

Voting Draft – As approved by the Commission on 6/25/2020

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COMMODITY FUTURES TRADING COMMISSION

17 CFR Chapter I

RIN Number 3038-AE79

Post-Trade Name Give-Up on Swap Execution Facilities

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission (CFTC or Commission) is issuing a final rule to prohibit post-trade name give-up for swaps executed, pre-arranged, or pre-negotiated anonymously on or pursuant to the rules of a swap execution facility (SEF) and intended to be cleared. The final rule provides an exception for package transactions that include a component transaction that is not a swap intended to be cleared, including but not limited to U.S. Treasury swap spreads.

DATES: The effective date for this final rule is **[INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**. The compliance date for swaps subject to the trade execution requirement under section 2(h)(8) of the Commodity Exchange Act (CEA or Act) is November 1, 2020. The compliance date for swaps not subject to the trade execution requirement under section 2(h)(8) of the CEA is July 5, 2021.

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SUPPLEMENTARY INFORMATION:

I. Background

A. November 2018 Request for Comment

On November 30, 2018, the Commission published in the Federal Register a request for comment regarding the practice of post-trade name give-up on SEFs (2018 RFC).¹ As described in the 2018 RFC, some SEFs facilitate post-trade name give-up by directly or indirectly disclosing the identities of swap counterparties to one another after a trade is matched anonymously. The 2018 RFC noted that a SEF may effectuate such disclosure through its own trade protocols or through a third-party service provider utilized to process and route transactions to a derivatives clearing organization (DCO) for clearing. In the 2018 RFC, the Commission questioned the necessity of the practice with respect to cleared swaps anonymously executed on a SEF. The Commission also summarized some of the general views on post-trade name give-up of various industry participants and requested public comments on the merits of the practice and whether the Commission should prohibit it.

The Commission received 13 comment letters in response to the 2018 RFC. Most commenters opposed the practice of post-trade name give-up for anonymously-executed swaps submitted to clearing, and requested that the Commission adopt a regulatory prohibition. The

¹ Post-Trade Name Give-up on Swap Execution Facilities, 83 FR 61571 (Nov. 30, 2018). “Post-trade name give-up” refers to the practice of disclosing the identity of each swap counterparty to the other after a trade has been matched anonymously.

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Securities Industry and Financial Markets Association (SIFMA) expressed support for the practice and concern about the effects of a prohibition. The views raised in those comment letters were considered and discussed by the Commission in a proposed rule on post-trade name give-up issued in December 2019.

B. December 2019 Proposed Rule

After considering the comments received in response to the 2018 RFC, on December 31, 2019, the Commission published in the Federal Register a proposed rule to prohibit post-trade name give-up for anonymously-executed and intended-to-be-cleared swaps (Proposal).² The Proposal prohibits a SEF from directly or indirectly, including through a third-party service provider, disclosing the identity of a counterparty to a swap executed anonymously and intended to be cleared. The Proposal also requires SEFs to establish and enforce rules prohibiting any person from effectuating such a disclosure.

In the Proposal, the Commission reasoned that a prohibition on post-trade name give-up may (1) advance the statutory objectives of promoting swaps trading on SEFs and fair competition among market participants; (2) further the objectives underlying the prohibition against swap data repositories (SDRs) disclosing the identity of a counterparty to a swap that is anonymously executed and cleared in accordance with the Commission's straight-through processing (STP) requirements; and (3) promote impartial access on SEFs.³

The Commission requested comments on all aspects of the Proposal, and also solicited comments through targeted questions relating to whether and how the proposed rule, if adopted, (1) would advance the statutory and regulatory goals described above; (2) might impact aspects of market quality and liquidity; and (3) should be tailored. Overall, the Commission received

² Post-Trade Name Give-up on Swap Execution Facilities, 84 FR 72262 (Dec. 31, 2019).

³ See Proposal at 72265-72267.

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comment letters on the Proposal from 20 different respondents: 13 public interest and industry groups; two global banks with affiliated swap dealers; two global market makers; a global asset manager; a SEF operator; and a third-party provider of derivatives trade processing services.⁴

Additionally, Commission staff participated in several *ex parte* meetings concerning the proposal.⁵ The Commission also consulted with the U.S. Securities and Exchange Commission and foreign regulators on the proposed rule.

II. Final Rule

After considering the public comments on the Proposal, the Commission is adopting the proposed regulations, with certain modifications and clarifications discussed below. Specifically, the Commission is amending its part 37 regulations to prohibit post-trade name give-up for swaps anonymously executed, pre-arranged, or pre-negotiated on or pursuant to the rules of a SEF and intended to be cleared. New § 37.9(d) prohibits a SEF from directly or indirectly disclosing the identity of a counterparty to any such swap, and requires a SEF to establish and enforce rules that prohibit any person from doing so.⁶ The final rule, however, contains an

⁴ Comment letters were submitted by the following entities: Alternative Investment Management Association (AIMA) (Feb. 17, 2020); American Bankers Association (ABA) (Mar. 2, 2020); Americans for Financial Reform Education Fund (AFR) (Mar. 2, 2020); Bank Policy Institute (BPI) (Mar. 10, 2020); Better Markets, Inc. (Better Markets) (Mar. 2, 2020); Citadel and Citadel Securities (Citadel) (Letter 1: Mar. 2, 2020, and Letter 2: Apr. 21, 2020); Citibank, N.A. (Citi) (Mar. 2, 2020); Coalition for Derivatives End-Users (Mar. 2, 2020); CTC Trading Group, LLC (CTC) (Mar. 10, 2020); FIA Principal Traders Group (FIA PTG) (Mar. 2, 2020); Financial Services Forum (FSF) (Mar. 2, 2020); Healthy Markets Association (HMA) (Mar. 9, 2020); IHS Markit (Mar. 2, 2020); Investment Company Institute (ICI) (Mar. 2, 2020); JPMorgan Chase & Co. (JPMorgan) (Mar. 2, 2020); Managed Funds Association (MFA) (Mar. 2, 2020); SIFMA, on behalf of a majority of SIFMA's swap dealer members who have expressed a view (Mar. 2, 2020); SIFMA's Asset Management Group (SIFMA AMG) (Mar. 2, 2020); ICAP Global Derivatives Limited and tpSEF, Inc. (TP ICAP); and Vanguard (Mar. 2, 2020).

⁵ See Comments for Proposed Rule 84 FR 72262, *available at* <https://comments.cftc.gov/PublicComments/CommentList.aspx?id=3066> (last retrieved June 23, 2020).

⁶ The Commission notes that this rule does not prohibit a SEF from disclosing the identities of all of the participants on the SEF to all other participants. However, such disclosure in specific cases may be prohibited under other provisions of the CEA and Commission regulations. In addition, the Commission may consider this issue in a future rulemaking.

exception for package transactions that include a component transaction that is not a swap intended to be cleared.

A. Statutory Authorities

CEA section 8a(5) authorizes the Commission to make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of the CEA.⁷ The Commission believes that prohibiting the practice of post-trade name give-up for intended-to-be-cleared swaps is reasonably necessary to promote trading of swaps on SEFs and fair competition among market participants. The Commission also believes that post-trade name give-up for intended-to-be-cleared swaps is inconsistent with the requirement that SEFs provide market participants with impartial access to trading on SEFs, as well as the objectives underlying the prohibition against SDRs disclosing the identities of counterparties to swaps anonymously executed on a SEF and cleared in accordance with STP requirements.

1. Promoting trading on SEFs and pre-trade price transparency (CEA section 5h(e))

CEA section 5h(e) establishes the statutory goal of the SEF regulatory regime to promote swaps trading on SEFs and promote pre-trade price transparency in the swaps market.⁸ In the Proposal, the Commission stated that despite available liquidity for cleared products on certain SEF platforms, the range and number of active participants may be limited due to market participants' concerns about information leakage and anticompetitive behavior made possible by post-trade name give-up.⁹ The Commission also stated that fully-anonymous trading (*i.e.*,

⁷ 7 U.S.C. 12(a)(5).

⁸ 7 U.S.C. 7b-3(e).

⁹ Proposal at 72265-72266.

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without post-trade name give-up) would likely encourage more participants to trade on those platforms.¹⁰ The Proposal requested public comments on how a prohibition on post-trade name give-up would impact trading and pre-trade price transparency on affected SEFs.

Several commenters on the Proposal stated that prohibiting post-trade name give-up would remove a significant barrier to increased participation on certain SEF platforms,¹¹ and that prohibiting the practice would lead to an increase in the number of participants trading on affected SEFs.¹² MFA, for example, stated that its members are “eager” to participate on affected SEFs and “to have the ability to transact cleared swaps anonymously; similar to how they currently trade in other asset classes (*e.g.*, equities, futures, foreign exchange, and Treasuries, among others).”¹³ JPMorgan, on the other hand, opined that “the more likely outcome of banning [post-trade name give-up] will be to *reduce overall* trading on SEFs, as dealers pull back from trading”¹⁴ Other commenters similarly argued that incumbent swap dealers may exit the market or reduce their trading.¹⁵ ICI and MFA, however, characterized this outcome as “unlikely.”¹⁶ MFA stated that competitive market forces would ensure that “in the unlikely event an individual dealer reduced its offering, other dealers would quickly step into its place.”¹⁷ Asserting its experience as a “top liquidity provider” in SEF markets, Citadel stated that it does not expect a prohibition on post-trade name give-up to affect its liquidity provision on pre-trade

¹⁰ *Id.* at 72266.

¹¹ See SIFMA AMG Letter, at 2; ICI Letter, at 3; MFA Letter, at 6 (“While MFA speaks only on behalf of our members, we have heard broadly and uniformly from them that the practice of Name Give-Up is the most significant obstacle to their participation on IDB SEFs.”); Citadel Letter 1, at 3-4 (“Name give-up is the most significant remaining such barrier preventing buy-side firms from trading on certain SEFs”).

¹² See AFR Letter, at 3; CTC Letter, at 1-2; FIA PTG Letter, at 2; MFA Letter, at 6.

¹³ MFA Letter, at 6.

¹⁴ JPMorgan Letter, at 10.

¹⁵ See ABA Letter, at 2; BPI Letter, at 1; FSF Letter, at 7-8; SIFMA Letter, at 4.

¹⁶ ICI Letter, at 5; MFA Letter, at 4.

¹⁷ MFA Letter, at 4.

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disclosed platforms or its use of pre-trade anonymous trading protocols.¹⁸ Citadel further asserted that “other swap dealers share our view, as UBS has supported the prohibition and SIFMA indicated that the views among swap dealers ‘are not uniform.’”¹⁹ Commenters in favor of the Proposal also pointed to their experience in other asset classes where post-trade name give-up is not practiced, asserting that such markets demonstrate that the purported negative liquidity impacts raised by some incumbent swap dealers are unwarranted.²⁰ Commenters opposed to the Proposal, however, asserted that the quality of liquidity in certain fully-anonymous markets has degraded, even as new types of market participants have entered the marketplace.²¹

Commenters also asserted that prohibiting post-trade name give-up would improve price transparency.²² Citadel noted that pre-trade anonymous execution methods, such as anonymous order books, will continue to function on a pre-trade basis as they do today, providing the same level of price transparency to market participants.²³ Citadel and MFA opined, however, that eliminating post-trade name give-up should be expected to increase pre-trade transparency, as more market participants are able to participate in these trading protocols.²⁴ MFA stated that post-trade name give-up has limited investor access to affected SEFs, thereby reducing pre-trade transparency regarding available bids and offers, limiting investor choice of trading protocols,

¹⁸ Citadel Letter 1, at 6.

¹⁹ Citadel Letter 1, at 7.

²⁰ See Citadel Letter 1, at 7; Citadel Letter 2, at 7, FIA PTG Letter, at 1-2, MFA Letter, at 4.

²¹ For example, FSF and JPMorgan assert that dealer-provided liquidity in some markets has increasingly been replaced by high-frequency trading firms that tend to retract liquidity sooner than other types of market participants during periods of high volatility. FSF Letter, at 9; JPMorgan Letter, at 6 and 9. See also Citi Letter, at 4 note 7 (“[D]egradations in liquidity have occurred in other markets that have transitioned to fully anonymous trading.”). By contrast, Citadel asserts that it is “bank dealers” that have withdrawn from SEFs and U.S. Treasury markets during certain periods of market volatility. Citadel Letter 2, at 12.

²² Citadel Letter 1, at 4-5; Citadel Letter 2, at 5; MFA Letter, at 4; SIFMA AMG Letter, at 2; Vanguard Letter, at 1.

²³ Citadel Letter 1, at 4-5.

²⁴ *Id.* at 5; Citadel Letter 2, at 5; MFA Letter, at 4.

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and creating information asymmetries between market participants.²⁵ MFA asserted that eliminating post-trade name give-up would facilitate investors selectively accessing additional liquidity pools and trading protocols, thereby improving price discovery and pre-trade transparency while reducing information asymmetries.²⁶

The Commission believes that prohibiting post-trade name give-up is reasonably necessary to facilitate and promote trading on SEFs. The practice of post-trade name give-up has reportedly deterred a significant segment of market participants from making markets on or otherwise participating on affected SEFs. Such market participants have ascribed their lack of participation to several potential harms resulting from post-trade name give-up, a principal concern being the risk of information leakage allowing counterparties to glean a SEF participant's trading positions and strategies.²⁷ The Commission has heard repeatedly and consistently from market participants eager to trade fully-anonymously on SEFs.²⁸ The Commission expects that many of these market participants will choose to participate on affected SEFs once the practice is prohibited, leading to increased trading. Furthermore, the Commission believes that prohibiting post-trade name give-up will promote pre-trade price transparency in the swaps market by encouraging a greater number, and a more diverse set, of market participants to anonymously post bids and offers on affected SEFs.

With respect to claims made by some commenters that incumbent swap dealers may pull back from trading on SEFs if post-trade name give-up is prohibited, the Commission does not

²⁵ MFA Letter, at 4.

²⁶ *Id.*

²⁷ See CFTC Market Risk Advisory Committee Meeting, *Panel Discussion: Market's Response to the Introduction of SEF's*, 133 *et seq.* (Apr. 2, 2015) (MRAC Meeting Transcript) at 142-144; Proposal at 72264; AIMA Letter, at 1; Citadel Letter 1, at 1, 3 and 10; ICI Letter, at 3; MFA Letter, at 3 and 7; SIFMA AMG Letter, at 1 and 2; Vanguard Letter, at 2.

²⁸ See, e.g., *supra* notes 12-13 and accompanying text; Proposal at 72264, notes 31-32 and accompanying text; MRAC Meeting Transcript at 140.

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believe that this prospect justifies maintaining the practice. In the Commission’s view, there is not convincing evidence, such as research or data, supporting the proposition that participation and trading on SEFs will decrease as a result of prohibiting post-trade name give-up. Rather, the Commission believes that fully-anonymous trading has facilitated liquidity and diverse participation in markets for instruments such as futures, equities, and U.S. Treasury securities, and academic literature suggests that markets with pre- and post-trade anonymity generally feature greater liquidity than those without.²⁹ The Commission believes that increased anonymity is reasonably likely to similarly enhance trading on SEFs.³⁰ The Commission intends to study the state of the swaps market in order to observe any changes to trading on SEFs following the implementation of this final rule.³¹

Moreover, the Commission finds the reasoning behind claims that incumbent swap dealers may reduce their trading if post-trade name give-up is prohibited to be at odds with the statutory requirements discussed in the following two sections: to promote fair competition among market participants and impartial access to the market. The reason proffered for a potential pullback in trading by incumbent swap dealers is that post-trade name give-up is

²⁹ See, e.g., S. Freiderich & R. Payne, *Trading Anonymity and Order Anticipation*, 21 *Journal of Financial Markets* 1-24 (2014) (finding that post-trade anonymity improved market liquidity, particularly for small stocks and stocks with concentrated trading, which may be more analogous to swaps); T.G. Meling, *Anonymous Trading in Equities* (2019 working paper) (also finding that post-trade anonymity improved market liquidity); P.J. Dennis & P. Sandas, *Does Trading Anonymously Enhance Liquidity?* *Journal of Financial and Quantitative Analysis* 1-25 (2019) (same); A. Hachmeister & D. Schierek, *Dancing in the Dark: Post-Trade Anonymity, Liquidity, and Informed Trading*, 34 *Review of Quantitative Finance and Accounting* 145-177 (2010) (same); J. Linnainmaa & G. Saar, *Lack of Anonymity and the Inference from Order Flow*, 25 *Review of Financial Studies* 1,414-1,456 (2012) (same). See also Treasury Market Practices Group, *White Paper on Clearing and Settlement in the Secondary Market for U.S. Treasury Securities* (Jul. 11, 2019) (stating that the emergence of new types of market participants in the U.S. Treasury securities market has “likely improved overall liquidity through enhanced order flow and competition”).

³⁰ See, e.g., T. Lee & C. Wang, *Why Trade Over-the-Counter? When Investors Want Price Discrimination*, at 26-27 (2019 working paper) (predicting that eliminating name give-up in swaps markets would decrease spreads on SEFs and increase total market participant welfare).

³¹ In this respect, the Commission will endeavor to conduct a preliminary study on the state of the swaps markets by July 2021, and a further study by July 2023.

important to ensure that swap dealers can hedge the risk of their client-facing trades.³² In this regard, some market participants argue that participation of buy-side clients and speculators on pre-trade anonymous SEFs (and without the ability to identify them through post-trade name give-up) will harm the ability of dealers to hedge reliably.³³ These arguments can be understood to imply that greater participation and competition from certain types of market participants (such as buy-side clients and speculators) on affected pre-trade anonymous SEFs will harm overall market quality and welfare. The Commission finds this proposition to be at odds with the statutory requirements to promote fair competition among market participants and impartial access on SEFs. The Commission believes that maintaining post-trade anonymity, where it is reasonable to do so, will better align with the statutory framework discussed below and level the playing field for market participants of all types and sizes to trade and compete on affected SEFs without exposing sensitive swap transaction information.

2. Promoting fair competition among market participants (CEA section 3(b))

CEA section 3(b) specifies that a purpose of the CEA is to promote fair competition among market participants.³⁴ In the Proposal, the Commission noted commenters' stated concerns about information leakage and anticompetitive behavior made possible by post-trade name give-up. The Commission reasoned that greater participation on SEFs resulting from a prohibition on post-trade name give-up would advance the goal of promoting competition on

³² See ABA Letter, at 2; BPI Letter, at 1; Citi Letter, at 4; FSF Letter, at 3-6; JPMorgan Letter, at 4-5; SIFMA Letter, at 4-5; TP ICAP Letter, at 5. Commenters supporting the Proposal, however, asserted that the proposition that post-trade name give-up is necessary for dealer risk management is spurious. See, Better Markets Letter, at 8; Citadel Letter 1, at 2; Vanguard Letter, at 2.

³³ See FSF Letter, at 4-6; Citi Letter, at 3; *infra* notes 53-57 and accompanying text.

³⁴ 7 U.S.C. 5(b).

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SEFs.³⁵ The Commission stated that the proposed rule may also advance the CEA’s goal of fostering fair competition among market participations by reducing opportunities for information leakage associated with post-trade name give-up.³⁶

In response to the Proposal, several commenters emphasized the view that post-trade name give-up is an anticompetitive practice and/or permits swap dealers to engage in certain anticompetitive behavior,³⁷ and some commenters opined that prohibiting the practice may lead to greater competition among dealers and liquidity providers.³⁸ Conversely, JPMorgan asserted that post-trade name give-up “*promotes* competition and attracts SEF trading by providing market participants multiple protocols from which to choose depending on their business models and preferences.”³⁹ By “limiting the methods through which SEFs can operate and compete with each other,” JPMorgan argued, banning post-trade name give-up “would clearly *reduce* innovation and *reduce* competition ‘among . . . markets,’ thus in fact contravening Section 3(b)’s mandate.”⁴⁰

The Commission is not persuaded by comments that prohibiting post-trade name give-up would itself impair competition or innovation. Post-trade name give-up is an ancillary post-trade

³⁵ Proposal at 72266.

³⁶ *Id.*

³⁷ See AFR Letter, at 2-3; Better Markets Letter, at 11-12 (“[T]he gleanings of trading interest and trade information and the apparent consequences of the practice of Post-Trade Name Give-Up – to permit dealers to exit order books with non-dealer participation and trade with informational advantages – conflict with the CEA’s overarching statutory objectives to ‘promote . . . fair competition among boards of trade, other markets and market participants’ . . .”); Citadel Letter 1, at 1; Citadel Letter 2, at 5 and 10; HMA Letter, at 2; MFA Letter, at 3; SIFMA AMG Letter, at 1.

³⁸ See CTC Letter, at 1-2 (“[W]e would expect abolishing name give-up to *increase* liquidity provision on SEFs given increased participation from buy-side firms, which should in turn drive enhanced participation from liquidity providers.”); ICI Letter, at 5 (“[P]rohibiting post-trade name give-up could encourage competition among dealers to the extent post-trade name give-up today gives a few dominant dealers in the market leverage over buy-side participants and other dealers.”); MFA Letter, at 4 (“[N]ew liquidity providers may be able to enter the market more easily, which will diversify sources of liquidity and increase competition.”).

³⁹ JPMorgan Letter, at 10.

⁴⁰ *Id.* at 11. See also FSF Letter, at 10 (“Contrary to what is argued in the [Proposal] and by commenters, banning name give-up would itself impair competition (certainly, innovation and competition among markets) . . .”).

protocol, and not a method of execution. The prohibition of post-trade name give-up, as proposed and adopted by the Commission, applies to all SEFs and all pre-trade anonymous execution methods. It does not proscribe SEFs from offering any existing execution method, nor does it prevent SEFs from developing new execution methods. Moreover, the Commission is concerned by other commenters' assertions that post-trade name give-up enables anticompetitive behavior. Regardless of the prevalence or magnitude of such behavior, the Commission believes that prohibiting post-trade name give-up will reduce the opportunity for such behavior to occur, and is therefore reasonably necessary to promote fair competition among market participants on pre-trade anonymous SEF markets for cleared swaps. The Commission believes that prohibiting post-trade name give-up will address concerns about information leakage and discriminatory behavior that market participants claim have dissuaded them from accessing pre-trade anonymous liquidity pools to date, thereby removing barriers to greater participation and competition.

3. Providing market participants with impartial access to the market (CEA section 5h(f)(2)(B) and CFTC regulation 37.202)

CEA section 5h(f)(2)(B) requires a SEF to establish and enforce trading, trade processing, and participation rules that provide market participants with “impartial access” to the market.⁴¹ The Commission implemented this statutory requirement by adopting CFTC regulation 37.202,⁴² which requires a SEF to provide market participants with impartial access to its market(s), including, among other things, criteria governing such access that are “impartial, transparent and applied in a fair and non-discriminatory manner.”⁴³ In this context, “impartial”

⁴¹ 7 U.S.C. 7b-3(f)(2)(B).

⁴² 17 CFR 37.202.

⁴³ 17 CFR 37.202(a).

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means fair, unbiased, and unprejudiced.⁴⁴ The impartial access requirement allows participants to compete on a level playing field, and additional liquidity providers to participate on SEFs.⁴⁵

In the Proposal, the Commission stated that post-trade name give-up may result in a “discriminatory effect” against certain market participants, and that the Commission preliminarily believed post-trade name give-up undermines the policy goals of the impartial access requirement, namely, to: (1) ensure that market participants can compete on a level playing field; and (2) allow additional liquidity providers to participate on SEFs.⁴⁶ The Commission also stated its preliminary assessment that promoting a fully-anonymous trading environment without post-trade name give-up would better fulfill the goals of the impartial access requirement.⁴⁷ The Proposal asked for public comments on whether post-trade name give-up undermines the stated goals of impartial access.

Several commenters stated that post-trade name give-up creates an uneven or unfair playing field by conferring benefits to select market participants (large incumbent swap dealers) and permitting such market participants to engage in discriminatory trading practices.⁴⁸ AFR stated that post-trade name give-up thereby “undermines impartial access and reduces the

⁴⁴ See Core Principles and Other Requirements for SEFs, 78 FR 33476, 33508 (June 4, 2013).

⁴⁵ *Id.*

⁴⁶ Proposal at 72267.

⁴⁷ *Id.*

⁴⁸ See AFR Letter, at 3 (“Post-trade name give-up exposes liquidity providers to several risks, including the risk of retaliation from large competitors and the risk of revealing information relevant to trading strategies to competitors. Smaller liquidity providers and new entrants would tend to be more vulnerable to these dangers.”); Better Markets Letter, at 9; Citadel Letter 1, at 3-4 and 6 (“[S]wap dealers are able to use name give-up as a post-trade check to ensure that they are only transacting with other swap dealer counterparties on [interdealer broker] SEFs, thereby maintaining dealer-only liquidity pools in direct contradiction of statutory impartial access requirements.”); Citadel Letter 2, at 10 (“[W]e note the experience of Citadel Securities entering the swaps market as a new liquidity provider, where we witnessed how certain other swap dealers can use name give-up for purposes that are inconsistent with the Commission’s impartial access requirements. Immediately following our entry as a new liquidity provider, this included certain incumbent swap dealers asking [interdealer broker] SEFs to cancel executed trades upon learning through name give-up that their counterparty was Citadel Securities.”); SIFMA AMG Letter, at 2.

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number of competitive liquidity providers on SEFs.”⁴⁹ Commenters also asserted that prohibiting post-trade name give-up would lead to additional, more diversified sources of liquidity on SEFs.⁵⁰ JPMorgan, on the other hand, opined that although eliminating post-trade name give-up “might draw certain market participants to trade on . . . SEFs that are fully anonymous, it may drive others (*e.g.*, dealers) away. Therefore, it is not clear that prohibiting [post-trade name give-up] would further the goal of impartial access”⁵¹ JPMorgan also argued that the concept of “discriminatory effect” is “amorphous” and could be used to justify other market interventions simply because certain market participants prefer it.⁵²

For commenters opposed to a prohibition on post-trade name give-up, the crux of their opposition is the notion that prohibiting the practice may impose “adverse selection” risk on incumbent swap dealers.⁵³ FSF explained that “dealers prefer to match with the natural other side of a trade (*e.g.*, another dealer generally seeking to maintain a risk-neutral position)” as opposed to other market participants, such as speculators, who may impose adverse selection costs.⁵⁴ According to FSF, swap dealers use post-trade name give-up to ascertain “what types of market participants are generally trading” on pre-trade anonymous SEFs, and “maximize the chances of

⁴⁹ AFR Letter, at 3.

⁵⁰ CTC Letter, at 1-2; FIA PTG Letter, at 2; AFR Letter, at 3; MFA Letter, at 4; Better Markets Letter, at 5.

⁵¹ JPMorgan Letter, at 12.

⁵² *Id.* See also FSF Letter, at 11. *But cf.* Better Markets Letter, at 10 (“[I]mpartial access would essentially become a fiction if certain classes of SEF participants could be targeted with trading practices, like Post-Trade Name Give-Up, that not only impose, but are meant to impose, disparate economic costs and trading limitations on competitors”).

⁵³ See ABA Letter, at 2; BPI Letter, at 1; FSF Letter, at 4-5; SIFMA Letter, at 3. FSF explained adverse selection in this context as follows. “[I]nstead of facing a speculator on the other side of a trade, who is more likely to trade in the same direction on other venues or trade in one direction in a small size on one venue in order to push the price in a certain direction so that it can trade in the opposite direction on a different venue at a better price, dealers prefer to match with the natural other side of a trade (*e.g.*, another dealer generally seeking to maintain a risk-neutral position). Such “naturals” are more likely to be hedging all their residual accumulated risk, rather than trading in a manner that would move the price in an unfavorable direction.” FSF Letter, at 5.

⁵⁴ FSF Letter, at 4-5.

trading with the natural other side and thus manage adverse selection costs.”⁵⁵ Citi similarly commented that “[i]f new participants will be enticed to join [dealer-to-dealer] SEFs, some presumably may be participants that quote speculatively and intermittently, thereby diluting the reliable and consistent nature of quoting and trading that is the hallmark of [dealer-to-dealer] SEFs.”⁵⁶ In a related argument, FSF asserted that post-trade name give-up makes request-for-quote (RFQ) pricing “more tailored and efficient” by allowing dealers to ensure their RFQ clients are not trading on dealer-to-dealer order books, or if they are, quoting them wider spreads via RFQ to accommodate a greater anticipated risk of hedging the balance sheet capacity allocated to such clients.⁵⁷

After considering all comments, the Commission believes that post-trade name give-up undermines the policy goals of the impartial access requirement, and that prohibiting the practice is reasonably necessary to effectuate the purposes of section 5h(f)(2)(B) of the Act. The Commission finds that the practice of post-trade name give-up effectively discriminates against certain market participants and has deterred participants from joining or trading in a meaningful way on SEFs that employ the practice. The use of post-trade name give-up to discriminate between certain types of market participants in order to maximize trading with one type of market participant and avoid trading with another – or to dissuade certain types of market participants from trading on a SEF – undermines the policy goals of the impartial access requirement to ensure that market participants can compete on a level playing field and to allow

⁵⁵ *Id.*

⁵⁶ Citi Letter, at 3.

⁵⁷ See FSF Letter, at 5 (“Name give-up allows a dealer, over time (not just at the point of execution), to more accurately assess its risk of providing balance sheet capacity to a particular client and determine how it should quote to the client in order to achieve the same desired return on capital for trading with that client as with another, *e.g.*, by quoting a tighter price to [an RFQ requester that does not trade in the dealer-to-dealer order book SEFs] than [an RFQ requester the dealer has seen trade frequently in order book SEFs].”). FSF explained that the price that a dealer gives a client over RFQ depends on the costs of hedging the client-facing trade, and the dealer’s available liquidity for hedging depends in turn on whether the client will also be accessing that liquidity. *Id.*

additional liquidity providers to participate on SEFs. Further, in implementing § 37.202(a), the Commission rejected the notion that a SEF could limit access to its trading systems to certain types of market participants such as swap dealers.⁵⁸ However, the practice of post-trade name give-up purportedly to avoid adverse selection risk, in the Commission’s view, leads to a similar result, and therefore conflicts with the purposes of the impartial access requirement imposed by CEA section 5h(f)(2)(B). Finally, the comment that a potential “discriminatory effect” could be used to justify market intervention simply because certain market participants prefer it misses the point. The Commission’s view here is based not upon the mere preference of certain market participants, but rather upon the entirety of facts and circumstances presented, the discriminatory manner in which post-trade name give-up is applied, and the realized effect of post-trade name give-up as a disincentive to access and participation by certain types of market participants and not others.

4. Information privacy and prohibition against post-trade name give-up at an SDR (CEA section 21(c)(6) and CFTC regulation 49.17(f)(2))

CEA section 21(c)(6) requires an SDR to maintain the privacy of any and all swap transaction information that it receives from a swap dealer, counterparty, or any other registered entity.⁵⁹ In implementing this statutory provision, the Commission promulgated regulation 49.17(f) to address the scope of access a market participant may have to swap data maintained by an SDR. For swaps executed anonymously on a SEF and cleared in accordance with the Commission’s STP requirements, § 49.17(f)(2) prohibits an SDR from providing a counterparty

⁵⁸ See Core Principles and Other Requirements for Swap Execution Facilities, 78 FR 33476, 33507-33508 (June 4, 2013).

⁵⁹ 7 U.S.C. 24a(c)(6).

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to a swap with access to the identity of the other counterparty or its clearing member.⁶⁰ In adopting this provision, the Commission explained that this swap transaction information is subject to the statutory privacy protections because, in the Commission’s view, swap counterparties would not otherwise know one another’s identity if the swap were submitted to clearing via STP.⁶¹ In the Proposal, the Commission stated that post-trade name give-up undercuts the intent of § 49.17(f)(2) and the congressional objectives of CEA section 21(c)(6). Therefore, the Commission reasoned, prohibiting post-trade name give-up would help to advance the objectives underlying the statutory privacy protections in CEA section 21(c)(6) and the Commission’s regulations thereunder.⁶²

Several commenters agreed with the Commission’s assessment in the Proposal that post-trade name give-up undercuts the intent of CEA section 21(c)(6) and § 49.17(f)(2).⁶³ FSF, on the other hand, asserted that name give-up is not comparable to an SDR disclosing counterparty information since, in FSF’s view, market participants choose to have their names disclosed by trading on a SEF that practices post-trade name give-up.⁶⁴ FSF also asserted that “[i]f Congress wanted to extend the privacy requirement to SEFs, it certainly would have done so.”⁶⁵

After considering commenters’ arguments, the Commission continues to believe that post-trade name give-up undermines the objectives underlying CEA section 21(c)(6) and § 49.17(f)(2) thereunder. In response to commenters who noted CEA section 21(c)(6) addresses SDRs and not SEFs, the Commission does not believe this reflects a Congressional intent to permit post-trade name give-up on SEFs. As the Commission noted in the Proposal, the

⁶⁰ 17 CFR 49.17(f)(2).

⁶¹ Swap Data Repositories—Access to SDR Data by Market Participants, 79 FR 16673-16674 (Mar. 26, 2014).

⁶² Proposal at 72266.

⁶³ See Better Markets Letter, at 11; Citadel Letter 1, at 4; FIA PTG Letter, at 2-3; ICI Letter, at 4.

⁶⁴ See FSF Letter, at 10-11.

⁶⁵ FSF Letter, at 11. See also SIFMA Letter, at 5; TP ICAP Letter, at 6.

Congressional intent to protect the privacy of trading information, including trader identities, is evident in other statutory provisions.⁶⁶ While some market participants willingly participate on SEF platforms practicing post-trade name give-up, others are reportedly deterred from doing so due to concerns over the privacy of their swap transaction information.⁶⁷ The Commission believes that prohibiting post-trade name give-up is consistent with Congressional intent and will further the objectives underlying CEA section 21(c)(6) and statutory provisions similarly aimed at protecting private information of market participants.

B. Application of the Rule

1. Scope of swaps covered

In the Proposal, the Commission stated its preliminary belief that, with respect to operational, credit and settlement, and legal issues in particular, post-trade name give-up is generally unnecessary where a swap is executed on a SEF and submitted to a DCO for clearing.⁶⁸ Accordingly, the Commission proposed in § 37.9(d) to prohibit disclosing the identity of a counterparty to a swap executed anonymously and “intended to be cleared.” The Commission specifically requested public comments on whether any operational, credit and settlement, legal, or similar issues exist that would still require post-trade name give-up for an intended-to-be-cleared swap. The Commission also requested public comments on whether it should narrow the scope of the proposed prohibition on post-trade name give-up to swaps required to be cleared under section 2(h)(1) of the Act or swaps subject to the trade execution requirement under section 2(h)(8) of the Act.

⁶⁶ Proposal at 72266, note 62. CEA Section 8(a), for example, prohibits the Commission from publication of data and information that would disclose the business transactions or market positions of any person and trade secrets or names of customers. 7 U.S.C. 12(a).

⁶⁷ See, e.g., Proposal at 72263-72264 (discussing market participants’ concerns over “information leakage” that could expose a counterparty’s trading positions, strategies and/or objectives).

⁶⁸ Proposal at 72267. The Commission also noted that STP requirements for transactions subject to clearing obviate the need for counterparty name disclosure. *Id.*

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The Commission received a number of comments opposing limiting the scope of the prohibition.⁶⁹ MFA opposed narrowing the scope of the prohibition to swaps required to be cleared or subject to the trade execution requirements, asserting that doing so “would mute the overall effectiveness of the Proposed Rule”⁷⁰ Similarly, Citadel asserted that the rationale for prohibiting post-trade name give-up applies equally to all swaps intended to be cleared, not just swaps subject to the clearing requirement or trade execution requirement and, therefore, “there is no rational basis for drawing such a distinction.”⁷¹ Citadel and FIA PTG, however, requested that the Commission clarify that “intended to be cleared” be interpreted to mean swaps that are intended to be submitted for clearing contemporaneously with execution, and not include swaps that begin as uncleared transactions and are later submitted to clearing.⁷² TP ICAP, on the other hand, asserted that any prohibition on post-trade name give-up should be limited to, at most, swaps subject to the clearing requirement.⁷³ TP ICAP reasoned that a SEF may not know whether parties to a voluntarily-cleared swap will in fact submit the swap to a DCO, as the parties may do so themselves post-execution.⁷⁴ TP ICAP stated that “it would be difficult, if not impossible, to impose a restriction on [post-trade name give-up] post-execution when it is not known whether the transaction will be submitted for clearing.”⁷⁵

⁶⁹ See AFR Letter, at 3; Citadel Letter 1, at 4; FIA PTG Letter, at 2; ICI Letter, at 5; MFA Letter, at 5-6.

⁷⁰ MFA Letter, at 5.

⁷¹ Citadel Letter 1, at 4 (asserting that name give-up has no justification where: (1) the Commission’s STP requirements ensure that a swap is quickly submitted to, and accepted or rejected by, a DCO (and is considered *void ab initio* if rejected); and (2) the two trading counterparties do not have credit, operational, or legal exposure to each other at any stage).

⁷² See FIA PTG Letter, at 2; Citadel Letter 1, at 4; Citadel Letter 2, at 16. Citadel noted that “SEFs may offer pre-trade anonymous trading protocols for swaps that begin as uncleared and then are ‘backloaded’ into clearing by the trading counterparties at a later time.” *Id.*

⁷³ TP ICAP Letter, at 2.

⁷⁴ *Id.*

⁷⁵ *Id.* TP ICAP also asserted that the Proposal “does not accommodate the necessity of Name Give-Up in transactions that are executed and cleared across time zones.” *Id.* TP ICAP stated that in such circumstances, transactions executed in one time zone may remain bilateral transactions until the relevant clearing house opens in

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The Commission declines to narrow the prohibition as requested by TP ICAP and is adopting § 37.9(d), as proposed, to include swaps that are intended to be cleared. The Commission continues to believe that there is no need for post-trade name give-up if a swap is executed on a SEF and submitted to a DCO for clearing pursuant to STP requirements. Narrowing the prohibition to apply only to swaps required be cleared under section 2(h)(1) of the Act would unduly narrow its scope and hamper the statutory and regulatory objectives underlying the prohibition. Whether or not a swap is intended to be cleared is a material term that affects trade pricing and trade processing workflows, and it is something a SEF should be able to determine at the time of execution.⁷⁶ However, to the extent a SEF's current systems do not indicate whether a swap is intended to be cleared, the Commission notes that the SEF must make necessary adjustments to its systems and processes to ensure that it can determine whether a swap is intended to be cleared before permitting post-trade name give-up.⁷⁷ The Commission recognizes that some SEFs may need time to make such adjustments, and the Commission is therefore providing a later compliance date for voluntarily-cleared swaps, as further described below. Finally, in response to the comments from Citadel and FIA PTG, the Commission clarifies that "intended to be cleared" should be interpreted to mean swaps that are intended to be submitted for clearing contemporaneously with execution. Accordingly, if a swap begins as an uncleared transaction and then is voluntarily submitted for clearing by the counterparties at a

another time zone, and post-trade name give-up would be necessary for the parties to manage counterparty credit risk until the trade can be submitted to the clearing house.

⁷⁶ Furthermore, the Commission notes that a SEF's knowledge of whether or not a swap is intended to be cleared is relevant to real-time reporting and STP requirements. See 17 CFR 43.3(b) and Appendix A to Part 43; 17 CFR 39.12(b)(7).

⁷⁷ As discussed in the following section below, the prohibition on post-trade name give-up applies equally to swaps that are pre-arranged or pre-negotiated by a broker on an anonymous basis. Therefore, a SEF must also ensure that its rules, systems, and processes require and enable brokers to engage in such pre-arrangement or pre-negotiation without compromising counterparty anonymity, and to reliably determine whether a swap is intended to be cleared prior to engaging in name give-up.

later time, the swap would not be considered “intended to be cleared,” and therefore would not be subject to the prohibition on post-trade name give-up.⁷⁸

2. Trades pre-arranged or pre-negotiated by a broker

A number of commenters recommended the Commission clarify that the prohibition on post-trade name give-up applies to a swap that is pre-arranged or pre-negotiated by a broker on an anonymous basis and thereafter submitted for execution on a SEF.⁷⁹ Commenters stated that doing so would help ensure that market participants cannot evade the prohibition on post-trade name give-up.⁸⁰ For example, Citadel stated that voice brokers, operating either within a SEF or through an affiliated introducing broker, may seek to evade a prohibition on post-trade name give-up by pre-negotiating or pre-arranging trades anonymously and then disclosing counterparty identities prior to formally executing the transaction on the SEF.⁸¹

To address this concern, the Commission is revising proposed § 37.9(d)(3) to state that the phrase “executed anonymously” for purposes of §§ 37.9(d)(1) and (2) includes a swap that is pre-arranged or pre-negotiated anonymously, including by a participant of the SEF. In addition,

⁷⁸ This includes swaps that are “backloaded” into clearing as described by Citadel. *See supra* note 72. The Commission notes that its STP regulations apply to all swaps cleared through a DCO, including voluntarily-cleared swaps. Those requirements are designed to (1) ensure that swaps are processed and accepted or rejected promptly from clearing, and (2) require swap dealers, SEFs and DCOs to coordinate with one another to ensure they have the capacity to accept or reject trades “as quickly as technologically practicable if fully automated systems were used.” 17 CFR 23.610, 37.702(b), 39.12(b)(7).

⁷⁹ *See* AIMA Letter, at 2; Citadel Letter 1, at 11; Citadel Letter 2, at 17-18; FIA PTG Letter, at 2; MFA Letter, at 7. In a related comment, TP ICAP noted that the Commission should consider additional exceptions or guidance “where a swap is arranged off-SEF (*e.g.*, by an Introducing Broker) [and] submitted for execution and clearing through a SEF to a [DCO]” where a prohibition on name give-up “would . . . be incongruous because the counterparties will already know one another's identity at the point of execution.” TP ICAP Letter, at 7.

⁸⁰ Citadel Letter 1, at 11; Citadel Letter 2, at 17-18; CTC Letter, at 2; FIA PTG Letter, at 2; MFA Letter, at 7. The Commission notes that the ban on post-trade name give-up is subject to the Commission’s broad anti-evasion requirements.

⁸¹ Citadel Letter 1, at 2; Citadel Letter 2, at 17-18.

the Commission is deleting the original text of proposed § 37.9(d)(3), which the Commission believes is superfluous.⁸²

3. Package transactions

In the Proposal, the Commission recognized that a limited exception to the post-trade name give-up prohibition may be necessary for cleared swaps that are components of package transactions that include uncleared swap components.⁸³ Uncleared swap components create bilateral credit, operational, and/or legal exposures that the counterparties must manage on an ongoing basis. Therefore, the Commission requested public comments on the necessity and scope of an exception to the post-trade name give-up prohibition for package transactions. The Commission also requested comments on whether an exception should be provided for package transactions involving any non-swap instrument, including U.S. Treasury securities.

Commenters agreed that a prohibition on post-trade name give-up should not apply to components of a package transaction that are uncleared swaps or non-swap instruments. Commenters differed on whether the Commission should provide an explicit exception in the regulation. FIA PTG, MFA and Citadel argued that while uncleared and non-swap components of package transactions should not be subject to a prohibition on post-trade name give-up, an explicit exclusion in the regulation is not necessary.⁸⁴ These commenters reasoned that, by its very terms, the proposed prohibition applies to swaps intended to be cleared; thus, where a package transaction contains a cleared swap component and another uncleared swap or a non-swap component, the prohibition would not apply to the uncleared swap or non-swap component

⁸² As proposed, § 37.9(d)(3) read as follows: “The provisions in paragraphs (d)(1) and (d)(2) of this section shall not apply with respect to any method of execution whereby the identity of a counterparty is disclosed prior to execution of the swap.” The Commission notes that the removal of this language from the final regulation is not intended to be a substantive revision or change the intended meaning or effect of the final rule. Notwithstanding this revision, the final rule does not apply to execution methods that are not pre-trade anonymous, such as name-disclosed RFQ.

⁸³ Proposal at 72267.

⁸⁴ See FIA PTG Letter, at 2; MFA Letter, at 5-6; Citadel Letter, at 9; Citadel Letter 2, at 17.

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of the transaction.⁸⁵ In contrast, JPMorgan and FSF stated that the Commission should provide an exception to the post-trade name give-up prohibition for package transactions that include an uncleared swap or security component.⁸⁶

The Commission agrees with commenters that the post-trade name give-up prohibition should not apply to an uncleared swap or non-swap component of a package transaction. Uncleared swap and non-swap components of package transactions may create bilateral credit, operational, and/or legal exposures that require the counterparties to know each other's identities. For uncleared components of a package transaction, post-trade name give-up enables market participants to perform credit checks on counterparties prior to finalizing the transaction. The practice also allows counterparties to manage credit exposure and payment obligations arising from the bilateral nature of such uncleared transactions. In the case of U.S. Treasury securities, post-trade name give-up may still be necessary to accommodate trading mechanisms and infrastructures currently used for U.S. Treasury swap spreads that do not allow for anonymous clearing and settlement of the Treasury component of such transactions.⁸⁷ Therefore, the Commission believes that a limited exception to the prohibition is appropriate at this time for package transactions that include a component that is an uncleared swap or a non-swap.⁸⁸ The

⁸⁵ Citadel and FIA PTG also stated that each component of a package already faces distinct post-trade operational workflows, so this treatment would be consistent with current market practice. FIA PTG Letter, at 2; Citadel Letter 1, at 9; Citadel Letter 2, at 17.

⁸⁶ See FSF Letter, at 6 and 15; JPMorgan Letter, at 6 and 19. Similarly, SIFMA stated that any prohibition on post-trade name give-up should exempt package transactions that involve a non-swap component. Without such an exemption, SIFMA argued, SEFs will be required to change the operational flow of both the swap component and the non-swap/security component of the package transaction. SIFMA Letter, at 6. SIFMA raised concern that "the changes necessary for this infrastructure have not been considered in the cost/benefit analysis, and have not been analyzed enough to consider unintended consequences." *Id.*

⁸⁷ To the extent that counterparties may be facilitating package transactions that involve a "security," as defined in section 2(a)(1) of the Securities Act of 1933 or section 3(a)(10) of the Securities Exchange Act of 1934, or any component agreement, contract, or transaction over which the Commission does not have exclusive jurisdiction, the Commission does not opine on whether such activity complies with other applicable laws and regulations.

⁸⁸ TP ICAP commented that the Commission should also consider an exception or additional guidance in cases where "a swap is a component of a package transaction involving another component that is not cleared at the same

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Commission will continue to monitor the operational development of these markets, and encourages SEFs and market participants to address existing operational limitations so that any need for post-trade name give-up may be further diminished.

Accordingly, the Commission is revising proposed § 37.9(d) by adding § 37.9(d)(4), which provides a limited exception to the post-trade name give-up prohibition for a swap that is intended to be cleared, when it is a component of a package transaction that includes a component transaction that is not an intended-to-be-cleared swap. The post-trade name give-up prohibition, as adopted in this release, prohibits SEFs from directly or *indirectly* disclosing the identity of a counterparty to a swap that is anonymously executed, pre-arranged or pre-negotiated on or pursuant to the rules of a SEF and intended to be cleared. Because the components of a package transaction are priced or quoted together as one economic transaction, the disclosure of the identity of a counterparty to any component of a package transaction effectively discloses the counterparty identity for all components of that package transaction. As such, if a SEF were to disclose the identity of a counterparty to the uncleared swap or non-swap component of a package transaction, the SEF would also be *indirectly* disclosing the identity of the counterparty to the intended-to-be-cleared swap component of the package transaction; and such indirect disclosure is otherwise prohibited under the regulation. Therefore, the Commission believes that a limited exception to the post-trade name give-up prohibition for package transactions with uncleared swap and non-swap components is necessary to provide clarity and regulatory certainty to SEFs and market participants.

DCO.” TP ICAP Letter, at 7. The Commission believes that such an exception or guidance is not necessary at this time, and further submits that an explanation as to what the issue or underlying problem could be in such cases has not been provided.

The exception will apply, for example, to U.S. Treasury swap spreads involving an intended-to-be-cleared swap and a U.S. Treasury security. However, the Commission emphasizes that the exception is limited in scope. Many package transactions are traded anonymously and involve only intended-to-be-cleared swaps, and the prohibition on post-trade name give-up will apply to these transactions in full.⁸⁹ The Commission notes that this exception is intended to accommodate trading and settlement workflows for certain package transactions as they exist today. It is not an invitation to structure package transactions to allow post-trade name give-up or to evade the prohibition on post-trade name give-up that the Commission is adopting in this final rule. In that regard, the final rule adopted herein is subject to the Commission's broad anti-evasion requirements.

The Commission emphasizes that this exception does not limit, prohibit, or otherwise restrain SEFs or market participants from developing and utilizing trading functionalities, operational workflows, or infrastructures for package trades that are fully anonymous, and do not utilize post-trade name give-up. The Commission encourages SEFs and market participants to continue to work to eliminate the technological and/or operational need for post-trade name give-up. The Commission will continue to monitor whether the exception in § 37.9(d)(4) can be refined as trading functionalities, operational workflows, and/or infrastructure continue to develop in the future.

4. Workups

In the Proposal, the Commission requested public comments on how, if at all, a prohibition on post-trade name give-up would affect trading protocols such as auctions, portfolio compression, and/or workup sessions. JPMorgan and FSF asserted that post-trade name give-up

⁸⁹ For example, “curve” and “butterfly” trades involving only intended-to-be-cleared swaps.

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is an integral part of workup protocols, and the Proposal will impair workup protocols and adversely affect dealers' ability to hedge.⁹⁰ These commenters asserted that a dealer's willingness to offer greater size through a workup may depend on (1) who its counterparty is, in particular whether the counterparty is likely to be able to execute on the full size the dealer is willing to offer,⁹¹ and (2), as FSF stated, whether the counterparty might impose adverse selection costs on the dealer upon knowing its trading interests.⁹² FSF suggested that if the Commission proceeds with a prohibition on post-trade name give-up, it should exclude from the prohibition any SEF that obtains a material portion of its trading volume, over a specified period, through workups.⁹³

In contrast, Citadel and MFA asserted that post-trade name give-up is not necessary for workup sessions. Citadel asserted that if a trading protocol is pre-trade anonymous, there is no need to disclose the trading counterparties in order to engage in a work-up session and, therefore, "work-up sessions on [interdealer broker] SEFs will function just as they do today in order to facilitate trading in size."⁹⁴ Citadel also stated that claims to the contrary "are easily disproven by looking at the U.S. Treasury market, where work-ups are commonly employed on interdealer platforms even though name give-up is not used."⁹⁵ MFA further argued that prohibiting post-

⁹⁰ See FSF Letter, at 2; JPMorgan Letter, at 7.

⁹¹ FSF Letter, at 4; JPMorgan Letter, at 7.

⁹² FSF Letter, at 4.

⁹³ FSF Letter, at 15.

⁹⁴ Citadel Letter 1, at 6. Citadel added that, similarly, a pre-trade anonymous auction or compression exercise should not require post-trade name give-up for intended-to-be-cleared swaps. *Id.*

⁹⁵ Citadel Letter 2, at 11. Citadel further stated that "there is nothing unique about transactions executed via work-up compared to other anonymously-executed cleared swaps that would require the disclosure of counterparty identities post-trade. In the fully anonymous U.S. Treasury market, work-ups account for a significant percentage of overall trading activity." *Id.* (citing to M.J. Fleming, E. Schaumburg & R. Yang, *The Evolution of Workups in the U.S. Treasury Securities Market*, Liberty Street Economics Blog (Aug. 20, 2015)).

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trade name give-up would benefit trading protocols such as auctions, portfolio compression, and/or workup sessions by increasing buy-side access and participation.⁹⁶

The Commission agrees that post-trade name give-up is not necessary for workup sessions. The reasons given by commenters for why they view post-trade name give-up as an important aspect of workup sessions are essentially the same reasons espoused for the purported benefits of post-trade name give-up generally, *i.e.*, ensuring reliable hedging and avoiding adverse selection for incumbent swap dealers.⁹⁷ The Commission does not find that workup sessions present a particular need for post-trade name give-up that is distinct from pre-trade anonymous order books. Accordingly, the Commission does not believe it is necessary or appropriate to include an exception for workups.

5. Error trades

Commenters also addressed the potential impact of a prohibition on post-trade name give-up on error trade corrections. TP ICAP asserted that a prohibition would prevent an efficient means for correcting trade errors, specifically, in cases “[w]here a party to a swap identifies an error that requires coordination with its counterparty.”⁹⁸ TP ICAP therefore identified error trade correction among issues “that require the Commission to consider exceptions and additional guidance.”⁹⁹ Similarly, FSF stated that post-trade name give-up “will remain necessary for counterparties to correct operational or clerical errors resulting in a trade being rejected.”¹⁰⁰ Citadel disagreed with these commenters, stating that “[i]n the event of an

⁹⁶ MFA Letter, at 6.

⁹⁷ See *supra* notes 32, 33, 53, 54, 55 and accompanying text.

⁹⁸ TP ICAP Letter, at 7.

⁹⁹ *Id.*

¹⁰⁰ FSF Letter, at 15.

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operational or clerical error, the SEF can facilitate the correction of the error without disclosing a counterparty’s identity”¹⁰¹

The Commission does not believe that post-trade name give-up is necessary or appropriate to resolve error trades for pre-trade anonymous and intended-to-be-cleared swaps. A SEF can intermediate communications if necessary, and otherwise facilitate error trade corrections, without disclosing counterparty identities.¹⁰² Accordingly, the Commission declines to adopt an exception to the prohibition on post-trade name give-up for error trade corrections. Therefore, any SEF offering trading in swaps subject to the prohibition must ensure its rules and procedures for error trades allow for error trade remediation without disclosure of the identities of counterparties to one another.

C. Compliance Dates

The Commission recognizes the final rule adopted herein may require SEFs to modify, in varying degrees, their rules and operations with respect to trading and trade processing systems, error trades, and compliance programs.¹⁰³ The Commission also recognizes that the modifications required – and the time necessary to implement them – may vary for different swap products. The Commission anticipates that compliance with the final rule will be simpler to implement for required transactions due to the fact that the methods of execution for such transactions are limited.¹⁰⁴ Permitted transactions may require more time to establish

¹⁰¹ Citadel Letter 1, at 10. *See also* Citadel Letter 2, at 17.

¹⁰² The Commission’s view on this issue is consistent with its stated view in the Proposal. *See* Proposal at 72267, note 78.

¹⁰³ This includes establishing rules to prohibit post-trade name give-up, as required under § 37.9(d)(2).

¹⁰⁴ 17 CFR 37.9(a) defines “required transaction” as a transaction involving a swap that is subject to the trade execution requirement in section 2(h)(8) of the Act, and provides that required transactions shall be executed on a SEF through an order book or RFQ to no less than three market participants.

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compliance, given that a SEF may offer any method of execution for such transactions.¹⁰⁵

Furthermore, for swaps that are not subject to mandatory clearing, a SEF may need to make additional adjustments to its systems and processes to ensure that it can determine whether a swap is intended to be cleared, and therefore subject to the prohibition on post-trade name give-up.

Accordingly, the Commission is adopting a phased compliance schedule. Specifically, for swaps subject to the trade execution requirement under CEA section 2(h)(8), SEFs must commence compliance with the requirements of § 37.9(d) no later than November 1, 2020. For swaps not subject to the trade execution requirement under CEA section 2(h)(8), SEFs must commence compliance with the requirements of § 37.9(d) no later than July 5, 2021.

III. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)¹⁰⁶ 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 an analysis regarding the economic impact on those entities. The final rule adopted by the Commission will directly affect SEFs. The Commission has previously determined that SEFs are not “small entities” for the purpose of the RFA.¹⁰⁷ Therefore, the Chairman, on behalf of the Commission, hereby certifies, pursuant to 5 USC 605(b), that the rule adopted herein will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

¹⁰⁵ 17 CFR 37.9(c) (defining “permitted transaction” as any transaction not involving a swap that is subject to the trade execution requirement in section 2(h)(8) of the Act).

¹⁰⁶ 5 U.S.C. 601 *et seq.*

¹⁰⁷ See Core Principles and Other Requirements for Swap Execution Facilities, 78 FR 33476, 33548 (June 4, 2013).

The Paperwork Reduction Act (PRA)¹⁰⁸ imposes certain requirements on Federal agencies, including the Commission, in connection with their conducting or 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 has previously received a control number from OMB that includes the collection of information associated with part 37 of the Commission’s regulations. The title for this collection of information is “Core Principles and Other Requirements for Swap Execution Facilities, OMB control number 3038-0074.”¹⁰⁹ Collection 3038-0074 is currently in force with its control number having been provided by OMB. However, the rule adopted herein does not impose any new recordkeeping or information collection requirements, and therefore contains no requirements subject to the PRA.

C. 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.¹¹⁰ Section 15(a) further specifies that costs and benefits shall be evaluated in light of 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) factors.

¹⁰⁸ 44 U.S.C. 3501 *et seq.*

¹⁰⁹ See OMB Control No. 3038-0074, *available at* <https://www.reginfo.gov/public/do/PRAOMBHistory?ombControlNumber=3038-0074> (last retrieved June 23, 2020).

¹¹⁰ 7 U.S.C. 19(a).

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The Commission is adopting amendments to part 37 of the Commission's regulations to prohibit post-trade name give-up for swaps anonymously executed, pre-arranged, or pre-negotiated on or pursuant to the rules of a SEF and intended to be cleared. Section 37.9(d) of the Commission's regulations adopted herein prohibits a SEF from directly or indirectly, including through a third-party service provider, disclosing the identity of a counterparty to any such swap. The regulation also requires SEFs to establish and enforce rules that prohibit any person from effectuating such a disclosure.

The baseline for this consideration of costs and benefits with respect to the rule adopted herein is the status quo, which includes the existing practice of post-trade name give-up for cleared swaps on some SEFs, and the current regulatory requirements that do not explicitly prohibit post-trade name give-up for cleared swaps anonymously executed, pre-arranged, or pre-negotiated on or pursuant to the rules of a SEF. The prohibition does not apply to uncleared swaps or SEF trading systems and platforms that are not pre-trade anonymous; and the final rule includes an exception for package transactions that include components that are not intended-to-be-cleared swaps. Much of the swaps trading on SEFs today occurs on disclosed trading systems and platforms that display the identities of potential counterparties to one another before execution occurs. Such is the case, for example, with many RFQ systems offered by SEFs.

The Commission notes that this consideration of costs and benefits is based on the understanding that the swaps market functions internationally, with many transactions involving U.S. firms taking place across international boundaries, with some Commission registrants being organized outside of the United States, with leading industry members typically conducting operations both within and outside the United States, and with industry members commonly following substantially similar business practices wherever located. Where the

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Commission does not specifically refer to matters of location, the below discussion of costs and benefits refers to the effects of the final rules on all swaps activity subject to the proposed and amended regulations, whether by virtue of the activity's physical location in the United States or by virtue of the activity's connection with or effect on U.S. commerce under CEA section 2(i).¹¹¹

The Commission has endeavored to assess the expected costs and benefits of the final rulemaking in quantitative terms, where possible. In situations where the Commission is unable to quantify the costs and benefits, the Commission identifies and considers the costs and benefits of the adopted rule in qualitative terms. The lack of data and information to estimate those costs is attributable in part to the nature of the final rule and uncertainty about the potential responses of market participants to the implementation of the final rule. The Commission recognizes that potential indirect costs and benefits of the prohibition on post-trade name give-up adopted herein – *i.e.*, those relating to effects on trading behavior, liquidity, and competition – may be impossible to accurately predict or quantify prior to implementation of the rule.

The final rule differs from the proposed rule in several ways. Section 37.9(d)(3) of the final rule states that for purposes of the rule, the term “executed anonymously” shall include a swap that is pre-arranged or pre-negotiated anonymously, including by a participant of the SEF. The proposed rule does not include this provision, which is intended to clarify that the prohibition on name disclosure also applies in cases where a broker pre-negotiates or pre-arranges a trade anonymously. The final rule also includes an exception for package transactions

¹¹¹ 7 U.S.C. 2(i). Section 2(i)(1) applies the swaps provisions of both the Dodd-Frank Act and Commission regulations promulgated under those provisions to activities outside the United States that “have a direct and significant connection with activities in, or effect on, commerce of the United States” Section 2(i)(2) makes them applicable to activities outside the United States that contravene Commission rules promulgated to prevent evasion of Dodd-Frank.

that include a component transaction that is not an intended-to-be-cleared swap, and a staggered compliance schedule depending on whether a swap is subject to the trade execution requirement.

1. Costs

The Commission recognizes that the final rule adopted herein may require SEFs to modify their rules and operations in varying degrees, including, potentially, with respect to trading and trade processing systems, error trades, and compliance programs; and that these modifications are likely to impose costs. For example, § 37.9(d)(2) requires SEFs to establish and enforce rules to prohibit any person from directly or indirectly, including through a third-party service provider, disclosing the identity of a counterparty to a swap that is executed anonymously and intended to be cleared. Complying with § 37.9(d)(2) will require a SEF to file such rules with the Commission in accordance with part 40 of the Commission's regulations. The Commission estimates that filing such rules may take up to 50 hours, which is unlikely to be a major cost burden on SEFs. The Commission also recognizes that the modifications required – and the time necessary to implement them – may vary for different swap products.

The Commission believes that these costs will be relatively small as compared to a SEF's overall operating costs. In the Proposal, the Commission stated a preliminary assessment that the direct costs in implementing and complying with the proposed rule would not be material, and that the costs of adjusting affected SEF protocols in order to comply would be negligible.¹¹² The Commission requested that SEFs provide estimates of any direct costs they would incur.¹¹³ The Commission received no such comments. The Commission anticipates that compliance with the final rule will be simpler and less costly to implement for swaps that are subject to the clearing requirement. The Commission recognizes that a SEF may incur additional costs with respect to

¹¹² Proposal at 72269.

¹¹³ *Id.*

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swaps that are not subject to mandatory clearing, insofar as its systems and processes must be adjusted to ensure that it is determined whether a swap is intended to be cleared prior to permitting post-trade name give-up to occur. The Commission is adopting a phased compliance schedule based on whether a swap is subject to the trade execution requirement. The extended compliance period for swaps not subject to the trade execution requirement will delay the benefits associated with the rule for certain swaps, but should also mitigate the costs to SEFs associated with compliance with the rule.

The Commission anticipates the direct cost of complying with § 37.9(d) for market participants to be at or near zero and has received no comments to the contrary. With respect to potential indirect costs of the proposed rule, commenters opposing the Proposal argued that it will harm liquidity by causing incumbent swap dealers to exit the market or reduce their trading and the liquidity they provide.¹¹⁴ Several proponents of the Proposal disputed these assertions. ICI and MFA characterized this outcome as “unlikely.”¹¹⁵ MFA stated that competitive market forces would ensure that “in the unlikely event an individual dealer reduced its offering, other dealers would quickly step into its place.”¹¹⁶ Asserting its experience as a “top liquidity provider” in SEF markets, Citadel stated that it does not expect a prohibition on post-trade name give-up to affect its liquidity provision on RFQ platforms or its use of pre-trade anonymous trading protocols.¹¹⁷ Citadel further asserted that “other swap dealers share our view, as UBS has supported the prohibition and SIFMA indicated that the views among swap dealers ‘are not uniform.’”¹¹⁸ Commenters also pointed to their experience in other asset classes where post-trade

¹¹⁴ See ABA Letter, at 2; BPI Letter, at 1; FSF Letter, at 7-8; SIFMA Letter, at 4.

¹¹⁵ ICI Letter, at 5; MFA Letter, at 4.

¹¹⁶ MFA Letter, at 4.

¹¹⁷ Citadel Letter 1, at 6.

¹¹⁸ Citadel Letter 1, at 7.

name give-up is not practiced, asserting that such markets demonstrate that the purported negative liquidity impacts raised by incumbent swap dealers are unwarranted.¹¹⁹

The Commission believes that incumbent swap dealers will continue to provide liquidity on the affected SEFs as long as it is in their business interest to do so and notes that the apparent desire of other entities to provide liquidity once post-trade name give-up is prohibited suggests that overall liquidity is not likely to decline.

A number of commenters asserted that without post-trade name give-up on dealer-to-dealer SEFs, pricing and liquidity offered by dealers to clients via RFQ or over-the-counter (OTC) may suffer.¹²⁰ Some of these commenters stated that post-trade name give-up helps dealers predict their hedging costs and tailor their pricing on RFQ SEFs.¹²¹ They argued that prohibiting the practice would likely result in inferior pricing for clients on RFQ SEFs.¹²² Similarly, commenters asserted that post-trade name give-up enables dealers to hedge the risk they accumulate by providing liquidity to clients off-SEF.¹²³ FSF argued that if dealers widen spreads as a result of a prohibition on post-trade name give-up, commercial end users may be disproportionately harmed because they rely more exclusively on dealer pricing and generally do not trade in cleared swaps on SEFs.¹²⁴ The Coalition for Derivatives End-Users (Coalition) stated that they “have heard from bank swap dealers that the Proposed Rule would result in less liquidity and worse pricing on SEFs, which in turn may increase costs for derivatives end users hedging transactions in the non-cleared OTC derivatives markets.”¹²⁵ The Coalition also stated that they “have heard from other market participants that, under the Proposed Rule, liquidity

¹¹⁹ See Citadel Letter 1, at 7; Citadel Letter 2, at 7, FIA PTG Letter, at 1-2, MFA Letter, at 4.

¹²⁰ See ABA Letter, at 2; Citi Letter, at 3-4; FSF Letter, at 2 and 5-6; JPMorgan Letter, at 5-6.

¹²¹ See JPMorgan Letter, at 5-6; FSF Letter, at 2; Citi Letter, at 3.

¹²² See Citi Letter, at 3-4; FSF Letter, at 5-6.

¹²³ ABA Letter, at 3; FSF Letter, at 2 and 5; Citi Letter, at 3-4.

¹²⁴ See FSF Letter, at 2 and 7.

¹²⁵ Coalition Letter, at 1.

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would increase and result in better pricing on SEFs, which in turn may drive down costs for derivatives end-users in the non-cleared OTC derivatives markets.”¹²⁶ The Coalition further stated that it “lacks the empirical data and institutional knowledge to reach a firm conclusion as to the effects of the Proposed Rule on the ability of end-users to access efficient and economical markets to hedge their commercial risks.”¹²⁷

SIFMA AMG and Citadel each generally disagreed with the notion that client pricing will be harmed by a prohibition on post-trade name give-up.¹²⁸ Citadel asserted that, “if anything, pricing should become more competitive, as buy-side firms gain access to additional sources of liquidity and will have more pre-trade price information on which to transact”;¹²⁹ and that “increasing competition should lower transaction costs, thereby facilitating dealer hedging.”¹³⁰

The Commission continues to believe that prohibiting post-trade name give-up is likely to increase competition on affected SEFs, which in turn should lead to lower overall transaction costs.¹³¹ The Commission is basing its belief on several studies described in the benefits section below, finding that post-trade anonymity tends to reduce trading costs and lead to better price quotes and lower realized spreads.¹³² Nevertheless, the Commission acknowledges that it is theoretically possible that the prohibition on post-trade name give-up could lead to increased trading costs associated with some OTC swaps, even if, as the Commission anticipates, it leads to improved liquidity and lower transaction costs for swaps traded on SEFs. One study reviewed

¹²⁶ *Id.*

¹²⁷ *Id.* at 2.

¹²⁸ See Citadel Letter 1, at 7; Citadel Letter 2, at 11; SIFMA AMG Letter, at 2.

¹²⁹ Citadel Letter 1, at 7.

¹³⁰ Citadel Letter 2, at 11.

¹³¹ See Proposal at 72269.

¹³² The Commission does note that reductions in transaction costs may lead to a reduction in profits for incumbent liquidity providers and thus, these lower costs may be perceived as a cost for those liquidity providers, even as it is perceived as a benefit for other market participants.

by the Commission, as discussed below, describes a theoretical scenario, where post-trade anonymity in swaps and bond markets could lead to an increase in OTC spreads and a simultaneous decrease in spreads on exchanges that ultimately improves overall welfare of market participants.¹³³

2. Benefits

The Commission believes that implementing the rule may reduce information asymmetries and improve liquidity, particularly on affected SEFs, and may reduce transaction costs and bid-ask spreads. The practice of post-trade name give-up and the prospect of information leakage have reportedly deterred a significant segment of market participants from making markets on or otherwise participating on affected SEFs. The Commission expects that many of these market participants will choose to participate on these SEFs once the practice is prohibited, leading to increased liquidity. Increased liquidity may benefit market participants by making it easier to execute transactions, especially larger transactions, quickly and without undue price impact.

In order to evaluate the expected benefits of implementing the rule, the Commission reviewed several empirical studies examining prior experiences with changes in post-trade anonymity. As detailed in the Proposal, the studies covered the experiences in U.S. securities markets and a wide range of foreign financial markets and, on balance, support the premise that post-trade anonymity promotes trading liquidity. Commenters in favor of the prohibition of name give-up cited other studies that further support the benefits of fully-anonymous trading. Commenters not in favor of prohibiting post-trade name give-up did not provide data, evidence, or studies regarding the impact of post-trade anonymity.

¹³³ T. Lee & C. Wang, *Why Trade Over-the-Counter? When Investors Want Price Discrimination* (2019 working paper).

Specifically, as discussed in more detail in the Proposal, the Commission reviewed six event studies focusing on post-trade anonymity in various equity exchanges around the world, most of which document an improvement in liquidity. The Commission acknowledges that none of these studies examine a change in post-trade anonymity for a swaps market, but the studies do provide real-world evidence on the effects on liquidity in a range of markets when the rules for post-trade anonymity are changed. Hence, they provide the most instructive empirical evidence available regarding a proposed change in such rules. Four of these studies, which focus on European equity markets, provide evidence of a liquidity improvement associated with post-trade anonymity,¹³⁴ which could be attributed to a reduction of information leakage.¹³⁵ A study on the 2003 introduction of post-trade anonymity on the NASDAQ platform found no evidence that best quotes were improved,¹³⁶ while a study on the South Korea Exchange found that reducing post-trade anonymity led to lower realized spreads.¹³⁷ The Commission believes that on balance the empirical evidence presented in these academic studies supports the benefits of anonymous trading.

As discussed in more detail in the Proposal, the Commission also reviewed several theoretical studies. The studies present models with various levels of post-trade disclosure in different settings, and the results offer insight into the trade-offs associated with changes in post-

¹³⁴ S. Freiderich & R. Payne, *Trading Anonymity and Order Anticipation*, 21 *Journal of Financial Markets* 1-24 (2014); T.G. Meling, *Anonymous Trading in Equities* (2019 working paper); P.J. Dennis & P. Sandas, *Does Trading Anonymously Enhance Liquidity?*, *Journal of Financial and Quantitative Analysis* 1-25 (2019); A. Hachmeister & D. Schierek, *Dancing in the Dark: Post-Trade Anonymity, Liquidity, and Informed Trading*, 34 *Review of Quantitative Finance and Accounting* 145-177 (2010).

¹³⁵ S. Freiderich & R. Payne, *Trading Anonymity and Order Anticipation*, 21 *Journal of Financial Markets* 1-24 (2014); J. Linnainmaa & G. Saar, *Lack of Anonymity and the Inference from Order Flow*, 25 *Review of Financial Studies* 1,414-1,456 (2012).

¹³⁶ K. Benhami, *Liquidity providers' valuation of anonymity: The NASDAQ Market Makers evidence* (2006 working paper).

¹³⁷ T. P. Pham, et al., *Intra-day Revelation of Counterparty Identity in the World's Best-Lit Market* (2016 working paper).

trade anonymity, notwithstanding the fact that the studies did not directly examine the case of bilateral disclosure of counterparty identities immediately after each trade. The Commission found that the results of these theoretical studies were mixed. One study, for example, focused on the post-trade public disclosure of the trades of insiders in equity markets, and the authors concluded that public disclosure of insider trades accelerates the price discovery process.¹³⁸ Therefore, the results suggest that post-trade anonymity might strengthen asymmetric information problems in the market and lead to subsequently reduced liquidity by exacerbating the market maker's adverse selection problem. Another study concluded that public disclosure can reduce the informational efficiency of prices and reduce market liquidity, because informed traders reduce trading in order to preserve their informational advantage.¹³⁹

The Commission also examined one theoretical study that explicitly addresses the practice of post-trade name give-up. The study, considered in more detail in the Proposal, modeled the investor choice between OTC markets and electronic order books.¹⁴⁰ The authors supported that the OTC market can detect and attract uninformed traders (*i.e.*, hedgers who are demanding liquidity but do not possess market moving information) by offering them lower spreads, which results in an increase in spreads for informed traders (*i.e.*, traders who demand liquidity in order to profit from the trade) in an electronic order book, as well as a decrease in average spreads and an increase in total volume. The authors concluded that a prohibition on post-trade name give-up would likely lead to an increase in overall welfare. They reasoned that, in the absence of post-trade name give-up, informed traders will continue to trade via RFQ in

¹³⁸ S. Huddart, J.S., Hughes & C.B. Levine, *Public Disclosure and Dissimulation of Insider Trades*, *Econometrica*, Vol. 69, No. 3 (May 2001), 665-681.

¹³⁹ A.M. Buffa, *Insider Trade Disclosure, Market Efficiency, and Liquidity* (2014 working paper).

¹⁴⁰ T. Lee & C. Wang, *Why Trade Over-the-Counter? When Investors Want Price Discrimination* (2019 working paper).

order to minimize exposure of their trading intentions, and that spreads in this venue will stay high to reflect this situation. On the other hand, uninformed traders will migrate to the order book and trade more, because spreads will decline due to the increased activity. They predicted that overall welfare would increase because the aggregate benefits of increased electronic trading at low spreads would more than offset the aggregate costs to informed traders who remain concerned about information leakage. The study is consistent with the Commission's recognition of the trade-offs in prohibiting post-trade name give-up.

Citadel cited two additional studies that the Commission did not consider in the Proposal, but which it has now reviewed.¹⁴¹ These studies examined the effect of various levels of intermediation (*i.e.*, access to multiple market makers) on liquidity in OTC markets and may be closer to the setting of the swaps market. One study provided an empirical evaluation of the implications of the OTC market structure for non-financial firms in the foreign exchange derivatives market.¹⁴² The authors documented extensive discriminatory pricing by dealers, who appeared to favor sophisticated customers, defined as those customers transacting high volume with multiple counterparties. However, clients trading on RFQ platforms, where they can request quotes from multiple dealers simultaneously, appeared to receive competitive pricing irrespective of the level of their sophistication which leads the authors to conclude that discriminatory pricing could be potentially eliminated with the use of a centralized order book. Finally, the authors argued that the lack of centralized dissemination of transaction prices provides dealers with an information advantage compared to clients, which enables them to

¹⁴¹ See Citadel Letter 2, at 16.

¹⁴² H. Hau, P. Hoffmann, S. Langfield, & Y. Timmer, *Discriminatory pricing of over-the-counter derivatives* (2017 working paper). We note that, while the paper focuses on the foreign exchange derivatives market, its conclusions regarding the impact of multi-dealer RFQ platforms are generally applicable across markets.

extract information rents.¹⁴³ The Commission recognizes the empirical fact that trading costs appear to differ across different venues and for different traders, as this study emphasizes. Nonetheless, the Commission finds that the design of the study precludes strong causal statements regarding the causes and effects of the observed variation.

The second study, which provides a theoretical model of a generic OTC market, concluded that sophisticated investors, who have access to multiple market makers or other investors, face lower transaction costs.¹⁴⁴ The authors theorized that the availability of other trading counterparties (*i.e.*, more competition) forces market makers to provide better pricing. The Commission agrees with the broad conclusion that more active, competitive markets are welfare enhancing.

Several commenters addressed the Commission’s review of academic studies in the Proposal. FSF, SIFMA, JPMorgan and TP ICAP each asserted that the studies on equity markets cited in the Proposal’s Cost-Benefit Considerations (CBC) are not relevant because equity markets are not comparable to the swaps market.¹⁴⁵ JP Morgan stated that “swap markets have many fewer participants, of which institutional participants constitute a far larger proportion, much lower trading frequency, far greater variation in tradeable products, and much larger typical trade sizes.”¹⁴⁶ The Coalition requested a quantitative analysis of the costs and benefits

¹⁴³ *Id.*

¹⁴⁴ D. Duffie, N. Gârleanu, & L.G. Pedersen, *Valuation in Over-the-Counter Markets*, Review of Financial Studies, Vol. 20, No. 5 (2007).

¹⁴⁵ See FSF Letter, at 9; SIFMA Letter, at 3; JPMorgan Letter, at 9; TP ICAP Letter, at 5.

¹⁴⁶ JPMorgan Letter, at 9. See also FSF Letter, at 9 (“The swap markets have many fewer participants, much lower trading volume, far greater variation in tradable products, and much larger typical trade sizes.”).

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for commercial end users.¹⁴⁷ BPI, FSF, Citi and JPMorgan further asserted that the CBC is not sufficient and that further study is necessary.¹⁴⁸

Better Markets, Citadel and AFR each commented that the Proposal, including the consideration of costs and benefits therein, provides a sufficient basis with which to move forward with a final rule.¹⁴⁹ Citadel also argued that the Proposal is consistent with the Commission’s previous decision in implementing part 37 not to limit SEF access to just swap dealers, and therefore the Commission can rely on its cost-benefit considerations for that rulemaking to support a prohibition on post-trade name give-up.¹⁵⁰ Citadel further argued that claims by some commenters that commercial end-users transacting swaps off-SEF might be negatively affected by the Proposal conflicts with academic research.¹⁵¹

The Commission notes that commenters who support prohibiting post-trade name give-up generally considered the academic studies discussed in the Proposal to be informative, while commenters who oppose the prohibition assert that the studies are not informative because swaps markets are different than equity markets. The Commission acknowledges that there are differences between the equity markets in most of these empirical studies and the U.S. swaps markets. Further, the Commission understands that the equity markets examined do not generally mirror the exact dealer-centric swaps markets under consideration. Nonetheless, the wide range of markets, time periods, and experiences considered in the empirical studies leads the

¹⁴⁷ Coalition Letter, at 2. The Commission notes that it is not possible to conduct a quantitative analysis of the costs and benefits to commercial end users of a prohibition on post-trade name give-up prior to finalizing the rule, because there is no data on the effects until after the rule is implemented.

¹⁴⁸ See BPI Letter, at 2; FSF Letter, at 12; Citi Letter, at 3; JPMorgan Letter, at 13-14. See also ABA Letter, at 2 (“[W]e see no relevant data cited in the Proposed Rule to support the contention that the prohibition would attract sufficient additional non-dealer market participants to CLOB SEFs to outweigh these negative consequences.”).

¹⁴⁹ See AFR Letter, at 1; Better Markets Letter, at 5; Citadel Letter 1, at 11; Citadel Letter 2, at 14-15.

¹⁵⁰ Citadel Letter 2, at 14.

¹⁵¹ Citadel Letter 2, at 15. Citadel cited two academic studies that it asserted “suggests that commercial end-users may not be best-served by maintaining the current *status quo*.” *Id.* These studies show that access to multiple market makers reduces trading costs.

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Commission to conclude that the value of anonymous trading is well-established. Moreover, to the extent that liquidity provision in swaps markets is more concentrated than in the most active and liquid equity markets, the empirical studies that provide evidence on smaller equity markets, or on the less liquid stocks in a given market, might be most informative.

Some of the equity markets studied may be deeper and more liquid than the U.S. swaps market. However, several of the markets studied are equity markets that are smaller than the U.S. equity market (*e.g.*, Finland, Norway, and Sweden), and therefore potentially more comparable to the swaps markets in the U.S. For example, one of the early empirical studies on the implementation of post-trade anonymity on the London Stock Exchange in 2001 finds that liquidity improvements were more pronounced for small stocks and stocks with higher trading concentration, which were potentially subject to larger information asymmetries. The Commission notes that, with respect to the smaller universe of liquidity providers, markets for smaller stocks could be more analogous to swaps markets than markets for larger and more liquid stocks with a broader array of market participants.

Commenters who objected to the application of the studies did not provide evidence to support the argument that the differences between the anonymous order books in swaps and equity markets would prevent the liquidity improvement associated with greater post-trade anonymity, as suggested by the empirical studies in equity markets. Accordingly, the Commission agrees with those commenters who stated that the studies are instructive for U.S. swap markets, since they share the use of pre-trade anonymous order books and these studies

appear to be of markets that are more analogous to swap markets than any other empirical study the Commission or commenters have identified.¹⁵²

The Commission believes that prohibiting post-trade name give-up is reasonably likely to improve liquidity on SEFs, particularly on affected pre-trade anonymous markets, as additional market participants choose to participate on these markets once post-trade name give-up is prohibited. The Commission has not found convincing evidence that a prohibition on post-trade name give-up will have net liquidity-reducing effects. Rather, the Commission notes that the evidence from the studies, as discussed above, suggests that markets with pre- and post-trade anonymity generally feature greater liquidity than those without. Moreover the Commission is concerned that the status quo may facilitate information asymmetries and hinder access and participation on affected SEFs for many market participants. The Commission believes that the rule as adopted may benefit market participants by reducing these information asymmetries and will increase participation on these SEF platforms.

3. Consideration of Alternatives

TP ICAP suggested the alternative that any prohibition on post-trade name give-up should be limited to, at most, swaps subject to the clearing requirement rather than all swaps that are intended to be cleared, because a SEF may not know whether the parties to a voluntarily-cleared swap will submit the swap to a DCO, as the parties may do so themselves post-execution. The Commission has determined not to adopt this alternative. The Commission notes that whether a swap is intended to be cleared is a material term that affects trade pricing and trade processing workflows, and it is something that SEF should be able to determine at the time of

¹⁵² Citi did suggest that the Commission study the effects of post-trade anonymity on the emerging market bond market. Citi Letter, at 4. The Commission does not have jurisdiction over emerging market bonds and does not have access to the relevant data.

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execution, including for voluntarily-cleared swaps. Thus, the Commission believes that the final rule, which applies the prohibition to voluntarily-cleared swaps, will enable a larger scope of swaps to receive the benefits associated with the regulation, including, potentially, greater participation and improved liquidity. However, to ensure that SEFs are provided with adequate time to make any necessary changes to their systems, the Commission is providing a phased compliance schedule, as discussed above.

A number of commenters suggested that before implementing a full post-trade name give-up prohibition, the Commission should implement a time-limited pilot program that would prohibit post-trade name give-up for some, but not all, products.¹⁵³ These commenters asserted that a pilot program would allow the Commission to assess the impact of a post-trade name give-up prohibition before requiring market-wide changes. The Commission has determined not to adopt this alternative. A temporary pilot program may provide market participants with different incentives than a permanent rule and thus may not be indicative of the efficacy of a permanent rule. As Citadel noted, “a short-term pilot would be easily susceptible to manipulation. Given their commercial interests in maintaining the *status quo* and privileged position as liquidity providers, the incumbent dealer banks could temporarily provide worse pricing for instruments covered by the name give-up prohibition in order to dictate the pilot results.”¹⁵⁴ The Commission agrees that a pilot program could create an incentive to engage in such conduct, but a permanent prohibition will not.

FSF and JP Morgan suggested the alternative approach whereby the Commission would require every order book SEF that offers post-trade name give-up to design a method that would permit its participants to opt out of post-trade name give-up, which could be through a parallel,

¹⁵³ See Citi Letter, at 5; JPMorgan Letter, at 14; FSF Letter, at 14.

¹⁵⁴ Citadel Letter 2, at 16.

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fully-anonymous order book, or by allowing participants to opt-out of post-trade name give-up on an order-by-order basis.¹⁵⁵ In the view of FSF, this approach would provide freedom for market participants to transact in the manner in which they wish to, while providing the option of fully-anonymous trading to buy-side clients concerned with undesirable information leakage.¹⁵⁶ The Commission has determined not to adopt this alternative. The Commission believes that post-trade name give-up is likely to persist wherever it is permitted, and that this alternative would provide little or no benefit while still imposing costs on SEFs that are at least as high as those of a full prohibition (as SEFs would need to change their systems to allow opting out). The Commission agrees with Citadel’s statement that one “would expect incumbent dealer banks not to agree to opt-out of name give-up, meaning that very little would change on [interdealer broker] SEFs.”¹⁵⁷

FSF suggested an alternative whereby the Commission would exclude from the prohibition on post-trade name give-up any SEF that obtains a material portion of its trading volume, over a specified period, through workups. JPMorgan and FSF asserted that post-trade name give-up is an integral part of workup protocols, and the prohibition will impair workup protocols and adversely affect dealers’ ability to hedge via adverse selection. In contrast, Citadel and MFA assert that post-trade name give-up is not necessary for workup sessions. Citadel asserted that if a trading protocol is pre-trade anonymous, there is no need to disclose the trading counterparties in order to engage in a workup session and, therefore, workup sessions will function just as they do today. Citadel also stated that claims to the contrary “are easily disproven by looking at the U.S. Treasury market, where work-ups are commonly employed on

¹⁵⁵ FSF Letter, at 14, JPMorgan Letter, at 15.

¹⁵⁶ FSF Letter, at 14.

¹⁵⁷ See Citadel Letter 2, at 16.

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interdealer platforms even though name give-up is not used.”¹⁵⁸ MFA further argued that prohibiting post-trade name give-up would benefit trading protocols such as auctions, portfolio compression, and/or workup sessions by increasing buy-side access and participation.

The Commission has determined not to adopt this alternative. The Commission agrees with those comments asserting that post-trade name give-up is not necessary for workup sessions and that post-trade anonymity will not make workup sessions more difficult or costly and may provide the benefits associated with increased participation. The reasons given by JPMorgan and FSF relating to why they view post-trade name give-up to be an important aspect of workup sessions are essentially the same reasons espoused for the purported benefits of post-trade name give-up generally, *i.e.*, avoiding adverse selection and ensuring reliable hedging for incumbent swap dealers.

Some commenters proposed an alternative of not applying the prohibition on post-trade name give-up to error trade corrections. Commenters asserted that post-trade name give-up remains necessary for counterparties to correct operational or clerical errors resulting in a trade being rejected for clearing. Citadel disagreed with these commenters, noting that SEFs can facilitate the correction of errors without disclosing the identities of counterparties. The Commission has determined not to adopt this alternative. A SEF can intermediate communications, if necessary, and otherwise facilitate error trade corrections without disclosing counterparty identities. The Commission acknowledges that some SEFs may incur additional costs associated with ensuring that their rules and procedures for error trades allow for error trade remediation without disclosure of the identities of counterparties to one another. The Commission notes that designated contract markets resolve error trades without engaging in

¹⁵⁸ Citadel Letter 2, at 11.

name give-up, and SEFs already intermediate the resolution of error trades to varying degrees.

The Commission believes that the additional costs some SEFs may incur to employ anonymous error trade remediation are relatively modest.

4. Section 15(a) Factors

a. Protection of Market Participants and the Public

The final rule is intended to protect market participants and the public by advancing the statutory goals of: (1) promoting swaps trading and pre-trade price transparency on SEFs; (2) fostering fair competition among market participants; (3) providing market participants with impartial access to SEFs; and (4) maintaining the privacy of swap transaction information.

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

The final rule is intended to enhance competitiveness in the swap markets by removing an effective barrier to participation on SEFs for many market participants who are concerned with the prospect of information leakage. The Commission expects participation on SEFs to increase as a result, leading to greater competition.

c. Price Discovery

The Commission believes that by increasing participation and competition on SEFs, the final rule will decrease information asymmetries between market participants, allowing market participants to attain broader knowledge of pricing across more SEFs, thereby enhancing SEF trading as a mechanism for price discovery.

d. Sound Risk Management Practices

Similarly, increased participation and competition on SEFs and decreased information asymmetry among market participants is likely to enhance SEF trading as a mechanism for risk management.

e. Other Public Interest Considerations

Post-trade name give-up is inconsistent with provisions intended to protect the privacy of a swap counterparty's trading information. Prohibiting post-trade name give-up will help to effectuate the statutory privacy protections under CEA section 21(c)(6) that apply to this information. Moreover, the Commission believes that the prohibition is reasonably likely to lead to enhanced liquidity and lower transaction costs.

D. Antitrust Considerations

Section 15(b) of the CEA requires the Commission to take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the purposes of the CEA, in issuing any order or adopting any Commission rule or regulation.¹⁵⁹ The Commission believes that the public interest to be protected by the antitrust laws is generally to protect competition. In the Proposal, the Commission requested comments on whether: (1) the proposed rulemaking implicates any other specific public interest to be protected by the antitrust laws; (2) the proposed rulemaking is anticompetitive, and if it is, what are anticompetitive effects; and (3) there are less anticompetitive means of achieving the relevant purposes of the CEA that would otherwise be served by adopting the proposed rules.

The Commission does not anticipate that the amendments to part 37 that it is adopting today will result in anticompetitive behavior, but instead, believes that the amendments will promote greater competition on, and among, SEFs. In the proposal, the Commission encouraged comments from the public on any aspect of the rulemaking that may have the potential to be inconsistent with the antitrust laws or be anticompetitive in nature. The Commission received two comments asserting that the proposed rule may be anticompetitive. JPMorgan commented

¹⁵⁹ 7 U.S.C. 19(b).

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that prohibiting post-trade name give-up “would itself impair competition and pose an unreasonable restraint on trade by forcing dealers to trade fully anonymously in order to access a [central-limit order-book], even though dealers prefer [post-trade name give-up]”¹⁶⁰ FSF similarly commented that “banning name give-up would itself impair competition (certainly, innovation and competition among markets) and unnecessarily push dealers to trade fully anonymously in order to access an Order Book SEF, despite their bona fide preference for name give-up.”¹⁶¹ As stated above, the Commission disagrees with comments that prohibiting post-trade name give-up would impair competition. Post-trade name give-up is an ancillary post-trade protocol, and not a method of execution. It does not proscribe SEFs from offering any existing execution method, nor does it prevent SEFs from developing new execution methods. Moreover, the Commission is concerned by other commenters’ assertions that post-trade name give-up enables anticompetitive behavior,¹⁶² and the Commission believes that prohibiting post-trade name give-up will reduce the opportunity for such behavior to occur, and is therefore reasonably necessary to promote fair competition among market participants. The Commission has considered the rulemaking and related comments to determine whether it is anticompetitive and continues to believe that these amendments to part 37 will not result in anticompetitive behavior.

List of Subjects in 17 CFT Part 37

Swaps, Swap execution facilities.

PART 37–SWAP EXECUTION FACILITIES

In § 37.9, add paragraph (d) to read as follows:

§ 37.9 Methods of execution for required and permitted transactions.

¹⁶⁰ JPMorgan Letter, at 10.

¹⁶¹ FSF Letter, at 10.

¹⁶² See *supra* note 37 and accompanying text.

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(d) *Counterparty anonymity.* (1) Except as otherwise required under the Act or the Commission’s regulations, a swap execution facility shall not directly or indirectly, including through a third-party service provider, disclose the identity of a counterparty to a swap that is executed anonymously and intended to be cleared.

(2) A swap execution facility shall establish and enforce rules that prohibit any person from directly or indirectly, including through a third-party service provider, disclosing the identity of a counterparty to a swap that is executed anonymously and intended to be cleared.

(3) For purposes of paragraphs (d)(1) and (d)(2) of this section, “executed anonymously” shall include a swap that is pre-arranged or pre-negotiated anonymously, including by a participant of the swap execution facility.

(4) *Package transactions.* For a package transaction that includes a component transaction that is not a swap intended to be cleared, disclosing the identity of a counterparty shall not violate paragraph (d)(1) or (d)(2) of this section. For purposes of this paragraph, a “package transaction” consists of two or more component transactions executed between two or more counterparties where: (i) execution of each component transaction is contingent upon the execution of all other component transactions; and (ii) the component transactions are priced or quoted together as one economic transaction with simultaneous or near-simultaneous execution of all components.

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