

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 50

RIN 3038-AE92

**Exemption from the Swap Clearing Requirement for Certain Affiliated Entities –
Alternative Compliance Frameworks for Anti-Evasionary Measures**

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission (Commission or CFTC) is adopting amendments to Commission regulation 50.52, which exempts certain affiliated entities within a corporate group from the swap clearing requirement under the applicable provision of the Commodity Exchange Act (CEA or Act). These amendments concern the anti-evasionary condition that swaps subject to the clearing requirement entered into with unaffiliated counterparties either be cleared or be eligible for an exception to or exemption from the clearing requirement. Specifically, the amendments make permanent certain temporary alternative compliance frameworks intended to make this anti-evasionary condition workable for international corporate groups in the absence of foreign clearing regimes determined to be comparable to CFTC requirements.

DATES: The effective date for this final rule is **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

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SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background

- A. Swap Clearing Requirement*
- B. Commission Regulation 50.52*

II. The Proposal to Amend Regulation 50.52

- A. The Commission's Proposal to Revise the Alternative Compliance Frameworks*
- B. Comments Received*
- C. Trade Execution Requirement*

III. Final Rule

- A. Amendments to Commission Regulation 50.52*
- B. Commission's Section 4(c) Authority*
- C. Effective Date and Compliance Date*

IV. Related Matters

- A. Regulatory Flexibility Act*
- B. Paperwork Reduction Act*
- C. Cost-Benefit Considerations*
- D. Antitrust Considerations*

I. Background

A. Swap Clearing Requirement

Part 50 of the Commission's regulations implements the swap clearing requirement under section 2(h) of the CEA and certain exceptions and exemptions thereto. The swap clearing requirement under section 2(h)(1)(A) of the CEA states that if the Commission requires a swap to be cleared, then it is unlawful for any person to engage in that swap unless the swap is submitted for clearing to a derivatives clearing organization (DCO) that is registered under the CEA or a DCO that the Commission has exempted from registration.

The Commission has adopted swap clearing requirement determinations for certain classes of interest rate swaps and credit default swaps.¹ Swaps that are subject to the Commission's swap clearing requirement are described in Commission regulation 50.4 (Clearing Requirement). Part 50 of the Commission's regulations also includes a number of exceptions to and exemptions from the Clearing Requirement. Certain of these exceptions or exemptions are based on statutory principles (*e.g.*, the end-user exception),² and others were adopted pursuant to the Commission's public interest exemption authority (*e.g.*, the exemption for cooperatives).³

In April 2013 the Commission adopted a limited exemption from the Clearing Requirement for certain affiliated entities pursuant to its public interest authority (Inter-Affiliate Exemption).⁴ The Inter-Affiliate Exemption is subject to certain conditions that limit the availability of the exemption and are designed to ensure that the Clearing Requirement is not circumvented. When the Commission adopted the Inter-Affiliate Exemption, it concluded that, an exemption subject to certain conditions is appropriate for the transactions at issue, promotes responsible financial innovation and fair competition, and is consistent with the public interest.⁵ These conditions are an important element of the Inter-Affiliate Exemption and continue to be an area of the Commission's focus. This final rule amends certain regulatory provisions in Commission regulation 50.52 relating to the conditions of electing the Inter-Affiliate Exemption.

B. Commission Regulation 50.52

¹ Clearing Requirement Determination Under Section 2(h) of the CEA, 77 FR 74284 (Dec. 13, 2012) and Clearing Requirement Determination Under Section 2(h) of the CEA for Interest Rate Swaps, 81 FR 71202 (Oct. 14, 2016).

² See End-User Exception to the Clearing Requirement for Swaps, 77 FR 42560 (Jul. 19, 2012).

³ See Clearing Exemption for Certain Swaps Entered Into by Cooperatives, 78 FR 52286 (Aug. 22, 2013).

⁴ Clearing Exemption for Swaps Between Certain Affiliated Entities, 78 FR 21750 (Apr. 11, 2013).

⁵ *Id.* at 21754.

Commission regulation 50.52 governs the eligibility and compliance requirements for market participants electing not to clear inter-affiliate swaps pursuant to the Inter-Affiliate Exemption. This regulation has been in effect since June 2013, and Commission staff has monitored the election and availability of the Inter-Affiliate Exemption over time. Certain assumptions about the global adoption of swap clearing mandates were not realized, and the Commission's conditions to the Inter-Affiliate Exemption that were adopted and implemented in 2013 no longer serve the function intended.⁶ This final rule amends those conditions to the Inter-Affiliate Exemption in order to reflect current regulatory practices.

1. Eligible Affiliate Counterparties

First, to qualify for the Inter-Affiliate Exemption, each counterparty to a swap must meet the definition of an "eligible affiliate counterparty" set forth in Commission regulation 50.52(a). The terms of the exempted swap must comply with a documentation requirement and be subject to a centralized risk management program. The election of the Inter-Affiliate Exemption, as well as how the requirements of the exemption are met, must be reported to a Commission-registered swap data repository. Finally, the Inter-Affiliate Exemption generally requires each eligible affiliate counterparty to clear swaps executed with unaffiliated counterparties (*i.e.*, outward-facing swaps), if the swaps are covered by the Commission's Clearing Requirement and do not otherwise qualify for an

⁶ Some non-U.S. jurisdictions are still in the process of adopting their domestic mandatory clearing regimes, some non-U.S. jurisdictions may never implement clearing for swaps, and a number of non-U.S. regimes vary significantly in terms of product and participant scope from the Commission's Clearing Requirement.

exception to or exemption from the Clearing Requirement (Outward-Facing Swaps Condition).⁷

The Commission continues to believe that it is necessary to impose risk-mitigating conditions on inter-affiliate swaps to uphold the Clearing Requirement, deter evasion, and help protect against systemic risk to the U.S. As the Commission stated in the adopting release issuing the Inter-Affiliate Exemption, entities that are affiliated with each other are separate legal entities notwithstanding their affiliation.⁸ As separate legal entities, affiliates generally are not legally responsible for each other's contractual obligations. This legal reality becomes readily apparent when one or more affiliate(s) become insolvent. Affiliates, as separate legal entities, are managed in bankruptcy as separate estates, and the trustee for each debtor estate has a duty to the creditors of the affiliate, not the corporate family, the parent of the affiliates, or the corporate family's creditors.

2. Outward-Facing Swaps Condition

The Outward-Facing Swaps Condition requires that an eligible affiliate counterparty relying on the Inter-Affiliate Exemption clear any swap covered by the Clearing Requirement (*i.e.*, an interest rate or credit default swap identified in Commission regulation 50.4) that is entered into with an unaffiliated counterparty, unless the swap qualifies for an exception or exemption from the Clearing Requirement under part 50. This provision applies to any eligible affiliate counterparty electing the Inter-

⁷ Commission regulation 50.52(b)(4)(i).

⁸ Clearing Exemption for Swaps Between Certain Affiliated Entities, 78 FR 21750, at 21752-21753 (Apr. 11, 2013).

Affiliate Exemption, including an eligible affiliate counterparty located outside of the United States.

The Outward-Facing Swaps Condition is intended to prevent swap market participants from using the Inter-Affiliate Exemption to evade the Clearing Requirement or to transfer risk to U.S. firms by entering into uncleared swaps with non-U.S. affiliates in jurisdictions that do not have mandatory clearing regimes comparable to the Commission's clearing requirement regime. Such evasion could be accomplished if the non-U.S. affiliate enters into a swap with an unaffiliated party also located outside of the U.S. and that swap is related on a back-to-back or matched book basis with the swap executed with the affiliated party located in the U.S. In the adopting release to the Inter-Affiliate Exemption, the Commission noted that section 2(h)(4)(A) of the CEA requires the Commission to prescribe rules to prevent evasion of the Clearing Requirement.⁹

The Commission did not propose and is not adopting any substantive changes to the definition of "eligible affiliate counterparty" or the Outward-Facing Swaps Condition. The final rule today adopts changes to the alternative conditions for complying with the Outward-Facing Swaps Condition.

II. The Proposal to Amend Commission Regulation 50.52

A. The Commission's Proposal to Revise the Alternative Compliance

Frameworks

⁹ Clearing Exemption for Swaps Between Certain Affiliated Entities, 78 FR 21750, at 21761 (Apr. 11, 2013). The Commission also notes that Commission regulation 1.6 makes it unlawful to conduct activities outside the United States, including entering into agreements, contracts, and transactions and structuring entities, to willfully evade or attempt to evade any provision of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, including the swap clearing requirement under section 2(h)(1) of the CEA. Any such evasive conduct will be subject to the relevant provisions of Title VII. In determining whether a transaction or entity structure is designed to evade, the Commission considers the extent to which there is a legitimate business purpose for such structure. 77 FR 48208, at 48301 (Aug. 13, 2012).

On December 23, 2019, the Commission published a notice of proposed rulemaking (the Proposal) to amend Commission regulation 50.52.¹⁰ The Commission proposed changes that would establish the same conditions and requirements to comply with the Inter-Affiliate Exemption as those provided for in current no-action relief granted to eligible affiliate counterparties under CFTC Letter No. 17-66.¹¹ The Commission requested comments from market participants about their experiences electing and complying with conditions of the Inter-Affiliate Exemption and on all other aspects of the Proposal.

The revisions outlined in the Proposal would effectively codify CFTC Letter No. 17-66 by reinstating and revising the two alternative compliance frameworks set forth in Commission regulations 50.52(b)(4)(ii) and (iii) (together, the Alternative Compliance Frameworks) and make additional minor changes. The Alternative Compliance Frameworks were adopted for a limited time period and expired on March 11, 2014.

Under the Proposal, the Commission regulation subsections 50.52(b)(4)(ii)(A) and 50.52(b)(4)(ii)(B), which both expired on March 11, 2014, would be reinstated and combined in revised subsection 50.52(b)(4)(ii). The Commission proposed to delete the expiration date, expand the list of jurisdictions in which one of the counterparties may be located and still comply with the Alternative Compliance Frameworks, and streamline the variation margining requirement. As explained in the Proposal, eligible affiliate counterparties continue to rely on the Alternative Compliance Frameworks made

¹⁰ Exemption From the Swap Clearing Requirement for Certain Affiliated Entities – Alternative Compliance Frameworks for Anti-Evasionary Measures, 84 FR 70446 (Dec. 23, 2019).

¹¹ CFTC Letter No. 17-66 (Dec. 14, 2017), available at <https://www.cftc.gov/LawRegulation/CFTCStaffLetters/index.htm>. See also, previously granted relief under CFTC Letter Nos. 14-135 (Nov. 7, 2014), 15-63 (Nov. 17, 2015), 16-81 (Nov. 28, 2016), and 16-84 (Dec. 15, 2016). CFTC Letter No. 17-66 expires on the earlier of (i) December 31, 2020 at 11:59 pm (Eastern Time); or (ii) the effective date of amendments to Commission regulation 50.52.

available through no-action relief. Deleting the March 11, 2014 expiration date reinstates this portion of the Alternative Compliance Framework. Revised Commission regulation 50.52(b)(4)(ii) permits non-U.S. eligible affiliate counterparties located in Australia, Canada, Hong Kong, Mexico, Switzerland, or the United Kingdom, to comply with this Alternative Compliance Framework, as well as eligible affiliate counterparties located in the European Union, Japan, or Singapore. Finally, for the reasons discussed below, the variation margin requirement in revised Commission regulation 50.52(b)(4)(ii) does not include the option to pay and collect full variation margin daily on all swaps entered into between the eligible affiliate counterparty located in the listed jurisdictions and an unaffiliated counterparty, because market participants have not relied on this provision.

Under the Proposal, the Commission did not revise the five percent test, described below, other than to delete the expiration date, modify the jurisdictions in which an eligible affiliate counterparty may be located for purposes of complying with that provision, and streamline the variation margining requirement. The five percent test is a provision in the Alternative Compliance Framework that permitted (until its expiration on March 11, 2014), an eligible affiliate counterparty located in the U.S. to comply with certain variation margin provisions in lieu of clearing, with respect to a swap executed opposite an eligible affiliate counterparty located in a non-U.S. jurisdiction other than the European Union, Japan, or Singapore.¹² According to this test, the aggregate notional value of swaps included in a class of swaps identified by Commission regulation 50.4 (classes of swaps covered by the Clearing Requirement) executed between an eligible affiliate counterparty located in the U.S. and an eligible affiliate counterparty located in a

¹² Commission regulation 50.52(b)(4)(iii).

non-U.S. jurisdiction other than the European Union, Japan, or Singapore may not exceed five percent of the aggregate notional value of all swaps included in a class of swaps identified by Commission regulation 50.4 that are executed by the U.S. eligible affiliate counterparty. If the five percent threshold was exceeded, the Alternative Compliance Framework was unavailable under existing Commission regulation 50.52(b)(4)(iii), in connection with swaps with eligible affiliate counterparties located in a non-U.S. jurisdiction other than the European Union, Japan, or Singapore.

Eligible affiliates in certain jurisdictions have been granted relief through CFTC staff letters with respect to the Alternative Compliance Framework under Commission regulation 50.52(b)(4)(ii), but CFTC staff had not issued no-action relief to remove those jurisdictions from the category of “other jurisdictions” contemplated by Commission regulation 50.52(b)(4)(iii). The Commission made these amendments in the Proposal to no longer categorize those jurisdictions as “other jurisdictions,” in order to appropriately broaden the availability of the Alternative Compliance Framework while maintaining protections against evasion of the Clearing Requirement.

As the Commission explained in the Proposal, the five percent test establishes a relative limit on the amount of uncleared swaps activity — activity that would otherwise be subject to the Commission’s Clearing Requirement — that any one U.S. eligible affiliate counterparty may conduct with its affiliated counterparties in certain “other jurisdictions.” In other words, the U.S. affiliate cannot enter into swaps that total (in aggregate) more than five percent of all of its swaps that are subject to the Commission’s Clearing Requirement, with affiliates in the “other jurisdictions.” The five percent test has the practical effect of limiting the relative notional amount of uncleared swaps

activity that affiliates conduct in jurisdictions that are not identified in Commission regulation 50.52(b)(4)(ii). The Commission continues to believe that limiting the relative notional amount of uncleared swaps executed in jurisdictions that have not established or implemented clearing regimes, along with conditioning relief on the use of variation margin, protects the eligible affiliate counterparty located in the United States from exposure to the risks associated with material swaps exposure in jurisdictions that do not have their own domestic clearing regime. The changes adopted today will decrease the number of “other jurisdictions” and as a result market participants may increase the notional amount of swap activity in those jurisdictions while still remaining below the five percent limit. The Commission did not receive any comments regarding this change. Furthermore, the Commission believes that the revised five percent test facilitates effective risk management among affiliated entities while protecting U.S. affiliates from transferring unmitigated risk into the U.S. from other jurisdictions.

Finally, under the Proposal, the variation margin requirement in revised Commission regulation 50.52(b)(4)(iii) did not include the option to pay and collect full variation margin daily on all swaps entered into between the eligible affiliate counterparty located in the listed jurisdictions and an unaffiliated counterparty, because market participants have not been electing this option.

The Proposal did not include any changes to the requirement that any swaps that are exempted from the Clearing Requirement under the Inter-Affiliate Exemption must be subject to a centralized risk management program.¹³ Also, all swaps exempted from the Clearing Requirement pursuant to the Inter-Affiliate Exemption will continue to be

¹³ Commission regulation 50.52(b)(3).

subject to the reporting requirements outlined in Commission regulation 50.52(c) - (d) and part 45 of the Commission's regulations. The Commission relies on these reporting requirements to monitor the number of entities electing the Inter-Affiliate Exemption, as well as the number of inter-affiliate swaps for which the exemption is claimed. As discussed in greater detail below, data on the election of the Inter-Affiliate Exemption has been considered by the Commission and supports its belief that this final rule to reinstate the Alternative Compliance Frameworks will not increase opportunities for affiliated entities to evade the Clearing Requirement.

B. Comments Received

The Commission received one comment letter in response to the Proposal from the International Swaps and Derivatives Association, Inc. (ISDA). ISDA supported the Proposal and stated that the revisions would provide legal certainty to market participants operating under Commission staff no-action relief. ISDA suggested two changes to the Proposal: (1) a modification to the variation margin requirements in the Proposal; and (2) a clarification related to the Commission's swap trade execution requirement under section 2(h)(8) of the CEA (Trade Execution Requirement).

ISDA recommended that the Commission allow eligible affiliate counterparties exchanging variation margin payments with other eligible affiliate counterparties under the Alternative Compliance Frameworks to comply with non-U.S. uncleared margin requirements that have been deemed comparable by the Commission. The Commission has issued comparability determinations regarding uncleared swap margin regimes for swap dealers and major swaps participants in Japan, the European Union, Australia, and the United Kingdom (by staff no-action relief as a former member of the European

Union).¹⁴ In ISDA's view, the Commission should allow eligible affiliate counterparties to rely on these comparability determinations in order to satisfy any variation margin requirements under the Alternative Compliance Frameworks. ISDA did not suggest a specific change to the regulatory text under Commission regulation 50.52, but argued that applying the comparability determinations in this context would be consistent with the Commission's efforts and policies relating to cross-border swaps activities.

For a number of reasons, the Commission declines to adopt any changes to the variation margin requirements under the Alternative Compliance Frameworks, other than the amendments that were considered in the Proposal. In response to ISDA's request, the Commission notes that while it has adopted uncleared margin comparability determinations for certain jurisdictions (but not all jurisdictions in which an eligible affiliate counterparty may be located), the application of a non-U.S. jurisdiction's uncleared margin regime would not be appropriate for counterparties electing the Inter-Affiliate Exemption. First, changing the Commission's approach to the variation margin requirements for counterparties using the Alternative Compliance Frameworks would require at least some counterparties to alter their existing variation margining practices with respect to inter-affiliate swaps. Eligible affiliate counterparties have been relying on the Alternative Compliance Frameworks in practice for approximately seven years and imposing a new standard for the variation margin requirement for certain entities would

¹⁴ Comparability Determination for Japan: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 81 FR 63376 (Sept. 15, 2016); Amendment to Comparability Determination for Japan: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 84 FR 12074 (Apr. 1, 2019); Comparability Determination for the European Union: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 82 FR 48394 (Oct. 18, 2017); and Comparability Determination for Australia: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 84 FR 12908 (Apr. 3, 2019). *See also* CFTC Letter No. 19-08, available at: <https://www.cftc.gov/csl/19-08/download>.

represent a significant change from a well-established status quo that the Commission believes has been working well over that period of time.

As discussed below, the condition requiring eligible affiliate counterparties to pay and collect variation margin provides risk-mitigating benefits and acts as a protection against accumulating uncollateralized risks in affiliated counterparties that do not clear their outward-facing swaps. The variation margin condition under the Inter-Affiliate Exemption also serves a distinct purpose in preventing the transfer of risk back to the United States. Permitting counterparties to comply with a non-U.S. uncleared margin regime in some instances may eliminate the risk-mitigation effects of the variation margin condition in the Alternative Compliance Frameworks because there may not necessarily be corresponding variation margin requirements under the non-U.S. jurisdiction's uncleared margin regime.

For instance, the Japanese inter-affiliate regime does not require counterparties to inter-affiliate swaps to pay or collect variation margin. If the Commission applied its findings from its comparability determination with respect to Japan in the Alternative Compliance Frameworks, then the eligible affiliate counterparties would not be required to pay or collect any variation margin on their swaps with other eligible affiliate counterparties.

The Commission understands that each non-U.S. jurisdiction may have a different treatment of inter-affiliate derivative transactions that is tailored to its own legal framework and market conditions. The Commission recognized this point and looked at the broader market framework in its comparability determinations with respect to margin

requirements for uncleared swaps for swap dealers and major swap participants.¹⁵ The comparability determinations analyze the uncleared margin regimes using broad, outcomes-based measures to assess compliance with the CFTC's margin requirements. The variation margin requirements included in the Alternative Compliance Frameworks can be distinguished from the analysis undertaken in the comparability determinations with respect to the uncleared margin regimes because the variation margin requirements under the Alternative Compliance Framework are more specifically designed to protect against the evasion of the Clearing Requirement and the transfer of risk back to the United States. The variation margin required under the Alternative Compliance Frameworks provides assurance that counterparties electing the Inter-Affiliate Exemption are not entering into uncollateralized uncleared outward-facing swaps that would otherwise be subject to the Clearing Requirement without taking important risk-mitigating precautions.

For these reasons, the Commission believes the Alternative Compliance Frameworks serve a unique risk mitigating function that protects against evasion of the Clearing Requirement and guards against systemic risks to the United States that could arise from uncleared swaps entered into by eligible affiliate counterparties. Accordingly, the Commission will not apply its comparability determinations to the variation margin requirements under revised Commission regulation 50.52(b)(4).

ISDA's comment letter also asked the Commission for confirmation that the eligible affiliate counterparties electing the Inter-Affiliate Exemption would be eligible for an automatic exemption from the Trade Execution Requirement. ISDA cited to

¹⁵ See Amendment to Comparability Determination for Japan: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 84 FR 12074, at 12078 (Apr. 1, 2019).

Commission statements in 2013 in which the Commission determined that swaps between certain affiliated entities electing the Inter-Affiliate Exemption would not be subject to the Trade Execution Requirement.¹⁶ The Commission reaffirms its previous statement in this final rule. However, the Commission is not making any findings or determinations related to the Trade Execution Requirement at this time. A further discussion of the Trade Execution Requirement is included below.

After considering ISDA's comment letter and the Commission's experience administering the Inter-Affiliate Exemption, the Commission is adopting amendments to Commission regulation 50.52 as proposed. Adopting these revisions provides legal certainty to swaps market participants and increases the flexibility offered to counterparties electing not to clear inter-affiliate swaps, while also guarding against the unmitigated transfer of risk into U.S. markets.

C. Trade Execution Requirement

The Inter-Affiliate Exemption provides relief from the Commission's Clearing Requirement. The Commission's Trade Execution Requirement is related to the Clearing Requirement because it applies to a subset of swaps that are subject to a clearing requirement determination under Commission regulation 50.4. The Trade Execution Requirement applies to swaps that have been made available to trade and requires that the counterparties execute a swap in accordance with the execution methods described in Commission regulation 37.9(a)(2).¹⁷

¹⁶ Process for a Designated Contract Market or Swap Execution Facility To Make a Swap Available to Trade, Swap Transaction Compliance and Implementation Schedule, and Trade Execution Requirement Under the Commodity Exchange Act, 78 FR 33606, at n. 1 (June 4, 2013).

¹⁷ Under Commission regulation 37.9(a)(2), swaps subject to the Trade Execution Requirement that are not block trades must be executed on an order book, as defined in Commission regulation 37.3(a)(3) or a

In the Proposal, the Commission stated that it was “not considering any changes with regard to the trade execution requirement because those are the subject of another ongoing rulemaking.”¹⁸ The Commission did not request comment regarding the Trade Execution Requirement and did not include a policy position in the Proposal. Therefore, the application of the Trade Execution Requirement is beyond the scope of this final rule.

The Commission continues to evaluate its 2018 proposal related to swap execution facilities and the Trade Execution Requirement (SEF Proposal).¹⁹ Under the SEF Proposal, the Commission proposed to exempt swaps relying on the Inter-Affiliate Exemption from the Trade Execution Requirement.²⁰ Because the SEF proposal addresses a broader set of exemptions from the Trade Execution Requirement (*i.e.*, more than swap transactions relying on the Inter-Affiliate Exemption from the Clearing Requirement), the Commission believes a final rule comprehensively addressing the Trade Execution Requirement is preferable to making a limited determination in this context.

In addition, Commission staff has provided no-action relief from the Trade Execution Requirement to eligible affiliate counterparties executing inter-affiliate swaps with other eligible affiliate counterparties, even if the Inter-Affiliate Exemption is not elected.²¹ ISDA’s comment to the Proposal included a request that the Commission

request for quote system, as defined in Commission regulation 37.9(a)(3) in conjunction with an order book. For the current list of swaps that are subject to the Trade Execution Requirement, *see* Swaps Made Available To Trade, available at: <https://www.cftc.gov/sites/default/files/idc/groups/public/@otherif/documents/file/swapsmadeavailablechart.pdf>.

¹⁸ Exemption From the Swap Clearing Requirement for Certain Affiliated Entities – Alternative Compliance Frameworks for Anti-Evasionary Measures, 84 FR 70446, at 70447 (Dec. 23, 2019).

¹⁹ Swap Execution Facilities and Trade Execution Requirement, 83 FR 61946 (Nov. 30, 2018).

²⁰ *Id.* at 62038.

²¹ CFTC Letter No. 17-67, available at: <https://www.cftc.gov/csl/17-67/download>.

adopt relief similar to the no-action relief provided in CFTC Letter No. 17-67. CFTC Letter No. 17-67 was not subject to any discussion in the Proposal and continues to be the staff's position. The Commission may address separately no-action relief from the Trade Execution Requirement for eligible affiliated entities.

III. Final Rule

A. Amendments to Commission Regulation 50.52

The Commission has considered the comment from ISDA and is adopting the amendments to Commission regulation 50.52 as proposed.

The Commission is inserting a new definition for the term "United States" under Commission regulation 50.52(a)(2)(iii). The Commission received no comments on this definition and is adopting the change as proposed.

The Commission is deleting references to the March 11, 2014 expiration date in Commission regulations 50.52(b)(4)(ii) and (iii) as proposed. This will reinstate the Alternative Compliance Frameworks as an option available in the Commission's regulations for complying with the Outward-Facing Swaps Condition.

The Commission is deleting Commission regulation 50.52(b)(4)(ii)(B) as proposed. This regulation permitted certain affiliate counterparties to comply with the Alternative Compliance Framework, provided, among other conditions, that neither eligible affiliate counterparty is affiliated with an entity that is a swap dealer or major swap participant. In the Proposal, the Commission noted that it had reviewed swap data and found that entities that elected to comply with the Alternative Compliance Framework were financial entities or affiliated with swap dealers and did not rely on this provision of the Alternative Compliance Framework. In response to the Proposal, no

commenter addressed this point or reported having relied on this provision without being so affiliated. Thus, the Commission believes it is appropriate to delete it.

The Commission is deleting Commission regulation 50.52(b)(4)(iii)(A) as proposed. Similar to the point above, the Commission noted in the Proposal that it was not aware of any eligible affiliate counterparty that has opted to use this provision, and requested comment on whether any market participant relied on this provision in the past, or intended to rely on this provision if it were reinstated. Since the Commission received no reports of use of this provision or other comments, it believes it is appropriate to delete it.

The Commission is adopting the revisions to the lists of jurisdictions included or excluded from Commission regulations 50.52(b)(4)(ii) and (iii) as proposed. The only comment on this point, from ISDA, supported the Commission's effort to provide legal certainty to market participants who have been operating under no-action relief pursuant to a series of CFTC staff letters.

Commission regulation 50.52(b)(4)(ii), as reinstated and revised, will permit each eligible affiliate counterparty, or a third party that directly or indirectly holds a majority interest in both eligible affiliate counterparties, to pay and collect full variation margin daily on all of the eligible affiliate counterparties' swaps with other eligible affiliate counterparties, if at least one of the eligible affiliate counterparties is located in Australia, Canada, the European Union, Hong Kong, Japan, Mexico, Singapore, Switzerland, or the United Kingdom.²² Under this provision, eligible affiliate counterparties electing the

²² The Commission is expanding the list of jurisdictions under Commission regulation 50.52(b)(4)(ii) to include the United Kingdom as a separate jurisdiction from the European Union, in order to codify the no-action relief issued in preparation for the United Kingdom's withdrawal from the European Union,

exemption must pay and collect variation margin on swaps with all other eligible affiliate counterparties with whom they enter into swaps. The variation margin requirement does not extend beyond these swaps to include swaps between counterparties not electing the exemption.

Commission regulation 50.52(b)(4)(iii), as reinstated and revised, will permit each eligible affiliate counterparty, or a third party that directly or indirectly holds a majority interest in both eligible affiliate counterparties, to pay and collect full variation margin daily on all of the eligible affiliate counterparties' swaps with other eligible affiliate counterparties, if the eligible affiliate counterparty that is located in the United States enters into swaps, included in the class of Commission regulation 50.4 swaps, with eligible affiliate counterparties located in jurisdictions *other than* Australia, Canada, the European Union, Hong Kong, Japan, Mexico, Singapore, Switzerland, or the United Kingdom. However, if relying on this provision, the aggregate notional value of swaps with such counterparties included in the class of Commission regulation 50.4 swaps may not exceed five percent of the aggregate notional value of all swaps included in the class of Commission regulation 50.4 swaps entered into by the eligible affiliate counterparty located in the U.S. As noted above, the eligible affiliate counterparties electing the exemption must pay and collect variation margin on swaps with all other eligible affiliate counterparties with whom they enter into swaps.

The Commission is adopting the revisions to the variation margining requirements under Commission regulation 50.52(b)(4)(ii) - (iii) as proposed. The Commission sought comment from market participants about the two different variation margining options

commonly referred to as "Brexit." CFTC Letter No. 19-09 (Apr. 5, 2019), *available at* <https://www.cftc.gov/csl/19-09/download>.

offered in current Commission regulations 50.52(b)(4)(ii)(A)(1) and (2), and Commission regulations 50.52(b)(4)(iii)(A) and (B). In particular, the Commission asked commenters whether compliance with the Outward-Facing Swaps Condition via the Alternative Compliance Frameworks was consistent or inconsistent with margin requirements in non-U.S. jurisdictions.²³ The Commission did not receive an independent analysis of the comparability between the Alternative Compliance Frameworks and margin requirements in non-U.S. jurisdictions. ISDA's comment letter requested that the Commission apply the uncleared margin requirement comparability determinations to the margin requirements in the Alternative Compliance Framework. As discussed above, the Commission is not implementing that change.

The Commission believes that amendments to Commission regulation 50.52(b)(4) adopted in this final rule provide an exemption from the Clearing Requirement in a manner that is demonstrated to be workable, while imposing conditions necessary to ensure that the Inter-Affiliate Exemption is not used to evade the Clearing Requirement and that inter-affiliate swaps exempted from required clearing meet certain risk-mitigating conditions to protect the U.S. financial system. In addition, the Commission believes that these amendments provide flexibility to eligible affiliate counterparties electing the Inter-Affiliate Exemption and increase legal certainty for the reasons stated above.

B. Commission's Section 4(c) Authority

In the Proposal, the Commission requested comment on whether the amendments to Commission regulation 50.52 were an appropriate exercise of the Commission's

²³ Exemption From the Swap Clearing Requirement for Certain Affiliated Entities – Alternative Compliance Frameworks for Anti-Evasionary Measures, 84 FR 70446, at 70452 (Dec. 23, 2019).

authority under section 4(c) of the CEA and whether they were in the public interest. The Commission received no comments regarding the Commission's use of its section 4(c) authority in this context.

The Commission continues to believe that its use of section 4(c) authority, which was used to adopt the Inter-Affiliate Exemption pursuant to section 4(c)(1) of the CEA, is appropriate to provide certain eligible affiliate counterparties with a limited exemption from the Clearing Requirement. Section 4(c)(1) of the CEA grants the Commission the authority to exempt any transaction or class of transactions, including swaps, from certain provisions of the CEA, including the Commission's Clearing Requirement, in order to "promote responsible economic or financial innovation and fair competition." Section 4(c)(2) of the CEA further provides that the Commission may not grant exemptive relief unless it determines that: (1) the exemption is appropriate for the transaction and consistent with the public interest; (2) the exemption is consistent with the purposes of the CEA; (3) the transaction will be entered into solely between "appropriate persons"; and (4) 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. In enacting section 4(c), Congress noted that the purpose 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.²⁴

The Commission believes that the Inter-Affiliate Exemption, including the Alternative Compliance Frameworks, as modified by this final rule, is consistent with the

²⁴ House Conf. Report No. 102-978, 1992 U.S.C.C.A.N. 3179, at 3213.

public interest and the purposes of the CEA. As the Commission noted in the adopting release for the Inter-Affiliate Exemption final rulemaking, inter-affiliate swaps fulfill an important risk management role within corporate groups.²⁵ These swaps may be beneficial to the entity as a whole. These amendments to the Outward-Facing Swaps Condition and the Alternative Compliance Frameworks will permit the variation margin provisions under revised Commission regulations 50.52(b)(4)(ii) and (iii) to be used in connection with swaps with eligible affiliate counterparties located in any non-U.S. jurisdiction, not only those located in the European Union, Japan, or Singapore. Pursuant to staff no-action relief, as discussed above, these provisions have been in use since 2013.

Based on the Commission’s review of recent data reported to the Depository Trust & Clearing Corporation’s swap data repository, DTCC Data Repository (U.S.) LLC, the Alternative Compliance Framework provisions under Commission regulation 50.52(b)(4)(ii) appear to be working. The Commission has identified approximately 55 entities located in Australia, Canada, the European Union, Hong Kong, Japan, Mexico, Singapore, Switzerland, or the United Kingdom that elected the Inter-Affiliate Exemption between January 1, 2019 to December 31, 2019.²⁶ The Commission believes that these entities chose to, or could have, complied with the Alternative Compliance Framework under Commission regulation 50.52(b)(4)(ii) because of the jurisdiction in which they are organized. Based on the same data set from January 1, 2019 to December 31, 2019, the

²⁵ Clearing Exemption for Swaps Between Certain Affiliated Entities, 78 FR 21750, at 21754 (Apr. 11, 2013) (citing to commenters and the proposal in support of the conclusion that “inter-affiliate transactions provide an important risk management role within corporate groups” and that “swaps entered into between corporate affiliates, if properly risk-managed, may be beneficial to the entity as a whole.”).

²⁶ The Commission notes that although current Commission regulation 50.52 does not permit entities to comply with either of the Alternative Compliance Frameworks because they have expired, the relief provided by staff no-action letters means that market participants have continued to use and report swaps activity in compliance with the Alternative Compliance Frameworks.

Commission identified 16 entities located in jurisdictions other than Australia, Canada, the European Union, Hong Kong, Japan, Mexico, Singapore, Switzerland, the United Kingdom, or the United States that elected the Inter-Affiliate Exemption and chose to, or could have, complied with the Alternative Compliance Framework under Commission regulation 50.52(b)(4)(iii). During the same time period, the data showed that approximately 110 U.S. entities elected the Inter-Affiliate Exemption.

The Commission believes that adopting amendments to the Alternative Compliance Frameworks, including reinstating the provisions and extending the availability of the first framework under Commission regulation 50.52(b)(4)(ii) to eligible affiliate counterparties located in Australia, Canada, the European Union, Hong Kong, Japan, Mexico, Singapore, Switzerland, and the United Kingdom, while correspondingly narrowing the availability of the second framework under Commission regulation 50.52(b)(4)(iii), is appropriate for purposes of swaps between affiliated entities, promotes responsible financial innovation and fair competition, and is consistent with the public interest.

In this regard, the Commission considered whether the availability of the Alternative Compliance Frameworks might result in fewer affiliated counterparties clearing their outward-facing swaps and the significance of any such reduction in terms of the use of inter-affiliate swaps as a risk management tool. Generally speaking, it is difficult to estimate whether the final rule will reduce central clearing of outward-facing swaps. Among other factors, the application of mandatory clearing and the availability of central clearing for particular types of swaps vary by jurisdiction. Also, market participants' response to the final rule may depend on which of their swaps are eligible

for the Inter-Affiliate Exemption. Despite this uncertainty, the Commission believes that there may be a significant number of affiliated counterparties that will continue to engage in uncleared swaps activity as permitted under the amended Alternative Compliance Frameworks, subject to the conditions imposed by this final rule.²⁷

Swap dealers electing the exemption use inter-affiliate swaps as an important risk management tool within corporate groups, and these affiliated groups are subject to a range of regulatory and other controls as part of their swap activities in the United States and in other jurisdictions. This includes the requirement to maintain a risk management program that takes into account risks posed by the swap dealer's affiliates and is integrated into the risk management of the broader corporate group.²⁸ In addition, the conditions to the Inter-Affiliate Exemption itself require the swaps covered by the exemption to be subject to a centralized risk management program. In sum, in considering whether the amendments in this final rule promote responsible financial innovation and fair competition and are consistent with the public interest, the Commission took the factors discussed above into account – *i.e.*, the value of inter-affiliate swaps as a risk management tool, the extent to which the Alternative Compliance Frameworks foster this use of inter-affiliate swaps, and the potential for more elections not to clear outward-facing swaps.

The Commission continues to believe that the amendments to the Outward-Facing Swaps Condition and Alternative Compliance Frameworks will be available only to

²⁷ Based on a recent review of swap data reflecting use of the Inter-Affiliate Exemption, the Commission estimates that over 70 eligible affiliate counterparties located outside of the United States may elect to comply with one of the reinstated Alternative Compliance Frameworks thereby choosing not to clear their outward-facing swaps and rather to pay and collect variation margin on all swaps with other eligible affiliate counterparties instead. These entities include affiliates of swap dealers that are active in multiple jurisdictions.

²⁸ Commission regulation 23.600(c)(ii).

“appropriate persons.” Section 4(c)(3) of the CEA includes within the term “appropriate person” a number of specified categories of persons, including such other persons that the Commission determines to be appropriate in light of their financial or other qualifications, or the applicability of appropriate regulatory protections. In the 2013 Inter-Affiliate Exemption final rulemaking, the Commission found that eligible contract participants (ECPs) are appropriate persons within the scope of section 4(c)(3)(K) of the CEA.²⁹ The Commission noted that the elements of the ECP definition (as set forth in section 1a(18)(A) of the CEA and Commission regulation 1.3(m)) generally are more restrictive than the comparable elements of the enumerated “appropriate person” definition. Given that only ECPs are permitted to enter into uncleared swaps, 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 Inter-Affiliate Exemption. Consistent with its finding in the 2013 Inter-Affiliate Exemption final rulemaking, the Commission reaffirms that the class of persons eligible to rely on the Inter-Affiliate Exemption is limited to “appropriate persons” within the scope of section 4(c)(3) of the CEA.

Finally, the Commission expects, based on its past experiences and the comment received, that the amendments to Commission regulation 50.52 will not have a material effect on the ability of the Commission to discharge its regulatory responsibilities. The Inter-Affiliate Exemption continues to be limited in scope and the Commission receives information regarding the election and use of exempt swaps between eligible affiliated entities because they are reported to a swap data repository. In fact, the Commission

²⁹ Clearing Exemption for Swaps Between Certain Affiliated Entities, 78 FR 21750, at 21754 (Apr. 11, 2013).

hopes that future changes to part 45 reporting requirements may improve the Commission's ability to ascertain quickly which swaps are subject to the Inter-Affiliate Exemption versus other available exemptions or exceptions to the Clearing Requirement.³⁰ As the Commission has done in the past, it will monitor swap counterparties' elections of the Inter-Affiliate Exemption and swap activity through reported data. The Commission's special call, anti-fraud, and anti-evasion authorities are unaffected by these amendments and remain in place. The Commission may exercise its special call, anti-fraud, or anti-evasion authorities in response to concerns about the use of the Inter-Affiliate Exemption. For all of these reasons, the Commission remains confident that it can discharge its regulatory responsibilities under the CEA.

C. Effective Date and Compliance Date

This final rule will be effective 30 days after publication in the *Federal Register*. Compliance with the revised Alternative Compliance Frameworks will be required on the effective date. Eligible affiliate counterparties entering into a swap on or after the effective date and claiming the Inter-Affiliate Exemption must comply with the revised Alternative Compliance Frameworks in Commission regulation 50.52.

III. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires agencies to consider whether the rules they issue will have a significant economic impact on a substantial number of small entities and, if so, to provide a regulatory flexibility analysis regarding the impact on

³⁰ See generally, Swap Data Recordkeeping and Reporting Requirements, 85 FR 21578 (Apr. 17, 2020).

those entities.³¹ Each Federal agency is required to conduct an initial and final regulatory flexibility analysis for each rule of general applicability for which the agency issues a general notice of proposed rulemaking.³²

As discussed in the Proposal, the amendments to the Inter-Affiliate Exemption will not affect any small entities, as the RFA uses that term. Pursuant to section 2(e) of the CEA, only ECPs may enter into swaps, unless the swap is listed on a DCM. The Commission has previously determined that ECPs are not small entities for purposes of the RFA.³³ The amendments to the Inter-Affiliate Exemption will affect only market participants that qualify as ECPs. All persons that are not ECPs are required to execute their swaps on a DCM, and all contracts executed on a DCM must be cleared by a DCO, as required by statute and regulation, not by operation of any Clearing Requirement. Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the amendments adopted in this final rule will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA)³⁴ imposes certain requirements on federal agencies, including the Commission, in connection with conducting or sponsoring any collection of information as defined by the PRA. Under the PRA, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number from the Office of Management and Budget (OMB).

³¹ 5 U.S.C. 601 *et seq.*

³² *Id.*

³³ 66 FR 20740, at 20743 (Apr. 25, 2001).

³⁴ 44 U.S.C. 3507(d).

This final rule will not require a new collection of information from any persons or entities. The Commission is not amending any reporting requirements related to the Inter-Affiliate Exemption in this final rule. The reporting requirement and collection of information related to the Inter-Affiliate Exemption, under Commission regulations 50.52(c) and (d), has been assigned control number 3038-0104 by OMB and will continue to be reviewed periodically.

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. 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). The Commission considers the costs and benefits resulting from its discretionary determination to adopt this final rulemaking with respect to each of the Section 15(a) Factors below.

The regulatory baseline for the Commission's consideration of the costs and benefits of this final rule is the regulatory status quo. The regulatory status quo is determined by the Commission's existing regulations governing the Clearing Requirement and the Inter-Affiliate Exemption in part 50 of the Commission's regulations. The Commission recognizes, however, that to the extent that market

participants have relied upon relevant Commission staff no-action relief, the actual costs and benefits of this final rule, as realized in the market, may not be as significant. For example, the Alternative Compliance Frameworks in current Commission regulation 50.52 expired on March 11, 2014. As a practical matter, market participants have continued to comply with the Inter-Affiliate Exemption using the Alternative Compliance Frameworks because a series of staff no-action letters stated that staff would not recommend that the Commission commence an enforcement action against entities using the Alternative Compliance Frameworks. Thus, the costs and benefits considered below are likely to be different than those faced by a current swap counterparty electing the Inter-Affiliate Exemption.

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 this final rule on all activity subject to the 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.³⁵ In particular, the Commission notes that a

³⁵ 7 U.S.C. 2(i).

significant number of entities affected by this final rule are located outside of the United States.

The Commission sought comments on all aspects of the cost and benefit considerations in the Proposal. In particular, the Commission requested that commenters provide any data or other information that would be useful in quantifying costs and benefits of the Proposal. The Commission also requested specific comments on two alternatives considered by the Commission: (i) adopting modified Alternative Compliance Frameworks including expiration dates; and (ii) making no amendments to the Outward-Facing Swaps Condition. The Commission received no comments in response to the Proposal that discussed cost and benefit considerations. Despite this fact, the Commission has endeavored to assess the costs and benefits of the amendments adopted by this final rule in quantitative terms wherever possible.

In the sections that follow, the Commission considers the costs and benefits of adopting this final rule, and the impact on the Section 15(a) Factors of adopting the final rule.

2. Considerations of the Costs and Benefits of the Commission's Action
 - a. Costs

The Commission believes that there will be some costs associated with adopting the final rule, as compared to the regulatory baseline. Under this final rule, eligible affiliate counterparties could increase their counterparty credit risk by electing to comply with one of the Alternative Compliance Frameworks instead of choosing to clear any outward-facing swap. Clearing, along with the Commission's requirements related to swap clearing, mitigates counterparty credit risk in the following ways: (1) a futures

commission merchant guarantees the performance of a customer and in so doing, takes steps to monitor and mitigate the risk of a counterparty default; (2) a clearinghouse collects sufficient initial margin to cover potential future exposures and regularly collects and pays variation margin to cover current exposures; (3) a clearinghouse has rules, and enforcement mechanisms to ensure the rules are followed, to mark a swap to market and to require that margin be posted in a timely fashion; (4) a clearinghouse facilitates netting within portfolios of swaps and among counterparties; and (5) a clearinghouse holds collateral in a guaranty fund in order to mutualize the remaining tail risk not covered by initial margin contributions among clearing members.³⁶ The risk-mitigating benefits of clearing outward-facing swaps will not be realized if the affiliated counterparties elect to use the Alternative Compliance Frameworks. This final rule may produce a marginal increase in systemic risk and related costs because certain outward-facing swaps that were required to be cleared may now remain uncleared as long as the affiliated counterparties exchange variation margin daily under the Alternative Compliance Frameworks.

Moreover, there may be an increased risk of contagion and systemic risk to the financial system that results from permitting additional market participants to use the Alternative Clearing Frameworks to avoid clearing certain swaps subject to the Clearing Requirement. Swap clearing mitigates risk on a transaction level, as outlined above, and it also provides protection against risk transfer throughout the financial system. While counterparty credit risk between affiliated entities represents a slightly lower risk to the overall financial system than counterparty credit risk between non-affiliated entities, it is

³⁶ See Clearing Requirement Determination Under Section 2(h) of the CEA for Interest Rate Swaps, 81 FR 71230 (Oct. 14, 2016).

still the case that clearing provides the most complete protection against counterparty credit risk. Systemic risk, and the costs associated with it, is minimized to the extent that affiliated counterparties exchange variation margin as a condition to the Alternative Compliance Frameworks.³⁷

Swap market participants could experience overall increases in the costs of clearing under the final rule. Fewer entities may choose to clear swaps in order to comply with the Outward-Facing Swaps Condition once the Alternative Compliance Frameworks are available.³⁸ Certain entities that had become members of a clearinghouse to clear outward-facing swaps may no longer need those relationships. The decrease in clearing activity could result in decreased liquidity in non-U.S. markets and at clearinghouses where eligible counterparties previously cleared outward-facing swaps. Collectively, these changes could make clearing swaps more expensive in those less liquid markets.

Finally, the availability of the modified Alternative Compliance Frameworks may increase costs to any third party creditor of an entity using an Alternative Compliance Framework instead of clearing its outward-facing swaps. While the variation margin requirements under the Alternative Compliance Frameworks mitigate the buildup of credit risk within a corporate group that uses a centralized risk management structure, it is still possible that requiring affiliated counterparties to exchange variation margin instead of clearing outward-facing swaps could produce additional risk to external

³⁷ Requiring counterparties to exchange variation margin daily is one effective risk management tool that prevents swap market participants from accumulating uncollateralized risk.

³⁸ As a practical matter, many market participants relied on Commission staff no-action relief to comply with the Outward-Facing Swaps Condition through modified alternative compliance frameworks. However, for purposes of this analysis of costs, the Commission assumes that the Alternative Compliance Frameworks have expired.

creditors and/or third parties. As noted above, clearing provides the most complete protection against counterparty credit risk, even though that risk, when it is between affiliated entities, represents a slightly lower risk to the overall financial system than when between non-affiliates.

In addition, the combination of reinstating the Alternative Compliance Frameworks while expanding the number of jurisdictions excluded from the five percent limitation may cause market participants to alter their swaps trading behavior. To the extent that affiliated entities under current requirements face a choice between clearing the outward-facing swap and satisfying some other exception or exemption from the Clearing Requirement, they may have a different internal calculation under the final rule for determining whether to engage in a swap or shift risk among affiliated entities depending on whether the swap would cause it to exceed the five percent test under new Commission regulation 50.52(b)(4)(iii). The new limitations and geographical restrictions in the final rule may incentivize affiliated entities to transition their swaps to counterparties located in swaps markets which do not have local clearing mandates or well-developed clearing infrastructures. Swaps entered into with counterparties in those locations may pose higher systemic risks and costs related to those risks could increase.

b. Benefits

The Commission believes that there will be significant benefits associated with adopting this final rule, as compared to the regulatory baseline. The final rule amendments to Commission regulation 50.52 will permit eligible affiliate counterparties to use the Alternative Compliance Frameworks. Swap counterparties will benefit from this additional flexibility in their inter-affiliate swap risk management. In addition to this

qualitative benefit, the Commission expects that there will be cost saving benefits for certain entities as well.

Affiliated counterparties that elect to comply with one of the Alternative Compliance Frameworks and exchange variation margin may experience cost savings if their variation margining practices are less expensive than clearing the outward-facing swap. The costs of clearing an outward-facing swap would include initial margin (paid to either a futures commission merchant or the clearinghouse) and clearing fees. This final rule does not specify the methods or calculations required for affiliated entities exchanging variation margin daily on all swaps with other eligible affiliate counterparties. Therefore, the level of these cost savings may differ from entity to entity, and from swap to swap.

Certain corporate entities might be incentivized by the new availability of the Alternative Compliance Frameworks to increase their inter-affiliate swap activity (or to start entering into swaps between affiliates). An increase in inter-affiliate swap activity between eligible entities complying with the conditions to the Inter-Affiliate Exemption could result in enhanced centralized risk management for those entities. The availability of, and improvements to, centralized risk management systems can produce long-term cost savings driven by efficiency, resiliency, and stability. Entities that increase or start to engage in inter-affiliate swaps may experience cost savings across their swaps books because they can use inter-affiliate swap transactions to shift swaps activity to the jurisdictions with more liquid markets (resulting in lower costs).

As discussed in the Proposal, the Commission estimated the number of entities that have used or potentially would use the Alternative Compliance Frameworks adopted

in this final rule under Commission regulation 50.52(b)(4)(ii) and (iii).³⁹ Since the Commission published the Proposal, Commission staff continued to examine swap data reported to the Depository Trust & Clearing Corporation's swap data repository, DTCC Data Repository (U.S.) LLC. The Commission's most recent data indicate that approximately 55 entities might elect to use the revised Alternative Compliance Framework under Commission regulation 50.52(b)(4)(ii) and as many as 16 entities might elect to use the revised Alternative Compliance Framework under Commission regulation 50.52(b)(4)(iii). Although historical data has limited benefit in predicting future use, the Commission notes that the number of entities that it estimates have used, or potentially would use, the Alternative Compliance Frameworks is similar to the data the Commission has collected in the past.

Besides the difficulty in determining which entities might use the revised Alternative Compliance Frameworks, the estimate of the benefit to each entity is further complicated by the differing costs and capital structures related to each entity. Further, the Commission realizes that there may be even higher numbers of entities in the future that would benefit from this final rule and elect to satisfy the requirements in the Alternative Compliance Framework rather than clear an outward-facing swap.

3. Alternative of allowing eligible affiliate counterparties to rely on comparability determinations in order to satisfy any variation margin requirements under the Alternative Compliance Frameworks

³⁹ See Exemption From the Swap Clearing Requirement for Certain Affiliated Entities – Alternative Compliance Frameworks for Anti-Evasionary Measures, 84 FR 70446, at 70454 and 70457 (Dec. 23, 2019).

The Commission considered the alternative of allowing eligible affiliate counterparties to rely on comparability determinations to satisfy the Alternative Compliance Frameworks. The Commission understands that each non-U.S. jurisdiction may have different requirements for inter-affiliate derivative transactions that are customized to its own market structure and legal framework. The Commission acknowledges this, and in conducting its comparability determination uses a holistic, outcomes-based approach. The Commission's comparability determinations do not require identical margin rules, including affiliated variation margin requirements. The variation margin required under the Alternative Compliance Frameworks provides important risk-mitigating safeguards that protect market participants and the public and are a sound risk management practice that helps reduce the buildup of credit exposure between affiliates. The design of the Commission's variation margin requirements under the Alternative Compliance Framework is to guard against evasion of the Clearing Requirement and the transmission of losses back to the United States. Thus, the Commission will not apply its comparability determinations to the variation margin requirements under revised Commission regulation 50.52(b)(4).

4. Section 15(a) Factors

a. Protection of Market Participants and the Public

In revising the Outward-Facing Swaps Condition and Alternative Compliance Frameworks, the Commission considered various ways to appropriately protect affiliated entities, third parties in the swaps market, and the public. The Commission seeks to ensure that the final rule prevents swap market participants from evading the Commission's Clearing Requirement and/or transferring excessive risk to an affiliated

U.S. entity through the use of uncleared inter-affiliate swaps. The Commission is permitting eligible affiliate counterparties to elect not to clear an outward-facing swap subject to the Clearing Requirement, but only if eligible affiliates pay and collect daily variation margin on swaps.

The Commission also considered the potential effects on the public of providing this alternative to clearing outward-facing swaps subject to the Clearing Requirement. In particular, the Commission considered the extent to which the Alternative Compliance Frameworks might result in fewer affiliated counterparties clearing their outward-facing swaps. One difficulty in estimating the effect of this final rule is the fact that the application of mandatory clearing and the availability of central clearing for particular types of swaps vary by jurisdiction. Also, many market participants enter into swaps and other financial instruments in multiple jurisdictions, which may give them the ability to adjust their financial and risk management activity in response to variations in regulatory requirements.

In the face of this uncertainty, the Commission believes that, even if the change in clearing activity and business for clearinghouses is uncertain, there may be a significant number of affiliated counterparties that will continue to engage in swaps activity permitted under the Alternative Compliance Frameworks.⁴⁰ The Commission understands that the swap dealers conduct their swaps activities using affiliates in various jurisdictions. Swap dealers engage in inter-affiliate swaps in order to distribute risk

⁴⁰ Based on a recent review of swap data reflecting use of the Inter-Affiliate Exemption, the Commission estimates that over 70 eligible affiliate counterparties located outside of the United States may elect to comply with one of the reinstated Alternative Compliance Frameworks thereby choosing not to clear their outward-facing swaps and rather to pay and collect variation margin on all swaps with other eligible affiliate counterparties instead. These entities include affiliates of swap dealers that are active in multiple jurisdictions.

among their affiliates. Thus, inter-affiliate swaps are an important part of prudent risk management, and a significant number of swap dealers and other market participants engage in inter-affiliate swaps. This inter-affiliate swaps activity is subject to a range of regulatory and other controls.

In considering how the final rule would affect the protection of market participants and the public, the Commission took into account the value of inter-affiliate swaps as a risk management tool and the extent to which the Alternative Compliance Frameworks would foster this use of inter-affiliate swaps. The Commission also considered potential increases in systemic risk if affiliates elect not to clear outward-facing swaps and use the Alternative Compliance Frameworks instead. In view of these factors, the Commission believes that the potential increases in systemic risk will be mitigated by the controls on the use of inter-affiliate swaps, their inherent risk management features, and the conditions set out in the Alternative Compliance Frameworks.

This final rule also would create certain costs that would be borne by entities electing the Inter-Affiliate Exemption. Under revised Commission regulation 50.52, entities that choose to comply with an Alternative Compliance Framework would be required to pay and collect variation margin on their inter-affiliate swaps, which could be a significant cost for those entities. However, an entity electing the Inter-Affiliate Exemption may continue to choose to clear an outward-facing swap with an unaffiliated counterparty instead of paying and collecting variation margin on all swaps with other eligible affiliate counterparties. Therefore, affected entities are free to choose which of these alternatives is best for them.

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

The Commission believes that the amendments to the Inter-Affiliate Exemption may have some, but not a significant, impact on the efficiency or competitiveness of swaps markets. As noted above, inter-affiliate swaps are an important risk management tool for affiliated corporate groups. To the extent that swap dealers may participate more extensively in swap markets in non-U.S. jurisdictions because they can use inter-affiliate swaps to manage risk efficiently, the amendments to the Inter-Affiliate Exemption may increase the efficiency, competitiveness, and financial integrity of swap markets by increasing the range of swaps that are available to market participants. The Commission also believes that the revised Outward-Facing Swaps Condition and Alternative Compliance Frameworks should discourage misuse of the Inter-Affiliate Exemption. For example, the Commission recognizes that internal calculations and swaps portfolio management are required to comply with the five percent test under Commission regulation 50.52(b)(4)(iii). If the Commission had not expanded the list of non-U.S. jurisdictions in which an affiliated counterparty may be located for purposes of Commission regulation 50.52(b)(4)(ii), entities may have failed to appropriately calculate the permissible limits under the five percent test under Commission regulation 50.52(b)(4)(iii). Aligning the scope of jurisdictions included in the Alternative Compliance Frameworks with the jurisdictions for which the domestic currency is subject to the Commission's Clearing Requirement may help to make these calculations and compliance with the provisions easier. This part of the final rule should promote the financial integrity of swap markets and financial markets as a whole.

c. Price Discovery

Under Commission regulation 43.2, a “publicly reportable swap transaction,” means, among other things, any executed swap that is an arms’-length transaction between two parties that results in a corresponding change in the market risk position between the two parties.⁴¹ The Commission generally believes that non-arms’-length swaps do not contribute to price discovery in the markets, as they are not publically reported.⁴² Given that inter-affiliate swaps as defined in this final rule are usually not arms’-length transactions, the Commission believes that these amendments to the Inter-Affiliate Exemption will not have a significant effect on price discovery.⁴³ However, if the availability of the Alternative Compliance Frameworks reduces the use of outward-facing swaps, which may or may not be publicly reported depending on the jurisdiction, there could be a negative impact on price discovery when outward-facing swaps would otherwise be publically reported.

d. Sound Risk Management Practices

The conditions of the Inter-Affiliate Exemption do not eliminate the possibility that risk may impact an entity, its affiliates, and counterparties of those affiliates.⁴⁴

⁴¹Commission regulation 43.2. *See also* Real-Time Public Reporting of Swap Transaction Data, 77 FR 1182 (Jan. 9, 2012).

⁴² Transactions that fall outside the definition of “publicly reportable swap transaction”—that is, transactions that are not arms-length—“do not serve the price discovery objective of CEA section 2(a)(13)(B).” Real-Time Public Reporting of Swap Transaction Data, 77 FR 1182, at 1195 (Jan. 9, 2012). *See also id.* at 1187 (discussing “Swaps Between Affiliates and Portfolio Compression Exercises”), and *also* Clearing Exemption for Swaps Between Certain Affiliated Entities, 78 FR 21750, at 21780 (Apr. 11, 2013).

⁴³ The definition of “publicly reportable swap transaction” identifies two examples of transactions that fall outside the definition, including internal swaps between one-hundred percent owned subsidiaries of the same parent entity. Commission regulation 43.2 (adopted by Real-Time Public Reporting of Swap Transaction Data, 77 FR 1182, at 1244 (Jan. 9, 2012)). The Commission notes that the list of examples is not exhaustive.

⁴⁴ The Commission notes that even in the absence of required clearing or margin requirements for swaps between certain affiliated entities, such entities may choose to use initial and variation margin to manage risks that could otherwise be transferred from one affiliate to another. Similarly, third parties that have entered into swaps with affiliates also may include variation margin requirements in their swap agreements.

Without clearing a swap to mitigate the transmission of risk among affiliates, the risk that any one affiliate takes on through its swap transactions, and any contagion that may result through that risk, increases. This makes the risk mitigation requirements for outward-facing swaps more important as risk can be transferred more easily between affiliates.

Exempting certain inter-affiliate swaps from the Clearing Requirement creates additional counterparty exposure for affiliates.⁴⁵ DCOs have many tools to mitigate risks. This increased counterparty credit risk among affiliates may increase the likelihood that a default of one affiliate could cause significant losses in other affiliated entities. If the default causes other affiliated entities to default, third parties that have entered into uncleared swaps or other agreements with those entities also could be affected.

In 2013, when the Commission finalized the Inter-Affiliate Exemption, it assessed the risks of inter-affiliate swaps and stated that the partial internalization of costs among affiliated entities, combined with the documentation, risk management, reporting, and treatment of outward-facing swaps requirements for electing the exception, would mitigate some of the risks associated with uncleared inter-affiliate swaps.⁴⁶ However, the Commission indicated that these mitigants are not a perfect substitute for the protections that would otherwise be provided by clearing, or by a requirement to use more of the risk management tools that a clearinghouse uses to mitigate counterparty credit risk (*i.e.*, both

⁴⁵ Clearing Exemption for Swaps Between Certain Affiliated Entities, 78 FR 21750, at 21780 – 21781 (Apr. 11, 2013).

⁴⁶ *Id.*

initial and variation margin, futures commission merchants monitoring the credit risk of customers, clearing member contributions to default funds, etc.).⁴⁷

e. Other Public Interest Considerations

The Commission has identified no other public interest considerations.

D. Antitrust Considerations

Section 15(b) of the CEA requires the Commission to take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the objectives of the CEA, in issuing any order or adopting any Commission rule or regulation (including any exemption under section 4(c) or 4c(b)), or in requiring or approving any bylaw, rule, or regulation of a contract market or registered futures association established pursuant to section 17 of the CEA.⁴⁸ The Commission believes that the public interest to be protected by the antitrust laws is generally to protect competition. The Commission requested comments on whether the Proposal implicated any other specific public interest to be protected by the antitrust laws and received no comments.

The Commission has considered this final rule to determine whether it is anticompetitive and has identified no anticompetitive effects. The Commission requested comment on whether the Proposal was anticompetitive and, if it was, what the anticompetitive effects were, and received no comments.

Because the Commission has determined that the final rule is not anticompetitive and has no anticompetitive effects, the Commission has not identified any less anticompetitive means of achieving the purposes of the CEA.

⁴⁷ *Id.* at 21778.

⁴⁸ 7 U.S.C. 19(b).

List of Subjects in 17 CFR Part 50

Business and industry, Clearing, Swaps.

For the reasons stated in the preamble, the Commodity Futures Trading Commission amends 17 CFR part 50 as set forth below:

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. Amend § 50.52 as follows:
 - a. Revise paragraphs (a)(2)(i) and (ii);
 - b. Add paragraph (a)(2)(iii); and
 - c. Revise paragraph (b)(4).

The revisions and additions read as follows:

§ 50.52 Exemption for swaps between affiliates.

(a) * * *

(2) * * *

(i) A counterparty or third party directly or indirectly holds a majority ownership interest if it directly or indirectly holds a majority of the equity securities of an entity, or the right to receive upon dissolution, or the contribution of, a majority of the capital of a partnership;

(ii) The term “eligible affiliate counterparty” means an entity that meets the requirements of this paragraph; and

(iii) The term “United States” means the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.

(b) * * *

(4)(i) Subject to paragraphs (b)(4)(ii) and (iii) of this section, each eligible affiliate counterparty that enters into a swap, which is included in a class of swaps identified in § 50.4, with an unaffiliated counterparty shall:

(A) Comply with the requirements for clearing the swap in section 2(h) of the Act and this part;

(B) Comply with the requirements for clearing the swap under a foreign jurisdiction's clearing mandate that is comparable, and comprehensive but not necessarily identical, to the clearing requirement of section 2(h) of the Act and this part, as determined by the Commission;

(C) Comply with an exception or exemption under section 2(h)(7) of the Act or this part;

(D) Comply with an exception or exemption under a foreign jurisdiction's clearing mandate, provided that:

(1) The foreign jurisdiction's clearing mandate is comparable, and comprehensive but not necessarily identical, to the clearing requirement of section 2(h) of the Act and this part, as determined by the Commission; and

(2) The foreign jurisdiction's exception or exemption is comparable to an exception or exemption under section 2(h)(7) of the Act or this part, as determined by the Commission; or

(E) Clear such swap through a registered derivatives clearing organization or a clearing organization that is subject to supervision by appropriate government authorities

in the home country of the clearing organization and has been assessed to be in compliance with the Principles for Financial Market Infrastructures.

(ii) If one of the eligible affiliate counterparties is located in Australia, Canada, the European Union, Hong Kong, Japan, Mexico, Singapore, Switzerland, or the United Kingdom and each eligible affiliate counterparty, or a third party that directly or indirectly holds a majority interest in both eligible affiliate counterparties, pays and collects full variation margin daily on all of the eligible affiliate counterparties' swaps with other eligible affiliate counterparties, the requirements of paragraph (b)(4)(i) of this section shall be satisfied.

(iii) If an eligible affiliate counterparty located in the United States enters into swaps, which are included in a class of swaps identified in § 50.4, with eligible affiliate counterparties located in jurisdictions other than Australia, Canada, the European Union, Hong Kong, Japan, Mexico, Singapore, Switzerland, the United Kingdom, or the United States, and the aggregate notional value of such swaps, which are included in a class of swaps identified in § 50.4, does not exceed five percent of the aggregate notional value of all swaps, which are included in a class of swaps identified in § 50.4, in each instance the notional value as measured in U.S. dollar equivalents and calculated for each calendar quarter, entered into by the eligible affiliate counterparty located in the United States, then the requirements of paragraph (b)(4)(i) of this section shall be satisfied when each eligible affiliate counterparty, or a third party that directly or indirectly holds a majority interest in both eligible affiliate counterparties, pays and collects full variation margin daily on all of the eligible affiliate counterparties' swaps with other eligible affiliate counterparties.

* * * * *

Issued in Washington, DC, on June 29, 2020, by the Commission.

Robert Sidman,

Deputy Secretary of the Commission.

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

**Appendices to Exemption from the Swap Clearing Requirement for Certain
Affiliated Entities – Alternative Compliance Frameworks for Anti-Evasionary
Measures—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—Supporting Statement of Chairman Heath P. Tarbert

I am pleased to support our final rule codifying the alternative compliance framework for the Commission’s inter-affiliate swap clearing exemption, which has been in place via the CFTC’s staff no-action relief since 2014. As I previously stated in connection with the proposed rule, codifying this relief is good policy and good government.¹

From a policy perspective, the rule advances the goals of our swap clearing requirements by making anti-evasionary provisions of the inter-affiliate exemption

¹ Statement of Chairman Heath P. Tarbert: “Tripling Down on Transparency” n.12 (Dec. 10, 2019), <https://www.cftc.gov/PressRoom/SpeechesTestimony/tarbertstatement121019>.

workable for cross-border corporate groups. Stepping back for a moment and looking at the bigger picture, our clearing and initial margin requirements are meant to address counterparty credit risk. These measures generally are not appropriate for credit exposures between members of a single corporate group, where risk is managed internally on a centralized basis.²

However, the CFTC has long been concerned that U.S. entities may misuse the inter-affiliate exemption to evade the clearing requirements more generally. For example, a U.S. entity may use back-to-back swaps to interpose a non-U.S. affiliate in the middle of the U.S. entity's trade with a non-U.S. counterparty, where the non-U.S. affiliate and counterparty are in jurisdictions that do not have mandatory clearing regimes comparable to the Commission's. In this way, the U.S. entity could improperly circumvent the clearing obligations that would apply if it were trading directly with the non-U.S. counterparty (because it would be exempted from clearing the trade with its non-U.S. affiliate, and the non-U.S. affiliate's back-to-back trade with the non-U.S. counterparty could fall outside U.S. clearing requirements).

This evasion concern was particularly acute in the early years of the CFTC's clearing regime, when a number of other jurisdictions had yet to implement their own clearing requirements in accordance with the G20 commitments at the 2009 Pittsburgh Summit. Moreover, section 2(h)(4)(A) of the Commodity Exchange Act requires us to prescribe rules to prevent evasion of the clearing requirement. Accordingly, as an anti-evasionary measure, the Commission required members of a corporate group taking

² See Clearing Exemption for Swaps Between Certain Affiliated Entities, 78 FR 21750, 21753 (Apr. 11, 2013) (justifying the inter-affiliate clearing exemption in view of incentives to avoid defaulting to affiliates and the common practice of centralized risk allocation decisions and default remedies, which reduce inter-affiliate default risk).

advantage of the inter-affiliate exemption to clear their outward-facing swaps if such swaps would be clearing-mandated under CFTC rules, regardless whether the parties to the outward-facing swap were in fact subject to such rules.³

The “clearing outward-facing swaps” condition to the inter-affiliate exemption is unworkable for many market participants, however, because of inter-jurisdictional mismatches in clearing requirements and infrastructures. Accordingly, the CFTC’s staff no-action relief has extended the rule’s time-limited alternative compliance framework allowing affiliates to exchange variation margin in lieu of clearing outward-facing swaps.⁴

This alternative compliance option has allowed cross-border corporate groups to attain the risk-mitigating benefits of inter-affiliate swaps,⁵ while complying with important anti-evasion measures in a way that is practicable for their global business. Indeed, the CFTC staff’s review of recent swap data indicates that over 70 eligible affiliate counterparties located outside the United States rely on the alternative compliance framework under the available staff no-action relief. By codifying this relief, we are providing the swaps market with clarity, certainty, and transparency—consistent with the CFTC’s mission, core values, and strategic objectives.⁶ I commend my fellow

³ 17 CFR 50.52(b)(4).

⁴ CFTC Letter No. 17-66 (Dec. 14, 2017),

<https://www.cftc.gov/LawRegulation/CFTCStaffLetters/index.htm>; see also previously granted relief under CFTC Letter Nos. 14-135 (Nov. 7, 2014), 15-63 (Nov. 17, 2015), 16-81 (Nov. 28, 2016), and 16-84 (Dec. 15, 2016). CFTC Letter No. 17-66 expires on the earlier of (i) December 31, 2020 at 11:59 pm (Eastern Time); or (ii) the effective date of amendments to Commission regulation 50.52.

⁵ See 78 Fed. Reg. at 21754 (citing to commenters and the 2012 inter-affiliate exemption notice of proposed rulemaking in support of the conclusion that “inter-affiliate transactions provide an important risk management role within corporate groups” and that “swaps entered into between corporate affiliates, if properly risk-managed, may be beneficial to the entity as a whole”).

⁶ See Draft CFTC 2020-2024 Strategic Plan, 85 Fed. Reg. 29,935 (May 19, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10676.pdf>.

Commissioners and the CFTC’s staff for working to finalize the rule before us today, and I look forward to further efforts to advance these principles and goals in the near future.

Appendix 3—Supporting Statement of Commissioner Brian Quintenz

I support today’s final rule providing legal certainty to swap counterparties electing the inter-affiliate exemption from the Commission’s requirement that certain interest rate swaps and credit default swaps be cleared. At issue is an important condition of the exemption that reduces the likelihood that uncollateralized exposures can build up at a U.S. swap participant.¹ I support the policy, made permanent by today’s rule, that permits variation margin to be exchanged by affiliated counterparties in lieu of clearing swaps with foreign counterparties. This provision appropriately balances an anti-evasionary measure with providing flexibility to market participants. The provision has functioned well since 2013, and it is appropriate to make the provision permanent after several extensions of the no-action relief.²

I would like to highlight that today’s final rule acknowledges that five additional jurisdictions have enacted swap clearing requirements since the first version of this rule was issued in 2013.³ Today’s rule therefore serves as another example of the Commission appropriately deferring to foreign regulatory regimes in order to reduce compliance burdens and promote market liquidity internationally.

Not only do I support today’s final rule because it makes a sound policy permanent, but also because it codifies no-action relief that has proven workable for

¹ CFTC regulation 50.52(b)(4)(ii)-(iii) (17 CFR 50.52(b)(4)(ii)-(iii)).

² CFTC Letters 14-135, 15-63, 16-81, 16-84, and 17-66.

³ The first version of the rule had permitted, until 2014, unlimited variation margining when an affiliate was located in the E.U., Japan, and Singapore. Today’s version expands the list of eligible jurisdictions to include Australia, Canada, Hong Kong, Mexico, Switzerland, as well as the U.K.

market participants. Codifying no-action relief makes the Commission's regulatory framework more transparent and simplifies compliance. I would support continuing to codify other no-action relief, for example with respect to providing relief from the trade execution requirement for a swap exempted from the clearing requirement.⁴

Finally, I would like to thank the staff of DCR for their diligence in completing this rulemaking.

⁴ CFTC Letter 17-67, proposed to be codified by the Commission's 2018 proposed revised rules for swap execution facilities, 83 Fed. Reg. 61,946 (Nov. 30, 2018).

Appendix 4—Concurring Statement of Commissioner Rostin Behnam

I support today's adoption of amendments to the exemption from the swap clearing requirement for certain affiliated entities within a corporate group. The amendments that update the conditions for the exemption incorporate several years of observation and analysis to build upon its utility within the global regulatory landscape, while affirming the Commission's appropriate use of its public interest authority under section 4(c) of the Commodity Exchange Act. It can be tempting to use somewhat fluid and undeniably desirable objectives such as the promotion of responsible economic and financial innovation and fair competition to support all manner of regulatory changes. And I have not hesitated to highlight my own concerns for the imprudent use of 4(c) exemptive authority. However, I am pleased that when it comes to the risks associated with U.S firms entering into uncleared swaps with non-U.S. affiliates or evading the clearing requirement altogether, the Commission has consistently demonstrated that its reliance on the 4(c) authority provides the checks to ensure that the policy and outcomes remain legally sound and rational.

I support today's final rule, as I did the proposal, because it provides legal certainty, benefits from careful analysis and consideration of the data as well as the global regulatory landscape as it has developed, and leaves in place critical tools for Commission monitoring, oversight, and enforcement.¹ However, I am mindful that guardrails put firmly in place by today's amendments as a substitute for clearing outward-facing swaps may produce additional risk to external creditors and/or third

¹ Exemption from the Swap Clearing Requirement for Certain Affiliated Entities, 84 FR 70446, 70460-1 (proposed Dec. 23, 2019).

parties, and that there may be an increased likelihood of risk to the financial system resulting from the availability of the exemption. While I encouraged interested parties to comment on this aspect of the exemption—the alternative compliance framework—the Commission did not receive any responsive comments.² Without comments, the Commission’s findings and conclusions remain neither vigorously supported nor expressly undermined, and we will continue to discharge our regulatory responsibilities, remaining quick to respond as we closely monitor the data and global regulatory developments to ensure that the exemption does not add unnecessary and preventable risk to the U.S. financial system.

I thank staff from the Division of Clearing and Risk for their thoughtful responses to my questions, and for making edits that reflect my comments and suggestions.

² *Id.* at 70461.

Appendix 5—Statement of Commissioner Dan M. Berkovitz

I support today’s final rule making permanent the alternative compliance frameworks for certain swaps involving the foreign affiliates of U.S. firms and their non-U.S. counterparties. The final rule upholds the Dodd-Frank Act’s clearing mandate, deters evasion, and protects against systemic risk from swaps executed overseas by foreign affiliates. The final rule, which adopts the rule as proposed,¹ codifies existing practice and addresses anti-evasion provisions governing inter-affiliate swaps that the Commission first issued in 2013 and later extended through staff no-action letters.

Commission regulations provide a limited, conditional “Inter-Affiliate Exemption” from clearing for swaps between certain affiliate counterparties, including U.S. firms and their foreign affiliates. Notably, the Inter-Affiliate Exemption includes an important “Outward-Facing Swaps Condition” to prevent U.S. firms from routing swaps through foreign affiliates to evade the Commission’s clearing requirement.² The Outward-Facing Swaps Condition allows outward-facing swaps to be cleared pursuant to a comparable and comprehensive foreign clearing regime.

Where the Commission has not made a comparability determination, the alternative compliance frameworks permit the foreign affiliate to exchange full, daily variation margin for the swap with its U.S. affiliate or its non-U.S. counterparty, rather than clearing the outward-facing swap. The alternative compliance frameworks preserve

¹ Exemption From the Swap Clearing Requirement for Certain Affiliated Entities – Alternative Compliance Frameworks for Anti-Evasionary Measures, 84 FR 70446 (Dec. 23, 2019).

² The Outward-Facing Swaps Condition requires the foreign affiliates of U.S. firms to clear their outward-facing swaps if such swaps are subject to the Commission’s clearing requirement and entered into with unaffiliated counterparties in foreign jurisdictions.

the competitiveness of the foreign affiliates of U.S. firms without importing significant risks into the U.S. Today's final rule makes the alternative compliance frameworks permanent, with certain modifications.³

I support the final rule's emphasis on clearing, anti-evasion, and systemic risk. The final rule also expands the jurisdictions subject to one of the alternative compliance frameworks to include additional jurisdictions that have adopted and implemented their respective domestic clearing mandates. By extending and making permanent the alternative compliance frameworks, the final rule addresses the lack of comparability determinations for foreign clearing regimes, while ensuring the continued operation of anti-evasion and anti-systemic risk provisions in the Commission's rules.

I thank staff of the Division of Clearing and Risk for their work on this final rule and for their effective cooperation with my office.

³ The original alternative compliance frameworks expired in 2014, but have been repeatedly extended through no-action letters.