

BILLING CODE [6351-01]

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 23

RIN 3038-[]

Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants

AGENCY: Commodity Futures Trading Commission

ACTION: Interim final rule with request for comment.

SUMMARY: The Commodity Futures Trading Commission (“Commission” or “CFTC”) is adopting and invites comment on an interim final rule amending its margin requirements for uncleared swaps for swap dealers (“SDs”) and major swap participants (“MSPs”) for which there is no prudential regulator (“CFTC Margin Rule”). The Commission is revising the compliance schedule for the posting and collection of initial margin under the CFTC Margin Rule to defer the compliance date of September 1, 2020, to September 1, 2021 (“Interim Final Rule”). The Commission is issuing the Interim Final Rule to address the operational challenges faced by certain entities subject to the CFTC Margin Rule as a result of the coronavirus disease 2019 (“COVID-19”) pandemic, consistent with the recent revision of the Basel Committee on Banking Supervision and Board of the International Organization of Securities Commissions (together, “BCBS/IOSCO”) implementation schedule for margin requirements for non-centrally-cleared derivatives.

DATES: Effective Date: This rule is effective [INSERT DATE PUBLISHED IN THE FEDERAL REGISTER].

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Comment Date: Comments must be received on or before [INSERT DATE 60 DAYS AFTER PUBLICATION IN FEDERAL REGISTER].

Comments submitted by mail will be accepted as timely if they are postmarked on or before that date.

ADDRESSES: You may submit comments, identified by RIN 3038-[], by any of the following methods:

- CFTC Comments Portal: <https://comments.cftc.gov>. Select the “Submit Comments” link for this rulemaking and follow the instructions on the Public Comment Form.

- Mail: Send to Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Center, 1155 21st Street, NW, Washington, DC 20581.

- Hand Delivery/Courier: Follow the same instructions as for Mail, above.

Please submit your comments using only one of these methods. Submissions through the CFTC Comments Portal are encouraged.

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

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Commission’s regulations.¹

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from <https://comments.cftc.gov> that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act (“APA”)² and other applicable laws, and may be accessible under the FOIA.³

FOR FURTHER INFORMATION CONTACT: Joshua B. Sterling, Director, 202-418-6056, jsterling@cftc.gov; Thomas J. Smith, Deputy Director, 202-418-5495, tsmith@cftc.gov; Warren Gorlick, Associate Director, 202-418-5195, wgorlick@cftc.gov; or Carmen Moncada-Terry, Special Counsel, 202-418-5795, cmoncada-terry@cftc.gov, Division of Swap Dealer and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Background

Section 4s(e) of the Commodity Exchange Act (“CEA”)⁴ directs the Commission to adopt rules establishing minimum initial and variation margin requirements on all

¹ 17 CFR 145.9. Commission regulations referred to herein are found at 17 CFR Chapter I.

² 5 U.S.C. Subchapter II.

³ 5 U.S.C. 552.

⁴ 7 U.S.C. 6s(e) (capital and margin requirements).

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swaps⁵ that are (i) entered into by an SD⁶ or MSP⁷ for which there is no prudential regulator⁸ (collectively, “covered swap entities” or “CSEs”)⁹ and (ii) not cleared by a registered derivatives clearing organization (“uncleared swaps”).¹⁰ To offset the greater risk to the SD or MSP and the financial system arising from the use of uncleared swaps, these requirements must (i) help ensure the safety and soundness of the SD or MSP and (ii) be appropriate for the risk associated with the uncleared swaps held as an SD or MSP.¹¹

BCBS/IOSCO established an international framework for margin requirements for uncleared derivatives in September 2013 (the “BCBS/IOSCO framework”).¹² After the establishment of the BCBS/IOSCO framework, the CFTC, on January 6, 2016, consistent with Section 4s(e), promulgated rules requiring CSEs to collect and post initial

⁵ CEA section 1a(47), 7 U.S.C. 1a(47) (swap definition); Commission regulation 1.3, 17 CFR 1.3 (further definition of a swap). A swap includes, among other things, an interest rate swap, commodity swap, credit default swap, and currency swap.

⁶ CEA section 1a(49), 7 U.S.C. 1a(49) (swap dealer definition); Commission regulation 1.3 (further definition of swap dealer).

⁷ CEA section 1a(32), 7 U.S.C. 1a(32) (major swap participant definition); Commission regulation 1.3 (further definition of major swap participant).

⁸ CEA section 1a(39), 7 U.S.C. 1a(39) (defining the term “prudential regulator” to include the Board of Governors of the Federal Reserve System; the Office of the Comptroller of the Currency; the Federal Deposit Insurance Corporation; the Farm Credit Administration; and the Federal Housing Finance Agency). The definition of prudential regulator further specifies the entities for which these agencies act as prudential regulators. The prudential regulators published final margin requirements in November 2015. *See generally* Margin and Capital Requirements for Covered Swap Entities, 80 FR 74840 (Nov. 30, 2015) (“Prudential Margin Rule”). The Prudential Margin Rule is similar to the CFTC Margin Rule, including with respect to the CFTC’s phasing-in of margin requirements, as discussed below.

⁹ CEA section 4s(e)(1)(B), 7 U.S.C. 6s(e)(1)(B). SDs and MSPs for which there is a prudential regulator must meet the margin requirements for uncleared swaps established by the applicable prudential regulator. CEA section 4s(e)(1)(A), 7 U.S.C. 6s(e)(1)(A).

¹⁰ CEA section 4s(e)(2)(B)(ii), 7 U.S.C. 6s(e)(2)(B)(ii). In Commission regulation 23.151, the Commission further defined the term uncleared swap to mean a swap that is not cleared by a registered derivatives clearing organization or by a derivatives clearing organization that the Commission has exempted from registration as provided under the CEA. 17 CFR 23.151.

¹¹ CEA section 4s(e)(3)(A), 7 U.S.C. 6s(e)(3)(A).

¹² *See generally* BCBS/IOSCO, Margin requirements for non-centrally cleared derivatives (Sept. 2013), <https://www.bis.org/publ/bcbs261.pdf>.

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margin (“IM”)¹³ and variation margin (“VM”)¹⁴ for uncleared swaps,¹⁵ adopting the implementation schedule set forth in the BCBS/IOSCO framework, including the revised implementation schedule adopted on March 18, 2015.¹⁶

In July 2019, BCBS/IOSCO further revised the framework to extend the implementation schedule to September 1, 2021.¹⁷ Consistent with this revision to the international framework, in April 2020, the Commission promulgated a final rule amending the compliance schedule for the IM requirements under the CFTC Margin Rule (“April 2020 Final Rule”).¹⁸

The World Health Organization declared the COVID-19 outbreak a global pandemic on March 11, 2020.¹⁹ On March 13, 2020, President Donald J. Trump declared

¹³ Initial margin is the collateral (calculated as provided by § 23.154 of the Commission’s regulations) that is collected or posted in connection with one or more uncleared swaps pursuant to § 23.152. Initial margin is intended to secure potential future exposure following default of a counterparty (*i.e.*, adverse changes in the value of an uncleared swap that may arise during the period of time when it is being closed out). *See* CFTC Margin Rule, 81 FR at 683.

¹⁴ Variation margin, as defined in Commission regulation 23.151, is the 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 the value of such obligations since the trade was executed or the last time such collateral was provided. 17 CFR 23.151.

¹⁵ *See generally* Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 81 FR 636 (Jan. 6, 2016). The CFTC Margin Rule, which became effective April 1, 2016, is codified in part 23 of the Commission’s regulations. 17 CFR 23.150 - 23.159, 23.161. In May 2016, the Commission amended the CFTC Margin Rule to add Commission regulation 23.160, 17 CFR 23.160, providing rules on its cross-border application. *See generally* Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants—Cross-Border Application of the Margin Requirements, 81 FR 34818 (May 31, 2016).

¹⁶ *See generally* BCBS/IOSCO, Margin requirements for non-centrally cleared derivatives (March 2015), <https://www.bis.org/bcbs/publ/d317.pdf>.

¹⁷ *See generally* BCBS/IOSCO, Margin requirements for non-centrally cleared derivatives (July 2019), <https://www.bis.org/bcbs/publ/d475.pdf>.

¹⁸ *See generally* Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 85 FR 19878 (April 9, 2020).

¹⁹ WHO Director-General's opening remarks at the media briefing on COVID-19 (March 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

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a national emergency due to the COVID-19 pandemic.²⁰ The disease has impacted individuals across the world.

The COVID-19 outbreak has severely disrupted domestic and international business, and adversely impacted the global economy. In March 2020, a group of global financial market trade associations wrote a letter to BCBS/IOSCO requesting a suspension of the nearing compliance dates, set to begin on September 1, 2020, and September 1, 2021, in light of the pandemic.²¹ The Trade Association Letter stated that staff at financial firms have been displaced and repurposed given the increased market volatility.²² The letter further stated that working from home limits access to legal and operational documentation and also limits abilities to communicate with counterparties.²³ With operational teams working at full capacity to ensure proper business continuity, the trade associations declared that the strained working conditions at firms had “impaired” such firms’ ability to undertake preparations to exchange IM, such as custodian onboarding and custodian documentation, by the upcoming September 1, 2020 deadline.²⁴

Under these circumstances, the Trade Association Letter emphasizes the industry concern about diverting resources from ongoing business continuity efforts to the

²⁰ Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (March 13, 2020), <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

²¹ Margin Requirements for Non-Centrally Cleared Swaps Margin—Impact of COVID-19 on Initial Margin Phase-In (March 25, 2020), <https://www.isda.org/2020/03/25/joint-trade-association-letter-on-impact-of-covid-19-on-initial-margin-phase-in/> (“Trade Association Letter”).

²² Trade Association Letter at 2.

²³ *Id.*

²⁴ Trade Association Letter at 3.

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substantial preparations needed for the exchange of regulatory IM ahead of the September 1, 2020 deadline.²⁵

In response to these concerns, BCBS/IOSCO decided to further extend the implementation schedule for the margin requirements for non-centrally cleared derivatives by one year.²⁶ BCBS/IOSCO, in a joint statement, stated that the extension would provide additional operational capacity for firms to respond to the immediate impact of COVID-19 and at the same time facilitate firms' diligent efforts to comply with the requirements by the revised deadlines.²⁷

Recently, a Global Markets Advisory Committee ("GMAC") subcommittee encouraged the adoption of the BCBS/IOSCO recommendation to extend the implementation schedule given the circumstances brought about by the COVID-19 pandemic. The subcommittee noted that the April 2020 BCBS-IOSCO action "serves as confirmation by the collective international standard-setting bodies that it is critical for the industry to be able to divert and dedicate scarce resources to respond to the COVID-19 crisis and related market volatility and liquidity issues without jeopardizing compliance with upcoming regulatory obligations under uncleared swap margin rules."²⁸

²⁵ *See id.*

²⁶ *See generally* BCBS/IOSCO, Margin requirements for non-centrally cleared derivatives (April 2020), <https://www.bis.org/bcbs/publ/d499.htm> ("2020 BCBS/IOSCO Margin Framework") and Press Release, April 3, 2020, <https://www.bis.org/press/p200403a.htm> ("April 2020 BCBS/IOSCO Press Release").

²⁷ Basel Committee and IOSCO announce deferral of final implementation phases of the margin requirements for non-centrally cleared derivatives (April 3, 2020), <https://www.bis.org/press/p200403a.htm>.

²⁸ *See Recommendations to Improve Scoping and Implementation of Initial Margin Requirements for Non-Cleared Swaps*, Report to the CFTC's Global Markets Advisory Committee by the Subcommittee on Margin Requirements for Non-Cleared Swaps, at 3 (April 2020), https://www.cftc.gov/media/3886/GMAC_051920MarginSubcommitteeReport/download. The GMAC adopted the subcommittee's report and recommended to the Commission that it consider adopting the report's recommendations. The GMAC subcommittee was not tasked to respond to the COVID-19 pandemic. Rather, its establishment pre-dates the pandemic's impact and its directive was to address the

II. Interim Final Rule

The Commission is issuing the Interim Final Rule to amend the CFTC Margin Rule by deferring for one year to September 1, 2021, compliance with the IM requirements for entities subject to the September 1, 2020 deadline. The Commission is issuing this deferral in recognition of the extraordinary operational challenges and risk-management demands faced by the entities as a result of the COVID-19 pandemic, consistent with the recent revision of BCBS/IOSCO’s implementation schedule.²⁹

The CFTC Margin Rule requires covered swap entities to post and collect IM with counterparties that are SDs, MSPs, or financial end users with material swaps exposure (“MSE”)³⁰ (“covered counterparties”) in accordance with a phased compliance schedule set forth in Commission regulation 23.161.³¹ The compliance schedule applies progressively to CSEs and their covered counterparties in staggered phases, starting with

ongoing challenges involving the implementation of the CFTC margin requirements during the last stages of the compliance schedule, which may be taken up at a later date by the Commission. *See* CFTC Commissioner Stump Announces New GMAC Subcommittee on Margin Requirements for Non-Cleared Swaps (Oct. 28, 2019), <https://www.cftc.gov/PressRoom/PressReleases/8064-19>.

²⁹ *See generally* 2020 BCBS/IOSCO Margin Framework. The Framework extends the BCBS/IOSCO implementation schedule to September 1, 2022, by deferring the compliance dates of September 1, 2020, and September 1, 2021, to September 1, 2021, and September 1, 2022, respectively. Given the immediate need to address the impact of the COVID-19 pandemic on entities nearing the September 1, 2020 deadline, the Commission is issuing the Interim Final Rule discussed herein. As discussed below, the Commission intends to issue a notice of proposed rulemaking with respect to the September 1, 2021 compliance date in the near term.

³⁰ Commission regulation 23.151 provides that MSE for an entity means that the entity and its margin affiliates have an average daily aggregate notional amount of uncleared swaps, uncleared security-based swaps, foreign exchange forwards, and foreign exchange swaps with all counterparties for June, July, and August of the previous calendar year that exceeds \$8 billion, where such amount is calculated only for business days. A company is a “margin affiliate” of another company if: (i) either company consolidates the other on a financial statement prepared in accordance with U.S. Generally Accepted Accounting Principles, the International Financial Reporting Standards, or other similar standards; (ii) both companies are consolidated with a third company on a financial statement prepared in accordance with such principles or standards; or (iii) for a company that is not subject to such principles or standards, if consolidation as described in paragraph (1) or (2) of this definition would have occurred if such principles or standards had applied. 17 CFR 23.151.

³¹ 17 CFR 23.161.

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entities with the largest average daily aggregate notional amounts (“AANA”) of uncleared swaps and certain other financial products, and then successively with lesser AANA.

The compliance schedule originally spanned from September 1, 2016 to September 1, 2020. The April 2020 Final Rule extended the schedule by one year by dividing the last compliance “phase”—which would have brought into scope CSEs and covered counterparties with an AANA between \$8 billion and \$750 billion—into two compliance phases. Under the April 2020 Final Rule, CSEs and covered counterparties with an AANA between \$50 billion and \$750 billion must comply with the IM requirements beginning on September 1, 2020.³² In addition, again pursuant to the April 2020 Final Rule, other remaining CSEs and covered counterparties, including financial end users with MSE, must comply beginning on September 1, 2021.³³

This Interim Final Rule amends Commission regulation 23.161, as revised by the April 2020 Final Rule,³⁴ by deferring for one year the April 2020 Final Rule’s compliance date of September 1, 2020. The Interim Final Rule reflects the recent revisions to the BCBS/IOSCO framework extending the margin implementation schedule.³⁵ More specifically, the Interim Final Rule defers compliance for entities that would come into scope beginning on September 1, 2020, requiring CSEs and covered counterparties with an AANA between \$50 billion up to \$750 billion during the three-

³² See 17 CFR 23.161(a)(6).

³³ 17 CFR 23.161(a)(7).

³⁴ 17 CFR 23.161.

³⁵ 2020 BCBS/IOSCO Margin Framework.

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month period of March-May of 2021 to come into compliance beginning on September 1, 2021.

By extending the September 1, 2020 deadline for compliance with the IM requirements under the CFTC Margin Rule, the Commission, consistent with BCBS/IOSCO's revision of the margin implementation schedule, seeks to alleviate the challenges, operational and otherwise, that COVID-19 poses to entities nearing the September 1, 2020 deadline. In the Commission's view, compliance with the existing requirements could exacerbate COVID-19's adverse impact on operations by causing entities to divert scarce resources from more pressing operational needs, which could hinder business continuity efforts and adequate management of volatility, liquidity, and other risks brought about by the pandemic.³⁶

The COVID-19 pandemic has severely and adversely impacted preparations for the exchange of regulatory IM in advance of the current compliance deadlines, including procuring rule-compliant documentation, setting up custodial arrangements, and establishing internal processes for the calculation, collection, and posting of IM, among other things. In the midst of high market volatility, firms have experienced a reduction in operational capacity, carrying out remote operations, with employees performing critical functions from home or other temporary locations, which has limited access to legal and operational documentation and limited the ability to work with counterparties.

³⁶ To be sure, the exchange of IM mitigates various risks, such as counterparty credit risk. However, given the relatively small share of the swaps market affected by this IFR, the Commission believes it is appropriate to defer covered entities' IM obligations to allow such entities to focus on immediate operational, volatility, and liquidity risks arising from the COVID-19 pandemic.

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Service providers, such as custodians, are facing similar operational challenges. As the next phase of compliance, beginning on September 1, 2020, approaches, custodian onboarding is being impeded, resulting in further delays in the establishment of custodian accounts. Other vendors providing IM-related services are being similarly affected.

The Commission notes that the compliance delay provided by the Interim Final Rule applies to entities whose uncleared swap portfolios tend to be smaller than the portfolios of entities that came into scope in earlier phases of the compliance schedule. The CFTC’s Office of the Chief Economist (“OCE”) has estimated that entities with such smaller uncleared swap portfolios represent only 8% of total AANA across all phases.³⁷ This modest share of notional amount, spread across many small entities, likely means that the uncollateralized swaps entered into by these entities—taking into account that no exchange of IM is required by the CFTC Margin Rule until the IM threshold amount has been exceeded³⁸—pose less risk to the financial markets than the risk posed by uncleared swaps entered into by entities that have already come into the scope of IM compliance.

This Interim Final Rule does not address the last phase of compliance beginning on September 1, 2021. As discussed below, the Commission is making a finding that notice and public procedure on this rule is impracticable because the need for relief is immediate. Because there is more time to address the last phase of compliance currently

³⁷ Richard Haynes, Madison Lau, & Bruce Tuckman, *Initial Margin Phase 5*, at 4 (Oct. 24, 2018), https://www.cftc.gov/sites/default/files/About/Economic%20Analysis/Initial%20Margin%20Phase%205%20v5_ada.pdf (“OCE Initial Margin Phase 5 Study”).

³⁸ Under Commission regulation 23.154(a)(3), there is no requirement to post or collect IM until the initial margin threshold amount has been exceeded. *See* 17 CFR 23.154(a)(3). The term “initial margin threshold amount” is defined in Commission regulation 23.151 as an aggregate credit exposure of \$50 million from all uncleared swaps between a CSE and its margin affiliates on one hand, and a covered counterparty and its margin affiliates on the other. 17 CFR 23.151. For the definition of “margin affiliate,” *see supra* note 30.

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set to commence on September 1, 2021, the Commission will address that compliance date through a notice of proposed rulemaking and public comment process. The Commission intends to take action with respect to the final compliance phase in the near term. The Commission notes that without an extension of the final compliance phase, approximately 700 entities would come into the scope of the IM requirements simultaneously on September 1, 2021.³⁹

III. Request for Comment

The Commission is issuing this Interim Final Rule to revise Commission regulation 23.161 to address concerns relating to the COVID-19 pandemic, as discussed above. Issuing an Interim Final Rule means that the amendment to delay the April 2020 Final Rule’s compliance deadline of September 1, 2020, will take effect sooner than if the Commission followed the usual prior notice and comment rulemaking process. A discussion of the Commission’s finding that there is good cause to omit the usual prior notice and comment procedures appears below in the section entitled “Administrative Procedure Act.”

The Commission welcomes public comments from interested persons regarding any aspect of the changes made by this Interim Final Rule. The Commission also seeks comment on the following specific questions. The Commission will take into consideration comments received and may modify the Interim Final Rule if warranted.

- (1) This Interim Final Rule delays by one year compliance with the IM requirements under the CFTC Margin Rule for entities subject to the September 1, 2020 deadline

³⁹ See OCE Initial Margin Phase 5 Study at 4.

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to alleviate the challenges, operational and otherwise, that COVID-19 poses to entities engaging in uncleared swaps nearing the existing compliance deadline as discussed above. Uncleared swaps that are entered into during the one year extension period will be legacy swaps not subject to the IM requirements (although they would be subject to VM requirements) and, as such, lesser amounts of margin would be collected for these swaps, potentially increasing counterparty risk and the risk of contagion.⁴⁰ In light of these risks, should the Commission consider any alternative to extending the compliance schedule? Please describe the alternatives if any can be identified.

- (2) As an alternative to the Interim Final Rule deferring compliance for the entities coming into scope in September 2020, should the Commission consider a longer deferral period for such firms? Please describe the potential benefits and any costs were the CFTC to provide a longer deferral period.

Please refer to the ADDRESSES section above with respect to the submission of comments.

IV. Related Matters

A. Administrative Procedure Act.

The APA generally requires federal agencies to publish a notice of proposed

⁴⁰ Pursuant to Commission regulation 23.161, the compliance dates for the IM and VM requirements under the CFTC Margin Rule are staggered across a phased schedule that extends from September 1, 2016, to September 1, 2021. The compliance period for the VM requirements ended on March 1, 2017 (though the CFTC and other regulators provided guidance permitting a six month grace period to implement the requirements following the implementation date), while the IM requirements continue to phase in through September 1, 2021. An uncleared swap entered into prior to an entity's IM compliance date is a "legacy swap" that is not subject to IM requirements. *See* CFTC Margin Rule, 81 FR at 651 and Commission regulation 23.161. 17 CFR 23.161.

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rulemaking and provide an opportunity for public comment before issuing a new rule.⁴¹ However, an agency may issue a new rule without publication in the Federal Register of a notice of proposed rulemaking with an opportunity for comment if “the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”⁴² The Commission for good cause finds that such notice and public procedure on the instant amendments to Commission regulation 23.161 are impracticable and contrary to the public interest due to the COVID-19 pandemic. The World Health Organization declared the COVID-19 outbreak a global pandemic on March 11, 2020.⁴³ On March 13, 2020, President Donald J. Trump declared a national emergency due to the COVID-19 pandemic.⁴⁴

The Commission for good cause finds that notice and public procedure on this rule are impracticable because the need for relief is immediate. With respect to the change to the compliance schedule for the CFTC Margin Rule, time is of the essence. Participants in the uncleared swaps markets have experienced diminished operational capacity due to stay-at-home orders, closures, and other community nonpharmaceutical interventions.⁴⁵ Efforts to comply with the IM requirements may divert manpower and funding resources from already strained operations, hindering business continuity efforts and focus on management of risks posed by the pandemic.

⁴¹ See 5 U.S.C. 553(b).

⁴² 5 U.S.C. 553(b)(B).

⁴³ See supra note 19.

⁴⁴ See supra note 20.

⁴⁵ See Nonpharmaceutical Interventions (NPIs) (describing strategies to slow the spread of COVID-19), <https://www.cdc.gov/nonpharmaceutical-interventions/index.html> (last visited April 28, 2020).

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The practical effect of these contagion mitigation strategies is to require many businesses to carry out remote operations with employees performing critical functions from their homes or other temporary locations. Preparations in anticipation of IM compliance by, among other things, procuring rule compliant documentation, setting up custodial arrangements, and establishing internal processes for the calculation, collection, and posting, are more difficult to accomplish when personnel are working remotely.

Undertaking the regular rulemaking proceedings would therefore be impracticable to provide the immediate relief market participants need to focus on immediate COVID-19 response. Delays in the response could exacerbate the adverse impact of the pandemic on these entities' operations and detract from more urgent operational matters.

The next compliance phase commences on September 1, 2020. Entities coming into scope need to prepare for months in advance to comply with the IM requirements. These preparations may be affected by the entities' reduced operational capacity. A compliance delay until September 1, 2021, will alleviate the operational burden. This militates against the delay needed to conduct the regular notice and comment rulemaking.

The Commission for good cause also finds that notice and public procedure thereon are contrary to the public interest in the context of the COVID-19 national emergency. As explained above, participants in the uncleared swaps markets have an immediate need for operational flexibility due to the COVID-19 pandemic. The Commission has determined that issuing this Interim Final Rule, to be effective immediately upon publication in the Federal Register, is crucial to alleviate the burden associated with the exchange of regulatory IM for entities whose operations may be already strained given the effect of COVID-19 on their operations. Providing a notice

and comment period pursuant to normal rulemaking process would delay relief and thus be contrary to the public interest.

For the above reasons, the Commission’s implementation of this rule as an Interim Final Rule, with provision for post-promulgation public comment, is in accordance with section 553(b) of the APA.⁴⁶

Similarly, for the same reasons set forth above under the discussion of section 553(b)(B) of the APA, the Commission, for good cause, finds that no transitional period, after publication in the Federal Register, is necessary before the amendment to § 23.161 made by this Interim Final Rule becomes effective. Accordingly, this Interim Final Rule shall be effective immediately upon publication in the Federal Register.

B. Regulatory Flexibility Act.

The Regulatory Flexibility Act⁴⁷ 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 regarding the economic impact on those entities. Because, as discussed above, the Commission is not required to publish a notice of proposed rulemaking for this rule, a regulatory flexibility analysis is not required.⁴⁸

C. Paperwork Reduction Act.

The Paperwork Reduction Act of 1995 (“PRA”)⁴⁹ imposes certain requirements on Federal agencies, including the Commission, in connection with their conducting or

⁴⁶ 5 U.S.C. 553(b)(B); 553(d)(3).

⁴⁷ 5 U.S.C. 601 *et seq.*

⁴⁸ *See* 5 U.S.C. 603(a).

⁴⁹ 44 U.S.C. 3501 *et seq.*

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sponsoring any collection of information, as defined by the PRA. The Commission may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (“OMB”) control number.

The Commission believes that this Interim Final Rule does not impose any new recordkeeping or information collection requirements, or other collections of information that require approval of OMB under the PRA.

D. Cost-Benefit Considerations

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. 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. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the section 15(a) considerations.

This Interim Final Rule revises the compliance schedule for the CFTC Margin Rule by deferring compliance with the IM requirements from September 1, 2020, to September 1, 2021, for CSEs and covered counterparties with an AANA ranging from \$50 billion up to \$750 billion,.

The baseline against which the benefits and costs associated with the Interim Final Rule are compared is the uncleared swaps markets as they exist today and the current compliance schedule. As discussed in both the CFTC Margin Rule and the April

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2020 Final Rule, the existing compliance schedule represented an attempt to balance the costs and benefits of requiring margin for uncleared swaps for different entities. For example, the CFTC Margin Rule noted that “[t]he compliance dates have been structured to ensure that the largest and most sophisticated CSEs and counterparties that present the greatest potential risk to the financial system comply with the requirements first. These swap market participants should be able to make the required operational and legal changes more rapidly and easily than smaller entities [that] engag[e] in swaps less frequently and pose less risk to the financial system.”⁵⁰ As discussed below, the COVID-19 pandemic has raised the cost of compliance for the next cohort of entities, and hence altered the calculus in setting the CFTC Margin Rule’s compliance schedule, which is based on balancing costs and benefits.

1. Benefits

As described above, the Interim Final Rule defers compliance with the IM requirements for CSEs and their covered counterparties subject to IM compliance beginning on September 1, 2020. The Interim Final Rule creates a benefit as it is intended to mitigate the disruptive effect of COVID-19 and the attendant market volatility by permitting firms to allocate their resources to ensure proper business continuity and management of risks brought about by the pandemic.

Starting in March, 2020, entities that trade uncleared swaps have experienced diminished operational capacity, due to stay-at-home orders, closures, and other

⁵⁰ Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 81 FR at 676.

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community nonpharmaceutical interventions.⁵¹ These entities are currently conducting business operations remotely and employees are performing critical business functions from their homes or other temporary locations.

With reduced operational capacity, preparations to come into compliance with the IM requirements in the next phase of the compliance schedule represent a challenge to these entities. Compliance will require procuring documentation addressing the exchange of regulatory IM, setting up custodial arrangements, and establishing processes for the calculation, posting, and collection of IM, among other things. Absent the Interim Final Rule, which delays compliance with the IM requirements, some market participants may be unable to secure necessary documentation and establish processes for the exchange of IM by the September 1, 2020 deadline. As a result, these entities may be required to cease uncleared swap trading in September, with a resulting reduction in their ability to hedge their risk. The inability of some entities to trade uncleared swaps may reduce liquidity in this market, and thereby potentially harm other traders as well.

Another potential benefit of the Interim Final Rule is that it would mitigate the effect on entities that would have otherwise been required to collect and post IM beginning on September 1, 2020, under the April 2020 Final Rule. Many of these entities would likely have reduced cash reserves due to the effects of COVID-19 on their business operations. For these firms, the compliance delay in the Interim Final Rule may mitigate the temporary cash constraint by eliminating or suspending the cost of IM collateralization, allowing for continued hedging and the management of risks posed by

⁵¹ See supra note 45.

the pandemic. By extending the September 1, 2020 compliance deadline, the Interim Final Rule defers the timeline for compliance, thereby promoting diligent risk management and allowing entities who might be precluded from trading uncleared swaps to continue to hedge using uncleared swaps.

2. Costs

The Interim Final Rule delays compliance with the IM requirements by one year for CSEs and covered counterparties that are subject to the September 1, 2020 compliance deadline. Uncleared swaps entered into between September 1, 2020, and the new deadline of September 1, 2021, may be treated as legacy swaps exempt from the IM requirements and, as such, lesser amounts of collateral would be collected to offset the risk of uncleared swaps, potentially increasing the risk of contagion and systemic risk to the United States.⁵²

In addition, many entities in advance of the nearing September 1, 2020 deadline may have already engaged in preparations for the exchange of regulatory IM, procuring compliant documentation and setting up processes for the exchange of IM. Given the extension of the compliance deadline, these entities would likely need to re-negotiate the existing documentation and refresh processes put into place as the new compliance deadlines approach and would thus incur additional costs to come into compliance with the IM requirements.

The Interim Final Rule provides relief to entities whose uncleared swap portfolios tend to be smaller than the portfolios of entities that came into scope in earlier phases.

⁵² See supra note 40 for the definition of “legacy swaps.”

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The decision to defer the compliance date of September 1, 2020, to September 1, 2021, affects slightly fewer than 200 entities, representing approximately 8% of AANA across all phases, as estimated by the OCE. This modest share of notional amount spread across many small entities likely means that the uncollateralized swaps entered into by these entities—taking into account that no exchange of IM is required by the CFTC Margin Rule until the initial margin threshold amount has been exceeded⁵³—pose less risk to the financial markets than the risk posed by uncleared swaps entered into by entities that have already come into the scope of IM compliance.

3. Section 15(a) Considerations

In light of the foregoing, the CFTC has evaluated the costs and benefits of this Interim Final Rule pursuant to the five considerations identified in section 15(a) of the CEA as follows:

(a) Protection of Market Participants and the Public

As discussed above, as a result of the COVID-19 pandemic, entities trading uncleared swaps are facing a reduction in their operational capacities due to stay-at-home orders, closures, and other community nonpharmaceutical interventions⁵⁴ to contain the spread of the virus and slow its progress. To alleviate the effect on entities nearing the September 1, 2020 deadline for compliance with the IM requirements, the Interim Final Rule delays compliance by one year for those entities, allowing them to continue to trade uncleared swaps and hedge their risk without incurring the full costs and operational demands of preparing for compliance while simultaneously responding to the COVID-19

⁵⁴ See supra note 45.

pandemic.

The Interim Final Rule also allows entities that would otherwise be focused on implementing regulatory margin requirements, in order to continue to trade uncleared swaps, to instead focus on and respond to the challenges posed by COVID-19.

Because the Interim Final Rule delays the implementation of mandatory IM for uncleared swaps, there may not be as much IM posted to protect the financial system as would be the case if the Interim Final Rule were not promulgated. This could potentially make market participants' positions more risky.

(b) Efficiency, Competitiveness, and Financial Integrity of Markets

Entities nearing the September 1, 2020 deadline for compliance with the IM requirements may face difficulties in preparing to exchange regulatory IM given the reduced operational capacity as a result of COVID-19. By extending the compliance deadline for these entities by one year, the Interim Final Rule may enhance efficiencies in several ways, as this extension allows these entities to shift their focus to emerging risks and to act diligently to comply with the IM requirements by the revised deadlines. As such, the Interim Final Rule promotes the financial integrity of the markets.

The Commission acknowledges that delaying compliance with the IM requirements will result in the collection of less IM overall, potentially making the uncleared swaps markets more susceptible to financial contagion where the default of one counterparty could lead to subsequent defaults of other counterparties. This could potentially harm market integrity. However, because this extension covers a relatively smaller share of the swaps market, the Commission believes that such a contagion is less likely to occur during the limited extension period.

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(c) Price Discovery

Delaying the margin requirement for one year for some entities may have an effect on trading behavior, and consequently, may potentially have an effect on price discovery. Postponing the requirement may allow more firms to trade uncleared swaps (i.e., those who would have an AANA above \$50 billion based on March-May 2020, yet could not comply with the IM requirements by September 2020). This, in turn, could make the uncleared swaps market more liquid, so that trading would be more likely to result in prices that reflect fundamentals.

(d) Sound Risk Management

By deferring the September 1, 2020 deadline by one year, the Interim Final Rule will have the effect of relieving some of the burden on managerial resources, at a time when such resources are strained from the COVID-19 outbreak. As such, the Interim Final Rule allows covered entities to more readily undertake proper business continuity measures and address the market, liquidity, operational, and other risks brought about by the pandemic. In this sense, the Interim Final Rule promotes sound risk management.

Uncleared swaps entered into during the one year compliance delay may be treated as legacy swaps exempt from the IM requirement. As such, less collateral would be collected to offset the risk of uncleared swaps, increasing the risk of contagion and systemic risk to the United States.

As noted above, the Interim Final Rule addresses entities whose uncleared swap portfolios tend to be smaller than entities that came into scope in earlier phases, comprising approximately 200 entities that represent 8% of total AANA, as estimated by

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the OCE.⁵⁵ This modest share of notional amount spread across those entities likely means that the uncollateralized swaps entered into by these entities during the one year delay pose relatively less risk to the financial markets than the swaps entered into by the entities with larger swap portfolios that are already subject to the IM requirements.

(e) Other Public Interest Considerations

The Interim Final Rule amends the CFTC Margin Rule consistent with the revised BCBS/IOSCO margin framework, promoting harmonization with international and domestic margin regulatory requirements and reducing the potential for regulatory arbitrage.

4. Request for Comments on Cost-Benefit Considerations

The Commission invites public comment on its cost-benefit considerations, including the section 15(a) factors described above. Commenters are also invited to submit any data or other information that they may have quantifying or qualifying the costs and benefits of the proposed amendment with their comment letters.

D. Antitrust Laws

Section 15(b) of the CEA requires the Commission to “take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the purposes of this Act, in issuing any order or adopting any Commission rule or regulation (including any exemption under section 4(c) or 4c(b)), or in requiring or approving any bylaw, rule, or regulation of a contract market or registered futures association established pursuant to section 17 of this Act.”⁵⁶

⁵⁵ See OCE Initial Margin Phase 5 Study at 4.

⁵⁶ 7 U.S.C. 19(b).

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

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

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

List of Subjects in 17 CFR Part 23

Capital and margin requirements, Major swap participants, Swap dealers, Swaps.

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

PART 23—SWAP DEALERS AND MAJOR SWAP PARTICIPANTS

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

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

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

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1. Amend § 23.161 by revising paragraph (a)(6) as follows.

§ 23.161 Compliance dates.

(a) Covered swap entities shall comply with the minimum margin requirements for uncleared swaps on or before the following dates for uncleared swaps entered into on or after the following dates:

* * * * *

(6) September 1, 2021 for the requirements in §23.152 for initial margin for any uncleared swaps where both—

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

(ii) Its counterparty combined with all its margin affiliates have an average daily aggregate notional amount of uncleared swaps, uncleared security-based swaps, foreign exchange forwards, and foreign exchange swaps in March, April, and May 2021 that exceeds \$50 billion, where such amounts are calculated only for business days; and where

(iii) In calculating the amounts in paragraphs (a)(6)(i) and (ii) of this section, an entity shall count the average daily notional amount of an uncleared swap, an uncleared security-based swap, a foreign exchange forward, or a foreign exchange swap between the entity and a margin affiliate only one time and shall not count a swap that is exempt pursuant to § 23.150(b) or a security-based swap that is exempt pursuant to section 15F(e) of the Securities Exchange Act of 1934 (15 U.S.C. 78o.10(e)).

* * * * *

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Christopher Kirkpatrick,

Secretary of the Commission.