

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 23 and 37

RIN Number XXXX-XXXX

Swap Confirmation Requirements for Swap Execution Facilities

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Commodity Futures Trading Commission (Commission or CFTC) is proposing amendments to its swap execution facility (SEF) regulations related to uncleared swap confirmations, as well as associated technical and conforming changes.

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

ADDRESSES: You may submit comments, identified by “Swap Confirmation Requirements for Swap Execution Facilities” and RIN number XXXX-XXXX, by any of the following methods:

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

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

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

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

FOR FURTHER INFORMATION CONTACT: Roger Smith, Associate Chief Counsel, (202) 418-5344, rsmith@cftc.gov, Division of Market Oversight, Commodity Futures Trading Commission, 77 West Jackson Blvd., Suite 800, Chicago, Illinois 60604; Stephen Kane, Research Economist, (202) 418- 5911, skane@cftc.gov, or Madison Lau, Research Economist, (202) 418- 5276, mlau@cftc.gov, Office of the Chief Economist, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.

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¹ 17 CFR 145.9. The Commission’s Regulations referred to in this release are found at 17 CFR Chapter I (2022), available on the Commission’s website at <https://www.cftc.gov/LawRegulation/CommodityExchangeAct/index.htm>.

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I. Background

A. Regulatory History: The Part 37 Rules

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) amended the Commodity Exchange Act (CEA or Act) by adding section 5h, which establishes

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registration requirements and core principles for SEFs.² The Commission implemented CEA section 5h by adopting part 37 of its regulations, which, among other things, sets forth operational requirements for SEFs and establishes various requirements for the trading of swaps on SEFs.³ As part of the implementing SEF regulations, the Commission adopted § 37.6(b), which requires a SEF to provide each counterparty to a swap transaction that is entered into on or pursuant to the rules of the SEF – whether cleared or uncleared – with a written record of all of the terms of the transaction, “which shall legally supersede any previous agreement and serve as a confirmation of the transaction.”⁴ Pursuant to § 37.6(b), the confirmation of all terms of the transaction must take place at the same time as execution, subject to a limited exception for certain information related to accounts included in bunched orders.⁵

In November 2018, the Commission issued a comprehensive proposal to amend the SEF regulatory framework.⁶ In the 2018 SEF Proposal, the Commission proposed to amend § 37.6(b) to establish separate swap transaction documentation requirements for cleared and uncleared swaps.⁷ For uncleared swap transactions, the Commission proposed to amend § 37.6(b) to require a SEF to provide the counterparties to the transaction with a “trade evidence record” that would memorialize the terms of the transaction agreed upon between the counterparties on the SEF.⁸ Under the 2018 SEF Proposal, a “trade evidence record” was defined as “a legally binding written documentation (electronic or otherwise) that memorializes the terms of a swap

² 7 U.S.C. 7b-3.

³ Core Principles and Other Requirements for Swap Execution Facilities, 78 FR 33476 (June 4, 2013) (SEF Core Principles Final Rule). The SEF Core Principles Final Rule also articulates, where appropriate, guidance and acceptable practices for complying with the SEF core principles set forth in CEA section 5h.

⁴ 17 CFR 37.6(b).

⁵ 17 CFR 37.6(b). Specific customer identifiers for accounts included in bunched orders involving swaps need not be included in confirmations provided by a SEF if the applicable requirements of 17 CFR 1.35(b)(5) are met.

⁶ Swap Execution Facilities and Trade Execution Requirement, 83 FR 61946 (Nov. 30, 2018) (2018 SEF Proposal).

⁷ *Id.*

⁸ *Id.* at 62096.

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transaction agreed upon by the counterparties and legally supersedes any conflicting term in any previous agreement (electronic or otherwise) that relates to the swap transaction between the counterparties.”⁹ In 2021, the Commission withdrew the unadopted portions of the 2018 SEF Proposal,¹⁰ including the proposed amendments to § 37.6, from further consideration.¹¹

Pursuant to section 731 of the Dodd-Frank Act, which added section 4s(i) to the CEA,¹² the Commission has adopted regulations to prescribe documentation standards for swap dealers (SDs) and major swap participants (MSPs) related to the timely and accurate confirmation, processing, netting, documentation, and valuation of swaps. The Commission adopted § 23.501 to specifically address swap confirmation requirements for SDs and MSPs, including for those swaps executed on a SEF or designated contract market (DCM).¹³ Among other things, § 23.501 provides that any swap transaction executed on a SEF or DCM shall be deemed to satisfy the swap confirmation requirements set forth in § 23.501, provided that the rules of the SEF or DCM “establish that confirmation of all terms of the transaction shall take place at the same time as execution.”¹⁴

B. Summary of Proposed Changes to § 37.6

⁹*Id.* at 61973; 62067.

¹⁰ The following final rulemakings of the Commission adopted certain portions of the 2018 SEF Proposal: (i) Exemptions From Swap Trade Execution Requirement, 86 FR 8993 (Feb. 11, 2021); and (ii) Swap Execution Facilities, 86 FR 9224 (Feb. 11, 2021).

¹¹ *See* Swap Execution Facilities and Trade Execution Requirement, 86 FR 9304 (Feb. 12, 2021). The Commission notes that because the 2018 SEF Proposal was withdrawn, comments on the proposed amendments to § 37.6(b) that were included in the 2018 SEF Proposal will not be part of the administrative record with respect to the current proposal to amend § 37.6(b). Further, the Commission notes that while certain proposals and rationales contained herein are similar, or in some cases identical, to proposals or rationales set forth in the 2018 SEF Proposal, the Commission believes that, overall, the context in which the current discrete proposal to amend § 37.6(b) is being adopted is very different from the comprehensive foundational shift in the regulatory framework for SEFs that was proposed in 2018. As such, commenters should submit comments relevant to this current proposal to amend § 37.6(b); commenters who wish to reference prior comment letters, including comment letters on the 2018 SEF Proposal, should reference those prior comment letters as specifically as possible.

¹² 7 U.S.C. 6s(i).

¹³ 17 CFR 23.501(a)(4)(i).

¹⁴ *Id.*

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During the implementation of part 37, SEFs informed the Commission that the confirmation requirement for uncleared swaps under § 37.6(b) is operationally and technologically difficult and impractical to implement. As discussed more fully below, Commission staff from the Division of Market Oversight (DMO) acknowledged these technological and operational challenges and provided no-action positions for SEFs with respect to certain provisions of the Commission’s regulations related to uncleared swap confirmations.¹⁵ In particular, DMO most recently issued CFTC No-Action Letter No. 17-17 (NAL No. 17-17), which provides a no-action position with respect to the obligation to obtain copies of underlying, previously negotiated agreements between the counterparties, as discussed in greater detail below, for a SEF that seeks for uncleared swaps to satisfy the confirmation requirement in § 37.6(b) by incorporating by reference terms of such underlying agreements.¹⁶

The Commission proposes to amend § 37.6(b) to codify this no-action position, which would enable SEFs to incorporate such terms by reference in an uncleared swap confirmation without being required to obtain the underlying, previously negotiated agreements. Further, the Commission proposes to amend § 37.6(b), which currently requires confirmation of all terms of a swap transaction to “take place at the same time as execution,” to require such confirmation to

¹⁵ NAL No. 17-17, Re: Extension of No-Action Relief for Swap Execution Facility Confirmation and Recordkeeping Requirements under Commodity Futures Trading Commission Regulations 37.6(b), 37.1000, 37.1001, 45.2, and 45.3(a) (Mar. 24, 2017). NAL No. 17-17 extended the no-action position previously provided by Commission staff. *See* CFTC Letter No. 16-25, Re: Extension of No-Action Relief for Swap Execution Facility Confirmation and Recordkeeping Requirements under Commodity Futures Trading Commission Regulations 37.6(b), 37.1000, 37.1001, 45.2, and 45.3(a) (Mar. 14, 2016) (NAL No. 16-25); CFTC Letter 15-25, Re: Extension of No-Action Relief for SEF Confirmation and Recordkeeping Requirements under Commission Regulations 37.6(b), 37.1000, 37.1001, and 45.2, and Additional Relief for Confirmation Data Reporting Requirements under Commission Regulation 45.3(a) (Apr. 22, 2015) (NAL No. 15-25); and CFTC Letter No. 14-108, Staff No-Action Position Regarding SEF Confirmations and Recordkeeping Requirements under Certain Provisions Included in Regulations 37.6(b) and 45.2 (Aug. 18, 2014) (NAL No. 14-108). *See also* CFTC Letter No. 13-58, Time-Limited No-Action Relief to Temporarily Registered Swap Execution Facilities from Commission Regulation 37.6(b) for Non-Cleared Swaps in All Asset Classes (Sept. 30, 2013) (NAL No. 13-58).

¹⁶ *See* NAL No. 17-17.

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take place “as soon as technologically practicable” after the execution of the swap transaction on the SEF for both cleared and uncleared swap transactions. The Commission also proposes to amend § 37.6(b) to make clear that the SEF-provided confirmation under § 37.6(b) shall legally supersede any *conflicting terms* in a previous agreement, rather than the entire agreement. In addition, the Commission proposes to make conforming amendments to § 23.501(a)(4)(i) to correspond with the proposed amendments to § 37.6(b).

Finally, the Commission proposes to make certain non-substantive amendments to §§ 37.6(a)-(b) to enhance clarity.

C. Consultation with Other U.S. Financial Regulators

In developing these rules, the Commission has consulted with the Securities and Exchange Commission (SEC), pursuant to section 712(a)(1) of the Dodd-Frank Act.¹⁷

II. Proposed Regulations

A. § 37.6—Enforceability

1. Proposed § 37.6(b)(1) — Uncleared Swap Confirmations: Incorporation by Reference of Underlying Previously Negotiated Agreements

Commission Regulation 37.6(b) requires a SEF to provide each counterparty to a swap transaction that is entered into on or pursuant to the rules of the SEF, whether cleared or uncleared, with a “confirmation” – a written record that contains all of the terms of the

¹⁷ Dodd-Frank Act, Pub. L. 111-203, tit. VII, § 712(a)(1), 124 Stat. 1376 (2010). On May 11, 2022, the SEC adopted proposed rules for security-based swap execution facilities (SB SEFs). *See* Rules Relating to Security-Based Swap Execution and Registration and Regulation of Security-Based Swap Execution Facilities, 87 FR 28872 (May 11, 2022) (SEC SB SEF Proposal). As part of the SEC SB SEF Proposal, the SEC proposed SEC rule 242.812 (SEC Proposed Rule 812), which was modelled after existing § 37.6 with some modifications. In particular, SEC Proposed Rule 812 would require an SB SEF to “as soon as technologically practicable after the time of execution of a transaction entered into on or pursuant to the rules of the facility, provide a written record to each counterparty of all of the terms of the transaction that were agreed to on the facility, which shall legally supersede any previous agreement regarding such terms.” *Id.* at 28893. To date, the SEC has not adopted the SEC SB SEF Proposal or SEC Proposed Rule 812.

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transaction – at the time of execution.¹⁸ The terms of a swap transaction include economic terms that are specific to the transaction, *e.g.*, swap product, price, and notional amount, and can also include non-specific “relationship terms” that generally govern all transactions between two counterparties – including, for example, relationship-level default, margin, or governing law provisions.

For uncleared swap transactions,¹⁹ the Commission is aware that many relationship terms that may govern certain aspects of the transaction are often negotiated and agreed upon in written documentation between the counterparties prior to execution.²⁰ The Commission previously stated that, for purposes of satisfying the requirements of § 37.6(b), a SEF’s confirmation terms for uncleared swap transactions may incorporate by reference relevant terms set forth in such underlying agreements, as long as those agreements have been submitted to the SEF prior to execution.²¹ As applied, § 37.6(b) requires that the SEF incorporate this documentation by reference into the issued confirmation, which is intended in part to provide SEF participants with legal certainty with respect to the terms of uncleared swap transactions.²²

¹⁸ 17 CFR 37.6(b). *See also* 17 CFR 23.500(c) (providing a similar definition of “confirmation” that is applicable to SDs and MSPs).

¹⁹ The Commission notes that swap trading relationship documentation is not required for swaps cleared by a derivatives clearing organization. *See* 17 CFR 23.504(a)(1).

²⁰ SEF Core Principles Final Rule at 33491 n.195. *See* Confirmation, Portfolio Reconciliation, Portfolio Compression, and Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants, 77 FR 55904, 55906 (Sept. 11, 2012) (noting that swap counterparties have typically relied on the use of industry-standard legal documentation to document their swap trading relationships. This documentation, such as the ISDA Master Agreement and related Schedule and Credit Support Annex (ISDA Agreements), as well as related documentation specific to particular asset classes, offers a framework for documenting uncleared swap transactions between counterparties.; *see also* 17 CFR 23.504(b) (noting that for uncleared swap transactions, § 23.504(b) requires written swap trading relationship documentation that includes all terms governing the trading relationship between an SD or MSP and its counterparty).

²¹ SEF Core Principles Final Rule at 33491 n.195. While the Commission’s statement specifically referenced the incorporation by reference of previously negotiated terms from “a freestanding master agreement,” the Commission recognizes that other previously negotiated freestanding agreements similarly may contain terms that are relevant to an uncleared swap confirmation.

²² To ensure that the SEF confirmation provides legal certainty, the Commission has stated that counterparties choosing to execute a swap transaction on or pursuant to the rules of a SEF must have all terms, including possible

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The requirement that the underlying agreements be submitted to the SEF prior to execution has, however, created impractical burdens for SEFs. Based upon feedback from SEFs, the Commission understands that SEFs have encountered many issues in trying to comply with the requirement, including high financial, administrative, and logistical burdens in order to collect and maintain bilateral transaction agreements from many individual counterparties. SEFs have stated that they are unable to develop a cost-effective method to request, accept, and maintain a library of every relevant previous agreement between counterparties.²³ SEFs have also noted that the potential number of previous agreements is considerable, given that SEF counterparties often enter into agreements with many other parties and may have multiple agreements for different asset classes.²⁴

Commission staff from DMO has acknowledged these technological and operational challenges and has accordingly granted no-action positions, most recently in NAL No. 17-17.²⁵ Based on these no-action positions, many SEFs have incorporated by reference applicable relationship terms from previously negotiated underlying agreements between counterparties in confirmations for uncleared swaps, without obtaining copies of these agreements prior to the execution of a swap and without maintaining copies of such underlying agreements on an ongoing basis.²⁶

long-term credit support arrangements, agreed to no later than execution, such that the SEF can provide a written confirmation inclusive of those terms. SEF Core Principles Final Rule at 33491.

²³ Many of these agreements are maintained in paper form or as scanned PDF files that are difficult to quickly digitize in a cost-effective manner. *See* WMBAA, Request for Extended Relief from Certain Requirements under Parts 37 and 45 Related to Confirmations and Recordkeeping for Swaps Not Required or Intended to be Cleared at 3 (Mar. 1, 2016). Further, some SEFs have cited the considerable resource cost of obtaining the number of different agreements that exist to accommodate different types of counterparties and asset classes. *Id.*

²⁴ *Id.*

²⁵ *See supra* note 15.

²⁶ *Id.* As a condition of staff's no-action positions, a SEF has been required to have a rule in its rulebook that requires its participants to provide copies of the underlying agreements to the SEF on request, as well as a rule in its rulebook that requires the SEF to (i) request from a participant an underlying agreement upon request from the Commission, and (ii) to furnish such agreement to the Commission as soon as it is available.

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Based on its experience with the part 37 implementation, the Commission acknowledges that cleared and uncleared swap transactions raise different issues with respect to confirmation requirements²⁷ and that the current § 37.6(b) requirements create difficulties for the latter type of swap transaction. As such, the Commission proposes to amend § 37.6(b) by adding § 37.6(b)(1) to permit SEFs to incorporate relevant terms from underlying, previously negotiated agreements by reference in a confirmation for an uncleared swap transaction without obtaining such incorporated agreements.²⁸

²⁷ See *supra* note 19.

²⁸ In addition to stating that DMO will not recommend enforcement action if a SEF incorporates by reference relevant terms from underlying, previously negotiated agreements in confirmations for uncleared swap transactions, without obtaining copies of such agreements, which the Commission proposes to codify in this release, NAL No. 17-17 also provides no-action positions with respect to the requirement to maintain copies of such agreements in order to comply with SEF recordkeeping obligations under §§ 37.1000, 37.1001, 45.2. Among other things, these requirements obligate a SEF to maintain “records of all activities relating to the business of” the SEF. The Commission preliminarily believes that allowing a SEF to incorporate by reference relevant terms from the underlying, previously negotiated agreements without obtaining such agreements will rectify the compliance issues posed with respect to §§ 37.1000, 37.1001, and 45.2. As a SEF would no longer be required to obtain the underlying, previously negotiated agreements, the Commission preliminarily believes that these agreements would not, as a general category, constitute records relating to the SEF’s business for purposes of §§ 37.1000, 37.1001, and 45.2. The Commission notes, however, that if a SEF did obtain such an underlying, previously negotiated agreement, including at the request of the Commission or its staff or in connection with the fulfillment of the SEF’s regulatory obligations, the SEF would, with respect to such agreement, need to comply with its recordkeeping obligations under §§ 37.1000, 37.1001, and 45.2. NAL No. 17-17 also provides a no-action position with respect to the swap data reporting requirements that apply to a SEF under § 45.3(a). In November 2020, the Commission amended its swap data reporting regulations, which amendments included the removal of the term “primary economic terms” and “confirmation data” from § 45.3(a). See *Swap Data Recordkeeping and Reporting Requirements*, 85 Fed. Reg. 75503 (Nov. 25, 2020) (Amended Part 45 Rules). Currently, SEFs are required to report as specified in the technical specification published on the Commission’s website, *available at* https://www.cftc.gov/LawRegulation/DoddFrankAct/Rulemakings/DF_18_RealTimeReporting/index.htm. As relevant in this context, the technical specification sets out the required validations and message types, including when, for swap data reporting purposes, specific data fields are mandatory, conditional, or optional. For example, the technical specification distinguishes between transaction, collateral, and valuation reporting. In general, SEFs will report transaction message types and not valuation and collateral message types. Those data elements in the technical specification relevant to on-SEF transactions that are contained in the transaction message type are readily available for a SEF to fulfil its reporting obligations under Commission regulations 45. As further evidence of this, the defined term “confirmation data” no longer exists in § 45.3(a). Therefore, the no-action position stated in Staff Letter 17-17 that “the Division will not recommend that the Commission take enforcement action against a SEF for failure to report certain confirmation data pursuant to Commission Regulation 45.3(a)...” (See NAL No. 17-17 at 3-4) has not been in effect since the implementation of the Commission’s Amended Part 45 Rules. Staff have not received a related, updated request for no-action position with respect to SEF reporting requirements. The Commission preliminarily believes the Amended Part 45 Rules and the associated technical specification requirements eliminate the need for the no-action position related to § 45.3(a) in NAL No. 17-17. Finally, the Commission is not proposing to codify certain conditions from NAL No. 17-17, including conditions that require a SEF to have rules in its rulebook that (i) require a SEF confirmation to state, where applicable, that it incorporates

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The Commission preliminarily believes, following staff's observation of SEFs and market participants operating under the existing no-action position in NAL No. 17-17 and precursor no-action letters, that proposed § 37.6(b)(1) would not compromise the legal certainty of confirmations issued by SEFs for uncleared swap transactions, and that proposed § 37.6(b)(1) is a financially and logistically appropriate alternative for SEFs to comply with the confirmation requirement under § 37.6(b) as it applies to uncleared swaps.²⁹ The approach set forth in proposed § 37.6(b)(1) should address the technological and operational challenges that have prevented SEFs from fully complying with § 37.6(b), by reducing the administrative burdens for SEFs, who would not be required to obtain and maintain a library of every relevant previously negotiated agreement between counterparties, and for market participants themselves, who would not be required to submit to the SEF all of their relevant underlying documentation with other potential counterparties on the SEF.

As more fully discussed below, the Commission expects that proposed § 37.6(b)(1) will reduce the cost of SEFs' compliance with the confirmation requirement in § 37.6(b).

Therefore, the Commission proposes to amend § 37.6(b) by adding § 37.6(b)(1) to permit SEFs to incorporate underlying, previously negotiated agreements by reference in a confirmation for an uncleared swap transaction without obtaining such incorporated agreements.

by reference the terms of the underlying previously negotiated freestanding agreements between the counterparties, and (ii) state that in the event of any inconsistency between a SEF confirmation and the underlying previously negotiated freestanding agreements, the terms of the SEF confirmation legally supersede any contradictory terms and that require the SEF's confirmations to state the same. The Commission preliminarily believes that the proposed amendments herein, if adopted, would clarify the requirements for uncleared swap confirmations issued by SEFs in a manner that obviates the need to codify these conditions. *See also* the discussion, *infra*, of those conditions in NAL No. 17-17 that address the SEF's ability to obtain, upon request, copies of the underlying previously negotiated freestanding agreements that have been incorporated by reference into an uncleared swap confirmation.

²⁹ The proposed amendment would also preserve the legal certainty of the terms of swap transactions for market participants.

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In order to avail themselves of the no-action position under NAL No. 17-17, SEFs must have rules in their rulebooks that, among other things;³⁰ (1) require “participants to provide copies of the underlying previously negotiated freestanding agreements to the SEF on request;” and (2) require “the SEF to request from participants the underlying previously negotiated freestanding agreements on request from the Commission and [require] the SEF to furnish such documents to the Commission as soon as they are available.”³¹ The Commission preliminarily believes that the existing requirements for SEFs under the CEA and the Commission’s part 37 regulations sufficiently account for these conditions of NAL No. 17-17, such that these conditions do not need to be incorporated as specific conditions of proposed new § 37.6(b)(1).

In particular, SEF Core Principle 5 and the implementing part 37 regulations require, among other things, that a SEF establish and enforce rules that will allow the SEF to obtain any necessary information to perform any of the functions described in section 5h of the Act; establish and enforce rules that will allow the SEF to have the ability and authority to obtain sufficient information to allow it to fully perform its operational, risk management, governance, and regulatory functions and any requirements under part 37; have rules that allow for its examination of books and records kept by the market participants on its facility; and provide information to the Commission on request.³² The Commission believes that, pursuant to these requirements and as necessary to carry out its statutory and regulatory functions, a SEF has the ability and authority to request copies of the underlying agreements that are incorporated by

³⁰ See also note 28, *supra*.

³¹ See NAL No. 17-17 at 4.

³² 7 U.S.C. 7b-3(f)(5); 17 CFR 37.500-503.

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reference into a confirmation for an uncleared swap transaction and to provide such agreements to the Commission upon request.³³

Request for Comment

The Commission requests comments on all aspects of proposed § 37.6(b)(1). In particular, the Commission requests comment on the following questions:

- (1)** Should the Commission allow a SEF to issue a confirmation for an uncleared swap transaction that does not, as currently contemplated under § 37.6(b), include all the terms of the transaction, for example by only including in the confirmation the terms agreed to on the SEF? If so, should the Commission amend § 23.501 accordingly?
- (2)** Should the Commission require a SEF to establish and enforce exchange rules that specifically require participants to maintain copies of all agreements incorporated by reference into an uncleared swap confirmation?
- (3)** Taking into account a SEF's obligations under SEF Core Principle 5 and the associated part 37 regulations, should the Commission require a SEF to establish and enforce exchange rules specifically requiring market participants to provide the SEF upon request with a copy of any document or agreement incorporated by reference into an uncleared swap confirmation?
- (4)** Taking into account the Commission's authorities under § 37.5 and § 37.1000, should the Commission adopt an express requirement for a SEF to furnish to the Commission upon request a copy of any document or agreement incorporated by reference into an uncleared swap confirmation?

³³ Further the Commission also has the ability to request information from the SEF under 17 CFR 37.5(a), which requires a SEF to file with the Commission information related to its business as a SEF upon the Commission's request. *See* 17 CFR 37.5.

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(5) Is the term “agreement” within proposed § 37.6(b)(1) broad enough to capture the types of documentation governing swap trading relationships that may need to be incorporated by reference into an uncleared swap confirmation?

2. Proposed Amendment to § 37.6(b)—Timing of Swap Transaction Confirmation

Section 37.6(b) requires that confirmation of all the terms of a swap transaction entered into on or pursuant to the rules of a SEF must take place at the same time as execution, except for a limited exception for certain information related to accounts included in bunched orders.³⁴ The Commission proposes to amend this timing requirement and instead require a confirmation of all the terms of a swap a transaction “as soon as technologically practicable” after the execution of a swap transaction on the SEF.³⁵

The Commission believes that the proposed standard—“as soon as technologically practicable” after execution—would continue to promote the Commission’s goals of providing swap counterparties with legal certainty in a prompt manner, while also being consistent with other Commission requirements related to swap confirmations.³⁶

³⁴ 17 CFR 37.6(b). Specific customer identifiers for accounts included in bunched orders involving swaps need not be included in confirmations provided by a SEF if the applicable requirements of §1.35(b)(5) are met. *See* 17 CFR 1.35(b)(5), which provides that specific customer account identifiers for accounts included in bunched orders executed on DCMs or SEFs need not be recorded at time of order placement or upon report of execution if the requirements set forth in § 1.35(b)(5)(i)-(v) are met.

³⁵ The Commission notes that in the context of real-time public reporting, it has defined “as soon as technologically practicable” to mean “as soon as possible, taking into consideration the prevalence, implementation, and use of technology by comparable market participants.” 17 CFR 43.2. The meaning of this term, as proposed in § 37.6(b) herein, would be consistent with this definition, except applying to comparable SEFs. For example, for purposes of taking into consideration the prevalence, implementation and use of technology by comparable SEFs, the Commission would expect that fully electronic SEFs would be comparable to one another, while SEFs that utilize more manual processes, such as voice, would be comparable to each other.

³⁶ For example, §§ 23.501(a)(1) and 23.501(a)(2) require that an SD or MSP issue a confirmation or acknowledgement for a swap transaction (as applicable) to its counterparty “as soon as technologically practicable...” *See* 17 CFR 23.501(a)(1)-(2). Further, the Commission notes that the proposed standard is consistent with the SEC’s proposed standard for SB SEFs in SEC Proposed Rule 812. *See* SEC SB SEF Proposal at 28893.

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In addition, for a block trade that is executed “away from” a SEF, – i.e., outside of the SEF’s trading system or platform, but still “pursuant to the rules” of the SEF for purposes of the § 37.6(b) confirmation requirement – a SEF would be unaware of the execution of the trade until the counterparties report the trade details to the SEF. From a temporal perspective, the SEF would consequently be unable to confirm all terms of the block trade at the same time as execution.

The Commission believes that the proposed standard reflects existing SEF capabilities while maintaining the Commission’s goal of providing swap counterparties with legal certainty for transactions. Given the Commission’s understanding that SEFs are complying with the “at the same time as execution” timing standard in existing § 37.6(b) for non-block swap transactions or block transactions executed on the SEF, the Commission expects that the impact of the proposed “as soon as technologically practicable” timing standard for confirmations for such swap transactions would not be substantive.³⁷ Rather, the proposal would take into account practical realities for confirming block trades executed away from the SEF but pursuant to the rules of the SEF, while ensuring that confirmation for all SEF-executed trades takes place in as prompt a manner as possible.

Therefore, the Commission proposes to require a SEF to confirm the terms of a swap transaction “as soon as technologically practicable” after the execution of the swap transaction on the SEF.

Request for Comment

³⁷ See *supra* note 35.

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The Commission requests comments on all aspects of the “as soon as technologically practicable” after execution standard proposed for confirmations pursuant to § 37.6(b). In particular, the Commission requests comment on the following questions:

(6) Is the Commission’s proposal to require a SEF to confirm the terms of a swap transaction “as soon as technologically practicable” after the execution of the transaction on the SEF an appropriate time frame? Should the Commission require that the SEF issue the confirmation by no later than a specified time for swap block trades that are executed away from the SEF but pursuant to the SEF’s rules, such as within 10 minutes of execution as this is consistent with various SEF rulebooks that require swap block trades executed away from the SEF to be reported to the SEF within 10 minutes of execution?

(7) Should “as soon as technologically practicable” mean something different for purposes of § 37.6(b) than the definition of “as soon as technologically practicable” set forth at § 43.2? If so, what should the definition be?

3. Proposed Amendment to § 37.6(b)—Conflicting Terms

The Commission proposes to amend § 37.6(b) to make clear that the terms of a swap confirmation issued by a SEF “shall legally supersede *any conflicting terms of* a previous agreement” (emphasis added).³⁸ As SEFs will now be able to incorporate underlying, previously negotiated agreements by reference into confirmations for uncleared swap transactions, this proposed amendment will help ensure legal certainty with respect to the terms of such transactions, and will also clarify the continuing applicability of those terms in the underlying

³⁸ While this amendment would apply with respect to both cleared and uncleared swap transactions executed on or pursuant to the rules of the SEF, the Commission notes that swap trading relationship documentation is not required for swaps cleared by a derivatives clearing organization. See 17 CFR 23.504(a)(1).

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agreements that do not conflict with the confirmation and that may, for example, govern the counterparties' non-SEF transactions.³⁹

As a condition of relying on the no-action position in NAL No. 17-17, SEFs must have rules which state that “in the event of any inconsistency between a SEF confirmation and the underlying previously negotiated freestanding agreements, the terms of the SEF confirmation legally supersede any contradictory terms.”⁴⁰ As such, this proposed amendment would also provide the benefits of continuing to allow SEFs that rely on NAL No. 17-17 to maintain market practices established under NAL No. 17-17 and precursor no-action letters.

Request for Comment

The Commission requests comments on all aspects of the proposal to amend § 37.6(b) to make clear that the terms of a swap confirmation issued by a SEF “shall legally supersede any conflicting terms of a previous agreement.” In particular, the Commission requests comment on the following questions:

(8) Does the proposed amendment provide sufficient legal certainty with respect to any contradictory terms that may be contained within previous agreements that are incorporated into an uncleared swap confirmation by reference?

(9) For uncleared swaps, to avoid any conflict between the terms of the swap and the SEF's confirmation, should the Commission require that the SEF's confirmation specifically state that the terms of the confirmation legally supersede any conflicting terms in underlying previously negotiated agreements that have been incorporated by reference?

³⁹ In the SEF Core Principles Final Rule, the Commission noted that the counterparties to the uncleared swap transaction would need to ensure that nothing in the confirmation terms contradicted the standardized terms intended to be incorporated from the underlying agreement. SEF Core Principles Final Rule at 33491, note 195.

⁴⁰ See NAL No. 17-17 at 4.

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(10) Should the Commission maintain the current requirement that the confirmation legally supersede any previous agreement? Why or why not?

4. Proposed Clarification of § 37.6(b)

Section 37.6(b) provides that a SEF shall provide each counterparty to a transaction that is entered into on or pursuant to the rules of the SEF with a written record of all of the terms of the transaction.

The Commission proposes a non-substantive amendment to § 37.6(b) to change the phrase “entered into” to “executed” in order to provide greater consistency within § 37.6(b). Currently § 37.6(b) uses “entered into” and “executed” interchangeably. This non-substantive amendment would, in conjunction with the proposed non-substantive amendment to § 37.6(a) discussed below, ensure consistent use of “executed” throughout § 37.6.

5. Proposed Clarification of § 37.6(a)

Section 37.6(a) is intended to provide market participants with legal certainty with respect to swap transactions on a SEF and generally clarifies that a swap transaction entered into on or pursuant to the rules of a SEF cannot be void, voidable, subject to rescission, otherwise invalidated, or rendered unenforceable due to a violation by the SEF of section 5h of the Act or part 37 of the Commission’s regulations or any proceeding that alters or supplements a rule, term or condition that governs such swap or swap transaction.⁴¹

The Commission proposes a non-substantive amendment to § 37.6(a) to change the phrase “entered into” to “executed” in order to provide greater consistency within § 37.6. Currently § 37.6 uses “entered into” and “executed” interchangeably. This non-substantive amendment would amend § 37.6(a) to use “executed” and, in conjunction with the proposed non-

⁴¹ 17 CFR 37.6(a).

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substantive amendment to § 37.6(b) discussed above, would ensure consistent use of “executed” throughout § 37.6.

B. Proposed Amendments to § 23.501(a)(4)(i)

The Commission proposes two amendments to § 23.501(a)(4)(i) to conform to the proposed amendments to § 37.6(b). Section 23.501(a)(4)(i) provides that a swap transaction executed on a SEF or DCM will be deemed to satisfy the swap confirmation requirements set forth for SDs and MSPs in § 23.501(a), provided that the rules of the SEF or DCM establish that confirmation of all terms of the transaction shall take place at the same time as execution. First, the Commission proposes to clarify that the safe harbor for SDs and MSPs in § 23.501(a)(4)(i) also applies to swap transactions executed “pursuant to the rules” of a SEF or DCM, *i.e.*, block trades executed away from the SEF’s or DCM’s trading system or platform. This clarification is consistent with the definition of “block trade” under § 43.2. Second, the Commission proposes to amend § 23.501(a)(4)(i) to conform to the proposed amendments to § 37.6(b), which would permit confirmation of all terms of a swap transaction as soon as technologically practicable following execution.⁴²

Request for Comment

The Commission requests comments on the proposed conforming changes to § 23.501(a)(4)(i).

III. Effective Date and Transition Period

The Commission proposes that the effective date for the final regulations be 30 days after publication of final regulations in the *Federal Register*. The Commission preliminarily believes

⁴² The Commission notes that while DCMs may provide confirmations for swap block trades executed away from but pursuant to the rules of the DCM, DCMs do not have a regulatory obligation analogous to the current regulatory obligation under § 37.6(b) for SEFs to provide such confirmations.

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that such an effective date would allow SEFs and market participants sufficient time to adapt to the amended confirmation rules in an efficient and orderly manner.

Request for Comment

The Commission requests comment on whether the proposed effective date is appropriate and, if not, the Commission further requests comment on possible alternative effective dates and the basis for any such alternative dates.

IV. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires Federal agencies, in promulgating regulations, to consider whether the regulations they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis with respect to such impact.⁴³ The regulations proposed herein will affect SEFs and their market participants. The Commission has previously established certain definitions of “small entities” to be used by the Commission in evaluating the impact of its regulations on small entities in accordance with the RFA.⁴⁴ The Commission previously concluded that SEFs are not small entities for the purpose of the RFA.⁴⁵ The Commission has also previously stated its belief in the context of relevant rulemakings that SEFs’ market participants, which are all required to be eligible contract participants (ECPs)⁴⁶ as defined in section 1a(18) of the CEA,⁴⁷ are not small entities for purposes of the RFA.⁴⁸ Therefore, the Chairman, on behalf of the Commission, hereby certifies, pursuant to 5 U.S.C. 605(b), that the proposed regulations will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* (PRA), imposes certain requirements on Federal agencies (including the Commission) in connection with conducting or

⁴³ 5 U.S.C. 601 *et seq.*

⁴⁴ 47 FR at 18618–21 (Apr. 30, 1982).

⁴⁵ SEF Core Principles Final Rule at 33548 (citing, among others, 47 FR 18618, 18621 (Apr. 30, 1982) (discussing DCMs));

⁴⁶ 17 CFR 37.703.

⁴⁷ 7 U.S.C. 1(a)(18).

⁴⁸ 66 FR 20740, 20743 (Apr. 25, 2001) (stating that ECPs by the nature of their definition in the CEA should not be considered small entities).

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sponsoring any “collection of information,”⁴⁹ as defined by the PRA. Among its purposes, the PRA is intended to minimize the paperwork burden to the private sector, to ensure that any collection of information by a government agency is put to the greatest possible uses, and to minimize duplicative information collections across the government.⁵⁰

The PRA applies to all information, “regardless of form or format,” whenever the government is “obtaining, causing to be obtained, [or] soliciting” information, and includes required “disclosure to third parties or the public, of facts or opinions,” when the information collection calls for “answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons.”⁵¹ The PRA requirements have been determined to include not only mandatory, but also voluntary information collections, and include both written and oral communications.⁵² The Commission may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number.

This proposed rulemaking affects regulations that contain collections of information for which the Commission has previously received control numbers from OMB. The titles for these collections of information are “Swap Documentation, OMB control number 3038-0088” and “Core Principles and Other Requirements for Swap Execution Facilities, OMB control number 3038-0074.” This proposal, if adopted, would modify the information collection requirements associated with OMB control number 3038-0074, as discussed below. The Commission therefore is submitting this proposal to the OMB for its review in accordance with the PRA.⁵³

⁴⁹ See 44 U.S.C. § 3502(3)(A).

⁵⁰ See 44 U.S.C. § 3501.

⁵¹ See 44 U.S.C. § 3502(3).

⁵² See 5 CFR 1320.3(c)(1).

⁵³ See 44 U.S.C. 3507(d) and 5 CFR 1320.11.

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1. OMB Collection 3038-0088—Swap Documentation

The Commission proposes two amendments to § 23.501(a)(4)(i) to conform to the proposed amendments to § 37.6(b). Section 23.501(a)(4)(i) provides that a swap transaction executed on a SEF or DCM will be deemed to satisfy the swap confirmation requirements set forth for SDs and MSPs in § 23.501(a), provided that the rules of the SEF or DCM establish that confirmation of all terms of the transaction shall take place at the same time as execution. First, the Commission proposes to clarify that the safe harbor for SDs and MSPs in § 23.501(a)(4)(i) also applies to swap transactions executed “pursuant to the rules” of a SEF or DCM, *i.e.*, block trades executed away from the SEF’s or DCM’s trading system or platform. Second, the Commission proposes to amend § 23.501(a)(4)(i) to conform to the proposed amendments to § 37.6(b), which would permit confirmation of all terms of a swap transaction as soon as technologically practicable following execution.

The Commission does not believe that these proposed amendments would substantively or materially modify any existing information collection burdens. Accordingly, the Commission is retaining its existing estimates for the burden associated with the information collections under OMB Collection 3038-0088.⁵⁴

2. OMB Collection 3038-0074—Core Principles and Other Requirements for Swap Execution Facilities

Under existing § 37.6(b), a SEF is required to provide each counterparty to a swap transaction, whether cleared or uncleared, that is entered into on or pursuant to the rules of the SEF, with a written “confirmation” that contains all of the terms of the transaction. With respect

⁵⁴ See Amended Supporting Statement for Currently Approved Information Collection, Swap Documentation, OMB Control Number 3038-0088 (Oct. 24, 2022), available at https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202210-3038-007.

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to an uncleared swap transaction, a SEF may comply with the requirement to include in the confirmation all of the terms of the transaction, by incorporating by reference relevant terms set forth in underlying, previously negotiated agreements between the counterparties, as long as the SEF has obtained these agreements prior to execution of the transaction.⁵⁵

The proposed rulemaking would add new § 37.6(b)(1), which would permit SEFs to incorporate by reference in a confirmation relevant terms set forth in underlying, previously negotiated agreements without being required to obtain these agreements.

The Commission preliminarily believes that this proposed approach would address technological and operational challenges that have prevented SEFs from fully complying with § 37.6(b), by reducing the administrative burdens for SEFs, who would not be required to request, accept, and maintain a library of every relevant previously negotiated agreement between counterparties.

As a result, the Commission believes that the proposed rulemaking would reduce a SEF's annual recurring information collection burden for uncleared swap transactions. The Commission estimates that proposed § 37.6(b)(1) would reduce annual recurring information collection burdens by one-third from 563 hours per SEF to 375 hours per SEF.⁵⁶

The aggregate annual estimates for the reporting burden associated with § 37.6(b), as proposed to be amended, would be as follows:

⁵⁵ SEF Core Principles Final Rule at 33491 n.195.

⁵⁶ The Commission previously estimated that the information collections related to § 37.6 would take SEFs approximately 1.5 hours per SEF participant and that on average, a SEF has about 375 participants. For purposes of estimating the number of burden hours that the proposed regulations would eliminate, however, the Commission is revising its previous estimate and will assume the relevant process would take SEFs approximately 1.0 hours per SEF participant. Accordingly, 375 participants × 1.0 hour per participant = 375 estimated burden hours. For information about the Commission's previous estimate. *See* Supporting Statement for New and Revised Information Collections, Core Principles and Other Requirements for Swap Execution Facilities, OMB Control Number 3038-0074, note 12 (Apr. 15, 2021), *available at* https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202104-3038-001.

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Estimated number of respondents: 23.

Estimated Average Burden Hours per Respondent: 375 hours.

Estimated total annual burden on Respondents: 8,625 hours.

Frequency of collection: On occasion.

There are no capital costs or operating and maintenance costs associated with this collection.

3. Information Collection Comments

The Commission invites the public and other Federal agencies to comment on any aspect of the proposed information collection requirements discussed above. The Commission will consider public comments on this proposed collection of information in:

(1) Evaluating whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have a practical use;

(2) Evaluating the accuracy of the estimated burden of the proposed collection of information, including the degree to which the methodology and the assumptions that the Commission employed were valid;

(3) Enhancing the quality, utility, and clarity of the information proposed to be collected;
and

(4) Minimizing the burden of the proposed information collection requirements on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological information collection techniques, *e.g.*, permitting electronic submission of responses.

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Copies of the submission from the Commission to OMB are available from the CFTC Clearance Officer, 1155 21st Street, NW, Washington, DC 20581, (202) 418–5714 or from <https://RegInfo.gov>. Organizations and individuals desiring to submit comments on the proposed information collection requirements should send those comments to:

- The Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, Attn: Desk Officer of the Commodity Futures Trading Commission;

- (202) 395–6566 (fax); or
- OIRAsubmissions@omb.eop.gov (email).

Please provide the Commission with a copy of submitted comments so that comments can be summarized and addressed in the final rulemaking, and please refer to the **ADDRESSES** section of this rulemaking for instructions on submitting comments to the Commission. OMB is required to make a decision concerning the proposed information collection requirements between 30 and 60 days after publication of this release in the *Federal Register*. Therefore, a comment to OMB is best assured of receiving full consideration if OMB receives it within 30 calendar days of publication of this release. Nothing in the foregoing affects the deadline enumerated above for public comment to the Commission on the proposed rules.

C. Cost-Benefit Considerations

1. Background

Section 15(a) of the CEA⁵⁷ requires the Commission to “consider the costs and benefits” of its actions before promulgating a regulation under the CEA or issuing certain orders. CEA section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad

⁵⁷ 7 U.S.C. 19(a).

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areas of market and public concern: (1) protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the CEA section 15(a) factors.

The Commission is proposing to amend certain rules in parts 23 and 37 of its regulations relating to the confirmation by CFTC-regulated exchanges, in particular SEFs, of the terms of swap transactions.

The baseline against which the Commission considers the costs and benefits of these proposed rule amendments is the statutory and regulatory requirements of the CEA and Commission regulations now in effect, in particular CEA section 5h and certain rules in parts 23 and 37 of the Commission's regulations. The Commission, however, notes that as a practical matter many SEFs and market participants have adopted some current practices based upon a no-action position provided by Commission staff that the proposed rule amendments generally would codify. As such, to the extent that SEFs and market participants have relied on this no-action position, the actual costs and benefits of the proposed rule amendments as realized in the market may not be as significant.

In some instances, it is not reasonably feasible to quantify the costs and benefits to SEFs and certain market participants with respect to certain factors, for example, market integrity. Notwithstanding these types of limitations, however, the Commission otherwise identifies and considers the costs and benefits of these proposed rule amendments in qualitative terms.

In the following consideration of costs and benefits, the Commission first identifies and discusses the benefits and costs attributable to the proposed rule amendments. The Commission,

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where applicable, then considers the costs and benefits of the proposed rule amendments in light of the five public interest considerations set out in § 15(a) of the CEA.

The Commission notes that this consideration of costs and benefits is based on its understanding that the swaps market functions internationally with: (1) transactions that involve U.S. entities occurring across different international jurisdictions; (2) some entities organized outside of the United States that are registered with the Commission; and (3) some entities that typically operate both within and outside the United States and that follow substantially similar business practices wherever located. Where the Commission does not specifically refer to matters of location, the discussion of costs and benefits below refers to the effects of the proposed rule amendments on all relevant swaps activity, whether based on its actual occurrence in the United States or on its connection with or effect on U.S. commerce.⁵⁸

The Commission generally requests comment on all aspects of its cost-benefit considerations, including the identification and assessment of any costs or benefits not discussed herein; the potential costs and benefits of the alternatives that the Commission discussed in this release; data and any other information to assist or otherwise inform the Commission's ability to quantify or qualitatively describe the costs and benefits of the proposed rule amendments; and substantiating data, statistics, and any other information to support positions posited by commenters with respect to the Commission's discussion. Commenters may also suggest other alternatives to the proposed approach where the commenters believe that the alternatives would be appropriate under the CEA and would provide a more appropriate cost-benefit profile.

2. Proposed Amendments to 37.6(b)

a. Benefits

⁵⁸ See, e.g., 7 U.S.C. 2(i).

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Under existing § 37.6(b), a SEF is required to provide each counterparty to a swap transaction that is entered into on or pursuant to the rules of the SEF, with a written “confirmation” at the time of execution that contains all of the terms of the transaction. SEFs may satisfy the requirements under existing § 37.6(b) for uncleared swap transaction confirmations by incorporating by reference, in the confirmation, the relevant terms set forth in underlying, previously negotiated agreements between the counterparties, as long as such agreements have been submitted to the SEF prior to execution.

Absent an adoption of proposed new § 37.6(b)(1), which would allow SEFs to incorporate relevant terms set forth in such underlying agreements without being required to obtain the agreements, SEFs would need to comply with the existing requirements under § 37.6(b) for uncleared swap confirmations, notwithstanding the significant burdens of doing so. The Commission understands that the financial, administrative, and logistical burdens to collect and maintain bilateral transaction agreements from any individual counterparties would be high. SEFs have stated that they are unable to develop a cost-effective method to request, accept and maintain a library of every relevant previous agreement between counterparties.⁵⁹ SEFs have also noted that the potential number of previous agreements is considerable, given that SEF counterparties often enter into agreements with many other parties and may have multiple agreements for different asset classes.⁶⁰

The Commission preliminarily believes that the proposed addition of § 37.6(b)(1) should benefit both SEFs and market participants by decreasing the financial, administrative, and logistical burdens to execute an uncleared swap on a SEF. Not only would a SEF not be required

⁵⁹ See WMBA, Request for Extended Relief from Certain Requirements under Parts 37 and 45 Related to Confirmations and Recordkeeping for Swaps Not Required or Intended to be Cleared at 3 (Mar. 1, 2016).

⁶⁰ *Id.*

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to expend time and resources to gather and maintain all of the underlying relationship documentation between all possible counterparties on the SEF, but market participants would also not be required to expend time and resources in gathering and submitting this documentation to the SEF, including any amendments or updates to that documentation. Moreover, the Commission preliminarily believes that not requiring SEFs to obtain the underlying relationship documentation would eliminate associated financial, logistical and administrative burdens.

The Commission notes that these benefits are currently available to market participants through the existing no-action position provided by Commission staff in NAL No. 17-17. As such, to the extent that SEFs, and by extension market participants, have relied on the existing no-action position to avoid the above described financial, operational and logistical burdens, through the incorporation by reference of relevant terms set forth in underlying relationship documentation, they have been availing themselves of the benefits from these reduced burdens.

The Commission also recognizes that many SEFs have already expended resources to implement technological and operational changes needed to avail themselves of the no-action position under NAL No. 17-17. The proposed amendments would preclude the need to expend additional resources to negate those changes.

Further, the proposed rule amendments do not propose to change the existing requirement for a SEF to issue a confirmation for all terms of a swap transaction for uncleared swaps. To the extent that a SEF were to not issue a confirmation that includes or incorporates by reference all of the terms of an uncleared swap transaction, the counterparties to the swap may be subject to other Commission regulations that impose those obligations, and therefore, increased costs. For example, where one of the counterparties to an uncleared swap transaction is an SD or MSP,

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§ 23.501 requires that the SD or MSP issue a confirmation for the transaction as soon as technologically practicable.⁶¹

SEFs should also benefit from the proposed requirement to confirm transaction terms “as soon as technologically” practicable after execution, rather than at the same time as execution. As noted above, the Commission preliminarily believes that this proposal would continue to promote the Commission’s goals of providing the swap counterparties with legal certainty in a prompt manner.

b. Costs

With respect to uncleared swaps, the proposed addition of § 37.6(b)(1) could reduce the financial integrity of transactions on SEFs compared to the current rule. There could be a greater risk of misunderstanding between the counterparties to a swap transaction if SEFs do not provide all the terms of a transaction at the time of execution. Even when underlying agreements are incorporated by reference, confusion could arise from issues such as multiple versions of an agreement with the same labeling, or missing sections. However, the Commission does not expect that this risk will materially reduce the integrity of the swaps market. The Commission notes that the relevant underlying agreements usually establish relationship terms between counterparties that govern all trading between them in uncleared swaps, and do not generally concern the terms of specific transactions.

To the extent that SEFs are relying on the existing no-action position provided by Commission staff in NAL No. 17-17, they could continue to implement existing industry practice related to confirmations for uncleared swap transactions which should not impose costs on SEFs. But to the extent that SEFs need to modify their rules or procedures in light of the

⁶¹ See 17 CFR 23.501(a).

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proposed amendments, such as removing the SEF rules required as conditions under NAL No. 17-17, they may incur modest costs.

c. Consideration of Alternatives

The relevant no-action position set forth in NAL No. 17-17, upon which the proposal is based, is subject to withdrawal by Commission staff. In addressing alternatives to adopting the proposed amendments to § 37.6(b), the Commission considered the costs and benefits associated with withdrawal of the no-action position in NAL No. 17-17, which would obligate SEFs and market participants to satisfy the requirements of existing § 37.6(b). The Commission preliminarily believes that adopting the proposed amendments to § 37.6(b), and the conforming amendments set forth in this proposal, would help to maintain the benefits previously articulated in the SEF Core Principles Final Rule, but also reduce related costs for SEFs with respect to confirmation requirements.⁶²

d. Section 15(a) Factors

(1) Protection of Market Participants and the Public

The proposed rule amendments should continue to promote the legal certainty of swap transactions executed on SEFs. The proposed amendments to § 37.6 for uncleared swaps, and the conforming amendments set forth in this proposal, would clarify compliance requirements, consistent with the position taken by Commission staff in NAL No. 17-17, while helping to maintain the protection of market participants and the public.

(2) Efficiency, Competitiveness, and Financial Integrity of Markets

⁶² The Commission recognized the important benefits provided by the § 37.6(b) confirmation requirements in the cost-benefit considerations to the SEF Core Principles Final Rule. Among those benefits, the Commission stated that the requirements would (i) provide legal certainty to market participants; (ii) promote accuracy for counterparties regarding exposure levels with other counterparties; and (iii) reduce costs and risks involved with resolving error trade disputes between counterparties. SEF Core Principles Final Rule at 33570.

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The proposed amendments to § 37.6 for uncleared swaps, and the conforming amendments set forth in this proposal, would ease compliance for SEFs and market participants on a longer-term basis, *i.e.*, by providing a regulatory solution beyond the corresponding no-action position provided by Commission staff in NAL No. 17-17. This may improve the efficiency of the swap markets with respect to issuing and transmitting swap confirmations to counterparties. In particular, SEFs would attain greater operational efficiency because they would not be required to develop an infrastructure for collecting and maintaining all relevant underlying, previously negotiated agreements.

As noted above, with respect to uncleared swaps, the proposed addition of § 37.6(b)(1) could reduce the financial integrity of transactions on SEFs compared to the current rule. There could be a greater risk of misunderstanding between the counterparties to a swap transaction if SEFs do not provide all the terms of a transaction at the time of execution. Even when underlying agreements are incorporated by reference, confusion could arise from issues such as multiple versions of an agreement with the same labeling, or missing sections. However, the Commission does not expect that this risk will materially reduce the integrity of the swaps market. As noted above, the Commission notes that the relevant underlying agreements usually establish relationship terms between counterparties that govern all trading between them in uncleared swaps, and do not generally concern the terms of specific transactions. Moreover, the proposed rule amendments could encourage financial integrity of the swap markets by, among other things, providing clarity that the terms of an uncleared swap confirmation issued by a SEF supersedes any conflicting terms in underlying agreements between the counterparties that have been incorporated by reference into the confirmation.

(3) Price Discovery

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The Commission is not aware of significant effects on the price discovery process from the proposed amendments to § 37.6, and the conforming amendments set forth in this proposal, regarding confirmations.

(4) Sound Risk Management Practices

The proposed amendments to the confirmation requirements within § 37.6(b), and the conforming amendments set forth in this proposal, would maintain the promotion of sound risk management practices with respect to the requirement for SEFs to issue transaction confirmations, *i.e.*, by providing market participants with the certainty that transactions executed on or pursuant to the rules of a SEF will be legally enforceable with respect to all counterparties to the transaction.⁶³

(5) Other Public Interest Considerations

The Commission is identifying a public interest benefit in codifying the no-action position in NAL 17-17, where the efficacy of that position has been demonstrated. In such a situation, the Commission believes it serves the public interest to engage in notice-and-comment rulemaking, where it seeks and considers the views of the public in amending its regulations, rather than for SEFs to continue to rely on a staff provided no-action position that does not bind the Commission, provides less long-term certainty, and offers a more limited opportunity for public input.

Request for Comment

The Commission invites public comment on all aspects of its cost benefit considerations, including the discussion of the section 15(a) factors. Commenters are requested to provide data and any other information or statistics to support their position. To the extent commenters

⁶³ *Id.*

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believe that the costs or benefits of any aspect of the proposed rules are reasonably quantifiable, the Commission requests that they provide data and any other information or statistics to assist the Commission in quantification.

(11) The Commission preliminarily believes that SEFs are relying on the no action position in NAL 17-17 and are not currently obtaining and maintaining previously negotiated underlying agreements that are incorporated by reference in uncleared swap transaction confirmations. Is the Commission's understanding correct or are there SEFs that have found practical ways to obtain and maintain such underlying agreements?

(12) If a SEF were required to comply with existing § 37.6(b) and obtain previously negotiated underlying agreements prior to incorporating by reference terms from such agreements in uncleared swap transaction confirmations, what costs and expenses would the SEF incur?

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 anti-competitive means of achieving the objectives of the CEA, in issuing any order or adopting any Commission rule or regulation.⁶⁴ The Commission does not anticipate that the proposed amendments to parts 23 and 37 would promote or result in anti-competitive consequences or behavior. However, the Commission encourages comments from the public with respect to any aspect of the proposal that may be perceived as potentially inconsistent with the antitrust laws or anti-competitive in nature.

⁶⁴ 7 U.S.C. 19(b).

V. Text of Proposed Regulations

List of Subjects

17 CFR Part 23

Confirmations, Swaps

17 CFR Part 37

Swaps, Swap Confirmations, Uncleared Swap Confirmations, Swap execution facilities.

For the reasons stated in the preamble, the Commodity Futures Trading Commission proposes to amend 17 CFR Parts 23 and 37 to read as follows:

Part 23—SWAP DEALERS AND MAJOR SWAP PARTICIPANTS

1. Authority: 7 U.S.C. 1a, 2, 6, 6a, 6b, 6b-1, 6c, 6p, 6r, 6s, 6t, 9, 9a, 12, 12a, 13b, 13c, 16a, 18, 19, 21.
2. Revise § 23.501(a)(4)(i) to read as follows:

* * * * *

* * * * *

(i) Any swap transaction executed on or pursuant to the rules of a swap execution facility or designated contract market shall be deemed to satisfy the requirements of this section, provided that the rules of the swap execution facility or designated contract market establish that confirmation of all terms of the transaction shall take place as soon as technologically practicable after execution.

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PART 37—SWAP EXECUTION FACILITIES

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3. Authority: 7 U.S.C. 1a, 2, 5, 6, 6c, 7, 7a-2, 7b-3, and 12a, as amended by Titles VII and VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376.
4. Revise § 37.6 to read as follows:

§ 37.6 Enforceability.

(a) A transaction executed on or pursuant to the rules of a swap execution facility shall not be void, voidable, subject to rescission, otherwise invalidated, or rendered unenforceable as a result of:

- (1) A violation by the swap execution facility of the provisions of section 5h of the Act or this part;
- (2) Any Commission proceeding to alter or supplement a rule, term, or condition under section 8a(7) of the Act or to declare an emergency under section 8a(9) of the Act; or
- (3) Any other proceeding the effect of which is to:
 - (i) Alter or supplement a specific term or condition or trading rule or procedure; or
 - (ii) Require a swap execution facility to adopt a specific term or condition, trading rule or procedure, or to take or refrain from taking a specific action.

(b) A swap execution facility shall provide each counterparty to a transaction that is executed on or pursuant to the rules of the swap execution facility with a written record of all of the terms of the transaction which shall legally supersede any conflicting terms of a previous agreement and serve as a confirmation of the transaction. The confirmation of all terms of the transaction shall take place as soon as technologically practicable after execution; provided that specific customer identifiers for accounts included in bunched orders involving swaps need not be included in confirmations provided by a swap execution facility if the applicable requirements of § 1.35(b)(5) of this chapter are met.

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(1) For a confirmation of an uncleared swap transaction, the swap execution facility may satisfy the requirements of § 37.6(b) by incorporating by reference terms from underlying, previously negotiated agreements governing such transaction between the counterparties, without obtaining such incorporated agreements except as otherwise necessary to fully perform its operational, risk management, governance, or regulatory functions, or any requirements under this part.