COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 23

RIN 3038–AF38

Revisions to Business Conduct and Swap Documentation Requirements for Swap Dealers and Major Swap Participants

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commodity Futures Trading Commission (''CFTC'' or ''Commission'') is proposing amendments to certain of the Commission's business conduct and documentation requirements applicable to swap dealers and major swap participants. These amendments would provide exceptions to compliance with such requirements when executing swaps that are: intended by the parties to be cleared contemporaneously with execution; or subject to prime broker arrangements that meet certain qualifying conditions. The proposed amendments would also make certain other changes discussed herein. The proposed amendments, if adopted, would supersede certain no-action positions issued by the Commission's Market Participants Division (''MPD'').

DATES: Comments must be received on or before October 24, 2025.

ADDRESSES: You may submit comments, identified by ''*Revisions to Business Conduct and Swap Documentation Requirements for Swap Dealers and Major Swap Participants*'' and RIN 3038–AF38, by any of the following methods:

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

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

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *https://comments.cftc.gov*. You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act (''FOIA''), a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission's regulations.[1] The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from *https://comments.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act (''APA'')[2] and other applicable laws, and may be accessible under FOIA.

FOR FURTHER INFORMATION CONTACT: Frank N. Fisanich, Deputy Director, 202–418–5949, *ffisanich@cftc.gov;* Jacob Chachkin, Associate Director, 202–418–5496, *jchachkin@cftc.gov;* or Dina Moussa, Special Counsel, 202–418–5696, *dmoussa@cftc.gov,* Market Participants Division, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Background

The Commission is issuing this notice of proposed rulemaking (''Proposal'') to propose amendments to certain business conduct standards for swap dealers (''SDs'') and major swap participants (''MSPs'' and, together with SDs, ''Swap Entities'')[3] contained in subpart H of part 23 of the Commission's regulations,[4] and to the swap trading relationship documentation rule for Swap Entities in § 23.504.[5] These proposed amendments are intended to address certain long-standing issues with the Commission's external business conduct standards and swap trading relationship documentation rule, as explained below.[6] The Commission is aware that various market participants have argued that certain aspects of the external business conduct standards and swap trading relationship documentation rule have impeded the efficient trading of cleared swaps, either executed bilaterally between a counterparty and an SD or executed on or pursuant to the rules of a swap execution facility, and that other aspects of the external business conduct standards make compliance with such rules either impossible or impracticable in the context of swaps executed pursuant to prime brokerage arrangements in place prior to the implementation of the Commission's swap rules. As explained below in the discussions of the Covered Staff Letters, the Commission has observed that MPD's long-standing no-action positions set forth in the Covered Staff Letters appear to have addressed many of the issues raised by market participants and the Commission is not aware of any adverse consequences of such MPD no-action positions. Therefore, the Commission has preliminarily determined to propose that the external business conduct standards and the swap trading relationship documentation rule be amended to provide an outcome comparable to such

[1] *See* 17 CFR 145.9. The Commission's regulations referred to in this release are found at 17 CFR chapter I (2025) and are accessible on the Commission's website at *https://www.cftc.gov/LawRegulation/CommodityExchangeAct/index.htm*.

[2] 5 U.S.C. 500 *et seq*.

[3] ''Swap dealer'' is defined in section 1a(49) of the Commodity Exchange Act (''CEA''), 7 U.S.C. 1a(49); and § 1.3, 17 CFR 1.3. ''Major swap participant'' is defined in section 1a(33) of the CEA, 7 U.S.C. 1a(33); and § 1.3, 17 CFR 1.3. SDs and MSPs are collectively referred to as ''Swap Entities'' throughout this release.

[4] 17 CFR part 23, subpart H.

[5] 17 CFR 23.504.

[6] The proposed amendments are also intended to supersede the no-action positions of MPD (formerly, the Division of Swap Dealer and Intermediary Oversight) contained in CFTC Staff Letters 12–58, 13–11, 13–12, 19–06, 23–01, and 25–09 (collectively, the ''Covered Staff Letters''). To avoid confusion and simplify understanding, this Proposal will refer to no-action positions issued by the Division of Swap Dealer and Intermediary Oversight as no-action positions issued by its successor division, MPD. *See* CFTC Staff Letter 12–58 (Dec. 18, 2012), Re: Request for Relief Regarding Obligation to Provide Pre-Trade Mid-Market Mark for Certain Credit Default Swaps and Interest Rate Swaps (''CFTC Staff Letter 12–58''); CFTC Staff Letter 13–11 (April 30, 2013), Re: Time Limited Relief for Swap Dealers in Connection with Prime Brokerage Arrangements (''CFTC Staff Letter 13–11''); CFTC Staff Letter 13–12 (May 1, 2013), Re: Relief for Swap Dealers and Major Swap Participants Regarding the Obligation to Provide Certain Disclosures for Certain Transactions Under Regulation 23.431 (''CFTC Staff Letter 13–12''); CFTC Staff Letter 19–06 (March 22, 2019), Re: No-Action Position for Off-SEF Swaps Executed Pursuant to Prime Brokerage Arrangements (''CFTC Staff Letter 19–06''); CFTC Staff Letter 23–01 (Feb. 1, 2023), Re: Revised No-Action Positions for Swaps Intended to be Cleared (''CFTC Staff Letter 23–01''); and CFTC Staff Letter 25–09 (Apr. 4, 2025), Re: No-Action Position for Swap Dealers and Major Swap Participants Regarding the Obligation to Provide a Pre-Trade Mid-Market Mark under 17 CFR 23.431(a)(3)(i) (''CFTC Staff Letter 25–09''). CFTC Staff Letters 13–12 and 23–01 are revisions to previous CFTC Staff Letters, as described in the relevant Covered Staff Letters. CFTC Staff Letters are available on the Commission's website at *https://www.cftc.gov/LawRegulation/CFTCStaffLetters/index.htm*.

no-action positions, with certain modifications discussed below.

Together, the Covered Staff Letters provided no-action positions regarding compliance with certain external business conduct standards (including certain required pre-trade disclosures) and documentation requirements applicable to Swap Entities in the context of: (1) swaps executed pursuant to prime broker arrangements between SDs acting as prime brokers and their customers; and (2) swaps executed by Swap Entities with counterparties where the parties to the swap intend the swap to be cleared contemporaneously with execution of such swap. The Commission expects that, upon the adoption of a final rule enacting this Proposal, MPD will withdraw some or all of the Covered Staff Letters as necessary to reflect the Commission's final rule.[7]

A. Applicable Regulatory Requirements

Section 4s(h) of the CEA [8] provides the Commission with both mandatory and discretionary rulemaking authority to impose business conduct standards on Swap Entities in their dealings with counterparties, including Special Entities.[9] Pursuant to this rulemaking authority, the Commission adopted rules in subpart H of part 23 of its regulations, which set forth business conduct standards for Swap Entities in their dealings with counterparties (the ''External Business Conduct Standards'').[10]

The External Business Conduct Standards include certain pre-trade disclosures required to be made by Swap Entities to their counterparties that are not Swap Entities, security-based swap dealers, or security-based major swap participants, including a requirement under § 23.431(a)(3)(i) to disclose the price of the swap and the so-called ''pre-trade mid-market mark'' (the ''PTMMM''; and such disclosure requirement, the ''PTMMM Requirement'').[11] The PTMMM was intended to be the mid-market mark of the swap, not including any amount added by the Swap Entity for profit, credit reserve, hedging, funding, liquidity, or any other costs or adjustments.[12]

The External Business Conduct Standards also include a requirement under § 23.431(b) that an SD must provide counterparties that are not Swap Entities, security-based swap dealers, or security-based major swap participants with notice that the counterparty may request and consult on the design of a scenario analysis to allow the counterparty to assess its potential exposure in connection with a swap (the ''Scenario Analysis Requirement'').[13] The scenario analysis, if requested, was required to (1) be completed over a range of assumptions, including severe downside stress scenarios that would result in significant loss; (2) disclose all non-proprietary material assumptions and calculation methodologies; and (3) consider any relevant analysis that an SD undertakes for its own risk management purposes.[14]

Section 4s(i) of the CEA requires the Commission to adopt rules governing swap documentation for Swap Entities.[15] Pursuant to this rulemaking authority, the Commission adopted rules in subpart I of part 23 of its regulations.[16] These include § 23.504, which mandates that Swap Entities enter into swap trading relationship documentation (''STRD'') meeting the requirements of the rule with counterparties prior to execution of a swap (the ''STRD Requirement'').[17]

B. Staff No-Action Positions

1. Intended To Be Cleared Swaps

In 2013, MPD issued CFTC Staff Letter 13–70 [18] following a request to provide a no-action position with respect to compliance with certain External Business Conduct Standards and the STRD Requirement in the context of swaps executed by SDs with counterparties where the parties to the swap intend to clear the swap contemporaneously with execution (such swaps are herein referred to as ''Intended To Be Cleared Swaps'' or ''ITBC Swaps''). Market participants argued that the External Business Conduct Standards and the STRD Requirement significantly hindered the efficient execution and processing of swaps that were intended to be cleared (*i.e.,* so-called ''straight-through-processing'') and that compliance with such regulatory requirements was unnecessary to achieve the Commission's regulatory goals. In support of this view, market participants generally argued that: (1) because swaps of a type accepted for clearing by a derivatives clearing organization (''DCO'') [19] are sufficiently standardized, (especially if also executed on a designated contract market (''DCM'') [20] or swap execution facility (''SEF'')) [21] and information about the risks and characteristics of such swaps is available from the DCO (or the DCM or SEF if executed there), the benefits of compliance by an SD with the disclosure and suitability requirements of the External Business Conduct Standards are to a large extent moot; and (2) because swaps, once cleared, are between the DCO and the market participant (not between the SD and its counterparty), there is no ongoing trading relationship between the SD and its counterparty and thus there is no need for the SD to comply with the on-boarding requirements of the External Business Conduct Standards or the STRD Requirement.[22]

In addition, in 2022, MPD recognized that the Commission had exempted a number of non-U.S. central clearing counterparties from registration as a DCO and a number of non-U.S. trading facilities from registration as a SEF. Specifically, section 5b(h) of the CEA

[7] The Commission notes that it is also changing inconsistencies found with respect to capitalization used throughout the regulatory text.

[8] 7 U.S.C. 6s(h).

[9] ''Special Entity'' is defined in § 23.401(c), 17 CFR 23.401(c).

[10] *See generally* Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties, 77 FR 9734 (Feb. 17, 2012) (''Final EBCS Rulemaking'').

[11] 17 CFR 23.431(a)(3)(i).

[12] § 23.431(d)(2), 17 CFR 23.431(d)(2). *See* Final EBCS Rulemaking at 77 FR 9766 (where the Commission noted that ''the spread between the quote and mid-market mark is relevant to disclosures regarding material incentives; and provides the counterparty with pricing information that facilitates negotiations and balances historical information asymmetry regarding swap prices.'').

[13] 17 CFR 23.431(b).

[14] §§ 23.431(b)(2)–(4), 17 CFR 23.431(b)(2)–(4).

[15] 7 U.S.C. 6s(i).

[16] *See* 17 CFR part 23, subpart I.

[17] 17 CFR 23.504. *See generally* Confirmation, Portfolio Reconciliation, Portfolio Compression, and Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants, 77 FR 55904 (Sep. 11, 2012).

[18] CFTC Staff Letter 13–70 (Nov. 15, 2013), Re: No-Action Relief: Swaps Intended to be Cleared (''CFTC Staff Letter 13–70'').

[19] ''Derivatives clearing organization'' is defined in section 1a(15) of the CEA, 7 U.S.C. 1a(15); and § 1.3, 17 CFR 1.3.

[20] ''Designated contract market'' is defined with ''contract market'' in § 1.3, 17 CFR 1.3.

[21] ''Swap execution facility'' is defined in section 1a(50) of the CEA, 7 U.S.C. 1a(50); and § 1.3, 17 CFR 1.3.

[22] Such compliance issues were not wholly unanticipated. *See* CFTC Staff Letter 13–70 at 4; *see also* Further Definition of ''Swap Dealer,'' ''Security-Based Swap Dealer,'' ''Major Swap Participant,'' ''Major Security-Based Swap Participant'' and ''Eligible Contract Participant,'' 77 FR 30596, 30610 n. 201 (May 23, 2012) (where the Commission stated ''[b]y contrast, it may be appropriate, over time, to tailor the specific requirements imposed on swap dealers depending on the facility on which the swap dealer executes swaps. For example, the application of certain business conduct requirements may vary depending on how the swap is executed, and it may be appropriate, as the swap markets evolve, to consider adjusting certain of those requirements for swaps that are executed on an exchange or through particular modes of execution.'').

authorizes the Commission to exempt, conditionally or unconditionally, a DCO from registration, if the Commission finds that the DCO is ''subject to comparable, comprehensive supervision and regulation by . . . the appropriate government authorities in the home country of the organization.'' [23] As of the date of this Proposal, the Commission has issued exemptions from registration to four derivatives clearing organizations: ASX Clear (Futures) Pty Limited (''ASX''); [24] Japan Securities Clearing Corporation (''JSCC''); [25] Korea Exchange, Inc. (''KRX''); [26] and OTC Clearing Hong Kong Limited (''OTC Clear'').[27] Any DCO that, as of any date of determination, is exempt from registration as a DCO under section 5b of the CEA,[28] including, without limitation, ASX, JSCC, KRX, and OTC Clear, is an ''Exempt DCO'' on such date for purposes of this Proposal.

Similarly, section 5h(g) of the CEA authorizes the Commission to exempt, conditionally or unconditionally, a SEF from registration, if the Commission finds that the facility is ''subject to comparable, comprehensive supervision and regulation on a consolidated basis by . . . the appropriate governmental authorities in the home country of the facility.'' [29] As of the date of this Proposal, the Commission has issued exemptions from SEF registration to facilities for the trading or processing of swaps from the European Union,[30] Singapore,[31] and Japan.[32] Any facilities for the trading or processing of swaps that, as of any date of determination, are exempt from registration as a SEF under section 5h(g) of the CEA,[33] including, without limitation, any Exempt EU Trading Venue, Exempt SG Trading Venue, or Exempt Japan Trading Venue is an ''Exempt SEF'' on such date for purposes of this Proposal.

Because Swap Entities that are otherwise subject to the Commission's External Business Conduct Standards and documentation requirements are free to execute swaps on Exempt SEFs and clear swaps on Exempt DCOs pursuant to, and subject to the conditions of, the foregoing Commission actions, MPD recognized that execution by Swap Entities of ITBC Swaps on an Exempt SEF and/or clearing of such ITBC Swaps on an Exempt DCO should be treated the same as swaps executed on DCMs or SEFs and/or cleared on DCOs. Consequently, MPD issued CFTC Staff Letter 23–01, which superseded CFTC Staff Letter 13–70 in its entirety.[34] CFTC Staff Letter 23–01 provided a revised MPD no-action position which incorporates, expands on, and refines the MPD no-action position presented in CFTC Staff Letter 13–70 with regard to compliance with certain External Business Conduct Standards by Swap Entities and clarifies the no-action position regarding documentation requirements under the STRD Requirement.[35]

The Commission has preliminarily determined that the standardization that occurs when a type of swap is made available to trade on a SEF [36] or Exempt SEF and/or accepted for clearing on a DCO [37] or Exempt DCO generally entails a material increase in the amount of information that is available about that type of swap. Prices, daily marks, and volume information become available and therefore market participants are able to research and track how such swaps respond to changing market conditions, providing insight into the risks and characteristics of a particular type of swap for non-swap entity counterparties to evaluate independently. The standardization may also allow parties to transact in smaller or larger notional amounts to suit their needs than may be available for an uncleared swap and to more easily find willing counterparties if they need to increase, decrease, or exit a certain position. Due to the standardization and concomitant

[23] 7 U.S.C. 7a–1(h).

[24] On August 18, 2015, the Commission issued an Order of Exemption with respect to ASX, which exempts ASX from registering with the Commission as a DCO, subject to certain terms and conditions in the order, *available at https://sirt.cftc.gov/sirt/sirt.aspx?Topic=ClearingOrganizations*.

[25] On October 26, 2015, the Commission issued an Order of Exemption with respect to JSCC, which exempts JSCC from registering with the Commission as a DCO, subject to certain terms and conditions in the order, *available at https://sirt.cftc.gov/sirt/sirt.aspx?Topic=ClearingOrganizations*. The Commission issued an amended exemptive order on May 15, 2017, which expanded the scope of products that JSCC is permitted to clear as an Exempt DCO, subject to several conditions set forth in the order, available at *https://www.cftc.gov/sites/default/files/idc/groups/public/@otherif/documents/ifdocs/jsccdcoexemptamdorder5-15-17.pdf*. The Commission issued a further amended exemptive order on Sept. 12, 2025, which permitted JSCC to clear interest rate swaps denominated in Japanese yen for clearing members of JSCC on behalf of U.S. persons, available at *https://www.cftc.gov/media/12671/JSCC%20AmendedExemptionOrder_09-12-2025/download*. MPD and the Commission's Division of Clearing and Risk recently published CFTC Staff Letter 25–32 (Sept. 12, 2025) which provided JSCC and its clearing members with a no-action position for clearing certain yen-denominated interest rate swaps for U.S. persons, subject to certain terms and conditions set forth in the letter.

[26] On October 26, 2015, the Commission issued an Order of Exemption with respect to KRX, which exempts KRX from registering with the Commission as a DCO, subject to certain terms and conditions in the order, *available at https://sirt.cftc.gov/sirt/sirt.aspx?Topic=ClearingOrganizations*.

[27] On December 21, 2015, the Commission issued an Order of Exemption with respect to OTC Clear, which exempts OTC Clear from registering with the Commission as a DCO, subject to certain terms and conditions in the order, *available at https://sirt.cftc.gov/sirt/sirt.aspx?Topic=ClearingOrganizations*.

[28] 7 U.S.C. 7a–1.

[29] 7 U.S.C. 7b–3(g).

[30] On December 8, 2017, the Commission issued an Order of Exemption with respect to multilateral trading facilities (''MTFs'') and organised trading facilities (''OTFs'') authorized in the European Union (''EU'') (the ''EU Exemptive Order''). *See* EU Exemptive Order, as most recently amended by the Third Amendment to Appendix A to Order of Exemption (October 26, 2022), *available at https://www.cftc.gov/media/7896/EuropeanUnionThirdAmendmentAppendixA_CEASection5hgOrder/download*. The EU Exemptive Order exempts each of the MTFs and OTFs listed in Appendix A thereto, as such Appendix A may be amended by the Commission from time to time (the ''Exempt EU Trading Venues''), from registration with the Commission as a SEF. In response to the withdrawal of the United Kingdom (''UK'') from the EU, commonly referred to as ''Brexit,'' CFTC staff from the Division of Market Oversight (''DMO'') issued a no-action position addressing certain UK MTFs and OTFs that had previously benefitted from the EU Exemptive Order. Under this no-action position, specified UK MTFs and OTFs may operate on much the same basis as an Exempt EU Trading Venue, subject to the terms of the letter, without DMO recommending that the Commission take an enforcement action against them for failure to register with the CFTC as a SEF. *See,* most recently, CFTC Staff Letter No. 24–11 (Aug. 28, 2024), *available at https://www.cftc.gov/csl/24-11/download*.

[31] On March 13, 2019, the Commission issued an Order of Exemption with respect to approved exchanges (''AEs'') and recognized market operators (''RMOs'') authorized in Singapore (the ''SG Exemptive Order,'' *available at https://www.cftc.gov/sites/default/files/2019-03/SingaporeCEASection5hgOrder.pdf*), as most recently amended by the ''Third Amendment to Appendix A to Order of Exemption,'' dated July 31, 2024 (*available at https://www.cftc.gov/media/11046/SingaporeThirdAmendmentAppendixA_CEASection5hgOrder/download*). The SG Exemptive Order exempts each of the AEs and RMOs listed in Appendix A thereto, as such Appendix A may be amended by the Commission from time to time (the ''Exempt SG Trading Venues''), from registration with the Commission as a SEF.

[32] On July 11, 2019, the Commission issued an Order of Exemption with respect to electronic trading platforms (''ETPs'') registered in Japan (the ''Japan Exemptive Order'') and, together with the EU Exemptive Order and the SG Exemptive Order, the ''SEF Exemptive Orders,'' *available at https://www.cftc.gov/media/2216/JapaneseCEASection5hgOrder/download*. The Japan Exemptive Order exempts each ETP listed in Appendix A thereto, as such Appendix A may be amended by the Commission from time to time (the ''Exempt Japan Trading Venues''), from registration with the Commission as a SEF.

[33] 7 U.S.C. 7b–3(g).

[34] CFTC Staff Letter 23–01 at 1.

[35] *See id*. at 7–10.

[36] *See, e.g.,* 17 CFR 40.2(a)(3), which requires a SEF seeking to list a new product to provide an explanation and analysis of the new product and the product's terms and conditions.

[37] *See, e.g.,* 17 CFR 39.5(b), which requires a DCO seeking to clear a new type of swap to provide information on the outstanding notional exposures, trading liquidity, and adequate pricing data, as well as product specifications, legal documentation, contract terms, and standard practices for managing life cycle events.

increase in the information available and additional trade management flexibility, the Commission has preliminarily determined that the public policy goals of the disclosure and suitability requirements of the External Business Conduct Standards have been met by other means, and thus compliance by a Swap Entity with the disclosure and suitability requirements are unnecessary for ITBC Swaps. Further, the Commission has preliminarily determined that compliance with such requirements may represent a significant hinderance to the efficient trading of cleared swaps.

The Commission has also preliminarily determined that because swaps, once cleared, are between the DCO and the market participant (not between the Swap Entity and its counterparty) and there is no ongoing trading relationship between the Swap Entity and its counterparty, compliance by a Swap Entity with the on-boarding requirements of the External Business Conduct Standards or the STRD Requirement represents a significant hinderance to the efficient trading of cleared swaps.

2. Prime Broker Arrangements

In 2013, MPD recognized that execution of swaps pursuant to long-standing conditions present in swap prime broker arrangements prevalent in the swap market made compliance with certain requirements under the External Business Conduct Standards by SDs operating as prime brokers (''PBs'') impossible due to the structure and information flows of these arrangements.[38]

PBs engaging in these swaps provide credit intermediation for their PB customers while permitting such customers to solicit prices from a wide variety of swap market participants. The PB customer agrees on a price and other critical terms of a swap with a potential swap counterparty, but the swap is actually executed at that price and on those terms between the PB and the counterparty chosen by the PB's customer (the ''trigger swap''). The PB, in turn, then enters into a matching swap with its customer (the ''mirror swap''). Thus, the customer has the advantage of seeking favorable prices while maintaining a credit relationship with only its PB, simplifying its operations and benefiting from collateral netting. The PB enters into two equal but opposite swaps and thus all but eliminates its market risk and has only credit risk to its customer and the trigger swap counterparty (*i.e.,* credit intermediation).

However, because the PB arrangement permits the PB customer to seek prices from various counterparties, the PB cannot know the price or the exact terms of the swap before the PB is obligated to execute both the trigger swap and the mirror swap. This lack of information may prevent a PB that is an SD from complying with certain pre-trade regulatory obligations under the External Business Conduct Standards, most notably the pre-trade disclosure of the price and a PTMMM of the swaps as required by § 23.431(a)(3).[39]

Recognizing these structural and informational hurdles to compliance with the External Business Conduct Standards, MPD issued a no-action position in CFTC Staff Letter 13–11 with respect to enumerated External Business Conduct Standards as they relate to certain covered transactions [40] executed under PB arrangements where the PB and trigger swap counterparty were each SDs registered with the Commission.[41] Specifically, MPD stated that it would not recommend an enforcement action against such SDs if the PB allocated its responsibilities under the relevant External Business Conduct Standards to the SD that is the trigger swap counterparty, subject to certain other conditions provided in CFTC Staff Letter 13–11.[42]

In addition, MPD recognized that many trigger swap counterparties transacting in the market for foreign exchange swaps and forwards that were exempted from the swap definition pursuant to the Treasury Determination (''Exempt FX Transactions'') [43] were not SDs. Although such transactions are exempted from the swap definition, SDs executing Exempt FX Transactions remain obligated to comply with the External Business Conduct Standards.[44] However, where the trigger swap counterparty is not an SD, such counterparty could not meet the conditions of CFTC Staff Letter 13–11 regarding allocation of certain External Business Conduct Standards between SDs. Thus, CFTC Staff Letter 13–11 presented a more straightforward and limited no-action position with respect to Exempt FX Transactions executed under a PB arrangement where the PB is a registered SD and the trigger swap counterparty is not registered with the Commission as an SD, providing a no-action position only with respect to a failure to comply with the disclosure requirements of §§ 23.431(a)(3)(i) and 23.431(b).[45]

Finally, in 2019, MPD recognized that certain PB transactions executed anonymously on SEFs raised additional structural and informational hurdles to compliance with the disclosure requirements of §§ 23.431(a) and (b) [46] in the context of PB arrangements. Commission regulation 23.431(c) provides that §§ 23.431(a) and (b) do not apply to swaps executed by an SD on a SEF where the SD does not know the identity of its counterparty prior to execution.[47] In the PB context, this exception from the disclosure requirements of §§ 23.431(a) and (b) would apply to the trigger swap between the SD acting as a PB (a ''PB/

[38] Such compliance difficulties were not wholly unanticipated. *See* Further Definition of ''Swap Dealer,'' ''Security-Based Swap Dealer,'' ''Major Swap Participant,'' ''Major Security-Based Swap Participant'' and ''Eligible Contract Participant,'' 77 FR 30596, 30610 n. 201 (May 23, 2012) (where the Commission stated ''[b]y contrast, it may be appropriate, over time, to tailor the specific requirements imposed on swap dealers depending on the facility on which the swap dealer executes swaps. For example, the application of certain business conduct requirements may vary depending on how the swap is executed, and it may be appropriate, as the swap markets evolve, to consider adjusting certain of those requirements for swaps that are executed on an exchange or through particular modes of execution.'').

[39] 17 CFR 23.431(a)(3).

[40] Pursuant to section 1a(47)(E) of the CEA, the U.S. Secretary of the Treasury (''Secretary'') was vested with the authority to determine whether foreign exchange swaps and foreign exchange forwards should be regulated as swaps under the CEA, provided that the Secretary made a written determination satisfying certain criteria specified in section 1b of the CEA. *See* 7 U.S.C. 1a(47)(E) (citing 7 U.S.C. 1b). On November 16, 2012, the Secretary issued a written determination that foreign exchange swaps and forwards should not be regulated as swaps as defined under the CEA. *See* U.S. Treasury Determination of Foreign Exchange Swaps and Foreign Exchange Forwards Under the Commodity Exchange Act, 77 FR 69694 (Nov. 20, 2012) (''Treasury Determination''). The term ''covered transaction'' means a swap, as defined in section 1(a)(47) of the CEA and § 1.3, other than swaps subject to the clearing requirement of section 2(h)(1)(A) of the CEA and part 50 of the Commission's regulations, and physically-settled foreign exchange forwards and swap agreements that have been exempted from the definition of swap under the Treasury Determination. *See* CFTC Staff Letter 13–11 and Treasury Determination.

[41] *See* CFTC Staff Letter 13–11.

[42] *Id.* at 6–10.

[43] In CFTC Staff Letter 13–11, ''Exempt FX Transactions'' are defined as physically-settled foreign exchange forwards and swap agreements that have been exempted from the definition of swap by the U.S. Department of Treasury. *Id.* (citing Treasury Determination).

[44] Notwithstanding the Treasury Determination, section 1a(47)(E)(iv) of the CEA provides that ''any party to a foreign exchange swap or forward that is a swap dealer or major swap participant shall conform to the business conduct standards contained in section 4s(h) [of the CEA].'' 7 U.S.C. 1a(47)(E)(iv). Thus, Swap Entities are required to comply with the External Business Conduct Standards with respect to Exempt FX Transactions.

[45] *See* CFTC Staff Letter 13–11 at 10 (stating that no-action position is only applicable with respect to a failure to comply with the disclosure requirements of 17 CFR 23.431(a)(3)(i) and 23.431(b)).

[46] 17 CFR 23.431(a) and (b).

[47] § 23.431(c), 17 CFR 23.431(c).

SD'') and the trigger swap counterparty that is executed anonymously on a SEF, but the mirror swap between the PB/SD and its PB customer would not be executed anonymously or on a SEF, and thus would not qualify for the exemption. However, the price of the mirror swap is determined based on the price at which the trigger swap is executed on the SEF, and therefore, it would be impossible for the PB/SD to provide the disclosures required by §§ 23.431(a) and (b) to its PB customer prior to being obligated to enter into the mirror swap. Recognizing this structural obstacle to compliance with §§ 23.431(a) and (b), MPD provided a no-action position in CFTC Staff Letter 19–06 stating that it would not recommend an enforcement action against a PB/SD for failure to make the disclosures required by §§ 23.431(a) and (b) to its customer in relation to the mirror swap where the trigger swap is executed anonymously on a SEF.[48]

The Commission has preliminarily determined that PB arrangements common in the swaps and Exempt FX Transaction markets prior to promulgation of the External Business Conduct Standards present significant structural and informational hurdles to compliance with the disclosure requirements of §§ 23.431(a) and (b).[49] The Commission has also observed that the long-standing MPD no-action position set forth in CFTC Staff Letter 13–11 (as extended to off-SEF swaps in CFTC Staff Letter 19–06) appears to have sufficiently addressed these significant structural and informational hurdles to compliance with the disclosure requirements of §§ 23.431(a) and (b),[50] and, to the Commission's knowledge, has not resulted in any adverse consequences. Thus, the Commission is proposing to amend its regulations to provide an outcome comparable to such no-action position, as discussed below.

3. Pre-Trade Mid-Market Mark No-Action Positions

In 2013, MPD provided a no-action position in CFTC Staff Letter 13–12 (which was a revision of CFTC Staff Letter 12–42)[51] stating that it would not recommend enforcement action against a Swap Entity for its failure to disclose an otherwise required PTMMM to a counterparty so long as the transaction was a foreign exchange swap, foreign exchange forward, or vanilla foreign exchange option of six-months or less that is physically settled, where: (1) each currency is one of the ''BIS 31 Currencies'' (*i.e.,* a specified, widely-traded currency);[52] (2) real-time tradeable bid and offer prices for the transaction are available electronically to the counterparty; and (3) the counterparty agrees in advance that the Swap Entity need not disclose the PTMMM.[53] CFTC Staff Letter 13–12 also provided a no-action position regarding the disclosure of a PTMMM for Exempt FX Transactions entered into by Swap Entities anonymously on electronic trading facilities that are not registered with the Commission as SEFs or DCMs, reasoning that because Exempt FX Transactions are not swaps per the Treasury Determination, such transactions need not be executed on SEFs or DCMs, but should be treated the same as swaps executed on SEFs or DCMs.[54] Swaps executed anonymously on a SEF or DCM are excepted from the requirement to disclose a PTMMM pursuant to § 23.431(c).[55]

MPD provided a substantially similar no-action position in CFTC Staff Letter 12–58, stating that it would not recommend enforcement action against a Swap Entity for failure to disclose a PTMMM for certain widely-traded interest rate swap or index credit default swaps,[56] provided that real-time tradeable bid and offer prices for the relevant swap are available electronically to the counterparty on a DCM or SEF, and the counterparty agrees in advance that the Swap Entity need not disclose the PTMMM.[57]

Finally, MPD provided a no-action position in CFTC Staff Letter 25–09, stating that it would not recommend that the Commission commence an enforcement action against a Swap Entity for failure to satisfy the PTMMM Requirement for its non-Swap Entity counterparties. MPD issued CFTC Staff Letter 25–09 in response to a request from certain trade associations representing a wide breadth of swap market participants who argued that: (1) the PTMMM Requirement does not provide any significant informational value to a Swap Entity's counterparties; (2) the PTMMM Requirement imposes significant operational burdens on Swap Entities and, at worst, impedes the prompt execution of swaps transactions; and (3) the elimination of the PTMMM Requirement would further harmonize the Commission's regulations with those of the United States (''U.S.'') Securities and Exchange Commission (''SEC'') applicable to security-based swap dealers and major security-based swap participants, which do not require disclosure of a PTMMM in relation to security-based swaps. The no-action position in CFTC Staff Letter 25–09 will remain in effect until the adoption by the Commission of a regulation addressing the PTMMM Requirement, such as this Proposal.

As discussed below, the Commission has preliminarily determined that the PTMMM Requirement provides no useful information to counterparties and delays efficient execution; and is, thus, proposing to eliminate the PTMMM Requirement in its entirety. The Commission notes that its repeal of the PTMMM Requirement in a final rule would render the MPD no-action positions in CFTC Staff Letters 12–58, 13–12, and 25–09 moot; and it would therefore expect that MPD would withdraw such positions in due course.

II. Proposed Amendments

The Commission is proposing certain amendments to the External Business Conduct Standards and the STRD Requirement, as described in this Section, that would provide exceptions to compliance with such requirements when executing swaps that are: (1) intended by the parties to be cleared contemporaneously with execution; or (2) subject to prime broker arrangements that meet certain qualifying conditions. The proposed amendments would also make certain other changes discussed herein, including eliminating the PTMMM Requirement. In addition, as a simplifying amendment as discussed above, the Commission is proposing to replace each reference in the External Business Conduct Standards to ''swap dealer and major swap participant'' with a reference to ''swap entity,'' as defined

[48] CFTC Staff Letter 19–06 at 3.

[49] 17 CFR 23.431(a) and (b).

[50] 17 CFR 23.431(a) and (b).

[51] *See* CFTC Staff Letter 12–42 (Dec. 6, 2022), Re: Request for Relief Regarding Obligation to Provide Pre-Trade Mid-Market Mark for Certain Foreign Exchange Transactions.

[52] Specifically, CFTC Staff Letter 13–12 defined the ''BIS 31 Currencies'' to be the U.S. dollar, Euro, Japanese yen, Pound sterling, Australian dollar, Swiss franc, Canadian dollar, Hong Kong dollar, Swedish krona, New Zealand dollar, Korean won, Singapore dollar, Norwegian krona, Mexican peso, Indian rupee, Russian rouble, Chinese renminbi, Polish zloty, Turkish lira, South African rand, Brazilian real, Danish krone, New Taiwan dollar, Hungarian forint, Malaysian ringgit, Thai baht, Czech koruna, Philippine peso, Chilean peso, Indonesian rupiah, and Israeli new shekel. *Id.* at 5, n. 16.

[53] *Id.* at 6.

[54] *Id.* at 6–7.

[55] 17 CFR 23.431(c).

[56] Specifically, CFTC Staff Letter 12–58 covered: (1) untranched credit default swaps referencing the on-the-run and most recent off-the run series of the following indices: CDX.NA.IG 5Y, CDX.NA.HY 5Y, iTraxx Europe 5Y and iTraxx Europe Crossover 5yr; and (2) interest rate swaps (A) in the ''fixed-for-floating swap class'' (as such term is used in § 50.4(a), 17 CFR 50.4(a)) denominated in USD or EUR, (B) for which the remaining term to the scheduled termination date is no more than 30 years, and (C) that have the specifications set out in § 50.4, 17 CFR 50.4. *Id.* at 1.

[57] CFTC Staff Letter 12–58 at 4.

in § 23.401 [58] to mean ''a swap dealer or major swap participant.''

The Commission requests comment on all aspects of the proposed amendments described below and has inserted more specific questions and requests for comment in numerical order in the discussion below. The Commission requests that commenters refer to the specific question number or request for comment in any response, if applicable.

A. Proposed Elimination of the Pre-Trade Mid-Market Mark Disclosure Requirement

The Commission is requesting comment on a proposal that the Swap Entity PTMMM Requirement set forth in § 23.431(a)(3)(i) [59] be eliminated in its entirety. This would be accomplished by deleting paragraphs (i) and (ii) of § 23.431(a)(3) and moving the price disclosure requirement currently in such paragraph (i) and the compensation disclosure requirement currently in such paragraph (ii) into paragraphs (2) and (3) of § 23.431(a), respectively, as reflected in the proposed rule text *infra.*

The Commission has several reasons for making this proposal based on its experience since 2013 when Swap Entity compliance with the External Business Conduct Standards was first required.

Although the Commission believed that the PTMMM Requirement would provide counterparties with ''pricing information that facilitates negotiations and balances historical information asymmetry regarding swap pricing,'' [60] several commenters, in responding to a request for comments and recommendations under the Commission's ''Project KISS'' in 2017,[61] stated that the Commission should eliminate or revise the PTMMM Requirement, arguing that, among other things, the requirement: (1) creates unnecessary burdens and costs; (2) is of minimal to no utility to counterparties; (3) hampers trading flow by delaying execution; (4) creates confusion; and (5) is unnecessary for counterparties because such counterparties must be eligible contract participants (''ECPs,'') [62] which are deemed sufficiently sophisticated to enter into over-the-counter swaps.[63] The Commission preliminarily believes that the PTMMM Requirement provides no utility to counterparties and may delay execution to the disadvantage of counterparties. Accordingly, elimination of the PTMMM Requirement would support the Commission's goal of increasing the efficiency of the swaps market. The Commission requests comment on this aspect of the Proposal as noted below.

The Commission also preliminarily believes that the no-action positions provided by MPD in the Covered Staff Letters show that the PTMMM Requirement has been unworkable in a wide variety of contexts in which uncleared swaps are executed between Swap Entities and their non-Swap Entity counterparties. This includes swaps executed pursuant to PB arrangements where a PB that is an SD does not know the price of a swap until after it is obligated to enter into the swap. It also includes, as discussed above, ITBC Swaps where the Swap Entities do not know the identity of their counterparty prior to execution, and widely-traded, highly-liquid swaps where the disclosure of a PTMMM is redundant because bid/offer prices are readily available to potential counterparties from trading and price information platforms.[64] Additionally, MPD has provided a no-action position regarding the disclosure of PTMMMs in the context of the LIBOR transition (swaps needing amendment to switch reference rates away from LIBOR) where the PTMMM Requirement applies, but is not relevant to the subject matter of the swap amendment.[65]

In addition to the foregoing, the Commission notes that the PTMMM Requirement, unlike the uncleared swap daily mark disclosure requirement promulgated in § 23.431(d)(2),[66] was not required by the amendments to the CEA contained in the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'').[67] Thus, elimination of the PTMMM disclosure requirement would not contradict any counterparty protection otherwise required by the Dodd-Frank Act. Further, the Commission also notes that the SEC does not require security-based swap dealers or security-based major swap participants to provide a PTMMM when entering into security-based swaps; [68] thus, elimination of the PTMMM disclosure requirement would serve to harmonize the Commission's rules governing swap dealing with those of the SEC.

Question 01: Should the Commission eliminate the PTMMM disclosure requirement from § 23.431(a)(3)? [69] Why or why not?

Question 02: If the commenter finds the PTMMM beneficial, please describe in detail the benefits of receiving the PTMMM. Please describe whether the PTMMM is beneficial for a particular type of swap and why the PTMMM disclosure requirement should be retained for each type of swap identified.

B. Proposed Elimination of the Scenario Analysis Requirement

The Commission is requesting comment on a proposal that the Scenario Analysis Requirement set forth in § 23.431(b) [70] be eliminated in its entirety. This would be accomplished by replacing subparagraph (b) of § 23.431 with ''[RESERVED],'' as reflected in the proposed rule text *infra.*

The Commission is making this proposal to eliminate the Scenario Analysis Requirement based on its experience since 2013, when Swap Entity compliance with the External Business Conduct Standards was first required. The Commission notes that the Scenario Analysis Requirement was not required by the Dodd-Frank Act amendments to the CEA.[71] The Commission also notes that the SEC does not require security-based swap dealers to provide a scenario analysis, by request or otherwise, when entering into security-based swaps; thus, elimination of the Scenario Analysis Requirement would serve to harmonize the Commission's rules governing swap dealing with those of the SEC.[72] In addition to the foregoing, the Commission has several reasons to propose elimination of the Scenario

[58] 17 CFR 23.401.

[59] 17 CFR 23.431(a)(3)(i).

[60] Final EBCS Rulemaking at 77 FR 9766.

[61] *See generally* Project KISS, 82 FR 23765 (May 24, 2017).

[62] ''Eligible contract participant'' is defined in section 1a(18) of the CEA, 7 U.S.C. 1a(18).

[63] *See* Project KISS comments of the Securities Industry and Financial Markets Association, the Financial Services Roundtable, the Foreign Exchange Professionals Association, and State Street Corporation, *available at https://comments.cftc.gov/PublicComments/CommentList.aspx?id=1809.*

[64] *See* CFTC Staff Letters 12–58 and 13–12.

[65] *See* CFTC Staff Letter 20–23 (Aug. 31, 2020), Re: Revised No-Action Positions to Facilitate an Orderly Transition of Swaps from Inter-Bank Offered Rates to Alternative Benchmarks, *available at https://www.cftc.gov/csl/20-23/download.*

[66] 17 CFR 23.431(d)(2).

[67] *See* section 4s(h)(3)(B)(iii)(II) of the CEA, 7 U.S.C. 6s(h)(3)(B)(iii)(II). *See* Section II.C, *infra,* for a discussion of proposed amendments to the daily mark disclosure requirement in § 23.431(d)(2), 17 CFR 23.431(d)(2).

[68] *See* § 240.15Fh–3(b), 17 CFR 240.15Fh–3(b); *see also* SEC, Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants, 81 FR 29960, 30145 (May 13, 2016) (''SEC EBCS Final Rulemaking'').

[69] 17 CFR 23.431(a)(3).

[70] 17 CFR 23.431(b).

[71] *See e.g.,* Final EBCS Rulemaking at 77 FR 9762 (where the Commission discusses that the rule is discretionary and not mandatory).

[72] *See* § 240.15Fh–3(b), 17 CFR 240.15Fh–3(b); *see also* SEC EBCS Final Rulemaking at 81 FR 30145.

Analysis Requirement based on its experience over the last decade.

In adopting the Scenario Analysis Requirement in 2012, the Commission stated that it believed the requirement would assist to ''materially enhance the ability of counterparties to assess the merits of entering into any particular swap transaction and reduce information asymmetries between swap dealers . . . and their counterparties.'' [73] However, in responding to a request for comments and recommendations under the Commission's ''Project KISS'' in 2017,[74] several commenters stated that the Commission should eliminate the Scenario Analysis Requirement or restrict the availability of scenario analysis, arguing that the current requirement provides little to no utility to counterparties, goes beyond typical risk disclosures, and incorporates extremely complex and subjective judgments about the probable or possible future market states and their relevance to a particular transaction.[75] The Commission preliminarily believes that the Scenario Analysis Requirement provides no utility to counterparties, and the Commission should eliminate it in its entirety. The Commission requests comment on this aspect of the Proposal as noted below.

Question 03: Should the Commission eliminate the Scenario Analysis Requirement from § 23.431(b)? [76] Why or why not?

Question 04: If the commenter finds the Scenario Analysis Requirement helpful, please describe in detail the benefits of requesting and receiving a scenario analysis. Please describe whether a scenario analysis is beneficial for a particular type of swap and why the Scenario Analysis Requirement should be retained for each type of swap identified. Please also describe if there are any types of swaps for which the Commission should mandate scenario analysis, even without the prior request of the counterparty?

Question 05: Do counterparties to SDs find SDs willing and able to provide scenario analysis upon request?

Question 06: Do counterparties feel pressured not to request a scenario analysis as permitted by the Scenario Analysis Requirement? If so, how is such pressure presented?

[73] Final EBCS Rulemaking at 77 FR 9743, n. 125.

[74] *See generally* Project KISS at 82 FR 23765.

[75] *See* Project KISS comments of the Securities Industry and Financial Markets Association, State Street Corporation, and the Foreign Exchange Professionals Association, *available at https://comments.cftc.gov/PublicComments/CommentList.aspx?id=1809.*

[76] 17 CFR 23.431(b).

C. Proposed Amendment of the Daily Mark Disclosure Requirement

The Commission is proposing to amend the daily mark disclosure requirement in § 23.431(d)(2) [77] to harmonize such requirement with the Commission's uncleared swap margin rules and swap data reporting rules.

Section 4s(h)(3)(B) of the CEA required the Commission to adopt disclosure requirements for Swap Entities, including a requirement that a Swap Entity disclose a daily mark for uncleared swaps entered into with non-Swap Entities, but did not define ''daily mark'' or describe how it was to be calculated.[78] Thus, the Commission issued § 23.431(d)(2), which currently describes the daily mark as the ''mid-market mark of the swap [not including] amounts for profit, credit reserve, hedging, funding, liquidity, or any other costs or adjustments.'' [79] The STRD Requirement in § 23.504 also requires Swap Entities to agree in writing with counterparties that are also Swap Entities or financial entities (as defined in § 23.500(e)) [80] regarding the process for determining the value of each swap at any time from the execution to the termination, maturity, or expiration of the swap.[81]

However, although the swap data reporting rules in part 45 of the Commission's regulations define ''valuation data'' by cross-referencing § 23.431,[82] appendix 1 to part 45 defines ''valuation amount'' (one of several elements that make up ''valuation data'') to mean the ''[c]urrent value of the outstanding contract. Valuation amount is expressed as the exit cost of the contract or components of the contract, *i.e.,* the price that would be received to sell the contract (in the market in an orderly transaction at the valuation date).'' [83] Commission regulation 45.4(c)(2)(i) requires current valuation data for each outstanding swap to be reported to a swap data repository each business day.[84]

In contrast, the Commission's uncleared margin rules [85] require Swap Entities to calculate and to collect or post variation margin from or to counterparties that are Swap Entities or financial entities each business day.[86] ''Variation margin'' is defined in § 23.151 to mean ''collateral provided by a party to its counterparty to meet the performance of its obligation under one or more uncleared swaps between the parties as a result of a change in value of such obligations since the trade was executed or the last time such collateral was provided,'' [87] whereas the ''variation margin amount'' is defined in § 23.151 as ''the cumulative mark-to-market change in value to a covered swap entity of an uncleared swap, as measured from the date it is entered into (or in the case of an uncleared swap that has a positive or negative value to a covered swap entity on the date it is entered into, such positive or negative value plus any cumulative mark-to-market change in value to the covered swap entity of an uncleared swap after such date), less the value of all variation margin previously collected, plus the value of all variation margin previously posted with respect to such uncleared swap.'' [88] Swap Entities are required to calculate the variation margin amount each business day pursuant to § 23.155 using methods, procedures, rules, and inputs that, to the maximum extent practicable, rely on recently-executed transactions, valuations provided by independent third parties, or other objective criteria.[89] Such methods are required to be documented in margin documentation required by § 23.158.[90]

Thus, based on the foregoing, on any business day, a Swap Entity may be required to calculate the valuation of a swap for three different purposes using three similar but not identical criteria for purposes of: (1) providing the daily mark of the swap to its counterparty under § 23.431(d)(2); (2) reporting valuation data for the swap to a swap data repository under § 45.4(c)(2); and (3) calculating the variation margin amount for the swap under § 23.155. To harmonize these similar but not identical calculations so that a Swap Entity is only required to make a single calculation of the valuation of the swap, the Commission is proposing to amend § 23.431(d)(2) (renumbered as

[77] 17 CFR 23.431(d)(2).

[78] 7 U.S.C. 6s(h)(3)(B)(iii)(II).

[79] 17 CFR 23.431(d)(2).

[80] 17 CFR 23.500(e).

[81] § 23.504(b)(4)(i), 17 CFR 23.504(b)(4)(i).

[82] *See* § 45.1, 17 CFR 45.1 (defining ''valuation data'' as ''the data elements necessary to report information about the daily mark of the transaction, pursuant to section 4s(h)(3)(B)(iii) of the Act, and to § 23.431 of this chapter, if applicable, as specified in appendix 1 to this part.'').

[83] 17 CFR part 45, appendix 1.

[84] § 45.4(c)(2)(i), 17 CFR 45.4(c)(2)(i).

[85] §§ 23.150–23.161, 17 CFR 23.150 through 23.161.

[86] *See* § 23.155, 17 CFR 23.155 (calculation of variation margin); and § 23.153, 17 CFR 23.153 (collection and posting of variation margin).

[87] *See* 17 CFR 23.151 (providing definitions applicable to margin requirements).

[88] *Id.*

[89] 17 CFR 23.155.

[90] *See* § 23.158(b)(1), 17 CFR 23.158(b)(1) (stating ''[t]he margin documentation shall specify the methods, procedures, rules, inputs, and data sources to be used for determining the value of uncleared swaps for purposes of calculating variation margin.'').

§ 23.431(d)(3) in the proposed rule text *infra*) such that the daily mark for uncleared swaps will be ''the estimated price that would be received by the counterparty to sell (expressed as a positive number), or be paid by the counterparty to transfer (expressed as a negative number), the uncleared swap in the market in an orderly transaction.'' The proposed rule would also require the daily mark to be calculated in accordance with the methodology agreed to in the swap trading relationship documentation required by § 23.504, and if applicable, § 23.158 of the Commission's uncleared swap margin rules.

The Commission believes that under this formulation non-Swap Entity counterparties would receive the daily mark required by section 4s(h)(3)(B) of the CEA, but a Swap Entity would only be required to calculate the valuation of a swap once daily and use the result of such calculation to provide the daily mark to its counterparty in compliance with § 23.431, and, if otherwise required, use such result for reporting valuation data to a swap data repository in compliance with § 45.4 and for purposes of calculating the variation margin amount in compliance with § 23.155.

Question 07: Should the Commission revise the daily mark calculation and disclosure requirement as set forth above? Why or why not?

Question 08: Will the formulation of the daily mark disclosure requirement as proposed permit a Swap Entity to perform a single daily calculation of the valuation of a swap that meets the criteria for compliance with the daily mark, data reporting, and variation margin requirements? If not, why not? Could the formulation be adjusted such that it could achieve the goal of harmonizing the three required calculations?

Question 09: Are there reasons why the daily mark disclosure requirement should remain distinct from the calculation of valuation data for swap reporting purposes or variation margin purposes? Please explain.

D. New and Amended Definitions in § 23.401

The Commission is proposing to add new definitions to § 23.401[91] and to amend a number of existing definitions in such section solely for the purposes of the subpart. These new and amended definitions are explained below. Each new definition would be placed in alphabetical order in § 23.401, as the section is proposed to be renumbered to account for the new definitions as shown in the proposed rule text *infra.*

1. Definition of ITBC Swap

The Commission is proposing to add a new definition of ''ITBC Swap'' to the definitions in § 23.401 applicable to subpart H of part 23 of the Commission's regulations.[92] The definition of ''ITBC Swap'' is intended to clearly describe the criteria and conditions that a swap must meet to be eligible for the various exceptions from disclosure and information collection requirements of the External Business Conduct Standards proposed in this Proposal that specify that the exception applies to ITBC Swaps, and the STRD Requirement set forth in §§ 23.402 through 23.451 and § 23.504 (referred to hereinafter as the ''ITBC Compliance Exceptions'').[93] Each of the ITBC Compliance Exceptions is explained below in the discussion of the proposed amendments to §§ 23.402 through 23.451 and § 23.504.[94] Other than as described below, the criteria and conditions in the proposed definition are substantially the same as the conditions necessary to qualify for the MPD no-action position set forth in CFTC Staff Letter 23–01.

First, under the Proposal, one of the parties to the swap must be a swap entity, as defined in new § 23.401(j) to mean an SD or MSP. ''Swap entity'' is used throughout the definitions and the proposed amendments to refer to an SD or MSP. The External Business Conduct Standards and the STRD Requirement only apply to Swap Entities. Thus, swaps where no Swap Entity is a counterparty have no need to qualify for the ITBC Compliance Exceptions.

Second, the swap would be required to be of a type accepted for clearing by a DCO registered with the Commission or an Exempt DCO.[95] Only swaps that are of a type accepted for clearing by a DCO or Exempt DCO qualify for the ITBC Compliance Exceptions. Thus, even if a Swap Entity and its counterparty enter into a swap that they intend to clear, but the swap is not of a type accepted for clearing on a DCO or Exempt DCO, such swap would not qualify for the ITBC Compliance Exceptions.

Third, the parties to the swap would be required to execute the swap with the present intention that the swap will be cleared contemporaneously with execution. The ITBC Compliance Exceptions would not be available for a swap that is entered bilaterally between two parties who then decide later that they would like to submit the swap for clearing. As discussed in the seventh condition below requiring submission of an ITBC Swap to a DCO or Exempt DCO as soon as practicable, a swap that is not intended to be cleared contemporaneously with execution means that there will be a trading relationship between the Swap Entity and its counterparty for some material period of time, which would necessitate compliance by the Swap Entity with the Commission's swap reporting, disclosure, and uncleared swap margin rules. While parties are free to enter into swaps that they intend to clear but are not cleared contemporaneously with execution, such swaps would not be ITBC Swaps and such swaps would not qualify for the ITBC Swap Compliance Exceptions.

Fourth, if the swap is intended to be cleared on a DCO, the Swap Entity and its counterparty would be required to either be clearing members of the DCO or have entered into an agreement with a clearing member of the DCO (*i.e.,* a futures commission merchant (''FCM'')) for clearing of swaps of the same type as the swap intended to be cleared. This condition is necessary to ensure that a swap that the Swap Entity and its counterparty intend to be cleared contemporaneously with execution can actually be cleared on the DCO. A Swap Entity or a counterparty that is not a clearing member of the DCO, or that has not entered into an agreement with an FCM that is a clearing member of the DCO covering the type of swap intended to be cleared, cannot actually clear the swap, no matter the intention of the parties to the swap.

Fifth, if the swap is intended to be cleared on an Exempt DCO, the Swap Entity and its counterparty would be required to be eligible to clear the swap on the Exempt DCO in accordance with the terms and conditions of the Exempt DCO's Order of Exemption from Registration issued by the Commission. Each Exempt DCO is exempt from registration pursuant to a unique order issued by the Commission, which may contain conditions and limitations to the Exempt DCO's ability to clear certain products for or on behalf of U.S. Persons pursuant to that order.[96] Most importantly, clearing members of some Exempt DCOs that are U.S. Persons (as defined in the exemption orders) may only clear swaps for themselves and those affiliates that meet the definition

[91] 17 CFR 23.401.

[92] 17 CFR 23.401.

[93] *See* 17 CFR 23.402–451 and 23.504.

[94] *See* Sections II.E through II.L *infra.*

[95] *See* Section I.B.1., *supra,* for a discussion of Exempt DCOs.

[96] *See* Section I.B.1., *supra,* n. 24–27, and accompanying text.

of ''proprietary account'' in § 1.3.[97] This eligibility condition is necessary to ensure that a swap that the Swap Entity and its counterparty intend to be cleared contemporaneously with execution can actually be cleared on the Exempt DCO. A Swap Entity or a counterparty that is not eligible to clear a swap on an Exempt DCO or has not entered into an agreement with a clearing member of the Exempt DCO covering the type of swap intended to be cleared cannot actually clear the swap, no matter the intention of the parties to the swap.

Sixth, the Swap Entity would be prohibited from requiring its counterparty or the counterparty's clearing member (*i.e.,* the counterparty's FCM) to enter into a breakage agreement or similar agreement as a condition to executing the swap intended to be cleared, but would not prohibit a Swap Entity from entering into a breakage or similar agreement at the request of a counterparty. Generally, this condition is meant to ensure that the parties to such swap are entering into the swap with the expectation that the swap will be cleared and would not enter into the swap absent such expectation. In the Commission's preliminary view, where a Swap Entity requires a breakage agreement pursuant to which parties agree in advance that if the swap does not clear then either the swap will be considered a bilateral swap between the parties or one party will owe a ''breakage'' payment to the other party to compensate such party for costs or damages incurred due to the failure to clear is evidence that the Swap Entity may not be entering into the swap with the requisite intention that the swap will be a cleared swap. The Commission has preliminarily determined that the same is not true where a breakage agreement is requested by the counterparty. In such case, the Commission believes it is more likely that the counterparty's main concern is that its intended position be established by the swap, whether cleared or uncleared. The Commission recognizes that because this condition would permit a counterparty to a Swap Entity to request a breakage agreement it is necessary to also modify the void *ab initio* condition from the form it was presented in CFTC Staff Letter 23–01, as detailed below in the discussion of condition eight.

Seventh, the Swap Entity would be required to ensure that the swap is submitted for clearing as quickly after execution as would be technologically practicable if fully automated systems were used. This proposed condition sets forth a standard for *submission* of the swap for clearing to a DCO or Exempt DCO. It would be in addition to the obligations in § 23.506 (which requires a Swap Entity to coordinate prompt and efficient swap transaction processing with the DCO) [98] and § 23.610 (which requires the Swap Entity to accept or reject each trade submitted to the DCO for clearing as quickly as would be technologically practicable if fully automated systems were used).[99] The Commission preliminarily expects this condition to ensure that a swap executed with the intention to be cleared is actually submitted for clearing as soon as possible after execution. The proposed ITBC Compliance Exceptions are based on the concept that there will be no contractual or trading relationship between a Swap Entity and its counterparty with respect to a swap intended to be cleared, so it is crucial that there be no delay between execution and submission to clearing. For example, a delay in clearing of even one business day implicates compliance by the Swap Entity with the Commission's swap reporting, disclosure, and uncleared swap margin rules.

Eighth, the Commission is proposing to require that if the swap is executed on a DCM, SEF, or Exempt SEF and is rejected from clearing, the swap must be void *ab initio.* This is a modification of the void *ab initio* conditions in CFTC Staff Letter 23–01, which stipulated that any ITBC Swap must be void *ab initio* if rejected from clearing, whether executed on a DCM, SEF, or Exempt SEF or executed bilaterally between a Swap Entity and its counterparty. This modification of the condition in CFTC Staff Letter 23–01 is necessitated by the Commission's recognition in condition six, discussed above, that a counterparty may request a breakage agreement from a Swap Entity while maintaining a prohibition on Swap Entities requiring breakage agreements as a condition to entering into a swap.

Compliance with this condition may be accomplished by executing the swap on a SEF or DCM where such SEF or DCM is required to have rules requiring swaps submitted for clearing to be void *ab initio* if not cleared.[100] However, if the swap is not executed on a SEF, DCM, or Exempt SEF that has rules requiring swaps submitted for clearing to be void *ab initio* if not cleared, then it would be incumbent on the Swap Entity to ensure that it has agreed with its counterparty that if such swap intended to be cleared fails to clear, the swap will be deemed by the parties to be void *ab initio.* That is, the swap will be deemed to have never been executed. The Commission recognizes that Swap Entities routinely enter into swaps with counterparties that are intended to be cleared (whether anonymously or otherwise) and therefore may have no pre-existing relationship with such counterparties where an agreement regarding the status of swaps rejected from clearing could be documented. However, the Commission preliminarily believes such an agreement can be made part of the terms of the swap agreed at execution and would not require a separate agreement between the parties (*i.e.,* the agreement that a swap rejected from clearing shall be void *ab initio* may be a term of the swap agreed at execution).

Question 10: The Commission intends that a counterparty to a Swap Entity could request a breakage agreement and thus a swap executed bilaterally between the parties that is rejected from clearing may not be void *ab initio.* For instance, where a counterparty intends to clear a swap but, if it fails to clear, still desires or needs the swap to exist to support a trading strategy, such counterparty may request that the Swap Entity enter into a breakage agreement that provides for an alternative to clearing if a swap fails to clear (*e.g.,* that the swap could become a bilateral swap between the Swap Entity and the counterparty). Thus, the Commission requests comment on whether the ITBC Swap definition conditions should be adjusted in some way to allow for a swap to survive a failure to clear pursuant to a breakage agreement requested by the counterparty (but not required by the Swap Entity)? The Commission notes that any such adjustment or alternative would have to account for compliance with the External Business Conduct Standards and the STRD Requirement.

Question 11: Is the definition of ITBC Swap as proposed appropriately drafted to capture the conditions for the ITBC Compliance Exceptions set forth in this Proposal?

Question 12: Should the definition be adjusted in any manner to better capture the Commission's intentions?

Question 13: Should any prong of the definition be adjusted or eliminated? Why or why not?

[97] *See* 17 CFR 1.3.

[98] 17 CFR 23.506.

[99] 17 CFR 23.610.

[100] *See* CFTC Staff Guidance Letter (Sept. 26, 2013), RE: Staff Guidance on Swaps Straight-Through-Processing, at 6 (stating that the Commission's Division of Market Oversight and Division of Clearing and Risk expect DCMs and SEFs to have rules stating that trades that are rejected from clearing are void *ab initio), available at https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/stpguidance.pdf.*

2. Definition of A–ITBC Swap

The Commission proposes to add a new definition of ''A–ITBC Swap'' to the definitions in § 23.401 [101] applicable to subpart H of part 23 of the Commission's regulations. ''A–ITBC Swap'' would define an ''Anonymous ITBC Swap'' to be an ITBC Swap where the Swap Entity does not know the identity of the counterparty prior to execution of the swap. The proposed definition further explains that an A–ITBC Swap may be executed on or pursuant to the rules of a SEF, DCM, or Exempt SEF, or may be executed bilaterally between a Swap Entity and a counterparty (such as where a Swap Entity enters into a ''block trade'' with an asset manager that intends to allocate portions of a swap to various funds or accounts under management post-clearing). The Commission preliminarily believes a definition of ''A–ITBC Swap'' will be helpful to distinguish ITBC Swaps that are executed in circumstances where the Swap Entity knows the identity of its counterparty prior to execution from those that it does not for purposes of application of the proposed ITBC Compliance Exceptions.

Question 14: The Commission requests comment on whether the definition of A–ITBC Swap is accurate and fit for purpose or whether it should be adjusted or eliminated in favor of some other formulation?

3. Definition of Covered Transaction

The Commission proposes to add a new definition of ''Covered Transaction'' to the definitions in § 23.401 [102] applicable to subpart H of part 23 of the Commission's regulations. The definition of Covered Transaction is intended to encompass all transaction types that may be subject to a Prime Broker Arrangement (defined and explained *infra*). As such, the proposed Covered Transaction definition encompasses swaps, as defined in section 1a(47) of the CEA,[103] but excludes swaps that are subject to the Commission's swap clearing requirement in section 2(h)(1)(A) of the CEA [104] and part 50 of the Commission's regulations.[105] In the Commission's preliminary understanding, swaps subject to Prime Broker Arrangements are exclusively uncleared swaps. The proposed definition of Covered Transactions would also include Exempt FX Transactions, which, as explained above, are not swaps (having been excluded from such definition by the Treasury Determination), but are nonetheless subject to the External Business Conduct Standards if entered into by a Swap Entity with a counterparty that is not a Swap Entity.[106] The Commission preliminarily intends for the definition of Covered Transaction to be substantially the same as the definition of such term set forth CFTC Staff Letters 13–11 and 19–06.

Question 15: Does the proposed definition of Covered Transaction adequately capture the universe of transactions that are currently subject to swap Prime Broker Arrangements, as defined in this Proposal?

Question 16: Are there types of transactions falling under the Commission's jurisdiction that should be added to the definition of Covered Transaction or are there transaction types included in such definition that should be removed?

Question 17: Should the definition of Covered Transaction include a catch-all to automatically include types of transactions that may in the future become subject to Commission jurisdiction?

4. Definition of Prime Broker Arrangement

The Commission proposes to add a new definition of ''Prime Broker Arrangement'' to the definitions in § 23.401 [107] applicable to subpart H of part 23 of the Commission's regulations.[108] The proposed definition of Prime Broker Arrangement is intended to universally encompass the various agreements and arrangements that constitute the credit intermediation service provided by a PB to their swap PB customers that allows such PB customers to seek prices on Covered Transactions from a variety of counterparties while only facing the PB for its ongoing obligations under Covered Transactions and allowing for collateral netting, but is also meant to recognize the roles of other parties, including, without limitation, executing dealers, intermediaries, and other PBs.

A Prime Broker Arrangement as proposed to be defined in § 23.401 would include at least one PB/SD and two or more other parties evidenced by a written agreement or agreements.[109] Pursuant to such written agreements, the PB/SD, subject to any applicable pre-conditions, would be contractually obligated to enter into a Covered Transaction (as defined in § 23.401 and explained above) that constitutes a PB trigger transaction (the ''Trigger Transaction'') [110] with a counterparty that may or may not be a Swap Entity, may be a PB customer of the PB/SD, an executing dealer, or another PB (the ''Trigger Counterparty'') and for which the PB/SD has not determined the price. The execution of the Trigger Transaction must also obligate the PB/SD to enter into a second Covered Transaction (the ''Mirror Transaction'') [111] with another counterparty that is not the Trigger Counterparty (the ''Mirror Counterparty''), which is a PB customer of the PB/SD and to whom the PB/SD owes regulatory obligations under the External Business Conduct Standards. The terms and price of the Mirror Transaction, from the perspective of the PB/SD, must be substantially equal but opposite to the terms and price of the Trigger Transaction.

The proposed ''substantially equal but opposite'' requirement is a recognition by the Commission that the terms and the price of a Mirror Transaction may be adjusted from those of a Trigger Transaction to allow for a spread or fee to be paid to the PB/SD, (or to an intermediary that has arranged the transaction), to compensate the PB/SD or the intermediary for providing the credit intermediation service evidenced by the Prime Broker Arrangement or the intermediary's services. The Commission also recognizes that the designation of a Trigger Transaction and a Mirror Transaction depends on the perspective of the parties to the transaction. For example, where two PBs are involved, the Mirror Transaction for one PB may be a Trigger Transaction for the second PB. The Commission is also aware that a single Trigger Transaction may trigger a string of transactions between various PBs and their PB customers, some of which could be both Trigger Transactions and Mirror Transactions.

The intention of the proposed definition of Prime Broker Arrangement is to capture the essence of the concept of credit intermediation through swap PB arrangements as it relates to compliance with the External Business Conduct Standards. In the Commission's preliminary view, such

[101] 17 CFR 23.401.

[102] *Id.*

[103] 7 U.S.C. 1a(47).

[104] 7 U.S.C. 2(h)(1)(A).

[105] 17 CFR part 50; 17 CFR 50.1–50.79.

[106] *See* Section I.B.2., *supra,* n. 40–42 and accompanying text.

[107] 17 CFR 23.401.

[108] 17 CFR part 23, subpart H; 17 CFR 23.400–23.451.

[109] The Commission preliminarily believes that MSPs do not and would not act as PBs.

[110] *See* § 43.2(a) for a definition of ''trigger swap'' used in the context of the Commission's swap reporting rules. 17 CFR 43.2(a).

[111] *See* § 43.2(a) for a definition of ''mirror swap'' used in the context of the Commission's swap reporting rules. 17 CFR 43.2(a).

essence lies in the fact that a PB/SD, due to its contractual obligations under the various forms of Prime Broker Arrangements, will, when certain specified pre-conditions are met, be contractually obligated to enter into a Covered Transaction for which it has not determined the price and simultaneously be obligated to enter into a substantially equal but opposite Covered Transaction, the price of which is determined based on the price of the first transaction. The Commission understands that where a PB/SD is entering into transactions with non-Swap Entity counterparties for which it has not determined the price prior to execution, it cannot comply with the price and PTMMM disclosure requirements of the External Business Conduct Standards.

Question 18: Does the proposed definition of Prime Broker Arrangement adequately encompass the concept of swap PB arrangements as a credit intermediation service provided by PB/SDs? Why or why not?

Question 19: Please comment on any adjustment or addition to the proposed definition of Prime Broker Arrangement that would better meet the Commission's intentions.

5. Definition of Qualified Prime Broker Arrangement

The Commission proposes to add a new definition of ''Qualified Prime Broker Arrangement'' to the definitions in § 23.401 [112] applicable to subpart H of part 23 of the Commission's regulations.[113] The definition of Qualified Prime Broker Arrangement incorporates conditions that, if met by a PB/SD's Prime Broker Arrangement with a particular non-Swap Entity counterparty (each a ''PB Counterparty''), would permit the PB/SD to qualify for an exception to the price disclosure requirement in § 23.431(a)(3) [114] with respect to Covered Transactions with such PB Counterparty. Depending on whether the Commission determines to eliminate the PTMMM disclosure requirement (as discussed above), meeting the conditions to the definition of Qualified Prime Broker Arrangement would also permit a PB/SD to qualify for an exception to the PTMMM disclosure requirement in § 23.431(a)(3).[115] Such proposed conditions are explained below.

The Commission has preliminarily determined that providing an exception from the price disclosure obligation (and, if necessary, the PTMMM disclosure obligation) of an SD when entering into a swap pursuant to a Qualified Prime Broker Arrangement is a reasonable accommodation to the long-standing prime broker arrangements prevalent in the swaps market prior to promulgation of the External Business Conduct Standards. The Commission's view is based on the fact that Prime Broker Arrangements are entered into by swap counterparties seeking certain benefits, among which are: (1) the ability of swap counterparties to seek favorable pricing from a wide variety of market participants, rather than just a handful of SDs with which they may have trading relationships; (2) the credit intermediation provided by PBs that permits price shopping by swap counterparties but consolidates credit risk of the swap counterparty with only their PB(s); and (3) the consolidation of credit risk with only their PB(s) that permits for more efficient use of collateral through netting of positions with only their PB(s). In the Commission's preliminary view, an insistence on price disclosure (and, if necessary, a PTMMM disclosure) by an SD acting as a PB, a requirement that was intended to provide a benefit to non-Swap Entity counterparties, would undermine that very benefit and eliminate all of the other benefits of Prime Broker Arrangements to swap counterparties, forcing such counterparties to trade swaps only with a handful of SDs with the concomitant loss of competitive pricing. Thus, the Commission has determined to propose the following conditions for a Qualified Prime Broker Arrangement that would qualify for an exception to the price disclosure (and, if necessary, the PTMMM disclosure) requirement.

First, to qualify as a Qualified Prime Broker Arrangement, the Prime Broker Arrangement between a PB/SD and its PB Counterparty would be required to contain an agreement in writing on the type, parameters, and limits of each potential Covered Transaction that may be entered into by the PB Counterparty with the PB/SD pursuant to the Prime Broker Arrangement (each, a ''Permitted PB Transaction''). This proposed condition would require the PB/SD to:

(1) Clearly delineate the types of transactions that the PB/SD will be obligated to enter into with the PB Counterparty pursuant to the Prime Broker Arrangement;

(2) To list all of the pre-conditions to the PB/SD's obligation to enter into each type of Permitted PB Transaction;

(3) To list all acceptable terms for each type of Permitted PB Transaction (such as tenor, payment terms, payment calculation terms, termination events, rate fallbacks, etc.); and

(4) To set limits (credit, market, trade volume, etc.) for each type of Permitted PB Transaction.

The purpose of this proposed condition is to ensure that, before execution of any Covered Transaction, the parties will know exactly what the PB/SD is required to execute with the PB Counterparty, thereby making compliance with the other conditions of the Qualified Prime Broker Arrangement definition possible. A PB/SD and its PB Counterparty would, of course, be free to update or adjust the parameters of Permitted PB Transactions at any time by agreeing to an amendment to their Prime Broker Arrangement.

Second, the PB/SD, now knowing the types and terms of all possible Covered Transactions that may be executed with the PB Counterparty pursuant to their Prime Broker Arrangement, would be required to provide the PB Counterparty with all disclosures that would be necessary for the Prime Broker to comply with § 23.431(a) [116] other than the pre-trade disclosure of the price of any Permitted PB Transaction (and the PTMMM, if the Commission determines not to eliminate the PTMMM Requirement). If the Commission determines not to eliminate the scenario analysis requirement in § 23.431(b) [117] (as discussed above), the PB/SD would also be required to provide a scenario analysis of any Permitted PB Transaction if requested by the PB Counterparty (the §§ 23.431(a) and (b) required disclosures and, if requested, the scenario analysis, are hereinafter referred to as the ''Regulatory Disclosures''). These Regulatory Disclosures would include material information concerning a Permitted PB Transaction provided in a manner reasonably designed to allow the PB Counterparty to assess:

(1) The material risks of a particular type of Permitted PB Transaction, which may include market, credit, liquidity, foreign currency, legal, operational, and any other applicable risks;

(2) The material characteristics of a particular type of Permitted PB Transaction, which would include the

[112] 17 CFR 23.401.

[113] 17 CFR part 23, subpart H; 17 CFR 23.400–23.451.

[114] 17 CFR 23.431(a)(3).

[115] *Id.; see* Section II.A., *supra,* for the Commission's discussion of its proposed elimination of the PTMMM.

[116] 17 CFR 23.431(a).

[117] 17 CFR 23.431(b); *see* Section II.B., *supra,* for the Commission's discussion of its proposed elimination of the Scenario Analysis Requirement in § 23.431(b).

material economic terms of the Permitted PB Transaction, the terms relating to the operation of the Permitted PB Transaction, and the rights and obligations of the parties during the term of the Permitted PB Transaction; and

(3) The material incentives and conflicts of interest that the PB/SD may have in connection with a particular type of Permitted PB Transaction, which would include any compensation or other incentive from any source other than the PB Counterparty that the PB/SD may receive in connection with a particular type of Permitted PB Transaction.[118]

As proposed, the disclosure obligation of the PB/SD under this second condition would be limited to the PB/SD's knowledge and reasonable belief at the time of disclosure. The Commission would consider a PB/SD to have met this condition if such disclosure is substantially the same as its disclosures to non-PB Counterparties for the same types of Covered Transactions, so long as such disclosures to non-PB Counterparties are not found deficient. The Commission notes that this condition would impose an on-going disclosure requirement that must be updated to the extent the PB/SD becomes aware of information that would make a previous disclosure incorrect, incomplete, or misleading.

Third, the PB/SD would be required to receive an acknowledgement from a PB Counterparty regarding various disclosures. The acknowledgement would state that: (1) the PB Counterparty has received the Regulatory Disclosures; and (2) the PB/SD has clarified or supplemented the Regulatory Disclosures as requested by the PB Counterparty in its sole discretion. Furthermore, the acknowledgement would provide that the PB/SD has no obligation to provide additional disclosures pursuant to section 4s(h)(3)(B)(i) of the CEA [119] or § 23.431(a) or (b) with respect to a Permitted PB Transactions so long as the PB/SD is not aware of information that would make the disclosure incorrect, incomplete, or misleading. PB Counterparties would be permitted to request updated disclosures in writing prior to execution. This proposed condition is not intended to release the PB/SD from its obligation to update the Regulatory Disclosures as necessary to meet the standard of the PB/SD's ''knowledge and reasonable belief.'' Rather, the purpose of the proposed condition is to make clear that once the PB/SD has met such standard and given the PB Counterparty an opportunity to request clarifications or supplements, there is a bright line drawn to show the end of the PB/SDs obligations for disclosure under § 23.431(a) and (b).[120]

Finally, the PB/SD would be required to make and keep a record of the Prime Broker Arrangement and the required acknowledgement from its PB Counterparty until the expiration or termination of all Permitted PB Transactions executed pursuant to the Prime Broker Arrangement, and for five years thereafter, in accordance with the SD recordkeeping rule, § 23.203.[121]

The Commission acknowledges that the proposed Qualified Prime Broker Arrangement set forth in this Proposal differs significantly from the MPD no-action position set forth in CFTC Staff Letter 13–11. The no-action position in CFTC Staff Letter 13–11 was conditioned, in part, on a PB/SD allocating its obligations under certain External Business Conduct Standards to another SD, effectively limiting some part of the prime brokerage market in swaps to participation only by SDs registered with the Commission.[122] The Commission preliminarily does not believe that allocation of regulatory responsibilities from one SD, which is responsible for compliance with such responsibilities, to another SD appropriately serves the purposes of the External Business Conduct Standards, which were mandated by the Dodd-Frank Act to provide counterparties with protections and information not previously required. In the Commission's preliminary view, the SD that is the actual counterparty to a swap with a PB Counterparty has the responsibility for performance of the swap and has the ongoing PB and trading relationship with the PB counterparty, and is therefore best incentivized to perform its regulatory responsibilities in compliance with the Commission's rules. The Commission notes that, absent the MPD no-action position, which was issued just days before compliance with the External Business Conduct Standards was required, existing Prime Broker Arrangements would likely have been significantly disrupted. However, the stop-gap nature of the MPD no-action position regarding allocation of responsibilities between SDs is less than ideal when the Commission is considering a permanent solution to the relationship between Prime Broker Arrangements and the External Business Conduct Standards. Thus, the Commission has preliminarily determined not to permit the allocation of regulatory responsibilities from one SD to another SD.

However, the Commission notes that another part of the no-action position set forth in CFTC Staff Letter 13–11, applicable only to Exempt FX Transactions, was not conditioned on an allocation of External Business Conduct Standard obligations from one SD to another, but rather was predicated on MPD's view that the only obligations impossible or impracticable for a PB/SD to perform in the context of swap prime brokerage are the obligations to provide a pre-trade price and a PTMMM.[123] That is the view that the Commission is proposing to adopt in this Proposal. In the Commission's preliminary view, a PB/SD that has entered into appropriate swap trading relationship documentation with a potential PB Counterparty in accordance with § 23.504 [124] and has entered into a Qualified Prime Broker Arrangement in accordance with this Proposal would only be unable to provide a pre-trade price (and, if the Commission determines not to eliminate it as proposed, a PTMMM) to a PB Counterparty prior to entering into a Permitted PB Transaction as described in this Proposal.

Question 20: The Commission requests comment on all aspects of the proposed definition of Qualified Prime Broker Arrangement.

Question 21: Is it possible for a PB/SD and a PB Counterparty to agree on the type, terms, and limits of each Covered Transaction that will be permitted to be executed under a Qualified Prime Broker Arrangement? Why or why not?

Question 22: Would the requirement that the type and terms of Permitted PB Transactions be clearly delineated unduly limit the range of transactions that would otherwise be permitted under Prime Broker Arrangements? Please provide examples of existing Prime Broker Arrangements that allow for transaction types and terms that could not be adequately delineated in compliance with the proposed definition of Qualified Prime Broker Arrangement.

Question 23: Is it possible to modify the terms of the definition of Qualified Prime Broker Arrangement in a way that would allow the PB/SD and its PB Counterparties to agree on the range and terms of Permitted PB Transactions such that a PB/SD could fulfill its disclosure obligations under § 23.431 (other than

[118] *See* § 23.431(a), 17 CFR 23.431.

[119] 7 U.S.C. 6s(h)(3)(B)(i).

[120] 17 CFR 23.431(a) and (b).

[121] 17 CFR 23.203.

[122] CFTC Staff Letter 13–11 at 5.

[123] *Id.* at 9–10.

[124] 17 CFR 23.504.

the pre-trade price and, if required, the PTMMM)?

Question 24: Would the acknowledgement requirement as proposed provide SD/PB counterparties with adequate notice that an SD/PB has completed its disclosure requirements under § 23.431? [125]

Question 25: Please note that, as explained above, the Commission does not intend to adopt a rule that would permit allocation of compliance obligations under the External Business Conduct Standards between SDs in the prime brokerage context, nor does it intend to permit the MPD no-action position set forth in CFTC Staff Letters 13–11 and 19–06 to continue indefinitely. Thus, if commenters find the Qualified Prime Broker Arrangement concept outlined in the Proposal to be unworkable, please provide a detailed alternative arrangement for the Commission's consideration.

E. Proposed Amendments to § 23.402

In general, § 23.402 (General provisions) requires or allows Swap Entities to (a) have written policies and procedures reasonably designed to ensure compliance with the External Business Conduct Standards; (b) obtain ''know-your-counterparty'' (''KYC'') information about their swap counterparties; (c) reasonably rely on representations obtained from their swap counterparties; (d) agree with counterparties on how information required to be obtained or disclosed to swap counterparties will be communicated; and (e) comply with recordkeeping requirements.[126]

The Commission proposes to amend § 23.402 by adding a new subparagraph (h) thereto that would state ''Paragraph (b) and (c) of this section shall not apply to an ITBC Swap.'' This proposed amendment would make clear that because ITBC Swaps are executed with counterparties with the intention to be cleared (and are generally void *ab initio* if such swaps fail to clear), there is no ongoing relationship between the Swap Entity and the counterparties for which the KYC or true name and owner provisions of § 23.402 serve a regulatory purpose. Specifically, because ITBC Swaps, once cleared, result in a new swap between the DCO or Exempt DCO and the swap counterparty, the Commission preliminarily believes that it may reasonably rely on the rules of such clearinghouses and the regulations applicable to FCMs to ensure that swap counterparties are adequately vetted for KYC purposes.[127] Additionally, because some ITBC Swaps may be A–ITBC Swaps, Swap Entities will not know, and may never know, the identity of the swap counterparty, making it impossible to comply with the requirements in subparagraphs (b) and (c) of § 23.402 that the Commission proposes to be disapplied.

Question 26: The Commission requests comment on all aspects of the proposed amendment to § 23.402.

F. Proposed Amendments to § 23.430

In general, § 23.430 (Verification of counterparty eligibility) requires Swap Entities to (a) verify the ECP status of each swap counterparty; (b) verify whether a swap counterparty is a Special Entity (as defined in § 23.401); and (c) notify swap counterparties of any right to elect to be a Special Entity available under the definition of Special Entity in § 23.401(c)(6).

Subparagraph (e) of § 23.430 provides that these verifications and notice requirements will not apply to swaps initiated on a DCM or, where the Swap Entity does not know the identity of the counterparty prior to execution, a SEF.[128]

The Commission proposes to amend § 23.430(e) by adding a further provision stating that the verification and notice requirements will not apply to A–ITBC Swaps or to ITBC Swaps that are initiated on a DCM, SEF, or Exempt SEF. This proposed amendment would make clear that because ITBC Swaps are executed with counterparties with the intention to be cleared (and are generally void *ab initio* if such swaps fail to clear), there is no ongoing relationship between the relevant Swap Entity and the counterparties. Like for KYC purposes discussed above, the Commission preliminarily believes that it may reasonably rely on the rules of relevant clearinghouses, SEFs, and Exempt SEFs and the DCO rules applicable to FCMs as clearing members to ensure that swap counterparties are adequately vetted for ECP status.[129]

Additionally, with regard to A–ITBC Swaps, Swap Entities will not know, and may never know, the identity of the swap counterparty, making it impossible to comply with the verification and notification requirements of § 23.430.

Question 27: The Commission requests comment on all aspects of the proposed amendment to § 23.430.

G. Proposed Amendments to § 23.431

In general, § 23.431 requires Swap Entities to (a) disclose to non-Swap Entity counterparties the material risks, characteristics, incentives, and conflicts of interest of any swap prior to entering into the swap; (b) provide the pre-trade price and the PTMMM of a swap to a non-Swap Entity counterparty prior to entering into the swap; (c) provide a scenario analysis of a swap if requested by a non-Swap Entity counterparty prior to entering into the swap; (d) provide non-Swap Entity counterparties that enter into cleared swaps with the Swap Entity with notice of the counterparty's right to receive, upon request, the daily mark for such cleared swaps from the appropriate DCO; and (e) provide the daily mark of an executed uncleared swap to a non-Swap Entity counterparty to such swap as of each business day from the execution of the swap to its expiration or termination.[130]

Subparagraph (c) of § 23.431 provides that the pre-trade disclosure obligations of §§ 23.431(a) and (b) will not apply to transactions that are initiated on a DCM or SEF where the Swap Entity does not know the identity of the counterparty prior to execution.[131]

The Commission proposes to amend § 23.431 by:

(1) Eliminating the PTMMM requirement as discussed in Section II.A. above;

(2) Eliminating the Scenario Analysis Requirement as discussed in Section II.B. above;

(3) Clarifying that a Swap Entity is not required to disclose to its counterparty information relating to the material characteristics of a particular swap to the extent that such characteristics are reflected in transaction documents that the counterparty has been provided prior to entering into the swap; [132]

(4) Expanding the exception for pre-trade disclosures in subparagraph (c) to include (i) swaps executed

[125] 17 CFR 23.431.

[126] *See* 17 CFR 23.402.

[127] *See* 31 CFR part 1026 and 17 CFR 42.2, which together require FCMs to establish customer identification and anti-money laundering programs. *See also* CME Clearing Member Application, available at: *https://www.cmegroup.com/company/membership/files/application-and-clearing-agreement-writeable.pdf.*

[128] *See* 17 CFR 23.430.

[129] The Commission notes that, pursuant to section 2(e) of the CEA, non-ECPs may execute swaps that are listed on a DCM, but not on a SEF, *see* 7 U.S.C. 2(e). Commission regulation 37.702, 17 CFR 37.702, requires a SEF to verify that its members are ECPs. Similarly, CME Rule 90005.C requires Clearing Members (*e.g.,* FCMs) to obtain a representation from each Participant for which it provides clearing services that such Participant is, and will be, an ECP at all times clearing services are provided.

[130] *See* 17 CFR 23.431.

[131] 17 CFR 23.431(c).

[132] For the avoidance of doubt, this exclusion includes only those material characteristics of a particular swap that are expressly reflected in such transaction documentation and not, for example, the material risks or conflicts of interest that the particular swap may present.

anonymously on an Exempt SEF; (ii) A–ITBC Swaps; (iii) ITBC Swaps executed on a DCM, SEF, or Exempt SEF; and (iv) Permitted PB Transactions entered into pursuant to a Qualified Prime Broker Arrangement, as discussed in Section II.D.5. above;

(5) Adding a new subparagraph (2) to § 23.431(d) (Daily mark) that would disapply the notice required to be given to cleared swap counterparties of the right to receive a daily mark from the clearing DCO for ITBC Swaps executed on a DCM, SEF or Exempt SEF and for any A–ITBC Swap;

(6) Revising the uncleared daily mark requirement in § 23.431(d)(2) (renumbered as proposed to be (d)(3)) as discussed in Section II.C. above; and

(7) Revising § 23.431(d)(3)(ii) (renumbered as proposed to be (d)(4)(ii)) to make clear that a Swap Entity may disclose to its non-Swap Entity counterparties that the daily mark provided to the counterparty each business day for existing swaps is an estimate only.

These proposed amendments reflect the Commission's preliminary view that:

(1) ITBC Swaps (including A–ITBC Swaps) are only swaps executed by a counterparty with the present intention to clear the swap and thus the counterparty has no need to receive notice of a right to receive a daily mark from the Swap Entity because the counterparty will face a clearing house;

(2) Swap Entities do not know the identity of their counterparties to A–ITBC Swaps prior to execution;

(3) Swaps may be executed by Swap Entities on or pursuant to the rules of Exempt SEFs and may clear swaps, if eligible, on Exempt DCOs;

(4) Swaps accepted for clearing on a DCO or Exempt DCO (especially those also listed for trading on DCM, SEF, or Exempt SEF) are sufficiently standardized and information about the material risks and characteristics of such swaps are available from the DCO or Exempt DCO (and/or a DCM, SEF, or Exempt SEF, if traded there); and

(5) The disclosure of information relating to material characteristics of a particular swap that are reflected in the transaction documentation for that swap would be duplicative.

Question 28: The Commission requests comment on all aspects of the proposed amendment to § 23.431.

H. Proposed Amendments to § 23.432

In general, § 23.432 requires Swap Entities to provide notice to their non-Swap Entity counterparties that the counterparty has the right to elect to clear a swap executed with the Swap Entity (assuming the swap is eligible for clearing on a DCO) and has the right to choose the DCO on which the swap will be cleared, if eligible.[133]

The Commission proposes to amend §§ 23.432(a) and (b) by making clear that the notice must be given prior to entering into a swap. The Commission further proposes to amend § 23.432 by adding a new subparagraph (c) that would disapply the notice requirements of subparagraphs (a) and (b) to ITBC Swaps executed on a DCM, SEF, or Exempt SEF and to all A–ITBC Swaps. As discussed above, this proposed amendment reflects the Commission's preliminary view that: (1) ITBC Swaps are only those where the counterparty has the present intention to clear the swap prior to execution and thus has no need to receive notice of a right to clear the swap or choose the clearinghouse; and (2) Swap Entities do not know the identity of their counterparties to A–ITBC Swaps prior to execution.

Question 29: The Commission requests comment on all aspects of the proposed amendment to § 23.432.

I. Proposed Amendments to § 23.434

In general, § 23.434 requires SDs that recommend a swap or a swap trading strategy to a non-Swap Entity counterparty to have a reasonable basis to believe that such swap or swap trading strategy is suitable for the counterparty after engaging in reasonable diligence to ascertain the counterparty's investment strategy, trading objective, and ability to absorb potential losses.[134]

However, § 23.434(b) provides a safe harbor, which, if complied with, deems the SD to have a reasonable basis to believe that the recommended swap or swap trading strategy is suitable for the counterparty.[135] The safe-harbor requires the SD to obtain a representation from its counterparty stating that the counterparty has complied in good faith with written policies and procedures that are reasonably designed to ensure that the persons responsible for evaluating any recommendation from an SD, and making trading decisions on behalf of the counterparty, are capable of doing so. This safe-harbor representation with respect to SD swap recommendations was incorporated into an industry-wide ISDA protocol in 2012.[136] By adherence to the ISDA protocol, counterparties to SDs incorporated the safe-harbor representation into the swap trading relationship documentation that such counterparties have entered into with each other entity that has also adhered to the ISDA protocol. To date, over 32,000 entities have adhered to the ISDA protocol.[137] Accordingly, the Commission preliminarily believes that all or nearly all SD counterparties have made the representation that they will independently evaluate any recommendation received from an SD and are capable of doing so.

The Commission proposes to amend § 23.434 to add a new subparagraph (d) that would provide an exception from the requirements of § 23.434 for A–ITBC Swaps and for ITBC Swaps executed by an SD with a non-Swap Entity on a DCM, SEF, or Exempt SEF. As stated above, the Commission has preliminarily determined that swaps listed for trading on a DCM, SEF, or Exempt SEF, and accepted for clearing on a DCO or Exempt DCO, are sufficiently standardized, and sufficient information about the pricing and material risks and characteristics of such swaps are available from the DCM, SEF, or Exempt SEF and/or the DCO or Exempt DCO. Because (i) this information is available to counterparties from sources other than an SD counterparty; (ii) ITBC Swap counterparties have no on-going relationship with an SD counterparty with respect to ITBC Swaps; and (iii) the Commission preliminarily believes that all or nearly all ITBC Swap counterparties have represented to any potential SD counterparty that they are capable of independently evaluating any recommendation from the SD, the Commission has preliminarily determined that ITBC Swap counterparties will likely look to SDs only for competitive pricing. Thus, the Commission preliminarily believes that requiring an SD to have a reasonable basis to believe that a recommended swap or swap trading strategy is suitable for its ITBC Swap counterparties is unnecessary where adequate information about the risks and characteristic of an ITBC Swap is available to the counterparty from sources other than the SD and the suitability analysis otherwise required is a hinderance to the efficient trading of ITBC Swaps for both the SD and its counterparty. Further, SDs that are counterparties to A–ITBC swaps do not know, and may never know, the identity of their counterparties, making a suitability analysis impossible.

The Commission considered but rejected the alternative of not proposing

[133] *See* 17 CFR 23.432.

[134] *See* 17 CFR 23.434.

[135] *See* 17 CFR 23.434(b).

[136] *See* ISDA August 2012 DF Protocol, available at *https://www.isda.org/protocol/isda-august-2012-df-protocol/*.

[137] *See* list of Adhering Parties, *id.*

an exception from the requirements of § 23.434 for ITBC Swaps, reasoning that there is no need for such exception if an SD simply refrains from recommending a swap or swap trading strategy to ITBC Swap counterparties. If an SD does not recommend a swap or swap trading strategy to an ITBC Swap counterparty, then there is no need to comply with the requirement in § 23.434(a)(2) that the SD have a reasonable basis to believe that the recommended swap or swap trading strategy is suitable for such counterparty. The Commission has preliminarily determined, however, that the tremendous uptake of adherence to the ISDA protocol discussed above is persuasive evidence that SDs are not willing to enter into swaps with counterparties that have not made the representation necessary for an SD to rely on the safe-harbor in § 23.434(b). The Commission preliminarily understands that SDs are unwilling to take the risk that something communicated during swap negotiations will be seen as providing a recommendation despite the best efforts or policies and procedures of the SD designed to prevent sales and trading personnel from making any recommendation to swap counterparties. Thus, the Commission is concerned that not providing an exception from the requirements of § 23.434 would likely result in SDs refusing to enter into swaps with ITBC Swap counterparties from whom they have not received the safe-harbor representation. Such potential decrease in available ITBC Swap counterparties would frustrate the purposes of this aspect of the Proposal.

Question 30: The Commission requests comment on all aspects of the proposed amendment to § 23.434.

Question 31: The Commission requests comment on whether the Commission's reasoning for rejecting the alternative of not providing an exception from the requirements § 23.434 for ITBC Swaps is reasonable or whether the Commission should reconsider such alternative.

J. Proposed Amendments to §§ 23.440 and 23.450

In general, §§ 23.440 and 23.450 concern requirements that SDs must comply with when acting as advisors to, and Swap Entities must comply with when entering into swaps with, Special Entities.[138] ''Special Entity'' is defined in § 23.401(c) [139] to be (1) a Federal agency; (2) a State, State agency, city, county, municipality, other political subdivision of a State, or any instrumentality, department, or a corporation of or established by a State or political subdivision of a State; (3) any employee benefit plan subject to Title I of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002); (4) any governmental plan, as defined in Section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002); (5) any endowment, including an endowment that is an organization described in Section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)); or (6) any employee benefit plan defined in Section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002), not otherwise defined as a Special Entity, that elects to be a Special Entity by notifying a swap entity of its election prior to entering into a swap with the particular swap entity.

Pursuant to §§ 23.440 and 23.450,[140] Swap Entities that enter into swaps with, or that advise, Special Entities owe heightened duties to the Special Entity intended to ensure that swaps or swap trading strategies recommended by an SD to the Special Entity are in the best interests of the Special Entity; [141] or that, in acting as a counterparty to the Special Entity, the Swap Entity has a reasonable basis to believe that the Special Entity has a representative that satisfies the requirements of § 23.450(b) (a ''Qualified Independent Representative'' or ''QIR'').[142]

However, each of §§ 23.440 and 23.450 provides a safe harbor, which, if complied with, deems the SD to not be acting as an advisor to a Special Entity and/or have a reasonable basis to believe that the Special Entity has a QIR.[143] The safe-harbors require the SD to obtain certain representations from its Special Entity counterparties that were incorporated into an industry-wide ISDA protocol in 2012.[144] By adherence to the ISDA protocol, Special Entity counterparties to SDs incorporated the safe-harbor representations into the swap trading relationship documentation that such counterparties may have with each other entity that has also adhered to the ISDA protocol. As noted above, over 32,000 entities have adhered to the ISDA protocol,[145] so the Commission preliminarily believes that all or nearly all SD Special Entity counterparties have made the representations that allow SDs to rely on the safe-harbors under §§ 23.440 and 23.450.

The Commission proposes to amend § 23.440 to add a new subparagraph (e), which would provide an exception from the requirements of § 23.440 in two circumstances. First, the proposed amendment would provide an exception from the requirements of § 23.440 for A–ITBC Swaps (*i.e.,* ITBC Swaps executed with a Special Entity whose identity is not known to an SD prior to execution). Second, the proposed amendment would provide an exception from the requirements of § 23.440 only for ITBC Swaps initiated by a Special Entity on a DCM, SEF, or Exempt SEF whose identity is known to an SD prior to execution, but whose status as a Special Entity is not known to the SD.

Section 4s(h)(4)(B) of the CEA provides that an SD that acts as an advisor to a Special Entity shall have a duty to act in the best interests of the Special Entity.[146] However, section 4s(h)(7) of the CEA provides an exception to this duty where a swap is initiated by a Special Entity on a DCM or a SEF and the SD does not know the identity of the counterparty to the transaction.[147] The Commission believes that this exception reflects Congressional intent to facilitate trading of cleared swaps on DCMs and SEFs in keeping with the G20 Leaders' Statement from the 2009 Pittsburgh Summit, committing its members to improving the OTC derivatives markets by, among other things, ensuring that standardized derivative contracts are traded on exchanges or electronic trading platforms, where appropriate, and cleared through central counterparties. Although section 4s(h)(7) of the CEA does not refer to clearing, it would be almost impossible for an SD to comply with its post-trade risk management and regulatory obligations for uncleared swaps if it does not know the identity of its counterparty prior to execution.[148] For example, the SD would need to ensure that it had appropriate documentation with the counterparty in place to comply with the STRD Requirement [149]

[138] *See* 17 CFR 23.440 and 450.

[139] 17 CFR 23.401(c).

[140] 17 CFR 23.440 and 23.450.

[141] *See* 17 CFR 23.440(c).

[142] *See* 17 CFR 23.450(b).

[143] *See* 17 CFR 23.440(b) and 17 CFR 23.450(d).

[144] *See* ISDA August 2012 DF Protocol, available at *https://www.isda.org/protocol/isda-august-2012-df-protocol/.*

[145] *See* list of Adhering Parties, *id.*

[146] *See* 7 U.S.C. 6s(h)(4)(B).

[147] *See* 7 U.S.C. 6s(h)(7).

[148] In addition to needing to know the identity of the counterparty to comply with regulatory requirements, an SD would not likely execute a swap on an anonymous basis unless the swap is intended to be cleared because the SD would not know the credit quality of the anonymous counterparty and therefore would not know how to price the swap or set other material terms for the uncleared, bilateral swap, such as margin levels or default provisions.

[149] Commission regulation 23.504(a)(2), 17 CFR 23.504(a)(2), requires an SD to execute

and appropriate documentation and information about its counterparty to comply with the Commission's uncleared swap margin requirements.[150] Thus by default, any swap executed under the statutory exception would likely be intended to be cleared because the swap is anonymous.

In applying this interpretation of the exception in section 4s(h)(7) of the CEA, the Commission incorporated a similar exception from certain External Business Conduct Standards for swaps initiated on a DCM or SEF where a Swap Entity does not know the identity of its counterparty prior to execution,[151] again to facilitate the trading of cleared swaps on DCMs and SEFs. This exception allows counterparties to seek competitive pricing on standardized swaps that will be cleared from any willing counterparty on exchanges or electronic trading platforms without being tied to seeking pricing only from SDs with whom such counterparties have established a trading relationship.

Thus, to further facilitate the trading of cleared swaps on DCMs, SEFs, and Exempt SEFs, in the context of ITBC Swaps initiated by a Special Entity on a DCM, SEF, or Exempt SEF, the Commission preliminarily interprets the condition in section 4s(h)(7) that the SD does not know the identity of the counterparty to be met not only where the SD is unaware of the name of the counterparty (*i.e.,* anonymous trading), but also where the SD is unaware of the status of the counterparty as a Special Entity, even if it knows the name of the counterparty. The Commission preliminarily considers this interpretation of ''identity'' as reasonable in the context of ITBC Swaps initiated by a Special Entity on a DCM, SEF, or Exempt SEF because the Commission preliminarily believes that this exception will facilitate trading of cleared swaps on exchanges or electronic platforms both generally and by Special Entities. In addition, for the reasons discussed above regarding the availability of information regarding the risks and characteristics of ITBC Swaps from sources other than an SD counterparty and the lack of any ongoing relationship with a counterparty to a cleared swap, the Commission preliminarily believes that Special Entities initiating swaps on a DCM, SEF, or Exempt SEF that are intended to be cleared would only be seeking competitive pricing from any willing counterparty. The initiating Special Entity cannot be entering into the ITBC Swap in reliance on the advice or recommendation of a particular SD that may be the willing counterparty providing the most competitive price if the SD does not even know the counterparty is a Special Entity. In other words, where a Special Entity is initiating an ITBC Swap on a DCM, SEF, or Exempt SEF, it is not concerned with the identity of its counterparty, and, in turn, its counterparty cannot possibly be providing advice to the Special Entity if it does not know the nature of the counterparty as a Special Entity. Thus, for purposes of the application of the duty imposed on SDs under section 4s(h)(4)(B) of the CEA to act in the best interests of a Special Entity when providing trading advice or a swap trading recommendation, the only salient aspect of the identity of a counterparty that initiates an ITBC Swap on a DCM, SEF, or Exempt SEF is whether the counterparty is in fact a known Special Entity. Where an SD has no actual knowledge that an ITBC Swap counterparty that initiates an ITBC Swap on a DCM, SEF, or Exempt SEF is, in fact, a Special Entity, the Commission preliminarily believes that such SD should not be deemed to know the ''identity'' of the counterparty to the transaction.

The Commission notes that the exception in 4s(h)(7) applies only to swaps ''initiated by a Special Entity'' on a DCM or SEF. This language is incorporated into the exception in the proposed amendment to § 23.440(e)(3) to better track the exception provided in the CEA, but the Commission has preliminarily determined that ''initiated by'' has no special meaning in this context and is synonymous with ''entered into by'' or ''executed by.'' The Commission understands that taking the active step of trading swaps on DCMs, SEFs, or Exempt SEFs may take many forms such as posting a request-for-quote, submitting a bid or offer to a central limit order book, or accepting a standing or resting bid or offer submitted by another market participant to a central limit order book. The Commission has preliminarily determined that limiting the proposed exception in proposed § 23.440(e)(3) to only a subset of the variety of available trading methodologies (*i.e.,* only those trading methodologies that the Commission has determined would constitute ''initiation by'' a Special Entity) would unnecessarily introduce complex trading limitations that may require material and costly changes to exchange trading programming or processes. The Commission preliminarily believes, therefore, that ''initiated by'' only means that a market participant is conducting trading on a DCM, SEF, or Exempt SEF for its own account or through a duly authorized agent.

The Commission notes that where an SD knows the name of its counterparty, there may be situations where actual knowledge of the counterparty's status as a Special Entity could be reasonably inferred by the name of the counterparty alone. For example, a counterparty known to an SD as ''City of New York'' or ''State of New York,'' alone, without more information, should put an SD on notice that its counterparty is a governmental Special Entity. In such situations, the Commission is aware that the SD may have actual knowledge of both the counterparty's name and its status as a Special Entity (and therefore will be deemed to have actual knowledge of the counterparty's ''identity'' as that term is used in section 4s(h)(7) of the CEA) and, thus, the SD will not qualify for the exception in proposed § 23.440(e)(3). While the Commission is aware that this may limit the trading of ITBC Swaps by Special Entities with names that readily identify them as Special Entities, the Commission believes it is restrained by the language in section 4s(h) of the CEA from providing any further exceptions. As noted below, the Commission seeks comment from Special Entities and their current or potential SD counterparties on the effect of the limited exception the Commission has proposed.

With respect to Special Entities that are not readily identifiable as Special Entities from their name alone, in the Commission's preliminary view, an SD would only have actual knowledge of whether a counterparty is a Special Entity if it has entered into a trading relationship with such counterparty and has, for example, entered into documentation in compliance with the STRD Requirement.[152] The Commission understands that such documentation, as entered into after promulgation of § 23.440, may specifically require counterparties to SDs to specify whether or not such counterparty is a Special

documentation meeting the requirements of the section prior to or contemporaneously with entering into a swap transaction with any counterparty.

[150] *See* 17 CFR 23.158(a).

[151] *See* 17 CFR 23.402(b) and (c), 23.430(e), 23.431(c), 23.450(h), and 23.451(b). *See also* Final EBCS Rulemaking at 77 FR 9756, n. 307, 77 FR 9789, n. 746, 77 FR 9744, and 77 FR 9757.

[152] The Commission notes that while compliance by an SD with the STRD Requirement would almost certainly entail a counterparty's self-identification as a Special Entity, the Commission believes that it is possible that some SDs may have entered into a trading relationship with a Special Entity that does not entail documentation that meets the STRD Requirement but still requires the counterparty to self-identify as a Special Entity, such as where the SD and Special Entity have agreed to only enter into cleared swaps.

Entity and exactly which prong of the Special Entity definition set forth in § 23.401(c) describes the counterparty. Thus, in the Commission's preliminary view, an SD, absent other evidence to the contrary, will be deemed not to have actual knowledge of whether a counterparty is a Special Entity unless it has entered into a trading relationship with the counterparty that includes identification of the counterparty as a Special Entity or not a Special Entity. Evidence that an SD has actual knowledge of a counterparty's Special Entity status absent a trading relationship could, for example, include a counterparty name that readily identifies the counterparty as a Special Entity or a trading relationship between the counterparty and an affiliate of the SD where the counterparty has self-identified as a Special Entity.

The Commission also proposes to amend § 23.450 to add a new subparagraph (h) to § 23.450, which would provide an exception from the requirements of § 23.450 for A–ITBC Swaps (*i.e.,* swaps with a counterparty whose identity is not known to the Swap Entity prior to execution), and also provide an exception from the requirements of the section for any ITBC Swaps entered into by a Swap Entity with a Special Entity initiated on a DCM, SEF, or Exempt SEF.

The Commission preliminarily believes that the proposed amendments to §§ 23.440 and 23.450 better serve the intent of the CEA than the rules now in effect. As discussed above, the Commission has preliminarily determined that swaps listed for trading on a DCM, SEF, or Exempt SEF, and accepted for clearing on a DCO or Exempt DCO, are sufficiently standardized and information about the material risks and characteristics of such swaps are available from the DCM, SEF, or Exempt SEF and/or the DCO or Exempt DCO. Because (i) this information is available to counterparties from sources other than a Swap Entity counterparty, (ii) ITBC Swap counterparties have no on-going relationship with a Swap Entity counterparty with respect to ITBC Swaps, and (iii) the Commission preliminarily believes that all or nearly all ITBC Swap counterparties have represented to any Swap Entity counterparty that they will not rely on recommendations from a Swap Entity and/or that any such recommendation will be independently evaluated by a fiduciary or a QIR, the Commission has preliminarily determined that ITBC Swap counterparties will likely be entering into ITBC Swaps on DCMs, SEFs, or Exempt SEFs on their own initiative rather than looking to SDs for trading advice or disclosures and likely looking to SDs only for competitive pricing. Because information about the material risks and characteristics of ITBC Swaps is available to Special Entity counterparties from a source other than a Swap Entity, the Commission has also preliminarily determined that it is likely that there may be no material regulatory purpose served by requiring an SD to determine that a Special Entity counterparty has a QIR. Further, Swap Entities that are counterparties to A–ITBC swaps or ITBC Swaps with counterparties where the Swap Entity does not know the Special Entity status of the counterparty do not know, and may never know, the ''identity'' (as interpreted by the Commission as discussed above) of their counterparties, making a suitability analysis or determination that a Special Entity has a QIR impossible.

The Commission considered but rejected the alternative of not proposing any exception from the requirements of § 23.440 for ITBC Swaps, reasoning that there is no need for such exception if an SD simply refrains from recommending a swap or trading strategy involving a swap that is tailored to the particular needs or characteristics of a Special Entity that is an ITBC Swap counterparty. If an SD does not recommend a swap or swap trading strategy that is tailored to the particular needs of a Special Entity, then there is no need to comply with the requirement in § 23.440(c)(1) that the SD make a reasonable determination that any swap or trading strategy involving a swap recommended by the SD is in the best interests of the Special Entity. The Commission has preliminarily determined, however, that the tremendous uptake of adherence to the ISDA protocol discussed above is persuasive evidence that SDs are not willing to enter into swaps with Special Entities that have not made the representation necessary for an SD to rely on the safe-harbor in § 23.440(b). The Commission preliminarily understands that SDs are unwilling to take the risk that something communicated during swap negotiations will be seen as providing a recommendation despite the best efforts or policies and procedures of the SD designed to prevent sales and trading personnel from making any recommendation to Special Entity counterparties. The Commission also preliminarily understands that SDs often do not know whether a counterparty is a Special Entity even when the SD knows the identity of the counterparty prior to execution of a swap.[153] Thus, the Commission is concerned that not providing an exception from the requirements of § 23.440 would likely result in SDs refusing to enter into swaps with ITBC Swap counterparties that are Special Entities (and potentially curbing trading with any counterparty if they don't know whether or not the counterparty is a Special Entity) unless they have received the safe-harbor representation. Such potential decrease in available ITBC Swap counterparties, especially SD counterparties willing to trade with Special Entities, would frustrate the purposes of this aspect of the Proposal.

The Commission did not consider the alternative of not providing an exception from compliance with § 23.450 because the requirements of § 23.450 apply to a Swap Entity whenever it enters into a swap with a Special Entity. Thus, whenever a Swap Entity offers to enter into or enters into a swap with a counterparty that it knows is a Special Entity, the Swap Entity, absent the exception, would be required by § 23.450(b)(1) to have a reasonable basis to believe that the Special Entity has a QIR. The Commission has preliminarily determined that the burden of obtaining the information or representations necessary for a Swap Entity to establish that a Special Entity has a QIR would likely result in a significant decrease in the number of Swap Entities willing to enter into ITBC Swaps with Special Entities. As noted above, the Commission also preliminarily understands that Swap Entities often don't know whether an ITBC Swap counterparty is a Special Entity even when the Swap Entity knows the identity of the counterparty prior to execution.

As reflected in the proposed amended rule text *infra,* the Commission is also proposing to amend the definition of the term ''statutory disqualification'' in § 23.450(a)(2).[154] This definition constitutes a condition to a person acting as a QIR for a Special Entity pursuant to § 23.450(b)(1)(ii).[155] The Commission proposes to amend the definition of ''statutory disqualification,'' and therefore the

[153] The Commission is aware that where SDs are matched with counterparties when executing ITBC Swaps on a SEF, the SD may be aware of the counterparty's identity, but the SEF does not ''flag'' those market participants that are Special Entities. Thus, absent the exception, SDs would be limited to entering into ITBC Swaps on SEFs anonymously or only with counterparties that they recognize as Special Entities from whom they have received the requisite safe-harbor representations.

[154] 17 CFR 23.450(a)(2).

[155] 17 CFR 23.450(b)(1)(ii).

condition to acting as a QIR, to read as follows, with proposed new language italicized:

The term ''statutory disqualification'' means, *with respect to a person that is not a registrant with the Commission,* grounds for refusal to register or to revoke, condition, or restrict the registration of any registrant or applicant for registration as set forth in sections 8a(2) and 8a(3) of the Act, *and, with respect to a person that is a registrant or an applicant for registration with the Commission, the Commission has refused registration or revoked, conditioned, or restricted the registration of such registrant or applicant for registration pursuant to sections 8a(2) or 8a(3) of the Act.*

The foregoing proposed amendment to § 23.450(a)(2) [156] is intended by the Commission to address the fact that many entities acting as QIRs for Special Entities are registered with the Commission as commodity trading advisors (and possibly other types of registrants).[157] In the Commission's experience, a minor compliance violation by such a person that does not result in the Commission taking any action to revoke the registration of the person may nonetheless result in such person being disqualified from acting as a QIR for Special Entities because the definition of ''statutory disqualification'' in § 23.451(a)(2) only requires that there be ''grounds'' for such disqualification.[158] The Commission has preliminarily determined that unless a person that is a registrant with the Commission has in fact had their registration revoked, refused, conditioned, or restricted by the Commission, then such registrant should continue to qualify as a QIR for Special Entities, thereby providing the Commission discretion similar to that under sections 8a(2) and (3) of the CEA.[159] Thus, for example, a violation of SEC rules or the securities laws by a dual-registrant of both the Commission and SEC would not constitute a statutory disqualification under this section unless the Commission determined to revoke, refuse, condition, or restrict the registration of such dual-registrant.[160] The Commission has preliminarily determined to propose this amendment because the current definition of ''statutory disqualification'' subjects QIRs to a higher standard of conduct than that applied to Commission registrants. With respect to regulatory violations by Commission registrants, the Commission has discretion whether to order revocation of registration or some other lesser penalty. If however, that same registrant is also acting as a QIR, the current definition of ''statutory disqualification'' provides no discretion because the mere existence of grounds for statutory disqualification disqualifies the person from acting as a QIR. The Commission has preliminarily determined that where a Commission registrant is also acting as a QIR and the Commission has determined not to revoke the registration of the registrant, the person should also be permitted to continue to act as a QIR.

Question 32: The Commission requests comment on all aspects of the proposed amendments to §§ 23.440 and 23.450.

Question 33: The Commission requests comment on whether the Commission's reasoning for rejecting the alternative of not providing an exception from the requirements § 23.440 for ITBC Swaps is reasonable or whether the Commission should reconsider such alternative.

Question 34: The Commission requests comment on whether its preliminary interpretation of ''identity'' in the context of CEA, sections 4s(h)(4)(B) and 4s(h)(7) (as described above) is reasonable. Why or why not?

Question 35: The Commission requests comment on whether its requirement that an SD not know the Special Entity status of a counterparty to qualify for the proposed exception in § 23.440(e)(3) is likely to result in the exclusion (in whole or in part) of Special Entities from the cleared swap markets executed on DCMs, SEFs, or Exempt SEFs. Do adequate avenues for anonymous trading of cleared swaps by Special Entities exist now or are such anonymous trading venues likely to be developed in response to the Proposal?

Question 36: The Commission requests comment on whether the Commission's reasoning for providing an exception from the requirements § 23.450 for ITBC Swaps is reasonable.

Question 37: Does the proposed amendment to the definition of ''statutory disqualification'' in § 23.450(a)(2) adequately address the issue of disqualifying persons from acting as QIRs for Special Entities based on minor compliance violations that do not result in Commission registration actions?

K. Proposed Amendments to § 23.451

In general, § 23.451, subject to certain conditions and exceptions, prohibits SDs from entering into swaps with a governmental Special Entity (as defined in § 23.451(a)(3)) within two years after any political contribution to an official of such governmental Special Entity was made by the SD or a covered associate (as defined in § 23.451(a)(2)) of the SD.[161] Pursuant to § 23.451(b)(2)(iii), however, this prohibition does not apply to swaps that are initiated on a DCM or SEF where the SD does not know the identity of the counterparty prior to execution.[162]

The Commission proposes to amend § 23.451 by revising subparagraph (b)(2)(iii) to provide that the prohibition will not apply to: (1) swaps that are initiated on a DCM, SEF, or Exempt SEF; and (2) A–ITBC Swaps.[163] This proposed amendment adds Exempt SEFs to the list of trading facilities that qualify for the exception, but does not maintain the anonymous execution condition for swaps that are executed on a DCM, SEF, or Exempt SEF. This change makes the Proposal different from MPD's no-action position in CFTC Staff Letter 23–01, which excluded Commission regulation 23.451 from the ITBC Compliance Exceptions. This exclusion by MPD in CFTC Staff Letter 23–01 was a change from its prior no-action position in CFTC Staff Letter 13–07 where Commission regulation 23.451 was not excluded. For the reasons detailed below, the Commission has preliminarily determined that MPD's reasoning for that change may have been incomplete or misinformed.

In proposing to include Commission regulation 23.451 in the ITBC Swap Compliance Exceptions for ITBC Swaps executed on a DCM, SEF, or Exempt SEF where the SD knows the identity of the counterparty, the Commission has preliminarily determined that the risk of political contributions inappropriately influencing governmental Special Entities' swaps trading decisions are substantially mitigated by the nature of trading on a DCM, SEF, or Exempt SEF. Such facilities, by definition, provide access to liquidity from multiple liquidity providers, not a single SD.

[156] 17 CFR 23.450(a)(2).

[157] QIRs may also be registered with the SEC and/or other domestic or foreign regulators or otherwise subject to other regulation and subject to disqualification as a result of violations thereof. *See* 7 U.S.C. 12a(2) and (3). Of note, the Commission is not required to disqualify any person from registration under these provisions, but is rather given the discretion to do so when grounds for disqualification are present. *Id.*

[158] *See* 17 CFR 23.450(a)(2).

[159] 7 U.S.C. 12a(2) and (3).

[160] Or such determination was made by the National Futures Association, a registered futures association and self-regulatory organization to which the Commission has delegated registration functions.

[161] *See generally* § 23.451, 17 CFR 23.451.

[162] 17 CFR 23.451(b)(2)(iii).

[163] *Id.*

Execution also takes place through competitive processes such as order books, multi-dealer requests for quote, or similar multilateral trading protocols. In addition, the Commission understands that many DCMs, SEFs, and Exempt SEFs prohibit pre-arranged trading and limit the extent of pre-execution communications. As a result, the Commission preliminarily believes that, unlike with off-facility, bilateral trading, DCMs, SEFs, and Exempt SEFs would not enable the sort of collusion between officials of a governmental Special Entity and SDs that have made contributions to those officials that Commission regulation 23.451 is designed to prevent.

In addition, the Commission understands from market participants that MPD's observations in CFTC Staff Letter 23–01 regarding ''no-trade'' lists and other internal requirements designed to prevent or mitigate violations of Commission regulation 23.451 are not implemented as simply as MPD may have surmised in the context of trading on DCMs, SEFs, or Exempt SEFs. The Commission is aware that staff guidance has, since 2013, discouraged SEFs from permitting ''enablement mechanisms'' such as those that, according to market participants, would allow an SD to enforce a ''no-trade'' list when trading on a SEF.[164] The Commission understands that DCMs and Exempt SEFs are generally subject to similar impartial access obligations. As a result, the Commission preliminarily believes that there may be significant impediments to SDs enforcing measures to comply with Commission regulation 23.451 when trading on DCMs, SEFs, and Exempt SEFs and thus has preliminarily determined to include Commission regulation 23.451 in the ITBC Swap Compliance Exceptions pursuant to this Proposal.

The proposed amendment to § 23.451 to exclude A–ITBC Swaps is intended to ensure that all swaps executed anonymously, including those not initiated, on a DCM, SEF, or Exempt SEF, will not be subject to § 23.451. The Commission has preliminarily determined that it is not possible for an SD to comply with § 23.451 where an SD does not know the identity of the counterparty prior to execution, regardless of whether the swap is executed bilaterally or on or pursuant to the rules of a DCM, SEF, or Exempt SEF.

The Commission is also proposing to delete the word ''Federal'' from § 23.451(a)(1)(iii) [165] which defines the term ''contribution'' in relation to transition or inaugural expenses for a successful candidate for office. Commission regulation 23.451 was promulgated using the Commission's discretionary rulemaking authority under section 4s(h) of the CEA [166] to impose business conduct requirements in the public interest, and thus the Dodd-Frank Act neither required the Commission to adopt that regulation nor to include Federal inaugural expenses within the meaning of ''contribution.'' [167] Further, the Commission intended the rule, among other things, to complement existing pay-to-play prohibitions imposed by Federal securities regulators to deter undue influence and other fraudulent practices that harm the public and promote consistency in the business conduct standards that apply to financial market professionals dealing with municipal entities.[168] However, neither of the substantially similar rules promulgated by the SEC for security-based swap dealers and the Municipal Securities Rulemaking Board (''MSRB'') for brokers, dealers, and municipal securities dealers include Federal election transition or inaugural expenses in their definitions of ''contribution.'' [169] Thus, the Commission is proposing to delete ''Federal'' from § 23.451(a)(1)(iii) to better align the rule with the intention of the Commission stated in the initial rulemaking, which was to complement the rules of the SEC and the MSRB.

Question 38: Is it appropriate for the Commission to harmonize its requirements with those of the SEC and MSRB by deleting the word ''Federal'' as proposed above?

Question 39: The Commission requests comment on all aspects of the proposed amendment to § 23.451.

L. Proposed Amendment to § 23.504

In general, § 23.504 requires Swap Entities to enter into swap trading relationship documentation covering certain enumerated topics with each swap counterparty prior to entering into a swap with such counterparty [170] (previously defined as the ''STRD Requirement'').[171] The Commission proposes to amend § 23.504(a)(1) by adding a new subsection (iii).

The revised section would read as follows: (1) Applicability. The requirements of this section shall not apply to: (i) swaps executed prior to the date on which a swap dealer or major swap participant is required to be in compliance with this section; (ii) swaps that have been cleared on a derivatives clearing organization or cleared on a clearing organization that is currently exempted from registration by the Commission pursuant to section 5b(h) of the Act; and (iii) an ITBC Swap as defined in § 23.401(d) of this chapter.

These proposed changes recognize that the clearing of swaps between a Swap Entity and a counterparty involves two stages: (1) the execution of a swap between a Swap Entity and its counterparty; and (2) the novation of that swap to a clearing organization that results in two swaps: (i) a swap between the clearing organization and the Swap Entity; and (ii) a swap between the clearing organization and its counterparty. The proposed changes to the applicability of the STRD Requirement in § 23.504(a)(1) therefore recognize that the STRD Requirement should not apply to an ITBC Swap as defined in § 23.401(d),[172] which is the swap between a Swap Entity and its counterparty that is intended to be cleared contemporaneously with execution (*i.e.,* § 23.504(a)(1)(iii)) because no documentation is needed if the swap will either be cleared promptly or if not cleared, void *ab initio.* For the same reason, the STRD Requirement need not apply to the swaps that result from the novation of such swap to a clearing organization (*i.e.,* § 23.504(a)(1)(ii)). The proposed amendment to § 23.504(a)(1)(ii) also recognizes that a swap may be cleared on a DCO or on an Exempt DCO.

Question 40: The Commission requests comment on all aspects of the proposed amendment to § 23.504.

Question 41: Does the Commission's proposed amendment to § 23.504(a)(1) adequately cover the exceptions for ITBC Swaps that have been proposed to be added to the External Business Conduct Standards proposed above? Why or why not?

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[164] *See* Guidance on Application of Certain Commission Regulations to [SEFs] (Nov. 14, 2013) at p. 1–3, *available at https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/dmostaffguidance111413.pdf.*

[165] *See* 17 CFR 23.451(a)(1)(iii).

[166] 7 U.S.C. 6s(h).

[167] *See generally* 17 CFR 23.451; *see also* Proposed Rules for Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties, 75 FR 80638, 80653–54 (Dec. 22, 2010).

[168] *Id.; see* Final EBCS Rulemaking at 77 FR 9799 (noting that § 23.451 was adopted pursuant to the Commission's discretionary rulemaking authority under section 4s(h) of the CEA).

[169] *See* 17 CFR 240.15fh–6(a)(1)(iii) and MSRB Rule G–37(g)(vi) (demonstrating that neither the SEC nor the MSRB apply their ''pay-to-play'' prohibition to transition or inaugural expenses incurred by successful candidates for Federal offices).

[170] 17 CFR 23.504.

[171] *See* Section I.A. *supra.*

[172] 17 CFR 23.401(d).

Question 42: Should the Commission's proposed amendment to § 23.504(a)(1) be phrased differently to cover the exceptions for ITBC Swaps that have been proposed to be added to the External Business Conduct standards proposed above? How should such proposed amendment to § 23.504(a)(1) be differently phrased to fulfill the Commission's intent that both swaps cleared on a DCO or Exempt DCO and ITBC Swaps be excepted from the STRD Requirement?

III. Cost Benefit Considerations

A. Statutory and Regulatory Background

As discussed above, section 4s(h) of the CEA [173] provides the Commission with both mandatory and discretionary rulemaking authority to impose business conduct standards on Swap Entities in their dealings with counterparties, including Special Entities.[174] Pursuant to this rulemaking authority, the Commission adopted the External Business Conduct Standards. In addition, section 4s(i) of the CEA requires the Commission to adopt rules governing swap documentation for Swap Entities.[175] Pursuant to this rulemaking authority, the Commission adopted the STRD Requirement.

B. Consideration of the Costs and Benefits of the Commission's Action

1. Section 15(a) of the CEA

Section 15(a) of the CEA requires the Commission to ''consider the costs and benefits'' of its actions before promulgating a regulation under the CEA or issuing certain orders.[176] Section 15(a) further specifies that the costs and benefits shall be evaluated in light of the following five broad areas of market and public concern: (1) protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations (collectively, the ''Section 15(a) Factors'').[177] In conducting its analysis, the Commission may, in its discretion, give greater weight to any one of the five enumerated areas of concern and may determine that, notwithstanding its costs, a particular rule is necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the Act.

The Commission notes that this cost-benefit consideration is based on its understanding that the derivatives market regulated by the Commission functions internationally with: (1) transactions that involve U.S. entities occurring across different international jurisdictions; (2) some entities organized outside of the United States that are registered with the Commission; and (3) some entities that typically operate both within and outside the United States and that follow substantially similar business practices wherever located. Where the Commission does not specifically refer to matters of location, the discussion of costs and benefits below refers to the effects of the proposed regulations on all relevant derivatives activity, whether based on their actual occurrence in the United States or on their connection with, or effect on U.S. commerce.[178]

2. Costs and Benefits of the Proposed Regulation

The baseline for the Commission's consideration of the costs and benefits of the Proposal are: (1) the Commission's rules governing business conduct standards for Swap Entities in the dealings with counterparties, adopted by the Commission as subpart H of part 23 of its regulations (§§ 23.400–23.451) pursuant to rulemaking authority granted under section 4s(h) of the CEA (the ''External Business Conduct Standards''); [179] and (2) Commission regulation 23.504, which mandate, respectively, that Swap Entities (i) comply with certain requirements when entering into swaps with counterparties, including Special Entities, and (ii) enter into swap trading relationship documentation (''STRD'') with counterparties prior to execution of a swap (the ''STRD Requirement''), adopted by the Commission pursuant to rulemaking authority granted in Section 4s(i) of the CEA [180] The Commission recognizes, however, that to the extent that SDs [181] have arranged their business in reliance on MPD no-action positions in the Covered Staff Letters, the actual costs and benefits of the Proposal may not be as significant. In situations where the Commission is unable to quantify the costs and benefits, the Commission identifies and considers the costs and benefits of these proposed rules in qualitative terms.

a. Benefits

Compliance with the conditions set forth in the definition of ITBC Swap in proposed § 23.401 [182] would permit SDs to qualify for exceptions to compliance with regulatory requirements set forth in the proposed amendments to §§ 23.402 through 23.451 and § 23.504.[183] The Commission preliminarily believes these exceptions would benefit SDs by reducing compliance obligations, and thereby lowering compliance costs, as well as reducing operational costs for SDs because such SDs would no longer have to agree on disclosure methodologies with their ITBC Swap counterparties, nor prepare and maintain the actual written disclosures. Specifically, the Commission preliminarily believes that the adoption of the ITBC Swap definition and the compliance exceptions in the Proposal as final rules by the Commission would, without materially disadvantaging their non-Swap Entity counterparties, significantly reduce the number of required disclosures an SD would otherwise be required to make, including disclosure pursuant to § 23.431(a) of the material risks and characteristics of particular swaps, disclosure of material incentives and conflicts of interest that an SD may have in connection with a particular swap, and disclosure of the PTMMM of a particular swap.[184] The SD may also benefit from an exception that would eliminate the scenario-analysis-upon-request requirement in § 23.431(b).[185] Similarly, an SD may benefit from the disapplication of the disclosure requirements regarding a counterparty's right to request clearing and choose the DCO on which a swap will be cleared under § 23.432.[186] Because an SD's ITBC Swap counterparties would not have to make arrangements to receive and process the various disclosures, such counterparties may also benefit from lower legal and operational costs.

Compliance with the conditions set forth in the definition of ITBC Swap in proposed § 23.401 would also benefit SDs by permitting SDs to qualify for exceptions to compliance with regulatory requirements that would otherwise require the SD to obtain information and representations from

[173] 7 U.S.C. 6s(h).

[174] ''Special Entity'' is defined in § 23.401(c), 17 CFR 23.401(c).

[175] 7 U.S.C. 6s(i).

[176] 7 U.S.C. 19(a).

[177] *Id.*

[178] *See, e.g.* 7 U.S.C. 2(i).

[179] 7 U.S.C. 6s(h).

[180] 7 U.S.C. 6s(i).

[181] Currently, there are no MSPs registered with the Commission and there have not been any MSPs registered with the Commission for several years. Thus, this Section regarding the Commission's consideration of the costs and benefits of the Proposal will only refer to SDs that may have relied on the Covered Staff Letters and may benefit from the compliance exceptions set forth herein.

[182] 17 CFR 23.401.

[183] *See* 17 CFR 23.401–23.451 and 23.504.

[184] 17 CFR 23.431(a).

[185] 17 CFR 23.431(b).

[186] 17 CFR 23.432.

their non-Swap Entity counterparties, including the KYC, ECP, and Special Entity status information and representations under §§ 23.402 and 23.430 [187] and due diligence information regarding a Special Entity's QIR under §§ 23.440 and 23.450.[188] These provisions of the Proposal would lower compliance and operational costs for SDs. Because, where the exception is available, an SD's ITBC Swap counterparties would not have to respond to SD requests for information and representations, such counterparties may also benefit from lower legal and operational costs.

If the Commission determines to eliminate the PTMMM disclosure requirement, as proposed above, SDs would benefit from a reduction in costs that would otherwise be incurred in preparing and disclosing the PTMMM. Not being required to source mid-market prices for certain swaps solely for disclosure of a PTMMM to non-Swap Entity counterparties may cause a cost savings for SDs.

Further, the Commission notes that, as a result of the no-action positions provided by MPD in CFTC Staff Letter 23–01 pertaining to ITBC Swaps, CFTC Staff Letter 13–12 pertaining to certain foreign exchange transactions (*e.g.,* swaps and Exempt FX Transactions for the 31 most widely-traded currencies), and, most recently, CFTC Staff Letter 25–09, the PTMMM is probably not being provided by some SDs to some counterparties to cleared and uncleared swaps and such foreign exchange transactions. Therefore, elimination of the PTMMM requirement may not be significant to the costs of or benefits to such SDs or their counterparties.

Similarly, the Commission notes that as a result of the no-action position provided by MPD in CFTC Staff Letter 23–01 pertaining to ITBC Swaps, scenario analysis is probably not being provided by some SDs to some cleared swaps counterparties and, therefore, elimination of the Scenario Analysis Requirement may not be significant to the costs of or benefits to such SDs or their counterparties.

Finally, compliance with the ITBC Swap conditions would benefit some SDs and their counterparties by providing an exception to the expensive and time-consuming process of negotiating and executing swap trading relationship documentation under the STRD Requirement in cases where the documentation is unnecessary because the subject swaps will either be cleared or void *ab initio.*[189] As a whole, the proposed exceptions from the documentation, onboarding, disclosure, and information collection requirements may potentially benefit ITBC Swap counterparties by allowing more SDs to act as potential counterparties to a particular ITBC Swap counterparty, providing more liquidity to the cleared swaps market as a whole.

Compliance with the conditions set forth in the proposed definition of a Qualified Prime Broker Arrangement in proposed § 23.401 [190] would also benefit SDs by disapplying the price disclosure requirement (and, if it remains applicable, the PTMMM disclosure requirement) under § 23.431(a).[191] Further, compliance with the proposed Qualified Prime Broker Arrangement conditions may permit PB/SDs to engage in transactions where counterparties to the Trigger Transaction and/or Mirror Transaction would not be required to only be other SDs (unlike under MPD's no-action position in CFTC Staff Letter 13–11), thereby potentially benefiting PB Counterparties and PB/SDs by increasing the number of participants in the markets for prime brokerage transactions.

Regarding the other miscellaneous proposed amendments, the proposed amendment to the daily mark disclosure requirement in § 23.431 may benefit SDs by harmonizing the calculation of the daily mark with the calculation of valuation data for SDR reporting and the calculation of variation margin, thereby reducing SDs' operational burdens. The proposed amendment of the definition of ''statutory disqualification'' in § 23.450 would benefit those persons not automatically barred from being a QIR and may benefit certain Special Entities if they are not required to find a new QIR in the event their existing QIR is subject to a regulatory action that would have previously constituted a statutory disqualification. Finally, certain Swap Entities may benefit from the proposed amendment to § 23.451 that would remove ''Federal'' from the definition of ''contributions'' under the rule, thereby not prohibiting the Swap Entity from entering into swaps with Federal governmental Special Entities if the Swap Entity makes a contribution to the transition or inaugural expenses of a successful candidate for Federal public office.

b. Costs

As compared to the baseline of full compliance with the External Business Conduct Standards and the STRD Requirement, compliance with the conditions set forth in the proposed definition of ITBC Swap in § 23.401 may entail the following costs:

1. Costs incurred by an SD and its ITBC Swap counterparty in determining whether counterparties are eligible to clear an ITBC Swap on a particular DCO or Exempt DCO, likely would require a written inquiry and receipt of a written response and attendant recordkeeping processes or entry of response in trading systems;

2. Costs incurred by an SD and its ITBC Swap counterparty in ensuring that swaps are submitted to clearing on a DCO or Exempt DCO as quickly after execution as would be technologically practicable if fully automated systems were used, likely would require on-boarding to DCO and/or Exempt DCO swap submission systems, or to their respective client clearing service providers, with attendant applications and other paperwork as well as recordkeeping processes; and

3. Costs incurred by SDs and their ITBC Swap counterparties in adjusting execution documentation to ensure agreement that swaps not executed on a DCM, SEF, or Exempt SEF that fail to clear would be deemed by the SD and its counterparty to be void *ab initio.*

The Commission notes that many, if not all, of the foregoing costs may have already been incurred by SDs to meet the conditions to the MPD no-action position in CFTC Staff Letter 23–01, though the Commission acknowledges that at least some additional costs would likely be incurred by SDs and their ITBC Swap counterparties due to minor variations between the Proposal and the conditions set forth in CFTC Staff Letter 23–01.

As compared to the baseline of full compliance with the External Business Conduct Standards, compliance with the conditions set forth in the proposed definition of Qualified Prime Broker Arrangement in proposed § 23.401 may entail costs incurred by PB/SDs and their new PB Counterparties to negotiate and enter into Prime Broker Arrangements, and costs incurred by PB/SDs and their existing PB Counterparties to negotiate and amend existing Prime Broker Arrangements, that meet the conditions of the definition of Qualified Prime Broker Arrangement, including:

1. Costs incurred to ensure that the parties have agreed on the type, parameters, and limits of each potential

[187] 17 CFR 23.402 and 430.

[188] 17 CFR 23.440 and 450.

[189] *See* 17 CFR 23.504.

[190] 17 CFR 23.401.

[191] 17 CFR 23.431(a).

Covered Transaction (as defined in proposed § 23.401) [192] that may be entered pursuant to the Prime Broker Arrangement;

2. Costs incurred in producing and maintaining records of all Regulatory Disclosures necessary to comply with the § 23.431(a) and (b),[193] other than pre-trade disclosure of price information;

3. Costs incurred in producing, delivering, and maintaining the required acknowledgement from PB Counterparties regarding receipt of the Regulatory Disclosures and the disapplication of the requirement that PB/SDs provide any further disclosures; and

4. Costs incurred for recordkeeping processes to maintain records of each Qualified Prime Broker Arrangement.

The Commission requests additional public comment regarding potential costs of the Proposal.

3. Costs and Benefits of the Commission's Proposal as Compared to Alternatives

The Commission considered several alternatives to the Proposal. On one hand, the Commission, for analytical completeness, considered terminating the no-action positions in the Covered Staff Letters or allowing them to expire. When compared only to the existing External Business Conduct Standards and STRD Requirement, which is the baseline for the cost and benefit considerations, this alternative imposes neither costs nor benefits because this approach would effectively constitute a reversion to the Commissions regulations prior to issuance of the Covered Staff Letters. However, the Commission does not anticipate that there would be any significant benefit to this approach relative to the approach contemplated by the Proposal, and indeed, preliminarily believes that there would be significant costs to market participants when compared to the Proposal, particularly in consideration of market participants' probable reliance on the no-action letters, which the Proposal would have the effect of codifying, with the modifications described herein. Terminating or allowing the no-action positions to expire without amending the regulations as discussed herein would, as noted above, preclude swap market participants from achieving or maintaining significant benefits and would likely require incursion of significant costs to unwind trading relationships and Prime Broker Arrangements entered into in reliance on the no-action positions or enter into new documentation and trading relationships, or implement new counterparty vetting procedures to ensure compliance with the External Business Conduct Standards and STRD Requirement.

Alternatively, the Commission considered, in the ITBC Swaps context, limiting the ITBC Swap Compliance Exceptions only to those swaps executed anonymously on a DCM, SEF, or Exempt SEF and cleared on a DCO or Exempt DCO. The Commission considered this as a less complex alternative to the Proposal, relying on the ''straight-through-processing'' rules applicable to Swap Entities, SEFs, and DCOs [194] to incentivize the trading of cleared swaps to be more like the trading of futures on DCMs. However, the Commission preliminarily believes that the swaps market has already made strides in this direction with the significant growth in the clearing of swaps noted above [195] and believes it would be less costly and disruptive to not interfere in the ongoing progression of swaps to execution on SEFs and clearing on DCOs.

Similarly, the Commission considered, in the Prime Broker context, whether eliminating the compliance exceptions for swaps executed under a Qualified Prime Broker Arrangement as set forth in the Proposal would incentivize SDs and their prime brokerage customers to seek clearing of swaps and Exempt FX Transactions as an alternative to the credit intermediation and other services provided by PBs. However, as noted above, the Commission preliminarily believes that the swaps market has already made strides in this direction and has determined that interference at this stage would require significant time and effort and may prove more disruptive than to allow the clearing of swaps to develop at its own pace.

Because the Commission is not aware of any adverse consequences resulting from the no-action positions in the Covered Staff Letters that have been in place for as long as a decade or more, the Commission preliminarily believes that the proposed amendments, which would have the effect of codifying the no-action positions with certain revisions, would be the most appropriate and beneficial approach for Swap Entities and their counterparties.

4. Section 15(a) Factors

Section 15(a) of the CEA [196] requires the Commission to consider the effects of its actions in light of the following five factors discussed below: (a) the protection of market participants and the public; (b) the efficiency, competitiveness, and financial integrity of futures markets; (c) price discovery considerations; (d) sound risk management practices; and (e) other public interest considerations.

a. Protection of Market Participants and the Public

Section 15(a)(2)(A) of the CEA requires the Commission to evaluate the costs and benefits of a proposed regulation in light of considerations of protection of market participants and the public.[197] The Commission preliminarily believes that the amendments proposed herein would maintain the efficacy of protections for customers and the broader financial system already contained in the External Business Conduct Standards and the STRD Requirement.

In general, the External Business Conduct Standards were adopted by the Commission as directed by the Dodd-Frank Act to increase protections for counterparties to Swap Entities by requiring additional disclosures about the material risks and characteristics of swaps and the material incentives and conflicts of interest that a Swap Entity may have to recommend or enter into swaps with such counterparties. One goal of the External Business Conduct Standards was to attempt to balance the historical asymmetry of information about swaps and the swap markets that had existed prior to the Dodd-Frank Act, leaving counterparties much less informed about the material risks and characteristics of swaps and the pricing of swaps, and the compensation being earned by Swap Entities when entering into swaps. The Proposal would provide regulatory compliance exceptions from

[192] *Id.*

[193] 17 CFR 23.431(a) and (b).

[194] In 2013, the Commission's Division of Clearing and Risk and its Division of Market Oversight issued staff guidance on the Commission's swaps straight-through-processing requirements (the ''STP Guidance''). The STP Guidance reiterates the requirements of Commission regulation 39.12(b)(7), 17 CFR 39.12(b)(7), that a SEF must route trades to a DCO ''as quickly after execution as would be technologically practicable if fully automated systems were used.'' Commission regulation 39.12(b)(7)(i)(B), 17 CFR 39.12(b)(7)(i)(B) also requires each FCM, SD, and MSP to ''establish systems that enable the clearing member, or the DCO acting on its behalf, to accept or reject each trade submitted to the DCO for clearing by or for the clearing member or a customer of the clearing member as quickly as would be technologically practicable if fully automated systems were used.'' The STP Guidance is available on the Commission's website: *http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/stpguidance.pdf.*

[195] *See* Section II.A and B. *supra.*

[196] 7 U.S.C. 19(a).

[197] 7 U.S.C. 19(a)(2)(A).

some of the required disclosures that counterparties to Swap Entities would otherwise receive. However, the context in which the compliance exceptions would apply provide a sound basis for the Commission to recognize the benefit of the disclosures and other competing regulatory interests.

In the context of Prime Broker Arrangements, the price (and, if required by a final rule, the PTMMM) [198] disclosures are proposed to be disapplied, but such disapplication of the disclosures would be necessary to allow PB Counterparties to seek prices for transactions from a variety of potential counterparties while maintaining only one or two trading relationships with PBs, serving the Commission's interest in robust price discovery processes and allowing counterparties to benefit from operational and collateral netting efficiencies. Without the disclosure exception for Qualified Prime Broker Arrangements, PB Counterparties seeking prices from a variety of potential counterparties would be required to forego the credit intermediation services provided by PB/SDs and would be required to have multiple trading relationships with SDs and perhaps non-SDs, with an attendant decrease in operational and collateral efficiencies.

In the context of ITBC Swaps, many more disclosure requirements and relationship-based requirements are proposed to be disapplied when Swap Entities enter into ITBC Swaps with non-Swap Entity counterparties. However, the Commission preliminarily believes that the disapplication of these regulatory requirements subject to the conditions provided for in the Proposal is reasonable when considered in light of the Commission's regulatory interest in promoting the trading of swaps on trading facilities and the clearing of swaps generally, two of the pillars of the reforms Congress intended be implemented for the swap markets by enactment of the Dodd-Frank Act. The Commission's purpose in disapplying the disclosure and trading relationship requirements in the context of ITBC Swaps as set forth in the Proposal [199] is to remove impediments to the efficient trading and clearing of swaps. Because a cleared swap is between a counterparty and the DCO or Exempt DCO and there is not an ongoing relationship between a Swap Entity and the counterparty, the Commission preliminarily believes that the relationship requirements in the External Business Conduct Standards and the STRD Requirement are of little relevance to the transaction. Similarly, the Commission preliminarily believes that for a swap to be listed for trading on a DCM, SEF, or an Exempt SEF and/or cleared by a DCO or Exempt DCO, information about that swap is necessarily made available to counterparties from sources independent of Swap Entities, thereby limiting the necessity for the disclosures otherwise required by the External Business Conduct Standards.

The elimination of the scenario analysis requirement in § 23.431(b) could also reduce the transparency of swaps transactions to swap counterparties. However, those analyses are only required when requested by a counterparty to the Swap Entity, and the Commission understands that they are requested rarely, if at all, due to their limited value.

For the foregoing reasons, the Commission preliminarily believes that the Proposal will not have a material detrimental effect on the protection of swap market participants or the public.

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

Section 15(a)(2)(B) of the CEA requires the Commission to evaluate the costs and benefits of a proposed regulation in light of ''efficiency, competitiveness, and financial integrity of futures markets.'' [200] The Proposal would not directly impact the efficiency, competitiveness, or financial integrity of futures markets because it relates solely to business conduct standards and documentation requirements applicable to swap market participants. However, to the extent the Proposal would disapply or eliminate certain requirements otherwise applicable to certain swaps, it may encourage some market participants to engage in swaps rather than futures market transactions, thereby potentially reducing the competition in futures markets.

c. Price Discovery

Section 15(a)(2)(C) of the CEA requires the Commission to evaluate the costs and benefits of a proposed regulation in light of price discovery considerations.[201] As discussed above, the Proposal's provision of regulatory compliance exceptions for ITBC Swaps and PB/SDs in Qualified Prime Broker Arrangements would permit counterparties to seek swap prices from a wider variety of market participants (SDs with whom counterparties have trading relationships and those with whom they do not, PBs, executing dealers, other PB Counterparties, etc.) and thus the Commission preliminarily believes that the Proposal would facilitate more efficient swap price discovery for swaps intended to be cleared and swaps in the markets served by PBs. However, to the extent that eliminating the PTMMM disclosures imposes higher information processing costs on some market participants, the proposal could hinder competition and price discovery.

d. Sound Risk Management Practices

Section 15(a)(2)(D) of the CEA requires the Commission to evaluate the costs and benefits of a proposed regulation in light of sound risk management practices.[202] The Commission preliminarily believes that the Proposal would not have a significant effect on risk management practices. Specifically, the Swap Entity risk management requirements under § 23.600 [203] and other Commission regulations would not change under the Proposal as it relates to ITBC Swaps because, absent this Proposal, a Swap Entity's risks would still relate to cleared swaps (and not uncleared swaps) even if the Swap Entity were required to make all of the required disclosures and comply with the relationship, suitability, and advisory rules of the External Business Conduct Standards. Similarly, the proposed relief from disclosure of the price (and, if required, the PTMMM) in the context of Prime Broker Arrangements would not change the required risk management processes applicable to PB/SDs.

However, to the extent that the Proposal promotes trading on DCMs, SEFs, and Exempt SEFs and clearing through a DCO or Exempt DCO, the Commission preliminarily believes that the Proposal may further sound risk management practices. The trades executed on DCMs, SEFs, and Exempt SEFs are subject to the rules of these entities' platforms and receive the associated protections. Also, the trades cleared on a DCO or Exempt DCO are subject to the rules of these entities, which helps to ensure market participants adequately address credit risks.[204]

[198] *See* Section II.A., *supra,* for a discussion of the Commission's proposed elimination of the PTMMM disclosure requirements.

[199] *See* Section II.D.1. *supra.*

[200] 7 U.S.C. 19(a)(2)(B).

[201] 7 U.S.C. 19(a)(2)(C).

[202] 7 U.S.C. 19(a)(2)(D).

[203] 17 CFR 23.600.

[204] *See* Derivatives Clearing Organization General Provisions and Core Principles, 85 FR 4800, 4843 (Jan 27, 2020) (stating that the amendments to Commission regulation 39.13 will strengthen and promote sound risk management practices across

e. Other Public Interest Considerations

Section 15(a)(2)(E) of the CEA requires the Commission to evaluate the costs and benefits of a proposed regulation in light of other public interest considerations.[205] The Commission is identifying a public interest benefit in its codification of the MPD no-action positions in the Covered Staff Letters, as noted herein, where the efficacy of those positions has been demonstrated. In such a situation, the Commission preliminarily believes it serves the public interest and, in particular, the interests of market participants, to engage in notice-and-comment rulemaking and to seek and consider the views of the public in amending its regulations, rather than for it to allow market participants to continue to rely on no-action positions that could be easily withdrawn or modified by MPD at any time, providing less long-term certainty for market participants and offering a more limited opportunity for public input.

Question 43: The Commission requests comment on all aspects of its consideration of the costs and benefits of the Proposal.

Question 44: The Commission requests comment, including any available quantifiable data and analysis, concerning the costs and benefits of the Proposal for Swap Entities and any other market participant(s), including regarding the extent to which market participants already enjoy any such benefits or incur any such costs.

Question 45: The Commission requests comment, including any available quantifiable data and analysis, concerning whether the tradeoff of costs and benefits of the Proposal for Swap Entities and any other market participant(s), could be improved by modifying the set of conditions set forth therein (*i.e.,* by deleting or modifying in a specified fashion any of the proposed conditions, or by adding specified additional conditions).

IV. Related Matters

A. Antitrust Considerations

Section 15(b) of the CEA requires the Commission to take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the purposes of the CEA in issuing any order or adopting any Commission rule or regulation.[206]

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

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

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

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA'') requires Federal agencies to consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, to provide a regulatory flexibility analysis reflecting the impact.[207] Whenever an agency publishes a general notice of proposed rulemaking for any rule, pursuant to the notice-and-comment provisions [208] of the APA,[209] a regulatory flexibility analysis or certification is typically required.[210] The Commission previously has established certain definitions of ''small entities'' to be used in evaluating the impact of its regulations on small entities in accordance with the RFA.[211] The proposed amendments only affect certain Swap Entities and their counterparties, which must be ECPs.[212] The Commission has previously established that Swap Entities and ECPs are not small entities for purposes of the RFA.[213]

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

C. Paperwork Reduction Act

The Paperwork Reduction Act (''PRA'') [214] imposes certain requirements on Federal agencies in connection with their conducting or sponsoring any collection of information as defined by the PRA. Any agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. The Commission will protect proprietary information it may receive according to the Freedom of Information Act and 17 CFR part 145, ''Commission Records and Information.'' In addition, section 8(a)(1) of the CEA strictly prohibits the Commission, unless specifically authorized by the CEA, from making public ''data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.'' [215] The Commission also is required to protect certain information contained in a government system of records according to the Privacy Act of 1974.[216]

This proposed rulemaking affects regulations that contain collections of information within the meaning of the PRA, as discussed below.[217] The titles for these collections of information for which the Commission has previously received two OMB Control Numbers are: (1) OMB Control Number 3038–0079 (Swap Dealer and Major Swap Participant Conflicts of Interest and Business Conduct Standards with Counterparties); and (2) OMB Control Number 3038–0088 (Swap Documentation). The Proposal, if adopted, would modify the Commission's burden estimates for the information collection requirements associated with OMB Control Number 3038–0079, as discussed below. The Commission therefore is submitting this proposal to Office of Management and Budget (''OMB'') for review, in

DCOs, their clearing members, and clearing members' customers.)

[205] 7 U.S.C. 19(a)(2)(E).

[206] 7 U.S.C. 19(b).

[207] 5 U.S.C. 601 *et seq.; see also* Policy Statement and Establishment of ''Small Entities'' for purposes of the Regulatory Flexibility Act, 47 FR 18618, 18618–21 (Apr. 30, 1982).

[208] *See* 5 U.S.C. 553 (for specific notice-and-comment provisions).

[209] *See* 5 U.S.C. 500 *et seq.*

[210] *See* 5 U.S.C. 601(2), 603–605.

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

[212] *See* 7 U.S.C. 2(e) (stating that, pursuant to section 2(e) of the CEA, each counterparty to an uncleared swap must be an ECP, as defined in 7 U.S.C. 1a(18)).

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

[214] 44 U.S.C. 3501 *et seq.*

[215] 7 U.S.C. 12(a)(1).

[216] 5 U.S.C. 552a.

[217] To the extent that the Commission does not identify a specific provision, the Commission does not believe that any associated change substantively or materially modifies an existing information collection burden or creates a new one.

accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11.

1. OMB Collection 3038–0079

a. Commission Regulation 23.431

As discussed above, the proposed revisions to § 23.431 [218] would make certain changes that the Commission preliminarily believes would substantively reduce the burden of complying with the regulation. Specifically, the Commission is requesting comment on a proposal that the PTMMM disclosure requirement set forth in § 23.431(a)(3)(i) [219] be eliminated in its entirety, as detailed *infra.* In addition, the Commission is proposing to eliminate the Scenario Analysis Requirement in § 23.431(b).[220]

The Commission estimates that eliminating the requirement to provide a PTMMM will decrease Swap Entities' burden hours incurred for each swap transaction by 10% on average. The Commission understands that, in certain rare cases (*e.g.,* where a Swap Entity develops internal models to determine a PTMMM for swaps that are not widely traded), producing a PTMMM may take a Swap Entity a significant amount of time; however, in the majority of cases, much of the process for generating a PTMMM for a particular swap has been automated by Swap Entities and, thus, the burden of preparing a PTMMM is very low. Thus, the Commission preliminarily believes that this estimated burden reduction is appropriate.

Further, the Commission estimates that eliminating the Scenario Analysis Requirement as proposed will decrease Swap Entities' burden hours incurred for each swap transaction by 5% on average across all Swap Entities. Although preparing a scenario analysis for a particular swap may take a substantial amount of time, the Commission understands that such analyses are rarely, if ever, requested as many counterparties have not found them to be useful in considering entering into a swap (or, in the alternative, Swap Entities are unwilling to do business with a counterparty that requires a scenario analysis due to the cost of providing such analysis).

The Proposal would also: (i) expand the exceptions in § 23.431(c) [221] from the pre-trade disclosure requirements in § 23.431(a) [222] for certain ITBC Swaps and Permitted PB Transactions,[223] and expand existing exceptions from such requirements to Exempt SEFs as shown in the proposed regulatory text, *infra;* and (ii) provide an exception from the requirement in § 23.431(d)(1) [224] to provide notice of the right to receive a daily mark for each cleared swap from the appropriate clearing organization for certain ITBC Swaps. Meeting the requirements for certain of these exceptions may entail certain burdens and costs as discussed in Section III. B.2.b, *infra,* but the Commission preliminarily believes that in the aggregate the modifications may reduce the burden of the regulations. However, in an effort to be conservative, because the number of swaps that will be eligible for the new and expanded exceptions is unknown, the Commission is leaving the estimated burden of the regulation associated with these amendments unchanged.

The Commission believes that the other changes that the Proposal would make to § 23.431 [225] would not substantively affect the burden of the regulation. This includes: (i) clarifying the requirements for disclosure of the material characteristics of a swap in § 23.431(a)(2); [226] and (ii) defining the daily mark provided for uncleared swaps under § 23.431(d)(2) [227] to be the estimated price that would be received or paid by the counterparty to transfer the uncleared swap in the market in an orderly transaction and disclosing that such price is an estimate to relevant counterparties.

b. Commission Regulations 23.402, 430, 432, 434, 440, 450, and 451

The proposed amendments to §§ 23.402, 430, 432, 434, 440, 450, and 451 [228] would create exceptions from the requirements of the regulations for certain ITBC Swaps and, where applicable, expand existing exceptions from such requirements to Exempt SEFs, as proposed *infra* in the regulatory text. Although the adoption of these changes may in the aggregate result in lesser burdens for market participants subject to these requirements, in an effort to be conservative, the Commission has preliminarily determined to leave its estimated burdens of these requirements unchanged at this time, as the potential amount of the reduction of any such burden is unknown.[229] For example, although the new proposed exceptions may apply for certain swaps entered into between a Swap Entity and its counterparty, the same parties may enter into other swaps that are not covered by the exceptions, such that, notwithstanding the exceptions in the Proposal, certain of the requirements would continue to apply (*e.g.,* the KYC procedures of § 23.402(b) and the representations under §§ 23.440 and 450).[230]

c. Estimated Revised Burdens Under OMB Control Number 3038–0079

In consideration of the above and the current number of Swap Entities, the Commission estimates that the total overall burdens for OMB Control Number 3038–0079 will be approximately as follows:

Estimated number of respondents affected: 108.

Estimated total annual burden hours per respondent: 2,173.

Estimated aggregate total burden hours for all respondents: 230,341.

There are no capital costs or operating and maintenance costs associated with this collection.

2. OMB Collection 3038–0088—Swap Documentation

a. Commission Regulation 23.504

Similar to the regulations discussed above, the Proposal would modify § 23.504 [231] to create exceptions from the requirements of the regulation for ITBC Swaps and, where applicable, expand existing exceptions from such requirements to Exempt DCOs, as shown *infra* in the proposed regulatory text.

b. Estimated Burdens Under OMB Control Number 3038–0088

Although the adoption of these changes may result in lesser burdens for market participants subject to § 23.504, in an effort to be conservative in

[218] 17 CFR 23.431.

[219] 17 CFR 23.431(a)(3)(i).

[220] 17 CFR 23.431(b).

[221] 17 CFR 23.431(c).

[222] 17 CFR 23.431(a).

[223] The Commission notes that a Qualifying Prime Broker Arrangement (as discussed in Section II.D.5., *supra,* under § 23.401(g)), like all swap prime brokerage arrangements, would be required to be kept by the Swap Entity under § 23.201 and would be covered by existing collections of information under OMB Control No. 3038–0087 (Reporting, Recordkeeping, and Daily Trading Records Requirements for Swap Dealers and Major Participants). Accordingly, the Commission is not submitting to OMB an information collection request to create a new information collection or modify OMB Control No. 3038–0087 in relation to Qualifying Prime Broker Arrangements.

[224] 17 CFR 23.431(d)(1).

[225] 17 CFR 23.431.

[226] 17 CFR 23.431(a)(2).

[227] 17 CFR 23.431(d)(2).

[228] 17 CFR 23.402, 430, 432, 434, 440, 450, and 451. Commission regulation 23.401 defines certain terms that are used in the revisions to these regulations. 17 CFR 23.401.

[229] In addition, the reduction in burden may be offset by any burden entailed by compliance with the requirements of the new exceptions for ITBC Swaps (*i.e.,* those in the definition of an ''ITBC Swap'' in § 23.401).

[230] 17 CFR 23.402(b) and 17 CFR 23.440 and 450.

[231] 17 CFR 23.504.

estimating the amount of the change, the Commission has determined to leave its estimated burdens of these requirements unchanged at this time as the potential amount of the reduction of any such burden is unknown. For example, although the new proposed exceptions may apply for certain swaps between a Swap Entity and its counterparty, the same parties may enter into other swaps that are not covered by the exceptions, such that, notwithstanding the exceptions in the Proposal, compliance with § 23.504 would nonetheless be required. Accordingly, the Commission is retaining its existing estimates for the burden associated with the information collections under OMB Collection 3038–0088.[232] The Commission does not anticipate any capital costs or operating and maintenance costs would be incurred by market participants related to the proposed modifications to § 23.504. For the foregoing reasons, the Commission is not submitting a request to OMB to modify OMB Control Number 3038–0088 as a result of this Proposal.

3. Request for Comment

The Commission invites the public and other Federal agencies to comment on any aspect of the proposed information collection requirements discussed above. The Commission will consider public comments on the proposed collections of information in: (1) evaluating whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have a practical use; (2) evaluating the accuracy of the estimated burdens of the proposed collections of information, including the degree to which the methodology and the assumptions that the Commission employed were valid; (3) enhancing the quality, utility, and clarity of the information proposed to be collected; and (4) minimizing the burden of the proposed information collection requirements on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological information collection techniques, *e.g.,* permitting electronic submission of responses.

Copies of the submission from the Commission to OMB are available from the CFTC Clearance Officer, 1155 21st Street NW, Washington, DC 20581, 202–418–5714 or from *http://RegInfo.gov*.

Organizations and individuals desiring to submit comments on the proposed information collection requirements should send those comments to:

- The Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, Attn: Desk Officer of the Commodity Futures Trading Commission;
- 202–395–6566 (fax); or
- *OIRAsubmissions@omb.eop.gov* (email).

Please provide the Commission with a copy of submitted comments so that all comments can be summarized and addressed in the final rulemaking, and please refer to the **ADDRESSES** section of this rulemaking for instructions on submitting comments to the Commission. OMB is required to make a decision concerning the proposed information collection requirements between 30 and 60 days after publication of this release in the **Federal Register**. Therefore, a comment to OMB is best assured of receiving full consideration if OMB receives it within 30 calendar days of publication of this release. Nothing in the foregoing affects the deadline enumerated above for public comment to the Commission on the proposed rules.

D. Executive Orders 12866, 13563, and 14192

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select those regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; and distributive impacts). Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as any regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, or the President's priorities.

The Office of Management and Budget has determined that this action is not a significant regulatory action as defined in Executive Order 12866, as amended, and therefore it was not subject to Executive Order 12866 review.

This Proposal, if finalized as proposed, is not expected to be an Executive Order 14192 regulatory action, because the proposed rule is not a significant regulatory action under E.O. 12866.

List of Subjects in 17 CFR Part 23

Reporting and recordkeeping requirements, Swaps, Trading records.

For the reasons stated in the preamble, the Commodity Futures Trading Commission proposes to amend 17 CFR part 23 as follows:

PART 23—SWAP DEALERS AND MAJOR SWAP PARTICIPANTS

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

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

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

■ 2. Revise subpart H to read as follows:

Subpart H—Business Conduct Standards for Swap Dealers and Major Swap Participants Dealing With Counterparties, Including Special Entities

Sec.

§ 23.400 Scope.

The sections of this subpart shall apply to swap dealers and, unless otherwise indicated, major swap participants. These rules are not intended to limit or restrict the applicability of other provisions of the Act and rules and regulations thereunder, or other applicable laws, rules and regulations. The provisions of

[232] *See* Amended Supporting Statement for Currently Approved Information Collection, Swap Documentation, OMB Control Number 3038–0088 (Oct. 24, 2022), *available at https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202210-3038-007*.

this subpart shall apply in connection with transactions in swaps as well as in connection with swaps that are offered but not entered into.

§ 23.401 Definitions.

Solely for purposes of this subpart, the terms listed in this section have the meanings set forth below.

(a) *A–ITBC Swap.* The term ''Anonymous ITBC Swap'' or ''A–ITBC Swap'' means an ITBC Swap (as defined in § 23.401(d)) where the swap entity does not know the identity of the counterparty prior to execution of the swap. An A–ITBC Swap may be executed bilaterally between the parties or may be executed on or pursuant to the rules of a designated contract market, swap execution facility, or a trading facility exempted from registration as a swap execution facility by the Commission pursuant to section 5h(g) of the Act.

(b) *Counterparty.* The term ''counterparty,'' as appropriate in this subpart, includes any person who is a prospective party to a swap.

(c) *Covered Transaction.* The term ''Covered Transaction'' means a swap, as defined in section 1a(47) of the Act and § 1.3 of this chapter (other than swaps subject to the clearing requirement of section 2(h)(1)(A) of the Act and part 50 of this chapter), and physically-settled foreign exchange forwards and swaps that have been exempted from the definition of swap by the U.S. Department of the Treasury.

(d) *ITBC Swap.* The term ''Intended to be Cleared Swap'' or ''ITBC Swap'' means a swap that meets the following conditions, as applicable:

(1) At least one of the parties to the swap is a swap entity;

(2) The swap is of a type accepted for clearing by a derivatives clearing organization registered with the Commission (''DCO'') or a clearing organization that is currently exempted from registration by the Commission pursuant to section 5b(h) of the Act (''Exempt DCO'');

(3) The swap is intended by the parties to be cleared contemporaneously with execution;

(4) If the swap is intended to be cleared on a DCO, the swap entity and its counterparty are either clearing members of the DCO to which the swap will be submitted, or have entered into an agreement with a clearing member of such DCO for clearing of swaps of the same type as the swap intended to be cleared;

(5) If the swap is intended to be cleared on an Exempt DCO, the swap entity and its counterparty must be eligible to clear the swap on the Exempt DCO pursuant to the terms and conditions of the Order of Exemption from Registration issued by the Commission regarding such Exempt DCO;

(6) The swap entity does not require its counterparty or its clearing member (if any) to enter into a breakage agreement or similar agreement as a condition to executing the swap;

(7) If the swap is not executed on or pursuant to the rules of a designated contract market (''DCM''), swap execution facility (''SEF''), or a trading facility currently exempted from registration as a swap execution facility by the Commission pursuant to section 5h(g) of the Act (''Exempt SEF''), the swap entity ensures that both parties submit the swap for clearing to a DCO or Exempt DCO as quickly after execution as would be technologically practicable if fully automated systems were used;

(8) If the swap is executed on or pursuant to the rules of a DCM, SEF, or Exempt SEF, the rules of the DCM, SEF, or Exempt SEF provide that if the swap is rejected from clearing, such swap is deemed to be void *ab initio;* provided that if the swap is executed on or pursuant to the rules of a DCM, SEF, or Exempt SEF and the rules of the DCM, SEF, or Exempt SEF do not provide for a swap rejected from clearing to be deemed void *ab initio,* the parties have agreed prior to or at execution that if such swap is rejected from clearing, the swap is deemed to be void *ab initio.*

(e) *Major swap participant.* The term ''major swap participant'' means any person defined in section 1a(33) of the Act and § 1.3 of this chapter and, as appropriate in this subpart, any person acting for or on behalf of a major swap participant, including an associated person defined in section 1a(4) of the Act.

(f) *Prime Broker Arrangement.* The term ''Prime Broker Arrangement'' means any arrangement sometimes known in the trade as ''swap prime brokerage'' or ''swap credit intermediation'' among at least one swap dealer acting as a prime broker (the ''Prime Broker'') and two or more other parties evidenced by a written agreement or agreements pursuant to which the Prime Broker, subject to any applicable conditions, is contractually obligated to enter into (whether pursuant to a ''give-up'' arrangement, novation, or otherwise):

(1) A Covered Transaction (the ''Trigger Transaction'') for which the Prime Broker has not determined the price with a counterparty (the ''Trigger CP''); and

(2) A second Covered Transaction with another counterparty that is not the Trigger CP, which transaction, from the perspective of the Prime Broker, is subject to substantially equal but opposite terms and conditions to the Trigger Transaction.

(g) *Qualified Prime Broker Arrangement.* The term ''Qualified Prime Broker Arrangement'' means a Prime Broker Arrangement that meets the following conditions:

(1) The Prime Broker (as defined under the definition of Prime Broker Arrangement) and a counterparty that is not a swap entity that has entered into a Prime Broker Arrangement with the Prime Broker (the ''PB Counterparty'') have agreed in writing on the type, parameters, and limits of each potential Covered Transaction that may be entered into by the PB Counterparty with the Prime Broker pursuant to such Prime Broker Arrangement (each, a ''Permitted PB Transaction'');

(2) The PB Counterparty has received from the Prime Broker all disclosures regarding the Permitted PB Transactions that, to the best of the Prime Broker's knowledge and reasonable belief, would be necessary for the Prime Broker to comply with § 23.431(a), other than the pre-trade disclosure of the price of the Permitted PB Transaction (the ''Regulatory Disclosures'');

(3) The Prime Broker has received an acknowledgement from the PB Counterparty that:

(i) The PB Counterparty has received the Regulatory Disclosures;

(ii) The Prime Broker has clarified or supplemented the Regulatory Disclosures as requested by the PB Counterparty in its sole discretion; and

(iii) The Prime Broker has no obligation to provide additional disclosures pursuant to section 4s(h)(3)(B)(i) of the Act or § 23.431(a) with respect to the Permitted PB Transaction to the PB Counterparty, unless requested by the PB Counterparty in writing prior to execution; and

(4) The Prime Broker maintains a record of the Prime Broker Arrangement and the required acknowledgement received from the PB Counterparty until the expiration or termination of all Permitted PB Transactions executed pursuant thereto and for a period of five (5) years thereafter in accordance with § 23.203.

(h) *Special Entity.* The term ''Special Entity'' means:

(1) A Federal agency;

(2) A State, State agency, city, county, municipality, other political subdivision of a State, or any instrumentality, department, or a corporation of or

established by a State or political subdivision of a State;

(3) Any employee benefit plan subject to Title I of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002);

(4) Any governmental plan, as defined in section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002);

(5) Any endowment, including an endowment that is an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)); or

(6) Any employee benefit plan defined in section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002), not otherwise defined as a Special Entity, that elects to be a Special Entity by notifying a swap entity of its election prior to entering into a swap with the particular swap entity.

(i) *Swap dealer.* The term ''swap dealer'' means any person defined in section 1a(49) of the Act and § 1.3 of this chapter and, as appropriate in this subpart, any person acting for or on behalf of a swap dealer, including an associated person defined in section 1a(4) of the Act.

(j) *Swap entity.* The term ''swap entity'' means a swap dealer or major swap participant.

§ 23.402 General provisions.

(a) *Policies and procedures to ensure compliance and prevent evasion*—(1) Swap entities shall have written policies and procedures reasonably designed to:

(i) Ensure compliance with the requirements of this subpart; and

(ii) Prevent a swap entity from evading or participating in or facilitating an evasion of any provision of the Act or any regulation promulgated thereunder.

(2) Swap entities shall implement and monitor compliance with such policies and procedures as part of their supervision and risk management requirements specified in subpart J of this part.

(b) *Know your counterparty.* Each swap dealer shall implement policies and procedures reasonably designed to obtain and retain a record of the essential facts concerning each counterparty whose identity is known to the swap dealer prior to the execution of the transaction that are necessary for conducting business with such counterparty. For purposes of this section, the essential facts concerning a counterparty are:

(1) Facts required to comply with applicable laws, regulations and rules;

(2) Facts required to implement the swap dealer's credit and operational risk management policies in connection with transactions entered into with such counterparty; and

(3) Information regarding the authority of any person acting for such counterparty.

(c) *True name and owner.* Each swap entity shall obtain and retain a record which shall show the true name and address of each counterparty whose identity is known to the swap entity prior to the execution of the transaction, the principal occupation or business of such counterparty as well as the name and address of any other person guaranteeing the performance of such counterparty and any person exercising any control with respect to the positions of such counterparty.

(d) *Reasonable reliance on representations.* A swap entity may rely on the written representations of a counterparty to satisfy its due diligence requirements under this subpart, unless it has information that would cause a reasonable person to question the accuracy of the representation. If agreed to by the counterparties, such representations may be contained in counterparty relationship documentation and may satisfy the relevant requirements of this subpart for subsequent swaps offered to or entered into with a counterparty, provided however, that such counterparty undertakes to timely update any material changes to the representations.

(e) *Manner of disclosure.* A swap entity may provide the information required by this subpart by any reliable means agreed to in writing by the counterparty; provided however, for transactions initiated on a designated contract market or swap execution facility, written agreement by the counterparty regarding the reliable means of disclosure is not required.

(f) *Disclosures in a standard format.* If agreed to by a counterparty, the disclosure of material information that is applicable to multiple swaps between a swap entity and a counterparty may be made in counterparty relationship documentation or other written agreement between the counterparties.

(g) *Record retention.* Swap entities shall create a record of their compliance with the requirements of this subpart and shall retain records in accordance with subpart F of this part and § 1.31 of this chapter and make them available to applicable prudential regulators upon request.

(h) *Exception.* Paragraphs (b) and (c) of this section shall not apply to an ITBC Swap.

§§ 23.403–23.409 [Reserved]

§ 23.410 Prohibition on fraud, manipulation, and other abusive practices.

(a) *Prohibition.* It shall be unlawful for a swap entity—

(1) To employ any device, scheme, or artifice to defraud any Special Entity or prospective customer who is a Special Entity;

(2) To engage in any transaction, practice, or course of business that operates as a fraud or deceit on any Special Entity or prospective customer who is a Special Entity; or

(3) To engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative.

(b) *Affirmative defense.* It shall be an affirmative defense to an alleged violation of paragraph (a)(2) or (3) of this section for failure to comply with any requirement in this subpart if a swap entity establishes that the swap entity:

(1) Did not act intentionally or recklessly in connection with such alleged violation; and

(2) Complied in good faith with written policies and procedures reasonably designed to meet the particular requirement that is the basis for the alleged violation.

(c) *Confidential treatment of counterparty information.* (1) It shall be unlawful for any swap entity to:

(i) Disclose to any other person any material confidential information provided by or on behalf of a counterparty to the swap entity; or

(ii) Use for its own purposes in any way that would tend to be materially adverse to the interests of a counterparty, any material confidential information provided by or on behalf of a counterparty to the swap entity.

(2) Notwithstanding paragraph (c)(1) of this section, a swap entity may disclose or use material confidential information provided by or on behalf of a counterparty to the swap entity if such disclosure or use is authorized in writing by the counterparty, or is necessary:

(i) For the effective execution of any swap for or with the counterparty;

(ii) To hedge or mitigate any exposure created by such swap; or

(iii) To comply with a request of the Commission, Department of Justice, any self-regulatory organization designated by the Commission, or an applicable prudential regulator, or is otherwise required by law.

(3) Each swap entity shall implement written policies and procedures reasonably designed to protect material confidential information provided by or on behalf of a counterparty from

disclosure and use in violation of this section by any person acting for or on behalf of the swap entity.

§§ 23.411–23.429 [Reserved]

§ 23.430 Verification of counterparty eligibility.

(a) *Eligibility.* A swap entity shall verify that a counterparty meets the eligibility standards for an eligible contract participant, as defined in section 1a(18) of the Act and § 1.3 of this chapter, before offering to enter into or entering into a swap with that counterparty.

(b) *Special Entity.* In verifying the eligibility of a counterparty pursuant to paragraph (a) of this section, a swap entity shall also verify whether the counterparty is a Special Entity.

(c) *Special Entity election.* In verifying the eligibility of a counterparty pursuant to paragraph (a) of this section, a swap entity shall verify whether a counterparty is eligible to elect to be a Special Entity under § 23.401(c)(6) and, if so, notify such counterparty of its right to make such an election.

(d) *Safe harbor.* A swap entity may rely on written representations of a counterparty to satisfy the requirements of this section as provided in § 23.402(d). A swap entity will have a reasonable basis to rely on such written representations for purposes of the requirements in paragraphs (a) and (b) of this section if the counterparty specifies in such representations the provision(s) of section 1a(18) of the Act or paragraph(s) of § 1.3 of this chapter that describe its status as an eligible contract participant and, in the case of a Special Entity, the paragraph(s) of the Special Entity definition in § 23.401(c) that define its status as a Special Entity.

(e) *Exceptions.* This section shall not apply with respect to a transaction that is:

(1) Initiated on a designated contract market;

(2) Initiated with a counterparty whose identity is not known to the swap entity prior to execution on a swap execution facility, or a trading facility currently exempted from registration as a swap execution facility by the Commission pursuant to section 5h(g) of the Act;

(3) An A–ITBC Swap; or

(4) An ITBC Swap initiated on a swap execution facility, or a trading facility currently exempted from registration as a swap execution facility by the Commission pursuant to section 5h(g) of the Act.

§ 23.431 Disclosures of material information.

(a) *Disclosure of material information.* At a reasonably sufficient time prior to entering into a swap, a swap entity shall disclose to any counterparty to the swap (other than a swap entity, security-based swap dealer, or major security-based swap participant) material information concerning the swap in a manner reasonably designed to allow the counterparty to assess:

(1) The material risks of the particular swap, which may include market, credit, liquidity, foreign currency, legal, operational, and any other applicable risks;

(2) The material characteristics of the particular swap, which shall include the price of the swap, the material economic terms of the swap, the terms relating to the operation of the swap, and the rights and obligations of the parties during the term of the swap to the extent that such characteristics are not reflected in transaction documentation with which the counterparty has been provided prior to entering into the swap; and

(3) The material incentives and conflicts of interest that the swap entity may have in connection with a particular swap, which shall include any compensation or other incentive from any source other than the counterparty that the swap entity may receive in connection with the swap.

(b) [Reserved]

(c) *Exceptions.* Paragraph (a) of this section shall not apply with respect to a transaction that is:

(1) Initiated on a designated contract market;

(2) Initiated with a counterparty whose identity is not known to the swap entity prior to execution on a swap execution facility, or a trading facility currently exempted from registration as a swap execution facility by the Commission pursuant to section 5h(g) of the Act;

(3) An A–ITBC Swap;

(4) An ITBC Swap initiated on a swap execution facility, or a trading facility currently exempted from registration as a swap execution facility by the Commission pursuant to section 5h(g) of the Act; or

(5) A Permitted PB Transaction entered into pursuant to a Qualified Prime Broker Arrangement.

(d) *Daily mark.* A swap entity shall:

(1) Notify each counterparty (other than a swap entity, security-based swap dealer, or major security-based swap participant) of the counterparty's right to receive, upon request, the daily mark for each cleared swap from the appropriate derivatives clearing organization.

(2) Paragraph (d)(1) of this section shall not apply with respect to a transaction that is:

(i) An ITBC Swap that is initiated on a designated contract market, a swap execution facility, or a trading facility currently exempted from registration as a swap execution facility by the Commission pursuant to section 5h(g) of the Act or;

(ii) An A–ITBC Swap.

(3) For uncleared swaps, provide the counterparty (other than a swap entity, security-based swap dealer, or major security-based swap participant) with a daily mark, which shall be the estimated price that would be received by the counterparty to sell (expressed as a positive number), or be paid by the counterparty to transfer (expressed as a negative number), the uncleared swap in the market in an orderly transaction, calculated in accordance with the methodology agreed in the documentation required by § 23.504, or if applicable, § 23.158. The daily mark shall be provided to the counterparty during the term of the swap as of the close of business or such other time as the parties agree in writing.

(4) For uncleared swaps, disclose to the counterparty:

(i) The methodology and assumptions used to prepare the daily mark and any material changes during the term of the swap; provided however, that the swap entity is not required to disclose to the counterparty confidential, proprietary information about any model it may use to prepare the daily mark; and

(ii) Additional information concerning the daily mark to ensure a fair and balanced communication, including, as appropriate, that:

(A) The daily mark is an estimate and may not necessarily be a price at which either the counterparty or the swap entity would agree to replace or terminate the swap;

(B) Depending upon the agreement of the parties, calls for margin may be based on considerations other than the estimated daily mark provided to the counterparty; and

(C) The daily mark is an estimate and may not necessarily be the value of the swap that is marked on the books of the swap entity.

§ 23.432 Clearing disclosures.

(a) *For swaps required to be cleared—right to select derivatives clearing organization.* A swap entity shall notify any counterparty (other than a swap entity, securities-based swap dealer, or major securities-based swap participant) prior to entering into a swap that is subject to mandatory clearing under section 2(h) of the Act, that the

counterparty has the sole right to select the derivatives clearing organization at which the swap will be cleared.

(b) *For swaps not required to be cleared—right to clearing.* A swap entity shall notify any counterparty (other than a swap entity, securities-based swap dealer, or major securities-based swap participant) prior to entering into a swap that is not subject to the mandatory clearing requirements under section 2(h) of the Act that the counterparty:

(1) May elect to require clearing of the swap; and

(2) Shall have the sole right to select the derivatives clearing organization at which the swap will be cleared.

(c) *Exceptions.* This section shall not apply with respect to a transaction that is:

(1) An ITBC Swap that is initiated on a designated contract market, a swap execution facility, or a trading facility currently exempted from registration as a swap execution facility by the Commission pursuant to section 5h(g) of the Act; or

(2) An A–ITBC Swap.

§ 23.433 Communications—fair dealing.

With respect to any communication between a swap entity and any counterparty, the swap entity shall communicate in a fair and balanced manner based on principles of fair dealing and good faith.

§ 23.434 Recommendations to counterparties—institutional suitability.

(a) *Requirements.* A swap dealer that recommends a swap or trading strategy involving a swap to a counterparty, other than a swap entity, security-based swap dealer, or major security-based swap participant, must:

(1) Undertake reasonable diligence to understand the potential risks and rewards associated with the recommended swap or trading strategy involving a swap; and

(2) Have a reasonable basis to believe that the recommended swap or trading strategy involving a swap is suitable for the counterparty. To establish a reasonable basis for a recommendation, a swap dealer must have or obtain information about the counterparty, including the counterparty's investment profile, trading objectives, and ability to absorb potential losses associated with the recommended swap or trading strategy involving a swap.

(b) *Safe harbor.* A swap dealer may fulfill its obligations under paragraph (a)(2) of this section with respect to a particular counterparty if:

(1) The swap dealer reasonably determines that the counterparty, or an agent to which the counterparty has delegated decision-making authority, is capable of independently evaluating investment risks with regard to the relevant swap or trading strategy involving a swap;

(2) The counterparty or its agent represents in writing that it is exercising independent judgment in evaluating the recommendations of the swap dealer with regard to the relevant swap or trading strategy involving a swap;

(3) The swap dealer discloses in writing that it is acting in its capacity as a counterparty and is not undertaking to assess the suitability of the swap or trading strategy involving a swap for the counterparty; and

(4) In the case of a counterparty that is a Special Entity, the swap dealer complies with § 23.440 where the recommendation would cause the swap dealer to act as an advisor to a Special Entity within the meaning of § 23.440(a).

(c) *Written representations.* A swap dealer will satisfy the requirements of paragraph (b)(1) of this section if it receives written representations, as provided in § 23.402(d), that:

(1) In the case of a counterparty that is not a Special Entity, the counterparty has complied in good faith with written policies and procedures that are reasonably designed to ensure that the persons responsible for evaluating the recommendation and making trading decisions on behalf of the counterparty are capable of doing so; or

(2) In the case of a counterparty that is a Special Entity, satisfy the terms of the safe harbor in § 23.450(d).

(d) *Exceptions.* This section shall not apply with respect to a transaction that is:

(1) An A–ITBC Swap; or

(2) An ITBC Swap initiated on a designated contract market, a swap execution facility, or a trading facility currently exempted from registration as a swap execution facility by the Commission pursuant to section 5h(g) of the Act.

§§ 23.435–23.439 [Reserved]

§ 23.440 Requirements for swap dealers acting as advisors to Special Entities.

(a) *Acts as an advisor to a Special Entity.* For purposes of this section, a swap dealer ''acts as an advisor to a Special Entity'' when the swap dealer recommends a swap or trading strategy involving a swap that is tailored to the particular needs or characteristics of the Special Entity.

(b) *Safe harbors.* A swap dealer will not ''act as an advisor to a Special Entity'' within the meaning of paragraph (a) of this section if:

(1) With respect to a Special Entity that is an employee benefit plan as defined in § 23.401(c)(3):

(i) The Special Entity represents in writing that it has a fiduciary as defined in section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002) that is responsible for representing the Special Entity in connection with the swap transaction;

(ii) The fiduciary represents in writing that it will not rely on recommendations provided by the swap dealer; and

(iii) The Special Entity represents in writing:

(A) That it will comply in good faith with written policies and procedures reasonably designed to ensure that any recommendation the Special Entity receives from the swap dealer materially affecting a swap transaction is evaluated by a fiduciary before the transaction occurs; or

(B) That any recommendation the Special Entity receives from the swap dealer materially affecting a swap transaction will be evaluated by a fiduciary before that transaction occurs; or

(2) With respect to any Special Entity:

(i) The swap dealer does not express an opinion as to whether the Special Entity should enter into a recommended swap or trading strategy involving a swap that is tailored to the particular needs or characteristics of the Special Entity;

(ii) The Special Entity represents in writing that:

(A) The Special Entity will not rely on recommendations provided by the swap dealer; and

(B) The Special Entity will rely on advice from a qualified independent representative within the meaning of § 23.450; and

(iii) The swap dealer discloses to the Special Entity that it is not undertaking to act in the best interests of the Special Entity as otherwise required by this section.

(c) *Requirements.* A swap dealer that acts as an advisor to a Special Entity shall comply with the following requirements:

(1) *Duty.* Any swap dealer that acts as an advisor to a Special Entity shall have a duty to make a reasonable determination that any swap or trading strategy involving a swap recommended by the swap dealer is in the best interests of the Special Entity.

(2) *Reasonable efforts.* Any swap dealer that acts as an advisor to a Special Entity shall make reasonable efforts to obtain such information as is necessary to make a reasonable determination that any swap or trading strategy involving a swap recommended

by the swap dealer is in the best interests of the Special Entity, including information relating to:

(i) The financial status of the Special Entity, as well as the Special Entity's future funding needs;

(ii) The tax status of the Special Entity;

(iii) The hedging, investment, financing, or other objectives of the Special Entity;

(iv) The experience of the Special Entity with respect to entering into swaps, generally, and swaps of the type and complexity being recommended;

(v) Whether the Special Entity has the financial capability to withstand changes in market conditions during the term of the swap; and

(vi) Such other information as is relevant to the particular facts and circumstances of the Special Entity, market conditions, and the type of swap or trading strategy involving a swap being recommended.

(d) *Reasonable reliance on representations of the Special Entity.* As provided in § 23.402(d), the swap dealer may rely on written representations of the Special Entity to satisfy its requirement in paragraph (c)(2) of this section to make ''reasonable efforts'' to obtain necessary information.

(e) *Exceptions.* This section shall not apply with respect to a transaction that is:

(1) Initiated with a counterparty whose identity is not known to the swap dealer prior to execution on a designated contract market, a swap execution facility, or a trading facility currently exempted from registration as a swap execution facility by the Commission pursuant to section 5h(g) of the Act;

(2) An A–ITBC Swap; or

(3) An ITBC Swap initiated by a Special Entity on a designated contract market, a swap execution facility, or a trading facility currently exempted from registration as a swap execution facility by the Commission pursuant to section 5h(g) of the Act, in each case with a swap dealer who does not know the Special Entity status of its counterparty prior to execution.

§§ 23.441–23.449 [Reserved]

§ 23.450 Requirements for swap entities acting as counterparties to Special Entities.

(a) *Definitions.* For purposes of this section:

(1) The term ''principal relationship'' means where a swap entity is a principal of the representative of a Special Entity or the representative of a Special Entity is a principal of the swap entity. The term ''principal'' means any person listed in § 3.1(a)(1) through (3) of this chapter.

(2) The term ''statutory disqualification'' means, with respect to a person that is not a registrant with the Commission, grounds for refusal to register or to revoke, condition, or restrict the registration of any registrant or applicant for registration as set forth in sections 8a(2) and 8a(3) of the Act, or, with respect to a person that is a registrant with the Commission, the Commission has refused registration or revoked, conditioned, or restricted the registration of such registrant or applicant for registration pursuant to sections 8a(2) or 8a(3) of the Act.

(b) *Reasonable basis.* (1) Any swap entity that offers to enter or enters into a swap with a Special Entity, other than a Special Entity defined in § 23.401(c)(3), shall have a reasonable basis to believe that the Special Entity has a representative that:

(i) Has sufficient knowledge to evaluate the transaction and risks;

(ii) Is not subject to a statutory disqualification;

(iii) Is independent of the swap entity;

(iv) Undertakes a duty to act in the best interests of the Special Entity it represents;

(v) Makes appropriate and timely disclosures to the Special Entity;

(vi) Evaluates, consistent with any guidelines provided by the Special Entity, fair pricing and the appropriateness of the swap; and

(vii) In the case of a Special Entity, as defined in § 23.401(c)(2) or (4), is subject to restrictions on certain political contributions imposed by the Commission, the Securities and Exchange Commission, or a self-regulatory organization subject to the jurisdiction of the Commission or the Securities and Exchange Commission; provided however, that this paragraph (b)(1)(vii) shall not apply if the representative is an employee of the Special Entity.

(2) Any swap entity that offers to enter or enters into a swap with a Special Entity as defined in § 23.401(c)(3) shall have a reasonable basis to believe that the Special Entity has a representative that is a fiduciary as defined in section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002).

(c) *Independent.* For purposes of paragraph (b)(1)(iii) of this section, a representative of a Special Entity will be deemed to be independent of the swap entity if:

(1) The representative is not and, within one year of representing the Special Entity in connection with the swap, was not an associated person of the swap entity within the meaning of section 1a(4) of the Act;

(2) There is no principal relationship between the representative of the Special Entity and the swap entity;

(3) The representative:

(i) Provides timely and effective disclosures to the Special Entity of all material conflicts of interest that could reasonably affect the judgment or decision making of the representative with respect to its obligations to the Special Entity; and

(ii) Complies with policies and procedures reasonably designed to manage and mitigate such material conflicts of interest;

(4) The representative is not directly or indirectly, through one or more persons, controlled by, in control of, or under common control with the swap entity; and

(5) The swap entity did not refer, recommend, or introduce the representative to the Special Entity within one year of the representative's representation of the Special Entity in connection with the swap.

(d) *Safe harbor.* (1) A swap entity shall be deemed to have a reasonable basis to believe that the Special Entity, other than a Special Entity defined in § 23.401(c)(3), has a representative that satisfies the applicable requirements of paragraph (b)(1) of this section, provided that:

(i) The Special Entity represents in writing to the swap entity that it has complied in good faith with written policies and procedures reasonably designed to ensure that it has selected a representative that satisfies the applicable requirements of paragraph (b) of this section, and that such policies and procedures provide for ongoing monitoring of the performance of such representative consistent with the requirements of paragraph (b) of this section; and

(ii) The representative represents in writing to the Special Entity and swap entity that the representative:

(A) Has policies and procedures reasonably designed to ensure that it satisfies the applicable requirements of paragraph (b) of this section;

(B) Meets the independence test in paragraph (c) of this section; and

(C) Is legally obligated to comply with the applicable requirements of paragraph (b) of this section by agreement, condition of employment, law, rule, regulation, or other enforceable duty.

(2) A swap entity shall be deemed to have a reasonable basis to believe that a Special Entity defined in § 23.401(c)(3) has a representative that satisfies the applicable requirements in paragraph

(b)(2) of this section, provided that the Special Entity provides in writing to the swap entity the representative's name and contact information, and represents in writing that the representative is a fiduciary as defined in section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002).

(e) *Reasonable reliance on representations of the Special Entity.* A swap entity may rely on written representations of a Special Entity and, as applicable under this section, the Special Entity's representative to satisfy any requirement of this section as provided in § 23.402(d).

(f) *Chief compliance officer review.* If a swap entity initially determines that it does not have a reasonable basis to believe that the representative of a Special Entity meets the criteria established in this Section, the swap entity shall make a written record of the basis for such determination and submit such determination to its chief compliance officer for review to ensure that the swap entity has a substantial, unbiased basis for the determination.

(g) *Disclosures.* Before the initiation of a swap, a swap entity shall disclose to the Special Entity in writing:

(1) The capacity in which it is acting in connection with the swap; and

(2) If the swap entity engages in business with the Special Entity in more than one capacity, the swap entity shall disclose the material differences between such capacities.

(h) *Exceptions.* This section shall not apply with respect to a transaction that is:

(1) Initiated with a counterparty whose identity is not known to the swap entity prior to execution on a designated contract market, a swap execution facility, or a trading facility currently exempted from registration as a swap execution facility by the Commission pursuant to section 5h(g) of the Act;

(2) An A–ITBC Swap; or

(3) An ITBC Swap initiated on a designated contract market, a swap execution facility, or a trading facility currently exempted from registration as a swap execution facility by the Commission pursuant to section 5h(g) of the Act.

§ 23.451 Political contributions by certain swap dealers.

(a) *Definitions.* For the purposes of this section:

(1) The term ''contribution'' means any gift, subscription, loan, advance, or deposit of money or anything of value made:

(i) For the purpose of influencing any election for federal, state, or local office;

(ii) For payment of debt incurred in connection with any such election; or

(iii) For transition or inaugural expenses incurred by the successful candidate for state or local office.

(2) The term ''covered associate'' means:

(i) Any general partner, managing member, or executive officer, or other person with a similar status or function;

(ii) Any employee who solicits a governmental Special Entity for the swap dealer and any person who supervises, directly or indirectly, such employee; and

(iii) Any political action committee controlled by the swap dealer or by any person described in paragraphs (a)(2)(i) and (a)(2)(ii) of this section.

(3) The term ''governmental Special Entity'' means any Special Entity defined in § 23.401(c)(2) or (4).

(4) The term ''official'' of a governmental Special Entity means any person (including any election committee for such person) who was, at the time of the contribution, an incumbent, candidate, or successful candidate for elective office of a governmental Special Entity, if the office:

(i) Is directly or indirectly responsible for, or can influence the outcome of, the selection of a swap dealer by a governmental Special Entity; or

(ii) Has authority to appoint any person who is directly or indirectly responsible for, or can influence the outcome of, the selection of a swap dealer by a governmental Special Entity.

(5) The term ''payment'' means any gift, subscription, loan, advance, or deposit of money or anything of value.

(6) The term ''regulated person'' means:

(i) A person that is subject to restrictions on certain political contributions imposed by the Commission, the Securities and Exchange Commission, or a self-regulatory agency subject to the jurisdiction of the Commission or the Securities and Exchange Commission;

(ii) A general partner, managing member, or executive officer of such person, or other individual with a similar status or function; or

(iii) An employee of such person who solicits a governmental Special Entity for the swap dealer and any person who supervises, directly or indirectly, such employee.

(7) The term ''solicit'' means a direct or indirect communication by any person with a governmental Special Entity for the purpose of obtaining or retaining an engagement related to a swap.

(b) *Prohibitions and exceptions.* (1) As a means reasonably designed to prevent fraud, no swap dealer shall offer to enter into or enter into a swap or a trading strategy involving a swap with a governmental Special Entity within two years after any contribution to an official of such governmental Special Entity was made by the swap dealer or by any covered associate of the swap dealer; provided however, that:

(2) This prohibition does not apply:

(i) If the only contributions made by the swap dealer to an official of such governmental Special Entity were made by a covered associate:

(A) To officials for whom the covered associate was entitled to vote at the time of the contributions, provided that the contributions in the aggregate do not exceed $350 to any one official per election; or

(B) To officials for whom the covered associate was not entitled to vote at the time of the contributions, provided that the contributions in the aggregate do not exceed $150 to any one official per election;

(ii) To a swap dealer as a result of a contribution made by a natural person more than six months prior to becoming a covered associate of the swap dealer, provided that this exclusion shall not apply if the natural person, after becoming a covered associate, solicits the governmental Special Entity on behalf of the swap dealer to offer to enter into or to enter into a swap or trading strategy involving a swap; or

(iii) To a swap that is:

(A) Initiated on a designated contract market, a swap execution facility, or a trading facility currently exempted from registration as a swap execution facility by the Commission pursuant to section 5h(g) of the Act; or

(B) An A–ITBC Swap.

(3) No swap dealer or any covered associate of the swap dealer shall:

(i) Provide or agree to provide, directly or indirectly, payment to any person to solicit a governmental Special Entity to offer to enter into, or to enter into, a swap with that swap dealer unless such person is a regulated person; or

(ii) Coordinate, or solicit any person or political action committee to make, any:

(A) Contribution to an official of a governmental Special Entity with which the swap dealer is offering to enter into, or has entered into, a swap; or

(B) Payment to a political party of a state or locality with which the swap dealer is offering to enter into or has entered into a swap or a trading strategy involving a swap.

(c) *Circumvention of rule.* No swap dealer shall, directly or indirectly, through or by any other person or means, do any act that would result in

a violation of paragraph (b) of this section.

(d) *Requests for exemption.* The Commission, upon application, may conditionally or unconditionally exempt a swap dealer from the prohibition under paragraph (b) of this section. In determining whether to grant an exemption, the Commission will consider, among other factors:

(1) Whether the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes of the Act;

(2) Whether the swap dealer:

(i) Before the contribution resulting in the prohibition was made, implemented policies and procedures reasonably designed to prevent violations of this section;

(ii) Prior to or at the time the contribution which resulted in such prohibition was made, had no actual knowledge of the contribution; and

(iii) After learning of the contribution:

(A) Has taken all available steps to cause the contributor involved in making the contribution which resulted in such prohibition to obtain a return of the contribution; and

(B) Has taken such other remedial or preventive measures as may be appropriate under the circumstances;

(3) Whether, at the time of the contribution, the contributor was a covered associate or otherwise an employee of the swap dealer, or was seeking such employment;

(4) The timing and amount of the contribution which resulted in the prohibition;

(5) The nature of the election (*e.g.,* federal, state or local); and

(6) The contributor's apparent intent or motive in making the contribution that resulted in the prohibition, as evidenced by the facts and circumstances surrounding the contribution.

(e) *Prohibitions inapplicable.* (1) The prohibitions under paragraph (b) of this section shall not apply to a contribution made by a covered associate of the swap dealer if:

(i) The swap dealer discovered the contribution within 120 calendar days of the date of such contribution;

(ii) The contribution did not exceed the amounts permitted by paragraphs (b)(2)(i)(A) or (B) of this section; and

(iii) The covered associate obtained a return of the contribution within 60 calendar days of the date of discovery of the contribution by the swap dealer.

(2) A swap dealer may not rely on paragraph (e)(1) of this section more than twice in any 12-month period.

(3) A swap dealer may not rely on paragraph (e)(1) of this section more than once for any covered associate, regardless of the time between contributions.

3. In § 23.504, revise paragraph (a)(1) to read as follows:

§ 23.504 Swap trading relationship documentation.

(a) *In general*—(1) *Applicability.* The requirements of this section shall not apply to:

(i) Swaps executed prior to the date on which a swap dealer or major swap participant is required to be in compliance with this section;

(ii) Swaps that have been cleared on a derivatives clearing organization or cleared on a clearing organization that is currently exempted from registration by the Commission pursuant to section 5b(h) of the Act; and

(iii) An ITBC Swap as defined in § 23.401(d).

* * * * *

Issued in Washington, DC, on September 25, 2025, by the Commission.

Christopher Kirkpatrick,

Secretary of the Commission.

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

Appendix to Revisions to Business Conduct and Swap Documentation Requirements for Swap Dealers and Major Swap Participants—Commission Voting Summary

On this matter, Acting Chairman Pham voted in the affirmative. No Commissioner voted in the negative.

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