

**17 CFR Parts 3, 23 and 170**

**RIN 3038 – AC95**

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

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Proposed rules.

**SUMMARY:** The Commodity Futures Trading Commission (“Commission” or “CFTC”) is proposing to adopt regulations that would establish the process for registering swap dealers (“SDs”) and major swap participants (“MSPs,” and collectively with SDs, “swaps entities”). The proposed regulations also would require swaps entities to become members of the National Futures Association (“NFA”) and to confirm that persons associated with them are not subject to a statutory disqualification under the Commodity Exchange Act (“CEA”) (“Proposal”). The Commission is making the Proposal 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:** Comments must be received on or before **[INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** You may submit comments, identified by RIN 3038-AC95, by any of the following methods:

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

- Mail: Send to David A. Stawick, Secretary, Commodity Futures Trading Commission, 1155 21st Street, N.W., Washington, DC 20581.
- Hand delivery/Courier: Same as Mail above.
- Federal eRulemaking Portal: <http://www.regulations.gov/search/index.jsp> Follow the instructions for submitting comments.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to [www.cftc.gov](http://www.cftc.gov). You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that is exempt from disclosure under the Freedom of Information Act,<sup>1</sup> a petition for confidential treatment of the exempt information may be submitted according to the procedures set forth in Commission Regulation 145.9.<sup>2</sup> The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from [www.cftc.gov](http://www.cftc.gov) that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

**FOR FURTHER INFORMATION CONTACT:** Barbara S. Gold, Associate Director, Christopher W. Cummings, Special Counsel, or Elizabeth Miller, Attorney-Advisor, Division of Clearing and Intermediary Oversight, 1155 21st Street, NW, Washington, DC 20581. Telephone

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

<sup>2</sup> Commission regulations referred to herein are found at 17 CFR Ch. 1 (2010), as amended by 75 FR 55409 (Sep. 10, 2010). They are accessible on the Commission's website.

number: 202-418-5450 and electronic mail: [bgold@cftc.gov](mailto:bgold@cftc.gov), [ccummings@cftc.gov](mailto:ccummings@cftc.gov) or [emiller@cftc.gov](mailto:emiller@cftc.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

On July 21, 2010, President Obama signed the Dodd-Frank Act.<sup>3</sup> Title VII of the Dodd-Frank Act<sup>4</sup> amended the CEA<sup>5</sup> to establish a comprehensive new regulatory framework for swaps and security-based swaps. The 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 derivative products; (3) creating robust recordkeeping and real-time reporting regimes; and (4) enhancing the Commission's rulemaking and enforcement authorities with respect to, among others, all registered entities and intermediaries subject to the Commission's oversight. The regulations in the Proposal concern the process for registering SDs and MSPs.

#### A. Relevant Definitions

In furtherance of the foregoing legislative goals, Section 721(a) of the Dodd-Frank Act amended the definitions of various existing terms in the CEA and added definitions of numerous new terms to the CEA. Relevant to the Proposal are the definitions of the new terms "swap

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<sup>3</sup> See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at <http://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm>.

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

<sup>5</sup> 7 U.S.C. 1 et seq. (2006).

dealer,” “major swap participant,” and “associated person of a swap dealer or major swap participant.” The Commission currently is developing regulations to implement the new “swap dealer” and “major swap participant” definitions (“Definitional Rulemakings”).<sup>6</sup> In light of the statutory mandate in new Section 4s(b)(5) of the CEA that “Rules under this section shall provide for the registration of swap dealers and major swap participants not later than 1 year after the date of enactment of the [Dodd-Frank] Act,” the Commission is proposing rules that will establish a process for the registration of swaps entities by this one-year deadline – i.e., by July 21, 2011.<sup>7</sup>

## 1. Swap Dealer

New Section 1a(49) of the CEA defines the term “swap dealer” as follows:

(A) IN GENERAL.—The term ‘swap dealer’ means any person who—

- (i) holds itself out as a dealer in swaps;
- (ii) makes a market in swaps;
- (iii) regularly enters into swaps with counterparties as an ordinary course of business for its own account; or
- (iv) engages in any activity causing the person to be commonly known in the trade as a dealer or market maker in swaps,

provided however, in no event shall an insured depository institution be considered to be a swap dealer to the extent it offers to enter into a swap with a customer in connection with originating a loan with that customer.<sup>8</sup>

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<sup>6</sup> See Sections 721(b) and (c) of the Dodd-Frank Act, which provide the Commission with authority to define these new terms.

<sup>7</sup> See also Paragraph C of this Section I, below.

<sup>8</sup> New Section 1a(49) further provides:

- (B) INCLUSION.—A person may be designated as a swap dealer for a single type or single class or category of swap or activities and considered not to be a swap dealer for other types, classes, or categories of swaps or activities.

## 2. Major Swap Participant

New Section 1a(33) of the CEA defines the term “major swap participant” as follows:

(A) IN GENERAL.—The term ‘major swap participant’ means any person who is not a swap dealer, and—

(i) maintains a substantial position in swaps for any of the major swap categories as determined by the Commission, excluding—

(I) positions held for hedging or mitigating commercial risk; and

(II) positions maintained by any employee benefit plan (or any contract held by such a plan) as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002) for the primary purpose of hedging or mitigating any risk directly associated with the operation of the plan;

(ii) whose outstanding swaps create substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets; or

(iii)(I) is a financial entity that is highly leveraged relative to the amount of capital it holds and that is not subject to capital requirements established by an appropriate Federal banking agency; and

(II) maintains a substantial position in outstanding swaps in any major swap category as determined by the Commission.<sup>9</sup>

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(C) EXCEPTION.—The term ‘swap dealer’ does not include a person that enters into swaps for such person’s own account, either individually or in a fiduciary capacity, but not as a part of a regular business.

(D) DE MINIMIS EXCEPTION.—The Commission shall exempt from designation as a swap dealer an entity that engages in a de minimis quantity of swap dealing in connection with transactions with or on behalf of its customers. The Commission shall promulgate regulations to establish factors with respect to the making of this determination to exempt.

<sup>9</sup> This section further provides:

### 3. Associated Person of a Swap Dealer or Major Swap Participant

New Section 1a(4) of the CEA defines the term “associated person of a swap dealer or major swap participant” as follows:

(A) **IN GENERAL.**— The term ‘associated person of a swap dealer or major swap participant’ means a person who is associated with a swap dealer or major swap participant as a partner, officer, employee, agent (or any person occupying a similar status or performing similar functions), in any capacity that involves—

(i) the solicitation or acceptance of swaps; or

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(B) **DEFINITION OF SUBSTANTIAL POSITION.**—For purposes of subparagraph (A), the Commission shall define by rule or regulation the term ‘substantial position’ at the threshold that the Commission determines to be prudent for the effective monitoring, management, and oversight of entities that are systemically important or can significantly impact the financial system of the United States. In setting the definition under this subparagraph, the Commission shall consider the person’s relative position in uncleared as opposed to cleared swaps and may take into consideration the value and quality of collateral held against counterparty exposures.

(C) **SCOPE OF DESIGNATION.**—For purposes of subparagraph (A), a person may be designated as a major swap participant for 1 or more categories of swaps without being classified as a major swap participant for all classes of swaps.

(D) **EXCLUSIONS.**—The definition under this paragraph shall not include an entity whose primary business is providing financing, and uses derivatives for the purpose of hedging underlying commercial risks related to interest rate and foreign currency exposures, 90 percent or more of which arise from financing that facilitates the purchase or lease of products, 90 percent or more of which are manufactured by the parent company or another subsidiary of the parent company.

(ii) the supervision of any person or persons so engaged.<sup>10</sup>

**B. Registration Requirements for SDs and MSPs**

New Section 4s(a) of the CEA<sup>11</sup> sets forth the registration requirements for 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.

(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.

New Section 4s(b)<sup>12</sup> directs the Commission to adopt rules that provide for the registration of SDs and MSPs. New Section 4s does not direct the Commission to adopt rules that provide for the registration of associated persons of SDs or MSPs. However, new 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

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<sup>10</sup> New section 1a(4) further provides:

(B) EXCLUSION.— Other than for purposes of section 4s(b)(6), the term ‘associated person of a swap dealer or major swap participant’ does not include any person associated with a swap dealer or major swap participant the functions of which are solely clerical or ministerial.

<sup>11</sup> Section 4s(a) was added to the CEA by Section 731 of the Dodd-Frank Act.

<sup>12</sup> Section 4s(b) similarly was added to the CEA by Section 731 of the Dodd-Frank Act.

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 Proposal, the Commission intends that a statutory disqualification is a disqualification under Section 8a(2) or 8a(3) of the CEA.<sup>13</sup>

Section 4s further directs the Commission to adopt rules that 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, trading duties, chief compliance officer,<sup>14</sup> and, with respect to uncleared swaps, segregation<sup>15</sup> (collectively, “Section 4s Requirements”). The Section 4s Requirements are being addressed by other rulemakings. Their impact on the registration process is discussed below at Paragraph C of this Section I.

Additionally, Section 716 of the Dodd-Frank Act 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>16</sup> Under Section 716(c), an IDI

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<sup>13</sup> 7 U.S.C. 12a(2) and 12a(3). These sections of the CEA contain an extensive list of matters that constitute grounds to 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.

<sup>14</sup> New Sections 4s(e) through (k), respectively, added to the CEA by Dodd-Frank Section 731.

<sup>15</sup> New Section 4s(l), added to the CEA by Dodd-Frank Section 724(c).

<sup>16</sup> Specifically, the prohibition against Federal assistance to swaps entities is set forth in paragraph (a) of Section 716 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.

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>17</sup> The Push-Out Affiliate, however, would not have access to Federal assistance. The Commission is not proposing any specific requirements at this time for any Push-Out Affiliate. The Commission does intend, however, 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.

Part 3 of the Commission’s regulations governs registration under the CEA. Currently, Part 3 is not applicable to swaps entities. To fulfill the statutory mandates of the Dodd-Frank Act, and as is discussed more fully below, the Commission is proposing amendments to Regulations 3.2, 3.4, 3.10, 3.21, 3.30, 3.31 and 3.33, and adoption of new Regulation 23.21. To

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Dodd-Frank Section 716(d) carves out certain swap 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>17</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.

further accomplish these aims, the Commission also is proposing adoption of new Regulations 23.22 and 170.16.<sup>18</sup>

### C. Phased Implementation

As is noted above, the Dodd-Frank Act requires the Commission to promulgate rules providing for the registration of SDs and MSPs not later than July 21, 2011.<sup>19</sup> Section 754 of the Dodd-Frank Act, however, permits the other separate rulemakings establishing specific criteria in the SD and MSP definitions that determine who must register, as well as the Section 4s Requirements, to become effective after July 21, 2011.<sup>20</sup> In order to meet the prescribed deadline to adopt rules providing for registration of swaps entities, even though the Definitional Rulemakings will not be effective until a later date and the criteria of many of the Section 4s Requirements will not be known with certainty until a later date, the Commission is proposing a provisional registration procedure for the transitional period between the July 21, 2011 date by which regulations establishing a process for swaps entities' registration must be in place and the effective dates of the Definitional Rulemakings and the rulemakings implementing the Section 4s

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<sup>18</sup> New Regulation 23.22 would pertain to requirements applicable to SDs and MSPs with regard to associated persons and new Regulation 170.16 would require SDs and MSPs to become members of NFA. As is discussed in Item II.C.2.b. below, the Commission specifically is requesting comment on certain matters related to these proposed requirements.

<sup>19</sup> New Section 4s(b)(5) of the CEA.

<sup>20</sup> Section 754 provides that:

Unless otherwise provided in this title, the provisions of this subtitle [Subtitle A – Regulation of Over-the-Counter Swaps Markets] shall take effect on the later of 360 days after the date of enactment of this subtitle [i.e., July 15, 2011], or, to the extent a provision of this subtitle requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of this subtitle.

Requirements. This approach is intended to ensure continuity of the business operations of existing swaps entities, and to avoid undue market disruption.

Moreover, to provide sufficient processing time for the initial set of applicants so that persons may be registered at the earliest possible date, persons would be able to begin applying for registration ahead of the July 21 date, beginning on April 15, 2011.<sup>21</sup> This process, which would be entirely voluntary, would permit a person that anticipates that it may be considered to be a “swap dealer” or “major swap participant” to apply for and obtain registration – albeit on a provisional basis – as soon as possible. SDs and MSPs who had not applied for registration by July 21 would be required to apply for registration not later than the effective date of the applicable Definitional Rulemaking.<sup>22</sup> In light of the possibility that the rulemakings regarding the operations and activities of swaps entities will have later compliance deadlines than the effective date of the Definitional Rulemakings, provisionally registered swaps entities would be permitted to come into compliance with the Section 4s Requirements within the compliance deadlines set forth in the respective final implementing rulemakings.<sup>23</sup> The Commission intends that upon the filing of an application these swaps entities would be provisionally registered, and

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<sup>21</sup> This advance application procedure is authorized by Section 712(f) of the Dodd-Frank Act, which states in relevant part:

[N]otwithstanding the effective date of any provision of this Act, the Commodity Futures Trading Commission . . . may, in order to prepare for the effective dates of the provisions of this Act . . . register persons under the provision of this Act . . . provided, however, that no [such] action . . . shall become effective prior to the effective date applicable to such action under the provisions of this Act.

<sup>22</sup> See Dodd-Frank Act Sections 721(b) and (c).

<sup>23</sup> For the purpose of this Federal Register release, the term “compliance” includes “ability to comply,” to the extent that a regulation subsequently adopted requires demonstration of the ability to comply. See proposed Regulation 3.10(a)(1)(v)(A).

would remain registered so long as they timely established compliance with the various Section 4s Requirements and met the standard fitness requirements. Swaps entities applying for registration after July 21, 2011 would be subject to the same provisional registration process but would have to demonstrate compliance with any applicable regulation for which a compliance deadline had passed by the time of the initial filing.

Once all of the Section 4s Requirements are adopted and effective, provisional registrants would become fully registered SDs and MSPs, provided that they demonstrate compliance with all applicable regulations. SDs and MSPs who failed to demonstrate compliance would cease to be registered, would be required to withdraw their registration application and would be prohibited from engaging in any subsequent new activity within the SD or MSP definition, as the case may be.<sup>24</sup> After all of the rulemakings implementing the Section 4s Requirements became effective, no provisional registrations would be granted.

By proposing a system of phased implementation, the Commission has endeavored to accomplish the registration of SDs and MSPs in a manner that is both efficient and minimally disruptive to on-going business. The Commission seeks comment on this or alternative approaches to registration, including extension of the effective date of the registration rules until such time as rules further defining the terms “swap dealer” and “major swap participant,” and rulemakings implementing the Section 4s Requirements, become effective.

#### D. Request for Comment on Allocation of Responsibilities

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<sup>24</sup> See Section II.B.2., Regulation 3.10, for a fuller discussion of this matter.

Currently, when a person registers with the Commission, they apply electronically via NFA’s online registration system.<sup>25</sup> NFA conducts a fitness review of the applicant, including background checks of principals and associated persons, and proficiency testing of associated persons. Presently, all registered futures commission merchants (“FCMs”), introducing brokers (“IBs”), retail foreign exchange dealers (“RFEDs”), commodity pool operators (“CPOs”) and those registered commodity trading advisors (“CTAs”) who manage or exercise discretion over client accounts must be members of NFA in order to conduct futures business with the public.<sup>26</sup> Associated persons of NFA Members must become NFA Associates.<sup>27</sup> On an ongoing basis, NFA audits registrants for compliance with regulatory requirements applicable to the particular registration category.

In the case of SDs and MSPs, the Commission proposes that an application for registration would commence with the filing of Form 7-R by means of NFA’s online registration system.<sup>28</sup> SDs and MSPs would also file accompanying Forms 8-R for the entity’s principals by means of NFA’s online registration system to verify that the principal is not subject to a statutory disqualification.<sup>29</sup> NFA would conduct a background check, and would provide to the SD or

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<sup>25</sup> NFA is registered as a futures association in accordance with Section 17 of the CEA, 7 U.S.C. 21.

<sup>26</sup> See NFA Bylaw 1101.

<sup>27</sup> See NFA Bylaw 301(b).

<sup>28</sup> Form 7-R is the form filed with NFA by entities – e.g., FCMs, IBs, RFEDs, CPOs and CTAs. The information called for includes the firm’s full legal name and form of organization, business address, business records location, branch office location, principals, contact information and any disciplinary history. Form 7-R is filed electronically and not as a paper form.

<sup>29</sup> Form 8-R is the form that is filed with NFA by the entity applicant on behalf of certain natural persons. It calls for the person’s name, address and other identifying information, any

MSP and to the Commission any information that would indicate the principal is unfit or subject to a statutory disqualification. Currently, the structure for oversight of existing registrants' activities is that the Commission has delegated to NFA responsibility for conducting all aspects of the registration process and for monitoring for compliance with all subsequent requirements.<sup>30</sup> Along these lines, then, the Commission is proposing to adopt Regulation 170.16 to include SDs and MSPs among the registrants that are required to become and remain members of at least one registered futures association.<sup>31</sup>

The Commission believes that there are three options with respect to who should be responsible for determining initial and ongoing compliance by swaps entities with respect to the Section 4s Requirements and all other applicable requirements. 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

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criminal history, any regulatory disciplinary history, employment, and educational history. The entity submits the Form 8-R and the person confirms the accuracy of the information. Form 8-R also is filed electronically and not as a paper form.

<sup>30</sup> See, e.g., 75 FR 55310 (Sep. 10, 2010), delegating registration functions for RFEDs, which includes the determination of compliance with net capital requirements, to NFA.

<sup>31</sup> Although Section 17 of the CEA provides that “[a]ny association of persons may be registered with the Commission as a registered futures association,” to date, NFA is the sole association that has applied for and has been issued registration as a futures association with the Commission.

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).

E. Extraterritorial Application of Swap Dealer and Major Swap Participant Registration Requirements

New Section 2(i) of the CEA, which was added by Section 722(d) of the Dodd-Frank Act, states that provisions of the CEA that were enacted by Title VII of the Dodd-Frank Act (which includes the definition of swap dealer, and the registration requirement) shall not apply to activities outside the United States unless those activities “have a direct and significant connection with activities in, or effect on, commerce of the United States,” or contravene rules or regulations the Commission may promulgate to prevent evasion.

In view of Sections 2(i) and 4s(a)(1), the Commission must determine under which circumstances a person who engages in the activities set forth in new Section 1a(49) of the CEA (“swap dealing activities”) outside the U.S. shall be required to register as an SD. By its terms, Section 2(i) sets a floor that must be met for the swap provisions of the CEA to apply abroad. Thus, a person whose swap dealing activity has no connection or effect of any kind, direct or indirect, whether through affiliates or otherwise, to U.S. commerce would not be required to register as a swap dealer. The Commission also recognizes the role that considerations of international comity play in determining the proper scope of extraterritorial application of federal statutes.<sup>32</sup>

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<sup>32</sup> See generally, Hartford Fire Insurance Co. v. California, 509 U.S. 764, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993); 1 Restatement (Third) of Foreign Relations Law of the United States §§ 402-403 (1987).

The Commission generally would not require a person to register as a swap dealer if their only connection to the U.S. was that the person uses a U.S.-registered swap execution facility, designated clearing organization or designated contract market in connection with their swap dealing activities,<sup>33</sup> or reports swaps to a U.S.-registered swap data repository.<sup>34</sup> On the other hand, a person outside the U.S. who engages in swap dealing activities and regularly enters into swaps with U.S. persons would likely be required to register as a swap dealer.

The Commission requests comment as to what level of swap dealing activity outside the U.S. would qualify as having a direct and significant connection with activities in or effect on commerce of the U.S., thereby requiring a person outside the U.S. to register as an SD. In particular, in view of the global nature of the swap markets and the ability to transfer swap-related risks within affiliated groups, the Commission requests comment on when swap dealing activity with or by non-U.S. affiliates of U.S. persons has a “direct and significant connection with activities in, or effect on” U.S. commerce for purposes of Section 2(i) of the CEA. For example, to what extent do persons outside the U.S. who engage in swap dealing activity with non-U.S. affiliates of U.S. persons (such as the non-U.S. subsidiary of a corporate parent headquartered in the U.S.) engage in swap dealing activity that has a direct and significant connection with activities in, or effect on, U.S. commerce?

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<sup>33</sup> Cf. 17 C.F.R. 3.10 (foreign broker not required to register as FCM if it: (1) limits its customers to customers located outside the U.S.; (2) confines its commodity interest activities to areas outside the U.S.; and (3) submits its trades for clearing on an omnibus basis through a registered FCM; also, registration exemption for any foreign person acting in the capacity of an IB, CTA or CPO solely with respect to customers located outside the U.S., provided that all commodity interest transactions are submitted for clearing to a registered FCM).

<sup>34</sup> Such persons, however, may be subject to other requirements imposed on swap dealers, such as reporting obligations. Further, the provisions of the CEA and the Commission’s regulations applicable to “any person” will apply as well, such as those prohibiting fraud and manipulation.

Registration of MSPs raises different jurisdictional issues, because the definition of MSP specifically focuses on the degree of risk that an entity's swaps pose to U.S. counterparties and the U.S. market. Thus, the analysis of whether a non-U.S. entity should register as an MSP would turn upon, among other things, swap positions with U.S. counterparties (including the use of a U.S. clearing agency or swap execution facility) or that involve U.S. mails or any means or instrumentality of interstate commerce. The Commission requests comment on these interpretive issues.

## **II. Section-by-Section Analysis**

### **A. Structure and Approach**

As noted above, the Dodd-Frank Act requires SDs and MSPs to be registered as such with the Commission, and it requires the Commission to adopt rules providing for registration of SDs and MSPs, as well as rules regulating their activities. To the extent practicable, the Commission intends to place requirements that are unique to SDs and MSPs in a new Part 23 of its regulations. However, as is noted above, the Commission's existing registration process for futures, commodity options and retail forex intermediaries, as well as for floor traders and floor brokers, is extensively set forth in Part 3 of the regulations. Replication in new Part 23 of all of the registration process requirements appropriate for SDs and MSPs would be unwieldy and potentially confusing. Accordingly, while two proposed new regulations would be in new Part 23, and one proposed new regulation would be in Part 170, most of the proposed changes in this rulemaking concern amendments to existing provisions of Part 3.<sup>35</sup>

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<sup>35</sup> In this regard, however, it has not been necessary for the Commission to propose any amendments to the following Part 3 regulations in order to subject SDs and MSPs to registration with the CFTC: 3.1, 3.11, 3.12, 3.13, 3.22, 3.40-3.47, 3.50-3.64, 3.70, and 3.75. This is because these regulations either apply to "applicants" or "registrants" generally, such that they would also

## B. Proposed Amendments to Existing Regulations

Some of the proposed amendments to Part 3 consist entirely of adding appropriate references to SDs and MSPs in existing regulations.<sup>36</sup> These proposed amendments will not be separately discussed. Other proposed amendments, however, involve substantive changes to existing regulations because of the particular attributes or characteristics of SDs, MSPs and swaps. They are separately discussed below.

1. Regulation 3.2 – Registration processing by the National Futures Association; notification and duration of registration

Regulation 3.2 generally provides for performance by NFA of registration, temporary licensing and denial, revocation or suspension of registration. Paragraph (c) of this regulation currently requires NFA to notify various registration applicants when a temporary license has been granted under provisions of Regulation 3.40. The Commission proposes to amend Regulation 3.2(c) to add paragraph (c)(3), which would provide that NFA will notify an applicant for registration as an SD or MSP (pursuant to the provisional application procedure described below, in the discussion of proposed amendments to Regulation 3.10) that the applicant has been granted provisional registration.

2. Regulation 3.10 – Registration of futures commission merchants, retail foreign exchange dealers, introducing brokers, commodity trading advisors, commodity pool operators and leverage transaction merchants

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apply to swaps entities, or they apply to other specific registration categories (such as floor broker or floor trader), such that they would not pertain to swaps entities.

<sup>36</sup> See the proposed amendments to Regulations: 3.4(a); 3.10 title and paragraphs (a)(1)(i), (b)(1) and (d); 3.21(c); 3.30(a); 3.31(a)(1) and (c); and 3.33(a), (b) introductory text and (e).

Regulation 3.10 sets forth the basic registration scheme for various firms. The Proposal would amend the regulation to accommodate SD and MSP registration. It would require an applicant for registration as an SD or MSP to commence the registration process by filing Form 7-R with NFA.<sup>37</sup> This is the same form currently used by an entity applying for registration as an FCM, IB, RFED, CPO, or CTA. Like those other registrants, an SD's or MSP's Form 7-R would be accompanied by a Form 8-R and a fingerprint card for each principal.<sup>38</sup> NFA would then conduct the same background check it performs with respect to other applicants for registration.<sup>39</sup>

Concurrently with or subsequent to the filing of the Form 7-R, the applicant for SD or MSP registration would be required to demonstrate their compliance with such regulations as the Commission adopts implementing the Section 4s Requirements.<sup>40</sup> Moreover, filing of Form 7-R by an SD or MSP would authorize the Commission to conduct on-site inspection to ascertain compliance with those obligations.<sup>41</sup> However, this filing would not require the Commission to

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<sup>37</sup> See the proposed amendment to Regulation 3.10(a)(1)(i). SDs and MSPs would thus be subject to the requirement in Regulation 3.10(a)(2) to file a Form 8-R for each natural person who is a principal of the firm, along with a fingerprint card for that person.

<sup>38</sup> See Section 8a(1) of the CEA. The term "principal" is defined in Regulation 3.1(a) to include generally: an officer, director, partner or similar person exercising control over an entity's activities; a person who owns or has power to vote ten percent or more of the entity's securities; or a person who has contributed ten percent or more of the entity's capital.

<sup>39</sup> In the event that final registration rules are adopted and published pursuant to the Proposal, the Commission would issue an order officially delegating these application and background check functions to NFA. The delegation order would require NFA to notify the Commission if it found information regarding an applicant indicating that the applicant was unfit or that it was subject to a statutory disqualification.

<sup>40</sup> See proposed Regulation 3.10(a)(1)(v)(A).

<sup>41</sup> See proposed Regulation 3.10(a)(1)(v)(B).

conduct such inspection. As is stated above, the Commission specifically is requesting comment on whether it or NFA (by delegation and subject to Commission oversight) should be directly responsible for ensuring compliance with the Section 4s Requirements.

As is noted above, the Commission is proposing a provisional registration process for the transitional period between adoption of regulations providing for registration of swaps entities, and the latest date by which applicants must comply with the final rulemakings for the Section 4s Requirements. This provisional registration process and the transition to full compliance would be incorporated into Regulation 3.10(a)(1)(v)(C). As proposed, a swaps entity would be able to file a Form 7-R at any time beginning April 15, 2011, which filing would cause the person to be provisionally registered. From and after the effective date(s) of the Definitional Rulemakings, a person within the SD or MSP definition must file a Form 7-R, and until such time as the last of the rulemakings implementing the Section 4s Requirements becomes effective, such person will also be provisionally registered. As each of the Section 4s Requirements rulemakings becomes effective, a provisionally registered SD or MSP would be required to demonstrate compliance within the timeframe required by such rulemaking. Once all of the Section 4s Requirement rulemakings are effective and an applicant has timely demonstrated compliance, the applicant would be notified that its provisional registration has become a full registration. If the applicant failed to demonstrate compliance within the prescribed period of time, it would be so notified and required to withdraw its registration application and its provisional registration would cease. In the event the applicant failed to withdraw its registration application within 30 days following receipt of notice that its application was deficient, the application would be deemed withdrawn and its provisional registration would cease. The regulation would provide that the Commission could extend the time to cure the deficiency upon written request from the applicant. Upon

withdrawal – whether on the part of the applicant or upon receipt of notice of deficiency – the applicant would be prohibited from subsequently engaging in any new activity described in Section 1a(33) or 1a(49) of the CEA. Finally, the regulation would make clear that it would not affect the terms of any swap transaction to which the applicant is a party entered into prior to the notice of deficiency.<sup>42</sup>

The same process would apply for persons applying for registration as an SD or MSP on or after July 21, 2011. Filing of Form 7-R would commence provisional registration, and would subject the applicant to immediate compliance with any rulemaking affecting it as an SD or MSP, insofar as the rulemaking was effective and compliance required at the time the applicant filed its Form 7-R. As additional rulemakings phase in, the provisionally registered SD or MSP would be required to meet the applicable compliance deadlines. Failure to do so would result in cessation of registration under the terms and conditions discussed in the preceding paragraph of this Federal Register release.

Swaps entities, like other registrants, would be required to review and update at least annually the information they had provided to NFA in their application. Additionally, swaps

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<sup>42</sup> See Proposed Regulation 3.10(a)(1)(v)(D)(3). Section 739 of the Dodd-Frank Act, in language to be codified as new Section 22(a)(5)(A) of the CEA, 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.

entities would be required to review and update at least annually the information they had provided to the Commission.<sup>43</sup>

### 3. Regulation 3.21 – Exemption from fingerprinting requirement in certain cases

Regulation 3.21 generally provides for submission of a copy of a fingerprint card previously submitted to the Federal Bureau of Investigation (“FBI”), instead of a new fingerprint card, and it provides for exemption from the fingerprint requirement for outside directors of a firm who are not directly involved in the firm’s activities subject to Commission regulation. As is currently true with other firms registering with the Commission, in lieu of submitting a fingerprint card in connection with the firm’s registration, under the Proposal an outside director of an SD or MSP would be able to submit a notice stating that the outside director is not engaged in soliciting business for the firm, handling its transactions, keeping its records or supervising those who are so engaged.<sup>44</sup>

### 4. Regulation 3.31 – Deficiencies, inaccuracies and changes to be reported

Regulation 3.31 generally sets forth the requirements and responsibility for correcting and updating the information submitted by applicants for registration on Form 7-R and Form 8-R. Each applicant for registration or registrant as a swaps entity would be required to promptly correct any inaccuracy or deficiency of the information in a Form 7-R or Form 8-R it has filed. Each principal of a swaps entity would likewise be responsible for correcting anything that renders the information in a Form 8-R filed on behalf of such person inaccurate or incomplete.

### 5. Regulation 3.33 – Withdrawal from registration

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<sup>43</sup> See the proposed amendment to Regulation 3.10(d).

<sup>44</sup> See the proposed amendment to Regulation 3.21(c).

Regulation 3.33 generally sets forth the forms, procedures and requirements for withdrawal from registration, and when such withdrawal becomes effective. In order to withdraw from registration, under the Proposal the Form 7-W that a swaps entity would file would specify the nature and extent of any swap counterparty actual, anticipated or threatened claims against the registrant.<sup>45</sup> Additionally, an SD's Form 7-W would specify that the person will not engage in any new activity described in the definition of the term "swap dealer"<sup>46</sup> and an MSP's Form 7-W would specify that the person will not engage in any new activity described in the definition of the term "major swap participant."<sup>47</sup>

As the Commission noted in adopting Regulation 3.33 (then designated as Regulation 1.10f):

Rule 1.10f provides that a request for withdrawal must contain information which is intended to inform the Commission of the status of the registrant making the withdrawal request, to substantiate the registrant's eligibility to withdraw from registration, and to enumerate any outstanding claims of its customers.<sup>48</sup>

Withdrawal of a registration under § 1.10f will become effective 30 days after receipt by the Registration Unit of the Commission's Division of Trading and Markets of a properly completed request.<sup>49</sup> The purpose of the 30 day period

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<sup>45</sup> See the proposed amendment to Regulation 3.33(b)(6)(vi).

<sup>46</sup> See proposed Regulation 3.33(b)(6)(viii).

<sup>47</sup> See proposed Regulation 3.33(b)(6)(ix).

<sup>48</sup> [Footnote in original] As used in § 1.10f, the term "customer" includes the customers of FCMs and the clients of CTAs, as well as the customers of any category of registrant that may be established in the future. Section 1.10f also refers to "commodity pool participants" – *i.e.*, those persons who have a direct financial interest in a commodity pool. See § 4.10(c), 46 FR 26004, 26014 (May 8, 1981).

<sup>49</sup> [Footnote in original] A request will be considered to be "received" when it is delivered to the address specified in the rule.

is to give the Commission time to review the information provided by the registrant to determine if there is any reason why withdrawal should not be allowed.<sup>50</sup>

C. New Part 23

As is stated above, the Commission expects that, to the extent practicable, various Section 4s Requirements will be included in new Part 23. At this juncture, by this Federal Register release, the Commission is proposing that Subpart B of Part 23 include the general requirements for the registration of SDs and MSPs and their obligations with respect to persons associated with them.<sup>51</sup>

1. Proposed Regulation 23.21 – Registration of swap dealers and major swap participants.

Proposed Regulation 23.21 has three paragraphs. Paragraph (a) states that anyone coming within the statutory definition of the term “swap dealer” in Section 1a(49) of the CEA and the Commission’s regulations issued thereunder is subject to the registration provisions under the CEA, and to Part 3 of the Commission’s regulations, and paragraph (b) states that anyone coming within the statutory definition of the term “major swap participant” in Section 1a(33) of the CEA and the Commission’s regulations issued thereunder is subject to the registration provisions under the CEA, and to Part 3 of the Commission’s regulations. Paragraph (c) deals with Push-Out Affiliates, and requires that any Push-Out Affiliate that comes within the statutory definition of an SD or an MSP be registered as an SD or as an MSP, as the case may be.

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<sup>50</sup> 46 FR 48915 (Oct. 5, 1981).

<sup>51</sup> The Commission intends that regulations applicable to the SD and MSP definitions will be placed in Subpart A of Part 23, and accordingly is proposing to reserve Regulations 23.1 through 23.20 for that purpose.

As is stated above, this requirement would apply to Push-Out Affiliates in existence on July 21, 2011, as well as to those that are organized and are active subsequent thereto.

2. Proposed Regulation 23.22 – Requirements applicable in the case of an associated person of a swap dealer or major swap participant

a. The Proposed Regulation

Proposed Regulation 23.22 incorporates the statutory prohibition in new Section 4s(b)(6) against swaps entities permitting persons subject to a statutory disqualification to be associated with them. For the purposes of this regulation, paragraph (a) defines the term “person” as a shorthand substitute for the statutory term “associated person of a swap dealer or major swap participant.” Paragraph (b) restates the statutory prohibition.

b. Request for Comment

Associated persons of existing Commission registrants (e.g., FCMs, IBs, RFEDs, CPOs or CTAs) are required to be registered. 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., an FCM, IB, CPO or CTA 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.<sup>52</sup> 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.

The Commission also requests comment on implementing the statutory prohibition against SDs and MSPs permitting persons subject to a statutory disqualification to be associated with them. Currently, in connection with registration applications for associated persons of existing registrants, NFA conducts a thorough background check in order to determine whether an individual is subject to statutory disqualification. This process includes submission of fingerprint cards, which are sent to the FBI to determine if the applicant has a criminal record. As for associated persons of swaps entities, the Commission is proposing that the responsibility of ensuring that such persons are not subject to statutory disqualification would fall upon the SD or MSP employing them. The Commission seeks comment on how SDs and MSPs could conduct background checks or otherwise fulfill this requirement. Possible alternatives include voluntary or required submission of identification information and fingerprint cards to NFA for the type of fitness review NFA conducts for existing registrants

#### D. New Regulation 170.16

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<sup>52</sup> See Regulation 166.4, which provides in pertinent part that “[e]ach branch office of each Commission registrant must use the name of the firm of which it is a branch for all purposes, and must hold itself out to the public under such name.” and 48 FR 35248, 35252 (Aug. 3, 1983), in which the Commission explained the history of the regulation. See also CFTC Staff Letters 84-10, Comm. Fut. L. Rep. (CCH) ¶22,252 (May 29, 1984) and 84-26, Comm. Fut. L. Rep. (CCH) ¶22,472 (Dec. 6, 1984), in which Commission staff further explained and interpreted this requirement. An entity that solicits for a registrant, but that is not a branch office of the registrant, must register as an IB.

Part 170 of the Commission’s regulations pertains to registered futures associations.<sup>53</sup> It concerns standards governing Commission review of applications for registration as a futures association, the registration statement that a futures association must submit to the Commission, and membership in a registered futures association.<sup>54</sup> With respect to the last subject area, Regulation 170.15 requires that, with the exception of certain “notice-registered” FCMs,<sup>55</sup> each person registered as an FCM “must become and remain a member of” at least one registered futures association that provides for FCM membership (unless no such registered futures association exists). The Commission is proposing that, like FCMs, SDs and MSPs be required to become and remain members of a registered futures association. Proposed Regulation 170.16 would thus closely follow the existing requirement for FCMs in Regulation 170.15.

### **III. Related Matters**

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

The Regulatory Flexibility Act (“RFA”)<sup>56</sup> requires that agencies consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and if so, provide a regulatory flexibility analysis respecting the impact. The Commission has already established certain definitions of “small entities” to be used in evaluating the impact of its rules on such small entities in accordance with the RFA.<sup>57</sup> SDs and

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<sup>53</sup> As is noted above, NFA is the sole association that has applied for and has been issued registration as a futures association with the Commission.

<sup>54</sup> Application forms for NFA membership are incorporated in Form 7-R.

<sup>55</sup> Regulation 3.10(a)(3) provides for notice registration of an FCM (or IB) in the case of certain persons registered as securities brokers or dealers in connection with trading security futures products.

<sup>56</sup> 5 U.S.C. 601 et seq.

<sup>57</sup> 47 FR 18618 (Apr. 30, 1982).

MSPs are new categories of registrant. Accordingly, the Commission has not previously addressed the question of whether such persons are, in fact, small entities for purposes of the RFA.

The Commission previously has determined that FCMs should not be considered to be small entities for purposes of the RFA. The Commission's determination was based in part upon their 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>58</sup> Like FCMs, SDs will be subject to minimum capital and margin requirements, and are expected to comprise the largest global financial firms. The Commission is required to exempt from designation entities that engage in a de minimis level of swaps dealing in connection with transactions with or on behalf of customers. Accordingly, for purposes of the RFA for this and future rulemakings, the Commission is hereby proposing that SDs not be considered "small entities" for essentially the same reasons that FCMs have previously been determined not to be small entities.

The Commission has also previously determined that large traders are not "small entities" for RFA purposes.<sup>59</sup> The Commission considered the size of a trader's position to be the only appropriate test for purposes of large trader reporting.<sup>60</sup> 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. Accordingly, for

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<sup>58</sup> Id. at 18619.

<sup>59</sup> 47 FR at 18620.

<sup>60</sup> Id.

purposes of the RFA for this and future rulemakings, the Commission is hereby proposing that MSPs not be considered “small entities” for essentially the same reasons that large traders have previously been determined not to be small entities.

The Commission is carrying out Congressional mandates by proposing these rules. The Commission is incorporating registration of SDs and MSPs into the existing registration structure applicable to other registrants. In so doing, the Commission has attempted to accomplish registration of SDs and MSPs in the manner that is least disruptive to ongoing business and most efficient and expeditious, consistent with the public interest, and accordingly believes that these registration rules will not present a significant economic burden on any entity subject thereto. Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the proposed rules will not have a significant economic impact on a substantial number of small entities.

#### B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA)<sup>61</sup> imposes certain requirements on Federal agencies (including the Commission) in connection with their conducting or sponsoring any collection of information as defined by the PRA. This proposed rulemaking would result in new collection of information requirements within the meaning of the PRA. The Commission therefore is submitting this proposal to the Office of Management and Budget (OMB) for review. If adopted, responses to this collection of information would be mandatory. The Commission will protect proprietary information according to the Freedom of Information Act and 17 CFR Part 145, “Commission Records and Information.” In addition, Section 8(a)(1) of the CEA strictly prohibits the Commission, unless specifically authorized by the CEA, from making

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<sup>61</sup> 44 U.S.C. 3501 et seq.

public “data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.” The Commission is also required to protect certain information contained in a government system of records according to the Privacy Act of 1974.<sup>62</sup>

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. OMB has not yet assigned a control number to the new collection.

1. Information Provided by Reporting Entities/Persons

The burden associated with the proposed new rules implementing registration of SDs and MSPs is estimated to be 752 hours, 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.

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. These estimates include the time needed to review instructions; 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; adjust the existing ways to comply with any previously applicable instructions and requirements;

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<sup>62</sup> 5 U.S.C. 552a.

train personnel to be able to respond to a collection of information; and transmit or otherwise disclose the information. While staff believes that there may likely be approximately 200 swap dealers, we have taken a conservative approach in estimating that there will be 250 SDs for PRA purposes. The estimated burden was thus calculated as follows:

Form 7-R

Respondents/Affected Entities: 300

Estimated number of responses: 300

Estimated total annual burden on respondents: 0.5 hours

Frequency of collection: On occasion and annually

Burden statement: 300 respondents x 0.5 hours = 150 Burden Hours

Form 8-R

Respondents/Affected Entities: 5 principals per each of 300 SDs and MSPs

Estimated number of responses: 1500

Estimated total annual burden on respondents: 0.4 hours

Frequency of collection: On occasion

Burden statement: 1500 respondents x 0.4 hours = 600 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: 6 minutes

Frequency of collection: On occasion

Burden statement: 20 respondents x 0.1 hours = 2 Burden Hours

2. Information Collection Comments

The Commission invites the public and other federal agencies to comment on any aspect of the reporting and recordkeeping burdens discussed above. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments in order to: (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 to respond, including through the use of automated collection techniques or other forms of information technology.

Comments may be submitted directly to the Office of Information and Regulatory Affairs, by fax at (202) 395-6566 or by e-mail at [OIRAsubmissions@omb.eop.gov](mailto:OIRAsubmissions@omb.eop.gov). Please provide the Commission with a copy of submitted comments so that all comments can be summarized and addressed in the final rule preamble. Refer to the Addresses section of this notice of proposed rulemaking for comment submission instructions to the Commission. A copy of the supporting statements for the collections of information discussed above may be obtained by visiting [RegInfo.gov](http://RegInfo.gov). OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the Federal Register. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication.

### C. Cost-Benefit Analysis

Section 15(a) of the CEA<sup>63</sup> requires the Commission to consider the costs and benefits of its action before issuing a rulemaking under the CEA. By its terms, Section 15(a) does not require the Commission to quantify the costs and benefits of a rule or to determine whether the benefits of the rulemaking outweigh its costs; rather, it simply requires that the Commission “consider” the costs and benefits of its actions. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular rule is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the CEA.

Summary of Proposed Requirements. The proposed rules would create a process to implement the registration requirements for swaps entities under the CEA pursuant to the Dodd-Frank Act generally through amendments to the existing regulatory framework.

Costs. With respect to costs, the Commission has determined that the costs of the new registration requirements imposed on SDs and MSPs will consist primarily of the fees that NFA will charge: (1) for application for registration of SDs and MSPs, which are expected to be \$500 per application; (2) to process fingerprints and background information for principals, which are expected to be \$85 per person; and (3) for NFA membership, which are expected to be \$7,500 for an SD and \$5,600 for an MSP annually. Time and expense to registrants relating to the registration process alone are expected to be relatively minimal as the forms are not complicated.

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<sup>63</sup> 7 U.S.C. 19(a).

Time and expense relating to the new registration requirements are therefore not expected to be a barrier to entry of registrants or to adversely affect the liquidity of any markets.

For purposes of this rulemaking, the costs of the new registration requirements do not include costs to registrants resulting from any need to create or augment an internal compliance and reporting infrastructure as a result of the Section 4s Requirements that are being addressed by other Commission rulemakings. The Commission therefore views the costs of the new registration requirements to be insubstantial when viewed in the context of the broader purpose of Congress to promote systemic safety for the financial markets as embodied in the Dodd-Frank Act.

Benefits. With respect to benefits, the Commission has determined that the benefits of registering swaps entities are significant. Registration will enable the Commission to identify the universe of SDs and MSPs, which will enable these entities to be monitored for compliance with the Dodd-Frank Act and the rules being implemented by the Commission thereunder. This will enable the protection of market participants and the public, promote efficiency and transparency of markets, promote sound risk management practices and promote the public interest, as described in the rules being proposed by the Commission implementing the substantive provisions of the Dodd-Frank Act. Similarly, the Commission has determined that the benefits of requiring swaps entities to become and remain members of a registered futures association are significant. Membership will provide the Commission with flexibility with regard to its oversight of compliance with the Dodd-Frank Act and Commission regulations.

Public Comment. The Commission invites public comment on its cost-benefit considerations. Commenters are also invited to submit any data or other information that they

may have quantifying or qualifying the costs and benefits of the Proposal with their comment letters.

**List of Subjects**

17 CFR Part 3

Definitions, Customer protection, Licensing, Registration, Swaps

17 CFR Part 23

Swaps, Swap dealers, Major swap participants, Registration

17 CFR Part 170

Authority delegations (Government agencies), Commodity futures, Swaps, Reporting and recordkeeping requirements

For the reasons presented above, the Commission proposes to amend Chapter I of Title 17 of the Code of Federal Regulations as follows:

**PART 3 – REGISTRATION**

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

**Authority:** 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. No. 111-203, 124 Stat. 1376 (Jul. 21, 2010).

2. Section 3.2 is amended by adding paragraph (c)(3) to read as follows:

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

\* \* \* \* \*

(c) \* \* \*

(3) Upon filing of an application for registration pursuant to § 3.10(a)(1)(v) of this part by a swap dealer or major swap participant the National Futures Association shall notify the swap dealer or major swap participant that it is provisionally registered pending completion of a fitness review by the National Futures Association.

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3. 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, floor broker, floor trader, associated person (other than an associated person of a swap dealer or major swap participant), commodity trading advisor, commodity pool operator, introducing broker, and leverage transaction merchant 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.

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4. Section 3.10 is amended by:

- a. revising the title;
- b. revising paragraph (a)(1)(i);
- c. adding paragraph (a)(1)(v); and
- d. revising paragraphs (b) 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 dealers, introducing broker, commodity trading advisor, commodity pool operator, swap dealer, major swap participant or leverage transaction merchant must be on Form 7-R, completed and filed with the National Futures Association in accordance with the instructions thereto.

\* \* \* \* \*

(v)(A) Applicants for registration as a swap dealer or major swap participant must demonstrate, concurrently with or subsequent to the filing of their Form 7-R with the National Futures Association, compliance with regulations adopted by the Commission pursuant to sections 4s(e), 4s(f), 4s(g), 4s(h), 4s(i), 4s(j) and 4s(k) of the Act, and, as applicable, section 4s(l) of the Act; 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 regulation may require demonstration of the ability to comply with a requirement.

(B) The filing of the Form 7-R 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 regulations referred to in paragraph (a)(1)(v)(A) of this section.

(C)(1) Any person may apply to be registered as a swap dealer or major swap participant by filing a form 7-R at any time from April 15, 2011 until such time as regulations adopted by the Commission further defining the terms “swap dealer” and “major swap participant” become effective.

(2) From and after such time as regulations adopted by the Commission further defining the terms “swap dealer” and “major swap participant” become effective, each swap dealer or major swap participant must apply to be registered as a swap dealer or major swap participant by filing a form 7-R.

(3) Any person who applies to be registered as a swap dealer or major swap participant before such time as all of the regulations specified in paragraph (a)(1)(v)(A) of this section have become effective will be granted provisional registration as a swap dealer or major swap participant, as the case may be, upon filing a Form 7-R and such documentation as may be required to demonstrate compliance with such of the regulations specified in paragraph (a)(1)(v)(A) of this section as are effective as of the date of such filing; Provided, however, that: Where the applicant has been granted provisional registration as a swap dealer or major swap participant, it must provide such documentation as may be required to demonstrate compliance with the remaining regulations specified in paragraph (a)(1)(v)(A) of this section by no later than the respective effective date of each such regulation.

(D)(1) Where an applicant for registration as a swap dealer or major swap participant that has been granted provisional registration has timely demonstrated compliance with the regulations specified in paragraph (a)(1)(v)(A) of this section in accordance with paragraph (a)(1)(v)(C) of this section, the applicant will be notified that its provisional registration has ceased to be provisional and it has become fully registered as a swap dealer or major swap participant.

(2) Where an applicant for registration as a swap dealer or major swap participant that has been granted provisional registration has failed to timely demonstrate compliance with any of the regulations specified in paragraph (a)(1)(v)(A) of this section in accordance with

paragraph (a)(1)(v)(C) of this section the applicant will be notified that its application is deficient, whereupon it must withdraw its registration application, it must not engage in any new activity described in the definition of “swap dealer” in section 1a(49) of the Act or the definition of “major swap participant” in section 1a(33) of the Act as such terms may be further defined by Commission regulations, and its provisional registration shall cease; Provided, however, that in the event the applicant fails to withdraw its registration application or cure the deficiency within 30 days following receipt of notice that its application is deficient, its application will be deemed withdrawn and thereupon its registration shall cease; Provided further, however, that upon written request by the applicant submitted to the Director of the Division of Clearing and Intermediary Oversight, the Commission may in its discretion extend the time within which the deficiency may be cured.

(3) Unless specifically reserved in the applicable swap, no withdrawal, deemed withdrawal, cessation or revocation of registration as a swap dealer or major swap participant pursuant to paragraph (a)(1)(v)(D)(2) above or (b) below 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, introducing broker, commodity trading advisor, commodity pool operator, swap dealer, major swap participant or leverage transaction merchant in accordance with paragraph (a) of this section will continue to be so registered until the effective date of any revocation or withdrawal of such 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, introducing broker, commodity trading advisor, commodity pool operator, swap dealer, major swap participant or leverage transaction merchant shall, on an annual basis, review and update registration information maintained with the National Futures Association and additionally, in the case of a swap dealer or major swap participant, with the Commission. 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).

5. Section 3.21 is amended by:

- a. revising paragraph (c) introductory text; and paragraph (c)(1)(iv);
- b. adding 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, introducing broker, commodity trading advisor, commodity pool operator, swap dealer, major

swap participant 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)(2), 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 of a swap agreement;

(2) \* \* \*

(i) Commodity interest or swap transactions;

\* \* \* \* \*

(4) \* \* \*

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

\* \* \* \* \*

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

\* \* \* \* \*

7. 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, commodity trading advisor, commodity pool operator, introducing broker, 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, commodity trading advisor, commodity pool operator, introducing broker, 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, commodity trading advisor, commodity pool operator, swap dealer, major swap participant, introducing broker 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.

\* \* \* \* \*

8. Section 3.33 is amended by

- a. revising paragraph (a) introductory text;
- b. revising paragraph (b) introductory text and paragraphs (b)(6)(vi) through (b)(6)(vii);
- c. adding 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, introducing broker, commodity trading advisor, commodity pool operator, swap dealer, major swap participant, 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, introducing broker, commodity trading advisor, commodity pool operator, swap dealer, major swap participant, 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 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 Commission regulations; 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 Commission regulations.

\* \* \* \* \*

(e) A request for withdrawal from registration as a futures commission merchant, retail foreign exchange dealer, introducing broker, commodity trading advisor, commodity pool operator, swap dealer, major swap participant 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 Clearing 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.

\* \* \* \* \*

9. Part 23 is added to read as follows:

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

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. No. 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 Commission regulations, 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 Commission regulations, 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 Prohibition against statutory disqualification in the case of an associated person of a swap dealer or major swap participant.**

(a) Definition. For purposes 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.

(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.

**§§ 23.23 – 23.40 [Reserved]**

**PART 170 – REGISTERED FUTURES ASSOCIATIONS**

1. The authority citation for part 170 is amended to read as follows:

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

2. 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 a 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 November 10, 2010, by the Commission.

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

## **Statement of Chairman Gary Gensler**

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

I support the proposed rulemaking to establish a process for the registration of swap dealers and major swap participants. This proposal would implement Congress's mandate that these entities be subject to registration and regulation for their swaps business. Registration will enable the Commission to monitor swap dealers and major swap participants for compliance with the Dodd-Frank Act and Commission rulemakings. Through regulation of the dealers, the Commission will be able to protect market participants and the public and promote sound risk management practices. The proposal includes a requirement that swaps dealers and major swap participants register with a registered futures association, such as the National Futures Association. This would provide the Commission with flexibility with regard to its oversight of swap dealers and major swap participants for compliance with the Dodd-Frank Act.