

17 CFR Parts 3, 23 and 170

RIN 3038 – AC95

**Registration of Swap Dealers and Major Swap Participants**

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Final rules.

**SUMMARY:** The Commodity Futures Trading Commission (Commission or CFTC) is adopting regulations under the Commodity Exchange Act (Act or CEA) that establish the process for the registration of swap dealers (SDs) and major swap participants (MSPs, and collectively with SDs, Swaps Entities) and that require Swaps Entities to become and remain members of a registered futures association (RFA). The Commission is also adopting regulations that define an “associated person” of an SD or MSP as a natural person and that implement the prohibition on a Swaps Entity permitting an associated person who is statutorily disqualified from registration from effecting or being involved in effecting swaps on behalf of the Swaps Entity. The Commission is adopting these regulations in accordance with Section 4s of the CEA, which was recently added to the CEA by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).

**DATES:** Effective **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].**

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## **SUPPLEMENTARY INFORMATION:**

### **I. Introduction**

#### **A. Background**

On July 21, 2010, President Obama signed the Dodd-Frank Act.<sup>1</sup> Title VII of the Dodd-Frank Act<sup>2</sup> amended the CEA<sup>3</sup> to establish a comprehensive new regulatory framework for swaps and security-based swaps. The goal of this legislation was to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) providing for the registration and comprehensive regulation of SDs and MSPs; (2) imposing clearing and trade execution requirements on standardized derivatives products; (3) creating robust recordkeeping and real-time reporting regimes; and (4) enhancing the Commission's rulemaking and enforcement authorities with respect to, among others, all registered entities and intermediaries subject to the oversight of the Commission. The regulations the Commission is adopting today concern the registration of SDs and MSPs, as required by CEA Section 4s(a). As

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<sup>1</sup> See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed through the Commission's Web site, <http://www.cftc.gov/>.

<sup>2</sup> Pursuant to Dodd-Frank Act Section 701, Title VII may be cited as the "Wall Street Transparency and Accountability Act of 2010."

<sup>3</sup> 7 U.S.C. 1 *et seq.* (2006). The CEA and Commission regulations issued thereunder similarly can be accessed through the Commission's Web site.

is discussed below, these final regulations are based in large part on the Commission's proposed registration regulations for SDs and MSPs (Proposal).<sup>4</sup>

In furtherance of the foregoing legislative goals, Dodd-Frank Act Section 721(a) amended the definitions of various existing terms in the CEA and added definitions of numerous new terms to the CEA, including definitions of the new terms "swap dealer," "major swap participant," and "associated person of a swap dealer or major swap participant."<sup>5</sup> Section 712(d)(1) of the Dodd-Frank Act directed the Commission and the Securities and Exchange Commission (SEC), in consultation with the Board of Governors of the Federal Reserve System, to further define the terms "swap dealer" and "major swap participant" (Entities Definitional Regulations).<sup>6</sup> The instant rulemaking will apply to SDs and MSPs as defined in the CEA and as further defined by the Commission.

#### B. Statutory Registration Requirements for SDs and MSPs

CEA Sections 4s(a) and 4s(b)<sup>7</sup> provide, in pertinent part, for the registration of SDs and MSPs as follows:

(a) REGISTRATION.—

(1) SWAP DEALERS.— It shall be unlawful for any person to act as a swap dealer unless the person is registered as a swap dealer with the Commission.

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<sup>4</sup> 75 FR 71379 (Nov. 23, 2010).

<sup>5</sup> See, respectively, CEA Sections 1a(49), 1a(33) and 1a(4).

<sup>6</sup> See 75 FR 80174 (Dec. 21, 2010).

<sup>7</sup> Sections 4s(a) and 4s(b) were added to the CEA by Dodd-Frank Act Section 731.

(2) MAJOR SWAP PARTICIPANTS.— It shall be unlawful for any person to act as a major swap participant unless the person is registered as a major swap participant with the Commission.

(b) REQUIREMENTS. —

(1) IN GENERAL. — A person shall register as a swap dealer or major swap participant by filing a registration application with the Commission.

(2) CONTENTS. —

(A) IN GENERAL. — The application shall be made in such form and manner as prescribed by the Commission, and shall contain such information, as the Commission considers necessary concerning the business in which the applicant is or will be engaged.

CEA Section 4s does not direct the Commission to adopt rules that provide for the registration of associated persons of SDs or MSPs. However, CEA Section 4s(b)(6) makes it unlawful for a Swaps Entity to permit a person to associate with it if the person is subject to a statutory disqualification, as follows:

Except to the extent otherwise specifically provided by rule, regulation, or order, it shall be unlawful for a swap dealer or major swap participant to permit any person associated with a swap dealer or major swap participant who is subject to a statutory disqualification to effect or be involved in effecting swaps on behalf of the swap dealer or major swap participant, if the swap dealer or major swap participant knew, or in the exercise of reasonable care should have known, of the statutory disqualification.

For the purpose of the regulations it is adopting today, and specifically Regulation 23.22, the Commission intends that, as proposed, a statutory disqualification is a disqualification under CEA Section 8a(2) or 8a(3).<sup>8</sup> These CEA sections contain an extensive list of matters that

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<sup>8</sup> See 75 FR 71379, 71380. The Commission did not receive any comments in response to this aspect of the Proposal. See Part II of this Federal Register release, which discusses the comments the Commission received on the Proposal.

constitute grounds pursuant to which the Commission may refuse to register a person, including, without limitation, felony convictions, commodities or securities law violations, and bars or other adverse actions taken by financial regulators.

CEA Section 4s further directs the Commission to provide for the regulation of SDs and MSPs with respect to, among others, the following areas: capital and margin, reporting and recordkeeping, daily trading records, business conduct standards, documentation standards, duties, designation of chief compliance officer,<sup>9</sup> and, with respect to uncleared swaps, segregation<sup>10</sup> (collectively, Section 4s Requirements). The Commission is addressing the Section 4s Requirements through other rulemakings (Section 4s Implementing Regulations) separate and apart from the instant rulemaking, which concerns the registration process for Swaps Entities.<sup>11</sup> Certain issues relevant to the Section 4s Implementing Regulations – *i.e.*, the timing of their adoption and the initial demonstration of compliance with them by SDs and MSPs – nonetheless have an impact on the registration process for Swaps Entities, which is discussed below in Part II of this Federal Register release.

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<sup>9</sup> CEA Sections 4s(e) through (k), respectively, added to the CEA by Dodd-Frank Act Section 731.

<sup>10</sup> CEA Section 4s(l), added to the CEA by Dodd-Frank Act Section 724(c).

<sup>11</sup> See 76 FR 23732 (Apr. 28, 2011), 76 FR 27802 (May 12, 2011) (Section 4s(e) – Capital and Margin); 75 FR 76666 (Dec. 9, 2010) (Section 4s(f) – Reporting and Recordkeeping, and Section 4s(g) – Daily Trading Records); 75 FR 80638 (Dec. 22, 2010), 75 FR 71391 (Nov. 23, 2010) (Section 4s(h) – Business Conduct Standards); 75 FR 81519 (Dec. 28, 2010), 76 FR 6708 (Feb. 8, 2011), 76 FR 6715 (Feb. 8, 2011) (Section 4s(i) – Documentation Standards); 75 FR 71397 (Nov. 23, 2010) (Section 4s(j) – Duties); 75 FR 70881 (Nov. 19, 2010) (Section 4s(k) – Designation of Chief Compliance Officer); 75 FR 75162 (Dec. 2, 2010), 75 FR 75432 (Dec. 2, 2010), (Section 4s(l) – Segregation Requirements for Uncleared Swaps).

Additionally, Dodd-Frank Act Section 716 prohibits an insured depository institution (IDI) from receiving Federal assistance if it is also an SD that engages in swaps activities that are not covered by the exclusion in Section 716(d).<sup>12</sup> Under Dodd-Frank Act Section 716(c), an IDI can retain its access to Federal assistance if it transfers covered activities to a non-IDI affiliate (a Push-Out Affiliate) that is an SD or MSP, if the affiliate complies with the requirements of Section 716(c), including such requirements as the Commission may establish.<sup>13</sup> The Push-Out Affiliate, however, would not have access to Federal assistance. The Commission did not

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<sup>12</sup> Specifically, the prohibition against Federal assistance to Swaps Entities is set forth in Dodd-Frank Act Section 716(a), as follows:

(a) PROHIBITION ON FEDERAL ASSISTANCE.— Notwithstanding any other provision of law (including regulations), no Federal assistance may be provided to any swaps entity with respect to any swap, security-based swap, or other activity of the swaps entity.

Dodd-Frank Act Section 716(d) carves out certain swaps activities of an IDI that is an SD, and therefore a “swaps entity,” from the prohibition against “Federal assistance.” In particular, the prohibition against Federal assistance does not apply to the extent the IDI SD engages in: (1) hedging and other risk-mitigating activities of the IDI; or (2) acting as an SD for swaps and security-based swaps involving rates (e.g., interest rate swaps) or reference assets that are permissible investments. Engaging in non-cleared credit default swaps, however, would subject an IDI SD to the prohibition against Federal assistance.

<sup>13</sup> Section 716(c) provides for the Push-Out Affiliate exception as follows:

(c) AFFILIATES OF INSURED DEPOSITORY INSTITUTIONS.— The prohibition on Federal assistance contained in subsection (a) does not apply to and shall not prevent an insured depository institution from having or establishing an affiliate which is a swaps entity, as long as such insured depository institution is part of a bank holding company, or savings and loan holding company, that is supervised by the Federal Reserve and such swaps entity affiliate complies with sections 23A and 23B of the Federal Reserve Act and such other requirements as the Commodity Futures Trading Commission . . . may determine to be necessary and appropriate.

include in the Proposal any specific Push-Out Affiliate requirements, and as it stated in the Proposal, the Commission intends that any Push-Out Affiliate that comes within the statutory definition of an SD or an MSP be subject to registration and regulation as an SD or as an MSP, as the case may be.<sup>14</sup>

### C. The Proposal

To fulfill the statutory mandates contained in CEA Sections 4s(a) and 4s(b), the Commission proposed amendments to existing Regulations 3.2, 3.4, 3.10, 3.21, 3.30, 3.31 and 3.33<sup>15</sup> and new Regulations 23.21, 23.22 and 170.16, to, respectively, establish the registration process for SDs and MSPs; incorporate the statutory prohibition on SDs and MSPs permitting an associated person to effect or be involved in effecting swaps on their behalf; and require SDs and MSPs to become and remain members of an RFA.

In the section-by-section analysis of the regulations contained in the Proposal, the Commission specifically requested comment on whether it should restrict the definition of an associated person of a Swaps Entity to a natural person, and how to best implement the statutory disqualification prohibition in CEA Section 4s(b)(6).<sup>16</sup> Elsewhere, the Commission requested comment on the concept of a provisional registration process for SDs and MSPs that would be responsive to a phased implementation of the Entities Definitional Regulations and the Section

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<sup>14</sup> See 75 FR 71379, 71380-81. The Commission did not receive any comments on its statement in the Proposal.

<sup>15</sup> Part 3 of the Commission's regulations governs the registration of intermediaries and certain market participants under the CEA.

<sup>16</sup> See 75 FR at 71385.

4s Implementing Regulations,<sup>17</sup> and on the allocation of responsibilities among the Commission and one or more RFAs attendant to the oversight of the activities of Swaps Entities generally.<sup>18</sup> Finally, the Commission requested comment on the application of extraterritorial issues to the registration requirements it proposed for Swaps Entities.<sup>19</sup>

## **II. Comments<sup>20</sup> and Responses**

### **A. In General**

The Commission received numerous comments on the Proposal. Commenters include domestic banks, foreign banks, companies engaged in various energy businesses, trade and public interest associations (energy, international banking, securities, and swaps), the National Futures Association (NFA, currently the only RFA), and both United States (U.S.) and foreign citizens. The Commission received several requests for clarification on and enhancements to its contemplated registration process for Swaps Entities, and the final regulations adopted today do contain some revisions to the Proposal. In consideration of the comments received, the Commission is adopting the Proposal mainly in the form as issued, with specific changes as discussed below.

### **B. Restricting Associated Persons to Natural Persons**

As stated in the Proposal:

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<sup>17</sup> See 75 FR at 71381.

<sup>18</sup> See 75 FR at 71381-82.

<sup>19</sup> See 75 FR at 71382-71383.

<sup>20</sup> The comments the Commission received on the Proposal are currently available on the Commission's Web site.

The term “associated person” in the context of existing Commission registrants is not defined in the CEA. That term is defined in the Commission’s regulations. Specifically, Regulation 1.3(aa) provides that “[T]his term [i.e., associated person] means any natural person who is associated with”, e.g., [a futures commission merchant] . . . in any capacity that involves solicitation or the supervision of any person or persons so engaged (emphasis added). “Associated person” has typically referred to a salesperson of a registrant. Thus, a corporation, partnership or other legal entity has never been considered an associated person. The use of the term “natural person” in the current associated person definition is intended to distinguish between the rights and responsibilities of persons acting as associated persons of a registrant and persons acting as IBs. However, in the absence of any language in the Dodd-Frank Act restricting associated persons of swaps entities to natural persons, the Commission is not proposing such a definition. The Commission nonetheless requests comment on whether it should by regulation in fact restrict associated persons of swaps entities to natural persons.<sup>21</sup>

The comments the Commission received in response to this request were unanimous in their support of such a restriction. The Commission is amending Regulation 1.3(aa) to include in the “associated person” definition provided for thereunder a natural person associated with an SD or MSP as a partner, officer, employee or agent (or functionally similar role) in a capacity that involves the solicitation or acceptance of swaps, or the supervision of persons so engaged. Specifically, this definition is now found in new Regulation 1.3(aa)(6).<sup>22</sup>

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<sup>21</sup> 75 FR at 71385 (footnote omitted).

<sup>22</sup> This action supersedes the prior proposal of the Commission to define the term “associated person of a swap dealer or major swap participant” in a new Regulation 1.3(zz). See 76 FR 33066, 33067 (June 7, 2011). However, for the purpose of adding the “Exemption from fingerprinting requirement in certain cases” provided for in Regulation 3.21(c) with respect to outside directors of an applicant for registration as an SD or MSP, the Commission has employed the term “transactions involving ‘commodity interests,’ as that term is defined in §1.3(yy)” – which regulation the Commission has proposed to revise to include “[a]ny swap as defined in the Act, the Commission’s regulations, a Commission order or interpretation, or a joint interpretation or order issued by the Commission and the Securities and Exchange Commission.” See 76 FR at 33069, 33086.

### C. Effect of Statutory Disqualification

The Commission proposed the adoption of new Regulation 23.22 to implement the statutory prohibition in CEA Section 4s(b)(6) against an SD or MSP permitting a person associated with it who is subject to a statutory disqualification to effect or be involved in effecting swaps on behalf of the SD or MSP, if the SD or MSP “knows, or in the exercise of reasonable care should know, of the statutory disqualification.” In the proposed regulation, paragraph (a) defined the term “person” as a shorthand substitute for the statutory term “associated person of a swap dealer or major swap participant,” and paragraph (b) restated the statutory prohibition without exception. The Commission proposed that an SD or MSP would be responsible for ensuring that its associated persons are not subject to a statutory disqualification. The Commission also requested comment on implementing the statutory prohibition.

The Commission in its request focused on how an SD or MSP could conduct background checks or otherwise fulfill the requirement to ensure that persons subject to a statutory disqualification would not effect or be involved in effecting swaps on its behalf. The sole comment that the Commission received on this issue expressed the view that the Commission allow, but not require, Swaps Entities to use NFA for this vetting purpose.<sup>23</sup> The Commission agrees with this comment. It believes that Swaps Entities should be free to work with and through the service provider of their choice to obtain information as to whether a prospective associated person is subject to a statutory disqualification – and NFA could qualify to be such a service provider. Accordingly, the Commission has not adopted any requirement that Swaps Entities must, and may only, employ NFA to fulfill their obligation under CEA Section 4s(b)(6).

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<sup>23</sup> Comment letter from the National Futures Association (Jan. 24, 2011) (NFA Comment Letter).

This same commenter suggested that if NFA performed the background check, “then it would constitute a safe harbor for the firm if the individual is subject to a statutory disqualification but NFA previously notified the firm that the person is not subject to one.” The Commission is not authorizing such a safe harbor.

One commenter on the implementation of the statutory prohibition<sup>24</sup> recommended that, contrary to the Proposal, the Commission adopt an exception to the association prohibition in Regulation 23.22(b) for any person listed as a principal or registered as an associated person of a futures commission merchant (FCM), retail foreign exchange dealer (RFED), introducing broker (IB), commodity pool operator (CPO), or commodity trading advisor (CTA) – notwithstanding that such person may be subject to a statutory disqualification under CEA Section 8a(2) or 8a(3).<sup>25</sup> This commenter noted that, pursuant to the authority the Commission has delegated to NFA to exercise its registration responsibilities in the futures markets, NFA has permitted a person to be listed as a principal or registered as an associated person where NFA, in its discretion, has determined that the incident giving rise to a statutory disqualification is insufficiently serious, recent, or otherwise relevant to evaluating the person’s fitness. Where this has occurred and the person now finds himself to be an associated person of an SD or MSP, the commenter explained that absent an exception as provided for in the introductory text of CEA Section 4s(b)(6), an anomalous result would ensue.

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<sup>24</sup> Id.

<sup>25</sup> See, e.g., CEA Section 4k, which requires the registration of associated persons of FCMs, IBs, CPOs, and CTAs, and Regulation 3.10(a)(2), which requires each natural person who is a principal of an applicant for registration to file a fingerprint card.

The statutory prohibition in CEA Section 4s(b)(6) applies “except to the extent otherwise specifically provided by rule, regulation, or order.” The Commission recognizes that if it did not provide an exception as suggested, a person could be permitted to direct futures-related activities or solicit futures-related business with members of the retail public – e.g., as, respectively, a principal or associated person of an FCM or CPO – but that same person would be barred from soliciting, accepting, or otherwise effecting or being involved in effecting swaps transactions with significantly more sophisticated clients as an associated person of an SD or MSP. On the other hand, adopting the requested exception could result in persons to whom the Dodd-Frank Act affords heightened protections engaging in transactions marketed by associated persons of an SD or MSP subject to a statutory disqualification. Even though the Commission did not propose such an exception, it believes that the commenter’s recommendation has merit. The Commission therefore is adopting the commenter’s recommendation that Regulation 23.22(b) include both the general prohibition against an SD or MSP permitting any person associated with it who is subject to a statutory disqualification to effect or be involved in effecting swaps on behalf of the SD or MSP and an exception to the prohibition for any person subject to a statutory disqualification who is already listed as a principal, registered as an associated person of another registrant (i.e., an FCM, RFED, IB, CPO, CTA, or leverage transaction merchant (LTM)), or registered as a floor broker (FB) or floor trader (FT).<sup>26</sup>

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<sup>26</sup> In addition to the registration categories included in the comment, the Commission has included in this exception any person listed as a principal or registered as an associated person of an LTM. Although there currently is no registered LTM, the CEA and Commission regulations issued thereunder provide for an LTM registration category. The Commission also has included in this exception any person registered as an FB or FT because, as a natural person and like an associated person of a registrant other than an SD or MSP, it must submit a Form 8-R in connection with applying for registration.

The same commenter also recommended that the Commission expand Regulation 3.12(f), or adopt a new regulation, “to address the situations in which an individual conducts swaps-related activity on behalf of more than one Swap Entity or conducts swaps activity on behalf of a Swap Entity and is also registered as an AP of a different firm.”<sup>27</sup> Regulation 3.12(f) currently provides for the reporting of dual and multiple associations of a person registered as an associated person with, and sponsored by, two or more Commission registrants. It provides, among other things, that each sponsor registrant is jointly and severally liable for the conduct of that associated person in specified circumstances. While the Commission agrees with the commenter’s recommendation, it anticipates promptly addressing this issue in a future rulemaking.

#### D. Phased Implementation<sup>28</sup>

The Commission proposed a provisional registration process for SDs and MSPs that would take into account, through phased implementation, the strong likelihood that the Commission would adopt the Section 4s Implementing Regulations subsequent to issuing the registration process regulations for SDs and MSPs. As the Commission explained in the Proposal, phased implementation is aimed at preserving the “continuity of the business operations of existing swaps entities, and to avoid undue market disruption,” by permitting applicants to continue swaps activities pending confirmation of initial compliance with the Section 4s Implementing Regulations and notification of registration. In addition, the final regulations make clear that provisional registration will be granted upon filing of the application

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<sup>27</sup> NFA Comment Letter.

<sup>28</sup> See generally 75 FR at 71379, 71381.

and any documentation required under the applicable Section 4s Implementing Regulation – and not upon NFA’s review and approval of the documentation.

Several commenters stressed the need for phased implementation over extended periods of time so that SDs and MSPs can come into compliance after evaluating the need, e.g., to restructure operations, re-document client agreements as a result of new organizational structures or new regulatory requirements, or upgrade systems. One commenter recommended that the Commission postpone the effective date of the registration process rulemaking until sometime after the Commission had adopted all of the Section 4s Implementing Regulations.<sup>29</sup> Another commenter opined that, owing to business continuity concerns, a reasonable transition period for a firm not previously subject to regulation would be “a one year period for such firm to (i) determine whether it is [an SD or MSP] and (ii) register with the Commission.”<sup>30</sup> It suggested a “roll off” period that would enable a putative Swaps Entity to fall outside the SD or MSP definition and thus not be subject to the requirement to register as an SD or MSP if enough of the Swaps Entity’s legacy swaps expired. The commenter also estimated “that it might take up to as much as two years in addition to the suggested one year registration period for such firms to complete the steps necessary to comply with all of the requirements necessary for registration as [an SD or MSP].”

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<sup>29</sup> Comment letter from the International Swaps and Derivatives Association, Inc. (Jan. 24, 2011) (ISDA Comment Letter). Another commenter advocated delaying effectiveness of the Section 4s Implementing Regulations until at least 60 days after the registration process regulations and the Entities Definitional Regulations became effective. Comment letter from the Securities Industry and Financial Markets Association (Jan. 18, 2011) (SIFMA Comment Letter).

<sup>30</sup> Comment letter from Hunton and Williams, LLP, on behalf of the Working Group of Commercial Energy Firms (Jan. 24, 2011) (WGCEF Comment Letter).

The Commission believes that the provisional registration process adopted today is consistent with the incremental staging requested by commenters. Thus, the Commission is declining to extend the effectiveness of any Section 4s Implementing Regulation today. Moreover, to provide the maximum amount of processing time, so that applicants for SD or MSP registration can be registered at the earliest possible date, and in the absence of any comments to the contrary, the Commission has adopted, as proposed, Regulation 3.10(a)(1)(v), which permits applicants to begin the registration process in advance of the effective date of the requirement to register as an SD or MSP.<sup>31</sup>

In the Proposal, the Commission provided for provisional registration with reference to the Dodd-Frank Act's general statutory effective date of July 16, 2011, and CEA Section 4s(b), which requires the Commission to issue regulations providing for the registration of Swaps Entities not later than one year after the enactment of the Dodd-Frank Act, or July 21, 2011. After issuing the Proposal, the Commission issued effective date clarification of, as well as specific exemptive relief from compliance with, numerous provisions of the Dodd-Frank Act (Effective Date Release).<sup>32</sup> The Effective Date Release explained that many Dodd-Frank Act provisions require rulemakings to implement them, including the registration mandate in CEA Section 4s(a) and other Section 4s Requirements, and that pursuant to Dodd-Frank Act Section 754, those provisions would not be effective until 60 days after the publication of those implementing final regulations (e.g., for the registration mandate, this Federal Register release).

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<sup>31</sup> In response to a comment received, the Commission has clarified in Regulation 3.10(a)(1)(v)(C)(1) when a person may apply to be registered as an SD or MSP and in Regulations 3.10(a)(1)(v)(C)(2) and 3.10(a)(1)(v)(C)(3) when a person must apply to be registered as an SM or MSP. See NFA Comment Letter.

<sup>32</sup> See 76 FR 42508, 42509 and 42524 (July 19, 2011).

Dates notwithstanding, for the reasons stated in the Proposal and above, the Commission continues to believe that provisional registration is appropriate and consistent with the Effective Date Release.<sup>33</sup>

Moreover, in response to a commenter requesting clarification on provisional registration<sup>34</sup> and as is reflected in the amended heading of Regulation 3.2 – which now reads “Registration processing by the National Futures Association; notification and duration of registration; provisional registration” (emphasis supplied) – the Commission has adopted in new Regulation 3.2(c)(3) the exact terms pursuant to which NFA will notify an applicant for SD or MSP registration that it is provisionally registered, the continuing obligations of a provisional registrant with respect to providing documentation of compliance with each Section 4s Implementing Regulation,<sup>35</sup> and the terms pursuant to which a provisional registrant will become registered with the Commission. The Commission believes this clarification provides necessary specific details on provisional registration and the transition of a provisional registrant into a registered SD or MSP.

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<sup>33</sup> So that the text of the registration regulations accurately reflects the impact of the Effective Date Release on phased implementation and the provisional registration process, the Commission is adopting certain definitions, and is incorporating those definitions into the registration process regulations it is adopting today. Specifically, new Regulation 3.1(f) defines the term “Section 4s Implementing Regulation” to mean “a regulation the Commission issues pursuant to Section 4s(e), 4s(f), 4s(h), 4s(i), 4s(j), 4s(k), or 4s(l) of the Act,” and new Regulation 3.1(g) defines the term “Swap Definitional Regulation” to mean “a regulation the Commission issues to further define the term ‘swap dealer,’ ‘major swap participant’ or ‘swap’ in Section 1a(49), 1a(33) or 1a(47) of the Act, respectively, pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act.” These terms are employed in such registration process regulations as Regulation 3.2(c)(3)(i) (pertaining to provisional registration) and 3.10(a)(1)(v) (pertaining to applying for registration as an SD or MSP).

<sup>34</sup> NFA Comment Letter.

<sup>35</sup> See also Regulation 3.10(a)(1)(v)(D).

The Commission proposed in Regulation 3.2(c)(3) to require NFA to notify the applicant for SD or MSP registration “that it is provisionally registered pending completion of a fitness review by the National Futures Association.”<sup>36</sup> However, in light of the purpose of provisional registration, along with the authority the Commission today intends to delegate to NFA by notice and order (Notice and Order) – e.g., the authority to conduct proceedings to deny the registration of an applicant for registration as an SD or MSP – the Commission has determined not to adopt any such delay with respect to the notification by NFA to the applicant that it is provisionally registered.

As proposed and as adopted, Regulation 3.10(a)(1)(i) provides that application for registration as an SD or MSP will commence with the filing of a Form 7-R with NFA – which is also how, under Regulation 3.10(a)(1)(i), the registration process commences for applicants for registration as an FCM, RFED, IB, CPO, CTA, or LTM.<sup>37</sup> In this regard, the Commission notes that, as proposed, Regulation 3.10(a)(1)(v)(B) provides that the commencement of the registration process by an SD or MSP authorizes the Commission to conduct on-site inspection of the applicant to determine compliance with the Section 4s Implementing Regulations

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<sup>36</sup> See 75 FR at 71387.

<sup>37</sup> The process for registration as an FB or FT commences with the filing of a Form 8-R, which reflects the fact that FBs and FTs are natural persons.

Further with respect to Regulation 3.10, the Commission notes that paragraphs (a)(1)(iii) and (a)(1)(iv) were inadvertently dropped from the regulation in connection with the adoption of the regulatory program of the Commission for RFEDs. See 75 FR 55410, 55424 (Sep. 10, 2010). By this Federal Register release, the Commission is returning paragraphs (a)(1)(iii) and (a)(1)(iv) to Regulation 3.10 in the form and text identical to that which existed prior to this unintentional deletion.

applicable to it. The Commission received no comment on the inspection authority proposed in Regulation 3.10(a)(1)(v)(B).

The Commission also proposed to require applicants for registration as an SD or MSP “to demonstrate compliance” with such of the Section 4s Implementing Regulations in effect at the time of their application. At the suggestion of a commenter, the Commission has adopted in Regulation 3.10(a)(1)(v)(A) the requirement that the Form 7-R must be accompanied by “such documentation as may be required to demonstrate compliance” with each applicable Section 4s Implementing Regulation.<sup>38</sup> The Commission believes that the addition of this phrase brings the registration application requirement for SDs and MSPs in line with existing requirements for applicants for registration in other categories – such as applicants for registration as an FCM or IB, who must accompany their Form 7-R with specified documentation that demonstrates their compliance with the financial requirements they must meet to become registered.<sup>39</sup> And, as proposed and as adopted, Regulation 3.10(a)(1)(v)(A) provides that for the purpose of this regulation, “the term ‘compliance’ includes the term ‘the ability to comply,’ to the extent that a particular Section 4s Implementing Regulation may require demonstration of the ability to comply with a requirement thereunder.”<sup>40</sup>

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<sup>38</sup> NFA Comment Letter.

<sup>39</sup> See Regulation 3.10(a)(1)(ii), which requires applicants for registration as an FCM or IB to accompany their Form 7-R with a Form 1-FR-FCM or Form 1-FR-IB, respectively.

<sup>40</sup> As the Commission has stated previously, it “will strive to ensure that current practices will not be unduly disrupted during the transition to the new regulatory regime.” Effective Date for Swap Regulation, 76 FR 42508, 42513 (July 19, 2011). Further, the Commission has determined that “the interdependencies of the various rulemakings will be a consideration in determining the implementation date for each final rule,” and that such determinations will be informed by the Commission’s further consideration of these issues, including public comments. Id.

Two commenters asked the Commission what documentation is required of an applicant for SD or MSP registration.<sup>41</sup> One of these commenters suggested that the documentation required to demonstrate compliance with the regulations the Commission adopts to implement the business conduct standards required by CEA Section 4s(h) might consist of written policies and procedures.<sup>42</sup> Or, as the Commission notes, the documentation required to demonstrate compliance with the regulations the Commission adopts to implement the capital requirements of CEA Section 4s(e) might be a financial form specifically designed for this purpose. The Commission anticipates that these questions will be considered in connection with its adoption of the relevant Section 4s Implementing Regulations.

The regulations the Commission proposed and is adopting also address, in Regulation 3.10(a)(1)(v)(D)(1), the situation where an applicant for registration as an SD or MSP to whom NFA has provided notification of provisional registration subsequently fails to demonstrate compliance with a Section 4s Implementing Regulation – *i.e.*, that NFA “will notify the applicant that its application is deficient, whereupon the applicant must withdraw its registration application, it must not engage in any new activity as a swap dealer or major swap participant, as

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Thus, for example, to determine with which Section 4s Implementing Regulations an applicant must demonstrate compliance as part of the registration process, the applicant should look to the Section 4s Implementing Regulations themselves to determine precisely when compliance is required for each. For example, the Section 4s Implementing Regulations for External Business Conduct Standards require compliance on the later of 180 days after the effective date of those regulations or the date on which swap dealers or major swap participants are required to apply for registration pursuant to Regulation 3.10.

<sup>41</sup> NFA and WGCEF Comment Letters.

<sup>42</sup> NFA Comment Letter.

the case may be, and the applicant shall cease to be provisionally registered.”<sup>43</sup> The Commission proposed a 30-day period – subject to extension at the discretion of the Commission – within which the applicant would be required to cure the deficiency. Upon further consideration, the Commission has adopted in the final regulation a 90-day cure period.<sup>44</sup> Further, Regulation 3.10(a)(1)(v)(D)(2) makes clear that the provisions of Regulation 3.10(a)(1)(v)(D)(1) supplement, and are in addition to, the other activities in which NFA engages under the Act and Commission regulations in connection with processing an application for registration as an SD or MSP.<sup>45</sup>

To address comments requesting clarification of the effect of provisional registration on the general registration process for SDs and MSPs,<sup>46</sup> the Commission notes that, as is stated in

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<sup>43</sup> This provision was found in proposed Regulation 3.10(a)(1)(v)(D)(2).

<sup>44</sup> New Regulation 3.10(a)(1)(v)(E), formerly proposed Regulation 3.10(a)(1)(v)(D)(3), addresses the effect on the applicable swap documentation of the SD or MSP. Broadly stated, as proposed and as adopted, this regulation provides that “unless specifically reserved in the applicable swap documentation,” any withdrawal, cessation or revocation of registration does not affect the terms of any swap transaction to which the applicant is a party entered into prior to receiving notice that it is deficient in its compliance with the applicable Section 4s Implementing Regulation. See CEA Section 22(a)(5), added by Dodd-Frank Act Section 739, which states:

EFFECT ON SWAPS. – Unless specifically reserved in the applicable swap, neither the enactment of the Wall Street Transparency and Accountability Act of 2010, nor any requirement under that Act or an amendment made by that Act, shall constitute a termination event, force majeure, illegality, increased costs, regulatory change, or similar event under a swap (including any related credit support arrangement) that would permit a party to terminate, renegotiate, modify, amend, or supplement 1 or more transactions under the swap.

<sup>45</sup> See, e.g., CEA Sections 8a(2) and 8a(3) and generally Part 3 of the Commission’s regulations.

<sup>46</sup> NFA Comment Letter.

Part II.E below, the Commission intends to issue the Notice and Order that delegates to NFA the authority to perform the full range of registration functions with respect to applicants for registration, and persons registered, as an SD or MSP. Currently, persons who apply for registration must file a Form 7-R, and a Form 8-R and fingerprint card for each principal of the applicant who is a natural person,<sup>47</sup> accompanied by such documentation as may be required to demonstrate compliance with applicable regulatory requirements. NFA subsequently reviews these materials in advance of granting registration.<sup>48</sup> This, then, is the course of action the Commission intends that NFA will follow upon notification to an applicant for registration as an SD or MSP that it is provisionally registered.

In this regard, the Commission expects that NFA will promptly perform these reviews and, as the Commission intends to state in the Notice and Order, NFA will be required to perform these registration processing functions in accordance with the standards established by the CEA and the Commission's regulations and to follow the same procedures with respect to recordkeeping, disclosure and tracking of fitness investigations and adverse action proceedings concerning SDs and MSPs as it must follow in cases involving other registrants. Thus, for example, notwithstanding that it has notified an applicant for registration as an SD or MSP that it is provisionally registered, NFA may subsequently take an action to deny the registration

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<sup>47</sup> Regulation 3.1 defines the term "principal" to mean, when referring to an applicant for registration, a registrant or a person required to be registered under the CEA or Commission regulations, to include officers, directors, and persons who own ten percent or more of the outstanding shares of the applicant or registrant.

<sup>48</sup> For example, this is the procedure that NFA follows with respect to applicants for registration as an FCM or IB, who must file a Form 7-R, a Form 8-R for each natural person principal, and specified financial documents.

application based on the statutory disqualification of one of the applicant's principals.<sup>49</sup> In this regard, the Commission notes that the Form 7-R specifies disclosures that must be made concerning an applicant's criminal, regulatory and disciplinary histories, and that Form 8-R additionally requires these disclosures for each of the applicant's principals.<sup>50</sup>

Another commenter requested that the Commission consider separate sets of regulations for SDs and MSPs.<sup>51</sup> The Commission has considered the reasons set forth in the comment and continues to believe that applicants for SD or MSP registration should be subject to the same registration requirements for the purpose of commencing the registration process – *i.e.*, the filing of the Form 7-R by the applicant.

E. Allocation of Responsibilities<sup>52</sup> and RFA Membership and Oversight.<sup>53</sup>

As part of its efforts to bring SDs and MSPs into the existing regulatory framework for futures intermediaries, the Commission proposed Regulation 170.16, which would require each person registered as an SD or MSP to become and remain a member of an RFA. As the Commission noted, FCMs are subject to the RFA membership requirement.<sup>54</sup> Currently, NFA is the sole RFA. The Commission received general comments in favor of the membership requirement, that claimed such a requirement would provide the Commission with flexibility in

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<sup>49</sup> See CEA Sections 8a(2) and 8a(3).

<sup>50</sup> These forms can be accessed through NFA's Web site, <http://www.nfa.futures.org/>.

<sup>51</sup> SIFMA Comment Letter.

<sup>52</sup> See generally 75 FR 71379 at 71381-82.

<sup>53</sup> See generally 75 FR at 71385.

<sup>54</sup> Id.

overseeing the operations and activities of Swaps Entities.<sup>55</sup> After consideration of the foregoing, the Commission is adopting Regulation 170.16 as proposed.

The Commission also requested comment on who should be responsible for determining initial and ongoing compliance by Swaps Entities with respect to the Section 4s Implementing Regulations and all other applicable requirements. The Commission suggested three alternatives: no delegation to any person, full delegation to NFA (or any association that may be subsequently registered as a futures association), and partial delegation to NFA (or any subsequent RFA).<sup>56</sup>

One commenter favored no delegation, arguing that “[t]he fundamental duty to determine initial and continuing compliance to qualify for registration is entrusted to and must remain with

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<sup>55</sup> Comment letter from the New England Fuel Institute and the Petroleum Marketers Association of America (Jan. 18, 2011) (NEFI/PMAA Comment Letter).

<sup>56</sup> The Proposal specifically provided:

Option number one would involve the Commission being directly responsible for ensuring compliance by swaps entities with all requirements applicable to them under the CEA and Commission regulations. Option number two would involve NFA (or any other association that may subsequently be registered as a futures association) being responsible for ensuring compliance, subject to Commission oversight. Option number three would involve certain compliance oversight activities being performed by the Commission and others being delegated to NFA (or a subsequently registered futures association). The Commission requests comment on these options. In the case of option number three, commenters should specify which oversight activities should be performed by the Commission and which should be delegated to, or performed by NFA (or another registered futures association).

75 FR at 71382.

the CFTC.”<sup>57</sup> This commenter nevertheless acknowledged that confirmation and oversight of compliance with functions involving reporting and recordkeeping, daily trading records, swap documentation structure, designation of chief compliance officer, and filing of annual compliance reports could be delegated to NFA if the Commission determined that “material efficiencies” could be achieved. But, confirmation and oversight of compliance with requirements relating to, among other functions, capital and margin requirements, business conduct standards and monitoring of trading and risk management were viewed by this commenter as requiring “involvement that is focused, decisive and utterly free from even the appearance of influence brought to bear by SDs and MSPs” – and therefore, this commenter claimed, should be retained by the Commission.<sup>58</sup> Another commenter observed that until the enactment of the Dodd-Frank Act, NFA had been the self-regulatory organization (SRO) for the futures industry exclusively, and advanced that NFA would need to develop new capabilities to serve as an effective SRO for the swaps industry.<sup>59</sup> Other commenters favored full delegation to NFA, based on NFA’s historical performance of the registration and fitness review functions, as well as confirming its members’ compliance with regulatory requirements.<sup>60</sup>

Another commenter requested that if the Commission adopted the partial delegation model, it clearly define the responsibilities delegated to NFA, and, in this regard, asked that the

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<sup>57</sup> Comment letter from Better Markets, Inc. (Jan. 24, 2011) (Better Markets Comment Letter).

<sup>58</sup> Id. (emphasis in original).

<sup>59</sup> ISDA Comment Letter.

<sup>60</sup> NFA and WGCEF Comment Letters.

Commission clarify certain of its registration process proposals.<sup>61</sup> It recommended that “the Commission delegate to NFA not only the authority to process Swap[s] Entity registration applications and conduct background checks but also to conduct adverse registration proceedings.” This commenter further requested that, in delegating “to NFA the responsibility to maintain records associated with processing Swap Entity registration applications . . . the Commission specify whether records filed with and maintained by NFA in connection with any background check . . . are considered Commission records.”

In response to these comments, in recognition of NFA’s proven track record in performing analogous functions for all other Commission registrants, and consistent with past practice,<sup>62</sup> including with respect to the newest registrant category of RFED, the Commission intends to delegate its full registration authority under the CEA and its regulations to NFA with respect to applicants for registration, and registrants, as an SD or MSP. Specifically, by the Notice and Order, the Commission intends to delegate to NFA the authority to take the following actions: (1) to process and grant applications for registration and withdrawals from registration of SDs and MSPs, and to notify applicants for registration as an SD or MSP of provisional registration; (2) in connection with processing and granting applications for registration of SDs

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<sup>61</sup> NFA Comment Letter.

<sup>62</sup> The Commission previously has authorized NFA to perform the full range of registration functions with regard to persons who must register under the CEA, including granting applications for registration; enabling withdrawals; and conducting proceedings to deny, condition, suspend, restrict or revoke the registration of existing registrants or applicants for registration in each category. See 48 FR 15940 (Apr. 13, 1983); 48 FR 35158 (Aug. 3, 1983); 48 FR 51809 (Nov. 14, 1983); 49 FR 8226 (Mar. 5, 1984); 49 FR 39593 (Oct. 9, 1984); 50 FR 34885 (Aug. 28, 1985); and 75 FR 55310 (Sep. 10, 2010).

and MSPs, to confirm initial compliance with applicable Section 4s Implementing Regulations;<sup>63</sup> (3) to conduct proceedings to deny, condition, suspend, restrict or revoke the registration of any SD or MSP or of any applicant for registration in either category; and (4) to maintain records regarding SDs and MSPs, and to serve as the official custodian of those Commission records.<sup>64</sup> The Commission intends that the Notice and Order will further provide that nothing contained therein “shall affect the Commission’s authority to review the performance by NFA of Commission registration functions, to adopt and enforce regulations applicable to SDs and MSPs as Commission registrants, and to conduct on-site examinations of the operations and activities of SDs and MSPs as Commission registrants.”

The Commission recognizes that the operations, activities and transactions engaged in by SDs and MSPs have not previously been subject to an extensive regulatory framework. Ideally, and as one commenter suggested, the Commission would retain direct responsibility, at least initially, for confirming compliance with the Section 4s Implementing Regulations.<sup>65</sup> However,

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<sup>63</sup> The Commission intends that applicants for registration may seek confidential treatment of documentation submitted to demonstrate initial compliance with the Section 4s Implementing Regulations in accordance with the procedures set out in Regulation 145.9. This approach is consistent with that taken in other Dodd-Frank Act rulemakings. *See, e.g.*, Process for Review of Swaps for Mandatory Clearing, 76 FR 44464, 44474 (July 26, 2011) (adopting Regulation 39.5(b)(5) which allows a derivatives clearing organization to request confidential treatment under Regulation 145.9 for portions of its submissions to the Commission).

<sup>64</sup> The Commission has adopted as proposed an amendment to Regulation 3.10(d) that subjects SD and MSP registrants to the requirement applicable to all other persons registered in accordance with Regulation 3.10 to annually review and update registration information with NFA. However, in light of its intent to delegate its full registration authority to NFA, the Commission has not adopted as proposed a further amendment to Regulation 3.10(d) that would have required SD and MSP registrants to also file this updating registration information with the Commission.

<sup>65</sup> Better Markets Comment Letter.

in order to best allocate its resources, the Commission has determined to delegate to NFA the responsibility for the initial determination that an applicant for registration as an SD or MSP is in compliance with the Section 4s Implementing Regulations.

Going forward, the Commission expects that NFA, as it has for its other members in connection with the discharge of its RFA responsibilities under CEA Section 17, will adopt rules for its SD and MSP members that are the same as, or more stringent than, the Section 4s Implementing Regulations, and that NFA will engage in active oversight of its SD and MSP members to monitor and ensure compliance with those rules.<sup>66</sup> In this regard, the Commission notes that CEA Section 17(j) requires an RFA – such as NFA – to submit to the Commission any new change in or addition to its rules and that the RFA –

may make such rules effective ten days after receipt of such submission by the Commission unless, within the ten-day period, the registered futures association requests review and approval thereof by the Commission or the Commission notifies such registered futures association in writing of its determination to review such rules for approval.

As for the standard of review to which RFA rules are subject, Section 17(j) further provides that:

The Commission shall approve such rules if such rules are determined by the Commission to be consistent with the requirements of this section and not otherwise in violation of this Act or the regulations issued pursuant to this Act, and the Commission shall disapprove, after appropriate notice and opportunity for hearing, any such rule which the Commission

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<sup>66</sup> See, e.g., NFA Compliance Rule 2-13 for its member CPOs and CTAs, wherein NFA has adopted in large part the Part 4 regulations of the Commission, which govern the operations and activities of these categories of registrant. See also NFA Financial Requirements Rules for its member FCMs, RFEDs and IBs, whereby NFA has adopted rules that are the same as, or more stringent than, the financial requirements the Commission has adopted for these categories of registrant.

determines at any time to be inconsistent with the requirements of this section or in violation of this Act or the regulations issued pursuant to this Act.<sup>67</sup>

However, and consistent with the Notice and Order the Commission intends to issue, adoption by the Commission of Regulation 170.16 requiring membership in an RFA by SD and MSP registrants and adoption by NFA of rules for its SD and MSP members does not affect the authority of the Commission to adopt and enforce regulations applicable to SDs and MSPs as Commission registrants and to conduct on-site examinations of the operations and activities of SDs and MSPs as Commission registrants.

The Commission has, in the past, issued written guidance to NFA regarding the exercise of delegated authority.<sup>68</sup> To the extent that a Section 4s Implementing Regulation is not specific in this regard, the Commission anticipates providing written guidance to NFA on the criteria for, and manner of, determining that an applicant for SD or MSP registration has demonstrated its initial compliance with the regulation.

#### F. Extraterritoriality

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<sup>67</sup> Section 17(j) further provides:

If the Commission does not approve or institute disapproval proceedings with respect to any rule within one hundred and eighty days after receipt or within such longer period of time as the [RFA] may agree to, or if the Commission does not conclude a disapproval proceeding with respect to any rule within one year after receipt or within such longer period as the [RFA] may agree to, such rule may be made effective by the [RFA] until such time as the Commission disapproves such rule . . . .

<sup>68</sup> See Letter to Robert K. Wilmoth, President, NFA, from Jean A. Webb, Secretary of the Commission, dated Dec. 4, 1997; Letter to Robert K. Wilmoth, President, NFA, from Jean A. Webb, Secretary of the Commission, dated Apr. 13, 2000. These letters are included in Appendix A to Part 3 of the Commission's regulations.

As is noted above, in the Proposal, the Commission requested comment on the extraterritorial application of the SD and MSP registration requirements. The Commission has determined to limit this final rulemaking to the process of registration. Issues relating to which entities are SDs or MSPs and the substantive requirements applicable to them, including the extraterritorial application of such substantive requirements, are beyond the scope of this rulemaking.

### **III. Related Matters**

#### **A. Regulatory Flexibility Act**

The Regulatory Flexibility Act (Reg Flex Act) requires federal agencies to consider the impact of its rules on “small entities.”<sup>69</sup> A regulatory flexibility analysis or certification typically is required for “any rule for which the agency publishes a general notice of proposed rulemaking pursuant to” the notice-and-comment provisions of the Administrative Procedure Act, 5 U.S.C. 553(b).<sup>70</sup> As the Commission stated in the Proposal, it previously has established that certain entities subject to its jurisdiction are not small entities for purposes of complying with the Reg Flex Act. However, as the Commission also noted in the Proposal, SDs and MSPs are new categories of registrant for which the Commission had not previously addressed the question of whether such persons are small entities.<sup>71</sup>

In this regard, the Commission explained in the Proposal that it previously had determined that FCMs should not be considered to be small entities for purposes of the Reg Flex

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<sup>69</sup> 5 U.S.C. 601 et seq.

<sup>70</sup> 5 U.S.C. 601(2), 603, 604 and 605.

<sup>71</sup> 75 FR 71379, 71385.

Act, based, in part, upon FCMs' obligation to meet the minimum financial requirements established by the Commission to enhance the protection of customers' segregated funds and protect the financial condition of FCMs generally.<sup>72</sup> Like FCMs, SDs will be subject to minimum capital requirements, and are expected to be comprised of large firms. The Commission is statutorily required to exempt from designation as an SD those entities that engage in a de minimis quantity of swap dealing in connection with transactions with or on behalf of customers.<sup>73</sup> Accordingly, for purposes of the Reg Flex Act for the Proposal and future rulemakings, the Commission proposed that SDs should not be considered small entities for essentially the same reasons that it had previously determined FCMs not to be small entities.<sup>74</sup>

The Commission further explained that it had also previously determined that large traders are not small entities for Reg Flex Act purposes, with the Commission considering the size of a trader's position to be the only appropriate test for the purpose of large trader reporting.<sup>75</sup> The Commission then noted that "MSPs maintain substantial positions in swaps, creating substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets."<sup>76</sup> Accordingly, for purposes of the Reg Flex Act for the Proposal and future rulemakings, the Commission also

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<sup>72</sup> 47 FR 18618 (Apr. 30, 1982).

<sup>73</sup> See CEA Section 1a(49)(D).

<sup>74</sup> 75 FR at 71385.

<sup>75</sup> Id.

<sup>76</sup> Id.

proposed that MSPs should not be considered to be small entities for essentially the same reasons that it previously had determined large traders not to be small entities.<sup>77</sup>

In response to the Proposal, one commenter, representing a number of market participants, submitted a comment related to the Reg Flex Act, stating that “[e]ach of the complex and interrelated regulations currently being proposed by the Commission has both an individual, and a cumulative, effect on [certain] small entities,” and that “the vast majority of [our] members meet the definition of ‘small entities’ under the Small Business Regulatory Enforcement Fairness Act.”<sup>78</sup> Thus, the commenter concluded that the Commission should conduct a regulatory flexibility analysis for each of its rulemakings under the Dodd-Frank Act, including this rulemaking applicable to the registration process for Swaps Entities.

This commenter did not provide any information on how the Proposal may have a significant economic effect on a substantial number of small entities. Nonetheless, the Commission has reevaluated this rulemaking in light of the statements made to it by this commenter. After further consideration of those statements, the Commission has again determined that this final rulemaking, which is applicable to SDs and MSPs, will not have a significant economic effect on a substantial number of small businesses.

In terms of affecting a substantial number of small entities, as is noted above, the Commission is statutorily required to exempt from designation as an SD those entities that engage in a de minimis quantity of swaps dealing. Thus, these exempted entities will not be

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<sup>77</sup> Id. at 71385-86.

<sup>78</sup> Comment letter from the National Rural Electric Cooperative Association, American Public Power Association, Large Public Power Council, Edison Electric Institute, and Electric Power Supply Association (June 3, 2011).

required to register as an SD. Moreover, the Commission does not expect that the small entities identified by the commenter will be subject to registration with the Commission as an MSP.

In terms of having a significant economic effect, in the experience of the Commission, complying with the registration process regulations has not had a significant economic effect on a substantial number of small entities. Notably, Regulation 3.10, containing the same registration requirements as those being issued today for SDs and MSPs, has been applicable to IBs and CTAs<sup>79</sup> without any known significant economic effects since 1983.<sup>80</sup> Most recently, in connection with its adoption of substantively similar registration regulations for RFEDs, the Commission stated that, in light of Congressionally-mandated capital requirements, it would not define RFEDs as small entities for Reg Flex Act purposes.<sup>81</sup> There is no indication, from the Commission's experience or the information presented by the commenter, that the registration process requirements for Swaps Entities would have an effect on small entities that would be subject to those requirements, if any, that would be different than the effect the same registration process requirements have had historically on other Commission registrants that also may be small.

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<sup>79</sup> The Commission historically has evaluated on a case-by-case basis the economic impact of a particular regulatory proposal on IBs and CTAs to determine whether the regulatory proposal will have a significant economic effect on a substantial number of small entities. See, e.g., 76 FR 33066, 33079 (June 7, 2011) (initial regulatory flexibility analysis conducted with respect to the possible economic effects of a proposal to require IBs, among others, to maintain records of certain oral communications).

<sup>80</sup> See 48 FR 35248 (Aug. 3, 1983).

<sup>81</sup> See 75 FR 55410, 55416 (Sep. 10, 2010). CEA Section 2(c)(2) generally requires an RFED to maintain adjusted net capital equal to or in excess of \$20,000,000.

Accordingly, for the reasons stated in the Proposal and the additional rationale provided above, the Commission continues to believe that the SD and MSP registration process 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 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. Introduction

The Paperwork Reduction Act (PRA)<sup>82</sup> imposes certain requirements on federal agencies in connection with their conducting or sponsoring any collection of information as defined by the PRA. Certain provisions of these regulations will result in new collection of information requirements within the meaning of the PRA. 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.

The Commission submitted the Proposal to the Office of Management and Budget (OMB) for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The Commission requested that OMB approve and assign a new control number for the collection of information covered by the Proposal. The title for this collection of information is “Registration of Swap Dealers and Major Swap Participants.” OMB has assigned OMB control number 3038–0072 to the Information Collection Request (ICR) in connection with the Proposal, but OMB has not yet

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<sup>82</sup> 44 U.S.C. 3501 et seq.

approved the ICR. The OMB control number will not appear in the active inventory until OMB grants approval.

Under the regulations that the Commission is adopting today, Swaps Entities that must register with the Commission will be obligated to file, periodically review and update certain registration forms. Responses to the collection of information contained within these final regulations are mandatory, and the Commission will protect proprietary information according to the Freedom of Information Act<sup>83</sup> and Part 145 of the Commission's regulations, "Commission Records and Information." In addition, the Commission emphasizes that CEA Section 8(a)(1) strictly prohibits the Commission, unless specifically authorized by the CEA, from "publish[ing] data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers." The Commission also is required to protect certain information contained in a government system of records pursuant to the Privacy Act of 1974.<sup>84</sup>

In the Proposal, the Commission estimated that there would be 300 "Respondents/Affected Entities" (respondents) and that the "respondent burden for this collection is estimated to average 0.5 hours per response for the Form 7-R; 0.4 hours per response for the Form 8-R; 3 minutes per response for the Form 7-W; 6 minutes per response for the Form 8-T; and 3 minutes per response for the Form 3-R."<sup>85</sup> As is discussed previously in this Federal Register release, the Commission has modified from the Proposal certain of the regulations it is adopting today. The Commission believes that none of these modifications

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<sup>83</sup> 5 U.S.C. 552.

<sup>84</sup> 5 U.S.C. 552a.

<sup>85</sup> 75 FR at 71386.

affect the burden estimates associated with the information collection that the Commission proposed. In response to comments received, the Commission has determined to increase the respondent burden hours estimated for Swaps Entities for each of the forms referenced above. The Commission is also decreasing the number of respondents to 125 from the Proposal's estimate of 300. The following sections address and respond to comments received on the proposed burden estimates, explain the Commission's reduction of the estimated number of respondents to this collection, discuss the registration fees included in this rulemaking, and list the revised burden hour estimates associated with this information collection and the final regulations adopted today.

## 2. Responses to Comments Received

The Commission invited the public and other federal agencies to comment on any aspect of the reporting and recordkeeping burdens discussed above. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicited comments in order to: (1) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) evaluate the accuracy of the Commission's estimate of the burden of the proposed collection of information; (3) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collection of information on those who are able to respond, including through the use of automated collection techniques or other forms of information technology.

OMB commented on the ICR in accordance with 5 CFR 1320.11(c), questioning the burden hours estimated, which appeared to OMB to be low. OMB stated that the Commission

should consider the comments it received on the Proposal, if any, to determine if the burden hours estimated should be revised.

The Commission received one other comment on its PRA discussion in the Proposal. This commenter stated in its letter that, “[a]lthough the Paperwork Reduction Act section of the release accompanying the Proposed Regulations (the ‘Release’) suggests that it will merely take a matter of minutes for Swaps Entities to complete the forms required by the Proposed Regulations, we are dubious that this is accurate.”<sup>86</sup> This commenter did not explain why it doubted the accuracy of the estimates, nor did it suggest alternative burden estimates. Nonetheless, the Commission has reviewed its PRA estimates in light of this comment, as well as the comment provided by OMB. For the following reasons, the Commission has determined to revise the burden hour estimates in the Proposal.

Generally, these forms request only the information about an applicant and its principals necessary for the Commission to appropriately exercise its statutory registration and compliance oversight functions with respect to them. This information generally includes the names, addresses, location of records, regulatory and disciplinary histories, and other similarly straightforward matters – all of which should be in the possession of the applicant and readily available for the applicant to provide. However, some Swaps Entities may be unfamiliar with the current registration process and the Forms 7-R and 8-R that they must complete in order to apply for registration as an SD or MSP.

The PRA estimates provided for these forms are averages that do not necessarily reflect the actual time to be expended by each and every person to complete the forms. The Commission’s estimates do not account significantly for the amount of time it would take to

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<sup>86</sup> ISDA Comment Letter.

complete the regulatory and disciplinary history sections of Forms 7-R and 8-R, which impose the greatest burden on persons completing the forms where the applicant SD or MSP (including a principal thereof) has an extensive criminal or disciplinary history. The Commission believes such SDs and MSPs will generally not be applying for registration in the first place because they will likely be disqualified from registration pursuant to CEA Section 8a(2) or 8a(3). In addition, these forms will be completed in an online, user-friendly process developed by NFA, the Commission's delegee pursuant to CEA Section 8a(10), which process currently is used by all other applicants for registration with the Commission.

Moreover, in proposing and adopting regulations applicable to the registration of Swaps Entities, the Commission has made every effort to establish a process that is minimally disruptive to the swap markets and minimally burdensome to Swaps Entities. In so doing, and as it proposed, the Commission is incorporating the registration process for Swaps Entities into the existing regulatory scheme for all other Commission registrants under Part 3 – as opposed to constructing a fundamentally new registration structure for Swaps Entities. While current registrants may be familiar with this scheme, some Swaps Entities will not have previously applied for registration with the Commission, and the revised burden estimates take the potential unfamiliarity of new applicants for registration into account.

The forms that Swaps Entities will be required to complete are virtually identical to those forms that other Commission registrants must currently complete, including RFEDs, who became subject to the Commission's registration requirements in 2010. There is, however, an additional requirement to which Swaps Entities will be subject in connection with completing the Form 7-R. CEA Section 4s(b)(6) prohibits a Swaps Entity, except to the extent otherwise

provided by rule, regulation or order,<sup>87</sup> from permitting a person associated with it who is subject to a statutory disqualification to effect or be involved in effecting swaps on the Swaps Entity's behalf, if the Swaps Entity "knew, or in the exercise of reasonable care should have known, of the statutory disqualification."<sup>88</sup> Form 7-R incorporates CEA Section 4s(b)(6) into the application for registration as an SD or MSP by explicitly quoting the statutory language and requiring the applicant to certify that "the applicant is and shall remain in compliance with Section 4s(b)(6) of the Act." Because of the additional time required to gather such background information on a Swaps Entity's associated persons as is necessary to make that certification, the Commission believes an increase in the time required for the Swaps Entity to complete the Form 7-R is warranted.

As part of the registration process, the regulations being adopted today require Swaps Entities to demonstrate initial compliance with the Section 4s Implementing Regulations as the Commission adopts these regulations in order to obtain registration. However, because the Section 4s Implementing Regulations are not yet final, and because they will be phased in over time after the Commission adopts the registration process regulations today, the Commission is unable to estimate burden hours in connection with producing or collecting the documentation required to demonstrate compliance with the Section 4s Implementing Regulations.

Consequently, the PRA estimates for this registration process rulemaking only include time to be expended by applicants' and registrants' personnel to complete the forms, and do not include time to be expended to collect, produce or otherwise develop the documentation required to demonstrate compliance with the Section 4s Implementing Regulations. The Commission has

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<sup>87</sup> See, e.g., infra Regulation 23.22(b).

<sup>88</sup> See supra pt. II.C for a detailed discussion of the prohibition in CEA Section 4s(b)(6).

estimated the burden hours associated with information collections in connection with the Section 4s Implementing Regulations in the rulemakings proposing those regulations, and those burden hours need not be replicated here.

### 3. Reduction of the Estimated Number of Respondents

In the Proposal, the Commission took “a conservative approach” to calculating the burden hours of this information collection by estimating that as many as 300 persons would come within the SD or MSP definition and, thus, would be subject to registration with the Commission.<sup>89</sup> Since the Proposal’s publication in November 2010, the Commission has met with industry participants and trade groups, discussed extensively the universe of potential registrants with NFA, and reviewed public information about potential SDs active in the market and certain trade groups. Over time, and as the Commission has gathered more information on the swap market and its participants, the estimate of the number of SDs and MSPs has decreased. In its FY 2012 budget drafted in February 2011, the Commission estimated that 140 SDs might register with the Commission.<sup>90</sup> After recently receiving additional specific information from NFA on the regulatory program it is developing for SDs and MSPs,<sup>91</sup> however, the Commission

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<sup>89</sup> 75 FR at 71386.

<sup>90</sup> CFTC, President’s Budget and Performance Plan Fiscal Year 2010, p. 13-14 (Feb. 2011), [available at](http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/cftcbudget2012.pdf) <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/cftcbudget2012.pdf>. The estimated 140 SDs includes “[a]pproximately 80 global and regional banks currently known to offer swaps in the United States;” “[a]pproximately 40 non-bank swap dealers currently offering commodity and other swaps;” and “[a]pproximately 20 new potential market makers that wish to become swap dealers.” *Id.*

<sup>91</sup> Letter from Thomas W. Sexton, Senior Vice President and General Counsel, NFA, to Gary Barnett, Director, Division of Swap Dealer and Intermediary Oversight, CFTC (Oct. 20, 2011) (NFA Cost Estimates Letter).

now believes that approximately 125 persons will come within the SD or MSP definition and, thus, be subject to registration with the Commission.<sup>92</sup>

#### 4. Registration Fees

The Commission is permitted to collect registration fees under CEA Section 8a(1). These registration fees are established by NFA as the Commission's delegee under CEA Section 8a(10). NFA has not yet adopted, and the Commission has not yet approved, an NFA rule setting forth registration fees for SDs and MSPs, although NFA currently estimates that such Swaps Entity registration fee will be \$15,000.<sup>93</sup> At such time as the Section 4s Implementing Regulations are finalized and the NFA registration fees established under CEA Section 8a(1) are approved, the Commission will revise the information collection for which it has sought approval.

#### 5. Revised Burden Hour Estimates for the Information Collection

For the reasons outlined above, the Commission has determined to revise the burden hour estimates for this information collection as follows. The burden associated with the new regulations implementing the registration process for SDs and MSPs is estimated to be 629 hours, assuming 125 respondents, which will result from: (1) application for registration by SDs and MSPs and submission of required information on behalf of their respective principals; (2) initially, no withdrawals from registration by SDs or MSPs and a relatively small decrease in the number of their respective principals; and (3) initially, no reported corrections. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a federal agency.

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<sup>92</sup> The number of MSPs is estimated to be quite small, at six or fewer.

<sup>93</sup> See infra pt. III.C (discussing the costs and benefits of this rulemaking).

The respondent burden for this collection is estimated to average 1 hour per response for the Form 7-R; 0.8 hours per response for the Form 8-R; 0.1 hours per response for the Form 7-W; 0.2 hours per response for the Form 8-T; and 0.1 hours per response for the Form 3-R. These estimates include the time needed: to review instructions; to develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; to adjust the existing ways to comply with any previously applicable instructions and requirements; to train personnel to be able to respond to a collection of information; and to transmit or otherwise disclose the information.

**Form 7-R**

Respondents/Affected Entities: 125

Estimated number of responses: 125

Estimated total annual burden on respondents: 1 hour

Frequency of collection: On occasion and annually

Burden statement: 125 respondents x 1 hour = 125 Burden Hours

**Form 8-R**

Respondents/Affected Entities: 5 principals per each of 125 SDs and MSPs

Estimated number of responses: 625

Estimated total annual burden on respondents: 0.8 hours

Frequency of collection: On occasion

Burden statement: 625 respondents x 0.8 hours = 500 Burden Hours

**Form 8-T**

Respondents/Affected Entities: 1 principal per each of 20 SDs and MSPs

Estimated number of responses: 20

Estimated total annual burden on respondents: 0.2 hours

Frequency of collection: On occasion

Burden statement: 20 respondents x 0.2 hours = 4 Burden Hours

### C. Considerations of Costs and Benefits of the Rulemaking

This final rulemaking implements provisions of the CEA, as amended by the Dodd-Frank Act, mandating the registration of Swaps Entities. CEA Section 4s(a) makes it unlawful for a person to act as an SD or MSP unless it is registered with the Commission. CEA Section 4s(b) requires an SD or MSP to apply for registration in accordance with such form and manner as the Commission may prescribe. To effectuate the Congressional directive, this final rulemaking: details the registration process for SDs and MSPs; requires Swaps Entities to become and remain members of an RFA; and implements the prohibition against a Swaps Entity permitting a statutorily disqualified associated person from effecting or being involved in effecting swaps on behalf of the Swaps Entity.

CEA Section 15(a) requires the Commission to consider the costs and benefits of its actions before promulgating regulations. The Commission must evaluate costs and benefits 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.

Before adopting these registration process regulations for Swaps Entities, the Commission sought public comment on the Proposal, including comment on the costs and

benefits of the Proposal.<sup>94</sup> The Commission has considered all comments, and, in particular, reasonable alternatives suggested by commenters. In some instances, for the reasons discussed above, the Commission has adopted such alternatives or modifications to the proposed regulations where, in the Commission's judgment, the alternative or modification accomplishes the same regulatory objective in a more effective manner. The Commission also specifically invited commenters to submit "any data or other information that they may have quantifying or qualifying the costs and benefits of the proposal with their comment letters."<sup>95</sup> Other than estimates of registration fees and annual membership dues from NFA (currently the only RFA),<sup>96</sup> the Commission did not receive any information quantifying or qualifying the costs or benefits of the proposed regulations relating to the registration process for Swaps Entities. The Commission did, however, receive general comments on the cost-benefit considerations of the rulemaking. These are addressed in the discussion below.

#### 1. Benefits of SD and MSP Registration Regulations

The Commission believes that the benefits of this final rulemaking are considerable even if not quantifiable. Registration, as mandated by Congress in the Dodd-Frank Act, will enable the Commission to increase market integrity and protect market participants and the public by identifying the universe of SDs and MSPs subject to heightened regulatory requirements and oversight in connection with their swaps activities. This rulemaking identifies the process to commence registration by an SD or MSP, specifies the applicable registration forms, and explains how SDs and MSPs should apply for registration. The Commission believes that this

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<sup>94</sup> See 75 FR 71379 at 71386-87.

<sup>95</sup> Id.

<sup>96</sup> NFA Cost Estimates Letter.

final rulemaking's specification of a registration process for SDs and MSPs administered by an RFA leverages the RFA's existing expertise and economies of scale and scope.

Further, and as is discussed above,<sup>97</sup> the Commission is exercising its discretion under the Dodd-Frank Act to provide for an exception in Regulation 23.22 from the prohibition against an SD or MSP permitting a person associated with it who is subject to a statutory disqualification to effect or be involved in effecting swaps on its behalf. In taking this action, the Commission is limiting the burden on SDs and MSPs with respect to their vetting of potential associated persons.

## 2. Costs of SD and MSP Registration Regulations

The Commission has identified and considered several costs associated with this rulemaking. First, an SD or MSP must pay fees to register with the Commission through NFA. Second, because this rulemaking requires a registrant to become and remain a member of an RFA – and NFA is currently the only RFA – Swaps Entities will incur the costs of annual NFA membership dues. Third, NFA is expected to incur expenses for executing the anticipated delegated registration process function on the Commission's behalf and for monitoring compliance by its SD and MSP members with NFA rules.<sup>98</sup> Fourth, Swaps Entities will incur costs when completing various CFTC registration forms that must be filed with NFA.

The Commission is obligated to estimate the burden of and provide supporting statements for any collection of information it seeks to establish under considerations contained in the PRA,

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<sup>97</sup> See supra pt. II.C.

<sup>98</sup> The NFA Cost Estimates Letter explains that NFA will incur direct and indirect costs associated with employing staff to perform this review and confirmation, and that the registration fee estimate of \$15,000 has been designed to offset a portion of the costs that NFA will incur in this regard.

and seek approval of those requirements from OMB. Therefore, the estimated burden and support of the collection of information in this rulemaking, as well as consideration of the comments thereto, are discussed in the PRA section of this rulemaking as required by that statute.<sup>99</sup> Registrants are required to update these forms when the information provided therein changes and to confirm these changes annually.

a. Fees and Dues

Based on current estimates from NFA, the Commission believes that SDs and MSPs will incur the following registration fees: (a) \$15,000 per SD or MSP registration application, which will include the initial determination by NFA of compliance with the Section 4s Implementing Regulations;<sup>100</sup> and (b) \$85 per person for processing fingerprints and background information for principals.<sup>101</sup>

Based on current estimates from NFA, the Commission believes that SDs and MSPs will incur annual NFA membership dues ranging from \$125,000 to \$1,000,000 per member, based upon the size and complexity of the firm's swap business.<sup>102</sup> The increase in the estimate of NFA membership dues is driven by two factors: first, the decision by NFA to recover costs for

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<sup>99</sup> See supra pt. III.B.

<sup>100</sup> The Commission estimated \$500 for the SD/MSP registration application fee in the Proposal, based on information NFA provided to staff upon request in connection with the development of the Proposal. See 75 FR at 71387. Since then, NFA significantly altered the registration fees it estimates it will be charging SD and MSP applicants, due to NFA's expected review and confirmation of an SD or MSP's initial compliance with each Section 4s Implementing Regulation prior to the SD or MSP becoming registered. NFA Cost Estimates Letter.

<sup>101</sup> This amount is unchanged from the Proposal. See 75 FR at 71387.

<sup>102</sup> NFA Cost Estimates Letter.

oversight of its SD and MSP members primarily through a membership dues structure, rather than assessing a fee on swap transactions similar to the fee NFA imposes on futures transactions; and second, NFA's estimate of the annual cost of its regulatory program for Swaps Entities when that program is fully staffed and operational. It is possible that NFA's estimates will change over time. Additionally, rules relating to membership dues must be approved by various NFA authorities, and, in accordance with CEA Section 17(j), must be approved by the Commission. The Commission expects that NFA will submit these rules for full review and approval.<sup>103</sup>

b. NFA Expenses

Concurrently with the adoption of these regulations, the Commission intends to issue the Notice and Order, whereby it will delegate to an RFA – i.e., NFA – its authority to register SDs and MSPs. Included in this delegation will be the authority to determine an applicant's fitness for registration and initial compliance with the Section 4s Implementing Regulations as they relate to the applicant. Also, the Commission is adopting proposed Regulation 170.16 to require that SDs and MSPs become and remain members of an RFA. As is stated above, NFA currently is the sole RFA.

Consistent with the current regulatory practice for Commission registrants who are NFA members, NFA will be responsible for monitoring compliance with NFA rules applicable to its members who are SDs and MSPs.<sup>104</sup> NFA therefore will incur overhead and direct costs on a continuing basis attributable to oversight activities to confirm SD and MSP compliance with

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<sup>103</sup> Id. (stating that NFA will submit these proposed initial registration fees, and membership dues to the Commission for full review and approval).

<sup>104</sup> These NFA requirements will be as strict as or stricter than the Section 4s Implementing Regulations, and like registration fees and membership dues, will be subject to Commission review and approval pursuant to CEA Section 17(j). See supra pt. II.E.

applicable NFA rules in addition to performing registration processing functions.<sup>105</sup> NFA's currently estimated \$15,000 application fee for registering SDs and MSPs does not include charges related to ongoing NFA oversight of its SD and MSP members for compliance with NFA rules – which, as is stated above, NFA expects to recover through the dues it will charge its SD and MSP members.

NFA's regulatory program for the oversight of Swaps Entities will entail significant costs. Based on an assumption of 125 SD and MSP members, NFA estimates that the annual cost of this regulatory program when it is fully staffed and operational in approximately three years will be approximately \$35-\$45 million.<sup>106</sup> NFA has stated that “[i]n order to generate at least \$35 million in revenue, [NFA has] preliminarily calculated that membership dues for SDs and MSPs could range between \$125,000-\$1 million per Member firm based upon the size and complexity of the firm's swaps business.”<sup>107</sup>

By delegating the authority to perform the registration functions for SDs and MSPs to an RFA, the Commission will avoid the expense of establishing a new registration program within the agency and will provide a familiar and efficient means of implementing the statutory requirements for the registration of SDs and MSPs.<sup>108</sup> Some SDs and MSPs will have previous

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<sup>105</sup> For futures transactions, NFA collects a fee per transaction. Initially, NFA expected to collect a fee per transaction from its SD and MSP members to defray the costs of overseeing their operations and activities, an approach it is no longer pursuing. NFA Cost Estimates Letter.

<sup>106</sup> NFA Cost Estimates Letter. In the Proposal, the Commission estimated for PRA purposes that as many as 250 SDs and 50 MSPs may register. See 75 FR at 71386. Should there be more than 125 Swaps Entities, NFA's total annual costs for the regulatory program may exceed this estimate. NFA Cost Estimates Letter.

<sup>107</sup> NFA Cost Estimates Letter.

experience with the registration process for futures intermediaries. The Commission believes that by delegating the registration process to an established RFA that already has similar oversight responsibilities for other persons registered with the Commission, the regulatory objectives of the Dodd-Frank Act can be achieved in a more cost-effective manner. The Commission anticipates that delegating the authority to perform registration functions for SDs and MSPs to an RFA will avoid the costs associated with duplicating the systems, processes, and personnel of the RFA.<sup>109</sup>

Thus, the Commission believes that it will be more cost-effective for NFA to augment its current systems and processes to accommodate the new SD and MSP registrants than it would be for the Commission to build the same capabilities. The Commission further believes that the delegation of the authority to process SD and MSP registration applications to an RFA, with the imposition of fees on those persons who must register, is a prudent and effective approach. This model, currently employed in the futures context, has worked successfully for Commission registrants and the Commission for many years. While one of the commenters on the Proposal expressed concern about NFA's current lack of swaps expertise, the Commission notes NFA's recent efforts to develop expertise in this area (e.g., forming a Swap Dealer Advisory Committee in May 2010<sup>110</sup>) and, accordingly, does not believe this concern merits a different conclusion.

#### c. Registration of Foreign Swaps Entities

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<sup>108</sup> One commenter wrote that "given the budgetary uncertainty faced by the Commission" the delegation to RFA-registration model provides the Commission with "flexibility" in its oversight of SDs and MSPs. NEFI/PMAA Comment Letter.

<sup>109</sup> One commenter stated that SROs reduce the costs of regulation to the government and the taxpayer. ISDA Comment Letter.

<sup>110</sup> NFA Cost Estimates Letter.

The Commission received many comments on the Proposal from entities such as foreign banks and derivatives dealers arguing that several of the Commission's proposed regulations, taken together, would require massive and potentially expensive internal reorganizations to comply with the new swaps regulatory regime. Some commenters predicted adverse consequences to the U.S. swaps markets if foreign entities were required to register as SDs or MSPs, such as decreased competition, reduced liquidity, an exodus of foreign-based market participants from the U.S. markets, rising costs for their U.S. customers, and increased systemic risk. Some argued that the Commission should defer to regulators in the home jurisdiction lest participants be subject to multiple and inconsistent regulatory burdens.<sup>111</sup> Most of these comments address the question of which entities are SDs or MSPs, and the consequences of being required to register as such, rather than the costs of the registration process per se.

The Commission generally does not believe that foreign-based Swaps Entities will bear higher costs associated with the registration process than U.S.-based Swaps Entities. The identified costs are fees to become registered under the CEA with the Commission and annual NFA membership dues. Many of these foreign-based commenters are already familiar with navigating various U.S. federal and state regulatory regimes in connection with their other lines of business, such as banking and insurance. Moreover, many of the commenters already have operations and capable personnel physically located in the U.S. To the extent that an SD or MSP has neither familiarity with other U.S. regulatory regimes nor personnel physically located in the U.S., the Commission believes that any potentially higher costs that may be incurred in

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<sup>111</sup> These commenters did not quantify these costs. Further, the Commission is unable to estimate these costs, which it views as not directly related to the costs of the registration process regulations for SDs and MSPs. These costs are more costs of compliance with the Section 4s Implementing Regulations, which the Commission intends to address as it finalizes those regulations.

connection with the registration process regulations by a foreign-based Swaps Entity are a necessary consequence of adequately regulating the U.S. swaps markets and ensuring a level playing field for all intermediaries involved in the U.S. swaps markets.

3. Evaluation of Market and Public Interest Considerations in light of CEA Section 15(a)

(1) Protection of market participants and the public

The registration of Swaps Entities is a critical component of the comprehensive regulation of these persons. It is a statutory requirement that SDs and MSPs be registered. Notably, the registration process will serve to confirm initial compliance by an SD or MSP with the Section 4s Implementing Regulations. Moreover, attendant to applying for registration, SDs and MSPs, along with their principals, will be vetted, and those deemed unfit will be barred from registration. As a result, registration and the related requirements<sup>112</sup> of this final rulemaking will help protect the public by preventing those unfit to intermediate and participate in the swaps markets from registering in the first instance.

Also, NFA provides an on-line, public database, the Background Affiliation Status Information Center (BASIC), with information on each registrant's status and the status of the registrant's principals. BASIC also provides additional information, such as regulatory actions taken by NFA or the Commission, with respect to a registrant or its principals. Access to this database provides all persons with important information about Commission registrants with whom they may seek to transact business.

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<sup>112</sup> E.g., as a prerequisite to granting registration, NFA will confirm initial compliance by an applicant for registration as an SD or MSP with each Section 4s Implementing Regulation, and a Swaps Entity may not, subject to certain limited exceptions, permit a statutorily disqualified associated person to effect or be involved in effecting swaps on its behalf.

(2) Efficiency, competitiveness, and the financial integrity of the market

Utilizing NFA's existing registration expertise and resources promotes efficiency in that it employs NFA's existing capabilities rather than requiring Commission investment (e.g., hiring staff and building a technological infrastructure to process applications) to build a new registration system. Similarly, because NFA is building upon its existing oversight infrastructure, it should incur fewer costs to oversee compliance relative to direct Commission oversight. While the Commission will continue to oversee the registration process, delegation of the performance of registration functions to an RFA will avoid the unnecessary diversion of limited agency resources from the Commission's other responsibilities to protect the public.

(3) Price discovery

The Commission has not identified any impact on price discovery through the registration provisions of this rulemaking.

(4) Sound risk management practices

As is explained above, registration is a critical component within the Dodd-Frank Act regulatory regime to ensure the fitness of SDs and MSPs. In addition to disqualifying ineligible persons, it enhances market participants' ability to make more informed counterparty selection decisions. In this way, it is consistent with sound risk management practices.

(5) Other public interest considerations

CEA Section 15 directs the Commission to consider in its cost-benefit evaluation "other public interest considerations." One such consideration is public confidence. As an element of a regulatory regime that establishes minimum participation standards, the Commission believes that the registration process will promote public confidence in swaps market integrity.

**List of Subjects**

17 CFR Part 1

Brokers, Commodity futures, Definitions, Major swap participants, Swap dealers.

17 CFR Part 3

Customer protection, Licensing, Major Swap Participants, Registration, Swap Dealers.

17 CFR Part 23

Associated persons, Major swap participants, Registration, Swap dealers.

17 CFR Part 170

Membership, Registered futures associations.

For the reasons presented above, the Commission hereby amends Chapter I of Title 17 of the Code of Federal Regulations as follows:

**PART 1 – GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT**

1. The authority citation for part 1 is revised to read as follows:

**Authority:** 7 U.S.C. 1a, 2, 2a, 5, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6k, 6l, 6m, 6n, 6o, 6p, 6r, 6s, 7, 7a-1, 7a-2, 7b, 7b-3, 8, 9, 10a, 12, 12a, 12c, 13a, 13a-1, 16, 16a, 19, 21, 23, and 24, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (July 21, 2010).

2. Section 1.3(aa)(6) is added to read as follows:

**§1.3 Definitions.**

\* \* \* \* \*

(aa) \* \* \*

(6) A swap dealer or major swap participant as a partner, officer, employee, agent (or any natural person occupying a similar status or performing similar functions), in any capacity that involves:

(i) The solicitation or acceptance of swaps (other than in a clerical or ministerial capacity); or

(ii) The supervision of any person or persons so engaged.

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### **PART 3 – REGISTRATION**

3. The authority citation for part 3 is revised to read as follows:

**Authority:** 5 U.S.C. 522, 522b; 7 U.S.C. 1a, 2, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6k, 6m, 6n, 6o, 6p, 6s, 8, 9, 9a, 12, 12a, 13b, 13c, 16a, 18, 19, 21, and 23, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (Jul. 21, 2010).

4. Section 3.1 is amended by adding paragraphs (f) and (g) to read as follows:

#### **§3.1 Definitions.**

\* \* \* \* \*

(f) Section 4s Implementing Regulation. Section 4s Implementing Regulation means a regulation the Commission issues pursuant to section 4s(e), 4s(f), 4s(h), 4s(i), 4s(j), 4s(k), or 4s(l) of the Act.

(g) Swap Definitional Regulation. Swap Definitional Regulation means a regulation the Commission issues to further define the term “swap dealer,” “major swap participant” or “swap” in section 1a(49), 1a(33) or 1a(47) of the Act, respectively, pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act.

5. Section 3.2 is amended by:

a. Revising the heading; and

b. Adding paragraph (c)(3) to read as follows:

**§ 3.2 Registration processing by the National Futures Association; notification and duration of registration; provisional registration.**

\* \* \* \* \*

(c) \* \* \*

(3)(i) If an applicant for registration as a swap dealer or major swap participant pursuant to §3.10(a)(1)(v) files a Form 7-R and a Form 8-R and fingerprint card for each natural person who is a principal of the applicant, accompanied by such documentation as may be required to demonstrate compliance with each of the Section 4s Implementing Regulations, as defined in §3.1(f), as are applicable to it, in accordance with the terms of the Section 4s Implementing Regulations, the National Futures Association shall notify the swap dealer or major swap participant, as the case may be, that it is provisionally registered.

(ii) Subsequent to providing notice of provisional registration to an applicant for registration as a swap dealer or major swap participant, the National Futures Association shall determine whether the documentation submitted pursuant to §3.10(a)(1)(v) by the applicant demonstrates compliance with the Section 4s Implementing Regulation to which it pertains; Provided, that where the National Futures Association has notified the applicant that it is provisionally registered, the applicant must supplement its registration application by providing such documentation as may be required to demonstrate compliance with each Section 4s Implementing Regulation that the Commission issues subsequent to the date the National Futures Association notifies the applicant that it is provisionally registered.

(iii) On and after the date on which the National Futures Association confirms that the applicant for registration as a swap dealer or major swap participant has demonstrated its initial compliance with the applicable requirements of each of the Section 4s Implementing Regulations

and all other applicable registration requirements under the Act and Commission regulations, the provisional registration of the applicant shall cease and it shall be registered as a swap dealer or major swap participant, as the case may be.

\* \* \* \* \*

6. Section 3.4 is amended by revising paragraph (a) to read as follows:

**§ 3.4 Registration in one capacity not included in registration in any other capacity.**

(a) Except as may be otherwise provided in the Act or in any rule, regulation, or order of the Commission, each futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, introducing broker, commodity pool operator, commodity trading advisor, leverage transaction merchant, floor broker, floor trader, and associated person (other than an associated person of a swap dealer or major swap participant) must register as such under the Act. Registration in one capacity under the Act shall not include registration in any other capacity; Provided, however, That a registered floor broker need not also register as a floor trader in order to engage in activity as a floor trader.

\* \* \* \* \*

7. Section 3.10 is amended by:

- a. Revising the heading;
- b. Revising paragraph (a)(1)(i);
- c. Adding paragraphs (a)(1)(iii), (a)(1)(iv), and (a)(1)(v); and
- d. Revising paragraphs (b)(1) and (d) to read as follows:

**§ 3.10 Registration of futures commission merchants, retail foreign exchange dealers, introducing brokers, commodity trading advisors, commodity pool operators, swap dealers, major swap participants and leverage transaction merchants.**

(a) Application for registration. (1)(i) Except as provided in paragraph (a)(3) of this section, application for registration as a futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, introducing broker, commodity pool operator, commodity trading advisor, or leverage transaction merchant must be on Form 7-R, completed and filed with the National Futures Association in accordance with the instructions thereto.

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(iii) Applicants for registration as a commodity pool operator must accompany their Form 7-R with the financial statements described in §4.13(c) of this chapter.

(iv) Applicants for registration as a leverage transaction merchant must accompany their Form 7-R with a Form 2-FR in accordance with the provisions of §31.13 of this chapter.

(v)(A) Applicants for registration as a swap dealer or major swap participant must accompany their Form 7-R with such documentation as may be required to demonstrate compliance with each Section 4s Implementing Regulation, as defined in §3.1(f), applicable to them, in accordance with the terms of the Section 4s Implementing Regulation; Provided, however, that for the purposes of this paragraph (a)(1)(v) the term “compliance” includes the term “the ability to comply,” to the extent that a particular Section 4s Implementing Regulation may require demonstration of the ability to comply with a requirement thereunder.

(B) The filing of the Form 7-R and accompanying documentation by the applicant swap dealer or major swap participant authorizes the Commission to conduct on-site inspection of the applicant to determine compliance with the Section 4s Implementing Regulations applicable to it.

(C)(1) At any time prior to the latest effective date of the Swap Definitional Regulations, defined in §3.1(g), any person may apply to be registered as a swap dealer or major swap participant.

(2) By no later than the latest effective date of the Swap Definitional Regulations, each person who is a swap dealer or major swap participant on that date must apply to be registered as a swap dealer or major swap participant, as the case may be.

(3) From and after the latest effective date of the Swap Definitional Regulations, each person who intends to engage in business as a swap dealer or major swap participant must apply to be registered as a swap dealer or major swap participant, as the case may be.

(D)(1) Where an applicant for registration as a swap dealer or major swap participant to whom the National Futures Association has provided notice of provisional registration under §3.2(c)(3) fails to demonstrate compliance with a Section 4s Implementing Regulation, the National Futures Association will notify the applicant that its application is deficient, whereupon the applicant must withdraw its registration application, it must not engage in any new activity as a swap dealer or major swap participant, as the case may be, and the applicant shall cease to be provisionally registered; Provided, that in the event the applicant fails to withdraw its registration application or cure the deficiency within 90 days following receipt of notice from the National Futures Association that its application is deficient, the application will be deemed withdrawn and thereupon its provisional registration shall cease; Provided further, that upon written request by the applicant submitted to the Commission, the Commission may in its discretion extend the time by which the applicant must cure the deficiency.

(2) The provisions of the foregoing paragraph (a)(1)(v)(D)(1) of this §3.10 shall supplement and be in addition to any other activities in which the National Futures Association

engages under the Act and Commission regulations in connection with processing an application for registration as a swap dealer or major swap participant.

(E) Unless specifically reserved in the applicable swap documentation, no withdrawal, deemed withdrawal, cessation or revocation of registration as a swap dealer or major swap participant pursuant to paragraph (a)(1)(v), (b), or (d) of this §3.10 shall constitute a termination event, force majeure, an illegality, increased costs, a regulatory change, or a similar event under a swap (including any related credit support arrangement) that would permit a party to terminate, renegotiate, modify, amend or supplement one or more transactions under the swap.

\* \* \* \* \*

(b) Duration of registration. (1) A person registered as a futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, introducing broker, commodity pool operator, commodity trading advisor, or leverage transaction merchant in accordance with paragraph (a) of this §3.10 will continue to be so registered until the effective date of any revocation or withdrawal of such registration. Upon effectiveness of any revocation or withdrawal of registration, such person will immediately be prohibited from engaging in new activities requiring registration under the Act or from representing himself to be a registrant under the Act or the representative or agent of any registrant during the pendency of any suspension of such registration.

\* \* \* \* \*

(d) On a date to be established by the National Futures Association, and in accordance with procedures established by the National Futures Association, each registrant as a futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, introducing broker, commodity pool operator, commodity trading advisor, or leverage

transaction merchant shall, on an annual basis, review and update registration information maintained with the National Futures Association. The failure to complete the review and update within thirty days following the date established by the National Futures Association shall be deemed to be a request for withdrawal from registration, which shall be processed in accordance with the provisions of § 3.33(f).

8. Section 3.21 is amended by:

- a. Revising paragraph (c) introductory text and paragraph (c)(1)(iv);
- b. Adding new paragraph (c)(1)(v);
- c. Revising paragraph (c)(2)(i); and
- d. Revising paragraph (c)(4)(i) to read as follows:

**§ 3.21 Exemption from fingerprinting requirement in certain cases.**

\* \* \* \* \*

(c) Outside directors. Any futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, introducing broker, commodity pool operator, commodity trading advisor, or leverage transaction merchant that has a principal who is a director but is not also an officer or employee of the firm may, in lieu of submitting a fingerprint card in accordance with the provisions of § 3.10(a)(2) and § 3.31(a)(3), file a “Notice Pursuant to Rule 3.21(c)” with the National Futures Association. Such notice shall state, if true, that such outside director:

(1) \* \* \*

(iv) The solicitation of leverage customers’ orders for leverage transactions,

(v) The solicitation or acceptance of a swap agreement;

(2) \* \* \*

(i) Transactions involving “commodity interests,” as that term is defined in §1.3(yy);

\* \* \* \* \*

(4) \* \* \*

(i) The name of the futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, introducing broker, commodity pool operator, commodity trading advisor, leverage transaction merchant, or applicant for registration in any of these capacities of which the person is an outside director;

\* \* \* \* \*

9. Section 3.30 is amended by revising paragraph (a) to read as follows:

**§ 3.30 Current address for purpose of delivery of communications from the Commission or the National Futures Association.**

(a) The address of each registrant, applicant for registration, and principal, as submitted on the application for registration (Form 7-R or Form 8-R) or as submitted on the biographical supplement (Form 8-R) shall be deemed to be the address for delivery to the registrant, applicant or principal for any communications from the Commission or the National Futures Association, including any summons, complaint, reparation claim, order, subpoena, special call, request for information, notice, and other written documents or correspondence, unless the registrant, applicant or principal specifies another address for this purpose: Provided, that the Commission or the National Futures Association may address any correspondence relating to a biographical supplement submitted for or on behalf of a principal to the futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, introducing broker, commodity pool operator, commodity trading advisor, or leverage transaction merchant with which the principal is affiliated and may address any correspondence relating to an associated person to the

futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, introducing broker, commodity pool operator, commodity trading advisor, or leverage transaction merchant with which the associated person or the applicant for registration is or will be associated as an associated person.

\* \* \* \* \*

10. Section 3.31 is amended by revising paragraphs (a)(1), (b) and (c)(2) to read as follows:

**§ 3.31 Deficiencies, inaccuracies, and changes, to be reported.**

(a)(1) Each applicant or registrant as a futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, introducing broker, commodity pool operator, commodity trading advisor, or leverage transaction merchant shall, in accordance with the instructions thereto, promptly correct any deficiency or inaccuracy in Form 7-R or Form 8-R which no longer renders accurate and current the information contained therein. Each such correction shall be made on Form 3-R and shall be prepared and filed in accordance with the instructions thereto. Provided, however, that where a registrant is reporting a change in the form of organization from or to a sole proprietorship, the registrant must file a Form 7-W regarding the pre-existing organization and a Form 7-R regarding the newly formed organization.

\* \* \* \* \*

(b)(1) Each applicant for registration or registrant as a floor broker, floor trader or associated person, and each principal of a futures commission merchant, retail foreign exchange dealer, introducing broker, commodity pool operator, commodity trading advisor, or leverage transaction merchant must, in accordance with the instructions thereto, promptly correct any deficiency or inaccuracy in the Form 8-R or supplemental statement thereto which renders no

longer accurate and current the information contained in the Form 8-R or supplemental statement. Each such correction must be made on Form 3-R and must be prepared and filed in accordance with the instructions thereto.

(2) Each applicant for registration or registrant as a swap dealer or major swap participant and each principal of a swap dealer or major swap participant, must, in accordance with the instructions thereto, promptly correct any deficiency or inaccuracy in the Form 8-R or supplemental statement thereto which renders no longer accurate and current the information contained in the Form 8-R or supplemental statement. Each such correction must be made on Form 3-R and must be prepared and filed in accordance with the instructions thereto.

(c) \* \* \*

(2) Each person registered as, or applying for registration as, a futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, introducing broker, commodity pool operator, commodity trading advisor, or leverage transaction merchant must, within thirty days after the termination of the affiliation of a principal with the registrant or applicant, file a notice thereof with the National Futures Association.

\* \* \* \* \*

11. Section 3.33 is amended by:

- a. Revising paragraph (a) introductory text;
- b. Revising paragraph (b) introductory text and paragraphs (b)(6)(vi) and (b)(6)(vii);
- c. Adding new paragraphs (b)(6)(viii) and (b)(6)(ix); and
- d. Revising paragraph (e) to read as follows:

**§ 3.33 Withdrawal from registration.**

(a) A futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, introducing broker, commodity pool operator, commodity trading advisor, leverage transaction merchant, floor broker or floor trader may request that its registration be withdrawn in accordance with the requirements of this section if:

\* \* \* \* \*

(b) A request for withdrawal from registration as a futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, introducing broker, commodity pool operator, commodity trading advisor, or leverage transaction merchant must be made on Form 7-W, and a request for withdrawal from registration as a floor broker or floor trader must be made on Form 8-W, completed and filed with the National Futures Association in accordance with the instructions thereto. The request for withdrawal must be made by a person duly authorized by the registrant and must specify:

\* \* \* \* \*

(6) \* \* \*

(vi) The nature and extent of any pending customer, retail forex customer, option customer, leverage customer, swap counterparty or commodity pool participant claims against the registrant, and, to the best of the registrant's knowledge and belief, the nature and extent of any anticipated or threatened customer, option customer, leverage customer, swap counterparty or commodity pool participant claims against the registrant;

(vii) In the case of a futures commission merchant or a retail foreign exchange dealer which is a party to a guarantee agreement, that all such agreements have been or will be terminated in accordance with the provisions of § 1.10(j) of this chapter not more than thirty days after the filing of the request for withdrawal from registration;

(viii) In the case of a swap dealer, that the person will not engage in any new activity described in the definition of the term “swap dealer” in section 1a(49) of the Act, as such term may be further defined by the Commission; and

(ix) In the case of a major swap participant, that the person will not engage in any new activity described in the definition of the term “major swap participant” in section 1a(33) of the Act, as such term may be further defined by the Commission.

\* \* \* \* \*

(e) A request for withdrawal from registration as a futures commission merchant, retail foreign exchange dealer, swap dealer, major swap participant, introducing broker, commodity pool operator, commodity trading advisor, or leverage transaction merchant on Form 7-W, and a request for withdrawal from registration as a floor broker or floor trader on Form 8-W, must be filed with the National Futures Association and a copy of such request must be sent by the National Futures Association within three business days of the receipt of such withdrawal request to the Commodity Futures Trading Commission, Division of Swap Dealer and Intermediary Oversight, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. In addition, any floor broker or floor trader requesting withdrawal from registration must file a copy of his Form 8-W with each contract market that has granted him trading privileges. Within three business days of any determination by the National Futures Association under § 3.10(d) to treat the failure by a registrant to file an annual Form 7-R as a request for withdrawal, the National Futures Association shall send the Commission notice of that determination.

\* \* \* \* \*

12. Part 23 is added to read as follows:

**PART 23 – SWAP DEALERS AND MAJOR SWAP PARTICIPANTS**

## **Subpart A – [Reserved]**

Sec.

23.1 – 23.20 [Reserved]

## **Subpart B – Registration**

23.21 Registration of swap dealers and major swap participants.

23.22 Associated persons of swap dealers and major swap participants.

23.23 – 23.40 [Reserved]

Authority: 7 U.S.C. 1a, 2, 6, 6a, 6b, 6c, 6p, 6s, 9, 9a, 13b, 13c, 16a, 18, 19, 21 as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (Jul. 21, 2010).

## **Subpart A – Definitions**

§§ 23.1 – 23.20 [Reserved]

## **Subpart B – Registration**

### **§ 23.21 Registration of swap dealers and major swap participants.**

(a) Each person who comes within the definition of the term “swap dealer” in section 1a(49) of the Act, as such term may be further defined by the Commission, is subject to the registration provisions under the Act and to Part 3 of this chapter.

(b) Each person who comes within the definition of the term “major swap participant” in section 1a(33) of the Act, as such term may be further defined by the Commission, is subject to the registration provisions under the Act and to Part 3 of this chapter.

(c) Each affiliate of an insured depository institution described in section 716(c) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. No. 111-203 § 716(c),

124 Stat. 1376 (2010)) is required to be registered as a swap dealer if the affiliate is a swap dealer or as a major swap participant if the affiliate is a major swap participant.

**§ 23.22 Associated persons of swap dealers and major swap participants.**

(a) Definition. For the purpose of this section, the term “person” means an “associated person of a swap dealer or major swap participant” as defined in section 1a(4) of the Act and §1.3(aa)(6).

(b) Fitness. No swap dealer or major swap participant may permit a person who is subject to a statutory disqualification under section 8a(2) or 8a(3) of the Act to effect or be involved in effecting swaps on behalf of the swap dealer or major swap participant, if the swap dealer or major swap participant knows, or in the exercise of reasonable care should know, of the statutory disqualification; Provided, however, that the prohibition set forth in this paragraph (b) shall not apply to any person listed as a principal or registered as an associated person of a futures commission merchant, retail foreign exchange dealer, introducing broker, commodity pool operator, commodity trading advisor, or leverage transaction merchant, or any person registered as a floor broker or floor trader, notwithstanding that the person is subject to a disqualification from registration under section 8a(2) or 8a(3) of the Act.

**§§ 23.23 – 23.40 [Reserved]**

**PART 170 – REGISTERED FUTURES ASSOCIATIONS**

13. The authority citation for part 170 continues to read as follows:

Authority: 7 U.S.C. 6p, 12a and 21.

14. Section 170.16 is added to read as follows:

**§ 170.16 Swap dealers and major swap participants.**

Each person registered as a swap dealer or major swap participant must become and remain a member of at least one futures association that is registered under section 17 of the Act and that provides for the membership therein of such swap dealer or major swap participant, as the case may be, unless no such futures association is so registered.

Issued in Washington, D.C. on January 11, 2012, by the Commission.



**David A. Stawick**  
Secretary of the Commission

Appendices to Registration of Swap Dealers and Major Swap Participants —Commission Voting  
Summary and Statements of Commissioners

NOTE: The following appendices will not appear in the Code of Federal Regulations

Appendix 1—Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Sommers, Chilton, O’Malia and Wetjen voted in the affirmative; no Commissioner voted in the negative.

Appendix 2—Statement of Chairman Gary Gensler

I support the final rule to establish a process for the registration of swap dealers and major swap participants. The rule implements the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) mandate that these entities be subject to registration and regulation for their swaps business. Registration will enable the Commodity Futures Trading Commission to monitor swap dealers and major swap participants for compliance with the Dodd-Frank Act and Commission rulemakings. Through regulation of dealers, the Commission will be able to protect

market participants and the public, as well as promote sound risk management practices. The final rule includes a requirement that swap dealers and major swap participants become members of a registered futures association, such as the National Futures Association (NFA).

In addition, I support the order delegating to the NFA the authority to register swap dealers and major swap participants. This will help efficiently allocate resources and provide the Commission with flexibility.