity through the direct or indirect exercise of controlling influence over the management or policies of the controlled company.

(2) A *subsidiary* means:

(i) A subsidiary as defined in § 349.2; or

(ii) Any company that is controlled by the covered swap entity through the direct or indirect exercise of controlling influence over the management or policies of the controlled company.

FARM CREDIT ADMINISTRATION

12 CFR Chapter VI

Authority and Issuance

For the reasons set forth in the preamble, the Farm Credit Administration amends chapter VI of title 12, Code of Federal Regulations, as follows:

PART 624—MARGIN AND CAPITAL REQUIREMENTS FOR COVERED SWAP ENTITIES

■ 17. The authority citation for part 624 continues to read as follows:

Authority: 7 U.S.C. 6s(e), 15 U.S.C. 78o–10(e), 12 U.S.C. 2154, 12 U.S.C. 2243, 12 U.S.C. 2252, 12 U.S.C. 2279bb–1.

■ 18. Section 624.1 is amended by revising paragraphs (e)(6) and (7) and (h) introductory text and adding paragraphs (h)(1) and (3) through (5) to read as follows:

§ 624.1 Authority, purpose, scope, exemptions and compliance dates.

* * * * *

(e) * * *

(6) September 1, 2020, with respect to requirements in § 624.3 for initial margin for any non-cleared swaps and non-cleared security-based swaps, where both:

(i) The covered swap entity combined with all its affiliates; and

(ii) Its counterparty combined with all its affiliates, have an average daily aggregate notional amount of non-cleared swaps, foreign exchange forwards and foreign exchange swaps for March, April, and May 2020 that exceeds $50 billion, where such amounts are calculated only for business days; and

(iii) In calculating the amounts in paragraphs (e)(6)(i) and (ii) of this section, an entity shall count the average daily aggregate notional amount of a non-cleared swap, a non-cleared security-based swap, a foreign exchange forward or a foreign exchange swap between the entity and an affiliate only one time, and shall not count a swap or security-based swap that is exempt pursuant to paragraph (d) of this section.

(7) September 1, 2021, with respect to requirements in § 624.3 for initial margin for any other covered swap entity with respect to non-cleared swaps and non-cleared security-based swaps entered into with any other counterparty.

* * * * *

(h) *Legacy swaps.* Covered swaps entities are required to comply with the requirements of this subpart for non-cleared swaps and non-cleared security-based swaps entered into on or after the relevant compliance dates for variation margin and for initial margin established in paragraph (e) of this section. Any non-cleared swap or non-cleared security-based swap entered into before such relevant date shall remain outside the scope of this subpart if amendments are made to the non-cleared swap or non-cleared security-based swap by method of adherence to a protocol, other amendment of a contract or confirmation, or execution of a new contract or confirmation in replacement of and immediately upon termination of an existing contract or confirmation, as follows:

(1) Amendments to the non-cleared swap or non-cleared security-based swap solely to comply with the requirements of 12 CFR part 47, 12 CFR part 252 subpart I, or 12 CFR part 382, as applicable;

* * * * *

(3)(i) Amendments to the non-cleared swap or non-cleared security-based swap that are made solely to accommodate the replacement of:

(A) An interbank offered rate (IBOR) including, but not limited to, the London Interbank Offered Rate (LIBOR), the Tokyo Interbank Offered Rate (TIBOR), the Bank Bill Swap Rate (BBSW), the Singapore Interbank Offered Rate (SIBOR), the Canadian Dollar Offered Rate (CDOR), Euro Interbank Offered Rate (EURIBOR), and the Hong Kong Interbank Offered Rate (HIBOR);

(B) Any other interest rate that a covered swap entity reasonably expects to be replaced or discontinued or reasonably determines has lost its relevance as a reliable benchmark due to a significant impairment; or

(C) Any other interest rate that succeeds a rate referenced in paragraph (h)(3)(i)(A) or (B) of this section. An amendment made under this paragraph (h)(3)(i)(C) could be one of multiple amendments made under this paragraph (h)(3)(i)(C). For example, an amendment could replace an IBOR with a temporary interest rate and later replace the temporary interest rate with a permanent interest rate.

(ii) Amendments to accommodate replacement of an interest rate described in paragraph (h)(3)(i) of this section may also incorporate spreads or other adjustments to the replacement interest rate and make other necessary technical changes to operationalize the determination of payments or other exchanges of economic value using the replacement interest rate, including changes to determination dates, calculation agents, and payment dates. The changes may not extend the maturity or increase the total effective notional amount of the non-cleared swap or non-cleared security-based swap beyond what is necessary to accommodate the differences between market conventions for an outgoing interest rate and its replacement.

(iii) Amendments to accommodate replacement of an interest rate described in paragraph (h)(3)(i) of this section may also be effectuated through portfolio compression between or among covered swap entities and their counterparties. Portfolio compression under this paragraph is not subject to the limitations in paragraph (h)(4) of this section, but any non-cleared swap[s] or non-cleared security-based swaps resulting from the portfolio compression may not extend the maturity or increase the total effective notional amount more than what is necessary to accommodate the differences between market conventions for an outgoing interest rate and its replacement.

(4) Amendments solely to reduce risk or remain risk-neutral through portfolio compression between or among covered swap entities and their counterparties, as long as any non-cleared swaps or non-cleared security-based swaps resulting from the portfolio compression do not:

(i) Exceed the sum of the total effective notional amounts of all of the swaps that were submitted to the compression exercise that had the same or longer remaining maturity as the resulting swap; or

(ii) Exceed the longest remaining maturity of all the swaps submitted to the compression exercise.

(5) The non-cleared swap or non-cleared security-based swap was amended solely for one of the following reasons:

(i) To reflect technical changes, such as addresses, identities of parties for delivery of formal notices, and other administrative or operational provisions as long as they do not alter the non-cleared swap's or non-cleared security-based swap's underlying asset or reference, the remaining maturity, or the total effective notional amount; or

(ii) To reduce the notional amount, so long as:

(A) All payment obligations attached to the total effective notional amount being eliminated as a result of the amendment are fully terminated; or

(B) All payment obligations attached to the total effective notional amount being eliminated as a result of the amendment are fully novated to a third party, who complies with applicable margin rules for the novated portion upon the transfer.

■ 19. Section 624.9 is amended by adding paragraph (h) to read as follows:

§ 624.9 Cross-Border application of margin requirements.

* * * * *

(h)(1) A covered swap entity described in paragraphs (d)(3)(i) and (ii) of this section is not subject to the requirements of § 624.3(a) or § 624.11(a) for any non-cleared swap or non-cleared security-based swap executed with an affiliate of the covered swap entity; and

(2) For purposes of paragraph (h)(1) of this section, "affiliate" has the same meaning provided in § 624.11(d).

■ 20. Section 624.10 is amended by revising paragraph (a) to read as follows:

§ 624.10 Documentation of margin matters.

* * * * *

(a) Provides the covered swap entity and its counterparty with the contractual right to collect and post initial margin and variation margin in such amounts, in such form, and under such circumstances as are required by this subpart, and at such time as initial margin or variation margin is required to be collected or posted under § 624.3 or § 624.4, as applicable; and

* * * * *

■ 21. Section 624.11 is revised to read as follows:

§ 624.11 Special rules for affiliates.

(a)(1) A covered swap entity shall calculate on each business day an initial margin collection amount for each counterparty that is a swap entity or financial end user with a material swaps exposure and an affiliate of the covered swap entity.

(2) If the aggregate of all initial margin collection amounts calculated under paragraph (a)(1) of this section does not exceed 15 percent of the covered swap entity's tier 1 capital, the requirements for a covered swap entity to collect initial margin under § 624.3(a) do not apply with respect to any non-cleared swap or non-cleared security-based swap with a counterparty that is an affiliate.

(3) On each business day that the aggregate of all initial margin collection amounts calculated under paragraph (a)(1) of this section exceeds 15 percent of the covered swap entity's tier 1 capital:

(i) The covered swap entity shall collect initial margin under § 624.3(a) for each additional non-cleared swap and non-cleared security-based swap executed that business day with a counterparty that is a swap entity or financial end user with a material swaps exposure and an affiliate of the covered swap entity, commencing on the day after execution and continuing on a daily basis as required under § 624.3(c), until the earlier of;

(A) The termination date of such non-cleared swap or non-cleared security-based swap, or

(B) The business day on which the aggregate of all initial margin collection amounts calculated under paragraph (a)(1) of this section falls below 15 percent of the covered swap entity's tier 1 capital;

(ii) Notwithstanding § 624.7(b), to the extent the covered swap entity collects initial margin pursuant to paragraph (a)(3)(i) of this section in the form of collateral other than cash collateral, the custodian for such collateral may be the covered swap entity or an affiliate of the covered swap entity; and

(4) For purposes of this paragraph (a), ''tier 1 capital'' means:

(i) For Farm Credit System banks and associations, the sum of common equity tier 1 capital as defined in 12 CFR 628.20(b) and additional tier 1 capital as defined in 12 CFR 628.20(c), and as reported in the institution's most recent Uniform Reports of Financial Condition and Performance (Call Report); or

(ii) For the Federal Agricultural Mortgage Corporation, as defined and required in in 12 CFR 652.61, and as reported in the institution's most recent Call Report.

(5) If any subsidiary of the covered swap entity (including a subsidiary described in § 624.9(h)) executes any non-cleared swap or non-cleared security-based swap with any counterparty that is a swap entity or financial end user with a material swaps exposure and an affiliate of the covered swap entity:

(i) The covered swap entity shall treat such non-cleared swap or security-based swap as its own for purposes of this paragraph (a); and

(ii) If the subsidiary is itself a covered swap entity, the compliance by its parent covered swap entity with this paragraph (a)(5) shall be deemed to establish the subsidiary's compliance with the requirements of § 624.11(a) and to exempt the subsidiary from the requirements for a covered swap entity to collect initial margin under § 624.3(a) from an affiliate.

(b) The requirement for a covered swap entity to post initial margin under § 624.3(b) does not apply with respect to any non-cleared swap or non-cleared security-based swap with a counterparty that is an affiliate.

(c) Section 624.3(d) shall apply to a counterparty that is an affiliate in the same manner as it applies to any counterparty that is neither a financial end user without a material swap exposure nor a swap entity.

(d) For purposes of this section:

(1) An *affiliate* means:

(i) An affiliate as defined in § 624.2; or

(ii) Any company that controls, is controlled by, or is under common control with the covered swap entity through the direct or indirect exercise of controlling influence over the management or policies of the controlled company.

(2) A *subsidiary* means:

(i) A subsidiary as defined in § 624.2; or

(ii) Any company that is controlled by the covered swap entity through the direct or indirect exercise of controlling influence over the management or policies of the controlled company.

FEDERAL HOUSING FINANCE AGENCY

12 CFR Chapter XII

Authority and Issuance

For the reasons set forth in the preamble, the Federal Housing Finance Agency amends chapter XII of title 12, Code of Federal Regulations, as follows:

PART 1221—MARGIN AND CAPITAL REQUIREMENTS FOR COVERED SWAP ENTITIES

■ 22. The authority citation for part 1221 continues to read as follows:

Authority: 7 U.S.C. 6s(e), 15 U.S.C. 78o–10(e), 12 U.S.C. 4513, and 12 U.S.C. 4526(a).

■ 23. Section 1221.1 is amended by revising paragraphs (e)(6) and (7) and (h) introductory text and adding paragraphs (h)(1) and (3) through (5) to read as follows:

§ 1221.1 Authority, purpose, scope, exemptions and compliance dates.

* * * * *

(e) * * *

(6) September 1, 2020, with respect to the requirements in § 1221.3 for initial margin for any non-cleared swaps and non-cleared security-based swaps, where both:

(i) The covered swap entity combined with all its affiliates; and

(ii) Its counterparty combined with all its affiliates, have an average daily aggregate notional amount of non-cleared swaps, foreign exchange forwards and foreign exchange swaps for March, April, and May 2020 that exceeds $50 billion, where such amounts are calculated only for business days; and

(iii) In calculating the amounts in paragraphs (e)(6)(i) and (ii) of this section, an entity shall count the average daily aggregate notional amount of a non-cleared swap, a non-cleared security-based swap, a foreign exchange forward or a foreign exchange swap between the entity and an affiliate only one time, and shall not count a swap or security-based swap that is exempt pursuant to paragraph (d) of this section.

(7) September 1, 2021, with respect to requirements in § 1221.3 for initial margin for any other covered swap entity with respect to non-cleared swaps and non-cleared security-based swaps entered into with any other counterparty.

* * * * *

(h) *Legacy swaps.* Covered swaps entities are required to comply with the requirements of this part for non-cleared swaps and non-cleared security-based swaps entered into on or after the relevant compliance dates for variation margin and for initial margin established in paragraph (e) of this section. Any non-cleared swap or non-cleared security-based swap entered into before such relevant date shall remain outside the scope of this part if amendments are made to the non-cleared swap or non-cleared security-based swap by method of adherence to a protocol, other amendment of a contract or confirmation, or execution of a new contract or confirmation in replacement of and immediately upon termination of an existing contract or confirmation, as follows:

(1) Amendments to the non-cleared swap or non-cleared security-based swap solely to comply with the requirements of 12 CFR part 47, 12 CFR part 252 subpart I, or 12 CFR part 382, as applicable;

* * * * *

(3)(i) Amendments to the non-cleared swap or non-cleared security-based swap that are made solely to accommodate the replacement of:

(A) An interbank offered rate (IBOR) including, but not limited to, the London Interbank Offered Rate (LIBOR), the Tokyo Interbank Offered Rate (TIBOR), the Bank Bill Swap Rate (BBSW), the Singapore Interbank Offered Rate (SIBOR), the Canadian Dollar Offered Rate (CDOR), the Euro Interbank Offered Rate (EURIBOR), and the Hong Kong Interbank Offered Rate (HIBOR);

(B) Any other interest rate that a covered swap entity reasonably expects to be replaced or discontinued or reasonably determines has lost its relevance as a reliable benchmark due to a significant impairment; or

(C) Any other interest rate that succeeds a rate referenced in paragraph (h)(3)(i)(A) or (B) of this section. An amendment made under this paragraph (h)(3)(i)(C) could be one of multiple amendments made under this paragraph (h)(3)(i)(C). For example, an amendment could replace an IBOR with a temporary interest rate and later replace the temporary interest rate with a permanent interest rate.

(ii) Amendments to accommodate replacement of an interest rate described in paragraph (h)(3)(i) of this section may also incorporate spreads or other adjustments to the replacement interest rate and make other necessary technical changes to operationalize the determination of payments or other exchanges of economic value using the replacement interest rate, including changes to determination dates, calculation agents, and payment dates. The changes may not have a longer maturity or increase the total effective notional amount of the non-cleared swap or non-cleared security-based swap beyond what is necessary to accommodate the differences between market conventions for an outgoing interest rate and its replacement.

(iii) Amendments to accommodate replacement of an interest rate described in paragraph (h)(3)(i) of this section may also be effectuated through portfolio compression between or among covered swap entities and their counterparties. Portfolio compression under this paragraph (h)(3)(iii) is not subject to the limitations in paragraph (h)(4) of this section, but any non-cleared swap[s] or non-cleared security-based swaps resulting from the portfolio compression may not have a longer maturity or increase the total effective notional amount more than what is necessary to accommodate the differences between market conventions for an outgoing interest rate and its replacement.

(4) Amendments solely to reduce risk or remain risk-neutral through portfolio compression between or among covered swap entities and their counterparties, as long as any non-cleared swaps or non-cleared security-based swaps resulting from the portfolio compression do not:

(i) Exceed the sum of the total effective notional amounts of all of the swaps that were submitted to the compression exercise that had the same or longer remaining maturity as the resulting swap; or

(ii) Exceed the longest remaining maturity of all the swaps submitted to the compression exercise.

(5) The non-cleared swap or non-cleared security-based swap was amended solely for one of the following reasons:

(i) To reflect technical changes, such as addresses, identities of parties for delivery of formal notices, and other administrative or operational provisions as long as they do not alter the non-cleared swap's or non-cleared security-based swap's underlying asset or reference, the remaining maturity, or the total effective notional amount; or

(ii) To reduce the notional amount, so long as:

(A) All payment obligations attached to the total effective notional amount being eliminated as a result of the amendment are fully terminated; or

(B) All payment obligations attached to the total effective notional amount being eliminated as a result of the amendment are fully novated to a third party, who complies with applicable margin rules for the novated portion upon the transfer.

■ 24. Section 1221.9 is amended by adding paragraph (h) to read as follows:

§ 1221.9 Cross-Border application of margin requirements.

* * * * *

(h)(1) A covered swap entity described in paragraphs (d)(3)(i) and (ii) of this section is not subject to the requirements of § 1221.3(a) or § 1221.11(a) for any non-cleared swap or non-cleared security-based swap executed with an affiliate of the covered swap entity; and

(2) For purposes of paragraph (h)(1) of this section, ''affiliate'' has the same meaning provided in § 1221.11(d).

■ 25. In § 1221.10 revise paragraph (a) to read as follows:

§ 1221.10 Documentation of margin matters.

* * * * *

(a) Provides the covered swap entity and its counterparty with the contractual right to collect and post initial margin and variation margin in such amounts, in such form, and under such circumstances as are required by this part, and at such time as initial margin or variation margin is required to be collected or posted under § 1221.3 or § 1221.4, as applicable; and

* * * * *

■ 26. Section 1221.11 is revised to read as follows:

§ 1221.11 Special rules for affiliates.

(a)(1) A covered swap entity shall calculate on each business day an initial margin collection amount for each counterparty that is a swap entity or financial end user with a material swaps exposure and an affiliate of the covered swap entity.

(2) If the aggregate of all initial margin collection amounts calculated under paragraph (a)(1) of this section does not exceed 15 percent of the covered swap entity's tier 1 capital, the requirements for a covered swap entity to collect initial margin under § 1221.3(a) do not apply with respect to any non-cleared swap or non-cleared security-based swap with a counterparty that is an affiliate.

(3) On each business day that the aggregate of all initial margin collection amounts calculated under paragraph (a)(1) of this section exceeds 15 percent of the covered swap entity's tier 1 capital:

(i) The covered swap entity shall collect initial margin under § 1221.3(a) for each additional non-cleared swap and non-cleared security-based swap executed that business day with a counterparty that is a swap entity or financial end user with a material swaps exposure and an affiliate of the covered swap entity, commencing on the day after execution and continuing on a daily basis as required under § 1221.3(c), until the earlier of;

(A) The termination date of such non-cleared swap or non-cleared security-based swap, or

(B) The business day on which the aggregate of all initial margin collection amounts calculated under paragraph (a)(1) of this section falls below 15 percent of the covered swap entity's tier 1 capital;

(ii) Notwithstanding § 1221.7(b), to the extent the covered swap entity collects initial margin pursuant to paragraph (a)(3)(i) of this section in the form of collateral other than cash collateral, the custodian for such collateral may be the covered swap entity or an affiliate of the covered swap entity; and

(4) For purposes of paragraph (a) of this section, ''tier 1 capital'' means:

(i) The sum of common equity tier 1 capital as defined in 12 CFR 1240.20(b) and additional tier 1 capital as defined in 12 CFR 1240.20(c).

(5) If any subsidiary of the covered swap entity (including a subsidiary described in § 1221.9(h)) executes any non-cleared swap or non-cleared security-based swap with any counterparty that is a swap entity or financial end user with a material swaps exposure and an affiliate of the covered swap entity;

(i) The covered swap entity shall treat such non-cleared swap or security-based swap as its own for purposes of this paragraph (a); and

(ii) If the subsidiary is itself a covered swap entity, the compliance by its parent covered swap entity with this paragraph (a)(5) shall be deemed to establish the subsidiary's compliance with the requirements of this paragraph (a) and to exempt the subsidiary from the requirements for a covered swap entity to collect initial margin under § 1221.3(a) from an affiliate.

(b) The requirement for a covered swap entity to post initial margin under § 1221.3(b) does not apply with respect to any non-cleared swap or non-cleared security-based swap with a counterparty that is an affiliate.

(c) Section 1221.3(d) shall apply to a counterparty that is an affiliate in the same manner as it applies to any counterparty that is neither a financial end user without a material swap exposure nor a swap entity.

(d) For purposes of this section:

(1) An *affiliate* means:

(i) An affiliate as defined in § 1221.2; or

(ii) Any company that controls, is controlled by, or is under common control with the covered swap entity through the direct or indirect exercise of controlling influence over the management or policies of the controlled company.

(2) A *subsidiary* means:

(i) A subsidiary as defined in § 1221.2; or

(ii) Any company that is controlled by the covered swap entity through the direct or indirect exercise of controlling influence over the management or policies of the controlled company.

Brian P. Brooks,

Acting Comptroller of the Currency.

By order of the Board of Governors of the Federal Reserve System.

Ann E. Misback,

Secretary of the Board.

Federal Deposit Insurance Corporation.

By order of the Board of Directors.

Dated at Washington, DC, on or about June 25, 2020.

James P. Sheesley,

Acting Assistant Executive Secretary.

Dated: June 24, 2020.

Dale Aultman

Secretary, Farm Credit Administration Board.

Mark A. Calabria,

Director, Federal Housing Finance Agency.

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