6351-01-P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 50

RIN 3038-AE33

Swap Clearing Requirement Exemptions

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of proposed rulemaking; supplemental notice of proposed rulemaking.

SUMMARY: The Commodity Futures Trading Commission (Commission or CFTC) is proposing amendments to the regulations governing which swaps are exempt from the clearing requirement set forth in the Commodity Exchange Act (CEA). The proposed amendments would address the treatment of swaps entered into by certain central banks, sovereign entities, and international financial institutions. The Commission also is issuing a supplemental notice of proposed rulemaking to further propose amendments to exempt from required clearing swaps entered into by certain bank holding companies, savings and loan holding companies, and community development financial institutions. Lastly, the Commission is proposing to publish a compliance schedule setting forth all the past compliance dates for the 2012 and 2016 swap clearing requirement regulations and to make certain other, non-substantive technical amendments to the relevant part of its regulations.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN 3038-AE33, by any of the following methods:

- *CFTC Comments Portal: https://comments.cftc.gov*. Select the "Submit Comments" link for this rulemaking and follow the instructions on the Public Comment Form.

- *Mail:* Send to Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581.

- *Hand Delivery/Courier*: Follow the same instructions as for Mail, above.

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

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

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 *https://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

[1] Commission regulation 145.9. Commission regulations referred to herein are found on the Commission's website at: *https://www.cftc.gov/LawRegulation/CommodityExchangeAct/index.htm*.

will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the FOIA.

FOR FURTHER INFORMATION CONTACT: Sarah E. Josephson, Deputy Director, at 202-418-5684 or *sjosephson@cftc.gov*; Megan A. Wallace, Senior Special Counsel, at 202-418-5150 or *mwallace@cftc.gov*; Melissa D'Arcy, Special Counsel, at 202-418-5086 or *mdarcy@cftc.gov*; Division of Clearing and Risk; or Ayla Kayhan, Office of the Chief Economist, at 202-418-5947 or *akayhan@cftc.gov*, in each case at the Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

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I. Background

A. Ongoing Review of Part 50 Regulations

On May 9, 2017, the Commission published in the *Federal Register* a request for information[2] seeking suggestions from the public for simplifying the Commission's regulations and practices, removing unnecessary burdens, and reducing costs. In response, a number of commenters asked the Commission to codify certain staff no-

[2] *See* 82 FR 21494 (May 9, 2017) and 82 FR 23765 (May 24, 2017).

action letters and Commission guidance through rulemakings.[3] The Commission also engaged in an agency-wide review of its rules, regulations, and practices to make them simpler, less burdensome, and less costly.[4]

In its review, the Commission identified the treatment of swaps entered into with central banks, foreign governments, and international financial institutions, as set forth in the preamble to the 2012 End-User Exception final rule as a provision that should be codified.[5] In the 2012 preamble, the Commission determined, for reasons discussed below, that central banks, foreign governments, and international financial institutions should not be subject to the clearing requirement set forth in section 2(h)(1) of the CEA (Clearing Requirement).[6] The Commission is proposing regulatory revisions to codify the treatment of swaps entered into with certain central banks, foreign governments,[7] and international financial institutions.[8] The proposed rulemaking also addresses four no-action letters that the Commission's Division of Clearing and Risk (DCR) issued in 2013

[3] *See*, *e.g.*, Comment Letter from the Institute of International Banking, International Swaps and Derivatives Association, Inc., and Securities Industry and Financial Markets Association dated July 24, 2017, at 2.

[4] 82 FR at 21494; 82 FR at 23765.

[5] End-User Exception to the Clearing Requirement for Swaps, 77 FR 42560 (Jul. 19, 2012) (hereinafter, the 2012 End-User Exception final rule).

[6] *Id*. at 42562.

[7] For purposes of this proposal, foreign governments will be referred to as "sovereign entities" for the reasons discussed below.

[8] The Commission is proposing the following definitions for these three terms: (1) the Commission is proposing to define a "central bank" in a new regulation 50.75(a) as meaning a reserve bank or monetary authority of a central government (including the Board of Governors of the Federal Reserve System or any of the Federal Reserve Banks) or the Bank for International Settlements; (2) the Commission is proposing to define a "sovereign entity" in new regulation 50.75(b) as meaning a central government (including the U.S. government), or an agency, department, or ministry of a central government; and (3) the Commission is proposing to define an "international financial institution" in new regulation 50.76(b) as one of 22 named entities, or any other entity that provides financing for national or regional development in which the U.S. government is a shareholder or contributing member.

and 2017[9] in response to requests from four international financial institutions for assurance that DCR would not recommend the Commission take enforcement action for not clearing swaps covered by the Clearing Requirement, if the international financial institution satisfies the provisions in the letter. The proposed revisions to part 50 of the Commission's regulations would exempt swaps entered into with certain central banks, sovereign entities, and international financial institutions from the Clearing Requirement.[10] The Commission believes that this rule proposal is consistent with the Commission's approach set out in the preamble to the 2012 End-User Exception final rule.[11]

This proposal includes additional revisions to part 50 of the Commission's regulations that are intended to simplify the text of the requirements and to minimize the compliance obligations for market participants. The Commission is proposing to include a chart of compliance dates for all swaps that the Commission has determined are required to be cleared under Commission regulation 50.4. In addition, the Commission took this opportunity to consider the structure and organization of part 50 of the Commission's regulations and is proposing minor heading changes and restructuring amendments. The Commission is proposing to re-codify the regulatory provisions exempting eligible banks, savings associations, farm credit institutions, and credit unions

[9] *See* CFTC Letter No. 13-25 (June 10, 2013) (providing no-action relief to the Corporación Andina de Fomento); CFTC Letter No. 17-57 (Nov. 7, 2017) (providing no-action relief to Banco Centroamericano de Integración Económica), CFTC Letter No. 17-58 (Nov. 7, 2017) (providing no-action relief to the European Stability Mechanism); and CFTC Letter No. 17-59 (Nov. 7, 2017) (providing no-action relief to the North American Development Bank).

[10] The swap clearing requirement of section 2(h)(1)(A) of the CEA is codified in part 50 of the Commission's regulations.

[11] *See* 77 FR at 42561-62.

from the definition of "financial entity" for purposes of section 2(h)(7)(A) of the CEA by moving the current requirements to a separate rule so that the exemption is easier to locate in the Commission's regulations and the conditions to claim the exemption are set forth more clearly. The Commission is not proposing to alter the substance of this exemption.

Finally, on August 29, 2018, the Commission issued a notice of proposed rulemaking that would codify existing relief and exempt swaps entered into by certain bank holding companies, savings and loan holding companies, and community development financial institutions (CDFIs) from the swap clearing requirement in section 2(h)(1)(A) of the CEA.[12] The Commission is supplementing that notice of proposed rulemaking with minor amendments to the regulation rule text proposed, as well as with technical revisions, and is soliciting additional input from the public regarding this proposed exemption.[13]

The Commission is requesting comments on all of these proposed rules and rule amendments.

B. Swap Clearing Requirement

The CEA, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),[14] establishes a comprehensive regulatory

[12] Amendments to Clearing Exemption for Swaps Entered Into by Certain Bank Holding Companies, Savings and Loan Holding Companies, and Community Development Financial Institutions, 83 FR 44001 (Aug. 29, 2018) (hereinafter, the 2018 Proposal).

[13] The Commission confirms that this supplemental proposal is not a replacement or withdrawal of the 2018 Proposal. Unless specifically amended in this release, all regulatory provisions proposed in the 2018 Proposal remain under active consideration for adoption as final rules. As discussed further below, the Commission received only one comment letter on its 2018 Proposal.

[14] Pub. L. 111-203, 124 Stat. 1376 (2010).

framework for swaps. The CEA requires a swap: (1) to be cleared through a derivatives clearing organization (DCO) that is registered under the CEA or a DCO that is exempt from registration under the CEA if the Commission has determined that the swap is required to be cleared, unless an exception to the clearing requirement applies;[15] (2) to be reported to a swap data repository (SDR) or the Commission;[16] and (3) if the swap is subject to the Clearing Requirement, to be executed on a designated contract market (DCM), or swap execution facility (SEF) that is registered with the Commission pursuant to section 5h of the CEA or a SEF that has been exempted from registration pursuant to section 5h(g) of the CEA, unless no DCM or SEF has made the swap available to trade.[17]

Pursuant to section 2(h)(1)(A) of the CEA, if a swap is subject to the Clearing Requirement, it shall be unlawful for any person to engage in a swap unless that person submits such swap for clearing to a DCO that is registered under the CEA or a DCO that is exempt from registration under the CEA if the swap is required to be cleared.[18] In 2012, the Commission issued its first clearing requirement determination pertaining to four classes of interest rate swaps and two classes of credit default swaps.[19] In 2016, the Commission expanded the classes of interest rate swaps subject to the clearing requirement to cover fixed-floating interest rate swaps denominated in nine additional currencies, as well as certain additional basis swaps, forward rate agreements, and

[15] Section 2(h)(1) of the CEA.

[16] Sections 2(a)(13), 4r, and 21(b) of the CEA.

[17] Section 2(h)(8) of the CEA.

[18] Section 2(h)(1)(A) of the CEA.

[19] Clearing Requirement Determination Under Section 2(h) of the CEA, 77 FR 74284 (Dec. 13, 2012) (hereinafter, the 2012 Clearing Requirement Determination).

overnight index swaps.[20] The regulations implementing the Clearing Requirement are in Commission regulation 50.4.

C. Swaps with Foreign Governments, Foreign Central Banks, and International Financial Institutions Not Subject to the Clearing Requirement

In the preamble to the 2012 End-User Exception final rule, in response to specific requests from commenters that the Commission determine certain entities, or types of entities, be permitted to elect the End-User Exception, the Commission stated that based on considerations of comity and in keeping with the traditions of the international system, swaps entered into with certain foreign governments, foreign central banks, and international financial institutions should not be subject to the clearing requirement under section 2(h)(1) of the CEA.[21] The Commission did not, however, codify its determination in rule text.

The Commission provided several reasons for its determination that foreign governments, foreign central banks, and international financial institutions should not be subject to the Clearing Requirement. First, the Commission noted that the Federal Reserve Banks and the Federal Government are not subject to the Clearing Requirement under the Dodd-Frank Act.[22] The Commission stated it would therefore expect that if

[20] Clearing Requirement Determination Under Section 2(h) of the CEA for Interest Rate Swaps, 81 FR 71202 (Oct. 14, 2016) (hereinafter, the 2016 Clearing Requirement Determination).

[21] 77 FR at 42561-62. The Commission noted that uncleared swaps with a counterparty that is subject to the CEA and Commission regulations with regard to that transaction must still comply with the CEA and Commission regulations as they pertain to uncleared swaps, *e.g.*, the recordkeeping and reporting requirements under parts 23 and 45 of the Commission's regulations. *Id.*

[22] *Id*. Congress specifically excluded any agreement, contract, or transaction a counterparty of which is a Federal Reserve bank, the Federal Government, or a Federal agency that is expressly backed by the full faith and credit of the United States from the definition of a swap under section 1a(47)(B)(ix) of the CEA. Only swaps are subject to the Clearing Requirement under the Dodd-Frank Act. *See* section 2(h) of the CEA.

any part of the Federal Government, Federal Reserve Banks, or international financial institutions of which the United States is a member were to engage in swap transactions in a foreign jurisdiction, the actions of those entities with respect to those transactions should not be subject to foreign regulation.[23] Second, the Commission stated that "canons of statutory construction 'assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws.'"[24] In addition, the Commission noted that international financial institutions operate with the benefit of certain privileges and immunities under U.S. law indicating that such entities may be treated similarly under certain circumstances.[25] The Commission stated that there is nothing in the text or legislative history of the swap-related provisions of the Dodd-Frank Act to establish that Congress intended to deviate from the traditions of the international system by subjecting foreign governments, foreign central banks, or international financial institutions to the Clearing Requirement set forth in section 2(h)(1) of the CEA.[26]

1. Foreign Governments and Foreign Central Banks

As noted in the 2012 End-User Exception final rule preamble, the Federal Reserve Banks and the Federal Government are not subject to the Clearing Requirement

[23] 77 FR at 42561-62.

[24] *Id.* at 42562 (citing *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004)).

[25] *Id.* at 42562 (citing various provisions of the U.S. Code, a Commission staff interpretative letter (stating "[b]ased on the unique attributes and status of the World Bank Group as a multinational member agency, . . . the CFTC believes that the World Bank Group need not be treated as a U.S. person for purposes of application of the CFTC's Part 30 rules"), and a determination of the Board of Governors of the Federal Reserve that the Bank Holding Company Act does not apply to foreign governments because they are not "companies" as such term is defined in the Bank Holding Company Act).

[26] *Id*. at 42562. The Commission also noted that if a foreign government, foreign central bank, or international financial institution enters into a non-cleared swap with a counterparty that is subject to the CEA and Commission regulations with regard to that transaction, then the counterparty should still comply with the CEA and Commission recordkeeping and recording requirements that apply to non-cleared swaps.

under the Dodd-Frank Act, and the Commission would expect that the swaps activities of these entities would not be subject to foreign regulation.[27] In order to apply consistent treatment to foreign governments and foreign central banks, the Commission stated in the preamble to the 2012 End-User Exception final rule that transactions with these entities should not be subject to the Clearing Requirement.[28]

The Commission also stated that for the purpose of the Clearing Requirement, the Commission considers the Bank for International Settlements (BIS), of which the Federal Reserve and foreign central banks are members, to be a foreign central bank, and, therefore, transactions with BIS should not be subject to the Clearing Requirement.[29]

The Commission's position with regard to the treatment of swaps with foreign governments and foreign central banks for purposes of the clearing requirement has not changed since the adoption of the 2012 End-User Exception final rule. Swaps with foreign governments and foreign central banks are not required to be cleared currently and, if this proposal is codified, would not be subject to any additional requirements.

2. International Financial Institutions

In the preamble to the 2012 End-User Exception final rule, the Commission identified 17 entities whose transactions should not be subject to the Clearing

[27] 77 FR at 42561-62. In 2013, central banks and public bodies charged with or intervening in the management of the public debt in the United States were excluded from EMIR. *See* Commission Delegated Regulation (EU) No 1002/2013 of 12 July 2013, 2013 O.J. (L 279) 2 (Oct. 19, 2013), available at *http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32013R1002*. *See also* Commission Delegated Regulation (EU) 2017/979 of 2 March 2017 (amending Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories to exempt central banks and public bodies from Australia, Canada, Hong Kong, Mexico, Singapore, and Switzerland).

[28] 77 FR at 42562.

[29] *Id*. at 42561, n.13.

Requirement.[30] The entities include the international financial institutions defined as such in section 262r(c)(2) of Title 22 of the U.S. Code,[31] and the multilateral development banks additionally referenced in a provision of the European Market Infrastructure Regulation (EMIR) that exempts such entities from all but the reporting obligation under EMIR.[32] The Commission did not extend its determination to sovereign wealth funds or similar entities because the Commission believed these entities were similar to investment funds. The Commission stated that "[t]he foregoing rationale and considerations do not, however, extend to sovereign wealth funds or similar entities due to the predominantly commercial nature of their activities."[33] The Commission's position with regard to international financial institutions has not changed since the adoption of the 2012 End-User Exception final rule. Consistent with that position, there have been

[30] The 17 international financial institutions identified in the preamble to the 2012 End-User Exception final rule are the following: (1) African Development Bank; (2) African Development Fund; (3) Asian Development Bank; (4) Bank for Economic Cooperation and Development in the Middle East and North Africa; (5) Caribbean Development Bank; (6) Council of Europe Development Bank; (7) European Bank for Reconstruction and Development; (8) European Investment Bank; (9) European Investment Fund; (10) Inter-American Development Bank; (11) Inter-American Investment Corporation; (12) International Bank for Reconstruction and Development (part of the World Bank Group); (13) International Development Association (part of the World Bank Group); (14) International Finance Corporation (part of the World Bank Group); (15) International Monetary Fund; (16) Multilateral Investment Guarantee Agency (part of the World Bank Group); and (17) Nordic Investment Bank. 77 FR at 42561-62 n.14.

[31] 22 U.S.C. 262r(c)(2).

[32] The twelve entities exempt from certain requirements under EMIR, which were also named in the 2012 End-User Exception final rule, are the following: (1) International Bank for Reconstruction and Development; (2) International Finance Corporation; (3) Inter-American Development Bank; (4) Asian Development Bank; (5) African Development Bank; (6) Council of Europe Development Bank; (7) Nordic Investment Bank; (8) Caribbean Development Bank; (9) European Bank for Reconstruction and Development; (10) European Investment Bank; (11) European Investment Fund; and (12) Multilateral Investment Guarantee Agency. *See* EMIR Article 1(5)(a) of Regulation (EU) No. 648/2012; Section 4.2 of part 1 of Annex VI to Directive 2006/48/EC, available at *http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32012R0648* and *http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32006L0048*. The Commission noted that the exemption for international financial institutions would be consistent with EMIR and other foreign laws. 77 FR at 42561 n.14.

[33] *Id*. at 42562, n.18.

four supplemental CFTC staff no-action letters that expanded the scope of international financial institutions afforded relief from the Clearing Requirement.

D. DCR No-Action Letters for Relief from the Clearing Requirement for International Financial Institutions

After the publication of the 2012 End-User Exception final rule, in 2013, DCR issued a no-action letter to Corporación Andina de Fomento (CAF), an economic development financing institution established pursuant to a treaty among 10 Latin American countries, stating DCR would not recommend that the Commission take enforcement action against CAF for failure to comply with the Clearing Requirement.[34] DCR was persuaded by CAF's representation that its organization and functions were similar to the international financial institutions addressed by the preamble to the 2012 End-User Exception final rule. DCR accepted CAF's statement that, like a number of the multilateral development banks that are named as international financial institutions in the adopting release, its purpose is to foster and promote sustainable development and economic integration. CAF also indicated it pursues its mission primarily through project and corporate lending and trade finance, generally in circumstances under which borrowers would not have access to traditional commercial lending sources.[35] DCR accepted that CAF used derivatives to hedge and reduce exposure to interest and exchange rate risks, and that it does not hold or issue derivatives for trading or

[34] CFTC Letter No. 13-25 (June 10, 2013). The letter required CAF to comply with other provisions of the CEA and Commission regulations, such as the recordkeeping and reporting requirements under parts 23 and 45 of the Commission's regulations, which would apply to a non-cleared swaps entered into by CAF opposite a counterparty who is subject to the CEA and Commission regulations with regard to that transaction.

[35] *Id*. at 3.

speculative purposes.[36] Furthermore, DCR agreed that CAF was established pursuant to an international treaty, with strict limitations on ownership which ensure that the sovereign nations are the controlling shareholders. Additionally, the Minister of Finance or equivalent officeholder of each principal shareholder country usually serves as a board member. Due to a combination of shareholdings, share classifications and voting rights, limitations on share transfers and other governance mechanisms, DCR agreed that the principal shareholder countries are assured control over CAF. DCR agreed that CAF has been granted various immunities and privileges from the principal shareholder countries, including, among other things: immunity from expropriation; free convertibility and transferability of its assets; exemption from all taxes and tariffs on income, properties, or assets; and exemption from any restrictions, regulations, controls, or moratoria with respect to its property or assets.

In 2017, DCR received three more requests for no-action relief from the Clearing Requirement from three other international financial institutions: (1) Banco Centroamericano de Integración Económica (CABEI) (an economic development financing institution established pursuant to a treaty among 11 Latin American countries, Spain, and Taiwan), (2) European Stability Mechanism (ESM) (a lending institution established by European Union member states to provide emergency financial assistance to member states located in the Eurozone), and (3) North American Development Bank (NADB) (a financing institution established by the United States and Mexico under the

[36] *Id.*

auspices of the North American Free Trade Agreement to finance environmentally sustainable infrastructure projects in the region along the U.S.-Mexican border).[37]

CABEI, ESM, and NADB each requested to have their transactions treated like CAF and the transactions with the international financial institutions addressed by the preamble to the 2012 End-User Exception final rule. In their request letters, CABEI, ESM, and NADB argued that their functions, missions, and ownership structures are analogous to the functions, missions, and ownership structures of CAF and the international financial institutions referenced in the End-User Exception final rule.[38] Based on their representations, DCR issued no action letters to each of the requesting institutions.[39]

II. Newly Proposed Amendments to Part 50

A. New Subpart D for Swaps Not Subject to the Clearing Requirement

The Commission proposes to exempt swaps entered into with a central bank, sovereign entity, or international financial institution from the Clearing Requirement. In proposing to adopt an exemption for swaps entered into with central banks and sovereign entities in new regulation 50.75, and an exemption for swaps entered into with international financial institutions in new regulation 50.76, the Commission would be

[37] CFTC Letter No. 17-57, at 3 n.10; CFTC Letter No. 17-58, at 3 n.11, and CFTC Letter No. 17-59 at 3.

[38] NADB is listed as a "multilateral development bank" by the four most recent Reports to Congress from the Chairman of the National Advisory Council on International Monetary and Financial Policies, dated March 2016, July 2017, June 2018, and April 2019, available at *https://www.treasury.gov/resource-center/international/development-banks/Pages/congress-index.aspx*.

[39] CFTC Letter Nos. 17-57, 17-58, and 17-59, respectively. Consistent with the CAF letter, DCR required each international financial institution to comply with other provisions of the CEA and the Commission's regulations, such as the recordkeeping and reporting requirements under parts 23 and 45 of the Commission's regulations, which would apply to an uncleared swap entered into by an international financial institution opposite a counterparty that is subject to the CEA and Commission regulations with regard to that transaction.

providing legal certainty to a narrowly defined group of entities that the swaps into which they enter are not subject to the Clearing Requirement, provided such swaps are reported to a swap data repository. The Commission is proposing to create a new subpart D in part 50 of the Commission's regulations for proposed regulations 50.75 and 50.76, as well as three other regulations discussed below. The creation of this new subpart is an effort to distinguish exemptions that apply to specific swaps from the exceptions and exemptions for market participants eligible to elect an exception or exemption under subpart C of part 50. This distinction is important because the proposed exemptions for swaps under subpart D would not be eligible for an analogous exemption from margin for uncleared swaps, as discussed below. Also, some of the proposed subpart D exemptions for swaps are more limited and, in some cases, have additional conditions.[40]

The Commission notes that the proposed exemptions are intended to be consistent with the Commission's determination set forth in the 2012 End-User Exception final rule and would not limit the applicability of any CEA provision or Commission regulation to any person or transaction except as provided in the proposed rulemaking.[41] This proposal modifies some of the terms that will be used to refer to the entities that are exempt from the Clearing Requirement, but this modification is not intended to change the scope or substance of the exemption. For example, in the 2012 End-User Exception final rule the Commission referred to "foreign central banks." Under this proposal, the Commission is

[40] For example, the proposed exemption for swaps entered into by CDFIs in proposed regulation 50.77 of subpart D would be available only for certain types of interest rate swaps. The exceptions and exemptions under subpart C of part 50 of the Commission's regulations apply generally to an entity that satisfies certain conditions.

[41] The Commission notes that uncleared swaps with a counterparty that is subject to the CEA and Commission regulations with regard to such swaps must still comply with the CEA and Commission regulations as they pertain to uncleared swaps.

proposing to use the term "central bank" and to include U.S. central bank entities such as the Board of Governors of the Federal Reserve System and other Federal Reserve Banks in the definition of "central banks" proposed to be exempted from the Clearing Requirement. This approach is similar to the one taken by the Commission and the prudential regulators in promulgating the margin requirements for uncleared swaps.[42]

In addition, in the 2012 End-User Exception final rule, the Commission referred to certain exempt swap counterparties as "foreign governments." The term "foreign government" was intended to refer to sovereigns, similar to the U.S. Federal Government, that were located outside of the U.S. Because the Commission distinguished the Federal Government from state and local government entities, the term "foreign government" was intended to apply only to the federal level of governmental organizations.[43] In an effort to make that distinction clear and to emphasize the fact that state level governmental bodies would not be eligible for this exemption, the Commission is proposing to use the term "sovereign entities" in this rule proposal rather than "foreign government," which was the term used in the 2012 End-User Exception final rule.

The Commission seeks comment regarding the terms and definitions proposed below.

1. Proposed Definition of Central Bank

Proposed regulation 50.75(a) would set forth a definition of "central bank." The proposed definition would define central bank to mean a reserve bank or monetary

[42] *See* definition of "sovereign entity" in Commission regulation 23.151.

[43] 77 FR at 42562. The Commission stated that, "Congress did not expressly exclude state and local government entities form the 'financial entity' definition. On the contrary, in Section 2(h)(7)(C)(i)(VII), Congress expressly included employee benefit plans of state and local governments in the 'financial entity' definition, thereby prohibiting them from using the end-user exception." *Id.*

authority of a central government (including the Board of Governors of the Federal Reserve System or any of the Federal Reserve Banks) or the Bank for International Settlements.[44] The Commission believes an exemption from the Clearing Requirement for central banks is appropriate because these entities are created by statute, are authorized to work to promote the public interest, and are part of, or aligned with, a central government. The authorizing statutes generally provide that the government owns all or part of the capital stock or equity interest of the central bank.[45] The proposed definition also includes the Bank for International Settlements (BIS) for clarity. BIS is made up of only central banks and monetary authorities. The Commission therefore believes it is appropriate to include BIS in the definition of central bank for purposes of this proposal.

In Commission regulation 23.151, the definition of "financial end user" for purposes of the Commission's uncleared swap margin requirements excludes the Bank for International Settlements from the uncleared margin requirements.[46] Part 23 of the Commission's regulations include a separate definition for the term "sovereign entity." Under Commission regulation 23.151, sovereign entity means a central government (including the U.S. government) or an agency, department, ministry, or central bank of a

[44] Congress specifically excluded "any agreement, contract, or transaction a counterparty of which is a Federal Reserve bank, the Federal Government, or a Federal agency that is expressly backed by the full faith and credit of the United States" from the definition of a swap. The proposed definition includes "any of the Federal Reserve Banks" for clarity.

[45] *E.g.*, Article 28.2, Capital of the ECB Protocol on the Statute of the European System of Central Banks and of the European Central Bank, available at *https://www.ecb.europa.eu/ecb/legal/pdf/en_statute_2.pdf*.

[46] Commission regulation 23.151 states, in part, that the term financial end user does not include any counterparty that is (i) a sovereign entity; (ii) a multilateral development bank; (iii) The Bank for International Settlements; (iv) an entity that is exempt from the definition of financial entity pursuant to section 2(h)(7)(C)(iii) of the CEA and implementing regulations; (v) an affiliate that qualifies for the exemption from clearing pursuant to section 2(h)(7)(D) of the CEA; or (vi) an eligible treasury affiliate that the Commission exempts from the requirements of §§ 23.150 through 23.161 by rule.

central government.[47] The Commission is not proposing to use identical definitions in new subpart D of part 50 as it adopted in part 23 of the Commission's regulations.[48] Certain types of entities may be defined differently for purposes of either rule set, but as an overall matter, the Commission believes this proposal to define "sovereign entity" and "central bank" is broadly consistent with part 23 of the Commission's regulations.

Request for Comment. The Commission requests comment on the scope of its proposed definition of central bank. Are there any central banks that are not established and operating pursuant to a statute? If so, should such a central bank be treated differently? Should the Commission distinguish between national central banks and regional central banks? Should the Commission consider adopting an alternative definition for "central bank," such as the definition included in section 25B of the Federal Reserve Act?[49]

2. Proposed Definition of Sovereign Entity

Proposed regulation 50.75(b) would set forth a definition of "sovereign entity" for purposes of the Clearing Requirement. Under the proposed definition, sovereign entity would mean a central government (including the U.S. government) or an agency,

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[47] *Id.*

[48] Under part 23 of the Commission's regulations, the Bank for International Settlements is excluded from the term "financial end user" for purposes of the uncleared margin rules. Commission regulations 23.154 and 23.155 require calculations of initial and variation margin for counterparties that are either swap entities or financial end users. As such, the Bank for International Settlements is not subject to the uncleared initial or variation margin requirements under part 23. Under proposed regulation 50.75(a), the Bank for International Settlements would be a "central bank" and swaps entered into with a central bank would not be subject to the Clearing Requirement. Although the Commission is using different terminology, the Bank for International Settlements would be exempt from requirements under both parts of the Commission's regulations.

[49] Section 25B of the Federal Reserve Act states that the term "central bank" includes any foreign bank or banker authorized to perform any one or more of the functions of a central bank. 12 U.S.C. 632.

department, or ministry of a central government.[50] The Commission believes this definition limits the exemption to national governments and provides clarity regarding the scope of the counterparties whose transactions would be excluded from the Clearing Requirement, as discussed in the 2012 End-User Exception preamble,[51] as well as the counterparties whose transactions are excluded by statute from the definition of a swap.[52] Under this definition, "sovereign entity" would not include state, regional, provincial, or municipal governments.[53] The Commission continues to believe, as it did in 2012, that most of these entities are predominantly engaged in non-banking and non-financial activities related to their core public purposes and functions and therefore are not likely to be "financial entities" ineligible to elect an exception from the Clearing Requirement under section 2(h)(7)(C) of the CEA.[54]

Request for Comment. The Commission requests comment on the scope of its proposed definition of sovereign entity. Should the Commission consider adopting an alternate definition for "sovereign entity?" If so, what definition should the Commission consider? Should there be criteria for determining if transactions with a sovereign entity should be exempt from the Clearing Requirement and, if so, what criteria would be appropriate?

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[50] As with the proposed definition of "central bank," the regulation would clarify that the definition of "central government" would include the U.S. government.

[51] 77 FR at 42562.

[52] *See* section 1a(47)(B)(ix) of the CEA.

[53] *Accord* 77 FR at 42562-63 ("A per se exclusion for state and local government entities from the 'financial entity' definition is inappropriate.").

[54] *Id*. at 42562-63 (explaining that the activities of state and local government entities that might be considered to be in the business of banking or financial in nature under section 2(h)(7)(C)(i)(VIII) "are likely to be incidental, not primary, activities of those entities.").

3. Proposed Definition of International Financial Institution

Proposed regulation 50.76 would define "international financial institution" to mean the entities the Commission identified as international financial institutions in the 2012 End-User Exception final rule, the entities to whom DCR issued no-action letters in 2013 and 2017,[55] the Islamic Development Bank,[56] and any other entity that provides financing for national or regional development in which the U.S. government is a shareholder or contributing member.

The Commission believes that an entity may be an international financial institution for purposes of an exemption from the Clearing Requirement if it has the following common qualities: a significant proportion of the entity's shareholders are limited to sovereign governments or other international financial institutions/multilateral development banks; the entity has been granted legal privileges and immunities that are typical of those enjoyed by other international financial institutions/multilateral development banks; the entity is governed by representatives from the public sector; the entity is a not-for-profit entity whose mission is to foster and promote economic

[55] The proposed list of named entities that would be defined as "international financial institutions" includes: (1) African Development Bank; (2) African Development Fund; (3) Asian Development Bank; (4) Banco Centroamericano de Integración Económica; (5) Bank for Economic Cooperation and Development in the Middle East and North Africa; (6) Caribbean Development Bank; (7) Corporación Andina de Fomento; (8) Council of Europe Development Bank; (9) European Bank for Reconstruction and Development; (10) European Investment Bank; (11) European Investment Fund; (12) European Stability Mechanism; (13) Inter-American Development Bank; (14) Inter-American Investment Corporation; (15) International Bank for Reconstruction and Development; (16) International Development Association; (17) International Finance Corporation; (18) International Monetary Fund; (19) Islamic Development Bank; (20) Multilateral Investment Guarantee Agency; (21) Nordic Investment Bank; and (22) North American Development Bank.

[56] The Commission is proposing to add the Islamic Development Bank to the current list of international financial institutions in an effort to harmonize the exemptions from required clearing with the exemptions from margin for uncleared swaps requirements. The Islamic Development Bank is included as a multilateral development bank under Commission regulation 23.151, and thus is exempt from margin requirements. In addition, this development bank is similarly situated to those entities the Commission identified in the 2012 End-User Exception final rule and in DCR no-action letters.

development in developing areas; the entity's financing is used to support activities that are in the public interest, *i.e.*, socioeconomic development projects; the entity uses swaps only to hedge credit, interest rate, or currency risk incurred during financing activities in support of their public interest missions; swaps are not used for speculative purposes; and the entity satisfies other considerations deemed important by the Commission, including the public interest. The Commission believes these qualities appropriately describe international financial institutions for purposes of an exemption from the Clearing Requirement.

The proposed definition of international financial institution includes a provision "23" encompassing "any other entity that provides financing for national or regional development in which the U.S. government is a shareholder or contributing member." The Commission believes that if the U.S. government is a shareholder or member of an international financial institution that provides financing for national or regional development activities that are in the public interest, then that entity is an international financial institution that should be exempt from the Clearing Requirement. The Commission preliminarily believes that this definition is appropriate because it would allow newly established entities meeting this criterion to be included as international financial institutions enumerated in proposed regulation 50.76.

In addition, the Commission believes that this proposed rule will encourage international comity and continued cross-border cooperation with authorities abroad, particularly with EU authorities in light of the several EU institutions that would be exempted under the proposed rule. An important example of the Commission's cooperation with EU authorities is the 2016 announcement by the CFTC and the

European Commission regarding requirements for cross-border central counterparties.[57] The principles of international comity counsel mutual respect for the important interests of foreign sovereigns.[58]

Request for Comment. Are there additional public interest considerations the Commission should consider? Should the factors listed be important in determining eligibility for a clearing exemption? Are there additional international financial institutions that should be added to the list? The Commission seeks comment regarding this definition.

4. Proposed Exemption from the Clearing Requirement for Swap Transactions with Central Banks, Sovereign Entities, and International Financial Institutions

Proposed regulation 50.75 would exempt from the Clearing Requirement swaps entered into with central banks and sovereign entities. Similarly, proposed regulation 50.76 would exempt from the Clearing Requirement swaps entered into with international financial institutions. Under new proposed regulations 50.75 and 50.76 the swap must be reported to an SDR to qualify for the exemption.

The new proposed regulations 50.75 and 50.76 would codify the Commission's determination that based on considerations of comity and in keeping with the traditions of

[57] On February 10, 2016, the CFTC and the European Commission announced "A Common Approach for Transatlantic CCPs." *See* Press Release and Related Statements, available at *https://www.cftc.gov/PressRoom/PressReleases/cftc_euapproach021016*.

[58] *See* Restatement (Third) of Foreign Relations Law of the United States sec. 403 (Am. Law Inst. 2018) (the Restatement). The Restatement provides that even where a country has a basis for jurisdiction, it should not prescribe law with respect to a person or activity in another country when the exercise of such jurisdiction is unreasonable. *See* Restatement section 403(1). Notably, the Restatement recognizes that, in the exercise of international comity, reciprocity is an appropriate consideration in determining whether to exercise jurisdiction extraterritorially.

the international system, swaps entered into with central banks (including BIS), sovereign entities, and international financial institutions should be treated like swaps entered into with the Federal Reserve Banks, the Federal Government, or a Federal agency and should not be subject to the Clearing Requirement. The Commission preliminarily believes these entities only use swaps to mitigate credit, interest rate, or currency risk incurred during financing activities in support of the public interest and the public good. As such, the Commission believes that it is appropriate to exclude swaps entered into with these entities from the Clearing Requirement. This exemption therefore would allow swaps entered into by these entities to be treated in the same manner as the statutory exclusion for a Federal Reserve Bank, the Federal Government, or a Federal agency that is backed by the full faith and credit of the United States.[59]

Consistent with the other exemptions in effect under current Commission regulation 50.5,[60] new proposed regulations 50.75 and 50.76 would exempt swaps entered into by a central bank, a sovereign entity, or an international financial institution from the Clearing Requirement, provided that the swap is reported to a swap data repository pursuant to part 45 of the Commission's regulations.[61]

Request for Comment. The Commission requests comment on the proposed exemption from the Clearing Requirement for swaps entered into with central banks,

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[59] The Commission is not proposing to exempt these transactions from the definition of a swap.

[60] Under existing Commission regulation 50.5(a), swaps entered into before July 10, 2010, are exempt from the clearing requirement under Commission regulation 50.2 if reported to a swap data repository pursuant to section 2(h)(5)(A) of the CEA and Commission regulation 46.3(a). Existing Commission regulation 50.5(b) exempts swaps entered into after July 10, 2010, but before the application of the clearing requirement under Commission regulations 50.2 and 50.4 for a particular class of swaps if reported to a swap data repository pursuant to 46.3(a), 45.3 and 45.4 of the Commission's regulations.

[61] In most instances, the central bank, sovereign entity, or international financial institution would not be the reporting counterparty, rather the swap dealer would report the transaction to the SDR.

sovereign entities, and international financial institutions. The Commission requests comment on the use of swaps by central banks, sovereign entities, and international financial institutions, including quantitative data where available.

B. Data Related to Swaps entered into by Central Banks, Sovereign Entities, and International Financial Institutions

The Commission has gathered preliminary data regarding the use of swaps by international financial institutions from the Depository Trust & Clearing Corporation's (DTCC's) swap data repository, DTCC Data Repository (DDR). From January 1, 2018 to December 31, 2018, 16 international financial institutions named in proposed regulation 50.76 were counterparties to a swap that was entered into and reported to DDR during that time period. Overall, the 16 international financial institutions entered into approximately 2,500 uncleared interest rate swaps with an estimated total notional value of $220 billion. Of the 16 international financial institutions, four entered into more than one hundred swaps during calendar year 2018. Compared to data that the Commission gathered from DDR during calendar year 2017, the number of international financial institutions entering into interest rate swaps increased from nine to 16, and the total number and total notional value of all uncleared interest rate swaps entered into by the international financial institutions increased from 381 swaps totaling $59.8 billion to approximately 2,500 swaps totaling $220 billion.

The Commission is not providing data estimates for swaps entered into by central banks and sovereign entities because it believes that the number of such swaps is likely to be small and could reveal confidential swaps trading and position information. In addition, it is difficult to define a representative set of central banks and sovereign

entities for purposes of collecting such data. The Commission invites public comment from affected central banks, sovereign entities, and their counterparties, including the submission of any data or other relevant information.

C. New Compliance Schedule for Subpart B

The Commission implemented the Clearing Requirement through two separate rulemakings: (i) the 2012 Clearing Requirement Determination; and (ii) the 2016 Clearing Requirement Determination. Under each of these final rules, the Commission made the decision to phase-in the compliance requirement. Neither clearing requirement determination required compliance by all market participants for all swaps included in Commission regulation 50.4 on a single date.

1. 2012 Clearing Requirement Determination

In order to facilitate an orderly transition to the new swap clearing regime established by the Dodd-Frank Act, the Commission decided to phase-in the 2012 Clearing Requirement Determination by type of market participant. The Commission adopted a swap clearing requirement compliance schedule in Commission regulation 50.25.[62] Commission regulation 50.25 contains definitions for Category 1 Entities and Category 2 Entities,[63] as well as other terms that are referenced in the implementation section of the 2012 Clearing Requirement Determination.[64] For all interest rate swaps and CDX credit default swaps that were required to be cleared pursuant to the 2012 Clearing Requirement Determination, the applicable implementation schedule was

[62] Swap Transaction Compliance and Implementation Schedule: Clearing Requirement Under Section 2(h) of the CEA, 77 FR 44441 (Jul. 30, 2012).

[63] Commission regulation 50.25(a).

[64] 2012 Clearing Requirement Determination at 74319-21.

published by the Commission in the final rulemaking preamble. However, the compliance dates were delayed for iTraxx credit default swaps until February 25, 2013, because no DCO offered client clearing.[65] Once client clearing was offered for iTraxx credit default swaps, specified credit default swaps subject to the Clearing Requirement in Commission regulation 50.4(b) were required to be cleared after sixty days. This information was publicized through Commission press releases, but is not reflected in part 50 of the Commission's regulations.

2. 2016 Clearing Requirement Determination

In 2016, the Commission expanded the set of interest rate swaps subject to the Clearing Requirement under Commission regulation 50.4(a) in order to harmonize the CFTC's swap clearing requirement with those in non-U.S. jurisdictions. When the Commission adopted the implementation schedule for the 2016 Clearing Requirement Determination, it elected not to phase-in compliance by the type of market participant and instead phased-in compliance based on when the corresponding non-U.S. jurisdiction's interest rate swap clearing mandate had gone into effect. Under the Commission's 2016 Clearing Requirement Determination, certain categories of interest rate swaps were required to be cleared on the earlier of: (i) 60 calendar days after any person was first required to comply with an analogous clearing requirement that has been adopted by a regulator in a non-U.S. jurisdiction, or (ii) two years after the final rule was published in the *Federal Register*.[66] All swaps that were subject to the Commission's 2016 Clearing Requirement Determination are now required to be cleared and the last compliance date

[65] CFTC Press Release No. 6521-13 (Feb. 25, 2013), available at *https://www.cftc.gov/PressRoom/PressReleases/pr6521-13*.

[66] *Id*. at 71227-28.

for a category of interest rate swaps under Commission regulation 50.4(a) was October 15, 2018. As in 2012, the compliance schedule was outlined in the preamble discussion, but the compliance dates were not published in the final rule.

In addition, the compliance dates for each category of interest rate swap subject to the expansion under the 2016 Clearing Requirement Determination were based on the product type, and in some cases, the tenor of the swap. For this reason, the Commission believes that publishing the compliance dates in a detailed format will be useful for market participants.

3. New Proposed Regulation 50.26

The Commission seeks to improve transparency and to provide the information about the compliance dates for both of the Commission's Clearing Requirements in one location that will be convenient for market participants to reference. In the new proposed regulation 50.26, the Commission has taken information that was available in different formats and repackaged it in a single table. Earlier press releases provided small pieces of information but did not provide a comprehensive statement of all Clearing Requirement compliance dates. In addition, as detailed above, the Commission's 2016 Clearing Requirement Determination compliance dates were not all published in the final rule. Now that all of the swaps covered in Commission regulation 50.4 have a compliance date, that information can be collected and published in one location in part 50 of the Commission's regulations instead of located in various places throughout the *Federal Register* and on the Commission's website.

The Commission believes that these compliance dates are static and not subject to change. Including a table of compliance dates in the Commission's regulations will be

useful for market participants trying to confirm whether their swaps are required to be cleared under the Clearing Requirement or would be considered to be legacy swaps not required to be cleared under regulation 50.5. This codification may be particularly useful for groups, such as the International Organization of Securities Commissions and others, that collect and disseminate such information.[67]

Request for Comment. The Commission requests comment on the proposed table headings and structure included in Table 1 and Table 2 of new proposed regulation 50.26. Are the tables sufficiently clear to communicate the specific dates on which compliance with the Clearing Requirement is required? If not, why not? Do market participants think that any additional compliance date information should be included in the tables or in this new section?

D. Technical Amendment to Subpart C for Banks, Savings Associations, Farm Credit System Institutions, and Credit Unions

In addition to proposing to codify exemptions from the Clearing Requirement, the Commission is proposing technical amendments to subpart C of part 50 to reorganize the subpart so that market participants find it easier to read and identify applicable regulations. The Commission preliminarily believes that re-codifying the existing regulatory provision for certain banks, savings associations, farm credit system institutions, and credit unions (together, small financial institutions) with a new numbered section and heading specifically will facilitate swap counterparties' use and understanding of part 50 of the Commission's regulations.

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[67] *E.g.*, the International Organization of Securities Commissions' Information Repository for Central Clearing Requirements for OTC Derivatives, available at *https://www.iosco.org/publications/?subsection=information_repositories*.

The current exemption for small financial institutions is located in paragraph (d) of Commission regulation 50.50 without any heading or other demarcation. Commission regulation 50.50 generally excepts non-financial entities from the Clearing Requirement if they satisfy certain conditions. In the final paragraph of Commission regulation 50.50, there is a separate category of relief for small financial institutions that are exempt from the definition of "financial entity" if the financial institution satisfies certain requirements. In order to promote transparency about the operation of exceptions and exemptions to the Clearing Requirement, the Commission is proposing to separate the small financial institutions exemption from the non-financial entities exception. The Commission views this as a non-substantive change, and the minor changes to the text of the regulations would serve only to clarify and update the requirements in light of current swap reporting conventions, specifically related to SDR reporting by entities eligible for an exception or exemption from the Clearing Requirement.

Current Commission regulation 50.50(d) limits the exemption to certain small financial institutions with two key definitional requirements. First, the small financial institution must be an entity that satisfies the statutory requirements under Commission regulation 50.50(d)(1). Second, the small financial institution must have total assets of $10 billion or less on the last day of such entity's most recent fiscal year. The Commission is leaving these requirements unchanged and has moved these requirements to new proposed regulation 50.53(a) and 50.53(b), respectively.

New proposed regulation 50.53 will require small financial institutions to satisfy the same reporting requirements in Commission regulation 50.50(b) that apply to entities qualifying for the exemption under Commission regulation 50.50(d) currently. The

Commission believes that the language proposed in new regulation 50.53(c) incorporates the requirements under Commission regulation 50.50(b) by reference and matches the current structure of a similar provision requiring exempt cooperatives to report specific information by reference to Commission regulation 50.50(b).[68] The Commission is proposing a small difference in new regulation 50.53(c) that does not match the language in 50.50(b) exactly. Proposed regulation 50.53(c) would make it clear that rather than "provide" the information to a SDR, the entity electing the exception will be expected to "report" the information to a SDR. In a few places in the new regulatory text of proposed regulation 50.53(c), the Commission is using the word "report" or "cause to be reported" instead of "provide" or "cause to be provided." The Commission believes the words "provide" and "report" have similar meaning, but the word "report" is more precise in this instance. The word "report" is the predominant term used under Commission regulations in part 45 and this term aligns with the obligations that parties are required to comply with under Commission regulations 45.3 and 45.4. Under this proposal, the Commission does not intend to alter how swap counterparties currently subject to Commission regulation 50.50(d) comply with the reporting provisions under existing Commission regulation 50.50(b). The Commission believes the obligations of banks and other entities eligible for relief from the Clearing Requirement under Commission regulation 50.50(d) would not change under new proposed regulation 50.53.

Under Commission regulation 50.50(b) electing entities are given the option to provide information to a registered SDR or to provide the information directly to the

[68] Commission regulation 50.51(c) states that an exempt cooperative that elects the exemption provided in that section shall comply with the requirements of Commission regulation 50.50(b).

Commission. The Commission believed such flexibility was necessary during the initial implementation phase of the Dodd-Frank Act. Now that SDRs have been established and are a reliable infrastructure resource, the Commission is proposing to eliminate the option for small financial institutions to submit information directly to the Commission. The Commission processes data from the SDRs and uses this data to monitor and track compliance with the Clearing Requirement. This change to require reporting of information through an SDR would further the Commission's goals of improving the quality and comprehensiveness of SDR data as well. The Commission notes that it is taking this approach to require reporting directly to SDRs (and not to permit reporting directly to the Commission) for all of the other exemptions for swaps with certain entities under proposed regulations 50.75 through 50.79. The Commission believes that the reporting methods employed by small financial institutions currently would satisfy the requirements in proposed regulation 50.53(c).

Finally, proposed regulation 50.53 includes a paragraph (d) that would require small financial entities to use the swap to hedge or mitigate commercial risk. This requirement is the same as current requirements under Commission regulation 50.50(d) and should not create new or different obligations on small financial institutions electing the exemption from the Clearing Requirement. The Commission reiterates its view that proposed regulation 50.53 would not substantively change the exemption for small financial institutions and is intended to be a clarifying amendment to part 50 of the Commission's regulations.

Request for Comment. The Commission requests comment on whether the proposed changes could materially alter the compliance requirements that exist currently for eligible banks, savings associations, farm credit system institutions, and credit unions.

III. Supplemental Proposal of Proposed Rulemaking for Bank Holding Companies, Savings and Loan Holding Companies, and Community Development Financial Institutions

A. Background on Prior Proposal and Supplemental Proposal

In August 2018, the Commission proposed regulations that would exempt from the Clearing Requirement, set forth in section 2(h)(1) of the CEA, certain swaps entered into by certain bank holding companies, savings and loan holding companies, and CDFIs.[69] Under the CEA, these entities are not eligible for an exemption from the definition of "financial entity" for purposes of an exemption from the Clearing Requirement that is afforded banks, savings associations, farm credit systems, and credit unions with total assets of $10 billion or less.[70]

The proposed amendments to the Commission's regulations under part 50 would exempt from the Clearing Requirement a swap entered into to hedge or mitigate commercial risk if one of the counterparties to the swap is either (a) a bank holding company or savings and loan holding company, each having no more than $10 billion in consolidated assets, or (b) a CDFI transacting in certain types and quantities of interest rate swaps. The proposed amendments would codify two no-action letters issued by

[69] *See* 2018 Proposal.

[70] *See* sections 2(h)(1)(A) and 2(h)(7)(A) of the CEA.

DCR in 2016.[71] As the Commission noted in the 2018 Proposal, it believes that codifying both of these staff no-action letters would be consistent with the policy rationale behind the exemption from the Clearing Requirement that the Commission granted for swaps entered into by banks, savings associations, farm credit institutions, and credit unions in the 2012 End-User Exception final rule.[72]

The 2018 Proposal received only one comment on the proposal.[73] In light of the proposed restructuring of part 50 of the Commission's regulations, the Commission is requesting additional comments on the 2018 Proposal, is proposing minor revisions to the rule text for CDFIs, and is proposing technical revisions as described below.[74]

B. Changes to the Proposed Rule Text for CDFIs and Technical Revisions to Proposed Rule Text for Bank Holding Companies and Savings and Loan Holding Companies

As proposed in August 2018, swaps entered into with certain bank holding companies, savings and loan holding companies, and CDFIs would be exempt from the Clearing Requirement. The 2018 Proposal would have amended Commission regulation 50.5 by adding definitions for CDFI, bank holding company, and savings and loan holding company to Commission regulation 50.5(a), and by adding the conditions of the

[71] CFTC Letter No. 16-01 (request from the American Bankers Association) and CFTC Letter No. 16-02 (request from a coalition of CDFIs).

[72] *See* 2018 Proposal at 44004. *See also* End-User Exception Final Rule, 77 FR at 42590-91.

[73] American Bankers Association (Oct. 22, 2018). The American Bankers Association supported the 2018 Proposal to codify CFTC Letters No. 16-01 and 16-02, and also recommended that the Commission treat all non-swap dealer or non-major swap participant banks, bank holding companies, savings associations, and savings and loan holding companies as end-users and exempt all of these entities from the Clearing Requirement.

[74] Procedurally, this supplemental proposal is not a replacement or withdrawal of the 2018 Proposal. Unless specifically amended in this release, all regulatory provisions proposed in the 2018 Proposal remain under active consideration for adoption as final rules. The Commission welcomes comment on both the 2018 Proposal and this supplemental proposal.

exemption in new subparts (e) and (f). In this supplemental proposal, the Commission is proposing to include the definitions and exemptions in a new subpart D of part 50 as Commission regulations 50.77, 50.78, and 50.79 as described further below.

1. CDFIs

In this supplemental proposal, the Commission is proposing to make the following clarifying revisions to the regulations that would exempt certain interest rate swaps and forward rate agreements entered into by CDFIs from the Clearing Requirement. First, these regulations, if adopted, would be set forth in regulation 50.77 rather than in Commission regulation 50.5. Second, the 2018 Proposal's definition of the term "community development financial institution" in proposed regulation 50.5(a) remains unchanged, but would be codified as regulation 50.77(a).[75] Third, proposed regulation 50.5(f) would become new regulation 50.77(b). The supplemental proposal would clarify the rule by adding the statutory authority for the exemption to the rule text and referencing the subpart. New proposed regulation 50.77(b) would state in relevant part that "a swap entered into by a community development financial institution shall not be subject to the clearing requirement of section 2(h)(1)(A) of the [CEA] and this part if…."

The supplemental proposal includes a technical change to the 2018 Proposal's reference to Commission regulation 50.2 that was included in previously proposed regulation 50.5(f)(2). Under the supplemental proposal, newly proposed regulation

[75] New proposed regulation 50.77(a) would state that, for the purposes of that section, the term community development financial institution means an entity that satisfies the definition in section 103(5) of the Community Development Banking and Financial Institutions Act of 1994, and is certified by the U.S. Department of Treasury's Community Development Financial Institution Fund as meeting the requirements set forth in 12 CFR 1805.201(b).

50.77(b)(1) would reference Commission regulation 50.4(a) and state that the swap is a U.S. dollar denominated interest rate swap in the fixed-to-floating class or the forward rate agreement class of swaps that would otherwise be subject to the clearing requirement under § 50.4(a).

In the 2018 Proposal, under previously proposed regulation 50.5(f)(3), swaps entered into by a CDFI would not be subject to the Clearing Requirement of section 2(h)(1)(A) of the CEA, and Commission regulation 50.2, if the total aggregate notional value of all swaps entered into by the community development financial institution during the twelve-month calendar is less than or equal to $200,000,000. To clarify the exemption, the Commission proposes to revise the language in proposed regulation 50.77(b)(2) to state the total aggregate notional value of all swaps entered into by the community development financial institution during the 365 calendar days prior to the day of execution of the swap is less than or equal to $200,000,000. Likewise, previously proposed regulation 50.5(f)(4) would be codified as proposed regulation 50.77(b)(3), and the Commission is proposing to include a technical revision that changes the time frame from "within a twelve-month calendar year" to "within a period of 365 calendar days." The Commission believes both revisions from measuring in months to calendar days are more accurate descriptions of the scope of the requirement and is consistent with the current requirement in Commission regulation 50.50(b)(2). Commission regulation 50.50(b)(2) states that reporting for certain entities that are eligible for an exception to the Clearing Requirement will remain effective for "365 days following the date of such reporting." The Commission believes this minor technical change will improve internal consistency within part 50 of the Commission's regulations by measuring time periods in

days in all relevant places rather than using days in some regulations and months in other regulations.

Previously proposed regulation 50.5(f)(1) would remain the same except it would be presented in this supplemental proposal as proposed regulation 50.77(b)(4). Previously proposed regulation 50.5(f)(5) would be presented by this proposal as proposed regulation 50.77(b)(5) with a technical change to the text such that the regulation would change from "the swap is used to hedge or mitigate commercial risk, as defined under § 50.50(c) of this part" and would instead state that the swap is used to hedge or mitigate commercial risk as provided in paragraph (c) of § 50.50.

2. Bank holding companies and savings and loan holding companies

In this supplemental proposal, the Commission is proposing to have separate regulations for exemptions for swaps with bank holding companies and savings and loan holding companies. Under the 2018 Proposal, the proposed definitions for a bank holding company and a savings and loan holding company were included in existing regulation 50.5(a). This supplemental proposal would move the definition for bank holding company to proposed regulation 50.78(a) and savings and loan holding company to proposed regulation 50.79(b).

Previously proposed regulation 50.5(e) would become proposed regulations 50.78(b) for bank holding companies and 50.79(b) for savings and loan holding companies. The supplemental proposal would clarify the text for each exemption by adding the statutory authority for the exemption to the text of the regulation and referencing the subpart.

This supplemental proposal would renumber previously proposed regulation section and paragraphs 50.5(e)(1), (2), and (3) as new proposed regulation section and paragraphs 50.78(b)(1), (2), and (3) for bank holding companies, and new proposed regulation section and paragraphs 50.79(b)(1), (2), and (3) for savings and loan holding companies. The regulations remain unchanged from the text of the 2018 Proposal with the exception of the technical change to paragraph (b)(3) of each proposed regulation. Those paragraphs would now state that the swap is used to hedge or mitigate commercial risk as provided in paragraph (c) of § 50.50.

C. Updated Data regarding the Use of Swaps by CDFIs, Bank Holding Companies, and Savings and Loan Holding Companies

When the Commission considered its 2018 Proposal, it included data about the number of swaps entered into by entities that would be eligible to elect the proposed exemption from the Clearing Requirement. The Commission is updating some of the data from DDR that it considered in the 2018 Proposal. All interest rate swaps data included in this section was reported to DDR as events-based data and was analyzed by Commission staff.[76] This information about past swaps activity is not used as a predictive measure of future swaps activity, but rather, it is included here to provide context about the current use of uncleared swaps by the entities discussed in this proposal.

In the most recent calendar year – between January 1, 2018 and December 31, 2018 – eight different CDFIs entered into interest rate swaps and four of those entities

[76] This section does not include credit default swaps data because the relief provided to CDFIs does not extend to credit default swaps and there was no credit default swaps activity reported by eligible bank holding companies or savings and loan holding companies in the time periods analyzed.

entered into more than one swap. During this one year period, CDFIs entered into thirteen uncleared interest rate swaps with an aggregate notional value of almost $84 million. According to this data, more CDFIs entered into uncleared interest rate swaps during the calendar year 2018 than during the previous 18-month time period between January 2017 and June 2018.[77] At the same time, the aggregate notional value of all uncleared interest rate swaps entered into during calendar year 2018 ($83.9 million) was less than the aggregate notional value of swaps entered into by CDFIs during the 18-month time period between January 2017 and June 2018 ($251.6 million).

The Commission is also updating the data regarding the number of swaps entered into by eligible bank holding companies and savings and loan holding companies. Between January 1, 2018 and December 31, 2018, eleven bank holding companies executed 18 interest rate swaps with an aggregate notional value of $152.5 million.[78] Seven of these bank holding companies entered into more than one swap during the calendar year 2018. In calendar year 2018 the aggregate notional value of all swaps entered into by eligible bank holding companies increased substantially ($152.5 million in 2018 compared to $68.6 million in 2017), but this increase was also the result of more eligible bank holding companies entering into uncleared interest rate swaps.

The increase in the number of uncleared swaps entered into by these entities may be the result of better information and more awareness by eligible entities about the relief

[77] During an earlier 18-month time period, between January 1, 2017 and June 29, 2018, three CDFIs executed interest rate swaps: One executed two swaps with an aggregate notional value of $5.6 million; another executed three swaps with an aggregate notional value of $116 million; and another executed three swaps with an aggregate notional value of $130 million.

[78] During the previous year, between January 1, 2017 and December 31, 2017, one bank holding company executed ten interest rate swaps with an aggregate notional value of $43.6 million, and a second bank holding company executed one interest rate swap with a notional value of $25 million.

provided under CFTC Letter Nos. 16-01 and 16-02, or it may be the result of different economic or market conditions. The data demonstrates that these entities have an ongoing interest in entering into uncleared swaps and likely would benefit from the Commission's proposal to codify the relief currently afforded under CFTC staff letters.

Request for Comment. The Commission requests comment on all aspects of the new proposed regulations, including the specific revisions to the proposed rule text as well as the technical amendments to the proposed regulations. In addition, the Commission requests additional comment on the use of swaps by CDFIs, bank holding companies, and savings and loan holding companies, including quantitative data where available.

IV. Commission's Section 4(c) Authority

Section 4(c)(1) of the CEA authorizes the Commission to promote responsible economic or financial innovation and fair competition by exempting any transaction or class of transactions, including swaps, from any of the provisions of the CEA (subject to exceptions not relevant here).[79] In enacting CEA section 4(c)(1), Congress noted that the goal of the provision is to give the Commission a means of providing certainty and stability to existing and emerging markets so that financial innovation and market development can proceed in an effective and competitive manner.[80] Section 4(c)(2) of

[79] Pursuant to section 4(c)(1) of the CEA, in order to promote responsible economic or financial innovation and fair competition, the Commission by rule, regulation, or order, after notice and opportunity for hearing, may (on its own initiative or on application of any person) exempt any agreement, contract, or transaction (or class thereof) that is otherwise subject to subsection (a) of CEA section 4(c), either unconditionally or on stated terms or conditions or for stated periods and either retroactively or prospectively, or both, from any of the requirements of subsection (a) of CEA section 4(c), or from any other provision of the CEA. The Commission is proposing to promulgate this exemptive rule pursuant to sections 4(c)(1) and 8a(5) of the CEA.

[80] H. R. Rep. No. 102–978, 102d Cong. 2d Sess. at 81 (Oct. 2, 1992), *reprinted in* 1992 U.S.C.C.A.N. 3179, 3213.

the CEA further provides that the Commission may not grant exemptive relief unless it determines that: (A) the exemption is consistent with the public interest and the purposes of the CEA; and (B) the transaction will be entered into solely between "appropriate persons" and the exemption will not have a material adverse effect on the ability of the Commission or any contract market to discharge its regulatory or self-regulatory responsibilities under the CEA.

The Commission believes that it is consistent with the public interest and the purposes of the CEA to exempt from the Clearing Requirement swaps entered into with central banks, sovereign entities, and international financial institutions, as discussed above. In 2012, the Commission stated its view that transactions with central banks, sovereign entities, and certain international financial institutions should be exempted from clearing on the basis of comity and in keeping with the traditions of the international system. The Commission continues to believe, as it did in 2012, that based on canons of statutory construction and considerations of comity, and in keeping with the traditions of the international system, foreign governments and central banks should not be subject to section 2(h)(1) of the CEA.[81] With respect to international financial institutions, the member governments generally have majority control and governance over the entities. The Commission therefore continues to believe that an exemption is appropriate because in a real sense, an international financial institution is not separable from its government owners. Codifying the Commission's 2012 determination through a section 4(c) exemption will provide further clarity to market participants. As with the

[81] The Commission continues to believe that transactions with sovereign wealth funds or similar entities should not be exempt from the Clearing Requirement because these entities generally act as investment funds. *See* 77 FR at 42562, n.18 ("The foregoing rationale and considerations do not apply to sovereign wealth funds or similar entities due to the predominantly commercial nature of their activities.").

other exemptions from the Clearing Requirement, the Commission reminds the counterparties that these swaps exempted from the Clearing Requirement by this proposal and the existing 2012 determination must be reported to an SDR. The Commission also believes it is appropriate to exempt swaps entered into with international financial institutions because these entities serve an important public policy purpose.

The Commission believes that the specific amendments to exempt swaps entered into by central banks, sovereign entities, and certain international financial institutions, as well as the previously approved proposal to exempt certain swaps entered into by bank holding companies, savings and loan holding companies, and CDFIs from the Clearing Requirement would be available to only "appropriate persons." Section 4(c)(3) of the CEA includes within the term "appropriate person" a number of specified categories of persons, including any governmental entity (including the United States, any state, or any foreign government) or political subdivision thereof, or any multinational or supranational entity or any instrumentality, agency, or department of any of the foregoing.[82] The Commission preliminarily believes that central banks, sovereign entities, and international financial institutions are appropriate persons within the scope of section 4(c)(3)(H) of the CEA. The Commission notes that these entities would also be considered eligible contract participants (ECPs) as set forth in section 1a(18)(A)(vii) of the CEA. The Commission continues to believe that eligible bank holding companies, savings and loan holding companies, and CDFIs are ECPs pursuant to section 1a(18)(A)(i) of the CEA.[83] Given that only ECPs are permitted to enter into uncleared

[82] Section 4(c)(3)(H) of the CEA.

[83] 2018 Proposal, at 44008.

swaps, and that the ECP definition is generally more restrictive than the comparable elements of the enumerated "appropriate person" definition, there is no risk that a non-ECP or a person who does not satisfy the requirements for an "appropriate person" could enter into an uncleared swap using the proposed exemptions from the Clearing Requirement. For purposes of this proposal, the Commission believes that the class of persons eligible to rely on the proposed exemptions that would be codified in new proposed regulations 50.75 through 50.79 will be limited to "appropriate persons" within the scope of section 4(c) of the CEA.

The Commission believes that the applicable central banks, sovereign entities, and international financial institutions have been relying on the language in the preamble exempting their swap transactions from the Clearing Requirement since issuance of the 2012 End-User Exception final rule. The Commission is not aware of any increase in counterparty risk attributable to affected entities' reliance on the 2012 Commission determination and the subsequent staff no-action letters. The proposed exemptions from the Clearing Requirement are limited in scope and, as described further below, the Commission will continue to have access to information regarding the swaps subject to this exemption because they will be reported to an SDR.[84] The Commission notes that the proposed exemptions are intended to be consistent with the Commission's determination set forth in the 2012 End-User Exception final rule and would not limit the applicability of any CEA provision or Commission regulation to any person or transaction except as provided in the proposed rulemaking. In addition, the Commission

[84] The Commission notes that uncleared swaps with a counterparty that is subject to the CEA and Commission regulations with regard to such swaps would still be required to comply with the CEA and Commission regulations as they pertain to uncleared swaps.

retains its special call, anti-fraud, and anti-evasion authorities, which will enable it to adequately discharge its regulatory responsibilities under the CEA. The Commission therefore preliminarily believes the exemption would not have a material adverse effect on the ability of the Commission to discharge its regulatory responsibilities under the CEA.

For the reasons described in this proposal, the Commission believes it would be appropriate and consistent with the public interest to adopt new proposed regulations 50.75, 50.76, 50.77, 50.78, and 50.79.

Request for Comment. The Commission requests general comments regarding the proposal and on whether it should exercise its authority under section 4(c) of the CEA, including whether the proposed exemptions promote the public interest. Additionally, the Commission requests comment on whether the proposed exemptions provide certainty and stability to existing and emerging markets so that financial innovation and market development can proceed in an effective and competitive manner.

V. Proposed Rules Do Not Effect Margin Requirements for Uncleared Swaps

Under Commission regulation 23.150(b)(1), the margin requirements for uncleared swaps under part 23 of the Commission's regulations do not apply to a swap if the counterparty qualifies for an exception from clearing under section 2(h)(7)(A) and implementing regulations.[85] Commission regulation 23.150(b) was added to the final margin rules after the Terrorism Risk Insurance Program Reauthorization Act of 2015 (TRIPRA)[86] amended section 731 of the Dodd-Frank Act by adding section 4s(e)(4) to

[85] Commission regulation 23.150(b)(1).

[86] Pub. L. 114-1, 129 Stat. 3.

the CEA to provide that the initial and variation margin requirements will not apply to an uncleared swap in which a non-financial entity (including a small financial institution and a captive finance company) qualifies for an exception under section 2(h)(7)(A) of the CEA, as well as two exemptions from the clearing requirement that are not relevant in this context.[87]

The proposed rules are not implementing section 2(h)(7)(A) of the CEA. The Commission, pursuant to its 4(c) authority (as discussed above), is proposing to exempt swaps entered into by central banks, sovereign entities, and international financial institutions, as well as eligible bank holding companies, savings and loan holding companies, and CDFIs from the Clearing Requirement. The Commission is not proposing to exclude these entities from the "financial entity" definition of section 2(h)(7)(C) of the CEA.

For the reasons stated above, the new proposed rules 50.75 through 50.79 do not implicate any of the provisions of section 4s(e)(4) of the CEA or Commission regulation 23.150.[88]

VI. Related Matters

A. Regulatory Flexibility Act

[87] Commission regulation 23.150(b)(2) provides that certain cooperative entities that are exempt from the Commission's clearing requirement pursuant to section 4(c)(1) authority also are exempt from the initial and variation margin requirements. None of the entities included in this proposal is a cooperative that would meet the conditions in Commission regulation 23.150(b)(2). In addition, Commission regulation 23.150(b)(3), which pertains to affiliated entities, does not apply in this context.

[88] The Commission believes that the proposed rules do not affect the margin rules for entities that are supervised by the prudential regulators. The prudential regulators' rules contain provisions that are identical to Commission regulation 23.150. *See* Margin and Capital Requirements for Covered Swap Entities, 80 FR 74916, 74923 (Nov. 20, 2015).

The Regulatory Flexibility Act (RFA) requires federal agencies to consider whether the regulations they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis on the impact.[89] The Commission previously has established certain definitions of small entities to be used in evaluating the impact of its regulations on small entities in accordance with the RFA.[90] The proposed regulations would not affect any small entities as that term is used in the RFA. The proposed rule would affect specific counterparties to an uncleared swap: central banks, sovereign entities, and international financial institutions. Sections 2(e) and 5(d)(11)(A) of the CEA provide that only ECPs may enter into uncleared swaps.[91] The Commission has previously stated that ECPs, by the nature of the definition, should not be considered small entities for RFA purposes.[92] Because ECPs are not small entities, and persons not meeting the definition of ECP may not conduct transactions in uncleared swaps, the Commission need not conduct a regulatory flexibility analysis respecting the effect of these proposed rules on ECPs.

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

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[89] 5 U.S.C. 601 *et seq*.

[90] 47 FR 18618 (Apr. 30, 1982).

[91] Section 2(e) of the CEA limits non-ECPs to executing swap transactions on DCMs and section 5(d)(11)(A) of the CEA requires all DCM transactions to be cleared. Accordingly, the two provisions read together only permit ECPs to execute uncleared swap transactions.

[92] *See* 66 FR 20740, 20743 (Apr. 25, 2001).

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA)[93] 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 not impose a new collection of any information or any new recordkeeping requirements from any persons or entities and would not require approval of the Office of Management and Budget (OMB) under the PRA.[94] The Commission invites public comment on its determination that no additional recordkeeping or information collection requirements, or changes to existing collection requirements, would result from the proposed rulemaking.

C. Cost-Benefit Considerations

1. Statutory and Regulatory Background

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing certain orders.[95] Section 15(a) further specifies that the costs and benefits shall be evaluated in light of the following five broad areas of market and public concern: (1) protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations (collectively referred to herein as the Section 15(a) Factors).

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[93] 44 U.S.C. 3501 *et seq.*

[94] The applicable collection of information is "Swap Data Recordkeeping and Reporting Requirements," OMB control number 3038-0096. Parties wishing to review the CFTC's information collections may do so at *www.reginfo.gov*, at which OMB maintains an inventory aggregating each of the CFTC's currently approved information collections, as well as the information collections that presently are under review.

[95] Section 15(a) of the CEA.

The baseline for the Commission's consideration of the costs and benefits of this proposed rulemaking is the existing statutory and regulatory framework under which any swap subject to the Clearing Requirement would be required to be cleared by central banks, sovereign entities, and international financial institutions. As a practical matter, however, the regulatory baseline has been affected by Commission action and staff no-action relief such that central banks, sovereign entities, international financial institutions, and their counterparties have relied on Commission statements in the 2012 End-User Exception final rule and staff no-action relief when entering into swaps that otherwise would be subject to the Clearing Requirement.

This proposal would codify current practice by exempting certain swaps with central banks (including BIS), sovereign entities, and international financial institutions from the Clearing Requirement. The Commission believes that the entities whose swaps would be exempted by this proposing release are the same entities governed by the determination set forth in the 2012 End-User Exception final rule and the entities that received staff no-action relief.[96] Consequently, the Commission expects that the actual costs and benefits of the proposed rule, as realized in the market, may not be as significant as compared to the baseline.

The Commission notes that this proposal would not change the eligibility to enter into uncleared swaps for any entity that has been relying on the 2012 End-User Exception final rule determination and has not been clearing swaps subject to the Clearing

[96] The one modification to the proposed list is to include the Islamic Development Bank as an additional entity that would be eligible for the exemption under proposed regulation 50.76(b). The Islamic Development Bank is not subject to the Commission's margin requirements for uncleared swaps.

Requirement. Entities named in the 2012 End-User Exception final rule[97] may continue to rely on the Commission's statement that they are not subject to section 2(h)(1) of the CEA and may choose not to clear a swap subject to the Clearing Requirement. The Commission has endeavored to assess the expected costs and benefits of the proposed rule in quantitative terms where possible. Where estimation or quantification is not feasible, the Commission has provided its discussion in qualitative terms.

The Commission notes that the consideration of costs and benefits below is based on the understanding that the markets function internationally, with many transactions involving U.S. firms taking place across international boundaries; with some Commission registrants being organized outside of the United States; with leading industry members typically conducting operations both within and outside the United States; and with industry members commonly following substantially similar business practices wherever located. Where the Commission does not specifically refer to matters of location, the below discussion of costs and benefits refers to the effects of the proposed rule on all activity subject to the proposed and amended regulations, whether by virtue of the activity's physical location in the United States or by virtue of the activity's connection with or effect on U.S. commerce under section 2(i) of the CEA.[98] In particular, the Commission notes that some entities affected by this proposed rulemaking are located outside of the United States.

In the sections that follow, the Commission considers: (1) the costs and benefits of the exemption to the Clearing Requirement for entities that meet the definitions of

[97] 77 FR at 42561-62 n.14.

[98] Section 2(i) of the CEA.

central bank, sovereign entity, and international financial institution, as identified in this proposed rule; and (2) the impact of the exemption for central banks, sovereign entities, and international financial institutions on the Section 15(a) Factors.

The Commission is incorporating by reference the costs and benefits of the supplemental proposal to exempt swaps entered into by certain bank holding companies, savings and loan holding companies, and CDFIs.[99]

2. Consideration of the Costs and Benefits of the Commission's Action

a. Costs

New proposed regulations 50.75 and 50.76 would exempt swaps entered into with central banks, sovereign entities, and certain international financial institutions from the Clearing Requirement. By exempting transactions with central banks, sovereign entities, and international financial institutions from the Clearing Requirement, the Commission recognizes that the benefits of central clearing will not accrue to swaps entered into by these entities. However, as discussed above, Congress exempted swaps with the Federal Reserve Banks, the Federal Government, and Federal agencies expressly backed by the full faith and credit of the United States by excluding any agreement, contract, or transaction entered into by these entities from the definition of a swap and consequently from the Clearing Requirement.[100] The proposed amendments to part 50 of the

[99] The Commission notes that the costs and benefits of the proposed changes in the 2018 Proposal were discussed in that release and remain under active consideration by the Commission. As the Commission noted in the 2018 Proposal, bank holding companies, savings and loan holding companies, and CDFIs are likely to have limited swap exposure, in terms of value and number of swaps. These entities would have relatively modest contributions to systemic risk and are expected to have some degree of protection against default because they would be required to indicate how they will meet financial obligations associated with uncleared swaps. Bank holding companies and savings and loan holding companies will benefit from an exemption from the Clearing Requirement through internal accounting efficiencies and all of the entities would benefit from the cost savings of not having to clear a swap. *See* 2018 Proposal at 44009-11.

[100] Section 1a(47)(B)(ix) of the CEA.

Commission's regulations would codify the Commission's 2012 End-User Exception final rule determination that based on considerations of comity, and in keeping with the traditions of the international system, swaps entered into with certain central banks (including BIS), sovereign entities, and international financial institutions should be treated like swaps entered into with the Federal Reserve Banks, the Federal Government, or a Federal agency and should not be subject to the Clearing Requirement.

The primary cost of the proposed amendments is, therefore, that swaps entered into with central banks, sovereign entities, and international financial institutions would not be subject to the Clearing Requirement.

In general, the principal risk to the financial system that central clearing seeks to address is counterparty credit risk. A DCO manages this risk by collecting initial and variation margin from its clearing members. The collection of margin allows a DCO to mitigate the possibility of a default, and to cover the losses due to default of a clearing member in many cases. By exempting transactions with these entities from the Clearing Requirement, the Commission recognizes that the risk-mitigating benefits of clearing will not attach to those transactions. In addition, the Commission is also aware that some of these entities may be covered under the Commission's uncleared margin requirements. In that case, the cost that may result from not requiring clearing these transactions may be mitigated. To the extent that these entities do not pay margin, there is a possibility of increased counterparty risk.

Request for Comment. The Commission requests comment, including any available quantitative data and analysis, on the risks resulting from the proposed amendment to the Clearing Requirement.

b. Benefits

Set against these costs are the benefits of allowing these entities to enter into swaps at a potentially lower cost. Specifically, the Commission believes that central banks (including BIS), sovereign entities, and international financial institutions would benefit from an exemption because project financing and risk management transactions with these entities would not be subject to required clearing or have the added expense of required clearing. The Commission believes that the cost savings achieved through an exemption from the Clearing Requirement would allow these entities to enter into more public service projects in furtherance of their missions.

The Commission believes there is an important benefit associated with the proposed amendments. If foreign governments (sovereign entities), central banks, or international financial institutions of which foreign governments are a member were subjected to regulation by the Commission in connection with their swaps, foreign regulators could treat the Federal Government, Federal Reserve Banks, or international financial institutions of which the United States is a member in a similar manner. The Commission expects that the proposed exemption from the Clearing Requirement will mean that if any of the Federal Government, Federal Reserve Banks, or international financial institutions of which the United States is a member were to engage in swaps in foreign jurisdictions, the actions of those entities with respect to those transactions would not be subject to foreign regulation. By allowing swaps entered into with central banks (including BIS), sovereign entities, and international financial institutions to be treated like swaps entered into with the Federal Reserve Banks, the Federal Government, and

Federal agencies, the Commission is facilitating similar treatment for transactions by foreign regulators.[101]

The Commission believes that most of the central banks, sovereign entities, and international financial institutions that would benefit from the proposed regulations would benefit from relief from the uncleared margin requirements under part 23 of the Commission's regulations, as well. For entities that would be required to comply with the Commission's uncleared margin requirements, their benefit from an exemption would be mitigated. Actual benefits may be less than expected if counterparties to eligible swaps by central banks, sovereign entities, and international financial institutions choose to voluntarily clear the swaps instead of electing an exemption from the Clearing Requirement.

As a practical matter, we believe that the entities for which the proposed rule would apply currently are not clearing all of their swaps subject to the Clearing Requirement.[102] In that regard, the practical effect of the proposed exception is to provide regulatory certainty. The Commission believes that regulatory certainty would reduce the legal costs faced by these entities.

Request for Comment. The Commission requests comment on the benefits, such as the expected cost savings to these entities, of codifying the Commission's determination and staff no-action relief that swaps entered into with central banks,

[101] *See* 77 FR at 42562.

[102] The Commission reviewed data from January 1, 2018 to December 31, 2018 that was reported to DDR and found that 16 international financial institutions entered into approximately 2,500 uncleared interest rate swaps with an estimated total notional value of $220 billion. Three international financial institutions elected to clear a portion of their interest rate swaps.

sovereign entities, or international financial institutions should be exempt from the Clearing Requirement.

3. Section 15(a) Factors

The discussion that follows supplements the related cost and benefit considerations addressed in the preceding section and addresses the overall effect of the proposed rule in terms of the factors set forth in section 15(a) of the CEA.

a. Protection of Market Participants and the Public

Section 15(a)(2)(A) of the CEA requires the Commission to evaluate the costs and benefits of a proposed regulation in light of considerations of protection of market participants and the public. The Commission considers the costs and benefits of the proposed exemption from the Clearing Requirement in light of its responsibility for determining which swaps should be required to be cleared. In recognition of the significant risk-mitigating benefits of central clearing, Congress amended the CEA to direct the Commission review all swaps that are offered for clearing by DCOs to determine whether such swaps should be required to be cleared. In developing the proposed rule, the Commission was cognizant that in enacting the Dodd-Frank Act, Congress excluded from the definition of a swap any agreement, contract, or transaction wherein the counterparty is a Federal Reserve Bank, the Federal Government, or a Federal agency that is expressly backed by the full faith and credit of the United States. In so doing, Congress determined that swaps with the Federal Reserve Banks, the Federal Government, and Federal agencies are not subject to the Clearing Requirement. Under this proposal, the Commission would be extending similar treatment for swap transactions with central banks and sovereign entities, as discussed above.

The Commission notes that the proposed exemption from the Clearing Requirement means that counterparties entering into swaps with certain entities would not have the protection afforded by central clearing through posting initial margin, daily variation margin payments, and other types of collateralization and risk mitigation associated with central clearing. The Commission, however, believes Congress would not have excluded the swaps entered into by the Federal Reserve Bank, the Federal Government, and Federal agencies from the definition of a swap if such transactions would pose a significant risk to market participants and the public. In proposing a similar exemption from the Clearing Requirement for swaps with central banks and sovereign entities, as discussed above, the Commission is applying a similar rationale.

As discussed above, the Commission believes that international comity would support similar regulatory treatment for swap transactions with central banks, sovereign entities, and international financial institutions. The Commission preliminarily believes these entities generally enter into limited swap transactions in support of their public interest missions. As such, while an exemption from the Clearing Requirement does result in reduced protection for counterparties, the Commission believes that the exemption for transactions with these entities would not pose a significant risk to market participants and the public.

b. Efficiency, Competitiveness, and Financial Integrity of Swap Markets

Section 15(a)(2)(B) of the CEA requires the Commission to evaluate the costs and benefits of a proposed regulation in light of efficiency, competitiveness, and financial integrity considerations. The Commission believes that proposed regulations 50.75 and

50.76 would lower the cost of using swaps for central banks, sovereign entities, and international financial institutions, and in that sense, make trading more efficient. A potential effect of the proposal would be to increase liquidity in swap markets, as entering into swaps would be less costly and these entities may engage in increased trading, which may in turn potentially improve the competitiveness of swaps markets for all participants. The Commission notes that to the extent that transactions with these counterparties are currently not cleared because of reliance on the Commission statements made in the 2012 End-User Exception final rule and DCR no-action letters, the impact of the proposed exemption on the efficiency, competitiveness, and financial integrity of the swap markets may be mitigated.

c. Price Discovery

Section 15(a)(2)(C) of the CEA requires the Commission to evaluate the costs and benefits of a proposed regulation in light of price discovery considerations. The Commission preliminarily believes that the proposed rule would not have a significant impact on price discovery. Typically more liquidity supports greater price discovery as more participants enter the market and/or more trading occurs. To the extent that markets become more liquid, price discovery could improve. In regard to transparency of prices, swap transactions, whether cleared or uncleared and regardless of the counterparty, are required by section 2(a)(13)(G) of the CEA to be reported to a swap data repository.

d. Sound Risk Management Practices

Section 15(a)(2)(D) of the CEA requires the Commission to evaluate the costs and benefits of a proposed regulation in light of sound risk management practices. The Commission believes that by eliminating the costs associated with clearing for central

banks, sovereign entities, and international financial institutions, the Commission is facilitating the use of swaps by these entities. To the extent that these entities use swaps to hedge existing risk, then the Commission preliminarily believes the proposed exemption from the clearing requirement will enable better risk management.

e. Other Public Interest Considerations

Section 15(a)(2)(E) of the CEA requires the Commission to evaluate the costs and benefits of a proposed regulation in light of other public interest considerations. As discussed above, the Commission believes that public interest and international comity support the exemption from the Clearing Requirement for swaps with central banks, sovereign entities, and international financial institutions. The Commission believes that the public interest mission of these entities will be served by lowering the cost of financing in support of their public interest missions. The Commission requests comment on other public interest considerations raised by the proposed exemption from the Clearing Requirement for swaps with central banks, sovereign entities, and international financial institutions.

D. General Request for Comment

The Commission requests comment on all aspects of the costs and benefits relating to the proposed exemption of these transactions from the Clearing Requirement. The Commission requests that commenters provide any data or other information that would be useful in estimating the quantifiable costs and benefits of this rulemaking.

E. Antitrust Considerations

Section 15(b) of the Act requires the Commission to take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least

anticompetitive means of achieving the objectives of the Act, as well as the policies and purposes of the Act, in issuing any order or adopting any Commission rule or regulation (including any exemption under section 4(c) or 4c(b)), or in requiring or approving any bylaw, rule, or regulation of a contract market or registered futures association established pursuant to section 17 of the Act.[103] The Commission believes that the public interest to be protected by the antitrust laws is generally to protect competition. The Commission requests comment on whether the proposal implicates any other specific public interest to be protected by the antitrust laws.

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

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

List of Subjects in 17 CFR Part 50

Business and industry, Clearing, Cooperatives, Reporting requirements, Swaps.

For the reasons discussed in the preamble, the Commodity Futures Trading Commission proposes to amend 17 CFR chapter I as set forth below:

[103] Section 15(b) of the CEA.

PART 50 – CLEARING REQUIREMENT AND RELATED RULES

1. The authority citation for part 50 is revised to read as follows:

Authority: 7 U.S.C. 2(h), 6(c), and 7a-1 as amended by Pub. L. 111-203, 124 Stat. 1376.

2. Revise the subpart B heading to read as follows:

Subpart B – Clearing Requirement Compliance Schedule and Compliance Dates

3. Add § 50.26 to read as follows:

§ 50.26 Swap clearing requirement compliance dates.

(a) *Compliance dates for interest rate swap classes.* The compliance dates for swaps that are required to be cleared under § 50.4(a) are specified in the table below.

Table 1

Swap Asset Class	Swap Class Subtype	Currency and Floating Rate Index	Stated Termination Date Range	Clearing Requirement Compliance Date
Interest Rate Swap	Fixed-to-Floating	Euro (EUR) EURIBOR	28 days to 50 years	Category 1 entities March 11, 2013
				All non-Category 2 entities June 10, 2013
				Category 2 entities September 9, 2013
Interest Rate Swap	Fixed-to-Floating	Sterling (GBP) LIBOR	28 days to 50 years	Category 1 entities March 11, 2013
				All non-Category 2 entities June 10, 2013
				Category 2 entities September 9, 2013
Interest Rate Swap	Fixed-to-Floating	U.S. Dollar (USD) LIBOR	28 days to 50 years	Category 1 entities March 11, 2013
				All non-Category 2 entities June 10, 2013
				Category 2 entities September 9, 2013
Interest Rate Swap	Fixed-to-Floating	Yen (JPY) LIBOR	28 days to 50 years	Category 1 entities March 11, 2013
				All non-Category 2 entities June 10, 2013
				Category 2 entities September 9, 2013
Interest Rate Swap	Fixed-to-Floating	Australian Dollar (AUD) BBSW	28 days to 30 years	All entities December 13, 2016

Swap Asset Class	Swap Class Subtype	Currency and Floating Rate Index	Stated Termination Date Range	Clearing Requirement Compliance Date
Interest Rate Swap	Fixed-to-Floating	Canadian Dollar (CAD) CDOR	28 days to 30 years	All entities July 10, 2017
Interest Rate Swap	Fixed-to-Floating	Hong Kong Dollar (HKD) HIBOR	28 days to 10 years	All entities August 30, 2017
Interest Rate Swap	Fixed-to-Floating	Mexican Peso (MXN) TIIE-BANXICO	28 days to 21 years	All entities December 13, 2016
Interest Rate Swap	Fixed-to-Floating	Norwegian Krone (NOK) NIBOR	28 days to 10 years	All entities April 10, 2017
Interest Rate Swap	Fixed-to-Floating	Polish Zloty (PLN) WIBOR	28 days to 10 years	All entities April 10, 2017
Interest Rate Swap	Fixed-to-Floating	Singapore Dollar (SGD) SOR-VWAP	28 days to 10 years	All entities October 15, 2018
Interest Rate Swap	Fixed-to-Floating	Swedish Krona (SEK) STIBOR	28 days to 15 years	All entities April 10, 2017
Interest Rate Swap	Fixed-to-Floating	Swiss Franc (CHF) LIBOR	28 days to 30 years	All entities October 15, 2018
Interest Rate Swap	Basis	Euro (EUR) EURIBOR	28 days to 50 years	Category 1 entities March 11, 2013
				All non-Category 2 entities June 10, 2013
				Category 2 entities September 9, 2013
Interest Rate Swap	Basis	Sterling (GBP) LIBOR	28 days to 50 years	Category 1 entities March 11, 2013
				All non-Category 2 entities June 10, 2013
				Category 2 entities September 9, 2013
Interest Rate Swap	Basis	U.S. Dollar (USD) LIBOR	28 days to 50 years	Category 1 entities March 11, 2013
				All non-Category 2 entities June 10, 2013
				Category 2 entities September 9, 2013
Interest Rate Swap	Basis	Yen (JPY) LIBOR	28 days to 30 years	Category 1 entities March 11, 2013
				All non-Category 2 entities June 10, 2013
				Category 2 entities September 9, 2013
Interest Rate Swap	Basis	Australian Dollar (AUD) BBSW	28 days to 30 years	All entities December 13, 2016

Swap Asset Class	Swap Class Subtype	Currency and Floating Rate Index	Stated Termination Date Range	Clearing Requirement Compliance Date
Interest Rate Swap	Forward Rate Agreement	Euro (EUR) EURIBOR	3 days to 3 years	Category 1 entities March 11, 2013
				All non-Category 2 entities June 10, 2013
				Category 2 entities September 9, 2013
Interest Rate Swap	Forward Rate Agreement	Sterling (GBP) LIBOR	3 days to 3 years	Category 1 entities March 11, 2013
				All non-Category 2 entities June 10, 2013
				Category 2 entities September 9, 2013
Interest Rate Swap	Forward Rate Agreement	U.S. Dollar (USD) LIBOR	3 days to 3 years	Category 1 entities March 11, 2013
				All non-Category 2 entities June 10, 2013
				Category 2 entities September 9, 2013
Interest Rate Swap	Forward Rate Agreement	Yen (JPY) LIBOR	3 days to 3 years	Category 1 entities March 11, 2013
				All non-Category 2 entities June 10, 2013
				Category 2 entities September 9, 2013
Interest Rate Swap	Forward Rate Agreement	Polish Zloty (PLN) WIBOR	3 days to 2 years	All entities April 10, 2017
Interest Rate Swap	Forward Rate Agreement	Norwegian Krone (NOK) NIBOR	3 days to 2 years	All entities April 10, 2017
Interest Rate Swap	Forward Rate Agreement	Swedish Krona (SEK) STIBOR	3 days to 3 years	All entities April 10, 2017
Interest Rate Swap	Overnight Index Swap	Euro (EUR) EONIA	7 days to 2 years	Category 1 entities March 11, 2013
				All non-Category 2 entities June 10, 2013
				Category 2 entities September 9, 2013
			2 years + 1 day to 3 years	All entities December 13, 2016
Interest Rate Swap	Overnight Index Swap	Sterling (GBP) SONIA	7 days to 2 years	Category 1 entities March 11, 2013
				All non-Category 2 entities June 10, 2013
				Category 2 entities September 9, 2013
			2 years + 1 day to 3 years	All entities December 13, 2016
Interest Rate Swap	Overnight Index Swap	U.S. Dollar (USD) FedFunds	7 days to 2 years	Category 1 entities March 11, 2013
				All non-Category 2 entities

Swap Asset Class	Swap Class Subtype	Currency and Floating Rate Index	Stated Termination Date Range	Clearing Requirement Compliance Date
				June 10, 2013
				Category 2 entities September 9, 2013
			2 years + 1 day to 3 years	All entities December 13, 2016
Interest Rate Swap	Overnight Index Swap	Australian Dollar (AUD) AONIA-OIS	7 days to 2 years	All entities December 13, 2016
Interest Rate Swap	Overnight Index Swap	Canadian Dollar (CAD) CORRA-OIS	7 days to 2 years	All entities July 10, 2017

(b) *Compliance dates for credit default swap classes*. The compliance dates for swaps that are required to be cleared under § 50.4(b) are specified in the table below.

Table 2

Swap Asset Class	Swap Class Subtype	Indices	Tenor	Clearing Requirement Compliance Date
Credit Default Swap	North American untranched CDS indices	CDX.NA.IG	3Y, 5Y, 7Y, 10Y	Category 1 entities March 11, 2013
				All non-Category 2 entities June 10, 2013
				Category 2 entities September 9, 2013
Credit Default Swap	North American untranched CDS indices	CDX.NA.HY	5Y	Category 1 entities March 11, 2013
				All non-Category 2 entities June 10, 2013
				Category 2 entities September 9, 2013
Credit Default Swap	European untranched CSD indices	iTraxx Europe	5Y, 10Y	Category 1 entities April 26, 2013
				Category 2 entities July 25, 2013
				All non-Category 2 entities October 23, 2013
Credit Default Swap	European untranched CSD indices	iTraxx Europe Crossover	5Y	Category 1 entities April 26, 2013
				Category 2 entities July 25, 2013
				All non-Category 2 entities October 23, 2013
Credit Default Swap	European untranched CSD indices	iTraxx Europe HiVol	5Y	Category 1 entities April 26, 2013
				Category 2 entities July 25, 2013
				All non-Category 2 entities October 23, 2013

4. Revise the subpart C heading to read as follows:

Subpart C – Exceptions and Exemptions from the Clearing Requirement

§ 50.50 [Amended]

5. Amend § 50.50 as follows:

a. Revise the section heading to read as follows:

§ 50.50 Non-financial end-user exception to the clearing requirement.

b. Remove and reserve paragraph (d).

§ 50.51 [Amended]

6. Revise the § 50.51 heading to read as follows:

§ 50.51 Cooperatives exempt from the clearing requirement.

§ 50.52 [Amended]

7. Revise the § 50.52 heading to read as follows:

§ 50.52 Affiliated entities exempt from the clearing requirement.

8. Add **§** 50.53 to read as follows:

§ 50.53 Banks, savings associations, farm credit system institutions, and credit unions exempt from the clearing requirement.

For purposes of section 2(h)(7)(A) of the Act, a person that is a "financial entity" solely because of section 2(h)(7)(C)(i)(VIII) shall be exempt from the definition of "financial entity" and is eligible to elect the exception to the clearing requirement under §50.50, if such person:

(a) Is organized as a bank, as defined in section 3(a) of the Federal Deposit Insurance Act, the deposits of which are insured by the Federal Deposit Insurance Corporation; a savings association, as defined in section 3(b) of the Federal Deposit

Insurance Act, the deposits of which are insured by the Federal Deposit Insurance Corporation; a farm credit system institution chartered under the Farm Credit Act of 1971; or an insured Federal credit union or State-chartered credit union under the Federal Credit Union Act; and

(b) Has total assets of $10,000,000,000 or less on the last day of such person's most recent fiscal year;

(c) Reports, or causes to be reported, the swap to a swap data repository pursuant to §§ 45.3 and 45.4 of this chapter, and reports, or causes to be reported, all information as provided in paragraph (b) of § 50.50 to a swap data repository; and

(d) Is using the swap to hedge or mitigate commercial risk as provided in paragraph (c) of § 50.50.

9. Add subpart D to read as follows:

Subpart D – Swaps Not Subject to the Clearing Requirement

Sec.

§ 50.75 Swaps entered into by central banks or sovereign entities.

Swaps entered into by a central bank or sovereign entity shall be exempt from the clearing requirement of section 2(h)(1)(A) of the Act and this part if reported to a swap data repository pursuant to §§ 45.3 and 45.4 of this chapter.

(a) For the purposes of this section, the term *central bank* means a reserve bank or monetary authority of a central government (including the Board of Governors of the

Federal Reserve System or any of the Federal Reserve Banks) or the Bank for International Settlements.

(b) For the purposes of this section, the term *sovereign entity* means a central government (including the U.S. government), or an agency, department, or ministry of a central government.

§ 50.76 Swaps entered into by international financial institutions.

(a) Swaps entered into by an international financial institution shall be exempt from the clearing requirement of section 2(h)(1)(A) of the Act and this part if reported to a swap data repository pursuant to §§ 45.3 and 45.4 of this chapter.

(b) For purposes of this section, the term *international financial institution* means:

(1) African Development Bank;

(2) African Development Fund;

(3) Asian Development Bank;

(4) Banco Centroamericano de Integración Económica;

(5) Bank for Economic Cooperation and Development in the Middle East and North Africa;

(6) Caribbean Development Bank;

(7) Corporación Andina de Fomento;

(8) Council of Europe Development Bank;

(9) European Bank for Reconstruction and Development;

(10) European Investment Bank;

(11) European Investment Fund;

(12) European Stability Mechanism;

(13) Inter-American Development Bank;

(14) Inter-American Investment Corporation;

(15) International Bank for Reconstruction and Development;

(16) International Development Association;

(17) International Finance Corporation;

(18) International Monetary Fund;

(19) Islamic Development Bank;

(20) Multilateral Investment Guarantee Agency;

(21) Nordic Investment Bank;

(22) North American Development Bank; and

(23) Any other entity that provides financing for national or regional development in which the U.S. government is a shareholder or contributing member.

§ 50.77 Interest rate swaps entered into by community development financial institutions.

(a) For the purposes of this section, the term *community development financial institution* means an entity that satisfies the definition in section 103(5) of the Community Development Banking and Financial Institutions Act of 1994, and is certified by the U.S. Department of the Treasury's Community Development Financial Institution Fund as meeting the requirements set forth in 12 CFR 1805.201(b).

(b) A swap entered into by a community development financial institution shall not be subject to the clearing requirement of section 2(h)(1)(A) of the Act and this part if:

(1) The swap is a U.S. dollar denominated interest rate swap in the fixed-to-floating class or the forward rate agreement class of swaps that would otherwise be subject to the clearing requirement under § 50.4(a);

(2) The total aggregate notional value of all swaps entered into by the community development financial institution during the 365 calendar days prior to the day of execution of the swap is less than or equal to $200,000,000;

(3) The swap is one of ten or fewer swap transactions that the community development financial institution enters into within a period of 365 calendar days;

(4) One of the counterparties to the swap reports the swap to a swap data repository pursuant to §§ 45.3 and 45.4 of this chapter, and reports all information as provided in paragraph (b) of § 50.50 to a swap data repository; and

(5) The swap is used to hedge or mitigate commercial risk as provided in paragraph (c) of §50.50.

§ 50.78 Swaps entered into by bank holding companies.

(a) For purposes of this section, the term *bank holding company* means an entity that is organized as a bank holding company, as defined in section 2 of the Bank Holding Company Act of 1956.

(b) A swap entered into by a bank holding company shall not be subject to the clearing requirement of section 2(h)(1)(A) of the Act and this part if:

(1) The bank holding company has aggregated assets, including the assets of all of its subsidiaries, that do not exceed $10,000,000,000 according to the value of assets of each subsidiary on the last day of each subsidiary's most recent fiscal year;

(2) One of the counterparties to the swap reports the swap to a swap data repository pursuant to §§ 45.3 and 45.4 of this chapter, and reports all information as provided in paragraph (b) of § 50.50 to a swap data repository; and

(3) The swap is used to hedge or mitigate commercial risk as provided in paragraph (c) of § 50.50.

§ 50.79 Swaps entered into by savings and loan holding companies.

(a) For purposes of this section, the term *savings and loan holding company* means an entity that is organized as a savings and loan holding company, as defined in section 10 of the Home Owners' Loan Act of 1933.

(b) A swap entered into by a savings and loan holding company shall not be subject to the clearing requirement of section 2(h)(1)(A) of the Act and this part if:

(1) The savings and loan holding company has aggregated assets, including the assets of all of its subsidiaries, that do not exceed $10,000,000,000 according to the value of assets of each subsidiary on the last day of each subsidiary's most recent fiscal year;

(2) One of the counterparties to the swap reports the swap to a swap data repository pursuant to §§ 45.3 and 45.4 of this chapter, and reports all information as provided in paragraph (b) of § 50.50 to a swap data repository; and

(3) The swap is used to hedge or mitigate commercial risk as provided in paragraph (c) of § 50.50.

Issued in Washington, DC, on April 17, 2020, by the Commission.

Christopher Kirkpatrick,

Secretary of the Commission.

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

Appendices to Swap Clearing Requirement Exemptions – Commission Voting Summary, Chairman's Statement, and Commissioners' Statements

Appendix 1 – Commission Voting Summary

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

Appendix 2 – Statement of Support of Chairman Heath P. Tarbert

I am pleased to support today's proposal to amend the CFTC's Part 50 rules, which implement the swap clearing requirement of section 2(h)(1) of the Commodity Exchange Act (the "Clearing Requirement"). The proposed Part 50 amendments would create new regulations 50.75 and 50.76, which would codify existing exemptions from the Clearing Requirement for swaps entered into with certain central banks, sovereign entities, and international financial institutions.[1]

Separately, today's proposal would create new regulations 50.77, 50.78, and 50.79, which would exempt from the Clearing Requirement certain swaps entered into by small bank holding companies, savings and loan holding companies, and community development financial institutions.[2] The proposal also provides a compliance schedule

[1] The majority of the entities covered by the proposed rule were previously identified in the preamble to the 2012 End-User Exception final rule as entities that should not be subject to the Clearing Requirement. *See* End-User Exception to the Clearing Requirement for Swaps, 77 FR 42560 (Jul. 19, 2012). Four international financial institutions covered by the proposed amendment separately obtained staff no-action letters concerning the clearing requirement. *See* CFTC Letter No. 13-25 (June 10, 2013) (providing no-action relief to the Corporación Andina de Fomento); CFTC Letter No. 17-57 (Nov. 7, 2017) (providing no-action relief to Banco Centroamericano de Integración Económica); CFTC Letter No. 17-59 (Nov. 7, 2017) (providing no-action relief to the North American Development Bank); and CFTC Letter No. 17-58 (Nov. 7, 2017) and CFTC Letter No. 19-23 (Oct. 16, 2019) (providing no-action relief to the European Stability Mechanism).

[2] In 2018, the Commission proposed to exempt these entities from the Clearing Requirement, but today we are supplementing that earlier proposal with technical amendments to the rule text, and we are soliciting

setting forth all the past compliance dates for the 2012 and 2016 swap clearing requirement rules and contemplates certain technical amendments to various other provisions within Part 50.

Together, these amendments to the Clearing Requirement would clarify existing exemptions for banks, savings associations, farm credit systems, and credit units with total assets under $10 billion.[3] While these entities are small, they play outsized roles in supporting the U.S. economy. These are not Wall Street banks, but primarily local institutions that support American communities, businesses, and families. Clarifying their relief from the Clearing Requirement advances the CFTC's strategic goal of regulating the derivatives markets to promote the interests of all Americans.[4]

In addition, today's proposed amendments to the Clearing Requirement will significantly reduce costs and regulatory burdens for entities that pose little or no systemic risk to the United States—*i.e.*, foreign governmental institutions on the one hand, and small domestic lenders on the other. By codifying existing exemptions, the Commission will give certainty to market participants by etching their clearing exemptions—now fragmented among various no-action letters—into the text of our Part 50 rules. Doing so is especially important in these challenging times: more than ever, certainty will help our market participants continue to perform their important functions.

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additional public comment. *See* Amendments to Clearing Exemption for Swaps Entered Into by Certain Bank Holding Companies, Savings and Loan Holding Companies, and Community Development Financial Institutions, 83 FR 44001 (Aug. 29, 2018).

[3] *See* proposed new regulations 50.77, 50.78, and 50.79.

[4] *See* Remarks of CFTC Chairman Heath P. Tarbert to the 35th Annual FIA Expo 2019 (Oct. 30, 2019), available at *https://www.cftc.gov/PressRoom/SpeechesTestimony/opatarbert2* (outlining the CFTC's strategic goals).

Today's proposed amendments to the Clearing Requirement take an important step in that direction.

Appendix 3 – Statement of Support of Commissioner Brian D. Quintenz

In March 2018, I articulated my approach to our current regulatory relationship with our European counterparts in light of their refusal to stand by or re-affirm their 2016 commitments in the CFTC's and European Commission's common approach to the regulation of cross-border central counterparties (CCPs) (CFTC-EC CCP Agreement).[1] Specifically, I believe that the absence of the agreement's re-affirmation in the European Market Infrastructure Regulation 2.2 (EMIR 2.2) directly implied the agreement's abrogation.[2] I therefore vowed that I would either object to or vote against any relief provided to, or requested by, European Union authorities until the agreement's clarity was restored. Since that time, I have consistently voted against, or objected to, any regulation or relief that provides special accommodations to European entities, including the proposed exemption from margin requirements for the European Stability Mechanism (ESM) that the Commission seeks to finalize today.[3]

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[1] Keynote Address of Commissioner Brian Quintenz before FIA Annual Meeting, Boca Raton, Florida (March 14, 2018), *https://www.cftc.gov/PressRoom/SpeechesTestimony/opaquintenz9*; and Joint Statement from CFTC Chairman Timothy Massad and European Commissioner Jonathan Hill, CFTC and the European Commission: Common approach for transatlantic CCPs (Feb. 10, 2016), *https://www.cftc.gov/PressRoom/PressReleases/pr7342-16*.

[2] The proposed implementation of EMIR 2.2 by ESMA is available at, *https://www.esma.europa.eu/press-news/esma-news/esma-consults-tiering-comparable-compliance-and-fees-under-emir-22*.

[3] Dissenting Statement by Commissioner Brian Quintenz before the Open Commission Meeting: FBOT Registration (Nov. 5, 2019), *https://www.cftc.gov/PressRoom/SpeechesTestimony/quintenzstatement110519*; Dissenting Statement by Commissioner Quintenz to the Proposed Exclusion for the European Stability Mechanism from the Commission's Margin Requirements for Uncleared Swaps (Oct. 16, 2019), *https://www.cftc.gov/PressRoom/SpeechesTestimony/quintentzstatement101619*; Statement of Commissioner Brian Quintenz on Staff No-Action Relief for Eurex Clearing AG (December 20, 2018), *https://www.cftc.gov/PressRoom/SpeechesTestimony/quintenzstatement122018*.

However, the unprecedented devastating economic and social impacts of COVID-19 across the globe warrant a reprieve from that position. In the United States, financial regulators have acted swiftly, decisively, and boldly to mitigate economic disruptions and support market liquidity, including providing regulatory relief where necessary. I am very proud of the CFTC's decisive response to the COVID-19 pandemic, which promoted the full functioning of derivatives markets despite the extraordinary challenges facing exchanges, clearinghouses, and market intermediaries as a result of social distancing.[4] I know the Commission, under the strong leadership of Chairman Heath P. Tarbert, is committed to providing any additional relief necessary to ensure that U.S. markets remain accessible.

Our European counterparts are engaged in the same epic struggle as we are to lessen the extraordinary economic and social harms of this pandemic. Although I remain committed to ensuring the terms of the CFTC-EC CCP Agreement are ultimately upheld, I also recognize that issue is one facet of a much broader, deeper bond we share with the European Union—a relationship that has been grounded in goodwill, trust, and partnership. Many of the European institutions affected by the rules and no-action relief before the Commission today are likely to be central to the European Union's COVID-19 economic recovery efforts. As a result, I believe it is appropriate to support the items before the Commission today, which, by providing relief from CFTC clearing and margin requirements, may bolster the ability of EU institutions to provide critical financial assistance to their economies, businesses, and citizens.

[4] Statement of CFTC Commissioner Brian Quintenz on Current Market Dynamics and Commission Actions Related to COVID-19 (March 18, 2020), *https://www.cftc.gov/PressRoom/SpeechesTestimony/quintenzstatment031820*.

For example, the European Commission, ESM, and European Investment Bank (EIB) are working in concert to take unprecedented actions at the European level to complement national measures to mitigate the impacts of COVID-19.[5] The ESM has many economic tools at its disposal, including making loans to Eurozone member states, purchasing the bonds of Eurozone members, providing precautionary credit lines that can be drawn upon if needed, and directly recapitalizing financial institutions.[6]

Similarly, the EIB, the lending arm of the European Union, and the European Investment Fund (EIF), which specializes in finance for small and medium sized businesses, are also working together to respond to COVID-19. Together, the EIB and the EIF have proposed a plan to provide immediate financing to combat the health and economic effects of the pandemic.[7] Each of these EU institutions may seek to enter into swaps subject to the CFTC's clearing or uncleared margin requirements in order to hedge the risks associated with these lending and investment activities. Accordingly, I support today's measures that provide relief from those requirements, thereby freeing up additional capital that can be immediately deployed in the European economy.

When the present hardship caused by COVID-19 abates, I look forward to re-engaging with our European counterparts on the critical issue of the oversight of U.S. CCPs. I believe the possibility still exists for a successful implementation of EMIR 2.2

[5] *The time for solidarity in Europe is now – a concerted European financial response to the corona-crisis*, *https://www.esm.europa.eu/blog/time-solidarity-europe-concerted-european-financial-response-corona-crisis* (April 2, 2020).

[6] European Stability Mechanism, Lending Toolkit, *https://www.esm.europa.eu/assistance/lending-toolkit*.

[7] Coronavirus outbreak: EIB Group's response to the pandemic, *https://www.eib.org/en/about/initiatives/covid-19-response/index.htm* (April 9, 2020).

that fully respects the CFTC's ultimate authority over U.S. CCPs, and I am committed to doing everything in my power to achieve this outcome.

Amendments to Swap Clearing Requirement Exemptions Under Part 50

I am pleased to support this proposal, which codifies existing relief, from the Commission's requirement that certain commonly traded interest rate swaps and credit default swaps be cleared following their execution.[8] The new exemptions could be elected by several classes of counterparties that may enter into these swaps, namely: *sovereign nations*; *central banks*; "*international financial institutions*" of which sovereign nations are members; *bank holding companies*, and *savings and loan holding companies*, whose assets total no more than $10 billion; and *community development financial institutions* recognized by the U.S. Treasury Department. Today's proposal notes that many of these entities have actually relied on existing relief, electing not to clear swaps that are generally subject to the clearing requirement.

I strongly support the policy of international "comity" described in the proposal, recognizing that sovereign nations and their instrumentalities should generally not be subject to the Commission's regulations. I trust that by proposing this relief, the United States, the Federal Reserve, and other U.S. government instrumentalities will receive the same treatment in foreign jurisdictions. As noted above, this policy is timely in light of the current projects the ESM, the EIB, and the EIF are currently undertaking in response to the pandemic. I am pleased that the Commission can provide flexibility to these entities at this time when entering into swaps with U.S. swap dealers. To this end, I also support the decision of the Division of Clearing and Risk to extend the current, time-

[8] The swap clearing requirement is codified in part 50 of the Commission's regulations (17 CFR part 50).

limited no-action relief provided to the ESM[9] pending the finalization of the amendments to part 50. I note that the EIB, EIF, other international financial institutions, central banks, and sovereign entities currently have relief that is not time-limited.[10]

As for the bank holding companies, savings and loan holding companies, and community development financial institutions that would be provided relief pursuant to this proposal, I am hopeful that the Commission will ultimately finalize this relief, which it first proposed for these entities in 2018.[11] However, I note that these entities currently have relief pursuant to no-action letters issued in 2016 that have no expiration dates.[12]

Final Rule Excluding the European Stability Mechanism from CFTC Margin Requirements for Uncleared Swaps

I support today's final rule that would exempt a swap between the European Stability Mechanism and a swap dealer from the Commission's margin requirements applicable to uncleared swaps. This rule is premised on the same policy of international comity referenced in today's proposed exemption from the swap clearing requirement. I would like to highlight that the EIB, EIF, and the other international financial institutions referenced by the proposed exemption from the swap clearing requirement, as well as sovereign entities and central banks, are already exempted from the Commission's margin requirements for uncleared swaps pursuant to Commission regulations.[13] Finally,

[9] CFTC Letter 19-23 (Oct. 16, 2019).

[10] End-User Exception to the Clearing Requirement for Swaps, 77 FR 42560, 42561-62 (Jul. 19, 2012).

[11] Amendments to Clearing Exemption for Swaps Entered Into by Certain Bank Holding Companies, Savings and Loan Holding Companies, and Community Development Financial Institutions, 83 FR 44001 (Aug. 29, 2018).

[12] CFTC Letters 16-01 and -02 (both Jan. 8, 2016).

[13] CFTC regulation 23.151.

I am pleased that the Division of Swap Dealer and Intermediary Oversight is today extending previously granted, time-limited no-action relief to the ESM,[14] pending the effective date of today's final rule.

[14] CFTC Letter 19-22 (Oct. 16, 2019).

Appendix 4 – Statement of Commissioner Dan M. Berkovitz

I support issuing the notice of proposed rulemaking ("Proposal") to codify certain exemptions from the swap clearing requirement that currently exist through Commission guidance or staff no action relief. Each of the proposed exemptions is consistent with longstanding Commission policy and the Commission's experience in implementing the swap clearing requirement over the past eight years. Codifying these exemptions will provide certainty and transparency for market participants.

First, the Proposal would codify in rule text a list of foreign central banks, sovereign entities at the national level, and international institutions that are currently excepted from the clearing requirement through no action relief or guidance. This codification would provide regulatory certainty that executing the swaps on an uncleared basis will not run afoul of our rules. This certainty benefits not only to the named entities, but also to their counterparties, most of which are swap dealers registered with the Commission. As described in the preamble to the Proposal, it has been the Commission's policy since the adoption of the clearing requirement to exempt these institutions due to considerations of international comity, the reduced risks arising from swaps entered into by these institutions, and the public purposes for which these institutions enter into such swaps.

Second, the Proposal includes a supplemental proposal making technical changes to a 2018 Commission proposal. This proposal would provide clearing exemptions for (i) certain interest rate swaps entered into by community development financial institutions to hedge or mitigate commercial risks, and (ii) for swaps entered into by bank or savings and loan holding companies that each have no more than $10 billion in consolidated

assets if they enter into the swaps to hedge or mitigate commercial risks. This supplemental proposal also would codify relief from the clearing requirement currently provided by two no-action letters. Commodity Exchange Act section 2(h)(7)(A) in essence excludes from the clearing requirement banks and savings associations with less than $10 billion in assets to the extent determined by the Commission. Since the Commission has already provided the exemption to individual banks and savings associations,[1] it makes sense to codify this exemption for holding companies for those entities that also have no more than $10 billion in consolidated assets. As described in the preamble, swap data repository data indicates that over the past several years the number and scope of such swaps entered into by these institutions that would be included within these exemptions has been relatively limited.

I commend the staff of the Division of Clearing and Risk for this well developed and drafted Proposal. Providing certainty to market participants is important and the Proposal would do so for the entities involved in the exempted swaps.

[1] *See* Regulation 50.50(d).