Enterprises means, collectively, the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation.

Excepted transfer fee covenant means a covenant to pay a private transfer fee to a covered association that is used exclusively for the direct benefit of the real property encumbered by the private transfer fee covenants.

Federal Home Loan Banks or *Banks* mean the Federal Home Loan Banks established under section 12 of the Federal Home Loan Bank Act (12 U.S.C. 1432).

Private transfer fee means a transfer fee, including a charge or payment, imposed by a covenant, restriction or other similar document and required to be paid in connection with or as a result of a transfer of title to real estate. A private transfer fee excludes fees, charges, or payments, or other obligations—

(1) Imposed by a court judgment, order or decree;

(2) Imposed by or are payable to the Federal government or a State or local government;

(3) Arising out of a mechanic's lien; or

(4) Arising from an option to purchase or for waiver of the right to purchase the encumbered real property.

Private transfer fee covenant means a covenant that—

(1) Purports to run with the land or to bind current owners of, and successors in title to, such real property; and

(2) Obligates a transferee or transferor of all or part of the property to pay a private transfer fee upon transfer of an interest in all or part of the property, or in consideration for permitting such transfer.

Regulated entities means the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, and the Federal Home Loan Banks.

Transfer means with respect to real property, the sale, gift, grant, conveyance, assignment, inheritance or other transfer of an interest in the real property.

§ 1228.2 Restrictions.

The regulated entities shall not purchase or invest in any mortgages on properties encumbered by private transfer fee covenants, securities backed by such mortgages or securities backed by the income stream from such covenants, unless such covenants are excepted transfer fee covenants. The Banks shall not accept such mortgages or securities as collateral, unless such covenants are excepted transfer fee covenants.

§ 1228.3 Prospective application and effective date.

This part shall apply only to mortgages on properties encumbered by private transfer fee covenants created on or after *February 8, 2011,* and to securities backed by such mortgages, and to securities issued after that date backed by revenue from private transfer fees regardless of when the covenants were created. The regulated entities shall comply with this part not later than 120 days following the date of publication of the final rule in the **Federal Register**.

§ 1228.4 State restrictions unaffected.

This part does not affect State restrictions or requirements with respect to private transfer fee covenants, such as with respect to disclosures or duration.

Dated: January 28, 2011.

Edward J. DeMarco,

Acting Director, Federal Housing Finance Agency.

[FR Doc. 2011–2565 Filed 2–7–11; 8:45 am]

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COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 23

RIN 3038–AC96

Orderly Liquidation Termination Provision in Swap Trading Relationship Documentation for Swap Dealers and Major Swap Participants

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commodity Futures Trading Commission (Commission or CFTC) is proposing regulations to implement new statutory provisions established under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). Section 731 of the Dodd-Frank Act added a new section 4s(i) to the Commodity Exchange Act (CEA), which requires the Commission to prescribe standards for swap dealers and major swap participants related to the timely and accurate confirmation, processing, netting, documentation, and valuation of swaps. The proposed rule would set forth parameters for the inclusion of an orderly liquidation termination provision in the swap trading relationship documentation for swap dealers and major swap participants.

DATES: Submit comments on or before April 11, 2011.

ADDRESSES: You may submit comments, identified by RIN number 3038–AC96 and Orderly Liquidation Termination Provision in Swap Trading Relationship Documentation for Swap Dealers and Major Swap Participants, by any of the following methods:

- Agency Web site, via its Comments Online process at *http://comments.cftc.gov.* Follow the instructions for submitting comments through the Web site.
- *Mail:* David A. Stawick, 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 *http://www.cftc.gov.* You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that 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 regulations, 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 *http://www.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT:

Sarah E. Josephson, Associate Director, 202–418–5684, *sjosephson@cftc.gov;* Frank N. Fisanich, Special Counsel, 202–418–5949, *ffisanich@cftc.gov;* or Jocelyn Partridge, Special Counsel, 202–418–5926, *jpartridge@cftc.gov;* Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., 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 Act [2] 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 swap dealers and major swap participants; (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.

Section 731 of the Dodd-Frank Act amends the CEA by adding a new section 4s, which sets forth a number of requirements for swap dealers and major swap participants. Specifically, section 4s(i) of the CEA establishes swap documentation standards for those registrants.

Section 4s(i)(1) requires swap dealers and major swap participants 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."

On January 13, 2011, the Commission voted to issue a notice of proposed rulemaking entitled, "Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants." This proposed regulation supplements that proposal and sets forth another element of the swap trading relationship documentation that swap dealers, major swap participants, and their counterparties must include in their documentation. The Commission is proposing the regulation discussed below, pursuant to the authority granted under sections 4s(h)(1)(D), 4s(h)(3)(D), 4s(a), 4s(i), and 8a(5) of the CEA.[4] The Dodd-Frank Act requires the Commission to promulgate these provisions by July 15, 2011.[5]

The proposed regulations reflect consultation with staff of the following agencies: (i) The Securities and Exchange Commission; (ii) the Board of Governors of the Federal Reserve System (Board of Governors); (iii) the Office of the Comptroller of the Currency; and (iv) the Federal Deposit Insurance Corporation (FDIC). Staff from each of these agencies has had the opportunity to provide comments to the proposal, and the proposed regulations incorporate elements of the comments provided.

In designing these rules, the Commission has taken care to minimize the burden on those parties that will not be registered with the Commission as swap dealers or major swap participants. To the extent that market participants believe that additional measures should be taken to reduce the burden or increase the benefits of documenting swap transactions, the Commission welcomes all comments.

II. Proposed Regulation

This proposed rulemaking supplements a prior notice of proposed rulemaking under which two rules were proposed—§§ 23.504 and 23.505. This proposal would set forth another element of the swap trading relationship documentation that swap dealers, major swap participants, and their counterparties must include in their documentation under § 23.504(b). The provision would require that swap dealers and major swap participants include in the documentation with each of their counterparties a provision that confirms both parties' understanding of how the new orderly liquidation authority under the Title II of the Dodd-Frank Act and the Federal Deposit Insurance Act (FDIA) may affect their portfolios of uncleared, over-the-counter, bilateral swaps.[6]

The Commission believes that the inclusion of this type of provision in the swap trading relationship documentation used by swap dealers and major swap participants registered with the Commission would promote legal certainty for market participants and lower litigation risk during times of significant market stress. In particular, the proposal would ensure both counterparties to a swap understand that under particular, unique circumstances, described in detail below, if one of the counterparties defaults, the non-defaulting party's positions could be transferred to a new, solvent counterparty by the FDIC, and the non-defaulting party may not be able to terminate its claims against the defaulting counterparty until 5 p.m. (U.S. eastern time) on the business day following the day the FDIC is appointed receiver. This stay would facilitate the FDIC's orderly liquidation of the defaulting counterparty's swap positions. This stay also is critical because it would allow the FDIC the requisite time to transfer the defaulter's open swap positions, claims, and collateral with the objective of avoiding widespread market disruption in the form of fire sales and contagion risk.

A. Background

The recent financial crisis, particularly the tumultuous events of 2008, revealed that U.S. financial regulatory authorities lacked an orderly resolution mechanism for certain large financial companies. The lack of such a resolution mechanism led to the need for government bail outs of financial companies considered "too big to fail" and contributed to major financial market dislocations resulting from the disorderly insolvency of Lehman Brothers Inc. and its affiliates under the Federal bankruptcy code.

One of the key lessons of the financial crisis is that for systemically important institutions, the traditional bankruptcy process may be too slow and cumbersome to effectively deal with defaults that require near instant action to diminish their effect on other entities and the financial system as a whole.[7] This is especially true for financial companies with significant derivatives positions that require frequent adjustments based on trading strategies

[1] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 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.*

[4] Section 8a(5) of the CEA authorizes the Commission to promulgate such regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of the CEA.

[5] This is the seventh rulemaking to be proposed regarding internal business conduct standards for swap dealers and major swap participants. Prior notices of proposed rulemaking are available on the Commission's Web site at *http://www.cftc.gov.*

[6] As proposed, this provision would not apply to swaps cleared by a derivatives clearing organization (DCO). The Commission does not believe it is necessary to address cleared swaps in this rulemaking because they are addressed in section 210(c)(8)(G) of the Dodd-Frank Act, but solicits comment on this issue.

[7] For example, over two years after the bankruptcy process for Lehman Brothers Holding Inc. began, it remains ongoing and active. On December 15, 2010, creditors filed a plan of reorganization by an ad hoc group of Lehman creditors despite Lehman's filing of a plan of reorganization on March 15, 2010. By contrast, under the special provisions under Commission regulation for treatment of cleared futures contracts, Lehman's futures business was resolved within a matter of weeks.

and the need to manage exposure to market risk.

With the passage of the Dodd-Frank Act, Congress sought to address these problems though the enactment of Title II, which establishes an "orderly liquidation authority" under which systemically important financial companies can be resolved in an orderly manner. This authority is separate from, but consistent with, the Federal bankruptcy and State dissolution laws.

B. Orderly Liquidation Under Title II of Dodd-Frank

Under Title II of the Dodd-Frank Act, Congress provided "the necessary authority to liquidate failing financial companies [8] that pose a significant risk to the financial stability of the United States in a manner that mitigates such risk and minimizes moral hazard." [9] To this end, Title II establishes a process under which, upon the recommendation of the FDIC and the Board of Governors, and after consultation with the President, the Secretary of the Treasury appoints the FDIC as the receiver to wind down the affairs of, and liquidate the assets of, the financial company whose default may pose a systemic risk to the financial markets. Accordingly, the decision to act under Title II would be taken under conditions that would have "serious adverse effects on financial stability in the United States." [10]

1. Entities Eligible for Liquidation Under Title II

Title II provides certain Federal financial regulatory authorities with the power, but not the obligation, to conduct an orderly wind down of a financial company. If the authorities decide not to act, the regular insolvency processes under the Federal bankruptcy code or banking laws would apply. For instance, non-bank swap dealers and major swap participants would be subject to the bankruptcy code's chapter 7 or chapter 11 proceedings.[11]

Title II applies to a class of business entities, referred as "covered financial companies," that meet certain criteria as determined by the Secretary of the Treasury under a process described in the next section. This class potentially could include swap dealers and major swap participants registered with the Commission. For example, under Title II, any company that is registered as a swap dealer or major swap participant with the Commission and designated as a systemically important financial institution (SIFI) by the Financial Stability Oversight Council (FSOC) under a process laid out in Title I of the Dodd-Frank Act,[12] could be deemed to be a "covered financial company" under Title II.[13]

It also is possible that a swap dealer or a major swap participant might be deemed to be a "covered financial company" independent of Title I's FSOC designation process. Under Title II, such a company could be deemed to be a "financial company" if that entity is (1) predominantly engaged in financial activities [14] and (2) those financial activities generate 85% or more of the company's revenues.[15] A "covered financial company" is a financial company for which a determination has been made under section 203(b) of the Dodd-Frank Act by the Secretary of the Treasury. A prerequisite to that determination process is the written recommendation of both the FDIC and the Board of Governors.

2. Process for Determining Whether Title II Authority Should Be Invoked

In making a determination to act under Title II, the Secretary of the Treasury (in consultation with the President) must determine that, among other things: (1) The financial company is in default or in danger of default; [16] (2) the default of the financial company would have a serious adverse effect on the financial stability of the United States; and (3) no viable private sector alternative is available to prevent the default. The Secretary must make a specific determination that any effect on the claims or interests of creditors, counterparties, and shareholders is appropriate.[17]

In order to meet each of these criteria, it is likely that a financial company would have to have a significant level of market and credit exposure and its default would be likely to pose a grave risk to financial markets. Only after these determinations have been made would the FDIC be granted resolution authority under Title II.

C. Resolution by the FDIC Under FDIA.

Before describing the FDIC's resolution authority under Title II, it is important to note that the FDIC also may have resolution authority over a swap dealer or major swap participant that is an insured depository institution. Generally speaking, an insured depository institution is defined under section 3(c) of the Federal Deposit Insurance Act (FDIA) as any bank or savings association the deposits of which are insured by the FDIC.[18] Under the FDIA, the FDIC has the authority to liquidate or wind up the affairs of an insured depository institution. Some swap dealers and major swap participants registered with the Commission may be insured depository institutions.

D. Role of the FDIC in the Orderly Liquidation of Swap Dealers and Major Swap Participants Under Either Title II or the FDIA

In many ways, the Title II resolution approach is modeled upon the FDIA. Indeed, as discussed below, certain Title II provisions are identical to provisions in FDIA. Consequently, the FDIC would be able to exercise similar powers with regard to swap dealers and major swap

[8] Under Title II, section 201(a)(11), a financial company includes, among other things, a bank holding company, a nonbank financial company supervised by the Board of Governors, or a company, or a subsidiary (other than an insured depository institution or an insurance company) of a company, that is predominantly engaged in activities that the Board of Governors has determined are financial in nature or incidental thereto.

[9] Section 204(a) of the Dodd-Frank Act.

[10] Section 203(b)(2) of the Dodd-Frank Act.

[11] In general, Chapter 7 allows for the liquidation of a debtor entity and Chapter 11 allows a debtor entity to reorganize its affairs.

[12] Section 113 of the Dodd-Frank Act sets forth the process by which U.S. nonbank financial companies may be designated as systemically important. The term U.S. nonbank financial company is defined in section 102(a)(4)(B) of the Dodd-Frank Act.

[13] Entities that are designated as SIFIs under Title I of the Dodd-Frank Act are considered to be supervised by the Board of Governors of the Federal Reserve System, and thus meet the definition of financial company under section 201(a)(11)(B)(ii).

[14] Financial activities are defined by reference to section 4(k) of the Bank Holding Company Act, 12 U.S.C. 1843(k), which includes activities such as dealing in or making a market in securities and any other activity that may be identified under rules or orders issued by the Board of Governors. *See* 12 U.S.C. 1843(k)(4) and 12 CFR 225.28.

[15] Section 201(a)(11)(B)(iii) or (iv) and section 201(b) of the Dodd Frank Act.

[16] The phrase "default or in danger of default" is defined in Title II, section 203(c)(4), to include situations where an entity has, or likely will promptly, be subject to a bankruptcy action; the entity has incurred losses that have or are likely to deplete all of its capital and there is no reasonable prospect of avoiding such a depletion; the entity's assets are less than its obligations to creditors and others; and the entity is, or is likely to be, unable to make its payments in the normal course of business. *See also* 12 U.S.C. 1813(x)(2) (providing a similar definition under the FDIA).

[17] Section 203(b) of the Dodd-Frank Act. Additional factors the Secretary must consider include: (1) Any action under the liquidation authority would avoid or mitigate such adverse effects on the financial system, the cost to the general fund of the Treasury, and the potential to increase excessive risk taking on the part of creditors, counterparties, and shareholders in the financial company; (2) a Federal regulatory agency has ordered the covered financial company to convert all of its convertible debt instruments that are subject to a regulatory order; and (3) the company satisfies the definition of "financial company" in section 201(a)(11) of the Dodd-Frank Act.

[18] 12 U.S.C. 1813(c).

participants regardless of whether the FDIC was acting under Title II or FDIA. Under either statutory authority, it is likely that the orderly wind-down and liquidation of those large firms whose demise may have systemic implications would have similar characteristics. For example, under both Title II and the FDIA, the FDIC would have the authority to transfer open positions, claims, and collateral to a receiving entity in an effort to move quickly to stabilize what could be deteriorating market conditions.[19]

As part of the resolution authority in Title II and in the existing provisions of the FDIA for insured depository institutions, the FDIC is given a one business day period in which to transfer swaps and certain other contracts to a solvent third party financial institution. For this transfer authority to be effective, a brief stay on the ability of counterparties to terminate, liquidate, or net is necessary.

Specifically, under section 210(c)(10) of Dodd-Frank or 11(e)(10) of FDIA, parties to qualified financial contracts[20] are prohibited from terminating, liquidating, or netting out positions solely by reason of the appointment of the FDIC as receiver or the financial condition of the insured depository institution, covered financial company, or covered subsidiary in receivership until the close of the next business day following the date of appointment of the FDIC as receiver. A party is also precluded from exercising any such contractual rights after it has received notice that its qualified financial contract has been transferred to another financial institution—including a bridge financial company. The effect of these provisions is to provide the FDIC one day after its appointment as receiver to consummate a transfer of a qualified financial contract to either a private acquirer or to a newly created bridge bank or financial company. Absent one of these two types of transfers within the allotted time frame, parties may exercise their contractual rights.

E. Application to Swaps

Swaps subject to the Commission's jurisdiction under Title VII of the Dodd-Frank Act would appear to be subject to orderly liquidation under either Title II or the FDIA by virtue of the fact that they fall under the definition of "qualified financial contract" under those two statutes.[21] The definition of qualified financial contract is identical under both Title II and FDIA and includes securities contracts, commodity contracts,[22] forward contracts, repurchase agreements, swap agreements, and any other contract determined by the FDIC to be a qualified financial contract.

The Commission recognizes the potential for regulatory arbitrage if the definition of qualified financial contract does not apply to swaps under Title VII. Moreover, the Commission believes that should the need for an orderly liquidation of any systemically important swap dealer or major swap participant arise, it would be most appropriate and practicable for all swaps held on the books of those entities to be considered to be part of a comprehensive and orderly resolution process.

F. Commission Involvement in an Orderly Liquidation

While the Commission is not granted explicit authority under Title II, that section does recognize the need for all U.S. financial authorities to work together and to "take all steps necessary and appropriate to assure that all parties * * * having responsibility for the condition of the financial company bear losses consistent with their responsibility * * *."[23] In addition, if the FDIC is appointed receiver of a swap dealer or major swap participant for which the Commission is the primary regulator, the FDIC is required to consult with the Commission "for purposes of ensuring an orderly liquidation of the entity."[24] As part of its consultative role, the Commission might have information on defaulting swap dealers or major swap participants that is relevant to the resolution process. Moreover, the Commission may have responsibility for potential transferees, *i.e.,* firms to which open swap positions might be transferred.

G. Proposed Regulation § 23.504(b)(5)

Previously proposed § 23.504(a) would require that swap dealers and major swap participants establish, maintain, and enforce written policies and procedures reasonably designed to ensure that each swap dealer or major swap participant and its counterparties have agreed in writing to all of the terms governing their swap trading relationship. Under previously proposed § 23.504(b), swap trading relationship documentation would include written agreement by the parties on certain terms, including general provisions on payment obligations, netting of payments, events of default or other termination events, transfer of rights and obligations, and governing law.

Proposed § 23.504(b)(5) would supplement the prior proposal by requiring the inclusion of a written agreement by the parties to comply with the FDIC's transfer authority under section 210(c)(9) and (10) of the Dodd-Frank Act and with the nearly identical sections under the FDIA.[25] This provision under the swap trading relationship documentation could be invoked only if a party to the documentation is deemed to be a "covered financial company" under Title II or is an insured depository institution and the FDIC is appointed as a receiver. Under either scenario, the proposed rule refers to this party as the "covered party."

The language of proposed § 23.504(b)(5)(i) very closely tracks the statutory language of section 210(c)(10)(B) of the Dodd-Frank Act and section 11(e)(10)(B) of the FDIA. Under this provision, counterparties will acknowledge in their trading relationship documentation that neither will exercise any right to terminate a swap due to the appointment of the FDIC as a receiver under Title II or the FDIA[26] until the close of the next business day after such appointment, or it receives notice that the FDIC has transferred its swaps to a performing third party (including a bridge bank, bridge financial institution, or other government-run financial institution). This stay provision would expire at 5 p.m. on the business day after the FDIC is appointed as receiver or as soon as the non-defaulting party receives notice that the FDIC has transferred the defaulting party's swaps positions, claims, and property supporting the positions pursuant to section 210(c)(9)(A) of the Dodd-Frank Act or section 11(e)(9)(A) of the FDIA.

[19] The FDIC also would have the authority to merge the covered financial company with another company under section 210(a)(1)(G) of the Dodd-Frank Act.

[20] Qualified financial contracts include any securities contract, commodity contract, forward contract, repurchase agreement, swap agreement, and any similar agreement as determined by the FDIC. Section 210(c)(8)(D) of the Dodd-Frank Act and section 11(e)(8)(D) of FDIA.

[21] Section 210(c) applies to contracts entered into before the appointment of a receiver under Title II. There is an analogous provision under the FDIA. *See* section 210(c)(8)(D) of the Dodd-Frank Act and section 11(e)(8)(D) of FDIA.

[22] Under this definition, futures contracts subject to the Commission's jurisdiction are considered to be qualified financial contracts.

[23] Section 204(a)(3) of the Dodd-Frank Act.

[24] Section 204(c)(1) and (3) of the Dodd-Frank Act.

[25] Sections 11(e)(9) and (10) of the FDIA; codified at 12 U.S.C. 1821(e)(9) and (10).

[26] The counterparties may be able to specify in their individual documentation that only Title II would apply if neither counterparty would be subject to resolution under the FDIA, *i.e.* neither party is an insured depository institution.

Proposed § 23.504(b)(5)(ii) would track the language of section 210(c)(9)(A) of the Dodd-Frank Act and section 11(e)(9)(A) of the FDIA and would require the parties to agree that if the FDIC decides to transfer swaps of the party in receivership, the FDIC will transfer all swaps between the parties to one financial institution, along with all claims and credit support related to such swaps.

Proposed § 23.504(b)(5)(iii) would require each party to consent to any transfer described in § 23.504(b)(5)(ii). Including an agreement to consent to the transfer of swaps to a solvent entity under the strict requirements of Title II or FDIA will facilitate the orderly wind-down of the defaulting firm and promote the prompt resolution of market uncertainty and allow a return to regular trading strategy for non-defaulting counterparties.

The Commission believes that the proposed regulation is important insofar as it will ensure that counterparties to swap transactions are on notice that, under particular, unique circumstances, their swap positions, claims, and the property supporting those positions may be transferred and that there may be a brief stay on their ability to terminate a swap. As described above, the provision would only be applicable in situations where the counterparties are financial institutions that could be designated covered financial companies under Title II or are insured depository institutions under FDIA.

The Commission also believes that this provision would facilitate the resolution process by minimizing the potential litigation when such resolution authority is exercised. Minimizing litigation risk is important for facilitating a quick and effective resolution process; particularly when the alternative, the sudden collapse of the covered financial company, poses systemic risk.

It is also worth noting that the inclusion of this provision in swap trading relationship documentation may help bring about broad equivalence with regard to the treatment of swaps globally. This is relevant because Congress recognized the need for greater international coordination relating to the orderly liquidation of financial companies by directing the Comptroller General of the United States to study ways to increase effective international coordination.[27]

H. Comment Requested

The Commission requests comment on all aspects of proposed § 23.504(b)(5). In particular, the Commission requests comment on the following questions:

- Are there any swaps as defined under Title VII of the Dodd-Frank Act that should not be considered to be qualified financial contracts as that term is defined under Title II of the Dodd-Frank Act and FDIA?
- Under what circumstances could the requirements of § 23.504(b)(5) allow for recognition of non-US authorities operating under legal provisions similar to that provided under Title II of the Dodd-Frank Act? Would inclusion of non-US authorities be useful with respect to financial companies that may have global operations through multiple subsidiaries and branches, including insured depository institutions?
- What steps can be taken to encourage standard documentation templates developed by industry groups, such as ISDA, to recognize the need to include termination stay provisions similar to those provided for under Title II and FDIA?
- Are there any anticompetitive implications to the proposed rules? If so, how could the proposed rules be implemented to achieve the purposes of the CEA in a less anticompetitive manner?
- Given the use in swaps of cross default provisions referencing agreements with affiliates, should "covered party", as defined in § 23.504(b)(5), also include affiliates of entities that may be designated as covered financial companies under Title II or that are insured depository institutions under FDIA?
- Does the Commission have legal authority to include affiliates in this way?

III. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires that agencies consider whether the rules they propose will have a significant economic impact on a substantial number of small entities.[28] The Commission previously has established certain definitions of "small entities" to be used in evaluating the impact of its regulations on small entities in accordance with the RFA.[29] The proposed rules would affect swap dealers and major swap participants.

Swap dealers and major swap participants are new categories of registrants. Accordingly, the Commission has not previously addressed the question of whether such persons are, in fact, small entities for purposes of the RFA. The Commission previously has determined, however, that futures commission merchants should not be considered to be small entities for purposes of the RFA.[30] The Commission's determination was based, in part, upon the obligation of futures commission merchants to meet the minimum financial requirements established by the Commission to enhance the protection of customers' segregated funds and protect the financial condition of futures commission merchants generally.[31] Like futures commission merchants, swap dealers will be subject to minimum capital and margin requirements and are expected to comprise the largest global financial firms. The Commission is required to exempt from swap dealer designation any entities that engage in a *de minimis* level of swaps dealing in connection with transactions with or on behalf of customers. The Commission anticipates that this exemption would tend to exclude small entities from registration. Accordingly, for purposes of the RFA for this rulemaking, the Commission is hereby proposing that swap dealers not be considered "small entities" for essentially the same reasons that futures commission merchants have previously been determined not to be small entities and in light of the exemption from the definition of swap dealer for those engaging in a de minimis level of swap dealing.

The Commission also has previously determined that large traders are not "small entities" for RFA purposes.[32] In that determination, the Commission considered that a large trading position was indicative of the size of the business. Major swap participants, by statutory definition, maintain substantial positions in swaps or maintain outstanding swap positions that create substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets. Accordingly, for purposes of the RFA for this rulemaking, the Commission is hereby proposing that major swap participants not be considered "small entities" for essentially the same reasons that large traders have previously been determined not to be small entities.

Moreover, the Commission is carrying out Congressional mandates by proposing this regulation. Specifically, the Commission is proposing these regulations to comply with the Dodd-

[27] Section 202(f) of the Dodd-Frank Act.

[28] 5 U.S.C. 601 *et seq.*

[29] 47 FR 18618, Apr. 30, 1982.

[30] *Id.* at 18619.

[31] *Id.*

[32] *Id.* at 18620.

Frank Act, the aim of which is to reduce systemic risk presented by swap dealers and swap market participants through comprehensive regulation. The Commission does not believe that there are regulatory alternatives to those being proposed that would be consistent with the statutory mandate. Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the proposed rules will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

The Paperwork Reduction Act (PRA) [33] imposes certain requirements on Federal agencies (including the Commission) in connection with their conducting or sponsoring any collection of information as defined by the PRA. This proposed rulemaking would result in new collection of information requirements within the meaning of the PRA. The Commission therefore is submitting this proposal to the Office of Management and Budget (OMB) for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The title for this collection of information is "Orderly Liquidation Termination Provision in Swap Trading Relationship Documentation for Swap Dealers and Major Swap Participants." 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. The OMB has not yet assigned this collection a control number.

The collection of information under this proposed regulation is necessary to implement new section 4s(i) of the CEA, which expressly requires the Commission to adopt rules governing documentation standards for swap dealers and major swap participants and explicitly obligates such registrants to conform to the documentation standards established by the Commission. The documentation required to be executed and maintained would be an important part of the Commission's regulatory program for swap dealers and major swap participants. Specifically, the required recordkeeping is essential to ensuring that swap dealers and major swap participants include in their trading relationship documentation certain agreements that are designed to enhance the consistent treatment of swaps in the event the FDIC is appointed receiver under Title II of the Dodd-Frank Act or the FDIA. The records required to be preserved would be used by representatives of the Commission and any examining authority responsible for reviewing the activities of the swap dealer or major swap participant to ensure compliance with the CEA and applicable Commission regulations.

If the proposed regulations are adopted, responses to this collection of information would be mandatory. The Commission will protect proprietary information according to the Freedom of Information Act and 17 CFR part 145, "Commission Records and Information." In addition, section 8(a)(1) of the CEA strictly prohibits the Commission, unless specifically authorized by the CEA, from making public "data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers." The Commission also is required to protect certain information contained in a government system of records according to the Privacy Act of 1974, 5 U.S.C. 552a.

1. Information Provided By Reporting Entities/Persons

Proposed § 23.504(b)(5) supplements previously proposed regulations that would establish trading swap relationship documentation requirements for swap dealers and major swap participants. Specifically, proposed § 23.504(b)(5) would require swap dealers and major swap participants to include in the documentation they execute with each counterparty a written agreement about events that will transpire if the FDIC is appointed as receiver under Title II of the Dodd-Frank Act or the FDIA.

The information collection burden associated with drafting and maintaining the agreements required by the proposed regulation is estimated to be 270 hours per year, at an initial annual cost of $27,000 for each swap dealer and major swap participant. The aggregate information collection burden is estimated to be 81,000 hours per year, at an initial annual aggregate cost of $8,100,000. Burden means the total time, effort or financial resources expended by persons to generate, maintain, retain, disclose, or provide information to or for a Federal agency.

The Commission has characterized the annual cost as an initial cost as the Commission anticipates that the agreements required by the proposed regulation generally would not require significant bilateral negotiation and, therefore, are likely to become standardized within the industry rather rapidly. Moreover, the Commission expects that there would be little need to modify the agreements on an ongoing basis. Accordingly, once a swap dealer or major swap participant has drafted the required agreements and incorporated them into its swaps trading documentation, the annual burden associated with the proposed regulation would be quite minimal.[34]

The hour burden calculation set forth below is based upon certain variables such as the number of swap dealers and major swap participants in the marketplace, the average number of counterparties of each of these registrants, and the average hourly wage of the employees that would be responsible for satisfying the obligation established by the proposed regulation. Swap dealers and major swap participants are new categories of registrants. Accordingly, it is not currently known how many swap dealers and major swap participants will become subject to these rules, and this will not be known to the Commission until the registration requirements for these entities become effective after July 16, 2011, the date on which the Dodd-Frank Act becomes effective. While the Commission believes that there will be approximately 200 swap dealers and 50 major swap participants, it has taken a conservative approach, for PRA purposes, in estimating that there will be a combined number of 300 swap dealers and major swap participants who will be required to comply with the recordkeeping requirements of the proposed rules. The Commission estimated the number of affected entities based on industry data.

Similarly, due to the absence of prior experience in regulating swap dealers and major swap participants and with regulations similar to the proposed rules, the actual, average number of counterparties that a swap dealer or major swap participant is likely to have is uncertain. Consistent with other proposed rulemakings, the Commission has estimated that each of the 14 major swap dealers has an average 7,500 counterparties and the other 286 swap dealers and major swap participants have an average of 200 counterparties per year, for an average of 540 total counterparties per registrant.

The Commission anticipates that agreements required by the proposed regulations typically would be drafted and maintained by a swap dealer or major swap participant's in-house

[33] 44 U.S.C. 3501 *et seq.*

[34] The Commission notes that swap dealers and major swap participants also would be required to develop written policies and procedures to maintain the obligatory agreements as part of their swaps trading relationship documentation. The costs associated with these policies and procedures have been accounted for in the Commission's prior proposal of the rest of regulation § 23.504.

counsel or by financial or operational managers within the firm. According to the Bureau of Labor Statistics findings, the mean hourly wage of an employee under occupation code 23–1011, "Lawyers," that is employed by the "Securities and Commodity Contracts Intermediation and Brokerage Industry" is $82.22.[35] The mean hourly wage of an employee under occupation code 11–3031, "Financial Managers," (which includes operations managers) in the same industry is $74.41.[36] Because swap dealers and major swap participants include large financial institutions whose employees' salaries may exceed the mean wage, however, the Commission has estimated the cost burden of the proposed regulations based upon an average salary of $100 per hour.

Based upon the above, the estimated hour burden was calculated as follows:

Agreement to Orderly Liquidation Termination Provision.

Number of registrants: 300.

Frequency of collection: At least once per counterparty.

Estimated number of annual responses per registrant: 540 [one per counterparty].

Estimated aggregate number of annual responses: 162,000 [300 registrants × 540 counterparties].

Estimated annual hour burden per registrant: 270 [540 counterparties × .5 hours per counterparty].

Estimated aggregate annual hour burden: 81,000 [300 registrants × 270 hours per registrant].

As stated above, the agreements required by proposed § 23.504(b)(5) would be required to be incorporated into the swaps trading relationship documentation obligations established by previously proposed subsections of § 23.504(b). The Commission does not anticipate that swap dealers and major swap participants would incur any start-up costs in connection with the proposed recordkeeping obligations, other than those previously noted and accounted for in the prior proposal.

2. Information Collection Comments

The Commission invites the public and other Federal agencies to comment on any aspect of the recordkeeping burden discussed above. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments in order to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (ii) evaluate the accuracy of the Commission's estimate of the burden of the proposed collection of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Comments may be submitted directly to the Office of Information and Regulatory Affairs, by fax at (202) 395–6566 or by e-mail at *OIRAsubmissions@omb.eop.gov.* Please provide the Commission with a copy of submitted comments so that all comments can be summarized and addressed in the final rule preamble. Refer to the Addresses section of this notice of proposed rulemaking for comment submission instructions to the Commission.

A copy of the supporting statements for the collections of information discussed above may be obtained by visiting *RegInfo.gov.* OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication.

C. Cost-Benefit Analysis

Section 15(a) of the CEA [37] requires the Commission to consider the costs and benefits of its actions before issuing a rulemaking under the CEA. By its terms, section 15(a) does not require the Commission to quantify the costs and benefits of a new regulation or to determine whether the benefits of the rule outweigh its costs; rather, it requires that the Commission "consider" the costs and benefits of its actions.

Section 15(a) further specifies that costs and benefits of a proposed rulemaking shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may, in its discretion, give greater weight to any one of the five enumerated considerations and could, in its discretion, determine that, notwithstanding its costs, a particular regulation was necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the CEA.

Summary of proposed requirements. The proposed regulation would implement new section 4s(i) of the CEA, which was added by section 731 of the Dodd-Frank Act. The proposed regulation would establish certain swap trading relationship documentation requirements applicable to swap dealers and major swap participants and related recordkeeping obligations.

Costs. With respect to costs, the Commission has determined that the cost that would be borne by swap dealers and major swap participants to satisfy the new regulatory requirement is far outweighed by the benefits that would accrue to the financial system as a whole as a result of the implementation of the rule. The Commission believes that the annual cost burden per registrant ultimately would be quite minimal as the agreements it requires are likely to become standardized and applicable to most counterparties, thereby negating the need for individual negotiation and drafting. They also would be able to be maintained using a registrant's pre-existing recordkeeping mechanisms.

Benefits. With respect to benefits, the Commission believes that the proposed regulation would ensure that swaps are treated consistently in the event of an appointment of the FDIC under either Title II of the Dodd-Frank Act or the FDIA. Providing the opportunity for swap dealers, major swap participants, and their counterparties to reach a written agreement about events that will transpire if the FDIC is appointed as receiver under Title II of the Dodd-Frank Act or the FDIA, will promote legal certainty and lower litigation risk at crucial times of market stress. Therefore, the Commission believes it is prudent to prescribe this proposed regulation.

Public Comment. The Commission invites public comment on its cost-benefit considerations. Commentators are also invited to submit any data or other information that they may have quantifying or qualifying the costs and benefits of the proposed rules with their comment letters.

List of Subjects in 17 CFR Part 23

Antitrust, Commodity futures, Conduct standards, Conflict of Interests, Major swap participants, Reporting and recordkeeping, Swap dealers, Swaps.

For the reasons stated in this release, the Commission proposes to amend 17 CFR part 23, as proposed to be added in FR Doc. 2010–29024, published in the

[35] *http://www.bls.gov/oes/2099/mayowe23.1011.htm.*

[36] *http://www.bls.gov/oes/current/oes113031.htm.*

[37] 7 U.S.C. 19(a).

Federal Register on November 23, 2010 (75 FR 71379), and as proposed to be amended elsewhere in this issue of the **Federal Register**, as follows:

PART 23—SWAP DEALERS AND MAJOR SWAP PARTICIPANTS

1. The authority citation for part 23 is revised to read as follows:

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. Amend proposed § 23.504 by adding paragraph (b)(5) to read as follows:

§ 23.504 Swap trading relationship documentation.

* * * * *

(b) * * *

(5) The swap trading relationship documentation shall include written documentation in which the counterparties agree that in the event a counterparty is a covered financial company (as defined in section 201(a)(8) of the Dodd-Frank Wall Street Reform and Consumer Protection Act) or an insured depository institution (as defined in 12 U.S.C. 1813) for which the Federal Deposit Insurance Corporation (FDIC) has been appointed as a receiver (the "covered party"):

(i) The counterparty that is not the covered party may not exercise any right that such counterparty that is not the covered party has to terminate, liquidate, or net any swap solely by reason of the appointment of the FDIC as receiver for the covered party (or the insolvency or financial condition of the covered party):

(A) Until 5 p.m. (U.S. eastern time) on the business day following the date of the such appointment; or

(B) After the counterparty that is not the covered party has received notice that the swap has been transferred pursuant to section 210(c)(9)(A) of the Dodd-Frank Wall Street Reform and Consumer Protection Act or 12 U.S.C. 1821(e)(9)(A);

(ii) A transfer pursuant to section 210(c)(9)(A) of the Dodd-Frank Wall Street Reform and Consumer Protection Act or 12 U.S.C. 1821(e)(9)(A) may include:

(A) All swaps between a counterparty that is not a covered party, or any affiliate of such counterparty that is not a covered party, and the covered party;

(B) All claims of a counterparty that is not a covered party, or any affiliate of such counterparty that is not a covered party, against the covered party under any such swap (other than any claim which, under the terms of any such swap, is subordinated to the claims of general unsecured creditors of such covered party);

(C) All claims of the covered party against a counterparty that is not a covered party, or any affiliate of such counterparty that is not a covered party, under any such swap; and

(D) All property securing or any other credit enhancement for any swap described in paragraph (b)(5)(i)(A) of this section or any claim described in paragraphs (b)(5)(i)(B) or (C) of this section under any such swap; and

(iii) The counterparty that is not the covered party consents to any transfer described in paragraph (b)(5)(ii) of this section.

* * * * *

Issued in Washington, DC, on January 20, 2011 by the Commission.

David A. Stawick,

Secretary of the Commission.

Appendices To Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants—Commissioners Voting Summary and Statements of Commissioners

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

Appendix 1—Commissioners Voting Summary

On this matter, Chairman Gensler and Commissioners Dunn, Sommers and Chilton voted in the affirmative; Commissioner O'Malia voted in the negative.

Appendix 2—Statement of Chairman Gary Gensler

I support the proposed rulemaking that establishes documentation requirements for swap dealers and major swap participants, ensuring consistency with statutory provisions in the event of an orderly liquidation of a swap dealer or major swap participant. The proposed regulation requires the inclusion of a provision in the swap trading relationship documentation that would inform counterparties that, if a swap dealer or major swap participant becomes a covered financial company subject to the resolution authority of the Federal Deposit Insurance Corporation, there may be a one-day stay on the ability of its counterparties to terminate, liquidate or net their uncleared swaps. The proposed rulemaking should lower litigation risk during times of significant market stress and promote an orderly and effective resolution process for large financial entities.

[FR Doc. 2011–2642 Filed 2–7–11; 8:45 am]

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COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 23

RIN 3038–AC96

Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commodity Futures Trading Commission (Commission or CFTC) is proposing regulations to implement new statutory provisions established under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). Section 731 of the Dodd-Frank Act added a new section 4s(i) to the Commodity Exchange Act (CEA), which requires the Commission to prescribe standards for swap dealers and major swap participants related to the timely and accurate confirmation, processing, netting, documentation, and valuation of swaps. The proposed rules would establish requirements for swap trading relationship documentation for swap dealers and major swap participants.

DATES: Submit comments on or before April 11, 2011.

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

- Agency Web site, via its Comments Online process at *http://comments.cftc.gov.* Follow the instructions for submitting comments through the Web site.
- *Mail:* David A. Stawick, 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 *http://www.cftc.gov.* You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that may be exempt from disclosure