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: Final rule.

SUMMARY: The Commodity Futures Trading Commission (''CFTC'' or ''Commission'') is adopting a final rule (the ''Final Rule'') amending certain of the Commission's business conduct and documentation requirements applicable to swap dealers and major swap participants. The Final Rule provides 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, and makes certain other changes discussed herein. The adopted amendments supersede certain no-action positions issued by the Commission's Market Participants Division (''MPD''), which the Commission expects MPD to terminate in due course.

DATES: The Final Rule is effective January 29, 2026.

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SUPPLEMENTARY INFORMATION:

I. Background

The Commission is issuing this Final Rule to amend certain business conduct standards for swap dealers (''SDs'') and major swap participants (''MSPs'' and, together with SDs, ''Swap Entities'') [1] contained in subpart H of part 23 of the Commission's regulations,[2] and to the swap trading relationship documentation rule for Swap Entities in § 23.504.[3] These amendments are intended to address certain long-standing issues with the Commission's external business conduct standards and swap trading relationship documentation rule, and are intended to supersede many long-standing no-action positions issued by MPD (together, the ''Covered Staff Letters'') by codifying such positions in the Commission's regulations, as explained below.[4] 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 is amending the external business conduct standards and the swap trading relationship documentation rule to provide an outcome comparable to such 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, in due course, MPD will withdraw all of the no-action positions contained in the Covered Staff Letters necessary to reflect the amendments to Commission Regulations made by this Final Rule.[5]

A. Applicable Regulatory Requirements

Section 4s(h) of the CEA [6] 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.[7] 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'').[8]

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'').[9] 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.[10]

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[1] ''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. 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] 17 CFR part 23, subpart H.

[3] 17 CFR 23.504.

[4] For purposes of the Final Rule, the Covered Staff Letters are 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 Final Rule refers 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.*

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

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

[7] ''Special Entity'' is currently defined in § 23.401(c), 17 CFR 23.401(c) (redesignated as § 23.401(h), 17 CFR 23.401(h)), in the Final Rule text *infra*).

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

[9] 17 CFR 23.431(a)(3)(i).

[10] § 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

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'').[11] 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.[12]

Section 4s(i) of the CEA requires the Commission to adopt rules governing swap documentation for Swap Entities.[13] Pursuant to this rulemaking authority, the Commission adopted rules in subpart I of part 23 of its regulations.[14] 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'').[15]

B. Staff No-Action Positions

1. Intended To Be Cleared Swaps

In 2013, MPD issued CFTC Staff Letter 13–70[16] 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''). In support of their request, market participants informed staff 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. Market participants generally argued that: (1) because swaps of a type accepted for clearing by a derivatives clearing organization (''DCO'')[17] are sufficiently standardized, (especially if also executed on a designated contract market (''DCM'')[18] or swap execution facility (''SEF'')),[19] 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 with respect to such swaps, 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.[20]

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 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.''[21] To date, the Commission has issued exemptions from registration to four DCOs: ASX Clear (Futures) Pty Limited (''ASX'');[22] Japan Securities Clearing Corporation (''JSCC'');[23] Korea Exchange, Inc. (''KRX'');[24] OTC Clearing Hong Kong Limited (''OTC Clear''),[25] and Taiwan Futures Exchange Corporation (''TAIFEX'').[26] Any DCO that, as of any date of determination, is exempt from registration as a DCO under section 5b of the CEA,[27] including, without limitation, ASX, JSCC, KRX, OTC Clear and TAIFEX, is an ''Exempt DCO'' on such date for purposes of this Final Rule.

Similarly, section 5h(g) of the CEA authorizes the Commission to exempt, conditionally or unconditionally, a SEF from registration, if the Commission

that facilitates negotiations and balances historical information asymmetry regarding swap prices).

[11] 17 CFR 23.431(b).

[12] §§ 23.431(b)(2)–(4), 17 CFR 23.431(b)(2)–(4).

[13] 7 U.S.C. 6s(i).

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

[15] § 23.504, 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).

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

[17] ''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.

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

[19] ''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.

[20] 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 by 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.).

[21] 7 U.S.C. 7a–1(h).

[22] 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.*

[23] 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 September 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 (''DCR'') 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.

[24] 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.*

[25] 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.*

[26] On February 14, 2024, the Commission issued an Order of Exemption with respect to TAIFEX, which exempts TAIFEX from registering with the Commission as a DCO, subject to certain terms and conditions in the order, *available at https://www.cftc.gov/IndustryOversight/IndustryFilings/ClearingOrganizations/51878.*

[27] 7 U.S.C. 7a–1.

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.'' [28] To date, the Commission has issued exemptions from SEF registration to facilities for the trading or processing of swaps from the European Union,[29] Singapore,[30] and Japan.[31] 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,[32] 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 Final Rule.

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.[33] 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 its no-action position regarding documentation requirements under the STRD Requirement.[34]

The Commission has determined that the standardization that occurs when a type of swap is made available to trade on a DCM, SEF [35] or Exempt SEF and/or accepted for clearing on a DCO [36] 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 increase in the information available and additional trade management flexibility, the Commission has 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 determined that compliance with such requirements may represent a significant hinderance to the efficient trading of cleared swaps.

The Commission has also 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.[37]

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 material economic 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

[28] 7 U.S.C. 7b–3(g).

[29] 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 (''UK NAL Exchanges''). Under this no-action position, UK NAL Exchanges 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*. The Commission expects that MPD will issue a no-action position for ITBC Swaps on UK NAL Exchanges after the publication of this Final Rule.

[30] 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.

[31] 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.

[32] 7 U.S.C. 7b–3(g).

[33] CFTC Staff Letter 23–01 at 1.

[34] *See id.* at 7–10.

[35] *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.

[36] *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.

[37] 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 by 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.).

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 and terms 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, material economic terms, and a PTMMM of the swaps as required by § 23.431(a)(3).[38]

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 the enumerated External Business Conduct Standards as they relate to certain covered transactions [39] executed under PB arrangements where the PB and trigger swap counterparty were each SDs registered with the Commission.[40] 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.[41]

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'') [42] 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.[43] 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).[44]

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) [45] 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.[46] 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/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 and other material economic terms of the mirror swap are determined based on those of the trigger swap 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.[47]

The Commission has 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).[48] 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),[49] and, to the Commission's knowledge, has not resulted in any adverse consequences.

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) [50] stating that it would not recommend enforcement action against a Swap Entity for its failure to disclose an otherwise required PTMMM to a

[38] 17 CFR 23.431(a)(3).

[39] 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''). *See also* CFTC Staff Letter 25–10 (Apr. 9, 2025), Re: Staff Interpretation Regarding Certain Foreign Exchange Products.

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.

[40] *See* CFTC Staff Letter 13–11.

[41] *Id.* at 6–10.

[42] 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).

[43] 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.

[44] *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)).

[45] 17 CFR 23.431(a) and (b).

[46] § 23.431(c), 17 CFR 23.431(c).

[47] CFTC Staff Letter 19–06 at 3.

[48] 17 CFR 23.431(a) and (b).

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

[50] *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.

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);[51] (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.[52] 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.[53] Swaps executed anonymously on a SEF or DCM are excepted from the requirement to disclose a PTMMM pursuant to § 23.431(c).[54]

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 swaps or index credit default swaps,[55] 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.[56]

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. CFTC Staff Letter 25–09 stated that it would remain in effect until the adoption by the Commission of a regulation addressing the PTMMM Requirement. This Final Rule addresses the PTMMM Requirement.

II. Summary of the Proposal and Comments Received

On September 30, 2025, the Commission approved and subsequently published in the **Federal Register** a Notice of Proposed Rulemaking (the ''Proposal'' or ''Proposed Rule'')[57] proposing amendments to the External Business Conduct Standards and the STRD Requirement to provide exceptions to compliance with such requirements when executing swaps that are: (1) ITBC Swaps; or (2) subject to prime broker arrangements that meet certain qualifying conditions. The Proposal also proposed certain other changes discussed herein, including eliminating the PTMMM Requirement and the Scenario Analysis Requirement, and proposed a simplifying amendment 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 in § 23.401[58] to mean ''a swap dealer or major swap participant.''

The Commission requested comments on all aspects of the Proposed Rule and on many specific questions listed in the Proposal. The comment period for the Proposal closed on November 14, 2025.[59] The Commission received a total of four comment letters, all of which were relevant to the Proposal.[60] All of these letters supported the Proposal broadly but only the ISDA/SIFMA Letter and the Citadel Letter suggested specific changes to portions of the Proposal, which are discussed in the relevant sections below.

A. Pre-Trade Mid-Market Mark Disclosure Requirement

As discussed above, Commission Regulation § 23.431(a)(3)(i) currently requires pre-trade disclosures by Swap Entities to their counterparties that are not Swap Entities, security-based swap dealers, or security-based major swap participants, including the PTMMM.

1. Proposal

In the Proposal, the Commission proposed to eliminate the Swap Entity PTMMM Requirement set forth in § 23.431(a)(3)(i)[61] in its entirety. The Commission cited several reasons for proposing this change based on its experience since 2013 when it first required Swap Entity compliance with the External Business Conduct Standards. First, 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,''[62] it received suggestions from several commenters, in their responses to a request for comments and recommendations under the Commission's ''Project KISS'' in 2017,[63] requesting that the Commission eliminate or revise the PTMMM Requirement, arguing that, among other things, the requirement: (1) creates

[51] 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.

[52] *Id.* at 6.

[53] *Id.* at 6–7.

[54] 17 CFR 23.431(c).

[55] 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.

[56] CFTC Staff Letter 12–58 at 4.

[57] Notice of Proposed Rulemaking, *Revisions to Business Conduct Requirements for Swap Dealers and Major Swap Participants*, 90 FR 47136 (Sept. 30, 2025).

[58] 17 CFR 23.401.

[59] The comment period was originally scheduled to end on October 24, 2025, but was extended as a result of a lapse in appropriations. *See* Order of the Commodity Futures Trading Commission Relating to the Continuation, Shutdown, and Resumption of Certain Commission Operations in the Event of a Lapse in Appropriations, 90 FR 47556, 47558 (Oct. 2, 2025).

[60] All comments on the Proposal are *available at https://comments.cftc.gov/PublicComments/CommentList.aspx?id=7624&ctl00_ctl00_cphContentMain_MainContent_gvCommentListChangePage=1.* The four comment letters are from Citadel Securities (''Citadel'') (the ''Citadel Letter''); Immutifi Inc.; the International Swaps and Derivatives Association, Inc. (''ISDA'') and the Securities Industry and Financial Markets Association (''SIFMA'') (the ''ISDA/SIFMA Letter''); and Kelly Moore.

[61] 17 CFR 23.431(a)(3)(i).

[62] Final EBCS Rulemaking at 77 FR 9766.

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

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''),[64] which are deemed sufficiently sophisticated to enter into over-the-counter swaps.[65]

Second, MPD's issuance of the no-action positions 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 or other material economic terms 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.[66] 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.[67]

In light of these circumstances, the Commission noted its preliminary belief in the Proposal that the PTMMM Requirement provides no utility to counterparties and may delay execution to the disadvantage of counterparties, and that the elimination of the PTMMM Requirement supports the Commission's goal of increasing the efficiency of the swaps market.

In addition to the foregoing, the Commission noted in the Proposal that the PTMMM Requirement, unlike the uncleared swap daily mark disclosure requirement promulgated in § 23.431(d)(2),[68] was not required by the amendments to the CEA contained in the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'').[69] Thus, elimination of the PTMMM disclosure requirement would not contradict any counterparty protection otherwise required by the Dodd-Frank Act. Further, the Commission noted that elimination of the PTMMM disclosure requirement would serve to harmonize the Commission's rules governing swap dealing with those of the SEC because 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.[70]

2. Comments Received and Final Rule

Only the ISDA/SIFMA Letter specifically addressed the proposed elimination of the PTMMM Requirement. It supported elimination unequivocally, agreeing with the Commission's reasoning for elimination in the Proposal, and noting that the PTMMM Requirement presumes an imbalance of information that does not exist in practice. After considering this comment, and having received no comments in support of the positive utility of receiving a PTMMM, the Commission has determined that elimination of the PTMMM Requirement will support the Commission's goal of increasing the efficiency of the swaps market by: (1) reducing unnecessary burdens and cost, (2) allowing for more timely trade execution, and (3) harmonizing the Commission's rules governing swap dealing with those of the SEC. Thus, the Commission is eliminating the PTMMM Requirement in its entirety as proposed 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 final rule text *infra.*

The Commission notes that its repeal of the PTMMM Requirement herein renders the MPD no-action positions in CFTC Staff Letters 12–58, 13–12, and 25–09 moot; it therefore expects that MPD will withdraw such positions in due course.

B. Scenario Analysis Requirement

As discussed above, § 23.431(b) currently requires Swap Entities to provide certain disclosures related to scenario analysis prior to entering into a swap with a counterparty (other than a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant) that is not made available for trading on a DCM or SEF. Such disclosures include that a Swap Entity must (1) notify the counterparty that it can request and consult on the design of a scenario analysis to allow the counterparty to assess its potential exposure in connection with the swap; (2) upon request of the counterparty, provide a scenario analysis, which is designed in consultation with the counterparty and done over a range of assumptions, including severe downside stress scenarios that would result in a significant loss; (3) disclose all material assumptions and explain the calculation methodologies used to perform any requested scenario analysis (a swap dealer, however, is not required to disclose confidential, proprietary information about any model it may use to prepare the scenario analysis); and (4) in designing any requested scenario analysis, consider any relevant analyses that the swap dealer undertakes for its own risk management purposes, including analyses performed as part of its ''New Product Policy'' specified in § 23.600(c)(3).

1. Proposal

In the Proposal, the Commission proposed to eliminate the Scenario Analysis Requirement set forth in § 23.431(b)[71] in its entirety based on its experience over the last decade since Swap Entity compliance with the External Business Conduct Standards was required, noting its belief that it provides no utility to counterparties.

In adopting the Scenario Analysis Requirement in 2012, the Commission 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.''[72] However, the Commission learned from several market participants, in responding to a request for comments and

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

[65] *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.*

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

[67] *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.*

[68] 17 CFR 23.431(d)(2).

[69] *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 the amendments to the daily mark disclosure requirement in the Final Rule.

[70] *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).

[71] 17 CFR 23.431(b).

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

recommendations under the Commission's ''Project KISS'' in 2017,[73] 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 and thus advocated that the Commission eliminate the Scenario Analysis Requirement or restrict the availability of scenario analysis.[74]

In the Proposal, the Commission also stated that elimination of the Scenario Analysis Requirement would serve to harmonize the Commission's rules governing swap dealing with those of the SEC noting 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. Further, the Commission noted that scenario analysis was not required by the amendments to the CEA made by the Dodd-Frank Act and thus was wholly the product of Commission rulemaking.[75]

2. Comments Received and Final Rule

Only the ISDA/SIFMA Letter specifically addressed the proposed elimination of the Scenario Analysis Requirement.[76] It supported elimination unequivocally, agreeing with the Commission's reasoning for elimination in the Proposal, noting that it is extremely rare for scenario analysis to be requested and stating the associations' view that scenario analysis is of little utility to buy-side counterparties.[77] Having considered this comment and having received no comments opposed to the elimination of the Scenario Analysis Requirement, the Commission agrees with commenters that the Scenario Analysis Requirement has proven to have little utility to counterparties. Thus, the Commission is adopting the elimination of the Scenario Analysis Requirement as proposed by replacing paragraph (b) of § 23.431 with ''[RESERVED],'' as reflected in the final rule text *infra.*

C. Daily Mark Disclosure Requirement

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 the term ''daily mark'' or describe how it was to be calculated.[78] Thus, the Commission promulgated § 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.

1. Proposal

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 proposed to reorganize § 23.431(d) such that paragraphs (d)(1) and (d)(2) would address the requirements for, and cover the exceptions from, respectively, the daily mark requirement for cleared swaps (as discussed in Section II.C below), and paragraph (d)(3) would address the

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

[74] *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.*

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

[76] *See* ISDA/SIFMA Letter at 1–3.

[77] *Id.* at 3.

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

requirements for, and cover the exceptions from, the daily mark requirement for uncleared swaps, including a description of the daily mark for uncleared swaps to 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 goal of this proposed change was to harmonize the daily mark disclosure requirement in § 23.431(d)(2) with the Commission's uncleared swap margin rules and swap data reporting rules.

2. Comments Received and Final Rule

Only the ISDA/SIFMA Letter specifically addressed the proposed change to the daily mark disclosure requirements. ISDA/SIFMA generally supported the Commission amending its daily mark requirements; however, rather than revising it as proposed, ISDA/SIFMA suggested that a better, more streamlined approach would be to (1) amend the definition of ''daily mark'' to provide Swap Entities with more flexibility in determining the mark, while still maintaining requirements for Swap Entities to disclose the methodologies and assumptions used to prepare the daily mark; and (2) eliminate the daily mark requirement for all non-cleared swaps that are subject to daily variation margining, arguing that this approach would better enable firms to align their daily mark disclosures under Commission Regulations with the methodologies they use for other purposes, whether for reporting, daily mark disclosures under SEC rules, internal valuation purposes, or otherwise. ISDA/SIFMA further argued that, given the institutional nature of the swap market, disclosure of the daily mark methodologies and assumptions, as provided in proposed § 23.431(d)(4), should provide counterparties with sufficient information to understand the daily marks they receive.

After considering these comments, the Commission has determined to amend its daily mark requirement under § 23.431(d) with some modifications from the Proposal. Specifically, at the suggestion of commenters, the Commission has determined to provide Swap Entities with greater flexibility in determining how to calculate daily marks for uncleared swaps, concluding that such flexibility would be a simpler way of achieving the Commission's goal in the Proposal of harmonizing the daily mark requirement with the other daily swap valuation requirements in the Commission's uncleared swap margin and swap reporting rules. In adopting the amendments to the daily mark requirement, the Commission notes that ''daily mark'' is not defined in the CEA and the Commission is persuaded by the comments of ISDA/SIFMA that disclosure of the methodology and assumptions required under final § 23.431(d)(4) is sufficient for counterparties to Swap Entities to determine for themselves the value of the daily mark received. In addition, the Commission has determined that, with respect to swaps subject to daily variation margin delivery requirements, whether subject to the Commission's variation requirements set forth in § 23.150 through § 23.161 or otherwise, notice of variation margin amounts necessarily entails valuation of each swap and thus such delivery requirements fulfill the Swap Entity's requirement to provide a daily mark under section 4s(h)(3)(B) of the CEA. Variation margin amounts are the change in the net present value of a swap since the last time the variation margin amount was exchanged between the parties. The daily mark is essentially the net present value of the swap, thus notice of variation margin amounts is materially equivalent to notice of the daily mark.

To effect these changes, the Final Rule excludes swaps subject to daily variation margining from the requirements of § 23.431(d)(3) and (4) and removes the requirement that the daily mark be the mid-market mark of the swap in § 23.431(d)(3) and related text, as reflected in the final rule text *infra.*

D. New and Amended Definitions in § 23.401

In the Proposal, the Commission proposed adding several 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 discussed below.

1. Definition of ITBC Swap

a. Proposal

The Commission proposed to add a new eight-prong definition of ''ITBC Swap'' to the definitions in § 23.401 applicable to subpart H of part 23 of the Commission's regulations.[92]

In the Proposal, the Commission explained that defining ''ITBC Swap'' in § 23.401 was intended to clearly describe the criteria and conditions that a swap must meet to be eligible for the various proposed exceptions from the disclosure, information collection, and documentation requirements of the External Business Conduct Standards and the STRD Requirement (hereinafter, the ''ITBC Compliance Exceptions''), each of which are explained in the relevant sections below.[93] The Commission noted that, other than what has been described in the Proposal, the criteria and conditions within 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.[94] ''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 Commission noted in the Proposal that 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. 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,

[91] 17 CFR 23.401.

[92] *Id.*

[93] *See* §§ 23.402–23.451 and § 23.594; 17 CFR 23.402–23.451 and 23.504.

[94] *See* Proposed Rule, 90 FR at 47143.

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

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. The Commission explained that 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 of ''proprietary account'' in § 1.3.[97] In the Proposal, the Commission explained that this proposed 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.[98] 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 Commission proposed that 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 (the ''Breakage Condition'').[99] The Commission explained that, generally, this condition, as proposed, was 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.[100] The Commission noted that, 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. In the Proposal, the Commission preliminarily determined that the same is not true where a breakage agreement is requested by the counterparty.[101] 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. Accordingly, the Commission stated its intent 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.*[102] 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).

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 (the ''Clearing Submission Condition'').[103] The Commission explained that this proposed condition sets forth a standard for *submission* of the swap for clearing to a DCO or Exempt DCO and 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)[104] 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).[105] The Commission included 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.[106] 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.[107] 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 proposed 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* (the ''Void *Ab Initio* Condition'').[108] As explained in the Proposal, this was 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.[109] 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 the Commission maintained a prohibition on Swap Entities requiring breakage agreements as a condition to entering into a swap.

The Commission stated that compliance with this condition as proposed may be accomplished by executing the swap on a SEF or DCM

[96] *See* Section I.B.1., *supra,* n. 22–31 and accompanying text.

[97] *See* 17 CFR 1.3.

[98] *See* Proposed Rule, 90 FR at 47144.

[99] *Id.*

[100] *Id.*

[101] *See* Proposed Rule, 90 FR at 47144.

[102] *See id.*

[103] *See id.*

[104] 17 CFR 23.506.

[105] 17 CFR 23.610.

[106] *See* Proposed Rule, 90 FR at 47144.

[107] *See id.*

[108] *See id.*

[109] *See* Proposed Rule, 90 FR at 47144.

where such SEF or DCM is required to have rules requiring swaps submitted for clearing to be void *ab initio* if not cleared.[110] 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* (a ''Void *Ab Initio* Agreement'').[111] That is, the swap will be deemed to have never been executed. The Commission recognized 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 a Void *Ab Initio* Agreement could be documented.[112] However, the Commission noted its preliminary belief that 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.,* a Void *Ab Initio* Agreement may be a term of the swap agreed at execution).[113]

b. Comments Received and Final Rule

Only the ISDA/SIFMA Letter and Citadel Letter specifically addressed the proposed definition of ''ITBC Swap.''

ISDA/SIFMA firmly supported providing relief for ITBC Swaps and generally supported the Commission's proposed definition of an ITBC Swap but noted three specific concerns.

First, ISDA/SIFMA noted that the Breakage Condition could be read to imply that a Swap Entity may not raise the topic of a breakage or similar agreement with a counterparty. It argues that a Swap Entity must be permitted to initiate discussion about how to address ITBC Swaps with its counterparty as a matter of good risk management, and such discussions—whether at the request of the Swap Entity or its counterparty—do not indicate that either party is entering into the swap without the requisite intention that the swap will not be a cleared swap.

Second, ISDA/SIFMA stated that the Commission should explicitly clarify that, under the Clearing Submission Condition, Swap Entities are not responsible for guaranteeing that their counterparties will take the necessary steps for submission (outside of reasonably designed policies and procedures), as Swap Entities are only able to control their own actions and processes.

Third, ISDA/SIFMA stated that they have practical concerns regarding the implementation of the Void *Ab Initio* Condition in the context of Exempt SEFs that do not impose void *ab initio* rules. They note that entering into a Void *Ab Initio* Agreement at the point of execution is not practical given actual trading practices on Exempt SEFs and, therefore, should not be required. Instead, they argue that the Commission should allow for more flexibility by enabling Swap Entities to determine how to address such rejected transactions. Under this approach, for ITBC Swaps executed on Exempt SEFs that do not impose void *ab initio* requirements, they ask that a Swap Entity may choose to either put breakage agreements in place with its counterparties prior to execution (so long as such breakage agreements are not a condition to trading), or may otherwise have a Void *Ab Initio* Agreement in place, prior to execution. They argue this approach is not only more operationally-feasible but would also be consistent with the Commission's position for bilaterally executed ITBC swaps.

With respect to the Void *Ab Initio* Condition, Citadel, on the other hand, strongly recommended that the Commission maintain a requirement that any ITBC Swap executed on a DCM, SEF, or Exempt SEF be deemed void *ab initio* if such swap fails to clear. Citadel argued that the Commission's goal of facilitating exchange trading of cleared swaps would not be advanced by allowing for ITBC Swaps traded on a DCM, SEF, or Exempt SEF to be subject to breakage or other types of agreements that would allow such swaps to survive a failure to clear.

After considering these comments, the Commission has determined to adopt a definition of ''ITBC Swap'' with certain modifications from the Proposal.

First, the Commission is revising the Clearing Submission Condition by replacing the word ''ensures'' in the proposed definition with the words ''takes reasonable measures to ensure,'' as shown in the final rule text, *infra.* This change is meant to clarify that a Swap Entity does not have to accept liability for a failure of its counterparty to take the necessary steps for clearing. Further, the Commission intends that this condition will be satisfied, with respect to a counterparty, where a Swap Entity has entered into an agreement with such counterparty that require the counterparty to submit the swap for clearing to a DCO or Exempt DCO, as applicable, as quickly after execution as would be technologically practicable if fully automated systems were used.

Second, the Commission is modifying the Void *Ab Initio* Condition, as reflected in paragraph (8) of the ITBC Swap definition in the final rule text *infra,* to provide that, where a swap is executed on or pursuant to the rules of an Exempt SEF and the rules of such Exempt SEF do not provide for a swap rejected from clearing to be deemed void *ab initio,* the condition will be satisfied solely if the parties have prior to or at execution of the swap (1) entered into a Void *Ab Initio* Agreement, or (2) agreed that a breakage agreement or similar arrangement (as contemplated in the Breakage Condition (condition 6 of the ITBC Swap definition discussed above)) applies to the swap. The Commission is adopting additional language (as reflected in the final rule text *infra*) in the Void *Ab Initio* Condition in paragraphs (7) and (8) to make clear that the terms of any such breakage agreement or similar arrangement must take into account the Swap Entity's regulatory obligations under the External Business Conduct Standards and the STRD Requirement, including those that are required to be completed prior to execution of a swap with a non-Swap Entity counterparty.

Similarly, the Commission is modifying paragraph (7) of the definition of ''ITBC Swap'' as reflected in the final rule text, *infra,* to require that parties to a bilaterally executed swap have prior to or at execution of the swap (i) entered into a Void *Ab Initio* Agreement, or (ii) agreed that a breakage agreement or similar arrangement (as contemplated in the Breakage Condition discussed above) applies to the swap. The Commission noted in the Proposal that it did not include a void *ab initio* requirement for bilateral swaps to allow for counterparties to Swap Entities to request these types of breakage arrangements under certain circumstances;[114] however, the Commission did not include a related condition in the rule text in the Proposal. As a technical addition, the Commission is now adding that condition, as it has determined that, as discussed in the Proposal,[115] either a

[110] *See* CFTC Staff Guidance Letter (Sept. 26, 2013), Re: Staff Guidance on Swaps Straight-Through-Processing, at 6 (stating that DMO and DCR 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.*

[111] *See* Proposed Rule, 90 FR at 47144.

[112] *See id.*

[113] *See id.*

[114] *See* Proposed Rule, 90 FR at 47144.

[115] *See* Proposed Rule, 90 FR at 47144, questions 10, 11, and 12.

Void *Ab Initio* Agreement or such breakage arrangement or similar arrangement must exist for a bilateral swap to be an ITBC Swap eligible for the exceptions for ITBC Swaps provided in this Final Rule.

The additional flexibility the Commission is providing around the Void *Ab Initio* Condition is intended to address practical concerns raised by ISDA/SIFMA with respect to the operation of the Void *Ab Initio* Condition on Exempt SEFs, as initially proposed. With respect to the comment of Citadel discussed above, the Commission has determined that because (1) it would be impractical for the Commission to revisit the various orders that it has previously granted to Exempt SEFs to impose conditions that would require such Exempt SEFs to have rules requiring that swaps that fail to clear are void *ab initio,* and (2) it would likely be impracticable for a Swap Entity to enter into a Void Ab Initio Agreement at the point of execution for swaps executed on an Exempt SEF, the Commission will not make the Void *Ab Initio* Condition applicable to ITBC Swaps executed on an Exempt SEF to the same extent that such condition in paragraph (8) applies to swaps executed on a DCM or SEF, provided, however, that in any case and as required by the Breakage Condition, a Swap Entity does not make entering into a breakage agreement a pre-condition to entering into an ITBC Swap.[116]

In addition, the Commission is clarifying that that it does not intend the Breakage Condition to limit the ability of Swap Entities to discuss breakage agreements with their counterparties, either at their own behest or at that of their counterparty. Rather, the Breakage Condition solely prohibits Swap Entities from requiring a counterparty to enter into a breakage agreement as a condition to trading.

2. Definition of A–ITBC Swap

a. Proposal

The Commission proposed to add a new definition of ''A–ITBC Swap'' to the definitions in § 23.401 [117] applicable to subpart H of part 23 of the Commission's regulations.[118] The Proposal defined an ''A–ITBC Swap'' or ''Anonymous ITBC Swap'' to mean an ITBC Swap (as defined in new § 23.401(d)) where the Swap Entity does not know the identity of the counterparty prior to execution of the swap.[119] The proposed definition 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).[120] In the Proposal, the Commission stated that a definition of ''A–ITBC Swap'' in § 23.401 will help 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.[121]

b. Comments Received and Final Rule

The Commission received no comments relating specifically to this definition and is adopting this term as proposed, as shown in the final rule text, *infra.*

3. Definition of Covered Transaction

a. Proposal

The Commission proposed to add a new definition of ''Covered Transaction'' to the definitions in § 23.401 [122] applicable to subpart H of part 23 of the Commission's regulations. The Proposal defined the term ''Covered Transaction'' to mean a swap, as defined in section 1a(47) of the Act and § 1.3 of chapter I (other than swaps subject to the clearing requirement of section 2(h)(1)(A) of the Act and part 50 of chapter I), 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.[123] The definition was intended to encompass all transaction types that may be subject to a Prime Broker Arrangement (defined and explained *infra*). As such, the proposed definition encompasses swaps, as defined in section 1a(47) of the CEA,[124] but excludes swaps that are subject to the Commission's swap clearing requirement in section 2(h)(1)(A) of the CEA [125] and part 50 of the Commission's regulations.[126] Based on the Commission's understanding, swaps subject to Prime Broker Arrangements are exclusively uncleared swaps. The proposed definition of Covered Transactions also included 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.[127] The Proposal explained that the Commission 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.[128]

b. Comments Received and Final Rule

The Commission received no comments relating specifically to this definition and is adopting this term as proposed, as shown in the final rule text, *infra.*

4. Definition of Prime Broker Arrangement

a. Proposal

The Commission proposed to add a new definition of ''Prime Broker Arrangement'' to the definitions in § 23.401 [129] applicable to subpart H of part 23 of the Commission's regulations.[130] The definition was 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.[131]

[116] *See* paragraph 8 of the definition of ITBC Swap in the final rule text *infra,* which states that provided that if the swap is executed on or pursuant to the rules of an Exempt SEF and the rules of the 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,* or the parties, prior to execution, have entered into a breakage agreement or similar arrangement that addresses the disposition of such rejected swap and includes arrangements that will permit a Swap Entity to comply with the requirements of subparts H and I of part 23 of chapter I with respect to the rejected swap.

[117] 17 CFR 23.401.

[118] *See* Proposed Rule, 90 FR at 47145.

[119] *See id.*

[120] *See id.*

[121] *See* Proposed Rule, 90 FR at 47145.

[122] 17 CFR 23.401.

[123] *See* Proposed Rule, 90 FR at 47162.

[124] 7 U.S.C. 1a(47).

[125] 7 U.S.C. 2(h)(1)(A).

[126] 17 CFR part 50; 17 CFR 50.1–50.79.

[127] *See* Proposed Rule, 90 FR at 47145. *See* Section I.B.2., *supra,* n. 42–44 and accompanying text.

[128] *Id.*

[129] 17 CFR 23.401.

[130] 17 CFR part 23, subpart H; 17 CFR 23.400–23.451.

[131] *See* Proposed Rule, 90 FR at 47145.

A Prime Broker Arrangement, as proposed, included at least one PB/SD and two or more other parties evidenced by a written agreement or agreements.[132] 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'') [133] 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'') [134] 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 in the Proposal was in 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.[135] In the Proposal, the Commission also recognized that the designation of a Trigger Transaction and a Mirror Transaction depends on the perspective of the parties to the transaction.[136] For example, where two PBs are involved, the Mirror Transaction for one PB may be a Trigger Transaction for the second PB. The Commission also acknowledged 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.[137]

The intention of the proposed definition of ''Prime Broker Arrangement'' was 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.[138] The Commission stated its preliminary view that such 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.[139] The Commission acknowledged 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.[140]

b. Comments Received and Final Rule

Only the ISDA/SIFMA Letter specifically addressed the proposed definition of ''Prime Broker Arrangement.''

First, ISDA/SIFMA requested certain changes to the definition to account for a situation where a PB customer determines that the execution desk of its SD/PB provides better pricing than other executing dealers. Such customers may, in their own discretion, choose to price/execute with that desk for give-up to its SD/PB. ISDA/SIFMA argue that market practice is for PBs to maintain an appropriate level of separation between their sales and trading business (*i.e.,* the executing desk), including information barriers. Thus, in practice, the pricing and execution mechanics between a PB customer and the execution desk of that SD/PB is similar to pricing and execution with an external SD. The Commission considered this comment but declines to make the change requested by ISDA/SIFMA to the definition of ''Prime Broker Arrangement.'' In the scenario explained by ISDA/SIFMA, the same legal entity is both the executing dealer entering into the Trigger Transaction and the PB entering into the Mirror Transaction with the PB customer. Because the executing dealer and PB are both parts of the same legal entity, and that legal entity is a registered SD, the executing dealer is required under § 23.431(a) to disclose the material economic terms and the price of the swap prior to execution. Having made such disclosure, the legal entity that is the PB/SD has fulfilled the regulatory obligations that would otherwise be excepted by the Final Rule. Thus, the Commission has determined that there is no reason to include the change requested by ISDA/SIFMA to the definition of Prime Broker Arrangement because there is no need to provide an exception from the regulatory obligations of an SD/PB that acts as both the executing dealer and the PB. Further, the Commission does not believe that a Commission regulation is the appropriate place to account for the purely internal arrangements that an SD/PB may have between its PB desk and its swap trading desks.

Second, ISDA/SIFMA requested changes to the definition of Prime Broker Arrangement to clearly recognize in the rule text that a Mirror Transaction may include a spread or fees to compensate a Prime Broker for providing the credit intermediation services. In the Proposal, as discussed above, the Commission had proposed that, from the perspective of the PB/SD, the Mirror Transaction must be ''substantially'' equal but opposite to the terms and price of the Trigger Transaction (but not identical), recognizing 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 an intermediary for providing the credit intermediation service evidenced by the Prime Broker Arrangement or the intermediary's services. ISDA/SIFMA request that the ''substantially equal'' language be replaced with an explicit recognition that a Mirror Transaction may contain a spread or fee that makes it somewhat different from the Trigger Transaction. The Commission has concluded that such explicit recognition would better address any ambiguity that may have existed in the Proposal on this point and has thus added clarifying language to the definition of ''Prime Broker Arrangement,'' as shown in the final rule text *infra.*

[132] Proposed Rule, 90 FR at 47145, n. 109 (stating that ''[t]he Commission preliminarily believed that MSPs do not and would not act as PBs.'').

[133] *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).

[134] *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).

[135] *See* Proposed Rule, 90 FR at 47145.

[136] *See id.*

[137] *See id.*

[138] *See* Proposed Rule, 90 FR at 47145.

[139] *See id.,* 90 FR at 47145–47146.

[140] *See id.,* 90 FR at 47145.

5. Definition of Qualified Prime Broker Arrangement

a. Proposal

The Commission proposed to add a new definition of ''Qualified Prime Broker Arrangement'' [141] to the definitions in § 23.401 [142] applicable to subpart H of part 23 of the Commission's regulations.[143] The definition incorporated 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 (and PTMMM Requirement, if applicable) in § 23.431(a)(3) [144] with respect to Covered Transactions with such PB Counterparty.[145] In the Proposal, the Commission 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.[146] This view was 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).[147] In the Proposal, the Commission expressed its view that an insistence on price 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.[148] Thus, the Commission proposed the following conditions for a Qualified Prime Broker Arrangement that would qualify for an exception to the price disclosure.

First, to qualify as a Qualified Prime Broker Arrangement under the Proposed Rule, 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'').[149] 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.[150]

As discussed in the Proposal, the purpose of this proposed condition was 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.[151] 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.[152]

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) [153] other than the pre-trade disclosure of the price of any Permitted PB Transaction (and the PTMMM, if applicable).[154] The Proposal also noted that if the Commission determined not to eliminate the scenario analysis requirement in § 23.431(b) [155] (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'').[156] 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 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.[157]

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.[158] In the Proposal, the Commission also stated that it 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 noted that this proposed 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.

[141] *See* Proposed Rule, 90 FR at 47146.

[142] 17 CFR 23.401.

[143] 17 CFR part 23, subpart H; 17 CFR 23.400–23.451.

[144] 17 CFR 23.431(a)(3).

[145] *See* Proposed Rule, 90 FR at 47146.

[146] *See id.*

[147] *See id.*

[148] *See* Proposed Rule, 90 FR at 47146.

[149] *See id.*

[150] *Id.*

[151] *See id.*

[152] *See* Proposed Rule, 90 FR at 47146.

[153] 17 CFR 23.431(a).

[154] *See* Proposed Rule, 90 FR at 47146.

[155] 17 CFR 23.431(b); *see* Section II.B., *supra,* for the Commission's discussion of its elimination of the Scenario Analysis Requirement.

[156] *See* Proposed Rule, 90 FR at 47146.

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

[158] *See* Proposed Rule, 90 FR at 47147.

Third, the PB/SD would be required under the Proposed Rule to receive an acknowledgement from a PB Counterparty regarding various disclosures.[159] 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.[160] Furthermore, under the Proposal, 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 [161] 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.[162] PB Counterparties would be permitted to request updated disclosures in writing prior to execution. This proposed condition was 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.'' [163] Rather, the Commission explained that 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).[164]

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.[165]

b. Comments Received and Final Rule

Only the ISDA/SIFMA Letter specifically addressed the proposed definition of ''Qualified Prime Broker Arrangement.'' ISDA/SIFMA recommended two changes to the definition as discussed below.

First, ISDA/SIFMA recommended that the definition be changed to clarify that the pre-trade disclosures required by the definition would not include the price of a swap (as proposed by the Commission) but also would not include the material economic terms of a swap, arguing that, like the price, the material economic terms of a particular swap are negotiated by the PB customer with its executing counterparty without the knowledge of the SD/PB. The Commission agrees that an SD/PB would not know the exact economic terms of a swap prior to execution, even if it has agreed with a PB customer on all of the possible permutations of the terms that could be agreed and provided all required disclosures, to the best of the SD/PBs knowledge and reasonable belief.[166] Thus, the Commission has determined to make the recommended change to the definition of Qualified Prime Broker Arrangement, as reflected in the final rule text *infra.*

Second, ISDA/SIFMA recommended that the Commission delete the requirement that an SD/PB obtain an acknowledgement from its PB customers acknowledging receipt of the Regulatory Disclosures and also delete the requirement that an SD/PB retain a record of such acknowledgement and the Qualified Prime Broker Arrangement with each PB customer. ISDA/SIFMA argued that an SD/PB is already required by the Commission's SD recordkeeping rules to keep records of all of agreements entered into as part of its business of dealing in swaps and thus the recordkeeping proposal was redundant.[167] The Commission agrees that the recordkeeping proposal would be redundant with the Commission's recordkeeping rules for SDs and has thus determined to delete that portion of the Proposal, as reflected in the final rule text *infra.* For similar reasons, the Commission has determined to accept ISDA/SIFMA's recommendation that the Commission delete the requirement that an SD/PB obtain an acknowledgement from its PB Customers regarding the delivery of the Regulatory Disclosures and the SD/PBs obligations related thereto. As explained by ISDA/SIFMA, the acknowledgement requirement would entail a costly and burdensome exercise to amend or supplement existing documentation with each PB Customer without any concomitant benefit. ISDA/SIFMA argue that SDs are already required to keep full and complete records of its business of dealing in swaps, including all correspondence with customers and counterparties.[168] Thus, the Commission is confident that an SD/PB is required to keep adequate records of providing its PB customers with the Regulatory Disclosures required under the definition of Qualified Prime Broker Arrangement and of the Prime Broker Arrangement itself under currently existing recordkeeping requirements in the Commission's Regulations and has determined to delete the acknowledgement requirement as reflected in the final rule text *infra.*

E. 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.[169]

1. Proposal

The Commission proposed to amend § 23.402 by adding a new paragraph (h) thereto that would state ''Paragraph (b) and (c) of this section shall not apply to an ITBC Swap.'' [170] This proposed amendment makes 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.[171] Specifically, because ITBC Swaps, once cleared, result in a new swap between the DCO or Exempt DCO and the swap counterparty, the Commission stated in the Proposed Rule that it 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.[172] Additionally, because some ITBC Swaps may be A–ITBC Swaps, Swap Entities will not know,

[159] *See id.*

[160] *See id.*

[161] 7 U.S.C. 6s(h)(3)(B)(i).

[162] *See* Proposed Rule, 90 FR at 47147.

[163] *See id.*

[164] *See id.* (citing 17 CFR 23.431(a) and (b)).

[165] 17 CFR 23.203.

[166] *See* paragraph (2) of the definition of Qualified Prime Broker Arrangement.

[167] *See e.g.,* 17 CFR 23.201 and 17 CFR 23.202.

[168] *See e.g.,* 17 CFR 23.201(a)(1)(i).

[169] *See* 17 CFR 23.402.

[170] *See* Proposed Rule, 90 FR at 47148.

[171] *See id.*

[172] *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.*

and may never know, the identity of the swap counterparty, making it impossible to comply with the requirements in paragraphs (b) and (c) of § 23.402 that the Commission proposed to be disapplied.[173]

2. Comments Received and Final Rule

The Commission received no specific comments with respect to the proposed amendment to § 23.402. Thus, the Commission is adopting this amendment as proposed as shown in the final rule text, *infra.*

F. 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).[174] Paragraph (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.[175]

1. Proposal

The Commission proposed to amend § 23.430(e) by adding an additional 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.[176] As discussed in the Proposal, this 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.[177] Like for KYC purposes discussed above, the Commission stated its preliminary belief 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.[178] The Commission also added that, 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.

2. Comments Received and Final Rule

The Commission received no specific comments with respect to the proposed amendment to § 23.430. Thus, the Commission is adopting this amendment as proposed as shown in the rule text, *infra.*

G. 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.[179] Paragraph (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.[180]

1. Proposal

The Commission proposed 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;[181] (4) expanding the exception for pre-trade disclosures in paragraph (c) to include: (i) swaps executed 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 paragraph (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.[182]

The Proposal stated that these proposed amendments reflected 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.[183]

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[173] *See* Proposed Rule, 90 FR at 47148.

[174] 17 CFR 23.401(c)(6) (redesignated as § 23.401(h)(6) in the Final Rule text *infra*).

[175] *See* 17 CFR 23.430.

[176] *See* Proposed Rule, 90 FR at 47148.

[177] *See id.*

[178] 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.

[179] *See* 17 CFR 23.431.

[180] 17 CFR 23.431(c).

[181] 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.

[182] *See* Proposed Rule, 90 FR at 47147–47148.

[183] *Id.* at 47149.

2. Comments Received & Final Rule

Other than comments regarding the elimination of the PTMMM Requirement, the Scenario Analysis Requirement, the daily mark requirement, and the exceptions for ITBC Swaps and Qualified Prime Broker Arrangements discussed in Section II A, B, C, and D above, the Commission did not receive any substantive comments on the proposed amendments to Commission Regulation § 23.431. Thus, other than the changes discussed in Section II A, B, C, and D above, the Commission is adopting the Proposed amendments to § 23.431 as proposed as reflected in the final rule text *infra.*

H. Amendments to § 23.432

In general, § 23.432 currently 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.[184]

1. Proposal

In the Proposal, the Commission proposed 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 proposed to amend § 23.432 by adding a new paragraph (c) that would disapply the notice requirements of paragraphs (a) and (b) to ITBC Swaps executed on a DCM, SEF, or Exempt SEF and to all A–ITBC Swaps.[185]

The Proposed Rule noted that this proposed amendment reflected 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.[186]

2. Comments Received & Final Rule

The Commission received no comments with respect to the proposed amendment. Thus, the Commission is adopting the proposed amendments to § 23.432(a) and (b) to clarify that the notice must be given prior to entering into a swap; and is adding a new paragraph (c) that disapplies the notice requirements of paragraphs (a) and (b) to ITBC Swaps executed on a DCM, SEF, or Exempt SEF and to all A–ITBC Swaps as reflected in the final rule text *infra.*

I. Amendments to § 23.434

In general, § 23.434 currently 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.[187]

However, § 23.434(b) currently also 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.[188] 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.[189] 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.[190]

1. Proposal

The Commission proposed to amend § 23.434 to add a new paragraph (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.[191] In making the Proposal, the Commission noted its preliminary determinations that (i) in light of the tremendous uptake of the ISDA protocol reference above, 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; (ii) 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; (iii) because (x) this information is available to counterparties from sources other than an SD counterparty; (y) ITBC Swap counterparties have no on-going relationship with an SD counterparty with respect to ITBC Swaps; and (z) the Commission's view 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, ITBC Swap counterparties will likely look to SDs only for competitive pricing.[192] Thus, the Proposed Rule expressed the Commission's belief 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, the Proposal noted that 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.[193]

2. Comments Received & Final Rule

The Commission received no comments with respect to the proposed amendments to § 23.434. Therefore, the Commission is adopting the proposed amendments to § 23.434 by adding a new paragraph (d) that provides an exception from the requirements of § 23.434 for A–ITBC Swaps and for ITBC Swaps executed on a DCM, SEF, or Exempt SEF as reflected in the final rule text *infra.*

J. Amendments to § 23.440 and 23.450

In general, §§ 23.440 and 23.450 currently 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.[194] ''Special

[184] *See* 17 CFR 23.432.

[185] *See* Proposed Rule, 90 FR at 47149.

[186] *Id.*

[187] *See* 17 CFR 23.434.

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

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

[190] *See id.* for list of Adhering Parties.

[191] Proposed Rule, 90 FR at 47149.

[192] *Id.*

[193] *Id.*

[194] *See* 17 CFR 23.440 and 23.450.

Entity'' is defined in § 23.401(c) [195] 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,[196] 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; [197] 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'').[198]

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.[199] 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.[200] 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,[201] so the Commission 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.

1. § 23.440 Proposal, Comments Received, and Final Rule

The Commission proposed to amend § 23.440 by adding a new paragraph (e), which would provide an exception from the requirements of § 23.440 in two circumstances.[202] 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).[203] Second, the proposed amendment provided 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.[204]

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.[205] 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.[206] In the Proposal, the Commission stated 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.[207] 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.[208] For example, the SD would need to ensure that it had appropriate documentation with the counterparty in place to comply with the STRD Requirement [209] and appropriate documentation and information about its counterparty to comply with the Commission's uncleared swap margin requirements.[210] Thus by default, any swap executed under the statutory exception would likely be intended to be cleared because the swap is anonymous.[211]

In applying this interpretation of the exception in section 4s(h)(7) of the CEA, the Commission incorporated a similar exception to certain other 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,[212] again to facilitate the trading of cleared swaps on DCMs and SEFs.[213] 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.[214]

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, in the Proposal the Commission preliminarily interpreted 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 is adopting that interpretation in this Final Rule and considers that interpretation of ''identity'' as reasonable in the context of ITBC Swaps initiated by a Special Entity on a DCM, SEF, or Exempt SEF

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[195] 17 CFR 23.401(c) (redesignated as 17 CFR 23.401(h) in the Final Rule text *infra*).

[196] 17 CFR 23.440 and 23.450.

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

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

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

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

[201] *See id.* for list of Adhering Parties.

[202] *See* Proposed Rule, 90 FR at 47150.

[203] *See id.*

[204] *See id.*

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

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

[207] *See* Proposed Rule, 90 FR at 47150.

[208] 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.

[209] *See* Commission regulation 23.504(a)(2), 17 CFR 23.504(a)(2) (requiring an SD to execute documentation meeting the requirements of the section prior to or contemporaneously with entering into a swap transaction with any counterparty).

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

[211] Proposed Rule, 90 FR at 47151.

[212] *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.

[213] *See* Proposed Rule, 90 FR at 47151.

[214] *See id.*

because the Commission 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 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 believes that such SD should not be deemed to know the ''identity'' of the counterparty to the transaction.

In the Proposal, the Commission noted that the exception in section 4s(h)(7) of the CEA applies only to swaps ''initiated by a Special Entity'' on a DCM or SEF.[215] This language is incorporated into the exception in the amendment to § 23.440(e)(3) to better track the exception provided in the CEA, but the Commission has determined that ''initiated by'' has no special meaning in this context and is synonymous with ''entered into by'' or ''executed by.'' [216] 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.[217] The Commission has 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 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.

In the Proposal, the Commission also noted certain limited situations where actual knowledge of a counterparty's status as a Special Entity could be imputed to an SD under certain circumstances. The Commission received one comment from ISDA/SIFMA arguing that imputing knowledge of a counterparty's Special Entity status was neither reasonable nor practical given that trading on a DCM, SEF, or Exempt SEF, by definition, is intended to provide access to liquidity from multiple liquidity providers through competitive processes to arrive at the best pricing available without regard to the ''identity'' of the counterparty. ISDA/SIFMA further argued that counterparties initiating a trade for an ITBC Swap are often represented through an abbreviated identifier (rather than a full, legal name) and that transactions can take place within seconds or less, making identification of a counterparty's Special Entity status impracticable if not impossible. Given these circumstances and the fact that trading venues do not offer special flags for Special Entities, ISDA/SIFMA's comment letter supported the Commission providing an exception from § 23.440 for all ITBC Swaps executed on a DCM, SEF, or Exempt SEF without regard to a counterparty's status as a Special Entity to further the Commission's goal of facilitating the trading of cleared swaps.

While mindful of commenters' views that the Commission should seek to facilitate the competitive trading of cleared swaps on DCMs, SEFs, and Exempt SEFs to the maximum extent possible, the Commission is also mindful of the requirement in section 4s(h)(7) of the CEA that an exception to the duty to act in the best interests of a Special Entity only be provided where an SD does not know the identity of its counterparty. Thus, in keeping with the Commission's interpretation of ''identity'' discussed above, the Commission has determined that a broad exception from the requirements of § 23.440 should be provided so long as an SD has no actual knowledge of whether a counterparty is a Special Entity. The Commission has also determined that such actual knowledge will not be imputed and, in the Commission's view, an SD will only have such actual knowledge if it has entered into a trading relationship with such counterparty and has, for example, entered into documentation in compliance with the STRD Requirement.[218] For the avoidance of doubt, in no event will an SD be deemed to have actual knowledge of a counterparty's status as a Special Entity where an SD's knowledge of a counterparty's identity is solely based on a trading venue's use of an abbreviated identifier to represent the counterparty.

Where an SD has entered into trading relationship documentation with a Special Entity, the Commission believes that the tremendous uptake of adherence to the ISDA protocol discussed above means that it is almost impossible that such Special Entity has not made the representations necessary for an SD to rely on the safe-harbor in § 23.440(b). Because in almost all cases the requirements for reliance on the safe-harbor in § 23.440(b) will have been met, an SD would be free to trade with any Special Entity participating on any DCM, SEF, or Exempt SEF without concern that the SD will be found to be acting as an advisor to such Special Entity and thus no exception from the requirements of § 23.440 is needed.

Other than the comments from ISDA/SIFMA discussed above, the Commission received no comments with respect to the proposed amendments to § 23.440 and is adopting

[215] Proposed Rule, 90 FR at 47151.

[216] *Id.*

[217] *Id.*

[218] In the Proposal, the Commission noted 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.

the amendments as proposed as reflected in the final rule text *infra.*

2. § 23.450 Proposal, Comments Received, and Final Rule

The Commission also proposed to amend § 23.450 to add a new paragraph (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.[219]

As discussed in the Proposal, the Commission believes that the proposed amendments to § 23.450 better serve the intent of the CEA than the rules now in effect.[220] As discussed above in relation to § 23.434, the Commission has 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) 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 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 determined that it is likely that there is 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.[221]

In the Proposal, the Commission also proposed to amend the definition of the term ''statutory disqualification'' in § 23.450(a)(2).[222] This definition constitutes a condition to a person acting as a QIR for a Special Entity pursuant to § 23.450(b)(1)(ii).[223] The Commission proposed to amend the definition of ''statutory disqualification,'' and therefore the condition to acting as a QIR, 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.*

In the Proposal, the Commission stated that the foregoing proposed amendment to § 23.450(a)(2) [224] was intended 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).[225] 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.[226] The Commission has 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.[227] 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.[228] The Commission proposed this amendment because the current definition of ''statutory disqualification'' subjects QIRs to a higher standard of conduct than that applied to Commission registrants.[229] 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.[230] The Commission has 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.

The Commission received no comments on its proposed amendments to § 23.450 and is adopting them as proposed as reflected in the final rule text *infra.*

K. Amendments to § 23.451

In general, § 23.451 currently, 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.[231] Pursuant to § 23.451(b)(2)(iii),

[219] *See* Proposed Rule, 90 FR at 47152.

[220] *Id.*

[221] *See id.*

[222] *See* Proposed Rule, 90 FR at 47152–47153. 17 CFR 23.450(a)(2).

[223] 17 CFR 23.450(b)(1)(ii).

[224] *See* Proposed Rule, 90 FR at 47153. 17 CFR 23.450(a)(2).

[225] 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.*

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

[227] 7 U.S.C. 12a(2) and (3).

[228] 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.

[229] *See* Proposed Rule, 90 FR at 47153.

[230] *Id.*

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

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.[232]

1. Proposal

The Commission proposed to amend § 23.451 by revising paragraph (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.[233] 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 made the Proposal different from MPD's no-action position in CFTC Staff Letter 23–01, which excluded § 23.451 from the ITBC Compliance Exceptions.[234] This exclusion by MPD in CFTC Staff Letter 23–01 was a change from its prior no-action position in CFTC Staff Letter 13–70 where § 23.451 was not excluded.[235] For the reasons detailed below, the Commission has determined that MPD's reasoning for that change may have been incomplete or misinformed.

In proposing to include § 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 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.[236] Such facilities, by definition, provide access to liquidity from multiple liquidity providers, not a single SD.[237] 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 (and as stated in the Proposal), the Commission 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 § 23.451 is designed to prevent.[238]

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 § 23.451 are not implemented as simply as MPD may have surmised in the context of trading on DCMs, SEFs, or Exempt SEFs.[239] 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.[240] The Commission understands that DCMs and Exempt SEFs are generally subject to similar impartial access obligations. As a result, the Commission believes that there may be significant impediments to SDs enforcing measures to comply with § 23.451 when trading on DCMs, SEFs, and Exempt SEFs and thus has determined to include § 23.451 in the ITBC Swap Compliance Exceptions.

The 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.[241] The Commission has 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 also proposed to delete the word ''Federal'' from § 23.451(a)(1)(iii),[242] which defines the term ''contribution'' in relation to transition or inaugural expenses for a successful candidate for office.[243] Commission regulation 23.451 was promulgated using the Commission's discretionary rulemaking authority under section 4s(h) of the CEA [244] 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.'' [245] 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.[246] 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.'' [247] Thus, the Commission proposed 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.[248]

2. Comments Received and Final Rule

The Commission received no comments with respect to the proposed amendments to § 23.451. Therefore, the Commission is adopting the amendments as proposed as reflected in the final rule text *infra.*

L. Amendment to § 23.504

In general, § 23.504 currently 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 [249] (previously defined as the ''STRD Requirement'').[250]

1. Proposal

The Commission proposed to amend § 23.504(a)(1) by adding a new paragraph (iii). The revised section would include the following provisions—as to applicability, the requirements of the section shall not

[232] 17 CFR 23.451(b)(2)(iii).

[233] *Id.*

[234] *See* Proposed Rule, 90 FR at 47153.

[235] *Id.*

[236] *Id.*

[237] Proposed Rule, 90 FR at 47153.

[238] *Id.* at 47154.

[239] *Id.*

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

[241] Proposed Rule, 90 FR at 47154.

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

[243] Proposed Rule, 90 FR at 47154.

[244] 7 U.S.C. 6s(h).

[245] Proposed Rule, 90 FR at 47154. *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, 80653–80654 (Dec. 22, 2010).

[246] *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).

[247] *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).

[248] *See* Proposed Rule, 90 FR at 47154.

[249] 17 CFR 23.504.

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

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 17 CFR chapter I.

As stated in the Proposal, 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.[251] 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 proposed § 23.401(d),[252] 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.*[253] 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.[254]

2. Comments Received and Final Rule

The Commission received no comments with respect to the proposed amendments to § 23.504. As such, the Commission is adopting the amendments to § 23.504(a)(1) as proposed by adding a new subsection (iii) as reflected in the final rule text *infra.*

III. Cost Benefit Considerations

A. Statutory and Regulatory Background

As discussed above, section 4s(h) of the CEA [255] 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.[256] Pursuant to this rulemaking authority, the Commission adopted the External Business Conduct Standards.[257] In addition, section 4s(i) of the CEA requires the Commission to adopt rules governing swap documentation for Swap Entities.[258] Pursuant to this rulemaking authority, the Commission adopted the STRD Requirement.[259]

Under this same authority and as discussed above, this Final Rule makes certain amendments to the External Business Conduct Standards and STRD Requirement to, among other things, 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. In addition, the Commission is eliminating the PTMMM Requirement and the Scenario Analysis Requirement in their entirety, amending the daily mark requirement under § 23.431(d) to provide Swap Entities greater flexibility in determining how to calculate daily marks for uncleared swaps, and making certain other changes discussed above.

As explained in Section I above, the Commission is issuing this Final Rule to amend certain business conduct standards for Swap Entities contained in subpart H of part 23 of the Commission's regulations,[260] and to the swap trading relationship documentation rule for Swap Entities in § 23.504.[261] As explained in detail in Section II.A. through Section II.L. above, the amendments are intended to address certain long-standing issues with the Commission's external business conduct standards and swap trading relationship documentation rule, and are intended to supersede many long-standing no-action positions issued by MPD (*i.e.,* the Covered Staff Letters described in detail in Section II.B. above), by codifying such positions in the Commission's regulations.

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.[262] 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'').[263] 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.[264]

Where reasonably feasible, the Commission has endeavored to estimate quantifiable costs and benefits. Where quantification is not feasible, the Commission identifies and describes costs and benefits qualitatively. The Commission acknowledges that it is limited in estimating the actual cost of the Final Rule. The initial and recurring costs for any particular Swap Entity, or a counterparty to a Swap Entity, will

[251] *See* Proposed Rule, 90 FR at 47154.

[252] 17 CFR 23.401(d).

[253] *See* Proposed Rule, 90 FR at 47154.

[254] *Id.*

[255] 7 U.S.C. 6s(h).

[256] ''Special Entity'' is defined in § 23.401(c), 17 CFR 23.401(c) (redesignated as § 23.401(h), 17 CFR 23.401(h), in the Final Rule text *infra*).

[257] *See* 17 CFR subpart H. *See also* Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties, 77 FR 9734 (Feb. 17, 2012).

[258] 7 U.S.C. 6s(i).

[259] *See* § 23.504, 17 CFR 23.504.

[260] 17 CFR part 23, subpart H.

[261] 17 CFR 23.504.

[262] 7 U.S.C. 19(a).

[263] *Id.*

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

depend on, among other things, its size, organizational structure, extent of swap dealing activity, other business activities, practices, and cost structure. The Commission did not receive any data or comments specifically or generally addressing the Commission's cost-benefit analysis in the Proposal.

2. Costs and Benefits of This Final Rule

As in the Proposal, the Commission identifies and considers the benefits and costs of the changes made by this Final Rule relative to the baseline of those generated by the current statutory and regulatory framework applicable to the issues addressed by this Final Rule, *i.e.,* the current status quo. Specifically, the baseline for the Commission's consideration of the costs and benefits are those the Commission believes are (or would be) realized by Swap Entity compliance with: (1) the External Business Conduct Standards and (2) the STRD Requirement.[265] The Commission recognizes, however, that to the extent that SDs [266] have arranged their business in reliance on MPD no-action positions in the Covered Staff Letters, the actual costs and benefits may not be as significant.

The Commission requested, both generally and with respect to specific proposed amendments, and did not receive any comments from commenters on the baseline. No commenter quantified nor attempted to quantify the costs and benefits of any part of the Proposal.

a. Benefits

Compliance with the conditions set forth in the definition of ITBC Swap in § 23.401 [267] of this Final Rule will permit SDs to qualify for exceptions to compliance with regulatory requirements set forth in final §§ 23.402 through 23.451 and § 23.504.[268] The Commission requested but received no information on the number of SDs that are currently relying on the MPD no-action position for ITBC Swaps in CFTC Staff Letter 23–01, although the Commission believes that a significant number of SDs are participating in the market for ITBC Swaps. The Commission believes these exceptions will benefit such SDs by reducing compliance obligations, and thereby lowering compliance costs, as well as reducing operational costs for SDs because such SDs will no longer have to agree on disclosure methodologies with their ITBC Swap counterparties, nor prepare and maintain the actual written disclosures. Specifically, the Commission believes that its adoption of the compliance exceptions in this Final Rule for swaps meeting the ITBC Swap definition will, without materially disadvantaging their non-Swap Entity counterparties,[269] significantly reduce the number of required disclosures an SD is required to make, including disclosure pursuant to § 23.431(a) of the material risks and characteristics of a particular swap, 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.[270] The SD may also similarly benefit from the elimination of the Scenario Analysis Requirement and 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.[271] Because an SD's ITBC Swap counterparties will not have to make arrangements to receive and process the various disclosures, such counterparties may also benefit from lower legal and operational costs.

The Commission also believes that compliance with the conditions set forth in the definition of ITBC Swap in final § 23.401 will benefit SDs by permitting them to qualify for exceptions to compliance with regulatory requirements that would otherwise require the SD to obtain information and representations from their non-Swap Entity counterparties, including the KYC, ECP, and Special Entity status information and representations under §§ 23.402 and 23.430 [272] and due diligence information regarding a Special Entity's QIR under §§ 23.440 and 23.450.[273] The Commission believes these provisions of this Final Rule will lower compliance and operational costs for SDs. For example, with respect to the elimination of the PTMMM Requirement, the Commission believes that SDs will 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 result in cost savings for SDs. Further, SDs' ITBC Swap counterparties may benefit from lower legal and operational costs to the extent they no longer need to respond to requests for information and representations from SDs that avail themselves of the exception.

However, as noted in the Proposal, 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 cost savings of, or benefits to, such SDs or their counterparties.

Similarly, with respect to the elimination of the Scenario Analysis Requirement, the Commission notes that because 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. Therefore, the Commission believes that 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 in the Final Rule will 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. As a whole, the 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.

The Commission believes that compliance with the conditions set forth in the definition of a Qualified Prime

[265] The Commission notes that, although the Commission is adopting amendments that add various new definitions and changes to existing definitions in 17 CFR 23.401, the costs and benefits of those definitions are discussed in the substantive rules in which the new or changed definitions appear.

[266] 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 Final Rule will only refer to SDs (not MSPs), a portion of which may have relied on the Covered Staff Letters.

[267] 17 CFR 23.401.

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

[269] *See* Section II.D.1 for why the Commission has determined that counterparties will not be materially disadvantaged.

[270] 17 CFR 23.431(a).

[271] 17 CFR 23.432.

[272] 17 CFR 23.402 and 430.

[273] 17 CFR 23.440 and 450.

Broker Arrangement in § 23.401 [274] of the Final Rule will also benefit SDs by disapplying the price and other material economic terms disclosure requirement under § 23.431(a).[275] Further, compliance with the 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 limited to other SDs as is the case under MPD's no-action position in CFTC Staff Letter 13–11. The Commission expects PB Counterparties from the ability to obtain competitive pricing from this widened pool of potential participants in the markets for prime brokerage transactions.

Regarding the other miscellaneous amendments, the amendment to the daily mark disclosure requirement in § 23.431 to provide additional flexibility to SDs may benefit SDs by reducing their operational burdens. The amended definition of ''statutory disqualification'' in § 23.450 of the Final Rule will 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 adopted amendment to § 23.451 that removes ''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 current External Business Conduct Standards and the STRD Requirement prior to adoption of the Final Rule, compliance with the conditions set forth in the 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 because determining eligibility likely will 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 because doing so likely will 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;

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 will either (i) be deemed by the SD and its counterparty to be void *ab initio,* or (ii) be subject to a breakage agreement or similar arrangement;

4. Costs incurred by SDs and their ITBC Swap counterparties in adjusting execution documentation to ensure agreement that a swap executed on or pursuant to the rules of an Exempt SEF where the rules of the Exempt SEF do not provide for a swap rejected from clearing to be deemed void *ab initio* will either (i) be deemed by the SD and its counterparty to be void *ab initio,* or (ii) be subject to a breakage agreement or similar arrangement.

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 will likely be incurred by SDs and their ITBC Swap counterparties due to minor variations between the Final Rule 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 definition of Qualified Prime Broker Arrangement in § 23.401 of the Final Rule 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, costs incurred to ensure that the parties have agreed on the type, parameters, and limits of each potential Covered Transaction (as defined in § 23.401) [276] that may be entered pursuant to the Prime Broker Arrangement.

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

In addition to the alternatives discussed in the Proposal, the Commission considered several alternatives to portions of this Final Rule, which are discussed in detail throughout this release.[277] In each instance, the Commission considered the costs and burdens of this Final Rule and the regulatory benefits that the Final Rule seeks to achieve in finalizing this Final Rule.

4. Section 15(a) Factors

Section 15(a) of the CEA [278] 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.[279] The Commission believes that the amendments adopted herein will 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

[274] 17 CFR 23.401.

[275] 17 CFR 23.431(a).

[276] *Id.*

[277] *See supra* Sections II.A.–II.L.

[278] 7 U.S.C. 19(a).

[279] 7 U.S.C. 19(a)(2)(A).

earned by Swap Entities when entering into swaps. This Final Rule provides regulatory compliance exceptions from some of the required disclosures that counterparties to Swap Entities would otherwise receive. However, for reasons described below, the Commission believes that it has crafted the exceptions in a way to realize important benefits while largely preserving the level of pricing-information symmetry for counterparties.

In the context of Prime Broker Arrangements, the price and other material economic terms disclosures are disapplied, but such disapplication is 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, additional disclosure requirements and relationship-based requirements are disapplied in situations when Swap Entities enter into ITBC Swaps with non-Swap Entity counterparties. However, the Commission believes that the potential costs associated with the disapplication of these regulatory requirements (subject to the conditions provided for in this Final Rule) are justified. First, doing so strongly furthers 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 to 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 this Final Rule [280] is to remove impediments to the efficient trading and clearing of swaps. Second, the Commission does not foresee a significant countervailing cost. Because a cleared swap is between a counterparty and the DCO or Exempt DCO and there is no ongoing relationship between a Swap Entity and the counterparty, the Commission believes that the relationship requirements in the External Business Conduct Standards and the STRD Requirement bear little, if at all, on the transaction. Similarly, the Commission 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 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 believes that this Final Rule 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.'' [281] This Final Rule will 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 Final Rule disapplies and eliminates 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.[282] As discussed above, this Final Rule's provision of regulatory compliance exceptions for ITBC Swaps and PB/SDs in Qualified Prime Broker Arrangements will 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 believes that the Final Rule will 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 discovery costs on some market participants, this Final Rule could hinder competition and price discovery. The Commission received no comments supporting the continuing availability of the PTMMM and thus has determined that any hinderance on competition or price discovery is immaterial.

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.[283] The Commission believes that this Final Rule will not have a significant effect on risk management practices. Specifically, the Swap Entity risk management requirements under § 23.600 [284] and other Commission Regulations will not change under this Final Rule as it relates to ITBC Swaps because, absent this Final Rule, a Swap Entity's risks will 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 relief from disclosure of the price and other material economic terms in the context of Prime Broker Arrangements will not change the required risk management processes applicable to PB/SDs. The Commission received no comments discussing the impact of the Proposal on the risk management capabilities of counterparties to SDs and thus has determined that any hinderance on such risk management capabilities is immaterial.

However, to the extent that the Final Rule promotes trading on DCMs, SEFs, and Exempt SEFs and clearing through a DCO or Exempt DCO, the Commission believes that the Final Rule 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

[280] *See* Section II.I.1. *supra.*

[281] 7 U.S.C. 19(a)(2)(B).

[282] 7 U.S.C. 19(a)(2)(C).

[283] 7 U.S.C. 19(a)(2)(D).

[284] 17 CFR 23.600.

cleared on a DCO or Exempt DCO are subject to the rules of these entities, which may help ensure market participants adequately address credit risks.[285]

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.[286] 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 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.

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 objectives of the CEA, in issuing any order or adopting any Commission rule or regulation.[287]

The Commission believes that the public interest to be protected by the antitrust laws is generally to protect competition. The Commission requested and did not receive any comments on whether the Proposed Rule implicated any other specific public interest to be protected by the antitrust laws.

The Commission has considered this Final Rule to determine whether it is anticompetitive and has identified no anticompetitive effects. The Commission requested and did not receive any comments on whether the Proposed Rule was anticompetitive and, if it was, what the anticompetitive effects are.

Because the Commission has determined that this Final Rule is not anticompetitive and has no significant discretionary anticompetitive effects and received no comments on its determination in the Proposed Rule, the Commission has not identified any less anticompetitive means of achieving the relevant purposes of the CEA.

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.[288] In the Proposed Rule, the Commission certified that the Proposed Rule would not have a significant economic impact on a substantial number of small entities. The Commission received no comments with respect to the RFA.

The amendments adopted herein affect certain Swap Entities and their counterparties, which must be ECPs.[289] The Commission has previously established certain definitions of ''small entities'' to be used in evaluating the impact of its regulations on small entities in accordance with the RFA.[290] Among those, the Commission has previously established that Swap Entities and ECPs are not ''small entities'' for purposes of the RFA.[291] Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the regulations will not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

The Paperwork Reduction Act (''PRA'') [292] imposes certain requirements on Federal agencies in connection with their conducting or sponsoring any collection of information as defined by the PRA. Under the PRA, an 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 from the Office of Management and Budget (''OMB'').[293] The PRA is intended, in part, to minimize the paperwork burden created for individuals, businesses, and other persons as a result of the collection of information by federal agencies, and to ensure the greatest possible benefit and utility of information created, collected, maintained, used, shared, and disseminated by or for the Federal Government.[294] The PRA applies to all information, regardless of form or format, whenever the Federal Government is obtaining, causing to be obtained, or soliciting information, and includes required disclosure to third parties or the public, of facts or opinions, when the information collection calls for answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons.[295]

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.'' [296] The Commission also is required to protect certain information contained in a government system of records according to the Privacy Act of 1974.[297]

This final rulemaking affects regulations that contain collections of information within the meaning of the PRA, as discussed below.[298] 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).

This final rulemaking modifies the Commission's burden estimates for the information collection requirements associated with OMB Control Number

[285] *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 DCOs, their clearing members, and clearing members' customers.)

[286] 7 U.S.C. 19(a)(2)(E).

[287] 7 U.S.C. 19(b).

[288] 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, 18618–18621 (Apr. 30, 1982).

[289] *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)).

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

[291] *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).

[292] 44 U.S.C. 3501 *et seq.*

[293] *See* 44 U.S.C. 3507(a)(3); 5 CFR 1320.5(a)(3).

[294] *See* 44 U.S.C. 3501.

[295] *See* 44 U.S.C. 3502(3).

[296] 7 U.S.C. 12(a)(1).

[297] 5 U.S.C. 552a.

[298] 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.

3038–0079, as discussed below and as shown in the Proposal.[299] The Commission submitted these information collections for OMB review in association with the Proposal, *see* ICR Ref. No. 202509–3038–001, and OMB has approved the modified collections contained in this Final Rule, in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11(g).

1. OMB Collection 3038–0079

a. Commission Regulation 23.431

As discussed above, the revisions to § 23.431 [300] make certain changes that the Commission believes will substantively reduce the burden of complying with the regulation, including the elimination of both the PTMMM Requirement and the Scenario Analysis Requirement (as detailed *supra*).

The Commission estimates that eliminating the PTMMM Requirement 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 believes that this estimated burden reduction is appropriate.

Further, the Commission estimates that eliminating the Scenario Analysis Requirement 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 Final Rule also: (i) expands the exceptions in § 23.431(c) [301] from the pre-trade disclosure requirements in § 23.431(a) [302] for certain ITBC Swaps and Permitted PB Transactions,[303] and expands existing exceptions from such requirements to Exempt SEFs as shown in the revised regulatory text, *infra;* and (ii) provides an exception from the requirement in § 23.431(d)(1) [304] 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., *infra,* but the Commission 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 to § 23.431 [305] in the Final Rule do 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); [306] and (ii) providing SDs with additional flexibility in calculating the daily mark for a swap under final § 23.431(d)(3).[307]

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

The Final Rule is amending §§ 23.402, 430, 432, 434, 440, 450, and 451 [308] to 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 reflected *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 is leaving its estimated burdens of these requirements unchanged at this time, as the potential amount of the reduction of any such burden is unknown.[309] For example, although the new exceptions adopted in the Final Rule 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 Final Rule, certain of the requirements will continue to apply (*e.g.,* the KYC procedures of § 23.402(b) and the representations under §§ 23.440 and 450).[310]

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 Final Rule modifies § 23.504 [311] 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 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 estimating the amount of the change, the Commission determined to leave its estimated burdens of these requirements unchanged at this time as the potential

[299] Although this Final Rule contains certain modifications to the Proposed Rule, as discussed above, the Commission does not believe these changes impact the PRA analysis in the Proposal. Therefore, the Commission is maintaining the Proposal's estimated number of responses, burden hours, and frequency of collection.

[300] 17 CFR 23.431.

[301] 17 CFR 23.431(c).

[302] 17 CFR 23.431(a).

[303] 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.

[304] 17 CFR 23.431(d)(1).

[305] 17 CFR 23.431.

[306] 17 CFR 23.431(a)(2).

[307] 17 CFR 23.431(d)(2).

[308] 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.

[309] 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).

[310] 17 CFR 23.402(b) and 17 CFR 23.440 and 450.

[311] 17 CFR 23.504.

amount of the reduction of any such burden is unknown. For example, although the new 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 this Final Rule, 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.[312] 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.

3. Information Collection Comments

In the Proposed Rule, the Commission requested comments on the information collection requirements discussed above, including, without limitation, on the Commission's discussion of the estimated burden of the collection of information requirements in the Proposal. The Commission did not receive any such comments.

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 Final Rule is not an Executive Order 14192 regulatory action, because it is not a significant regulatory action under E.O. 12866.

E. Congressional Review Act

Pursuant to the Congressional Review Act,[313] the Office of Information and Regulatory Affairs has designated this Final Rule as not a ''major rule,'' as defined by 5 U.S.C. 804(2).

List of Subjects in 17 CFR Part 23

Reporting and recordkeeping requirements, Swaps, Trading records.

For the reasons set forth in the preamble, the Commodity Futures Trading Commission amends 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 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 paragraph (d) of this section) 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

[312] *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.*

[313] 5 U.S.C. 801 *et seq.*

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 takes reasonable measures to ensure 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, and either:

(i) 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,* or

(ii) The parties, prior to execution, have entered into a breakage agreement or similar arrangement that addresses the disposition of such rejected swap and includes arrangements that will permit a Swap Entity to comply with the requirements of subparts H and I of this part with respect to the rejected swap;

(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 an Exempt SEF and the rules of the Exempt SEF do not provide for a swap rejected from clearing to be deemed void *ab initio:*

(i) 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,* or

(ii) The parties, prior to execution, have entered into a breakage agreement or similar arrangement that addresses the disposition of such rejected swap and includes arrangements that will permit a Swap Entity to comply with the requirements of subparts H and I of this part with respect to the rejected swap.

(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 material economic terms and price with a counterparty (the ''Trigger CP''); and

(2) One or more additional Covered Transactions with one or more other counterparties that are not the Trigger CP, resulting in the Prime Broker being party to equal but offsetting transactions as a credit intermediary; provided that one or more of the Covered Transactions may include a spread or fee to be paid to the Prime Broker and/or an intermediary that has arranged the transactions (or a portion thereof) as compensation for the Prime Broker's credit intermediation services and/or the services of the intermediary.

(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''); and

(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 material economic terms and the price of the Permitted PB Transaction;

(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(h)(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(h) 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) *Disclosures 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) For cleared swaps, 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 not subject to daily variation margining, provide the counterparty (other than a swap entity, security-based swap dealer, or major security-based swap participant) with a daily mark for each uncleared swap. 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 not subject to daily variation margining, 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:

(i) An A–ITBC Swap; or

(ii) 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(h)(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(h)(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(h)(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(h)(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(h)(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(h)(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(h)(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 December 18, 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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