

## COMMODITY FUTURES TRADING COMMISSION

### 17 CFR Part 49

RIN 3038-AD20

### Swap Data Repositories

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Commodity Futures Trading Commission (“CFTC” or “Commission”) is proposing rules to implement new statutory provisions introduced by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”). Section 728 of the Dodd-Frank Act amends the Commodity Exchange Act (“CEA” or the “Act”) by adding new Section 21, which establishes registration requirements, statutory duties, core principles and certain compliance obligations for registered swap data repositories (“SDRs”) and directs the Commission to adopt rules governing persons that are registered, as such, under this Section.

**DATES:** Comments must be received by February 22, 2011.

**ADDRESSES:** You may submit comments, identified by RIN 3038-AC20, by any of the following methods:

- *Agency Web site, via its Comments Online process:* <http://comments.cftc.gov>. Follow the instructions for submitting comments through the Web site.

- *Mail:* David A. Stawick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

- *Hand Delivery/Courier:* Same as mail above.

- *Federal eRulemaking Portal:* <http://www.Regulations.gov>. Follow the instructions for submitting comments. Please submit your comments using only one method.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to <http://www.cftc.gov>. You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that may be exempt from disclosure under the Freedom of Information Act (“FOIA”),<sup>1</sup> a petition for confidential treatment of the exempt information may be submitted according to the established procedures in § 145.9 of the

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

#### FOR FURTHER INFORMATION CONTACT:

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### I. Background

On July 21, 2010, President Obama signed into law the Dodd-Frank Act.<sup>3</sup> Title VII of the Dodd-Frank Act<sup>4</sup> amended the CEA<sup>5</sup> to establish a comprehensive new regulatory framework for swaps and security-based swaps. The legislation was enacted to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) Providing for the registration and comprehensive regulation of swap dealers (“SDs”) and major swap participants (“MSPs”); (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating robust recordkeeping and real-time reporting regimes; and (4) enhancing the Commission’s rulemaking and enforcement authorities with respect to, among others, all registered entities and intermediaries subject to the Commission’s oversight.

To enhance transparency, promote standardization and reduce systemic risk, Section 728 of the Dodd-Frank Act establishes a newly-created registered entity—the SDR<sup>6</sup>—to collect and maintain data and information related to swap transactions as prescribed by the

<sup>3</sup> See Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376 (2010), available at <http://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm>.

<sup>4</sup> Pursuant to Section 701 of the Dodd-Frank Act, Title VII may be cited as the “Wall Street Transparency and Accountability Act of 2010.”

<sup>5</sup> 7 U.S.C. 1, *et seq.*

<sup>6</sup> Section 721 of the Dodd-Frank Act amends Section 1a of the CEA to add the definition of SDR. Section 1a provides that the term “swap data repository means any person that collects and maintains information or records with respect to transactions or positions in, or the terms and conditions of, swaps entered into by third parties for the purpose of providing a centralized recordkeeping facility for swaps.” 7 U.S.C. 1a(48). Currently there are global trade repositories for credit, interest rate, and equity swaps. Since 2009, all G-14 dealers have submitted credit swap data to the Depository Trust & Clearing Corporation’s (“DTCC”) Trade Information Warehouse. In January 2010, TriOptima launched the Global OTC Derivatives Interest Rate Trade Reporting Repository after selection by the Rates Steering Committee of the International Swaps and Derivatives Association to provide a trade repository to collect information on trades in interest rate swaps. In August 2010, DTCC also launched the Equity Derivatives Reporting Repository for equity swaps and other equity derivatives. Other entities may also perform trade repository functions on a regional or more localized basis. In addition, a variety of firms also provide ancillary services and functions essential to the efficient operation of trade reporting of swaps. Trade repositories for other asset classes such as commodities and foreign currency have yet to be formally established but are expected to be developed in the near future in connection with the effective date of the Dodd-Frank Act.

<sup>1</sup> 5 U.S.C. 552.

<sup>2</sup> 17 CFR 145.9.

Commission<sup>7</sup> and to make such data and information directly and electronically available to regulators. Section 2(a)(13)(G) of the CEA, adopted by Section 727 of the Dodd-Frank Act, requires all swaps—cleared or uncleared—to be reported to an SDR. Section 728 of the Dodd-Frank Act added to the CEA new Section 21 governing registration and regulation of SDRs, and directed the Commission to adopt regulations governing SDR duties and responsibilities specified in the legislation. Section 21 requires that SDRs be registered with the Commission,<sup>8</sup> allows a derivatives clearing organization (“DCO”) to register as an SDR, and specifies that persons required to be registered as SDRs must register with the Commission whether or not they are also licensed as a bank or registered as a security-based swap data repository with the Securities and Exchange Commission (“SEC”).<sup>9</sup> To register with the Commission and maintain registration, SDRs are required to comply with the duties and core principles set forth in Section 21 of the CEA as well as other requirements that the Commission may prescribe by rule.<sup>10</sup>

Pursuant to the specific duties outlined in Section 21(c) of the CEA, SDRs must (1) accept data; (2) confirm with both counterparties to the swap the accuracy of the data that was submitted; (3) maintain data according to standards prescribed by the Commission; (4) provide direct electronic access to the Commission or any designee of the Commission; (5) provide public reporting of swap data in the form and frequency as the Commission may require; (6) establish automated systems for monitoring and analyzing data (including the use of end-user clearing exemptions) at the direction of the Commission; (7) maintain user privacy; (8) on a confidential basis, pursuant to Section 8 of the CEA,<sup>11</sup> upon request

<sup>7</sup> Regulations governing the SDRs’ data collection and recordkeeping responsibilities are the subject of a separate proposed rulemaking under part 45 of the Commission’s regulations. See 17 CFR part 45.

<sup>8</sup> The Dodd-Frank Act mandates that the Commission promulgate rules to implement these provisions by July 15, 2011. See Section 712 of the Dodd-Frank Act.

<sup>9</sup> If a DCO so registers, then to the extent that final rules on governance and conflicts of interest, discussed *infra* Section II.D.2, differ between a DCO and an SDR, the DCO must meet the more stringent set of rules.

<sup>10</sup> Section 21(f)(4)(A) of the CEA, added by the Dodd-Frank Act, authorizes the Commission to develop one or more additional duties applicable to SDRs. 7 U.S.C. 24a(f)(4).

<sup>11</sup> Section 8 of the CEA, 7 U.S.C. 12(e), establishes among other things the conditions under which the Commission may furnish information obtained in connection with the administration of the CEA to

and after notifying the Commission, make data available to other specified regulators; and (9) establish and maintain emergency procedures. As a separate matter, prior to sharing information with specified entities, the SDR must, pursuant to Section 21(d) of the CEA, receive a written agreement from each such entity stating that it will abide by the confidentiality provisions of Section 8 of the CEA and agree to indemnify the SDR and the Commission for any litigation expenses relating to information provided under Section 8.

Section 21(e) of the CEA requires that each SDR have a chief compliance officer (“CCO”) and specifies the duties of the CCO. Section 21(f) of the CEA establishes four core principles for SDRs. First, an SDR is prohibited from adopting any rule or taking any action that results in any unreasonable restraint of trade or imposing any material anticompetitive burden on the trading, clearing or reporting of transactions. Second, each SDR must establish governance arrangements that are transparent to fulfill the public interest requirements and to support the objectives of the federal government, owners and participants. Third, each SDR must establish and enforce rules to minimize conflicts of interest in the SDR’s decision-making processes and establish a process for resolving conflicts of interest. Lastly, a fourth core principle provides that the Commission must establish additional duties for registered SDRs to minimize conflicts of interest, protect data, ensure compliance and guarantee the safety and security of the SDR and may develop additional duties taking into account evolving standards of the United States and the international community.<sup>12</sup>

The Commission notes that in May 2010, a working group jointly established by the Committee on Payment and Settlement Systems (“CPSS”) of the Bank of International Settlements (“BIS”) and the Technical Committee of the International Organization of Securities Commissions (“IOSCO”) published a consultative report entitled “Considerations for Trade

any department or agency of the United States; such information shall not be disclosed by such department or agency except in any action or proceeding under the laws of the United States to which it, the Commission or the United States is a party. Similarly, the Commission may furnish such information to a foreign futures authority if the Commission is satisfied that the information will not be disclosed by such foreign futures authority except in connection with an adjudicatory action or proceeding brought under the laws of such foreign government or political subdivision, or foreign futures authority, is a party.

<sup>12</sup> See Section 21(f)(4) of the CEA, 7 U.S.C. 24a(f)(4).

Repositories in the OTC Derivatives Markets” (“Working Group Report”).<sup>13</sup> The Working Group Report presents a set of factors to consider in connection with the design, operation and regulation of SDRs. A significant consideration of the Working Group Report is access to SDR data by appropriate regulators. As noted in this Working Group Report, a trade repository “should support market transparency by making data available to relevant authorities and the public in line with their respective information needs.”<sup>14</sup> The Commission believes that the Dodd-Frank Act and proposed part 49 of the Commission’s Regulations are consistent with the goals of the Working Group Report. Unless inconsistent with the statutory framework set forth in Section 21 of the CEA and related provisions, the Commission proposes that SDRs will largely follow the recommendations in the Working Group Report to enhance transparency, promote standardization and reduce systemic risk in the swaps market.

Additionally, Section 752(a) of the Dodd-Frank Act directs the Commission to consult and coordinate with foreign regulatory authorities regarding the establishment of consistent international standards for the regulation of swaps and various “swap entities.”<sup>15</sup> Consistent with this directive, the Commission believes that the data maintained by SDRs must be available to all appropriate foreign regulators consistent with their regulatory responsibilities and the Dodd-Frank Act. Accordingly, in support of its cooperative international approach to the regulation of SDRs, the Commission has consulted with various foreign regulatory authorities in promulgating the proposed rules.

The Commission also notes the recent issuance by the European Commission

<sup>13</sup> See CPSS–IOSCO Consultative Report, Considerations for Trade Repositories in the OTC Derivatives (May 2010), available at <http://www.bis.org/publ/cpss90.pdf>.

<sup>14</sup> *Id.*

<sup>15</sup> The Dodd-Frank Act provides:

In order to promote effective and consistent global regulation of swaps and security-based swaps, the Commodity Futures Trading Commission, the Securities and Exchange Commission, and the prudential regulators (as that term is defined in Section 1a(39) of the Commodity Exchange Act), as appropriate, shall consult and coordinate with foreign regulatory authorities on the establishment of consistent international standards with respect to the regulation (including fees) of swaps, security-based swaps, swap entities, and security-based swap entities and may agree to such information-sharing arrangements as may be deemed to be necessary or appropriate in the public interest or for the protection of investors, swap counterparties, and security-based swap counterparties.

Section 752(a) of the Dodd-Frank Act.

of its regulatory proposal related to OTC derivatives, central counterparties and trade depositories.<sup>16</sup> It is the Commission's intention to harmonize its approach with that of the European Commission to the extent possible consistent with the statutory provisions of Dodd-Frank Act relating to SDRs.

The Commission submits further that Section 21 of the CEA does not provide the Commission with the authority to exempt any entity performing the functions of an SDR from the registration requirements or any other regulatory duties established by the Dodd-Frank Act. However, swap activity that is strictly of a "non-U.S." nature would be excluded from Commission registration and regulation. Specifically, Section 2(i) of the CEA, as amended by Section 722 of the Dodd-Frank Act, excludes from U.S. jurisdiction all swap activity that does not have a "direct and significant connection with activities in, or effect on, commerce of the United States", or which contravene regulations necessary to prevent evasion.<sup>17</sup>

## II. The Proposed Regulations: Part 49

As discussed above, part 49 will contain the provisions that apply to registration and regulation of SDRs. Proposed § 49.3 will establish the procedures and substantive requirements for registration as an SDR. Compliance with the statutory duties described in Section 21(c) of the CEA is described in proposed § 49.9 and detailed in proposed §§ 49.10 through 49.18. Core principles applicable to SDRs as outlined in Section 21(f) are set forth in proposed §§ 49.19 through 49.22. The additional duties promulgated pursuant to Section 21(f)(4) of the CEA (Core Principle 4) are set forth in proposed §§ 49.23 through 49.27.

<sup>16</sup> See Proposal for a Regulation of the European Parliament and of the Council on OTC Derivatives, Central Counterparties, and Trade Depositories (the "European Commission Proposal"), COM (2010) 484/5.

<sup>17</sup> Section 2(i) of the CEA, as amended by Section 722(d) of the Dodd-Frank Act, provides:

(i) APPLICABILITY.—The provisions of this Act relating to swaps that were enacted by the Wall Street Transparency and Accountability Act of 2010 (including any rule prescribed or regulation promulgated under that Act), shall not apply to activities outside the United States unless those activities—

(1) have a direct and significant connection with activities in, or effect on, commerce of the United States; or

(2) contravene such rules or regulations as the Commission may prescribe or promulgate as are necessary or appropriate to prevent the evasion of any provision of this Act that was enacted by the Wall Street Transparency and Accountability Act of 2010.

7 U.S.C. 2(i)(1)–(2).

### A. Requirements of Registration

Proposed §§ 49.3–49.4 and 49.6–49.7 provide the substantive requirements and framework for SDR registration. The Proposed Regulations include provisions relating to: (1) Procedures for registration; (2) provisional registration; (3) an annual filing requirement; (4) withdrawal of application for registration; (5) reinstatement of dormant registration; (6) withdrawal of registration; (7) registration of successor entities; and (8) SDRs located in foreign jurisdictions. Each of the proposed Regulations is discussed below in turn.

#### 1. Procedures for Registration— Proposed § 49.3

To implement the requirements of Section 21(a) of the CEA, as amended by Section 728 of the Dodd-Frank Act, and to ensure the Commission's ability to administer part 49 of the Commission's Regulations generally, the Commission proposes in § 49.3 to establish application and approval procedures for any entity seeking registration as a SDR. The Commission, in connection with proposed § 49.3, is proposing to require each SDR applicant to file for registration on proposed Form SDR.

(a) *Proposed Form SDR.* Proposed § 49.3(a) provides that applications for registration as an SDR must be filed electronically with the Commission on new Form SDR. Proposed Form SDR will be used for an initial or provisional registration as an SDR as well as any updates or amendments to registration. Each applicant will be required to provide the Commission with documents and descriptions pertaining to the (i) business organization, (ii) financial resources, (iii) technological capabilities and (iv) accessibility of services of the SDR.

SDR applicants will be required to provide documents describing the applicant's legal status, including a copy of the constitution, articles of incorporation or association with all amendments, existing by-laws, rules or instruments corresponding with, and a description of the organizational and governance structure. SDRs must also submit copies of any applicable rules and regulations (as defined in revised § 40.1),<sup>18</sup> disclose any affiliates along with a brief description of the nature of the affiliation, and submit copies of any agreements between the SDR and third parties that will assist the SDR in complying with the duties set forth in Section 21(c) and the core principles

<sup>18</sup> See Commission, Notice of Proposed Rulemaking: Revisions to part 40 (Provisions Common to Registered Entities), 75 FR 67282 (Nov. 2, 2010).

specified in Section 21(f). If the applicant is a foreign entity, the entity is required to certify and provide an opinion of counsel that the SDR, as a matter of law, is able to provide the Commission with prompt access to the books and records of the SDR and that the SDR can submit to onsite inspection and examination by the Commission.

Financial information filed as part of Form SDR would include (i) a balance sheet, (ii) statement of income and expenses, (iii) statement of sources and application of revenues and (iv) all notes or schedules, as of the most recent fiscal year. A balance sheet and an income and expense statement for each affiliate, as of the end of the most recent fiscal year, will also be required for those affiliates of the SDR that provide SDR regulatory services. If the applicant is a newly-created entity without sufficient time in operation, the applicant should provide pro forma financial statements for the most recent six months, or since inception of the entity, whichever occurs first. Except for pro forma financial statements prepared for newly-created entities, financial statements shall be prepared in conformity with generally accepted accounting principles ("GAAP") applied on a basis consistent with that of the preceding financial statement.

Applicants will be required to demonstrate operational capability through documentation such as technical manuals and/or third party service provider agreements that will be employed to provide services to the SDR. Applicants will also be required to set forth practices and procedures for accepting swap data and providing services to market participants. As required by proposed § 49.27, access must be fair, open and non-discriminatory.

(b) *180-Day Review Procedures.* An entity that seeks to register as a SDR is required to electronically file Form SDR with the Commission in accordance with the instructions contained in Form SDR. The Commission will review Form SDR and, at or prior to the conclusion of a 180-day period, by order either (i) grant registration; (ii) extend the 180-day review period for good cause; or (iii) deny the application for registration. If deemed appropriate, the Commission may grant registration as a SDR subject to conditions. The 180-day review period will commence once a completed submission on Form SDR is submitted to the Commission, as determined solely in the discretion of the Commission. If the Commission denies an application for registration, it will specify the grounds for such denial. In the event the Commission denies an applicant

registration, such person may request an opportunity for a hearing before the Commission.

(c) *Standard for Approval.* The Commission, in reviewing applications for SDR registration, will review whether SDR applicants are properly organized and have the capacity to assure the prompt, accurate and reliable performance of the SDR duties in Section 21(c), core principles in Section 21(f) and additional duties of Section 21(f)(4). Subject to the ability of the Commission to extend the 180-day period as noted above, the Commission would deny registration if it appears at the end of the 180-day period that the application (i) is materially incomplete;<sup>19</sup> (ii) fails in form or substance to meet the requirements of Section 21 of the CEA and proposed part 49 of the Commission's Regulations;<sup>20</sup> and/or (iii) is amended or supplemented in a manner that is inconsistent with proposed § 49.3. The Commission, in each instance of the denial of an application for registration, will provide notification setting forth the deficiencies in the application, or the manner in which the application fails to meet the requirements of proposed part 49 of the Commission's Regulations.<sup>21</sup>

(d) *Amendments and Annual Filing.* Proposed § 49.3(a)(3) provides that if any information reported on Form SDR or any subsequent amendment becomes inaccurate, the SDR is required to promptly file an amendment on Form SDR updating such information. This requirement is applicable regardless of whether the information becomes inaccurate before or after an application for registration has been granted. Proposed § 49.3(a)(3) also requires that each registered SDR annually file an amendment on Form SDR within 60 days after the end of each calendar year.

(e) *Service of Process.* The Commission is proposing in proposed § 49.3(a)(5) to require each SDR to designate and authorize on Form SDR an agent in the United States, other than a Commission official, to accept any notice or service of process, pleadings, or other documents in any action or

proceedings against the SDR to enforce the CEA and related Regulations. If an SDR appoints another agent to accept such notice or service of process, then the SDR would be required to file promptly an amendment on Form SDR updating this information.<sup>22</sup> Proposed § 49.3(a)(5) is intended to conserve the Commission's resources and to minimize any logistical obstacles (e.g., locating defendants or respondents abroad) that the Commission may encounter when attempting to effect service.

(f) *Provisional Registration.* Proposed § 49.3(b) permits the Commission, upon the request of an applicant, to grant a provisional registration of an SDR, if such applicant is in substantial compliance with the standards set forth in proposed § 49.3(a)(4). This application for provisional registration would be filed on proposed Form SDR. Such provisional registration will expire on the earlier of: (i) The date that the Commission grants or denies registration of the SDR; or (ii) the date that the Commission rescinds the provisional registration of the SDR. The Commission may rescind such provisional registration on the same grounds as those set forth in proposed § 49.3(a)(3).

The proposed provisional registration would enable an SDR to comply with the Dodd-Frank Act upon its effective date (i.e., the later of 360 days after the date of its enactment or 60 days after publication of the final rule implementing Section 21 of the CEA). The provisional registration would also allow the Commission to implement the registration requirements of the Dodd-Frank Act for SDRs while providing the Commission sufficient time to fully review the application of an SDR. An SDR that is provisionally registered with the Commission would be subject to Section 21 of the CEA and related regulations during the period in which the Commission is reviewing the SDR's application of registration.

The Commission believes that the provisional registration should not be a permanent provision of part 49. Accordingly, proposed § 49.3(b) includes a "sunset" provision so that provisional registration would terminate 365 days from the effective date of proposed § 49.3(b).

Notwithstanding the availability of a provisional registration, the Commission encourages each SDR to apply for registration as soon as possible following the Commission's adoption of final part 49, to permit sufficient time for an SDR to answer any questions that

the Commission staff may have and to provide additional information or documentation, if necessary. The Commission will review applications in the order in which they are received. Applications seeking provisional registration that are received close to the effective date of the SDR registration requirement may not be reviewed and approved by the effective date.

(g) *Withdrawal of Application for Registration.* Proposed § 49.3(c) permits an applicant for registration as an SDR to withdraw its application by filing a request with the Commission. Such a voluntary withdrawal by the applicant SDR will not affect any action taken or to be taken by the Commission based upon conduct occurring during the time that the application for registration was pending with the Commission.

(h) *Reinstatement of Dormant Registration.* Proposed § 49.3(d) provides that the Commission must affirmatively re-instate the registration of a dormant SDR (as defined in revised § 40.1 of the Commission's Regulations)<sup>23</sup> prior to such dormant SDR accepting or re-accepting swap data.

(i) *Delegation of Authority.* Proposed § 49.3(e) delegates authority to the Director of the Division of Market Oversight (or designee) with the consultation of the General Counsel of the Commission (or designee) for certain matters relating to the sufficiency of the application on Form SDR filed with the Commission. In particular, the Commission in this proposed Regulation delegates to the Director of the Division of Market Oversight or designee, with the consultation of the General Counsel or designee, the authority to notify an applicant for registration as an SDR under Section 21 of the CEA that such application for registration is materially incomplete and that the running of the 180-day period is stayed. This delegation of authority does not prohibit the Commission from otherwise exercising its authority that would be delegated under this proposed Regulation. The Director of the Division of Market Oversight may also submit to the Commission for its consideration any matter which has been delegated under this proposed Regulation.

## 2. Withdrawal From Registration— Proposed § 49.4

Consistent with Section 7 of the CEA, proposed § 49.4 permits a registered SDR to withdraw from registration by filing a notice of withdrawal with the Commission at least 90 days prior to the

<sup>19</sup> An SDR applicant that is denied registration based on an incomplete application would be permitted to re-file an application with the Commission.

<sup>20</sup> The Commission would deny the registration of a SDR applicant that is unable to demonstrate compliance with the statutory duties set forth in Section 21(c) of the CEA, 7 U.S.C. 24a(c) and proposed § 49.9 as well as the core principles set forth in Section 21(f) of the CEA, 7 U.S.C. 24a(f), and proposed § 49.19.

<sup>21</sup> This provision is comparable to the designated contract market ("DCM") and DCO applications set forth in Section 6 of the CEA, 7 U.S.C. 8.

<sup>22</sup> See proposed § 49.3(a)(5).

<sup>23</sup> See Provisions Common to Registered Entities, *supra* note 18.

named withdrawal date. As part of its notice of withdrawal, the SDR is required to: (1) Designate another SDR to serve as the custodian of the withdrawing SDR's books and records; (2) specify the location of the data and records; and (3) provide an opinion of counsel that the SDR is authorized to make such data and records available. Prior to the filing of a notice of withdrawal, a SDR must file an amended Form SDR to update any inaccurate information.

The withdrawal of a SDR's registration will be effective on the 60th day after receipt by the Commission of the notice of withdrawal, unless the Commission determines to extend or curtail the effectiveness of an SDR's registration by order, deemed necessary or appropriate and in the public interest.

Proposed § 49.4(c) provides that after an opportunity for hearing, the Commission may revoke the registration of a registered SDR if the Commission finds that any registered SDR has obtained its registration by making any false and misleading material statements or has violated or failed to comply with any provision of the CEA and Commission Regulations. Pending final determination of whether the registration of an SDR should be revoked, the Commission may suspend the registration of the SDR if it appears to the Commission, after notice and opportunity for hearing, to be necessary or appropriate in the public interest.

### 3. Equity Interest Transfer Notification—Proposed § 49.5

Proposed § 49.5 would require SDRs to file with the Commission a notice of the equity interest transfer of ten percent or more, no later than the business day, as defined in revised § 40.1,<sup>24</sup> following the date on which the SDR enters into a firm obligation to transfer the equity interest.<sup>25</sup> The notification must include and be accompanied by: (i) Any relevant agreement(s), including preliminary agreements; (ii) any associated changes to relevant corporate documents; (iii) a chart outlining any new ownership or

<sup>24</sup> See Provisions Common to Registered Entities, *supra* note 18.

<sup>25</sup> The Commission is proposing a 10 percent threshold because it believes that a change in ownership of such magnitude may have an impact on the operations of the SDR. The Commission believes that such impact may be present even if the change in ownership does not constitute a change in control. Given the potential impact that a change in ownership might have on the operations of a SDR, the Commission believes that it is appropriate to require such SDR to certify after such change that it continues to comply with all obligations under the CEA and Commission regulations.

corporate or organizational structure; (iv) a brief description of the purpose and any impact of the equity interest transfer; and (v) a representation from the registered SDR that it meets all of the requirements of Section 21 of the CEA and Commission regulations adopted thereunder. The SDR would also be required to amend any information that is no longer accurate on Form SDR consistent with the procedures set forth in proposed § 49.3.

The proposed Regulation requires that the registered SDR keep the Commission informed of the projected date that the transaction resulting in the equity interest transfer will be consummated, and provide to the Commission any new agreements or modifications to the original agreement(s) filed pursuant to this proposed Regulation. The registered SDR is required to notify the Commission of the consummation of the transaction on the business day in which it occurs. The proposed Regulation will enable Commission staff to consider whether any conditions contained in an equity transfer agreement(s) are inconsistent with the duties, responsibilities and core principles of a SDR.

Proposed § 49.5(c) would require the SDR upon a 10% or greater change in ownership to certify, within two business days following the date on which the change in ownership occurs, that such SDR meets all of the requirements of Section 21 of the CEA and proposed Regulations under Part 49 of the Commission's regulations. The proposed Regulation also requires that the SDR include as part of its certification whether any aspects of the SDR's operations will change as a result of the change in ownership, and if so, the SDR must provide a description of the changes. Proposed § 49.5(c) also provides that the certification may rely on, and be supported by, prior materials and information submitted as part of an application for registration or new filings if necessary to update its previous filings.

The Commission notes that there may be differences in notification procedures for transfers or changes in equity ownership of registered entities proposed by the Commission.

*Request for Comment.* The Commission requests comment regarding the proposed notification procedures as follows:

- Should there be uniformity or differentiation in procedures applied to different registered entities?

### 4. Registration of Successor Entities—Proposed § 49.6

Proposed § 49.6(a) sets forth the process of registering successor entities of an SDR as the result of corporate change of control or other similar events. Specifically, the proposed Regulation provides that in the event of a corporate reorganization, merger, acquisition, bankruptcy or other similar corporate event that creates a new entity, the SDR is required to request a transfer of its registration, rules, and other matters, within 30 days of the succession. The registration of the predecessor SDR entity will be deemed to remain effective as the registration of the successor if the successor, within 30 days after such succession, files an application for registration on Form SDR, and the predecessor files a request for withdrawal of registration. The proposed Regulation would further provide that the registration of the predecessor SDR shall cease to be effective 90 days after the application for registration on Form SDR is filed by the successor SDR.<sup>26</sup> In other words, the 90-day period would not begin to run until a complete Form SDR has been filed by the successor with the Commission.

The following are examples of the types of successions that would be required to be completed by filing an application: (1) An acquisition, through which an unregistered entity purchases or assumes substantially all of the assets and liabilities of the SDR and then operates the business of the SDR, (2) a consolidation of two or more registered entities, resulting in their conducting business through a new unregistered entity, which assumes substantially all of the assets and liabilities of the predecessor entities, and (3) dual successions, through which one registered entity subdivides its business into two or more new unregistered entities.

Proposed § 49.6(b) sets forth the process of registering successor entities of an SDR as the result of a change in the predecessor SDR's date or state of incorporation, form of organization, or composition of a partnership. In these cases, the successor SDR, within 30 days after the succession, must amend the registration of the predecessor SDR on Form SDR to reflect the changes. Such amendment would be deemed an application for registration filed by the predecessor and adopted by the successor. In all three types of successions, the predecessor must cease operating as an SDR. The Commission

<sup>26</sup> See proposed § 49.6(a).

preliminarily believes that it is appropriate to allow a successor to file an amendment to the predecessor's Form SDR in these types of successions because such successions do not typically result in a change of control of the SDR. The purpose of proposed § 49.6 is to enable a successor SDR to operate without an interruption of business by relying for a limited period of time on the registration of the predecessor SDR until the successor's own registration becomes effective. The proposed Regulation is intended to facilitate the legitimate transfer of business between two or more SDRs and to be used only where there is a direct and substantial business nexus between the predecessor and the successor SDR. The proposed Regulation would not allow a registered SDR to sell its registration, eliminate substantial liabilities, spin off personnel, or facilitate the transfer of the registration of a "shell" organization that does not conduct any business. No entity would be permitted to rely on proposed § 49.6 unless it is acquiring or assuming substantially all of the assets and liabilities of the predecessor's SDR business.

Proposed § 49.6 would not apply to reorganizations that involve only registered SDRs. In those situations, the registered SDRs can continue to rely on their existing registrations. The proposed rule would also not apply to situations in which the predecessor intends to continue to engage in SDR activities. Otherwise, confusion may result as to the identities and registration statuses of the parties.

#### 5. Swap Data Repositories Located in Foreign Jurisdictions—Proposed § 49.7

Proposed § 49.7 relates to those SDR applicants that are located outside of the United States. This proposed Regulation is intended to enable the Commission to obtain necessary swap data and related books and records maintained by a SDR located outside of the United States. Proposed § 49.7 would require each SDR located outside of the United States to provide an opinion of counsel that the SDR can, as a matter of law, provide the Commission with prompt access to its books and records and submit to onsite inspection and examination by the Commission. The Commission notes that each jurisdiction may have a different legal framework that may limit or restrict the Commission's ability to receive information from an SDR. An opinion of counsel regarding prompt access to books and records and onsite inspection and examination will allow the Commission to better evaluate an SDR's capability to meet the

requirements of registration and ongoing supervision. Failure to provide an opinion of counsel may be a basis for the Commission to deny an application for registration.

*Request for Comment.* The Commission requests comment on the questions set forth below regarding registration.

(1) Are the instructions in proposed Form SDR clear? If not, identify any instructions that should be clarified and, if possible, offer alternatives.

(2) Would any of the requested information on proposed Form SDR be burdensome for an SDR to supply? If so, explain.

(3) Should the Commission require any additional information on proposed Form SDR? If so, what information and why?

(4) Are there any items on proposed Form SDR that the Commission should not request? If so, which items and why?

(5) Is the Commission's proposed registration process appropriate and sufficiently clear? If not, why not and what would be a better alternative?

(6) If a SDR located outside of the United States is registered, should the registration process for the foreign SDR be any different than the Commission's proposed registration process?

(7) Are there any factors that the Commission should take into consideration to ensure that a SDR located outside the United States seeking to register as an SDR can, in compliance with applicable foreign laws, provide the Commission with access to the SDR's books and records that are required pursuant to proposed § 49.7 and can submit to onsite inspection and examination by the Commission?

(8) Should the Commission consider any other factors relating to a SDR located outside of the United States with respect to the Commission's registration rules or in general?

(9) Is the Commission's proposed rule regarding provisional registration appropriate? If not, why not?

(10) What conditions should apply to the granting of a provisional registration? What criteria should the Commission consider for approving provisional registration applications?

(11) Are the timeframes in the proposed registration process appropriate? If not, why not and what would be more appropriate timeframes?

(12) Are the proposed factors in determining whether the Commission should grant or deny an application for registration appropriate and sufficiently clear? If not, why not? Should the Commission take into consideration any

other factors in determining whether to grant or deny an SDR's application for registration?

#### B. Duties of Registered SDRs

Section 21(c) of the CEA sets forth the minimum duties that a SDR is required to perform to become registered and to maintain registration. These statutory duties require that SDRs (i) accept swap data as prescribed by the Commission; (ii) confirm with both counterparties to a swap the accuracy of the data; (iii) maintain the data submitted; (iv) provide the Commission or its designee with direct electronic access to the swap data; (v) provide the necessary information as prescribed by the Commission to comply with the public reporting requirements set forth in Section 2(a)(13) of the CEA; (vi) establish automated systems for monitoring, screening, and analyzing swap data; (vii) maintain the privacy or confidentiality of any and all swap data that the SDR receives; (viii) provide access to the swap data to certain "appropriate" domestic and foreign regulators; and (ix) adopt and implement emergency procedures. In addition, the Commission pursuant to its authority under Sections 21(f)(4) and 8a(5)<sup>27</sup> of the CEA also proposes to add by regulation four additional duties which would require that registered SDRs (i) adopt and implement system safeguards, including business continuity and disaster recovery ("BC-DR") plans; (ii) maintain sufficient financial resources; (iii) furnish market participant with a disclosure document setting forth the risks and costs associated with using the services of the SDR; and (iv) provide fair and open access and fees and charges that are equitable and non-discriminatory.

The following subsections describe in detail the Regulations proposed by the Commission to implement SDR statutory duties set forth in Section 21(c) of the CEA.

#### 1. Acceptance of Data—Section 21(c)(1) of the CEA

The Commission in a companion release<sup>28</sup> is proposing in new part 45 to

<sup>27</sup> Section 8a(5) of the CEA, 7 U.S.C. 12a(5), authorizes the Commission to promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or accomplish any of the purposes of the CEA. In connection with SDRs, Section 21(a)(3)(A)(ii), 7 U.S.C. 24a(a)(3)(A)(ii) specifically requires that a SDR to be registered and maintain its registration must comply with any requirement that the Commission may impose by rule or regulation pursuant to Section 8a(5) of the CEA.

<sup>28</sup> See Commission, Notice of Proposed Rulemaking: Swap Data Recordkeeping and

the Commission's Regulations the data elements that must be reported and applicable to DCMs, DCOs, swap execution facilities ("SEFs"), foreign boards of trade ("FBOTs"),<sup>29</sup> SDs, MSPs and/or end-users in connection with the reporting of such swap data to SDRs.<sup>30</sup> These data elements and standards would include the reporting of continuation data throughout the life of the swap.<sup>31</sup> In addition, the Data NPRM provides specific requirements for SDRs relating to (i) determining which counterparty must report to the SDR;<sup>32</sup> (ii) third party facilitation of swap data reporting;<sup>33</sup> (iii) reporting to a single SDR in connection with the reporting of swap data;<sup>34</sup> (iv) required data

Reporting Requirements, 75 FR 76574 (Dec. 8, 2010) (the "Data NPRM").

<sup>29</sup> Proposed § 48.1 defines a FBOT as "any board of trade, exchange or market located outside of the United States, its territories or possessions, whether incorporated or unincorporated, where foreign agreements, contracts or transactions are entered into." See Commission, Notice of Proposed Rulemaking: Registration of Foreign Boards of Trade, 75 FR 70974 (Nov. 19, 2010) (expected to be codified at 17 CFR part 48). Since 1996, FBOT requests to provide direct access to their electronic trading and order matching systems (trading systems) from within the U.S. have been addressed by Commission staff via the no-action process set forth in Commission Regulation 140.99. See, e.g., Deutsche Terminborse, CFTC No-Action Letter, 1994-1996 Transfer Binder], Comm. Fut. L. Rep. (CCH) ¶ 26,669 (Feb. 29, 1996), available at <http://www.cftc.gov/ucm/groups/public/@lrllettergeneral/documents/letter/96-28.pdf>.

<sup>30</sup> As detailed in the Data NPRM, SDRs will also be required by proposed § 45.4(a) to issue unique swap identifiers ("USIs"), used to identify each particular swap transaction, when both counterparties to a swap are not SDs or MSPs. The SDR would be required to transmit the USI to each counterparty and DCO (if applicable) involved in the swap as soon as technologically practicable.

<sup>31</sup> See proposed § 45.3(b) detailed in the Data NPRM, *supra* note 28.

<sup>32</sup> Proposed § 45.5 establishes a mechanism for counterparties to follow in choosing the counterparty to report in situations where both counterparties have the same hierarchical status, in order to prevent confusion or delay concerning this choice. Where both counterparties are SDs, or both are MSPs, or both are non-SD/MSP counterparties, the proposed regulations require the counterparties to agree as one term of their swap transaction which counterparty will fulfill reporting obligations with respect to that swap. In addition, and notwithstanding the other provisions in proposed § 45.5, where only one counterparty to a swap is a U.S. person, the proposed Regulation would require the U.S. person to be the reporting counterparty.

<sup>33</sup> The Commission in proposed § 45.6 permits registered entities and counterparties to contract with third-party service providers to facilitate their reporting obligations. However, registered entities and counterparties remain fully responsible for their reporting obligations.

<sup>34</sup> Proposed § 45.7 would require that all swap data for a given swap must be reported to the SDR to which required primary economic terms data for that swap is first reported. The SDR receiving the initial report must transmit its own identity, together with the USI for the swap to each counterparty to the swap, to the SEF or DCM, if any, on which the swap was executed, and to the DCO, if any, to which the swap is submitted for clearing.

standards; and (v) the reporting of errors and omissions.

As part of proposed § 49.10, market participants will be required to fulfill their reporting obligations to SDRs in a reliable, secure, and efficient manner. Proposed § 49.10 specifically requires that SDRs adopt policies and procedures that will enable the SDR to electronically accept data and other regulatory information.<sup>35</sup> These policies and procedures must provide specific technological protocols for market participants in submitting swaps data to the SDR.

Proposed § 49.10 will also require SDRs to accept all swaps in an asset classes for which they have registered. The requirement is intended to minimize the number of swaps that are not accepted by any SDR by enabling market participants to easily identify a SDR that accepts particular asset classes. As described in proposed § 49.3 relating to registration, each SDR applying for registration on Form SDR will be required to specify the specific asset classes for which it will accept swap data. Proposed § 49.2(a)(2) defines the term "asset class" as those swaps in a particular broad category of goods, services or commodities underlying a swap. The asset classes include credit, equity, interest rates, currency,<sup>36</sup> other commodities and such other asset classes as may be determined by the

Thereafter, the proposed Regulation requires that all data reported for the swap by any registered entity or any counterparty to the swap, and all corrections of errors and omissions in previously reported data, must be reported to that same SDR (or to its successor in the event that it ceases to operate).

<sup>35</sup> See Section 21(c)(1) of the CEA, 7 U.S.C. 24a(c)(1).

<sup>36</sup> Section 1a(47)(iii) of the CEA states:

Notwithstanding a written determination by the Secretary under clause (i), all foreign exchange swaps and foreign exchange forwards shall be reported to either a swap data repository, or, if there is no swap data repository that would accept such swaps or forwards, to the Commission pursuant to section 4r within such time period as the Commission may by rule or regulation prescribe.

7 U.S.C. 1a(47)(E)(iii). Clause (i) of Section 1a(47)(E) provides:

Foreign exchange swaps and foreign exchange forwards shall be considered swaps under this paragraph unless the Secretary makes a written determination under section 1b that either foreign exchange swaps or foreign exchange forwards or both—

(I) should be not be regulated as swaps under this Act; and

(II) are not structured to evade the Dodd-Frank Wall Street Reform and Consumer Protection Act in violation of any rule promulgated by the Commission pursuant to section 721(c) of that Act.

7 U.S.C. 1a(47)(E)(iii).

See also, Department of the Treasury, Notice and Request for Comments: Determination of Foreign Exchange Swaps and Forwards, 75 FR 66829 (Oct. 29, 2010) and 75 FR 66426 (Oct. 28, 2010).

Commission.<sup>37</sup> In proposing these five major asset categories, the Commission considered market statistics that distinguish between those general types of underlying instruments, as well as market infrastructures that have been established for these five types of instruments. The first category would encompass the underlying of any swap which is based, in whole or in part, on one or more reference rates, such as swaps of payments determined by fixed and floating rates. The second category would encompass the underlying of any swap that is based, in whole or in part, on rates of exchange between different currencies, changes in such rates or other aspects of such rates, including a foreign exchange option. The currency asset class includes foreign exchange swaps, as defined in Section 1a(25) of the CEA. The third category would encompass the underlying of any swap that is based, in whole or in part, on one or more broad-based indices related to instruments of indebtedness, including but not limited to any swap that is an index credit default swap or a total return swap on one or more indices of debt instruments.<sup>38</sup> The fourth category would encompass the underlying of any swap that is based, in whole or in part, on one or more broad-based indices of equity securities, such as a total return swap on one or more equity indices. The fifth category would encompass the underlying of any swap not included in the interest rate, currency, credit or equity asset class categories, including, without limitation, any swap for which the primary underlying notional item is a physical commodity or the price or any other aspect of a physical commodity.

In addition, part 43 of the Commission's proposed regulations states that SDRs acting as "real-time disseminators" for the purposes of real-time reporting may require additional information to (1) match the real-time swap transaction and pricing data to data reported to the SDR; and/or (2) confirm that parties to a swap have reported in a timely manner pursuant to Section 2(a)(13)(F) of the CEA. Such additional information requested by an SDR acting as a real-time disseminator may include a transaction identification

<sup>37</sup> As detailed in proposed § 49.27, SDRs would be required to provide fair and open access to their services. The Commission submits that SDRs would not be permitted to discriminate in connection with the access to their services. As a result, market participants with sufficient technology resources for connectivity and the payment of fees would be granted access to the services of the SDR.

<sup>38</sup> This category does not encompass the underlying of a derivatives contract that is based on an instrument of indebtedness solely in connection with the swap's financing leg.

code, the names of the parties to the swap, or such other additional information as may be necessary.<sup>39</sup>

Additionally, part 43 of the Commission's proposed regulations will also require registered SDRs to calculate the appropriate minimum block size for swaps for purposes of real-time reporting.

Proposed § 49.10(c) would also require an SDR to establish sufficient policies and procedures to prevent a valid swap from being invalidated, altered or modified through the confirmation or recording process of the SDR. The Commission is concerned that a validly executed swap may, through contractual provisions or other practices of an SDR, be improperly invalidated. To this end, the Commission submits that SDRs should not be in a position to alter, amend or invalidate otherwise valid swaps of counterparties through the reporting process. In addition, proposed § 49.10(d) would also require SDRs to establish procedures and provide facilities for effectively resolving disputes over the accuracy of the swap data and positions that are recorded in the SDR. In this manner, disputes can be resolved quickly and efficiently so that the integrity and reliability of SDR data reporting and recordkeeping is facilitated.

*Request for Comment.* The Commission requests comment on the question set forth below on acceptance of data:

(1) Should the Commission require an SDR to accept all swaps of a given asset class? If not, what other mechanism should the Commission use to prevent "orphaned" swaps (*i.e.*, those swaps not accepted by an SDR)?

(2) How should the Commission address swaps that do not clearly belong to a particular asset class or that could arguably belong to more than one asset class? Should the Commission allow an SDR that accepts swaps in one asset class to accept any swap that arguably belongs to that asset class, but which could also belong to a second asset class, without requiring the SDR to then accept all swaps in the second asset class?

(3) Are there any circumstances under which a validly, executed swap should be modified or altered other than by the express agreement of the counterparties? What should be the role of the SDR in these circumstances? Should the SDR be able to alter or modify an existing swap based on a contractual arrangement with a reporting party?

<sup>39</sup> See proposed § 43.4(c) set forth in Notice of Proposed Rulemaking: Real Time Public Reporting of Swap Transaction Data, 75 FR 76140 (Dec. 7, 2010) (the "Real Time NPRM").

## 2. Confirmation of Data Accuracy— Section 21(c)(2) of the CEA

Section 21(c)(2) of the CEA, as adopted by Section 728 of the Dodd-Frank Act, requires SDRs to "confirm with both counterparties to the swap the accuracy of the data that was submitted."<sup>40</sup> Proposed § 49.11 provides that an SDR must establish and adopt policies and procedures to ensure the accuracy of swap data that is reported to an SDR by DCMs, DCOs, SEFs, FBOTs, SDs, MSPs and/or end-users or certain third party service providers such as confirmation or matching service providers acting on their behalf. The specific form and content of the swaps data will be established by the Commission in proposed part 45 of the Commission's regulations relating to data elements and standards. In particular, proposed § 49.11 requires that the SDR confirm with both counterparties to the swap the accuracy of the data and information submitted.<sup>41</sup>

Proposed § 49.11 provides that in connection with the required confirmation, the SDR must confirm with each counterparty to the swap and receive acknowledgement of all data submitted as well as corrections of any errors.<sup>42</sup> The acknowledgement and correction of errors must pertain to all information submitted by either counterparty or entity that has been delegated the reporting obligation. The SDR must keep a record of corrected errors and make that record available upon request to the Commission. Confirmation is unnecessary when the reporting obligation is borne by a SEF, DCM, DCO or a confirmation or matching service provider to whom the swap counterparty has delegated its reporting obligation. In these situations, the SDR must still ensure that the data and information it receives from such entity is accurate.

In addition, proposed part 43 of the Commission's regulations relating to real-time reporting requires that registered SDRs which accept and publicly disseminate swap transaction and pricing data to also disseminate any

<sup>40</sup> Section 21(c)(2) of the CEA, 7 U.S.C. 24a(c)(2).

<sup>41</sup> The Data NPRM details and defines "confirmation" and "confirmation data." The term confirmation is proposed in § 45.1(b) to mean "the full, signed legal confirmation by the counterparties of all of the terms of a swap." The term "confirmation data" is proposed in § 45.1(c) to mean "all of the terms of a swap matched and agreed upon by the counterparties in confirming the swap." See Data NPRM, *supra* note 28.

<sup>42</sup> This requirement does not apply to real-time public reporting. See proposed § 43.3(f), *supra* note 39.

cancellations and corrections to such data.<sup>43</sup>

## 3. Recordkeeping Requirements— Section 21(c)(3) of the CEA

Proposed § 49.12, which implements Section 21(c)(3) of the CEA, requires SDRs to, in accordance with the requirements of proposed § 45.2(f), maintain the books and records of all activity and data relating to swaps reported to the SDR.<sup>44</sup> Proposed § 45.2(f), relating to swap data recordkeeping requirements, requires that SDRs maintain reported swap data, consistent with the data elements described in proposed § 45.9, throughout the life of such swap transaction plus an additional five year period, during which time the swap data must be readily accessible by the SDR and available to the Commission via real-time electronic access. In addition, proposed § 45.2(f) would also require the SDR to provide subsequent archival storage.<sup>45</sup> This archival storage would require the SDR to be able to retrieve such swap data within three business days.

Consistent with proposed § 45.2(g), proposed § 49.12(c) would also require the books and records maintained by a SDR to be open to inspection upon request by any representative of the Commission, the United States Department of Justice, the SEC or by any representative of a prudential regulator as authorized by the Commission. The SDR would be required to provide copies to the Commission, either by electronic means, in hard copy, or both, as requested by the Commission.

Proposed § 49.12(d) would require each SDR that publicly disseminates swap data in real time to comply with the real time public reporting and recordkeeping requirements prescribed in part 43. In connection with real-time reporting, proposed § 49.2(a)(9) defines "position" to mean the gross and net notional amounts of open swap transactions aggregated by one or more attributes, including, but not limited to, the (i) underlying instrument, index, or reference entity; (ii) counterparty; (iii) asset class; (iv) long risk of the underlying instrument, index, or reference entity; and (v) short risk of the underlying instrument, index, or reference entity. Position data is required to be provided by SDRs to certain entities pursuant to Section

<sup>43</sup> See proposed Regulations 43.3(f)(3)–(4), *supra* note 39.

<sup>44</sup> See Data NPRM, *supra* note 28.

<sup>45</sup> The Commission in the Data NPRM is requesting comment relating to the time period in which an SDR should be required to maintain archival storage of swap data records.



2(a)(13) of the CEA.<sup>46</sup> The proposed term is designed to be sufficiently specific so that SDRs are aware of the types of positions that regulators may require an SDR to provide, while at the same time, provide enough flexibility to encompass the types of positions that regulators and the industry will find important as new types of swaps are developed.

The Dodd-Frank Act specifically directs the Commission to issue regulations to limit the amount of positions, other than bona fide hedge positions, that may be held by any person with respect to commodity futures and option contracts in exempt and agricultural commodities.<sup>47</sup> The Data NPRM accordingly has proposed data reporting requirements that would require all persons reporting to SDRs to include futures contract equivalents for each swap transaction.<sup>48</sup> As set forth below, the Commission requests comment on position data and how it should be maintained and monitored.

*Request for Comment.* The Commission requests comment on the questions set forth below on data maintenance:

(1) Is the appropriate time period for readily accessible access to the transaction data the life of the particular swap plus at least five years after expiration of the swap? Should the Commission provide different recordkeeping requirements for transaction data and position data? For transaction data, would ten years after expiration of the applicable swap be more appropriate and why? What would be the benefits and burdens associated with each of these time periods? Are there other retention periods that would be more appropriate?

(2) What is the appropriate time period for archival storage of SDR data and records?

(3) What are the costs/benefits of requiring longer data retention requirements?

(4) Should position data be maintained and monitored by SDRs? If not, in what manner should the Commission monitor speculative position limits that may include swaps? What would be the proper role of an SDR? What entity or entities should have the responsibility to aggregate and

maintain the position data for regulatory purposes?

(5) Should the Commission specify particular standards or procedures for calculating positions?

4. Direct Electronic Access to SDR by the Commission—Section 21(c)(4) of the CEA

A critical function and responsibility of an SDR as set forth in Section 21(c)(4)(A) of the CEA is to provide “direct electronic access” to the Commission or its designee, which could include another registered entity.<sup>49</sup> For purposes of proposed § 49.17, “direct electronic access” is defined as “an electronic system, platform or framework that provides internet or web-based access to real-time swap transaction data.”<sup>50</sup>

Proposed § 49.17 provides for two requirements in connection with “direct electronic access” that each SDR must develop. First, proposed § 49.17 would require a SDR to provide the Commission or its designee with connectivity and access to the SDR’s database of swap data and web-based services. Connectivity access and web-based services will allow the Commission or its designee to receive any and all information regarding a swap transaction that may be required for regulatory, examination and/or enforcement purposes on a real-time basis. Second, proposed § 49.17 would also require the SDR to electronically deliver to the Commission or its designee, certain data in the form and manner prescribed by the Commission.

Section 21(c)(5) of the CEA requires a registered SDR, at the direction of the Commission, to establish automated systems for monitoring, screening, and analyzing swap data. Pursuant to proposed § 49.17,<sup>51</sup> registered SDRs in connection with providing “direct electronic access” will also be required to provide the Commission with monitoring tools, capable of screening

and analyzing swap data, identical to those provided to compliance staff and the CCO of the registered SDR, including, but not limited to, access to the staff of the registered SDR and/or third party service providers or agents familiar with the operations of the registered SDR, who can provide assistance to the Commission regarding data structure and content, web-based services and various software.

Proposed § 49.17 further provides that the swap data provided to the Commission by a registered SDR will be accessible only by authorized persons. The Commission will provide registered SDRs with a list of authorized users on a quarterly basis so that proper security protocols may be efficiently implemented.

*Request for Comment.* The Commission requests comment on the following issues related to swap data access.

(1) What are the advantages and disadvantages of requiring SDRs to provide a direct streaming of the data to the Commission or its designee? Should the Commission require periodic electronic transfer of data as an alternative? If so, how often should such transfer occur (*e.g.*, hourly, a few times a day, every few days, once a week)?

(2) What are the advantages and disadvantages of requiring SDRs to provide a user interface that permits the Commission or its designee access to the data maintained by the SDR and that provides the Commission or its designee with the ability to query or analyze the data in the same manner that is available to the SDR?

(3) What would be the most feasible and cost-effective method for an SDR to provide direct electronic access to the Commission or its designee?

(4) Are there other methods of providing direct electronic access to the Commission or its designee that the Commission should consider?

(5) Are there specific reports or sets of data that the Commission should consider obtaining from SDRs to monitor risk exposures of individual counterparties to swap transactions, to monitor concentrations of risk exposures, or for other purposes?

(6) In addition to the data already subject to the Commission’s request, are there additional reports or sets of data that the Commission should consider obtaining from SDRs to evaluate systemic risk or that could be used for prudential supervision?

(7) Are there any other reports or sets of data that the Commission should consider obtaining from SDRs?

<sup>46</sup> See Section 727 of the Dodd-Frank Act.

<sup>47</sup> See Commission, Notice of Proposed Rulemaking: Position Reports for Physical Commodity Swaps, 75 FR 67258 (November 2, 2010). The Commission in this proposal would require position data for not only futures and option contracts but also for economically equivalent swaps.

<sup>48</sup> See Data NPRM, *supra* note 28.

<sup>49</sup> The term “registered entity” is defined in Section 1a(40) of the CEA to include (i) a board of trade designated as a contract market under Section 5 of the CEA; (ii) a DCO registered under Section 5b of the CEA; (iii) a SEF registered under Section 5h of the CEA; (iv) a SDR registered under Section 21 of the CEA; and (v) with respect to a contract that the Commission determines is a significant price discovery contract, any electronic trading facility on which the contract is executed or traded. 7 U.S.C. 1a(40).

<sup>50</sup> See proposed § 49.17(b)(3).

<sup>51</sup> Section 21(c)(5) of the CEA reads: “A swap data repository shall— \* \* \* at the direction of the Commission, establish automated systems for monitoring, screening, and analyzing swap data, including compliance and frequency of end user clearing exemption claims by individual and affiliated entities.”

7 U.S.C. 24a(c)(5).

### 5. Monitoring, Screening and Analyzing Swap Data—Section 21(c)(5) of the CEA

Section 21(c)(5) of the CEA, as amended by Section 728 of the Dodd-Frank Act, requires SDRs to implement such automated systems for “monitoring, screening, and analyzing swap data” as the Commission may direct. In addition, Section 21(c)(5) also requires SDRs to establish automated systems to monitor, screen, and analyze data for end-user clearing exemption claims by individuals and affiliated entities.” The Commission proposes to implement the requirements of Section 21(c)(5) through proposed §§ 49.13 and 49.14, which closely resembles the statutory text, by requiring SDRs to monitor, screen, and analyze swap data in their possession, as directed by the Commission, including data related to end-user clearing exemptions claims.<sup>52</sup> Proposed § 49.13 also requires SDRs to establish and maintain sufficient information technology, staff, and other resources to fulfill these tasks. Section 21 of the CEA reflects SDRs’ significant responsibilities in the new swaps market regulatory structure established by the Dodd-Frank Act. SDRs will function not only as warehouses for all swap transaction data, but also as potential sources of regulatory information for the Commission and other appropriate regulators.

By its terms, Section 21(c)(5), requires that such automated systems be established “at the direction of the Commission,” but does not provide for specific functions which SDRs should undertake with respect to the swap transaction data in their possession.<sup>53</sup> Similarly, while suggesting a role for SDRs in monitoring end-user clearing exemption claims, the only specific requirement of Section 21(c)(5) is that SDRs have systems in place capable of fulfilling such requirements as the Commission may assign. The Commission proposes to implement the requirements of Section 21(c)(5) via proposed § 49.13 which, as summarized below, requires that SDRs: (1) Monitor, screen, and analyze all swap data in their possession as the Commission may require; (2) develop systems and resources as necessary to execute any monitoring, screening, or analyzing functions assigned by the Commission;

<sup>52</sup> Section 2(h)(7) of the CEA, 7 U.S.C. 2(h)(7) provides that the clearing requirement of Section 2(h)(1)(A) shall not apply to a swap if one of the counterparties (i) is not a financial entity; (ii) is using swaps to hedge or mitigate commercial risk; and (iii) notifies the Commission, in a manner set forth by the Commission, how it generally meets the financial obligations associated with entering into non-cleared swaps.

<sup>53</sup> *Id.*

and (3) monitor, screen, and analyze swap transactions which are reported to the SDR as exempt from clearing pursuant to Section 2(h)(7) of the CEA (*i.e.*, end-user clearing exemption).

#### (a) Proposed § 49.13(a)

Proposed § 49.13(a) requires SDRs to monitor, screen, and analyze all swap data in their possession in such a manner as the Commission may require. An SDR’s duties in this respect include routine monitoring, screening, and analysis to accomplish any swap surveillance objectives established by the Commission, and specific monitoring, screening, and analysis tasks based on *ad hoc* requests by the Commission. The Commission expects that SDRs will be required to compile, extract, filter, and report information necessary to assist the Commission in the fulfillment of its regulatory obligations with respect to swap markets. However proposed § 49.13(b) only requires that SDRs undertake these functions at the Commission’s request. The Commission will consider specific tasks to be performed by SDRs at a later date, as its knowledge of the regulatory oversight needs with respect to the swap markets increases.

#### (b) Proposed § 49.13(b)

Proposed § 49.13(b) obligates SDRs to maintain sufficient information technology, staff, and other resources as necessary to fulfill any requirements that may arise through proposed § 49.13(a). It also requires SDRs to monitor their resources at least annually, and to make adjustments as needed to remain in regulatory compliance. Proposed § 49.13(b) is modeled on existing and proposed Commission requirements applicable to other registered entities. For example, part 38 of the Commission’s Regulations requires DCMs to have “arrangements and resources for effective trade practice surveillance” and “arrangements, resources and authority for effective rule enforcement.”<sup>54</sup> With respect to SDRs, the Commission also recognizes the necessity for adequate resource requirements given its expectation that SDRs may play a significant role in assisting the Commission to fulfill its regulatory mandate.

<sup>54</sup> See 17 CFR 38, Appendix B, Core Principle 2(a)(1)–(2). See also Notice of Proposed Rulemaking Relating to Core Principle and Other Requirements for Designated Contract Markets approved for publication by the Commission at an open meeting on Dec. 1, 2010 and expected to be published shortly in the **Federal Register** (to be codified at 17 CFR part 38).

#### (c) Proposed § 49.14

Pursuant to Section 2(h)(7) of the CEA, the Dodd-Frank Act creates a framework by which certain swap transactions may be exempt from the mandatory clearing requirement.<sup>55</sup> Swap transactions may be exempt from clearing if one of the counterparties to a swap is (i) not a financial entity;<sup>56</sup> (ii) is using swaps to hedge or mitigate commercial risk;<sup>57</sup> and (iii) notifies the Commission as to how it generally meets its financial obligations associated with entering into non-cleared swaps (the so-called “end-user” clearing exemption).<sup>58</sup> The Commission is expected in a subsequent proposed rulemaking to require that swap counterparties claiming the clearing exemption submit supplemental information along with transaction data and notification for any swap transaction claimed under the clearing exemption. Counterparties may be required to answer entity-related identification questions, identify how they generally expect to meet their financial obligations associated with the non-cleared swaps, identify whether the swap claimed under the exemption is being used to hedge or mitigate commercial risk, and identify whether the transaction was approved by a governing body of the entity.

Section 2(h)(7) of the CEA—and more specifically Section 2(h)(7)(F) of the CEA—also enables the Commission to monitor the use of clearing exemption claims and to prevent abuses by prescribing rules, issuing interpretations, or requesting information from persons claiming the clearing exemption.<sup>59</sup> Although exempt from clearing, counterparties claiming the clearing exemption must nonetheless report the swap transaction to an SDR, and must provide the notification required pursuant to Section 2(h)(7)(A)(iii) of the CEA, including information regarding how the counterparty generally meets its financial obligations associated with non-cleared swaps, and any additional information which the Commission deems necessary to prevent abuse pursuant to Section 2(h)(7)(F) of the CEA.

Proposed § 49.14 is designed to implement the Commission’s program

<sup>55</sup> See Section 2(h)(1)(A) of the CEA, 7 U.S.C. 2(h)(1)(A).

<sup>56</sup> See Section 2(h)(7)(A)(i) of the CEA, 7 U.S.C. 2(h)(7)(A)(i).

<sup>57</sup> See Section 2(h)(7)(A)(ii) of the CEA, 7 U.S.C. 2(h)(7)(A)(ii).

<sup>58</sup> See Section 2(h)(7)(A)(iii) of the CEA., 7 U.S.C. 2(h)(7)(A)(iii).

<sup>59</sup> See Section 2(h)(7)(F) of the CEA, 7 U.S.C. 2(h)(7)(F).

to monitor and prevent abuse of end-user clearing exemption claims. It requires SDRs to have automated systems capable of identifying, aggregating, sorting and filtering all swap transactions reported to an SDR that are exempt from clearing pursuant to Section 2(h)(7) of the CEA. Such systems are also required for information provided by end-users to the SDR regarding how an end-user meets the requirements of Sections 2(h)(7)(A)(i)–(iii) of the CEA and any regulations promulgated by the Commission thereunder. The Commission believes it is important to monitor the use and claims of end user exemptions to prevent abuse and assure compliance with the required disclosures. At this time the Commission is only requiring that SDRs establish the infrastructure to fulfill the requirements of this rule, and any requirements for specific data processing will be set forth at a later time.

*Request for Comment.* The Commission requests comment on the following issue relating to the monitoring of margin.

- Should the Commission require SDRs to establish automated systems for monitoring, screening, and analyzing the reporting of margin required, and of margin on deposit, as proposed in new part 23 of the Commissions Regulations?<sup>60</sup>

#### 6. Maintenance of Data Privacy—Section 21(c)(6) of the CEA

Proposed § 49.16 would implement the statutory requirements of Section 21(c)(6) of the CEA as adopted by Section 728 of the Dodd-Frank Act to maintain the privacy and confidentiality of swap data provided to the SDR. In particular, Section 21(c)(6) of the CEA provides that an SDR shall “maintain the privacy of any and all swap transaction information that the swap data repository receives from a SD, counterparty, or any other registered entity”.<sup>61</sup> Proposed § 49.16 would also partially implement Section 21(f)(3) of the CEA, as adopted by Section 728 of the Dodd-Frank Act.<sup>62</sup> Such section sets forth a conflicts of interest “core principle” applicable to an SDR.<sup>63</sup> As

detailed further below, the Commission has identified certain conflicts that may implicate access, disclosure, or use of SDR Information.<sup>64</sup> SDR Information includes any information that an SDR receives from a reporting entity (*i.e.*, the submitter(s) of the data, including, without limitation, market participants<sup>65</sup> such as DCMs, DCOs, SEFs, SDs, MSPs, end-users and/or any other counterparties). The Commission emphasizes that SDRs will receive two separate “streams” of data: (i) data related to real-time public reporting which by its nature is publicly available and (ii) core data that is intended for use by the Commission and other regulators which is subject to statutory confidential treatment. Accordingly, pursuant to Sections 21(c)(6) and 21(f)(3) (Core Principle 3—Conflicts of Interest) of the CEA, SDR information that is not subject to real-time public reporting should be treated as non-public and strictly confidential, so that it may not be accessed, disclosed, or used for purposes not related to SDR responsibilities under the CEA or the regulations thereunder, unless such use is explicitly agreed to by the reporting entities (*i.e.*, the submitter(s) of the data). However, aggregated data that cannot be attributed to individual transactions or market participants may be made publicly available by SDRs.

*Request for Comment.* The Commission requests comment on the questions set forth below regarding the limitations on the use of SDR Information.

(1) Has the Proposal correctly defined “SDR Information”?

(2) Are there any other concerns regarding the use of SDR Information that the Commission should consider?

(3) Would public availability of aggregated swap data be consistent with an SDR’s obligation to keep swap data confidential?

Proposed § 49.16 would require the SDR to establish, maintain, and enforce specific policies and procedures to protect the privacy or confidentiality of any and all SDR Information. This would also include privacy or confidentiality policies and procedures for the sharing of SDR Information with

SDR affiliates<sup>66</sup> as well as certain non-affiliated third parties.<sup>67</sup> As noted above, swap data that is publicly disseminated in real-time by SDRs pursuant to proposed part 43 of the Commission’s Regulation would not be subject to the privacy and confidentiality requirements set forth in proposed § 49.16.

Proposed § 49.16 would also require the SDR to establish and maintain safeguards, policies, and procedures that would, at a minimum, address the misappropriation or misuse of swap data that the Commission is prohibited (save for limited exceptions) from disclosing pursuant to Section 8 of the CEA (“Section 8 Material”).<sup>68</sup> Section 8 Material is that information or material described in Section 8(a) of the CEA that the Commission is prohibited from publishing if it “would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.”<sup>69</sup>

<sup>66</sup> The term “affiliate” is defined in proposed § 49.2(a)(1) to mean a person that “directly, or indirectly, controls, is controlled by, or is under common control with, the swap data repository.”

<sup>67</sup> The term “non-affiliated third party” is defined in proposed § 49.2(a)(7) to mean “any person except (i) swap data repository, (ii) the swap data repository’s affiliate, or (iii) a person employed by a swap data repository and any entity that is not the swap data repository’s affiliate (and “non-affiliated third party” includes such entity that jointly employs the person).”

<sup>68</sup> The term “Section 8 Material” is defined in proposed § 49.2(a)(13) as “the business transactions, trade data, or market positions of any person and trade secrets or names of customers.” The legislative history of Section 8 of the CEA reflects substantial Congressional concern with protecting the legitimate interests of certain market participants. In particular, Congressional members were concerned that “bona fide hedging transactions” and “legitimate” or “necessary” speculative transactions would be impracticable if disclosure of positions or transactions was permitted. Congress was also concerned that publication of the names and market positions of large traders would facilitate manipulation and place traders at a competitive disadvantage. Section 8(e) generally provides that “upon request,” the CFTC may furnish “any information” in its possession. 7 U.S.C. 12(e). *See generally* 61 Cong. Rec. 1321 (1921); Regulation of Grain Exchanges, Hearing on H.R. 8829 Before the H. Comm. on Agriculture, 73rd Cong. (1934).

<sup>69</sup> Section 8(a) of the CEA outlines the scope and authority of the Commission to publish or otherwise publicly disclose information that is gathered in the course of its investigative and market surveillance activities. While the Section authorizes the Commission to publish or disclose the information obtained through the use of its powers, it expressly provides that, except in specifically prescribed circumstances, the Commission may not lawfully:

publish data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers \* \* \*. 7 U.S.C. 12(a).

The statutory bar to disclosure of “business transactions, market positions and trade secrets” is qualified by several narrowly-defined exceptions set forth in Section 8(e) of the CEA. 7 U.S.C. 12(e). Section 8(e) generally provides that “upon request,”

<sup>60</sup> See Commission, Notice of Proposed Rulemaking: Regulations Establishing and Governing Duties of Swap Dealers and Major Swap Participants, 75 FR 71397 (Nov. 23, 2010).

<sup>61</sup> See Section 21(c)(6) of the CEA, 7 U.S.C. 24a(c)(6).

<sup>62</sup> See Section 21(f)(3) of the CEA, 7 U.S.C. 24a(f)(3).

<sup>63</sup> According to such “core principle,” each SDR shall “establish and enforce rules to minimize conflicts of interest in [its] decision-making process

\* \* \*” and “establish a process for resolving conflicts of interest \* \* \*” *Id.*

<sup>64</sup> The term “SDR Information” is defined in proposed § 49.2(a)(15) to mean “any information that the swap data repository maintains.” Proposed § 49.17(f) and (g) contain more specific prohibitions on access or use of SDR Information.

<sup>65</sup> The term “market participant” is defined in proposed § 49.2(a)(6) to mean any person participating in the swap market, including, but not limited to, DCMs, DCOs, SEFs, SDs, MSPs, and any other counterparties to a swap transaction.

Such information would typically include trade data, position data, business transactions, trade secrets and any other non-public personal information about a market participant or any of its customers. Moreover, proposed § 49.16 would require an SDR to also protect SDR information that is not Section 8 Material as well as intellectual property that may include trading strategies.

The Commission submits that the abovementioned SDR safeguards, policies, and procedures addressing privacy and confidentiality—as well as misuse and misappropriation—of data should provide (i) limitations on access related to Section 8 Material and other SDR Information; (ii) standards related to controlling persons associated with the SDR trading for their personal benefit or the benefit of others; and (iii) adequate oversight to ensure SDR compliance with proposed § 49.17. As set forth in proposed § 49.17 discussed below in the section entitled “Access to SDR Data,” the SDR may share swap data and information with certain appropriate domestic and foreign regulators. Commercial use of the data maintained by an SDR—exclusive of real-time reporting data—would be strictly circumscribed as provided in proposed § 49.17.

#### 7. Access to SDR Data—Section 21(c)(7) of the CEA

Section 21(c)(7)<sup>70</sup> of the CEA requires a registered SDR, on a confidential basis pursuant to Section 8 of the CEA, upon request and after notifying the Commission, to make available all

the CFTC may furnish “any information” in its possession “obtained in connection with its administration of the [CEA]” to another U.S. government department or agency, individual states, foreign futures authorities and foreign governments and any committee of the U.S. Congress that is “acting within the scope of its jurisdiction.” *Id.* In addition, Section 8(e) also provides an exception for information that was previously disclosed publicly and Section 8(b) permits disclosure of Section 8 Material in connection with congressional, administrative or judicial proceedings. *Id.*

<sup>70</sup> Section 21(c)(7) of the CEA reads:

A swap data repository shall— \* \* \* on a confidential basis pursuant to Section 8, upon request, and after notifying the Commission of the request, make available all data obtained by the swap data repository, including individual counterparty trade and position data, to—(A) each appropriate prudential regulator; (B) the Financial Stability Oversight Council; (C) the Securities and Exchange Commission; (D) the Department of Justice; and (E) any other person that the Commission determines to be appropriate \* \* \*.

<sup>71</sup> U.S.C. 24a(c)(7). Included in the definition of Appropriate Domestic Regulators are all domestic entities listed in Section 21(c)(7) and other persons that the Commission has determined to be appropriate.

data<sup>71</sup> obtained by the registered SDR, to “Appropriate Domestic Regulators” and “Appropriate Foreign Regulators.”

(a) *Appropriate Domestic Regulator.* An “Appropriate Domestic Regulator” is defined in proposed § 49.17 as (i) the SEC; (ii) each prudential regulator identified in Section 1a(39) of the CEA with respect to requests related to any of such regulator’s statutory authorities, without limitation to the activities listed for each regulator in Section 1a(39); (iii) the Financial Stability Oversight Council (“FSOC”);<sup>72</sup> (iv) the Department of Justice; (v) the Federal Reserve Bank of New York (“FRBNY”); (vi) the Office of Financial Research (“OFR”)<sup>73</sup> and (vii) any other person the Commission deems appropriate.<sup>74</sup>

Although Section 21(c)(7) of the CEA does not specifically provide for the sharing of information between an SDR and the FRBNY or OFR, the Commission in proposed § 49.17 is proposing to deem the FRBNY and OFR as “appropriate” persons under Section 21(c)(7) of the CEA. The FRBNY is one of 12 regional Federal Reserve Banks, which together with the Board of Governors of the Federal Reserve System comprise the Federal Reserve System. Each of the Federal Reserve Banks has features and/or characteristics of private corporations

<sup>71</sup> The sharing of data with an Appropriate Domestic Regulator by a registered SDR is subject to the confidentiality and indemnification restrictions in Section 21(d) of the CEA, 7 U.S.C. 24a(d).

<sup>72</sup> FSOC consists of the Department of the Treasury (“Treasury”), the Board of Governors of the Federal Reserve System (the “Fed”), the Office of the Comptroller of the Currency (“OCC”), the Bureau of Consumer Financial Protection, the SEC, the Commission, the Federal Deposit Insurance Corporation (“FDIC”), the Federal Housing Financial Agency, National Credit Union Administration Board and an independent member appointed by the President, by and with the advice and consent of the Senate, having insurance expertise.

<sup>73</sup> Under Section 152 of the Dodd-Frank Act, OFR will be established within the Department of the Treasury. OFR is intended to help facilitate improved financial market data gathering and analyses for financial regulators, including the new FSOC, which is responsible for monitoring the financial system as a whole in order to promote financial stability. OFR will support the FSOC and its member agencies by providing them with better financial data, information, and analysis so that policymakers and market participants have a more complete understanding of risk in the financial system. The data and analysis provided by the OFR will enhance the ability to identify emerging threats in financial markets, and will help ensure that the government has the information and analytical tools it needs to respond appropriately to future crises.

<sup>74</sup> The definition of “Appropriate Domestic Regulator” set forth above specifically includes those federal agencies or departments that are identified as prudential regulators in Section 1a(39) of the CEA. Each prudential regulator will have access to all data related to any of its statutory authorities, without limitation to the activities listed for each regulator in Section 1a(39).

and quasi-public federal agencies.<sup>75</sup> OFR will be an office within the Department of the Treasury with the primary function to support the FSOC in the monitoring and containment of systemic risk. OFR will also be a resource for the FSOC and all of its member agencies. In particular, OFR will support the agencies in their efforts to supervise financial institutions and the financial system as well as in their work to implement the Act. In addition, regulatory agencies will have access to new data collected by the OFR, which will improve regulators’ ability to monitor risks within their respective focus areas.

(b) *Appropriate Foreign Regulator.* An “Appropriate Foreign Regulator” is defined in proposed § 49.17 and contains a two-part analysis. First, proposed § 49.17 defines as an Appropriate Foreign Regulator as those “foreign regulators”<sup>76</sup> with an existing memorandum of understanding (“MOU”) or other similar type of information sharing arrangement executed with the Commission. Second, proposed § 49.17 provides that foreign regulators without an MOU with the Commission may be deemed “Appropriate Foreign Regulators” as determined on a case-by-case basis by the Commission.

Proposed § 49.17 details the filing procedures for foreign regulators who do not currently have an MOU with the Commission to obtain the status of an “Appropriate Foreign Regulator.” The foreign regulator in its application<sup>77</sup> filed with the Commission is required to provide sufficient facts and details to permit the Commission to analyze whether the foreign regulator has appropriate confidentiality procedures and whether the foreign regulator is otherwise subject to local laws, regulations and/or customs that would require disclosure of information in contravention of the CEA.

In its review of applications filed by foreign regulators seeking the status of an “Appropriate Regulator” under proposed § 49.17, the Commission must

<sup>75</sup> The FRBNY oversees the Second Federal Reserve District, which includes the state of New York, the 12 northern counties of the state of New Jersey, Fairfield County in the state of Connecticut, Puerto Rico and the U.S. Virgin Islands. Though it serves a geographically small area compared with those of other Federal Reserve Banks, the FRBNY is the largest Reserve Bank as measured by assets and volume of activity.

<sup>76</sup> The term “foreign regulator” is defined in proposed § 49.2(a)(4) to mean “a foreign futures authority as defined in Section 1a(26) of the Commodity Exchange Act, foreign financial supervisors, foreign central banks and foreign ministries.”

<sup>77</sup> The form and manner of this filing will be prescribed by the Commission.

be satisfied that any information potentially provided by a registered SDR will not be disclosed except in limited circumstances such as an adjudicatory action or proceeding involving the foreign regulator.<sup>78</sup> In addition, the Commission on an ongoing basis, reserves the right in connection with any determination of an “Appropriate Foreign Regulator” to revisit or reassess a prior determination consistent with the CEA.

(c) *Procedure for Gaining Access to an SDR.* Pursuant to proposed § 49.17, an Appropriate Domestic Regulator or Appropriate Foreign Regulator will be required to request access with the registered SDR. The request will set forth in sufficient detail the basis for such request. The Appropriate Domestic Regulator or Appropriate Foreign Regulator must also certify (i) its statutory authority and (ii) that it is acting within the scope of its jurisdiction.

A registered SDR must notify the Commission promptly by electronic means of any request received from an Appropriate Domestic Regulator or Appropriate Foreign Regulator. The registered SDR will then provide access to the requested swap data if satisfied that the Appropriate Domestic or Appropriate Foreign Regulator is acting within the scope of its authority.

*Request for Comment.* The Commission requests the following comments relating to regulator access of data maintained by SDRs.

(1) What mechanisms or other processes should the Commission consider in connection with Appropriate Domestic Regulators and/or Appropriate Foreign Regulators access to the data maintained by SDRs?

(2) Should the Commission provide that Appropriate Domestic Regulators and Appropriate Foreign Regulators specifically request access from an SDR for each individual data request? Or, should the Commission provide for a single prospective data access request to SDRs by Appropriate Domestic and Foreign Regulators followed up by a certification at intervals determined by the Commission? For each specific instance of access or regulatory use of an SDR’s data by Appropriate Domestic Regulators and Appropriate Foreign Regulators, should the Commission be notified in each case by the SDR?

(3) Given the regulatory outlines set forth by the Dodd-Frank Act, what would be an appropriate way for regulators to access the swap data held by SDRs for the purpose of fulfilling their regulatory responsibilities?

(d) *Confidentiality and Indemnification Agreement.* Consistent with proposed § 49.18, the Appropriate Domestic Regulator or Appropriate Foreign Regulator prior to receipt of any requested data or information from a registered SDR must execute a “Confidentiality and Indemnification Agreement” with the registered SDR. This requirement is mandated by Section 21(d) of the CEA and applies to those entities set forth in Section 21(c)(7) of the CEA. Upon execution of a Confidentiality and Indemnification Agreement with a registered SDR, the Appropriate Domestic Regulator or Appropriate Foreign Regulator is required to notify and provide a copy of the Confidentiality and Indemnification Agreement to the Commission.

The specific entities identified in Section 21(c)(7) include: (i) Each appropriate prudential regulator specified in Section 1a(39) of the; (ii) FSOC; (iii) SEC; (iv) Department of Justice; and (v) any other person the Commission deems appropriate, including foreign financial supervisors, foreign central banks and foreign ministries. Pursuant to the general authority of the Commission as set forth in Section 21(c)(7)(E) of the CEA to deem any other person “appropriate,” the Commission proposes, for purposes of this Regulation, to deem “appropriate” the FRBNY, OFR and those foreign regulators with an existing MOU or other similar type of information sharing arrangement executed with the Commission.<sup>79</sup>

Proposed § 49.18 implementing Section 21(d) of the CEA requires that the Confidentiality and Indemnification Agreement executed with each Appropriate Domestic Regulator and/or Appropriate Foreign Regulator provide that such entity abide by the confidentiality requirements set forth in Section 8 of the CEA relating to the swap data that is to be provided by the registered SDR. Moreover, the Confidentiality and Indemnification Agreement must also provide that each Section 21(c)(7) entity agree to indemnify the registered SDR and the Commission for any expenses arising from litigation relating to the information provided under Section 8 of the CEA.

The Commission is mindful of the potential difficulty that certain domestic and foreign regulators may have in executing a Confidentiality and Indemnification Agreement with an

<sup>79</sup> Any other Foreign Regulator that would require access to SDR data would need to be specifically approved and deemed “appropriate” by the Commission as set forth in proposed § 49.17.

SDR pursuant to Section 21(d) of the CEA<sup>80</sup> due to various statutory laws, regulations and/or customs. This provision could have the unintended effect of inhibiting access to the data maintained by SDRs, and, possibly hindering the ability of certain foreign regulators to fulfill their corresponding statutory mandates. To promote and ensure international harmonization as envisioned in Section 752 of the Dodd-Frank Act, the Commission continues to coordinate with its foreign regulatory counterparts on pending and proposed regulatory initiatives. To the extent consistent with the regulatory framework set forth in the Dodd-Frank Act, and the CEA generally, the Commission will endeavor to provide sufficient access to SDR data to appropriate domestic and foreign regulatory authorities.

The Commission believes that access to the swap data maintained by SDR will assist regulators to, among other things, monitor risk exposures of individual counterparties to swap and swap transactions, monitor concentrations of risk exposures, and evaluate systemic risks. The Commission notes that, pursuant to Section 8(e) of the CEA, the Commission may share confidential information in its possession obtained in connection with its administration of the CEA to “any foreign futures authority, department or agency of any foreign government or any political subdivision thereof” acting within the scope of their jurisdiction.<sup>81</sup>

*Request for Comment:* The Commission requests comment from those regulators that may be affected by Section 21(d) of the CEA and the proposed related Regulations. In particular, the Commission requests comment on the following questions:

- Are the proposed time frames for Commission response relating to access to swap data maintained by a SDR by Appropriate Domestic and Appropriate Foreign Regulators reasonable? Should the Commission provide for an expedited or emergency procedure?

<sup>80</sup> Section 21(d) of the CEA provides:

Before the swap data repository may share information with any entity described in subsection (c)(7)–(1) the swap data repository shall receive a written agreement from each entity stating that the entity shall abide by the confidentiality requirements described in Section 8 relating to the information on swap transactions that is provided; and (2) each entity shall agree to indemnify the swap data repository and the Commission for any expenses arising from litigation related to the information provided under section 8.

See 7 U.S.C. 24a(d).

<sup>81</sup> See 7 U.S.C. 12(e).

<sup>78</sup> See *supra* text accompanying note 69.

(e) *Access to SDRs by Third Party Service Providers.* Section 21(c)(3)<sup>82</sup> of the CEA directs registered SDRs to maintain data in such form and manner as may be required by the Commission. Section 21(c)(6)<sup>83</sup> of the CEA requires registered SDRs to maintain the privacy of any and all swap data that the registered SDR receives from a SD, counterparty, or any other registered entity. The operations of registered SDRs may require them to provide occasional access to data and information to third party service providers for the purpose of obtaining certain technology and SDR infrastructure services. Proposed § 49.17 permits such access provided these third party service providers have implemented strict confidentiality procedures that protect data and information from improper disclosure. Prior to swap data access, third party service providers will be required to execute a “Confidentiality Agreement” setting forth minimum confidentiality procedures and permissible uses of data received.

(f) *Access to SDRs by Market Participants.* Section 21(c)(6) of the CEA requires registered SDRs to maintain the privacy and confidentiality of any and all swap transaction information that the registered SDR receives from a SD, counterparty, or any other registered entity. As mentioned above, Section 21(f)(3)<sup>84</sup> of the CEA requires an SDR to establish and enforce rules to mitigate conflicts of interest, among other things. As detailed further below, the Commission has identified certain conflicts that may implicate access to SDR Information. Consequently, in partial implementation of Sections 21(c)(6) and 21(f)(3) of the CEA, proposed § 49.17 generally prohibits access to swaps data maintained by a registered SDR by market participants, such as commercial end-users, SDs and MSPs unless the specific data was originally submitted by such party.

(g) *Commercial Use of Data Maintained by the SDR.* As outlined by Sections 21(c)(6) and (c)(7) of the CEA, Congress in the Dodd-Frank Act was concerned with maintaining the confidentiality of information provided to registered SDRs by SDs,

counterparties or any other Commission-registered entity.<sup>85</sup> Furthermore, as outlined in Section 21(f)(3) of the CEA, Congress in the Dodd-Frank Act was concerned that conflicts of interest may affect SDR operations. As detailed below, the Commission has identified certain conflicts of interest that may implicate commercial use of SDR Information (other than swap data subject to real-time public dissemination). In response to concerns reflected in Sections 21(c)(6), 21(c)(7), and 21(f)(3), the Commission believes that “commercial use” of any data submitted and maintained by an SDR must be severely restricted. The privacy and confidentiality concerns set forth in Section 21(c)(6) of the CEA do not apply to the swap data subject to proposed part 43 of the Commission’s Regulations, which set forth the requirements for real-time public reporting of swap data by SDRs.

Therefore, in partial implementation of Sections 21(c)(6), 21(c)(7), and 21(f)(3), proposed § 49.17 generally provides that SDR Information (as defined in proposed § 49.2(a)(13)) may not be used for commercial or business purposes by the registered SDR or any of its affiliated entities. In connection with its obligation to maintain the privacy and confidentiality of SDR Information as outlined in Sections 21(c)(6), 21(c)(7), and 21(f)(3) of the CEA, registered SDRs are required to adopt and implement adequate “firewalls” to protect the swaps data required to be maintained under proposed § 45.2<sup>86</sup> and Section 21(c)(3) of the CEA from any improper, commercial use.

Proposed § 49.17 permits a limited exception to the commercial use restrictions for market participants, such as end-users, SDs and MSPs, who submit SDR Information maintained by the registered SDR. The exception requires that the registered SDR must receive the express written consent of the counterparties to the swap. The Commission is concerned that a registered SDR may attempt to use this limited “commercial use” exception as a condition for the reporting of end-users, SDs and/or MSPs swap transactions. Accordingly, in proposed § 49.27 the Commission submits that a registered SDR must be equitable and must not discriminate against submitters of data regardless of whether such a submitter has agreed to any “commercial use” of its data.

8. Emergency Procedures—Section 21(c)(8) of the CEA

Section 21(c)(8) of the CEA, as amended by Section 728 of the Dodd-Frank Act, provides that a “swap data repository shall establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery that allows for the timely recovery and resumption of operations and the fulfillment of the responsibilities and obligations of the organization.”<sup>87</sup> Section 21(c)(8) of the CEA reflects SDRs’ critical role as central storehouses of information in the new swap market structure established by the Dodd-Frank Act. In particular, it recognizes that SDRs must be available to meet their statutory obligations in all circumstances, and that swap data must be readily accessible to the Commission and other regulators even in emergency situations. To effectuate the purposes of Section 21(c)(8) of the CEA, the Commission proposes § 49.23, which requires SDRs to adopt specific policies and procedures for the responsible exercise of emergency authority in the event of natural, man-made, information technology, and other, emergencies.

While SDRs are a new type of registered entity created by Dodd-Frank, proposed § 49.23 applies existing emergency procedure concepts borrowed from analogues in the Commission’s regulatory experience. For example, prior to the enactment of the Dodd-Frank Act, DCMs were subject to former DCM Core Principle 6, which contemplated exigent circumstances that might justify the exercise of emergency authority by a DCM.<sup>88</sup> The application guidance for former DCM Core Principle 6 set forth the Commission’s requirements for emergency procedures. It stated, in part, that a DCM “should have clear procedures and guidelines for contract market decision-making regarding emergency intervention in the market, including procedures and guidelines to avoid conflicts of interest while carrying out such decision making.”<sup>89</sup> The application guidance also stated that a DCM’s procedures and guidelines for the exercise of emergency authority should include “notifying the Commission of the exercise of [emergency authority], explaining how conflicts of interest are minimized, and documenting the contract market’s decision-making process and the

<sup>82</sup> Section 21(c)(3) reads: “A swap data repository shall— \* \* \* maintain the data described in paragraph (1) in such form, in such manner, and for such period as may be required by the Commission.” 7 U.S.C. 24a(c)(3).

<sup>83</sup> Section 21(c)(6) reads: “A swap data repository shall— \* \* \* maintain the privacy of any and all swap transaction information that the swap data repository receives from a swap dealer, counterparty, or any other registered entity.” 7 U.S.C. 24a(c)(6).

<sup>84</sup> See *supra* text accompanying notes 62–63.

<sup>85</sup> 7 U.S.C. 24a(c)(6)–(7).

<sup>86</sup> See Data NPRM, *supra* note 28.

<sup>87</sup> Section 21(c)(8) of the CEA. 7 U.S.C. 24a(c)(8).

<sup>88</sup> Former Section 5(d)(6) of the CEA, 7 U.S.C. 7(d)(6).

<sup>89</sup> 17 CFR part 38, App. B, Application Guidance for former Core Principle 6.

reasons for using its emergency authority.”<sup>90</sup>

The Commission has generally found that procedures implemented by DCMs in response to former DCM Core Principle 6 allowed for adequate responses in the event of emergencies.<sup>91</sup> Accordingly, the Commission is proposing new application guidance and acceptable practices to implement emergency procedures core principles for both DCMs and SEFs that are modeled on former DCM Core Principle 6 and its application guidance.<sup>92</sup> Similarly, the Commission’s proposed § 49.23 for SDR emergency procedures is modeled on relevant provisions of the statutory text, application guidance, and acceptable practices, as applicable, for the former and current DCM and SEF emergency procedures core principles.

(a) Emergency Policies and Procedures Required—Proposed § 49.23(a)

Proposed § 49.23(a) requires that an SDR establish policies and procedures for the exercise of emergency authority in the event of any emergency, including but not limited to, natural, man-made, and information technology emergencies. Proposed § 49.23(a) will mirror language in the application guidance for former DCM Core Principle 6, which states that DCMs must “have clear procedures and guidelines for contract market decision-making regarding emergency intervention. \* \* \*” Similar language is also proposed in the guidance and acceptable practices for new DCM Core Principle 6 and new SEF Core Principle 8. Proposed § 49.23(a) and the new DCM Core Principle 6 and new SEF Core Principle 8 reflect the Commission’s view that these policies must be transparent to the Commission and to market participants whose transaction data resides at the SDR.

<sup>90</sup> *Id.*

<sup>91</sup> The Commission notes that former DCM Core Principle 6, and its successor Core Principle 6 pursuant to Section 735 of the Dodd-Frank Act, both incorporate market-specific emergencies and responses into their statutory requirements. For example, under both core principles, a DCM’s emergency authority must include the authority to liquidate or transfer open positions in any contract; the authority to suspend or curtail trading in any contract; and the authority to require market participants in any contract to meet special margin requirements. The emergency policies and procedures required of SDRs pursuant to proposed § 49.23 do not incorporate these market-specific concepts as they are not relevant to SDRs.

<sup>92</sup> The new DCM emergency procedures core principle is also enumerated as DCM Core Principle 6 and codified in Section 5(d)(6) of the CEA, 7 U.S.C. 7(d)(6); it is substantively similar to its predecessor. The new SEF emergency procedures core principle is enumerated as SEF Core Principle 8 and codified in Section 5h(f)(8) of the CEA, 7 U.S.C. 7b–3(f)(8).

(b) Invocation of Emergency Authority—Proposed § 49.23(b)

Proposed § 49.23(b) requires an SDR to enumerate the circumstances under which it is authorized to invoke its emergency authority, and the procedures that it must follow to declare an emergency. Such policies and procedures must also address the range of measures that an SDR is authorized to take when exercising emergency authority.

Proposed § 49.23(b) helps ensure that an SDR can respond quickly to an emergency but reduces the possibility that SDRs will exercise such authority arbitrarily. Similar to the Commission’s view on the development of emergency policies and procedures, proposed § 49.23(b) reflects the Commission’s view that the use of emergency authority should be governed by transparent standards and be predictable to the Commission and to swap market participants.

(c) Designation of Persons Authorized to Act in an Emergency—Proposed § 49.23(c)

Proposed § 49.23(c) requires an SDR to designate, and notify the Commission of, one or more persons authorized to exercise emergency authority on its behalf. In the event that such designated persons are unavailable, an SDR must also establish a chain of command. The Commission believes that the proposed regulation reduces the possibility that emergency situations will be exacerbated by a lack of leadership and inadequate line of decisional authority.

(d) Conflicts of Interest—Proposed § 49.23(d)

Proposed § 49.23(d) requires that SDR policies and procedures include provisions to avoid conflicts of interest in any decision made pursuant to emergency authority. SDR policies and procedures must also require that the SDR’s CCO be consulted in any emergency decision that may raise potential conflicts of interest.<sup>93</sup> The Commission believes that specific policies and procedures designed to avoid conflicts in the exercise of emergency authority will focus SDR decision-makers’ attention and guide their decisions in ways that minimize

<sup>93</sup> Section 21(e) of the CEA, 7 U.S.C. 24a(e) creates the position of CCO and prescribes detailed responsibilities to CCOs. Section 21(e)(2)(C) tasks CCOs with “resolv[ing] any conflicts of interest that may arise” in consultation with the SDR’s board of directors, a body performing a similar function as the board, or the senior officer of the SDR. Proposed § 49.26 specifically implements new Section 21(e), 7 U.S.C. 24a(2)(C).

the risk for actual or perceived conflicts of interest.

(e) Notification to the Commission—Proposed § 49.23(e)

Proposed § 49.23(e) requires that an SDR’s policies and procedures include provisions for the exercise of emergency authority to notify the Commission as soon as reasonably practicable regarding any invocation of emergency authority by the SDR. When notifying the Commission of an exercise of emergency authority, an SDR must explain the reasons for taking such emergency action, explain how conflicts of interest were minimized, and document the decision-making process. In addition, any underlying documentation must be made available to the Commission upon request. These proposed provisions will help keep the Commission informed of emergency situations, allow the Commission to participate as necessary, and facilitate any review that the Commission may wish to conduct at a later date.

*Request for Comment.* The Commission requests comment on the questions set forth below on SDR duties:

(1) Should the Commission impose any additional duties on SDRs? For example, should SDRs be required to provide downstream processing services or ancillary services (e.g., managing life-cycle events and asset servicing)?

(2) Should the Commission establish more specific requirements to avoid contract invalidation by an SDR?

C. Designation of Chief Compliance Officer

Section 21(e) of the CEA, as amended by Section 728 of the Dodd-Frank Act, creates an internal regulatory framework for all SDRs, with the position of CCO serving as a focal point for compliance with the CEA and applicable Commission Regulations. The three-part structure of Section 21(e) requires, first, that every SDR designate an individual to serve as CCO.<sup>94</sup> Second, it enumerates specific duties for CCOs and establishes their responsibilities within an SDR.<sup>95</sup> Third, it outlines the

<sup>94</sup> See Section 21(e)(1) of the CEA, 7 U.S.C. 24a(e)(1).

<sup>95</sup> See Section 21(e)(2) of the CEA, adopted as part of the Dodd-Frank Act, providing that a CCO shall:

(A) report directly to the board or to the senior officer of the swap data repository; (B) review the compliance of the swap data repository with respect to the requirements and core principles described in this section; (C) in consultation with the board of the swap data repository, a body performing a function similar to the board of the swap data repository, or the senior officer of the swap data repository, resolve any conflicts of interest that may arise; (D) be responsible for administering each policy and procedure that is required to be established pursuant to this section; (E) ensure

requirements of a mandatory annual report from SDRs to the Commission, which must be prepared and signed by an SDR's CCO.<sup>96</sup> The Commission proposes to implement Section 21(e) of the CEA through proposed § 49.22, which further develops the already robust CCO requirements enacted by the Dodd-Frank Act. Section 21(e) of the CEA and proposed § 49.22 are summarized below.

The first provision of Section 21(e)—21(e)(1)—provides only for the self-explanatory requirement that each SDR designate an individual to serve as its CCO. The second provision of Section 21(e) offers a detailed description of a CCO's role within an SDR. Specifically, Section 21(e)(2) includes seven enumerated duties incumbent upon all CCOs, and thereby outlines the internal regulatory structure of an SDR as contemplated by the Dodd-Frank Act. The enumerated duties of CCOs include: (1) Reporting directly to the SDR's board of directors or to its senior officer; (2) reviewing an SDR's compliance with the requirements and core principles described in Section 21; (3) resolving any conflicts of interest that may arise, in consultation with the board of directors or the senior officer of the SDR; (4) administering any policy or procedure that is required to be established by an SDR pursuant to Section 21; (5) ensuring compliance with the CEA and Commission Regulations as they pertain to agreements, contracts, or transactions entered into by an SDR; (6) establishing procedures for the remediation of noncompliance issues identified by the

compliance with this Act (including regulations) relating to agreements, contracts, or transactions, including each rule prescribed by the Commission under this section; (F) establish procedures for the remediation of noncompliance issues identified by the chief compliance officer through any—(i) compliance office review; (ii) look-back; (iii) internal or external audit finding; (iv) self-reported error; or (v) validated complaint; and (G) establish and follow appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.

<sup>7</sup> U.S.C. 24a(e)(2).

<sup>96</sup> See Section 21(e)(3)(A) of the CEA, adopted as part of the Dodd-Frank Act, providing that a CCO shall: (A) Annually prepare and sign a report that contains a description of—(i) the compliance of the swap data repository of the chief compliance officer with respect to this Act (including regulations); and (ii) each policy and procedure of the swap data repository of the chief compliance officer (including the code of ethics and conflict of interest policies of the swap data repository). (B) REQUIREMENTS.—A compliance report under subparagraph (A) shall—(i) accompany each appropriate financial report of the swap data repository that is required to be furnished to the Commission pursuant to this section; and (ii) include a certification that, under penalty of law, the compliance report is accurate and complete.

<sup>7</sup> U.S.C. 24a(e)(3)(A)–(B).

CCO; and (7) establishing and following appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.<sup>97</sup>

Finally, the third provision of Section 21(e)—21(e)(3)—requires CCOs to prepare and sign annual compliance reports on behalf of their SDRs. The annual compliance reports must describe an SDR's compliance with the CEA and Commission Regulations. They must also describe the policies and procedures of the SDR, including the code of ethics and conflict of interest policies. In addition, the annual compliance reports must include “a certification that, under penalty of law, the report is accurate and complete.”<sup>98</sup> The annual compliance report must be furnished to the Commission as it may prescribe.

Proposed § 49.22 develops each of these statutory provisions in greater detail and grants CCOs the regulatory authority necessary to fulfill responsibilities in each regard.

#### 1. Definition of Board of Directors—Proposed § 49.22(a)

Proposed § 49.22(a) defines “board of directors” as “the board of directors of a swap data repository or for those swap data repositories whose organizational structure does not include a board of directors, a body performing a function similar to a board of directors.” The proposed definition reflects the various forms of business associations which an SDR could conceivably take, including forms which do not include a corporate board of directors. It also reflects the flexibility in Section 728 of the Dodd-Frank Act, which refers, for example, to “a body performing a function similar to a board” in discussing the duties of a CCO pursuant to Section 21(e)(2)(C) of the CEA.

*Request for Comment.* The Commission requests comment on the following.

(1) Should the Commission develop additional rules around the types of bodies which may perform board-like functions at an SDR, depending on their business form?

(2) Should the proposed definition of board of directors appropriately address issues related to parent companies, subsidiaries, affiliates, and SDRs located in foreign jurisdictions? Does the proposed rule allow for sufficient flexibility with regard to an SDR's business structure?

<sup>97</sup> 7 U.S.C. 24a(e)(2).

<sup>98</sup> 7 U.S.C. 24a(e)(3)(B)(ii).

#### 2. Designation and qualifications of Chief Compliance Officer—Proposed § 49.22(b)

Proposed § 49.22(b)(1) requires an SDR to establish the position of CCO, designate an individual to serve in that capacity and provide that individual with the authority and resources to develop and enforce policies and procedures necessary to fulfill the duties set forth for CCOs in the Dodd-Frank Act and Commission regulations. In addition, proposed § 49.22(b)(1) provides that CCOs must have supervisory authority over all staff acting in furtherance of the CCO's statutory and regulatory obligations. In short, proposed § 49.22(b)(1) establishes CCOs as the focal-point of an SDR's regulatory compliance functions.

Proposed § 49.22(b)(2) details minimum competency standards for CCOs. It requires that CCOs have the background and skills necessary to fulfill the responsibilities of the position, and prohibits anyone who would be disqualified from registration under Sections 8a(2) or 8a(3) of the CEA from serving as a CCO. Although the CCO would not be required to register with the Commission, as the primary individual with responsibility for ensuring an SDR's legal compliance, the Commission believes that CCOs should meet the same standard as those individuals who are required to register, as set forth in the list of statutory disqualifications under Sections 8a(2) and (3) of the CEA. These standards largely consist of a high degree of responsibility and requirements relating to integrity and honesty in financial and business dealings.

The Commission is seeking comment on whether additional limitations should be placed on persons who may be designated as a CCO. For example, the function of the CCO and in-house or general counsel may have inherent tension between, for example, the duty to defend the swap data repository and duties as a CCO.

#### *Request for Comment.*

(1) The Commission requests comment on whether the provisions of proposed § 49.22(b)(1) are sufficient to ensure that a CCO has the authority and resources necessary to fulfill his or her statutory and regulatory obligations.

(2) The Commission also requests comment regarding the qualifications that should be required of a CCO, and whether the requirements expressed in proposed § 49.22(b)(2) are sufficient.

(3) Should there be additional restrictions placed on who is qualified to be designated as a CCO? The Commission requests comment on



whether restricting a CCO from serving as the General Counsel or other attorney within the legal department of a SDR would address conflict of interest concerns.

### 3. Appointment, Supervision, and Removal of Chief Compliance Officer—Proposed § 49.22(c)

Taken together, proposed §§ 49.22(c)(1), 49.22(c)(2), and 49.22(c)(3) provide the supervisory regime applicable to CCOs. Proposed § 49.22(c)(1) requires that a CCO be appointed by a majority of the SDR's board of directors or senior officer, and that a majority of the board or senior officer be responsible for approving the CCO's compensation. An SDR must notify the Commission within two business days of appointing a new CCO. The proposed regulation also requires the CCO to meet at least annually with the board of directors to discuss the effectiveness of the CCO's administration of the compliance policies adopted by the registrant. The meeting or meetings would create an opportunity for a CCO and the directors to speak freely about any sensitive issues of concern to any of them, including any reservations about the cooperativeness or compliance practices of the registrant's management. Finally, proposed § 49.22(c)(1) also provides that the senior officer of a SDR may assume responsibility for appointing the CCO and approving his or her compensation.

Proposed § 49.22(c)(2) addresses routine oversight of an SDR's CCO. It allows an SDR with a board of directors to grant oversight authority to either its board or to its senior officer. The proposed regulation is modeled on the terms of Section 21(e)(2)(A) of the CEA, which requires a CCO to "report directly to the board or to the senior officer of the swap data repository."

*Request for Comment.* The Commission requests comment regarding the appropriate reporting relationship for the CCO of an SDR that has both a senior officer and a board of directors.

(1) In such cases, should a CCO report to the SDR's board rather than to its senior officer?

(2) What potential conflicts of interest might arise if a CCO reports to the senior officer rather than to the board, and how might those conflicts be mitigated?

(3) In addition, the Commission requests comment regarding whether "senior officer" of an SDR should be a defined term, and if so, how the term should be defined.

### 4. Removal of CCO—Proposed § 49.22(c)(3)

Proposed § 49.22(c)(3) requires approval of a majority of an SDR's board of directors to remove a CCO. The Commission believes that these removal provisions will help insulate CCOs and their decision-making from day-to-day commercial pressures that they may otherwise experience. If an SDR does not have a board, the proposed regulation provides that the CCO may be removed by its senior officer. Proposed § 49.22(c)(3) also requires an SDR to notify the Commission in writing within two business days of the removal or voluntary departure of its CCO by providing a statement describing the circumstances surrounding his or her departure.<sup>99</sup> The Commission believes that this provision will help protect CCOs from undue influence or retaliatory termination by the board or the senior officer of the SDR.

Proposed §§ 49.22(c)(1) and 49.22(c)(3) seek to provide an SDR's CCO with a measure of independence from management in the performance of his or her duties, and to ensure that such duties are executed in the most effective and impartial manner possible.

*Request for Comment.* The Commission requests comment on any additional measures that should be required to adequately protect CCOs from undue influence in the performance of their duties. The Commission is particularly interested in how it might offer such protection to a CCO who reports to his or her senior officer, either at the SDR's choosing or because the SDR does not have a board of directors. In addition, the Commission also requests comment on whether the provision that would require a majority of a board of directors to remove the CCO is sufficiently specific.

### 5. Duties of the Chief Compliance Officer—Proposed § 49.22(d)

Proposed § 49.22(d) details the duties of a CCO, as well as his or her authority within an SDR. The proposed regulation codifies and expands upon the CCO duties already set forth in Section 21(e)(2) of the CEA. These duties include overseeing and reviewing compliance with the CEA and Commission regulations, as well as resolving, in consultation with the board of directors or the senior officer, any conflicts of interest that may arise.

<sup>99</sup> Upon the removal or voluntary departure of a CCO, proposed § 49.22(c)(3) requires an SDR to appoint an interim CCO immediately and a permanent replacement as soon as practicable. See proposed § 49.22(c)(3).

The proposed Regulation also lists a number of potential conflicts that may confront a CCO. The list of conflicts of interest indicates the types of conflicts that the Commission believes an SDR's CCOs should be aware of, but it is not exhaustive.

Proposed § 49.22(d) also requires that the CCO establish and administer a written code of ethics and policies and procedures designed to prevent violations of the CEA and Commission regulations. The Commission believes that such written documentation will serve as a useful guide for the SDR's management and staff, as well as for swap participants who will be submitting data to the SDR. It will also help the Commission to evaluate the SDR's compliance and adherence to its own internal standards. Finally, proposed § 49.22(d) requires that a CCO establish and follow procedures for the remediation and closing of any noncompliance issues that are identified. To assist the CCO in meeting this responsibility, proposed § 49.22(b)(1), summarized above, grants a CCO oversight authority over all compliance functions and staff acting in furtherance of those compliance functions. The CCO's authority would also extend to any activities performed by the SDR to verify that other entities are in compliance with applicable laws and regulations, such as the verification of the timeliness of certain swap data, pursuant to proposed § 49.15. The Commission recognizes that the staff that assists a CCO may not be dedicated to the CCO full-time; however, the proposed regulation would ensure that a CCO has authority over any staff and resources while they are acting in furtherance of compliance functions.

*Request for Comment.* The Commission requests comment regarding proposed § 49.22(d). Comments should address any additional CCO duties which the Commission should include in the proposed regulation. In addition, they should specifically address a CCO's role in managing conflicts of interest within an SDR, the types of conflicts which commenters believe might arise within an SDR, and how and by whom those conflicts should be resolved.

### 6. Preparation and Submission of Annual Compliance Report—Proposed §§ 49.22(e) and 49.22(f)

Section 21(e)(3) of the CEA requires a CCO to prepare an annual compliance report. As discussed above, the Commission believes that this annual compliance report should give the Commission a complete and accurate picture of an SDR's compliance

program. Proposed § 49.22(e) details the information that must be included in the annual compliance report. The report must include: (i) A description of the SDR's written policies and procedures, code of ethics and conflicts of interest policies; (ii) a detailed review of the SDR compliance with Section 21 of the CEA, including an assessment by the CCO of the effectiveness of the SDR's policies and procedures in ensuring compliance with Section 21 of the CEA and a discussion of areas for improvement; (iii) a description of any material changes to the policies and procedures that were made to these since the last annual compliance report; (iv) a description of the financial, managerial, operational, and staffing resources set aside for the SDR's compliance program; (v) a description of any material compliance matters, including instances of noncompliance, that were identified in the year prior to the filing of the report; and (vi) any objections to the annual compliance report by the board or senior officer of the SDR. In addition to the above information, proposed § 49.22(e) also requires the annual report to include a certification by the CCO that, under penalty of law, the compliance report is accurate and complete.

Proposed § 49.22(f)(1) sets forth the procedures for the review of the annual compliance report by the board of directors of the SDR or senior officer, prior to submission to the Commission. While the board or senior officer has a chance to review the annual compliance report before submission, the report is not subject to their approval. Proposed § 49.22(f)(1) explicitly prohibits the board or senior officer from forcing the CCO to make any material changes to the report. The purpose of this review is to permit the members of the board or the senior officer to provide the Commission with any objections they might have to the report. The Commission believes that the prohibition against the board and senior officer making changes to the annual compliance report will allow the CCO to make a complete and accurate assessment of the SDR's compliance program.

Proposed § 49.22(f)(2) describes the process for submission of the report to the Commission. The proposed Regulation requires that the annual compliance report be electronically provided to the Commission not more than 60 days after the end of the calendar year. If a CCO determines that an annual compliance report filed with the Commission has a material error or if material non-compliance is identified after filing, proposed § 49.22(f)(3) would

require a SDR to promptly file an amended report. This amended report must also include the certification by the CCO as to the accuracy and completeness made in the initial submission of the report. If a CCO is unable to file an annual compliance report within 60 days of the end of the calendar year, proposed § 49.22(f)(4) would permit a CCO to request the Commission to grant an extension of time to file its compliance report based on substantial undue hardship. Extensions for the filing deadline would be granted at the discretion of the Commission. Additionally, to protect the trade secrets of the SDR and the security of the data held by the SDR, the proposed Regulation requires that annual compliance reports filed pursuant to § 49.22 be treated as exempt from mandatory public disclosure for purposes of FOIA<sup>100</sup> and the Sunshine Act<sup>101</sup> and parts 145 and 147 of Commission Regulations.

*Request for Comment.* The Commission request comment on its proposed regulations regarding the preparation and submission of an SDR's annual compliance report.

(1) Should the annual compliance report contain additional content beyond what is proposed in § 49.22(e)? Are additional provisions necessary to ensure that an SDR's board of directors cannot adversely influence the content of an annual compliance report as drafted by the CCO?

(2) In the alternative, are additional provisions necessary to insure that individual directors or other SDR employees have an adequate opportunity to register any concerns or objections they might have to the contents of an annual compliance report?

The Commission also requests comment relating to insulating an SDR's CCO from undue influence or coercion.

(1) Should the Commission adopt a regulation that prohibits an officer, director or employee of the SDR or related person to coerce, manipulate, mislead, or fraudulently influence the CCO in performing his or her duties?

(2) Is it necessary to adopt regulations to address potential conflicts between and among an SDR's compliance, commercial, and ownership interests?

(3) If so, what should such regulations entail, and what specific conflicts of interest should they address?

#### 7. Recordkeeping—Proposed § 49.22(g)

Proposed § 49.22(g) details SDRs' recordkeeping requirements for records

relating to a CCO's areas of responsibility. This proposed regulation requires an SDR to maintain: (i) A copy of its written policies and procedures, including its code of ethics and conflicts of interest policies; (ii) copies of all materials, including written reports provided to the board of directors in connection with review of the annual report, as well as the board minutes or other similar written records, that record the submission of the annual compliance report to an SDR's board of directors or its senior officer; and (iii) any other records relevant to an SDR's annual report. The records required to be maintained pursuant to this section are designed to provide Commission staff with a basis to determine whether an SDR has complied with the CEA and applicable Commission Regulations. The Commission also wants to preserve its ability to reconstruct why certain information was included or excluded in an annual report, in the event that such reconstruction becomes necessary under a future audit or investigation.

The SDR would be required to maintain these records in accordance with § 1.31 of the Commission's Regulations. Following § 1.31, all records must be kept for a period of five years.

*Request for Comment.* The Commission requests comment regarding whether the requirements of proposed § 49.22(g) are sufficient to create a complete and easily auditable record of a board of directors' or senior officer's review of an annual compliance report to ensure that the report, as drafted by the CCO, was not altered.

#### D. Core Principles Applicable to SDRs

Section 21(f) of the CEA details the "core principles" that are applicable to SDRs. These core principles include (i) antitrust considerations; (ii) governance arrangements; and (iii) conflicts of interest.<sup>102</sup>

Registered SDRs will be required to comply with the core principles as described in proposed § 49.19. Unless otherwise determined by the Commission by order, rule or regulation, an SDR would have reasonable discretion in establishing the manner in which it complies with the core principles described in proposed § 49.19. The following subsections describe in detail the Regulations

<sup>100</sup> See 5 U.S.C. 552.

<sup>101</sup> See 5 U.S.C. 552b(b).

<sup>102</sup> Section 21(f)(4), 7 U.S.C. 24a(f)(4), establishes a fourth core principle which authorizes the Commission to establish additional duties for registered SDRs. The Commission is proposing to add several additional duties pursuant to this authority; these proposed duties are discussed in Section E, below.

proposed by the Commission to implement the “core principles.”

### 1. Antitrust Considerations (Core Principle 1)

Consistent with Section 15(a) of the CEA,<sup>103</sup> the Commission in proposing § 49.19 believes that an SDR should (unless necessary or appropriate to achieve the purposes of the CEA) avoid adopting any rule, regulation or policy, or taking any action that results in an unreasonable restraint of trade or imposing any material anticompetitive burden on the trading, clearing, reporting and/or processing of swaps (“Core Principle 1”).

### 2. Introduction—Governance Arrangements (Core Principle 2) and Conflicts of Interest (Core Principle 3)

Section 21(f)(2) of the CEA requires that each SDR establish governance arrangements that are transparent to fulfill public interest requirements and to support the objectives of the Federal Government, owners, and participants (“Core Principle 2”).<sup>104</sup> Section 21(f)(3) of the CEA provides that each SDR must establish and enforce rules to minimize conflicts of interest in the decision-making process of the SDR and to establish a process for resolving such conflicts (“Core Principle 3”).<sup>105</sup> In many respects, Core Principles 2 and 3 are interrelated, although each provides a separate source of authority for the Commission.<sup>106</sup>

<sup>103</sup> Section 15(b) of the CEA provides:

The Commission shall take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the objectives of this chapter, as well as the policies and purposes of this chapter, in issuing any order or adopting any Commission rule or regulation (including any exemption under Section 6(c) or 6(c)(b) of this title), or in requiring or approving any bylaw, rule, or regulation of a contract market or registered futures association established pursuant to Section 21 of this title.

7 U.S.C. 19.

<sup>104</sup> See Section 21(f)(2) of the CEA, 7 U.S.C. 24a(f)(2) as added by Section 728 of the Dodd-Frank Act.

<sup>105</sup> See Section 21(f)(3) of the CEA, 7 U.S.C. 24a(f)(3) as added by Section 728 of the Dodd-Frank Act.

<sup>106</sup> In Section 4(a), the Commission identifies potential conflicts of interest in the operation of a registered SDR. Such conflicts may implicate (i) SDR access, pricing, and provision of services and (ii) disclosure or use of SDR Information. As further discussed, such conflicts of interest may originate in the control of an SDR by one reporting entity or a small subset of reporting entities (a “control group”). Such control may result from representation on SDR governing bodies, whether through (i) ownership of voting equity or the exercise of voting rights or (ii) other direct or indirect means. The existence of such conflicts may frustrate the public interest, as well as the objectives of the Federal Government, certain owners, and participants, in facilitating the reporting of swap transactions. Therefore, in

In order to ensure proper implementation of Core Principles 2 and 3, respectively, the Commission proposes regulations regarding (i) the transparency of SDR governance arrangements and (ii) SDR identification and mitigation of existing and potential conflicts of interest.<sup>107</sup> The proposed rules reflect consultation with staff of the following agencies: (i) The SEC; (ii) the Fed; (iii) OCC; (iv) FDIC; and (v) the Treasury Department. Additionally, the proposed rules were informed by: (1) The joint public roundtable that Commission and SEC staff conducted on September 14, 2010 (the “SDR Roundtable”);<sup>108</sup> and (2) answers to a survey that the Commission informally circulated to existing trade repositories<sup>109</sup> and other companies that may be interested in registering as SDRs in the future (the “SDR Survey”).<sup>110</sup> Finally, mindful of the importance of international harmonization, the proposed rules incorporate certain elements of the European Commission Proposal<sup>111</sup> and the Working Group Report.<sup>112</sup> The Commission intends for the proposed rules, as well as the final rules, to meet or exceed the standards set forth by the

establishing governance arrangements that are transparent as to (i) the sources of such control and (ii) the decisions resulting from such control, the SDR may be satisfying Core Principles 2 and 3 simultaneously.

<sup>107</sup> The Commission notes that entities dually registered with the Commission and the SEC would be required to comply with both sets of rules.

<sup>108</sup> See Press Release, Commission, CFTC, SEC Announce Panelists, Room Update and Webcast Address for September 15 Public Roundtable to Discuss Swap Execution Facilities and Security-Based Swap Execution Facilities (Sept. 14, 2010), <http://www.cftc.gov/PressRoom/PressReleases/pr5895-10.html>; Press Release, Commission, CFTC, SEC Announce Panelists for September 14 Public Roundtable to Discuss Swap and Security-Based Swap Data, Swap and Security-Based Swap Data Repositories and Real Time Reporting (Sept. 13, 2010), <http://www.cftc.gov/PressRoom/PressReleases/pr5892-10.html>; Press Release, Commission, CFTC, SEC to host public roundtable to discuss swap data, swap data repositories and real time reporting (Sept. 7, 2010), available at <http://www.cftc.gov/PressRoom/PressReleases/pr5886-10.html>. See also Transcript, Public Roundtable to Discuss Swap Data, Swap Data Repositories and Real Time Reporting (Sept. 14, 2010), available at <http://www.cftc.gov/ucm/groups/public/@swaps/documents/file/derivative18sub091410.pdf> (the “SDR Roundtable Tr.”).

<sup>109</sup> Although SDRs are new entities created pursuant to the Dodd-Frank Act, similarly-functioning entities called trade repositories have been in existence for quite some time.

<sup>110</sup> Commission staff circulated the informal survey to five entities and received answers to certain questions. See [http://www.cftc.gov/LawRegulation/DoddFrankAct/OTC\\_9\\_DCOGovernance.html](http://www.cftc.gov/LawRegulation/DoddFrankAct/OTC_9_DCOGovernance.html) (last visited Nov. 1, 2010).

<sup>111</sup> See European Commission Proposal, *supra* note 16.

<sup>112</sup> See Working Group Report, *supra* note 13.

Working Group Report relating to trade repositories.<sup>113</sup>

### 3. Governance Arrangements (Core Principle 2)

In addition to proposed Regulations discussed in sections II.B.6, II.B.7 and II.E.4,<sup>114</sup> the Commission proposes to impose, pursuant to proposed § 49.20 (implementing Core Principle 2), certain minimum standards for the transparency of SDR governance arrangements.

#### (a) Transparency of Governance Arrangements

The Commission proposes to mandate minimum standards for the transparency of SDR governance arrangements.<sup>115</sup> Pursuant to such standards, an SDR must:

- Include a statement in its charter documents regarding the transparency of its governance arrangements, and the manner in which such transparency supports the objectives of the Federal Government;
- Make available certain information to the public and relevant authorities;<sup>116</sup>
- Ensure that the information made available is current, accurate, clear and readily accessible; and
- Disclose summaries of significant decisions in a sufficiently comprehensive and detailed fashion so

<sup>113</sup> *Id.*

<sup>114</sup> See proposed §§ 49.16 regarding maintenance of data privacy, discussed in section II.B.6 of this proposed rulemaking; 49.17 regarding access to SDR data, discussed in section II.B.7. of this proposed rulemaking; and 49.27 regarding equitable and non-discriminatory access and fees, discussed in section II.E.4 of this proposed rulemaking.

<sup>115</sup> In addition, the Commission proposes to require each registered SDR to establish governance arrangements that are well defined and include a clear organizational structure with consistent lines of responsibility and effective internal controls. As the SDR must have such arrangements to (i) properly identify the sources of potential conflicts of interest and (ii) establish an appropriate process for resolving such conflicts, such arrangements also satisfy Core Principle 3.

<sup>116</sup> Such information includes: (i) The registered SDR mission statement; (ii) the mission statement and/or charter of the registered SDR Board of Directors and certain committees; (iii) the board of directors nominations process of the registered SDR, as well as the process for assigning members of the board of directors or other persons to certain committees; (iv) names of all members of (a) the board of directors and (b) certain committees; (v) a description of how the board of directors and certain committees consider an independent perspective in their decision-making processes; (vi) the lines of responsibility and accountability for each operational unit of the registered SDR; and (vii) summaries of significant decisions implicating the public interest, the rationale for such decisions, and the process for reaching such decisions. These significant decisions include decisions relating to pricing of repository services, the offering of ancillary services, access to data, and the use of SDR Information.

that the public and relevant authorities would have the ability to discern the SDR policies or procedures implicated and the manner in which SDR decisions implement or amend such policies or procedures.

In addition, although a registered SDR is not required to disclose minutes of board of directors or committee meetings to the public, it must furnish this information to the Commission upon request.

*Request for Comment.* The Commission requests comment on the questions set forth below.

(1) Are the requirements described above sufficiently clear? If not, why not? What would be a better alternative?

(2) Should the Commission require the SDR to make any other information available to the public? To the relevant authorities? Conversely, should the Commission permit the SDR to maintain the confidentiality of any information that the Commission currently contemplates making public?

(3) Should the Commission prescribe more detailed standards on the manner in which an SDR must ensure that its information is "current, accurate, clear, and readily accessible"? If so, which standards?

(4) Should the Commission require the SDR to disclose summaries of significant decisions? Why or why not? Has the Commission correctly identified which decisions should be considered significant? If not, what would be a better alternative? In what manner should these decisions be disclosed?

(5) Are the requirements described above necessary or appropriate to implement Core Principle 2? If not, why not?

(6) What other measures should the Commission consider to implement Core Principle 2? Should such measures supplement or replace the requirements described above? Why?

*(b) Consideration of an Independent Perspective*

Proposed § 49.20(c) would require each registered SDR to establish, maintain, and enforce policies and procedures to ensure that (i) its board of directors, as well as (ii) any SDR committee that has the authority to (A) act on behalf of the board of directors or (B) amend or constrain the action thereof, adequately considers a perspective independent of competitive, commercial, or industry interests in its deliberations.<sup>117</sup> The Commission believes that the board of directors, as well as each abovementioned

committee, would be more likely to contemplate the manner in which a decision might affect all constituencies, and less likely to concentrate on the manner in which a decision affects the interests of the control group, if it integrates an independent perspective in its deliberations. Hence, in counterbalancing the perspective of certain reporting entities controlling an SDR, the integration of an independent perspective would aid in addressing the conflicts of interest identified herein. The Commission believes that it is particularly important for an independent perspective to be reflected in the nominations process for the board of directors, as well as the process for assigning members of the board of directors or other persons to the abovementioned committees. Therefore, proposed § 49.20(c) would also require each registered SDR to establish, maintain, and enforce policies and procedures to ensure that such nominations and assignment processes adequately incorporate an independent perspective.

Along with the requirements noted above, the Commission is proposing that a registered SDR meet certain reporting requirements relating to its board of directors, as well as each SDR committee that has the authority to (i) act on behalf of its board of directors or (ii) amend or constrain the action thereof. Specifically, the Commission proposes to require an SDR to submit the following within thirty (30) days after an election of the board of directors: (i) For the board of directors, as well as each such committee, a list of all members; (ii) a description of the relationship, if any, between such members and the SDR or its affiliates; and (iii) any amendments to the policies and procedures that the SDR maintains with respect to consideration of the independent perspective. The Commission believes that such disclosure promotes the transparency of governance arrangements and improves the detection and prevention of conflicts of interest, and which may actually deter such conflicts in the first instance.

*Request for Comment.* The Commission requests comment on the questions set forth below.

*Consideration of an Independent Perspective*

(1) To ensure the consideration of an independent perspective, should the Commission require a registered SDR to have public directors on (i) its board of directors and (ii) any committee that has the authority to (A) act on behalf of the board of directors or (B) amend or

constrain the action of the board of directors?

a. If not, why not and what would be a better alternative to improve governance and mitigate conflicts of interest?

b. If so, what should be the required composition of the board of directors and each such committee? Should there be a minimum requirement on the number or percentage of public directors? If so, what should the minimum requirement be and why?

c. How should the Commission define "public director" for registered SDRs?

d. Would providing for fair representation on an SDR board of directors and each such committee be preferable to, or complementary to, mandating a specific number or percentage of public directors?

(2) Should the Commission require a registered SDR to establish a nominating committee? Is the nominating committee necessary or appropriate for the mitigation of the conflicts of interest identified herein, or of any other conflict of interest? If not, why not and what would be a better alternative? If so, should the nominating committee have a certain percentage, minimum number, or be comprised solely of public directors? Why?

(3) Should the Commission require a registered SDR to establish any other committees to mitigate conflicts of interest? If so, what would be the responsibilities of such a committee? Should the Commission require such a committee to have a certain percentage, a minimum number, or be comprised solely of public directors? Why?

*Limitations on Ownership of Voting Equity and the Exercise of Voting Rights*

(4) Should the Commission impose limitations on the ownership of voting or non-voting equity and the exercise of voting rights on reporting entities or other market participants? If so, what should the required ownership and voting limitations be? Are such limits necessary or appropriate for mitigating the conflicts of interest identified herein, or any other conflicts of interest?

(5) Would SDR compositional requirements be more or less effective than ownership or voting limitations at addressing conflicts of interest? Would SDR compositional requirements, on their own, be sufficient to address conflicts of interest concerns (assuming that such restrictions are necessary for this purpose) or are both restrictions on governance and ownership needed?

(6) If the Commission were to require ownership and voting limitations, should the Commission permit the SDR board of directors to waive the

<sup>117</sup> See 75 FR 63732, 63737–38 (Oct. 18, 2010) (regarding the importance of the independent perspective in mitigating conflicts of interest).

limitations for a person who is not an SDR participant (and its related persons) provided that certain conditions are met? If so, under what conditions? Should the waiver be subject to the review of the Commission?

(7) Would an aggregate limit on the ownership of voting equity and the exercise of voting rights be appropriate for SDRs? If so, should such aggregate limit be applied only to reporting entities? Which reporting entities? What should such aggregate limit be? Why?

(8) Should any ownership and voting limitations be extended to the parent company of an SDR?

(9) If the Commission were to impose ownership or voting limitations, should the Commission require remediation by an SDR of any interest that a reporting entity or a related person holds or exercises in excess of the limitations?

(10) If the Commission were to impose ownership or voting limits, should the limitations be phased-in for SDRs to provide a grace period for those entities that would not meet the limits at the outset, but that could potentially meet them at a later date, e.g., one or two years after SDR registration with the Commission?

(11) If the Commission were to impose ownership and voting limitations, how might such limitations influence the competitive dynamics of the SDR market?

(12) If the Commission were to impose ownership or voting limitations, how might such limitations address changes in conflicts of interest resulting from the evolution of the regulated swaps market?

(13) Are there potential ways to more narrowly target voting and ownership limitations?

(14) Should the Commission require parent companies of SDRs to comply with the substantive requirements applicable to SDR boards of directors?

(15) Should the Commission require parent companies' officers, directors, employees and agents to be subject to Commission authority?

(16) Should the Commission require that the books and records of SDR parent companies be open to inspection by the Commission?

(c) Substantive Requirements for SDR Boards of Directors (and Certain SDR Committees)

(i) Expertise

The Commission is proposing a number of substantive requirements for SDR boards of directors and certain SDR committees to mitigate existing and potential conflicts of interest. Proposed § 49.20(c)(5) would require that the SDR

board of directors, SDR senior management, and members of any SDR committee that has the authority to (i) act on behalf of the board of directors or (ii) amend or constrain the actions thereof, in each case, have (A) sufficiently good reputations, (B) the requisite skills and expertise to fulfill their responsibilities in the management and governance of the registered SDR, (C) a clear understanding of such responsibilities, and (D) the ability to exercise sound judgment about SDR affairs.

(ii) Other Substantive Requirements

In addition to the expertise requirement, the Commission in proposed § 49.20(c) proposes the following requirements, which aim to enhance the accountability of SDR boards of directors to the Commission, with respect to the manner in which such boards of directors cause the registered SDRs to discharge all statutory and regulatory responsibilities<sup>118</sup> under the Dodd-Frank Act, as it amends the CEA:

- The roles and responsibilities of SDR boards of directors must be clearly articulated, especially in respect of the manner in which each such board of directors ensures that the registered SDR complies with all statutory and regulatory responsibilities under the Dodd-Frank Act, as it amends the CEA.
- Each SDR board of directors shall review its performance and that of its individual members annually. It should consider periodically using external facilitators for such reviews.
- A registered SDR must have procedures to remove a member from its board of directors, where the conduct of such member is likely to be prejudicial to the sound and prudent management of the SDR.

*Request for Comment.* The Commission requests comment on the questions set forth below.

(1) Are the proposed substantive requirements for board of directors (and certain SDR committees) necessary or appropriate to mitigate SDR conflicts of interest, in light of the proposed minimum standards on (A) transparency, (B) identification and resolution of conflicts of interest, and (C) access, use, or disclosure of SDR Information? If not, why not?

(2) How might the proposed substantive requirements influence the competitive dynamics of the SDR market?

(3) How might the proposed substantive requirements address changes in conflicts of interest resulting

from the evolution of the regulated swaps market?

(4) What other substantive requirements should the Commission consider imposing on an SDR board of directors? How might such requirements affect the competitive dynamics of the SDR market?

(5) Should the Commission focus on ensuring fair representation? If so, should the Commission view fair representation as complementing or replacing an independent perspective? What entities should be included in fair representation? Would the value of fair representation differ depending on the organizational structure of the SDR (e.g., an at-cost utility or a for-profit entity)? The Commission particularly welcomes factual examples.

(6) If the Commission decides to focus on ensuring fair representation as either an alternative to, or a complement of, an independent perspective, what changes should the Commission make to the proposed substantive requirements?

(7) In what ways can a SDR board of directors incorporate an independent perspective into its decision-making process?

(8) Should the nominations process require the right to petition for alternative candidates? If so, to whom should such right be granted (e.g., certain groups of market participants)?

4. Conflicts of Interest (Core Principle 3)

(a) Conflicts of Interest

Based on discussions at the SDR Roundtable, as well as answers to the SDR Survey, the Commission has identified several potential conflicts of interest, including but not limited to, discrimination against certain reporting entities and unfair or anticompetitive disclosure. A control group may compete with other reporting entities in the execution or clearing of swap transactions and may have an incentive to leverage its influence over the registered SDR to gain a competitive advantage in relation to other reporting entities. Additionally, because the Dodd-Frank Act requires all swaps (whether cleared or uncleared) to be reported to a registered SDR,<sup>119</sup> swap data<sup>120</sup> and SDR analyses of SDR

<sup>119</sup> See Section 2(a)(13)(G) of the CEA, as amended by Section 727 of the Dodd-Frank Act.

<sup>120</sup> For example, such data would enable regulatory authorities, such as the Commission, to ascertain the exposure of reporting entities and their counterparties to swap transactions. See generally 7 U.S.C. 24a(c)(7). See also SDR Roundtable Tr., *supra* note 108, at 55–56 (Comments from Jiro Okochi, CEO and Co-Founder, Reval, stating “In terms of the actual data itself, I think one of the goals of the reform is to allow more transparency and efficiency in the marketplace \* \* \*”).

<sup>118</sup> See proposed §§ 49.16, 49.17 and 49.27.

Information could have great commercial value.<sup>121</sup> A control group may have an incentive to (i) limit or burden access to such analyses on a discriminatory basis or (ii) disclose or use the data of other reporting entities for its own competitive purposes (*e.g.*, front-running). The control group may also have an incentive to cause the SDR to provide such data to an affiliate for derivative applications or ancillary services (especially if such applications or services are bundled).

*Request for Comment.* The Commission requests comment on the questions set forth below on potential conflicts of interest.

(1) Has the Proposal correctly identified the conflicts of interest that a registered SDR may confront? Has the Proposal accurately specified the possible effects of such conflicts of interest on SDR operations? What are other possible effects?

(2) What other conflicts of interest may exist? What are the effects of such conflicts?

(3) How might conflicts of interest change as registered SDRs become more established?

(4) How might conflicts of interest change as the swaps market evolves under regulation?

#### (b) Mitigation of Conflicts of Interest

To mitigate conflicts of interest, the Commission proposes to mandate, pursuant to proposed § 49.21, that each registered SDR maintain and enforce rules (i) that would identify, on an ongoing basis, existing and potential conflicts of interest, and (ii) that would enable the SDR to make decisions if a conflict exists. Such rules would complement the abovementioned provisions.

#### (c) Policies and Procedures to Identify and Mitigate Conflicts of Interest

To ensure that the mitigation in Core Principle 3 is effected, the Commission proposes to require each registered SDR to establish, maintain and enforce rules to identify existing and potential conflicts of interest in its decision-making process. As discussed above, a control group can dominate an SDR to further its economic interests to the detriment of other reporting entities. Therefore, the Commission believes that it is critical for a registered SDR to establish, maintain and enforce policies

and procedures to mitigate such a conflict. Moreover, the Commission believes that an SDR should engage in the identification and mitigation of conflicts of interest on an ongoing basis since conflicts can arise or change at any time. Further, the Commission proposes to require such SDR to have rules for making decisions in the event of a conflict of interest. The Commission believes such rules should require, at a minimum, the recusal of any person involved in the conflict from such decision-making. Such recusal rules will alleviate certain concerns regarding the impartiality of the SDR decision-making process.

*Request for Comment.* The Commission requests comment on the questions set forth below.

(1) Are the requirements described above sufficiently clear? If not, why not? What would be a better alternative?

(2) Should the Commission prescribe more detailed standards for SDR rules on identifying conflicts of interest? If so, which standards?

(3) Should the Commission prescribe more detailed standards for SDR rules on decision-making in the event of a conflict of interest? If so, which standards?

#### E. Additional Duties

In addition to the “core principles” set forth above in section D, Section 21(f)(4) of the CEA established a fourth core principle under which the Commission may prescribe additional duties for SDRs for the purpose of minimizing conflicts of interest, protecting data, ensuring compliance and guaranteeing the safety and security of the SDR. In this regard, pursuant to its authority under Sections 21(f)(4) and 8a(5) of the CEA the Commission proposes to require four additional duties that would require an SDR to (i) adopt and implement system safeguards, including business continuity and disaster recovery plans; (ii) maintain sufficient financial resources; (iii) furnish to market participants a disclosure document setting forth the risks and costs associated with using the services of the SDR; and (iv) provide fair and open access to the SDR and fees that are equitable and non-discriminatory. These additional duties are discussed in turn below.

##### 1. System Safeguards

Proposed § 49.24 would require SDRs to (1) establish and maintain a program of risk oversight to identify and minimize sources of operational risk through the development of appropriate controls and procedures and the development of automated systems that

are reliable, secure, and have adequate scalable capacity; (2) establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery that allow for the timely recovery and resumption of operations and the fulfillment of the responsibilities and obligations of the SDR, *i.e.*, BC–DR Plans; and (3) periodically conduct tests to verify that backup resources are sufficient to ensure continued fulfillment of all duties of the SDR established by the CEA or the Commission’s regulations.

The proposed regulation would require an SDR’s program of risk analysis and oversight to address six categories of risk analysis and oversight, including information security; BC–DR planning and resources; capacity and performance planning; systems operations; systems development and quality assurance; and physical security and environmental controls. It would require each SDR to maintain a BC–DR plan and have BC–DR resources sufficient to enable recovery and resumption of its operations and resumption of its ongoing fulfillment of its duties and obligations as an SDR during the next business day following any disruption of its operations, either through sufficient infrastructure and personnel resources of its own or through sufficient contractual arrangements with other SDRs or disaster recovery service providers.<sup>122</sup> The proposed regulation would require each SDR to notify Commission staff of various security-related events and provide relevant documents to the Commission; and to conduct regular, periodic, objective testing and review of its automated systems. It would also require each SDR, to the extent practicable, to coordinate its BC–DR plan with SEFs, DCMs, DCOs, SDs, and MSPs who report swap data to the SDR, as well as initiate coordinated testing of such plans, and to take into account in its own BC–DR plan, the BC–DR plans of relevant telecommunications, power, water, and other essential service providers.

Because automated systems play a central and critical role in today’s financial markets, oversight of these systems will be an essential part of the effective regulatory oversight of swaps.

<sup>122</sup> See Commission, Notice of Proposed Rulemaking: Business Continuity and Disaster Recovery, 75 FR 42,633 (July 22, 2010); Interagency Paper on Sound Practices to Strengthen the Resilience of the U.S. Financial System issued by the Board of Governors of the Federal Reserve System, the Department of the Treasury and the SEC, 68 FR 17,809 (Apr. 11, 2003); SEC, Policy Statement Relating to Business Continuity Planning for Trading Markets, Exchange Act Release No. 48,545 (Sept. 25, 2003), 68 FR 56,656 (Oct. 1, 2003).

<sup>121</sup> Warehouse Trust Response to the SDR Survey, at p. 4, available at <http://www.cftc.gov/ucm/groups/public/@swaps/documents/file/derivative9sub100510-wt.pdf> (stating that “SDR data is extremely valuable and could be sold either stand alone or enhanced with other market data and analysis”).

Prompt and adequate notice to the Commission concerning systems malfunctions, systems security incidents, or any events leading to the activation of an SDR's BC-DR plan will assist the Commission's oversight and its ability to assess systemic risk levels. Additionally and because SDRs will hold data needed by financial regulators from multiple jurisdictions, safeguarding such systems will be essential to mitigation of systemic risk world-wide. The ability of SDRs to recover and resume operations promptly in the event of a disruption of their operations will be highly important to the U.S. and world economy. It would present unacceptable risks to the U.S. and world financial system if SDRs that hold data concerning swaps and thus comprise critical components of the world financial system were to become unavailable for an extended period of time for any reason. Adequate system safeguards are crucial to mitigation of such risks.

*Request for Comment.* The Commission requests comment on whether the time periods specified in proposed § 49.24 with respect to submission of annual reviews and written notices of material system outages and material systems changes the correct time periods to use? Should any of the proposed time periods be shortened or lengthened? If so, please explain your reasoning.

## 2. Financial Resources

Proposed § 49.25 would require an SDR to maintain financial resources sufficient to enable it to perform its functions in compliance with the duties set forth in proposed § 49.9 and the core principles set forth in proposed § 49.19.<sup>123</sup> The Commission believes that requiring SDRs to maintain sufficient financial resources will help to ensure the protection of the swap data maintained by the SDR as well as the safety and security of the SDR.

Proposed § 49.25 (a)(3) provides that financial resources<sup>124</sup> will be considered sufficient for an SDR if their value is at least equal to the total amount that would enable the SDR, or

<sup>123</sup> An entity that operates as both a SDR and DCO would also be required to comply with the financial resource requirements of Core Principle B set forth in Section 5b(c)(2)(B) of the CEA, 7 U.S.C. 7a-1(c)(2)(B).

<sup>124</sup> The financial resources allocated by the swap data repository to meet these requirements must include unencumbered, liquid financial assets (*i.e.*, cash and/or highly liquid securities) equal to at least six months' operating costs. If any portion of such financial resources is not sufficiently liquid, the SDR may take into account a committed line of credit or similar facility for the purpose of meeting this requirement.

applicant for SDR registration, to cover its operating costs for a period of at least one year, calculated on a rolling basis. The types of financial resources to meet this obligation would include the SDR's own capital and any other financial resource acceptable to the Commission. The financial resources required in proposed § 49.25 must be the independent or dedicated resources of the SDR and may not be resources used for other purposes or by affiliated entities, *i.e.*, the same assets or capital may not be used for multiple purposes.

Proposed § 49.25(c) provides that SDRs, in computing its financial resource requirement, may make a reasonable calculation of its projected operating costs over a 12-month period.<sup>125</sup> This would be performed on a quarterly basis. Financial resources of a SDR would also be valued under proposed § 49.25(d) on at least a quarterly basis.

Proposed § 49.25(f) sets forth the reporting requirements to the Commission. Specifically, no later than 17 business days after the close of each fiscal quarter or at any time upon Commission request, a SDR is required to report the amount of financial resources required by proposed § 49.25(a) together with financial statements, including the balance sheet, income statement, and statement of cash flows of the SDR or of its parent company.

*Request for Comment.* The Commission requests comment on whether the methodology set forth above for determining sufficient financial resources would provide the necessary resources to ensure the financial integrity of the SDR. If not, please provide a different methodology or manner for calculating sufficient SDR financial resources.

## 3. Disclosure Requirements of Swap Data Repositories

Proposed § 49.26 would require an SDR furnish to market participants a disclosure document ("SDR Disclosure Document") setting forth the risks and costs associated with using the services of the SDR. The Commission believes that this requirement will benefit market participants and the swap market generally by helping to (i) minimize conflicts of interest and (ii) ensure SDR compliance with its statutory responsibilities and duties.

The Commission in proposed § 49.26 would require that each SDR Disclosure

<sup>125</sup> The SDR shall have reasonable discretion in determining the methodology used to compute such projected operating costs. The Commission may review the methodology and require changes as appropriate.

Document contain the following information:

- The SDR's criteria for providing others with access to services offered and data maintained by the SDR;
- The SDR's criteria for those seeking to connect to or link with the SDR;
- A description of the SDR's policies and procedures regarding its safeguarding of data and operational reliability, as described in proposed § 49.24;
- The SDR's policies and procedures designed to protect the privacy and confidentiality of any and all swap transaction information that the SDR receives from market participants, as described in proposed § 49.16;
- The SDR's policies and procedures regarding its non-commercial and/or commercial use of the swap data;
- The SDR's dispute resolution procedures involving market participant;
- A description of all the SDR's services, including any ancillary services;
- The SDR's updated schedule of any fees, rates, dues, unbundled prices, or other charges for all of its services, including any ancillary services; any discounts or rebates offered; and the criteria to benefit from such discounts or rebates; and
- A description of the SDR's governance arrangements.

*Request for Comment.* The Commission requests comment on the following questions:

(1) How should the SDR Disclosure Document be furnished to market participants? Would public availability on a SDR's Web site be sufficient? Any other available alternatives?

(2) How useful would the SDR Disclosure Document be for market participants?

## 4. Non-Discriminatory Access and Fees

Proposed § 49.27 is intended to establish non-discriminatory access to the services provided by SDRs because all swap transactions must be reported to a SDR pursuant to Section 2(a)(13)(G) of the CEA. The Commission believes that the intent and purpose of Section 21 of the CEA is for SDRs to provide open and equal access to its services. Consistent with open and equal access to SDR services, the Commission further believes that fees or charges adopted by an SDR must be equitable and otherwise non-discriminatory.

(a) *Access.* Proposed § 49.27(a) would require that the services provided by SDRs be available to all market participants, such as DCMs, SEFs, DCOs, SDs, MSPs and any other counterparty, on a fair, open and equal

basis. SDRs that register and agree to accept swap data in a particular asset class (such as interest rates or commodities) could not offer their services on a discriminatory basis to select market participants or select categories of market participants. The Commission believes, pursuant to Section 21 of the CEA, that access should be fair, open and equitable. As a component of fair, open and equal access, the Commission submits that SDRs must ensure that they have the necessary operational capability to provide services to market participants that would seek access for the reporting of swap transactions consistent with Section 21 of the CEA.

(b) *Fees.* Proposed § 49.27(b) would ensure that fees or other charges established by a SDR are not used as a means to deny access to some market participants by employing disparate and/or discriminatory pricing. The Commission is especially concerned that SDRs could attempt to adopt disparate pricing for performing their statutory duties and obligations set forth in Section 21 of the CEA. The Commission believes that such action would be inconsistent with Core Principle 3 discussed above, the CEA generally and the guiding principles set forth in the Dodd-Frank Act.

The Commission recognizes that the ability to receive swap data in the form and manner proposed by part 45 of the Commission's regulations and the ongoing maintenance of such data may involve significant costs, including, but not limited to, technology, personnel, technical support and appropriate BC-DR plans. The Commission in this proposed § 49.27(b) seeks to ensure that the fees charged to DCMs, DCOs, SEFs, SDs, MSPs, and any other counterparties are equitable and do not become an artificial barrier to access, thereby potentially reducing competition for SDR services.

The Commission submits that an equitable fee would be a uniform and non-discriminatory set of fees for both "core" regulatory services provided by the SDR as well as any "ancillary" or "supplemental" services such as life-cycle analysis, confirmation, compression, dispute resolution, and mark-to-market valuation.

Any preferential pricing such as volume discounts or reductions would not be generally viewed as equitable by the Commission. Proposed § 49.27(b) provides that SDRs shall not offer preferential pricing arrangements to any market participant, including volume discounts or reductions *unless* such discounts or reductions apply to all market participants uniformly and are

not otherwise established in a manner that would effectively limit the application of such discount or reduction to a select number of market participants. Proposed § 49.27 also would require SDRs to provide fee transparency to market participants. At a minimum, the proposed § 49.27 would require SDRs to set forth on its Web site a schedule of fees and charges as well as in the Disclosure Document discussed above in proposed § 49.26.

In addition, part 43 of the Commission's proposed regulations relating to real-time reporting would prohibit a registered SDR from offering a discount based on the volume of swap transaction and pricing data reported to the registered SDR for public dissemination, unless such discount is offered to all reporting parties and swap markets.<sup>126</sup>

*Request for Comment.* The Commission requests comment on the questions set forth below on fees:

(1) Are there circumstances in which it would be fair or reasonable for an SDR to charge a counterparty to a swap a fee to satisfy itself that the swap data submitted to the SDR by the other counterparty to the swap is accurate?

(2) In what instances would an SDR differentiate among its users with respect to fees, dues, other charges, discounts, and rebates? Should any of those instances be explicitly prohibited or restricted?

(3) Are there any other requirements that the Commission should impose on an SDR that would promote competition?

#### F. Real Time Reporting

Proposed § 49.15 details SDRs' ability to accept and publicly disseminate swap transaction and pricing data for public reporting of swap transactions executed on a DCM as well as those executed off-exchange.<sup>127</sup> The Dodd-Frank Act's real-time public reporting requirements and the text of proposed § 49.15 are summarized below.

Section 727 of the Dodd-Frank Act establishes certain public reporting requirements for all swap transactions and participants, and identifies the purpose of such public reporting as "to make swap transaction and pricing data available to the public in such form and at such times as the Commission determines appropriate to enhance price discovery."<sup>128</sup> Section 2(a)(13)(B) establishes the reporting requirements

pursuant to which the Commission is authorized to promulgate regulations mandating the public availability of swap transaction and pricing data in "real-time."<sup>129</sup> By its terms, Section 2(a)(13)(A) of the CEA defines real-time public reporting to mean "as soon as technologically practicable after the time at which the swap transaction has been executed." Section 2(a)(13)(D) of the CEA permits the Commission to require registered entities to publicly disseminate swap transaction and pricing data.

To implement Section 2(a)(13) of the CEA, the Commission is proposing a real-time public reporting framework for swap transaction and pricing data in a new part 43 of the Commission's regulations that is subject to a separate rulemaking.<sup>130</sup> Proposed Section 43.2(v) defines "reportable swap transaction" to mean any executed swap, novation, swap unwind, partial novation, partial swap unwind or such other post-execution events that affect the price of the swap. A reportable swap transaction includes not only the execution of a swap contract, but also certain price-affecting events that occur over the "life" of a swap. The proposed regulations in part 43 require registered SDRs to publicly disseminate "off-facility" swap data and allows SDRs to choose to disseminate publicly for swaps executed on a swap market. The proposed regulations in part 43 organize swap transactions into a number of distinct categories for purposes of real-time public reporting, including (1) swap transactions executed on a "swap market" as defined in proposed § 43.2(z)<sup>131</sup>, and (2) "off-facility" swaps as defined in proposed § 43.2(p).<sup>132</sup>

<sup>129</sup> See Section 2(a)(13)(C) of the CEA, 7 U.S.C. 2(a)(13)(C) (authorizing and requiring the Commission to provide, by rule, for the real-time public availability of swap transaction and pricing data for four types of swap transactions: (1) Swaps that are subject to the mandatory clearing requirement, including those swaps that may qualify for an exemption; (2) swaps that are not subject to the mandatory clearing requirement but are cleared at a registered derivatives clearing organization; (3) bilateral swap transactions between two counterparties that are reported to a registered swap data repository or the Commission in accordance with Section 2(h)(6) of the Act; and (4) swaps that are determined to be required to be cleared but are not cleared.). Pursuant to section 2(a)(13)(F) parties to a swap are required to report to a registered entity in a timely manner as prescribed by the Commission. Timeliness standards are prescribed in part 43. See *supra* note 39.

<sup>130</sup> See *supra* note 39.

<sup>131</sup> Proposed § 43.2(z) defines "swap market" as "any registered swap execution facility or registered designated contract market that makes swaps available for trading." See *supra* note 39.

<sup>132</sup> Proposed § 43.2(p) defines "off-facility" swaps as "any reportable swap transaction that is not

<sup>126</sup> See proposed § 43.3(i), *supra* note 39.

<sup>127</sup> As explained below, proposed § 49.15 applies to off-facility swap transactions. See proposed § 49.15.

<sup>128</sup> Section 2(a)(13)(A) of the CEA, 7 U.S.C. 2(a)(13)(A).



Proposed § 49.15 applies to off-facility swap transactions and to all swap transactions executed on a SEF or DCM that fulfill their public dissemination requirement<sup>133</sup> by reporting to a registered SDR.

Under proposed part 43, registered SDRs that disseminate swap transaction and pricing data to the public in real-time, must make the data available and accessible in an electronic format that is capable of being downloaded, saved and/or analyzed.<sup>134</sup> Proposed § 43.3(i) requires registered SDRs who disseminate publicly to retain all data related to a reportable swap transaction (including large notional swaps and block trades) for a period of not less than five years following the time at which such reportable swap transaction is publicly disseminated.

Proposed part 43 of the Commission's Regulations also reflects the Commission's belief in the economic utility of real-time swap data that is promptly reported to the public. Accordingly, proposed § 43.3(a) proposes specific timeliness standards that must to be met for each subcategory of swap transaction.

As noted above, proposed § 49.15 applies to off-facility swap transactions and all transactions executed on a SEF or DCM that fulfill their public dissemination requirement by reporting to a registered SDR that has undertaken to accept and publicly disseminate swap transaction and pricing data in real time. For these transactions, the proposed regulations in part 43 will require that one party to the swap transaction report specified real-time data to such a registered SDR, which, in turn, will be required to disseminate such data to the public.<sup>135</sup> In

executed on or subject to the rules of a swap market." See *supra* note 39.

<sup>133</sup> The proposed part 43 Regulations will provide that a swap market may fulfill its public dissemination requirement by either (i) sending the required data to a registered SDR that accepts and publicly disseminates such data; or (ii) by utilizing a third-party service provider to perform this function. See *supra* note 39.

<sup>134</sup> The Commission is proposing this provision to address the concern that a registered SDR may flash real-time swap transaction and pricing data to selected market participants before making such information available to the public and all market participants. Requiring registered SDRs to allow market participants and the public to download, save and/or analyze the real-time swap transaction and pricing data upon public dissemination, ensures equal access to real-time swap transaction and pricing data. See proposed § 43.3(e), *supra* note 39.

<sup>135</sup> The Commission notes that proposed § 43.3(b) also provides for an alternative method of reporting by using a third-party service provider for public dissemination. Reporting entities electing to satisfy their real-time reporting requirements through a third-party service provider would not need to report through an SDR. See *supra* note 39.

coordination with proposed part 43, proposed § 49.15(b) requires SDRs to "establish such electronic systems as are necessary to receive real-time swap transaction data," and specifies that such systems must be capable of publicly disseminating all data fields specified by the Commission in proposed part 43.

Proposed § 49.15(c) requires SDRs who disseminate swap transaction and pricing data in real time to promptly notify the Commission when real-time swap data is not timely reported. This proposed regulation also specifies the information that must be included in any notification to the Commission of untimely reporting. The notification must include all of the real-time swap data submitted; identify the party to the swap that submitted the real-time swap data; and contain the date and time the real-time swap transaction data was received by the SDR. The Commission will take appropriate regulatory action against the delinquent reporting party based on these notifications.

*Request for Comment.* The Commission request comment on the following questions relating to real-time reporting of swap transactions.

(1) Should any party that receives swaps data pursuant to proposed part 43 of the Commission's Regulations for the purpose of performing a real-time reporting function be required to register as a swap data repository?

(2) Should additional regulatory conditions and requirements apply to a party receiving swaps data pursuant to proposed part 43 of the Commission's Regulations for the purpose of performing a real-time reporting function if such a party is not required to register as a swap data repository?

#### G. Procedures for Implementing Swap Data Repository Rules

Proposed § 49.8 is largely intended to conform to the proposed changes to existing § 40.5(b) (Voluntary submission of rules for Commission review and approval).<sup>136</sup> The proposed amendments to § 40.5(b) are set forth in a separate rulemaking pertaining to "Provisions Common to Registered Entities."<sup>137</sup>

#### 1. Request for Approval

Proposed § 49.8 provides that an applicant for registration as a SDR may

<sup>136</sup> Proposed § 40.3 is amended to require additional information to be provided by registered entities submitting new products for the Commission's review and approval. Proposed § 40.5(b) codifies a new standard for the review of new rules or rule amendments as established under the Dodd-Frank Act. See *supra* note 18.

<sup>137</sup> *Id.*

request that the Commission approve under Section 5c(c) of the CEA, any or all of its rules and subsequent amendments, prior to implementation or, notwithstanding the provisions of Section 5c(c)(2) of the CEA, at anytime thereafter, under the procedures set forth in § 40.5 of the Commission's Regulations. SDRs that submit operating rules to the Commission for approval at the same time as an application for registration pursuant to proposed § 49.3 on Form SDR to reinstate the registration of a dormant registered SDR, as defined in § 40.1, or while one of the foregoing is pending, will be deemed approved by the Commission no earlier than when the swap data repository is deemed to be registered or reinstated.

#### 2. Self-certification of Rules

Rules of a registered swap data repository not voluntarily submitted for prior Commission approval as described above must be submitted to the Commission with a certification that the rule or rule amendment complies with the CEA and Commission Regulations pursuant to the procedures set forth in § 40.6.

### III. Effectiveness and Transition Period

The statutory deadline for final rules is July 15, 2011. Final rules will become effective sixty (60) days after the **Federal Register** publication of the final rules. The Commission expects all SDR applicants to fully comply with the final rules. The Commission requests comment on the nature and length of implementation and phase-in periods that would be appropriate to allow potential SDRs and market participants time to adapt to the new swaps regulatory structure and implement the Proposal in an efficient and orderly manner.

*Request for Comment.* The Commission requests comment on the questions set forth below.

(1) Is a phase-in period appropriate (especially for existing trade repositories that may seek SDR registration)? If so, how long should such phase-in period be?

(2) Conversely, should all applicants for SDR registration have to demonstrate compliance with the final rules to receive registration? Why or why not?

### IV. General Request For Comments

In addition to any specific request for comment included above, the Commission generally requests comment on all aspects of the Proposal. Interested persons are invited to submit written presentations of views, data, and arguments concerning the Proposal.

## V. Related Matters

### A. Paperwork Reduction Act

Provisions of proposed part 49 would result in new “collection of information” requirements within the meaning of the Paperwork Reduction Act of 1995 (“PRA”).<sup>138</sup> An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. The Commission therefore is submitting this proposal to OMB for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The title for this collection of information is “Part 49—Swap data repositories; registration and regulatory requirements,” OMB control number 3038–NEW. If adopted, responses to this new collection of information would be mandatory.

The Commission will protect proprietary information according to the Freedom of Information Act and 17 CFR part 145, “Commission Records and Information.” In addition, Section 8(a)(1) of the Act strictly prohibits the Commission, unless specifically authorized by the Act, from making public “data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.” The Commission also is required to protect certain information contained in a government system of records pursuant to the Privacy Act of 1974, 5 U.S.C. 552a.

#### 1. Summary of the Proposed Requirements

The proposed regulations would establish a new registered entity called a swap data repository (“SDR”), which would gather swap data and make such data available to the Commission and other regulators. The Commission believes there will be approximately 15 entities seeking registration as SDRs.

#### 2. Information Provided by Reporting Entities

As noted above, proposed part 49 will impose multiple new collections of information requirements within the meaning of the PRA. First, proposed part 49 would impose a registration requirement on all SDRs. This registration requirement is composed of a one-time initial registration as well as amendments to registration documents previously submitted to the Commission by an SDR. Second, proposed part 49 imposes a reporting requirement on registered SDRs. As part of this

reporting requirement, SDRs are required to provide access to the swap data it holds to either the Commission or one of the Commission’s designees. Additionally, an annual compliance report must be submitted by an SDR’s CCO. Third, proposed part 49 imposes a recordkeeping requirement for registered SDRs whereby a registered SDR is required to maintain records of all swap transaction data for a period of at least five years after a swap expires and must maintain a written copy of written policies and procedures, including the code of ethics and conflicts of interest policies in furtherance of compliance with the Act and Commission regulations and any records relevant to the annual compliance report. Lastly, proposed part 49 imposes a disclosure requirement whereby registered SDRs must provide written disclosures before accepting any swap data from a reporting entity or upon a reporting entity’s request.

**Registration Requirement.** Under proposed § 49.3, SDRs would be required to demonstrate compliance with specified registration requirements on Form SDR. The proposed collection for this one-time initial registration is estimated to involve 400 burden hours per SDR. The Commission bases this estimate on consultation with other regulators involving similar collections.<sup>139</sup> As noted above, the Commission believes 15 entities will be subject to this burden. Accordingly, the Commission estimates that the one-time initial registration burden for all SDRs will be approximately 6,000 annual burden hours.

Additionally, under proposed § 49.3, registered SDRs must amend Form SDR annually (*i.e.*, within 60 days after the end of each calendar year of such SDR) as well as when certain information specified on the Form SDR becomes inaccurate.<sup>140</sup> The Commission estimates that the hourly burden for complying with each amendment requirement will be 15 burden hours per amendment for each SDR. The Commission estimates that respondents will be required to file, on average, including the mandatory annual amendment, three amendments per year, for an ongoing annualized burden

of approximately 45 hours per SDR and approximately 675 burden hours for all SDRs.

In addition to amending Form SDR, the following filing requirements may be imposed on an SDR in the following circumstances.<sup>141</sup> Under proposed § 49.3, a SDR may withdraw its registration application by filing an electronic request with the Secretary of the Commission at the Commission’s Washington, DC office. In the event an SDR is registered and seeks to withdraw from registration, proposed § 49.4 would require such SDR to give notice to the Commission, in writing, requesting that its registration as an SDR be withdrawn. Such notice must be made at least 90 days prior to the date named therein as the date when the withdrawal of registration shall take effect. The Commission estimates the burden hours associated with these filings, which are in addition to and separate from the requirement to amend Form SDR, to be 10 hours per filing. Additionally, the Commission estimates that such filings will occur once over a period of two years for all registered SDRs. Therefore, the average burden hours annualized for all SDRs are expected to be 5 burden hours.

If an SDR is located outside of the United States and is seeking to register, proposed § 49.7 requires such SDR to, in addition to filing a Form SDR, provide the Commission with an opinion of counsel that the SDR, as a matter of law, is able to provide the Commission with prompt access to the book and records of such SDR and that the SDR can submit to onsite inspection and examination by the Commission. The Commission estimates that the hourly burden for complying with each opinion of counsel will be 20 burden hours per opinion for each SDR. The Commission estimates that five SDRs will be located outside the United States and therefore the aggregate burden hours associated with this requirement is estimated to be 100 annual burden hours for those SDRs.

Therefore, the total number of annual burden hours estimated to be required by the proposed regulations for purposes of registration is 6,000 hours initially (Form SDR)<sup>142</sup> and 680 hours

<sup>139</sup> The Securities and Exchange Commission (“SEC”) calculated in 2008 that Form SIP takes 400 hours to complete. Submission for OMB Review; Comment Request, 73 FR 34060 (June 16, 2008) (outlining the most recent SEC calculations regarding the PRA burdens for Form SIP). While the requirements of Form SIP and Form SDR are not identical, the Commission believes that there is sufficient similarity for PRA purposes that the burden would be roughly equivalent.

<sup>140</sup> An amendment to Form SDR may occur pending SDR registration.

<sup>141</sup> Prior to filing a notice to withdraw or vacate an application to register or filing for withdrawal of registration status, an SDR shall file an amended Form SDR to update any inaccurate information on the registration form (such burden hours associated with amendments to Form SDR are calculated above).

<sup>142</sup> The initial burden hours imposed will increase for SDRs located outside the United States.

<sup>138</sup> 44 U.S.C. 3501 *et seq.*

on an ongoing basis for any additional filings.

**Reporting Requirements.** Under proposed § 49.22, chief compliance officers (“CCOs”) of registered SDRs would be required to submit an annual compliance report that contains a description of the SDR’s written policies and procedures, including those related to the code of ethics, conflicts of interest, and compliance with Section 21(c) core principles. If any material error is discovered in the annual compliance report, the CCO must promptly file an amendment with the Commission to correct such material error or omission. An amendment shall contain the oath or certification required by proposed § 49.22(e)(7) that, to the best of the CCO’s knowledge and reasonable belief, and under penalty of law, the annual compliance report is accurate and complete. Based on the Commission’s discussions with industry and other regulators, the Commission estimates that these reports (and any amendments which may be necessary) are estimated to involve an average of 5 annual burden hours per respondent per year, for an aggregate of 75 aggregate annual burden hours.

A CCO would also be responsible under proposed § 49.22 for, among other things, establishing procedures for the remediation of noncompliance issues, and establishing and following appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues. The Commission estimates that these two requirements will require 520 hours to create and 120 hours to administer per year per respondent, for a total burden of 7800 hours initially and 1800 hours on average, annually.

Under proposed § 49.10, SDRs would be required to establish, maintain, and enforce policies and procedures for the reporting of swap data of the SDR and shall accept and promptly record all swap data in its selected asset class and other regulatory information that is required to be reported pursuant to part 45. Once such swap data is accepted, proposed § 49.17 would require an SDR to provide direct electronic access to the Commission or its designees and, pursuant to proposed § 49.17(d), make such data available to other parties, including other regulators (*i.e.*, Appropriate Domestic Regulators and Appropriate Foreign Regulators). In the event an Appropriate Domestic Regulator or Appropriate Foreign Regulator files a request to gain access to the swaps data maintained by an SDR, proposed § 49.17 provides that the registered SDR must notify the Commission electronically and in a

format specified by the Secretary of the Commission. Under proposed § 49.16, SDRs would be required to develop written policies and procedures to protect the confidentiality of data, and, under proposed § 49.11, ensure that submitted data is accurate. Prior to an Appropriate Domestic Regulator or Appropriate Foreign Regulator receiving the data, proposed § 49.17 requires that a “Confidentiality and Indemnification Agreement” between the Appropriate Domestic Regulator or Appropriate Foreign Regulator and the registered SDR be executed. Proposed §§ 49.23 and 49.24 specify the reporting requirements for a registered SDR’s emergency policies and procedures and system safeguards. Proposed § 49.23 would require registered SDRs to establish procedures for the exercise of emergency authority in the event of an emergency. A registered SDR policies and procedures shall include provisions to notify the Commission as soon as reasonably practicable of any exercise of emergency authority. When notifying the Commission of any exercise of emergency authority, a SDR shall explain the reasons for taking such emergency action, explain how conflicts of interest were minimized, and document the decision-making process. Underlying documentation shall be made available to the Commission upon request. Proposed § 49.24 provides that a registered SDR must maintain a BC-DR plan which can be invoked in the case of an emergency. A registered SDR shall provide to the Commission, upon request, current copies of its BC-DR plan and other emergency procedures, its assessments of its operational risk and other documents requested by Commission staff for purpose of maintaining a current profile of the SDR’s automated systems. Proposed § 49.24 also requires a registered SDR to notify the Commission staff of: (1) All system malfunction; (2) cyber security incidents or targeted threats that actually or potentially jeopardize automated system operation, reliability, security, or capacity; and (3) any activation of the SDR’s BD-DR plan. Additionally, an SDR shall give the Commission staff timely notice of all (1) planned changes to automated systems that may impact the reliability, security, or adequate scalable capacity of such systems; and (2) planned changes to the SDR’s program of risk analysis and oversight. The Commission estimates that the start-up burden associated with the reporting requirements in this paragraph will be 40,000 hours per respondent for a total of 600,000 aggregate burden hours for all

respondents. The Commission further estimates that the total ongoing annual burden of these systems to be 15,000 hours per respondent for a total of 225,000 aggregate burden hours for all respondents.

Proposed § 49.25 would require a registered SDR to report to the Commission (and provide sufficient documentation to substantiate the calculations made therein) the amount of financial resources available to the SDR to meet the requirements set forth in proposed § 49.25, the value of each financial resource available, and provide a financial statement, including the balance sheet, income statement, and statement of cash flows of the registered SDR. In addition to providing documentation of the methodology used to compute its financial requirement, a registered SDR must also provide copies of any agreement establishing or amending a credit facility, insurance coverage, or other arrangement evidencing or otherwise supporting the SDR’s conclusions. The Commission estimates the financial statement will result in 200 annual burden hours per SDR for 3000 aggregate annual burden hours.

**Recordkeeping Requirement.** Under proposed § 49.12, registered SDRs, which are estimated to be approximately 15 entities, would be required to maintain the swap transaction data it receives for a period of not less than five (5) years after the applicable swap expires, during which time the records must be readily available by the SDR and available to the Commission via real-time electronic access. Thereafter, the swap data must be archived and retrievable by the SDR within 3 business days. In addition to requiring SDRs to maintain records of swap transaction and pricing data, the proposed Regulations impose an additional recordkeeping requirement on SDRs whereby they must maintain: (a) A copy of written policies and procedures, including the code of ethics and conflicts of interest policies in furtherance of compliance with the Act and Commission regulations, and (b) any records relevant to the annual compliance report. These proposed recordkeeping obligations are estimated to involve, initially, 300 burden hours, for an aggregate of 4500 annual burden hours. The Commission further estimates that the ongoing annual burden would be 254 hours per respondent for a total ongoing annual burden of 3810 hours.

**Disclosure Requirements.** Proposed § 49.26 provides that before accepting any swap data from a reporting entity or upon a reporting entity’s request, a

registered SDR shall furnish to the reporting entity a disclosure document. This disclosure document must contain written information which reasonably enables the reporting entity to identify and accurately evaluate the risks and costs associated with using the services of the SDR. The proposed disclosure obligation is estimated to involve a one-time initial burden of 100 hours per respondent (*i.e.*, preparation of template disclosure document), for a total initial burden of 1,500 hours. The Commission expects this requirement will result in an ongoing annual burden of one hour per respondent, for a total annual burden of 15 hours for all registered SDRs.

### 3. Information Collection Comments

The Commission invites the public and other Federal agencies to comment on any aspect of the reporting and recordkeeping burdens discussed above. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments in order to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (ii) evaluate the accuracy of the Commission's estimate of the burden of the proposed collection of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Comments may be submitted directly to the OMB's Office of Information and Regulatory Affairs, by fax at (202) 395-6566 or by e-mail at [OIRASubmissions@omb.eop.gov](mailto:OIRASubmissions@omb.eop.gov). Please provide the Commission with a copy of submitted comments so that all comments can be summarized and addressed in the final rule preamble. Refer to the Addresses section of this notice of proposed rulemaking for comment submission instructions to the Commission. A copy of the supporting statements for the collections of information discussed above may be obtained by visiting [RegInfo.gov](http://RegInfo.gov). OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release in the **Federal Register**. Consequently, a comment to OMB is most assured of being fully effective if received by OMB (and the Commission) within 30 days after publication of this notice of proposed rulemaking. Nothing in the foregoing

affects the deadline enumerated above for public comment to the Commission on the proposed rules.

### B. Cost-Benefit Analysis

Section 15(a) of the CEA <sup>143</sup> requires that the Commission, before promulgating a regulation or issuing an order, to consider the costs and benefits of its action. By its terms, Section 15(a) of the CEA does not require the Commission to quantify the costs and benefits of a new regulation or to determine whether the benefits of the regulation outweigh its costs. Rather, Section 15(a) of the CEA simply requires the Commission to "consider the costs and benefits" of its action.

Section 15(a) of the CEA further specifies that costs and benefits shall be evaluated in light of the following considerations: (1) Protection of market participants and the public; (2) efficiency and competition; (3) financial integrity of the futures markets and price discovery; (4) sound risk management practices; and (5) other public interest considerations. Accordingly, the Commission could, in its discretion, give greater weight to any one of the five considerations and could determine that, notwithstanding its costs, a particular regulation was necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the Act.

#### 1. Costs

The Commission has determined that if the proposed regulations are not enacted, there will be a continued lack of transparency in the swaps market for both market participants and regulators. Increased costs to market participants will result from inefficiencies in the market related to price discovery and risk management and the inability of regulators to monitor systemic risk. This will ultimately result in greater market risk for all market participants and greater systemic risk for the larger economy.

#### 2. Benefits

The Commission has determined that the proposed regulations would benefit market participants and the public by improving governance arrangements to prevent conflicts of interests that if not addressed, would serve the interests of one group of constituents over other groups, including market participants and the public. Additionally, the proposed regulations will improve efficiency and competition by identifying and mitigating conflicts of

interests, which will lead to improved efficiency in decision-making on the one hand, and benefit competition by increasing open access to markets, on the other hand. The proposed regulations will also spur competition in the data and trade repository industry by setting forth clear registration guidelines and requirements for becoming SDRs and requiring more transparency and access for existing repositories. Enhanced transparency in the markets will also facilitate price discovery, which will decrease risk and, in turn, increase financial integrity. The increased transparency resulting from the proposed rules will lead to improved risk management practices, and the new governance arrangements more effectively balance different interests so that the risks presented by a "control group" or other interests will not dominate decision-making in the organization. Lastly, the proposed rules will give the Commission and other federal regulators access to data accepted by registered SDRs. Such access will promote greater risk management and give regulators a better measure of systematic risk throughout the financial markets. The proposed rules, for the reasons cited above, operate in the best interests of the public.

### 3. Public Comment

The Commission invites public comment on its cost-benefit considerations. Commenters are also invited to submit any data or other information that they may have quantifying or qualifying the costs and benefits of this proposal with their comment letters.

### C. Antitrust Considerations

Section 15(b) of the Act requires "[t]he Commission [to] take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the objectives of this Act, as well as the policies and purposes of this Act, in issuing any order or adopting any Commission rule or regulation

\* \* \*<sup>144</sup>

The Commission does not anticipate that these proposed regulations will result in anticompetitive behavior. However, because these proposed regulations are creating a new registered entity for a new market (*i.e.*, swaps market), the Commission encourages comments from the public on this regulation's potential anticompetitive nature.

<sup>143</sup> 7 U.S.C. 19(a).

<sup>144</sup> 7 U.S.C. 19.

#### D. Regulatory Flexibility Act

The Regulatory Flexibility Act (“RFA”) <sup>145</sup> requires that agencies consider whether the regulations they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis respecting the impact. <sup>146</sup> The proposed Regulations by the Commission will affect only SDRs, which will comprise a new category of registered entity. Accordingly, the Commission has not previously addressed the question of whether SDRs are, in fact, small entities for purposes of the RFA.

The Commission has previously established certain definitions of “small entities” to be used in evaluating the impact of its rules under the RFA. <sup>147</sup> The Commission previously determined that derivatives clearing organizations (“DCOs”) are not small entities because they clear contracts executed on contract markets such as designated contract markets (“DCMs”). The Commission’s decision was based in part on its previous determination that DCMs are not small entities because of “the central role” they play in “the regulatory scheme concerning futures trading.” <sup>148</sup> Because of the “importance of futures trading in the national economy,” to register as a DCM, a board of trade has to meet stringent requirements set forth in Section 5 of the Act, 7 U.S.C. 7. <sup>149</sup> DCOs are subject to similar stringent requirements, including substantial financial resource requirements, set forth in Section 5b of the Act, 7 U.S.C. 7a–1.

The Dodd-Frank Act defines a SDR as any person that collects and maintains information or records with respect to transactions or positions in, or the terms and conditions of, swaps entered into by third parties for the purpose of providing a centralized recordkeeping facility for swaps. Similar to DCOs and DCMs, SDRs will play a central role both in the regulatory scheme for swaps trading and in the overall market for swap transactions. Additionally, the amount and complexity of swap transaction data expected to be reported, maintained and disseminated by SDRs is expected to require significant financial resources to build the systems necessary to comply with the statutory mandates set forth in the Dodd-Frank

Act. SDRs will receive data from DCOs and DCMs, amongst others. Additionally, SDRs will be required to maintain certain minimum financial resources to perform its statutory duties set forth in proposed § 49.9 and the core principles set forth in proposed § 49.19. Although the financial requirements will vary for SDRs (*i.e.*, an SDR’s financial resources shall be considered sufficient if their value is at least equal to a total amount that would enable the SDR, or applicant for registration, to cover its operating costs for a period of at least one year, calculated on a rolling basis), for the basic purpose of the financial integrity of the swaps market, the Commission can make no size distinction among registered SDRs. The Commission believes that the financial resources required to be registered as an SDR and to meet the statutory obligations of an SDR would essentially prohibit “small entities.” Therefore, for purposes of the RFA, the Commission is hereby determining that SDRs, like DCOs and DCMs, are not “small entities.”

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

#### VI. List of Subjects

##### List of Subjects in 17 CFR Part 49

Swap data repositories; registration and regulatory requirements.

In consideration of the foregoing, and pursuant to the authority in the Commodity Exchange Act, as amended, and in particular Sections 8a(5) and 21 of the Act, the Commission hereby proposes to amend Chapter I of Title 17 of the Code of Federal Regulation by adding a new part 49 as follows:

#### PART 49—SWAP DATA REPOSITORIES

- Sec
- 49.1 Scope.
  - 49.2 Definitions.
  - 49.3 Procedures for registration.
  - 49.4 Withdrawal from registration.
  - 49.5 Equity interest transfers.
  - 49.6 Registration of successor entities.
  - 49.7 Swap data repositories located in foreign jurisdictions.
  - 49.8 Procedures for implementing registered swap data repository rules.
  - 49.9 Duties of registered swap data repositories.
  - 49.10 Acceptance of data.
  - 49.11 Confirmation of data accuracy.
  - 49.12 Swap data repository recordkeeping requirements.
  - 49.13 Monitoring, screening and analyzing swap data.

- 49.14 Monitoring, screening and analyzing end-user clearing exemption claims by individual and affiliated entities.
  - 49.15 Real-time public reporting of swap data.
  - 49.16 Privacy and confidentiality requirements of swap data repositories.
  - 49.17 Access to SDR data.
  - 49.18 Confidentiality and indemnification agreement.
  - 49.19 Core principles applicable to registered swap data repositories.
  - 49.20 Governance arrangements (Core Principle 2).
  - 49.21 Conflicts of interest (Core Principle 3).
  - 49.22 Chief compliance officer.
  - 49.23 Emergency policies and procedures.
  - 49.24 System safeguards.
  - 49.25 Financial resources.
  - 49.26 Disclosure requirements of swap data repositories.
  - 49.27 Access and fees.
- Appendix A to part 49—Form SDR

**Authority:** 7 U.S.C. 12a and 24a, as amended by Title VII of the Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010), unless otherwise noted.

##### § 49.1 Scope.

The provisions of this part apply to any swap data repository as defined under Section 1a(48) of the Act which is registered or is required to register as such with the Commission pursuant to Section 21(a) of the Act.

##### § 49.2 Definitions.

- (a) As used in this part:
- (1) *Affiliate*. The term “affiliate” means a person that directly, or indirectly, controls, is controlled by, or is under common control with, the swap data repository.
  - (2) *Asset Class*. The term “asset class” means the particular broad category of goods, services or commodities underlying a swap. The asset classes include credit, equity, interest rates, currency, other commodities, and such other asset classes as may be determined by the Commission.

(3) *Control*. The term “control” (including the terms “controlled by” and “under common control with”) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

(4) *Foreign Regulator*. The term “Foreign Regulator” means a foreign futures authority as defined in Section 1a(26) of the Act, foreign financial supervisors, foreign central banks and foreign ministries.

(5) *Commercial Use*. The term “commercial use” means the use of swap data held and maintained by a

<sup>145</sup> 5 U.S.C. 601 *et seq.*

<sup>146</sup> 5 U.S.C. 601 *et seq.*

<sup>147</sup> Policy Statement and Establishment of Definitions of “Small Entities” for Purposes of the Regulatory Flexibility Act, 47 FR 18,618 (Apr. 30, 1982).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at note 3.

registered swap data repository for a profit or business purposes. The use of swap data for regulatory purposes and/or responsibilities by a registered swap data repository would not be considered a commercial use regardless of whether the registered swap data repository charges a fee for reporting such swap data.

(6) *Market Participant*. The term “*market participant*” means any person participating in the swap market, including, but not limited to, designated contract markets, derivatives clearing organizations, swaps execution facilities, swap dealers, major swap participants, and any other counterparties to a swap transaction.

(7) *Non-affiliated third party*. The term “*non-affiliated third party*” means any person except:

- (i) The swap data repository,
- (ii) The swap data repository’s affiliate, or
- (iii) A person employed by a swap data repository and any entity that is not the swap data repository’s affiliate (and “*non-affiliated third party*” includes such entity that jointly employs the person).

(8) *Person Associated with a Swap Data Repository*. The term “*person associated with a swap data repository*” means:

- (i) Any partner, officer, or director of such swap data repository (or any person occupying a similar status or performing similar functions);
- (ii) Any person directly or indirectly controlling, controlled by, or under common control with such swap data repository;
- (iii) Or any employee of such swap data repository.

(9) *Position*. The term “*position*” means the gross and net notional amounts of open swap transactions aggregated by one or more attributes, including, but not limited to, the:

- (i) Underlying instrument;
- (ii) Index, or reference entity;
- (iii) Counterparty;
- (iv) Asset class;
- (v) Long risk of the underlying instrument, index, or reference entity; and

(vi) Short risk of the underlying instrument, index, or reference entity.

(10) *Reporting Entity*. The term “*reporting entity*” means those entities that are required to report swap data to a registered swap data repository. These reporting entities include designated contract markets, swaps execution facilities, derivatives clearing organizations, swap dealers, major swap participants and certain end-users.

(11) *Section 8 Material*. The term “*Section 8 Material*” means the business

transactions, trade data, or market positions of any person and trade secrets or names of customers.

(12) *Swap Data*. The term “*swap data*” means the specific data elements and information set forth in part 45 of this chapter that is required to be reported by a reporting entity to a registered swap data repository.

(13) *SDR Information*. The term “*SDR Information*” means any information that the swap data repository maintains.

(14) *Registered Swap Data Repository*. The term “*registered swaps data repository*” means a swaps data repository that is registered under Section 21 of the Act.

(15) *Independent Perspective*. The term “*independent perspective*” means a viewpoint that is impartial regarding competitive, commercial, or industry concerns and contemplates the effect of a decision on all constituencies involved.

(b) *Defined Terms*. Capitalized terms not defined in this part shall have the meanings assigned to them in § 1.3 of this chapter.

#### § 49.3 Procedures for registration.

(a) *Application Procedures*. (1) An applicant, person or entity desiring to be registered as a swap data repository shall file electronically an application for registration on Form SDR provided in appendix A to this part, with the Secretary of the Commission at its headquarters in Washington, DC at [submissions@cftc.gov](mailto:submissions@cftc.gov) in accordance with the instructions contained therein.

(2) The application shall include information sufficient to demonstrate compliance with core principles specified in Section 21 of the Act and the regulations thereunder. Form SDR consists of instructions, general questions and a list of Exhibits (documents, information and evidence) required by the Commission in order to determine whether an applicant is able to comply with the core principles. An application will not be considered to be materially complete unless the applicant has submitted, at a minimum, the exhibits as required in Form SDR. If the application is not materially complete, the Commission shall notify the applicant that the application will not be deemed to have been submitted for purposes of the 180-day review procedures.

(3) *180-Day Review Procedures*. The Commission will review the application for registration as a swap data repository within 180 days of the date of the filing of such application. At or prior to the conclusion of the 180-day period, the Commission will either by order grant registration; extend, by order, the 180-

day review period for good cause; or deny the application for registration as a swap data repository. The 180-day review period shall commence once a completed submission on Form SDR is submitted to the Commission. The determination of when such submission on Form SDR is complete shall be at the sole discretion of the Commission. If deemed appropriate, the Commission may grant registration as a swap data repository subject to conditions. If the Commission denies an application for registration as a swap data repository, it shall specify the grounds for such denial. In the event of a denial of registration for a swap data repository, any person so denied shall be afforded an opportunity for a hearing before the Commission.

(4) *Standard for Approval*. The Commission shall grant the registration of a swap data repository if the Commission finds that such swap data repository is appropriately organized, and has the capacity, to ensure the prompt, accurate and reliable performance of its functions as a swap data repository, comply with any applicable provisions of the Act and regulations thereunder, carry out its functions in a manner consistent with the purposes of Section 21 of the Act and the regulations thereunder, and operate in a fair, equitable and consistent manner. The Commission shall deny registration of a swap data repository if it appears that the application is materially incomplete; fails in form or substance to meet the requirements of Section 21 of the Act and part 49; or is amended or supplemented in a manner that is inconsistent with this § 49.3. The Commission shall notify the applicant seeking registration that the Commission is denying the application setting forth the deficiencies in the application, and/or the manner in which the application fails to meet the requirements of this part.

(5) *Amendments and Annual Filing*. If any information reported on Form SDR or in any amendment thereto is or becomes inaccurate for any reason, whether before or after the application for registration has been granted, the swap data repository shall promptly file an amendment on Form SDR updating such information. In addition, the swap data repository shall annually file an amendment on Form SDR within 60 days after the end of each calendar year of such swap data repository.

(6) *Service of Process*. Each swap data repository shall designate and authorize on Form SDR an agent in the United States, other than a Commission official, who shall accept any notice or service

of process, pleadings, or other documents in any action or proceedings brought against the swap data repository to enforce the Act and the regulations thereunder.

(b) *Provisional Registration.* The Commission, upon the request of an applicant, may grant provisional registration of a swap data repository if such applicant is in substantial compliance with the standards set forth in paragraph (a)(4) of this section. Such provisional registration of a swap data repository shall expire on the earlier of: the date that the Commission grants or denies registration of the swap data repository; or the date that the Commission rescinds the temporary registration of the swap data repository. This paragraph (b) of this section shall terminate within 365 days of the effectiveness of this Regulation. A provisional registration granted by the Commission does not affect the right of the Commission to grant or deny permanent registration as provided under paragraph (a)(3) of this section.

(c) *Withdrawal of Application for Registration.* An applicant for registration may withdraw its application submitted pursuant to paragraph (a) of this section by filing with the Commission such a request. Withdrawal of an application for registration shall not affect any action taken or to be taken by the Commission based upon actions, activities, or events occurring during the time that the application for registration was pending with the Commission, and shall not prejudice the filing of a new application by such applicant.

(d) *Reinstatement of Dormant Registration.* Before accepting or re-accepting swap transaction data, a dormant registered swap data repository as defined in § 40.1(e) of this chapter shall reinstate its registration under the procedures set forth in paragraph (a) of this section; provided, however, that an application for reinstatement may rely upon previously submitted materials that still pertain to, and accurately describe, current conditions.

(e) *Delegation of Authority.* (1) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or the Director's delegates, with the consultation of the General Counsel or the General Counsel's delegates, the authority to notify an applicant seeking registration as a swap data repository pursuant to Section 21 of the Act that the application is materially incomplete and the 180-day period review period is extended.

(2) The Director of the Division of Market Oversight may submit to the

Commission for its consideration any matter which has been delegated in this paragraph.

(3) Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in paragraph (e)(1) of this section.

(f) *Request for Confidential Treatment.* An applicant for registration may request confidential treatment for materials submitted in its application as set forth in § 145.9 of this chapter. The applicant shall identify with particularity information in the application that will be subject to a request for confidential treatment.

#### § 49.4 Withdrawal from registration.

(a)(1) A registered swap data repository may withdraw its registration by giving notice in writing to the Commission requesting that its registration as a swap data repository be withdrawn, which notice shall be served at least ninety days prior to the date named therein as the date when the withdrawal of registration shall take effect. The request to withdraw shall be made by a person duly authorized by the registrant and shall specify:

(i) The name of the registrant for which withdrawal of registration is being requested;

(ii) The name, address and telephone number of the swap data repository that will have custody of data and records of the registrant;

(iii) The address where such data and records will be located; and

(iv) A statement that the custodial swap data repository is authorized to make such data and records available in accordance with § 1.44.

(2) Prior to filing a request to withdraw, a registered swap data repository shall file an amended Form SDR to update any inaccurate information. A withdrawal of registration shall not affect any action taken or to be taken by the Commission based upon actions, activities or events occurring during the time that the facility was designated by the Commission.

(b) A notice of withdrawal from registration filed by a swap data repository shall become effective for all matters (except as provided in this paragraph (b)) on the 60th day after the filing thereof with the Commission, within such longer period of time as to which such swap data repository consents or which the Commission, by order, may determine as necessary or appropriate in the public interest.

(c) *Revocation of Registration for False Application.* If, after notice and opportunity for hearing, the

Commission finds that any registered swap data repository has obtained its registration by making any false and misleading statements with respect to any material fact or has violated or failed to comply with any provision of the Act and regulations thereunder, the Commission, by order, may revoke the registration. Pending final determination whether any registration shall be revoked, the Commission, by order, may suspend such registration, if such suspension appears to the Commission, after notice and opportunity for hearing, to be necessary or appropriate and in the public interest.

#### § 49.5 Equity interest transfers.

(a) *Equity transfer notification.* Upon entering into any agreement(s) that could result in an equity interest transfer of ten percent or more in the swap data repository, the swap data repository shall file a notification of the equity interest transfer with the Secretary of the Commission at its Washington, DC headquarters at [submissions@cftc.gov](mailto:submissions@cftc.gov) and the Division of Market Oversight at [DMOSubmissions@cftc.gov](mailto:DMOSubmissions@cftc.gov), no later than the business day, as defined in § 40.1 of this chapter, following the date on which the swap data repository enters into a firm obligation to transfer the equity interest. The swap data repository shall also amend any information that is no longer accurate on Form SDR consistent with the procedures set forth in § 49.3 of this part.

(b) *Required information.* The notification must include and be accompanied by: any relevant agreement(s), including any preliminary agreements; any associated changes to relevant corporate documents; a chart outlining any new ownership or corporate or organizational structure; a brief description of the purpose and any impact of the equity interest transfer; and a representation from the swap data repository that it meets all of the requirements of Section 21 of the Act and Commission regulations adopted thereunder. The swap data repository shall keep the Commission apprised of the projected date that the transaction resulting in the equity interest transfer will be consummated, and must provide to the Commission any new agreements or modifications to the original agreement(s) filed pursuant to this section. The swap data repository shall notify the Commission of the consummation of the transaction on the day in which it occurs.

(c) *Certification.* (1) Upon a transfer of an equity interest of ten percent or more

in a registered swap data repository, the registered swap data repository shall file with the Secretary of the Commission at its Washington DC headquarters, at *submissions@cftc.gov*, and the Division of Market Oversight, at *DMOSubmissions@cftc.gov*, a certification that the registered swap data repository meets all of the requirements of Section 21 of the Act and Commission regulations adopted thereunder, no later than two business days, as defined in § 40.1 of this chapter, following the date on which the equity interest of ten percent or more was acquired. Such certification shall state whether changes to any aspects of the swap data repository's operations were made as a result of such change in ownership, and include a description of any such change(s).

(2) The certification required under this paragraph may rely on and be supported by reference to an application for registration as a swap data repository or prior filings made pursuant to a rule submission requirement, along with any necessary new filings, including new filings that provide any and all material updates of prior submissions.

#### § 49.6 Registration of successor entities.

(a) In the event of a corporate transaction, such as a re-organization, merger, acquisition, bankruptcy or other similar corporate event, that creates a new entity, in which the swap data repository continues to operate, the swap data repository shall request a transfer of the registration, rules, and other matters, no later than 30 days after the succession. The registration of the predecessor shall be deemed to remain effective as the registration of the successor if the successor, within 30 days after such succession, files an application for registration on Form SDR, and the predecessor files a request for vacation of registration on Form SDR *provided, however*, that the registration of the predecessor swap data repository shall cease to be effective 90 days after the application for registration on Form SDR is filed by the successor swap data repository.

(b) If the succession is based solely on a change in the predecessor's date or state of incorporation, form of organization, or composition of a partnership, the successor may, within 30 days after the succession, amend the registration of the predecessor swap data repository on Form SDR to reflect these changes. This amendment shall be an application for registration filed by the predecessor and adopted by the successor.

#### § 49.7 Swap data repositories located in foreign jurisdictions.

Any swap data repository located outside of the United States applying for registration pursuant to § 49.3 of this part shall certify on Form SDR and provide an opinion of counsel that the swap data repository, as a matter of law, is able to provide the Commission with prompt access to the books and records of such swap data repository and that the swap data repository can submit to onsite inspection and examination by the Commission.

#### § 49.8 Procedures for implementing registered swap data repository rules.

(a) *Request for Commission approval of rules.* An applicant for registration as a swap data repository may request that the Commission approve under Section 5c(c) of the Act, any or all of its rules and subsequent amendments thereto, prior to their implementation or, notwithstanding the provisions of Section 5c(c)(2) of the Act, at anytime thereafter, under the procedures of § 40.5 of this chapter.

(b) Notwithstanding the timeline under § 40.5(c) of this chapter, the rules of a swap data repository that have been submitted for Commission approval at the same time as an application for registration under § 49.3 of this part to reinstate the registration of a dormant registered swap data repository, as defined in § 40.1 of this chapter, will be deemed approved by the Commission no earlier than when the swap data repository is deemed to be registered or reinstated.

(c) *Self-certification of rules.* Rules of a registered swap data repository not voluntarily submitted for prior Commission approval pursuant to paragraph (a) of this section must be submitted to the Commission with a certification that the rule or rule amendment complies with the Act or rules thereunder pursuant to the procedures of § 40.6 of this chapter, as applicable.

#### § 49.9 Duties of registered swap data repositories.

(a) *Duties.* To be registered, and maintain registration, as a swap data repository, a registered swap data repository shall:

- (1) Accept data as prescribed in § 49.10 for each swap;
- (2) Confirm, as prescribed in § 49.11, with both counterparties to the swap the accuracy of the data that was submitted;
- (3) Maintain, as prescribed in § 49.12, the data described in part 45 of the Commission's Regulations in such form and manner as provided therein and in the Act and the rules and regulations thereunder;

(4) Provide direct electronic access to the Commission (or any designee of the Commission, including another registered entity) as prescribed in § 49.17;

(5) Provide the information set forth in § 49.15 to comply with the public reporting requirements set forth in Section 2(a)(13) of the Act;

(6) Establish automated systems for monitoring, screening, and analyzing swap data as prescribed in § 49.13;

(7) Establish automated systems for the monitoring, screening and analyzing end-user clearing exemption claims as prescribed in § 49.14;

(8) Maintain the privacy of any and all swap data and any other related information that the swap data repository receives from a reporting entity as prescribed in § 49.16;

(9) Upon request of certain appropriate domestic and foreign regulators, provide access to swap data and information held and maintained by the swap data repository as prescribed in § 49.17;

(10) Adopt and establish appropriate emergency policies and procedures as prescribed in § 49.23.

(11) Designate an individual to serve as a chief compliance officer who shall comply with § 49.22; and

(12) Subject itself to inspection and examination by the Commission.

(b) This Regulation is not intended to limit, or restrict, the applicability of other provisions of the Act, including, but not limited to, Section 2(a)(13) of the Act and rules and regulations promulgated thereunder.

#### § 49.10 Acceptance of data.

(a) A registered swap data repository shall establish, maintain, and enforce policies and procedures for the reporting of swap data to the registered swap data repository and shall accept and promptly record all swap data in its selected asset class and other regulatory information that is required to be reported pursuant to part 45 of this chapter by designated contract markets, derivatives clearing organizations, swap execution facilities, swap dealers, major swap participants and/or end-users.

(1) *Electronic Connectivity.* For the purpose of accepting all swap data as required by part 45, the registered swap data repository shall adopt policies and procedures, including technological protocols, which provide for electronic connectivity between the swap data repository and designated contract markets, derivatives clearing organizations, swaps execution facilities, swap dealers, major swap participants and/or end-users who report such data. The technological



protocols established by a swap data repository shall provide for the receipt of swap creation data, swap continuation data, real-time public reporting data, and all other data and information required to be reported to such swap data repository. The swap data repository shall ensure that its mechanisms for data acceptance are reliable and secure.

(b) A registered swap data repository shall set forth in its application for registration as described in § 49.3 the specific asset class or classes for which it will accept swaps data. If a swap data repository accepts swap data of a particular asset class, then it shall accept data from all swaps of that asset class.

(c) A registered swap data repository shall establish policies and procedures reasonably designed to prevent any provision in a valid swap from being invalidated or modified through the confirmation or recording process of the swap data repository.

(d) A registered swap data repository shall establish procedures and provide facilities for effectively resolving disputes over the accuracy of the swap data and positions that are recorded in the registered swap data repository.

#### § 49.11 Confirmation of data accuracy.

(a) A registered swap data repository shall establish policies and procedures to ensure the accuracy of swap data and other regulatory information required to be reported by this part 49 that it receives from reporting entities or certain third party service providers such as confirmation or matching service providers acting on their behalf.

(b) With respect to data and other regulatory information submitted by a reporting entity or certain third party service providers acting on a reporting entity's behalf, the swap data repository shall confirm with both counterparties to the swap the accuracy of the data and information submitted. This requirement applies to all reported swap data except for data reported for purposes of real-time public reporting.

(c) A registered swap data repository in connection with the process of confirming the accuracy of the data and information submitted shall communicate with both counterparties to the swap and receive acknowledgement of the data and information submitted as well as any correction of any errors. The acknowledgement and correction of errors shall pertain to all information submitted by either counterparty and any entity that has been delegated the reporting obligation. The swap data repository shall keep a record of

corrected errors that is available upon request to the Commission.

#### § 49.12 Swap data repository recordkeeping requirements.

(a) A registered swap data repository shall maintain its books and records in accordance with the requirements of § 45.2 of this chapter regarding the swap data required to be reported to the swap data repository.

(b) A registered swap data repository shall maintain swap data (including all historical positions) throughout the existence of the swap and for five years following final termination of the swap, during which time the records must be readily accessible by the swap data repository and available to the Commission via real-time electronic access; and in archival storage for which such swap data is retrievable by the swap data repository within three business days.

(c) All records required to be kept pursuant to this Regulation shall be open to inspection upon request by any representative of the Commission, the United States Department of Justice, the Securities and Exchange Commission, or by any representative of a prudential regulator as authorized by the Commission. Copies of all such records shall be provided, at the expense of the swap data repository or person required to keep the record, to any representative of the Commission upon request, either by electronic means, in hard copy, or both, as requested by the Commission.

(d) A registered swap data repository that accepts and disseminates swap transaction and pricing data shall comply with the real time public reporting and recordkeeping requirements prescribed in part 43 of this chapter.

(e) A registered swap data repository shall establish policies and procedures to calculate positions for position limits and any other purpose as required by the Commission, for all persons with swaps that have not expired maintained by the registered swap data repository.

#### § 49.13 Monitoring, screening and analyzing swap data.

(a) *Duty to Monitor, Screen and Analyze Data.* A registered swap data repository shall monitor, screen, and analyze all swap data in its possession in such a manner as the Commission may require. A swap data repository shall routinely monitor, screen, and analyze swap data for the purpose of any standing swap surveillance objectives which the Commission may establish as well as specific monitoring, screening, and analysis tasks based on ad hoc requests by the Commission.

(b) *Capacity to Monitor, Screen and Analyze Data.* A registered swap data repository shall establish and maintain sufficient information technology, staff, and other resources to fulfill the requirements in this § 49.13 in a manner prescribed by the Commission. A swap data repository shall monitor the sufficiency of such resources at least annually, and adjust its resources as its responsibilities, or the volume of swap transactions subject to monitoring, screening, and analysis, increase.

#### § 49.14 Monitoring, screening and analyzing end-user clearing exemption claims by individual and affiliated entities.

A registered swap data repository shall have automated systems capable of identifying, aggregating, sorting, and filtering all swap transactions that are reported to it which are exempt from clearing pursuant to Section 2(h)(7) of the Act. Such capabilities shall be applicable to any information provided to a swap data repository by or on behalf of an end user regarding how such end user meets the requirements Sections 2(h)(7)(A)(i), 2(h)(7)(A)(ii), and 2(h)(7)(A)(iii) of the Act and any Commission regulations thereunder.

#### § 49.15 Real-time public reporting of swap data.

(a) *Scope.* The provisions of this § 49.15 apply to real-time public reporting of swap data for off-facility swaps, as defined in part 43 of this chapter.

(b) *Systems to Accept and Disseminate Swap Data In Connection With Real-Time Public Reporting.* A registered swap data repository shall establish such electronic systems as are necessary to accept and publicly disseminate real-time swap data submitted to meet the real-time public reporting obligations of part 43 of this chapter. Any electronic systems established for this purpose must be capable of accepting and publicly disseminating all data fields required by part 43 of this chapter.

(c) *Duty to Notify the Commission of Untimely Data.* A registered swap data repository must notify the Commission of any swap transaction for which the real-time swap data was not received by the swap data repository within the time period required by § 43.3(a)(3). This notification must be submitted electronically to the Commission within forty-eight hours of when the swap data repository first receives an untimely real-time swap data report from one of the parties to the swap transaction. The notification submitted to the Commission must include all real-time swap data submitted for the relevant

swap transaction; identify the party to the swap that submitted the real-time swap data; and contain the date and time, to the nearest second, the real-time swap data was received by the swap data repository.

**§ 49.16 Privacy and confidentiality requirements of swap data repositories.**

(a) Each swap data repository shall:

(1) Establish, maintain, and enforce written policies and procedures reasonably designed to protect the privacy and confidentiality of any and all SDR Information that is not subject to real-time public reporting set forth in part 43 of this chapter. Such policies and procedures shall include, but are not limited to, policies and procedures to protect the privacy and confidentiality of any and all SDR Information (except for data disseminated under part 43) that the swap data repository shares with affiliates and non-affiliated third parties; and

(2) Establish and maintain safeguards, policies, and procedures reasonably designed to prevent the misappropriation or misuse, directly or indirectly, of:

(i) Section 8 Material;

(ii) Other SDR Information; and/or

(iii) Intellectual property, such as trading strategies or portfolio positions, by the swap data repository or any person associated with the swap data repository. Such safeguards, policies, and procedures shall include, but are not limited to,

(A) limiting access to such Section 8 Material, other SDR Information, and intellectual property,

(B) standards controlling persons associated with the swap data repository trading for their personal benefit or the benefit of others, and

(C) adequate oversight to ensure compliance with this subparagraph.

**§ 49.17 Access to SDR data.**

(a) *Purpose.* This Section provides a procedure by which the Commission, other domestic regulators and foreign regulators may obtain access to the swaps data held and maintained by registered swap data repositories. Except as specifically set forth in this Regulation, the Commission's duties and obligations regarding the confidentiality of business transactions or market positions of any person and trade secrets or names of customers identified in Section 8 of the Act are not affected.

(b) *Definitions.* For purposes of this § 49.17, the following terms shall be defined as follows:

(1) *Appropriate Domestic Regulator.* The term "Appropriate Domestic Regulator" shall mean:

(i) The Securities and Exchange Commission;

(ii) Each prudential regulator identified in Section 1a(39) of the Act with respect to requests related to any of such regulator's statutory authorities, without limitation to the activities listed for each regulator in Section 1a(39);

(iii) The Financial Stability Oversight Council;

(iv) The Department of Justice;

(v) The Federal Reserve Bank of New York;

(vi) The Office of Financial Research; and

(vii) Any other person the Commission deems appropriate.

(2) *Appropriate Foreign Regulator.*

The term "Appropriate Foreign Regulator" shall mean those Foreign Regulators with an existing memorandum of understanding or other similar type of information sharing arrangement executed with the Commission and/or Foreign Regulators without an MOU as determined on a case-by-case basis by the Commission.

(i) *Filing Requirements.* For those Foreign Regulators who do not currently have a memorandum of understanding with the Commission, the Commission has determined to provide the following filing process for those Foreign Regulators that may require data or information maintained by a registered swap data repository. The filing requirement set forth in this § 49.17 will assist the Commission in its analysis of whether a specific Foreign Regulator should be considered "appropriate" for purposes of Section 21(c)(7) of the Commodity Exchange Act.

(A) The Foreign Regulator is required to file an application in the form and manner prescribed by the Commission.

(B) The Foreign Regulator in its application is required to provide sufficient facts and procedures to permit the Commission to analyze whether the Foreign Regulator has appropriate confidentiality procedures and whether the Foreign Regulator is otherwise subject to local laws, regulations and/or customs that would require disclosure of information in contravention of the Act.

(ii) The Commission in its analysis of Foreign Regulator applications shall be satisfied that any information potentially provided by a registered swap data repository will not be disclosed except in limited circumstances such as an adjudicatory action or proceeding involving the Foreign Regulator that are identified in Section 8 of the Act.

(iii) The Commission reserves the right in connection with any determination of an "Appropriate Foreign Regulator" to revisit or reassess a prior determination consistent with the Act.

(3) *Direct Electronic Access.* For the purposes of this regulation, the term "direct electronic access" shall mean an electronic system, platform or framework that provides internet or web-based access to real-time swap transaction data.

(c) *Commission Access.*

(1) *Direct Electronic Access.* A registered swap data repository shall provide direct electronic access to the Commission or the Commission's designee, including another registered entity, in order for the Commission to carry out its legal and statutory responsibilities under the Act and related regulations.

(2) *Monitoring Tools.* A registered swap data repository is required to provide the Commission with proper tools for the monitoring, screening and analyzing of swap transaction data, including, but not limited to, web-based services, various software and access to the staff of the swap data repository and/or third party service providers or agents familiar with the operations of the registered swap data repository, which can provide assistance to the Commission regarding data structure and content. These monitoring tools shall be identical in analytical capability as those provided to the compliance staff and the Chief Compliance Officer of the swap data repository.

(3) *Authorized Users.* The swap transaction data provided to the Commission by a registered swap data repository shall be accessible only by authorized users. The swap data repository shall maintain and provide a list of authorized users in the manner and frequency determined by the Commission.

(d) *Other Regulators—(1) Procedure for Gaining Access to Registered Swap Data Repository Data.* Appropriate Domestic Regulators and Appropriate Foreign Regulators seeking to gain access to the swaps data maintained by a swap data repository are required to apply for access as follows:

(i) File a request for access with the registered swap data repository setting forth in sufficient detail the basis of its request; and

(ii) Certify the statutory authority for its request and that it is acting within the scope of its jurisdiction;

(2) *Obligations of the Registered Swap Data Repository in Connection with Appropriate Domestic Regulator or*

*Appropriate Foreign Regulator Requests for Data Access.*

(i) A registered swap data repository shall promptly notify the Commission regarding any request received by an Appropriate Domestic Regulator or Appropriate Foreign Regulator to gain access to the swaps transaction data maintained by such swap data repository.

(ii) The registered swap data repository shall notify the Commission electronically in a format specified by the Secretary of the Commission.

(3) *Timing.* Once the swaps data repository provides the Commission with notification of a request for data access by an Appropriate Domestic Regulator or Appropriate Foreign Regulator as required by paragraph (d)(2) of this section, such swap data repository shall provide access to the requested swaps data if satisfied that the Appropriate Domestic Regulator or Appropriate Foreign Regulator is acting within the scope of its authority.

(4) *Confidentiality and Indemnification Agreement.* Consistent with § 49.18 of this part, the Appropriate Domestic Regulator or Appropriate Foreign Regulator prior to receipt of any requested data or information shall execute a “Confidentiality and Indemnification Agreement” with the registered swap data repository as set forth in Section 21(d) of the Act.

(e) *Third Party Service Providers to a Registered Swap Data Repository.* Access to the data and information maintained by a registered swap data repository may be necessary for certain third parties that provide various technology and data-related services to a registered swap data repository. Third party access to the swap data maintained by a swap data repository is permissible subject to the following conditions:

(1) Both the registered swap data repository and the third party service provider shall have strict confidentiality procedures that protect data and information from improper disclosure.

(2) Prior to swaps data access, the third party service provider and the registered swaps data repository shall execute a “Confidentiality Agreement” setting forth minimum confidentiality procedures and permissible uses of the information maintained by the swaps data repository.

(f) *Access by Market Participants—*

(1) *General.* Access of swap data maintained by the registered swaps data repository to market participants is generally prohibited.

(2) *Exception.* Data and information maintained by the registered swap data

repository may be accessed by market participants if the specific data was originally submitted by such party.

(g) *Commercial Uses of Data Maintained by the Registered Swap Data Repository Prohibited.* Data maintained by the swap data repository generally may not be used for commercial or business purposes by the swap data repository or any of its affiliated entities.

(1) The registered swap data repository is required to adopt and implement adequate “firewalls” to protect the data required to be maintained under § 49.12 of this part and Section 21(b) of the Act from any improper, commercial use.

(2) *Exception.* Market participants who submit the data maintained by the registered swap data repository may permit the commercial or business use of that data by express written consent.

**§ 49.18 Confidentiality and indemnification agreement.**

(a) *Purpose.* This section sets forth the obligations of registered swap data repositories to execute a “Confidentiality and Indemnification Agreement” in connection with providing access to swaps data to certain domestic regulators and “appropriate foreign regulators.”

(b) *Confidentiality and Indemnification Agreement.* Prior to the registered swap data repository providing access to the swaps data with any Appropriate Domestic Regulator or Appropriate Foreign Regulator as defined in § 49.17(b), the swap data repository shall receive a written agreement from each such entity stating that the entity shall abide by the confidentiality requirements described in Section 8 of the Act relating to the swap data that is provided; and each such entity shall agree to indemnify the swap data repository and the Commission for any expenses arising from litigation relating to the information provided under Section 8 of the Act.

**§ 49.19 Core principles applicable to registered swap data repositories.**

(a) *Compliance with Core Principles.* To be registered, and maintain registration, a swap data repository shall comply with the core principles as described in this paragraph. Unless otherwise determined by the Commission by rule or regulation, a swap data repository shall have reasonable discretion in establishing the manner in which the swap data repository complies with the core principles described in this paragraph.

(b) *Antitrust Considerations (Core Principle 1).* Unless appropriate to achieve the purposes of the Act, a registered swap data repository shall avoid adopting any rule or taking any action that results in any unreasonable restraint of trade; or imposing any material anticompetitive burden on trading, clearing or reporting swaps.

(c) *Governance Arrangements (Core Principle 2).* Registered swap data repositories shall establish governance arrangements as set forth in § 49.20.

(d) *Conflicts of Interest (Core Principle 3).* Registered swap data repositories shall manage and minimize conflicts of interest and establish processes for resolving such conflicts of interest as set forth in § 49.21.

(e) *Additional Duties (Core Principle 4).* Registered swap data repositories shall also comply with the following additional duties:

(1) *System Safeguards.* Registered swap data repositories shall establish and maintain a program of system safeguards, including business continuity and disaster recovery plans as set forth in § 49.24;

(2) *Financial Resources.* Registered swap data repositories shall maintain sufficient financial resources as set forth in § 49.25;

(3) *Disclosure Requirements of Registered Swap Data Repositories.* Registered swap data repositories shall furnish an appropriate disclosure document setting forth the risks and costs of swap data repository services as detailed in § 49.26; and

(4) *Access and Fees.* Registered swap data repositories shall adhere to Commission requirements regarding fair and open access and the charging of any fees, dues or other similar type charges as detailed in § 49.27.

**§ 49.20 Governance arrangements (Core Principle 2).**

(a) *General.* (1) Each registered swap data repository shall establish governance arrangements that are transparent to fulfill public interest requirements, and to support the objectives of the Federal Government, owners, and participants.

(2) Each registered swap data repository shall establish governance arrangements that are well-defined and include a clear organizational structure with consistent lines of responsibility and effective internal controls, including with respect to administration, accounting, and the disclosure of confidential information. § 49.22 of this part contains rules on internal controls applicable to administration and accounting. § 49.16 of this part contains rules on internal

controls applicable to the disclosure of confidential information.

(b) *Transparency of Governance Arrangements.* (1) Each registered swap data repository shall state in its charter documents that its governance arrangements are transparent to support, among other things, the objectives of the Federal Government pursuant to Section 21(f)(2) of the Act.

(2) Each registered swap data repository shall, at a minimum, make the following information available to the public and relevant authorities, including the Commission:

(i) The mission statement of the registered swap data repository;

(ii) The mission statement and/or charter of the board of directors, as well as of each committee of the registered swap data repository that has:

(A) The authority to act on behalf of the board of directors or

(B) The authority to amend or constrain actions of the board of directors;

(iii) The board of directors nomination process for the registered swap data repository, as well as the process for assigning members of the board of directors or other persons to any committee referenced in paragraph (b)(2)(ii) of this section;

(iv) For the board of directors and each committee referenced in paragraph (b)(2)(ii) of this section, the names of all members;

(v) A description of the manner in which the board of directors, as well as any committee referenced in paragraph (b)(2)(ii) of this section, considers an Independent Perspective in its decision-making process, as § 49.2(a)(14) of this part defines such term;

(vi) The lines of responsibility and accountability for each operational unit of the registered swap data repository to any committee thereof and/or the board of directors; and

(vii) Summaries of significant decisions implicating the public interest, the rationale for such decisions, and the process for reaching such decisions. Such significant decisions shall include decisions relating to pricing of repository services, offering of ancillary services, access to data, and use of Section 8 Material, other SDR Information, and intellectual property (as referenced in § 49.16 of this part).

(3) The registered swap data repository shall ensure that the information specified in paragraph (b)(2)(i) to (vii) of this section is current, accurate, clear, and readily accessible, for example, on its Web site. The swap data repository shall set forth such information in a language commonly used in the commodity futures and

swap markets and at least one of the domestic language(s) of the jurisdiction in which the swap data repository is located.

(4) Furthermore, the registered swap data repository shall disclose the information specified in paragraph (b)(2)(vii) of this section in a sufficiently comprehensive and detailed fashion so as to permit the public and relevant authorities, including the Commission, to understand the policies or procedures of the swap data repository implicated and the manner in which the decision implements or amends such policies or procedures. A swap data repository shall not disclose minutes from meetings of its board of directors or committees to the public, although it shall disclose such minutes to the Commission upon request.

(c) *The Board of Directors—*

(1) *General.* (i) Each registered swap data repository shall establish, maintain, and enforce (including, without limitation, pursuant to paragraph (c)(4) of this Regulation) written policies or procedures:

(A) To ensure that its board of directors, as well as any committee that has:

(1) Authority to act on behalf of its board of directors or

(2) Authority to amend or constrain actions of its board of directors, adequately considers an Independent Perspective in its decision-making process;

(B) To ensure that the nominations process for such board of directors, as well as the process for assigning members of the board of directors or other persons to such committees, adequately incorporates an Independent Perspective; and

(C) To clearly articulate the roles and responsibilities of such board of directors, as well as such committees, especially with respect to the manner in which they ensure that a registered swap data repository complies with all statutory and regulatory responsibilities under the Act and the regulations promulgated thereunder.

(ii) Each registered swap data repository shall submit to the Commission, within thirty days after each election of its board of directors:

(A) For the board of directors, as well as each committee referenced in paragraph (c)(1)(i)(A) of this section, a list of all members;

(B) A description of the relationship, if any, between such members and the registered swap data repository or any reporting entity thereof (or, in each case, affiliates thereof, as § 49.2(a)(1) of this part defines such term); and

(C) Any amendments to the written policies and procedures referenced in paragraph (c)(1)(i) of this section.

(2) *Compensation.* The compensation of non-executive members of the board of directors of a registered swap data repository shall not be linked to the business performance of such swap data repository.

(3) *Annual Self-Review.* The board of directors of a registered swap data repository shall review its performance and that of its individual members annually. It should consider periodically using external facilitators for such reviews.

(4) *Board Member Removal.* A registered swap data repository shall have procedures to remove a member from the board of directors, where the conduct of such member is likely to be prejudicial to the sound and prudent management of the swap data repository.

(5) *Expertise.* Each registered swap data repository shall ensure that members of its board of directors, members of any committee referenced in paragraph (c)(1)(i)(A) of this Regulation, and its senior management, in each case, are of sufficiently good repute and possess the requisite skills and expertise to fulfill their responsibilities in the management and governance of the swap data repository, to have a clear understanding of such responsibilities, and to exercise sound judgment about the affairs of the swap data repository.

(d) *Compliance with Core Principle.* The chief compliance officer of the registered swap data repository shall review the compliance of the swap data repository with this core principle.

#### **§ 49.21 Conflicts of interest (Core Principle 3).**

(a) *General.* (1) Each registered swap data repository shall establish and enforce rules to minimize conflicts of interest in the decision-making process of the swap data repository, and establish a process for resolving such conflicts of interest.

(2) Nothing in this section shall supersede any requirement applicable to the SDR pursuant to § 49.20 of this part.

(b) *Policies and Procedures.* (1) Each registered swap data repository shall establish, maintain, and enforce written procedures to:

(i) Identify, on an ongoing basis, existing and potential conflicts of interest; and

(ii) Make decisions in the event of a conflict of interest. Such procedures shall include rules regarding the recusal, in applicable circumstances, of

parties involved in the making of decisions.

(2) As further described in § 49.20 of this part, the chief compliance officer of the registered swap data repository shall, in consultation with the board of directors or a senior officer of the swap data repository, resolve any such conflicts of interest.

(c) *Compliance with Core Principle.* The chief compliance officer of the registered swap data repository shall review the compliance of the swap data repository with this core principle.

#### § 49.22 Chief compliance officer.

(a) *Definition of Board of Directors.* For purposes of this part 49, the term “board of directors” means the board of directors of a registered swap data repository, or for those swap data repositories whose organizational structure does not include a board of directors, a body performing a function similar to a board of directors.

(b) *Designation and qualifications of chief compliance officer—(1) Chief Compliance Officer Required.* Each registered swap data repository shall establish the position of chief compliance officer, and designate an individual to serve in that capacity.

(i) The position of chief compliance officer shall carry with it the authority and resources to develop and enforce policies and procedures necessary to fulfill the duties set forth for chief compliance officers in the Act and Commission regulations.

(ii) The chief compliance officer shall have supervisory authority over all staff acting in furtherance of the chief compliance officer’s statutory and regulatory obligations.

(2) *Qualifications of Chief Compliance Officer.* The individual designated to serve as chief compliance officer shall have the background and skills appropriate for fulfilling the responsibilities of the position. No individual disqualified from registration pursuant to Sections 8a(2) or 8a(3) of the Act may serve as a chief compliance officer.

(c) *Appointment, Supervision, and Removal of Chief Compliance Officer—(1) Appointment and Compensation of Chief Compliance Officer Determined by Board of Directors.* A registered swap data repository’s chief compliance officer shall be appointed by its board of directors. The board of directors shall also approve the compensation of the chief compliance officer and shall meet with the chief compliance officer at least annually. The appointment of the chief compliance officer and approval of the chief compliance officer’s compensation shall require the approval

of a majority of the board of directors. The senior officer of the swap data repository may fulfill these responsibilities. A swap data repository shall notify the Commission of the appointment of a new chief compliance officer within two business days of such appointment.

(2) *Supervision of Chief Compliance Officer.* A registered swap data repository’s chief compliance officer shall report directly to the board of directors or to the senior officer of the swap data repository, at the swap data repository’s discretion.

(3) *Removal of Chief Compliance Officer by Board of Directors.* Removal of a registered swap data repository’s chief compliance officer shall require the approval of a majority of the swap data repository’s board of directors. If the swap data repository does not have a board of directors, then the chief compliance officer may be removed by the senior officer of the swap data repository. The swap data repository shall notify the Commission within two business days of appointing any new chief compliance officer, whether interim or permanent.

(d) *Duties of Chief Compliance Officer.* The chief compliance officer’s duties shall include, but are not limited to, the following:

(1) Overseeing and reviewing the swap data repository’s compliance with Section 21 of the Act and any related rules adopted by the Commission;

(2) In consultation with the board of directors, a body performing a function similar to the board, or the senior officer of the swap data repository, resolving any conflicts of interest that may arise:

(i) Conflicts between business considerations and compliance requirements;

(ii) Conflicts between business considerations and the requirement that the registered swap data repository provide fair and open access as set forth in § 49.27 of this part; and

(iii) Conflicts between a registered swap data repository’s management and members of the board of directors;

(3) Establishing and administering written policies and procedures reasonably designed to prevent violation of the Act and any rules adopted by the Commission;

(4) Ensuring compliance with the Act and Commission regulations relating to agreements, contracts, or transactions, and with Commission regulations under Section 21 of the Act, including confidentiality and indemnification agreements entered into with foreign or domestic regulators pursuant to Section 21(d) of the Act;

(5) Establishing procedures for the remediation of noncompliance issues identified by the chief compliance officer through a compliance office review, look-back, internal or external audit finding, self-reported error, or validated complaint;

(6) Establishing and following appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues; and

(7) Establishing and administering a written code of ethics designed to prevent ethical violations and to promote honesty and ethical conduct.

(e) *Annual Compliance Report Prepared by Chief Compliance Officer.* The chief compliance officer shall, not less than annually, prepare an annual compliance report, that at a minimum, contains the following information covering the time period since the date on which the swap data repository became registered with the Commission or since the end of the period covered by a previously filed annual compliance report, as applicable:

(1) A description of the registered swap data repository’s written policies and procedures, including the code of ethics and conflict of interest policies;

(2) A review of applicable Commission regulations and each subsection and core principle of Section 21 of the Act, that, with respect to each:

(i) Identifies the policies and procedures that ensure compliance with each subsection and the core principle, including each duty specified in Section 21(c);

(ii) Provides a self-assessment as to the effectiveness of these policies and procedures; and

(iii) Discusses areas for improvement, and recommends potential or prospective changes or improvements to its compliance program and resources;

(3) A list of any material changes to compliance policies and procedures since the last annual compliance report;

(4) A description of the financial, managerial, and operational resources set aside for compliance with respect to the Act and Commission regulations;

(5) A description of any material compliance matters, including noncompliance issues identified through a compliance office review, look-back, internal or external audit finding, self-reported error, or validated complaint, and explains how they were resolved;

(6) Any objections to the annual compliance report by those persons who have oversight responsibility for the chief compliance officer; and

(7) A certification by the chief compliance officer that, to the best of

his or her knowledge and reasonable belief, and under penalty of law, the annual compliance report is accurate and complete.

(f) *Submission of Annual Compliance Report by Chief Compliance Officer to the Commission.* (1) Prior to submission of the annual compliance report to the Commission, the chief compliance officer shall provide the annual compliance report to the board of the registered swap data repository for its review. If the swap data repository does not have board, then the annual compliance report shall be provided to the senior officer for their review. Members of the board and the senior officer may not require the chief compliance officer to make any changes to the report. Submission of the report to the board or senior officer, and any subsequent discussion of the report, shall be recorded in board minutes or similar written record, as evidence of compliance with this requirement.

(2) The annual compliance report shall be provided electronically to the Commission not more than 60 days after the end of the registered swap data repository's fiscal year.

(3) Promptly upon discovery of any material error or omission made in a previously filed compliance report, the chief compliance officer shall file an amendment with the Commission to correct any material error or omission. An amendment shall contain the oath or certification required under paragraph (e)(7) of this section.

(4) A registered swap data repository may request the Commission for an extension of time to file its compliance report based on substantial, undue hardship. Extensions for the filing deadline may be granted at the discretion of the Commission.

(5) Annual compliance reports filed pursuant to this section will be treated as exempt from mandatory public disclosure for purposes of the Freedom of Information Act and the Government in the Sunshine Act and parts 145 and 147 of this chapter, but will be available for official use by any official or employee of the United States and any State, by any self-regulatory organization of which the person filing the report is a member, and by any other person to whom the Commission believes disclosure is in the public interest.

(g) *Recordkeeping.* (1) The registered swap data repository shall maintain:

(i) A copy of the written policies and procedures, including the code of ethics and conflicts of interest policies adopted in furtherance of compliance with the Act and Commission regulations;

(ii) Copies of all materials, including written reports provided to the board of directors or senior officer in connection with the review of the annual compliance report under paragraph (f)(1) of this section and the board minutes or similar written record of such review, that record the submission of the annual compliance report to the board of directors or senior officer; and

(iii) Any records relevant to the registered swap data repository's annual compliance report, including, but not limited to, work papers and other documents that form the basis of the report, and memoranda, correspondence, other documents, and records that are:

(A) Created, sent or received in connection with the annual compliance report and

(B) Contain conclusions, opinions, analyses, or financial data related to the annual compliance report.

(2) The registered swap data repository shall maintain records in accordance with § 1.31 of this chapter.

#### **§ 49.23 Emergency policies and procedures.**

(a) *Emergency Policies and Procedures Required.* A registered swap data repository shall establish policies and procedures for the exercise of emergency authority in the event of any emergency, including but not limited to natural, man-made, and information technology emergencies. Such policies and procedures shall also require a swap data repository to exercise its emergency authority upon request by the Commission. A swap data repository's policies and procedures for the exercise of emergency authority shall be transparent to the Commission and to market participants whose swap transaction data resides at the swap data repository.

(b) *Invocation of Emergency Authority.* A registered swap data repository's policies and procedures for the exercise of emergency authority shall enumerate the circumstances under which the swap data repository is authorized to invoke its emergency authority and the procedures that it shall follow to declare an emergency. Such policies and procedures shall also address the range of measures that it is authorized to take when exercising such emergency authority.

(c) *Designation of Persons Authorized to act in an Emergency.* A registered swap data repository shall designate one or more officials of the swap data repository as persons authorized to exercise emergency authority on its behalf. A swap data repository shall also establish a chain of command to be used

in the event that the designated person(s) is unavailable. A swap data repository shall notify the Commission of the person(s) designated to exercise emergency authority.

(d) *Conflicts of Interest.* A registered swap data repository's policies and procedures for the exercise of emergency authority shall include provisions to avoid conflicts of interest in any decisions made pursuant to emergency authority. Such policies and procedures shall also include provisions to consult the swap data repository's chief compliance officer in any emergency decision that may raise potential conflicts of interest.

(e) *Notification to the Commission.* A registered swap data repository's policies and procedures for the exercise of emergency authority shall include provisions to notify the Commission as soon as reasonably practicable regarding any invocation of emergency authority. When notifying the Commission of any exercise of emergency authority, a swap data repository shall explain the reasons for taking such emergency action, explain how conflicts of interest were minimized, and document the decision-making process. Underlying documentation shall be made available to the Commission upon request.

#### **§ 49.24 System safeguards.**

(a) Each registered swap data repository shall, with respect to all swap data in its custody:

(1) Establish and maintain a program of risk analysis and oversight to identify and minimize sources of operational risk through the development of appropriate controls and procedures and the development of automated systems that are reliable, secure, and have adequate scalable capacity;

(2) Establish and maintain emergency procedures, backup facilities, and a business continuity-disaster recovery plan that allow for the timely recovery and resumption of operations and the fulfillment of the duties and obligations of the swap data repository; and

(3) Periodically conduct tests to verify that backup resources are sufficient to ensure continued fulfillment of all duties of the swap data repository established by the Act or the Commission's regulations.

(b) A registered swap data repository's program of risk analysis and oversight with respect to its operations and automated systems shall address each of the following categories of risk analysis and oversight:

(1) Information security;

(2) Business continuity-disaster recovery planning and resources;

(3) Capacity and performance planning;

(4) Systems operations;

(5) Systems development and quality assurance; and

(6) Physical security and environmental controls.

(c) In addressing the categories of risk analysis and oversight required under paragraph (b) above, a registered swap data repository should follow generally accepted standards and best practices with respect to the development, operation, reliability, security, and capacity of automated systems.

(d) A registered swap data repository shall maintain a business continuity-disaster recovery plan and business continuity-disaster recovery resources, emergency procedures, and backup facilities sufficient to enable timely recovery and resumption of its operations and resumption of its ongoing fulfillment of its duties and obligations as a swap data repository following any disruption of its operations. Such duties and obligations include, without limitation, the duties set forth in § 49.9 and the core principles set forth in § 49.19; and maintenance of a comprehensive audit trail. The swap data repository's business continuity-disaster recovery plan and resources generally should enable resumption of the swap data repository's operations and resumption of ongoing fulfillment of the swap data repository's duties and obligations during the next business day following the disruption.

(e) Swap data repositories determined by the Commission to be critical swap data repositories are subject to more stringent requirements as set forth below.

(1) Each swap data repository that the Commission determines is critical must maintain a disaster recovery plan and business continuity and disaster recovery resources, including infrastructure and personnel, sufficient to enable it to achieve a same-day recovery time objective in the event that its normal capabilities become temporarily inoperable for any reason up to and including a wide-scale disruption.

(2) A same-day recovery time objective is a recovery time objective within the same business day on which normal capabilities become temporarily inoperable for any reason up to and including a wide-scale disruption.

(3) To ensure its ability to achieve a same-day recovery time objective in the event of a wide-scale disruption, each swap data repository that the Commission determines is critical must maintain a degree of geographic

dispersal of both infrastructure and personnel such that:

(i) Infrastructure sufficient to enable the swap data repository to meet a same-day recovery time objective after interruption is located outside the relevant area of the infrastructure the entity normally relies upon to conduct activities necessary to the reporting, recordkeeping and/or dissemination of swap data, and does not rely on the same critical transportation, telecommunications, power, water, or other critical infrastructure components the entity normally relies upon for such activities; and

(ii) Personnel sufficient to enable the swap data repository to meet a same-day recovery time objective, after interruption of normal swap data reporting, recordkeeping and/or dissemination by a wide-scale disruption affecting the relevant area in which the personnel the entity normally relies upon to engage in such activities are located, live and work outside that relevant area.

(4) Each swap data repository that the Commission determines is critical must conduct regular, periodic tests of its business continuity and disaster recovery plans and resources and its capacity to achieve a same-day recovery time objective in the event of a wide-scale disruption. The swap data repository shall keep records of the results of such tests, and make the results available to the Commission upon request.

(f) A registered swap data repository that is not determined by the Commission to be a critical swap data repository satisfies the requirement to be able to resume operations and resume ongoing fulfillment of the swap data repository's duties and obligations during the next business day following a disruption by maintaining either:

(1) Infrastructure and personnel resources of its own that are sufficient to ensure timely recovery and resumption of its operations, duties and obligations as a registered swap data repository following any disruption of its operations; or

(2) Contractual arrangements with other registered swap data repositories or disaster recovery service providers, as appropriate, that are sufficient to ensure continued fulfillment of all of the swap data repository's duties and obligations following any disruption of its operations, both with respect to all swaps reported to the swap data repository and with respect to all swap data contained in the swap data repository.

(g) A registered swap data repository shall notify Commission staff promptly of all:

(1) Systems malfunctions;

(2) Cyber security incidents or targeted threats that actually or potentially jeopardize automated system operation, reliability, security, or capacity; and

(3) Any activation of the swap data repository's business continuity-disaster recovery plan.

(h) A registered swap data repository shall give Commission staff timely advance notice of all:

(1) Planned changes to automated systems that may impact the reliability, security, or adequate scalable capacity of such systems; and

(2) Planned changes to the swap data repository's program of risk analysis and oversight.

(i) A registered swap data repository shall provide to the Commission upon request current copies of its business continuity and disaster recovery plan and other emergency procedures, its assessments of its operational risks, and other documents requested by Commission staff for the purpose of maintaining a current profile of the swap data repository's automated systems.

(j) A registered swap data repository shall conduct regular, periodic, objective testing and review of its automated systems to ensure that they are reliable, secure, and have adequate scalable capacity. It shall also conduct regular, periodic testing and review of its business continuity-disaster recovery capabilities. Both types of testing should be conducted by qualified, independent professionals. Such qualified independent professionals may be independent contractors or employees of the swap data repository, but should not be persons responsible for development or operation of the systems or capabilities being tested. Pursuant to §§ 1.31, 49.12 and 45.2 of the Commission's Regulations, the swap data repository shall keep records of all such tests, and make all test results available to the Commission upon request.

(k) To the extent practicable, a registered swap data repository should:

(1) Coordinate its business continuity-disaster recovery plan with those of the swap execution facilities, designated contract markets, derivatives clearing organizations, swap dealers, and major swap participants who report swap data to the swap data repository, and with those of regulators identified in Section 21(c)(7) of the Act, in a manner adequate to enable effective resumption of the registered swap data repository's

fulfillment of its duties and obligations following a disruption causing activation of the swap data repository's business continuity and disaster recovery plan;

(2) Participate in periodic, synchronized testing of its business continuity-disaster recovery plan and the business continuity-disaster recovery plans of the swap execution facilities, designated contract markets, derivatives clearing organizations, swap dealers, and major swap participants who report swap data to the registered swap data repository, and the business continuity-disaster recovery plans required by the regulators identified in Section 21(c)(7) of the Act; and

(3) Ensure that its business continuity-disaster recovery plan takes into account the business continuity-disaster recovery plans of its telecommunications, power, water, and other essential service providers.

#### **§ 49.25 Financial resources.**

(a) *General rule.* (1) A swap data repository shall maintain sufficient financial resources to perform its statutory duties set forth in § 49.9 and the core principles set forth in § 49.19.

(2) An entity that operates as both a swap data repository and a derivatives clearing organization shall also comply with the financial resource requirements of Core Principle B set forth in Section 5b(c)(2)(B) of the Act.

(3) Financial resources shall be considered sufficient if their value is at least equal to a total amount that would enable the swap data repository, or applicant for registration, to cover its operating costs for a period of at least one year, calculated on a rolling basis.

(4) The financial resources described in this paragraph (a) must be independent and separately dedicated to ensure that assets and capital are not used for multiple purposes.

(b) *Types of financial resources.* Financial resources available to satisfy the requirements of paragraph (a) of this section may include:

(1) The swap data repository's own capital; and

(2) Any other financial resource deemed acceptable by the Commission.

(c) *Computation of financial resource requirement.* A swap data repository shall, on a quarterly basis, based upon its fiscal year, make a reasonable calculation of its projected operating costs over a 12-month period in order to determine the amount needed to meet the requirements of paragraph (a) of this section. The swap data repository shall have reasonable discretion in determining the methodology used to compute such projected operating costs.

The Commission may review the methodology and require changes as appropriate.

(d) *Valuation of financial resources.* At appropriate intervals, but not less than quarterly, a swap data repository shall compute the current market value of each financial resource used to meet its obligations under paragraph (a) of this section. Reductions in value to reflect market and credit risk (haircuts) shall be applied as appropriate.

(e) *Liquidity of financial resources.* The financial resources allocated by the swap data repository to meet the requirements of paragraph (a) shall include unencumbered, liquid financial assets (*i.e.*, cash and/or highly liquid securities) equal to at least six months' operating costs. If any portion of such financial resources is not sufficiently liquid, the swap data repository may take into account a committed line of credit or similar facility for the purpose of meeting this requirement.

(f) *Reporting requirements.* (1) Each fiscal quarter, or at any time upon Commission request, a swap data repository shall report to the Commission the amount of financial resources necessary to meet the requirements of paragraph (a), the value of each financial resource available, computed in accordance with the requirements of paragraph (d); and provide the Commission with a financial statement, including the balance sheet, income statement, and statement of cash flows of the swap data repository or of its parent company. Financial statements shall be prepared in conformity with generally accepted accounting principles (GAAP) applied on a basis consistent with that of the preceding financial statement.

(2) The calculations required by this paragraph shall be made as of the last business day of the swap data repository's fiscal quarter.

(3) The report shall be filed not later than 17 business days after the end of the swap data repository's fiscal quarter, or at such later time as the Commission may permit, in its discretion, upon request by the swap data repository.

#### **§ 49.26 Disclosure requirements of swap data repositories.**

Before accepting any swap data from a reporting entity or upon a reporting entity's request, a registered swap data repository shall furnish to the reporting entity a disclosure document that contains the following written information, which shall reasonably enable the reporting entity to identify and evaluate accurately the risks and costs associated with using the services of the swap data repository:

(a) The registered swap data repository's criteria for providing others with access to services offered and data maintained by the swap data repository;

(b) The registered swap data repository's criteria for those seeking to connect to or link with the swap data repository;

(c) A description of the registered swap data repository's policies and procedures regarding its safeguarding of data and operational reliability to protect the confidentiality and security of such data, as described in § 49.24;

(d) The registered swap data repository's policies and procedures reasonably designed to protect the privacy of any and all swap data that the swap data repository receives from a reporting entity, as described in § 49.16;

(e) The registered swap data repository's policies and procedures regarding its non-commercial and/or commercial use of the swap data that it receives from a market participant, any registered entity, or any other person;

(f) The registered swap data repository's dispute resolution procedures;

(g) A description of all the registered swap data repository's services, including any ancillary services;

(h) The registered swap data repository's updated schedule of any fees, rates, dues, unbundled prices, or other charges for all of its services, including any ancillary services; any discounts or rebates offered; and the criteria to benefit from such discounts or rebates; and

(i) A description of the registered swap data repository's governance arrangements.

#### **§ 49.27 Access and fees.**

(a) *Fair, Open and Equal Access.* A swap data repository, consistent with Section 21 of the Act, shall provide its services to market participants, including but not limited to designated contract markets, swap execution facilities, derivatives clearing organizations, swap dealers, major swap participants and any other counterparties, on fair, open and equal basis. For this purpose, a swap data repository shall not provide access to its services on a discriminatory basis but is required to provide its services to all market participants for swaps it accepts in an asset class.

(b) *Fees.* (1) Any fees or charges imposed by a registered swap data repository in connection with the reporting of swap data and any other supplemental or ancillary services provided by such swap data repository shall be equitable and established in a uniform and non-discriminatory



manner. Fees or charges shall not be used as an artificial barrier to access to the swap data repository. Swap data repositories shall not offer preferential pricing arrangements to any market participant on any basis, including volume discounts or reductions unless such discounts or reductions apply to all market participants uniformly and are not otherwise established in a manner that would effectively limit the application of such discount or reduction to a select number of market participants.

(2) All fees or charges are to be fully disclosed and transparent to market participants. At a minimum, the registered swap data repository shall provide a schedule of fees and charges that is accessible by all market participants on its Web site.

(3) The Commission notes that it will not specifically approve the fees charged by swap data repositories. However, any and all fees charged by swap data repositories must be consistent with the principles set forth in paragraph (b)(1) of this section.

**Appendix A to Part 49—Form SDR  
UNITED STATES COMMODITY  
FUTURES TRADING COMMISSION  
FORM SDR**

**SWAP DATA REPOSITORY  
APPLICATION OR AMENDMENT TO  
APPLICATION FOR REGISTRATION  
UNDER THE COMMODITY EXCHANGE  
ACT**

**REGISTRATION INSTRUCTIONS**

***Intentional misstatements or omissions of fact may constitute federal criminal violations (7 U.S.C. § 13 and 18 U.S.C. § 1001) and/or grounds for disqualification from registration.***

**DEFINITIONS**

Unless the context requires otherwise, all terms used in the form have the same meaning as in the Commodity Exchange Act, as amended, and in the Regulations of the Commission thereunder.

For the purposes of this form, the term “applicant” shall include any applicant for registration as a swap data repository or any registered swap data repository that is amending Form SDR.

**GENERAL INSTRUCTIONS**

1. Two (2) copies of Form SDR and Exhibits thereto are to be filed with the Commodity Futures Trading Commission by applicants for registration as a swap data repository, or

by a registered swap data repository amending such registration, pursuant to Section 21 of the Commodity Exchange Act and the regulations thereunder. Upon the filing of an application for registration, the Commission will publish notice of the filing and afford interested persons an opportunity to submit written data, views and arguments concerning such application. No application for registration shall be effective unless the Commission, by order, grants such registration.

2. Individuals’ names shall be given in full (last name, first name, middle name).

3. Signatures must accompany each copy of the Form SDR filed with the Commission. If this Form SDR is filed by a corporation, it must be signed in the name of the corporation by a principal officer duly authorized; if filed by a limited liability company, this Form SDR must be signed in the name of the limited liability company by a member duly authorized to sign on the limited liability company’s behalf; if filed by a partnership, this Form SDR must be signed in the name of the partnership by a general partner authorized; if filed by an unincorporated organization or association which is not a partnership, it must be signed in the name of the organization or association by the managing agent, *i.e.*, a duly authorized person who directs, manages or who participates in the directing or managing of its affairs.

4. If Form SDR is being filed as an initial application for registration, all applicable items must be answered in full. If any item is not applicable, indicate by “none,” “not applicable,” or “N/A” as appropriate.

5. Under Section 21 of the Commodity Exchange Act and the regulations thereunder, the Commission is authorized to solicit the information required to be supplied by this form from applicants for registration as a swap data repository and from registered swap data repositories amending their registration. Disclosure of the information specified on this form is mandatory prior to processing of an application for registration as a swap data repository. The information will be used for the principal purpose of determining whether the Commission should grant or deny registration to an applicant. Except in cases where confidential treatment is requested by the applicant and granted by the Commission pursuant to the Freedom of

Information Act and the regulations of the Commission thereunder, information supplied on this form will be included routinely in the public files of the Commission and will be available for inspection by any interested person. **A Form which is not prepared and executed in compliance with applicable requirements and instructions may be returned as not acceptable for filing. Acceptance of this Form SDR, however, shall not constitute any finding that the Form SDR has been filed as required or that the information submitted is true, current or complete.**

**UPDATING INFORMATION ON THE FORM SDR**

1. Section 21 requires that if any information contained in Items 1 through 15, 21, 27, and Item 51 of this application, or any supplement or amendment thereto, is or becomes inaccurate for any reason, an amendment must be filed promptly, unless otherwise specified, on Form SDR correcting such information.

2. Registrants filing Form SDR as an amendment (other than an annual amendment) need file only the facing page, the signature page (Item 11), and any pages on which an answer is being amended, together with such exhibits as are being amended. The submission of an amendment represents that all unamended items and exhibits remain true, current and complete as previously filed.

**ANNUAL AMENDMENT ON THE FORM SDR**

Annual amendments on the Form SDR shall be submitted within 60 days of the end of each calendar year. Applicants must complete the facing page and provide updated information.

An applicant may request an extension of time for submitting the annual amendment with the Secretary of the Commission based on substantial, undue hardship. Extensions for filing annual amendments may be granted at the discretion of the Commission.

**WHERE TO FILE**

File registration application and appropriate exhibits electronically with the Commission at the Washington, D.C. headquarters in a format specified by the Secretary of the Commission. Applications should be sent to the attention of the Secretary of the Commission at [submissions@cftc.gov](mailto:submissions@cftc.gov).

**BILLING CODE 6351-01-P**

## UNITED STATES COMMODITY FUTURES TRADING COMMISSION

**FORM SDR**

SWAP DATA REPOSITORY  
APPLICATION OR AMENDMENT TO APPLICATION FOR REGISTRATION  
UNDER THE COMMODITY EXCHANGE ACT

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**Exact name of applicant as specified in charter**

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**Address of principal executive offices**

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- If this is an **APPLICATION** for registration, complete in full and check here.
- If this is an **AMENDMENT** to an application, or to an effective registration (other than an annual amendment) list all items that are amended and check here.

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- If this is an **ANNUAL AMENDMENT** to an application, or to an effective registration (other than an annual amendment) list all items that are amended and check here.

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Please indicate which asset class(es) the applicant intends to serve:

- Interest Rate
- Equity
- Credit
- Foreign Currency
- Commodity (Specify) \_\_\_\_\_
- Other (Specify) \_\_\_\_\_

**GENERAL INFORMATION**

1. Name under which business is conducted, if different than name specified on facing sheet:

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2. If name of business is hereby amended, state previous business name:

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3. Mailing address, if different than address specified on facing sheet:

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**(Number and Street)**

(City)	(State)	(Zip Code)
(Phone)	(Fax)	(Email)

4. List of principal office(s) and address(es) where swap data repositories activities are conducted

<u>Office</u>	<u>Address</u>

5. If applicant is a successor to a previously registered swap data repository, please complete the following:

a. Date of succession

\_\_\_\_\_

b. Full name and address of predecessor registrant

\_\_\_\_\_ (Name)

\_\_\_\_\_ (Number and Street)

\_\_\_\_\_ (City) (State) (Zip Code)

\_\_\_\_\_ (Phone) (Fax) (Email)

6. Furnish a description of the function(s) that the applicant performs or proposes to perform:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**BUSINESS ORGANIZATION**

7. Applicant is a:

- Corporation
- Partnership
- Limited Liability Company
- Other (Specify) \_\_\_\_\_

8. If applicant is a corporation or limited liability company, please complete the following:

a. Date of incorporation

\_\_\_\_\_

- b. State/Country of incorporation  
\_\_\_\_\_
9. If applicant is a partnership, please complete the following:
- c. Date of filing of partnership articles  
\_\_\_\_\_
- d. State/Country in which filed  
\_\_\_\_\_
10. Applicant agrees and consents that the notice of any proceeding before the Commission in connection with its application for registration as a swap data repository may be given by sending such notice by certified mail or confirmed telegram to the officer specified or person named below at the address given.

\_\_\_\_\_  
(Name of person (if applicant is a corporation or limited liability company, title of officer))

\_\_\_\_\_  
(Name of applicant)

\_\_\_\_\_  
(Number and Street)

\_\_\_\_\_  
(City) (State) (Zip  
Code)

\_\_\_\_\_  
(Phone)

\_\_\_\_\_  
(Fax)

\_\_\_\_\_  
(Email)

#### SIGNATURES

11. The Applicant had duly caused this application or amendment to be signed on its behalf by the undersigned, hereunto duly authorized, this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_. The Applicant and the undersigned represent hereby that all information contained herein is true, current and complete. It is understood that all required items and Exhibits are considered integral parts of this form and that the submission of any amendment represents that all unamended items and Exhibits remain true, current, and complete as previously filed.

\_\_\_\_\_  
(Name of Applicant)

\_\_\_\_\_  
(Manual Signature of Authorized Person)

\_\_\_\_\_  
(Title)

#### BILLING CODE 6351-01-C

#### EXHIBITS INSTRUCTIONS

The following exhibits must be included as part of Form SDR and filed with the Commodity Futures Trading Commission by applicants for registration as a swap data repository, or by registered swap data repository amending such registration, pursuant to Section 21 of the Commodity Exchange

Act and regulations thereto. Such exhibits should be labeled according to the items specified in this Form. If any exhibit is not applicable, please specify the exhibit letter and indicate by "none," "not applicable," or "N/A" as appropriate. The applicant must identify with particularity the information in these exhibits that will be subject to a request for confidential

treatment and supporting documentation for such request pursuant to Commission Regulation § 145.9.

If the applicant is a newly formed enterprise and does not have the financial statements required pursuant to Items 25 and 26 of this form, the applicant should provide *pro forma* financial statements for the most recent

six months or since inception, whichever is less. Except for pro forma financial statements prepared for newly-created entities, financial statements shall be prepared in conformity with generally accepted accounting principles ("GAAP") applied on a basis consistent with that of the preceding financial statement.

#### EXHIBITS I—BUSINESS ORGANIZATION

12. List as **Exhibit A** any person who owns ten (10) percent or more of applicant's equity or possesses voting power of any class, either directly or indirectly, through agreement or otherwise, or in any other manner, may control or direct the management or policies of applicant. "Control" for this purpose is defined in Commission Regulation § 49.2(a)(3).

State in Exhibit A the full name and address of each such person and attach a copy of the agreement or, if there is none written, describe the agreement or basis upon which such person exercises or may exercise such control or direction.

13. Attach as **Exhibit B** to this application a narrative that sets forth the fitness standards for the board of directors. Attach a list of the present officers, directors, governors (and, in the case of an applicant not a corporation, the members of all standing committees grouped by committee), or persons performing functions similar to any of the foregoing, of the swap data repository or of the entity identified in Item 16 that performs the swap data repository activities of the applicant, indicating for each:

- a. Name
- b. Title
- c. Date of commencement and, if appropriate, termination of present term of position
- d. Length of time each present officer, director, or governor has held the same position
- e. Brief account of the business experience of each officer and director over the last five (5) years
- f. Any other business affiliations in the securities industry or OTC derivatives industry
- g. A description of:
  - (1) any order of the Commission with respect to such person pursuant to Section 5e of the Act;
  - (2) any conviction or injunction within the past 10 years;
  - (3) any disciplinary action with respect to such person within the last five (5) years;
  - (4) any disqualification under Sections 8b, and 8d of the Act;
  - (5) any disciplinary action under Section 8c of the Act;

(6) any violation pursuant to Section 9 of the Act.

h. For directors, list any committees on which they serve and any compensation received by virtue of their directorship.

14. Attach as **Exhibit C** to this application the following information about the chief compliance officer who has been appointed by the board of directors of the swap data repository or a person or group performing a function similar to such board of directors:

- a. Name
- b. Title
- c. Dates of commencement and termination of present term of office or position
- d. Length of time the chief compliance officer has held the same office or position
- e. Brief account of the business experience of the chief compliance officer over the last five (5) years
- f. Any other business affiliations in the derivatives/securities industry or swap data repository industry
- g. A description of:
  - (1) any order of the Commission with respect to such person pursuant to Section 5e of the Act;
  - (2) any conviction or injunction within the past 10 years;
  - (3) any disciplinary action with respect to such person within the last five (5) years;
  - (4) any disqualification under Sections 8b, and 8d of the Act;
  - (5) any disciplinary action under Section 8c of the Act;
  - (6) any violation pursuant to Section 9 of the Act.

15. Attach as **Exhibit D** a copy of documents relating to the governance arrangements of the applicant, including, but not limited to:

- a. the nomination and selection process of the members on the applicant's board of directors, a person or group performing a function similar to a board of directors (collectively, "board"), or any committee that has the authority to act on behalf of the board or amend or constrain the action of the board, the responsibilities of each of the board and such committee, and the composition of each board and such committee;
- b. the process for assigning members of the board or other persons to any committees referenced in (a);
- c. a description of the manner in which the board and the committees referenced in (a) allows the applicant to comply with applicable core principles, regulations, as well as the policies and procedures of the applicant (including those involving consideration of an Independent Perspective (as

Commission Regulation § 49.2(a)(14) defines such term));

d. a description of the manner in which the board reviews its performance and the performance of its members;

e. a description of the procedures to remove a member of the board, where the conduct of such member is likely to be prejudicial to the sound and prudent management of the applicant.

16. Attach as **Exhibit E** a narrative or graphic description of the organizational structure of the applicant. Note: If the swap data repository activities are conducted primarily by a division, subdivision, or other segregable entity within the applicant's corporation or organization, describe the relationship of such entity within the overall organizational structure and attach as Exhibit E only such description as applies to the segregable entity. Additionally, prove any relevant jurisdictional information, including any and all jurisdictions in which the applicant or any affiliated entity is doing business and registration status, including pending application (e.g., country, regulator, registration category, date of registration). In addition, include a description of the lines of responsibility and accountability for each operational unit of the applicant to (i) any committee thereof and/or (ii) the board.

17. Attach as **Exhibit F** a copy of the conflicts of interest policies and procedures implemented by the applicant to minimize conflicts of interest in the decision-making process of the swap data repository and to establish a process for the resolution of any such conflicts of interest.

18. Attach as **Exhibit G**, a list of all affiliates of the swap data repository and indicate the general nature of the affiliation. Provide a copy of any agreements entered into or to be entered by the swap data repository, including partnerships or joint ventures, or its participants, that will enable the applicant to comply with the registration requirements and core principles specified in Section 21 of the Commodity Exchange Act.

19. Attach as **Exhibit H** to this application a copy of the constitution, articles of incorporation or association with all amendments thereto, and existing by-laws, rules or instruments corresponding thereto, of the applicant. A certificate of good standing dated within one week of the date of the application shall be provided.

20. Where the applicant is a foreign entity seeking registration or filing an amendment to an existing registration, attach as **Exhibit I**, an opinion of

counsel that the swap data repository, as a matter of law, is able to provide the Commission with prompt access to the books and records of such swap data repository and that the swap data repository can submit to onsite inspection and examination by the Commission.

21. Where the applicant is a foreign entity seeking registration, attach as **Exhibit I-1**, to designate and authorize an agent in the United States, other than a Commission official, to accept any notice or service of process, pleadings, or other documents in any action or proceedings brought against the swap data repository to enforce the Act and the regulations thereunder.

22. Attach as **Exhibit J**, a current copy of the applicant's rules as defined in Commission Regulation § 40.1, consisting of all the rules necessary to carry out the duties as a swap data repository.

23. Attach as **Exhibit K**, a description of the applicant's internal disciplinary and enforcement protocols, tools, and procedures. Include the procedures for dispute resolution.

24. Attach as **Exhibit L**, a brief description of any material pending legal proceeding(s), other than ordinary and routine litigation incidental to the business, to which the applicant or any of its affiliates is a party or to which any of its or their property is the subject. Include the name of the court or agency in which the proceeding(s) are pending, the date(s) instituted, and the principal parties thereto, a description of the factual basis alleged to underlie the proceeding(s) and the relief sought. Include similar information as to any such proceeding(s) known to be contemplated by the governmental agencies.

#### **EXHIBITS II—FINANCIAL INFORMATION**

25. Attach as **Exhibit M** a balance sheet, statement of income and expenses, statement of sources and application of revenues and all notes or schedules thereto, as of the most recent fiscal year of the applicant. If a balance sheet and statements certified by an independent public accountant are available, such balance sheet and statement shall be submitted as Exhibit M. Except for pro forma financial statements prepared for newly-created entities, financial statements shall be prepared in conformity with generally accepted accounting principles (GAAP) applied on a basis consistent with that of the preceding financial statement.

26. Attach as **Exhibit N** a balance sheet and an income and expense statement for each affiliate of the swap

data repository that also engages in swap data repository activities as of the end of the most recent fiscal year of each such affiliate. Except for pro forma financial statements prepared for newly-created entities, financial statements shall be prepared in conformity with GAAP applied on a basis consistent with that of the preceding financial statement.

27. Attach as **Exhibit O** the following:

a. A complete list of all dues, fees and other charges imposed, or to be imposed, by or on behalf of applicant for its swap data repository services and identify the service or services provided for each such due, fee, or other charge.

b. Furnish a description of the basis and methods used in determining the level and structure of the dues, fees and other charges listed above in paragraph a of this item.

c. If the applicant differentiates, or proposes to differentiate, among its customers, or classes of customers in the amount of any dues, fees, or other charges imposed for the same or similar services, so state and indicate the amount of each differential. In addition, identify and describe any differences in the cost of providing such services, and any other factors, that account for such differentiations.

#### **EXHIBITS III—OPERATIONAL CAPABILITY**

28. Attach as **Exhibit P** copies of all material contracts with any swap execution facility, clearing agency, central counterparty, or third party service provider. To the extent that form contracts are used by the applicant, submit a sample of each type of form contract used. In addition, include a list of swap execution facilities, clearing agencies, central counterparties, and third party service providers with whom the applicant has entered into material contracts. Where swap data repository functions are performed by a third-party, attach any agreements between or among the applicant and such third party, and identify the services that will be provided.

29. Attach as **Exhibit Q** any technical manuals, other guides or instructions for users of, or participants in, the market.

30. Attach as **Exhibit R** a description of system test procedures, test conducted or test results that will enable the applicant to comply, or demonstrate the applicant's ability to comply with the core principles for swap data repositories.

31. Attach as **Exhibit S** a description in narrative form or by the inclusion of functional specifications, of each service or function performed as a swap data repository. Include in Exhibit S a

description of all procedures utilized for the collection, processing, distribution, publication and retention (e.g., magnetic tape) of information with respect to transactions or positions in, or the terms and conditions of, swaps entered into by market participants.

32. Attach as **Exhibit T** a list of all computer hardware utilized by the applicant to perform swap data repository functions, indicating where such equipment (terminals and other access devices) is physically located.

33. Attach as **Exhibit U** a description of the personnel qualifications for each category of professional employees employed by the swap data repository or the division, subdivision, or other segregable entity within the swap data repository as described in Item 16.

34. Attach as **Exhibit V** a description of the measures or procedures implemented by applicant to provide for the security of any system employed to perform the functions of a swap data repository. Include a general description of any physical and operational safeguards designed to prevent unauthorized access (whether by input or retrieval) to the system. Describe any circumstances within the past year in which the described security measures or safeguards failed to prevent any such unauthorized access to the system and any measures taken to prevent a reoccurrence. Describe any measures used to verify the accuracy of information received or disseminated by the system.

35. Attach as **Exhibit W** copies of emergency policies and procedures and applicant's business continuity-disaster recovery plan. Include a general description of any business continuity-disaster recovery resources, emergency procedures, and backup facilities sufficient to enable timely recovery and resumption of its operations and resumption of its ongoing fulfillment of its duties and obligations as a swap data repository following any disruption of its operations.

36. Where swap data repository functions are performed by automated facilities or systems, attach as **Exhibit X** a description of all backup systems or subsystems that are designed to prevent interruptions in the performance of any swap data repository function as a result of technical malfunctions or otherwise in the system itself, in any permitted input or output system connection, or as a result of any independent source. Include a narrative description of each type of interruption that has lasted for more than two minutes and has occurred within the six (6) months preceding the date of the filing, including the date of each interruption,

the cause and duration. Also state the total number of interruptions that have lasted two minutes or less.

37. Attach as **Exhibit Y** the following:

a. For each of the swap data repository functions:

(1) quantify in appropriate units of measure the limits on the swap data repository's capacity to receive (or collect), process, store or display (or disseminate for display or other use) the data elements included within each function (e.g., number of inquiries from remote terminals); and

(2) identify the factors (mechanical, electronic or other) that account for the current limitations reported in answer to (1) on the swap data repository's capacity to receive (or collect), process, store or display (or disseminate for display or other use) the data elements included within each function.

b. If the applicant is able to employ, or presently employs, the central processing units of its system(s) for any use other than for performing the functions of a swap data repository, state the priorities of assignment of capacity between such functions and such other uses, and state the methods used or able to be used to divert capacity between such functions and such other uses.

#### EXHIBITS IV—ACCESS TO SERVICES

38. Attach as **Exhibit Z** the following:

a. As to each swap data repository service that the applicant provides, state the number of persons who presently utilize, or who have notified the applicant of their intention to utilize, the services of the swap data repository.

b. For each instance during the past year in which any person has been prohibited or limited in respect of access to services offered by the applicant as a swap data repository, indicate the name of each such person and the reason for the prohibition or limitation.

c. Define the data elements for purposes of the swap data repository's real-time public reporting obligation. Appendix A to part 43 of the Commission's Regulations (Data Elements and Form for Real-Time Reporting for Particular Markets and Contracts) sets forth the specific data elements for real-time public reporting.

39. Attach as **Exhibit AA** copies of any agreements governing the terms by which information may be shared by the swap data repository, including with market participants. To the extent that form contracts are used by the applicant, submit a sample of each type of form contract used.

40. Attach as **Exhibit BB** a description of any specifications, qualifications or

other criteria that limit, are interpreted to limit, or have the effect of limiting access to or use of any swap data repository services furnished by the applicant and state the reasons for imposing such specifications, qualifications, or other criteria, including whether such specifications, qualifications or other criteria are imposed.

41. Attach as **Exhibit CC** any specifications, qualifications, or other criteria required of participants who utilize the services of the applicant for collection, processing, preparing for distribution, or public dissemination by the applicant.

42. Attach as **Exhibit DD** any specifications, qualifications, or other criteria required of any person, including, but not limited to, regulators, market participants, market infrastructures, venues from which data could be submitted to the applicant, and third party service providers who request access to data maintained by the applicant.

43. Attach as **Exhibit EE** policies and procedures implemented by the applicant to review any prohibition or limitation of any person with respect to access to services offered or data maintained by the applicant and to grant such person access to such services or data if such person has been discriminated against unfairly.

#### EXHIBITS—OTHER POLICIES AND PROCEDURES

44. Attach as **Exhibit FF**, a narrative and supporting documents that may be provided under other Exhibits herein, that describe the manner in which the applicant is able to comply with each core principle and other requirements pursuant to Commission Regulation § 49.17.

45. Attach as **Exhibit GG** policies and procedures implemented by the applicant protect the privacy of any and all swap information that the swap data repository receives from reporting entities.

46. Attach as **Exhibit HH** a description of safeguards, policies, and procedures implemented by the applicant to prevent the misappropriation or misuse of (a) any confidential information received by the applicant, including, but not limited to "Section 8 Material" and "SDR Information," as those terms are defined in Commission Regulation § 49.2, about a market participant or any of its customers; and/or (c) intellectual property by applicant or any person associated with the applicant for their personal benefit or the benefit of others.

47. Attach **Exhibit II** policies and procedures implemented by the

applicant regarding its use of the SDR Information that it receives from a market participant, any registered entity, or any person for non-commercial and/or commercial purposes.

48. Attach as **Exhibit JJ** procedures and a description of facilities of the applicant for effectively resolving disputes over the accuracy of the transaction data and positions that are recorded in the swap data repository.

49. Attach as **Exhibit KK** policies and procedures relating to the applicant's calculation of positions.

50. Attach as **Exhibit LL** policies and procedures that are reasonably designed to prevent any provision in a valid swap from being invalidated or modified through the procedures or operations of the applicant.

51. Attach as **Exhibit MM** a plan to ensure that the transaction data and position data that are recorded in the applicant continue to be maintained after the applicant withdraws from registration as a swap data repository, which shall include procedures for transferring the transaction data and position data to the Commission or its designee (including another registered swap data repository).

Issued in Washington, DC on November 19, 2010, by the Commission.

**David A. Stawick,**

*Secretary of the Commission.*

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

#### Statement of Chairman Gary Gensler Swap Data Repositories

I support the proposed rulemaking to establish registration requirements and regulations of swap data repositories. This proposal would implement Congress's mandate that all swaps—whether cleared or uncleared—be reported to a swap data repository registered with the Commission. Registration will enable the Commission to monitor swap data repositories for compliance with the Dodd-Frank Act and Commission regulations. The proposal implements Congress's direction that regulators would have direct access to information maintained by swap data repositories. The proposal requires swap data repositories to verify the accuracy and completeness of all of the swaps data it accepts. The proposed rule also includes a requirement that swap data repositories would receive notifications with regard to non-financial end-users hedging or mitigating commercial risk. The proposal also includes important features where swap data repositories will facilitate real time reporting of

swaps transactions. Lastly, the proposal includes provisions for swap data repositories to aggregate certain information for regulators and the public.

Dissenting Statement of Commissioner  
Jill E. Sommers

I disagree with several aspects of the proposal the Commission is issuing today, but seek public comment on two particular areas that I believe are important as they relate to the critical function of real-time public reporting of swap data.

First, I request public comment on whether the Commission should require registered swap data repositories (SDRs) to perform the real-time reporting duties described in section 2(a)(13) of the Commodity Exchange Act (CEA), as amended by the Dodd-Frank Act.

Section 21(c) of the CEA sets forth specific duties that SDRs must perform. It directs, in relevant part, that SDRs “shall . . . provide the information described in paragraph (1) [i.e., swap data] in such form and at such frequency as the Commission may require to comply with the public reporting requirements contained in section 2(a)(13) [i.e., real-time reporting].” Section 21(c)(4)(B). The proposal contemplates that SDRs will be required to perform real-time reporting for off-facility swaps, but can choose not to perform this function for swaps executed on a swap market, in which case the data can be submitted to a third-party vendor for real-time reporting.

In my view, real-time reporting is one of the core functions that Congress intended SDRs to perform. The structure

the Commission is proposing may needlessly fragment the public reporting of real-time data and could undermine the purpose of real-time reporting, which is to make data available to the public in a form that enhances price transparency.

Second, I recognize that under Section 2(a)(13) of the CEA the Commission may also require other registered entities to perform real-time reporting, but I question the utility of allowing third-party vendors to perform this important function. As such, I also seek public comment on whether third-party vendors should be subject to some form of regulatory oversight in the event the Commission permits them to accept data for real-time reporting purposes.

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