COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 23

RIN 3038–AF07

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34–90246; File No. S7–15–20]

RIN 3235–AM64

Portfolio Margining of Uncleared Swaps and Non-Cleared Security-Based Swaps

AGENCY: Commodity Futures Trading Commission and Securities and Exchange Commission.

ACTION: Request for comment.

SUMMARY: The Commodity Futures Trading Commission (''CFTC'') and the Securities and Exchange Commission (''SEC'') (collectively, the ''Commissions'') seek public comment on potential ways to implement portfolio margining of uncleared swaps and non-cleared security-based swaps.

DATES: Comments should be received on or before December 7, 2020.

ADDRESSES: Comments should be sent to both agencies at the addresses listed below.

CFTC: You may submit comments, identified by RIN 3038–AF07, by any of the following methods: CFTC website: *https://comments.cftc.gov.* Follow the instructions for submitting comments through the website.

• *Mail:* Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.

• *Hand Delivery/Courier:* Same as Mail above.

Please submit your comments using only one method.

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

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

SEC: Comments may be submitted by any of the following methods:

Electronic Comments

• Use the SEC's internet comment form (*http://www.sec.gov/rules/other.shtml*); or

• Send an email to *rule-comments@sec.gov.* Please include File No. S7–15–20 on the subject line.

Paper Comments

• Send paper comments to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number S7–15–20. This file number should be included on the subject line if email is used. To help the SEC process and review your comments more efficiently, please use only one method of submission. The SEC will post all comments on the SEC's website (*http://www.sec.gov*). Comments are also available for website viewing and printing in the SEC's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make publicly available.

FOR FURTHER INFORMATION CONTACT:

CFTC: Thomas J. Smith, Deputy Director, at (202) 418–5495, *tsmith@cftc.gov* or Joshua Beale, Associate Director, at (202) 418–5446, *jbeale@cftc.gov,* Division of Swap Dealer and Intermediary Oversight; Robert B. Wasserman, Chief Counsel and Senior Advisor, at (202) 418–5092, *rwasserman@cftc.gov,* Division of Clearing and Risk, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.

SEC: Michael A. Macchiaroli, Associate Director, at (202) 551–5525; Thomas K. McGowan, Associate Director, at (202) 551–5521; Randall W. Roy, Deputy Associate Director, at (202) 551–5522; Raymond Lombardo, Assistant Director, at 202–551–5755; or Sheila Dombal Swartz, Senior Special Counsel, at (202) 551–5545, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–7010.

SUPPLEMENTARY INFORMATION:

I. Introduction

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Title VII'') established a new regulatory framework for the U.S. over-the-counter (''OTC'') derivatives markets.[1] The Dodd-Frank Act assigns responsibility for certain aspects of the U.S. OTC derivatives markets to the CFTC and the SEC. In particular, the CFTC has oversight authority with respect to swaps, and the SEC has oversight authority with respect to security-based swaps.[2] The CFTC has adopted final margin rules for uncleared swaps applicable to nonbank swap dealers and nonbank major swap participants.[3] The SEC has adopted final margin requirements for non-cleared security-based swaps applicable to nonbank security-based swap dealers (''SBSDs'') and nonbank major security-based swap participants (''MSBSPs'').[4]

[1] *See* Public Law 111–203, 771 through 774 (''Dodd-Frank Act'').

[2] The CFTC has oversight authority with respect to a ''swap'' as defined in Section 1(a)(47) of the Commodity Exchange Act (''CEA'') (7 U.S.C. 1(a)(47)), including to implement a registration and oversight program for a ''swap dealer'' as defined in Section 1(a)(49) of the CEA (7 U.S.C. 1(a)(49)) and a ''major swap participant'' as defined in Section 1(a)(33) of the CEA (7 U.S.C. 1(a)(33)). The SEC has oversight authority with respect to a ''security-based swap'' as defined in Section 3(a)(68) of the Exchange Act (15 U.S.C. 78c(a)(68)), including to implement a registration and oversight program for a ''security-based swap dealer'' as defined in Section 3(a)(71) of the Exchange Act (15 U.S.C. 78c(a)(71)) and a ''major security-based swap participant'' as defined in Section 3(a)(67) of the Exchange Act (15 U.S.C. 78c(a)(67)). The SEC and the CFTC jointly have adopted rules to further define those terms. *See Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement''; Mixed Swaps; Security-Based Swap Agreement Recordkeeping,* Exchange Act Release No. 67453 (July 18, 2012), 77 FR 48208 (Aug. 13, 2012); *Further Definition of ''Swap Dealer,'' ''Security-Based Swap Dealer,'' ''Major Swap Participant,'' ''Major Security-Based Swap Participant'' and ''Eligible Contract Participant,''* Exchange Act Release No. 66868 (Apr. 27, 2012), 77 FR 30596 (May 23, 2012).

[3] CFTC, *Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants,* 81 FR 636 (Jan. 6, 2016) (''*CFTC Final Margin Release*''). The Commissions use the terms ''uncleared swaps'' and ''non-cleared security-based swaps'' throughout this request for comment because those are the defined terms adopted in their respective final margin rules.

[4] SEC, *Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and*

Bank regulators have adopted capital and margin requirements for bank swap dealers and bank major swap participants and for bank SBSDs and bank MSBSPs pursuant to Title VII.[5] The SEC and CFTC also have issued exemptive orders to facilitate the portfolio margining of cleared swaps and security-based swaps that are credit default swaps (''CDS'') held in a swap account.[6]

In implementing Title VII, the Commissions are committed to working together to ensure that each agency's respective regulations are effective, consistent, mutually reinforcing, and efficient. In certain cases, the Commissions believe that these objectives may be served better by harmonizing requirements. Portfolio margining is one area where the Commissions believe it is appropriate to explore whether increased harmonization would better serve the purposes of Title VII.

Portfolio margining generally refers to the cross margining of related positions in a single account, allowing netting of appropriate offsetting exposures. Portfolio margining of uncleared swaps, non-cleared security-based swaps, and related positions can offer benefits to customers and the markets, including promoting greater efficiencies in margin calculations with respect to offsetting positions. This can align margining and other costs more closely with overall risks presented by a customer's portfolio. This alignment can reduce the aggregate amount of collateral required to meet margin requirements, facilitating the availability of excess collateral that can be deployed for other purposes. The netting of exposures allowed by portfolio margining may also help to improve efficiencies in collateral management, alleviate excessive margin calls, improve cash flows and liquidity, and reduce volatility.

At the same time, facilitating portfolio margining for uncleared swaps, non-cleared security-based swaps, and related positions requires careful consideration to ensure that any customer protection, financial stability and other applicable regulatory objectives and potential impacts are appropriately considered and addressed. These considerations include, among other things, potential impacts on margin requirements, the segregation and bankruptcy treatment of uncleared swaps and non-cleared security-based swaps in different account types and entities, and the potential impact on regulatory capital requirements.

The implementation of portfolio margining of uncleared swaps and non-cleared security-based swaps also requires careful consideration of the differences in the capital, margin, and segregation requirements of the CFTC and SEC applicable to uncleared swaps and non-cleared security-based swaps, respectively. These differences reflect the policy objectives of, and choices made by, each agency and reflect each agency's assessment of potential costs and benefits of alternative approaches and the impact on the markets for swaps and security-based swaps. The differences between the CFTC and SEC requirements is a result of these differing policy objectives and related assessments.

For example, the CFTC's margin rule for uncleared swaps requires swap dealers to collect and post initial margin to certain counterparties, subject to exceptions.[7] When adopting this requirement, the CFTC stated that ''the posting requirement under the final rule is one way in which the Commission seeks to reduce overall risk to the financial system, by providing initial margin to non-dealer swap market counterparties that are interconnected participants in the financial markets (*i.e.,* financial end users that have material swap exposure).'' [8] The CFTC further noted that commenters stated that requiring swap dealers to post initial margin ''not only would better protect financial end users from concerns about the failure of [the swap dealer], but would also act as a discipline on [swap dealers] by requiring them to post margin reflecting the risk of their swaps business.'' [9]

The SEC's margin rule for non-cleared swaps does not require nonbank SBSDs to post initial margin.[10] The SEC stated when adopting the margin rule that ''[r]equiring nonbank SBSDs to deliver initial margin could impact the liquidity of these firms'' and that ''[d]elivering initial margin would prevent this capital of the nonbank SBSD from being immediately available to the firm to meet liquidity needs.'' [11] The SEC further stated that, ''[i]f the delivering SBSD is undergoing financial stress or the markets more generally are in a period of financial turmoil, a nonbank SBSD may need to liquidate assets to raise funds and reduce its leverage'' and that ''[a]ssets in the control of a counterparty would not be available for this purpose.'' [12]

In addition, the CFTC's margin rule requires that initial margin posted to or by the swap dealer must be held by a third-party custodian and does not permit the initial margin to be re-hypothecated.[13] When adopting the margin rule, the CFTC stated ''that the ultimate purpose of the custody agreement is twofold: (1) That the initial margin be available to a counterparty when its counterparty defaults and a loss is realized that exceeds the amount of variation margin that has been collected as of the time of default; and (2) initial margin be returned to the posting party after its swap obligations have been fully discharged.'' [14]

The SEC margin rule for non-cleared swaps does not require that initial margin posted to the nonbank SBSD be held at a third-party custodian.[15] The SEC stated that this difference from the CFTC's margin rule reflects its ''judgment of how to 'help ensure the safety and soundness' of nonbank

Major Security-Based Swap Participants and Capital and Segregation Requirements for Broker-Dealers (''SEC Final Capital, Margin and Segregation Release''), Exchange Act Release No. 86175 (June 21, 2019), 84 FR 43872, 43956–43957 (Aug. 22, 2019). The compliance date for the SEC's margin rules is October 6, 2021. Covered counterparties under the CFTC's uncleared swap margin rules already post and collect variation margin. CFTC initial margin requirements are being implemented under a phase-in schedule through September 1, 2022. *See Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants,* 85 FR 41463 (Jul. 10, 2020); *see also* CFTC, Press Release Number 8287–20, *CFTC Finalizes Position Limits Rule at October 15 Open Meeting, Commission Also Approves Final Rules on Margin Requirements for Uncleared Swaps and Registration Exemptions for Foreign Commodity Pools* (Oct. 15, 2020).

[5] *See Margin and Capital Requirements for Covered Swap Entities,* 80 FR 74840 (Nov. 30, 2015). These margin requirements for bank entities were adopted by the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Farm Credit Administration, or the Federal Housing Finance Agency (collectively, these organizations are known as the ''prudential regulators'').

[6] *Order Granting Conditional Exemptions under the Securities Exchange Act of 1934 in Connection with Portfolio Margining of Swaps and Security-based Swaps,* Exchange Act Release No. 68433 (Dec. 12, 2012) 77 FR 75211 (Dec. 19, 2012); CFTC, Order, *Treatment of Funds Held in Connection with Clearing by ICE Clear Credit of Credit Default Swaps* (Jan. 13, 2013), *available at: https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/icecreditclearorder011413.pdf*; CFTC, Order, *Treatment of Funds Held in Connection with Clearing by ICE Clear Europe of Credit Default Swaps* (Apr. 9, 2013), *available at: https://www.cftc.gov/sites/default/files/stellent/groups/public/@requestsandactions/documents/ifdocs/icecleareurope4dfcds040913.pdf.*

[7] *See* 17 CFR 23.152.

[8] *See CFTC Final Margin Release,* 81 FR at 649.

[9] *Id.*

[10] *See* 17 CFR 240.18a–3.

[11] *See SEC Final Capital, Margin and Segregation Release,* 84 FR at 43918.

[12] *Id.*

[13] *See* 17 CFR 23.157.

[14] *See CFTC Final Margin Release,* 81 FR at 670.

[15] *See* 17 CFR 240.18a–3.

SBSDs . . . as required by Section 15F(e)(3)(i) of the Exchange Act.'' [16]

Moreover, there are differences in the segregation schemes for swaps and security-based swaps. As discussed above, the CFTC's margin rule requires initial margin received from customers with respect to uncleared swaps to be held by an independent third-party custodian.

With respect to the SEC's rules for non-cleared security-based swaps, Section 3E(f) of the Exchange Act establishes a program by which a counterparty to an SBSD can elect to have an independent third-party custodian hold the initial margin it posts to the SBSD.[17] Section 3E(f)(4) provides that if the counterparty does not choose to require segregation of funds or other property (*i.e.,* waives segregation), the SBSD shall send a report to the counterparty on a quarterly basis stating that the firm's back office procedures relating to margin and collateral requirements are in compliance with the agreement of the counterparties.[18] Security-based swap customers of a broker-dealer (other than an OTC derivatives dealer), including a broker-dealer registered as an SBSD, that are not affiliates of the firm cannot waive segregation. The SEC explained that this prohibition against waiving the segregation requirement in the case of a non-affiliated customer of the broker-dealer is a consequence of the broker-dealer segregation rule—Rule 15c3–3—being promulgated under Section 15(c)(3) of the Exchange Act, which does not have an analogous provision to Section 3E(f) of the Exchange Act.[19] More specifically, Section 15(c)(3) of the Exchange Act and Rule 15c3–3 thereunder do not contain provisions pursuant to which a customer can waive segregation.[20] The SEC further explained that the prohibition will protect customers and the safety and soundness of broker-dealers.[21]

In addition to these two statutory options, the SEC adopted segregation rules permitting broker-dealers and SBSDs to hold and commingle initial margin received from security-based swap customers. These rules restrict how initial margin can be used by a broker-dealer or SBSD and require that it be held in a manner that is designed to facilitate its prompt return to the customers (''omnibus segregation rules'').[22] The omnibus segregation rules are mandatory requirements with respect to cleared security-based swaps and the default requirements with respect to non-cleared security-based swaps if a customer of an SBSD does not choose one of the two statutory options: (1) Having initial margin held by an independent third-party custodian or (2) waiving segregation, if permitted.

The omnibus segregation rules permit broker-dealers and SBSDs to re-hypothecate initial margin received with respect to non-cleared swaps under limited circumstances. In the case of a broker-dealer (other than an OTC derivatives dealer), including a broker-dealer registered as an SBSD, the ability to re-hypothecate initial margin is limited. For example, if the broker-dealer enters into a non-cleared security-based swap with a customer and hedges that transaction with a second broker-dealer, the first broker-dealer can use the initial margin collected from its customer to meet a regulatory margin requirement arising from a transaction with a second SBSD to hedge the transaction with the customer.[23] The SEC stated that it ''designed the hedging exception for non-cleared security-based swap collateral to accommodate dealers in OTC derivatives maintaining 'matched books' of transactions.'' [24]

Similarly, an SBSD that is registered as an OTC derivatives dealer or not registered as a broker-dealer (both types of SBSDs hereinafter a ''Stand-Alone SBSD'') that enters into a non-cleared, security-based swap with a customer and hedges that transaction with another SBSD also may use the initial margin collected from its customer to meet a regulatory margin requirement arising from the hedging transaction with the other SBSD.[25] This provision applies if the Stand-Alone SBSD is required to comply with the omnibus segregation requirements of Rule 18a–4 or offers omnibus segregation to its customers.[26] However, pursuant to Section 3E(f) of the Exchange Act, customers of a Stand-Alone SBSD also may waive their right to have initial margin for non-cleared security-based swaps segregated, and a Stand-Alone SBSD can operate under an exemption from the omnibus segregation requirements of Rule 18a–4, subject to certain conditions.[27] If the customer waives segregation or the Stand-Alone SBSD operates under the exemption from Rule 18a–4, the Stand-Alone SBSD may re-hypothecate the initial margin without restriction. Pursuant to Section 3E(f) of the Exchange Act, customers of this Stand-Alone SBSD can elect to have the initial margin they post to the SBSD held by a third-party custodian rather than waiving the right to segregation.[28] The SEC explained that permitting customers to elect to either have their initial margin held by a third-party custodian or waive their right to segregation reflected the provisions of Section 3E(f) of the Exchange Act, providing customers with these two options.[29]

Finally, the implementation of portfolio margining of uncleared swaps and non-cleared security-based swaps also requires careful consideration of the potential impact on competition, including how it might influence customer behavior in selecting to do business with certain types of registrants (*e.g.,* firms with multiple registrations that permit them to engage in a broader range of activities).

Given the scope, importance and interrelationships among the matters to consider, the Commissions believe it would be helpful to gather further information and comment from interested persons regarding portfolio margining of uncleared swaps and non-cleared security-based swaps. In section III below, the Commissions request comment generally on portfolio margining these instruments and on portfolio margining these positions in different account types.

II. Regulatory Background

The specific requests for comment below take into account: (1) The types of registrations (broker-dealer, OTC derivatives dealer, SBSD, futures commission merchant (''FCM''), and swap dealer) an entity may need in order to engage in portfolio margining of uncleared swaps, non-cleared security-based swaps, and related positions; (2) the account types (securities account, security-based swap account, and swap account) these registrants can maintain; and (3) the margin and segregation requirements that apply to products carried in these account types. In particular, a broker or dealer in securities must be registered with the SEC. A broker-dealer that limits

[16] *See SEC Final Capital, Margin and Segregation Release,* 84 FR at 43909.

[17] *See* 15 U.S.C. 78c–5(f).

[18] *See* 15 U.S.C. 78c–5(f)(4),

[19] *See SEC Final Capital, Margin and Segregation Release,* 84 FR at 43931. *See also* 17 CFR 240.15c3–3; 15 U.S.C. 78o(c)(3); 15 U.S.C. 78c–5(f)(4).

[20] *See SEC Final Capital, Margin and Segregation Release,* 84 FR at 43931.

[21] *Id.* at 43931.

[22] *See* 17 CFR 240.15c3–3(p); 17 CFR 240.18a–4. *See also SEC Final Capital, Margin and Segregation Release,* 84 FR at 43930–43.

[23] *See* 17 CFR 240.15c3–3(p)(1)(ii)(B) and (p)(2).

[24] *See SEC Final Capital, Margin and Segregation Release,* 84 FR at 43937 (footnote omitted).

[25] *See* 17 CFR 240.18a–4(a)(2)(ii) and (b).

[26] *See* 17 CFR 240.18a–4.

[27] *See* 15 U.S.C. 78c–5(f)(4); 17 CFR 18a–4(f).

[28] *See* 15 U.S.C. 78c–5(f)(4).

[29] *See SEC Final Capital, Margin and Segregation Release,* 84 FR at 43877–78, 43930, 43937.

securities dealing to OTC equity options and other OTC derivatives can operate as a special purpose broker-dealer known as an OTC derivatives dealer. An entity that deals in security-based swaps above a de minimis notional threshold will need to register with the SEC as an SBSD. An entity that solicits and accepts funds from customers to margin, secure, or guarantee futures, options on futures, or cleared swap transactions must register with the CFTC as an FCM. And, an entity that deals in swaps above a de minimis notional threshold must register with the CFTC as a swap dealer.

A. Broker-Dealers

A broker-dealer is subject to initial margin requirements promulgated by the Board of Governors of the Federal Reserve System (''Federal Reserve Board'') in Regulation T.[30] A broker-dealer also is subject to maintenance margin requirements promulgated by self-regulatory organizations (''SROs'').[31] The initial margin requirements of Regulation T generally govern the amount of credit that can be extended by a broker-dealer to finance a position in a margin account. The maintenance margin requirements of the SROs govern the amount of equity that must be maintained in the margin account on an ongoing basis. Regulation T has an exception from its initial margin requirements for accounts that are margined pursuant to an SRO portfolio margin rule.[32] SROs have adopted portfolio margin rules subject to this exception and, therefore, a broker-dealer must collect initial and maintenance margin in a portfolio margin account in accordance with the SRO portfolio margin rules. Margin calculations under the SRO portfolio margin rules are based on the method in Appendix A to Rule 15c3–1 (''Appendix A Methodology'').[33] With respect to options, initial and maintenance margin requirements are generally set by the SROs.[34]

A broker-dealer also is subject to margin rules for security futures promulgated jointly by the Commissions.[35] Security futures margined in an SRO portfolio margin account are not subject to the Commissions' rules and, therefore, are margined according to the SRO portfolio margin rules.[36]

A broker-dealer that operates as an OTC derivatives dealer is exempt from the requirements of Regulation T, provided that the firm complies with Regulation U of the Federal Reserve Board.[37] While an OTC derivative dealer is subject to Regulation U, this rule generally does not prescribe margin requirements for OTC derivatives such as OTC equity options. The firm also is exempt from membership in an SRO and, therefore, not subject to SRO margin rules.[38]

A broker-dealer that is also registered as an SBSD will be subject to the margin requirements of Rule 18a–3 for non-cleared security-based swaps on the compliance date for that rule.[39] A broker-dealer SBSD may apply to the SEC for authorization to use a model (including an industry standard model) to calculate initial margin for non-cleared security-based swaps. However, broker-dealer SBSDs (other than OTC derivatives dealers registered as SBSDs (''OTCDD/SBSDs'')) must use standardized haircuts prescribed in Rule 15c3–1 (which includes the option to use the Appendix A Methodology) to compute initial margin for non-cleared equity security-based swaps (even if the firm is approved to use a model to calculate initial margin for other types of positions).[40] Moreover, as discussed above, Rule 18a-3 does not require a nonbank SBSD to post initial margin to any counterparties.

A broker-dealer that holds customer securities and cash (including securities and cash being used as initial margin) is subject to Rule 15c3–3.[41] The SEC amended Rule 15c3–3 to adopt the omnibus segregation requirements for security-based swaps applicable to a broker-dealer and a broker-dealer (other than an OTC derivatives dealer) also registered as a SBSD.[42] A customer of a broker-dealer that is also registered as an SBSD can elect to have initial margin held by a third-party custodian pursuant to Section 3E(f) of the Exchange Act or held by the SBSD subject to the omnibus segregation requirements of Rule 15c3–3. Customers that are not affiliates of the broker-dealer cannot waive segregation, whereas affiliates can waive segregation.

As discussed above, the broker-dealer can re-hypothecate initial margin received from a customer for the limited purpose of entering into a transaction with another SBSD that hedges the transaction with the customer.[43] Cash and securities held in a securities account at a broker-dealer (other than an OTC derivatives dealer)[44] is protected under the Securities Investor Protection Act (''SIPA''), subject to certain exceptions. An OTC derivatives dealer is not subject to Rule 15c3–3 and is not a member of the Security Investor Protection Corporation.[45] Consequently, cash and securities held in a securities account at an OTC derivatives dealer are not protected by SIPA.

B. Nonbank Stand-Alone SBSDs

A Stand-Alone SBSD that is not a bank (''Nonbank Stand-Alone SBSD'') will be subject to the margin requirements of Rule 18a–3 for non-cleared security-based swaps on the compliance date for that rule.[46] A Nonbank Stand-Alone SBSD may apply to the SEC for authorization to use a model (including an industry standard model) to calculate initial margin for non-cleared security-based swaps. Moreover, unlike a broker-dealer (other than an OTCDD/SBSD) registered as an SBSD, a Nonbank Stand-Alone SBSD may use a model to calculate initial margin for non-cleared equity security-based swaps, provided the account of the counterparty does not hold equity security positions other than equity security-based swaps and equity swaps. Initial margin requirements also may be calculated by applying the standardized haircuts prescribed in Rule 18a–1, the net capital rule for Stand-Alone SBSDs.[47] As discussed above, Rule 18a–3 does not require a Nonbank Stand-Alone SBSD to post initial margin to its counterparties.

Pursuant to Section 3E(f) of the Exchange Act, a customer of a Nonbank Stand-Alone SBSD can elect to have initial margin posted to the firm held by a third-party custodian or waive segregation with respect to the initial margin.[48] In addition, a Nonbank Stand-

[30] 12 CFR 220.1, *et seq.*

[31] *See, e.g.,* FINRA Rules 4210–4240. Customers of broker-dealers are also subject to specific margin rules for security futures, jointly regulated by the CFTC and the SEC.

[32] 12 CFR 220.1(b)(3)(i).

[33] *See, e.g.,* FINRA Rule 4210(g).

[34] 12 CFR 220.12(f).

[35] *See* 17 CFR 41.42–41.49 (CFTC regulations); 17 CFR 242.400–242.406 (SEC regulations).

[36] *See* 17 CFR 242.400(c)(2).

[37] 17 CFR 240.36a1–1.

[38] 17 CFR 240.15b9–2.

[39] *See* 17 CFR 240.18a–3.

[40] 17 CFR 240.15c3–1.

[41] 17 CFR 240.15c3–3. For a discussion of Rule 15c3–3, *see* SEC, *Capital, Margin, and Segregation Proposing Release,* 77 FR at 70276–70277. Regulation T and portfolio margin accounts are combined when calculating segregation requirements under Exchange Act Rule 15c3–3.

[42] *See* 17 CFR 240.15c3–3(p).

[43] *See* 17 CFR 240.15c3–3(p)(1)(ii)(B) and (p)(2).

[44] *See* section II.A (describing regulatory requirements for OTC derivatives dealers).

[45] 17 CFR 240.15c3–3(a)(1) (defining the term customer to exclude a counterparty to an OTC derivatives transaction with an OTC derivatives dealer if certain conditions are met) and 17 CFR 240.36a1–2 (Exemption from SIPA for OTC derivatives dealers).

[46] 17 CFR 240.18a–3.

[47] 17 CFR 240.18a–1.

[48] *See* 15 U.S.C. 78c–5(f).

Alone SBSD will be subject to the omnibus segregation requirements of Rule 18a–4 with respect to non-cleared security-based swaps.[49] The omnibus segregation requirements are the default requirement if the counterparty does not elect to have initial margin held by a third-party custodian or waive segregation.

A Nonbank Stand-Alone SBSD, however, will be exempt from the requirements of Rule 18a–4 if the firm meets certain conditions, including that the firm: (1) Does not clear security-based swap transactions for other persons; (2) provides notice to the counterparty regarding the right to segregate initial margin at an independent third-party custodian; (3) discloses to the counterparty in writing that any collateral received by the Nonbank Stand-Alone SBSD will not be subject to a segregation requirement; and (4) discloses to the counterparty how a claim of the counterparty for the collateral would be treated in a bankruptcy or other formal liquidation proceeding of the Nonbank Stand-Alone SBSD.[50]

C. Swap Dealers

The CFTC's margin rules impose initial and variation margin requirements on covered swap dealers and covered major swap participants for swap transactions (''covered swap entities'') that are not cleared by a registered derivatives clearing organization.[51] The CFTC's initial margin rules require a covered swap dealer to both collect and post initial margin on uncleared swap transactions entered into with other swap dealers and with financial end users with material swaps exposure.[52] CFTC margin rules require that initial margin be calculated using a standardized table-based method or a model (including an industry standard model).[53] The initial margin model must be approved by the CFTC or a registered futures association (*i.e.,* National Futures Association).

The CFTC's uncleared swap margin rules also establish minimum standards for the safekeeping of collateral. The rules generally require that initial margin collateral received or posted by the covered swap entity must be held by one or more unaffiliated third-party custodians.[54] The rules also require the custodian to act pursuant to a custodial agreement that is legal, valid, binding, and enforceable under the laws of all relevant jurisdictions, including in the event of bankruptcy, insolvency, or similar proceedings.[55] The custodial agreement must prohibit the custodian from rehypothecating, repledging, reusing, or otherwise transferring (through securities lending, repurchase agreement, reverse repurchase agreement, or other means) the funds or other property held by the custodian.[56]

III. Request for Comment

A. General Request for Comment

The Commissions request comment on all aspects of the portfolio margining of uncleared swaps and non-cleared security-based swaps, including on the merits, benefits, and risks of portfolio margining these types of positions, and on any regulatory and operational issues associated with portfolio margining them. The Commissions seek comment on these matters generally and commenters are encouraged to address matters related to portfolio margining not specifically identified in the requests for comment below.

In responding to this general request for comment and on the specific requests for comment below, the Commissions encourage commenters to provide empirical support for their arguments and analyses. Comments are of the greatest assistance to the Commissions when accompanied by supporting data and analysis.

B. Specific Requests for Comment

1. Securities Account

The Commissions request comment on whether uncleared swaps, non-cleared security-based swaps, cash market securities positions, listed securities options, OTC securities options, futures, options on futures, and security futures should be permitted to be portfolio margined in the following account types: (1) A securities account that is subject to SRO portfolio margin rules; and (2) a securities account that is subject to the initial margin requirements of Regulation T and maintenance margin requirements of the SRO margin rules (*i.e.,* a securities account that is not subject to the SRO portfolio margin rules). Commenters are asked to address the following matters.

- Identify and describe the relative benefits of portfolio margining in each of these securities account types, and describe how the benefits compare to the benefits of other account types discussed in this request for comment.
- Identify and describe the risks of portfolio margining in each of these securities account types, and describe how those risks compare to the risks of other account types discussed in this request for comment, as well as how the risks compare to margining under the existing framework.
- Identify and describe what models might be appropriate for portfolio margining positions in each of these securities account types, as well as the process for approving and reviewing such models.
- Identify and describe any regulatory issues associated with portfolio margining in each of these securities account types, including issues relating to (1) differences in the statutes governing futures, options on futures, uncleared swaps, non-cleared security-based swaps, and securities other than security-based swaps, (2) differences in the regulatory requirements of the CFTC, SEC, and SROs applicable to futures, options on futures, uncleared swaps, non-cleared security-based swaps, and securities other than security-based swaps (including differences in margin and segregation requirements), and (3) differences in the bankruptcy treatment of futures, options on futures, uncleared swaps, non-cleared security-based swaps, and securities other than security-based swaps.
- As discussed above, the CFTC's rules prohibit the re-hypothecation of initial margin collateral. The SEC's rules permit limited re-hypothecation of initial margin collateral received from customers or counterparties. Discuss the potential implications of the differences in the Commissions' approaches to the re-hypothecation of initial margin collateral relevant to a portfolio margin scheme.
- Section 16 of SIPA defines the terms ''customer,'' ''customer property,'' and ''net equity'' to include securities, futures, and options on futures, but not swaps or security-based swaps.[57] The

[49] 17 CFR 240.18a–4.

[50] 17 CFR 240.18a–4(f). Rule 18a–4 also has exceptions pursuant to which a foreign stand-alone SBSD need not comply with the segregation requirements (including the omnibus segregation requirements) for certain transactions. 17 CFR 240.18a–4(e).

[51] The CFTC's uncleared swap margin rules are codified in part 23 of the CFTC's regulations (17 CFR 23.150—23.161).

[52] 17 CFR 23.152. The term ''material swaps exposure'' for an entity means that the entity and its margin affiliates have an average daily aggregate notional amount of uncleared swaps, uncleared security-based swaps, foreign exchange forwards, and foreign exchange swaps with all counterparties for June, July and August of the previous calendar year that exceeds $8 billion, where such amount is calculated only for business days.

[53] 17 CFR 23.154.

[54] 17 CFR 23.157(a)–(b).

[55] 17 CFR 23.157(c).

[56] *Id.*

[57] Section 983 of the Dodd-Frank Act amended Section 16 of SIPA to define the term ''customer'' to include a person that has a claim for futures and options on futures, and to define the term

Commissions request comment on steps broker-dealers (including broker-dealers that are SBSDs) can take to ensure the protections afforded by SIPA will apply to all positions held in a securities account. Comment also is sought on the types of disclosures broker-dealers and SBSDs can make to their portfolio margin accountholders about positions in a securities account that are not within the SIPA definitions of ''customer,'' ''customer property,'' and ''net equity.'' Comment also is sought on the expectations of market participants as to whether the initial margin and accrued gains associated with uncleared swaps and non-cleared security-based swaps held in a portfolio margin account that is a securities account is subject to SIPA protection in the event of the insolvency of the broker-dealer.

- As noted above, the CFTC margin rules require swap dealers to post initial margin for uncleared swaps entered into with other swap dealers or with financial end users with material swaps exposure. The SEC's margin rules permit, but do not require, an SBSD to post initial margin for non-cleared security-based swaps entered into with other broker-dealers, SBSDs, swap dealers, or financial end users. How should the Commissions address the differences in the initial margin posting requirements in a portfolio margin account? If portfolio margining resulted in the transfer of significant swap trading relationships to SBSDs, which would operate under a ''collect only'' regime, would that increase the potential for counterparty risk, including liquidity mismatches between counterparties? Alternatively, would it lower systemic risk by promoting the liquidity of SBSDs? Discuss the potential impact on the markets and market participants if entities registered as broker-dealers and swap dealers or as broker-dealers, SBSDs, and swap dealers are not required to post initial margin to counterparties for uncleared swaps held in a portfolio margin account while stand-alone swap dealers are required to post initial margin to counterparties for uncleared swap transactions. Should the Commissions require entities registered as broker-dealers and swap dealers or as broker-dealers, SBSDs, and swap dealers to post margin for uncleared swaps held in a portfolio margin account with covered counterparties? How should such margin be computed? Would requiring these entities to post margin undermine the benefits of portfolio margining? Would it increase costs to customers to compensate these entities for having to use their capital to meet margin requirements? In addition, would requiring these entities to post initial margin create a barrier to entry for smaller firms that do not have the resources to post initial margin?
- If portfolio margining resulted in the transfer of significant swap trading relationships to broker-dealer SBSDs, which would operate under a ''collect only'' regime, how would this impact the risks customers face in the event of an SBSD's default? How should the Commissions balance the relative concerns related to trying to enhance liquidity of SBSDs while ensuring customer protection? Are there any lessons to be learned from events impacting swap markets during the recent COVID market volatility?
- Identify and describe any operational issues associated with portfolio margining in each of these securities account types.
- SIPA defines the term ''customer'' to include a person that has a claim for futures and options on futures, and defines the term ''customer property'' to include futures and options on futures, in each case where they are held in a portfolio margining account carried as a securities account pursuant to a portfolio margining program approved by the SEC. The Commissions request specific comment on any legal and operational issues associated with holding futures and options on futures in a portfolio margin account that is a securities account.
- As discussed above, an entity that effects transactions in securities must be registered with the SEC as a broker-dealer. A broker-dealer that limits securities dealing to OTC equity options and other OTC derivatives can operate as a special purpose broker-dealer known as OTC derivatives dealer. An entity that deals in security-based swaps above a de minimis notional threshold will need to register with the SEC as an SBSD. An entity that deals in swaps above a de minimis notional threshold must register with the CFTC as a swap dealer. And, an entity that clears futures, or options on futures, or swaps for customers must register as an FCM. Please discuss any regulatory or operational issues raised by portfolio margining in each securities account type in light of these and any other relevant registration requirements.
- Discuss how the Commissions could implement portfolio margin requirements for each securities account type, including potential relief the Commissions could provide to address regulatory and operational issues associated with portfolio margining in each securities account type.
- Identify and describe any conditions the Commissions should consider with respect to portfolio margining in each securities account type to mitigate risk and address regulatory and operational issues.
- Identify the categories of futures, options on futures, uncleared swaps, non-cleared security-based swaps, and securities (other than security-based swaps) that should be permitted to be portfolio margined in each securities account type and discuss why they should be included and, if applicable, why other categories of these instruments should be excluded.
- Discuss whether market participants would be likely to use either of these securities account types to portfolio margin futures, options on futures, uncleared swaps, non-cleared security-based swaps, cash market securities positions, listed securities options, and OTC securities options, and explain why they would or would not use the securities account type.
- Identify and describe the potential costs and benefits, as well as the competitive impact—either positive or negative—of permitting market participants to portfolio margin futures, options on futures, uncleared swaps, non-cleared security-based swaps, cash market securities positions, listed securities options, OTC securities options, and security futures in either of these securities account types. Please quantify, including by way of example, these potential costs, benefits and impacts to the extent practicable.

2. Security-Based Swap Account

The Commissions request comment on whether non-cleared security-based swaps, uncleared swaps, and OTC securities options (if the firm is registered as an OTCDD/SBSD) should be permitted to be portfolio margined in a security-based swap account. Commenters are asked to address the following matters.

- Identify and describe the relative benefits of portfolio margining in a security-based swap account, and describe how the benefits compare to the benefits of other account types discussed in this request for comment, as well as how the risks compare to margining under the existing framework.
- Identify and describe the risks of portfolio margining in a security-based swap account, and describe how those risks compare to the risks of other

''customer property'' to include futures and options on futures, in each case where they are held in a portfolio margining account carried as a securities account pursuant to a portfolio margining program approved by the SEC. Section 3(a)(10) of the Exchange Act defines the term ''security'' to include a security-based swap for purposes of the Exchange Act. 15 U.S.C 78c(a)(10).

account types discussed in this request for comment.

• Identify and describe what models might be appropriate for portfolio margining positions in a security-based swap account, as well as the process for approving and reviewing such models.

• Identify and describe any regulatory issues associated with portfolio margining in a security-based swap account, including issues relating to (1) differences in the statutes governing uncleared swaps, non-cleared security-based swaps, and securities other than security-based swaps, (2) differences in the regulatory requirements of the CFTC, SEC, and SROs applicable to uncleared swaps, non-cleared security-based swaps, and securities other than security-based swaps (including differences in margin and segregation requirements), and (3) differences in the bankruptcy treatment of uncleared swaps, non-cleared security-based swaps, and securities other than security-based swaps.

• The Dodd-Frank Act amended section 3E(g) of the Exchange Act to provide that a *security-based swap* shall be considered a ''security'' as the term is used in a stockbroker liquidation under Subchapter III of title 11 of the U.S. bankruptcy code (11 U.S.C. 741–753). Section 3E(g) was not amended to provide that a *swap* shall be considered a ''security'' as the term is used in a stockbroker liquidation under Subchapter III of title 11 of the U.S. bankruptcy code. Section 3E(g) of the Securities Exchange Act also provides that the term ''customer'' as defined in section § 741 of title 11 of the U.S. bankruptcy code, excludes any person to the extent that such person has a claim based on a non-cleared option or non-cleared security-based swap except to the extent of margin delivered to or by the customer with respect to which there is a customer protection requirement under Section 15(c)(3) of the Exchange Act or a segregation requirement. The Commissions request specific comment on steps SBSDs can take to ensure the protections afforded by the stockbroker liquidation provisions will apply to positions held in a security-based swap account, including swaps and accrued gains on open options and non-cleared security-based swaps. What are the implications for customer protection? Can those implications be mitigated? If so, how?

• Comment also is sought on the types of disclosures SBSDs can make to their portfolio margin accountholders about positions in a security-based swap account that are not within the definitions of ''customer,'' ''customer property,'' and ''net equity'' in the stockbroker liquidation provisions of the U.S. bankruptcy code. Comment also is sought on the expectations of market participants as to the extent to which customer claims in a stockbroker liquidation under the U.S. bankruptcy code include property held to margin swaps or accruing to the customer as a result of swap transactions in a portfolio margining account held in a security-based swap account.

• As noted above, the CFTC margin rules require swap dealers to post initial margin for uncleared swaps entered into with other swap dealers or with financial end users with material swaps exposure. The SEC's margin rules permit, but do not require, an SBSD to post initial margin for non-cleared security-based swaps entered into with other broker-dealers, SBSDs, swap dealers, or with financial end users. How should the Commissions address the differences in the initial margin posting requirements in a portfolio margin account? If portfolio margining resulted in the transfer of significant swap trading relationships to SBSDs, which would operate under a ''collect only'' regime, would that increase the potential for risk and liquidity mismatches between counterparties? Alternatively, would it lower systemic risk by promoting the liquidity of SBSDs? Discuss the potential impact on the markets and market participants if entities registered as SBSDs and swap dealers are not required to post initial margin to counterparties for uncleared swaps held in a portfolio margin account while stand-alone swap dealers are required to post initial margin to counterparties for uncleared swap transactions. Should the Commissions require entities registered as SBSDs and swap dealers to post margin for uncleared swaps held in a portfolio margin account with covered counterparties? How should such margin be computed? Alternatively, would requiring these entities to post margin undermine the benefits of portfolio margining? Would it increase costs to customers to compensate these entities for having to use their capital to meet margin requirements? In addition, would requiring these entities to post initial margin create a barrier to entry for smaller firms that do not have the resources to post initial margin?

• If portfolio margining resulted in the transfer of significant swap trading relationships to Nonbank Stand-Alone SBSDs, which would operate under a ''collect only'' regime, how would this impact the risks customers face in the event of an SBSD's default? How should the Commissions balance the relative concerns related to trying to enhance liquidity of SBSDs while ensuring customer protection? Are there any lessons to be learned from events impacting swap markets during the recent COVID market volatility?

• Identify and describe any operational issues associated with portfolio margining in a security-based swap account.

• As discussed above, an entity that effects transactions in securities must be registered with the SEC as a broker-dealer. A broker-dealer that limits securities dealing to OTC equity options and other OTC derivatives can operate as special purpose broker-dealer known as OTC derivatives dealer. An entity that deals in security-based swaps above a de minimis notional threshold will need to register with the SEC as an SBSD. And, an entity that deals in swaps above a de minimis notional threshold must register with the CFTC as a swap dealer. Please discuss any regulatory or operational issues raised by portfolio margining in a security-based swap account in light of these and any other relevant registration requirements.

• Discuss how the Commissions could implement portfolio margin requirements for a security-based swap account, including potential relief the Commissions could provide to address regulatory and operational issues associated with portfolio margining in a security-based swap account.

• Identify and describe any conditions the Commissions should consider with respect to portfolio margining in a security-based swap account to mitigate risk and address regulatory and operational issues.

• Identify the categories of uncleared swaps, non-cleared security-based swaps, and OTC securities options (if the firm is registered as an OTC derivatives dealer) that should be permitted to be portfolio margined in the security-based swap account and discuss why they should be included and, if applicable, why other categories of these instruments should be excluded.

• Discuss whether market participants would use a security-based swap account to portfolio margin uncleared swaps, non-cleared security-based swaps, and OTC securities options (if the firm is registered as an OTCDD/SBSD) and explain why they would or would not use this account type for this purpose.

• Identify and describe the potential costs and benefits, as well as the competitive impact—either positive or negative—of permitting market participants to portfolio margin non-cleared security-based swaps, uncleared swaps, and OTC securities options (if the firm is registered as an OTCDD/SBSD) in a security-based swap account. Please quantify, including by way of example, these potential costs, benefits and impacts to the extent practicable.

3. Swap Account

The Commissions request comment on whether uncleared swaps and non-cleared security-based swaps should be permitted to be portfolio margined in a swap account. Commenters are asked to address the following matters.

• Identify and describe the relative benefits of portfolio margining in a swap account, and describe how the benefits compare to the benefits of other account types discussed in this request for comment.
• Identify and describe the risks of portfolio margining in a swap account, and describe how those risks compare to the risks of other account types discussed in this request for comment, as well as how the risks compare to margining under the existing framework.
• Identify and describe what models might be appropriate for portfolio margining positions in a swap account, as well as the process for approving and reviewing such models.
• Identify and describe any regulatory issues associated with portfolio margining in a swap account, including issues relating to (a) differences in the statutes governing uncleared swaps, non-cleared security-based swaps, and securities other than security-based swaps, (b) differences in the regulatory requirements of the CFTC, SEC, and SROs applicable to uncleared swaps, non-cleared security-based swaps, and securities other than security-based swaps (including differences in margin and segregation requirements), and (c) differences in the bankruptcy treatment of uncleared swaps, non-cleared security-based swaps, and securities other than security-based swaps.
• As noted above, the CFTC margin rules require swap dealers to post initial margin for uncleared swaps entered into with other swap dealers or with financial end users with material swaps exposure. The SEC's margin rules permit, but do not require, an SBSD to post initial margin for non-cleared security-based swaps entered into with other broker-dealers, SBSDs, swap dealers, or with financial end users. How should the Commissions address the differences in the initial margin posting requirements in a portfolio margin account? If portfolio margining resulted in the transfer of significant swap trading relationships to SBSDs, which would operate under a ''collect only'' regime, would that increase the potential for risk and liquidity mismatches between counterparties? How do commenters view any systemic risk implications of SBSDs not posting initial margin? Would it lower systemic risk by promoting the liquidity of SBSDs? Discuss the potential impact on the markets and market participants if entities registered as broker-dealers and swap dealers or as broker-dealers, SBSDs, and swap dealers or as SBSDs and swap dealers are not required to post initial margin to counterparties for uncleared swaps held in a portfolio margin account while stand-alone swap dealers are required to post initial margin to counterparties for uncleared swap transactions. Would such a portfolio margining approach provide a disincentive for customers to trade with stand-alone swap dealers and what would be the potential market impact of such a disincentive? Should the Commissions require entities registered as broker-dealers and swap dealers or as broker-dealers, SBSDs, and swap dealers or as SBSDs and swap dealers to post margin for uncleared swaps held in a portfolio margin account with covered counterparties? How should such margin be computed? Alternatively, would requiring these entities to post margin undermine the benefits of portfolio margining? Would it increase costs to customers to compensate these entities for having to use their capital to meet margin requirements? In addition, would requiring these entities to post initial margin create a barrier to entry for smaller firms that do not have the resources to post initial margin?
• As discussed above, an entity that effects transactions in securities must be registered with the SEC as a broker-dealer. A broker-dealer that limits securities dealing to OTC equity options and other OTC derivatives can operate as special purpose broker-dealer known as OTC derivatives dealer. An entity that deals in security-based swaps above a de minimis notional threshold will need to register with the SEC as an SBSD. And, an entity that deals in swaps above a de minimis notional threshold must register with the CFTC as a swap dealer. And, an entity that clears futures, options on futures, or swaps for customers must register as an FCM. Please discuss any regulatory or operational issues raised by portfolio margining in a swap account in light of these and any other relevant registration requirements.
• Identify and describe any operational issues associated with portfolio margining in a swap account.
• Discuss how the Commissions could implement portfolio margin requirements for a swap account, including potential relief the Commissions could provide to address regulatory and operational issues associated with portfolio margining in a swap account.
• Identify and describe any conditions the Commissions should consider with respect to portfolio margining in a swap account to mitigate risk and address regulatory and operational issues.
• Identify the categories of swaps and security-based swaps that should be permitted to be portfolio margined in the swap account and discuss why they should be included and, if applicable, why other categories of these instruments should be excluded.
• Discuss whether market participants would use a swap account to portfolio margin uncleared swaps and non-cleared security-based swaps, and explain why they would or would not use this account type for this purpose.
• Identify and describe the potential costs and benefits, as well as the competitive impact—either positive or negative—of permitting market participants to portfolio margin uncleared swaps and non-cleared security-based swaps in a swap account. Please quantify, including by way of example, these potential costs, benefits and impacts to the extent practicable.

4. Other Potential Portfolio Margin Scenarios

In addition to the requests for comment on the specific account types discussed above, the Commissions request comment on whether there are any other potential portfolio margin scenarios with regard to uncleared swaps, non-cleared security-based swaps, and other related positions that the Commissions should consider at this time. Commenters should identify and describe the specific products and account type involved in any other potential portfolio margin alternatives. Commenters also are asked to address any potential regulatory or operational issues involving a particular portfolio margin scenario. Finally, commenters should address any potential costs and benefits and competitive impact the Commissions should consider in evaluating a particular portfolio margin scenario.

By the Securities and Exchange Commission.

Dated: October 22, 2020.

Vanessa A. Countryman,

Secretary.

Issued in Washington, DC, on October 23, 2020, by the Commodity Futures Trading Commission.

Christopher Kirkpatrick,

Secretary of the Commission.

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

Appendices to Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants—CFTC Voting Summary and Commissioner's Statement

Appendix 1—CFTC Voting Summary

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

Appendix 2—Supporting Statement of CFTC Commissioner Brian Quintenz

I am proud to support today's request for comment, which marks the beginning of the agencies' consideration of ways to implement a portfolio margining regime for uncleared swaps and non-cleared security-based swaps. Portfolio margining can lead to efficiencies in margin calculation by appropriately accounting for the impact offsetting positions have on a portfolio's actual risk profile. This, in turn, gives firms and customers additional capital that can be deployed elsewhere. However, given the differences between the regulatory regimes for swaps and security-based swaps, it also implicates incredibly important legal and policy considerations. This request for comment solicits critical feedback from market participants on how portfolio margining could impact the safety and soundness of firms, result in competitive advantages for certain types of registrants, and raise questions about how collateral would be treated in the event of bankruptcy. In order to make an informed decision about if, and how, portfolio margining should be implemented for uncleared swaps and non-cleared security-based swaps, we need thoughtful feedback on these complex questions. I encourage all interested parties to provide written comments, including data wherever possible, in order to further the agencies' understanding of the various options presented in the request for comment.

[FR Doc. 2020–23928 Filed 11–4–20; 8:45 am]

BILLING CODE 6351–01–P

LIBRARY OF CONGRESS

U.S. Copyright Office

37 CFR Part 210

[Docket No. 2020–12]

Music Modernization Act Transition Period Transfer and Reporting of Royalties to the Mechanical Licensing Collective: Request for Additional Comments

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: This supplemental notice of proposed rulemaking (''SNPRM'') updates the Copyright Office's July 17, 2020 proposed rule concerning the Music Modernization Act transition period transfer and reporting of royalties to the mechanical licensing collective. Specifically, this SNPRM provides an alternate approach to requirements concerning the content of cumulative statements of account to be submitted by digital music providers to the mechanical licensing collective at the conclusion of the statutory transition period and proposes estimate and adjustment provisions with respect to payment of accrued royalties to the mechanical licensing collective in connection with this reporting.

DATES: Written comments must be received no later than 11:59 p.m. Eastern Time on November 25, 2020.

ADDRESSES: For reasons of government efficiency, the Copyright Office is using the *regulations.gov* system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through *regulations.gov.* Specific instructions for submitting comments are available on the Copyright Office's website at *https://www.copyright.gov/rulemaking/mma-transition-reporting.* If electronic submission of comments is not feasible due to lack of access to a computer and/or the internet, please contact the Office using the contact information below for special instructions.

FOR FURTHER INFORMATION CONTACT: Regan A. Smith, General Counsel and Associate Register of Copyrights, by email at *regans@copyright.gov,* John R. Riley, Assistant General Counsel, by email at *jril@copyright.gov,* or Jason E. Sloan, Assistant General Counsel, by email at *jslo@copyright.gov.* Each can be contacted by telephone by calling (202) 707–8350.

SUPPLEMENTARY INFORMATION:

I. Background

This SNPRM is issued subsequent to a notification of inquiry published in the **Federal Register** on September 24, 2019 and a notice of proposed rulemaking (''NPRM'') published on July 17, 2020 relating to implementation of the Music Modernization Act (''MMA'').[1] In its NPRM, the Office proposed regulations pertaining to cumulative statements of account, which digital music providers (''DMPs'') are required to provide to the mechanical licensing collective (''MLC'') for such DMPs to be eligible for the statutory limitation on liability for unlicensed uses of musical works prior to the license availability date.[2] This SNPRM generally assumes familiarity with the prior NPRM and notification of inquiry, as well as the public comments and summaries of *ex parte* meetings received in response to those documents, all of which are publicly accessible from the Copyright Office's website.[3]

As relevant here, the NPRM considered whether to propose regulations with respect to the ability of DMPs to rely upon estimates and subsequently adjust their cumulative statements of account. The NPRM tentatively declined to propose broad language given the ''one-time nature'' of cumulative statements of account, but did propose that DMPs could estimate applicable performance royalties, and that ''any overpayment (whether resulting from an estimate or otherwise) should be credited to the DMP's account, or refunded upon request.'' [4]

[1] 85 FR 43517 (July 17, 2020); 84 FR 49966 (Sept. 24, 2019). All rulemaking activity, including public comments, as well as legislative history and educational material regarding the Music Modernization Act, can currently be accessed via navigation from *https://www.copyright.gov/music-modernization/.* Comments received in response to the September 2019 notification of inquiry are available at *https://www.regulations.gov/docketBrowser?rpp=25&po=0&dct=PS&D=COLC-2019-0002&refD=COLC-2019-0002-0001.* Comments received in response to the July 2020 notice of proposed rulemaking are available at *https://beta.regulations.gov/document/COLC-2020-0011-0001/comment.* Related *ex parte* letters are available at *https://www.copyright.gov/rulemaking/mma-implementation/ex-parte-communications.html.* References to these comments and letters are by party name (abbreviated where appropriate), followed by ''Initial Comment,'' ''Reply Comment,'' ''NPRM Comment,'' or ''*Ex Parte* Letter'' as appropriate.

[2] *See* 17 U.S.C. 115(d)(10).

[3] Guidelines for *ex parte* communications, along with records of such communications, are available at *https://www.copyright.gov/rulemaking/mma-implementation/ex-parte-communications.html.* As stated in the guidelines, *ex parte* meetings with the Office are intended to provide an opportunity for participants to clarify evidence and/or arguments made in prior written submissions, and to respond to questions from the Office on those matters.

[4] 85 FR at 43520.