Appendices to Segregation of Assets Held as Collateral in Uncleared Swap Transactions—Commission Voting Summary, Chairman's Statement, and Commissioners' Statements

Appendix 1—Commission Voting Summary

On this matter, Chairman Giancarlo and Commissioners Quintenz, Behnam, Stump, and Berkovitz voted in the affirmative. No Commissioner voted in the negative.

Appendix 2—Statement of Chairman J. Christopher Giancarlo

This final rule is another Project KISS proposal simplifying and reducing burdens by revisiting our rules based on staff implementation experience and public comment. Today's amendments will remove overly burdensome and prescriptive conditions for providing notice to counterparties of their right to segregate initial margin for uncleared swaps and the commercial arrangement between the parties regarding the investment of segregated initial margin.

Staff experience shows that counterparties rarely elect to segregate initial margin, even though the option to do so was provided for in the Commodity Exchange Act and in the CFTC's Regulations 23.700 through 23.704. Enabling the election of segregation is a bipartisan goal, starting with a unanimous Commission rulemaking by a previous commission. By reducing the burdens and prescriptiveness of these rules, and providing additional flexibility for the parties to engage in written segregation arrangements to fit their needs, as the final rule does here, more counterparties may opt to use this provision and avail themselves of any benefits of doing so.

Appendix 3—Concurring Statement of Commissioner Rostin Behnam

I respectfully concur with the Commodity Futures Trading Commission's (the ''Commission'' or ''CFTC'') approval of amendments to subpart L of the Commission's Regulations (''Segregation of Assets Held as Collateral in Uncleared Swap Transactions'' consisting of Regulations 23.700 through 23.704), which implement section 4s(*l*) of the Commodity Exchange Act (''CEA'' or the ''Act''). The amendments to subpart L respond to ongoing concerns and confusion created by the finalization of the CFTC and Prudential Regulator Margin Rules and CFTC interpretive guidance. I voted for the proposal of the subpart L amendments. However, I expressed reservations about the Commission's proposal to extend its prior interpretation of CEA section 4s(*l*) concerning the timing and frequency of required notifications of swap counterparties regarding their right to segregate initial margin for uncleared swaps.[1] I continue to believe that the Commission's rationale in support of interpreting CEA section 4s(*l*) to require a single, one-time notification to a counterparty of their right to require segregation of any initial margin may be based on an incomplete record; it is nevertheless based on the record before us. The Commission sought comment from the public on the appropriateness of the proposed amendments and received just four comment letters. However, none of the letters addressed whether and how requiring the notice to be provided annually has actually impacted or effected decision making by counterparties.

I am disappointed that the Commission is declining to specify what constitutes the beginning of the first swap transaction or to proscribe when trading may commence following the initial notification.[2] In an effort to remain flexible, the Commission is creating uncertainty that may ultimately lead to additional rulemaking. Where the record suggests that need for the current amendment to the notification requirement in CFTC Regulation 23.701(a)(i) may be a consequence of a stakeholder-led compliance effort, I believe the Commission ought not to risk making the same mistake twice.

Appendix 4—Statement of Commissioner Dan M. Berkovitz

The final rule amends CFTC regulations giving certain swap counterparties the right to require initial margin segregation. I support the amendments.

In this instance, real world experience in implementing new regulations demonstrates that modifying certain of the regulatory requirements may help better achieve the intended customer protection goals. An added benefit of fine-tuning the regulations is a reduction in costs for registrants without a reduction in customer protections.

CFTC regulations 23.701 through 23.704 (''Margin Segregation Rules'') set forth certain requirements concerning the right of counterparties of swap dealers to elect segregation of initial margin posted to secure uncleared swaps. These regulations support an important safety measure for mostly non-financial swap counterparties by providing them the right to have collateral posted as initial margin for swaps to be held in segregated accounts at third-party custodians. Segregation protects the counterparty by keeping the counterparty's collateral, and the collateral posted by the swap dealer to cover obligations to the counterparty, separate from the swap dealer's other assets and liabilities in the event of a bankruptcy. The regulations currently in effect provide detailed requirements regarding the delivery of notices by swap dealers to their counterparties of the right to segregate as well as specific, limited investment choices for the collateral.

The Margin Segregation Rules were adopted in 2013. Since that time, two things have happened to warrant changes to the regulations. First, in 2016, the Commission adopted its uncleared swaps margin regulations. The margin rules effectively superseded regulations 23.702 and 23.703 regarding investment of margin funds for a large majority of affected swap counterparties. Second, as detailed in the final release, experience from implementing the Margin Segregation Rules demonstrated that certain aspects of these rules have provided little or no benefit. Almost no counterparties are electing to segregate initial margin in the manner provided by the Margin Segregation Rules with fewer than five counterparties making the election at each of the swap dealers examined for this issue. In addition, some of the specific requirements of the rule added unnecessary costs and the rule's purpose could be achieved through more efficient means.

The amendments in the final rule will reduce the burdens of the rule's notice requirements while assuring that each counterparty is properly notified of the important right to segregate initial margin at the most effective time in the swap documentation process. The final rule also provides the parties with greater flexibility to negotiate mutually beneficial terms for the segregation arrangements based on the specific needs of the counterparties. This flexibility may encourage more counterparties to elect segregation. In addition, the final rule will increase regulatory efficiency by reducing unnecessary notices and procedural requirements that must be documented and examined by the National Futures Association in their oversight of swap dealers.

The reduced costs and greater flexibility that will result from the final rule should benefit both swap dealers and end users in uncleared swap transactions. The comment letters that the Commission received on the notice of proposed rulemaking all provided reasoned support for the proposal. I therefore support today's final rule.

[FR Doc. 2019–06424 Filed 4–2–19; 8:45 am]

BILLING CODE 6351–01–P

[1] Segregation of Assets Held as Collateral in Uncleared Swap Transactions, 83 FR 36484, 36493 through 36494 (proposed July 30, 2018).

[2] Segregation of Assets Held as Collateral in Uncleared Swap Transactions, section II.B. (to be codified at 17 CFR part 23).

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 202

[Release No. 34–85437]

Public Company Accounting Oversight Board Hearing Officers

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is revising its regulations with respect to the method by which hearing officers of the Public Company Accounting Oversight Board (''Board'' or ''PCAOB'') are appointed and removed from office. Specifically, the Commission is adopting a rule expressly requiring that the appointment or removal of a PCAOB hearing officer be subject to Commission approval.

DATES: *Effective Date:* April 3, 2019.

FOR FURTHER INFORMATION CONTACT: Mark Jacoby, Senior Special Counsel, at (202) 551–5337, or Giles Cohen, Acting Chief Counsel, at (202) 551–2512, in the Office of the Chief Accountant, or Lisa Helvin, Counsel to the General Counsel, at (202) 551–5195, or Bryant Morris, Assistant General Counsel, at (202) 551–5153, in the Office of the General Counsel, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

I. Background

The Sarbanes-Oxley Act of 2002, as amended (the ''Sarbanes-Oxley Act'' or the ''Act''),[1] established the PCAOB to oversee the audits of companies that are subject to the securities laws, and related matters, in order to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports.[2] The Act vests the Commission with comprehensive oversight and enforcement authority over the PCAOB. It grants the Commission authority to, among other things, appoint and remove the members of the PCAOB, approve PCAOB rules and professional standards, and oversee the PCAOB's exercise of certain assigned powers and duties.[3]

Section 105 of the Sarbanes-Oxley Act authorizes the Board to investigate and, if necessary, initiate disciplinary action against registered public accounting firms and their associated persons.[4] Upon initiating such an action, the Board may hold a hearing to determine whether a registered public accounting firm or associated person committed, and should be disciplined for, any violation of the Sarbanes-Oxley Act, the securities laws, the Commission's rules, the Board's rules, or professional standards.[5]

The Sarbanes-Oxley Act directs the Board to promulgate rules governing its investigations and adjudications.[6] The Board has done so. As relevant here, those rules provide that once the Board has issued an order instituting proceedings, or after a registration applicant has requested a hearing, a hearing officer will be assigned to preside over the proceeding.[7] The hearing officer is granted ''the authority to do all things necessary and appropriate to discharge his or her duties,'' including: Issuing accounting board demands; receiving and ruling on the admissibility of evidence; generally ''regulating the course of a proceeding and the conduct of the parties and their counsel''; holding pre-hearing and other conferences; ruling on motions; and preparing an initial decision.[8] The role of the PCAOB hearing officer thus closely resembles that of the Commission's administrative law judges (''ALJs'').

On June 21, 2018, the United States Supreme Court in *Lucia* v. *SEC* considered a challenge to the method by which the Commission's ALJs were appointed, holding that because the ALJs exercise ''significant authority pursuant to the laws of the United States,'' they are ''Officers of the United States'' who must be appointed in the manner prescribed by the Constitution's Appointments Clause—by the President, a court of law, or head of a department, such as the Commission.[9] In so holding, the Court followed its earlier decision in *Freytag* v. *Commissioner,* in which it determined that, given the powers they exercise, special trial judges of the United States Tax Court are also constitutional officers.[10]

While PCAOB hearing officers are similarly vested with ''the authority needed to ensure fair and orderly adversarial hearings,'' [11] there are notable differences between the powers they exercise and those exercised by Commission ALJs and Tax Court special trial judges. Unlike the other adjudicators, for example, PCAOB hearing officers are not authorized to administer oaths or punish contemptuous conduct.[12] Moreover, to date, no court has held that PCAOB hearing officers must be appointed as inferior officers under the Appointments Clause.[13] Nevertheless, to remove any doubt about the constitutional status of PCAOB hearing officers, the Commission hereby amends 17 CFR part 202, subpart A (Regulation P) to require that the Commission, acting as head of a department, must approve both the appointment and the removal from office of any PCAOB hearing officer before any such action may take effect.[14]

We believe this requirement is consistent with both the Constitution and the oversight and appointment authority Congress has granted the Commission. The Commission has the constitutional authority to both appoint and remove from office the inferior officers under its supervision.[15] Congress has also authorized the Commission to appoint inferior officers ''necessary for carrying out its functions under the securities laws,'' including those specified in the Sarbanes-Oxley Act.[16] Further, pursuant to the Sarbanes-Oxley Act, Congress has granted the Commission comprehensive oversight and enforcement authority over the PCAOB, and it has specified that the Board's appointment of employees and its delegation of functions to such employees are subject to the Commission's oversight.[17]

[1] 15 U.S.C. 7201 *et seq.*

[2] 15 U.S.C. 7211(a).

[3] 15 U.S.C. 7211–7219.

[4] 15 U.S.C. 7215.

[5] *Id.* The Board is authorized to delegate the hearing function to an employee, pursuant to Section 101(f)(4) and (g)(2), 15 U.S.C. 7211(f)(4) & (g)(2).

[6] 15 U.S.C. 7215.

[7] PCAOB Bylaws and Rules, Section 5-Investigations and Adjudications, available at *https://pcaobus.org//Rules/Documents/Section_5.pdf* (effective pursuant to SEC Release No. 34–49704, File No. PCAOB–2003–07, 2004 WL 1439833 (May 14, 2004)).

[8] PCAOB Rule 5200(b); *see also* Guide to Proceedings Before a PCAOB Hearing Office, available at *https://pcaobus.org/Enforcement/Adjudicated/Pages/guide-to-proceedings-before-PCAOB-hearing-officer.aspx* (''A hearing on the merits before a PCAOB Hearing Officer is, in many respects, similar to a trial before a judge in state or federal court.'').

[9] 138 S. Ct. 2044, 2050–51 (2018); Art. II, § 2, cl.2.

[10] *Lucia,* 138 S. Ct. at 2053–54 (citing *Freytag* v. *Comm'r,* 501 U.S. 868 (1991)).

[11] *Lucia,* 138 S. Ct. at 2053.

[12] *Compare, e.g.,* PCAOB Rules 5103, 5105, 5200(b)(1), 5424 (PCAOB hearing officers) *with* 17 CFR 200.14(a)(1) & (2), 200.111(b), 180(a), 232(e), 322 (Commission ALJs) *and Freytag* v. *Comm'r,* 501 U.S. at 881–82 (Tax Court special trial judges).

[13] While the Board is not a governmental entity for statutory purposes, it is '''part of the Government' for constitutional purposes.'' *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.,* 561 U.S. 477, 485–86 (2010).

[14] On December 20, 2018, the Board adopted amendments to its bylaws and rules (collectively, the ''proposed amendments'') to provide that the PCAOB's appointment and removal of hearing officers are subject to Commission approval. The PCOAB filed the proposed amendments with the Commission on January 29, 2019, and on February 11, 2019, the Commission published notice of this filing. See *https://www.sec.gov/rules/pcaob/2019/34-85090.pdf.*

[15] *See Lucia,* 138 S. Ct. 2044, 2051 & n.3; *Edmond* v. *United States,* 520 U.S. 651, 663 (1997); *see also Free Enter. Fund,* 561 U.S. at 513–14.

[16] 5 U.S.C. 4802(b) (citing 15 U.S.C. 78c(a)(47)); 15 U.S.C. 78d(b).

[17] 15 U.S.C. 7217(a); 15 U.S.C. 7211(f), (g).

This power to appoint—or approve the appointment of—inferior officers carries with it the power to remove those individuals from office. As the Supreme Court has explained, ''the power of removal from office is incident to the power of appointment,'' and thus statutes vesting heads of department with appointment authority are presumed to carry with them removal authority, absent language to the contrary.[18] Here, the relevant statutes provide no such restrictions.[19] Accordingly, the Commission may require that it approve both the appointment and the removal from office of any PCAOB hearing officer before any such action may take effect.

II. Administrative Law Matters

The Commission finds, in accordance with the Administrative Procedure Act (''APA''),[20] that these revisions relate solely to agency organization, procedures, or practice and do not constitute a substantive rule. Accordingly, the APA's provisions regarding notice of rulemaking, opportunity for public comment, and advance publication of the amendments prior to their effective date are not applicable. These changes are therefore effective on April 3, 2019. For the same reason, and because these amendments do not affect the rights or obligations of non-agency parties, the provisions of the Small Business Regulatory Enforcement Fairness Act [21] are not applicable. Additionally, the provisions of the Regulatory Flexibility Act,[22] which apply only when notice and comment are required by the APA or other law, are not applicable. These amendments do not contain any collection of information requirements as defined by the Paperwork Reduction Act of 1995.[23] Further, because the amendments impose no new burdens on private parties, the Commission does not believe that the amendments will have any impact on competition for purposes of Section 23(a)(2) of the Exchange Act.

[18] *See Keim* v. *United States,* 177 U.S. 290, 293–94 (1900); *Ex parte Hennen,* 38 U.S. (13 Pet.) 230, 259–60 (1839); *Power of the Secretary of the Treasury to Remove Inspectors of Hulls and Bollers,* 10 Op. Att'y Gen. 204, 207–09 (1862); *Tenure of Office of Inspectors of Customs,* 1 Op. Att'y Gen. 459, 459 (1821).

[19] *See* 5 U.S.C. 4802(b); 15 U.S.C. 78d(b); 15 U.S.C. 7217(a); 15 U.S.C. 7211(f), (g); *see also Free Enter. Fund,* 561 U.S. at 510 (Commission may remove members of the Board ''at will'').

[20] 5 U.S.C. 553(b)(3)(A).

[21] 5 U.S.C. 804(3)(C).

[22] 5 U.S.C. 601 *et seq.*

[23] *See* 44 U.S.C. 3518(c)(1)(B)(ii); 5 CFR 1320.4.

III. Statutory Authority

This rule is adopted pursuant to statutory authority granted to the Commission, including 5 U.S.C. 4802(b), Sections 4(b) and 23(a) of the Exchange Act, 15 U.S.C. 78d(b), and Sections 101 and 107 of the Sarbanes-Oxley Act of 2002, 15 U.S.C. 7211, 7217.

List of Subjects in 17 CFR Part 202

Administrative practice and procedure, Securities.

Text of Rule

For the reasons set out in the preamble, title 17, chapter II of the Code of Federal Regulations is amended as *COM007*follows:

PART 202—INFORMAL AND OTHER PROCEDURES

■ 1. The authority citation for part 202 continues to read in part as follows:

Authority: 15 U.S.C. 77s, 77t, 77sss, 77uuu, 78d–1, 78u, 78w, 78*ll*(d), 80a–37, 80a–41, 80b–9, 80b–11, 7201 *et seq.,* unless otherwise noted.

* * * * *

Subpart A—Public Company Accounting Oversight Board (Regulation P)

■ 2. Section 202.150 is added to read as follows:

§ 202.150 Commission approval of appointment or removal from office of Public Company Accounting Oversight Board hearing officers.

The Commission shall approve both the appointment and removal from office of any hearing officer employed by the Public Company Accounting Oversight Board. No action by the Board proposing to appoint or remove from office a hearing officer shall be final absent Commission approval.

By the Commission.

Dated: March 28, 2019.

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2019–06427 Filed 4–2–19; 8:45 am]

BILLING CODE 8011–01–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Chapter I

Comparability Determination for Australia: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants

AGENCY: Commodity Futures Trading Commission.

ACTION: Notification of determination.

SUMMARY: The following is the analysis and determination of the Commodity Futures Trading Commission (''Commission'') regarding a request by the Australian Prudential Regulation Authority (''APRA'') that the Commission determine that laws and regulations applicable in Australia provide a sufficient basis for an affirmative finding of comparability with respect to margin requirements for uncleared swaps applicable to certain swap dealers (''SDs'') and major swap participants (''MSPs'') registered with the Commission. As discussed in detail herein, the Commission has found the margin requirements for uncleared swaps under the laws and regulations of Australia comparable to those under the Commodity Exchange Act (''CEA'') and Commission regulations.

DATES: This determination was made and issued by the Commission on March 27, 2019.

FOR FURTHER INFORMATION CONTACT: Matthew Kulkin, Director, 202–418–5213, *mkulkin@cftc.gov;* Frank Fisanich, Deputy Director, 202–418–5949, *ffisanich@cftc.gov;* or Lauren Bennett, Special Counsel, 202–418–5290, *lbennett@cftc.gov,* Division of Swap Dealer and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Introduction

Pursuant to section 4s(e) of the CEA,[1] the Commission is required to promulgate margin requirements for uncleared swaps applicable to each SD and MSP for which there is no U.S. Prudential Regulator (collectively, ''Covered Swap Entities'' or ''CSEs'').[2] The Commission published final margin requirements for such CSEs in January 2016 (''CFTC Margin Rule'').[3]

[1] 7 U.S.C. 1 *et seq.*

[2] *See* 7 U.S.C. 6s(e)(1)(B). SDs and MSPs for which there is a U.S. Prudential Regulator must meet the margin requirements for uncleared swaps established by the applicable U.S. Prudential Regulator. 7 U.S.C. 6s(e)(1)(A). *See also* 7 U.S.C. 1a(39) (defining the term ''Prudential Regulator'' to include: The Board of Governors of the Federal Reserve System; the Office of the Comptroller of the Currency; the Federal Deposit Insurance Corporation; the Farm Credit Administration; and the Federal Housing Finance Agency). The U.S. Prudential Regulators published final margin requirements in November 2015. *See* Margin and Capital Requirements for Covered Swap Entities, 80 FR 74840 (Nov. 30, 2015) (''U.S. Prudential Regulators' Margin Rule'').

[3] *See* Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 81 FR 636 (Jan. 6, 2016). The CFTC Margin Rule,