



(e) *Warning statements.* Each product shall address the warning statements shown on figure 13 to paragraph (d)(7) of this section, at a minimum.

**Note 4 to paragraph (e):** “Address” means that verbiage other than what is shown can be used as long as the meaning is the same or information that is product-specific is presented.

#### § 1243.7 Instructional literature.

(a) Instructions shall be provided with the product and shall be easy to read and understand and shall be in the English language at a minimum. These instructions shall include information on assembly, maintenance, cleaning, and use, where applicable.

(b) The instructions shall address the following additional warnings:

(1) Read all instructions before using this product.

(2) Keep instructions for future use.

(3) Do not use this this product if it is damaged or broken.

(4) Instructions shall indicate the manufacturer’s recommended maximum weight, height, age, developmental level, or combination thereof, of the occupant for which the infant support cushion is intended. If this product is not intended for use by a child for a specific reason, the instructions shall state this limitation.

(c) The cautions and warnings in the instructions shall meet the requirements specified in § 1243.6(d)(4) through (6), except that sections 6.4 and 7.2–7.6.3 of ANSI Z535.4—2011 need not be applied. However, the signal word and safety alert symbol shall contrast with the background of the signal word

panel, and the cautions and warnings shall contrast with the background of the instructional literature.

**Note 1 to paragraph (c):** For example, the signal word, safety alert symbol, and the warnings may be black letters on a white background, white letters on a black background, navy blue letters on an off-white background, or some other high-contrast combination.

(d) Any instructions provided in addition to those required by this section shall not contradict or confuse the meaning of the required information or be otherwise misleading to the consumer.

#### § 1243.8 Incorporation by reference.

Certain material is incorporated by reference into this part with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. All approved incorporation by reference (IBR) material is available for inspection at the U.S. Consumer Product Safety Commission and at the National Archives and Records Administration (NARA). Contact the U.S. Consumer Product Safety Commission at: the Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; phone (301) 504-7479; email: [cpsc-os@cpsc.gov](mailto:cpsc-os@cpsc.gov). For information on the availability of this material at NARA, visit [www.archives.gov/federal-register/cfr/ibr-locations](http://www.archives.gov/federal-register/cfr/ibr-locations) or email [fr.inspection@nara.gov](mailto:fr.inspection@nara.gov). The material may be obtained from the following sources:

(a) American National Standards Institute (ANSI), 25 West 43rd Street,

4th Floor, New York, NY 10036, USA; phone: (212) 642-4900; website: [www.ansi.org](http://www.ansi.org) (<https://ibr.ansi.org/Standards/nema.aspx>).

(1) ANSI Z535.4–2011, *American National Standard for Product Safety Signs and Labels*, approved October 20, 2017; approved for § 1243.6.

(2) [Reserved]

(b) ASTM International, 100 Barr Harbor Drive, P.O. Box CB700, West Conshohocken, Pennsylvania 19428–2959; phone: (800) 262-1373; website: [www.astm.org](http://www.astm.org).

(1) ASTM D3359–23, *Standard Test Methods for Rating Adhesion by Tape Test*, approved [TBD]; approved for § 1243.5.

(2) [Reserved]

**Alberta E. Mills,**

*Secretary, Consumer Product Safety Commission.*

[FR Doc. 2023–27324 Filed 1–12–24; 8:45 am]

**BILLING CODE 6355–01–P**

## COMMODITY FUTURES TRADING COMMISSION

### 17 CFR Part 23

RIN 3038–AF33

### Capital and Financial Reporting Requirements for Swap Dealers and Major Swap Participants

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Commodity Futures Trading Commission (“Commission” or

“CFTC”) proposes to amend certain of the Commission’s regulations that impose minimum capital requirements and financial reporting obligations on swap dealers (“SDs”) and major swap participants (“MSPs”). The Commission proposes to do this by codifying parts of staff interpretive letter 21–15 to SDs addressing the Tangible Net Worth Capital Approach for calculating capital under the applicable Commission regulation and no-action letter 21–18 (and its successor no-action letter 23–11) regarding alternative financial reporting by SDs subject to the capital requirements of a prudential regulator (together, “CFTC Letters”). The Commission is also proposing to amend certain of its regulations applicable to SDs, in areas including the required timing of certain notifications, the process for approval of subordinated debt for capital, and the revision of financial reporting forms to conform to the rules. The proposed amendments are intended to make it easier for SDs to comply with the Commission’s financial reporting obligations and demonstrate compliance with minimum capital requirements.

**DATES:** Comments must be received on or before February 13, 2024.

**ADDRESSES:** You may submit comments, which must be in writing and identified by RIN 3038–AF33, by any of the following methods:

- *CFTC Comments Portal:* <https://comments.cftc.gov>. Select the “Submit Comments” link for this rulemaking and follow the instructions on the Public Comment Form.
- *Mail:* Send to Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.
- *Hand Delivery/Courier:* Follow the same instruction as for Mail, above.

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

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

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

**FOR FURTHER INFORMATION CONTACT:** Amanda L. Olear, Director, 202–418–5283, [aolear@cftc.gov](mailto:aolear@cftc.gov); Thomas Smith, Deputy Director, 202–418–5495, [tsmith@cftc.gov](mailto:tsmith@cftc.gov); Joshua Beale, Associate Director, 202–418–5446, [jbeale@cftc.gov](mailto:jbeale@cftc.gov); Jennifer Bauer, Special Counsel, 202–418–5472, [jbauer@cftc.gov](mailto:jbauer@cftc.gov); Maria Aguilar-Rocha, Attorney Advisor, 202–418–5840, [maguilar-rocha@cftc.gov](mailto:maguilar-rocha@cftc.gov); Andrew Pai, Attorney Advisor, 646–746–9893, [apai@cftc.gov](mailto:apai@cftc.gov); Market Participants Division; Lihong McPhail, Research Economist, 202–418–5722, [lmcpfail@cftc.gov](mailto:lmcpfail@cftc.gov), Office of the Chief Economist; Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.

**SUPPLEMENTARY INFORMATION:** On September 15, 2020, the Commission published in the **Federal Register** final rules adopting capital and financial reporting requirements for SDs and MSPs.<sup>1</sup> The Final Rules accomplished the Congressional mandate<sup>2</sup> directing the Commission to adopt rules imposing both capital requirements and initial and variation margin requirements on SDs and MSPs that are not subject to a prudential regulator (“nonbank SDs” and “nonbank MSPs”, respectively).<sup>3</sup> The Final Rules included amendments to existing capital rules for futures

commission merchants (“FCMs”) to provide explicit additional capital requirements for proprietary positions in swaps and security-based swaps that are not cleared by a clearing organization. The Final Rules also included a detailed capital model application process whereby eligible nonbank SDs and nonbank MSPs could apply to the Commission or a registered futures association (“RFA”) of which they are a member for approval. Further, the Final Rules adopted a capital comparability determination process for certain eligible foreign domiciled nonbank SDs and nonbank MSPs to seek substituted compliance for the Commission’s capital and financial reporting requirements.<sup>4</sup> Finally, the Final Rules adopted detailed financial reporting, recordkeeping and notification requirements, including limited financial reporting requirements for SDs and MSPs subject to the capital requirements of prudential regulators (“bank SDs” and “bank MSPs”, respectively).

The Commission initially proposed capital and financial reporting requirements for nonbank SDs and nonbank MSPs, and financial reporting requirements for bank SDs and bank MSPs, in 2011.<sup>5</sup> After extensive comment, in 2016 the Commission re-proposed the rules for comment.<sup>6</sup> The Commission received numerous comments from a broad spectrum of market participants in response to the re-proposal.<sup>7</sup> In addition, following the 2016 re-proposal, the SEC adopted a final set of capital, margin and financial reporting requirements for security-based swap dealers and major security-

<sup>4</sup> To date, the Commission has issued proposals for substituted compliance for eligible nonbank SDs domiciled in Japan, Mexico, and the European Union for public comment. Notice of Proposed Order and Request for Comment on an Application for a Capital Comparability Determination From the Financial Services Agency of Japan, 87 FR 48092 (Aug. 8, 2022); Notice of Proposed Order and Request for Comment on an Application for a Capital Comparability Determination Submitted on Behalf of Nonbank Swap Dealers Subject to Regulation by the Mexican Comision Nacional Bancaria y de Valores, 87 FR 76374 (Dec. 13, 2022); Notice of Proposed Order and Request for Comment on an Application for a Capital Comparability Determination Submitted on Behalf of Nonbank Swap Dealers Domiciled in the French Republic and Federal Republic of Germany and Subject to Capital and Financial Reporting Requirements of the European Union, 88 FR 41774 (June 27, 2023).

<sup>5</sup> Capital Requirements of Swap Dealers and Major Swap Participants, 76 FR 27802 (May 12, 2011).

<sup>6</sup> Capital Requirements of Swap Dealers and Major Swap Participants, 81 FR 91252 (Dec. 16, 2016) (the “2016 Capital Proposal”).

<sup>7</sup> The comment letters for the 2016 *Capital Proposal* are available at <https://comments.cftc.gov/PublicComments/CommentList.aspx?id=1769> (the public comment file).

<sup>1</sup> Capital Requirements of Swap Dealers and Major Swap Participants, 85 FR 57462 (Sept. 15, 2020) (the “Final Rule” or the “Final Rules”).

<sup>2</sup> Section 4s(e) of the Commodity Exchange Act (“CEA” or the “Act”), 7 U.S.C. 6s(e), which is contained in section 731 of the Dodd-Frank Act, requires the Commission to adopt minimum capital and margin requirements for SDs and MSPs that are not subject to a prudential regulator. Section 731 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010) (the “Dodd-Frank Act”). The text of the Dodd-Frank Act is available at <https://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm>.

<sup>3</sup> The term “prudential regulator” is defined as the Board of Governors of the Federal Reserve System (“Federal Reserve Board”); the Office of the Comptroller of the Currency (“OCC”); the Federal Deposit Insurance Corporation (“FDIC”); the Farm Credit Administration; and the Federal Housing Finance Agency. Section 1a(39) of the CEA, 7 U.S.C. 1a(39).

based swap participants (“SBSBs” and “MSBSPs,” respectively).<sup>8</sup> In December 2019, the Commission re-opened the proposed rules for comment in light of the SEC’s final rules, and requested commenters to provide detailed data and information regarding several critical areas of the Commission’s proposed approach.<sup>9</sup>

The Final Rules became effective November 16, 2020.<sup>10</sup> To address concerns from commenters that a sufficient period of time would be necessary to develop policies, procedures and systems to implement the new financial reporting requirements and to develop and obtain approval to use capital models, the Commission adopted an extended compliance date of October 6, 2021 (“Extended Compliance Date”).<sup>11</sup> The Extended Compliance Date also corresponded to the SEC’s compliance date for SBSBs and MSBSPs, thus permitting better coordination for dually-registered entities.<sup>12</sup>

The Commission’s overall capital approach in the Final Rules permits nonbank SDs and MSPs to select one of three methods to calculate their capital requirements.<sup>13</sup> Each method is discussed in detail in the Final Rule and determines the frequency and type of financial reporting information to be provided to the Commission by each nonbank SD and nonbank MSP.<sup>14</sup> Bank SDs, which are not subject to the capital requirements of the Commission, are required to provide the Commission and National Futures Association (“NFA”) with limited financial information regarding the capital and swap positions of the firms. Bank SDs are required to file the limited financial information using CFTC forms that were intended to be comparable with forms required by the prudential regulators and consistent with forms adopted by the SEC for SBSBs subject to the capital rules of a prudential regulator.<sup>15</sup> Together, the

financial reporting and notice requirements included in the Final Rules serve as the mechanism for the Commission to monitor capital compliance by nonbank SDs.

In the Final Rule, the Commission also recognized the role of NFA as the only RFA under the CEA. NFA is an integral component of the Commission’s registration and oversight program. Specifically, the Commission has authorized NFA to administer the registration process for SDs and MSPs,<sup>16</sup> and to approve the use of capital and initial margin models. NFA also conducts examinations of nonbank SDs and nonbank MSPs to assess compliance with Commission and NFA rules.<sup>17</sup> As such, the Final Rules required that financial reports and notices be filed with both the Commission and the NFA,<sup>18</sup> and explicitly recognized NFA’s ability to adopt standardized forms and processes to carry out the Commission’s financial reporting and notification requirements for SDs.<sup>19</sup>

During the period leading up to the Extended Compliance Date, Commission, NFA, and SEC staff collaborated to develop a process for the collection of financial reports and to respond to inquiries from industry participants regarding compliance with financial reporting and notice obligations. On January 12, 2021, Commission staff approved NFA’s capital model application process.<sup>20</sup> On December 21, 2021, NFA adopted new Financial Requirements Section 18 of its rules, which in addition to including capital rules largely modeled after those adopted by the Commission in the Final Rules, published newly developed standardized financial reporting forms FR–CSE–NLA and FR–CSE–BHC for use by nonbank SDs that are not also registered with the SEC.<sup>21</sup>

Prior to the Extended Compliance Date, Commission staff also received inquiries from market participants regarding compliance with various capital and financial reporting

obligations under the Final Rule. In response, Commission staff issued eight no-action and interpretative letters.<sup>22</sup> Two letters, CFTC Letters No. 21–15 and 21–18,<sup>23</sup> are discussed below in detail and inform this proposed rulemaking. In addition, the Commission is proposing several other amendments that are the result of Commission staff’s experience implementing the Final Rule. These amendments are intended to provide technical and other clarifying changes necessary to effectuate the Final Rule’s purpose.

## II. Proposed Amendments to Commission Regulations

### A. Codification of the CFTC Letters and Other Amendments

#### 1. Amendments to Tangible Net Worth Capital Approach—CFTC Letter No. 21–15

The Commission is proposing amendments to definitions in Commission regulation § 23.100<sup>24</sup> to ensure that the Tangible Net Worth Capital Approach may be utilized by eligible nonbank SDs as intended in the Final Rule. Prior to the Final Rules’ implementation date, several nonbank SDs intending to elect the Tangible Net Worth Capital Approach raised concerns regarding the application of the eligibility test to different corporate structures. In response to concerns raised, the Market Participants Division (the “Division”) issued interpretive CFTC Letter No. 21–15 on June 29, 2021.<sup>25</sup> In CFTC Letter No. 21–15, the Division stated that the asset and revenue tests for “predominantly engaged in non-financial activities” could be assessed at the nonbank SD’s

<sup>22</sup> CFTC Letter No. 21–15, June 29, 2021, available at <https://www.cftc.gov/csl/21-15/download>; CFTC Letter No. 21–18, Aug. 31, 2021, available at <https://www.cftc.gov/csl/21-18/download>; CFTC Letter No. 21–20, Sept. 30, 2021, available at <https://www.cftc.gov/csl/21-20/download>; CFTC Letter No. 21–21, Sept. 30, 2021, available at <https://www.cftc.gov/csl/21-21/download>; CFTC Letter No. 21–22, Sept. 30, 2021, available at <https://www.cftc.gov/csl/21-22/download>; CFTC Letter No. 21–23, Sept. 30, 2021, available at <https://www.cftc.gov/csl/21-23/download>; CFTC Letter No. 22–01, Jan. 5, 2022, available at <https://www.cftc.gov/csl/22-01/download>; CFTC Letter No. 22–02, Jan. 5, 2022, available at <https://www.cftc.gov/csl/22-02/download>.

<sup>23</sup> CFTC Letter No. 21–18 was time-limited and set to expire on October 23, 2023. To permit time for the Commission to issue a proposed rulemaking and address any comments received, the Market Participants Division extended the expiration of the letter to the earlier of October 6, 2025, or the adoption of any revised financial reporting requirements for bank SDs under regulation § 23.105(p). CFTC Letter No. 23–11, July 10, 2023, available at <https://www.cftc.gov/csl/23-11/download>.

<sup>24</sup> 17 CFR 23.100.

<sup>25</sup> CFTC Letter No. 21–15.

<sup>8</sup> Capital, Margin and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital and Segregation Requirements for Broker-Dealers, 84 FR 43872 (Aug. 22, 2019) (the “SEC Final Capital Rule”).

<sup>9</sup> Capital Requirements of Swap Dealers and Major Swap Participants, 84 FR 69664 (Dec. 19, 2019).

<sup>10</sup> Final Rules, 85 FR at 57462.

<sup>11</sup> *Id.* at 57525.

<sup>12</sup> *Id.*

<sup>13</sup> See generally *id.* at 57467. The three methods discussed in detail in the Final Rules include the Bank-Based Capital Approach, the Tangible Net Worth Capital Approach, and the Net Liquid Assets Capital Approach.

<sup>14</sup> See generally *id.* at 57480–57502.

<sup>15</sup> See generally *id.* at 57491–57498. This approach is consistent with other Commission rules that permit the acceptance of certain filings under

the SEC adopted final rules in lieu of the Commission’s own rules. See e.g., 17 CFR 1.10(b)(1), 23.105(d)(3), and (e)(5).

<sup>16</sup> See generally Performance of Registration Functions by National Futures Association with Respect to Swap Dealers and Major Swap Participants, 77 FR 2708 (Jan. 19, 2012).

<sup>17</sup> Final Rules, 85 FR 57507–57510.

<sup>18</sup> *Id.* at 57515.

<sup>19</sup> *Id.* at 57518.

<sup>20</sup> CFTC Letter No. 21–03, Jan. 12, 2021, available at <https://www.cftc.gov/csl/21-03/download>.

<sup>21</sup> NFA submitted these rules for Commission review under section 17(j) of the CEA, 7 U.S.C. 21(j), on November 22, 2021, and the rules became effective on December 21, 2021. NFA Notice to Members I–21–45, available at <https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=5437>.

entity level or ultimate parent level and, further, such tests could be computed under International Financial Reporting Standards issued by the International Accounting Standards Board (“IFRS”) in lieu of generally accepted accounting principles (“GAAP”) as adopted in the United States if the entity was permitted to use IFRS for financial reporting.<sup>26</sup> The Division also confirmed that supplemental position reporting for nonbank SDs meeting these qualifications may be filed on a quarterly basis along with the financial reports, as opposed to monthly.<sup>27</sup> In the Commission’s experience over the past two years, the interpretation in CFTC Letter No. 21–15 helped eligible nonbank SDs better understand their compliance obligations under the Commission’s capital and financial reporting requirements at the implementation date of the Final Rules by pointing out an obvious but inadvertent mistake in the Final Rules. Therefore, the Commission is now proposing to modify the relevant Commission regulations to more fully align the Tangible Net Worth Capital Approach with the Commission’s intention as expressed in the preamble to the Final Rules and consistent with the terms of CFTC Letter No. 21–15.

The Commission is proposing to amend the definition in Commission regulation 23.100 of “predominantly engaged in non-financial activities.”<sup>28</sup> This definition is one of the key components, along with the definition of “tangible net worth,”<sup>29</sup> in determining the eligibility for electing and the application of the Tangible Net Worth Capital Approach.<sup>30</sup> Eligibility for this approach is conditioned upon a nonbank SD meeting both a revenue and asset-based test to determine if the nonbank SD is predominantly engaged in non-financial activities. The proposed amendment would modify the definition of “predominantly engaged in non-financial activities” in Commission regulation § 23.100 to explicitly permit the satisfaction of both the revenue and asset-based tests at the consolidated parent level of the nonbank SD as discussed in the preamble to the Final Rules. That is, the proposed amendments would clarify that the tests

may be satisfied either at the level of the nonbank SD or at the level of the nonbank SD’s consolidated parent<sup>31</sup> rather than seeming to exclude the consolidated parent of the nonbank SD as questioned by some commenters.<sup>32</sup>

The Commission is also proposing to amend the definition of “tangible net worth” in Commission regulation § 23.100.<sup>33</sup> Nonbank SDs electing the Tangible Net Worth Capital Approach are currently permitted to use IFRS for their financial reporting obligations under Commission regulation § 23.105.<sup>34</sup> IFRS is permitted as an acceptable reporting standard for all nonbank SDs provided that they otherwise do not prepare financial statements in accordance with U.S. GAAP.<sup>35</sup> The definition of “tangible net worth” in Commission regulation § 23.100, however, only references U.S. GAAP, despite the permissive use of IFRS as part of financial reporting obligations under Commission regulation § 23.105.<sup>36</sup> The proposed amendments to the definition of “tangible net worth” in Commission regulation § 23.100 would clarify that “tangible net worth” may be determined under either applicable accounting standard, U.S. GAAP or IFRS. This amendment would align and correct the permitted use of IFRS in determining eligibility for the approach with the standard permitted and utilized by the nonbank SD in preparation of its financial statements. As discussed in the Final Rule, the Commission is generally comfortable with both U.S. GAAP and IFRS accounting standards in this context, especially as both standards continue to move towards greater convergence.<sup>37</sup> The Commission has preliminarily determined that nonbank SDs utilizing the same standard as is permitted for their financial reporting comports with the purpose of the eligibility test to determine if a SD is predominantly engaged in non-financial activities.

The Commission is also proposing to amend Commission regulation § 23.105(l)<sup>38</sup> to require that each nonbank SD and nonbank MSP file Appendix B to Subpart E of Part 23 (“Appendix B”),<sup>39</sup> which contains aggregate securities, commodities, and swap position information and certain

credit exposure information, with the Commission and NFA on a quarterly rather than a monthly basis. This proposed amendment would align that filing with the periodicity permitted as part of the nonbank SD’s or nonbank MSP’s routine financial report filings required by Commission regulation § 23.105(d) and would clarify that the information provided should be consistent with those financial report filings. Currently, Commission regulation § 23.105(d) permits nonbank SDs electing the Tangible Net Worth Capital Approach to file required financial reports quarterly, whereas nonbank SDs electing either the Bank Based Capital Approach or the Net Liquid Asset Capital Approach are required to file such information on a monthly basis.<sup>40</sup> The amendment would make clear that all swap position and credit information required in Commission regulation § 23.105(l) and Appendix B must be filed at the same periodicity as routine financial reporting required of the respective nonbank SDs set forth within Commission regulation § 23.105(d), which could be either monthly or quarterly depending on the approach elected by the SD.

The Commission has already determined that nonbank SDs electing the Tangible Net Worth Capital Approach may engage in a wide variety of businesses and not be otherwise subject to any financial reporting. Thus, the Commission determined in the Final Rule that such SDs need only file financial reports quarterly and not monthly and may take a longer period of time to file audited financial reports.<sup>41</sup> Moreover, the Commission intended the swap position and credit information in Commission regulation § 23.105(l) and Appendix B to be filed together with other financial information required by Commission regulation § 23.105(d) as this information is supplementary to the financial statements as a whole and completes the routine financial reporting package. This approach is also consistent with how dually-registered SDs with the SEC complete the SEC’s Form X–17A–5 (“FOCUS Report”) Part II.<sup>42</sup> Thus, the proposed amendment is consistent with previous Commission determinations and harmonizes the approach across different nonbank SDs.

<sup>26</sup> *Id.* at 3–6.

<sup>27</sup> *Id.* Compare 17 CFR 23.105(d) with 17 CFR 23.105(l), as the former includes monthly or quarterly periodicity as opposed to the latter only referring to monthly.

<sup>28</sup> See 17 CFR 23.100 for the definition of the term “predominantly engaged in non-financial activities.”

<sup>29</sup> See 17 CFR 23.100 for the definition of the term “tangible net worth.”

<sup>30</sup> 84 FR 69664 at 69668.

<sup>31</sup> Final Rules, 85 FR 57480.

<sup>32</sup> *Id.* at 57499.

<sup>33</sup> See 17 CFR 23.100 for the definition of the term “tangible net worth.”

<sup>34</sup> 17 CFR 23.105(d) and (e).

<sup>35</sup> *Id.*

<sup>36</sup> 17 CFR 23.105.

<sup>37</sup> Final Rules, 85 FR 57514.

<sup>38</sup> 17 CFR 23.105(l).

<sup>39</sup> Appendix B to subpart E of part 23.

<sup>40</sup> 17 CFR 23.105(d).

<sup>41</sup> Final Rules, 85 FR 57514–57515.

<sup>42</sup> SEC Form X–17A–5 FOCUS Report Part IIC, available at <https://www.sec.gov/manage-filings/forms-index/form-x-17a-5-2c>.

## Request for Comment

*Question 1.* Do the proposed amendments to Commission regulations §§ 23.100 and 23.105(l) address the compliance matters for entities electing the Tangible Net Worth Capital Approach?

## 2. Amendments to Bank SD Financial Reporting Requirements—CFTC Letter No. 21–18

The Commission is also proposing to amend the financial reporting requirements for bank SDs and bank MSPs set forth in Commission regulation § 23.105(p).<sup>43</sup> The Commission intended the bank SD and bank MSP reporting requirements contained in the Final Rules to be consistent with the SEC requirements for bank SBSBs and bank MSBSPs, to maintain equivalent financial reporting requirements for dually-registered firms.<sup>44</sup> Several bank SDs, however, did not register as SBSBs, and therefore are subject only to limited financial reporting under the Commission's rules.<sup>45</sup> In certain instances, the financial reporting required by the prudential regulators for these bank SDs permit a longer period of time and utilize a different format than that adopted by the Commission.<sup>46</sup> In addition, some of these bank SDs are not required to file financial reports with a prudential regulator if the bank SDs are domiciled outside the United States, and may instead be subject only to financial reporting of a home country supervisor.

Following the adoption of Commission regulation 23.105(p), bank SDs requested relief from this provision's requirements.<sup>47</sup> Bank SDs

indicated that the financial reporting filing deadline adopted by the Commission preceded the financial reporting filing deadline imposed by prudential regulators.<sup>48</sup> In addition, although Appendix C to Subpart E of Part 23 ("Appendix C")<sup>49</sup> was intended to capture line items on existing Federal Financial Institutions Examination Council ("FFIEC")<sup>50</sup> Form 031 ("Call Report") provided to prudential regulators, line items on the Call Report had either been removed, added or otherwise changed since the Commission adopted Appendix C.<sup>51</sup> As a result, on August 31, 2021, the Division issued a time-limited no-action letter to bank SDs regarding compliance with financial reporting requirements under Commission regulation § 23.105(p).<sup>52</sup> On July 11, 2023, the Division extended the expiration date to the earlier of October 6, 2025 or the adoption of any revised financial reporting and notification requirements applicable to bank SDs.<sup>53</sup>

CFTC Letter No. 21–18, as extended under CFTC Letter No. 23–11,<sup>54</sup> articulates a position by the Division that it would not recommend that the Commission engage in an enforcement action against bank SDs providing the Commission with copies of financial reports that are required by, and filed with, their respective prudential or home country regulators, in lieu of complying with the substantive requirements of Appendix C, subject to certain conditions.<sup>55</sup> CFTC Letter No. 21–18 also contains a no-action position with respect to bank SDs filing comparable Call Report schedules with the Commission in lieu of Appendix C in accordance with and within the timeframe permitted by the prudential regulators.<sup>56</sup> CFTC Letter No. 21–18 further provides that the Division would not recommend enforcement action against certain foreign-domiciled bank SDs ("Non-U.S. bank SDs") that do not provide financial reports to a prudential regulator if they file with the Commission balance sheet and statement of regulatory capital information in accordance with applicable home country requirements,

so long as the financial information is in English, with balances converted to U.S. dollars, and the financial information is filed within 15 days of the earlier of the date such financial information is filed or required to be filed with the Non-U.S. bank SDs' applicable home country regulator.<sup>57</sup> Finally, the Division stated that it would not recommend enforcement action against dually-registered foreign bank SDs filing comparable SEC-required financial reports and schedules with the Commission.<sup>58</sup>

The Commission is proposing to amend Commission regulation § 23.105(p) to add an exception to the financial reporting requirements for Non-U.S. bank SDs that do not submit financial reports to a prudential regulator. These Non-U.S. bank SDs would be permitted to file with the Commission financial reports that are submitted to their respective home country regulator, provided the financial reports submitted to the Commission are translated into English with balances converted to U.S. dollars. These Non-U.S. bank SDs, however, would continue to be required to file specific swap position information set forth in Schedule 1 to Appendix C. Finally, these Non-U.S. bank SDs would be required to file with the Commission such reports no later than 90 calendar days following quarter-end.

The Commission is not proposing to include the restriction in CFTC Letter No. 21–18 that Non-U.S. bank SDs be subject to home country capital standards in a G–20 jurisdiction.<sup>59</sup> The Commission preliminarily believes that such a requirement is moot at this time, as to date, all registered Non-U.S. bank SDs have met this criterion. Moreover, this approach will provide greater regulatory flexibility and permit Commission staff the ability to evaluate on a case-by-case basis each bank SD.

The Commission preliminarily believes that the required information in the manner proposed will permit it to assess the Non-U.S. bank SDs' financial position. Extending the time period to 90 days should permit these Non-U.S. bank SDs to file financial reports with the Commission no earlier than such Non-U.S. bank SDs are required to

<sup>43</sup> 17 CFR 23.105(p).

<sup>44</sup> Final Rules, 85 FR 57463–57465.

<sup>45</sup> 17 CFR 23.105(p).

<sup>46</sup> Commission regulation § 23.105(p) requires bank SDs to report financial information within 30 calendar days of quarter-end. 17 CFR 23.105(p)(2). The Instructions for Preparation of Consolidated Reports of Condition and Income, Schedule RC–D, available at [https://www.ffiec.gov/pdf/FFIEC\\_forms/FFIEC031\\_FFIEC041\\_202303\\_i.pdf](https://www.ffiec.gov/pdf/FFIEC_forms/FFIEC031_FFIEC041_202303_i.pdf), however, permit a bank with more than one foreign office to submit its FFIEC 031 forms within 35 calendar days following quarter-end. Additionally, the SEC extended the filing deadline of FOCUS Report Part IIC for non-U.S. SBSBs subject to a prudential regulator from 30 to 35 days following quarter end, noting that "U.S. prudential regulators permit certain U.S. banks to file their financial reports 35 days after the quarter end." Order Specifying the Manner and Format of Filing Unaudited Financial and Operational Information by Security-Based Swap Dealers and Major Security-Based Swap Participants That Are Not U.S. Persons and Are Relying on Substituted Compliance Determinations With Respect to Rule 18a–7, 86 FR 59208 (October 26, 2021) at 59210.

<sup>47</sup> ISDA–SIFMA Joint Letter, Aug. 20, 2021, available at <https://www.cftc.gov/LawRegulation/CFTCStaffLetters/index.html>.

<sup>48</sup> *Id.* at 3–4.

<sup>49</sup> Appendix C to subpart E of part 23.

<sup>50</sup> Federal Financial Institutions Examination Council, Consolidated Reports of Condition and Income for a Bank with Domestic and Foreign Offices—FFIEC 031, available at [https://www.ffiec.gov/pdf/FFIEC\\_forms/FFIEC031\\_202203\\_f.pdf](https://www.ffiec.gov/pdf/FFIEC_forms/FFIEC031_202203_f.pdf).

<sup>51</sup> ISDA–SIFMA Joint Letter at 3–4.

<sup>52</sup> See generally CFTC Letter No. 21–18.

<sup>53</sup> CFTC Letter No. 23–11.

<sup>54</sup> See *supra* note 23.

<sup>55</sup> CFTC Letter No. 21–18 at 4–5.

<sup>56</sup> *Id.* at 4–5, Condition 1.

<sup>57</sup> *Id.* at 5, Conditions 2–4.

<sup>58</sup> *Id.*, Condition 5. In comparison to the SEC's approach to similarly situated bank SBSBs, the Commission's capital comparability process adopted in Commission regulation § 23.106 does not extend to bank SDs. See 17 CFR 23.106.

<sup>59</sup> Letter No. 21–18 is limited to eligible Non-U.S. bank SDs subject to home country capital standards in a G–20 jurisdiction or to capital standards consistent with the Capital Accord of the Basel Committee on Banking Supervision. CFTC Letter No. 21–18 at 3–5.

prepare such reports under home country requirements. The Commission proposes to adopt this approach because the Commission is collecting such reports in order to maintain the ability to monitor the capital condition across all SDs, although the Commission does not establish the capital or margin requirements of bank SDs.<sup>60</sup>

The Commission is further proposing to amend Commission regulation § 23.105(p) to permit bank SDs to file the relevant schedules under the Call Report (Schedule RC and Schedule RC–R), rather than replicating various line items from within those reports on a separately constructed balance sheet and statement of regulatory capital currently maintained in Appendix C.<sup>61</sup> Schedule 1 of Appendix C, which contains relevant swap, mixed swap and security-based swaps position information, would remain a required schedule to be provided by all bank SDs. This approach would permit the Commission to collect necessary financial information prepared in accordance with prudential regulators' guidance, while eliminating the necessity that bank SDs familiarize themselves with a new reporting form and prevent the Commission from having to routinely monitor and update its form when prudential regulators amend their schedules. These proposed changes are consistent with the terms of CFTC Letter No. 21–18, which have resulted in the Commission and its staff receiving the requisite information to meaningfully oversee its population of bank SDs since 2021. In addition, and as mentioned above, the Commission proposes to adopt this approach because the Commission is collecting such reports in order to maintain the ability to monitor the capital condition across all SDs.

<sup>60</sup> Section 4s(f) of the CEA requires SDs and MPSSs, including those for which there is a prudential regulator, to make any reports regarding transactions and positions, as well as any reports regarding financial condition, that the Commission adopts by rule or regulation. 7 U.S.C. 6s(f).

<sup>61</sup> As adopted, Appendix C contains three schedules: 1. Statement of Financial Condition (balance sheet); 2. Statement of Regulatory Capital; and 3. Schedule 1. Both the Statement of Financial Condition and Statement of Regulatory Capital schedules within Appendix C are modeled off the FOCUS Report Part IIC as adopted by the SEC for bank SBSBs and contain specific line item references corresponding to the Call Report. See Final Rules, 85 FR at 57566–57569. Following adoption of these schedules, changes were made to the underlying Call Reports making the schedules obsolete. The SEC has since proposed changes to the FOCUS Report Part IIC to reflect these changes. See generally Electronic Submission of Certain Materials Under the Securities Exchange Act of 1934; Amendments Regarding the FOCUS Report, 88 FR 23920 (Apr. 18, 2023).

#### Request for Comment

*Question 2.* Do the proposed amendments to Commission regulations in § 23.105(p) address compliance matters identified in CFTC Letter No. 21–18 for bank SDs?

*Question 3.* Do the financial reporting requirements as proposed to be amended for Non-U.S. bank SDs permit the Commission to monitor these entities at timely intervals?

#### 3. Amendments Regarding Financial Reporting and Computation Requirements of Swap Dealers

##### a. Amendments to Schedules in Financial Reporting and Frequency of Filings

The Commission is proposing to amend the scope of Commission regulation § 23.105(k)<sup>62</sup> and the heading and scope of Commission regulation § 23.105(l), as well as the titles of certain schedules included in Appendix B,<sup>63</sup> to further clarify that these reporting obligations are applicable to all nonbank SDs and nonbank MSPs. Commission regulation § 23.105(k) lists both model-specific information that nonbank SDs must report as well as a description of the same type of exposure information as reflected in the schedules to Appendix B. Commission regulation § 23.105(l), however, requires all nonbank SDs, including those not approved to use models, to complete the Appendix B schedules on a monthly basis. As a result, several nonbank SDs have filed each of the schedules to Appendix B without having received capital model approval. Thus, in current form, Commission regulations § 23.105(k) and (l), as well as, the titles of Schedules 2–4 of Appendix B, could more explicitly indicate that all of the information within the schedules included in Appendix B is required of all nonbank SDs, including those not authorized to use models.<sup>64</sup> In addition, as proposed to be amended, nonbank SDs electing the Tangible Net Worth Capital Approach and all MSPs must

<sup>62</sup> 17 CFR 23.105(k).

<sup>63</sup> Appendix B is comprised of 4 individual schedules: SCHEDULE 1—AGGREGATE SECURITIES, COMMODITIES AND SWAPS POSITIONS; SCHEDULE 2—CREDIT CONCENTRATION REPORT FOR FIFTEEN LARGEST EXPOSURES IN DERIVATIVES; SCHEDULE 3—PORTFOLIO SUMMARY OF DERIVATIVES EXPOSURES BY INTERNAL CREDIT RATING; and SCHEDULE 4—GEOGRAPHIC DISTRIBUTION OF DERIVATIVES EXPOSURES FOR TEN LARGEST COUNTRIES.

<sup>64</sup> To further complicate matters, the heading and first paragraph to Commission regulation § 23.105(k) both indicate that this provision only applies to SDs approved to use internal models to calculate market risk and credit risk for calculating capital under Commission regulation § 23.102(d).

submit quarterly rather than monthly financial reporting as Commission regulation § 23.105(l) currently requires.

Each of the schedules included in Appendix B is identical to corresponding schedules found in SEC's FOCUS Report required to be completed by both SBSBs and certain broker dealers ("BDs").<sup>65</sup> To the extent practicable, the Commission intends to align financial reporting requirements, including those listed in textual form in Commission regulation § 23.105(k) and in the finalized schedules part of Appendix B, with the reporting requirements finalized by the SEC pertaining to SBSBs, MSBSPs, and BDs.<sup>66</sup> The information required under Appendix B is nearly identical in all material respects to corresponding forms found in the SEC Form FOCUS Report Part II and was intended to ensure harmonization of the reporting schedules across several registrants, including those that are dually-registered.<sup>67</sup> This is also consistent with the Commission's general approach permitting dually-registered BDs and SBSBs to file SEC Form FOCUS Report Part II in lieu of their requirements under Commission regulations § 23.105(d) and (e), and for those dually-registered SBSBs subject to the capital rules of a prudential regulator under Commission regulation § 23.105(p).<sup>68</sup>

In addition, NFA has adopted nearly identical capital and financial reporting requirements for its member nonbank SDs and nonbank MSPs.<sup>69</sup> The finalized NFA rules also mandate the use of comprehensive standardized forms for financial reporting by member nonbank SDs and nonbank MSPs that are not otherwise able to file an SEC Form FOCUS Report Part II.<sup>70</sup> These new NFA forms, FR–CSE–NLA and FR–CSE–BHC, include each of the required schedules found in Appendix B. Moreover, all the information listed in textual form in paragraph (k)(1)(v) of Commission regulation § 23.105 can be found in specific schedules found in Appendix B.<sup>71</sup> As such, the Commission has

<sup>65</sup> See SEC Form X–17A–5 FOCUS Report Part IIC, available at <https://www.sec.gov/management/forms-index/form-x-17a-5-2c>.

<sup>66</sup> See Final Rules, 85 FR 57519.

<sup>67</sup> See 2016 Capital Proposal, 81 FR 91278.

<sup>68</sup> As indicated in the Final Rule, the Commission has a long history of permitting SEC registrants to meet their financial statement filing obligations with the Commission by submitting required SEC forms in lieu of the CFTC's forms, which reduces the burden on dually-registered firms by not requiring two separate financial reporting requirements. See Final Rules, 85 FR 57515.

<sup>69</sup> NFA section 18.

<sup>70</sup> NFA section 18(e).

<sup>71</sup> For example, Commission regulation § 23.105(k)(1)(v)(B) requires that all model-

preliminarily determined that the specific schedules found in Appendix B, which is now part of NFA's adopted forms, should be the mechanism for firms to provide the required information listed in Commission regulation § 23.105(k).<sup>72</sup> In this proposal, the Commission hopes to eliminate any ambiguity that the Final Rule may have caused. As discussed in the Final Rule, the information in Appendix B, which includes credit exposure to swap transactions, is vital to the Commission's regulatory oversight of SDs and the financial system.<sup>73</sup> This information provides valuable insight into the risk exposures of nonbank SDs, which is essential to performing regulatory oversight of SDs. The Commission proposes to make clear that all nonbank SDs must complete all schedules in Appendix B.

The Commission is therefore proposing to amend Commission regulation § 23.105(k) to require that the information listed in Appendix B is completed by all nonbank SDs and nonbank MSPs as was intended, and is consistent with that required by the SEC and NFA. The Commission is further proposing to amend Commission regulation § 23.105(l) and the headings of certain schedules in Appendix B to further clarify that these schedules must be reported at the same periodicity as the financial reporting of each respective nonbank SD, either monthly or quarterly as applicable, and that all of the schedules are required for all nonbank SDs, not just those authorized to use models.

#### Request for Comment

*Question 4.* Will the proposed amendments to Commission regulations in § 23.105(k) and (l) and the related changes to the headings of the schedules contained in Appendix B facilitate consistent and comprehensive swaps positions and counterparty reporting for all nonbank SDs under the Final Rules and align with the same reporting requirements of the SEC for dual registrants?

approved SDs file the current exposure (including commitments) listed by counterparty for the 15 largest exposures, which is also found in Schedule 2 to Appendix B. Similarly, the information listed in textual form in Commission regulations § 23.105(k)(1)(i)-(v) corresponds verbatim to the textual requirements found in SEC rule 18a-7(a)(3). See 17 CFR 240.18a-7(a)(3).

<sup>72</sup> As discussed in the Final Rule, the Commission may (and subsequently has) approved additional procedures developed by an RFA, which could include standard forms or procedures necessary to carry out the Commission's filing requirements. See Final Rules, 85 FR 57518.

<sup>73</sup> Final Rules, 85 FR 57517.

#### b. Changes to Public Disclosure Requirements

The Commission is proposing to amend Commission regulation § 23.105(i)<sup>74</sup> to align the public disclosure of unaudited financial information with the periodicity permitted by routine financial filings in Commission regulation § 23.105(d), and to remove reference to a statement in both the unaudited and audited information disclosing the amounts of minimum regulatory capital and the amount of its minimum regulatory capital requirement computed in accordance with Commission regulation § 23.101.<sup>75</sup>

Paragraphs (i)(1)(ii) and (i)(2)(ii) of Commission regulation § 23.105 currently require a nonbank SD or nonbank MSP to publicly disclose on its website a statement of the amount of the nonbank SD's or nonbank MSP's regulatory capital and its minimum capital requirement.<sup>76</sup> This information is required to be disclosed as of the nonbank SD's or nonbank MSP's fiscal year end, and as of six months after the firm's fiscal year end. Following adoption of the Final Rule, nonbank SD's requested clarification as to whether the regulatory capital information required by Commission regulations § 23.105(i)(1)(ii) and (i)(2)(ii) must be a schedule or, if the information may be reported in a narrative format, in the footnotes to the financial statements.

The Commission is proposing to revise Commission regulation § 23.105(i)(1)(i)<sup>77</sup> to include the footnotes to the unaudited Statement of Financial Condition in the required disclosures. The Commission is also proposing to revise Commission regulations § 23.105(i)(1)(ii) and (i)(2)(ii) to replace the word "statement" with "amounts" to indicate that required capital information does not need to exist in a standalone statement or form. This is consistent with the Commission's intent, to the extent practicable, to align its requirements with those required of BDs and SBSDs by the SEC.<sup>78</sup> The Commission has preliminarily determined that the information contained in the footnotes accompanying the financial statements should ordinarily satisfy the requirements for disclosing minimum regulatory capital. However, the Commission recognizes that not all accounting standards permit, nor do the

respective reporting formats utilized by firms always provide for, such disclosure in footnote form. Some disclosures may be presented in either narrative or graphical formats. The Commission's sole intention is to ensure that the public has the requisite information, not to prescribe the format of such disclosures made by the firm on its website. Therefore, the Commission is proposing to permit nonbank SDs and their auditors to determine the format for disclosure of this information.

#### Request for Comment

*Question 5.* The Commission requests comment on whether nonbank SDs and their auditors should be able to determine the reporting format of the requisite information in their public disclosure? Should the Commission instead specify a particular format? If yes, which format and why?

#### c. Changes to Form 1-FR-FCM

The Commission is proposing to amend Form 1-FR-FCM to add new lines to the form to include the 2 percent of uncleared swap margin capital requirement under Commission regulation § 1.17(a)(1)(i)(B)(2).<sup>79</sup> The proposed capital requirement based on 2 percent of the uncleared swaps margin would be added as new lines 22.A.vi through vii. of the Statement of the Computation of the Minimum Capital Requirements ("CFTC Minimum Net Capital Requirements") on the Form 1-FR-FCM.

The Commission is also proposing to amend the Form 1-FR-FCM to add swaps and security-based swaps haircuts to the computation of net capital. The specific market risk charges for swaps and security-based swaps would appear as new lines 16.D. of the CFTC Minimum Net Capital Requirements.

Under Commission regulation § 1.10, all FCMs must submit a Form 1-FR-FCM when they file for registration as an FCM and periodically following registration.<sup>80</sup> The Form 1-FR-FCM includes, among other things, the computation of CFTC Minimum Net Capital Requirements supplementary schedule.<sup>81</sup> In the Final Rule, the Commission added a 2 percent of uncleared swap margin capital requirement to the risk-based net capital requirement for FCMs which are also registered as SDs ("FCM-SDs"), and adopted specific market risk charges for uncleared swaps in the FCM net capital requirements in Commission regulation

<sup>74</sup> 17 CFR 23.105(i).

<sup>75</sup> 17 CFR 23.101.

<sup>76</sup> 17 CFR 23.105(i)(1)(ii) and (i)(2)(ii).

<sup>77</sup> 17 CFR 23.105(i)(1)(i).

<sup>78</sup> See 17 CFR 240.18a-7(b).

<sup>79</sup> 17 CFR 1.17(a)(1)(i)(B)(2).

<sup>80</sup> 17 CFR 1.10.

<sup>81</sup> CFTC Form 1-FR-FCM at 6-8.

§ 1.17.<sup>82</sup> In addition, FCMs dually-registered as BDs are permitted to file the SEC's FOCUS Report Part II in lieu of the Commission's Form 1-FR-FCM in reporting net capital.<sup>83</sup> The SEC has recently proposed to amend its FOCUS Report Part II to include the Commission's net capital changes adopted for FCM-SDs, including the addition of the 2 percent uncleared swap margin to the risk-based net capital requirement of FCM-SDs.<sup>84</sup> The Commission is proposing to amend its form to more explicitly require disclosure of the 2 percent amount and to conform with the SEC's proposal. This information is important to the Commission in monitoring the Final Rules, as reporting the 2 percent amount enables the Commission to confirm that the FCM-SD is complying with its capital requirement.

#### Request for Comment

*Question 6.* Do the proposed changes to the Form 1-FR-FCM address the net capital changes applicable to FCMs that are also registered as SDs as were adopted in the Final Rules?

#### d. Additional Cross References To Clarify Applicable Market and Credit Risk Charges

The Commission is proposing to add new language to Commission regulations § 23.103(a)(1) and (c)(1)<sup>85</sup> to clarify that the same standardized market and credit risk charges are applicable to nonbank SDs electing the Tangible Net Worth Capital Approach as are applicable to all other nonbank SDs not approved to use models. Nonbank SDs electing the Tangible Net Worth Capital Approach and who have chosen not to apply for approval to use models, have questioned what the applicable standardized credit risk charges are under Commission regulation § 23.103.<sup>86</sup> Commission regulation § 23.103(b)<sup>87</sup> provides that nonbank SDs electing the Tangible Net Worth Capital Approach or Net Liquid Assets Capital Approach are required to compute standardized market risk charges contained in SEC Rule 18a-1<sup>88</sup> and Commission regulation § 1.17, as

applicable. Commission regulation § 23.103(c)<sup>89</sup> also provides that a nonbank SD electing the Net Liquid Assets Capital Approach must compute its standardized credit risk charge in accordance with SEC Rule 18a-1 or Commission regulation § 1.17, as applicable, but fails to provide a reference for nonbank SDs electing the Tangible Net Worth Capital Approach.<sup>90</sup> Because standardized credit risk charges were intended to be the same for nonbank SDs using the Tangible Net Worth Capital Approach or the Net Liquid Assets Capital Approach, the Commission is proposing to amend Commission regulations § 23.103(a)(1) and (c)(1) to correct this omission. Thus, the Commission proposes to amend Commission regulations § 23.103(a)(1) and (c)(1) to direct nonbank SDs electing the Tangible Net Worth Capital Approach to compute standardized credit risk charges in accordance with SEC Rule 18a-1 or Commission regulation § 1.17, as applicable.

Similarly, nonbank SDs electing the Bank-Based Capital Approach indicated after the adoption of the Final Rules that a cross reference in Commission regulation § 23.102(d)<sup>91</sup> to the calculation of market risk exposure and credit risk exposure using internal models, seems to be intended to reflect the requirements applicable to such nonbank SDs in the application to use models in Commission regulation § 23.102(c).<sup>92</sup> The Commission agrees that this was the intention, and thus is proposing to amend Commission regulation § 23.102(d) to correct the applicable cross reference in order to make it clearer that either 12 CFR part 217 or Appendix A to Subpart E of Part 23 ("Appendix A")<sup>93</sup> should be utilized as applicable by the nonbank SD depending on the respective capital approach elected.<sup>94</sup>

#### Request for Comment

*Question 7.* Do the proposed amendments to Commission regulations § 23.103(a)(1) and (c)(1) clarify the applicable standardized credit risk charge to be added to the \$20 million

minimum requirement under Commission regulation § 23.103(c)(3)?<sup>95</sup>

*Question 8.* Does the proposed amendment to Commission regulation § 23.102(d) clarify the applicable model-based market and credit risk charges applicable to nonbank SDs which have applied to use such models under the Bank-Based Capital Approach?

#### B. Other Amendments

##### 1. Notice of Substantial Reduction in Capital

The Commission adopted specific notice requirements for nonbank SDs and MSPs related to capital compliance in the Final Rules. However, one of the notice requirements contained in Commission regulation § 23.105(c)(4), which requires notice of a substantial reduction in capital as compared to the last reported in a financial report, did not specify a timeframe for the notice filing.<sup>96</sup> The Commission has preliminarily determined that registrants should be able to file such a notice within two business days after the date of occurrence. Further, such an approach is also consistent with that applied to FCMs, which must notify the Commission within two business days following a substantial reduction in capital.<sup>97</sup> The Commission is proposing to amend Commission regulation § 23.105(c)(4) to add a two-business day reporting timeframe to the requirement for a nonbank SD to file notice of a substantial reduction in capital. The Commission has preliminarily determined that adding a reporting timeframe to the notice requirement will enhance compliance by providing regulatory certainty to nonbank SDs regarding when such a filing is due.

##### 2. Subordinated Debt Approval

The nonbank SD capital requirements for both the Bank-Based Capital Approach and the Net Liquid Assets Capital Approach permit the use of subordinated debt as capital in order to align with the permitted use of subordinated debt under the FCM net capital requirements.<sup>98</sup> The requirements for qualifying subordinated debt were adopted by the SEC in its capital rule for SBSDs and were included by reference by the Commission for other nonbank SDs in the Bank-Based Capital Approach.<sup>99</sup> Commission staff received questions regarding the process for approving subordinated debt for nonbank SDs not

<sup>82</sup> 17 CFR 1.17(a)(1)(i)(B)(2) and (c)(5)(iii). See generally Final Rules, 85 FR 57473-57476 and 57562.

<sup>83</sup> 17 CFR 1.10(h).

<sup>84</sup> See generally Electronic Filing of Certain Forms and Other Filings Under the Securities Exchange Act of 1934; Technical Amendments Regarding the FOCUS Report, SEC Proposed Rule (Undated), available at <https://www.sec.gov/news/press-release/2023-58>.

<sup>85</sup> 17 CFR 23.103(a)(1) and (c)(1).

<sup>86</sup> 17 CFR 23.103.

<sup>87</sup> 17 CFR 23.103(b).

<sup>88</sup> 17 CFR 240.18a-1.

<sup>89</sup> 17 CFR 23.103(c).

<sup>90</sup> SDs electing to use the Tangible Net Worth Capital Approach are required to meet a minimum capital requirement which includes, among other things, \$20 million plus the amount of the SD's market risk exposure requirement and its *credit risk exposure* requirement associated with the SD's swap and related hedge positions that are part of the SD's swap dealing activities. 17 CFR 23.101(a)(2)(ii)(A).

<sup>91</sup> 17 CFR 23.102(d).

<sup>92</sup> 17 CFR 23.102(c).

<sup>93</sup> Appendix A to subpart E of part 23.

<sup>94</sup> Final Rules, 85 FR 57506.

<sup>95</sup> 17 CFR 23.103(c)(3).

<sup>96</sup> 17 CFR 23.105(c)(4).

<sup>97</sup> 17 CFR 1.12(g)(1).

<sup>98</sup> 17 CFR 1.17(h).

<sup>99</sup> 17 CFR 23.101(a)(1).



also registered with the SEC because the Final Rule did not articulate a process. To address this omission, NFA adopted Financial Requirements Rule Section 18(d).<sup>100</sup> Under the existing framework, NFA already approves subordinated loan agreements for net capital agreements for nonbank SDs that are not dually-registered with the SEC. Similarly, although nonbank SDs that are dually-registered with the SEC are able to obtain SEC approval on subordinated debt,<sup>101</sup> nonbank SDs that elect either the Bank-Based Capital Approach or the Net Liquid Assets Capital Approach but are not registered with the SEC, do not have an approval process for the use of subordinated debt under the Commission's rules. As discussed in the Final Rule,<sup>102</sup> when adopting the permissive use of subordinated debt in establishing minimum regulatory capital, the Commission has long approved a process for FCMs to obtain subordinated debt approval from their Designated Self-Regulatory Organizations ("DSROs"), including the NFA.<sup>103</sup>

The Commission has preliminarily determined to permit NFA to administer the approval process for nonbank SDs because of the NFA's extensive history and experience as a DSRO administering a subordinated debt approval program for FCMs. This would also make the subordinated debt approval process for nonbank SDs consistent with the subordinated debt approval process for FCMs. In addition, NFA has already devoted substantial efforts to obtain the personnel and other resources necessary to perform the review, approval and ongoing assessment of nonbank SDs' permitted use of subordinated debt following the

adoption by NFA of Financial Requirements Rule Section 18(d).<sup>104</sup> Codifying that subordinated debt will be approved for net capital requirements either through the Commission or by an RFA should remedy this omission from the Final Rules and will sanction a process that is consistent with the current practice. The Commission proposes to amend Commission regulations § 23.101(a)(1)(i)(B) and (a)(1)(ii)(C)<sup>105</sup> to establish that using subordinated debt as regulatory capital is subject to the approval of either an RFA of which the nonbank SD is a member or the Commission.

### 3. Statement of No Material Difference

The Commission proposes to amend Commission regulation § 23.105(e)(4)(v)<sup>106</sup> for nonbank SDs and nonbank MSPs to explicitly require a statement, if applicable, that there are no material differences between the audited annual report and the unaudited annual report of the same date. Commission regulation § 23.105(e) requires nonbank SDs and nonbank MSPs to submit an annual audited financial report with the Commission and with NFA.<sup>107</sup> Included with the financial report is, among other things, a reconciliation of any material differences from the unaudited financial reports prepared as of the nonbank SD's or nonbank MSP's year-end date.<sup>108</sup>

For instances in which no material differences exist between the unaudited and audited year-end financial statements, however, Commission regulation § 1.10(d)(2)(vi)<sup>109</sup> requires FCMs to include a statement indicating that no such differences exist. Commission regulation § 23.105(e) does not currently provide for such a statement in this parallel provision for audits of nonbank SDs or nonbank MSPs. The Commission is proposing to amend Commission regulation § 23.105(e)(4)(v) so that when nonbank SDs and nonbank MSPs file their audited annual report, a statement that there are no material differences between the audited annual report and the unaudited annual report is included, if no such differences exist. This will align the filing approach for auditors of nonbank SDs and nonbank MSPs with that of FCMs. Requiring an affirmative statement that no material differences exist when none are otherwise reported should enhance the reliability of the

annual reports filed by nonbank SDs and nonbank MSPs and should encourage auditors to more rigorously assess the materiality of reporting any discovered audit findings.

### Request for Comment

*Question 9.* Are the regulations as proposed to be amended fit for purpose? If not, what changes would be necessary to achieve the Commission's objective in obtaining timely financial reporting of the capital position of nonbank SDs and MSPs?

## III. Related Matters

### A. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RF Act") requires that Federal 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>110</sup> Whenever an agency publishes a general notice of proposed rulemaking for any rule, pursuant to the notice-and-comment provisions of the Administrative Procedure Act,<sup>111</sup> a regulatory flexibility analysis or certification typically is required.<sup>112</sup> This proposed rulemaking would affect the obligations of SDs, MSPs, and FCMs. The Commission has previously determined that SDs, MSPs, and FCMs are not small entities for purposes of the RF Act.<sup>113</sup> Therefore, the requirements of the RF Act do not apply to those entities.

Accordingly, for the reasons stated above, the Commission has preliminarily determined that this proposed rulemaking will not have a significant economic impact on a substantial number of small entities. Therefore, the Chairman, on behalf of the Commission, hereby certifies, pursuant to 5 U.S.C. 605(b), that the proposed Commission regulations being published today by this **Federal Register** release will not have a significant economic impact on a substantial number of small entities.

### B. Paperwork Reduction Act

#### 1. Background

The Paperwork Reduction Act of 1995 ("PRA")<sup>114</sup> imposes certain

<sup>100</sup> See generally NFA Interpretative Notice 9078 (Feb. 18, 2021), available at <https://www.nfa.futures.org/rulebooksql/rules.aspx?Section=9&RuleID=9078#:~:text=In%20order%20to%20permit%20these%20non-SEC%20registered%20SD,NFA%27s%20pre-approval%20of%20the%20subordinated%20debt%20loan%20agreement>.

<sup>101</sup> Nonbanks SDs that are duly-registered as SBSDs typically elect under Commission regulation § 23.101(a)(1)(ii) to maintain net capital by complying with § 240.18a-1d, and are independently subject to such requirements, including the subordinated-debt approval process, by their registration as a SBSD with the SEC. 17 CFR 240.18a-1d.

<sup>102</sup> Final Rules, 85 FR 57495.

<sup>103</sup> See Miscellaneous Rule Deletions, Amendments or Clarifications, 57 FR 20633, 20634 (May 14, 1992). The subordinated debt approval program for FCMs administered by NFA has been in place for over 30 years. In addition, the NFA, as the only registered futures association under the CEA, is specifically required to adopt capital requirements on its members, including SDs, and to implement a program to audit and enforce the compliance with such requirements in accordance with section 17(p)(2) of the CEA, 7 U.S.C. 21(p)(2).

<sup>104</sup> NFA section 18(d).

<sup>105</sup> 17 CFR 23.101(a)(1)(i)(B) and (a)(1)(ii)(C).

<sup>106</sup> 17 CFR 23.105(e)(4)(v).

<sup>107</sup> 17 CFR 23.105(e).

<sup>108</sup> 17 CFR 23.105(e)(4)(v).

<sup>109</sup> 17 CFR 1.10(d)(2)(vi).

<sup>110</sup> 5 U.S.C. 601 *et seq.*

<sup>111</sup> 5 U.S.C. 553. The Administrative Procedure Act is found at 5 U.S.C. 500 *et seq.*

<sup>112</sup> See 5 U.S.C. 601(2), 603, 604 and 605.

<sup>113</sup> Policy Statement and Establishment of Definitions of "Small Entities" for Purposes of the Regulatory Flexibility Act, 47 FR 18618 (Apr. 30, 1982) (FCMs) and Registration of Swap Dealers and Major Swap Participants, 77 FR 2613, 2620 (Jan. 19, 2012) (SDs and MSPs).

<sup>114</sup> 44 U.S.C. 3501 *et seq.*

requirements on Federal agencies (including the Commission) in connection with their conducting or sponsoring any collection of information as defined by the PRA. These proposed rule amendments would result in an amendment to existing collection of information “Regulations and Forms Pertaining to Financial Integrity of the Market Place; Margin Requirements for SDs/MSPs”<sup>115</sup> as discussed below. The Commission, therefore, is submitting this proposed amendment to the Office of Management and Budget (“OMB”) for review and approval in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The responses to this collection of information are mandatory. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number issued by OMB.

The Commission has preliminarily determined that the rule amendments as proposed do not impose any other new collections of information that require approval of OMB under the PRA.

## 2. Amended Information Collection Requirements and Related Burden Estimates<sup>116</sup>

Currently, there are approximately 106 SDs and no MSPs registered with the Commission that may be impacted by this proposed rulemaking and, in particular, the collection of information discussed below.

Commission regulation § 23.105 requires that each SD and MSP maintain certain specified records, report certain financial information and notify or request permission from the Commission under certain specified circumstances, in each case, as provided in the Commission regulation. For example, the Commission regulation requires generally that SDs and MSPs maintain current books and records, provide notice to the Commission of regulatory capital deficiencies and related documentation, provide notice of certain other events specified in the rule, and file financial reports and related materials with the Commission (including the information in Appendices B and C, as applicable). Commission regulation § 23.105 also requires the SD or MSP to furnish information about its custodians that hold margin for uncleared swap

transactions and the amounts of margin so held, and for SDs approved to use models (as discussed above), provide additional information regarding such models, as further described in Commission regulation § 23.105(k).

The Commission estimates that there are 31 SD firms which are required to fulfill their financial reporting, recordkeeping and notification obligations under Commission regulations § 23.105(a)–(n)<sup>117</sup> because they are not subject to a prudential regulator, not already registered as an FCM, and not dually-registered as a SBSB. The Commission does not anticipate that its estimates of burden associated with these obligations will change as a result of any the amendments to Commission regulation § 23.105 proposed herein.

Commission regulation § 23.105(p) and its accompanying Appendix C impose quarterly financial reporting and notification obligations on SDs subject to a prudential regulator. Approximately 55 of the 106 registered SDs are subject to a prudential regulator. The Commission has previously estimated that these reporting and notification requirements impose an on-going burden of 33 hours annually. This results in a total aggregate burden of 1,815 hours annually. The Commission estimates this burden will remain unchanged by the proposed amendments to Commission regulation § 23.105(p), as the burden associated with requirements to file quarterly financial reporting and notifications previously were based on these entities filing their existing information contained in Call Reports along with Schedule 1 information, and under the proposed amendments those remain the obligations for bank SDs, except for Non-U.S. bank SDs who will also still file existing financial reporting information as reported to their home country supervisor, along with Appendix C Schedule 1 information.

### C. 15(b) Antitrust Laws

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

association established pursuant to section 17 of the CEA.<sup>118</sup>

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

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

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

## IV. Cost Benefit Considerations

### A. Background

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its discretionary actions before promulgating a regulation under the CEA or issuing certain orders.<sup>119</sup> Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations (collectively, the “Section 15(a) Factors”). In this cost benefit section, the Commission discusses the costs and benefits resulting from its discretionary determinations with respect to the Section 15(a) Factors.<sup>120</sup>

Section 4s(e) of the CEA, added by section 731 of the Dodd-Frank Act, provides the Commission with mandatory and discretionary rulemaking authority to adopt capital requirements for nonbank SDs and

<sup>115</sup> OMB Control No. 3038–0024, available at <http://www.reginfo.gov/public/do/PRAOMBHistory?ombControlNumber=3038-0024>.

<sup>116</sup> This discussion does not include information collection requirements that are included under other Commission regulations and related OMB control numbers.

<sup>117</sup> 17 CFR 23.105(a) through (n).

<sup>118</sup> 7 U.S.C. 19(b).

<sup>119</sup> 7 U.S.C. 19(a).

<sup>120</sup> The Commission notes that the costs and benefits considered in this proposed rulemaking, and highlighted below, have informed the policy choices described throughout this release.

nonbank MSPs,<sup>121</sup> as well as financial reporting requirements for SDs and MSPs.<sup>122</sup> Section 4s(e) of the CEA requires the Commission to adopt minimum capital requirements for nonbank SDs and nonbank MSPs that are designed to help ensure their safety and soundness and are appropriate for the risk associated with the uncleared swaps held by such nonbank SD or nonbank MSP. In addition, section 4s(e)(2)(C) of the CEA, requires the Commission to establish capital requirements for nonbank SDs or nonbank MSPs that account for the risks associated with their entire swaps portfolio and all other activities conducted. Lastly, section 4s(e)(3)(D) of the CEA provides that the Commission, the prudential regulators, and the SEC, must “to the maximum extent practicable” establish and maintain comparable capital rules. Accordingly, this proposed rulemaking includes certain capital and financial reporting requirements related to SDs and MSPs.

The baseline for the Commission’s consideration of the costs and benefits of this proposed rulemaking is the existing statutory and regulatory framework applicable to SDs and MSPs, including the capital and margin requirements for SDs and MSPs under subpart E of part 23. The Commission recognizes, however, that to the extent that SDs<sup>123</sup> have arranged their business in reliance on Division interpretations and no-action positions in CFTC Letters No. 21–15 and 21–18, as extended under CFTC Letter No. 23–11, the actual costs and benefits of this proposed rulemaking may be mitigated.

The Commission recognizes that the proposed amendments may impose costs. The Commission has endeavored to assess the expected costs and benefits of the proposed amendments in quantitative terms, including PRA-related costs, where possible. In situations where the Commission is unable to quantify the costs and benefits, the Commission identifies and considers the costs and benefits of the proposed rules in qualitative terms. The lack of data and information to estimate those costs and benefits is attributable in part to the nature of the proposed amendments, which are tailored

financial reporting requirements based on the specific businesses and types of SDs registered with the Commission. Further, SDs represent a wide diversity of business models catering towards different swap counterparties, from financial end users to commercial enterprises. As a result, the Commission expects each SD to have developed its corporate entity in a unique manner by employing different corporate cost structures, making it particularly difficult to estimate the quantitative impacts of both costs and benefits on each SD.

#### *B. Codification of the CFTC Letters and Other Amendments*

The Commission is proposing technical amendments to its definitions in Commission regulation § 23.100 for “predominantly engaged in non-financial activities” and “tangible net worth.” Further, the Commission is proposing to amend Commission regulation § 23.105(p) to add exceptions to the financial reporting requirements for Non-U.S. bank SDs, and permitting bank SDs to file the relevant schedules under the Call Report (Schedule RC and Schedule RC–R) instead of as required by Appendix C. In addition, the Commission is making a number of clarifying amendments including: (1) amending the heading and scope provisions of Commission regulation § 23.105(k) and the titles of certain schedules included in Appendix B; (2) changing public disclosure requirements under Commission regulation § 23.105(i); (3) amending Form 1–FR–FCM to more accurately address net capital changes; (4) adding language to Commission regulation § 23.103(a) and (c)(1) to clarify that standardized charges are the same as applicable to all SDs not using the Bank-Based Capital Approach; and (5) amending the cross reference in Commission regulation § 23.102(d) to make clear that either 12 CFR part 217 or Appendix A should be utilized as applicable by the nonbank SD depending on the respective capital approach elected.

#### 1. Benefits

##### a. Amendments to Tangible Net Worth Capital Approach—CFTC Letter No. 21–15

The amendments to definitions of “predominantly engaged in non-financial activities” and “tangible net worth” codifying CFTC Letter No. 21–15 are intended to ensure that the Tangible Net Worth Capital Approach can be utilized by certain nonbank SDs as was originally intended in the Final Rule.

These amendments are expected to benefit certain nonbank SDs by ensuring clear and effective compliance with regulatory requirements under the Tangible Net Worth Capital Approach as amended, ultimately reducing operational costs for such nonbank SDs. In particular, nonbank SDs would no longer be required to calculate asset and revenue tests separately between the entity and the ultimate parent level or compute such tests under U.S. GAAP even if such entity was permitted to use IFRS. Further, these amendments would allow nonbank SDs meeting such qualifications to file their supplemental position reports at the same time as routine financial reporting for all nonbank SDs set forth within Commission regulation § 23.105(d).

##### b. Amendments to Bank SD Financial Reporting Requirements—CFTC Letter No. 21–18

Similarly, the amendments to Commission regulation § 23.105(p) codifying CFTC Letter No. 21–18, as extended under CFTC Letter No. 23–11, are expected to benefit bank SDs by permitting: (1) Non-U.S. bank SDs to file reports by their home country regulators subject to certain conditions; (2) bank SDs to file comparable Call Report schedules in accordance with, and within the timeframe permitted by, the prudential regulators; (3) Non-U.S. bank SDs to file balance sheet and statement of regulatory capital information in accordance with home country requirements provided they are in English, converted to U.S. dollars and filed within 90 calendar days following quarter-end; and (4) dually-registered Non-U.S. bank SDs to file comparable SEC-approved financial reports and schedules. The Commission anticipates that these amendments will eliminate duplicative and superfluous reporting and streamline financial reporting for both Non-U.S. and dually-registered bank SDs.

##### c. Amendments Regarding Financial Reporting and Computation Requirements of Swap Dealers

Lastly, the amendments regarding financial reporting and computation include: (1) amendments to the heading and scope provision of Commission regulation § 23.105(k) and (l); (2) titles of certain schedules included in Appendix B; (3) alignment of the public disclosure of unaudited financial information with the periodicity permitted by routine financial filings in Commission regulation § 23.105(d), and to remove reference to a statement disclosing the amounts of minimum regulatory capital; (4) amending Form

<sup>121</sup> Section 4s(e)(2)(B) of the CEA, 7 U.S.C. 6s(e)(2)(B).

<sup>122</sup> Section 4s(f) of the CEA, 7 U.S.C. 6s(f).

<sup>123</sup> Currently, there are no MSPs registered with the Commission and there have not been any MSPs registered with the Commission for several years. Thus, this section regarding the Commission’s consideration of the costs and benefits of this proposed rulemaking will only refer to SDs that may have relied on CFTC Letters No. 21–15 and 21–18 and may benefit from the compliance exceptions set forth herein.

1–FR–FCM to add the 2 percent of uncleared swap margin capital requirement and swaps and security-based swaps haircuts; and (5) addition of clarifying language to Commission regulations § 23.103(a)(1) and (c)(1) to provide additional clarity to registrants that the same standardized market and credit risk charges are applicable to nonbank SDs utilizing the Tangible Net Worth Capital Approach as are applicable to all other nonbank SDs if not approved to use models. These amendments are meant to clarify what was originally intended in the Final Rule or what is already included within the existing Commission regulations, as well as align the schedules as currently required by the SEC and the NFA. The Commission anticipates that these amendments will remove uncertainty amongst SDs about the type of form and the extent of detail that they should be reporting.

## 2. Costs

The Commission generally does not anticipate any costs associated with the above amendments as they are intended to streamline and clarify existing financial reporting and capital requirements. Of the above, only the amendments to Commission regulation § 23.105(l) would impose additional financial reporting requirements on nonbank SDs and nonbank MSPs not approved to use models to file Schedules 2–4 of Appendix B.

Currently, there are 8 nonbank SDs not approved to use models that are not currently filing Schedules 2–4 of Appendix B but would be required to do so under the amendments to Commission regulation § 23.105(l). The information required under Appendix B is nearly identical in all material respects to corresponding forms found in the SEC Form FOCUS Report Part II, as well as the capital and financial reporting requirements by the NFA for its member nonbank SDs and nonbank MSPs. Thus, the Commission has preliminarily determined that these nonbank SDs already have developed policies, procedures and systems to aggregate, monitor, and track their swap activities and risks as is required under Schedules 2–4 of Appendix B. This should mitigate some of the burdens of the additional reporting and recordkeeping requirements. Finally, the amendments to Commission regulation § 23.105(k) clarify that nonbank SDs and nonbank MSPs approved to use models may comply with the requirements to provide specific financial information required by Commission regulation § 23.105(k) by filing Appendix B. Such nonbank

SDs and nonbank MSPs have already been filing Appendix B with the Commission, and thus the Commission has preliminarily determined that the amendments to Commission regulation § 23.105(k) would not impose any additional burden for such nonbank SDs and nonbank MSPs.

## 3. Section 15(a) Factors

The following is a discussion of the cost and benefit considerations of this proposed rulemaking, as it relates to the five broad areas of market and public concern identified in section 15(a) of the CEA: (1) protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of swaps markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations.

### a. Protection of Market Participants and the Public

The proposed rules are intended to enhance the clarity of financial reporting and computation requirements by revising the language of the regulations with respect to the type of forms and the tests that SDs should be using as part of their financial reporting process. The changes to the computation of Tangible Net Worth are anticipated to benefit the public by allowing investors to monitor tangible net worth at the consolidated parent's level, and the financial reporting requirements for both bank SDs and nonbank SDs set out in this proposed rulemaking should help the Commission and market participants monitor and assess the financial condition of such SDs more accurately and as was intended in the Final Rule. These amendments are also intended to harmonize financial reporting requirements with those of the prudential regulators, and the SEC, through which market participants and the Commission can gain a clearer and more directly comparable understanding of the financial reports received. Clarifying rules should safeguard both market participants and the public by improving transparency and reducing ambiguity.

#### Request for Comment

*Question 10.* Do the proposed financial reporting and computation requirements protect market participants and the public? Please explain.

### b. Efficiency, Competitiveness, and Financial Integrity of Swaps Markets

In this proposed rulemaking, the Commission seeks to promote efficiency

and financial integrity of the swaps market by streamlining many of the financial reporting requirements. For example, the amendments to Commission regulation § 23.105(p) permit certain bank SDs to file with the Commission comparable Call Report schedules in accordance with, and within the timeframe permitted by, the prudential regulators that they currently file with the prudential regulators, or comparable SEC-approved financial reports and schedules, as applicable. The proposed amendments to Commission regulation § 23.105(p) would also allow certain Non-U.S. bank SDs to file with the Commission what they currently file with their respective home country regulators, subject to certain conditions. In addition, the amendments to Commission regulation § 23.105(k) are meant to ensure that the information listed in Appendix B is completed by all nonbank SDs and nonbank MSPs as was intended, and is consistent with that required by the SEC and NFA, and the amendments to Form 1–FR–FCM are meant to harmonize with the SEC's requirements in its FOCUS Report Part II. Harmonizing requirements should foster a more level playing field, ultimately promoting trust and integrity within the market.

The Commission anticipates that these amendments will promote greater operational efficiencies for both bank and nonbank SDs that are already regulated, either prudentially or through comparable foreign regulators, as they may be able to avoid creating duplicative compliance and operational infrastructures. The proposed amendments should allow the Commission to monitor the financial integrity of swaps markets more clearly and efficiently, including in the case of any default or financial contagion.

#### Request for Comment

*Question 11.* How might this proposal affect market integrity? Is market integrity adversely affected by the proposed rules? If so, how might the Commission mitigate any harmful impact?

### c. Price Discovery

The Commission anticipates that the proposed amendments may enhance price discovery. By clarifying financial reporting and computation requirements and harmonizing reporting practices, a more efficient operating environment would be created for SDs, which are important intermediaries within the swaps markets. This improved data quality reported to regulators has the potential to enhance supervision, leading to improved market quality.

Consequently, this could lead to a more effective and accurate price discovery process.

#### Request for Comment

*Question 12.* How might this proposed rulemaking affect price discovery? Please explain.

#### d. Sound Risk Management Practices

The Commission has preliminarily determined that, as a result of the proposed reporting and recordkeeping requirements, SDs may more effectively track their trading and risk exposure in swaps and other financial activities. To the extent that these SDs can better monitor and track their risks, the Commission anticipates that this should help them better manage risk within the entity.

#### Request for Comment

*Question 13.* How might this proposal affect SD's risk management practices? Please explain.

#### e. Other Public Interest Considerations

The Commission has not identified any additional public interest considerations related to the costs and benefits of the proposed rule.

#### Request for Comment

*Question 14.* Are there other public interest considerations that the Commission should consider? Please explain.

#### C. Other Amendments

The Commission is proposing a number of clarifying amendments intended to align with existing Commission regulations, including: (1) amending Commission regulation § 23.105(c)(4) to add a two business days reporting timeframe to the requirement for nonbank SD notice filing of a substantial reduction in capital; (2) amending Commission regulations § 23.101(a)(1)(i)(B) and (a)(1)(ii)(C) to establish that the use of subordinated debt as regulatory capital is subject to the approval of either an RFA of which the nonbank SD is a member, or the Commission; and (3) amending Commission regulation § 23.105(e)(4)(v) for SDs and MSPs to include an explicit statement, if applicable, that there are no material differences between the audited annual report and the unaudited annual report of the same date.

#### 1. Benefits

##### a. Notice of Substantial Reduction in Capital

The amendments to the notice requirements in Commission regulation

§ 23.105(c)(4) would add a two-business days requirement for nonbank SDs for notice of substantial reduction in capital. The Commission has preliminarily determined that adding a reporting timeframe to the notice requirement will enhance compliance by providing regulatory certainty to nonbank SDs of when such a filing is due.

##### b. Subordinated Debt Approval

The amendments to Commission regulation § 23.101(a)(1)(i)(B) would establish that the use of subordinated debt as regulatory capital is subject to the approval of either an RFA of which the nonbank SD is a member, or the Commission. The amendments should further provide regulatory clarity by establishing the process for approving subordinated debt for nonbank SDs, which was not explicitly articulated in the Final Rule and had led to uncertainty among nonbank SDs.

##### c. Statement of No Material Difference

Lastly, the amendments to Commission regulation § 23.105(e)(4)(v) would require that the SDs and MSPs include an explicit statement, if applicable, of no material differences between the audited and the unaudited annual report of the same date. Doing so should not only align the filing approach for auditors of SDs with that of FCMs, but also enhance the reliability of such annual reports by encouraging auditors to more rigorously assess the materiality of reporting any discovered audit findings.

#### 2. Costs

The Commission does not anticipate that compliance with the above amendments will lead to any significant costs. The amendments to Commission regulations § 23.105(c)(4) and (e)(4)(v) are meant to align the financial reporting requirements of SDs with that of FCMs, and based on the Commission's experience with existing filings and discussions with registered SDs, the Commission has preliminarily determined that the registrants will be able to file necessary information within the timeframe provided. The amendments to Commission regulation § 23.101(a)(1)(i)(B) are meant to establish a process of approving subordinated debt for nonbank SDs, and as such they would not levy any additional costs to the nonbank SDs.

#### 3. Section 15(a) Factors

The following is a discussion of the cost and benefit considerations of the proposed rulemaking, as it relates to the five broad areas of market and public

concern identified in section 15(a) of the CEA: (1) protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of swaps markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations.

##### a. Protection of Market Participants and the Public

The Commission anticipates that the proposed amendment to Commission regulation § 23.105(c)(4) should protect market participants and the public against possible market disruption by requiring that all SDs file a notice of a substantial reduction in capital within two business days after such an incident has occurred. Similarly, the amendments to Commission regulation § 23.101(a)(1)(i)(B) should provide market clarity on how subordinated debt is approved for consideration as capital, and the amendments to Commission regulation § 23.105(e)(4)(v) should allow the Commission and the public to effectively monitor cases where there are no material differences between the audited and unaudited annual report of the same date filed by nonbank SDs and nonbank MSPs. These amendments should enable market participants to have better insights into SD's capital and financial positions. This, in turn, should enhance the protection of both market participants and the public.

#### Request for Comment

*Question 15.* Do the proposed financial reporting requirements protect market participants and the public? Please explain.

##### b. Efficiency, Competitiveness, and Financial Integrity of Swaps Markets

The proposed amendments should improve the accuracy and completeness of nonbank SDs' and nonbank MSPs' financial reporting by imposing a two-business day deadline for notice of substantial reduction in capital, and an affirmative statement of no material differences between the audited and unaudited annual financial statement, as applicable. The establishment of a process for approving subordinated debt should lead to increased efficiency in how such subordinated debt is monitored. Further, these amendments are also intended to harmonize financial reporting requirements with those of the prudential regulators, as well as the Commission's existing framework regarding FCMs. Harmonizing requirements should foster a more level playing field, ultimately promoting trust and integrity within the market.

## Request for Comment

*Question 16.* Is market integrity adversely affected by the proposed rules? If so, how might the Commission mitigate any harmful impact?

## c. Price Discovery

The Commission anticipates that the proposed amendments may enhance price discovery. By improving financial reporting requirements for nonbank SDs and nonbank MSPs, a more efficient operating environment should be created for SDs, which are important intermediaries within the swaps markets. This improved data quality reported to regulators has the potential to enhance supervision, leading to improved market quality. Consequently,

this could lead to a more effective and accurate price discovery process.

## Request for Comment

*Question 17.* How might this proposed rulemaking affect price discovery? Please explain.

## d. Sound Risk Management Practices

The Commission anticipates that the above amendments will lead to better risk management practices among SDs and MSPs, particularly by requiring them to monitor for potential reduction in capital and material differences between the audited and the unaudited annual financial statements.

## Request for Comment

*Question 18.* How might this proposed rulemaking affect risk

management practices of nonbank SDs and nonbank MSPs? Please explain.

## e. Other Public Interest Considerations

The Commission has not identified any additional public interest considerations related to the costs and benefits of the proposed rule.

## Request for Comment

*Question 19.* Are there other public interest considerations that the Commission should consider? Please explain.

**Note:** The following appendix to this preamble pertains to a form that does not appear in the Code of Federal Regulations.

**BILLING CODE 6351-01-P**

Appendix to the Preamble—Proposed Revisions to Selected Section of Form 1-FR-FCM: Statement of the Computation of the Minimum Capital Requirements

Appendix to the Preamble – Proposed Revisions to Selected Section of Form 1-FR-FCM:

Statement of the Computation of the Minimum Capital Requirements<PHOTO>

CFTC FORM 1-FR-FCM STATEMENT OF THE COMPUTATION OF THE MINIMUM CAPITAL REQUIREMENTS AS OF

Net Capital

Table with 6 main rows (1-6) and sub-rows (A-F) for deductions. Includes descriptions of assets and liabilities, and numerical values in boxes (e.g., 3000, 3010, 3020, 3030, 3040, 3050, 3060, 3070, 3080, 3090, 3100).

Charges Against Net Capital (see regulation 1.17(c)(5))

Table with 6 rows (7-11) describing charges against net capital. Includes descriptions of commodity contracts and inventories, and numerical values in boxes (e.g., 3110, 3120, 3130, 3140, 3150).

12. Charges as specified in section 240.15c3-1(c)(2)(vi) and (vii) against securities owned by firm, including securities representing investments of domestic and foreign customers' funds:

	Market Value	Charge
A. U.S. and Canadian government obligations	3160	3170
B. State and Municipal government obligations	3180	3190
C. Certificates of deposit, commercial paper and bankers' acceptances	3200	3210
D. Corporate obligations	3220	3230
E. Stocks and warrants	3240	3250
F. Other securities	3260	3270
G. Total charges (add lines 12.A. - 12.F.)		3280

13. Charges as specified in section 240.15c3-1(c)(2)(iv)(F):

A. Against securities purchased under agreements to resell	3290
B. Against securities sold under agreements to repurchase	3300

14. Charges on securities options as specified in section 240.15c3-1, Appendix A

3310
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15. Undermargined commodity futures and commodity options accounts - amount in each account required to meet maintenance margin requirements, less the amount of current margin calls in that account and the amount of any noncurrent deficit in the account

A. Customer accounts	3320
B. Noncustomer accounts	3330
C. Omnibus accounts	3340

16. Charges against open commodity and cleared OTC derivatives positions in proprietary accounts and swaps

A. Uncovered exchange-traded futures, cleared OTC derivatives positions and granted options contracts		
i. percentage of margin requirements applicable to such contracts	3350	
ii. Less: equity in proprietary accounts included in liabilities	3360	3370
B. Ten percent (10%) of the market value of commodities which underlie commodity options not traded on a contract market carried long by the applicant or registrant which has value and such value increased adjusted net capital (this charge is limited to the value attributed to such options)		3380
C. Commodity options which are traded on contract markets and carried long in proprietary accounts. Charge is the same as would be applied if the applicant or registrant was the grantor of the options (this charge is limited to the value attributed to such options)		3390
D. Haircuts on swaps and security-based swaps pursuant to 1.17(c)(5)(iii), (iv), (xv), and (xvi) (itemize to the subparagraph level on separate page)		XXXX

17. Five percent (5%) of all unsecured receivables from foreign brokers

3410
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18. Deficiency in collateral for secured demand notes

3420
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19. Adjustment to eliminate benefits of consolidation (explain on separate page)

3430
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20. Total charges (add lines 7 through 19)

3440
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Adjusted Net Capital Computation

Table with 2 columns: Description and Value. Rows include Adjusted net capital (3500), Adjusted Net capital required (A. Risk Based Capital Requirement, B. Minimum Dollar Amount Requirement, C. Other NFA Requirement, D. Adjusted Net Capital Requirement), and Excess adjusted net capital (3610).

Computation of Early Warning Level

- 24. If the Minimum Adjusted Net Capital Requirement computed on line 22.D (Box 3600) is:
- The Risk Based Requirement, enter 110% of line 22.A.viii. (XXXX), or
- The Minimum Dollar Requirement of \$1,000,000, for FCMs, or \$20,000,000 for FCMs registered as SDs, enter 150% of line 22.B. (3565), or
- The Minimum Dollar Requirement of \$20,000,000 for FCMs offering or engaging in retail forex transactions or Retail Foreign Exchange Dealers ("RFED"), enter 110% of line 22.B. (3565), or
- Other NFA Requirement of \$20,000,000 plus five percent of the FCM's offering or engaging in retail forex transactions or RFED's total retail forex obligations in excess of \$10,000,000, enter 110% of line 22.C. (3575), or
- Any other NFA Requirement, enter 150% of line 22.C. (3575)

This is your early warning capital level. If this amount is greater than the amount on line 21, you must immediately notify your DSRO and the Commission pursuant to section 1.12 of the regulations.

Guaranteed Introducing Brokers

- 25. List all IBs with which guarantee agreements have been entered into by the FCM and which are currently in effect. See Attached. (3650)

BILLING CODE 6351-01-C

List of Subjects in 17 CFR Part 23

Reporting and recordkeeping requirements, Swaps.

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

PART 23—SWAP DEALERS AND MAJOR SWAP PARTICIPANTS

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

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

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

2. Amend § 23.100 by adding, in alphabetical order, a definition of the term "Call Report" and revising the definitions of the terms "Predominantly engaged in non-financial activities" and "Tangible net worth" to read as follows:

§ 23.100 Definitions applicable to capital requirements.

\* \* \* \* \*

Call Report. This term means the Federal Financial Institutions Examination Council Form 031 that a swap dealer or major swap participant

for which there is a prudential regulator is required to file with its applicable prudential regulator.

\* \* \* \* \*

Predominantly engaged in non-financial activities. A swap dealer is predominantly engaged in non-financial activities if:

(1) The swap dealer's consolidated annual gross financial revenues, or if the swap dealer is a wholly owned subsidiary, then the swap dealer's consolidated parent's annual gross financial revenues, in either of its two most recently completed fiscal years represents less than 15 percent of the swap dealer's or the swap dealer's

consolidated parent’s consolidated gross revenue in that fiscal year (“15% revenue test”), and

(2) The consolidated total financial assets of the swap dealer, or if the swap dealer is wholly owned subsidiary, then the consolidated total financial assets of the swap dealer’s parent, at the end of its two most recently completed fiscal years represents less than 15 percent of the swap dealer’s or the swap dealer’s consolidated parent’s consolidated total assets as of the end of the fiscal year (“15% asset test”).

(3) For purpose of computing the 15% revenue test or the 15% asset test, a swap dealer’s activities or swap dealer’s parent’s activities shall be deemed financial activities if such activities are defined as financial activities under 12 CFR 242.3 and Appendix A to 12 CFR 242, including lending, investing for others, safeguarding money or securities for others, providing financial or investment advisory services, underwriting or making markets in securities, providing securities brokerage services, and engaging as principal in investing and trading activities; *Provided, however*, a swap dealer or a swap dealer’s consolidated parent may exclude from its financial activities accounts receivable resulting from non-financial activities.

*Tangible net worth.* This term means the net worth of a swap dealer or major swap participant as determined in accordance with U.S. generally accepted accounting principles, or International Financial Reporting Standards issued by the International Accounting Standards Board if the swap dealer or major swap participant is permitted under § 23.105(b) to prepare and maintain books and records in accordance with such standards, but in either case, excluding goodwill and other intangible assets. In determining net worth, all long and short positions in swaps, security-based swaps and related positions must be marked to their market value. A swap dealer or major swap participant must include in its computation of tangible net worth all liabilities or obligations of a subsidiary or affiliate that the swap dealer or major swap participant guarantees, endorses, or assumes either directly or indirectly.

■ 3. Amend § 23.101 by revising paragraphs (a)(1)(i)(B), (a)(1)(ii)(B), and (a)(1)(ii)(C), and adding paragraph (a)(1)(ii)(D) to read as follows:

**§ 23.101 Minimum financial requirements for swap dealers and major swap participants.**

(a)(1) \* \* \*

(i) \* \* \*

(B) An aggregate of common equity tier 1 capital, additional tier 1 capital, and tier 2 capital, all as defined under the bank holding company regulations in 12 CFR 217.20, equal to or greater than eight percent of the swap dealer’s BHC equivalent risk-weighted assets; *provided, however*, that the swap dealer must maintain a minimum of common equity tier 1 capital equal to six point five percent of its BHC equivalent risk-weighted assets; *provided further*, that any capital that is subordinated debt under 12 CFR 217.20 and that is included in the swap dealer’s capital for purposes of this paragraph (a)(1)(i)(B) must qualify as subordinated debt under § 240.18a–1d of this title in accordance with a qualification determination of the Commission or a registered futures association of which the swap dealer is a member;

\* \* \* \* \*

(ii) \* \* \*

(B) A swap dealer that uses internal models to compute market risk for its proprietary positions under § 240.18a–1(d) of this title must calculate the total market risk as the sum of the VaR measure, stressed VaR measure, specific risk measure, comprehensive risk measure, and incremental risk measure of the portfolio of proprietary positions in accordance with § 23.102 and Appendix A to subpart E of this part;

(C) A swap dealer may recognize as a current asset, receivables from third-party custodians that maintain the swap dealer’s initial margin deposits associated with uncleared swap and security-based swap transactions pursuant to the margin rules of the Commission, the Securities and Exchange Commission, a prudential regulator, as defined in section 1a(39) of the Act, or a foreign jurisdiction that has received a margin Comparability Determination under § 23.160; and

(D) The qualification of any subordinated debt used to meet any capital requirements shall be as determined by the Commission or a registered futures association of which the swap dealer is a member.

\* \* \* \* \*

■ 4. In § 23.102, revise paragraph (d) to read as follows:

**§ 23.102 Calculation of market risk exposure requirement and credit risk exposure requirement using internal models.**

\* \* \* \* \*

(d) The Commission, or registered futures association upon obtaining the Commission’s determination that its requirements and model approval process are comparable to the

Commission’s requirements and process, may approve or deny the application, or approve or deny an amendment to the application, in whole or in part, subject to any conditions or limitations the Commission or registered futures association may require, if the Commission or registered futures association finds the approval to be appropriate in the public interest, after determining, among other things, whether the applicant has met the requirements of this section. A swap dealer that has received Commission or registered futures association approval to compute market risk exposure requirements and credit risk exposure requirements pursuant to internal models must compute such charges in accordance with paragraph (c) of this section.

\* \* \* \* \*

■ 5. In § 23.103, revise paragraphs (a)(1) and (c)(1) to read as follows:

**§ 23.103 Calculation of market risk exposure requirement and credit risk requirement when models are not approved.**

(a) \* \* \*

(1) Computes its regulatory capital requirements under § 23.101(a)(1)(ii) or (a)(2), and

\* \* \* \* \*

(c) \* \* \*

(1) A swap dealer that computes regulatory capital under § 23.101(a)(1)(ii) or (a)(2) shall compute counterparty credit risk charges using the applicable standardized credit risk charges set forth in § 240.18a-1 of this title and § 1.17 of this chapter for such positions.

\* \* \* \* \*

■ 6. In § 23.105, revise paragraphs (c)(2) and (c)(4), (d)(2) through (d)(4), (e)(4)(v), (e)(6), (i)(1)(i) and (ii), (i)(2)(ii), the introductory text to (k)(1), (l), (p)(2), and (p)(7) to read as follows:

**§ 23.105 Financial recordkeeping, reporting and notification requirements for swap dealers and major swap participants.**

\* \* \* \* \*

(c) \* \* \*

(2) A swap dealer or major swap participant who knows or should have known that its regulatory capital at any time is less than 120 percent of its minimum regulatory capital requirement as determined under § 23.101, or less than the amounts identified in § 1.12(b) of this chapter for a swap dealer or major swap participant that is also a futures commission merchant, must provide written notice to the Commission and to the registered futures association of which it is a

member to that effect within 24 hours of such event.

\* \* \* \* \*

(4) A swap dealer or major swap participant must provide written notice within two business days to the Commission and to the registered futures association of which it is a member of a substantial reduction in capital as compared to that last reported in a financial report filed with the Commission pursuant to this section. The notice shall be provided if the swap dealer or major swap participant experiences a 30 percent or more decrease in the amount of capital that the swap dealer or major swap participant holds in excess of its regulatory capital requirement as computed under § 23.101.

\* \* \* \* \*

(d) \* \* \*

(2) The financial reports required by this section must be prepared in the English language and be denominated in United States dollars. The financial reports shall include a statement of financial condition, a statement of income/loss, a statement of changes in liabilities subordinated to the claims of general creditors, a statement of changes in ownership equity, a statement demonstrating compliance with and calculation of the applicable regulatory capital requirement under § 23.101, and such further material information as may be necessary to make the required statements not misleading. The monthly or quarterly report and schedules must be prepared in accordance with generally accepted accounting principles as established in the United States; *Provided, however*, that a swap dealer or major swap participant that is not otherwise required to prepare financial statements in accordance with U.S. generally accepted accounting principles, may prepare the monthly or quarterly report and schedules required by this section in accordance with International Financial Reporting Standards issued by the International Accounting Standards Board.

(3) A swap dealer or major swap participant that is also registered with the Securities and Exchange Commission as a broker or dealer, security-based swap dealer, or a major security-based swap participant and files a monthly Form X-17A-5 FOCUS Report Part II with the Securities and Exchange Commission pursuant to § 240.18a-7 or 240.17a-5 of this title, as applicable, must file such Form X-17A-5 FOCUS Report Part II with the Commission and with the registered futures association in lieu of the financial reports required under

paragraphs (d)(1) and (2) of the section. The swap dealer or major swap participant must file the form with the Commission and registered futures association when it files the Form X-17A-5 FOCUS Report Part II with the Securities and Exchange Commission, *provided, however*, that the swap dealer or major swap participant must file the Form X-17A-5 FOCUS Report Part II with the Commission and registered futures association no later than 17 business days after the end of each month.

(4) A swap dealer or major swap participant that is also registered with the Commission as a futures commission merchant must file a Form 1-FR-FCM or such other form as the futures commission merchant is permitted to file under § 1.10 of this chapter, in lieu of the monthly financial reports required under paragraphs (d)(1) and (2) of the section.

(e) \* \* \*

(4) \* \* \*

(v) A reconciliation of any material differences from the unaudited financial report prepared as of the swap dealer's or major swap participant's year-end date under paragraph (d) of this section and the swap dealer's or major swap participant's annual financial report prepared under this paragraph (e) or, if no material differences exist, a statement so indicating; and

\* \* \* \* \*

(6) A swap dealer or major swap participant that is also registered with the Commission as a futures commission merchant must file an audited Form 1-FR-FCM or such other form as the futures commission merchant is permitted to file under § 1.10 of this chapter, and must comply with the requirements of § 1.16 of this chapter, including filing a supplemental accountant's report on material inadequacies concurrently with the audited annual report, in lieu of the annual financial report required under this paragraph (e).

\* \* \* \* \*

(i) \* \* \*

(1) \* \* \*

(i) The statement of financial condition including applicable footnotes; and

(ii) The amounts of the swap dealer's or major swap participant's regulatory capital and minimum regulatory capital requirement, computed in accordance with § 23.101.

(2) \* \* \*

(ii) The amounts of the swap dealer's or major swap participant's regulatory capital as of the fiscal year end and its minimum regulatory capital

requirement, computed in accordance with § 23.101.

\* \* \* \* \*

(k) \* \* \*

(1) A swap dealer that has received approval or filed an application for provisional approval under § 23.102(d) from the Commission, or from a registered futures association of which the swap dealer is a member, to use internal models to compute its market risk exposure requirement and credit risk exposure requirement in computing its regulatory capital under § 23.101 must file with the Commission and with the registered futures association of which the swap dealer is a member the specific information contained in Appendix B to subpart E of this part and the following information within 17 business days of the end of each month or quarter as applicable:

\* \* \* \* \*

(l) *Additional position and counterparty reporting requirements for swap dealers and major swap participants not approved to use models.* A swap dealer or major swap participant which is not subject to paragraph (k) of this section must provide the Commission and the registered futures association of which the swap dealer or major swap participant is a member, the additional specific information contained in Appendix B to subpart E of this part on a monthly or quarterly basis as applicable to its required frequency of financial reporting under paragraph (d) of this section.

\* \* \* \* \*

(p) \* \* \*

(2) *Financial report and position information.* (i) A swap dealer or major swap participant that files a Call Report with its applicable prudential regulator shall file Schedule RC—Balance Sheet and Schedule RC—R Regulatory Capital from its Call Report filed with the prudential regulator, and Schedule 1 of Appendix C to subpart E of this part, with the Commission on a quarterly basis. The swap dealer or major swap participant shall file the schedules with the Commission on the date the Call Report is due to be filed with the swap dealer's or major swap participant's prudential regulator.

(ii) A swap dealer or major swap participant domiciled in a non-U.S. jurisdiction that is not required to file a Call Report by its applicable prudential regulator shall file a statement of financial condition and regulatory capital information containing comparable financial information as required by Schedule RC—Balance Sheet and Schedule RC—R Regulatory

Capital of the Call Report, and shall file Schedule 1 of Appendix C to subpart E of this part, with the Commission on a quarterly basis. The statement of financial condition, regulatory capital information, and Schedule 1 of Appendix C to subpart E of this part shall be prepared and presented in accordance with the accounting standards approved by the swap dealer's or major swap participant's home country regulatory authorities, *provided, however*, that the schedules and information must be in the English language with balances converted to U.S. dollars. The swap dealer or major swap participant shall file the statement of financial condition, regulatory capital information, and Schedule 1 of Appendix C to subpart E of this part

with the Commission no later than 90 calendar days after the end of the swap dealer's or major swap participant's fiscal quarter.

\* \* \* \* \*

(7) A swap dealer or major swap participant that is subject to the capital requirements of a prudential regulator and is also registered with the Securities and Exchange Commission as a security-based swap dealer or a major security-based swap participant and files a quarterly Form X-17A-5 FOCUS Report Part IIC with the Securities and Exchange Commission pursuant to § 240.18a-7 of this title, must file such Form X-17A-5 FOCUS Report Part IIC with the Commission in lieu of the financial reports required under paragraphs (p)(2) of this section. The

swap dealer or major swap participant must file the form with the Commission when it files the Form X-17A-5 FOCUS Report Part IIC with the Securities and Exchange Commission, *provided, however*, that the swap dealer or major swap participant must file the Form X-17A-5 FOCUS Report Part IIC with the Commission no later than 30 calendar days from the date the report is made.

■ 7. In Appendix B to subpart E of part 23, revise the schedule headings of Schedules 1, 2, 3, and 4, and republish the schedules, to read as follows:

**Appendix B to Subpart E of Part 23—  
Swap Dealer and Major Swap  
Participant Position Information**

BILLING CODE 6351-01-P

Reg. 23.105(k)  
and (l)  
Appendix  
B

SCHEDULE 1 – AGGREGATE SECURITIES, COMMODITIES, AND SWAPS POSITIONS

Items on this page to be reported by: Swap Dealers (Authorized and not authorized to use models)  
Major Swap Participants (Authorized and not authorized to use models)

Aggregate Securities, Commodities, and Swaps Positions	LONG/BOUGHT	SHORT/SOLD
1. U.S. treasury securities.....	\$ _____ 8200	\$ _____ 8201
2. U.S. government agency and U.S. government-sponsored enterprises.....	\$ _____ 8210	\$ _____ 8211
A. Mortgage-backed securities issued by U.S. government agency and U.S. government-sponsored enterprises.....	\$ _____ 18001	\$ _____ 18002
B. Debt securities issued by U.S. government agency and U.S. government-sponsored enterprises.....	\$ _____ 18003	\$ _____ 18004
3. Securities issued by states and political subdivisions in the U.S.....	\$ _____ 8220	\$ _____ 8221
4. Foreign securities		
A. Debt securities.....	\$ _____ 8230	\$ _____ 8231
B. Equity securities.....	\$ _____ 8235	\$ _____ 8236
5. Money market instruments.....	\$ _____ 8240	\$ _____ 8241
6. Private label mortgage backed securities.....	\$ _____ 8250	\$ _____ 8251
7. Other asset-backed securities.....	\$ _____ 8260	\$ _____ 8261
8. Corporate obligations.....	\$ _____ 8270	\$ _____ 8271
9. Stocks and warrants (other than arbitrage positions).....	\$ _____ 8280	\$ _____ 8281
10. Arbitrage.....	\$ _____ 8290	\$ _____ 8291
11. Spot commodities.....	\$ _____ 8330	\$ _____ 8331
12. Other securities and commodities.....	\$ _____ 8360	\$ _____ 8361
13. Securities with no ready market		
A. Equity.....	\$ _____ 8340	\$ _____ 8341
B. Debt.....	\$ _____ 8345	\$ _____ 8346
C. Other.....	\$ _____ 8350	\$ _____ 8351
D. Total securities with no ready market.....	\$ _____ 12777	\$ _____ 12782
14. Total net securities and spot commodities (sum of Lines 1-12 and 13D).....	\$ _____ 12778	\$ _____ 12783
15. Security-based swaps		
A. Cleared.....	\$ _____ 12106	\$ _____ 12114
B. Non-cleared.....	\$ _____ 12107	\$ _____ 12115
16. Mixed swaps		
A. Cleared.....	\$ _____ 12108	\$ _____ 12116
B. Non-cleared.....	\$ _____ 12109	\$ _____ 12117
17. Swaps		
A. Cleared.....	\$ _____ 12110	\$ _____ 12118
B. Non-cleared.....	\$ _____ 12111	\$ _____ 12119
18. Other derivatives and options.....	\$ _____ 8295	\$ _____ 8296
19. Counterparty netting.....	\$ _____ 12779	\$ _____ 12784
20. Cash collateral netting.....	\$ _____ 12780	\$ _____ 12785
21. Total derivative receivables and payables (sum of Lines 15-20).....	\$ _____ 12781	\$ _____ 12786
22. Total net securities, commodities, and swaps positions (sum of Lines 14 and 21).....	\$ _____ 8370	\$ _____ 8371

Name of firm: \_\_\_\_\_  
As of: \_\_\_\_\_

NOTE: The information required to be reported within this form is intended to be identical to that required to be reported by Security Based Swap Dealers and Major Security Based Swap Participants under SEC FORM X-17a-5 FOCUS Report Part II. Please refer to FOCUS REPORT II INSTRUCTIONS and related interpretations published by the SEC in the preparation of this form.

Reg. 23.105(k)  
and (l)  
Appendix  
B

SCHEDULE 2 – CREDIT CONCENTRATION REPORT FOR FIFTEEN LARGEST EXPOSURES IN DERIVATIVES

Items on this page to be reported by: Swap Dealers (Authorized and not authorized to use models)  
Major Swap Participants (Authorized and not authorized to use models)

I. By Current Net Exposure

Counterparty Identifier	Gross Replacement Value		Net Replacement Value	Current Net Exposure	Current Net and Potential Exposure	Margin Collected
	Receivable (Gross Gain)	Payable (Gross Loss)				
1.	12120	12135	12151	12167	12183	12215
2.	12121	12136	12152	12168	12184	12216
3.	12122	12137	12153	12169	12185	12217
4.	12123	12138	12154	12170	12186	12218
5.	12124	12139	12155	12171	12187	12219
6.	12125	12140	12156	12172	12188	12220
7.	12126	12141	12157	12173	12189	12221
8.	12127	12142	12158	12174	12190	12222
9.	12128	12143	12159	12175	12191	12223
10.	12129	12144	12160	12176	12192	12224
11.	12130	12145	12161	12177	12193	12225
12.	12131	12146	12162	12178	12194	12226
13.	12132	12147	12163	12179	12195	12227
14.	12133	12148	12164	12180	12196	12228
15.	12134	12149	12165	12181	12197	12229
All other counterparties		12150	12166	12182	12198	12230
Totals:		7810	7811	7812	7813	12231

II. By Current Net and Potential Exposure

Counterparty Identifier	Gross Replacement Value		Net Replacement Value	Current Net Exposure	Current Net and Potential Exposure	Margin Collected
	Receivable (Gross Gain)	Payable (Gross Loss)				
1.	12232	12247	12264	12281	12315	12332
2.	12233	12248	12265	12282	12316	12333
3.	12234	12249	12266	12283	12317	12334
4.	12235	12250	12267	12284	12318	12335
5.	12236	12251	12268	12285	12319	12336
6.	12237	12252	12269	12286	12320	12337
7.	12238	12253	12270	12287	12321	12338
8.	12239	12254	12271	12288	12322	12339
9.	12240	12255	12272	12289	12323	12340
10.	12241	12256	12273	12290	12324	12341
11.	12242	12257	12274	12291	12325	12342
12.	12243	12258	12275	12292	12326	12343
13.	12244	12259	12276	12293	12327	12344
14.	12245	12260	12277	12294	12328	12345
15.	12246	12261	12278	12295	12329	12346
All other counterparties		12262	12279	12296	12330	12347

Totals:	\$	12263	\$	12280	\$	12297	\$	12314	\$	12331	\$	12348
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Name of firm: \_\_\_\_\_  
 As of: \_\_\_\_\_

NOTE: The information required to be reported within this form is intended to be identical to that required to be reported by Security Based Swap Dealers and Major Security Based Swap Participants under SEC FORM X-17a-5 FOCUS Report Part II. Please refer to FOCUS REPORT II INSTRUCTIONS and related interpretations published by the SEC in the preparation of this form.

Reg. 23.105(k)  
 and (l)  
 Appendix  
 B

SCHEDULE 3 – PORTFOLIO SUMMARY OF DERIVATIVES EXPOSURES BY INTERNAL CREDIT RATING

Items on this page to be reported by: Swap Dealers (Authorized and not authorized to use models)  
 Major Swap Participants (Authorized and not authorized to use models)

	Internal Credit Rating	Gross Replacement Value		Net Replacement Value	Current Net Exposure	Current Net and Potential Exposure	Margin Collected
		Receivable	Payable				
1.	12349	\$ 12386	\$ 12423	\$ 12460	\$ 12497	\$ 12534	\$ 12572
2.	12350	\$ 12387	\$ 12424	\$ 12461	\$ 12498	\$ 12535	\$ 12573
3.	12351	\$ 12388	\$ 12425	\$ 12462	\$ 12499	\$ 12536	\$ 12574
4.	12352	\$ 12389	\$ 12426	\$ 12463	\$ 12500	\$ 12537	\$ 12575
5.	12353	\$ 12390	\$ 12427	\$ 12464	\$ 12501	\$ 12538	\$ 12576
6.	12354	\$ 12391	\$ 12428	\$ 12465	\$ 12502	\$ 12539	\$ 12577
7.	12355	\$ 12392	\$ 12429	\$ 12466	\$ 12503	\$ 12540	\$ 12578
8.	12356	\$ 12393	\$ 12430	\$ 12467	\$ 12504	\$ 12541	\$ 12579
9.	12357	\$ 12394	\$ 12431	\$ 12468	\$ 12505	\$ 12542	\$ 12580
10.	12358	\$ 12395	\$ 12432	\$ 12469	\$ 12506	\$ 12543	\$ 12581
11.	12359	\$ 12396	\$ 12433	\$ 12470	\$ 12507	\$ 12544	\$ 12582
12.	12360	\$ 12397	\$ 12434	\$ 12471	\$ 12508	\$ 12545	\$ 12583
13.	12361	\$ 12398	\$ 12435	\$ 12472	\$ 12509	\$ 12546	\$ 12584
14.	12362	\$ 12399	\$ 12436	\$ 12473	\$ 12510	\$ 12547	\$ 12585
15.	12363	\$ 12400	\$ 12437	\$ 12474	\$ 12511	\$ 12548	\$ 12586
16.	12364	\$ 12401	\$ 12438	\$ 12475	\$ 12512	\$ 12549	\$ 12587
17.	12365	\$ 12402	\$ 12439	\$ 12476	\$ 12513	\$ 12550	\$ 12588
18.	12366	\$ 12403	\$ 12440	\$ 12477	\$ 12514	\$ 12551	\$ 12589
19.	12367	\$ 12404	\$ 12441	\$ 12478	\$ 12515	\$ 12552	\$ 12590
20.	12368	\$ 12405	\$ 12442	\$ 12479	\$ 12516	\$ 12553	\$ 12591
21.	12369	\$ 12406	\$ 12443	\$ 12480	\$ 12517	\$ 12554	\$ 12592
22.	12370	\$ 12407	\$ 12444	\$ 12481	\$ 12518	\$ 12555	\$ 12593
23.	12371	\$ 12408	\$ 12445	\$ 12482	\$ 12519	\$ 12556	\$ 12594
24.	12372	\$ 12409	\$ 12446	\$ 12483	\$ 12520	\$ 12557	\$ 12595
25.	12373	\$ 12410	\$ 12447	\$ 12484	\$ 12521	\$ 12558	\$ 12596
26.	12374	\$ 12411	\$ 12448	\$ 12485	\$ 12522	\$ 12559	\$ 12597
27.	12375	\$ 12412	\$ 12449	\$ 12486	\$ 12523	\$ 12560	\$ 12598
28.	12376	\$ 12413	\$ 12450	\$ 12487	\$ 12524	\$ 12561	\$ 12599
29.	12377	\$ 12414	\$ 12451	\$ 12488	\$ 12525	\$ 12562	\$ 12600
30.	12378	\$ 12415	\$ 12452	\$ 12489	\$ 12526	\$ 12563	\$ 12601
31.	12379	\$ 12416	\$ 12453	\$ 12490	\$ 12527	\$ 12564	\$ 12602
32.	12380	\$ 12417	\$ 12454	\$ 12491	\$ 12528	\$ 12565	\$ 12603
33.	12381	\$ 12418	\$ 12455	\$ 12492	\$ 12529	\$ 12566	\$ 12604
34.	12382	\$ 12419	\$ 12456	\$ 12493	\$ 12530	\$ 12567	\$ 12605
35.	12383	\$ 12420	\$ 12457	\$ 12494	\$ 12531	\$ 12568	\$ 12606

36.	12384	\$	12421	\$	12458	\$	12495	\$	12532	\$	12569	\$	12607
Unrated	12385	\$	12422	\$	12459	\$	12496	\$	12533	\$	12570	\$	12608
Totals:		\$	7822	\$	7823	\$	7821	\$	7820	\$	12571	\$	12609

Name of firm: \_\_\_\_\_  
As of: \_\_\_\_\_

NOTE: The information required to be reported within this form is intended to be identical to that required to be reported by Security Based Swap Dealers and Major Security Based Swap Participants under SEC FORM X-17a-5 FOCUS Report Part II. Please refer to FOCUS REPORT II INSTRUCTIONS and related interpretations published by the SEC in the preparation of this form.

Reg. 23.105(k)  
and (l)  
Appendix  
B

SCHEDULE 4 – GEOGRAPHIC DISTRIBUTION OF DERIVATIVES EXPOSURES FOR TEN LARGEST COUNTRIES

Items on this page to be reported by: Swap Dealers (Authorized and not authorized to use models)  
Major Swap Participants (Authorized and not authorized to use models)

I. By Current Net Exposure

Country	Gross Replacement Value		Net Replacement Value	Current Net Exposure	Current Net and Potential Exposure		Margin Collected
	Receivable	Payable			Potential Exposure		
1.	12510	\$ 12620	\$ 12630	\$ 12640	\$ 12650	\$ 12661	\$ 12671
2.	12511	\$ 12621	\$ 12631	\$ 12641	\$ 12651	\$ 12662	\$ 12672
3.	12512	\$ 12622	\$ 12632	\$ 12642	\$ 12652	\$ 12663	\$ 12673
4.	12513	\$ 12623	\$ 12633	\$ 12643	\$ 12653	\$ 12664	\$ 12674
5.	12514	\$ 12624	\$ 12634	\$ 12644	\$ 12654	\$ 12665	\$ 12675
6.	12515	\$ 12625	\$ 12635	\$ 12645	\$ 12655	\$ 12666	\$ 12676
7.	12516	\$ 12626	\$ 12636	\$ 12646	\$ 12656	\$ 12667	\$ 12677
8.	12517	\$ 12627	\$ 12637	\$ 12647	\$ 12657	\$ 12668	\$ 12678
9.	12518	\$ 12628	\$ 12638	\$ 12648	\$ 12658	\$ 12669	\$ 12679
10.	12519	\$ 12629	\$ 12639	\$ 12649	\$ 12659	\$ 12670	\$ 12680
Totals:		\$ 7803	\$ 7804	\$ 7802	\$ 12660	\$ 7801	\$ 12681

II. By Current Net and Potential Exposure

Country	Gross Replacement Value		Net Replacement Value	Current Net Exposure	Current Net and Potential Exposure		Margin Collected
	Receivable	Payable			Potential Exposure		
1.	12682	\$ 12692	\$ 12703	\$ 12714	\$ 12725	\$ 12736	\$ 12747
2.	12683	\$ 12693	\$ 12704	\$ 12715	\$ 12726	\$ 12737	\$ 12748
3.	12684	\$ 12694	\$ 12705	\$ 12716	\$ 12727	\$ 12738	\$ 12749
4.	12685	\$ 12695	\$ 12706	\$ 12717	\$ 12728	\$ 12739	\$ 12750
5.	12686	\$ 12696	\$ 12707	\$ 12718	\$ 12729	\$ 12740	\$ 12751
6.	12687	\$ 12697	\$ 12708	\$ 12719	\$ 12730	\$ 12741	\$ 12752
7.	12688	\$ 12698	\$ 12709	\$ 12720	\$ 12731	\$ 12742	\$ 12753
8.	12689	\$ 12699	\$ 12710	\$ 12721	\$ 12732	\$ 12743	\$ 12754
9.	12690	\$ 12700	\$ 12711	\$ 12722	\$ 12733	\$ 12744	\$ 12755
10.	12691	\$ 12701	\$ 12712	\$ 12723	\$ 12734	\$ 12745	\$ 12756
Totals:		\$ 12702	\$ 12713	\$ 12724	\$ 12735	\$ 12746	\$ 12757

Name of firm: \_\_\_\_\_  
As of: \_\_\_\_\_

NOTE: The information required to be reported within this form is intended to be identical to that required to be reported by Security Based Swap Dealers and Major Security Based Swap Participants under SEC FORM X-17a-5 FOCUS Report Part II. Please refer to FOCUS REPORT II INSTRUCTIONS and related interpretations published by the SEC in the preparation of this form.

■ 8. Amend Appendix C to subpart E of part 23 by removing the Balance Sheet and Regulatory Capital forms and revising the Schedule 1—Aggregate

Security-Based Swap and Swap Positions form to read as follows:

**Appendix C to Subpart E of Part 23—  
Specific Position Information for Swap  
Dealers and Major Swap Participants  
Subject to the Capital Requirements of  
a Prudential Regulator**



Reg. 23.105(p) Appendix C	SCHEDULE 1 – AGGREGATE SECURITY-BASED SWAP AND SWAP POSITIONS
	Items on this page to be reported by: Bank SDs Bank MSPs

Aggregate Positions	LONG/BOUGHT	SHORT/SOLD
1. Security-based swaps		
A. Cleared	\$ _____ <span style="border: 1px solid black; padding: 2px;">12801</span>	\$ _____ <span style="border: 1px solid black; padding: 2px;">12809</span>
B. Non-cleared	\$ _____ <span style="border: 1px solid black; padding: 2px;">12802</span>	\$ _____ <span style="border: 1px solid black; padding: 2px;">12810</span>
2. Mixed swaps		
A. Cleared	\$ _____ <span style="border: 1px solid black; padding: 2px;">12803</span>	\$ _____ <span style="border: 1px solid black; padding: 2px;">12811</span>
B. Non-cleared	\$ _____ <span style="border: 1px solid black; padding: 2px;">12804</span>	\$ _____ <span style="border: 1px solid black; padding: 2px;">12812</span>
3. Swaps		
A. Cleared	\$ _____ <span style="border: 1px solid black; padding: 2px;">12805</span>	\$ _____ <span style="border: 1px solid black; padding: 2px;">12813</span>
B. Non-cleared	\$ _____ <span style="border: 1px solid black; padding: 2px;">12806</span>	\$ _____ <span style="border: 1px solid black; padding: 2px;">12814</span>
4. Other derivatives	\$ _____ <span style="border: 1px solid black; padding: 2px;">12807</span>	\$ _____ <span style="border: 1px solid black; padding: 2px;">12815</span>
5. Total (sum of Lines 1-4)	\$ _____ <span style="border: 1px solid black; padding: 2px;">12808</span>	\$ _____ <span style="border: 1px solid black; padding: 2px;">12816</span>

Name of firm: \_\_\_\_\_

As of: \_\_\_\_\_

NOTE: The information required to be reported within this form is intended to be identical to that required to be reported by Security Based Swap Dealers and Major Security Based Swap Participants under SEC FORM X-17A-5 FOCUS Report Part IIC. Please refer to FOCUS REPORT PART IIC INSTRUCTIONS and related interpretations published by the SEC in the preparation of this form.

**BILLING CODE 6351-01-C**

Issued in Washington, DC, on December 22, 2023, by the Commission.

**Christopher Kirkpatrick,**  
*Secretary of the Commission.*

**Note:** The following appendices will not appear in the Code of Federal Regulations.

**Appendices to Capital and Financial Reporting Requirements for Swap Dealers and Major Swap Participants—Commission Voting Summary, Chairman’s Statement, and Commissioners’ Statements**

**Appendix 1—Commission Voting Summary**

On this matter, Chairman Behnam and Commissioners Johnson, Goldsmith Romero, Mersinger, and Pham voted in the affirmative. No Commissioner voted in the negative.

**Appendix 2—Statement of Support of Chairman Rostin Behnam**

I support the proposed rule to amend certain requirements in part 23 of the Commission’s regulations to address specific issues identified during the implementation of the Commission’s 2020 final rule on

capital and financial reporting requirements for swap dealers (SDs) and major swap participants (MSPs).<sup>1</sup> The proposed rule would codify interpretive CFTC Letter No. 21–15<sup>2</sup> regarding capital and financial reporting requirements for nonbank SDs and nonbank MSPs electing the tangible net worth capital approach;<sup>3</sup> codify the time-limited no-action position in CFTC Letter No. 21–18<sup>4</sup> regarding financial reporting requirements for bank SDs; clarify technical aspects of the reporting requirements; and update an FCM reporting form consistent with net capital requirements previously adopted by the Commission for FCMs. The proposed amendments are not intended to change the Commission’s capital approach.

This proposal is a testament to the commitment I previously made for the Commission to consider the codification of various forms of relief previously provided by CFTC Division staff through no-action

position letters.<sup>5</sup> As staff letters only bind the staff of the issuing Division with respect to the specific facts, situations, and persons addressed by the respective staff letters,<sup>6</sup> it is good government for the Commission to clean-up its rule set where the Commission determines that compliance with certain regulations is impossible. Such Commission action not only provides regulatory certainty and clarity to our registrants with the benefit of notice and public comment, but also ensures the efficient use of staff resources to fix an issue once instead of allocating time to a series of no-action positions for the same matter.

I look forward to hearing the public’s comments on the proposed amendments to the regulations and the relevant appendices in part 23 of the Commission’s regulations. I thank staff in the Market Participants Division, Office of the General Counsel, and the Office of the Chief Economist for all of their work on the proposal.

<sup>1</sup> Capital Requirements of Swap Dealers and Major Swap Participants, 85 FR 57462 (Sept. 15, 2020).

<sup>2</sup> CFTC Letter No. 21–15, Jun. 29, 2021, available at <https://www.cftc.gov/csl/21-15/download>.

<sup>3</sup> See 17 CFR 23.101.

<sup>4</sup> CFTC Letter No. 21–18, Aug. 31, 2021, available at <https://www.cftc.gov/csl/21-18/download>.

<sup>5</sup> Keynote Address of Chairman Rostin Behnam at the ABA Business Law Section Derivatives & Futures Law Committee Winter Meeting, (Feb. 3, 2023), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opabehnam31>.

<sup>6</sup> See, e.g., 17 CFR 140.99.

### Appendix 3—Statement of Commissioner Kristin N. Johnson

The Commodity Futures Trading Commission (Commission or CFTC) adopted a proposal to amend certain of the Commission's part 23 regulations that impose minimum capital requirements and financial reporting obligations on swap dealers (SDs) and major swap participants (MSPs) (Proposed Amendments).<sup>1</sup> I support the amendments advanced by the Market Participants Division (MPD).

Minimum capital requirements serve as a cushion during times of severe market stress to ensure our registrants' safety and soundness, protect the financial stability of our financial system, and prevent a run on our financial institutions. Financial condition reporting provides the Commission with visibility and insight into the business and financial health of our registrants and enables us to require corrective action and prevent a failure of a single entity or group of entities or segment of the derivatives market, which could raise system risk concerns.

#### Dodd-Frank Act Reforms

The Commission introduced new capital and financial reporting requirements for SDs in 2020, as mandated by the Dodd-Frank Act (2020 Capital Rule).<sup>2</sup> Title VII of the Dodd-Frank Act amended the Commodity Exchange Act (CEA) to establish a new regulatory framework for swaps, regulated by the Commission, and security-based swaps, regulated by the Securities and Exchange Commission (SEC), to reduce risk, increase transparency, and promote market integrity within the financial system. Section 4s(e) of the CEA introduced minimum capital requirements for SDs,<sup>3</sup> and section 4s(f) of the CEA created financial reporting and recordkeeping requirements for all SDs.<sup>4</sup>

In the United States, the capital framework is divided into three parallel regimes. SDs subject to regulation by a prudential regulator are required to comply with the minimum capital requirements adopted by the applicable prudential regulator,<sup>5</sup> while SDs not subject to regulation by a prudential regulator are required to meet the minimum capital requirements of the Commission, and security-based swap dealers (SBSDs) and major security-based swap participants (MSBSPs) that do not have a prudential regulator are required to comply with the minimum capital requirements of the SEC.<sup>6</sup> The prudential regulators or banking agencies and the SEC have adopted capital rules for swaps and security-based swaps.

In the adopting release for the 2020 Capital Rule, the Commission indicated that it would

consult with the prudential regulators and the SEC to assess the capital adequacy of SDs, MSPs, SBSDs, and MSBSPs, monitor the implementation of the rule and data, and consider modifications to the capital and financial reporting requirements.<sup>7</sup>

With the Proposed Amendments, the Commission seeks to make surgical changes to the 2020 Capital Rule, including a number of technical corrections, based on consultation with the prudential regulators and SEC, and based on market feedback on the adoption and implementation of the 2020 Capital Rule. While the Proposed Amendments are not adjusting the capital components of the 2020 Capital Rule, all regulations designed to mitigate known systemic risk concerns in the swaps market must be subject to careful evaluation.

I commend the Commission for taking formal steps to engage in a rulemaking process that invites Commission discussion and public notice and comment on these regulations, which ensure compliance with the Dodd-Frank Act while remaining practical and solutions-oriented. I strongly encourage the Commission, however, to begin a formal rulemaking process to address several unresolved issues necessary to ensure compliance with the Dodd-Frank Act and these requirements.

#### Clarifying Capital Requirements for Commercials

The Proposed Amendments codify Interpretive Letter 21–15, which applies to commercial non-bank SDs—typically entities that primarily engage in agricultural and energy swaps and provide services that are important to the U.S. economy. The Commission's overall capital approach permits non-bank SDs to select one of three methods to calculate their capital requirements, as permitted under the rule: the net liquid assets capital approach;<sup>8</sup> the bank-based capital requirements;<sup>9</sup> or the tangible net worth capital approach.<sup>10</sup>

The Commission proposes to revise the 2020 Capital Rule so that the test to determine tangible net worth may be applied at the entity level or ultimate consolidated parent level; so that International Financial Reporting Standards (IFRS) accounting standards or GAAP may be used; and so that position and financial exposure reporting occur at the same frequency as financial reporting, which for SDs is quarterly.

The Proposed Rule minimizes disruption, and clarifies the interpretation and implementation of the tangible net worth test for commercial non-bank SDs.

#### Refining Financial Reporting Requirements

The Proposed Amendments address issues presented in No-Action Letter (NAL) 21–18, which was extended under NAL 23–11 and applies to bank SDs, including non-U.S. bank SDs. Non-U.S. bank SDs can file the applicable financial reporting within 90 days of the end of the financial reporting period and the same forms (e.g., relating to balance sheet and regulatory capital schedules) in the same format as provided to home country regulators (but in English and U.S. dollars). Additionally, U.S. bank SDs can file the same forms (e.g., relating to balance sheet and regulatory capital schedules) under bank regulators' Call Report and within the same timeframe as when filing with their prudential regulator.

The Proposed Amendments allow the Commission to collect information from bank SDs as a comparative tool. Also, all SDs must use Schedule 1 for position information, which is similar to the SEC's FOCUS report—duplicative forms are eliminated.

MPD has demonstrated collaboration working with the prudential regulators and SEC in developing and harmonizing processes, procedures, and forms for financial reports and notifications—some of which are adopted the Proposed Amendments. Further, the 2020 Capital Rule was an important initiative that demonstrated the Commission's recognition of the complexity and interconnectedness of the derivatives markets.

#### Technical Corrections

##### *SD Exposure Reporting*

The Proposed Amendments amend Commission regulation to clarify that certain supplemental schedules used to report SD exposure are intended to be provided by all non-bank SDs. These amendments are necessary to align the reporting of similar information collected by the SEC from SBSDs and to provide the Commission and National Futures Association with important information regarding SD exposure across several geographical locations and counterparties. This information provides valuable insight into the risk exposure of non-bank SDs, which is essential to performing the regulatory oversight of SDs.

##### *Notice Requirements for Substantial Reduction in Capital*

The Commission should begin to review notice requirements comprehensively in light of greater, faster capabilities to comply, notwithstanding the potential existence of challenges for non-U.S. SDs in light of time zone differences. The Proposed Amendments require notification of a substantial reduction of capital within two business days. The 2020 Capital Rule did not specify a timeframe, and the Proposed Amendments are consistent with the timeframe applicable to FCMs.

#### Conclusion

In order to prevent the market instability witnessed during the period when swaps traded in bespoke, bilateral markets, the Commission imposes capital requirements on non-bank SDs, and imposes financial reporting requirements on bank SDs as well

<sup>1</sup> Since no MSP is currently registered with the Commission, in this statement, I will refer to SDs only.

<sup>2</sup> Capital Requirements of Swap Dealers and Major Swap Participants (Capital Requirements), 85 FR 57462 (Sept. 15, 2020); Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

<sup>3</sup> 7 U.S.C. 6s(e).

<sup>4</sup> 7 U.S.C. 6s(f).

<sup>5</sup> 7 U.S.C. 6s(e)(1)(A).

<sup>6</sup> Section 15F of the Exchange Act addresses capital requirements for SBSDs/MSBSPs.

<sup>7</sup> Capital Requirements, 85 FR at 57465.

<sup>8</sup> A capital requirement that is consistent with the SEC's final capital regulations for SBSDs, as well as the existing CFTC's capital rules for FCMs, and the existing SEC's capital rules for broker-dealers.

<sup>9</sup> A capital requirement that is consistent with the prudential regulators' capital requirements for bank SDs and that is based on the existing Federal Reserve Board capital requirements for bank holding companies.

<sup>10</sup> A capital requirement that is based on the SD's tangible net worth, if the SD or parent is predominantly engaged in non-financial activities.

as non-bank SDs. These regulations are critical to the oversight of the swaps market.

I want to thank MPD and the Office of the Chief Economist (OCE) for their excellent work bringing forth this proposed rulemaking, in particular Jennifer Bauer, Maria Aguilar-Rocha, Andrew Pai, Joshua Beale, Thomas Smith, and Amanda L. Olear of MPD, and Lihong McPhail of OCE.

#### Appendix 4—Statement of Support of Commissioner Caroline D. Pham

I support the Notice of Proposed Rulemaking on Capital and Financial Reporting Requirements for Swap Dealers and Major Swap Participants (Proposal) because it addresses issues left outstanding from implementing a rule by offering pragmatic solutions that not only rectify the problem at hand, but do so without imposing unnecessary burdens or complications. I would like to thank Andrew Pai, Maria Aguilar-Rocha, Josh Beale, Tom Smith, and Amanda Olear in the Market Participants Division for their work on the Proposal. I greatly appreciate the time staff took to discuss my questions and concerns.

It is important to remember that most of the CFTC's provisionally-registered swap dealers are subject to three or more regulatory regimes.<sup>1</sup> Of the CFTC's 106 currently provisionally registered swap dealers, most are also registered with and supervised by another agency or authority, such as a prudential, functional, or market regulator. This awareness must inform the Commission's approach when considering any rule impacting swap dealers.<sup>2</sup> Otherwise, we risk missing the nuances associated with the complex interplay or conflict that arises between the various regulations.

Capital, the subject of today's Proposal, is one area in which the CFTC's provisionally-registered swap dealers are subject to multiple regulatory regimes. By this point, we know that the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) mandated the Commission establish capital requirements for swap dealers and major swap participants,<sup>3</sup> and that the Commission adopted capital requirements for nonbank swap dealers and major swap participants,<sup>4</sup> as well as financial

reporting requirements for bank swap dealers and major swap participants, together with nonbank swap dealers and major swap participants.<sup>5</sup>

Therefore, when considering solutions to challenges that have arisen while implementing the capital rules, we must remember that we are not a prudential banking regulator like the Fed, OCC, or FDIC, nor are we a primarily disclosures-based market regulator like the SEC.<sup>6</sup> Today's proposal offers a pragmatic solution to challenges faced by our market participants that respects the differences among the financial regulators.

The extent of capitalization and reach of financial reporting were decided years ago and are not the subject of today's Proposal. Rather, today we consider, primarily, fixing issues that arose when implementing the capital and financial reporting rules,<sup>7</sup> and secondarily, miscellaneous technical changes to make the rules more workable.

I support the entire Proposal, but will focus my comments on the codification of: (1) CFTC Staff Interpretative Letter No. 21–15 for commercial swap dealers and major swap participants electing the Tangible Net Worth Capital Approach;<sup>8</sup> and (2) the time-limited, no-action relief in CFTC Letter No. 21–18<sup>9</sup> regarding financial reporting requirements for bank swap dealers and major swap participants.<sup>10</sup>

Before I begin, I want to draw attention to a bigger issue relating to capital for the

<sup>5</sup> *I.e.*, swap dealers and major swap participants that are not subject to the capital requirements of a prudential regulator, along with the swap dealers and major swap participants for which there is a prudential regulator. *See* Capital Requirements of Swap Dealers and Major Swap Participants, 85 FR 57462 (Sept. 15, 2020).

<sup>6</sup> Concurring Statement of Commissioner Caroline D. Pham Regarding the CFTC Request for Information on Climate-Related Financial Risk (June 2, 2022). I reiterate the importance of keeping our focus on our markets, products, and purpose to avoid the risk of diluting our limited resources and potentially straying from our core expertise and responsibilities into areas already tasked to others.

<sup>7</sup> During that time, staff worked to develop processes, procedures, and forms to accept the financial reports and notifications required by the capital and financial reporting rules. In so doing, CFTC staff received several compliance related questions, and as a result, issued eight staff letters, all available at the Commission's website, [www.cftc.gov](http://www.cftc.gov): CFTC Letter Numbers 21–15 (June 29, 2021); 21–18 (Aug. 31, 2021); 21–20 (Sept. 30, 2021); 21–21 (Sept. 30, 2021); 21–22 (Sept. 30, 2021); 21–23 (Sept. 30, 2021); 22–01 (Jan. 5, 2022); 22–02 (Jan. 5, 2022).

<sup>8</sup> CFTC Letter No. 21–15 (June 29, 2021), <https://www.cftc.gov/csl/21-15/download>.

<sup>9</sup> Staff extended the relief in CFTC Letter No. 21–18 until the earlier of October 6, 2025 or the adoption of any revised financial reporting requirements for bank swap dealers and major swap participants under Regulation 23.105(p). CFTC Letter No. 23–11 (July 10, 2023), available at <https://www.cftc.gov/csl/23-11/download>.

<sup>10</sup> CFTC Letter No. 21–18 (Aug. 31, 2021), <https://www.cftc.gov/csl/21-18/download>. Bank swap dealers and major swap participants have limited financial reporting obligations, recognizing that prudential regulators have an obligation to impose their capital requirements and are primarily responsible for monitoring bank swap dealer and major swap participant capital under the CEA. 7 U.S.C. 6s(e)(2)(i).

coming year. The broad impacts of the Basel III Endgame are being widely reported and discussed,<sup>11</sup> including impact to CFTC swap dealers and major swap participants.<sup>12</sup> I am deeply concerned about this issue for our markets, which is why I expect that under my sponsorship, the Global Markets Advisory Committee (GMAC) will work on offering actionable recommendations for the Commission in this area. I encourage everyone to watch the presentation made on the subject at the recent November 6th meeting via the meeting's archived webcast,<sup>13</sup> and look forward to working with the GMAC and all of you on the issue in 2024.

#### A. Codifying CFTC Letter No. 21–15

Nonbank swap dealers and major swap participants can elect one of three approaches to calculating their regulatory capital.<sup>14</sup> One option allows certain qualifying nonbank swap dealers and major swap participants to use a regulatory capital approach that is based on the firm's tangible net worth.<sup>15</sup> Generally, these nonbank swap dealers and major swap participants have to be “predominantly engaged in non-financial activities” and maintain positive tangible net worth according to U.S. generally accepted accounting practices (GAAP) at all times.<sup>16</sup>

When the rules were being implemented, nonbank swap dealers identified three problems: (1) the rule's preamble expanded the definition of “predominantly engaged in financial activities” to permit these nonbank swap dealers and major swap participants to meet the regulation's tangible net worth test directly or through its ultimate consolidated parent entity, but the text of regulation § 23.100 was unclear about it; (2) regulation § 23.105(b) allowed books and records to be maintained in accordance with International Financial Reporting Standards (IFRS) but the “tangible net worth” definition in regulation § 23.100 only referenced U.S. GAAP; and (3) there was an inconsistency in the timelines of certain financial reports required by regulation § 23.105(l).<sup>17</sup>

To fix these issues, the Commission is proposing to adopt the remedies provided in Letter No. 21–15: revise the definitions of “tangible net worth” and “predominantly engaged in non-financial activities” and regulation § 23.105 to clarify the test can be applied at the parent or entity level, as well as using U.S. GAAP or IFRS; and amend regulation § 23.105(l) to clarify that position and other related exposure reporting must be

<sup>11</sup> Recent coverage has focused on what the Federal Reserve Board supports and could look to do. Victoria Guida, “Fed's Waller: Support for Final Basel Rule ‘a Possibility’” PoliticoPro (Nov. 28, 2023).

<sup>12</sup> Luke Clancy, “US Basel Endgame Hits Clearing with Op Risk Capital Charges” *Risk.net* (Sept. 25, 2023), <https://www.risk.net/regulation/7957815/us-basel-endgame-hits-clearing-with-op-risk-capital-charges>.

<sup>13</sup> The CFTC maintains the archived webcast at: <https://www.cftc.gov/PressRoom/Events/opaevent/gmac110623>.

<sup>14</sup> 17 CFR 23.101.

<sup>15</sup> 17 CFR 23.101(a)(2).

<sup>16</sup> *Id.*

<sup>17</sup> CFTC Letter No. 21–15.

<sup>1</sup> Statement of Commissioner Caroline D. Pham on Risk Management Program for Swap Dealers and Futures Commission Merchants Advance Notice of Proposed Rulemaking (June 1, 2023).

<sup>2</sup> *See* Concurring Statement of Commissioner Caroline D. Pham Regarding Proposed Order and Request for Comment on an Application for a Capital Comparability Determination (June 2, 2022).

<sup>3</sup> Section 731 of the Dodd-Frank Act added a new section 4s to the Commodity Exchange Act (CEA) to require the CFTC adopt rules establishing minimum initial margin, variation margin and capital requirements for swap dealers and major swap participants. Under CEA section 4s(e), the CFTC is required to adopt capital requirements for swap dealers and major swap participants that are not subject to the capital rules of the prudential regulators, which include nonbank subsidiaries of bank holding companies.

<sup>4</sup> *I.e.*, swap dealers and major swap participants that are not subject to the capital requirements of a prudential regulator, as opposed to swap dealers and major swap participants for which there is a prudential regulator.

made at the same frequency as financial reporting, which in this instance is quarterly.

#### **B. Codifying CFTC Letter No. 21–18**

Bank swap dealers and major swap participants must file unaudited quarterly financial information with the CFTC within 30 calendar days of the end of their fiscal quarter.<sup>18</sup> The information should be submitted via the specific forms in Appendix C to subpart E of part 23. The Commission intended that these forms would be identical to those filed by banks with their prudential regulator. However, when the capital and financial reporting rules were being implemented, it became evident that there were some differences in the forms, as well as with the timelines for filing.

<sup>18</sup> 17 CFR 23.105(p)(2). The required financial information consists of a statement of financial condition, a statement of regulatory capital, and a schedule of the aggregate positions in security-based swaps, mixed swaps, swaps, and other derivatives.

Therefore, CFTC Letter No. 21–18 let bank swap dealers and major swap participants provide home country regulator reports and comparable schedules on the prudential regulators' timeline; foreign bank swap dealers and major swap participants provide home country regulator balance sheets and statements of regulatory capital information as long as they are in English, USD, and within 15 days of filing with home country regulator; and SEC dually-registered foreign bank swap dealers and major swap participants file comparable SEC approved financial reports and schedules.

To fix these issues, the Commission is proposing to adopt the remedies provided in CFTC Letter No. 21–18: amend regulation § 23.105(p) to allow foreign bank swap dealers and major swap participants to file the applicable financial reporting within 90 days of the end of the financial reporting period; accept balance sheet and regulatory capital schedules under prudential regulator reports for U.S. bank swap dealers and major swap participants; and to accept the filing of

such schedules at the same time as filed with prudential regulators. For foreign swap dealers, the Commission is proposing to permit the filing of a balance sheet and statement of regulatory capital schedules in the format provided to their home country regulator, as long as they are in English and converted to USD, and filed no later than 90 days following the reporting period end date.

I support this rule because codifying well-tailored relief helps provide market certainty while avoiding imposing unnecessary burdens and creating compliance complications. I also support this rule because the Commission does so while also continuing to respect the differences between our rules and those of the other regulators overseeing swap dealers on capital. It is a laudable achievement. I again commend staff in the Market Participants Division for their hard work on this rule, and look forward to reviewing the comments.

[FR Doc. 2023–28649 Filed 1–11–24; 8:45 am]

**BILLING CODE 6351–01–P**