

COMMODITY FUTURES TRADING COMMISSION

17 CFR PART 23

RIN 3038-AC96

Business Conduct and Documentation Requirements for Swap Dealers and Major Swap Participants

AGENCY: Commodity Futures Trading Commission

ACTION: Interim final rules; request for comment.

SUMMARY: The Commodity Futures Trading Commission (“Commission”) is adopting, as interim final rules, amendments to §§ 23.402; 23.410(c); 23.430; 23.431(a)-(c); 23.432; 23.434(a)(2), (b), and (c); 23.440; and 23.450 contained in subpart H of part 23 of the Commission’s regulations, §§ 23.502, 23.504, 23.505 contained in subpart I of part 23 of the Commission’s regulations, and § 23.201(b)(3)(ii) found in subpart F of part 23. The amendments extend the compliance dates for these rules by four months, in the case of the subpart H and F rules, and up to six months, in the case of the subpart I rules. The amendments are intended to provide swap dealers (“SDs”) and major swap participants (“MSPs”) with additional time to achieve compliance with the aforementioned regulations.

DATES: The rules will become effective [INSERT THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]. As discussed below, the Commission is publishing interim final rules. The Commission will, however, consider any comments received on or before [INSERT DATE THAT IS 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER] and will revise the interim final rules, if warranted.

ADDRESSES: You may submit comments, identified by RIN number 3038-AC96 and Business Conduct and Documentation Requirements for Swap Dealers and Major Swap Participants, by any of the following methods:

- Agency web site, www.cftc.gov, via its Comments Online process at <http://comments.cftc.gov/PublicComments/ReleasesWithComments.aspx>. Follow the instructions for submitting comments through the web site.
- Mail: Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581.
- Hand Delivery/Courier: Same as mail above.
- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Please submit your comments using only one method.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to www.cftc.gov. You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that may be exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the established procedures in § 145.9 of the Commission's regulation, 17 CFR § 145.9.

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

Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT: Frank Fisanich, Chief Counsel, 202-418-5949, ffisanich@cftc.gov, Jason A. Shafer, Attorney-Advisor, 202-418-5097, jshafer@cftc.gov, Division of Swap Dealer and Intermediary Oversight, or Sayee Srinivasan, Research Analyst, 202-418-5309, ssrinivasan@cftc.gov, Office of the Chief Economist, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Background

On July 21, 2010, President Obama signed the Dodd-Frank Act.¹ Title VII of the Dodd-Frank Act² amended the Commodity Exchange Act (“CEA”)³ to establish a comprehensive regulatory framework to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) providing for the registration and comprehensive regulation of SDs and MSPs; (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating rigorous recordkeeping and real-time reporting regimes; and (4) enhancing the Commission’s rulemaking and enforcement authorities with respect to all registered entities and intermediaries subject to the Commission’s oversight.

¹ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at <http://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm>.

² Pursuant to Section 701 of the Dodd-Frank Act, Title VII may be cited as the “Wall Street Transparency and Accountability Act of 2010.”

³ 7 U.S.C. 1 et seq.

In the two years since its enactment, the Commission has finalized 41 rules to implement Title VII of the Dodd-Frank Act. Earlier this year, the Commission, jointly with the Securities and Exchange Commission, finalized the main foundational elements of the Dodd-Frank regulatory framework by adopting regulations further defining the terms “swap dealer” and “major swap participant,”⁴ as well as the regulations further defining the term “swap.”⁵ The Commission also adopted regulations setting forth a comprehensive scheme for the registration process for SDs and MSPs.⁶ Other finalized rules include various substantive requirements applicable to SDs and MSPs under CEA section 4s,⁷ which address reporting and recordkeeping,⁸ business conduct standards,⁹ documentation standards,¹⁰ duties,¹¹ and designation of chief compliance officers.¹²

Among other things, upon registration, an SD or MSP must submit documentation demonstrating its compliance with any Commission regulation issued pursuant to section 4s(e), (f), (g), (h), (i), (j), (k), or (l) of the CEA that is applicable to it and for which the compliance

⁴ See Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant,” and “Eligible Contract Participant,” 77 FR 30596 (May 23, 2012).

⁵ See Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 FR 48208 (Aug. 13, 2012).

⁶ See Registration of Swap Dealers and Major Swap Participants, 77 FR 2613 (Jan. 19, 2012).

⁷ 7 U.S.C 6s.

⁸ See Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants, 77 FR 20128 (Apr. 3, 2012).

⁹ See Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties, 77 FR 9734 (Feb. 17, 2012).

¹⁰ See Confirmation, Portfolio Reconciliation, Portfolio Compression, and Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants, 77 FR 55904 (Sept. 11, 2012).

¹¹ See supra note 8.

¹² Id.

date has passed. Such Commission regulations include business conduct standards under subpart H of part 23 of the Commission's regulation promulgated under section 4s(h) of the CEA, documentation standards under subpart I of part 23 of the Commission's regulations promulgated under section 4s(i) of the CEA, and reporting and recordkeeping requirements under subpart F of part 23 of the Commission's regulations promulgated under section 4s(f) of the CEA.

With respect to business conduct standards with counterparties, section 4s(h) of the CEA provides the Commission with both mandatory and discretionary rulemaking authority to impose business conduct standards on SDs and MSPs in their dealings with counterparties, including Special Entities, and section 4s(i) of the CEA establishes swap documentation standards for SDs and MSPs.

Pursuant to section 4s(h) of the CEA, on December 22, 2010, the Commission published in the Federal Register proposed subpart H of part 23 of the Commission's regulations.¹³ There was a 60-day period for the public to comment on the proposing release. On May 4, 2011, the Commission published in the Federal Register a notice to re-open the public comment period for an additional 30 days, which ended on June 3, 2011.¹⁴ On February 17, 2012, the Commission adopted as final rules subpart H to part 23, which set forth business conduct standards for swap dealers and major swap participants in their dealings with counterparties.¹⁵ A number of the Commission's rules under subpart H of part 23 require SDs and MSPs to provide or obtain specific information from their counterparties prior to entering into (or in some cases, offering to

¹³ Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties, 75 FR 80638 (proposed Dec. 22, 2010).

¹⁴ Reopening and Extension of Comment Periods for Rulemakings Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act, 75 FR 25274 (May 4, 2011).

¹⁵ See supra note 9.

enter into) a swap with such counterparties.¹⁶ Subpart H of part 23 permits SDs and MSPs to rely on written representations from their counterparties and standardized disclosures, each of which may require amendments or supplements to an SD's or MSP's relationship documentation with such counterparties prior to entering into a swap with such counterparties.¹⁷

SDs and MSPs are required to comply with the requirements found in subpart H to part 23 by January 1, 2013.¹⁸

Section 4s(i)(1) of the CEA requires SDs and MSPs to “conform with such standards as may be prescribed by the Commission by rule or regulation that relate to timely and accurate confirmation, processing, netting, documentation, and valuation of all swaps.” Under section 4s(i)(2), the Commission is required to adopt rules “governing documentation standards for swap dealers and major swap participants.” The Commission proposed the regulations on swap confirmation, portfolio reconciliation, and portfolio compression on December 28, 2010.¹⁹ In a separate rulemaking, on February 8, 2011, the Commission proposed regulations governing swap documentation, including what documentation would be required to be kept by the SD or MSP when it transacts with a counterparty that exercises its rights under the end-user clearing

¹⁶ See, e.g., § 23.402(b) (requiring SDs to obtain essential facts about their counterparty prior to execution of a transaction); § 23.430(a) (requiring SDs and MSPs to verify that a counterparty meets the eligibility standards for an eligible contract participant before offering to enter into or entering into a swap with such counterparty); and § 23.431(a) (requiring SDs and MSPs to provide material information concerning a swap to its counterparty at a reasonably sufficient time prior to entering into the swap).

¹⁷ See § 23.402(d), (e), and (f).

¹⁸ The external business conduct standards final rule required that swap dealers and major swap participants must comply with the rules in subpart H of part 23 on the later of 180 days after the effective date of these rules or the date no which swap dealers or major swap participants are required to apply for registration pursuant to Commission rule 3.10. However, in a subsequent rulemaking, the compliance date for §§ 23.402; 23.410(c); 23.430; 23.431(a)-(c); 23.432; 23.434(a)(2), (b), and (c); 23.440; and 23.450 was deferred until January 1, 2013. See Confirmation, Portfolio Reconciliation, Portfolio Compression, and Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants, 77 FR 55904, 55942 (Sept. 11, 2012).

¹⁹ Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants, 75 FR 8519 (proposed Dec. 28, 2010).

exception from the mandatory clearing requirement under section 2(h)(7) of the CEA.²⁰ There was a 60-day comment period for both proposals. On September 11, 2012, the Commission issued final rules governing swap confirmation (§ 23.501), portfolio reconciliation (§ 23.502), portfolio compression (§ 23.503), and swap trading relationship documentation (§ 23.504), and end user exception documentation (§ 23.505).²¹ Among other things, § 23.502 requires SDs and MSPs to agree in writing with each counterparty on the terms of conducting portfolio reconciliation.²² Section 23.504 requires that an SD or MSP execute swap trading relationship documentation meeting the requirements of the rule with a counterparty prior to or contemporaneously with entering into a swap transaction with such counterparty.²³ Section 23.505 requires, with an exception, that SDs and MSPs, when transacting with market participants claiming the exception to clearing under 2(h)(7) of the CEA, obtain documentation sufficient to provide a reasonable basis on which to believe that its counterparty meets the statutory conditions required for the exception.²⁴

With regard to the portfolio reconciliation requirements found in § 23.502, the Commission staggered the compliance dates by providing extended compliance dates for those SDs and MSPs that have not been previously regulated by a prudential regulator, and thus are least likely to have the infrastructure in place to begin regular reconciliation with their

²⁰ Swap Trading Relationship Documentation for Swap Dealers and Major Swap Participants, 76 FR 6715 (proposed Feb. 8, 2011).

²¹ See *supra* note 10.

²² See § 23.502(a)(1).

²³ See § 23.504(a)(2).

²⁴ See § 23.505(a).

counterparties.²⁵ SDs and MSPs that have been previously regulated by a prudential regulator need not comply with § 23.502 until December 11, 2012. SDs and MSPs that have not been previously regulated need not comply with § 23.502 until March 11, 2013. The earliest that an SD or MSP would be required to comply with the swap trading relationship documentation requirements found in § 23.504 is January 1, 2013.²⁶ Additionally, the earliest that an SD or MSP would be required to comply with the documentation requirements found in § 23.505 is December 31, 2012.

Section 4s(f)(1) of the CEA requires SDs and MSPs to “make such reports as are required by the Commission by rule or regulation regarding the transactions and positions and financial condition of the registered swap dealer or major swap participant.” Under section 4s(f)(1)(B)(i) and (ii) of the CEA, the Commission was authorized to prescribe the books and records requirements of “all activities related to the business of swap dealers and major swap participants.” On December 9, 2010, the Commission proposed § 23.201, which set forth the

²⁵ 77 FR 55904, 55941-42 (Sept. 11, 2012).

²⁶ The current compliance schedule associated with § 23.504 is as follows: With respect to swap transactions with SDs, security-based swap dealers, MSPs, major security-based swap participants, or any private fund, as defined in section 202(a) of the Investment Advisers Act of 1940, that is not a third-party subaccount (defined below) and that executes 200 or more swaps per month based on a monthly average over the 12 months preceding this adopting release (active funds), SDs and MSPs must comply with § 23.504 by January 1, 2013. With respect to swap transactions with commodity pools; private funds as defined in section 202(a) of the Investment Advisers Act of 1940 other than active funds; or persons predominantly engaged in activities that are in the business of banking, or in activities that are financial in nature as defined in section 4(k) of the Bank Holding Company Act of 1956, provided that the entity is not an account that is managed by an investment manager that (1) is independent of and unaffiliated with the account’s beneficial owner or sponsor, and (2) is responsible for the documentation necessary for the account’s beneficial owner to document swaps as required under section 4s(i) of the CEA (third-party subaccounts), SDs and MSPs must comply with § 23.504 by April 1, 2013. With respect to swap transactions with any other counterparty, SDs and MSPs must comply with § 23.504 by July 1, 2013. 77 FR 55904, 55940 (Sept. 11, 2012). However, in a final rule recently adopted by the Commission, the compliance schedules for active funds was amended by requiring private funds to calculate the number of swaps they enter as a monthly average over the past 12 months preceding November 1, 2012.

records SDs and MSPs must maintain.²⁷ After a 60-day period for the public to comment on the proposal, the Commission published a Federal Register notice that re-opened the comment period for an additional 30 days ending on June 3, 2011.²⁸ On April 3, 2012, the Commission adopted final rules governing, among other requirements, general records requirements for SDs and MSPs (§ 23.201).²⁹ The earliest that an SD or MSP would be required to comply with § 23.201 is December 31, 2012.³⁰

II. Interim Final Rule: Compliance Date Extension for Certain Business Conduct and Documentation Requirements for Swap Dealers and Major Swap Participants

Subsequent to the issuance of the above-identified rules, the Commission received requests from a variety of market participants for additional time to achieve compliance with the documentation requirements of such rules.³¹ More specifically, market participants requested that the Commission extend the compliance dates for the provisions of subpart H of part 23 that involve documentation,³² the compliance dates for the provisions of § 23.502 (Portfolio

²⁷ Reporting, Recordkeeping, and Daily Trading Records Requirements for Swap Dealers and Major Swap Participants, 75 FR 76666 (proposed Dec. 9, 2010).

²⁸ See *supra* note 14.

²⁹ See *supra* note 8.

³⁰ See 77 FR 20128, 20165 (Apr. 3, 2012). § 23.201(a)(1) is currently the subject of a staff no-action letter that was published on October 26, 2012, which provided no-action relief from compliance with § 23.201(a)(1) until March 31, 2013. See CFTC Letter No. 12-29, Request for No-Action Relief for Swap Dealers and Major Swap Participants from Compliance with Certain Internal Business Conduct Requirements Found in subpart F to part 23 of the CFTC's Regulations (<http://www.cftc.gov/ucm/groups/public/@llettergeneral/documents/letter/12-29.pdf>).

³¹ See, e.g., Letter dated Dec. 4, 2012 from the International Swaps and Derivatives Association ("ISDA") requesting exercise of Commission authority regarding part 23 Compliance Rules, Letter dated Nov. 27, 2012 (revised Dec. 6, 2012) from ISDA requesting exercise of Commission authority regarding part 23 compliance rules ("ISDA Dec. 6 Letter"), and Letter dated Nov. 20, 2012 from ISDA requesting no-action relief from compliance with §§ 23.502 and 23.504.

³² The current compliance date for §§ 23.402; 23.410(c); 23.430; 23.431(a)-(c); 23.432; 23.434(a)(2), (b), and (c); 23.440; and 23.450 is January 1, 2013. See Confirmation, Portfolio Reconciliation, Portfolio Compression, and Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants, 77 FR

Reconciliation), which has a significant documentation component, and the compliance dates for the provisions of § 23.504 (Swap Trading Relationship Documentation),³³ which also has a significant documentation component, to facilitate an orderly transition to the new regulatory regime.

In their letter, ISDA states that in order to facilitate an efficient transition to compliance, it has sponsored a number of documentation protocols for its members and other market participants, where amendments or supplements required by the Commission's regulations are effected through delivery of an adherence letter by each party to the underlying document to be amended (*i.e.*, a master agreement), and provides for additional bilateral delivery requirements in order to effectuate the addition of supplemental terms.³⁴

ISDA published its first Dodd-Frank protocol in August 2012, focused on facilitating compliance with several new Commission regulations, including those found in part 23.³⁵ Pursuant to this first protocol, each party that submits an adherence letter must also deliver a completed questionnaire to another protocol participant for the addition of supplemental terms to be effective with respect to that protocol participant. To facilitate the delivery of completed

55904, 55942 (Sept. 11, 2012); see also Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties, 77 FR 9734, 9823-27 (Feb. 17, 2012) (promulgating the relevant provisions of subpart H of part 23 of the Commission's Regulations).

³³ 77 FR at 55940.

³⁴ See <http://www2.isda.org/dodd-frank-documentation-initiative/>.

³⁵ ISDA's first Dodd-Frank protocol is intended to facilitate compliance with the following Final Rules: Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties, 77 FR 9734 (Feb. 17, 2012); Large Trader Reporting for Physical Commodity Swaps, 76 FR 43851 (July 22, 2011); Position Limits for Futures and Swaps, 76 Fed. Reg. 71626 (Nov. 18, 2011); Real-Time Public Reporting of Swap Transaction Data, 77 FR 1182 (Jan. 9, 2012); Swap Data Recordkeeping and Reporting Requirements, 77 FR. 2136 (Jan. 13, 2012); Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants, 77 FR 20128 (Apr. 3, 2012); and Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps, 77 FR 35200 (June 12, 2012). However, this interim final rule does not address compliance with rules other than those specifically stated in the text above.

questionnaires, ISDA, together with Markit, have developed a technology-based solution to automate the information-gathering process and provide sharing of submitted data and documents to permissioned counterparties.

ISDA has represented to the Commission that, despite an extensive counterparty outreach and education effort by its members, only 17.5% of counterparties to prospective SDs and MSPs have submitted an adherence letter for its first Dodd-Frank protocol and less than 1% have submitted the completed questionnaires necessary for SDs and MSPs to make use of the protocol and integrate necessary counterparty information into their compliance systems. ISDA has represented that more time is needed for these counterparties to understand the Commission's requirements, to understand the legal consequences of adhering to the protocol, and to gather the information needed to complete the questionnaire from principals and beneficial owners.

In addition, ISDA states that Hurricane Sandy has hampered the ability of SDs, MSPs, and their counterparties to complete the documentation process necessary to comply with the Commission's regulations within the original compliance periods. ISDA states that Hurricane Sandy shut down institutions and vendors, depleted staff and severely damaged development efforts in a number of compliance areas – producing a knock-on effect across institutional (and vendor) compliance efforts (including delays at Markit – the provider of protocol automation mechanisms). Further, specifically with respect to the January 1, 2013 compliance date for subpart H of part 23 of the Commission's regulations, ISDA has represented that compliance obstacles are compounded by industry code freezes, which are typically put into effect near the calendar year-end to ensure a stable IT environment for the closing of books and records. The freezes limit the ability of firms to make adjustments to IT infrastructure related to the delivery

of required disclosure and the re-onboarding of counterparties in accordance with the counterparty characteristics provided in response to the first Dodd-Frank protocol.

Absent completion of the protocol process by a counterparty, or completion of bilateral amendments to trading documentation with the equivalent effect, an SD or MSP that continues to enter into swaps with such counterparty would be in violation of multiple Commission regulations contained in part 23. In order to avoid such violations of Commission regulations, ISDA has represented that many SDs and MSPs will stop entering into swaps with counterparties that have not completed the protocol process by December 31, 2012, which could result in a sudden and dramatic drop in the number of participants in the swap markets. ISDA states that the resulting decrease in liquidity would damage all market participants as well as the broader economy.

ISDA has further represented that market participants are working diligently toward publishing a second Dodd-Frank protocol covering other Commission rules requiring documentation supplements, including §§ 23.502 and 23.504, but require additional time to complete the review process and implement the protocol. ISDA states that the pace of implementation of its second Dodd-Frank protocol has been adversely affected by the difficulty of reaching agreement on the valuation methodologies required by § 23.504(b)(4),³⁶ the developmental challenges to reaching the agreement on reconciliation processes required by § 23.502(a)(1), the consumption of legal and operational resources by the implementation of the first Dodd-Frank protocol, and the effects of Hurricane Sandy discussed above. Accordingly, ISDA has represented that an extension of the compliance dates for §§ 23.502 and 23.504 would

³⁶ Commission regulation § 23.504(b)(4) requires SDs and MSPs to agree with their counterparties, prior to the execution of a swap, on the process for determining the value of such swap at any time from execution to the termination, maturity, or expiration of such swap.

allow for a smooth and orderly progression to compliance with such rules and avoid unnecessary market disruption.

For reasons described above, the Commission has decided to defer the compliance dates for §§ 23.201(b)(3)(ii), 23.402; 23.410(c); 23.430; 23.431(a)-(c); 23.432; 23.434(a)(2), (b), and (c); 23.440; 23.450; and 23.505 of subpart F, subpart H, and subpart I of part 23 until May 1, 2013. In addition, the Commission has decided to defer the compliance dates for § 23.502 (Portfolio Reconciliation) and § 23.504 (Swap Trading Relationship Documentation)³⁷ of subpart I of part 23 until July 1, 2013.³⁸ Compliance dates for all other provisions of subpart F, subpart H, and subpart I of part 23 remain unchanged. All market participants are subject to the new compliance dates regardless of whether they participate in the protocol.

III. Related Matters

A. Administrative Law Matters and Request for Comments

The Administrative Procedure Act³⁹ (“APA”) generally requires an agency to publish a notice of a proposed rulemaking in the **Federal Register**.⁴⁰ This requirement does not apply, however, when the agency “for good cause finds * * * that notice and public procedure are impracticable, unnecessary, or contrary to the public interest.”⁴¹ Moreover, while the APA requires generally that an agency publish an adopted rule in the **Federal Register** 30 days before

³⁷ As discussed in note 26 *supra*, the Commission imposed a staggered compliance schedule for § 23.504, establishing three separate compliance dates based on the type of counterparty. The compliance date established herein—July 1, 2013—provides SDs and MSPs with a single compliance date for § 23.504, that is applicable for all types of counterparties.

³⁸ The Commission’s decision to defer compliance does not reflect an endorsement of the industry-led effort, nor does it imply that the Commission has reviewed the documentation protocol for compliance with Commission rules.

³⁹ 5 U.S.C. 553

⁴⁰ 5 U.S.C. 553(b)

⁴¹ *Id.*

it becomes effective, this requirement does not apply if the agency finds good cause to make the rule effective sooner.⁴²

The Commission, for good cause, finds that notice and solicitation of comment regarding the amendments is impracticable, unnecessary and contrary to the public interest. As of December 3, 2012, the CFTC has finalized over 41 new rulemakings pursuant to the Dodd-Frank Act, with each rulemaking imposing significant new regulatory requirements on market participants. In the aggregate, the rulemakings establish a robust and comprehensive registration and regulatory framework intended to achieve the overarching goals of the Dodd-Frank Act, as detailed in Section I above. In promulgating the final rules, the Commission constructed a phased implementation schedule that was intended to allow market participants to achieve full compliance through an orderly and effective process over a period of time. Market participants, including a trade association, buy-side firms and sell-side dealers, have represented to the Commission that they have been diligently preparing to comply with the part 23 rules, in accordance with the phased implementation schedule. The Commission anticipates that the phased implementation schedule for most rules promulgated under part 23 will continue, on schedule, without need for delay.

Notwithstanding the Commission's efforts to implement the business conduct standards rules required under the Dodd-Frank Act in a timely manner, the Commission has determined that, due to circumstances beyond the Commission's control, a short delay in the implementation schedule for a limited set of part 23 rules is necessary. As discussed in greater detail in Section II above, ISDA has represented that, despite an extensive counterparty outreach and education effort by its members, a relatively small percentage of counterparties have fully executed the

⁴² 5 U.S.C. 553(d).

necessary documentation to comply with the provisions of subpart H of part 23 that involve documentation. ISDA has represented that more time is needed for these counterparties to understand the Commission's requirements, to understand the legal consequences of adhering to the required documentation, and to gather the information needed to complete the questionnaire from principals and beneficial owners. ISDA further represented that without additional time to address that relatively narrow scope of documentation rules, a sudden and dramatic drop in the number of participants in the swap markets could occur, and the resulting decrease in liquidity would damage all market participants as well as the broader economy.

The extended compliance dates provided herein do not include all business conduct standards promulgated by the Commission. Specifically, compliance dates for § 23.410(a) and (b), § 23.433, and § 23.434(a)(1) are not being extended. Consequently, fundamental counterparty protections relating to (i) prohibitions on fraud, manipulation and abusive practices, (ii) fair dealings in communications, and (iii) reasonable diligence regarding recommended swaps would not be affected by delayed compliance.

Accordingly, for the reasons discussed above, the Commission finds good cause to extend the compliance dates for a short period, for a limited number of rules promulgated under part 23, to enable market participants to continue the work necessary to achieve full compliance. Specifically, the compliance date for §§ 23.201(b)(3)(ii), 23.402; 23.410(c); 23.430; 23.431(a)-(c); 23.432; 23.434(a)(2), (b), and (c); 23.440; 23.450, and 23.505 is delayed until May 1, 2013, providing an additional 4 months from the original compliance date. Likewise, the compliance date for § 23.502 and § 23.504 is deferred until July 1, 2013, providing an additional 6 months

from the original date.⁴³ Compliance dates for all other provisions of part 23 remain unchanged. The Commission anticipates that the amended compliance dates will enable market participants to achieve full compliance with the affected rules prior to the expiration of the amended compliance period.

Although the Commission is dispensing with prior notice of proposed rulemaking, the Commission is soliciting written comments on the interim final rules within 30 days after publication of this release in the Federal Register. The Commission will consider those comments and make changes to the amendments if necessary.

B. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (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.⁴⁴ The interim final rule will not impose any new recordkeeping or information collection requirements, or other collections of information that require approval of the Office of Management and Budget under the PRA. The Commission invites public comment on the accuracy of its estimate that no additional information collection requirements or changes to existing collection requirements would result from the rules proposed herein.

C. Considerations of the Costs and Benefits

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 an order. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of the following five broad

⁴³ The Commission's decision to defer compliance does not reflect an endorsement of the industry-led effort, nor does it imply that the Commission has reviewed the documentation protocol for compliance with Commission rules. All market participants are subject to the new compliance dates regardless of whether they participate in the protocol.

⁴⁴ 44 U.S.C. 3501 *et seq.*

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.

1. Background

The Commission is adopting, as interim final rules, amendments to specific sections of subparts H, I and F of part 23 of the Commission regulations. Subpart H to part 23 sets forth business conduct standards for SDs and MSPs in their dealings with counterparties. SDs and MSPs are required to comply with the requirements found in subpart H to part 23 by January 1, 2013. The amendments to §§ 23.402; 23.410(c); 23.430; 23.431(a)-(c); 23.432; 23.434(a)(2), (b), and (c); 23.440; and 23.450 contained in subpart H rules will extend the compliance dates for these provisions until May 1, 2013. Compliance dates for all other provisions of subpart H of part 23 remain unchanged.

With regard to the portfolio reconciliation requirements found in § 23.502, for those SDs and MSPs that have been previously regulated by a prudential regulator, the Commission had provided for a compliance date of December 11, 2012. The compliance date for SDs and MSPs that have not been previously regulated was March 11, 2013. The earliest that an SD or MSP would be required to comply with the swap trading relationship documentation requirements of § 23.504 is January 1, 2013. The earliest that an SD or MSP would be required to comply with the end user documentation requirements of § 23.505 is December 31, 2012. The amendments adopted as interim final rules to §§ 23.502 and 23.504 contained in subpart I will extend the compliance dates for these provisions until July 1, 2013. The amendments adopted as interim final rules to § 23.505 will extend the compliance date for this rule until May 1, 2013.

With regard to the general records requirements found in § 23.201 of subpart F of part 23, the earliest that an SD or MSP would be required to comply with such requirements is December 31, 2012. The amendments adopted as interim final rules to § 23.201 will extend the compliance date for certain provisions of this rule until May 1, 2013.

The interim final rules being adopted do not change the substance of the rules; rather, they merely provide additional time by which parties can comply. As such, the costs and benefits of the Commission's action relate only to the additional time provided.

2. Costs

The Commission does not anticipate there being any new, quantifiable costs attributable to this interim final rule because it is only extending the compliance dates for certain requirements in part 23 of the Commission's regulations. At the same time, however, the Commission is mindful that a delay in the protections afforded by the regulations could result in costs to the public, even if the same is not amenable to quantification. The Commission believes, however, that these costs are mitigated by the maintenance of various other provisions relating to (i) prohibitions on fraud, manipulation and abusive practices, (ii) fair dealings in communications, and (iii) reasonable diligence regarding recommended swaps. These provisions are unaffected by delayed compliance from this extension. The Commission invites comments from the public on any costs, quantitative and qualitative, arising from the delay granted by the interim final rules.

3. Benefits

The additional time for compliance provided for in these interim final rules will yield substantial benefit for market participants and the public alike. Absent this extension, market participants would be required to implement temporary solutions while the more permanent,

industry wide solutions described earlier are finalized. The Commission believes that this duplication of efforts to achieve compliance would impose extensive burdens and costs on parties without any concomitant benefit to the public. Moreover, the Commission is concerned that based on the representations made by market participants, absent this interim final rule, market participants might exit the market or curtail their swaps activity due to a lack of legal certainty and protection afforded by Commission relief. If that were to occur, the Commission expects that reduced market liquidity would increase the costs of hedging, which would then be passed on the public in the form of higher costs.

4. Section 15(a)

Section 15(a) of the CEA requires the Commission to consider the effects of its actions in light of the following five factors:

a. Protection of Market Participants and the Public

The Commission believes that by extending the compliance date for certain regulations in part 23, market participants will be able to continue to participate in the swaps market without concerns about potential consequences of failure to comply with the specified regulations. This will, in turn, protect the public by ensuring that the economy does not suffer as a result of any unintended consequences that may have arisen if market participants exited the swaps market. The Commission recognizes that any delay in compliance with the aforementioned business conduct and documentation requirements continues to leave the public without the protections and attendant benefits of those requirements. However, the Commission believes that delaying compliance for only certain business conduct and documentation requirements, while retaining the original compliance dates for fundamental counterparty protections relating to (i) prohibitions on fraud, manipulation and abusive practices, (ii) fair dealings in communications,

and (iii) reasonable diligence regarding recommended swaps, will mitigate those effects while avoiding this risk that market participants will exit the market due to legal uncertainty.

b. Efficiency, Competitiveness, and Financial Integrity of Markets

The Commission believes that extending the compliance dates for the aforementioned rules will help protect the efficiency and competitiveness of the markets by obviating the need to stop transacting in swaps due to delay in complying with specific Commission regulations. It will also strengthen the financial integrity of markets by ensuring that market participants do not transact in the swaps markets while not being in full compliance with these regulations.

c. Price Discovery

If concerns regarding non-compliance results in a reduction in participation by a large number of market participants, such a decrease in swaps activity will adversely impact the price discovery process of the swaps markets.

d. Sound Risk Management

If counterparties refrain from transacting in swaps, the ability of other market participants to hedge their risks using these instruments may suffer. By mitigating the concerns of market participants regarding compliance with Commission rules, this interim final rule helps ensure that, while firms diligently complete the compliance requirements, they can continue entering into swap transactions to hedge their business and investment risks.

e. Other Public Interest Considerations

The Commission has not identified an impact on other public interest considerations, other than those mentioned above, as a result of the interim final rule, but seeks comment as to any potential impact on this and other 15(a) factors.

Issued in Washington, DC on December 18, 2012, by the Commission.

X

Sauntia S. Warfield
Assistant Secretary of the Commission

Appendix to Business Conduct and Documentation Requirements for Swap Dealers and Major Swap Participants—Commission voting summary

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

Appendix 1—Commission Voting Summary

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